

THE ROLE OF THE LAW AND THE JUDICIARY IN PREVENTING CHILD ABUSE: ZAMBIAN EXPERIENCE

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1.0 DEFINITION OF JUSTICE FOR CHILDREN:

The goal of the Justice for Children approach is to ensure that children are better served and protected by the Justice system. It specifically aims at ensuring full application of international norms and standards for all children who come into contact with Justice systems as victims, witnesses and alleged offenders; or for other reason where judicial intervention is needed for example regarding their care, custody or protection. Justice for Children goes beyond Juvenile Justice i.e. working with children in conflict with the law - to include all children going through the justice system for whichever reason (victims, witnesses, care, custody, alleged offenders etc)¹.

This can only be achieved by ensuring children's access to justice, to seek and obtain redress in criminal and civil matters. Access to justice can be defined as the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards, including those set out in the Convention on the Rights of the Child (CRC). Lack of access to justice is a defining attribute to poverty and an impediment to poverty eradication. Children's access to justice is therefore a vital part of the UN mandate to reduce poverty and fulfill children's rights. Proper access to justice requires legal empowerment of all children. All should be enabled to

¹ UNICEF, UN Common Approach to Justice for Children March 2008, p.4.

claim their rights, through legal and other services such as child rights, education or advice and support from knowledgeable adults.

2.0 IMPORTANT GUIDING PRINCIPLES PERTAINING TO JUSTICE FOR CHILDREN:

Upholding human rights principles and standards is at the heart of rule of law work, including Justice for Children. The following child rights principles are based on international legal standards and norms contained in instruments like the convention on the Rights of the Child 1989 (CRC), United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules) etc. These rules should guide all justice for children interventions, from policy development to direct work with children. The following rules are critical to a viable Justice for Children System:

- (i) *Every child has the right to have his or her best interests given primary consideration. In all other actions concerning children, whether undertaken by courts of law, administrative or other authorities, including non-state, the best interests of the child must be applied both when taking decisions regarding an individual child or for children as a group. This principle should guide the whole process (Judicial, administrative or other) but also be a primary consideration in determining in the first place whether the child should participate in the process or not;*
- (ii) *Every child has the right to be treated fairly and equally, free from all kinds of discrimination underpins the development of Justice for Children programming and support programmes for all children's access to Justice. Special attention need to be given to the most vulnerable groups of children associated armed groups, children without parental care, children with disabilities, children belonging to minority groups, migrant children, children born as a result of war-time rape and children affected by HIV/AIDS;*

- (iii) *Every child has the right to express his or her views freely and to be heard. Children have a particular right to be heard in any judicial and administrative proceedings, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law;*
- (iv) *Every child has the right to protection from abuse, exploitation and violence. Children in contact with the law should be protected from hardship while going through state-run and non-state justice proceedings, as well as after the process. Procedures have therefore to be adapted and appropriate protective measures put in place, noting that the risks faced by boys and girls differ. Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment, must be prohibited. In the Zambian case, the High Court has ruled that corporal punishment is inhuman and degrading and therefore contrary to Article 15 of the Constitution.² Also capital punishment and life imprisonment without the possibility of release shall not be imposed for offences committed by children;*
- (v) *Every child has the right to be treated with dignity and compassion. Every child has to be treated as a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected;*
- (vi) *Respect for legal guarantees and safeguards. Basic procedural safeguards as set forth in relevant national and international standards and norms shall be guaranteed at all stages of proceedings in both state-run and non-state systems, as well as in international justice. This includes for example the right to*

² *Phiri Vs Attorney General HP/2001/1571*, and also see Chapter 1 of the Laws of Zambia.

- privacy, the right to legal aid and other type of assistance and the right to challenge any decision with a higher judicial authority;*
- (vii) *Prevention of conflict with the law, as a crucial element of any juvenile justice policy. Within juvenile justice policies, emphasis should be placed on prevention strategies facilitating the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and the world of work. In particular, prevention programmes should focus on support for particularly vulnerable children and families; and*
- (viii) *Deprivation of liberty of children should only be used as a measure of last resort and for the shortest appropriate period of time. Provisions should therefore be made for restorative justice, diversion mechanisms and alternatives to the deprivation of liberty. For the same reason, programming on Justice for Children needs to build on informal and traditional justice systems as long as they respect basic human rights principles and standards.³*

3.0 THE ZAMBIAN EXPERIENCE

(i) The Zambian Legal System has recognized, the concept “*Parens Patriae*”. This is the idea that the state has a responsibility to play a parental role for youths that have been neglected by their parents. The Latin term roughly translates to the concept of “*State as Parent*” or “*Parent of the Country*”. The U.S. adopted “*parens patriae*” from British Common Law, under which the sovereign was charged with the role of acting as parent to the country.

³ UNICEF UN Common Approach, op cit, pp.5-6.

The Zambian law sets the following requirements, as described in Sections 58 and 60 of the Juveniles Act:⁴

- (i) *detention should be avoided;*
- (ii) *if detention cannot be avoided, children must be kept from adults, and girls must be placed under the care of a female officer;*
- (iii) *the child should as far as possible be kept in a place of safety; and*
- (iv) *the Officer-in-Charge of the police station must show to the court why detention is required under Section 60 and why the child could not have been released on own recognizance or police bond.*

(ii) ARREST, RECEPTION AND REFERRAL SERVICE:

In response to the convention on the Rights of the Child, Zambia established the Arrest, Reception and Referral Service (ARRS). This was based on the one-stop centre model adopted in South Africa. The one-stop model in fact preceded by a simplified form that would ensure that all arrested children in a city were brought to one central police station from other police stations. This essentially ensured more accurate monitoring and enabled the concentration of resources, such as a probation officer and family **finders**, at one locality instead of spreading them over several police stations. This approach is suitable for urban areas where distances are not excessive and where there is sufficient case load to justify the concentration of resources in order to create efficiency and effectiveness.

The purpose is to limit children's exposure to the criminal justice system by efficient inter-sectoral case management at the arrest and reception phase and correct channeling. This is achieved by centralization of arrests and the treatment of children in line with the standards contained in our domestic legislation and international instruments.

The objectives of the ARRS are:

⁴ Chapter 53 of the Laws of Zambia.

- (i) *to limit delays through the concentration of resources at points in the criminal justice system where they are needed;*
- (ii) *to prevent children from being “stuck” at a particular stage (for example in detention in police holding cells)*
- (iii) *to ensure rapid location of parents, caregivers so that the child can be released into their care;*
- (iv) *to prevent detention as far as possible;*
- (v) *to facilitate accurate record keeping; and*
- (vi) *to detain children if required, under acceptable conditions⁵*

The ARRS is critical as a number of cases in the Child Justice System involve “**Status Offences**”. Status offences are distinguished from delinquent acts by the fact that they are only law violations on the basis of the offender’s “**Status**” as a minor. Some examples of status offenses are:

- (i) *underage alcohol consumption;*
- (ii) *truancy from school;*
- (iii) *general ungovernability;*
- (iv) *violation of a curfew; and*
- (v) *running away from home*

(iii) **STATUTORY PROACTIVE MEASURES**

The Zambian Justice System has recognized that there is need to institute proactive measures to reduce the vulnerability of orphaned and homeless children from committing status offences and other serious offences. The courts in Zambia have jurisdiction to classify vulnerable children as a “child in need of care.” Under Section 9 (1)⁶ under Section 10 (1) (2)⁷ any police officer or juvenile inspector who has reasonable grounds for believing that a child is in need of care may bring him before a child Court

⁵ Government of the Republic of Zambia, Muntungu Lukas Evaluation Report on Child Justice in Zambia 2007, p.32.

⁶ Chapter 53 of the Laws of Zambia.

⁷ Ibid.

and the Court may order his parents or guardian to enter into recognizances to exercise proper care and guardianship or commit him to the care of a fit person whether a relative or not, who is willing to undertake the care of him or place him/her under the supervision of a probation officer or send him to an approved school.

(iv) ESTABLISHMENT OF CHILD FRIENDLY COURTS (CFC)

A child friendly court is a specialized court which aims to conduct trials of children in a manner that reinforces their respect for human rights and fundamental freedoms of others. The court takes into account the child's age and provides for the reintegration of children so that they play a meaningful role in the community.⁸

The establishment of a Child Friendly Court (CFC) was recommended as part of the 2000 situational analysis. Historically, criminal courts are not child friendly and the Zambian courts are no exception. Access to legal representation, out-dated legislation and a generally punitive approach are some of the major challenges that children face in the Zambian Court System. Criminal Justice Systems in Zambia and elsewhere tend to look only at the crime that was committed and pay little or no attention to the child and his and her circumstances, nor are children treated substantially differently from adults. The situation analysis also noted the absence of diversion as a principle from the Zambian legal process and thus recommended the establishment of such programmes. The purpose was to provide a court system that assesses the child holistically in a non-threatening and participative manner and makes decisions based on the best interests of the child balanced with the interests of justice. The decisions should be contextual.

The child-friendly court:

- *is presided by a specialized magistrate, prosecutor and probation officer;*
- *promotes cooperation among key role players;*

⁸ Zambia Child Justice Forum, Providing the Administration of Child Justice in Zambia User Guide, Child Justice Secretariat, p.3.

- *trials are conducted in a separate court room;*
- *age of the child is taken into consideration;*
- *language is adjusted so that children can understand what is going on;*
- *it is important that children have legal representation;*
- *parents and guardians have to be present; and*
- *first time offenders who have committed minor offences are diverted.*⁹

A classical case of contextual judging and the defiance of the legislation came to the fore in the case of *Mulenga Jo Vs The People*¹⁰. The author was the Principal Resident Magistrate at Lusaka presiding over the case. A girl juvenile aged 17 years was found in possession of cannabis and was absolutely discharged. Two weeks later, she was again arrested for being in possession of cannabis. The then drug legislation had provided for a minimum of ten years for the second offender without distinction whether the offender was a juvenile or an adult, which conflicted the Juveniles Act. The author asked for a Social Welfare Report, which revealed that the juvenile and five young brothers were orphans. She was selling cannabis to support her young brothers. The Social Welfare Department offered to provide food for three years and recommended that the girl be put on probation for that period. The author agreed with the department's recommendation.

(v) **DIVERSION**

Diversion is the channeling or turning away of the child in conflict with the law from the formal criminal justice system. Instead of going the complete route/cycle of the criminal justice process, the child is referred to a service provider who offers diversion programmes for the child to embark in a programme aiming at addressing his or her particular needs, based on the assessment by the Social Welfare Officer.

⁹ Zambia Child Justice Forum, op cit.

¹⁰ SSP/003/1994.

Currently diversion is offered by the following organizations: Rural youth and Child in Need; Jesus Cares Ministries and Youth Women Christian Association.

In the Capital Lusaka, diversion has taken off through Rural Youth and Child in Need, Jesus Cares Ministries and Youth Women Christian Association. A total of 71 children were referred to diversion in 2008. 40 successfully completed the programme and have not re-offended since completing the programme.

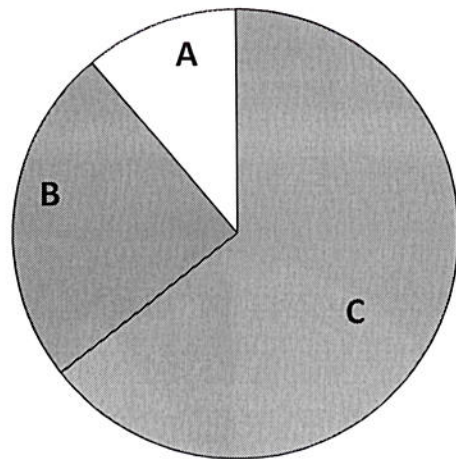
Diversion has improved the life of a 17 year old girl, *Marita. She was diverted to a programme after being arrested for assault at the age of 16. The child managed to complete all the 8 counseling sessions, which helped her to realize the power that she has to change things and also to regain her self-esteem. As a result of the offence she committed coupled with the court process, the girl suffered a lot of trauma and stigmatization from her peers and community. She never thought it would be possible to be accepted in her community and continue with her education. She completed her grade 12 in December 2008.

*Zukas is now 18 years old. He is about to start Vocation Training in Mechanics. A year ago he was not sure he was to achieve his dream. He got into trouble with the law for stealing a cell phone. The assessment by a Probation Officer showed his willingness to take responsibility for his actions showed that he has potential to change his ways. He was referred to a diversion service provider to counseling and completed all sessions that are part of the programme. The life skills programme helped him understand that it is his choices in life that get him into trouble, like communicating his feelings instead of resorting to stealing. This is what he has to say about his diversion experience: *“With the skills I acquired through the life skills programme. I am now confident that whatever the circumstances I will be found in, self-control will be applied and exercised. I would love such skills to be extended even to other children who have not committed crimes so that they are prevented from coming into conflict with the law”*.

Not only does he recognize the diversion service provider, but also the magistrate and welfare officers who treated him with dignity and gave him a second chance.

(VI) SUMMARIZED OFFENCE PROFILE OF CHILDREN ON REMAND IN ZAMBIA, 2007

The diagram below illustrates the percentage of children in conflict with the law in the three categories of offences:



- A. victimless offences 11.1 per cent
- B. offences against persons 24.4 per cent
- C. offences against property 64.4 per cent

The above portrait indicates that the majority of the children are involved in offences like burglary/house breaking and theft. This could be attributed to poverty, which is a result of being orphaned at a tender age, single parentage or coming from broken homes. There is therefore a co-relationship between poverty and children coming in conflict with the law. The International Justice Mission in Zambia (IJM) an

NGO and other NGOs try to mitigate this, by providing orphans with basic necessities like food clothes and school fees. This portrait may mirror the situation in many developing countries.

CONCLUSION:

There is need to involve more diversion partners in all regions/provinces. Parliamentarians should be involved in the process, if there has to be political buy-in in the process. Stakeholders should undertake extensive research, evaluate the impact of the existing models. There should be a wide roll out of ARRS and child friendly courts throughout Zambia. There should be extensive training of all participants in the Child Justice System to eliminate maltreatment of children in contact with the law. A program to support vulnerable children by providing basic social needs should be widely rolled out to insulate children from committing crimes in order to survive. Only then will the Zambian and indeed other developing systems offer the child “justice which is compassionate.”

I thank you for your attention and wish everybody here present God’s blessings.

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