CHRONICLE CHRONIQUE CRÓNICA

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Editorial — Avril Calder

The media and youth and family courts

For different reasons in different countries the question of privacy in courts where children are involved has been an issue for several years, heightened by access to electronic media. So I am pleased to be able to publish a variety of articles which shed light on the different approaches taken.

Justice Belinda van Heerden* of South Africa shows that balancing a free press with the best interests of the child has been frequently examined by the country's Constitutional Court; and **Sir Nicholas Wall**, who until recently was President of the Family Division for England and Wales, sets out thoughts on the challenges inherent in balancing the two rights.

Sally Averill, senior policy advisor to the Crown Prosecution Service in England and Wales explains how the challenges have been met in the Youth Court.

In Germany a specially appointed judge deals with the press. **Judge Ingrid Kaps** tells us about her role as official spokesperson, balancing information and the rights of those concerned.

In Austria the youth courts are generally open although, as **Judge Norbert Gerstberger*** reports, restrictions may be applied if necessary. By contrast, the family courts in Austria are usually closed, but may be open to the public under certain criteria, as explained by **Magistrate Doris Täubel-Weinreich.**

From the University of Leiden, where Professor Ton Liefaard (UNICEF Chair) leads a centre of excellence for children's rights**, Maria de Jong, Jill Stein and Celesta Bonnet** consider the issues from a children's rights perspective, taking both an international and a Dutch point of view.

Judge Lana Peto-Kujundzic* takes us through the Constitutional and special laws in Croatia, **Judge Imman Ali*** reports on Bangladesh and **Judge Clarence Nelson*** answers some pertinent questions in relation to Samoa.

Professor Philip Jaffé Director of Children's Rights at the Institute Kurt Bösch in Switzerland has contributed a completely different article in which he examines the global framework of the media, explores how children have adapted to online life and addresses some of the dangers and protection issues generated by the digital environment.

Finally in this section, **Judge Patricia Klentak** of Argentina addresses the impact of the mass media on the development of children and media regulation by international laws protecting children's rights—in particular Article 17 of the Convention on the Rights of the Child (CRC).

Gangs (continued)

Following the last edition of the Chronicle, I received three articles on gangs all of which add information. The first by **Professor Dr. Cordula von Denkowski** explains the long term European programme of research which involves a network of researchers and policy makers interested in understanding youth gangs and troublesome youth groups better; and our President, **Hon. Judge Joseph Moyersoen*** tells us how Latin American gangs are active in Italy.

In her article *A Journey of Hope* **Dr Sally Zlotowitz** describes the *MAC-UK Charity Integrate Model* for working with hard-to-reach, at risk young people, which has just won a prestigious award for improving the mental health of those involved in gang activity.

Restorative justice

Moitsaida Zitha clearly sets out the argument that South African youth need to be reformed and empowered with skills rather than be sent to prison; and that education and restorative justice are the keys to achieving those aims.

Family Issues

Solicitor **Anne–Marie Hutchinson** and her colleague **Richard Kwan** have recently been involved in an important case *Re AI and MT [2013] EWHC 100 (Fam)* which made the headlines because it involved both the High Court in London and the Beth Din in New York. Their report makes essential reading for all judges hearing divorce cases.

Parenthood after divorce is a project run by the Quebec Ministry of Justice which originated in a change to the guidelines for family mediation in Quebec. Psychologist **Harry Timmermans** relates how it works and tells us about its success.

To date a total of 90 countries have either ratified the Hague Convention or have acceded to it. Two articles—by **Professor Charlotte Phillips*** and **Judge Sophie Ballestrem***—illuminate inter-country adoption which has been falling in recent years, as far as legal registration is concerned.

Barrister **Anil Malhotra*** who has an active interest in the issues faced by non-resident Indians (NRIs) brings us up to date with thinking about the current use of DNA profiling.

Call for articles

Please would you contact me as soon as possible if you would like to contribute an article for the January 2014 edition.

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Child Friendly Justice
XIX World Congress

The Argentinean, Brazilian, Paraguayan Associations and the Mercosur Association of South America

will host the next IAYFJM World Congress in 25-29 March 2014

in the Region of the Foz do Iguaçu,

The main theme is Child Friendly Justice.

Families, children and the media in South African law: balancing competing interests

Justice Belinda van Heerden

Introduction

Over the last few decades, the mushrooming of print and electronic media has resulted in a corresponding shrinkage of the private sphere of the individual. This is clearly illustrated by the reporting of divorce proceedings, as well as other proceedings concerning families and children. Tension arises between, on the one hand, the right to freedom of expression, and, on the other, the rights to privacy and dignity, all of which are enshrined in the Bill of Rights in the South African Constitution (the Constitution).[1] Like other courts throughout the world, South African courts have had to deal with how to maintain the correct balance between these competing rights.

Section 16 of the Constitution protects the right to freedom of expression, including freedom of the press and other media and freedom to receive and impart information or ideas, while the rights to dignity and privacy are protected by sections 10 and 14, respectively. Furthermore, section 28(2) provides that the best interests of the child are of paramount importance in every matter concerning the child. The interplay between these rights came to the fore in the Constitutional Court case of *Johncom Media Investments Ltd v M & Others (Media Monitoring Project as Amicus Curiae)*,[2] which concerned the constitutional validity of section 12 of the Divorce Act 70 of 1979. This section sought to protect the rights to privacy and dignity of divorcing parties and their children by prohibiting the publication of any particulars of a divorce action or any information coming to light in the course of such an action, other than the publication of the names of the parties to a divorce action, the fact that a divorce action between the parties is pending in a court of law, and the judgement or order of the court. This prohibition also applied to proceedings relating to the enforcement or variation of any order made in divorce proceedings, as well as to any enquiry instituted by a Family Advocate, in terms of the Mediation in Certain Divorce Matters Act 24 of 1987, into the best interests of children involved in such proceedings. The prohibition did not apply to the publication of particulars or information for the purpose of the administration of justice, in a *bona fide* law report, or for the advancement of or use in a particular profession or science.

Prior to this case, section 12 of the Divorce Act had formed the subject of an investigation by the South African Law Reform Commission (SALRC) (Project 114 *Publication of Divorce Proceedings: Section 12 of the Divorce Act (Act 70 of 1979)*). In its Report, published in August 2002, the SALRC pointed out that, since the enactment of the Divorce Act, modern technology and rapidly increasing exposure of South Africa to the rest of the world had made foreign newspapers and online news sites freely available in this country. While South African media were bound by the prohibition on publication contained in section 12, this did not apply to foreign media. Thus, since many South African citizens have access to the foreign print and electronic media, the initial purpose of the prohibition was defeated. Moreover, in the case of high-profile individuals, there had been wide-scale contravention of section 12 by the South African media, as was evident during former President Mandela's divorce action in 1996, and that of Earl and Countess Spencer in 1997. The SALRC concluded that section 12 indeed resulted in an unjustifiable limitation of the right to freedom of expression and should be amended or repealed. It considered various options in this regard and ultimately recommended that section 12 should be amended by retaining the prohibition on publication, but giving courts the discretion to make an order granting leave to any party to publish some or all of the prohibited information. The SALRC also recommended the insertion of a new subsection in section 36, in terms of which the court may, on its own initiative or on application by an interested party, direct that the proceedings be held behind closed doors, if the court finds that there is a likelihood that harm may be caused to a minor as a result of the hearing of any evidence in the proceedings. This would apply to all people except those whose presence is necessary in

[1] Act 108 of 1996.

[2] 2009 (4) SA 7 (CC).

connection with the divorce proceedings, or the legal representative of any such person.

I now turn to a brief synopsis of the background to the *Johncom Media Investments* case.

Background

Ms M and Mr D were married in March 1975. Two children were born of this marriage, a boy (PD) and a girl.[3] The parties were divorced in March 1995 by means of a decree of divorce incorporating a settlement agreement. This agreement dealt with issues such as the custody of the children and the division of assets between the parties. The custody of PD was awarded to Mr D.

In 2001, Mr D instituted an action against his former wife and PD, claiming payment of the sum of more than a million rand as damages; the restoration of certain benefits paid to his wife in terms of the divorce settlement; a partial rescission of the divorce order insofar as it referred to PD as his son; and an order declaring that PD was not his biological son. According to Mr D, his wife had wrongfully misrepresented to him that PD was his biological son, while she knew this to be false. This misrepresentation had caused him to suffer damages in the amount claimed. The action was defended.

While the action was pending, the case came to the attention of the editor of *The Sunday Times*, a newspaper owned by Johncom Media Investments Ltd (Johncom). He regarded it to be of potential interest to the newspaper's extensive readership and a journalist was thus assigned to write a story based on the untested facts alleged in the pleadings, as the case had not yet gone to trial.

Before publication, the newspaper invited comments on the story from the affected parties. In response to this, an urgent application for an interdict against Johncom was instituted by Ms M and PD. This application was premised on the ground that the publication would violate section 12 of the Divorce Act and would also infringe Ms M's and PD's rights to dignity and privacy. The Johannesburg High Court issued an interim interdict on the eve of publication of the story. A similar order was obtained against members of the Independent Group of Newspapers. The effect of these orders was that the story could not be published in any newspaper in South Africa.

Johncom opposed the confirmation of the interim order, at the same time bringing a counter-application challenging the constitutionality of section 12.

In support of this application, Johncom alleged that section 12 was overbroad and disproportionate in that it went much further than was necessary to protect the privacy of divorcing parties and their children, while at the same time failing to afford any discretion to the court to determine whether it was appropriate that media disclosure should be prohibited in order to serve a legitimate purpose. It therefore prohibited members of the media from reporting properly on matters before court in circumstances where there was no justifiable basis to limit such reporting.

The constitutional challenge to section 12 necessitated the joinder of the Minister for Justice and Constitutional Development as the Minister responsible for the administration of the Divorce Act. The Minister did not oppose the declaration of constitutional invalidity, but merely drew the attention of the court to steps already taken by the department in an attempt to align the Divorce Act with the Constitution. In this regard, the Minister referred to the investigation and recommendation made by the SALRC in its 2002 Report referred to above.

In February 2008, the Johannesburg High Court dismissed the main application and upheld the counter-application. Cassim J declared section 12 to be invalid on the basis that it unjustifiably limited the section 16 right to freedom of expression.[4] He referred the declaration of constitutional invalidity to the Constitutional Court for confirmation.[5]

The judgement of the Constitutional Court[6]

South African jurisprudence requires a court, when determining whether a statutory provision infringes a right enshrined in the Bill of Rights, to apply a two-stage test. The first stage involves a determination whether the impugned provision limits a right entrenched in the Bill of Rights. If so, then the second stage requires a decision whether the limitation can be justified in terms of section 36 of the Constitution. Section 36(1) poses the question whether the limitation is

"*. . . reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*

[3] For the sake of convenience, I use the same abbreviations as those used by Jafta AJ.

[4] Mr D's civil action subsequently went to trial and an order of absolution from the instance was made by the trial court, as Mr D had failed to prove the alleged misrepresentation that PD was his biological son.

[5] In terms of section 167(5) of the Constitution, the Constitutional Court "*makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.*"

[6] The Media Monitoring Project, a non-governmental organization concerned with ensuring that media is South Africa are effectively monitored, applied to the Consitutional Court for leave to be admitted as *amicus curiae*. This application was granted.

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

Jafta AJ, writing for a unanimous court, pointed out that, textually, section 12 meant that, apart from the specified limited information, "*publication of information that comes to light during a hearing of a divorce case is prohibited irrespective of the nature of the information, and regardless of whether the publication will infringe the rights of the divorcing parties and the interests of their children.*"[7] This constituted a limitation of the media's right to impart information, as contained in section 16 of the Constitution.

As regards the second stage of the enquiry, it is interesting to note that none of the parties contended that the section 36 requirements for justification had been met. This notwithstanding, it was necessary for the court to deal briefly with the question of justification. As the court acknowledged, it is obvious that the right to freedom of expression is a very important constitutional right – the principle of a free flow and exchange of information in the public arena is by now firmly rooted in the South African constitutional democracy. This has been emphasised by the Constitutional Court in a variety of judgements. It is not easy to justify a limitation of this right. Moreover, the limitation of freedom of expression resulting from section 12 of the Divorce Act not only affects the media, but also impacts on the right of members of the public to receive information.

The court considered the purpose of section 12 to be "apparent", namely to avoid violation of the rights to privacy and dignity of people involved in divorce proceedings, and of children in particular. However, section 12 not only engaged the right to freedom of expression, but also the "general rule that the courts are open to the public".[8] Divorce proceedings can raise issues of public interest and there are sometimes legitimate reasons for publishing these issues. Even in those circumstances, section 12 prohibited the publication of the relevant issues, without the court having any discretion to allow publication in appropriate circumstances.

In coming to the conclusion that section 12 was inconsistent with the Constitution, Jafta AJ stated the following:

"But the chosen method of protecting the rights of children, quite apart from going too far, is not particularly efficient in achieving the purpose. The legislature, almost thirty years ago, chose to allow the publication of the identities of children as well as of parties to a divorce action and, at the same time, prohibited the publication of any evidence at a divorce trial, whether or not the prohibition of publication was necessary to protect the relevant privacy and dignity interests. Yet, as will be shown below, another way to protect children and parties would, in my view, be to prohibit publication of the identity of the parties and of the children. If that were to be done, the publication of the evidence would not harm the privacy and dignity interests of the parties or the children, provided that the publication of any evidence that would tend to reveal the identity of any of the parties or of the children is also prohibited. The purpose could be better achieved by less restrictive means."[9]

The court thus upheld the declaration of constitutional invalidity and ordered in addition that, subject to authorisation granted by a court in exceptional circumstances, the publication of the identity of, and any information that may reveal the identity of any party or child in any divorce proceedings, is prohibited. Failure to comply with this prohibition will amount to contempt of court.

Discussion

As was pointed out by the Constitutional Court, the route of prohibiting the publication of identifying particulars is similar to the statutory provision governing the publication of information relating to the proceedings of a children's court. In terms of section 74 of the Children's Act 38 of 2005, which Act came into force on 1 April 2010:

"*No person may, without the permission of a court, in any manner publish any information relating to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings.*"

A contravention of section 74 constitutes a criminal offence.[10]

The Children's Act goes further by providing that the proceedings of a children's court are closed and may be attended only by the child involved in the matter before the court and any other party in the matter, as well as by other specified persons whose presence is necessary for the purpose of the proceedings. This covers the officials of the court, the legal representatives of the parties, the social worker managing the case, any person who has been instructed by the clerk of the children's court to attend the proceedings, and any person

[7] Para 18.

[8] See the unreported judgement of the Johannesburg High Court in *M & Another v Johncom Media Limited; Johncom Media Limited v M & Others* Case No 2007/06719 dated 11 February 2008, as cited by the Constitutional Court (para 29).

[9] Para 30.

[10] See section 305(1)(b) of the Children's Act.

who has obtained permission from the presiding officer of the children's court to be present. [11] In this way, the Children's Act goes contrary to the general rule of open courts, ranking the interests of parties to children's court proceedings in a more private courtroom environment higher than this general rule.

So too, in terms of sections 36(1) and (2) of the Maintenance Act 99 of 1998,[12] it is an offence to publish, in any manner whatsoever, the name or address of any person under the age of 18 years who is or was involved in any proceedings at a maintenance enquiry, or the name of his or her school or any other information likely to reveal the identity of that person. However, if the relevant Minister or the officer presiding at the maintenance enquiry –

"*is of the opinion that the publication of information in respect of a particular person under the age of 18 years would be just and in his or her interest, the Minister or such officer may in writing dispense with the prohibition contained in subsection (1) to the extent so specified.*"[13]

The general rule of open courts also does not apply in maintenance court proceedings, section 10(4) of the Maintenance Act providing that no one whose presence is not necessary shall be present at a maintenance enquiry, save with the permission of the maintenance court.

It is not only in civil proceedings that this kind of provision is made to accommodate the interests of minor children. In terms of section 154(3) of the Criminal Procedure Act 51 of 1997, there is a prohibition on publication of any information which reveals or may reveal the identity of an accused under the age of 18 years or of a witness at criminal proceedings who is under the age of 18 years. The presiding judicial officer has the discretion to authorise the publication of so much of this information as he or she may deem fit, "*if the publication thereof would in his [or her] opinion be just and equitable and in the interest of any particular person.*"

Criminal proceedings in a child justice court[14] are also closed. In this regard, section 63(5) of the 2005 Child Justice Act provides as follows:

"*No person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with proceedings of the child justice court or the presiding officer has granted him or her permission to attend.*"[15]

The case of *Media 24 Ltd & Others v National Prosecuting Authority & Others (Media Monitoring Africa as Amicus Curiae): In re S v Mahlangu & Another*[16] concerned the murder on his farm of Mr Eugene Terre'blanche, the leader of the Afrikaner Weerstandsbeweging (AWB)[17], a far-right wing political organisation. The first and second respondents (an adult and a minor),[18] both workers on Terre'blanche's farm, were accused of the murder. There was a veritable frenzy of sensational print and electronic coverage of the death of Terre'blanche. The murder sparked a heated public debate on race relations in South Africa and led to much speculation and a fair degree of racial tension. Some journalists speculated that there may be a link between this death and the singing of a struggle song entitled "Dubula ibhunu" or '"Kill the Boer"[19] by the then president of the African National Congress Youth League. It was also reported that Terre'blance's killing might have been part of a broader political campaign to murder farmers. In addition, there were reports that the murder had sexual overtones, as Terre'blanche was found with his trousers pulled down.

The applicants, the owners of various newspapers and television stations, contended that, in view of the rumours and avid speculation around Terre'blance's killing, the court should exercise its discretion under section 63(5) of the Child Justice Act and allow them access to the trial, even though one of the accused was a minor. They argued that the trial concerned issues of immense public interest, that the complete barring of journalists from the trial – as required by section 63(5) – would significantly limit the right of members of the public to receive information and would thus undermine the principle of open justice. They also contended that there was a simple mechanism available to protect the best interests of the minor accused, while preserving the right of members of the public to have knowledge of the proceedings.

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11 Section 56.

12 Which Act came into force on 26 November 1999.

13 Section 36(3).

14 A child justice court is a criminal court "*dealing with the bail application, plea, trial or sentencing of a child*". A child is in turn defined as "*any person under the age of 18 years*", subject to very limited circumstances in which a person who is 18 years or older, but under the age of 21 years, is also regarded as a child. See section 1 of the Child Justice Act 75 of 2008 which, like the Children's Act, came into operation on 1 April 2010.

15 Section 63(4) of the Child Justice Act provides that a child justice court must, during the proceedings before it, ensure that the best interests of the child are upheld and "*must, during all stages of the proceedings, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child*". Section 63(6) incorporates section 154(3) of the Criminal Procedure Act, in terms of which the publication of any information that reveals the identity of an accused or of a witness under the age of 18 years is prohibited (see above).

16 2011 (2) SACR 321 (GNP).

17 Loosely translated as the Afrikaner Opposition Movement.

18 The respondents did not oppose the application and elected to abide the decision of the court. When the matter was called, Media Monitoring Africa applied for leave to be admitted as *amicus curiae*, which application was granted.

19 "Boer" means farmer.

The court commented that the media plays a vital role in protecting the public's right to receive or impart information, thus advancing the constitutional values of openness and accountability. The court also held that the child has important rights of privacy and dignity, as well as the section 28(2) right to have his or her best interests protected in all matters concerning him or her. The child's right to a fair trial is also engaged in the exercise of the court's discretion under section 63(5).

Raulinga J emphasised the need to interpret legislation in a manner that advances the constitutional values underlying the Bill of Rights. Furthermore, in interpreting any legislation, a court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[20] One of the most basic tenets of criminal justice is that trials should be held in public, a principle entrenched in the Constitution (section 35(3)(c)) and "*of indisputable importance to ensure the public's trust in the independence and functioning of the courts*".[21] Vulnerable witnesses and youthful accused persons may suffer emotional or psychological harm should they be subject to public disclosure. Public disclosure of their identity may endanger their lives or safety or, at the very least, cause them discomfort or embarrassment. Section 63(5) is a recognition of the need to give utmost protection to such persons.

As indicated above, section 28(2) of the Constitution entrenches the best interests of the child as the paramount principle in all matters concerning the child. However, this principle does not automatically trump the principle of the "public's interest" irrespective of the circumstances of the particular case. There may be exceptional circumstances in a given case that might warrant a limitation of the child's right – the Constitutional Court has held that, like any other right, children's rights might be limited (see *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2004 ((1) SA 406 (CC) para 55; *Sonderup v Tondelli & Another* 2001 (1) SA 1171 (CC) paras 27-29).

Raulinga J agreed with the contention by the *amicus* that the best-interests principle, seen together with the child's rights to privacy, dignity and a fair trial, required that, as a general rule, section 63(5) be interpreted as closing child justice proceedings to the public. However, the fact that the presiding officer may grant any member of the public permission to be present, gives the court a discretion to allow access to the proceedings. This discretion must be interpreted and applied with due regard to the spirit, purport and object of the Bill of Rights and with reference to the values of the Constitution, including the right to freedom of expression and the right to receive information. The court must strike a proper balance between "fair trial interest" and "public interest" without opening the floodgates to abuse of the discretion contained in section 63(5). The right to a fair trial must be balanced against the right to the free flow of information and open justice – "*freedom of expression lies at the heart of democracy"* and "*justice must be seen to be done*".[22]

With reference to sections 63(4) and (6),[23] the court reiterated that –

"*[t]he underlying principle is therefore that, in criminal proceedings involving child accused, the court should be closed to the public and entry should only be admitted by the presiding officer in very exceptional circumstances. The invasion of the child accused's privacy and dignity must be avoided at all costs.*"[24]

Any permission for child justice proceedings to be held in open court should be considered on a case-by case basis, so that the existence of exceptional circumstances is properly considered in every case. The need to create a more sensitive courtroom environment for children is also always important.

The court held that, given the factors that had attracted intense public curiosity and interest in this matter, the public was entitled to know through the media, or on their own, what information was contained in the case. In view of the exceptional circumstances which were present, the trial should, to a limited extent, be heard in the public domain. Raulinga J concluded by granting permission to a specified number of media representatives to attend the trial, but only to the extent of allowing them to view the trial in a closed-circuit television room. This also applied to four members of Terre'blanche's family who would only be allowed to view the proceedings in the same room. Finally, the identity of the child accused as viewed on the television screen should be obscured through either the placing of the camera, the blurring of the image, or some other means.

[20] Section 233 of the Constitution.

[21] Para 11.

[22] Para 21.

[23] See footnote 15 above.

[24] Para 19.

Conclusion

The discussion above has illustrated that, both in civil and in criminal proceedings, courts are obliged to show due concern for, and sensitivity to, the rights and needs of families and children. The Constitutional Court has ordered that there must be no publication of information likely to reveal the identity of the parties involved in divorce proceedings. In the case of maintenance court proceedings, children's court proceedings and criminal proceedings, the relevant statutory provisions prohibit the publication of the identity of children involved. In this way, the rights of children and, where appropriate, other family members, to privacy, dignity and a fair trial, as the case may be, are protected, albeit at the expense of the right of the media and of other members of the public to freedom of expression. In all such cases, publication of identifying information may be permitted, to the extent that the court concerned exercises its discretion to allow such publication. This illustrates the interplay between potentially conflicting constitutional rights and the manner in which a delicate balance must be struck in this regard.

Second, while the general rule of open courts bends to the constitutional rights and interests of minor children and of other parties in maintenance enquiries, children's court proceedings and criminal proceedings, the courts in question do have a discretion to allow members of the media or other members of the public to attend such proceedings. The kind of circumstances that must be present before the court will "open the courtroom" in this manner, appear vividly from the judgement of Raulinga J in the *Media 24 Ltd* case referred to above. By contrast, in the case of divorce proceedings, the general rule of open courts applies and there is no statutory or other provision creating exceptions to this rule. Interestingly, the SALRC, in its Report discussed above, recommended a statutory amendment to section 12 of the Divorce Act to allow the court to close its proceedings to the public, on the grounds that a child involved in such proceedings was likely to suffer harm as a result of the hearing of any evidence.

This recommendation was never implemented – instead, the Constitutional Court declared section 12 of the Divorce Act to be unconstitutional and prohibited publication of information relating to the identity of any party to or child involved in divorce proceedings, subject to authorisation granted by the divorce court in exceptional circumstances.

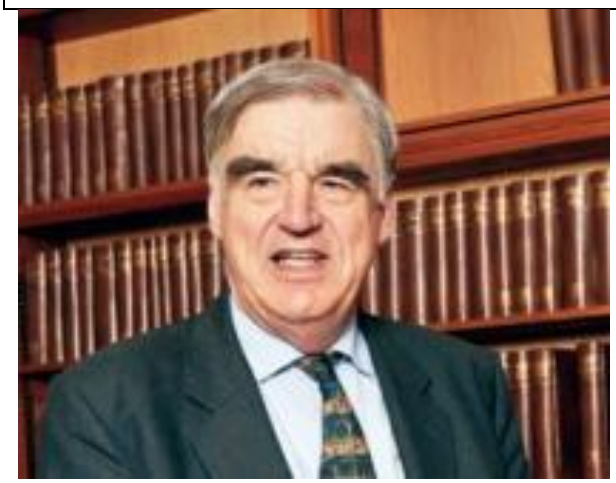
Finally, it should be noted that even an order of the Constitutional Court has not stood in the way of public disclosure of identifying information in high-profile, "newsworthy" cases. So, in the recent case of pending divorce proceedings concerning Human Settlements Minister Mr Tokyo Sexwale and his estranged wife, Ms Judy Sexwale, the print and electronic media appeared to have no qualms about revealing the identity of both parties in reporting on intimate details of the couple's marriage, the alleged cause of the breakdown of their marriage and the financial demands allegedly being made by Ms Sexwale against her husband. To the best of my knowledge, there was no attempt by the media to approach the court to show "exceptional circumstances" to warrant judicial authorisation for publication of identifying particulars. Thus are defeated the "best laid schemes o' mice an' men"![25]

Belinda van Heerden*, Judge of Appeal of the Supreme Court of Appeal, South Africa

[25] From Robert Burns' 1786 poem "*To a Mouse*".

Privacy and publicity in family law: their eternal tension

Sir Nicholas Wall



The general view is that greater transparency is required in the Family Proceedings Courts in England & Wales but nobody knows quite how to achieve it. The question has recently been addressed by both a Parliamentary Select Committee and a governmental Family Panel Review. Commenting on the Select Committee's report the Government said:

….whilst there are divergent views how to increase the transparency and accountability of the family courts, there is general consensus that the status quo is unsatisfactory

The purpose of this paper is to examine the arguments for and against publicity in proceedings relating to children and to see—if we can—which way the balance of the argument falls.

In the wider civil and criminal justice systems[1], there are, of course, occasions when anonymity is practised. But they are few and far between. The print media usually have free admission to proceedings and are, on the whole, free to report as they wish. Proceedings are (usually) conducted in open court. There are few complaints from either side. One of the questions is, therefore, whether that system can be adapted to family justice.

Exceptions to transparency / publicity.

We must recognise that there have always been exceptions to the general rule that justice should be exercised in public. Thus one hundred years ago in *Scott v Scott*[2]. Lord Haldane said:

….. the exceptions are themselves the outcome of a yet more fundamental principle that the object of the courts of justice must be to secure that justice is done. In the two cases of wards and of lunatics the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative…… It may often be necessary, in order to attain its primary object, that the court should exclude the public. ***……***

The sentiments expressed in *Scott v Scott*, have found Parliamentary expression in several places, notably:

a. section 12 of the Administration of Justice Act 1960;

b. sections 97(2) and 97(6) of the Children Act 1989; and

c. section 39 of the 1933 Children Act

The argument that cases involving children should be heard in public has been taken to Strasbourg but was rejected by the European Court of Human Rights (ECtHR). The thinking of the Court followed *Scott v Scott*

Whilst Article 6(1) of the Convention provided that, in the determination of civil rights and obligations 'everyone is entitled to a fair and public hearing', it was apparent from the text of the Article itself that the requirement to hold a public hearing was subject to exceptions. The present proceedings were prime examples of cases where the exclusion of the press and public might be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interests of justice.

Moreover, it was not inconsistent with the general rule stated in Art 6(1) for a state to designate an entire class of case as an exception when considered necessary in the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of parties, although the need for such a measure must always be subjected to the court's control. The decision in each applicant's case to hold the hearing of his application for a residence order in chambers [ie in private] did not give rise to a violation of Art 6(1).[3]

[1] Media may attend the Youth Court and Family Proceedings Court, but Identification of the parties is not allowed [Editor

[2] Lord Chancellor, Viscount Haldane in *Scott v. Scott A.C 417 in 1913*—authority on public hearings

[3] Edited extract from R v United Kingdom:P v United Kingdom[2001]2 Family Law Report 261: 823

The Court did not think it necessary to consider Article 10 separately in the light of its findings on Article 6 and the limited extent to which county court[4] judgements are made available to the general public

Thus there is ample basis for the now universally exercised discretion to hear proceedings relating to children in private; and for there to be reporting restrictions on such proceedings in the Court of Appeal, which sits in public.

Moreover, children do not wish the intimate affairs of themselves and their carers to be publicised[5]. Dr Danya Glaser, a well known child and adolescent psychiatrist has made the powerful point that important information might be lost to the court if a child refused to co-operate with a clinician fearing that what the clinician wrote could become known to third parties outside court[6].

Concerns of the media

There is general and genuine acceptance by the media of the proposition that the anonymity or privacy of children must be respected. There is also acceptance of the proposition that parents and other adults who bear the same surname may have to be anonymous.

But beyond this, the media's argument for transparency is very simple:

- justice should be administered in public;
- with child anonymity protected why should not erring adults, social workers, experts and local authorities be identified? Since they are unaccountable to the press, they are unaccountable to the public. The argument that decisions they make are subject to judicial scrutiny cuts no ice: the judge's role is seen as at best passive, and at worst collusive. The judge sits in private, and usually delivers judgement in private. With rare exceptions, even judgements made publicly available are heavily anonymised; and
- the public is entitled to know how its money is spent by, for example, social services.

So, subject to privacy safeguards, the media say why not open up proceedings, and hear them in open court or—at the very least and subject to the same safeguards—allow them to be fully reported. In short, ECHR Article 10 should prevail over the rights of the parties under ECHR Article 8.

The charge by the Press of "secret justice" is an easy one to make and from the judicial point of view, sitting in private undoubtedly leads to a number of evils. Because journalists often hear only one side, often passionately expressed by one of the litigants, they say they are unable to redress the balance.

Unfortunately this often leads to judges being traduced in the press for things they have not done, allied as it nearly always is to illicit and tendentious leakage to the press by one side.[7]

If public understanding of family justice is to be improved there is certainly an argument that the better informed the Press is about what we judges do, the greater will be the accuracy of what they report.

Critics may say that the Press sensationalises cases, to which the Press can legitimately answer that:

- it is aware of the law of contempt of court, and while frequently possessed of information in family proceedings does not publish it without the agreement of the court.
- whenever a court wishes to find a missing child, it calls on the media's services, with the child fully identified. And the media invariably co-operate.

In April 2009 Family Proceedings Rules were updated to allow:

duly accredited representatives of news gathering and reporting organisations to be present at certain proceedings held in private. [8]

The accompanying Practice Direction, however, made it clear that this

- did not entitle the media *to receive or peruse* ***court documents*** without the permission of the judge; and
- there was no clarification of what could be reported without the judge's consent.
- The result was initial confusion and, latterly, the right to attend has not been exercised. I do not think that any criticism can properly be levelled at the media for the rule's desuetude. The situation, accordingly, remains unclear and confused. Hence the pressure to put things to rights.

In my view two concerns of the Press in particular are warranted:

- **access to court lists** which provide them with sufficient information to enable them to decide whether or not the case is worth coming to hear. Subject to appropriate safeguards about the publication of any information thus made available, it is difficult to see why this request could not be met.

[4] The courts where the cases were originally heard.

[5] *The Views of Children and Young People Regarding Media Access to Family Courts*, Professor Julia Brophy. Published by the Office of the Children's Commissioner, England 2010

[6] {2009} Family Law 211

[7] See Re H (Freeing Orders:Publicity) [2005] EWCA Civ 1325,[IFLR 815]

[8] Rule 27.11(2)

- **access to documents**.

If the purpose of sight of the documents is to enable the journalist

i. to follow the proceedings;

ii. to understand that any tendentious version put by one side is or may be inaccurate; and

iii. to further the process of accurate reporting,

it is difficult to see—once again subject to safeguards—why the Press should not have access to at least some of the papers.

The current legal position

The law as it currently stands was set out by Munby J[9], who referred to principles explained by Lord Steyn in Re S (A Child). These lead to a *parallel analysis* of the ECHR rights with an *ultimate balancing test* reflecting the Convention's principle of proportionality.

What **Lord Steyn** said[10] was:

What does, however, emerge clearly are four propositions:

- *neither article (8 and 10) has as such precedence over the other;*
- *where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary;*
- *the justifications for interfering with or restricting each right must be taken into account;.and*
- *the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.*

Re S involved the attempt, in care proceedings, to protect the subject child from identification as the son of woman who was to be tried for the murder of a sibling. The judge dismissed an application to restrain the publication by newspapers of the mother's identity. Appeals on the child's behalf were also dismissed.

The right of the press under Article 10 to report a criminal trial featured strongly (*a public event*: and *the glare of contemporaneous publicity ensures that trials are properly conducted*) Lord Steyn took as a general position an extract from a speech by Lord Nicholls of Birkenhead in *Reynolds v Times Newspapers Limited* [11]:

The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment.

[9] now President of the Family Division of the High Court

[10] in paragraph 17

[11] [2001] 2 AC 127 at 200G-H

Is it possible to learn from the practice of the Court of Protection?

The Court of Protection looks after the affairs of people who are incapable of doing so for themselves.

The general rule in proceedings in the Court of Protection is that *a hearing is to be held in private*[12]. However, everything is effectively left to the judge's discretion including who may attend the hearing and what may be published[13]:

The Court also has the power[14] to order that a hearing be held **in public**, with similar powers to limit attendance and restrict the publication of material emanating from it (as in Rule 90). However, this can be done only where it appears to the court that there is **good reason** for making the order[15] .

In a case[16], which had already engendered substantial public interest, concerning an application by relatives of a severely disabled pianist to be appointed his deputies and to take decisions on his behalf, Hedley J granted access to designated members of the press.

The judge's order also enabled the press to apply to him for permission to publish information disclosed in the proceedings. In their submissions the media had argued that, having listened to the case, they would be able to make informed submissions about what, if any, matters they should seek to publish.

The judge took the view that it was in the public interest that the issues raised by the application made by A's relatives should be heard by the media; and that it was also in the public interest that the jurisdiction and powers of the Court of Protection, and how they were exercised, should be understood.

He acknowledged that some of these considerations could be said to apply in almost any case, and stressed that it was the combination of these considerations in this particular and unusual case that led him to his decision. He took the view that once *good reason* was established, the balancing exercise between ECHR Articles 8 and 10 needed to be undertaken.

The decision was upheld on appeal. The Court of Appeal commented however:

In agreement with Hedley J, we would emphasise that, even when good reason appears, before the necessary authorisation can be granted, better reasons may lead the court to refuse it…. [B]efore the court makes an order, a two stage process is

[12] rule 90(1) of the Court of Protection www.hmcourts-service.gov.uk/cms/14705.htm.

[13] rule 91(2) and (3)

[14] rule 92

[15] see rule 93(1) (a)

[16] A (*by his Litigation Friend the Official Solicitor) v Independent News and Media Limited and others*)

required; the first involves deciding whether there is "good reason" to make an order; if there is, then the second stage is to decide whether the requisite balancing exercise justifies the making of the order.

The Court of Appeal rejected a submission that media access to the judgement only would be sufficient.

However, the Court of Appeal disagreed with the judge's assertion that the ECHR Article 10 rights of the media were not engaged until *good reason* had been established. It took the view that Article 10 was engaged at the time the media made its application.

Could the approach of the Court of Protection be applied more generally? If the Press is allowed to publish what occurs in chambers in Family Proceedings, nobody, least of all the judiciary, can dictate to the Press what part of that material it should publish. Thus it is one thing to say that given material—for example, the identity of the child—shall *not* be published: it is quite a different thing to identify permissible material which *should* be published.

In family jurisdiction, in the absence of legislation or agreement there is thus no obligation to report, for example, the judge's judgement, and the ultimate outcome of the case. This is a serious defect and undoubtedly in some cases leads to unbalanced and potentially unfair reporting.

There will always be journalists for whom the Family Justice System is corrupt and for whom the judge can do no right[17]. But am I alone in thinking they are, perhaps, a minority, and that a more open trusting attitude would lead to the truth being published. It is, in my view, unacceptable that conscientious judges and magistrates doing their best, with limited resources and under heavy pressure of work to make difficult decisions in the best interests of children, should be accused of administering 'secret' justice, especially when what they are doing is following Parliament's instructions.

Finally, I agree with Judge Bellamy in *BBC v Coventry City Council and others*,[18][when he said that it was not a proportionate restriction on the Article 10 rights of the media to prevent them naming a local authority, whom he had ordered to pay a substantial contribution to the parents' costs in care proceedings which they, the local authority, had sought leave to withdraw. He held that the risk of breaching the children's Article 8 rights was potential, whereas the breach of the media's Article 10 rights was real. The residents of Coventry had "the right to know" that their local authority was involved, and the media had the right to report that.

Conclusion

In a world of instantaneous communication, it seems to me that we are going to have to rethink many of our rules, not least to try to answer the concerns of the media as set out earlier in this article.

Justice must be seen to be done while balancing the rights of individuals under Articles 6, 8 and 10 of the ECHR. What may be required is not legislation; but an **agreement**—covered by rules of court procedure—that, in return for information about proceedings and access to them, the media would not publish the names of the parties without their consent and that of the court, and that under no circumstances would the names of children (or means of identifying them) go into the public domain.

There is a further consideration—would the very presence of the Press in cases concerning children mean that proceedings could no longer be considered to be private with unforeseen effects on children and their families. Loss of privacy has huge implications.

In my judgement, provided that the anonymity of children is guaranteed, there is a powerful argument for public authorities, public servants and expert witnesses being named. My understanding is that current law[19] does not prevent that, although so far as I am aware this has not been subject to authoritative interpretation in the House of Lords or the Supreme Court. This question needs to be resolved. If an expert can be publicly named, it should follow that his or her report, suitably redacted if need be, should also be in the public domain.

A great deal of public money is spent on care proceedings. As the press argues, the public should be entitled to know *how* its money is spent.

I would rather have an enforceable agreement between the media and judges than an imposed solution. Such an agreement may not be possible. Terms proposed by the Family Justice System may be unacceptable to the media, and *vice versa*. I do not know the answer, but I do know that we will not know unless we try.

It would be a welcome outcome if achieving greater transparency were to lead to better public understanding of the family justice system and the problems that it grapples with every day.

The above article is as edited version of the lecture given at Gresham College, London, June 2012. A transcript and a video of the lecture are available at www.gresham.ac.uk

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17 See RP v Nottingham City Council and the Official Solicitor (Mental Capacity of Parent [2008] EWCA Civ 462. [2008] 1 FLR 1516

18 [2011] 1 FLR 977

19 Section 12 of the Administration of Justice Act 1960

Crown Prosecution Service Guidance— reporting restrictions in England & Wales

Sally Averill

This is an abridged version of the guidance on reporting restrictions in England and Wales for cases where children and young people appear as witnesses or defendants.

Role of the Prosecutor

Prosecutors should:

- be familiar with the circumstances where automatic reporting restrictions exist, along with the discretionary powers of the court to restrict reporting and to restrict public attendance at hearings:
- draw the court's attention to these provisions in open court thereby enabling the court to make appropriate orders and give advice to the media;
- understand the rights enshrined in the European Convention on Human Rights , the United Nations Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Justice 1985 (the Beijing Rules);
- assist the court to respect and protect the rights of victims, witnesses and defendants;
- where automatic reporting restrictions do not arise, seek reporting restrictions only when the public interest and the right to receive and impart information is outweighed by the rights of victims, witnesses or defendant;
- where automatic restrictions do occur, only seek the lifting of these after conviction in the narrowly prescribed circumstances set out in this guidance;
- comply with and encourage compliance by other parties and interested persons with Part 16 of the Criminal Procedure Rules;
- provide a draft order to the court when an order is sought.

The tension between open justice and privacy

The starting point is that the administration of justice should occur in public so that justice is seen to be done. Cases should be heard in open court so that the public can access and the media can report proceedings. Courts are public authorities for the purposes of the Human Rights Act 1998 and must not act in a way that is incompatible with a right guaranteed under the European Convention on Human Rights (section 6 Human Rights Act 1998).

The principal exception to the open justice principle relates to youth court proceedings, which by statute are not open to the public. Section 49 of the Children and Young Persons Act 1933 (CYPA 1933) places an automatic restriction on reporting that identifies or is likely to identify any person under the age of 18 who is concerned in youth court proceedings as a victim, witness or defendant.

Additionally, there is a discretionary power under section 39 CYPA 1933 to restrict reporting the identity of victims, witnesses and defendants under the age of 18 who appear in magistrates' courts and the Crown Court. The protection provided by these provisions is subject to and should be interpreted in accordance with the rights contained in the European Convention of Human Rights and in the United Nations Convention on the Rights of the Child 1989 (UNCRC) [1].UNCRC has been ratified by the UK so although it has not been formally incorporated unto the law in England and Wales, the Articles have binding force. It also informs the way that the ECHR is interpreted in cases involving children and young people under the age of 18.

All courts must also have regard to the welfare of all children and young people who attend the court as victims, witnesses or defendants (section 44 CYPA 1933) and this will be a relevant consideration when deciding whether reporting should be restricted. The welfare of the child is likely to favour a restriction on publication. Any decision to lift reporting restrictions must be necessary, proportionate and there must be a pressing social need for it (Article 10 ECHR).

The general rule is that reporting restrictions expire when the young person attains the age of 18 as he/she is no longer a child in the proceedings and does not come within the child protection remit of the CYPA 1933 whether under section 39: R v CCC ex p W, B and C [2001] 1 Cr. App R (2) or section 49: T v DPP and North East Press [2003] EWHC 2408 Admin. The purpose underlying sections 39 and 49 is not to protect the interest of young people who have become adults.

Section 49 Children and Young Persons Act 1933: Youth Court

The general rule is that proceedings in the youth court are not open to the public (section 47 CYPA 1933) and although press representatives are permitted to report on proceedings, they are automatically restricted from reporting the identity or any details that would lead to the identity of any child or young person involved in the proceedings, whether as a defendant, witness or victim (section 49 CYPA 1933).

Section 49 also applies to appeals from the youth court. The Crown Court must hear an appeal from the magistrates' court (including the youth court)

[1] The Annexes to the main document address the relevant Articles of the European Convention of Human Rights and the United Nations Convention on the Rights of the Child.

in public even though reporting restrictions apply automatically. However, it may order such a hearing to be in private (CPR 63.7) and prosecutors should usually make an application for a private hearing unless the appeal concerns a matter of law of general importance.

When reporting restrictions are used, including breach of restrictions: Section 39 Children and Young Persons Act 1933

The identity of a victim, witness or defendant under the age of 18 who is concerned in proceedings in the magistrates' court or Crown Court may be published unless the court makes an order under section 39 CYPA restricting reporting in a newspaper; or in a sound or television broadcast.

Prosecutors should make an application to restrict reporting the identity or details that would lead to the identity of a victim and witness under the age of 18 under section 39 CYPA 1933 when the victim or witness has requested this restriction. If the views of the victim or witness have not been ascertained, prosecutors should still seek such restrictions if these would appear to be in the best interests of the young victim or witness, having regard to the principles set out in this guidance.

Young victims of rape and other serious sexual offences will have automatic anonymity subject to the provisions of the Sexual Offences (Amendment) Act 1992. Young witnesses to such offences do not receive this protection and so therefore it is at the discretion of the court to make an order under section 39 CYPA 1933.

Enforcement and breach of section 39 and section 49 orders

Breach of reporting restrictions imposed automatically under section 49 or made by a section 39 CYPA 1933 order are summary offences (section 39(2) CYPA 1933 and section 49(9) CYPA1933, which are effectively offences of strict liability).

There are very good reasons for restricting publication of material that identifies children and young people who are concerned in court proceedings. Public identification of children and young people in breach of CYPA is irreversible and can cause both immediate and long term distress and harm; therefore it will almost always be in the public interest to prosecute those who have responsibility for publication of material that breaches CYPA 1933.

When an application should be made to lift reporting restrictions: Section 49 Children and Young Persons Act 1933

The reporting restriction under section 49 is automatic so the court does not need to make an order. It may make an order allowing restrictions to be lifted if:

- it is appropriate to do so to avoid injustice to the child or young person under 18;or;
- it is necessary to dispense with the restriction to apprehend a defendant who is unlawfully at large and has been charged with or has been convicted of a violent or sexual offence or one that is punishable with imprisonment for 14 years or more if committed by a person aged 21 or over; or
- it is in the public interest to dispense to any specified extent with the restrictions in relation to a child or young person convicted of an offence (section 49(4A)). This power to dispense with anonymity must be exercised with very great care, caution and circumspection.

The court may make the order of its own motion but it must provide the parties to the proceedings an opportunity to make representations and it must take into account any representations which are duly made. It is likely that any application to dispense with the restriction will be made by a representative of the media who should comply with Rule 16 CPR by giving notice of the application to all the parties and providing an explanation as to why the reporting restriction should be varied or removed.

Prosecutors should give the following points careful consideration and make appropriate enquiries before making an application that it is in the public interest to dispense with the automatic restriction:

- Youth Court Bench Book (March 2010 page 10) states that the power is exercisable where a child or young person has been found guilty of persistent offending and it is in the public interest to dispense with the restriction;
- the court may direct that other persons should be notified of the application, so it may be appropriate to obtain the views of parties such as the police, the Governor of the YOI where the youth is or is likely to be detained before the court determines where the public interest lies. There may be additional information that neither the CPS nor the defence can supply e.g. the impact of the loss of anonymity on rehabilitation or a risk to the safety of the youth and his family if he is identified;

- although the court may make an order under section 49(4A) as soon as the youth is convicted or enters a plea, it may be in the interests of justice to delay making a decision until the sentencing hearing when the court will have the benefit of the Pre-Sentence Report and the views of any other interested parties. Where the defendant is convicted after trial, it may be appropriate to wait for the appeal period to expire or, if an appeal is lodged, the outcome of the appeal before making the order.
- the court should consider the effect of identification on rehabilitation.
- it would be wholly wrong for any court to dispense with a juvenile's prima facie right to anonymity as an additional punishment. It is also very difficult to see any place for "naming and shaming."
- the public interest may be served by partial lifting of the reporting restriction. It may be sufficient to publish the name of the defendant to satisfy the public interest but publication of a photograph, address or school should remain restricted to protect the welfare and privacy of the child or young person.

When reporting restriction should be opposed / sought: section 39 Children and Young Persons Act 1933: Youth defendants

A reporting restriction in respect of a defendant will usually be sought by the defence and may be opposed by a press representative. It is usual for a section 39 order to be made at the outset of proceedings and for the court to consider removal or variation post conviction. The prosecutor should remind the court of its powers and the principles to be applied. The CPS should not oppose an application for a section 39 order where the restriction appears to be necessary for a fair trial or to protect the ECHR and UNRCC rights of the youth and these factors outweigh the open justice principle.

Youths are "vulnerable defendants" for the purposes of Part III. 30 Consolidated Criminal Practice Direction[2] and therefore all possible steps must be taken to assist them to understand and fully participate in their trial. The ordinary trial process should be adapted as far as necessary to meet those ends so that magistrates' courts and Crown Court procedures are analogous to those in use in the youth court. This includes restricting reporting and restricting attendance by members of the public, so that the youth is not distracted or deterred from giving evidence.

Where the only reason that the youth is not being tried in the youth court (and therefore covered by automatic reporting restrictions) is that he is jointly charged with an adult and it is in the interests of justice for them to be tried together, prosecutors should seek/not oppose a reporting restriction before conviction.

There will sometimes be circumstances, for example where a youth has been convicted of a particularly serious crime that the prosecutor should make an application to the court to lift an order made under section 39.

Section 39 orders: the test to be applied

- In R on the application of Y v Aylesbury Crown Court, Crown Prosecution Service, Newsquest Media Group Limited [2012] EWHC 1140 (Admin), the Administrative Court[3] gave the following guidance to courts to decide whether a section 39 restriction should be made/lifted:
- the defendant will have to satisfy the court that there is a good reason to impose the restriction. In most cases the good reason upon which the defendant child or young person will rely is his or her welfare (Section 44 Children and Young Persons Act 1933);
- the court should identify the factors which would favour restriction on publication and the factors which would favour no restriction;
- the court should balance the interests of the public in the full reporting of criminal proceedings against the desirability of not causing harm to a child concerned in the proceedings. The court is required to have regard to the welfare of the child, and should give considerable weight to the age of the offender and to the potential damage to any young person of public identification as a criminal before having the burden or benefit of adulthood;
- if having conducted the balancing exercise, the factors favouring a restriction on publication and the factors favouring publication are very evenly balanced, then a court should make an order restricting publication; any order made must comply with Article 10 ECHR [4]- it must be necessary, proportionate and there must be a pressing social need for it. Age alone is not sufficient to justify imposing an order;

[2] This Part of the Consolidated Criminal Direction applies to cases involving children under 18 heard in the adult magistrates' court or Crown Court. The purpose of this direction is to extend to proceedings in these adult courts procedures analogous to those in the youth court.

[3] The Administrative Court exercises a supervisory jurisdiction over inferior courts and tribunals and has an appellate jurisdiction in respect of certain decisions of criminal courts.

[4] Article 10 ECHR is the Right to Receive and Impart Information. Further details are given in Annex 2 of the main document

- the court may also decide to permit the publication of some details but not all;
- the court may review an order at any time and frequently are invited to do so where a defendant named in an order has been convicted at trial.
- the welfare of the child must be taken into account, but the weight to be given to it changes where there has been a conviction, particularly in a serious case. There is a legitimate public interest in knowing the outcome of proceedings in court and the potential deterrent effect in respect of the conduct of others in the disgrace accompanying the identification of those guilty of serious crimes;
- the court should give reasons for its decision.

When reporting restrictions should be opposed/sought: Section 39 Children and Young Persons Act 1933: Young victims and witnesses

In all cases heard in the (adult) magistrates' court and Crown Court where there are victims and witnesses under the age of 18, the CPS should ask the police to inform the child or young person and their parent(s) or guardian(s) of the court's power to restrict reporting and ascertain whether they would like the court to make an order under section 39 CYPA 1933.

Where a section 39 order is sought in respect of a victim or witness, the CPS should make the application to the court as soon as is reasonably practicable and notify the defence of the application in accordance with CPR 16.

The media or defence may ask for a section 39 order to be later varied or lifted, and in such cases, the CPS should ask the court to require the applicant to comply with CPR by serving the young person currently protected by the section 39 restriction and the police with notice of the application. The prosecutor should ask the court not to lift the restriction until the victim or witness or any other person given notice has had a reasonable opportunity to make representations.

Anti Social Behaviour Orders (ASBOs)

There is no automatic restriction on reporting that the youth court has made an ASBO as an ancillary order after conviction (section 1C (9C) Crime and Disorder Act 1998 or where a youth has been convicted of the offence of breach of an ASBO (section 1(10) Crime and Disorder Act 1998). This is to facilitate the effectiveness of ASBOs by informing the public of the identity of those who are subject to ASBOs and the conditions on the ASBO so that breaches can be reported to the police.

However, any convictions in the youth court for offences that preceded and led to the ASBO being made are still subject to an automatic restriction under section 49 CYPA unless the court makes an order under section 49(4A) lifting that restriction. Courts will usually adopt a logical approach by making an order under section 49(4A) to allow reporting of the substantive offences as well as the ASBO (or breach), or by making a section 39 order in respect of the ASBO (or breach).

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Court reporting in Germany—a balancing act between the privacy rights of the individual and the right of the public to get information

Judge Ingrid Kaps

Court reporting is an important part of the media landscape. More and more the press likes to report not only about the criminal but also about the ”everyday“ trial. Among these trials those concerning young people and their families are always of particular interest.

Basically the duty of the justice system to give information to the press is based on the National press laws. In Bavaria, article 4 of the so called “Bayerischem Pressegesetz“ entitles the press to have access to all kind of information concerning public authorities. Information can only be denied when the right of privacy of individuals is affected. This right of information can be exercised only against the head of the authority. Each of the federal countries of Germany has a similar regulation.

The judge as spokesperson for a court

This law also applies to the judiciary. The head of the court delegates the duty to give the required information to the spokesman or spokeswoman of the authority. The spokesperson is a judge in that jurisdiction. There is a very important rule: the judge dealing with the case should not give information! He should not be put in the position of having to defend his judgement in front of the press. During an ongoing trial the impression may be given that he is prejudiced.

The spokespersons have a very heavy responsibility. They are considered as a qualified source. This means that the press can rely on information given by a court`s spokesperson and that he and not the press is responsible for the truth of the information. The spokesperson also has to weigh between his duty of giving information and the rights of privacy of the people concerned.

Most of the spokespersons have worked in the authority (as judges) before they get to this position. So they know the procedures of the court. What they have to learn is how the press works. They must be open to the journalists and be ready to work outside normal working hours. They must be able to speak and write in plain German, forgetting the legal terminology but not the legal content.

The spokespersons have to develop a media concept. It is not sufficient only to respond to the demands of the journalist. It must be made clear what tasks the court has to deal with, how the court works and what innovations are coming. In this context the spokesperson can talk about sensitive fields of law such as family law and juvenile justice. He can create understanding without giving sensitive data.

Naturally a great part of the work of a court’s spokesperson concerns ongoing court proceedings. Major challenges here are the hearings/trials before the family and the youth court. At the first glance things seem to be simple. Court proceedings at the family court in Germany are not public, just as the trials before the youth court, if the accused is aged between 14 and 17 are not[1].

[1] Criminal age of responsibility in Germany is 14 years

In both cases the press is not allowed to attend the hearings/trials. Here the privacy rights outweigh the right of the press to obtain information. Therefore in principle the spokesperson of the court also is not allowed to report about the on goings in the hearing/trial.

But in reality things are more difficult. The journalists often have a lot of information about the cases. They get them from many sources. Sometimes the lawyers, who also have a duty to protect the rights of their clients, want to get some publicity or hope to show their client in a special light talk to the media. Neighbours or people who know the accused and want to be shown in newspapers and TV (some of them even get paid) are ready to give information. Sometimes journalists know personnel inside the police; sometimes they are just lucky and are in the right place at the right time. So often there are press releases before the hearing/trial at the court.

Duties of the media

Surely, there are regulations for the press, too. In principle our constitution guarantees in article 5 press freedom. But press freedom is not unlimited. The press, too, has to balance the right of reporting and the privacy rights of the individual.

If someone is accused of an offence the media have firstly to consider that s/he could be innocent. Normally they are not allowed to use the real name of the person or to give data which can cause identification. They are not allowed to publish photos which can lead to identification. This is a strong consideration, since the trial/hearing that follows is not public.

But although the press normally takes these regulations into account, the result is that the public interest is focused on cases which normally nobody would have noticed. And the spokesperson of the court has to deal with it.

So normally a short summary about the trial and the result has to be given – naturally in an anonymised form. The accused person or the people standing in front of a family court have to be protected. No information should be given which makes it impossible for them to live in peace afterwards.

Sometimes this means great efforts when the hearings/trials are prepared. That the press is not allowed to go inside the courtroom and watch the hearing/trial does not mean that they don't come to the court. If it is an interesting case they are there and hope to gather information.

So sometimes barrier walls have to be erected and the spokesperson has to watch that nobody goes behind them trying to catch a photo. This often means that policemen or security persons of the court have to maintain the proper running of the trial. To protect the data of the juvenile defendant the court has to take care that no list is shown outside the courtroom containing the name of the accused.

Most of the journalists observe the rules, but there are always some of them who do not. We live in a society which wants news every day, the more detailed the better and with photos, so some of the journalists are under pressure to deliver. The task of the spokesperson of the court is that they cannot!

Joint proceedings—under and over 18 years of age

A difficult situation can arise when a juvenile person (aged between 14 and 17) and a person aged 18 and over are accused in the same trial. Then this trial is public. This legal regulation is not understandable. The exclusion of the public when a juvenile person is concerned is based on the idea that the juvenile should not be stigmatized and should be able to be integrated into the society again. It is not understandable why these ideas do not apply when an older person is involved.

In such a case the judge has to decide whether he excludes the public. § 48 of the German Juvenile Court Act provides the basis for the decision. Accordingly to this regulation the public may be excluded if this is necessary for the proper development of young defendants. Here, considerations of developmental psychology and youth education prevail. An exclusion of the public can serve to reduce inhibitions and shyness. Also the aim to explore the truth and the personality of the accused as precisely as possible can justify the exclusion of the public. A juvenile defendant can be intimidated by the public in such a way that the court cannot get an accurate picture about his moral and spiritual maturity. If there is a risk of interference by third persons present an exclusion of the public may also be considered.

This is not an easy decision because the violation of the principle of public trial can lead to the annulment of the judgement. So often the trial stays public which means that the journalist can stay in the courtroom and can follow the whole trial. They can take pictures before the trial starts. Certainly there are regulations for the journalists taking photos. In principle portraits are allowed to be distributed or put on public display only with the consent of the person depicted (§ 22 Kunsturhebergesetz). This regulation protects the right to dispose of one's own image.

Exceptions are made only in particularly severe, salient deeds. (§ 23 Kunsturhebergesetz). This is not usually the case in trials where juveniles are accused. Besides their young age would also have to be considered and in most cases would outweigh the right of the press to publish their photos without consent.

But the journalists can release the photos when they pixel them to make the accused unrecognizable. But even if they do so, taking pictures always includes the danger to get known.

During the hearing/trial pictures and film recordings are not allowed. Also broadcasting of the hearing/trial is forbidden.

Sometimes the personal circumstances of the young persons and their families can allow the judge to exclude the public when they are discussed. But this also has always to be justified.

It would be better if the law were changed. If one accused is under 18 the whole trial should not be public.

After the decision/ verdict is pronounced the press can publish it in an anonymised way. After that they have to take into account that the sentenced has the right to rehabilitation. The more time passes the less must be reported about the trial.

Conclusion

Court reporting is a balancing act and even if there should be no public interest you cannot completely avoid it. Therefore you need the spokespersons of the court and they need enough time to do their work. In some courts they have to do it beside their normal work as a judge. In bigger courts this is not possible as experience shows. If good press work is pursued then you need a spokesperson that is exempted from the greater part of the daily tasks of a judge.

The same applies to the spokespersons of the public prosecution and the youth office where the well-being of a child is the issue.. The public prosecutors are the first who are involved in the case. The news is fresh so the interest of the press to report about it is very high. So the pressure on those spokespersons is even more intense.

The protection of the privacy rights of the individuals and especially those of young persons and their families is some of the most important things in a society which thirsts for news every day.

Judge Ingrid Kaps is a spokesperson (*Presse Sprecherin*) in the District Court—of which the Youth and Family courts are part and where she sits in the Civil Court—in Munich, Germany. Earlier in her career she was first a prosecutor and then a Judge in the Youth Court.

Media and juvenile justice in Austria

Judge Norbert Gerstberger

Youth criminal proceedings in Austria are generally held publicly - in contrast to the legal situation in Germany. Through this the general public's confidence in the judicial system should be strengthened and additional control provided to the legal appeal procedure system.

Nevertheless, it is a requirement that accused juveniles are granted special protection against pillory or humiliation by society. Therefore, juvenile law allows—as a derogation to the rules of procedure for adult defendants—extended options to exclude the public.

Paragraph 42 of the Austrian Juvenile Law (JGG) permits exclusion of the public if this is "in the interest of the juvenile". This broad and vague formulation allows a case-oriented handling, and is concerned with whether the further development or advancement of the juvenile is affected by the procedure being executed in public. Thus, the Court can already officially exclude the public without the need of a specific request by the young defendant or his lawyer to do so. If there is such a request, it is up to the accused to state specific reasons. Of controversy is the question as to whether the juvenile's rights can be damaged by admitting the public if he abnegates the charges.

On no account can the public be excluded from the pronouncement of judgement. The upholding of the principle of public access is mitigated by a weakening of the principle of oral proceedings in that, in every case, the available psychological surveys, ("Jugenderhebungen"), which provide a social anamnesis of the accused's history, need not be read out by the judge in the public trial. This ensures some level of protection of privacy for the accused. In practice, the public in juvenile criminal proceedings sometimes consists of school classes visiting the court proceedings and also of courtroom reporters, reporting for the media. The latter, of course, incurs the risk that young people might suffer through sensationalistic and distorted media coverage. For this reason, photographs of the defendants are not permitted and the media representatives must abide by the obligation to refrain from naming the accused and remain satisfied with initials.

Besides this however, there are no legal restrictions on media coverage of juvenile criminal matters.

The opinions of judges on this question is mixed. Some are in favour of a law change in the direction of the German legal position (non-public juvenile criminal proceedings), others are strict followers of a public hearing. When there are applications for the exclusion of the public, naturally the opinions of legal representatives present (such as parents) are deemed relevant and are included in the judicial decision-making process.

Each court in Austria also has a so-called spokesman. This person is tasked primarily to answer questions from media representatives about specific criminal proceedings. This is since it is deemed inappropriate for the judges themselves to comment on their procedures or even their judgements to the media. This would conflict with the requirement for the judge to be impartial.

On the contrary, it is acceptable that judges who are representatives of their profession, publicly answer questions of general legal interest.

Judge Gerstberger* was a Juvenile Court Judge in Vienna from 1983 – 2003. Since 2003 he has been sitting in the Vienna Regional Court, specializing in juvenile criminal cases and jury-cases. Since 2000 he has heard appeal-cases. He is Chairman of the Austrian juvenile judges association.

Family courts and the media in Austria

Mag. Doris Täubel-Weinreich

Legal drama over "abducted" twins—A Frenchman is accused of abusing his children, but the law is on his side. Will he get them back anyway?

Custody cases are always good for spectacular headlines; if information is provided by just one side, it's easy to get the impression that its source is disadvantaged in court. In the above case, the Supreme Court has affirmed the existence of unlawful removal according to the Hague convention of abduction, or Brussels II. This does not mean that the father will get his twins back, but they do have to return to their country of origin, France…

Most serious journalists have become rather cautious, and reports of individual cases the exception. Do enough research and the supposedly dramatic story can quickly become unsubstantial, as it is one parent's word against the others and the truth remains elusive. The respected Austrian editor Peter Resitarits was pensive in our conversation, saying, "The stage offered to a parent by television and print media has strongly detrimental effects on the child's well-being, as it will be asked about the reports by outsiders. That should really be avoided."

This is not to say that family law has disappeared from the media! Look at these headlines:

Overworked- youth welfare officers do what they can. That's not enough!

Fathers in the shade- 10% of children lose contact with their father after a divorce.

Many headlines regarding family law do not treat a single case, but briefly describe one to illustrate their reporting of youth services' or courts 'work. The angle is almost inevitably critical of those institutions.

When reporting on children taken away from their parents, in particular, the media tend either to bemoan the arbitrary exercise of power of state institutions against a nice, hardworking mother, whose child is taken for trivial reasons (like the cancellation of dentist appointments) or show incomprehension of why these children are still with their parents, despite suspicions of child abuse or similar.

The so-called media edict (Justice Ministry's edict JMZ 4410/9-Pr 1/2003 from the 12. November 2003) regulates the cooperation of the justice system and the media. The justice system is required to fulfil the media's demand for information, in compliance with the legal framework. This contact with the media and public was to be cultivated by designated media posts. They have been created in the Ministry of Justice, for the president of the Supreme Court; the procurator general's office, the leading state prosecutor, presidents of courts of the first and second instance, public prosecutors and at regional courts with ten or more full-time judges. Media spokespersons are experienced judges or public prosecutors. It is their duty to fulfil the justice system's obligation of disclosure and pass information to the media. They must take care to respect the involved peoples' privacy rights, the principle of the presumption of innocence and ensure a fair trial can take place. On the other hand, they should also show regard for the public interest in free and encompassing information and the media's role *vis a vis* all state functions. Only media spokespersons or their deputies should act in this capacity. No other member of the court is to make disclosures to the press.

The non-contestual procedure Act, which is applied in conflicts over children, almost always precludes public access, whether automatically or upon request of an involved party, because private issues, e.g. pertaining to family life, are discussed. In child custody cases, for instance, none of the information from hearings is public. Public access may be granted if

- neither party objects,
- no aspects of their private and family life are discussed and
- access does not impinge on the well-being of the child in question.

Whenever proceedings are closed to the public (either automatically, or by decree), parties have the right to bring a confidant into hearings. It is forbidden to publish details of someone's private/ family life that come to light in the course of a court case, if a conflict party or third party has a demonstrable interest in their being kept secret.

The above restrictions of public access in family law cases automatically limit the media's access to such cases. Additionally, no recordings or transmissions are allowed of court hearings. Audio or visual recordings from outside the courtroom itself require permission from the court director.

In addition to the regulations discussed, the media decree institutes certain protective duties. It is generally forbidden to identify the parties involved whether by name, address or any other potentially identifying feature. Spokespeople from the courts should urge extreme reticence regarding personal data on their contacts in the media. Names may be used only if the involved parties explicitly consent, or they are already well-known publicly for their part in the proceedings in question.

Naturally, neither the media decree nor other regulatory frameworks can prevent one of the parties involved in a case from going public with their views. Family judges are frequently confronted with the threat "if you don't make the decision I want, I'm going to the press", though the above mentioned reticence of journalists is helpful here. This is very different for cases with an international aspect. In child abduction cases, in particular, the press propagates a clear line in favour of keeping children that have lived in Austria here. The oftimes dramatic reporting may overlook the fact that Austria is bound by international agreements. Recently, the media circus surrounding little Oliver, whom his father removed to Denmark, provided an instructive example of this…

With the introduction of the Children and Name Amendment Act, passed into law on the 1.2.2013, the country closed a seemingly endless debate on child Law. The discussion was heavily impacted by party politics, and led to repeated requests for judges to present their views on custody and visiting arrangements. Here, the section of family judges, which is a sub-group of the Austrian Society of Judges, were the media's contact, independently of media spokespeople. The internal debate over the extent to which judges can or should publicly present their views on social issues is ongoing. In the end, the section is open to media requests, feeling that the public has a legitimate interest in their expert opinion, and that there is often a clear deficit of information (or understanding) in the press to be corrected. Extensive conversations with journalists can allow a family law judge to present the complexity of his/her job, and transport the fact that the judge is not on the side of fathers or mothers generally, but must attempt to find the best solution for each child. Several journalists have told me at the end of our talk that they don't envy me my job- it's so tough! Then I feel I've communicated my role in the process, and perhaps even served to enhance family judges' public image.

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The media and youth and family courts in the Netherlands— a children's rights perspective

Maria de Jong, Jill Stein & Celesta Bonnet

Maria de Jong

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1. Introduction

High profile cases in court that shock the nation or that cause lots of public discussion are interesting material for the media. In such situations the principle that all courtroom cases in which minors are suspects or part of a family law procedure should be *in camera*, might be problematic. The media represent interests like free access to information, publicity, and possibly a fair hearing. The child also has interests: he needs extra protection because children in general are entitled to special care and assistance and privacy protection, as when he is subjected to criminal justice proceedings (art. 40 and Preamble of the Convention on the Rights of the Child). And besides, the child has its life ahead, thus stigmatization needs to be avoided.

This study explains the relationship between the media and courtroom cases involving children in the Netherlands from a children's rights perspective. As said, these cases normally take place behind closed doors, but under what conditions are the media allowed to attend cases in which a minor is involved and how does this relate to international human rights law and standards?

In two recent cases, the role of the media in the courtroom was widely discussed: in the case of 'the sailing girl' (child protection law) in 2010 and in the case of 'the Facebook Murder' (juvenile justice law) in 2012. These cases will be described in paragraph 2 with a special focus on the aspect of closed doors. Paragraph 3 addresses the set of provisions in International Human Rights Law and Standards regarding the protection of the child's privacy on the one hand and the right of access to the courts on the other hand.

Paragraph 4 focuses on the Dutch legal framework and policy regarding courtroom procedures behind closed doors. Paragraph 6 aims at the description of legal practice from the point of view of respectively the judges, children and their families and the court's spokespersons. This study is divided into discussing the juvenile criminal proceedings and the family law proceedings. After addressing the international legal framework, the Dutch legal framework and its practical implications the conclusion (paragraph 7) analyses whether Dutch law and practice are compliant with International Human Rights Law and Standards.

2. Highlighting two cases: 'the sailing girl' and 'the facebook murder'

The sailing girl

Laura Dekker is known worldwide as 'the sailing girl'. At the age of 13, she had an interview with a Dutch newspaper in which she announced her plan for a two-year solo sailing voyage around the globe.[1] Due to the objections of the local child protection authorities, a Dutch court decided to place her under supervision of the State. As a consequence Laura Dekker was prevented from departing for her sailing voyage. In July 2010, the Dutch family court[2] in Middelburg ended this custody arrangement in an oral and public judgement and the record breaking attempt finally began on 21 August 2010. This case received extensive international media attention, which is atypical for a child protection case. Amongst other things, it was an issue to what degree a

[1] S. Docter,'13-jarige wil de wereld rondzeilen', *Algemeen Dagblad,* 8 August 2009.

[2] District Court of Middelburg, 27 July 2010, *LJN* BN2481 (LJN: Dutch jurisprudence registration number).

government has the right to intervene when children engage in risky behaviour that is parentally supported.[3] The case of Laura Dekker is exceptional compared with other child protection cases when it comes to media attention. All courtroom sessions concerning the case of Laura Dekker took place behind closed doors, but the website of the Dutch Judiciary (www.rechtspraak.nl) provided 14 documents on Laura's case to satisfy the media attention. Five were about the case itself and the judgements and nine were press releases or explanatory documents.[4] It was striking to see that Laura seemed to seek all this media attention as well, because this could influence her case in a positive way. It is an unanswered question what the judges would have decided if Laura had requested public hearings (optional since 2013, see par. 4). But it clearly appears from this case that the Dutch Judiciary wants to regulate and control imaging of the case.

The Facebook Murder

In the so called 'Facebook Murder' case – a girl whose Facebook posts led to a contract for her killing, was stabbed to death by a 15-year-old boy (commissioned by two other children) - the court granted special access to journalists to attend the youth trial.[5] Two out of three minor suspects were tried in public. The judge asked for psychiatric and psychological advice concerning the question if the boys (aged 15 and 17) would not be damaged by a public trial. The psychiatrist and psychologist did not expect them to be damaged by a public hearing. It was thought that the youngest suspect could even be helped by a public trial because this would show him the seriousness of his behaviour. The third suspect (a girl, aged 16) was expected not to benefit from a public hearing: this could have severely harmed her personal development.

Both the girl of 16 and the boy of 17 were convicted under adult criminal law and they both appealed against the decision. The Court of Appeal in Arnhem announced that the hearings will take place behind closed doors (July 2013). The Court decided that the right to privacy outweighed the interest of publicity of the trial (despite the fact that one of the suspects had turned 18 in the meantime).

It is interesting to see that the judges considered very carefully if and how the trial should take place behind closed doors.

3. International legal framework regarding media and children in court

As mentioned before, the media aim to provide information, but they also serve as a watchdog by critically analysing the fairness of the justice system. They have the right to do so, which is also confirmed by article 10 European Convention on Human Rights (ECHR), which lays down the right to freedom of expression. Furthermore, media should be able to attend hearings and publish accordingly, considering the principle of access to judicial proceedings and the fact that everyone has the right to a public hearing and judgements shall be pronounced publicly (art. 6 ECHR).

With cases involving minors, however, additional factors should be taken into account. Questioning whether the media should be allowed in trials involving children, it is important to look at article 16 of the Convention on the Rights of the Child (CRC), which stipulates that every child has the right to protection of his or her privacy. This also follows from articles 6 and 8 ECHR and 14, 17 and 24 International Covenant on Civil and Political Rights (ICCPR). According to article 6 ECHR the judgement must be pronounced in public, but 'where the interests of juveniles or the protection of the private life of the parties so require', the media may be (partially) excluded from the trial. Furthermore, notwithstanding its non-binding status, the European Guidelines on child-friendly justice state that whenever a child is being heard – whether as a victim, witness or as the accused – this should preferably take place *in camera*.[6] In this regard, the media should be excluded from the courtroom.

In addition, according to the UN Guidelines on Justice in Matters involving Child Victims and Witnesses these child victims and witnesses should be protected from undue exposure to the public, which can, for example, be prohibited by excluding the media from the courtroom.[7] Furthermore, concerning juvenile offenders the CRC goes even further than the ECHR by stipulating that their privacy shall be fully respected 'at all stages of the proceedings'.

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[3] I. Weijers, *Parens Patriae en prudentie. Grondslagen van jeugdbescherming*, Amsterdam: SWP Publishers 2012.

[4] N. Ruigrok e.a., *Rechtspraakverslaggeving in een veranderend medialandschap: een evaluatie van de persrichtlijn 2008*, Raad voor de Rechtspraak 2011, p. 119.

[5] The same happened recently during the pro-forma session of the court Midden-Nederland concerning the 'football linesman', Find it here In this case, the judge asked the public prosecutor for advice as well as the defense lawyers.

[6] As for children in conflict with the law, see also: UN Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard (General Comment No. 12),* CRC/C/GC/12, 20 July 2009, par. 61 and Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, COE Document CM/2010/147/Add.2 final (*European Guidelines on child-friendly justice*), par. 9.

[7] UN Economic and social Council, *UN Guidelines on justice in matters involving child victims and witnesses*, E/RES/2005/20, 22 July 2005, par. 28.

Having a public trial is thus likely to be on strained terms with the UN Guidelines and article 40 (2) (b) (vii) CRC.[8]

On the other hand, assigning a strict category of cases that will be dealt with behind closed doors is not in line with the principle of publicity of article 6 ECHR, as follows from the judgements of the European Court of Human Rights in the cases *Moser v. Austria* [9] and *B and P v. the UK*.[10] It is left to the discretion of the judge to decide in each individual case whether doors should be opened or closed. The interests of society could outweigh those of the child. Moreover, it is important not to forget that media can also serve as a control mechanism to observe the procedure to be fair, which can serve the child's interest (see article 40(2)(b)(iii)).[11]

One could also argue that allowing the media to attend the hearing could lead to a violation of the right to an effective participation.[12] The presence of the media could lead to a certain uneasiness of the child, making it hard for him to be able to express his words effectively when being heard and - in a broader sense - to participate in and to understand the process. In this regard, allowing the media to enter the courtroom is likely to be at odds with international standards. In conclusion, a good balance has to be found between the interests of society and the principle of free access to judicial proceedings and the right of the minor to the protection of his or her privacy and effective participation. In order to avoid stigmatisation and in light of the child's well-being, the doors should only be opened in well-defined cases.[13]

Another aspect of privacy is concerned with what information the media are allowed to disclose. In this regard especially the right to freedom of expression, as stipulated in articles 10 ECHR and 19 ICCPR, is a fundamental human right. Nevertheless, children should be protected from possible harmful consequences of publicity or labelling, which justifies limitations on this right. Apart from the right to protection of privacy, support for this statement can be found in General Comment no. 10,[14] the Beijing Rules,[15] the UN Guidelines and the Child-friendly justice guidelines, which all recommend a prohibition of publishing information that may lead to the identification of a child. This information does not only include the child's name, but also images, detailed descriptions, audio and video records and other information or data that may (indirectly) lead to disclosure of the child's identity.[16] It is thus up to the States to take appropriate measures to secure the child's right to privacy.

4. Dutch legal framework and policy regarding media and children in court

Juvenile criminal proceedings

The Dutch juvenile justice system applies to juveniles between twelve and eighteen years old.[17] In principle, juvenile criminal proceedings in the Netherlands take place behind closed doors.[18] This fundamental exception to the criminal law principle that hearings in court are public[19], dates from 1905 when the 1901 Penal Children's Act[20] entered into force. It was derived from the idea that many intimate details of the juvenile suspect should be protected due to the possibility of negative labelling of the juvenile as well as to

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[8] Rule 8.1 of the 1987 United Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules') similarly provides that '(t)he juvenile's right to privacy shall be respected at all stages'. This standard should be lived up to 'in order to avoid harm being caused to her or him by undue publicity or by the process of labelling'. See also par. 65 of United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice (General Comment No. 10)*, CRC/C/GC/10, 25 April 2007, par. 65.

[9] ECHR 21 December 2006, nr. 12643/02 (*Moser v. Austria*).

[10] ECHR 5 September 2001, nrs. 36337/97 and 35974/97 (*B. and P. v. the United Kingdom)*.

[11] In some legal systems the right to court access can guarantee a fair hearing, e.g. for minors who are prosecuted in military courts (I. Mijnarends, Minderjarig maar minderwaardig, Richtlijnen voor een verdragsconforme jeugdstrafrechtspleging, Leiden, p. 242).

[12] See also the right to be heard, article 12 CRC and par. 34 of the United Nations Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard (General Comment No. 12)*, CRC/C/GC/12, 20 July 2009, which states: 'A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate.'

[13] See also: United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice (General Comment No. 10)*, CRC/C/GC/10, 25 April 2007, par. 65.

[14] See also: General Comment No. 10, par 64, 65.

[15] Rule 8.2 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, General Assembly of the UN, resolution 40/33, 29 November 1985 ('In principle, no information that may lead to the identification of a juvenile offender shall be published')..

[16] Par. 26, 27 UN Guidelines on justice in matters involving child victims and witnesses and par. 6 Child-friendly justice guidelines.

[17] Article 77a Dutch Code of Criminal Law. Furthermore, article 486 Dutch Code of Criminal Procedure stipulates that children below twelve are deemed to be below the age of criminal responsibility.

[18] Article 495b Dutch Code of Criminal Procedure (see decision of the Supreme Court 3 October 1989, *NJ* 1990, 197); See also decision of the Supreme Court 15 February 1972, *NJ* 1973, 34, in which the Dutch Supreme court stated that the clerk has to record whether the juvenile criminal proceedings take place behind closed doors or not, under penalty of (substantial) nullity of the court hearing). In contrast, all verdicts, including those concerning juveniles, should always be pronounced in public (see Article 121 Dutch Constitution and article 5 Judiciary Organisation Act). In practice, however, the judge who gives a ruling as *unus*, immediately after the closure of the court hearing, does not always open the doors.

[19] As stated in article 120 Dutch Constitution, article 6 ECHR and article 14 ICCPR.

[20] Act of 12 February 1901, *Stb.* 1901, 63.

prevent contagion.[21] Furthermore, while adult suspects have the possibility to withdrawal from their public hearings, minors have the legal obligation to attend them[22] and thus have additional interest in closed trials.[23] Nevertheless, article 495b of the Dutch Code of Criminal Procedure provides two exceptions to this rule. Paragraph 1 gives courts the possibility to grant special access to attend the closed trial. This special access may for example be granted to persons who are known to publish the trial in press in such a way that the interests of the juvenile suspect are not jeopardised, or at least not more than absolutely necessary.[24] Moreover, paragraph 2 allows courts to depart from the principle of trying minors behind closed doors, if in its opinion 'the importance of hearing the case in open court must outweigh the importance of protecting the privacy of the suspect, his co-accused, parents or guardian'. In this case, the media do not need special permission to attend the youth trial.

Regarding to what information the media are allowed to disclose, the Netherlands Press Council has published Guidelines (2010) which provide that 'a journalist prevents himself from publishing details in pictures and text as a result of which suspects and accused can be easily identified and traced by persons other than the circle of people that already know about them' (par. 2.4.6).[25] The Guidelines do not make any difference between adult and minor suspects.

Persons and family law proceedings

Until recently, in the Netherlands all cases concerning persons and family law, including youth protection procedures, had to take place behind closed doors.[26] There were no exceptions to this law. Therefore, the media were not allowed to attend these trials. In response to the two decisions of the European Court[27] as mentioned in paragraph 3, the accuracy of this general and unconditional exception to articles 6 ECHR and article 14 ICCPR was questioned, which made amendment desirable.[28] As a result of the entry into force of the Act of 26 April 2012 'amending the Code of Civil Procedure and some other laws in order to give further substance to the principle of openness of cases concerning persons and family law' in January 2013[29], article 803 of the Dutch Code of Civil Procedure currently provides an exception to this rule.[30] The new paragraph 2 stipulates that the court may decide, at the request of one of the interested parties, whether or not a hearing in court is all or partly in public.[31] This is in contrast to the exceptions in juvenile criminal proceedings, in which the request of one of the interested parties is not required. However, very similar to those exceptions, the importance of hearing the case in open court must outweigh the importance of protecting the privacy of the minors or the privacy of (other) interested parties.

Press Guidelines for media professionals

In addition to the aforementioned laws, the Dutch Council for the Judiciary uses Press Guidelines for media professionals visiting the courts. In March 2013 the new Press Guidelines have entered into force. Currently, judges and communications departments of the courts are giving practical effect to the adjustments.[32] Journalists have access to all public hearings in court, including youth trials that are not held behind closed doors.[33] In consultation with the courts, journalists can be allowed to take pictures, and even to make visual and/or sound recordings. In general, the communications departments provide journalists with information about upcoming and ongoing legal proceedings.[34] Proceedings concerning youth, persons and family courts, which take place behind closed doors, however, are an exception to this practice.[35] The possibility to grant special access to journalists is enshrined in article 3.11.2 of the Press Guidelines. According to this provision journalists have to submit a written reasoned request to the communications department of the court. If special access is granted, the court still decides whether or not and concerning which parts of the trial visual and sound recordings are allowed.[36]

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21 J.R. Bac, *Kinderrechter in strafzaken: evolutie en evaluatie*, Deventer: Gouda Quint 1998, p. 99-100.

22 Article 495a Dutch Code of Criminal Procedure. This difference between juvenile criminal proceedings and regular criminal proceedings, may lead to difficulties when both minors and adults are involved as suspects in the same case.

23 *Parliamentary documents II* 1992/93, 21 327, nr. 13, p. 9.

24 *Parliamentary documents II* 1992/93, 21 327, nr. 12, p. 16.

25 Find it here

26 Act of 7 July 1994, *Stb.* 1994, 570.

27 ECHR 21 December 2006, nr. 12643/02 (*Moser v. Austria*); ECHR 5 September 2001, nr. 36337/97 and 35974/97 (*B. and P. v. the United Kingdom*).

28 *Parliamentary documents II* 2010/11, 32 856, nr. 3, p. 2.

29 Act of 26 April 2012, *Stb.* 2012, 200; *Parliamentary documents II* 2010/11, 32 856, nr. 2.

30 J. Kok & G. Cardol, 'Actualiteiten', *FJR* 2012, 53.

31 Kok expects that in practice such a request hardly never will be made. See J. Kok, 'Open deuren voor 'Facebookmoord'?, *FJR* 2012, 91.

32 'Press release: Beter beeld rechtszaken door ruimere regels voor media', *De Rechtspraak*, http://www.rechtspraak.nl/Actualiteiten/Nieuws/Pages/Beter-beeld-rechtszaken-door-ruimere-regels-voor-media.aspx (retrieved, 24 March 2013).

33 Article 3.1 Press Guidelines of the Council for the Judiciary.

34 Article 2.1 Press Guidelines of the Council for the Judiciary.

35 Articles 2.3 and 3.11.1 Press Guidelines of the Council for the Judiciary.

36 Articles 3.11.3 Press Guidelines of the Council for the Judiciary.

Moreover, journalists who have permission to attend a trial behind closed doors may be asked to sign a protocol with additional guidelines.[37] Hence, the court always has the final say.

5. The media and youth and family courts in legal practice

Views of the judges

For the purposes of this paper four juvenile judges have been interviewed on the practice in youth trials. Their answers show that, as prescribed by national law, public and media are usually being excluded from the courtroom during trials where minors are involved. Especially in protection cases they will close the doors. Although in principle the same goes for penal law cases, there are two conditions that can lead to a trial in public.

Firstly, the doors can be opened if it is necessary to simultaneously deal with an adult suspect during that trial. The facts will then be dealt with in public. Subsequently, the personal circumstances of the minor are then to be discussed behind closed doors. Having a trial in public, only because an adult acts as a co-defendant could constitute a violation of the minor's right to full respect of his or her privacy. The judge should therefore be careful to allow these 'combined' trials and, if possible, prosecute adults separately. This decision has to be based on the relevant circumstances of that particular case.

Secondly, there can be situations where the interests of society (especially external publicity) outweigh the importance of protecting the minor's privacy, which leads to the decision to have a trial in public or to grant special access. This hardly ever occurs, but extreme cases can be found, such as the Facebook murder, where media and public were granted access to the courtroom. This is allowed under international law. As also follows from the Moser and B. and P. cases, there needs to be discretion for the judge to decide to have a trial in public or not.

In general, the questioned judges seem to be content with the current Press Guidelines; they leave enough room for them to come to a well considered decision. One point of concern, as mentioned by one of the judges we interviewed for the purpose of this article, was the fact that decisions are made public on the website of the Dutch Judiciary[38]: 'In order to make a well argued and motivated decision, private information has to be processed. This violates the privacy of the person concerned.' This might be a point of concern indeed, since the publication makes this private information very accessible. This makes it hard to fully respect the minor's privacy.

Nonetheless, publication on a national website *per se* does not necessarily constitute a violation of the child's right to privacy, since article 6 ECHR and article 121 of the Dutch Constitution stipulate that the judgement shall be pronounced publicly .

Court's spokespersons and their role

In view of the court's spokespersons' role, a press officer in service of the Council for the Judiciary as well as the Head of the communications department of the District Court of The Hague have been interviewed. Hereinafter, their answers are discussed.

The communications departments of the Dutch courts respond to media calls. Whether or not and to what extent these calls are answered depends on the specific case. With regard to youth and family courts the principle of 'closed doors' is of huge importance. Because of this principle, the courts' press office acts reactively. Especially pending trial, courts are reluctant to provide information. Judgements and other decisions of the court, however, are public. Thereupon, the court might give an explanation on request.

When a response is requested for radio, television or other audiovisual media, a so-called 'press judge' comes into view. In line with the aforementioned communications departments, the press judge will be reluctant to provide information about current proceedings. Nevertheless, the press judge may elucidate judgements and orders of the court in the media. Although, such requests are very exceptional for youth protection cases, they are more common for juvenile criminal cases.

6. Conclusion and discussion

Media and children who are present in court hearings have an ambivalent relation. This brief study explored how the principle of publicity and the principle of court hearing behind closed doors when children are concerned are weighed and balanced in international human rights and children's rights law and standards.

According to international law standards, the starting point is that juvenile court hearings and child protection cases take place behind closed doors but judges have the discretion to opt for a public trial (given the principle of publicity). Dutch judges decide on a case-by-case basis if and how they allow media to attend court hearings in which minors are present. Although exact numbers about court hearings in which the media was allowed to attend are not available, judges seem to be very reserved and careful on this issue.[39] Judges for example ask psychiatrists, defendant lawyers and public prosecutors (see the example of the 'Facebook Murder' case) for advice on the matter of a public or non-public trial.

[37] Articles 3.11.4 Press Guidelines of the Council for the Judiciary.

[38] Find it here

[39] In juvenile criminal cases, it comes to a few times a year per court. This is an estimation of a press officer in service of the Council for the judiciary.

The CRC very clearly states that children alleged as or accused of having infringed the penal law should be guaranteed to have his or her privacy fully respected at all stages of the proceedings. The principle that juvenile criminal proceedings in the Netherlands take place behind closed doors is in accordance with this provision. Taking into account the right of a fair hearing and the right to publicity, judges do not go against the principle of protecting the juvenile's privacy when making an exception to this rule. Reasons for concern are trials in which minors are jointly sued with adults in one lawsuit. The Press Guidelines do not make any suggestions for this. Another concern is the observation that regulation about what information the media are allowed to disclose, is only to be found at the level of the Press Council. Finally, verdicts all have to be pronounced in public and this can be in conflict with international standards. The Council for the Judiciary should elaborate on this in the Press Guidelines.

Regarding the media and persons and family law proceedings the Act of 26 April 2012 provides more compliance with articles 6 ECHR and 14 ICCPR as well as judgements of the European Court. Although it is interesting to see that case-law of the European Court directly influences the new legislation in the Netherlands, it should be honestly asked if this law is a dead letter because media attention in child protection cases is very unlikely (except the case of the Sailing Girl).

In practice, courts themselves are providing a lot of press releases about sensational and high-profile cases. The judge has a managing role here, too.

Except some gaps and vagueness in law and regulations about juvenile criminal proceedings, the Dutch legal system and legal practice seem to be compliant with international law standards about the media and children in court. But the question whether a trial shall be held in public or not should be weighed again in each new (high profile) case.

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Media and children—a Croatian perspective

Judge Lana Petö Kujundžić

The Constitution of the Republic of Croatia

The protection of children's privacy in court procedures or the presentation of their private family circumstances is based upon the Constitution of Republic of Croatia[1], especially **article 20**. which states that there is no justification for deviation from the principles established by the Constitution: *"Anyone violating the provisions of this Constitution concerning the basic freedoms and rights of man and the citizen shall be held personally responsible and may not exculpate himself from invoking a higher order."*

Even though children are considered as a special category, they are also protected by the general provision for all Croatian citizens which guarantees the protection of private and family life, dignity, reputation and honour in the **article 35** of the Constitution:

"All citizens shall be guaranteed respect for and legal protection of personal and family life, dignity, reputation and honour".

Article 37 especially emphasizes the protection of personal data of all people, including children, so that:

"Everyone shall be guaranteed the safety and secrecy of personal data. Without consent from the person concerned, personal data may be collected, processed and used only under conditions specified by law.

Protection of data and supervision of the work of information systems in the Republic of Croatia shall be regulated by law. The use of personal data contrary to the purpose of their collection shall be prohibited".

The guarantee for the protection of personal data is followed by the guaranteed freedom of the media and press in the **article 38**.

"Freedom of thought and expression of thought shall be guaranteed.

Freedom of expression shall specifically include freedom of the press and other media of communication, freedom of speech and public expression, and free establishment of all institutions of public communication.

Censorship shall be forbidden. Journalists shall have the right to freedom of reporting and access to information.

The right to correction shall be guaranteed to anyone whose constitutionally determined rights have been violated by public communication".

The Constitution especially emphasizes the protection of children by the state in the **article 63**:

"*The Republic shall protect maternity, children and young people, and shall create social, cultural, educational, material and other conditions conducive to the realization of the right to a decent life."* Also, it is stated that the care and protection of children and helpless persons is everybody's duty.

In the Republic of Croatia international agreements are a part of legal system and they are above the law. **Article 141** of the Constitution states:

"International treaties which have been concluded and ratified in accordance with the Constitution, and published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law."

The Convention on the Rights of the Child is, together with the **article 16**, applicable to the Croatian system and thereby forbids arbitrariness and illegal intervention in children's privacy and the child has the right to legal protection.

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse from 2007 also legally binds Croatia on the matters of children's privacy and reputation protection in all the phases of the investigation and criminal court proceedings.

[1] The Constitution of Republic of Croatia, Narodne novine (The Official Gazette) 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10

Special laws in the Republic of Croatia

Special laws in the Republic of Croatia which protect children's interests regarding publishing their private data in the media and reporting about their future without invading their privacy are the following:

- The Juvenile Courts Act, Law on Social Welfare,
- The Law on Police work and jurisdiction,
- Criminal Procedure Act,
- Criminal code and
- Media law[2].
- Family Law

1. The *Juvenile Courts Act*[3] is a special law which proscribes procedural, material and distrait measures on the juvenile perpetrators of criminal offences, to be specific, persons from the age of 14 until the age of 18 and young adults who have committed an offence when they were between the ages of 18 and 21. It also applies to the criminal offences committed against children and youth which are specially noted in the law (sexual abuse and violation of the child's rights and his family). Hereby it is guaranteed that all the child's data remains a secret during the investigation, conducted by the police and the state attorney, and during the criminal court proceedings. In **article 60** it is stated that:

"No information on the course of the criminal proceedings against a minor or decision issued in such proceedings may be disclosed without the court's approval. Only the information about the part of the proceedings, and only the part of the decision for which approval has been given may be disclosed. However, in that case it is not allowed to state the minor's name and other information on the basis of which the identity of the minor concerned might be revealed."

These provisions also apply to criminal offences committed against children and youth.

These provisions are applied when reporters demand the data of the case from the juvenile judge or a police officer specialized in youth work, no personal data can be given including the place or the name of the school, if it is a small town area no name is stated only the name of the county (for example: county of primorsko-goranska). In courts as well as in the police stations there are public relations persons who respond to the inquiries of the reporters and they give information on: procedure ,current proceedings and its results,

- the police investigation before the formal prosecution,
- social welfare procedures,
- actions taken by state attorney and court proceedings and
- execution or records of criminal sanctions.

2. The *Law on Police work and jurisdiction*: **article 18** states the need for specialization by police officers—the Police academy supplies the knowledge about the protection of the minor's privacy. Additionally, in the police force there is a child expert, usually a social pedagogue/social worker.

Article 18 also states:

"Police jurisdiction towards minors and young adults— in cases of criminal-law and protection of children and minors— provides a specially qualified police officer who is bound to take care of the protection of the child's best interest as well as his/her privacy."

The Law on Social Welfare also guarantees the child's right to protection of privacy and obliges the social workers to honour that right and goes on to say:

"The person that provides social welfare service must not invade the privacy of the beneficiary more than is necessary to provide the service needed and must ensure the rights of the beneficiary."

3. The *Criminal Procedure Act*[4] **article 43** states

" The child or a minor victim of a criminal offence has the same rights of the victims in other provisions, including:

- *A lawyer paid for by the State*
- *secrecy of personal data*
- *exclusion of the public*

The court, state attorney, investigator and the police must act accordingly towards the child or minor victim of a criminal offence, taking into account the child's age, personality and other circumstances in order to avoid harmful effects for its upbringing and developmentr."

The exclusion of the public refe s to public in the pre-court proceedings, investigation and it also applies in court to the procedures of the police, social welfare, state attorney and court.

Article 388 of the CPA states:

"The court, council on the court will exclude all public from the whole hearing or a part of it, for the sake of protecting the child or minor".

This means it is an obligation for the president of the court and not an optional court decision.

This provision aligns with the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007 which dictates that the state must include the option of excluding the public from a public hearing when it is in the best interests of the child. The decision to exclude the public is made by the president of the council is a decision which is publicly announced and justified.

[2] Media Law , Official Gazette 59/04 and 84/11

[3] Juvenile Court Act, Official Gazette 84/11, 143/12

[4] Criminal Procedure Act, Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12

Furthermore, all persons inside the courtroom are obliged to keep all the information from the hearing as a secret. Betrayal of secrecy is a criminal offence.

Article 389 is concerned with the latter:

"The exclusion of the public does not apply to the parties, victim, their attorneys and defenders. The council may allow the inclusion of certain persons in the hearing from which the public is excluded, for example officials, experts and public workers and spouse and relatives on the request of the defendant and other parties. The president of the council will warn all the present persons of the secrecy of hearing and inform them that the betrayal of secrecy is a criminal offence".

If a person who was present at a hearing gives away information or delivers it to the media, he/she is committing a criminal offence (a breach of confidentiality of proceedings).

4. The *Criminal Code* in **article 307** states:

"(1)Whoever, without authorization, discloses what has come to his knowledge in proceedings before the court, administrative proceedings, proceedings before a notary public or disciplinary proceedings and what, pursuant to the law or a decision based upon the law, is deemed to be a secret, shall be punished by imprisonment not exceeding three years.

(2) The same punishment as referred to in paragraph 1 of this Article shall be inflicted on whoever, without the court's permission, publishes information about the course of criminal proceedings against a juvenile or the decision in such proceedings."

This law took effect on the 1st of January 2013 and has brought a new and further incrimination of the criminal offence of the secrecy of proceedings breach. It is meant as a protection for the child in all proceedings in which the rights and interests of the child are at stake, as a general prohibition against giving away information about the proceedings if a procedure is a secret and the public is excluded. It is important to stress that only the court is authorized to make public information on its proceedings.

The Criminal code[5], in **article 178,** takes into account the criminal offence of the violation of a child's privacy:

(1)"Whoever exposes or disseminates a matter concerning the personal or family life of a child which can damage his honour or reputation shall be punished by a fine or by imprisonment not exceeding one year.

(2) Whoever does so through the press, radio, television, in front of a number of persons, at a public assembly or in another way in which the exposure of personal or family conditions becomes accessible to a large number of persons shall be punished by imprisonment not exceeding two years." If the person committing this offence is an official or is on official duty the punishment is imprisonment not exceeding three years.

This criminal offence is placed under the chapter of protection of personal and family life of a child and is concerned with the criminal offences against marriage, family and youth. Herein, the privacy of the child is protected and indirectly its well-being and development. It is forbidden to publish a photo or the identity of a child which would endanger its well-being, media publishing or publishing by an official will be severely punished.

5. The privacy of a child is also defined by the *Media Law* which provides the definition of media in **article 2:**

"Newspapers and other press, radio and television programs, journal agency programs, electronic publications, teletex and other mediums of daily or periodical publishing of editorials and programs through record, voice, tone or image.

Media is not a book, text book, magazines and other mediums of information providing education, scientific or cultural process, advertising, business communication, sales company work, institutions, organizations, political parties, religious and other organizations, school newsletter, „Narodne novine" of Republic of Croatia, the official gazette of local and regional government and other official announcements, posters, flyers and billboards and other free information."

The protection of privacy is the one of the media principles stated in **article 16**:

"Media is obliged to respect privacy, dignity, reputation and honour of citizens, especially of children, youth and the family regardless of sex and sexual orientation. It is forbidden to publish information that reveals the identity of a child if it endangers its well-being. Media is obliged to respect the right of identity protection of witnesses and victims of criminal offences; without their knowledge and consent they cannot reveal their identity".

Everybody has the right to correction of published information and has the right to demand the correction from the editor without compensation. The right to correction of published information includes legal persons as well as other organizations and corporations, if their rights and interests were transgressed. The purpose of information correction is correcting incorrect or partial information.

The Croatian journalist association often holds symposiums on publishing of personal data of children, the journalist code which provides the knowledge in reporting of news or events that include children.

[5] Criminal Code, Official Gazette 125/11, 144/12

6 *Family Law*

Family law[6] in procedural rules has a definition of exclusion of the public in adoption hearings and in all procedure about status cases (family courts). The last amendments were made in 2011 to Family law but the work group of the Ministry of social welfare are working on reforms of the family law and other procedural provisions regarding exclusion the public and secrecy of proceedings, to make it more clear that it is forbidden to expose information about a child, its family life, relationships, personal life as well as its identity by image or photo.

The correct implementations of conventions, constitutional provisions and legal texts have helped to reduce the violation of child's privacy but the final goal is the complete discontinuation of such practice.

The Office of the Ombudsman for Children has posted on its website the obligation of media towards children and that topic is frequently repeated publicly as well as in symposiums for the media representatives. It has been stated that:

"A child will not be harmed by every situation in which it appears on a TV show or in the newspapers. Nevertheless, before publishing such material the potential damage should be evaluated. The Media has a strong and positive role in the promotion of children's rights, in discovering possible threats for the children and alarming the public; the media has a strong influence on societal values and the sensibility of public towards children in distress. The role of the media is also important in aiding children and encouraging humanitarian and good behaviour of citizens; the media campaigns concerning social and health projects are especially valuable. The media has the power to encourage or prevent negative types of behaviour. The Office of the Ombudsman for Children has recommended to some media companies to consult the relevant welfare centre in situations that potentially endanger the rights and welfare of children, especially when the interest of children and their parents or other legal representatives are in potential collision".

Conclusion

1. Freedom of speech is necessary and sits alongside other basic human rights such as the right to protection of privacy.

2. Reporting on children should be done with great care and caution.

3. Children's right should be incorporated in the curriculum for the students of journalism as mandatory and optional classes

4. Questions of ethics should be a matter of a journalist's education and specialization as well as the provision of the Convention on the rights of the child.

5. Journalists and editors can raise public consciousness about children's rights violations.

6. Journalist or the journalists' associations should create rules about reporting about children.

7. The protection of a child's identity, family circumstances and other identity revealing data should always be taken into consideration during reporting.

8. The consent of a child and its legal representative should always and without exception be provided and the child should be familiarized with the context in which its data will be published.

9. Special attention must be given to the "especially vulnerable group of children" like the young perpetrators of misdemeanours or criminal offences- it is forbidden to publish their identity as well as the interpretation of the reasons for offending.

10. Children that live in poverty or disease should not be represented pitifully.

11. Children with disabilities should not be represented as lonely, isolated and helpless persons but as members of society. Their success and accomplishments should be acknowledged.

12. The use of language should be examined at all times and derogatory terms should be avoided, such as: handicapped, retarded, invalid, criminal, beggar, orphan, natural child, foster care child.

13. The scientific reports on the children's development, good behaviour and moral reasoning should be used.

14. Some reports state that the child shall more quickly adopt good rather than aggressive attitudes but such content is hard to find in the programs aimed at children. Such content should be promoted and implemented in programs.

15. Whoever deals with children should always try to minimize their negative influence on children.

16. It is possible to be a part of creating better conditions for children's development, especially for the journalists, editors and editorials by their everyday conduct and by following the provisions of the Code of Ethics of Croatian Journalists

17. The report should always focus on the event and not on the child that is a part of it.

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[6] Family Law, Official Gazette 116/03, 17/04, 136/04, 107/07, 57/11, 61/11

Protection of children in contact with the law: treatment by media and Court officials in Bangladesh

Hon. Justice M. Imman Ali

Introduction

Children normally do not have occasion to go to Court. However, they sometimes come into contact with the law and are compelled to attend Court, which may be due to their fault or, sometimes, no fault of theirs. The question often arises as to whether, when children find themselves in contact with the law, how they should be treated and whether they should be heard. It is by now certain that the Victorian adage that 'children should be seen and not heard' has no place in modern society. On the contrary, numerous international covenants, treaties, declarations etc. have been developed over the years to ensure that 'children should have a say in matters which concern them.' In recent times the role of the media in these parts has changed dramatically. Delicate family and personal matters, which were previously hushed up due to fear of disgrace and shame coming to the family, are now hot topics for the media and needless to say beneficial for the vulnerable and downtrodden, who would otherwise be without redress as crime would go unreported. However, both the topics are to be dealt with following extreme caution, keeping in mind rights and priorities.

Treatment of children by the media

The Constitution of Bangladesh guarantees freedom of the press subject to restrictions imposed by law in respect of security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.[1] On the other hand, every citizen is protected against defamation and libellous statements.[2] There are the usual exceptions, including publication of anything which is true concerning any person, or publication in good faith, if such publication would be in the public interest, any substantially true report of the proceedings of a Court of Justice etc. However, the Supreme Court, comprising both the High Court Division and the Appellate Division, has the power of punishing for contempt of court.

In the case of children and women, provisions exist in special laws prohibiting publications of their identities. This has been done with a view to protecting these two categories of persons from stigmatisation, victimisation, marginalisation and social alienation. There is no gainsaying that, for example, where a girl, who is alleged to have been raped, will not find a husband in Bangladesh society if that fact becomes known. Through no fault of her own, she becomes an outcast in her society and a burden on her parents. Without the help of the media such offences do not come out into the open and the offenders remain unpunished. Equally, a child alleged to have committed an offence becomes stigmatised for life if her/his name is published by the media and is not likely to be easily accepted in a job or even in the community without being looked down upon. This may happen even if after due process of trial the child is acquitted.

However, the need for media publicity for creating awareness, particularly of injustices suffered by the poor and indigent, is immense. Recently there has been a dramatic change brought about by electronic media leading to disclosure by women of serious offences, such as rape, molestation, sexual harassment and domestic violence, which were by and large brushed under the carpet in bygone years. However, the special laws which penalise such criminal activities also provide for protection of the victims from publicity which would negatively affect their lives.

[1] article 39 (2)(b) of the Constitution

[2] section 499 of the Penal Code, 1860

For example, section 14(1) of the Nari-o-Shishu Nirjatan Daman Ain 2000 (Prevention of Repression Against Women and Children Act), provides that news of any offence committed under this Act, or any proceedings, or the name and address or any other information regarding the victim shall not be published in any media whereby the identity of the woman or child may be disclosed. Breach of this law may result in a prison sentence of up to 2 years or fine of a maximum of one lakh Taka or both.[3] Section 17 of the Children Act, 1974 contains a similar provision prohibiting direct or indirect identification of any child involved in any case or proceeding in any court under the Act. The publication of any picture of such child is also prohibited. However the court has discretion to permit the disclosure of information about the case or proceeding if in its opinion such disclosure is in the interest of child welfare and is not likely to affect adversely the interest of the child concerned. Again, there is a sanction for breach of this provision which may entail imprisonment for up to 2 months or a fine of Taka 200 or with both. The apparent disparity in the punishment for the same offence in two different statutes, enacted 26 years apart, can only be explained by the fact that the outcry against the most heinous offences perpetrated against women and children had to be satiated by providing severe punishment which was a hallmark of the new law enacted in the year 2000.

In spite of the prohibition on publicity in cases involving children, we find a huge number of cases where names and identities of child offenders and victims, both women and children, were regularly named and identified in the newspapers and in court records. Upon noticing this trend, in the year 2008 a Division Bench of the High Court Division, presided by the author, observed and directed as follows:

"In view of the fact that the matter involves a child, we wish to remind all concerned that section 17 of the Children Act, 1974 provides that the picture, name and identity of a child offender shall not be published in the media and any such publication would be an offence under the said Act. Hence, the publication of any photograph or the real name, address and identity of the *detenu* is strictly prohibited in any form or manner whatsoever in any electronic form, print or other media."[4]

However, in the following year another case came to the notice of the High Court Division, presided by the author, where the child victim of rape was named and identified in a television programme. The case was of wrongful custody of a seven-year-old girl who had been raped by her neighbour and upon production before the magistrate's court was placed in a safe home of the Ministry of Social Welfare. On conclusion of the matter, the High Court Division observed as follows:

"Finally, we may mention that the work done by Channel I in broadcasting the plight and misery faced by an innocent minor girl is commendable. However, we are constrained to remind the media once again that disclosing the identity of minor accused and victims is prohibited under section 17 of the Children Act, 1974 and is punishable under section 46 of that Act. Publication of identity is also prohibited under section 14(1) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 and is punishable under section 14(2) of the Ain."[5]

In the year 2010, it was again noticed by a Division Bench of the High Court Division, presided by the author, that the practice of identifying child offenders still persisted. Again, the High Court Division felt constrained to observe and direct as follows:

"The learned advocate further points out that in spite of ruling by this Court, the news media are still publishing reports concerning alleged criminal activities of minors giving details of their identity, which is barred by section 17 of the Act….

Finally, we must again reiterate that section 17 of the Act prohibits the publicity in relation to any child who is involved in any case or proceeding in any Court under the Children Act, which leads directly or indirectly to the identification of such child, nor shall any picture of such child be published. We appreciate that the newspaper has brought to the notice of the public at large the illegalities which have been committed by the law enforcing agencies and the judiciary, but at the same time, we must insist that they refrain from identifying children who are alleged to have committed criminal offences and are again reminded of provisions of 17 of the Children Act and the sanction that is provided under section 46 of the Children Act."[6]

The courts are slow to take punitive action against the media for breach of the law in this regard, since it is the action of the media in bringing the matter into the open, which has enabled the courts to find out about and redress the breach of human rights suffered by child offenders and women and children victims of criminal offences.

[3] section 14 (2) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (Prevention of Repression Against Women and Children Act)

[4] Fahima Nasrin vs Government of Bangladesh, 61 DLR 232

[5] State vs. Secretary, Ministry of Law, Justice and Parliamentary Affairs, 29 BLD 656

[6] The State -Versus- The Secretary, Ministry of Home Affairs, and others, 16 MLR 254

Nevertheless, the warnings in the three cases mentioned above appear to have stemmed the practice of publishing names of victims in newspapers and media. Nowadays, we find many reports in newspapers where the victims are children or women who are not named unless the victims are killed in the incident concerned. It now appears that the message delivered by the High Court Division has finally reached target.

On the other hand, the courts still name child offenders and women and children victims within the court records. The habit of using letters of the alphabet in place of full names of victims/minor offenders has not yet developed. This is largely due to lack of proper instructions and good example set by seniors and peers of the trial judges. There is an apprehension that confusion may arise in the course of trial if the child offender/victim is not named and identified in court records. Clearly this is an area where guidance is needed for the judges conducting trials.

Media in court

As all hearings are open to the public, there is no restriction on media personnel entering the courtrooms and reporting on the proceedings which take place and the progress and results of cases. It is the discretion of the court to order a trial *in camera* in any fit case. In practice, however, media men seldom go into the courtrooms as the reporting is done by practising advocates who are designated as court reporters by the respective media. In real terms the only restriction on the reporting would be utterances which may be considered as prejudging the issues in a *sub judice* matter or statements which may bring upon the reporter imputation of libel or defamation. By and large the reporters, be they advocates or professionals, realise that certain reports might expose them to face contempt of court proceedings and usually confine themselves to reporting the actual progress of the proceedings.

So far as restrictions on publication of identities of children and women victims and child offenders are concerned, in all probability only the observations and directions of the High Court Division stand as guidance. The court reporters being lawyers by profession would also be aware of the restrictions and sanctions existing in the special laws. Perhaps it was the lack of guidance earlier which led to many media reports identifying child accused and victims.

Courts dealing with children

Essentially children might come into contact with the law and find themselves in court for one of four reasons:

1. As offenders, having contravened any penal laws
2. As neglected children, being in need of care and protection
3. As victims of crime perpetrated against them
4. As witnesses to any crime
5. As subject (or objects) of divorce proceedings or custody or maintenance matters
6. The first four categories are dealt with under the Children Act, 1974.

Child offenders

Children who come into conflict with the law (children alleged to have committed an offence), are mandated by the Children Act to be dealt with in accordance with the provisions of that Act, which by and large follow the international norms. However, since the Act predates the UN Convention on the Rights of the Child, not all the beneficial provisions are incorporated in the domestic law. Nevertheless, there is a decision of the Appellate Division as well as a number of decisions of the High Court Division[7] wherein it has been observed that beneficial provisions of international instruments are to be implemented unless they conflict with the domestic laws. Unfortunately, in spite of instruction from the higher judiciary through judgements in individual cases and training given by the Judicial and Administrative Training Institute, the subordinate judiciary still appear to be hazy about the provisions of the Children Act 1974 and Children Rules 1976. Disclosure of identities of children in the media appears to have abated due to warnings and directions issued by the High Court Division. However, the Courts have not refrained from identifying the accused children and other children involved in cases within the case records. This can come about possibly only after guidance from the Higher Courts.

Abused and neglected children, victims and witnesses who are minors

The Children Act also deals with children who are neglected and abused as well as minors who are victims or witnesses in any criminal case. Among its duties the court has to ascertain the age of the children, thereby ensuring their legal rights and while dispensing justice, to implement the aims of the statute, which deals, inter alia, with custody, protection and treatment of children.

[7] State v Metropolitan Police Commissioner, 60 DLR 660

The Guardians and Wards Act 1890 provides that whatever action is taken by the Court must be for the welfare of the minor. Section 17(3) provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference. Article 12 of the CRC also mandates that the views of the child be taken into consideration when dealing with matters affecting the child. The Courts, by and large, do ask questions to ascertain the views of the children concerned. However, when the child was not asked his/her views, it transpired that wrong decisions were made by the Court, for example in the case of the seven year old rape victim who was separated from her mother and sent to a safe home for safe custody.[8] The High Court Division pointed out to the trial judge that the child should have been asked her views and also that the law required that when a parent is capable and willing to provide safe custody then that should be given priority. In another case the custody of a five year old boy was given to his mother. When he was being handed over to the mother inside the very courtroom, the child started screaming that he wanted to remain with his father. This scene would not have taken place had the child been spoken to before passing the order.

Protection in civil proceedings

As mentioned above, all hearings are public, unless otherwise ordered by the court. Cases involving children who are victims, witnesses or accused are protected from publicity by section 17 of the Children Act. However, no such restrictions exist in civil proceedings, such as divorce, custody and maintenance. Although the existing law provides that the Court must keep in mind the welfare of the child in deciding custody matters, there is no law to protect the child from the trauma of Court proceedings and publicity. Article 16 of the CRC provides that "no child shall be subjected to arbitrary or unlawful interference with his or her privacy…. nor to unlawful attacks on his or her honour and reputation." Hence, for the protection to be effective, such attack on the privacy, honour or reputation has to be prohibited by law.

The Family Courts Ordinance governing divorce, custody and maintenance does not have any provision for the protection of parties involved in the case. The children find themselves in an invidious situation where they become victims of their parent's quarrelling. The family's right to privacy gives way to the media's right to freedom of speech. However, the Court must consider the welfare of the child, and pass necessary order prohibiting disclosure of identity of the child if such publicity would detrimentally affect the future of the child.

Conclusion

The existing laws in Bangladesh clearly aim to protect women and children from harmful publicity and provide punitive measures for breach of the law by the media. The Courts which were oblivious of the law are now more aware as are the media. However, the same cannot be said for women and children exposed to civil litigation. It is unlikely that the situation will change unless legal provisions are introduced to ensure protection of litigants and witnesses from publicity which may adversely affect them. Media will always seek out materials in Court cases which tend to create sensational news. Unless specific laws are enacted, Courts are unlikely to consider ban on media publicity. However, in spite of absence of laws, and even where laws exist, it is the good sense and good will of the media which will ensure protection against damaging publicity. The Courts also can play a part in protecting children by passing necessary orders keeping in mind what is in the best interest of the child.

Hon Justice M Imman Ali*
Appellate Division
Supreme Court of Bangladesh

[8] State vs. Secretary, Ministry of Law, Justice and Parliamentary Affairs, 29 BLD 656

The media in the Youth and Family Courts in Samoa

Judge Clarence Nelson

1. Is the press allowed into the youth/family courts; what laws govern reporting?

- The Press is allowed into the Youth & Family Court but is subject to any directions from the presiding judge issued under Article 9(1) of the Samoa Constitution as to what they can and cannot report.
- In all cases there issues, as a matter of routine procedure, an Order under section 8 of the Young Offenders Act 2007 (punishable by a fine of up to $1,000) prohibiting publication of the details of a young defendant or an alleged victim of sexual offending (irrespective of age).
- TV coverage is not permitted in any court unless expressly approved by the presiding judge. Such approval is rare and has only been granted for undisputed matters such as admissions of lawyers to the Bar.
- Article 9(1) of our Constitution guarantees the right "to a fair and public hearing by an independent and impartial tribunal". But it also provides that:

"the public and representatives of news service may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice".

Very wide powers indeed are vested in the court hearing the matter.

2 **Do the media abide by the laws?**

Media unquestionably follow any judicial restrictions imposed pursuant to the above powers.

3 What views do the judges have?

The judges regularly exercise these powers especially in relation to juvenile cases and those involving serious sexual offending. The Judges support and abide by their constitutional mandate. There is no present move to amend these powers.

4 Are the views of children/young people and their families taken into account?

- In the Youth Court their views are most essential to the exercise of the court's sentencing discretion.
- Likewise that of the family of the victim and the Village Council of the village of the young person. All play a significant role in relation to penalty.
- Our law also requires any customary penalty and relevant traditions be taken into account by the court.

5 Are there courts' spokespersons

There are no official court spokes-people. All such inquiries are handled by the Registrar of the particular Court.

Family Courts

These processes do not all apply in the Family Court jurisdiction. The views of the family may be relevant in certain instances for example custody applications by full time working mothers. And the views of young persons over the age of 12 years are relevant to applications to adopt/take custody over them.

Judge Clarence Nelson*, Justice of the Supreme Court of Samoa.

The avatar adolescent: a virtual generation

Prof. Philip D. Jaffé

The way children and young people bond with the new media emerging in the digital age is rather disconcerting, especially for older generations who were not, or were much less, exposed to the virtual universe behind a variety of screens. This situation deserves attention, not least because of a palpable concern about the potentially untoward effects on young people. This paper is divided into four parts. The introduction examines the global framework of media and new technologies under the heading *The evolution of information and communication technologies: From cave paintings to the Internet.* The second part explores some of the ways children have adapted to a new life immersed online. Its title hints strongly at the type of relationship: *Information and me and me and me.* The third part addresses some of the dangers and the protection issues generated by the digital environment. It discusses t*he benefits of I-technology and its shadowy side*… Finally, *The last byte* addresses a brief conclusion.

The evolution of information and communication technology: From cave paintings to the Internet

A first observation is that today's children and teenagers have "constructed their [mental] selves in a world where reality is not limited to what is tangible"[1] (Marty & Missonier, 2010, p. 473). It is even fair to assert that they are immersed in an obscenely[2] rich and dense media populated virtual world, which is mostly, but not exclusively, electronic and digital. Of course, print newspapers and magazines still exist, but growth of the new media is exploding.

On a global level, since about 2000, media consumption has increased dramatically, the lion's share of which is made up of digital television, the Internet, Smartphones, etc. One way to capture this exponential growth is to compare how long it took for different types of media to reach 50 million users: 38 years for radio to gather 50 million listeners, 13 years for television to bring in 50 million viewers, 4 years for the personal computer, 2 years for Facebook and only one year for Twitter!

With its keen sense of understatement, the Swiss Committee of Ministers[3] (2000) makes the same observation it its report on *Youth and violence:*

"Current surveys show that households in which children and young people live possess many electronic devices. The use of media occupies a growing part of this generation's activities, but traditional media usage is decreasing in favor of the new"[4] (p. 60).

As noted by Marty and Missonnier (2010), "virtual reality is only the actual face of a long historical process in which it was preceded by drawing, painting, photography, silent and then sound movies, digital simulation" [5] (p. 473-474). And the evolution of the expressive and media environment is accelerating: in just 10,000 years, humanity has journeyed from the much admired Cro-Magnon prehistoric cave wall paintings, to the notion of a World Wide Web canvas. With regard to the current digital walls, Internet has unquestionably become the pencil of the 21st century.

So then, how does this play out for children and adolescents? What do these new technologies represent for young people and what kind of relationships do they establish with these media?

1 Translated by the author from the French: «[se sont] construits [mentalement] dans un monde où la réalité ne se limite pas à ce qui est tangible».

2 In the etymological sense, because much of what can be viewed should neither be shown nor seen by young people.

3 Switzerland's executive governing body made up of seven ministers, from which the President is selected annually on a rotating basis.

4 Translated by the author from the French: «Les enquêtes actuelles montrent que les ménages où vivent des enfants et des jeunes possèdent de nombreux médias électroniques. L'utilisation des médias occupe une place grandissante dans l'emploi du temps de cette génération, mais celle des médias classiques diminue au profit des nouveaux»

5 Translated by the author from the French: «la réalité virtuelle n'est que le visage actuel d'une longue histoire où l'ont précédé le dessin, la peinture, la photographie, le cinéma muet puis sonorisé, la simulation numérique».

But also, what influences are they subjected to? These are some of the very complex issues that this paper seeks to examine.

Information and me and me and me

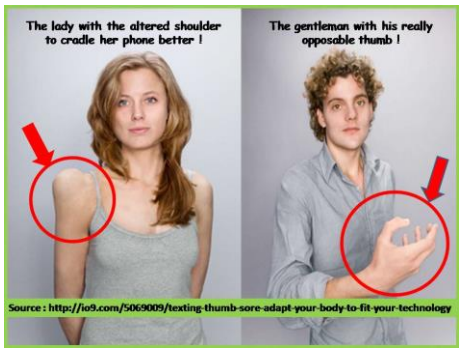
First, as attested by many surveys, there is no doubt that we are dealing with a multi-equipped, perhaps even an over-retrofitted generation. Available statistical data on the degree of access to the various new media is clear. The French TNS Sofres survey (Simon & Duhautois, 2009) shows that 96% of children and adolescents age 12 to 17 have access to an Internet connected computer at home. This figure represents more or less the norm for the richest European countries, but almost all Eastern European countries have now caught up. 84% of 12 to 17 years old children and teenagers own a mobile phone. However, it is likely that these relatively recent 2009 figures are already outdated since, at least in the USA, one adolescent out of four uses a Smartphone (iPhone or Android) with substantial access to the Internet. With its increased functionalities, the Smartphone radically changes how young people use mobile phones. Furthermore, 83% own a video game console, not to mention the possibility to play online games on a computer.

This is remarkable… especially if you compare this data to digital usage by older generations, including the Neanderthals like most readers of this paper and its author. Recently, the Swiss Federal Statistical Office (2012) compiled, between October 2007 and March 2012, data on Internet usage according to age. It is no surprise to discover that young people between 14 and 30 years old are the most frequent Internet users and were the first to discover and to flock to the Internet. Fifty-, sixty- and seventy-years-old persons are significantly behind, even if the increase of Internet use is spectacular for these age groups as well.

Another adolescent hit, far less practiced behavior by adults, is the use of text messages. According to a survey by the Pew Research Center (Lenhart, 2010), one out of three American adolescent sends 100 text messages per day from his/her mobile phone. Texting has even become the preferred means of communication among American teenagers. Girls send an average of 80 text messages a day and boys around 30. 87% of adolescents even sleep with their mobile phone next to them, which may help explain why it appears that the average duration of sleep among young people in the USA is decreasing. At the very least, this fosters discontinuity of sleep, which is likely to take place in blocks between sent and received text messages.

Did you know that if a girl puts a full stop at the end of her text message to another girl, she is often communicating that she is a little crazy! This is but one of many examples of the new forms of communication between teenagers. Adolescents have even invented a language made of a mix of acronyms and abbreviations, like for instance LOL for *laughing out loud* or *lots of love*, CUL8R for *see you later*. Other expressions are more "technical" and less often used: PAW for *parents are watching* or IWSN for *I want sex now*.

On a related note, our society should be concerned about the evolution of our species, since it appears that the American adolescent's body is changing under the influence of heavy mobile phone and texting usage. On the Internet, you may find a skillfully transformed picture of an adolescent girl with an enlarged shoulder allowing her phone to fit perfectly between her neck and her ear, or of a boy with giant thumbs, perfectly adapted for quick texting. Darwin surely would turn in his grave shocked by such an irrefutable demonstration of the accuracy of his theory!



One of the very interesting results emerging from Pew Research Center's study (Lenhart, 2010) is that mobile phones, including text messaging, allow American adolescents to improve their relationship with their parents. At least, this is what a majority of respondents believe which is paradoxical and quite dramatic. One possible interpretation is that these adolescents, boys and especially girls, realize that mobile phones give them more freedom since both themselves and their parents think they can always remain in touch, providing all with a fuzzy subjective technological feeling of safety. This sense of freedom also feels like a conquest for American teenagers. Furthermore, phone and text message communication, because it takes place at physical distance, is potentially much less tense and confrontational for parents as well as for teenagers. However, the apparent lesser degree of emotional intimacy, experienced through text messages and phone calls, and its consequences requires additional scientific investigation. Indeed, the jury is still out on this question, although it is safe to assume that the subjective feeling of the average adolescent is that a high degree of emotional intimacy can be achieved through electronic means.

And yet, it is also fair to say that comparisons are difficult to carry out since an ever larger slice of our emotional exchanges passes through a technological conduit.

The Times Magazine cover of December 25, 2006 captures the state of the phenomenon. It shows a desktop computer with *You* written in big bold letters on its screen. And, below the keyboard: *You… Yes You. You control the information age. Welcome to your world.* This cover is fascinating because it suggests two central elements of the experience of adolescents and the nature of their relationship with new technologies: the first is that they should be convinced that they control the contents of information they expose themselves to and the second is that they are at the center of the information flow. Yet, these two feelings are complete illusions. With regard to the first suggestion, only a limited portion of the information produced by new technologies' is "controlled", for instance statistical and factual data from trusted sources. As for the second proposition, and this is one of the disquieting aspects of the I-Generation flagged by Rosen in several influential books (2007, 2010, 2012), the formation of identity in teenagers, immersed in new mostly online technologies, macerates in a strange narcissism that appears at times quasi pathological. Reference here is made to the strange life that develops on Social Networking Sites, the so-called social networks.

The benefits of I-technology and its dark side…

Before delving into the dark aspects of connectivity and the Internet, the positive aspects and the benefits of social networks must be acknowledged. On this issue, the famous French psychiatrist Serge Tisseron (2009) declared, rather neutrally, in an oft cited conference: "New technologies induce new behaviors in young people which are sketching a new culture. It is no longer the culture of books but the culture of screens". Like many other specialists of human behavior, Tisseron notes that among the major changes brought about by digital technologies is a new relation to space, time and knowledge.

Regarding knowledge, for the first time in history of mankind access to bountiful information no longer requires us to strain our capacity to memorize and to store it in our brains. Certainly, we must still encode knowledge, but we now have at our disposal unlimited external hard drives that store the information we need and even more (de Rosnay, 2008).

If we learn to navigate towards the information we need and if we manipulate it with creativity, it can bring important benefits to the pursuit of knowledge.

But especially, as far as time and space are concerned, information has become a commodity that is fully available everywhere and anytime, as long as there is an Internet access on our computer or Smartphone.[6]

The Internet environment is fluid and malleable, and can be adapted to our best ways of learning. Think of the flexibility of video or audio recordings, the availability of exciting and mostly free podcasts. And most importantly, what is a historic moment for humanity, children and adolescents can explore and gain knowledge in a new *social landscape*. What is emerging for example is that young people carry out their homework assignments while exchanging via Internet, often in groups on social networks (such as *Facebook*). Instead of being locked in solitary confinement in their rooms working alone at their desk in front of a book or a notebook, information flows, and adolescents multitask, consult, compare, motivate, emulate and much more.

Is it a fantasy to think positively about new learning methods? How does one answer the question Times Magazine's (2006, March 27) asks on its cover, featuring a child surrounded by multiple gadgets such as Smartphones: *"Are kids too wired for their own good?"*? The reasonable answer is: not really. Indeed, the positive aspects of this cyber-generation, the *genM (generation multitasking)*, are widely demonstrated and besides, if this were not the case, not much can be done, because evolution in this direction is unstoppable.

Yet, there are also many valid reasons to be concerned and cautious. For example, Tisseron (2009) highlights how the Internet has dramatically changed teenagers' relationship to their body, language and empathic capacity. To optimally accompany young people in their school and classroom of the future, it is necessary to take time to create spaces where people can meet for in person, can touch each other and talk face to face. Education specialists should also accompany the emotional decoding that takes place between young people, because circulation of emotions via the Internet or text messaging is often poorly mastered. They do not really grasp how an insult posted on a social network and visible to all "friends" plays out. And thus, the notion of empathy has to be worked on and understood, for instance via role-playing, in order to find an efficient translation that leads to the respect of the Netiquette, namely the appropriate and respectful behavior that should characterize interactions on the Internet.

6 My European generation was limited by the opening hours of the library. A first personal revolution was the opportunity to study in an American university where the library was open 24/7.

In many ways, adolescence is a very sensitive period of human development. Young people have to cope with major physical transformations and engage in the psychological construction of their identity. Visiting social networks such as *MySpace* or *Facebook* or various chats provide teenagers many opportunities to experiment with their identity, a process that human behavior specialists have yet to fully describe and understand. Firstly, we know that the image an adolescent has of him/herself is a source of narcissistic interest and anxiety like at no other age. How others perceive him or her is fundamental and looks are sometimes more important than being. So behind the screen, on social networks, in chat rooms, in online games, young people enter a world of nicknames and avatars. As playfully stated by Marty and Missonnier (2010), the adolescent has the "opportunity to show him/herself while hiding—unless it is hiding while showing him/herself"[7] (p. 482). And the contradictions are numerous!

Some adolescents reveal everything: intimate details, photos and real information. For others, estimated between 10 and 20%, the creation of one or several fake identities allows them to adopt another sex, another personality, another reality. Often it is the same teenager who oscillates between the over authentic and intimate and the fake identity. Tisseron (2001) suggests the wonderful term of "extimacy", as opposed to the word "intimacy", to clarify the strange link between self-esteem and identity, this peculiar showing of signs of interiority.

This obviously raises the issue of managing privacy and partly explains how some teenagers become confused about what they expose or how to deal on the Internet and on their Smartphones with the intimate information they have on their friends in real life and their "friends" belonging to the same social network. Because for many teenagers, to be seen on *Facebook* means existing. They become someone and it comforts them. Being noticed signifies to have an identity! And on this topic, we adults must admit that teenagers always have been and always will be the creative specialists of how to be noticed! Every generation is periodically surprised, often outraged, by the ability of adolescents to create a striking and sometimes disturbing image. Social networks are only the virtual field of what every prior generation has done differently with different means.

And the dark side… There is no escaping the following platitude: throughout the history of mankind, every technological advance came with collateral damage, perverse side effects, dangerous forms of usage that had not been anticipated. New media are not an exception. Rather than detailing the catalogue of horrors produced, let us focus on some examples.

Due to the exposure of ever-younger children to new technologies and the information they contain, along with the considerable disconnect with culture of their parents, it is very difficult for young people to analyze the truthfulness and quality of what they come across and to put it to use in a realistic way.

On the Internet, nothing is true, nothing is false! This surely is valid for the identity of the interlocutor. A very effective advertisement by the association *Action Innocence*[8] shows two identical images of what can be discerned as a man's face. In one version, he is wearing a boy's mask and, in the other, a girl's mask. His real identity cannot be recognized. This user, a male adult, presents himself under the identity he wants to project. In the same vein, a famous newspaper cartoon from Peter Steiner published in the New Yorker magazine (July 5, 1993) shows a dog sitting in front of a computer saying to another dog: "On the internet nobody knows you're a dog".

When it comes to consulting information on the Internet, nothing is true, nothing is false. Worse still, everything is plausible. As a prerequisite, preparing a school assignment, based on an Internet search, calls for the capacity to evaluate information critically. Now, how many teenagers, or even how many adults, fall into the trap of adopting *Wikipedia* as an encyclopedic reference? Even papers by graduate students reflect a difficulty to verify information and to weigh the reliability and validity of Internet sources.

Critical judgement also fails adolescents with regard to certain aspects of Internet pornography. Watching endless sexual jousts featuring men as tireless athletes reaching orgasm five times in a row and women as objects who enjoy vile degradation and being ejaculated on gives a distorted idea of human sexuality. If, on the Internet, women engage in sexual relations with animals -such images are often passed around on children and adolescents Smartphones- then many young people come to believe that this behavior is acceptable.

7 Translated by the author from the French: «la possibilité de se montrer en se cachant. A moins qu'il ne s'agisse de se cacher en se montrant».

8 Of which I was a proud co-founder more than a decade ago: Find it here

Other illustrations of the dark side… First of all *sexting*. This behavior usually refers to a young person who sends sexually explicit messages, sometimes takes sexually suggestive photos of him/herself, but more often embarrassing pictures of someone belonging to his/her peer group, and electronically passes them on (via text messaging or the Internet) to a group of friends and beyond. Pure *sexting*, that is to say only texts, has been reported by approximately 10% youth in a French sample (Simon & Duhautois, 2009). In a recent scientific survey conducted on a sample of over 4000 French and German speaking 10 to 12 year old schoolchildren of the Swiss canton of Valais, this type of cyberbullying is statistically emerging (Jaffé, Moody & Piguet, 2012). The effects can be tragic. Jesse Logan, an American teenager who took her life in the context of bullying via *sexting*, greatly contributed to public awareness of the phenomenon and an attempt, in the USA, to criminalize *sexting* behavior. In France, a national campaign, providing educational material and video clips on cyberbullying, was launched under the influence of our colleague Eric Debarbieux (www.agircontreleharcelementalecole.gouv.fr).

It cannot be dismissed that, for physical violence as well as sexuality, there is an inexorable precocious evolution towards extreme behavior. Many surveys suggest that children and adolescents' exposure to extreme online content fosters trivialization and disinhibition, which ultimately increases potential risky behavior and violent acting out. However accurate, this finding must be qualified. For example, not all young people evolve in that direction. On a different level, research also shows that young people who fall for the potentially most harmful influences of new technologies seem to be already at risk because of their fragile personality or their failing family environment.

Indeed, in this field, nothing is simple. As illustration of this assertion, an excellent suggested reading is the fascinating *Kiki Kannibal* story published in RollingStone magazine (Erdely, 2011). In short, *Kiki* was a shy 12-year-old young girl who opened a *MySpace* account and became an undisputed Internet star by staging and playing with her identity and sexuality. She attracted tens of thousands of "fans", of which some were driven by such strong hatred that her house was vandalized and her family had to move. Worse was to come… What is interesting is that Kiki's parents supported their daughter's online projects, convinced by her argument that it was her right of expression and that ending her presence would be punishing her for the disrespectful behavior of her bullies.

The last byte

To conclude, let us echo *Kiki* who points to her right to freedom of expression which often coexists in tension with the need to protect young people. In this regard it is worth quoting the United Nations Convention on the Rights of the Child (1989) which states in Article 13:

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order, or of public health or morals.

Although the United Nations Convention on the Rights of the Child was written before the birth of the Internet, the basic principles it enshrines, such as freedom of expression, must also prevail in relationship to the new technologies that young people are the only members of our society to really master and explore.

As adults, we must indeed try to protect them, but we must also trust them. Remember Jimmy Buffett's words (1983): *We are the people our parents warned us about.*

This article is based on a conference at the September 2012 gathering of the Swiss Society for the Criminal Law for Juveniles, held in Schaffhausen, on the theme: *Communication without limits - Limits of information*.

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The mass media, violence and the protection of children's rights

Judge Patricia Klentak

The impact of the mass media on the development of children has been regulated by several international laws on the protection of children's rights.

In this regard, Article 17 of the Convention on the Rights of the Child states that *"States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall*:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child […];

(b) Encourage international cooperation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources […];

*(c) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 [right to information] and 18 [*Parental *responsibilities; state assistance.]"*

Accordingly, the United Nations Guidelines for the Prevention of Juvenile Delinquency (also called "the Riyadh Guidelines") make special reference to the mass media, stating that *"emphasis should be placed on prevention policies that facilitate the successful socialization and integration of all children", in particular through the family, education, the community and the mass media.*

Guideline 42 states that the mass media generally, and the television and film media in particular, should be encouraged to minimize the level of pornography, drugs and **violence** portrayed, while Guideline 44 states that the mass media should be aware of its extensive social role and responsibility.

At a local level, in Argentina, Article 3 of Law No. 26522 on Audiovisual Communication Services (passed in 2009) states that one of the objectives of audiovisual media services is to educate individuals. Article 68 makes special reference to the protection of children by stating that contents must be G-rated from 6 am to 10 pm. It further adds that TV programs subject to parental guidance must show the relevant rating.

Law No. 13298 and Law No. 13634, applicable in the Province of Buenos Aires, state that the media is forbidden from broadcasting the identity of a child involved in administrative or judicial procedures.

Mass media content must be produced and broadcast taking into consideration the protection of children's rights and its great impact on the child's physical, psychological and emotional development.

After conducting research on the levels of violence children are exposed to while watching TV, it was found that, according to "Violence Rates on Argentine TV", a report drafted by the Argentine Federal Broadcasting Committee in 2008, there is an act of violence every 15 minutes on the news and every 16 minutes and 23 seconds on fictional programs.

As a result, an individual exposed to several prime-time TV shows watches about two acts of physical violence (punches, gunshots, suicides, homicides etc.), two acts of psychological violence (insults, threats, intimidations) and one act of accidental violence (for example, car accidents), in just one hour of programming.

Acts of violence rose to 67.6% in the fictional programs under analysis. 100% of foreign fictional programs include acts of violence, while the figure decreased to 50% on national fictional programs.

Moreover, it should be noted that violence is not significantly reduced during the safe harbor (from 6am to 10pm): there is a violent scene every 19 minutes during that time period.

Consequently, young viewers become passive receptors of violence. The exposure to multiple violent scenes during daytime may lead children to imitate aggressive behavior, to adopt violent forms of conflict resolution, to release their aggressive behavior, to suffer from nightmares and night terrors caused by fear, to get used to

and to reinforce certain values, and/or to identify themselves with what they see. This process is known as "observational learning".

Later, children may adopt such violent behavior in their daily activities as a rational means to interact with their environment, for example, at school[1].

The Second Regional Comparative and Explanatory Study (SERCE) on school violence developed in 2008 by the United Nations Educational, Scientific and Cultural Organization (UNESCO) for Latin America and the Caribe, showed that violence among students is a serious issue in the region.

The study examined results from 2969 schools, 3903 classrooms and 91223 sixth-grade students (between 11 and 12 years old), in Argentina, Brazil, Colombia, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic and Uruguay.

The study revealed that 51.1% of sixth-grade primary students in 16 Latin American countries had been robbed, insulted, threatened or struck by peers.

Argentina exhibits the highest rate of insults and threats, followed by Peru, Costa Rica and Uruguay.

Five countries showed a particularly high rate of physical violence among students: Argentina, Costa Rica, Ecuador, Nicaragua and Dominican Republic.

At a judicial level, the Supreme Court of Justice of Argentina has recognized in several court decisions the freedom of the press without preemptive censorship, the right of reply (provided for in international agreements as a tool to prevent, mitigate and/or repair any abuse and excess incurred by the mass media), the personal right to image, the right to privacy, and the responsibility of the mass media.

For example, in the case "Ekmekdjian v. Sofovich*" [(CSJN 7-7-92)]*, the Supreme Court of Justice of Argentina reaffirmed the social right to information as well as the freedom of the press as a necessary condition to guarantee a free government. Nonetheless, it also acknowledged the changing scenarios in which these rights are exercised as a result of technological advancement.

In this regard, the Court stated that *"[…] these days, thanks to technological revolution, the contenders to control the mass media have changed. The idea of individuals playing an active role has been virtually erased; the contenders are now the State against the groups, and the groups against themselves".*

The abovementioned decision echoes the decision reached by the Supreme Court of the United States in the case "Miami Herald Publishing v. Tomillo" (1976). The Court expressed that the First Amendment right to information was in peril because mass media broadcasting had become a marketplace of ideas, monopolized by the owners of the market.

Finally, if we analyze the gap between the legal principles on the protection of children's rights and the actual contents shown on TV, we come to the conclusion that all areas involved must take action in order to bridge such gap and, consequently, prevent the negative effects of television on children. These actions include:

- Promoting awareness campaigns about the harmful effects of TV violence on the normal development of the child;
- Encouraging journalists to give special priority to the protection of children's rights;
- Including a general observation on this topic in international documents for its specific regulation, such as the general observations established by the International Committee on the Rights of the Child;
- Promoting and applying good practices, such as the Self-Regulation Code on TV Contents and Children adopted in Spain, with the purpose of reconciling economic objectives with the protection of children;
- Encouraging adults to assist children in developing a reflexive and critical attitude towards TV violence;
- Encouraging greater coordination among Latin American bodies (*Mercosur*, *Unasur*, etc.) to address this issue;

From my point of view, opting for a change on mass media contents means opting for the normal development of each and every one of our children, and endorsing to a project to build a more peaceful and constructive society.

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This article was written in collaboration with **Nahuel Ortiz.**

[1] The violence in the Mass Media shall be fitted in the General comment No. 13 's contents (2011) of the Committee on the Rights of the Child about "The right of the child to freedom from all forms of violence " , which defines violence as "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse " to understand the multifactorial character of the problem.

The Eurogang Program of Research

Prof. Dr Cordula von Denkowski

Fifteen years of comparative multi-method research on youth gangs in Europe and beyond

Youth gangs have long been considered a problem of the United States and Latin American societies. Since the 1990s, however, violent youth groups in several European countries have attracted attention of police authorities, politicians, and researchers.

The Eurogang Program of Research (also called the Eurogang Project) is a network of researchers and policy makers interested in better understanding youth gangs and troublesome youth groups. The Eurogang web site (http://www.umsl.edu/ccj/eurogang/euroganghome.html) notes three primary goals of the network:

- *To build a foundation of knowledge regarding the socioeconomic conditions and institutional processes that foster or curtail the emergence and persistence/dissolution of youth gangs and problematic groups;*
- *to construct an infrastructure for comparative, multi-method, cross-national research on youth violence in group contexts; and*
- *to disseminate and effectively utilize knowledge to inform the development of effective local, national, and international responses to emerging youth crime and violence issues* (retrieved 04/07/13).

The Eurogang Project is guided by a Steering Committee[1] and in 2012 consisted of 217 members from 28 countries, the majority from the United States and European countries.[2] Unlike the name "Eurogang" suggests, the network is not restricted to Europe but open to researchers and practitioners from all over the world; the only limitation being that the working language of Eurogang is English.

The first ideas leading to the Eurogang Program of Research were conceived in 1997 in Leuven, Belgium, when US-gang researcher Malcolm Klein and a small group of international scholars met to discuss how the study of youth gangs in Europe could be fostered (Esbensen & Maxson, 2012a, pp.2-3). Due to the very positive response of researchers to this initial meeting, the first international Eurogang workshop was organized in Schmitten, Germany, in September 1998. An important issue at this workshop was the question whether youth gangs existed in Europe. European researchers were reluctant to use the word 'gang' to refer to troublesome youth groups in Europe because the groups they had studied were different from the American gangs portrayed in sensationalized media reports[3] (Esbensen & Maxson, forthcoming). In addition, there were "understandable concerns that acknowledgement of European gangs might cause a 'moral panic' that could stimulate a suppressive overreaction to the phenomenon" (Esbensen & Maxson, 2012a, p. 3). The Schmitten workshop generated a spirit of enthusiasm for fostering systematic research on the similarities and differences between US-American youth gangs and European violent youth groups.

During the following years and at subsequent workshops, the question of how to define a youth gang in the European context proved to be highly controversial among researchers.

[1] The members of the Eurogang Steering Committee are Judith Aldridge, University of Manchester, UK, Finn-Aage Esbensen, University of Missouri-St. Louis, Frank van Gemert, Free University, Amsterdam, Cheryl Maxson, University of California, Irvine, Juanjo Medina, University of Manchester, UK, and Frank Weerman, Netherlands Institute for the Study of Crime and Law Enforcement. Contact details can be found on the Eurogang Project website.

[2] Source: Eurogang Membership Directory, 2012 edition

[3] The argument that European youth groups were not like American street gangs became known as the Eurogang Paradox because most American youth gangs did not resemble the stereotypical street gangs depicted in the mass media (Esbensen & Maxson, fothcoming)

The aim was to agree on a gang definition that could be used as the common ground for future comparative research. At the fifth Eurogang workshop in 2002, participants finally reached consensus on a shared gang definition:

> *A street gang (or troublesome youth group corresponding to a street gang elsewhere) is any durable, street-oriented youth group whose involvement in illegal activity is part of its group identity* (Esbensen & Maxson, 2012, p. 6).

An important step towards agreeing on this definition was to distinguish between gang *definers* and gang *descriptors*. The former are "those elements that are absolutely essential to characterize the group as a gang, while descriptors refer to those elements that help to describe specific characteristics of a particular group" (ibid.) In other words, the Eurogang definition names the elements that are necessary for any group to be considered a gang. Other elements, such as group names, symbols, or the use of tattoos are characteristics of some *but not all* gangs. Thus, comparative studies on youth gangs within the Eurogang Program of Research are supposed to use the same gang definition, but results of such studies may show differences between gangs or between individual gang members in terms of specific characteristics (descriptors).

Apart from agreeing on a shared gang definition, the growing Eurogang network developed, translated and pre-tested five data collection instruments for comparative gang research: A city-level instrument, ethnography guidelines, an expert survey, a prevention and intervention inventory, and a youth survey. These instruments and a manual that explains how to use them can be downloaded from the Eurogang web site. Any researcher interested in conducting comparative research on youth gangs or troublesome youth groups is invited to use these instruments. Although the Eurogang Project focuses on Europe and the comparison between US-American gangs and European troublesome youth groups, gang researchers from other regions are also invited to use the Eurogang methodology and instruments and contribute to the growing body of knowledge on youth gangs worldwide.[4]

Over the past 15 years, the Eurogang Program of Research has convened thirteen international workshops in Belgium, Denmark, Germany, The Netherlands, Norway, Spain, Sweden, the United States and Great Britain. Based on the presentations at these workshops, four edited volumes have been published (Klein, Kerner, Maxson & Weitekamp, 2001; Decker & Weerman, 2005; van Gemert, Peterson & Lien, 2008; Esbensen & Maxson, 2012).

Since the 12th workshop of the Eurogang Project in Stockholm, in 2012, the network has started paying more attention towards prevention and intervention of youth gang activity. This new approach includes closer cooperation with police authorities and law enforcement practitioners.[5]

To conclude, I will summarize some of the findings of the Eurogang Program of Research that seem to me particularly relevant to youth and family judges and magistrates: Young people who join gangs in different countries seem to have more in common than one might expect given the cultural, political or economic differences. Some risk factors for gang membership, such as delinquent offending and negative peer behaviors, are fairly consistent across countries (Haymoz, Maxson, & Killias, forthcoming). Another frequent finding of comparative research is that joining a youth gang leads to higher rates of illegal activities, especially violent offending, among young people. On the other hand, research has consistently shown that most young people participate in gangs only for a relatively short time (e.g. several months). By the time some of these young people are being prosecuted for illegal gang activities, many of them are no longer active members.[6]

Eurogang research has also revealed that public opinion on youth gangs very much relies on stereotypical images of US-west coast gangs. Most troublesome youth groups in the United States and Europe, however, are quite different from this stereotype.[7] Another important lesson learnt from the Eurogang project is that strongly suppressive responses to youth gangs have proved to be ineffective if not counterproductive. Most youth gang members come from socially marginalized groups, so policies and law enforcement measures that perpetuate or increase their social exclusion are damaging and foster rather than diminish illegal gang activities.[8]

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[4] Frank van Gemert, personal communication, 03/06/13; Cheryl Maxson, personal communication, 03/12/13.

[5] Frank van Gemert, personal communication, 03/06/13.

[6] Finn-Aage Esbensen, personal communication, 03/13/13.

[7] Frank van Gemert, personal communication, 03/06/13.

[8] Cheryl Maxson, personal communication, 03/12/13.

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A Journey of Hope

Dr Sally Zlotowitz

In 2008, Dr. Charlotte Alcock, as a newly qualified Clinical Psychologist in the UK, set in motion a chain of events that has led to the creation of an innovative and promising model for working with young people involved in gangs. The event that started it? Whilst hanging out outside a fish and chip shop on an estate in London. Dr Alcock, better known as Charlie, noticed a group of young men outside the youth centre who never came through the door – indeed were not allowed in – and who did not engage with any agencies. Accounts from the local authority and police suggested this was a group of young men actively engaging in gang-related activity, not likely to change and on the path to prison. Charlie decided she needed their help to find a way of changing that path. After six months of hanging out where they did, one of the young men finally gave her the opportunity to ask when he came over and accused her of being undercover police. Having tolerated spitting, stone throwing and general verbal aggression, Charlie was absolutely delighted that one of them had finally come to speak to her and give her the chance to ask the question: 'Can you help me?'

A few months later, after this young man had acted as a bridge between the group and Charlie, they were working together to put on regular music sessions at the youth centre. These sessions were only for them and their peers. They could listen to music loudly, teach each other DJ-ing and rapping skills and hang out in a safe space. This is what the young men had suggested would work to engage the group and as it grew in participants, Charlie realized they were right. The young people decided to call the new project 'Music & Change'. Music & Change is now the flagship project of the charity MAC-UK, which hopes to spread to statutory services the co-produced model of working – called 'Integrate'©, which takes young people and staff together on a journey towards change.

Starting Point

In London alone, gang members carry out half of all shootings and are involved in 22% of all serious violence[1]. So the need to find innovative ways of addressing gangs and youth offending in the UK is critical, even more so as we learn that our current approaches are inadequate and seriously lacking in an evidence-base[2]. For young offenders dealt with in 2009, the reconviction rate was 67% for community-based penalties and 72% for custody[3] Behind the well-known headlines about gangs and youth offenders, lies the evidence that these young people are often the most disadvantaged and excluded within our society and that our youth justice systems are often not fit for the purpose of rehabilitation[4].

The anti-social behaviour of these (mostly) young men can be violent, exploitative and thoughtless. This understandably makes it difficult for society to view them as vulnerable or 'in need', indeed few of these young men would describe themselves as this either. Yet, the evidence is stacking up that young people involved in gangs or offending have a host of unmet needs, including mental health needs. The Youth Justice Board has reported that one in three young offenders have an unmet mental health need at the time of offence[5]. A report in the British Journal of Psychiatry reviewing the needs of young offenders demonstrated high levels of needs in a number of different areas including: mental health (31%), education/work (36%) and social relationships (48%). Young offenders in the community had significantly more needs than those in secure care and these needs were often unmet. One in five young offenders was also identified as having a learning disability (Intelligence Quotient less than 70)[6]. Behaviours that challenge, including threatening behaviour, aggressive outbursts and frustration can mask depression[7]. As young people are excluded from agencies and services for these behaviours or imprisoned, the underlying reasons for their behaviour can remain.

Part of the issue is that it is as easy to conceptualise current mental health services as

[1] Metropolitan Police Intelligence Bureau, 2011

[2] Densley, 2011, Smith, 2011

[3] Ministry of Justice, 2011

[4] Youth Justice Working Group, 2012

[5] Youth Justice Board, 2005

[6] Chitsabesan et al, 2006

[7] Bailey, 2003

'hard to reach' as it is the young people (Flanagan and Hancock, 2010). Help-seeking for mental health problems in young men and adolescents generally is low[8] and for this group who are excluded and for whom help-seeking is an inconceivable task, it is even lower. Services are set up such that excluded young people need to firstly believe that they have a treatable difficulty and after that huge hurdle they then need to be able to access a General Practioner (doctor), navigate referral systems, and trust in unknown authority professionals to deliver that treatment. Just these requirements, taken for granted by many, maintain the health inequalities clearly apparent for this group. As the Psychotherapist Alexandra Lemma describes, expecting groups of excluded young people living chaotic lifestyles to attend appointment-scheduled therapy may be "simply asking too much of the young person"[9] .

So, the health and social inequalities of offenders are vast.

- Less than 1% of ex-offenders living in the community are referred for mental health treatment
- 63% percent of male prisoners are hazardous drinkers
- In the week following their release male prisoners are 29 times more likely to die than males in the general population
- Before being in custody, 58% of prisoners are unemployed and 47% are in debt [10]

For young people involved in gangs, the nature of their needs may be even more complex. Evidence clearly indicates that gang involvement increases offending, aggression[11] and victimization and trauma[12]. The chances of young people having poorer outcomes – such as school exclusion, unemployment, substance misuse and unsafe sexual practices[13] are also increased.

Reasons for gang involvement range from criminological and sociological theories, such as differential opportunity and social deprivation, which suggests gang activity compensates for employment and educational shortcomings through illegitimate means[14] to the psychological theories, such as family and individual risk factors. In terms of family systems, young people involved in gangs are more likely to have suffered separation from parents or a parent through divorce, death or estrangement[15] as well as experience more pre-teen stress[16] (7). Alongside family composition, parents of gang members tend to provide poorer supervision and family management[17] or conduct criminal behaviour themselves[18].

There still may be positive bonds with individual parents[19] but this is not easily transferred to authority figures, who are mistrusted[20] .

Research is very clear about the influence of associating with delinquent peers on increasing offending and violence amongst the group as well as substance misuse and other poorer health outcomes[21].

Alleyne and Wood (2010) describe a range of other psychological characteristics associated with gang members including high impulsivity, low self esteem, risk-seeking and impulsivity[22]. Alongside these are cognitive strategies that maintain individuals' offending behaviour, such as diffusion of responsibility, and the setting aside of moral beliefs in favour of being accepted by the chosen group[23]. However, Pitts (2007) reminds us that young people can be 'reluctant gangsters' trying to protect themselves and their families from harm, rather than necessarily remorseless individuals.

Wood and Alleyne (2010) describe a theory that marries many of these different influences on how a young person becomes involved in a gang including individual, family, peer and neighbourhood characteristics. This theory and this brief literature review indicate that gang interventions need to intervene in multiple domains of a young person's life and within wider systems. But an often missed message is that interventions must wholeheartedly recognize that offending is a health issue as much as a criminal justice one.

Where We Are Now – Taking Mental Health to the streets—co-production of projects

The Integrate model puts mental health and clinicians at the heart of gang intervention for groups of young people. The model emerged through co-production between Charlie and young people. However, it is clearly underpinned by community psychology theory[24], attachment

8 Addis & Mahalik, 2003; Rothi & Leavey, 2006

9 Lemma, 2010: p.425

10 Department of Health, 2009; Ministry of Justice, 2010, 2011, 2012

11 Gatti et al., 2005

12 Wood and Alleyne, 2010

13 Thornberry et al., 2003

14 Klemp-North, 2007

15 *ibid*

16 Sirpal, 2002; Klemp-North, 200

17 Hill et al., 1999

18 Gottfredson & Hirschi, 1990

19 Hill et al., 1999

20 Alleyne and Wood, 2010

21 Fergusson et al, 2002

22 Esbensen et al., 2001; Esbensen & Weerman, 2005

23 Emler & Reicher, 1995)

24 Nelson & Prilleltensky, 2010

theory[25], and lifespan developmental psychology[26]. It is a radical approach taking what we know works in mental health and applying it in new ways. The model fundamentally turns help-seeking on its head by co-producing projects with young people and taking mental health services out of the clinic and onto the streets. Integrate mental health practitioners use their clinical understanding and skills to inform every aspect of their interactions with young people.

The model describes a young person's journey through the intervention with the overall aims being to reduce offending, bridge young people into other appropriate services as well as employment, education or training. This journey can last between six months to fours years, depending on individual needs. As with any behaviour change, motivation for a different lifestyle can ebb and flow over time, but sticking with young people through it all is key. Providing an experience of healthy attachments with opportunities to try new ways of relating takes time and patience but is well worth the wait, as Charlie herself is reminded everyday. Several of her colleagues at MAC-UK are original members of the fish and chip shop group.

The Integrate Model's Five-Stage Journey

1. Initial Engagement. Relationships are initially developed using a combination of a peer-to-peer referral system and staff 'hanging out' in key locations where the young people are known to be. This approach recognises that gang involved young people may have been formally referred to many services but have found them to be inaccessible. Integrate therefore uses the power of peer influence and peer modelling to attract young people to its service. It also allows young people to trust Integrate staff more readily from the beginning.

2. Youth-led Projects. Young people choose, design and run a range of activities (anything from music, sport to drama). Their help is actively requested in all aspects of the activities and they take up explicit leadership roles such as Head of Music or Gym Project Lead to promote a sense of ownership and responsibility. The activities may vary from week to week because these young people can get bored easily. Young people often do want to prevent other younger people going too deep into offending, so they often start projects to try and reach out to younger groups.

These youth-led projects are flexible, responding to the interests of young people in order to keep them engaged and develop trusting relationships with staff. Practitioners' clinical understanding of individual young people inform how best to work alongside them. Within the model, young people can also be employed on an ad hoc and part time basis to carry out some of the project work. This provides opportunities for young people to develop professional skills, gain relevant work experience and earn a live employers reference. It also means almost daily contact between staff and young people, who are all on the same team.

3. 'Streetherapy'© is at the core of the Integrate model. It is a flexible approach led by teams of mental health clinicians. The aim of 'Streetherapy' is to alleviate mental health distress and promote positive mental health.

The aim is ultimately to bridge young people into existing services. 'Streetherapy' breaks down the barriers between young people and the services they so desperately need. Young people peel off into 'Streetherapy' at their own pace and wherever and whenever they feel comfortable. This can take place on a bus, in a stairwell, or whilst waiting at court. This innovative approach takes what we know works from the mental health field, and delivers it in a highly adaptive and flexible way.

For example, clinicians look for opportunities to make mental health relevant to young people's goals. For instance, the difficulty of becoming a music artist is explored if anger difficulties mean you can't work with your colleagues. But it's also about looking for the signs in everyday life. If a young person seems more withdrawn, more aggressive or comments that their future is hopeless, clinicians can start to informally assess their mood. If a young person can't focus whilst in a Youth Employee meeting, clinicians can take the opportunity to discuss strategies to manage a shorter attention span. If a young person is ambivalent about change, motivational interviewing techniques from the field of addiction can be employed to explore and enhance their motivation.

4. Bridging Out. Activities and employment have an explicit 'bridging out' function, which helps young people to access and use other services that might be able to support them on their onward journey. This involves anything from supporting a young person to attend a job interview to setting up their own youth social enterprise. 'Bridging out' is tailored to each young person's needs and frequently involves supporting a young person to access stability services in order to move on, such as bank accounts, passports or supported accommodation. The level of exclusion in terms of basic services such as these is staggering within this population.

5. Championing Change. The fifth stage involves young people co-producing training, campaigns and lobbying activities with Integrate staff to effect change in the wider systems around young people. They become champions of change within their peer group and encourage new peer referrals. They can also join Integrate staff to train other agencies on the impact of health and social

[25] Bowlby, 1969

[26] Baltes, Lindenberger & Staudinger, 2006

inequalities on their lives. Young people have visited the Home Office with Charlie to argue the point there; they have taught on Doctoral level courses at Universities about the inaccessibility of services, trained agencies such as the police on the importance of trust and they have joined staff to influence housing policy at a local authority level.

The End Goal

MAC-UK's vision is to radically transform the way mental health services are delivered to this excluded group. The goal is for the Integrate model to become the gold standard gang intervention within the UK. This can only happen through statutory services implementing the model. Integrate has received widespread acclaim[27] and is now being tested at three pilot sites with new groups of young people over the next three years. Two of these are multi-agency sites with workers realigned from statutory services, including the NHS and the local authority, to put the model into action in their community.

Integrate uses evidence-based psychological theory and interventions. Moreover, a review of the 'what works' in youth rehabilitation by Professor John Pitts also points to many of the model's features. According to his review, programmes that 'work' are: holistic and deal with many aspects of young people's needs, informed by developmental theory, build on young people's strengths, involve young people in decisions and offer opportunities to engage with problems and deficits which got young people into trouble in the first place[28].

Of course, ongoing evaluation of the model is absolutely crucial to statutory uptake and as a whole gang interventions can be inadequately evaluated[29]. Outcomes so far have been promising, with 75% of the original cohort of young people now in employment, education and training; with three of the original group now employed by the social enterprise they helped create, 'Mini-MAC'. In the second cohort of approximately forty young people within Music & Change, an independent evaluation by the Mental Health Foundation (in prep) found that over the course of 2010 to 2012:

- 90% of those young people, many of which are considered the some of the most frequent offenders in the Borough, reached the highest level of engagement the charity records - 'actively seeking out Music & Change staff for support for a range of needs';
- 90% of young people received interventions for their emotional wellbeing through'Streetherapy';
- 90% worked towards employment, education and training;
- 80% were bridged into stability services;
- Comparing the first six months of 2011 and 2012 for approximately half of the Music & Change cohort, data from our partnership agencies showed that:
- The total number of young people offending reduced from 54% to 17%;
- The total severity of offending scores decreased by 76% between these two time-points.

The Centre for Mental Health is[30] now independently evaluating the Integrate model going forward, with independent researchers attached to each pilot site and with much more data being collected. Part of the aim of the research is to understand which parts of the model work and which need to be developed, as we know this is very much a work in progress. Still Charlie, young people and communities affected by gangs, wait, with hope, for the results of these pilot sites.

Case History of a Young Person's Journey through the Integrate Model*

Lee was identified by the local police and community safety team as a young man on a path to prison with a gradual increase in his offending since age of 15 years old both in frequency and severity. Lee had been excluded from school and spent his time hanging out on his local estate with older friends. He started drug running and committing burglaries under the duress of older peers. He became involved in the local gang, partly just to keep himself safe. He witnessed a serious stabbing and was threatened himself.

He lived with his Mum and three siblings in a deprived community. Mum worked long hours to make ends meet and couldn't always manage Lee's behaviour—he was becoming more challenging. Sometimes the police would raid their home suspicious that he was running drugs. He was regularly stopped and searched. He was once strip searched. He was smoking skunk (strong cannabis) every day. Lee was offered various courses by the council officers and youth workers but didn't engage. He was committed to moving up the gang and thought any professionals he engaged with would talk to the police.

He was into music and started going with peers to an Integrate activity - recording some lyrics. Staff at first just sat in the room with him occasionally asking about the lyrics or music and listening to

27 Home Office, 2011, North West Public Observatory, 2012, Youth Justice Working Group, 2012,

28 Pitts, 2005

29 Densley, 2011

30 Find it here

his tunes. Several months later he overheard a peer talking about getting help with his court case from Integrate staff. He asked staff about a character reference for his next court appearance for cannabis possession and staff went to court with him. Staff spent the next few weeks contacting Lee, texting, calling and following up on the chat about the character reference and asking for his input into it. When the court date came, staff talked together about the stress of court and whether he managed stress through avoiding thinking about things and smoking skunk. Staff used Cognitive Behavioural Therapy (CBT) techniques to link his feelings, thoughts and behaviour around how he manages stress and explored how well this worked for him.

Lee was regularly asked for his help with the music activities and he arranged a trip to a studio for him and peers with staff. Over this same time period, he completed an application for a passport with staff and, having missed the first interview, the second time staff woke him up and went with him to collect it. On the way, Lee talked about what he's interested in doing but staff noticed his ambivalence towards working and didn't push the conversation, instead normalizing how it can take time to find what you're passionate about. Using a mentalisation-based approach, staff spoke to each other in front of Lee about their experiences of finding their interests, of volunteering to gain experience and of the enjoyment they gained from their work.

Over the next year the relationship was built with Lee by staff following up on his requests and going for food together in the local cafe. Staff gradually asked him about his hopes for the future and used motivational interviewing, an evidence-based therapeutic technique used for behaviour change, to explore change with him. During 'Streetherapy' sessions with staff he spoke about feeling low and worrying all the time. Sometimes he had nightmares. Staff explored possible trauma issues but it seemed the nightmares came along with poor sleep because of his low mood. All his court cases had left him feeling hopeless and some of his friends were now in prison. He missed them but also hadn't heard from them. He worried about his Mum and felt there was nothing there to help his family. Lee's clinical needs were discussed in a 'Streetherapy' meeting and staff created a clinical map of his mental health.

On the basis of this, staff shared some of their understanding and supported him with his hopeless beliefs and strategies for his low mood using CBT techniques. Over time Lee agreed to teach youth workers alongside Integrate staff about mental health and the benefits of music. Staff also initiated a discussion about feeling low in one of the peer group music sessions. Sometimes Lee would get angry at staff for asking difficult questions and not attend for a few weeks at a time. Staff tried to respect these occasions of disengagement and space, but then look for ways to renew contact when it felt clinically appropriate.

Thinking about how to affect change in the systems around Lee, staff liaised with his probation worker, the police, the council and a drugs worker about Lee's positive work with the Integrate project. With Lee's explicit permission they shared their clinical understanding of him and spoke about 'what worked' with Lee. Staff also gained a deeper understanding of Lee through the other professionals' ideas. They also discussed with Lee the different professionals' roles and understanding of his needs.

A few months later again, after attending trips and becoming employed as a 'Youth Motivator', Lee and a friend got into the idea of making music videos so staff went with Lee and his friend to look into courses that might help them. They both enrolled with a reference from Integrate staff in support. At first staff went and woke Lee up to go to college whilst continuing to explore motivation with him, as it went up and down over time. Staff reflected back to him the enormity of his transition back into education and, using a solutions-focused technique, asked how he had managed it and kept his motivation going.

Lee was then employed to go with the MAC-UK CEO to a government roundtable on gang violence and gave his opinion on the strategy and the lack of resources in his community, explaining the gang provided him with financial security and personal safety.

*Lee is not a real person but this describes a typical case and is simplified for the purposes of this article.

Dr. Sally Zlotowitz, Clinical Psychologist and MAC-UK Head of Research

In 2013 MAC-UK won a prestigious GSK IMPACT Award for its outstanding contribution to improving the mental health of young people involved in gang activity.

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Latin-American Youths Gangs

Hon. Judge Joseph Moyersoen

Various sociological and criminological studies have been done on “gangs” of young people in the last hundred years[1]. The first interesting sociological studies date from the 1920s. I recall "The gang" by Thrasher, who investigated and analyzed 1313 youth gangs in Chicago during a period of seven years[2]. From this study a gang appears to be “active adolescents with a code of conduct that governs the complex interaction with the group”.

According to Thrasher, the gangs often arose as spontaneous groups of children playing together and composed of close friends. Expulsion from school or other forms of marginalization often acted as a catalyst for the formation of a gang. The gangs studied by Thrasher tended to be unstable, many members left the group and others entered, but the attitudes and behaviours of the adolescents were strongly influenced by the group.

Today, for over twenty years, we have been faced in many countries in Central and South America, the United States of America (USA) and, more recently, Spain and Italy—in particular its large northern cities such as Genoa and Milan—with the new gang phenomenon of Latin American youths. The "band" is composed of different youths who may be older but usually under eighteen years (who I call "adolescents" and not "minors", respecting the term used here Brazil), who have a negative connotation attached to the types of behaviours they exhibit and the actions they carry out. Characteristics of named Gangs such as "Latin King", "Commando", "Manhattan", "Dangers", "Revolution" are many, but first and foremost is the fact that the young people involved come from Central America, particularly El Salvador, Guatemala and Honduras and from South America, especially Ecuador and Peru.

But the countries involved in the Latin American gangs are not only the countries of Central America and South America, but also the countries of the USA and Europe, especially Spain and Italy. Interventions to fight against this phenomenon in the countries of their origin have been focused on a safe and essentially repressive approach, often "zero tolerance", but without any results. Even in Spain, in particular in the city of Barcelona, the policy of "zero tolerance" did not yield any results. For this reason they had to start another approach, such as that in Barcelona where the gang members were involved in a course of conversion to being members of associations which were recognized and legalized, with a move away from illegal activities. It is a participatory approach. This route is ongoing and has already produced some results. It has also been initiated in other cities and countries.

The Italian Experience

The characteristics of this phenomenon as observed in Italy can be summarized thus:

a. country of origin which has experienced civil wars;

b. unstructured families without fathers, in a context of poverty and lack of opportunities;

c. migration of the mother to Italy (and other countries such as the USA and Spain) and the abandonment of the child/children with members of the extended family (eg grandmother) at home in the country of origin;

d. later reunification with the son/s as preadolescent/s or adolescent/s in Italy (or other country of destination)—often with a new family—with little concern about the son/s integration into the family and society after reunification justifying this with the need for full-time work[3] and

e. the adolescent searches for identity in a group of "peers" .

So, during their childhood and adolescence, Latin American youths experience multiple traumas both in their country of origin and in their adopted country.

[1] Studies of Thrasher, Whyte, Sherif, Doise, Adler et Stevens.

[2] F.M. Thrasher, The Gang, Chicago, University of Chicago Press, 1927.

[3] This double abandon of the son into the country of origin and in the country of destination, may have been caused a "double trauma".

In Milan there was a case where such an adolescent was taken into custody. After a lengthy investigation, dozens of young adults and 12 adolescents were brought to the attention not only of the justice system, but also to the notice of public opinion and the media. During the course of the criminal proceedings of the adolescents the involvement of "*associazione per delinquere*", (a criminal organization) was acknowledged. During the following four years the Judicial Police identified about 4,000 people who were involved in Milan and its surroundings. After this case, the former "Latin King" and "Commando" gangs collapsed and gave way to new groups with the same or other names and with a composition that might be called "internationalized" involving young people from different countries of origin.

A very special type of gang is formed by the "maras" or "pandillas" of El Salvador: Mara Salvatrucha 13 or MS 13 and 18[4]. The "maras" were born in the major towns in the USA such as Miami, San Francisco, beginning in Los Angeles, in the 1980s.

The city of Los Angeles has two main highways: the 13th and the 18th. Salvadorans who emigrated to Los Angeles, lived in the 13th and Mexicans in the 18th. When the Salvadorans had no place in the 13th they would seek a place in the 18th, while Mexicans who had no place in the 18th would look in 13th. Mexico and El Salvador never had good relations and were football rivals. The term "salvatrucha" is made up of the word "trucha" which means trout, that is to say "someone smart and fast" and the word "salva" derives from the word Salvador. This slang term is used in gangs and, therefore, members of Salvadoran gangs define themselves as smart and fast. In the 1980s the two "maras" took complete control and monopolised some neighbourhoods near highways 13th and 18th in Los Angeles. They especially managed drug trafficking and prostitution. When this phenomenon became a real problem for these towns, the police began to expel the leaders and members of the gangs to their countries of origin —El Salvador and Mexico—where they quickly rebuilt the same highly organized control system with the objectives of territory control and unconditional conflict with the opponent gangs. "We live to eliminate the members of the opponent gang to control the city, the country and other countries of the world like the USA, Spain and Italy"[5].

So, the "maras" have introduced new forms of action and organization; they consist of very large groups of young people living in a particular area and identifying with it. Defence and control of territory is one of the main elements of their behaviour. At the centre of the "maras" there are young people called the "vida loca" who lead a crazy, deregulated life, based on theft and alcohol and drug abuse. It is a life of strong emotions—for example the feelings they get in a fight with an opposing gang or with the Police, the appetite for risk in the commission of illegal acts. But, equally, what young people achieve in the gang is a feeling of belonging. Young people have tattoos all over the body symbols of the gang they belong to. They are forced to undergo initiation rituals in which they must prove their devotion to the gang, their abilities and their obedience skills. In El Salvador the presence of tattoos on the body was a part of identification and belonging to a gang. As a result the Police began arresting young people for the mere fact of having the body tattoos. Consequently the use of tattoos has recently greatly diminished.

Some statistical data.

In recent years in El Salvador 3,500 people were killed each year—almost 10 people every day—armed conflicts between gangs; For this reason the President of El Salvador set as its main objective a zero tolerance fight against crime and criminality. The policy, which lasted for three years, was a failure. That's when someone said to the President: "You are wrong, return to the prevention and rehabilitation approach; listen to what the gang members ask"; but the President replied that he could not communicate with the criminals. Thus, the Catholic Church intervened, and the state told the Church it would support everything she did. The Church decided to initiate a dialogue with gangs and this led in 2012 to a truce between two gangs who decided not to kill any more provided they are offered rehabilitation programmes. Daily deaths fell to 5, that is to say they were halved. Unfortunately the USA—the origin of this "mara" phenomenon—does not seem to intend to provide any type of support to foster the success of the truce. But as a member of a "mara", which through its illegal activities maintains his family, reintegration into society has a significant cost in the short term.

There are 3 million Salvadorans in the world, 2 million are in the USA and 50,000 are in Italy. The escape of affiliates abroad where there is a danger that these gangs reform has already been highlighted.

[4] On this subject, watch the documentary "Marked for life", made in 2006 by Marco Nicoletti and funded by RAI Cinema and the Italian Ministry of Foreign Affairs. And also "La Vida Loca" made in 2007 by Christian Poveda and funded by Eurimages (Council of Europe) and the Spanish Cooperation.

[5] Sentence pronounced by a young member of « mara » in San Salvador prison. From the Documentary "Marked to life", see previous footnote.

The Italian approach

To fight against this phenomenon, what are the instruments to be used? First of all, instruments of observation and treatment are essentials. Here I mention the example of the "messa alla prova"[6], an Italian legal instrument applicable when a minor, aged between 14 and 18 has committed a criminal offence. It is the suspension of proceedings for testing the minor[7] which, unlike "probation" in the execution phase of the penalty in other countries, in Italy is implemented after the investigation phase and during the preliminary hearing or the hearing of the judgement(trial) phase. Obviously for procedural guarantees there is the presumption of innocence until the decision although the application of this instrument requires that the defendant admits committing the offence. This instrument provides that public social services with the involvement of the minor accused prepare a draft educational programme of limited duration—one to three years depending on the type and seriousness of the offence. It is presented to the panel of judges (bench) of the Youth Court. If the panel of judges decides to apply the programme, it suspends the criminal proceedings for the programme's duration. At the end of the programme, if there is a positive result, a decision "not to place on record" is recorded against the young person.

A characteristic of this testing is its high flexibility, which is reflected in its applicability to any type of criminal offence, even where there has been a previous conviction. When results are only partially achieved it is possible to modify the programme's activities or requirements as well as lengthening its duration.

The objectives of "messa alla prova" may be summarized as:

a. change in the objectives of the youth's life;

b. participation of the youth in a programme of testing;

c. promoting education;

d. rehabilitation and reintegration into society.

The testing is applied to about 5 to 10% of total criminal proceedings, the programme's content being tailored to each young person. Its application is steadily increasing (eg 788 cases in 1998 and 1856 in 2003 throughout Italy). Positive results exceed 82% of cases.

It is important to note that good practice involves:

- networking,
- collaborative programmes with various social services (from the Ministry of Justice and from the Municipalities),
- periodic checks during the programme by the Youth Court which usually delegates an "honorary" judge or member of the panel to do the checking
- parental involvement in the programme through periodic meetings to support parental responsibility. In fact parental participation is required by law[8]
- the educational intervention also insists on family involvement with the minor and his entourage (extended family, school, training and work context, etc).

It is the practice in many Italian Youth Courts that the Social Services Department of Juvenile Justice (USSM) works with the family of the accused minor; indeed, a specific requirement in the court's decision provides for the suspension of proceedings to test parental support. The involvement of parents and the treatment of trauma is essential not only for rehabilitation but also to prevent transmission of traumatic codes across generations.

Helping these young people to be reintegrated into society is a duty of the State and of the professionals working for and with young people, who are not only the future of the society but the present.

Letter of an adolescent who had lived a gang's story.

I decided to tell you my story with a letter. The protagonist, however, will not be me, but an invented friend, a figment of my imagination, who I'll call Alejandro. It is complicated for me to be in his shoes. It is difficult to speak in the first person to take responsibility for his behaviour, but I can say, today I am ashamed.

I was about 11 years when I started attending a school with classes composed of children coming from Latin America. At the end of 2002, I was 12, I met Alejandro. I met him again about three years later in the ninth grade. This was the beginning of friendship and trust that he gave me.

At 15 he began to move away from his family, fascinated by some people he knew, only seemingly "innocent", the kind of people who will upset his life. He began to be part of another family called "Manhattan", a small group called "Hermandad organizada" (organized brotherhood) composed of about 20 people, aged 18 to 35 years, often fathers, but also teenagers between 14 and 17 years. He told me that he had to fill in forms with personal data where it said he want to join the group. Afterwards there were the following ceremonies:

PRIMERA FASE (Phase I): the youth was placed in the centre of the group, he would declare loyalty with his right hand on his chest, his left hand clutching the black beads rosary with a crucifix in black pearl, symbol of the group.

[6] A kind of probation during the criminal proceeding.

[7] Art. 28 of the DPR 448/1988, the Italian Youth Criminal Proceeding Code.

[8] Art. 27, second paragraph of the D.L. 272/1989.

SEGUNDA FASE (second phase) was to demonstrate resistance. The youth was placed in the centre of the group and with his face covered by his arms, he was struck by fists and elbows, as a ceremony. But it did not stop there. The price for resisting was 150 push-ups and an exercise called "Jumping Frog", which was to jump 100 times, knees bent and arms behind his head.

"Nonsense," I said as I listened ...

TERCERA FASE (third phase): the last test—of courage. Rookie chose an opponent to confront in a "round." Rookie must not give up, even if exhausted, until victory.

Once inside the group, everyone was given a nickname—Alejandro was "Wizard". Finally, there was the price: a bracelet in different colours, always with mother of pearl, representing the position occupied in the gang.

This gang, in particular, was just one of many: "Latin Kings" (Latin Kings), "Neta-puñeta" (Closed Fist), "Master" (Teacher), "Manhattan", "Rebeldes" (Rebels), "Batos Locos" (Crazy People), "Contras" (Against All), "Templados" (The Prouds), "Pitufos" (The Smurfs), "Main Family", "Yankees" (Americans), "Diamantes" (Diamonds) and others. They were set up by teenagers of fifteen or sixteen years who had no authorization to organize and train gangs and gang members.

Each gang has its own rules, moments of encounter "Reunión", which always involved the "Three Points", the three leaders. Manhattan was the symbol of the crown with three branches, five branches for the Latin King. The three-pointed crown represented the historical monuments of Manhattan: the Brooklyn Bridge, the Twin Towers and the Statue of Liberty, a symbol of courage, respect and freedom. There were also moments of leisure, small parties, outings, sports events. But there were also punitive events. If you failed, you were punished with beatings and bad treatments, real tortures. It was things like you lie down with your head to the ground, with arms behind your head, and you are kicked and punched in the hips, ribs and shoulders. Sometimes, you'd also have to do 50 push-ups while being beaten or hold your arms behind your back and receive a discharge of fists against your chest, without stopping.

The birth of this group, Manhattan, dates back to 1999 along, with the group Rebeldes: over time, in 2004, the two groups clashed. Fights and beatings followed.

If you met one of the other gang, trouble had to be faced.

Once, when Alejandro was 16 he took his revenge on the beating by the Rebeldes of his cousin who was 12 years old. One night during a weekend, he went to a nightclub with his "compatriots". He found himself talking with one of the Rebeldes. Without warning he threw himself against the Rebeldes member, smashed a still full beer bottle and struck and wounded him with the broken bottle. Two other Rebeldes intervened to defend their assaulted member and Alejandro's compatriots joined in. Another Rebeldes member intervened, while the first young man recovered a knife and stabbed Alejandro in his side. He responded immediately but felt weak, saw the blood on his shirt and faded.

He woke up in the hospital where he stayed for two-weeks. He felt anger, hatred and revenge: the doctor told him that a few millimeters away, the knife would have touched the heart.

I asked myself why?

I think the reason is to be found in the desire to assert oneself among peers.

You want respect. You require it. You dictate it, whatever the cost, throwing away all relationships, and becoming more and more involved in crime.

I think that to be important as a human being, the way of life needs to be completely different"

This article is based on a presentation given by the author during the International Conference "Juvenile Delinquency, Urban Violence and Social Justice", Centro Universitario São Camilo, São Paulo, Brazil 2013

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South African youth need to be in schools not in prison: the role of restorative justice system in achieving this goal

Moitsadi Zitha

Abstract

The emergence of the new democratic dispensation in South Africa under the leadership of Nelson Mandela saw a need for a culture of human rights for children and the youth. Youthful offending remains a significant challenge since more than half of South African population is constituted by young people and fall within the age group frequently in conflict with the law. The Child Justice Act 75 of 2008[1] made special provision for the handling and treatment of youthful offenders within the criminal justice system and stated that incarceration should be the last resort and alternative methods such as diversion should be prioritized. This article examines the significance of education for youthful offenders deprived of their liberty.

Introduction

Crime has increased rapidly over the years, particularly violent crimes and the number of children and youth between the ages of 14 and 18 years of age, arrested and convicted over the past few years has grown. Recently, there have been reports on the new trend of children as young as 9 years of age are involved in deviant behaviour, involving rape, assault and murder. This means, these new trend will affect the statistics of the cohort of children under the age of 13 years.

The Child Justice Act 75 of 2008 provides for a criminal justice system that takes account of the vulnerability and special needs of children. It is also vital to note that the Act amends the common law regarding the age of criminal capacity. According to the Act, a child committing an offence while under the age of 10 years cannot be prosecuted for such offence because of lack of criminal capacity.

According to the crime report[2], approximately 2.1 million serious crimes were registered in our country. Of the 2.1 million cases almost a third (30, 8 % or 638 468 cases) were contact crimes. South African children are socialized in a violent environment. The criminal activity of children and youth is a significant social problem that ultimately disrupts their learning

Muntingh[3] indicated that, in 1999, 114, 773 children were arrested in South Africa. Thereafter. this number increased rapidly each year and according to the Department of Correctional Services[4] 2010/2011 statistics 75, 453 children were charged by the police from April 2010 to March 2011,which shows a significant drop in the number of children charged as a result of the role of restorative justice and diversion programmes. However the data recording system is limited; this presents a challenge to analysts trying to determine the number of children serving prison sentences.

This article's focus will be on the factors contributing to youth offending in South Africa, the extent of youth offending, programmes offered to incarcerated and diverted youth and child offenders and the role of restorative justice.

Historical background of Restorative Justice

South Africa's participation and involvement in the Contemporary International Movement of Restorative justice began in 1992. In 1995 an Inter-Ministerial Committee (IMC) for young people at risk was established and restorative justice was adopted as a "practice principle for [the] transformation"…

The principle of restorative justice within the African perspective is not a new phenomenon. Traditionally, African societies focused primarily on the victims of crime and restitution and reconciliation were considered as essentials to correct the wrong caused by crime[5].

Pre-colonial African societies and their legal systems) were family based, linked together in clans and ruled by chiefs. Senior members of the community had to be consulted in all matters of consequence and were obliged to always act in the interests of the collective (Ubuntu principle). In African social systems the concept of "Ubuntu" has been the basis for the resolution of disputes through African custom[6].

Modern restorative justice practice has its roots in victim-offender mediation (VOM), which became popular in the western world during the 1970's. The first initiatives were taken by National Institute for Crime Prevention and Reintegration of Offenders (NCRO), in 1992 to establish and evaluate South Africa's first VOM project. NICRO"S first VOM was established in Cape Town. The project targeted referrals at both the pre-trial and pre-sentence stages. In 1995, an Inter-Ministerial Committee (IMC) for young People at Risk was

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1 Republic of South Africa. (2008).Child Justice Act 75 of 2008. Government Gazette, 32225. 11 May 2009. Pretoria: Government Printers.

2 Republic of South Africa. Department of South African Police Service 2010/2011 Crime Report. Find it here. Date Accessed 10-09-2012.

3 Muntingh, L. (2003:8). "Nicro's Submission to the portfolio Committee". Article 40 5, No.1.

4 Republic of South Africa. Department of Correctional Services (2012). Youth and children incarceration levels. Find it here. Accessed on 01-10-2012.

5 Nsereko, N.1992. "Victims and their Rights." In Criminology in Africa, edited by M.Mushanga.Rome: UNICRL.

6 Dissel, A. (2002). Restoring the Harmony: A report on Victim Offender Conferencing Pilot Project. Restoring Justice Initiative and Centre for the study of Violence and Reconciliation: Johannesburg.

established, and restorative justice was adopted as a "practice principle" for the transformation of the child and youth care system. A study tour to New Zealand was authorised by the IMC in 1996. The restorative Justice Centre (RJC) was then established in Pretoria-Tshwane in 1998.

Contributory risk factors towards South African youth offending

Dealing with young offenders remains a worldwide problem and contributory factors to youth offending is complex.

According to Burton[7] South African youth are growing up in a society where they are exposed and socialised in an environment which is crime oriented, for example they are exposed to community violence, poverty stricken communities, access to alcohol and drugs, and all these factors contribute to young people's deviant behaviour. The most challenging is the lack of employment for South African youth, which often leads to anti-social behaviour.

In South Africa, there are various factors contributing to youth offending inter alia,

- **Exposure to inter-parental violence** implies that children are either present in the room when parents fight and hear screams, yelling, swearing and in some cases the threatening of one's life. The climate of such homes may reflect a culture of violence[8]. According to Bezuidenhout[9] and Tshiwula[10], abused mothers are likely to experience stress and depression, which may lead to negative or inconsistent parental practices.
- **Inadequate or no parental supervision**, research conducted by Mokwena[11], indicates that when families fail to minister to emotional needs of their children, they may easily turn to streets where there is a high possibility that they will learn sophisticated ways of taking part in violent crime.
- **Inconsistent parenting styles,** parenting is inadequate when parents or caregivers are unable to teach children to distinguish between right and wrong without resorting to violent punishment[12] Generally offenders come from homes where what is right is not always clearly defined and have rarely been taught by parents how to mediate shortcomings such as limited opportunities and exclusive resources[13].
- **Sexting and cyber bullying,** Advances in technology have resulted in instances of undesirable communication between the children. Cyber bullying and sexting are two relatively new phenomena and unacceptable behaviours currently occurring in the school yard. Children are mostly unaware of the consequences of sexting, that is, some of the pictures, videos or messages that they circulate amongst themselves may be regarded as child pornography. Sending or sharing may constitute a contravention of legislation prohibiting the possession, distribution, creation, production of child pornography. This may result in children being prosecuted on very serious charges, with serious consequences[14].
- **Single parent families,** in most South African households women are raising children alone because they are either not married to the children's biological fathers or the male partner works far away from home. In view of the study done, both parental genders are important for child growth but optimal parenting can be achieved regardless of the familial structure[15]. According to research, the absence of a father figure in the child's upbringing through neglect has devastating effects, especially with respect to boys[16]. Research reveals that when families are disorganised, the chances of children exercising social control become diminished[17].
- **Substance abuse in schools**, substance use has a detrimental effect on the health of the learners and is also recognized as a significant barrier to both teaching and learning. South African students are vulnerable to both drug and alcohol abuse which are on the rise by students in all grade levels. The substance most abused by learners is alcohol, followed by cigarettes and marijuana. A Report by the Bureau of Justice[18] revealed that, 85 per cent of teenagers claim that they know where to obtain marijuana, while 29 per cent state that someone has offered or sold them an illegal substance at school. Substance use has been associated with a host of high risk behaviours including unprotected sex, crime and violence, as well as mental and physical health problems.

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16 Richter, L. & Morrell, R.2005. Men and fatherhood in South Africa-Introduction. [O]. Find it here. Accessed on 07 -07-2012.

17 Muntingh, L. 2005, *op. cit.*

18 Modisaotsile, B. 2012. Africa Institute of South Africa. Policy briefing No. 72. Find it here, Accessed on 10-10-2012.

- **The culture of violence in schools,** violence and crime in South African schools is rife and is a critical problem[19]. It has been found that a positive school culture and a school climate are important dimensions that can be linked to effective risk prevention and the enhancement of teaching and learning[20]. School violence is nothing more than community violence which penetrates schools[21]. This study is underpinned by a theoretical model which places the school context, including school culture and climate, at the centre of school violence[22].
- **The prevalence of HIV/AIDS amongst the youth:** the overall incidence in South Africa of HIV/AIDS is at epidemic proportions, with the incidence rate among the young at 22.9 per cent. This means that there are many child headed households[23]. The unfortunate part is that these young people are exposed to crime as a way of survival hence alternative sentencing is imperative.
- **Poverty and unemployment ,** Poverty and unemployment have a negative impact on the upbringing of children, as parents are unfortunately unable to provide for their children with basic needs and which in turn , because of peer pressure, results in young children being involved in crimes such as stealing and theft in order to "fit in" with their peers. Another negative effect is that such parents are likely to work long hours or be absent from home looking for work[24]. Tshiwula warns against the overemphasis of the impact of poverty and puts more emphasis on weak bonds between people, institutions and values as contributing factors to youth offending[25].

The situational analysis of South African youth in prison

According to the report on children in conflict with the law, there were 75, 453 children charged by the police from April 2010 to March 2011. Only 16, 462 children were diverted at the pre-sentencing stage of proceedings. Based on snapshot data, children remain awaiting trial in the department of correctional services facilities for an average of 70 days[26].

According to South African law, every child has the right not to be detained except as a measure of last resort and for the shortest possible time (Child Justice Act 75 of 2008, South African constitution, Section 69 (1) (d)) and has the right to be detained separately from detained persons over the age of 18 years and treated in a manner, and kept in conditions, that take account of the child's age (Constitution, Section 28 (1) (g))[27].

Of particular concern is the fact that children of compulsory school-going age in 'awaiting trial' facilities are excluded from educational programmes. Some facilities surveyed were overcrowded and have "staff-shortages". The Correctional Services Act requires that all children of compulsory school going age must attend education programmes while incarcerated and children who are inmates and not subject to compulsory education must be allowed access to educational programmes (Correctional Service Act, Section 19(1))[28].

The impact of incarceration cannot be underestimated on young children's lives. Offenders are faced with a substantial risk of being coerced, assaulted, raped and even killed at the hands of other offenders. Even though the Correctional services act and case law is clear that it is the duty of the state to ensure the safe custody and maintain standards of human dignity, violence and the threat of violence forms an integral part of prison experience and Section 28 of the Child Justice Act, provides amongst others, that a child be detained in conditions which take into account their particular vulnerability in order to reduce the risk of harm to that child, including the risk of harm that maybe caused by other children.[29]

Offence profile of South African children and youth

The total number of children in South African prisons has decreased drastically since the early 1990's. Table one below, presents the offence profile of children in custody, recorded as the average number per year for the period of 1995 to 2011. While the overall number of children in custody has declined, there was also a substantial shift in the offence profile of children detained (sentenced and unsentenced) in prisons. In 1995 the majority of children (51.5%) who were incarcerated (sentenced and unsentenced) were either charged or convicted of property offences. This figure has dropped to 28% by 2010. Aggressive and sexual offences have increased by roughly 12% respectively. The remaining two categories (Narcotics and other) remained stable at around 1% and 3.5% respectively.

19 Le Roux, C.S & Mokhele P.R. 2011. The persistence of violence in South African schools: in search of solutions. Africa Education Review, 8: 318-335.

20 Cohen J & Pickeral T. 2007. How measuring school climate can improve your school. Commentary in Education week. Find it here. Accessed on 10-08-2012.

21 Arnette, J.L& Walsleben M.C.1998. Combating fear and restoring safety in schools. Juvenile Justice Bulletin. US Department of Justice. Find it here. Accessed 15-06-2012.

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23 Modisaotsile, B. 2012, *op. cit.*

24 Masuku. D.2004. Numbers that count: National monitoring of police conduct. In South Africa Crime Quarterly No. 8. June.

25 Muntingh, L. 2005, *op. cit.*

26 Muntingh. L & Ballard. C. 2012. Report on Children in Prison in South Africa. Find it here.

27 Republic of South Africa. (2008), *op. cit.*

28 Republic of South Africa. Department of Correctional Services (DCS). 2011. White Paper on Corrections in South Africa. 2011. Pretoria: Government Printer / Department of Correctional Services.

29 White, A. 2008. The concept of "less eligibility" and the social function of prison violence in class society. Buffalo Law Review, 737-817.

TABLE 1—Offence type by percentage

YEAR	ECONOMICAL	AGGRESSIVE	SEXUAL	NARCOTICS	OTHER	TOTAL
1995	51.5	32.6	10.0	1.5	4.3	100
1996	49.1	33.5	12.0	1.1	4.3	100
1997	49.5	32.2	13.8	1.3	3.2	100
1998	46.2	33.9	16.1	1.1	2.7	100
1999	46.0	35.0	15.0	0.8	3.2	100
2000	44.3	37.5	14.2	0.9	3.1	100
2001	43.7	39.2	13.4	0.8	2.9	100
2002	43.4	39.6	13.2	0.8	3.0	100
2003	42.6	41.2	12.3	0.8	3.1	100
2004	40.4	42.6	12.6	1.0	3.3	100
2005	35.5	46.4	14.2	0.9	2.9	100
2006	33.1	47.7	13.4	1.0	4.9	100
2007	34.4	46.7	13.3	1.2	4.3	100
2008	32.3	46.0	16.0	1.3	4.4	100
2009	31.7	45.2	17.4	1.3	4.4	100
2010	29.8	46.0	19.1	1.2	3.9	100
2011	27.9	44.7	22.9	1.1	3.3	100

Source: Muntingh. L & Ballard. C. 2012, *op. cit.*

Age Profile

Table two below presents the age profile of children in prison according to sentence status as well as the average age of detained children for the period of 1995 to February 2011 and for the year 2010. The data shows that there has been a notable shift in the age profile of unsentenced children but that the profile for sentenced children remains the same. The age profile of unsentenced children shows a marked reduction in the younger age categories (7-16 years of age), in 2010 compared to the full term profile and proportionate increase in 17 year old children. This suggests that the legislative efforts at keeping young children out of prison have been effective.

TABLE 2

	PERCENTAGE BY AGE (YEARS) OF **UNSENTENCED** CHILDREN AND YOUNG PERSONS					PERCENTAGE BY AGE (YEARS) OF **SENTENCED** CHILDREN AND YOUNG PERSONS				
AGE	7-13	14	15	16	17	7-13	14	15	16	17
1995-2011	0.8	5.1	14.0	31.3	48.8	0.4	1.7	8.0	26.4	63.5
2010	0.2	1.5	7.9	25.6	64.8	0.1	1.9	8.3	25.4	64.4

Source: Muntingh. L & Ballard. C. 2012, *op. cit.*

Recent reports by the media have highlighted a new trend of children as young as 9 years of age, committing violent crimes, such as rape and assault with grievous bodily harm, meaning, these new trends amongst youth offenders can affect statistics of the cohort of children under the age of 13 years.

Programmes offered in South African Prison to young offenders

The provisions of section 41 of the Correctional Services Act further require the Department of Correctional Services to provide a full range of programmes and activities, including needs based programmes, which is practical to meet the educational and training needs of sentenced offenders.

TABLE 3—Programmes offered to young offenders in South African prisons

PROGRAMMES AND SERVICES PRESENTED	SERVICE PROVIDER
Life Skills	DCS Social Workers
Crisis intervention	DCS Social Workers
Mirror Programme	Khulisa & Nicro
Substance Abuse Awareness Programme	Khulisa & Nicro
Anger Management programmes	DCS Psychologist
Family Care Supportive services Orientation Crime Prevention Awareness Campaign Community Projects	DCS Social Worker

Source: Muntingh. L & Ballard. C. 2012, *op. cit.*

The role of Restorative Justice

Despite various challenges, diversion and reintegration services in South Africa are increasingly demonstrating the value of a criminal justice system that embraces the principles of restorative justice. Restorative justice is considered to be a philosophical framework, rather than a specific programme. Restorative in South Africa is closely linked with the African traditional justice system that uses traditional mechanisms to deal with issues of crime[1]. The development of effective diversions to address social problems such as child and youth offending depends on a sound understanding of the nature of the problem. The most preferred form of justice for children is through diversion.

Examples of Restorative Justice Applications in South Africa, with regard to youth and children in conflict with the law

There are two main non-profit organizations that deal with children and youth in conflict with the law, that is Khulisa and Nicro. The researcher will describe the operations of both these organizations.

Khulisa

Khulisa's performance is monitored using a system that provides statistical information, trend analysis and impact analysis and assists in predicting future outcomes. Khulisa offers "Positively Cool" programmes mainly to young offenders. This diversion programme is a life skill programme incorporating a number of essential skills necessary for the effective management of a child's life

Diversion options offered by Khulisa are as follows[2]:

- "Being Positively Cool- Junior "Mini" diversion Programme : 8 weeks for youth aged 8-13
- "Being Positively Cool"- Senior "Mini" Diversion Programme: 8 weeks, for youth aged 14-18 who have committed more serious offences
- "Being Positively Cool" – "Senior" Diversion Programme: 16 weeks, for youth aged 14-18 who have committed more serious offences
- "Facing Your Shadow- Sexual Diversion Programme : 16 weeks programme for youth aged 14-18 who have committed a sexual offence
- "Silence the violence"- Violent and Aggressive Behaviour Diversion Programme: 10 week programme for youth aged 14-18 who have committed an offence that is violent in nature.

[1] Skelton, A & Batley, M. 2006. Mapping the progress, chasing the future. Restorative in South Africa: RJC.

[2] Khulisa Crime Prevention Initiative. 2011. Khulisa and diversion. Find it here. Accessed 01-10-2012.

The National Institute for Crime Prevention and Reintegration of Offenders (NICRO)

Diversion projects offered by NICRO offers a second chance to young people charged with a criminal offence. In lieu of prosecution and conviction young offenders must participate and comply with one or more of the programmes. NICRO offers various programmes to offenders in prison and those who were diverted.

The programmes are as follows[3]:

- Youth Empowerment Scheme – a six-part life skills programme spread over six weeks,
- Pre-trial Community Service ,
- Victim Offender Mediation – for the victim and offender to work out a mutually acceptable agreement with the aim of restoring the balance,
- Family Group Conference involving families of the victim and the offender in the mediation process and
- The journey Programme, is aimed at high risk children and juveniles and involves life skills, adventure education and vocational skills training.

NICRO also conducts community engagement through schools in the form of short workshops or presentations. The school headmaster must take the initiatives by inviting social workers that will give the learners various talks about crime, violence, life skills and high risk behaviour and parents can be involved in such school activities.

The services provided to young offenders add value to our criminal justice process and aid in rehabilitating offenders and reducing re-offending.

Recommendations

The researcher would like to make the following recommendations to all stakeholders involved in the diversion of children in conflict with the law and service providers:

- All South Africans should have equal access to information and services for diversion.
- More youth in conflict with the law should be referred for diversion by the Child Justice system.
- Support systems should be in place after the completion of the programmes. Follow up sessions are necessary to ensure that these children do not relapse into the life of crime.
- Children and parents should be educated and made aware of cyber bullying and sexting and the consequences of these practices.
- Provision of diversion programmes dealing with cyber bullying and sexting should be available to young offenders. Notwithstanding the challenges, there is a need to develop a model to test the impact of Restorative Justice Programmes in South Africa.

Conclusions

South Africa's history has influenced the youth of South Africa today. The apartheid regime has put our youth at a disadvantage both by sequestrating their communities into poverty stricken families and limiting opportunities for employment and education, but also instilled in the population emotional triggers which have added to the propensity for criminal behaviour and an ethos of violence. It is clear that South African youth need to be reformed and empowered with skills rather than be sent to prison. Strengthening family welfare and parenting services might be essential to help the government rehabilitate children who have circumstantially been raised to lack the desire to explore and reach beyond violent experiences. The Department of Correctional Services should ensure that all children who are under their care obtain the necessary education and skills to assist with the rehabilitation process. When nine to fourteen year olds embrace crime as a way of living and overlooking the opportunities that might prevail with education, it means South Africa is headed for a crisis.

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[3] Nicro's Non-Custodial Sentencing Turn Around Newsletter. 2011. Find it here. Accessed 7-08-2012.

Religious Courts

Anne-Marie Hutchinson & Richard Kwan

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Richard Kwan

In January of this year, Mr Justice Baker, sitting in the Family Division of the High Court, adopted a unique and progressive course in settling an international divorce and children's case. In the case, *Re AI and MT* [2013] EWHC 100 (Fam), Mr Justice Baker case managed the English proceedings in such a way so as to permit the parties to resort to a form of arbitration by a nominated religious court. The Judge scrutinised the terms of the religious court's award and thereafter converted that award into a free standing English consent order. The case sparked very considerable media interest and comment, not all of it altogether accurate. The Telegraph reported that: *"Sharia divorces could be allowed after legal ruling"*[1], whilst The Times' front page proclaimed: *"High Court opens way to Sharia divorce".*[2]

Background

Despite the headlines, the case, in fact, involved an orthodox Jewish couple. The parties formed part of a truly international family. In August 2006, they married in a Jewish ceremony in London, having met just over a year earlier. They then settled in Israel, during which time they visited Toronto, Canada so that they could carry out their civil marriage ceremony in October 2006. The mother then travelled to London in August 2007 to give birth to the parties' first daughter, A.

The parties thereafter made plans to leave Israel and move to Canada; these plans were finalised in February 2009.

However, regrettably, difficulties in the marriage arose and on 19 April 2009, the parties decided to seek help from a Rabbi in London (where they were attending Passover and a wedding with the mother's family). The mother and father then, on separate occasions, travelled to Canada. The mother claimed that she went to Canada only to try and attempt a reconciliation. The father, by contrast, claimed that this was in fact part of their joint plan **to move to** Toronto indefinitely.

Ten weeks after arriving in Toronto, the mother flew back to London to give birth to the parties' second daughter, M. The mother by this point had reached the conclusion that the marriage had broken down irretrievably; she therefore did not return to Canada. In response, the father issued an application under the *1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 Hague Convention")* seeking the children's summary return to Canada. The mother reacted by issuing (in England) her own application for a prohibited steps order, asserting that the father and his mother were attempting to remove A from her care.

The New York Beth Din

During the *1980 Hague Convention* proceedings in London, which came on for final hearing before Mr Justice Baker, and remained reserved to him thereafter, the parties entered into negotiations and agreed to explore the option of having their disputes resolved through a Beth Din in New York (one of a number based there), which for the purposes of the proceedings was simply called, "the New York Beth Din". This was a novel course but one which Mr Justice Baker sought to encourage. To that end, Mr Justice Baker:

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1 Find it here

2 *The Times*, Friday 1 February 2013

- adjourned the court proceedings so that the parties could commit to proceedings before the New York Beth Din;
- made wardship orders under the inherent jurisdiction to protect the children while the parties were engaging in proceedings before the New York Beth Din;
- made "safe harbour" orders which allowed the mother to travel to New York with the parties' second daughter, M, for the purposes of contact with the father;
- held an emergency interim contact hearing when the parties were at loggerheads as to who should have contact with the children around Passover; and
- facilitated the granting of the Jewish divorce (the Get).

The granting of the Get, in particular, required a creative solution: the mother feared that the father might refuse to divorce her under Jewish law; she believed that he might fail to provide her with a Get once the consent order had been sealed. This would make her a "chained wife" or "agunah" and, under Orthodox Jewish law, unable to remarry. The father, for his part, was concerned that the mother might retract her agreement in relation to the consent order once he had provided her with a Get.

Mr Justice Baker dealt with this delicate issue by indicating that he would endorse the order that the parties placed before him which transposed the New York Beth Din award into terms appropriate for an English court order), and only seal the order once the father had provided a Get to the mother. This allowed the father to provide the mother with a Get in the knowledge that the court had indicated its willingness to endorse the consent order while giving the mother security that, should the father fail to provide her with a Get, the consent order would not be sealed.

And so, accordingly, the father provided the mother with a Get and Mr Justice Baker, as he had indicated, sealed the consent order. That final order ran to no less than 17 pages. It was a comprehensive solution to all the disputes that the parties had. Amongst other matters, it settled the arrangements in relation to residence of, and contact with, the children; it regulated the exercise of parental responsibility; it divided and distributed the parties' finances; it made appropriate declarations as to jurisdiction; and it put in place a comprehensive mechanism – again combining the expertise of the New York Beth Din with the supervisory jurisdiction of the English court – by which future disputes could be settled.

What was particularly striking about the case was the endorsement by the High Court of the determination of the New York Beth Din and the distillation of the Beth Din ruling into an order of the High Court.

Alternative Dispute Resolution: the background

Long gone are the days where the route to redress inevitably led to the doors of a court. A generous **(and now well known)** menu of alternative avenues has increasingly served separating couples over the last few decades: mediation in the 1980's and 1990's; collaborative law around the turn of the century; and more recently, family arbitration (introduced last year). Not one of these avenues can oust the jurisdiction of the court. Judges, ultimately, have the final say.

The closest form of dispute resolution to that adopted in this case is arbitration: a process where (unlike mediation or collaborative law where only the parties can reach their own settlement) a third party, the arbitrator, imposes his or her decision on the parties. The arbitration never operates within a court of law (although family law arbitrators will follow English law). As nothing can oust the jurisdiction of the court, a court may refuse to endorse an arbitration award. However, in reality, many Judges support the arbitration process and will be reluctant to vary its terms due in part to the desirability of reducing costs and delay.

Re AI and MT confirms that religious arbitration, or quasi-religious arbitration, including proceedings in a Beth Din or a Sharia court, is no exception to the rule that nothing can oust the court's jurisdiction. As Mr Justice Baker stated:

"27. First, insofar as the court has jurisdiction to determine issues arising out of the marriage, or concerning the welfare and upbringing of the children, that jurisdiction cannot be ousted by agreement. The parties cannot lawfully make an agreement either not to invoke the jurisdiction or to control the powers of the court where jurisdiction [is] invoked: see Lord Hailsham in Hyman v Hyman [1929] AC 601."

Religious arbitration, however, is a rather different creature from the more common forms of alternative dispute resolution. It draws into it factors which are absent from the conventional: to what extent, for example, should a Judge respect parties' deeply held religious beliefs and their desire to engage in a dialogue rooted in immutable religious norms if, in light of domestic law, those norms produce an unfair result?

The courts are in, to some extent, a difficult position. It is one thing dismissing an award on the basis that conventional arbitration has produced an unfair result; it is perhaps more controversial for a court to dismiss an award which is grounded in revered religious principles. It might be thought that there is a fine balance to be struck: overzealous scrutiny of religious awards may lead to inferences of a prevailing culture of distrust, whilst regular endorsements of those awards without scrutiny might suggest that the court is not applying its own principles appropriately.

Looking at it from the parties' perspective, the benefits of alternative dispute resolution are clear. If a conventional mediation agreement or arbitration award is less likely to break down than a judicial determination (given the increased participation and control of the parties), it could be that a religious arbitration award is even more likely to stick, as couples are more inclined to abide by the decision of their religious superiors. As with conventional arbitration, parties may be able to choose and submit to the decision of a religious leader whom they know and trust (although whether he or she will be seen to be independent if they know the parties is another matter). As all family practitioners will be aware, having awards that will stick is vital where there is a need to preserve the long term relationship between the parties.

Furthermore, and bearing in mind the overburdened court system, religious arbitration – as with other forms of alternative dispute resolution – may be seen as a quicker and cheaper solution (both to the parties and to the public purse) than court litigation. However, it could be argued that, given the uncertainty as to whether or not a civil court will endorse a religious award, parties may experience a sharp escalation in their costs should a Judge decide to depart from the religious award and assess the case afresh.

Religious diversity

Ultimately, *Re AI and MT* was grounded on the principles of individual autonomy, respect for religious diversity and the recognition that religion plays a profound role in many couples' lives. As Mr Justice Baker made clear:

"this court gives appropriate respect to the cultural practice and religious beliefs of orthodox Jews as it does to the practices of all other cultures and faiths."

The question then is: when should a court refuse to endorse a religious award? In terms of the financial dispute in *Re AI and MT***,** it is perhaps interesting to note that the court endorsed the religious award in respect of the parties' finances, notwithstanding that there was no financial disclosure at all before the court.

There was also no evidence that the New York Beth Din had rationalised its approach in line with customary principles in English law (for example, the principle that there should be no discrimination between a home-maker's and a breadwinner's contributions). As to this issue, the consent order recorded that:

"(4) … the parties agreed and accepted that the financial agreements set out in the schedule [containing the Beth Din award] *may be contrary to legal advice from their English solicitors, their respective barristers having not been instructed to provide any advice on the financial matters set out below…"*

Should the court have required the parties to disclose their finances to the court? Would such a requirement be a proportionate use of the parties' funds, and the court's time, given that their finances had already been disclosed to the New York Beth Din?

The case's impact

Re AI and MT has, perhaps unsurprisingly, provoked mixed reactions. The Muslim Council of Britain voiced optimism at Mr Justice Baker's decision.[3] A spokesman stated in The Times that *"If it leads to the eventual acceptance of Sharia court divorces, then Muslims will be very encouraged."*

Others were more circumspect; some others - and not just anonymous online correspondents to newspapers in which the case was reported – were even a little critical.

Some of this criticism is centred on a fear that the courts are losing a grip on its jurisdiction and that the case paves the way for religious courts to step in and dictate how family disputes should be dealt with. The disproportionate focus on Sharia courts is perhaps unfortunate: as discussed below, the actual implications of *Re AI and MT* is a matter of debate and Mr Justice Baker was in fact very careful to highlight that every case is unique and should be judged on its own facts.

Unfortunate as the disproportionate focus on Sharia courts may be, it is perhaps unsurprising. The concerns that have been raised in the public sphere about perceived discriminatory practices occurring in Sharia courts are now well established. For example, the *Arbitration and Mediation Services (Equality) Bill* which is currently in its infancy seeks to protect people against perceived inequitable consequences arising out of religious tribunals. At its centre are the concerns surrounding Sharia courts, although it explicitly refers to religious courts in general. Baroness Cox, who moved the Bill, summarised its intention thus:

[3] Ibid

"The bill seeks to address two interrelated issues: the suffering of women oppressed by religiously sanctioned gender discrimination in this country; and a rapidly developing alternative quasi-legal system which undermines the fundamental principle of one law for all."

Examining the perceived gender discrimination taking place in religious courts is beyond the scope of this article. It is interesting to note, however, that while the media highlighted the opportunity the case presented in paving the way for determinations made in the Sharia courts, it is important to remind ourselves of Mr Justice Baker's cautious comments about the potential impact of the case:

"It does not, however, necessarily follow that a court would be content in other cases to endorse a proposal that a dispute concerning children should be referred for determination by another religious authority. Each case will turn on its own facts."

Importantly, in *Re AI and MT*, Mr Justice Baker felt reassured that the requirement of natural justice was being met in the New York Beth Din. Given the Judge's assurance, going forward it would suggest that a court may decide to depart from a religious award where, for example, the evidence demonstrated that a women's testimony would be given half the weight of a man's in a given religious court. This would need to be balanced against the values of religious tolerance and respect towards parties' choice to seek a religious determination.

The best interests principle

The Judge specifically required, and was provided with, evidence of the principles by which the New York Beth Din would direct itself. He was satisfied that, in terms of the disputes about the children, its approach was consistent with how the English court would determine such issues. The evidence presented to the court demonstrated that there were two theories under Jewish law applicable to children matters:

"There are two implicit basic theories used in Jewish Law to analyse child custody matters and different rabbinic decisors are inclined to accept one or the other… one theory grants parents certain rights regarding their children while also considering the interests of the child while the other theory focuses nearly exclusively on the best interests of the child…"

By way of comparison, section 1(1) of the Children Act 1989, which applies to questions of custody and contact, states that:

"1 Welfare of the child.

(1) When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration."

While Mr Justice Baker was reassured in this case that the children's best interests would be given primary focus by the Beth Din (the best interests principle under English law being *"sufficiently broad and flexible to accommodate many cultural and religious practices"*), one wonders whether the Judge would have endorsed the Beth Din's award had the other theory referred to above – granting parents certain rights – been used as a basis for the Beth Din's determination. Again we reach the same maxim: each case must turn on its own facts. However, given the vital importance that is afforded to the best interests principle under English law, it is suggested that it is unlikely a court would be willing to endorse an award that was wholly inconsistent with that principle.

Mr Justice Baker also made reference to, by way of comparison, the Institute of Family Law Arbitrators. The IFLA have made it clear that the scope of their scheme does not cover questions relating to the care or parenting of children. In contrast, the New York Beth Din, as we have seen, did deal with the parties' children matters: the court thereby extending the scope of alternative resolution methods (at least to those who adhere to a particular faith).

Conclusion

Critics of *Re AI and MT* have pointed out that the case threatens the foundations of a unified system of law and that it unfairly offers religious citizens a longer menu of alternative ways to resolve their family conflicts; that is not to mention the perceived erosion of established legal principles. However, what the case does offer is a clear signal from the judiciary that individual autonomy and respect for religious practice is a vital bedrock of our society, one which the court was willing to facilitate in the context of a private, family dispute. Whether it will open the floodgates for further endorsements of religious awards is a matter to be seen.

What *Re AI and MT* does still make clear, however, is that courts will always have the final say – nothing (until perhaps there is statutory development that prescribes otherwise) can oust the jurisdiction of the court.

Anne-Marie Hutchinson OBE (Partner) and **Richard Kwan** (Trainee Solicitor) at Dawson Cornwell Solicitors, London

Parental conferences after divorce—an effective technique from Quebec

Harry Timmermans

We know from experience that marital breakdown is one of the most difficult situations for human beings to cope with. The period of breakdown is often disfigured by all kinds of violence, intense suffering, aggression turned either against the other person or against the self and it is easy to see why people are naturally drawn to the justice system because it provides a strict framework and punishment for wrongs committed. But it is noticeable that currently there are on offer more ways of thinking designed to encourage a constructive rather than a destructive approach. People living through the tragedy of a breakdown in their marriage are in search of new ways of acquiring life-skills and expertise in personal relationships.

Every adult needs to know what it is that would make life better. It is unusual for people to understand what is going on during divorce—the pain or the anger is too great, there is not enough space and the picture of what life will be like after divorce is too grim to contemplate.

This article describes an approach aimed at giving parents an awareness of what is likely to happen—both to them and their children—depending on how they deal with their separation. We believe this approach can help parents achieve a proper (not necessarily an easy) end to their being together and help them to make new arrangements for the family when mummy and daddy will no longer be living under the same roof. People are usually referred to these post-divorce parenthood sessions by judges, lawyers, mediators, social workers or even friends. The meetings are voluntary, but an element of compulsion is about to be introduced for separating parents who have given no thought to how their children will be looked after.

This article describes how the system works for parents going through divorce, presents some psychological material we have developed and a statistical evaluation of the structure and content.

How the sessions work

Parenthood after divorce is a project, run by the Quebec Ministry of Justice, which originated in a change to the guidelines for family mediation in Quebec. The Committee monitoring the implementation of family mediation in Quebec—whose job it was to find out how far the objectives set out in the law had been achieved—recommended the introduction of seminars on parenthood after divorce. In their third report, the Committee recommended

"that the current group information session should become a seminar on parenting after divorce, The session should be led by two accredited, qualified mediators, one from the field of social psychology, the other with a legal background".

The Committee also recommended

"that the Ministry of Justice make these seminars on parenting after divorce available on a regular basis across the whole of Quebec, using every possible method of communication—internet, CD-rom, videoconference, etc".

The Ministry of Justice launched a pilot series of seminars on 2 December 2009. Each seminar has a strand on the social and psychological impact of divorce and a strand on family mediation including some legal information. The sessions are led jointly by two qualified mediators, one from each of the relevant fields. The aim is to make the sessions, which last two hours and a half, available in the courthouses where the Superior Court of the Province of Quebec sits. By December 2012 this aim will be met with all the content broadcast by videoconference from four of the courthouses to the others.

Some of the socio-psychological material

This material is delivered in a session with three sections:

- the psychological shock of divorce;
- the needs and reactions of the children;
- communication between parents.

Introduction

During separation or divorce, our emotions are generally damaged and are poor guides to what we should do. On the other hand, our intelligence is, for the most part, intact because we carry on living, working and coping well enough with the other areas of our life. Information is the best nourishment for intelligence and the session on parenting after divorce makes use of this remaining source of strength by telling parents the hard facts about divorce and its consequences,

both for themselves and their children. We tell the assembled parents about the valuable experiences of those who have already been through this difficult transition and whom we have followed throughout the whole process. This well-targeted research raises awareness among parents who are going through a divorce of the effect that their actions will have and gives them a new insight into present and future realities.

The psychological shock of divorce

Divorce certainly brings suffering. But although human beings do not like suffering, they can accept it if there is a point to it. We can, for example, accept a painful treatment for an illness if we think there is a chance of a cure. This possibility gives some meaning to the pain

During a breakdown in their marriage we have noticed that people quickly find a meaning for their suffering by blaming the other person. We can punish the other person for being responsible for the problems we face. This approach does provide a little relief for the pain, but it is illusory and the pain soon comes back. Blaming the other person inflames the conflict and it is the conflict that is doing the damage. It is rather like running through a never-ending tunnel. We need to retrace our steps otherwise we shall emerge even more damaged than before.

Actually, to find real meaning in our pain we need to understand our responsibility for getting into this position. We have never come across a separation where responsibility lay entirely with one partner. We need to look within ourselves, because the intensity of this difficult time in our lives will enable us to see aspects of ourselves that were hitherto hidden from us. This heightened awareness will surely allow us to become a better person than we were before. There would be nothing more tragic than to stay the same as the person we were before divorce. We would have suffered for no purpose. It is important to remember that an improved state is the normal outcome of a crisis.

Children's needs and reactions

After divorce, persistent and unresolved tensions between parents can traumatise their children. For the children, the situation poses a question to which there is never a satisfactory answer: 'What is the point of separating if mummy and daddy keep on squabbling?' It needs to be clearly understood that children are never happy when parents are arguing about them and that never-ending tension can harm the child's future. We have never forgotten a young adult who was seeking a lightening of his depression and who summed up his childhood: *'My parents loved me so much that they killed one another over me'*.

A young women, overwhelmed with guilt, began to believe that the disaster would not have happened if she had not been born. This thought contained the seeds of a suicidal impulse which showed just how disturbed this young adult was.

Communication

Communication between human beings works in the following way: *it is the listener who determines how good the communication is, not the speaker*. In a situation where communication is difficult, you do not need to agree with the other person, but you do have to listen to them. A good listener usually achieves a clear understanding of what is being said, avoiding the misunderstandings that can be so damaging. Furthermore, you do not have to say everything that is in your mind, but you do have to think about everything that has been said and keep hold of anything that might help to reduce the conflict.

We have always had a special place for poets who, through their feelings and intuition, have a remarkable understanding of human nature and the right words to express it. As one of our poets, Gilles Vigneault, put it: *when speech falls silent, the cannon roar*. Similarly, Félix Leclerc emphasised with great relevance that: *It is when people argue that you see the power of politeness*. Indeed, staying polite can open up avenues that will always be closed to rudeness.

We will round off this extract from the section on communication with a quotation from Aesop, the Greek writer of fables who lived several centuries before Christ. With his deep understanding of the power of words, Aesop wrote a fable which he called *Language*.

One day Aesop's master Xanthos sent him to market with orders to buy the best things that were on offer. Aesop bought nothing but languages,, arguing that there was nothing better than language because it was the source of civilised life, the key to knowledge and the instrument of truth, reason and prayer.

The next day, to put him on the spot, Xanthos told him to buy the worst things available. Again, Aesop bought languages, arguing that language is the worst thing in the world. It is the mother of every argument, a source of division and war and the instrument of error, slander, blasphemy and impiety.

It does not need much thought to realise the amazing power of influence that every one of us has by virtue of our language—a power for doing good as well as for destruction. Sadly, we often make use of this instrument lightly and inconsiderately, following the impulse of the moment—often with the same result as if we had been handling explosives without taking any precautions.

Statistical evaluation

The content of the sessions on parenting after divorce came directly out of seminars on co-parenting that we organised from February 1995 to June 2011 for the same audience—parents going through separation or divorce. During these 16 years there were 208 seminars (a seminar consisted of two meetings each lasting two hours) attended by 9,152 people—56% of them women, 44% men. Our statistics show that the section dealing with the shock of divorce scored an approval rating of 72%. This is the most difficult of the sections to grapple with, especially for men, who gave it an approval rating of 63%, against the women's 82%. The section on children scored 91% and on communication 93%. We were able to appreciate the enormous need that people undergoing separation have for information—86% of people who came to the first session returned for the second and 76% of those attending a second session voluntarily came to a third.

The most frequent answers given to an open question under the heading *What did you find most valuable?* were:

- the content about children,
- better understanding of communication, concrete examples, humour,
- removal of guilt,
- clarity of the messages, and
- the co-parenting charter and accompanying documents.

- Under the heading of *least appreciated* were:
- the absence (sometimes the presence) of the other partner,
- timing of the sessions and
- the suggestion that they were too short.

An important point about the seminars is that they are disseminated live from a courthouse and are available there and then by videoconference. A major evaluation study is underway, but it has already shown that the understanding and interest of people in the videoconferences was 3% lower than for the people who were present at the meeting. Such a difference is not thought to be of significance and endorses the use of videoconferencing for the sessions. The study also shows that 89.4% of parents felt that the session gave them a better understanding of their children's behaviour during their separation.

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Intercountry adoption— controversies and criticisms

Professor Charlotte Phillips

Introduction

The African Child Policy Forum (hereinafter: ACPF) organised the Policy Conference *Intercountry Adoption: Alternatives and Controversies*, in May 2012 at the United Nations Conference Centre in Addis Ababa, Ethiopia. Some 400 participants from around the globe took part in the deliberations: government officials, members of the African Committee of Experts on the Rights and Welfare of the Child and the UN Committee on the Rights of the Child, representatives of NGOs, advocacy groups and private adoption agencies as well as academics and individual children's rights activists. One of the main objectives of the conference was to raise awareness about the phenomenon intercountry adoption in relation to the protection of African children and the promotion of legal and policy action, in line with the best interests of the child.[1]

Although the African continent is considered to be the 'new frontier' for intercountry adoption, this phenomenon does not only affect children in Africa but also impacts on children in other parts of the world.[2]

In recent years, intercountry adoption has become the subject of public debate, leading to a division between those who support this form of adoption and those who view it with a jaundiced eye. The death of a Russian boy, adopted into a family in the USA caused thousands of people to come out in support of a ban on adoption of Russian children by American citizens.[3] Equally topical are: the Haiti adoption scandal after the devastating earthquake in 2010, where many children were airlifted from their home country and adopted by foreigners without the required safeguards taken into consideration – also referred to as an "international adoption bonanza"[4] – and the controversial adoptions of children by celebrities such as Mia Farrow, Angelina Jolie and Madonna.[5]

In this article the relevant international and regional instruments, as well as the current status of intercountry adoption will be presented.

1. Legal framework intercountry adoption

The divergent views countries held on intercountry adoption, especially in relation to the best interest of the child principle, led to the organisation of the 1971 *World Conference on Adoption and Foster Placement*.[6] Following on this conference, the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally was drafted and subsequently adopted by the UN General Assembly in 1986.[7] Despite the fact that this Declaration contained a number of stipulations on intercountry adoption, the factual impact of this document was negligible. The awareness of the topic had nevertheless been raised and the two most important instruments relating to children's rights, the 1989 Convention on the Rights of the Child (hereinafter: CRC) and the 1990 African Charter on the Rights and Welfare of the Child (hereinafter: ACRWC), both contain provisions on intercountry adoption.[8] Articles 21 CRC and 24 ACRWC stipulate that the best interest of the child should be the paramount consideration. Furthermore, according to these articles, intercountry adoption should only be considered when there are no suitable alternatives available in the child's country of origin – such as foster care, national adoption or residential care – and intercountry adoption is to be employed as a measure of last resort.

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1 African Child Policy Forum, *Intercountry Adoption: Alternatives and Controversies. The Fifth International Policy Conference on the African Child. Conference Report.* Addis Ababa, Ethiopia, 2012.

2 African Child Policy Forum, *Africa: The New Frontier for Intercountry Adoption.* Addis Ababa, Ethiopia, 2012.

3 Find it here accessed on 18 March 2013.

4 Find it here accessed on 18 March 2013.

5 Find it here accessed on 18 March 2013.

6 S.A. Detrick, *Commentary on the United Nations Convention on the Rights of the Child*, The Hague: Kluwer Law International 1999, p. 332.

7 UN General Assembly, A/RES/41/85, 3 December 1986.

8 Article 21 CRC and article 24 ACRWC respectively.

Due to the vast increase in the number of international adoptions in the 1980s, the need for a multinational approach in addition to the aforementioned Declaration on foster placement and adoption was acknowledged by the international community.[9] Subsequently, the Hague Conference on Private and International Law set out to draft a convention specifically aimed at intercountry adoption and in 1993 the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption came into being (hereinafter: the Hague Convention).

The Hague Convention outlines the minimum standards for intercountry adoption procedures and contains a Preamble and 48 articles. In the Preamble, the importance of a child growing up in a family environment is underlined: should a suitable family environment not be available in the country of origin, then intercountry adoption may be considered for the child in question. Given that in the text of the Convention no reference is made to non-family based care – residential care[10] – as an alternative, intercountry adoption is evidently ranked above this form of alternative care and is therefore – contrary to the tenets of the CRC and the ACRWC – not recognised as a measure of last resort.[11]

The definition of intercountry adoption which can be derived from the Hague Convention is:

The creation of a permanent and legal child-parent relationship between a child habitually resident in one country (State of origin) and a couple/person habitually resident in another country (receiving State).[12]

Chapter II of the Hague Convention sets out the requirements for intercountry adoption and contains obligations for both the child's country of origin and for the receiving country. In the State of origin, safeguards should be in place with regard to the following aspects:[13]

- The adoptability of a child has to have been established.
- Intercountry adoption should be in the best interests of the child and other – national – options have to have been thoroughly investigated.
- All parties involved have to be duly informed regarding the consequences of their consent to intercountry adoption; consent should be freely and voluntarily given by all and, in case of the biological mother, not before the child is born; consent may not depend on financial or other gain.
- If age and maturity of the child permit, the child should be sufficiently informed; his wishes and opinions should be taken into consideration; when applicable, his consent should be obtained freely.

The receiving State has to ensure that:[14]

- prospective adopters are suitable and eligible to adopt the child;
- prospective adoptive parents have received counselling where required;
- the child is able to legally enter and live permanently in the receiving country.

In chapter III of the Hague Convention the requirement of a Central Authority and Accredited Body is laid down. Every Member State should establish a Central Authority, in charge of carrying out the duties imposed on the State by the Hague Convention. Authorities from different countries should co-operate to such an extent that they provide each other with necessary information in intercountry adoption procedures and ensure that all processes involved are in line with the Hague Convention.[15]

Articles 14 – 22 (chapter IV) of the Hague Convention cover the legal requirements of intercountry adoption in both the country of origin and the receiving country. Prospective adoptive parents who wish to adopt a child from another country should apply to the Central Authority in their own country. The Central Authority is to establish whether the prospective parents are eligible and suitable for adoption. Furthermore, the Authority is required to prepare a report containing information on the prospective parents regarding identity, eligibility and suitability, as well as information concerning their background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, and the characteristics of the children for whom they would be qualified to care. This report should be submitted to the country of origin.[16] In turn, the State of origin is held to prepare a report on the prospective adoptee, covering the following aspects: identity, adoptability, background, social environment, family history, medical history (including that of the biological family), and – if applicable – any

[9] G. Parra-Aranguren, *Explanatory Report on the 1993 Hague Intercountry Adoption Convention*, The Hague: HCCH Publications 1994, p. 3.

[10] Residential care is temporary or long-term care provided on a 24-hour basis in a group-based setting, by remunerated adult staff, in a building or buildings owned or provided by the implementing organisation, C. Phillips, *Child-headed households: A feasible way forward, or an infringement of children's right to alternative care?*, Amsterdam: Phillips 2011, p. 75.

[11] S. Vité & H. Boéchat, *A Commentary on the United Nations Convention on the Rights of the Child. Article 21 Adoption*, Leiden/Boston: Martinus Nijhoff Publishers 2008, p. 45.

[12] Article 2 Hague Convention.

[13] Article 4 Hague Convention.

[14] Article 5 Hague Convention.

[15] Articles 6 – 13 Hague Convention.

[16] Article 15 Hague Convention.

special needs. The report on the child, as well as the required consents, shall be conveyed to the Central Authority of the receiving State. Based on both reports, the decision is taken on whether adoption of the child in question by the prospective adopters is in the child's best interests, whereby due consideration should be given to the child's upbringing and ethnic, religious and cultural background.[17] Before the country of origin takes a decision on whether a child should be entrusted to the future adopters, the Central Authority of this country has to ensure that: 1) the prospective parents agree to the adoption, 2) the Central Authority of the receiving country has given its approval to the adoption, 3) the Central Authorities of both countries support the adoption, and 4) the prospective parents are eligible and suitable for adoption and the child is allowed to enter and reside permanently in the receiving country.[18] The actual transfer of the child from his home country to his adoptive parents can only take place once the aforementioned conditions have been met.[19]

Chapter V outlines the recognition and the effects of intercountry adoption. Member States should recognise adoptions which have taken place in accordance with the Hague Convention; recognition may only be refused by a Member State when an adoption is patently not in compliance with its public policy, whereby the best interest of the child is taken into consideration.[20] Recognition of an adoption includes the following aspects:[21]

- existence of a legal child-parent relationship
- parental responsibility of the adopters for the adoptee
- termination of previous parental relationships of the child, unless adoption does not result in a termination on the basis of the legal system of the countries in question.

A number of general provisions are covered by chapter VI. These relate to the constraints on contact between the child and his adopters when it has not yet been established that all the requirements for the adoption have been met; preservation of information with regard to the child's origin; prohibition of improper (financial) gain in relation to the adoption; the applicability of the Hague Convention.[22] The final clauses in chapter VII concern formalities such as signature and ratification of the Convention.[23]

[17] Article 16 Hague Convention.

[18] Article 17 Hague Convention.

[19] Article 19 Hague Convention.

[20] Articles 23 and 24 Hague Convention.

[21] Article 26 Hague Convention.

[22] Articles 28 – 42 Hague Convention.

[23] Articles 43 – 48 Hague Convention.

2. Current status intercountry adoption

To date, a total of 90 countries have either ratified the Hague Convention or have acceded to it, only a handful of which are African countries.[24] Given that children who are adopted to or from non-membercountries run a considerably higher risk of having their rights violated, countries are increasingly encouraged to sign up to the Hague Convention. For instance, in 2010, UNICEF urged African governments to adopt the Hague Convention.[25] In their Concluding Observations and Recommendations, both the African Committee of Experts on the Rights and Welfare of the Child and the CRC Committee on the Rights of the Child recommend that countries expedite the ratification of the Hague Convention and/or ensure that national legislation is in full conformity with the Hague Convention.[26]

However, countries governed by Islamic Law will not ratify the Hague Convention, as under this law adoption is prohibited. Instead, these countries provide a form of guardianship, known as *kafalah*, which is a commitment by an adult to bring up a child and take care of his education and maintenance until the child reaches adulthood.[27] The term *kafalah* is derived from the Arabic word *kafl*, meaning 'to take care of as a father would of his son'. Contrary to adoption, a child maintains his own family name and does not acquire inheritance rights in relation to his new caregiver(s).[28]

The number of inter-country adoptions has decreased significantly during a period of almost ten years. The most recent data, provided by 23 receiving States,[29] indicate a drop of more than 40% from 41,535 adoptions in 2003 to 23,609 in 2011. The top five receiving countries in 2011 –all of which have ratified the Hague Convention – were:

1. USA (9,320); 2. Italy (4,022); 3. Spain (2,573); 4. France (1,995); 5. Canada (1,785).[30]

[24] Find it here accessed on 21 March 2013.

[25] Find it here accessed on 26 March 2013.

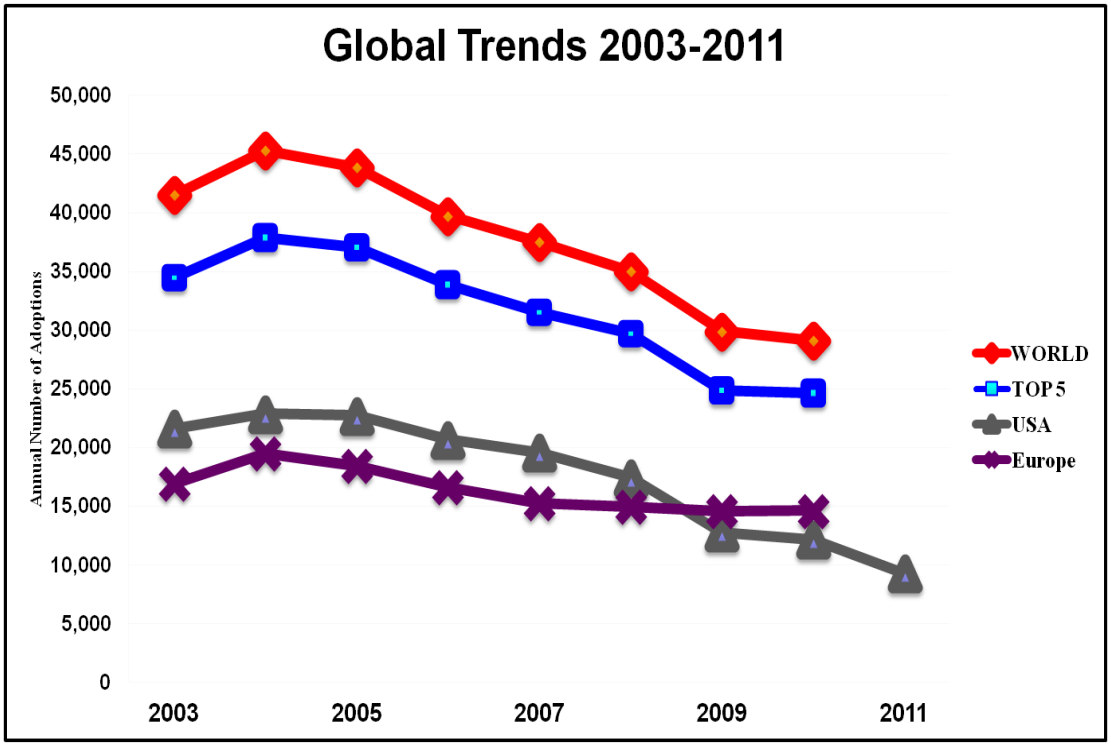
[26] See in this regard: Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of Tanzania, November 2010; Committee on the Rights of the Child, CRC/C/CAN/CO/3-4, Concluding Observations Canada, December 2012; Committee on the Rights of the Child, CRC/C/NAM/CO/2-3, Concluding Observations Namibia, October 2012; Committee on the Rights of the Child, CRC/C/BIH/CO/2-4, Concluding Observations Bosnia and Herzegovina, November 2012.

[27] African Child Policy Forum, *Intercountry Adoption: Alternatives and Controversies. The Fifth International Policy Conference on the African Child. Conference Report.* Addis Ababa, Ethiopia, 2012, p. 16.

[28] UN Department of Economic and Social Affairs, Population Division, *Child Adoption: Trends and Policies*, New York, USA, 2009 (UN DESA ST/ESA/SER.A/292 2009), pp. 26, 27.

[29] Andorra, Australia, Belgium, Canada, Cyprus, Denmark, Finland, France, Germany, Iceland, Ireland, Israel, Italy, Luxembourg, Malta, New Zealand, Netherlands, Norway, Spain, Sweden, Switzerland, UK, USA.

[30] P. Selman, *Key Tables for Intercountry Adoption: Receiving States and States of Origin 2003-2011,* available on request from the author at **pfselman@yahoo.co.uk**.


Global Trends 2003-2011
Annual Number of Adoptions
50,000
45,000
40,000
35,000
30,000
25,000
20,000
15,000
10,000
5,000
0
2003
2005
2007
2009
2011
WORLD
TOP 5
USA
Europe

The top five countries of origin in 2011 were mainly non-member countries:

1. China (4,405)
2. Ethiopia (3,455)
3. Russia (3,325)
4. Colombia (1,577)
5. Ukraine (1,070). [1]

These figures solely reflect registered adoptions. However, signals that numerous unregistered, illegal adoptions take place – especially from non-Hague countries – indicate that the factual number of intercountry adoptions is significantly higher.[2]

As stated previously, although the total number of registered intercountry adoptions has decreased during the past decade, the number of children adopted from African countries has seen an increase during this period. Whereas, in 2003 a mere 5% of all intercountry adoptions concerned African children, in 2009 this number had risen to 22%.[3] As most African countries have not ratified the Hague Convention and national legislation on the subject of intercountry adoption is scanty, the necessary safeguards for the protection of children who are put up for adoption are not in place. It is therefore of paramount importance that the Hague Convention be ratified where possible and the implementation of the Convention's stipulations is a vital step in combating illegal and unsafe adoptions. In recent years, concern has been raised about the adoption of thousands of Ethiopian children, mainly by American and European adopters.

It is questionable whether these adoptions are legitimate as in a number of cases the incentive appears to be financial (an adoption may be 'worth' up to $35,000) rather than the best interests of the child.[4] Other frequently encountered reasons for intercountry adoption – whereby the best interest of the child is not the main consideration – are the desire of adoptive parents to form or expand their own family[5] and the opinion that the receiving country is better equipped to care for a child than the country of origin.[6] Notwithstanding the undoubted significance of the Hague Convention, ratification does not necessarily imply compatibility with domestic laws and procedures. For instance, legislation in two of the top five receiving countries, the USA and France, allow for privately-arranged intercountry adoptions, which are usually not in compliance with the Hague Convention.[7]

[1] Ibid.

[2] See in this regard: Child Trafficking in East and South-East Asia: Reversing the Trend, UNICEF EAPRO, 2009; Adopting the Rights of the Child, A study on intercountry adoption and its influence on child protection in Nepal, UNICEF / Terres des Hommes9 Foundation, 2008;Find it here, accessed on 27 March 2013; Find it here, accessed on 27 March 2013.

[3] African Child Policy Forum, *Intercountry Adoption: Alternatives and Controversies. The Fifth International Policy Conference on the African Child. Proceedings Report.* Addis Ababa, Ethiopia, 2012, pp. 9 – 10.

[4] Find it here acccessed on 27 March 2013.

[5] African Child Policy Forum, *Intercountry Adoption: Alternatives and Controversies. The Fifth International Policy Conference on the African Child. Proceedings Report.* Addis Ababa, Ethiopia, 2012, p. 7.

[6] Ibid, p. 22.

[7] African Child Policy Forum, *Intercountry Adoption: Alternatives and Controversies. The Fifth International Policy Conference on the African Child. Conference Report.* Addis Ababa, Ethiopia, 2012, p. 7.

3. Conclusion

The foremost international instruments governing the protection of children's rights – the CRC and the ACRWC – both consider intercountry adoption to be a measure of last resort. Only in situations where a child cannot be adequately cared for in its own country, should intercountry adoption be considered and only when this is in the best interests of the child in question. Intercountry adoption is positioned last in line when options are contemplated for children without (adequate) parental care.

Contrary to the CRC and the ACRWC, the Hague Convention does not regard intercountry adoption as a measure of last resort, ranking this form of adoption higher than institutional care. However, the Preamble of the Hague Convention provides that measures be taken to ensure that intercountry adoptions are made in the best interests of the child and with respect for its fundamental rights. This implies that should there be universal consensus that intercountry adoption may not be considered to be in the best interests of children, this form of care should no longer be promoted or employed. This, however, is a utopian ideal as there are still many countries which champion intercountry adoption as a justifiable form of 'aid'. Given that intercountry adoption *does* take place, it is of paramount importance that countries in which this form of adoption is allowed – or is in any case not prohibited – be(come) party to the Hague Convention. As set out in this article, the Hague Convention provides States with guidelines as to how to best implement rules and regulations concerning necessary safeguards, processes and supervisory bodies.

However, ratification of the Hague Convention should not be embraced as a 'miracle cure' as privately-arranged and illegal adoptions currently also occur in Member States, albeit to a lesser extent than in non-Member States. Despite the safeguards provided by the Hague Convention, the risks involved in intercountry adoptions are immense: child harvesting, baby farms, child trafficking, child labour, child prostitution are only a few of the dangers potentially facing children. Implementation of and adherence to the provisions of the Hague Convention is therefore vital.

With regard to the principle of intercountry adoption being a measure of last resort, this author should like to pose the following question: Is it right to assert that there are circumstances under which children – even those in the most acute need of alternative care – cannot be looked after in their own country? In certain situations a measure of assistance – financial or otherwise – may be required in order to support extended family members or a foster family in raising the child. However, in most cases awareness that a child is in need of alternative care and adequate national policies dealing with such situations will suffice; in this regard, the promotion of national adoption possibilities has led to positive results, in that a significant increase in domestic adoptions in several countries has been achieved. The answer to the aforementioned question should therefore – to my mind – be an unequivocal 'No.' As voiced by David Mugawe, Executive Director of the ACPF, during the final session of the Policy Conference *Intercountry Adoption: Alternatives and Controversies*: "There is no place any longer for intercountry adoption; Africa can look after its own children." This is a sentiment that in my opinion does not only pertain to the African continent, but is universally applicable.

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The Hague Convention

Judge Sophie Ballestrem

The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("CIP")

The Convention was concluded on 19 October 1996 and entered into force on 1 January 2002. It is meant to succeed the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors.

You can find the text of the CPC and the list of the Contracting States (status table) on the website of HccH: http://www.hcch.net. In October 2012 there were 39 Contracting States.

Germany deposited its instrument of ratification in respect of the Convention on 17 September 2010. The CPC entered into force in Germany on 1 January 2011.

The main objectives of the Convention are

- to provide for the better ***protection of children in cross-border situations*** under civil (not criminal) law;
- to improve ***inter-State cooperation*** for the protection of vulnerable children;
- to avoid ***conflicts between legal systems*** in decisions concerning child protection.

The convention applies to all children up to the age of eighteen (Art.2), including trafficked children as well as young refugees and internationally displaced children (Art.6) and helps to protect runaway and unaccompanied children.

The Convention is an instrument to handle cases of cross-border parental disputes over custody or contact and conflicting claims for parental responsibility. It provides measures for the placement of children abroad in foster or institutional care or care by *Kafala*[1] or an analogous institution (Art.3) and strengthens the provisions of the 1980 Convention on the Civil Aspects of International child Abduction and improves procedures.

The Convention does not apply (for the full list see Art. 4) to procedures for establishing or contesting of a parent-child relationship, decisions on adoption, emancipation, maintenance obligations, successions and decisions on rights of asylum.

The basic rules of the Convention

The ***primary jurisdiction*** to make decisions about the child is with the authorities of the child`s habitual residence country (Art. 5). Any country where a child is present may take necessary or *provisional emergency measures of protection* (Art. 11).

When measures of protection have to be taken, *the country generally applies to its own rules* to decide what measures can be taken (Art. 15), and the measures of protection taken in one Contracting State are *automatically recognised in all other Contracting States* (Art. 23).

Practical applications of the Convention

1. **Parental disputes over custody and contact**:
The Convention ensures that the authorities / courts of the country of the child´s habitual residence have primary jurisdiction (Art.5) but helps to avoid expensive and time-consuming litigation by connecting the jurisdiction for the child with the application for divorce, legal separation or annulment of the parents´ marriage (Art.10). The automatic recognition of decisions reduces incentives to abduction, facilitates decisions on relocation and gives parents confidence to permit visitation abroad (Chap. IV). The convention provides for exchange of information between authorities in different countries (Chap.V) and offers an international structure for mediation or other means to find agreed solution (Art. 31 b).

2. Refugee children, displaced children, children who are the subject of trafficking or abduction and unaccompanied minors:
The Convention provides for inter-state-co-operation to exchange information and to institute necessary protective measures (Art. 31, 32, 34, 35, 36 and 37); especially the Central Authorities of the Contracting States co-operate in locating the child (Art. 31 c). Again, the Convention determines which country´s authorities have responsibility to take protective measures (Art. 5, 6 and 7).

[1] Foster care which has some features of adoption (*Editor*)

3. Cross-frontier placements of children:
The Convention provides for inter-state-co-operation in regulating crossborder alternative care arrangements other than adoption (Art. 3e) and 33), e.g. foster-care placements, extended "holiday" or "recuperation" arrangements, placements by way of *Kafala.*

4. **The 1980 Child Abduction Convention:**
The Convention confirms the primary role of the authorities in the child´s habitual residence (Art. 7). It allows the court dealing with the return application to take urgent /provisional protective measures, e.g.: contact orders and orders which help to ensure a safe return (Art. 11), improves arrangements for contact between child and non-custodial parent and provides for the recognition of such measures in the country to which the child is returned (Art. 23).

The 1996 Convention assists in cases of international child abduction; but the 1980 Convention remains the primary convention to deal with international child abduction, supplemented and reinforced by 1996 convention.

Benefits of the Convention

- The Convention reflects the "best interests of the child" principle set out in CRC Article 3 and
- offers States a practical means of fulfilling the obligations of co-operation which arise under the CRC, such as Articles 12 (e), 22, 34 and 35;
- it establishes the framework for a global child protection network at State levels, which benefits many categories of children at risk;
- the Convention´s rules bring certainty to decision-making in cross-border situations an avoid the possibility of conflicting decisions and
- provides for a unique opportunity for building bridges between legal systems having diverse cultural or religious backgrounds.

Judge Sophie Ballestrem* sits in the Family Court in Munich, Germany

A milestone achieved— DNA profiling comes of age

Anil Malhotra

DNA Testing Enforceable

A valuable right of a party to prove paternity by DNA testing has been tried, tested and proved. A person can now be physically compelled to give a blood sample for DNA profiling in compliance with a Civil Court order in a paternity action. The erudite judgement of the Delhi High Court of 27 April 2012 in *Rohit Shekhar Vs. Narayan Dutt Tiwari* held that once a matrimonial or civil court exercises its inherent power to order a person to submit to a medical examination or when it directs holding a scientific, technical or expert investigation, which is resisted or refused by a party, the Court is entitled to enforce such direction and not simply take the refusal on record to draw an adverse inference. The Court also settled the issue that such mandatory testing upon an unwilling person does not violate the right to life or privacy of a person under Article 21 of the Constitution. However, the power to decree a DNA test should be exercised after weighing all "*pros and cons*" and satisfying the "*test of 'eminent need'*". This right has nonetheless been restricted to the Civil Courts only by holding that the same reasoning cannot be applied in the context of criminal cases as the Supreme Court in *Selvi Vs. State of Karnataka (2010) 7 SCC 263*, held that Narcoanalysis, Polygraph (Lie-detector) test and BEAP (Brain Electrical Activation Profile) conducted against the will of a person are impermissible under criminal law, as an accused cannot be compelled to make self-incriminating statements or to be a witness against himself.

Some previous instances

On December 6th 2005, in *Nirmaljit Kaur Vs. The State of Punjab*, at the Apex Court—relying exclusively on a report dated August 30th 2005, for "DNA Typing Evidence For Establishing Maternity"—came to the conclusion that the child produced before the Court was not the real child of the petitioner and that the petitioner's real child was in the custody of the respondents elsewhere. The Supreme Court also held that "A perusal of the entire proceedings in this Court and the proceedings pending before the other Courts would only go to show the respondents' evil desire to grab the property and to make the life of the petitioner – a widow with a young girl – miserable." The respondents were also convicted for contempt of Court.

- On September 26, 2005, in *State of Uttar.Pradesh. through CBI (Central Bureau of Investigation) Vs. Madhumani Tripathi*, the State of Uttar Pradesh through CBI, aggrieved by the order passed by the Allahabad High Court releasing the accused on bail, filed appeals before the Supreme Court in a case of murder where the DNA reports proved that the accused was the father of a six-month-old foetus found in the womb of the deceased. The Supreme Court, while disposing of the appeals, held that on the basis of the collected evidence, the Supreme Court set aside the High Court orders, cancelled the bail bonds and directed the respondents to surrender forthwith.
- Maninder Pal Singh Kohli, accused of murdering Hannah Foster in Hampshire in 2003, was apprehended in India and extradited to the UK by the British Police in 2007 after his wife consented to have their two sons DNA-tested. The Forensic Science Service was then able to infer a DNA profile for the fugitive criminal, which matched the DNA of the semen found on the clothes of Hannah Foster.

In view of the above quoted instances, today, the most debatable question which generates thoughts amongst jurists, judges, scientists, lawyers and academicians, irrespective of any legal system, is as to how the present value based system of justice requires to be modified for the purposes of utilising the advantages of scientific and technological advancements in the justice delivery system.

DNA fingerprinting — inputs and advantages

This science is used as a new form of circumstantial evidence and is placed on a higher pedestal than direct and ocular evidence because of its objectivity, scientific accuracy, infallibility and impartial characteristics. Moreover, this new technology is also extensively applied in civil cases in order to determine paternity or maternity disputes, baby-swapping matters, succession disputes, maintenance proceedings and matrimonial disputes etc. No other evidence or corroboration is required because timely medical examination and proper sampling of body fluids followed by quality forensic examination can offer irrefutable evidence, avoiding the need of protracted Court proceedings. Regardless of the fact that science itself may be foolproof, the human action which controls the result of this scientific forensic examination may be questionable. There is the lurking possibility of manipulation and tampering of this scientific evidence. This apart, the results of the scientific process may be held to be infallible.

Some conflicting case law propositions

Depending on the individual facts and circumstances in different cases over varying lengths of time, diversified views have emerged from the Apex Court vis-à-vis admissibility and credibility of DNA profiling as cogent evidence before courts of law. Even though Medical Jurisprudence has immensely benefited the legal arena but the fact remains that DNA fingerprinting has no statutory recognition.

- In *Goutam Kundu v. State of West Bengal (1993) 3 SCC 418*, the Supreme Court expressed the most reluctant attitude in the application of DNA evidence in resolving the paternity dispute arising out of a maintenance proceeding. In said case, the father disputed paternity and demanded a blood grouping test to determine parentage for the purpose of deciding child maintenance from him under Section 125 of the Code of Criminal Procedure. In this context, the Supreme Court held that, where the purpose of the application was nothing more than to avoid payment of maintenance without making out any ground whatever to have recourse to the test, the application for blood test couldn't be accepted. It was also held that no person could be compelled to give a sample of blood for analysis against his will and no adverse inference could be drawn against him/her for such refusal. The Apex Court held (at page 428 para 26):
- *"that courts in India cannot order blood test as a matter of course; wherever applications are made for such prayers in order to have roving enquiry, the prayer for blood test cannot be entertained. There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act. The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman. No one can be compelled to give sample of blood for analysis."*
- In a judgement of the Supreme Court in the year 2001, *Kamti Devi v. Poshi Ram (2001) 5 SCC 311* the Court gave priority to social parentage over biological parentage and thereby rejected DNA evidence by observing that, though the result of a genuine DNA test is said to be scientifically accurate, it is not enough to escape from the conclusiveness of Section 112 of the Evidence Act, 1872. Accordingly, it was held that under Section 112 of the Evidence Act, non-access between the man and the woman is the only way to raise the presumption against legitimacy and the DNA result was not given any weight.
- However, in total contrast to those two previous cases, in *Sharda v. Dharmpal (2003) 4 SCC 493***,** the Apex Court took a very positive view regarding the importance as well as the admissibility of medical evidence in matrimonial matters. The Supreme Court categorically summed up its conclusions as hereunder (at page 524, para 81):

"*1. A matrimonial court has the power to order a person to undergo medical test.*

2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

3. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

In the aforesaid case, the Supreme Court, by distinguishing its earlier decision in Goutam Kundu's case, further held that right to privacy under Article 21 of the Constitution is not an absolute right and in a case of conflict between the fundamental rights of the two parties, the court has to strike balance between the competing rights.

- In a turn around, the Apex Court in *Banarsi Dass vs. Teeku Dutta, (2005) 4 SCC 449***,** following *Goutam Kundu v. State of West Bengal (1993) 3 SCC 418***,** while determining the question whether a direction can be given for conducting a DNA test in proceedings for the issuance of a succession certificate, declined the same and held that a DNA test is not to be directed as a matter of routine. It was held by the Court that even though the result of a DNA test is said to be scientifically

accurate, it is not enough to escape the conclusiveness of Section 112 of the Evidence Act. According to the Court, if a husband and wife are living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. Legally, this presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities.

- In *Kamalanantha and others Vs. State of Tamil Nadu (2005)5 SCC 194*, in a case of conviction for the rape of 13 Ashram girls and the murder of one of his inmates, a dead foetus was DNA-tested to establish the defendant's paternity. The reliance of the subsequent scientific reports proving rape was sought to be dislodged on appeal on different grounds. Rejecting the challenge, the Apex Court upheld the veracity of the DNA reports which were held to be good testimony for convicting the accused.
- A perusal of some of the decisions in the last 20 years indicates that, in the absence of any statutory recognition of DNA as credible evidence, its acceptance may vary at the discretion of the Court trying a civil or criminal case. Statutory inferences to the contrary dispel scientific results of DNA evidence. Hence, views vary on a case by case approach, depending on the debated facts and circumstances which necessitate testing of credibility DNA evidence.

Existing statutes dealing with medical evidence

- Several convictions have occurred in India where the scientific evidence (DNA) has been accepted under Section 45 of the Indian Evidence Act dealing with opinions of experts. The Courts have opined that medical evidence is only an evidence of opinion and is hardly decisive, not being substantive evidence.
- Likewise, Section 293 of the Code of Criminal Procedure (CrPC**)** deals with reports of certain Government scientific experts. Section 293(2) says that the Court may, if it thinks fit, summon and examine such expert as to the subject matter of his report. However, DNA finger printing and diagnostics is not specifically included amongst Government scientific experts mentioned in Section 293 (4) of CrPC, which applies to specified government scientific experts.
- Section 53 of the CrPC provides some scope for the investigating officer to have the accused examined by a medical practitioner at the request of the police. But this section does not specifically say whether it would be applicable for DNA testing as well.
- To determine a child's parentage, there is a statutory presumption under Section 112 of the Evidence Act that any person born during the continuance of a valid marriage between his/her mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he/she is the legitimate child of that man, unless it can be shown that the parties had no access to each other at any time when that child could have been begotten. Now, DNA testing may be attempted to rebut the said statutory presumption arising under the Act, or to establish evidence in the circumstances where no presumption arises. One may seek DNA parentage testing in order to obtain evidence that the person is not the father of the child. DNA parentage testing may also attempt to provide evidence to show that a person has a biological connection with a deceased person and can be a proof in support of a succession claim. However, in the absence of any legislation regarding the status of DNA evidence, it is the discretion of the Court whether to accept or decline such evidence, which may be brought on the record of the Court.

Changes & reforms in the present system: need of the hour

- The vigilant search for truth is the hallmark of our criminal justice system. Science and law – two distinct professions – have become increasingly intermingled to ensure a fair process and to see that justice is done. The legal system today has to deal with novel scientific evidence, which has posed new legal challenges. Many of these dilemmas arise from fundamental differences the between legal and scientific processes. Scientific evidence brings accurate, fact-finding results without uncertainties, which accompany legal decision-making. However, if these scientific investigations do not find statutory recognition, their reports may or may not be accepted at the discretion of the Court. DNA profiling in criminal cases is one such paradox.
- The 185th Report of the Law Commission of India on the review of the Indian Evidence Act, 1872, dated March 13, 2003 has recommended that Section 112 of the Evidence Act be amended on the subject of the proof of paternity. Three other exceptions by way of blood group test, DNA investigations, and medical tests to prove impotency have been recommended to be introduced other than non-access of parties to each other.

A reading of the above shows that if this recommendation is accepted and incorporated in the Evidence Act, it may be the first Indian legislation to give statutory acceptance to DNA investigations conducted by consent of parties. Furthermore, it will dispel the existing requirement of proof where other than non-access of parties, even DNA investigations are not considered conclusive proof to rebut legitimacy. As of now, if the DNA result does not match, the identity of the person is not established. But, surprisingly, the contrary is not true. Maybe the amended position will bring harmony to the matter.

Conclusion: so near yet so far

- In Western Countries, DNA testing and profiling is now widely employed. In India, systematic programme and scientific planning also ought to be adopted for the use of DNA technology. Orientation programmes, seminars, workshops, publications and awareness campaigns ought to be carried out for popularising and creating awareness of the benefits of DNA tests. All concerned functionaries in the civil and criminal justice delivery system in general and the police, Courts and correctional institutions in particular must be acquainted with this science. A fusion of knowledge of forensic sciences and new DNA technology will not only lead to quick detection of crimes but may also be useful in the prevention and control of crimes. Needless to add, civil disputes will be resolved more quickly..
- A serious endeavour should be made to emphasize the need for recognition of an independent body, called the DNA Profiling Advisory Committee, and for implementing quality control measures with reference to DNA profiling. This would permit to provide recommendation on the use of current and future DNA methods, to draft an appropriate legislation for all issues concerning DNA profiling, to safeguard the rights of individuals thereunder, and to create a National DNA Bank for aiding the Criminal Justice System
- Immediate steps should be taken to make suitable changes in the Code of Criminal Procedure 1973, the Indian Penal Code 1860, the Indian Evidence Act 1872, The Family Courts Act 1984, and all other prevalent family law legislations in India to provide for statutory amendments, to recognize results of DNA investigations and to provide for DNA tests and profiles as authentic modes of proof in matters of civil, criminal and matrimonial disputes.

In sum and substance, rather than leaving it to a case by case approach by the Courts, clear legislation is the need of the hour. How long will it take before DNA evidence can be universally accepted as reliable evidence depends on the drivers for change. It may also be said that the existing value-based criminal justice system cannot be done away with and a balance must be struck between the modern system and the existing pattern. It may be unsafe to convict or acquit a person exclusively on the basis of DNA evidence, but its scientific results cannot be ignored while searching for the truth. It may be remembered that the DNA witness is unstoppable and given a chance it will speak the truth and only the truth. Despite vast benefits, legally speaking, medical jurisprudential techniques are still not treated as primary or secondary evidence. The present Indian Evidence Act continues to treat technical findings such as results of DNA tests as expert evidence. This stalemate will continue until a suitable legislation is enacted by Parliament. It is sincerely hoped that the proposed Bill for recognizing DNA as evidence sees the light of the day at the earliest. Justice demands it.

Finally and in addition, Non-Resident Indians (NRIs) would greatly benefit from DNA evidence in paternity determination, in surrogate arrangements and in resolving consequential immigration issues.

Anil Malhotra*LLM (London) is the author of "India, NRIs and the Law, and co-author of "Acting for Non-resident Indian Clients." He is a Fellow of the International Academy of Matrimonial Lawyers (IAML) and can be reached at:

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Treasurer's column — Avril Calder

Subscriptions 2013

In February 2013 I sent out e-mail requests for subscriptions to individual members (GBP 30; Euros 35; CHF 55 for the year 2013 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 of the IAYFJM—click on membership then subscribe to pay online, using PayPal. This 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 email address is treasurer@aimjf.org 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. I will send you my home address if you e-mail me.

If you need further guidance, please do not hesitate to email me.

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

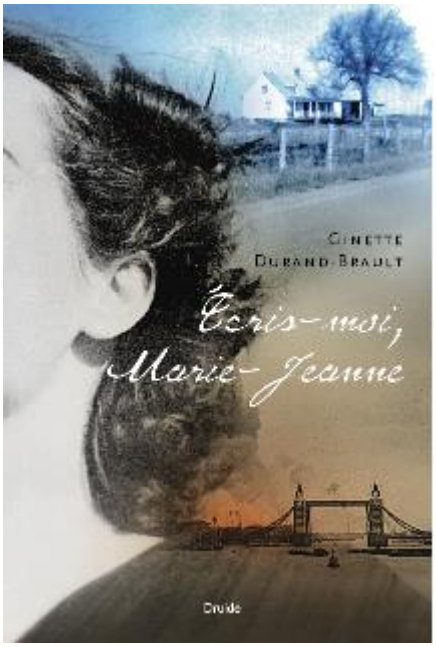
Without your subscription it would not be possible to produce this publication.

Avril Calder

A book by Judge Ginette Durand Brault

For several years Judge Ginette Durand Brault has most generously proofread articles in French for the Chronicle so I am delighted to be able to publicise her first novel— *Editor*

Écris-moi, Marie-Jeanne.



Écris-moi, Marie-Jeanne speaks of the impact of the Second World War on the small town of Saint-Jérôme and its inhabitants. Everything changes in the worker hometown of Quebec. Between the kitchen of Marie-Jeanne and the battle field where Rodrigue is fighting, letters are exchanged that reflect the devastating and yet promising transformations that war imposes on each person.

Ginette Durand-Brault always dreamed of writing, but life brought her into the world of law. Attorney and Chief-Attorney at the Juvenile Court of the District of Montreal, she was appointed as a Judge of the Court of Quebec, Youth Division. Her first novel appeals to those who like to immerse themselves in another time through well drawn characters and a history as captivating as it is moving.

Contact Corner — Anaëlle Van de Steen

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 us have similar links for future editions.

From	Topic	Link
Action Innocence	Website	Find it here
CVP Crime, Victims, Psicantropos	Website	Find it here
CRIN The Child Rights Information Network	Website	Find it here
	Email	info@crin.org
	Eurochild's 2013 Conference 13-15 November, Milan, Italy	mafalda.leal@eurochild.org
Defence for Children International	Website	Find it here
EJJO	ITACA Project in Europe	Find it here
IAYFJM	Website	Find it here
FICE International Federation of Educative Communities	FICE World Congress 9-12 October 2013, Bern, Switzerland	Find it here congress@fice-congress2013.ch
IDE International Institute for the Rights of the Child	Website	Find it here
	Newsletter	newsletter@tdhAchildprotection.org
	Seminar on Children's Rights and sexual exploitation 15-18 October 2013 in Sion, Switzerland	Find it here ide@childsrights.org
IJJO International Juvenile Justice Observatory	Website	Find it here
	Newsletter	newsletter@oijj.org
	Children and young people across Europe call for an end to violence in custody	Find it here
IPJJ Interagency Panel on Juvenile Justice	Website	Find it here
	Newsletter	newsletter@juvenilejusticepanel.org
NACRO	Website	Find it here
OHCHR Office of the High Commissioner for Human Rights	Website	Find it here
TdH Fondation Terre des Hommes	Website	Find it here
UNICEF	Website	Find it here
Youth Justice Board	Website	Find it here
Youth Offending Teams	Information	Find it here

World Congress 25-29 March 2014 Iguazu Falls

Four members of the Local Organising Committeee relax at the Falls, May 2013

Joseph Moyersoen, Eduatdo Rezendo Melo, Elbeo Ramos, Marta Pascuale

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Chronicle Chronique Crónica

Voice of the Association

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

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

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

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

Contributions from all readers are welcome. Articles for publication must be submitted in English, French or Spanish. The Editorial Board undertakes to have articles translated into all three languages—it would obviously be a great help if contributors could supply translations. Articles should, preferably, be 2000 - 3000 words in length. 'Items of Interest', including news items, should be up to 800 words in length. Comments on those articles already published are also welcome. Articles and comments should be sent directly to the Editor-in-Chief. However, if this is not convenient, articles may be sent to any member of the editorial board at the e-mail addresses listed below.

Articles for the Chronicle should be sent directly to:

Avril Calder, Editor-in-Chief,

chronicle@aimjf.org

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SEXUAL TOURISM IMPLICATING CHILDREN: PREVENTION, PROTECTION, INTERDICTION AND CARE FOR VICTIMS

Organized by

The International Children's Rights Institute (IDE)

In collaboration with

The Kurt Bösch University Institute (IUKB)

Dates: October 15 to 18 2013

Place: International Children's Rights Institute

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Languages: French and English, simultaneous translation available during plenary sessions

CONTEXT

Sadly, the sexual exploitation of children is not a new phenomenon, and exists in developed and developing developing countries. Such exploitation always carries an economic connotation, which differentiates it from sexual abuse; the gains go to adults, often parents, assuredly the “recruiters” and traffickers, all of the intermediaries and often to criminal organizations which establish systems of exploitation. Children, of whatever age, are always the victims and their “consent” to these practices is legally irrelevant.

What is new is the awareness that the international community has developed within the past 15 years on this issue; the new forms that this exploitation has taken on and its scope are also new, and have been underestimated for a long time. The sexual exploitation of children has clearly become a global issue.

It is certain that the Convention on the rights of the child remains the main instrument insuring the protection of children against all forms of exploitation, namely sexual exploitation ; the quasi-universal ratification of the instrument gives it an unprecedented scope and allows all actors to speak the same language in regards to the under 18. Nevertheless, the Convention was not explicit on the issue of the sexual exploitation of children, and in 2000 it was supplemented by the Optional Protocol on the sale of children, child prostitution and child pornography (OPSC), which has been ratified to date by 161 States. The Protocol is built upon the premise that all forms of sexual exploitation of children is criminal by nature, and that the perpetrators must be identified, prosecuted and punished, and that the victims must be protected.

It is in this general context that, among the different expressions of sexual exploitation, sexual tourism is singled out as a problematic case, since it concerns both Northern countries, which supply the tourists, and Southern countries, which offer sexual exploitation of many children who are often in situations of negligence and most of the time in dire financial straits. While the case of sexual tourism may not be explicitly described by the Convention and its Optional Protocol, the phenomenon has been addressed by the Committee on children’s rights very often, and has been the object of recommendations on behalf of the Committee for very many countries. This phenomenon is global in scope and is not limited to some exotic destinations. Sexual tourism possesses an evolving and ever-changing character: as soon as prevention and protection efforts intensify in one given country, sexual tourists tend to simply travel to another destination.

The 2013 international seminar discusses the relation between the sexual exploitation of children and sexual tourism in order to attempt to define its contours and its legal, economic, psychological, sociological and political dimensions. This delimitation seems to be necessary in order to comprehend the issue in relation to other factors such as poverty, exclusion, inequalities, access to information or to decent work, social norms and the vulnerability of certain categories of children.

TOPICS COVERED

1. Examine the legal, sociological, psychological and economic aspects of sexual tourism

2. Highlight good and bad practices

3. Propose solutions.

In addition to the plenary sessions, workshops will allow participants to discuss concrete cases through various examples.

TARGET AUDIENCE

Representatives of State parties, members of parliament, actors within the tourism sector, members of NGOs in the area, UN organs, economists, social workers, sociologists, jurists, psychologists, researchers and students. All other persons concerned by the theme and members of the media are welcome!