CHILD JUSTICE: AN ANALYSIS OF THE DEVELOPMENT OF CHILD JUSTICE REFORM IN BOTSWANA

by

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DECLARATION

I Nthabiseng Rosalind Bertha Isaacs (s212395459) hereby declare that I have not submitted this research work in part or in whole to any other university or institution and I cede all copyrights in favour of the Nelson Mandela Metropolitan University.

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NTHABISENG ROSALIND BETHA ISAACS
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ABSTRACT

This dissertation addresses the developments of child justice in Botswana. The first ever child justice that was established is discussed with the aim to understand the influence it had on Botswana with regard to the nature of the proceedings and the founding principles of child justice and its application in the courts.


The measures that are currently in place for the protection of children who are in conflict with the law are examined with particular emphasis on those children that are arrested and detained.

A comparison is drawn between the Children’s Act CAP [28:04] OF 1981, the Children’s Act 8 of 2009 and the South African Child Justice Act 75 of 2008 and the differences between the systems are highlighted. The provisions of the 2009 Act pertaining to children in conflict with the law are discussed in depth and shortfalls of the 2009 Children’s Act are identified.

Diversion, as a form of correctional action, is discussed in light of international conventions. The provisions regarding the diversion of child offenders in the Child Justice Act are interrogated. Trial procedures under the 2009 Children’s Act are discussed and compared to those in South Africa including measures in place for the sentencing child offenders in both Botswana and South Africa.

After an analysis of the international conventions, legislation and case law, the conclusion is reached that there is a commitment in Botswana towards the protection
and realization of children’s rights especially those who are in conflict with the law. It is recommended in the conclusions that Botswana import some provisions of the Child Justice Act into domestic legislation in order to comprehensively address the plight of children in trouble with the law so as to strive towards maximum compliance with conventions that Botswana has signed.
CHAPTER 1
INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 BACKGROUND

Botswana, formally known as Bechuanaland, is a landlocked African state lying astride the tropic of Capricorn.¹ The country shares its territorial borders with Namibia, Zambia, Zimbabwe and South Africa. Botswana is a former British protectorate and it gained its independence in 1966. In the last forty-six years post-independence, Botswana has experienced accelerated diversification both economically and politically. The country is regarded as one of the most democratic countries in Africa, and from a developmental perspective, it can be classified as a developing country.

In the application of its criminal justice system, Botswana is progressively making efforts to comply with international Conventions. In as far as children’s rights are concerned; legislative reforms have been in place since 1981. The first ever Children’s Act² was promulgated in 1981. Before 1981 there was no separate procedural system in place to deal with juvenile offenders. Prior to the promulgation of the Act 1981, juveniles who committed crimes in Botswana were accommodated in the same criminal justice system as adults.

Young offenders and children, children in particular, deserve to be treated differently from adult offenders.³ The Act recognized children’s rights separate from those of adults. The Act was an attempt by the legislature to comply with international instruments that provide for the protection of the rights of children.

The Act was revised and a draft Bill was approved in 2006. The President assented to the current Children’s Act⁴ on the 16th of June 2009. The adoption of these Acts

⁴ Act 8 of 2009.
was a step in the right direction by the country towards the realization of the needs and rights of children. Not only does the 2009 Children’s Act offer protection for juveniles in trouble with the law, but it also encapsulates the rights of children in general. The preamble of the 2009 Children’s Act states that it is “An Act to make provision for the promotion and protection of the rights of the child; for the promotion of the physical, emotional, intellectual and social development and general well-being of children; for the protection and care of children; for the establishment of structures to provide for the care, support, protection and rehabilitation of children; and for matters connected therewith”. Part XIV of the 2009 Children’s Act provides specifically for children who are in conflict with law whilst Part VII provides for the establishment of a children’s court as well as the appointment of the officers of the children’s court.

In keeping up with international best practices, Botswana is party to and has ratified a number of international Conventions that have a bearing on the rights of children, and more importantly for the purposes of this study, the rights and welfare of children who come into conflict with the law. The Beijing Rules provide *inter alia* that member States shall attempt to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when he or she is most susceptible to deviant behavior, will foster a process of personal development and education which is free from crime and delinquency as possible.\(^5\)

The Penal Code\(^6\) provides that a person under the age of eight years is not criminally responsible for any act or omission.\(^7\) In terms of the Penal Code a person under the age of fourteen years is not criminally responsible for an act or omission unless it proved that at the time of carrying out the unlawful conduct he had the capacity to know that he ought not to do that act or make the omission.\(^8\) A male person under the age of twelve years is also considered incapable of having carnal knowledge.\(^9\) It is apparent that the Penal Code does not explicitly prescribe the minimum age at

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\(^6\) [CAP 08:01].
\(^7\) Art 13(1).
\(^8\) Art 13(2).
\(^9\) Art 13(3).
which a child is deemed to have criminal capacity. The 2009 Children’s Act also
does not prescribe a minimum age for criminal capacity but also creates the
presumption of incapacity for children below the age of 14 unless it can be proved
that the time of committing the offence the child had capacity to know that he or she
ought not to do so.\textsuperscript{10}

The African Charter on the Rights and Welfare of the Child defines a child as any
person below the age of 18 years\textsuperscript{11} whilst the Beijing Rules leaves the prescription of
the minimum age of criminal capacity to be determined by each State, it does
however provide that the age limit for criminal incapacity should not be set too low.

Children are more vulnerable than adults to the negative effects of imprisonment and
for this reason detention of children should be avoided where possible.\textsuperscript{12} Sentencing
of juveniles in Botswana has always been approached with caution. Before the 1981
Children’s Act, the provision that took precedence over other laws in the Republic
regarding sentencing of children was Article 26(2) of the Penal Code. The provision
states that provided that the death sentence shall not be pronounced on or recorded
against any person convicted of an offence if it appears to the court that at the time
when the offence was committed he was under the age of 18 years. In the place of a
deadth sentence, the court shall sentence such person to be detained during the
President’s pleasure, and if so sentenced he shall be liable to be detained in such
place and under such conditions as the President may direct, whilst so detained, the
person shall be deemed to be in legal custody.

The 2009 Children’s Act reiterates this position by providing that a child convicted of
murder shall not be sentenced to death.\textsuperscript{13} This provision is in line with international
instruments that demand that children should not be punished in a cruel and
inhumane way.\textsuperscript{14} Notwithstanding this provision, it is important to note that corporal
punishment can be lawfully imposed on a juvenile offender by a court although it is

\begin{footnotes}
\item[10] S 82.
\item[13] S 89(2).
\item[14] Art 2(a) of the African Charter on the rights and welfare of the child, Art 17.2 of the Beijing
Rules, Art 6(5) of the International Covenant on Civil and Political Rights.
\end{footnotes}
against the standards of Conventions that the country has ratified. In most countries in Southern Africa corporal punishment has been declared a cruel and inhumane form of punishment and has therefore been pronounced unlawful.\textsuperscript{15} The 2009 Children’s Act stipulates that a sentence of corporal punishment shall not exceed six strokes and shall be inflicted only in accordance with the provisions of section 305 of the Criminal Procedure and Evidence Act read together with section 28 of the Penal Code.\textsuperscript{16}

Imprisonment or corporal punishments are not the only options available for the rehabilitation of juvenile offenders. When sentencing a child offender in Botswana a court may opt to send the child offender to a school of industry.\textsuperscript{17} This form of diversion is encouraged and favored by the Beijing Rules and is also used in other States in Southern Africa.\textsuperscript{18}

1.2 RESEARCH PROBLEM AND RESEARCH QUESTIONS

Within the context of legislative developments, the proposed study seeks to establish whether the legislation adequately addresses the plight of children end up in the criminal justice system.

The study seeks to address the following questions:

1) Which are the measures in place for the protection of rights of juvenile offenders?
2) Which international conventions have Botswana ratified that have a bearing on the rights of children?
3) What is the state of compliance with the international conventions in as far as children’s rights are concerned? and
4) In Botswana, is there a significant difference in the protection offered to juvenile offenders by the 2009 Children’s Act and the protection that was offered to

\textsuperscript{15} S v Williams and Others 1995 (2) SACR 251 (CC).
\textsuperscript{16} S 90.
\textsuperscript{17} They are empowered to do so by s 85(b) of the 2009 Children’s Act.
\textsuperscript{18} Chs 6 and 8 of the Child Justice Act 75 of 2008 provides for the diversion of juvenile offenders in South Africa.
PURPOSE AND SCOPE OF THE STUDY

This study seeks to assess the child justice reforms in Botswana and its development since the enactment and coming into operation of the 2009 Children's Act. The study will do so by first reflecting on the historical development of the first ever child justice system in the United States of America. This study will also investigate the measures in place for the protection of rights of children who are embroiled in the justice system in Botswana. It further seeks to identify International Conventions that Botswana is party to, and the extent of compliance with them.

Undertaking this research is of paramount importance considering the escalating amount of cases involving juveniles in the criminal system. This intends to identify the shortcomings of the reforms in place for the protection of rights of juvenile offenders. This research also intends to raise awareness regarding the rights of children. Lastly, this study intends to identify whether there has been any positive changes in the transition from the 1981 Children’s Act to the 2009 Children’s Act and whether the plight of children embroiled in the criminal justice system in Botswana is being adequately addressed under the dispensation of the new Children's Act.

RESEARCH METHODOLOGY

This study takes the form of analytical literature study. In conducting this study, an intensive desktop research was employed. Primary and secondary sources of information were utilized. Primary sources include specific legislation, policies and conventions that have been developed for the protection of rights of children. Secondary sources include textbooks, journals, case law, essays and previous researches relevant to study area.

An in-depth analysis of the information obtained from these sources was carried so to reach the objectives of this study. A comparative critical analysis approach was also employed during the study as parallels were drawn from Botswana, South African and international experiences.
15  OUTLINE OF THE STUDY

The study is structured as follows:

Chapter 2 reflects on the broad history of the first ever juvenile justice system in the United States of America, its roots and its development to date. It is based on extensive literature review on the juvenile justice system.

Chapter 3 discusses international conventions applicable that have a bearing on the rights of children in Botswana. It identifies those conventions that Botswana has ratified and those that Botswana has assented to but not yet incorporated in the domestic statutes. This chapter further determines the country’s extent of compliance with these conventions with particular focus on the measures in place for the protection of the rights of children.

Chapter 4 focuses on the Children’s Act of 2009 in Botswana. This Chapter also assess case law so as to investigate how child justice was addressed and also to assess the progress that the Act has made.

Chapter 5 outlines the findings, conclusions and recommendations emanating from the study.
CHAPTER 2
THE JUVENILE JUSTICE SYSTEM

2.1 INTRODUCTION

The definition of a child for purposes of juvenile justice administration differs from country to country and in different jurisdictions. The term “juvenile” is defined as a person who has attained the age of fourteen years and is under the age of eighteen years.\(^{19}\) In this chapter the founding principles and the procedures of the first ever child justice system that was established in Illinois, United States of America are discussed. In addition, the chapter focuses on the application of the principles in the courts of law and with the aid of case law, a general understanding of the objectives of the principles of child justice are elaborated.

2.2 A HISTORICAL OVERVIEW OF THE JUVENILE JUSTICE SYSTEM

The first separate procedural system designed to accommodate children charged with criminal offences was established in the United States of America in 1899 in the State of Illinois. This separate procedural system for juvenile offenders was the result of the enactment of Illinois Juvenile Court Act 21.\(^{20}\) The Act established a court that had exclusive jurisdiction in presiding over matters that involved juveniles. It had as its main purpose, the removal of children from criminal court. By providing a special court it was thought that the children would be protected from being stigmatized as criminals and traumatized by a highly formal public trial.\(^{21}\) In the early history of the country’s criminal justice system in the United States of America child offenders did not receive separate adjudicative proceedings.\(^{22}\) It was only after the enactment of the Illinois Juvenile Court Act\(^ {23}\) that separate courts specifically devised

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\(^{20}\) 21 of 1899.

\(^{21}\) Rubin “Juvenile Court System in Evolution” 1967 2 Valparaiso University Law Review 1 1.

\(^{22}\) Polacheck “Juvenile Transfer: From get better to get tough and where we go from here” 2009 35:3 William Mitchell Law Review 1163 1165.

\(^{23}\) 21 of 1899.
to try cases of juveniles were established and juveniles treated differently and separately from adults. This system removed children from adult criminal courts with the intention to focus on rehabilitation rather than punishment; the perception was that children were both less culpable for their actions and more responsive to rehabilitative treatment than adult offenders.\textsuperscript{24} The juvenile justice system was therefore a response to the harsh treatment children received in the criminal justice system that furthered punishment of offences rather than rehabilitation.

One of the fundamental reasons for the establishment of a separate system catering for juveniles was the mental capacity of juveniles. The juvenile justice system was premised on the beliefs that young people were both cognitively and morally underdeveloped such that they should not be considered fully responsible for their offences and that young offenders were particularly malleable and therefore susceptible to moral and social rehabilitation.\textsuperscript{25} The Juvenile court sought to rehabilitate juvenile offenders rather than punish them taking into consideration the developmental stage they are in. The was an underlying belief in the early American juvenile system that children were entitled to a range of special protection due to their vulnerability and immaturity, the juvenile court was intended to separate youth from the deleterious effect of the adult justice system,\textsuperscript{26} this belief recognized the developmental differences between adults and children at the same time holding children accountable for their acts.

\section*{2.3 THE ROLE OF WELFARISM}

It becomes apparent that one of the main reasons for the establishment of a separate criminal justice system for children or juveniles was the welfare of children. Welfarism promoted the idea that children should be separated from adults both in court and in institutions, and they should be treated according to different procedures.

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{24} Friedman “Protecting truth: An argument for juvenile rights and a return to In Re Gault” 2011 58 UCLA Law Review Discourse 165 168.
\item\textsuperscript{25} Ainsworth “The courts effectiveness in protecting the rights of juveniles in delinquency cases” 1996 6 The Future of Children 64 64.
\item\textsuperscript{26} Males and Macallair “The Colour of Justice: An analysis of juvenile adult court transfers in California” Building Blocks for Youth www.buildingblockforyouth.org Retrieved on:2013/10/18 at 15:35.
\end{itemize}
\end{footnotesize}
from those of adults. The movement relied heavily on the involvement of social workers and probation officers.\textsuperscript{27} The welfarist approach made it easier for the system to assess each case taking into consideration each accused child’s upbringing and the nature of the alleged criminal conducted therefore the system was able to employ an individualized approach to each matter and assist each juvenile accordingly.

Because of the influence of welfarism, juvenile courts were designed to be inquisitorial and less accusatorial unlike the criminal justice system that adults are processed through. The advantage of the early juvenile courts and the court procedures therein was that they took the form of an enquiry rather than a trial, and no conviction or sentence was imposed.\textsuperscript{28} From the beginning each juvenile court statute declared that the adjudication was not criminal and that it did not constitute a conviction, no matter how serious the underlying violation that brought a child to court as a delinquent.\textsuperscript{29}

The court was intended to be civil not criminal. It was intended to be helpful and rehabilitative to the offender, not designed to be punitive or aimed at retribution. The primary objective was to offer additional protection to the child.\textsuperscript{30} The state bestowed itself with the duty of affording protection to juveniles especially vulnerable juveniles embroiled in the harsh criminal justice system. The doctrine of Parens Patriae was applied by the juvenile courts to enable the state to carry out the obligation of extending extra protection to juvenile delinquents.

\textsuperscript{27} Skelton “From Cook County to Pretoria: Along walk to justice for children” 2011 6 Northwestern Journal of law & Social Policy 414 413.
\textsuperscript{29} Rubin 1967 Valparaiso Law Review 2.
2.4 THE DOCTRINE OF PARENTS PATRIAE

*Parents Patriae* is a legal concept underpinning the welfarist approach that allowed a monarch to protect vulnerable parties usually in issues of inheritance or guardianship, the doctrine was applied more broadly in the United States of America allowing the state to act as a “kind and just parent.” When the 19th Century reformers spoke of *parens patriae*, they were dealing with neglected and criminal children, they were articulating the duty of the government to intervene in the lives of all children who might become a community crime problem. In the application of this doctrine in the United States of America the state placed a duty on itself to act as a parent or guardian to those juveniles that came into conflict with the law. It took over the duties and obligations of natural parents. The state was treated or seen as a common guardian of the community especially juvenile offenders.

It was through this doctrine of *Parents Patriae* that the idea of a sheltering juvenile court for all young people who need help was developed at the turn of the century with the primary objective of affording additional protection to the juvenile offender. The application of the *Parents Patriae* doctrine manifested the intention of the state and the judiciary to prioritise the welfare of children who were embroiled in the juvenile justice system. This illustrates that in its early days, the juvenile justice system recognized the need to afford child offenders more protection than adults.

2.5 DUE PROCESS IN JUVENILE COURTS

In any criminal justice system, a procedure is necessary that maximizes correct outcomes and minimizes errors. Due process is a doctrine that underlies the values of criminal procedure in most criminal justice systems across the world. It is applied according to the rule of law to safeguard the rights of people and to combat abuse of

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power so as to avoid situations where individuals are deprived of their rights and liberties without just reasons.\textsuperscript{35}

The doctrine originated from American Constitutional law and is usually referred to as fair judicial process, a fair hearing, a fair trial or simply procedural fairness.\textsuperscript{36} Due process guarantee is an effort, one with deep roots in the history of western civilization-to reduce the power of the State to a comprehensible rational order, to ensure that citizens are not deprived of life, liberty or property except with good reason.\textsuperscript{37} It aims to protect citizens from arbitrary exercise of power especially in the criminal justice system.

An in depth study of the concept of due process reveals the importance placed on this doctrine especially its proper application.\textsuperscript{38} As stated, it has its roots firmly rooted in embracing fair processes in the judicial system, not only at the trial stage but before and after conclusion of trial as well and the ability of the courts to safeguard, protect and enforce the right to due process. It becomes apparent that due process is mainly focused on the processes, fair processes, and aims to preserve this fundamental right to fair judicial processes. A person should therefore not be convicted unless they found guilty by due process of the law and by an impartial court or tribunal. The essence of due process is to prevent coercion and persecution, rather than the persecution of suspects. It prevents illegal arrests and detention, search and seizure.\textsuperscript{39}

\section*{2.6 THE EXCLUSION OF DUE PROCESS IN JUVENILE JUSTICE}

Due process found its permanent place in criminal justice systems especially in America where it was first developed and entrenched in its federal and state

\textsuperscript{35} Howe “The meaning of Due Process of Law prior to the adoption of the fourteenth Amendment” 1930 18 \textit{California Law Review} 583 583.

\textsuperscript{36} Okpaluba “Constitutional damages, procedural dues process and the Maharaj legacy: A comparative review of the recent commonwealth decisions part 1” 2011 26 \textit{SAPL} 256 259.


\textsuperscript{38} \textit{Joint Anti-Facist v McGrath} 341 US 123 1951 (decided in the US Supreme Court).

\textsuperscript{39} Douglas “Juvenile Courts and Due Process of the Law” 2009 19 \textit{Juvenile Court Judges Journal} 9 11.
Constitution in the fifth and fourteenth Amendments. Even though it was viewed with fundamental importance and also entrenched in both the Federal and State Constitutions, it was deliberately excluded from the first juvenile justice system that was created in Chicago Illinois. This means that there was a free system of evidence in the Juvenile Courts and rights that are encompassed by the concept of due process like the right to remain silent, the right to a legal representative and the right to be informed of such rights *inter alia* were not of primary importance in the early juvenile courts in the United States of America. The exclusion of due process and the exclusion strict requirements of due process enabled the early Juvenile Court proceedings to be carried out in an informal manner which is one of the major characteristics of juvenile criminal justice systems.

2.7 IMPORTANT CASES IN THE HISTORY OF JUVENILE JUSTICE

As stated before, due process was not a strict requirement when it came to juvenile courts and the procedures therein. This was so because in adjudicating cases involving juveniles as offenders, courts acting on behalf of the state assumed the parental and guardianship role thereby moving away from the adversarial nature of adult criminal courts and adopted a more inquisitorial approach. The proceedings were more inquisitorial.

The two most prominent cases in the history of juvenile justice are *Kent v United States* 383 U.S.40 and *In the Application of Gault*.41 These cases addressed issues that marred the juvenile justice system especially the procedures of juvenile courts. The courts in these cases tackled the issues that included the exclusion of due process in juvenile justice system and juvenile waiver and transfers.

2.8 KENT v UNITED STATES OF AMERICA

In *Kent v United States* the facts of the case were as follows: Kent was a sixteen (16) year old boy who first came under the authority of the Juvenile Court when he was fourteen years old. He was arrested for several house break-ins that resulted in him

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being released on probation in the custody of his mother. At 16 years he was charged with housebreaking, robbery and theft. At that age he was under the exclusive jurisdiction of the Juvenile Court as prescribed by the Juvenile Court Act.

Kent was arrested and interrogated by police officers for seven (7) hours. It appears that during that interrogation he admitted his involvement and participation in the crimes he was arrested for. He was interrogated further the following day. According to the judgment, the record does not show when the mother became aware that Kent was in custody but shortly after 2pm of the day following the arrest she retained counsel for Kent.\textsuperscript{42} He was thereafter detained at the Receiving Home for almost a week. Whilst detained there, there was no determination by a judicial officer of probable cause for Kent’s apprehension.

In the case of Kent the Juvenile Court did not set out to do any such evaluations as to the mental status of the child. It was Kent’s counsel who arranged for examinations by two psychiatrists and a psychologist for Kent. Moreover, after medical examinations by experts, it was certified that Kent was a victim of severe psychopathology\textsuperscript{43} yet the court proceeded to waive its jurisdiction after such findings. Such waiver of jurisdiction by the Juvenile Courts is not in a child’s best interest because once transferred, the child offender loses their status as a minor and becomes legally culpable for their conduct, which in turn results in the child being processed through the rigid adult criminal justice system.

The Juvenile Court judge presiding over the matter waived jurisdiction of the Juvenile Court without providing reasons, he made no finding and without making full investigations provided for by the Juvenile Court Act.\textsuperscript{44} The case was as a result transferred from the exclusive jurisdiction of the District of Colombia Juvenile Court.

The Supreme Court of the United States on appeal held that the waiver by the Juvenile Court was invalid. In handing down the decision of the court Fortas J stated that:

\textsuperscript{42} \textit{Kent v United States supra} 545.

\textsuperscript{43} \textit{Kent v United States supra} 546.

\textsuperscript{44} \textit{Kent v United States supra} 547.
“It is inconceivable that a court of justice dealing with adults with respect to a similar issue would proceed in this manner. It would be extraordinary if society’s special concern for children, as reflected in the District of Columbia’s Juvenile Court Act, permitted this procedure. We hold that it does not.”

The court of appeal in this case concerned itself primarily with the issue of waiver of the jurisdiction of the Juvenile Court, more specifically, ways in which Juvenile Courts may waive their jurisdiction over child offenders accused of serious crimes and the criteria to be applied by presiding judicial officers faced with the question of waiver in Juvenile Courts. The court was not satisfied that the procedures that led to the granting of the waiver were justiciable because the State is supposed to proceed in respect of the child as parens patriae, and not as adversary.

2.9 IN THE APPLICATION OF GAULT

In the application of Gault, the Appellant was the father to a 15 year old boy who was taken into custody after a complaint was laid against him for making lewd phone calls. On 8 June 1964 Gerald Francis Gault and his friend Ronald Lewis were taken into custody. At the time he was taken into custody Gerald was still on probation from a 1964 case in which he was in the company of a friend who had stolen a wallet from a woman. Gerald was taken into custody on June 8 after a complaint was laid by a neighbor with the police that the boys made a telephone call with offensive and indecent remarks to her. At the hearing that was held on June 9, there were no records, transcripts or recordings of the proceedings and the hearing was held in the judge’s chambers. At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the State Industrial School “for the period of his minority, that is, until 21, unless sooner discharged by “due process of law.”

The United States Supreme Court in the appeal of this case changed the Juvenile Criminal Court procedures by holding that children were constitutionally entitled to the privilege against self incrimination and the right to legal representation. Thus

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45 Kent v United States supra 553.
46 Kent v United States supra 555.
47 In re: Gault supra 386.
judgment to some degree addressed the critical issues regarding due process in the Juvenile Justice system.

2.10 CONCLUSION

The first juvenile justice system was established in the State of Illinois in the United States of America. The system separated children from adults because of the view that children lacked the mental capacity to appreciate the consequences of their actions and therefore needed extra protection. The government usurped the role of parents when a child was charged with an offence because the child would be considered to be in need of care. The welfare of children in conflict with the law was of paramount importance in the juvenile justice system that was established. It focused more on the rehabilitation of the child offenders as opposed to the retributive aspect. The proceedings in the Juvenile Courts that were first established were informal and due process rights were excluded. The case of Kent and In re: Gault introduced due process rights to the Juvenile Courts especially the rights to legal representation.
CHAPTER 3
INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF THE RIGHTS OF CHILDREN

3.1 INTRODUCTION

In this chapter international instruments in place that are specifically devised to provide for the protection of rights of children are explained.

3.2 THE CONVENTION ON THE RIGHTS OF THE CHILD 44/25 OF 1989

The primary guiding policy document with regards to the rights of children in the international plane is the Convention on the Rights of the Child, which Botswana ratified in 1995. The Convention was adopted and acceded to by the General Assembly Resolution 44/25 on 20 November 1989. The Convention came into force on the 2nd of September 1990. In its preamble the Convention also recognizes inter alia that the child, by reason of his or her physical and mental immaturity, needs special safeguards and care including appropriate legal protection before and as well as after birth.

The Convention defines a child as every human being below the age of eighteen years unless under the law applicable to that child, majority is attained earlier. This Convention therefore concerns itself with only those people who are of the age of eighteen (18) years and below and affords them all the rights and protections contained therein. Article 2 of the Convention tasks member states to respect, uphold and ensure that the rights contained in the Convention are protected in their respective jurisdictions without discriminations of any kind. It demands that member States take appropriate measures to ensure that the child is protected against all

\[48\] Preamble.
\[49\] Art 1.
forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child’s parents, legal guardians or family members.  

One of the most paramount directions contained in the Convention is that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative, the best interests of the child shall be a primary consideration”. This clause imposes an obligation on any body or organization dealing with children to consider first the best interests of the child and afford them primary importance. Article 3 further articulates that member States who are party to the Convention must take all appropriate legislative and administrative measures to ensure compliance with this provision.

Article 40 of the Convention provides specifically for children who come into conflict with the law. This provision sets out the rights that an accused child should be afforded when being processed in the criminal justice system. It guarantees procedural rights and due process to accused children who are embroiled in the criminal justice system and places a duty on the States that are party to the Convention to ensure compliance with the procedures and protections set out in this provision. More importantly it recommends measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

The Convention not only stipulates how children who come into conflict with the law should be treated at trial stages, but it also addresses issues to be taken into consideration when sentencing a child accused. The Convention expressly prohibits torture or other cruel, inhumane or degrading punishment. It states that neither capital punishment nor life imprisonment without the possibility of release shall be imposed on offences committed by a person below the age of eighteen (18) years of age. It further states that a child may only be detained as a matter of last resort.

50 Art 2.  
51 Art 3.  
52 Art 3.2.  
53 Art 40(3)(a).  
54 Art 37(a).  
55 Art 37(b).
In the event that a child accused is deprived of his or her liberty by an order of a court of law, the child must be treated with humanity and dignity and in a manner that takes into account the needs of a person his/her age and must be detained separately from adults.\(^{56}\)

### 3.3 United Nations Standard Minimum Rules for the Administration of Juvenile Justice 40/33 of 1985

Also known as the “Beijing Rules”, these are a set of rules that were adopted by the United Nations Assembly on 29 November 1985. They were later incorporated to the Convention on the Rights of the Child and as a result attained binding status. The Rules are formulated in such a way that they can be applied in different jurisdictions according to their respective legal systems and procedures. The Beijing Rules encourage signatory States to make efforts to establish in their respective jurisdictions, a set of laws, rules and provisions specifically applicable to juvenile offenders to meet the varying needs of child offenders and the needs of society whilst protecting the basic rights of children.\(^{57}\) Botswana having acceded this convention is bound by its imperatives. The Beijing Rules state that juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.\(^{58}\)

The Beijing Rules do not specifically state the recommended age of criminal capacity but rather provides that the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.\(^{59}\) As stated above, their incorporation in the Convention of the Rights of the Child gave them binding status and are, as a result, enforceable in the jurisdictions of the member States. The Beijing Rules guarantee procedural fairness,\(^{60}\) due process\(^{61}\) and diversion of child offenders to avoid them being processed in the criminal justice

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\(^{56}\) Art 37(c).

\(^{57}\) Rule 2.3 of the Beijing Rules.

\(^{58}\) Rule 1.4 of the Beijing Rules.

\(^{59}\) Rule 4 of the Beijing Rules.

\(^{60}\) Rule 6 of the Beijing Rules.

\(^{61}\) Rules 7 and 15 of the Beijing Rules.
The Beijing Rules also provide that a child offender may only be detained as a measure of last resort and for the shortest period of time, and they further list a number of dispositions available to the courts, which may be ordered. It is important to note that all the dispositions provided by the Beijing Rules emphasize and encourage rehabilitation rather than restitution and punishment.

3.4 United Nations Rules for the Protection of Juveniles Deprived of their Liberty 45/113 of 1990

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty addresses issues of management of juveniles whilst on detention. These Rules which Botswana has ratified were adopted by the General Assembly resolution 45/113 on the 14th of December 1990. They establish the minimum acceptable standards for the treatment of juveniles in detention for signatory States and outline the rights that must be afforded to detained child offenders. For purposes of enforcement of these rules, a child is any person a juvenile is every person under the age of 18, the Rule further demands that the age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty states that incarceration of juveniles should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. This rule instructs authorities to only detain child offenders when there is no other disposition available to them and for the shortest period possible, it aims to restrict situations in which a child may be detained. Rule 13 the Convention states that the deprivation of liberty should be effected in conditions and circumstances, which ensure respect for the human rights of juveniles. The Rules apply to all types and forms of detention facilities in which juveniles are deprived of their liberty. The United Nations Rules

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62 Rule 11 of the Beijing Rules.
64 Rule 18 of the Beijing Rules.
65 Rule 2.
66 Rule 11(a).
67 Ibid.
68 Rule 1.
69 Rule 15.
for the Protection of Juveniles Deprived of their Liberty guarantee due process to all detained child offenders. Juveniles who are detained under arrest or awaiting trial are presumed innocent and shall be treated as such.\textsuperscript{70}

The Rules promote and encourage the reformation of detained juveniles by providing that every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty.\textsuperscript{71} This provisions also aims to ensure that the child’s integration into society after release from detention will be productive because of the knowledge gained through the educational programmes provided. One of the vital provisions in the rules demands that every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated.\textsuperscript{72} Whilst in detention, a child must also not be subjected to disciplinary measures constituting cruel, inhuman or degrading treatment. Such treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned.\textsuperscript{73}

3.5 UNITED NATIONS GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY 45/112 OF 1990

These guidelines are also known as the “Riyadh Guidelines”. They were adopted and proclaimed by General Assembly Resolution 45/112 on the 14\textsuperscript{th} of December 1990. The Riyadh Guidelines recognize that the prevention of juvenile delinquency is an essential part of crime prevention in society. They offer a broad range of guidelines and comprehensive and plans to combat and prevent juvenile delinquency

\textsuperscript{70} Rule 17.
\textsuperscript{71} Rule 38.
\textsuperscript{72} Rule 49.
\textsuperscript{73} Rule 67.
and they aim to minimize circumstances that to lead to proliferation of delinquency amongst children.

3 6 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS OF 1966

The International Covenant on Civil and Political Rights was adopted by the General Assembly of the United Nations on 19 December 1966 and came into force on the 23rd of March 1976 and ratified by Botswana in 2000. It lays down a foundation of rights to be guaranteed to every person, it states that “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

This protection of rights includes children as well. The Covenant concerns itself with the rights to be guaranteed to all persons, but has certain provisions that provide for children who are in conflict with the law. The Covenant states that a sentence of death shall not be imposed for crimes committed by persons below eighteen years of age.

3 7 AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD CAB/LEG/24.9/49 1990


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74 Art 2 of the ICCPR.
75 Art 6(5) of the ICCPR.
of the child which reflected African concerns.\textsuperscript{76}

Article 17 of the African Charter deals specifically with the rights of children who are in conflict with the law. This article\textsuperscript{77} imports due process requirements into juvenile justice systems across Africa. It more importantly demands the separation of children from adults in their place of detention or imprisonment\textsuperscript{78} for their safety, protection and welfare

\section*{3.8 CONCLUSION}

There are a number of international treaties that Botswana has assented to and is bound by the above mentioned conventions that have a bearing on the rights of children in conflict with the law. The primary legal framework dealing with the rights of the child is the Convention on the Rights of the Child. It provides member states with the rights with which to frame their legislation relating to the rights of children in general including the rights of children who are in trouble with the law. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice which is also known as the “Beijing Rules” which have been incorporated into the Convention on the Rights of the Child set down the rules for member States on how to handle cases of juvenile offenders. It lays down the rules for administrators on how to process child offenders from the time they are charged to the sentencing stages. The United Nations Guidelines for the Prevention of Juvenile Delinquency are guidelines that are set to assist signatory states in combating juvenile crime. They give guidelines on how to detect problem that cause children to be delinquent and how to tackle those issues. The International Covenant on Civil and Political Rights furthers the rights of all people including children. The regional framework in place that binds the Government of Botswana is the African Charter on the Rights and Welfare of the Child. It reaffirms the principles contained in other international instruments.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{76} Kaima “The African Charter on The Rights and the Welfare of the Children A Socio Legal Perspective” 2009 Pretoria University Law Press 22.
\item \textsuperscript{77} Art 17.
\item \textsuperscript{78} Art 17(2)(a).
\end{itemize}
\end{footnotesize}
CHAPTER 4
CHILD JUSTICE SYSTEM IN BOTSWANA

4.1 CHILD JUSTICE IN BOTSWANA

Botswana is a signatory State to the Convention on the Rights and Welfare of the Child which means that it has undertaken to extend those rights contained in the Convention to all the children residing within the Republic by signing and ratifying the Convention. The Convention on the rights of the Child was adopted in 1989 and came into force in 1990. Before the Convention was adopted, Botswana already had a Children’s Act.79

4.2 THE 1981 CHILDREN’S ACT

The adoption of the Children’s Act of 1981 was a calculated move by the government of Botswana towards extending much needed protection to children after realizing the increase in child offending in the country. From 2002 to 2003 the number of children in conflict with the law increased from two hundred and one (201) to four hundred and three (403), in 2004 the number increased again to eight hundred and eighty eight (888) and the number escalated even further in the year 2005 to a record one thousand two hundred and fifty seven (1257).80 The Children’s Act of 1981 provided protection to all children in general but also included provisions in the Act that provide for children who are in trouble with the law.81 The Act established the country’s first Juvenile Court in section 22. It further defined a juvenile as person who has attained the age of 14 years and is under the age of 18 years82 and therefore in terms of the Act, the Juvenile Court does not adjudicate on matters of persons over the age of 18 years.83

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80 Semommung “Reflections on Children in Botswana” 2010 1 Thari Ya Botswana 6 58.
81 Ss 22-33.
82 S 2.
83 S 22.
The Children's Act of 1981 provided for the operation of juvenile courts within the existing judicial structures. It also stipulated that a Customary Court could sit as a Juvenile Court. The Act also provided for the appointment of Juvenile Court officers, which were appointed by the Chief Justice and the Director of Public Prosecutions. Section 27 of the Act provided steps and procedures to be followed when any person has reasonable cause to believe that a child or juvenile has committed an offence. The Act however did not regulate or provide for the trial proceedings of an accused child, it only stated that a Juvenile Court shall be held informally and shall sit in a room other than that which any other court ordinarily sits. Another welcome change that was brought by the Children’s Act of 1981 was the exclusion of the public from the trial of an accused child as well as the prohibition of publication of any information relating to a case where a juvenile was an accused.

4.3 A NEW DISPENSATION OF CHILD JUSTICE IN BOTSWANA

The 1981 Children’s Act was promulgated nine years before the Convention on the Rights of the Child was adopted. After the Convention came into force in 1990, the Botswana Government sought to incorporate and domesticate the objects and provisions of the Convention on the Rights of the Child into national legislation in order to harmonise the relevant laws of the Republic with the Convention and thereby give binding effect to the provisions of the Convention. This undertaking manifested itself in the form of the 2009 Children’s Act.

In its preamble, the 2009 Children’s Act states that it is an Act to make provision for the promotion and protection of the rights of the child; for the promotion of the physical, emotional, intellectual and social development and general well-being of children; for the protection and care of children; for the establishment of structures to provide for the care, support, protection and rehabilitation of children; and for matters

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84 Ibid.
85 S 23.
86 S 24(1).
87 S 24.
88 S 25.
connected therewith.\textsuperscript{89}

The Child Justice Act\textsuperscript{90} governs Child justice in South Africa. In terms of the Child Justice Act, a child below the age of ten years does not have criminal capacity and cannot be prosecuted for an offence but must be dealt with in terms of section 9.\textsuperscript{91} Where a police officer has reason to believe that a child suspected of having committed an offence is under the age of ten years, he or she may not arrest the child and must, within the prescribed manner, immediately hand over the child to his or her parents or guardians. If no parents or guardian is available, the child may be handed over to a suitable child and youth care center.\textsuperscript{92} A child who is ten years or older but under the age of fourteen years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity.\textsuperscript{93} In terms of the Child Justice Act, every child who is alleged to have committed an offence must be assessed by a probation officer provided that the child and his/her parents or guardian have received a written notice, have been served with a summons or when a child has been arrested on suspicion of having committed an offence. The purpose of this assessment is to establish whether a child may be in need of care and protection.\textsuperscript{94}

The decision whether to prosecute a child over the age of ten years but under the age of fourteen years lies with the prosecutor assigned to the case. The Child Justice Act stipulates the factors that the prosecutor has to take into consideration when making a decision whether to prosecute a child accused or not.\textsuperscript{95} For a child older than ten years but below the age of fourteen to be prosecuted, the State has to prove beyond a reasonable doubt that the child could appreciate the difference between right and wrong at the time the alleged offence was committed and acted and acted in accordance with that appreciation.\textsuperscript{96} Where the age of the child is uncertain, the Child Justice Act provides the procedures and assessments to be

\begin{footnotesize}
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\item \textsuperscript{89} 8 of 2009.
\item \textsuperscript{90} 78 of 2009.
\item \textsuperscript{91} S 7(1).
\item \textsuperscript{92} S 9.
\item \textsuperscript{93} S 7(2).
\item \textsuperscript{94} S 35.
\item \textsuperscript{95} S 10(1).
\item \textsuperscript{96} S 11(1).
\end{itemize}
\end{footnotesize}
carried out when faced with such a situation.\textsuperscript{97}

The 2009 Children’s Act defines a child as any person below the age of 18 years\textsuperscript{98} and also states that a child under the age of 14 years shall not be presumed to have the capacity to commit a criminal offence unless it can be proved that at the time of committing the offence the child had capacity to know that he or she ought not to do so.\textsuperscript{99} The Penal Code\textsuperscript{100} provides that a person under the age of eight years is not criminally responsible for any act or omission\textsuperscript{101} and further stipulates that a person under the age of 14 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.\textsuperscript{102} The age of criminal responsibility set by the 2009 Children’s Act read with section 13(2) of the Penal Code is not in compliance with international instruments that demand that the age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.\textsuperscript{103} This means that a child below the age of 8 years is not capable of committing an offence which is too low and a child below the age of 14 years cannot be held criminally liable for any act or omission unless it can be proved that at the time of the commission of the offence he had the capacity to appreciate the consequences of his actions and knew not to carry out such conduct. Unlike the South African Child Justice Act, the 2009 Children’s Act does not make clear provisions as to the onus to be discharged when proving the criminal capacity of a child accused below the age of fourteen years. The 2009 Children’s Act also does not provide for situations where a child’s age not known or the procedure to be followed when trying to ascertain a child’s age. The Child Justice Act on the other hand in sections twelve to sixteen concisely lays down the procedure to be followed should the court be faced with such an issue.

\begin{itemize}
\item \textsuperscript{97} S 12-16.
\item \textsuperscript{98} S 1.
\item \textsuperscript{99} S 82(1).
\item \textsuperscript{100} [CAP 08:01] of 1964.
\item \textsuperscript{101} S 13(1).
\item \textsuperscript{102} S 13(2).
\item \textsuperscript{103} Rule 4 Beijing Rules.
\end{itemize}
4.4 ESTABLISHMENT OF A CHILDREN’S COURT

In terms of the 1981 Children’s Act, the Magistrate Courts and Customary Courts were empowered to sit as Juvenile Courts when hearing a charge against a juvenile.\textsuperscript{104} The 2009 Children’s Act introduced a slight change in the courts that are to entertain matters involving child offenders.

What the new 2009 Children’s Act has done is, it has removed the jurisdiction that was previously conferred on Customary Courts to hear matters involving child offenders now only Magistrate Courts can sit as Juvenile Courts. The Children’s Act of 2009 has established a new Children’s Court that entertains all matters involving children including matters where a child is accused of having committed an offence. In terms of the new Children’s Act every magistrate shall be a presiding of a Children’s Court.\textsuperscript{105}

The 1981 Children’s Act was silent on the status of the High Court with respect to cases of child offenders. This lacuna resulted in the unequal treatment of children whose matters were heard by the High Court because it was not given jurisdiction by the 1981 Children’s Act of to sit as a Juvenile Court. The proceedings were therefore conducted in a regular manner and the child accused treated as an adult when standing trial in the High Court. In the case of \textit{Outlwise And Another v The State},\textsuperscript{106} two juvenile applicants and three adult co-accused were charged with murder. The applicants were charged and arraigned separately from their adult co-accused but the matter did not proceed to trial in the juvenile court. Rather, two years after commission of the offence, the applicants were committed to the High Court for trial, together with their adult co-accused. At the commencement of the trial, the applicants sought a stay of their prosecution on the grounds that, in terms of section 22(3) of the Children’s Act\textsuperscript{107} it was obligatory that they be tried separately from their adult co-accused and that the state had delayed unduly in bringing them to trial.

\textsuperscript{104} S 22 of Act of 1981.
\textsuperscript{105} S 37.
\textsuperscript{106} [2010] 2 BLR 389.
\textsuperscript{107} Cap 28:04.
The High Court on appeal held that the discontinuance of the process commenced in the juvenile court was in violation of section 22(3) of the 1981 Children’s Act and was unlawful. The committal of the applicants for trial in the High Court were a nullity and the trial in the High Court could not continue. The 2009 Children’s Act clarified this issue by providing that nothing in the Act shall be construed as limiting the inherent jurisdiction of the High Court as upper custodian of all children. This means that when a High Court entertains a matter where a child is accused of having committed an offence, it shall sit as a Children’s Court and will therefore be bound by the provisions of this Act. This clarification has resulted in the equal and uniform treatment of child offenders in all judicial court in the Republic.

4.5 SITTING OF A CHILDREN’S COURT

Just like its predecessor, the Children’s Act of 2009 directs that a Children’s Court shall be held informally and shall sit in a venue other than that in which any other court ordinarily sits. This is the ideal position and not what is actually in practice. Due to financial restrictions, there are no separate infrastructures set up for the adjudication of matters involving children. The Children’s Court currently sits in the same court rooms utilized for adult offenders although the procedures are different so as to cater for the needs of children. In the case of State v Moseki held in the High Court, the accused was 17 years old and was charged with rape. He was convicted of common assault and sentenced to six months imprisonment wholly suspended. The matter was before the High Court on review of the sentence imposed by the Magistrate Court sitting as a Juvenile Court. The court stated that the court a quo should have constituted itself as a Juvenile Court and disposed of the case in accordance with the provisions of the Act which the court did. The pertinent issue that arose in the review was whether the magistrate imposed a proper sentence on the juvenile.

108 [2010] 2 BLR 389F.
109 S 39(1).
110 S 39(1).
111 1990 BLR 171 (HC).
The court held that a Juvenile Court has no power to impose a sentence of imprisonment on a juvenile and it is also not empowered to impose a suspended sentence. The conviction was confirmed by the High Court but the suspended sentence was set aside on the grounds that the Magistrate Court did not constitute itself as a Juvenile Court with respect to the sentencing of Moseki.

In the case of Khudung v The State\textsuperscript{113} that was decided two years prior to the case of State v Moseki, the High Court was also faced with a review of a Magistrate Court case where a juvenile was charged and convicted for office breaking and theft. The magistrate presiding over the case failed to put on record that the Magistrate Court was sitting as a Juvenile Court for the trial of Khudung. The High Court held that when a Magistrate Court is hearing a matter concerning a juvenile offender, the court must clearly state and put on record that it is sitting as a Juvenile Court.\textsuperscript{114} Under the dispensation of the 2009 Children’s Act, there is still no infrastructure built exclusively to sit as Children’s Court. The above mentioned cases decided under the regime of the 1981 Children’s Act still set precedent under the new Act because the Children’s Court sit in already existing infrastructures that are also used in the cases of adult offenders so a court acting under the provisions of the Children’s Act of 2009 also needs to put on record clearly and concisely when it is sitting as a Juvenile Court.

The Children’s Act of 2009 also directs that no person shall be present at any sitting of a Children’s Court except the officers and members of the court, the child concerned and his/her parents or guardians, the social worker concerned and such other person as the court may specially authorize to be present.\textsuperscript{115} This section shows a child rights-centered approach which international instruments demand. The Child Justice Act also demands that criminal proceedings held in respect of a child accused be held \textit{in camera}.\textsuperscript{116}

In South Africa, when hearing a case where a child is accused of having committed an offence, the child justice court must apply the relevant provisions of the Criminal

\textsuperscript{113} 1988 BLR 281 (HC).
\textsuperscript{114} Supra.
\textsuperscript{115} S 39(2).
\textsuperscript{116} S 63(5).
Procedure Act relating to plea and trial of accused persons.\textsuperscript{117} It is important to note that the court must have the requisite jurisdiction to entertain the matter.\textsuperscript{118} Where a child is charged jointly with an adult in a case involving the same facts, the court must apply the provisions of the Child Justice Act in respect of the child and the Criminal Procedure Act in respect of an adult.\textsuperscript{119}

\section*{4.6 INSTITUTION OF PROCEEDINGS AGAINST A CHILD}

The 2009 Children’s Act lays down the procedure to be followed when a child is suspected to have committed a criminal offence. The Act requires that any person having reasonable cause to believe that a child has committed an offence, make a report to a police officer in the district in which the alleged offence has been committed. If on receipt of a complaint, the police officer is satisfied that \textit{prima facie} an offence has been committed, the police officer must investigate the crime and cause a social worker to inquire into and file a report to the Children’s Court. After concluding his or her investigations into the alleged crime, the police officer shall refer the docket relating to the child’s matter to the Director of Public Prosecution who shall take such steps as are appropriate in respect of the matter.\textsuperscript{120}

An enquiry is held into the environment that the child grew up in by a social worker when a police officer is satisfied that a child has committed an offence. The Child Justice Act also requires that a preliminary inquiry be held in respect of any child who is ten years and older who is accused of having committed an offence.\textsuperscript{121} This approach is compliant with international standards that demand that the welfare and best interest of the child are of paramount importance which is why child offenders can not be treated the same way adult offenders are treated. Where a child is charged jointly with a person of the age of 18 years and over, the child shall, subject to the evidence, be given a separate trial from the other accused person.\textsuperscript{122}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{117} S 63(2).
\item\textsuperscript{118} S 62(1).
\item\textsuperscript{119} S 63(2).
\item\textsuperscript{120} S 81.
\item\textsuperscript{121} S 5(3).
\item\textsuperscript{122} S 83(2).
\end{enumerate}
\end{footnotesize}
offender aged 18 years and over, the trial shall be held in a Children’s Court.\textsuperscript{123}

To secure the attendance of a child at a preliminary inquiry the Child Justice Act empowers the police official assigned to the case to hand a written notice to the child, issue a summons to the child in the presence of his or her parents or guardian or to arrest the child in terms of section 20 of the Act.\textsuperscript{124} However, a child may not be arrested for an offence referred to in schedule 1 unless there are compelling reasons justifying the arrest.\textsuperscript{125} In compliance with international conventions, the Child Justice Act provides that when considering the release or detention of a child who has been arrested, preference must be given to releasing the child.\textsuperscript{126} This provision ensures that a child is detained as a measure of last resort.

The 2009 Children’s Act on the other hand does not make any specific provision for the arrest and detention of child offenders. The proceedings stipulated in Part XIV of the Act do not provide for the arrest and detention of child offenders before or during the trial stages. Since Botswana has signed and ratified the Convention on the Rights of the Child,\textsuperscript{127} Beijing Rules\textsuperscript{128} as well as the African Charter on the Rights and Welfare of the Child, the provisions contained in these Conventions should then be applied to fill in this vacuum and to avoid the police officials and the judiciary operating in a lacuna. These international instruments demand that children be detained as a measure of last resort, for the shortest possible period and separately from adults. The Child Justice Act is more specific in it provisions in this regard. It states that a child may not be arrested for a schedule one offence unless compelling reasons are present justifying the arrest.\textsuperscript{129} It also sets the conditions that a child offender may be arrested as well as the approach to be followed when considering the release or detention of a child offender.\textsuperscript{130}

\textsuperscript{123} S 83(3).
\textsuperscript{124} S 17.
\textsuperscript{125} S 20(1).
\textsuperscript{126} S 21.
\textsuperscript{127} Art 37(b).
\textsuperscript{128} Rule 13.1 of the Beijing Rules provides that Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.
\textsuperscript{129} S 20.
\textsuperscript{130} Ss 21-23.
Chapter two of the Constitution of Botswana contains the Bill of Rights. Included in the Bill of Rights are the provisions to secure protection of the law. These provisions aim to protect the rights of every person in the country charged with a criminal offence. The Constitution states that if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law. The rights contained sections 10 are due process rights that aim to curb arbitrary administrative practices by the police, government and judicial courts. Children in the Republic of Botswana are also protected by this Constitutional guarantee contained in the Constitution.

The 2009 Children’s Act does not provide in much detail the rights that a child offender has when facing criminal charges. Section 95 of the Act provides for the right to legal representation in the Children’s Court. A party may appoint a legal representative of his/her choice at their own expense or the State shall provide a legal representative for a party at the State’s expense if a party to proceedings in the Children’s Court cannot afford the cost of legal representation. The Act also grants the right to pursue appeals and reviews in the event that a party is dissatisfied with a decision or order of the court. It becomes clear that the Act is only listing these two rights because it is abiding by its position that a Children’s Court shall be held informally so as to prohibit the application of many court rules that the juvenile justice system seeks to dispose of in order to protect children. The Child Justice Act provides clearly the due process rights in the conduction of trials involving children.

The rights contained in section 10 of the Constitution read with sections 95 and 96 of

\[\text{Footnotes:}\]

\[131\] Constitution of Botswana 1966.
\[132\] S 10.
\[133\] S 38.
\[134\] S 63.
the 2009 Children’s Act comply with Conventions that Botswana has signed with respect to the rights of children in conflict with the law. The Beijing Rules also demand that throughout the proceedings, the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.

4.8 DIVERSION UNDER THE 2009 CHILDREN’S ACT

The Child Justice Act of defines diversion as the diversion of a matter involving any child away from the formal court procedures in a criminal matter by means of procedures established in terms of the Act. It can be understood as the channeling of children into appropriate reintegration programmes and services where the intervention of the formal court system is not necessary. Diversion assists in the rehabilitation of child offenders without having to put a child accused through the vigorous and adversarial formal procedures of a formal trial, resulting in the accused child not having a criminal record.

The Convention on the Rights of the Child provides that 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 must be utilized. The Child Justice Act makes provision for the diversion of children who are alleged to have committed offences. The Act provides that the objectives of diversion are to *inter alia* deal with a child outside the formal criminal justice system, encourage the child to be accountable for the harm caused by their actions, to meet the particular needs of individual children, promote the reintegration of the child back into society and their homes and to provide an opportunity to those affected by the harm to express their views on its impact on them.

A child may be considered for diversion at a preliminary inquiry or during trial after

136 Rule 15.1.
137 S 1.
138 Mbambo “Diversion: A central feature of the child justice system” 2000 2 Article 40 76 76.
139 Art 40(3)(b) of the Convention of the Rights of the Child.
140 S 51.
consideration of all relevant information.\textsuperscript{141} The Child Justice Act provides diversion in two options being; level one which applies to schedule one offences and level two which applies to schedules two and three offences which are considered the more serious than schedule one offences.\textsuperscript{142} There are diversion service providers that are accredited in terms of the Act that are authorized to offer diversion programmes to cases referred to them.

The Act sets out minimum standards that that diversion programmes have to meet in order to comply with the objectives of diversion. The diversion options are structured in such a way as to strike a balance between the circumstances of the child, the nature of the offence and the interests of society.\textsuperscript{143} The requirements of the diversion options are set out in section 55 of the Act. Once a child has been diverted and the diversion order has been fully complied with, a prosecution on the same facts may not be instituted.\textsuperscript{144} A diversion order made in terms of the Act does not constitute a previous conviction and a private prosecution in terms of the Criminal Procedure Act may not be instituted against a child who has been diverted in terms of the Child Justice Act.

Botswana having ratified the Convention is obligated to take all political, legal and administrative steps necessary to implement the imperatives contained therein. The children’s rights contained in the Convention have to be implemented and realized through legislative measures and policies. Unfortunately as it stands with the 2009 Children’s Act, diversion has not been accorded legal recognition. Unlike Botswana’s neighbor South Africa,\textsuperscript{145} Botswana has not promulgated legislation or provisions in clear and concise terms to provide for diversion of child offenders away from the criminal justice system.

The Beijing Rules also state that consideration shall be given, wherever appropriate to dealing with juvenile offenders without resorting to a formal trial by the competent

\textsuperscript{141} S 52.
\textsuperscript{142} S 35.
\textsuperscript{143} S 55(1).
\textsuperscript{144} S 59(1)(a).
\textsuperscript{145} Ss 59-62 of Act 75 of 2008.
authority.\textsuperscript{146} As already stated, the 2009 Children’s Act makes no provision that grants competent authorities to divert child offenders away from the criminal justice system, which it ought to do in order to comply with international instruments that the country is party to. The Beijing Rules further direct that in order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.\textsuperscript{147} The 2009 Children’s Act does make provision for such dispositions although these dispositions are only utilized after a child offender has undergone the vigorous trial procedures, has been convicted and is at the sentencing stage. Part XIV of the Children’s Act of 2009 provides the different ways a court may dispose of a case once it is satisfied of a child’s guilt.\textsuperscript{148}

In the case of \textit{Letsididi v The State}\textsuperscript{149} held in the Court of Appeal, a social workers report to which the court was referred to, recommended that the appellant be admitted to a reformatory institution or rehabilitation center which offers various counseling services to meet his needs. The \textit{court a quo} however did not comply with those recommendation and confirmed the sentence of 14 years imprisonment for the charge of murder because the appellant had previously been put on probation after being convicted of housebreak-ins and was also previously admitted to a school of industries after being convicted of several robberies. The sentencing of a child offender to a school of industries or community service in terms of the Act can only be done when a court is satisfied of the child’s guilt. This means that a child accused has to be put through the ordeal of trial first, the one thing that diversions seeks to do away with when dealing with child offenders especially those accused of committing minor offences.

The diversion of child offenders is an ideal way to deal with children who are in conflict with the law because it encourages a child offender to be accountable for his wrongdoing. This is so because before a child can be diverted he/she has to acknowledge their wrongdoing and consent to the diversion programmes ordered by

\textsuperscript{146} Rule 11.1 of the Beijing Rules.
\textsuperscript{147} Rule 11.4 of the Beijing Rules.
\textsuperscript{148} S 85.
\textsuperscript{149} 2010 1 BLR 18 CA.
the Juvenile Court. When a child offender is diverted he will not have a criminal record, which assists, in his re-integration with society and his family. Diversion therefore prevents the stigmatizing of child offenders, as their dignity will as a result not be impaired.

4.9 SENTENCING OF A CHILD OFFENDER IN TERMS OF THE 2009 CHILDREN’S ACT

There are several pieces of legislation in Botswana that govern the sentencing of child offenders. Section 7(1) of the Constitution stipulates that no person shall be subjected to torture or degrading punishment or other treatment. This protection from inhumane treatment is subject to an internal limitation clause which states that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution. The Penal Code provides that a sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.

In terms of the 2009 Children’s Act, the only competent courts to try cases of juveniles are the Magistrates Courts sitting as a Children’s Court and the High Court, which will sit as Children’s Court for purposes of hearing a matter where a child is accused of committing a crime. The only courts that have the jurisdiction to pass a sentence on a child offender is the Magistrates Court and the High Court sitting as a Children’s Court. Section 85 of the Act provides the different ways in which the court can deal with a child offender once it is satisfied of the child’s guilt.

150 S 51(1) of Act 75 of 2008.
151 S 7(2) of the Constitution of 1966.
152 Art 26(2).
Any sentence to be imposed on a convicted child offender in South Africa must be in accordance with chapter eight of the Child Justice Act. The Child Justice Act provides several sentencing options at the disposal of the child justice court. These sentencing options include community based sentences,\textsuperscript{153} restorative justice sentences,\textsuperscript{154} fines or alternative to fine,\textsuperscript{155} sentences involving correctional supervision,\textsuperscript{156} sentences involving compulsory residence in a child and youth care centre,\textsuperscript{157} and a sentence of imprisonment in terms of section 77. Before sentencing a child accused the child justice court must, in compliance with the Act, request a pre-sentencing report by a probation officer.\textsuperscript{158}

4 10  NON-CUSTODIAL MEASURES OF SENTENCING IN THE CHILDREN’S ACT OF 2009

A Children’s Court may, after conviction place a child offender on probation for a period of not less than six months or more than three years.\textsuperscript{159} The court may also sentence the child to community service for such a period as the court considers appropriate.\textsuperscript{160} Before making an order for probation under section 85, the court shall explain to the offender in ordinary language, and in the language that the offender understands, the effect of the order and that if he or she fails to comply therewith or commits another offence while on probation, he or she will be liable to be sentenced for the original offence as well as any other penalty which the court may consider fit to impose.\textsuperscript{161} A probation order is a competent sentence in terms of the Act and it can be varied or cancelled upon application by the child offender or the probation officer.\textsuperscript{162} The Act however, does not provide the grounds on which a child offender may apply for a probation order to be varied or cancelled. It is apparent that the decision of varying or cancellation of a probation order is at the discretion of the presiding judicial officer. The Children’s Court may also sentence a child to

\begin{itemize}
\item[\textsuperscript{153}] S 72.
\item[\textsuperscript{154}] S 73.
\item[\textsuperscript{155}] S 74.
\item[\textsuperscript{156}] S 75.
\item[\textsuperscript{157}] S 76.
\item[\textsuperscript{158}] S 71.
\item[\textsuperscript{159}] S 85(a).
\item[\textsuperscript{160}] S 85(c).
\item[\textsuperscript{161}] S 86(1).
\item[\textsuperscript{162}] S 87.
\end{itemize}
An order for community service is desirable because it re-integrates the child offender into society and teaches the child to be a productive member of the community. Section 26(2) of the Penal Code provides that sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.

Corporal punishment is one of the controversial methods of sentencing existing in Botswana today. The 2009 Children's Act provides for corporal punishment as one of the competent sentences that can be handed down by the Children's Court on a child offender. The Penal Code provides that no person shall be sentenced to undergo corporal punishment for any offence unless this Code or any other law specifically authorizes such punishment. In terms of the Penal Code a sentence of corporal punishment shall be inflicted once only and shall specify the number of strokes, shall be inflicted in accordance with section 305 of the Criminal Procedure and Evidence Act and may not be passed upon females, males sentenced to death and males whom the court considers to be forty years old and older.

It is clear from the directions of the Penal Code that corporal punishment shall not be inflicted on females irrespective of their age, males sentenced to death and any male above the age of 40 years. In South Africa, the Abolition of Corporal Punishment Act has abolished corporal punishment. The decision in the case of S v Williams and Others triggered the enactment of the Abolition of Corporal Punishment Act. Corporal punishment is therefore not a competent sentence that a court can impose in South Africa.

163 S 85(d).
164 S 26.
165 Supra.
166 33 of 1997.
167 1995 (2) SACR 251 (CC).
The Criminal Procedure and evidence Act\textsuperscript{168} provides as one of the methods of dealing with convicted juveniles that, any court in which a person under the age of 18 years has been convicted of any offence may, instead of imposing any punishment upon him for that offence (but subject to the provisions of section 26(2) of the Penal Code) order that he be placed in the custody of any suitable person designated in the order for a specific period. This order shall be granted provided that such order may be made in addition to the imposition of corporal punishment; and provided further than no order made in terms of this subsection shall direct that the convicted person shall remain in the custody in which he has been placed after he attains the age of 18 years.\textsuperscript{169} In terms of the Criminal Procedure and Evidence Act the caning shall be carried out in a manner and with a cane of a type approved by the Minister and shall only be inflicted on any convicted person when he has been certified by a medical officer to be fit for such punishment. Every sentence of corporal punishment shall be carried out privately in a prison or such a place that the Minister may consider proper for administering corporal punishment in traditional manner with traditional instruments.\textsuperscript{170} Section 305(d) of the Criminal Procedure and Evidence Act prescribes that corporal punishment shall not be administered in installments. In the case of \textit{Petrus and Another v The State}\textsuperscript{171} it was held that the provision of the Penal Code that makes it mandatory for a court to make an order for corporal punishment along with a prison sentence cannot be held to be inhuman or degrading especially where one considers the gravity of the offences in respect of which this term of punishment is prescribed.\textsuperscript{172} The decision of this judgment also declared the administering of corporal punishment in installments as inhuman.\textsuperscript{173}

There has been a growing concern from the international community on the legality of corporal punishment in Botswana. The Committee on the Rights of the Child stated:

\begin{quote}
"The Committee notes with deep concern that corporal punishment is permissible under the State party laws and is used as a way of disciplining children at home, as a\end{quote}

\textsuperscript{168}[CAP 08:02] The Act commenced on 1939.
\textsuperscript{169}S 304(1) of the Criminal Procedure and Evidence Act.
\textsuperscript{170}S 305 of the Criminal Procedure and Evidence Act.
\textsuperscript{171}1984 BLR 14 (CA).
\textsuperscript{172}Petrus v The State 41 F-H.
\textsuperscript{173}Supra 44D.
disciplinary measure by schools as stipulated in the Education Act and as a sanction in the juvenile justice system. The Committee strongly recommends that the State party take legislative measures to expressly prohibit corporal punishment in the family, schools and other institutions and to conduct awareness-raising campaigns to ensure that positive, participatory, non-violent forms of discipline are administered in a manner consistent with the child’s human dignity and in conformity with the Convention, especially article 28, paragraph 2, as an alternative to corporal punishment at all levels of society.”  

In its Concluding Observations of the Initial report the Human Rights Committee recommended that the State Party, which is Botswana, must abolish all forms of penal corporal punishment as it is in violation of Article 7 of the Covenant.  

The government responded to the Universal Periodic Review on the 17 of March 2007. In declining the recommendation to abolish corporal punishment the government stated:

“The recommendation is not accepted. The Government, however, has no plans to eliminate corporal punishment, contending that it is a legitimate and acceptable form of punishment, as informed by the norms of the society. It is administered within the strict parameters of legislation in the frame of the Customary Courts Act, the Penal Code and the Education Act.”

Despite pressure, the government of Botswana is not displaying any intention of abolishing corporal punishment and as it stands corporal punishment is a competent sentence that may be passed on male child offenders in the country.

4 11 CUSTODIAL SENTENCING

As already submitted, international instruments demand that a child should only be detained as a measure of last resort and for the shortest possible time. The 2009 Children’s Act, unlike the Child Justice Act, does not legislate for the arrest and detention of child offenders. Any sentence to be imposed on a convicted child offender in South Africa must be in accordance with chapter eight of the Child Justice Act. The Child Justice Act provides several sentencing options at the disposal of the child justice court. These sentencing options include community based sentences.
restorative justice sentences,\textsuperscript{178} fines or alternative to fine,\textsuperscript{179} sentences involving correctional supervision,\textsuperscript{180} sentences involving compulsory residence in a child and youth care centre,\textsuperscript{181} and a sentence of imprisonment in terms of section 77. Before sentencing a child accused the child justice court must, in compliance with the Act, request a pre-sentencing report by a probation officer.\textsuperscript{182}

When considering the imposition of sentence involving imprisonment, the Child Justice Act tasks the child justice court to take into account the seriousness of the offence, the protection of the community, the severity of the impact of the offence on the victim, the desirability of keeping the child out of prison and the previous failure of the child to respond to non-residential alternatives if applicable.\textsuperscript{183} A child justice court may not impose a sentence of imprisonment on a child who is under the age of fourteen years at the time of sentencing. The Act states that when sentencing a child who is fourteen years and older at the time of sentencing, imprisonment must be a measure of last resort and for the shortest appropriate period of time.\textsuperscript{184}

The 2009 Children’s Act lists imprisonment as one of the manners of disposing of a case where a court is satisfied of the child’s guilt where a child is a repeat offender.\textsuperscript{185} There are no measures in place to regulate the imprisonment of child offenders so as to ensure that a child is detained as a measure of last resort and for the shortest possible period. The Penal Code directs that a sentence of imprisonment shall not be passed on any person under the age of 14 years.\textsuperscript{186} There is also no specific provision in the Act of the imposition of life sentence on a convicted child offender although life sentence contradicts the internationally required standard of detention of child offenders as the measure of last resort and for the shortest possible period. The Act also authorizes the committal of child offenders to a school of industries for a period not exceeding three years or until the child has

\textsuperscript{178} S 73.
\textsuperscript{179} S 74.
\textsuperscript{180} S 75.
\textsuperscript{181} S 76.
\textsuperscript{182} S 71.
\textsuperscript{183} S 69(4).
\textsuperscript{184} S 77.
\textsuperscript{185} S 85(e).
\textsuperscript{186} S 27(1) of the Penal Code.
attained the age of 21 years.\textsuperscript{187} This institution is located in Molepolole and currently admits boys only. The school offers trades in carpentry, building, welding and fabrication and motor mechanics. The children admitted in the school are also provided with psychosocial support for emotional enrichment and to mould their characters to become responsible citizens.\textsuperscript{188}

It is submitted that there is no clear prohibition in the 2009 Children's Act for the prohibition of the application of statutory minimum period of imprisonment for child offenders. The absence of such provision in the 2009 Children's Act is a violation of international conventions that children be treated differently from adults. Section 27(4) of the Penal Code states that notwithstanding any provision in any enactment which provides for the imposition of a statutory minimum period of imprisonment upon a person convicted of an offence, a court may, where there are exceptional extenuating circumstances which would render the imposition of the statutory minimum period of imprisonment totally inappropriate, impose a lesser and appropriate penalty. The Court of Appeal under the dispensation of the Children's Act of 1981 previously held in the case of \textit{State v Molaudi and Others}\textsuperscript{189} CA that the imposition of the statutory minimum sentence by a Juvenile Court was unlawful.\textsuperscript{190} This decision by the Court of Appeal was decided in 1988, twenty-five years later this position was not incorporated into the new legislation governing children in conflict with the law. In \textit{Mfazi v The State}\textsuperscript{191} the appellant was appealing his conviction and sentence for rape on the grounds that the magistrate had erred in not considering that the appellant had committed the offence as a juvenile and ought to have been tried and sentenced as such. On May 2006 the appellant had raped the complainant at Bokaa village whilst her mother was out. The appellant at the time was 16 years old and at Bokaa Community Junior Secondary School whilst hid victim was 10 years old. By the time the appellant was brought to trial on 20 May 2008 he was 18 years old and employed as a laborer in a panel beating business. There was no reasonable explanation given to the court by the prosecution as to the delay in in

\begin{itemize}
  \item \textsuperscript{187} S 85(b).
  \item \textsuperscript{188} First Periodic Report to the African Commission on Human and People’s Rights “Implementation of the African Charter on Human and Peoples Rights”.
  \item \textsuperscript{189} [1988] BLR 214.
  \item \textsuperscript{190} \textit{State v Molaudi} 217H.
  \item \textsuperscript{191} [2009] 1 BLR 168 HC.
\end{itemize}
finalizing the case. In its judgment the court tried to elaborate what extenuating circumstance in section 27(4) of the Penal Code means. The presiding judicial in the judgment referred to a case of *R v Fundakubi*\(^{192}\) where it was held that extenuating circumstances encompass only factors that have a bearing on the accused’s moral blameworthiness in committing the offence.\(^{193}\) In passing judgment the court stated:

> “in the present case there is no room for the granting of a constitutional exemption. The grounds relied upon, namely the youth of the appellant, his first-offender status and his plea of guilty, are all usual factors raised in extenuation or in mitigation of sentence. They are neither rare nor unusual.”\(^{194}\)

The conviction and sentence of the appellant were then upheld. The court held that the appellant did not receive a sentence that which would not have been competent had he been tried on the date that he committed the offence. This means that had the appellant been tried at the age of 16 years which was the age he had committed the offence, the court would still not have departed from the statutory minimum sentence because the grounds relied upon by the appellant on appeal one of which was his youthful age do not constitute exceptional extenuating circumstances as contemplated by section 27(4) of the Penal Code. It is therefore submitted that statutory minimum sentences are applied to child offenders in Botswana. The application of the statutory minimum sentences on child offenders in Botswana negates the notion of incarceration as a measure of last resort and for the shortest possible time period. It also removes the internationally mandated distinction between children and adults and moves away from the reformatory principle of sentencing children and leans towards the retributive principle.

The Criminal Law Amendment Act introduced mandatory minimum sentencing into South African law in 1997.\(^{195}\) The Amendment Act sought to bring about uniformity in the sentencing of serious crimes and to also act as a deterrent for crime. Section 51 of the Amendment Act dictates minimum sentences for certain serious offences with

\(^{192}\) (3) SA 810(A).

\(^{193}\) *Mfazi v The State* 175E.

\(^{194}\) *Mfazi v The State* 175G-H.

the most serious offences attracting the most severe penalties.\textsuperscript{196} In terms of the Criminal Law (Sentencing) Amendment Act,\textsuperscript{197} prescribed minimum sentencing had limited application with respect to children below the age of eighteen years. The Amendment Act however, made it possible for the minimum sentencing to be imposed on offenders on children sixteen years and older but below the age of eighteen years and those below the age of sixteen were exempt from the provisions. This position was changed when the Constitutional Court confirmed the declarations of invalidity made by the North Gauteng High Court in the case of \textit{Center for Child Law v Minister for Justice and Constitutional Development, Minister for Correctional Services, Legal Aid Board and National Institution for Crime Prevention and the Reintegration of Offenders}.\textsuperscript{198} The Constitutional Court stated that the effect of the Amendment Act is to impose the minimum sentencing regime on sixteen and seventeen year old offenders in the scheduled categories, resulting in tougher sentences for them. It further stated that this removes the constitutionally mandated distinction between them and adult offenders, and require sentencing courts to start with the obligation to impose the minimum sentences and depart from these only in rare circumstances when substantial and compelling circumstances exist.

\textbf{4.12 CONCLUSION}

Botswana prior to enacting the 2009 Children’s Act had legislation that provided for children who were in conflict with the law. It was the 1981 Children’s Act. The 2009 Children’s Act was enacted to give effect to the rights contained in the Convention on the Rights and Welfare of the Child. Although the Children’s Act of 2009 is a step in the right direction for the country in the realization of the rights of children in the country, it still does not fully comply with the conventions that the country has signed. Botswana needs to import some provisions from the South African Child Justice Act into its 2009 Children’s Act to cover for the shortfalls in the 2009 Children’s Act.


\textsuperscript{197} 38 of 2007.

\textsuperscript{198} 2009 (11) BCLR 1105 (CC) 195.
CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

Botswana is a democratic country, which gained its independence in 1966. Since the country has been experiencing accelerated diversification both economically and politically. This development is also evident in the laws that the country is enacting and amending in order to comply with conventions that the country is party to. One of those legislations is the Children’s Act of 2009. Botswana first established a separate criminal justice system for children in 1981 after the promulgation of the 1981 Children’s Act.

A historical background on juvenile justice traces back to the United States of America in the State of Illinois when the Illinois Juvenile Court Act of 1899 was enacted. This Act established the first ever juvenile justice system which was characterized by its informal procedures and free system of evidence. It established separate courts that had exclusive jurisdiction over matters involving child offenders although there were instances in which the courts were allowed to waive their jurisdiction. One of the fundamental reasons for the establishment of a separate justice system for children was the separation of juveniles from adult because of the view that children lacked the capacity to appreciate the long-term consequences of their actions and hence needed protection from the harsh adult criminal justice system. The welfare of the children was of pivotal importance when the first courts were established and the Federal government tasked itself with acting as a just parent where juvenile offenders were concerned. Due process was excluded from the first Juvenile Courts so as to allow for a free system of evidence and to keep the proceedings informal. This position as changed however by the decisions in the cases of Kent and In re:Gault.

There are several international and regional conventions that Botswana is party to that have a bearing on the rights of children. The Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice cover more ground with regards to children who are in conflict with

The 2009 Children’s Act was enacted to give effect to the rights contained in the Convention on the Rights of the Child. It was a step in the right direction by the government of Botswana in addressing all issues pertaining to children and legislating to regulate those issues. Although the 2009 Children’s Act is an all-encompassing Act that deals with a broad range of children’s rights, it also makes provision for children who come into conflict with the law.

Although the Act is a great step towards the realization of rights of children who are in trouble with the law, it does fall short in some material aspects, in that, it does not fully comply with the international convention that the country has signed. The Act does not regulate the arrest and detention of child offenders especially at the pre-trial stages and during trial. This leaves a void in which police officials and courts operate in thus giving them too much discretion. The Act needs to specifically prohibit the arrest and detention of child offenders and include a provision that child offenders must be detained as a measure of last resort and for the shortest possible time as per the demands of the Beijing Rules and the Convention on the Rights of the Child.

It is recommended that the following actions should be taken by the Botswana government in order to improve the child justice system:

It is firstly recommended that Botswana import the provisions from chapter six of the Child Justice Act of South Africa that provide for the diversion of child offenders away from the criminal justice system into domestic legislation. Provision must be made in legislation for the diversion of child offenders away from the criminal justice system especially those charged with minor offences. Diversion will assist in the reforming of the child through diversion programmes such that a child offender will not be subjected to the stigma of having a criminal record.
Secondly it is recommended that, in addition to the school of Industries in Molepolole, Botswana should make use of service providers that specialize in reforming and taking care of child offenders (like BOSASA) in South Africa to relieve the overcrowding in the School of Industries and to better address the individual needs of child offenders.

In order to strive towards maximum compliance with international conventions, it is thirdly recommended that the government of Botswana must legislate measures to prohibit the use of corporal punishment in all institutions including schools. The imposition of corporal punishment as a competent sentence that a Children’s Court may order must be strictly prohibited. To achieve this, it is recommended that Botswana promulgate an Act similar to the Abolition of Corporal Punishment Act\textsuperscript{199} of South Africa.

It is in the fourth instance recommended that a pre-sentencing enquiry be made mandatory and included in the current legislation when sentencing child offenders so as to assist the courts in reaching a just sentence best suited for the child’s needs. In this way the mandated individualistic approach when dealing with children will be upheld. Botswana may take instance from section seventy-one of the South African Child Justice Act in this regard.

Fifthly, it is recommended that Government should also establish a sentencing guidelines committee which will be tasked with setting up guidelines and principles to be followed by the court when sentencing child offenders.

In the sixth instance, it is also recommended that parliament must legislate a provision that prohibits the imposition of life sentence on child offenders. Legislation must be enacted to prohibition of the application of statutory minimum sentences to the sentencing of child offenders as this violates the international requirement that children must only be detained as a measure of last resort and for the shortest

\textsuperscript{199} 33 of 1997.
possible time. The application of statutory minimum sentence to cases of children also negates the notion that children must be treated differently from adults.

In the final instance, it is recommended that in order to follow and make use of the Riyadh Guidelines, the Government should work hand in hand with non-governmental organizations to attempt to combat juvenile delinquency by setting up mentorship programmes, sponsoring sports activities when schools are closed and to create employment for the youth that is out of school.

It is advanced that the introduction of the above-mentioned recommendations will indeed improve the practical application of the juvenile justice dispensation in Botswana.
BIBLIOGRAPHY

BOOKS


JOURNALS

Ainsworth “The courts effectiveness in protecting the rights of juveniles in delinquency cases” 1996 6 The Future of Children 64

Cruise “Special Issues In Juvenile Justice” 2006 2(3) Applied Psychology in Criminal Justice 177


Howe “The meaning of Due Process of Law prior to the adoption of the fourteenth Amendment” 1930 18 California Law Review 583

Okpaluba “Constitutional damages, procedural dues process and the Maharaj legacy: A comparative review of the recent commonwealth decisions part 1” 2011 26 SAPL 256

Polacheck “Juvenile Transfer: From get better to get tough and where we go from here” 2009 35:3 William Mitchell Law Review 1163

Rubin “Juvenile Court System in Evolution” 1967 2 Valparaiso University Law Review
Sandefur “In defense of substantive due process” 2012 35 Harvard Journal of Law & Public Policy 283

Skelton “From Cook County to Pretoria: Along walk to justice for children” 2011 6 Northwestern Journal of Law & Social Policy 414

TABLE OF CASES

In the Application of Gault 387 U.S. (1967)

Joint Anti-Facist v McGrath 341 US 123 1951

Kent v United States of America 383 U.S. 541(1966)

Khudung v The State 1988 BLR 281 (HC)

Letsididi v The State 2010 1 BLR 18 CA

Mfazi v The State [2009] 1 BLR 168 HC

Outlwile and Another v The State [2010] 2 BLR 389

Petrus and Another v The State 1984 BLR 14 (CA)

R v Fundakubi (3) SA 810(A

State v Molaudi and Others [1988] BLR 214 CA

State v Moseki 1990 BLR 171 (HC)

S v Williams and Others 1995 (2) SACR 251 (CC)
TABLE OF STATUTES

Abolition of Corporal Punishment Act 33 of 1997

Children’s Act CAP 28:04 of 1981

Child Justice Act 75 of 2008

Children’s Act 8 of 2009

Constitution of 1966

Criminal Law (Sentencing) Amendment Act 38 of 2007

The Criminal Procedure and Evidence Act [CAP 08:02]

The Penal Code [CAP 08:01] of 1964
WEBSITES


INTERNATIONAL CONVENTIONS


International Covenant on Civil and Political Rights of1966

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty 45/113 of 1990


INTERNATIONAL REPORTS

Concluding Observations of the Initial Report the Human Rights Committee 24 April 2008, CCPR/C/BWA/CO/1


Initial Report 3 November 2004, CRC/C/15/Add.242

Universal Periodic Review 17 March 2007 A/HRC/10/69/Add.1