Article 40

The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa

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UN CROC General Comment No. 10 (2007): Children's rights in Juvenile Justice

"..the CRC requires States Parties to develop and implement a comprehensive juvenile justice policy. This comprehensive approach should not be limited to the implementation of the specific provisions contained in articles 37 and 40 of the CRC, but should also take into account the general principles enshrined in articles 2, 3, 6 and 12 of the CRC, and all other relevant articles of the CRC, such as article 4 and 39."

GENERAL COMMENT NO 10 (CHILDREN'S RIGHTS IN JUVENILE JUSTICE) RELEASED

A new vision for child justice in international law

by Julia Sloth-Nielsen, Research Fellow, Children's Rights Project, Community Law Centre

On 2 February 2007, at the conclusion of the 44th session of the Committee on the Rights of the Child, an important milestone was reached with the release of the Committee's 10th General Comment, which deals with child justice (hereafter called juvenile justice in line with the wording used in the General Comment itself). It follows on a range of General Comments issued by this Committee, each covering a seperate thematic issue. The idea with a General Comment is to elaborate more extensively the nature of the State's and other duty bearer's obligations with respect to rights set out in the principal treaty, the Convention on the Rights of the Child (CRC), and to guide States Parties in the implementation of the right concerned. Whilst a General Comment does not constitute 'binding' or hard law, it can nevertheless play a significant role in the interpretation of the issue at the domestic level, including shaping the jurisprudence of the courts.

This General Comment is fairly extensive as would be expected, given that the treaty articles (article 37 and 40) on this theme

EDITORIAL

Welcome to the first edition of Article 40 *for 2007. As we welcome a new decade of South Africa's Constitution, so we usher in a new decade since the initiation of the child justice law reform process – still without finalized child justice legislation. This editoral column has previously commented at length on South Africa's failure to enact the Child Justice Bill. This failure is now even more pronounced with the release of the United Nations Committee on the Rights of the Child's General Comment No. 10 on Children's Rights in Juvenile Justice – discussed in depth by Julia Sloth-Nielsen in this edition.*

This document sets out a guiding framework for States on how to implement and comply with the obligations contained in Article 37 and Article 40 of the Convention on the Rights of the Child. A reading of the document highlights the clear need for legislation to create a separate justice system for children, but it also goes beyond the need for legislation and requires a comprehensive policy on juvenile justice.

This has significant implications for South Africa. Article 40 *has consistently promoted the developments in South African child justice that have emanated from government departments and civil society alike. However, while indicative of good practice, these developments occur not as a result of a co-ordinated government policy, but departmental initiatives that transpire without a common child justice vision or strategy.*

The challenge then, in addition to ensuring that the Child Justice Bill is passed in order for South Africa to finally have a separate criminal justice system for children, is for all actors within the child justice system to develop a comprehensive policy on child justice that cuts across departmental lines and barriers in order to promote a crime prevention policy that aligns with the principles and objectives of the Child Justice Bill.

together constitute the most extensive elaboration of any one aspect of children's rights in the entire Convention. It's stated objectives are to promote responses to children in conflict with the law that are effective in protecting the best interests of children, but also 'the short and long term interest of the whole society' (par 2). What follows highlights areas of special relevance to South Africa, either given the existing child justice system, or viewed in the light of the Child Justice Bill 49/2002 and Portfolio Committee debates on it's provisions.

Preliminary issue – a comprehensive policy

The introduction notes the lack of a comprehensive policy for the field of juvenile justice in many States Parties, and in particular the lack of information on measures to prevent children coming into conflict with the law. Another gap concerns the very limited statistical data on the treatment of such children. In this regard, South Africa is unfortunately a culprit, both insofar as we still, after a decade of reform and development, lack key information as to (for instance) how many children are arrested each year as well as how many children overall are deprived of their liberty in the country (although we have good data on children in correctional facilities). Also, the absence of a comprehensive policy on children in conflict with the law, including prevention policies, perhaps explains why a clear vision - and concrete plan - for finalising the Child Justice Bill has yet to emerge.

Elaborating it's vision for the required juvenile justice policy, the General Comment emphasises the importance of the four general principles which form the 'pillars' of the Convention, namely non-discrimination, the best interests of the child (which require that the traditional objectives of criminal justice – repression or retribution – give way to rehabilitation and restorative justice objectives), the right to life, survival and development (which requires policies and responses that support a child's development), and the right to be heard. A special mention is also given to the child's right to dignity, which is additionally enshrined in article 40 (1) of the CRC and promotes the treatment of the child in a manner that is consistent with a child's sense of dignity and worth.

The General Comment then details the six key elements of the comprehensive policy that it has suggested States Parties must put in place:

- The prevention of juvenile delinquency
- Interventions without resorting to judicial proceedings
- Interventions in the context of judicial proceedings
- The minimum age of criminal responsibility and the upper age limits for juvenile justice
- The guarantees for a fair trial
- Deprivation of liberty including pre-trial and post trial incarceration (which includes not only the issue of when a child may be deprived of liberty, but also the conditions and regulatory environment under which this deprivation occurs).

The General Comment does not appear to support the situation in which we find ourselves in South Africa at present, with a plethora of laws, policies and government departments and non-governmental organisations involved in various aspects of the juvenile justice system, operating in the absence of a single, unifying, overarching 'masterplan'. Although par 30 of the General Comment clarifies that States Parties have a dis-

cretion in the form of laws and policies they adopt, seen as a whole they must form a comprehensive system. The fact that South Africa does not have any unifying policy may explain why prevention and diversion efforts, whilst they have expanded in scope and reach impressively over the last decade, are not having maximum impact.

Prevention of juvenile delinquency

The General Comment devotes substantial attention to this issue, one that is, of course, uppermost in the minds of South Africans at the moment too. Crucially, the General Comment notes that any system which proceeds in the absence of a set of measures aimed at preventing delinquency suffers from 'serious shortcomings'. The concrete elements of such a policy are not in any way new, and focus on family and community based support, by and large. Thus the General Comment proposes elements such as parent training, programmes to enhance parent/child interaction, home visitation programmes, the expansion of early childhood education, risk- focused community programmes, and extending special care and protection to young persons at risk or who have dropped out of school.

Diversion

The General Comment proceeds from the assumption that diversion 'should be a well-established practice that can and should be used in most cases' (par 11). The point is made that it is up to State Parties to decide on the exact nature and content of diversionary measures, and to take the necessary legislative (and other) measures for their implementation. This surely points to the desperate gap in our law, which has no legislative environment regulating diversion, absent the passage and implementation of the Child Justice Bill. At par 13, the General Comment takes the further position that 'the law has to contain specific provisions indicating in which cases diversion is possible'. This is not so as to exclude children's cases from the consideration from diversion, but 'in particular, to protect the child from discrimination'. For the same reasons, the General Comment suggests that the powers of the police, prosecutors and/or other agencies making diversion decisions should be regulated and reviewed.

In accordance with the overall stance, based on article 40(3)(b) of the CRC which requires that human rights and legal safeguards be fully respected during diversion referrals, the General Comment requires (the word 'must' is used) that the child be given an opportunity to consult with legal or other appropriate assistants before acceding to the diversion measure offered by the competent authority (e.g. police or prosecutor). It is also stressed that diversion must result not only in closure of the case, but that it may not be regarded as a previous conviction in any way. If confidential records of diversion are kept, access must be exclusively given to authorities working in the juvenile justice system, and records may be kept only for a limited period of time (the suggestion is for a maximum period of one year).

The minimum age of criminal responsibility (MACR)

Unsurprisingly, based on Concluding Observations of the Committee over the last 15 years, the General Comment recommends that a MACR below the age of 12 years is internationally unacceptable, thereby setting a benchmark for countries who have a lower MACR to increase this at least to the age of 12 years (par 16). States Parties with an existing higher MACR are urged not to lower this as a consequence of the 'new' benchmark.

The General Comment expresses concern about State Parties who permit a lower MACR in certain exceptional cases, e.g. where the child is accused of committing a serious offence or is considered more mature. Moreover, the situation contemplated in the Child Justice Bill of a 'spilt' age (e.g. 10 years, with a rebuttable presumption of incapacity applying to children aged between 10 and 14 years, who must be shown to have the required maturity) is regarded as wholly unacceptable. 'The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes. The system of two minimum ages is often not only confusing but leaves much to the discretion of the court/judge and may result in discriminatory practices.' (par 16).

The concerns expressed above are well taken. However, it must also be said that the South African proposals which found their way into the Child Justice Bill were soundly and publicly debated by civil society and a range of experts (anthropologists, criminologists, judiciary, psychologist and so forth) before being placed in the public arena.

The upper age limit for juvenile justice

As categorical as the General Comment is about a fixed MACR of no less than twelve years, as specific it is about the upper age limit. '[The] special rules for juvenile justice – both in terms of procedural rules and in terms of rules for diversion and special dispositions – should apply, starting at the MACR set in the country, for all children who, at the time of their alleged commission of an offence ... have not yet reached the age of 18 years'(Par 20).

Referring particularly to countries which allow the treatment of 16 or 17 year old children either as adults, or in an exceptional and different (and hence, discriminatory) way, the General Comment requires changes to laws to ensure full implementation of a juvenile justice system to all persons under the age of 18 years (par 21). [Provisions which extend protection, either generally or by way of exception, to those aged over 18 but under 21 years, are however, accorded appreciation.]

As Ehlers (Child Justice: Comparing the South African child justice reform process and experiences of juvenile justice reform in the United

States of America, Open Society Foundation, Occasional Paper No. 1 (2006)) has described, moves were afoot in Parliament when the Child Justice Bill was originally up for debate to limit access to diversion in certain instances, notably where children of 16 or 17 years were charged with certain specified (serious) offences. Such disqualification would clearly fall foul of the express stance of the General Comment in this regard.

Speedy trials

The Comment refers in several places to the need for speedy trials where children are concerned, referring to international consensus that the time between the commission of the offence and the final response to this should be as short as possible, because the longer the period, the more likely it is that the response loses it's pedagogical impact (par 23(g)). Indeed, the Committee recommends review of pre-trial detention every two weeks (par 28(b)), and further that States Parties introduce legal provisions to ensure final decisions are made by courts within six months after charges have been presented (par 28(b)).

Privacy and expungement of records

The General Comment elaborates in considerable detail various aspects of the right of the child to have his or her privacy fully protected in all stages of proceedings in order to avoid stigmatisation. However, one notable point of interest for the development of South African law is the link between confidentiality of records of previous proceedings and the child's right to privacy. The General Comment maintains that 'records of child offenders shall not be used in adult proceedings in subsequent cases involving the same offenders (See Beijing Rules, rule 21.1 and 21.2), or to enhance such future sentencing. The Committee recommends States Parties to introduce rules which would allow for an automatic removal from the criminal records the name of a child who committed an offence upon reaching the age of 18 ...' (par 23(l)). The provisions of the Child Justice Bill relating to expungement of child criminal records may need to be re-examined in the light of the Committee's views.

Disposition

The requirements of a rights-compliant sentencing framework forms a substantial part of the General Comment. Of key importance is the categorical statement that 'a strictly punitive approach is not in accordance with the leading principles for juvenile justice spelt out in Article 40(1) of the CRC' (par 25), which requires treatment that takes account of a child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.' Even in serious cases, where dispositions proportional to the circumstances of the offender and the gravity of the offence are deemed necessary, and where the needs of public safety fall to be considered, these considerations 'must always be outweighed by the need to safeguard the well-being and the best interests of, and to promote the reintegration of, young persons' (par 25).

Life imprisonment is dealt with in par 27, and not only is the principle stressed that life imprisonment without the possibility of parole is proscribed where an offence was committed by a person aged under 18 at the time of commission of the offence, but for all sentences, the possibility of children's release should be realistic and regularly considered. The General Comment notes that where life imprisonment with the possibility of parole is used, sentencing must still comply with the overall aims of disposition set out in article 40(1) of CRC, i.e. the eventual reintegration of the child and the fostering of the ability to assume a constructive role in society. 'Given the likelihood that the life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States Parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18' (par 27, underlining inserted).

Specialisation

The General Comment emphasises the need for specialisation in this sphere. Whilst stating that juvenile courts should be established either as separate units, or as part of existing regional or district courts, the Comment nevertheless notes that States Parties should ensure that they are staffed by specialised judges or magistrates, and that specialised services – probation, for instance – should be available. The important role of non-governmental organisations in the administration of juvenile justice is recognised, and State Parties are enjoined to seek their active involvement in the development and implementation of their comprehensive juvenile justice policy.

Conclusion

The General Comment concludes with remarks concerning the need for ongoing evaluation and research into juvenile justice administration and practice, highlighting the important role that independent academic institutions should play in this regard. Research can pinpoint 'critical areas of success and concern' (par 35), such as success in diversion programming (on the one hand), and discriminatory practices (on the other).

In this regard, the General Comment reinforces that point that the passage of legislation – such as the Child Justice Bill 49/2002 – is but one step (even if an entirely necessary one) on the way to developing a comprehensive juvenile justice system that meets international standards. Further building blocks required to assess the efficacy of implementation still remain to be conceptualised and implemented. To this end, the improvement of data collection systems and their integration with existing information sources should be a high priority for government in its quest to deliver a justice system fit for children.

Children'd Rights and the Convention against Torture

By Lovell Fernandez and Lukas Muntingh

South Africa ratified the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) in December 1998 and ratified the Optional Protocol to the Convention Against Torture (OPCAT) in 2006. Obligations created by international law necessitate that a critical look be taken at the domestic legislation and its application to prevent and combat torture. South Africa needs to develop legislation that would be effective in criminalising torture and also provide for an effective investigative regime. Effectiveness in this sense is measured not only by the scope of application, but also by the depth thereof, ranging not only from providing for certain measures but also to ensure that measures of protection are available, accessible and applied consistently without prejudice.

To make torture an offence under domestic legislation explicitly signifies an important shift in acknowledging the nature of torture as defined in the UNCAT and the obligations created by ratification. It recognises the fact that torture is different from assault or attempted murder, and that torture is an extremely serious offence. In terms of a definition of torture, the Convention creates the following criteria:

- conduct must result in severe physical or mental suffering;
- harm must be intentionally inflicted;
- conduct must have a certain purpose;
- perpetrators are limited to public officials, or people acting in an official capacity; and
- torture excludes pain and suffering arising only from or inherent in acts which are lawfully sanctioned.

While preventing torture remains the overall purpose, the UNCAT places a duty on State Parties to be relentless in investigating torture and making perpetrators accountable for their actions. The criminalisation of torture is an important step towards attaining the objective of holding offenders accountable. Furthermore, it should be emphasised that the UNCAT places a duty on State Parties to protect its citizens and persons in its care from torture, cruel, inhuman or degrading treatment or punishment at all times. This duty is not conditional and has the status of a peremptory norm in international law.

There are various substantive aspects to criminalising torture in South Africa as well as creating a framework for its effectiveness to investigate and eliminate torture. These include:

- the criminalisation of torture;
- the obligation on state parties not to return (refouler) or extradite persons to countries where there is a substantial likelihood that they will be tortured;
- the duty to prosecute and punish offenders;
- standards to be observed when interrogating persons alleged to have committed a crime;
- the prompt and impartial investigation of allegation of torture by competent authorities.

The implications of UNCAT for children who are detained or institutionalised

This section explores the most important settings and facilities that will be covered by legislation criminalising torture. It is particularly when people are deprived of their liberty that they are vulnerable to torture, cruel, inhumane and degrading treatment or punishment. The intention is not that legislation should be specific to each setting or type of facility, as that would result in unwieldy and unnecessarily detailed descriptions of what applies when and where. Rather, the aim is to ensure that the legislation is of the requisite scope and depth to provide adequate protection and reactive measures to protect people who are deprived of their liberty in these facilities.

Children represent a particularly vulnerable group and they often find themselves deprived of their liberty in police cells, prisons, schools of industry, places of safety, secure-care facilities and treatment centres.

SAPS

The SAPS developed a policy on the prevention of torture in 1998 that acknowledges the risks involved and is therefore categorical in its prohibition:

The Policy makes it clear that no member may torture any person, permit anyone else to do so, or tolerate the torture of another by anyone. No exception will serve as justification for torture - there can simply be no justification, ever, for torture. Any order by a superior or any other authority that a person be tortured is therefore unlawful and may not be obeyed. The fact that a member acted upon an order by a superior will not be a ground of justification for torture. [1]

The Policy states that if an investigation should find that a member committed or attempted to commit torture or acted as an accomplice in the commission of torture, "it should be deemed to be serious misconduct and disciplinary proceedings should immediately be instituted against such a member in terms of regulation 8(2)(a) of the South African Police Service Discipline Regulations". The 1996 Disciplinary Regulations, however, have been repealed and replaced by the 2005 Disciplinary Regulations. Regulation 20 of the 2005 Regulations, in describing actions constituting misconduct in the SAPS, does not pay specific attention to the manner in which the police should treat suspects.

All persons detained by the police can, at any stage, lay a criminal charge against a member of SAPS at the station at which they are being detained. All heads of police stations are required to visit the holding cells at 07h00 every day and detainees can raise any matter with him or her during that visit. Throughout the day, cells should be monitored hourly and any incidents or complaints recorded in the Occurrence Book. Complaints against the SAPS can also be lodged with the Independent Complaints Directorate (ICD), which provides an independent complaints and investigative procedure.

The existence of a policy on the prevention of torture is a significant advantage in the protection of human rights; it is notable that SAPS is the only government department that addresses this problem directly.

Prisons

South Africa's prisons are governed by the Constitution, the Correctional Services Act 111 of 1998, as well as the Regulations to the Act. The Act, in sections 4 to 21, describes the general requirements pertaining to prison conditions and the treatment of prisoners. These are augmented by Chapter 2 of the Regulations. Chapter 3 of the Regulations provides for the treatment of sentenced prisoners.

The Correctional Services Act, through the creation of the Judicial Inspectorate of Prisons, enabled the establishment of an elaborate structure for providing oversight over the treatment of prisoners and conditions in prisons. Unlike the SAPS, the DCS does not have a specific policy on the prevention of torture nor does the Judicial Inspectorate have a specific mandate to investigate such cases. Current practice is that the police will investigate such cases after the prisoner has laid a charge, e.g. assault or attempted murder. The Judicial Inspectorate may investigate any allegation and forward recommendations to the Minister of Correctional Services as well as the Director of Public Prosecutions.

Places of safety, secure-care facilities and schools of industry

Places of safety, secure-care facilities and schools of industry are established in terms of Section 28 of the Child Care Act 74 of 1983.

The Regulations to the Act[2] provide very specific guidance on the rights of children (see Regulation 31) and the duties of care of facility managers. In fact, Regulation 32(3) lists the particular activities and management practices that are expressly forbidden and include group punishment, humiliation and ridicule, physical punishment and deprivation of access to parents and family.

Regarding oversight, Section 31 provides for the inspection of facilities established under the Act and mandates the Director General of the relevant department to delegate such inspections to a member of his or her staff. Regulation 34A provides for the inspection of a facility should there be reason to believe that the facility and its management are not in compliance with the Act. The Director General of the relevant department may then institute a formal investigation in accordance with the procedures set out in the Regulations. The emphasis of this investigation is clearly on ensuring that the institution is run according to policy guidelines and the requirements of the Act and Regulations. Should all proactive measures fail, the Director General may decide to have the facility deregistered. The approach therefore leans strongly towards problem-solving as opposed to holding perpetrators of abuse, ill-treatment and assault criminally liable.

A recent matter involving the George Hofmeyer School of Industry (female children) in Standerton (Mpumalanga) illustrates a number of shortcomings in the current approach[3] and highlights a number of failings in the current oversight and protection system. In the first instance, it took a non-government organisation to apply to the High Court (Transvaal Division) to seek immediate relief on a number of rights violations that had taken place at the behest of the school

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1 *Policy on the prevention of torture and the treatment of persons in custody of the South African Police Service http://www.saps.gov.za/docs_publs/legislation/policies/torture.htm*

2 *No. 18770, issued on 31 March 1998.*

3 *Initial Report of the curator ad litem in the application of The Centre for Child Law and Eleven Others v The Minister of Justice and Ten Others, Transvaal Provincial Division of the High Court, Case no. 8523/2005.*

principal. Secondly, the organisation further asked the Court to instruct the Department of Education (DoE) to conduct an assessment (developmental quality assurance) of the school. Thirdly, the process thus far has not sought to bring criminal charges against the staff of the facility for assaulting or torturing the children placed in their care.

The Court ordered that a Developmental Quality Assurance (DQA) investigation be conducted, which the DoE (Mpumalanga) facilitated. The report following from the DQA raised some significant concerns about the treatment of children at the facility and there was strong evidence of ill-treatment and torture.

From this particular case it is apparent that effective independent oversight was severely lacking and that, where problems were encountered, even if they were extremely serious, there was no provision in the Act that encouraged the Director General of Education to lay criminal charges against members of staff who may be guilty. Although the Regulations are clear on what activities and practices are prohibited, the types of punishment for transgressions relate to the licence of the institutions and not the individual who committed the acts, or gave the instructions and/or allowed the harmful practice to continue. Legislation criminalising torture must ensure that both individual staff members and management are held accountable for acts of torture and ill-treatment and that a strong duty is placed on managers of such facilities to report cases of alleged torture or to facilitate the reporting of allegations.

Treatment centres

Treatment centres that focus on rehabilitation from substance abuse and addiction are established in terms of the Prevention and Treatment of Drug Dependency Act 20 of 1992. Section 7 provides for the establishment and abolition of such centres by the state and Section 9 requires that all privately-operated centres be registered in terms of the Act. Section 12 provides for the inspection of such centres by a social worker, medical officer or any other person authorised by the Director General of Social Development or any magistrate to do so. Section 24 provides for the temporary custody of a person in a treatment centre, registered treatment centre, hostel, registered hostel, prison, police cell or lock-up, or other place regarded by the magistrate as suitable prior to the person being transferred to a treatment centre. If the person is under the age of 18 years, he or she can also be detained in place of safety. However, no person may be detained for longer than 28 days in respect of Section 24.

The Regulations to the Act provide clarity on some of the operational matters, but generally are weak in protecting the rights of patients and ensuring a proactive human rights regime.

In 2005, the Department of Social Development (DoSD) published a guideline of minimum standards for in-patient treatment centres.[4] Although the minimum standards deal with specific issues of abuse (that could be construed as torture), the aim is rather to create a system that functions properly and is based on human rights standards. The *Minimum Norms and Standards for Inpatient Treatment Centres* substantially clarify a range of matters by defining what is appropriate and inappropriate and by detailing the duty of care and protection placed on centre managers. The Standards are also significant because they demand the involvement of local magistrates in reporting and oversight duties, especially where this concerns measures that inherently pose a risk to individual rights. Whilst the Standards do not use the terminology of torture, Standard 8.7 lists activities that have been associated with the abuse of patients in treatment centres. The conceptualisation of torture therefore needs to be seen within the framework that ill-treatment may take place supposedly for behaviour change or curative purposes. Subjecting patients to hardships and other forms of deprivation may be difficult to justify when drug addiction is correctly defined as an illness and not as a personal or spiritual flaw. In summary, the level of detailed standards developed for treatment centres is regarded as very positive and would facilitate the enforcement of legislation criminalising torture. Other sectors may indeed benefit greatly from developing applicable norms and standards.

Conclusion

If the purpose of legislation that criminalises torture is to be summed up in one sentence, it is to make it possible to investigate, prosecute, punish and imprison the torturer. To achieve this, it is necessary not only that the enabling law is appropriately formulated, but that all other laws and subordinate legislation, rules and regulations governing the public sector give effect to the obligations under UNCAT. Public officials should be left in no doubt as to what standards of conduct are expected of them and that to transgress these would attract investigation and sanction. The harmonisation of legislation and the strengthening of regulations and orders are regarded as critical steps in ensuring that torture is prevented and that when it is perpetrated it is effectively investigated, prosecuted and punished.

For more information on the South African submissions on the Initial Country Report on the Convention against Torture, visit www.ohchr.org/english/bodies/cat/cats37.htm

4 *National Department of Social Development Minimum norms and standards for inpatient treatment centres (2005).*

It takes a village to raise a child

by Benyam D. Mezmur

Uganda embarked on child law review process as early as 1990 and in 1997, the Children's Act of 1996 commenced operation. At present the Children's Act is the principal law that deals with children's affairs and their protection. The Act was aimed at consolidating all laws relating to child care, protection and maintenance.

A major part of the Children's Act relates to children in conflict with the law. It sought to establish institutions that can ensure easy access to justice by children and deal with children in conflict with the law. It provides for the Family and Children Courts and remand homes. The Act makes extensive provision for the age of criminal responsibility, arrest, bail, trial, sentencing, detention and rehabilitation of child offenders. The Act heavily draws from the CRC, ACRWC and other international standards on children in conflict with the law.[1]

Juvenile crime in Uganda

Generally Uganda is not a country with a high crime rate. The Second Periodic Report of the Government to the UN Committee on the Rights of the Child indicates that children are mainly charged with minor offences. Theft is the predominant offence committed by children while defilement constitutes the principal major offence. Therefore, the majority of children, who enter the judicial system have been charged with minor offences which are, in the main, related to the environmental context in which they live. The Periodic Report also notes that it is difficult to know the exact magnitude of offences committed by children due to the problem of poor record-keeping, especially at the village level.

The role players in diversion

In Uganda, diversion occurs mainly through the discretion afforded to various officials: namely village courts (under the Local Council Courts), the police, and family and children's courts.[2] The practice of diversion for children in conflict with the law supports the main thinking behind the Children's Act. This is because the central thrust of the Children's Act is that children in conflict with the law, whose offences are not serious, should wherever possible be dealt with and assisted in their communities by Local Council Courts that exist at village, parish and sub-county level, rather than being taken to the Family and Children Court at the district or sub-county level.

One of the most innovative support systems from which children in conflict with the law have benefited is the appointment of Fit Persons and Mediators. The formal role of Fit Persons is setout in 91(9) of the Children's Act: specifically it is person who can closely supervise or offer accommodation to a child, where a parent/guardian are unable to, instead of the child being remanded in custody.

Community Development Assistants based at the sub-county level also play a significant role in the reintegration of children in conflict with the law. Their training of Fit Persons and Mediators, Local Councils and Community Based Organizations, their counseling of children and assisting children in Family and Children's Courts and Local Council Courts are all of critical importance for children in conflict with the law. Community Development Assistants also support the work of the District Probation and Social Welfare Officers who are responsible for the care and protection of children, which includes marital disputes affecting children, child abandonment, disability, abuse and children in conflict with the law.

Diversion: A focus on Local Council Courts

The main diversion for children in conflict with the law is conducted under the auspices of the community or village court system, insofar as the law provides for local councils with judicial power over a number of criminal offences. It is the Constitution of the Republic of Uganda that provides for the creation of Local Councils as part of the decentralisation of power. Local Councils are the lowest units

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1 In preparing this article the author wishes to acknowledge the following research report as providing background reading: Some impacts of the Children's Act in Uganda, 1996-2005: A comparative study and evaluation of the impact of the Children's Act in relation to children in conflict with the law in eight districts of Uganda (January-February 2005), compiled by John Parry-Wiliams, August 2005.

2 J. Gallinetti "Diversion" in J. Sloth-Nielsen and J. Gallinetti, Child Justice in Africa: a Guide to Good Practice (2004) 67.

with administrative, legislative, and judicial powers on behalf of central governments. It is also the structure closest to the people through the village council.

Initially introduced as Resistance Committee Courts, Local Council Courts were based on the ideas of popular justice and popular democracy. They are intended to address the problems associated with the cumbersome court system and also attempt to bring justice nearer to the people. The people participate in electing the members of the Committees, which constitute these courts, and they are designed to resolve local disputes quickly and at minimum cost. At first these courts were used in resolving adult disputes. However, the Children's Act built on the structure and many of the principles of the Local Councils and adapted them so they could also hear the cases of children in conflict with the law in a way that was compliant with the CRC and ACRWC and other international standards concerning justice for children.

Of the Local Council Courts, the village court is by far the most active as it is designated by the Act as the court of first instance for a number of minor, but common charges, such as theft, affray, assault and criminal trespass. Therefore a significant number of cases involving children in conflict with the law are entertained at the village courts within the Local Council Courts. The Local Council Courts at the parish and sub-county are largely for appeals from the village court. The Local Council Courts cannot incarcerate or order corporal punishment. The disposals they are permitted include compensation, restitution, apology, caution and a 6 month guidance order. There are also some that order the performance of community service.

It is also noteworthy that Local Council Courts use Mediators and Fit Persons to try and resolve cases involving children in conflict with the law, rather than bringing them to the Village Local Council Courts. Thus, one of the advantages of the Children's Act is that Fit Persons and Mediators settle children's cases and this way children avoid earning the bad name they would have if their cases had been dealt with by the police. Interestingly, Fit Persons are usually women, mainly in their 50s and 60s. Some investigation of a prospective Fit Person's suitability to provide care and protection for children is carried out before any appointment. Community Development Assistants also have a role to play in handling cases involving children in conflict with the law, particularly during diversion and rehabilitation and reintegration back into their community.

One of the main reasons why the work of the Local Council Courts in handling children in conflict with the law could be characterised as a good practice is because it involves the community. It supports the recognition of the paramount importance of parents, families and the communities in the socialisation and upbringing of children. It also is commendable as it assists in the earliest reunification of children with their families and communities. The Local Councils have been able to use alternative punishments like compensation, apology and restitution. This has in return helped increase the acceptability of non-custodial sentences among surrounding communities.

The advantage of Local Council Courts in dealing with children in conflict with the law is not only limited to the above points. It also has benefits in the use of local language, speed, accessibility, being more empowering to the poor, more understandable and, for this reason, lawyers are not allowed to participate as that would complicate the proceedings. The courts operate in an informal manner, which makes the proceedings non-intimidating for the child involved. They could also be convened any time, which offers some degree of flexibility.

Room for improvement

Admittedly, there is room for improvement in handling diversions in the Local Council Courts. Some of the challenges experienced include the fact that members of the Court having no access to key reference materials, officials are sometimes not aware of the rights of children, there has been bias against women and children, poor bookkeeping practices have occurred, and the fact that the members of the public are unaware of their rights in the Local Council Courts.

One of the ways of addressing these gaps is training. Accordingly the training of Local Councils has been a priority. Civil society including the Legal Aid Clinic of Kampala, Save the Children and Defence for Children International have provided training for Local Councils, and they are already showing positive impact on the way Local Council Courts are dealing with children in conflict with the law.

Conclusion

In Uganda, subjecting children to the formal legal system, apart from being in violation of the CRC and ACRWC, can have serious negative implications for the rights of children in conflict with the law. This is partly because there is concern, particularly from the UN Committee, at the lack of magistrates, lack of remand homes for children in conflict with the law, and the conditions in such institutions. A concept paper on the Children's Act by the Uganda Law Reform Commission states that the implementation of the Act is undermined by, among others, inadequate human and financial resources in the established institutions and the negative attitudes of the society on matters of children's rights.

The Local Council Courts have managed to significantly minimize the high influx of children's cases of petty crime into the formal legal system. Currently, Local Council Courts have taken an active role and, both from what justice personnel say and from data collected, it seems fewer cases are now going to the police and to the district courts than before. Indeed, the involvement of the community in the different capacities noted above is a clear case of the common African adage that "it takes a village to raise a child".

Experiences and views

on alternative sentencing from Pinetown

by Jeffrey Gar, Magistrate, Pinetown

I cannot put it any better than the quote from the Honourable Justice M.S. Navsa, Judge of Appeal:[1]

"A prison visit is a sobering experience. Massive overcrowding is the norm. As a puisne judge I stopped pontificating about rehabilitation in my judgments on sentencing. Often prison administrators have their hands full dealing with the mere mechanics of managing prison populations – how to arrange meals and exercise times on rotation and how to marshal the limited resources at their disposal.

For juvenile awaiting trial prisoners imagine the shock of being thrust into these conditions. The number of prisoners awaiting trial for inordinate periods is substantial. The opportunity to develop human material so as to engage in a career or to study is limited, if not non-existent. Juveniles have no way of studying awaiting

1 Delivering the opening address at the Criminal Justice Conference: 10 years Consolidating Transformation, 7-8 February 2005, Cape Town.

> *I am a firm believer in community service. The benefits are: firstly, it enables the offender to have his dignity restored by helping others, and secondly, possible job opportunities may arise. That the community benefits goes without saying.*

trial. The disproportionate number of warders in relation to prisoners is not only a security factor, it impacts directly on the manner in which prisoners are treated.

Internationally the prison population is notoriously at the bottom of priority lists. This trend should be resisted. Human capital should not be lost. People should be afforded an opportunity at redemption. While prisons should not be rest and recreation centres, they should however, not hold persons under medieval conditions. Ideally, persons returning to society should not return as hardened criminals but should return as persons who are able to reintegrate as useful citizens. Human rights activists should reconsider the low priority afforded to prisoner's rights."

My problem as a magistrate has been dealing with perpetrators of economic crimes. In my experience I have found that in most of these cases the same formula crops up each and every time. An accused between the ages of 16 and 50, with a standard two education (if that) and you can see straight away this crime has been committed because of hunger. But, what happens when they come out of prison? We have various options such as NGO's and Correctional Services' Community Corrections Directorate. However, no matter how much you lecture to an accused or to prisoners about the ethical wrongs or the moral wrongs of crime, the hunger is still there when they come out of prison.

Yes, Correctional Services do have some skills development programmes but gangs and overcrowding militate against this. And, the only government sponsored skills development programme in our area is for those with a matric-level education.

It has been said that we are as responsible for what happens to us, as we are for how we react to our circumstances. As a magistrate, my duty towards offenders and the community is even more pronounced when dealing with a child accused.

What we must do is ensure that rehabilitation begins the moment an accused is sentenced. We must restore a person's pride.

Putting alternative sentencing into practice

In relation to section 297, Du Toit et al in the Commentary of the Criminal Procedure Act, states on page 28-46 (service 19): "A co-ordinator was appointed for each magistrate's office, who will contact institutions and persons in order to obtain their co-operation in the control and supervision of persons performing community service. The co-ordinator generally will be responsible for setting up the infrastructure necessary for the practical implementation of community service orders. Registrars of the various Divisions of the Supreme Court will also be put in possession of relevant information by the co-ordinator."

I suggest that this co-ordinator also ascertains from the community which projects are in need of attention. After interviewing the accused as to his/her talents or expertise, this co-ordinator makes a report to court . All this work is time-consuming and help is required for the magistrate either by this co-ordinator or a volunteer to run this project at each court.

I am a firm believer in community service. The benefits are: firstly, it enables the offender to have his dignity restored by helping others, and secondly, possible job opportunities may arise. That the community benefits goes without saying.

We must try to ensure that the offender does not regard community service as punishment. He must understand that it is a vehicle to assist him, so that when his service is complete, he can still offer his services and be called upon when the need arises. I am certainly against community service being carried out at police stations or libraries for obvious reasons.

In Pinetown, we have a data base of some clinics, orphanages, old age homes and welfare organizations in the area and this list continues to grow. I usually ask the offender if there are any such organizations in his area and provide him/her with a pro forma letter to the person in charge, enquiring if they require assistance. The offender returns to court a few days later with the contact details and the prosecutor makes contact, explaining what the court has in mind and what the offender has been convicted of.

The offender is then sentenced. All or part of the sentence is suspended with the usual conditions, including attending a life skills course and community service. Section 297(8) letters are sent to both the life skills programme facilitator as well as the organizations where community service is being conducted, for them to "police" the offender, taking the pressure off correctional services.

Conclusion

What one must bear in mind is that prison is the "university of crime". It is imperative to give a child offender or first offender a viable alternative so that he ends his criminal activity.

NOTICE-BOARD

DOWNLOAD GENERAL COMMENT 10

The UN Committee on the Rights of the Child General Comment No. 10 on Children's Rights in Juvenile Justice can be accessed at :

http://www.ohchr.org/english/bodies/crc/comments.htm

NEW REPORT

childjustice alliance

Open Society Foundation for South Africa

The Child Justice Alliance and the Open Society Foundation has released the conference report on Child Justice in South Africa: Children's Rights under Construction. The report can be accessed at:

http://www.communitylawcentre.org.za/Projects/Childrens-Rights

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