

**CARIBBEAN ASSOCIATION OF JUDICIAL OFFICERS – CAJO**

**2<sup>ND</sup> BIENNIAL CONFERENCE**

***BRINGING THE LAW CLOSER TO THE PEOPLE***

**BRITISH COLONIAL HILTON HOTEL**

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**CHALLENGES IN SENTENCING JUVENILES**

**1. INTRODUCTION**

I had just returned from a disappointing day in court and was ruminating over the day's events, when my secretary asked me to take an urgent telephone call. The caller was incoherent and emotional. "Ms. Ahye," he spluttered, "I see my pension and gratuity running up St. Vincent Street." He was a policeman well-known to me from the magistrates' courts where I frequently represented clients of the Hugh Wooding Law School Legal Aid Clinic. He had never before appeared to me to be one who would come from, or whom I would refer to the district Mental Health Clinic, so I asked him to explain himself. He babbled, "Your client, your client."

Finally, I was able to piece the puzzle together. That morning, I had represented a 17-year-old at a preliminary enquiry into a charge of murder. The prosecutor, now, herself, a magistrate, had agreed with my submission that the prosecution had failed to negative self defence. Nevertheless, the magistrate had sent the case for trial at the next Assizes. The victim was a police officer's son, but, surprisingly, my client was well-liked by the police. After the hearing, instead of returning him to the prison, the officer decided to take my client for a drink in a bar in the area. My client decided that he would bolt. Thank God he was not Usian Bolt. The officer had quickly caught him. He knew his ill-advised action could result in summary dismissal, with his "pension and gratuity running up St. Vincent Street."

When I took my client to task, he explained, “Miss Ahye, when the murder case was going on, my little nieces and nephews used to come to see me by the court. Now my case gone High Court, I don’t know when it will call. I hear it does take years, so I tell myself, if I escape, police will hold me and give me another charge and I will start coming back to court and I will see my nieces and nephews again.”

This story illustrates some challenges in sentencing juveniles. Should we treat as an adult, a child charged with a serious offence, but who, by virtue of age, is immature, impulsive, does not weigh consequences and whose brain will not fully develop until age twenty-five,? Do principles of retribution and deterrence trump rehabilitation of juveniles? What are the guiding principles in sentencing juveniles? And what of the unspoken, always avoided and swept-under- the carpet question: Do classism, racism and gender influence juvenile sentencing?

## **2. INTERNATIONAL STANDARDS AND NORMS IN JUVENILE JUSTICE.**

In 1899 the first juvenile Court was born in Cook County, Illinois, largely through the labour (pun intended) of the ‘child savers,’ who were concerned about very young children being subject to the brutality of adult criminal justice. Since then, juvenile Courts have been legally adopted into justice systems world-wide, yet, concerns persist that juvenile justice is “the stepchild of the legal system.”

Several international instruments recognize the special needs of children. The **1948 Universal Declaration of Human Rights** states that, “motherhood and childhood are entitled to special care and assistance.”<sup>1</sup>The **1959 Declaration of the Rights of the Child** declares that “the child by reason of his physical and mental immaturity

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<sup>1</sup> Article 25.. 2 of the Universal Declaration of Human Rights proclaimed by the General Assembly in 1948

needs special safeguards and care, including appropriate legal protection.”<sup>2</sup> The **1966 International Covenant on Civil and Political Rights (ICCPR)** asserts every child’s right to “such measures of protection as are required by his status as a minor”<sup>3</sup> and requires that procedures for juveniles should “take account of their age and the desirability of promoting their rehabilitation.”<sup>4</sup> The **1985 UN Standard Minimum Rules for the Administration of Juvenile Justice, (Beijing Rules)** advocates juvenile justice be “conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles.” The **1989 UN Convention on the Rights of the Child, (CRC)** ratified universally, save two unlikely bedfellows, United States and Somalia, has been described as the “Bill of Rights” for children. The **1990 UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)** reiterates the fundamental principle of deprivation of liberty as a measure of last resort and for the minimum period and details the rights of juvenile in detention.

### **3. WHO IS A JUVENILE?**

There is no consensus among States as to the answer to that question. The CRC defines “child” as “every human being under the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”<sup>5</sup> It does not define, or even use the term” “juvenile.” Since, however, the CRC advocates the establishment of a justice system specifically applicable to all children, it follows that if the age of majority in a jurisdiction is age eighteen, every person below that age is a child and comes within the purview of that State’s juvenile justice laws.

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<sup>2</sup> Preamble to the 1959 Declaration of the Rights of the Child.

<sup>3</sup> Article 24 International Covenant on Civil and Political Rights

<sup>4</sup> Article 14.4. Ibid.

<sup>5</sup> Article 1 of the UN Convention on the Rights of the Child

The term “juvenile” is defined in the Beijing Rules as “a child or young person, who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.”<sup>6</sup> In other words, the Beijing Rules defines a juvenile as a person whom a particular legal system decides to treat as a juvenile, and, thus, by its circularity of definition, leaves the matter open for each individual State’s determination.

In the Caribbean, the question of who is a child and who is a juvenile does not receive a uniform response. Most Caribbean juvenile justice laws dissect the child into categories, namely, child, young person and young offender and define each category differently. Thus, in one jurisdiction, a “child” is defined as “a person under the age of fourteen years”, in another, “a person under twelve years,” and a “young person”, as “a person under the age of sixteen” or “under seventeen years” or “who has attained the age of fourteen years but is under the age of eighteen years,”<sup>7</sup> and then there is the collective term, “juvenile,” used for children and young persons as a group, or to mean “a person under the age of eighteen years.”<sup>8</sup> Categories and definitions are important because of varying standards in treatment of the different categories of children who come within the jurisdiction of the juvenile justice system. One such case is the provision in most Caribbean States which prohibits imprisonment of children, but not so, young persons.

In general, the upper age limit for juvenile justice protection in the Caribbean is age sixteen. The exceptions are The Bahamas,<sup>9</sup> Dominica,<sup>10</sup> the British Virgin

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<sup>6</sup> Rule 2.2 of the Beijing Rules

<sup>7</sup> S.2 Government Training School Act Ch.12:34 of the Laws of Dominica..

<sup>8</sup> Ibid

<sup>9</sup> Section 116(1) Child Protection Act,2007,The Bahamas

<sup>10</sup> Children and Young Persons Act Ch. 37: 50

Islands,<sup>11</sup> Jamaica<sup>12</sup> where it is age eighteen years, and Guyana, where it is 17 years.<sup>13</sup> Many Caribbean jurisdictions are, therefore, not in line with the CRC. The Havana Rules are more explicit and define a juvenile as “every person below the age of eighteen.”<sup>14</sup>

The issue of the upper age- limit for juvenile justice has now been settled by the Committee on the Rights of the Child. In their General Comment No. 10 (2007), *Children’s rights in juvenile justice*, the Committee has stated, categorically, that “every person under the age of eighteen years at the time of the commission of an offence must be treated in accordance with the rules of juvenile justice.”<sup>15</sup> What remains outstanding is the age of criminal responsibility which varies in the Caribbean from age seven years to twelve years. The Caribbean Consensus on Juvenile Justice emanating from the Juvenile Justice Symposium in Port of Spain in 2000 proposed age twelve and this minimum age finds support with the Child Rights Committee who, in its said 2007 General Comment proposed aged twelve as the minimum acceptable international age of criminal responsibility.

#### **4. JUVENILE JUSTICE PRINCIPLES.**

The CRC demands that, “in all actions concerning children, the best interests of the child shall be a primary consideration.”<sup>16</sup> The principle of the best interests of the child, as well as, non-discrimination,<sup>17</sup> the right to life, survival and development<sup>18</sup> and the right to be heard,<sup>19</sup> have been deemed the umbrella principles of the CRC

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<sup>11</sup> Children and Young Persons Act , 2005

<sup>12</sup> The Child Care and Protection Act, 2004

<sup>13</sup> Juvenile Offenders Act, Chap. 10: 03.

<sup>14</sup> Rule 11 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

<sup>15</sup> See note 36 page 12 of General Comment No 10(2007)CRC/C/GC/10

<sup>16</sup> Article 3 of the CRC

<sup>17</sup> Article 2 *ibid*.

<sup>18</sup> Article 6 *ibid*

<sup>19</sup> Article 12 *ibid*

by the UN Committee on the Rights of the Child, the body responsible for receiving reports from States Parties on their implementation of the CRC.<sup>20</sup>

The CRC devotes a great deal of attention to juvenile justice. It enjoins States to recognize the right of every juvenile to be treated in a manner “consistent with the promotion of the child’s sense of dignity and worth, which takes into account the child’s age and the desirability of promoting reintegration and the child’s assuming a constructive role in society.”<sup>21</sup> It calls for the establishment by all States of a justice system “specifically applicable to children<sup>22</sup>” and adopts within its structure guiding principles enunciated in the Beijing Rules. The Beijing Rules in its Fundamental Principles states succinctly that “the aims of juvenile justice should be two-fold: the promotion of the well-being of the juvenile and a proportionate reaction by the authorities to the nature of the offender as well as the offence.”<sup>23</sup> Drawing on these international instruments, the guiding principles for sentencing juveniles, the focus of this paper, can be summarised thus:

- A. prohibition of capital punishment and corporal punishment
- B. detention as a last resort and for minimum appropriate period of time;
- C. avoidance of unnecessary delay;
- D. proportionality;
- E. various dispositions to allow flexibility and avoid institutionalization;
- F. separation from adults;
- G. rights to procedural safeguards;
- H. well –being of the juvenile and effective implementation of the disposition;
- I. umbrella principles of the CRC.

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<sup>20</sup> Article 43 of the CRC

<sup>21</sup> Article 40..1 Ibid.

<sup>22</sup> Article 40.3

<sup>23</sup> Rule 1 Beijing rules

## 5. APPLICATION OF JUVENILE JUSTICE PRINCIPLES IN SENTENCING (DISPOSITIONS)

### A. PROHIBITION OF CAPITAL AND CORPORAL PUNISHMENT

The ICCPR,<sup>24</sup> Beijing Rules<sup>25</sup> and the CRC<sup>26</sup> all prohibit the imposition of the death sentence for those who have committed offences while a juvenile.

Caribbean juvenile justice legislation, as in the large majority of jurisdictions of the world, enacted laws to this effect.<sup>27</sup> All Caribbean jurisdictions, therefore, recognize the child's right to life, survival and development. The United States, tentatively started to board the ship of death penalty abolition, when, the Supreme Court in *Thompson v Oklahoma*, 487 U.S. 815 (1988) established that juveniles cannot be executed for crimes committed under the age of sixteen. They came fully aboard, in *Roper v. Simmons* S.C.03-633(2005), when the death penalty for crimes committed under the age of eighteen years was declared unconstitutional.

**Corporal punishment** is sanctioned by most Caribbean juvenile justice laws. It has been abolished as a sentence for juveniles in Belize, Jamaica, Saint Lucia and Trinidad and Tobago. The Committee on the Rights of the Child has called for the abolition of corporal punishment.<sup>28</sup> The Report of the Independent Expert for the UN Study on Violence Against Children set a target date of 2009 for the

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<sup>24</sup> Art.6.5 of the ICCPR

<sup>25</sup> Rule 17.2 Beijing Rules

<sup>26</sup> Art.37(a) CRC

<sup>27</sup> See ss. 13 & 14 Juvenile Offenders Act Cap 138, Barbados; section 78 The Child Care and Protection Act, 2004, Jamaica; s. 19 Juveniles Act Cap 168 Saint Vincent & the Grenadines; ss 78& 79 Children Act Trinidad & Tobago.

<sup>28</sup> General Comment No 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.

prohibition of all violence against children, including all corporal punishment. That target has not been met.

## **B. DETENTION: LAST RESORT AND SHORTEST POSSIBLE TIME.**

The CRC prohibits the imposition of life imprisonment without possibility of release on juvenile offenders. This was abolished in the United States, only in 2010 in the case of *Graham v Florida 08- 7412*. Prohibition against life imprisonment requires indeterminate sentences to be reviewed periodically by the State. A juvenile who has been found guilty of murder was, having regard to the illegality of the imposition of the death sentence, formerly subjected to the mandatory sentence of being detained at Her Majesty's, or the Governor - General or the State's pleasure. In *Browne v R, (1999) 54 WIR 213*, an appeal from the Eastern Caribbean Supreme Court, *DPP v, Mollinson(2003), 64WIR 140*, an appeal from Jamaica and *Griffith v. R (2004)65 WIR50*, an appeal from Barbados, the Privy Council, following *Reg v Secretary of State for the Home Department , Ex Parte Venables and Thompson(1998) AC 407* held that the detention at the Governor-General's pleasure was not a life sentence but a sentence for discretionary custody ,that it was contrary to the constitutional imperative of the separation of powers, as the Governor-General was part of the executive and not the judiciary, and that the duration of the sentence must be reviewed from time to time by the Court. Since then, the sentence which a juvenile receives is "detention at the Court's pleasure.'

In the course of their judgement in *the Venables case*, their Lordships explained that the policy underlying the periodic review of sentence was "to maintain flexibility and to enable the duration of the defendant's detention to take into



account his welfare, the desirability of reintegrating him into society and his developing maturity through his formative years.”

In the case of *Attin v. The State (2005) 67 WIR276* the Trinidad Court of Appeal giving directions for passing sentences of detention during the Court’s pleasure, stipulated that the Court must determine and state in open Court the minimum sentence to be served and that sentence must be reviewed at three-year intervals. Trinidad’s Court of Appeal, following Barbados Court of Appeal in *Scantlebury v. R (2005) 68 WIR 88*, which, in its turn, had adopted the factors set out in the English Criminal Justice Act 2003, gave the principles which should be taken into account by the Court in determining the minimum sentence as being:

- (a) the penal objectives of retribution and general deterrence;
- (b) the seriousness of the offence;
- (c) the principle of individualised sentencing;
- (d) any aggravated or mitigating factors; and
- (e) any other relevant matters.

Alike the Barbados Court, the Trinidad and Tobago Court, in detailing aggravating factors relevant to the charge of murder, strangely, included “the age of the offender.” One would have thought that this would have been deemed a mitigating factor. In the *Venables Case* Lord Browne -Wilkinson made mention of the CRC and some of its guiding principles such as “the best interests of the child”, “having regard to” the child’s age and the desirability of the child’s reintegration into the society and the child’s assuming a constructive role in the society.”

The then Barbados Chief Justice, Sir David Simmons, in his judgement in the *Scantlebury case*, dealt comprehensively with the issue of the separation of powers and the need to substitute the sentence of detention at her Majesty’s pleasure for

detention at the Court’s pleasure and declared the period for review of such sentences at four –yearly intervals. His Lordship specifically mentioned Barbados’ ratification of the CRC and said that Barbados “desired to act in a manner consistent with (its) international treaty obligations.” That desire and the act, however, were never married, as the Court missed the opportunity to flesh out and act on the concept of individualised justice.”

The Trinidad’s Court of Appeal, in its judgement, made only vague reference to that State’s treaty obligations. The relevant part of the judgement reads: “Quite apart from the relevant international conventions to which the State may be a party....” Neither the Barbados nor Trinidad Court saw it fit to include in the factors determining the minimum sentence, principles of detention as a last resort and for the shortest possible time, or the need to rehabilitate the juvenile in accordance with the CRC. They both followed English guidelines in Venables for the review of the minimum sentence. These constitute a list of reports from various agencies as Superintendent of Prisons, Prison Chaplain and other departments.

For States that are inclined to view the mother country as a role model for juvenile justice, and, therefore, one to be emulated, I must point out that the Child Rights Committee, in its Concluding Observations on the Report of Great Britain and Northern Ireland in 2008, recommended that that State party “fully implement international standards of juvenile justice” and specifically advised them to implement, inter alia, the relevant CRC articles, the Beijing Rules, the Committee’s General Comment No 10 and the Havana Rules.<sup>29</sup>

But where there is life, there is hope, so six months after Scantlebury , in ***Griffith, Tennyson, Mark Harris et al, 2005HC 21***, we see a much more enlightened

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<sup>29</sup> CRC/C/GBR/CO/4

view of juvenile justice being showcased in the judgement of the Honourable Chief Justice Sir David. It warmed my heart to hear Sir David say in his judgement: “The overriding mitigating factor in this case is that, at the time of the offences, the prisoners were young boys barely out of school. I pay special regard to their tender ages at the time.” In alluding to the fact that their sentences had not been reviewed for the past 14 years he remarked: “The system appears to have worked against their interests and, in my opinion, they should not be disadvantaged because of systemic deficiencies.” He further, in his new juvenile justice proponent incarnation, said: “Having regard to their ages at the time of the offence, their degree of participation in the murder, the conduct of the deceased, and the principle of individualised sentencing, I am of opinion that the punitive element (that is, the tariff) should have been fixed at eighteen years.” The Chief Justice considered the prison reports submitted, their family support and the fact that they had not benefitted from discount on their behavior over the years and having also noted that the time already served was proportionate to the gravity of the offence, ordered their immediate release. The Trinidad and Tobago Courts followed a similar suit in the case of **Leroy Andrews HC2473 of 2003** who was freed after serving eighteen years in prison for a murder he committed at age sixteen years. The Court found he was no longer a threat to society.

The Barbados Court of Appeal continued on its path of redemption and its ascent into the hallowed halls of juvenile justice, with its judgement in the 2010 case of **Pope v. The Queen**. In refusing leave to appeal the excellent judgement of Justice Reifer, the Court took full cognizance of all relevant factors, his age at the time of the commission of the offence, the pre-sentence reports and especially, the many recommendations in reports before the judge, that he be placed in a secure facility,

and his guilty plea. Having weighed all, against the seriousness of the offence, the Court did a balancing act and wisely refused to vary the sentence.

The sentencing guidelines stated to have been followed by Justice Hariprashad - Charles of the Eastern Caribbean Supreme Court in the case of the *Queen v Brian Walters Case no 3 of 2008*, a case involving a 15-year old who was before the Court on a charge of murder and found guilty of manslaughter, do not, to any appreciable extent, reflect the guidelines in the international standards and norms in juvenile justice. It seems from the pronouncements of the Court that deterrence was uppermost in the judge's mind when she said: "Society has shown its abhorrence for criminal activities amongst young people. It is the duty of the Court in such circumstances to send out a strong signal that criminality among youths will not be tolerated."

The Court, however, did mention as a mitigating factor that the accused "was 15 years of age and this might have affected his responsibility." There are some positive aspects to this case which I will address later in this paper.

### **C. DELAY**

The CRC enjoins States to ensure that "every child alleged as or accused of having infringed the penal law has a right to have the matter determined without delay..."

Rule 20 of Beijing Rules required that cases involving juveniles "shall from the outset be handled expeditiously, without unnecessary delay." The commentary to the Rule states that: *the speedy conduct of formal procedures in juvenile case is a paramount concern. Otherwise whatever good may be achieved by the procedure and the disposition is at risk. As time passes, the juvenile will find it increasingly*

*difficult, if not impossible to relate the procedure and disposition to the offence, both intellectually and psychologically.*<sup>30</sup>

New York Judge Michael Corriero, in his book, *Judging Children as Children: A Proposal for a Juvenile Justice System*,<sup>31</sup> explains, “It is important to deal expeditiously with the cases of juvenile offenders because swift action increases the effectiveness of the Court’s intervention.” He revealed that “the New York Family Court recognizes the urgency of dealing with these cases and “strict time limits are imposed on prosecutors.”<sup>32</sup>

Prompt hearing of juvenile justice matters is not the norm in the Caribbean. In this regard, special mention must be made of the *Brian Walters case* discussed earlier and commendation paid to the Eastern Caribbean Supreme Court and especially, the justice system in the British Virgin Islands for achieving the remarkable feat of having that case concluded within five months of the commission of the offence. I recall a case in 2007 being heard in Trinidad and Tobago within five months. It involved a murder of a fourteen year-old boy by a twelve-year-old boy. His plea of guilty of manslaughter was accepted by the prosecution.

Aside from the potential for lack of effectiveness of the disposition occasioned by delay in the trial, is the injustice caused to the juvenile when the delay results in the infliction of a more severe sentence than would have been imposed when the delay results in the juvenile being convicted when no longer a juvenile, and thus becomes subject to penalties as an adult.

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<sup>30</sup> See Commentary to Rule 20.1

<sup>31</sup> Corriero, Michael, *Judging Children as Children: A Proposal for a Juvenile Justice System*. Temple University Press 2006.

<sup>32</sup> Ibid

The Trinidad and Tobago case, *Jomaine Bowen v. The State Cr. App. No 26 of 2004*, is a particularly unfortunate one. The appellant was fifteen years of age at the time of the commission of the sexual offence involving a young child. When the case came for trial, some six years after in 2004, he was an adult. The Court of Appeal recognized that the delay between committal and trial was in no way attributable to the appellant. The Court had before it the probation officer's report that stated that "the appellant was a young man of good character with many good qualities and he had never had a brush with the law," a petition signed by more than 250 persons who spoke of his glowing performance at his workplace, a letter from a minor cousin who spoke of the love she had for the appellant and the high esteem in which she held him. The Court also noted the trial judge's finding that Bowen was not in need of rehabilitation, that had the appellant been sentenced pursuant to the Young Offenders Detention Act, he could not have received a term of not more than four years, but sentenced the appellant to three years' in prison. In light of all that was before the Court, one wonders at the justification for the imposition for a custodial sentence. Was there no discretion to do otherwise? The Court reasoned that "there must be a balancing exercise that takes into account on the one side the harm done to the victim and the need for retribution and the need to protect society from persons who commit such crimes on the other." Surely, in light of the circumstances, it could not really be thought, that society needed to be protected from this particular offender, and a term of imprisonment was warranted. In the balancing exercise, the Court did not seem to factor into the equation in any realistic way, the principle of individualised justice. It did however, take note of the House of Lords decision *R v. State, ex parte Uttley (2004) 4 All ER 38*, which it interpreted to have decided that, "where the accused at the time of the offence would have been liable to a certain term of imprisonment as a young offender had

he been tried within a reasonable time, that term must be taken into account when determining the sentence after a delay of a number of years.” I am not so sure that *Uttley’s case*, which dealt with a change of legislation, can be so broadly interpreted, and would welcome views on the subject.

Like perilous potholes scattered along the treacherous road of juvenile justice are cases of juveniles in respect of offences committed when they were minors and which have come on for trial after they have achieved the age of majority. The result is that these juveniles have not been able to benefit from the lesser penalties they would have been awarded had they been tried as juveniles. No one is held accountable for the violations of human rights of the juvenile, their shattered lives and the fractured families resulting from their belated incarceration for offences long ago committed, hardly remembered. What prevents the DPP fast-tracking juvenile cases? Why cannot time lines be established for the adjudication and disposition of these cases? This is not the first case of this kind to come to the court that has been decided as *Jomaine’s case*.<sup>33</sup> A refreshing exception is *R v Gordon (1972) 20 WIR 265*, where the Jamaica Court of Appeal refused to follow the trend and stated, “It is the duty of this court to ensure by its decision that delay of this nature, whether caused by design or negligence, or the sheer inertia of the system, does not offend against what is right and just.” The Court then proceeded to allow the appeal against sentence.

I repeat the advice of the Child Rights Committee in its General Comment: Children’s Rights in Juvenile Justice: “Every person under the age of eighteen years at the time of the commission of an offence must be treated in accordance with the rules of juvenile justice.”

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<sup>33</sup>R .v. Ronald Williams(1970) 16 WIR 63; R v Martin Wright (1972) 18 WIR302;

## D. PROPORTIONALITY

As mentioned before, the principle of proportionality is a fundamental principle in juvenile justice. This principle is **not** to be equated with the principle of proportionality in sentencing as explained by Sir David Simmons in *Director of Public Prosecutions Reference No 1 of 2003*. In that case, which predates the *Griffith et al case*, Sir David, discussing the Penal System Reform Act said that the Act incorporates “notions of proportionality in sentencing” and “gives effect to the penological theory of just deserts.” He continued: “This Court has a duty to protect the public as far as it can from the wanton violence perpetrated by some of our young people. Public concern about illegal firearms and violence and the need for general deterrence must be reflected in the sentences passed by the Court. The public are entitled to expect the Courts to play their part in fighting the proliferation of firearms and violence. These Courts serve the public interest.” As I said, this case predates the **Griffiths et al** case.

The principle of proportionality, in international juvenile justice is in direct opposition to the principle of just deserts. As stated in the Beijing Rules, “the reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and needs of the juvenile as well as the needs of the society.”<sup>34</sup> It obliges the Court to investigate the background and circumstances of the particular juvenile before the Court and to take the pre-sentence report into consideration in the disposition.

Almost invariably, pre-sentence reports are requested in juvenile matters, but, as in the *Bowen case*, Courts do not always heed recommendations made in the

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<sup>34</sup> Rule 17 1(a) Beijing Rules.



report and tend to favour custodial sentences. However, in *Walters case* the judge, having considered the report, expressed discomfort at the lack of sentencing options and in *Pope's case* close attention was paid to the report.

The Ontario Court of Justice, sitting under the provisions of the Youth Criminal Justice Act SC 2002 in the 2010 case of *R. v P(D) a young person*, in which an accused youth was charge with armed robbery possession of a firearm and other charges, said: *Just because custody is available sentence does not necessarily mean that it is required or appropriate. Sentencing under the Youth Criminal Justice Act, is significantly different than sentencing under the Criminal Code. The purpose of sentencing is to hold the young person accountable for the offence by imposing just sanctions that have meaningful consequences to the young person that promote his rehabilitation and reintegration into society. The focus of sentencing is to protect society through an attempt to rehabilitate and reintegrate the youth back into the community. The sentence must be the least-restrictive sentence capable of achieving the purpose of sentencing and must be proportionate to the seriousness of the offence and the offender's degree of responsibility. Deterrence ,be it specific or general – are not considerations on sentencing under the YCJA though that may be an effect of a just sentence...the sentence must be proportionate to the seriousness of the offence and the degree of the young person's responsibility.*<sup>35</sup>

The Commentary to the Beijing Rules explains that” the difficulty in formulating guidelines *for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature, such as rehabilitation versus just deserts; assistance versus repression and punishment; reaction according to the singular merits of an individual case versus reaction*

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<sup>35</sup> RV.P(D)CarswellOnt 1353,2010 ONCJ76

*according to the protection of society in general and general deterrence versus individual incapacitation.*<sup>36</sup>

## **E. VARIOUS AVAILABLE DISPOSITIONS.**

Both the CRC and the Beijing Rules require that the juvenile justice system should make available a variety of dispositions. The Beijing Rules states that this would allow for flexibility so as to avoid institutionalization to the greatest extent possible. Many of the measures recommended already form part of the juvenile justice regime which we inherited from England in colonial times and some are new. The CRC recommends dispositions such as “care, guidance and supervision orders, counselling, probation, foster care, educational and vocational training programmes and other alternatives to institutional care.”<sup>37</sup> The Beijing Rules add community service orders, financial penalties, compensation and restitution, intermediate and other treatment orders.<sup>38</sup>

Recent Caribbean legislation has been breaking out of the mould of archaic English provisions. Thus, in Barbados, on the menu of dispositions are: absolute and conditional discharge, suspended sentence, attendance centres orders, community service orders, curfew orders, curfew orders with electronic monitoring, combination orders and mediation.<sup>39</sup> New legislation in the British Virgin Islands now provide for: conditional discharge, attendance centre orders, care orders, detention in youth custody and training centre orders, drug rehabilitation and after care order, fines, compensation and fine, probation order, curfew with additional specification, curfew with electronic monitoring, combination orders, community service order, suspended sentence, placing on

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<sup>36</sup> Commentary to Rule 17 Guiding principles in adjudication and disposition.

<sup>37</sup> Article 40.4 of CRC

<sup>38</sup> Rule 18 Beijing Rules.

<sup>39</sup> Penal System Reform Act 1998 s, 3, 6 9, 13, 15, 16 17 and 20

bond and parenting orders.<sup>40</sup> The Bahamas has now included among its juvenile justice dispositions, an order for the parent or guardian and the offender to attend together parenting or counseling classes for a period of not less than six weeks.<sup>41</sup>

Without benefit of specific legislation, some magistrates have been creative in using the blanket provision of being able to deal with the offender as they see fit to make orders which they deem suitable in the circumstances of the particular juvenile, as imposing curfew where the law does not so prescribe or having the offender write an essay to reflect on consequences of the offence.

There is a growing world movement to include in the list of juvenile justice dispositions, restorative justice programmes, such as victim -offender mediation, sentencing circles and family group conferences. These programmes have been successful in places such as South Africa, New Zealand, Canada, Australia, have spread to all states of the United States and originate from indigenous culture.

## **F. SEPARATION FROM ADULTS**

International instruments and juvenile justice laws provide for separation of juveniles from adults at all stages of the proceedings, including after disposition. Some jurisdictions, particularly in the Eastern Caribbean, are challenged in the availability of facilities to house juveniles who must serve custodial sentences. Even when the juveniles are placed in a separate part of the adult prison, the danger of contamination remains very real. In some cases, as in Trinidad and Tobago, the issue is one of gender bias as the law seems reluctant to remove its blinkers and acknowledge that there are serious offences

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<sup>40</sup> Criminal Justice (Alternative Sentencing) Act , 2005s 3, 5, 8, 12, 15, 17, 20, 21, 22, 25, 26, 27, 28, 31, 38, 39, 42, 48.

<sup>41</sup> S.125 Child Protection Act 2007

being committed by older teenage girls, who need to be housed in a secure facility. Such girls are sent to the women's prison in violation of their rights. Some courageous magistrates have refused to so sentence them, being fully aware that a women's prison is not a safe place for a teenage girl. They have sought to send a message to the government to address this need, but clearly, long after the death of the hearing -impaired Father of the Nation, the government continues to be deaf to their cries.

Another gender issue is the tendency in our patriarchal society to seek to police girls' sexuality through institutionalization for status offences such as running away from home. They may be fleeing from sexual exploitation. The Riyadh Guidelines, Beijing Rules and the Child Rights Committee have called for the abolition of status offences.

## **G. RIGHT TO PROCEDURAL SAFEGUARDS**

In 1966 the U.S. Supreme Court in *Kent v United States* 383 U.S. 541 (1966) declared that a juvenile had a right to a lawyer and that the doctrine of *parens patriae* did not confer on states the right to infringe the rights of juveniles. The march towards juvenile rights intensified with the Supreme Court judgement in *Re Gault* 387 U.S.1(1967) which put beyond argument the right of a juvenile to due process, including the right to an attorney, right to silence, to examine and cross examine witnesses. The Beijing Rules and the CRC all place a duty on all states to secure juveniles their human rights. Yet lawyers are still very conspicuous by their absence from juvenile Courts and many magistrates remain hostile to lawyers coming into their Court as they see themselves perfectly capable to act in the best interests of the child. Even when the liberty

of the juvenile is at stake, there may be no lawyers to represent the juvenile. They are not regarded as having the right to the presumption of innocence and are hardly ever given a chance to be heard and, if given such an opportunity, they are so intimidated that they are unable to speak. Courts must recognize that juveniles have human rights and insist that they be afforded those rights.

## **H. WELL- BEING OF THE JUVENILE**

The need to ensure the well-being of juveniles should pervade the entire juvenile justice process. It does not end with the adjudication and disposition of the case. The Court must concern itself with what happens in the custodial setting. Very rarely do Courts take the opportunity to give direction on the care of the juvenile during incarceration or investigate the existence of a holistic rehabilitative programme to address the needs of young persons. Such a course was embarked upon by Justice Hariprashad –Charles of the Eastern Caribbean Supreme Court in the case of the *Queen v Brian Walters Case no 3 of 2008*. Although the facilities were inadequate to cater for the juvenile's needs, the Court sentenced the juvenile to a term of imprisonment, but was concerned enough to order that during his incarceration the juvenile receive counselling and that the Ministry of Education do all that was necessary to assist him with the continuation of his studies.

In *Pope's case*, Justice Reifer, in addition to the term of imprisonment she imposed, ordered that Pope be enrolled in a drug treatment programme in prison, that he be given remedial education: and that he should be provided with psychological counseling. (Is it a coincidence that these two judges are women?)

In *Attin's* case, although it was reported at the review of sentence hearing, that the prisoner had not made progress and there was no change in his attitude, there was no real enquiry concerning the nature of the programmes to which he was exposed.

In the case of *Leroy Andrews*, mentioned before, it was reported that during his thirteen years of detention, he had not been interviewed by a psychologist, psychiatrist, or other health personnel. Society's responsibility to rehabilitate and eventually reintegrate juveniles into the society requires that our institutions be equipped to provide therapeutic services that the juveniles might so urgently need.

## **I. UMBRELLA PRINCIPLES OF THE CRC**

The theme of the conference is bringing law closer to the people. It is a commendable one. The people to whom we must bring the law closer must include juveniles. Juveniles, while not mini -adults, are people too. They have a strong sense of justice and need to feel that the law and the justice system care about them. The umbrella principles of the CRC apply to all children's rights and, even more critically to juvenile justice. These principles, I repeat, are: non-discrimination- article 2; best interests of the child –article 3; the right to life, survival and development- article 6; and the child's right to be heard-article 12.

### **i. Non-discrimination**

We would like to believe that the streams of justice are clean and pure, that discrimination does not dwell therein. What name, then, do we give it when cases involving persons of paler hue are heard more speedily than those of the boys from the ghetto? What name do we give it when no conviction is recorded and a charge of marijuana possession is dismissed against the upper class youth, while juveniles from the inner city similarly charged rides the Black Maria to

prison? What name do we give it when a mitigating factor is stated to be the many CXC passes of a juvenile and an aggravating factor is another juvenile's propensity for absconding from a school that does not cater to his needs? What is its name, when the detention centre is so located that the cost of travelling from a rural district or another island is so prohibitive that the parents of the juvenile cannot visit? Is law brought closer to the people then?

**ii. Best interests of the child**

The days of *parens patriae* being interpreted to mean a purely welfare principle with no thoughts of entitlement to human rights of a juvenile are over. All juvenile justice personnel need to be educated on the international standards and norms in juvenile justice. It is a perpetual call from the Child Rights Committee when reviewing State's reports. When will we heed that call? We will not, cannot, bring law closer to juveniles if we continue to ignore their human rights.

**iii. Right to life survival and development**

We have abolished the death penalty for juveniles. Life imprisonment without possibility of parole has been eliminated. But is this enough? The obligation to ensure life and to the "maximum extent possible the survival and development of the child" does not mean the right to mere existence, but implies obligation for the child's holistic development. Bringing law closer to the people must mean ensuring that laws provide for the juvenile to achieve to the maximum extent possible all that is needed to survive and to make a worthwhile contribution to society. Society must make certain that all developmental needs are met: education, physical, mental and psychological health, social needs and the right to life free of violence. The child in conflict with the law continues to

be the bearer of all those rights .The juvenile justice system must ensure that even while in custody, the juvenile's needs receive attention.

#### **iv. Right to be heard**

The days of children being seen and not heard are long gone. The juvenile's right to express views freely must be fully implemented in the letter and spirit of the law at every stage of juvenile justice. In bringing the law closer to the juvenile, to avoid his feeling of alienation, the child's voice must be heard directly or through a representative and his views taken into account. The appointment of a guardian ad litem does not ensure that the child's voice is heard. Such guardian represents the best interests of the child, not necessarily the child's view. These do not always coincide.

### **6. CONCLUSION**

I recommend that all stakeholders in juvenile justice, familiarize themselves with the international standards and norms in juvenile justice, namely, the CRC, the Beijing Rules, the Havana Rules, and the Riyadh Guidelines, that judges use these principles to guide their decisions and state that they have done so. They would also benefit from a course in child development.

States should revise their juvenile justice laws to accord with the international standards and norms in juvenile justice. We speak of our children as “flowers of our nation”, but our actions make justice for them, as elusive as a butterfly.

I congratulate the Barbados Government on legislating in the Penal System Reform Act, Cap 139, judicial sentencing guidelines and the Trinidad and Tobago Judicial Education Institute on the Sentencing Handbook published in December, 2010. I suggest that both documents could be improved by inclusion



of a special section dealing with juvenile sentencing. Principles set out in section 6 of the Children (Criminal Proceedings) Act 1987 of Australia may be a useful starting point.

W.E.B. Dubois in the *Souls of Black Folk* wrote: “The chief problem in any country cursed with crime is not the punishment of the criminals, but the preventing of the young from being trained to crime.”<sup>42</sup>

Can we prevent the young from turning to crime by implementing child rights?

Professor John Eekelaar, former Reader in Law at Oxford University, in his paper entitled: *The Importance of Thinking that Children Have Rights*, said: *If all young people are secured all the physical, social and economic rights proclaimed in the Convention, the lives of millions of adults of the next generation would be transformed. It would be a grievous mistake to see the Convention as applying to childhood alone. Childhood is not an end in itself, but part of the process of forming the adults of the next generation. The Convention is for all people. It could influence their entire lives. If its aims can be realized, the Convention can truly be said to be laying the foundations for a better world.*<sup>43</sup>

In concluding, I commend to you the words of this very wise man.

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<sup>42</sup> Chicago: A.C. McClurg & Co.; [Cambridge]: University Press John Wilson and Son, Cambridge, U.S.A., 1903.

<sup>43</sup> Eekelaar, John. *The Importance Of Thinking that Children Have Rights* in Children, Rights and the Law. Ed. Philip Alston, Stephen Parker, John Seymour. 3<sup>rd</sup> ed. New York: Oxford U P, 1993