

**EVALUATION OF CHILD DIVERSION PROGRAMME  
IN ZAMBIA**

By

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## **DECLARATION**

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## **DEDICATION**

I dedicate this dissertation to the memory of my late father Alefa Njobvu Nyalugwe and late mother Donalia T Nyalugwe. They were truly inspirational in building my character and abilities based on Christian principles. May their souls rest in everlasting peace.

## **ACKNOWLEDGEMENT**

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## ABSTRACT

Juvenile diversion program is designed to transfer the formal processing of juvenile offenders within the criminal justice system to a legally conducive alternative. This is because the formal criminal justice system is perceived to have a negative effect on juvenile offenders. The program utilizes informal processing and sanctions as a means of preventing future wrongdoings. In other words, instead of imprisoning children who come into conflict of the law, diversion programme exposes them to an educational or correctional program. The aim is to keep them from falling back into criminal activities. However, since its introduction in Zambia, little is known of its effectiveness in preventing diverted juveniles from committing similar or any other offence.

The Diversion Program was introduced after the 2000 Situational Analysis which provides a detailed description of the state of child justice in Zambia as observed then. The study on child justice was instituted by the Ministry of Home Affairs in collaboration with UNICEF, Danish and Swedish Embassies and the Department for International Development (DFID). The overall purpose of the study was to describe the then situation of child justice in Zambia. The study found among other things that children who committed minor offences were being subjected to the formal judicial proceedings. Consequently, the area of concern was the psychological effect on the suspected offending children as regards to the way they were handled from the arrest to detention stage. It was therefore, recommended that a child diversion program be effectively established.

As a result, four diversion service providers signed agreements with the Child Justice Forum to receive diversion referrals. The service providers include Rural Youth Children in Need, hereto thereafter, RYOCHIN, Young Women's Christian Association, (YWCA) and Jesus Cares Ministries and Drug Enforcement Commission (DEC).

The need to review the Child Justice Administration system in Zambia came at a time when there was an increase in numbers of children who came into conflict with the law. Unfortunately, the Zambian criminal justice system did not have supporting structures for a diversion programme as an alternative to reformatories and incarcerations.

This study evaluates the nature and scope of diversion program in Zambia. It is necessitated by evidence of little or lack of diversion activities as being an established principle in the juvenile

justice system. This study also evaluates the level of the Child Justice System and its consistency in conformity with the International Laws. This is done on the strength that on 20th November 1989, the United Nations General Assembly unanimously adopted the Convention on the Rights of the Child and Zambia ratified it.

## **ABBREVIATIONS**

CAPJ - Central Arresting Points for Juveniles

Child Friendly Court – CFC

CJF - Child Justice Forum

CPC - Criminal Procedure Code

CRC - Convention on the Rights of the Child

DEC. - Drug Enforcement Commission

DP – Diversion Programme

FGC - Family Group Conferences

HURID - Institute of Human Rights, Intellectual Property and Development Trust

NGO - Non-governmental Organization

NICRO - National Institute for Crime Prevention and the Reintegration of Offenders

PTCS - Pre-Trial Community Service

RYOCHIN - Rural Youth and Children in Need

UN - United Nations

UNCRC - United Nations Convention on the Rights of the Child

UNICEF - United Nations Children’s Fund

UNJDLD – United Nation for the Protection of Juveniles Deprived of their Liberty

USA – United States of America

VOM - Victim-Offender Mediation

VSU - Victim Support Unit

YES- Youth Empowerment Scheme

YWCA - Young Women's Christian Association

## **TABLE OF STATUTES AND CASES**

### **LOCAL STATUTES**

Constitution of Zambia Act 1(as amended by Act No.18 of 19196)

Juveniles Act Chapter 53 of the laws of Zambia

Penal Code Act Chapter 87 of the laws of Zambia

Criminal Procedure Code Act Chapter 88.of the laws of Zambia

Affiliation and Maintenance of Children Act Chapter 64 of the laws of Zambia

Maintenance Orders Act Chapter 55 of the laws of Zambia

Adoption Act Chapter 54 of the laws of Zambia

### **INTERNATIONAL STATUTES**

Child Justice Act 75 of 2008 of the laws of South Africa

United Nations Convention on the Rights of the child - 1989

Commentary to the Beijing Rules

Convention on the right of the child; Resolution 44/25 of November 1989

Child Justice Act 75 of 2008 of the laws of South Africa

Commentary to the Beijing Rules Rule 11.1

The international covenant on civil and political rights

UN Resolution 44/25 of 20 November 1989

United Nations Convention on the Rights of the child

United Nations General Assembly Resolution 45/113 of 14 December 1990,

The United Nation Guidelines for the Prevention of Juvenile Delinquency

Republic of South Africa Government Gazette No. 32225, Act No. 75, 2008 11 May 2009

### **CASES**

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## CHAPTER ONE

### INTRODUCTION

#### **1.0 Introduction**

The world community in general has always agitated for the protection of the rights of children. In recognizing the importance of the whole welfare of the child, the United Nations endeavored to protect these rights by creating a treaty called the Convention on the Rights of the Children CRC.<sup>1</sup> The CRC is a universally recognized principle guide on the protection of child's rights, to which Zambia consented, and ratified on 06 December 1991.<sup>2</sup> Diversion has been identified as one of the ways of safe guarding the rights of children who come in conflict with the law.

#### **1.1 Definition of Diversion**

Diversion is a rehabilitation programme that targets juvenile offenders appearing before a Magistrate in a child-friendly court. Diversion occurs when the prosecution decides to withdraw charges against a juvenile offender or where a Magistrate decides to impose an alternative sentence other than imprisonment.<sup>3</sup> Diversion mostly favours juveniles who are first time offenders and whose felonies could be considered as 'petty,' although prosecutable in terms of the Penal Code.

A diversion programme can in other terms, be defined as diverting juvenile offenders from a criminal justice system to a rehabilitation alternative with an aim of preventing relapsing. It involves the referral of cases away from formal criminal court procedures where there is enough evidence to prosecute. Therefore, instead of sentencing the juvenile offender, the Magistrate makes an order of referring him or her to a diversion service provider. (Service providers are discussed in Chapter Five below).

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<sup>1</sup> <http://www2.ohchr.org/English/law/crc.htm>[Convention on the right of the child; Resolution 44/25 of November 1989] (Accessed on 20.09.2010)

<sup>2</sup> The Criminal justice System in Zambia: enhancing the Delivery of Security in Africa; pg 169

<sup>3</sup> The Criminal justice System in Zambia: enhancing the Delivery of Security in Africa; pg 169

Rehabilitation and reintegration are key components of the programme. A diversion programme questions why an offender should return to the old lifestyle and provide an offender an alternative thinking and also gives new aims in life. The community plays a key role in the programme. If a juvenile is placed on a diversion programme, he or she must have a place in a family or community to which he or she can belong, and meaningfully attend the particular diversion programme. Placement in a community or family is in fact, one of the conditions that need to be fulfilled before the court could place a juvenile on a diversion programme.<sup>4</sup>

## **1.2 Definition of a Child in the Zambian Legal System**

In defining a juvenile, age plays a very important role. However, it must be noted that there is no international instrument that defines by age the threshold of criminal responsibility of a juvenile (a child is also a juvenile) offender. Therefore, each state prescribes its own minimum age limit at which a child should be presumed not to have the capacity to infringe laws such as the Penal Code.

In Zambia, the law relating to child justice is provided for in the Juvenile Act 53,<sup>5</sup> enacted in 1956. Section 2(1) of the Act,<sup>6</sup> provides as follows;

“A child is a person who has not attained the age of sixteen years.<sup>7</sup> A young person is a person who has attained the age of sixteen years, but has not attained the age of nineteen years.”<sup>8</sup>

Therefore, according to the Act<sup>9</sup> the definition of a juvenile includes a child and a young person.

The legislation provides for procedures to be followed when dealing with children who come into conflict with the law.

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<sup>4</sup> The Criminal justice System in Zambia: enhancing the Delivery of Security in Africa; pg 111

<sup>5</sup> Chapter 53 Juveniles Act of the laws of Zambia

<sup>6</sup> Section 2(1) of Juveniles Act Chapter 53 of the laws of Zambia

<sup>7</sup> Section 2(1) of Juveniles Act Chapter 53 of the laws of Zambia

<sup>8</sup> Section 2(1) of Juveniles Act Chapter 53 of the laws of Zambia

<sup>9</sup> Chapter 53 Juveniles Act of the laws of Zambia

Moreover, the Act provides that all cases against juveniles<sup>10</sup> should be heard by a Juvenile Court, except where the juvenile is charged with an offence of homicide or attempted murder<sup>11</sup> or where a juvenile is jointly charged with adults,<sup>12</sup> in which case the matter is heard by any competent court. The other piece of legislation which protects juvenile offenders is the constitution.

### **1.3 The Rights of Children who are in Conflict with the Law**

Children's welfare and rights have been of central concern to the United Nations since its creation in 1945. This is because children and young people are fragile and vulnerable in nature. In order to mitigate the vulnerability of children, the UN has provided additional rights to protect them. One of the first steps of the General Assembly was to establish the United Nations Children's Fund (UNICEF) which is today the main pillar of international assistance for children (UN Fact Sheet No. 10).<sup>13</sup> Moreover, the UN has protected children's rights in general, through some international covenants such as the Convention on the Right of the Child (CRC).

In Zambia, Magistrates' courts deal with the bulk of cases involving child offenders. Therefore, it is incumbent upon them to ensure that the provisions that are stipulated in the laws of Zambia and international instruments, which are designed to protect juvenile offenders, are observed. However, although children may be protected by different laws in different states, the CRC acts as an umbrella on all aspects of children rights. Likewise, Children who come into conflict with the law are specifically protected by articles 12, 37 and 40 of the CRC.

Firstly, article 12<sup>14</sup> states that children have the right to be heard in judicial proceedings affecting them. It reads as follows;

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<sup>10</sup> Section 2(1) of Juveniles Act Chapter 53 of the laws of Zambia

<sup>11</sup> Section 64(1) of Juveniles Act Chapter 53 of the laws of Zambia

<sup>12</sup> Section 65(1) of Juveniles Act Chapter 53 of the laws of Zambia

<sup>13</sup> Permanent Human Rights Commission; National Plan of Action for Human Rights 1999 – 2009 ,pg39

<sup>14</sup> <http://www2.ohcr.org/english/law/crc>[United Nations Convention on the Rights of the child - 1989] (Accessed on 22.09.2010)

## Article 12(2)

“For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”<sup>15</sup>

Secondly, Article 37<sup>16</sup> of the CRC addresses what governments can and cannot do in dealing with a child who is deprived of his or her liberty.

The article provides that deprivation of liberty for a child should be a measure of the last resort. Article 37<sup>17</sup>(b) states as follows;

### Article 37(b)

“States Parties shall ensure that;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”<sup>18</sup>

Thirdly, article 40<sup>19</sup> of the CRC refers to the administration of juvenile justice in member states.

### Article 40

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and in particular;

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.<sup>20</sup>

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<sup>15</sup> [http://www2.ohcr.org/english/law/crc\[Article 12\(2\) of the United Nations Convention on the Rights of the child - 1989\]](http://www2.ohcr.org/english/law/crc[Article 12(2) of the United Nations Convention on the Rights of the child - 1989]) (Accessed on 22.09.2010)

<sup>16</sup> [http://www2.ohcr.org/english/law/crc\[United Nations Convention on the Rights of the child -1989 \]](http://www2.ohcr.org/english/law/crc[United Nations Convention on the Rights of the child -1989 ])(Accessed on 22.09.2010)

<sup>17</sup> [http://www2.ohcr.org/english/law/crc\[United Nations Convention on the Rights of the child - 1989\]](http://www2.ohcr.org/english/law/crc[United Nations Convention on the Rights of the child - 1989]) (Accessed on 22.09.2010)

<sup>18</sup> [http://www2.ohcr.org/english/law/crc\[Article 37\(b\) of the United Nations Convention on the Rights of the child - 1989\]](http://www2.ohcr.org/english/law/crc[Article 37(b) of the United Nations Convention on the Rights of the child - 1989]) (accessed on 22.09.2010)

<sup>19</sup> [http://www2.ohcr.org/english/law/crc\[United Nations Convention on the Rights of the child - 1989\]](http://www2.ohcr.org/english/law/crc[United Nations Convention on the Rights of the child - 1989]) (Accessed on 22.09.2010)

<sup>20</sup> <sup>20</sup> [http://www2.ohcr.org/english/law/crc\[Article 40\(3\) and \(4\) of the United Nations Convention on the Rights of the child - 1989\]](http://www2.ohcr.org/english/law/crc[Article 40(3) and (4) of the United Nations Convention on the Rights of the child - 1989]) (Accessed on 22.09.2010)

Children are also entitled to enjoy all the other rights that are meant to secure a fair trial.

In Zambia, the protection of child rights has received attention from various quarters of society including donors and other interest groups. The notable institution which has shown tremendous interest in the protection of children who are in conflict with the law, is the United Nations Children's Fund (UNICEF). In the year 2000, the UNICEF commissioned a study aiming at investigating prevailing practices in the administration of justice for children offenders. The findings indicated that gaps existed in the administration of criminal justice for the children and recommended that pilot projects be undertaken.<sup>21</sup> Consequently, a child justice programme was established which led to the creation of the Child Justice Forum (CJF), a Child Friendly Court (CFC), Central Arresting Points for Juveniles (CAPJ) and a Diversion Programme (DP). This was under the leadership of Ministry of Home Affairs.<sup>22</sup> However, this thesis will only look at the diversion programme as one of the pioneer projects recommended.

#### **1.4 Development of the Diversion Programme in Zambia**

The concept of Diversion Programme was adapted from South Africa, primarily to divert juvenile offenders from the formal criminal justice system to a more child-friendly alternative. This programme was introduced in Zambia by a Non-Governmental Organization called Rural Youth and Children in Need (RYOCHIN). As at 2011, only three registered service providers for diversion programmes operated in Zambia. These are, the Rural Youth and Child in Need (RYOCHIN), the Young Women's Christian Association (YWCA) and the Drug Enforcement Commission (DEC).

#### **1.5 Aim of the Diversion Programme**

The stakeholders of the child diversion programme were of the view that it was not in the best interest of children charged with minor offences to be convicted if there could be other options.

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<sup>21</sup> [http://www.unicef.org/evaldatabase/files/Zambia\\_2005\\_002\\_child\\_justice.pdf](http://www.unicef.org/evaldatabase/files/Zambia_2005_002_child_justice.pdf)[report on child justice in Zambia with reference to Unicef supported projects; by Lukas Muntingh] (Accessed on 29.09.2010)

<sup>22</sup> [http://www2.ohchr.org/English/bodies/hrc/docs/advance\\_Docs/Zambia\\_replies\\_90.pdf](http://www2.ohchr.org/English/bodies/hrc/docs/advance_Docs/Zambia_replies_90.pdf) [Zambia responses to the list of issues from the human right committee relating to the periodic report on the international covenant on civil and political rights-Zambia] (Accessed on 16.10.2010)

These concerns stem from the fact that many children suffer unnecessary exposure to the rigorous criminal justice system. As a result of these concerns stakeholders sought to introduce a diversion programme with the following aims:

- i. To prevent young offenders from entering the formal justice procedures, where they end up acquiring a criminal record;
- ii. To give young offenders a second chance in life and 'at the same time give them survival and life-skills;
- iii. To promote reconciliation between the victim and the young offender; and
- iv. To promote restorative justice in the local communities.

However, in order to achieve this goal, service providers (as they are called) render services such as education, life skills and psychological support to young offenders. The ultimate goal of the diversion programme was to re-integrate children who come into conflict with the law into society and change their perceptions about crime.<sup>23</sup>

## **1.6 Statement of the Problem**

Zambia introduced the Diversion programme in the Child Justice Administration after the 2000 study.<sup>24</sup> However, despite the introduction of this programme, juvenile offenders are still being held in prisons in Zambia. Therefore, it is against this background that a research needs to be undertaken in order to evaluate the effectiveness of the implementation of child diversion Programme in the country.

Incidentally, the criminal justice system in Zambia consists of three major stages and these are;

- i. The arrest and detention, enforced by the police.
- ii. Detention pending trial enforced by the police.
- iii. Trial and sentencing carried out by the Judiciary.

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<sup>23</sup> The Criminal justice System in Zambia: enhancing the Delivery of Security in Africa; pg 111

<sup>24</sup> The Criminal justice System in Zambia: enhancing the Delivery of Security in Africa; pg 111

## **1.7 The Purpose of the Study (Objective of the Research)**

The overall objective of the study is to evaluate the extent to which the Diversion Programme is being implemented in Zambia and the impact on the juvenile justice system.

The study intends to answer the following questions:

1. How has been the implementation of the diversion programme in Zambia?
  - a) Investigation must be done on whether the diversion programme is consistent with domestic and international law.
2. What are the laws that regulate the treatment of children who come in conflict with the law and how do they relate to the diversion programme?
  - a) There is need to find out whether there are adequate laws and structures that back up the diversion programmes.
3. What has been the impact of diversion programme in Zambia?
  - a) The study will investigate whether diversion programme in Zambia has achieved its intended purpose.

## **1.8 Significance of the Study**

It is recognized that child diversion programme is a good measure of restorative justice for children in conflict with the law. This is because it allows the offender to have another chance in life. Therefore, the programme needs to be well established as a principle practice in the administration of child justice in Zambia.

However, since the evaluation of the UNICEF supported projects report of 2005 by Lukas Muntingh,<sup>25</sup> no study which exclusively, evaluates the diversion programme in Zambia has been conducted.

In view of this situation a research to exclusively evaluate, child diversion programme in the country is essential. Consequently, this study has been undertaken to evaluate current trends of the programme and determine whether it was still on track.

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<sup>25</sup> [http://www.unicef.org/evaldatabase/files/Zambia\\_2005\\_002child\\_justice.pdf](http://www.unicef.org/evaldatabase/files/Zambia_2005_002child_justice.pdf)[Report on child justice in Zambia with reference to Unicef supported projects by Lukas Muntingh] (accessed on 15 11 2010)

The study will help identify whether diversion programme is making a positive contribution to the administration of child justice in Zambia and whether there are areas which need legislative intervention.

## **1.9 Methodology**

In this research both primary and secondary data has been used. The basic investigative tools were questionnaires, interviews and various legal instruments both domestic and international. In addition, various documents including internet sources pertaining to child diversion have been used. Questionnaires<sup>26</sup> were administered in person as well as via emails to the respondents. In-depth interviews have been held with various officials in targeted organizations. Where it was found necessary, field visits to targeted organization were conducted.

## **1.10 Ethical Consideration**

The Research Work will involve collection of information from primary and secondary sources through interviews, questionnaires, surveys, observations, and analysis. Therefore, high ethical standards will be complied with.

Confidentiality will strictly be observed. Therefore, if it is found necessary to include a name of an individual and other personal and private detail, permission would be sort unless such information is already in the public domain.

## **1.11 Conclusion**

The importance of child rights cannot be overemphasized, because children play a critical role in the development of any nation since they are future leaders. Children who come into conflict with the law should not be condemned but be reformed so that they should also contribute to the development of a nation. It is cardinal therefore, that society should recognize that every developing child is bound to error as he or she is growing.

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<sup>26</sup>Appendix 1 [Questionnaire]

Consequently, it is vitally important that corrective measures for the child who errors should be for his or her best interest. Incidentally, one of the corrective measures is the diversion programme.

Therefore, it is necessary to evaluate how the child diversion Programme is being implemented in Zambia. It is hoped that the findings would help policy makers as well as other interested groups to focus their strategies towards improving the programme.

## CHAPTER TWO

### THE DIVERSION PROGRAMME FROM AN INTERNATIONAL PERSPECTIVE

#### 2.0 Introduction

This chapter will look at diversion programmes from an international perspective. This will include the aspect of international legal instruments which promote rights of a child in conflict with the law. Moreover, the chapter will briefly look at what is obtaining in two other countries in terms of the implementation of child diversion programme.

#### 2.1.0 International law

Juvenile justice is a matter of practical concern in all regions and all legal systems. Large numbers of children get caught up in legal systems as accused or accusers, victims or witnesses. The most significant development in the administration of child justice on the international level was the establishment of the United Nations Convention on the Rights of the Child. This Convention<sup>27</sup> and related international instruments provide the decisive international framework within which children offenders should be managed. In addition there are a number of principles, minimum rules and standards which deal specifically with children in conflict with the law. The outstanding ones in this regard are as follows;

- i. The United Nations Standard Minimum Rules on the Administration of Juvenile Justice popularly known as the 'Beijing Rules.'
- ii. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UN JDL Rules), adopted in 1990.<sup>28</sup>
- iii. The United Nations Guidelines for the Prevention of Juvenile Delinquency. (Riyadh Guidelines)

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<sup>27</sup><http://www2.ohchr.org/english/law/crc>[United Nations Convention on the Rights of the child - 1989](Accessed on 22.09.2010)

<sup>28</sup>[http://www2.ohchr.org/English/law/res45\\_113.htm](http://www2.ohchr.org/English/law/res45_113.htm) [United Nations General Assembly Resolution 45/113 of 14 December 1990,] (Accessed on 23.09.2010)

### 2.1.1 The United Nations Convention on the Rights of the Child (UNCRC)

UNCRC stands for United Nations Convention on the Rights of the Child. It is popularly referred to as the “CRC”. During preparations for the International Year of the Child (1979), the need to give the force of treaty law to children’s rights became apparent. The CRC<sup>29</sup> was adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989. It entered into force as a treaty on 2 September 1990,<sup>30</sup> in accordance with article 49 of the UN.<sup>31</sup> The convention is legally binding on the countries that have signed and ratified it. Zambia signed and ratified the CRC on 06 December 1991.<sup>32</sup>

The CRC is the most comprehensive convent ever made in terms of the rights of the child and is the first document to give these rights the force of international law.<sup>33</sup> Notably, children and young people have the same human rights as everyone else. However, because of their immaturity and vulnerability the Convention provides them with additional rights to protect them and ensure that they are not discriminated against. The Convention is so important because it gives legal precedence to the fact that children have human rights which should be at the heart of governance. Moreover, it approaches the rights of children and young people in a holistic way with emphasis on protecting them. Therefore, the convention provides a list of rights for all children and young people. Everywhere in the world children have these rights, no matter who they are, where they live or what they believe in.

The UNCRC has 54 articles which protect the rights of children and young people. Articles 1 to 41<sup>34</sup> (each outlining a Right) set out how children and young people should be treated.

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<sup>29</sup> [http://www2.ohcr.org/english/law/crc\[United Nations Convention on the Rights of the child - 1989\]](http://www2.ohcr.org/english/law/crc[United Nations Convention on the Rights of the child - 1989]) (Accessed on 22.09.2010)

<sup>30</sup> [http://www2.ohcr.org/english/law/crc\[United Nations Convention on the Rights of the child - 1989\]](http://www2.ohcr.org/english/law/crc[United Nations Convention on the Rights of the child - 1989]) (Accessed on 22.09.2010)

<sup>31</sup> [http://www2.ohcr.org/english/law/crc\[United Nations Convention on the Rights of the child - 1989\]](http://www2.ohcr.org/english/law/crc[United Nations Convention on the Rights of the child - 1989]) (Accessed on 22.09.2010)

<sup>32</sup> The Criminal justice System in Zambia: enhancing the Delivery of Security in Africa; pg 169

<sup>33</sup> Permanent Human Rights Commission; National Plan of Action for Human Rights 1999 – 2009 ,pg39

<sup>34</sup> [http://www2.ohcr.org/english/law/crc\[United Nations Convention on the Rights of the child - 1989\]](http://www2.ohcr.org/english/law/crc[United Nations Convention on the Rights of the child - 1989]) (Accessed on 22.09.2010)

The other 13 articles are all about how governments and adults should work together to make sure children and young people can access and enjoy their Rights (42 to 54).<sup>35</sup> The aim of the CRC is to provide protection for children; hence the preamble echoes appropriate treatment of children worldwide,<sup>36</sup> and it states in parts as follows;

“Bearing in mind that the child by reason of his physical and mental immaturity needs special safe guards and care, including appropriate legal protection before as well as after birth.”<sup>37</sup>

Many governments have recognized the importance of the protective measures for children. As such, all major legal systems have enacted legislation and created mechanisms to safeguard the welfare of their young ones. This is because children are always seen to be fragile and inexperienced in nature.

Article 1<sup>38</sup> defines children as "all human beings below the age of 18." As stated in Article 3 and repeated throughout the text, the CRC is geared towards ensuring that the " best interest of the child" is safeguarded. Moreover, under Article 4,<sup>39</sup> States are obliged to do all they can to ensure that the rights set out in the CRC are realized.

The emphasis on diverting children from prison actually extends to diversion from court proceedings altogether. Governments have adopted a number of measures to accomplish this aspect. It starts from police cautions (formal warnings), to treatment programmes and restorative justice conferences.

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<sup>35</sup><http://www2.ohchr.org/english/law/crc>[United Nations Convention on the Rights of the child General Assembly. Resolution 44/25 44 U N GASOR, supp (no.49) UN Doc. A44/49](1989)](Accessed on 14.11.2010)

<sup>36</sup> <http://www2.ohchr.org/English/law/crc.htm>[Convention on the right of the child; Resolution 44/25 of November 1989](Accessed on 14.11.2010)

<sup>37</sup> The Preamble of the United Nations Convention on the Rights of the child - 1989]

<sup>38</sup> <http://www2.ohchr.org/English/law/crc.htm>[Convention on the right of the child; Resolution 44/25 of November 1989](Accessed on 14.11.2010)

<sup>39</sup> <http://www2.ohchr.org/English/law/crc.htm>[Convention on the right of the child; Resolution 44/25 of November 1989](Accessed on 14.11.2010)

## **2.1.2 The Beijing Rules**

The complete title for the Beijing Rules is the “United Nations Standard Minimum Rules for the Administration of Juvenile Justice.” The Rules were adopted by the UN in Beijing, China in 1985, hence the reason why they are called “The Beijing Rules.”

This is the first set of international rules to comprehensively set standards for the administration of child justice.<sup>40</sup>

One of the most important aspects of the Beijing Rules is that they provide for the development of separate and specialised systems of child justice. Therefore, the development of a separate child justice system in Zambia, or any proposal for legislative change which may affect children who come into conflict with the law, should bear in mind the Beijing Rules.

Although the Beijing Rules are not legally binding, certain principles have been incorporated into the Convention on the Rights of the Child and are, therefore, binding. It is important to know and uphold these provisions, especially those that refer to law enforcement officers.

Two of the most important principles in terms of child justice as it relates to the promotion of the rights of a child who comes into conflict with the law are; the child's well-being and the principle of proportionality. These principles constitute the aims of a child justice system.<sup>41</sup>

Zambia copied a South African model of diversion programmes. Therefore, it is necessary to look briefly the reasons that necessitated the development of the programme in South Africa and how the concept is implemented (refer paragraph 2.2.1 below).

## **2.1.3 United Nations Guidelines for the Prevention of Juvenile Delinquency. (Riyadh Guidelines)**

The Riyadh Guidelines were adopted by the UN General Assembly one year after the CRC, and should be interpreted as supplementary (built on) to the CRC.

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<sup>40</sup> Child Justice in Zambia; a Trainer's Manual for Child Justice Role Players, Manual Formulation Funded by UNICEF; Revised and Finalised by The HURID August, 2005

<sup>41</sup> Child Justice In Zambia; A Trainer's Manual For Child Justice Role Players, Manual Formulation Funded by UNICEF; Revised and Finalised by The HURID August, 2005

The Riyadh Guidelines embody a new approach to the prevention of child crime.<sup>42</sup> The Riyadh Guidelines emphasise the holistic (all encompassing) nature of the administration of child justice.

Diversion programmes cannot work in a vacuum. Without prevention programmes, the high rate of recidivism (repetition of crime by the same offenders) in Zambia and elsewhere would probably continue to escalate.<sup>43</sup> The aim is to successfully integrate children into society throughout the social structures such as the family, the community, the peer- groups, the school etc.

The Guidelines encourage active prevention of crime rather than merely reacting to crimes that have been committed. This includes educating the public, in respect of child crime prevention.<sup>44</sup> Perhaps the most progressive innovation of the guidelines is the viewing of prevention policies as being for all children and not just for children who come into conflict with the law.

### **2.2.0 Diversion Programme at International Level**

International declarations have strong emphasis against holding children in detention. For example, Article 37 of the United Nations Convention on the Rights of the Child states that young people who break the law should not be treated cruelly. It further says that such children should not be put in prison with adults and should be able to keep in contact with their families.<sup>45</sup> Perhaps this article is the main referral point on which the whole concept of diversion programme hinges.

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<sup>42</sup> <http://wwwojjdp.gov/mpg/progTypesTeenYouth.aspx> [Office of Juvenile Justice and Delinquency Prevention] (Accessed on 28.11.2010)

<sup>43</sup> Child Justice In Zambia; A Trainer's Manual For Child Justice Role Players, Manual Formulation Funded by Unicef, Revised and Finalised by The HURID August, 2005

<sup>44</sup> Child Justice In Zambia; A Trainer's Manual for Child Justice Role Players, Manual Formulation Funded by Unicef, Revised and Finalised by The HURID August, 2005

<sup>45</sup> <http://www2.ohcr.org/english/law/crc>[Article 37 ;United Nations Convention on the Rights of the child -1989] (Accessed on 22.09.2010)

Moreover, the office of the United Nations High Commissioner for Human Rights established guidelines for action on children in the criminal justice system<sup>46</sup>, and the following are the objectives:

(i) to implement the Convention on the Rights of the Child and to pursue the goals set forth in the convention with regard to children in the context of the administration of juvenile justice, as well as to use and apply the United Nations standards and norms in juvenile justice and other related instruments, such as the Declaration of Basic Principles of Justice for Victims of Crime<sup>47</sup>

(ii) to facilitate the provision of assistance to state parties for the effective implementation of the convention on the rights of the child and related instruments.<sup>48</sup> Paragraph 15 of the guidelines<sup>49</sup> provides as follows in parts;

“A review of existing procedures should be undertaken and, where possible, diversion or other alternative initiatives to the classical criminal justice systems should be developed to avoid recourse to the criminal justice systems for young persons accused of an offence. Appropriate steps should be taken to make available throughout the State a broad range of alternative and educative measures at the pre-arrest, pre-trial, trial and post-trial stages, in order to prevent recidivism and promote the social rehabilitation of child offenders.<sup>50</sup>”

The guidelines in paragraph 42<sup>51</sup> further emphasises the need of not over-relying on the criminal justice system when dealing with children’s behaviour. It states as follows;

“To prevent further overreliance on criminal justice measures to deal with children's behaviour, efforts should be made to establish and apply programmes aimed at strengthening social assistance, which would allow for the diversion of children from the justice system, as appropriate, as well as improving the application of non-custodial measures and reintegration programmes. To establish and apply such programmes, it is necessary to foster close cooperation between the child justice sectors, different services in charge of law enforcement, social welfare and education sectors.”<sup>52</sup>

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<sup>46</sup><http://www2.ohchr.org/english/system/htm> [guidelines for action on children in criminal justice system, recommended by Economic and Social Council resolution 1997/30 of 21 July 1997](Accessed on 14.11.2010)

<sup>47</sup><http://www2.ohchr.org/english/system/htm> [guidelines for action on children in criminal justice system: recommended by Economic and Social Council resolution 1997/30 of 21 July 1997] accessed on 14.11.2010

<sup>48</sup><http://www2.ohchr.org/english/system/htm> [guidelines for action on children in criminal justice system: recommended by Economic and Social Council resolution 1997/30 of 21 July 1997](Accessed on 14.11.2010)

<sup>49</sup> <http://www2.ohchr.org/english/system/htm> [guidelines for action on children in criminal justice system: recommended by Economic and Social Council resolution 1997/30 of 21 July 1997](Accessed on 14.11.2010)

<sup>50</sup> <http://www2.ohchr.org/english/system/htm> [guidelines for action on children in criminal justice system: recommended by Economic and Social Council resolution 1997/30 of 21 July 1997](Accessed on 14.11.2010)

<sup>51</sup> <http://www2.ohchr.org/english/system/htm> [guidelines for action on children in criminal justice system: recommended by Economic and Social Council resolution 1997/30 of 21 July 1997] Accessed on 14.11.2010

<sup>52</sup> <http://www2.ohchr.org/english/system/htm> [guidelines for action on children in criminal justice system:

### 2.2.1 South Africa

In South Africa, the diversion programme was an initiative of non-governmental organizations and lawyers for human rights.

This was done initially on an informal basis. Subsequently, the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), an NGO, launched the first diversion initiatives in South Africa in the early 1990s in the Western Cape and KwaZulu-Natal. The first two programmes were the Youth Empowerment Scheme (YES) and Pre-Trial Community Service (PTCS). NICRO later expanded the range of diversion programmes to include Family Group Conferences (FGC), Victim-Offender Mediation (VOM) and The Journey.<sup>53</sup> Like any other newly formed programmes, it had its own teething problems in its early stages, but it has gone through diverse transformation for it to be where it is now.

Catherine Wood<sup>54</sup> writes that diversion initiatives in South Africa had previously occurred in a more or less selective and disjointed fashion. She attributed the haphazardness to the fact that there was no legislative framework to regulate this development. She further states that, since 1996 there has been a significant increase in the development and provision of new diversion initiatives. These initiatives have been facilitated by a variety of individuals and organisations including state-employed probation officers, concerned prosecutors, non-governmental organisations and collaborative initiatives.<sup>55</sup> Moreover, proponents of diversion, advocated for its expansion including making it a cornerstone of juvenile justice and as one way of decongesting the criminal justice system. In order to give the programme the legal impetus, the Child Justice Bill was proposed. Nevertheless, the bill had to be drafted in conformity with the CRC.

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recommended by Economic and Social Council resolution 1997/30 of 21 July 1997] Accessed on 14.11.2010

<sup>53</sup> <http://www.iss.co.za/pubs/papers/79/paper79.html> [Diversion in South Africa: A review of policy and practice, 1990-2003; by Catherine Wood] ( Accessed on 16.11.2010)

<sup>54</sup> <http://www.iss.co.za/pubs/papers/79/paper79.html> [Diversion in South Africa: A review of policy and practice, 1990-2003; by Catherine Wood] ( Accessed on 16.11.2010)

<sup>55</sup> <http://www.iss.co.za/pubs/papers/79/paper79.html> [Diversion in South Africa: A review of policy and practice, 1990-2003; by Catherine Wood](Accessed on 16.11.2010)

South Africa ratified the United Nations Convention on the Rights of the Child in 1995. In terms of this treaty governments are admonished to enact legislation that gave effect to Article 40 of the Convention, which calls for a criminal justice system that caters for the needs of children who commit offences.

In terms of Article 40 of the CRC<sup>56</sup> State Parties are required to enact domestic legislation that requires firstly, children who commit offences to be legally represented. Secondly, that such a child should be diverted out of the normal criminal justice system. Thirdly, that they should attend programmes that might help them become law-abiding citizens.

Incidentally, it took 13 years for South African legislature to pass a legislation that gave an effect to Article 40 of the CRC. The Child Justice Act 75 of 2008 was finally enacted and signed in into law on 11 May 2009. The delay is said to have been attributed to the fact that it was necessary to put mechanisms in place for effective implementation of the Act. This helped the training of the implementers of the Act e.g. Magistrates, prosecutors, probation officers, and the police to have further training.<sup>57</sup>

In terms of section 2, the objects of the Act include the use of diversion as a means to prevent children being exposed to adverse effects of the formal justice system. As already defined in paragraph 1.1 above, diversion involves the referral of cases away from the formal criminal court procedures where there exists a suitable amount of evidence to prosecute.

According to the Act<sup>58</sup> diversion is achieved in three ways.

- i. Firstly, by way of prosecutorial diversion for minor offences committed.
- ii. Secondly, at the preliminary inquiry, through an order of the inquiring magistrate.
- iii. Thirdly, during the trial in the child justice court, through an order of the court. The Act now provides a regulatory framework to ensure consistency of the practice and legal certainty with regard to diversion.

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<sup>56</sup><http://www2.ohchr.org/English/law/crc.htm>[Convention on the right of the child; Resolution 44/25 of November 1989](Accessed on 14.11.2010)

<sup>57</sup><http://www.crin.org/violnce/search/closeup.asp?infoID;22364> [Commentary by Lorenzo Wakefield, researcher at the Children's Rights Project at the Community Law Centre at the University of the Western Cape]. (Accessed on 23/3/2011)

<sup>58</sup><http://www.communitylawcentre.org.za/clc-projects/childrens-right/article-40archives/Art11-2.pdf/> [The child justice Act 75 of 2008 of the laws of South Africa](Accessed on 23/3/2011)

The Act provides detailed procedures on how to implement the diversion programme in South Africa. For example it exclusively dedicated the entire Chapter 8 to deal with diversion. This goes to show how serious South African legal system has taken the welfare of children who come into conflict with the law.

In terms of Section 51 Chapter 8 of Act 75,<sup>59</sup> it provides the objectives of diversion in South Africa as follows;

Sec 51.

The objectives of diversion are;

- “(a) deal with a child outside the formal criminal justice system in appropriate Cases;
- (b) Encourage the child to be accountable for the harm caused by him or her;
- (c) Meet the particular needs of the individual child;
- (d) Promote the reintegration of the child into his or her family and community;
- (e) Provide an opportunity to those affected by the harm to express their views on its impact on them;
- (f) Encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- (g) Promote reconciliation between the child and the person or community affected by the harm caused by the child;
- (h) Prevent stigmatizing the child and prevent the adverse consequences flowing from being subject to the criminal justice system;
- (i) reduce the potential for re-offending;
- (j) Prevent the child from having a criminal record; and
- (k) Promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.<sup>60</sup>”

The Act recognizes the age of a child to be the most important factor when determining criminal responsibility. Consequently, children are put into age category in order to avoid dealing with children who have no capacity to commit a crime. Chapter 2 section 5 of the Act deals with criminal capacity in South Africa as follows;

Chapter 2 section 5

- “(1) Every child who is alleged to have committed an offence and is under the age of 10 years must be referred to a probation officer to be dealt with in terms of section 9.
- (2) Every child who is 10 years or older, who is alleged to have committed an offence and who is required to appear at a preliminary inquiry in respect of that offence must, before his or her first appearance at the preliminary inquiry, be assessed by a probation officer, unless assessment is dispensed with in terms of section 41(3) or 47(5).
- (3) A preliminary inquiry must be held in respect of every child referred to in subsection (2) after he or she has been assessed, except where the matter—
  - (a) has been diverted in accordance with Chapter 6;<sup>61</sup>

<sup>59</sup>[http://www.child\\_justice.org.za/downloads/A75-2008.pdf](http://www.child_justice.org.za/downloads/A75-2008.pdf) [Child justice Act 75 of 2008 of the laws of South Africa] (Accessed on 23/3/2011)

<sup>60</sup>Section 51 of the Child justice Act 75 of 2008 of the laws of South Africa

<sup>61</sup><http://www.communitylawcentre.org.za/clc-projects/childrens-right/article-40archives/Art11-2.pdf/> [The child

- (b) involves a child who is 10 years or older but under the age of 14 years where criminal capacity is not likely to be proved, as provided for in section 10(2)(b); or  
 (c) has been withdrawn.
- (4) (a) A matter in respect of a child referred to in subsection (2) may be considered for diversion—
- (i) by a prosecutor in accordance with Chapter 6; or  
 (ii) at a preliminary inquiry in accordance with Chapter 7.
- (b) A matter which is for any reason not diverted in terms of paragraph (a) must, unless the matter has been withdrawn or referred to a children's court, be referred to a child justice court for plea and trial in terms of Chapter 9.
- (c) A matter in respect of a child referred to in paragraph (b) may, before the conclusion of the case for the prosecution, be considered for diversion by a child justice court in terms of Chapter 9.”

The Act amends the common law position of the criminal capacity of children by increasing the minimum age of criminal responsibility from 7 to 10 years old. Section 7 of the Act stipulates that children between the ages of 10 and 14 years shall be presumed not to possess criminal capacity. Unfortunately, the Act does not stipulate what the position is on children older than 14. Therefore it is presumed that they possess criminal capacity, as in the common law.<sup>62</sup>

As regards to the selection of diversion options, section 54 of chapter 8 ably deals with the subject. However, there are factors which need to be considered when selecting a diversion option. The following are some of the factors that determine which option to be considered.

- i. The child's cultural, religious and linguistic background;
- ii. The child's educational level, cognitive ability, domestic and environmental circumstances;
- iii. The proportionality of the option recommended or selected to the child's circumstances, the nature of the offence and the interests of society;
- iv. The child's age and developmental needs.

Most importantly, Section 54(2) provides that the various diversion options may be used in combination with each other. In terms of Section 54(3), an individual diversion option which meets the objectives of diversion may be developed for a particular child.

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justice Act 75 of the laws of South Africa] (Accessed on 23/3/2011)

<sup>62</sup><http://www.crin.org/violnce/search/closeup.asp?infoID;22364> [Commentary by Lorenzo Wakefield, researcher at the Children's Rights Project at the Community Law Centre at the University of the Western Cape].(Accessed on 23/3/2011)

This allows for flexibility and creativity where a particular child's needs are not specifically catered for by other options available.<sup>63</sup>

Section 41 of Chapter 6 of the Act defines formalities of how a prosecutor can divert a matter involving a child in respect of minor offences. The Act provides as follows:

#### Sec 41

- “(1) A prosecutor may divert a matter involving a child who is alleged to have committed an offence referred to in Schedule 1 and may, for this purpose, select any level one diversion option set out in section 53(3) or any combination thereof, if the prosecutor is satisfied—
- (a) that the factors referred to in section 52(1) (a) to (d) have been complied with; and
  - (b) in the case of a child who is 10 years or older but under the age of 14 years, that criminal capacity is likely to be proved in terms of section 11.
- (2) The diversion referred to in subsection (1) must take place—
- (a) in accordance with directives issued by the National Director of Public Prosecutions, as provided for in section 97(4) (a) (i) (bb);
  - (b) subject to subsection (3), after an assessment of the child in accordance with Chapter 5; and
  - (c) before a preliminary inquiry as provided for in Chapter 7.
- (3) If the child has not been assessed, the prosecutor may dispense with the assessment if it is in the best interests of the child to do so: Provided that the reasons for dispensing with the assessment must be entered on the record of the proceedings by the magistrate in chambers referred to in section 42.
- (4) If the prosecutor is of the opinion that the child is in need of care and protection as envisaged by section 150 of the Children's Act, he or she must not divert the matter but refer the matter to a preliminary inquiry for consideration of referring it to a children's court.
- (5) In order to decide whether to divert the matter or not, the prosecutor must take into account whether the child has a record of previous diversions.
- (6) If the prosecutor decides not to divert a matter in terms of this section, he or she must immediately make arrangements for the child to appear at a preliminary inquiry referred to in Chapter 7.<sup>64</sup>”

Diversion options are made an order of the court and Section 42 of the Act provides as follows:

#### Section 42.

- “(1) If a matter is diverted in terms of Section 41, the child and, where possible, his or her parent, appropriate adult or guardian must appear before a magistrate in chambers, in order to have the diversion option that has been selected by the prosecutor, made an order of court.
- (2) The provisions of Section 58 apply with the changes required by the context, to a child who fails to comply with any order referred to in subsection (1).”<sup>65</sup>

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<sup>63</sup><http://www.crin.org/violnce/search/closeup.asp?infoID;22364>[commentary by Lorenzo Wakefield, researcher at the children's right project at the community law centre at the University of the Western Cape] (Accessed on 23/3/2011)

<sup>64</sup> <http://www.crin.org/violnce/search/closeup.asp?infoID;22364>[commentary by Lorenzo Wakefield, researcher at the children's right project at the community law centre at the University of the Western Cape]. (Accessed on 23/3/2011)

<sup>65</sup> <http://www.crin.org/violnce/search/closeup.asp?infoID;22364>[commentary by Lorenzo Wakefield, researcher at the children's right project at the community law centre at the University of the Western Cape]. (Accessed on 23/3/2011)

However there are minimum standards applicable to diversion in South Africa and these are set out in Section 55 of the Act as follows:

Section 55.

“(1) Diversion options, in keeping with the objectives of diversion must be structured in a way so as to strike a balance between the circumstances of the child, the nature of the offence and the interests of society, and—

(a) may not be exploitative, harmful or hazardous to the child’s physical or mental health;

(b) must be appropriate to the age and maturity of the child;

(c) may not interfere with the child’s schooling;”

(d) may not be structured in a manner that completely excludes certain children due to a lack of resources, financial or otherwise; and

(e) must be sensitive to the circumstances of the victim.”<sup>66</sup>

The Act applies to all criminal offences. However, it divides them into three schedules depending on the seriousness of the offences. Schedule 1 contains the least serious offences and Schedule 3 the most serious ones. These schedules have different implications if a child to be charged in one of them. For instance, children charged with Schedule 3 offences (the most serious) can only be diverted in exceptional circumstances. If a child is charged with more than one offence and these are all dealt with in the same criminal proceedings, the most serious offence must guide the manner in which the child must be dealt with.<sup>67</sup>

## 2.2.2 United States of America

The Juvenile Justice Administration system in United States of America is not bound by the Convention on the Right of the Child. This is because the USA is one of the countries that have not yet ratified<sup>68</sup> the CRC. Nevertheless, there are a number of diversion service providers for children who come into conflict with the law. Mostly, these service providers are community-based organizations who work with institutions which deal with children welfare.

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<sup>66</sup><http://www.crin.org/violnce/search/closeup.asp?infoID;22364>[commentary by Lorenzo Wakefield, researcher at the children’s right project at the community law centre at the University of the Western Cape]. (Accessed on 23/3/2011 at 14.23hrs

<sup>67</sup><http://www.crin.org/violnce/search/closeup.asp?infoID;22364>[Getting to know the Child Justice Act Jacqui Gallinetti (accessed on 23/3/2011)

<sup>68</sup>[http://www.unicef.org/crc/index\\_30229.html](http://www.unicef.org/crc/index_30229.html) [convention on the right of the child - 1989] (Accessed on 22.11.2010)

### 2.2.2.1 Teen Court

In the United State of America one of the programmes which deal with diversion of children who come into conflict with the law is called the Teen Court. Teen (or youth or peer) courts are programmes designed to divert young, first-time offenders from formal juvenile court proceedings to an informal process that incorporates components of restorative justice to hold youth accountable for their offenses and prevent future delinquency.<sup>69</sup>

Teen courts are much like traditional courts in that there are prosecutors and defense attorneys, offenders and victims, judges and juries. The way the teen court works is that, volunteer teens perform the roles of prosecuting and defense attorneys, bailiff, clerk and jury. The Judge is the only adult directly involved in the court proceedings.

Teen Court is a real justice program run by teens for teens. Juvenile's aged between 12 and 17 who have committed a misdemeanor crime appear before a jury of their peers. In other words the offender is brought to the Teen Court whose jury is his peers, which sentences him or her to constructive service in a community. Basically, the crime is generally a first offense, and the respondent must admit involvement since this is a disposition (sentencing) hearing only. This programme seeks to deter teens from future unlawful behavior, while providing direct experience in the judiciary system and an understanding of their future role as a productive citizen.<sup>70</sup>

The principal goal of a Teen Court is to hold young offenders accountable for their behaviour by imposing sanctions that will repair some of the harm imposed on the victim and community, thereby, reduce repeat offending. Unlike other problem-solving court models, Teen Court programmes do not operate as a court within the judicial branch of government, but rather as part of a diversion process that works to keep youth from formal court proceedings in the juvenile justice system. The most typical offenses that Teen Courts will accept are theft, vandalism, and underage drinking, disorderly conduct, and assault, possession of marijuana, tobacco violations, and curfew violations.<sup>71</sup>

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<sup>69</sup><http://www.wojdp.gov/mpg/progTypesTeenYouth.aspx> [Office of Juvenile Justice and Delinquency Prevention] (Accessed on 28.11.2010)

<sup>70</sup> <http://www.cityoflewsville.com/wemsite/publishing.nsf/content/what+is+Teen+Court> (Accessed on 18/2/2011)

<sup>71</sup> <http://www.promoteprevent.org/publications/prevention-briefs/youth-courts>[National Center for Mental Health Promotion and youth Violence Prevention](Accessed on 29/11/2010)

One example of a Teen Court in the USA is “The Anne Arundel County Teen Court.” Their report<sup>72</sup> shows that since its inception in January 1998, more than 815 cases have come before the Anne Arundel County Teen Court. The programme completion rate for offenders was around 81.78% with a recidivism rate of 10%.<sup>73</sup>

### **2.2.2.2 Project Impact**

Project Impact is another diversion programme in the USA. It began in 1986 in South Central Los Angeles, involving communities, churches, government and other civic agencies in comprehensive, relevant programmes for at-risk teens and their families.

The aim of Project Impact is to provide a comprehensive Juvenile Diversion programme by providing "at-risk" youth, positive alternatives to misdeeds that destroy young lives. The following write up by Project Impact offers a detailed analysis on how the programme deals with diverted offenders.

According to Project Impact, youth are diverted from juvenile court and/or incarceration through guidance counseling, personal development workshops and referral assistance. Youth referred into the programme are assigned a counselor who develops personalized case plan with specific treatment goals and strategies to be achieved as a part of the programme. The assigned counselor meets with the client to evaluate treatment needs, set goals and provide additional support to see that each person in the programme is able to achieve their stated goals. A wide range of treatment services are available to each programme participant to further assure their success and development.

Each youth will receive eight 1-hours weekly individual counseling sessions and eight 2-hour weekly group counseling sessions run by a licensed counselor dealing with self-esteem enhancement, career development, goal setting, drug and alcohol abuse counseling and civic responsibility.

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<sup>72</sup> <http://www.aacounty.org/Police/TeenCourt.cfm> [The Anne Arundel County Teen Court](Accessed on 29/11/2010)

<sup>73</sup> <http://www.aacounty.org/Police/TeenCourt.cfm> [The Anne Arundel County Teen Court] (29/11/2010)

Each youth involved in counseling will receive an additional 6 hours of follow-up counseling to monitor programme effectiveness and to provide resource assistance to help each participant achieve their "Contract Goals."<sup>74</sup>

### 2.3 Conclusion

The convention is the only human rights treaty to come close to achieving universal ratification, with only the United States of America and Somalia not ratifying it. It is the only comprehensive international treaty which gives legal guidelines on how to deal with children who come into conflict with the law. According to the Beijing Rules, Rule 11, as well the CRC Article 40 (3) (b) and Article 40 (4), States are advised to encourage alternative measures for dealing with children in trouble with the law without resorting to judicial proceedings. These provisions form the basis for the States concerning measures of diversion, which includes channeling cases away from court to a variety of programmes. This is also in line with Article 37 (b) of the CRC, which states that a child should only be deprived of his or her liberty as a measure of last resort and for the shortest time possible.

However, each state has its own domestic legal system that deals with the welfare of children who come into conflict with the law. Some states have dedicated portions of their domestic laws which require the administration of children justice, (e.g. South Africa) to exclusively deal with diversion programmes.

To avoid the haphazard implementation of a diversion programme by service providers, it is necessary to have domestic legislation that is backed by international legal instruments.

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<sup>74</sup><http://projectimpactusa.org/services.php#counseling> [Project Impact USA Making a difference one life at a time] (Accessed on 29 11.2010)

## CHAPTER THREE

### APPLICABLE LAWS ON JUVENILE JUSTICE ADMINISTRATION IN ZAMBIA

#### 3.0 Introduction

This chapter will provide the laws that are available in Zambia for the administration of child justice. The laws will include Acts of Parliament and international protocols. However, before we look at which laws are obtaining, it is necessary to be specific about the age group of children who are criminally liable. Age is the most important factor to determine whether a child is criminally liable for his or her acts or omissions. Hence, before a child is charged with an offence it is important to ascertain the age of the offender. Obviously, if age is not known, serious legal implications could be encountered. It is a fact that sometimes the age claimed by juveniles may not always correspond to the reality or because they may sometimes not be aware of it. The difficulty in establishing ages of some children in conflict with the law arises as a result of lack of births records in some cases.

#### 3.1 Criminal Responsibility in Zambia

In Zambia, a person under the age of eight years is not criminally responsible for any act or omission.<sup>75</sup> This is considered to be an immature age. Chapter 87 section 14 (2)<sup>76</sup> of the Penal Code provides that;

“A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.”<sup>77</sup>

Section 14(3)<sup>78</sup> provides that “A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.”

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<sup>75</sup>Section 14,( 1 ) Penal Code Act Chapter 87 of the laws of Zambia

<sup>76</sup>Section 14,( 2 ) Penal Code Act Chapter 87 of the laws of Zambia

<sup>77</sup> Section 14,( 2 ) Penal Code Act Chapter 87 of the laws of Zambia

<sup>78</sup>Chapter 87. Penal Code Act of the laws of Zambia

### 3.2.0 General Laws Protecting the Rights of Juveniles

Laws which are related to children in Zambia are disseminated among different statutes as already indicated in 1.1.0 above. Although this chapter is only limited to laws pertaining to children in conflict with the law, a brief mention of other laws affecting children is important.

High on the pyramid of legislative laws in Zambia is the Constitution. This is the supreme law which acts like an umbrella within which all other laws operate in conformity with it. Other legislation dealing with children include the Juveniles Act<sup>79</sup>, the Penal Code<sup>80</sup>, the Criminal Procedure Code Amendment,<sup>81</sup> the Intestate Succession Act,<sup>82</sup> the Affiliation and Maintenance Act,<sup>83</sup> the Adoption Act<sup>84</sup> and others. All these instruments should be in conformity with the Constitution.

It must be noted that the implementation of statutory legislation on children is done through programmes such as:

- i. the Child Justice Forum.
- ii. the National Plan of Action to Eradicate Child Labour.
- iii. the Victim Support Unit.
- iv. the National Youth Policy and the National Child Policy.
- v. The Diversion Programme.

Moreover, Zambia has a number of government ministries that deal with specific needs of children in general and those which are involved in the diversion programme in particular, such as;

- i. Ministry of Sport, Youth and Child Development.
- ii. Ministry of Community Development and Social Services.
- iii. Ministry of Justice.

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<sup>79</sup>Chapter 53 Juveniles Act of the laws of Zambia

<sup>80</sup>Chapter 87. Penal Code Act of the laws of Zambia

<sup>81</sup>Chapter 88. Criminal Procedure Code Act of the laws of Zambia

<sup>82</sup>Chapter 64. Affiliation and Maintenance of Children Act of the laws of Zambia

<sup>83</sup>Chapter 55. Maintenance Orders Act of the laws of Zambia

<sup>84</sup>Chapter 54. Adoption Act of the laws of Zambia

### 3.2.1 Specific Legislation on Juvenile Offenders

As said earlier in 3.3.0 above, there are a number of statutes that govern the affairs of children in general. The main legislation dealing with the administration of child justice in Zambia is the Juvenile Act 53. The other legal instruments worth mentioning are the Penal Code,<sup>85</sup> the Criminal Procedure Code Amendment,<sup>86</sup> the Penal Code,<sup>87</sup> and the Constitution.<sup>88</sup> Incidentally, customary law and customs are also observed. All these laws ought to complement each other in order to provide a statutory regime which is conducive for children accused of different offences.

### 3.2.2 Diversion Programme *vis-à-vis* Juvenile Act Chapter 53 of the Laws of Zambia.

First and foremost, it must be noted that in Zambia, the Diversion Programme is not provided for in any specific legislation, as a result a courts only use their discretion to divert children.

Child justice administration in Zambia is governed by the Juvenile Act Chapter 53 of the laws of Zambia. The Act was promulgated in 1956 (Act 4 of 1956) and was amended frequently, most drastically in 1964 and 1969. Other laws on juvenile justice system only complement the Juveniles Act. The Act<sup>89</sup> makes provisions for the establishment of juvenile courts which deal with any matter where the person charged is a juvenile in terms of Section 2 of the Juveniles Act.<sup>90</sup>

The Zambian court can only make diversion orders by using its discretion to divert children offenders. The court relies heavily on Section 73(1) of the Juveniles Act 53 to make such orders.<sup>91</sup> The Act reads as follows:

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<sup>85</sup>Chapter 87.Penal Code Act of the laws of Zambia

<sup>86</sup>Chapter 88.Criminal Procedure Code Act of the laws of Zambia

<sup>87</sup> Chapter 87.Penal Code Act of the laws of Zambia

<sup>88</sup> Constitution of Zambia Act 1(as amended by Act No.18 of 1996)

<sup>89</sup> Chapter 53 Juveniles Act of the laws of Zambia

<sup>90</sup>,Section 63 of juveniles Act Chapter 53 of the laws of Zambia

<sup>91</sup> Section 73 (I)j of juveniles Act Chapter 53 of the laws of Zambia

## Section 73(1)

“Where a juvenile charged with any offence is tried by any court, and the court is satisfied of his guilt, the court shall take into consideration the manner in which, under the provisions of this or any other written law, the case should be dealt with, namely;

- (a) by dismissing the charge;
- (b) by making a probation order in respect of the offender;
- (c) by sending the offender to an approved school;
- (d) by sending the offender to a reformatory;
- (e) by ordering the offender to be caned;
- (f) by ordering the offender to pay a fine, damages or costs;
- (g) by ordering the parent or guardian of the offender to pay a fine, damages or costs;
- (h) by ordering the parent or guardian of the offender to give security for the good behaviour of the offender;
- (i) where the offender is a young person, by sentencing him to imprisonment;
- (j) by dealing with the case in any other manner in which it may legally be dealt with.”<sup>92</sup>

It is apparent that the above provision is in conformity with the Beijing Rules, Rule 11.1<sup>93</sup>, as well the CRC Article 40 (3) (b) and Article 40 (4).<sup>94</sup> The main emphasis in these international instruments is that States are advised to encourage alternative measures when dealing with children in trouble with the law without resorting to judicial proceedings. However, Section 73(1) does not specifically mention that children in conflict with the law should be referred to diversion programmes. Nevertheless, these provisions form a basis concerning measures of diversion. The most striking feature of this Act as well as the above-mentioned international instruments is the emphasis on alleviating the suffering of children who come into conflict with the law. The wording of section 72(1), (2) and (3) gives a proper cover in terms of restriction on punishment of juveniles. The Act states as follows;

## Section 72 Chapter 53;

“72. (1) No child shall be sentenced to imprisonment or to detention in a detention camp.

(2) No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other manner.

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<sup>92</sup> Section 73 (I) j of juveniles Act Chapter 53 of the laws of Zambia

<sup>93</sup> [http://child-abuse.com/childhouse/childrens\\_rights/dci\\_be29.html](http://child-abuse.com/childhouse/childrens_rights/dci_be29.html)[Commentary to the Beijing Rules Rule 11.1] (Accessed on 19 1 2011)

<sup>94</sup> <http://www2.ohcr.org/english/law/crc>[United Nations Convention on the Rights of the child – 1989] (Accessed on 22.09.2010)

(3) A court shall not order a child to be sent to a reformatory unless the court is satisfied that having regarded his character and previous conduct, and to the circumstances of the offence, it is expedient for his reformation and the prevention of crime that he should undergo a period of training in a reformatory.”<sup>95</sup>

Basically, the shortest interpretation of Section 72<sup>96</sup> is that a child in conflict with the law may *prima facie* be diverted from the criminal justice system. In the case of *Mwula v the People*, it was stated that the intended purpose of the Juveniles Act is to ensure that no child should be ordered to prison in any circumstances unless he or she cannot be suitably be dealt with in any other manner.<sup>97</sup>

### 3.2.3 Diversion Programme *vis-à-vis* Penal Code Chapter 87

The Juvenile Act<sup>98</sup> and the Penal Code are the two main pieces of laws applicable for the administration of juvenile justice in Zambia.

The Penal Code Act<sup>99</sup> sets out the general principals of law and prescribes certain conducts as criminal acts. This Act also prescribes the penalties to be imposed on persons who commit criminal acts and establishes the minimum age of criminal responsibility.<sup>100</sup> (Refer 3.2.0 above).

These provisions form the procedure to be followed when deciding to divert children who come into conflict with the law. The guiding principle in the diversion programme is called “the best interest of the child” and this principle is the main anchor in the implementation of the programme. The best interests of the child ought to be broadly applied from investigation, administrative decisions to policy formulation. Moreover, the phrase, “best interest of the child” appears in a variety of contexts throughout the CRC, which makes it to be one of the strongest principles for the welfare of children.

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<sup>95</sup> Chapter 53 Juveniles Act of the laws of Zambia

<sup>96</sup> Chapter 53 Juveniles Act of the laws of Zambia

<sup>97</sup> *Mwula v the People* (1990 - 1992) Z.R. 54 (S.C.)

<sup>98</sup> Chapter 53 Juveniles Act of the laws of Zambia

<sup>99</sup> Chapter 87. Penal Code Act of the laws of Zambia

<sup>100</sup> Section 14.1 & 2, Part I of the Penal Code Act, Chapter 87 of the Laws of Zambia.

### **3.2.4 Diversion Programme vis-à-vis The Criminal Procedure Code, Chapter 88**

The Criminal Procedure Code<sup>101</sup> (CPC) does not make specific reference to children who come into conflict with the law. As a result the CPC does not distinguish between a child and an adult offender.

When a child comes into conflict with the law, the criminal proceedings will be conducted in accordance with the provisions of the Juvenile Act. However, if it is necessary to arrest and detain a child, a police officer can only do so in the presences of a social welfare officer or parents or guardian. The police should be very clear in terms of the reason of detaining a child. As a general rule, detention before trial should be avoided and limited to exceptional circumstances, but where children are detained, priority should be given to ensuring a speedy trial.

### **3.3 The Constitution**

The Constitution of Zambia was adopted in 1991 after consultations with the Zambian citizens, and was amended in 1996. It repealed the Constitution of Zambia Act of 1973. The Zambian Constitution is the supreme law of the country and all other laws must be consistent with it. In other words, if any law is inconsistent with the Constitution that other law shall be void to the extent of its inconsistency.<sup>102</sup> Therefore, Zambia has a constitutional supremacy.

The Zambian Constitution strives to actively promote the welfare of all people, including children and presents the structure within which all laws must operate. In terms of the protection of children, it has entrenched basic rights, like the right to citizenship,<sup>103</sup> the right to life of an unborn child<sup>104</sup> and the right of young persons not to be exploited.<sup>105</sup> Article 24(2)<sup>106</sup> introduces an additional protection for children by stating that all young persons shall be protected against physical or mental ill-treatment, all forms of neglect, cruelty and exploitation.

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<sup>101</sup>Chapter 88.Criminal Procedure Code Act of the laws of Zambia

<sup>102</sup> Article 1(3) of the Constitution of laws of Zambia Act 1(as amended by Act No.18 of 1996)

<sup>103</sup> Article 5 of the Constitution of laws of Zambia Act 1(as amended by Act No.18 of 1996)

<sup>104</sup> Article 12 of the Constitution of laws of Zambia Act 1(as amended by Act No.18 of 1996)

<sup>105</sup> Article 24 of the Constitution of laws of Zambia Act 1(as amended by Act No.18 of 1996)

<sup>106</sup> Constitution of Zambia Act 1(as amended by Act No.18 of 1996)

### **3.4 Customary Law**

In addition to constitutional and statutory legislation, the customary law also regulates some matters pertaining to children. In Zambia, Local Courts utilizes the principles of customary law, which vary widely throughout the country according to the tribes and traditions attached to them. Local courts are presided over by a Presiding judge, who usually is a prominent local citizen. The presiding Judges have ample powers to invoke customary law, render judgments regarding marriages, divorces, inheritances. They also presides over other civil matters, and rule on minor criminal matters. Consequently, it is common to find that a judgment is not fully in accordance with the statutory laws. However, one of the advantages of customary law is that the system is accessible, inexpensive and speedy. There is no backlog of cases and cases are quickly and expeditiously disposed of.<sup>107</sup>

### **3.5 Domestication of International Conventions in Zambia**

A number of states have adopted a constitutional provision as a determining factor in terms of the status of treaties in the national law. Therefore, the exact legal implications of becoming party to a treaty will vary from state to state. There are two basic theories on the relationship between international and domestic law; monism and dualism. The monist view considers international and municipal law as forming a unity in the same legal order, whereas the dualist view assumes international and municipal as separate and existing independent of each other.<sup>108</sup> States which follow the transformation or dualism approach use the treaty provisions as the basis for enacting appropriate national legislative rules.

Zambia has adopted the dualist theory and thus the CRC and other international conventions are not directly applicable in the Zambian legal system because they are not domesticated. Domestication can only occur if the legislature passes an Act of parliament providing for the application of the provision.

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<sup>107</sup> The Criminal justice System in Zambia: enhancing the Delivery of Security in Africa; pg 141

<sup>108</sup> Ishwor Prasad Khatiwada Report On Ensuring Fair Trial in Cases Children in Conflict With the Laws (Nepalese perspectives) September, 2004 – June, 2005

States consider this freedom of method of implementation as being their sovereign right.<sup>109</sup> Therefore, although Zambia ratified the CRC she is not obliged to comply with the provisions of the Convention on the Rights of the Child.

The Convention has yet to be domesticated, and therefore, holds no authority in terms of enforcement by Zambian courts.

Given that Zambia has adopted this approach, the only role that the CRC plays in Zambian legal system is only to address issues of what government can and cannot do. Articles 40(3 &4) of the CRC provides what is internationally expected to be done by member states. It states as follows;

Article 40 Section 3 & 4

3. "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.<sup>110,</sup>

Nevertheless, although Zambia is not obliged to apply the CRC in its domestic laws the ideals of diversion programme stems from the provisions in the Convention<sup>111</sup>(CRC) and Rule 11.1 of the Beijing Rules.<sup>112</sup> These provisions form the basis concerning the development and implementation of diversion programme.

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<sup>109</sup> Akehurst, Introduction to international law p. 63.

<sup>110</sup> United Nations Convention on the Rights of the child - 1989

<sup>111</sup> United Nations Convention on the Rights of the child - 1989

<sup>112</sup> [http://child-abuse.com/childhouse/childrens\\_rights/dci\\_be29.html](http://child-abuse.com/childhouse/childrens_rights/dci_be29.html) [Commentary to the Beijing Rules Rule 11.1] (Accessed on 19 1 2011)

## CHAPTER FOUR

### CURRENT TRENDS IN ZAMBIA

#### **4.0 Introduction**

The existing trends on diversion programme in Zambia will be dealt with in this chapter. These include the implementation of the diversion programme, the framework within which international standards are applied including the regulatory laws and structures that are available in Zambia. Other issues which will be looked at briefly include the following;

- i. The achievements of the diversion programme.
- ii. The failures of the diversion programme.
- iii. The strengths of diversion programme.
- iv. The weakness in the implementation of Diversion programme.
- v. The opportunities available to achieve the intended goal.
- vi. The threats against the diversion programme.

Diversion programmes in Zambia, are run by NGOs. These NGOs provide a non-custodial approach to juvenile offenders, explicitly aiming at reforming and reintegrating those convicted by the law. It must be emphasized that in Zambia, a child who qualifies to a diversion programme is an offender who has been convicted by the Magistrates' Court. However, instead of serving a custodial sentence, the child is referred to a service provider for a non custodial programme.

After recognizing that gaps existed in the administration of child justice in Zambia, (as observed by the situational analysis study of 2000, by Lukas Muntingh) the Zambian government embarked on a law reform process. The aim was to review various pieces of child-related legislations in order to harmonize and bring them in line with the general principles of the CRC. Conversely, the process of these reforms seems to be slow.

#### **4.1 General Perception on Children in Conflict of the Law**

Before the commencement of the transformation process, children in conflict with the law were not regarded and treated like people with rights. The system was harsh on them e.g. being detained in appalling and inhumane conditions. Torture and assaults by officials were also common. However, although the situation is slowly changing, there are still reports of children not being treated with dignity during the process of administration of justice.

The community still needs to be educated on the rights of children in conflict with the law. In some cases, families and even some parents are largely intolerant and do not usually support a child who is in conflict with the law. It is also common for society to avoid and reject such children who are connected to a criminal record. Communities also reject such children as a result; reintegration into the community becomes difficult.<sup>113</sup>

#### **4.2 Child Justice Forum**

Child Justice Forum (CJF) was established after situational analysis study of 2000.<sup>114</sup> This was Zambia's response to addressing some of the gaps that existed in the administration of juvenile justice system and take the leadership role in the country. The Forum brings together role players in the juvenile justice arena. These are; the police, probation officers, prosecutors, and organizations from the civil society. Moreover, CJFs are largely trained in the aspects of children's rights and oversee the implementation of Juvenile Justice Programmes.

As a result, it is regarded as a key ingredient for a transformation process of the child justice system, in Zambia.<sup>115</sup>

#### **4.3 The Brief Summary of Diversion Procedure from the Arrest Stage**

The procedure of arresting a child in conflict with the law is provided for in Sections 58 to 60 of the Juvenile Act.<sup>116</sup>

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<sup>113</sup>User Guide; Zambia Child Justice Forum; Promoting the administration of child justice for children in Zambia:

<sup>114</sup>[http://www.unicef.org/evaldata/files/Zambia\\_2005\\_002\\_child\\_justice.pdf](http://www.unicef.org/evaldata/files/Zambia_2005_002_child_justice.pdf) [report on child justice in Zambia with reference to UNICEF supported projects by Lukas Muntingh] (accessed on 11/03/11)

<sup>115</sup>[http://www2.ohchr.org/English/bodies/hrc/docs/advance\\_Docs/Zambia\\_replies\\_90.pdf](http://www2.ohchr.org/English/bodies/hrc/docs/advance_Docs/Zambia_replies_90.pdf) [Zambia responses to the list of issues from the human right committee relating to the periodic report on the international covenant on civil and political rights-Zambia] (Accessed on 16.3.2011 )

Section 58 of the Act provides for the prevention of juveniles associating with adults during detention. Issues of bail for arrested juveniles are provided for in section 59 of the Act, whereas, custody of juveniles who are not released on bail after the arrest is provided for in section 60.<sup>117</sup>

After the arrest (usually in the presence of social officer or parent or guardian), a child is supposed to be tried in a child friendly court where social welfare officers act like advocate for him or her. If the court (Magistrate Court) finds the child guilty, a social welfare officer should interview such a child to assess whether he or she qualifies for a diversion Programme. If the child is found suitable, a social welfare officer makes referral application to the Magistrate requesting for the child to be diverted.

If the application is accepted by the magistrate, the social welfare officer refers the recommended child to a service provider. The nature of the offence determines the category of service provider a child is referred to. For example, Drug related offences are referred to the DEC, defilement cases to YWCA and other crimes to RYOCHIN.

The diverted child is required to undergo and complete a diversion programme for eight weeks. If a diverted child completes the sessions he or she is reintegrated into society. However, if she or he fails to complete the sessions, the magistrate is notified. As a result, the case is sent back to court to order the re-arrest. Consequently, the case is reopened and most often than not, custodial sentence is given. Unfortunately, these are some of the children who add to the statistics of juveniles who are in prisons or reformatories.

#### **4.4 Social Welfare Officers**

Social welfare officers are so important in the implementation of diversion programmes. As already said (Refer paragraph 4.3 above), these officers act like advocates on behalf of juveniles. Therefore, no arrest is supposed to be made in the absence of a social welfare officer. However, this research found that not all social workers are familiar with diversion programmes. Moreover, some are not acquainted with available procedures applicable to aspects of diversion.

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<sup>116</sup> Chapter 53 Juveniles Act of the laws of Zambia

<sup>117</sup> Chapter 53 Juveniles Act of the laws of Zambia

Nevertheless, it is still their duty to ensure that the best interest of a child is attained at any given time. Unfortunately, the department is seriously understaffed; as a result, monitoring the activities of the law enforcers and the judiciary is seriously undermined. Consequently, some cases are handled without the involvement of social welfare officers.

The following case illustrates an example of some of the injustices which juvenile offenders experience in a situation where, social welfare officers are not involved in the administration of child justice.

“The child was convicted on 6 June 2004 at the age of 15 years for defilement and received a sentence of 21 years. He knew the victim, who was a neighbour and roughly the same age as himself. Both his parents had passed away, his father when he was aged 10, and his mother a year later. After that, he stayed with an aunt until he was arrested. He is illiterate and attended school until Grade 4. At the trial in the subordinate court, he pleaded guilty but was never assessed or interviewed by a social welfare officer and a report on his personal circumstances was apparently not submitted. The magistrate felt that the subordinate court did not have sufficient jurisdiction for sentence and referred the case to the high court for sentence. The boy explained that he was sitting in prison when he was informed that he had received a sentence of 21 years imprisonment.”<sup>118</sup>

The above example is attributed to a failure of the monitoring process, characterized by understaffing and lack of other resources in the department of the social welfare.

During the interview with Mrs. Nosiku Mulambia the social welfare officer,<sup>119</sup> she explained that, though diversion programmes are relatively a new concept in Zambia, positive achievements have been recorded and some successes have been in the following areas;

- i. “Children are given a second chance and more effective information pertaining to their circumstances.”
- ii. “In some cases the two families (the perpetrator’s family and the victim of crime’s family) reconcile after counseling by social workers or service providers.”
- iii. “Children who are recommended for diversion programme are allowed to go about their normal life, including attending school while on diversion programme.”<sup>120</sup>

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<sup>118</sup> <http://www.wiss.co.za/pgcontent.php?VID=2607> [Institute for security studies; The criminal justice system in Zambia; Enhancing the delivery of security in Africa; monograph 159, April 2009] (accessed on 10/01/11)

<sup>119</sup> Interview: Nosiku L Mulambia-Social [Welfare Officer; The department of Social welfare -Lusaka district] on 16.03.2011

<sup>120</sup> Interview: Nosiku L Mulambia-Social [Welfare Officer; The department of Social welfare -Lusaka district] on 16.03.2011

The department of the social welfare handles cases of children with diverse social circumstances with an aim of alleviating their suffering. In terms of those children in conflict with the law, the department works closely with the courts and monitors the disposal of their cases.

Table 1 below, represents statistics on disposal of Juvenile cases obtained from the department of Social Welfare in Lusaka District from 1<sup>st</sup> January to 31<sup>st</sup> December 2010.<sup>121</sup>

Table 1

NO	DISPOSAL	TOTAL NUMBER OF PERSONS		
1	Probation orders	46		
2	Approved school order	24		
3	Reformatory school order	25		
4	Caning	0		
5	Imprisonment	0		
6	Condition discharge	15		
7	Absolute Discharge	0		
8	Suspended Sentence	0		
9	Acquitted	30		
10	Withdraw	46		
11	Pending Court Order	0		
12	DIVERSION	123		
13	DEC Counseling	24		
14	Fined	4		
15	Probation (Insakwe)	1		
	<u>TOTAL</u>	<u>338</u>		

The above statistics show only cases which came to the attention of social welfare department in Lusaka district.

<sup>121</sup> Report on disposal of Juvenile cases as obtained from the department of Social Welfare in Lusaka District [for the period from 1<sup>st</sup> January to 31<sup>st</sup> December 2010]

The figures in the table above show that out of 338 cases handled, 147 (The figures include 24 cases diverted to DEC) were recommended for the child diversion programme.<sup>122</sup> Clearly, the above statistics indicate that the court ordered more cases for diversion programme than any other order. Further, it proves a point that if diversion programmes were taken seriously and legally incorporated into the Zambian laws, administration of child justice could be enhanced. Unfortunately, the programme is not implemented country wide for lack of service providers in other parts of the country.

#### 4.5.0 Service Providers

CJF is the driving force in terms of the transformation process of the child justice system. As already mentioned in 1.4 above, there are three registered service providers which are overseen by the CJFs (refer paragraph 4.5.1 and 4.5.2 below). For the sake of uniformity, CJF have set minimum standards which service providers are required to comply with. These standards focus on organizational capacity to deliver services and programme outcomes.

These standards were developed in South Africa, for the South African department of social development and have wholly been adopted in Zambia.

In his report Mr. Lukas Muntingh,<sup>123</sup> a South African-based consultant said the following about standards;

“It should be emphasized that the standards were developed with two broad objectives. Firstly, the standards had to be both desirable and feasible. In other words, the standard must be effective in protecting children’s rights in a progressive manner and it must be possible for an organization to adhere to this standard. Secondly, the standards had to be developmental and empowering. This means that in their application it is “acceptable” not to meet the standard provided that a corrective plan is developed within an appropriate time frame.”<sup>124</sup>

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<sup>122</sup> Annual report for the period of 1<sup>st</sup> January 2010 to 31<sup>st</sup> December 2010 for the Department of Social welfare-Lusaka District

<sup>123</sup> [http://www.unicef.org/evaldatase/files/Zambia\\_2005\\_002\\_child\\_jusice.pdf](http://www.unicef.org/evaldatase/files/Zambia_2005_002_child_jusice.pdf) [report on child justice in Zambia with reference to UNICEF supported projects by Lukas Muntingh] (Accessed on 11/03/11)

<sup>124</sup> [http://www.unicef.org/evaldatase/files/Zambia\\_2005\\_002\\_child\\_jusice.pdf](http://www.unicef.org/evaldatase/files/Zambia_2005_002_child_jusice.pdf) [report on child justice in Zambia with reference to UNICEF supported projects by Lukas Muntingh] (Accessed on 11/03/11)

#### 4.5.1 Rural Youth and Child in Need (RYOCHIN)

Rural Youth and Child in Need (RYOCHIN) are the pioneers of the Diversion Programme in Zambia.

This programme was established after the recommendations of the 2000 Situational Analysis.<sup>125</sup> At that stage RYOCHIN was identified as the only NGO able to take up the establishment and development of a diversion programme in Lusaka. RYOCHIN in conjunction with UNICEF and the Magistrates' Court have been running life skills programmes for children offenders as part of its diversion work since 2002.<sup>126</sup> In addition to rendering diversion programmes, RYOCHIN conduct other activities e.g.

- i. Implementing a crime awareness and crime prevention programme.
- ii. Conducting training with role players outside Lusaka in order to establish CJFs.

A Mr. Arthur Mofya, is the director of programmes at RYOCHIN. During interview with him as regards to how he perceives the implementation of the diversion programme in Zambia, he had this to say;

“In my personal opinion, diversion programme has been accepted in Zambia. Nevertheless, there is need to attend to the following issues by all concerned in order to enhance its development.

Firstly, there must be an increased number of people to be trained in the development of local level strategic plan and implementation schedules on diversion programmes. In districts where diversion programme has been introduced, training of facilitators is needed. In addition resources for service providers must be adequate in order to avoid lapses in the monitoring of programmes. Lastly, local guidelines and implementation standards for the diversion Programmes must be developed.”<sup>127</sup>

Apart from interviews, a questionnaire was also sent to RYOCHIN whose data is part of this research.

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<sup>125</sup>[http://www.unicef.org/evaldatase/files/Zambia\\_2005\\_002\\_child\\_justice.pdf](http://www.unicef.org/evaldatase/files/Zambia_2005_002_child_justice.pdf) [report on child justice in Zambia with reference to UNICEF supported projects by Lukas Muntingh] (Accessed on 11/03/11)

<sup>126</sup>[http://www.unicef.org/evaldatase/files/Zambia\\_2005\\_002\\_child\\_justice.pdf](http://www.unicef.org/evaldatase/files/Zambia_2005_002_child_justice.pdf) [report on child justice in Zambia with reference to UNICEF supported projects by Lukas Muntingh] (accessed on 11/03/2011)

<sup>127</sup> Interview: Arthur Mofya - Director of Programmes- RYOCHIN on 11. 03.2011

#### 4.5.2 Young Women's Christian Association (YWCA)

Young Women's Christian Association is one of the diversion service providers. The organization was established in 1957. In Zambia it is represented in all provinces apart from Luapula. YWCA was registered as a service provider in 2006 and predominantly handles cases of children charged with sexual offences. Statistics provided by their office in Lusaka indicates that between the year 2009 and 2010, twelve cases<sup>128</sup> were referred to YWCA by Magistrates' Courts through the Social Welfare Office.

A Miss Brenda Mwiinga is the youth coordinator at YWCA. During the interview with her on the current trends of diversion programme in Zambia, she said the following;

“First and foremost it is important to have Child Friendly Court which allows children to testify freely without intimidation. Secondary, law enforcers and judiciary must be sensitized on the importance of having a diversion programme. Thirdly, where there is a clear need to incarcerate a child offender, it must be done in his or her best interest which include having separate facilities from adult detainees”<sup>129</sup>

When asked about the social status of the children who are referred to them, Ms Mwiinga explained that mostly, children referred to them come from poor families. On the current trends in terms of the implementation of diversion programme in rural areas she said as follows;

“Diversion in rural areas is not very active as compared to urban areas. However, some training for people to form child justice forums has been done in a hope of promoting diversion programmes in areas where there is none. This has placed the rural child to be disadvantaged and denied a second chance in life if he or she is in conflict with the law.”<sup>130</sup>

In terms of the existing laws on child justice, the coordinator<sup>131</sup> said that current laws were not adequate. Therefore, there was need to either amended the existing provisions or enact new laws which would exclusively provide for diversion programmes in Zambia.

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<sup>128</sup> Young Women's Christian Association–Lusaka [Statistics: obtained on 21 03 2011]

<sup>129</sup> Interview: Brenda Mwiinga-Youth Coordinator [Young Women's Christian Association–Lusaka] on 10.03.2011

<sup>130</sup> Interview: Brenda Mwiinga-Youth Coordinator [Young Women's Christian Association–Lusaka] on 10.03.2011

<sup>131</sup> Interview: Brenda Mwiinga-Youth Coordinator [Young Women's Christian Association–Lusaka] on 10.03.2011

A Mr Richard Nawa, a Diversion Counsellor at YWCA was also interviewed concerning his perception on sexual offenders who were referred to them. He had the following to say;

“Diversion programme is a good initiative which needs to be promoted and strengthened because children who come into conflict with the law are able to reform. Sending children to prison for sexual offences may not be an ideal situation because it is extremely a rare situation where recidivism in such cases is reported. Diverting these offenders from a formal criminal justice system to counselling orders may be the best alternative for children”<sup>132</sup>

Nevertheless, a personal opinion of the Diversion Counsellor<sup>133</sup> was that diversion programme was a very good initiative which needed to be promoted and strengthened because it strengthens protection of children.

Apart from interviews, a questionnaire was sent to the YWCA whose data is part of this research.

#### **4.6 The Drug Enforcement Commission**

The commission only handles drug related cases and that it has its own procedure of handling such cases.

However, an appointment for an interview with DEC officials concerned with the diversion programme was declined. The reasons given were that since DEC was a security wing, it would be inappropriate to conduct an interview on such a matter.

#### **4.7 Notable Achievements of Diversion Programme**

In Lusaka, diversion has taken off through RYOCHIN and YWCA. A total of 71 children were referred to diversion programmes in 2008 of which 40 successfully completed the programme and have not re-offended since then.<sup>134</sup>

Two testimonies of young people named Marita a girl and Zukas a boy on how diversion programme has worked for them were obtained from the CJF publication.<sup>135</sup>

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<sup>132</sup>Interview: Richard Nawa- Diversion Counsellor [Young Women’s Christian Association–Lusaka] on 10.03.2011

<sup>133</sup> Interview: Richard Nawa- Diversion Counsellor [Young Women’s Christian Association–Lusaka] on 10.03.2011

<sup>134</sup>Zambia Child Justice Forum; Promoting the administration of child justice for children in Zambia:[User Guide]

According to the publication entitled “Promoting the administration of child justice for children in Zambia,” diversion programme has improved the life of Marita, a 17 year old girl.

She was diverted to a programme after being arrested for assault at the age of 16. Marita managed to complete all the counseling sessions which helped her realize the power that she was to change things and also to regain her self-esteem. As a result of the offence she committed coupled with the court process, she had 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 her education. However, she completed her grade 12 in December 2008. As a result of the support from the diversion service provider, Marita wishes that the life-skills which are provided by service providers must be extended to all young people in schools and communities and if possible across the country.<sup>136</sup>

Another moving testimony is that of the 18years old Zukas who was about to start his Vocation Training in Mechanics. Previously he was not sure that he was going to achieve his dream. Zukas had got into trouble with the law after stealing a cell phone. The assessment by a probation Officer showed his willingness to take responsibility for his actions and showed that he had potential to change his ways. He was referred to a diversion service provider for counseling and completed all sessions that are part of the programme. The life skill programme helped him understand that it was his choices in life that got him into trouble. He began to understand how he thinks and reacts to challenges facing him. He was able to understand his actions and how it affected others. Zukas learnt skills that prevented him from getting into trouble, e.g. communicating his feelings instead of resorting to stealing. This is what he had to say about his diversion experience;<sup>137</sup>

“With the skills I acquired through the life skills programme 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.”<sup>138</sup>

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<sup>135</sup> Zambia Child Justice Forum; Promoting the administration of child justice for children in Zambia: User Guide: (In terms of ethical considerations, this information is already in the public domain as regards to names of the individuals therein.)

<sup>136</sup> Zambia Child Justice Forum; Promoting the administration of child justice for children in Zambia:[User Guide]

<sup>137</sup> Zambia Child Justice Forum; Promoting the administration of child justice for children in Zambia:[User Guide]

<sup>138</sup> Zambia Child Justice Forum; Promoting the administration of child justice for children in Zambia:[User Guide]

Zukas now appreciates the orders made by the Magistrate who diverted him. He also appreciates the services of the social welfare officers and diversion service providers.

#### **4.8 Notable Failures of diversion Programme**

Firstly, one of the major failures in the implementation of diversion programme in Zambia is that, the current service providers are only confined in big cities. As a result, rural juveniles are excluded from having an opportunity of being given a second chance. This means that even a child who has committed a petty felony would face the full wrath of the law. As a result, such children end up being given custodial sentences if found guilty, because there are no alternatives available for them.

The failure to cater for rural juveniles who come into conflict with the law is one of the reasons some jails and reformatories are still having juvenile prisoners.

Secondly, the other notable failure is that not all offenders who are referred to a diversion programme complete the eight week sessions. For example, out of 71 children referred to RYOCHIN in 2008, 31 failed to complete the eight week secession. Consequently, the potential of those children who fail to complete the programme to re-offend cannot completely be ruled out. In fact, if a diverted child fails to complete the programme, He or she is referred back to court for the order of re- arresting.

#### **4.9.0 The Strengths, Weaknesses, Opportunities and Threats of Diversion Programme in Zambia**

##### **4.9.1 The Strengths of Diversion Programme in Zambia**

The justice system in Zambia has recognized that diversion programmes can be an important aspect in the administration of child justice.

This is evident by the government's recognition that gaps existed in the system as observed by Lukas Muntingh<sup>139</sup> in the 2000 situational analysis report, hence the willingness to review the system then. Moreover, the creation of CJF has shown commitment by government to improve the implementation of the diversion programmes.

The other strength is that Zambia is still in good standing with some international organizations who are concerned with the welfare of Children.

The example of such good standing is the financial support from donors such as the Dutch, the Danish, the Swedish and UNICEF<sup>140</sup>, This shows that diversion programmes can be strengthened if such understanding between the government and other international and local institutions could continue to work together.

#### **4.9.2 The Weakness of Diversion Programme in Zambia**

The first notable weakness in the implementation of Diversion programme in Zambia is that there is no authoritative legislation backing the programme. The current position is that Magistrates heavily rely on Section 73(1) (j) of chapter 53 of the juveniles Act which provides as follows;

##### Chapter 53 section 73 (1)

“Where a juvenile charged with any offence is tried by any court, and the court is satisfied of his guilt, the court shall take into consideration the manner in which, under the provisions of this or any other written law, the case should be dealt with, namely:

(j) “by dealing with the case in any other manner in which it may legally be dealt with.”<sup>141</sup>

Obviously this approach entitles a magistrate to use his or her own discretion in deciding the case. Surely, this is a “gray area” in the system because there is no yard stick for measuring discretion.

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<sup>139</sup>[http://www.unicef.org/evaldatabase/files/Zambia\\_2005\\_002\\_child\\_justice.pdf](http://www.unicef.org/evaldatabase/files/Zambia_2005_002_child_justice.pdf)[report on child justice in Zambia with reference to unicef supported projects; by Lukas Muntingh] (Accessed on 11/03/11)

<sup>140</sup>[http://www.unicef.org/evaldatabase/files/Zambia\\_2005\\_002\\_child\\_justice.pdf](http://www.unicef.org/evaldatabase/files/Zambia_2005_002_child_justice.pdf)[report on child justice in Zambia with reference to unicef supported projects; by Lukas Muntingh] (Accessed on 11/03/11)

<sup>141</sup> Section 73 ( 1 ) j of juveniles Act, Chapter 53 of the laws of Zambia

Secondly, there are some international instruments which diversion programmes could depend upon, particularly Article 40 (3) and (4) of the CRC, which provides as follows;

Article 40 Section 3 & 4

3. "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.<sup>142</sup>

Unfortunately, it is not possible to directly apply these instruments because they are not part of Zambian laws. (Refer paragraph 3.5 above).

The other weakness is that the Criminal Justice System in Zambia has some Justice officials who are not trained in dealing with children in conflict with the law. As a result, there is lack of express recognition of children's rights in the criminal justice system.<sup>143</sup> This situation impacts negatively on the implementation of diversion programme as an alternative. Consequently, situations where juveniles are given custodial sentences is still prevalent in Zambia. The system is further weakened by high labour turnover of the few trained personnel in the police service, social welfare department and judiciary.

#### **4.9.3 The Opportunities of Diversion Programme in Zambia**

This study showed that diversion in Zambia is still in its infancy. and that the community has not fully comprehended its existence or benefits.

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<sup>142</sup> United Nations Convention on the Rights of the child - 1989

<sup>143</sup> The Criminal Justice System in Zambia: Enhancing the Delivery of Security in Africa - African Human Security Initiative pg 104.

However, considering that Zambia has shown willingness to have a youth policy and growing interest in child welfare, there is a great opportunity for diversion programmes to develop. Furthermore, the world community in general has always agitated for the protection of the rights of children therefore; development of diversion principles could thrive in such an environment. Accordingly, these aspects would provide opportunities for children in conflict with the law to develop their knowledge and life skills, which promote a pro-social rather than anti-social behavior.

#### **4.9.4 Threats against Diversion Programme in Zambia**

The major threat for child diversion programme in Zambia is that, all current service providers except DEC (DEC only deals with drug related diversions) are run by NGOs. Unfortunately, these NGOs are heavily donor dependant, and government has no specific budgetary allocation for the programme. The threat here is that if these donors withdraw their support, all service providers established by NGOs would run into difficulty or even close diversion programmes. This would mean that all efforts of enhancing this important aspect of administration of child justice system would be destabilized.

#### **4.9.5. Factors contributing to Incarceration of Juveniles**

In reference to the problem statement of this essay (refer paragraph 1.6 above), the research questions the legitimacy of imprisoning juvenile offenders, when there is diversion programme in place. This research found the following to be some of the contributing factors.

- i. One of the gaps in the system is that diversion programmes are only implemented in big cities where service providers mostly operate. As a result, juveniles in conflict with the law in places where service providers are not available end up in reformatories or prisons.

- ii. Social welfare services are not represented throughout the country thereby; some juvenile's cases (e.g. a case in paragraph 4.4 above) go through the criminal procedure without a social worker. As a result, some juveniles are incarcerated instead of being diverted to other alternatives.
- iii. Some officials who handle children in conflict with the law are inadequately trained in their fields hence, they fail to recognise the rights of children and the importance of diversion programmes. This has also resulted in having children being incarcerated without being given other alternatives.
- iv. Zambia has no enforceable laws that specifically regulate the implementation of diversion programmes. As a result, courts only rely on the provisions contained in the juveniles Act 53 section 73(1) (j). This provision states that a Magistrate can deal with the case in any other manner in which it may legally be dealt with. The loophole here is that the law does not compel a Magistrate to divert a child who is in conflict with the law to other alternatives. Therefore, if a Magistrate fails to exercise his discretion such an offender would end up in prison or reformatory.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### **5.0 Conclusion**

The importance of child rights cannot be overemphasized because children play a critical role in the development of any nation. Children who come into conflict with the law should not be condemned but be reformed so that they should develop into responsible adults. It is cardinal for the society to note that every developing child is bound to error when growing up. It is un rebuttable presumption therefore, that every grown up adult today may have faulted in one way or the other as a juvenile. Therefore, it is vitally important that corrective measures for the child who errors should be for his or her best interest. Incidentally, one of the corrective measures is the diversion programme.

Diversion Programmes in the world are still evolving but few countries have incorporated the alternative sentencing option in their national legislation. Diversion Programme has the advantage that instead of sentencing the child to imprisonment, the child is referred to other alternatives. The aim is to educate and change the views of the young person in order to prevent recidivism.

It is unfortunate that some officials who are engaged in handling children in conflict with the law are inadequately informed of the few provisions of law regarding administration of child justice in Zambia. As a result, they fail to recognize children's rights in the criminal justice system.

To avoid implementing diversion programme haphazardly by service providers, law enforcers and the judiciary, it is necessary to have domestic laws on children which are unambiguous and which are supported by the international law. It is clear that diversion programmes in Zambia relay on NGOs who are only concentrated in urban areas. This has undermined the welfare of juveniles in the rural areas. As a result, some children in conflict with the law are still given custodial sentences in some parts of the country instead of being given other alternatives.

On the international level, the most significant development in the administration of child justice was the creation of the United Nations Convention on the Rights of the Child (CRC). This Convention and other related international instruments provide the decisive international framework within which children offenders should be managed. However, in terms of the laws of Zambia, Child justice administration is governed by the juveniles Act chapter 53 of the laws of Zambia.

## **5.1 Recommendations**

In order to have a well defined diversion programme in Zambia, the following are some of the recommendations which need to be implemented by the stake holders.

Firstly, since Zambia has ratified the CRC, it is vitally important that she domesticates this treaty for it to be relevant to the Zambian Courts. Obviously the domestication of the CRC would strengthen the current provision of the Juvenile Act 53 of the laws of Zambia.

Secondary, it is important to have a wide variety of diversion programmes, in order to ensure that each child who is ordered to undergo the programme is referred to one which suites him or her. One programme cannot fit all offenders because different juveniles need a different amount of time in each programme. For example, in South Africa and USA they have variety of diversion programmes. A more practical example of the programme that has been developed in South Africa is Youth Empowerment Scheme: This is a life-skills training programme which is spread for over six weeks with one session per week. Zambia can learn from such a programme so that all the needs of children in conflict with the law are catered for.

In view of the above, there is need to intensify training of juvenile justice administrators, in order to enhance quality service delivery. This should include conducting refresher courses for the purposes of updating the role players about emerging issues in administration of juvenile justice.

The following are some of the findings which need to be addressed by stake holders;

- i. There is a serious lack of man power in the department of social welfare, as a result, in some cases children are arrested without the involvement of social workers. Therefore, there is need to increase manning levels in the department of the social welfare.
- ii. The problem of inadequate detention facilities for juveniles has been an ongoing occurrence. Recommendation for better detention facilities for children has been brought forward to the stake holders before but received little or no attention.  
However, for the sake of emphasis it is recommended that suitable centers for juvenile detainees be provided. Such centers should include basic facilities for example, education, health and recreation which should meet at least the minimum international standards.
- iii. This research found out that in rural areas there are no service providers to implement diversion programmes, as a result rural juveniles are discriminated against in terms of having a second chance in life. Therefore, it is recommended that rural areas which are not catered for by NGOs, the government should step in and create institutions which should implement diversion programmes.
- iv. Additional resources are required for the implementation of diversion programmes, to ensure increased awareness of child rights.
- v. The government should create conducive environment which could attract more organizations to offer diversion programmes. In fact as a matter of priority the government should create its own institutions as service providers. Such institutions could be supervised by the CFJ and be housed by any of the following ministries;
  - a) Ministry of Sport, Youth and Child Development.
  - b) Ministry of Community Development and Social Services
  - c) Ministry of Justice.

In addition to the above, Zambia has no authoritative legislation which compel law enforces and the judiciary to divert children who come into conflict with the law, other than Section 73(1) (j) of chapter 53 of the juveniles Act.

It is the opinion of the author that section 73(1) (j) of chapter 53 of the juveniles is inadequate in dealing with diversion aspects. Moreover, the author feels that Section 73(1) (j) of chapter 53 of the juveniles Act is discretionary legislation which Magistrates can use in whichever way.

As a result, some children could be sent to prisons or reformatories if discretion of referring them to the diversion programme is not exercised.

It is strongly recommended therefore, that a more specific legislation needs to be enacted and that the provisions in the CRC pertaining to children in conflict of the law be domesticated.

Finally, the whole concept of developing a solid foundation of diversion programmes would be jeopardized should the stake holders ignore the findings in paragraph 4.9.5 above. Consequently, Zambian prisons will still be hosting juvenile prisoners who could have been referred to diversion programmes.

**APPENDICES**

**Appendix 1**

**QUESTIONNAIRE ON “THE EVALUATION OF CHILD DIVERSION PROGRAMME  
IN ZAMBIA”**

**DATA**

1 Gender of the respondent

Male.....

Female.....

2 Educational qualification.....

3 Professional Qualification.....

4. Years of experience in dealing with child related cases.....

5 Do you know what the child diversion programme is?

YES.....

NO.....

6 If yes, how has been the implementation of the programme?

Successful.....

Not Successful.....

7. Illustrate your answer to the question above.

8. Has the implementation of the Child Diversion Programme in Zambia been within the provisions of the Convention of the Right of Children?

YES.....

NO.....

9. Illustrate briefly your answer to the question above.

10. Do you know of the laws that regulate child diversion in Zambia?

YES.....

NO.....

11. If yes which are these laws?

12. Are you aware that there are still juveniles who are sent to prisons and reformatories?

YES.....

NO.....

If yes, state the contributing factors which lead to sending juveniles to prisons and reformatories instead of diversion programmes.

13. Do you think the laws are adequate for effective implementation of diversion programme?

YES.....

NO.....

Illustrate briefly your answer to the question above.

14 .List some of the laws which you are familiar with, concerning the implementation of child diversion programme

15. Has the child diversion programme in Zambia achieved its intended purpose?

YES.....

NO.....

16. If yes, what are the major positive aspects that you have noticed?

17. If no, what are the major negative aspects that you have noticed?

18. Do you have any other views that you think are necessary for the enhancement of child diversion programme in Zambia?

YES.....

NO.....

19. Give your comment.

Thank you for your time.

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Arthur Mofya - Director of Programmes- RYOCHIN on 11. 03.2011

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Helen Phiri - Assistant Social welfare Officer – Lusaka District on 10.03.2011

Henry Njovu – District Welfare Officer – Lusaka District on 10.03.2011

Kangwa Ng'andu- Project coordinator- Child Justice Forum on 11.03.2011

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