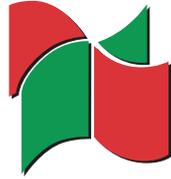




‘HEAR THEM CRY’

**An Analysis of State Violence Against Children
During the January 2019 Protests**

November 2019



Zimbabwe
HUMAN RIGHTS
NGO Forum

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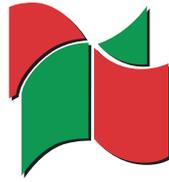


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Zimbabwe
HUMAN RIGHTS
NGO Forum

ABOUT THE FORUM

The Zimbabwe Human Rights NGO Forum (the Forum) is a coalition of 20 human rights organisations working towards the realisation of a society that respects all human rights in Zimbabwe.

MEMBERS OF THE FORUM

- Amnesty International - Zimbabwe (AI - Z)
- Catholic Commission for Justice and Peace – Zimbabwe (CCJP - Z)
- Civic Education Network (CIVNET)
- Counselling Services Unit (CSU)
- Gays and Lesbians of Zimbabwe (GALZ)
- Justice for Children (JC)
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- Zimbabwe Women Lawyers Association (ZWLA)

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ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child
CID	Criminal Investigation Department
DSW	Department of Social Welfare
JC	Justice for Children
JSC	Judicial Service Commission
LSZ	Law Society of Zimbabwe
NGO	Non-Governmental Organisation
NPA	National Prosecuting Authority
PTD	Pre-Trial Diversion
UNCRC	United Nations Convention on the Rights of the Child
VFS	Victim Friendly System
ZCTU	Zimbabwe Congress of Trade Unions
ZLHR	Zimbabwe Lawyers for Human Rights
ZNCWC	Zimbabwe National Council for the Welfare of Children
ZNA	Zimbabwe National Army
ZPCS	Zimbabwe Prisons and Correctional Services
ZRP	Zimbabwe Republic Police

FOREWORD

Since the advent of the ‘new dispensation’, violence has increased as reported in our ‘*New Deception Report*.’ In a number of analytical reports released by the Forum this year, it has become abundantly clear that the violence is not random but systematic. The worst part of this reality is that, not even children are spared of this violence.

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”

Nelson Mandela, Former President of South Africa

In this report, we have taken the events of January 2019 and put them under scrutiny in the light of children’s rights. This report gives a detailed analysis of the direct and structural violence against children. On structural violence we address the defects in the legal framework and the structures that are supposed to protect children and expose the loopholes and notoriety of the system. On direct violence we look at intentional infliction of physical or psychological harm on children at the hands of state agents and their ancillaries.

With this lens, we try to show that addressing children’s rights requires a more integrated approach that fixes not only the structures and the law, but also the behavioural aspect. In identifying the specific cases and locations as well as specific violations, we assert the authenticity of the reports and seek to reduce deniability. The report goes further to look not only at the domestic framework but also at the regional and international standards. For a government that is seeking international re-engagement, there is no better way to make the case for re-engagement than embracing global human rights standards in protection of children.

As we commemorate the 2019 International Children’s Day, this report invites us to ‘*hear the cry*’ of our children who find themselves in a man-made hell of injustice at the hands of the state and advocate for their safeguarding and protection. Implementing the recommendations outlined in this report is the first step towards making our children safe and our future more secure.

EXECUTIVE SUMMARY

Although Zimbabwe has no child justice framework contained within a single Child Justice Act, the Constitution and legislation such as the Children's Act [Chapter 5:06] and the Criminal Procedure and Evidence Act [Chapter 9:07] provide for special protection for children in conflict with the law. Zimbabwe, as a signatory to global and regional instruments such as the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), has adopted a legal regime that offers special protection to children who interface with the criminal justice system. This is augmented by the United Nations Standard Minimum Rules for Administration of Juvenile Justice (Beijing Rules). The Beijing rules outline how children who interface with the criminal justice system should be treated. Among such protections are special procedures in trial of children, and a regime of reformative and rehabilitative sentencing as opposed to retributive and punitive sentencing. A mechanism to divert children's cases from the criminal justice system exists in the form of the Pre-Trial Diversion programme.

At least 51 children were arrested and processed through the court system facing public violence charges in the crackdown that followed the nationwide protests of 14-16 January 2019. This figure is significantly larger than the officially reported figure of 12, as at the 30th of January 2019. While arrests for public violence were made across the country, known cases of children who were arrested were in Harare, Chitungwiza, Macheke and Bulawayo, mostly in dragnet arrests. As access to information was restricted due to restricted movement and internet shutdown during part of the period, it was difficult to ascertain in real time what was transpiring in all the parts of the country. There could have been more children arrested in the more remote areas of the country, whose arrests were not captured.

Torture and assault were recorded at the point of arrest, and on arrest, children were placed in police cells, bundled with adults. In some cases, children were over-detained, beyond the constitutionally stipulated 48 hours. Pre-trial detention was the standard for all children arrested, with one spending 10 days at Chikurubi Maximum Security Prison, in contravention of national laws that prohibit pre-trial detention except under specified circumstances and only as a measure of last resort. 14 children were detained at Khami Prison in Bulawayo after their initial appearance in court, but were later released after their birth certificates were produced in court.

Children appeared at Rotten Row and Mbare Courts in Harare, Chitungwiza Magistrates Court in Chitungwiza, and Tredgold and Western Commonage Courts in Bulawayo.

Trials truncated due process, and trials were fast-tracked at the instance of prosecutors and Magistrates, in the process violating protections accorded to children in terms of the law. Probation Officers' reports were not furnished in many trials, and children and their lawyers were not accorded adequate time to prepare their defences.

Despite mostly circumstantial evidence, a number of children were convicted, and sentences were far from consistent, ranging from suspension of sentencing, wholly suspended sentences, corporal punishment and community service. No children were sentenced to effective imprisonment. At least 4 children in Bulawayo were diverted from the courts through the Pre-Trial Diversion programme. Several trials are yet to commence as at the time of this report, as the State was yet to issue summons calling on the children that were removed from remand to attend trial.

In spite of children being victims of the economic and political decay that caught them in the cross-fire of protests in one way or another, children's treatment in the criminal justice system violated international and domestic standards and norms, signalling a spectacular retrogression in the advancement of the rights of children in conflict with the law.

It is recommended as follows:

- The justice system must have specific systems and procedures to follow in dealing with children arrested in time of conflict and mass arrests. The juvenile justice system must remain intact even in times of crisis.
- Childhood and youthfulness of the accused must not be diminished on account of a context of conflict. The Judicial Service Commission (JSC), National Prosecuting Authority (NPA), Zimbabwe Republic Police (ZRP) and every role player in the justice delivery system must be activated to protect the best interests of children.
- The police and courts must observe legal restrictions regarding pre-trial detention of children.
- There is need to have specialist courts dealing with children's cases in the criminal courts. These courts will have specialist magistrates and prosecutors, who understand child justice processes and systems. A similar model of Children's Courts in the civil court system or the Victim Friendly Court System could be adopted.
- Magistrates should be adequately capacitated to deal with children who come before them, so that there are no inconsistencies in the way children are treated, tried and sentenced for the same charge and substantially similar circumstances.
- A comprehensive, one-stop piece of legislation with a child justice framework must be developed as a concrete reference point for juvenile justice. There is therefore need for the Child Justice Bill to be enacted into law.
- The government should ensure that the Legal Aid Directorate provides legal assistance to children who are caught up as offenders in times of conflict. Provisions of legal aid services should not be left entirely to civil society legal aid organisations.
- Until the underlying political and economic issues are resolved, the recurrence of unrests in Zimbabwe remains real. As much as possible, government and citizens should work towards preventing conflict, violent protests and criminal activity that would result in children being caught up in the mayhem.

CHAPTER 1

COLLATERAL DAMAGE: CHILDREN AS VICTIMS IN TIMES OF CONFLICT

“The paradox ... is that even when children are construed as rights holders, it is difficult for them to assert their rights. The reasons are practical, political and legal. Young children are completely and unavoidably dependant on those who have power over their lives”

O’ Donovan, 1983

- Among those arrested, detained and tried after the January 2019 protests were children aged between 9 and 17 years.
- Although some children participated in the January 2019 protests as perpetrators of violence, correctly put, children were victims of economic and political decay – whether they found themselves willingly participating in the skirmishes or they were caught in the crossfire.
- Several rights of children were affected, among them arrests and detention that violated the law, the rights to assembly and education, freedom of movement, access to health care due to the closure of facilities, exposure to violence, and separation of children from their parents.
- Children were physically abused as the police were beating people randomly and throwing teargas indiscriminately to disperse crowds.
- The repercussions for children were beyond physical injuries and psychological trauma. Belligerent behaviour and attitudes were inculcated in children, with some children getting desensitised to violence.



1.1 Introduction

This report examines the treatment of children under the criminal justice system in Zimbabwe in time of conflict. By definition, children are people below the age of 18 years in terms of section 81(1) of the Zimbabwean Constitution. The report focuses on the recent episode of violence experienced during the January 2019 protests dubbed the #ZimShutDown.¹

1. This was the hashtag used on social media, having popularised by the social movements that were drivers of the stay away, along with the ZCTU.

This episode brought into focus the administration of justice in Zimbabwe, with children being a specific interest group. On account of the particular vulnerability of children, juvenile justice is a special area of criminal law, and Zimbabwe has special protections in its law that seek to protect juveniles, and such protections provide for processes to be followed where children are accused of contravening the law or found to be in conflict with the law. For instance, the Constitution, the Children's Act [Chapter 5:06] and the Criminal Procedure and Evidence Act [Chapter 9:07] all provide for mechanisms to ensure that the best interests of the child are upheld at all times when dealing with children in conflict with the law. Times of conflict however bring peculiar dimensions, and mass violations of human rights have been known to occur.

1.2 Purpose and Scope of the Report and Methodology

This report is the outcome of a study commissioned by the Zimbabwe Human Rights NGO Forum and it examines how children were protected in the criminal justice system in Zimbabwe in the aftermath of the January 2019 protests. It seeks to serve as an informative and advocacy tool that will feed into law reform advocacy, and the possible development of a policy on children who interface with the criminal justice system in Zimbabwe especially in times of conflict. The report and its expected uses are meant to aid the full protection of children in terms of the constitutional protections in the country, as well as to ensure implementation of the standards and norms encapsulated in key international law instruments to which Zimbabwe is a state party, specifically the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). The report looks at when, why and how children were arrested and detained, how they were processed through the criminal justice system (due process), who was involved in the process and how, protection of substantive and procedural rights, violations that occurred, who was responsible for the violations, and recommendations for reform.

This report is a product of a multi-methodical approach, with data gathered through both primary and secondary data collection methods. Both qualitative and quantitative methods were employed, including through an assessment of existing reports covering the period under review.

1.3 Background and Context

Within a period of six months, Zimbabwe was rocked with at least two episodes of conflict, which are both significant events within independent Zimbabwe, and within the so-called new dispensation from November 2017. On 1 August 2018, supporters of the main opposition Movement for Democratic Change Alliance party led demonstrations in Harare over delayed announcement of Presidential election results by the Zimbabwe Electoral Commission (ZEC), resulting in seven (7) people being shot dead by members of the Zimbabwe National Army (ZNA). In the aftermath was a crackdown that led to about 40 arrests, with most charged with public violence. In January 2019, widespread protests in the major cities of the country erupted following an announcement by President Emmerson Mnangagwa on 12 January 2019 that fuel prices were increased by 150% with immediate effect. Within the context of an economic meltdown and deepening poverty, the Zimbabwe Congress of Trade Unions (ZCTU) along with social movements such as #ThisFlag called for a nationwide three-day stay away on the 14th to 16th of January 2019. What followed was a three-day period of anarchy and protests in major cities and towns across the country. The stay away which was supposed to be peaceful as the organisers intended resulted into violent clashes between State security and civilians. Streets were barricaded with huge boulders and burning tyres in the high-density areas and Central Business Districts (CBDs) in Harare, Bulawayo and other major cities. In Mutare this obtained in places such as Sakubva, Chikanga, Dangamvura and Hobhouse. Shops, especially in high density suburbs in Harare, Chitungwiza and Bulawayo, were looted and acts of arson were committed. The State responded with force and widespread arrests. Many were dragnet arrests, coupled with a few that were targeted. Over 1000 people were arrested, several of them children.

Although there were no children that were arrested following the 1 August 2018 post-election violence, among those arrested, detained and tried after the January 2019 protests were children aged between 9 and 17 years. The children, along with adults, were arrested and detained in police cells. All those who were connected to the protests, including children, were charged with public violence in terms of section 36 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and were arraigned before the Magistrates Courts. In Bulawayo, the alternative charges of looting and theft were also put forward to the accused children. The Judicial Service Commission (JSC) reported that 12 children were processed through the courts. However, a local NGO that provides free legal services to children, Justice for Children (JC) tracked the cases and recorded a total of 51 children who were arraigned before the Magistrates Court in Harare, Chitungwiza and Bulawayo connected to the violence.

1.4 Children as Collateral Damage

Although some children participated in the January 2019 violence as perpetrators, correctly put, children were victims of economic and political decay – whether they found themselves willingly participating in the skirmishes or they were caught in the crossfire. For all intents and purposes, children were essentially collateral damage or incidental victims. It is within this context that the assessment of the treatment of children by the criminal justice system must be understood. Several rights of children were affected, as follows.

Arrests and Detention

Tens of children were arrested and detained. Arrest and detention by their very nature are egregious forms of violation of children rights, which must occur only in limited circumstances. The dragnet nature of the arrests, and the subsequent treatment of children in custody and in the court system significantly subtracted from the protection of children.

Assembly and Education

In almost all urban centres in the country, schools were closed in the week of the 14th of January



January 2019 arrested protestors being transported to court

2019. From some of the schools came reports of members of the ZNA threatening officials and learners and forcing closure of those schools that were operating. The motives of this were unclear. In Harare some schools opened on Monday, the 14th of January, but were closed around mid-morning. Children could be seen – including on some days during the week – walking about the streets in school uniform, during school hours. In most rural areas, schools remained open for quite a few days, but were eventually closed as the week progressed. This included places like Zvimba and Murehwa. In some schools, teachers were leaving their workstations, leaving the children exposed and confused. In Binga, at one school pupils reportedly heard gun shots at their school. Although teachers stay onsite at the school, students were not attending school following that incident. In Manicaland, as with many other places, transport operators were unable to ferry children to schools as all roads were barricaded.

The few schools that attempted to open were forced to close. For instance, students from Dangamvura, St Joseph's and Sheni Primary Schools in Mutare urban were returned home. Children as young as Early Childhood Development (ECD) level were forced to walk back home on their own. Children got lost along the way as they had not walked these distances before. In Sakubva some children were seen wondering along the roads not knowing where to go. These were picked up by a good Samaritan who took them to Sakubva Police Station where they were taken to their homes with the help of the police officers.

Freedom of Movement

There were disturbances to the transport ferrying children to school, and some students were left stranded. Some roads were closed and busses were unable to proceed. In some areas, children were among the adults who were ordered to disembark from public transport and to terminate their trips.



Armed Anti-riot Police searching vehicles in January

Children exposed to and participating in violence

As violence broke out, children were caught up as victims, with some participating in the skirmishes. Children were physically abused as the police were beating people randomly and throwing teargas indiscriminately to disperse crowds. Teargas was reportedly indiscriminately deployed on the streets, affecting children particularly in Bulawayo. Children in some schools had teargas thrown at them. Children witnessed their parents, siblings and neighbours being beaten and arrested during the night raids by the police and soldiers. A two-year-old child in Mazhambe in Mutare had to endure the pain of having her mother beaten up while the mother carried him on her back. The mother was washing a blanket when the soldiers entered their house telling her that she should have been indoors. In Dangamvura and Chikanga 3, soldiers moved around knocking on people's doors at midnight. In Chikanga 3, three young children watched their mother being beaten for watching people who were blocking the roads. Parents were picked up and arrested and children were left unattended as the parents were detained at police stations. This affected

children psychologically, along with the gunshot sounds the children were exposed to.

Children also participated in crimes perpetrated during the stay away period. In Sakubva, Mutare, some children were compelled to join in the violence that occurred along the Sakubva-Dangamvura road. Children were beaten up at Mutare Teacher's College for being part of the marching crowd. As the security forces searched for the people who participated in the violent activities some children who were involved had to run away from their homes for hiding. At Acid Shopping Centre in Chikanga, Mutare, children in school uniform joined the march on their way back from school. There were primary school pupils who were manning the roadblocks. In areas such as Highfields, Glenview and Waterfalls in Harare, children were taking the lead from adults and were putting stones on the roads and setting up "toll-gates". In Glen View, an adult reported having to pay \$1 to a child whom he estimated to have been 10 years old, in order to pass a "toll-gate". That money was not pocketed by the child, but the child was seen giving the money to an adult. 15 to 17-year olds were reported to have been burning tyres and

involved in the skirmishes in various ways. In high density areas such as Highfields, shops were looted and some of the conspicuous looters were children. One adult reported seeing children fighting over the loot, and some threatening each other with knives which they had in their possession. Video footage circulating on social media from Bulawayo showed children participating in the looting of shops along with adults.

In Dzivaresekwa 2 in Harare, there were reports of children and their parents who had escaped to the hills being asked to roll down the hills, in the process getting injured. House arrests were reported in some high-density areas in Harare, with children being detained for long in their houses together with their parents and guardians. Households suffered as they were running out of supplies and movement was highly curtailed. In cases of those who died due to military action, children were left orphaned and without bread winners. This was the case with a 7-months-old child in Chitungwiza whose 22-year-old father was shot dead by soldiers in the protests in Chitungwiza.² The Zimbabwe Human Rights Commission reported that more people died in the January 2019 protests compared to the extra-judicial killings of 1 August 2018.³

Access to Health

Another impact of the stay away on children was violation of the children's right to access health care facilities. For instance, on the 15th of January 2019, Sakubva Clinic in Mutare was forced to close save for the maternity department. This meant that all injured children had nowhere to be attended to. A boy from New Dangare, Sakubva who needed his wound dressed-up was stuck with her mother at the gate of the clinic as there was no one to attend to them. More pain and suffering had to be endured until on the 18th of January when the clinic was back to its normal operations.

A girl from Chinyausunzi was brutally beaten by the military for walking along the streets around Sakubva Stadium. She had her hand oozing with blood and could not be attended at Sakubva Clinic as a result of the closure. In Dangamvura a child who presented symptoms of malaria could not get immediate medical assistance because all the medial centres were shut down.

Children being separated from their parents

In various places in Harare and beyond, there was a high number of incidences of children being separated from their parents. There were some reports of abductions and displacements, which left children with no adults to attend to them. In Marondera there was an incident of a child who had to be picked from the police station by her parent after the child's school had closed and dismissed children – with some of the children having no one to collect them and nowhere to go in the chaos.

In cases of those who died due to military action, children were left orphaned and without bread winners.

1.5 Conclusion

Generally, there was minimal reporting on the plight of children during this period, especially in the local State-controlled media. A few privately-owned newspapers, however, carried stories of children who suffered as a result of the protests, including arrests of children. Notwithstanding, the repercussions for children were beyond physical injuries and psychological trauma as a result of their experiences. Belligerent behaviour and attitudes were inculcated in children, with some children getting desensitised to violence.

2. "I've been robbed by the state: Family mourns 22-year-old shot in the head as Zim in chaos" New Zimbabwe, 19 January 2019 at <https://www.newszimbabwe.com/i've-been-robbed-by-the-state-family-mourns-22-year-old-in-the-head-as-zim-in-chaos/>.

3. Monitoring Report in the Aftermath of the 14 January to 16 January 2019 "Stay Away" and Subsequent Disturbances, <http://www.zhrc.org.zw/monitoring-report-in-the-aftermath-of-the-14-january-to-16-january-2019-stay-away-and-subsequent-disturbances>.

CHAPTER 2

CHILDREN IN CONFLICT WITH THE LAW: INTERNATIONAL AND LEGAL FRAMEWORK

“Children deserve less punishment because they may have less capacity to control their conduct and think in long-range terms than adults. Moreover, juvenile crime, as such, is not exclusively the offender’s fault.

Offences by juveniles also present a failure by family, school and the social system, which share responsibility for the development of the youth. Actions of a child are less likely to be evidence of irretrievable depravity.”

Chief Justice Luke Malaba, *S v Chokuramba* CCZ 10-19

- Zimbabwe, as a signatory to global and regional instruments such as the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), has adopted a legal regime that offers special protection to children who interface with the criminal justice system.
- While Zimbabwe has no child justice framework contained within a single Child Justice Act, the Constitution and legislation such as Children’s Act and the Criminal Procedure and Evidence Act provide special protections for children in conflict with the law.
- The United Nations Standard Minimum Rules for Administration of Juvenile Justice (the Beijing Rules) augment the national child justice system. The Beijing rules outline how children who interface with the criminal justice system should be treated.
- Among such protections are special procedures in the trial of children, and a regime of reformative and rehabilitative sentencing as opposed to retributive and punitive sentencing.
- A mechanism to divert children’s cases from the criminal justice system exist in Zimbabwe in the form of the Pre-Trial Diversion programme.



2.1 Children in conflict with the Law and in Detention in Zimbabwe

Children in conflict with the law, or in contact with the law, refers to children who are accused or found guilty of committing criminal offences. The criminal justice system for dealing with such children is referred to as the juvenile justice system or child justice system. Generally, juvenile justice and detention is a little studied area in Zimbabwe. In most cases, these areas are covered as part of broader researches and academic work. For instance, the Zimbabwe Child Law Monitor of 2016 highlights some gaps in the law when it comes to detention of juveniles. The report on *Pre-Trial Detention in Zimbabwe* done in 2013 by the Zimbabwe Lawyers for Human Rights (ZLHR) and the Law Society of Zimbabwe (LSZ) which analyses the criminal justice system and pre-trial detention conditions in Zimbabwe is perhaps the most focused study on detention in Zimbabwe, albeit it focuses on pre-trial detention. In that study the law of juvenile justice is briefly addressed, and more pertinently, some experiences of juvenile detainees in police custody are covered. Experiences of children being beaten in police cells by the police are highlighted. At the time (2013) the report also placed the percentage of juvenile prisoners (under 18s) to the entire prison population of 16, 902 at 0.7%. Yet another piece of work “*Contributing to Legal Aid for Detained Juveniles in Zimbabwe Project Plan*” of June 2012 by the Lawyers Without Borders Dutch Project Group Zimbabwe, recorded as at 2010 that “*According to recent government sources, there are around 300 children in prison and many of them were not represented by a lawyer or supported by a probation officer during their trial and have not had their case reviewed since entering detention*”. There is however a significant body of global work on juvenile justice, including judicial decisions, which help shape best-practice and inform a local analysis and development of recommendations.

2.2 International and National Legal Framework

Zimbabwe has ratified both the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), which both provide a global standard insofar as the treatment of children in conflict with the law is concerned – including issues of detention. These human rights treaties impose a legal obligation upon Zimbabwe to align its laws to the international legal framework governing juvenile justice. The UNCRC specifically calls upon States “*to promote the*

establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law.”⁴ The UNCRC and the ACRWC require special procedures in the trial of children, and a regime of reformatory and rehabilitative sentencing as opposed to retributive and punitive sentencing.

The United Nations Standard Minimum Rules for Administration of Juvenile Justice (popularly known as the Beijing Rules) augment the national child justice system. The Beijing rules outline how children who interface with the criminal justice system should be treated. These rules were recently given extensive reference to by the Constitutional Court in its judgment outlawing judicial corporal punishment for boys in *S v Chokuramba* CCZ 10-19. The Constitution along with the applicable legal framework together significantly accord to the minimum standard stipulated in the Beijing rules.

Insofar as arrest, detention and treatment of children in the child justice system are concerned, the Constitution entitles children to protections generally afforded to everyone in the criminal justice system. In addition, children are entitled to specific protections addressing their peculiar vulnerabilities, from the moment they are arrested until they exit the criminal justice system. For instance, a child is entitled to prompt and direct information of the charges in a language that he understands so that he can answer it.⁵ The child is also entitled to an

4. Article 41(3) of the UNCRC.

5. Article 40 (2)(b)(ii) of the UNCRC; Article 17(2)(ii) of the ACRWC; section 70(1) (b) of the Constitution.

interpreter if he does not understand the language spoken. Children are entitled to freedom from compulsory self-incrimination;⁶ should not be subjected to torture, cruel, inhuman and degrading treatment meant to force an admission or confession, and are entitled to legal representation and other appropriate assistance.⁷ There should be adequate time and facilities for the preparation of the defence.

As is the case with Article 3 of the UNCRC and Article 4 of the ACRWC, Section 81(2) of the Constitution provides that “a child’s best interests are paramount in every matter concerning the child.”

In the context of juvenile justice, the principle means that the “traditional objectives of criminal justice (repression/retribution) must give way to rehabilitation and restorative justice objectives in dealing with child offenders.”⁸ This takes into account the physical, emotional and psychological vulnerability of children. The Constitution of Zimbabwe further provides for the right of the child to be heard.⁹ The UN Committee of the Rights of the Child, has explained that in the context of judicial proceedings, implementation of this right involves five stages which are preparation, the hearing, assessment of the child’s capacity, information about the weight given to the child’s views and availability of complaints or appeal procedures and remedies.¹⁰ This right requires that proceedings should be conducive to the best interests of the child and conducted in an atmosphere of understanding which allows the child to participate therein and to express himself or herself freely.¹¹ It is crucial to consider the child’s age, maturity and other special needs in dealing with effective child participation hence courtroom procedures and practices may

have to be modified in dealing with children so that the environment is conducive for the child’s participation.

The Constitution of Zimbabwe has elaborated on the right to be informed promptly of the charge to include the right to be given sufficient details to enable a person to answer to the charge.¹² Among the national objectives contained in the Constitution of Zimbabwe is legal aid provision. The State is enjoined to take all practical measures, within the available resources, to provide legal representation in both civil and criminal cases to people who need it and cannot afford legal practitioners of their choice.¹³ The Constitution goes further to enshrine as a fundamental human right of everyone to choose a legal practitioner who can represent them at their own cost and to be represented by a legal practitioner assigned by the State and at its expense where substantial injustice would otherwise result.¹⁴ The Government of Zimbabwe enacted the Legal Aid Act [Chapter 7:16] whose objectives are to ensure that all deserving persons are able to obtain legal assistance without having to pay the legal fees through an entity known as the Legal Aid Directorate (LAD). It is possible for the court to refer a child in conflict with the law to the Legal Aid Directorate so that he or she makes an application for legal aid in terms of the Legal Aid Act. However, Zimbabwean law does not provide for a specific right to legal representation for children in conflict with the law, that is, children do not have a right to free legal representation at all times at the expense of the State.

The Constitution provides that any person arrested or detained who is not released must be brought before a court as soon as possible and in any event not later than forty-eight (48) hours after the arrest took place or the detention begun

6. Article 40 (2)(b)(iv) of the UNCRC.

7. Article 40 (2)(b)(ii) of the UNCRC; Article 17 (2)(ii) of the ACRWC; section 70(1)(d) of the Constitution.

8. United Nations Office on Drugs and Crime Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary United Nations New York 2013 page 3.

9. Section 81 (1)(a) of the Constitution.

10. Committee of the Rights of the Child, General Comment No. 12 (2009), The Right to be Heard, U.N. Doc. CRC/C/GC/12.

11. United Nations Standard Minimum Rules for Administration of Juvenile Justice (the Beijing Rules) Rule 14.2.

12. Section 70(1)(b) of the Constitution.

13. Section 31 of the Constitution.

14. Section 70(1)(d) and (e) of the Constitution.

whether or not the period ends on a Saturday, Sunday or public holiday.¹⁵ Section 84 of the Children's Act [Chapter 5: 06] governs pre-trial detention of children as follows:

"84 Detention of Juvenile

(1) A child or young person who is charged with an offence shall not before conviction be detained in a prison or police cell or lock-up unless his detention is necessary and no suitable remand home is conveniently available for his detention.

(2) In deciding the suitability of any place for the detention of a person mentioned in subsection (1), regard may be had to the nature of the offence with which he is charged and to his age, sex, race and character."

The Constitution further provides that *"no person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment."*¹⁶ This right is absolute and non-derogable. It provides that no law may limit and no person may violate the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.

The Constitution is supported by the Criminal Law (Codification and Reform) Act [Chapter 9:23] (the Code), Criminal Procedure and Evidence Act [Chapter 9:07] (CPE Act), Children's Act [Chapter 5:06] and the Prisons Act [Chapter 7:11]. These provide for substantive and procedural protection to children who come in contact with the law.

The Criminal Code contains the provisions on criminal capacity. According to Section 6 of the Criminal Code, *"a child below the age of seven years shall be deemed to lack the criminal capacity and shall not be tried for or convicted of any crime which he or she is alleged to have committed before attaining that age."* Children

between the age of 7 years and 14 years are presumed to lack the capacity to form the intention to commit an offence. Alternatively, where negligence is an element of the crime concerned, they are presumed to lack the capacity to behave in the way that a reasonable adult would behave in the circumstances.¹⁷

This presumption may be rebutted depending on the circumstances of each case. The onus is on the State to establish beyond reasonable doubt that the accused child was mature and did understand that the act constituting the offence was wrongful. Section 231 of the Criminal Code however provides that *"no proceedings in respect of any crime shall be instituted or continued against any person who is under the age of fourteen years, other than proceedings for the purpose of remand, without the authority of the [Prosecutor]-General."*

Children above the age of 14 years are presumed to have the capacity to form the necessary intention to commit any crime or, where negligence is an element of the crime concerned, to behave in the way that a reasonable person would have behaved in the circumstances of the crime.¹⁸ These children can therefore be tried for offences. There is therefore no presumption of criminal incapacity for children over the age of fourteen years. As such they can be arrested and tried subject to safeguards of them still being children below the age of 18 years. The CPE Act compels a police officer, unless otherwise directed by a Magistrate, upon arresting a person under the age of 18 years or warning such a person to appear before the court, to warn the parent or guardian of such a child to also appear in court. This does not apply to a person who is under the age of 18 years but emancipated in terms of the law.¹⁹ A child's parents or guardians must be notified of the arrest of the child so as to ensure their involvement early in the process and to provide general psychological and emotional assistance to the child during the proceedings.²⁰

15. Section 50 (2) of the Constitution.

16. Section 53 of the Constitution.

17. Section 7 of the Criminal Code.

18. Section 8 of the Criminal Code.

19. Section 142(5) of the Criminal Procedure and Evidence Act [Chapter 9:07].

20. UN Committee of the Rights of the Child, General Comment No. 10 (2007) Children's Rights in Juvenile Justice.

The CPE Act further provides that a child below the age of 16 years may be assisted by his or her natural or legal guardian in conducting their defence.²¹ The court can also permit another person to assist any person who is charged with a criminal offence in their defence.²² This provision can be used to allow a child above the age of 16 years to be assisted by any other person, including his or her natural or legal guardian.

The CPE Act prohibits the publication of the name, address, school, place of occupation or any information that is likely to reveal the identity of any person under the age of 18 years who is being tried or has been tried in court except with the consent of a Magistrate, Judge or Minister. That consent can be given where it is considered just and equitable and in the public interest to have such publication.²³ This protects the right to privacy of children in conflict with the law. The child should have his or her privacy respected from arrest until the final decision is made by the court. This is to avoid harm being caused to a child by undue publicity or by the process of labelling. It is desirable that all hearings of cases involving children should be conducted behind closed doors with the exception of the presence of experts or other professionals with a special permission of the court.

When it comes to sentencing, the sentencing options should be suitable for the child. A juvenile offender has a right not to be detained except as a measure of last resort.²⁴ If detained, the child should be detained for the shortest appropriate period, should be separated from adult offenders and should be treated in a manner and kept in conditions that take into account the child's age. Section 63 of the Prison Act provides that insofar as the prison accommodation renders it practicable, young prisoners shall be kept apart from other prisoners.²⁵ The challenge is that in many prisons there are no separate juvenile sections hence

children are kept together with other prisoners. This poses a danger to children who may be hardened by adult offenders. Mixing juvenile offenders with adult offenders affects the children's behaviour. By virtue of being young, children tend to imitate what they hear or see. The children are also likely to experience violence or abuse at the hands of adult prisoners. It is therefore encouraged that alternative measures which promote rehabilitation and reintegration are employed.

As for the sentencing options, children in conflict with the law should be given sentences appropriate to their well-being and proportionate both to their circumstances and the offence. The aim is to promote the best interests of the child as well as their rehabilitation and reintegration into society. In *S v Mavasa* HH 13-10 per Makarau JP, the High Court stated that it is wrong to sentence juvenile offenders as if one is dealing with an adult offender. Courts were admonished to be slow to expose a convicted juvenile to the same rigours of punishment that it would impose on an adult.²⁶

The CPE Act provides for special provisions relating to the punishment of children in conflict with the law from Sections 351 to 353. Section 351 of the CPEA provides that a court which has convicted a person under the age of 19 years may, instead of imposing punishment or imprisonment for that offence, order that the person be taken before a Children's Court and be dealt with in terms of the Children's Act or, after ascertaining with the Minister responsible for social welfare that accommodation is available, that the person be placed in a training institute or reform school. A child placed in an institution or reform school shall remain there until after 3 years has lapsed from the date of the order, or he is released or discharged from the order in terms of the Children's Act.²⁷ This section is important so as to promote alternative measures to imprisonment which are aimed at

21. Section 191(b) of the CPEA.

22. Section 191(c) of the CPEA.

23. Section 195 of the CPEA, see also Section 197 of the same Act which protect the identity of child witnesses in judicial proceedings.

24. Article 37(b) of the UNCRC and section 81 (1)(i) Constitution.

25. The Prison Act defines a young prisoner as a person under the "apparent age of nineteen years."

26. This approach was adopted and applied in *S v FM (A Juvenile)* HH 112-15 and several other cases.

27. Section 352(2) of the CPEA.

the rehabilitation and reintegration of the child. The advantage of referring a convicted juvenile to the Children's Court is that *"the conviction shall not, for the purposes of any enactment, be regarded as a conviction."*²⁸

Section 4(6), (7) and (8) of the Children's Act provides for the use of Public Prosecutors as Children's Court assistants. It further provides for the appointment of Probation Officers for the Children's Court.²⁹ If a juvenile offender is ordered to be taken before a Children's Court or the court disposes of him or her in terms of s 351(2)(b) of the Act, the conviction shall not, for the purposes of any enactment, be regarded as a conviction. If, however, such person is convicted on a second or subsequent occasion before he or she attains the age of eighteen years it shall be lawful to prove that earlier conviction as a conviction.

The Children's Act details the manner in which children referred to the Children's Court by a criminal court which has convicted them are dealt with in the Children's Court. The Children's Court will hold an inquiry in the presence or absence of the child and *"shall, wherever it is possible and appropriate to do so, seek the opinion of the [child]."*³⁰ There are various orders which the Children's Court can opt for after holding the inquiry. The Court can:

- Upon being satisfied that a certified institution will accept the child, order that the child shall be placed in a named certified institution;
- Order that the child shall be placed in, returned to or remain for foster care in the custody of any named suitable person;
- Order that the child be placed in, returned to or remain in the custody of his or her parent or guardian;
- Order that the child shall reside in a place determined by the court;

- Order that the child shall render service for the benefit of the community; or
- Upon being satisfied that a training institute will accept the child, order that the child be placed in a named training institute.³¹

Where a child is placed in the custody of a parent or guardian, foster care of any named suitable person or where the child resides in a named place the court may also order the child to be under the supervision of a Probation Officer for a period not exceeding 3 years.³² These provisions, could work towards the rehabilitation and reintegration of children in conflict with the law for they seek to avoid the imprisonment of children.

The CPE Act also empowers a court to impose a fine and community service upon a convicted child.³³ Community service can be useful in rehabilitating the child offender.

The CPE Act is also relevant in child justice in that it empowers the courts to postpone the passing of sentence and to suspend the operation of the sentence passed.³⁴ Both options can give a child the chance to reform. Lastly, the CPE Act allows the court to *"discharge the offender with a caution or reprimand."*³⁵ This should be used to deal with children, especially where they commit minor offences.

If a juvenile offender is ordered to be taken before a Children's Court or the court disposes of him or her in terms of s 351(2)(b) of the Act, the conviction shall not, for the purposes of any enactment, be regarded as a conviction.

28. Section 351(7) of the CPEA.

29. Section 4 (2a) of the Children's Act.

30. Section 19(2) of the Children's Act.

31. Section 20(1)(b) of the Children's Act

32. Section 20(2) of the Children's Act

33. Section 336 of the CPEA.

34. Section 358 of the CPEA.

35. Section 358 of the CPEA.

The locus classicus on sentencing of juveniles is now *S v Chokuramba*, Justice for Children’s Trust Intervening as Amicus Curiae Zimbabwe Lawyers for Human Rights Intervening as Amicus Curiae CCZ 10-19. The Constitutional Court stated as follows:

“The kinds of punishment a court may impose on a juvenile offender convicted of a crime are set out in s 336 of the [Criminal Procedure and Evidence] Act. The section provides that a court may impose on a person convicted of an offence a sentence of imprisonment for a determinate period, a fine, community service, or recognizance with conditions. The provisions of the CRC and other relevant international instruments contain the principles which a court is required to consider and enforce in the assessment of an appropriate sentence to be imposed on a juvenile offender convicted of a crime. The application of the principles ensures that the sentence or disposition order is appropriate in respect of its proportionality to the circumstances of the juvenile offender, the offence, and the interests of society.”

When dealing with children in conflict with the law, courts are encouraged to prioritize rehabilitation as opposed to retribution. It was held in the case of *S v Chokuramba*, that *“to determine an appropriate sentence, the court has to be innovative and preventative....”* It is therefore important to note that when it comes to juvenile offenders, the traditional objectives of criminal justice, that is, repression and retribution, must give way to rehabilitation and restorative justice objectives. Priority should be given to respecting the rights of the child or young person when determining the best solution or response.

A mechanism to divert children’s cases from the criminal justice system exist in the form of the Pre-Trial Diversion programme introduced in 2009. It is aimed at children who commit minor

offences and accept their responsibility. That programme is, however, not supported by legislation, and is implemented through a Department in the Ministry of Justice, Legal and Parliamentary Affairs. The objectives of the Pre-Trial Diversion Programme are:

- a. To promote the dignity and well-being of the child, the development of his or her sense of self-worth and the ability to contribute positively to the society;
- b. To impart useful life skills and education thereby promoting the child’s right to development;
- c. Where appropriate, to encourage restoration, restitution or compensation to the victim, thereby bringing closure to both the victim and the offender;
- d. To ensure that the child understands the impact of his or her crime on others including the victim, the respective families and the community;
- e. To promote forgiveness of the child for the crimes committed, reconcile the child with the victim and the community and promote and support rehabilitation and reintegration of the child-offender back into the community;
- f. To prevent further re-offending by the child through equipping him or her with useful skills in different areas of life; and
- g. To prevent young offenders from receiving a criminal record early in their lives and being labelled as criminals as this may become a self-fulfilling prophecy.

When dealing with children in conflict with the law, courts are encouraged to prioritize rehabilitation as opposed to retribution.

36. Page 54 of the judgment.

The programme applies to children:

- Who have committed an offence that would not attract a sentence of over 12 months imprisonment. Children who commit serious offences such as murder, rape and robbery will not be eligible. Repeat and serious offenders will also not be eligible.
- Who, without coercion, accept and take responsibility of their actions. Children who deny their guilt are not eligible; and
- Who are willing to take part in the programme activities identified by the Diversion Officer.

2.3 Conclusion

The 1 August 2018 violence and subsequent arrests, and the January 2018 protests provide for critical period to assess the efficacy of the juvenile justice regime in the country, focusing on commendable aspects and shortcomings and challenges.



CHAPTER 3

CHILDREN IN CELLS: ARRESTS AND PRE-TRIAL DETENTION

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”

Nelson Mandela, Former President of South Africa

- Although the Chief Justice in a statement said that 12 juveniles were released into the custody of either their parents/guardians or social welfare officers on their appearance in court, Justice for Children (JC) recorded a total of 51 children who were arraigned in the Magistrates Courts in Harare, Chitungwiza and Bulawayo.
- Several atrocities were committed against children at the point of arrest, and the police emerged to be the primary violators of the rights of children.
- Once arrested, no proper screening processes were followed by the members of the ZRP.
- Children were assaulted and beaten by soldiers in residential areas, and by police at the point of arrest.
- Children were detained at police stations in Harare, Chitungwiza and Bulawayo in unlawful and avoidable pre-trial detentions.



3.1 Arrest of Children in January 2019

Following the #ZimShutDown protests, massive arrests followed. A number of children were arrested for allegedly participating in looting, acts of arson and erecting barricades, among other activities. Although arrests for public violence were made across the country, known cases of children who were arrested were only recorded in Harare, Chitungwiza, Macheke and Bulawayo. Arrests primarily took the form of dragnet arrests; groups were arrested for being caught in assembly, and people on the streets were arrested, and more disturbingly, people in areas such as Epworth and Chitungwiza were dragged from their houses at night by the police and armed soldiers, and were arrested. The latter was in respect of males. These arrests were indiscriminate, in the sense that children were arrested in the process. Arrests started on the first day of the protests, and continued well into the end of January. The number of children arrested was

gradually increasing over that period. All who were arrested were charged with committing public violence as defined in section 36 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. Bulawayo was the exception, with the police preferring the additional or alternative charges of looting and theft.

The then Zimbabwean Republic Police (ZRP) Chief Spokesperson Senior Assistant Commissioner Charity Charamba on 24 January 2019 confirmed that the police had arrested children involved in the

protests, stating that the children were involved in looting, acts of arson and violence. However, contrary to other media reports and reports from lawyers representing these juveniles, she stated that only 4 juveniles had been arrested and had been released into the custody of their parents. On 30 January 2019, the Assistant Commissioner confirmed that the number had risen to 36 children, with the arrests taking place mostly in Harare and Bulawayo. She remarked that some of the children were arrested for throwing stones at police officers and for looting and justified arresting children on the basis that there is no law in Zimbabwe that proscribes the arrest of children when they commit crimes. She added that failure to arrest children would inculcate a culture of criminality. The Chief Justice however in a statement in response to a petition delivered by a group of lawyers that marched and delivered the petition on 29 January 2019, stated that as at 30 January 2019, “12 juveniles were released into the custody of either their parents/guardians or social welfare officers on their appearance in court”.³⁷

However, a local NGO that provides free legal services to children, Justice for Children (JC) tracked the cases and recorded a total of 51 children who were arraigned in the Magistrates Court in Harare, Chitungwiza and Bulawayo connected to the violence. As access to information was restricted due to restricted movement and internet shutdown during part of the period, it was difficult to ascertain in real time what was transpiring in all the parts of the country. There could have been more children arrested in the more remote areas of the country, whose arrests were not captured.

At Western Commonage Police Station in Bulawayo, lawyers attended to 7 children aged between 12 to 16 years who were arrested on the 26th of January 2019. On engagement with the Officer in Charge however, charges were dropped in respect of some of the children, who were subsequently released. Others, however, were referred to court.

3.2 Violations Committed against Children

Several atrocities were committed against children at the point of arrest, and the police emerged to be the primary violators of the rights of children in the criminal justice system. The Zimbabwe National Council for the Welfare of Children (ZNCWC) issued out a statement on behalf of the Child Rights Coalition in Zimbabwe on the 1st of February

2019 stating that it was “deeply concerned with reports and evidence on the arrest and detention of children accused of public violence” and that “evidence gathered from our members working on the ground shows that children have been arrested and detained without following the international and local standards that uphold children’s rights as enshrined in the UNCRC, ACRWC, s81 of the Constitution of Zimbabwe and the Children’s Act”.³⁸ Recorded violation were as follows.

Due Process

Once arrested, no proper screening processes were followed by the ZRP. During trial at Rotten Row Court, one arresting officer confirmed that proper policing procedures were not followed as the police were under pressure to act and were overwhelmed by the incidences of the period.

Generally, the police did not make efforts to inform the parents and guardians of the children on arrest, nor was the Department of Social Welfare (DSW) alerted. This meant sometimes children were detained without the knowledge of the guardians, and guardians were then forced to look for their children.

Almost all the children who were arrested in Harare and Chitungwiza did not have their parents notified. In one case, a 16-year-old child was arrested in Mabvuku, and the parents learnt of the arrest while watching Zimbabwe Broadcasting Corporation (ZBC) television (TV)

37. Judicial Service Commission “Comments by the Honourable Chief Justice Following Complaints on Handling of Public Violence Cases”, page 4 at

<https://jsc.org.zw/jscbackend/upload/Publications/FULL%20VERSION%20PETITION%20%20RESPONSE.pdf>

38. Zimbabwe National Council for the Welfare of Children “Press Statement in Arrest and Detention of Children Accused of Public Violence” 1 February 2019, <http://kubatana.net/2019/02/01/press-statement-arrest-detention-children-accused-public-violence>

news.³⁹The parents saw images of prisoners in prison uniform being transported from Chikurubi Maximum Security Prison to Rotten Row Court, and identified their child among the prisoners in the vehicle. Police officers often obtained statements from children in the absence of their guardians or representatives of the DSW.

Beatings and Torture

Children were assaulted and beaten by soldiers in residential areas, and by police at the point of arrest. Lawyers representing children engaged with the Officer-in-Charge at the Criminal Investigation Department (CID) Law and Order section at Harare Central Police Station who confirmed that children were being properly treated and handled once in cells. It was apparent that the children and other adult detainees were being beaten outside before they got to the police stations, either at the point of arrest or prior to that. There were incidences in which children were assaulted by the military. This especially applied to children around the ages of 16 and 17 years. A child protection NGO received a case in which a child was assaulted by soldiers. The Counselling Services Unit (CSU) and the Zimbabwe Association of Doctors for Human Rights (ZADHR) reported children to be among those brutalised by the military, ranging from 8 to 17-year olds.

The Zimbabwe Human Rights Commission (ZHRC) made various home visits across the country and recorded that armed soldiers and police visited peoples' homes starting the evening of 14 January 2019. They indicated that there were severe and indiscriminate beatings inflicted on men, including boys as young as 11 years, and the perpetrators would then ask the victims to run or arrest them.

*A child protection NGO
received a case in which a child
was assaulted by soldiers.*

The military targeted those who lived in shared residences where there would be different families in one house with more than one male per house. This was confirmed by the ZHRC:

*“The findings reveal that in the aftermath of the 14th of January 2019 disturbances, armed and uniformed members of the Zimbabwe National Army and the Zimbabwe Republic Police instigated systematic torture. The torture was organized in that they targeted men who stay near areas where barricades had been placed and near areas that were torched by protestors or looted. They also targeted shared homes where they would round up many men in one homestead. The facts gathered from interviews held with communities reveal that the police and the soldiers indiscriminately targeted men in the residential areas merely due to proximity to the areas where barricades had been placed and shopping centres where looting and vandalism had taken place. Yet interviews with most stakeholders in the areas that were monitored revealed that those who had put barricades on the road on 14 January 2019 or those who led the looting did not even stay in the areas and most were unknown to the communities. To conclude that every men living close to the looted shops or barricaded roads were involved and to proceed to conduct door to door searches for and arrest them on this basis led to a violation of personal liberty of men who had not been involved in the incidents, including boys below the age of 18 years”.*⁴⁰

39. Information provided by lawyer who represented the child.

40. The Zimbabwe Human Rights NGO Forum also reported in “On the Days of Darkness in Zimbabwe: An Updated Report on the Human Rights Violations Committed between 14 January, 2019 to 5 February, 2019 that” at page 7 that “The crackdown included door to door raids which resulted in the assault and torture of women, children, people with disabilities and the elderly.” See report at <http://www.hrforumzim.org/wp-content/uploads/2019/02/Shutdown-Atrocities-Report-6-February-2019.pdf>



A child watches as Riot Police block the road

The police during bail hearings in Chitungwiza admitted that they had arrested primary school children, some as young as 11 years, although these were later released at the police stations.⁴¹ In another case, Sky News reported that a number of children were randomly arrested, reporting that a sixteen-year old (16) was grabbed from the house, beaten up and bundled into a police vehicle.⁴²

In one case reported in the media, a 16-year-old girl from Epworth collapsed in court at Rotten Row before Magistrate Francis Mapfumo.⁴³ The teenager was arrested along with 60 others from Epworth.

Pre-trial Detention

In almost all cases, the police detained children on arrest, without enquiring into the necessity and legality of such detention. Children were detained at police stations in Harare, Chitungwiza and Bulawayo. There is no known case in which police officers arrested and released the children into the custody of their guardians without detaining them at first. Detention of all children recorded was ended by the courts, serve in a single case in Bulawayo in which the children were released into the custody of their parents, but having spent a night in police cells, and in Chitungwiza where 11 years old were arrested but were then released into the

custody of their parents. The ZHRC in its report noted that:

“Juveniles were also arrested although they were eventually released into the custody of their parents by the courts. Some were said to have spent more than 48 hours in detention. The police during bail hearing in Chitungwiza admitted that they had arrested primary school children, some as young as 11 years, although they were later released at the police stations. Almost all suspects above the age of 18 were denied bail on the basis of the nature of the offence and that some of the suspects were of no fixed abode.”⁴⁴

Children were not only being detained at local police stations, but were being taken to the CID Law

41. Ibid.

42. “Zimbabwe crackdown: Children shackled and caged in security round-up” SkyNews, 26 January 2019, <https://news.sky.com/story/zimbabwe-crackdown-children-shackled-and-caged-in-security-round-up-11617977>.

43. “16-year-old torture victim collapses in court”, Newsday, 21 January 2019, <https://www.newsday.co.zw/2019/01/16-year-old-torture-victim-collapses-in-court/>.

44. Monitoring Report in the Aftermath of the 14 January to 16 January 2019 “Stay Away” and Subsequent Disturbances, <http://www.zhrc.org.zw/monitoring-report-in-the-aftermath-of-the-14-january-to-16-january-2019-stay-away-and-subsequent-disturbances/>.

and Order section at Harare Central Police Station, in the case of Harare. For instance, on 22 January 2019 lawyers responded to a case in which 4 juveniles were detained in the cells together with adults. Again, on 24 January 2019 lawyers responded to another call for more juveniles detained and bundled with adults at the CID Law and Order at Harare Central Police Station, who had been arrested on the evening of 23 January 2019. The children were found in possession of items allegedly looted in a shop in Machipisa, Highfields. The three juveniles were found in possession of pencils and clothing items they had picked up after the items were dropped by looters at Machipisa Shopping Centre in Highfields, Harare.

Across all detention facilities, detention conditions were far from ideal. Children were sleeping on the floor without blankets, and had no access to food and water. For the periods the children were detained, they had no access to washing facilities.

Detention of Children with Adults

In almost all cases, children were bundled up with adults and thrown in detention facilities without separation. This was the case in Chitungwiza, Harare and Bulawayo. In Mabvuku in Harare, a 16-year-old child was arrested while running on the streets. Upon arrest, he was taken by the police to Choppies supermarket which had been looted. There, he was put together with adults arrested at the supermarket and was detained together with the adults at Mabvuku Police Station for almost 48 hours. All children who were detained at Harare Central Police Station CID Law and Order section were placed in cells with adults. No separate facilities were reserved for children.

Over-detention

Notwithstanding stipulations in the law, there were cases in which children were over-detained. Two Epworth juveniles arrested on Monday 14 January 2019 and charged with public violence were released on Friday 18 January 2019 after Harare Magistrate

Obedience Matare ruled that they had been detained for more than forty-eight hours. The juveniles aged 14 and 16 respectively were represented by the Zimbabwe Lawyers for Human Rights. In another case, a grandmother in an interview with Sky News stated that her minor granddaughter was arrested and detained in police cells some days.⁴⁵ The girl child had been assaulted on her breasts at the time that she was apprehended by the police. The girl child relayed that she was denied food for three days whilst in custody.

Access to Lawyers

In some police stations, particularly in Harare, lawyers were denied access to the detainees, who included children. At the CID Law and Order section at Harare Central Police Station, a group of 30 people that was arrested on 22 January 2019 had among them 4 children. Since 3am on 23 January 2019, lawyers were seeking to access the detainees without success. The children were only accessed mid-morning, at which point the lawyers proceeded to take instructions. The children were arrested as part of a group that was picked up by members of the police force at a safe house in Harare while being kept after receiving treatment at a local clinic.

The children, along with the adults, had received medical treatment from beatings they had sustained from members of the police force in Dzivarasekwa. The group was later released, and had to appear in court the following day. The release was largely because fresh arrests had been made and room was needed to be created for the new detainees to be kept.

In Chitungwiza, the police made it clear they would not assist lawyers to access juveniles arrested and would not assist with information. They informed the lawyers that instead of looking for “*perpetrators*”, the lawyers should be assisting the police officers in Chitungwiza as they were “*victims*”. The guardrooms At Makoni Police Station had been set alight during the violence, along with 6 cars and 3 buses in the yard.

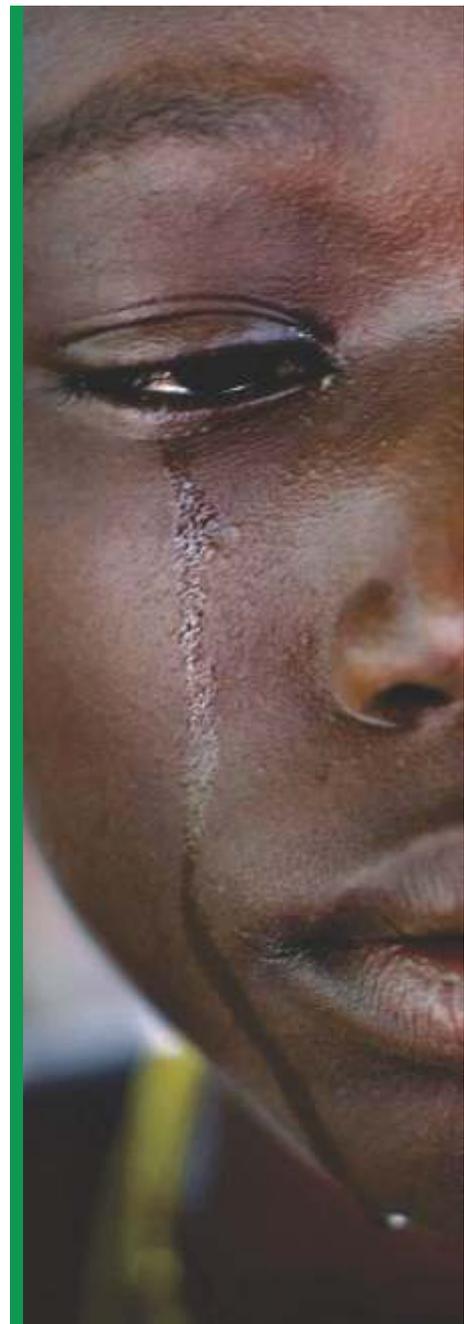
45. “Zimbabwe crackdown: Children shackled and caged in security round-up” SkyNews, 26 January 2019, <https://news.sky.com/story/zimbabwe-crackdown-children-shackled-and-caged-in-security-round-up-11617977>

Right to Privacy and Publicity of Name of Juvenile

The child's privacy should be respected from the point of arrest until the trial is completed, and the name of the juvenile shall not be published by any means, and no information likely to reveal the identity of the juvenile should be released.⁴⁶ However, this was not strictly followed. In one case, parents of a 16-year-old child arrested in Mabvuku learnt of the arrest of her child on national television, when they identified her child as part of a group of prisoners being transported to court by the ZPCS.

3.3 Conclusion

The majority of children were arrested in group arrests, or while going about on the streets. Upon arrest, they were bundled with adults, and were detained in police cells, including at the CID Law and Order section of the Harare Central Police Station. This indiscriminate pre-trial detention was at odds with section 84 of the Children's Act [Chapter 5:06], which provides for the circumstances in which a child can be detained pre-trial. Some children were over-detained, beyond the stipulated 48 hours, and on a few occasions, lawyers were hindered from accessing children in police detention. Children were assaulted both by members of the military and the polices forces. The privacy of detained children was not fully ensured, as evidenced by the showing on national television the face of a child in detention. All in all, international and national norms and standards of child justice were violated in the manner in which arrests were effected and the children were treated once arrested. There was a conspicuously disturbing trend in the effected arrests: arrests were mostly if not exclusively in CBDs and high-density areas. This is a deeply structural issue that has been becoming apparent in skirmishes that have been recorded in recent times – with the dichotomy between low density and high-density areas apparent.



46. Article 40(2)(b)(iv) of the UNCRC and section 195 of the Criminal Procedure and Evidence Act.

CHAPTER 4

CHILDREN ON TRIAL: COURTS AND CHILDREN IN CONFLICT WITH THE LAW

“There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace.”

Kofi Annan, Former UN Secretary General

- The Pre-Trial Diversion programme found little use during the January 2019 arrests and trials.
- The children who were arrested and charged with public violence in Harare, Chitungwiza and Bulawayo were legally represented by Justice for Children, Legal Resources Foundation and Zimbabwe Lawyers for Human Rights.
- Matters were being tried in a hasty manner, defeating the principles of a fair trial. Prosecutors and Magistrates were insisting that trials commence at initial appearance, before lawyers were given an opportunity to confer with their clients and prepare their defences.
- Prosecutors were curiously opposing certain applications such as separation of trials of children from those of adult co-accused, and release of children on free bail into the custody of their guardians.
- There were inconsistencies in the sentences imposed by Magistrates. Whilst some children were given wholly suspended sentences, some were ordered to perform community service whilst some were sentenced to corporal punishment.



4.1 Children on Trial for Public Violence

The events of January 2019 saw a number of child rights violations emanating from the way the children in contact with the law were treated in the courts. Allegations emerged on the politicisation of the judiciary due to the substantive and procedural decisions made by the judicial officers. Some

children were remanded in custody although the law provides for their release without bail to their guardians or the Department of Social Welfare in the absence of parents.⁴⁷

47. Section 135 of the Criminal Procedure and Evidence Act [Chapter 9:07].

Local NGO Justice for Children (JC) recorded a total of 51 children who were arraigned in the Magistrates Court in Harare, Chitungwiza and Bulawayo. This is despite the Chief Justice Luke Malaba mentioning in a statement that 12 children were arraigned before the courts as at 30 January 2019. Most public violence cases were recorded in Bulawayo and Harare and the main courts that dealt with cases of public violence involving children were as follows:

- Tredgold Magistrates Court, Bulawayo
- Western Commonage Magistrates Court, Bulawayo
- Rotten Row Magistrates Court, Harare
- Mbare Magistrates Court, Harare and
- Chitungwiza Magistrates Court, Harare

4.2 The Victim Friendly System

There is in place a national Victim Friendly System which is composed of the Victim Friendly Unit within the ZRP, and the Victim Friendly Courts within the court system. The system is meant to provide victim-friendly services to those who seek justice through the court system, primarily in sexual offenses and domestic violence. However, this system protects complainants, which are designated as the victims or survivors, as opposed to accused persons, even when the accused are children. Children accused of criminal offences are therefore not beneficiaries of the Victim Friendly System. This is in spite of the fact that children who commit criminal offences are themselves victims of youthful influences, and victims of whatever circumstances that would have led them to commit the criminal offences. During the January 2019 protest trials, no child accused of public violence was taken through the Victim Friendly system, including at police stations, for the stated reasons.

4.3 The Pre-Trial Diversion (PTD) programme

The PTD programme found little application during the January 2019 arrests and trials. In Harare and Chitungwiza all children arrested during #ZimShutDown were either tried, or cases were removed from remand, with the State to proceed by way of summons should it decide to prosecute the children. None of the cases had

PTD considered as an option. In Bulawayo one case involving a 9-year-old was channelled for diversion through the prosecutor and the Department of Social Welfare. Authority to Prosecute had not been obtained from the Prosecutor-General. On 26 January 2019, three children aged between 13 and 16 were diverted at Western Commonage Court after lawyers representing the children engaged the prosecutors. Although prosecutors were initially reluctant, they eventually relented. Due to the fast-tracked justice, PTD was probably seen as a non-viable system to achieve the objectives of the day. The programme was thus thrown into the periphery in the moment. For all intents and purposes, the public violence trials appeared to have been designed to achieve some goals which the government had set, such as punishing participants in the protests, and deterring future demonstrations and protests through sending a clear and audible message that the law would descend on any one who dares participate in violent demonstrations.

4.4 Legal Representation

Although the government's Legal Aid Directorate (LAD) has offices at all provincial centres in the country, including in Bulawayo and Harare where most children were prosecuted for public violence, LAD did not legally represent any child who was facing charges of public violence during the period under review. This might have been due to the fact that LAD is a government body and events of January 2019 were politicised.



Fortunately, the children who were arrested and charged with public violence in Harare, Chitungwiza and Bulawayo were legally represented by Justice for Children, Legal Resources Foundation and Zimbabwe Lawyers for Human Rights. It is however critical to note that these lawyers were not engaged by the prosecution or the courts to offer legal representation, as often happens, but rather they had conducted monitoring visits at police stations and prisons where children who needed legal representation were identified. Had it not been for these NGO legal aid organisations, the children would have appeared in court without legal representation. No cases were recorded where legal practitioners were denied an opportunity to legally represent children in courts.

4.5 Release Without Bail

In terms of section 135 of the Criminal Procedure and Evidence Act [Chapter 9:07], when a child is accused of an offence other than treason, murder or rape, a judge, magistrate or police officer has the power to release the child without bail into the custody of the parent or guardian or into a place of safety.

Almost all children were released into the custody of their guardians and parents on initial appearance in the Magistrates Courts. The gross exception was one 16-year-old child who appeared before the Magistrates Court at Rotten Row in Harare among a group of 10 accused persons arrested in Mabvuku. The group had already spent 48 hours in police custody at Mabvuku Police Station, and on initial appearance in court on 16 January 2019, bail was denied for the entire group – including the child. Making it worse, the group was remanded in custody at Chikurubi Maximum Security Prison, as opposed to Harare remand Prison. The child was only released on free bail into the custody of his mother on the 25th of January 2019. In Bulawayo, 14 children were remanded at Khami Prison, but that was because no proof of their age had been produced in court on initial appearance. The minors were subsequently released once their birth certificates were produced.

4.6 Separation of Trials

There were instances where children were jointly charged with adults, the lowest number being three recorded in Mbare Magistrates Court in Harare and the highest being 9 children recorded at Tredgold Magistrates Court in Bulawayo. Generally, separation of trials was granted in cases in which applications were made, where children were jointly charged with adults. The State however vigorously opposed some of these applications by lawyers. In one case at Rotten Row in Harare, the State opposed the separation of trial application, but relented after a while and openly asked the court for a chance to make “consultations”. The court shied away from making a ruling. Consultations were then done – clearly with the prosecutor’s superiors during adjournment – and the prosecutor returned to court with an instruction that the child be released. Only then was the child released.

4.7 Irregularities in the Courts

In quite an unprecedented fashion, due process was truncated en masse in the courts. What began to emerge clear was that these were not isolated incidences of courts and prosecutors butchering and mutilating legal process out of recognition; rather, this was systematic and consistent throughout courts trying public violence cases across the country. Irregularities that were experienced in the courts include the following:

Rushed Trials and Proceedings

Prosecutors and Magistrates insisted that trials commence on initial appearance, before the children and their lawyers had time to prepare their defences. Initial appearances are ordinarily reserved for bail and remand proceedings. It is highly irregular for a matter to proceed to trial on the date of initial appearance, let alone without the defence counsel having been given access to the state papers and having been accorded the opportunity to prepare the defence. On 23 January 2019, for instance, lawyers representing 3 children aged 16 and 17 who were facing charges of public violence attended to the children’s initial appearance at the Mbare Magistrates Court. The children were placed in

holding cells from around 1000hrs and initially appeared in court at around 1700hours. The prosecutor insisted that the matter go for trial despite the fact that the defence lawyer had only been furnished with state papers at 1700hrs. The children's legal counsel had to vigorously argue against instant trial. The Magistrate only granted postponement for the trial to proceed the very next day at 11.15 am. The same happened at Rotten Row Court, Chitungwiza Court and at the Bulawayo Courts.

Although one can argue that the principles of a fair trial provide that an accused person has a right to have their matter dealt with expediently, in this scenario courts were sanctioning fast-track trials without affording children adequate time to prepare for their defences. The courts were not entertaining postponement of matters, and the prosecutors appeared under instruction to refuse and contest any postponements. This offends provisions of the International Covenant on Civil and Political Rights and national laws that stipulate that there should be adequate time and facilities for the preparation of the defence when dealing with child offenders.⁴⁸

The public violence trials generally, were characterised by mass trials and the dismissal of bail applications and other pre-trial applications made by legal practitioners. None of the adults were being granted bail whatsoever, and this appeared to be a pattern in courts across the country in cases of this nature. It appeared that prosecutors and Magistrates were under instruction to act in a particular way. In respect of prosecutors, this was informally confirmed on a number of occasions by prosecutors during informal conversations with lawyers. One prosecutor confirmed that every day, prosecutors were reporting to their superiors on the progress of cases, on which lawyers appeared representing the accused, on what form of applications the lawyers were making, and on how the Magistrates were ruling. Challenges that lawyers faced with prosecutors included prosecutors not furnishing state papers to defense counsel on time; prosecutors

ambushing accused children and their lawyers into trial, with the support of Magistrates; prosecutors refusing to entertain requests for diversion of cases; and prosecutors opposing certain applications that one could never expect opposition on, such as separation of trials of children from those of adult co-accused, and release of children on free bail into the custody of their guardians.

In Marondera, however, there was a single case of public violence involving a child that came from Macheke, and prosecution was refused.

Proceedings not Conducted in Camera

When a child is being tried, the gallery should be cleared during proceedings. Other than court officials, only the child's parents or guardians are allowed in the court room, along with legal representatives of the child and the Department of Social Welfare. This is done so as to avoid harm being caused to a child by undue publicity which might have serious repercussions on the child. Children in conflict with the law have a right to privacy from the time they are arrested until the matter is completed in court.⁴⁹

Due to the nature of the arrests that saw children arrested and co-charged with adults in groups, children made initial appearances in court rooms that were not cleared, and included members of the media. Almost all preliminary proceedings were not done in camera. However, most if not all the trials were properly held in camera.

4.8 Convictions and Acquittals

The State's evidence, as with most cases involving public violence in January 2019, was mostly circumstantial.

In Chitungwiza, lawyer Job Sikhala who represented several minors in court remarked that some of the evidence brought to court as exhibits was not only laughable but absolutely shocking. Notwithstanding, a number of children were convicted.

48. Article 13 (3) (b) of the International Covenant on Civil and Political Rights.

49. Article 40 (2) (b) (vii) of the UNCRC and Section 195 of the Criminal Procedure and Evidence Act [Chapter 9:07].

4.9 Sentencing

The events of January 2019 were characterised with inconsistencies in the sentences that were being passed by Magistrates. Whilst some children were given wholly suspended sentences, some were ordered to perform community service whilst some were sentenced to corporal punishment. Others were warned and cautioned. No convicted children were referred to the Children's Court to be dealt with in terms of the Children's Act, and no children were sentenced to effective imprisonment. Children convicted of public violence and other alternative charges were given the following sentences:

Postponement and Suspension of Sentence

In some cases, passing of sentence was postponed for periods ranging from 3 to 5 years. Other were granted imprisonment terms ranging from 6 months to 2 years, which sentences were wholly suspended on imposed conditions.

Warned, Cautioned and Discharged

A few children were warned, cautioned and discharged on conviction.

Community Service

One 17-year-old boy in Bulawayo represented by ZLHR was ordered to perform 105 hours of community service. In another case, a 17-year-old boy in Form 4 who was represented by JC at Tredgold Magistrates Court was sentenced to 18 months imprisonment, 6 months of which were suspended on condition that he does not commit a similar offence and the other 12 months suspended on condition the he performs 420 hours of community service during weekends. The lawyers noted an appeal against the sentence, and it is pending in the High Court in Bulawayo.

Corporal Punishment

In spite of protests and spirited arguments by the legal representative, some children convicted of public violence were sentenced to corporal punishment, the minimum imposed being 3 moderate strokes and the maximum being 5

moderate strokes. The 5 strokes were imposed by Regional Magistrate Hosea Mujaya at Rotten Row on 14 February 2019, and were in addition to a wholly suspended prison sentence of 6 months. This matter was reported in the Daily News.⁵⁰ The Constitutional Court of Zimbabwe has however banned judicial corporal punishment on the grounds that it is by nature, intent and effect an inhuman and degrading punishment within the meaning of Section 53 of the Constitution of Zimbabwe.⁵¹ The declaration of invalidity of section 353 of the Criminal Procedure and Evidence Act [Chapter 9:07] which allowed for judicial corporal punishment, only took effect on 3 April 2019 with the effect that no male juvenile convicted of any offence shall be sentenced to receive moderate corporal punishment. The prohibition applies to sentences to receive moderate corporal punishment that had already been imposed and were awaiting execution.

4.10 Completion of Trials and Authority to Prosecute

Trials involving children were dispensed with timely, taking an average of two-three days to be completed, although in some instances it took one week. There are some trials that have not kicked off as at the publication of this report, pending authority to prosecute from the Prosecutor-General due to the ages of the children. In terms of section 231 of the Criminal Law (Codification and Reform) Act [Chapter 9:23], children under 14 years of age cannot be prosecuted unless a certificate authorising the prosecution is issued by the Prosecutor-General. The latest public violence case involving a child to be handled was completed at Western Commonage Court in Bulawayo in mid-June, where the Prosecutor-General issued authority to prosecute for a 13-year-old girl. The minor was convicted for theft. Some cases were placed off remand, for the primary reason that the State was not ready to proceed to trial as it had no evidence. For instance, at Rotten Row Court on 23 January 2019, JC represented four (4) minors whom it had earlier attended at the CID Law and Order at Harare Central Police Station and these

50. "Teen receives 5 strokes of the cane" Daily News, 15 February 2019, <http://www.zncwc.co.zw/2019/02/15/protests-teen-receives-5-strokes-of-the-cane/>.

51. S v Willard Chokuramba CCZ 10-19.

minors were all removed from remand, and the State was to proceed by way of summons. The minors were released into the custody of their guardians. All children that were removed from remand and where the State was to proceed by way of summons have not been prosecuted to date. While there is no indication as yet as to whether the State will prosecute these children, the chance that the children would at some point be prosecuted remains.



Zimbabwean lawyers show placards during a demonstration at the High Court of Zimbabwe on 29 January 2019 against irregularities in the handling of public violence cases in Magistrates Courts

The irregularities in the trials of accused persons connected to the January violence prompted lawyers to march and deliver a petition to the Chairperson of the Judicial Service Commission and the Chief Justice on 29 January 2019. Earlier on 23 January 2019, the Law Society of Zimbabwe (LSZ) had issued a statement calling for respect of the rule of law and due process in the courts. The Chief Justice responded to the petition with a statement issued on 30 January 2019.⁵²

52. Judicial Service Commission "Comments by the Honourable Chief Justice Following Complaints on Handling of Public Violence Cases" 30 January 2019, available at <https://jsc.org.zw/jscbackend/upload/Publications/FULL%20VERSION%20PETITION%20%20RESPONSE.pdf>

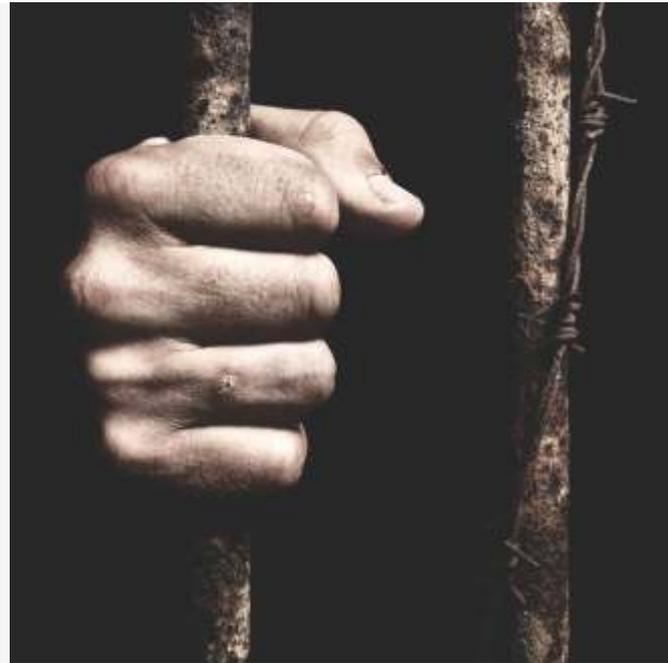
CHAPTER 5

CHILDREN IN PRISONS

“It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones”.

Nelson Mandela

- Children who were arrested were placed in police custody, but were then released by courts at initial appearance.
- A 16-year-old boy was detained at Chikurubi Maximum Security Prison for 10 days after his initial appearance at Rotten Row Court, and 14 children were detained at Khami Prison in Bulawayo pending production of birth certificates in court.
- At Chikurubi, lawyers who visited the prison to see the child who was detained there were wrongly informed by prison officials that the child had been released, barring him access to legal representation.
- Some prisons have no specific cells for child offenders, and children are mixed with adults.
- The conditions in prisons are not suitable and desirable for children.



Categories of children in prisons are either children in prison pending trials, awaiting sentence or children serving sentences. The best interests of the child remain the paramount consideration in dealing with children in prisons.

Following the #Shutdown protests in January 2019, children who had been arrested were placed in police custody upon arrest, and most were then released by courts at initial appearance. However, one case was recorded in which a 16-year-old boy was detained at Chikurubi Maximum Security Prison after his initial appearance at Rotten Row Court.

He had been arrested on 15 January 2019 and was released from prison on 25 January 2019. In Bulawayo, 14 children aged between 16 and 17 years were detained at Khami Prison after initial appearance for the reason that they could not produce birth certificates in court as proof of their minority. The children were released into the custody of their guardians once birth certificates were produced in court.

There is a young offenders prison called Whawha Young Offenders Prison in Gweru that houses young male inmates under the ages of 21 years. However, no children charged with public violence were sent to that prison either pre- or post-trial.

5.1 Separation from Adult Prisoners

Although efforts have been made to protect children's rights during incarceration, children are for the most part not separated from adults while in prison. Some prisons have no specific cells for juvenile offenders and children are mixed with adults. Following the mass arrest in January 2019, the prison population became higher than normal, and the overcrowding left no room for separate facilities for children.

Failure to separate children from adults in prisons exposes children to abuse and the criminogenic effects of prison. However, this failure to separate children from adults in prison is not a problem of the law, but of implementation. The law is clear in both the Constitution and in statutes that children should be kept separately from adults.

5.2 Conditions of Prison and Treatment that is appropriate to the Child's Age

Various researches and reports indicate that the conditions in Zimbabwe's prisons are generally appalling.⁵³ Prison conditions are not suitable and desirable for children. Zimbabwe's prisons are old and lacking in infrastructure and resources, with most prison infrastructure inherited from colonial times. No separate facilities were built in prisons to cater specifically for children and their needs.

In June 2019 it was reported that the conditions at Chikurubi Maximum Prison were less than satisfactory as a result of overcrowding at the institution. The prison which is supposed to house 1 360 prisoners at the men's section had 2 508 men.⁵⁴ There have been reports of shortage of medicines, food and bedding in prisons. It has also been reported that the prisons are infested with lice and vermin.⁵⁵ Due to overcrowding in the prisons, there are shortages of food and blankets, and there is limited access to bathing facilities. Children who were detained in prisons during the period under review faced these challenges.

Prison conditions have been worsened by the economic crisis facing Zimbabwe, which has seen little resources channelled towards improvement of prison conditions.

5.3 Prison Officers Denying Access to Lawyers

In the case of the child who was detained at Chikurubi Maximum Security Prison, lawyers responded to a call and travelled to Chikurubi Maximum Security Prison to see the child. At the prison, the lawyers were informed by prison officials that the child had been moved, and were not allowed in. Yet the child was still inside the prison. As a result, lawyers were unable to assess the condition of the child and to take instructions. The child was to appear at Rotten Row Court the following day on 25 January 2019, at which point the lawyers were notified of his appearance at court. The lawyers then rushed and attended to the child in court.



53. See for instance Zimbabwe Human Rights NGO Forum "Rights Behind Bars: A Study of Prison Conditions in Zimbabwe 2018" available at <http://www.hrforumzim.org/wp-content/uploads/2010/10/Prison-Report-2018.pdf> and Shadreck Vengesai "Juvenile Justice in Zimbabwe: A contradiction between theory and Practice: An analysis of Zimbabwe's Compliance with article 37 and 40 CRC and Article 17 ACRWC" Unpublished LLM thesis, Tilburg University, page 42.

54. "Prisons under Siege as Zimbabwe's economic woes persist" <https://www.thesouthafrican.com/news/zimbabwe-prison-conditions-june-2019>

55. Ibid

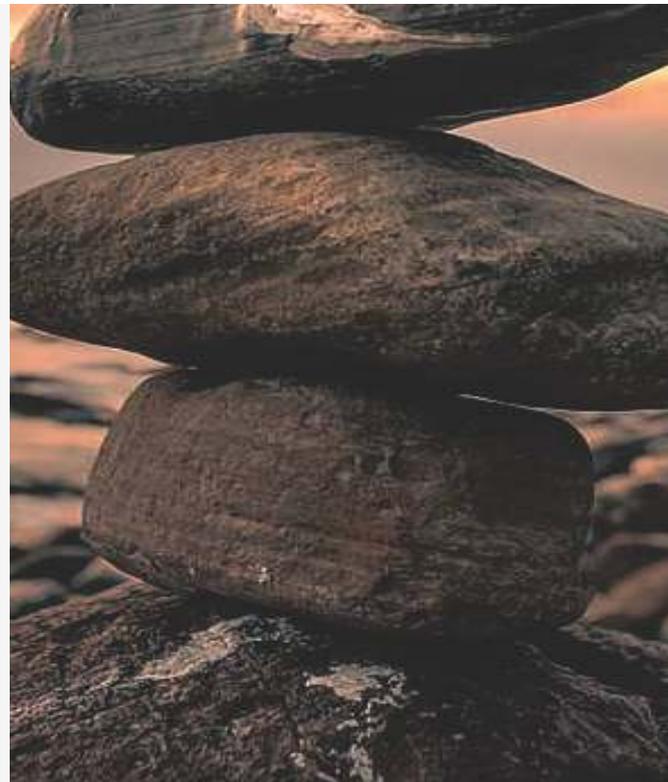
CHAPTER 6

ROLE OF THE DEPARTMENT OF SOCIAL WELFARE

“Where a juvenile commits an offence the procedural safeguard of roping in the assistance of those with the requisite expertise in dealing with juveniles in order for the court to make an informed decision is one that should be taken seriously by both the probation officer and the magistrate.”

Tsanga J in S v FM (A Juvenile) HH 112-15

- The police, particularly in Harare and Chitungwiza, did not engage the Department of Social Welfare, despite also not informing parents and guardians of the arrest of their children.
- Many children who were tried in the aftermath of the January protests were tried without probation officers' reports.
- Cases of 9 children charged with looting were postponed by a month at Tredgold Magistrates Court in Bulawayo to allow for Probation Officer's reports to be furnished to court.
- Only one child who appeared at Western Commonage in Bulawayo on 16 January 2019 was referred to a Children's Institution, awaiting bail ruling by the court.
- No psychosocial support was given to children arrested during the January 2019 protests, and there were no follow ups conducted to ascertain the reformation of those convicted and sentenced.



The Department of Social Welfare (DSW) under the Ministry of Public Service, Labour and Social Welfare, has a critical role to play in cases of children in conflict with the law. The department houses probation officers and government social workers who work with the courts in dealing with children in conflict with the law. The Children's Act [Chapter 5:06] lays out the functions of a Probation Officer.

The Department runs Children's Centres, formally referred to as Training Institutes and Reformatory Institutions. These house children whether pre- or post-trial, and also provides for safe spaces for children.

6.1 Release of Juveniles without Bail where there is no Guardian

At initial appearance in court, if a child has no parents or guardians or if these are unable to be located, the child can be released into the custody of the Department, and the Department will house the child at one of its Children's Centres. Probation Officers would need to attend to the police station or to the court, as the case may be, and take custody of the child. During the #ZimShutDown arrests, the police, particularly in Harare and Chitungwiza, did not engage the Department of Social Welfare, despite also not informing the children's parents and guardians of the children's arrest. Fortunately, eventually all the children were legally represented, and the parents and guardians were notified by the lawyers and attended court to receive the children. Thus, no children were released into the hands of the DSW on account of unavailability of parents and guardians.

6.2 Probation Officers' Reports

In all matters before the courts involving children in conflict with the law, Probation Officers are required to conduct an inquiry and then come up with a Probation Officer's report. The report, a social and psychoanalysis of the child, should entail the age of the child, personal circumstances and upbringing of the child, the child's educational circumstances, the nature of the offence, comments about the child's capacity to commit the particular offence, circumstances surrounding the commission of the offence, attitude of the child towards the offence, and the recommended intervention that would rehabilitate and reform the child, among other pertinent issues. The Probation Officer's report will not bind the court; Probation Officers' reports are not definitive, and they do not necessarily direct the court as to what it should do. Rather, they are part of the evidence and information before the presiding officer to allow the court to be in a better position to exercise its discretion in an informed manner. The reports serve as critical and useful guides to the Magistrate or Judge in deciding on the appropriate approach, including the appropriate intervention or sentence.

Importantly, the reports bring an extra-legal dimension in the assessment of the juvenile in conflict with the law and the influences surrounding that child, including criminogenic influences. The law on juvenile justice considers the empirical, agreed upon and acceptable socio-economic, political and sociological influences surrounding children committing offences, and the consequent need to bring back such children into ideal citizenship. This was captured by

Justice Amy Tsanga in the High Court case of *S v Masuku* HH 106-15 wherein she stated that: *"[T]he reality is that law on its own in such instances cannot be the panacea to problems that have deep social contexts. Law does not operate in a vacuum"*.

Justice Tsanga also highlighted in *S v FM (A Juvenile)* HH 112-15 that: *"It is also the responsibility of all officials involved both judicial and non-judicial to be thorough in their assessments so as to give each accused child a real chance at being justly treated"*.

Many children were tried and sentenced in the aftermath of the January protests without probation officers' reports. This protection mechanism was dispensed with. As a result, the courts that dispensed with the need for the reports treated children in a manner that disregarded the legal and statutory protections accorded to children.

In those cases where Probation Officers' reports were prepared, some reports were furnished to the courts timeously, while in some instances the DSW cited lack of transport funds to take the reports to court.

In some instances, delays in furnishing the reports delayed commencement of trials. For instance, at Tredgold Magistrates Court in Bulawayo, cases of 9 children charged with looting were postponement by a month to allow for Probation Officers' reports to be furnished to court.

Thought it is required and desired that a Probation Officer's report is presented before a court dealing with a child, it is not fatal to a case to

pass sentence without a probation officer's report.⁵⁶

In addition, the Probation Officer also has a duty to counsel, supervise and control any juvenile placed under their supervision, what is referred to as probationary supervision. However, no children were placed on probationary supervision.

6.3 Children's Institutions (Reformatory institutions)

The Department of Social Welfare operates Children's Institutions, formerly referred to as Reformatory Institutions. A total of six (6) Children's Institutions are operational across the country. These are as follows:

- North Court, Harare,
- Kadoma Training Institute, Kadoma,
- Blue Hills Probation Hostel, Gweru,
- Luveve Training Institution for Girls, Bulawayo,
- Percy Ibbotson Probation Hostel, Bulawayo, and
- Mutare Probation Hostel, Mutare

During the period under review, there were no children that were taken to Children's Institutions post-trial. Convicted children were not placed at Children's Institutions as the courts opted to give suspended sentences, community service orders and sentences of corporal punishment. Only one child was recorded to have been placed at a Children's Institution pre-trial. The child appeared at Western

Commonage Court in Bulawayo on 16 January 2019, having been arrested for carrying 4kgs of sugar, two bottles of cooking oil and two loaves of bread after breaking into Marisha Supermarket in Old Magwegwe, Bulawayo. The juvenile was referred to the Percy Ibbotson Home, awaiting bail ruling by the court.

6.4 Psycho-Social Support and follow ups

No psychosocial support was provided to children arrested during the January 2018 protests, and no children were placed on probationary supervision. Similarly, there were no follow-ups conducted by the DSW to check on the children's reformation and rehabilitation. Entities such as Childline however provided counselling to some children who were generally affected by the January 2019 violence, but this was not targeted at those arrested and convicted.

56. In *S v Masara* HMA 18-17 per Mawadze J, the High Court in a review judgment held that:

"The mere absence of a Probation Officer's report per se does not constitute a misdirection or miscarriage of justice." The court has remarked earlier that "Judicial notice should be taken of the fact that there are real constraints faced by the courts in obtaining such reports leading to inordinate delays in finalising criminal cases. Where appropriate this can be solved by being resourceful and proactive as was done by the learned Senior Regional Magistrate. The bottom line is whether the trial court has carried out a meaningful pre-sentence inquiry to equip itself with sufficient information to properly sentence the accused without committing an injustice".

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

*“In serving the best interests of children,
we serve the best interests of all humanity.”*

Carol Bellamy

During and after the January 2019 protests, children became collateral victims. It is evident that arrests and trials in the aftermath of the January 2019 protests were an affront to the rule of law and to notions of justice. This was generally across the board. Children being a vulnerable group, had their rights trampled even the more. The specific protections afforded to children, such as protection from indiscriminate pre-trial detention, and the need for Probation Officers’ reports, were violated. Due process was truncated, and prosecutors unduly opposed applications for separation of trials and release on children without bail.

Children’s rights were sacrificed at the altar of politically motivated arrests and trials. What is clear is that notwithstanding the legal protections accorded to children who interfaced with the criminal justice system, children were bundled together with adults in the way in which they were treated by the system. The only significant difference in treatment was that children were released on free bail and were not given effective imprisonment terms upon conviction.

Yet the need to safeguard and protect children in the criminal justice system is even more pronounced in times of crisis.

Against this background, it is recommended as follows:

- The justice system must have specific systems and procedures to follow in dealing with children arrested in time of conflict and mass arrests. Children should not become invisible in the multitudes of arrestees. The juvenile justice system must remain intact even in times of crisis.
- Childhood and youthfulness on the accused must not be diminished on account of a context of conflict. If anything, constitutional and statutory protections are most needed during times of conflict. The Judicial Service Commission (JSC), National Prosecuting Authority (NPA), Zimbabwe



Republic Police (ZRP) and every role player in the justice delivery system must be activated to protect the best interests of children.

- There is need to have specialist courts dealing with children’s cases in the criminal courts. These courts will have specialist magistrates and prosecutors, who understand child justice processes and systems. A similar

model of Children's Courts in the civil court system or the Victim Friendly Court System could be adopted.

- Magistrates should be adequately capacitated to deal with children who come before them, so that there are no inconsistencies in the way children are treated, tried and sentenced by the court for the same charge and substantially similar circumstances.
- A comprehensive, one-stop piece of legislation with a child justice framework must be developed as a concrete reference point of juvenile justice. There is therefore need for the Child Justice Bill to be enacted into law.
- The government should ensure that the Legal Aid Directorate provides legal assistance to children who are caught up as offenders in times of conflict. Provisions of legal aid services should not be left entirely to civil society legal aid organisations. Although there is no special right to legal representation at the state's expense when children are brought before the courts to answer to criminal charges, the State should consider the peculiarities of times of conflict, the vulnerability of children, and the high risk of children being unfairly treated and tried as adults if they are not provided with legal aid.
- The government must consider compulsory legal aid for unrepresented children in conflict with the law, and this may be incorporated in the Child Justice Bill.
- The police and courts must observe restrictions regarding pre-trial detention in terms of the law.
- Procedures of informing parents and guardians and the Department of Social Welfare upon arrest of a minor must be followed and enforced. This would ensure that children are accorded the rights they are entitled to upon arrest.
- Probation Officer's reports must be furnished, and timely, in all cases involving children as accused before the criminal court. This legal requirement must be strictly enforced.
- Children should not be placed in Maximum Security prisons, whether for pre- or post-trial detention. When incarcerated, children should not be mixed with adults as this exposes children to further abuses. Separate facilities for children should be reserved as required by the law.
- Until the underlying political and economic issues are resolved, Zimbabwe might continue to face unrest and civil action in the future. The recurrence of unrests remains real. As much as possible, government and citizens should work towards preventing conflict, violent protests and criminal activity that would result in children being caught up in the mayhem.



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