UNIVERSITY OF KWAZULU-NATAL

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Justice for Juvenile Offenders under the New Amended Legal Framework of the Child Justice Act

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ABSTRACT

Juvenile justice has come a significantly long way in South Africa as separate system of law, which operates to specifically deal with children in conflict with the law based on international and regional instruments. While South Africa has undoubtedly sought to protect the rights of children who come into conflict with the law, there is still much room for further development and proper application of these laws. Recently the new amended Child Justice Act was passed and is awaiting promulgation. The amendments will enable the assessment of the criminal capacity of juveniles be dealt with in a more effective manner with the assistance of the police and probation officers. The policy of Diversion will also be at the forefront of facilitating the speedy process of juvenile offenders where possible. The issue of sentencing remains contentious, as juveniles are consistently sentenced to lengthy terms of imprisonment without the presiding officers having sufficient information to make a proper evaluation of an appropriate sentence. The Child Justice Act must be amended to include an in-depth sentencing policy in order to ensure that juveniles are afforded proper justice as per the vision imparted in the preamble of the Act.

TALE OF CONTENTS

Acronyms and abbreviations

African Charter on the Rights and Welfare of the Child (1990)..... ACRWC

Child Justice Act 75 of 2008 ..... (the Act), CJA

Child Justice Amendment Act, 2019 ..... the amended Act

Convention on the Rights of the Child ..... CRC

Declaration of the Rights of the Child ..... (DRC)

The UN Guidelines for the Prevention of Juvenile Delinquency ..... (Riyadh Guidelines)

The UN Rules for the Protection of Juveniles Deprived of Liberty ..... JDL

The UN Standard Minimum Rules for the Juvenile Justice ..... Beijing Rules

Universal Declaration on Human Rights ..... (UDHR)

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CHAPTER 1: BACKGROUND AND INTRODUCTION

1. Juvenile justice in South Africa

New hope dawned within the legal fraternity when the Child Justice Act 75 of 2008 (the Act) came into operation[1] after a lengthy legal reform process.[2] The guidance and direction towards developing juvenile justice in South Africa originates from principles set out international and regional legal instruments.[3] The Act[4] exclusively deals with juvenile offenders.[5] The values entrenched by the Constitution[6], regional and international instruments all contribute towards creating the exclusivity of the juvenile system and all the principles underlined dealing with all the processes and procedures.[7]

The preamble to the Act[8] states that prior to democratic freedom in South Africa, the statutory regime regarding juveniles was not effective nor comprehensive. Juvenile offenders who came into 'conflict with the law'[9] were dealt with in a manner in which failed to take an accumulation of circumstances[10] in order to protect their rights accordingly.

1.1 Who is a child?

The Bill of Rights[11] gave a classification regarding the the word '*child*'.[12] The concept of a child and children's rights therafter strengthened under the enactment of the Children's Act 38 of 2008.[13]

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[1] The Child Justice Act 75 of 2008 Act. (The Act, or CJA).
[2] L Corrie & J van Niekerk with E Louw *A Practical Approach to the Child Justice Act* Revised 1 ed (2016) v.
[3] M A A Mustapha *Child Justice Administration in Africa.* (2020) 129-54 available at *https://www.palgrave.com/gp/book/9783030190149#review*s, accessed on 20 July 2021.
[4] The Act.
[5] J Gallinetti '*Getting to know the Child Justice Act' The Child Justice Alliance* (2009) available at *http://www.childjustice.org.za/publications/Child%20Justice%20Act.pdf* 8, accessed on 19 July 2021.
[6] The Constitution of the Republic of South Africa, 1996 (The Constitution).
[7] Section 28(2) of the Constitution 'A child's best interests are of paramount importance in every matter concerning the child*'*. See also Gallinetti op cit note 5 above.
[8] The Act.
[9] Child Justice Act 75 of 2008, Preamble 1.
[10] Preamble to the Act.
[11] Section 30 (2) and (3) of the Constitution of the Republic of South Africa Act 200 of 1993 provides *"(2) Every child who is in dentention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes into account of his or her age.*
(3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.
[12] L Schafer *Child Law in South Africa – Domestic and International Perspectives* (2011) 13.
[13] Ibid; S 6 of the Children's Act 38 of 2008 provides "*the general principles set out in this section guide: -*
a) the implementation of all legistation applicable to children including the Act; and (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.

Through the further developments, the Child Justice Act[14] defined a child as "*any person under the age of 18 years and, in certain circumtances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2).*"[15]

The Bill of Rights[16] and the Children's Act[17] are both in line with International Human Rights standards and detailed as per the report of the Law Reform Commission for South Africa.[18] It is clear from the legislation that developed child law in South Africa emanates from the CRC. Section 4(2) of the Act[19] further details the procedure that is to be followed for purpose of persecution of child offender. This section authorises the prosecutions as per the National Director of Public Prosecution Directives.[20] The section elobarates that proceedings can only be instituted against any person under the age of 18.[21] If the juvenile offender is 18 or older but under the age of 21 such directives authorises prosecution accordingly.[22]

1.2 The purpose of a juvenile justice system in South Africa The Act[23] aims to promote the rights listed in the Bill of Rights, more specifically those guaranteed under section 28 of the Constitution[24] promoting 'restorative justice'[25] as a principle to help juvenile offenders reintegrate into society.[26]

[14] L Schafer *Child Law in South Africa – Domestic and International Perspectives* (2011) 13.
[15] Child Justice Act 75 of 2008, Chapter 1 Definitions, Objects and Guiding Principles of the Act (ss 1 – 3).
[16] Chapter two of the The Constitution.
[17] Childrens's Act 38 of 2008.
[18] Schafer op cit note 11 at 15-16.
[19] S 4 (2) of the Act provides that "*The Director of Public Prosecutions having jusrisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 97 (4) (a) (i) (aa), in the case of a person who-*

(a) is alleged to have commited an offence when he or she is under the age of 18 years; and
(b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1) (b),

direct that the matter be dealt with in terms of section 5 (2) to (4)."
[20] Child Justice Act 75 of 2008: Directives in terms of Section 97 (4), R252 – Part M *Directive in repect of persons who were children at the time of commission of a crime but are 18 years and older, but under 21 years,* published 31 March 2010.
[21] S 4 (2) (a) of the Act.
[22] S 4 (2) (b) of the Act.
[23] The Act.
[24] The Constitution.
[25] A Skelton Developing a Juvenile Justice system for South Africa: International instruments and restorative justice, *Acta Juridica* 180 (1996) 180 – 182.
[26] *Centre for Child Law v Media 24 Ltd* 2020 (4) SA 319 (CC) (4 December 2019) paragraph 77 available at *http://www.saflii.org/za/cases/ZACC/2019/46.html,* accessed on 19 July 2021.

1.3 The Restorative Justice Principle

The objectives of the Act are set under Section 2.[27] This section explains how the Act should be implemented.[28] The purpose of this section describes the importance of juvenile rights protection, diversity, restorative justice and the special treatment of juvenile offenders.[29] Restorative Justice is a process aimed at ensuring that all parties involved in the offence are equally considered in order to ensure the objectives of reparation and justice are accomplished.[30] The overarching aim is reconciliation and restitution between the offender, victim and the interests of the community.[31] Restorative justice does not mean that the offender will get a slap on the wrist.[32] Resolution, reparation and restorative justice is "central to the CJA" to ensure that children are given a chance to rehabiliate and reintegrate into society.[33] Restorative justice is the typical avenue to guide mediation between the juvenile offender; the victim of the crime and the respective parents or guardians of the offender and victim.[34] The goal is to ensure that the juvenile offenders are held accountable for their actions.[35] Skelton and Batley[36] found that restorative justice is a process that includes encouraging 'offenders to accept responsibility for their actions and to be obliged to work towards restoration for such actions'.[37]

Sloth-Neilsen and Gallinetti[38] affirm that the "Act ushers in a new epoch in the field of alternate dispute resolution insofar as provision is made for restorative justice options as diversionary alternatives; thus the Act is characterised by a restorative justice orientation."[39] The new amended Child Justice Act[40] has been implemented to affirm the issues of reformative justice, diversion and

[27] S 2 of the Act.
[28] Ibid.
[29] Ibid.
[30] Restorative Justice and Child Justice available at https://www.euforumrj.org/en/he restorative-justice-and-child-justice, accessed on 24 March 2022.
[31] W F M Luyt and T D Matshaba 'The application of restorative justice amongst sentenced offenders in an Eastern Cape correctional centre: a South African case study' *Acta Criminologica: African Journal of Criminology & Victimology* (2014) 27(2) at 83-85.
[32] Ibid 17-18.
[33] Ibid 20.
[34] Ibid.
[35] Ibid.
[36] A Skelton & M Batley 'Restorative justice: a contemporary South African review' (2008) 21(3) *Acta Criminologica: African Journal of Criminology and Victimology* 38-40.
[37] Ibid 38-40.
[38] J Sloth-Nielsen & J Gallinetti 'Just Say sorry?" Ubuntu, Africanisation and the Child Justice System in the Act' (2011) *PER / PELJ* (14) at 64.
[39] Ibid.
[40] The Child Justice Act 28 of 2019 (the amended Act).

due processes regarding juvenile justice. In keeping with the values and rights enshrined in the Act, the new amendment goes further into the protection of rights of juvenile offnders considering the importance of age as a factor when considering suitability of appropriate reform orders.

1.4 Statement purpose

The writer will examine the extent to which the amended Act[41] will assist child justice courts to order appropriate sentences, having regard to the juvenile offender's age. The ultimate aim of the Act and the new amendments are to ensure that juvenile offenders are protected and given the best suitable form of punishment mostly in the form of diversion. Diversion and mediation are options that are at times not suitable due to the seriousness and complexity of the offence.[42] In the event of failing to implement of diversion and mediation successfully, the juvenile is then processed through the criminal justice system by the Child Justice Courts.[43] Courts have done their best to achieve the goals and objectives of the Act however through case law and research, it is found that there are procedural irregularities in terms of sentencing.[44] Common procedural irregularities will be investigated and recommendations will be made for the consideration of sentencing under the amended Act to ensure that true juvenile justice may be realised.

Case law emanating from various courts, appeals and review matters will be particularly highlighted and analysed to reveal the basis on which judicial officers sentence child offenders, with regard to due consideration of the age of the child offender at the time of the commission of the offence.

1.5 Research Questions

The writer seeks to establish if child justice courts are setting effective sentences standards in line with the Act. The writer will examine the initial process of the juvenile justice system to the point

[41] The Child Justice Act 28 of 2019 (the amended Act).
[42] F Steyn 'Challenges of diversion strategies in meeting the diversion of the Child Justice Act (75 of 2008)' *Acta Criminologica: African Journal of Criminology & Victimology* (2012) at 80-83.
[43] S5 (4) (b) "*A matter which is for any reason not diverted in terms of paragraph (a) must, unless the matter has been withdrawn or referred to a children's court, be referred to a child justice court for a plea and trial in terms of Chapter 9.*"
[44] 'Western Cape Child Justice Forum Leads the way – The dynamics of youth justice & the Convention on the rights of the child in South Africa' Article 40 (2003) 5(3) at 4-5.

of trial and sentencing stage. The examination will cover the guidelines and various factors followed by presiding officers to sentence juvenile offenders effectively. The key questions to be answered in this dissertation with regard to the new amendments and sentencing options are as follows:

- Do the Child Justice Courts apply chapter 10 of the Act correctly?
- Are courts effectively sentencing juvenile offenders who turn 18 at trial stage in accordance with the age at the time of the commission of the offence?
- Are the current sentencing options clear and definitive within Child Justice Act to afford presiding officers to make appropriate sentencing orders?
- Does the new amendments to the Child Justice Act assist to improve the sentencing of juvenile offenders?

1.6 Rationale

The intention of the legislature was to ensure that a separate system of law would operate specifically for juvenile offenders.[45] The primary goal was to ensure that juveniles are 'treated differently to adult offenders in the criminal justice system'.[46] The reason for such approach is to ensure that child justice courts and stakeholders promote "re-socialisation and re-education" for juvenile offenders.[47] Juvenile offenders have more capability to reform and rehabilitate than adults.[48] Therefore it is essential for the separation of the systems so that juvenile offdenders are given the opportunity to reintegrate into society with the objective of rehabilitation.[49] Despite the Act[50] having been being operative for the past decade, presiding officers consistently fall into error by usurping excessively wide judicial discretion when sentencing child offenders.[51]

[45] Corrie & Van Niekerk with Louw op cit note 2 at v-vi.
[46] *S* v *B* 2006 (1) SACR 3111 (SCA) at para 14.
[47] T Mukwnede 'Reform, reintegrate, rehabilitate – balancing restorative justice and juvenile offender rehabilitation' De Rebus 1 October 2014 available at https://www.derebus.org.za/reform-reintegrate-rehabilitate-balancing-restorative-justice-juvenile-offender-rehabilitation/, accessed on 24 March 2022.
[48] Ibid.
[49] Ibid.
[50] The Act.
[51] SS Terblanche 'Sentencing a child who murders – *DPP, KwaZulu-Natal* v *P* 2006 (1) SACR 243 (SCA)' (2007) 20 *South African Journal of Criminal Justice* 339.

Juvenile offenders receive harsher sentences without presiding officers carefully analysing the various factors that need to be considered in terms of Chapter 10 of the Act[52] with regard to the juvenile offenders.[53] The excessive number of reviews and appeals in such matters[54] gives rise to the question whether there should be a sentencing policy specifically for juvenile offenders as an addendum to the amendments of the legal framework. The study further examines whether the new amendments to the Act should have included sentencing guidelines and if not, delineate the shortcomings of the new amendments.

1.7 Research goal

The goals of this research are the following:

1. To examine the new amended legal framework and the extent in which it will change the procedures regarding juvenile offenders;
2. To examine whether child justice courts, in sentencing juvenile offenders, comply with the requirements of Chapter 10 of the Child Justice Act 75 of 2008;
3. To examine the sentencing procedure followed particularly to those juverniles who turn 18 during the course of the trial proceedings;
4. To determine the guidelines, if any, presiding officers use to determine an appropriate sentence for the juvenile offenders.

1.8 Research Methodology

The research methodology adopted for this dissertation is a desktop research. The dissertation research was derived predominantly from primary and secondary sources that include; online library case law and publications, government periodicals, various internet articles and many other online data relating to the subject matter.

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[52] Reneke M, 'Child Justice' (2016) 29(3) *South African Journal of Criminal Justice* at 376.
[53] *S* v *M* 2007 (12) BCLR 1312 (2007) at para 3, court held that "*Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process*", available at *http://www.saflii.org/za/cases/ZACC/2007/18.html*, accessed on 19 July 2021.
[54] *S v CS* 2016 (1) SACR 584 (WCC).

1.9 Literature Review

Sentencing juvenile offenders is no easy task.[55] More specifically, child justice presiding officers have wide discretionary power to consider appropriate sentencing orders for juvenile offenders.[56] This wide sentencing discreation has caused inconsistent sentencing.[57] Section 85 of the Act serves as a mechanism to ensure that no irregurilites occur during the trial proceeding in relation to juvenile offenders. In as much as this menchanism obviates any irregularity, there is a pattern that such courts are continously sentencing juveniles to lengthy prison sentences. Terblanche expresses the notion that imprisonment of juvenile offenders is not to be avoided completely.[58] The point creating a separate juvenile system is to ensure that where imprisonment cannot be avoided, the notion of sentencing a juvenile as a measure of last resort and for a short period of time must be upheld. This must be done in conjunction with the CRC and Constitution[59] relating to the best interests of a child. The lines of sentencing are clearly blurred when presiding officers consider sentencing of juvenile offenders and adults. In line with the literature reviews available in respect of sentencing regarding juvenile offenders, the writer will explore further into the approaches that should be used in terms of sentencing. Further to discuss the new amendments to the Child Justice Act with the recommendation that the sentencing chapter should be enhanced to guide presiding officers. The writer seeks to analysis the patterns of inconsistent sentencing and provide a recommendation that a sentencing guidline be implement in along with the new amended act to elevate the common patterns of inconsistent sentencing.

1.10 Chapter Layout

Chapter one introduces the juvenile system background and the definition of a child. This introductory chapter focuses on the writer's intention to show that the juvenile justice system has commendably sustained the objectives as set under Section 2[60] of the CJA however to further direct vital issues such as sentencing consideration to assist Child Justice Courts to make appropriate orders.

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[55] SS Terblanche, 'Judgments of Sentencing: Leaving a lasting legacy' (2013) 76 *THRHR* 95.
[56] Terblanche op cit note 53 at 244.
[57] Ibid.
[58] Terblanche op cit note 51.
[59] The Constitution of the Republic of South Africa, 1994.
[60] The Act.

Chapter two is aimed at providing an overview of the regional and international laws affecting juvenile justice. The laws and provisions particulary discussing the factors to be considered when juveniles are sentenced.

Chapter three provides an outlay of the new amendments to the amended Act. This chapter will highlight Chapter 10, dealing with sentencing of juvenile offenders and aspects of age consideration.

Chatper four will focus on the critical analysis of pertinent case laws relating to decisions of sentences regarding juvenile offenders. This assessment will critically analyse the inconsistency with sentencing and common irregularities present, through these case studies.

The final Chapter five will conclude on the subject of sentencing in relation to juvenile offenders and make recommendations towards a better assessment mechanism for appropriate sentencing procedures.

1.11 Limitations to the study

The study was limited in terms of the information and literary review regarding the new Child Justice amendments. There is little information on the subject of the new amendments due to the recent promulgation.

Interviews with district and regional presiding officers would have been meaningful in order to gain perspective on sentencing evaluation, however due to the covid pandemic currently experienced, no contact or interviews could be conducted.

As discussed above, the age analysis in respect of sentencing of juvenile offenders are seen to be excessive and inconsistent with the underlying prinicples that imprisonment must be seen as a measure of last resort. Further such sentencing determination must be met with the best interests of the juvenile thus ensuring that should imprisonment be seen as the last resort then same must be given for the shortest appropriate time. The following chapter will discuss the regional and international instruments applicable to these factors and how they must be implemented through South African Child Justice Courts.

CHAPTER 2: BACKGROUND TO JUVENILE JUSTICE IN SOUTH AFRICA

2. Introduction

Contextualising current developments in juvenile justice in South Africa requires an historical perspective,[61] involving tracing and the expansion of juvenile justice in the context of pertinent international and regional law instruments, which influenced the enactment of the Child Justice Act (the Act).[62]

In the decades of non-racial democracy, South Africa has consistently strived to achieve a successful juvenile rights regime.[63] The Act is regarded as a unique model encapsulating the amalgamation of domestic and international laws.[64] In 1900, Swedish-born Ellen Karolina Sofia Key was a well-known advocate for children's rights, particularly advocated for "making children the focal point for political reform and education, promoting child-centred approaches to teaching and learning."[65] Her writings foreshadowed focus on child based rights "in order to ensure that the future of child rights will be vital in the present decade."[66] Society has changed rapidly over the years, thus moving towards justice and fairness for juveniles in the present day. The development of juvenile justice commenced with the developing the Children's Act that derives its features from International Law.[67] The rise for the movement towards juvenile justice sparks its interpretation and application from regional and international laws which will be discussed in this chapter.

[61] A Skelton and B Tshehla 'Child Justice in South Africa' (2008) 150 *Institute for Security Studies Monograph* 7.
[62] The Act.
[63] Schafer op cit note 11 at 9.
[64] Ibid.
[65] LT Grindheim, J S Borgen and E E Odegaard 'In the Best Interests of the Child' in *From the Century of the Child to the Century of Sustainability* (2020) 16, available at *https://brill.com/view/book/9789004445666/BP000011.xml*, accessed on 01 June 2021.
[66] G Boas 'The Century of the Child.' (1938) 7(3) *The American Scholar* JSTOR 268-76.
[67] Schafer op cit note 11 at 53.

2.1 Overview of International Instruments

International Law touches juvenile justice at many distinct levels; at the most basic it provides an external guideline for constructing domestic legislation.[68] International law, like domestic law, recognises that children (and not just adults) are the bearers of human rights,[69] a situation that was largely ignored before 1994, when international law played a very limited role in South African jurisprudence.[70] With regard to international treaties and conventions, courts, paid respect to the doctrine of the separation of powers by following the dualist theory by which a treaty would have legal effect only if an Act of Parliament had incorporated it into domestic law.[71]

There are four prominent international sources used towards developing juvenile justice in South Africa.[72] The following international instruments are as follows: -

2.1.1 The United Nations Convention on the Rights of the Child 1989 (commonly referred to the CRC);[73]

2.1.2 The United Nations Guidelines for the Prevention of Juvenile Delinquency (commonly known as the Riyadh Guidelines);[74]

2.1.3 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (commonly known as the Beijing Rules);[75] and

2.1.4 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (commonly known as JDL).[76]

[68] Schafer op cit note at 82.
[69] Schafer op cit note 11 at 67.
[70] Ibid.
[71] Ibid at 87.
[72] *S v Brandt* 2005 (2) ALL SA (SCA) at para 65.
[73] United Nations Conventions on the Rights of the Child, 1989.
[74] United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), 1990.
[75] United Nations Standard Minimum rules for the Administration of Juvenile Justice (The Beijing Rules), 1985.
[76] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990.

2.1.1 The CRC

The CRC, "comprehensively designed to protect the rights of children, is the most ratified convention in the world";[77] having been ratified by 193 states[78] at the present count.[79]The CRC sets out four main goals:

- 'That children are to be made part of the decision-making process regarding their position in society;
- protection from any form of discrimination, neglect and exploitation;
- the prevention of harm on children; and
- to ensure that all their 'basic requirements are met.'[80]

The CRC states that 'childhood is separate from adulthood, and lasts until 18; it is a special, protected time, in which children must be allowed to grow, learn, play, develop and flourish with dignity'.[81]

In 1996 South African Law Commission and the Minister of Justice created a five-member project committee to draft the Child Justice Bill.[82]The committee was required to draft the Bill in line with the guidelines set by the CRC. The members chosen to be part of the committee were members of non-govermental organisations active in the field of child justice reform in South Africa.[83]

By "1999 South Africa was obliged to report to the United Nations Committee on the Rights of the Child",[84] which required details of implementation of the CRC into domestic law,[85] and South Africa submitted its first report;[86] however since 2002 no further reports were submitted to the committee,[87] suggesting that South Africa has satisfactorily undertaken to maintain the 'best

[77] UNICEF 'What is the Convention on the Rights of the Child?' available at *https://www.unicef.org/child-rights-convention/what-is-the-convention* accessed on 18 October 2020.
[78] Schafer op cit note 11 at 90.
[79] European Commission 'Child Rights Mainstreaming in Programme and Project Cycle Management' available at *https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/2.4.html,* accessed on 18 October 2020.
[80] Schafer op cit note 11 above at 90.
[81] UNICEF note 75.
[82] C Hamilton, The fragility of the children's righs agenda *University of Essex, Director, Children's Legal Centre* available at *http://www.unicef.org/tdad/roleofstatspublicopinion2sa(1).doc*, accessed on 20 October 2020.
[83] Ibid.
[84] Schafer op cit note 11 at 91.
[85] Ibid.
[86] Schafer op cit note 11 at 179.
[87] Schafer op cit note 11 at 179.

interests of the child' concept[88] as a 'primary measure' in terms of the Constitution[89] and Child Justice Act.[90]

This convention deals with a wide range of juvenile rights. Articles 37[91] and 40 (1)-(3)[92] specifically deals with the juvenile justice system which South Africa operates.[93] Section 28 (1)(g) of the Constitution[94] is in line with Article 37 of the CRC in that juvenile offenders convicted must be sentenced as a measure of last resort and for the shortest possible period.[95]

Article 40[96] is more elobrate and implores guidelines[97] directly in line with fundamental human rights as set out in our Bill of Rights.[98] These key features of rights are important when juveniles are reintegrated into society upon commiting any offence as it will conform to the element of rehabilation as a form of punishment. The elements of reintegration and re-socialisation are key aspects within the Guidelines and is central to the application of the Act.[99]

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[88] Schafer op cit note 11 at 179.
[89] The Constitution, s 28
[90] The Act.
[91] Article 37 (b) of the CRC provides *"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 last resort and for the shortest appropriate period of time."*
[92] Article 40 of the CRC provides for state parties to ensure that juvenile justice is in line with the protection of juvenile rights such as "*dignity and worth*."
[93] A Skelton, 'Developing a juvenile justice system for South Africa: International instruments and restorative justice' *Acta Juridica* 180 (1996) 181-183.
[94] The Constitution.
[95] CRC note 89.
[96] CRC note 71.
[97] Article 40 of the CRC *(2)(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (i) To be presumed innocent until proven guilty according to law; (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality ;(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used; (vii) To have his or her privacy fully respected at all stages of the proceedings.*

[98] CRC note 90.
[99] Skelton op cite note 91.

2.1.2 The Riyadh Guidelines

The Riyadh guidelines set standards to prevent juvenile delinquent behaviour by assessing their social and economic background, premised on juvenile-centred orientation.[100] The guidelines serve to supplement the process South Africa follows in treating juvenile delinquents. This approach is followed by diversion programmes to help the young offender be rehabilitated from 'community and institutional treatment practices' as envisaged by the Child Justice Act.[101] The primary vision of the Riyadh Guidelines requires all stakeholders to ensure that young offenders avoid the criminal justice system as much as possible,[102] and to focus on promoting harmonious development of juveniles in conflict with the law.[103] It is evident that these guidelines serve strategic points for each state to consider to prevent juvenile delinquency.[104] This speaks to our stakeholders (such as presiding officers, social works and legal representatives) that their role is ensure the effectiveness of the juvenile justice system.[105] Without the important role players, the new juvenile justice system will not work and that re-socialisation is the key to the realisation of these guidelines.

2.1.3 The Beijing Rules

The Beijing Rules set a "uniform guideline for the administration of juvenile justice",[106] indicative of the principle that the juveniles must be dealt proportionately to the crime committed and the age of the juvenile at the time of the commission of the offence.[107] Rules 1.1 to 1.3 direct the state to ensure that all legislation and policies are in line with the welfare of the juvenile offender.[108] These rules detail the age in the assessment of criminal responsibility of the juvenile, as in turn reflected

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[100] United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) available at *https://www.ohchr.org/en/ProfessionalInterest/Pages/PreventionOfJuvenileDelinquency.aspx* , accessed on 20 October 2020.
[101] B J Matshego and J M C Joubert 'Best Practices in the institutional and community based treatment of young offenders' (2002) 1, *Acta Criminologica: African Journal of Criminology and Victimology*, at 123-37.
[102] Riyadh Guideline supra note 71.
[103] Ibid.
[104] Ibid.
[105] Ibid.

[106] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) Adopted by General Assembly resolution 40/33 of 29 November 1985 available at *https://www.ohchr.org/documents/professionalinterest/beijingrules.pdf* , accessed on the 20 October 2020.
[107] Ibid.
[108] The Beijing Rules.

in the Child Justice Act.[109] Chapter 3 outlines how the legislature is continuing to amend the current Act in line with the Beijing Rules, which also set out the 'scope of discretion within the administration of juvenile justice'.[110] This is in line with the discretionary power afforded to South African courts in dealing with juvenile offenders at trial stage.[111] Part six[112] of the Beijing Rules make it clear that research and policy formulation are a continuing process, which accords with South Africa's efforts to be alive to develop its juvenile justice system in line with the advance of research.

2.1.4 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL)

JDL rules "*are intended to ensure that children under the age of 18 are only deprived of their right to liberty as a last resort*".[113] These standards reflect on the management of juvenile dentention. JDL's assist with the guide to the proper approach to create a separate detention centre when juveniles below the age of 18 are kept as a measure of last resort.[114] The Correctional Services Department[115] within South Africa has created and maintained a Youth Centre Facility specifically designed to detain under 18 juveniles pending finalisation of their cases.[116] The issue that arises with the application of the JDL's and the Child Justice Act[117] is that when juveniles attain the age of majority the detention aspect is unclear as Youth Facilities only house under 18 years juveniles. The inadequente application of these rules will be expanded under Chapter 4.

[109] The Act.
[110] The Beijing Rules.
[111] Schafer op cit note 11 at 187.
[112] Rule 30.3 of the Beijing Rules state *"efforts shall be made to establish a regular evaluative research mechanism built into the system of juvenile justice administration and to collect and analyse relevant data and information for appropriate assessment and future improvement and reform of the administration."*
[113] Skelton & Tshehla op cit note 57 above.
[114] Schafer op cit note 11 at 191.
[115] Correctional Services Act 111 of 1998.
[116] Parliamentary Monitoring Group, Department of Justice & Correctional Services: Briefing on Joint Monitoring Committee on the Status of Children, Youth and Disabled persons 2000 available at https://pmg.org.za/committee-meeting/4495/, accessed on 6 April 2022.
[117] The Act.

2.2 OVERVIEW OF REGIONAL INSTRUMENTS

2.2.1 *African Charter on the Rights and Welfare of the Child (1990)*

While 49 states have ratified the African Charter on the Rights and Welfare of the Child (the Charter),[118] it was only in 2000 that South Africa decided to ratify the Charter.

The Charter[119] is based on child-specific rights which requires the legislative committee to make appropriate decisions pertaining to the best interests of the juvenile offenders. This is evidenced clearly though our Consitiuion and Child Justice Act. Article 17[120] of the Charter is premised on the administration of juvenile justice. Essentially Article 18(3) ensures that juvenile offenders must be treated according to the objectives of International treaties. The importance of juvenile rehabilitation into society.[121] Article 17(4) further reinterates the point of a minimum age to be considered relating to criminal capcity of the juvenile offender. This article bears the obligations for the South African juvenile justice system to create an overall procedure to be followed in line with its International Obligations. South Africa has maintained its obligation by introducing the Child Justice Act.[122]

Overall implementation of the above regional and international instruments is indicative of promoting juvenile justice on a fair and just plane. The overall message that are echoed from the above discussion are premised on treating juvenile offenders with great consideration to afford them the opportunity to rehabilitate and reintregrate into society upon commission of the offence committed. South African courts have taken due consideration for the role of the regional and international instruments in order to ensure that the juvenile system operates on restoration juvenile rights.[123]

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[118] African Charter on the Rights and Welfare of the Child (ACRWC) available at *https://endcorporalpunishment.org/human-rights-law/regional-human-rights-instruments/acrwc/* , accessed on 20 October 2020.
[119] ACRWC.
[120] Article 17 of ACRWC provides *"Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent will the child's sense of dignity worth and which reinforces the child right for human rights and fundamental freedoms of others".*
[121] Article 17 (3) of ACWCR.
[122] The Act.
[123] *Kekana v The State* (498/2015) ZASCA 194 (01 December 2015) para 11.

2.3 The Introduction of the Child Justice Act

South Africa has attempted to create a system separate for protecting the rights of juveniles. The primary goal of the enactment of Child Justice Act[124] was to create accountability and responsibility within the mainstream sphere where juveniles were in conflict with the law. The Act[125] guarantees that 'all children in conflict with the law will be treated individually and fairly, to ensure that they are rehabilitated and reintegrated into society'.[126]

The rationale behind section 2[127] treating children differently to adults is premised on the fact that youth is a mitigating factor and offending is often merely a temporary manifestation of adolescence.[128] Child law academic Terblanche emphasises "that children must not be treated more severely than adults".[129] "*Children must be treated in ways reflecting their age; the successful reintegration of child offenders into society is the desirable outcome and the treatment must be proportionate to the child's circumstances and the offence*, *children are more impulsive and consequently less liable to be aware of the consequences of their actions* [author's emphasis."[130]. Children are vulnerable, and if exposed to adult prisoners, they are susceptible to be recruited into a life of crime. On the other hand, children generally react well to positive influences and treatment thus allowing for rehabilitation and reintegration into society.[131]

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[124] The Act.
[125] Ibid.
[126] Section 2 of the Child Justice Act 75 of 2008

> "(a) protect the rights of children as provided for in the Constitution;
>
> (b) promote the spirit of ubuntu in the child justice system through—
>
> (i) fostering children's sense of dignity and worth;
>
> (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;
>
> (iii) supporting reconciliation by means of a restorative justice response; and
>
> (iv) involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the reintegration of children.

[127] Ibid.
[128] SS Terblanche, 'The Child Justice Act: a detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders' (2012) 67 *Potchestroom Electronic Law Journal* 6.
[129] Ibid.
[130] *S v TNS* (14658) [2014] ZAWCHC 160 at para 2.
[131] K Steyn, *The Child Justice Act, 2008* (Unpublished notes, Justice College, 2019).

Section 3 of the Act[132] identifies a number of guiding principles relevant to the application of the Act. In particular section 3(i)[133] states that application of the Act must follow the guiding principles set by the Charter as well as the CRC. In *Government of the Republic of South Africa* v *Grootboom,* Yacoob J held:[134]

> "The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable"

2.4 Conclusion

South Africa commendably transformed through the years by engaging with international and regional human rights jurisprudence,[135] giving rise to a successful juvenile justice system. Recent law reform goals are indebted to the guidance and standards set by international human rights principles.[136] The Law Reform Commission has formulated domestic laws through our international obligations.[137] From the overview of the regional and international instruments, it is evident that the juvenile justice system is separate and unique in its application in respect of juveniles within South Africa. The Child Justice Act[138] maintains all the above rules and guidelines. With the almalgamation of the above, the realisation of juvenile justice is succient and clear however the implementation of such principles must be seen actual practice. In the next chaper the writer will expand on the new amendments to the Child Justice Act 75 of 2008, which are yet to come into operation. The amendments sought to show the stance of the South African legislation in improving the juvenile justice system by varying and improving certain sections accordingly.

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[132] The Act.
[133] Ibid.
[134] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
[135] Schafer op cit note 11 at 82.
[136] Ibid.
[137] Ibid.
[138] The Act.

CHAPTER 3: THE CHILD JUSTICE AMENDMENT ACT 28 OF 2019

3.1 Introduction

The South African government has attempted to improve its systems and processes in order to reform juvenile justice by fulfilling its mandate in accordance with the guidelines of the CRC.[139] The obligation to review child justice laws every five years has prompted Parliament to consider making important changes.[140] According to Sloth-Neilsen[141], the minimum age of criminal capacity has also been a much-debated topic from the onset of the drafting process of the Act.[142] Whilst research reveals minimum academic comment on the recent changes to the Act[143] according to Sloth-Neilsen's comments, there are three prominent amendments made to the CJA. This chapter highlights how the CJA operates and introduces to the current amendments to the Act[144] which await commencement.

3.2 The operation of the Child Justice System

In terms of the Act, a juvenile offender charged for an offence under Section 6[145] will be dealt with according to the provisions of section 5.[146] The preliminary inquiry is informal in nature.[147] The

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[139] J Sloth-Nielsen 'Child Justice: Changes to the minimum age of criminal capacity' (2020) 33(2) *South African Journal of Criminal Justice* 469.
[140] S 8 of the Act.
[141] Sloth-Nielsen op cit note 142 at 476-479.
[142] Ibid at 496.
[143] The Act.
[144] Ibid.
[145] S 6 of the Act, Seriousness of offences – "*(1) In order to determine the seriousness of the offences for purposes of this Act, the categories of the offences are listed in the following order, beginning with the category of least serious offences:*

(a) Offences contained in Schedule 1;
(b) Offences contained in Schedule 2; and
(c) Offences contained in Schedule 3.

(2) In the case of a child being charged with more than one offence which are dealt with in the same criminal proceedings, the most serious offences must guide the manner in which the child must be dealt with in terms of this Act."
[146] S 5 (1) of the Act *"Every child who is 12 years or older, who alleged to have committed an offence and who is required to appear at a preliminary inquiry in respect of that offence must, before his or her first appearance at the preliminary inquiry, be assessed by a probation officer, unless the assessment is dispensed with in terms of section 41(3) or 47 (5)."*
[147] The Child Justice Act, 2008, Information Booklet, Department of Justice and Constitutional Development available at https://www.youthpolicy.org/library/wp-content/uploads/library/2008_Child_Justice_Act_2008_Information_Booklet_Eng.pdf, accessed on 05 April 2022.

purpose of the inquiry is to establish if the charges against the juvenile offender may be diverted, withdrawn, or referred to the children's court or child justice court.[148]

The manner in which the proceedings will proceed are dependant on the type of offence committed by the juvenile offender.[149] The first appearance of a juvenile offender before a presiding officer of a child justice court must be done so within 48 hours of the arrest.[150] The preliminary inquiry is conducted by the presiding officer and prosecutor together with the juvenile offender, accompanied by an adult as a guardian.[151] The probation officer will assess the juvenile offender to determine the extent of culpability of the offence.[152] If the court is satisfied that the juvenile has accepted responsibility and understands the fault of their actions, the matter maybe be diverted out of the criminal justice system.[153]

If upon the finalisation of the inquiry the court determines that the juvenile offender does not accept responsibility for the crime committed or if the offence falls under the ambit of schedule 3, the matter will be transferred to the Child Justice Court for trial.[154] It is worth highlighting that the Act does not stipulate clearly the establishment of a 'child justice court'.[155] This factor does not hinder the operation of trial related case in respect of juveniles as it clearly states that any court can sit as a child justice court.[156]After various parliamentary meetings and debates, the Child Justice Amendment Act, 2019[157] (herein after referred to as 'the amended Act') was assented to by the State President on 4 June 2020. A parliamentary meeting report[158] had found that many provisions of the Act needed to be re-assessed to give effect to 'the purpose of the Act'.[159]

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[148] S43 (2) (a) i – iii, Child Justice Amendment Act 28 of 2019.
[149] S 6 of the Act note 148 above;
Schedule 1 offences refer to less serious offences not exceeding R2500; Schedule 2 offences refer to more serious offences whereby the offence exceeds R2500;
Schedule 3 deals with very serious offence such as Muder, Rape and other listed offences as per the Act (see Corrie op cit note 2 at 32).
[150] S 48 (1) of the Act.
[151] Terablanche op cit note 57 at 448 – 449.
[152] S 5 of the Act.
[153] Ibid
[154] S 63 (1) (a) of the Act.
[155] Terablanche op cit note 57 at 447 – 448.
[156] S 71 of the Act read with the Criminal Procedure Act 51 of 1977.
[157] The amended Act.
[158] The Parliamentary Monitoring Group's 'Child Justice Act implementation: briefing by Department of Justice, 21 June 2011 available at https://pmg.org.za/committee-meeting/13117/, accessed on 02 May 2021.
[159] The Act.

According to the Parliamentary Monitoring Group[160] there were many challenges experienced in the early stages of the operation of the Act[161] which included the poor quality of the information in relation to statistics reviewing the juvenile justice system.[162] This undoubtedtly created an inconclusive picture of the success of the implementation of the Act.[163] The data collated in relation to children entering the child system was diminishing, as there were fewer arrests by police.[164] Schoeman wrote that the role of police officials recognised by the Act[165] 'in essence serves to show that police officials are gatekeepers [for] child offenders [to gain] access to the services intended by the Act'.[166] Further to this, it was clear that there had also been a small decrease in the number of preliminary inquiries conducted by social workers.[167] The Parliamentary Justice Committee learned that the lack of knowledge, resources and capacity of all role players within the child justice system, had caused implementation to fall behind. The role players identified were social workers, police officials, magistrates and prosecutors.[168]

The discussions for the amended Act[169] resulted in two important changes, the first being the "minimum age of criminal capacity of children increasing from 10 years to 12 years" and the second being the removal of the requirement of proving criminal capacity for the purposes of diversion and to facilitate preliminary inquiries.[170] These important changes show the Portfolio Committee's stance towards inproving and changing the juvenile system in order to prevent any violation to the best interests of juvenile offenders.

[160] The Parliamentary Monitoring Group Briefing op cit note 161.
[161] The Act.
[162] The Parliamentary Monitoring Group Briefing op cit note 161.
[163] Ibid.
[164] LM Muntingh, "Children in Conflict with the Law: A Compendium of Child Justice Statistics: 1995-2001', Cape Town, (2003) available at *https://static.pmg.org.za/docs/2003/appendices/030310compendium.htm*, accessed on 19 July 2021.
[165] The Act.
[166] Schoeman M, 'The Role of the South African Police Service in the implementation of the Child Justice Act', (2017) 30(2) Acta Criminologica: Southern African Journal of Criminology at iv.
[167] The Parliamentary Monitoring Group's May/June 2015, available at https://pmg.org.za/page/newsletter, accessed on 02 May 2021.
[168] Corrie & Van Niekerk with Louw op cit note 2 at ix.
[169] The amended Act.
[170] The Parliamentary Monitoring Group's briefing, supra note 23.

3.3 THREE PROMINENT AMENDMENTS

3.3.1 Minimum Age for Criminal Capacity

The first and most prominent amendment to the Act is that of the minimum age for the assessment (MACR) of juvenile criminal capacity.

Prior to 'the establishment of the Act, South Africa was one of the countries with the lowest minimum ages for criminal capacity'.[171] The inquiry into the age of the juvenile had to be considered before proceedings began,[172] and the criminal capacity base line age was 7 to 10 years of age.[173] The age inquiry was intended to assess the juvenile's cognitive development, and the offender's acknowledgement of criminal responsibility.[174]

The proposed amendment recommends the minimum age of 12 years in which a juvenile lacks the criminal capacity to commit an offence.[175] The age of 12 is known to be an international standard followed by many states.[176] According to the CRC and Beijeng Rules, the general comments were that the age of 12 years should by the accepted minimum age of criminal capcity.[177] The 'Minister of Justice and Constitutional Development was mandated to review and report to Parliament on the issue of age and criminal capacity by 31 March 2015'.[178] It was upon the Portofolio commitees five year review of the Act that the South African government was pursauded to consider and accept the international stardard age of criminal capacity. An expert seminar comprising representatives of 20 magisterial districts was undertaken and a report, drafted as an overview of the empirical research and the information received through the seminar, was submitted to Parliament in January 2016 (Department of Justice and Constitutional Development, 'Report on the Minimum Age of Criminal Capacity').[179] The review of changing the minimum age was to ensure that each child's level of maturity and development' would be assessed more accurately in order for cases to be properly dealt with.[180]

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[171] A Skelton and C Badenhorst, "The criminal capacity of children in South Africa – International development and considerations for a review', *Child Justice Alliance* 14.
[172] Corrie & Van Niekerk with Louw op cit note 2 at 32.
[173] Ibid.
[174] Ibid.
[175] S 5 of the Amendment Act.
[176] Sloth Neilsen op cit 142 at 471-472.
[177] Ibid 471 – 474.
[178] Corrie & Van Niekerk with Louw op cit note 2 at 35.
[179] J Sloth-Neilsen op cit note 142 at 473.
[180] Corrie & Van Niekerk with Louw op cit note 2 at 34.

3.3.2 Diversion

Diversion is an integral part of the Act. Diversion allows for the juvenile offender to be given an apportunity to reintrgate into society as an alternative form of punishment. This may be in the form of community services and educational programmes.[181]

Maintaining the effectiveness of diversion in the new Act[182] will regulate the prosecution's role, and that of the presiding officers in ensuring that all proper factors are taken into account 'within an inquiry to consider the successful diversion of the child offender'.[183] The proposed amendment will now remove the requirement for the prosecutor to prove criminal capacity before considering diversion.[184] By the removal of the words cognitive ability, this will allow the state a wider discretion to consider diversion without having to go through a lengthy criminal capacity assessment thus fast tracking the procedure.[185] The objective of the Act has always been to consider restorative justice and diversion.

The amendment enhances the process of diversion by allowing the state to use their discretion from the onset on the case.[186] The amendment Act[187] includes the process by which probation officers are "to assess criminal capacity of children in conflict with the law",[188] and also seeks to ensure that juvenile offenders between the ages 12 and 14 years are protected in the process of their prosecution. [189]

The addition is to ensure that role-players such as the prosecutors, probation officers and presiding officers consider all relevant factors that might affect the child offender entering the criminal

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[181] Terablanche op cite note 67 at 446.
[182] The Amendment Act.
[183] Ibid.
[184] S 10 of the Amended Act *(1) A prosecutor who is required to make a decision whether or not to prosecute a child referred to in section 7 (2) must take the following into consideration:*
*(a) The educational level, [**cognitive ability**] domestic and environmental circumtances, age and maturity of the child*
[185] Ibid
[186] Child Justice Act 75 of 2008, Amended National Policy Framework on Child Justice, Department of Justice and Constitutional Development (May 2018) 7th Edition available at https://www.justice.gov.za/legislation/notices/2018/20180727-gg41796_gon751_CJA-policy.pdf, accessed on 6 April 2022 at 24-28.
[187] The Amendment Act.
[188] M I Schoeman 'Determining the Age of Criminal Capacity: Acting in the best interest of children in conflict with the law' (2016) 57 *SA Crime Quarterly* 34.
[189] Ibid.

justice system, with diversion continuing to play a pivotal role in line with the international guidelines set under the Beijeng Rules.[190]

3.3.3 Gaurdianship

A significant change to the Child Justice Act[191] was the insertion of the words '*appropriate person*'. The word '*adult*' has been removed and is substituted by the phrase '*appropriate person*',[192] meaning '*any member of a child's family, including a sibling who is 16 years or older, or care-giver referred to in section 1 of the Children's Act*'[193] is deemed an appropriate person. This amendment was necessary to safeguard the situation where a child has no parent or guardian. Thus the word extends to the meaning that any person in control of the child offender at the time of the commission of the offence, may assist him or her during the entire court process. Should there not be an appropriate person to assist, the child will be considered as a child in need of care and the police then has duty to '*hand the child over to a suitable child and youth care centre, and must notify a probation officer*'.[194]

3.4 Conclusion

Sloth-Neilsen[195] correctly points out that the "most significant change brought to the Child Justice Act[196] was the raising of the minimum age of criminal capacity".[197] This amendment has been long-awaited and a much-needed transformation. In this chapter, the writer briefly discusses the

[190] B Mbambo 'Diversion: A central feature of the new child justice system' in Traggy Maepa (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* chapter 7, available at *http://issafrica.s3.amazonaws.com/site/uploads/111CHAP7*.PDF, accessed on the 20 February 2021.
[191] The Act.
[192] S 1 The Amendment Act: Section 1 of the Child Justice Act, 2008 (hereinafter refered to as the principle Act), is hereby amended by the subustituion for the the definition *"appropriate person".*
[193] Ibid.
[194] S 9(1) (b) of Amendment Act.
[195] Sloth-Neilsen op cit note 142 at 478.
[196] The Act.
[197] Sloth-Neilsen op cit note 142 at 478.

important changes made to the principal Act, illustrating that these changes have taken time to execute on account of lack of proper data and statistics.[198]

The preamble of Act[199] states that '*every child must be treated in a manner which takes into account the needs of persons of his or her age'*,[200] consistent with the direction in the CRC. Along with the change of MACR and diversion being a form of non-penal punishment, no amendments have been made to Chapter 10[201] which deals with the appropriate sentences according to the age of majority. A challenge which emanates from the Act is the sentencing of children who turn 18 during trial proceedings, and sentencing of children overall upon the unsuccessful non-penal options. In the past few years, many court decisions have reflected a systematically irregular interpretation of sentencing of child offenders.[202] The Law Reform Committee should have included the CRC and AWRCR's General Comments 10 that strongly point to social and educational measures to be considered for sentencing aspects.[203] The ultimate point being that after all sentencing considerations that have been exhausted, imprisonment must be considered as a last measure and to be fully justified upon merits.[204] In the next chapter the writer will examine case law related to the determination of appropriate sentencing orders. The analysis will establish whether a set of guiding principles for sentencing of juvenile offenders should have been included in the amended Act. The writer further explores the issue of age evaluation during the sentencing stage, attempting to show that, despite the altered the minimum age for juvenile offenders, there are lacunae in relation to age, which prevent courts carefully considering appropriate sentencing orders.

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[198] Skelton & Tshehla op cit note 61 above; The minimum age of criminal responsibility: 10 or 12? Acticle 40 Vol 10(1) (May 2008) available at https://journals-co-za.ukzn.idm.oclc.org/doi/10.10520/AJA0000003_4, accessed on 6 April 2022.
[199] The Act.
[200] Ibid.
[201] Chapter 10 (Sentencing) of the Act.
[202] *Mpofu v Minister of Justice and Constitutional Development and Others* 2013(2) SACR 407 (CC) at para 19-25.
[203] Committee on the Rights of a Child (April 2007) Children's Rights in Juvenile Justice - General Comment 10 (CRC/C/GC/10) *"94. In addition, specialized services such as probation, counselling or supervision should be established together with specialized facilities including for example day treatment centres and, where necessary, facilities for residential care and treatment of child offenders. In this juvenile justice system, an effective coordination of the activities of all these specialized units, services and facilities should be promoted in an ongoing manner."*
[204] Wakefield op cit note 102 at 179-182.

CHAPTER 4: SENTENCING OF JUVENILE OFFENDERS UNDER THE CHILD JUSTICE ACT

4.1 Introduction

Over the years, juvenile justice in South Africa advanced immensely as seen in the account herein of its legislative and judicial history, and especially in the current amendments to the Act. The judiciary is striving towards ensuring that juvenile offenders are dealt with effectively and considerately.[205] As much as the child justice system has developed, there are areas that need to be critically evaluated, like aspects of sentencing. Terrablanche noted that the provisions of Chapter 10 of the Act,[206] in relation to section 68[207], contain interpretative issues regarding juvenile offenders and child justice courts.[208] Terblanche investigated many procedural sentencing issues, writing that judicial officers need to take into account the Child Justice Act as a whole in order to make an appropriate sentencing determination.[209] Courts have a duty to ensure that their decisions are in line with the purpose and purport of the Act.[210] This chapter aims to highlight the importance of the age of a child in the sentencing process, and recommend provisions that need to be inserted by way of amendments to the Act[211] to better its application.

4.2 Sentencing under the Child Justice Act 75 of 2008

Sentencing of children embraces the aim of reintegrating the child in society,[212] and the Act[213] seeks to ensure that restorative justice is the overarching principle of juvenile justice.[214] Section 68 of the Act[215] states that 'a court must, after convicting a child, pass a sentence in accordance with Chapter 10', pertinent to age of the child.[216]

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[205] Article 40, 'The dynamics of youth justice and the convention on the rights of the child in South Africa' 15 (1) May 2013 available at https://journals.co.za/doi/pdf/10.10520/EJC160527, accessed on 06 April 2022.
[206] Chapter 10 ss 68-79 deals with Sentencing.
[207] The Act.
[208] SS Terblanche 'The Child Justice Act: Procedural Sentencing Issues' (2013) 16(1) *Potchefstroom Electronic Law Journal* 438.
[209] Ibid 342.
[210] Ibid.
[211] The Amendment Act.
[212] *R v Saayman* 2008 (1) SACR 393 (E) 402 – 405; Corrie op cit note 2 at 193.
[213] The Act.
[214] *R v Saayman* supra note 210; S 69 (2) *"In order to promote the objectives of sentencing referred to in subsection (1) and to encourage a restorative justice approach, sentences may be used in combination."*
[215] The Act.
[216] Corrie op cite note 2 at 193.

The 2000 South African Law Reform Report[217] on Justice set out three determining factors as the basis for sentencing in the Act. They were:

1. Restorative Justice as a primary factor related to juvenile offenders, to ensure that there is a separate and successful system for juveniles.[218]
2. Section 28 of the Constitution[219] which entrenches the principle of 'the best interests of the child', and imprisonment being imposed as 'a last measure of resort and for the shortest period'.[220]
3. International and regional instruments – the 'Convention on the Rights of the Child' and the 'African Charter' which recognise the primary objective of reintegration of juveniles into society and their family.[221]

These three factors must always be considered by courts in determining an appropriate sentence, failing which the purpose of the Act would be negated.[222] Pre-Child Justice case law also showed that juvenile justice sentencing must be indicative by the principles outlined under Section 28 (1) (g) and International instruments.[223] Subsequent case law have directed that juvenile offenders must be given detailed consideration towards individualised interests and to ensure avoid imprisonment as a sentencing option.[224]

4.3 Aspects child justice courts must consider for purposes of sentencing

4.3.1 The importance of age determination

The Act states that the 'purpose of a preliminary inquiry is to establish the age and offence which the child has committed'.[225] The age of the child[226] must be considered for purposes of sentencing.

[217] South African Law Commission Report, Project 106 – Juvenile Justice (July 2000) available at https://www.justice.gov.za/salrc/reports/r_prj106_juvjus_2000%20jul.pdf, accessed on 24 March 2022.
[218] Ibid 153-160.
[219] The Constitution.
[220] Ibid.
[221] The CRC and ACRWC.
[222] *S v Brandt* 2005 (2) SA SCA at para13-14.
[223] C Ballard 'Youthfulness and sentencing prior to the operation of the Child Justice Act: a case review of Fredericks v The State' *African Journals* Article 40 (14) (2012) at 10-11.
[224] Ibid.
[225] Corrie, Van Niekerk with Louw op cit note 2 at 32.
[226] The Act, ss 7-11 (Criminal capacity under Chapter 2).

The case law analysed in this chapter, demonstrates how appeal and review courts have placed emphasis on the relevance of the age of the offender, and that it was the *'age at the time of the commission of the offence and not the age at the time of sentence that must be considered in order to determine an appropriate sentence'*.[227]

As seen in Chapter 3, the new amendments are pertinent to preliminary inquiries and criminal capacity assessment, by which the courts should have no difficulty to implement when adudicating juvenile matters. Once the case passes the preliminary inquiry stage, the juvenile offender must be dealt with through the child justice court. Such offender must be dealt with as at the 'age of the commission of the offence' and not as an adult.[228] In a literal interpretation of section 68[229] the words *'after convicting a child'*[230] must be read with the definition of a '*child*'.[231] According to the Act,[232] '*any court where a child appears must sit as a child justice court*',[233] and the procedure must follow chapters 9 and 10[234] of the Act.[235] 'A child justice court is therefore obliged to ensure that sentencing is in accordance with the requirements set out in Chapter 10.'[236]

Section 85[237] provides for automatic review of child justice cases in which the accused has been 'sentenced to a direct term of imprisonment'[238] or any 'sentence without suspension',[239] to ensure the absence of gross irregularities.

[227] Terablanche op cit note 53 at 7 - 9.
[228] Terablanche op cit note 53 at 7 - 9.
[229] The Act.
[230] S 68 of the Act.
[231] Corrie & Van Niekerk with Louw op cit note 2 at 193.
[232] The Act.
[233] The Act, Ch 1, s 1, *'child justice court' means any court provided for in the Criminal Procedure Act, dealing with bail application, plea, trial or sentencing of a child.*
[234] *JA v S* (20190063) [2019] ZAECGHC 64 (3 June 2019) para 5.
[235] The Act.
[236] *JA v S* supra note 361 at para 5.
[237] The Act.
[238] Ibid.
[239] Ibid.

4.3.2 Factors to be considered for an appropriate sentence

In line with the principles outlined by the South African Law Reform Project, presiding officers have a certain degree of judicial discretion in respect of sentencing[240]. This discretion is however limited to special factors unique to juvenile justice.

These factors include:[241]

a) No minimum sentences are applicable to children;[242]

b) No life sentence to be ordered without consideration of parole;[243]

c) Imprisonment to be considered as a measure of last resort;[244]

d) If imprisonment is ordered by the child justice court, it will be subject to review by the High Court.[245]

The above factors are consonant with the purport of the CRC[246] that deprivation of liberty is to be limited and to be as a point of last resort as long as it is justifiable.[247]

4.3.3 General sentencing discretion

The well-known judgment in *S v Zinn*[248] sets an authoritative guideline for sentencing. The Zinn Triad' considers the crime, the interest of society and the accused's personal circumstances.[249] The courts are enjoined to strike a balance between these three factors in order to arrive at an appropriate sentence. Whilst the triad has been invoked by the child justice courts, the Act adds additional factors which have to be considered in sentencing. Section 69 of the Act[250] relates to

[240] Corrie & Van Niekerk with E Louw op cit note 2 at 189.
[241] Ibid.
[242] *Centre for Child law v the Minister of Justice and Constitutional Development and Others* [2009] ZACC 18.
[243] Corrie & Van Niekerk with Louw op cit note 2 at 189.
[244] The Constitution, s 28 (1) (g).
[245] S 85 of the Act.
[246] The CRC.
[247] Corrie & Van Niekerk with E Louw op cit note 2 at 190.
[248] *S v Zinn* 1969 (2) SA 537 (A) 540G-H.
[249] Ibid.
[250] Section 69: *Objectives of sentencing and factors to be considered '(1) In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to-*

(a) encourage the child to understand the implications of and be accountable for the harm caused;
(b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;
(c) (c) promote the reintegration of the child into the family and community;

the 'objectives of sentencing' and factors to be measured. These factors are intended to ensure particular attention to sentencing children, and to ensure that the juvenile is ultimately rehabilitated and reintegrated in society.

4.4 Challenges in respect of appropriate sentencing orders as per case analysis

According to Wakefield and Gallinetti,[251] the manner and approach used by presiding officers in respect of sentencing juveniles is not 'fully in line with the objectives of the Act'.[252] They report that presiding officers continue to employ the Criminal Procedure Act[253] in the sentencing process[254], and fail to sentence juveniles 'as provided for under the CJA'.[255] Part 2 of the Act makes provision for various sentencing options afforded to presiding officers to consider in order to make an appropriate sentencing order.[256]

Section 68 clearly stipulates that the Act has to be considered as a whole in order for the child justice court to adopt a sentence as guided by section 72 to 79.[257]

Presiding officers are bound to justify sentencing juveniles with valid reasons.[258] A problem is occasioned by the overlapping of Acts, as indicated by Wakefield and Gallinetti,[259] such as the Criminal Procedure Act.[260] However, the legislature has made it clear from the start that child justice is a separate system created for juvenile offenders – a policy that must be strictly enforced without the overlap of other statutes.

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d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and
(e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.'
[251] L Wakefield and J Gallinetti 'Sentencing of Children to Child and Youth Care Centres': *Workshop Report*, 8 June 2011 (2011) 2-3.
[252] The Act.
[253] Criminal Procedure Act 51 of 1977.
[254] Ibid.
[255] The Act, s 76.
[256] S72-79 of the Act - Sentencing options *(Community-based; Restorative justice sentences; Fine or alternatives to fine; Sentencing involving correctional supervision; Sentence of compulsory residence in child and youth care centre; Sentence of imprisonment; Postponement or suspension of passing of sentence; Failure to comply with certain sentences).*
[257] Corrie & Van Niekerk with Louw op cit note 2 at 194.
[258] *Mpofu v Minister for Justice and Constitutional Development and Others (Centre for Child Law as Animus Curiae)* 2013 (2) SACR 407 at para 41 – 56.
[259] L Wakefield and J Gallinetti 'Sentencing of Children to Child Youth Care Centres: *Workshop Report*, 8 J at 2-3.
[260] Criminal Procedure Act 51 of 1977.

A second problem is the age determination of the juvenile offender at sentencing stage. Terblanche correctly points to long delays in finalising cases,[261] in which time the accused might have turned 18 by trial stage. The question then has arisen whether the accused will have lost his juvenile status. In practice presiding officers have difficulty ordering an appropriate sentence due to the lack of clarity in the Act.[262]

Terblanche points to two other factors which pose practical problems for child justice courts:

> 'There are two sides to this coin. On the one hand, delays in the system should not remove any child from the protection provided by the Act for no fault of his or her own. On the other hand, someone much older than 18 at the time of sentencing might, for that reason alone, not be a suitable candidate for the sentences provided for in chapter 10, or be in need of the protection offered by the Act.'

Terblanche raises a serious problem 'in respect of the application of the Child Justice Act'.[263] It is submitted that the Act[264] be amended to clearly state that 'when a child turns 18 during the proceedings of the trial, the Act is still applicable to him or her'. The age at the time of the offence must hold sway.[265]

In the case of *Mpofu v Minister of Justice and Constitutional Development*,[266] the court held that High courts are known as upper gaurdians of juveniles. They have duty to ensure that juveniles are treated differently from adults.[267] The appellant in this case was convicted in the High Court for murder together with other serious offences of which he was sentenced to life imprisonment. He was convicted for the other serious offences whereby the sentence of 28 years imprisonment were to run concurrently with the life sentence.[268]

[261] SS Terblanche *A Guide to Sentencing in South Africa* 3 ed (2016) 352.
[262] The Act.
[263] Ibid.
[264] Ibid.
[265] V Noncembu "Sentencing the erstwhile child: imprisonment and committal to a child and youth care centre', (2017) 30(3) *South African Journal of Criminal Justice*, at 311-312.
[266] Supra note 214 at para 20-25.
[267] Supra.
[268] Supra at para 4-6.

The Constitutional Court held that the Section 28 (1) (g) serves to be used as a different inquiry in respect of juvenile offenders.[269] The court found that the trial court and High Court failed to consider the age of the juvenile offender.[270] It was found that the offender's age was considered as if he was a major. The court further held that it was a clear misdirection from the High Court.[271] The final order from the court was that the term of life imprisonment must be set aside and an accumulative sentence of of 20 years is most suitable.[272] *Mpofu's* case is important for juvenile justice cases as the Constitutional Court made it clear that in order for Section 77 (4)[273] to be considered as a form of sentence, such determination must be fully justified upon a full investigation of the juvenile's age as well as background of childhood.[274]

A Verulam Regional Court magistrate, Vuyokazi Noncembu[275] described practical challenges posed in the child justice court regarding children who turn 18 during proceedings:

> "The law describes a child as a person below the age of 18 years, however it does not take into account that at 18 years that person is still in the process of developing into an adult, and that although termed to be an adult they are still in a developmental process and cannot be said to have fully reached adulthood. The demarcation of 18 as the end of childhood is said to be an artificial one as there is no one moment or age at which all people can be said to have reached full maturity."

This important submission[276] criticises the absolute rule in the Act[277] that the age of 18 is a cut-off date for entering adulthood.[278] She found support in *S v Brandt*:[279]

> "A child is not immature, impetuous and developing the day before her eighteenth birthday and a mature and responsible adult the next; cautioning courts to take this factor into account when sentencing offenders of 18 years and above".

[269] Supra note 214 at para 22.
[270] Supra at para 23.
[271] Supra at para 40-45.
[272] Supra at para 56.
[273] The Act.
[274] Supra note 214 at para 48-53.
[275] Noncembu op cit note 252 above.
[276] Ibid.
[277] The Act.
[278] Ibid.
[279] 2005 (2) ALL SA (SCA).

> Noncembu concludes reaching the age of 18 does not open the door for the presiding officer to exercise wide discretionary powers. As indicated earlier, that discretion is limited to the four corners of the Act.[280]

Another point of contention in this dissertation, are the lengthy terms of imprisonment imposed on juvenile offenders. It is clear from various review and appeal judgments, that excessive sentences have been imposed by presiding officers under the Act. The Constitution and international and regional instruments provide that imprisonment should only be used as a measure of last resort and for the shortest appropriate period of time in sentencing child offenders.[281] If imprisonment as a last resort is to be imposed, the reasons must first be fully explained.

4.4.1 Sentencing of children who turn 18 years before the commencement of a trial

In this case of *S v SN* (unreported) case number: 141114/14,[282] the High Court had to consider the 'application of the Child Justice Act (CJA) in conjunction with the provisions of section 28 of Constitution[283] to the child offender who turned 18 during the proceedings. The court confirmed, *'that there was no arbitrary end to childhood for children who have committed offences before they attain the age of adulthood'*.[284] The two accused were 17 at the 'time of the commission of the offence' and had stabbed a fellow pupil at their school.[285] Both pleaded guilty in terms of section 112(2) of the Criminal Procedure Act'[286] and in their 'plea statements they set out their versions of the events that led to the fatal stabbing of the deceased.' Both accused were correctly found guilty of murder and sentenced to terms of 10 years direct imprisonment.[287]

The decision went on automatic review in terms of section 85 of the Act.[288] The High Court was tasked with evaluating irregularities allegedly arising from the decision of the presiding officer. It was alleged that the presiding officer relied on the factors set out in the probation officer's report

[280] The Act.
[281] Noncembu op cit note 252 above.
[282] *S v SN* (unreported) case number: 141114/14 (WCC).
[283] The Constitution.
[284] C Du Toit and Z Hansungule, '*S v SN* unreported, case no 141114/14 sentencing child offenders after they turn 18', (2015) 54 *SA Crime Quarterly* at 65.
[285] Ibid at 66.
[286] Criminal Procedure Act 51 of 1977.
[287] *S v SN* supra note 233.
[288] The Act.

rather than the facts arising from the juvenile offender's plea statements. The High Court raised the following issues:

- 'On what basis did the presiding officer rely on the facts provided in the probation officer's report for purposes of sentencing, when such report contradicted the version of events as per the plea statements of both child offenders.
- Whether the provisions of section 28 of the Constitution were applied in respect of sentencing'.

The presiding officer erred[289] saying 'that both accused turned 18 before they were sentenced', concluding that section 28(3)[290] of the Constitution only applied to offenders below the age of 18. The conclusion that sections 28(1) (g)[291] and 28(2)[292] were not applicable in the case for purposes of sentence was erroneously decided upon.

The reviewing court rejected the presiding officer's reasoning, asserting that the juvenile offenders ought to have been dealt with under the provisions of the CJA[293] and finding that the '*child offenders were below the age of 18 at the time of their arrest and qualified to be dealt with accordingly'*.

The review court stressed the importance of treating children differently from adults for purpose of sentencing.[294] The High Court referred to the definition of a '*child*' in terms of the Act[295] as a person below the age of 18 years,[296] and extending the definition 'to include a person who is 18 or older but under the age of 21 years'.[297]

Section 4(1)[298] shows that the age of the juvenile offender at the time of the commission of the offence is relevant and vital upon the application of the Act.[299] Juvenile offenders who commit

[289] Du Toit & Hansungule op cit note 261 at 67.
[290] The Act.
[291] The Constitution.
[292] Ibid.
[293] The Act.
[294] Du Toit & Hasungule op cit note 261 above.
[295] The Act.
[296] The Act, Ch 1, definitions, objects and guiding principles of Act (ss 1).
[297] *S v SN* supra note 233 at para 8.
[298] Du Toit & Hasungule op cit note 261 above at 67.
[299] S 4 of the Act.

crimes when they are under the age of majority will not always be considered juveniles when the matter arrive at Child Justice Court for trial proceedings.[300]

In reviewing *S v SN*[301], the High Court set aside the 10-year sentences on both accuseds and referred the matter back to the trial court before a new presiding officer for a fresh consideration of sentence.[302] The court held further that the presiding officer had misdirected himself when implementing section 28[303] by failing to consider 'other alternate sentences such as compulsory residency in a child and youth care centre' listed under Chapter 10, Section 68 of the Act.[304] In summary, the court held that detention was not appropriate.[305]

In *S v Melapi 2014 (1) SACR 363 (GP)* the matter came on review in terms of section 85 of the Act.[306] The child offender was 17 years and 2 months old at the time of the commission of the offence and had turned 18 at the time of sentencing. The juvenile offender was convicted of murder and sentenced to five years' imprisonment in terms of section 276(1) (i) of the Act for murder of his stepfather. This allowed the Commissioner of the Parole Board the discretion to place the accused under correctional supervision.[307] The presiding officer sought to have the child offender placed in a youth facility for purposes of serving his sentence. However, youth facilities only cater for minors until they attain the age of majority. The Child Law Centre was asked to explain to the reviewing court how it could make an appropriate order in respect of sentence.[308] The Child Law Centre raised issues of trial irregularities and submitted that a youth centre should cater for the accused.[309] The reviewing court confirmed the conviction and turned to the issue of sentence, drawing distinction between children and adults in the criminal justice system. The court referred to '*Mpofu v Minister of Justice and Constitutional Development* in which it was held: '[310]

[300] Ibid.
[301] *S v SN* supra note 259.
[302] Du Toit & Hasungule op cit note 261 at 69.
[303] The Constitution.
[304] The Act.
[305] *S v SN* supra note 259.
[306] The Act.
[307] *S v Melapi* 2014 (1) SACR 363 (GP) at para 3.
[308] *Melapi* supra at para 5.
[309] Supra.
[310] *Mpofu v Minister of Justice and Constitutional Development* [2013] ZACC at para 15.

> 'Children's rights are of the utmost importance on our society. Courts are required to distinguish between children and adult offenders when sentencing, and children must enjoy preferential treatment'[311]

The reviewing court also noted that as the accused was convicted of a schedule 3 offence[312] in terms of section 77(3)(a) of the Act[313]', even a person who was 'a child at the time of the commission of the offence' may be given a term of imprisonment if warranted by the facts.[314] The court affirmed the '*last resort*'[315] principle of imprisonment related to juvenile offenders and that any departure should result in imprisonment for the shortest period of time.[316] The court held that the 'principles set out in *Centre for Child Law v Minister of Justice*[317] were in line with [the objectives set out in] section 69 of the CJA'.[318] The court reiterated 'that child offenders were more capable of rehabilitation than adults', and that when imprisonment was the only appropriate sentence, it must be imposed subject to the Bill of Rights' mitigatory injunction that it should be for an appropriate term.[319]

This case stresses aspects of appropriate juvenile sentencing, which the trial court failed to consider. For example, the High Court gleaned from the probation officer's report that the child offender was subject to alcohol-fuelled and personal abuse by the deceased in the case.[320] The court also found that evidence of substance abuse by the juvenile contributed to the commission of the offence. The failure of the trial court to properly investigate the circumstances of the case in its entirety led to the accused being prejudiced.[321] The trial 'court also failed to take serious account of the probation officer's recommendations. There were alternate sentencing options available for the trial court to consider,[322] and direct imprisonment was not an appropriate sentence.[323] The court found that a suspended sentence was appropriate, amending the sentence to

[311] *Melapi* supra note 282 at para 33.
[312] The Act, Schedule 3.
[313] The Act.
[314] *Melapi* supra note 282 at para 32.
[315] S 28 (1) (g) of the Constitution.
[316] Supra at para 35.
[317] *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 ZACC 18.
[318] Supra at para 37.
[319] *Melapi* supra note 282 at para 32.
[320] Supra at para 40.
[321] Supra.
[322] Section 69 of the Act.
[323] *Melapi* supra note 282 at para 41.

'an order in terms of section 276(1)(h)[324], bringing the decision in line with the requirements of the authoritative *S v Zinn*'.[325]

An important outcome of the case is that it would be an anomalous for a 'child who turns 18 during the trial proceedings to be stripped of his legal protection'. That offended the principles of South African juvenile justice.[326]

4.4.2 Consideration of previous convictions in sentencing a juvenile offender

The issue in the case of *S v SM 2013 JDR (1874) (ECG)* concerned the provisions of section 85(1)(b) of the CJA. The accused was 17 years of age at the time of the commission of the offence, was convicted of murder and sentenced to direct imprisonment for a period of 10 years.[327] The reviewing court held that the presiding officer misdirected himself by considering the offender's previous conviction when the state had not proved any previous convictions, but had relied on information in the probation officer's report. The reviewing court upheld the conviction but was concerned with the sentence,[328] highlighting that 'the presiding officer in the court *a quo* had found that the accused was indeed a minor at the time of the commission of the offence, but relied on the probation officer's report to find that he had not been leading a life as a juvenile, and that his actions and way of life was inconsistent with that of a child.'[329]

The court submitted that 'where the state has not proved the previous convictions against the accused, it would be highly irregular of the presiding officer to elicit that information' from a probation officers report. The reviewing court agreed,[330] referring to the case of the State vesus *Hlangomva*[331] at paragraph175 F-H:

> "The principle enunciated in the case referred to above applies with equal force in this matter. That the accused has himself, volunteered the information concerning his previous brush with the law without being asked, should not change the picture; it does not give the

[324] The Criminal Procedure Act 51 of 1977.
[325] *S v Zinn* 1969 (2) SA 537 (A).
[326] *Melapi* supra note 282 at para 52.2.
[327] *S v SM* 2013 JDR (1874) (ECG) para 1.
[328] Supra at para 5.
[329] Supra at paras 3-4.
[330] Supra at para 6.
[331] *S v Hlangomva* 1999 (1) SACR 173 (E).

> magistrate the licence to proceed and to pose questions relating to the precise nature, dates and other information concerning the previous conviction as was done in this matter."[332]

The reviewing court then had to decide whether the matter should be sent back to the Child Justice Court for sentence afresh; the only issues to be considered were based on fairness and bias.[333] If the accused was sentenced afresh, then there was a likelihood that his previous convictions would be formally proved, giving rise to the possibility of a heavier sentence.

The court concluded that the offence by the child offender did not warrant imprisonment.

> "In determining an appropriate sentence, regard must be had for the provisions of the CJA and the accused must be treated as a juvenile offender. This requires imprisonment being considered as a measure of last resort." [334]

Considering the child offender's age, the court suspended a portion of the prison sentence,[335] thereby meeting the requirement of imprisonment being for the shortest period, preventing the child offender from engaging in such criminal conduct in the future.[336]

4.4.3 Sentencing as a last resort

In *S v Brandt* 2005 (2) SACR ALL SA 1 (SCA), the sentence was the core issue of the appeal. The Appeal Court was to decide the applicability of the minimum sentence regime particularly for juvenile offenders. The juvenile offender was given a life imprisonment sentence which the appeal court considered to be wholly inpropriate. In conclusion of its decision, the court held that the principle enshrined by the Constitution that sentences of lenghy imprisonment must be considered as a measure of last resort. Factors such as youthfulness, mental and emotional maturity, and the merits of the case must be assessed cumulatively.[337]

Sentencing juveniles requires the international and regional guidelines to be implemented as well as the CJA and Consitution. Along with strict adherence to juvenile justice legal instruments, the

[332] *S v SM* 2013 JDR (1874) (ECG) para 7.
[333] Supra at para 10.
[334] *Melapi* supra note 282 at para 13.
[335] Supra.
[336] Supra at para 14.
[337] *Brandt* supra 74 note at 11-12.

principle of proportionality must not be overlooked.[338] The principle of proportionality centers on the premise of curbing serious punishment that the courts may impose. This principle allows for the presiding officer to the nature of the offence committed, the personal circumstance of the accused as well as the victim's perspective regarding a suitable punishment for the offender.[339] The essence of the use of the proportionality is to ensure that the welfare of the juvenile offender is safeguarded along with the victims' position. Ultimately guaranteeing juvenile offenders rights as envisioned by section 28.[340]

In conclusion the appeal court decided that sentencing juvenile offenders over the age of 16 but under 18 must be free from the application of the minimium sentence regime. Substantial and compelling circumtances were not applicatable to juvenile offenders for purpose of sentencing thus the sentencing court is free to consider the general sentencing factors to determine the most appropriate sentence. The court ordered the term of life imprisonment be set aside with a term of 18 months' imprisonments were counts 2 and 3 to run concurrently with the sentence imposed. Court emphasised that importance of not losing sight of the aim of juvenile justice and to consider re-integration and rehabilitation as the key underlying issues to be taken into account for purpose of sentence ensuring that imprisonment must be as a measure of last resort and for an appropriate period of time

In *JA v S*,[341] Judge Melusi reiterated that Child Justice Courts are obliged to sentence juveniles in accordance with the sentencing provisions under the Child Justice Act.[342] The review court decided that the sentence of 8 years direct imprisonment on the juvenile offender who was 16 years old at the time of the commission of the offence was shockingly inappropriate.[343] The regional court magistrate clearly did not factor into account that imprisonment must be a measure of last resort and for the shortest period. The High Court in its review highlighted that the presiding

[338] Supra at para 13 – 15.
[339] *S v Zinn* 1969 (2) SA 537 (A) 540G-H.
[340] Supra.
[341] *JA v S* (20190063) [2019] ZAECGHC 64 (3 June 2019).
[342] Supra at para 8.
[343] Supra at para 10.

officer in the case erred by not fully justifying the imposition of imprisonment.[344] The review was based on the irrugurlaity of the sentence and the fact that at no stage did the presiding officer use the Chapter 10 of the CJA[345] in order to consider the most appropriate order of sentence. In this case the review court set aside the conviction and sentence on the basis that the court did not consider the CJA at all. They proceedings were irregular and sentence of imprisonment did not fulfil the obligations of S60 of the Act. The matter was reverted to start de novo.[346]

4.4.4 Appropriate awarding of sentence

In *S v Nkosi* 2001 (1) JDR 0912 (W), the appeal emanates from the trial courts decision of imposing a term of life imprisonment upon the appellant. The court of appeal had to deal with the applicability of section 51[347], which ultimately was argued to be inconsistent with the obligations attached with international legal instruments and the Consitution.[348] The appeal court in this case was affirmed the position that an imposition of imprisonment must consider as the measure of last resort upon evaluation of the merits of the case and personal circumtances of the accused.[349] The appeal court held that the trial court incorrectly applied section 51 (3) (a-b) when dealing with juveniles between ages 16 and 18.[350]

The appeal court held that the following guidelines must be used to assist court when sentencing a juvenile offender:

- Imprisonment as a form of sentence should be avoided where the court deems possible[351];
- In respect of serious and violent crimes in nature, and where a term of imprisonment cannot be avoided, must be for the shortest period.[352]

[344] Supra at para 11.
[345] The Act.
[346] *JA* supra note 329 at para 8-19.
[347] The Criminal Law Amendment Act.
[348] *S v Nkosi* 2001 (1) JDR 0912 (W) at 2.
[349] Supra.
[350] Supra.
[351] Supra at 13.
[352] *Nkosi* supra note 314 at 13.

- In order to consider the short period of imprisonment, the seriousness of the offence, and personal circumtances of the accused as well as the interests of the community must be considered.[353]
- Rehabilitation and reintegration are two important tenants when sentencing juvenile offenders.
- Life imprisonment will only be considered in the event the court finds that the juvenile offender poses a serious threat to society. Failure to show that the juvenile can be rehabilitate and reintregated into society will only then justify a term of life imprisonment.[354]

The above factors became the guideline for child justice courts to consider when considering an appropriate sentence in serious offences.[355] The appeal court held that the trial court misdirected itself with the application of section 51 (3) (b)[356] thus substituting the appellents life imprisonment with 18 years imprisonment.[357]

The case of *S v KD* (2021) JOL 49493 (WCC) involved an automatic review in terms of section 85 of the Act read with Chapter 30 of the Criminal Procedure Act. The accused was a child offender who was 14 years old at the time of the commission of the offence and was 15 years old at the time of sentencing. He was convicted on a 'charge of possession of a firearm without a licence and was sentenced to 12 months' compulsory residence in a child and youth care centre'. The probation officer 'recommended that the court sentence the accused to compulsory residence in terms of section 76(1) of the Act',[358] and the court duly sentenced the accused to 'compulsory residence' at a youth care centre for 12 months'. The court further ordered that 'the order must be brought to the attention of all relevant functionaries in the prescribed manner'. It was also ordered 'that the head of the child and youth care centre submit a report not later than six weeks before the child completed his sentence to the court which imposed the sentence, containing his views on the extent

[353] Supra.
[354] Supra at 15-16.
[355] *Nkosi* supra note 314 at 13.
[356] Act 38 of 2007.
[357] *Nkosi* supra note 314 at 18.
[358] The Act.

to which the relevant objectives of sentencing referred to in section 9 of the Act[359] had been achieved, and the possibility of the child's reintegration into society without serving the additional terms of imprisonment. In terms of section 103(2) of the Firearms Control Act,[360] the accused was declared unfit to possess a firearm.

In the High Court Lekhuleni AJ[361] expressed concerned with 'the sentence of the court *a quo* and the ancillary order made in terms of section 103 of the Firearms Control Act[362] as follows"

- 'Did the sentence comply with the provisions of Chapter 10 of the CJA, in particular if there was compliance with section 69(1) (a-e) and section 69(3)?[363]
- Did the court consider other sentencing options enshrined in sections 71, 74 and 75 of the CJA?[364]
- '[The] Court was also "deeply troubled" with the ancillary order made by the magistrate in terms of section 103(2) of the Firearms Control Act.'[365]

The court deliberated on whether the provisions listed under sections 72, 74 and 75 of the Act had been properly invoked for purposes of sentencing, reiterating that 'the Child Justice Act[366] creates a separate and distinct system of criminal justice for children that [is] different from [that] of the Criminal Procedure Act'.[367]

An important objective of the Act[368] was the 'use of imprisonment only as a measure of last resort and only for the shortest appropriate period of time'.[369] The reviewing court found that the court *a quo* had not considered alternative sentencing options but only had 'the committal of the accused to a child and youth care centre as the only available option at its disposal'.[370]

The probation officer only considered two sentencing options, namely:

[359] The Act.
[360] Firearms Control Act 60 of 2000.
[361] *S v KD* (2021) JOL 49493 (WCC) (KD).
[362] Firearms Control Act 60 of 2000.
[363] *KD* supra note 237 at para 6.
[364] *KD* supra note 237 at para 6.
[365] Supra.
[366] The Act.
[367] The Criminal Procedure Act 51 of 1977; *KD* supra note 237 at para 7.
[368] The Act.
[369] The Act, s 69.
[370] *KD* supra note 327 at para 10.

- a suspended sentence and
- a sentence of committal to a child and youth care centre.

The court held in summary that:

> 'Unfortunately, the learned magistrate [went] along with the insufficient recommendation of the probation officer without conducting an inquiry in terms of section 69(1) (a)-(e) and section 69(3) of the CJA.[371] It seems to me the court was overwhelmed by the submissions of the prosecutor that a longer period of incarceration will be to the benefit of the accused's mother as she will not have to struggle with disciplining the accused and that this will give the accused an opportunity to attend to programs at the child and youth care centre.'[372]

The reviewing court stated that the sentence brought about a sense of shock and was disturbingly inappropriate,[373] concluding that the 'most appropriate sentence was one of a wholly suspended sentence[374] and that the ancillary order declaring the child offender unfit to possess a firearm was accordingly set aside'.[375]

In the case of *S v S* 2016 (1) SACR 584 (WCC), the appellant in the matter was a 15-year-old child at the time of the commission of the offences with which this appeal was concerned'.[376] He was convicted of murder, possession of a firearm in contravention of section 3 of the Firearms Control Act'[377] (a 9mm semi-automatic firearm) and for unlawful possession of 9 rounds of 9mm ammunition'.[378]

The appellant was sentenced to 10 years' imprisonment for murder, three years' imprisonment for possession of a firearm and one-year imprisonment for the possession of ammunition. The court ordered the sentences imposed on counts 2 and 3 to run concurrently with the sentence imposed on count 1.

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[371] Supra at para 8.
[372] Supra at para 9.
[373] *KD* supra note 327 at para 13.
[374] Supra at para 22(3).
[375] Supra at para 22(4).
[376] *S v S* (A505/15) [2016] ZAWCHC 24; 2016 (1) SACR 584 (WCC) at para 1.
[377] Firearms Control Act 60 of 2000.
[378] Section 90 of the Firearms Control Act 60 of 2000.

Whilst the matter went on automatic review in terms of section 85 of the Act[379] read with Chapter 30 of the Criminal Procedure Act',[380] an appeal was also lodged.[381] In the result the High Court dealt with the matter as an appeal.[382] Confirming the conviction, the court dealt with the issue of sentence, inviting counsel to address it on the following issues: -

- "Whether the court in sentencing the appellant had complied with the provisions of Chapter 10 of the Child Justice Act, and in particular, if there was compliance with s69(1)(a-e) and s69(4);"[383]
- "Whether the court *a quo* considered the sentencing options as set out in ss72**,** 73**,** 74 and 76 of the CJA;"[384]
- "Whether the provisions of s 77(5) of the CJA are peremptory and if so, whether the court *a quo* complied therewith."[385]

The High Court found that

> '[I]t goes without saying that presiding officers must apply the provisions of the Child Justice Act[386] relating to sentencing'.[387] They cannot proceed as if the Act does not exist.[388] One of the purposes of the Act as set out in the preamble[389] is to establish a criminal justice system for children, who are in conflict with the law, in accordance with the values underpinning the Constitution.[390] In applying the Child Justice Act, a court must also adhere to ordinary considerations relating to sentencing,[391] such as the *Zinn* triad[392] and the aims of punishment (deterrence, rehabilitation, prevention and retribution)'[393]

[379] The Act.
[380] The Criminal Procedure Act.
[381] *S v S* supra note 342 at para 4.
[382] Supra at para 6.
[383] Supra at para 7.
[384] The Act.
[385] The Act.
[386] Ibid.
[387] *S v S* supra note 342 at para 15.
[388] Ibid.
[389] The Act.
[390] Ibid.
[391] *S v S* supra note 342 at para 17.
[392] *S v Zinn* 1969 (2) SA 537 (A) at 540 G where the court held that the triad consists of "*the crime, the offender and the interests of society*".
[393] *S v S* supra note 342 at para 17.

The court concluded that as due weight must be given to deterrence and retribution; a direct term of imprisonment 'must be a measure of last resort.'[394]The imprisonment term of 10 years was not a 'short period' as the regional court failed to take into account that the appellant had spent almost 10 months in custody awaiting trial.[395] The court held that 'given the seriousness of the offence, the interests of society as well as the fact that the appellant is still a young person, the most appropriate sentence would be a direct term of imprisonment for a period of eight years.'[396] High courts were the upper guardians of children and so it was appropriate that they 'assist in the effective functioning of the child justice system'.[397] Their concern for the proper application of the Act[398] can 'ensure that children's best interests are protected in the child justice system'.[399]

In ***S v IO***[400] the appeal court dealt with the trial courts failure to consider the age of the accused at the time of the commission of the offence. The Appellent was convicted on two counts of murder, three counts of attempted murder and unlawful possession of ammunition and firearm. The appellant was sentenced to a term of 25 years' imprisonment. The appeal court held that the trial court did not take into account the international obligations and the Constitution in respect of sentencing juvenile offenders. The appeal court noted that the trial court did not mention the key evaluation of Section 28 of the Constitution and the tenants of sentencing emanating from international instruments.[401] The failure of the trial court to consider the above for purpose of sentence was materially flawed.[402] The appeal court set aside the sentence of 25 years imprisonment with 18 years imprisonment.[403] Juvenile offenders under the age of 18 at the time of the commission of the offence must not be overlooked. The case evaluations in this chapter show that presiding officers do not provide any reasons for departing from the regular sentence provisions as laid by Act. The sentences of imprisonment were lengthy and undesirable,

[394] Supra at para 30.
[395] Supra.
[396] Supra at para 31.
[397] A Skelton 'Case Note: The automatic review of child offenders' sentences' (2003) 44 *South African Crime Quarterly* at 44.
[398] The Act.
[399] Skelton op cit note 363 above at 44.
[400] *S v IO* 2010 (1) SACR 342 (c).
[401] Supra at para 7.
[402] *S v IO* supra note 366 at para 15.
[403] Supra at para 21.2.

constituting a gross irregularity in respect of the trial proceedings, causing the reviewing judges to interfere with the sentence which should be considered as undesirable.

Juvenile sentencing differs from that of and adult and this must be show through the correct consideration and application of section 28 and international legal instruments. This must be done by taking into the merits of the case as well as the seriousness of the offence.[404]

4.5 Conclusion

Evidence from the above case analysis are indicative that the best interests of the juvenile offender are vitally important for purposes of sentence. It is clear that the juvenile offenders age is an important determining factor that must be consider in order for child justice courts to determine an appropriate sentence. In each case it was found that the review and appeal courts had repeatedly explained the difference between juvenile and adult sentencing, emphasising in each case *'that detention truly is a measure of last resort and, where unavoidable, that it is for the shortest period of time so that every day a child spends in prison should be because there is no alternative'*.[405]

It is clear that judicial officers of the child justice courts have applied the provisions of the Act inconsistently with regard to sentencing.[406] They fail to pay due regard to the importance of the juvenile offender's age when deliberating sentencing orders thus failing to fully justify the sentence. From the pre-CJA case of *Mpofu*[407] and post-CJA cases, recently *S v SN*[408] it can be said that our courts have not applied the CJA as a whole to determine appropriate sentences. This then goes to the point that the legislature should have taken the opportunity to evaluate this issue and consider amending Chapter 10 of the Act to make it clearer for the judiciary to understand and effectively apply.

Inasmuch as section 85[409] serves the purpose of reviewing irregularities, the reviewing courts cannot be expected to duplicate the adjudication of the lower courts when it comes to sentencing. It is very clear that conviction is not a problem however it is the failure of the courts to adequently

[404] Supra at para 6-9.
[405] Skelton op cit note 363 above at 44.
[406] The Act.
[407] Supra note 214 above.
[408] Supra note 294 above.
[409] The Act.

sentence juvenile offenders. If proper sentencing guidelines were to be included in the amended legal framework, the pattern of irregular sentencing orders evidenced in the case evaluation above would have been prevented. The duty of courts is to bestow justice accordingly to the law.[410] Rightfully, juvenile offenders are afforded treatment different to adults but also where the offences are serious, there must be a proper sentence determination.[411]

The final chapter will propose that whilst the current Child Justice Act[412] was not understood and appropriately applied to juvenile offenders, the amended Act will not make a difference to the approach followed by judicial officers in the absence of additional amendments in respect of sentencing.

[410] DPP, KwaZulu-Natal v Ngcobo (165/08) [2009] ZASCA 72 (1 June 2009) at para 26.
[411] Ibid.
[412] The Act.

CHAPTER 5: CONCLUSION AND RECOMMENDATION

5.1 Introduction

This chapter concludes that the Child Justice Amendment Act[413] should contain a clear sentencing guideline to give effect to the application of Chapter 10.[414] This is sought to assist role players to understand and implement the Act appropriately for sentencing purposes. The Criminal Procedure Act[415] must not be used piecemeal in sentencing juvenile offenders. The legislature has implemented a separate system for juvenile justice; thus there should not be an overlapping of other Acts. The guidelines should be specifically set out in the Act to prevent the type of sentencing irregularities described in this study.

The preamble of the Act[416] states:

> The Constitution, while envisaging the limitation of fundamental rights in certain circumstances, emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards, among others, the right: -
>
> > 'not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time.'

As seen in Chapter 4, child justice courts have been allowed wide discretion to the point of neglecting the purpose of the Child Justice Act.[417] Judge Malusi in *JA v S*[418] used a borrowed phrase '*no longer business as usual*'[419] to emphasise that from '*the time a child is arrested to the very end of the trial proceedings, he or she is to be treated as per the Child Justice Act.*'[420]

It is clear from the case analysis that there are many appeal and review cases arising from harsh sentences on juvenile offenders. The promulgation of the new amended Act only gives rise issues such has the rising of minimum age regarding criminal capacity and a much clear scope for diversion authorised by prosecution.

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[413] The Amendment Act.
[414] The Act.
[415] Criminal Procedure Act 51 of 1977.
[416] The Act.
[417] Ibid.
[418] *JA v S* supra note 309 para 15.
[419] *S v Malgas* 2001 (1) SACR 469 (SCA) at para 7.
[420] The Act.

Presiding officers of the child justice courts have not entirely executed the principle of imposing prison sentences on juvenile offenders for an appropriate period of time. The case analysis discussed under chapter 4 reflect on the lack of understanding of the Child Justice Act and its implementation. The appeal courts have repeatedly expressed in the judgements that presiding officers fail to give reasons as to why other sentencing options under Chapter 10[421] of the Child Justice Act cannot be viable options for sentencing. In as much as section 85 of the CJA allows for review regarding irregular proceedings, it cannot be the only ongoing mechanism for correcting issues of appropriate sentencing. The High Court cannot be made to continuously revert matters to the child justice courts for sentence to start afresh because of the lact of application of the CJA. In conclusion to the case analysis, it is clear that Chapter 10 of the CJA is not carefully applied and consider to convicted juvenile offenders.

The second issue that follows stems from the age of the juvenile offender at the time of sentencing. The cases further show that presiding officers have sentenced the juvenile offenders to harsh and lengthy terms of imprisonment without justifying the reasons for departing from the sentencing options set under Chapter 10 of the CJA. In Chapter 4, the case of *S v SN*[422] showed a clear misdirection from the presiding officer in the matter relating to the age of juvenile offender and a harsh sentencing order. The High Court reaffirmed that the presiding officer failed to make use of the various sentencing options laid under Chapter 10 of the Act. A further misdirection arose from failing to consider the age of the juvenile at the time of the commission of the offence. The wide discretionary powers given to presiding officers during sentencing proceedings clearly show the how court have misdirected the use to the CJA. The new amended Act[423] can be seen as a movement towards positive change towards ensuring the juvenile offenders will be offered more opportunity to rehabilitate and reintegrate into society by means of diversion. This however is not enough to cover the rising issue of inappropriate sentencing orders. In as much as diversion orders is being met as per the CJA, there are cases under Schedule 3 of the CJA which do not allow for diversion thus juvenile offenders are transferred to the child justice courts for trial purpose.

[421] Chapter 10 of the Act – Sentences such as a fine, suspended sentences, correctional supervision, and committal to a youth centre / compulsory residence.
[422] Supra 282.
[423] The Child Justice Act 28 of 2019 (the Amended Act).

In the event of conviction, it is vital that presiding officers apply the the principles of sentencing appropriately and not overarch their powers by using the CPA for purposes of sentencing. Chapter 10 does give a clear and definitive set of wide ranging sentencing options; however, a set of guidelines are lacking to assist presiding officers to make appropriate determination orders in accordance with the best interests of the juveniles.

5.2 Recommendations

Over and above this, the Act should include amendments to allow for sentences to be described in more detail and to strike out options for lengthy terms of imprisonment. Part 2 of the Child Justice Act (Sentencing Options sections 72-79) should be reviewed and amended to allow for clear and specific sentencing options.

The writer proposes that following sections be reviewed for purpose of the amendment:

1. The provision of section 68 of the Act[424] should be revised to include that 'a child justice court must, after convicting a child, impose a sentence in accordance with the chapter, even if the offender attains the age of 18 and above'.
2. Section 77(3)[425] should include a guideline for what 'substantial and compelling circumstances' means when the court determines a term of imprisonment.
3. Section (4)[426] should be struck out in its entirety. The maximum term of imprisonment of 25 years is very undesirable and unduly long.
4. The Act should consider placing minimum and maximum terms of sentences to be considered by child justice courts. For example:
    4.1 District Courts – 'Maximum term of imprisonment should be 1 year'.
    4.2 Regional Courts – 'Maximum term of imprisonment should be 10 years'.
    4.3 High Courts – 'Maximum term of imprisonment should be 15 years'.

[424] The Act.
[425] Ibid.
[426] Ibid.

The above maximum terms of imprisonment must be in line with the offences listed under Schedules 1 to 5 in the Act. It is noted that the above maximum terms closely echo those of the German criminal justice system.

Clearly, South Africa has been greatly influenced by international law in respect of its juvenile justice system. The legislature should consider a sentencing guide similar to other countries relating to juveniles in conflict with the law. This would to ensure that juvenile offenders are treated differently from adults.

Thus maximum sentences may be considered, subject to all the other sentencing options under Chapter 10 of the Act having been exhausted upon proper and full consideration of the pre-sentencing reports.

The following factors relating to sentence can be derived from section 69 of the Act[427]:

i) The age of the offender;

ii) The offence committed and the level of seriousness of the offence committed;

iii) The extent of culpability on the part of the offender;

iv) The personal circumstances of the offender;

v) The interest of society;

vi) The offenders mental, psychological and emotional state (which will be derived from the social workers' report);

vii) Possible supervision of sentences to be considered by social workers as well as the resources that might serve to avail the offender;

The above factors must first be considered in detail for a term of imprisonment to be justified as measure of last resort and the shortest period.

The Act must contain a policy guideline similar to the above, to assist presiding officers to order appropriate sentences. This would limit the need for review of sentences, saving High Court Judges from having to revisit the sentences handed down by court *a quo*.

[427] The Act.

Legislative change to the sentencing regime related to juveniles would certainly be an advance. In addition, South Africa's degree of commitment to realising the aims of international and regional conventions and treaties would advance juvenile justice. For the time being, the writer concludes that there will not be proper implementation of juvenile justice under the new amendment Act if the country does not review serious issues such as sentencing procedures. The stark reality is that diversion and mediation cannot work in all cases, especially serious offences. Thus when such non-penal options are exhausted we have to rely on the Child Justice Courts to ensure that rehabilitation and reitegration elements are used during the stage of sentence. In order for these aspects to be realised we must show a proper application of the Child Justice Act.[428]

[428] The Act.

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