

**AN ASSESSMENT OF THE ZAMBIAN JUVENILES
ACT: DOES IT ENTRENCH THE PROTECTION OF
THE RIGHTS OF THE CHILD?**

BY

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ABSTRACT

TOPIC:

An assessment of the *Zambian Juveniles Act*: Does it entrench the protection of the rights of the child?

The Juveniles Act is the principal legislation with regards to juvenile matters. The Act was enacted to make provision for the custody and protection of juveniles and to provide correction for juvenile delinquents. Its provisions do state the above but its application as will be highlighted, is questionable.

Although the contents of the Act show the protection of children's rights in judicial proceedings, it does not fully comply with all the goals of the United Nations Convention on the Rights of the Child. Moreover, the convention has not been domesticated meaning that it does not hold authority or enforcement in Zambia.

The introduction of the Child Justice Forum has so far proved to be the unsurpassed attempt to merge the provisions of the Convention and other international instruments on juvenile justice and the Juveniles Act. The forum, however, still needs to be reinforced because it is insufficient to act as law.

The Child Justice Act of South Africa, on the other hand, provides better protection for the rights of the child and conforms to the standards accepted by the United Nations. It therefore, serves as the best model for the changes required in our statute, the Juveniles Act, because it covers virtually every aspect in relation to the plight of juveniles.

LIST OF ABBREVIATIONS

ARRS:	Arrest, Reception and Referral Services
ACRWC:	African Charter on the Rights and Welfare of the Child
CFC:	Child Friendly Court
CRC:	Convention on the Rights of the Child
OAU:	Organisation for African Unity
ROYCHIN:	Rural Youth and Children in Need
UNICEF:	United Nations Children's Emergency Fund
YWCA:	Young Women's Christian Association

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CHAPTER ONE

INTRODUCTION

As a developing nation, Zambia is evidently one of the poorest countries in the world. The need for survival and the increase in poverty and unemployment levels are just some of the major causes of juvenile delinquency. Children in most cases are forced into situations where they find themselves coming into conflict with the law. However, as much as they may be in conflict with the law, they are usually mere victims. It is therefore the role of government to ensure that children are protected in every way possible.

The Juveniles Act chapter 53 of the Laws of Zambia is the principal legislation that was enacted to protect juvenile delinquents. As stated in its preamble, the Act aims “to provide correction of juvenile delinquents; and to provide for matters incidental to or connected with the foregoing.” Some of the provisions of this act appear to espouse the constitutionally recognised rights of children but the application thereof raises a number of issues regarding the rights of juveniles.

1.1 STATEMENT OF THE PROBLEM

The problem with juvenile justice in Zambia is that children lack separate laws that regulate all matters that concern them. The application of the existing legislation, especially, the Juveniles Act is questionable. Moreover, the supreme law of the country, the Constitution lacks an independent provision solely dedicated to children.

Therefore, the Juveniles Act lacks the ability to provide effective protection of children’s rights due to weak enforcement.

1.2 PURPOSE OF THE STUDY

The United Nations Convention on the Rights of the Child (CRC) aims to ensure that

“the child is regarded as a human being and a member of society with full human and legal rights, and not simply as an object of care or control by adults.”

The purpose of this study is therefore, to harmonise these internationally recognised standards with the Juveniles Act.

Zambia is in desperate need of a criminal justice system that will provide effective tools in denouncing, preventing and responding to incidents of violence against children. Violence against children in this regard includes the manner in which children are treated while they are in police custody as well as when they are serving their sentences. It is evidently clear as this study will show that children are in a position where they cannot always count on the current criminal justice system for protection. There is need for the existing legislation to be reviewed so as to ensure that the rights of the child are protected in every way possible.

Various local newspaper articles and reports have made indications of the existing loopholes in the legislation and the criminal justice system as a whole. These articles and reports have unveiled situations that have proved to be in defiance of international norms concerning children in conflict with the law. For instance, reports have been published about how children younger than twelve years old are locked up together with hard core adult criminals. This is just one of the problems that have been highlighted concerning juvenile delinquents. This study will make further investigations regarding the current situation.

The issue of rehabilitating youths in this country is important especially with the rising of poverty levels. If this is not done in a proper manner, it will definitely threaten social development and to a certain extent, economic growth. The approach that the law utilises to deal with juvenile delinquents determines their input in society. Therefore, the question is whether the existing legislation and justice system ensures that juveniles are really rehabilitated to become better law-abiding citizens or whether it worsens the way in which these children perceive society once they are set free.

1.3 RESEARCH OBJECTIVES

The core objective of this study is to make an assessment of the application of the Juveniles Act. This will entail the identification of the key role players in law enforcement, especially the judiciary and the police and prisons authorities. The assessment will emphasise on the procedures followed by these authorities, that is, whether they adhere to the provisions of the legislation and act within the scope of its provisions.

Secondly, the study will make comparative analyses with the recently enacted, Child Justice Act of the Republic of South Africa; the African Charter on the Rights and Welfare of the Child (ACRWC); the United Nations Convention on the Rights of the Child (CRC) as well as other international instruments on the subject. By doing so, it will identify whether

internationally recognised standards and norms concerning the treatment of juvenile offenders are acknowledged in Zambia.

Thirdly, the study intends to recognise loopholes specifically in this piece of legislation and generally in the entire criminal justice system and suggest recommendations on identified areas that need improvement.

A greater part of this thesis is thus, devoted to the analysis of juvenile welfare in Zambia and it is hoped that the conclusions that will be drawn in summation may be employed to enable authorities over matters of juvenile welfare to make the relevant changes to the existing legislation and prescribe action plans for implementation to achieve the objectives set by the Act.

1.4 RESEARCH QUESTIONS

Firstly, the question that is of paramount importance is whether the Juveniles Act entrenches the protection of the rights of the child. This question is drawn from how the Act is applied in practice by the relevant authorities empowered to do so.

Secondly, the aspect of whether the Juveniles Act is in conformity with internationally recognised standards on juvenile justice will be considered.

Thirdly, an investigation of what the loopholes in the Act are and what has been put into place by relevant authorities to improve the status quo will be carried out.

1.5 SIGNIFICANCE OF THE STUDY

The significance of this study is to reveal challenges faced by children in conflict with the law as they are unable to stand and speak for themselves. The study, by making an assessment of the Juveniles Act and the application thereof, will bring to light the loopholes as well as propose significant changes that seek to improve the existing legislation concerning juveniles.

1.6 METHODOLOGY

The study will be conducted through the use of both primary and secondary sources of data. In the case of primary data, interviews with relevant authorities will be conducted. These will include key role players in the judiciary, police department and organisations that contribute

to child welfare in this country. The attendance of court trials that involve juveniles will help highlight court procedures and whether they are in compliance with the provisions of the Act.

The secondary data (desk analysis) will include existing legislation, that is, the Juveniles Act and other similar legislation relevant to this study; Case studies, Law Reports and judgments; foreign legislation, for instance, the Child Justice Act of South Africa; local newspaper articles; reports and publications by renowned institutions (local and international) and international treaties created by the United Nations to which Zambia is a member state.

1.7 OUTLINE OF CHAPTERS

The research will consist of five chapters. The first chapter will be the introduction to the entire topic. It will highlight the position of Zambian law and the criminal justice system in relation to juvenile offenders.

The second chapter will discuss the Juveniles Act in practice and bring out the outcome in collected data from the court trials, circulated questionnaires and interviews with the relevant authorities and stakeholders.

The third chapter of the study will comprise of the comparative analyses with the Child Justice Act of South Africa; the African Charter on the Rights and Welfare of the Child (ACRWC); the United Nations Convention on the Rights of the Child (CRC) and other international guidelines on Juvenile justice.

The fourth chapter will draw attention to my own findings concerning the topic in light of the preceding chapters and other identified aspects relating to the topic.

The final chapter will draw conclusion to the topic and provide recommendations and improvements.

1.8 THE CAUSES OF JUVENILE DELINQUENCY

There are many theories that have been proposed in relation to juvenile delinquency. Two conflicting theories¹ will be briefly discussed:

Firstly, it is suggested that delinquency is a consequence of factors of the individual person and secondly that delinquency is a consequence of factors beyond the individual.

The first theory highlights the fact that delinquency is a result of what the individual is going through. This includes aspects of mental health, personality disorders that lead to children making wrong choices and judgments. Furthermore, gender is an even bigger issue when it comes to delinquency. Therefore, biological factors must be addressed when dealing with the treatment of juvenile offenders. Statistically, male children are more prone to committing crimes as opposed to females.

The second theory entails that delinquency results from environmental influences. These influences are beyond the individual and include cultural values or the lack thereof and poverty, amongst other things. In Zambia, the absence of enough legitimate earning opportunities leads to youths seeking other means of income. Activities such as dealing in drugs, robberies and prostitution sometimes seem to be the only means of earning an income for young people.

Having highlighted the above theories, the factors contributing to juvenile delinquency arise. The most common factor in Zambia is poverty. Children raised in poverty-stricken homes are exposed to the dynamics of financial stress on a household and maybe pushed to begin stealing. Moreover, the poverty issue is also the main cause of children dropping out of secondary school due to lack of finances. These children from such homes are forced to adopt a survival mentality towards life and react accordingly. Another factor is that of neglect, that is, children neglected in homes tend to seek attention from wrong places and may even end up in gangs that perpetuate violence in the community. These children maybe as young as ten years of age. Furthermore, instances of domestic violence can impact child behaviour in society because they may often need to escape the reality of their situation.

From the factors mentioned above, it is important for government to treat juvenile offenders as victims despite the fact that they are in conflict with the law.

1.9 THE STATUS QUO

The basic source of Zambian criminal law, the Penal Code stipulates that children under the age of eight cannot be charged with a crime² but juveniles between eight and eighteen maybe charged. Currently, The Juveniles Act³ and other supporting legislation such as the Prisons

² s14

³ Chapter 53 of the Laws of Zambia

Act⁴ regulate the issue of juvenile offenders. It seeks to protect the plight of these children who come into conflict with the law but as will be discussed, the application thereof seems to be questionable. The low status of children is reflected in the fact that only a handful of countries have enacted or adopted laws to give children the same protection that adults enjoy. For instance, the Constitution of Zambia provides for the protection of the right to personal liberty and the procedure of arrest and legality of detention in circumstances where the person's right to liberty maybe limited by law⁵. This is merely a general provision that includes both children and adults and thus children lack a separate express provision that ensures their protection in society in general.

Various local newspaper articles and reports have made indications of the existing loopholes in the legislation and the criminal justice system as a whole. These articles and reports have unveiled situations that have proved to be in defiance of international norms concerning children in conflict with the law. One of the local papers put the point in the following terms:

“...even the young innocent-looking suspects, some of them as young as 12 years old or below, are also locked up together with the hard-core criminals. At times, these juveniles are detained for petty offences such as shoplifting, loitering and assaults. Only in a few instances are they detained for sexual offences like rape, impregnating, elopement and the like...”⁶

It is therefore clear that Zambia is in need of a criminal justice system that will provide effective tools in denouncing, preventing and responding to incidents of violence against children. Violence against children in this regard includes the manner in which children are treated while they are in police custody as well as when they are serving their sentences. Children are in a position where they cannot always count on the current criminal justice system for protection. There is need for the existing legislation to be reviewed so as to ensure that the rights of the child are protected in every way possible.

Attempts to make effective changes to the existing legislation have been made by different organisations and institutions advocating for children's rights. For example, a shadow report to the Human Rights Committee in Zambia was done by the United Nations Human Rights Committee in July 2007, which brought out important issues concerning juvenile justice, such as situations in Zambian prisons and lack of proper infrastructure⁷ and highlighted the number of juveniles in remand. Although this report raised several issues that required

immediate attention, such as prison overpopulation, inadequacy of amount and quality of food, hygiene and access to medical care and the segregation of prisoners (separation of juvenile from adult offenders), the situation as will be shown has not really changed.

Apart from the treatment of juveniles in prison custody or those serving their sentence, attention must also be drawn to the treatment by the judiciary. The Juveniles Act lays down the procedures to be followed by the courts when dealing with juvenile offenders. The fact that there is no length of pre-trial detention in Zambia has led to detainees remaining under remand at times for over four years. What this means is that some of these juvenile offenders are remanded when they are juveniles but then tried as adults. Therefore, the judiciary has a major role to play in this regard and most importantly must ensure speedy and fair trials for these young offenders. The period spent in remand exposes them to various forms of abuse including sexual abuse. In a report by the Legal Resources Foundation, the United Nations Children's Emergency Fund (UNICEF) country representative, Lotta Sylwander observed that:

“...[t]he criminal justice system reiterates many of the emotional and psychological characteristics of the sexual abuse experienced as a result of their ignorance or indifference on the part of the range of legal personnel with whom they must interact.”⁸

One other identified problem in the judiciary is the absence of the parents of the offenders as well as social welfare officers during trials. This serves to show that there is need for children who come into conflict with the law to be treated in a manner consistent with their sense of dignity and worth. This will reinforce the child's respect for human rights of others.

1.10 CONCLUSION

With the various issues raised above, the challenging question is therefore, how the status quo can be altered. As the main piece of legislation on the plight of juveniles, the Juveniles Act will be assessed in the chapters that follow. By doing so, solutions will be proposed in the final chapter. The solutions or recommendations to be made will emphasise that measures to be employed must ensure that crime prevention and criminal justice practices are themselves not contributing to the revictimisation of children whether they are victims or perpetrators.

⁸ www.lrf.org.zm/newsletter/index.php?option=com_content&view 20/07/2010

CHAPTER TWO

THE PRACTICAL ASPECTS OF THE JUVENILES ACT

2.1 THE JUVENILES ACT

2.1.1 Age

The minimum age of criminal capacity according to the Penal Code⁹ is eight years. A child below that age cannot be held criminally liable for his actions. The provision further states that children between the ages of eight and twelve only have limited criminal capacity and this must be proved in a court of law. Moreover, the Act states that a male person under the age of twelve years is presumed to be incapable of having carnal knowledge¹⁰.

In terms of the Act, a juvenile means a person who has attained the age of nineteen years; and includes a child and a young person¹¹. A child means a person who has not attained the age of sixteen years while a young person means a person who has attained the age of sixteen, but has not attained the age of nineteen years.

The courts have had difficulties in determining the age of certain juveniles as the majority of juveniles are illiterate and are unaware of their actual year of birth. Those who are familiar with the law often fake their real age and the courts have had to send some for age determination tests at the University Teaching Hospital which usually delays the case being tried. This was deduced from the various court trials attended while carrying out research for this thesis. For example, in one of the court trials attended, the court had to adjourn the case because of the uncertainty in determining the age of the juvenile. In the interview with the Social Worker prior to the trial, he had mentioned that he was nineteen years old. However, during the trial, the juvenile told the court that he was born in 1992, making him twenty years old. In light of this difficulty, the court instructed the social worker to make an application for age determination.

Despite the fact that age is an important aspect of juvenile delinquency as noted above, case law has shown that juvenile offenders should not always rely on it as a defence. In *The People v Zimba*¹², the court highlighted whether a juvenile offender can rely on his youth or

⁹ Cap 87, s14(2)

¹⁰ s14(3)

¹¹ s2

¹² (1976) Z.P 86 (H.C)

lack of experience with regards to driving. In this particular matter, a thirteen year old juvenile offender was found guilty of careless driving and driving without being the holder of a driving licence and was convicted on both counts. In his judgment, Cullinan, J relied on the judgment in *McCrone v Riding*¹³ and held that:

“...As I see it therefore the juvenile offender cannot rely on the fact that he was too young to apply for a provisional licence or on his complete lack of experience...”

However, the learned judge discharged the juvenile offender absolutely on grounds that he was a first time offender and also considered the nature of the offence. Although the findings of guilty on both counts were confirmed, the convictions were recorded as nullities.

2.1.2 Preliminary Proceedings relating to Juveniles

The Juveniles Act does not expressly provide for procedures that should be followed by the police when effecting arrest. Interviews with police have confirmed this as most of them stated that arresting juveniles is just like any other arrest as stipulated in the Criminal Procedure Code:

“In making an arrest, the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.”¹⁴

This means that if violence is used in effecting arrest, these juveniles merely have no defence against this. Although the Penal Code justifies the use of force in effecting arrest¹⁵, police have still proven to abuse their authority in this regard. The Juveniles Act however, has express provisions with regard to the detention of juveniles.

Section 58 of the Act provides that:

“ It shall be the duty of the Commissioner of Police to make arrangements for preventing, as far as possible, a juvenile while detained in a police station, or while being conveyed to or from any criminal court, or while waiting before or after attendance in any criminal court, from associating with an adult (not being a relative) who is charged with an offence, other than an offence with which the juvenile is jointly charged, and for ensuring that a girl (being a juvenile) shall, while so detained, being conveyed, or waiting be under the care of a woman.”

This provision underscores the importance of separating juveniles from adults starting from the time of being deposited in holding cells, during their delivery to court for hearing their cases or at the time of returning them to custody. However, reports have shown otherwise. For instance, an article in the Post newspaper published a complaint by the father of a fourteen-year old juvenile charged with assault in *Mazabuka* condemning the police for

¹³ (1938) 1 All E.R. 157 at 158.

¹⁴ s18(1)

¹⁵ s18

detaining his son together with elder inmates. The officer in charge in defence of the police stated that it was necessary to detain the juvenile together with adult suspects because of the nature of the crime¹⁶. The provision makes no such exception in so far as detention of juveniles is concerned and this indicates a classical case of police officials' tendency to abuse the authority bestowed on them and disregard the important aspect of the best interest of the child. Moreover, this contravenes section 62 of the Act which provides:

(1) Where it is impracticable in a remand prison to separate juveniles from adults detained in custody, a superintendent of prisons may detain any juvenile awaiting trial, or placed on remand by a court, in a suitable dwelling, other than a prison or detention camp, and whilst the juvenile is so detained, he shall be deemed to be in legal custody.

The Child Justice Forum, established with the aim of 'promoting the administration of child justice for children in Zambia' has initiated the Arrest Reception and Referral Services (ARRS) to protect the rights of children accused of crimes from the point of entering the criminal justice system. Although this has proved to be a work in progress, its objectives may just be the solution to the plight of juveniles. The objectives of the ARRS include¹⁷:

To limit delays in processing children's cases through the concentration of resources at points in the criminal justice system where they are needed;

To prevent children from being "stuck" at a particular point in the system, such as at detention in police holding cells;

To prevent detention as far as possible;

To facilitate accurate record keeping and therefore monitoring of children in the system;

To ensure rapid location of parents, guardians or caregivers to ensure that children are released into their care; and

To detain children, if required, under humane and acceptable conditions.

Section 59 of the Act stipulates the procedure concerning the granting of bail to juveniles. However, it also lays down exceptions in this regard which are:

- (a) unless the charge is one of homicide or other grave crime; or
- (b) unless it is necessary in the interest of such person to remove him from association with any reputed criminal or prostitute; or

¹⁶ The Post Newspaper, 3 January 2010.

¹⁷ Child Justice Forum, bulleting on 'ARRS' 2010.

- (c) unless the officer has reason to believe that the release of such person would defeat the ends of justice.

Section 60 provides that where a juvenile could not be granted bail due any of the three exceptions mentioned above (Section 59), the police officer in charge has a duty to have such a juvenile detained in a place of safety until such a time that the juvenile is brought before a court of law. However, the officer in charge has discretion and can determine otherwise by certifying:

- (a) that it is impracticable to do so; or
- (b) that the juvenile is of so unruly or depraved a character that he cannot safely be so detained; or
- (c) that by reason of the state of health or of the mental or bodily condition of the juvenile it is inadvisable so to detain him;

and the certificate shall be produced to the court before which the person is brought.

The Act defines the phrase “Place of safety” to include:

“ any institution, police station, or any hospital or surgery, or any other suitable place the occupier of which is willing temporarily to receive a juvenile, but does not include any remand prison, prison or detention camp¹⁸.”

This provision has evidently not been adhered to by most police authorities as earlier stated that juveniles are still being held in remand with adult suspects. There is also evidence suggesting that children as young as ten are remanded for as long as nine months in prisons. The Post newspaper published an article where Lusaka Judge Charles Kajimanga granted a ten year old boy charged with murder constitutional bail after being remanded for nine months at Katete prison and then later transferred to Chipata’s Namuseche Prison¹⁹. Another example is a court trial attended²⁰ where the four jointly accused juveniles had been remanded from 13 January 2010 and their case was only tried on 7 December 2010. The four had not been granted bail and they were charged for aggravated robbery of a mobile phone worth K35 000 and K200 000 cash. After the trial, the four were still held

¹⁸ s2

¹⁹ The Post Newspaper, 26 August 2010

²⁰ Hon. Mulife’s juvenile court session at the New Magistrates’ Court Complex, Ridgeway, Lusaka, 7 December 2010

in remand awaiting submissions from the state and the defence which would only be ready on 20 January 2011.

In aid of juveniles who are the subject of such serious criminal proceedings, Section 61, stipulates that:

(1) A court on remanding or committing for trial a juvenile who is not released on bail shall, instead of committing him to prison, commit him to custody in a remand prison or place of safety named in the commitment, to be detained there for the period for which he was remanded or until he is thence delivered in due course of law:

Provided that, in the case of a young person, it shall not be obligatory on the court so to commit him if the court certifies that he is of so unruly or depraved a character that he is not a fit person to be so detained.

(2) A commitment under this section may be varied or, in the case of a young person who proves to be of so unruly or depraved a character that he is not fit to be so detained, revoked by any court acting in or for the place in or for which the court which made the order acted, and, if the order is revoked, the young person may be committed to prison.

Although this provision ‘justifies’ the committal of juveniles and young persons in remand or places of safety, there is need for improvement in the places where these children are remanded. Some of the juveniles in Honourable Mulife’s court when asked if they had anything to address the court before being sent back to their cells, complained of uncomfortable sleeping arrangements and one even stated to the court that he had been diagnosed with dysentery. These are just some of the few complaints aired by juveniles. A shadow report to the Human Rights Committee in Zambia done by the United Nations Human Rights Committee in July 2007 observed that the state of cells in police stations was very poor. It highlighted that the cells lacked adequate provision of water and food presenting a high health risk contrary to the respect of human rights.²¹ This obvious poses a dangerous health risk for juveniles who are not separated from adults as they are exposed to various infectious diseases such as HIV/Aids, tuberculosis as well as sexually transmitted diseases.

2.1.3 Establishment and Procedure of Juvenile Courts

In Lusaka, juvenile courts have been set up at the New Magistrates Court Complex and are mandated to sit each day of the week. Five Magistrates have been given a day to hold juvenile court sessions and each has been assigned with one Social Welfare Officer. This is in conformity with the provisions of section 63 of the Act which states as follows:

A subordinate court sitting for the purposes of-

hearing any charge against a juvenile; or

²¹ OMCT Shadow Report to the Human Rights Committee: Zambia at p.15

- b) exercising any other jurisdiction conferred on juvenile courts by or under this or any other Act; is in this Act referred to as a juvenile court.

The procedure in these sessions usually involves more than ten juveniles who are each called by the court individually. The session consists of the Magistrate, an Interpreter, a Social Welfare Officer, a Prosecutor, one Police Officer and sometimes a Defence Counsel (if any of the juveniles have been afforded legal representation).

The Magistrate first requests that spectators not related to the juvenile leave the court after which the prosecutor calls out the name of the case and the juvenile involved stands before the court.

The procedure followed by the court is laid down in section 64 of the Act, which provides as follows:

- (1) Where a juvenile is brought before a juvenile court for any offence other than homicide or attempted murder, the case shall be finally disposed of in such court.
- (2) After explaining the substance of the alleged offence, the court shall ask the juvenile whether he admits the offence.

From the observation made in the proceedings attended, the charge is read out quickly by the Magistrate and the interpreter usually at the same time after which the juvenile is asked to confirm if he/she understands the allegations against him/her. The fact that the charge is read at the same time by the Magistrate and the Interpreter often results in the juvenile agreeing to the fact that he admits the offence despite not really understanding what is being read out due to the formal language used. In most of the cases, it was clear that some of the juveniles on trial were not even attentive to the proceedings as some had been awaiting their chance to be tried for as long as two hours.

It is worth noting that the same section 64 provides for procedure to be adopted even where a Juvenile who is not legally represented seemingly admits the charge. The Act empowers a juvenile court, other than a court presided over by a senior resident magistrate, resident magistrate or such other magistrate, as the Chief Justice may designate, in any case where the juvenile is not legally

represented, to hear the evidence of the witnesses in support of the offence with which the Juvenile is charged²².

At the close of the evidence in chief of each witness, the magistrate must ask the juvenile, and the juvenile's parent or guardian if present in court, whether he wishes to put any questions to the witness. The Magistrate must go further and aid the Juvenile's cross examination. If, instead of asking questions by way of cross examination, the juvenile makes assertions, the court must put to the witness such question as it thinks necessary on behalf of the juvenile and may for this purpose question the juvenile in order to bring out or clear up any point arising out of such assertions. The Court's duty to assist the Juvenile in cross examining the witness is subject to the prosecution having the right to re-examine the witness upon the answers to such questions.

If the court forms the view that a prima facie case is made out, the evidence of any witness for the defence shall be heard and the juvenile shall be allowed to give evidence or make a statement.²³

In most of the proceedings attended, the juveniles did not have legal representation and their parents/guardians were absent. Some of the cases had to be adjourned due to lack of comprehensive preparation by the prosecution, for example, failure to locate witnesses relevant to the case. In other cases, the juveniles did not show up for their trials and various reasons were presented by their guardians who appeared on their behalf. The most common reason given was that the juvenile was ill but there was also failure to present proof that this was actually true. The court however, acted in accordance with the expectations of juvenile justice. It was very lenient and gave these absent juveniles the benefit of the doubt.

Notwithstanding the provision in section 64(4), the juvenile and guardian usually have no questions to address witnesses due to their lack of understanding the proceedings themselves. Some of the guardians who attended court seemed to be absent-minded and to an extent appeared to be intimidated by the court.

In one of the cases where the juveniles had legal representation, the defence counsel appeared to be unprepared for the case. The case involved four juveniles who were jointly charged with

²² Section 64(3) Note: All magistrate empowered to hold a subordinate court of the first or second class designated by G.N. No. 972 of 1967.

²³ Sections 64(4) (5) and (6)

aggravated robbery. The prosecution presented its case and called on the arresting officer as its witness. At the close of the evidence in chief, the defence counsel was given the stand to cross examine the witness. It was evident from the way this was done that the defence counsel had not prepared for the case. It had been alleged that the four boys had assaulted the victim with a plank and the defence counsel decided to ask the witness to present the said plank before the court. Moreover, the counsel merely asked the witness what his 'thoughts' were about the crime. She asked the witness to tell the court what his conclusion was after visiting the crime scene, that is, whether 'he felt the crime was preconceived' or if it was what she referred to as a 'spur of the moment type of crime'. The prosecutor objected to this question while the magistrate agreed that there was no way the witness could have been able to draw such conclusions just from visiting a crime scene. The defence counsel had no further questions after this and was then asked to make her submissions to the court.

From the interviews carried out with different Court Officials, it was pointed out that the above scenario was usually common in juvenile court proceedings. The defence usually come unprepared and rush out of court at the end.

(7) If the court is satisfied that the offence is proved, the juvenile shall then be asked if he desires to say anything in extenuation or mitigation of the penalty or otherwise. Before deciding how to deal with him, the court shall, if practicable, obtain such information as to his general conduct, home surroundings, school record, and medical history as may enable it to deal with the case in the best interests of the juvenile, and may put to him any question arising out of such information. For the purpose of obtaining such information or for special medical examination or observation, the court may from time to time remand the juvenile on bail or to a place of detention so, however, that he appears before a court at least once in every twenty-one days.

In one of the cases, a sixteen year old juvenile of *Mutendere* Township, was charged with defilement of a thirteen year old girl. The boy pleaded guilty to the charge and the court moved the date of sentence to January 2011 in order to obtain a report from the social welfare officer. However, the juvenile was afforded the chance to address the court. In mitigation, the juvenile stated that he had previously written his junior secondary leaving exams and was awaiting his results. Miss Charity Mutende, the social welfare officer present at the proceedings, said that the reports usually take two to three weeks because she usually has up to ten reports to compile. She further stated that sometimes it even takes longer as some of the parents or guardians are not entirely cooperative. This particular juvenile was allowed to go home pending the preparation and presentation of the report. However, other juveniles were ordered back into police custody to await the preparation and presentation of their respective reports.

In an after Court interview with Honourable Mulife, he stated that although the court has the discretion to pass a sentence that it deems fit in relation to the crime, it is rare that magistrates drift away from the social welfare report. Therefore, the social welfare office has a major role to play in determining juvenile justice. The social welfare officers have to make an assessment of the child's behaviour and interview anyone who maybe closely connected to the juvenile before giving the final report to the court. If the Court fails to consider the report of the Social Welfare Officer, any custodial sentence given to a Juvenile is liable to be set aside on appeal. In *Mvula v The People*²⁴ the Social Welfare Officer presented a report on the juvenile and that report recommending that the juvenile be put on probation. Despite that recommendation the trial magistrate sent the juvenile to prison for a term of eighteen months with hard labour and gave no reasons for adopting this course.

On appeal the Supreme Court set aside the prison sentence. The Court made the following observation as the reason for upsetting the lower Court's verdict:

"It seems to us that the appellant could have been suitably dealt with in a manner other than sending him to prison. The object of the Juveniles Act, as Mr Kamalanathan rightly pointed out in his submission, is that as far as possible, juveniles should not normally be sent to prison. The reason for this is simple, namely, that if juveniles come into contact with adult hardened criminals chances are that they too will themselves become hardened criminals. In this case the learned trial magistrate could suitably have dealt with the appellant by, for instance, malting probation or an approved school order. We consider that the magistrate erred in principle by sending the appellant to prison. The prison term is set aside."

The Child Justice Forum has through the establishment of the child-friendly court, echoed the views aired in the above judgment by emphasising that the courts should opt to give lighter orders. Among the recommended court orders, the following are included²⁵ Discharge; probation Order; payment of fines; approved school order; reformatory school order and orders against parents of the child where the court is satisfied that a parent or guardian has contributed to their child committing the offence by neglecting to exercise due-care of the child.

2.2 CONCLUSION

The current juvenile justice system has both procedural and practical shortcomings as has been highlighted in this Chapter. To start with the Statute does not provide for a juvenile friendly procedure of effecting an arrest of a juvenile offender. During Court proceedings there are no visible safety procedures to ensure the juvenile offender is accorded a hearing that is in full compliance with the stipulations of the Act. This from what was observed is

²⁴ (1976) Z.R 80 (S.C)

²⁵ Child Justice Forum, bulleting on 'Child-friendly Court' 2010 .

attributed to the lack of knowledge on the part of some stakeholders in the proceedings and the non appreciation of the roles of some Magistrates, Guardians and sometimes the Welfare Officers themselves.

Once these shortcomings are considered against the background of the inadequacies of the Juveniles Act itself, which will be considered in later chapters, it can be concluded that more must be done to make child justice in Zambia responsive to the expectation of the utilisers of the Country's justice system.

On this very cardinal point, however, the Child Justice Forum established after a study on Child Justice in Zambia commissioned by the United Nations International Children Emergency Fund [UNICEF]²⁶, has currently become the central point for the improved application of the Act.

Although its implementation is still a work in progress, its objectives strive to improve the application of the provisions of the Act and further aims to ensure that children's rights are respected at every stage of the administration of juvenile justice process. Some of the achievements of the forum such as the training of criminal justice personnel (police, magistrates, prosecutors and social welfare officers) have produced positive outcomes. This can be seen from Honourable Mulife's willingness to work cooperatively with social welfare officers while handling matters involving juvenile Offenders

²⁶ Please refer to Chapter Four

CHAPTER THREE

COMPARATIVE ANALYSES WITH INTERNATIONAL INSTRUMENTS AND OTHER LEGISLATION

3.1 THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The United Nations Convention on the Rights of the Child (CRC) is the most important international legal instrument on juvenile justice and is more powerful and widely applicable than other similar instruments. This Convention is binding on all members of the United Nations. It incorporates the full range of human rights (civil, cultural, economic, political and social rights). The treaty was entered into force in 1990 and the Zambian Government ratified it on 20th November 1990,²⁷ Thereby signifying agreement to be legally bound by the terms of the Convention.

The Convention aims to safeguard the rights of every child including those in conflict with the law. The Convention's preamble partly provides that:

“[t]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”

The convention as opposed to the Juveniles Act defines a child as ‘every human being below the age of eighteen years’.²⁸ The Act defines a child as ‘a person who has not attained the age of sixteen years’.²⁹ This already shows that although Zambia has ratified the convention, it does not fully adhere to its provisions. However, it must be borne in mind that Zambia is yet to domesticate the provisions of the CRC into its national law. The most significant sections of the convention that are applicable to the topic under discussion are Articles 3(1), 37 and 40. Article 3(1) emphasises the notion of the best interest of the child:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 37 stipulates a number of rights for children deprived of their liberty. The article provides that children deprived of their liberty:

²⁷ Zambia Child Justice Forum User Guide

²⁸ Article 1

²⁹ s2

- (a) should not be subjected to cruel inhumane or degrading treatment or punishment and; should not be subjected to the imposition of capital punishment and life imprisonment without the possibility of release where the offender is a child below eighteen years of age.³⁰
- (b) should not be deprived of their liberty unlawfully but that their arrest, detention or imprisonment must conform with the law and must be the last resort.³¹
- (c) should be treated with humanity and respect for the inherent dignity of the human person and must be in consideration of the needs of persons of that age; should be confined in a manner where they are separated from adults in cells and must be allowed to maintain contact with parents or guardians.³²
- (d) should have the right to have access to legal assistance and other appropriate assistance and the right to go to court or another competent, independent and impartial authority in order to challenge the legality of the deprivation of their liberty.³³

The provisions in Article 40 underscores the rights of children deprived of their liberty from the time it is alleged that they have committed an offence until they are sentenced. It entreats all state parties to:

- (1) ensure that children deprived of their liberty are treated with dignity and worth. By doing this, it reinforces the child's respect for human rights and fundamental freedoms of others. It emphasises on the consideration of the child's age as well as the reintegration into society.
- (2) (a) ensure that no child is accused of infringing the law due to acts or omissions not prohibited by national or international law at the time of infringement.
- (b)(i) ensure that children in conflict with the law are guaranteed amongst other things, a presumption of innocence,³⁴
- (ii) ensure that they are informed promptly of the charges and have legal and other appropriate assistance;
- (iii) ensure that children have the matter determined without delay and have a fair hearing, access to a free interpreter and the right to privacy.

³⁰ Article 37 (a)

³¹ Article 37 (b)

³² Article 37 (c), Note: Section 58 of the Juveniles Act has a similar provision for the prevention of juveniles associating with adults during detention

³³ Article 37 (d)

³⁴ The Child Justice Forum has stressed this as one of the procedural rights under the Arrest Reception and Referral Services (Child Justice Forum, bulletin on 'ARRS' 2010) .

- (3) seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children who come into conflict with the law, most particularly establishing the minimum age at which children can be held criminally liable and introduction of diversion programmes that would prevent these children from undergoing judicial proceedings.

Zambia has to large extent currently managed to domesticate Articles 37 and 40 through the introduction of the Child Justice Forum which aims to promote the administration of child justice in Zambia. The forum was established after a study done by the Ministry of Home Affairs in 2000 on the conditions and experiences of children accused of crimes revealed that they were not in conformity with provisions of the CRC and most specifically the Juveniles Act. The Juveniles Act is the principal legislation in the implementation of the Child Justice Forum. However, from the key messages promoted by the forum, it is evident that it also seeks to promote the provisions of the CRC. The following are the key messages promoted by the Forum³⁵:

1. promote the best interests of the child accused of crimes.
2. use detention as a measure of last resort.
3. restorative justice, diversion, reconciliation and reintegration instead of punishment and sentencing.
4. partnership and inter-sectoral collaboration.
5. crime prevention.

The Child Justice forum comprises of three parts³⁶:

Arrest, Reception and Referral Services (ARRS) which offer” comprehensive, inter-sectoral and rights based case management service at arrest and reception phase as well as a coordinated response by all relevant service providers.”

Child Friendly Court (CFC) “...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 reintegration of children so that they play a meaningful role in the community.”

³⁵ Child Justice Forum, bulleting on ‘Child Justice Forum’ 2010 .

³⁶ Zambia Child Justice Forum User Guide

Diversion which “is the channelling or turning away of the child in conflict with the law from the formal criminal justice system.”

The above evidently echo the provisions of Articles 37 and 40 as discussed above. Achievements of the forum include amongst other things training of criminal justice system personnel.

The CRC is also supported by other international legal instruments on juvenile justice especially the following³⁷:

3.1.1 The United Nations Guidelines for the prevention of Juvenile Delinquency (Riyadh Rules)

The Riyadh Rules contain social policies that are to be applied in the prevention and protection of juveniles from committing offences. The rules stipulate that general prevention consists of comprehensive prevention plans at every governmental and non-governmental agencies as well as youth participation in the prevention policies and processes. This can be seen in the first fundamental principle which states that:

“...By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes.”

One of the functions of the Child Justice Forum is to create awareness and sensitise key stakeholders including the community at large on the implementation of pilot projects and other initiatives addressing children accused of crimes.

3.1.2 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)

The Beijing Rules establish a progressive justice system for children in conflict with the law and where adopted by the United Nations in 1985. Although they are merely recommendatory and non-binding on members, most of the provisions are encompassed in the CRC. They encourage the diversion from formal hearings to appropriate community programmes. They focus on specialised training for personnel dealing with juvenile cases, and reinforce the requirement that proceedings before any authority must be conducted in the best interest of the child.

³⁷ <http://www.juvenilejusticepanel.org/en/standardsoverview.html> 20/07/2010

3.1.3 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)

These rules are aimed at safeguarding fundamental rights and establishing measure for social reintegration of young people once deprived of the liberty whether in prison or other institutions. They include principles that universally define the specific circumstances under which children can be deprived of their liberty, with emphasis on the fact that it should be a last resort, for the shortest possible period of time limited to exceptional cases.

The seventh fundamental perspective of these rules states that:

“States should incorporate the Rules into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles.”

These rules have not been expressly incorporated into Zambian legislation but the principles are included in the projects initiated by the Child Justice Forum which as mentioned above is centred on the Juveniles Act.

3.2 THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The Charter is a regional treaty and because it was established in an African context by the African Union (formally Organisation for African Unity – OAU), it probably has more bearing on African states in comparison to the CRC. The treaty recognises in its preamble that a child requires legal protection in conditions of freedom, dignity and security due to his or her physical and mental development and takes into consideration their cultural heritage and values of the African civilisation.

Article 17 is the most relevant section of the treaty with regards to juvenile justice. It literally mirrors the provisions of Articles 37 and 40 of the CRC. For instance, Article 17 (1) states that children in conflict with the law should be treated with dignity and worth so as to reinforce their respect for human rights and the fundamental freedoms of others. This is the exact provision in Article 40 (1) of the CRC. Therefore, its provisions are also enforced in the Child Justice Forum despite the fact that Zambia has not yet ratified it.

3.3 THE CHILD JUSTICE ACT, 2008 OF SOUTH AFRICA

The Child Justice Act of South Africa came onto force in 2008. As stated in its preamble, the Act was promulgated:

“to establish a criminal justice system for children, who are in conflict with the law and accused of committing offences in accordance with the values underpinning the constitution and the international obligations...”

The Act is centred on the values enshrined in the South African Constitution³⁸ as it

“emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards...”

Some examples of these safeguards include separating them from adults and to have detention as a last resort.

Furthermore, one of the aims of the Act is to:

“expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed.”

It also highlights South Africa’s aim to comply with provisions of international treaties such as the CRC and regional treaties such as the ACRWC. It expressly mentions the rights and obligations contained in these treaties as one of its guiding principles.

The Child Justice Act extensively lays down the procedures to be followed by relevant authorities from the time a child is arrested until he/she is sentenced and goes as far as appeal. It sets out the minimum age of criminal capacity as ten years and gives the procedure to be followed when dealing with children under the age of ten. On a comparison of the preamble of the Child Justice Act of South Africa and the Zambian Juveniles Act Cap 53, it is evident that our legislation lacks specific and comprehensive provisions regarding the aims of the Act. The Child Justice Act on the other hand, extensively lays down the following:

What it aims to achieve, - ‘Balance the interests of children and of society, with due regard to the rights of victims.’

Recognition of mistakes made in the past when handling cases involving children, - ‘Children were not given the opportunity to live as children which led to them come into conflict with the law.’

Lists its object - ‘Provide for the specific treatment of children in a child justice system designed to break the cycle of crime.’

Stipulates the guiding principles - ‘All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.’

³⁸ s28 of the South African Constitution is solely about the rights of the child.

The Act is then divided into fourteen chapters dealing with matters ranging from the determination of age, procedures during court sessions and appeals and reviews of cases. The Juvenile Act however, is not specifically for children in conflict with the law but simply dedicates a few sections in this regard. One has to continuously go back and forth between the Juveniles Act and supporting legislation such as the Penal Code. Although it lays down certain provisions relevant to this topic, it does not do so comprehensively like the Child Justice Act does. Moreover, the Child Justice Act is user friendly for legal personnel as well as relevant authorities that deal with juveniles, such as the Police.

3.4 CONCLUSION

From the discussion above, the Juveniles Act evidently needs to be revisited and improved. Although the establishment of the Child Justice forum has brought about some significant positive achievements, it is insufficient to act as law. Change needs to be created into law, only then will it be binding. As can be seen from the Child Justice Act of South Africa, the obligations and rights flowing from the CRC and ACRWC are expressly stated thus entrenching them in their national law.

The Juveniles Act appears very skeletal in many aspects and there is therefore need for the legislature to include more provisions, especially highlighting Zambia's obligations and rights under the United Nations. This may be done by drawing lessons from the Child Justice Act as its format and language are extremely comprehensible.

CHAPTER FOUR

FINDINGS AND OBSERVATIONS

4.1 INTRODUCTION

It is estimated that more than fifty percent of Zambia's population comprises children under the age of eighteen. Of this estimate, more than 75 000 live on the street and three-quarters of Zambian children live below the poverty datum line³⁹. Moreover, the HIV/AIDS epidemic has had a negative impact on children, leaving most of them orphaned. Therefore, in a country where half the population comprises of children, there is evidently need for government and other key role-players in child justice to pay extensive attention to the plight of children, especially those who come in conflict with the law.

4.2 OBSERVATIONS

Children have a low status in society and this can be reflected in the fact that Zambia has not expressly adopted laws that grant children the equal protection that adults enjoy. The Zambian Constitution has a general provision for the protection of the right to personal liberty and the procedure of arrest and legality of detention in circumstances where the person's right to liberty maybe limited by law⁴⁰. This section is a clear indication of the low status of children in our society as this provision is not exactly focused on children. Section 28 of the South African Constitution on the other hand, specifically provides for the various rights that children should enjoy. The rights stipulated in this section include, the right to be protected from maltreatment, neglect, abuse or degradation; the right not to be detained except as a measure of last resort⁴¹; the right to be kept separately from detained persons over the age of 18 years and treated in a manner and kept in conditions that take account of the child's age⁴². Furthermore, South Africa's Child Justice Act was promulgated for the extensive protection of the rights of children in conflict with the law. This was after thorough

³⁹ Zambia Child Justice Forum User Guide

⁴⁰ Article 13

⁴¹ s28(1)(d)

⁴² s28(1)(g)

research and the realisation by key stakeholders that children had in recent years not been afforded the various freedoms enjoyed by adults.

The fact that juvenile offenders are held in remand for long periods of time could eventually deprive them of their youth. This can be deduced from the reality that unlike approved reformatory schools, remand prisons do not provide recreational facilities or educational programmes for children. Furthermore, most of the child's fundamental rights are not respected. These include the right to legal assistance and in some cases parents or guardians of these children may not have access to them.

Relevant authorities do not follow up the absence of parents or guardians in court sessions. This should be of paramount importance in the administration of justice for juvenile offenders. Unless there is complete failure to locate these parents or guardians, sanctions should be introduced for failure to appear before the court in assistance to these children.

There is need for excessive assessment when it comes to sentencing juveniles. From my observation, it seems magistrates leave this solely to social welfare officers. Assessment, in terms of the section 1 of The Probation Services Amendment Act⁴³, has been defined as follows:

“a process of developmental evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding the alleged commission of an offence, its impact upon the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor.”

Zambia needs to adopt this definition when it comes to social welfare officers making reports that assist Magistrates in sentencing. In evaluating family circumstances, these officers maybe required to visit the homes and families of the juvenile offender, but that is rarely done because these children usually come from residential areas that may not easily accessible.

The Juveniles Act does not have a provision that sets a time limit to the length of pre-trial detention. There is need for this to be regulated because it is evident that there is difficulty by police officers to ensure the separation of children and adults in prison cells. Without a set limit, detained juveniles are prone to remain under remand at times for over three to four years. This results in the denial of the right to a speedy trial and in the long run leads to the congestion currently experienced in prisons. A Human Rights

⁴³ 35 of 2002 (South Africa)

Watch Research ⁴⁴conducted between September 2009 and February 2010 by Prisons Care and Counselling Association (PRISCCA) reported that Zambian prisons were among the most overcrowded in the world and were at over 275% of capacity in October 2009. The report highlighted how Zambia is in violation of the internationally recognised standards for prisons through the statistics below:

PRISON	HOLDING CAPACITY	NUMBER OF INMATES HOUSED
Mukobeko	400	1,731
Lusaka central	200	1,145
Mwembeshi	55	345

All the above facilities included child inmates. Peter, a teenage inmate at one of the facilities reported⁴⁵ that, he was threatened by adult inmates if he ever revealed that children shared the cells with adults. He further stated that he was told to lie that he slept in a separate juvenile cell and that he would be punished or beaten if he talked.

Although the advantage of juvenile cases being tried in Magistrates Courts is that these courts have limited sentencing power as opposed to higher courts, the judgments from these courts do not end up being reported in law reports and therefore do not create precedent. This makes it hard for legal personnel to have authority to rely on when preparing for trial.

The Child Justice Forum seems to be mostly concentrated in Lusaka. There is need for non-governmental organisations that advocate for the rights of children to play a major role in ensuring that other parts of the country equally benefit from this initiative. Moreover, the community is not sensitised in matters of child rights. This lack of education creates ignorance when it comes to issues involving juvenile justice.

⁴⁴ [http://southasia.oneworld.net/globalheadlines/Zambian-prisons-overcrowded and dangerous 14/02/2011](http://southasia.oneworld.net/globalheadlines/Zambian-prisons-overcrowded-and-dangerous-14/02/2011)

⁴⁵ [http://southasia.oneworld.net/globalheadlines/Zambian-prisons-overcrowded and dangerous 14/02/2011](http://southasia.oneworld.net/globalheadlines/Zambian-prisons-overcrowded-and-dangerous-14/02/2011)

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 ASSESSMENT

This thesis set out to assess whether the Juveniles Act entrenches the protection of the rights of the child and whether the provisions of the Act are in fact in harmony with the internationally recognised standards of Juvenile Justice. As stated earlier, the United Nations Convention on the Rights of the Child is the main international instrument that addresses matters pertaining to juvenile justice. The convention aims at ensuring that the child is regarded as a human being and a member of society with full human and legal rights, and not simply as an object of care or control by adults.

The preceding chapters have highlighted that Zambia is in need of a criminal justice system that is user friendly to the welfare of juveniles. The law must operate as an effective tool required in denouncing, preventing and responding to incidents of violence against children. The recommendations that will be made in this chapter are intended to draw attention to the major shortcomings in the law and suggest possible solutions. The recommendations were made bearing in mind that the approach used by the law to deal with juvenile delinquents, determines their input in society.

5.2 RECOMMENDATIONS

The most important recommendation is the enforcement of international instruments (especially those discussed in chapter three) in Zambia. Zambia exercises a dualist legal system which does not allow international instruments to be self- executing locally. Moreover, the instruments cannot be invoked before a domestic court of law because they are not considered to be part of our law. Currently, the establishment of the Human Rights Commission, hereafter referred to as 'the Commission' was intended for the better implementation of international instruments by mainly carrying out investigations on the human rights situation in the country. The functions of the Commission, according to section 9 of the Human Rights Commission Act⁴⁶ include investigating any maladministration of justice and any human rights violations as well as to propose effective measures to prevent

⁴⁶ Cap 48 of the Laws of Zambia

human rights abuses. As much as this appears to be a positive step towards implementation, it is recommended that government needs to increase the budget for the Commission in order to put into action findings it makes after carrying out investigations. Moreover, the commission needs to be given more power to enforce its recommendations as it solely depends on other higher and appropriate authorities to do so.

The following recommendations flow from the Guidelines for Action on Children in the Criminal Justice System which were developed at an expert group meeting held in Vienna in February 1997. The following are the recommendations relevant to this thesis:

Firstly, the existing procedures need to be reviewed and where possible, alternative initiatives to the criminal justice system must be developed so as to avoid recourse to the criminal justice system for children accused of an offence. In this regard, it is further recommended that appropriate steps be taken to provide a broad range of alternative and educative measures at the pre-arrest, pre-trial, trial and post-trial stages. Furthermore, in the measures to be adopted, the family of the juvenile in question should be involved, to the extent that it operates in favour of the good of the child offender.

Secondly, priority must be given to the establishment of agencies and programmes that will provide legal and other assistance to children, if possible, such services must be provided freely. This initiative will help in avoiding scenarios such as the one discussed in the second chapter, where the counsel representing a juvenile appeared before the court unprepared. The agencies and programmes established will focus solely on the rights of the child from the time the child is detained.

Thirdly, easy access by relatives or any other person who has a legitimate interest in the child's welfare to police stations or places of safety must be ensured. This will assist in maintaining a link between the detained child and his or her family as well as the community at large. The interested relative or party's access to the juvenile offender should be avoided if it will be contrary to the notion of the best interest of the child.

Fourthly, a department of juvenile welfare, which is dedicated to monitoring and reporting on a regular basis the conditions of children in custodial facilities, must establish a visible liaison with the Human Rights Commission dedicated to the fostering of protection of juveniles who come into conflict with the law. The government should also permit children to communicate

with such a monitoring body and be afforded protection as this has evidently proved to be dangerous for children⁴⁷.

Fifthly, Government must begin to take due account of concerns and issues raised by non-governmental organisations and other interested parties concerned with the plight of children deprived of their liberty. The inception of the Child Justice Forum seems to be a solution to this but as earlier observed, the forum lacks funding to put into action all of its goals which shows that there is need for government to give it more attention.

The following recommendations are drawn from an assessment of the Child Justice Act of South Africa. The thirteenth chapter of the Act provides for the expungement of criminal records to prevent the child from being criminalised for the rest of his or her life. The Magistrate or Judge may be given discretionary power in this regard and a fixed term can be set for expungement in relation to the seriousness of the offence and the age of the child at the time of the commission of the offence. Sections 34 to 40 give a detailed procedure for the assessment of the child and also state the purpose of assessment. The purpose of assessment⁴⁸ as stipulated in the Act includes to:

- a) establish whether a child may be in need of care and protection in order to refer the child to a children's court
- b) estimate the age of the child if the age is uncertain
- c) gather information relating to any previous conviction, previous diversion or pending charge in respect of the child.

It is recommended that assessment should become a standard procedure in our criminal justice system. Legal personnel such as prosecutors, magistrates as well as the police must be given an obligation to facilitate and take assessment into account. This will definitely help in the decision to deal with a juvenile offender within the criminal justice system or whether an alternative route is to be utilised.

Diversion is another key recommendation that needs to be emphasised as its implementation is already underway. This concept, which was borrowed from a South African non-governmental organisation, is currently operated by a Zambian non-governmental organisation called Rural Youth and Children in Need (ROYCHIN). It is simply "the

⁴⁷ Refer to Chapter Four

⁴⁸ s35

channelling or turning away of the child in conflict with the law from the formal criminal justice system.”⁴⁹

It entails the referring of the child to a service provider such as ROYCHIN to embark in a programme aimed at addressing his or her particular needs, based on the assessment by a social welfare officer. Jesus Cares Ministries and Youth Women Christian Association (YWCA) are also service providers for diversion programmes. The strengthening of diversion can be done through increased government and donor funding. A provision concerning diversion needs to be enacted into the Juveniles Act so that it becomes part of our law as it may not have much enforcement if it is merely operated by non-governmental organisations.

UNICEF, in one of its reports on child justice in Zambia⁵⁰ recommended that there was need to give more publicity to child justice due to the recognised substantial ignorance in relation to children in conflict with the law. In recognition of this problem, it proposed that Zambia should host a regional conference aimed at developing solutions for Zambia involving the SADC region and also commence with a media campaign that not only publicises the fate of children in the criminal justice system but also profiles success stories.

5.3 CONCLUSIONS

The objectives of this dissertation stated in the first chapter have been achieved. The first objective which was to assess the practical applications of the Juveniles Act was done in Chapter two. The attendance of court trials highlighted how the Juveniles Act is applied in practice and attempts to promote the administration of child justice in Zambia through the Child Justice Forum were also discussed. Furthermore, comparative analyses with other legislation and international treaties were made and show that Zambia is still making provisions through the Child Justice Forum and organisations such as UNICEF to comply with the internationally recognised standards.

The loopholes recognised were highlighted in chapter four and indicate that until children are recognised as human beings and members of society with full human and legal rights, the aspect of making serious changes with regards to child justice will not be as successful as it is in other countries such as South Africa. Overall, the entire Juveniles Act needs to be revisited so that the recommendations stated above can become part of the law.

⁴⁹ Child Justice Forum User Guide

⁵⁰ http://www.unicef.org/evaldatabase/index_29617.html

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