

# Juvenile Justice in Namibia: Law reform towards reconciliation and restorative justice?

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## *Abstract:*

Namibia is a newly independent nation, which in the wake of colonial oppression and foreign rule has yet to develop a comprehensive juvenile justice system. The current criminal justice system is informed by stereotyped common sense concepts of 'criminality' and 'the criminal'. Simplistic views undergirded by utilitarian arguments have put Namibia at odds with international instruments, such as the United Nations Rules for the Administration of Juvenile Justice (Beijing Rules) and the Convention on the Rights of Children (CRC), which have embraced a holistic perspective on juvenile crime and deviance. In the spirit of 'Ubuntu', a frame of mind prevalent in sub-Saharan Africa, which relates to a specific communal approach to the notion of people, Namibia has set forth to establish a restorative juvenile justice system. This endeavor has led to the drafting of the Child Justice Bill, which is under scrutiny in this article. The authors highlight the arguments behind the most important parts of the draft Bill, and assess the merits of the proposed law against the backdrop of international legal instruments and law reform projects of other countries.

## **I. Introduction**

In the aftermath of colonialism and apartheid, Namibia was left virtually without a real system to manage young people in trouble with the law. There were only limited provisions providing specifically for the management of young offenders, spread throughout a number of separate statutes. They include the Criminal Procedure Act 51 of 1977, the Children's Act 33 of 1960, and the Prison Act 17 of 1998. Apart

from a small number of statutory provisions addressing specifically young offenders, the law applied uniformly to adult and juvenile offenders, and adults and young persons were put through the same system, are tried by the same courts, and the same functionaries. In September 1990 Namibia ratified the United Nations Convention on the Right of the Child (CRC). In so doing Namibia accepted the obligation to establish laws, procedures, authorities and institutions specifically applicable to children in

conflict with the law. This was done against the background of the experience of the Namibian people under an inhumane political system in general, and a retributive, and rather archaic criminal justice system in particular. Apart from the CRC, the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs) contain the other international instruments addressing the issue of children in conflict with the law. In so far as Article 144 Namibian Constitution establishes a (modified) monistic system, which integrates general rules of the public international law, self-executing provisions of international agreements and the domestic legal system, it seems a strong argument that in particular the CRC takes precedence over earlier inconsistent legislation (law). However, in practice the effect of the international instruments remained insignificant, and there is still no single piece of legislation, which reflects the recognition that due to the special needs

of young people who come in conflict with the law it is necessary to provide special protection. This lack of differentiation *de lege lata*, between young persons and adults contradicts international standards and does not acknowledge sufficiently that preventive and repressive needs in case of young offenders are different from those that can be established for adults.

### **1. The current criminal justice system**

The current Namibian Criminal Justice System conforms most closely to the so-called **justice model** (Schulz, 2002b, 357, 365). General features include 'due process', crime control and retribution (Snyman, 1995, p. 24f). The present system, as far as the criminal law is concerned, is firmly based on the notion of retributive justice. It reflects a moralizing, though individualistic world-view, where for purposes of coercion and conformity the deviant actor is perceived as independent author of his/her actions, endowed with a degree of free will. If a rule has been contravened, the balance of the scale of justice has been disturbed and can be restored only if the offender is punished.

“The extent of the punishment must,..., be proportionate to the extent of the harm done or of the violation of the law” (Snyman, 1995, p. 20). The criminology of the criminal law of Namibia is rather simple. It is based on a number of unsophisticated assumptions as to the cause-effect-relationship between punishment/absence of punishment and the commission of crimes, which leads to a limited, and rather formalized way of consideration of developmental, socio-economical and other aspects in the context of criminality. The system denies largely the role of society in the commission of crimes. A prime example for this tradition is the recent Combating of Rape Act 8 of 2000, where a minimum sentence of 5 (five) years imprisonment for a conviction on rape has been prescribed. The Act is an important piece of modern legislation otherwise, but in terms of gender relations Namibia is a sick patient, and the relatively large number of sexual offenses, in particular sexual violence, violence against women and children is, from a sociological perspective a function of the disease. How harsh sentences and retributive justice can cure the disease has not been shown yet. The

Namibian legislator follows here the classical conception of crime, which is according to Bentham, that “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure” (Bentham 1970 [1789], p. 11). In particular because the system makes no distinction between young and adult offenders, it ignores pivotal research in criminology: Moral intellectual development theory (Kohlberg, 1969) complemented by considerations on information processing suggests, that the younger the actor, the less probable it is, that the sense of right and wrong informs always the actor’s behavior. When Piaget hypothesized on moral and intellectual development, he believed that people’s reasoning process develop in an orderly fashion, beginning at birth and continuing until they are 12 years or older (Piaget, 1932). According to Kohlberg (1969) people travel through stages of moral development, during which their decisions and judgments on right or wrong are made for different reasons. As children mature they are able to make use of more cues from their environment in action-control<sup>i</sup> and become more and more capable to handle all kind of situations in line with

normative societal expectations. The ramifications of the prevailing system do not reflect these insights in terms of distinct requirements and procedures.

## **2. Towards new horizons**

Upon advent of Independence the current criminal justice system was at odds with the reality of most of the Namibian people, living, even at Independence, largely ignored by legislative intentions of the German colonial and later apartheid administration. Be it the Children's Act 33 of 1960 or the Criminal Procedure Act 51 of 1977, targeted society, and targeted people were certainly not the indigenous population. German colonial and apartheid administration established a dual society of *us and them* (Nachtwei, 1976, p.59-62), and only if indigenous people, often *nolens volens*, crossed the barrier in between, they became subjected to the "white man's law" (Hinz, 2002, p. 197). Thus it does not come as surprise that most people consulted and interviewed in the different regions of Namibia "favored traditional courts over state courts" (Hinz, 2002, p. 197). Traditional courts were more accessible because people could speak their own languages in

them, they were also less costly than state courts, traditional judges were in a better position to assess cases brought before them because they were familiar with the local environment, and last not least, traditional courts applied the law known to the people.

It is not within the remit of this paper to shed light on the problems of law reform in Namibia, but one<sup>ii</sup> of the more important reasons why it took nevertheless 13 years since Independence, until the Namibian society embarks now on a serious attempt to write law reform with a piece of legislation that shall bring about a single, uniform, and comprehensive system for the management of young persons in conflict with the law, may be the fact that upon Independence the democratic power had still to be appropriated by the legitimate people. Whereas, formally, state power vested upon Independence in the people of Namibia, as much as Articles 66 and 140 Namibian Constitution secured the survival of the maze of pre-independence laws, substance, structure and application of this power reflected the life-world of former oppressors.

Since Namibia, as reference state-territory for the Namibian nation, developed only under colonial/apartheid rule, no alternative model for the normative horizon, which could have filled the void created if all “white man’s law” had been nullified upon independence, existed. No counter concept of how the society would look alike existed for the integration of the cultural variety of newly independent Namibia. The effect of Articles 66 and 140 Namibian Constitution was, however, that the apartheid legacy of legal positivism (Schulz, 2002a, p. 192) encroached the minds of elected and appointed office bearers representing ‘modern authority’ - the intermediaries between the traditional communities and the structures of the state (Hinz 2002, 200). Together with a prevalence of local ‘cultural positivism’, which in various ways informs for many still the acceptance of a status quo (though from another perspective, see: Fox, 2002, p. 317), and slowed down the reception of a generic solution-oriented approach to social problems (see: Fox, 2002, p.326), this makes law reform in Namibia a tenacious process. However, following Independence, the law of the state, i.e.

common law and statutory law, became more and more relevant for all sectors of society, and with that the shortcomings of the criminal justice system in respect of the treatment of young offenders became apparent.

Eventually, a couple of years after independence Namibia realized that something had to be done to address juvenile delinquency in a coherent and systematic approach. After the UN Committee on the Rights of the Child in 1994 concluded that

*“...as regards the system of juvenile justice in place in Namibia, the Committee is concerned as to its conformity with the Convention on the Rights of the Child, namely its Articles 37 and 40, .... “ (UN Committee on the Rights of the Child, 1994),*

Namibia set on track the Inter Ministerial Committee on Juvenile Justice (IMC) with the aim to remedy the situation on the ground. Together with a number of NGOs, other representatives of civil society and with the support of the Austrian Development Co-operation the transformation of the current order towards a structured and holistic juvenile justice system was begun with the aim to reduce delinquency in Namibia in a sustainable way. This Juvenile Justice

Program had ambitious objectives, inter alia:

- To develop laws to protect and safeguard the rights of children entrenched in the Namibian Constitution;
- to develop and expand the *service delivery system* to cater for all children in conflict with the law throughout the country and to broaden the net of diversion options to ensure that children are channeled to a program that responds to their need;
- to develop policies and interim guidelines to make the juvenile justice practice uniform;
- to develop a viable system for ongoing evaluation, research and monitoring.

Against the background of the understanding that the envisaged system as a preventative and remedial value has its own inherent limitations, and that its instrumental value would depend in the first place on a well developed service delivery system, the IMC commissioned in 2000 the drafting of a Juvenile Justice Bill. This was done with the aim to normatively cover not only criminal procedures, but also the different components of the envisaged *service delivery system*. The drafter incorporated the shared views, ideas and perceptions submitted by the various stakeholders,

and the outcome was discussed at workshops and conferences, aiming at the achievement of a broad consensus. The ongoing activities for the implementation of the Juvenile Justice Program, pilot studies, statistical data etc led to the perception of feasibility and desirability of certain structures and procedures as appropriate to the Namibian circumstances. Such outcomes have been (12/2002) integrated into the existing draft bill. On 8 May 2003 a follow-up meeting of Government Ministers, including 5 members of the Cabinet Committee on Legislation, took place with the aim to get broad governmental approval for the draft Child Justice Bill. Although this meeting occasioned some few, but nevertheless important changes of the draft, it is now expected that the Bill can still be tabled in 2003 in the National Assembly.

## **II. The Draft ‘Juvenile/Child Justice Bill’**

The idea behind the upcoming system, the proposed names is ‘Child Justice System’, is based on ‘reconciliation’ and ‘peace-making’. It is located at the extreme end of a continuum, which has at its opposite end hosts purely

retributive systems. The most important legal provisions of the draft under consideration are pertaining to *age and criminal capacity, police procedures and release policies, diversion, juvenile courts and sentencing.*

## 1. Age and criminal capacity

### Section 6 Draft Bill

- (1) It is conclusively presumed that a child under the age of ten years cannot commit an offence.
- (2) There is a rebuttable presumption that a child who is 7 years of age or older but not 14 years of age is incapable of committing an offence because the child does not have the capacity to distinguish between right and wrong.”

Until the follow up meeting of Government Ministers of 8 May 2003 the draft bill provided the amendment of the common law pertaining to the criminal capacity of children under the age of 14. According to the proposed structure of the draft, a child who had not attained the age of ten years could not be prosecuted. Only a child, who at the time of the alleged commission of the offence was ten years of age or more, but under the age of 14 years, would have been presumed not to have the ‘capacity to appreciate the difference between right and wrong and to act in

accordance with that appreciation’. This presumption, however, would have been rebuttable, and provided it could be proved beyond reasonable doubt that the offender had such capacity, the child might have been held criminally liable. Eventually, for any person who is 14 years or more the common law on age and criminal capacity was intended to remain unchanged. During the above meeting, it was however resolved that the common law as it stands should stay. The intended change was significant, but it appeared already during the negotiation process of stakeholders towards the Draft Child Justice Bill that the submission was not easily acceptable to all players in the system. In respect of a ubiquitous reflex, that societal order is intrinsically linked with the existence and performance of a criminal justice system, different views on age limits for criminal responsibility reflect different needs in terms of control, visibility of control, and feeling of security. During the process, in particular lawyers, and here are in the first place to mention prosecutors, did not always appreciate the raise of the age limit, and argued, that in the past there had been cases, where young offenders became authors

of violence, sexual violence, and even murder, and did in view of the court in fact not lack criminal capacity, and that in future the envisaged new *doli incapax* rule would prevent in such cases, that offenders may be brought to justice.

This is an important argument, which, to look beyond our jurisdiction, has drawn upon the attention of generations of policy makers and jurists all over the world. The concerns go far back in legal history, and already at the 27<sup>th</sup> Deutschen Juristentag 1904 it was pointed out, that any practitioner would confirm, that s/he had come across very young persons, who warranted the proverbial phrase: “*malitia supplet annos*” (Albrecht 2002a). Some scholars held, therefore, that due to the experienced and obvious variation in maturity of different persons a fixation of age limits for criminal capacity could not be appropriate. Against this background it is interesting that the Draft Bill did not stipulate that a person under the age of ten is presumed to have no criminal capacity, but that such a person ‘cannot be prosecuted for the alleged commission of an offence’. The relevance of criminal capacity for any further societal reaction would have been

authoritatively excluded. The rejection of the new raised age limit by Government Ministers must be considered as a serious set back for the law reform process.

The decision to establish a specific age limit for criminal liability is based on the consideration of a number of aspects besides the so-called crime control model. In the second half of the 20<sup>th</sup> century law Packer outlined the crime control model as one of two competing “models of the criminal process” (Packer, 1993). The alternative model, known as the so-called due process model, and the crime control model, reflect the tensions of crime control in a democratic society. The crime control model’s key issues are the apprehension and punishment of offenders and punishment of criminals. In contrast, in Packer’s terms, the due process model’s assumption is that the detection and prosecution of suspects are unreliable and fraught with error. Some of these errors may manifest bias, or prejudice triggered, as the case may be, by the seriousness of the act, other errors may be honest mistakes. According to the due process model, the criminal justice system’s primary purpose must be to

protect suspects from such errors. The due process model emphasizes procedural justice above anything else. As Packer put it: "The Due Process Model insists on the prevention and elimination of mistakes to the extent possible; the Crime Control Model accepts the probability of mistakes up to a level at which they interfere with the goal of repressing crime" (Packer, 1993, 21-22).

If the Namibian legislature were to find a balance between crime control and due process with regard to the management of young people in conflict with the law, it would have to take into consideration some stunning facts about the prevailing system: Research conducted in Namibia revealed that the presumption of innocence of many a young offender has been practically ignored, and which led in a huge number of cases to a presumably unlawful infringement on the right to fair trial (Article 12 Namibian Constitution). It has been revealed that, in those instances where the prosecution set out to prove criminal capacity, the test almost always focused on whether the child knows the difference between right and wrong and not whether the child had the ability to

act in accordance with the knowledge of that unlawfulness (Super, 1999, p. 56). This problem was to be addressed by the draft bill for children of ten years and more, but under the age of fourteen years. The debate about age, stage of maturity and criminal responsibility is a complex and controversial one. Whatever age is chosen will always be somewhat arbitrary. However, the decision to exempt young offenders under the age of ten from criminal liability reflected the commitment to a more sophisticated, holistic view of a 'just' society. This commitment embraces a broader perspective on social justice.

In this context the findings of developmental psychologists are of note. Usually, notwithstanding a cognitive comprehension of the difference between right and wrong, a young offender lacks the full appreciation of significance and impact of his/her offence. It could be shown that children at an early age (pre-primary school) acquire an understanding for moral norms with regard to their formal and universal applicability. Also, it appears that it is not only anxiety, and a conditioned reflex in connection with

reward and punishment, or compassion for others' suffering, which informs children's behavior. Nevertheless it became evident that this cognitive capacity did not correspond with the ability to act accordingly. Research also revealed that access to the moral knowledge base alone is not sufficient for norm-abiding behavior, but that a positive norm-affirmative environment that caters for the developmental needs of children, contributes, and importantly so, to the establishment of behavioral barriers against deviant behavior. Sociological research, but also the experience of social field work, has shed light on the fact that in the overwhelming majority of cases where children come into conflict with the law, the children have been brought up in an environment of relative, and most often even absolute, economic deprivation. In such situations, where life is deprived much of meaning, many are left in dire needs. This means less guidance, less control, less personal and less cultural continuity, which in accordance with Gottfredson and Hirschi's 'General Theory of Crime' leads to low levels of self-control and subsequently to more crime (Gottfredson & Hirschi, 1990, p.

89). The above should be compelling reasons for the raise of the age limit in comparison with the common law *doli capax/doli incapax* rules.

The resolution at the follow-up meeting of Government Ministers ignores these views, which were time and again emphasized during the hearings, and workshops with stakeholders. It now has to be feared that the Namibian society will miss the opportunity to take up its societal responsibility for primary crime prevention, and to abandon the idea that individuals who had not even had a chance to miss opportunities, should be treated as criminals. In this sense the new direction, which the process of law reform has been given, is at odds with Rule 5.1 of the Standard Minimum Rule for the administration of Juvenile Justice, under which the UN advocates the use of (modified) welfare models (Winterdyk, 2002, p. XXI). Notwithstanding the fact that the practical application of the *doli capax/doli incapax* rules hitherto led many times to gross injustices - an outcome which may be said can be avoided in the future - passing a Child Justice Bill, which leaves the common law on age and criminal capacity

untouched, symbolizes the public affirmation of prevalent social ideas and norms, namely the value of retribution and deterrence as a means of social control. The future law as now to be expected undermines the role of primary crime prevention, and may even hamper the law reform project, which is under way with regard to the children's act.

The Children's Act 33 Of 1960, hitherto the (unsatisfactory) instrument governing the administration of 'children in need of care or protection', shall soon be substituted by the Child-Care and Protection Act; the law reform project has produced a Bill, which since a couple of years (1998) is waiting to be introduced by the Minister of Health and Social Welfare<sup>iii</sup>. This law-reform project shall give child-care a new basis, and a new understanding. Whereas the interventionist character of the present Children's Act caused often inadequate measures being taken, and often too late, the new framework provides for an earlier intervention, but from different perspective. Under the current dispensation the question *what is in the interest of the child?* is largely answered against the backdrop of a white middle-class, bourgeois world-view, with a strong paternalistic moment. In line with international development of a person-centered understanding of rights, in particular children's rights consistent with the UN Convention on the Rights of the Child, the envisaged Child Care and Protection Act introduces a different notion of the best interest of the child: The best interests of the child are to

be interpreted in light of the "ascertainable wishes and feelings of the child concerned considered in the light of her age and understanding" (section 2 (1), (2) Child Care and Protection Bill). The purpose of the Bill emphasizes prevention: It is one of the primordial objectives, that families be assisted in solving problems which may affect the well-being of the family's children. With the envisaged Act, Government undertakes to help families supply their children with the basic necessities of life through empowerment rather than welfare wherever possible. In this line of thought the Bill makes it clear, that involuntary poverty on its own should not be treated as abuse or neglect. If a parent is simply unable to provide food for a child, despite the best efforts, the answer is to help the family; the removal of a child from the home should be a last resort (sections 29, 30 Child Care and Protection Bill).

As deplorable as the outcome of the ministers' meeting of 8 May 2003 may be, in view of the rather thoughtless application of the common law presumption of criminal incapacity in the past (Super, 1999, pp. 30, 31), the draft bill will address the burning problem, that in practice the operation of the presumption was often reversed. Under the Bill, and at the instance of the prosecution or the child's legal representative, an evaluation of the child in terms of his/her cognitive, emotional, psychological, and social development

must be ordered by the court. The intention of the drafter in this respect is clear. In practice, the presumption had been reversed, with the effect that children were held criminally liable and the absence of criminal capacity had by and large become the exception. Under the new law, the presumption shall be effectively revived. Against the background of international experience this should exempt the majority of young offenders from the application of the Juvenile Justice Act. Very often a large element in the offence by young offenders is their lack of judgment, their lack of experience, their lack of forethought. But also peer pressure or the controlling influence of adults, as well the significance of a conflict situation, play a role, and in many such instances one would conclude that the child was not capable to act in a different, law-abiding way (Albrecht, 2002a, p. 53).

Whether this will lead in the future to a majority of decisions where the child has been recognized as lacking criminal capacity depends on the availability of other than punitive alternatives. If the child lacks criminal capacity the only alternative option is the referral to a

children's court inquiry. The Children's Act applies in the first place to children "in need of care". In terms of the Child Justice Draft Bill it shall be indicative if the child has committed an offence, the purpose of which was to meet the child's basic need for food and warmth, or the abuse of dependence-producing substances. Therefore, under the circumstances of many young persons in Namibia today, the application of the Children's Act would be the natural choice. However, in the past the outcome of referrals to a children's court inquiry was often unsatisfactory. A personal communication to one of the authors from the commissioner of the children's court in Windhoek revealed that many children's court inquiries are thrown out of the court due to the fact that a social worker's report is not presented to the court within a reasonable time.<sup>iv</sup> Another factor will be that the options available to a child in need of care are very limited. The virtual void of a respective child-welfare service delivery system coupled with the perceived need to take action in terms of the criminal control mode, may create a tendency of the judiciary, to assume criminal capacity. The ongoing

establishment of a well functioning service delivery system as integral part of the upcoming child justice system may even reinforce this tendency.

Eventually, the presumption of criminal capability in respect of the age group 14 and older seems to establish a low age limit too. On the other hand, in countries, for instance Germany, where the (rebuttable) presumption of lack of capacity is extended to young offenders under the age of 18 years, in practice the duty to establish criminal capacity in each and every single case has always been considered as cumbersome, superfluous and negligible. In the overwhelming majority of cases the establishment of criminal responsibility does not take place, and unless there are obvious reasons for doubt, judges, prosecutors and also defense counsels, work on the assumption that the accused had the required capacity. This might not always be in line with the purpose of the law, but to follow the law at the bottom of the letter, would in the less serious cases mostly seem inappropriate. Besides, the normative acknowledgement of criminal responsibility for persons of the age

group 14 and older reflects a general expectation in terms of developmental aspects of independence and participation of young persons. In this respect, the result that a young person lacks criminal capacity can even be stigmatizing, and because of its symbolic nature contra-productive (Albrecht 2002a).

#### *International comparison*

With a retained minimum age of 7 years Namibia will still be located amongst those countries with a relatively low age requirement. Most of the developed countries define the age limit at about 13 to 14 years (Winterdyk 2002, xii – xiii). But there are countries like for instance Ireland, or Switzerland and the United States of America, where criminal liability may also be imputed as from the age of 7 years (Backmann and Stumpf, 2002, 367). And there are countries, where movements lobby for decreasing the age of criminal responsibility, for instance Germany (Albrecht, 2002b, 173). On the other hand recent legislative reform in Africa follows clearly the trend towards increasing the age of criminal capacity in line with the majority of developed countries. In the Uganda Children's Statute, the age of

criminal capacity has been fixed at 12 years (article 89); it had been 7 years previously. In Ghana, the proposals for a Children's Code recommended that "the minimum age of criminal responsibility shall be fourteen years" (Report by the Ghana National Commission on Children 1996 Part VII article 1). Namibia, by all means, would do better if it were to follow countries, having established higher age limits. However, Namibia will seemingly not comply with the Beijing Rules (Rule 4), which recommend that when states establish such an age of criminal capacity, "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". That the age limit of 7 years would not be in line with Rule 4, may be derived from the frequent criticism of the Committee on the Rights of the Child against countries that have established minimum age of criminal capacity of 10 years or younger.

## **2. Police procedures and release policies**

The way in which the draft bill addresses police procedures and release policies tackles burning issues of the current

criminal justice system. This refers to the problem of timeous conclusion of criminal proceedings, the problem of lengthy periods of pre-trial detention, and the manner in which pre-trial detention is carried out. Arrest and detention are the primary methods of the current system of securing the attendance of children in court. International rules provide that children awaiting trial should be detained only as a last resort. Although Namibia is signatory to these international instruments, detention of arrested children is the norm in Namibia. The law also does not make provision for all arrested children to be kept separate from adults. Consequently, though there is a standing order that all arrested children to be kept separately from adults, this happens only at some few police stations, especially not where and when police cells are overcrowded.

Practice has revealed that extended periods of pre-trial detention of several months can be observed (Albrecht, 1997). The adverse results of institutionalization and the undesirability of separation of children from their families, which inhibits reintegrating of the child into society linked with long

pre-trial detention periods are even reinforced with most, if not all of the police stations in the country not running any program with the children. Under the current system a police may release an accused only in terms of s 56 CPA on written notice to appear in court, or in terms of s 59 CPA on bail. Both sections are, however, only of very limited application. A notice is primarily meant for minor offences, i.e. offences for which the court would not impose a fine in excess of N\$300, and release on bail may only be considered in respect of specific offences, in particular not with regard to offences referred to in Part II, III or IV of Schedule 2 of the Criminal Procedure Act 51 of 1977. Although this leaves still a considerable margin of discretion, in practice both provisions have not been made extensive use of. The draft bill, in line with the diversion options discussed hereafter, tends to reverse this practice. The power of police to arrest a child has been considerably modified, if not curtailed:

Section 12

- (1) A police official may not arrest a child for offences referred to in Schedule (1) and must consider any of the alternative methods of starting a proceeding referred to in section 11 (2).
- (2) ....

The draft bill provides not only for the administering of a caution to the child instead of starting a proceeding against the child. A police official may also not arrest a youth for an offence referred to in Schedule 1 of the draft bill, such as assault without grievous bodily harm being inflicted, malicious injury to property, trespass, or ordinary theft, conspiracy, incitement or attempt to commit any of the offences mentioned here, anymore. Schedule 1 in particular, refers to offences, which constitute the core area of child delinquency. Even in cases where the child is suspected to have committed an offence referred to in Schedule 2, this schedule includes most of the remaining offences, but excludes murder, rape and certain cases of robbery, a police must consider alternative methods. A police may arrest the child only if s/he believes on reasonable grounds that arrest is necessary to prevent a continuation or a repetition of the offence of the commission of another offence, to prevent concealment, loss or destruction of evidence relating to the offence, or that the youth is unlikely to appear at a preliminary inquiry before a juvenile

justice court in response to a summons or an attendance notice.

Should the child have been arrested, the draft bill provides peremptorily, that further detention must be carried out in such a way that a child must be detained separate from adults and separate from persons of the opposite gender. However, in principle police shall release a child accused of an offence referred to in Schedule 1, before the child's appearance at a preliminary inquiry (infra), from police custody into the custody of the child's parents or an appropriate adult. In consultation with the Prosecutor General a police may also release a child from police detention, who is accused of an offence referred to in Schedule 2.

With regard to the gross violations of children's rights during detention, the draft bill states authoritatively that the child must, whilst in detention have access to adequate food and water, medical treatment, reasonable visits by parents, guardians legal representatives and alike, reading and educational material, adequate exercise, and, importantly, that the child must be

provided with adequate clothing, sufficient blankets and bedding.

#### *International comparison*

The draft Bill places Namibia directly in line with international principles regulating police powers and duties in relation to juvenile justice. Article 37 (b) CRC stipulates that arrest, detention and imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. The draft Bill emulates the CRC and goes even a step further because according to section 12 (1) draft Child Justice Bill a police may not arrest a child for an offence referred to in Schedule 1 (supra). To the extent that the draft Bill orders for any other case that consideration must be had of any alternative methods of starting a proceeding at a preliminary inquiry, the envisaged law will turn around the assumption, deeply entrenched in the Namibian criminal justice system, that the alleged commission of an offence warrants in principle always the arrest of the suspect. Not only the adverse results of institutionalization, and further introduction into delinquency will be averted, the constitutional presumption

of innocence will eventually be taken seriously.

### **3. Diversion and preliminary inquiry**

Diversion is understood as the “channeling of prima facie cases away from the criminal justice system on certain conditions.” (SA Law Commission. Discussion Paper 79, Project 106: Juvenile Justice, p. 139). Under the current system, no specific provision for diversion, no guidelines ensuring uniformity of diversion in Namibia exist. Although, the General Prosecutor as *dominus litis*, s. 6 CPA has the power to decide whether to dismiss, or indict criminal cases, which includes logically also the option to withdraw charges under conditions of diversion, this has not become very instrumental. Despite the fact that the Prosecutor General gave permission for diversion in October 1997, a lack of uniformity in the way children are assessed in preparation for decisions concerning diversion has led to a situation where not all children in Namibia receive the same treatment, and where available, diversion options are not recognized.

#### Section 46

The object of this Chapter is to set up diversion options to deal with a child of 10 years or older who is alleged to have committed an offence in order to divert the child from the court’s criminal justice system.

#### Section 47

The purposes of diversion under this Part are to –

- (a) ... (b) ...
- (h) facilitate dealing with unlawful behaviour of a child within the community and without government intervention or criminal proceedings.

The draft bill strives to remedy most of the shortcomings of the current system. In terms of the draft bill a child may be considered for diversion provided certain requirements are met. The voluntarily acknowledgement of responsibility for the alleged offense is one of the prerequisites for the child entering the diversion process. The most important aspect of the draft bill, however, is that each and every child has a right that diversion must be considered, if the formal requirements are given.

Whether the child actually enters the diversion process, depends on the outcome of a preliminary enquiry, presided over by an inquiry magistrate, which has the objective to establish whether the matter is appropriate for diversion and to identify a suitable diversion option. Through the

preliminary enquiry the state appropriates the process of diversion, or at least channels the itinerary in a formal way. This must not be seen as directed against diversion per se, rather to safeguard against the effect of net-widening with its possible encroachment on due process rights of the child. The envisaged procedural sequence entails that an assessment of the child precedes the preliminary inquiry. Upon apprehension of a child suspected of the commission of an offence, a police official has to notify a youth/child worker for that an assessment of the juvenile can take place as soon as possible. One of the purposes of assessment is to establish the possibility of diversion of the case. The assessment report informs, together with other data introduced into the preliminary inquiry the basis for the decision whether the matter can be diverted. It is, however, envisaged that the inquiry magistrate may only make an order regarding an appropriate diversion option or options, if prosecution indicates that the matter can be diverted; in the final analysis the prosecutor remains *dominus litis*.

Based, and importantly so, on the experience with diversion options

available in Namibia since the permission from the Prosecutor General to implement diversion, but not without taking into consideration experience had in neighboring countries, in particular South Africa, the draft bill provides a range of diversion options, set out in three levels. Different diversion options allow for an individualized process, with best prospects for success. Level one diversion options are for instance a formal caution with or without conditions, referral to counseling or therapy, the symbolic restitution, or the restitution of a specified object to the victim/s of the alleged offense. Level two diversion options include community service of some kind or other, but also the payment of a compensation, the provision of some service or benefit to a specified victim, the referral to appear at a family group conference, or a victim-offender mediation. Level three diversion options are more onerous, applicable only in respect of a child 14 years and older. Here referral to programs with a so-called 'residential' element is also possible.

The family group conference and the victim offender mediation allow for

inclusive ways of dealing with the matter. Any specific experience with the diversion option family group conference does not exist yet in Namibia, but *The Bridge Project*, an NGO for youth work and one of the pillars of the current informal implementation of a juvenile justice system, in Mariental a smaller town in the Southern part of Namibia, is about to start a pilot project. It is hoped that the pilot project generates sufficient insight in how the local context informs this diversion option. In both procedures, family group conference and victim offender mediation, victim and offender may become involved, which allows not only the offender to be forgiven for apology and repentance, but also the victim to get a better understanding of their experience of the crime. The family group conference is an example of 'reintegrative shaming' (Braithwaite 1989). The conference serves as a reintegration ceremony. Like in the case of victim offender mediation, victims and offenders are put in a central place in trying to right the wrong, which has been caused by the offence.

#### ***International Comparison***

The significance of the UN Convention on the Rights of the Child with regard to juvenile justice is that it has elevated diversion to a legal norm (Article 40 (3) (b) CRC), which is binding on Namibia since ratification. With the proposed draft Bill Namibia undertakes to introduce basically the full range of diversion options currently suggested by professionals and experts. With the introduction of the family group conference model, which had been in use for some time in New Zealand, and the victim offender mediation, Namibia eventually recognizes that the etiological process towards deviant behavior has its roots very often in the nearer social environment of the offender, and has to be given meaning not only in relation of the offender and the state.

#### **4. Juvenile (child) justice courts**

##### Section 85

- (1) A child justice court is a court at district court level which must adjudicate on all cases referred to that court in terms of this Act, .....
- (5) The child justice court and the presiding officer of the court must be designated by the Chief Magistrate of each magisterial district and such court must, as far as is possible, be staffed by specially selected and trained personnel.

Chapter 8 provides for the establishment of the Child Justice Court. The establishment of Child Justice Courts at district court level, apart from ordinary magistrate's courts, will be a *novum* in Namibian legal history. The prerogative of the prosecution to determine the court, which shall hear the case, is curtailed under the draft bill, and it is envisaged that preference must be given to referral to the child justice court. One provisions of the draft deserves particular attention. It is planned that child justice courts, as far as possible, must be staffed by specially selected and trained personnel. In practice the provision will be rather of a programmatic nature. But the clause is commendable, because it is an acknowledgement in principle, that young persons are not just little adults. Young persons have special needs in respect of communication, but also participation in the proceedings. Often such needs are not acknowledged by ordinary persons, which are not sensitized to such issues.

***International comparison***

A wide variety of models, which establish juvenile court systems are to be found in international literature. Over the last two decades, however, most

international examples of juvenile justice legislation are characterized by the creation of a separate court system for children in trouble with the law. Examples in point are India, Uganda, New Zealand, and Canada. Although still many shortcomings are deplored in respect of the system (DVJJ Juvenile Justice Reform Commission Final Report 2002, 27), Germany has experienced the advantage of the establishment of a special youth court, where in principle judges and prosecutors, specially trained in youth matters, are responsible for the youth adequate process (Roessner and Bannenberg, 2002, 71).

**5. Sentencing**

Section 103

Upon conviction of a child a court must impose a sentence in accordance with the provisions of this chapter.

Section 104

- (1) Upon conviction of a child a court must request a pre-sentence report from a child worker or any other suitable person before imposing a sentence in terms of this Act. ... A child justice court is a court at district court level which must adjudicate on all cases referred to that court in terms of this Act.....

Section 105

The purposes of sentencing in terms of this Act are to -

- (a) Encourage the child to understand the implications of and be accountable for the harm caused;
- (b) Promote an individualized response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused by the offence;
- (c) Promote the reintegration of the child into the family and the community; and
- (d) Ensure that any necessary supervision, guidance, treatment or services, which form part of the sentence can assist the child in the process of reintegration.

Section 108

- (1) A sentence involving a compulsory residential requirement may not be imposed upon a child unless the presiding officer is satisfied that the sentence is justified by –
  - (a) the seriousness of the offence, the protection of the community and the severity of the impact of the offence upon any victim; or
  - (b) the previous failure of the child to respond to non-residential alternatives....

An analysis of a random selection of closed cases, which were dealt with at the Windhoek Magistrate's Court from 1995 – 1997 brought to light that in many instances there is no correlation between offence committed and sentence imposed (Super 1999, 58). It is held that the personal circumstances of an accused young offender are often not taken into account when sentencing, and that the decision on sentencing seems to be based on the nature and seriousness of the offense alone. This is partly due to

the fact that presiding officer, prosecutor, and, if the child is legally represented, the defense lawyer, are not trained, and have not pedagogic background. Another factor, contributing to this kind of sentencing is the fact that a pre-sentence report is not always requested, or within the time limit allocated for its compilation, not available. This means that the magistrate is not in a position to properly assess the case before him/her. For the envisaged system the draft bill stipulates imperatively, that upon conviction a court may only dispense with a pre-sentence report if the conviction is for an offence mentioned in Schedule 1.

Sentencing is linked to diversion as well as to the principles and values underlying a juvenile justice system. The draft Bill includes restorative justice, proportionality and limitations on the restriction of liberty. Restorative justice has been described as a theory of reconciliation, rather than a theory of punishment. The decision for restorative justice informs the whole Chapter 10 of the draft Bill. Apart from the necessity of a pre-sentence report, a court may impose a sentence involving a compulsory detention in a residential

facility only under very narrow conditions. The draft Bill provides that if a restorative justice sentence fails or is not carried out, the child must “appear before court in order to impose an appropriate sentence” (section 107). The draft follows here a recommendation by the South African Law Commission (1997, 60) in respect of the South African law reform project. The advantage would be not only to encourage, but also ensure maximum consideration of alternative sentencing.

## 6. Application of the draft Child Justice Bill

### Section 2

- (1) This Act applies to any child in Namibia, irrespective of nationality, country of origin or immigration status, who –
  - (a) is alleged to have committed an offence; and
  - (b) was under the age of 18 years at the time of the alleged commission of the offence
- (2) The prosecutor General or a designated prosecutor may direct that the proceedings in terms of this Act be followed in respect of a person who is over the age of 18 years but not over the age of 21 years, and who is alleged to have committed an offence jointly with others, the majority of which are children; ...

According to the draft bill the normal point of transition from the juvenile to adult justice system should occur at the

age of 18. Only in respect of a person who is 18 years or more but not over the age of 21 years, and who is alleged to have committed an offence jointly with others, the majority of which are younger than 18, the prosecution may direct that the proceedings be followed in terms of the juvenile justice bill. This provision is, however, purely based on procedural considerations, and supposed to protect the interests of the young person allegedly having committed an offence jointly with an adult. Under the current system, and in the absence of a similar provision, in most cases where adults and young persons were suspected, the proceedings are conducted jointly against both adult and young offender at the same time. Amongst professionals working with young offenders, lawyers, social workers etc. there is a consensus that the transition between the envisaged juvenile system and the adult criminal justice system is too abrupt. Whether an accused is under the age of 18 years is often accidental. In particular when a group of young persons approaching the age of 18, act together, the one or other amongst them will cross the age bridge earlier than his/her peers. It appears arbitrary to

apply in the one case the juvenile justice law, but not in the other depending on the age of the majority. Although the symbolic meaning of coming of age may have an impact on the maturation process of the young adult, the age barrier of 18 does not correspond with the beginning of adulthood otherwise. The law as it stands, section 1 of the Age of Majority Act 57 of 1972, states: “All persons, whether males or females, attain the age of majority when they attain the age of twenty-one years.” Whereas this is a decisive and significant age barrier for the Namibian society, which occasions celebrations, to attain 18 years of age has no specific connotation.

Other bills currently under construction, also define a child being a person under the age of 18, but provision for flexible handling on the merit of the case is made. In terms of section 47 of the Child Care and Protection Bill (supra), orders for the benefit of persons of 18 years and older, but not older than 20, may remain in effect, or even be renewed or modified, provided that the grounds for the order, renewal or modification exist. In respect of the treatment of young offenders the view that a case by case management would be more appropriate

is not necessarily shared by all stakeholders, in particular not by protagonists of a strong crime control model. This seems to be another indication for that whenever society has to deal with a breach of presumably unswerving social standards, it reverts to reductive theories, and here in particular deterrence and just desert theories.

It seems that the draft bill has not incorporated the suggestion for the application of the legal consequences, provided with the draft bill, to all offenders under the age of 21<sup>v</sup>. If the abrupt transition from juvenile to adult justice is unsatisfactory, the question is, *How to deal with the problem?*

Different solutions are thinkable:

*First*, we may think of a model, which treats young adults in accordance with the legal consequences of the child justice law only, if the offender shows clear signs of maturational retardation, or the offence can be considered as typical for juveniles (s. 105 Youth Court Act/Jugendgerichtsgesetz [Germany]; Albrecht, 2002, p.192). *Another* model might suggest the application of the legal consequences, provided with the draft bill, to all offenders under the age of 21 (inclusive model). *Still another* model

prefers the exclusive application of child justice law to young offenders under the age of 18 years (exclusive model), but suggests the acknowledgement of young adulthood as a mitigating factor for sentencing. The Greek criminal law, Article 133 of the Penal Code, stipulates that the court may impose on young adults 18 years of age and older but not older than 20 years a lesser sentence than for adults (Chaidou, 2002, p. 195, 197).

The underlying arguments for the one or other solution are different. The first grounds in the consideration that young adults are sometimes, still, subject to the developmental forces which are characteristic for adolescents, who are then deemed to be malleable by those interventions which the juvenile justice system provides. This, however, should not be a sufficient reason to extend the application of the child justice law to all offenders under the age of 21 years. Developmental psychology holds that the development of behavioral patterns, and their underlying motives is usually not completed with attainment of the age of majority, and that the period between 18 and 21 years does not mark the transition from youth to adulthood (Roessner and Bannenberg, 2002, 73).

From a social perspective the attainment of adulthood would concur with economic independence, and/or founding of a family, thus incidents which may often only occur somewhere during the third decade of life (Roessner and Bannenberg, 2002, 74). The transitional periods, also in developing countries, have been prolonged under circumstances of modernity, and the entrance to the adult world has become more difficult for certain subgroups of juveniles (Albrecht, 2002, p.194). The second and third model, take the difficulties, which may arise from the application of such vague concepts like 'maturational retardation', or 'typical for juveniles' into consideration. To the extent that they include or exclude young adults from the application of the juvenile/child justice law, they do not only allow for a more uniform application of the law. In this respect they are more in line with constitutional requirements of the rule of law. The difference between them is, however, that the inclusive model opens the way for a more individualistic reaction. In our view this should be the preferred model. Under circumstances, where young people are largely affected by social

exclusion and poverty (Mufune, 2002, 179ff) the societal reaction needs to take into consideration the developmental impact of the offender's reality. This can only be secured, if the more flexible sentencing range of the juvenile/child justice system is applicable.

### **III. Law reform in perspective: reconciliation and restorative justice**

During recent years the binary of due process guaranties given by Article 12 of the Namibian Constitution (and already previously by various principles under the common law) and the CPA on the one hand, and the crime control model on the other hand, has come under strong critique. Not only because some people believed that the balance had moved far too much in favor of due process and at the expenses of crime control. It was repeatedly held that rights of offenders and rights of victims had to be brought in balance. Whereas some held that this meant simply a shift towards the application of retributive theories on punishment (O'Linn) and a re-emphasis on crime control, others felt with Christie (1977), that the state who has stolen the conflict between the offender

and victim, should return the conflict as much as this is possible under the circumstances of the modern state. The latter view opened the way towards an idea of restorative justice. In Sub-Saharan Africa, thus also Namibia, this coincides with what has become known as African Renaissance.

#### **1. African Renaissance**

The introduction of the notion of 'restorative justice' as reference criterion for the forthcoming juvenile justice system reflects the advent of an African Renaissance<sup>vi</sup>. Restorative justice lies at the heart of traditional African adjudication (Hinz, 1998). It emanates from the spirit of 'ubuntu', which holds that 'a person is a person because of other people. This frame of mind translates literally from Zulu language: "Umuntu ngumuntu nagabantu", but expresses the self-picture and tradition of all indigenous societies of Southern Africa; and Namibia does not make an exception (Isaak and Lombard, 2002, p.93/94). In particular in South Africa the notion of 'ubuntu' has been invoked as a powerful source of constitutional values. J Mokgoro points out in S v Makwanyane "(ubuntu) embraces the

key values of group solidarity, compassion, respect, human dignity, conforming to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasizes respect for human dignity, marking a shift from confrontation to conciliation.” This statement should have a significant impact on the Namibian legislature (see: Isaak & Lombard, 2002, p. 93ff).

## **2. Restorative justice**

Restorative justice programs address important criticisms leveled against the prevalent binaries of due process and crime control, or more precisely, it refers to the functional aspects of cognitive self-regulation.

This view on personality assumes that people take up goals and try to move towards them. To ensure that they are moving in the right direction, people monitor their progress. Life is a continuing flow of decisions, involving sensing, checking, and adjusting towards a network of (self-defined) goals (Carver and Scheier, 2000, 436ff, 497ff). The most important components of a restorative justice system are usually Life Skills Programs (LSP), Community

Service, Victim-Offender Mediation (VOM), and Family-Group Conferences. Assuming that law-breaking incidents reflect often distorted views of the offender on the cognitive triad, i.e. his/her self, the world and the future, a system of restorative justice aims at reducing cognitive distortions and resulting distress. The surface arguments for the above-mentioned components sometimes seem to be different, but a closer look reveals that they contain all an element, which allows cognitive restructuring or reframing:

Life Skills Programs address the child offender, and aim at assisting the child in making correct choices, even in difficult situations. LSP-principles thus correspond highly with the social cognitive perspective. Amongst others these principles cover the following: LSPs

- comprise an interactive and participatory process, involving all participants;
- are based on reality, i.e. takes into account the socio-economic and cultural circumstances within which the participants find themselves;
- do not aim to blame or judge but rather aim to create something positive about past events.

Community service is said to be not interchangeable with LSPs, because the primary function of community service should be “punishment by taking away leisure time” (Mutingh, 1994, 51). However, the integration of this measure in the social context of communities reconfirms also symbolically the ties between the individual and the social.

Victim-Offender-Mediation as one of the central planks of restorative justice means facilitating a dialogue (talk) between the victim and the offender. In as much as the objective is to work out an agreement between victim and offender, it requires intuition and skills on the side of the mediator. The dialogue places the incriminated action in perspective for both, victim and offender. It is this contextualization of an incident, which opens ways to mutual understanding and subsequently healing. One of the principles of VOM is to give the victim, and the offender, an opportunity to speak. To be able to talk about emotional feelings and experiences around the offence openly, allows the re-introduction of victim and offender to each other as persons in social context. The recognition of the other as a person rehabilitates victim and

offender as actors, who are not powerless, but who are deemed to be capable of managing their (social) lives. This means in part restructuring/reframing in the sense mentioned above. The same principle applies to the Family Group Conference in a more complex setting. It involves not only victim and offender but also their families and relevant community members. Disapproval of the offence is communicated, but the identity of the offender is preserved (or as the case may be restored) as good. Again, the (antisocial) act is placed in a historical, social and personal narrative, to which all participants contribute.

### **3. The Draft Juvenile/Child Justice Bill – a paradigm shift**

The discourse about a new juvenile justice system for Namibia has brought about a draft bill, which goes along with the principles of restorative justice. The draft bill makes provisions for Life Skill Programs, Community Service, Victim-Offender-Mediation, and Family Group Conference. Therefore, once the law was passed in Parliament, a paradigm shift will have taken place. Admittedly, the Prosecutor General remains *dominus*

*litis*, and without her approval diversion may not take place. This could be understood as counter-productive, because it leaves the system in the hands of the prosecution, traditionally inclined to value crime control and retribution more than restorative justice. Theoretically, the whole system could be suspended under the command of a reluctant protagonist of crime control and retribution. However, even after conviction of the child offender, the system remains foursquare within the coordinate of a restorative justice system. As was shown above, the purposes of sentencing are mainly to encourage the offender to understand the implications of and to be accountable for the harm cause, to promote an individualized response, and to reintegrate the offender into the family and/or community. Schedule 1 offences may not lead to a sentence of imprisonment, and 'Community based sentences' and 'Restorative justice sentences' (supra) do not seem to require approval by the prosecution.

#### **IV. Outlook**

In this paper no more than an aperçu of the envisaged 'Child Justice System' could be given. However, the paragraphs on diversion, juvenile courts and sentencing should have outlined the intentions linked to the draft bill. This concluding section shall allow some side-looks on the prospects of the envisaged system in reality.

##### **1. The Namibian project from an international perspective**

The Namibian Child Justice Draft Bill has not only borrowed from the South African law reform project on Juvenile Justice. But admittedly, it derived main ideas from the SA Law Commission's<sup>vii</sup> proposed Child Justice Bill. In as much as the South African Law Commission has been able to "consider the experiences of other countries as well as the approaches of various international instruments and initiatives adopted in the field of child/youth justice" (Skelton and Potgieter, 2002, 498), Namibia has followed suit: The new system will, with the exception of the *doli capax/doli incapax* rule, be built on internationally recognized standards.

## 2. Challenges ahead

The manifest objective of the upcoming Child Justice System is a sustainable reduction of child/juvenile delinquency in Namibia. The service delivery system, which needs to be put in place upon future promulgation of a Child Justice Act, addresses pressing problems arising from the sphere of primary crime prevention. But what lies ahead for the administration of youth justice depends on uncertain dimensions. The most challenging factors seem to be adverse effects of the current demographic development and subsequent economic decline. The question to be answered will then be whether the Namibian state can afford its child justice program. The probable increase of HIV/AIDS related death rate of the age group 15 – 49 would not only leave behind more orphans with all devastating effects on their upbringing, but also deprive Namibia's economy of a significant part of its workforce. Whereas the update 2000 of the UNAIDS/WHO 'Epidemiological Fact Sheet on HIV/AIDS' for Namibia reported an estimated number of adults and children living with HIV/AIDS for the end of 1999 of about 160.000, and an adult rate,

referring to men and women aged 15 to 45 of 19.5%, the latest 2002 update reports an estimated number of about 230.000, with an adult rate of about 22.5% (see also: The Namibian of 27.11.2002, p.1f). A persistent patriarchal and conservative culture has at least partly led to a situation where "apparently well organized health campaigns in the country...had only partial or no impact on the spread of HIV/AIDS...." (Fox, 2002, p.319). Namibia will, therefore, with a high probability, face a rupture of economic structures and a steady deconstruction of the social and cultural fabric (Jackson, 2002, pp.22-36). In terms of any sociological theory that emphasizes social structure, this means that society becomes a prime breeding-place for crime and deviance. Even if the negative impact of HIV/AIDS can be curbed, the new system is ambitious and requires a structural re-adjustment of government spending. The transformation of constitutional directions and obligations derived from international instruments (supra) into positive law, must not be confused with a strong determination to enforce the law. A prime factor for the well functioning of the law is its

manageability and the support by the institutions, which have to enforce it. It is here where the Service Delivery System anchors. The maintenance of a variety of diversion options, and the adherence to the principles of restorative justice require more than enthusiastic youth workers. It requires dedicated, skilled, and trained professionals endowed with and backed by a corresponding infrastructure. If we only have a look at the guidelines for the application of VOM and FGC, which are all based on practical experience, it becomes obvious that the requirements for success are resource intensive. In other words, if the service delivery system does not perform, the Act becomes meaningless.

Another challenge is the programmatic friction between the current criminal justice system and the envisaged child justice system, which in the future have to co-exist side by side. It has been claimed that sociological perspectives on crime have been less instrumental for the establishment of a separate child justice system than positivist-legalistic attitudes (Schulz, 2002b, p.372). The same proponents of a restorative humanitarian/welfare model

approach to youth justice revert to ‘just desert’ policies with regard to (adult) crime in general, as if a silent metamorphosis of the ontological character of crime takes place in the transition from adolescence and adulthood. The friction between both systems could become virulent, when the decline in youth crime, which is expected after the introduction of principles of restorative justice, will be absorbed by the effects of further deteriorating socio-economic conditions, ongoing modernization, urbanization and subsequent disintegration.

### **3. Chances**

The envisaged child justice system strives for a limited autonomy from the adult judicial system. It is evident that with regard to the establishment of a performing service delivery system as a center piece for diversion, and the provision of a shifting exit-point for the conversion of a case into a children’s court inquiry at any time, aid and assistance to children and families are not only considered in terms of crime prevention, but also in terms of youth welfare. The application of the

upcoming system offers chances under different aspects.

First, the dignity of young offenders as persons may be restored. As has been said above, under the current system, no consideration had been given to the specific circumstances informing youth delinquency. Young offenders had been treated against the backdrop of a concept of societal order and its instruments to safeguard this order, which was virtually disconnected from the life-world of young offenders. This would change with the new Act, which would allow, and prescribe, to deal with the child offender in accordance with his/her personality, and, with such needs in terms of personal development and welfare, as indicated by the incriminated act, and identified on occasion of the said act.

Second, the introduction of a system which departs from the tenets of classical theory, and which is based on the notion of restorative justice, revives the traditional concept of reconciliation and Ubuntu. Notwithstanding the fact, that there may be an abrupt transition from the application of the child justice system to the adult justice system at the age of 18 years, the notion may cause

repercussions beyond the co-ordinates of the child justice system.

Eventually, and this may be the most important point in terms of criminal policies, the general application of the system across the country may result in a significant reduction of youth delinquency. This may be seen as contradictory in respect of the expectation that due to the impact of declining socio-economic conditions a net-increase of youth crime will occur in the long run. However, the envisaged system is expected to perform better than the orthodox system under any collateral ecological and environmental conditions. As a consequence youth crime rates may be significantly lower than under the prevailing system.

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<sup>i</sup> Over the last two decades, research on the role of motivation and volition towards the enactment of intentions has led to an enhanced understanding of action- and self-control. Of not is here in particular the work by Heckhausen (1990), Kuhl (1987), and Kuhl & Fuhrmann (1998).

<sup>ii</sup> Another problem is certainly the lack of adequate human resources.

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<sup>iii</sup> Further information, and a full text of the draft bill can be obtained from the Ministry of Health and Social Services, Windhoek.

<sup>iv</sup> According to the Commissioner of the Children's court in Windhoek 1999/2000 saw only a single case of conversion (Personal Communication of May 2000). Similar information was given to Super for the year 1999, see: Super, 1999, p. 58.

<sup>v</sup> During the workshop one of the authors (Schulz) suggested the application of the sentencing guidelines of the Child Justice Bill to all offenders under the age of 21.

<sup>vi</sup> South African President, Thabo Mbeki is one of the African leaders, who constantly sought to bring the notion of African Renaissance on the political agenda. One of Thabo Mbeki's earliest public references to the African renaissance appears in his speech as deputy president – reproduced in his collection of speeches *Africa: The Time has Come* (1998: 201) – delivered at the Summit on Attracting Capital to Africa that was organized by the Corporate Council on Africa in Chantilly, Virginia, April 19–22 1997. In respect of the history of the term, see also: <http://www.africavenir.org/FR/fulltext/fulltext01.html#history>.

<sup>vii</sup> The South African Law Commission's website can be visited under <http://www.wits.ac.za/salc/salc.html>. It contains the report on juvenile justice submitted by the commission, which reports on and reflects the proposed Draft Child Justice Bill.