

**THE APPLICATION OF THE PRESCRIBED
MINIMUM
SENTENCE IN TERMS OF THE CRIMINAL
LAW AMENDMENT ACT, 105 OF 1997 ON CHILD
OFFENDERS CHARGED WITH SERIOUS CRIMES**

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MINIMUM SENTENCE IN TERMS OF THE
CRIMINAL LAW AMENDMENT ACT, 105 OF 1997
ON CHILD OFFENDERS CHARGED WITH SERIOUS
CRIMES**

by

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DECLARATION

I declare that the short dissertation (thesis), hereby submitted to the University of Limpopo, for the degree of Master of Laws in Development and Management Law has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

BOROTO MLF

Date



PREFACE

The Constitution of the Republic of South Africa 108 of 1996 has brought about an inspiration for the development of our legal system. Youthful offenders like any other person in South Africa have fundamental rights. Section 28 provides for the rights of children in general and section 28(2) makes provisions for the supremacy of children's rights in every field of the law.

With regard to child offenders charged with serious crimes, courts and all those dealing with them need to take their basic rights into account. Courts should observe the rules and procedures of fair trial in order to protect and promote the individual or group of child offender's rights.

Courts are enjoined to act dynamically to obtain full particulars of the child offender's personality and personal circumstances, and to engage the services of the probation officers or correctional service officials.

The Constitution of the Republic of South Africa Act 108 of 1996, the Child Care Act 74 of 1983 and 38 of 2005, Criminal Law Amendment Act 105 of 1997, Criminal Procedure Act 51 of 1977, etc regulate and guide courts in dealing with children who fall foul of the law.

Firstly, I am indebted to Mrs. A.T Thoka, and Prof. Scheepers my supervisors who unselfishly assisted and encouraged me through the maze I had to go through this dissertation. I would also like to express my gratitude to the late Mrs Motimele Mapula Rebecca, my wife Ramadimetja Teresiah, my daughter Isabel Madithotsana Mokonyama and my two sons Mokitlelo and Matsimela to whom this short dissertation is dedicated for their kindness in allowing me to use their quality time for my personal advancement. Last, but not least, my thanks are extended to Ms Makgatho Jerminah for having typed and compiled this dissertation.

THE APPLICATION OF THE PRESCRIBED MINIMUM SENTENCE IN TERMS OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997 ON CHILD OFFENDERS CHARGED WITH SERIOUS CRIMES

1. INTRODUCTION

Since the dawn of the new democracy in South Africa in 1994 and the promulgation of the 1996 Constitution, crime has already increased to such an extent that everybody has become a potential victim. Even the President and other members of Parliament, who were thought to be beyond the reach of criminals, are now victims. The once strong South African criminal justice system has now become ineffective. It is thought that crime has become a major reason for the economic decline, poor service delivery, poverty, high rate of emigration, etc.

It is disturbing to realize that most of serious crimes are perpetrated by armed children. Some of these youth are hardly above the age of fourteen years old. In Mpumalanga province, an AK47- wielding 14 year old teenager died of bullet wounds when he and his 12 year old brother attacked a farmer in the crime ridden Marloth Park area¹ The reasons why a large number of juveniles engage in serious crimes are unknown. Misuse by adult criminals, peer pressure, experimentation and mere greediness are some of the reasons thought to be causing youth to take part in violent crimes. A growing number of violent criminals consist of child offenders, some of whom are barely old enough to can cast a vote. This means that offenders in South Africa are getting younger and their ages range from between 11 years and 23 years.² The problem of crime committed by the youth is, however, not limited to South Africa only, but is a global phenomenon.

In Cincinnati, Ohio, a 14 years boy was arrested of a restaurant owner.

In San Antonio, Texas, a 13 years boy was sentenced to 14 years for the murder of a 2 years old baby. In Portland, Oregon, a 10 year old youth was sentenced for the murder of a 5 year old sister³.

In the United Kingdom not so long ago in the case of *R v Secretary of State for the Home Department, ex parte Venables*; *R v Secretary of State for the Home Department, ex parte Thompson*⁴ and in South Africa a 12 year old girl was convicted of murder and was given a suspended sentence with very strict conditions⁵

¹ Sowetan, Friday 27 2008, p.9

²² Janine Stephen, Centre for the study of Violence and Reconciliation, Sunday Times News and Review(December 3 2006) p.33.

³ Esaius van Rooyen, Die Ongepastheid van gevangenisstraf vir jeugoortreders, *Codicillus*, Volume 45 NO 2(2004) p.39.

⁴ [1997] All ER 97

⁵ The Director of Public Prosecutions Kwazulu- Natal v P (2006) (3) 515 (SCA)

With these new challenges at hand, the question is whether South Africa's criminal justice system is well equipped to deal with the rising tide of crime.

It will be appropriate, before I can proceed with this topic to define a child. Before the promulgation of the 1996 Constitution, a child was defined as any person below the age of 21 years. The Constitution now provides that a child is any person below the age of 18 years. The Children's Act 38 of 2005 also provides that a child is anybody below the age of 18 years.

Should these child offenders be convicted and be given custodial sentences like any other adult offenders or should they be treated otherwise? Will it be correct to keep children in conflict with the law to be given custodial or non-custodial sentences? Should the statutory prescribed minimum sentences in terms of the Criminal Law Amendment Act 105 of 1997 be made applicable to these kids or not? If so, is this legislation applicable to all child offenders?

The aim of this short thesis is to answer these questions and make recommendations, where necessary, with reference to the local, regional, international instruments and case law.

The trial and at the best of times the sentencing of juvenile offenders is never easy and is far more complex than the trial and sentencing of adult offenders (*S v Ruiters*⁶; *The Director of Public Prosecutions, Kwazulu - Natal v P*⁷). It is even worse if the youthful offender concerned is a child.

To ensure that child offenders facing the possibility of being convicted and sentenced in terms of the South African Criminal Law Amendment Act 105 of 1997 are fairly dealt with, the courts are to be guided by the traditional approach, international instruments, the Constitution, the recommendations of the South African Law Commission and the case law⁸.

These instruments, legislation and source materials confirm that child offenders under the age of 18 years should be dealt with by the criminal justice system in a manner that takes into account their age, intellectual maturity, special needs into account. The courts are obliged to ensure that the welfare of the child offenders should not be disproportionate to the offence, Otherwise this would infringe upon the young offender's fundamental rights⁹.

⁶ 1975(3) SA 526 (C) at 531E- F.

⁷ *op cit* footnote 4

⁸ *op cit*.

⁹⁹⁹⁹. A Skelton; Developing a juvenile justice system for South Africa: " International instruments and restorative justice" 180 – 186 in R Knightley (ed) Children's Rights 1996; and *DPP Kwazulu – Natal v P 2006 (3) 515 (SCA)*

2. THE TRADITIONAL APPROACH

The traditional approach requires the sentencing court to consider the ‘triad consisting of the crime, the offender and the interest of the society’ and in assessing an appropriate sentence, to have regard to the main purposes of punishment (*S v Zinn*; *S v Khumalo* and *The Director of Public Prosecutions Kwazulu – Natal v P*). In the case of *S v Rabie* , it was stated the punishment must be blended with a measure of mercy.

3. THE CONSTITUTION AND THE INTERNATIONAL INSTRUMENTS

On 16 June 1995, South Africa ratified the 1989 United Nations Convention on the Rights of the Child (CRC). This instrument had far reaching implications on South Africa with regard to the child justice system. The convention put an obligation on South Africa to incorporate its provisions into its domestic law⁹. Of relevance to this thesis is Articles 37(b) and 40 (1). The former article provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of the last resort and for the shortest appropriate period of time.

The article provides that the State Parties recognize the rights of every child alleged as accused of or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of the others...

Another most important international instrument is the United Nation Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (1985). Rule 5.1 provides that the juvenile justice system shall emphasize the wellbeing of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence committed.

One other source having the same effect is our Constitution of 1996. Section 28(g) which originates from the United Nations Convention on the Rights of the Child is another provision setting out the general principle governing the sentencing of youthful offenders. The section reads that:

Every child has the right-

Despite these measures, the National Council on Correctional Service presented statistics to the Justice and Constitutional Development Portfolio Committee which indicated that between 1988 to 2003, a large number of children under the age of 14 years were sentenced to prison.

The importance of these instruments and the 1996 Constitution is to remind courts that the welfare and well being of a child offender should be considered first and foremost before other factors can be taken into account¹⁰

It is obvious that courts should always aim at dealing with each child in an individualized way. The child should be able to participate in decision making.

Depriving children of their liberty should be a measure of last resort and should be restricted to the shortest appropriate period of time. The courts should ensure that the principles underpinning the instruments are carried through into the practice of juvenile justice in South Africa¹¹.

4. THE APPLICATION OF ACT 105 OF 1997

Subsections (1) and (3) of section 51 of the Act, provides as follows:

- (1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall –
 - (a) if it has convicted a person of an offence referred to in Part 1 of Schedule 2; or
-
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions that take into account the child's age ...

Eiselen G T S, Children and Young Persons in private international law, The Law of Children and Young Persons (J A Robinson (ed), 227

¹¹ See footnote 13 on page 191 – 192.

- (b) if the matter has been referred to it under section 52 (1) for sentence after the person concerned has been convicted of an offence referred to in Part 1 of Schedule 2, sentence the person to imprisonment for life¹².
- (2) (a) if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of proceedings and may thereupon impose such lesser sentence.

In the case of *S vs Nkosi*¹³ the court held that in respect of an accused who was 16 years of age at the time of the commission of the offence, the legislature had differentiated between the position of two classes of persons in sections 51 (3) and (b).

Although a court was, therefore, free to apply the usual sentencing criteria in deciding on an appropriate sentence for a child between the age of 16 and 18, a court in the exercise of the discretion had to have regard to the purpose of Act 105 of 1997 and in so doing it could impose the prescribed sentence, including a sentence of life imprisonment if it could be justified by the circumstances of a case.

- (b) if any court referred to in subsection (1) or 2 decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for the decision on the record of proceedings.

In terms of section 51(6) of the Act, the statutory prescribed minimum sentence does not apply to child offenders who were under the age of 16 years at the time of the commission of an act constituting an offence. The minimum sentence legislation, however, applies to child offenders older than 16 years, but below the age of 18 years and only under extreme cases¹⁴.

In order to ensure that only deserving children are appropriately punished and that their human fundamental rights are not easily transgressed, specific measures and requirements are to be met before the strict provisions of the statute can be applied.

¹² Commentary on Criminal Procedure, p 23-15

¹³ 2002(1) SACR 135(W)

¹⁴ *S vs Blaauw* (2001(2) SACR 255, the court held that the sentencing court, however, does have a discretion to impose the minimum sentence for these 16-18 years offenders, but it is not obliged to impose it and if it does elect to do so its reasons must be stated.

From the time of the child's arrest until the case is finalized, all role-players in the child's case must ensure that the juvenile's rights are considered and protected. In other words, the court is obliged to ensure that the juvenile gets a fair trial as required by section 35 of the 1996 Constitution.

To ensure that the purport and the spirit of the Constitution is upheld and that all is in line with the international instruments, the children, for the purpose of the proper application of the statutory minimum sentence, are classified into two categories in accordance with their criminal capacity and intellectual maturity.

The reason behind this classification appears to be that children in the first category are not intellectually matured to can have considered and appreciated the consequences of their criminal act.

In *S vs Nkosi*¹⁵, it was held that it remains, however, that in spite of the apparent seriousness of the crime, the court in dealing with a case involving young children whose moral culpability cannot be compared to that of an adult should approach punishment in principle in as far as it is possible from the point of view of rehabilitation and care.

The courts dealing with children should, therefore, always bear in mind that child offenders have, also, a right to be protected from maltreatment, neglect, abuse or degradation.

Section 28(2) of the 1996 Constitution provides also that the child's best interests are of paramount importance in every matter concerning the child. It is, therefore, imperative that where the provisions of the statutory prescribed minimum sentences are applied with extraordinary caution to all child offenders¹⁶. The basic procedural requirements discussed below should be met.

4.1 THE ACCUSED'S AGE

The general rule is that the best admissible evidence must be used to determine a juvenile accused's age. In *S v Ngoma*¹⁷, the court held that the following can be used:

- a birth certificate
- evidence of the parents;

¹⁵ 2000(3) SACR 94 (T)

¹⁶ JM Kruger "The protection of children's rights in the South African Constitution: Reflections on on the first decade" 2007 (70) 248

¹⁷ 1984 (3) SA 666 (A) and cases cited there.

- evidence of family or other persons knowing of the birth of the accused;
- expert evidence (Medical evidence regarding the physical development and even X-Rays; and
- estimating age in terms of section 337 of the CPA, 1977.

For the proper application of the provisions of the statutory prescribed minimum sentence in terms of the Criminal Law Amendment Act 105 of 1997, the age of the child offender must be accurately determined and established.

The charge sheet and the detention warrant must bear the correct age of the accused. Despite the application of the minimum sentence legislation, the age will enable the Department of Correctional Service and the SAPS to classify the children during detention. It is, therefore, required that the age of the accused child be determined by the trial court if the accused's age is not clear¹⁸.

Section 337 of the Criminal Procedure Act, 51 of 1977 requires from the presiding officer to estimate the age of a person when the age is relevant to and there is insufficient evidence with regard to age¹⁹. The purpose of the determination of the age of the children charged or convicted of the serious offence is to inform the court, fully, about the maturity and other personal circumstances of the child, the appropriateness of the punishment and the place where the child can be appropriately detained.

In *S versus Z*,²⁰ the court held that for the purpose of sentencing, the court must properly determine the accused charged as a juvenile, also in borderline cases. If it appears that the age of the accused has been incorrectly recorded in the charge sheet, the court must rectify the record to ensure that his true age is reflected in the warrant of committal, and in other documentation concerning sentence.

In terms of section 29 of the Correctional Services Act 89 of 1959, juveniles should be detained separately from adult detainees. It is on the basis of their age as reflected in the aforesaid documents, and because, for the purpose of the Department, juveniles are persons under the age of 21 (now **18 years**) years, and it is necessary to determine the age of all prisoners under the age of 21 years, and not only those who are under the age of 16 years.

It must be noted that as emphasized in the case of *S versus Machasa*²¹, section 14(4) of the Child Care Act, 74 of 1983 provides that a juvenile is someone under the age of 18 years.

¹⁸ *S v Swartz* 1970 (2) SA 240 (NC); *S v Sibisi* 1976 (2) SA 162 (N); and *S v Khumalo* 1991 (2) SACR 694 (W)

¹⁹ A Skelton, "Children, Young Persons and the Criminal Procedure: The Law of Children and Young Persons" 1997.

²⁰ 1999 (1) SACR 427 (E CD)

²¹ 1991 (2) SACR 328 (A)

In case the courts are in doubt with regard to the age of the accused, they refer the child to a district surgeon for the determination of age. The finding of the presiding officer about the age of the juvenile may not be simply based on observation. The classified approach of William J in *Hadebe*²² is that there should be a proper attempt at finding documentary evidence, and where there is no direct evidence, the accused should be examined by a district surgeon.

In *S versus Mbelo*,²³ the court was concerned with the question of determining the age of young people who are in conflict with the law. The accused had been convicted on a plea of guilty for the rape of a 14 years old girl, a conviction that could render him subject to the prescribed minimum sentence provided for in the Criminal Law Amendment Act, 105 of 1997.

Two ages were relevant: the alleged age of the victim (since a prescribed life sentence applies where a rape victim is aged under 16 years) and the age of the convicted child offender (allegedly 17 years old), since the sentences prescribed by the Act 105 of 1997 do not apply in respect of a child offender who was under the age of 16 years at the time of the commission of the relevant offence, The court found that the information furnished by both the accused and his father about the accused's age was unattested and hence did not constitute evidence. The court further found that a baptismal certificate is hearsay, and is not sufficient proof of age where age is a material issue in the case.

Also the information contained in the probation officer's report relating to the accused's age was viewed as nothing other than hearsay.

Sections 62 and 63 of Child Care Act, 38 of 2005 provide that the court may make an order that a designated social worker, medical practitioner or other suitably qualified person to carry out an investigation to establish the circumstances (age) of a child and submit a supplementary evidence or report to court.

Such evidence or report which formed an authoritative opinion in respect of a child or the circumstances of a child involved in a matter before court is, subject to the decision of the presiding officer, on its mere production to the court hearing the matter admissible as evidence of the facts stated in the report.

4.2. **PROBATION OFFICER'S REPORT**

In order to be in line with the requirements of section 28(1) (g) of the South African Constitution and article 37 (b) of the United Nation Convention on the Rights of the Child, it is an obligation that before a convicted child in conflict with the law can be

²² 1960 (1) SA 488 (T)

²³ 2003 (1) SACR 84.

sentenced, the probation officer's pre-sentence report or that of the Correctional Services officer be submitted to the court.

The significance of the report is that the court will be in a proper position to determine and individualize a suitable sentence for the juvenile. In *S v Ngomane*²⁴ the court held that the probation officer's report assisted the court by conveniently collecting and then presenting facts material to sentence, including facts relevant to both the accused and the victim, thereby saving valuable time and possibly also highlighting facts which might otherwise be overlooked.

In the case of *S versus Z and Another*²⁵ that for the purpose of sentencing the court must act dynamically to obtain full particulars about the accused's personality and personal circumstances. Where necessary the court must obtain a pre-sentence report from a probation officer or a correctional service officer. Such a report is necessary where the accused has committed a serious offence, or where he has previous convictions.

It is inappropriate to impose a sentence of imprisonment, including a suspended sentence, unless such a pre-sentence report has been obtained. In *S v Van Rooyen* (High Court case number 01\5413) the court concluded that it is difficult to see how the magistrate could properly have determined an individualized punishment suitable for the needs of the offender (18 years old) without the benefit of the pre-sentence report.

The same conclusion was arrived at in *S versus B* (High Court case number 0982\02) where a 15 years old was involved²⁶. In *S v Peterson*²⁷ the court stated that an imprisonment on a juvenile should take place without a proper pre-sentencing report and evidence giving the necessary background to the juvenile as well as consideration of alternative sentencing options.

In the case of *Gagu v The Sate*²⁸ , the court found that the court *aquo* should have requested that it provided with a report by the probation officers regarding the personal circumstances of the appellants. The sentence in respect of the appellants was set aside and referred back to the trial court for imposition of sentence afresh after a proper investigation of the pertinent facts and circumstances.

²⁴ 2007 (2) SACR 535 (W)

²⁵ Supra note 17

²⁶ Jean Redpath, South Africa: Article 40, Volume 5 – Number 1 – March 2003.

²⁷ 2001 (1) SACR 16 (SCA)

²⁸ 2006 SCA 5 (RSA)

It meant that the court was to request to be provided with the pre-sentence report. The view by the full bench of the Free State High Court that, when the crime is so serious that a long prison sentence is required for the protection of society, a pre-sentence report will be of almost no use is unacceptable²⁹ The probation officer's report is also important in the sense that it will assist the court to determine and decide whether or not the child offender is a suitable candidate for diversion or custodial sentencing in case of conviction.

4.3 LEGAL REPRESENTATION

In the past, the application of the criterion of the best interest of the child was limited to family-law proceedings. However, the wording of section 28(2) of the 1996 Constitution clearly indicates that the criterion must now be applied in respect of all fields of law³⁰. The best interests of the child offender will be best served by proving a legal practitioner to represent it than conducting own defence.

In the case of *S v Makhandela*³¹, it is stated that prior to 1994 accused had no right to legal representation at State expense. Section 35(3) (f) and (g) of the 1996 Constitution provides that accused has a right to have legal practitioner assigned at State expense if substantial injustice would otherwise result.

It is of vital importance that all child offenders charged with serious offences and are likely to suffer substantial prejudice be provided with legal representation of their choice or where they are indigent and unable to afford legal representation, be provided with it at state expense. What substantial prejudice or injustice here means is that due to the indigence of the accused he or she is unable to afford the costs of legal representation. Whether or not an indigent accused is entitled to legal representation at State expense was discussed in the case of *S v Khanyile and Another*³².

The court came to the conclusion that the presiding officer dealing with the case must consider factors such as the inherent simplicity or complexity of the case, personal equipment of accused and gravity of the case. Should it be found that the accused is likely to suffer hardships arising from lack of legal representation, he or she (court) must refer the case to those dealing with legal aid and should decline to proceed with the trial until representation is procured.

²⁹ *S v Manka* 2003 (2) SACR 505 (C) at 521; CF SS Terblanche, A Guide to Sentencing in South Africa (2nd Ed) (2007) at 320.

³⁰ Krger JM, "The protection of children's rights in the South African Constitution: Reflection on the first decade" 2007(70) THRHR 247

³¹ 2007(2) SACR 620 (W)

³² 1988 (3) SA 795 (NPD) 815 d-e

This and similar other cases emphasize the state's obligation to provide unrepresented young offenders with legal representation at state's expense if substantial injustice would otherwise result. The obligation to provide an accused with legal representation is contained in our Constitution (section 35 (2) (c)³³ and section 73 (2) of the Criminal Procedure Act, 51 of 1977.

The latter section's provisions are the same. In the case of *S v Mafere*³⁴ the court held that the rights of the accused must be explained to the indigent persons who are detained in connection with a charge which may lead to imprisonment. It must be taken into account that in almost all crimes (especially crimes the provisions of which provide for a minimum sentence) have potential of direct imprisonment as a sentencing option.

It is in these cases that legal representation is a necessity in that failure to provide an accused with legal assistance may result in an unfair trial. In *S v Mguni*³⁵ it was stated that where the sentence is severe and the accused is unable to cross-examine a witness, his own insistence to conduct his own defense was not an informed choice.

The conviction and sentence were set aside on the basis of unfairness of the trial. In *S v Ndlovu*³⁶, the accused was charged and convicted of unlawful possession of a fire arm in contravention of section 2 of the Arms and Ammunition Act, 75 of 1969 and unlawful possession of ammunition in contravention of section 36 of the same Act.

The conviction activated the provisions of section 51 (2) (a) (I) of the Criminal Law Amendment Act, 105 of 1997 which prescribed a minimum penalty of 15 years for a first offender, unless substantial and compelling circumstances existed which justified the imposition of a lesser sentence.

The court found no substantial and compelling circumstances and sentenced accused as prescribed. On appeal the court held that by invoking the provisions of the Act without it having been brought pertinently to the appellant's attention that this would be done rendered the trial in that respect substantially unfair.

³³ "Every accused person, including a child offender, has a right to a fair trial which include the right to choose, and be represented by a legal practitioner or to have a legal practitioner assigned to him by the state and at state expense, if substantial injustice would otherwise result and be informed of this right promptly"

³⁴ 1998 (9) BCLR 1157 (N).

³⁵ 2002 (1) SACR 294 (T).

³⁶ 2003 (1) SACR 331 (SCA)

In the case of *S versus Dickson*³⁷ there was no indication that the accused was warned of the minimum sentence regime although it appeared that he was warned about the seriousness of the charge. The court found that the accused did not receive a fair trial and set aside the conviction and sentence and remitted the case back for retrial before another magistrate. A slightly different view was held in the case of *S v Cunningham*³⁸ where it was held that whilst it was desirable that specific reference should be made to any sentencing legislation upon which the State may seek to rely and to facts which the state intends to prove to bring the accused within the ambit of such legislation, it is not necessarily essential, Where there is no such reference, the issue is whether the accused had a fair trial.

I am of the view that it still essential that the accused be fully informed and advised of the implication of the consequences of the legislation.

In *S v Tshidiso*³⁹ it was held that the failure to explain the implication of section 51 of Act 105 of 1997 in circumstances where there was clear evidence of robbery, obvious aggravating circumstances and the taking of a motor vehicle, did not amount to such prejudice as to vitiate either conviction on the count of robbery or the sentence. This should not apply in the case of a youth of between the age 16 and 18 years.

The possibility of convictions and sentences being overturned because the accused was not advised of the rights can be much reduced if every charge sheet relative to an offence carrying a minimum sentence states so explicitly, and if every accused facing such a charge is advised of the minimum sentence prior to the plea and is encouraged to obtain legal assistance⁴⁰.

Where an underrepresented accused is charged and convicted of certain crimes, judicial officers should never assume that the accused persons are fully aware of their rights and of the implications of acting in their own defense. Even if the assumption might be correct, it is incumbent, more so if the accused is a juvenile, on the presiding officer at a criminal trial to ensure that such an accused is fully informed, not only of the right to legal representation but, also of the consequences of not having a legal assistant⁴¹.

The court practice as stated above which is in line our Constitution, the Children's Act, and the international instruments, should, as now emphasized by the Child Justice Bill, be the approach where child offenders are charged and convicted of serious offences where statutory prescribed minimum sentences are likely to be applied.

³⁷ 2000 (2) SACR 304 (C)

³⁸ 2004 (2) SACR 16 (EC)

³⁹ 2002 (1) SACR 207 (W)

⁴⁰ *S v Ndlovu* 2004 (2) SACR 70 (W)

⁴¹ *May v S 2005* (4) All SA 334 (SCA)

5. APPROACH TO SENTENCING OF JUVENILES

It is beyond doubt that a different approach should be followed when child offenders convicted of serious offences are to be sentenced. This was so even during the pre-constitutional era. In *R v Smith*⁴² the court declared that the state not punish a child of tender years as a criminal and stamp him as such throughout his life, but it should endeavor to educate and uplift him.

The interest of both the child and the society cannot be served by disregarding the interest of the young offender because a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being returned to society.⁴³ Even in the Criminal Law Amendment Act 105 of 1997, the legislature ensured that child offenders are treated differently from adult convicts when it comes to sentencing.

In terms of section 51(6), the provisions of this Act are not applicable to convicted child offenders below the age of 16 years. In respect of this category of children, the court's discretion is, absolutely, restricted. This might be the reason why the court in the case of *DPP Kwazulu- Natal v P*⁴⁴ did not even bother to mention the provision of this Act when it considered the sentence on a 12 years old girl convicted of murder.

In the case of juveniles between the ages of 16 and 18 years, it is provided that if any court referred to decides to impose a sentence prescribed in these subsections upon a child who was between 16 and 18 years at the time of the commission of the offence in question, it shall enter the reasons for its decision on the record of the proceedings⁴⁵

This means that for this group of children the court has discretion in as far as the decision to impose the prescribed minimum sentence is concerned. Once the decision is made to do so, it must record the reasons for such a decision on the record of proceedings before the imposition of such a sentence.

In *S v Mofokeng and Another*⁴⁶ Stegman J interpreted section 51 (3) (b) as implying that, in respect of children aged 16 and 17 years at the time of the commission of the offence, the court is not obliged to pronounce the minimum sentence imposed by the Parliament, but is left free to sentence them in accordance with its own discretion according to the ordinary criteria usually applicable to the determination of a fair sentence.

⁴² 1922 TPD 199

⁴³ *S v Jansen* 1975 (1) SA 425 (A)

⁴⁴ Footnote 4 above.

⁴⁵ Section 51 (3) (b)

⁴⁶ 1999(1) SACR 502 (W) at 520.

An equivalent reading of this section was given in *S v Daniels (case number RC 75/01*, unreported), *S v K and Another* (case number SS 50/99, unreported) and *S v S and Another* (case number SS 181/00, unreported) all of which involved one or more convicted juveniles under 18 years. In the first case it was agreed between the Sate and the defence that the provisions of section 51 of Act 105 of 1997 were also not applicable to those of the accused who were aged between 16 and 18 years.

In *S v Blaauw*⁴⁷ was concerned with offender who was six weeks over the age of 16 years at the time of the commission of an offence of rape. The victim was a child aged five years, which immediately raised the ambit of the sentencing provisions of section 51(1) of Act 105 of 1997.

The prescribed sentence was never applied in this case. The judgment confirmed the idea that the prescribed minimum sentences should not apply to children aged between 16 and 18 years at the time of the commission of the offence. This interpretation is in line with section 28 of the Constitution and the United Nation Convention on the Rights of the Child the purpose of which in the total protection and promotion of the child offenders' constitutional rights..

In *S v Z and Others*,⁴⁸ the fact that the accused fell a mere six weeks short of being exempt altogether from the minimum sentences was regarded in itself as being a substantial and compelling circumstance for departing from the prescribed sentence. In this case the principle of proportionality and individualization of sentence where juvenile offenders are concerned were considered and applied.

In the case of the *Direkteur van Openbare Vervolgings, Transvaal v Makwestsj*⁴⁹ it was stated as follows: While the statutorily prescribed minimum sentence should be imposed on offenders between the ages 16 and 18 years only in extreme cases, that did not mean that the Legislature did not intent those sentences to apply to all offenders above the age of 16 years.

If the Legislature did not in fact intent the minimum sentences to apply to child offenders aged 16 and 17 years, it would have explicitly excluded that category of offenders as it had to children below the age of 16 years in terms of section 51 (6). Section 51 (1) decrees that the minimum sentence must be imposed subject to subsection (3) (a) and (b).

Youthfulness per se would ordinarily constitute a substantial and compelling circumstance. If a sentencing court intends to impose the prescribed minimum sentence then section 51 (3) (b) envisages that it set out clearly its reasons for doing so. The scheme of the section serves to remind a sentencing court to make "doubly sure" that a young offender, who has to be sentenced with caution, is deserving of the prescribed minimum sentence."

⁴⁷ 2001(2) SACR 255 (C).

⁴⁸ 1999 (1) SACR 427 (E)

⁴⁹ 2004 (2) SACR 1 (TPD)

In other words there must be substantial and compelling circumstances justifying the court to impose the statutorily prescribed minimum sentence on a juvenile offender who was below the age of 18 years at the time of the commission of the offence.

The concept “ substantial and compelling circumstances” is a complex and the yet undefined term which differs from one case to the other.

The manner of approach to the question of whether substantial and compelling circumstances exist or not has been determined by the Supreme Court of Appeal in the case of *S v Malgas*.⁵⁰ The court held that if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the legislature has provided.

The provisions of section 51 have, therefore, only limited the court’s discretion and not eliminated it. What is required is that the court should not lightly depart from the prescribed sentence. The substantial and compelling circumstances, whilst not to be exceptional, courts are required not to impose a lesser sentence by, maybe, overemphasizing mitigating or aggravating factors in a particular case.

The courts are also not supposed to take into account for purposes of sentencing, considerations that are simply unwarranted.⁵¹ The Constitutional Court has, in *S v Dodo*,⁵² endorsed the approach provided for in *Malgas* as a practical method to be employed by all judicial officers faced with the application of section 51. In *S v Fatyi*,⁵³ in applying the test adopted in *Malgas*, the Supreme Court of Appeal held that despite weighing up all the facts of the case, there was no justification for departing from the minimum sentence.

One of the most recent cases in which the question of substantial and compelling circumstances came into consideration is *S v Esposito*.⁵⁴ Here the appellant had faced charges of robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition in a regional court.

⁵⁰ 2001 (1) SACR 469 (SCA)

⁵¹ *Gagu v The State* (2006) SCA 5 (RSA)

⁵² 2001 (1) SACR 594 (CC)

⁵³ 2001(1) SACR 485 (SCA).

⁵⁴ 2007 (1) SACR 527 (C).

He was convicted on the first two charges and acquitted on the last. He was sentenced to 15 years imprisonment in terms of section 51 of Act 105 of 1997 and two years imprisonment were ordered to run concurrently.

On appeal, the court held that regarding the sentence imposed on the robbery was limited, that the significant number of stolen articles had been recovered, and that the appellant had spent four months in custody awaiting trial were considerable factors which cumulatively constituted substantial and compelling circumstances. It was the view of the court that it was necessary to guard against imposing uniform sentence that did not distinguish between the facts of different cases and the personal circumstances of the offenders.

These cases emphasize the fact that not a single factor on its own amounts or constitutes substantial and compelling circumstances. Only a number of weighty factors may amount to substantial and compelling circumstances.

It was in *S v Nel*⁵⁵ that the court held that a gambling addiction on its own could never be a substantial and compelling circumstance justifying a departure from the prescribed sentence. It, however, found that a number of factors caused by gambling, accused's business activities, that accused did not derive any benefit from the offence, used an unloaded firearm, did not physically injure the victims and that the robbery was amateurish created substantial and compelling circumstances that permitted the imposition of a lesser sentence.

At the best of times, the sentencing of a youthful offender is never an easy task and is far more complex than the sentencing of an adult person. In order for a court or a presiding officer to make a proper decision and pass an appropriate sentence, he or she must give a due and careful consideration to the case.

The court must approach the case with the necessary degree of objectivity and desist from placing too much emphasis on personal circumstances of the accused and undermine other material considerations.⁵⁶ Since there is no objective yardstick to measure the sentence, any decision on sentence will, for an unforeseeable future, remain within the discretion of the individual presiding officer.

The basic rule of practice is that, when dealing with convicted juvenile offenders, they should be dealt with a pinch of mercy and with forgiving attitude, emphasis on their future, in the interests of the society that will be dealing with them for many years in future.⁵⁷ Youthful offenders should not be dealt with in the same way the adult offenders are dealt with even if they have committed serious offences.

⁵⁵ 2007 (2) SACR 481 (SCA).

⁵⁶ Note 6 above par 6 and 7 and SS Terblanche *Guide to Sentencing in South Africa* (1999)

⁵⁷ SS Terblanche *Guide to Sentencing in South Africa* (2007) 139

In *DPP Kwazulu-Natal*⁵⁸ the judge expressed that the accused (a 12 years girl) and in spite of her age and background, acted like an ordinary criminal and should have been treated as such. Although the accused was ultimately given an acceptable, fair and appropriate sentence, the judge's remarks may be misleading as a child offender should never be equated with an adult offender. The court's aim with regard to youthful offenders is rehabilitation and re-integration back to the society.

To illustrate that the court must balance the factors relating to the young accused and not to de-emphasize some factors at the expense of others, the court held, in the case of *S v Qwabe*,⁵⁹ that even though the offence had been a serious one, it was necessary to have regard to the rehabilitation of the accused and to the probable effect of a further period of correctional supervision. In *S v Kwelase*⁶⁰ the court set out the following as the judicial approach to the sentencing of juvenile offenders who needed to be re-appraised and developed:

- (a) The requirement of proportionality between the gravity of the offence, the child's interests and the society.
- (b) The importance of the sentence that assists with the rehabilitation of the child offender and with its re-integration into a society and the family.
- (c) Renewed employment of innovative sentences other than imprisonment.

This approach is an emphasis of the substantial and procedurally fair manner to be followed in sentencing a juvenile in conflict with the law. The sentence should be aimed at disciplining and developing a juvenile instead of punishing and destroying its future.

The loud and clear message of the Constitution and the international instruments is that child offenders should not be incarcerated except under very exceptional circumstances and for as short period as possible. This means that where there are other options of dealing with a child offender, such measures should be exhausted first before incarceration can be resorted to.

It is the duty of the court to consider all other alternative methods of dealing with the problematic child. The ultimate object of investigating alternative methods is to afford a youthful offender an opportunity for rehabilitation. In the case of *S v Qwabe*,⁶¹ the court referred to the case of *S v Nkosi*⁶² where the principles regarding sentencing of a child offender were explained as follows:

- (i) Where possible a sentence of imprisonment should be avoided, especially in the case of the first offender.

⁵⁸ Note 6 above at paragraph 9

⁵⁹ 2007(2) SACR 411

⁶⁰ 2002(2) SACR 155 (C)

⁶¹ Ibid

⁶² 2002(1) SACR 135 (W)

- (ii) Imprisonment should be considered as a measure of the last resort, where no other sentence can be considered appropriate. Serious violent crimes would fall into this category.
- (iii) Where imprisonment is considered appropriate it should be for the shortest possible period of time having regard to the nature and gravity of the offence and the needs of society as well as the particular needs and interests of the child offender.
- (iv) If all possible the judicial officer must structure the sentence in such a way as to promote the rehabilitation of the child concerned into his or her family or community.

This case is a follow up of what the court had said in *S v Z*⁶³ where it embarked upon an enquiry into the principles governing and the options available for the imposition of sentence upon youthful offenders. Some of the guidelines for sentencing juvenile offenders were as follows:

- (i) Before commencement of the trial the court must, in appropriate cases, promote the enrolment of the accused in a juvenile programs (it is one of the rehabilitation programs offered by NICRO) in respect of accused who had successfully completed the programs and in respect of which the Director of Public Prosecutions had authorized the withdrawal of charges.
- (ii) The court must exercise its wide discretion sympathetically and imaginatively, to determine a sentence suitable to the accused, in the light of his personal circumstances and of the crime of which he stands convicted.
- (iii) The court must adopt, as its point of departure, the principle that where possible a sentence of imprisonment should be avoided, and should bear in mind especially (a) that the younger the accused, the less appropriate imprisonment will be, (b) that imprisonment is inappropriate in the case of a first offender, and (c) that short term imprisonment is rarely appropriate. However, if all relevant circumstances and upon consideration of the objects of sentencing, imprisonment appears to be the appropriate sentence, the court must impose it.

These cases are in line with the Beijing Rules (rule 17) which provides the guiding principles of sentencing where the need for proportionality, and well-being of the juvenile offender is to be considered. The least possible use of measures which restrict or remove the personality of the young offender is stressed.

⁶³ Note 37 above

The Child Justice Bill also prohibits imprisonment for children less than 14 years at the time of the commission of the offence. In *S v Jansen*⁶⁴ Botha JA stated that in the case of juvenile offender it is above all necessary for the court to determine what appropriate form a punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile.

The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society. The Criminal Law (Sentencing) Amendment Bill (B-2007) further prohibits the application of section 51 of Act 105 of 1997 to accused who were below the age of 16 years at the time of the commission of the offence they are charged with.

6. **BALANCED APPROACH IN DEALING WITH CONVICTED CHILD OFFENDERS**

⁶⁴ 1975 (1) SA 425 (A) 427H-428A.

In compliance with the principle of “last resort and shortest time imprisonment period” contained in the Constitution, international instruments and the much awaited Child Justice Bill, the courts have an obligation to ensure that convicted juvenile offenders are disciplined and rehabilitated and not punished. Beijing Rules (rule 11) provides that in the punishment of juvenile offenders, consideration shall be given, wherever appropriate, to dealing with them without resorting to formal trial by the competent authority.⁶⁵ Currently, the appropriate approach for dealing with convicted juvenile offenders is found in the Criminal Procedure Act.⁶⁶ Any offence here will, definitely, include all offences referred to in Part I to IV of Schedule 2. The only deciding factor should be the fact that the sentence to be imposed on the child offender must be proportionate to the gravity of the offence and in the interests of the child offender and the society at large. In *S v Scott-Crossley*⁶⁷, the court held that while deterrence and retribution are legitimate elements of punishment, they are not the only ones or for that matter, even the overriding ones. Against that must be weighted the appellant’s prospects of reformation and rehabilitation. It is true that it is in the interests of justice that crime should be punished, however, punishment that is excessive serves neither the interests of justice nor those of society. The proportionality and appropriateness of the sentence was emphasized in the case of *State v N*⁶⁸ where an 18 year old boy was convicted of stealing a loaf of bread valued at R3.25 and sentenced to eight months imprisonment. The court held, on review, that though the conviction was in order, the sentence was not. The theft of a loaf of bread was the archetypal petty theft. It should have been obvious to the magistrate that in the circumstances, direct imprisonment even for a boy with behavioral problems, was entirely inappropriate and disproportional to the crime. Even where the crime is serious and there are substantial and compelling circumstances to make imprisonment rather than some alternative form of punishment imperative, the sentence must still be in proportion and appropriate to the crime.

In *DPP Kwazulu-Natal*,⁶⁹ some of the alternative forms of punishment imposed on a child offender convicted of murder are:

- (a) Seven years “imprisonment”, the whole of which is suspended for five (5) years on condition that the accused is not again convicted of an offence of which violence is an element, committed during the period of suspension and of which she is sentenced to a term of imprisonment without the option of a fine.

⁶⁵ Ann Skelton “Developing a juvenile justice system for South Africa: International instruments and restorative justice.” *Children’s Rights* (1996) 188.
 I Section 290 (1) (a) and (b) provide that any court in which a person under the age of 18 years is convicted of any offence may, instead of imposing punishment upon him/her for that offence order that he/she be placed under the supervision of a probation officer or a correctional official or in the custody of any suitable person designated in the order.

⁶⁷ 2008 (1) SACR 223 (SCA) 241.

⁶⁸ 2007(3) SACR 398(E)

⁶⁹ Footnote 4 above

- (b) Thirty-six months of correctional supervision terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977.on the following conditions:
- (i) that she be placed under the house arrest, in the care and custody of her mother and legal guardian for the duration of thirty-six months, on the conditions set out below;
 - (ii) That she be confined to the flat occupied by her mother save and except in the following circumstances:
 - (aa) that she attend school during “ normal school hours”. For these purposes “normal school hours” means one (1) hour prior to the commencement of school, for the purpose of travelling to and from school;
 - (bb) that she attend official school activities falling outside of “ normal school hours” as sanctioned by the principal of the school;
 - (cc) that she attend the NICRO program known as “ Journey”, other life skills training and therapeutic courses, activities or counseling as prescribed by *the probation officer* and/or the correctional officer;
 - (dd) that she receive medical and/or dental treatment as determined by a medical doctor or dentist;
 - (ee) that she be in the building of which the flat forms a part, but outside the confines of the flat itself for one hour between 16:00 and 17:00 during school term, and for two (2) hours in total respectively between 10:00 and 11:00 and between 15:00 and 16:00 during school holidays:
 - (iii) that she receive regular support therapy from *the probation officer* or any other suitable professional designated by her/him, and that she co-operate fully in receiving such therapy;
 - (iv) that she render one hundred and twenty (120) hours per year of community service, as approved by the probation officer and the correctional officer, in addition to her school curriculum activities, when she attains fifteen (15) years of age;
 - (v) that she be permitted visitors at the flat where she lives, as approved by the accused’s mother and *the probation officer*, only in the presence of her mother;

- (vi) the probation officer or the correctional officer are requested to submit quarterly reports to the Director of Public Prosecutions, briefly setting out the progress being made by the accused and the general compliance by the accused with the terms of this order;
- (vii) that the correctional officer is ordered to visit the flat where the accused will be living at least four times per month, including weekends and after office hours, at irregular intervals to ensure compliance by the accused with the terms of her confinement. The correctional officer is also ordered to telephone the accused, once a telephone has been installed in the flat, at irregular intervals and after hours to ensure compliance by the accused;
- (viii) the Director of Public Prosecutions, the probation officer and/or the correctional officer, are given leave to approach this Court at any time, for a variation of the terms of this order;
- (ix) in the event of any breach by the accused of any of these conditions, the correctional officer is directed to immediately report such breach on affidavit to the Director of Public Prosecutions who may then apply for the necessary relief.

The approach in this case is balanced in that it is proportional and appropriate to the offence and it affords the accused an opportunity mend her behaviors, acquire skills and to be integrated into the community. This is an example of a restorative justice proposed in the Child Justice Bill. It is beneficial to the accused and the society, which includes the victim (s).

The importance of the postponement and conditional suspension of sentence are set out and summarized in *S v Williams*⁷⁰ where it is said as follows:

⁷⁰ 1995(2) SACR 251 (CC)

“ There are, for instance, community service orders which are linked to suspended or postponed sentence. These are structured in such a way that they meet the punitive element of sentencing while allowing for the education and rehabilitation of the offender. There is also a victim-offender mediation process in terms of which the victim is enabled to participate in the justice process, receive restitution while the offender is assisted to rehabilitate. There are sentences which are suspended on condition that the offender attends a young offender school for a specific purpose. These orders are structured in such a way they yield benefits to the victim or the crime, the offender and to the community. Doubtless these processes, still in their infancy, can be developed through involvement by the state and non-governmental agencies and institutions which are involved in young justice projects.” The postponement of sentence is most useful for a child offender on whom an immediate sentence will have no rehabilitative effect since it is aimed more at deterring future crime than at punishing the current offence.⁷¹ A fine is one of the alternative forms of punishment mostly less favored by the courts as it is taken as an indirect punishment to the young offender’s parents or guardians. The imposition of a fine is still necessary and it is supported in section 94 of the Child Justice Bill.

As the main aim of section 28 (1)(g) of the Constitution is to keep children in conflict with the law from being subjected to incarceration or long period of detention, as many forms of alternative punishment as possible need to be utilized.

⁷¹ Note 46 above

Some of these means may be by diverting the child from normal court process. Diversion is the practice of referring a child offender from formal court procedures with or without conditions and at any stage in the criminal justice process. It is a form of restorative justice system whereby offenders make amends for what they have done. The accused, the victim and the community are involved in the healing process. Diversion and restorative justice have rehabilitative and deterrence characteristics. Except the fact that diversion has no legislative framework currently, it is a practice developed over many years in South Africa. It is central feature of the child justice system proposed by the much-talked Child Justice Bill. Its programs are favoured and run by the South African National Institute for Crime Prevention and the Re-integration of Offenders (NICRO). Some of these programs are the Youth Empowerment Scheme (YES), Pre-trial Community Service (PTCS), the Journey, Victim-Offender Mediation (VOM), etc. The importance of NICRO was set in *S v Z*⁷² where the court laid down as one of the general guidelines for sentencing juvenile offenders that before the commencement of the trial the court must, in an appropriate case, promote the enrolment of the accused in a juvenile diversion program in respect of accused who had successfully completed it and where the Director of Public Prosecutions had authorized the withdrawal of charges. Again the court in the *DPP Kwazulu-Natal*⁷³ put as a condition of the suspension of sentence that accused attend the NICRO program known as “Journey.”

NICRO, with the support of the government, will continue to play a major role in the handling of young offenders convicted of serious offences.

The court may also invoke the provisions of section 276(1) (i) of Act 51 of 1977. This section permits the Commissioner of Correctional Services to place a prisoner on correctional supervision after serving at least one sixth of a sentence. In *Ntaka v The State*,⁷⁴ an appeal was lodged against effective sentence of six years’ imprisonment imposed on 17 year-old boy on conviction of rape of fellow pupil. The majority of the court, however, held that six-year sentence imposed by the magistrate was inappropriate as it disregarded (a) the fact that he was very young when he committed the crime – in terms of the Constitution he was still a child (under 18), and had to be treated as a child offender; and (b) that the crime, although horrible, was unplanned and resulted from an impulsive error of judgment connected to his youthfulness.

⁷² Note 12 above.

⁷³ Note 4 above

⁷⁴ (469/2007) [2008] ZASCA 30 (28 March 2008)

Another way of dealing with a convicted child offender may be the application of the provisions of section 290(1) (d) of the Criminal Procedure Act 51 of 1977. It provides that any court in which a person under the age of eighteen years is convicted of any offence may, instead of imposing punishment upon him for the offence, order that he be sent to a reform school as defined in section 1 of the Child Care Act 74 of 1983. Referral to a reformatory school is a drastic measure and ought to be carefully considered. Sending a child offender to a reform school is, otherwise, a desirable alternative to direct imprisonment where the conviction arose from a serious offence⁷⁵.

The advantages of the restorative justice and its rehabilitative tonic are included in the Child Justice Bill which only needs approval and promulgation into an Act of Parliament.

7. COMPARATIVE OVERVIEW

Having adopted and ratified some of the international conventions that promote and protect the rights of child offenders, the South African child justice system is, to a large extent, influenced by these international instruments. For instance, the United Nations Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child and other such instruments put an obligation on the South African domestic laws to comply with these international and regional instruments. Beside these instruments the constitutions of other foreign and regional countries provide a guide to balanced approach for dealing with juvenile offenders.

These are, briefly, discussed hereunder.

7.1. UNITED STATES OF AMERICA

The American Convention on Human Rights⁷⁶ provides for the protection of child offenders subjected to criminal proceedings. The separation and speedy trial of these juveniles is emphasized. This approach is in line with our Constitution and court practice.

7.2. UNITED KINGDOM

The Children and Young Persons Act of 1969 makes provision for a separate child justice system for juvenile offenders. Though a separate system exists, the incarceration or detention of children under certain circumstances is allowed. In the case of *R v Secretary of State for the Home Department, ex parte Venables* and *R v Secretary of State for the Home Department, ex parte Thompson*⁷⁷ two boys aged ten were convicted of murder and were sentenced to ten years imprisonment.

⁷⁵ Basil King, "Manner Of Dealing With Child Offender If Prosecuted"

⁷⁶ Article 5.5

⁷⁷ (1997) ALL ER, 97

This sentence will, surely, never be acceptable in South Africa as it is contrary to the Constitution⁷⁸ and does not comply with the concept of “last resort and shortest period” principle.

Also in the United Kingdom, the policy of alternative imprisonment has been introduced by the Criminal Justice Act.⁷⁹

This policy promotes non-custodial restorative justice, which ensures rehabilitation and re-integration offender into the society.

7.3. NEW ZEALAND

The Children, Young Persons and their Families Act, 24 of 1989 is aimed, directly, at the restorative justice system. The central mechanism, for achieving this process, is a family group conference where youthful offenders are diverted out of formal criminal justice system. At the family group conference, consisting of a youth coordinator, a family member, friend(s), victim or family member and police official, discuss the incident and decide how best to resolve it. The meeting will negotiate an agreement through a process of consensus decision-making. The offender is expected to accept responsibility for his or her wrongful actions; apologies to the victim; to render community service or to the victim; to make reparation and to make or to make a donation to a charity. In this country, the family group conferences have brought about satisfaction to the community and, to a large extent, a number of outstanding cases have been reduced.⁸⁰

7.4. AUSTRALIA

Here the family group conferences are also held to resolve disputes involving juvenile offenders. The Wagga program, which is more victim-centered, is being utilized. The Australian model concentrates on the community of the people around the incident instead of the around the young offender. The model is a stronger emphasis on the victim.⁸¹

7.5. CANADA

A process called “community sentencing circles,” is used here whereby community conferences have been experimented. The sentencing circles lay emphasis on collective responsibility, consensus decision-making

7.6. UGANDA and on healing relationships.

⁷⁸ Section 12 (1)(e)

⁷⁹ Section 1 provides: (2) the court shall not pass custodial sentence on the offender (including a child offender) unless it is of the opinion that (a) the offence or combination of the offences and one other offence associated with it was so serious that only such sentence can be justified.

⁸⁰ Footnote 53 above, 193

⁸¹ Ibid

In this country, the sentencing of youthful offenders is regulated by the Magistrates Courts Act of 1970.⁸² The principle, with regard to youthful offenders, is that those under the age of 18 years must not be sent to prison unless there are no other means of dealing with such a child.⁸³

The child justice system in Uganda is similar to our system and is in compliance with the sentencing guidelines in the international instruments.

7.7. ETHIOPIA

By means of the New Criminal Code, an attempt is made to address the problem of child delinquency, the seriousness and the proportion of offences they commit. Certain specific guidelines and restrictions apply regarding punishment to be imposed and the standards of detention for child offenders, irrespective of the offence committed. There are special punishments and measures applicable to child offenders upon conviction. Some of these measures are:

- (a) that imprisonment may be imposed only as a measure of last resort;
- (b) juvenile offenders may not be kept in custody with adult offenders.

This provision is similar to our section 29 of the Correctional Service Act 89 of 1959, which prohibits the detention of child offenders in police cells and prisons.

In terms of article 36(3) of the Ethiopian Constitution, child offenders should be kept separate from adults once they are admitted to the corrective or rehabilitative institutions. One drawback of the new Criminal Code is the lack of compulsory legal representation for child offenders.⁸⁴

8. CONCLUSION

The South African Constitution has guaranteed the rights of children accused of having committed crimes irrespective of whether those crimes are serious or not. The violation of these rights will result in unfair trials.

The approach used for the purpose of reforming the child justice sentencing system is varied and diverse. For the purpose of reformation of the law, not only the Parliament but, all stakeholders, including the non-governmental organizations, community based organizations, court officials, law commissions, etc, must be part of the child justice reformation process. Like HIV/AIDS and other pandemics,

⁸² Section 189 provides (1) that a person liable to imprisonment for a life or any other period may be sentenced to any other short term;(2) that a person liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment. .

⁸³ Benjamin J Odoki, "Reforming the Sentencing System in Uganda" (2003, *The Uganda Living Journal*, Volume 1 Number 1, 3.

⁸⁴ B D Mezmur, "The New Criminal Code of Ethiopia," What does it mean to for Child Offenders?, Article 40 Volume 8 Number 1(2006), 8-9.

juvenile delinquency is a global challenge. Statistics indicate that the number of children in conflict with the law and incarcerated in places of safety and even in prison in South Africa has increased at alarming rate from 1995.

In its political party pledge against violence against women and children, the Azanian People Organization (AZAPO) stated as follows:

“Nobody is born a violent person, our upbringing in the context of society turn some individuals into perpetrators of violence and crime in general. Violence is a problem of society and society must solve it.”⁸⁵

To minimize the commission of serious crimes by youth in South Africa, the Criminal Procedure Act 51 of 1977 should be amended. An inclusion of the provision that no convicted child offender under the age of 18 years at the time of the commission of the offence shall be sentenced to custodial imprisonment, unless other alternative forms of punishment stated under sections 276(1)(h) and 290 and the Child Justice Bill, have been exhausted, would serve the purpose of reforming the law. In other words, no matter how serious the offence is, rehabilitative and restorative forms of punishment should be tried first as the aim of the reformed child justice is to rehabilitate, develop and restore the offending child into the society. The objective of the reformation should be to discipline and develop instead of punishment and deterrence of the child offender.

The general sentencing guidelines mentioned in the international instruments and supported by the comparable constitutions and laws of other foreign and regional countries are already applied in South Africa. The proposed amendment of the Criminal Procedure Act and the passing of the Child Justice Bill into an Act will, therefore, bring the child justice system on a competitive level of reformation with other countries.

Another improvement will be that all people involved in the criminal justice system will have together to make sure victims, child offenders and a society get a better deal. As a community-friendly approach is a multi-agency task, an attempt has been made with the Child Justice Bill and it is the duty of the Parliament to take the last step forward. Apart from being in line with our ideal of developing a culture of human rights, a victim-centric approach may bear real fruits in so far as crime prevention is concerned⁸⁶.

⁸⁵ Parliament’s Reflections, City Press, December 16 2007.

⁸⁶ Sheila Camerer “What about the victims? Suggested changes to the criminal justice system with the aim of promoting a more victim-centric approach” De Rebus, January 1999, 25.

BIBLIOGRAPHY

BOOKS

Keightley R., *Children's Rights* (1996)

Ann Skelton, "Juvenile Justice Reform: Children's rights versus Crime Control, 101-102" in CJ Davel (ed) *Children's Rights in Transitional Society* (1999).

Ann Skelton, "Developing a juvenile justice system for South Africa" in R Keightley(ed) *Children's Rights*(1996)

Robinson J A., *The Law of Children and Young Persons in South Africa* (1997)

Terblanche SS., *Guide to Sentencing in South Africa* (1999)

Terblanche SS., *Guide to Sentencing in South Africa* (2007)

ARTICLES

- Camerer Sheila, “What about the victims? Suggested changes to the criminal justice system with the aim of promoting a more victim-centric approach”, *De Rebus*, January 1999, 25
- Mezmur BDM., “The New Criminal Code of Ethiopia”, What does it mean for Child Offenders? *Article 40 Volume 8 No. 1* (2006)
- Luhlanga P., “Suitability of prescribed sentence of life imprisonment for juvenile offenders; interpretation of section 51(3)(b) of Minimum Sentence Legislation- S v Brandt (Unreported but reportable Case No. 513/2003 dated 30 November 2004 (SCA)” *Sexual Offences Bulletin*, Volume 1 – 2005 (Number 6),13
- Odoki BJ., “Reforming the Sentencing in Uganda”, 2003 *The Uganda Living Journal*, Volume 1 No.1 3
- Redbath J. “Child Sex Offenders in Custody in South Africa”, *Article 40* Volume 5 No. 1, March 2003
- Sloth-Nielsen J., “Case review on minimum sentences for children,” *Article 40* No.3 June 2001
- Van Rooyen E R., “Die ongepasteheid van gevangenisstraf vir jeugoortreders”, *Codicillus*, Volume 45 No. 2 (UNISA) (2004).

NEWS PAPERS.

Stephen Janine “Breeding a generation of jailbirds”: *Sunday Times News & Review* (December 3 2006).

AZAPO, “Violence is a problem of society and society must solve it: The rapists are our sons, or brothers and our partners” *City press* ((December 16 2007).

Sowetan Friday 27 June 2008

TABLE OF CASES

Brandt v S (2005) 2 ALL SA 115 (A)
Director of Public Prosecutions, Kwazulu-Natal v P 2006(3) 515 (SCA)
Direkteur van Openbare Vervolgings, Transvaal v Makwetsja (2004) 2 SACR 1
(TPD)
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Hadebe 1960 (1) SA 488 (T)
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 S v Ngomane 2007(2) SACR 535 (W)
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 S v Z and Others 1999(1) SACR 427 (E)

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TREATIES AND INTERNATIONAL INSTRUMENTS

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American Convention on Human Rights

Children, Young Persons and their Families Act (1989) (New Zealand)

International Covenant on Civil and Political Rights

Magistrates Court Act 1970 (Uganda)

New Criminal Code of Ethiopia

United Nations Convention on the Rights of the Child (1989)

United Nations Guidelines for the Prevention of Juvenile Delinquency (GA Res.45/112)

United Nations Standard Minimum Rules for the Administration of Juvenile Justice
(GA Res 40/33)