

**THE PRINCIPLES UNDERLYING THE SENTENCING
OF JUVENILE OFFENDERS**

by

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DECLARATION

I, Annette Singh, registration number 8729343, hereby declare that the thesis entitled

The Principles Underlying the Sentencing of Juvenile Offenders

is the result of my own investigation and research and that it has not been submitted in part or in full for any other degree or to any other university.

Signature

Date

ACKNOWLEDGEMENT

The motivation for this study was largely due to the desire to unveil the truth of the plight of sentenced children in South Africa. Stirred by accounts in the media and the writings of academics about the treatment of sentenced children, I began my own journey of discovery into the field of juvenile justice. **The Principles Underling the Sentencing of Juvenile Offenders** is the culmination of my findings and experiences. This study would not have been accomplished without the support and assistance of the following persons:-

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CHAPTER ONE

INTRODUCTION

1.1 SUBJECT OF THE STUDY

This study is directed at an examination of the phenomenon of sentencing with particular consideration of the origin and development of the sentencing philosophies which have guided the sentencing of young offenders within the criminal justice system. In the study the writer also focuses on the influence of various international instruments and the effect that South Africa's ratification of the United Nations Convention on the Rights of the Child (1989), has had on juvenile justice issues in general and the sentencing of juveniles specifically, in South Africa.

The punishment of criminal offenders has been described as being the most complex and controversial issue in the criminal justice system.¹ In attempting to establish a philosophical foundation for sentencing, the penologist Gies' study culminates in the definition of punishment as the imposition of suffering upon offenders as a response to the suffering they inflicted.² The essence of Gies' work is also articulated by the Honourable Justice Sir Green, who maintains that irrespective of how it is perceived by society and how uncomfortable one may feel about it, the law is clear that the purpose of sentencing is to denounce or to express community disapproval of the criminal conduct for which it is being imposed.³ Throughout history, criminal punishment has sought to fulfil numerous aims. Even though from time to time the emphasis placed on specific schools of thought has shifted, the goals of sentencing have basically been recognized as being just desserts, rehabilitation, incapacitation, retribution and deterrence. These fundamental purposes of sentencing are examined in greater detail in chapter two.

¹ JJ Senna and LJ Siegel *Introduction to Criminal Justice* (1990) 446.

² KK Gies "Sentencing a Cure for Crime" (1989) 25 *Williamette Law Review* 883.

³ G Green "The Concept of Uniformity in Sentencing" (1996) 70 *Australian Law Journal* 112.

The history of punishment reveals that regardless of whether it were an adult or a youth on whom punishment was to be inflicted, physical forms of punishment were always imposed to sanction people's behaviour. As a result of the early Christian Church being the dominant influence in regulating the behaviour of its subjects, it is not surprising that when seeking solutions to everyday problems, biblical reference was inevitable. In handling misdirected youth, for instance, guidance was sought from the following verses:-

If a man has a stubborn and rebellious son who will not obey the voice of his father or the voice of his mother ... all men of the city shall stone him to death with stones.

Deuteronomy Chapter One,
verses 18 to 21.⁴

So obsessed were the Puritans with Christian teachings that when they settled in the New World, they incorporated biblical verses as part of the 'law' to govern people.⁵ The early laws of both Massachusetts and Connecticut, that related to the handling of rebellious children, were an exact replication of the above-mentioned biblical verses.⁶ Undoubtedly, the punishments imposed on children were indeed quite barbaric. Common forms of punishment included hanging, branding (burning the hand), cutting off part or all of the offender's ear and corporal punishment.⁷ It was only in the early nineteenth century that reformers began to consider whether these inhumane sanctions ever justified the offences, which in some cases were mere childish pranks. As a result of the work of the early reformers or 'child savers' as they were termed who campaigned against the use of corporal punishment and the excessive use of physical sanctions against children many of these laws were abrogated.⁸ According to the thinking of the 'child-savers' the child was perceived not only as a useful member of society but as an 'investment' whose contributions were an indispensable part of community life and

⁴ P Marcotte "Criminal Kids" (1990) 76 *American Bar Association Journal* 61.

⁵ EH Grinney *Delinquency and Criminal Behaviour* (1992) 21.

⁶ *Idem.*

⁷ *Idem.*

⁸ S Bloom "Spare the Rod, Spoil the Child? A Legal Framework for Recent Corporal Punishment Proposals" (1995) 25 *Golden Gate University Law Review* 365.

therefore deserved protection.⁹ The idea that began to gain prominence was that children were decidedly different from adults and when working with them special care and protection was imperative.¹⁰ The writer deals with the aspect of physical sanctions and corporal punishment more closely in chapters two and three.

Even though most of the civilized legal systems ceased to implement corporal punishment as a sanction on juvenile offenders over two centuries ago,¹¹ it nevertheless still prevailed as South Africa's most common type of sentence. Professor Kader Asmal, a former Human Rights Professor at the University of Western Cape and now Minister of Education described corporal punishment as South Africa's 'favourite' sanction when sentencing its juvenile offenders.¹² Discontented that it comprised approximately fifty percent of sentences in sentencing young offenders in South African courts, he was adamant that such draconian forms of punishment must be abolished.¹³ Singh, making reference to section 290 of the Criminal Procedure Act 51 of 1977,¹⁴ also shared his opinion. Her affirmation was that:-

This provision is ... out of line with most legal systems where whipping is completely abolished.¹⁵

As a result of pressure from academics, non-governmental organisations and legislative developments, corporal punishment was finally abolished as a sanction for young offenders in South Africa in 1995.¹⁶

⁹ G van Bueren *The International Law on the Rights of the Child* (1995) 3. It is believed that the 'investment motive' approach still continues particularly in rural developing countries where the survival of the family is dependant on the contributions made by the children.

¹⁰ Grinney *Delinquency and Criminal Behaviour* 25.

¹¹ S Bloom "Spare the Rod, Spoil the Child? A Legal Framework for Recent Corporal Punishment Proposals" (1995) 25 *Golden Gate University Law Review* 367-368.

¹² Report of the International Seminar *Children in Trouble with the Law* K Asmal "Children in the Streets and the Courts" (1993) A Community Law Centre Publication 14 at 21.

¹³ *Idem*.

¹⁴ The Criminal Procedure Act 51 of 1977 would hereinafter be referred to as the Criminal Procedure Act.

¹⁵ Report of the International Seminar - *Children In Trouble With The Law* P Singh "Some Considerations for the Future of Juvenile Justice in South Africa" (1993) A Community Law Centre Publication 41 at 43.

¹⁶ S v Williams and Others 1995 2 SACR 251.

Since the early 1990's campaigns such as 'Justice for children : No child should be Caged,' 'The National Working Committee on Children in Detention' and 'Free a Child for Christmas' began to address the issue of the dearth of effective means for dealing with young offenders.¹⁷ Even though the efforts of these campaigns were quite commendable, it was really the workshop held during 1993, at the University of Western Cape which gave impetus to the drafting of juvenile justice legislation for South Africa.¹⁸ Drawing from international instruments such as the United Nations Convention on the Rights of the Child (1989), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), The United Nations Guidelines for the Prevention of Juvenile Delinquency (1990), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and the Constitution of the Republic of South Africa Act 200 of 1993, the drafting committee provided a basic framework of what the proposed legislation on child justice in South Africa should include. In chapter three the influence of the above international instruments, and the impact of the ratification of the United Nations Convention on the Rights of the Child (referred to above) on a developing juvenile justice system in South Africa is examined. The writer therefore traces the origin and development of the new child justice system and critically analyses the sentencing alternatives proposed by the legislative drafters.

Foreign jurisdictions that have had the opportunity of developing their juvenile justice systems well before South Africa and now have workable juvenile justice structures in place have also revealed interesting approaches to juvenile sentencing practices. In the light of contemporary legal thought on institutionalization, both the Canadians and Americans have expressed dissatisfaction with a system which ostensibly, in an attempt to 'rehabilitate' its youth, confines them in "stone cold, grey prisons and throws away the keys".¹⁹

¹⁷ Proposals for Policy and Legislative Change *Juvenile Justice For South Africa* (1994) 5-6.

¹⁸ Ibid at 4.

¹⁹ JC Costello and EJ Jameson "Ethical And Legal Duties of Health Care Professionals To Incarcerated Children" (1987) 8 *The Journal Of Legal Medicine* 220-221.

In Britain custodial sanctions for young offenders are also frowned upon.²⁰ The Swedes were so influenced by the statistics of the Protective Law Commission which indicated that the rate of recidivism was much higher for young offenders sentenced to custodial sentences, that youth imprisonment was totally abolished in 1980.²¹ Chapter three involves a comparison of the sentencing principles applied in respect of the following international jurisdictions, America, Canada, United Kingdom, Australia, Sweden, Singapore, China and Africa. The aim of the writer in chapter three is to comparatively evaluate the sentencing principles in the above jurisdictions so as to elicit from them possible practical sentencing options for legislative consideration in South Africa.

Even though the Criminal Procedure Act provides a variety of different types of sentences to which young offenders may be subjected,²² however, criteria clearly spelling out when these sanctions are to be imposed and what factors are to be taken into consideration in deliberating over sentences are not provided. As a consequence, courts have to grapple with the provisions of numerous different Acts in order to pass the appropriate sentence.²³ A critique of these options as well as an assessment of the mitigating and aggravating factors in sentencing is dealt with in chapter four.

1.2 THE PROBLEM OF THE STUDY

According to Kothari, cited in the research undertaken by Reddi, in order to determine whether one's study encapsulates a research problem, it is necessary for the following conditions to be satisfied:-²⁴

²⁰ P Cavadino "Suspended Sentences for Young Offenders" (1986) 136 *New Law Journal* 934.

²¹ C Clarkson and R Morgan *The Politics Of Sentencing Reform* (1995) 98.

²² See Section 297 (5) (a); Section 290; Section 290 (1) (b); Section 290 (1)(d); Section 276 A and Section 297 of the Criminal Procedure Act 51 of 1977.

²³ The Acts referred to include : -the Criminal Procedure Act 51 of 1977, the Child Care Act 74 of 1983 and the Correctional Services Act 8 of 1959.

²⁴ M Reddi "Constitutional Minority Linguistic Rights : A Comparative Study of Indian Languages in South Africa and India" Doctoral Dissertation submitted at the University of Durban-Westville in 1999 at 8.

- (i) There must be an individual or group to whom the problem can be attributed.²⁵
- (ii) There must be a minimum of one or two possible outcomes or objectives to be attained.²⁶
- (iii) There must be an environment to which the problem pertains.²⁷

This study fulfils all of the above criteria.

First, there exists a targeted group of people, being juveniles or child offenders on whom the study is based. Secondly, as the study involves an analysis of the judicial process of sentencing, the aims are:-

- (i) To determine the effectiveness of prevailing sentencing options which are imposed on young offenders; and
- (ii) Where these options have proved to be ineffective or inappropriate, to make submissions for more suitable options.

The various documents of the United Nations as well as the sentencing principles applied by foreign jurisdictions were used as a yardstick with which to 'measure' the effectiveness of sanctions imposed on young offenders in South Africa. In keeping with Article 40 (1) of the United Nations Convention on the Rights of the Child which provides that:-

State parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law, to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for human rights and fundamental freedoms of others and takes into account the child's age and promoting the child's reintegration and the child assuming a constructive role in society,

²⁵ Idem.

²⁶ Idem.

²⁷ Idem.

the restorative approach, which is a theory based on the concept of reconciliation rather than punishment, emerged as the most viable sentencing option for a developing juvenile justice system. The restorative approach encompasses a wide range of options to achieve its objective of repairing harm to the victim or to society.²⁸ A discussion on restorative justice and the solutions that it has to offer for South Africa is contained in chapters three and five.

The third condition articulated above, that the problem has to pertain to a particular environment, is also met. Even though the writer has drawn from the provisions of a number of international instruments and the variety of sentencing principles applied in foreign jurisdictions, such comparisons were only deemed necessary to determine their potential for the sentencing of young offenders in South Africa. As there is a dearth of effective sentencing mechanisms for young offenders in South Africa, the absence of juvenile justice legislation makes this study especially pertinent to South Africa.

1.3 AIMS OF THE STUDY

The basic aims of the study are as follows:-

- (i) To examine the fundamental purposes which underly the sentencing of offenders in general;
- (ii) To historically trace the philosophies that have guided the sentencing of juvenile offenders;
- (iii) To analyse sentencing trends applied in foreign jurisdictions;
- (iv) To examine the influence of international instruments on the development of juvenile justice legislation in South Africa;
- (v) To demonstrate through an examination of case-law the principles applied by courts in sentencing young offenders;

²⁸ South African Law Commission Issue Paper 9 *Juvenile Justice* (1997) 60-61.

- (vi) To assess the prevailing sentencing options and to make submissions for more practical alternatives which are appropriate to South African youth.

1.4 **METHODOLOGY**

The study comprises an accumulation of both 'primary' and 'secondary' sources of information.

Empirical research conducted by the writer formed the basis of the primary source of the research material. Together with the empirical research, personal interviews were also conducted with sentenced juvenile offenders at selected prisons in South Africa.

Literature research constituted the secondary source of information. Various journals, periodicals, books, magazines and other forms of documentation available in South Africa which were relevant to sentencing were also consulted for the study. The reference libraries at the University of Durban-Westville, the University of Natal and the Don Africana Library mainly, provided the researcher with the secondary sources of information.

1.4.1 **Empirical Research**

The empirical research was conducted by means of interviews and pre-planned questionnaires which were administered to sentenced juvenile offenders at the following prisons in South Africa:-

- (i) Westville Prison - Kwa-Zulu Natal;
- (ii) Harrismith Prison - Orange Free State;
- (iii) Krugersdorp Prison – Gauteng; and

(iv) St. Albans Prison - Eastern Province

The research method employed by the writer for the empirical research was the descriptive survey method.²⁹ The descriptive method is a method used to enable a researcher to obtain the required information through observation.³⁰ Due to the fact that sometimes data which is required lies within the minds, feelings and attitudes of people, as was the writer's dilemma when interviewing juvenile offenders in the present study, there was a need for the writer to delve beyond the physical reach to make the observations.³¹ To facilitate the process therefore use was made of questionnaires with both the qualitative and quantitative style of questioning, structured with screening questions, open questions, factual questions and questions on opinions and attitudes³² to extrapolate information from the interviewees, relevant to the study. The purpose of the enquiry was necessary to:

- (i) Determine the kinds of offences for which young offenders served prison sentences;
- (ii) Establish the kinds of activities that young offenders were involved in during their term of incarceration;
- (iii) Determine how the young offenders who were incarcerated perceived their sentences; and
- (iv) Assess whether imprisonment fulfilled the rehabilitative ideal.

The respondents comprised a randomly drawn selection of sentenced juvenile offenders at the above-mentioned prisons who had voluntarily availed themselves for the interviews. Twenty-five respondents at each institution were interviewed and at Westville Prison this comprised both male (fourteen)

²⁹ *Criminology 3 Research Coursepack* (1997) A Department of Criminology Publication – University of Durban-Westville 48-135.

³⁰ *Ibid* at 48.

³¹ *Ibid* at 50-51.

³² *Ibid* at 54-57

and female (eleven) interviewees. A sample of a hundred sentenced juvenile offenders had assisted with the furnishing of the required information.

1.4.2 **Table 1.1**

THE AVERAGE AGE OF THE RESPONDENTS

	Westville Prison (Males)	Westville Prison (Females)	Harrismith Prison	Krugersdorp Prison	St. Albans Prison
The Average Age	18	16	19	18	19

Table 1.1 above reflects that while the average age of the respondents at Krugersdorp Prison and at Westville Prison (males) was eighteen, the average age of the respondents at Harrismith and at St. Albans Prisons was nineteen. The average age of the female respondents at Westville Prison was sixteen years of age, indicating that the sample of female offenders interviewed were comparatively younger than their male counterparts.

Table 1.2**THE TYPES OF OFFENCES COMMITTED BY YOUNG OFFENDERS**

	Westville Prison (Males)	Westvile Prison (females)	Harrismith Prison	Krugersdorp Prison	St Albans Prison
1. Murder	-	18%	4%	-	36%
2. Attempted Murder	-	9%	-	12%	12%
3. Rape	-	-	16%	-	20%
4. Robbery and Armed Robbery	14%	9%	12%	32%	24%
5. Assault	-	9%	12%	4%	4%
6. Theft	38%	36%	16%	20%	8%
7. Theft of a motor-vehicle	7%	-	-	8%	16%
8. Housebreaking	29%	18%	44%	32%	12%
9. Illegal Possession of a firearm	-	-	4%	20%	4%
10. Possession of dagga	7%	-	8%	-	-
11. Driving without a license	-	-	-	-	4%
12. Escape from custody	-	-	16%	-	-
13. Abduction	-	-	4%	-	-
14. Attempted Theft	14%	-	-	-	-
15. Theft of a firearm	-	-	4%	-	-
16. Failure to adhere and comply with correctional supervision	-	-	12%	-	-

Note

Due to the fact that some respondents may have been involved in a number of offences example, assault, theft and escaping from custody, with respect to the above percentages there would be an overlapping hence the percentages do not necessarily add up to 100%.

An examination of the offences committed reveals that young offenders have been convicted of and serve sentences for a large variety of offences, as reflected in Table 1.2.

The largest number of respondents who were serving sentences for murder and attempted murder came from St. Albans Prison, being thirty-six and twelve percent respectively. Even though respondents from Harrismith and Westville Prison were also incarcerated for murder, what is noteworthy about the murders committed by the St. Albans respondents is that the respondents admitted that their offences were mainly gang related. Interestingly, while none of the male respondents at Westville Prison were imprisoned for murder, the female respondents were found to be serving sentences for both murder and attempted murder. What can be gauged from a comparison between the male and female respondents at Westville Prison is that the females were found to be serving sentences for much more serious offences than the males.

While theft of a motor-vehicle featured quite prominently as an offence among the respondents in Krugerdorp, St. Albans and Westville Prisons, none of the respondents in Harrismith were serving sentences for this offence. Also the offence of theft of a motor-vehicle was an offence which was apparently exclusive to the male respondents. Apart from theft of a motor-vehicle, the possession of a fire-arm without a license; driving without a license; escaping from custody; possession of dagga; abduction; theft of a firearm; attempted theft; rape and failure to adhere and comply with correctional supervision were offences which were also found to have been committed solely by the male respondents.

Common offences committed by respondents in all four prisons included:-

- (i) housebreaking
- (ii) theft

- (iii) robbery
- (iv) armed robbery

House-breaking has been revealed as the most commonly committed offence among the respondents in all of the four prisons and being significantly high in Harrismith Prison where forty-four percent of the respondents were serving sentences of imprisonment for this offence. A high percentage of the respondents at Westville Prison i.e. thirty-eight percent of the males and thirty-six percent of the female respondents were found to be serving sentences for theft. For the offence of robbery and armed robbery Krugersdorp Prison had the highest number of respondents who had been convicted of this offence, i.e. thirty-two percent of the respondents. What is significant about the offences of housebreaking, theft, robbery and armed robbery is that these offences proved to be common amongst both males and females.

1.4.3 **Deductions**

The impression that one can garner from the statistics reflected in Table 1.2 is that the majority of the respondents (both male and female) who are imprisoned appear to be serving sentences for offences which had been committed with the intention of appropriating some or other sort of financial benefit to the perpetrator.

A fuller account of the findings of the empirical research are presented in chapters two, three and four.

1.5 PROBLEMS

This study aimed at analysing the principles underlying sentencing is directed at a certain category of persons, namely juvenile offenders. Whilst the intention of the researcher was to focus primarily on offenders below eighteen, the difficulty experienced in this regard was that many of the 'juvenile prisons' under examination housed offenders up to twenty years of age. This problem stems from the fact that there have been some inconsistencies in past approaches to the determination of who is a 'juvenile'. The Criminal Procedure Act incorporated some provisions which were applicable to those under the age of eighteen years,³³ whilst the Correctional Services Act 8 of 1959³⁴ defined a juvenile as being a person under the age of twenty-one years.

South African case-law concerning the principles applicable to the sentencing of youthful offenders does not adhere to rigid age limits. Rather, the trend (as revealed in chapter four) has been to focus on a broad definition of 'youth' when determining mitigating factors in sentencing, occasionally including those over the age of twenty-one years. It is submitted that the findings of the empirical study and the reported decisions discussed in chapter four are both relevant to the topic of the dissertation even where they in fact deal with persons who have attained the age of majority.

However, it appears from recent initiatives in South Africa (for example the appointment of the project committee of the South African Law Commission on juvenile justice) that eighteen years of age is increasingly regarded as the upper age threshold as far as the creation of a separate juvenile justice system is concerned.

³³ See Section 50 (4) and (5); Section 254 and Section 290 of the Criminal Procedure Act 51 of 1977.

³⁴ The Correctional Services Act 8 of 1959 would hereinafter be referred to as the Correctional Services Act.

1.5.1 Limitations to the Study

The inability of the researcher to communicate in the languages spoken by the majority of the respondents created difficulties for the purposes of the interviews. As only a handful of the respondents were fully conversant in English, the services of interpreters were heavily relied upon for all the isiZulu, isi Xhosa and isi Sotho speaking respondents at the prisons visited.

Further, while it would have been ideal to interview an even number of male and female respondents, only one of the four prisons housed female offenders, the effect being that the sample comprised only eleven percent females.

Yet another problem was that the Department of Correctional Services³⁵ specifically provided that the identity of the offenders were not to be disclosed. This placed a further restriction on the research conducted in that it hampered the researcher's access to the actual physical records of the trials of the respondents. The effect of this was that the researcher was compelled to draw her findings and make submissions based solely on the information elicited during the course of the interviews.

Of all of the difficulties experienced, the most notable proved to be the cost factor. Due to the researcher's limited financial resources, she was compelled to confine her fieldwork to four prisons only. The researcher therefore concedes that while the statistics relating to the empirical research are not ideal, they are nevertheless presented in this study to provide some indication of young offenders perceptions of the sentence of imprisonment.

³⁵ The Department of Correctional Services was the Department that granted permission to conduct the research.

CHAPTER TWO

AN ANALYSIS OF THE HISTORICAL DEVELOPMENT OF THE PHILOSOPHIES OF SENTENCING

2.1 THE FUNDAMENTAL PURPOSES OF SENTENCING

2.1.1 Introduction

In order to understand the purposes of punishment it has been suggested that a return to basics is necessary to remind oneself of exactly what purposes punishment may seek to serve.¹ While the various aims of punishment² have generally been identified as just desserts, rehabilitation, incapacitation, retribution and deterrence,³ the Honourable Sir Guy Green maintains that new elements of the purposes of punishment are in the process of being added to the considerations which are relevant to the exercise of the sentencing discretion, the purposes of punishment cannot be regarded as being immutable.⁴ It is therefore submitted that while a discussion on the traditional purposes of punishment ensues, the statements of what they comprise them should not be regarded as exhaustive.

2.1.2 Just Desserts

In terms of the objectives of sentencing, the just desserts approach seemed to have dominated the thinking of early philosophers. The Code of Hamurabi which encompassed the principle of *lex talionis*, namely, 'an eye for an eye, a tooth for a tooth,' is an example of this: It seemed that the most basic reason to punish an offender was simply because his action warranted it.⁵ The work

¹ RS Frase "The Uncertain Future of Sentencing Guidelines" (1993) Vol 8 *Law and Inequality* 8.

² G Green "The Concept of Uniformity in Sentencing" (1996) Vol 70 *The Australian Law Journal* 112.

³ The aims of punishment may be described differently by various writers.

⁴ Green "The Concept of Uniformity in Sentencing" (1996) Vol 70 *The Australian Law Journal* 112 -113.

⁵ B Forst and C Welford "Punishment and Sentencing : Developing Sentencing Guidelines Empirically from Principles of Punishment" (1997) Vol 33 *Rutgers Law Review* 820.

of Kant also echoed the sentiment that punishment was to be imposed on the individual who had inflicted harm by committing a crime.⁶

Embodied in the just desserts principle is the notion that the penalty must be directly proportional to the seriousness of the offence.⁷ It must be neither inhumane nor excessively harsh nor must it be too lenient. It was also suggested that the only manner in which the offender could be given his 'just desserts' was if the punishment was scaled down as accurately as possible to fit the crime.⁸

However, the very process of scaling punishments in terms of their levels of severity does in itself present certain difficulties.⁹

The problem in particular is that it provides no basis for determining the extent to which the entire scale of punishments should be lifted upward or downward. A likely result is that disagreement may pervade over punishments which are too severe, too lenient or about right.¹⁰ Yet a further criticism directed against the just desserts theory is that it does not take into consideration the impact that a sanction may have on a particular offender. For example, while a sanction of institutionalization may be much harsher for an offender who is claustrophobic, it may not have the same effect on one who is not. Similarly, while a fine of two thousand rands may be quite a large sum of money to one who is not wealthy, the same fine would be an insignificant amount to one who is wealthy.¹¹

In response to these disparities, academics began to advocate that discretion in sentencing be substantially reduced and that sentences generally should be made more uniform and proportional. Simply put, all offenders who

⁶ Ibid.

⁷ Frase "The Uncertain Future of Sentencing Guidelines" (1993) Vol 8 *Law and Inequality* 8.

⁸ Forst and Welford "Punishment and Sentencing : Developing Sentencing Guidelines Empirically from Principles of Punishment" (1997) Vol 33 *Rutgers Law Review* 822-823.

⁹ Ibid at 822-823.

¹⁰ Ibid at 822-823.

¹¹ The Law Reform Commission (Ireland) *Report on Sentencing* (1996) at 22.

commit the same crime should effectively receive the same punishment.¹² As a consequence of this legal thinking, the mid 1970's saw the advent of sentencing guidelines in a number of jurisdictions throughout the world. The Minnesota Sentencing Guidelines which came into operation in 1980, was one such guideline. A decade later, however, these guidelines were the focus of much scrutiny. While some critics maintained that the Minnesota Sentencing Guidelines were too rigid and inflexible in not giving judges room for discretion, others assumed a contradictory view, that the Minnesota Guidelines were not retributive enough.¹³

Professor Alschuler's criticism against sentencing guidelines generally is that they give prosecutors too much control over sentences. The manner in which this occurs is that it enables a prosecutor to determine the severity of the crime of which the person has been charged and this ultimately affects the defendants placement on the grid.¹⁴ Supporters for sentencing guidelines maintain that in the drafting and implementing of sentencing rules, the 'just desserts' purpose, by virtue of it being offender-based, is the best choice in that it eliminates disparities.¹⁵ By tracing the evolution of sentencing guidelines through his own research, Frase too, has confirmed its effectiveness in reducing sentencing disparities.¹⁶

2.1.3 Rehabilitation

The underlying core values of rehabilitation seek to transform the offender into a productive and law-abiding member of society through treatment and correction.¹⁷ A wide range of measures have been utilized to achieve the goals of rehabilitation ranging from psychiatric treatment which may be used to help the mentally ill to supervised probation which may be employed for the

¹² Frase "The Uncertain Future of Sentencing Guidelines" (1993) Vol 8 *Law and Inequality* 8.

¹³ *Ibid* at 10.

¹⁴ *Ibid* at 18.

¹⁵ *Ibid* at 25.

¹⁶ *Ibid* at 33.

¹⁷ Forst and Welford "Punishment and Sentencing : Developing Sentencing Guidelines Empirically from Principles of Punishment" (1997) Vol 33 *Rutgers Law Review* 820.

juvenile offender.¹⁸ The aims of rehabilitation would be defeated if it did not concern itself with the re-integration of the offender back into society.¹⁹ Emanating from the submission that the rehabilitative philosophy can only be truly achieved through community support,²⁰ Williams maintains that for rehabilitation to be effective, the conditions inside the institutions ought to be conducive to this aim.²¹

The previous discussion on just desserts reveals that its principles clearly clash with those of rehabilitation. The following illustration supports this contention. If the just desserts principle were applied in the case of a mentally ill offender who commits an act such as murder, a term of imprisonment would be the applicable sentence yet, in pursuit of the goals of rehabilitation, it would be required for the offender to be subjected to 'treatment' in the form of psychiatric testing and analysis, and he would be sentenced accordingly. Ostensibly, a prison sentence would be counter-productive and would only exacerbate the offender's position by reinforcing his criminal tendencies.²²

Due to the popular appeal of the rehabilitative ideal, there appears to be substantial judicial recognition of this doctrine.²³

2.1.4 Incapacitation

Incapacitation has been defined as the protection of society from harm caused by the offender through his or her removal from society so as to prevent the commission of further crimes.²⁴ The manner in which the incapacitation ideology strives to accomplish its aims is by placing a physically restrictive burden on the individual.²⁵

¹⁸ The Law Reform Commission (Ireland) *Report on Sentencing* (1996) at 19.

¹⁹ An examination of the aims of rehabilitation and its role in helping to restore young offenders back into the community is covered in more detail later in the chapter.

²⁰ JS Williams *The Law of Sentencing and Corrections* (1974) 58.

²¹ *Ibid* at 59.

²² The Law Reform Commission (Ireland) *Report on Sentencing* (1996) at 19.

²³ Williams *The Law of Sentencing and Corrections* 59.

²⁴ Forst and Welford "Punishment and Sentencing : Developing Sentencing Guidelines Empirically from Principles of Punishment" (1977) Vol 33 *Rutgers Law Review* 804.

²⁵ Williams *The Law of Sentencing and Corrections* 62.

In the nineteenth century, the idea that gained prominence was that subjecting the individual to days and weeks of isolation would not only prevent further crimes but it would also allow the offender to reflect on his wrong doings. It was believed that such reflection would 'cure' him by a process of spiritual healing. However, at the time, crime and sin were erroneously thought to be synonymous. The Christian basis to do repentance is prevalent in this ideology.²⁶ The question therefore arises, what about those offenders who did not have a Christian orientation and did not atone? Probably, for this reason the incapacitation principle did not gain popularity in the nineteenth century.

Also embodied in the aims of incapacitation is the element of prevention. The criticism evoked here is that preventative measures have varying degrees of efficacy, the least efficacious being probation and the most effective (only in terms of prevention) being the death penalty.²⁷ In this respect, one has to tread rather cautiously, since the philosophy brings the controversial issue of the death penalty into focus.²⁸

Clearly, the incapacitation school of thought was and is still highly contentious. In his comprehensive work on the philosophy of sentencing, Williams is adamant that this goal has been achieved in 'some' cases.²⁹

2.1.5 Deterrence

Deterrence is basically divided into two broad categories, namely general deterrence and special deterrence. With general deterrence the intention is to impose a penalty which would serve as a warning to society at large, while special deterrence focuses on the offender in particular and attempts to discourage him from resorting to further criminal activities by the imposition of

²⁶ Ibid at 57.

²⁷ Ibid at 62.

²⁸ In South Africa the death penalty is considered unconstitutional. See case S v Makwanyane 1995 (6) BCLR (CC). The death penalty is contrary to Section 10, Section 11 and Section 12 (1) (d) and (e) of the Constitution of the Republic of South Africa Act 108 of 1996.

²⁹ Williams *The Law of Sentencing and Corrections* 57.

a particular form of sanction.³⁰ Many critics have expressed scepticism about whether an offender could possibly be deterred from criminal activities by a sanction.³¹

Identifying the appropriate sanction that would have a deterrent effect on an individual may also be problematic. While a long term of imprisonment may be selected as an appropriate sanction where the offender's behaviour has been very serious, a short prison sentence or a non-custodial sentence may also prove to be equally effective.³² This dilemma has plagued sentencers from the very inception of this philosophy. Yet another difficulty which exists is, how does one 'measure' the deterrent effect of punishments which are imposed? Campaigners for this school of thought may not be too pleased to discover that the statistics measuring the increases and decreases of deterrence have been, on the whole, considered as ambivalent!³³

2.1.6 Retribution

The retributive school demands that the offender should 'pay the price' for his misdeeds. However, it is questionable whether the infliction of harm can ever be conceived of as being just and good.³⁴ The constitution of the State of Indiana is explicit that:-

The penal code shall be founded on the principles of reformation and not on vindictive justice.³⁵

Even though provisions such as these are reflected in most constitutions throughout the world,³⁶ indicating a strong consensus among the international community against the notion of vengeance, Gies nevertheless suggests

³⁰ Forst and Welford "Punishment and Sentencing : Developing Sentencing Guidelines Empirically from Principles of Punishment" (1997) Vol 33 *Rutgers Law Review* 804.

³¹ The Law Reform Commission (Ireland) Report on Sentencing (1996) 20.

³² *Ibid.*

³³ Williams *The Law of Sentencing Corrections* 60.

³⁴ *Ibid* at 64.

³⁵ *Idem.*

³⁶ *Idem.*

that the state's use of punishment does in fact satisfy public retributive urges.³⁷

2.2 AN EXAMINATION OF THE APPLICATION OF THE TRADITIONAL PURPOSES OF PUNISHMENT IN PRACTICE

In an American survey conducted by Forst and Welford to determine the perceived importance of sentencing goals amongst judges, the following results were revealed : deterrence was regarded as being the most important sentencing goal among judges interviewed, with 65% indicating that general deterrence was an extremely important goal and 62% showing support for special deterrence. Incapacitation was perceived of as being relatively important, with 51% of the judges expressing an inclination towards this goal. Following close on the heels of the goal of incapacitation was that of rehabilitation, with 49% of the judges showing favour for this sentencing goal. Finally, the just desserts principle was revealed as being the least important with only 23% of the judges showing support for this doctrine.³⁸

From the information gleaned, there appears to be a tendency amongst American judges to regard goals which are directly associated with crime control as more important than other goals. Incapacitation was therefore generally regarded as being very effective in that it was associated with tough sentences, while rehabilitative ideas were viewed as 'being soft on offenders' in that they resulted in more lenient sentences.³⁹ Interestingly, the recent approach adopted in South Africa towards sentencing aims differs markedly from that detailed above. The shift in emphasis from the retributive to the restorative approach ensures that blame and the administration of pain which are pivotal to the incapacitation, deterrence and just desserts schools of thought are obviated by a rehabilitative or healing process aimed at promoting repair, reconciliation and reassurance.⁴⁰

³⁷ KK Gies "Sentencing a Cure for Crime" (1989) 25 *The Willamette Law Review* 884.

³⁸ Forst and Welford "Punishment and Sentencing : Developing Sentencing Guidelines Empirically from Principles of Punishment' (1977) Vol 33 *Rutgers Law Review* 805.

³⁹ *Idem*.

⁴⁰ The South African Law Commission Issue Paper 7 *Sentencing Restorative Justice* (1977) 4-6.

A perusal of some foreign case-law also indicates a demise in the use of the just desserts principle amongst judicial officers. The case of Rv Dixon is reflective of this. In the case, Fox J, held that:-

The primary sentencing aims are ...

- a) the deterrence of the particular offender;
- b) the deterrence of others who might be inclined to commit similar offenders;
- c) the reformation of the particular offender;
- d) the exaction of retribution and
- e) securing of society from further harm by the detention of the offender.⁴¹

Even though the fundamental goals of sentencing exist, judges may or may not agree about how to achieve them. For example, when confronted with the facts of a particular case, two judges may reach a consensus that crime prevention is the primary goal of sentencing. However in respect to the term of imprisonment or how many crimes would be prevented by imposing the sanction, they may not necessarily agree.⁴² In the context of the sentencing decision Forst and Welford therefore maintain that disagreement among judges is such a common occurrence that studies have repeatedly found evidence that patterns of decision-making differ from one judge to another.⁴³ In the South African sentencing context sentencers have a discretion to determine the nature and extent of the punishment to be imposed on offenders.⁴⁴ Operating within this framework therefore, the wide discretion within which sentencers are allowed to operate is quite evident. However while such discretion does exist, there are also limitations that determine the manner in which this discretion is to be exercised. For example, where a sentence is found to be 'startlingly inappropriate' or where it 'induces a sense

⁴¹ R v Dixon 1975 22 ACT R 13.

⁴² Forst and Welford "Punishment and Sentencing : Developing Sentencing Guidelines Empirically from Principles of Punishment" (1997) Vol 33 *Rutgers Law Review* 802.

⁴³ *Ibid* at 802.

⁴⁴ The South African Law Commission Issue Paper II *Sentencing Mandatory Minimum Sentences* (1997) 13.

of shock', these are regarded as control mechanisms by the courts of appeal to determine whether to interfere with the decisions of the trial courts.⁴⁵ However, *albeit* their extensive use by courts, these tests have been criticized as being 'vague and imprecise'.⁴⁶

This therefore raises the issue of sentencing disparity. Do judges have too much or too little discretion when imposing sentences?⁴⁷ In the 1970's the people of the State of Minnesota, in the United States of America, were compelled to answer this very question. Before the adoption of sentencing guidelines in Minnesota, judges could impose absolutely any sentence from probation to the maximum term of imprisonment. This disparity in sentencing led to sentencing anarchy. Conservatives were critical of the indeterminate sentencing approach in that there was no certainty with regard to punishments. Liberals on the other hand were of the opinion that indeterminate sentencing would inevitably lead to disparities and racial bias in the treatment of offenders. In response to the situation, an agreement was reached that sentences should be made more or less uniform.

In drafting its guidelines, Minnesota drew from the suggestion that the legislature should not only impose a single theory of punishment but should rather incorporate all of all the traditional purposes of punishment in the sentencing discretion.⁴⁸

It is not surprising that this trend in sentencing which encompasses all the traditional goals of punishment in imposing a single sentence has been imitated and applied extensively in jurisdictions internationally.⁴⁹

⁴⁵ Ibid at 13.

⁴⁶ Idem.

⁴⁷ JJ Senna and LJ Siegel *Introduction to Criminal Justice* (1990) 446. The South African Law Commission has identified the existence of sentencing discretion in South Africa as being the source of much inconsistency and disparity in the sentencing process.

⁴⁸ Frase "The Uncertain Future of Sentencing Guidelines" (1993) Vol 8 *Law and Inequality* 9.

⁴⁹ Idem.

2.3 THE EVOLUTION IN THE ATTITUDES TOWARDS PUNISHING YOUNG OFFENDERS

2.3.1 AN Historical Examination of the Forms of Punishment Imposed on Children

2.3.1.1 Physical Sanctions and Corporal Punishment

Tracing the history of punishment indicates that various types of physical punishment were imposed on both children and adults. As already highlighted in Chapter one, severe physical sanctions were imposed on children to regulate their behaviour.⁵⁰ Although most of the humiliating and dehumanising forms of punishment fell into disuse, one method, namely whipping remained as the primary means of preserving discipline in the domestic, military and academic spheres.⁵¹ According to Bloom berating or whipping had an especially long life span, from primitive times, well into the early 20th century.⁵²

Not only did the Puritans find the whip an acceptable form of punishment,⁵³ the eastern countries also modified the whip to the bastinado which was employed as a penalty on children as well as military offenders. Russia called her whip the knout which comprised of interwoven thongs and wires. It was said that so great was the shock and wounding caused by it that the outcome was always death!⁵⁴ The U.S. Navy also resorted to using the whip as a form of punishment. In 1812 the British Army recorded up to 17 000 lashes per month as a form of military discipline.⁵⁵ It seemed that few people were spared the pain of the lash prior to the 19th century. Slaves women and children were often also rigorously subjected to corporal punishment.⁵⁶

⁵⁰ See chapter one for a discussion on the types of physical sanctions imposed on children.

⁵¹ S Boom "Spare the Rod, Spoil the Child? A Legal framework for Recent Corporal Punishment Proposals" (1995) *Golden Gate University Law Review* 364.

⁵² Ibid.

⁵³ EH Grinney *Delinquency and Criminal Behaviour* (1992) 20.

⁵⁴ PN Walter *Punishment on Illustrated History* (1972) 27.

⁵⁵ Bloom "Spare the Rod, Spoil the Child? A Legal Framework for Recent Corporal Punishment Proposals" (1995) *Golden Gate University Law Review* 365.

⁵⁶ Idem.

From the earliest form of civilized society, parents were empowered to use corporal punishment on their children in an attempt to control their behaviour. According to Bloom parents were entitled to inflict corporal punishment on their children only as long as excessive force was not used in the process of administering the punishment.⁵⁷

In South Africa, this common law right still prevails and entitles parents to administer corporal punishment provided that such beating does not exceed 'reasonable chastisement'.⁵⁸ The question that arises is, how would one be able to assess whether the punishment imposed is indeed moderate and reasonable?

The following factors are usually taken into account by a court:-

1. the nature of the offence;
2. the condition of the child physically and mentally;
3. the motive of the person administering the punishment;
4. the severity of the punishment, that is, the degree of force applied;
5. the object used to administer the punishment;
6. the age and sex of the child; and
7. the build of the child.⁵⁹

While courts possess the power to intervene where the parents discretion has not been exercised in a proper manner, it seems that ultimately parents have the discretion to decide on the nature of the punishment to be imposed.⁶⁰

Even though the right of parents to chastise their children prevails as a feature of most legal systems, research conducted to determine the impact

⁵⁷ Idem.

⁵⁸ S Pete "To Smack or Not to Smack? Should the Law Prohibit South African Parents from Imposing Corporal Punishment on their Children" (1998) Vol 14 *The South African Journal of Human Rights* 431.

⁵⁹ Ibid at 444.

⁶⁰ Idem.

of corporal punishment on children has revealed interesting results. Most of the investigations seem to indicate that the corporal punishment permitted to parents is far from beneficial.⁶¹ In Britain research undertaken indicated that corporal punishment may have a negative effect on children. In 1989, the Child Research Unit at Nottingham University also published results that revealed a link between corporal punishment and delinquency.⁶² Further still, evidence tendered by psychologists to the Scottish Law commission on the harmful nature of corporal punishment was adequate to recommend that it be abolished.⁶³ It is not surprising that the 'anti-smackers' as they call themselves regard the smacking of children by parents and the imposition of other forms of 'moderate' corporal punishment as being tantamount to legalised child abuse.⁶⁴

2.3.1.2 The Demise of Corporal Punishment and the Introduction of the Prison System

The demise in the use of corporal punishment at the end of the 18th century was largely due to a revolutionary shift in emphasis from the infliction of physical pain towards the rehabilitative philosophy which introduced prisons and the concept of rehabilitative methods in controlling criminal behaviour in adults and in children.⁶⁵ Reformers were of the view that if prisoners were locked away and were free from outside influences, this would enable them to mend their ways by repentance.⁶⁶ The perception that the criminal was an enemy was transformed to one of a fellow citizen who needed to be restored to a useful place in society.⁶⁷ It was this ideology which gave impetus to the

⁶¹ Ibid at 451.

⁶² Ibid at 452.

⁶³ Ibid at 454.

⁶⁴ Ibid at 431.

⁶⁵ Bloom "Spare the Rod, Spoil the Child? A Legal Framework for Recent Corporal Punishment Proposals" (1995) *Golden Gate University Law Review* 366.

⁶⁶ Grinney *Delinquency and Criminal Behaviour* 24-25. Pennsylvania was the first state to test this theory. In 1870 it started the worlds first penitentiary (derived from the word penitent meaning one who repents).

⁶⁷ S Pete "Spare the Rod and Spoil the Nation? : Trends in Corporal Punishment abroad and its place in the new South Africa" (1994) Vol 7 *The South African Journal of Criminal Justice* 295-297.

reform movements across Europe and America in the 18th century.⁶⁸ Shocked by the brutal and inhuman primitive measures employed on offenders and especially convinced of their failure as deterrents, the Italian philosopher Cesare Beccaria advocated that capital punishment be substituted by imprisonment. His penological thinking was based on the idea of imposing heavy sentences to deter the potential criminal and simultaneously allowing the offender to repay his 'debt' to society.⁶⁹ In his revolutionary publication *Crime and Punishment* he proposed that 'it is better to prevent crimes than to punish them'.⁷⁰

So influential was his work, that shortly thereafter other reformers began to follow suit. The British philosopher Jeremy Bentham was one of these. He led the utilitarian movement directed at reforming the criminal justice system.⁷¹ Sir Samuel Romilly, a British lawyer, was said to have worked tirelessly towards reforming the English Criminal Code, which upon his death in 1818, prompted Sir Robert Peel to continue. As a result of Peel's efforts there was a complete overhaul of the British Criminal Code with the total elimination of barbaric and dehumanising forms of punishment and the substitution thereof with imprisonment.⁷² The use of prisons to accomplish this aim became increasingly prevalent and it eventually eradicated all other established forms of punishment.⁷³

However the initial euphoria which this form of sentencing seemed to offer was shortlived. As a result of factors such as lack of funds, overcrowding and the lack of sanitation, prisons were soon termed 'the jungles of darkest barbarism'.⁷⁴ Appalled by such conditions in prisons, John Howard was

⁶⁸ Bloom "Spare the Rod, Spoil the Child? A Legal Framework for Recent Corporal Punishment Proposals" (1995) *Golden Gate University Law Review* 366.

⁶⁹ *Ibid* at 366.

⁷⁰ *Idem.* Cesare Beccaria was the first philosopher to effectively apply theories of humanitarianism, enlightenment and rationalism to criminal law.

⁷¹ Bloom "Spare the Rod, Spoil the Child? A Legal Framework for Recent Corporal Punishment Proposals" (1995) *Golden Gate University Law Review* 366.

⁷² *Ibid* at 367.

⁷³ Pete "Spare the Rod and Spoil the Nation? : Trends in Corporal Punishment abroad and its place in the new South Africa" (1994) Vol 7 *The South African Journal of Criminal Justice* 296-297.

⁷⁴ Criminology Course-pack *Penology* The University of Durban-Westville 29.

instrumental in drafting the British Penitentiary Act in 1778, which was based on discipline, penitence and reformation.⁷⁵ Due to Britain's involvement in wars, the building of these penitentiaries did not materialise in Britain, but emerged in America.⁷⁶ American prison reformers began to campaign for improved prison conditions.⁷⁷

2.3.1.3 Attempts at De-Criminalizing the Young Offender

Right up until the early 19th century, there was a tendency to subject children and adults to the same kinds of punishment. If found guilty of even petty offences like theft, children could be hanged or thrown into prison with adults, or worse still, they faced the possibility of being exiled to penal colonies away from the security of their homes and families for the rest of their lives.⁷⁸

Due to the awareness initiated by John Howard, by 1820, another American movement began to gain momentum. Religious leaders, educators and medical establishments began to question the imposition of sanctions on juvenile offenders.⁷⁹ As a consequence thereof, the attitude that emerged was that they were decidedly different from adults and when working with them special care and protection was imperative.⁸⁰

With these emerging ideals, one would have expected the harsh conditions to which young offenders were accustomed to be ameliorated. This was however only a misconception. Even though this new attitude to sentencing of juveniles existed, it existed only in theory. Geller is of the view that this attitude of decriminalizing juveniles and helping to restore them to a more upright and righteous path was merely an idealistic concept which never truly formed part of the system. He further asserts that the main reason that made

⁷⁵ Idem.

⁷⁶ Idem.

⁷⁷ Bloom "Spare the Rod, Spoil the Child? A Legal Framework for Recent Corporal Punishment Proposals" (1995) *Golden Gate University Law Review* 367.

⁷⁸ Grinney *Delinquency and Criminal Behaviour* 23.

⁷⁹ Bloom "Spare the Rod, Spoil the Child? A Legal Framework for Recent Corporal Punishment Proposals" (1995) *Golden Gate University Law Review* 367-368.

⁸⁰ Grinney *Delinquency and Criminal Behaviour* 25.

these goals unattainable, was that these detention centres and institutions were not conducive to care and treatment. They could have very aptly been termed 'junior versions of jails'.⁸¹ In the attempt to create institutions for the purpose of helping young offenders mend their ways, the growth and development of young persons were usually ignored with the result that the institutions which emerged were regarded as 'mere storage facilities' to keep troublesome youngsters off the streets.⁸² So deplorable were the conditions within juvenile detention centres that a study revealed the following:-

The scene was always the same, a dark, odoured, filthy cell, a lone adolescent or young man sitting at a table playing with a tattered deck of old cards ..., inevitably smoking, dressed in crumpled institutional issue coloured trousers and a rumpled look in his eyes, an air of depression and fatality.⁸³

Apart from the appalling conditions to which the young offenders were subjected very often the punishment imposed on these offenders within these institutions were also severe.⁸⁴ As a result the practice which developed among judicial officials and juries alike was that instead of sentencing young offenders to prison life, where they were bound to be exposed to 'hardened criminals' and learn the tricks of the trade, young people were acquitted!⁸⁵

Inherent in this attitude of acquitting young offenders, was the need to decriminalize the young offender. By turning him away from the criminal justice system it immediately eradicated all the negative connotations associated with the labelling or stigmatization dilemma.

In South Africa, reform schools have been used in an attempt to avoid children being sent to prison.⁸⁶ By virtue of its name reform schools were

⁸¹ DA Geller "Putting Parens Back Into Parens Patriae : Parental Custody to Pre-Trial Juvenile Detention" (1995) Vol 21 *New England Journal on Criminal and Civil Confinement* 522.

⁸² RL Heugle "The Right to Treatment for Juvenile Offenders" (1980) Vol 26 *Loyola Law Review* 362.

⁸³ Geller "Putting Parens Back Into Parens Patriae : Parental Custody to Pre-Trial Juvenile Detention" (1995) Vol 21 *New England Journal on Criminal and Civil Confinement* 522.

⁸⁴ Heugle "The Right to Treatment for Juvenile Offenders" (1980) Vol 26 *Loyola Law Review* 362.

⁸⁵ CR Noon " 'Waiving' Goodbye to Juvenile Defendants, Getting Smart vs Getting Tough" (1994) Vol 49 *University of Miami Law Review* 435.

⁸⁶ Section 290 (1) (a) of the Criminal Procedure Act 51 of 1977.

intended for the "reception, care and training of children".⁸⁷ However it seems that while these institutions profess to have a designated function, many of them have been unable to provide children with the required care or training. In a Report by the National Cabinet Investigation into Places of Safety, Reform Schools and Schools of Industry, it was revealed that many of the reform schools visited in fact closely resembled prisons. They were found to be cold, austere, not very child-centred, and with an overwhelming sense of restriction about them.⁸⁸ Punishment at these institutions were considered as being the pivotal means of handling young people.⁸⁹ Contrary to the provisions in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, isolation cells were commonly used to keep young people in check.⁹⁰ There were also cases of young people who complained about physical abuse at the hands of staff members.⁹¹ The issue of the suitability of care-staff working at these institutions was also criticized by Paton in his book *Diepkloof* where he made mention of the fact that punishment was perceived by the institutional staff as having a beneficial rather than a detrimental effect.⁹² This was also consistent with the observation made in the above-mentioned Report that the majority of the care-workers were not trained, neither did they have the expertise or insight to deal with the complex issues associated with young adolescents.⁹³ It would appear that even though reform schools were supposed to be used as an alternative to imprisonment, the negativity associated with institutionalization however, was not avoided.⁹⁴

Research conducted by Martin Gold in 1973 at the University of Michigan Institute for Social Research among teenagers from forty-eight states,

⁸⁷ A Report by the National Cabinet Investigation into Places of Safety, Reform Schools and Schools of Industry (1997) 2.

⁸⁸ Ibid at 33.

⁸⁹ Ibid at 31.

⁹⁰ Rule 67 of the United Nations Rules for the Protection of Juveniles Deprived of the Liberty; A Paton *Diepkloof-Reflections of Diepkloof Reformatory* (1986) 101.

⁹¹ A Report by the National Cabinet Investigation into Places of Safety, Reform Schools and Schools of Industry at 31.

⁹² Paton *Diepkloof-Reflections of Diplkooof Reformatory* (1986) 104.

⁹³ A Report by the National Cabinet Investigation into Places of Safety, Reform Schools and Schools of Industry at 39.

⁹⁴ The Sentence of committal to reform schools would be examined in greater detail in Chapter four.

revealed that while generally half of the number of them had escaped prosecution, the other half of teenagers under study were arrested for similar offences. Interestingly his results revealed that these arrested young people were twice as likely to commit further offences.⁹⁵ The reason that he presented for the above statement was largely based on the fact that the court system has the tendency to stigmatize and label young persons as criminals – hence affecting their perceptions about themselves.⁹⁶ The legal thought propounded by him was that when children are apprehended and enter the criminal justice system they are often treated as though they are already criminals. This attitude of the police and the court system is indeed very damaging to their self-esteem.⁹⁷

Wilson in his extensive work on juvenile courts in Canada, is in agreement with the above submissions. He maintains that the 'labelling or stigma dilemma' re-inforces criminal tendencies among young people.⁹⁸ He therefore avers that merely calling a young person a juvenile delinquent actually pushes the offender further in the direction of anti-social behaviour.⁹⁹

The criticism levelled by Regoli and Hewitt against such criminal labelling is that even though a large number of young offenders may only be guilty of status offences, by way of truancy, running away and promiscuity, they are nevertheless still assigned the label of law violators.¹⁰⁰

The concern expressed by Wilson, however is that while the need to obviate the term 'juvenile delinquent' is necessary, the transformation of the label to one of 'young offenders', nevertheless still harbours the very essence of the problem, which is a continuation of the 'labelling dilemma'.¹⁰¹

⁹⁵ Grinney *Delinquency and Criminal Behaviour* 47.

⁹⁶ *Idem.*

⁹⁷ *Idem.*

⁹⁸ LC Wilson *Juvenile Courts in Canada* (1982) 255.

⁹⁹ *Ibid* at 255.

¹⁰⁰ RM Regoli and JD Hewitt *Delinquency in Society* (1991) 416.

¹⁰¹ Wilson *Juvenile Courts in Canada* 258.

So while it seems that the acquitting of young offenders may dispense with the 'labelling crisis'¹⁰², it certainly does not address the more pertinent issues relating to the child, the circumstances surrounding the commission of the offence and the prospects for rehabilitative treatment. A more practical solution offered by Regoli and Hewitt is to focus on the child and the ability to reintegrate him into society by orientating him towards more meaningful and constructive social roles.¹⁰³

2.4 INSTITUTIONALIZATION

Rules 31 and 32 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, respectively provide that:-

Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity. [and that]

The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities...¹⁰⁴

In the light of the afore-mentioned provisions, a discussion of the concept of institutionalization, with particular consideration of the following aspects, is conducted:-

2.4.1 The rehabilitative aim of institutionalization. What does it seek to accomplish?

2.4.2 The concept of residential treatment and its role in the rehabilitation of young offenders.

¹⁰² Regoli and Hewitt *Delinquency in Society* 417.

¹⁰³ Rule 31 and Rule 323 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, C.A. res 43/113, annex 45 U.N. GAOR Supp (No 49A) at 205, U.N. DOC A/45/49 (1990).

¹⁰⁴ *People v JA* 127 Ill. App. 3d. 811, 469 N.E. 2d 449 (1st Dist 1984).

2.4.3 The impact of imprisonment and the physical environment of the prison on the child.

2.4.4 Recidivism as an evaluative criterion and the problems related therewith.

2.4.1 **The ‘Rehabilitative Aim’ of Imprisonment. What does it seek to Accomplish?**

In deciding on the sentence to be imposed on young offenders, it has been established that the rehabilitative purposes of sentencing should always be construed as being of prime importance. The question that emerges is, what about the issue of the protection of society? Should the need to rehabilitate the young individual outweigh the protection of society? If not, how do you reconcile the two? The rehabilitation versus the protection of society debate forms the basis of the ensuing discussion.

The sentence of an eight year term of incarceration imposed on a young offender, in the case of People v J.A., brought the very issue into focus. In the case the court drew attention to the distinction of sentencing policy between adults and juveniles and affirmed the position that while the primary policy when dealing with adult offenders is the protection of society, the predominant concern when sentencing young offenders lies with the rehabilitation of young offenders.¹⁰⁵ Based on the reasoning it was established that the failure to consider the rehabilitative effect of the sentence on the thirteen-year-old offender was in conflict with this underlying policy.¹⁰⁶ The approach of the court in placing too much emphasis on the protection of society was condemned by many academics. One in particular, Richo, maintains that if the focus of the sentencing court is directed at protecting society rather than rehabilitating the juvenile, rehabilitation efforts in this case

¹⁰⁵ AS Richo “Mandatory Sentencing for Habitual Juvenile Offenders : People v JA” (1985) Vol 34 *De Paul Law Review* 1105.

¹⁰⁶ *Idem.*

would be frustrated.¹⁰⁷ In response Roth avers that while the state may have a general interest in rehabilitating all juvenile offenders, it nevertheless has the power to incarcerate those individuals who due to their anti-social acts are likely to pose a threat to society.¹⁰⁸

Therefore, it is obvious that while the rehabilitation of young offenders has been established, the need to confine those young persons who pose a danger to society has been recognized both by the courts, in their imposition of relatively long prison sentences on young offenders and by academia in its support for the protection of society from anti-social acts committed by young persons.

As a result of the rehabilitation versus protection of society dilemma, in the case of Rv H (A),¹⁰⁹ the debate over the term of incarceration imposed on the young offender presented interesting repercussions for the sentencing court. Taking cognisance of the severity of the offence committed by the young offender in stabbing and permanently incapacitating his victim, the trial court acknowledged the need for protection of society, hence the imposition of the two year period of confinement of the offender.¹¹⁰ Nevertheless, in spite of the offender's violent and aggressive tendencies and the likelihood of posing further danger to society, the Appeal Court reduced the original sentence. The reason for doing so was that the accused was reacting negatively to custody. From the evidence adduced at the trial, it was revealed that 'his behaviour had become more and more anti-social since he had been incarcerated'.¹¹¹

Consequently, a two year term of confinement was altered to one of eight months.¹¹²

¹⁰⁷ Ibid at 1106.

¹⁰⁸ AD Roth "An Examination of Whether Incarcerated Juveniles are Entitled by the Constitution to Rehabilitative Treatment" (1985) Vol 84 *Michigan Law Review* 297.

¹⁰⁹ R v H.A. (1991), 65 C.C.C. (3d) 119.

¹¹⁰ A Riley "Proportionality as a Guiding Principle in Young Offender Dispositions" (1994) Vol 17 *Dalhousie Law Journal* 570.

¹¹¹ Idem.

¹¹² Idem.

Based on the R v H (A) decision, it would appear that in spite of the rehabilitation versus the protection of society debate, there may be instances when the court may be forced to look beyond attempting to balance the two criteria and focus solely on the individual, his needs and his response to the length of the period of confinement imposed on him.

The writer submits that because young people are more malleable, the potential for transformation exists. They should therefore be entitled to rehabilitative opportunities irrespective of the offences committed. The writer therefore stresses that the aim to rehabilitate should prevail as being of paramount importance when dealing with all young offenders.

2.4.2 The Concept of 'Residential Treatment' and its Role in the Rehabilitation of Young Offenders

The term 'treatment' or 'residential treatment' as it is referred to in Rule 32 of the Rules for Juveniles Deprived of the Liberty, is the source of much debate among academics.

While Leschied's study in Alberta, Canada, revealed a consensus among judges about the primary goal of treatment, namely, 'to alter an offenders attitude and behaviour so that he or she is less inclined to commit crime again,'¹¹³ an assessment of the role and effectiveness of treatment among juveniles had more varied results. Leschied expressed concern about whether sentencing has the desired effect primarily because he found that the term 'treatment' was perceived differently by different judges.¹¹⁴ According to Leschied's study, while some youth court judges viewed an order of custody as treatment, other judges regarded custody as punishment, 'despite the fact that the actual place of custody was the same for all the judges in question.'¹¹⁵ Hence, in his response to what ought to be considered as treatment, Leschied

¹¹³ ADW Leschied "Comments – Balancing Rights and Needs : Addressing the Dilemma in Canadian Juvenile Justice Policy" (1987) Vol 6 *Canadian Journal of Family Law* 373.

¹¹⁴ *Idem.*

¹¹⁵ *Idem.*

conceded that since all offenders are not alike and 'there are no panaceas that work well with all young persons',¹¹⁶ any treatment programme aimed at trying to rehabilitate a young offender must include:-

1. identifying the problem
2. discovering the relationship between the causes of crime and potential underlying disorders
3. understanding the context of the person's functioning (i.e. school, family etc) and
4. a tailoring programme to meet the individual needs of the person concerned.¹¹⁷

Like Leschied, Neumeyer was also in agreement with the approach that at the outset it is vital to the treatment process, to identify the young offender who is in need and in trouble. According to Neumeyer identifying difficulties early in the process would prevent more serious difficulties at a later stage.¹¹⁸

While many experts have painstakingly theorized over the concept of what constitutes treatment and while others may have even formulated guidelines for effective administration of such treatment, Wilson in his extensive work on juvenile courts, is dubious about the fulfilment of this promise by the courts.¹¹⁹ His main reason for expressing such doubts is based on the premise that juvenile court philosophy pre-supposes that the court will have rehabilitative resources and professionals at its disposal.¹²⁰

Nevertheless, the provision of additional money and staff will not necessarily provide the desired remedy.¹²¹ According to Wilson, the problem is much more intricately interwoven and seems to emanate largely from the assumption that the rehabilitation of young offenders regarded as being at risk is an attainable goal.¹²²

¹¹⁶ Idem.

¹¹⁷ Idem.

¹¹⁸ MH Neumeyer *Juvenile Delinquency in Modern Society* (1961) 323.

¹¹⁹ Wilson *Juvenile Courts in Canada* 248-249.

¹²⁰ Ibid at 248.

¹²¹ Idem.

¹²² Idem.

As a consequence of the findings of his study it was revealed that in the application of the treatment 'no practical predictive devices have yet been developed, and the screening and treatment decisions at all stages are largely *ad hoc* intuitive reactions.¹²³ The uncertainty in the sphere of the administering of treatment to juveniles is also shared by Senna and Siegel, who assert that even in respect of the minimum standards of care and treatment, no clarity exists, with the result that in order to gauge such minimum standards a monitoring of cases on a case by case basis is necessary.¹²⁴

In tracing the treatment process the question as to whether the right to treatment should be the right of only a certain category of young offenders or whether such a right should extend to all young offenders, is inescapable. From the case of Martarella v Kelly (1972) it has been revealed that:-

... when juveniles judged to be 'persons in need of supervision' are not furnished with adequate treatment, the failure to provide such treatment violates the eight and fourteenth amendments.¹²⁵

While the case of Morales v Turman (1973) established that juveniles at training school has a statutory right to treatment,¹²⁶ the decision of Nelson v Heyne (1974), far surpasses the importance of the above decisions. The significance of the Nelson decision is that it was the first Appellate Division decision to lay down that the Fourteenth Amendment guarantees a constitutional right to treatment to all incarcerated juveniles.¹²⁷

In his work on the examination of rehabilitative treatment among incarcerated juveniles, Roth affirms that due to the fact that society has an interest in rehabilitating 'all' juvenile offenders,¹²⁸ that irrespective of the nature of the offences 'all incarcerated juveniles' are constitutionally entitled to rehabilitative

¹²³ *Idem.*

¹²⁴ Senna and Siegel *Introduction to Criminal Justice* 658.

¹²⁵ Martarella v Kelly 349 F. Supp. 575 (1972).

¹²⁶ Morales v Turman 364 F. Supp. 166 (1973).

¹²⁷ Nelson v Heyne 491 F. 2d 352 (7th Cir 1974).

¹²⁸ Roth "An Examination of Whether Incarcerated Juveniles are Entitled by the Constitution to Rehabilitative Treatment" (1985) Vol 84 *Michigan Law Review* 297.

treatment.¹²⁹ On reviewing the rights of incarcerated individuals in South Africa, Steytler also affirms the constitutional protection of the right to treatment. He maintains that while the individual's right to humane treatment falls squarely within the ambit of Section 10,¹³⁰ Section 35(2) (e) further 'expands on these guarantees'.¹³¹ According to Section 35 every sentenced prisoner has the right not only to conditions which are consistent with human dignity but it also articulates that the detained individual is to be provided with adequate accommodation, nutrition, reading material and medical treatment, at state expense. The effect of this duty on the state therefore ensures that all sentenced prisoners, including juveniles are to be provided with the 'greatest protection'.¹³² As far as the application of the above right to residential treatment is concerned, it is provided that his right would commence from the moment after arrest until the person is finally released.¹³³

In South Africa, the absence of a separate juvenile justice legislation has created its own unique problems. The result is that one has to contend with a system which does not emphasise treatment. With sentencing authorities focusing predominantly on options available in terms of the Criminal Procedure Act 51 of 1977, the resultant effect is that sanctions of a more punitive nature are imposed on children. In light of the provisions of the new Constitution and the above submissions, the writer therefore maintains that it is imperative for legislation in South Africa to highlight not only the shift in emphasis from the punitive to rehabilitative goals but also to make provision for treatment programmes with specific consideration for the needs of incarcerated youth. It is also envisaged that the objectives of these programmes and the criteria in respect of how they ought to be effected, would be clearly articulated in future legislation.

¹²⁹ Idem.

¹³⁰ Section 10 of the Constitution of the Republic of South Africa Act 108 of 1996 guarantees the right to dignity.

¹³¹ N Steytler *Constitutional Criminal Procedure* (1998) 183.

¹³² Ibid at 183.

¹³³ Ibid at 187. According to Steytler the right does not only cover imprisoned persons but also extends to those deprived of liberty in places of safety, reform schools and schools of industry.

2.4.3 The Impact of Imprisonment and the 'Physical Environment' of the Prison on the Child

In an early study undertaken by Neumeyer investigating the effects of incarceration on young offenders, it was discovered that 'detention has a different psychological meaning for each child'.¹³⁴ Neumeyer noted that it is largely due to the existence of a number of factors, operating in the child's life that causes him to perceive his confinement differently from others. He therefore distinguished factors such as the child's personality, experiences encountered by the child, his interpretation of being imprisoned, his reasons for being incarcerated and various other factors as contributing to the young offender's perception of his incarceration.¹³⁵ It is obvious therefore that due to the influence of these factors while a particular child may be frightened by the thought of being incarcerated, there may be those for whom incarceration may not be regarded as being such a daunting experience as the results of the Scared Straight Programme conducted in the United States a few years ago revealed.¹³⁶ The programme was devised with the intention of exposing young first offenders to the harsh realities of prison life so as to frighten them away from a life of crime. During the visit of the adult male prisons, the young males were 'threatened and scared by the tough, older inmates'.¹³⁷ However due to the fact that the young boys regarded these inmates as the 'meanest, coolest dudes they had ever seen',¹³⁸ the outcome of the experiment had squarely the opposite effect. It was revealed that instead of being frightened away from the prisoners and the prison conditions, the boys 'romanticized and glamourised them'.¹³⁹

While the lack of available statistics has made it difficult to determine the exact number of young offenders who may find the term of their confinement

¹³⁴ Neumeyer *Juvenile Delinquency in Modern Society* 322.

¹³⁵ *Idem.*

¹³⁶ VL Streib "Sentencing Juvenile Murderers : Punish the Last Offender or Save the Next Victim?" (1995) Vol 26 *University of Toledo Law Review* 771.

¹³⁷ *Idem.*

¹³⁸ *Idem.*

¹³⁹ *Ibid* at 777.

a pleasant one, there has not been much difficulty amongst researchers in demonstrating the contrary effect of imprisonment.

The study conducted by Neumeyer is important for this reason. It illustrates how dehumanising the prison experience can be for a child. According to Neumeyer, institutionalization very often leaves children feeling insecure. They are uncertain about themselves and their future. He also maintains that as a result of the many hours spent in confinement and the monotony of the experience, a sense of helplessness seems to pervade among the youth. Emotional disturbances which manifests themselves during the period of detention and which are aggravated by past experiences are also a common occurrence among young children who are incarcerated.¹⁴⁰

Some of the reactions displayed by these disturbed individuals include anxiety, bewilderment, remorse, uncertainty, fear, distrust, hostility, defiance, resentment and outward indifference. According to Neumeyer the tendency among children to hide their inner feelings often makes it extremely difficult to determine exactly how a child is feeling and what he is experiencing.¹⁴¹

So it seems that attempts directed at helping incarcerated young individuals to overcome these feelings may only 'appear' successful. The suggestion that Neumeyer makes is that the only manner in which the detained child can be truly helped to deal with this emotional turmoil and to rise above his situation is with the assistance and motivation provided by an adequately trained staff.¹⁴²

The actual physical environment of most prison institutions with their poor design and lack of adequate facilities have also been condemned on the basis of not being conducive to proper living. The exposure of the existence of these sub-human conditions in the case of Inmates v Afflek (1972),¹⁴³ left the

¹⁴⁰ Neumeyer *Juvenile Delinquency in Modern Society* 322.

¹⁴¹ *Ibid* at 322-323.

¹⁴² *Ibid* at 323.

¹⁴³ Inmates v Afflek 346 F. Supp. 1354 (1972).

American public appalled, when conditions within a juvenile institution were revealed:

Located on the floor above Annex C is a series of small, dimly lit steel barred cells used for solitary confinement. Each cell is approximately eight feet by four feet, containing a sink and toilet. Boys confined are released only to take showers about twice a week. They get no exercise. The inmates attorneys but not his family, is allowed to visit him there. Because windows on the wall opposite the cell block are broken, the cells are cold. There is a small hole in the bars, through which meals, sometimes cold, are passed.¹⁴⁴

It is not surprising therefore that due to the negative psychological impact as outlined by Neumeyer and the clearly inhabitable milieu of the prison environment as revealed in the above case, that academics are sceptical about the role of the prison system in professing to accomplish its rehabilitative functions.

East is unconvinced that prisons do in fact rehabilitate offenders. In fact he maintains that in their current form, prisons do not rehabilitate offenders back into the community.¹⁴⁵

Walter is in concurrence with East. He submits that 'the prison environment is the poorest environment' that can be created to help offenders.¹⁴⁶ Frase is also in agreement with the above averments.¹⁴⁷ From their findings on the investigation of conditions in South African prisons, Sloth-Nielson *et al* also unveil a rather grim picture of the prison environment. Due to the confrontation with the harsh and often dehumanising conditions of most of the prisons visited, the assertion made is that prison is indeed no place for a child.¹⁴⁸

¹⁴⁴ Senna and Siegel *Introduction to Criminal Justice* 657.

¹⁴⁵ P East "Modern Sentencing Developments" (1990) *The New-Zealand Law Journal* 13.

¹⁴⁶ RN Walker *Psychology of the Youthful Offender* (1995) 78.

¹⁴⁷ Frase "The Uncertain Future of Sentencing Guidelines" (1993) Vol 8 *Law and Inequality* 36.

¹⁴⁸ A Community Law Centre Publication *Children in Prison in South Africa – A Situational Analysis* (1995) 5.

Frase's research culminates in the finding that overcrowding in prisons is the reason responsible for making the prison environment such a poor one.¹⁴⁹ According to Frase, 'overcrowded prisons are dangerous and self-defeating'.¹⁵⁰ He further asserts that 'as prisons become more and more overcrowded, they become less and less safe'.¹⁵¹ In his investigation of the conditions to which young people are subjected in prisons, Neumeyer also discovered that overcrowding was at the core of all problems experienced.¹⁵²

What do such overcrowded institutions have to offer for the troubled child confined within its boundaries? According to Neumeyer overcrowding combined with 'poor physical conditions, indiscriminate mixing and unintelligent and unkind treatment' only serve to further exacerbate the position of the child who is in need of care and treatment.¹⁵³ Sloth-Nielsen *et al* also identified overcrowding of prisons as being the stumbling block that hindered making the prison stay a 'rehabilitative experience for the child'.¹⁵⁴ It was revealed that without a proportionate increase in prison staff, the influx of young offenders being sentenced to imprisonment means that prisons in effect would not be able to provide stimulation to incarcerated youth by way of developmental programmes.¹⁵⁵ Swenson after her examination of the plight of the incarcerated child in the U.S. stressed that conditions in juvenile institutions beg attention. She noted that 'all is not well' for the one million detained youth.¹⁵⁶ The issues that she identified as being problematic included:-

Housing of status offenders with juvenile delinquents, confining juvenile offenders in adult facilities, the use of four point restraints (strapping out of control children by hands and feet to a metal framed bed), inadequate educational programmes for the mentally handicapped, unchecked violence between youth,

¹⁴⁹ Frase "The Uncertain Future of Sentencing Guidelines (1993) Vol 8 *Law and Inequality* 36-37.

¹⁵⁰ *Ibid* at 36.

¹⁵¹ *Ibid* at 37.

¹⁵² Neumeyer *Juvenile Delinquency in Modern Society* 323.

¹⁵³ *Idem*.

¹⁵⁴ A Community Law Centre Publication *Children in Prison in South Africa – A Situational Analysis* 44.

¹⁵⁵ *Ibid* at 30.

¹⁵⁶ KB Swenson "John L v Betty Adams : Taking Bounds in the Right Direction for Incarcerated Juveniles" (1994) Vol 24 *Memphis State University Law Review* 449.

untreated medical disorders, particularly inadequate mental health and sexual discrimination.¹⁵⁷

From the study conducted by Forst and other researchers comparing the treatment of youths confined in training schools and prisons in the greater Boston, Memphis, Detroit and Newark it was revealed that youths in adult prisons were five times more likely to be beaten by guards and that weapon attacks were fifty percent more common.¹⁵⁸

Hence it seems that there is much truth in Frase's comment that prisons are responsible for 'breeding more crime than they prevent'.¹⁵⁹

Frase concedes that while the attitude of people generally is that they do not care about what prisoners do to each other while behind bars, he emphasises that one should not lose sight of the fact that almost all of these very same violent and uncontrolled persons will eventually be released back to society.¹⁶⁰ Neumeyer therefore, maintains that when dealing with children and especially those who are confined the preservation of their self-respect should remain as the main concern. He also provides that it should be made incumbent upon authorities concerned to ensure that the child's environment is made conducive to his well-being and that the harsh conditions to which children are subjected be eliminated.¹⁶¹ He further proposes that what is needed is a well-rounded programme of positive and constructive activities that is more than mere 'time filing'.¹⁶² In response to East's submission that prisons are not capable of rehabilitating offenders, Neumeyer holds the view that 'together with adequate treatment, education and counselling' of young persons, the objectives of the rehabilitative process can in fact be realized.¹⁶³

¹⁵⁷ Ibid at 449-450.

¹⁵⁸ P Marcotte "Criminal Kids" (1990) Vol 76 *American Bar Association Journal* 65.

¹⁵⁹ Frase "The Uncertain Future of Sentencing Guidelines" (1993) Vol 8 *Law and Inequality* 36.

¹⁶⁰ Ibid at 37.

¹⁶¹ Neumeyer *Juvenile Delinquency in Modern Society* 323.

¹⁶² Idem.

¹⁶³ Idem.

In the fieldwork undertaken by the writer to determine the reaction of juvenile inmates to institutional life, interesting similarities emerged between the writer's own findings and that of the findings of other researchers.¹⁶⁴ In response to the question – What did he/she learn from his/her prison stay?, the following are some of the responses received:-

- "I don't want to be in prison. There are too many things to do in life which are important and by being in prison you can't get anything done."
- "I want to be a real person, but you can't be that way in prison because there too many restrictions."
- "All you do in prison is wonder about the outside world."
- "Prison breaks up your family and it is difficult living away from them."
- "I would not do anything bad again because I would not want to be back here."
- "I have learnt nothing from being in prison."
- "Prison life is bad and has not been helpful to me."
- "Prison is a terrible place, you always have to be watching your back."
- "Prison life is just a waste of time."
- "I have learnt what prison life is all about and I don't want to ever return."

Like the respondents interviewed by the writer, the institutionalized youth of the Baum and Wheeler study also expressed feelings about missing their families.¹⁶⁵ Refer to the above response - "Prison breaks up your family and it is difficult living away from them". The study conducted by Sloth-Nielsen *et*

¹⁶⁴ PC Kratcoski *Juvenile Delinquency* (1990) 314.

¹⁶⁵ *Idem*.

al also revealed that the majority of the children were seriously affected by this separation from their families.

Due to the failure of many of them to maintain contact with their families, the researchers noted that the isolation experienced by the children was quite obvious.¹⁶⁶

The youth in respect of the above studies also expressed concerns about what they were missing in the outside world.¹⁶⁷ Refer to above response – “All you do in prison is wonder about the outside world”. Similar to the writer’s findings, Baum and Wheeler also revealed frustrations about the boring routine of institutional life and the general wastefulness of the experience among the confined youth.¹⁶⁸ This boredom and listlessness was also prevalent among the incarcerated youth interviewed in the Sloth-Nielsen study.¹⁶⁹ In fact it was revealed that the ‘boys displayed extreme lethargy during the day’. One child made the following remark:-

Usually cells are locked all day. There is nothing to do. I only sleep, otherwise I am worried thinking about my case. You end up going crazy. Here they make you a ‘bandiet’.¹⁷⁰

Refer to the above response – “Prison life is just a waste of time”; “I don’t want to be in prison. There are too many things to do in life which are important and by being in prison you can’t get anything done”.

It was therefore quite obvious that according to the above studies, the majority of the youth were quite adamant that they did not benefit from being institutionalized.¹⁷¹ Refer to the above response - “I have learnt nothing from being in prison;” “Prison life is bad and has not been helpful to me.”

¹⁶⁶ Idem.

¹⁶⁷ Idem.

¹⁶⁸ A Community Law Centre Publication *Children in Prison in south Africa – A Situational Analysis* 1.

¹⁶⁹ Ibid at 29.

¹⁷⁰ Kratcoski *Juvenile Delinquency* 314.

¹⁷¹ Idem.

Yet a further similarity between the work of Baum and Wheeler and that of the writer was the interest that the youth expressed in enhancing their scholastic abilities or pursuing a trade or some form of employment upon their release.¹⁷²

TABLE 2.1

INTENTIONS ON BEING RELEASED

	Westville Prison (males)	Westville Prison (females)	Harrismith Prison	Krugersdorp Prison	St. Albans Prison
School	57%	36%	48%	68%	28%
Work	29%	64%	36%	32%	44%
Further Studies	-	-	12%	-	-
Other	14%	-	-	-	12%
Not Sure	-	-	4%	-	16%
Total	100%	100%	100%	100%	100%

Quite a large percentage of the respondents throughout all of the above-mentioned prisons showed a keen interest in resuming their schooling when released. At Krugersdorp Prison and at Westville Prison (males) this interest was particularly high, with sixty-eight percent and fifty-seven percent of the interviewees at the respective prisons indicating such an inclination. A possible reason why the majority of the male respondents at Westville Prison and at Krugersdorp Prison had the intention of resuming their schooling could be that the average age of the respondents at these two prisons were lower than that at the other prisons, (See Table 1) indicating the likelihood of not having completed with their secondary education, hence the intention to do so.

¹⁷² Idem.

The respondents were also quite eager to seek employment. Interestingly, the female respondents at Westville Prison compared to all of the other respondents were most keen to work. Sixty-four percent of the female respondents indicated that this was their intention on being released. Twelve percent of the respondents at Harrismith Prison who had completed their formal education had intentions of furthering their studies at tertiary institutions. A few of the respondents however clearly did not seem to have a desire to work or to attend school. One youth reflected that he would like to resume playing soccer for his former soccer club, another had an intention of becoming a musician and yet another had been inspired during his prison stay to become a preacher when released. Only a relatively small percentage of the respondents were uncertain about their future plans.

Deductions:-

From the above statistics, it can be ascertained that generally the respondents seemed to have positive thoughts and ideas about what they intended to do upon their release. Despite their isolation from the rest of the world, the interviewees nevertheless still displayed their desire to resume their places in society, to be educated, to work and to make their contribution to society. Moreover, like the institutionalized youth studied by Baum and Wheeler, the respondents who fell within the writer's study were also motivated not to commit further offences.

TABLE 2.2**INDICATION OF COMMITTING OTHER OFFENCES**

	Westville Prison (males)	Westville Prison (females)	Harrismith Prison	Krugersdorp Prison	St. Albans Prison
Yes	-	-	8%	-	4%
No	100%	100%	92%	100%	92%
Not Sure	-	-	-	-	-
Did not commit the offence	-	-	-	-	4%
Total	100%	100%	100%	100%	100%

There was a strong sense among the interviewees that further offences would not be committed. A hundred percent of the respondents at both the male and female sections at Westville Prison and at Krugersdorp Prison were confident that they would not resort to criminal activities under any circumstances whatsoever. Nevertheless eight percent of the respondents at St. Albans Prison expressed that they could very possibly commit further offences. They qualified this response by adding that it would depend on the particular circumstances involved. However, another four percent of the respondents at St. Albans Prison were quite adamant about not providing a YES/NO response because they maintained that they had not committed any offence at the outset. The most common reasons submitted by the respondents for not committing further offences once released related to the fact that they viewed their prison experience as a negative one and were determined to avoid returning to the institutions at all costs.

However, the point of departure, in respect of the reasons submitted by Baum and Wheeler and the writer is quite significant. While the youth in regard to the Baum and Wheeler study indicated that they would not commit further offences due to the fact that they had 'learnt their lesson',¹⁷³ the writer's

¹⁷³ Idem.

findings revealed otherwise. According to the writer's findings, the majority had no intention of resorting to further crime because they felt that the prison experience was such a terrible one that they did not wish to return to its drudgery and gloom.

Therefore the statistics of almost a hundred percent of the interviewees at all of the prisons involved in the writer's study, indicating that they would not commit further offences cannot be attributed to the success of the prison system. Rather what it does in fact reveal is a failure of the prison system to offer to the incarcerated youth a beneficial stay during the term of their incarceration. From the writer's findings it therefore seems that while prisons generally may claim to serve a rehabilitative function, as far as the majority of the interviewed youth were concerned, this was a promise that never materialized. Sloth-Nielsen *et al* affirm that this is the position and distinguished the inhumane conditions to which children have to yield to in prison as being the primary reason that makes the rehabilitative goal such an unattainable one. It is submitted that in view of the conditions to which children are subjected, there is little room for rehabilitation and development.¹⁷⁴

In view of the above difficulties articulated by the writer and other researchers in other jurisdictions, Neumeyer's suggestion for an amelioration of existing conditions in prisons are well-received. He advises that if detention is necessary, adequately facilitated institutions be provided and the personnel are to be suitably trained for the job.¹⁷⁵

The realization of the need to recruit staff especially sensitive to the needs of the young child is also reflected in Rule 82 of the Rules for Juveniles Deprived

¹⁷⁴ A Community Law Centre Publication *Children in Prison in South Africa – A Situational Analysis* 5.

¹⁷⁵ Neumeyer *Juvenile Delinquency in Modern Society* 323.

of the Liberty.¹⁷⁶ Therefore in keeping with international principles, it is envisaged that Neumeyer's suggestions should form the basis for the creation of future juvenile correctional institutions in South Africa.

2.4.4 Recidivism as an Evaluative Criterion and the Problems Related Therewith

In order to ascertain whether a particular sanction imposed on a young offender has proven successful in terms of achieving its goals of sentencing, researchers have had regard to the examination of recidivism rates among juveniles as a basis for testing how effective a sanction has proven. While data on recidivism has thus far served as a yardstick to measure the effect of sanctions, reliance on such information has in itself been revealed to be quite problematic.

In his work on *Juvenile Delinquency*, Kratcoski explained that the difficulty that one is normally confronted with in trying to obtain recidivism data, is related to the fact that generally that upon the release of the young offender, there is a loss of contact between the young person and the institutional personnel.¹⁷⁷ Another grey area encountered by him in the course of his study was that when many youth are released from institutions, they were in fact closer to the 'upper age limit of juvenile status', meaning that if further offences are committed referral is made to the adult system and not the juvenile justice system. He therefore stated that this lack of communication between the two systems makes the 'compilation of recidivism data a hard task'.¹⁷⁸ The problem experienced by Regoli and Hewitt stems from the use of recidivism in the absolute term. They submit that the use of recidivism in the absolute rather than relative term could result in positive results being obscured.¹⁷⁹

¹⁷⁶ Rule 82 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty provides :- the administration should provide for the careful selection and recruitment of every grade and type of personnel, since the proper management of detention facilities depends on their integrity, humanity, ability and professional capacity to deal with juveniles as well as personal suitability for the work.

¹⁷⁷ Kratcoski *Juvenile Delinquency* 313.

¹⁷⁸ Ibid at 313-314.

¹⁷⁹ Regoli and Hewitt *Delinquency in Society* 416.

Their dissatisfaction of referring to recidivism as an absolute term is attributed mainly to the fact that even a 'single arrest or violation' would be sufficient to term the young person as a recidivist.¹⁸⁰

Moreover all of the above researchers have viewed recidivism as being problematic in terms of an evaluative criterion, in that it tends to cloud the distinction between long term and short term consequences from society. Regoli and Hewitt maintain that while the incarceration of a youth may have a short term solution of protecting society, the long-term consequences of the negative impact of such imprisonment would affect the offender not only during the period of incarceration, but even well after his release and in most cases influencing the rest of his life.¹⁸¹

The dilemma that Kratcoski has with the above situation is, how does one measure success and failure?

If a child has learned to cope better with his or her environment, social situation and family problems and has developed ego-strength and internalized a pro-social value system, should the institutionalization process be considered successful even if the child engages in some future delinquencies, or should a young person who stays within the law after release but emerges from the institution hostile, dependent, emotionally scarred or fearful of authority be rated a success merely because of a lack of recidivism.¹⁸²

Clearly, there is no definite answer.

Ironically, the factor distinguished among researchers which has been instrumental in re-inforcing recidivism rates among young offenders has in fact been revealed to be the exact same system which was established to help young offenders – the juvenile justice system.¹⁸³

¹⁸⁰ Idem.

¹⁸¹ Ibid at 416-417.

¹⁸² Kratcoski *Juvenile Delinquency* 314.

¹⁸³ Grinney *Delinquency and Criminal Behaviour* 47.

2.5 THE ORIGIN AND DEVELOPMENT OF THE JUVENILE JUSTICE SYSTEM

The juvenile court system operating today owes its existence to the feudal days of England. However, the structure and main objectives of the first juvenile court system differs markedly from those of today. The practice that emerged was that in situations of death, the crown intervened and supervised the estates of surviving minors. The courts were thus compelled to assume the role of parents in the absence of these parents, giving rise to the immutable doctrine of *parens patriae*.¹⁸⁴ This idea that the state is the ultimate parent of all minors formed the basis of the early juvenile court system. Its sole purpose was to offer care and protection. However, the mid-nineteenth century saw an extension of the courts jurisdiction over minors and a modification of its initial roles. Apart from care and protection, the juvenile court asserted its parental functions even further to include those of discipline and reform of unruly young people. Nevertheless, the expansion of the functions of the early juvenile court was not the only challenge of the time, so too was the desire to expand territorially and with the conquering of the New World, the English juvenile court system was passed on and adapted by the United States of America.¹⁸⁵

The first juvenile court established in the U.S.A., Illinois, in 1899, was a welfare court. It's aims reflected in the Illinois Act of 1899 were directed at providing care and treatment. Clearly it stated:-

Why is it not just and proper to treat juvenile offenders as we deal with neglected children, as a wise and merciful father handles his own child whose errors are not discoverable by the authorities?... To take him in charge, not so much as to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.¹⁸⁶

¹⁸⁴ SJ Skuris "For Troubled Youth Help Not Jail" (1979) Vol 31 *Hastings Law Journal* 540.

¹⁸⁵ *Idem*.

¹⁸⁶ *Ibid* at 542-543.

Its promise to rehabilitate way/ward youth and accord protection to youth in need was in striking contrast to the adversarial court familiar to the criminal justice system.¹⁸⁷ Nevertheless, inherent in the very functioning of the welfare court system were the mechanisms which entitled certain matters to be transferred or 'waived' to the criminal court.¹⁸⁸

As a result of the establishment of the 1899 juvenile court system in Illinois, by 1945 almost every state in the United States followed suit and had created their own 'alternative' to the juvenile criminal justice system.¹⁸⁹

In contrast to adult proceedings, juvenile proceedings were intended to be 'intimate, informal and protective'.¹⁹⁰ Chief Justice Burger submitted that the 'sensitive problems of youthful offenders' would only be compounded if not dealt with 'through benevolent and less formal means'.¹⁹¹ The aim evidently was not to convict or sentence but rather to treat or care for the misdirected or misguided child. The system was therefore, designed to cater for the needs of young people. Consequently the juvenile court movement advocated for individualized and non-punitive measures to meet the needs of young people who found themselves in trouble with the law.¹⁹²

In the case of Re Winship, Professor Feld drew attention to the merits of the structure architected for the specific needs of the young offender. In comparing the adult court with the juvenile court, it was noted that first a completely separate building was used so as to prevent any form of stigmatization associated with criminal proceedings. Hearings were also held in private and instead of a child being found guilty of an offence, he was

¹⁸⁷ MR Gardner "Punitive Juvenile Justice – Some Observations on a Recent Trend" (1987) Vol 10 *International Journal on Law and Psychiatry* 130.

¹⁸⁸ Idem.

¹⁸⁹ Idem.

¹⁹⁰ GA Martin "The Delinquent and the Juvenile Court : Is there Still a Place for Rehabilitation" (1992) Vol 25 *Connecticut Law Review* 59.

¹⁹¹ MR Gardner "The Right of Juvenile Offenders to be Punished : Some Implications of Treating Kids as Persons" (1989) Vol 10 68 *Nebraska Law Review* 191.

¹⁹² Gardner "Punitive Juvenile Justice – Some Observations on a Recent Trend" (1987) Vol 10 *International Journal on Law and Psychiatry* 130.

declared 'delinquent'. These terminologies and procedures were intended to prevent the child from being 'tainted' by the criminal proceedings.¹⁹³

Evidently, juvenile court judges had their work cut out for them. Incorporating 'treatment' as part of the sentences proved more difficult than anticipated. As social scientists were incapable of diagnosing and prescribing appropriate treatment for young offenders, judges were often left to their own devices.¹⁹⁴ To overcome the enormity of their task, judges were thus given a broad discretion to act 'in the best interests' of the child when sentencing.¹⁹⁵ Nonetheless, this only exacerbated the problem. Entrusting too broad a discretion in the hands of any authority is risky and in the case of judicial officers this was no exception. As a result of the power with which they were endowed, widespread abuses arose.¹⁹⁶

Notwithstanding the fact that the juvenile court movement advocated for non-punitive measures, this apparently only had theoretical significance. Judicial officers still employed punitive sanctions in their pursuit of quick solutions. By the early 1970's, fearing that the legal environment of the juvenile court was slowly beginning to resemble that of the adult court, critics began to question the 'treatment' of juveniles and lashed out against the punitive nature of the juvenile courts.¹⁹⁷

Swartz summed up the contradictory functions of the juvenile court as simultaneously treating and punishing juvenile offenders.¹⁹⁸

It was in the mid – 1970's that the U.S. made it a requirement that juvenile courts were to adopt the criminal justice systems procedural protections.¹⁹⁹

¹⁹³ *In Re Winship* 397 US 358, 378 (1970).

¹⁹⁴ Marcotte "Criminal Kids" (1990) Vol 76 *The American Bar Association Journal* 61.

¹⁹⁵ Noon "Waiving Goodbye to Juvenile Defendants, Getting Smart v Getting Tough" (1994) Vol 49 *University of Miami Law Review* 443.

¹⁹⁶ Marcotte "Criminal Kids" (1990) Vol 76 *The American Bar Association Journal* 61.

¹⁹⁷ Noon "Waiving Goodbye to Juvenile Defendants, Getting Smart v Getting Tough" (1994) Vol 49 *University of Miami Law Review* 436.

¹⁹⁸ Marcotte "Criminal Kids" (1990) Vol 76 *The American Bar Association Journal* 61-62.

¹⁹⁹ Gardner "The Right of Juvenile Offenders to be Punished : Some Observation on a Recent Trend (1987) Vol 6 *The International Journal on Law and Psychiatry* 131.

In the case of In Re Gault, considering that Gault was a juvenile, his case was not brought before a criminal court but rather before a juvenile court.²⁰⁰ In most of the States of America the situation is that juveniles have no due process protections when their cases are waived from a criminal court to a juvenile court. Such protections are only acquired where the waive is from a juvenile court to a criminal court. What this indicates is that procedural rights were not regarded as important in juvenile courts which espoused a welfare philosophy.²⁰¹

From the case of In Re Gault the following procedural protections in respect to juveniles were identified: a minor's advance notice of charges; a fair and impartial hearing; assistance of counsel; opportunity to confront and cross-examine witnesses and the privilege against self incrimination.²⁰² Prior to this, the rights of juveniles were not considered as important as the rights of adult offenders and they received what Swartz describes as a 'second rate justice'²⁰³

The decision of Gault's case is a milestone in the establishment of increased procedural protections for juveniles.²⁰⁴

2.6 SUMMARY AND CONCLUSION

Even before we attempt to determine the effectiveness of sentences, it is essential that we understand why we impose punishments at all. From the various schools of thought propounded on the purposes of punishment, it is apparent that from time to time and for numerous reasons, discussed above, the emphasis placed on the different philosophies have changed. However it has been gleaned that largely due to the perception that children are different from adults and therefore require greater care and protection, the

²⁰⁰ Gardner "The Right of Juvenile Offenders to be Punished : Some Implications of Treating Kids as Persons" (1987) Vol 10 68 *Nebraska Law Review* 209.

²⁰¹ Ibid 212-213.

²⁰² In Re Gault 387 U.S. 1 (1967).

²⁰³ Marcotte "Criminal Kids" (1990) Vol 76 *The American Bar Association Journal* 62.

²⁰⁴ Gardner "The Right of Juvenile Offenders to be Punished : Some Implications of Treating Kids as Persons" (1987) Vol 10 *The Nebraska Law Review* 209.

rehabilitative philosophy in sentencing has been the dominant school of thought. From the above studies undertaken by other researchers as well as that conducted by the writer in order to assess the effectiveness of imprisonment on children, it was apparent that the rehabilitative ideology did not materialize for the imprisoned youth in most of the cases. In view of this, it is submitted that if prison sentences are to be continued to be used as sentences on children, it is vitally important that, in keeping with Rules 31 and 32 of the Rules for the Protection of Juveniles Deprived of their Liberty, they be structured on the rehabilitative school of thought so as to encourage the re-integration of children into society.

CHAPTER THREE

INTERNATIONAL LAW AND THE RECOGNITION OF THE RIGHTS OF THE CHILD

3.1 INTRODUCTION

While the concerns of some individuals and humanitarians to recognize and prescribe standards for the treatment and handling of children throughout history have been noted, it was really only in the twentieth century that this empathy assumed such world wide proportions that it resulted in the development of internationally recognized rights of the child.

Since the beginning of the twentieth century, the development of international law on the rights of the child can be divided into three stages.¹ The first was the recognition by the international community that all individuals, including children were objects of international law requiring international legal protection. The second was the granting of specific substantive rights to individuals, including children; and the third stage highlighted that all individuals should be able to enjoy and exercise these fundamental rights.² While in principle children like adults are also entitled to enjoy the full measure of these rights, the criticism levelled against a number of international jurisdictions is that, in practice, these rights are not acknowledged by all states.³ In this chapter, the writer traces the development of international documents pertinent to the rights of the child and the latter part of the chapter examines the approach of various jurisdictions towards the sentencing of young offenders and draws a comparison of these approaches to the South African perspective.

¹ G Van Bueren *The International Law on the Rights of the Child* (1995).

² Idem.

³ Idem.

3.2 AN EXAMINATION OF INTERNATIONAL INSTRUMENTS RELEVANT TO THE RIGHTS OF THE CHILD

The United Nations Declaration of the Rights of the Child (1924) was the very first instrument that was adopted by the international community.⁴ The preamble of the document directs its contents at "all men and women of all nations,"⁵ indicating a strong humanitarian concern for the plight of the child. While this 'humanitarian debt', being the term coined by Van Bueren, is also reflected in the 1959 Declaration of the Rights of the Child, the latter document also further highlights 'special safeguards and care, including appropriate legal protection',⁶ which are vital to the needs of the child. Nevertheless these earlier instruments did little more than establish a charter of pious wishes. Comparatively it was really only the United Nations Convention on the Rights of the Child (1989) that actually created rights. An examination of the Convention on the Rights of the Child reveals that from its inception it was directed at achieving the following goals:-

1. It created new rights under international law for children where previously no rights existed, for example the right of indigenous children to practise their own culture;
2. It laid down the child's rights to be heard either directly or indirectly in a judicial or administrative proceeding affecting the child;
3. It bound states to acceptable standards in areas where there were previously only non-binding recommendations;
4. It imposed new obligations on states in regard to the general protection of children; and

⁴ Ibid at 7.

⁵ Ibid at 7.

⁶ Ibid at 10.

5. It also contained an agreement that states were not to discriminate against children on any basis whatsoever.⁷

What is quite note-worthy about the Convention on the Rights of the Child is that it acknowledged that the only solution when working with children is a child-centred approach.

While a tremendous surge of interest relating to the child and his rights was shown at the beginning of the century, it was not until the 1980's that there was an incorporation of specific rights of children into the administration of juvenile justice. The administration of juvenile justice is a relatively recent development in international law.⁸

In 1985, the United Nations Standard Minimum Rules for the administration of juvenile justice was adopted by the United Nations.⁹ Entitled the Beijing Rules, they were intended to provide states with a model of an equitable and humane approach to handling juveniles.¹⁰

3.2.1 The International Response to Sentencing of Juvenile Offenders

International law prohibits the imposition of specific forms of punishment on children. Corporal punishment and the imposition of the death penalty are considered as being totally unacceptable forms of punishment. The prohibition on such treatment is a common feature of most internationally recognized instruments.¹¹ According to Article 37 (a) of the Convention of the Rights of the Child:-

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.¹²

⁷ Ibid at 16.

⁸ Ibid at 169-170.

⁹ Ibid at 170.

¹⁰ Ibid at 170.

¹¹ Ibid at 185.

¹² Article 37 (a) of the Convention on the Rights of the Child provides that – No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years of age.

The Beijing Rules is also clear in its assertion that:-

Juveniles shall not be subject to corporal punishment.¹³

The death penalty is also prohibited. Van Bueren submits that the reasoning behind the prohibition of the death penalty on juveniles is that, due to their youth and immaturity a failure on the part of persons under the age of eighteen to fully understand the consequences of their actions, makes the death penalty an inappropriate form of punishment.¹⁴ Life imprisonment, without the possibility of the release for persons under the age of eighteen is also prohibited.¹⁵ According to the Convention on the Rights of the Child this form of sentencing is not permitted because it constitutes a form of cruel, inhuman or degrading punishment which is wholly inconsistent with the provisions of Article 37 (a).¹⁶

Where the imprisonment of children is concerned, although states have not reached a consensus on the total abolition of the imprisonment of children, the trend revealed by a number of states has been a definite inclination in that direction.¹⁷ Thus the internationally recognized principle in respect of juveniles deprived of their liberty is that, when the circumstances require the imposition of this sanction, it is only to be used as a measure of last resort and for the shortest appropriate period of time.¹⁸ A further aspect emphasized by the Convention regarding the imprisonment of the child, is the separation of the child from adult detainees.¹⁹ This principle is also echoed in the Standard Minimum Rules for the Treatment of Prisoners.²⁰ The idea of separating juveniles from adult offenders, first embodied in the International Covenant on

¹³ Rule 17.3 of the Beijing Rules.

¹⁴ Van Bueren *The International Law on the Rights of the Child* 187.

¹⁵ Article 37 (a) of the Convention on the Rights of the Child (1989).

¹⁶ Article 37 (a) of the Convention on the Rights of the Child provides that – No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years of age.

¹⁷ Van Bueren *The International Law on the Rights of the Child* 206.

¹⁸ Article 37 (b) of the United Nations Convention on the Rights of the Child.

¹⁹ Article 37 (c) of the United Nations Convention on the Rights of the Child.

²⁰ Rule 8 (d) of the Standard Minimum Rules for the Treatment of Prisoners 1955.

Civil and Political Rights(1966), clearly provides that juveniles are to be separated from adults.²¹ The introduction of the concept of this separation is to ensure and maintain the physical and moral integrity of the child.²²

In keeping with the maintenance of the well-being of the child, the speed of the judicial process is considered to be pivotal to the effective administration of justice. For the child who finds himself in conflict with the law, it is not only the imposition of the sentence that is likely to be stressful, but it is the entire judicial experience from his arrest to final release that can be extremely traumatic. International law therefore postulates that when dealing with juveniles, the speed of the judicial processes is of paramount importance. Article 37 (d) of the Convention on the Rights of the Child directs that a child is to have 'prompt' access to legal assistance and the right to a 'prompt' decision.²³ Emphasis on the word prompt is deliberate. It ensures that there are no unnecessary delays which could impede the administration of justice. Rule 20 of the Beijing Rules also addresses the issue of unnecessary delays and maintains that from the outset, the matter should be dealt with 'expeditiously and without any unnecessary delay'.²⁴ This concern is also highlighted in Article 10 (2) (b) of the International Covenant on Civil and Political Rights, which postulates that the adjudication of juveniles should be dealt with as 'speedily as possible'.²⁵

The use of the words 'prompt', 'unnecessary delay' and 'expeditiously' in respect of the above international documents are intended to ensure that speedy attempts are made regarding the outcome of the child's future. The writer is also in agreement with the assertion by Van Bueren that the purpose

²¹ Article 10 (2) (b) of the International Covenant on Civil and Political Rights.

²² Van Bueren *The International Law on the Rights of the Child* 221.

²³ Article 37 (d) of the United Nations Convention on the Rights of the Child provides that – Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision or any such action.

²⁴ G Van Bueren *International Documents on Children* (1993) 210; Van Bueren *The International Law on the Rights of the Child* 175.

²⁵ Van Bueren *The International Law on the Rights of the Child* 75.

for the emphasis on speed in regard to judicial processes is to uphold that which is in the best interests of the child.²⁶

Where circumstances arise that require the imposition of a sentence that deprives a child of his or her liberty, the elements contained in Article 37 (c) of the United Nations Convention on the Rights of the Child clearly dictate the manner in which the child is to be treated.²⁷ Together with humanity and dignity, the 'needs' of the child are also accentuated. Likewise Rule 26.2 of the Beijing Rules also highlights these needs and provides that institutionalized juveniles are to :-

Receive care, protection and all necessary assistance ... which are essential because of their age, sex and personality in the interest of a wholesome development.²⁸

According to juvenile experts, like Heugle, the successful treatment of a juvenile can only be achieved by giving due recognition to the needs of the young adolescent.²⁹

Undoubtedly, the importance of the family structure as a core unit and the role of the family and community involvement in the life of every child cannot be undermined. Skelton avers that the above components are also central to the life of the child.³⁰ The question that arises then is, how does one enable a juvenile 'deprived of liberty' maintain family contact or community involvement?

²⁶ Idem.

²⁷ Article 37 (c) of the United Nations Convention on the Rights of the Child provides that : - Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

²⁸ Van Bueren *International Documents on Children* 213.

²⁹ R L Heugle "The Right to Treatment for Juvenile Offenders" (1980) 6 *The Loyola Law Review* 374.

³⁰ A Skelton "Developing a Juvenile Justice System for South Africa : International Instruments and Restorative Justice" (1996) *Acta Juridica* 184.

Article 37 (c) of the Convention on the Rights of the Child and Rule 60 of the U.N. Rules for the Protection of Juveniles Deprived of their Liberty attempt to reconcile these relationships by ensuring that the child who has been deprived of his or her liberty, derives his or her source of stability and support from his family by remaining in contact with the family throughout the judicial process.³¹ Rule 60 of the Rules for the Protection of Juveniles Deprived of their Liberty further prescribes that these contacts should at least be once a week and not less than once a month.³² Further still, Heugle asserts that while in detention every young person should also maintain telephonic contact with his or her family.³³ Apparently, while Article 37 (c) of the Convention on the Rights of the Child is silent about whether the right to 'family contact' could also be extended to visits by friends or other concerned members of society, Rule 59 of the Rules for the Protection of Juveniles Deprived of their Liberty is explicit that in order to ensure 'adequate' communication with the outside world, not only is the juvenile to be entitled to remain in contact with his or her family, but contact with the wider community is also permitted.³⁴ Since in administering treatment to the incarcerated juvenile the aim of re-integration into the community is of primary consideration,³⁵ the writer is in agreement with the approach reflected in Rule 59. Also reflected in Rule 12 of United Nations Guidelines for the Prevention of Juvenile Delinquency is the acknowledgement of the role of the 'extended family' in the life of the child.³⁶ It is clearly obvious that the above international instruments do not only emphasise the role of the family but have also accorded due consideration to the role of the extended family as well as other concerned members of society who may have an interest in the child. They are necessary to ensure that the young person is entitled to as much contact as possible with the outside world, so as to facilitate the transition from the confined environment to the eventual release.

³¹ Rule 37 (c) of the Convention on the Rights of the Child; Rule 60 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

³² Rule 60 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

³³ Heugle "The Right to Treatment for Juvenile Offenders" (1980) *The Loyola Law Review* 374.

³⁴ Van Bueren *International Documents on Children* 227.

³⁵ Van Bueren *The International Law on the Rights of the Child* 218.

³⁶ Skelton "Developing a Juvenile Justice system for South Africa : International Instruments and Restorative Justice" (1996) *Acta Juridica* 184.

Rule 38 of the Rules for the Protection of Juvenile's Deprived of their Liberty highlights the juvenile's educational needs and specifically provides that such education ought to be sufficient to enable him or her to return to society and resume their roles.³⁷ To further assist the young person to adapt to life outside of the institution, Rule 12 of the Rules for the Protection of Juveniles Deprived of their Liberty emphasises that especially to secure employment, vocational training received whilst institutionalized must be sufficient for the purposes of any future employment.³⁸ Heugle accordingly submits that there ought to be adequate resources for both intellectual and vocational development.³⁹ The incorporation of the essence of Rule 40 is of particular significance. In keeping with the principle that the young offender is not to be stigmatised or prejudiced in any way, Rule 40 expressly provides that if diplomas or educational certificates are awarded to juveniles while in detention, no indication whatsoever must be made to the fact that the individual concerned had been incarcerated.⁴⁰

Consistent with the elements of dignity and humanity embodied in Article 37 (c) of the Convention on the Rights of the Child, Heugle maintains that young offenders should be allowed to pursue their own identity through experimentation with dress and hairstyles.⁴¹ Rules 35 and 36 of the Rules of the Protection of Juveniles Deprived of their Liberty are also indicative of these elements.⁴² While Rule 35 entitles the juvenile to retain possession of personal articles like clothing and money, Rule 36 however modifies this right. According to Rule 36, juveniles only have the right to use their own clothing 'to the extent possible'.⁴³ While the instrument does not provide one with clarity in regard to the interpretation of the phrase 'to the extent possible', it is assumed that it is intended to cover those instances when the juvenile leaves the institution for whatever purpose.

³⁷ Van Bueren *International Documents on Children* 224.

³⁸ *Idem*.

³⁹ Heugle "The Right to Treatment for Juvenile Offenders" (1980) 26 *Loyola Law Review* 374.

⁴⁰ Van Bueren *International Documents on Children* 2244 ; Van Bueren *The International Law on the Rights of the Child* 218.

⁴¹ Heugle "The Right to Treatment for Juvenile Offenders" (1980) 26 *Loyola Law Review* 374.

⁴² Van Bueren *International Documents on Children* 223-224.

⁴³ Van Bueren *The International Law on the Rights of the Child* 218.

As far as the young person's nutritious needs are concerned, the assertion by Heugle that the meals ought to be suitably prepared, is well received.⁴⁴ This sentiment is also mirrored in Rule 37 of the Rules of the Protection of Juveniles Deprived of their Liberty, which further stipulates that these meals are to be of a :-

Quality and quantity to satisfy the standards of dietetics, hygiene and health.⁴⁵

While the above Rule is also aimed at attempting to satisfy the religious and cultural dietary requirements of incarcerated juveniles, the writer is sceptical about its application. This is largely due to the practical difficulties that are likely to be encountered by institutional staff, first in regard to keeping records of the religious preferences of each individual and secondly in regard to the preparation of certain cultural meals which may be unfamiliar to institutional staff. Nevertheless the intention behind the inclusion of the requirement as provided for in respect of Rule 37 is indeed commendable.

In terms of Rule 48 of the Rules for the Protection of Juveniles Deprived of their Liberty, juveniles are also entitled to satisfy their religious and spiritual life by attending services arranged in the detention facility or by conducting their own services.⁴⁶ In keeping with the individuals right to privacy, Rule 48 also enables the individual to retain possession of books and other religious items which are necessary for the practising of his or her religion.⁴⁷ Where a number of juveniles belong to a given religion, representatives of that religion are permitted to perform religious services within the institution for the benefit of those juveniles.⁴⁸ However, in instances where a particular individual belongs to an orthodox religion whose religious beliefs for example demand animal sacrifices, it is questionable whether these rights would be upheld. On the other hand, should the juvenile decline from participating in religious

⁴⁴ Heugle "The Right to Treatment for Juvenile Offenders" (1980) 26 *Loyola Law Review* 374.

⁴⁵ Van Bueren *International Documents on Children* 224.

⁴⁶ *Ibid* at 226.

⁴⁷ *Idem*.

⁴⁸ *Idem*.

services or being exposed to religious indoctrination of whatever nature, such a right must be upheld.⁴⁹

Notwithstanding the fact that juveniles who are imprisoned are prohibited from exercising their basic right to freedom, the preceding discussion of the various rules and principles underlying institutionalization indicates that in their application as far as is possible the humanity and dignity of juveniles are to be upheld and respected.

Due to the tremendous amount of criminological research demonstrating the negative influences of institutionalization, it is not surprising that the international community views this form of sentencing as the least effective and least favoured option.⁵⁰ The tendency to resort to alternatives other than institutional care among a number of states has therefore been revealed as the preferred approach to dealing with juveniles. Article 40 (4) of the Convention of the Rights of the Child therefore provides an exhaustive list in regard to the kinds of alternatives that are available, with emphasis on state parties to seek 'alternatives other than institutional care'⁵¹ Academics submit that in effect this now places an onus on states to promote sentencing options other than institutionalization.⁵²

Thus far, the only alternative which guarantees the well-being of the child and simultaneously dispels the negativity associated with conviction and sentence, is diversion.⁵³ Incorporated in Rule 11 of the Beijing Rules⁵⁴ and Article 40 (3) (b) of the Convention on the Rights of the Child,⁵⁵ this approach allows for the juvenile offender to be dealt with outside of the formal criminal justice system by means of carefully devised programmes or procedures.⁵⁶ In light of the

⁴⁹ Idem.

⁵⁰ Van Bueren *The International Law on the Rights of the Child* 184.

⁵¹ Van Bueren *The International Law on the Rights of the Child* 184-185.

⁵² Ibid at 186.

⁵³ The term 'diversion' is misleading as children are not diverted away from the legal system itself but only from the more formal mechanisms.

⁵⁴ Van Bueren *The International Law on the Rights of the Child* 205.

⁵⁵ Van Bueren *The International Law on the Rights of the Child* 174.

⁵⁶ Skelton "Developing a Juvenile Justice System for South Africa : International Instruments and Restorative Justice" (1996) *Acta Juridica* 183.

fact that diversion is an integral means of dealing with offenders in progressive juvenile justice systems across the world today,⁵⁷ its potential and relevance for South African youth will be discussed in the latter part of this chapter.

3.2.2 A Comparative Evaluation of the Sentencing Practices Applied in International Jurisdictions

International jurisdictions have revealed a variety of approaches not only in respect of sentencing but in regard to all aspects of juvenile justice. An evaluation of the sentencing trends ranging across the globe from the American states to Singapore is presented.

AMERICA

Although in her research Gatewood reveals that in the last decade greater emphasis has been placed on punishment rather than rehabilitation,⁵⁸ the trend in recent years in states throughout America has been towards treatment of the young offender with the primary focus on public protection and accountability rather than punishment. The shift in emphasis from punishment to accountability is evident in the statutes of a number of states, namely California, Minnesota and Washington which notably, while providing for public safety and accountability, have not totally discarded the rehabilitative nature of the juvenile justice system.⁵⁹

The aim of a recent American reform movement involving the approach of the treatment of status offenders by subjecting them to a host of diversion programmes which proved favourable amongst Americans,⁶⁰ was based on the premise that all status offenders and other minor juvenile offenders would

⁵⁷ Idem.

⁵⁸ DR Gatewood "The High Cost of Juvenile Justice" (1993) 20 *Fordham Urban Law Journal* 661.

⁵⁹ D Passarelli "Department of Youth Services : Control over Sentencing and Monitoring of Juvenile Delinquents" (1995) 21 *New England Journal On Criminal And Civil Confinement* 597.

⁶⁰ EH Grinney *Delinquency and Criminal Behaviour* (1992) 33.

be removed from the juvenile justice system and kept out of institutional programmes.⁶¹

Due to the severity of incarceration as a statutory disposition many states are more guarded in the use of institutionalization as a sentencing option. They have therefore enacted legislation to ensure that if a child has to be subjected to institutional treatment, that such terms of confinement are only to be restricted to between one to three years. The intention for the above modification to existing legislation is to ensure that children who have been found guilty of the same offence as adult offenders are not to be incarcerated for periods longer than that of adults.⁶²

Particularly in regard to female juvenile offenders, judges have shown a predilection for custodial sanctions. In his study of the female juvenile offender, Streib concludes that the plight of the female juvenile is often much worse than that of the male. Young female offenders are incarcerated for first offences much more than their male counterparts. Females also tend to be imprisoned for less serious offences than males.⁶³ In their study, Goldstein, Freud and Solnit stress that placements of children should be based on the 'least detrimental alternative' with particular emphasis being placed on the child's growth and development. The situation in America today is that most states apply custodial restrictions or institutionalization only to children who commit serious offences.⁶⁴

Where a child is found guilty of a fact-finding hearing, the case is referred to a dispositional hearing, which is a more formal court proceeding, which enables a judge to choose from a range of sentencing options. Mindful of the harsh effects that institutionalization could have on impressionable young people, a

⁶¹ JJ Senna and LJ Siegel *Introduction to Criminal Justice* (1990) 648-650 ; A Status offender is one who is guilty of a status offence which includes truancy, running away, promiscuity, incorrigibility etc. Only a juvenile can be found guilty of a status offence.

⁶² *Ibid* at 651.

⁶³ VL Streib and L Sametz "Executing female Juveniles" (1989) 22 *Connecticut Law Review* 9.

⁶⁴ Senna and Siegel *Introduction to Criminal Justice* 650.

judge often selects less severe sentencing options in preference to subjecting the young person to months or years in a juvenile institution.⁶⁵

From the host of sentencing options at his disposal, a judge may decide that a juvenile : -

1. may be discharged on condition that he will be supervised by a court official; or
2. may be placed on probation and referred to the care of a social agency; or
3. may be placed in a community – based residence; or
4. may be placed in a long time institution for juveniles.⁶⁶

In 1987, statistics concerning sentenced juveniles revealed that sixty percent of the cases that were disposed of by the court were put on probation.⁶⁷

In terms of the system of juvenile probation, the child is placed under the supervision of a probation officer. Conditions of probation imposed on the child may require the child to participate in a vocational training programme, to attend school regularly or to make restitution. Restitution normally takes the form of community service. Probation systems which integrate community protection, the accountability of the offender, competency and individualization are regarded as being most beneficial due to their balanced approach.⁶⁸

In 1989, the Massachusetts Department of Youth Services (hereinafter referred to as D.Y.S), was named the best agency in the United States by the National Council on Crime and Delinquency. Four years later however, the

⁶⁵ Grinney *Delinquency and Criminal Behaviour* 33.

⁶⁶ *Idem*.

⁶⁷ *Ibid* at 34.

⁶⁸ Senna and Siegel *Introduction to Criminal Justice* 651.

same agency was heavily criticized when three youth, who were released from its custody, were killed and a fourth was involved in a double – murder.⁶⁹ The manner in which the D.Y.S. operates is that when a child is committed to the D.Y.S, it is the D.Y.S and not a judge that decides on the placement and on the length of confinement of the particular juvenile. The presiding judge in the matter therefore has no authority in respect of placement and sentencing.⁷⁰ In order to achieve its aim of the re-integration of young offenders back into the community, a more holistic approach in the treatment of sentenced juveniles is imperative. Passarelli, commenting on the sentencing trend in Massachusetts states that Massachusetts' D.Y.S. needs to change its approach towards youths so as to enable the juvenile court to work more closely with law enforcement and the community.⁷¹

Interestingly, the Pennsylvanian Juvenile Act 333 of 1972 does not include the crime of murder in its definition of a 'delinquent act'.⁷² The deliberate exclusion of the offence of murder by the legislature indicates a concern that due to the severity of the offence, murder should be given special consideration when sanctioning young offenders.⁷³

The consequences of a youth's actions which left the American public aghast was that of a Florida youth, fifteen-year-old, Francisco Del Rey.⁷⁴ While drag-racing at three o' clock in the morning Del Rey's corvette slammed into another car, killing its three occupants and paralyzing Del Rey's passenger. It was later discovered that Del Rey had been illegally driving with a false driver's license for months before the accident. Evidence indicated that his parents had been instrumental in obtaining his false driver's license for him! The State-Attorney in this case filed a motion to transfer the juvenile to be tried as an adult. In assessing the case before him, the juvenile court judge

⁶⁹ Passarelli "Department of Youth Services : Control over Sentencing and Monitoring of Juvenile Delinquents (1995) 21 *New England Journal on Criminal and Civil Confinement* 576.

⁷⁰ Ibid at 585.

⁷¹ Ibid 601.

⁷² BM Farrell "Pennsylvania's Treatment of Children who commit murder : Criminal Punishment Has Not Replaced *Parens Patriae*." (1994) 98 *Dickson Law Review* 754.

⁷³ Idem.

⁷⁴ CR Noon "'Waiving' Goodbye to Juvenile Defendants, Getting Smart v Getting Tough" (1994) 49 *University Of Miami Law Review* 443.

who 'was not going to be soft on juveniles who commit crimes with such serious consequences', through the process of judicial waiver, allowed Del Rey to be transferred to adult court for prosecution because of the 'aggressive and wilful nature of his act'.⁷⁵

Commenting on these transfer proceedings, the Honourable Justice Martin noted that transfer resembles a safety valve in that where the juvenile justice system fails to rehabilitate the juvenile within the time available, it sends the youth to the adult court to be dealt with accordingly.⁷⁶

The waiver of a child to an adult court is indeed an extreme sanction. A juvenile who is transferred to an adult criminal court has to contend with the exposure of a public trial and a public record which may prevent him from military service as well as public or private employment.⁷⁷ For the young person, the possibility of a longer term of incarceration, harsher conditions of confinement, exploitation and abuse as a result of age and size are inevitable.

Without a doubt, the young person concerned would be hardened by the experience.⁷⁸ In view of the fact that serious crimes committed by juveniles are rampant, understandably, there has been the pressure to have more juvenile offenders transferred to adult courts.

The difficulty that Martin has with the process of transferring juveniles to adult courts and dealing with them accordingly is that these children who need treatment the most would be denied the very treatment that could have been accorded to them had they remained within the juvenile justice system.⁷⁹

The American solution to the 'treatment' of its juvenile murderers has been long term imprisonment. Streib is of the opinion that the American judicial

⁷⁵ Ibid at 444.

⁷⁶ GA Martin "The Delinquent And The Juvenile Court: Is There Still a Place For Rehabilitation" (1992) 25 *Connecticut Law Review* 62-63.

⁷⁷ RM Regoli and JD Hewitt *Delinquency In Society - A Child Centred Approach* (1991) 355.

⁷⁸ Idem.

⁷⁹ Martin "The Delinquent and the Juvenile Court : Is there still a Place for Rehabilitation (1992) 25 *Connecticut Law Review* 63-64.

system is sentencing too many juvenile offenders to incarceration. The sentencing trend in the state of Washington and many other states in respect of juveniles who commit murders has been life imprisonment without the possibility of parole.⁸⁰ Streib asserts that this process of subjecting young people to such long terms of imprisonment without any prospects of parole, would result in prisons being converted to geriatric institutions.⁸¹ At the end of their terms of life imprisonment, about 2050 and 2060, they would indeed be very old men who would have no recollection whatsoever of something they had done as teenagers.⁸² He therefore maintains that life imprisonment is not only impractical but in his words 'it simply does not make sense'.⁸³

If the submission that the nature of the individual would be significantly affected by what occurred during confinement, is accepted, then unless something constructive is done about it, the future of the youth subjected to imprisonment without any chance of parole does not look very promising.⁸⁴

A sentence of life imprisonment has been equated to the controversial death penalty over decades of sentencing reform.⁸⁵ In the United Kingdom, Soviet Union and New Zealand juveniles cannot be executed. Even though the death penalty has been completely abolished in Australia, West Germany, France and Portugal, the Netherlands and all Scandinavian countries, it nevertheless still remains available as an option in sentencing juveniles in the United States.⁸⁶

In 1642, the first known execution of a youth under the age of eighteen was carried out in Plymouth Colony. Before the decision of Furman v Georgia,⁸⁷ in

⁸⁰ VL Streib "Sentencing Juvenile Murderers : Punish The Last Offender or Save The Next Victim" (1995) 26 *University Of Toledo Law Review* 775-776.

⁸¹ *Ibid* at 781.

⁸² *Idem*.

⁸³ *Idem*.

⁸⁴ Martin "The Delinquent and the Juvenile Court : Is there Still a Place for Rehabilitation: (1992) 25 *Connecticut Law Review* 64.

⁸⁵ Streib "Sentencing Juvenile Murderers : Punish the Last Offender or Save the Next Victim" (1995) 26 *University of Toledo Law Review* 776.

⁸⁶ ME Garner "Capital Punishment for Minors" (1994) 15 *Journal Of Juvenile Law* 154.

⁸⁷ Furman v Georgia 408 U.S. 238 (1972).

1972 which found the imposition of the death penalty to be unconstitutional, approximately one hundred and seventy-five young offenders were executed. The death sentence is no longer unconstitutional and since 1975, one hundred and ten children have been sentenced to death. By the 1990's approximately two hundred and eighty-seven juveniles have been executed in the United States. Only nine of the youths were female, three quarter were people of colour and overwhelmingly their victims were white.⁸⁸

In three separate cases, Furman v Georgia,⁸⁹ Stanford v Kentucky,⁹⁰ and Wilkins v Missouri,⁹¹ the question as to whether the imposition of the death penalty constituted cruel and unusual punishment under the Eighth Amendment which states 'excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted', was considered. Interestingly, all three convictions were overturned on the basis of the unconstitutionality of the death penalty.⁹²

The case which captured international attention was that of Paula Cooper. In 1985 Paula Cooper, at the age of seventeen became the youngest female to be sentenced to death.⁹³ Cooper, together with three other youths, was involved in the brutal murder and stabbing of a bible teacher in Indiana. The case revealed that the sentencing of Cooper by Judge Kimbrough was the hardest act that he had done as a judge and he did so only because the law of Indiana required the death penalty under the circumstances of the case. The obvious reluctance of the judge to sentence Cooper is noted.⁹⁴

⁸⁸ SD Strater "The Juvenile Death Penalty : In the Best Interests of the Child?" (1995) 26 *Loyola University Chicago Law Journal* 151.

⁸⁹ Furman v Georgia 408 U.S. 238 (1972).

⁹⁰ Stanford v Kentucky 492 U.S. 361 (1989).

⁹¹ Wilkins v Missouri 736 S.W. 2d 409 (1987).

⁹² C Hancock "The Incompatibility of the Juvenile Death Penalty And The United Nations Convention on The Rights of the Child : Domestic And International Concerns" (1995) 12 *Arizona Journal Of International And Comparative Law* 708-709.

⁹³ Cooper v State 540 N.E. 2d 1216, 1221.

⁹⁴ SD Strater "The Juvenile Death Penalty : In the Best Interests of the Child?"(1995) 26 *Loyola University Chicago Law Journal* 169.

A perusal of case law on capital punishment for juveniles reveals that states are clearly divided on the issue. Due to the tremendous amount of data against the juvenile death penalty, Hancock's view is to allow individual states to determine their own sentences.⁹⁵

Strater is very critical of the state in carrying out its *parens patriae* function. (See Chapter Two for discussion on the concept of *paren patriae*). The assertion propounded by her is that the contradiction between the state's duty as the *parens patriae* to protect children on the one hand and its role in executing children on the other is sufficient reason why there should be no capital punishment of children.⁹⁶

A case which clearly supports her argument is that of the youth Jerome Allen.⁹⁷ Sixteen-year-old Allen was convicted of murdering a service station manager. Although the evidence tended at the trial revealed that Allen had a troubled youth and was in fact in need of care, the trial judge entirely dismissed these submissions. He opted rather to impose the death sentence. The approach of the court is controversial on the basis of being incompatible with the *parens patriae* doctrine. While one has to concede that the crime committed was indeed a serious one which deserved a serious sanction, nevertheless, the imposition of the death penalty by the court denied the youth any prospects of rehabilitation. Strater's confusion in this regard that it is contradictory for a civilized society promote the welfare and rehabilitation of children in one instance and execute them the next,⁹⁸ is well founded.

Opposition to the imposition of capital punishment has been voiced by various judicial circles. Justice Stevens submits that the imposition of the death penalty has not made any measurable contribution to the goals which capital

⁹⁵ C Hancock "The Incompatibility of the Juvenile Death Penalty and the United Nations Convention on the Rights of the Child : Domestic and International Concerns" (1995) 12 *Arizona Journal of International and Comparative Law* 713.

⁹⁶ SD Strater : "The Juvenile Death Penalty : In the Best Interests of the Child?" (1995) 26 *Loyola University Chicago Law Journal* 170.

⁹⁷ *Allen v State* 636 50. Sd 494, (Fla 1994).

⁹⁸ SD Strater : "The Juvenile Death Penalty : In the Best Interests of the Child?" (1995) 26 *Loyola University Chicago Law Journal* 171-172.

punishment seeks to achieve.⁹⁹ There are many throughout the United States, if not throughout the world who also echo the sentiments of the learned Judge Brennan that youth crime is not exclusively the offender's fault. He therefore concedes that what such offences do in fact represent is a failure of the combined influences of the family structure, the school and the social system.¹⁰⁰

CANADA

The Canadian sentencing framework by way of the Young Offenders Act, of 1983 (hereinafter referred to as the Young Offenders Act) reflects the concern for equity and justice and has been considered as the pinnacle of sentencing reform. In pursuit of the idea that punishment should fit the crime and should be proportionate to the gravity of the offence, but not be excessive or more than is necessary, a rational and fair sentencing policy has emerged.¹⁰¹

The Young Offender's Act,¹⁰² has been the result of decades of sentencing reform and has created the foundation upon which to understand the young offender and provide answers for his predicament.

The sentencing alternatives which may be imposed on a youth in terms of the Young Offenders Act, include the following:

1. absolute charges;
2. fines not exceeding 1000 dollars;
3. restitution and compensation orders;
4. community and personal services order;
5. probation;
6. committal to custody.

⁹⁹ ME Garner "Capital Punishment for Minors" (1994) 15 *Journal for Juvenile Law* 155.

¹⁰⁰ *Ibid*, at 157.

¹⁰¹ K Jobson and G Ferguson "Toward A Revised Sentencing Structure for Canada" (1987) 66 *The Canadian Bar Review* 26.

¹⁰² The Young Offenders Act replaced The Juvenile Delinquents Act in 1984.

In comparing the American system to the Canadian, the similarities in sentencing options are noted, however, in addition the court is also entitled to subject the young person to other reasonable and ancillary conditions as it deems appropriate and which is considered to be in the best interests of the young person and the public.¹⁰³

As restitution and community service orders are not available to the adult court in Canadian law, it is evident that in sentencing, alternatives vary more considerably with young persons than it does for adult offenders.¹⁰⁴

Custodial dispositions of up to two years is allowed and according to the Young Offenders Act : -

Where the youth court makes more than one disposition at a time, the combined duration of the dispositions shall not exceed two years¹⁰⁵

Provision against the abuse of discretionary power in sentencing of juveniles is also provided for:-

No disposition can be made which results in punishment greater than the maximum punishment that would be applicable to an adult who committed the same offence.¹⁰⁶

Like their American counterparts, the Canadians are also aware of the harsh realities of prison life and the negative impact that the removal of the young individual from his family could have on him. Riley therefore suggests that institutionalization is to be avoided wherever possible.¹⁰⁷

¹⁰³ LC Wilson *Juvenile Courts In Canada* (1982) 205–206.

¹⁰⁴ LC Wilson “Changes to Federal Jurisdiction Over Young Offenders : The Provincial Response” (1990) 8 *The Canadian Journal Of Family Law* 340.

¹⁰⁵ Section 20(3), Section 20(5) and Section 20(7) of The Young Offenders Act.

¹⁰⁶ Section 20(1) (K) and Section 20(4) of The Young Offenders Act.

¹⁰⁷ A Riley “Proportionality As A Guiding Principle In Young Offender Dispositions” (1994) 17 *Dalhousie Law Journal* 563.

As expected, the Young Offenders Act has modified various sections of the Juvenile Delinquents Act relating to persons being placed in custody and now authorizes certain benefits that were not previously granted in terms of the Juvenile Delinquents Act.

The provincial director of a province or his delegate now has the authority to temporarily release a young person from custody for a period not exceeding fifteen days, where he may find it necessary or desirable to release him for medical, compassionate or humanitarian reasons or simply for the purpose of rehabilitating the young person or re-integrating him into the community.¹⁰⁸

The responses to the Young Offenders Act throughout Canada's provinces has been varied. While some provinces have enacted legislation virtually identical to the sentencing provisions of the Act, others have been innovative and have added new sentencing options to treat young offenders.¹⁰⁹

The humanitarian ideology that caught alight in Canada and spread like wild fire through the work of Kilso was that, it was not appropriate to punish children for their misdeeds, it was more fitting to help. He therefore presented the argument that juvenile offenders should not be regarded or criminals but should rather be dealt with in the same manner as one would treat a sick or defective child.¹¹⁰

UNITED KINGDOM

The British approach to sentencing of juveniles has always shown itself to be fully conversant with the real problems of implementation and has resulted in the delivery of a humane and just criminal justice system for young people.

¹⁰⁸ LC Wilson *Juvenile Courts in Canada* 201–202.

¹⁰⁹ Ibid at 339–340.

¹¹⁰ N Boyd "The Circularity of Punishment And Treatment : Some Notes on Legal Response to Juvenile Delinquency" (1980) 3 *The Canadian Journal Of Family Law* 427.

Like in most other international jurisdictions, the imposition of corporal punishment reared its ugly head at the dawn of juvenile justice and it became available as a method of treatment in both adult and juvenile courts. In 1925, noting that only one point eight six percent of those found guilty of the offences for which they were tried, were ordered to be whipped, the committee on Corporal Punishment recommended that this degrading and humiliating sentence be abolished for offenders of all ages and this became the law in 1948.¹¹¹

The shift in emphasis in sentencing trends in Britain from making the offender pay for what he has done by suffering retributive punishment to helping him become a productive and law-abiding member of society is reflected in British legislation as well as the work of sentencing reformists.¹¹² The British appear to have completely surpassed both Canada and America in their approach and attitude to capital punishment. While the Canadians were still toying with the death penalty, making it available in the commission of certain crimes, the Britons have completely discarded the death penalty as a form of sentencing for its young offenders.¹¹³

In Canada and America, the use of long prison sentences on children in an apparent attempt to rehabilitate them is also condemned.¹¹⁴ The counter-productivity of custodial sanctions is also frowned upon in Britain. In its attempt to propose a new sentence which would replace institutionalization and other forms of custodial sanctions for young offenders, the Advisory Council on the penal system had the following to say:-

If the nature of the offence is not such that the court considers an immediate custodial sentence necessary, but at the same time a considerable degree of social intervention and control over the offender's time is warranted, the court should

¹¹¹ WE Cavenagh *Juvenile Courts, The Child And The Law* (1967) 94–95.

¹¹² *Ibid* at 95.

¹¹³ ME Garner "Capital Punishment for Minors" (1994) 15 *Journal of Juvenile Law* 154.

¹¹⁴ JC Costello and EJ Jameson "Ethical And Legal Duties of Health Care Professionals To Incarcerated Children" (1987) 8 *The Journal Of Legal Medicine* 220–221.

seriously consider whether it could not use a non-custodial sentence.¹¹⁵

Parliament has thus enacted legislation which severely curtails the powers of courts to sentence young offenders to youth custody.¹¹⁶ Right up until May 1983, prison sentences including suspended sentences were available for offenders between the ages of seventeen and twenty. The effect of the Criminal Justice Act of 1982 however saw the abolition of imprisonment for young adults and replaced it with the 'new youth custody sentence'.¹¹⁷ In terms of section 7(8) of the Criminal Justice Act of 1982, the maximum term of imprisonment is twelve months.¹¹⁸ The approach of the Court of Appeal has been that a discount should be given for a plea of guilty, resulting in a sentence normally being reduced from twelve to nine months, as was the situation in the case of Dixon v Reynolds.¹¹⁹ Even though many sentencers expressed the sentiment that often their powers are inadequate to satisfy the demands of the public and the victim,¹²⁰ the Law Reform Commission in Ireland in its recent Reform on Sentencing is adamant in its submission that a sentence of imprisonment should be regarded as a sentence of last resort. The Law Reform Commission also maintains the stance that community service orders should be utilized in all circumstances and not merely in substitution for a sentence of imprisonment. Probation service orders should also be exploited to their fullest.¹²¹ This sentiment was also expressed in the government's approval of this change in emphasis in the White Paper Proposal on 'Crime, Justice and Protecting the Public'.¹²²

Also reflected in the Green Paper on 'Punishment, Custody and the Community' and the Action Plan Document was an interest by the government to see the extension of inter-agency co-operation of social

¹¹⁵ P Cavadino "Suspended Sentences For Young Offenders" (1986) 136 *New Law Journal* 934.

¹¹⁶ JMA Barker "Some Problems In Sentencing Juveniles" (1985) *The Criminal Law Review* 759.

¹¹⁷ P Cavadino "Suspended Sentences for Young Offenders" (1986) 136 *New Law Journal* 934.

¹¹⁸ JMA Barker "Some Problems in Sentencing Juveniles" (1985) *The Criminal Law Review* 759.

¹¹⁹ Dixon v Reynolds – unreported decision (1983).

¹²⁰ JMA Barker "Some Problems in Sentencing Juveniles" (1985) *The Criminal Law Review* 759–760.

¹²¹ The Law Reform Commission "Report On Sentencing" (Ireland) 69.

¹²² ID Brownlee "Targeting The Young Adult Offender : An Evaluation Project In Leeds" (1990) *The Criminal Law Review* 852–853; The Home Office White Paper "Crime Justice and Protecting the Public Cm.965 (1990) H.M.S.O."

services, probation services, non-statutory organisations and the juvenile courts into the young adult group. The aim of the amalgamation of efforts of the agencies was to find community-based alternatives to custody for young offenders, particularly those within the age group of seventeen to twenty.¹²³ It was against this background that the Young Adult Offenders Project emerged in Leeds.¹²⁴

Similar to the focus of the Department of Youth Services in Massachusetts on the individual needs of the offender,¹²⁵ the objectives of the programmes of the Young Adult Offenders Project were tailored to suit the assessed needs of the individual.¹²⁶ Sessions were therefore designed on a 'one-to-one' basis to encourage the offender to face up to what he or she had done, both in terms of the impact it has had on their own lives and on the effect that it has had on their victims. Assistance was also given to the offender with matters such as accommodation, job-seeking and controlling finances. The primary aim was to help the young offender to develop his self control, self esteem and responsibility and to assist him in avoiding the commission of offences in the future.¹²⁷

In dealing with young persons, Cavenagh provides that the principles which ought to guide every court when dealing with young persons is that they must have regard for the welfare of the child, take the necessary measures for removing him from undesirable surroundings and ensure that every provision is made for his education and training.¹²⁸

¹²³ Ibid at 853.

¹²⁴ Idem.

¹²⁵ D Passarelli "Department of Youth Services : Control over Sentencing and Monitoring of Juvenile Delinquents" (1995) 21 *New England Journal on Criminal and Civil Confinement* 585.

¹²⁶ ID Brownlee "Targeting the Young Adult Offender : An Evaluation Project in Heeds" (1990) *The Criminal Law Review* 853.

¹²⁷ Idem.

¹²⁸ WE Cavenagh "*Juvenile Courts, the Child and the Law* (1967) 95.

AUSTRALIA

The compilation and dissemination of sentencing ideologies in Australia owes its origin to a unique and capricious socio-economic climate. Since its development is comparatively newer than most other jurisdictions, the Australians have availed themselves to the benefit of borrowing from these more 'mature' systems. Community-service in Western-Australia has been modelled on the English experience. However the difference in England is that the order constitutes a sentence. Unlike the English approach whereby both community-service and probation are treated as distinct sentencing options, community service in Australia is not recognized as a sanction in its own right.¹²⁹ Due to the fact that its nature draws from the characteristics of community-service and probation and the fact that its single clear aim is obfuscated, many have been critical of community-service in Australia.

According to Morgan a common misconception that exists about community-service and probation is that they are regarded as inseparable siamese twins. He therefore maintains that even though one option may mirror common features of the other, they are conceptually very different and must be regarded as such.¹³⁰ There are many who also feel that community-service and probation have the potential to be developed as alternate sanctions to imprisonment.¹³¹ This idea has therefore given fresh impetus in Australia to develop a hierarchy of sanctions which courts can take into consideration in sentencing young offenders.¹³²

Like other foreign jurisdictions, Australia's dissatisfaction with a system which imprisons its young and deprives them of the essence of their youth and

¹²⁹ N Morgan "Imprisonment As A Last Resort : Section 19A of The Criminal Code And Non-Pecuniary Alternatives To Imprisonment" (1993) 23 *The University Of Western Australia Law Review* 307-308.

¹³⁰ *Ibid* at 307.

¹³¹ *Ibid* at 318.

¹³² New South Wales Law Reform Commission "Discussion Paper 33 – Sentencing" April 1996 12-13.

freedom is well founded. The New South Wales Law Reform Commission emphasized that in its treatment of young offenders, less weight is to be given to retribution and deterrence and special consideration to the prospect of rehabilitation.¹³³ Due to these underlying core values that guide the sentencing of youth offenders, the Law Commission has expressed disapproval of custodial sanctions and in its recommendations stipulates that as far as possible non-custodial options should be utilized.¹³⁴

Legislative attempts in other jurisdictions pales in comparison to the client-centred values in the Victorian Children and Young Persons Act of 1989. This remarkable piece of legislation attempts to tell lawyers who appear in courts on behalf of juveniles exactly where their primary loyalties must lie. It provides that any lawyer representing a child must act in accordance with the wishes of the child, having regard to the maturity of the child, of course.¹³⁵

The above appears to be in keeping with the United States National Advisory Committee on Criminal Justice Standards and the Goals Task Force on Juvenile Justice and Delinquency Prevention which stipulates that the principal duty of an attorney is to represent a client's interest under law. While it is desirable for the lawyer to seek the advise of parents or other interested persons in making any decisions regarding the child, ultimately the lawyer is bound by the decision which reflects the child's interests.¹³⁶

EUROPE

SWEDEN

With its egalitarian approach and innovative handling of its juvenile offenders, Sweden has far surpassed juvenile justice developments in America, Britain,

¹³³ Ibid at 12.

¹³⁴ Ibid at 12-13.

¹³⁵ Section 20(a) of The Children And Young Persons Act of 1989.

¹³⁶ A Freiberg , R Fox and M Hogan "Procedural Justice In Sentencing Australian Juveniles" (1989) 15 *The Monash University Law Review* 297.

Canada and Australia. While the debate over the issue still looms in these jurisdictions, institutionalization no longer exists in Sweden as a sanction for young offenders. It was the Working Group set up by the National Council for Crime Prevention in 1977 which, in its report on a 'new penal system', gave impetus for the reformation of the Sentencing System in Sweden.¹³⁷ It advocated a decreased use of incarceration, a general lowering of repression, abolition of indeterminate incarceration and the increased use of fines and other non-incarcerating sanctions.¹³⁸ Therefore, due to the dearth of statistics indicating the effectiveness of institutionalization as a sanction for young offenders, youth imprisonment was abolished in 1980.¹³⁹

In support of the idea that institutionalization does not work, the Protective Law Commission has revealed statistics indicating that where young offenders are sentenced to sanctions which deprive them of their liberty the recidivism rate was much higher and where these sanctions were of long duration the recidivism rate was particularly high.¹⁴⁰

In Sweden, *ungdomsbrattlighet*, or youth criminality, is dealt with more as a social or a welfare problem. In Stockholm, where the young person is under eighteen, the police report goes directly to the Social Welfare Committee. The District Attorney then awaits a statement from the Committee about what measures would be taken in the handling of the youth. If, on the other hand, the alleged offence is thought to be merely childish misdeeds, then the case is closed without the youth being officially charged. However, what is important is that the offender would have to admit the offence. If the offence is denied then prosecution would follow.¹⁴¹

In Sweden, the formalized and rigid procedural rules common to other sentencing systems are totally dispensed with, leaving the proceedings as 'child-friendly' as possible. The well-being of the child is taken into

¹³⁷ C Clarkson and R Morgan *The Politics Of Sentencing Reform* (1995) 98.

¹³⁸ *Idem.*

¹³⁹ *Idem.*

¹⁴⁰ UV Bondeson "Alternatives To Imprisonment" in J Hagan (ed) *Crime And Society* (1994) 29.

¹⁴¹ RM Regoli and JD Hewitt *Delinquency In Society – A Child Centred Approach* (1991) 360.

consideration. There is little adversary eloquence, the child does not have to take an oath and he can change or withdraw his statement at any time, allowing the youngster to feel less alienated and victimized.¹⁴²

In the Protective Law Commission's Work, the assertion was made that the purpose of criminal policy was to protect the community and its members against criminal activity by preventing crime. The Commission also referred to research which indicated that the majority of inmates in correctional institutions had been brought up in violent, anti-social environments. The Commission stressed the importance of the determining years of childhood and a good upbringing by placing emphasis on treatment and the child's well-being.¹⁴³ As a result, the Commission stated that there was a need for different kinds of treatment measures, first to dispel any physical or mental weaknesses, second to ensure that the offender gets a job and third that he is placed in a suitable environment and in keeping with his needs.¹⁴⁴

THE FAR EAST

SINGAPORE

Sentencing of juvenile offenders in Singapore differs dramatically from other jurisdictions. It still imposes corporal punishment as a sentencing option. This has been Singapore's solution to the increase in juvenile offences and the aim to deter future offenders is the primary mission of sentencing.

It was the case of eighteen-year-old, Ohio youth, Michael Fay who was sentenced to six lashes in Singapore prison which brought Singapore's sentencing policy to the fore. Had he committed the same offence of vandalism in America, Fay could have received a sentence of sixty days in jail, a fine of five hundred dollars and restitution to the property owner. An

¹⁴² Idem.

¹⁴³ UV Bondeson "Alternatives to Imprisonment" in Hagan (ed) *Crime and Society* 29.

¹⁴⁴ Idem.

appeal by President Clinton only resulted in a reduction of the lashes from six to four.¹⁴⁵ American public reaction to Fay's sentence was split between those praising Singapore for its intolerance of petty crime and those who felt that Fay had been brutally punished for a minor offence. A poll conducted jointly by C.N.N. and TIME in April 1994 produced interesting statistics. It was found that forty-six percent of those who were questioned approved of Fay's punishment, giving as the reason for approval their frustration over the increasing crime rates.¹⁴⁶

In view of the fact that Americans come from a culture which 'physically sanctions' its young for offences,¹⁴⁷ statistics which lean towards corporal punishment should not come as too much of a surprise.¹⁴⁸

CHINA

The Chinese approach to the care and treatment of its 'wayward' youth is indeed impressive. Unlike Singapore which shows itself to be an angry parent with low tolerance of childish pranks, China, on the other hand, is patient with its youth, allowing them to reform through nurturing. This nurturing attitude seems to have the desired result in China.

Nearly eighty-five percent of juveniles who are released from correctional institutions stay out of trouble.¹⁴⁹

According to Chinese law, juveniles under the age of fourteen are reformed at home and those between the ages of fourteen and eighteen are sent to correctional institutions.¹⁵⁰ The Junshun Juvenile Delinquency Reform and Vocational School which houses approximately one thousand two hundred

¹⁴⁵ S Bloom "Spare The Rod, Spoil The Child? A Legal Framework For Recent Corporal Punishment Proposals" (1995) 25 *The Golden Gate University Law Review* 361.

¹⁴⁶ Ibid at 362.

¹⁴⁷ Garner "Capital Punishment for Minors" (1994) 15 *Journal of Juvenile Law* 152.

¹⁴⁸ Bloom "Spare The Rod, Spoil The Child? A Legal Framework For Recent Corporal Punishment Proposals" (1995) 25 *The Golden Gate University Law Review* 362.

¹⁴⁹ Regoli and Hewitt *Delinquency in Society - A Child Centred Approach* 408.

¹⁵⁰ Idem.

juveniles (about one thousand boys and two hundred girls), comprises basically two kinds of offenders: those who have been convicted and sentenced for serious crimes (one-fifth) and those who have committed minor offences (four-fifths). Both these groups are educated and also take part in useful work which could assist them when released, such as electronics repair, art and painting, raising chickens, sewing and making mirrors.¹⁵¹

The Chinese approach is to be commended and owes its success rates to the attitude of its staff who make a concerted effort in attempting to reform their juveniles and re-integrate them into society. They call themselves 'gardeners' who help to cultivate and mature 'young plants', referring to young people, whom they groom to be fine members of the community.¹⁵²

AFRICA

Having emerged from the 'storm' of colonialism and subordination, African countries were left to their own devices in the development of a just and humane justice system for its young people. Even though the colonial influence is apparent in its legislative developments, African countries were often torn between this and their own cultural beliefs in their treatment of juvenile ill.

In the treatment of its young offenders, states have used various methods, some focusing on just desserts, others on rehabilitation, while others only emphasise restitution.

In Zaire, the approach is that young offenders are released to the custody of their parents on condition that their parents are to ensure that their behaviour is to be improved. The Ivory Coast only concerns itself with offenders from the age of thirteen onwards. In terms of its Code of Criminal Procedure, the court may impose one of the following sentences:-

¹⁵¹ Idem.

¹⁵² Idem.

1. placement in the care of his parents; or
2. placement in an institution or in a licensed medical or mediocopedagogic establishment; or
3. placement in the care of a children's Aid Service; or
4. placement in an appropriate boarding school for offenders in the same age group.

In Kenya, the sentenced youth is sent to remand homes and then to correctional or approved schools, depending on the availability of vacancies. Here the emphasis is not on punishment but rather to teach children to become responsible and law-abiding citizens. Nigeria's measures comprise of reformatory and preventive methods. Where youths below the age of sixteen commit offences, they are housed in approved schools until their eighteenth year. In Nigeria, Borstal institutions which cater for the rehabilitation of the young offender, are used as an alternative measure to imprisonment to house particularly serious offenders between the ages of sixteen and twenty-one years.¹⁵³

In 1972, Kenya with a population of twelve million had only nine juvenile offenders. Ivory Coast, with a population of six million in 1975 recorded only one hundred and ninety-seven offenders and Nigeria in 1976, with a population of fifty-five million showed itself as having a mere one thousand and sixty-six young offenders.¹⁵⁴ The above statistics raise questions about the low delinquency rates and begs an enquiry about the true state of affairs.

In his work on juveniles in Africa, Igbinovia states that the main reason why it is difficult to know exactly how much delinquency exists in Africa is that people tend to deal with the problem themselves without resorting to higher authorities.¹⁵⁵ Instead of going to the police, the injured party would attempt to obtain compensation from the parent of the guilty youth and if his parents are

¹⁵³ PE Igbinovia "Perspectives on Delinquency in Africa" (1985) 9 *Journal Of Juvenile Law* 31-33.

¹⁵⁴ *Ibid* at 18-19.

¹⁵⁵ *Ibid* at 20.

unknown, the injured party normally takes it upon himself to subject the offender to a spanking.¹⁵⁶

While the writer is in agreement with the process of allowing communities and families to be involved in decision-making in respect of sanctions to be imposed on the young offender, the concern however, is that the possibility of abuse should not be overlooked. Due to community or family intervention in trying to curb the delinquency problem in Africa, juvenile delinquency may be a greater problem than is officially recorded. In light of the above, it is suggested that an earnest effort is required by the states to ensure that their cultural practices are in line with the international principles of what is in the child's best interest. A revision and reformation of sentencing structures, in order to marry the above two concepts and concisely lay down guidelines for sentences of young offenders, is what is needed by those African states which do not have such a policy in existence.

Like most other African states, South Africa too has not had a separate system for dealing with its juvenile offenders. In seeking solutions for the treatment of juveniles in conflict with the law, a variety of different Acts had to be consulted in order to determine the permissible mode of treatment.¹⁵⁷ What this resulted in however was a fragmented and unsatisfactory approach which was totally uncondusive to the best interests of the child. The following discussion therefore focuses on the South African perspective in respect of the development of a separate juvenile justice system.

3.3 THE SOUTH AFRICAN PERSPECTIVE

As far as the development of juvenile sentencing reform was concerned, a comparison of the South African situation with that of other jurisdictions reveals that South African development in the field of juvenile justice was by far much slower. While the rest of the world proceeded with legislative

¹⁵⁶ Idem.

¹⁵⁷ These Acts include – The Criminal Procedure Act 51 of 1977, The Child Care Act 74 of 1983, The Correctional Services Act 8 of 1959 and The Probation Services Act 116 of 1991.

developments in incorporating more humane sentencing principles for young offenders, the South African approach to the handling of its juveniles remained anachronistic. Sentencing authorities persisted in the use of corporal punishment as a means of curbing juvenile misconduct. South African 'obsession' with the use of this form of sanction can be ascribed to a number of factors. Due to its authoritarian nature and the fact that it was considered as being especially appropriate for children, the South African judicial system tended to exploit this one particular option when sentencing its juvenile offenders.¹⁵⁸

Apparently the misconception that seemed to justify its popularity was that it was not considered as being a harsh form of sanction, but rather it was deemed as a 'loving chastisement' which combined paternal anger with affection and concern.¹⁵⁹ Those who supported its use also claimed that as a sentence on children it was an especially effective deterrent. As a result of this thinking a study by Midgley on South African juvenile courts revealed that about fifty-seven percent of all juveniles convicted were sentenced to a whipping.¹⁶⁰ Nevertheless inspite of its popularity among sentencers, the British Advisory Council on the Treatment of Offenders submitted that there was no evidence statistical or otherwise to verify that whipping or coporal punishment had a deterrent effect.¹⁶¹ On the contrary the English Curtis Commission revealed that the consequences of a whipping were in fact psychologically damaging to the child.¹⁶² As a result of the above-mentioned fallacies and a failure to heed humanitarian concerns for the negative psychological effects of corporal punishment, statistics revealed that during the period 1991 – 1993 approximately 30 000 to 40 000 young offenders were sentenced to be whipped annually.¹⁶³ It is not surprising therefore that with the advent of the Constitution of the Republic of South Africa Act 200 of 1993

¹⁵⁸ S Pete "To Smack or Not to Smack? Should the Law Prohibit South African Parents from Imposing Corporal Punishment on the Children" (1998) 14 *The South African Journal of Human Rights* 442.

¹⁵⁹ *Idem*.

¹⁶⁰ D van Zyl Smith and L Offen "Corporal Punishment – Joining Issue" (1984) *The South African Journal on Criminal Justice and Criminology* 71-72.

¹⁶¹ *Ibid* at 72.

¹⁶² *Ibid* at 72.

¹⁶³ *Ibid* at 444.

that the constitutionality of the imposition of corporal punishment was to become an issue under scrutiny. The landmark decision in question being that of S v Williams and Others.¹⁶⁴ From the findings of the Court it was concluded that judicial corporal punishment was contrary to the Constitution as it constituted 'cruel' inhuman or degrading treatment or punishment'.¹⁶⁵ (The case of S v Williams and Others is dealt with in detail in Chapter 4).

Further still, the impact of the following legislative enactments led to the final abolition of corporal punishment in South Africa in 1997. In terms of the South African Schools Act 84 of 1996 (which took effect in 1997), any person responsible for administering corporal punishment to a child can be found guilty of assault.¹⁶⁶ As a result of the Correctional Services Second Amendment Act 79 of 1996 (which also came into effect in 1997) the imposition of corporal punishment as a mode of discipline within prisons has also been finally eradicated. The purpose of the Amendment to the Correctional Services Act is the exclusion of all provisions dealing with the infliction of corporal punishment within prisons.¹⁶⁷ Last but not least, the Abolition of the Corporal Punishment Act 33 of 1977 has repealed all legislation relating to the imposition of corporal punishment as a sentence by any court of law. (Pete avers that this would also include tribal courts)¹⁶⁸ Indeed, for a country which made a 'tradition' of judicial corporal punishment, the significance of the above recent legislative developments cannot be ignored.¹⁶⁹

An assessment of sentencing trends since the abolition of the sentence of whipping has revealed interesting results. Statistics revealed by the Department of Correctional Services indicate that for the period between 31:07:95 to 31:07:96, there was approximately a 30% increase in the number

¹⁶⁴ S v Williams and Others 1995 (3) SA 632.

¹⁶⁵ Whipping was regarded as being contrary to Section 12 of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁶⁶ Section 10 (2) of The South African Schools Act 84 of 1996.

¹⁶⁷ Pete "To Smack or Not to Smack or Not to Smack? Should the Law Prohibit South African Parents from Imposing Corporal Punishment on their Children" (1998) 14 *South African Journal of Human Rights* 443.

¹⁶⁸ *Idem*.

¹⁶⁹ *Idem*.

of children serving prison sentences.¹⁷⁰ Just over a year later (30:09:97), the percentage for the daily average of sentenced children had risen to 61,89%.¹⁷¹ While there may be a number of possible reasons for the increase, the abolition of the sentence of whipping has to be included amongst them.¹⁷² From an examination of prison conditions to which children are subjected, which reveals that there is minimum room for rehabilitative efforts, (See Chapter two for a discussion of these conditions), the writer is in agreement with the submission by Sloth-Nielsen that the need to focus on diversion and alternative sentencing options is now greater than it ever was.¹⁷³

Section 254 of the Criminal Procedure Act 51 of 1977 and Section 11 of the Child Care Act 74 of 1983 provide the legislative mechanisms which enable the process of diversion. The manner in which these provisions operate to keep children out of the criminal justice system is that they allow for the conversion of a criminal case to a children's court enquiry.¹⁷⁴ This conversion is significant in that it eradicates possible stigmatisation by eradicating all criminal charges imposed on the child. The question that emerges then is, do we in South Africa have the necessary juvenile courts or children's courts to facilitate the functioning of these judicial processes? The answer is both yes and no.

Juvenile Courts are criminal courts which are specifically designed for trying juvenile offenders. As far as juvenile courts are concerned, at present South Africa does not have such structures in place for trying children accused of criminal offences.¹⁷⁵ The result is that where the child is brought before such

¹⁷⁰ J Sloth Nielsen "Juvenile Justice Review 1996" (1996) 9 *The South African Journal of Criminal Justice* 350-351.

¹⁷¹ J Sloth Nielsen "Juvenile Justice Review 1997" (1998) 11 *The South African Journal of Criminal Justice* 104-105.

¹⁷² Sloth Nielsen "Juvenile Justice Review 1996" (1996) 9 *The South African Journal of Criminal Justice* 351.

¹⁷³ Sloth Nielsen "Juvenile Justice Review 1997" (1998) 11 *The South African Journal of Criminal Justice* 107

¹⁷⁴ Skelton "Developing a Juvenile Justice System for South Africa : International Instruments and Restorative Justice" (1996) *Acta Juridica* 188.

¹⁷⁵ A Skelton "Children Accused of Crimes" in A Skelton (ed) *Children and the Law* (1998) 156.

a court, he or she is exposed to exactly the same adversarial model of criminal justice as any adult would be. Children's courts on the other hand are not criminal courts. Their purpose is to deal with children in need of care.¹⁷⁶ As far as children's courts are concerned, by virtue of prevailing legislation which provides that every magistrate's court must include a children's court, such courts do exist in South Africa. In spite of the fact that children's courts need not comprise special rooms, one finds that in larger South African cities, specific rooms are actually set aside for hearing children's matters.¹⁷⁷ Since circumstances may require for the child to be dealt with in terms of the criminal court or a children's court, the need for further development of these structures within our juvenile justice system is imperative.

In situations where children are charged with criminal offences, if the magistrate is convinced that the commission of the offence was the result of poverty, abuse, neglect or peer pressure, it is incumbent upon the magistrate to ensure that the criminal case is converted to a children's court enquiry and dealt with accordingly.¹⁷⁸ Skelton avers that this procedure should also be extended to cater for instances where parents cannot be traced or where parents refuse to assume responsibility for their children.¹⁷⁹ She has expressed dismay that while this particular mechanism for diverting children out of the criminal justice system has been a permissible option for many years, it has been under-utilized.¹⁸⁰ In view of the obvious advantages of diverting children out of the criminal justice system to a welfare system, these submissions are well founded.

Any discussion relating to children's court proceedings would not be complete without also examining the child's right to legal representation. Section 28 (h) of the Constitution entitles the child who has been arrested the opportunity to

¹⁷⁶ Section 13 and Section 14 of the Child Care Act 74 of 1983.

¹⁷⁷ N Zaal "Children in Need of Care" in A Skelton (ed) *Children and the Law* (1998) 129.

¹⁷⁸ *Ibid* at 138.

¹⁷⁹ Skelton "Developing a Juvenile Justice System for South Africa : International Instruments and Restorative Justice" (1996) *Acta Juridica* 188-189.

¹⁸⁰ *Ibid* at 138.

obtain legal representation.¹⁸¹ However this right to legal representation is not an absolute one. The Constitution specifically provides that the State would only bear the costs of this representation in situations where 'substantial injustice would otherwise result'. In view of the fact that the phrase 'substantial injustice' has not been clearly defined, the fear expressed in this regard is that it may give rise to a situation whereby different courts may interpret the provision differently.¹⁸² Nevertheless, the legal thought propounded in this regard is that it is indeed not that difficult to determine whether substantial injustice would occur, since in most, if not all, in instances where a young person has been arrested, substantial injustice would certainly occur if he or she does not have legal representation.¹⁸³ The findings of the fieldwork undertaken by the writer to assess the correlation between legal representation and the sentences received by juvenile offenders, also supports the above argument.

TABLE 3.1

LEGAL REPRESENTATION OF JUVENILE OFFENDERS IN COURT

Name of Prison	Westville Prison (males)	Westville Prison (females)	Harrismith Prison	Krugersdorp Prison	St. Albans Prison
Respondents that Received legal Representation	50%	45%	40%	56%	88%
Respondents that did not have legal Representation	50%	55%	60%	44%	12%
Total	100%	100%	100%	100%	100%

¹⁸¹ Section 28 (h) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁸² Zaal "Children in Need of Care" in Skelton (ed) *Children and the Law* 33.

¹⁸³ Skelton "Children Accused of Crimes" in Skelton (ed) *Children and the Law* 154.

Note

The respondents who were legally represented were either represented by Legal Aid attorneys or had instructed private attorneys.

The respondents who were not legally represented, represented themselves in court.

DEDUCTIONS

It was found that while a legally represented male respondent at Westville Prison received a two year sentence of imprisonment for the offence of theft, another respondent at the same institution who was not legally represented and who was also convicted of theft, had received the same term of imprisonment. However, at Krugersdorp Prison where a legally represented respondent was sentenced to five years for robbery, a youth who was not legally represented was subjected to a ten year term of incarceration for the same offence. Further still, a respondent convicted of house-breaking and theft and who had an attorney received a four year sentence and one who had no legal representation received a longer prison sentence, seven years, for housebreaking and theft.

What can be ascertained from an examination of the above sample of interviewees, is that whilst in some instances legal assistance did not appear to affect the sentence imposed on the young offender in that the sentences received for those who were legally represented and those who were not were similar, nevertheless there was evidence to support the contention that those who were not legally assisted had received harsher sentences.

Considering that more than 80% of children who appear in South African criminal courts are unrepresented,¹⁸⁴ the statistics raise questions about the severity of sentences imposed on these indigent youth who more often than not do not have the necessary expertise to provide adequate self

¹⁸⁴ N Zaal and A Skelton "Providing Effective Representation for Children in a New Constitutional Era : Lawyers in the Criminal and Children's Courts" (1998) 14 *The South African Journal of Human Rights* 543.

representation. Zaal and Skelton also echo these sentiments. They submit that the lack of knowledge and skill on the part of the child makes it unlikely for him or her to emerge successful against a legally trained public prosecutor.¹⁸⁵ Their response to overcome this imbalance is that 'all' children appearing before criminal courts be provided with legal assistance.¹⁸⁶

The writer also submits that in keeping with the constitutional provision that 'every accused person has a right to a fair trial',¹⁸⁷ specialized legal advisory bodies or services which focus primarily on the needs of the accused child be created for this purpose. It is envisaged that the objective of this service should be to inform 'all' young accused persons of their rights, what is to be expected in respect of court-room proceedings and the role of the legal representative. It should be stressed however that if upon being provided with all of the above information, the child is still adamant that he does not require legal assistance, only then should the child be allowed to represent himself at his own trial. In view of the fact that currently in South Africa only the Legal Aid Board provides legal representation for children who cannot afford the services of a private lawyer, the suggestion propounded that an amalgamation of the services of the Legal Aid Board and the Association of Law Societies to jointly work together to improve the quality of legal representation for children in South Africa,¹⁸⁸ should receive serious consideration.

3.3.1 Recent Developments in the Field of Juvenile Justice

In a Human Sciences Research Council Report examining the conviction rates for juveniles between the period 1956 to 1988, it was revealed that conviction rates for murder, attempted murder, aggravated assault, robbery,

¹⁸⁵ Idem.

¹⁸⁶ Idem.

¹⁸⁷ Section 35 (3) of The Constitution of the Republic of South Africa Act 108 of 1996.

¹⁸⁸ Zaal and Skelton "Providing Effective Representation for Children in a New Constitutional Era : Lawyers in the Criminal and Children's Courts" (1998) 14 *The South African Journal of Human Rights* 559.

burglary and car theft were astoundingly high for juveniles.¹⁸⁹ Commenting on these figures Skelton *et al* maintained that it was clear that all earlier methods of dealing with juveniles were ineffective.¹⁹⁰ The factor identified for contributing to the escalation of conviction rates for juveniles in South Africa was that right up until 1990 there was a failure to admit that there was a problem at all. Notwithstanding the fact that various state departments were involved, the problem was compounded even further still, since no one particular department in South Africa could be held accountable for the handling of juvenile offenders.¹⁹¹ This realization gave impetus to the manifestation of the idea that the only effective solution for dealing with juveniles was a separate juvenile justice system.

In South Africa the South African Law Commission (SALC) was designated with the task of establishing this very system.¹⁹² The South African Law Commission first began by perusing documents which guided the international community. Drawing from sources such as the United Nations Convention on the Rights of the Child, the Beijing Rules, the Organisation of the African Unity's Charter on Children, and on Chapter 3 of the Interim Constitution of South Africa, (the international documents have been examined earlier in Chapter three), the drafters began a process of documenting proposals of what new legislation relating to juveniles ought to incorporate.¹⁹³

Since the ratification of the United Nations Convention on the Rights of the Child (1989), South African efforts have been geared towards transforming its approach of dealing with juvenile offenders.¹⁹⁴ As a member state South Africa has been under an international obligation to ensure the creation of a

¹⁸⁹ A Skelton, D Pinnock and R Shapiro "New Juvenile Justice Legislation for South Africa : Giving Children a Chance" (1994) 7 *The South African Journal of Criminal Justice* 339. The report revealed that the conviction rates were notably high for offenders in the age group 19-20 and especially among people defined as Coloured.

¹⁹⁰ *Idem*.

¹⁹¹ Juvenile Justice for South Africa "Proposals for Policy and Legislative Change" (1994) 4.

¹⁹² Skelton "Children Accused of Crimes" in Skelton (ed) *Children and the Law* 158.

¹⁹³ Juvenile Justice for South Africa "Proposals for Policy and Legislative Change" (1994) 5.

¹⁹⁴ The Convention on the Rights of the Child (1989) was ratified by the South African Parliament on 16 June 1995.

specialized legal framework for children.¹⁹⁵ Indeed the South African Law Commission's Issue Paper on Juvenile Justice (hereinafter referred to as the Issue Paper) must be regarded as a product of an effort in this direction.¹⁹⁶ As a result of years of intensive research and consultations with various experts in the field both nationally and internationally,¹⁹⁷ the South African Law Commission emerged with a document which attempted to holistically address juvenile justice issues in South Africa.

In keeping with international requirements which explicitly emphasized the child's best interests, the proposals and policy recommendations contained in the Issue Paper raised the following issues for debate and comment:-

1. The general principles upon which a future Juvenile Justice Act ought to be based;
2. Submissions to change the minimum age at which children are channelled through the criminal justice system;
3. The idea that there ought to be alternatives to arrest;
4. A consideration of the various models of juvenile courts for South Africa;
5. The need for specialization and training of personnel who work with juveniles;
6. Suggestions on how to improve and provide effective legal representation for children accused of crimes;

¹⁹⁵ Skelton "Developing a Juvenile Justice System for South Africa : International Instruments and Restorative Justice" (1996) *Acta Juridica* 182.

¹⁹⁶ South African Law Commission Project 6 Issue Paper 9 "Juvenile Justice" (1997).

¹⁹⁷ Juvenile Justice for South Africa "Proposals for Policy and Legislative Change" (1994) 5.

7. Proposals for sentencing guidelines which ought to be included in the new legislation; and
8. A presentation of various means of diverting children out of the criminal justice system.¹⁹⁸

In response to the international requirement for utilizing measures for diverting children out of the criminal justice system,¹⁹⁹ it is now necessary for South African sentencing authorities to ensure that the possibility of diversion is considered in each and every case involving children.²⁰⁰ The manner in which diversion operates is that the public prosecutor withdraws the charge against the accused on the basis that a diversion programme is completed. Programmes presently used in South Africa are Youth Empowerment Schemes, pre-trial community service, victim-offender mediation and family group conferencing.²⁰¹ What is quite significant about these programmes is that in attempting to achieve their goals, they embody principles of restorative justice. This approach takes cognisance of both the needs of the victim and the offender. While it is accepted that reparation to the victim or the family of the victim is necessary, implicit in these requirements, is that the offender needs to take responsibility and be 'accountable' for his behaviour. The question that one may be compelled to ask then is, what is meant by accountability? Accountability has been defined as one's understanding and acknowledging of harm caused and taking the necessary steps to make things right.²⁰²

Although some may be unable to conceive of the restorative justice model as being serious and regarding diversion options as forms of sanctions, Zehr's response to this is that the accepting of responsibility is indeed a painful process and will in time be understood as punishment.²⁰³

¹⁹⁸ Skelton "Children Accused of Crimes" in Skelton (ed) *Children and the Law* 158.

¹⁹⁹ Article 40 (3) (b) of the Convention on the Rights of the Child (1989).

²⁰⁰ Skelton "Developing a Juvenile Justice System for South Africa : International Instruments and Restorative Justice" (1996) *Acta Juridica* 189.

²⁰¹ Skelton "Children Accused of Crimes" in Skelton (ed) *Children and the Law* 154.

²⁰² H Zehr *Changing Lenses – A New Focus for Crime and Justice* (1990) 200-201.

²⁰³ *Ibid* at 209.

In spite of the fact that the South African Law Commission advocates that the restorative approach becomes intrinsically part of the juvenile sentencing process, it however concedes that as a model no system can be entirely restorative. Restorative processes can however be included amongst the available sanctions.²⁰⁴

Even though South Africa does have the legislative mechanisms to facilitate the process of diversion by way of conversion of a criminal case to a children's court enquiry,²⁰⁵ academics have expressed disapproval at the reluctance by courts to use this sentencing option.²⁰⁶ Yet a further set-back regarding diversion as a sentencing option is that since these programmes are only offered in areas where NICRO offices are available and in some areas where the Department of Welfare offers such programmes,²⁰⁷ this makes it inaccessible to the majority of young people who are accused of committing crimes. Nevertheless many researchers involved in the field are optimistic that it is possible to develop a juvenile justice system in South Africa based on the restorative justice model. Considering that diversion can take place in a variety of different ways, this means that judicial officers have a wider range of options at their disposal.²⁰⁸ What this ensures is that children can be subjected to the type of programmes which are specifically designed to meet their needs and circumstances which are appropriate to their individual cases.

3.4 SUMMARY AND CONCLUSION

The diverse approaches to sentencing practices, outlined in the discussion above can be attributed to a number of different factors. The most influential

²⁰⁴ South African Law Commission Project 6 Issue Paper 9, "Juvenile Justice" (1997) 61.

²⁰⁵ Section 254 of the Criminal Procedure Act 51 of 1977 and Section 11 of the Child Care Act 74 of 1983.

²⁰⁶ Skelton "Developing a Juvenile Justice System for South Africa : International Instruments and Restorative Justice" (1996) *Acta Juridica* 189.

²⁰⁷ Skelton "Children Accused of Crimes" in Skelton (ed) *Children and the Law* 154.

²⁰⁸ Skelton "Developing a Juvenile Justice System for South Africa : International Instruments and Restorative Justice" (1996) *Acta Juridica* 195.

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being the United Nations Convention on the Rights of the Child. As a result of the ratification of the United Nations Convention on the Rights of the Child, member states are bound by international law to ensure that their policies epitomise the principles and standards embodied in the above international document. The sentencing framework of these states therefore must reflect the requirements of international law. For the states which are not signatories to the United Nations Convention on the Rights of the Child such an obligation simply does not exist. Having only ratified the United Nations Convention on the Rights of the Child in 1995, South Africa was one of these states which were 'free' to use sanctions which did not mirror the concerns of the international community. Consequently, as discussed above, wide-spread abuses prevailed in the context of juvenile sentencing. The incessant use of corporal punishment, the lengthy terms of imprisonment and the housing of juveniles with adult offenders were just some of these unsuitable forms of sentences.

The comparative evaluation of sentencing practices applied in the various jurisdictions above have revealed interesting sentencing trends. While some jurisdictions have shown a preference for the use of more conventional forms of sentencing dispositions, others have opted for more unconventional methods of sanctioning juvenile behaviour. It has also been gleaned that foreign jurisdictions have also resorted to imbibing traditional ethnic practices and restorative justice in sentencing policy. While these sentencing options may be alien to South African sentencing principles, their effectiveness in reducing recidivism rates among young offenders is indeed sufficient reason to consider exploring their sentencing potential in future legislation.

CHAPTER FOUR

THE APPROACH OF SOUTH AFRICAN COURTS IN SENTENCING JUVENILE OFFENDERS

4.1 INTRODUCTION

In chapter four, the writer examines the range of sentencing options which have been utilized by courts in sentencing juvenile offenders. From a discussion of reported decisions indicating the various offences of which juveniles have been convicted and fieldwork undertaken by the writer to examine the sentence of imprisonment, the writer critically analyses the principles which have guided sentencers in sentencing juvenile offenders. The objective of the chapter is to ascertain whether the sentencing policy which has been employed by courts in regard to the choice of sentences has been sufficient in providing the most suitable sentence to meet the needs of the child that finds himself or herself in trouble with the law. To garner the required information a perusal of reported decisions from the period 1970 to 1998 is presented.

When a child has been found guilty of the commission of an offence, a court in assessing the appropriate sentence has recourse to the following options:-

4.1.1 Imprisonment;

4.1.2 Payment of a fine which may be allowed in instalments (Section 297 (5) (a) of the Criminal Procedure Act 51 of 1977, hereinafter referred to as the Criminal Procedure Act);

4.1.3 Placement under supervision of a probation officer or correctional official (Section 290 of the Criminal Procedure Act);

- 4.1.4 Placement in the custody of any suitable person designated by the court (Section 290 (10 (b) of the Criminal Procedure Act);
- 4.1.5 Placement in a reform school (Section 290 (1) (d) of the Criminal Procedure Act);
- 4.1.6 Correctional Supervision (Section 276 A of the Criminal Procedure Act);
- 4.1.7 Discharge with a caution reprimand (Section 297 of the Criminal Procedure Act); and
- 4.1.8 Postponement of sentence (Section 297 of the Criminal Procedure Act);

Whipping which used to be a sentencing option, was declared invalid in 1995 for being contrary to Section 10 and Section 11 (2) of the Constitution of South African Act 200 of 1993.¹

4.2 A CRITIQUE OF THE GENERAL PRINCIPLES RELEVANT TO JUVENILE SENTENCING

From an examination of the offences, committed by the respondents in the study, of murder, theft, public violence, assault, rape and narcotic related offences the writer presents the following common principles which have aided the decisions of sentencing authorities when sentencing juvenile offenders.

¹ See S v Williams and Others 1995 (7) BCLR 861 (CC).

4.2.1 Murder

TABLE 4.1

SENTENCES RECEIVED FOR THE OFFENCE OF MURDER

Name of Prison	Westville Prison (Males)	Westville Prison (Females)	Harrismith Prison	Krugersdorp Prison	St. Albans Prison
Sentences Received	None of the respondents interviewed were convicted of murder	1. 8 years of which 2 were suspended. 2. 20 years	1. 2 years	None of the respondents interviewed were convicted of murder	1. 5 years 2. 6 years 3. 8 years

For the offence of murder, the periods of the prison sentences imposed on the respondents in the study have ranged between five years to twenty years, with only one respondent at Harrismith Prison receiving a two year prison sentence. From the sample surveyed it seems that generally where young offenders have been convicted of murder, fairly lengthy prison sentences have been imposed in some instances.

The writer's finding seems to find support in case-law. In the cases of S v Hlongwana,² S v Machasa en Andere³ and S v Dlamini,⁴ prison sentences of at least twenty years were the focal point of debate and were the sentences that the Courts finally opted for in the cases of S v Hlongwana and S v Dlamini. However, in spite of the trial court's ruling in favour of a twenty year prison sentence in the case of S v Machasa en Andere, the statements of the Court of

² S v Hlongwana 1974 (4) SA 567 (D).

³ S v Machasa en Andere 1991 (2) SACR 308A.

⁴ S v Dlamini 1991 (I) SA 18 (AD).

Appeal for recognition of the tender age of the offender and the negative impact of such a sentence, resulted in the trial court's reducing the sentences to ten years and eight years in regard to the fourth and fifth appellants respectively.

What is also significant about the decisions of S v Hlongwana and S v Dlamini is that both these cases also brought the controversial issue of the death penalty into focus. Notwithstanding the fact that the death penalty was never allowed as a sentencing option for juveniles in South Africa, the use of the term 'youthful offenders' has created some obscurity in understanding exactly who is a 'juvenile',⁵ hence the debate surrounding the imposition of the sentence for the offenders in the above cases who were barely twenty years of age.

While one has to concede that the crimes committed in respect to the above-mentioned cases were of a heinous nature,⁶ and deserving of a severe sentence, however, in assessing the 'proper sentence'⁷ to be imposed, the Appeal Court in the case of S v Dlamini maintained that even though the accused was not a teenager but rather 'on the threshold of manhood', the 'possibility for rehabilitation' did exist.⁸ Hence the replacement of the initial sentence of the death penalty to one of twenty years imprisonment. Likewise in the case of S v Hlongwana, consideration of factors such as the influence of liquor and the influence of older persons also resulted in the original sentence being altered to one of a twenty year prison term as well.⁹

Another contentious issue where young persons have been convicted of murder, has been the weight that courts have attached to the importance of pre-sentencing reports. While the Court in the case of S v Hlongwana¹⁰ submitted

⁵ See discussion in chapter one for the definition of the term 'juvenile offender' and the difficulty associated with the use of the term in the South African context.

⁶ S v Dlamini 1992 (1) SA 18 (AD) at 29 D-E.

⁷ *Ibid* at 28 J.

⁸ *Ibid* at 32 C-D.

⁹ S v Hlongwana 1974 (4) SA 567 (AD) at 567.

¹⁰ *Ibid* at 567.

that the failure to obtain a probation officer's report was not crucial to the findings of the case and ultimately to the sentence which was imposed, the Court in the case of S v Jansen and Another maintained a contrary view. Botha J stated that it had become the established practice by courts to examine the probation officer's report in determining the appropriate form of punishment. Despite the fact that Courts have relied on pre-sentencing reports in assessing sentences for other offences, the learned Judge affirmed that particularly in regard to murder, the significance of such a report should not be underestimated.¹¹ He stated further that for serious offences like murder, it has now become the 'established practice' to ask for a probation officer's report.¹² Du Toit *et al* perceive this advantage as being two-fold. First, it endows the presiding officer with information which he ordinarily would not have and secondly it enables the presiding officer to exercise an independent discretion.¹³

In light of the above assertions, the writer respectfully submits that the Court in S v Hlongwana erred in discrediting the value of these reports.¹⁴ The South African Law Commission has also frowned upon the unfortunate situation where many children had sentences of imprisonment imposed on them without pre-sentence reports having been considered. The Commission therefore proposes that these documents be made compulsory in determining sentences, especially where the likelihood of prison sentences exist.¹⁵

¹¹ S v Jansen and Another 1975 (1) SA 425 (AD) at 428.

¹² *Ibid* at 428.

¹³ E Du Toit, FJ De Jager, A Paizes, ASQ Skeen and S Van der Merwe *Commentary on the Criminal Procedure Act* (1977) Chapter 28 at 28-10 D.

¹⁴ S v Hlongwana 1974 (4) SA 567 (AD) at 567.

¹⁵ The South African Law Commission Issue Paper 9 *Juvenile Justice* (1997) 63.

4.2.2 Theft

TABLE 4.2

SENTENCES RECEIVED FOR THE OFFENCE OF THEFT

Name of Prison	Westville Prison (Males)	Westville Prison (Females)	Harrismith Prison	Krugersdorp Prison	St. Albans Prison
Sentences Received	1. 2 years 2. 15 months	1. 5 years 2. 5 years + 90 days	1. 1 year 2. 1½ years 3. R500 or 5 months	1. 1 year 2. 2 years	1. 2 years 2. 2 years 3. 3 years 4. 5 years

From the fieldwork undertaken by the writer, theft was not only revealed as one of the more common offences committed by the respondents interviewed, but was also an offence found to be peculiar to both male and female interviewees (with 38% of the males and 36% of the females at Westville Prison serving sentences for the offence).¹⁶

Of the prison sentences received, a two year term of imprisonment was found to be a popular term of incarceration used by judicial officers to sentence juveniles convicted of theft. Of the five male respondents who were convicted of theft at Westville Prison, four were imprisoned for two years each. At St. Albans Prison two of the four respondents serving sentences for theft had also each received two year prison sentences. A possible reason why the female respondents at Westville Prison were in receipt of comparatively longer prison sentences (namely five years and five years and ninety days) could be that these respondents had previous convictions. This clearly indicates that previous

¹⁶ See Table 1.2 in chapter one for a detailed tabulation of the percentage of respondents who were convicted for the various offences.

convictions for similar offences or the evidence of criminal proclivities of accused persons tend to operate as aggravating factors when sentencing.

However, a distinct change in attitude in respect of sentences received for theft was noted for the respondents at Harrismith Prison. Two of the respondents who were serving sentences for theft had each been sentenced to fines of five hundred rands or five months imprisonment. Due to their financial deprivation, the payment of the fines was beyond the means of both the accused who therefore had no choice but to serve the five month prison sentences.

A sentence of a fine in the case of young persons who can barely support themselves is indeed questionable as such persons are generally of school-going age and therefore in most cases unemployed. Consequently they are unlikely to be in a position to pay the amount of money stipulated by the court. The unfair situation that often arises is that children who come from wealthier families escape punishment while the impoverished youth have no alternative but to go to jail. For the reasons presented, the writer is in agreement with the submission of the South African Law Commission that the imposition of fines on juveniles needs to be reviewed.¹⁷

What has been gleaned from case-law is that for the offence of theft, courts seem to show a propensity towards the use of reform schools as a sentencing option.¹⁸ In the realm of juvenile sentencing, this option was perceived as being a very severe sentence which was only to be imposed where juveniles had demonstrated marked criminal tendencies.¹⁹ However, in the cases of S v H and

¹⁷ The South African Law Commission Issue Paper *Juvenile Justice* (1977) 59; The argument for the dispensing of fines as a sentencing option does not only apply to theft but also holds for all offences where juvenile offenders are concerned.

¹⁸ An examination of the circumstances when courts have employed the option of reform schools and the role of the probation officer is dealt with later in chapter four. See 4.4.7 Reports by Probation Officers.

¹⁹ S v M en 'n Ander 1998 (1) SACR 384 (C).

Another,²⁰ S v L²¹ and S v M,²² notwithstanding the fact that some of the accused were first offenders who displayed no criminal proclivities whatsoever except for the acts for which they were convicted, all of the accused were ordered by the trial courts to be committed to reform schools. The sending of juveniles to reform schools was considered a preferred option in that it allowed for juvenile offenders to be sent to institutions other than prisons and so removed any stigmatisation associated with imprisonment.²³ However, while the whole point of committal to reform schools was intended to avoid long prison sentences, in a recent report by the Inter-Ministerial Committee, the observation was made that children sentenced to reform schools tended to serve longer sentences at these institutions than they would have if they had been imprisoned.²⁴ Due to this finding by the Inter-Ministerial Committee, it seems that there was indeed quite a strong likelihood that the young offenders in the cases of S v H and Another, S v L and S v M would have been subjected to long terms of confinement. Hence, the writer is in agreement with the decisions of the Courts to set aside the initial sentences and instead order that the accused in respect of all of the above cases dealt with in terms of a children's court enquiry,²⁵ an option which clearly dispelled the criminal stigmatization of the young accused. However, even though the magistrate in the case of S v T²⁶ also revealed a desire for dealing with the seventeen-year-old offender in terms of a children's court, the fact that the young accused had previously served a prison sentence, disintitiled the presiding officer from resorting to the use of this option.²⁷

²⁰ S v H and Another 1978 (3) SA 385 (E).

²¹ S v L 1978 (2) SA 75 (C).

²² S v M 1984 (3) SA 496 (A).

²³ A Skelton "Children Accused of Crimes" in A Skelton (ed) *Children and the Law* (1998) 145-158 at 157.

²⁴ The South African Law Commission Issue Paper 9 *Juvenile Justice* (1997) 58-59.

²⁵ S v L 1978 (2) SA 75 (C) at 77 D-E; S v M 1984 (3) SA 496 (A) at 518 H-I. The relevant legislation being Section 30 and 31 of the Children's Act 33 of 1960 which allows for the court to deal with the child in terms of a children's court enquiry.

²⁶ S v T 1993 1 SACR 468 (C).

²⁷ The prevailing legislation which now enables a court to deal with the child before a children's court enquiry is Section 13, 14 and 15 of the Child Care Act 74 of 1983.

Yet another case where the court had to contend with a very young accused convicted of theft, was that of S v Kwadiso and Another.²⁸ Without due consideration of the personal circumstances of the accused and the fact that the accused was a mere child of nine years old, the trial magistrate sentenced the offender to committal to a reformatory even though other options existed for dealing with a child of such tender years. The magistrate eliminated the possibility of committing the child to a children's home as he expressed more concern about the likelihood of the accused escaping and that he could have a bad influence on other children in the home.²⁹ On review the Judge felt that such fears were not sufficient to justify sentencing the child to a reform school³⁰ and as a result directed the matter be dealt with in terms of Section 30 and 31 of the Children's Act 32 of 1960.³¹

From an analysis of the above reported decisions relating to the offence of theft, it would appear that even though courts could have imposed more severe sentences, the obvious inclination towards dealing with matters in terms of a children's court enquiry instead, is noted. It is therefore clear that apart from the severity of the offences, the influence of factors such as the age or youthfulness of the accused, the absence of previous criminal records and the susceptibility to the influence of older persons have proven to be instrumental in the mitigation of sentences.³²

4.2.3 Public Violence

Although the offence of public violence is not unique to South Africa, the socio-economic and political climate during the apartheid era has been particularly

²⁸ S v Kwadiso and Another 1977 (3) SA 876 (E).

²⁹ Ibid at 877 A.

³⁰ Ibid at 877 B.

³¹ Section 30 and 31 of the Children's Act 33 of 1960 enabled the process of converting a criminal matter to a children's court enquiry. The prevailing legislation now is Section 13, 14 and 15 of the Child Care Act 74 of 1983.

³² The influence of each of the above-mentioned factors in sentencing is examined in detail later in the chapter.

conducive to creating an environment where people acted out violently in response to the conditions to which they were subjected. As the apartheid system was one which only secured the interests of the minority, the majority of the people rebelled against these imbalances and the uneven distribution of wealth and power.³³ Young people in South Africa were especially demonstrative. The cases of S v Tsatsi and Others,³⁴ S v Dingswayo and Others,³⁵ S v Quandu en Andere³⁶ and S v Mbuyisa³⁷ which deal with acts of public violence are all reflective of such discontentment among the youth.

While the decision for a term of imprisonment and a fine in the case of S v Quandu en Andere were set aside on appeal,³⁸ in regard to S v Tsatsi and Others,³⁹ S v Dingswayo and Others⁴⁰ and S v Mbuyisa,⁴¹ sentences imposed have included, a judicial whipping, a prison term and the payment of a fine respectively. While the severity of the above-mentioned sentences cannot be denied, their imposition on school children who were mainly first offenders raises even further controversy. Drawing from the principle that youth is usually a factor against imprisonment,⁴² the Appeal Court, in the case of S v Mbuyisa, took full cognisance of this as well as the fact that the accused had no previous convictions and over-ruled the lower courts decision of a three year prison sentence.⁴³

Notwithstanding the fact that most sentencers have yielded to sentences other than prison terms when they dealt with first offenders, the attitude of the Court in

³³ Proposals for Policy and Legislative change *Juvenile Justice for South Africa* (1994) at 3.

³⁴ S v Tsatsi and Others 1976 (1) SA 390 (T).

³⁵ S v Dingswayo and Others 1985 (3) SA 175 (KGD).

³⁶ S v Quandu en Andere 1989 (1) SA 517 (AA).

³⁷ S v Mbuyisa 1988 (1) SA 89 (N).

³⁸ S v Quandu en Andere 1989 (1) SA 517 (AA) at 518 I.

³⁹ S v Tsatsi and Others 1976 (1) SA 390 (T) at 392 A-C.

⁴⁰ S v Dingswayo and Others 1985 (3) SA 175 (CKGD) at 180 G-H.

⁴¹ S v Mbuyisa 1988 (1) SA 89 (N) at 94 A-B.

⁴² Du Toit, De Jager, Paizes, Skeen, Van der Merwe *Commentary on the Criminal Procedure Act* Chapter 28 28-16 A.

⁴³ S v Mbuyisa 1988 (1) SA 89 (N) at 93 G-H.

S v Dingswayo is inconsistent with this principle.⁴⁴ Having acknowledged that the Court had to pass sentence on first offenders, the learned judge nevertheless still subjected the youth to three years' imprisonment,⁴⁵ clearly indicating that first offendership or youth does not as a 'rule' prevent the imposition of prison sentences.⁴⁶

In their assertion that imprisonment is usually not desirable for first offenders, Du Toit *et al* are emphatic that Courts ought to give alternatives serious consideration.⁴⁷

The question following upon that therefore is, what are these alternatives and are they appropriate sentences for school-goers, who prior to their offence of public violence displayed no criminal tendencies?

While one has to concede that most of the sentencing options available in terms of Section 290 of the Criminal Procedure Act proved to be inadequate for effective handling of young offenders, Section 290 (1) (a) and (b) and Section 254 nevertheless still allow for judicial officers to implement sentences which do not directly draw juveniles into the criminal justice system.⁴⁸ It would also seem that even though in terms of Section 290 (1) (a), a young offender could be placed under the supervision of a probation officer or (b) be placed in the custody of any suitable person designated by Court, these options were seldom exploited, and certainly not used in regard to any of the above cases examined.

It would seem however, that the popular choice of sentencing juvenile offenders who had committed public violence was the payment of fines. In the case of S v

⁴⁴ S v Dingswayo and Others 1985 (3) SA 175 (CKGD) at 180H.

⁴⁵ *Ibid* at 180 D.

⁴⁶ The South African Law Commission Issue Paper 11 *Sentencing Mandatory Minimum Sentences* (1997) 14.

⁴⁷ Du Toit, De Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* Chapter 28 28-16 A.

⁴⁸ Section 290 (1) (a) and (b) and Section 254 of the Criminal Procedure Act 51 of 1977.

Mbuyisa, the Appeal Court reduced a three year prison sentence to a fine of five hundred rands.⁴⁹ Furthermore, in the cases of S v Dingswayo and Others⁵⁰ and S v Quandu en Andere,⁵¹ both of the Courts a quo required the offenders to pay fines. On appeal, however, the argument presented in S v Quandu en Andere for challenging and finally setting aside of the sentence of a monetary fine was due to the fact that the magistrate had not given due consideration to the fact that the accused were school-going youth who were unemployed.⁵²

4.2.4 Assault

Probably due to the dearth of effective options at the disposal of sentencing authorities, the observation made from an examination of case-law was the popularity among sentencers for whipping⁵³ and imprisonment.⁵⁴ From the 1970's up until the early 1990's sentencers have shown a preference for whipping. In fact so accustomed were South African Courts to juvenile whipping that in 1993 it was revealed that anything between thirty-five to forty thousand children were sentenced to whipping annually.⁵⁵ Although the sentence of a judicial whipping was not exclusive to the offence of assault, it has proven to be a favourable option amongst judicial officers when assessing a viable sentence for the offence of assault. In fact so bent was Judge Greenfield on this option in the case of S v Mguni (1973) that he maintained that due to the limited types of punishment available to the Court that very often corporal punishment was the only practical solution.⁵⁶

⁴⁹ S v Mbuyisa 1988 (1) SA 89 (N) at 94 A-B.

⁵⁰ S v Dingswayo and Others 1985 (3) SA 175 (CKGD) at 177 C-D.

⁵¹ S v Quandu en Andere 1989 (1) SA 517 (AA) at 518 F-I.

⁵² *Ibid* at 518 H-I; Refer to discussion on Theft for the writers motivation of why fines for children ought to be done away with.

⁵³ S v Mguni 1973 (2) SA 457 (R); S v T 1993 (1) SACR 468 (C).

⁵⁴ S v T 1993 SACR 468 (C) at 468 e-f; S v Vakalisa 1990 (2) SACR 88 (TK) at 95 h-j; See results of fieldwork undertaken by writer examining the sentence of imprisonment.

⁵⁵ S Pete "To Smack or Not to Smack? Should the Law Prohibit South African Parents from Imposing Corporal Punishment on their Children" (1998) 14 *South African Journal of Human Rights* 443-444.

⁵⁶ S v Mguni 1973 (2) SA 457 at 458.

While one has to admit that the options available to Courts in handling young offenders were certainly limited, however to consider corporal punishment as the only 'practicable' option, when at least ten other options existed,⁵⁷ is without a doubt stretching the truth. What can be observed therefore is that courts resorted to a quick and easy solution, the whip, without much consideration for the dignity and self respect of the young person.⁵⁸

TABLE 4.3

SENTENCES RECEIVED FOR THE OFFENCE OF ASSAULT

Name of Prison	Westville Prison (Males)	Westville Prison (Females)	Harrismith Prison	Krugersdorp Prison	St. Albans Prison
Sentences Received	None of the respondents interviewed were convicted for assault	1. 6 months	1. 6 months 2. 9 months 3. 1½ years	1. 42 months	1. 24 months

Yet another observation made from an examination of case-law as well as the writer's fieldwork, was the inclination among judges to impose prison sentences on young offenders found guilty of assault.

What is also quite note-worthy about the sentences imposed is that generally the offenders concerned were sentenced to fairly short prison sentences, seldom exceeding twelve months. At Harrismith Prison a six month and a nine month

⁵⁷ Refer to Introduction for a list of these options.

⁵⁸ The impact of the sentence of a judicial whipping on a juvenile offender is examined in the light of the decision of S v Williams and Others 1997 (7) BCLR 861 (CC), which led to the abolition of a juvenile whipping. Refer to discussion in 4.3 The Impact of Recent Constitutional Decisions on Current Sentencing Trends in the chapter.

sentence were imposed on a nineteen-year-old and an eighteen-year-old female respondent respectively. A nineteen-year-old female respondent at Westville Prison convicted of the same offence, also received a six month prison sentence. It seemed that only where the respondents were convicted of assault together with other offences that the sentences were for longer periods than twelve months.

In the cases of S v Vakalisa⁵⁹ and S v T,⁶⁰ a twelve month prison sentence was also opted for by the courts of first instance, with a six month prison sentence being the final outcome of the trial in the case of S v Vakalisa.⁶¹ Due to the harmful effects and the negativity associated with imprisonment,⁶² the writer is sceptical about the effectiveness of these short terms of imprisonment and maintains that as far as possible they should be avoided. The writer therefore advocates that alternative sentencing options be utilized. This suggestion is also in keeping with the submission by the South African Law Commission that non-custodial options are to be explored and used as much as possible.⁶³

Even though the social worker in the case of S v T recommended that a twelve-month prison sentence be imposed,⁶⁴ what is surprising though was the fact that Judge Marais disregarded these submissions. His reason for doing so was a new sentencing option. With the incorporation of Section 276 (l) of the Criminal Procedure Act which came into effect on 1 April 1992, the introduction of correctional supervision as an alternative to incarceration was very favourably received.⁶⁵ Giving due consideration to the fact that the young offender was likely to benefit from the sentence, the presiding Judge placed under correctional supervision. The South African Law Commission is also keen to see correctional

⁵⁹ S v Vakalisa 1990 (2) SACR 88 (TK) at 89 h-i.

⁶⁰ S v T 1993 (1) SACR 468 (C) at 468 e-f.

⁶¹ S v Vakalisa 1990 (2) SACR 88 (TK) at 95 h-j.

⁶² See chapter two for more insight into the effects of imprisonment on the child.

⁶³ The South African Law Commission Issue Paper 9 *Juvenile Justice* (1997) 54.

⁶⁴ S v T 1993 (1) SACR 468 (C) at 470 b-c.

⁶⁵ As a result of the amendment to the Criminal Procedure Act 51 of 1977 correctional supervision has been included as a sentencing option in terms of Section 276 (1) (i).

supervision exploited as a sentencing option.⁶⁶ Particularly in cases where placement in reform schools or imprisonment arise as options, which inevitably separates children from their families, the Commission is optimistic that correctional supervision would provide a better option in that the child would not have to be removed from his home while serving his sentence.⁶⁷

4.2.5 Rape or Indecent Assault⁶⁸

TABLE 4.4

SENTENCES RECEIVED FOR THE OFFENCE OF RAPE

Name of Prison	Westville Prison (Males)	Westville Prison (Females)	Harrismith Prison	Krugersdorp Prison	St. Albans Prison
Sentences Received	None of the respondents were convicted for rape	None of the respondents were convicted for rape	1. 2 years 2. 3 years 3. 4 years	None of the respondents were convicted for rape.	1. 4 years 2. 5 years 3. 8 years

In respect of the offence of rape, the fieldwork conducted by the writer indicates that a wide range of prison sentences have been imposed on respondents. While a twenty-year-old first offender at Harrismith Prison received a two-year sentence for his offence, another twenty-year-old first offender at St. Albans Prison was the recipient of an eight year term of incarceration. Further, while two nineteen-year-old first offenders at Harrismith Prison received a three year and four year sentence respectively, a fifteen-year-old who was also a first offender at

⁶⁶ The South African Law Commission Issue Paper 9 *Juvenile Justice* (1997) 62.

⁶⁷ Ibid at 62.

⁶⁸ The writer has made reference to the offence as being one of rape or indecent assault since according to existing law a child of fourteen years or below is regarded as being *doli incapax* and cannot be convicted of rape but can only be charged with indecent assault.

St. Albans Prison received a five year prison sentence, highlighting the principle that while first offendership is a factor in sentencing, it does not mean that first offenders could avoid being imprisoned.⁶⁹

An examination of reported decisions have also revealed the use of a wide range of prison sentences by courts. In the cases of S v Sigenu,⁷⁰ S v Theron⁷¹ and S v Ven 'n Ander,⁷² all of the accused had also been sentenced to varying lengths of prison terms. In the case of S v Theron, the court *a quo* sentenced the offender who was fifteen years old at the time of the offence to a total period of ten years. So dissatisfied was the Appeal Court with the approach of the trial court in placing too much emphasis on the maturity of the accused at the time of the sentence rather than the youthfulness at the time of the commission of the offence, that it found it necessary to reduce the ten year sentence to a six year term of incarceration.⁷³ In the case of S v Ven 'n Ander even though the Court considered the youth and immaturity of the young accused when determining the appropriate sentence, it nevertheless still subjected the young offender to a long term of imprisonment.⁷⁴ This yet again illustrates the principle that while the youthfulness of the accused is generally considered as a factor which prevents the use of imprisonment, this does not mean that as a rule youthfulness would prevent courts from imposing prison sentences.⁷⁵

While the Court in S v Theron and S v Ven 'n Ander generally had to contend with offenders between the ages fifteen and sixteen, the case of S v Sigenu,⁷⁶ brought a thirteen-year-old offender charged with indecent assault on a six-year-old child before Court. In assessing an appropriate sentence the Court was

⁶⁹ The South African Law Commission Issue Paper 11 *Sentencing Mandatory Minimum Sentences* (1997) 15.

⁷⁰ S v Sigenu 1977 (3) SA 1097 (C) at 1099 B-C.

⁷¹ S v Theron 1986 (1) SA 884 (AA) at 886 H.

⁷² S v Ven 'n Ander 1989 (1) SA 532 (A) at 533 D.

⁷³ S v Theron 1986 (1) SA 884 (AA) at 886 B.

⁷⁴ S v Ven 'n Ander 1989 (1) SA 532 (A) at 533 E-F.

⁷⁵ The South African Law Commission Issue Paper 11 *Sentencing Mandatory Minimum Sentences* (1997) 14.

⁷⁶ S v Sigenu 1977 (3) SA 1097 (C) at 1097 H.

compelled to deal at some length with the peculiar circumstances of the case. According to a report detailing his medical history, it was revealed that the accused had been treated for a condition termed precocious puberty. As a consequence thereof, in spite of his mere thirteen years of age he displayed the physical maturity of at least fifteen years in advance of his true age and was therefore fully sexually developed. Moreover it was revealed that his anti-social behaviour was not only confined to sexual behaviour but also extended itself to other fields as well.⁷⁷

Judge Diemont in assessing the sentence to be applied on the youth stated the following:-

It seems to me that in this case one must not have regard to the chronological age of the accused but to his physical maturity which is that of a man double his age and that being so he should be punished accordingly.⁷⁸

In spite of the fact that the court was fully acquainted with the inherent medical condition of the young accused which was evidently beyond his control, the argument of the Court in giving due consideration to the accused's physical maturity rather than his chronological age seems rather harsh. Moreover due to the attitude of the Court that incarceration was the 'only' practical solution,⁷⁹ the effect of the decision was that a prison sentence was deduced as being the most appropriate option to be imposed on the thirteen-year-old child.

In examining the court's decision of sentencing such a young offender to imprisonment, it is necessary to consider the principle as laid down in the case of S v Scheepers,⁸⁰ where it was provided that as a sentence, imprisonment is used when it is necessary to remove the offender from society where he poses a

⁷⁷ Ibid at 1098 E-G.

⁷⁸ Ibid at 1098 – 1099.

⁷⁹ Ibid at 1099 C.

⁸⁰ S v Scheepers 1977 (2) SA 155 A.

threat or danger to the community and where no alternative sentence could be used to achieve the aims of punishment.⁸¹

The question that arises then is, could the young offender not have been imposed with an alternative sentence to achieve these aims?⁸²

In answering the above question, one needs to reflect on the approach followed by the courts in assessing the appropriate sentence where persons have been found guilty of committing offences of a sexual nature. In the case of S v Baptie,⁸³ like in the case of S v Sigenu, the court had to deal with an accused suffering from a disordered mental condition, the attitude of the Court was that the feelings of disgust and dismay at the nature of the offences were to be suppressed. The Court stated that in the interests of justice it was necessary to focus on the accused, his background, his domestic state and intellectual ability and more importantly to aid his condition not by imprisonment but rather with a suspended sentence and psychiatric treatment.⁸⁴

The approach of the Court of Appeal in the case of S v S,⁸⁵ however was somewhat different. Conceding that the appellant was indeed in need of psychiatric treatment, the Court nevertheless still imposed a prison sentence. The reason for doing so was that prevention was considered as being one of the main objects of punishment and the Court emphasized that 'imprisonment should serve as a warning to others not to indulge in similar conduct.'⁸⁶ Similarly in the case of S v B,⁸⁷ where the accused was sentenced to five years imprisonment for

⁸¹ The South African Law Commission Issue Paper 11 *Sentencing Mandatory Minimum Sentences* (1997) 15.

⁸² The main aims of punishment are generally regarded as being deterrence, prevention, retribution, rehabilitation and just deserts. From the case of S v Khumalo 1984 (3) SA 327 at 330 D-E, deterrence has been identified as the most important object of punishment.

⁸³ S v Baptie 1963 (1) PH 96 (N).

⁸⁴ The South African Law Commission Issue Paper 11 *Sentencing Mandatory Minimum Sentences* (1997) 16.

⁸⁵ S v S 1977 (3) SA 830 (A).

⁸⁶ The South African Law Commission Issue Paper 11 *Sentencing Mandatory Minimum Sentences* (1997) 17.

⁸⁷ S v B 1985 (2) SA 120 (A).

attempted rape, the Appeal Court confirmed that the magistrate had correctly applied the deterrent aim of punishment for the accused as well as for others.⁸⁸ In the case of S v E,⁸⁹ where the accused had been convicted for committing indecent acts on children, the Appellate Division also took a stance against the violation of rights of innocent persons and was emphatic about the need to deter future offenders.⁹⁰

From the above discussion it is apparent that while our Courts have shown an inclination towards the treatment model, deterrence and prevention as sentencing aims have dominated sentencing discretion.⁹¹ The reasoning behind the decision of the Court in the case of S v Signeu to incarcerate the young offender so as to prevent the commission of further violations on children and to deter other youth who might resort to such abominable behaviour, is therefore understandably clear.

Apart from the tendency to resort to custodial sanctions, from a perusal of cases of rape or indecent assault, it is evident that corporal punishment was a very popular sanction. All of the courts of first instance in S v Sigenu,⁹² S v F⁹³ and S v V en 'n Ander⁹⁴ sought recourse to the whip. What is also indicative of case-law is that irrespective of the age of the young offender concerned, whipping was yet again exploited in the sentencing of young offenders. While the Court in S v Sigenu and S v V en 'n Ander, had to pass sentences on young offenders between the ages of thirteen and sixteen, the Court in S v F had an even more difficult task of trying and sentencing a ten-year-old child who had allegedly been

⁸⁸ The South African Law Commission Issue Paper 11 *Sentencing Mandatory Minimum Sentences* (1977) 17.

⁸⁹ S v E 1992 (2) SACR 625 (A).

⁹⁰ The South African Law Commission Issue Paper 11 *Sentencing Mandatory Minimum Sentences* (1977) 19.

⁹¹ All of the cases mentioned in the preceding discussion namely S v Scheepers 1977 (2) SA 155 (A); S v Baptie 1963 (1) PH 96 (N); S v S 1977 (3) SA 830 (A); S v B 1985 (2) SA 120 (A) and S v E 1992 2 SACR 625 (A), deal with adult offenders but have been included in the discussion to illustrate the principles that have been established by courts.

⁹² S v Sigenu 1997 (3) SA 1097 (C) at 1098 B-C.

⁹³ S v F 1989 (1) SA 460 (ZH) at 460 F-G.

⁹⁴ S v V en 'n Ander 1989 (1) SA 532 (A) at 533 E-F.

charged with indecent assault on an eight-year-old girl.⁹⁵ Evidently the charge brought an accused and a complainant of extreme tender years before the Court. While the focus of the Court should have been to find a solution on how to deal with such young persons who could barely appreciate the criminal court proceedings to which they were subjected, it is remarkable that the magistrate's concerns lay not with the youth or immaturity of the parties but rather with being unable to charge the ten-year-old of rape.⁹⁶ In response to the attitude adopted by the trial Court, the High Court's Judge Greenland was explicit in his assertions that it was unjust to prosecute a child who could not understand the proceedings against him.⁹⁷ Furthermore the Court also expressed condemnation of the sentence of whipping which unfortunately at the time that the matter had been taken on review had already been administered on the boy. Drawing from the case of S v Ndhlovu where an adult whipping was considered as 'barbaric, inherently brutal, cruel, inhuman and degrading',⁹⁸ Judge Greenland maintained that the same had to apply where a ten-year-old boy was to be whipped.⁹⁹ Following upon that reasoning therefore the Court quashed the conviction and set aside the sentence.¹⁰⁰

4.2.6 Narcotic Related Offences¹⁰¹

While judicial officers had a choice:-

1. to sentence a young offender to imprisonment for a period of not less than five years;¹⁰²

⁹⁵ S v F 1989 (1) SA 460 (ZH) at 460E.

⁹⁶ Ibid at 463 G-H.

⁹⁷ Ibid at 460 G.H.

⁹⁸ Ibid at 465 A.

⁹⁹ Ibid at 465 A-B.

¹⁰⁰ Ibid at 465 E-F.

¹⁰¹ Narcotic related offences include those offences for which the offender has been found to be in contravention of The Abuse of Dependence Producing Substances Act 41 of 1971.

¹⁰² Section 29 (a) of the Abuse of Dependence Producing Substances Act 41 of 1971.

2. to sentence a youth to a whipping;¹⁰³
3. to order that he be placed under supervision of a probation officer;¹⁰⁴ or
4. to order that he be admitted to a reform school,¹⁰⁵

in the cases of S v Maharaj,¹⁰⁶ S v Pledger,¹⁰⁷ S v Roy,¹⁰⁸ S v Hattingh¹⁰⁹ and S v Jantjies,¹¹⁰ notwithstanding the fact that all of the above decisions were overturned on appeal, all of the Courts of first instance imposed terms of imprisonment of not less than five years on the offenders.

Even though the potential existed to prevent young offenders from being subjected to the negative influences of imprisonment and from being tainted by the criminal justice system it is surprising that none of the above-mentioned cases viewed any of these options as being feasible. The direction of the Courts of Appeal to give due consideration to these alternatives in S v Roy¹¹¹ and S v Jantjies¹¹² and to accord specific recognition to the option of placement of the young offender under supervision of a probation officer in S v Hattingh¹¹³ and S v Maharaj¹¹⁴ are therefore well-founded. From the judgement of S v Roy, the position maintained by the leaned Judge is revealed by the following statement :-

... it appears to me to be desirable to send the matter back to him [referring to the trial magistrate] to enable him [again referring to the trial magistrate] to consider the whole question afresh in the light of the alternatives available to him.¹¹⁵

¹⁰³ Section 342 of the Criminal Procedure Act 56 of 1955. Whipping is no longer available as an option. See discussion of S v Williams 1995 (7) BCLR 861 (CC) in 4.3. The Impact of Recent Constitutional Decisions on Current Sentencing Trends.

¹⁰⁴ Section 342 (3) (a) of the Criminal Procedure Act 56 of 1955.

¹⁰⁵ Section 342 (3) (b) of the Criminal Procedure Act 56 of 1955.

¹⁰⁶ S v Maharaj 1974 (2) SA 559 (N) at 559 H.

¹⁰⁷ S v Pledger 1975 (2) SA 244 (E) at 245 B.

¹⁰⁸ S v Roy 1974 (1) SA 386 (N) at 387 A-B.

¹⁰⁹ S v Hattingh 1972 (2) SA 826 (AD) at 828 e.

¹¹⁰ S v Jantjies 1978 (1) SA 1048 (E) at 1049-1050.

¹¹¹ S v Roy 1974 (1) SA 386 (N) at 388 B-C.

¹¹² S v Jantjies 1978 (1) SA 1048 (E) at 1051 F-G.

¹¹³ S v Hattingh 1972 (2) SA 826 (AD) at 834 F-G.

¹¹⁴ S v Maharaj 1974 (2) SA 559 (N) at 560 G-H.

¹¹⁵ S v Roy 1974 (1) SA 386 (N) at 388 B-C.

More recent legislation relating to drugs have revealed the imposition of prison sentences ranging between five to twenty-five years imprisonment, with either the inclusion or the exclusion of fines, as a court may deem fit.¹¹⁶

In comparison it would appear that the penalties are in fact much harsher than provided in earlier legislation.¹¹⁷ These lengthy sentences could possibly be the reason why sentencers have shown a reluctance for their imposition on children. Statistics by the Department of Correctional Services also lend support to the above assertion. For the period between 31:07:1995 to 31:07:1996, it was revealed that the number of children serving sentences in South African prisons for narcotic related offences had only risen from four to six, with seventeen-year-old offenders being the dominant age-group that resorted to the commission of the offence.¹¹⁸

TABLE 4.5

SENTENCES RECEIVED FOR NARCOTIC RELATED OFFENCES

Name of Prison	Westville Prison (Males)	Westville Prison (Females)	Harrismith Prison	Krugersdorp Prison	St. Albans Prison
Sentences Received	1.1 year		1. 1½ years. 2. R100 or 20 days + 3 years of which 18 months were suspended		

¹¹⁶ This is in terms of Section 17 (a), (b), (c), (d) and (e) of the Drugs and Drug Trafficking Act 140 of 1992.

¹¹⁷ A comparison is made between the Drugs and Drug Trafficking Act 140 of 1990 and the Abuse of Dependence Producing Substances Act 41 of 1971.

¹¹⁸ J Sloth Nielsen "Juvenile Justice Review 1996: (1988) 9 *The Annual Journal of Criminal Justice* 350.

What was quite significant about the respondents serving sentences for narcotic related offences is that all three respondents also indicated that they had served previous sentences for drug related offences.

Case law concerning drug offenders also revealed a similar trend. In the cases of S v Peters and S v Harvey both of the accused also indicated that they were previously convicted for the same offence.¹¹⁹ On the other hand even if there were no previous convictions, a common feature pertinent to these young drug offenders was their long involvement in either drug abuse or drug peddling.¹²⁰ Considering that such evidence emerged at the trials and that the Courts were fully acquainted with the fact that these offenders were in dire need of treating their drug addiction and moreover while the committal to a treatment centre existed as a possible option for the courts in terms of section 290 of the Criminal Procedure Act,¹²¹ the courts choice of sentences in S v Peters, S v Job and S v Roy, ranging from a whipping, to a committal to a reformatory, to extended prison terms respectively are therefore questionable.¹²²

4.3 THE IMPACT OF RECENT CONSTITUTIONAL DECISIONS ON CURRENT SENTENCING TRENDS

The emergence of the Constitution of South Africa Act 200 of 1993 brought the constitutionality of many decisions into question, the sentencing of juvenile offenders being no exception. In the case of S v Williams and Others,¹²³ the Constitutional Court had to determine whether or not the imposition of corporal punishment was contrary to the provisions of the Constitution. To a country whose people had grown blasé to the practice of

¹¹⁹ S v Peters 1974 (1) SA 368 (N) at 368 F–G; S v Harvey 1977 (2) SA 185 (O) at 186 G.

¹²⁰ S v Pledger 1975 (2) SA 244 (E) at 249; S v Jantjies 1978 (1) SA 1048 (E) at 1049 A–B.

¹²¹ Section 290 of the Criminal Procedure Act 51 of 1977.

¹²² S v Job 1978 (1) SA 736 (NC) at 736 H; S v Peters 1974 (1) SA 368 (N) at 368 G–H; S v Roy 1974 (1) SA 386 (N) at 387 A–B.

¹²³ S v Williams and Others 1995 (7) BCLR 861 (CC).

subjecting thousands of young offenders to whipping,¹²⁴ the outcome of the decision was eagerly awaited.

In his judgement Judge Langa dealt at some lengths with the manner in which juvenile whipping was effected in terms of section 294 (1) of the Criminal Procedure Act :-

- (a) While a cane could have been used, the choice of the instrument was normally left to the discretion of the court;¹²⁵
- (b) A maximum number of seven strokes only was to be imposed at any one time;¹²⁶
- (c) The whipping had to be inflicted over the buttocks which was to have been covered with normal attire;¹²⁷
- (d) A parent or a guardian was allowed to be present; and ¹²⁸
- (e) A district surgeon had to certify that the juvenile was in a fit medical condition to withstand the whipping.¹²⁹

In his assessment of the administering of the whipping, the learned Judge was somewhat sceptical about whether a prior medical examination was at all beneficial to the young offender. From the judgement one can garner the attitude of the court in this respect :-

Nor is there any solace to be delivered from the fact that there is a prior examination by the district surgeon.¹³⁰

The portrayal of the scenario was always one of a 'helpless' juvenile,¹³¹ who in the words of the Judge :-

¹²⁴ Proposals for Policy and Legislative charge *Juvenile Justice For South Africa*, (1994) 2.

¹²⁵ Section 294 (1) (a) of the Criminal Procedure Act 51 of 1977.

¹²⁶ Section 294 (1) (a) of the Criminal Procedure Act 51 of 1977.

¹²⁷ Section 294 (2) of the Criminal Procedure Act 51 of 1977.

¹²⁸ Section 294 (3) of the Criminal Procedure Act 51 of 1977.

¹²⁹ Section 294 (5) of the Criminal Procedure Act 51 of 1977.

¹³⁰ S v Williams and Others 1995 (7) BCLR 861 (CC) at 876 (45) H-I.

¹³¹ *Ibid* at 876 (45) H-I.

... has to submit to the beating, his terror and sensitivity to pain notwithstanding.¹³²

In the opinion of the Court therefore a whipping amounted to nothing less than 'a severe affront to their (referring to juvenile and adult offenders) dignity as human beings,'¹³³ an obvious contravention of section 10 of the Constitution.

Before the Court embarked upon any comment as to whether corporal punishment was contrary to section 11 (2) of the Constitution, a discussion on the meaning of the concepts 'cruel, inhuman or degrading punishment' was advanced. Drawing from the European Commission of Human Rights, inhuman treatment was described as 'causing severe suffering, mental and physical, which in the particular situation is unjustifiable' and torture as 'an aggravated form of inhuman treatment.'¹³⁴ The European Court of Human Rights also categorised degrading conduct as 'that which aroused in its victims feelings of fear, anguish and inferiority leading to humiliation and debasement and possible breaking of physical or moral resistance.'¹³⁵

In the assessment of what is conceived of as being 'cruel, inhuman or degrading punishment', the Constitutional Court also made reference to the Eighth Amendment of the Constitution of the United States of America as well as Article 12 of the Canadian Charter of Rights and Freedoms which prohibited the imposition of 'cruel and unusual punishment.' According to the Canadian Supreme Court the test to be implemented in order to determine whether punishment was 'cruel and unusual' was simply 'whether the punishment prescribed is so excessive as to outrage the standards of decency.'¹³⁶

¹³² Idem.

¹³³ Idem.

¹³⁴ Ibid at 871 (27) C-E.

¹³⁵ Idem.

¹³⁶ Smith v The Queen (1988) 31 CRR (35) G-H.

In its final analysis of the meanings to be accorded to 'cruel, inhuman and degrading punishment,' the Court maintained that irrespective of whether one refers to 'cruel and unusual punishment' in the Eight Amendment of the United States Constitution or Article 12 of the Canadian Charter or whether reference is made to 'inhuman or degrading punishment' of the European Convention the stark fact is that 'each phrase is the identification and acknowledgement of society's concept of decency and human dignity.'¹³⁷ Therefore, in the application and interpretation of the meaning of the words in a South African context section 35 (1) of the Constitution lays down that sections 10 and 11 (2) shall be interpreted in accordance with the values which underlie an open and democratic society.¹³⁸ To simply reiterate the position of the court in this regard means that punishment must respect human dignity and be consistent with the provisions of the constitution.¹³⁹ It is further submitted that 'there is no place for brutal and dehumanising treatment and punishment'.¹⁴⁰

On the basis of the above reasoning, the sentence of whipping was considered as being in violation of section 10 and section 11 (2) of the Constitution and was finally eradicated from our legislation as a sentencing option.¹⁴¹

The impact of the decision of S v Williams and Others has far-reaching consequences in the realm of juvenile sentencing. Of particular significance is the Court's condemnation of sentencing authorities which have legitimated the use of violence as a means to control and rectify the behaviour of young offenders. In keeping with the provisions of a Constitution which embodies the norms and values of a democratic society, the advice of the Court to

¹³⁷ S v Williams and Others 1995 (7) BCLR 861 (CC) at 873 (35) G–H.

¹³⁸ *Ibid* at 874 (37) C–E.

¹³⁹ *Ibid* at 874 (77) F–G.

¹⁴⁰ *Ibid* at 884 (77) F–G.

¹⁴¹ *Ibid* at 888 (96) G–I.

emphasize 'correction, prevention and recognition of human rights rather than retribution and vengeance' ought to be heeded.¹⁴²

In response to the school of thought that the removal of corporal punishment would result in an escalation in the number of juveniles who are imprisoned, the Constitutional Court dismissed this as a false notion and envisaged that the solution to overcome a possible influx of young offenders in prisons was to accord due recognition to alternative sentencing options.¹⁴³

The suggestion propounded by the Court therefore was that the introduction of correctional supervision in terms of section 276 of the Criminal Procedure Act, which was primarily a community-based sentencing option, provided a more flexible approach and should be utilized more extensively in the rehabilitation of young offenders.¹⁴⁴ Interestingly, the approach by the Court was also articulated by the submissions of the South African Law Commission in its motivation to 'encourage maximum consideration of alternative sentencing.'¹⁴⁵ However, the South African Law Commission concedes that in spite of the availability of community service orders, correctional supervision and other non-custodial alternatives these options were 'not frequently used' by courts.¹⁴⁶ In fact the findings of the South African Law Commission revealed that judges tend to adhere to only a 'very limited number of sentencing options.'¹⁴⁷

Finally the judgement of S v Williams and Others also reflects the need to create new methods of dealing with young offenders. The Court viewed the victim-offender mediation process which endowed benefits to the victim, the offender and the community as an effective sentencing mechanism and

¹⁴² Ibid at 878 (50) E-F.

¹⁴³ Ibid at 883 (72) – (73) D-F.

¹⁴⁴ Ibid at 882 (62) C-E.

¹⁴⁵ The South African Law Commission Issue Paper 9 *Juvenile Justice* (1997) at 61.

¹⁴⁶ Ibid at 57.

¹⁴⁷ Idem.

urged for a greater involvement in such juvenile justice projects.¹⁴⁸ The South African Law Commission is also optimistic that this restorative process which de-emphasises the role of retribution as having tremendous potential in the South African sentencing context stated that they had no qualms about the place of alternative sentencing in the future. In fact the South African Law Commission maintains that proposed legislation should encourage sentences to be innovative and creative, in the absence of formal alternative sentencing programmes.¹⁴⁹

4.4 **A CRITIQUE OF THE SPECIFIC PRINCIPLES RELATIVE TO SPECIFIC SENTENCES**

Section 274 of the Criminal Procedure Act makes provision for the Court to receive evidence that would enable it to pass the most appropriate sentence.¹⁵⁰ It would appear however that even though prevailing legislation allows for Courts to consider specific principles when sentencing, a failure by the legislature to provide clear and firm rules when exercising sentencing discretion has resulted in inconsistency and disparity in the sentencing process in South Africa.¹⁵¹ Further still, the discretionary power with which sentencers are endowed, allows for sentences to be imposed based on the 'feeling' of the sentencing personnel concerned.¹⁵² T.M. Sacco's research further re-inforces the point that judicial officers have their own opinions and beliefs and take particular stands on social, religious, economic and political issues,¹⁵³ the possibility does exist that sentences are likely to be tainted by bias rather than impartiality. Hence the

¹⁴⁸ S v Williams and Others 1995 (7) BCLR 861 (CC) at 884 (75) A-D.

¹⁴⁹ The South African Law Commission Issue Paper 9 *Juvenile Justice* (1997) 60.

¹⁵⁰ Section 274 of the Criminal Procedure Act 51 of 1977.

¹⁵¹ The South African Law Commission Issue Paper 11 *Sentencing Mandatory Minimum Sentences* (1997) 21.

¹⁵² *Ibid* at 20.

¹⁵³ TM Sacco "Humanising The Accused: The Social Workers Contribution in Mitigation of Sentence" (1994) 30 *Social Work* 161.

criticism that sentencers appear to approach sentencing in an intuitive and unscientific manner.¹⁵⁴

While the above are just some of the difficulties experienced by courts, it would appear that the problem is even further compounded when sentencing authorities have to deal with juvenile offenders 'whose understanding of responsibility is less than complete, whose character has yet to be fully developed and whose need for guidance is consequently greater than that of an adult offender'.¹⁵⁵ The assertion made by Riley therefore is that there are special circumstances to be considered when sentencing young offenders.¹⁵⁶

The writer attempts to highlight these 'special circumstances' and their influence on sentencing. The writer however stresses that even though her discussion is confined to the specific principles or factors as enumerated hereunder, the list is not exhaustive.

4.4.1 Age or Youthfulness

From an examination of case law, it is apparent that while the age or youthfulness of the young accused has generally operated in favour of the youth as far as sentencing is concerned, there have been instances where due to the existence of other circumstances that Courts have not considered the age or youthfulness of the offender as a factor in mitigation of sentence. The case of S v Jantjies bears mention in this regard.¹⁵⁷ In dealing with the eighteen-year-old female offender, who was charged with dealing in dagga, the trial court had ostensibly taken the youthfulness of the offender into consideration in imposing the sentence. Considering that the magistrate had considered the offender's

¹⁵⁴ The South African Law Commission Issue Paper 11 *Sentencing Mandatory Minimum Sentences* (1997) 22.

¹⁵⁵ P Riley "Proportionality as a Guiding Principle in Young Offender Dispositions" (1994) 17 *The Dalhousie Law Journal* 560.

¹⁵⁶ *Idem*.

¹⁵⁷ S v Jantjies 1978 (1) SA 1048 (E) at 1048.

youthfulness, one would have expected a much lighter sentence than the five year prison sentence which was imposed.¹⁵⁸ However, in light of the difficulties experienced at the time in relation to mandatory sentences, the magistrate was obliged to impose the prescribed minimum of five years imprisonment for the offence.¹⁵⁹ Nevertheless, it was only when the matter had been taken up on review, that due consideration was given to 'all' of the circumstances of the case.¹⁶⁰ Clearly in disagreement with the approach of the magistrate, Judge Soloman maintained that before passing sentence on the accused, the magistrate should have at least asked for a social worker's report. This, in his opinion, would have been instrumental in shedding light on all of the circumstances of the case.¹⁶¹ Due to the youthfulness of the accused, the initial sentence of five years imprisonment was set aside.¹⁶²

The case of S v M brought an even younger offender before court.¹⁶³ Charged for robbery and murder, the sixteen-year-old offender received a six year prison sentence of which three years were suspended for robbery and nine years imprisonment of which three years were suspended for murder.¹⁶⁴ Commenting on the age of the accused who was only sixteen-years-old at the time of the offence, the Appellate Judge attributed this as a reason for the comparatively lenient sentence passed on him,¹⁶⁵ yet again illustrating the influence of the age or youthfulness of offenders on the sentencing process.

Nevertheless, the findings of the decision of the Court in S v Dlamini,¹⁶⁶ revealed an even longer period of imprisonment imposed on the offender for the offences of murder, assault and robbery with aggravating circumstances. While the trial

¹⁵⁸ Ibid at 1049-1050.

¹⁵⁹ Idem.

¹⁶⁰ Ibid at 1051 E.

¹⁶¹ Idem.

¹⁶² Ibid at 1051 F-G.

¹⁶³ S v M 1993 (2) SACR 487 (A) at 487.

¹⁶⁴ Ibid at 487 f-g.

¹⁶⁵ Idem.

¹⁶⁶ S v Dlamini 1992 (1) SA 18 (AD) at 18.

Court contemplated the death penalty, the Appellate Division eventually sentenced the twenty-year-old offender to an effective twenty five years' imprisonment.¹⁶⁷ Evidence submitted by the accused's counsel to establish his age as a factor in mitigation (as the accused was under twenty when the offence was committed) proved unconvincing. From the judgment of the case it was revealed that even though at the time of the murder Dlamini was still a teenager he was by no measure an immature youth. In fact he was revealed as a man fairly seasoned in crime.¹⁶⁸

However, even though Dlamini's age was not established as a factor in mitigation of sentence, the Appellate Division nevertheless found it relevant to the assessment of the propriety of the death sentence.¹⁶⁹ Conceding that the youth had led a 'shiftless existence', the Court maintained that the 'possibility of rehabilitation' should not be excluded and consequently set aside the death penalty.¹⁷⁰

In the case of S v Jansen and Another,¹⁷¹ the approach to the youthfulness of the accused was somewhat different. Directing his argument at the sixteen-year-old convicted of murder, the magistrate of the Court *a quo*, had the following to say:-

I am not going to take into account the fact that some of you are very young. In fact it is almost an aggravating fact because it is the young men who are causing this trouble, it is not the older people.¹⁷²

From the above it is therefore evident that while the youthfulness of offenders has generally been presented as a mitigating factor, there may be instances when the very same factor can also be considered in aggravation of sentence.

¹⁶⁷ Ibid at 32 F.

¹⁶⁸ Ibid at 30 B-C.

¹⁶⁹ Ibid at 31 H.

¹⁷⁰ Ibid at 32 C-D.

¹⁷¹ S v Jansen and Another 1975 (1) SA 425 (AD) at 425.

¹⁷² Ibid at 427 F-G.

4.4.2 The Immaturity of the Offender

From an examination of case law, it is evident that the immaturity of the offender has been considered as a factor distinct from youthfulness. While the age of the young offender can 'normally' be affirmed by a mere perusal of a birth certificate,¹⁷³ the assessment of the youth's maturity or immaturity, which is in actuality a determination of the youth's sensibleness, involves more insight into the personality of the young offender. Therefore, it seems that irrespective of the age of the young offender, immaturity can nonetheless still serve as a factor separate and distinct from age. Hence one can see that while the Court in the case of S v Willemse en Andere,¹⁷⁴ acknowledged the immaturity of a fourteen-year-old offender, a comparatively older youth who was in fact closer to eighteen years of age in S v V en 'n Ander,¹⁷⁵ was likewise in the opinion of the Court also deemed to be an immature youth.

Due to the severity of the crimes for which the accused in S v Willemse en Andere was convicted, which included *inter alia*, murder, rape, house-breaking and theft, the trial Court imposed a prison sentence totalling ten and a half years, on the fourteen-year-old offender.¹⁷⁶ The Appeal Court, however, in disagreement with the attitude of the trial Court in not according due consideration to the immaturity of the youth on trial, regarded the sentence as being 'shockingly inappropriate'. The Court stated that even though a fourteen-year-old boy was capable of committing crime, however by reason of his immaturity he would not be to restrain himself if the situation required.¹⁷⁷

¹⁷³ The writer uses the word 'normally' since while a birth certificate would provide a true indication of the young offenders age, the existing situation in South Africa is that there are a number of children who are not in possession of such a document; The South African Law Commission Issue Paper 9 *Juvenile Justice* (1997) 14.

¹⁷⁴ S v Willemse en Andere 1988 (3) SA 836 (A) at 836.

¹⁷⁵ S v V en 'n Ander 1989 (1) SA 532 (A) at 532.

¹⁷⁶ S v Willemse en Andere 1988 (3) SA 836 (A) at 838 G.

¹⁷⁷ *Ibid* at 838 D.

Consequently, the sentence was effectively changed to one of two years' imprisonment and three years' suspended imprisonment. While the attempt by the Appeal Court to reduce the sentence is quite commendable, nevertheless the decision of the Court, to allow the fourteen-year-old youth to serve the remainder of his sentence in prison, when he could have been easily transferred to a reform school, leaves much to be desired. The argument submitted by the Court for not imposing a sentence of a reform school was that at the time of the decision the young accused had already served a year of his prison sentence.¹⁷⁸

Therefore, in taking cognisance of the accused's immaturity, there appears to be a contradiction in the approach of the Appeal Court. In conceding that the youth was both immature and vulnerable, the Court should have also given due consideration to the accused's susceptibility in a prison environment and should have removed the accused from prison and committed him to a reform school.

In the case of S v Ven 'n Ander, the Court, having to contend with a youth who was almost eighteen years of age at the time of the commission of the offence, was also influenced by the immaturity of the offender. So convinced was the Appellate Division that the young offender's, '...behaviour that night was chiefly attributable to immaturity and vulnerability ...',¹⁷⁹ that the initial sentence of three years' imprisonment, for two counts of rape, which were not to run concurrently and an additional five strokes of whipping imposed on the first appellant was altered to a setting aside of the corporal punishment segment of the sentence.¹⁸⁰ Commenting on the immaturity and vulnerability of the accused, there was an acknowledgement by the Court that generally these factors were perceived as being 'well-known mitigating factors', hence the prompt application of such evidence to lighten the accused's sentence.¹⁸¹

¹⁷⁸ Ibid at 838 I; The sentence of reform schools is dealt with more closely under the discussion of the role of the probation officer.

¹⁷⁹ S v Ven 'n Ander 1989 (1) SA 532 (A) at 533 E-F.

¹⁸⁰ Ibid at 533 H-I.

¹⁸¹ Ibid at 533 E-F.

Unlike the offender's age, which is usually determined objectively either by the production of a birth certificate or a medical examination,¹⁸² it would seem that the test to determine the maturity of immaturity of the offender is one which extends even further and is a process which is certainly not a simple one. While sentencing authorities have generally relied on external elements when assessing the extent of the impact of the accused's vulnerability,¹⁸³ it is clear from case law that the kind of psychological testing as suggested by Sacco, in order to determine the young offender's level of maturity or immaturity,¹⁸⁴ is seldom resorted to by the courts. In light of the above, therefore, it would be safe to assume that due to the failure of judicial officers to ask for such a psychological analysis in the majority of the cases when sentencing young offenders, that there may be many incarcerated youth whose immaturity could have resulted in a mitigation of sentence, had the analysis been conducted.

4.4.3 Susceptibility to Influence of Others

In the cases of S v Hlongwana,¹⁸⁵ S v V en 'n Ander¹⁸⁶ and S v Willemse en Andere,¹⁸⁷ apart from the fact that the immaturity and the vulnerability of the offenders were taken into consideration, the Court also displayed concern that the crimes committed were attributed to the bad influence of older persons. Based on that premise therefore, a mitigation of sentence in respect of all of the above-mentioned situations, was the result.

In the case of S v Hlongwana where the death sentence was considered as an option for a sixteen-year-old convicted of murder, the Court drew attention to the

¹⁸² The South African Law Commission Issue Paper 9 *Juvenile Justice* (1997) 14-15.

¹⁸³ S v V en 'n Ander 1989 (1) SA 532 (A) at 533 E-F.

¹⁸⁴ Sacco "Humanising The Accused : The Social Workers Contribution in Mitigation of Sentence" (1994) 30 *Social Work* 164-165.

¹⁸⁵ S v Hlongwana 1975 (4) SA 567 (AD) at 567.

¹⁸⁶ S v V en 'n Ander 1989 (1) SA 532 (A) at 532.

¹⁸⁷ S v Willemse en Andere 1988 (3) SA 836 (A) at 836.

fact that the youthfulness, liquor and the influence of older persons, had to be regarded as extenuating circumstances.¹⁸⁸ Consequently the decision of the Court *a quo* was substituted by a twenty year period of imprisonment instead.¹⁸⁹ Likewise due to the 'bad influence of older persons' in both S v V en 'n Ander and S v Willemse en Andere, the Appellate Division reduced the sentences imposed by the Courts of first instance.¹⁹⁰

Prevalent in all of the above decisions, is the fact that while the Courts have accorded due consideration to the fact that children are capable of being easily influenced by older and more assertive persons, this specific principle always seems to be considered together with other factors.

In the case of S v Hlongwana, while the influence of the older person in committing the offence was quite evident, the Court seemed to be more persuaded by the combined effect of such influence together with the offender's youthfulness and the fact that he was intoxicated at the time of the offence.¹⁹¹

Likewise in S v V en 'n Ander, the 'vulnerability to bad influence by older persons' as well as the accused's immaturity were regarded as mitigating factors.¹⁹² Further still, even though it had been established that the accused in the case of S v Willemse en Andere had fallen under the influence of older persons, the Court seemed to be more swayed by the youth's immaturity.¹⁹³

¹⁸⁸ S v Hlongwana 1975 (4) SA 567 (AD) at 567.

¹⁸⁹ *Ibid* at 567.

¹⁹⁰ S v V en 'n Ander 1989 (1) SA 532 (A) at 533 H-I; S v Willemse en Andere 1988 (3) SA 836 (A) at 838 J- 839 A.

¹⁹¹ S v Hlongwana 1975 (4) SA 567 (AD) at 567.

¹⁹² S v V en 'n Ander 1989 (1) SA 532 (A) at 533 E-F.

¹⁹³ S v Willemse en Andere 1988 (3) SA 836 (A) at 838 D-E.

4.4.4 Previous Criminal Records

In instances where offenders have displayed no prior criminal proclivities other than the offences for which they were convicted, the courts have adopted a more lenient approach towards sentences which have been imposed.

In the case of S v Machasa en Andere,¹⁹⁴ so influenced was the Court by the fact that neither of the accused had previous convictions or showed any indication of criminal tendencies in either of them,¹⁹⁵ that a reduction of a twenty year sentence of imprisonment for murder to one of ten years and eight years in the case of the fourth and fifth appellants respectively, was the result.¹⁹⁶

Interestingly, even though the appellants were hopeful that the evidence of an expert to establish mitigating factors would assist their defence, the Appeal Court nonetheless discounted the value of this evidence. In spite of the fact that the expert summoned before the Court dwelt at some length on the conduct of the crowd that had commenced with the attack on the deceased, the Court seemed to be unconvinced that the expert had provided an adequate explanation for the 'murderous conduct' of the appellants.¹⁹⁷ Reiterating the position of the trial Court in this regard the Appeal Court maintained that the evidence of the expert had not established mitigating factors.¹⁹⁸

While the Court remarked that the accuseds' youthfulness, immaturity and susceptibility to influence of others had played a role in the reduction of the sentences received by the accused, the Court was most influenced by the fact that neither of the youth had previous convictions.

¹⁹⁴ S v Machasa en Andere 1991 (2) SACR 308 (A) at 308.

¹⁹⁵ Ibid at 311 b.

¹⁹⁶ Ibid at 311 a.

¹⁹⁷ Ibid at 310 f-g.

¹⁹⁸ Idem.

In the case of S v Madigoane,¹⁹⁹ where the accused had falsely represented that he was the holder of a code eleven driver's licence, the magistrate's court had imposed a sentence of twelve months imprisonment. On appeal, however, the Court took cognisance not only of the fact that the accused was of school-going age but also that he had no previous convictions and in view of these circumstances, a period of imprisonment was an inappropriate sentence.²⁰⁰ Even though the Appeal Court conceded that the offence was of a serious nature, it held that it was contrary to the public interest to require of a scholar who had no prior criminal tendencies to be incarcerated. The sentence was therefore altered to one of nine months' imprisonment conditionally suspended for five years.²⁰¹

In S v Maharaj, no prior convictions and the accused's age were especially instrumental in altering a five year sentence of imprisonment for a dagga conviction.²⁰² Notwithstanding the fact that the trial magistrate outruled placement under supervision of a probation officer as a possible option in the matter, the Presiding Judge Leon found this particular option as being more favourable. What is noteworthy in respect of the above matter is that supervision of a probation officer was not considered as an appropriate alternative by the trial magistrate because the accused was 'married and had children'.²⁰³ Due to the fact that the magistrate failed to clearly indicate how this fact was capable of disentitling an accused from being subjected to such supervision, one is still in the dark in this regard. Nevertheless, due consideration to the accused's circumstances, her age, the fact that she had been deserted by her husband and especially that she had no previous convictions resulted in the reviewing authority placing her under the supervision of a probation officer.²⁰⁴

¹⁹⁹ S v Madigoane 1992 (2) SACR 87 (A).

²⁰⁰ Ibid at 87.

²⁰¹ Ibid at 89 b-d.

²⁰² S v Maharaj 1974 (2) SA 559 (N) at 559.

²⁰³ Ibid at 560 C.

²⁰⁴ Ibid at 560 G-H.

Whilst in respect to the above two matters, the Courts had to contend with persons ranging between the ages of sixteen and nineteen years of age, in S v M,²⁰⁵ the Court had to deal not with a teenager, but with a child of nine years who had given no previous trouble.²⁰⁶

A failure on the part of the magistrate of the Court *a quo* to conduct a proper investigation in respect to the factors surrounding the matter, resulted in a grossly unjust punishment – the sentencing of a child of nine to corporal punishment for negligently dropping a match and starting a fire.²⁰⁷ Appalled by the trial magistrate's superficial enquiry of only putting the following two questions to the accused:-

How did you start the fire? [and]
Do you know it is wrong to start a fire in the veld and leave it?,²⁰⁸

Judge Didcott condemned the approach of the magistrate on the basis that the information it extracted was not sufficient to justify a conviction.²⁰⁹

Even though the conviction was set aside, nevertheless at that stage, the sentence of a juvenile whipping had already been imposed.²¹⁰

Generally while there is an inclination among judicial officers to take the absence of previous convictions into consideration or the lack of any prior criminal propensity on the part of young offenders as a factor in mitigation of sentence, unfortunately, however, a failure by the trial magistrate to do so, in the case of S v M when the court had to pass sentence on a nine-year-old child, who had absolutely no criminal record, was a real travesty of justice.

²⁰⁵ S v M 1982 (1) SA 240 (N).

²⁰⁶ Ibid at 245 C.

²⁰⁷ Ibid at 241 F-G.

²⁰⁸ Ibid at 243 A.

²⁰⁹ Ibid at 243 A-B.

²¹⁰ Ibid at 246 B.

4.4.5 Character Evidence of the Accused

Case law reveals that evidence submitted on behalf of the accused which is aimed at establishing the positive aspects of the offender's character and especially which is propounded by reputable members of society have been tremendously influential as a factor in sentencing.

In the Zimbabwean case of S v Barry, the Court commented on the reports of both of the first appellant's headmaster and employer.²¹¹ In terms of the headmaster's report, the first appellant was described as 'quiet, modest, well-mannered, reasonably hard-working and should give useful service to his employer'.²¹² In respect to the employer's report, the accused was revealed as being an 'exemplary employee'.²¹³

When considering that Judge Beadle did not elaborate on factors which judges, when dealing with young offenders, usually do, such as age, youthfulness, immaturity etcetera, but rather focused on the essence of reports submitted by other persons, the impact of the character evidence of the accused on the Court is quite obvious. It is not surprising therefore, that for his offence of house-breaking with intent to steal and theft, the first appellant was successful in his appeal against twelve months imprisonment with hard labour, six months of which was suspended. Consequently, the Appeal Court did not find it necessary for the accused to go to prison, but instead changed his sentence to a combination of a juvenile whipping and a fine of \$100.²¹⁴

In the case of S v Pledger which brought a youth on a contravention of a drug charge before Court, however, due to the fact that the accused was almost twenty years of age, no mention was made of the fact that he was immature or

²¹¹ S v Barry 1973 (4) SA 424 (AD).

²¹² *Ibid* at 425 G-H.

²¹³ *Ibid* at 425 H.

²¹⁴ *Ibid* at 429 G-H.

easily influenced by other persons.²¹⁵ The only reason for the accused to be accorded minority or juvenile status was his age at the time of the commission of the offence.²¹⁶ The evidence of a religious minister indicating that the appellant was 'morally and religiously rehabilitated' was presented in mitigation.²¹⁷ So convincing was the evidence submitted that it was 'not challenged'.²¹⁸ As a result of the appeal the five year sentence of imprisonment was set aside and a moderate correction of a whipping of five cuts was substituted instead.²¹⁹

Comparatively therefore, while the other factors such as age, immaturity, vulnerability, bad influence of others and no previous convictions by the accused have generally been revealed to operate as a combined set of factors in a mitigation of sentence, case law indicates that the character evidence of the accused is a factor which can largely influence the judgement of the court.

4.4.6 Report by Social Worker

Even though courts are not bound by the report of a social worker presented at the trial, the position of a social worker as an expert witness has been largely responsible for the value which courts have attached to these reports. Hoffman and Zeffert maintain that due to their expertise, social workers are actually in a better position to draw inferences than judicial officers.²²⁰ In her article highlighting the role of the social worker in the mitigation of sentence, Sacco maintains that:-

In effect when giving expert testimony in mitigation of sentence, the social worker does not usurp the role of the Court and recommends how the decision should be settled, but rather helps the sentencer

²¹⁵ S v Pledger 1975 (2) SA 244 (E).

²¹⁶ *Ibid* at 248 H.

²¹⁷ *Ibid* at 250 A-B.

²¹⁸ *Idem*.

²¹⁹ *Ibid* at 250 F-H.

²²⁰ Sacco "Humanising The Accused : The Social Workers Contribution in Mitigation of Sentence" (1994) 30 *Social Work* 160.

understand the case more fully in the hope that the outcome fits the crime.²²¹

When a child has been convicted of an offence, the role of the social worker to investigate the background and history of the child and help the Court understand the child's circumstances are crucial to the sentencing process. However very often these investigations have had the contrary effect in that they have resulted in sentencers not opting for any of the forms of punishment, but rather have found children to be 'in need of care' and dealt with accordingly.²²²

In the unusual circumstances of the case of S v L,²²³ where a fifteen-year-old first offender had broken into her own home, the magistrate accepted the recommendation by the social worker that the girl be committed to a reform school.²²⁴ On reviewing the matter, the Judge regarded the offence as being of such a 'trivial' nature that the initial conviction and sentence was set aside.²²⁵ Moreover due to the fact that the accused was regarded as being in need of 'discipline and control' the criminal proceedings were converted to an enquiry in terms of Section 30 of the Children's Act 33 of 1960.²²⁶

Likewise in the case of S v Jodwana²²⁷ where the Court had to deal with a very young child of twelve years who had been convicted of stock-theft, investigation into the boy's circumstances revealed that as he lacked 'parental guidance and control', he was described as a 'child in need of care'.²²⁸ As a result of these findings, the initial sentence of committal to a reform school was set aside and

²²¹ Ibid at 161.

²²² Children were previously found to be 'in need of care' in terms of Section 30 and 31 of the Children's Act 33 of 1960. The prevailing legislation in this regard is Section 13, 14 and 15 of the Child Care Act 74 of 1983.

²²³ S v L 1978 (2) SA 75 (C).

²²⁴ Ibid at 76 D-E.

²²⁵ Ibid at 75H.

²²⁶ Ibid at 77 D-E.

²²⁷ S v Jodwana 1968 (4) SA 367 (E).

²²⁸ Ibid at 367 F-G.

the young accused was instead dealt with in terms of Section 30 and 33 of the Children's Act of 1960.²²⁹

In the case of S v L, in order to guide the Court in its decision, a welfare officer's report detailing the offender's personal background was compiled.²³⁰ Apart from revealing an unstable and troubled background, the welfare officer also had to weigh the best sentencing option in view of the offender's personal make-up and circumstances. Of the available options, the welfare officer disregarded the postponement of a sentence on the basis that the offender had ample opportunity to mend his ways but did not. She also rejected corporal punishment since the offender had been punished in a number of different ways without success and discounted committal in terms of the Child Care Act 74 of 1983 due to the fact that the offender's father was unfit to care for him. The only option favourable in sentencing the seventeen-year-old youth in the opinion of the welfare officer was committal to a reformatory.

As the offender had absconded from places of safety on numerous occasions, committal to a reformatory due to its strict discipline was envisaged as the most appropriate option.²³¹ Abiding by the recommendations of the welfare officer, the presiding magistrate committed the young offender to a reformatory.²³²

Nevertheless on a review of the matter to the Cape Provincial Division, Judge Rose-Innes, in disagreement with the approach of the Court of first instance, submitted:-

...the Court should have dealt with the juvenile for the offences of which he had been convicted and not for the possibility of future offences which he has not committed. It may be that the risk of an accused committing further offences in the future exists also should

²²⁹ Ibid at 368 D-G.

²³⁰ S v L 1993 (1) SACR 386 (C) at 386.

²³¹ Ibid at 388 a-f.

²³² Ibid at 388 f-g.

he abscond from a reformatory... It is accordingly not a good ground for committal to a reformatory.²³³

Based on the above premise therefore, committal to the reform school was set aside and in terms of section 254 of the Criminal Procedure Act, the young accused was ordered to be brought before the Children's Court.²³⁴

In the case of S v T,²³⁵ while there was an agreement by both the social worker and the magistrate that a twelve month sentence of imprisonment be imposed on the sixteen-year-old offender convicted of assault, in an appeal against the sentence the learned Judge, dissatisfied with both the social worker's suggestions and her evidence produced during cross-examination, discredited the value of her submissions.²³⁶ The Appeal Court was of the opinion that the social worker had erred in failing to consider community service as a viable sentencing option. Therefore as a result of the findings of the Court the twelve month sentence of imprisonment was set aside and correctional supervision in terms of Section 276 (1) (i) of the Criminal Procedure Act was instituted.²³⁷

What can be ascertained from the discussion of the above cases is that even though the reports of social workers have proven to be influential in the determination of an appropriate sentence, there have been cases where Courts have simply not followed the recommendations made. In considering that social worker's reports are merely intended 'to provide an expression of opinion for the guidance of the Court',²³⁸ one can understand why Courts have not slavishly followed such recommendations in every single case involving juveniles. In spite of this however one has to concede that the advantage of reports presented by social workers is invaluable in enabling courts to make a decision on whether to deal with the child through the criminal justice system or in terms of a children's

²³³ Ibid at 390 b-d.

²³⁴ Ibid at 390 g-i.

²³⁵ S v T 1993 (1) SACR 468 (C) at 468.

²³⁶ Ibid at 469 j – 470 a.

²³⁷ Ibid at 470 d-f.

²³⁸ S v H and Another 1978 (4) SA 385 (E) at 385 B-C.

court enquiry. Sacco is also optimistic about the contribution of social workers in a dynamic legal environment and provides:-

As the law is capable of continuous growth, it can be seen as an opening for social workers to influence the development of principles relating to their purposes in mitigation of sentence.²³⁹

4.4.7 Report by the Probation Officer

Similar to the report of the social worker, the probation officer's report in furnishing the Court with additional information about the accused is aimed at assisting in sentencing. The case of S v H and Another²⁴⁰ aptly summed up the purpose of the probation officer's report as follows:-

The purpose of a probation officer's report is to provide a Court with all available information which will assist in understanding the problems of the juvenile being dealt with, thereby enabling the Court to determine an appropriate punishment in all circumstances.²⁴¹

A failure by the magistrate of the Court *a quo* in the case of S v Jansen and Another²⁴² to accord due consideration to the value of such a report was strongly condemned by the Appeal Judge, particularly in view of the fact that the case was a serious murder charge. The learned Judge was emphatic in his assertions that especially where the charge is a serious one like murder, the Court should not impose a sentence without consulting a report provided by a probation officer.²⁴³

While the value of such a report in sentencing is unmistakable, the judgement of S v H and Another also highlights the precaution that judicial officers must not

²³⁹ Sacco :Humanising The Accused : The Social Workers Contribution in Mitigation of Sentence" (1994) 30 *Social Work* 160.

²⁴⁰ S v H and Another 1978 (4) SA 385 (E).

²⁴¹ *Ibid* at 385 B-C.

²⁴² S v Jansen and Another 1975 (1) SA 425 (AD).

²⁴³ *Ibid* at 428 B-C.

follow such recommendations without applying their minds to the matter at hand.²⁴⁴ In view of the fact that the presiding magistrate of the trial Court did not abide by this safety measure, but allowed himself to totally give in to the recommendations of the probation officer and committed the accused to a reform school, his decision was met with much criticism. Judge Smalberger found it undesirable that the accused, who were first offenders, had been committed to a reformatory.²⁴⁵ He felt that the magistrate had disregarded the possible negative impact of such a committal and as a consequence thereof remitted the matter to the magistrate to pass sentence afresh.²⁴⁶

From case-law it has been clearly observed that Courts regard the option of committal to a reform school as an extremely severe sanction. In the case of S v M²⁴⁷ not only did the Court comment on the severity of this form of punishment but it also stated that the sanction should preferably be used in instances where the offender had shown marked criminal tendencies.²⁴⁸ As a result of this reasoning the theft committed 'on the spur of the moment' by the accused did not in the opinion of the Court justify use of this form of punishment.²⁴⁹

In the case of S v Zungu and Another,²⁵⁰ the reluctance of the Court to impose a sentence of committal to a reform school in the case of a first offender, was also noted. The Court also heeded the caution that sending a person to a reform school was viewed as being such a severe sanction that the 'greatest care' was to be exercised before imposing such a sentence.²⁵¹ In attempting to clarify the meaning of the term 'greatest care', the explanation forwarded was that it was imperative for Courts to seek the assistance of probation officers' reports before

²⁴⁴ S v H and Another 1978 (4) SA 385 at 386 E-F.

²⁴⁵ Ibid at 386 F-H.

²⁴⁶ Ibid at 387 F.

²⁴⁷ S v M en 'n Ander 1998 (1) SACR 384 (E).

²⁴⁸ Ibid at 384 h-i.

²⁴⁹ Ibid at 384 I-j.

²⁵⁰ S v Zungu and Another 1962 (1) SA 377 (N).

²⁵¹ Ibid at 377 C-D.

sentencing the juvenile. It was provided that information about the accused's age, his background and evidence from his parents about his behaviour were essential to the sentencing process.²⁵²

The case of R v Rabotapi,²⁵³ also affirmed the above criteria when imposing a sentence of committal to a reform school. The Court also provided that in the absence of parents or guardians, it was necessary for the probation officer to submit a motivation for his or her decision for employing this sentence.²⁵⁴ This yet again established the importance of the role of the probation officer in sentencing.

From the decision of S v Mvulha,²⁵⁵ it was clearly pointed out that evidence by the probation officer about the juvenile offender concerned be given under oath.²⁵⁶ This further re-inforces the importance that Courts have attached to the evidence received for the purposes of sentencing.

From the above discussion, it is clear that not only does case-law establish the role of the probation officer in sentencing but as far as the sentence of committal to a reform school is concerned, it would appear that the probation officer has more extensive powers than a magistrate since from the case of S v Langeveldt,²⁵⁷ it was held that while a magistrate was not permitted to specify the reform school to which the offender was to be sentenced, a probation officer on the other hand was entitled to make a recommendation in this regard.²⁵⁸

Case law also indicates that the reports of probation officers have proven to be very influential in the sentencing process and the tendency among judicial

²⁵² Ibid at 378.

²⁵³ R v Rabotapi 1959 (3) SA 837 (T).

²⁵⁴ Ibid at 837 H.

²⁵⁵ S v Mvulha 1965 (4) SA 113 (O).

²⁵⁶ Ibid at 113 H.

²⁵⁷ R v Langeveldt 1957 (4) SA 365 (C).

²⁵⁸ Ibid at 365 A-B.

officers has been to adhere to suggestions and recommendations submitted by probation officers without critically analysing such evidence.²⁵⁹

In the case of S v D²⁶⁰ and S v L,²⁶¹ the recommendations by the probation officer to commit the young offenders to reform schools were accepted and applied by both of the magistrates of the Courts *a quo*.²⁶² Dissatisfied that the prolonged stay in a reformatory in the case of S v D was going to be beneficial to the sixteen-year-old offender and that a committal to a reform school was a conducive environment for a fifteen-year-old first offender in the case of S v L, the convictions and sentences were set aside.²⁶³ Interestingly in respect of both of the above cases, the Court directed that the offenders instead be dealt with in terms of Children's Court enquiry in terms of sections 30 and 31 of the Children's Act 33 of 1960.²⁶⁴ Yet another case where the probation officer's report assisted the court in shedding light on all of the information relevant to the young accused and the commission of the offence was that of S v Adams.²⁶⁵ As a result of the report tendered at the trial which indicated that the accused was co-erced by older offenders, the initial sentence of nine months imprisonment was postponed for a period of two years, during which time the young accused was to be subjected to the supervision of the probation officer.²⁶⁶

4.5 THE NEED FOR A MORE STRUCTURED SENTENCING POLICY FOR JUVENILE OFFENDERS

In the light of the foregoing discussion it is obvious that in the absence of legislation which accords due recognition to juvenile culpability, judicial officers are compelled to adhere either to the limited sentencing provisions of existing

²⁵⁹ S v H and Another 1978 (4) SA 385 (E) at 386 D-E.

²⁶⁰ S v D 1977 (1) SA 759 (C).

²⁶¹ S v L 1978 (2) SA 75 (C).

²⁶² S v D 1977 (1) SA 759 (C) at 760 B-C; S v L 1978 (2) SA 75 (C) at 76 C-D.

²⁶³ *Ibid* at 760 G-H; *Ibid* at 77 B-C.

²⁶⁴ *Ibid* at 761; *Ibid* at 77 D-E.

²⁶⁵ S v Adams 1971 (4) SA 125 (C).

²⁶⁶ *Idem*.

legislation²⁶⁷ or precedents established by case law. The result is that sentencers often impose sanctions that are inadequate to the handling of young individuals.

The ideology that developmental differences render young offenders less culpable than their adult counterparts²⁶⁸ only seemed to gain prominence in South Africa over the last decade with the work of organisations and academics only genuinely gaining momentum during the latter five years.²⁶⁹ Academics whose writings are clearly reflective of the need to approach the wrong doing of a young offender with leniency and understanding as they are less culpable and therefore less criminally liable, are Skelton, Pinnock and Shapiro. They propose the route for a new juvenile justice legislation, maintaining that in deciding on sanctions for young offenders, courts should be guided by the following factors:-

- a) age should be a mitigating factor in any decision about sanctions or type of sanctions;
- b) the sanctions should promote the development of the family or the community;
- c) it should be borne in mind that a young person should not need to be institutionalized in order to have his welfare needs met;
- d) a young person should only be placed in detention in exceptional circumstances;
- e) where it is considered to be necessary, detention or imprisonment should be used for the shortest possible time and never longer than the sentence that would be given to an adult committing a similar offence;
- f) young people in any form of custody should have the narrowest possible restriction place on their constitutional rights.²⁷⁰

²⁶⁷ The Criminal Procedure Act 51 of 1977; the Probation Services Act 116 of 1991; the Child Care Act 74 of 1983; the Correctional Services Act 8 of 1959.

²⁶⁸ MR Gardner "Punitive Juvenile Justice : Some Observations on a Recent Trend" 1987 10 *The International Journal On Law And Psychiatry* 142.

²⁶⁹ The following documents reflect the need for a creation of a new juvenile justice system for South Africa :- Proposals for Policy and Legislative Change *Juvenile Justice For South Africa* (1994) and The Issue Paper 9 *Juvenile Justice* (1997).

²⁷⁰ A Skeleton, D Pinnock and R Shapiro "New Juvenile Justice Legislation for South Africa : Giving Children a Chance" 1994 7 *The South African Journal Of Criminal Justice* 346-347.

From the examination of case law, it is obvious that the approach of sentencing authorities generally seems to be inconsistent with the criteria articulated by Skelton, Pinnock and Shapiro. First, while they are of the opinion that age should be presented as a factor in mitigation of sentence, the case law indicates that there are instances where the age of the young offender has actually been revealed as an aggravating factor.²⁷¹ Secondly, with regard to the promotion of the family in imposing sentences, very seldom do presiding officers reflect on the promotion and development of the family. In most instances, the weight attached by judicial officers to the protection of the interests of society seem to far exceed the individual's need to remain in contact with the family – hence the popularity among judicial officers for the sentence of imprisonment. Thirdly, while Skelton, Pinnock and Shapiro aver that young offenders should only be imprisoned for the shortest possible time, case law reveals quite the contrary situation. Young offenders may spend up to five years,²⁷² ten years²⁷³ or in some instances even more than twenty years in prison,²⁷⁴ for a variety of different offences, clearly indicating that in some cases young offenders serve sentences of equal length or in other instances actually exceeding the sentences imposed on adult offenders. Such a situation has been frowned upon by the South African Law Commission. The stance of the Commission in regard to prison sentences is clear when it stated that:-

Custodial sentences should be the last resort in children's matters. Where such sentences are passed, they should be for a minimum period and should be conducive to the return of children back to society.²⁷⁵

Fourthly, Skelton, Pinnock and Shapiro are also opposed to the idea of imprisoning young offenders for reasons other than for purposes of punishment.

²⁷¹ See cases S v Dlamini 1992 (1) SA 18 (AD) at 30 B-C; S v Jansen and Another 1975 (1) SA 425 (AD) at 427 F-G.

²⁷² S v Jantjies 1978 (1) SA 1048 (E) at 1049-1050.

²⁷³ S v Willemse en Andere 1988 (3) SA 836 (A) at 838 G.

²⁷⁴ S v Dlamini 1992 (1) SA 18 (AD) at 32 B-D.

²⁷⁵ The South African Law Commission Issue Paper 9 *Juvenile Justice* (1977) 88.

While they emphasise welfare needs as being one of these reasons, cases which have indicated the intention to imprison young persons merely to prevent future escapes from institutions, such as places of safety, would without a doubt also fall in this category.²⁷⁶ Last but not least, Skelton, Pinnock and Shapiro also reinforce the idea that even though offenders may be subjected to custodial sanctions, this should not disentitle them from enforcing their Constitutional rights, which must ensure the least amount of restriction of their rights. It is not surprising therefore that in keeping with what is in the best interests of the child, the South African Law Commission re-iterates the position that:-

...the presiding officer should be guided by the principle of proportionality, the best interests of the child, the least possible restriction on the child's liberty and the right of the community to live in safety.²⁷⁷

4.6 SUMMARY AND CONCLUSION

In developing legislation, factors in mitigation of sentence and factors in aggravation of sentence ought to be set out with reasonable clarity to guide sentencing authorities. However it ought to be borne in mind that while criteria such as age, immaturity or maturity, the absence or presence of criminal records and character evidence of the young offender are all factors which are relevant and should be given due consideration in sentencing, the very important aspect of also examining the specific psychological make-up of the young offender and his psycho-social responses to his environment should be regarded as being indispensable to the process.

Considering that every individual is a unique product of his peculiar physical inheritance and environmental shaping of that genetic endowment by social conditioning,²⁷⁸ no two individuals are alike and therefore, no two persons would

²⁷⁶ *S v L* 1993 (1) SACR 386 (C) at 388 a-f.

²⁷⁷ The South African Law Commission Issue Paper *Juvenile Justice* (1997) 5.

²⁷⁸ R N Walker *Psychology Of The Youthful Offender* (1995) 4.

react in the same way in a particular situation nor would they be affected to the same extent by the same set of circumstances.²⁷⁹ Thus it follows that apart from an assessment of the crime and the accused's response to it, of vital importance as well is an investigation of the young offender's psychological, and psychosocial functioning and the developmental task he is confronted with at the particular stage in his life when he resorts to the commission of the offence.²⁸⁰

While an examination by courts of the factors enlisted above is necessary, the writer maintains that the importance of the psychological analysis as set out above should not be undermined and should be conducted by the court in respect of each young individual. It is envisaged that only such an analysis would reveal specific factors pertinent to the individual. It is suggested that courts should be guided by such an analysis in order to gauge the extent of its impact on the young offender concerned. The writer therefore maintains that only such an examination of factors would be a true reflection of what is perceived to be in the child's best interest, in sentencing the young offender.

²⁷⁹ *Idem.*

²⁸⁰ Sacco "Humanising The Accused : The Social Workers Contribution in Mitigation of Sentence" (1994) 30 *Social Work* 163-166.

CHAPTER FIVE

CONCLUSION

5.1 INTRODUCTION

Unlike other foreign jurisdictions,¹ in South Africa the focus on juvenile justice is a relatively recent phenomenon. The concern to develop a system revolving around the interests of the child only seemed to gain momentum over the last few years.² This late development in the field has enabled South Africans not only to merely draw from these jurisdictions but also to mould their own system closely akin to the more successful models in the realm of juvenile sentencing. Simply stated, South Africans have had the luxury of borrowing from other systems which have already had the opportunity of 'trying and testing' the sentencing principles which should underly the sentencing of young offenders. However, apart from the above obvious advantage, the products of the democratic regime namely the new Constitution³ and the ratification of the United Nations Convention on the Rights of the Child⁴ have also equipped South Africans with a 'yardstick' with which to determine whether sentencing policies are acceptable and reflective of internationally recognized standards.⁵ It was in analysing juvenile sentencing in South Africa against this background that a number of observations are made in regard to the writer's study.

¹ See chapter three for a fuller account of sentencing practices in international jurisdictions.

² This concern has been largely due to the new South African Constitution – The Republic of South Africa Act 108 of 1996.

³ Reference here is made to the Republic of South Africa Act 108 of 1996.

⁴ South Africa ratified the United Nations Convention on the Rights of the Child on the 16 June 1995.

⁵ See chapter three for a critique of the various international instruments.

5.2 OBSERVATIONS

5.2.1 The Tendency of Sentencing Authorities to Gravitate Towards the Use of only a Few Sentencing Options

As already outlined in chapter four, judicial personnel have had a host of sentencing options at their disposal.⁶ Nevertheless while courts have had a choice of approximately ten alternatives to choose from when sentencing juveniles, an examination of case-law as well as fieldwork undertaken by the writer has indicated an obvious inclination towards the use of only a few sentencing options.

Prior to its abolition,⁷ the use of corporal punishment as a means to sanction the conduct of young offenders, reached such alarming proportions that it was revealed that between 1991 and 1993 that about 30 000 to 40 000 juvenile offenders were sentenced to a judicial whipping annually.⁸ Due to the influence of a number of different factors, already discussed in chapter three, sentencing authorities tended to exploit this one particular sentence.⁹

However, with the recent abolition of whipping, the increased use of imprisonment has been quite notable. From an examination of case-law to determine the kinds of sentences imposed for the commission of a variety of offences,¹⁰ imprisonment was revealed as being a very popular choice amongst judges irrespective of the youth of the offenders. This finding has also been confirmed by an independent investigation into the number of children serving prison sentences.¹¹ Case-law reveals that in spite of the express provision highlighted in international instruments, custodial sanctions

⁶ These options are examined in greater detail in chapter four.

⁷ The case which has been instrumental in the abolition of the sentence of whipping is *S v Williams* 1995 (7) BCLR 861 (CC).

⁸ *The Citizen* 10 June 1996.

⁹ See chapter three for a detailed account of the influence of factors in sentencing.

¹⁰ See chapter four for a discussion of the offences of murder, theft, public violence, assault, rape or indecent assault and narcotic related offences.

¹¹ J Sloth-Nielsen "Juvenile Justice Review" (1998) 11 *The South African Journal of Criminal Justice* 104 – 105.

were to be a measure of last resort¹² and in spite of the availability of options like placement in a reform school, correctional supervision or alternative sentencing (just to mention a few) which could have easily eradicated the negativity associated with a prison sentence,¹³ these options were not used as much as imprisonment.¹⁴

5.2.2 The Failure of Sentencing Authorities to Abide by Sentencing Guidelines or to utilize Criteria Relevant to Juvenile Sentencing

Partly due to the existence of sentencing discretion among judicial personnel in South Africa, and partly due to the absence of rules for exercising sentencing discretion in prevailing legislation, there has been uncertainty and disparity in the sentencing process. From a perusal of cases as well as fieldwork undertaken by the writer, it has been observed that irrespective of the offence committed by the young offender, sentencers have an unfettered discretion in employing any option in sentencing the child.¹⁵ Therefore regardless of whether the court had to pass sentence on a seasoned criminal who was almost twenty years of age,¹⁶ or a thirteen year old youth convicted of indecent assault,¹⁷ or a first offender who had no prior criminal records,¹⁸ all of the courts imposed prison sentences of varying lengths. A further disparity was discovered in regard to the approaches applied by courts in considering factors relevant to sentencing. While some courts in assessing the appropriate sentence, took a few factors into consideration, others only placed emphasis on the influence of a single factor and further still, other courts considered the combined effect of all of the factors relevant to the case.¹⁹

¹² Article 37 (b) of the United Nations Convention on the Rights of the Child.

¹³ See chapter two for an examination of the negative effects of imprisonment.

¹⁴ See cases S v Hlongwana 1974 (4) SA 567, S v Sigenu (1977 (3) SA 1097 and S v Dingswayo 1985 (3) SA 175 where prison sentences were imposed.

¹⁵ See chapter four for an examination of the sentences imposed for different offences.

¹⁶ S v Hlongwana 1974 (4) SA 567.

¹⁷ S v Sigenu 1977 (3) SA 1097.

¹⁸ S v Dingswayo 1985 (3) SA 175.

¹⁹ See chapter four for an assessment of the roles of mitigating and aggravating factors in sentencing.

This unsystematic approach further exacerbated the inconsistencies in sentencing.²⁰

5.2.3 The Need to Incorporate the Restorative Model into Sentencing Policy

In comparing the approaches of the various international jurisdictions to sentencing of juvenile offenders in chapter three,²¹ it has been gleaned that while some countries attempt to secure their sentencing aims through the implementation of more formal measures,²² there are other regions that have opted for the assimilation of less formal means in their legislation to correct juvenile behaviour.²³ What is quite significant about these informal approaches to sentencing is the fact that they have proven to be very effective in dealing with juvenile misconduct. In China the approach of 'nurturing' youth who find themselves in trouble with the law and assisting their re-integration back into society, is one such region. It boasts of an impressive eighty-five percent success rate and attributes its successes to community-involvement.²⁴

However community participation in solving juvenile crime is not a restricted Chinese concept. In New Zealand as a result of the Maori influence, family conferencing is a process used to deal with young people who find themselves in trouble with the law.²⁵ In Fiji as well, decisions of the community are used to determine the manner in which the young person is to be dealt with.²⁶ The Nguni people too, have also resorted to indigenous legal traditions and the people's court to curb the problem of juvenile crime.²⁷

²⁰ This criticism against the unscientific approach to sentencing was also made by the South African Law Commission. Issue Paper 11 *Mandatory Minimum Sentences* (1997) 21.

²¹ The jurisdictions under examination were America, Canada, Britain, Australia, Sweden, Singapore, China and Africa.

²² The jurisdictions that employed the more formal measures were America, Canada, Britain and Australia.

²³ China and the African countries found the informal sentencing measures more effective.

²⁴ RM Regoli and JD Hemitt *Delinquency in Society – A Child Centred Approach* (1991) 408.

²⁵ D Pinnock "Justice for Children" (1996) 9 *The South African Journal of Criminal Justice* 78.

²⁶ *Ibid* at 79.

²⁷ *Idem*.

However, while the above examples quoted indicate the obvious preference among indigenous people to use informal measures for conflict resolution and to depend on the community for justice this phenomenon is not exclusive to these groups of people. International instruments such as the International Convention on the Rights of the Child (1989) and the United Nations Minimum Rules for the Administration of Juvenile Justice²⁸ have also urged the international community (in particular the member states) to promote the use of alternative sentencing options²⁹ and to ensure community involvement throughout the judicial process.³⁰

5.3 RECOMMENDATIONS

In response to the above observations made by the writer, it is recommended that a juvenile justice system in South Africa must be centred on the restorative approach. It is conceived that in providing the basis for a new system such as model would obviate many of the problems outlined above.

With its emphasis on 'repairing harm done to the victim or society' it is submitted that such a creature would assist in orientating the young offender towards taking responsibility and being accountable for his actions.³¹ From case-law it has been revealed that in many instances, offences committed by young persons were as a result of immaturity or the inability to restrain themselves. To subject such a person to imprisonment, or a reform school or to expect the payment of a fine is in the opinion of the writer not an appropriate means of exacting punishment. It is therefore submitted that restorative justice which allows both the victim and the offender to be directly involved in resolving the problem is actually more beneficial and productive to all the parties concerned. In giving the young offender an opportunity of making things right it would also at the same time empower the victim to claim

²⁸ See chapter three for a detailed examination of these international documents.

²⁹ Article 40 of the Convention on the Rights of the Child.

³⁰ Rule 26.6 of the United Nations Minimum Rules for the Administration of Juvenile Justice.

³¹ The South African Law Commission Issue Paper 9 (1997) *Juvenile Justice* 61.

the justice that he or she is seeking, while not losing sight of giving due recognition to the community.³²

In foreign jurisdictions the restorative approach in sentencing has assumed the following forms, namely family group conferences, community youth conferences, community aid panels and circle sentencing.³³ It is maintained however that while the above schemes may provide South Africans with models from which to work, it is imperative that legislators adopt and incorporate forms of community conferencing mindful of the South African culture and the particular needs of young South Africans.³⁴

The writer avers that the observations made above in regard to the tendency to use only a few options and the disparities in regard to the sentences received can also be eliminated through the restorative process.

In considering that sentencers tend to impose prison sentences, for example, irrespective of the offence committed or the circumstances of the young offender, it is submitted that it is necessary to provide sentencers with guidelines of a hierarchy of sanctions to be imposed for the different offences committed by young persons. The manner in which these guidelines should operate is as follows:-

- ***where the offence committed is of such a serious nature and***
- ***where there is a likelihood that the young offender would pose a threat or danger to society if released,***
then confinement in prison would be the appropriate sentence³⁵

³² The South African Law Commission Issue Paper 7 (1997) *Sentencing – Restorative Justice* 4-5. Crime results in harm to victims, offenders and communities.

³³ *Ibid* at 16-17.

³⁴ Academics like A Skelton are optimistic about a restorative justice model for South Africa. See article – A Skelton “Developing a Juvenile Justice System for South Africa : International Instruments and Restorative Justice (1996) *Acta Juridica* 195.

³⁵ The writer maintains that imprisonment should only be used as a measure of last resort, to sanction criminal behaviour of a very serious nature. It is envisaged that the incorporation of this principle into sentencing policy would eliminate short prison sentences and increase the use of alternative sentences.

- ***Otherwise if the court is of the opinion that in spite of the offence committed that the accused would not pose a threat to society, then the restorative means must be employed to fulfill the court's sentencing aims.***

So for example if a young offender had been found guilty of stealing from a local store, instead of being sentenced to two or three years' imprisonment, he could be dealt with through a form of community – sentencing.

However the writer maintains that:-

- ***Where the court has to contend with a young person below the age of fourteen who has committed a serious offence and the likelihood of danger to society does exist, imprisonment is not to be imposed.***³⁶
- ***The Court has the option of a reform school or an appropriate form of community sentencing, depending of course on the character of the accused and his propensity to commit further crimes.***

While sentencers would still have the options of placement in the custody of a probation officer or correctional official, correctional supervision, discharge with a caution or reprimand or postponement of a sentence, at their disposal, the guidelines submitted above are intended to ensure that young offenders not be imprisoned or deprived of their liberty particularly where the likelihood exists for them to be able to benefit from a community based sentence. In view of the obvious merits of the restorative approach, the writer echoes the words of Skelton:-

"If we can use this community source of justice and still be guided by international instruments and the fundamental rights set out in the Constitution ... we will be on our way to a fair and effective juvenile justice system for South Africa".³⁷

³⁶ This submission is made to as to ensure that young persons below the age of fourteen are not sentenced to imprisonment. Instead the writer is hopeful that more extensive use is made of community-based sentences.

³⁷ Skelton "Developing a Juvenile Justice System for South Africa : International Instruments and Restorative Justice" *Acta Juridica* 196.

APPENDIX 1

A SUMMARY OF THE DISCUSSION PAPER NO. 79 PROJECT 106 ON JUVENILE JUSTICE

INTRODUCTION

At the stage that the project committee began to focus its efforts on the presentation of the Discussion Paper on Juvenile Justice, much research and accumulation of data in the field of child justice had already been completed by way of workshops and invitations to the general public to comment on various aspects of child justice. The document therefore does not only encapsulate the principles and submissions of the designated members of the project committee but also highlights pressing concerns and responses to issues raised in the Issue Paper 9 on Juvenile Justice. In comparing the Discussion Paper to earlier initiatives to address and formalise a child justice system, such as the Issue Paper 9 (1997) and the Proposals for Policy and Legislative Change for Juvenile Justice in South Africa (1994), it is quite evident that the former is in fact a much more comprehensive document.

Emanating from a detailed examination of the multi-faceted area of child justice, the Discussion Paper culminates in a proposed Draft Bill. In line with the focus of the writer's study, the following commentary of the Discussion Paper highlights aspects of child justice which are relevant to sentencing.

1.1 AN OVERVIEW OF THE PROPOSED CHILD JUSTICE SYSTEM

To facilitate a workable proposed child justice system, the project committee identified the following key issues as being pivotal to the development of the system.

In keeping with international human rights and constitutional principles, the Discussion Paper recognizes diversion as being of paramount importance. Interestingly though, the project committee does not only see the value of this

process in sentencing of young people but also advocates for its use more extensively 'at all stages of the child justice process'.¹ The manner in which the new system aims to incorporate diversion as part of the process is by virtue of a 'preliminary enquiry',² which is to become a compulsory pre-trial procedure. The purpose of such an enquiry would be to enable the judicial officer to decide after assessing all the factors whether or not to use diversion as an option for the child. The use of this option would ensure that the child is removed out of the criminal justice system. Due to the keen reception of this option by South African academics, it is not surprising that the project committee has made the submission that the Proposed Bill reflect and emphasize the protection of the child's rights throughout the judicial process.³

In view of the fact that children are essentially different from adults and hence require treatment that is in accordance with their age and levels of maturity, the project committee has stressed the need for a 'substantial degree' of specialization within the child justice system.⁴ The first area of specialization that has been proposed by the project committee is for a specialized child justice court, designated specifically for children's matters. Considering that presently there are no separate courts for trying children, the exposure of children to adult offenders is indeed quite a common occurrence. Further due to the nature of court-procedures, the child may feel completely alienated and unable to communicate effectively with judicial personnel. In view of this, the writer is of the opinion that the need for a specialized child justice court, is in fact long overdue.

The project committee has also identified the need for greater specialisation in relation to the role of the probation officer. Presently, after carrying out the necessary investigations, the probation officer is only required to make a recommendation to the sentencing authority about the most viable sentencing option to be imposed on the child.⁵ With the advent of the establishment of

¹ The South African Law Commission Discussion Paper 79 *Juvenile Justice* (1999) 30.

² *Ibid* at 32.

³ See Chapter 3 for discussion on diversion.

⁴ The South African Law Commission Discussion Paper 79 *Juvenile Justice* 31.

⁵ See Chapter 4 for a fuller account of the role of the probation officer.

assessment centres, it is envisaged that adequately trained probation officers in the field of child justice be an indispensable part of the system. From the experience of working with children they would in fact be located in a better position to make decisions regarding the child's future than judicial officer's would. The committee therefore foresees that by virtue of their expertise, the role of the probation officer should become crucial not only to the sentencing process but to the entire future of the child justice system.⁶

The question of the legal representation of children is also quite a pressing area of concern. In view of the fact that children tend to perceive lawyers negatively,⁷ large numbers of children actually prefer to represent themselves in court.⁸ As a result of a lack of expertise in the field and their inability to communicate effectively, these children are poorly represented. The project committee therefore maintains that in order to dispel the negativity with which children view Legal Aid Lawyers, it is imperative that these legal briefs first indicate their interest in child advocacy.⁹ The committee further provides that one would only be able to achieve the goals of the system by ensuring the lawyers who represent children in South Africa receive adequate training in the field of child justice.¹⁰

In addressing the difficulties experienced by the South African Law Commission in the field of a developing child justice system, it has been conceded that the aims of a child justice system 'cannot be achieved at the stroke of a pen'.¹¹ What is therefore required is an inter-sectoral and inter-departmental effort,¹² to aid the development of diversion programmes and encourage greater specialisation so as to promote the aims of the proposed system.¹³

⁶ The South African Law Commission Discussion Paper 79 *Juvenile Justice* 31.

⁷ *Ibid* at 266-267.

⁸ *Ibid* at 266.

⁹ *Ibid* at 32.

¹⁰ *Idem*.

¹¹ *Ibid* at 35.

¹² *Ibid* at 34.

¹³ *Ibid* at 35.

1.2 PRINCIPLES AND FRAMEWORK FOR THE PROPOSED BILL

Due to the fact the initial responses to the inclusion of principles has revealed varied opinions on the issue,¹⁴ the Discussion Paper has dealt with the question of the incorporation of general principles into proposed legislation in substantial detail.

Having recently ratified the United Nations Convention on the Rights of the Child,¹⁵ South Africa is now under an obligation not only to ensure that it establishes a legal framework which accords due recognition to the rights of children, but also to enact domestic laws which clearly reflect the principles enshrined in these international instruments.

The international instruments which have been directly influential in the development of a child justice system in South Africa have been:-

1. The United Nations Convention on the Rights of the Child;
2. The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines);
3. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDLS) and
4. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).¹⁶

In examining the essence of the above instruments, each espouses its own perspective on how to treat children who find themselves in trouble with the law.

¹⁴ Ibid at 77.

¹⁵ South Africa ratified the United Nations Convention on the Rights of the Child (1989) in 1995.

¹⁶ The South African Law Commission Discussion Paper 79 *Juvenile Justice* 77.

The United Nations Convention on the Rights of the Child emphasizes that when dealing with children in conflict with the law it is imperative to promote the re-integration of the child back to society.¹⁷ Since the convention is firm in the assertion that custodial sanctions are to be avoided as far as possible, a wide variety of other dispositions are listed instead.¹⁸ Of considerable importance is the encouragement of the use of 'diversion' as a means of dealing with young people.¹⁹

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) also addresses concerns that are likely to be experienced by children who are incarcerated. The Rules specifically stipulate that custodial sanctions are only to be a measure of last resort and if circumstances require their use that they be used only for the shortest period of time. The rules also provide that at no stage are juveniles to be detained with adult offenders.²⁰ To avoid the adverse effects of imprisonment and any form of stigmatisation or labelling associated with it, the Rules stress that diversion be used as an alternative. In fact the Beijing Rules maintain that diversion is not only to be regarded as a sentencing option but advocates for its use at all stages of the decision-making process.²¹

As the title suggests the aim of the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), is to prevent juvenile delinquency in society. The manner in which these Guidelines attempt to achieve their goals is by focusing on community-based preventative programmes that encourage the well-being of the young person in society.²² What is significant about these Guidelines is that they provide government and non-government organisations with a framework within which to operate to encourage and promote the rights and well-being of young people.²³

¹⁷ Article 40(1) of the United Nations Convention on the Rights of the Child (1989).

¹⁸ Article 40(4) of the United Nations Convention on the Rights of the Child (1989).

¹⁹ The South African Law Commission Discussion Paper 79 *Juvenile Justice* 86.

²⁰ Rule 13 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985).

²¹ The South African Law Commission Discussion Paper 79 *Juvenile Justice* 83.

²² *Ibid* at 84.

²³ *Ibid* at 85.

According to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rules 17 and 18 are clear that where children are detained whilst awaiting trial all efforts are to be directed at ensuring that such detention is only for the shortest period of time.²⁴ The rules also emphasize the rights of juveniles to be provided with legal counsel or legal aid, to continue with education or training and to retain materials for leisure and recreation while in detention.²⁵

In keeping with the general principles emanating from the above discussion, the project committee decided that the aim of proposed legislation for children must be to promote the well-being of the child.²⁶ Diversion has therefore been distinguished as the most appropriate means of dealing with children in conflict with the law, in that it is based on reconciliation rather than punishment, and draws on community-based and indigenous mechanisms to resolve disputes.²⁷ It is especially significant when dealing with young people who find themselves in trouble with the law, since it inculcates accountability while at the same time encourages victim empowerment.²⁸

The project committee has also stressed that in keeping with the best interests of the child, the child should be entitled to legal representation as well as remain in contact with his or her family throughout the judicial process. The committee further cautions that such proceedings be for the shortest period of time, with no unnecessary delays.²⁹

In accordance with international principles, the project committee is also steadfast in its assertion that when dealing with the young offender imprisonment is only be used as a measure of last resort and for the shortest possible period of time.³⁰

²⁴ Ibid at 85.

²⁵ Idem.

²⁶ Ibid at 78.

²⁷ Ibid at 87.

²⁸ Ibid at 79.

²⁹ Ibid at 79.

³⁰ Idem.

It is maintained that as the above principles are also reflected in international instruments and are consistent with the provisions of the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as the Constitution), they be incorporated into proposed legislation for children. Due to the overwhelming response received³¹ that general principles be included in proposed legislation, the project committee has taken the stance that not only are the general principles to be included in proposed legislation but role-players also be provided with a list of objectives to assist in the interpretation of legislation.³²

1.3 AGE AND CRIMINAL RESPONSIBILITY

1.3.1 Age and Age Determination

The questions relating to age and age determination have also been considered in the Discussion Paper. Considering that the young person's age has a direct bearing on the manner in which he or she is treated within the judicial system and ultimately on the kind of sentence which is imposed, it is therefore essential that the age of the child is determined at the outset.

However it would seem that the approach to age determination in South Africa is not as cut and dried as simply resorting to the production of children's birth certificates. Many South African children are unaware of their true ages and dates of birth.³³ Even the parents of these children in some cases are unable to furnish authorities with such information.³⁴ The prevailing situation therefore is to call for an examination of a district surgeon to determine the age of the child.³⁵

Commenting on some of the responses in the Issue Paper on the question of age determination, it was revealed that while a more accurate method could

³¹ Ibid at 88.

³² Ibid at 88-89.

³³ Ibid at 108.

³⁴ Idem.

³⁵ Ibid at 108.

be used in age determination through the use of x-rays,³⁶ this method was not practical due to the cost factor involved.³⁷ A preferred option therefore suggested by the Natal Society of Advocates was to have the child examined by a district surgeon if a probation officer or social worker were unable to provide the court with adequate information in this regard.³⁸ The Association of Law Societies also supported this proposal and further provided that it was necessary for guidelines to be clearly set out detailing the roles of judicial personnel in the process of age determination.³⁹

On reviewing all of the submissions made, the project committee has conceded that while no accurate means of age determination exists, it is necessary for the Draft Bill to designate the functions of role-players in age-determination. What the committee has emerged with is the following procedure - due to the fact that the police officer is the first person who has contact with the child, he would have to make the enquiry about the child's age.⁴⁰ Where difficulties arise about the age of the child, it would be necessary for the police officer to take the child either to the probation officer or a district surgeon to carry out an examination.⁴¹ In the course of the examination the committee has recommended that the probation officer record all the details taken in the assessment of the child on a form entitled the 'assessment of age form'.⁴² It is provided that this document detailing all of the information regarding the assessment of the child's age, be presented to the presiding officer to enable him to make the most appropriate decision regarding the treatment of the child.⁴³ One therefore has to admit that the proposed 'assessment of age form' could probably be considered as the single most important document in the sentencing process.

³⁶ Ibid at 110.

³⁷ Idem.

³⁸ Idem.

³⁹ Idem.

⁴⁰ Ibid at 111.

⁴¹ Idem.

⁴² Ibid at 112.

⁴³ Ibid at 113.

1.3.2 Criminal Responsibility

The South African dilemma with age also appears to be reflected in Acts which have regulated the treatment of children. While the Criminal Procedure Act 51 of 1977, the Child Care Act 74 of 1983 and the Constitution define a child as a person under the age of 18 years, the Correctional Services Act 8 of 1959 defines a juvenile as a person under the age of 21 years.⁴⁴

The project committee's response to this inconsistency in the approaches of the above Acts is that in keeping with international law which specifically stipulates that a child is regarded as person below the age of 18, that 18 be retained as the age limit to determine whether a person is a child or not.⁴⁵ The respondents who participated in the questionnaire administered to determine the exact age at which the upper age limit was to be fixed, also showed an overwhelming support for the age 18 years.⁴⁶

While there appeared to be a fairly widespread agreement on the choice of 18 years as the cut-off age, the age of criminal responsibility however received more conflicting responses. In terms of prevailing law in South Africa, a child under 7 years is irrebuttably presumed to be *doli incapax*. A child between 7 and 14 years is rebuttably presumed to be *doli incapax*.⁴⁷ In view of the fact that South Africa has been criticized on the basis that it has one of the lowest threshold ages of criminal responsibility in the world,⁴⁸ the following options for improving the present situation in South Africa were submitted for consideration⁴⁹:-

1. The retention of the *doli capax/doli incapax* presumption, but placing more emphasis on rebutting the presumption;

⁴⁴ Ibid at 90. It is only the new Correctional Services Bill that defines a child as a person below 18 years of age.

⁴⁵ Ibid at 91.

⁴⁶ Ibid at 93.

⁴⁷ Ibid at 95.

⁴⁸ Ibid at 99.

⁴⁹ Ibid at 96.

2. Raising of the lower age of criminal capacity from 7 to 10 years and retaining the presumption for children over 10 years and 14 years (with certain safeguards);
3. Parting with the rule of *doli capax/doli incapax* and raising the minimum age of criminal responsibility to 12 or 14 years.⁵⁰

In analysing the first option, the committee conceded that the *doli capax/doli incapax* presumption was helpful in that it distinguished younger from older children and that it recognized the need to treat younger children differently.⁵¹ However the test employed whereby the prosecutor merely asked the child whether or not he or she knew that the action was wrong, was considered by the committee as being unsatisfactory in establishing criminal responsibility.⁵² The committee also maintained that a retention of the first option would mean that South Africa would have one of the lowest ages of criminal capacity in the world.⁵³

The second option which departed from the test of criminal capacity but instead attempted to determine the minimum age below which a child may not be prosecuted, was more favourably received.⁵⁴ The committee observed that the words 'minimum age of prosecution' rather than 'criminal capacity' were in fact a more accurate description of the actual enquiry surrounding the child.⁵⁵ However in respect to the idea that all children below the minimum age be dealt with through the children's court instead of through the criminal justice system, the project committee cautioned that this option should only be used where it has been discovered that the child is one who is 'in need of care'.⁵⁶

⁵⁰ Ibid at 96.

⁵¹ Ibid at 101.

⁵² Ibid at 103.

⁵³ Ibid at 103-104.

⁵⁴ Ibid at 104.

⁵⁵ Idem.

⁵⁶ Ibid at 105.

Like the second option, the third also favoured the idea of a minimum age of prosecution.⁵⁷ While this option, like the one above, attempted to stipulate the age below which children cannot be prosecuted, it nevertheless also provided certain exceptions to the rule.⁵⁸ The proposition made by the committee in regard to the third option is that the minimum age of prosecution be set at either 12 or 14 years and allows for a child of 10 years to be prosecuted for the commission of the offences of murder, rape, indecent assault, robbery with aggravating circumstances, any offence related to the Drugs and Drugs Trafficking Act 1992 and any offence relating to the dealing or smuggling of ammunition, firearms, explosives or armaments.⁵⁹

The proposed Draft Bill provides for all of the options discussion above.⁶⁰

1.4 LEGAL REPRESENTATION

In spite of the provisions of Section 73 of the Criminal Procedure Act 51 of 1977 and Section 35 of the Constitution which ensures the right of all accused persons, including children to be provided with legal assistance, it is surprising that over 80% of children who appear in South African criminal courts are unrepresented.⁶¹

From an assessment of some of the reasons submitted by the children in a Lawyers for Human Rights Project which revealed that they do not trust so called 'government lawyers', they prefer to speak for themselves rather than have someone else do so for them and they are innocent and do not need lawyers,⁶² it is obvious that a more improved model for legal representation is needed to dispel the negativity associated with the present model.

In considering the three options raised in the Issue Paper that:-

⁵⁷ Ibid at 106.

⁵⁸ Idem.

⁵⁹ Ibid at 107.

⁶⁰ Ibid at 107-108.

⁶¹ Ibid at 266.

⁶² Ibid at 266-267.

1. Children should be allowed to instruct their own attorneys at state expense,⁶³
2. A specially trained public defender should be introduced for representation of young people and that;⁶⁴
3. The current judicial system be retained but extended with a higher level of specialisation,⁶⁵

concern was revealed among the respondents about the practical problems associated with the implementation of the first option.⁶⁶ The view was expressed that entitling children to lawyers of their choice at state expense, would be discriminatory in that it would give young offenders preferential treatment over adult offenders.⁶⁷ With regard to the option of the public defender system respondents raised questions about the availability and workability of the system, particularly in view of the fact that the system was not in operation nationally.⁶⁸ Considering that only children living in larger centres would benefit from such services, this option was not met with much approval.⁶⁹ On the other hand the third option which proposed the idea of a large degree of specialisation into the present system was found to be most appealing among the respondents. Suggestions were therefore made for the incorporation of these services into law faculties of universities.⁷⁰

In assessing the question of whether children should be entitled to waive the right to legal representation, there appeared diverse opinions on the issue. While some argued that the right to legal representation also included the right to refuse legal representation,⁷¹ there were also those who felt that

⁶³ Ibid at 267.

⁶⁴ Ibid at 267.

⁶⁵ Ibid at 268.

⁶⁶ Ibid at 270.

⁶⁷ Idem.

⁶⁸ Ibid at 270.

⁶⁹ Idem.

⁷⁰ Ibid at 270.

⁷¹ Ibid at 271.

young people should not have the right to waive legal representation.⁷² In fact the position maintained by the Association of Law Societies was that the High Court as the upper guardian of all minors should have a discretion whether to make representation compulsory.⁷³

In reviewing all of the options and the suggestions raised on the issue of legal representation, the project committee stated that it was not enough to simply provide children with lawyers, it was more important to ensure that these lawyers who undertook to represent children, had a special commitment and a desire to provide a high standard of legal representation.⁷⁴

Conceding that South Africa does not have an effective legal representation system for children, the project committee stressed that it was imperative that the Draft Bill provide the 'building blocks' for the development of such a system.⁷⁵ It was maintained that legal representation at state expense was the first requirement. For the lawyer who chose to work as a legal representative in the child justice court, not only was it necessary for him or her to abide by the required principles and standards but it was also necessary to be updated with guidelines, legislation and other information relevant to child justice.⁷⁶

The project committee therefore recommended that children be informed of their right to legal representation by both the arresting officer and again by the probation officer.⁷⁷ If the child were to appear at the pre-liminary enquiry without legal representation, such a right must again be explained to him or her.⁷⁸ Should the child then wish to have a legal representative at the enquiry, the suggested procedure to be followed was that the pre-liminary enquiry be postponed for a period of about 48 hours, during which time the

⁷² Ibid at 270.

⁷³ Ibid at 270-271.

⁷⁴ Ibid at 279.

⁷⁵ Ibid at 281.

⁷⁶ Idem.

⁷⁷ Ibid at 275.

⁷⁸ Ibid at 277.

child or his family was to instruct a lawyer.⁷⁹ If after the finalisation of the preliminary enquiry a legal representative had not been appointed and if it was clear that either the child was to be remanded in custody or referred to court for the institution of charges then the enquiry magistrate would have to assist the child to obtain legal representation through the Legal Aid Board.⁸⁰ Where the child simply refused to be provided with any form of legal representation, the project committee submitted that in such instances, the lawyer should be present throughout the proceedings so as to intervene and act in the child's best interests when circumstances arise.⁸¹ It has been provided that such steps might be necessary where the child has decided to waive the right to legal representation.⁸²

The writer maintains that the training and specialization emphasized by the project committee in the discussion above as well as the involvement of not only the lawyer but all of the role-players in the child justice process would provide for more qualitative legal representation for children.

1.5 SENTENCING

Of all of the issues relevant to child justice, the aspect of sentencing of young offenders has received a considerable degree of scrutiny in the Discussion Paper. In conceding that 'sentencing is inextricably linked to the overall principles and values that underlie a child just system',⁸³ arises the responsibility to ensure that the proposed child justice system reflects the principles and values of a just and humane society.

Particularly over the last few years, a number of factors have brought about significant changes in the realm of juvenile sentencing in South Africa.⁸⁴ The three most influential factors have been:-

⁷⁹ Ibid at 277-278.

⁸⁰ Ibid at 275.

⁸¹ Ibid at 279.

⁸² Ibid at 278-279.

⁸³ Ibid at 214.

⁸⁴ From the decision of S v Williams 1995 (7) BCLR 861 CC, the sentence of whipping has been declared invalid on the basis of it is contrary to the provisions of the Constitution.

1. The inclusion of the restorative justice model as the primary objective of the criminal justice system;⁸⁵
2. The new Constitution of the Republic of South Africa which espouses principles of legality, equality and proportionality⁸⁶; and
3. The sentencing approaches reflected in international documents which promote the principles of proportionality and the re-integration of the child into society.⁸⁷

Due to the ratification of the United Nations Convention on the Rights of the Child, South Africa is now under an international obligation to ensure that the principles of international instruments are also incorporated into sentencing policy. Of the host of options available in South Africa for the sentencing of young offenders,⁸⁸ a number of the options have been criticized on the basis that they are not consistent with the principles articulated above.

1.5.1 **Sentencing Options**

1.5.1.1 Fines

In the Issue Paper, the suggestion was made for the eradication of the payment of fines. The reasons motivated for this was that in most instances children were of school-going age and were not in a position to pay the monies stipulated.⁸⁹ Interesting responses were received to the above proposition. Even though the Association of Law Societies admitted that the option was not effective one, it was nevertheless provided that as an option, it not be entirely excluded from future legislation.⁹⁰ The Society of Advocates maintained that in view of the fact that some children do receive employment,

⁸⁵ The South African Law Commission Discussion Paper 79 *Juvenile Justice* 214.

⁸⁶ *Ibid* at 216.

⁸⁷ *Ibid* at 216-217.

⁸⁸ *Ibid* at 218.

⁸⁹ *Ibid* at 229.

⁹⁰ *Ibid* at 232.

it is not inconceivable for children to pay back fines. It was therefore expressed that this option be retained.⁹¹

In considering the above responses, the project committee was reluctant to deviate from the overwhelming support that monetary fines were not to be included as a sentencing option.⁹² However, conceding that some children were in a position to pay fines, the committee proposed that the option should be maintained in such instances.⁹³ Moreover the committee was optimistic that restitution or reparation to the victim could indeed be retained as elements of the restorative approach mentioned above.⁹⁴

1.5.1.2 Alternative Sentences⁹⁵

Presently in South Africa alternative sentences cannot be imposed on their own but only as conditions of suspension or postponement of sentence.⁹⁶ The question raised in the Issue Paper was whether these alternative sentences could be imposed independently without always being associated with suspended or postponed sentences.⁹⁷

In surveying the responses to the above question, it was revealed that there was a widespread support for the idea of imposing alternative sentencing without using suspended or postponed sentences.⁹⁸

On examining the option of community service, the project committee noted that even though the option had predominantly been used by courts for less serious offences, there was no reason why it could not also be extended for use in the case of serious offences.⁹⁹ The committee also noted that the restorative element was highly prevalent in this option in that it upheld the

⁹¹ Idem.

⁹² Ibid at 249.

⁹³ Idem.

⁹⁴ Ibid at 250.

⁹⁵ Ibid at 229. . Most sentences can be described as alternative sentences, example compensation, community service, attendance at courses and treatment at specified centres.

⁹⁶ Ibid at 229.

⁹⁷ Idem.

⁹⁸ Ibid at 250.

⁹⁹ Ibid at 251.

accountability of the offender.¹⁰⁰ In view of the merits of the above option, the position assumed by the project committee was that community service be incorporated into future legislation as an independent sentencing option.¹⁰¹

1.5.1.3 Correctional Supervision

Presently correctional supervision cannot be imposed on persons below 15 years of age.¹⁰² Considering that correctional supervision requires a tremendous degree of responsibility by way of complying with attendance requirements and conditions of house-arrest, many have expressed reluctance about the imposition of the sentence on persons younger than 15.¹⁰³ The Issue Paper raised the suggestion of introducing correctional supervision as an alternative to a two year residential sentence in a reform school.¹⁰⁴

In addressing the set-backs of the correctional supervision option, the project committee made the point that while correctional supervision may indeed be a serious sanction for persons below the age of 15, there is still more support for its use than subjecting a child of 14 years to imprisonment.¹⁰⁵ In view of the above, the assertion by the committee therefore was that by adhering to the minimum age of admission to prison, correctional supervision could indeed be a real alternative for imprisonment.¹⁰⁶

1.5.1.4 Reform Schools

In evaluating the option of reform schools, a report by the Inter-Ministerial Committee revealed numerous problems with this particular form of sentencing. The first major dissatisfaction was expressed about the lengthy sentences. It was found that very often children serving sentences in reform schools were compelled to spend longer periods in confinement than they

¹⁰⁰ Ibid at 251.

¹⁰¹ Ibid at 252.

¹⁰² Ibid at 252.

¹⁰³ Ibid at 219.

¹⁰⁴ Ibid at 230.

¹⁰⁵ Ibid at 244.

¹⁰⁶ Ibid at 244-245. . In the case of S v Williams, the constitutional court described correctional supervision as a 'milestone in the process of humanising the criminal justice system'.

would have if they had been imprisonment.¹⁰⁷ The second major problem was that the uneven distribution of reform schools throughout the provinces, meant that children would inevitably be separated from their families for long periods of time.¹⁰⁸ In view of the above findings, the Issue Paper asked for a re-examination of this sentencing option with particular consideration of possible alternatives as well as a review of the minimum period of time that a child should spend in such institutions.¹⁰⁹

On assessing the option of reform schools, the project committee noted that due to the absence of guidelines clearly providing for when sentencers ought to use reform schools as a sentence for children there was a tremendous amount of uncertainty surrounding the imposition of the sentence. It was therefore submitted that it was necessary for proposed legislation to cover this issue more fully.¹¹⁰

The project committee also re-iterated the concerns raised in the Issue Paper that dispensing with this option would in actuality result in an increase in the use of imprisonment as a sentence.¹¹¹ In view of this, the project committee maintained that it was necessary to retain the option of reform schools.¹¹² On the issue of the lengths of the sentences, the committee felt that while the minimum period of confinement not be for periods less than six months, the maximum terms of incarceration not be for more than two years, save for exceptional cases where a child convicted of a serious offence was serving this sentence as an alternative to imprisonment.¹¹³

1.5.2 Pre-Sentence Reports

A recent examination of sentencing procedures and a monitoring of children in detention has indicated that many children serving prison sentences do so

¹⁰⁷ Ibid at 228

¹⁰⁸ Idem.

¹⁰⁹ Idem.

¹¹⁰ Ibid at 246.

¹¹¹ Ibid at 228.

¹¹² Ibid at 247.

¹¹³ Ibid at 247-248.

without the sentencing authorities having requested for the assistance of pre-sentence reports.¹¹⁴ In view of the above situation, the proposition was made that pre-sentence reports be made mandatory before a term of imprisonment or referral to a reform school was to be imposed.¹¹⁵

In considering the value of pre-sentence reports and their role in sentencing, the project committee affirmed that while pre-sentence reports were of assistance to sentencers, the ultimate decision of the choice of the sentence lay with the judge or magistrate.¹¹⁶ Nevertheless the committee submitted that it was essential to the sentencing process that the Draft Bill include provisions requiring the presentation of a pre-sentence report for perusal by a magistrate or judge prior to the passing of sentence.¹¹⁷ The project committee therefore that especially in cases where a court has to impose a sentence with a period of residence, for a child below 18 years, it was imperative that a pre-sentence report be provided.¹¹⁸

1.5.3 Evidence Relevant to Sentence

The issue of whether evidence of pre-trial diversion was to be admitted in the sentencing process received a number of different responses. The Issue Paper drew attention to the fact that such information would be considerably beneficial to the child in that the sentencer would be aware of whether or not past programmes to which the child had been subjected, was successful.¹¹⁹ However, the disadvantage of allowing such evidence was that it could indeed be prejudicial to the child.¹²⁰ In weighing the advantages against the disadvantages the project committee has taken the stance that proposed legislation should allow for the reception of the evidence, but it has been

¹¹⁴ Ibid at 231.

¹¹⁵ Idem.

¹¹⁶ Ibid at 253.

¹¹⁷ Ibid at 254.

¹¹⁸ Idem.

¹¹⁹ Ibid at 231.

¹²⁰ Ibid at 231-232.

stressed that such evidence is not to be used in the aggravation of sentence.¹²¹

1.5.4 Sentencing Guidelines

It was clearly indicative from responses received in the Issue Paper, that there was strong support for the establishment of sentencing guidelines in South Africa¹²². In the Issue Paper II on Mandatory Minimum Sentences, the South African Law Commission expressed concern that officials in magistrate's courts tend to pass sentences in an unscientific manner.¹²³ It was therefore felt that there was a need especially in lower courts to introduce guidelines to be used in sentencing.¹²⁴ The observation was also made that albeit there is a wide range of sentencing options at the disposal of sentencers, there was a tendency to resort to only a few options. Prison sentences apparently being the most favourable.¹²⁵

At this point in time, the project committee has not made a recommendation for sentencing guidelines to be incorporated in proposed legislation. The view that the project committee has adopted however is that the wide range of sentencing options and the large degree of discretion with which sentencing officers are endowed are to be retained so as to encourage the use of the host of available sanctions in a creative and innovative way.¹²⁶ The project committee is optimistic that this approach would be a catalyst in the development of alternative sentences, restorative and community-based sentencing options.¹²⁷

¹²¹ Ibid at 255.

¹²² Ibid at 235.

¹²³ Ibid at 236.

¹²⁴ Idem.

¹²⁵ Idem.

¹²⁶ Ibid at 237.

¹²⁷ Ibid at 237-238.

APPENDIX 2

QUESTIONNAIRE ADMINISTERED TO SENTENCED JUVENILE OFFENDERS IN PRISON

PERSONAL DETAILS

1. Does he/she object to giving information regarding his/her term of imprisonment already served?

2. Name : _____

3. Age : _____

4. Sex : _____

5. At which medium or section in prison is he/she being held?

6. **OFFENCE**

Of what offence has he/she been convicted?

Was he/she previously convicted of any other offence?

7. **SENTENCE**

What was the sentence that he/she received?

What part of the sentence has already been served?

How does he/she feel about the sentence that was imposed?

- (a) lenient
- (b) fair
- (c) harsh
- (d) Did not commit an offence

8. **LEGAL REPRESENTATION**

Did he/she know about his rights in respect to legal representation?

Was he/she legally represented in court?

Was the attorney appointed by the Legal Aid Board or was the attorney instructed privately?

9. **SCHOOL**

In prison does he/she attend a formal school or a trade-school?

10. **RECREATION**

What are the recreational facilities that are available?

What does he/she do for recreation?

11. **VISITORS**

Is he/she allowed visitors?

Does he/she have regular visitors?

Does he/she have family contact?

12. **WEEKEND PASSES**

Is he/she allowed weekend-passes entitling him/her to leave the prison to spend weekends with family?

13. **SOCIAL WORKER**

Does the social worker see to him/her regularly?

Are his/her needs met?

14. **WARDEN**

Is he/she happy with his/her supervision?

15. **HOUSING ARRANGEMENTS**

Is he/she allocated an individual cell or does he/she share the cell with other sentenced offenders?

Is so, how many share a cell?

16. What does he/she intend doing when released from prison?

17. What did he/she learn from being in prison?

18. Would he/she commit another offence?

19. **MEALS**

Is he/she satisfied with the meals which are received?

YES

NO

20. If not, how would you like to see this changed or improved?

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