

Opening Session

Address by Hon. Justice Mr. Philip K. Tunoi

Address by Hon. Justice Mr. Bernard Chunga

Keynote Speech by Mr. Mikinao Kitada



ADDRESS

By
Hon. Justice Mr. P. K. Tunoi
Judge of Appeal

Your Lordship the Chief Justice of Kenya,
Your Excellency Mr. Morihisa Aoki, Japanese Ambassador to Kenya,
My brother and sister Judges,
Mr. O. Otsuka, Resident Representative Director of JICA,
Permanent Secretaries,
Mr. Mikinao Kitada, Director of UNAFEI, Scholars and Staff,
Your Worships,
Distinguished Guests and Participants,

On behalf of the Judicial Training Committee and the Organizing committee between Kenya and the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), I would like to take this opportunity to warmly welcome all of you to this seminar.

This very important seminar is co-organized by UNAFEI and the Judiciary of Kenya in close co-operation with various criminal justice agencies and scholars. These include the offices of the Vice-President, The Attorney General, The Police Department and The Prisons Department.

The theme for the seminar: *Effective Co-ordination and Co-operation of Criminal Justice Agencies in the Administration of Juvenile Justice* is very appropriate for us in Kenya in that, right now, there is a Bill pending for discussion before our Parliament as Regards the Rights of the Child. Again, our country is in the process of making a new Constitution and there is live discussion as to what is believed should be contained in the Bill of the Rights of the child.

The concept of the rights of the child is of relatively recent origin. Historical data reveal that not only were children regarded as insignificant, they were also maltreated. Indeed, judged by contemporary standards, attitudes and practices toward children, showed heartlessness and cruelty. Children who were unfortunate to breach the law were killed, abandoned, beaten and terrorized.

However, the evolution of the concept of childhood has occurred gradually over a course of time. Today the legal status of children, in most countries of the world, has undergone a radical transformation. Children are now valued social beings imbued with legally protected rights. However, it must be remembered that the social reality of childhood in many parts of the world is still that of a precarious existence fraught with obstacles.

I am proud to say that we, in Kenya, have since long ago considered the entire interests of the child as of paramount importance. In the case of *YASMIN V MOHAMED* (1973) E.A. p 370 that sagacious judge, the late Madan J who later became the Chief Justice said:

“This court is especially endowed with jurisdiction to safeguard the interests of infants. The court is the parent of all infants. The welfare of infants is paramount and it is dear to the heart of the court. There could be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe or sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are fully preserved.”

Also, only last week His Excellency The Vice President emphasized that the Government of Kenya takes seriously all the problems facing the child and he called on parents, other adults, organizations and local and national authorities to strive to observe these rights by legislative and other measures.

Seminars, like this one, will no doubt increase public awareness of these problems and that the social and legal status of the world's children will continue to improve so that their rights as envisaged by the United Nations Declaration of the Rights of the Child are realized. The Seminar, for us in Kenya, is a great opportunity to exchange views and ideas with experts from UNAFEI. At the end of the Seminar, I hope, we shall have guidelines and recommendations for actual implementation and further development of effective administration of juvenile justice.

On behalf of my committee, I would like to thank again JICA, UNAFEI and the Kenya Government for their support, which has enabled us to hold this Seminar. My thanks also go personally to His Lordship the Chief Justice for having sacrificed judicial times of his staff to enable them take part in this Seminar. I extend the same to His Excellency the Vice President, the Attorney General, the Commissioner of Police, the commissioner of Prisons and all those who will contribute their papers for presentation and discussion.

I wish you fruitful discussions during the next four days.

Thank you,

ADDRESS

By
Hon. Justice Mr. Bernard Chunga
Chief Justice of Kenya

*My Lord Judges of Appeal,
My Lord Judges of the High Court,
Members of the Law Society of Kenya,
Members of International Commission of Jurists,
Members of the Legal Fraternity,
Honourable Magistrates and Deputy Registrars,
Distinguished guests,
Ladies and Gentlemen,*

It gives me great pleasure to welcome each one of you to this Joint Seminar. The general objective of this joint seminar shall be to improve and sustain administration of Juvenile Justice.

The specific objectives are:-

- (i) To enhance and promote corporation and coordination of all juvenile justice agencies in effective administration of juvenile justice,
- (ii) To create awareness of importance of such corporation and coordination.
- (iii) To identify the problems and suggest solutions of tackling the problems that hamper such coordination and corporation.
- (iv) Create and promote public awareness of and participation in crime prevention efforts, i.e. (prevention of crimes against children), in conjunction with coordinated efforts of the Government of Kenya and other Non-Governmental and private Organizations interested in prevention of child abuse and violation of children's rights in Kenya. To achieve this objective, this seminar has invited both local and international papers from:-
 - (a) Director UNAFEI on the topic "Juvenile Justice Systems in Japan"
 - (b) Director of Public Prosecution – Kenya – on the topic – Juvenile Justice Systems in Kenya.
 - (c) Ministry for Home Affairs on the topic – Linking Juvenile Agencies.
 - (d) National Police Agency of Japan on the topic – Policing Juvenile Justice in Japan.
 - (e) Prof. Tanabe UNAFEI – on the topic – The Role of Public Prosecutors in Juvenile Justice in Japan
 - (f) The Commissioner of Police on the topic – The Role of Kenyan Police in Juvenile Justice in Kenya
 - (g) The director Criminal Investigation Department – Kenya – on The Role of CID in Juvenile Justice in Kenya.
 - (h) Prof. Miura UNAFEI – on the topic – The Role of Family Court in Administration of Justice in Japan.
 - (i) Senior Family Court Probation Officer, Japan on the topic, The Role of Family Court Probation Officers in Japan.
 - (j) Magistrate, Juvenile Court, on the topic – The Role of the Juvenile Court in the Administration

- of Juvenile Justice in Kenya.
- (k) Judge of High Court of Kenya on the topic – The Role of Family Court in the Administration of Juvenile Justice in Kenya.
 - (l) Prof. Tsutomi UNAFEI – on the topic – Institutional Treatment of Juvenile Delinquents in Japan.
 - (m) Prof. Kakihara UNAFEI – on the topic Community-Based Treatment of Juvenile Delinquents in Japan.
 - (n) Director Children’s Department on the topic – The role of Children’s Department in the Treatment of Juvenile Justice Delinquents.
 - (o) Commissioner of Prisons on the topic – The Role of Prison Department in the Treatment of Juvenile Delinquents.
 - (p) The Director of Probation Department on the topic - The Role of Probation Department in the Treatment of Juvenile Delinquents.
 - (q) Prof. Someda UNAFEI – on the topic – International Instruments in the Field of Juvenile Justice.
 - (r) Resident Representative UNICEF on the topic – UNICEF Approach in the Administration of Juvenile Justice.
 - (s) UNAFRI – Uganda on the topic – Juvenile Justice Reform – Ugandan Experience.
 - (t) Save the Children U.K. on the topic – The Role of N.G.O.s in Juvenile Justice Reform.

I wish to highlight some provisions of the Laws of this country that apply to children or Juveniles to enable you to understand the age of persons we are concerned here as follows:-

- The age of majority Act Cap 33 Laws of Kenya defines persons below 18 years as minors.
- The Children and Young Persons Act Cap 141 Laws of Kenya defines a child as under 16 years old but over 14 years.
- The Penal Code Cap 63 Laws of Kenya defines a child and includes the unborn child as Sections 158 and 159 prohibit abortion.

Under section 14 of the penal Code – a person below 8 years is incapable of forming a criminal intent and Kenya’s criminal law presumes that a girl aged below 14 years cannot consent to sexual intercourse. However, the law allows an offender to put up a defence if he believed that the girl is over 14 years old.

It is presumed that a male child below 12 years cannot commit the offence of rape. Further under the Penal Code no death penalty can be meted out against a person below 18 years old. Girls under the age of 21 years are protected from being procured for immoral purposes, girls below 18 may not be retained for sexual exploitation by the householder.

- Section 82 of the Constitution of Kenya allows different personal laws on adoption, marriage, divorce, burial, devolution of property and other related matters.
- Section 2 of the Borstal Institution Cap. 92 Laws of Kenya provides that young offenders between 15 and 18 years may be committed to Borstal Institutions. Parents are allowed to participate in enforcing the penalties prescribed against such offenders.
- Under the Prisons Act Cap 90 Laws of Kenya – persons aged 17 and 21 years may be placed in corrective Training Institutions instead of Prisons.
- Under the Evidence Act, the evidence of a minor is not admissible unless corroborated (although courts do assess each individual child).
- Under the Oaths and Statutory Declaration Act Cap. 15 Laws of Kenya – a child of tender age

may testify on oath only if the child understands the nature and seriousness of an oath (the courts assess the child and give a certificate to that effect).

- Under the Traffic Act – Persons under 16 years are not issued with a driving licence.
- Under the Liquor Licensing Act Cap 121 Laws of Kenya – alcoholic drinks are not sold to children.
- Under the Marriage Act Cap. 150 Laws of Kenya – the marriage age is 16 years for girls and 18 years for boys. In both cases, parental consent is required. This also applies to the Hindu marriage and Divorce Act.
- Under the Employment Act, the minimum age of employment is 16 years, though Kenya signed the International Labour Organization Convention 138 that provides the employment minimum age as 15 years.
- Under the Trade Unions Act, children below 16 years may not participate or be presented in Trade Unions.
- Under Adoption and Guardianship of Infants Act – Cap 143 – Section 2 defines an infant as a person under 18 years.
- Armed Force Act, Cap 199 Laws of Kenya – Persons under the age of 18 years may not be recruited in the Armed Forces without consent of parents, guardians or District Commissioner.

Cases involving Juveniles are heard in Juvenile Courts and among them include – children who are:-

- Neglected, displaced or street children,
- Children in need of care and protection
- Children who have come into conflict with the Law,
- Physically and sexually molested or abused children
- Exploited children – who provide cheap labour in industrial or agricultural farms, etc.

There is no provision that clearly and exhaustively spells out the rights of a child in Kenya. However since Kenya ratified the Convention on the Rights of a Child in 1990, the Kenya Government has taken speedy steps to formulate a Bill on the Rights of a Child that has already been tabled in Parliament awaiting to be enacted to become Law.

The Kenya Government is committed to put in place a sound Juvenile Justice system in order to improve and sustain effective Administration of Juvenile Justice, both locally and internationally. In particular, the Judiciary wishes to encourage the continuous use of existing efforts to harmonize national legislation with international standards for inclusion in the National Development plans through Law Reform and Policy Development, to safeguard the rights and to promote the protection of children. The Judiciary further urge all the Juvenile Justice Agencies in this country to support the Government to support the United Nations Global programme against trafficking of human beings with emphasis on children, by organized crime groups, promote the development of effective Juvenile Justice responses through research and documentation, information networking, and monitoring system, technical cooperation activities and development of national and regional protocols and bilateral/multilateral arrangements.

It would also be in the interests of justice, that juvenile justice agencies herein strengthen cooperation and coordination in strengthening and institutionalizing child-friendly training and education programs among Juvenile Justice practitioners in order to enhance their competence in the management of the cases

of abused and exploited children and to uphold their dignity and prevention of revictimization.

In our effort to continue to strengthen the government's efforts in improving Juvenile Justice, the Judiciary, through the Judicial Training Committee, played a key role in organizing and coordinating this Joint Seminar which aims at strengthening linkages with the Government and other concerned Non-Governmental Organizations, both local and international, the private sector and donor organizations who help in allocating resources to mainstream programs, projects and activities for children.

I have often emphasized that courts, who are the custodians of justice have to work with other players in the administration of justice, similarly for effective juvenile justice, juvenile justice agencies must cooperate and coordinate with the courts.

For this purpose, this seminar has brought together the following justice agents involved in juvenile justice.

- The Judiciary,
- The Attorney General's Prosecution Department,
- The Police Department,
- The Prison Department,
- The Children's Department,
- The Probation Department,
- The Probation and After Care Services Department,
- The Criminal Investigations Department,
- Several Non-Governmental Organizations such as
 - Save the Children U.K. (S.C.F.)
 - International Federation of Women Lawyers (FIDA)
 - Law Society of Kenya (L.S.K.)
 - International Commission of Jurists Kenya (I.C.J.)
 - Kituo cha Sheria
 - The African Network for the Prevention and Protection against Child Abuse and Neglect ANPPCAN
 - United Nations, Asia and Far East Institute (UNAFEI)
 - UNAFRI

The Seminar is unique and a pioneer Kenya-UNAFEI joint seminar will create awareness of the need for cooperation and coordination in the administration of juvenile justice among all juvenile justice agents. I believe that the seminar will come up with concrete suggestions, appropriate practical and valuable recommendations on effective administration of juvenile justice. Further that this seminar will come up with recommendations on how to develop strategies, interventions and programs to promote children's safety at large, as well as to programme for the recovery and integration of children survivors/victims in their families and communities at large.

I wish every one of you every success.

KEYNOTE SPEECH

UNAFEI'S APPROACHES TO JUVENILE JUSTICE

By

Mr. Mikinao Kitada, Director, UNAFEI

Honourable Chief Justice of the Republic of Kenya, Mr. Justice Bernard Chunga; Honourable Permanent Secretary of the Ministry of Home Affairs, Heritage and Sports, Mrs. Bernadette Musundi; Honourable Resident Representative of Japan International Cooperation Agency of Kenya Office, Mr. Otsuka; and the honourable guests, distinguished participants, ladies and gentlemen, good morning.

First of all, I would like to express my deep gratitude to the Government of Kenya, particularly the Honourable Judge of the Court Appeal, Justice Tonui and the Judicial Training Committee led by him, and the many people concerned, for their strong support and great cooperation in the successful realization of this Joint Seminar. At the same time, I would like to express my deep appreciation to the Japan International Cooperation Agency for its support, which has enabled us to hold this Seminar.

UNAFEI is a United Nation's regional institute for the prevention of crime and the treatment of offenders, established in 1961. We are based in Tokyo, Japan and have been engaged in offering International Training Courses and International Seminars in the field of criminal justice, to participants mainly from Asian and Pacific regions. However, we have also received more than 150 participants from Africa. Among the African nations, the Republic of Kenya has sent the largest number of participants to us, totalling almost 40 so far.

In addition to those training courses and seminars, Joint Seminars held overseas are one of the main activities of UNAFEI. Joint Seminars have been conducted almost annually since 1981. This is the 21st Joint Seminar of the Institute, and the first to be held in the 21st century and the first in the African continent. We are truly honoured to be able to participate in this significant event with the kind presence and warm support of the honourable administrators and executives of the criminal justice systems of the Republic of Kenya, and with the active participation of so many high-ranking criminal justice personnel.

In this Joint Seminar we will discuss "Effective Administration of Juvenile Justice". I am confident that this topic is both pertinent and timely. In the field of juvenile justice, UNAFEI has maintained a close relationship with Kenya by sending its faculty members as JICA experts attached to the Children's Department, consecutively for five years. Also, we welcomed a group of nine Kenyans working for children's services to our one-month training course last year and look forward to the arrival of a new group this coming November. I am truly happy today that we have another chance to contribute to juvenile justice in Kenya by holding this Joint Seminar.

I hear that juvenile delinquency, especially that of street children in major cities, is a major issue in Kenya. "Juvenile Delinquency" has been paid full attention by the United Nations, with the adoption of "the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century" (A/CONF.187/4/Rev.3), at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna, 10-17 April 2000. The declaration stresses the importance of undertaking measures to prevent juveniles from becoming delinquent in its para. 24 by developing comprehensive crime prevention strategies addressing the root causes and risk factors related to crime in its para. 25. Bearing this in mind, we look forward to reaching solutions to the problems of juvenile delinquency in Kenya at this Joint Seminar.

UNAFEI's approach to problem solving are practical, comparative and integrative. Being practical means to study problems and difficulties being faced in each country and devise solutions. Being comparative means to learn from examples of other countries' experiences which may be applicable to different contexts. Being integrative means to solve problems and difficulties by joining the strengths of criminal justice and other agencies.

To be practical, we have met many important criminal justice officials in Kenya to hear their opinions since our arrival. We have visited many juvenile justice institutions taking care of Kenyan children and youth under their care.

We have learned that Kenyans involved in the care of children in conflict with the law are facing a lot of difficulties. Let me illustrate my observations with two examples.

First, although there is a need for diversionary community alternatives such as temporary supervision and guidance, restitution, and compensation of victims as are emphasized in rule 11.4 of the Beijing Rules and fitting the requirement of Article 40.3(b) of the Convention on the Rights of the Child which asks States to promote:

wherever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings

I learned that the Kenyan police rarely contact social/children's services before they take the case to court. Therefore, police warnings, cautions and admonitions are under-utilized and more often unaccompanied by measures to assist the child. The comparative approach may give us a few answers to this difficulty.

In New Zealand, the Children, Young Persons and Their Families Act 1989 introduced the Family Group Conference in which the child's immediate family and extended family, the victim of the crime and others with a legitimate interest are invited to identify a solution to the child's difficulty and a resolution for the offending behaviour. The FGC can operate informally or formally. In the informal process, the FGC is initiated upon referral from the police. Thus, the FGC works as a means for the police to activate the community resources.

In Singapore, the Guidance Programme (GP) was launched to strengthen the effectiveness of the police caution. The GP is an inter-agency networking mechanism which involves the Police, schools and volunteer welfare officers to provide counselling and rehabilitative programmes for juvenile offenders. Also, in GP, parents are helped to acquire knowledge and skills in effective parenting and supervision of the juvenile.

These examples suggest the capacity of the police to utilize multi-agency and community-based services needs to be enhanced. It goes without saying that these examples direct us to the integrative nature of the solutions: the third approach of UNAFEI. The significance of the integrative approach is also emphasized in the Riyadh Guidelines as:

Close interdisciplinary co-operation between national, State, provincial and local governments, with the involvement of the private sector; representative citizens of the community to be served, and labour; child-care, health education, social, law enforcement and judicial agencies in taking concerted action to prevent juvenile delinquency and youth crime.

Actually, this is the spirit which should prevail in this joint seminar. We will have five sessions starting today, in which we welcome presenters representing all juvenile justice agencies and related non-governmental bodies. We will learn from each other and share our solutions on the last day.

Let me move on to the second example. After our arrival in Nairobi, I also learned that it is difficult for the court to pay due regard to the requirement of rule 14.2 of the Beijing Rules that proceedings be:

conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely due to heavy caseloads and insufficient training of local magistrates.

We also learned that another related besetting problem for the judiciary is that of delay. The impact of delay may be serious for children whose time is valuable considering their speed of development. Recognizing the importance of reducing delay, rule 20.1 of the Beijing Rules requests that:

Each case shall from the outset be handled expeditiously, without any unnecessary delay.

Again, the comparative approach may give us a few answers to this difficulty.

In Uganda, they put limitations on the length of any trial process. Minor cases will be dismissed if the trial is not completed within 3 months after the plea is taken. If the case is of a serious nature the case should be completed within 12 months or thereafter be dismissed. In addition, the maximum period a child can stay on remand in custody in case of a serious offence is 6 months and thereafter the child should be released on bail. Similar and more stringent provisions are available in the Juvenile Law of Japan.

In the UK, the days from arrest to sentence has been reduced from 142 to 83 by the campaign against the adjournment culture in the courts and substituting it with performance management more commonly associated with business. In addition, various agencies involved are encouraged to work together to reduce delay. They have also started Bail Support and Supervision projects offering support and supervision to young people on remand awaiting trial and sentence. This reform clearly acknowledges rule 13.2 of the Beijing Rules that:

Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

Because supervision or placement cannot be implemented without the collaboration of community-based resources, it is again clear that a multidisciplinary/integrative approach is required.

Particularly notable about the juvenile justice reform in Uganda is the role of the Save the Children Foundation, a UK-based non-governmental organization to start the reform process. It provided funding and technical guidance to a national committee (Child Law Review Committee) which was charged with the responsibility of formulating proposals for legislation. Together with other NGOs, UNICEF and government bodies, it lobbied for the enactment of the statute. Again, the importance of collaboration is confirmed.

In our 118th International Training Course which just ended in July 2001, UNAFEI used the three approaches to come up with the best practices in delinquency prevention and child offender treatment. Participants from 16 countries discussed these issues practically, comparatively, and integratively, learning from visiting experts from Canada, New Zealand, Singapore, the UK and the USA. This is another example of our comparative approach.

In those developed countries, the child-centredness of juvenile justice is under attack and various reforms have been introduced to bring “offender-centredness” into juvenile justice while maintaining its rehabilitative function. Examples include the Family Group Conference introduced by New Zealand, which I touched upon earlier, and the referral order launched by the UK in 1999, involving the referral of a young offender to a youth offender panel (YOP), consisting of one official and at least two community members, one of whom acts as chair. Japan also amended our Juvenile Law recently to solve the same issue.

At the same time, in those developed countries, scientific evidence on effective juvenile justice has accumulated. In due course, our integrative approach requires the integration of practice and science in juvenile justice.

The evidence tells us that more serious offenders need more intensive services and that even with serious offenders the mobilization of personal resources such as parents, other significant others, schools and employers works. Now, It has become more obvious that rule 17.1(d) of the Beijing Rules which says:

the well-being of the juvenile should be the guiding factor in the consideration of her or his case

is leading us in the right direction. We should devise a juvenile justice system which does not deny services to more serious delinquents but accords more intensive treatment to them. Rationale for treatment needs to be re-examined so that juvenile justice can pursue the best interests of the child and society simultaneously.

We have our Newsletter No. 105 to be distributed, which reports the outcome of the 118th International Training Course so that we can share what was achieved in the course. The model practices proposed there should have something applicable to Kenyan situations.

As to delinquency prevention, the participants adopted what is called a risk-focused prevention framework, in which communities are mobilized to identify risk factors for offending and implement prevention methods designed to counteract them. In addition, protective factors are identified and enhanced. Programs are chosen and implemented to target these factors. This model can be applied to Kenya where the District Children's Advisory Committee are organized where all important players interested in the well-being of children are involved.

As to the community-based treatment of juvenile offenders, the model proposed by the participants is based upon three ideas: the establishment of a multidisciplinary team; the continuous or through care; and the mobilization of social resources. Again, in Kenya, the DCAC is an ideal multidisciplinary team which will be a vehicle to provide continuous care and to mobilize community resources such as child-oriented non-governmental organizations and voluntary or benefactory individuals such as potential educators and employers.

As to the institutional treatment of juvenile offenders, the participants produced a model which centres around the idea of individualized treatment which is emphasized in rule 27 of the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty. I hear that the idea of individualized treatment sits at the core of the treatment model developed for Kenyan approved schools, out of the collaborative work of one of our faculty members and the staff members of the Children's Department.

Juvenile justice, child-centred criminal justice or justice-centred child welfare, started when the first juvenile court was opened in 1899 in the State of Illinois, USA. Since then, it has spread all over the world. Our practical, comparative and integrative approaches to juvenile justice will refill its strengths at the turn of the century.

Although this Joint Seminar is only 4 days long, a relatively short program, I hope that the seminar will provide a rare opportunity where various juvenile justice agencies get together and share common goals and strategies for the betterment of the situations of children in conflict with the law in Kenya.

I sincerely hope that the Kenya-UNAFEI Joint Seminar will bring about a fruitful outcome which will improve the effectiveness and efficiency of Kenyan juvenile justice systems. I believe that it will also be of great significance for the furtherance of the close and friendly relationships between Kenyan criminal justice officials and UNAFEI.

The history of human beings started here in Kenya, the birthplace of mankind. I heard that Kenya has a tradition of *Harambee* in which community members help each other, for example, to build a local primary school. Drawing upon this tradition, I believe, a new history of juvenile justice is in its making in Kenya.

Thank you.