

Article 40

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

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Article 40(1)

States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

NATIONAL YOUTH DEVELOPMENT OUTREACH

Providing innovative intervention

by Rene Botha

Since its inception in 1990, the National Youth Development Outreach (YDO) has worked extensively with youth at risk in the area east of Pretoria's central business district. YDO's programmes include diversion, mentorship, prevention and family preservation, with a primary focus on rebuilding the individual's sense of self-worth.

EDITORIAL

In this edition of Article 40 we examine two diversion programmes that are being offered in certain areas of South Africa. We continuously try to promote awareness of the programmes available for children to encourage the use of these for diversion or alternative sentences. The core components of the Child Justice Bill include the use of diversion and alternative sentences for children so as to make appropriate interventions in children's lives and in that way reduce re-offending. Even though the Child Justice Bill has not yet been passed or enacted, the National Prosecuting Authority has a clear policy that promotes the use of diversion. The Department of Justice has recently also provided training to magistrates across the country on the use of alternative sentences for children.

There is thus a great need for programmes that can be offered to children. Although general programmes are available, South Africa is unfortunately still lacking in the provision of specialist programmes, for example for serious and violent offenders. Likewise, while there are some programmes for young sex offenders, these are not available in all areas of the country, with the result that some children are excluded from the benefits of these interventions. In addition, the desirability of mentoring children after the completion of the formal programme in order to ensure reintegration into the community is becoming increasingly apparent.

Programme development in all areas of South Africa therefore needs to be prioritised. While the Department of Social Development is playing a vital role in supporting the provision of programmes in all provinces, we must encourage the donor community to take cognisance of the gaps in programme development and support research on and the creation of new specialist programmes.

In the interim, magistrates, prosecutors and probation officers should familiarise themselves with the programmes and appropriate resources available in their areas. These interventions can then be used to divert children away from the criminal justice system, or for use in alternative sentencing.

The organisation has three operational sites in Mamelodi, Eersterus and Nelmapius. While these communities have their own strengths and unique opportunities, the legacy of apartheid and marginalisation has manifested itself in rampant crime and unemployment.

The areas are characterised by poverty, family disintegration as well as substance abuse, especially among young people. The most common types of crimes committed by young people include shoplifting, assault, robbery, housebreaking and car theft. Young people said to be most at risk are those between the ages of 14 and 18 years. In a context where crime lords are the envied role models due to the material possessions they have, YDO has the challenge of providing competing role models for the young through their mentors. The mentors come from the same background as the youngsters, but have a firm determination to prove that there is a better, crime-free way of life.

YDO programmes

Diversion

The Adolescent Development Programme (ADP) is the main diversion programme offered by YDO. It is a 12-week non-residential programme that seeks to enhance the self-esteem and personal development of the young participants. The programme focuses on the development of self-awareness and on the life skills needed to create a productive society. Children are encouraged to take responsibility for their choices and repair the harm done through their actions. The curriculum is flexible and the environment child-friendly, with the emphasis on building and sustaining positive relationships.

YDO is one of the first organisations in the country to formally integrate mentoring into its youth justice focus. It offers an innovative, community-focused initiative in the form of a youth mentoring component that is designed to complement the ADP. A mentor of approximately the same age as the youth they are working with, is assigned as a role model to every young person that the court refers to the ADP.

Family group conferencing is also offered as a diversion option through the satellite centre in Mamelodi, due to the increased number of children that come into conflict with the law in that area.

A recent introduction to the YDO diversion programme is the use of indigenous drumming circles. Playing the djembe is clinically proven to reduce stress, boost the immune system and facilitate personal and social development. Group drumming is a powerful method of healing conflict, processing trauma and building team spirit and communication. The drumming sessions appeal to children with a minimal attention span, those who have trouble communicating and those who exhibit irritability. The group drumming can also be extended to staff from local schools working under stressful conditions, staff from local police stations and community service providers, as well as victims of crime.

Prevention

Whilst working with young people who are in conflict with the law, YDO identified a need to develop a programme aimed at prevention. The youth at risk programme therefore focuses strongly on life skills for



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crime prevention. The target groups include children in schools, street children and the community at large. The programme is primarily offered in Eersterus and Mamelodi. YDO is also recognised as a Safer School Project by the Department of Education.

Family Preservation

YDO social workers and mentors also work with families at risk, promoting the perspective that the best way to achieve permanency in the lives of children is to be with their families. The programme aims to prevent the placement of children outside of family care, offering family services that are family-centred, crisis-oriented, focused on strengths, and can be delivered in the home over a short, intensive period. The services are designed to provide individualised and immediate assistance to families when the child is at imminent risk of being removed from the home.

The goal is to preserve the family while ensuring that the child or children are safe. At the same time, the programme is geared to help the family learn the necessary skills to successfully remain together.

Working towards reintegration

The services offered by YDO allow the children in these three communities to access a variety of programmatic options that are designed to address issues relating to their offending. The mentoring component of the diversion programme, as well as the fact that the services are situated in the communities themselves, constitutes a concerted effort by YDO to ensure that children in trouble with the law have every chance of being reintegrated into their communities. ●

Substance abusers

in the criminal justice system

*by Sarah Fisher of SMART**



Complex issues arise from drug abuse. It is therefore essential that role-players in the criminal justice system increase their capacity if they want to effectively intervene with children dependent on such substances.

In South Africa, much like the rest of the world, there are more illegal and dangerous drugs than ever before and substance abuse is on the increase. In the past Mandrax, dagga and alcohol have been abused by adults, but in the last ten years this picture

has changed dramatically. Methamphetamine (tik), heroin and cocaine have become widely available and the users have become younger. Although the problem has escalated significantly, research into effective systems for treating and managing substance abuse and SUDs (substance use disorders), has fortunately also taken a quantum leap forward in the last decade.



... court officers would need specific education about SUDs, substance abuse treatment and the location of treatment centres.



We know that substance abusers often find themselves in conflict with the law, and that families sometimes see the justice system as a way of accessing 'help' for a family member. But are the courts and their officers equipped to deal with this problem? And, even if they are, is there an adequate range of referral services to support them?

The need for specialised knowledge

Substance abuse and SUDs are seen as a specialist area of the Behavioural Sciences field so, in order to find effective solutions to such a complicated bio-psycho-social issue, we need people with the relevant specialised knowledge to intervene with substance-abusing offenders, particularly young ones. SUDs run along a continuum from experimentation, through use and abuse to dependence – a chronic, relapsing condition characterised by functional and molecular changes in the brain. Each of these stages requires a different type of specialised intervention.

The different drugs also need different types of detox and treatment; heroin and alcohol, for example, need a clinically monitored detoxification, whereas methamphetamine (tik) and dagga don't. However, treating tik abusers comes with a completely different set of challenges, because tik can often cause psychosis and always causes cognitive deficits. The United Nations estimates that there are 35 million tik users worldwide (the most widely used illegal drug after dagga); 15 million heroin users (about 14 000 of them in Cape Town), and 10 million people worldwide using cocaine. All the research tells us

that, unlike heroin users, tik-dependent individuals rarely seek treatment of their own volition, but usually only access treatment once they have come into contact with the criminal justice system.

Diagnosis, referral, treatment and monitoring

Regardless of whether it is for alternative sentencing or diversion options, or for a sentenced prisoner, the first step should always be diagnosis and assessment, using internationally recognised clinical diagnostic tools. The assessment report would then drive the referral/sentencing recommendations of an officer of the court.

However, before making informed choices about appropriate referral options and treatment, court officers would need specific education about SUDs, substance abuse treatment and the location of treatment centres. The Department of Social Development is currently implementing a registration system for treatment centres. It is vital that court officials only refer to registered centres that run ethical programmes and that comply with the Department's minimum norms and standards.

Of course, there is no point in any of the foregoing if nothing is monitored, so the court officers should receive regular reports that include urine analyses and breath alcohol testing, treatment programme compliance and family reports.

The challenges

Given the complexity of substance use disorders, the lack of referral resources and the time-consuming nature of all interventions, it is unrealistic to expect already overburdened magistrates, prosecutors and probation officers to manage cases relating to substance abuse without specific education. But sadly, even with highly skilled and educated court officials or even dedicated drug courts, without access to a range of effective treatment services for offenders, very little will change. ●

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* SMART is an organisation that offers drug and alcohol programmes and formulates policies based on research, compassion, health and human rights.

In the December 2005 edition of Article 40 the issue of children used by adults to commit crime (CUBAC) was addressed. The issue of CUBAC has been given prominence recently in the area of child labour: the International Labour Organisation's (ILO) Convention 182 on the worst forms of child labour lists "the use, procuring or offering of a child for illicit activities" as one of the worst forms of child labour.

The background features two stylized silhouettes. On the left is a larger, light blue silhouette of an adult figure. In the foreground, on the right, is a smaller, dark blue silhouette of a child figure. The child's right arm is raised, and their hand is positioned near the adult's shoulder, suggesting a protective or guiding gesture.

Pilot projects in South Africa

AN UPDATE



Historically, there seems to be a general understanding that children accused of crimes are entitled to certain rights and procedural guarantees by the South African government. However, it appears that little thought has been given to the issue of child offenders also being victims of the worst form of child labour: being used by adults or older children to commit offences. It is only recently that this phenomenon has been officially recognised and action steps proposed to combat the problem.

Following on from South Africa's Child Labour Programme of Action, a study focusing on children used by adults to commit crimes has been undertaken and pilot projects aimed at addressing the problem are under way in Mitchells' Plain in the Western Cape and Mamelodi and Hatfield in Gauteng.

The pilot programmes

Following various recommendations made during initial research done on CUBAC during 2005, including the design of programmatic responses for children and direct interventions for government, a detailed project design was drafted. The pilot programmes are being run from April 2006 to March 2007. The overall goal of the pilot programmes is to help eliminate the instrumental use of children by adults as a worst form of child labour. The pilots comprise a range of activities and interventions, which include:

- **Programmatic intervention** – This involves the design of prevention and diversion programme content specific to CUBAC. A prevention programme and CUBAC diversion session are being offered at the pilot sites to complement ordinary criminal justice practice and mainstream CUBAC into programmatic interventions for children. The CUBAC diversion session was designed as a component that can be added on to existing diversion programmes. The diversion programme is being offered by Nicro in Mitchell's Plain, and National Youth Development Outreach (YDO) and the Restorative Justice Centre in Mamelodi and Hatfield. YDO and Creative Education for Youth at Risk (Cred) are doing follow-up activities with children who have been referred to the diversion programmes in both sites.
- **Assessments and probation officers** – During the initial research everyone agreed that, in order to identify it, CUBAC needs to be considered in the assessment procedure. Some participants in the study felt that the assessment form should be changed to include questions that would lead to the identification of CUBAC, whilst others felt that an instruction/directive to probation officers needed to be drafted to ensure that they would be mindful of CUBAC during the assessment phase. This directive would also include triggers/indicators of risk to assist probation officers in the identification of CUBAC. Subsequently the provincial departments of Social Development in the Western Cape and Gauteng have drafted the instruction and have issued it to probation officers at the pilot sites.
- **Instructions to police and prosecutors** – In addition, during the initial research it became apparent that there was a need for instructions for police and prosecutors relating to the investigation and prosecution of CUBAC cases. These instructions were drafted and issued by the provincial offices of both the SAPS and the National Prosecuting Authority (NPA) for the Western Cape and Gauteng. The instructions were directed at police and prosecutors at the pilot sites and cover the identification of CUBAC as well as the investigation and prosecution of adults.
- **Local co-ordination** – The research also showed that efforts concerning CUBAC at the pilot sites would involve an array of different role-players. Local co-ordination was necessary to ensure a co-ordinated and holistic approach to the management of CUBAC at the pilot sites, as well as inter-departmental and service delivery co-operation. Accordingly, CUBAC is now being addressed by the Case Review Management Task Team in Mitchells' Plain and a local CUBAC steering committee has been formed in Mamelodi comprising the prosecution, police, service providers, the probation officer and the Department of Education.
- **Management protocol or guidelines for CUBAC** – Although unofficial, it was felt that a document should be developed, setting out the basic action steps as well as the responsibilities of each role-player for the management of CUBAC. Not only would such a document raise awareness about CUBAC and the legal basis for specific action in this regard, it would also serve as a reference tool for role-players to refer to when faced with a CUBAC case. Because of the identified need for inter-departmental co-operation, such a document would also inform all the relevant role-players (governmental and non-governmental) of their colleagues' duties in respect to CUBAC. A copy of the guidelines can be accessed at www.communitylawcentre.org.za/children/publications.php#cubac.

CHILDREN USED BY ADULTS TO COMMIT CRIME

Preliminary findings

The pilot programmes will run until the end of March 2007, but certain issues regarding the implementation of the CUBAC action steps – as contained in the Child Labour Programme of Action – have already arisen from two provincial seminars on the pilot projects:

- **Safety of the children** – This issue was identified as a risk factor right at the outset of the project. Children who are used by adults fear the consequences of disclosing the identity of the adults and possible reprisals from the adult perpetrators. Role-players in the pilot projects noted that they are aware of these risks and therefore have difficulty trying to ensure that the adults are prosecuted. However, the instructions issued to the officials make it quite clear that the safety of the children is of paramount importance and that the best interests of the child would precede any attempt to prosecute an adult.
- **Reluctance of the children to disclose their CUBAC status** – This was also identified as a risk factor at the outset of the project and is closely linked to the aforementioned issue. If children fear that their safety is at risk, they refuse to declare their CUBAC status (even in the face of information that indicates they have in fact been used) or disclose who the adult perpetrator is. Again linked to this is the reported distrust children have of police officials and their unwillingness to reveal anything to them or even believe that the police would assist them by apprehending the perpetrator.
- **Children appearing in court where the person claiming to be their guardian is the perpetrator** – Children appearing in criminal courts must be assisted by a parent or guardian. Probation officers who perform the assessments of the child often request the police to search for a parent or guardian if one is not accompanying the child. However, sometimes in the intervening period, an adult claiming to be a guardian arrives to assist the child. It is reported that frequently this turns out to be a local gangster or drug-lord that is using the child to commit crimes. On account of the pressures of dealing with matters concerning children, children appear in court with these perpetrators because the police or probation official has not had sufficient time or resources to establish the so-called guardian's credibility.
- **Insufficient evidence to prosecute the adult** – The first premise is that both an adult and a child involved in the same offence would ordinarily be liable as co-perpetrators of that offence, and would theoretically be equally liable to prosecution and conviction, provided the child is over the minimum age of criminal responsibility (7 years). Adult influence would, however, serve as a factor to be considered in

mitigation of the child's sentence and could also serve to aggravate the sentence received by the adult offender. Unless the defence of duress could be successfully raised by the child concerned so as to vitiate dolus, voluntary participation in the act would usually be sufficient to ensure a conviction.

As far as an adult 'instigator' is concerned, a conviction on the grounds of the doctrine of common purpose, or as an accessory after the fact, is also possible where the actions of the accused adult do not indicate actual participation in the commission of the offence itself, but where such adult 'commissioned' the act in question, or has rendered assistance subsequently. Even though at common law, the person who conspires with or incites another to commit a crime would in any event be vested with criminal liability him-/herself on the basis that he or she meets the definitional requirement to be convicted either as a co-perpetrator or an accomplice, prevailing legal uncertainty regarding the liability of the inciter or conspirator who did not actually participate in the commission of the wrongful act has led to statutory intervention as early as 1914. The applicable statute has been redrafted several times, and conspiracy to commit a crime is now punishable in terms of section 18(2) of the Riotous Assemblies Act 17 of 1956.

However, despite the available substantive law, the prosecutors at both pilot sites have noted that often the available evidence is insufficient to secure a prosecution of the adult involved. This could be on account of the child not disclosing the identity of the adult, not knowing the identity of the adult, being a co-perpetrator, or being an unreliable witness.


- **Instances where the perpetrator is a family member or relative** – The pilot site role-players cited a number of examples of children being used by relatives and the difficulties that this causes for family relations, support structures, parental influence and so on. It was suggested that greater use be made of the welfare system in these instances and that proper investigations into the family circumstances of the child be undertaken to determine whether he or she is a child in need of care or not.

Conclusion

South Africa has committed itself to eliminating CUBAC as a worst form of child labour by adopting ILO Convention 182, and by including specific action steps to combat CUBAC in the Child Labour Programme of Action. The pilot projects at Mitchell's Plain, Mamelodi and Hatfield are revolutionary in their attempt to concretely address the problem and seek solutions that involve child focused interventions and concentrating state action on investigating and prosecuting adults.

The pilot projects have highlighted certain difficulties regarding the way in which it was originally envisaged that CUBAC could be addressed in the criminal justice system.

However, these projects will nevertheless raise awareness of the issue and ensure that dedicated attention is given to children who are victims of this, a worst form of child labour. ●



The overall goal of the pilot programmes is to help eliminate child labour in the form of using children as an instrument in illicit activities in South Africa.

*The consideration of any human rights related issue in Sierra Leone – including juvenile justice – should be considered against the fact that the country is still grappling with the dual effects of poverty and a devastating civil war that lasted for 11 years. Children suffered the most during the civil war – UNICEF Sierra Leone reports that a total of 7 204 children were directly affected by the war both as combatants and separated non-combatant victims.**

A small country's big efforts at law and policy reform**

by Benyam D. Mezmur

* See generally, for the situation of children in Sierra Leone, <http://www.unicef.org/infobycountry/sierraleone_841.html > (last accessed 30 November 2006).

** Take note that part of the information in this article is based on a field visit undertaken by the writer in April 2005 to Sierra Leone, the second periodic report of Sierra Leone to the UN Committee on the Rights of the Child, and the National Child Justice Strategy Document (June 2006).

The consequences of this prolonged conflict have had a tremendous impact on children and communities, resulting in increased instances of abuse against children and children in conflict with the law. There is a prevalence of orphans and the problem of street children is soaring. Although juvenile crime is not high in relative terms, it continues to rise in the aftermath of the conflict. The civil war has caused the near collapse of the juvenile justice system and other relevant institutions.

Child justice in Sierra Leone is dispensed in accordance with Chapter 44 of the Children and Young Persons Act of 1945 (the "Act"). The Act makes provision for a separate system for dealing with children in trouble with the law through separate institutions, and also makes legislative provision for establishing separate courts for children. In its report to the Committee on the Rights of the Child (the "Committee"), the government has indicated that the age of criminal responsibility is 10 years.

The status quo

The Act has its limitations. Against the backdrop of article 1 of the Convention on the Right of the Child (the "Convention"), which provides for the definition of a child, anyone who is 17 years or older is treated as an adult for the purposes of criminal law. The Act defines a "child" as someone below 14 years and a "young person" as someone between 14 and 17 years of age. The juvenile courts set in place under the Act do not have jurisdiction to handle homicide cases. Children jointly charged with adults are tried in adult courts. Juveniles are still detained by police in ordinary cells for adults, which is largely due to the lack of the standard tools to determine age. There is also a lack of separate cells for juveniles, as well as a lack of programmes at reform institutions. The fact that the various components of the juvenile justice system fall under different ministerial portfolios hampers the coordination among stakeholders.

The existence of archaic laws in dealing with children in conflict with the law is therefore a major problem.

Reforming outdated laws

In a follow-up to the Committee's concluding observations to Sierra Leone's report in 2000,

the country has embarked on policy intervention and law reform on issues relating to children in conflict with the law. Although complementary instruments such as the Education Act (2004), the Human Rights Commission Act (2004) and the Local Government Act (2004) have been enacted, the major attempt relates to the putting in place of a Child Rights Bill ("Bill") that applies the Convention's principles with modifications and adaptations to suit local conditions. A National Child Justice Strategy has also been developed.

Setting the parameters

The Bill places the juvenile offender not only as the bearer of rights, but also as a vulnerable victim in need of parental care and society's support. It increases the minimum age of criminal responsibility from 10 to 16 years. This is a most progressive step that goes even beyond the emerging minimum age for criminal responsibility under international law, which is 12 years of age. The proposal for the enactment of the Bill, as suggested by the various reference groups, provides that children jointly charged with adults should be tried separately. Among other things, this addresses the problem involved in trying children used by adults to commit crimes.

Treating children differently

The Bill expunges both corporal punishment and capital punishment from the laws relating to or affecting children. In clear compliance with article 37(b) of the Convention, the Bill also provides that the institutionalisation of children should be used as a measure of last resort in dealing with cases involving child offenders. The formal court system, according to the Bill, shall be used as a measure of last resort and proceedings in the court shall be informal and free from naming or stigmatising the suspected child offender.

The practice of keeping children away from the formal justice system was also followed in the aftermath of the conflict when children involved in armed conflict were brought before the Truth and Reconciliation Commission as opposed to the Special Court for Sierra Leone. The informal proceedings envisaged in the Bill are to be held in camera and a number of alternative or diversionary methods for disposing of the case, without ordering custodial sentences, should be applied. This mirrors some of the procedural guarantees under article 40 of the Convention and rules 7.1 and 15.1 of the Beijing Rules. If passed into law, the Bill will also stipulate that the criminal records of juvenile offenders should be destroyed ten years after a court's decision.

Making rehabilitation a priority

The Bill suggests that persons who attain 18 years and are convicted for offences committed prior to that age shall be entitled to rehabilitation therapy under the supervision of a probation officer. The Bill contains extensive provisions on alternative/diversionary approaches to the issue of juvenile justice and the attendant reform, rehabilitation and reintegration of affected children.

It is anticipated that the Child Rights Bill, when enacted, shall at all stages of the investigation into the alleged offence pursue diversionary methods, including verbal sanctions or advice, conditional discharges, fines, expropriation and compensation orders, suspended sentencing, probation and supervision orders, referrals and, inter alia, non-

institutional treatment like community service orders. Referrals may, where necessary, be subsequently made to a Mediation Committee, which shall be the Child Welfare Committee of the given location. In addition, the Bill suggests the establishment of a Child Rights Commission with a mandate to, inter alia, “monitor and coordinate the implementation of the Convention on the Rights of the Child”.

A national strategy for protecting children

The Bill’s standards are further reinforced by the five-year National Child Justice Strategy (“National Strategy”) (June 2006) that seeks to protect children who are involved in the criminal justice system as offenders, victims or witnesses. It also promotes the monitoring and evaluation of all key institutions involved in this process.

The contents of this strategy come from a consensus reached following a research process. This process involved extensive consultations using participatory approaches with children, community leaders, juvenile justice practitioners and stakeholders across the country. A workshop was also held to garner the opinions of children, civil society groups and related ministries on what a Child Justice Strategy for Sierra Leone’s children should entail.

Within the National Strategy, relevant, workable and sustainable recommendations proposed for children in conflict with the law involve training judicial personnel and justices of the peace in handling children’s matters; expanding the mandate of the family support unit to handle child offenders; developing a handbook on children’s issues for use at the police training school; rehabilitating and equipping the remand home in Freetown; establishing a remand home in Makeni; establishing bail homes (community foster care) for areas without remand homes, and ensuring that trained staff are available at these detention centres.

Practical steps

Practical activities that could boost the juvenile justice system are under way. With the support of partners, the government has set up one national and four regional committees on juvenile justice. Guidelines for bail homes were developed with a view to establishing these centres. Training of social workers, the police, community leaders and child rights monitors is ongoing. Probation officers are reuniting children with their families, while children in the available correctional facilities within the country continue to participate in regular recreational, educational and counselling activities. Sensitisation campaigns on the

protection and promotion of the rights and welfare of children, especially those in difficult circumstances, are being carried out at all levels of society. The government has involved children in child protection and welfare issues with frontline roles in advocacy and sensitisation programmes.

A clear commitment to children’s rights

The Bill and the National Strategy posit the juvenile or affected child’s best interests as the primary focus of juvenile justice and its administration. The current Bill, after two major efforts in 2001 and 2004, has come a long way in being more technical, inclusive and structured. The Bill is yet to be passed into law and consultations on certain crucial issues are ongoing, but this need not take too long. Although the government lacks the means to adequately enforce children’s rights as a result of the social, legal and economic structure throughout the country being looted and destroyed during the 11-year insurgency, a high degree of commitment to improving children’s rights and welfare is clearly present. Cooperation with partners is significant.

Against all odds, the country has just submitted its second periodic report to the Committee. According to the 2005 United Nations Development Programme Human Development Index, Sierra Leone may be ranked as the second least developed country in the world. Still, it has put the children’s rights agenda, particularly the issue of children in conflict with the law, as a priority. It should be an example to those with relatively more resources but less political will. ●

Additional sources:

The Children and Armed Conflict Unit Juvenile justice in Sierra Leone: An analysis of legislation and practice <http://www.essex.ac.uk/armedcon/story_id/000013.htm>

Defence for Children International Final report on juvenile justice administration in the western area of Sierra Leone (reporting period September 2003–August 2004)
http://www.oijj.org/doc/documental_1367_en.pdf

Update

on the case of "M": A creative sentence

by Ann Skelton

The case of M was described in the October edition of Article 40 earlier this year. M was 13 years and three months old when he stabbed a 14-year-old boy from the neighbourhood. He appeared in the Pietermaritzburg court on a charge of murder, to which he pleaded guilty. He was sentenced to eight years imprisonment. The Centre for Child Law appealed against both the conviction and the sentence. The sentence was found to be startlingly inappropriate and was set aside. The High Court referred the matter back to the Regional Court for a probation officer's pre-sentencing report and a new sentence to be passed.

The social worker in the case, Ms Linda Makhatini, met with the boy in prison. She also met with his mother and sister, as well as the mother of the deceased child. Although the mother of the victim said she was prepared to forgive him, both she and M's mother were not confident that he would be safe in the community, due to the community's anger about the case. The idea of a restorative justice process was mooted, but the victim's mother said that at that stage she was not ready to go through such a process.

Counsel therefore argued for a sentence that was crafted to deal with the specific needs of the case.

Sentence was handed down on 31 October 2006 in Regional Court 4, Pietermaritzburg. The court took into account the fact that M had already served two years in prison. The new sentence reads as follows:

"The accused is sentenced to three (3) years imprisonment, wholly suspended for five (5) years on the following conditions:

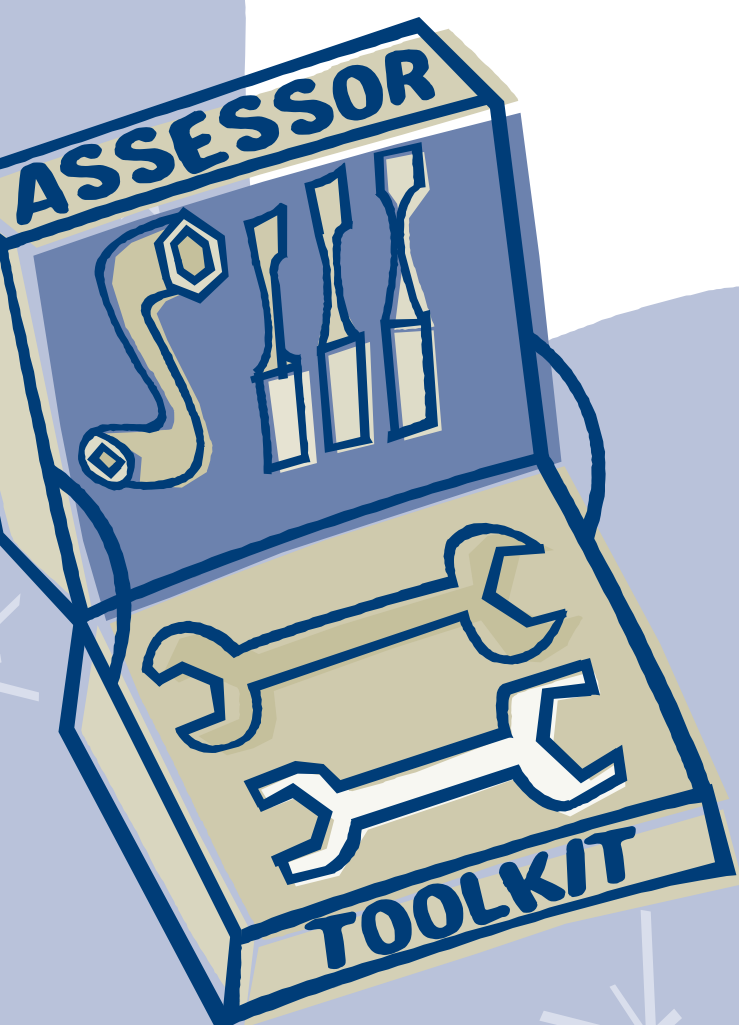
- (i) that he is not again convicted of murder or culpable homicide;
- (ii) that a children's court inquiry be opened in respect of the accused in terms of sections 13, 14 and 15 of the Child Care Act 74 of 1983;
- (iii) that he be placed under the supervision of a probation officer in terms of section 290(3) of the Criminal Procedure Act 51 of 1977;
- (iv) that if and when called upon to do so by the probation officer (within the period of suspension), he will participate in a restorative justice process with the family of the deceased and/or other community members."

This is a creative sentence, in that the fact that there was concern about M's safety in the community will be dealt with through social work intervention to support a children's court inquiry. In the meantime, M will set free from prison to live in a place of safety. If it is found that he is unable to return to the community in the near future, the outcome of the children's court could be a placement in a children's home. The door has been kept open for a restorative justice solution, which could pave the way for his safe return. ●



Assessor toolkit for child justice

by Julia Sloth-Nielsen



As part of a UN mandated request, the UN Office for Drugs and Crime has been working on designing assessor toolkits to enable field workers to assess the compliance of various parts of the criminal justice system with applicable international standards. As part of the series, which include the prosecution service, courts, the police, prisons, and social reintegration, it was decided to include a toolkit on child justice. Obviously toolkits of this nature have to be designed to be applicable in a variety of legal systems, with different legal traditions, and within a huge array of differing country contexts. This toolkit, together with the others, will be launched in Brussels shortly together with the Belgian OSCE presidency, and will also be available on the website of the UNODC (www.unodc.org).

The juvenile justice toolkit spans two discrete areas: children in conflict with the law, and child victims and witnesses who may interact with legal systems in various other ways. The first part is again divided into further sections. The first deals with the legal and regulatory framework, which includes both general measures that define and describe the system applicable to children in conflict with the law, as well as questions pertinent to specific

areas, such as diversion, initial contact with the authorities, the adjudicatory process, restorative justice (as a discrete area of investigation), institutional treatment and after care and reintegration. Then the attention turns to identified vulnerable groups in respect of whom separate and context-specific additional answer may be sought. The three groups dealt within in this section are children who are living or working on the street (who frequently find themselves caught up in criminal justice processes), child soldiers and armed gang members, as well as the particular circumstances of girl children.

Next, under the heading 'management and coordination' an assessor's attention is directed to the system co-ordination and management aspects inherent in an inter-sectorally applied series of actions (arrest, trial, serving of sentence, for example) as well as the fiscal control and budgets attached overall to the child justice system (or any part thereof). Research and policy making are also highlighted, as is the need to focus on the role of donor agencies and civil society partnerships.

A sample of the style adopted by the toolkit will illustrate the type of guidance it attempts to provide, using the questions specific to the circumstances of the girl child:

- "A. How are girls in conflict with the law treated? Are they held separately from boys, and from adults, including female prisoners, when deprived of their liberty in any way? Do they enjoy the same rights as boys in the juvenile justice system? If they are held in general women's institutions are they provided with separate facilities? Is access to education and vocational programmes ensured for children when they are held in general women's institutions?
- B. Do girls have equal access to services as boys, including alternative dispositions, and access to education and vocational programmes? Do they have access to equal recreational facilities?
- C. Are special measures being taken to protect girls from all forms of violence whilst in the juvenile justice system? Are the staff of the institutions specially trained and selected to deal with girls? What is the ratio of male vs female staff in the institu-

tions where girls are held? Are girls who have been victims of violence provided with reintegration services, including mental health care? Are there records of rapes or other gender-based violence against girls in institutions? Are there records of interventions or disciplinary measures being taken against staff in such cases?

- D. Are special programmes or facilities available for girls in conflict with the law who are/become pregnant? How does the juvenile justice system deal with pregnant girls who come into conflict with the law?"

Turning to part B of the toolkit, here the focus is on the many and varying situations in which children interface with criminal and other judicial processes, ranging from care and welfare proceedings, to family violence proceedings, to criminal cases. The toolkit points out that for this reason, a potentially vast array of sources may have to be consulted, including welfare sources, NGO reports from organisations providing services to victims, victimisation surveys, reports of national human rights commissions, not to mention the obvious ones – courts, justice and prosecuting authority reports.

Again, the toolkit poses a series of questions, based to a large extent on the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (adopted by ECOSOC Resolution 2005/20 of 22 July 2005). As before, they cover the themes legal and regulatory framework, institutional framework (which seeks to identify who the principle stakeholders are in protecting and providing services to child victims of crime), two categories of especially vulnerable child victims (namely child victims of trafficking and child victims of commercial sexual exploitation), management and co-ordination (which focuses especially on the need for specialised training in child development, child psychology and children's rights for those rendering services to, or working otherwise with, child victims), fiscal control and budgets, and finally donor coordination. A dedicated final section poses some important questions related to research in this sphere, especially the need for research pinpointing the causes, trends and problems pertaining to the victimisation of children, and the need for policy and programmatic responses to be based on 'appropriate, detailed and targeted evidence-based research'.

The final part of the assessor toolkit consists of a template to assist track what information can be found to provide answers to specific questions, and what the sources of that information might be.

Even if one does not intend using the assessor toolkit as a fieldworker or investigator, it nevertheless is useful in other respects. It allows for an in-country focus on what data does exist, where gaps need to be filled, and what (based on the international standards and guidelines) needs to be able to be answered in the long term. Further, since the toolkit was developed to accommodate disparate legal systems and contexts, it is potentially a useful pointer to areas that have not previously emerged as a focus in South Africa (e.g. the questions noted above about what happens to pregnant girls in conflict with the law). Third, the toolkit tackles new ground in taking forward the recent UN Guidelines on Child Victims and Witnesses, and elaborating the sphere(s) of application of these Guidelines, as well as setting at least a preliminary agenda for further research in this somewhat neglected area. ●

Placing Children's Rights into Local Municipality Plans

by Buyi Mbambo: Independent Consultant on Children's Rights

The Constitution of South Africa gives recognition to local municipalities as the third and local sphere of government. According to the Constitution the objects of local government include:

- to ensure the provision of services to communities in sustainable manner
- to promote social and economic development
- to promote a safe and healthy environment
- to encourage the involvement of communities and community organisations in matters of local government

Each municipality has developed an Integrated Development Plan (IDP) which sets out how the municipality seeks to fulfill its mandate. A scan of some of these IDPs shows that even though they have good intentions in terms of developmental issues, specific attention to children's requirements is scarcely mentioned. The word "child" is rarely mentioned in most of them. It is always taken for granted that children will benefit – the "trickle down effect" – from services that benefit the whole community.

The implications of signing the United Nations Convention on the Rights of the Child (CRC) and other instruments relating to children is that there is an expectation that legislation at all levels (including local government) will be brought into compliance with the provisions of the CRC. This means that municipality by-laws, for example should pay attention to children's needs and requirements.

How can children be ensured visibility at local government level?

Some local municipalities in South Africa have begun processes to place children's rights issues onto local government agenda and plans. These efforts are being supported by international organisations such as UNICEF (in KZN and EC), Save the Children in the Free State and NGO facilitated work supported by the Nelson Mandela Children's Fund in Port St John Municipality in the Eastern Cape, to mention just a few. Lessons learned from these processes (which are work in progress) show that it is possible to introduce children's issues into local government using the rights-based approach. Child justice is one of the critical children's rights issues that is also being looked at alongside a range of other rights. The following are issues for consideration:

(a) Raising awareness of children's rights

A deeper level of awareness of children's rights issues is a prerequisite for local municipality leaders and structures. This awareness is essential for changing attitudes towards children. Thinking about the rights of children should be a matter of business as usual for municipalities. During these awareness raising efforts mayors, councillors, various municipality structures and local leadership structures



are targeted. Information on what constitutes children's rights is shared. Local debate and discussion is promoted. In the Eastern Cape this has resulted in a high level of political buy-in. The Mayor of the OR Tambo District Municipality instructed that a Children's Desk be established in all local municipalities within the district. Resources were mobilised for such Children's Desks with the intention that they mobilise the community, mobilise resources and see to the implementation and monitoring of plans to address children's rights issues.

(b) Training and capacity development on children's rights

In order to address children's rights issues it is important that local officials acquire new and different sets of knowledge and skills. For instance, many local government officials are highly knowledgeable on infrastructural development issues as well as administration of local government policies and frameworks. Children's rights require an understanding of different policies, legislation and their implications on service delivery. For children in conflict with the law, it has been found that there is always an attitude of intolerance for children involved in crime. Diversion is least understood at local level. The training includes how local municipalities can use their existing structures and youth development programmes to support children caught up in the criminal justice system.

(c) Plans of Action for children

As mentioned earlier, municipality plans in the form of IDPs make little or no reference at all to children. Some of the municipalities mentioned in this paper have undertaken a process of developing a Local Plan of Action for Children. Those plans are developed following a series of consultations with a range of stakeholders, including children themselves. In

KwaZuluNatal, the Nkandla Local Municipality used the Millennium Development Goals and the Municipality's Development Vision for 2014 as a framework to address children's rights. It was deemed important to go through a process of developing a Children's Plan, in order to pay proper attention to children's issues, to use the process to raise more awareness and build partnerships, for consensus building on priority issues.

Children's issues were then integrated into the IDP during its periodic review. The IDP then included a couple of specific programmatic actions relating to children's rights and this was taken up with Provincial Treasury – the IDP was used to mobilise more funding for children's programmes at local municipality level. A similar process was undertaken in the Eastern Cape by the Mhlontlo Local Municipality. The Plan of Action for Children was used to mobilise resources for the establishment of the Children's Desk and appointment of a Children's Desk Coordinator to oversee children's issues.

Information gathering and Baselines

In order to be able to assess the impact of the programme it is important to obtain baseline information on the conditions of children. This is a very difficult aspect of the process because information management systems at local level are particularly weak. What was done was to develop data using existing information and records. For example, SAPS, the Department of Social Development and the Department of Justice keep records of arrested children. Prosecutors keep records of children who have gone through the courts and are supposed to keep records for children who have been diverted. This process of data gathering looked at existing information. Even though the record keeping systems still

need to be improved and coordinated at local level, a picture of what is happening in the area of child justice emerged. This information was fed back to the community for action and monitoring. Basic tools will be included in the training module. Information on other rights issues, such as in the child protection sector, education, health, etc. were obtained in the same manner.

Participation of Children

Admittedly this has been rather weak component of the process; there has been a level of engaging children to identify issues of their concern. The process is deemed weak because the municipalities are so vast and it is always difficult to extend the process to all localities. There are never enough resources to engage children adequately. Only a selection of children participated and there has not been evidence of sustaining the children's group beyond the planning phase in order to have them involved in monitoring the implementation. Despite this weakness, it is worth citing the example of the Eastern Cape where children raised environmental issues as one of their main concerns. Children expressed the fact that the environment was not safe – community amenities were located in inappropriate and dangerous spots. This prompted a programme to improve the safety of children, which is implemented by the NGO Umthatha Child Abuse Resource Centre. This is an area to look at and possibly develop capacity of structures such as Ward Forums as well as youth structures at local level.

Implementation

It is still early stages yet to draw implementation related lessons from the processes that have been initiated by these municipalities. The principles guiding implementation is that municipalities should begin with the "doables" by trying to mainstream children's issues. Making municipalities safe places for children is something that does not require an extra-ordinary injection of funds. It is something that the municipality should be conscious of as part of urban or rural planning and development efforts. An example relating to child justice is when a causality analysis is conducted on why children commit crimes. Usually, lack of recreational facilities is cited as one of the causes. Provision of recreation is one of the mandates of local municipalities. Therefore as part of fulfilling their mandate, municipalities should keep this in mind, and ensure that all recreational facilities are decentralised, accessible and well-equipped. Safety considerations most of the time do not require extra resources. In putting up a children's park for instance, environmental conditions should be a consideration – accessibility to children, child-friendly equipment, and security whilst children are at play, light, availability of safe toilets, water, etc. Municipalities can regulate traffic issues by putting road humps where children cross, garbage collection should be driven by "what is the best interest of children". For instance, if garbage is left lying around, children can find harmful objects such as used needles, used condoms (which they like to blow like balloons unfortunately!). For children caught up in the criminal justice system, these projects can be used for diversion and community service orders and the municipality can have a role in monitoring them. To be able to implement such project with a child at the centre of planning requires a high level of awareness and consistent monitoring, but it can certainly be done and the criminal justice system can benefit therefrom.

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Restoring self respect

through rituals in wild places

by Don Pinnock & Tony Naidoo

More than 12 years ago, when the ground rules that would lead to the Child Justice Bill were being hammered out, diversion became a fulcrum issue. Youths sent to prison didn't reform; they simply got deeper into the cycles of abuse and crime. Now it's obvious why that happened, but back then it required revolutionary thinking. One of the crucial questions that arose was: diversion to what? Thousands of youths were being pulled into the criminal justice system but there were almost no appropriate programmes to send them to if they were diverted.

Scope of the programme

Usiko (the name means first ritual in Zulu) began as the first steps towards solving this problem. Based on notions of rites of passage (common parlance now, but almost unheard of then), it explored the importance of rituals for young people together with the healing power of wilderness areas far from city distractions. Now nearly seven years old, this programme has been a learning curve for its initiators, mentors and the youths who undergo this nine-month intervention programme.

The programme was first set up in Bonteheuwel, Cape Town, and in Jamestown near Stellenbosch. Its core principles included intense mentorship (re-fathering), wilderness experiences, rituals of transformation, and both youth and community buy-in. Initially the initiates were only young men, but Jamestown now also has a programme for young women.

Usiko currently runs school-based prevention programmes, as well as a diversion programme for youth referred by the courts. Once selected by their schools, communities or the courts, the young people spend time with their mentors; participate in courses on life skills, conflict resolution, sexual awareness, HIV and leadership, and undertake sessions in the wilderness.

In the mountains they are posed physical and emotional challenges. They learn new skills and gather stories about themselves that bolster their self-esteem. A major 'test' is to go solo – spending one or several nights alone in the wilderness, reflecting on their life direction. Completing this task is marked by a celebration and triumphant homecoming.

At least 400 young people have passed through the Usiko programmes. Follow-ups have found that not one of them has joined a gang. Two initiates are currently participating in leadership programmes in Canada. Three have gone on to study at college and university and several have come full-circle to become mentors in the programme.

Re-authoring their lives

Insights which inform the programmes are that adolescents – especially if they have had poor parenting or violence in their homes – desperately need caring adults and their peers to restore their self-esteem. This is one of the reasons for the high number of gangs in Cape Town.

The Usiko programme creates an alternative space for youth to cultivate a sense of belonging, mastery, independence and generosity. Youths who have clashed with the law are guided through a cycle of change in which they are challenged to review, restore, reintegrate and revise their lives.

Usiko uses these understandings to forge the initiates into a circle of trust and respect by taking them into what to them seem dangerous adventures – wild places, sleeping rough, hikes into the unknown, trust rituals. In doing these things, initiates gain the respect of their mentors and have experiences that make fascinating retelling. And in retelling these stories, they get a sense of who they are and who they might become. They are given an opportunity to re-author their lives!

It works – spectacularly – and there have been heartening scenes of personal reassessment shared in both laughter and tears. These initiatives speak of the essence of restorative justice. ●

Placing Children's Rights into Local Municipality Plans

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Monitoring

Unless indicators to measure progress have been set, it would be difficult to measure the success of the children's rights initiatives at local level. It is therefore important that on each children's rights issue, at least five core indicators are developed and these should be public knowledge. The municipalities have established Local Coordinating Structures to monitor the Plans of Action for Children. These are intersectoral and are coordinated at municipality level. Once again monitoring and evaluation generally is a weak area in most of these initiatives. It requires that partners and role-players supply data consistently. It also requires that the Children's Desk Coordinators be knowledgeable in children's rights and basic monitoring. In some instances this level of knowledge is not available. There is still a lot of work that needs to be done by the supporting international organisations including government as local monitoring structures can ensure the proper management of information from local right up to national level. A number of children's laws require that monitoring structures be established at provincial, district and local level. These provisions could well be utilised to improve monitoring structures at municipality level. The Child Justice Bill also makes for such a provision; therefore it provides an opportunity to monitor child justice at local level. ●

Note

This article is a personal reflection of the author of this article based on her observations having been part of some of the initiatives in the municipalities referred to in this article. It does not reflect the views of the municipalities and organisations that support this work. For more information on children's rights work at municipality level, Buyi can be contacted at : buyimbambo@webmail.co.za

NOTICE-BOARD



FAMILY LAW CONFERENCE

Miller Du Toit Inc and the Faculty of Law at the University of the Western Cape will be hosting their annual Family Law Conference in January 2007 entitled The 2nd Decade of Democracy – Equality, Children’s Rights and Access to Justice

The conference will take place on Thursday, 25 and Friday, 26 January 2007 at the Hotel Protea President, Alexander Road, Sea Point.

For more information contact Joan Cornish at:

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NEW REPORTS

- The UN Office on Drugs and Crime has just launched the **2006 World Drug Report**. The publication can be accessed at http://www.unodc.org/unodc/en/world_drug_report.html
- A new report by Rob Allen of the Centre for Crime and Justice Studies has just been released entitled “**From punishment to problem solving. A new approach to children in trouble**”. Copies can be accessed on <http://www.kcl.ac.uk/depsta/rel/ccjs/2006-punishment-to-problem-solving.pdf>



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