

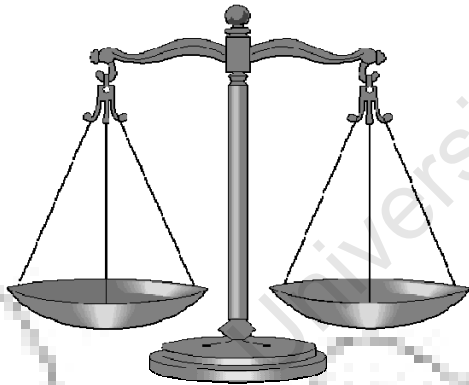
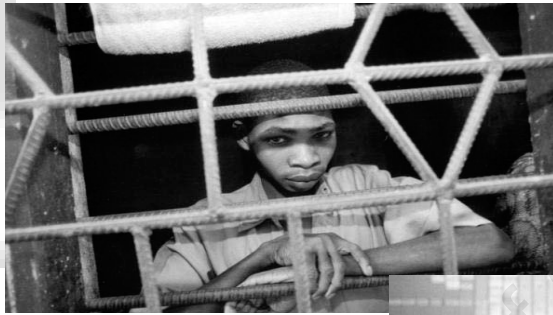
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# **CHILD JUSTICE IN BOTSWANA:**

## **THE COMPATIBILITY OF THE CHILDREN'S ACT WITH INTERNATIONAL AND REGIONAL STANDARDS**

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Research dissertation presented for the approval of Senate in of part of the requirements for the degree of Master of Laws in Human Rights in approved courses and minor dissertation at the University of Cape Town. The other part of the requirements for this qualification was the completion of the programme of courses.

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## Declaration

I hereby declare that I have read and understood the regulations governing submission of the Master of Laws dissertations including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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**Kepaletswe Chikhwa Somolekae**

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## **Dedications**

This thesis is dedicated to the loving memory of my late grandfather Tom Kenyemenya Ngubula and my grandmother Tjabongwa Ngubula, without their love, nurturing and constant support I would not have made it this far.

University of Cape Town

## Acknowledgments

I wish to express my deep gratitude and sincere appreciation to my supervisor, Professor Danwood Chirwa for his guidance, insight, support and patience in writing this thesis.

To my husband, Bochengedu for his tremendous encouragement, dedicated support and being the best single father throughout the year. Thank you Dear!

To my daughters Shathani and Wedu, for encouraging me to study hard and to have fun while at it and patiently waiting for me to come home.

To Moyo, my little sister, UCT would not have been the same without you around. Thank you for being there for me throughout the year. You showed me around Kramer law building when I first arrived, and I was overwhelmed by the place and thought I would get lost every day and miss lectures. You were my mentor on how to log into Vula and access materials, you showed me how to find cases on line, I could go on and on, the list is endless. I just want to appreciate you for all you have done for me and to let you know that sisters are for sharing laughter and wiping tears, we did just that together in Cape Town and I will cherish every moment we shared studying together at UCT.

To my pastors Tyler, Elizabeth and Jenna, your prayers, support and encouragement to my family throughout the year have been a tremendous source of strength and a constant reminder of God's love and faithfulness. I thank God for you.

To my friend Grace Zitha, for covering me in prayer all year round.

To all my family members, nearby and extended and friends for their constant support throughout the year, thank you.

Finally to the Lord Almighty, I am not qualified to do anything on my own, my qualifications come from you. Thank you Lord, for I could not have accomplished this task without your power and grace. Guide me to use the knowledge that I have gained wisely to serve you and for the benefit of others.

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## ACRONYMS

### 1. Abbreviations

CRC	United Nations Convention on the Rights of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
ICCPR	International Covenant on Civil and Political Rights

### 2. Short names

Beijing Rules	Standard Minimum Rules for the Administration of Juvenile Justice
CRC Committee	Committee on the Rights of the Child
JDLs	UN Rules for Juveniles Deprived of their Liberty
Riyadh Guidelines	UN Guidelines for the Prevention of Juvenile Delinquency

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## Chapter I

### INTRODUCTION

#### 1. Introduction

When Botswana attained independence from Britain in 1966, it was ranked among the top 10 poorest countries in the world.<sup>1</sup> However, by 1970, with the discovery of diamond and copper nickel, the country had become economically secure.<sup>2</sup> The government invested the returns from mining into improving the living standards of the majority of the population through the provision of education and health care services; and the development of physical and social infrastructure. Along with the growth of the major mining towns, associated new towns and infrastructure mushroomed throughout the country, ushering in an era of industrialisation.<sup>3</sup> The transformation in the economy prompted by the widespread rural-to-urban labour migration<sup>4</sup> ultimately put a strain on the traditional family structure and eroded its role and that of the community in shaping the lives of young people.<sup>5</sup>

Initially, government offered free education only for primary school learners and thereby produced masses of unemployable out-of-school youths, who quickly channeled their energies into crime and other anti-social behaviour, setting in motion a legacy of juvenile delinquency which Botswana is still grappling with today.<sup>6</sup> At that time, Botswana did not have a separate justice system to adjudicate over children in conflict with the law. Such children were therefore (subject to a few exceptions and concessions), treated in the same way as adults. They were processed through the same criminal court system, bound by the same substantive and procedural laws, rules, and were punished in a similar fashion.

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<sup>1</sup> Thomas Tlou & Alec Campbell *History of Botswana* (2006) 302.

<sup>2</sup> Dahlgren Stefan *et al SIDA's development assistance to Botswana 1966-1993: An evaluation of 27 years of development co-operation with Botswana* (1994) 44.

<sup>3</sup> *Ibid* 44.

<sup>4</sup> Bojosi Othogile 'Child delinquency in Botswana and the 1981 Children's Act (1985) xviii *Comparative and International law Journal of Southern Africa* 396 at 396.

<sup>5</sup> *Ibid*.

<sup>6</sup> Othogile (note 4) 397.

It was only in 1981, with the enactment of the Children's Act, that Juvenile justice became a part of Botswana's law.<sup>7</sup> The impetus for the introduction of juvenile justice sprang from concerns that children were increasingly brushing with the law at an early age and courts struggled to deal with such cases because there were few alternatives to imprisonment.<sup>8</sup> The Children's Act therefore comprehensively provided for the care and protection of children in need of care and treatment of child offenders.<sup>9</sup>

In its title, the Act provides for '[t]he custody and care of children; for the appointment of commissioners of child welfare; for the establishment of children's and juvenile courts and certain institutions for the reception of children; and for other matters connected therewith'.

Part VI of the this statute makes provision for the establishment of juvenile courts, the appointment of their officers and procedures and rules for dealing with juvenile offenders. Part VI is dedicated to the establishment of institutions for the reception of children including juvenile offenders. A juvenile court has jurisdiction to hear and determine any charge against any person between the ages of seven years and 18 years.<sup>10</sup>

The 2001 Population and Housing Census revealed that Botswana had a relatively large youthful population. Out of the 1,680,863 people living in Botswana at the time, about 732,053 or 43.65 percent were youths or people between 1 and 29 years. In addition, most relevant to this study, 28.7 percent were aged between 10 and 14 years while 27.8 percent were aged 15 and 19 years.<sup>11</sup> The young population is not evenly distributed throughout the country with most of them (56.7 percent) living in the urban areas mainly in the two major cities – Gaborone and Francistown. Of the urban youth population, the 10-14 year-olds and the 14-19 year-olds account for 23 percent and 26 percent respectively.<sup>12</sup> The concentration of young people in the urban areas is attributed to their quest for greener pastures.

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<sup>7</sup> Children's Act 1981 (CAP 28:04).

<sup>8</sup> Hansard 70 Fourth Parliament sitting from 23 February to 31 March 1981 13.

<sup>9</sup> Ibid.

<sup>10</sup> Section 22(2). Ibid.

<sup>11</sup> Analytical Report, Botswana 2001 Population and Housing Census 268-9.

<sup>12</sup> Analytical Report (note 11) 276.

This study is mostly concerned with primary and junior secondary school drop outs whom, due to lack of skills and work experience, are unlikely to get absorbed in any economic activity or vocational training because of the limited number of such centers. As a result, they become idle ending up engaging in social ills such as crime and drug abuse that are often propagated by negative peer pressure<sup>13</sup>. This could be the major reason why at the last census there were over 2000 young people in prisons.<sup>14</sup> These numbers illustrate the extent of child delinquency in Botswana and calls for appropriate legal measures to address it.

The Children's Act came into effect, almost a decade and two decades before the United Nations Convention on the Rights of the Child (CRC)<sup>15</sup> and the African Charter on the Rights and Welfare of the Child (ACRWC) entered into force respectively.<sup>16</sup> This implies that the Act is now obsolete and does not stand up to the provisions of the two international and regional instruments and the emerging realities of the youth in Botswana.<sup>17</sup>

To lay the ground for an informed and comprehensive assessment of the efficacy of Botswana Children's Act, this study will first trace the historical evolution of the law on juvenile justice. This will be followed by a critical analysis of the scope, objectives, rights and guarantees provided by the Children's Act for children in trouble with the law. The study will assess the efficacy of this piece of legislation in safeguarding their rights. This will be viewed against the backdrop of Botswana's obligations under the relevant international and regional instruments.<sup>18</sup>

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<sup>13</sup> Analytical Report (note 11) 271.

<sup>14</sup> Analytical Report (note 11) 275.

<sup>15</sup> On 2 September 1990. UN Convention on the Rights of the Child General Assembly Resolution 44/25 of 20 November 1989.

<sup>16</sup> On 29 November 1999. African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49 (1990).

<sup>17</sup> Bugalo Maripe 'The recognition and enforcement of children's rights in domestic law: an assessment of child protection laws in Botswana' (2001) 9 *International Journal of Children's Rights* 339 at 342.

<sup>18</sup> CRC, ACRWC, UN Standard Minimum Rules for the Administration of Child Justice (Beijing Rules) General Assembly Resolution 40/33 of 29 November 1985, UN Rules for the Protection of Juveniles Deprived of their Liberty General Assembly Resolution 45/113 of 13 December 1990, UN General Assembly Guidelines for the Prevention of Child Delinquency (Riyadh Guidelines) General Assembly Resolution/45/112 of 14 December 1990.

## 2. Background

The CRC along with other international treaties and documents contain standards and norms setting out state obligations on the preservation of the family, legal protection of the child in family relations and protection of the child from specific forms of violence in a wider social environment.<sup>19</sup> Complementary provisions of the CRC provide for the protection of the rights of those children who find themselves in conflict with the law.<sup>20</sup> How the state deals with such children must therefore be consistent with the rights of children enshrined in these provisions.

Recognising that children are mostly likely to experience violations of their rights while in policy custody, the overarching principle of the child justice system in the CRC is the rule that the arrest, detention or imprisonment of children may only be employed as measures of last resort. Where detention is the appropriate course of action in the circumstances, it must be for the shortest period of time.<sup>21</sup>

The CRC also calls for a system of juvenile justice that is sufficiently distinct from the adult criminal justice system and which focuses on the needs of the children. Accordingly, the proceedings must be informal to allow the child to participate and must be held in camera (not open to the general public and the media) to protect their privacy. The adjudicator in such cases must endeavour to pass sentences appropriate to the child offender's age.<sup>22</sup> These stipulations recognise the fact that children are fundamentally different from adults in terms of their level of maturity, responsibility and their potential for rehabilitation. Their treatment and successful reintegration into society are therefore the main goals of child justice.

Like the CRC, the ACRWC, also recognises a child's right to be heard either directly or through a representative in all judicial or administrative proceedings affecting him/her,<sup>23</sup> a child's right to privacy,<sup>24</sup> and guarantees due process rights in the

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<sup>19</sup> Ivana Stevanovich 'Combining child justice with family law reform in Serbia' in Eric L Jensen & Jorgen Jepsen (eds) *Juvenile law violators, human rights and the development of new juvenile justice systems* (2006) 391 at 392.

<sup>20</sup> Articles 37 and 40.

<sup>21</sup> Article 37(c).

<sup>22</sup> Article 40.

<sup>23</sup> Article 4.

<sup>24</sup> Article 10.

administration of child justice.<sup>25</sup> As party to both the CRC and the ACRWC, Botswana is bound to undertake the obligations contained in the two instruments and in the context of this study– those relating to the treatment of children in conflict with the law.

### **3. Scope and objectives of the study**

This study will first examine the historical evolution of the law on juvenile justice and the development of international standards regulating juvenile justice. This will lay the ground for a comprehensive assessment of the efficacy of Botswana's Children's Act concerning child justice. This will entail a critical analysis of the relevant provisions of the Children's Act, and an assessment of the extent to which the Act is sensitive and responsive to the needs and welfare of the children in conflict with the law. The study will also review the role of the courts in the protection of children's rights during the criminal justice process, and consider the extent to which the Act and the court practice comply with the aspirations and objectives of the CRC and the ACRWC.

The purpose of this study is to raise the level of awareness and understanding of the international law on the administration of juvenile justice; highlight Botswana's level of compliance with the international regime on child justice; and illuminate the challenges involved in the administration of justice for child offenders among decision makers and the justice sector stakeholders in Botswana. It is hoped that the study will foster the establishment of a fair and humane juvenile justice system which recognises, respects and protects the rights of children in conflict with the law.

### **4. Methodology**

The research will predominantly be desk-top- based, in which an in-depth analysis of domestic laws, jurisprudence and policies and international law on juvenile justice will be done. It will specifically focus on the CRC and the ACRWC's provisions on juvenile justice and highlight the shortcomings of the Children's Act against these instruments and the challenges that poses for an efficient and effective delivery of child justice in Botswana.

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<sup>25</sup> Article 17.

## **5. Chapter Synopsis**

### **Chapter I: Introduction.**

This chapter outlined the focus of the study, and drew out the scope, objectives and methodologies for research.

### **Chapter II: Origins and development of the laws on child justice**

Chapter two traces the historical development of the law on juvenile justice from the historic Illinois Juvenile Court Act of 1899 and its evolution up to the 1970s.

### **Chapter III: International framework on child justice**

Chapter three looks at the development of international norms and standards on juvenile justice and identifies critical ideas and concepts that shape the laws regulating juvenile justice today. The chapter will lay a foundation for a critical evaluation of the efficacy of the provisions of Botswana's Children's Act on juvenile justice and their compatibility with international standards.

### **Chapter IV: Child justice under Botswana's Children's Act**

Chapter four will focus on child justice in Botswana. This entails critical assessment and analysis of the relevant provisions of the Children's Act, and examination of the extent to which they are sensitive and responsive to the needs and welfare of the child offenders. It also reviews the role of the courts in the protection of child rights during the criminal justice process, and how well the Act and the court's practice incorporate the aspirations and objectives of the CRC the ACRWC. Inherent flaws and loopholes, which exist in its provisions regarding child offenders, will be addressed and suggestions made on how the Act can be improved to bring it in line with the goals of the two treaties.

### **Chapter V: Conclusion and recommendations.**

This chapter gives a general overview of the thesis and concludes with recommendations for review of the provisions of the Children's Act dealing with child justice.

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## Chapter II

### ORIGINS AND DEVELOPMENT OF THE LAWS ON CHILD JUSTICE

#### 1. Introduction

To gain a full understanding of the current laws on juvenile justice, it is necessary to get acquainted with the origins of the juvenile justice system and how it evolved over time. The developments in the United States' juvenile justice system influenced the beginnings of a global movement on juvenile justice and subsequently led to the development of international norms and standards on juvenile justice that are the subject of the next chapter in this thesis. This chapter therefore traces the development of the law on juvenile justice from the historic Illinois Juvenile Court Act of 1899 and its evolution up to the 1970s.

#### 2. The historical development of the law on juvenile justice

The path to the modern juvenile justice system began in 1899 when the Illinois legislature passed the Juvenile Court Act in 1899.<sup>26</sup> The Act created the first juvenile court to deal with delinquent and neglected children under the age of 16 years. It laid the foundation for the rest of the states in the US and, by 1917, all but three states had adopted similar laws. By 1932, there were 600 independent juvenile courts in the United States.<sup>27</sup>

The juvenile justice movement was not confined to the United States. Subsequent years would see it spread abroad to Great Britain, Canada, Switzerland, France, Belgium, Hungary, Croatia, Argentina, Austria, India, the Netherlands, Madagascar, Japan, Germany, Brazil, Spain, Mexico, Australia, New Zealand, Sweden,

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<sup>26</sup> Illinois Juvenile Court Act (1899) III Laws 133.

<sup>27</sup> Joel F Handler 'The juvenile court and the adversary system: Problems of function and form' (1965) 81 *Wisconsin Law Review* 7.

Czechoslovakia, Egypt, Poland and South Africa.<sup>28</sup> A study by the League of Nations in 1931 found that juvenile courts existed in 30 countries.<sup>29</sup>

The development of juvenile justice institutions in the United States in the first half of the 19<sup>th</sup> century was due to the increasing industrialisation and associated labour migration, which brought thousands of people into the country's cities, causing overcrowding and a sharp increase in crime committed by both adults and juveniles.<sup>30</sup> Prior to the inception of the juvenile courts in the United States, juveniles and adults charged with crimes had the same rights and were subject to the same forms of punishment. Like an adult, a juvenile who had reached the common age of responsibility could be arrested, indicted, tried and imprisoned if convicted.<sup>31</sup> The introduction of the juvenile court system was therefore part of a general shift aimed at removing children from the adult criminal law process and creating special programmes for delinquent, dependent, and neglected children.<sup>32</sup>

The Chicago Women's Club and the Hull House Community spearheaded the drafting of new legislation by offering a series of proposals pointing out the shortcomings in the proper care of delinquent children in Chicago to the Bar Association in October 1898.<sup>33</sup> These included the incarceration of children in the same places as vicious adult criminals; the lack of provision for dependent children other than public almshouses; and the fact that judges were overwhelmed with other work that they could not devote due attention to children's cases.<sup>34</sup> The Bar Association accepted the proposals and appointed a committee to draft the necessary legislation.<sup>35</sup> Other child welfare agencies<sup>36</sup> joined in the lobbying for the law and together presented a united front of reformers, which eventually culminated in the passing of the Juvenile Court

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<sup>28</sup> Frederick Faust & Paul J Brantingham *Juvenile justice philosophy readings, cases and comments* (1979)15.

<sup>29</sup> UNICEF (1998) Innocenti digest: Juvenile Justice 10, available at [www.unicef-irc.org/publications/pdf/digest3e](http://www.unicef-irc.org/publications/pdf/digest3e) [accessed on 11 October 2009].

<sup>30</sup> Paul R Kfoury *Children before the court reflections on legal issues affecting minors* (1987) 41.

<sup>31</sup> Ibid.

<sup>32</sup> Anthony M Platt *The child savers: The invention of delinquency* (1969) 10.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Such as the Chicago Bureau of Associated Charities, Catholic Visitation and Aid Society, Protestant Illinois Children's Home and Aid Society.

Act on 14 April 1899. It created the first juvenile court in the world and a judicial framework that would serve as a model for other states to follow.<sup>37</sup>

### 3. The Illinois Juvenile Court Act

The objective of the Act was ‘to regulate the treatment and control of dependent, neglected and delinquent children’. It gave the court jurisdiction over all persons under the age of 16 whom it deemed delinquent, dependent or neglected. It also established ‘juvenile delinquency’ as a legal concept and thus distinguished between children who were delinquent and those that were merely neglected. Delinquent children were those under the age of 16 years who violated the law, while dependent and neglected children were those who committed status offences.<sup>38</sup> Most importantly, the Act established a court and a probation programme specifically designed for children and allowed them to be committed to institutions and reform programmes under the control of the state.

Special procedures were developed to govern the adjudication of juvenile matters. In this respect, the administration of juvenile justice was to differ in many important aspects to the usual criminal process. The Act sought to remove all traces of the criminal system from the new juvenile court: it used chancery procedures instead of criminal procedures and changed the terminology in order to eliminate all connection to criminal law.<sup>39</sup>

It is important to note, however, that the juvenile court was not to be a new or independent tribunal but merely a special jurisdiction within the circuit court. Circuit court judges chose and appointed among themselves, a special judge to adjudicate juvenile cases in facilities separate from the adult courthouse.<sup>40</sup> The physical surroundings of the court also changed to make them less intimidating than a courtroom. Instead of sitting behind a bench a judge sat at a desk or table and had to

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<sup>37</sup> Elizabeth J Clapp ‘The Chicago juvenile court movement in the 1890s’ available at [www.le.ac.uk/hi/teaching/papers/clapp1.html](http://www.le.ac.uk/hi/teaching/papers/clapp1.html) [accessed on 6 November 2009].

<sup>38</sup> Section 1. Section

<sup>39</sup> Chancery procedures were more flexible and administrative than common law court procedures and carried the power of guardianship over persons, especially children, who lacked adequate remedies at law.. Megan M Sulok ‘Extended jurisdiction juvenile prosecutions: To revoke or not to revoke’ (2007)

<sup>39</sup> *Loyola University Law Review* 215 at 225.

<sup>40</sup> Section 3. Ibid.

be fatherly and sympathetic while still authoritative and sobering.<sup>41</sup> The records of the court were kept separately in a child record.<sup>42</sup> Formal rules of evidence and jury trial were dispensed with although interested parties could demand a jury trial or the judge on his own motion could order one.<sup>43</sup>

The informality of procedures was a major part of the rehabilitative process and resulted in proceedings that were minimally adversarial without the due process safeguards.<sup>44</sup> Lawyers were excluded because the adjudication focused on the child's background, welfare and the services the child needed for reformation, not on the circumstances surrounding the commission of a specific crime.<sup>45</sup>

In adjudications over delinquent children, the court had the power to release the child into its parents' custody, subject to the care and guardianship of probation officers. This entailed home visitations by the probation officer, or the child reporting to the officer as often as required, pending the final adjudication of the case. The court could also commit the child to the care and guardianship of the probation officer who would place him/her in a suitable family home, subject to the friendly supervision of the probation officer. The officer could also board out the said child in a suitable family home, if there was provision for payment of the board, or he would commit the child to a training school for boys or an industrial school for girls.<sup>46</sup>

The adjudication proceedings were conducted in privacy to the exclusion of the public and the press and records of proceedings were generally unavailable for inspection.<sup>47</sup> Confinement was used as a measure of last resort and in cases where it was deemed necessary, the child was housed in a way which would give him the rehabilitation and

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<sup>41</sup> Sulok (note 39) 219.

<sup>42</sup> Section 3.

<sup>43</sup> Section 2. Sulok (note 39) 219.

<sup>44</sup> Kellie M Johnson 'Juvenile competency statutes: A model for state legislation' (2006) 81 *Indiana Law Journal* 1067 at 1069.

<sup>45</sup> Barry C Field 'The Juvenile Court meets the principle of the offence: Legislative changes in juvenile waiver statutes' (1987) 78 *Journal of Criminal Law and Criminology* 471 at 477.

<sup>46</sup> Section 9.

<sup>47</sup> Monrad G Paulsen 'Fairness to the juvenile offender' (1956-1957) 41 *Minnesota Law Review* 547 at 548.

training he needed.<sup>48</sup> These measures were aimed at avoiding the stigma attached to the criminal proceedings and the consequent conviction.

#### 4. Transformation of the juvenile court system

From its inception in 1899, the juvenile justice system in the United States largely remained unchanged until the 1960's, when due to societal changes, significant aspects of its legal processes came under the spotlight of civil liberties attorneys and criminologists.<sup>49</sup> Statutes establishing most juvenile courts were severely criticised for not following the due process of law, for meting out cruel and degrading punishment, denying equal protection before the law and unnecessarily interfering with the relationship between parent and child.<sup>50</sup>

Much of the criticism was aimed at the court's departure from some of the basic concepts of justice such as the standards used by the court to adjudge adolescents as delinquents, dependent or neglected and therefore subject to official intervention; the vast discretionary powers reposed on the police and the probation officers at the pre adjudication stage, and the lack of important elements of the procedural due process in the adjudication of delinquency before the courts.<sup>51</sup> The reasoning behind the condemnation of the juvenile court system was that it violated constitutional guarantees of due process and stigmatised adolescents as delinquents by incarcerating them in institutions that were, in practice, not distinguishable from adult prisons.<sup>52</sup>

In the period between the 1960s and 1970s, the United States Supreme Court radically changed the face of juvenile justice when it issued a series of decisions that established the rights of juveniles to receive due process of law. The first such decision was in the case of *Kent v United States*<sup>53</sup> where the court held *inter alia* that (i) the state is *parens patriae* rather than prosecuting attorney and judge, but that

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<sup>48</sup> Ibid.

<sup>49</sup> Eric L Jensen 'An historical overview of the American juvenile justice system' in Eric L Jensen & Jorgen Jepsen (eds) *Juvenile law violators, human rights and the development of new juvenile justice systems* (2006) 86.

<sup>50</sup> Matthew J Beemsterboer 'The juvenile court-benevolence in the star chamber' (1959-1960) 50 *Journal of Criminal Law and Criminology* 464 at 467.

<sup>51</sup> Handler (note 27) 8.

<sup>52</sup> Faust & Brantingham (note 28) 20.

<sup>53</sup> 383 US 541 (1966).

admonition to function in a parental relationship is not an invitation to procedural arbitrariness, (ii) petitioner was entitled to certain procedures and benefits as a consequence of his statutory right to the exclusive jurisdiction of the juvenile court including a hearing access by his counsel to the social and probation or similar reports and to a statement of the juvenile court's decision.

*Kent* was followed by *In Re Gault*,<sup>54</sup> which is considered the most influential and far-reaching decision that led to major changes in the child justice system.<sup>55</sup> The Supreme Court held almost unanimously that children in juvenile court hearings had the constitutional right to certain due process protections when they are in jeopardy of being incarcerated. These included the right to counsel; the right to notice of charges; the right to confront and cross-examine witnesses against them; and the privilege against self-incrimination.

In the subsequent case of *In re Winship*,<sup>56</sup> the United States Supreme Court ruled that the preponderance of evidence is not a sufficient basis for a decision of delinquency, and that the due process clause of the 14<sup>th</sup> Amendment to the U.S. Constitution, requires proof beyond reasonable doubt for a conviction in child proceedings.

These Supreme Court decisions prompted dramatic changes in the American juvenile court system and laid the foundation for a more adversarial juvenile justice system with increased legalistic orientation.<sup>57</sup> The development of the American juvenile court system and its reforms, seem to have influenced the inclusion of juvenile justice provisions in the CRC.<sup>58</sup>

## 5. Conclusion

This chapter traced the historical development of juvenile justice philosophy from its 19<sup>th</sup> Century origins, when the progressive reformers in the United States, sought to create a new mechanism that would ameliorate the harsh undifferentiated treatment of

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<sup>54</sup> 387 US 1 (1967).

<sup>55</sup> Jensen (note 49) 86.

<sup>56</sup> 397 US 358, 90 S Ct 1068, 25 L Ed 2d 368 (1970).

<sup>57</sup> Jensen (note 49) at 87.

<sup>58</sup> *Ibid.*

juveniles in the criminal justice system. The reforms culminated in the creation of the first juvenile court in 1899, based on the doctrine of *parens patriae* which, gave the court jurisdiction and wide discretionary powers over delinquent, neglected and dependent under the age of 16 years. The court's informal procedures were aimed at securing the rehabilitation of children, and the means for achieving that.

This chapter has also illuminated the strong concerns expressed by reformers over the violation of the rights of juveniles appearing before such courts. Such violations included the lack of procedural safeguards for juvenile offenders which were routinely available to adults, even though the children were subjected to the same type of penalties as the adult offenders (such as pre trial detentions and incarceration in correctional facilities). These concerns culminated in constitutional challenges against the informal procedures of the juvenile courts, resulting in seminal decisions that overhauled and transformed child justice. These decisions removed the informal procedures and conferred adversarial procedures that, today, characterise international juvenile justice.

## Chapter III

### INTERNATIONAL FRAMEWORK ON JUVENILE JUSTICE

#### 1. Introduction

As the juvenile delinquency became an issue of global concern, an increasing number of states began to look for ways to remove child offenders from the adult criminal court system. It became imperative to develop an international framework which would guide states in establishing their own juvenile justice systems. This chapter maps out the development of international norms and standards on juvenile justice and identifies critical ideas and concepts that have shaped this regime.

Until the last quarter of the 20<sup>th</sup> Century, juvenile justice did not feature prominently on the international human rights agenda.<sup>59</sup> It took a long time for it to get priority at United Nations.<sup>60</sup> The two Declarations of the Rights of the Child adopted by the League of Nations and the United Nations in 1924<sup>61</sup> and 1959<sup>62</sup> respectively recognised the rights of children generally as an issue of international concern, but both were silent on the rights of children in conflict with the law.<sup>63</sup>

In 1955, the Standard Minimum Rules for the Treatment of Prisoners became the first international instrument to give some recognition to the rights of children in trouble with the law.<sup>64</sup> The Rules called for the separation of young prisoners from adults and also the separation of convicts and those awaiting trial in custodial facilities for both adults and children.<sup>65</sup> In 1966, the International Covenant on Civil and Political

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<sup>59</sup> Diane E Hill 'Juvenile justice international' encyclopedia of children and childhood in history and society available at [www.faqs.org/childhood/in-ke/child-justice.html](http://www.faqs.org/childhood/in-ke/child-justice.html) [accessed on 23 November 2009].

<sup>60</sup> A D Viccica 'The promotion and protection of children's rights through the development and recognition of an international notion of child justice and its child centred perspective in the United Nations' (1989) 68 *Nordic Journal of International Law* 68 at 81.

<sup>61</sup> League of Nations OJ Spec Supp 21, at 43 (1924).

<sup>62</sup> General Assembly Resolution 1386 (XIV), 14 UN GAOR Supp. (No 16) at 19, UN Doc A/4354 (1959).

<sup>63</sup> Geraldine Van Bueren 'Child oriented Justice; An international challenge for Europe' (1992) 6 *International Journal of Law and the Family* 381 at 382.

<sup>64</sup> Adopted by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13<sup>th</sup> May 1977.

<sup>65</sup> *Ibid* para 8 (b) and (d).

Rights<sup>66</sup> (ICCPR) was adopted and contained specific and narrow provisions on the administration of child justice. These related to the separation of accused juveniles from adults and the speedy adjudication of their cases;<sup>67</sup> the segregation of juveniles from adults in the penitentiary system so that they could be accorded treatment appropriate to their age and legal status.<sup>68</sup> The ICCPR also impressed upon states to establish trial procedures for juveniles that would take account of the offender's ages and the desirability of promoting their rehabilitation.<sup>69</sup> The covenant prohibited the imposition of the death penalty on offenders below the age of 18 years,<sup>70</sup>

## **2. International Instruments**

### **2.1 UN non-binding standards**

In 1980, the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders called for the preparation of minimum rules regulating the administration of child justice which would comprehensively address the unique needs of child offenders.<sup>71</sup> In 1985 the Standard Minimum Rules for the Administration of Child Justice (The Beijing Rules)<sup>72</sup> was adopted by the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, marking a significant milestone in the development of juvenile justice. The Rules provided new standards of juvenile justice.<sup>73</sup>

The Beijing Rules provide a framework within which a national juvenile justice system should operate. They set standards for a fair and humane response to juveniles who find themselves in conflict with the law<sup>74</sup> from the time they are arrested, throughout the ensuing processes of investigation, prosecution, adjudication and disposition, non-institutional treatment, institutional treatment and aftercare.

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<sup>66</sup> General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

<sup>67</sup> Article 10(2)(b).

<sup>68</sup> Article 10(3).

<sup>69</sup> Article 14(4).

<sup>70</sup> Article 6(5).

<sup>71</sup> Van Bueren (note 63) 383.

<sup>72</sup> General Assembly Resolution 40/33 of 29 November 1985.

<sup>73</sup> Viccica (note 60) 81.

<sup>74</sup> Van Bueren (note 63) 383.

In 1985, the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders called for the development of two additional instruments on child justice.<sup>75</sup> Five years later, the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)<sup>76</sup> and the UN Rules for Juveniles Deprived of their Liberty (JDLs)<sup>77</sup> were adopted.

The Riyadh Guidelines offer a comprehensive and proactive approach to prevention of delinquency and the social reintegration of children at risk of being abandoned, neglected and abused.<sup>78</sup> They are aimed at minimising the circumstances and conditions, which drive children to crime or expose them to victimization and entrapment in irregular situations. They indicate situations which would need official intervention and encourage an environment conducive to healthy development, integration and adjustment.<sup>79</sup>

The JDLs on the other hand stipulate the standards applicable to juveniles deprived of their liberty in all forms and emphasise that deprivation of liberty must be a means of last resort, for the shortest possible period of time and limited to exceptional cases.<sup>80</sup> These rules outline specific circumstances under which children can be deprived of liberty. They are essentially intended to counteract the detrimental effects of deprivation of liberty by ensuring the protection of the rights of child offender and their welfare while in custody.<sup>81</sup>

The Beijing Rules, Riyadh Guidelines and JDLs all constitute a comprehensive framework for the care, protection and treatment of children who come into conflict with the law. However, their limitation is that they are mere recommendations, which, though persuasive, are non-binding.<sup>82</sup>

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<sup>75</sup> Viccica (note 60) 86.

<sup>76</sup> General Assembly Resolution 45/112 of 14 December 1990.

<sup>77</sup> General Assembly Resolution 45/113 of 14 December 1990.

<sup>78</sup> Nikhil Roy & Mabel Wong 'Juvenile justice: modern concepts of working with children in conflict with the law' available at <http://www.crin.org/docs/save-jj-modern-concepts.pdf> [accessed on 23 November 2009].

<sup>79</sup> Viccicia (note 60) 70.

<sup>80</sup> Roy & Wong (note 78) 23.

<sup>81</sup> Ibid.

<sup>82</sup> Van Bueren (note 63) 383.

## 2.2 The UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child

In 1989, an important milestone was reached in the child rights discourse with the adoption of the United Nations Convention the Rights of the Child (CRC).<sup>83</sup> This instrument which went down in history as the most rapidly and almost unanimously ratified human rights instrument is the cornerstone of child rights regime. It lays down the morals claims to which children are entitled both as people and because of their special status as minors.<sup>84</sup> It consolidates the protections of children's rights scattered in various human rights treaties under a single comprehensive document.<sup>85</sup> Shortly after the CRC's entry into force, the Organisation of African Unity (now the African Union) adopted the African Charter on the Rights and Welfare of the Child (ACRWC) which also provided the full range of children's rights but taking into consideration the virtues of the African cultural heritage.

Both the CRC and the ACRWC are premised on a set of four principles which guide consideration of all issues relating to the rights of the child, including the administration of child justice. These are the 'best interests of the child' (which must be a primary consideration in all actions concerning the child),<sup>86</sup> non-discrimination,<sup>87</sup> the right to life, survival and development,<sup>88</sup> and the right to be heard.<sup>89</sup>

The 'best interests of the child' is an interpretative principle that guides the application of the other three principles. According to the CRC Committee on the Rights of the Child, its application requires systematic consideration of how children's rights and interests are or will be affected by decisions and actions concerning the child, undertaken by public or private welfare institutions including

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<sup>83</sup> General Assembly Resolution 44/25 of 20 November 1989.

<sup>84</sup> Don Cipriani *Children's rights and the minimum age of criminal responsibility: A global perspective* (2009)19.

<sup>85</sup> Jonathan Todres 'Emerging limitations on the rights of the child; The UN Convention on the Rights of the Child and its early case law' (1998-1999) 30 *Columbia Human Rights Law Review* 159 at 170.

<sup>86</sup> Article 3 of the CRC; article 4 (1) of the ACRWC.

<sup>87</sup> Article 2 of the CRC; article 3 of the ACRWC.

<sup>88</sup> Article 6 of the CRC; article 5 of the ACRWC.

<sup>89</sup> Article 12 of the CRC makes provision of the child's right 'to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law...' The ACRWC has a similar provision in article 4(1).

judicial and administrative decisions as well as policy formulation.<sup>90</sup> In all actions and decisions, affecting the child, the best interests of the child must be the subject of active consideration and it must be shown that children's interests have been explored and taken into account as a primary consideration.<sup>91</sup>

The principle of non-discrimination prohibits discrimination on the basis of gender, ethnic or social origin, race, disability or any other status, and calls for the equal treatment of children. It underpins approaches to all other rights enshrined in the Convention including the rights of children who come into conflict with the law. By this principle, state parties are obliged to take all the necessary steps to ensure that all children in conflict with the law are treated equally by establishing rules, regulations or protocols, which enhance the equal treatment of child offenders and provide redress, remedies and compensation.<sup>92</sup>

By conferring the right to life survival and development upon all children, both treaties place an obligation upon state parties to recognise every child's inherent right to life and to ensure, to the maximum extent possible, the survival and development of the child. States parties are expected to interpret development in its broadest sense as a holistic concept embracing the child's physical, mental, spiritual, moral, psychological and social development, to achieve optimal development of all children.<sup>93</sup>

Child participation highlights the role of the child as an active participant in the promotion, protection and monitoring of his/her rights and applies equally to all measures adopted by states to implement the CRC.<sup>94</sup> The principles impress upon governments to open their decision-making processes to children and to ensure respect for their views in matters that affect them.<sup>95</sup> Within the child justice context, the right must be fully respected and implemented through every stage of the process,

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<sup>90</sup> CRC General Comment No 5: General Measures for the Implementation of the Convention on the rights of the Child, CRC/GC/2003/5 (2003).

<sup>91</sup> Rachel Hodgkin & Peter Newell *Implementation handbook for the Convention on the Rights of the Child* (2002) 39.

<sup>92</sup> CRC General Comment No 10 'Children's rights in juvenile justice' CRC/C/GC/10 25 April 2007 para 6.

<sup>93</sup> *Ibid* para 12.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid*.

by giving children the right to participate either directly or through competent legal representation.<sup>96</sup> The child's participation must be genuine and not a mere formality. The older and more mature the child is, the more weight should be given to his/her views.<sup>97</sup> According to the CRC, a child is every human being below the age of 18 years unless under the national law of a country, majority is attained earlier.<sup>98</sup> Under the ACRWC a child is an every human being below the age of 18 years, with no room for flexibility.<sup>99</sup>

The CRC contains an elaborate set of guidelines for maintaining human rights standards in juvenile justice systems.<sup>100</sup> Two substantial articles deal specifically with the administration of juvenile justice, encompassing the basic principles of the three non-binding standards, and give them binding effect. Similarly, the ACRWC also incorporates a number of basic principles on which a juvenile justice system should be based. Both treaties reiterate the fundamental principle of international child justice; that the essential aim of treatment of every child accused or found guilty of having infringed a penal law shall be his or her reformation, reintegration into his or her family and social rehabilitation.<sup>101</sup> They also guarantee special treatment for a child in conflict with the law in a manner consistent with the child's sense of dignity and worth, which reinforces the child's respect for human rights.<sup>102</sup> The CRC and the ACRC both confer some fundamental procedural safeguards and rights to such children. The former goes on to maintain a balance between informality of procedures and the fundamental rights of the child to due process.

### **3. Specialised legislation, procedures and institutions**

In order to be able to give effect to their obligations under the international human rights law, state parties have a duty to create a child justice system with specific laws, procedures, authorities and institutions attuned to the specific needs, problems and

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<sup>96</sup> CRC General Comment No 5 (note 90) para 12.

<sup>97</sup> 'Human rights in the administration of justice: A manual on human rights for judges, prosecutors and lawyers' (2003) United Nations. New York and Geneva, available at [www.ohchr.org/Documents/Publications/training9Titleen.pdf](http://www.ohchr.org/Documents/Publications/training9Titleen.pdf) [accessed on 26 November 2009].

<sup>98</sup> Article 1.

<sup>99</sup> Article 2.

<sup>100</sup> Julia Sloth-Neilson 'The international framework' in Julia Sloth- Neilson & Jacqui Gallinetti (eds) *Child justice in Africa: A guide to good practice* (2004) 22.

<sup>101</sup> CRC Articles 37 and 40; Article 17 of the ACRWC.

<sup>102</sup> Article 17(1).

situations of children alleged to have infringed the law.<sup>103</sup> This requires the establishment of specialised units within the police, judiciary, court system, prosecutor's office and provision of specialized defenders or other representatives for children.<sup>104</sup>

According to international standards, a juvenile justice system must uphold the rights and safety and promote the physical and mental well-being of children in conflict with the law.<sup>105</sup> This is to ensure that children are treated differently from adults in a safe environment which complies with norms regarding the well being of the child.<sup>106</sup> The specific national legislation should strike a fair balance between the interests of the child, the state and the community.<sup>107</sup>

#### **4. Aims of child justice**

The primary aim of juvenile justice is the rehabilitation and social integration of the child in a manner that respects the child's sense of dignity and worth of its own person and fosters his or her respect for the fundamental rights of others.<sup>108</sup> The second is for children in conflict with the law to be treated in a manner proportionate to the offence and in due consideration of their circumstances. This is intended to avoid punitive and retributive measures in favour of positive and rehabilitative responses to child offending.<sup>109</sup>

The third aim of child justice is to ensure that the deprivation of the liberty of a child offender is employed as a measure of last resort, and that those that are eventually deprived of their liberty, are treated in a manner consistent with their needs as young persons.<sup>110</sup> This implies that children are to be kept separate from adults and detained in separate institutions or in a separate part of an institution also holding adults. Such is so that the children can receive care and protection and all the necessary assistance

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<sup>103</sup> Article 40(3).

<sup>104</sup> CRC General Comment No 10 (note 92) para 92.

<sup>105</sup> UNICEF Innocenti Digest (note 29) 10.

<sup>106</sup> Roy & Wong (note 78) 78.

<sup>107</sup> Beijing Rule 2.3.

<sup>108</sup> Article 40(1) of the CRC & article 17(3) of the ACRWC.

<sup>109</sup> Beijing Rule 5.1.

<sup>110</sup> Article 37(c) of the CRC.

in view of their age, sex and personalities.<sup>111</sup> Separation of children from adults is necessary because children are impressionable, hence susceptible to the negative influences of the more hardened adult offenders. Moreover, by virtue of their lower physical strength (to that of adult offenders), such separation ensures their safety.<sup>112</sup>

### **5. Minimum age of criminal responsibility**

State parties to both the CRC and the ACRWC are required to establish a minimum age of criminal responsibility to demarcate the age at which children are presumed to lack criminal responsibility.<sup>113</sup> There is however, no clear international standard regarding the age at which such responsibility can be reasonably imputed to a child and the CRC and the ACRWC set no limit.

Rule 4 of the Beijing Rules recommends that the beginning of the minimum age of criminal responsibility should not be fixed at too low an age due to the emotional, mental and intellectual maturity of the child. Relying on this rule, the CRC Committee encourages state parties to increase their minimum ages of criminal responsibility to at least 12 years and to continue to increase the age.<sup>114</sup>

The Committee has also criticised national provisions setting multiple age limits for criminal responsibility in particular age ranges for rebuttable presumptions of non-responsibility (*doli incapax* tests). It notes that child offenders who at the time of the commission of the crime are at or above the minimum age but below the maximum age of criminal responsibility are assumed to be criminally responsible only if they have the required maturity. However, the determination of maturity is left to the discretion of the court often, without any expert guidance and may thus result in discriminatory practices.<sup>115</sup>

One can therefore safely assume from the General Comment of the CRC Committee, that each state party should establish a single minimum age of criminal responsibility that applies to all children within its jurisdiction. This would not only ensure that

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<sup>111</sup> Beijing Rule 13.

<sup>112</sup> Larry J Siegel & Brandon C Welsh *Child delinquency: Theory practice and law* (2009) 593.

<sup>113</sup> Article 40(3)(a).

<sup>114</sup> CRC General Comment No 10 (note 92) para 32.

<sup>115</sup> CRC General Comment No 10 (note 92) para 30.

different standards are not imposed upon different children in conflict with the law, but would also satisfy the principle of non-discrimination which is one of the leading principles of child justice.<sup>116</sup>

## 6. Diversion

Diversion is the channeling of children into appropriate reintegrative programmes and services, where the intervention of the formal court system is not necessary.<sup>117</sup> It aims to find viable and constructive ways of keeping a child from coming into contact with the justice system unnecessarily, and has been internationally acknowledged as a key element in the shift from the retributive to the restorative justice system for child offenders.<sup>118</sup> Diversion seeks to temper the harsh and punitive nature of the criminal justice processes in recognition of the particular vulnerabilities of children in trouble with the law. Article 40(3)(b) of the CRC therefore advocates this route, requiring states, where appropriate, to adopt measures which divert from judicial proceedings, while maintaining the legal safeguards for the protection of the rights of the child offenders..

Alternative measures may involve other bodies, apart from the court, dealing with child offenders at the earliest stages of the criminal justice process, and disposing of such cases at their discretion. Examples of such entities include the police, the prosecution and/or other agencies.<sup>119</sup> Such measures are appropriate in minor offences where the family, the school and other informal social control institutions have already reacted or are likely to react in an appropriate and constructive manner.<sup>120</sup> Additionally care, guidance and supervision orders, counseling, probation, foster care educational and vocational measures, should be preferred instead of criminal proceedings, which should always be used only as a last resort.<sup>121</sup>

The CRC Committee recommends the use of such measures as an integral part of national child justice systems and that it be a well established practice that can be used

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<sup>116</sup> Ibid para 5.

<sup>117</sup> Buyi Mbambo 'Diversion: A central feature of the new child justice system' in Traggy Maepa (ed) *Beyond retribution prospects for restorative justice in South Africa* (2005) 77.

<sup>118</sup> Ibid.

<sup>119</sup> Beijing Rule 11.

<sup>120</sup> Ibid.

<sup>121</sup> Article 40 (4) of the CRC.

in most cases involving children who commit minor offences such as shoplifting or limited damage to property and first offenders.<sup>122</sup> The use of such measures avoids stigmatisation, yields positive results for both the child and public safety, and is cost effective.<sup>123</sup>

The rights of the child must be fully protected in all diversion measures and such should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility and gives informed consent to the diversion.<sup>124</sup> Such consent is also essential for the success of this process.

Diversionary measures must also be commensurate with the offence. They must take into account the child's age and individual circumstances, the child's willingness to co-operate, the impact of the crime on the victim and the community. Any previous offences and opportunity for diversion and the availability and strength of family and community support must also be considered.<sup>125</sup> In order to minimise the potential for coercion and intimidation at all levels of the diversion process, the child's consent to partake in this process should be subject to challenge before a competent authority or tribunal.<sup>126</sup>

## **7. Deprivation of liberty and prohibition against torture and degrading treatment**

Children are mostly likely to become victims of torture and other forms of abuse while in police custody or detention. It is also when they may be denied contact with their parents and legal representatives, who might be best placed to provide them with the necessary protection from abuse.<sup>127</sup> It is for the above reasons that international human rights law makes the deprivation of liberty of children a measure of last resort.<sup>128</sup>

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<sup>122</sup> CRC General Comment No 10 (note 92) para 25.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid para 27.

<sup>125</sup> Roy & Wong (note 78) 15.

<sup>126</sup> Beijing Rule 11.

<sup>127</sup> UNICEF Innocenti Digest (note 29) 8.

<sup>128</sup> 'Human Rights in the Administration of Justice' (note 99).

The CRC and the ACRWC require that deprivation of liberty be in conformity with the law. The former instrument further requires that deprivation of liberty be used as a measure of last resort and for the shortest possible period. In line with international law, the deprivation of liberty of a child must be lawful and not arbitrary; it must be imposed as a measure of last resort when no other appropriate alternative measures are available and it must be for the minimum period possible and only employed in exceptional cases.<sup>129</sup> The length of the deprivation should be determined by the judicial authority without precluding the possibility of a child's early release.<sup>130</sup>

Child offenders deprived of their liberty are entitled to be treated with due respect of their dignity and taking into account their age related needs. They must be separated from adults unless it is considered to be in their best interests.<sup>131</sup> Separation of children from adults protects them from exploitation, abuse and negative influences and ensures that the detention of children is effected in facilities that cater for their special needs.

International human rights law also law upholds the dignity of children deprived of their liberty by prohibiting their torture and degrading treatment or punishment.<sup>132</sup> The prohibition against torture and degrading treatment is absolute and applies to all children wherever they are. It is complemented and extended by Articles 19 and 39 of the CRC. Article 19 calls upon states to take all appropriate legislative administrative, social and educational measures to protect the child from all forms of physical violence injury or abuse neglect or negligent treatment, maltreatment or exploitation including sexual abuse while in care of their parents, legal guardians or any other person who takes care of the child. Article 39 places a legal duty upon State Parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child who is a victim of torture or any other form of cruel, inhuman or degrading treatment or punishment, in an environment which fosters the health, self-respect and dignity of the child.

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<sup>129</sup> Article 37(b) of the CRC and JDLs Rules 1 and 2.

<sup>130</sup> Ibid.

<sup>131</sup> For instance in cases where the whole family is arrested. This often happens in Botswana to immigrant families from neighbouring countries. Article 37 (b) of the CRC.

<sup>132</sup> Article 37 (a) of the CRC.

Children deprived of their liberty must also be accorded the right to maintain contact with their families through correspondence and visits, save in exceptional circumstances. The circumstances of each case must be examined in light of the basic principles underlying the two treaties. Maintaining contact with the child's family and the wider community is essential for preparing the child's reintegration into society.<sup>133</sup>

Children also have the right to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty before a court or other competent independent and impartial authority.<sup>134</sup> The JDLs emphasise that children deprived of their liberty should be enabled to apply for legal aid where it is available and to communicate regularly with their legal representative.<sup>135</sup> Other forms of assistance may come from a social worker who may have worked with the child and whom he/she has confidence in.

## **8. Due process**

Any person accused of an offence has a right to the due process of law which entails a fair treatment and trial.<sup>136</sup> Children in conflict with the law are accorded important due process rights and guarantees that are meant to secure their fair treatment and trial. According to the fundamental principle of non retroactivity of penal sanctions, penal offences must have been defined in law by the time of the alleged offence. Like any other offender these children must be presumed innocent until proven guilty. Children in trouble with the law have a right to:

- be notified promptly of the charges;
- legal assistance;
- presence of parents or guardians except where not in the child's best interests;
- determination without delay by a competent and independent and impartial authority or judicial body;
- a fair hearing, to remain silent;
- confront and cross-examine witnesses;

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<sup>133</sup> JDLs Rule 59.

<sup>134</sup> Article 37(c) and (d) of the CRC.

<sup>135</sup> Rule 18(a).

<sup>136</sup> UNICEF Innocenti Digest (note 29) 5.

- a free language interpreter;
- full respect of privacy at all stages of the process; and
- judicial review of decisions.<sup>137</sup>

Some of these guarantees are well established in international human rights law<sup>138</sup> while some are designed to meet the specific needs and interests of children. These special guarantees for children include *in camera* proceedings which are meant to guard the right to privacy of child offenders, and the right of presence of parents and guardians to provide psychological and emotional assistance to the child. Such modified courtroom procedures and practices are meant to allow for the expeditious handling of cases and in an atmosphere of understanding, to enable the child to participate and express him/herself freely.<sup>139</sup> These special protections stem from a child's right to be treated in a manner which respects his/her dignity and worth and which takes into account his/her evolving capacities as encapsulated under both the CRC and the ACRWC.

## 9. Alternative sentencing options

Where a child's case is not diverted from the formal court procedure, non-institutional measures should be made available to ensure that the child is dealt with in a manner appropriate to his/her well-being and proportionate to the offence and with due regard to his/her circumstances.<sup>140</sup> State Parties to the CRC are therefore obliged to develop and promote a variety of dispositions such as care; guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes; and other alternatives to institutional care.<sup>141</sup>

In addition to the above alternative measures proposed by the CRC, the Beijing Rules provide *inter alia* the following sentencing options: community service, financial penalties, compensation and restitution, intermediate treatment and group counseling.<sup>142</sup>

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<sup>137</sup> Article 40 (2) of the CRC & article 17 of the ACRWC.

<sup>138</sup> Article 14 of the ICCPR .

<sup>139</sup> 'Human rights in the administration of justice' (note 99).

<sup>140</sup> CRC Article 40(4).

<sup>141</sup> Ibid.

<sup>142</sup> Rule 18.

The United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules)<sup>143</sup> offer more options for dealing with child offenders such as verbal sanctions which include admonition, reprimand and warning; conditional discharge; status penalties; economic sanctions and monetary penalties, such as fines and day-fines; confiscation or an expropriation orders; restitution to the victim or a compensation order; suspended or deferred sentence; probation and judicial supervision; community service orders; referral to an attendance centre; house arrest; any other mode of non-institutional treatment; or a combination of the measures listed above.<sup>144</sup>

These measures allow flexibility in sentencing and assure that the deprivation of liberty is used only as a measure of last resort and for the shortest possible period of time in accordance with Article 37(b) of the CRC. They also stress the importance of the family as the fundamental institution and the natural environment for the development and wellbeing of children.<sup>145</sup>

## **10. Punishment**

International human rights law not only places limitations on the deprivation of liberty of children, it also prohibits specific types of punishment from being imposed on children. These are the administration of corporal punishment, imposition of the death penalty and the sentence of life imprisonment without the possibility of release or parole.

### **10.1 Corporal punishment**

For a long time, corporal punishment was considered a legitimate form of punishment for child offenders and as a disciplinary and parenting tool in institutions of learning and family settings respectively. This form of punishment has since been condemned by the international human rights law as a violation of children's rights. From a human rights perspective, children are autonomous beings with inherent rights including the right to physical security. By virtue of their humanity and vulnerability, they are entitled to the protection of their physical integrity and dignity equal to the

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<sup>143</sup> General Assembly Resolution 45/110, annex, 45 UN GAOR Supp (No 49A) at 197, UN Doc A/45/49 (1990).

<sup>144</sup> Rule 8.1.

<sup>145</sup> CRC Preamble.

protection that adults enjoy.<sup>146</sup> The use of corporal punishment in the administration of child justice is therefore prohibited in human rights law.

The CRC provides that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment<sup>147</sup> and impresses upon state parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence injury or abuse.<sup>148</sup> States are further obliged to ensure that school discipline is administered in a manner consistent with the child's dignity.<sup>149</sup>

All the above provisions have been interpreted by the CRC Committee as prohibiting corporal punishment in all settings.<sup>150</sup> In the Committee's view, the corporal punishment of children is invariably degrading<sup>151</sup> and directly conflicts with the children's rights to dignity and physical integrity. The distinct nature of children, their initial dependence and developmental state, their unique human potential as well as their vulnerability, all demand a high level of legal (and other) protection from all forms of violence.<sup>152</sup>

The CRC Committee has provided substantial guidance by outlining legislative and other measures necessary to eliminate corporal punishment. Recognising that law reform alone will not change society's entrenched inclination to corporal punishment (particularly in Africa), the Committee recommends raising awareness on children's protective rights to dignity and physical integrity.<sup>153</sup>

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<sup>146</sup> Joan E Durrant 'Physical punishment culture and rights' (2008) 29 *Journal of Development and Behavioral Pediatrics* 55 at 60.

<sup>147</sup> Article 37.

<sup>148</sup> Article 19.

<sup>149</sup> Article 28.

<sup>150</sup> 'Global Initiative to end all corporal punishment of children prohibiting corporal punishment of children: A guide to legal reform and other measures' (2008) 5, available at [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org) [accessed on 11 February 2010].

<sup>151</sup> CRC General Comment No 8 'The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment' CRC/C/GC/8 (2007) para 11.

<sup>152</sup> CRC General Comment No 8 para 21.

<sup>153</sup> CRC General Comment No 8 para 45.

## 10.2 Life imprisonment

The CRC prohibits life imprisonment without the possibility of release on those who committed offences while below the age of 18 years.<sup>154</sup> The rationale for this prohibition is found in Beijing Rule 19, which provides that; ‘the placement of a child in an institution shall always be a disposition of last resort and for the minimum necessary period’. That life imprisonment can never be for a minimum period necessary is implicit from its very name.

In terms of this provision, therefore, State parties may sentence an individual who committed an offence when under the age of 18 years of age to life imprisonment, provided that such sentence is commensurate to the offence and the offender and there is an effective procedure in place for reviewing the sentence.<sup>155</sup>

Life imprisonment poses a significant hindrance to the enjoyment of the child’s right to development. In this regard, the CRC Committee has stressed that for all sentences imposed on children, the possibility of release should be realistic and regularly considered. Where children are sentenced to life imprisonment with possibility of release, they should receive education, treatment and care aimed at their release, reintegration and ability to assume a constructive role in society.<sup>156</sup> The rule of international child justice that the imprisonment of children should be a measure of last resort and for the shortest appropriate period, calls upon state parties to sentence a child to life imprisonment only in exceptional cases and aim towards totally abolishing the sentence altogether for persons under the age of 18 years.<sup>157</sup>

## 10.3 Death penalty

According to international human rights law, the death penalty, whether applied to adults or children, is an inhumane punishment, which violates an individual’s right to life. Be that as it may, international human rights law does not expressly prohibit the imposition of the death penalty; it only places limitations and restrictions on its use including categories of persons who may be sentenced to death and the circumstances

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<sup>154</sup> Article 37(a).

<sup>155</sup> Geraldine van Bueren *International children’s rights* (1995) 191.

<sup>156</sup> CRC General Comment No 10. (note 92) para 77.

<sup>157</sup> *Ibid.*

under which it may be carried out. The ICCPR<sup>158</sup> thus prohibits the imposition of the death penalty on persons below the age of 18 years and on pregnant women.

The CRC<sup>159</sup> and the ACRWC<sup>160</sup> echo this prohibition in line with the principle that children have a right to life survival and development. The prohibition is also reaffirmed by the Beijing Rules,<sup>161</sup> and the Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty which provide that juveniles must not be sentenced to capital punishment for any offence.<sup>162</sup>

The prohibition against the execution of persons under the age of 18 years is based on the fact that it violates contemporary standards of decency and fails to take account of the fact that children are often lack the capacity to fully appreciate the consequences of their actions. Such a penalty also tends to disregard their susceptibility to domination by others, as well as their potential for change, growth and rehabilitation.<sup>163</sup>

According to the CRC Committee, the decisive criterion for the prohibition of capital punishment is the age at the time of the commission of the offence. If a child commits an offence which attracts the death penalty, that child can never be executed. A state cannot, therefore, wait until a person attains the age of 18 years and then carry out the execution.<sup>164</sup> The Committee further calls upon state parties that still retain the death penalty for offences committed by persons below 18 years, to abolish it and to place a moratorium on all death sentences pending the enactment of legislative measures which abolish the penalty altogether. It encourages the States to find appropriate alternatives to this form of punishment that is in line with the spirit of the CRC.<sup>165</sup>

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<sup>158</sup> Article 6 (5). There is a Second Optional Protocol to the ICCPR aimed at the total abolition of the death penalty. Although Botswana is not party to it, it nevertheless is part of international jurisprudence on the death penalty. General Assembly Resolution 44/128, annex, 44 UN GAOR Supp (No 49) at 207, UN Doc A/44/49 (1989), *entered into force* July 11, 1991.

<sup>159</sup> Article 37(a).

<sup>160</sup> Article 5 (3).

<sup>161</sup> Rule 17.2.

<sup>162</sup> UN Doc ECOSOC Res 1984/50 adopted 25 May 1984.

<sup>163</sup> Van Bueren (note 155) 187.

<sup>164</sup> CRC General Comment No 10 (note 92) para 76.

<sup>165</sup> *Ibid.*

## **11. Conclusion**

This chapter has elaborated on the development of international standards, which regulate child justice and their guiding principles. It provides a foundation for testing the compatibility of the treatment and protection of children in conflict with the law globally, especially for countries that have ratified or acceded to such standards thereby signifying their willingness to undertake the obligations contained therein. The Republic of Botswana, a state party to both the CRC and the ACRWC is bound to respect and ensure that the rights set forth in the two treaties are assured to all children within her jurisdiction, and in the context of this study - children in conflict with the law. The next chapter therefore examines child justice in Botswana and its compatibility with such standards and norms.

## Chapter IV

### CHILD JUSTICE IN BOTSWANA UNDER THE CHILDREN'S ACT.

#### 1. Introduction

Chapter III traced the development of international law on child justice and identified critical principles that should underpin national juvenile justice systems. This chapter will now focus on the administration of juvenile justice in Botswana under the Children Act of 1981. It will assess the legislation's level of compliance with the international and regional standards outlined in the preceding chapter. Apart from gauging the extent to which the provisions of the statute are sensitive and responsive to the welfare of children in conflict with the law, the chapter will also review the role of the courts in the protection of children's rights through the criminal justice process and assess their performance against the country's international obligations. The chapter will illuminate the flaws and limitations of the Act in relation to the administration of juvenile justice and offer some suggestions for law reform.

#### 2. Historical background of the Children's Act

As indicated in the introductory chapter, prior to 1981 when the Children's Act was passed, Botswana did not have a separate court to adjudicate over child offenders. Such children were therefore subject to a few exceptions and concessions, treated in the same way as adults. They went through the same criminal court system, were bound by the same substantive and procedural rules and subsequently punished in a similar fashion.

The Botswana Penal Code of 1964<sup>166</sup> provides that a person under the age of eight years is not criminally responsible for any act or omission.<sup>167</sup> There is thus an irrebuttable presumption that children under the age of eight are incapable of committing any offence. They are thus immune from prosecution.

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<sup>166</sup> [Cap 08:01].

<sup>167</sup> Section 13(1). 'A person under the age of eight years is not criminally responsible for any act or omission.'

For children between the ages of eight and 13 years, the law deems them incapable of committing an offence by act or omission unless it is proved that at the time of doing the act or making the omission, they had the capacity to know that that they ought not do the act or make the omission.<sup>168</sup> The onus is on the prosecution to establish, beyond any reasonable doubt, that a person between those ages had the capacity to commit the crime at the time of the alleged offence.<sup>169</sup>

The criminal liability of children over the age of 14 was regarded the same as that of adults. Children were therefore routinely tried in adult courts with little consideration of their evolving capacities. Almost two decades after the enactment of the Penal Code. This changed, with the introduction of child justice in Botswana's legal system,

With regard to punishment, the Penal Code made concessions for children in respect of the types of sentences that could be imposed on them. Accordingly, courts took account their youthfulness in mitigation of sentence.<sup>170</sup> The Code prohibits the imprisonment of any person under the age of 14 years<sup>171</sup> and vests the courts with discretion to impose corporal punishment instead of imprisonment in cases of male persons under the age of 18 years if convicted of any offence punishable with imprisonment.<sup>172</sup> It also prohibits the death penalty against any person convicted of a capital offence<sup>173</sup> if it appears to the court that at the time the offence was committed, s/he was under the age of 18 years.<sup>174</sup> A court convicting such a person is obliged to sentence him/her to be detained at the President's pleasure, in a place and in conditions as the President may direct.<sup>175</sup>

As there were also no separate penal institutions for children, the courts rather imposed corporal punishment and suspended sentences on first time juvenile

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<sup>168</sup> Section 13(2).

<sup>169</sup> Kwame Frimpong & Alexander McCall Smith *'The criminal law of Botswana'* (1992) 33.

<sup>170</sup> *Regina v Kaute* 1964-1967 BLR 75 (HC); *State v Kgotane and another* 1973 (1) BLR 71 (HC), *State v Jampi Chaherani and ORS* 1976 BLR 10 (HC); *State v Dikgang Banthoelang* 1977 BLR 66 (HC); *State v Mooketsi Kgabi and ORS* 1976 BLR 11 (HC)

<sup>171</sup> Section 27.

<sup>172</sup> Section 28(4).

<sup>173</sup> These are murder, treason and piracy with intent to murder in terms of Sections 203(1), 63(2) and 34(1) respectively of the Penal Code.

<sup>174</sup> Section 26(2).

<sup>175</sup> *Ibid.*

offenders to avoid incarceration. In *State v Kgotane and another*,<sup>176</sup> the subordinate court had imposed a custodial sentence on the 15-year-old accused for shop-breaking and theft. The High Court set aside the sentence, holding that imprisonment of a boy of this age, who was also a first offender, was inappropriate and would only turn him into a criminal. It sentenced the accused to six strokes of a cane and cautioned him under Section 312 of the Criminal Procedure and Evidence Act.

In cases of repeat offenders, courts often found themselves in the invidious position of having to send children to prison. In *State v Mooketsi Kgabi and ORS*,<sup>177</sup> the three accused were juveniles aged 15 years. They were convicted on two counts of shop breaking and theft and one count of burglary and theft. The first accused had two previous convictions for which he had received strokes. In this case the court sentenced him to one year imprisonment on each of the three counts, while his co-accused, who were first offenders were each sentenced to four strokes for each of the three counts. On review, the High Court reduced the sentences and stating that,

While the problem of juvenile delinquency particularly in Gaborone was becoming increasingly difficult to deal with, magistrates were under a duty to display a measure of restraint in the case of juveniles and not do anything, which may have the effect of turning them into hardened criminals. To impose a prison sentence of 3 years duration on a lad of 15 years for offences of this nature amounts to more than a very sharp lesson which the magistrate so described in his sentence. It cannot be allowed to stand.<sup>178</sup>

The dilemma that courts faced when having to give custodial sentences to juveniles, was the prospect of sending them to penitentiaries that were overcrowded, and where adult and child convicts were incarcerated together and subjected to the same discipline and routine. Incarcerated children also did not receive any special training or education geared towards their reformation and rehabilitation. Corduff J aptly summed this position in *Benjamin Skitom Nisbert v State* as follows;

I fully realise the invidious position in which our courts find themselves when dealing with offenders such as the appellant, and in this the High Court has no advantage over the Magistrate's Court. The options open to the court are strokes, suspended

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<sup>176</sup> 1973 (1) BLR 71 (HC).

<sup>177</sup> 1976 BLR 11-12 (HC).

<sup>178</sup> Ibid.

sentence of imprisonment and actual imprisonment. When strokes prove ineffective, as in this case, the trial court has to look at imprisonment and to decide whether there should be suspension of the sentence in part or wholly. If it feels that suspension of the sentence would not meet the case all that is left is actual imprisonment. But under existing conditions imprisonment is wholly inappropriate. In my view no court can in good conscience sentence a child to undergo the rigours of prison life where he would be open to serious moral and mental dangers that must exist where men are confined within a restricted area for long periods. I am sure it is not necessary to amplify this further. I am equally sure that no one could seriously argue that young boys should be deliberately sent into such dangers.<sup>179</sup>

In 1981, Parliament recognised the increase in child offending in Botswana and the limited alternatives to imprisonment, and enacted the Children's Act which comprehensively provided for the treatment of child offenders. The Act introduced special procedures for dealing with such children which included their removal from the adult criminal system, to rehabilitate and reintegrate them into society before they became hardened criminals. The statute does not establish separate juvenile courts. Instead, it provides for the operation of juvenile courts within the existing judicial structures.

The Constitution of the Republic of Botswana of 1966 establishes the Judiciary as one of the three arms of government.<sup>180</sup> The judicature is broadly made up of the High Court, Court of Appeal, Magistrates' courts and the customary courts. This structure reflects the dual system of the laws operating in the country: in that the first three regular courts administering the common law and statutory laws, and the customary courts administering the civil customary law and limited aspects of the written criminal law.<sup>181</sup>

### **3. Objectives of the Children's Act**

The Children's Act seeks to make provision for the custody and care of children; for the appointment of commissioners of child welfare; for the establishment of juvenile

<sup>179</sup> High Court Criminal Appeal No 209 of 1983, unreported.

<sup>180</sup> Part VI, Sections 95-107 of the Constitution of Botswana.

<sup>181</sup> Daniel D Ntanda Nsereko *Constitutional law in Botswana* (2001) 190.

courts and certain institutions for the reception of children; and for other matters concerned therewith. Part VI of the Act provides for the establishment of juvenile courts, the appointment of their officers and procedures and rules for dealing with children in conflict with the law. Part VI is dedicated to the establishment of institutions which receive children including juvenile offenders. This Act together with the Penal Code and the Criminal Procedure and Evidence Act are the main statutes regulating child justice in Botswana.

#### **4. Establishment of the juvenile court**

International juvenile justice standards and norms require state parties to establish a distinct system of criminal justice that treats children in a manner appropriate to their ages and levels of maturity. In a bid to satisfy this requirement, the Children's Act designates a Magistrate's Court or a customary court to hear a charge against a juvenile or to exercise any other jurisdiction conferred on it as a juvenile court.<sup>182</sup> In *Khudung v The State*<sup>183</sup> a Magistrate's Court tried and convicted a 17-year-old child for office breaking and theft. On review the High Court noted that apart from directing a social welfare officer to interview the child, the magistrate had given no indication that he sat as a juvenile court. The court held that a subordinate court hearing a charge against a child should indicate on the record that it is sitting as a juvenile court.<sup>184</sup>

In terms of Children's Act, it is only the subordinate courts that can sit as juvenile courts. The statute is silent on the status of the High Court when it sits in its original jurisdiction to determine a charge against a child offender. In this regard, the Act fails to take into consideration the limitations placed on the jurisdiction of the subordinate courts by various statutes. Subordinate courts for example, have no jurisdictional competence to try murder cases; this therefore means that children charged with murder and other offences, which fall outside the jurisdiction of these courts, will be tried before the High Court outside the provisions of the Children's Act. In the cases

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<sup>182</sup> Section 22(1). Ibid

<sup>183</sup> 1988 BLR 281.

<sup>184</sup> Ibid.

of *State v Mothokgo*,<sup>185</sup> *State v Skila*<sup>186</sup> and *Balo v State*<sup>187</sup> juveniles aged 17, 16 and 15 years respectively, were charged with murder in the High Court. All three were tried, convicted and sentenced outside the provisions of the Children's Act.

The Constitution<sup>188</sup> and the Criminal Procedure and Evidence Act,<sup>189</sup> vests in the Director of Public Prosecutions (DPP) with the powers to prosecute any person, for any offence committed in Botswana and in any court of the country. Accordingly, s/he may direct that criminal cases involving children (which would ordinarily fall within the jurisdiction of the subordinate courts) be tried in the High Court. This would normally happen where the DPP is of the view that the offence committed is so serious and therefore deserves to be dealt with outside the parameters of the Children's Act.

This position was confirmed by the Court of Appeal in *State v Molaudi and others*.<sup>190</sup> In this case three accused persons who were all juveniles were tried and found guilty of rape in a Magistrate's Court. Despite a recommendation by the social welfare officer that they be placed on probation, the court sentenced each one of them to four years imprisonment and three strokes of cane. On appeal, the High Court set aside the custodial sentences on grounds that the Magistrate's Court had not constituted a juvenile court to hear the charges and that a sentence of imprisonment was not appropriate for a juvenile, except in cases where the sentence is fixed by law. The court ruled that the magistrate had exceeded his powers in imposing prison sentences on the appellants.

Dissatisfied with the outcome of the appeal, the Attorney-General submitted the ruling to the Court of Appeal to determine whether it was unlawful for a juvenile court to impose a sentence of imprisonment. The State argued that where a juvenile was convicted of a very serious crime or a crime was committed in very serious circumstances, it would not be in the interests of justice for the offender to be treated under the lenient provisions of the Children's Act. The Court of Appeal held that the

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<sup>185</sup> 1989 BLR 247.

<sup>186</sup> 2001(1) BLR 378.

<sup>187</sup> 2008(1) BLR 155.

<sup>188</sup> Section 51(2) and (3).

<sup>189</sup> Section 7. [Cap 08:02].

<sup>190</sup> 1988 BLR 214 [CA].

danger to the interests of justice referred to by counsel for the Attorney-General can be avoided by the power of the Attorney-General to bypass the magistrate's court and send the case to the High Court for trial where s/he considers that this is required due to seriousness of the case.

The Act's failure to designate the High Court sitting to hear a charge against a child a juvenile court and the discretionary powers of the DPP to institute charges against a child before a court other than a juvenile court creates a bifurcated child justice system in which certain children are excluded from the applications, processes and procedural protections in the Children's Act based on the offence or offences they allegedly committed.

As demonstrated in the previous chapter, international law requires state parties to respect the rights of the child without discrimination of any kind. With regard to juvenile justice, the CRC and ACRWC call upon state parties to take all the necessary measures to ensure that children in conflict with the law are treated equally through the establishment of rules, regulations and protocols, which enhance equal treatment of child offenders.<sup>191</sup> In view of these requirements therefore, the exclusion of certain children from the jurisdiction of the juvenile court and the protections offered by the Act goes against principle of non-discrimination of children, one of the fundamental norms of the international child rights regime.

It prejudices such children (tried and sentenced outside the framework of the Children's Act) not only in relation to other children in conflict with the law, but also to adults who appear in the criminal courts. This affects the efficacy of the Act and undermines the rights of children charged with offences outside the jurisdiction of the designated courts. One would propose an amendment of the Children's Act to extend its protections to all children in conflict with the law, irrespective of the type of offence committed and the court or tribunal before which they are tried. These will create a uniform child justice system that ensures that all child offenders benefit from the same protections.

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<sup>191</sup> CRC General Comment No 10 (note 92) para 6.

## 5. Jurisdiction

A juvenile court has the jurisdiction to hear and determine any charge against any person between the ages of seven and 18 years.<sup>192</sup> The Act further requires that where a child or a juvenile is charged jointly with a person aged 18 years or above, their trials must be separated to allow the child or a juvenile to be tried before a juvenile court.<sup>193</sup>

The Act, however, does not stipulate whether the juvenile or child should have been below the age of 18 years at the time of the commission of the offence, or at the time of framing the charge or at the time of the commencement of the trial. This omission is problematic for the courts when they decide whether such a person should be tried by a juvenile court with all the attendant procedures and protections for child offenders or tried in the ordinary criminal court as an adult.

This lacuna has often resulted in deliberate and calculated stalling tactics by the police or the prosecution authority, to ensure that a child offender attains the age of 18 years before he or she is charged. Such would mean that an offence committed during childhood would be catapulted into the formal adult criminal court with its strictures and often highly punitive sanctions.

This scenario was clearly portrayed in the case of *Mokone and Another v The State*<sup>194</sup> where the two appellants were aged 17 years robbed the complainant of money and items of clothing. They were arrested, but upon realising that the accused had not yet attained the age of 18 years, the police released them. After finding out from their parents when they would turn 18 years old, the police rearrested them the following year and charged them with robbery under the normal rules of criminal procedure applicable to adults. They were tried, convicted and given the mandatory minimum custodial sentence of 10 years.

On appeal, their convictions were confirmed but the sentences were varied on the grounds that they were juveniles at the time of the commission of the offence and that

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<sup>192</sup> Section 22(2).

<sup>193</sup> Section 22(3).

<sup>194</sup> 2003(2) BLR 225 (HC).

this in itself constituted a special circumstance.<sup>195</sup> In reducing the sentence, the court first discussed the special provisions available in respect of criminal liability and sentencing of persons below the age of 18 years under the Penal Code, Criminal Procedure and Evidence Act and the Children's Act and noted that;

Unfortunately, for the appellants, although they were juveniles at the time they committed the offence, they were not brought before the courts timeously. However, by the time they were, they had ceased to be juveniles and therefore the special provisions discussed no longer applicable to them. In other words, they were prejudiced by the delay in charging them, because they would have been subjected to a different set of rules and procedures regarding sentence, which is less stringent than those are which were applied...<sup>196</sup>

The court condemned the conduct of the police for deliberately waiting until the appellants turned 18 years before they charged them urging them to abide by the special provisions enacted for the protection of juveniles.

A similar scenario arose in the case of *Mogodu v The State*.<sup>197</sup> The appellant, an adult, was charged together with two other 19-year-old persons for rape. At the time of the commission of the crime, the latter two accused were juveniles aged 15 years. The inordinate delay in bringing the accused persons to trial was unaccounted for. Although the court convicted the three, the magistrate nevertheless declared the proceedings in relation to the second and third accused persons a mistrial. He thus discharged the two 19-year-old accused at the sentencing stage, stating that as they were juveniles at the time of the offence, they should have been tried even at age of 19 years as at the time of the trial in the magistrate court because of the earlier violation of their rights under Section 27 of the Children's Act.

On appeal, Masuku J held that the Children's Act specifically deals with situations where a child charged with an offence is tried by a juvenile court and does not apply to an adult who was a juvenile at the time the offence was committed. The lawmakers

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<sup>195</sup> Section 27(4) of the Penal Code provides: 'Notwithstanding any provision in any enactment which provides for the imposition of a statutory minimum period of imprisonment upon a person convicted of an offence, a court may where there are exceptional extenuating circumstances which would render the imposition of the statutory minimum period of imprisonment totally inappropriate, impose a lesser and appropriate penalty.'

<sup>196</sup> *Mokone and Another v The State* (note 203) 240.

<sup>197</sup> 2005(1) BLR 384 (HC).

did not foresee scenarios where the trials of juveniles would be delayed to a point when a child is over 18 years. The Judge emphasised that juveniles must be dealt with expeditiously in order to afford them rights under the Children's Act.<sup>198</sup>

The two cases discussed above underscore the importance of providing for the relevant stage within the chain of criminal justice processes at which the age of the child should determine whether he or she stands to be tried by the juvenile court. One of the aims of juvenile justice as provided for under international law is to protect children from the harsh realities of the criminal justice system, and to promote their rehabilitation and social integration through the special measures that take into account their special attributes. The special protections accorded to child offenders, is premised on the fact that their intellect and maturity are not sufficiently developed to have the same criminal responsibility as adults.

It may be argued that the relevant date should be the date of the commission of the offence. The mental capacity of the child offender at the time of the commission of the offence is vital and is what must be considered. To hold otherwise would defeat the aims of juvenile justice as it would leave children at the whims of the police.

It would be prudent for Botswana to take a leaf from South Africa's Child Justice Act.<sup>199</sup> Section 4 unambiguously states that the relevant date:

- (1) Subject to Section 2, this Act applies to any person in the Republic who is alleged to have committed an offence and-
- (a) was under the age of 10 years at the time of the commission of the alleged offence; or
  - (b) was 10 years or older but under the age of 18 years when he or she was
    - (i) handed the written notice in terms of Section 18 or 22,
    - (ii) served with a summons in terms of Section 19, or
    - (iii) arrested in terms of Section 20 for that offence.

## 6. Minimum age of criminal responsibility

As shown in the preceding chapter, state parties to the CRC and ACRWC are required to set a minimum age which children are be presumed not to have the

<sup>198</sup> *Mogodu v The State* (note 206) 394.

<sup>199</sup> No 75 of 2008.

capacity to infringe the penal law. For purposes criminal liability, the Children's Act like the Penal Code, divides children into three broad categories which are: children under the age of seven years or infants who are *doli incapax* or incapable of committing an offence; children between the ages of seven and 13 years on whom the *doli incapax* rule continues to apply but with a rebuttable presumption that the child had the requisite criminal capacity; and children between the ages of 14 and 18 years or juveniles who are assumed to have the normal capacity for forming the requisite criminal intent.<sup>200</sup> A juvenile court is vested with the jurisdiction to hear and determine any charge against any person between the ages of seven and 18 years.<sup>201</sup> In terms of the Act therefore, the minimum age of criminal responsibility is seven years. This is inconsistent with the Penal Code, which sets such age slightly higher at eight years.<sup>202</sup>

Botswana's minimum age of criminal responsibility is not only very low but also inconsistent with both the Convention on the Rights of the Child and the ACRWC which call for the setting of a minimum age of criminal responsibility below which children shall be presumed not to have the capacity to infringe the penal law. The CRC Committee has interpreted the CRC as calling for the establishment of a uniform minimum age of criminal responsibility starting at the age of 12 years and gradually increasing to higher age levels. National laws must be harmonised with international law and raise criminal responsibility to at least the age of 12 years as recommended by the CRC Committee.

## 7. Specialised procedures and institutions

The juvenile court in Botswana operates as a court of special jurisdiction within the existing judicial structures. It constitutes of a magistrate who may be assigned by the Chief Justice to preside over the court from time to time and a juvenile court assistant assigned by the Director of Public Prosecutions, to adduce evidence and generally assist the court in the performance of its functions under the Act. The other members of the court are a probation officer and a clerk of the court.<sup>203</sup>

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<sup>200</sup> Section 2.

<sup>201</sup> Section 22(2).

<sup>202</sup> Section 13.

<sup>203</sup> Section 23.

Probation officers are persons of good character who are, by experience, qualified in matters relating to social welfare. They are appointed by the Minister of Local Government.<sup>204</sup> The functions of probation officers as laid down in the Act are:

- (a) to enquire into and prepare a comprehensive report on the general conduct, home environment, and character of the child or child on trial before the court as well as the cause and circumstances contributing to the delinquency of the child or child;
- (b) to devise and carry out any measures for the observation and correction of tendencies to delinquency in children or juveniles and for the discovery and removal of conditions causing or contributing to the child delinquency;
- (c) to supervise or control any child, child or other person convicted of an offence and placed under the supervision of a probation officer;
- (d) to perform such other duties as may be conferred upon them under the Act.<sup>205</sup>

The recommendations made by the probation officer help the court in deciding how best to deal with the juvenile offender in a manner consistent with international standards.<sup>206</sup> The absence of a probation officer in a case involving a juvenile is regarded as a failure of justice, which vitiates the entire proceedings. In *Maleke v The State*,<sup>207</sup> the appellant, a juvenile, was tried and convicted before Magistrate's Court in the absence of a probation officer. She successfully appealed her conviction to the High Court, which held that in the absence of a probation officer, the juvenile court was not properly constituted to conduct the trial, hence violating Section 10 of the Constitution as it was a gross departure from the established rules and procedures followed in such cases.

The need to ensure that a juvenile court is properly constituted before it proceeds to hear a charge against a child was also emphasised in *Molaudi and Others v The State*.<sup>208</sup> The court held that:

It is desirable that a Magistrates' Court or a Customary Court hearing a charge against a juvenile should record the place (i.e. the room) where the proceedings are being held, the presence of a probation officer, required by law to be present, and the presence

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<sup>204</sup> Section 32(1).

<sup>205</sup> Section 32(2).

<sup>206</sup> CRC General Comment No 10 (note 92) para 13.

<sup>207</sup> 1988 BLR 325.

<sup>208</sup> 1988 BLR 48 (HC).

of those permitted by law to be present. Otherwise, a court exercising powers of review or an appellate court would not be in a position to know that important provisions of the Children's Act, 1981 referred to above have been complied with.<sup>209</sup>

## 8. Nature of proceedings

The conduct of proceedings in juvenile courts differs significantly from those of the ordinary criminal courts. Firstly, the Act requires that the court sit informally in a room other than that in which any other court ordinarily sits.<sup>210</sup> This requirement recognises that the formality of the adult court system may be particularly intimidating to children. It therefore seeks to have the courtroom arranged and furnished in a way that creates an atmosphere of dignity but simplicity with most of the trappings of the adult court such as the dock, the bench and witness stand excluded.<sup>211</sup> The informal and relaxed setting of the court is meant to provide an atmosphere of understanding that will not intimidate the child, but will allow him/her to participate in the proceedings and express him/herself freely taking into account his/her age and maturity.<sup>212</sup>

Secondly, it restricts attendance to; (a) officers and members of the court; (b) the child concerned and his parents or guardian; (c) the social welfare officer concerned with the case and (d) such other persons as the court may authorise to be present.<sup>213</sup>

The attendance of the parent(s) or guardian(s) of the child is required for various reasons including parental support and comfort for the child, and where the child is not legally represented the parent(s) or guardian(s) ought to be there to help the child conduct his defence. The Beijing Rules provide;

The parents or guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interests of the juvenile. They may however be denied participation by the competent authority if there is reason to assume that such exclusion is necessary in the interests of the juvenile.<sup>214</sup>

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<sup>209</sup> Ibid .

<sup>210</sup> Section 24(1).

<sup>211</sup> Hugh K Bevan *Child Law* (1989) 545.

<sup>212</sup> Beijing Rule 14.2.

<sup>213</sup> Section 24(2).

<sup>214</sup> Rule 15.2

The added advantage is that their attendance often enables the court to get a better picture of the family from which the child comes and also to bring home to the parents their own responsibilities concerning the upbringing of the child and to point out their past failures in this respect.<sup>215</sup> More importantly, upon a finding the child guilty, the court may order the parent or guardian to pay a fine, damages or costs which therefore requires their presence.

The court may authorise other persons to be present during its sitting who may include trainee magistrates, law and social welfare students on internship and researchers into the workings of the juvenile court. The discretion to allow such persons to attend should, however, be exercised cautiously and restrictively to guard the privacy of the child concerned.<sup>216</sup>

Both the CRC and the ACRWC require that the privacy of a child in conflict with the law be fully respected at all stages of the proceedings, to avoid harm to the children by undue publicity. In order to protect the child's right to privacy, the Children's Act prohibits the publication of the name or address of any person before a juvenile court or the name and address of any school which that child is or has been attending, or any photograph of the child in any manner likely to lead to his/her identification except with the written permission of the court.<sup>217</sup> Contravention of this provision constitutes an offence, which attracts a fine of P100 and or three months imprisonment.<sup>218</sup> This means that the presence of the press in the juvenile court and access to the record of proceedings is not *per se* prohibited. What is restricted is the right to publish reports of the proceedings which are likely to reveal the identity of the child concerned.

The above measures are intended to make the court environment less intimidating to the child, to avoid his/her stigmatisation and to protect and respect the privacy of the child. They also promote the child's reintegration and assumption of a constructive role in society. In this regard, the Children's Act complies with both the CRC and the

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<sup>215</sup> Bevan (note 212) 550.

<sup>216</sup> Bevan (note 212) 549.

<sup>217</sup> Section 25(1).

<sup>218</sup> Section 25(2).

ACRWC which guarantee a child offender special treatment that respects a child's sense of dignity and worth and in turn reinforces the child's respect for human rights and fundamental freedoms of others.<sup>219</sup>

These safeguards, however, are not always followed by the courts in Botswana. Maintenance of the privacy of the courtroom is not always feasible. The inadequacy of courtroom accommodation in certain areas hampers the effective implementation of the Act. Out of the 19 Magistrate's Courts in Botswana, only four have separate facilities or court rooms specially designated for juvenile courts.<sup>220</sup> This means that in other Magistrate's Courts, juvenile courts sit *in camera* in ordinary criminal court rooms designated for adult offenders.

Where there are no specially designated rooms for a juvenile court, children and their parent(s) or guardian(s) have to wait in the court gallery along with adult offenders, for cases to be called for hearing. When the court session starts, the magistrate decides on which cases to hear first. In the event that the court decides to deal with the child's case first, it directs the court orderly to clear the gallery of all persons not authorised to be present. This is usually done in the presence of the child and his parent(s) or guardian(s). If the court decides to deal with the case last, the child and his parents have to wait in the gallery until all the adult criminal cases have been called and dealt with.<sup>221</sup>

Allowing children and adults to share the same waiting area and courtroom, and to mingle freely while they wait for their cases to be, is clearly violates the right of the child offender to privacy. It exposes children to the adult criminal system from which they are supposed to be shielded. There is therefore an urgent need for government to provide separate facilities for the juvenile courts to sit.

The prohibition against the publication of the name and address of any person before a juvenile court is not only inadequate, but it is also not strictly enforced or adhered to. Media reports on child offenders sometimes disclose the addresses of schools

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<sup>219</sup> See Article 40(1) of the CRC; Article 17(1) of the ACRWC.

<sup>220</sup> Interview with Senior Clerk of Mochudi Magistrate's Court Agisanyang Gabanakgang on 04/01/2010.

<sup>221</sup> From the writer's experience covering over 12 years as a magistrate in Botswana.

where juveniles are attending or attended in a manner likely to lead to the identification of such children. In 2009 a local newspaper carried a story about a juvenile offender under the heading '*Notorious student committed to Boys Prison*'.<sup>222</sup> Along with the story, the newspaper disclosed the age of the offender and the school he attended and other details with sufficient clarity to lead to easy identification of the child. Although the particulars in a newspaper account may effectively prevent the child from being identified by the public, a catalogue of details such as the hometown or district, the age of the offender, the nature of the offence and the address where it took place may easily identify the child for the community he lives in.

Of concern also is the fact that the prohibition of the publication of the name and address of a child is limited to court proceedings and not other stages of the criminal justice process, such as arrest and investigation. This means that before the child offender is taken to court, there is no protection for the child's privacy and the media takes advantage of this lacuna in the law.<sup>223</sup> The CRC guarantees children in conflict with the law the right to have their privacy fully respected at all stages of the proceedings. The Committee on the Rights of the Child has interpreted 'at all stages of the proceedings' as including from the initial contact with the law enforcement agency, until the final decision by a competent authority, or on release from supervision custody or penitentiary.<sup>224</sup>

Finally, as is evident from the cases cited above, the full names of the children in conflict with the law in Botswana are used in the record of proceedings and in the law reports. The anonymity of the children is therefore not maintained. This practice clearly defeats the whole purpose of protecting the privacy of the child, and as a result, the stigma of a criminal conviction will stay with him/her throughout his/her life.

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<sup>222</sup> *The Voice on line Botswana* 13<sup>th</sup> March 2009.

<sup>223</sup> *The Botswana Sunday Standard* Newspaper Online editions on 15 September 2009 and 26 September 2009 respectively reported on the story of two boys who allegedly gang-raped and murdered a four-year-old girl. The first report not only disclosed the ages of the two boys and the names of the schools they attended, but also had a picture of their homestead where the incident took place, the name of the village and district, as well as the name of the family spokesperson on the front cover. When the matter was brought before the court two weeks later, the newspaper carried the story again with the ages and addresses of the two children and their whereabouts, and that they had been released from police detention into the custody of their parents due to their ages.

<sup>224</sup> CRC General Comment No 10 Children's Rights in Child Justice CRC/C/GC/10 (2007) para 23.

It is therefore imperative for the Act to be amended to extend this protection to children at the earliest contact with the criminal justice system and to ensure that they remain anonymous throughout the proceedings and in the law reports. Furthermore, the penalty for violating this provision is very low and may not deter a newspaper from publishing a story that it considers newsworthy.

## 9. Diversion

Diversionary measures are meant to avoid a child's early contact with the criminal justice system. Diversion of child offenders from the formal criminal justice system is provided for in Article 40(3) (b) of the CRC, which calls for such measures to be used in appropriate cases, provided the rights of the children involved are respected. Respect for the rights of the child entails securing the informed consent of both the child and his/her parents to the diversion, bearing in mind the child's right to be heard and taken seriously in matters affecting him/her.

The main diversionary measure provided for under the Children's Act is by referring a child offender from the juvenile court to the children's court.<sup>225</sup> Where a child in conflict with the law is referred to the children's court, the criminal case falls away and the child is treated as a child in need of care. The Act defines a child in need of care as one who meets any of the following descriptions;

- (a) has been abandoned or is without visible means of support;
- (b) has no parent or guardian or has a parent or guardian who does not or is unfit to exercise proper control over the child;
- (c) engages in any form of street trading, unless he has been deputed by his parents to help in the distribution of merchandise of a family concern;
- (d) is in custody of a person who has been convicted of committing upon or in connection with the child any offence referred to in part IV or
- (e) frequents the company of an immoral or violent person, or is otherwise living in circumstances calculated to cause or conduce to his seduction, corruption or prostitution.<sup>226</sup>

<sup>225</sup> A children's court deals with social welfare issues while the juvenile court is for criminal matters.

<sup>226</sup> Section 14.

Where a court is satisfied, (after enquiring into the circumstances of a child offender) that such child in need of care, it has the discretion to make any of the following orders;

- (a) that the child returns or remains in custody of his parents or guardian or the person in whose custody he was immediately before the commencement of the proceedings;
- (b) that the child be placed in the custody of a suitable foster parent;
- (c) that the child be sent to a children's home; or
- (d) that the child be sent to a school of industries.<sup>227</sup>

Orders made under (a) or (b) above may be made subject to supervision by a social welfare officer.<sup>228</sup> At the termination of the period of supervision, the social welfare officer must submit a report of the behavior, progress and welfare of the child to the Commissioner of the District in which the child resides.<sup>229</sup>

A child offender's failure to comply with an order of the children's court is an offence punishable by either a caution or reprimand or corporal punishment.<sup>230</sup> A parent or guardian, who fails to ensure that his child complies with an order made in respect of the child under Section 19, commits an offence and is liable upon conviction to a maximum fine of P100 or three months imprisonment.<sup>231</sup>

In making an order to send a child or child to a children's home or to a school of industries (c) and (d) above the court must be guided by the best interests of the child principle.<sup>232</sup> This entails having regard to;

- (a) the ascertainable wishes and feelings of the child concerned, considered in light of the child's age and understanding;
- (b) the physical, emotional and educational needs of the child;
- (c) the likely effect on the child of any change in his or her environment;
- (d) the age sex, background and any other characteristics of the child which the court considers relevant; and

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<sup>227</sup> Section 19(1).

<sup>228</sup> Section 19(2).

<sup>229</sup> Section 19(4).

<sup>230</sup> Section 20.

<sup>231</sup> Section 21.

<sup>232</sup> Section 7(1) of the 'Child in Need of Care' Regulations, Statutory Instrument No 8. of 2005Section.

(e) any harm already suffered or that is likely to be suffered by the child if the child is not removed from his or her home.<sup>233</sup>

The regulations further require the court to deal with the matter of removing a child (in need of care) to an institution or a foster home expeditiously, to avoid any delay that would prejudice the welfare of the child.<sup>234</sup>

This is the one diversionary measure under the Act which diverts a child (who would otherwise be an offender) away from the formal criminal justice system and brings him/ her under the care of the court. It helps the child avoid the stigma attached to conviction and sentence.

Such a measure also enables the identification of any social, economic, family and health problems contributing to the criminal conduct of the child and helps to address the causes of such conduct and not merely its consequences.<sup>235</sup> The orders provided for are aimed at helping the child offender to understand and assume responsibility for his unlawful conduct, as well as to change and improve his future behavior. In this regard, the Children's Act is sensitive and responsive to the needs of children who find themselves on the wrong side of the law due to lack of care, which is in line with the spirit of the CRC.

The Act, however, does not accord a child in conflict with the law the right to be heard and to consent to the decision to divert him from the criminal justice system. This decision lies solely with the Commissioner of the children's court, upon consideration of the social welfare officer's report.<sup>236</sup>

The informed consent of the child concerned is of paramount importance in helping him assume responsibility for his conduct and mend his ways. Furthermore, a child who consented to a diversion would most likely be more cooperative with the

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<sup>233</sup> Section 7(2).

<sup>234</sup> Section 7(4).

<sup>235</sup> Human Rights and Equal Opportunity Commission Issue Paper, Australian Law Reform Commission Issues Paper 18 'Speaking for ourselves: Children and the legal process' available at [www.communitylaw.org.au/public\\_resource\\_details.php?resource\\_id](http://www.communitylaw.org.au/public_resource_details.php?resource_id) [accessed on 8 February 2010].

<sup>236</sup> Section 19(1) According to Section 3 of the Act every magistrate is a Commissioner of the Children's Court

authorities involved and abide by the orders of the court, than one who was never given an opportunity to voice his opinion on the matter.

Where the child stands to be deprived of his/her liberty and sent to a children's home or school of industries for a period of two years, the rights of that child must be given due consideration and protection.<sup>237</sup> Additionally no appeal lies against the decision of the Children's Court declaring any child a child in need of care and the consequent orders.<sup>238</sup>

There is therefore need to harmonise the Act with the CRC<sup>239</sup> and to accord the juveniles in conflict with the law an opportunity to be heard, and their views given due weight in accordance with their evolving capacities, and to ensure that they are not forced into the diversion option. The decision to divert the child offender from the criminal justice system to the children's court and the consequent disposition of the said court should be made subject to appeal or review by a higher court. This would be in line with both the CRC and the ACRWC's requirement that decisions and measures imposed on children considered to have infringed the penal laws, be subjected to review or appeal by an independent and impartial authority or judicial body according to law.<sup>240</sup>

## **10. Arrest and detention**

In order to meet international standards, deprivation of liberty of a child must be lawful and not arbitrary; it must be imposed as a measure of last resort when no other appropriate alternative measures are at the authorities' disposal, and must be for the minimum possible period of time and limited to exceptional cases.<sup>241</sup>

The Constitution of Botswana prohibits arbitrary arrest and detention and requires that any person who is arrested or detained must be informed as soon as is reasonably

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<sup>237</sup> 'An order made for the placement of a child in terms of Section 19 of the Act shall specify a period not exceeding 2 years as the period of placement.' Section 8(2)

<sup>238</sup> Section 9 (1) the orders made under Section 19 of the Act are subject to review and variation by the Children's Court at the instance of the social welfare officer and not the child or its parents.

<sup>239</sup> Article 12.

<sup>240</sup> CRC Article 40(v); article 17(2)(c)(iv) of the ACRWC.

<sup>241</sup> Article 37(b) of the CRC; Rule 1 & 2 of the JDLs.

practicable, in a language he/she understands, of the reasons for his arrest and detention.<sup>242</sup> Where a person is arrested or detained upon reasonable suspicion of having committed, or being about to commit a criminal offence, he/she must be brought as soon as is reasonably practicable, before a court. If he/she is not tried within a reasonable time, he/she must be released either unconditionally or upon such reasonable conditions to ensure that he/she appears at a later date for trial.<sup>243</sup> Any person who is unlawfully arrested or detained by any other person is entitled to compensation from that other person.<sup>244</sup>

In effecting an arrest of a suspect, the police are required to produce a warrant of arrest issued by a duly authorised judicial officer,<sup>245</sup> except in circumstances such as when an officer witnesses an offence being committed in his presence.<sup>246</sup> A suspect arrested without a warrant and placed in police custody must be charged before the Magistrate's Court within 48 hours of his/her arrest. If no charge is laid against the suspect, he/ she must be released.<sup>247</sup>

The Constitution recognises that a child may be deprived of his/her liberty under the order of a court or with the consent of his/her parent or guardian for his education or welfare, until he attains the age of 18 years.<sup>248</sup> The Children's Act also envisages the detention of children and therefore provides for the establishment of a youth shelters for the reception of juveniles who have been arrested and are waiting to appear before the juvenile court.<sup>249</sup> However, since 1981 when the Act was enacted, such shelters were never been established.

Children in conflict with the law benefit from the constitutional and legislative prohibition against torture and inhuman or degrading treatment or punishment. The Children's Act protects children against neglect and ill-treatment by any parent or guardian of a child, or any person having the custody of a child. Any such person

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<sup>242</sup> Section 5 (2).

<sup>243</sup> Section 5 (3).

<sup>244</sup> Section 5 (4).

<sup>245</sup> Section 37(1) of the Criminal Procedure and Evidence Act.

<sup>246</sup> Section 27(1).

<sup>247</sup> Section 36 (1) and (2).

<sup>248</sup> Section 5(1)(f).

<sup>249</sup> Section 34(1).

having custody of a child who neglects, ill-treats or exploits the child or allows or causes him to be neglected, ill-treated or exploited, is guilty of an offence.<sup>250</sup>

For the purposes of this provision, a child is deemed to have been neglected if the parent or guardian or any person having the custody of the child does any of the following;

- (a) unreasonably fails to provide or pay for adequate food, clothing or housing for the child;
- (b) unreasonably fails to make adequate provision for the proper health and care of the child;
- (c) unreasonably leaves the child in the care of any person or institution without showing any further interest in the child; or
- (d) exposes the child to conditions or circumstances, which are likely to cause him physical, mental or psychological distress or damage.

Custody referred to in this provision extends beyond parental custody. It includes caregivers and any person having custody of a child such as police officers (where in the child is detained at the police station) and prison officials (where the child is remanded in custody, pending determination of his/her matter before the court, or where he/she is serving a prison term). This provision is consistent with the definition of deprivation of liberty under the JDLs, which means any form of detention imprisonment, or the placement of a person in a public or private custodial setting, from which the person is not permitted to leave at, will, by order of any judicial, administrative or any public authority.<sup>251</sup> The torture of child offenders by state officials is prosecutable under the various genres of assault<sup>252</sup> provided for under the Penal Code. There is no specific provision for torture under this or any other statute.<sup>253</sup>

Due to the general lack of separate facilities for the detention child offenders, both the courts and the police detain such children as a last resort and for the shortest time

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<sup>250</sup> Section 11.

<sup>251</sup> Rule 11(b).

<sup>252</sup> These are causing grievous harm( s230), unlawful wounding (s233), common assault ( s246) and assault occasioning actual bodily harm. Sections 230; 233; 246; and 247 respectively.

<sup>253</sup> CRC Committee Consideration of reports submitted by state parties under Article 444 of the Convention. Initial reports of state parties Botswana CRC/C/51/Add.9 27 February 2004.

possible. *The Botswana police duties and procedures handbook*<sup>254</sup> lays down the following rules for the detention of juveniles;

- (i) Juvenile persons will only be detained when no other cause of action is possible.
- (ii) No female juveniles will except in most extenuating circumstances be detained in any police cell.
- (iii) No male juvenile will be detained in a police cell unless no other reasonable cause is possible.
- (iv) Juvenile prisoners will not be detained in cells together with adult prisoners.

While in police custody, children are entitled to reasonable assistance to contact their parents, friends and legal representatives and such people, who, at the discretion of the investigating officer or formation commander, may be allowed access to the said child.<sup>255</sup> Foreign child offenders are granted reasonable assistance on request to contact their country's diplomatic or consular representative.<sup>256</sup>

Courts are also wary of remanding children in custody pending their adjudication before the juvenile court, and only resort to detention in serious cases such as murder and aggravated assaults and cases where the safety of the child might be compromised if he/she were to be released into the custody of his parents.<sup>257</sup> Children who are beyond parental control such that their parents cannot guarantee their attendance in court on scheduled dates and times, may also be remanded in custody.<sup>258</sup>

In terms of the Criminal Procedure and Evidence Act, failure to give particulars of name and address to a police officer constitutes an offence.<sup>259</sup> A child offender may give false particulars to the police, on arrest, thus hampering their efforts to locate his/her parents. In *State v Phemelo Patrick Tshelang*,<sup>260</sup> the juvenile was arrested on a Saturday for a robbery he allegedly committed jointly with an adult accomplice. On interrogation he gave the police false particulars and addresses in three different

<sup>254</sup> Botswana Police College (1979) 105-6.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> *State v Tiragalo Letshwiti* Criminal Case No MU 44 of 2005, unreported. Here the mother of the child requested the court to remand her son in custody for fear of retaliation from complainants whose houses he had broken into and stolen goods. The said goods had not been recovered and she was unable to compensate the complainants for their losses. They wanted to take the law into their own hands by assaulting the child.

<sup>258</sup> The mother also indicated that the child was uncontrollable. Ibid.

<sup>259</sup> Section 30.

<sup>260</sup> Criminal Case No CMMMC 000186 of 2008, unreported.

villages. Efforts to trace his parents over that weekend were fruitless and he was detained in the police cells. He was then taken to court the following Monday and it was only then that he revealed his true particulars and addresses where his parents were. He explained that his partner in crime had advised him to mislead the police. The court remanded him in custody for 14 days to allow the police to trace and bring his parents to court.

Another category of children in conflict with the law in Botswana who are inevitably always detained pending adjudication are illegal immigrants, especially those from neighbouring Zimbabwe, who because of the political and economic instability in their country, make their way into Botswana illegally to eke out a living. They are often unaccompanied by an adult, do not have any identification documents on them and have no fixed places of abode in Botswana. When they are arrested for allegedly infringing the penal law, the police and the courts often have no option but to detain them. Such pre-trial detention can sometimes stretch into weeks and months as efforts are made to trace their relatives in their home country and bring them to Botswana to attend court with them.

In the case of *State v Sherpard Magovera and Jabulani Mangove*,<sup>261</sup> the two accused were Zimbabwean male children aged about 17 years. When they were arrested for burglary and theft, it was discovered they were illegal immigrants with no travel and identification documents. The police were not inclined to take their word that they were 17 years old. They took them before the court and applied for their remand in custody pending an examination by a forensic pathologist to determine their ages<sup>262</sup> and to secure the attendance of their parents from Zimbabwe. Both were remanded at Boys Prison in Gaborone. The forensic examination revealed that they were about 17 years old and therefore juveniles.

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<sup>261</sup> Criminal Case No MU 212 of 2004, unreported.

<sup>262</sup> In terms of Section 334 of the Criminal Procedure and Evidence Act which provides as follows: 'If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available in those proceedings the court may estimate the age of such person by his appearance or from any information which may be available, and the age so estimated shall be deemed to be such person's correct age, unless (a) it is subsequently proved that the said estimate was incorrect; and (b) the person accused in those proceedings could not have been lawfully convicted of the offence with which he was charged if the person's correct age was proved'..

Efforts to trace their families through the Social Services in Zimbabwe were in vain. It turned out that they were both orphans with no immediate family members and were thus further detained. The second accused eventually escaped from Boys Prison resulting in the first accused being moved to the adult maximum-security prison for security reasons. He eventually turned 18 years while in custody awaiting trial because of the delays in tracing his relatives, but the court still dealt with him in terms of the Children's Act as the delay was through no fault of his. He was sentenced to two strokes of cane and ordered to be deported to Zimbabwe.

A child in conflict with the law who has been remanded in custody pending the adjudication of his case before the juvenile court, and is aggrieved by the decision denying him bail, has a right of appeal to the High Court.<sup>263</sup> He/she may also apply for bail before the same juvenile court, should there be any subsequent change in the circumstances that led to his detention. While in pre-trial custody, children in conflict with the law, like adults, have a right to contact family members and to instruct counsel of their choice at their own expense.

Measured against international standards on child justice, the detention of children in conflict with the law in Botswana is wanting. There are no separate detention facilities for such children resulting in them being held in prisons with adult detainees. Placement of children in adult prisons compromises their basic safety, well being, and their future ability to remain free of crime and to reintegrate.<sup>264</sup> The youth shelters for the reception of juveniles who have been arrested and are awaiting to appear before the juvenile court provided for under the Children's Act are overdue and should be established and staffed with child centered personnel, policies and practices.

## **11. Due process rights**

Both the CRC and the ACRWC recognise due process rights for child offenders and mandates states to make them available to children alleged as or accused of criminal acts. In Botswana, children in conflict with the law like adults are accorded the protections of the law. The Constitution of Botswana entrenches the principle of non-

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<sup>263</sup> Section 113.

<sup>264</sup> CRC General Comment No 10 para 85.

retroactivity of penal legislation<sup>265</sup> and guarantees all persons within the country who come into conflict with the law certain due process protections aimed at ensuring that they are accorded a fair trial before the courts.

In terms of the Constitution,<sup>266</sup> every person charged with a criminal offence is entitled to: a fair hearing within a reasonable time by an independent and impartial court established by law; has the right to be presumed innocent until proven guilty,<sup>267</sup> the right to be informed as soon as reasonably practicable in a language that he/she understands and of the nature of the offence charged. He/she also has the right to be given adequate time and facilities for the preparation of his/her defence; the right to defend him/herself before the court in person or at his own expense and by a legal representative of his own choice; the right to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court, on the same conditions as those applying to witnesses called by the prosecution; and the right to free assistance of an interpreter if he cannot understand the language used at the trial of the charge.<sup>268</sup> In addition to the above due process rights, the Children's Act makes special provisions tailored to meet the specific needs of children in conflict with the law, such as hearing cases in camera and special dispositions.

Although the criminal justice system in Botswana generally strives to uphold the rights of children in conflict with the law, an examination of the decisions of the courts reveal violations of some of these due process rights by those charged with the administration of child justice. A frequently violated right is that relating to a speedy trial. With regard to children in conflict with the law, this right assumes a particular significance because the passage of time and attainment of a higher age effectively

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<sup>265</sup> 'No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place constitute such an offence, and no penalty shall be imposed for any criminal offence that is severe in degree or description than the maximum penalty that might have been imposed for that offence when it was committed.' Section 10(4).

<sup>266</sup> Section 10.

<sup>267</sup> Section 10 (2) (a)-(f)

<sup>268</sup> Ibid.

takes the child concerned out of the child justice system and its procedures processes and protections and catapults him or her into the adult criminal system.<sup>269</sup>

The adage that ‘justice delayed is justice denied’ refers not only to the efficient and expeditious delivery of justice, as a matter of procedural fairness to the offender, but is also linked to the effectiveness of the intervention decided on by the court. In the context of child justice, the speedy conduct of the formal procedures in the juvenile court is of paramount importance, to ensure that the child is able to relate to the procedures and the consequent disposition to the offence, both intellectually and psychologically.<sup>270</sup> Delays of several years between the crime and intervention, often renders nugatory the perceived connection between the two due to lapse of memory, loss of interest and the possibility of loss of evidence.

The CRC guarantees child offenders the right to have the matter determined without delay by a competent and impartial authority or judicial body. With regards to this right, the CRC Committee concluded that:

Internationally there is a consensus that for children in conflict with the law, the time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired positive pedagogical impact and the more the child will be stigmatized.<sup>271</sup>

In order to secure this right, the Committee recommends that state parties set and implement time limits for the period between the commission of the offence and the completion of police investigations, and the decision to prosecute and the final adjudication and decision by the court.<sup>272</sup> To guarantee compliance with the above recommendation,, appropriate policy and practice directives should be adopted by all the relevant role players, stipulating the time limits within which a child in conflict with the law should have his/her case processed within the criminal justice system. This should cover the period from initial contact with the law enforcement agency right up to and including the final decision by a competent authority, or release from supervision custody or deprivation of liberty.

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<sup>269</sup> See *Mokone and Mogodu cases* (notes 197 & 199 respectively)

<sup>270</sup> Beijing Rule 20.

<sup>271</sup> CRC General Comment No 10 para 51.

<sup>272</sup> *Ibid.*

The Constitution recognises the right to legal representation without necessarily assuring it for those without the financial means to engage a lawyer.<sup>273</sup> This is so because there is no legal aid available to the poor apart from those charged with murder. The government legal aid (in the form of the *pro-deo* system) is only available to people charged with capital offences who cannot afford legal representation. Those charged with non-capital offences including children, are tried without legal representation if they cannot afford an attorney.<sup>274</sup> The appointment of counsel to represent an accused person on *pro deo* (at the state's expense) is not a rule of law but of practice that has been followed consistently in all capital offences.<sup>275</sup> The appointment of counsel is done by the Registrar of the High Court, sometimes on recommendation by the court before which an accused person is charged.<sup>276</sup>

The only assistance that child offenders who cannot afford legal representation have is therefore limited to social welfare officers and their parents or guardians who are required to attend court hearings with them.<sup>277</sup>

According to the CRC Committee, such assistance meets the requirements of the CRC provided it is appropriate. The appropriateness and perimeters of such assistance are left to the discretion of the State Party as long as it is provided freely. Such legal assistance must be provided by a person with sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and trained to work with children in conflict with the law.<sup>278</sup>

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<sup>273</sup> 'Every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice.' Section 10 (2)(d). Gideon Duma Boko 'Fair trial and the Customary Courts in Botswana: Questions on legal representation' (2000) 11 *Criminal Law Forum* 445 at 448.

<sup>274</sup> Charles M Fombad (ed) *Essays on the law of Botswana* (2007) 21.

<sup>275</sup> *Bojang v The State* 1994 BLR 146 at 158.

<sup>276</sup> Godfrey Nthomiwa 'Pro deo- the Current practice and how it can be improved' paper presented at the Legal Aid Seminar on 4<sup>th</sup> April 2002.

<sup>277</sup> Section 24(2)(b) Children's Act and Section 177 of the Criminal Procedure and Evidence Act. Which provides that Every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined or cross-examined by his counsel or other legal representative: provided that upon his trial before a magistrate court, an accused person under the age of 16 years may be assisted by his natural or legal guardian, and any accused person who in the opinion of the court requires the assistance of another person may, with the permission of the court be so assisted.

<sup>278</sup> CRC General Comment No 10 (note 92) para 49.

## 12. Alternative sentencing options

International juvenile justice law prefers the use of alternative non-custodial measures over traditional punitive measures for child offenders especially those who do not present a serious threat to society. In this regard state parties to the CRC are obliged to develop alternative sentencing measures to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence.

Under the Children's Act, where the juvenile offender is committed to a juvenile court for trial and the court is satisfied of his/her guilt, it may, after taking into consideration the general conduct, home environment, school records and medical history (if any) of such child, dispose of the case in any of the following ways;

- (a) dismissing the charge;
- (b) discharging the offender on his entering into a recognizance;
- (c) placing the offender on probation for a period of not less than six months or more than three years;
- (d) sending the offender to a school of industries for a period not exceeding three years or until he attains the age of 21 years; or
- (e) ordering the parent or guardian to pay a fine, damages or costs.<sup>279</sup>

The Court of Appeal in *Molaudi and Others v The State*<sup>280</sup> declared the intent and purpose of Section 28 as follows;

The powers given by Section 28 are remedial and clearly not punitive in intent. They are intended for the protection of the juvenile or child and to ensure his keeping out of trouble. Any punitive aspect is incidental. The general tenor of the Act seems to show an intention in Section 28 to substitute in respect of children and juveniles an educational and protective measure in substitution for the more rigorous and substantially punitive aspects of the general law.<sup>281</sup>

The powers of the juvenile court on a finding of guilt are limited to the dispositions under Section 28 and they exclude any other form of punishment known to law.

According to the Court of Appeal:

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<sup>279</sup> Section 28.

<sup>280</sup> 1988 BLR 214-219 (CA).

<sup>281</sup> Ibid.

Section 28 is a complete statement of the powers of a juvenile court and it excludes any powers of imprisonment conferred under legislation outside the Children's Act save in circumstances set out in Section 29 of the Children's Act of 1981, it follows that the exclusion extends to offences even where punishment is mandatory.<sup>282</sup>

A juvenile court therefore has to decide on the most appropriate way of dealing with a juvenile within the limits of Section 28 and cannot impose a sentence of imprisonment. In the case of *Masowa v The State*<sup>283</sup> the accused, a juvenile aged 16 years, was tried and convicted on a charge of rape by a Magistrate's Court. He was sentenced to 21 months imprisonment plus six strokes. On review, the High Court had to decide whether it was lawful for a Magistrate's Court to pass a sentence of imprisonment upon a juvenile. The Court quashed both the conviction and the sentence. In respect of the sentence, the court held (relying on the *State v Molaudi and Others*), that the accused was only 16 years old and therefore a juvenile as defined by Section 2 of the Children's Act. Magistrates presiding in juvenile courts had no powers to sentence juveniles to prison, and were restricted to the exercise of the powers listed in Section 28 of the Children's Act. The sentence imposed by the magistrate was therefore unlawful.

### 12.1 Dismissing the charge

A conditional or absolute discharge is a non-punitive alternative for child offenders. The Act does not specify the circumstances under which the court can dismiss a charge against a child after being satisfied of his/her guilt. However dismissal of charge against an offender is provided for under the Penal Code.<sup>284</sup> The Code gives a Magistrate's Court the discretion to dismiss a charge against an offender if the charge is proved, but the court is of the opinion that it is inexpedient to impose punishment.<sup>285</sup> These factors are the character, antecedents, age, health or mental condition of the accused, the trivial nature of the offence and the extenuating circumstances under which the offence was committed.<sup>286</sup> Where the court is

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<sup>282</sup> Ibid.

<sup>283</sup> 1989 BLR 24(HC).

<sup>284</sup> Section 32.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

satisfied of the existence of any of these factors, it may, without proceeding to conviction, dismiss the charge. This is a suitable option for less serious offences and first offenders.

## 12.2 Discharging the offender

A court may altogether discharge the child<sup>287</sup> particularly for minor offences. The Criminal Procedure and Evidence Act provides that;

Whenever a person is convicted before the High Court or any Magistrate's Court of any offence other than an offence specified in the second schedule, the court may in its discretion discharge the offender with a caution or reprimand and such a discharge shall have the effect of an acquittal except for the purpose of proving and recording previous convictions.<sup>288</sup>

The Court may also discharge the offender upon successful promotion of reconciliation between the offender and the victim under the Criminal Procedure and Evidence Act, which provides as follows:

- (1) In criminal cases a Magistrate's Court may with the consent of the prosecutor promote reconciliation, and encourage and facilitate the settlement in an amicable way, of proceedings for assault or for any other offence of a personal or private nature not aggravated in degree, on terms of payment of compensation or other terms approved by such court and may thereupon order the proceedings to be stayed.
- (2) If the proceedings are stayed they shall be stayed for a sufficient length of time to enable the settlement to be carried out and if the terms be carried out by that date it shall be recorded on the record to the case and the accused discharged; if the terms have not been carried out, the case against the accused will then proceed unless the proceedings are further stayed.<sup>289</sup>

The above provision suggests that before the court can promote reconciliation between the offender and the victim, it must be endorsed by the public prosecutor on behalf of the Director of Public Prosecutions. The prosecutor will decide whether or not to prosecute an offender. The type of offence involved must be a minor assault or any other offence of a private nature that is not aggravated in degree. The underlying principle being that the more serious the offence, the greater the public interest to

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<sup>287</sup> Section 28(b).

<sup>288</sup> Offences specified under the second schedule are rape, murder and robbery and any offences of which a minimum punishment is by law imposed. Section 314.

<sup>289</sup> Section 321.

have deterrent and punitive penalties on the offender.<sup>290</sup> The wording of the Section also suggests that the court must play an active role in the process of reconciling the parties. It must therefore encourage the parties to reach a settlement.<sup>291</sup> The conditions of settlement are not stipulated in the Act, leaving the court the latitude to determine such conditions depending on the nature of the offence and on what the parties agree. Such conditions may include payment of monetary compensation, apologies, repairing damaged property and working for the victim.<sup>292</sup>

## 12.2 Placing the offender on probation

The court may place the offender on probation for a period of not less than six months or more than three years.<sup>293</sup> The length of probation is predicated upon the needs of each child. Probation allows the child offender to live at home in the custody of his/her parents or guardian, but under the supervision of a probation officer and upon such conditions as the court deems appropriate. Leaving the child at home is not considered punitive and is therefore free from social stigma. The Act does not spell out such conditions, leaving the court to make such determination on a case-by-case basis. This provides the court with an unlimited opportunity to determine probation conditions to suit the particular circumstances of the particular child.

However, in *State v Moemedi Nikei Ramotogo*,<sup>294</sup> the High Court warned that in formulating such conditions, the juvenile court should be wary not to impose unreasonable conditions, which may undermine a child's constitutional rights. Based on the social welfare officer's report that the accused juvenile became hysterical after taking alcohol, the juvenile court had placed him on six months' probation and ordered that during the period of probation, he should abstain from drinking alcohol and from smoking, and that he should attend school daily. The court further ordered that if the accused violated any of these conditions, he would be brought back to court for an order of detention.

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<sup>290</sup> Daniel D Ntanda Nsereko 'Compensating victims of crime in Botswana' (1989) 33 *Journal of African Law* 157 at 167-8.

<sup>291</sup> Ibid.

<sup>292</sup> Ibid.

<sup>293</sup> Section 28 (c)

<sup>294</sup> High Court Review Case No 221 of 1984, unreported.

On review, the High Court held that while placing the accused on probation was appropriate, the order that the accused should neither drink liquor nor smoke and to make any breach a reason for his detention was unreasonable, and a breach of a the child's constitutional rights. It further found that although alcohol and smoking was bad for the child's health, it was not a matter for the court to consider and further that it would be difficult for the court to determine whether such conditions had been breached. The court quashed the above conditions and substituted them with those it deemed appropriate.<sup>295</sup>

General conditions of probation may include obedience to parents, regular school attendance, following instructions given by probation officers, notification of temporary or permanent change of address and staying away from undesirable companions and places of disrepute.<sup>296</sup> Specific conditions may relate to restitution, living with a relative or other appropriate person where there is no parental home, attendance at a special school, affiliation with an approved recreational facility and carrying out medical recommendations.<sup>297</sup> The contacts of the probation officer and the child are usually through home visits or through the child reporting at the office of the probation officer. The frequency of such contacts will differ from case to case.

Breach of a probation order and or commission of another offence while on probation, opens the child to sentence for the original offence under the relevant penal provisions.<sup>298</sup> A court making a probation order must explain to the child in simple language, the implications of the order to ensure compliance. A probation order terminates at the end of the stipulated time and on satisfaction of the conditions of probation. The order may be varied or cancelled upon application to the court which made the order, by either the probation officer or the offender.<sup>299</sup>

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<sup>295</sup> '(i) That the child reports once a month to the probation officer, (ii) that he answers all questions put to him by the probation officer truthfully and obey orders given to him by such officer. (iii) That he is not convicted of any offence in contravention of Section 176(1) of the Penal Code or Section 254(b) of the Penal Code or Section 337(1) of the Penal Code committed during the period of probation.'

<sup>296</sup> John Otto Reinemann 'Probation and the delinquent' (1949) 261 *Annals of the American Academy of Political Science* 109 at 116.

<sup>297</sup> Ibid.

<sup>298</sup> Section 29.

<sup>299</sup> Section 30.

#### 12.4 Sending the offender to a school of industries

A juvenile court may send a child offender to the school of industries for a maximum period of three years or until the offender attains the age of 21 years.<sup>300</sup> This is the principal custodial sentence for children in conflict with the law in Botswana. Its purpose is not to punish but to reform and rehabilitate the child so that he/she may be reintegrated into society.

However, this is not an option that should be lightly passed as it removes the child from parental control and the home environment. It separates the child from his/her family. Because of its severity, the courts must use it sparingly and for children who have committed serious offences, recidivists, unruly children who pose a serious danger to themselves and the community and those who are considered to need more supervision than is available at home.

In the case of *State v Tirafalo Letshwiti*,<sup>301</sup> a 17-year-old juvenile was charged and pleaded guilty to seven counts of house breaking and theft. The social enquiry report filed with the court revealed that he was a school dropout, with a string of previous convictions for similar offences for which he had been sentenced to corporal punishment and ordered to return to school. The report further disclosed that he had gone to school for only three days and stopped with no explanation. Enquiries at the school revealed that he had broken into the school building and stolen a television set. The school authorities suspended him for 25 days and gave him a final warning. The juvenile told the court that he never went back to school because he felt that he had been unjustly punished. The television set he stole had been taken and sold by an older accomplice and therefore he did not get a share of the proceeds.

His mother, a widow, told the court that she was unable to control him and that he often sneaked out of home to commit offences. She said she had lost count of the number of times she had had to pay for his offences and that she no longer had the means to pay. She further said she feared for his safety as some of the people whose houses he had broken into and stolen from, were threatening to assault him. She therefore pleaded with the court to commit him to prison long enough for him to

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<sup>300</sup> Section 28(d).

<sup>301</sup> Criminal Case No MU 44 of 2005, unreported.

mature. Having regard of the juvenile's character and life history, the court sent him to the school of industries for a period of three years.

The school of industries is intended to rehabilitate child offenders, curb re-offending by changing their character and attitude towards commission of crime, train them in saleable skills and provide them with skills of trade to make them self-sufficient.<sup>302</sup> Juveniles committed to the school are made to do short courses in carpentry, brick-laying, welding and fabrication, motor mechanics and basic computer skills. At the end of their stay, juveniles are issued with a certificate of completion of the trade they would have pursued.<sup>303</sup>

The school has an open door policy intended to facilitate shared supervision and guidance between the school and the parents or guardians. To this end, parents and guardians are allowed to visit their children at the school and to be briefed on their performance in the rehabilitation programme.<sup>304</sup> In order to break the long periods away from home and de-stigmatise the school as a prison for children, compassionate visits are provided for children to their homes for bereavements of close relatives and for traditional family celebrations such as weddings.<sup>305</sup> The visits enable the community members to get used to seeing the child among them. This paves way for acceptance and integration at the completion of his/her committal, without being viewed as an ex convict or ex-criminal.<sup>306</sup>

The problem with this sentencing option is that there is only one school of industry with a capacity of 100 trainees to service the entire country. It admits male juveniles only. In terms of international norms and standards, every child deprived of liberty has the right to maintain contact with his/her family through correspondence and visits. To facilitate this, the child should be placed in a facility that is as close as possible to the place of residence of his/her family.<sup>307</sup>

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<sup>302</sup> Ministry of Local Government *Philosophy: School of industries prepared for the Judiciary* (2001).

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

<sup>307</sup> JDLs Rule 59.

Having one school to service the entire country often results in children being committed far away from their homes and families making visitation and maintaining contact difficult. The exclusion of girls from admission into the school limits the sentencing alternatives for the court when dealing with female child offenders. It places them at the risk of being sent to the adult prison when it is necessary to deprive them of liberty.

### **12.5 Ordering the parent or guardian of the offender to pay a fine or damages or costs**

A court may order the parent or guardian of the offender to pay a fine, damages or costs as children are in no position to do so themselves.<sup>308</sup> This has the effect of punishing other people for an offence committed by a child. It is also seen as a way of reminding parents and guardians of their duty to train their children or wards in proper social behavior so that they do not victimise other members of the public.<sup>309</sup> Such an order is given on condition that the parent or guardian is present in court and given an opportunity to be heard on the matter. In the case of *State v Moemedi Nikie Ramotogo*,<sup>310</sup> the High Court quashed an order of the lower court, of compensation issued against the mother of a 17-year-old boy who had pleaded guilty to maliciously damaging two windows of a police vehicle. The order was based on the hearsay that his mother had agreed to pay compensation. The High Court declared the order invalid because the mother of the boy was not the accused and that there was nothing on record to show that she had been present in court when the order was made.

Imposing a fine on the parent or guardian of the offender would also pose problems in the event of default of payment where the fine is set as an alternative to imprisonment. The court would have to commit the defaulter to prison for non-payment, which in this case would be the parent or guardian. The offender and not his parent or guardian should pay the fine, compensation, damages or costs as the court may determine. In this regard, the court should look into the financial status of the child before making

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<sup>308</sup> Bevan (note 212) 575.

<sup>309</sup> Nsereko (note 291) 159.

<sup>310</sup> See (note 306).

such an order. Some children may have allowances or pocket money from which they can meet the order, while others may be employed and earning a salary or wage.

For those children who are unable to pay alternative measures such as community service would be an appropriate way of making amends to the community by making good the damage the offending has caused.<sup>311</sup> The Children's Act allows a child, his parents or guardian to appeal or apply for judicial review in the High Court against such a decision or order.<sup>312</sup>

As can be seen from Section 28 of the Act, the juvenile court has no powers to enter a conviction against a child offender. Instead, it only has to be satisfied of the guilt of the offender. This ensures that children are not labeled a criminal and stigmatised. The lenient measures promote an individualised response, which strikes a balance between the circumstances of the child, the nature of the offence and the interests of the community and encourage the child to understand the implications of the harm caused to others. They also enable the child to escape the severe forms of punishment provided for under other the penal statutes and promote his or her social reintegration.

The alternative sentencing measures provided for under the Act, are in my view in harmony with the requirements of the CRC. The instrument obliges state parties to promote a variety of dispositions for children in conflict with the law. These include care, guidance and supervision orders, counseling, probation, foster care, education and vocational training programmes and other alternatives to institutional care. This is to ensure that children are dealt with appropriately and proportionately.<sup>313</sup> The prohibition of imprisonment of children is also in line with the CRC, which emphasises the use of institutionalization as a measure of last resort.<sup>314</sup>

The limited range of dispositions provided for under the Act necessitate its amendment to provide more alternatives to the institutionalisation of children and to ensure that treatment of children in conflict with the law is consistent with the aims of child justice and the general principles of the CRC. These additional orders would

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<sup>311</sup> Othogile (note 4) 399.

<sup>312</sup> Section 31.

<sup>313</sup> Article 40(4)

<sup>314</sup> Article 37(b)

include care orders, guidance orders, community service orders, restitution orders and treatment or counseling orders.<sup>315</sup>

Another flaw of the Act lies in its provision for differential treatment of children in conflict with the law depending on whether they are diverted to the children's court or tried in the juvenile court. When a child is diverted to the children's court, the best interests of that child must be the guiding principle for that decision. The child's wishes and feelings must be ascertained and considered in light of his/her age and understanding before he is sent to a children's home or school of industries. The same right, however, is not accorded to a child who is committed to trial before the juvenile court.

In making an appropriate order or orders, a juvenile court is not bound to treat the best interests of the child or child as the paramount consideration. Moreover the child or juvenile's participation in his/her trial before the juvenile court is limited to the giving of evidence if s/he pleads not guilty. If s/he pleads guilty, his/her participation is negligible by way of a plea in mitigation.<sup>316</sup>

This differentiation in treatment of children is not justifiable and is contrary to both the CRC and the ACRWC. Both require that the determination of all issues relating to the rights of the child including the administration of child justice, be based on the best interests of the child without any discrimination. There is therefore a need to extend the application of the best interests of the child principle to children before the juvenile court and to ensure that all rights apply to all children in conflict with the law without equally.

### **13. Punishment**

As pointed out in chapter three, international human rights law prohibits specific types of punishment from being imposed on children. These are corporal punishment, death

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<sup>315</sup> Department of Social Services Ministry of Local Government 'Report of the Review of Botswana's Children's Act 1981' (2004) 89.

<sup>316</sup> Ibid.

penalty and life imprisonment without the possibility of release or parole. These penalties are considered below in the context of Botswana.

### 13.1 Corporal punishment

Both the CRC and the ACRWC guarantee children the right to be free from torture or other cruel, inhuman or degrading treatment or punishment. In its General Comment No 8,<sup>317</sup> the CRC Committee emphasised that ‘corporal punishment and other degrading forms of punishment constitutes violence and states must take all appropriate legislative, administrative, social and educational measures to eliminate them.’<sup>318</sup>

While the Constitution of Botswana protects every person within the country from torture or inhuman or degrading punishment or other treatment,<sup>319</sup> corporal punishment as a sentence for crime has been upheld by the highest court in the land as not contravening this constitutional provision.

In the case of *Petrus and Another v The State*,<sup>320</sup> the two appellants had been convicted of house breaking and theft. Both were sentenced to three years imprisonment and to corporal punishment as provided under Section 301(3) of the Criminal Procedure and Evidence Act which provided that;

[W]here a person had been convicted under certain provisions of the Penal Code, including Section 305(1) and was sentenced to corporal punishment, such person shall be given 4 strokes each quarter in the last years of his term of imprisonment. Such strokes being administered in the traditional manner with a traditional instrument at such places as may be specified by the minister.

On review, the High Court reserved for determination by the Court of Appeal the question whether Section 305(1) of the Penal Code made it mandatory for the court to sentence the two accused persons to corporal punishment as prescribed by Section

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<sup>317</sup> CRC General Comment No 8 ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment’ CRC/C/GC/8 (2006).

<sup>318</sup> Ibid.

<sup>319</sup> Section 7.

<sup>320</sup> 1984 BLR 14 (CA) see also *Desai and Another v The State* 1987 BLR 55 (CA) where the court held (following its earlier finding in *Petrus* case) that mandatory imposition of corporal punishment is by itself not necessarily inhuman and degrading punishment or treatment especially where it is prescribed for grave offences such as trade in habit-forming drugs which have dreadful consequences both direct and indirect to untold numbers of persons. Such punishment is only inhuman and degrading where it is coupled with a mandatory fine and in default of payment to a further mandatory term of imprisonment.

301(3) of the Criminal Procedure and Evidence Act, if it suspended part of the custodial sentence. Before the Court of Appeal and with the consent of the parties, the question was reformulated and asked whether corporal punishment prescribed by Section 301(3) of the Criminal Procedure and Evidence Act, was *ultra vires* and in conflict with Section 7 of the Constitution.

After considering various authorities cited by the parties, including case law from other jurisdictions and regional and international human rights instruments relevant to corporal punishment, the court found that none permitted the repeated and delayed infliction of corporal punishment. It rejected the state's contention that the issue had to be considered from the point of view of the citizens of Botswana on ground that the country is a member of the comity of civilized nations, and that the rights and freedoms of its citizens are entrenched in its constitution, which is binding on the legislature.

It therefore answered the first part of the question raised in the affirmative and held that repeated and delayed infliction of corporal punishment was inhuman and degrading and therefore goes against Section 7 of the Constitution. The Court declined to address the question whether corporal punishment was in itself a breach of Section 7 of the Constitution, because it was only obliquely and tangentially raised by counsel for the accused in replying submissions without full argument.

The Children's Act does not prescribe corporal punishment as an alternative sentence that a juvenile court may impose on a child upon being satisfied of his or her guilt. Corporal punishment only comes into play where a child or juvenile who has been declared a child in need of care and dealt with in terms of Section 19 of the Act fails to comply with any of the consequent orders. It is an offence for a child or juvenile to fail to comply with such order and upon conviction, he/she is liable to 'corporal punishment in a customary manner which shall be in accordance with Section 305 of the Criminal Procedure and Evidence Act'.<sup>321</sup>

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<sup>321</sup> Section 20,

Other statutes, however, provide for the use corporal punishment as a lawful sentence for male adults and children in conflict with the law. The Penal Code allows a maximum of six strokes of cane as a sentence for males under the age of 18 years.<sup>322</sup> This sentence may be in addition to or as a substitute for imprisonment.<sup>323</sup>

The Criminal Procedure and Evidence Act also authorises any court in which a person under the age of 18 years has been convicted 'instead of imposing any punishment on him for that offence (but subject to Section 26 (2) of the Penal Code) to order that he be placed in the custody of a suitable person designated in the order for a specific period'. The order may in the discretion of the court be coupled with the imposition of corporal punishment.<sup>324</sup>

Under the Customary Courts Act, chiefs are empowered to sentence a male person under the age of 40 years to corporal punishment for any offence within the jurisdiction of the particular court except those in respect of which a minimum sentence is imposed by law and conspiracy to commit such.<sup>325</sup>

In respect of Botswana, the Committee on the Rights of Child has recommended that legislative measures should be taken to expressly prohibit corporal punishment in the family, schools and other institutions.<sup>326</sup> This has not been heeded and corporal punishment remains in the statutes books as an alternative to imprisonment. The continued retention of corporal punishment is clearly not in consonance with international human rights standards, which provides for the right of children to respect of their dignity and physical integrity. As a state party, Botswana is bound by these international standards to ensure that the law respects and protects these rights. This it can be achieved by legislating against corporally punishing children.

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<sup>322</sup> Section 28(2) of the Penal Code.

<sup>323</sup> Section 28(4).

<sup>324</sup> Section 305.

<sup>325</sup> Section 18 of the Criminal Procedure and Evidence Act.

<sup>326</sup> CRC Committee 37 session 'Consideration of reports submitted by parties under Article 44 of the Convention CRC/C/15/Add.242 3 November 2004 para 36-37.

### 13.2 Life imprisonment

As shown in the previous chapter of this study, international law prohibits states from sentencing those who committed offences while below the age of 18 years to life imprisonment without the possibility of release. State parties can sentence an individual who committed an offence under the age of 18 years of age to life imprisonment, provided that such sentence is commensurate to the offence and the offender and there is an effective procedure in place for reviewing the sentence.

In Botswana, life imprisonment is prescribed as a maximum penalty for certain serious offences under the Penal Code.<sup>327</sup> However, the sentence of life imprisonment is not absolute. A person sentenced to life is eligible for release on parole after serving a minimum of seven years.<sup>328</sup> Shortly before a prisoner becomes eligible for release, the parole board may consider his case at least once every year taking into account reports on the prisoner from a medical officer and the officer in charge of the prison in which the prisoner is detained, with a view of recommending or denying his/her release on parole.<sup>329</sup> The recommendation is made in writing to the relevant minister who after considering the recommendation may order the conditional release of such prisoner subject to the president's written confirmation.<sup>330</sup>

### 13.3 Death penalty

In line with international standards and norms, the Penal Code prohibits the imposition of the death penalty on persons below the age of 18 years at the time of the commission of the offence. In terms of Section 26(2) of the Penal Code, a sentence of death shall not be pronounced or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years, but *in lieu* thereof such a person shall be detained at the president's pleasure. This is a mandatory sentence where the death penalty is warranted for a child offender.<sup>331</sup>

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<sup>327</sup> Such as rape, defilement of persons under the age of 16 years and inciting mutiny. Sections 142, 147 & 420 respectively.

<sup>328</sup> Section 85 (c).

<sup>329</sup> Section 86

<sup>330</sup> Section 87.

<sup>331</sup> *Balo v The State* [2008] 1 BLR 155.

A child offender ordered to be detained at the pleasure of the president is in the same position as an adult serving a term of life imprisonment, as both are eligible for release from prison on parole after serving a minimum of seven years imprisonment if such parole is recommended by the parole board.<sup>332</sup> The recommendation of the parole board is submitted to the Minister who may order the release of the prisoner concerned subject to the President's written confirmation. The final power to release or decline to release a person detained at the President's pleasure, lies ultimately with the president.<sup>333</sup> The sentence to be detained at President's pleasure is indefinite, and a child detained under this provision may languish in prison without any certainty as to when he or she might be released until the president's pleasure is known.

Its severity was brought to light in the case of *Modisaotsile Mojaki v The State*<sup>334</sup> wherein the accused was charged with two counts of murder and two other counts of house breaking and theft. On the first count of murder, the court found extenuating circumstances, but by the barest margins. In view of the extreme brutality of his crime (He repeatedly stabbed a defenceless 81 year old lady, and left her for dead while he ransacked her house in search for money), the court averred that were it not for the provisions of Section 26 (2) the Penal Code, it would have imposed the ultimate penalty. The court sentenced the accused to be detained at the president's pleasure at such a place as his Excellency may direct.

On the second count, the court found the moral blameworthiness of the accused reduced by the fact that although brutal, the murder followed a quarrel between the accused and the deceased, and that the totality of the extenuating circumstances called for lengthy term of imprisonment. The court accordingly sentenced the accused to 16 years of imprisonment. On each of the house breaking counts, the court sentenced the accused to six months imprisonment to run concurrently with the 16 years sentence on the second murder count.

On appeal against sentence, the accused sought to have the 16 years imprisonment ordered to run concurrently with the sentence of detention during the President's

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<sup>332</sup> Section 85(c) Prisons Act [Cap 21:03] of 1979.

<sup>333</sup> Section 87 of the Prisons Act.

<sup>334</sup> 2005(2) [BLR] 106.

pleasure. In setting aside the order that the accused be detained at the President's pleasure, and substituting it with a sentence of 16 years imprisonment to run concurrently with the one on count II, the Court of Appeal noted that;

It is it would seem, clear that an order that an accused person be detained at the president's pleasure is not a determinate sentence and cannot therefore be ordered to run concurrently with a determinate sentence of imprisonment; nor can a period of imprisonment be made to run concurrently with an order for the detention at the president's pleasure. In *casu*, the sentence of 16 years imprisonment would have to be served consecutively upon appellant's release from his detention at the President's pleasure. It is impossible to forecast when that may occur. It is already some two and half years since 22 August 2003 when the appellant was ordered to be detained. It may be years before his release is ordered. His effective sentence will already be one of 18½ years if the present sentences are confirmed. It may be much longer.<sup>335</sup>

The detention of child offenders at the President's pleasure goes against, not only the principle of imprisonment of children as a measure of last resort and only for the shortest appropriate period of time, but it also violates the principles of proportionality and rehabilitation. For a child offender not to know exactly when he/she would be released from prison, is punishment in itself that offers no hope and does not in any way assist in the rehabilitation of the child. The indeterminate nature of the sentence is also not consistent with the objective of release and reintegration of the child into the community, which is one of the aims of child justice.

#### **14. Conclusion**

The Children's Act provides for the protection of children in conflict with the law within the criminal justice system. However, its effectiveness is hampered by the inadequate implementation of some of its provisions. This is in part due to the non-provision of the institutional framework on which the effective operation of the Act depends, and the lack of training on children's human rights, of those charged with the administration of juvenile justice. To date, there is no youth shelter for the detention of child offenders awaiting trial before the courts. There is only one school of industries, which caters for boys only. Of most concern in the fact that the Act does not embody the internationally recognised principles of the best interests of the child, non-discrimination, the right of the child to be heard and the right to life and survival,

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<sup>335</sup> *Modisaotsile Mojaki v The State* Court of Appeal Criminal Appeal No 034 of 2005, unreported.

which should guide consideration of all issues relating to the rights of the child including child justice. It offers very few options for the diversion of children from the formal criminal justice system and has limited sentencing options. It is therefore essential to overhaul the Act to bring it in line with international standards, in order to secure the effective protection of children in conflict with law in Botswana.

## CHAPTER V

### CONCLUSION AND RECOMMENDATIONS

The aim of this thesis has been to assess and critically examine the protection of children in conflict with the law within the criminal justice system in Botswana and to test the compatibility of the legislation governing juvenile justice, with international standards and norms on juvenile justice. To achieve this goal, the first task was to outline the historical evolution of the law on juvenile justice in the United States of America where the first juvenile court was established by the state of Illinois in 1899. For the first time, children in conflict with the law were separated from adults and special procedures were developed to govern the adjudication of their matters. The American juvenile court and its transformation prompted a worldwide movement for the protection of children in conflict with the law. It pushed for reforms in judicial processes and penal treatment. This movement resulted in the development of international standards and norms regulating juvenile justice.

The CRC and other UN standards on juvenile justice as well as the ACRWC provided a template for the assessment of the protection of children in conflict with the law in Botswana. The Children's Act was the first piece of legislation adopted by Botswana to deal specifically with children in conflict with the law. The intention behind the Act was to restrict the incarceration of children in prison, which was considered to be a breeding ground for criminals. The aim was to keep children within the family and the community, where they could be rehabilitated into future productive citizens. Despite the fact that the Children's Act was a laudable and progressive piece of legislation which captures significant aspects of the requirements of international standards on juvenile justice, it is an antiquated law when measured against current international trends on juvenile justice. As the Act pre-existed the international and regional standards on child justice, the statute is clearly inadequate and to some extent outdated in protecting children in conflict with the law. It does not stand up to the current realities of children in Botswana.

The Act only partially satisfies the requirements of international children's rights norms by its provision for a separate and specialised court for children in conflict with the law. However, it does not embody the four principles of the best interests of the child, non-discrimination, child participation and the right to life survival and development, which should guide decisions on all issues relating to children. The requirement that children must be heard and their views taken into consideration according to their evolving capacities, is not respected in practice.

The Act is discriminatory against certain children based on the type of offence or offences they allegedly committed. For instance, it excludes children accused of murder (or at the discretion of the DPP), from the special protections and procedures accorded to other children in conflict with the law. The Act is also deficient as far as it does not stipulate the appropriate date for determining the age of the accused for purposes of the jurisdiction of the juvenile court.

The dispositions provided for under the Act (while aimed at rehabilitating the child and ensuring their successful reintegration into the community) are limited and should be extended to include care orders, guidance orders, community service orders, restitution orders and treatment or counseling orders, as provided by the CRC and other international standards on juvenile justice.

On the positive side, the imposition of the death penalty and life imprisonment on persons under the age of 18 years is prohibited in Botswana and this is consistent with international standards as it respects the child's right to development and survival. Children can, however, be sentenced to be detention indefinitely at the president's pleasure. This is not consistent with the principle that children should only be detained as a measure of last resort and for the shortest time possible. Such a provision must be done away with.

While the CRC requires states to protect children from all forms of physical and mental violence, and to ensure that children are not subjected to torture or to other cruel, inhuman or degrading treatment or punishment, including corporal punishment, Botswana retains corporal punishment in her statute books as lawful sentence for male children in conflict with the law. There is no justification for the retention of corporal

punishment as there are other viable and effective alternatives to dealing with children in conflict with the law.

Child offenders in Botswana are generally accorded the same protections of the law as adults and those charged with the administration of juvenile justice generally strive to uphold such rights. However, there is still a lack of awareness of human rights, in particular those for children, among the criminal justice personnel, which often results in violations of such rights. This is further compounded by the status of children as minors and their inability to enforce or claim such rights on their own.

There is therefore need for concerted efforts to train all who are charged with the administration of juvenile justice (such as the police, judicial officers, social welfare officers) in human rights principles and in particular children's rights. This will provide them with the necessary means and enable them to be responsive and sensitive to the needs of children in conflict with the law and thus fulfil their functions more effectively.

Children and their parents also need to be informed about the law, their rights and legal responsibilities. In this regard, there is need for public awareness on both the Children's Act and Article 42(1) of the CRC. This may be done through educational outreach programs in schools and in the community at large.

The effectiveness of the Act in the protection of children in conflict with the law can also be enhanced by providing an adequate institutional framework for its implementation such as detention facilities for children awaiting trial before the juvenile courts to avoid mixing them with adults in prisons and police cells. More schools of industries ought to be constructed throughout the country to cater for both female and male child offenders and to reduce the distance that parents have to travel to visit and maintain contact with their children.

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