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**An examination of child sex offenders and their constitutional rights
with regard to the National Register for Sex Offenders
in South Africa**

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for the degree of Master of Laws

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

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ABSTRACT

There are provisions in Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 that are unconstitutional with regards to the registration of child sex offenders in the National Register for Sex Offenders because they infringe on many of child offender's rights such as right to dignity, right to privacy and right to fair trial. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 repealed the automatic entry of child offenders on the National Register for Sex Offenders, but it did not draw a clear line between child and adult offenders. The repeal of automatic admission is not enough to make it a viable tool for separating child offenders from adult offenders. This is because it just addresses inclusion and ignores the procedures for removal and the repercussions of being on the list.

Rights such as the right to privacy, the right to a fair trial and the right to dignity remain at risk, which is against international law, the Constitution of the Republic of South Africa, 1996, the Child Justice Act 75 of 2008, the Children's Act 38 of 2005, and the Criminal Procedure Act 51 of 1977. These sources illustrate different ways in which to handle a child caught in contravention of the law in the criminal justice system, but the National Register for Sex Offenders contradicts all the above statutes.

In matters involving children, the best interests of the child take precedence, as emphasised by the Constitution of the Republic of South Africa, 1996 and other international instruments. The presence of a child's name on the register has psychological and social consequences for the child, which may lead to recidivism. Long-term registration may result in stigmatisation that affects peers and society as a whole, potentially endangering the child. This violates constitutional principles such as Ubuntu and restorative justice.

According to the United Nations Convention on the Rights of the Child (1989), any procedure of punishment for children should be as lenient as possible compared to that for adults. South Africa is a signatory to many of these international conventions, and the National Register for Sex Offenders should reflect these standards. Since children are among the most vulnerable group in any human community, the State has a duty to protect their constitutional rights regardless of age and status. The register currently specifies that the confidential details of child offenders who are listed in the register must be recorded. The consequential disclosure of the child sex

offender's name, location and age jeopardises the child's wellbeing in society and employment opportunities will be limited. This has been seen in registers in the United Kingdom and the United States of America, where registered child sex offenders have been stigmatised and bullied, and some have gone to the extent of committing suicide because the public has had access to their particulars. Even though Kenyan and South African law grants access authority only to specific institutions and individuals, the disclosure of such particulars is an area that can be further debated to allow for public access. In the United Kingdom and the United States of America, the information is public knowledge; however, South Africa has tried changing how the register works so that the offender's privacy is protected.

The National Register for Sex Offenders interferes with not only the right to privacy but also the right to a fair trial and the right to dignity. Therefore, legislation relating to the registration of minor sex offenders should be amended. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) should be amended because the National Register for Sex Offenders is against the best interests of the child and does little to reduce sexual crimes against children.

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LIST OF ABBREVIATIONS

<i>Abbreviation</i>	<i>Meaning</i>
AHRLJ	African Human Rights Law Journal
ACRWC	African Charter on the Rights and Welfare of the Child
ANCOR	Australian National Child Offender Register
ASAJ	A South African Journal
AWA	Adam Walsh Child Protection and Safety Act of 2006
CJA	Child Justice Act 75 of 2008
CPA	Criminal Procedure Act 51 of 1977
CPOR	Community Protection (Offender Reporting) Act of 2004
CRC	United Nations Convention on the Rights of the Child
DNA	Deoxyribonucleic acid
ECHR	European Convention on Human Rights
FBI	Federal Bureau of Investigation
GPS	Global Positioning System
ICCPR	International Covenant on Political and Civil Rights
JCL	Journal of Child Law
KIDS	Keeping the Internet Devoid of Predators Act of 2008
NCPR	National Child Protection Register
NRSO	National Register for Sex Offenders
NSOPW	National Sex Offenders Public Website
NSOR	National Sex Offender Registry
PER	Potchefstroom Electronic Review
PROTECT	Prosecutorial Remedies and other Tolls to End the Exploitation of Children Today Act of 2003
SA	South Africa
SACE	South African Council of Educators
SACQ	South African Crime Quarterly
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SORMA	Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007)

SORNA	Sex Offender Registration and Notification Act
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNICEF	United Nations Children Fund
USA	United States of America
ViSOR	Violent and Sexual Offender Register
ZACC	South African Constitutional Court

CHAPTER 1

INTRODUCTION

I BACKGROUND

In 2007, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, (hereinafter referred to as ‘SORMA’), was enacted in South Africa.¹ It introduced the National Register for Sex Offenders (hereinafter referred to as the ‘NRSO’) in its chapter 6.² The purpose and object of this legislation was to curb and ultimately eradicate sexual crimes against children in South Africa.³ However, the SORMA and the the Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 (hereinafter referred to as the ‘Amendment Act’) and the substantive and procedural laws supporting the NRSO are not freely applicable in the South African Constitutional Court, the Supreme Court and the High Court, which tried to apply the NRSO, and the constitutionality of the inclusion and removal of child sex offenders in the register remains contentious. For the purposes of this research, reference to a child sex offender or minor sex offender includes a child or minor charged with or convicted of a sexual crime or offences.

The Amendment Act repealed the vague and unconstitutional provisions of the SORMA and included the decriminalising consensual sexual relations between teenagers.⁴ Children convicted of sexual offences had to be assessed before their names were added to the

¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as ‘SORMA’). The meaning of ‘rape’ was traditionally restricted to vaginal sex, but it was extended by SORMA to include all non-consensual penetration. The legal age of consent for heterosexual and homosexual intercourse remained the same.

² The National Register for Sex Offenders (hereinafter referred to as the ‘NRSO’) was established under chapter 6 of the SORMA. For this research, only the most significant aspects of the NRSO, with special regard to children, will be covered.

³ As provided by the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the ‘Constitution’) ‘a child is any person below the age of 18’. See also Children’s Act 38 of 2005 (hereinafter referred to as the ‘Children’s Act’) and S S Terblanche *The Guide to Sentencing in South Africa* 3 ed (2016) 352–353.

⁴ Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 (hereinafter referred to as the ‘Amendment Act’).

NRSO, and child offenders, once found to be a risk to others, were placed on the register.⁵ However, despite the well-intentioned rationale behind the Amendment Act, the constitutionality of the register remained contested, and the central issues of the constitutional rights and best interests of a minor sex offender were not thoroughly explored and dealt with.⁶

South African courts incarcerate offenders to prevent them from further harming society, particularly in the case of aggravated crimes.⁷ This has proved to be ineffective for sex offenders as recidivism is high and children are sexually abused habitually by these same offenders.⁸ The South African legislature enacted provisions mandating the registration of sex offenders in which personal information was recorded and their activities were restricted and monitored.⁹ A sex offender register is a product of the Western judicial system whereby all sex offenders are listed in a register, which is frequently updated by law enforcement institutions.¹⁰ In the United Kingdom (UK) and the United States of America (USA) the public is notified of any new sex offender through notices and internet publication. The register is regarded as a success in these jurisdictions.¹¹

The idea of a register for sex offenders was submitted in the South African Parliament after the highly-publicised brutal rape of a nine-month-old baby girl in 2001.¹² The NRSO was established to protect children and mentally disabled persons from abuse by restricting the sex offenders' chances of gaining access to vulnerable groups.¹³ The Kenyan and South African registers are not based on the so-called 'stranger danger' notion as they are in the UK and USA

⁵ Ibid ss 4 to 8.

⁶ See section 28 of the Constitution (the rights of the child in s 28 and s 28(2) enunciating the best interest's standard).

⁷ Terblanche op cit note 3 above at 473.

⁸ T Harris & C Bezuidenhout 'A Psychocriminological Investigation into Risk Factors Contributing to Youth Sex Offending' (2010) *ASAJ* 28 at 32.

⁹ See chapter 6 of SORMA.

¹⁰ N Mollema 'The Viability and Constitutionality of the South African Register for Sex Offenders: A Comparative Study' (2015) 18 *PER/PELJ* 2707 at 2708.

¹¹ L McPherson 'The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future' (2016) 64 *Drake Law Review* 741 at 780.

¹² Mollema op cit note 10 above at 2708.

¹³ Ibid.

registers, by which children are urged to avoid strangers as potentially dangerous.¹⁴ In South Africa, studies have shown that most children are sexually abused by people to whom they are related or with whom they are familiar.¹⁵ The rules for the register were adjusted to take account of these findings, preventing punishment which merely promoted further sexual abuse by giving offenders access to other children in an institution.¹⁶ Children feel comfortable around adoptive parents, educators and foster parents and the register restricts sex offenders from these destinations; names of children who might have access to other children must first be checked against a list of sex-offenders (the register) before granting them access to children or people with disabilities.¹⁷

Despite these institutional efforts, the prevalence of sexual crimes against minors in South Africa remains the highest in the world.¹⁸ Sexual violence is prevalent in South Africa, with research indicating a lifetime frequency of 26.2 per cent in academic institutions and 24.9 per cent among women aged 18–49 years.¹⁹ These rates are greater than the global rate of 7.2 per cent and 17.4 per cent in Southern Africa, respectively.²⁰ A nationally representative study of sexual violence among children in South Africa found a lifetime frequency of 10 per cent for boys and 15 per cent for girls.²¹ According to the study, physical abuse, emotional abuse, neglect, family violence, and substance addiction are all highly linked to sexual assault.²² Another study found that sexual

¹⁴ K Hynes ‘The Cost of Fear: An Analysis of Sex Offender Registration, Community Notification and Civil Commitment Laws in the United States and the United Kingdom’ (2013) 2 *Penn State Journal of Law & International Affairs* 351 at 351-2.

¹⁵ Mollema op cit note 10 above at 2709.

¹⁶ *Ibid.*

¹⁷ See s 42 of SORMA.

¹⁸ L Townsend, S Waterhouse & C Nomdo ‘Court Support Workers Speak Out: Upholding Children’s Rights in the Criminal Justice System’ (2014) 48 *AJOL* 75 at 75.

¹⁹ AL Ajayi, E Mudefi and EO Owolabi ‘Prevalence and Correlates of Sexual Violence Among Adolescent Girls and Young Women: Findings from a Cross-Sectional Study in a South African University’ *BMC Women's Health* (2021) 21(1) 1 at 2.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

violence clustered around primary and secondary schools in low-income South African communities.²³

Between 2018 and 2019, the number of victims of sexual offences registered by Statistics South Africa increased by 17.9 per cent, and by the same amount in 2019-2020.²⁴ The South African Police Service (SAPS) report for the period April 2019 to April 2020 recorded an increase of 1.7 per cent in sexual offences, of which 22 070 were sexual offences against children. The same report stated that children committed 3 058 of the sexual offences.²⁵ Of the 124 526 sexual abuse cases reported in the three years from 2015-2018, minors were the victims of a disturbing 41 percent – almost half of the sex-related cases.²⁶ Referring to SAPS statistics for the year 2010/2011, more than 50 per cent of the 56 272 sexual offences cases reported involved children.²⁷ In the 2011/12 financial year 40 per cent of sexual offence cases reported involved children.²⁸ The statistics show little overall improvement, except for a drop of 10 per cent in the financial year 2011/12,²⁹ which may be attributed to the introduction of NRSO in 2009. However, since 2012, the rate of sexual crimes committed against children remains high.

It remains unclear whether the South African Council of Educators (hereinafter referred to as the ‘SACE’) has formally applied to check whether any new employees feature in the NRSO.³⁰ The Registrar for the NRSO, Ms Ntombizodwa Matjila, maintains that the SACE has not made such an inquiry,³¹ which means that even more children are vulnerable to abuse in the

²³ Ibid.

²⁴ StatsSA 2020. *Statistical Release P0341 Victims of Crime Statistics South Africa*. Available: <http://www.statssa.gov.za/publications/P0341/P03412019.pdf>, accessed on 8 October 2021.

²⁵ South African Police Service (SAPS). 2020. *Crime Statistics*. Available at https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf, cessed on 8 October 2021.

²⁶ N Andersen ‘Shocking stats reveal 41% of rapes in SA are against children’ *The South African* 1 November 2021. Available at <https://www.thesouthafrican.com/rape-statistics-41-children/>, accessed on 10 May 2018.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Z Zama ‘Sex Offenders Register is Accessible Via Application’ – Radio 702 30 May 2018 9:48 <http://www.702.co.za/articles/305630/listen-sex-offenders-register-is-accessible-via-application>, accessed on 7 September 2019.

³¹ Ibid.

education system. The NRSO Registrar had earlier admitted to problems regarding accessibility and efficiency of the NRSO.³² Regardless of who is to blame for the faults in the register, a valuable resource has been wasted as the Department of Education is unable to check whether employees are a danger to children despite the rise in sexual crimes against women and children.³³ This throws into question the purpose of the register.

II A SHORT OUTLINE OF THE PROVISIONS GOVERNING THE NRSO

(a) *The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*

Chapter 6 of SORMA contemplates that the NRSO will protect children and mentally disabled people by maintaining a list of sexual offenders and alleged sexual offenders.³⁴ Chapter 6 urges all employers, licensing and other authorities involved in the curatorship, fostering of parentage, adoption and caregiving to apply for information about a prospective applicant or employee, whether the name appears on the NRSO or not.³⁵ It specifies further that all names of the convicted and, in certain circumstances, alleged sex offenders who have perpetrated a sexual offence against children or mentally-ill persons should be logged with the NRSO.³⁶ It is immaterial if the crime was committed ‘before or after the coming into force of the provision, or whether the crime was committed in or outside the Republic of South Africa’.³⁷

It is not clear if SORMA mandates all organisations and institutions working with children to participate in the programme for the prevention of further child abuse. The subheading to Chapter 6 peremptorily refers to ‘obligations of employers in respect of employees’, whereas section 45 under the same subheading reads ‘may from the date of establishment of the Register’, which gives it a directory effect. It is unclear whether the legislation is directory or peremptory.³⁸

³² Ibid note 1 SORMA.

³³ Ibid.

³⁴ See s 50 of SORMA supra note 1.

³⁵ Ibid s 41(1).

³⁶ Ibid s 50(1)(a)(i)–(ii).

³⁷ Ibid s 43.

³⁸ SORMA chapter 6 supra note 1.

Section 46 provides that all ‘employers, licensing authorities and authorities dealing with fostering kinship and temporary safe caregiving, adoption or curatorship should be informed whether or not the person’s particulars appear on the register’.³⁹ The check must be done irrespective of the sector in which the employer operates.⁴⁰

Sex offenders whose names are on the register are prohibited from participating in adoption or foster care, and any position that involves to authority over children.⁴¹ When an employer finds out at any point in time that an employee’s name is on the register, the employer must terminate the employment contract immediately or change that employee’s post so as to be out of direct contact with or in a position of authority over children or disabled people.⁴² If an employee is ‘convicted of any sexual offence against a child or a person who is mentally disabled’, they are legally obliged to disclose the ruling to the employer.⁴³ If the employee was convicted under the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the ‘CPA’), the employee must inform the new employer of the verdict when applying for a job.⁴⁴

Failure to disclose such a guilty verdict to an employer is tantamount to an offence leading to a fine, imprisonment, or both.⁴⁵ Anyone with particulars on the register who fails to reveal the same and applies to operate a business or organisation that deals with children will be regarded as a lawbreaker.⁴⁶ The above obligation applies ‘in respect of applications for fostering, kinship, caregiving, temporary safe caregiving and adoption of children or curatorship’.⁴⁷

According to SORMA, anyone accused of committing a sexual crime against a minor or disabled ‘person may apply for removal of his name from the register after five years

³⁹ Ibid s 47 SORMA supra note 1.

⁴⁰ Ibid s 46.

⁴¹ Ibid s 48.

⁴² Ibid s 45.

⁴³ Ibid s 45.

⁴⁴ Ibid s 46(1) and (2). See also s 77(6) and s 78(6) of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as ‘CPA’).

⁴⁵ See s 46(3) of SORMA supra note 1.

⁴⁶ Ibid s 47(3).

⁴⁷ Ibid s 48(3).

from inclusion on the register'.⁴⁸ In addition, anyone whose conviction carried a custodial sentence of fewer than six months 'may apply to be removed from the register after seven years'.⁴⁹ The sentence must be a term of incarceration, intermittent imprisonment, and correctional supervision or imprisonment 'for six months or less, without the prospect of a fine'.⁵⁰ It is irrelevant whether such a sanction was suspended or not; the perpetrator will be able to apply to have their information removed from the register only after seven years after being released from prison or 'after the period of suspension has lapsed'.⁵¹ Persons sentenced as above for six to 18 months may similarly apply to have their names struck off the NRSO after a period of 10 years.⁵² If the punishment exceeds '18 months, and the offender has been sentenced to a term of imprisonment, periodical imprisonment, and correctional supervision, or imprisonment without the option of a fine', their names may not be removed from the register.⁵³

A person who has been convicted twice or more for a sexual offence against a child or a person who is mentally disabled will be registered for life,⁵⁴ and will not be removed from the register even if the sentence is suspended.

(b) *The Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015*

Sections 46 to 51 of the Amendment Act are relevant and important for this research.⁵⁵ Section 50 affords the court the discretion of deciding whether or not to enter minor sex perpetrators information on the NRSO. Consequently, minor sex offenders may not be registered automatically. In addition, section 51(2) and section 51(2A) of the Amendment Act state that inclusion effectively gives 'an opportunity for child sex offenders convicted before the commencement of the

⁴⁸ Ibid s 51(1)(b).

⁴⁹ Ibid s 51(1)(a)(ii).

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid s 51(1)(a)(i).

⁵³ Ibid s 51(1)(a)(iii).

⁵⁴ Ibid s 51(2)(b).

⁵⁵ See ss 4 to 8 of the Amendment Act supra note 4.

Amendment Act and whose records have been reported in the NRSO to appeal to a court for the removal of their details'.⁵⁶

III A BRIEF OVERVIEW OF THE CASE LAW PERTAINING TO THE REGISTER

The *S v RB; S v DK*⁵⁷ case was one of the first to test the consistency and constitutional propriety of registration of child offenders. The issues in this case included the best interests of the minor, other constitutional rights and how they could be limited. In simple terms, it concerned balancing the interest of the convicted child and the victim. Hansungule opines that the right of the victims is not ignored by the court by striking such a balance. He also commended the court for having taken into consideration the rights of both the offender and the victim.⁵⁸

The *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*⁵⁹ (hereinafter referred to as the '*Teddy Bear*') case examined in depth the outlawing of consensual sexual relations among minors and the effect of consequent registration. It was found that stigmatisation and prejudice attached to the registration.⁶⁰ Restrictions in employment, trade and profession came with being placed on the register with potential to impair the minor's rights to dignity and privacy.⁶¹ The case is important to this research because it analyses rights of children in conflict with the law for sexual offences, and issues around children and sexual maturity in South Africa.

The well-known case that dealt with child sex offenders and the NRSO was *Johannes v S*⁶² (hereinafter referred to as '*Johannes*').⁶³ It was argued in the High Court that

⁵⁶ Ibid s 8.

⁵⁷ 2010 (1) SACR 447 (NCK).

⁵⁸ Z Hansungule 'Protecting Child Offender's Rights: Testing the Constitutionality of the National Register for Sex Offenders' (2014) 50 *SACQ* 23 at 28, Hansungule commended the court in *S v RB; S v DK* supra for taking into consideration the rights of both the offender and the victim.

⁵⁹ 2014 (1) SACR 327 (CC) (hereinafter referred to as '*Teddy Bear*').

⁶⁰ Hansungule op cit note 58 above at 57.

⁶¹ Ibid at 64.

⁶² 2013 (2) SACR 599 (WCC) (hereinafter referred to as '*Johannes*').

⁶³ Also cited as *S v IJ* 2013 2 SACR 599 (WCC).

children were not as physically and mentally developed as adults, and therefore were entitled to guidance and nurturing.⁶⁴ It was further argued that section 50(2) of the SORMA did not afford the court discretion to decline or approve the registration of child sex offenders, which was in contravention of section 3 of the Child Justice Act 75 of 2008 (hereinafter referred to as the ‘CJA’), which required courts to adopt an individualistic approach by looking at the surrounding factors, the nature of the crime and the interests of society.⁶⁵ Automatic registration amounted to an infringement of the rights to privacy, dignity and freedom of trade, profession and occupation, as well as a denial of fair labour practice.⁶⁶ In consequence, the register infringed the best interest of the child provision in section 28 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as ‘the Constitution’), thereby placing the child’s social and moral development and well-being at risk.⁶⁷ It was argued that children ought to be distinguished from adults, and even though the limitation in section 36 of the Constitution might be applied, the limitation differed from that of adults because of section 28.⁶⁸ The *Johannes* case held that the long-term impact of the NRSO on a minor sex perpetrator had not been taken into account, and in general, chapter 6 of SORMA did not take into account the long-lasting impact of registration on a minor perpetrator.⁶⁹

It was further contended that section 50(2) of SORMA simply assumed that child offenders grew up to become adult offenders, and there were less restrictive ways to achieve the purposes of section 52(2) of SORMA.⁷⁰ For the respondents it was argued that the register was designed to protect minors and disabled persons; therefore, the mere registration of the name of the minor offender should not be regarded as an impairment of the rights of the minor offender;

⁶⁴ *Johannes* supra note 62 at para 52.

⁶⁵ Ibid para 53 and para 60. Also see P Stevens ‘Recent Developments in Sexual Offences against Children – A Constitutional Perspective’ (2016) 19 *PER/PELJ* 1 at 26.

⁶⁶ *Johannes* supra note 62 at para 55.

⁶⁷ Ibid para 56.

⁶⁸ Ibid para 57.

⁶⁹ Ibid para 59.

⁷⁰ Ibid para 75–79.

and in any event the NRSO was not publicly accessible and did not transgress the spirit and purport of the CJA.⁷¹

The judgment emphasised the need to invoke the CJA to grant the child special protection as underlined by the Constitution,⁷² proposing that a child sex offender may have his or her rights infringed by chapter 6 of SORMA and the same rights may be limited under the limitation clause in section 36 of the Constitution.⁷³ The court elaborated on the objectives of the register, the position of sex offenders and the overbroad interpretation of section 50(2),⁷⁴ holding that because of the number of sexual offences cited in SORMA, the judicial officer should be afforded discretion to decide whether a child offender should be registered in the NRSO and whether lack of representation infringed the right to a fair trial and the principle of *audi alteram partem*.⁷⁵ This made section 50(2) of SORMA an unreasonable and unjustifiable limitation in terms of the limitation clause in section 36 of the Constitution.⁷⁶

The order issued by the High Court was taken on appeal to the Constitutional Court as *The J v National Director of Public Prosecutions*⁷⁷ (hereinafter referred to as the '*J v NDPP*') a landmark case in which the Constitutional Court invalidated section 50(2)(a) of SORMA and declared it unconstitutional because it unjustifiably infringed a number of child rights.⁷⁸ The state argued that the High Court was overbroad in interpreting section 50(2), hence they should separate section 50(2)(a) and 50(2)(b) when interpreting the act.⁷⁹ The Constitutional Court held that the plain reading of the term 'person' included children, and was therefore a violation of section 34, which afforded the right to a fair hearing, for the child offender.⁸⁰ The court held that children and

⁷¹ Ibid paras 81–93.

⁷² Ibid paras 94–96.

⁷³ Ibid paras 96–105.

⁷⁴ Ibid paras 120–121.

⁷⁵ Ibid paras 122–126. Also, see also ibid paras 133–137.

⁷⁶ Ibid para 130.

⁷⁷ 2014 (2) SACR 1 (CC) (hereinafter referred to as '*J v NDPP*').

⁷⁸ Ibid para 53.

⁷⁹ Ibid para 12.

⁸⁰ Ibid para 29. Also see s 34 of the Constitution.

adults should be treated differently – concurring with the judgment of the High Court.⁸¹ The court affirmed that the child offender should be afforded a fair trial with a reasonable opportunity for representation.⁸²

The court further acknowledged that the best interests of the child was the starting point for the right,⁸³ describing a child as a developing person who needed nurturing in his or her best interests,⁸⁴ a notion supported by the CJA. The best interests was noted as a right and a principle that demanded that the courts differentiate between adults and children.⁸⁵ The best interests supported the individualistic approach, which meant looking at the ‘circumstances of the child, the nature of the crime and the interest of society’.⁸⁶ Lastly, the best interests should be to afford child sex offenders the opportunity to defend themselves before being registered in the NRSO.⁸⁷

The Constitutional Court noted that a major weakness in the NRSO provisions was that courts had no discretion whether or not to register.⁸⁸ Registration had severe consequences such as restricted employment opportunities and limited choices of trade, profession, and licences,⁸⁹ the impact of which would be felt through to adulthood, increasing the chances of recidivism.⁹⁰

The question of constitutional justifiability was approached in a different way. The court first looked at section 36 of the Constitution and went on to look at the rights of the offender. The court also listed the rights of a victim to security, privacy and dignity.⁹¹ It was not clear that registration would restrict the child from reoffending. There were less restrictive ways, such as

⁸¹ Ibid para 31.

⁸² Ibid para 34.

⁸³ Ibid para 35.

⁸⁴ Ibid para 36.

⁸⁵ Ibid para 37.

⁸⁶ Ibid para 38–39.

⁸⁷ Ibid para 9.

⁸⁸ Ibid para 40–41.

⁸⁹ Ibid para 42.

⁹⁰ Ibid paras 43–4.

⁹¹ Ibid para 48.

granting the court discretion, to accomplish the objective of the register.⁹² The registration of child offenders was found to be unjustifiable.⁹³ The section was suspended and the legislature was given time to amend it, which led to the promulgation of the Amendment Act.

IV LITERATURE REVIEW

The NRSO has a number of shortcomings that have led to a number of legal challenges in practice. Many provisions are vague and lacking in adequate procedural instructions.⁹⁴ Murungi states that the registration of the minor offender's name is a threat to the public at large and other children,⁹⁵ and interferes with the commitments of the legislature and the courts. This does not, however, entirely preclude including child offenders in the register. A major portion of SORMA was not touched on in the Amendment Act. The law and courts were failing to give guidance on how to preside over such cases where there were incompatible principles and interests.⁹⁶ In previous cases, the courts dealt only with the matters at hand, which mainly involved the substantive and not the formal rules.

Child offenders whose names are entered on the register have their identity at risk, which may infringe their rights to privacy and dignity. When deciding whether discrimination is unjust or not, human dignity plays a significant role.⁹⁷ Murungi argues that the court did not take into consideration these factors, even after the negative effects had been revealed.⁹⁸ The court permitted the limitation of child offenders rights after considering the 'best interests of the child' as proclaimed in section 28(2) of the Constitution.

⁹² Ibid para 50.

⁹³ Ibid para 51.

⁹⁴ N Mollema 'Impotent? The Prospects of the National Register for Sexual Offenders' (2015) 36 *Obiter* 476 at 483.

⁹⁵ N Murungi 'Whom to protect? Offender versus Victim – Entry of Minor Offenders' Names into the Sexual Offences Register: Reminiscing the Import of the Decision of the High Court in *S v RB and S v DK and another*' (2010) 12(1) at 5, available at <http://hdl.handle.net/10520/EJC21094>, accessed 2 October 2017, states that the court in the present review was of the opinion that the entry of the name of a minor convicted of sexual offences on the register 'would amount to publication of such particulars' and would obviously affect such minor accused negatively.

⁹⁶ Ibid at 6.

⁹⁷ Mollema op cit note 10 above at 2719.

⁹⁸ Murungi op cit note 95 above at 5.

Mollema disagrees with the register and the surrounding provisions, believing that the NRSO neither discourages perpetrators nor provides any rehabilitative or conciliatory prospects,⁹⁹ which contradicted the values of the child justice system and several international instruments seeking reformation and rehabilitation of child offenders.¹⁰⁰ Not only is the register questionable as a means of controlling child sex offenders, but it is also constitutionally controversial.¹⁰¹ Mollema concludes that the register is a quick fix for a complicated problem from which various legal challenges have arisen.¹⁰² He argues that there are many undesirable effects of the register on minor offenders,¹⁰³ but does not delve in depth on the socio-economic and psychological effects of the register on both the victim and the offender.

The psychological effects have been discussed in some foreign jurisdictions like Western Australia. These include depression, anti-social behaviour, and suicidal tendencies.¹⁰⁴ In the same jurisdictions, disclosure of the identity of registered child offenders resulted in a violent and embittered relationship between society and the offender.¹⁰⁵ Nevertheless, the future of the child may be compromised over his or her faults as a child that would violate the general principles of the CJA, which aims at reintegrating a child offender into society.¹⁰⁶ The minor's well-being, ethical and social growth needs to be protected against degradation, otherwise his/her well-being, will be at risk. Social labelling and alienation of the child sex offender, negatively affects the child offender's rehabilitation.

Mollema disagrees with the register, arguing that in children courts or any matter that involves a minor under section 3 of the CJA, diversion is a better option of children as a means

⁹⁹ Mollema op cit note 94 above at 483.

¹⁰⁰ Terblanche op cit note 3 above at 180.

¹⁰¹ P Stevens 'Protecting the Vulnerable? Assessing the Constitutionality of The National Register for Sex Offenders in Respect of Juvenile Sex Offenders – *S v IJ* 2013 2 SACR 599 (WCC)' (2014) 17(6) *PER / PELJ* 2796 at 2801.

¹⁰² Mollema op cit note 94 above at 483.

¹⁰³ Mollema op cit note 10 above at 2719.

¹⁰⁴ See Law Reform Commission of Western Australia 'Community Protection Offender Reporting Act 2004' at 113, available at https://www.lrc.justice.wa.gov.au/_files/PI01-FR.pdf, accessed on 18 May 2018.

¹⁰⁵ Mollema op cit note 10 above at 2720.

¹⁰⁶ *Ibid.*

of handling child offenders.¹⁰⁷ Mollema states that discrimination, which may have an ability to violate dignity, is unfair. A register has the capacity to weaken and prejudice the inherent right to dignity of child offenders, which is against their best interests.¹⁰⁸

Hansungule is not entirely against the substantive law of the register but opposes the formal law that comes with it.¹⁰⁹ Hansungule applauds the court decision in *J v NDP* for advocating the granting the discretion to courts¹¹⁰ and advocates for the register to operate in a manner that is fair, justifiable, open and democratic, that is, incorporating child principles such as restorative justice, criminal capacity, separation of children from adults and the constitutional value of Ubuntu, depending on individual circumstances.¹¹¹ Ubuntu is defined as a philosophy of life.¹¹² It has been submitted that Ubuntu signifies personhood, humanity, humaneness, and morality.¹¹³ Ubuntu, in direct translation, means ‘a person can be a person only through others’.¹¹⁴

Because there has been an increase in child sex offences,¹¹⁵ it is critical to provide a situational context for the problem in South Africa. Scholars have suggested that a shift away from the register should be made.¹¹⁶ This includes support solutions such as proper sentencing guidelines, deterring the potential offenders and lengthier periods of correctional supervision. Other authors have advocated values such as restorative justice and Ubuntu when sentencing

¹⁰⁷ Mollema op cit note 94 above at 480.

¹⁰⁸ Ibid.

¹⁰⁹ Hansungule op cit note 58 above at 28.

¹¹⁰ Ibid. Hasungule believes that the interests and rights of the victims are not entirely ignored but the court successfully strikes a balance between the victim and offender.

¹¹¹ Ibid at 28.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ S Cibane ‘Application of the Constitutional Value of Ubuntu in Private Relations: The Private Law of Contract as a Test Case’ 2012 *Phronimon* 1 at 2–3.

¹¹⁵ SAPS op cit note 25 above at 5.

¹¹⁶ Mollema op cit note 94 above at 483. Also see N Andersen ‘Shocking Stats Reveal 41% Of Rapes in SA are Against Children’ *The South African* 18 May 2018, available at <https://www.thesouthafrican.com/rape-statistics-41-children/>, accessed on 10 May 2018.

children, while others emphasise criminal capacity and seriousness of the offence.¹¹⁷ However, many young sex offenders receive custodial sentences without the benefit of any treatment programmes.¹¹⁸ Section 7(1)(h) of the Children’s Act 38 of 2005 (hereinafter referred to as ‘the Children’s Act’), specifies the minor’s need for ‘physical security, emotional security, intellectual growth, emotional development, social progress and cultural development’. However, there is poor management of child offenders in rehabilitation programmes by mixing young people convicted of different crimes.¹¹⁹

In the USA, UK and Kenya, the register’s success in protecting children against sex offences is debatable.¹²⁰ However, these foreign registers are more punitive and demanding compared to the NRSO since names of offenders are published to the community or police officials. Moreover, they contain every detail of the offender, including age, name, residential address, and photograph or other depiction.¹²¹ The information is published on an internet register and is readily available to all citizens, causing a number of problems such as revenge violence and suicides.¹²² The registration of adjudicated delinquency is still a universally controversial topic. Some jurisdictions have completely removed child offenders from the register while others require a minimum age for registration, but most have no limit on the application of the register.¹²³ This arguably impairs child rights to privacy, dignity and a fair trial, factors largely dismissed by these legal systems.¹²⁴

Hansungule adds that the application procedure for removal from the register of child offenders also confounds constitutional rights of children,¹²⁵ as held in *J v NDPP*, which further exposed infringement of constitutional rights such as ‘a right to dignity, the right to privacy

¹¹⁷ Ibid. Also see S S Terblanche ‘Aspects of Sentencing Child Offenders in Terms of the Child Justice Act 75 of 2008’ (2013) 14 *ASAJ* 1 at 3.

¹¹⁸ Mollena op cit note 94 above at 483.

¹¹⁹ Ibid.

¹²⁰ McPherson op cit note 11 above at 793.

¹²¹ Ibid.

¹²² See See Law Reform Commission op cit note 104 at 113. *Supra* note 101.

¹²³ Ibid.

¹²⁴ *J v NDPP* *supra* note 77 para 48.

¹²⁵ Hansungule op cit note 58 above at 2789.

and the right to fair labour practice and freedom of trade'.¹²⁶ According to the constitutional and international law ethos, the removal of children from the register should be lenient when compared to adults. The infringement of constitutional rights (of both adult and child offenders) by registration should lapse after a certain period. Registration has a very limiting effect on a child since they find themselves in the vicinity of other minors at schools, day-care centres, play areas, hospitals, home, shops and bus stops.

In accordance with the empirical principles of the Constitution, the objectives of the CJA could be interpreted as giving distinct protection and care to minors who perpetrate criminal offences.¹²⁷ Therefore, a general application of the substantive and procedural law may limit these rights, subject, however, to being 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.¹²⁸ There is a need for research to fill the existing gaps between SORMA and child justice systems consonant with constitutional and international law. The automatic registration of minor sex perpetrators on the NRSO is an obvious threat to child rights. Many experts in child law and constitutional law in South Africa could have foreseen such threat. However, since the amendment of automatic entry of child offender in the register, not much research has been undertaken on the subject. The aim of the research should be to interrogate the constitutional and related matters in terms of inclusion and removal of child sex offenders listed in the NRSO.

The methodology of this study is a desktop review of secondary information such as selected laws, regulations, the register, policy and guidelines pertaining to child sex offenders, balancing the best interests of both the minor victim and the minor sex offender. The study is limited as it does not review the extent of the implementation of the laws, regulations, register, policy and guidelines. This research seeks to establish that the registration of minor sex offenders should be amended with immediate effect because it infringes a number of child rights.

¹²⁶ In *J v NDPP* supra note 77.

¹²⁷ See *Johannes* supra note 62 para 96.

¹²⁸ See s 36 of the Constitution.

V RESEARCH QUESTIONS.

The research seeks to address the constitutionality and related legal matters brought about by the inclusion and removal of minor offenders in the NRSO. The following questions will be addressed:

- Does the NRSO uphold the constitutional rights of child sex offenders in South Africa?
- Is the NRSO a punishment, and if so, to what extent is the punishment justifiable in light of the Constitution and international conventions applicable to child sex offenders?
- Is the registration of child sex offenders a reflection of the child's best interests as a paramount concern in cases involving minors?
- How does the NRSO differ from the USA, Australia, the UK and Kenya in terms of application and results?

VI THE RESEARCH OBJECTIVES.

The specific objectives of the study are the following:

- To determine whether the NRSO constitutes a punishment and to what extent punishment is justifiable in light of the Constitution and international instruments in respect of child sex offenders.
- To determine whether the registration of child sex offenders reflects the best interests of the child as a paramount factor in matters that involve minors.
- To compare and analyse the aspects surrounding child sex offenders' rights and the register in other legal systems such as Australia, Kenya, UK and USA

VII RESEARCH STRUCTURE

(a) *Chapter One: Introduction*

Chapter one lays the foundation by providing an introduction and background to an examination of child sex offenders and their constitutional rights with respect to the NRSO in South Africa. The chapter describes the provisions surrounding the register, an analysis of the register and a literature review. The introduction is a background to the whole thesis.

(b) *Chapter Two: An Examination of the International Legal Instruments Pertaining to Child Offenders*

This chapter focuses on international instruments. The South African child justice legislative framework is interconnected with international law, and this chapter offers a critical analysis of the international and regional instruments which focus broadly on child offenders. The Constitution emphasises that courts should defer to international law when interpreting any constitutional right.

(c) *Chapter Three: The Position of the NRSO in Criminal Law*

The research thoroughly defines and explains the position of the minor offender in the criminal justice system according to domestic provisions. The chapter discusses the provisions that deal with separation of children from adults, sentencing of minors and the restorative justice principle.

(d) *Chapter Four: An Analysis of the Impact of the NRSO on the Constitutional Rights of Child Sex Offenders*

The findings of this study in respect of the aims, objectives and research questions are revisited in this chapter to verify the constitutionality of the register with regard to other legal instruments affecting child offenders. The chapter analyses relevant cases that elucidate the particular challenges faced by child sex offenders and their victims.

(e) *Chapter Five: A Comparative Analysis of Registration of Child Sex Offenders in Different Legal Systems*

This chapter embodies a comparative analysis of other legal systems such as those of the UK, USA and Australia, from which the register system was borrowed. Therefore, this study compares how other legal systems have applied the register for child sex offenders. Various register applications and procedures differ depending on the legal system. A comparative analysis strengthens the constitutional exploration of the register.

(f) *Chapter Six: Conclusion and Recommendations*

This final chapter draws conclusions from the study, inclusive of recommendations on the constitutional status of the register. The study limitations and future research are indicated herein.

VIII CONCLUSION.

Owing to the rise of violent crimes against children and women in South Africa, one cannot underestimate the need and importance to alert society to guard against such heinous crimes. However, rights such as the rights of dignity and privacy of all persons should be respected.¹²⁹ The potential advantage of the register in the protection of children against potential sexual abuse cannot be denied. Conclusively, sexual abuse of minors has a ‘devastating adverse social and mental health effects on the victims’.¹³⁰ Therefore, a register may be considered a necessary evil in order to protect children and people with disabilities from sexual crimes and to reduce the likelihood of repeat offences. Whether the register protects the vulnerable groups or infringes the rights of the same vulnerable group it seeks to protect in the process is open to question. Consequently, the effectiveness and relevance of the NRSO has been compromised because its provisions are vague and have failed to develop adequate and effective procedural rules.¹³¹ This research seeks to fill the specific gaps pointed out in the research questions concerning the registration of child sex offenders. Registration of child sex offenders should be readdressed since the Amendment Act does not make separate provisions for child removal from those in the NRSO, and the NRSO still infringes many of the child sex offender rights – and it should therefore be amended. The objective of the research is to establish the unconstitutionality of the register through analysis of international law, foreign registers and constitutional rights.

¹²⁹ B Stout ‘Applying Effective Practice Principles to Work with Child Sex Offenders in South Africa’ (2003) 16 *Acta Criminologica Southern African Journal of Criminology* 14 at 15.

¹³⁰ *Ibid* at 15. Also see Townsend, Waterhouse & Nomdo *op cit* note 18.

¹³¹ Mollema *op cit* note 94 above at 483.

CHAPTER 2

AN EXAMINATION OF INTERNATIONAL LEGAL INSTRUMENTS PERTAINING TO CHILD OFFENDERS

I INTRODUCTION

Owing to the proliferation of abuse against women, minors and people living with disabilities, the United Nations Children Fund (hereinafter referred to as ‘UNICEF’) lobbied states to implement laws recognising the rights of the aforementioned groups.¹ This led to a comprehensive attempt at addressing sexual offences and child offenders rights, which led to the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as ‘SORMA’) and the Child Justice Act 75 of 2008 (hereinafter referred to as the ‘CJA’).² South Africa is a signatory to the UN Convention on the Rights of the Child (1989) (hereinafter referred to as the ‘CRC’) which it signed and ratified into law in 1995.³

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law to any alternative interpretation that is inconsistent with international law.⁴ Therefore, the aim of this chapter is to interpret the aim and objectives of the NRSO in line with the registration of child sex offenders and international instruments. International instruments are also used as an interpretative mechanism in the Bill of Rights, as section 39 provides that the courts may have regard to them as long as they are consistent with the Constitution. Section 39 of the Constitution provides:

¹ Articles 19 and 32–39 of the United Nations Convention on the Rights of the Child, 1989 U.N. Doc. A/44/49 (1989) (hereinafter referred to as the ‘CRC’).

² The National Register for Sex Offenders (NRSO) was established under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as ‘SORMA’). Also see Child Justice Act 75 of 2008 (hereinafter referred to as the ‘CJA’).

³ Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the ‘Constitution’).

⁴ S 233 of the Constitution supra note 3.

‘(1) When interpreting the Bill of Rights, a court, tribunal or forum–

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.’

The Constitution is the supreme law of the land; consequently, no law or government action can supersede it. This also applies to international law which was ratified in South African law for example, the UN Convention on rights of children reflected in section 28 of the Constitution. Departure from these provisions may constitute a violation of the Constitution and relevant international conventions, meaning that children must be e treated appropriately when involved in the criminal justice system. International law identifies a child or minor as ‘a person below the age of 18 years’,⁵ which is consistent with the South African domestic law definition mentioned in chapter one. There are relatively well-established international law principles that guide State conduct regarding child offenders involved in the criminal justice system. Among the most relevant international and regional instruments that define child offenders’ rights are the following:

- Universal Declaration of Human Rights (1948) (‘UDHR’);
- United Nations Standard Minimum Rules on the Administration of Child Justice (‘Beijing Rules’ 1985);
- UN Guidelines for the Prevention of Child Delinquency (‘Riyadh Guidelines’ 1990);⁶
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985) (‘Convention against Torture’);
- United Nations Convention on the Rights of the Child (1989) (‘CRC’); and
- African Charter on the Rights and Welfare of the Child (1990) (‘ACRWC’).

South Africa has signed all the above-mentioned international and regional instruments and ratified most of them except the Riyadh Guidelines. These conventions are a

⁵ Article 1 of the CRC supra note 1.

⁶ The guidelines were adopted in 1990 with the goal of stressing the need for progressive policies for the prevention of delinquency, as well as the systematic review and implementation of strategies for such prevention policies.

guide to the interpretation of children's (and in some instances, adults') economic, cultural, social, political and civil rights. By ratifying all these instruments and guidelines, South Africa has pledged to protect and to be held responsible and accountable for their obligations in relation to the rights of the minor.⁷ This imposes a range of tasks on the South African legal system to identify certain developmental realities of childhood and to guarantee separate setoff defences to which underage defendants are entitled.⁸ It follows therefore that the criminal procedures should ensure that the best interests of the child are catered for in the prosecution of minor offenders.⁹

The CRC is the most common instrument, although there were once and have been since other international instruments for minors in conflict with the law both before and after its adoption.¹⁰ These instruments offer a succinct and detailed structure through which states are expected to fashion a system of child justice. Some of the related provisions covered include:

- '[t]he child's right to dignity, worth and right to privacy;
- the desirability of promoting the child's reintegration and [taking] the child's presumptive constructive role in society into account;
- the need for the establishment of a specialised criminal justice system for children in conflict with the law;
- the need for children to respect the fundamental human rights of others;
- the establishment of a minimum age of criminal capacity and the need to take into account the age of the children; and
- the need for creating alternative dispositions to institutional care in a manner appropriate to children's well-being and proportionate both to their circumstances and the offence'.¹¹

⁷ In terms of s 231(5) of the Constitution, South Africa is bound by international agreements that are binding on the republic when Constitution took effect.

⁸ V Pupavac 'The Infantilization of the South and the U.N. Convention on the Rights of the Child' in S Dillon (ed) *International Children's Rights* (2010) 65 at 68.

⁹ J Pratt 'Corporatism: the third model of juvenile justice' (1989) 29 *The British Journal of Criminology* 236 at 250.

¹⁰ In 1995 South Africa ratified the CRC (note 1 above) without reservation. The CRC was accepted by the General Assembly in 1989 only to be ratified in 1995.

¹¹ The *Johannes v S 2013 (2) SACR 599 (WCC)* (hereinafter referred to as the '*Johannes*') cited Art 40(3) of the CRC providing that government should establish institutions, authorities, laws and procedures precisely appropriate to child offenders.

The above international guidelines are a summary of how states should structure their child justice systems. While the South African legislature and judiciary are globally praised for the exemplary way in which they have adopted the CRC, the NRSO abandons many of these guidelines in the way it treats minors who are sex offenders. If these international instruments and sentiments are not included in the child justice system, South Africa's ratification of these guidelines would be hypocritical nonsense.¹² In the final analysis, it is submitted that international instruments should provide consistency in the application of rights, so the procedures in child sexual offence cases must be in line with the relevant regulations and conventions.¹³

II THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

All procedures and decisions in the child justice system are guided by article 3 of the CRC which states that 'the best interests of the child should be the primary consideration'. Therefore, in issues regarding a minor, 'the best interests of the child are paramount'.¹⁴ The principles of international law emphasise that the best interests of the minor is of the utmost importance in all matters regarding a minor,¹⁵ and calls for an establishment of a separate, minor-orientated system that recognises a minor as a holder of rights and freedoms separate from those of adults.

Terblanche cautions that the child's best interests, highlighted in article 3(1) of the CRC, is not the overriding factor, but consideration must also be given to other competing or conflicting factors in matters involving children.¹⁶ With regard to the register, the competing

¹² The *Johannes* case citing art 40(3) of the CRC supra note 11.

¹³ UNICEF 'Convention on the Rights of the Child: Setbacks and Success' in S Dillon (ed) *International Children's Rights* (2010) at 113–114.

¹⁴ According to the UN Committee on the Rights of the Child, *General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, available at <https://www.refworld.org/docid/4670fca12.html> accessed on 23 July 2018 on *Children's Rights in Child Justice*, it was held that the best interest is paramount in any instances that involve a child in the child justice system.

¹⁵ See J Todres 'Emerging Limitations of the Rights of the Child: The U.N Convention on the Rights of the Child and its Early Case Law' in S Dillon (ed) *International Children's Rights* (2010) 48, 49. See also CRC (note 1 above) and African Charter on the Rights and Welfare of the Child (1990) (hereinafter referred to as the 'ACRWC'), art 4(1).

¹⁶ S S Terblanche *The Guide to Sentencing in South Africa* 3 ed (2016) 346.

factors may include justice for the victim and protection of society as a whole from future victimisation. Hodgkin and Newell explain that the CRC uses the term ‘best interests’ to focus states’ attention on the needs of an individual in a particular matter, while requiring states to determine the best interests of children as individuals.¹⁷ This means that in issues involving a minor, the best interests of the child determine the actions to be taken in respect of the particular child in question, taking into account each child’s particular circumstances.¹⁸ Article 3(1) of the CRC serves as a universal principle compelling the minor’s best interests to be weighed along with other interests which could also restrict the minor’s interests. Some general instruments such as the Child Rights Convention, the Beijing Rules and the Havana Rules require the principle of the minor’s distinct interests to be overarching in issues involving the individual minor. However, the register discounts a child offender’s psychological and moral development because the NRSO lacks provisions that detail the child’s best interests as an individual. The ‘best interests’ principle should be applied in a concurrent and flexible manner, taking into consideration the needs and future prospects of the child.¹⁹

The child justice system should consider the best interests of the child by looking at the surrounding circumstances such as age, background and the effects of the NRSO.²⁰ The motive for child sex offenders to commit offences in South Africa is linked to other risk factors to which they are exposed, such as crime, drugs and abuse²¹ as a result of poverty; they grow up to be criminals themselves, with many starting at a tender age.²² Therefore, in any matter, consideration of the best interests of the child offender will be to help a child offender to develop into a responsible adult through the application of rehabilitative and restorative justice measures. Rule 1.2 of the Beijing Rules proposes conditions that ensure that the child offender maintains a

¹⁷ R Hodgkin and P Newell *Implementation Handbook for the Convention on the Rights of the Child* 3 ed (2007) 39.

¹⁸ Terblanche op cit note 16 above at 347.

¹⁹ *J v National Director of Public Prosecutions* 2014 (2) SACR 1 CC (hereinafter referred to as the ‘*J v NDPP*’) para 21.

²⁰ J E Grusec & JJ Goodnow ‘Impact of parental discipline methods on the Child’s Internationalization of Values: A Reconceptualization of Current Points of View’ (1994) 30(1) *Developmental Psychology*, 4 at 4.

²¹ T Harris & C Bezuidenhout ‘A Psychocriminological Investigation into Risk Factors Contributing to Youth Sex Offending’ 2010 *ASAJ* 28 at 29–30.

²² *Ibid* at 32.

meaningful life in the community after being exposed to the criminal justice system. These broad fundamental perspectives of the Beijing Rules refer to comprehensive social policy in general and aim to promote juvenile welfare to the greatest extent possible, minimising the need for intervention by the juvenile justice system and, as a result, reducing the harm that any intervention may cause.²³ Such preventative actions for the young, prior to the commencement of delinquency, are basic policy requirements meant to eliminate the need for the Rules to be applied. Throughout that teenage phase, when the child is susceptible to deviant behaviour, the State, community, guardians and other stakeholders involved in the upbringing and development of the minor have a duty to promote a crime-free environment for personal growth and education.²⁴ However, the NRSO burdens a child sex offender with a criminal record and that offers little or no opportunity for rehabilitation.

In countries that have child legal systems that follow the model of the criminal courts, the well-being of the child should be stressed, avoiding crude punitive penalties that do not offer opportunity for change in or reintegration into society.²⁵ This information could be considered as a series of mitigating factors during the registration application process by the State.

The African Charter on the Rights and Welfare of the Child (hereinafter referred to as 'ACRWC') frames the best interest principle in clearer and more applicable terms when compared to the CRC, as explained below.²⁶ Article 4(1) of the ACRWC states that the principal factor in interpretative disputes is the best interests of the child. The ACRWC describes the best interests of the child as 'the primary consideration in all actions regarding the child'.²⁷ Most authors acknowledge this to be a powerful statement,²⁸ in contrast to article 3(1) of the CRC,

²³ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985 available at <https://www.ohchr.org/documents/professionalinterest/beijingrules.pdf>, accessed on 19 June 2018.

²⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter referred to as the 'Beijing Rules'), 1990A/RES/40/33 (1990), Rule 1.2.

²⁵ Beijing Rules *supra* Rule 24.

²⁶ *S v M* 2008 (3) SA 232 (CC) para 25. Also see ACRWC *supra* note 15 above.

²⁷ ACRWC *supra* note 1 above Article 4(1).

²⁸ The instruments of the United Nations actively advocate an 'individualised approach to the rights of the child, whereas the ACRWC affirms a collective approach', integrating the rights of children together with the family and

which denotes the best interests of the child as ‘an’ (rather than ‘the’) important factor in all matters regarding minors,²⁹ underlining the importance of the principle of the best interests of the child in any matter that involves a child. The ACRWC has gained more currency by its indelible assertion that the child’s best interests occupy a higher theoretical level relative than the CRC and the Constitution.³⁰

Regularly, sexual crimes are committed because many of these children are themselves victims of unreported abuse.³¹ Hence, the child offenders either do not appreciate the effects of such crimes on society or they think they will get away with them in the same way as those who have preyed on them.³² Article 40(4) of the CRC enumerates a non-exhaustive list of factors that may be viewed as being in the best interests of the minor. These factors would guarantee that minors are treated in a way that is appropriate for their well-being and proportionate to both their surrounding factors and the crime.³³ This would also usher in alternative measures, such as ‘counselling, probation, foster care, education and vocational training programmes, along with other alternatives to institutional care’.³⁴ Individually and collectively, all minors have the right to express themselves without violating the rights of others as independent social beings.³⁵

community norms that are part of it. This means ACRWC guidelines are supposed to be applied in a family or community set-up when it comes to the register. This supports a measure that leans towards reconciliation rather than a register that tries to separate the victim and the offender.

²⁹ ‘The’ is used to refer to specific or particular nouns and is called a definite article. Use of ‘a/an’ is used to modify non-specific or non-particular nouns and is called an indefinite article.

³⁰ See s 28(2) of the Constitution provides that the child’s best interests are ‘of paramount importance in every matter concerning a child’.

³¹ Harris & Bezuidenhout op cit note 21 above at 29.

³² K Richards ‘What Makes Juvenile Offenders Different from Adult Offenders?’ (2011) 409 *Trends and issues in crime and criminal justice* 1 at 1.

³³ Ibid at 1.

³⁴ See Article 40 (b) of the CRC supra note 1.

³⁵ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (1) SACR 327 (CC) (hereinafter referred to as the ‘*Teddy Bear case*’) para 40.

III THE PROTECTION OF CHILD OFFENDERS FROM MALTREATMENT AND DEGRADATION

The right to protection ‘from maltreatment, neglect, abuse or degradation’ is not clearly defined as a distinct right in the Constitution, but it is listed under section 28 of the Constitution.³⁶ The child’s right originates from various sources of law and instruments, implying that children have a right to share both their own joy and grief, to play, to dream and discover in their own particular way, and to start to understand their bodies and brains and feelings in their own way.³⁷ In the fullness of the social and moral world, children should, above all, learn how to conduct themselves and make choices.³⁸ However, these rights should be expressed without impairing the rights of others, in which event consequences may include unpleasant treatment appropriate to the minor age and mental maturity. Sexual crimes have serious effects on the victim, their families and the community, but registration affects only the child offender .

Legal instruments are enacted to protect child offenders from maltreatment and degradation. Article 17(1) of the ACRWC advocates the right to special care for child offenders compatible with the child’s sense of integrity and worth, and which strengthens the minor’s respect for the basic rights of other individuals.³⁹ Arguably, registration of a minor may lead to stigmatisation which impairs the minor’s sense of dignity and worth, diminishing the child offender’s rights to dignity and equality in situations that may be regarded as unreasonable and unjustifiable according to the Constitution.⁴⁰

Most minor sex perpetrators are usually victims of sexually related crimes.⁴¹ The same studies have established that because of abandonment and failure to get care, treatment or

³⁶ See section 28 of the Constitution. Also see Terblanche op cit note 16 above at 651.

³⁷ *Teddy Bear* case supra note 35 above cited *S v M* 2008 (3) SA 232 (CC).

³⁸ Ibid.

³⁹ See ACRWC supra note 16.

⁴⁰ N Mollema ‘The Validity and the Constitutionality of the South African register for Sex Offenders: A Comparative Study’ (2015) 18 *PER/PELJ* 2707 at 2719.

⁴¹ Harris & Bezuidenhout op cit note 21 above at 45.

counselling,⁴² the abused teens started offending earlier than those who did not suffer from sexual abuse and had affected twice as many victims.⁴³ As a result of the neglect, the child resorts to offending and preying on other children, although such actions are neither commendable nor justifiable. However, the cause of such behaviour cannot be ignored; considering that such a child had been a victim at some point but had never received assistance, registration in the NRSO constitutes an inhumane and cruel form of treatment.⁴⁴

South Africa has ratified the UNCR under which it is legally bound to protect everyone, particularly minors, from ill-treatment, abuse or degradation.⁴⁵ It is argued that the register is designed to protect child victims from further abuse in the light of a huge rise in sexual crimes, especially against children and disabled members of the society. The effects of sexual abuse are severe and long-lasting,⁴⁶ meaning that all children, regardless of their age and status, deserve more protection because of their vulnerable position in society.

IV CRIMINAL CAPACITY

Rule 4.1 of the Beijing Rules highlights the recognition of the concept of the age of criminal accountability of children in any criminal justice system.⁴⁷ The minimum age for criminal responsibility varies from legal system to legal system, but Rule 4 of the Beijing Rules advocates

⁴² G Da Costa, G M Spies & L Coetzee 'Contributory Factors to Child on Child Sexual Abuse: Perceptions of Diverted Female Youth Sex Offenders' (2004) 15 *ASAJ* 35 at 45.

⁴³ *Ibid* at 45.

⁴⁴ Also see Article 7 of the UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, (1966). Also see Article 4 of the Universal Declaration of Human Rights (UDHR) (1948).

⁴⁵ The reason was to protect the child from physical and emotional abuse. Also see the preamble of Declaration of the Rights of the Child, 1959 G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959). This assertion was tested against the right to religion in *Christian Education SA v Minister of Education* 2000 (10) BCLR 1051 (CC); 2000 (4) SA 757 (CC).

⁴⁶ Harris & Bezuidenhout *op cit* note 21 above at 32.

⁴⁷ Beijing Rules *supra* note 24.

an age level that is neither too young nor too low.⁴⁸ The international standard for criminal responsibility or capacity is 12 years.⁴⁹

Different minimum ages of criminal capacity vary from country to country according to different histories and cultures, especially in their child justice systems.⁵⁰ The statutes governing the NRSO do not stipulate the minimum age for registration of a minor sex offender, but vaguely use the term ‘child’, while international law stipulates different ages for child criminal capacity.⁵¹ This prejudices child offenders because all children are capable of being registered, in effect overlooking international guidelines. Mostly, the principle of responsibility for delinquent or illegal activity is closely linked to certain social rights and obligations, for example, marital status and civil majority.⁵² There ought therefore to be a minimum age for registration of child offenders.

Article 40(3) of the CRC requires state parties to establish ‘a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’.⁵³ This fails to provide clear guidance as to what exactly the minimum age of criminal responsibility ought to be. In terms of the CJA, the minimum age of criminal responsibility is 9 years.⁵⁴

⁴⁸ Ibid.

⁴⁹ See para 16 of the Convention on the Rights of Child General Comment number 10 CRC/ C/ GC/ 10 (2007) cited in Terblanche op cit note 17 at 651. The age level can possibly be increased to a higher age than 12 years.

⁵⁰ See M Molan *Cases and Material on Criminal Law* 3 ed (2005) 82.

⁵¹ See the Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 (Amendment Act).

⁵² G Van Bueren ‘A Curious Case of Isolationism: America and International Child Criminal Justice’ in S Dillon (ed) *International Children’s Rights* (2010) 650 at 657.

⁵³ CRC supra note 1.

⁵⁴ M I Schoeman ‘Determining the age of criminal capacity: Acting in the best interest of children in conflict with the law’ (2016) 57 *SACQ* 35 at 35. After enactment of the CJA, the Minister was given five years to assess whether the age of 10 years was suitable for minimum age in South Africa., Thirteen years have passed since the promulgation of the CJA, reflecting the approval of an age that is not recommended by international law standards. Also see A Skelton ‘Proposal for the Review of the Minimum Age of Criminal Responsibility’ (2013) 3 *SACJ* 257.

Once separate justice systems for adults and children have been developed, they should comply with the principles and requirements of international instruments with regard to age limits and potential care.⁵⁵ The CRC imposes on states parties an obligation to maintain a balance between formal laws and the fundamental rights of children.⁵⁶ The Beijing Rules recommend that all officials coming into contact with a child should ‘avoid harm to her or him with due regard to the circumstances of the case’.⁵⁷ The Beijing Rules prohibition of ‘harm’ is broader than the customary ban on torture and cruel, inhumane and undignified treatment and punishment.⁵⁸ According to the Beijing Rules, a child should be treated differently from adults in the course of the administration of justice.⁵⁹ Nevertheless, prior to the promulgation of the Amendment Act, minors and adults were dealt with in a similar manner and the Amendment Act changed only one part of it, requiring revision of the remaining provisions.⁶⁰ Both the Beijing Rules and the CRC are based on the principle that any involvement of a child in the criminal justice system is ‘harmful’. Therefore, compassionate and kind firmness ought to be important elements the NRSO possesses in order to validate the system to protect child rights while maintaining objective justice, protecting victims and holding offenders accountable.

Despite noticeable changes, more modifications are required concerning the inclusion on and removal of child names from the register because, as it stands, the register still infringes internationally recognised children’s rights. Children remain on the register for the same length of time as adults.⁶¹ Children should receive different treatment in that respect. Children

⁵⁵ Van Bueren op cit note 52 above at 657.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ SORMA did not separate children from adults in the inclusion and removal of children from the NRSO. There was the same procedure for inclusion of adults and children until it was challenged in various cases, such as *J v NDPP* case. The situation was revised by s 5(b)(i) of the Amendment Act that prevented the State from registering a child sex offender automatically without a court order.

⁶¹ See s 51 of SORMA supra note 2.

should in principle get separate treatment from adults in all situations based on age, maturity and vulnerability.⁶²

International law condemns the publication of a minor's particulars or information.⁶³ Specifically, the Havana Rules state that all reports concerning minors, that is, legal records, disciplinary proceedings and records, ought to be located in a confidential or private and separate file.⁶⁴ The reports ought to be updated regularly, and be available only to persons authorised by the statute (or should be otherwise classified or confidential).⁶⁵ The guideline stresses that when children have served their sentence, their records shall be sealed, and should be expunged when the criminal system sees fit.⁶⁶ Although SORMA stresses that the register is not accessible to everyone, child information is supposed to be sealed and not published in any form.⁶⁷ The State may not share the information with anyone or any authorities. This brings into focus the retrospective effect of the register. Retrospective legislation has an effect on future, present and past legal circumstances.⁶⁸ Child offenders who have been convicted and have served their sentence are supposed to have their files sealed or expunged. That means in effect that a child should not be registered for any purposes.

Rule 19 of the Havana Rules states that any child has the right to challenge information or decisions on his or her file to correct false, unreasonable or unjust claims.⁶⁹ To facilitate the process, protocols should be in place to give a third-party access to the information upon request. Childlike behaviour or a childlike act does not predetermine future social norms

⁶² *Johannes supra* note 11 above para 57.

⁶³ Rule 19 of the United Nations Rules for the Protection for the Protection of Juveniles Deprived of their Liberty (hereinafter referred to as the 'Havana Rules'), 1991 A/RES/45/113 (1991).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ C Botha *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 55.

⁶⁹ Havana Rules *supra* note 63, Rule 19.

and values.⁷⁰ Defiance is also part of the process of maturation and development and dissipates in the transition to adulthood in most individuals. Arguably such defiance may carry through to adulthood if not treated at a young age. However, and in any event, registration is not the best solution for such offenders; assistance in the form of moral reconnection therapy⁷¹ could lay the basis for rehabilitation.

A difficult decision is whether to risk the future of many other children while preserving the innocence and decent future of the child offender.⁷² It is highly probable that many jurisdictions will choose to protect future victims by supporting the objectives of the register. This may seem a fair argument; however, considering how many children in South Africa are susceptible to crime and recidivism, the crime rate will continue to increase.⁷³ According to Van Boerne, a well-resourced child criminal justice system lessens the odds of a child reoffending, hence challenging the use of punitive forms of justice such as the NRSO.⁷⁴ A well-resourced child criminal justice system is an institution that complies with international law and is not a drain on the national resources but a facet of natural development in society's interest.⁷⁵ Instead of listing and publishing names of children, which infringes a number of international instruments, the State can move towards a well-resourced child justice system.

⁷⁰ P Stevens 'Protecting the Vulnerable? Assessing the Constitutionality of the National Register for Sex in Respect of Juvenile Sex Offenders – *S v IJ* 2013 2 SACR 599 (WCC) and *J v National Director of Public Prosecutions* 2014 ZACC 13 (2014) 17(6) *PER/PELJ* 2779 at 2797.

⁷¹ Moral Reconnection Therapy is a step-by-step, progressive therapeutic technique that aims to improve ego, social, moral, and positive behavioral growth. With the purpose of reducing re-offending, it improves social skills, self-control, problem solving, and impulse management. It is founded on the notion that properly functioning, moderately fulfilled, happy people have a strong sense of self and that their behavior and relationships are guided by moral judgment levels that are quite high. LM Ferguson & JS Wormith 'A Meta-Analysis of Moral Reconnection Therapy' (2012) 57(9) *International Journal of Offender Therapy and Comparative Criminology* 1076 at 1079.

⁷² Mollema op cit note 41 above at 2720.

⁷³ Harris & Bezuidenhout op cit note 21 above at 29.

⁷⁴ Van Bueren op cit note 52 above at 650.

⁷⁵ Ibid.

VI MINIMUM REQUIREMENTS WITH REGARD TO PROCEDURES FOR MINOR OFFENDERS

As discussed above, the register is a punitive form of treatment strongly forbidden by international law.⁷⁶ The register does not constitute actual imprisonment but a sanction which is punitive, with severe effects comparable to imprisonment.⁷⁷ There is a need to improve these conditions by shortening the periods of sanctions.⁷⁸ Child justice systems are designed to counteract these detrimental effects by fostering a positive relationship between the child and society,⁷⁹ cognisant that the care of minors whose liberty has been impaired in the care of social services is of great importance.⁸⁰ However, section 48 of SORMA states that any person added to the register cannot work or have authority over children for his or her lifetime, which may be seen as harsh for child sex offenders. Even if a child is not tried in a special hearing, the child is deprived of liberty by any sanction such as that imposed by way of the NRSO.⁸¹ A child may be registered for his or her entire life, depending on the sentence handed to him or her by the court. As a result, the basic principle of re-integration is overlooked.⁸²

States are directed to pay attention to children's need for privacy, sensual stimuli, sport, leisure and opportunities for peer association.⁸³ The aims of the register are to limit access of a minor sex offender to other children, limiting the opportunity for peer association causing stigmatisation that will have a negative impact on sensual stimuli and infringing the right to privacy and dignity. The child's continuing access to the community and the community's access to the child will be limited. Rule 32 of Havana Rules emphasises the importance of children's

⁷⁶ See Rule 5 of the Beijing Rules *supra* note 24. Also see Havana Rules *supra* note 63, Rule 68.

⁷⁷ *Ibid.*

⁷⁸ Havana Rules *supra* note 63, Rule 68.

⁷⁹ *Ibid* Rule 3.

⁸⁰ *Ibid* Rule 8.

⁸¹ Van Bueren *op cit* note 52 above at 652 and 655.

⁸² Havana Rules *supra* note 63 Rule 14. Life imprisonment without parole or an option of release does not fulfil the criteria of the shortest appropriate period of time.

⁸³ Havana Rules *supra* note 63, Rule 32.

continuing access to the community.⁸⁴ Labelling from being registered in the NRSO could push child offenders to the margins of society as outcasts, which may lead to reoffending.

VII CONCLUSION

The listing of a child sex offender as a national sex offender comes with stigmatisation and humiliation which contravenes many international instruments, despite their ratification into domestic law and the interpretative approach directed in section 39 and Chapter 14 of the Constitution.⁸⁵ This means that all policies, strategies and legal frameworks that are not in line with international law are invalid and unconstitutional.

Further, the register could harm the child's best interests, and therefore falls to be amended to avoid such harm. As the child offender is considered per se as being less culpable than an adult offender, treatment processes relating to children should be towards social reintegration by applying constitutional principles of restorative justice. The set-up of the ACRWC sits well with the culture of African adjudication, restorative justice and Ubuntu. International child law advises on how to mitigate the punitive measures that adversarial court procedures and systems have on a minor rights.⁸⁶ Countries that have signed the international treaties and conventions are obliged to treat the child who is in conflict with the law in a compassionate and humane manner, in line with international norms, values and standards.⁸⁷ As in other areas of children rights, the question should be asked whether their human rights are protected or whether they provide cover for governments that fail to alter child behaviour despite declaring concern for children's rights. SORMA and the Amendment Act should be consistent with international law, and any inconsistency may constitute a violation of the Constitution,

⁸⁴ Also see Ibid. Terblanche op cit note 16 above at 4. Also see s 3 of the the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNJD) See also J Gallinetti *Getting to Know the Child Justice Act* (2009) at 9, also available at <http://www.childjustice.org.za/publications/Child%20Justice%20Act.pdf> (Accessed 19 January 2018).

⁸⁵ Ratified instruments include CRC supra note 1 and ACRWC supra note 15.

⁸⁶ L Townsend, S Waterhouse & C Nomdo 'Court support workers speak out: Upholding children's rights in the criminal justice system' (2014) 48 *AJOL*, also available at <http://dx.doi.org/10.4314/sacq.v48i1.7> (accessed 7 January 2018).

⁸⁷ Van Bueren op cit note 52 above at 652.

thereby rendering the NRSO unlawful.⁸⁸ South Africa has signed and ratified many international instruments that condemn sanctions such as those imposed by the NRSO on child sex offenders.⁸⁹

⁸⁸ This is expanded by Rule 5 of Havana Rules (supra note 63) which stresses that the rules are intended to act as convenient reference standards, offer assistance and instruction to practitioners engaged in the administration of the framework of child justice.

⁸⁹ Ratified instruments include CRC (note 1 above) and ACRWC (note 15 above).

CHAPTER 3

THE POSITION OF THE NRSO IN CRIMINAL LAW

I INTRODUCTION

This chapter highlights the position of the National Register for Sex Offenders (hereinafter referred to as the ‘NRSO’) in criminal law. The NRSO was established in terms of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as ‘SORMA’). The purpose of SORMA is clearly stated in the preamble to the Act, to address prevalent sexual offences and to provide for discriminatory measures to take the edge off the suffering of victims of sexual offences and lastly to incorporate international legal instruments in South African criminal law relating to sexual offences.¹ SORMA created the NRSO in order to protect children and people with disabilities from persons who had been convicted of sexual offences.² The court has the discretion either to register or to decline to register the child offender on application by the prosecution.³ Adult sex offender registration is automatic once an adult has been convicted of a sexual crime and sentenced. Punishment is without doubt a primary function of criminal law. This discussion explores the purposes of punishment and criminal capacity in line with the register. The Child Justice Act 75 of 2008 (hereinafter referred to as the ‘CJA’) and the related pieces of legislation establish general principles for handling a child case while promoting a different style of litigation between adults and child offenders.⁴

¹See ss 41(1) and (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as ‘SORMA’).

² Subsequently, according to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 (hereinafter referred to as the ‘Amendment Act’), there is no automatic registration of child offenders but an application for registration is submitted after sentence has been imposed.

³³ Ibid s 50 Amendment Act supra.

⁴ See s 3(b) of the Child Justice Act 75 of 2008 (hereinafter referred to as the ‘CJA’) notes that on similar facts, a child must not be treated more harshly than an adult would be treated.

On 16 June 2009 the South African government brought into force the National Register for Sexual Offenders in an attempt to alleviate the problem of sexual crime. The NRSO found its way into the Sexual Offences Bill immediately prior to its being passed by the National Assembly at the bidding of Jonny De Lange as chairperson of the South African Parliamentary Portfolio Committee on Justice and Constitutional Development.⁵ One of the objectives of the NRSO was to keep a record of all those persons who had been convicted of sexual offences against children or mentally ill persons, whether committed before or after the commencement of the chapter and whether the offence was committed in or outside South Africa.⁶ Another objective was to inform an employer, licensing authority or relevant authorities dealing with fostering, kinship, care, temporary safe-care, adoption or curatorship applying for a certificate in respect of a particular employee or applicant whether that person's details appear on the NRSO.⁷

The following terms demand clarity for purposes of this chapter:

- 'Sentencing' refers to an action or procedure or imposition on a certain offender of an unpleasant order or sentence by the court.⁸ Sentence refers to any final measure or order imposed by the court of law on any person convicted of a crime, except where specific provision is made for application of any other measure. Section 276(1) of the CPA draws a list of the sentences a court can impose on the offender, but the list is not complete because it does not contain all the orders a court of law can impose. If the sentence is suspended, it does not normally amount to a sentence, but a caution amounts to a sentence.

⁵ Z Jooma *The National Register for Sexual Offenders: The Solution to Protecting Children in South Africa?* (Unpublished LLM thesis, University of Pretoria, 2010) 11. De Lange desired to see a blacklist or sexual offenders registration in South Africa, and he disagreed with the SALRC's stance that such a list would give people a false sense of security. De Lange then asked legal drafters at the Department of Justice to look into the possibility of establishing a register. This is how the NRSO was incorporated into the Sexual Offences Bill just before it was passed by the National Assembly.

⁶ See s 41 of SORMA supra note 1.

⁷ Ibid s 44 SORMA supra notes 1. An application for a prescribed certificate means a certificate stating whether or not the particulars of a person mentioned in the application are recorded in the register.

⁸ JJ Joubert *Criminal Procedure Handbook* 12 ed (2017) 325.

In *S v RB; S v DK*⁹, the question was whether the name of the person whose punishment had been postponed should be listed on the register. According to section 297(1)(a) of the CPA, this applies to a child offender who has not been sentenced but has been granted a postponement of sentencing. This is a quite different procedure from the imposition of sentence. In questionable decisions, the court ruled that the NRSO provisions failed to give the judicial officer any discretion in this regard.¹⁰ It was also submitted in *S v RB; S v DK* that under section 297(1)(a) of the CPA, when a child offender is not sentenced, yet the court grants a postponement of sentencing, this was a quite different procedure from the imposition of sentence. There are no clear precedents for cases in which a sentence has been postponed. Hansungule asserts that there is also no clear legal procedure for when a child offender sentence has been suspended.¹¹ Therefore, a register may be regarded as a sentence since it is an order applied by and at the discretion of the court in respect of sexual offences.

- '[P]unishment simply refers to an unpleasant experience, or a sense of discomfort which is imposed by the court after conviction.'¹² From a procedural point of view, most sentences are punishments.¹³ In short, a punishment is a sentence or sanction imposed as punishment for a crime on an accused duly convicted by an authorised court.¹⁴ A register does bring some level of discomfort and unpleasantness to the offender through limited employment opportunities and an obligation to disclose his or her previous conviction or

⁹ 2010 (1) SACR 447 (NCK) (hereinafter referred to as the '*S v RB; S v DK*' case).

¹⁰ *J v National Director of Public Prosecutions* 2014 (2) SACR 1 CC (hereinafter referred to as the '*J v NDPP*') para 20.

¹¹ Z Hansungule 'Protecting Child Offender's Rights: Testing the Constitutionality of the National Register for Sex Offenders' (2004) 50 *SACQ* 23 at 29.

¹² Joubert op cit note 8 above at 325.

¹³ Ibid at 25.

¹⁴ S S Terblanche 'Aspects of Sentencing Child Offenders. The Child Justice Act 75 of 2008' (2013) 14 *ASAJ* 1 at 5–6, states that punishment clearly intends to include not only what a court orders to the offender but also punishment by the parents or community.

information of personal sexual experience.¹⁵ It is legally understood that a sanction is a form of punishment.¹⁶

Purposes of the punishment include deterrence, rehabilitation, prevention and retribution. The aim of the NRSO is to protect all minors and persons living with disabilities from interaction with sex perpetrators by compiling a list of sexual offenders and using the list to warn ‘employers, licensing authorities and childcare authorities’ that specific individuals are on the list.¹⁷ The question remains: does a register constitute a punishment; and if so, how much unpleasantness is necessary and justifiable for children?

(a) *NRSO Preventative Purpose*

Preventative purpose in an extreme sense refers to punishment.¹⁸ In light of this, the child is permanently incapacitated to prevent him or her from posing a future risk to society. Examples of a preventative purpose are capital punishment or the death penalty, which is usually applied only to adults.¹⁹ A penalty of this nature aims to incapacitate or physically prevent the child offender from committing a sexual crime again.²⁰ Considering the register narrowly, it falls under this purpose as an extreme or absolute form of punishment. It may be argued that this is a less drastic way to prevent sexual crimes than imprisonment. Prevention is the register’s primary objective.²¹ It lasts longer, to the extent of a lifetime. Yet many other punitive measures for children, such as imprisonment and detention, last for only a short time. In most punitive sentences the offender will be released in a short time and may gain wide latitude to commit the same crime.

¹⁵ Also, as a consequence, the child offender’s scope of employment is limited by not having access to or authority over children.

¹⁶ J Law and E A Martin *Oxford Dictionary of Law* 7 ed (2009) 492. Also see CR Snyman *Criminal Law* 6 ed (2016) at 37. The punishment is pronounced in a sentence of the court.

¹⁷ *J v NDPP* supra note 10 para 20.

¹⁸ Snyman op cit note 37 above at 20.

¹⁹ Ibid. A narrow approach is mainly applied in courts. In *Zinn* 1969 2 SA 537 (A) at 540 (hereinafter referred to as ‘*Zinn*’) the theory was described as a combination of the theories. It is regarded as more practical in the sense that it is balanced, and theories or purposes can overlap – known as the triad.

²⁰ Terblanche op cit note 12 above at 177. See too *Zinn* supra note 19.

²¹ *Zinn* supra note 19.

However, when it comes to registration, one has to look at the age and maturity of the perpetrator.²² Section 51(1) and (2) of SORMA states that information in respect of the individual will not be removed from the NRSO if the imprisonment is for longer than 18 months or if the individual gets a second conviction related to sexual circumstances. Even though the register is effective in identifying persons who have been convicted of sexual offences, the registration of particulars of minors or children may constitute an inhumane, degrading punishment which undermines the best interests of the child.²³

(b) *NRSO Deterrent Purpose*

The meaning of deterrence was explained as ‘[t]he idea that man, being a rational creature, would refrain from the commission of crimes if he could know that unpleasant consequences of punishment would follow the commission of certain acts’.²⁴ The deterrent purpose has two further subdivisions: individual deterrence and general deterrence. The purpose of individual deterrence is to try to deter the particular offender from committing further crimes. The theory is that it will deter the child from reoffending because he or she has learnt from the unpleasant experience.²⁵ From an objective point of view, a register fits under the purpose of individual deterrence, the aim of which is primarily to deter the individual from committing sexual offences against children. This objective is set out in section 43 of the SORMA, which mandates that a register be maintained containing a list of persons who have been convicted of sex-related crimes or alleged to have committed them, so as to deter them from having access to children. Registration is a hefty sentence effectively intended to deter a child from reoffending.²⁶

²² See also Terblanche op cit note 12 above at 177.

²³ See s 28 of the Constitution.

²⁴ Terblanche op cit note 12 above at 177. Also see *S v Rabie* 1975 4 SA 855 (A).

²⁵ Ibid Terblanche at 177.

²⁶ P Stevens ‘Protecting the Vulnerable? Assessing the Constitutionality of the National Register for Sex in Respect of Juvenile Sex Offenders – S v IJ 2013 2 SACR 599 (WCC) and *J v National Director of Public Prosecutions* 2014 ZACC 13 (2014) 17(6) *PER/PELJ* 2779 at 2796.

General deterrence in punishment is used as an example to daunt potential perpetrators²⁷ – it is aimed at deterring society as a whole or a wider sector of society.²⁸ Child offender cases are not published. As a result, other children do not know what happens in a children’s court, as opposed to the publication of adult proceedings. A deterrent message by way of the register will be received by only a few people or a small group in society since the register provisions are not published or publicly accessible.

III THE NRSO AS A PUNISHMENT

When a sexual offence is committed, many lives are ruined, and the primary response of the justice system is to exact the worst possible punishment on the child sex abuser.²⁹ However, this is not always the safest path forward, since many of the child offenders are victims of circumstances that have become prevalent in many South African societies, such as substance abuse and crime.³⁰ Over half of the population of children in South Africa have experienced some kind of sexual abuse, and this is becoming a norm.³¹ Many of these minor offenders need reformation instead of sanctions and labelling them as a danger.³² This goal is best achieved in terms of the CJA, through the imposition of sanctions that strive to achieve the goals of the Act and not through the imposition of a further burden or punitive measure on the child offender, such as the NRSO, which undermines the CJA goals. There are three constitutional principles in the Bill of Rights that must be considered before any sanction is imposed, but only one will be discussed in this research,³³ namely the right

²⁷ Ibid. Stevens asserts that the belief is that the threat of similar punishment will cause such potential or next offender to refrain from committing crime.

²⁸ Ibid.

²⁹ G da Costa, G M Spies & LCoetzee ‘Contributory Factors to Child on Child Sexual Abuse: Perceptions of Diverted Female Youth Sex Offenders’ (2004) 15 *ASAJ*, 35 at 36. Also see *J v NDPP* supra note 15 para 48.

³⁰ T Harris & C Bezuidenhout ‘A Psychocriminological Investigation into Risk Factors Contributing to Youth Sex Offenders’ 2010 *ASAJ* 28 at 32.

³¹ Da Costa, Spies & Coetzee op cit note 29 above at 36.

³² Ibid.

³³ See section 35 of the Constitution.

not to be exposed to cruel, inhumane or demeaning treatment.³⁴ Courts are obliged to pass sentences that conform to the principles and directions of the Constitution.

The NRSO leans more towards preventative and deterrent purposes,³⁵ similar to the failed measures by the then Minister of Justice, BJ Vorster, to prevent crimes in 1956.³⁶ The legislators had not learnt the historical lesson when they drafted chapter 6 of SORMA or revisit any of the constitutional rights of children when the Amendment Act was promulgated.³⁷ It has been 10 years since the register was introduced into the South African legal system, but sexual offences remain high, raising questions as to whether the State should look for other ways to address this problem,³⁸ relying on diversionary protocols rather than the regular procedures of the criminal courts, including

'[p]romoting the reintegration of the child into his or her family and community, preventing the stigmatisation of the child, preventing the child from suffering the adverse consequences flowing from being subject to the criminal justice system and promoting the dignity and well-being of the child'.³⁹

Courts must consider all mitigating factors before passing sentence. In sexual offences, mitigating circumstances carry insufficient weight to make a substantial difference to the sentence imposed. However, being a youth or a first-time offender does carry substantial weight.⁴⁰

³⁴ Terblanche op cit note 12 above asks specifically whether a punishment which is out of proportion to the gravity of the particular offence and/ or the blameworthiness of the particular offender conflicts with this provision.

³⁵ N Mollema 'The Validity and the Constitutionality of the South African register for Sex Offenders: A Comparative Study' (2015) 18 *PER/PELJ* 2707 at 2719.

³⁶ DJ Cornwell *Criminal Punishment and Restorative Justice: Past, Present and Future Perspectives* (2006) 172.

³⁷ Ibid. Cornwell argues that the aim was to reduce growing crime rate through introducing heavy penalties, for the reason that they would deter and reform the offender, but it failed. Although, one can argue that it had a political motive, efforts to interfere with the sentence did not succeed as expected. The crime rate increased because of resistance from the public and sexual exposure in the criminal justice system.

³⁸ Da Costa, Spies & Coetzee op cit note 29 above at 42.

³⁹ See *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (1) SACR 327 (CC) (hereinafter referred to as the 'Teddy Bear case').

⁴⁰ Terblanche op cit note 12 above at 350.

The court cannot treat an immature young offender as it would an adult offender.⁴¹ The State should also try to rehabilitate those who are not first offenders, and the best interests of the child must be taken into account before adding them to the register. The rights of the victim should also be considered, and it has even been argued that victims of abuse may be helped through reconciliation with the perpetrator.⁴²

Terblanche asserts that young age is a major reason for many child sex offences.⁴³ After an offender grows older or reaches a certain age, she or he becomes less likely to commit that crime.⁴⁴ This proposition has merit because it protects the victim and society from further harm. However, the major reason for some children committing sex crimes is that their physical abilities are often at a peak, and factors such as peer pressure, impetuosity, lack of responsibility and the quest for adventure are also at peak level.⁴⁵ These factors cannot nullify wrongdoings of a child but may be used to forge a better solution in the best interests of both the victim and the offender. Cornwell argues that punishment has no exemplary value unless it serves to reinforce law-abiding behaviour, and secular intuition tends to support, or at least accommodate, such a contention.⁴⁶ Therefore, it would be unjust to give a child a lengthy sentence immortalised in a register when the child may be diverted by rehabilitative measures and by more nurturing methods to accommodate them back into society. There is concern that children who are involved in the formal criminal justice system will be disadvantaged for the rest of their life and will be more prone to engage in criminal behaviour in the future. This trajectory can be averted by intervening early with self-development skills training. Through rehabilitation, the CJA seeks to break the cycle of violence, crime and gangs and foster safe societies by putting into practice ‘re-

⁴¹ In *S v Mhlobane* 1969 (1) SA 561 (A) 565, (paraphrased) ‘[t]he younger the offender, the clearer the evidence needs to be about this background, education, intelligence, and mental abilities in order to enable the courts to determine the level of his maturity, and therefore his blameworthiness’, cited in Terblanche op cit note 12 above at 255.

⁴² Da Costa, Spies & Coetzee op cit note 29 at 36.

⁴³ Terblanche op cit note 12 above at 353.

⁴⁴ Ibid. Terblanche emphasises that the logic of a long sentence diminishes as the offender gets older.

⁴⁵ Stevens op cit note 24 above at 2797.

⁴⁶ Cornwell op cit note 35 above at 59.

socialisation and re-education programmes for child perpetrators, which the NRSO does not embrace'.⁴⁷

Sometimes sexual child offences among children are a result of adolescent curiosity.⁴⁸ but the child offender faces the possibility of permanent stigma when categorised as a national sex offender.⁴⁹ At a young age, most children experience puberty and have a poor understanding and control over their desires and their hormonal development. As mentioned above, this does not constitute an excuse for the commission of sexual offences; but the implementation of a pre-determined formula, irrespective of the circumstances, will in fact be detrimental to the best interests of the child involved.⁵⁰ In the case of *Teddy Bear*, the Constitutional Court held that during puberty, South African children reach physiological sexual maturity between 12 and 16 years of age and that this developmental period applies to young people of these ages.⁵¹ The developmental period is not just a biological phenomenon, but also occurs within a social framework based on the community, religion, race, socio-economic status and family origin of the youth.⁵² Physical and cognitive growth start to slow down during middle adolescence, but socio-emotional development is more intense and children develop their own ways of understanding sex-related activities.⁵³ Such awareness is focused on the past and present sexual perceptions in school sex education of young people, the approach by the family towards sexual activities, normalising behaviours involving sex and violence, past physical and sexual assault, introduction to pornography, and how their peer group exposes them to sex.⁵⁴ Children are regarded as vulnerable emotionally and physically; therefore, the court must consider the best interests of the minor offender in this context.

⁴⁷ K Geldenhuys 'Child offenders and their rights' (2015) 108 *SARP*, 10, available at <https://journals.co.za/doi/10.10520/EJC176372>, accessed on 18 January 2021.

⁴⁸ *Teddy Bear* supra note 36 para 47.

⁴⁹ Stevens op cit note 26 above at 2797.

⁵⁰ *S v M* 2008 (3) SA 232 (CC) at 324.

⁵¹ *Teddy Bear* supra note 36 para 35.

⁵² Da Costa, Spies & Coetzee op cit note 29 above at 39.

⁵³ Harris & Bezuidenhout op cit note 30 above at 32.

⁵⁴ Da Costa, Spies & Coetzee op cit note 29 above at 39.

Section 3 of the CJA emphasises guiding principles when dealing with child offenders, such as the fact that ‘a child must not be treated more severely than an adult would have been treated in the same circumstances’.⁵⁵ However, the South African legislature has not followed the many examples of international and foreign law standards discussed in chapters 2 and (later) 5 that prohibit minors from being sanctioned as adults even when they are convicted of the same serious offences.⁵⁶ The register defeats the goals of the CJA, with specific reference to sections 2 and 3, and section 2 of the Children’s Act. It is debatable whether minor sex offenders can be rehabilitated in the same way as other minor offenders; however, in *Centre for Child Law v Minister of Justice and Constitutional Development*,⁵⁷ the court emphasised the capacity of a minor offender to rehabilitate.⁵⁸

A register may not have been designed as a means of punishment, but it has evolved into a sanctioning practice, contradictory to the expectations of the Constitution. For those serving a second sentence, the fact that the child has already been in a rehabilitation school does not necessarily mean that referral for a child court is inappropriate.⁵⁹ Listing a child as a sex offender should be a last resort because the register does more harm than good.⁶⁰ The penalty of exclusion from aspects of life and employment that could shape their individual dignity, private life, and desire to pursue a lawful life permanently stigmatises child perpetrators who are registered but have completed their sentences.⁶¹ However, sexual crimes against minors have a devastating effect on the victim, the family and society. At the end of the process, the sanction should reflect the gravity of the offence.

⁵⁵ Section 3(b) of the CJA supra note 4.

⁵⁶ Rule 68 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (hereinafter referred to as the ‘Havana Rules’), 1991 A/RES/45/113 (1991). See also Terblanche op cit note 12 above at 6.

⁵⁷ 2009 (6) SA 632 (CC).

⁵⁸ *Centre for Child Law v Minister of Justice and Constitutional Development* [2008] ZAGPHC at 341.

⁵⁹ See section 51(2)(b) of SORMA supra note 1.

⁶⁰ Mollema op cit note 35 above at 2712.

⁶¹ *J v NDPP* supra note 10 para 44.

The position of the NRSO in the South African legal system remains ambivalent. Critics of the register have developed inconclusive arguments in different jurisdictions.⁶² It has been submitted that the register does not limit ‘a registered person’s freedom of movement and consequently does not amount to quasi-custody or a form of supplementary sanction’ and is therefore not a punishment.⁶³ Furthermore, it is argued that even if the registration procedures are demanding and may have unpleasant effects on the offender, they do not constitute punishment.⁶⁴

Section 276 of the CPA gives the court an option of imposing any other sentence if there is a statute which specifically provides for that. Thus, the NRSO constitutes a form of sanction (formulated by Chapter 2 of SORMA) in an attempt to curb the number of sexual perpetrators in society. The child justice system has provided special measures for young offenders when ordinary punishment measures are not appropriate.⁶⁵ The measures mentioned in sections 276 (the nature of the punishments) and 290 (manner of dealing with a minor offender) of the CPA are based on the reform, training or supervision of young offenders, rather than on punishment.

According to section 291(1) of the CPA, these measures are supposed to last for two years from the day that the sentence was pronounced. The court can still determine a shorter sentence or extend the period if the Minister is not satisfied with the progress of the child, but for

⁶² See Stevens op cit note 26 above at 2797 and Mollema op cit note 35 above at 2712.

⁶³ New South Wales Ombudsman *Review of the Child Protection Register: Report under section 25(1) of the Protection (Offender Registration) Act 2000* (2005) 27. Other legal systems have established that a register is a punishment, see D Hunt ‘Child Protection Through Offender Registration’ (2001) 13 *Judicial Officers’ Bulletin* 65 and 67 as cited in Law Reform Commission of Western Australia ‘Community Protection Offender Reporting Act 2004’ 31 (Final Report – Project Number 101, 2012) at 28, available at https://www.lrc.justice.wa.gov.au/_files/PI01-FR.pdf, accessed on 18 May 2018.

⁶⁴ South Australia, *Parliamentary Debates*, House of Assembly 29 August 2006 at 75, available at <https://www.parliament.sa.gov.au/HouseofAssembly/BusinessoftheAssembly/RecordsandPapers/Digest/Documents/DigesttoPrinters.pdf>, accessed 3 June 2018.

⁶⁵ *S v C* 1974 2 SA 680 (C), 684B.

a further period not exceeding two years.⁶⁶ The criminal justice system is intended to minimise harsh sentences for children.⁶⁷

IV CHILD SEX OFFENDERS' CRIMINAL LIABILITY

Criminal capacity is concerned with mental ability, and it is this characteristic that distinguishes children from adults.⁶⁸ According to certain studies, it was discovered that mentally ill persons and young children lack the mental capacity to commit crimes, which finding was included in legislation;⁶⁹ youth as a defence was dealt with in section 7(1) of the CJA.⁷⁰ Such individuals cannot be held liable for an unlawful act or behaviour. SORMA had a blanket provision which was applicable to all minors which was later amended in the Amendment Act, where a specific differentiation between adults and children was made. However, a blanket provision is still seen when it comes to the removal procedures from the register and the number of years in the register. Thus, criminal capacity or responsibility of a child is the first issue evaluated when a child comes before court.⁷¹ Criminal capacity simply means a minor's mental ability to understand the consequences of committing a crime,⁷² legally described as the requirement of *mens rea*.⁷³

The law requires a court to acquit any person who is unable to understand the criminal procedure or, at the time of commission of the alleged offence, was incapable of

⁶⁶ The probationary sentence may be imposed until the offender reaches 21 years, according to section 290(3) of the CPA.

⁶⁷ See section 3 of the CJA supra note 4.

⁶⁸ Criminal capacity denotes the mental ability or capacity that a child has in order to act with responsibilities and to incur criminal liability.

⁶⁹ Snyman op cit note 16 above at 173.

⁷⁰ The CJA supra note 4 deals with youth as a factor that may exclude criminal capacity. Part 2 of Chapter 2 of the Act provides for the new minimum age for criminal capacity.

⁷¹ See s 7 of the CJA.

⁷² Snyman op cit note 16 above at 174.

⁷³ *Mens rea*, is a technical term whose cognitive and conative components sum up the ability to differentiate and exercise self-control. The two defences can be accepted only if the psychological incapability is the result of particular circumscribed mental characteristics to be found in the wrongdoer. The moment one of the above functions or components is lacking, the child lacks criminal capacity irrespective of whether it is the first or second offence. These mental characteristics are mental illness and the perpetrator's youth, as set out in section 78(1) of the CPA.

comprehending the wrongfulness of his or her actions or behaviour.⁷⁴ However, some minors are found to have criminal capacity and are accountable, which means they may be added to the register.

Studies have shown that distorted intellectual patterns or perverted minds are the main causes of sexual offending in children.⁷⁵ This understanding of a youth sex offender's cognitive function is important in reducing sex offences in South Africa, because more solutions to assist the offenders can be found by understanding how they think. A register provides information on how and why child sex offenders struggle with maladaptive beliefs and distorted thinking. According to Snyman, immature age is an instance of 'non-pathological incapacity since many young persons do not suffer from mental illness but are instead underdeveloped'.⁷⁶ Age affects the status of a child and should prevail in declining the registration of minor sex offenders.⁷⁷

In *J v NDPP*, it was held that the '[l]imited circumstances in which an offender can apply for his or her removal from the register are insufficiently flexible to consider the particular child's development or reform'.⁷⁸ A separate criminal justice system for children is predicated by age, restorative justice and historical factors, which are listed under sections 2 and 3 of the CJA as objectives and guiding principles. The objects of the CJA are as follows:

- (a) 'to protect the rights of children as provided for in the Constitution;
- (b) to promote the spirit of ubuntu in the child justice system ...;
- (c) to provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults;
- (d) to prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion; and

⁷⁴ See section 77 of the CPA.

⁷⁵ Da Costa, Spies & Coetzee op cit note 29 at 43.

⁷⁶ Snyman op cit note 16 above at 175. See also Terblanche op cit note 12 above at 376.

⁷⁷ Snyman op cit note 16 above at 175.

⁷⁸ *J v NDPP* supra note 10 para 42.

- (e) to promote co-operation between government departments, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of this Act'.⁷⁹

The following guiding principles must be taken into account when applying the CJA:

- (a) 'All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.
- (b) A child must not be treated more severely than an adult would have been treated in the same circumstances.
- (c) Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken.
- (d) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.
- (e) Every child should be treated in a manner which takes into account his or her cultural values and beliefs.
- (f) All procedures in terms of this Act should be conducted and completed without unreasonable delay.
- (g) Parents, appropriate adults and guardians should be able to assist children in proceedings in terms of this Act and, wherever possible, participate in decisions affecting them.
- (h) A child lacking in family support or educational or employment opportunities must have equal access to available services and every effort should be made to ensure that children receive similar treatment when having committed similar offences.

⁷⁹ See s 2 of the CJA. Section 2(b) reads as follows:

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

- (i) The rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.⁸⁰

The separate guidelines for the adjudication of child offenders take into account their age, vulnerability, society, their victim, and their future. There are unsettled controversies behind the philosophical and biological nature of minors in conflict with the law. Although the Amendment Act separated minor offenders and adult offenders in terms of registration procedures, it neglected to tackle the issue of registration periods, since they remain the same for both adults and children.⁸¹

The fundamental principles for sanctioning a minor perpetrator are contained in section 69(1) of the CJA, and can be summarised as follows:

- (a) The punishment should be individualised, and the recognised triad of variables, namely the perpetrator, the offence and the interests of society, must be balanced against each other.⁸²
- (b) When sentencing an infant, restorative justice must be given significant consideration to ensure that a minor understands the consequences of and be responsible for the crime committed or harm caused.⁸³
- (c) A minor perpetrator must be reintegrated with his or her family and community, and monitoring, treatment or other interventions should be afforded as needed.⁸⁴

A clear summary of these values and principles that affect child offenders is listed under sections 2 and 3 of the CJA.⁸⁵ However, the register itself does not individualise the registration and ignores restorative justice, which includes integrating the minor sex offender with the victim and society.

⁸⁰ See section 3 of the CJA.

⁸¹ Hansungule op cit note 11 above at 2789.

⁸² Zinn supra note 19 at 540.

⁸³ See section 69(1)(a) of the CJA.

⁸⁴ Terblanche op cit note 12 above at 4.

⁸⁵ Stevens op cit note 26 above at 2796.

In an analysis of section 77(1) of the CJA, the court in *J v NDPP* held that a sentence of life in prison for children was unconstitutional.⁸⁶ To the contrary, SORMA provides that if the punishment exceeds 18 months, without a fine, the child offender may not be removed from the register, regardless of age;⁸⁷ and where there are ‘two or more convictions of a sexual offence against a child or a person(s) with disabilities, the child offender shall not be removed on the NRSO⁸⁸ even when the sentence is suspended’. Section 77(2) of the CJA provides that minimum sentences should be appropriate for minors aged 16 or older but disallows imprisonment of those who are 14 and below. However, the SORMA provisions do not differentiate between adult perpetrators and child perpetrators with regard to the length of time of the registration, but it is based on the sentence. The number of years a person can be registered is not based on the age or criminal capacity of the person but rather the sentence. This can be unfair to children because there is supposed to be a separation of child and adult offenders with regard to the number of years they have been on the register.

There are four categories of NRSO registration, depending on the year of registration and type of sentence.⁸⁹ A minor sentenced to less than six months’ imprisonment can request that his or her information be removed from the NRSO list seven years after his or her release or after the suspension period has expired.⁹⁰ In addition, after five years have elapsed since their inclusion on the NRSO list, children accused of committing a sexual offence may apply for removal.⁹¹ A perpetrator sentenced to a prison term of between six and 18 months may request that his or her information be deleted only 10 years after his or her release or after the expiry of the period of suspension.⁹²

Section 6 of the CRC provides that a child requires affection and understanding for complete and harmonious development of his personality in an environment of love and moral and

⁸⁶ *J v NDPP* supra note 10 para 28.

⁸⁷ Section 51(1)(a)(iii) of SORMA.

⁸⁸ Ibid section 51(2)(b).

⁸⁹ Article 7 of the International Covenant on Civil and Political Rights (1966) repeats word for word art 12 of Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR).

⁹⁰ Section 51(1)(a)(ii) of the SORMA. Also see section 51(1)(a)(i) of the SORMA.

⁹¹ Sorma ibid section 51(1)(b).

⁹² Ibid section 51(1)(a)(i).

material security.⁹³ Unlike SORMA, the above enunciation does not separate victims and offenders but relates to all children regardless of their criminal record. In other words, child offenders should also be afforded protection from ill-treatment and degradation, regardless of their age and criminal record.

The NRSO does not offer rehabilitation, counselling or vocational training programmes for child sex offenders and registration may even thwart any rehabilitation process.⁹⁴ Sections 72 and 76 of the CJA empower the court to consider alternatives such as diversion when sanctioning a child,⁹⁵ meaning that registration of child sex offenders is inconsistent with a number of statutes that oversee the treatment of children.

V SEPARATION SYSTEM FOR CHILD OFFENDER

The law generally establishes a number of key principles in distinguishing adults from children. The criminal justice system for adult offenders differs procedurally and substantively from that of child offenders.⁹⁶ In *Centre for Child Law v Minister of Justice and Constitutional Development*,⁹⁷ it was submitted that minor crimes arise from immaturity, lack of experience and unformed character, which meant that children should be held accountable, but not as adults.⁹⁸ This view is contentious because sex offenders regardless of age have become a danger to society, and many people have called for harsh measures to deter offenders, even to the extent of restoring the death

⁹³ See CRC (note 1 above).

⁹⁴ Hansungule op cit note 12 above at 27. See also *S v Adams* 1971 4 SA 125 (C) 126H, cited by Terblanche op cit note 12 above.

⁹⁵ Diversion is discussed in chapter 8 of the CJA (ss 51–62). The same approach was taken by the Constitutional Court in *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC) (hereinafter referred to as '*Centre for Child Law*') where it was stated: '[t]he sharp distinction drawn between children and adult offenders is not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children are more in need of protection, less resourceful, less mature, more vulnerable to influence and pressure from others, more capable of rehabilitation.'

⁹⁶ *Centre for Child Law* supra note 95.

⁹⁷ *Centre for Child Law* supra.

⁹⁸ *Ibid* 29.

sentence.⁹⁹ In *J v NDPP*, the court questioned the reasoning that separates child offenders from adult offenders.¹⁰⁰ However, the registration periods for adult and child offenders are similar, which serves to undermine certain constitutional and CJA principles.¹⁰¹

In serious sexual crimes, the sanction must be punitive, because of the growing concern at the rise of sexual crimes against children and women. However, the courts should not jettison the rights of children when sanctioning minor sex offenders. Terblanche establishes two central theories for sentencing a child offender.¹⁰² First, '[y]oung offenders are not as blameworthy as adult offenders, because they lack the maturity and insight which is expected of adults'.¹⁰³ Secondly, '[i]f the offender can be dealt with in a manner which will present a reasonable chance that he/she will not reoffend and it is accepted that a young offender is more open to reform, he/she should be dealt with appropriately'.¹⁰⁴ While the probation officer under section 7(c)(ii) of the Amendment Act may report that the child may recommit the offence, the general idea is to mould the system so that minors do not reoffend.¹⁰⁵

⁹⁹ Z Mvumvu 'Cabinet will discuss calls for return of death penalty: Ronald Lamola' *Times Live* 03 September 2019 19:58 available at <https://www.timeslive.co.za/politics/2019-09-03-cabinet-will-discuss-calls-for-return-of-death-penalty-ronald-lamola/>, accessed on 7 September 2019.

¹⁰⁰ *Johannes v S* SACR 99 (WCC) (hereinafter referred to as '*Johannes*') para 57

¹⁰¹ *Ibid* at 67, where it was held that in failing to grant a different removal procedure and failing to exercise a discretion to consider relevant circumstances before making an order, section 51 of the SORMA does not recognise the individualistic approach which the Child Justice Act seeks to establish, namely, that every individual is different, that crimes differ and that not every sex offender should be treated in the same way.

¹⁰² Terblanche *op cit* note 12 above at 222 claims *dicta* such as those quoted above remain the exception, made individually by isolated judges, and all too often children find themselves punished indiscreetly; for example, the committal to a reform school almost always requires a pre-sentence report, but no similar requirement exists for a sentence of imprisonment. Also, see *S v Lehnberg* 1975 4 SA 553 (A) 561A.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*. See also P Stevens 'Recent Developments in Sexual Offences against Children – A Constitutional Perspective' (2016) 19 *PER/PELJ* 1 at 26.

¹⁰⁵ See section 7(c)(ii) of the Amendment Act.

One can argue that a register is not strictly punitive, but is applied to curb sexual recidivism likely from the undesirable characteristics in an offender.¹⁰⁶ Another argument proposes that being on the list of sex offenders and being required to report for a definite period of time is equal to a punishment.¹⁰⁷ However, registration must be recognised as a punishment since periodic reporting to responsible authorities, police or an employer, even in private and with the assistance of another, may be traumatic and disturbing for some child perpetrators.¹⁰⁸ ‘Providing relevant personal information to police may be a traumatic experience and accordingly, laws were amended to diminish potential distress; for example, the right to support of the offender and the condition that reporting should be done in private.’¹⁰⁹ It can be argued that being placed on a register fits impeccably as a form of sanction.¹¹⁰ An offender is allowed limited access to children and his or her choices of employment are limited. The immediate effect is unpleasant a stigmatisation.

The NRSO burdens a child with a criminal record and offers little or no rehabilitation to the child sex offender. There is a need for adequate interest by the criminal justice system to mobilise all probable resources to achieve positive steps in the child justice system.¹¹¹ Many children are living in harsh environments such as poverty, domestic violence and drug abuse in communities because of the past injustices that affected more than half of the population.¹¹² Large numbers of children are unfortunate to be part of this population.¹¹³ A register may do more harm than benefit to the offender and society as a whole because many children grow up exposed to many forms of societal evils and are thus drawn into the offending spheres. A register separates victims and child sex offenders, impeding reconciliation and restorative justice in society and potentially causing greater harm to both sides. One can argue that deterrence is inappropriate for

¹⁰⁶ See section 7(c)(ii) of the Amendment Act.

¹⁰⁷ Law Reform Commission of Western Australia *supra* note 63 at 28.

¹⁰⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 June 2000, at 6907

¹⁰⁹ Law Reform Commission of Western Australia *supra* note 63 at 28.

¹¹⁰ *Ibid.*

¹¹¹ G Da Costa, G M Spies & L Coetzee ‘Contributory Factors to Child on Child Sexual Abuse: Perceptions of Diverted Female Youth Sex Offenders’ (2014) 15 *ASAJ* 35 at 43.

¹¹² *Ibid.*

¹¹³ Harris & Bezuidenhout *op cit* note 30 above at 32.

children because most children are not rational or mature enough to comprehend the effects of their behaviour and actions on the criminal justice system.

It may be submitted that the register does not take the emotional and psychological needs of the child into consideration. In all cases, the registration of minor sex perpetrators is a violation of the right to protection from degradation and ill-treatment.¹¹⁴ Researchers have indicated that child sex offenders have a higher potential of rehabilitation than adults because of their difference in pathology and cognitive skills.¹¹⁵ As a result, a register may expose a child offender to a variety of psychological issues at a time when the youngster requires protection in order to rehabilitate and reform. Interaction with the outside world and the larger community must be tolerated and made feasible since it is a critical component of the right to fair and humane care and is required for children's preparation to return to the community. This is also required for the recovery process.

Once the child is registered as a sex offender, the registration has a national labelling effect as a sex offender. Once registered in the NRSO, the inherited title of 'national sex offender' ignores the best interests of the child.¹¹⁶ Emerging trends in international law such as the introduction of restorative justice have combined the punishment and rehabilitation roles of child justice with the provision of care and child welfare protection functions, describing the old regimen as being judgemental.¹¹⁷ The ACRWC and CRC advocate special treatment, the right to apt and legitimate treatment, which respects the minor's human dignity and worth when involved in the criminal justice system. The registration of child offenders may be argued to defeat the purpose of ACRWC and CRC.

Researchers note that tagging a child offender as a 'juvenile', 'delinquent' or 'deviant' can unconsciously cause anti-social behaviour in the minor offender.¹¹⁸ Additional terms

¹¹⁴ *J v NDPP* supra note 22 para 33.

¹¹⁵ Stevens op cit note 26 above at 2797. Also see Ibid.

¹¹⁶ M Rothwella, D Fidob & N Heym 'Perceptions Around Adult and Child Sex Offenders and their Rehabilitation as a Function of Education in Forensic Psychology Independent of Traditionalism and Perpetrator Sex' (2021) 2 *Forensic Science International: Mind and Law* 1 at 1.

¹¹⁷ See ACRWC and CRC supra.

¹¹⁸ Rule 5(f) Riyadh Guidelines supra note 87 cited in Van Bueren op cit note 54 above at 652.

or a legal lexicon must not be applied to child sex offenders in a manner similar to any other offenders. Registration contradicts the child best interests 'having more impact than the term juvenile'. It therefore has psychological and emotional effects on the minor. The unfairness of this system is magnified when those registered have been acquitted or have had charges dropped or diverted. The system deprives a child of his or her rights, including the right to dignity, a fair trial and privacy.

VII CONCLUSION

The child criminal justice system applies justice not only by strictly following rules or procedures, but rather requires compassionate justice in terms of preserving the innocence of the child and protecting children from any form of harm. This involves a different procedure, making room for informal questioning in protection of the interest of the minor. Sometimes informal procedures will have to be employed in specific situations. Also, little will be lost if the formal procedures are jettisoned because the Constitution sets out rights which apply to the child criminal justice system.¹¹⁹

A register may not have been originally adopted as a measure of punishment, but it ultimately is a sanction. There are certain recurring legal problems regarding child offenders, such as how to find a balance between conflicting legislation and how to mediate in the apparent tension between victim and offender, and still consider the best interests of the child. This is applicable to the NRSO, where there is an added dimension at play when the rights of the child offender and child victim are at stake. Registration of child offenders is not a constitutionally acceptable limitation, and it does little to improve the child and damages the relationship between the victim and offender.¹²⁰ In *J v NDPP*, sections 46, 50 and 51 of SORMA were submitted as being unconstitutional and contrary to the principles of international instruments and domestic law.

¹¹⁹ See section 28 of the Constitution.

¹²⁰ *Johannes v S* (note 100 above) para 8.

Therefore, despite the provisions of the Amendment Act, rules for registration of minors should be amended.¹²¹

¹²¹ Ibid 56. The Constitutional Court found the automatic inclusion of child offenders on the register without discretion of the court unconstitutional. This is one of the most recent cases in relation to the inclusion and removal of children on the register.

CHAPTER 4

AN ANALYSIS OF THE IMPACT OF THE NRSO ON CHILD SEX OFFENDERS' CONSTITUTIONAL RIGHTS

I INTRODUCTION

Children, like other autonomous beings, have human rights. As such, a child offender's autonomy, both actual and potential, should be acknowledged. This chapter will critically examine Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as the 'SORMA') and the National Register for Sex Offender (hereinafter referred to as the 'NRSO') against the child-orientated principles set out in the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the 'Constitution'). Constitutional anomalies exist in the NRSO, established under Chapter 6 of the SORMA.¹ While justifiable, fair and reasonable limits on intervention or infraction of constitutional rights should be tolerated to protect child offenders against their own irrational actions,² this chapter will also determine whether registration of sex offenders (which currently include children), is consistent with the Constitution, based on the premise that there must be proportionality between crime and punishment.³ Therefore, a balance should be struck between the rights of victims and offenders. Child offenders may be held accountable for their wrongdoing, but trial courts should consider prevailing circumstances that may warrant the non-registration of a child offender.⁴ The research will also look at the best interests of the minor sex offender, which includes the need to shield the minor from any bodily

¹ The National Register for Sex Offenders (NRSO) was established under Chapter 6 of the Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007 (SORMA). Also see N Mollema 'Impotent? The Prospects of the National Register for Sexual Offenders' (2015) 36 *Obiter* 476 at 480–483.

² S S Terblanche *The Guide to Sentencing in South Africa* 3 ed (2016) 314.

³ See Rule 5 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) (Beijing Rules), 1990A/RES/40/33 (1990).

⁴ *Ibid.*

or mental impairment that may result from exposure to degradation or maltreatment and exposing a minor to further criminal conduct.⁵

Section 28 of the Constitution gives a detailed exposition of children's rights from which the research will examine the best interests of the minor sex offender. Sections 9, 10 and 27 of the Constitution also set out other rights that protect children.⁶ Harsh punishment resulting in degrading treatment causes serious harm, which impedes their best interests, dignity, privacy and equality, consequently contributing to a culture that devalues their well-being, worth and development.

This chapter will also discuss the need to clarify the technique that courts should generally apply to child offenders' rights, making it clear that minors exercise all fundamental constitutional rights granted to them as independent bearers of those rights,⁷ to accommodate their status as independent persons and as part of a family.⁸ Specific aspects of the child offender rights are highlighted in the Bill of Rights.

II THE BEST INTERESTS STANDARD AS A SELF-STANDING RIGHT

The fundamental principle in all issues involving a minor is the child best interests, provided for under section 28(2) of the Constitution.⁹ Through various conventions and instruments, international law explicitly gives special value to the right and principle of the child's best interests.¹⁰ This may be viewed as prioritising child rights over societal interests.¹¹ Section 9 of the Children's Act 38 of 2005 (hereinafter referred to as the 'Children's Act') and section 28(2) of the Constitution conform to article 3 of the United Nations Convention on the Rights of the Child

⁵ A Govindjee et al *Introduction to Human Rights* 2 ed (2016) 268.

⁶ See Chapter 2 of the Constitution of the Republic of South Africa, 1996 (Constitution).

⁷ *Teddy Bear Clinic for the Abused Children v Minister of Justice and Constitutional Development* 2014 (1) SACR 327 (CC) (hereinafter referred to as the 'Teddy Bear case') para 38.

⁸ *Ibid* para 38.

⁹ *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC) (hereinafter referred to as the 'J v NDPP case') para 35.

¹⁰ *Teddy Bear* supra note 7 above para 31.

¹¹ J Torres 'Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the child and its Early Case Law' in S Dillon (ed) *International Children's Rights* (2010) 48 at 49.

(1989) (hereinafter referred to as the ‘CRC’) and article 4 of the African Charter on the Rights and Welfare of the Child (1990) (hereinafter referred to as the ‘ACRWC’).¹²

In *J v National Director of Public Prosecutions* (hereinafter referred to as the ‘*J v NDPP*’)¹³ the Constitutional Court clearly expressed the importance of section 28(2) of the Constitution with regard to minor sex offenders and the register, referring to best interest as crucial to the moral, social and psychological development of the child sex offender.

The Children Act lays down the general principles for ‘implementing laws, guiding proceedings, actions and decisions by organs of the state concerning section 28 and children’.¹⁴ The court has a discretion to determine the best interests of the child sex offender when it comes to registration of a child sex offender.¹⁵ Courts should consider the child’s age, the nature of the offence, the surrounding factors and the interests of society.¹⁶ This is especially necessary because the register has been associated with degradation, stigmatisation and infringement of rights, which threaten the child’s social, moral and psychological development.¹⁷

In the *Teddy Bear Clinic for the Abused Children v Minister of Justice and Constitutional Development*¹⁸ (hereinafter referred to as the ‘*Teddy Bear*’) case, it was argued that the best interest of the child could not be determined without examining the background of the minor in a particular case.¹⁹ This included the reasons for the commission of the crime, background and age.

Section 91 of the Children’s Act highlights that ‘[e]arly childhood development means emotional, cognitive, sensory, spiritual, moral, physical, social and communication

¹² See United Nations Convention on the Rights of the Child, 1989 U.N. Doc. A/44/49 (1989) (CRC) and African Charter on the Rights and Welfare of the Child, 1990 OAU Doc CAB/LEG/24.9/49 (1990) (ACRWC). Also see Terblanche (note 2 above) 281, who cited *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC). Also see H Bosman-Sadie & L Corie *A Practical Approach to the Children’s Act* (2013) 20.

¹³ 2014 (2) SACR 1 (CC).

¹⁴ See s 6(1) of the Children’s Act 38 of 2005.

¹⁵ See *J v NDPP* supra note 9 para 134. Also see sections 4–8 of the Amendment Act.

¹⁶ See s 3 of the CJA. Also see s 6(1) of the Children’s Act.

¹⁷ *Teddy Bear* supra note 7 para 31.

¹⁸ 2014 (1) SACR 327 (CC).

¹⁹ *Teddy Bear* supra note 7 para 66.

development of children which starts from birth to school-going age'. Is it in the minor's best interest to assist the child or separate them from society by labelling them as a threat? Section 28(2) of the Constitution is an extensive guarantee that the minor's best interest is 'paramount in every case concerning the child'.²⁰ In the *Teddy Bear* case, it was argued that after examining the child's interests, any action inconsistent with section 28 was invalid.²¹

However, like any other rights enshrined in chapter two of the Constitution, section 28(2) is subject to reasonable and justifiable limitations in accordance with section 36 of the Constitution. The word 'paramount' as used in section 28(2) means that other rights or provisions could never limit the child best interests, application of that right has to consider its relationship with other rights, which may require that their reach be limited while other interests are not compromised.²² Given this interpretation of section 28(2), the limited dominance of the best interest principle operates at the same level as the best interests principle as stated in article (1) of the CRC.²³ Constitutional rights are 'mutually interrelated and interdependent and form a single constitutional value system'.²⁴ The principle of 'paramountcy' makes it an overriding right that lays to rest any idea of limitation.

III THE RIGHT TO DIGNITY

Section 10 of the Constitution states that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'. Human dignity is mentioned in several sections of the Constitution and functions both as a value in sections 1(a) and 39(1)(a), and as a human right in section 10 of the Constitution. The right to dignity is a significant right, which forms the basis of many other constitutional rights as the pre-eminent value and cornerstone of constitutional order in South Africa.²⁵ Dignity intersects with other rights such as equality and autonomy and serves to

²⁰ *Sonderup v Tondeli* 2001 (1) SA 1171 (CC).

²¹ *Teddy Bear* supra note 7 para 68, cited *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 CC and *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC).

²² *S v M* 2008 (3) SA 232 (CC), para 28.

²³ See art 1 of the CRC (note 12 above).

²⁴ *De Reuck v Director of Public Prosecutions Witwatersrand Local Division* 2004 (1) SA 406 (CC) para 55.

²⁵ Govindjee op cit note 5 above at 69.

strengthen the overlapping rights.²⁶ The value of human dignity is that it informs and helps with the interpretation of many, possibly all, other rights.²⁷ In this discussion, competing interests of the minor offender and the victim arise again. While there is a need to protect children from sexual abuse by the listing sex offenders, there is also the need for balance and proportionality when it comes to sanctioning a child sex offender.

A person should be treated with respect, worth and common humanity, regardless of circumstances.²⁸ A register constitutes humiliating, labelling and stigmatising of a child sex offender, which offends the Constitution. The conditions and treatment of registration offend the child sex offender's worth in society. This affects their physical and psychological integrity and empowerment as an individual human being because the register's overreaching treatment infringes many of their rights.²⁹ Any sanction or procedure that is degrading, humiliating or demeaning undermines the offender's right to dignity.³⁰ When child offenders are registered, they are labelled as 'national sex offenders', which amounts to stigmatisation.³¹ To be classified as a national sex offender is ultimately degrading.³² Mollema argues that the register infringes the right to dignity of the child because of the labelling and stigmatisation attached to it.³³ The right to

²⁶ See *S v Makwanyane* 1995 (3) SA 391(CC) (hereinafter referred to as 'Makwanyane case') at 326 cited in R Steinmann 'Law and Human Dignity at Odds over Assisted Suicide' (2015) 558 *De Rebus* 24, 26.

²⁷ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35.

²⁸ Govindjee op cit note 5 above at 69.

²⁹ P de Vos et al *South African Constitutional Law in Context* (2014) 457.

³⁰ De Vos supra not 29. See also Govindjee op cit note 3 above at 70.

³¹ M Rothwella, D Fidob & N Heym 'Perceptions Around Adult and Child Sex Offenders and their Rehabilitation as a Function of Education in Forensic Psychology Independent of Traditionalism and Perpetrator Sex' (2021) 2 *Forensic Science International: Mind and Law* 1 at 1 puts forward that 'The term sex offender evokes extremely negative emotions and perceptions including disgust, fear and moral outrage and individuals with sexual convictions are typically perceived more negatively, dangerous, violent, unpredictable and unchangeable than perpetrators of other (non-sexual) crimes.'

³² P Stevens 'Protecting the Vulnerable? Assessing the Constitutionality of The National Register for Sex Offenders in Respect of Juvenile Sex Offenders – *S v IJ* 2013 2 SACR 599 (WCC) and *J v National Director of Public Prosecutions* 2014 ZACC 13 (2014) 17(6) *PER/PELJ* 2796 at 2797. Also see Ibid.

³³ N Mollema 'The Viability and Constitutionality of the South African Register for Sex Offenders: A Comparative Study' (2015) 18 *PER/PELJ* 2707 at 2709 cited *Teddy Bear* supra note 7 para 78.

dignity is relevant when deciding whether a procedure or sanction is cruel, inhumane or degrading.³⁴ Everyone has inherent dignity, meaning that ‘all persons are independently recognised as having dignity as both an attribute and a right in section 10 of the Constitution’.³⁵ Assuming that child sex offenders have a right to dignity by virtue of their individual lack of criminal capacity, immaturity and need for guidance, the criminal justice system must treat them in a compassionate way. This is because every child generally possesses a sense of innocence.³⁶ Child sex offenders should be held accountable for their criminal misconduct but not through stigmatisation in a way that diminishes their sense of worth in the community.

Human dignity simply denotes an inherent attribute of humanity that a child possesses in equal measure regardless of status.³⁷ Thus, every child has his or her own dignity.³⁸ A minor involved in the criminal justice system is to be constitutionally considered as a person with a separate personality.³⁹ The NRSO simply perceives a child as a ‘criminal miniature person’ set to reach adulthood as a sex predator.⁴⁰ The right to dignity is a non-derogable right.⁴¹

The enactment of the Amendment Act may have addressed the vague provisions of SORMA, as evidenced by the reduction of scholarly criticism directed at it. Judicially, a reduction in appeals was also noted after the Amendment Act came into operation, and no case in relation to

³⁴ *Makwanyane* supra note 26 para 144.

³⁵ *Mathe v Minister of Police* (33740/14) [2017] ZAGPJHC 133; 2017 (2) SACR 211 (GJ); [2017] 4 All SA 130 (GJ) (24 May 2017). See also Court’s dictum in *S v Dodo* 2001 3 SA 382 (CC) para 35, which confirms this principle.

³⁶ See also ACRWC supra note 12 under Article 17(1) of the Administration of Child offender Justice of ACRWC. See also Article 37(c) of CRC supra note 12. To be treated with humanity and respect is a common standard applicable to adults and children, which is also emphasised in Article 10(1) of the International Covenant on Civil and Political Rights.

³⁷ Steinmann op cit note 26 above at 25.

³⁸ *Teddy Bear* supra note 7 above para 78.

³⁹ Ibid para 40, citing *S v M* supra note para 22, where it was stated that this approach is consistent with this court’s jurisprudence.

⁴⁰ Ibid. P Stevens ‘Recent Developments in Sexual Offences against Children – A Constitutional Perspective’ (2016) 19 *PER/PELJ* 1 at 26.

⁴¹ Report of the High Commissioner for Human Rights on the protection of human rights of minor perpetrators who have been deprived their liberty under Number 21 on art 10 of the International Covenant and Political Rights.

the register has been taken up by academics at this time. The Amendment Act was promulgated to revise the vague provisions and sections that had been considered unconstitutional by the courts. However, the Amendment Act did little to correct the constitutional shortcomings, and it remains vague and unclear on a number of grounds about the entry of child offenders on the register, infringing the rights to privacy, dignity and to practise freedom of trade, fair labour and occupation, and a profession.⁴²

IV THE RIGHT TO A FAIR TRIAL (THE RETROSPECTIVE EFFECT OF NRSO)

Section 35(3)(n) of the Constitution directs that every person should benefit from the least severe of the proposed sanctions if the recommended sentence for the crime has been amended prior to the time of sentencing. The general rule is that legislation applies to the future, based on preventing retrospective and unfair application. A statute is presumed to apply in the future so that rights vested by the existing law are not removed.⁴³ SORMA commenced on 16 December 2007.⁴⁴ The date of commencement of the register was not provided for, but section 42 of SORMA placed the operative date of the register before 30 June 2009. Section 42(1) states that the ‘National Register for Sex Offenders containing particulars of persons convicted of any sexual offence against a child ... whether committed before or after the commencement of this Chapter and whether committed in or outside the Republic, must ... be established and maintained by the Minister’.⁴⁵ Therefore, SORMA allows the retrospective application of the NRSO regarding the registration of sex offenders convicted prior to and post enactment of the statute, regardless of age.

In general, the rule that legislation is presumed to ‘apply to the future is one of the foundations of a legal system based on the rule of law and constitutional rights’.⁴⁶ This enables the courts to determine the purpose of the statute. The SORMA and Amendment Act clearly intended

⁴² Chapter 2 of the Constitution, which is the Bill of Rights, a human rights charter that protects the socio-economic rights, civil and political rights of all people in South Africa.

⁴³ *Curtis v Johannesburg Municipality* 1906 TS 308 at 312.

⁴⁴ See the commencement provision of SORMA.

⁴⁵ See also section 50(1)(a)(iii)–(iv) of SORMA.

⁴⁶ C Botha *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 55, this rule (retroactivity) stems from ‘the prevention of unfair and unreasonable results, and to ensure predictability and legality: individuals must be able to be familiar with what the law is and to adapt their conduct accordingly.’

the retrospective registration of child sex offenders prior to commencement of the legislation. SORMA and the Amendment Act operate retrospectively by facilitating registration of all sex offenders and attaching to those sexual offenders apprehended before the commencement of the Act.⁴⁷ Therefore, the Act has a retrospective effect as regards the registration of sexual offences committed prior to the enactment of SORMA.⁴⁸

Section 35(1)(m) of the Constitution relates to punishment for something that one has been acquitted or convicted of, but children convicted of sexual offences before the coming into operation of the SORMA can be regarded as being punished for a crime they did not commit. Even if minor sex perpetrators have served their sentence, they will have another life-limiting sanction which has a detrimental effect on their personal dignity and privacy, their families, and their ability to pursue a living.⁴⁹ There is no evidence that minors or mentally disabled persons will be safe and free from harm as a result of the register's retrospective application. The courts 'cannot issue a moratorium on further registration of child offenders or allow the declaration to operate retrospectively'.⁵⁰ Conversely, it may be argued that, considering the urgency of curbing sexual crimes and protecting vulnerable groups from sexual harassment in areas where they ought to be protected, the NRSO fulfils an essential function, and it would not be fair and equitable to stop its retrospective functioning.⁵¹

The retrospective operation of SORMA and the Amendment Act interferes with the right of the child sex offender to a fair trial. Retrospective provisions may be enacted in non-penal statutes, subject to the courts testing whether such provisions are consonant with the Bill of Rights.⁵² The presumption of non-constitutionality is rebuttable if it can be shown that failure to make it retrospective would be absurd or unfair. The retrospective nature of the register, however,

⁴⁷ Section 42(1) of SORMA.

⁴⁸ The principle that legislation should only be retrospective also applies to the Constitution because it is also retroactive.

⁴⁹ Z Hansungule 'Protecting Child Offender's Rights: Testing the Constitutionality of the National Register for Sex Offenders' (2014) 50 *SACQ* 23 at 27.

⁵⁰ *J v NDPP* supra note 9 para 55.

⁵¹ *Ibid.*

⁵² Botha op cit note 46 above at 62.

offends section 35(3)(l) and (m) of the Constitution.⁵³ New crimes cannot be enacted, and current sanctions cannot be increased, either retrospectively or retroactively. SORMA and the Amendment Act are not the only statutes in conflict with the Constitution, and they should all be rendered null and void. The listing of child sex perpetrators under ostensible authority of the NRSO is *pro tanto* invalid.⁵⁴

V THE RIGHT TO PRIVACY

Section 14 of the Constitution provides that ‘everyone has the right to privacy’, defined as including his or her ‘family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community’.⁵⁵ The right to privacy of a child offender shall be protected at all times in order to prevent harm caused to him or her by undue exposure or reporting, or by the process of registration.⁵⁶ As a rule, no information that may expose or increase the chances of identification of a minor perpetrator is permitted to be published.⁵⁷ The register includes listing the child name in a register of sex offenders. This amounts to infringement of the child’s intimate and personal sphere of life.⁵⁸

Of course, the register is not published, but there are still consequences attached to such listing. Trusted third parties such as employers are obligated by section 54 of the SORMA not to disclose or share the particulars that may have been shared with them in the strictest confidence when they apply to check the register. A limited number of people and organisations have access to listed names, but it is still debatable whether the registered particulars may fall into the wrong hands. The CRC requires the privacy of a minor to be respected always,⁵⁹ including during the three stages of criminal justice – pre-trial, trial and post-trial – when a child must be

⁵³ See section 35(3)(l) and (m) of the Constitution.

⁵⁴ De Vos op cit note 29 above at 450.

⁵⁵ See *Bernstein v Bester* 1996 (2) SA 751 (CC) para 67 and 69 cited in *Teddy Bear* supra note 9 above para 7. The court identified the ‘inner sanctum’ of personhood that is protected by the right to privacy.

⁵⁶ Further to this, Rule 8 of the Beijing Rules (supra note 3), emphasises the significance behind the protection of the child offender's right to privacy.

⁵⁷ Ibid Rule 8.2.

⁵⁸ See s 28 of the Constitution.

⁵⁹ Article 40(2)(b)(vii) and art 16 of CRC (supra note 12).

kept secluded from the public view in respect of criminal proceedings. Thus, the registration of the minor perpetrator's information on the NRSO has the immediate effect of encroaching on the child offender's right to privacy and dignity.⁶⁰

The right to privacy can be limited, especially when there is justifiable and reasonable cause. The protection of children and women is a justifiable cause to limit the right to privacy of a sex offender. However, the limitation of the minor sex offender's rights does not guarantee the safety of other children. Therefore, different, less restrictive ways can be employed to reduce the chances of recidivism of the offender. The register intrudes on the core of the child offender's privacy, which supports human dignity insofar as it is founded on the right of a person to 'a sphere of private intimacy and autonomy and preserves it'.⁶¹ The NRSO provisions involve a correlated limitation of teenage dignity rights.⁶² The same applies to the victim, as exposing the identity of the offender may also impair the right to privacy of the victim.

One may argue that anyone related to the child offender is greatly affected and their right to privacy may be encroached.⁶³ No minor must be 'exposed to unreasonable or unlawful intrusion into his or her privacy, family, home or correspondence, or to attacks on his or her honour or reputation, given that parents or guardians are entitled to exercise fair control over the behaviour of their children'.⁶⁴

VI THE RIGHT TO EQUALITY

Section 9(1) of the Constitution states that everyone or every subject 'has the right to be treated equally by the law, afforded equal protection by law and to benefit equally from the law'. This means child offenders should be afforded equal protection, treatment and enjoyment under the law, but they should be treated with even more attentiveness since they are vulnerable. However, as regards the register, children do not benefit equally from the law since there is no distinct

⁶⁰ *Johannes v S* 2013 (2) SACR 599 (WCC) (hereinafter referred to as '*Johannes*') para 65.

⁶¹ *Ibid.*

⁶² *Teddy Bear* supra note 7 para 46.

⁶³ Mollema op cit note 33 above at 2714.

⁶⁴ Article 10 of the ACRW supra note 12. Also see Article 17 of the International Covenant on Civil and Political Rights (1966) (ICCPR).

separation between children and adults in the register. Section 9(2) of the Constitution states that '[t]he right to equality includes the right to full and equal gratification of all rights and freedoms that exist'. This does not apply to the right to full and equal enjoyment of childhood innocence.

Unfair discrimination can be direct or indirect discrimination on the grounds listed in section 9(4) of the Constitution. The discrimination against child offenders on the register can be both direct and indirect. Direct discrimination can be related to the register's failure to separate child offenders from adult offenders. Indirect discrimination occurs through the failure of SORMA to afford children protection through the best interests principle as for any other child offender.⁶⁵

To prove discrimination, one must prove discrimination on a given ground referred to in section 9(3) or on an equivalent ground. Only unjust discrimination is forbidden. The Child Justice Act 75 of 2008 (CJA) advocates lenience when it comes to any matter that involves a child.⁶⁶ This means that child sex offenders should not be registered for a period equal to that for which adults are registered. Rule 5(c) is to be pursued predominantly in the young person's overall interests and steered by fairness and equity.⁶⁷ This means that children should benefit from the Child Justice Act through diversion programmes and not be treated as though they are adults.

VII THE RIGHT TO A CHOICE OF EMPLOYMENT

Registration in the NRSO carries grave socio-economic penalties for the sex offender. As outlined in chapter 6 of SORMA, numerous limitations are placed on embarking on certain child ventures or using certain facilities, the scope of employment, and freedom of access to minors or mentally disabled persons.⁶⁸ These restrictions may not affect the minor offender while still young, but only

⁶⁵ The court laid down the three stages or test of inquiry to determine the violation of the equity clause in *Harksen v Lane* 1998 1 SA 300 (CC).

⁶⁶ See section 3 of the CJA.

⁶⁷ Guideline 5C of the UN Guidelines for the Prevention of Child Delinquency (Riyadh Guideline), 1990 45/112, A/RES/45/112 (1990).

⁶⁸ Section 40 of the SORMA. From the definitions of an employer or licensing authority it is practically impossible to penetrate the economic welfare sphere where one does not have access to or authority over children, especially females.

when they are adults; the result of registration differs depending on the individual minor's surroundings and age and the child offender's right to his or her choice of employment.

Section 22 of the Constitution guarantees every person 'a right to choose their trade, occupation, or profession freely'.⁶⁹ However, if an individual is listed on the NRSO, several adverse consequences follow, and the stigma of criminalisation is intensified by section 41 of SORMA, which mandates that the particulars of any person who is registered should be entered on the register. Such a limitation is *prima facie* perfectly justifiable to protect children from potential sexual abuse.⁷⁰ Although registration of child sex offenders is no longer automatic, those registered suffer specific employment prohibitions. A child offender who is registered may not 'be employed or work with children; may not hold any position which places him or her in authority, supervision or care of children; and may not become a foster parent or an adoptive parent'.⁷¹ Section 41(1) plainly and commendably emphasises the need to curb sexual crimes against minors, but limiting the child's choice of employment purely because of childhood transgressions, adolescent development, or disorderly behavior amounts to a significant limitation of the child's right to employment and dignity.⁷² The choice of employment is a crucial part of identity for anyone because it involves a relationship that shapes and completes a person through his lifetime.⁷³

A child sex offender is required to reveal any previous sexual offences to an 'employer, licensing authority or childcare authority'.⁷⁴ Thus, a registered offender, regardless of whether he/she has or has not been convicted of a sexual offence, is indefinitely required to disclose the fact of his or her transgression or conviction.⁷⁵ Once registered in the NRSO, a person's information may be taken off the list in limited instances after five years in terms of section 51(2) and after and 10 years depending on the sentence.⁷⁶ Those with sentences above

⁶⁹ Nearly all of the rights under Chapter of the Constitution are textually applicable. Also see art 23(1) of the Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR).

⁷⁰ *Johannes* (note 60 above) para 88.

⁷¹ See section 46 of SORMA.

⁷² *Teddy Bear* supra note 7 para 57.

⁷³ *Govindjee* op cit note 5 above at 191.

⁷⁴ See section 51.

⁷⁵ *Stevens* op cit note 32 above at 2784.

⁷⁶ See section 51(2) of SORMA.

18 months may never be removed from the register, meaning discrimination in respect of certain types of employment, such as teaching or nursing, is prohibited for the remainder of their lives. One might argue that the objects of the SORMA propose that ‘a conservative approach is warranted to the interpretation of these NRSO provisions with regard to limitation of rights’.⁷⁷ Since many jobs involve working with children and people with disabilities, this may cause economic hardships later in life because of a limited choice of employment, which may in turn lead to recidivism.

VIII RESTORATIVE JUSTICE

Restorative justice is a principle of justice which depends on reconciliation rather than punishment. It has origins in America in the early 1990s.⁷⁸ In terms of the CJA interpretation clause, restorative justice means:

*‘[a]n approach to justice that aims to involve the child offender, the victim, the families concerned and community members to identify and address harms collectively, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation’.*⁷⁹

The child justice system seeks to safeguard victims, while rehabilitating the offender according to the best interests principle. Neglecting the interests of offenders or perpetrators may cause much harm to all groups.⁸⁰ Failure to consider the child sex offender’s rights may lead to recidivism on account of stigmatisation and the psychological impact of exposure to the criminal justice ethos.⁸¹ The long title and preamble of the CJA refer to restorative justice as an indispensable principle for dealing with child offenders.⁸² The objective of any child

⁷⁷ Stevens op cit note 32 above at 2794.

⁷⁸ See H Zehr *Changing Lenses: A New Focus for Criminal Justice* (1990) 5.

⁷⁹ See Chapter 1, ‘Definitions’ clause of the Child Justice Act.

⁸⁰ South African Law Commission *Issue Paper* (Project 106- July 2000) available at https://www.justice.gov.za/salrc/reports/r_prj106_juvjus_2000%20jul.pdf, accessed on 14 May 2018.

⁸¹ Ibid.

⁸² See the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century (2000) emphasises that ‘development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties’.

justice system must be to promote the minor's well-being and ensure that the actions taken with minors in the child justice system are proportionate to the circumstances of both the perpetrators and the crime.⁸³ A vital element of the reformative aims is to guarantee minor perpetrators a fair chance of being reintegrated into the community.⁸⁴

Such objectives are set out in the Constitution. Since most of the actors in minor sex-related cases are young people, there is a need to balance their individual rights with the laws and norms the law of the community.⁸⁵ The question is how the register advances the function of restorative justice, because the register aims only at protecting victims through quarantining the offender from access to the victim. There is no reconciling of the victim and offender as required by restorative justice. SORMA draws a visible line between victim and offender and prevents any form of reconciliation.

The register does not address harm to, needs of, and reconciliation of the victim, society and the offender suffering such trauma. The victim may need answers to help process the trauma he or she has suffered,⁸⁶ and failure of the criminal justice system to provide assistance delays the healing process for the victim. The register imposes obligations and does not facilitate restitution. There is much that can be said in favour of restorative justice, acknowledged worldwide as a positive move towards acknowledging child offenders' rights, the democratisation of the criminal justice system, and providing a universal method of preventing crimes.⁸⁷ The advantages are reinforced by a concomitant move away from procedural concepts of justice towards substantive justice. In other words, justice is not only about following rules or rational procedures but requires outcomes that are rational and meet the needs of society.

Restorative justice has had a major effect on the reorganisation of the child justice system in South Africa. The NRSO provisions contrast with what the principles of restorative justice seeks to achieve. Restorative justice goals are intended to hold the child sex offender accountable while bringing the victim and the offender together, whereas the register separates

⁸³ Rule 5 of the Beijing Rules supra note 3.

⁸⁴ *J v NDPP* supra note 9 para 44.

⁸⁵ Stevens op cit note 32 above at 2787.

⁸⁶ G Johnstone and W Daniel *Handbook of Restorative Justice* (2007) 85.

⁸⁷ D J Cornwell *Criminal Punishment and Restorative Justice: Past, Present and Future Perspectives* (2006) 26.

them. The register aims at protecting victims and amounts to failure to commit to the progressive advances in international and domestic law. Restorative justice sentences comprise ‘family group conferences and victim-offender mediation as recommended or ordered by the court’.⁸⁸ A register aims to reduce sex crimes against children by labelling child offenders, while courts are obliged to practise restorative justice, giving rise to an obvious contradiction in which the register disproportionately protects the victim’s rights.

IX APPLICATION OF THE AFRICAN PHILOSOPHY (UBUNTU) ON CHILD SEX OFFENDERS

The African philosophy of Ubuntu, recognised since the birth of the constitutional era in South Africa, has raised a debate as to whether it is a constitutional value or a customary concept.⁸⁹ Ubuntu may be defined as a ‘philosophy of life in a broad sense’.⁹⁰ Ubuntu fundamentally ‘represents personhood, humanity, humaneness, and morality’.⁹¹ A literal translation of Ubuntu would be ‘[a] person can only be a person through others’.⁹² However, it was not until after the adoption of the Constitution of the Republic of South Africa, Act 200 of 1993 (hereinafter referred as the ‘interim Constitution’) that the concept was given a legal meaning.⁹³ The preamble of the English text of the interim Constitution referred to Ubuntu as ‘a need for understanding but not for vengeance, a need for reparation but not for retaliation, and a need for Ubuntu but not for victimisation’.⁹⁴ Victimisation refers to the ‘action of singling someone out for cruel or unjust treatment’.⁹⁵ Since child care and child justice systems are continuously under scrutiny by the

⁸⁸ Ibid.

⁸⁹ Constitution of the Republic of South Africa, Act 200 of 1993 (hereinafter referred as the ‘interim Constitution’). Since Ubuntu was invoked in *Makwanyane* (supra note 26), it now part of new South African case law of constitutional jurisprudence.

⁹⁰ S Cibane ‘Application of the Constitutional Value of Ubuntu in Private Relations: The Private Law of Contract a Test Case’ 2012 *Phronimon* 1 at 2–3.

⁹¹ Cibane op cit not 90 above.

⁹² Ibid.

⁹³ Ibid at 1.

⁹⁴ See the preamble of the Interim Constitution. By registering child sex offenders in the NRSO, there are singled out as sex predators, thus undermining their well-being and best interests. Cibane op cit not 90 at 86.

⁹⁵ J Law & A Martin *Oxford Dictionary of Law* 7 ed (2013) 578.

Constitution and international law, courts are obligated to apply Ubuntu,⁹⁶ which introduces a humanitarian approach in cases where a minor is involved in the child justice system.⁹⁷ Ubuntu emphasises values of the community which can be resorted to as a rehabilitative tool.⁹⁸

In *S v Makwanyane*⁹⁹ (hereinafter referred to as ‘*Makwanyane*’), Ubuntu was matched with rehabilitation, maintenance of law and order, humaneness, social justice and fairness.¹⁰⁰ Some traits or standards of Ubuntu are inherent in multi-cultural Africa.¹⁰¹ Mokgoro argues that it would be abnormal if dignity, humaneness, obedience and respect were foreign to any race or culture.¹⁰² Additionally, applying Ubuntu community values is productive because most of its elements are derived from the culture, beliefs and practices of a wide array of indigenous sub-Saharan people, invariably portrayed as clinging to a communitarian way of living. In this way, children may be easily diverted from crimes since they practise the same customs.¹⁰³ The NRSO did not take this into consideration. The register singles out a child sex offender and separates him or her from the community, which is the community setting advocated by Ubuntu. Even though the register is not publicly accessible, the registration of child sex offenders creates false security that the children are safe from future abuse.¹⁰⁴ The child sex offender is perceived in the same way as any sex offender and has restricted access to other children. In this way, the

⁹⁶ Preamble to the English text of the Interim Constitution.

⁹⁷ J Y Mokgoro ‘Ubuntu and the Law in South Africa’ at 10, available at https://www.researchgate.net/publication/26633677_Ubuntu_and_the_law_in_South_Africa, accessed on 1 April 2018.

⁹⁸ Ibid.

⁹⁹ 1995 (3) SA 391(CC).

¹⁰⁰ *Makwanyane supra* note 26 at 224, 225, 237, 243 and 250.

¹⁰¹ Mokgoro op cit note 97 above at 4. Also see Cibane op cit not 89 at 86. T Metz ‘African Values and Human Rights as Two Sides of the Sam Coin: A Reply to Oyewe’ (2014) 4 *AHRLJ* 306 at 307 puts forward those African values are frequently related with discussions of ubuntu, a Nguni term for humanness that is used to describe sub-Saharan morality and cites T Metz ‘*Ubuntu as a Moral Theory and Human Rights in South Africa*’ (2011) 11 *African Human Rights Law Journal* 532–559.

¹⁰² Ibid.

¹⁰³ Metz op cit note 101 above at 309 & 318.

¹⁰⁴ Z Jooma *The National Register for Sexual Offenders: The Solution to Protecting Children in South Africa?* (Unpublished LLM thesis, University of Pretoria, 2010) 11.

register divides the offender and victim since the child offender is isolated from interacting with other children, which is against the values of Ubuntu, such as reconciliation, humanness and forgiveness.¹⁰⁵

These communal relationships are understood and practised as a combination of what is labelled as ‘identity and solidarity’.¹⁰⁶ A child is groomed by the whole community with whom he or she will identify, or share a way of life, by which is meant experiencing a sense of intimacy and participating in communal projects.¹⁰⁷ Another element of communion is caring for the standard of living of others, which implies helping others for altruistic purposes and as a result of sympathy.¹⁰⁸ When African thinkers say ‘community’, they refer to its moral attractiveness, which consists of a combination of identity and solidarity.¹⁰⁹ The NRSO labels a child as a national sex offender, which restricts the child access to other children whom he or she needs for psychological and moral development. Registering every offence has become increasingly problematic in that it does not adequately deal with victims’ trauma.

A register is a retributive sanction for a child sex offender. The court in the process acknowledges retribution as a reasonable purpose of punishment, but this purpose should not be given excessive recognition, given South Africa’s past injustices and the culture of developing human rights and spirit of Ubuntu.¹¹⁰ The Constitutional Court has held that the primary purpose of punishment is deterrence, prevention, and rehabilitation, and not only deterrence and revenge.¹¹¹ SORMA keeps a record of sex offenders and contributes nothing to the rehabilitation process. The rights, values and ideals of a child perpetrator must be discussed through principles such as dignity, equality and freedom, which have become the focus of the above discourse and will undoubtedly proceed to be argued as such. There is indeed no clear or logical reason why Ubuntu values should

¹⁰⁵ Mokgoro op cit note 97 above at 4.

¹⁰⁶ Metz op cit note 101 above at 313, explains that Ubuntu represents a foundation that pushes for positive child rights.

¹⁰⁷ Ibid at 318.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid at 309–310.

¹¹⁰ *Makwanyane* supra note 26 para 129.

¹¹¹ Ibid paras 130–131.

be excluded from this discussion.¹¹² The *Makwanyane* case emphasises the role of Ubuntu in our courts as a constitutional value. As is the case with many other ethically charged constitutional principles, definitional issues regarding Ubuntu are closely related to moral questions, such as ‘dignity’, ‘democracy’, ‘equality’, ‘inhumanity’ and ‘barbaric behaviour’.¹¹³

These assertions tally with the discussion above over child sex offenders’ desires and needs, moral energies, emotional safeguards, and humanity, especially from the community. In due course, they aid in accomplishing self-fulfilment through a set of collective social ideals and help with the child offender’s maturity, psychological development and intellectual growth to become a law-abiding citizen. That includes preserving the innocence of children and not stigmatising the child as a sex offender. The outstanding feature of Ubuntu is the value it places on the life of everyone and on human dignity, which is ignored in the NRSO.¹¹⁴ Ubuntu tenets also call upon the victim’s sense of justice to be upheld and thus balance the scale of the crime and the punishment in the case of the perpetrator.

X CONCLUSION

The rights of a child offender have proved to be multifaceted because they encompass theories and concepts. These include moral, philosophical and legal frameworks, as well as social concerns. Their exclusion in the NRSO denies their rights, rendering the register an unconstitutional sanction for child offenders. The register fails to accommodate constitutional values such as Ubuntu and restorative justice. The CJA fundamentally attempts to extend and integrate the concepts of restorative justice and Ubuntu into the ‘criminal justice system for children who are in conflict with the law by ensuring their responsibility and accountability for crimes committed’.¹¹⁵ At this time the child must go through the criminal courts to answer before the judicial officer and be held accountable to their crimes.¹¹⁶ To this end, the CJA advocates a restorative justice response in support of child offenders, stressing reconciliation. It includes special emphasis on rehabilitation

¹¹² C Himonga, M Taylor and A Pope ‘Reflections on Judicial Views of Ubuntu’ (2013) 16 *PER/PELJ* 372 at 377.

¹¹³ Himonga, Taylor & Pope op cit note 112 at 380.

¹¹⁴ *Makwanyane* supra note 26 at 225. See further assertions by other judges.

¹¹⁵ The preamble of the Child Justice Act 75 of 2008.

¹¹⁶ *Teddy Bear* supra note 7 above para 70.

and reincorporating these children and their victims into society.¹¹⁷ The *Makwanyane* judgment stressed the need for ‘humaneness, empathy, and compassion’. Those three values are embodied in Ubuntu, and the same values are always in the child’s best interests. In this context, the sanction of continuous registration impairs human dignity and security. The very sanction itself becomes ‘cruel, inhumane and degrading’.¹¹⁸

Chapter 5 will explore foreign registers. No legal system has enacted a substantial or resoundingly successful law concerning registration of child offenders, because the register ultimately fails to take into account rehabilitation, separation of children from adults and restorative justice.

¹¹⁷ *Johannes* supra note 59 above para 52.

¹¹⁸ *Du Plooy v Minister of Correctional Services* 2004 3 All SA 613 (T) para 29 cited in Himonga, Taylor & Pope op cit note 112 at 395.

CHAPTER 5

A COMPARATIVE ANALYSIS OF THE REGISTRATION OF CHILD SEX OFFENDERS IN DIFFERENT LEGAL SYSTEMS

I INTRODUCTION

In the past few decades, the registration of sex offenders has played a significant role in many legal systems, aimed at curbing sexual crimes against children. In the United States of America (USA), the practice of tracking sex offenders through a register is one which dates back to the 1930s.¹ The idea began with small pieces of information being shared between law enforcement officials.² They collected personal information about sex offenders and made it available to the public. In other legal systems, the information is available on publicly accessible websites, while others keep the information confidential.³

Since the South African register was adopted from the legal practice of the USA's and the United Kingdom (UK)'s legal systems, there is a need for comparative analysis of the operations of the National Register for Sex Offenders (the 'NRSO') which was established under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) with those of other jurisdictions. The study will compare the systems in Australia, the USA, the UK and Kenya with that of the NRSO. The Constitution of the Republic of South Africa, 1996 ('the Constitution') 'incorporates principles from the USA and UK systems, making the comparative analysis of constitutional rights more easily applicable since these countries share the same constitutional values'.⁴ Furthermore, the reference to the USA is based on the fact that it was one of the first countries to implement and develop registration

¹ I Burriany & J D Bohn 'Juvenile Sex Offender Registration Laws in the United States: How the Adam Walsh Act Will Affect Juvenile Sex Offenders' (2007) 12 *PILP* 190 at 192.

² Ibid.

³ Ibid.

⁴ P de Vos et al. *South African Constitutional Law in Context* (2014) 41–52. Different constitutionalism models were adopted: the Westminster constitutional model, USA constitutional model, and the German constitutional model. The Westminster constitutional model was a British model, and it was adopted mainly by British colonies.

of sex perpetrators. Because English law has historically been imposed on and adopted into the South African legal system, primarily through precedent and legislation, the research will concentrate on the UK experience. The Australian register was implemented at almost the same time as the NRSO, and the comparative analysis aims to understand how it has approached the issue of registration of minor sex perpetrators. The Kenyan register was implemented after the NRSO in 2010. The research compares the development of the registers of both legal systems and issues around child rights. The Kenyan register was also used in the comparative analysis because the two countries are considered developing countries with similar legal systems.

II A REGISTER FOR SEX OFFENDERS IN THE USA

(a) *A Brief Overview of the Statutes of the USA Sex Offenders Register*

The USA is identified as the founder and transformer of the registration scheme.⁵ This was in response to the increase in violent sex offences against minors in the USA.⁶⁷ Beginning with the Jacob Wetterling Act: ‘Crimes Against Children and Sexually Violent Offenders Registration Act 1994’, introduced registration of sex perpetrators, including those charged with non-sexual offences against minors, for example kidnapping. The Jacob Wetterling Act allowed publication of the offenders’ information but did not explicitly mandate the publication of recorded information.⁸ The Megan Law, passed in 1996, which amended the Wetterling Act, mandated public disclosure of registered sex offender particulars when the public was considered to be at risk. The Pam Lychner Sexual Offender Tracking and Identification Act of 1996 established the national database for sex offenders known as the National Sex Offender

⁵ Burriany & Bohn op cit note 1 above at 192. It was first introduced in California in 1947 and, because of a noticeable progressive outcome, numerous federal statutes were passed in the 1990s, mandating creation of registers.

⁶ Ibid at 193, the authors point out that before 1994, there were no federal laws dealing with the registration of sex perpetrators in the entire USA.

⁷ Ibid.

⁸ Ibid.

Registry (NSOR), managed by the Federal Bureau of Investigation (FBI).⁹ In 2003, the Prosecutorial Remedies and Other Tolls to End the Exploitation of Children Today (PROTECT) Act was introduced and obligated States to create websites or databases containing offenders' particulars under the auspices of the Department of Justice. The Adam Walsh Child Protection and Safety Act of 2006 (AWA) together with Title 1 of the Sex Offender Registration and Notification Act (hereinafter referred to as ORNA), entirely amended all the federal standards for sex perpetrator registration and notification.¹⁰ Section 16918 of AWA emphasises that each state should make the registered offender's particulars readily accessible to the public. However, the information of the victim is to be protected from disclosure.¹¹

(b) *Registration of Minor Sex Offenders in the USA*

As soon as a court orders the registration of the child offender, all the necessary information is gathered and submitted to the appropriate databases.¹² Biometric indicators such as fingerprints, palm prints, and the deoxyribonucleic acid (DNA) of the offender are collected during registration.¹³ The public registry website is connected to the National Sex Offenders Public Website (NSOPW), the single official countrywide list of public sex perpetrators in the USA.¹⁴ States in the USA are obligated to have thorough community notification systems

⁹ The Protection of Children from Sexual Predators Act followed in 1998. The Campus Sex Crimes Prevention Act of 2000 was passed to register people involved in the education department but was vague about registering sex perpetrators who were minor students or pupils. It formed part of the famous Violence Against Women Act of 2000.

¹⁰ N Mollema 'The Viability and Constitutionality of the South African Register for Sex Offenders: A Comparative Study' (2015) 18 *PER/PELJ* 2707 at 2709, establishing baseline standards for the registration of sex offenders and offences in so doing repealed previous laws.

¹¹ Burriany & Bohn op cit note 1 above) at 211. In addition, several laws were passed after the AWA, such as the Keeping the Internet Devoid of Predators (KIDS) Act of 2008, Military Sex Offender Reporting Act of 2015 and International Megan's Law of 2016, to amend vague provisions of the register in the USA. Military Sex Offender Reporting Act of 2015 formed a portion of the Justice for Victims of Trafficking Act of 2015.

¹² See Adam Walsh Act Protection and Safety Act of 2006 (hereinafter referred to as 'AWA') § 16914. Also see AWA 42 U.S.C. § 16913(b)(2).

¹³ Mollema op cit note 10 above at 2709. Each jurisdiction had discretion over which information to publish on the public registry website.

¹⁴ See AWA § 16920(b).

available in order to notify other law enforcement agencies and the public, whenever there is a new addition to or removal from the list.¹⁵ In the USA, the database is arranged in tiers with emphasis on the nature of the crime. A tier in terms of SORNA refers to categories of the number of years an offender will remain registered.¹⁶

In registering child sex offenders, the law is inconsistent. The goals of registering sex offenders are to ‘deter, punish, and incapacitate sex offenders by providing law enforcement officials with an information tracking tool, thereby increasing public safety’.¹⁷ In the USA, register laws are globally well known and are considered significant.¹⁸ However, they were imprecise and ambiguous with regard to registration of minor sex offenders, and, as a result, each state had to decide whether to register minor sex offenders based on their child justice system values.¹⁹ Although society in general strongly supported the sex register scheme, uncertainty remained about whether a child sex offender should be registered and treated in the same way as adults.²⁰

¹⁵ Ibid § 16921(b)(3).

¹⁶ L McPherson ‘The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future’ (2016) 64 *Drake Law Review* 741 at 760. Referring to SORNA, Tier I crimes comprise of possession of child pornography and misdemeanors and could be registered for 15 years. One could also get five years’ reduction for Tier I, where the person had not been convicted for 10 years following the sentence. Tier II crimes commonly include child sexual exploitation offences and one could be registered up to 25 years. Tier III is reserved for the utmost grave offences, such as aggressive penetration crimes or crimes against minors below the age of 13 years and the listing was for a lifetime. The details could be removed after 10 years, where the sex perpetrator under tier III was not convicted in the next 10 years that followed. Only a child registered under Tier III with no convictions may have his years on the register reduced to 25 years. In an ultimate SORNA application, any jurisdiction would determine the suitable ‘Tier’ after imposing a register. The conviction or sentence determined a tier and each tier had prescribed years of registration. Also see C Hargreaves & B Francis ‘The Long Term Recidivism Risk of Young Sexual Offenders in England and Wales – Enduring Risk or Redemption?’ (2014) 42 *JCL* 164 at 169.

¹⁷ SW Craun ‘Juvenile Offenders and Sex Offender Registries: Examining the Data Behind the Debate’ (2006) 70 *Federal Probation Journal* 45 at 49.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

SORNA implemented a punitive and uniform rule ‘as a guiding principle’, which meant all sex perpetrators were treated the same regardless of their age.²¹ SORNA defined a sex perpetrator as ‘a person convicted under the law of any jurisdiction of any kind of sex offence’.²² The definition was regarded as broad since it included children younger than 14 years who had been classified as delinquent for an attempted sexual offence.²³ The period of registration and internet publishing was determined by the seriousness of the offence and not its gravity or the risk of recidivism.²⁴

The location monitoring of sex perpetrators using Global Positioning System (GPS) technology has been used by the government and municipal law enforcement in modern times. However, SORNA and other laws do not direct GPS electronic monitoring of registered sex perpetrators in public.²⁵ However, a few states use the strictest restrictions on minor sex offenders with GPS to monitor sex offenders.²⁶ Section 216 of the AWA repealed the Bail Reform Act of 1966, making electronic monitoring compulsory for anyone released on bail in federal court for nearly all of the offences registrable by SORNA. Placing a GPS monitor on a sex perpetrator was seen as an unjustified search in a certain case and unconstitutional under the Fourth Amendment of the US Bill of Rights,²⁷ which prohibits unreasonable searches and seizures.

The internet has developed as a modern basic service around the world in the past decade. It is now standard for every person to use the internet for bill paying, job searching and shopping online.²⁸ Interacting on the internet has become a norm on platforms such as Facebook and Twitter. Regrettably, many child sex offenders use these platforms to lure

²¹ Sex Offender Registration and Notification Act 2006 (SORNA).

²² See AWA 42 U.S.C § 16914(b), cited in McPherson op cit note 14 above at 760. A sex offender is supposed to be registered under their jurisdictions.

²³ Ibid.

²⁴ Burriany & Bohn op cit note 1 above at 193.

²⁵ Ibid at 787. See AWA 42 U.S.C § 16981(B) (2012).

²⁶ Ibid at 204.

²⁷ See McPherson op cit note 16 above at 788, who cited the bases of the arguments on *United States v. Jones* 132 S. Ct 945 (2012).

²⁸ Ibid.

unsuspecting victims and commit crimes.²⁹ Register laws in the USA did not restrict internet access to registered offenders until the passing of the Keeping the Internet Devoid of Predators (KIDS) Act of 2008. States were directed to gather all sex offenders' internet searches as part of the registration process, although they were exempted from publishing the same on the website. Some states have passed laws to limit or prohibit internet access to registered sex offenders.³⁰ Moreover, sex perpetrators on federally supervised probation are normally exposed to certain restrictions on internet access. Restriction of internet access has been held to be unconstitutional in other states.³¹ These restrictions have been the subject of First Amendment litigation and continual debates regarding their propriety and effectiveness.³² However, this restriction would be impossible to apply to minor sex offenders since this generation depends on the internet for, inter alia, studying and communication.

Furthermore, the SORNA provisions allow for the collection of sex perpetrators' international travel information to facilitate international tracing. The International Megan Law of 2016 amended SORNA and the Megan Law of 1996 to allow foreign governments to share information about international sex offenders.³³ The law requires perpetrators to file a notice of intention to travel internationally.³⁴ Although the law is still new, other legal systems such as those in Australia, the UK and Canada accept collection of travel information of registered sex offenders for international tracing.

One can argue that these restrictions are effective in reducing recidivism of sex offenders, thereby promoting societal safety. Regardless of the arguments raised, the USA has recorded that the register has been a successful measure to reduce sexual violence against children in the last 20 years.³⁵ Most authors have applauded the register's objectives and results,

²⁹ Ibid at 789.

³⁰ Ibid.

³¹ B Schreiner 'Judge strikes down web restrictions for sex offenders' – *Courier Journal* (20 October 2017), available at <https://www.courier-journal.com/story/news/local/2017/10/20/judge-strikes-down-kentucky-internet-restrictions-sex-offenders/786270001/>, accessed on 5 April 2018.

³² McPherson op cit note 16 above at 789.

³³ International Megan's Law of 2016.

³⁴ See section 6 of International Megan's Law of 2016.

³⁵ McPherson op cit note 16 above at 793.

but feel that it fails to consider the suffering of child offenders under the ‘uniform age rule’.³⁶ While the register laws have been amended several times, little attention has been given to the plight of registered child sex offenders.³⁷ All countries should follow international regulations and recommendations dealing with child sex offenders. A blanket rule marginalises and stigmatises child sex offenders, causing some to have been psychologically and physically abused because their particulars have been made public.³⁸ The same marginalised children are often not rehabilitated but are pushed to re-offend. Therefore, the register also creates the same problem it tries to combat by increasing the chances of recidivism in the offenders it marginalises.³⁹

A broad analysis of adjudication of sex perpetrators in the USA found that the largest drop in sex-related offences happened prior to the passing of registration and notification laws.⁴⁰ Most of these restrictions, such as employment restrictions, GPS supervision, residency restrictions, travel monitoring and internet limitations, form part of statutes enacted by municipalities and are not a part of SORNA’s ‘minimum standards’.

There is a need to address the issue of separation of children from adults, although a few states in the USA do separate children from adults.

(c) *An Analysis of the USA Courts’ Approach to Registration of Minor Sex Offenders*

In the USA, registration of child sex perpetrators ‘has been met with mixed views in the courts’. Despite SORNA requirement that a child convicted as delinquent in respect of certain crimes should be registered as a sex offender and have his or her details displayed, the application of this provision has caused dissonance among states,⁴¹ many of which do not completely register

³⁶ Ibid at 760.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ K Hynes ‘The Cost of Fear: An Analysis of Sex Offender Registration, Community Notification, and Civil Commitment Laws in the United States and the United Kingdom’ (2013) 2 *Penn State Journal of Law & International Affairs* 351 at 364.

⁴¹ Ibid Hynes at 374.

child offenders. Some apply a minimum age threshold for child offender registration, some designate exceptional crimes where a child offender can be registered, and others focus on the period of placement, frequency or information displayed to the public.⁴² However, in general, the principle of the best interests of the child sex offender has been outweighed by other considerations such as the best interests of the victim and the impact of sexual crimes on society.⁴³

Some states have obligatory registration laws for certain children, while for others it is discretionary, based on a hybrid approach.⁴⁴ For instance, other courts have ruled that requirements which are applied to child sex offenders during registration do not infringe the Eighth Amendment,⁴⁵ which forbids courts from imposing excessively harsh penalties or sanctions on criminal defendants. Other states have ruled that the practice of automatically registering children for life is a violation of due process rights and have prohibited it as cruel and unusual punishment.⁴⁶ In any event, registration of child sex perpetrators in the national register contravenes the Federal Juvenile Delinquency Act's privacy and confidentiality provisions.⁴⁷

One of the first arguments raised against the USA register was the retrospective application of the register against minor sex offenders. Various applications against the retroactive application were lodged between the 1990s and 2000s.⁴⁸ In *Smith v Doe*,⁴⁹ the court settled the retrospective effect issue as being a violation of the *ex post facto*-clause of the Constitution.⁵⁰ 'a criminal law with retrospective effect was deemed unfair for various

⁴² Ibid.

⁴³ *Clark v State*, No. 585, 2007, 2008 WL 3906890.

⁴⁴ *N. L. v State*, 989 N.E 2d 773 at 776.

⁴⁵ According to the U.S.A. Constitution Eighth Amendment.

⁴⁶ McPherson op cit note 16 above at 776.

⁴⁷ Ibid cited Federal Juvenile Delinquency Act of 1984.

⁴⁸ See SORNA supra note 19. However, when it comes to SORNA it was submitted that the provisions were in line with the registration of those minors convicted before the coming into operation of provisions surrounding sex offender register.

⁴⁹ 538 U.S. 84, 91 (2003).

⁵⁰ See *Smith v Doe*, 538 U.S. 84, 91 (2003) as cited in McPherson op cit note 16 above at 777.

reasons'.⁵¹ The period of grace did not last. The USA Supreme Court decided that registration and notification with regard to that case were non-punitive; hence the laws could be imposed retroactively as regulatory actions.⁵² This decision serves as a powerful defence to the argument in South Africa that registration of minors is unlawful on the ground of its retrospective effect.

Although some states in the USA follow the decision in *Smith v Doe*⁵³ as upholding the retrospectivity of the registration laws, other states hold that in the case of the life registration (Tier III), the retrospective effect was unconstitutional. In *Doe v State*,⁵⁴ retrospective application was permitted if the minor offender was given a chance to defend him-/herself.⁵⁵ The question of whether residential detention would be appropriate is open to debate, with the duty of compliance unclear. The use of internet publication has proved to have caused stigmatisation and harassment, causing enormous instability in the lives of minor sex offenders and increasing their chances of recidivism. Homelessness, physical assaults, unemployment, property damage, loss of life, and harm to family members have resulted from the publication of their information.⁵⁶ Internet notifications have indirectly contributed to the above effects, and less directly to restrictions on employment, place of residence, internet usage, and travelling.

III A REGISTER FOR SEX OFFENDERS IN THE UK

(a) *A Brief Overview of the Statutes Pertaining to the UK Sex Offenders Register*

The categorisation of sexual offenders has been used in the UK legal system since the 1990s, and their registration has played a fundamental role in controlling sexual offending by monitoring and supervising of convicts found guilty of sexual misconduct once they are released into the community. The Sex Offenders Bill gazetted on 18 December 1996 was

⁵¹ The 'ex post facto' clause of article I of USA's Constitution provides that 'no State shall pass any ex post facto Law.'

⁵² McPherson op cit note 16 above at 777.

⁵³ 538 U.S. 84, 91 (2003).

⁵⁴ 111 A.3d 1077, 1101 (n.h.2015).

⁵⁵ Ibid.

⁵⁶ Ibid.

promulgated on 21 March 1997 and commenced operation as the Sex Offenders Act of 1997.⁵⁷ This Act had vague provisions such as:

- a person could register by post with no proof of identity;
- the law did not mandate registration in person; and
- there were no consequences for failure to register.⁵⁸

The abduction and killing of 8-year-old Sarah Payne in 2000 led to an amendment to the regime of the registration of perpetrators⁵⁹ as part of Schedule 5 to the Criminal Justice and Court Services Act of 2000.⁶⁰ The operation of the register was later revised by the Sexual Offences Act of 2003 and now forms part of the Violent and Sexual Offender Register (ViSOR).⁶¹ Six national registers have been developed.⁶² Child sex offenders are expected to report frequently to the nearest police station to update or confirm their details. Sections 80 to 92 and Schedule 3 of the Sexual Offences Act Part 2 amended the Sex Offenders Act of 1997 by outlining the register's framework.⁶³ To name a few requirements, registration is granted upon submission of an insurance number, a photograph, and fingerprints. Notably, the registration requirements have been expanded to include a DNA sample, bank account and credit card information, and email addresses.⁶⁴ Annually, the registered offender is required to

⁵⁷ Sex Offenders Act 1997 (c.51).

⁵⁸ A McAlinden 'Sex Offenders and Child Protection' (1998) 4 *Child Care in Practice* 250 at 254.

⁵⁹ T Thomas 'When Public Protection Becomes Punishment? The UK use of Civil Measures to Contain the Sex Offender' (2004) 10 *European Journal on Criminal Policy and Research* 337 at 341.

⁶⁰ Because of a combined meeting between the Home Office and Scottish Executive, Part 2 of the Sexual Offences Act 2003 has since replaced these provisions.

⁶¹ Violent and Sexual Offender Register (hereinafter referred to as 'ViSOR'). Hynes (op cit note 40 above at 364). According to C Cobley 'Keeping Track of Sex Offenders- Part 1 of the Sex Offenders Act 1997' (1997) 60 *Modern Law Review* 690 at 696, the sex register scheme makes no provision for drawing a distinct register but there are wide-ranging 'type' lists of all found guilty, suspected and alleged of sexual offences against children now in the UK.

⁶² Cobley op cit note 62 above at 691.

⁶³ Thomas op cit note 59 above at 343, notes that the perpetrators' particulars are registered by the police official and kept in the law enforcement national computer database. The offender is obligated to register in person not longer than three days after their release from prison.

⁶⁴ Part 4 *Criminal Justice (Forensic Evidence and DNA Database System) Bill*, 2013.

confirm the details even where no changes have occurred.⁶⁵ The length of registration for adults and children is the same and is determined by the crime and the sentence imposed. The length of registration ranges from two years for those cautioned for a sex-related crime, to lifetime registration.⁶⁶

Part 2 of the Sexual Offences Act 2003 (chapter 42) regulates the registration and notification of sex perpetrators in the UK registry. Section 80 of the Act expounds on precisely who is obliged to register, including any persons cautioned or convicted of a sexual related offence. The term ‘person’ does not exclude children or those found insane by the court, and every registration is done in person.⁶⁷ The 2003 Act went even further than expected in guaranteeing the community protection from sexual violation through sexual crimes prevention orders, international orders and notification orders, and Risk of Sexual Harm Orders (RSHOs).⁶⁸

Unlike the USA registry scheme, the UK declined an absolute public notification system to reduce vigilantism and to give the police space to do their work.⁶⁹ However, the UK seems to be deviating from the original stance of non-disclosure with the Child Offender Disclosure Scheme of 2000 (Sarah’s Law), allowing victims and their relatives to be notified about certain offenders.⁷⁰ These statutes are a sign of erosion of the original stance

⁶⁵ See section 85 of the Sexual Offences Act, 2003. Offenders with no main or sole residence must report weekly.

⁶⁶ Thomas op cit note 59 above at 497.

⁶⁷ Under this statute, police can apply to a judicial officer for a search warrant for a registered offender's property to ensure that the sex offender does not pose any recidivism risk. It is immaterial whether or not the offender is acting within registration boundaries.

⁶⁸ When an offender is under any one of the above orders, they automatically become liable to register. Failure to report to orders issued or ‘registration and notification requirements’ in terms of section 80 of ViSOR is tantamount to a crime with up to five years imprisonment.

⁶⁹ Hynes op cit note 40 above at 368. First, the concern was that if people have access to public information such as offenders’ information, there is a high risk of vigilantism. Secondly, the duty to monitor dangerous situations and offenders are the responsibility of trained officials and not defenceless people.

⁷⁰ Ibid at 365. The implementation of Sarah’s Law and the Proposal of Clare’s Law have been tagged as a disturbing trend in the United Kingdom that may lead to a USA standard of publicising the names of the offenders in the future.

that sex offenders should be afforded privacy protection.⁷¹ The latest amendment of Sarah's Law, which was adopted in 2009, protects the public interest,⁷² and these amendments do not differentiate between adults and minor sex offenders but generalise behind the term 'person', thereby including minor sex perpetrators.

(b) *An Assessment of the UK Registers and the Courts' Approach to Registration of Child Sex Offenders*

One of the significant parliamentary debates initiated before implementing the Sex Offenders Act was on registering minor sex offenders, although the arguments against the Act were not upheld.⁷³ It was proposed that separate provisions should be made for child sex offenders or that judicial officers should be afforded discretion whether to register child offenders.⁷⁴ The Sexual Offences Act 1993 dismissed the biological arguments that boys under 14 years of age are incapable of sexual relations. This was later revised by the 1998 Crime and Disorder Act section 34, which removed the *doli incapax* defence because biologically, minors were held to be capable of having sexual intercourse. The Act required the court to prove the minor's criminal capacity when aged 10 to 14 years.⁷⁵ Indefinite registration was held to be proportionate.⁷⁶ The court findings focused on the proportionality of the rights of the individual and indefinite time of registration without review, dismissing the application on a balance of interests because of the impact of sexual crimes on victims. However, the court went on to emphasise that the register was an additional sanction for the perpetrator.⁷⁷

⁷¹ Ibid at 365.

⁷² For instance, parents are allowed to request the status of a person who has regular, unsupervised access to their children.

⁷³ Thomas op cit note 59 above at 493.

⁷⁴ Ibid. The idea that children have no criminal capacity can be traced back to the common law presumption that children below the age of 14 were incapable of committing sexual offences.

⁷⁵ Ibid at 492.

⁷⁶ Ibid at 498, Thomas cited *Re Kevin Gallagher* [2003] NIQB 26 held in the Northern Ireland High Court. Also, see *R and Thompson v. Secretary of State for the Home Department* (2010) UKSC 17, (2011) 1 A.C. 331, the court held that that the law's objective was distinctly reasonable and that deterrence of sex perpetrators is of 'great social value'.

⁷⁷ Hynes op cit note 40 above at 368.

In *Adamson v UK*,⁷⁸ the European Court of Human Rights ruled that the register does impair the right to privacy but is compliant with article 8 of the European Convention on Human Rights.⁷⁹ Conversely, in *The Queen on the application of F and Aubrey Thompson v Secretary of State for Justice Department*,⁸⁰ it was held that those child sex perpetrators registered for an unspecified period had the right to challenge their registration. The lifetime registration was found to be unjustified and disproportionate. It was submitted that such registration for a continuous and indefinite time on the register without an option of a review was irreconcilable with article 8, ‘the right to privacy and family life’, under ECHR.⁸¹ The review powers were to be exercised by an independent tribunal with discretion to determine if the particulars of a sex perpetrator might be removed after 15 years on the register. In *U v Metropolitan Police Commissioner; R v Durham Constabulary*,⁸² the court ruled that the register was incompatible with article 6 of the ECHR, which ensures the right to a fair hearing of a child.⁸³ This implied that children qualified for separate registration laws, giving them an equal chance of a fair trial.

Although registration of sex perpetrators alerts the community to new sex perpetrators in the community, it has shortcomings regarding registration of child sex offenders.

⁷⁸ (1999) 28 EHRR CD 209.

⁷⁹ The other legal challenge to the register was in terms of a universal right to privacy under Article 8 of the European Convention of Human Rights 4 November 1950, ETS 5, (1950) (ECHR). The UK does not have the right to privacy in their Constitution, so it depends on the international instruments.

⁸⁰ [2008] EWCH 3170.

⁸¹ Article 8 of the ECHR (note 79 above). Also, see Hargreaves and Francis op cit note 14 above at 169, citing the case as a landmark decision in favour of child sex offenders. In *F and Thompson v Secretary of State for the Home Department* [2008] EWCH 3170, the UK Supreme Court declared the indefinite registration contradictory to ECHR.

⁸² [2002] EWCA 2486.

⁸³ T Thomas ‘Children and Young People on the UK Sex Offender Register’ (2009) 17 *International Journal of Children’s Rights* 491 at 497, referring to a decision that can be viewed as similar to the decision of *R v Chief Constable of North Wales Police, ex parte Thorpe* (1999) QB 396 (CA), where the ‘policy of blanket disclosure’ was condemned for not separating minor sex offenders from adult sex offenders.

The legislation is unclear about when the public may be notified about a sex offender and in what circumstances particulars about minor sex perpetrators may be disclosed to society.⁸⁴

IV A REGISTER FOR SEX OFFENDERS IN AUSTRALIA

(a) *A Brief Overview of the Statutes Pertaining to the Australia Sex Offenders' Register*

The registration scheme for sex perpetrators in Australia was regulated by the Community Protection (Offender Reporting) Act of 2004 (CPOR).⁸⁵ It paved the way for a change to the nationally recognised child sex perpetrators registration laws by the Australian Police. By 2007 the entire Australian jurisdiction had passed laws relating to registration of sex perpetrators.⁸⁶ The so-called CrimTrac has to maintain the Australian National Child Offender Register (ANCOR) and law enforcement officers can share the information across states including that relating to offenders' travelling plans interstate or overseas.⁸⁷ The overriding objectives of the CPOR are to protect society as it seeks to decrease recidivism and enable the investigation and prosecution of crimes.⁸⁸ The system is intended to help law enforcement agencies from other

⁸⁴ McAlinden op cit note 59 above at 256. At present, the police are only allowed to disclose limited details of a sex offender's particulars, and his location only in special instances of immediate danger.

⁸⁵ The Community Protection (Offender Reporting) Act of 2004 (CPOR) was enacted on 8 December 2004, but the commencement date was 1 January 2005.

⁸⁶ Through CPOR section 3 and the Community Protection (Offender Reporting) Regulations 2004 (WA) 7, the Australian Police Minister's Council formally established a national register model in 2004, although the legal inconsistencies emanating from different states persisted.

⁸⁷ CrimTrac stands for Australian Criminal Intelligence Commission which used to be an Agency in the Attorney-General's department but was later merged with the Australian Crime Commission on 1 July 2016.

⁸⁸ CPOR highlights that these aims will be attained by obligating sex perpetrators to inform the law enforcement agencies of their location and other personal particulars continuously. To curb recidivism, the CPOR empowers courts to make orders barring perpetrators from conducting themselves in a certain manner.

states to track high-risk sex perpetrators and provide victims, their families and the broader community with information for greater protection.⁸⁹

Similar to the UK and USA, persons registered in Australia, including children, are obliged to report to the police at certain intervals to confirm their particulars such as address and employment.⁹⁰ However, it has been criticised for causing undesirable stigmatisation from the public.⁹¹ The consequences of registration for first-time offenders or once-off offenders are unduly punitive.⁹²

Initially, the Australian Law Council appeared to agree with the objective of the register operation.⁹³ However, the Law Council National Criminal Law Liaison Committee urged each State and Territory operate the register differently.⁹⁴ However, this was not applied in any of the states and territories for failure to deal with a number of inconsistencies concerning the ANCOR, such as that of persons facing mental illness or the registration of minor sex offenders on the register.⁹⁵

(b) *An Analysis of the Registration of Minor Sex Offenders in Australia*

In Australia registration of sex perpetrators includes child sex perpetrators who have committed sexual crimes. Minor offenders are exempted from registration in very narrow circumstances, such as when the sexual offence is considered less severe and those registered receive a 50 per

⁸⁹ Western Australia, Parliamentary Debates, Legislative Assembly, 22 September 2004, 6279b–6282a (MH Roberts, Minister for Police and Emergency Services). The CPOR Act partly follows the 2003 recommendations of the Australasian Police Ministers' Council national working party.

⁹⁰ The registration continues even after release from prison or after the expiry of any sentence imposed.

⁹¹ Law Council Australia 'Policy Principles on Registration and Reporting Obligations of Child Sex Offenders-100610 Final Portfolio' available at <https://www.lawcouncil.asn.au/docs/0812d103-cc39-e711-93fb-005056be13b5/1010-Policy-Statement-Registration-Reporting-Obligations-for-Child-Sex-Offenders.pdf>, accessed on 8 April 2018.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

cent time reduction.⁹⁶ Anyone convicted of a reportable crime is automatically obliged by law to register their particulars with the police; failure, without a reasonable and justifiable excuse, is tantamount to an offence punishable by imprisonment. It was subsequently proposed that a general, countrywide reliable registration system for sexual perpetrators required an obligatory, not a discretionary, system.⁹⁷ However, the exemption of certain low-level sentences from automatic registration as ‘minimum sentencing thresholds’ was suggested to curb unjustified and unfair long-term sanction of registration.⁹⁸

Researchers concluded that registration leads to the marginalisation of minor sex perpetrators in the community owing to constant contact with police, which potentially heightens their stress and alienation levels.⁹⁹ In the current internet era, their peers who may have access to registration details often expose minor sex perpetrators to cyber abuse.¹⁰⁰ Other studies have shown that some perpetrators have felt restricted by the sex register procedures and are disturbed about being labelled as an ex-offender.¹⁰¹

The CPOR operates retrospectively with regard to two groups of child sex offenders: child offenders who have been charged with more than two offences and have served their sentence; and those serving their sentence.¹⁰² Some states restrict retrospective application to exclude minor sex offenders under government supervision or those under supervision when the CPOR commenced. In terms of the latter, a retrospective application could also strain

⁹⁶ Hargreaves and Francis op cit note 16 above at 169.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ K Seidler ‘Community Management of Sex Offenders: Stigma versus support’ (2010) 2 *Sexual Abuse in Australia and New Zealand* 66 at 70.

¹⁰⁰ See Law Reform Commission of Western Australia ‘Community Protection Offender Reporting Act 2004’ at 31, available at https://www.lrc.justice.wa.gov.au/_files/PI01-FR.pdf, accessed on 18 May 2018.

¹⁰¹ Ibid.

¹⁰² See Child Protection (Offenders Registration) Act 2000 (NSW) section 3A; Sex Offenders Registration Act 2004 (Vic) section 6; Child Protection (Offender Reporting) Act 2004 (Qld) section 5; Child Protection (Offender Reporting and Registration) Act (NT) section 7; Community Protection (Offender Reporting) Act 2005 (Tas) section 5; Crimes (Child Sex Offenders) Act 2005 section 8.

resources required to maintain the register.¹⁰³ It was proposed that if an offender commits two sexual offences in a period of eight years, registration can be extended retrospectively.¹⁰⁴

Registration laws concerning minor sex offenders now vary across Australia. Several states strongly abide by the national model and include ‘minimum sentencing thresholds’, whereas some new models are diverting from the national model, which weakens the court discretion for registration of child sex offenders.¹⁰⁵ This is applied, for example, in Tasmania. After a thorough analysis, the Commission established that CPOR registration laws remained comparatively strict in respect of child offenders nationwide.¹⁰⁶

V A REGISTER FOR SEX OFFENDERS IN KENYA

(a) *A Brief Overview of the Statutes of the Kenya Sex Offenders Register*

Kenya's sex offender registration statute was passed in 2006 and the regulations to implement the registration were promulgated in 2008.¹⁰⁷ In 2010, the Kenyan National Council for Law Reporting began collecting an independent register of sex offence convictions to be reported to the Registrar, with the aim of compiling a national register of such offences, and in 2012, the official register database was unveiled.¹⁰⁸

The Sexual Offences Act 3 of 2006 (hereinafter referred to as ‘SOA’), establishes the definition of sexual offences, as well as the prevention and protection of all people from unlawful sexual

¹⁰³ Inter-Jurisdictional Working Party, *Child Protection Offender Registration with Police: A National Approach, Report to the Australasian Police Ministers’ Council* (2003) 73 at 75.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Smart ‘Global Overview of Sex Offender Registration and Notification Systems’ available at <https://www.icmec.org/wp-content/uploads/2016/05/Global-Overview-of-Sex-Offender-Registration-2.pdf>, accessed on 22 October 2022.

¹⁰⁸ Ibid.

actions.¹⁰⁹ In Kenya, children are unable to consent to sex.¹¹⁰ Sexual assault is defined as the penetration of a person's body part or object into another person's body part. Defilement carries penalties ranging from 15 years to life in prison, depending on the age of the child.¹¹¹

(b) *A Reflection on the Registration of Minor Sex Offenders in Kenya*

In accordance with section 39(13) of the SOA, the registrar of the High Court should keep a register known as the Register of Convicted Sexual Offenders (hereinafter referred to as the 'RCSO') in which information about a sexual offender shall be entered.¹¹² Sex offenders are required to notify the Registrar of their whereabouts, employment and whenever they leave the jurisdiction of the court.

Children's procedures must be heard in a children's court, according to section 73 of the Children's Act 8 of 2001 (hereinafter referred to as the 'CA'). However, children's courts are rare in Kenya, and there are no criteria for making courts child friendly.¹¹³ Where a minor has been convicted of an offence,¹¹⁴ the courts take into account the provisions of section 191 of the CA when sentencing the minor offenders. Child offenders can spend up to three years in a borstal or rehabilitation school, or they can obtain a sentence reduced to probation.¹¹⁵ Laws are necessary for the protection of children and so comply with Article 34 of the United Nations Convention on the Rights of the Child (1989) (hereinafter referred to as the 'CRC').¹¹⁶ Child offenders are entitled to free legal representation in line with Article 19 of the CRC. The

¹⁰⁹ C K Wangamati et al 'Sexualised violence against children: a review of laws and policies in Kenya' (2019) 27 (1) *Sexual and Reproductive Health Matters* 16 at 19.

¹¹⁰ Ibid.

¹¹¹ Ibid. Penetration is the partial or complete entrance of a person's genital organs into the genital organs of another person. Defilement (child rape) is defined as an act that causes penetration with a kid.

¹¹² The Sexual Offences Act 'KENYA: National Council for Law Reporting with the Authority of the Attorney General, available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_127528.pdf, accessed on 15 December 2021.

¹¹³ Wangamati et al op cit note 109 above at 22.

¹¹⁴ The Sexual Offences Act. 2006 supra note 112.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

SOA relies on the Criminal Procedure Code's¹¹⁷ Chapter 75 provisions for directions on how to conduct court proceedings and the Evidence Act Chapter 80.¹¹⁸

There is not much literature regarding the issues of child sex offenders and the register in Kenya. It is unclear whether the lack of literature is because they do not have sufficient child sex offenders to spark a debate, or because scholars have not investigated the phenomenon. There have not been any cases regarding child registration; hence there is a limitation to this research. Thus, the comparative analysis with Kenya will be limited to current literature.

VI A COMPARATIVE ANALYSIS OF THE FOREIGN REGISTERS WITH THE NRSO

(a) *The Separation of Child Sex Offenders from Adult Sex Offenders*

In the USA, most child sex offenders, and all other sex perpetrators, are mandated to submit to the register their name, social security number, residential address and information about their employment and employer, although some states in the USA did not accept these laws requiring registration.¹¹⁹ In certain states, a minor offender is required to submit information such as student particulars, licence-plate number and any other information that the USA Attorney General might need.¹²⁰ In the UK and Australia the information for of registration is not clearly itemised, with their legislation couched in broad terms to include minors. From the analysis of the wording in Kenyan legislation, it seems the word 'offender' is used for adults and children.

¹¹⁷ Kenya Law 'Criminal code procedure, chapter 75, Laws of Kenya. Government of Kenya' available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/85001/94924/F209599740/KEN85001.pdf>, accessed on 17 December 2021.

¹¹⁸ Kenya Law 'Evidence Act chapter 80, Laws of Kenya. Government of Kenya' available at <http://kenyalaw.org/lex/rest/db/kenyalaw/Kenya/Legislation/English/Acts%20and%20Regulations/E/Evidence%20Act%20Cap.%2080%20No.%2046%20of%201963/docs/EvidenceAct46of1963.pdf>, accessed on 17 December 2021.

¹¹⁹ Burriany & Bohn op cit note 1 above at 196. For example, in Florida, it was suggested that there should be a psychosexual test and the child sex offender should be given three years in a 'community-based sex perpetrator care programme' or to be listed as sex perpetrators if they are considered incapable of rehabilitation.

¹²⁰ Ibid at 212.

South Africa took a different path with the Amendment Act, with the requirements for minors differing from those for adults. However, regardless of the NRSO being clear in terms of separating child sex offenders from adult sex offenders (unlike the inclusive foreign registers), ‘the NRSO requirements do not provide separate procedures for removal from the register for adults and children, which amounts to a violation of child rights, demonstrating that children should not be registered at all, or only as a last resort’.

Ironically, a fundamental difference between child and adult offenders is a child offender’s amenability to treatment and rehabilitation.¹²¹ This is one of the reasons that child offenders are traditionally afforded legal protections such as the right to secrecy or confidentiality, closed-door hearings, sealed records, and assurance that up to a particular age, their cases would be heard in a children’s court behind closed doors.¹²² All jurisdictions should not treat child sex perpetrators in a way similar to adult offenders regardless of their having committed the same offence, as stipulated by relevant international instruments.

(b) *Publication of Minor Sex Offender Information*

South Africa borrowed the idea of the use and implementation of the register from the USA and the UK, with the goal of protecting minors and people with disabilities from violent crimes.¹²³ The USA and the UK registers focus more on notification to the public. The Kenyan register is not published to the public as it is acceptable only to approved individuals. However, the NRSO has been considered ineffective by many academics for many reasons when compared to foreign registers.¹²⁴ Foreign registers are used to notify the public and assist in investigations since they collect all the details and information of the offender from fingerprints to DNA. The failure or omission by the NRSO to notify the public and use the register for investigations may be regarded as a significant flaw.¹²⁵ Additionally, insufficiency of information and particulars as to when and how registration is to be done and updated in case

¹²¹ Ibid at 196.

¹²² Ibid at 215.

¹²³ Hynes op cit note 40 above at 366.

¹²⁴ Mollema op cit note 10 above at 2716.

¹²⁵ Z Jooma *The National Register for Sexual Offenders: The Solution to Protecting Children in South Africa?* (Unpublished LLM thesis University of Pretoria, 2010) 40.

of changes, along with failure to notify enforcement agencies of any future international travel, affords a broad spectrum within which convicted perpetrators may avoid being registered in South Africa.¹²⁶

In the USA, three adjustments have been suggested concerning notification and publication of child sex offenders.¹²⁷ These changes commend implementation by South Africa and could help child sex perpetrators reintegrate into the community. By neglecting these possible amendments, South Africa, the UK, the US and Australia will remain on the same path of deliberately turning a blind eye to child sex offenders' rights in pursuit of justice and public safety. There is a need to follow international law on treating child sex offenders in all countries

Arguably, the UK approach to sex perpetrators' registration and community notification is rational.¹²⁸ Research in the USA confirmed that the UK had adopted better laws relating to sex perpetrators. Australia adopted a rationale similar to that of the UK in terms of public notification. In Australia, a register containing information on minor sex offenders is regarded as highly personal and the information should be disclosed only for legitimate purposes.¹²⁹ South Africa, in the same way as Kenya, completely opposes public notification. Mollema notes that the scope in the South African NRSO laws is more constrained and the conditions are less stringent than those of the USA.¹³⁰ Studies have in any event shown that public notification laws have outcomes contradictory to their envisioned results. If the public has access to the list of offenders and particulars, they may take the law into their own hands

¹²⁶ Ibid.

¹²⁷ Hynes op cit note 40 above at 379. First, the community notification of minors must be prohibited, but since registration has helped curb sex offences against children, police should gather sex offenders' information for investigation purposes. Secondly, registered minor sex offenders' rights should be re-examined at intervals to access their chances of recidivism. Thirdly, unconventional methods or legislation should be introduced for future minor sex offenders that do not depend on the register.

¹²⁸ Ibid at 377.

¹²⁹ Law Council Australia (note 91 supra) 4–5. It has been submitted that registered sex offenders should be notified when their information has been disclosed and be afforded a chance to challenge the disclosure.

¹³⁰ Mollema op cit note 10 above at 716.

and bully or assault the child sex offender. This is one of the reasons that the UK has refused full public access to the register, ironically defeating the whole purpose of public protection.¹³¹

(c) *Retrospective Effect of Registers and the Right to a Fair Trial*

In a similar way to foreign registers, the South African register applies retrospectively,¹³² which is contentious in all the legal systems discussed. There was significant debate over the negative effects of retrospective application in the UK before the passing of the Sex Offenders Act of 1997.¹³³ In Kenya there is no literature suggesting that there have been any debates with regard to retrospective effects of the register. In America, it has been criticised as an infringement to the right to due process.¹³⁴ Similar criticism can be laid against the NRSO in South Africa.

(d) *The Length of the Period in the Register*

Registration periods are imposed differently in different legal systems. In the UK, Australia, and South Africa, it is based on the sentence imposed, while in the USA, it is based on the offence. In Kenya, the registration period for a sex offender shall lapse upon the sex offender's death. In some states in the USA, registered child sex offenders have been denied their right to appeal against registration for a lifetime, even if it is established in due course that they are rehabilitated and will not commit sexual crimes.¹³⁵ A review is conducted 15 years after registration, despite studies having shown that most child sex offenders desist from sexual crimes after reaching 21 years of age.¹³⁶ In the USA, certain states held that registration requirements as applied to child sex offenders did not violate the Eighth Amendment, which prohibits the courts from imposing unduly harsh sanctions on criminal defendants. However, other states ruled that the automatic lifetime period of registration infringed due process rights

¹³¹ Hynes op cit note 40 above at 377.

¹³² Section 41 of SORMA.

¹³³ Cobley op cit note 61 above at 692.

¹³⁴ McPherson op cit note 16 above at 779.

¹³⁵ Hargreaves and Francis op cit note 16 above at 180. The indefinite period of registration of minor sex offenders has been under scrutiny in the UK in light of human rights legislation. Also see *F and Thompson v Secretary of State for the Home Department* [2008] EWHC 3170.

¹³⁶ Ibid.

and the prohibition of ‘inhumane, cruel and unusual sanctions’.¹³⁷ This ruling is supported by multiple court decisions that have ruled that the registration of child sex perpetrators in the national register is an impairment of the Federal Juvenile Delinquency Act’s privacy and confidentiality provisions.¹³⁸

SORMA directs that anyone sentenced to more than 18 months’ imprisonment should have his or her particulars registered for life, irrespective of age. As argued above, this provision violates a number of the constitutional rights applying to children and must be amended for the following reasons:

- First, there is consensus that for minors serving longer sentences, lifetime registration is not required.
- Secondly, for child sex offenders, there should be some preferential treatment. No empirical evidence exists to support both the determination and the duration of the period on the register.¹³⁹

In South Africa, child sex offenders registered for indefinite periods are not directly denied the right to review but the law is silent over those rights. In Australia, it was proposed that the law should provide a child a chance to apply for removal from the register regardless of the sentence imposed.¹⁴⁰ This guarantees support of the child and his/her rehabilitation as they become adults, thereby protecting their rights.

(e) *Registers Restrict the Employment Choices for Child Sex Offenders*

Some states in America have a specific and distinct driver licence for sex offenders and this has led to a denial of education, housing and employment.¹⁴¹ This does not apply to South Africa except in the case of employment, where registered offenders are denied access to positions of authority and access to children. This proves to be a major challenge when these

¹³⁷ McPherson op cit note 16 above at 776.

¹³⁸ Ibid.

¹³⁹ Hargreaves and Francis op cit note 16 above at 169.

¹⁴⁰ Law Council Australia supra note 91 at 4.

¹⁴¹ S Mairs *When Kids Are Sex Offenders* September 20, 2013 *Boston* available at <http://bostonreview.net/blog/youth-sex-offender-registry-hrw>, accessed 7 May 2018) at 2.

children become adults. The restriction on employment is a major legal challenge in the USA, where offenders have mandatory fees, credits and taxes to pay. Kenyan legislation stipulates that sex offenders are required to disclose offences to potential employers and thus it can result in restrictions on employment. If the register in South Africa maintains employment restrictions, it may trigger recidivism in these child sex offenders when they reach adulthood. Although the employment restriction is under debate, it remains part of registration law. In the USA, states can implement employment restrictions; and in the UK Sarah Law provides for to suspicious families or victims to be notified of any sex offender in their area.¹⁴²

(f) *The Register Exposes Child Sex Offenders to Stigmatisation*

There is a growing concern in other legal systems about stigma and labelling associated with the registration of minor sex offenders, which, at such a young age, have the potential to hinder rehabilitation of the child offender.¹⁴³ Researchers have established that labelling and stigmatisation of minor sex offenders ‘inhibits the young person’s impetus to change as a result of designations such as “juvenile” and “delinquency”’.¹⁴⁴ One can argue that child sex offenders are not necessarily permanent paedophiles with a pathological sexual fondness for minors.

However, in Australia, it was argued that labelling does not occur if the register is not public, while others claim that stigmatisation does not emanate from the registration but from the conviction.¹⁴⁵ In *R v Burke*,¹⁴⁶ the court ruled that conviction alone does not lead to a formalised mark designated by the state; and the conviction stigma claim was rejected in Canada. As section 3(1) of the Sex Offender Information Registration Act specifically identifies those who are mandated by the Act as ex-perpetrators, the presence in the register contributes to formalised state-designated naming. This has a psychological effect on such

¹⁴² Mollema op cit note 8 above at 2713.

¹⁴³ See Law Reform Commission supra note 91 at 112. See also P Stevens ‘Protecting the Vulnerable? Assessing the Constitutionality of The National Register for Sex Offenders in Respect of Juvenile Sex Offenders – *S v JJ* 2013 2 SACR 599 (WCC)’ (2014) 17(6) *PER/PELJ* 2779 at 2797.

¹⁴⁴ *Ibid.*

¹⁴⁵ See Law Reform Commission supra note 91 at 114.

¹⁴⁶ (2005) ONCJ 422.

people when they realise that they are officially designated as ‘national sex perpetrators’.¹⁴⁷ This constitutes stigmatisation, and identification particulars may be compromised. While SORMA does not allow public notification, mere registration may be argued to have a psychological effect which stems from being known as a person registered as a sex offender. Adults may be able to ignore it, but the psychological impacts on children are severe.

(g) *The Right to Liberty or Right to Dignity of a Registered Child Sex Offender*

In the USA the register has been associated with limitations to the offender’s right to liberty. While freedom from physical restriction has always been at the heart of the freedom guaranteed by the ‘Due Process Clause’, the right to freedom is not absolute.¹⁴⁸ In *Kansas v Hendricks* it was concluded that if ‘proper protocols’ and ‘proof requirements’ are applied, involuntary civil commitment would not violate due process substantively.¹⁴⁹ Failure to acknowledge child sex offenders’ civil commitment is problematic, even in the South African legal system. Registers have been found to be a punitive sanction on child sex offenders in many American states. However, some argue that ‘in order for such a prevalent constraint on the liberty to be worthwhile, there must be substantial benefits’.¹⁵⁰ It remains debatable whether registration of child offenders is of any benefit to the public, with specific reference to South Africa, where crimes against children remain high.

The inherent right to dignity has not been discussed as a major legal or constitutional challenge concerning registration of child sex offenders in most legal systems, except in South Africa.¹⁵¹ Human dignity is used as a yardstick to determine whether discrimination is fair or not.¹⁵² The provisions of the NRSO have been argued to impair the

¹⁴⁷ *R v Burke* (2005) ONCJ 422 12.

¹⁴⁸ *Kansas v Hendricks*, 521 U.S. 346 (1997) 356.

¹⁴⁹ *Ibid* at 357.

¹⁵⁰ Hynes *op cit* note 40 above at 377.

¹⁵¹ Sections 9(3)– (4) of the Constitution of South Africa cited in *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC).

¹⁵² G Carpenter ‘South Africa and the Human Rights Experience since 1994’ (2004) 45 *Codicillus* 1 at 4.

right to dignity.¹⁵³ In *Doe v State*,¹⁵⁴ it was held that registration orders are significant, intrusive and have a chance of exposing the sex offender through public notification policy. This leads to humiliation and community-wide ostracism, which has a negative impact on the psychological, moral and social development of minor sex perpetrators.¹⁵⁵ It was ruled that the legislation provides ‘a deterrent and retributive effect that goes past any non-punitive purpose and therefore does not violate human dignity’.¹⁵⁶ This is arguable, because registration as a sex offender has a possibility to violate the child’s inherent dignity and affect the child adversely. While register laws in the UK, Australia and South Africa have criminalised public disclosure of registered offenders, that does not guarantee privacy. The registered child sex offender’s inherent dignity is impaired by being listed, labelled and humiliated.¹⁵⁷ From the decision in *S v Bateman*,¹⁵⁸ researchers in the USA concluded that registration for an indefinite length of time undermined the child’s dignity through harassment and humiliation. This shows that the registers have been shown to impair the right to dignity of minor sex offenders in all legal systems.¹⁵⁹

(h) *The Right to Privacy of Child Sex Offenders*

The register in other jurisdictions has been argued to infringe the right to privacy. In the USA, the right to privacy is not included in the Constitution, but the Supreme Court acknowledged privacy as a basic right in certain cases and contexts.¹⁶⁰ However, the court ruled that sex perpetrators’ privacy remain secondary to maintaining public safety.¹⁶¹ In *Connecticut Department of Public Safety v Doe*,¹⁶² the court held that the right to privacy was less important

¹⁵³ Mollema op cit note 10 above at 2713.

¹⁵⁴ 189 P 3d 999 1000 (Alaska 2008).

¹⁵⁵ *Doe v State* 189 P 3d 999 1000 (Alaska 2008) 235–6. In other words, any discrimination that violates one's dignity constitutes unfair discrimination.

¹⁵⁶ *Ibid* at 238.

¹⁵⁷ See Mollema op cit note 10 above at 2722.

¹⁵⁸ 95 Or App 456 771 P2d 316 (1989).

¹⁵⁹ Mollema op cit note 10 above at 2722.

¹⁶⁰ *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

¹⁶¹ Hynes op cit note 40 above at 353.

¹⁶² 538 U.S. 1(2003).

than public safety and does not apply to the statutory scheme.¹⁶³ While register laws in the UK, Australia, Kenya and South Africa have criminalised public disclosure of registered offenders, that does not guarantee privacy. In the UK, the right to privacy is not prescribed, but relies on international instruments.¹⁶⁴ Like the USA, article 8 limits ‘the right to privacy in the interest of public policy safety’.¹⁶⁵ In *R v Secretary of State for the Home Department*,¹⁶⁶ the UK court based its ruling on article 8 of the European Commission on Human Rights (hereinafter referred to as ‘ECHR’). Although the public protection was held to be important, the indefinite registration without a review contravened the right to privacy in the light of article 8 of the ECHR.¹⁶⁷

(i) *The Best Interests of Child Sex Offenders*

The concept of the child’s best interests is not recognised as a paramount factor in matters that concern a child in other legal systems.¹⁶⁸ The best interests of ‘the individual child should be of primary consideration in all legal systems’.¹⁶⁹ Australia indicates a direction and application but does not apply it as a primary principle. This undermines the protection and application of minor sex offenders’ best interest in all jurisdictions that register minors.

South African legislators have tried to balance the competing rights of child offenders and victims. However, unanticipated consequences such as long registration periods have harmed child perpetrators and put community members at risk. The South African register has tended to recognise child rights and is more lenient than the registers of other foreign jurisdictions. However, SORMA repeated the ambiguities and contentious patterns of other jurisdictions, such as automatic registration of child offenders. Automatic registration was ruled unconstitutional in the USA in 2005 by most states, but the SORMA adopted it in 2007.

¹⁶³ Hynes op cit note 40 above at 371.

¹⁶⁴ In 1998, the UK ratified the ECHR (note 82 above) into their law through the Human Rights Act of 1998, making it binding law in the UK.

¹⁶⁵ Hynes op cit note 39 above at 353.

¹⁶⁶ (2010) UKSC 17 (2011) 1 A.C 331.

¹⁶⁷ Hynes op cit note 40 above at 368 cited in *H and L v A City Council* (2011) EWCA (Civ) 403.

¹⁶⁸ See section 28 of the Constitution.

¹⁶⁹ Law Council Australia supra note 91 above at 5.

Ironically SORMA was supposed to be based on laws such as the Welsh Act and CPOR to distinguish it from vague and ambiguous laws on the registration of child offenders.¹⁷⁰

VI CONCLUSION

Register laws in different legal systems have positive and negative consequences on child sex offenders and appear to follow the same patterns in most criminal justice jurisdictions. Globally, child sex offender registration arrangements differ but they tend universally to embody detrimental effects such as discrimination and recidivism in the very communities the register is designed to protect. In some jurisdictions, a wide range of offences is included, while in others, registration is restricted to sexual offences committed against children. Some jurisdictions screen the offenders using the criteria of age or seriousness of the offence, while others cover all sexual offences. Despite these registers having different registration requirements, they all have a negative impact on child sex offenders.

Broad comparative research has shown that there are collateral consequences of registering minor sex perpetrators in any registry system anywhere.¹⁷¹ It hinders rehabilitation and employment chances; creates vulnerability to vigilante attacks; causes problems with social mixing, and finds difficulties in obtaining and keeping accommodation – especially in the USA.¹⁷² It may look as though the issue affects adults only; however, it will affect child sex offenders in the future when they start searching for employment. The NRSO register was enacted after the USA, UK and Canadian registers, but has failed to rectify the deficiencies with regard to child rights. Therefore, registration of child sex offenders should be amended, to protect children from degradation and stigmatisation.

Different views in different jurisdictions have been tendered for dealing with the problems in child offender registration, but none has offered a convincing legal solution. Minors' rights are still infringed, and most legal systems justify this in the interests of ensuring public safety. The next chapter, which deals with the conclusion and recommendations, seeks to provide solutions to the legal loophole. The negative results of unemployment, recidivism,

¹⁷⁰ See AWA.

¹⁷¹ Hargreaves and Francis *op cit* note 16 above at 15

¹⁷² Law Council Australia *supra* note 91 at 5.

stigmatisation and psychological harm¹⁷³ influence public safety. Registration of child sex offenders in South Africa should be amended to ensure rehabilitation of the child offender. There is a need for a detailed study of other registers before implementing a register in South Africa to develop an ideal system that balances the interests of both victim and offender.

¹⁷³ McPherson op cit note 16 above at 179.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

I CONCLUSION

The objectives of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as ‘SORMA’) are to criminalise and reduce sexual crimes. A National Register for Sex Offenders (hereinafter referred to as the ‘NRSO’) has been created, which is riddled with a number of constitutional, procedural and substantive irregularities¹ in respect of the child perpetrator’s rights, the most contentious of which has been the right to a fair trial under section 35 of the Constitution. Section 50(2) of SORMA has been particularly contentious in respect of the child offenders’ constitutional rights. In *J v National Director of Public Prosecution*² (hereinafter referred to as ‘*J v NDPP*’), the Constitutional Court ruled section 50(2) of the SORMA unconstitutional, and it was amended in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 (hereinafter referred to as the ‘Amendment Act’). Automatic registration was replaced by the requirement of an application by the state, with the court afforded discretion whether or not to order the registration of child sex offenders (section 8 of the Amendment Act). After the Amendment Act was passed, many scholars and stakeholders withheld criticism of the registration of minor offenders either because the NSRO addressed their shared concerns or because they simply turned a blind eye. Whatever the case, the offenders’ rights must still be addressed because the laws and principles on which the register was founded were ignored, rendering the registration of child sex offenders unconstitutional and invalid.

The research has explained that a register constitutes a constitutionally unjustifiable sanction under the Constitution with respect to child offenders. The authors failed to distance a register from a sanction.³ A register is undeniably a punitive reprimand on the child offender,

¹ National Register for Sex Offenders (NRSO) was established under Chapter 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as ‘SORMA’).

² 2014 (2) (SACR) 1 (CC) (hereinafter referred to as ‘*J v NDPP*’).

³ New South Wales Ombudsman, *Review of the Child Protection Register: Report Under Section 25(1) of the Child Protection (Offenders Registration) Act 2000 (2005)* 27. Also see D Hunt ‘Child Protection through Offender

considering the purpose and effects of a register on a child sex offender.⁴ A register has preventative and deterrent purposes to reduce sexual crimes through restricting access to children. However, it comes with stigmatisation and humiliation, effects that best describe punishment, which is an unpleasant sanction imposed by the court on an offender.⁵ This answers the affirmative research question one, which states: ‘Does the NRSO constitute a punishment and if so, to what extent is the punishment justifiable as provided for by the Constitution and various international laws in respect of child sex offenders?’ Making registration discretionary under the Amendment Act may be seen to be a major concession, but it could (and should) have been amended to exclude child sex offenders⁶ in the best interests and the right to dignity of the minor offender.

When the registration of a child sex offender amounts to a sanction, such a sanction should be consistent with constitutional rights and binding international instruments. Moreover, child sexual recidivism varies among minors because of factors such as background, maturity or age, and culture. If the goal is to protect vulnerable groups, registering child sex offenders will not always produce the same positive results in all legal systems. However, the child sex offender is him-/herself in a vulnerable group, and any decision to register must take into account age and background. Almost all NRSO removal procedures for children are similar to those for adult offenders, and this in a child justice system the principles of which require child offenders to be treated differently from adult offenders. The register is excessively punitive for a child offender compared to the sanctions allocated for children by section 290 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the ‘CPA’).

The Constitution requires the court to consider international instruments when interpreting the Bill of Rights. The second chapter responds to research question two by citing various international instruments that govern the treatment of children involved in the criminal

Registration’ (2001) 13 *Judicial Officers Bulletin* 65 at 67. Child Protection Through Offender Registration’ (2001) 13 *Judicial Officers’ Bulletin* 65 and 67 as cited in Law Reform Commission of Western Australia ‘Community Protection Offender Reporting Act 2004’ at 28, available at https://www.lrc.justice.wa.gov.au/_files/P101-FR.pdf, accessed on 18 May 2018.

⁴ Ibid.

⁵ J J Joubert *Criminal Procedure Handbook* 12 ed (2017) 325.

⁶ See section 8 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 (Amendment Act).

justice system. The NRSO has managed to upend most, if not all, international instruments pertaining to children in conflict with the law; they advocate special treatment of children in the criminal justice system as well as the protection of their rights. In interpreting minors' constitutional and international rights in relation to the register, minor offenders are protected by international treaties. In that regard the register does not positively affect the well-being, healthy development, and psychological growth of the minor sex offender. The Convention on the Rights of the Child (CRC) explains that 'development should be looked at in a broad sense, embracing the child's physical, mental, spiritual, moral, psychological and social development'.⁷

The Amendment Act did not consider the Constitutional Court ruling and recommendations in *J v NDPP* and other related cases. Although the CJA came into force a year after SORMA in 2007, with the register provisions coming into operation two years later, the Amendment Act could still have taken into consideration the domestic law with regard to sanctioning and treatment of child offenders. As a result, the CJA provisions and principles were intended to have an impact on the Amendment Act. While the primary goal of SORMA and the NRSO is to prevent sexual crimes against children, domestic and international law both oppose harsh punishments for children. Both domestic and international law urge courts to use different procedures and impose more lenient sanctions on minors than on adult offenders.⁸ Sanctions and treatment of a harsh nature should be remedies of last resort.

The current registration of children on the NRSO contradicts the best interests of the child, as provided for in section 28(2) of the Constitution and section 7 of the Children's Act respectively. While it may seem *prima facie* fair to register child sex offenders, one must look at the impact this has on the child and how he or she is viewed by society. It is an unnecessary burden on child offenders, especially as it has not yet met its objectives a decade after it was established. The offender is dogged by burdensome obligations that have the effect of prolonging the sentence.⁹ They are constantly involved in the child justice system or the courts, which causes them to be marginalised and stigmatised. As a result, registration of child sex offenders is no longer required.

⁷ T Boezaart *Child Law in South Africa* 2 ed (2017).

⁸ *J v NDPP* supra note 2.

⁹ See s 43 of SORMA.

The unconstitutionality of the register with regard to children can be measured by assessing it against the best interests of the minor offender, as set out in chapters three and four. Section 28(2) of the Constitution and sections 10 to 12 of the Children's Act respectively provide that the minor's best interests are of 'paramount importance in every matter involving a child'. This standard originates from article 3 of the CRC and article 4(1) of the ACRWC. When the principle is recited together with the right to social development, it requires the interests of the young sex offender to be given due consideration.¹⁰ It does not essentially supersede all other principles but rather contemplates the appropriate law that ascribes the most important values, that is, the best interests of a minor sex offender and the minor victim.¹¹

Behind section 28(2) of the Constitution is the assumption that since many child sex offences are caused by abuse and being exposed to social ills,¹² it is in their best interest to be given a chance to rehabilitate, get treatment and reintegrate with society. Individual concerns of the perpetrator, such as social status, the damage caused by the crime, family situation, or other factors may also influence the perpetrator's conduct. A register provides no assistance, but only separates the offender from society, which is contrary to principles of rehabilitation and restorative justice. This addresses question four of the research, which claims that the NRSO does not consider the minor best interests.

When the court registers a child sex offender it should consider that the 'best-interest principles are established as rights that are self-governing and range beyond the acknowledgment of other child offenders' rights in the Constitution'.¹³ Whether or not the best interests of the child have been applied as a principle or as a right in the NRSO, children are denied the opportunity for their well-being, psychological growth, and emotional development. As a constitutional concern, the best interests of the minor take precedence in all matters involving

¹⁰ See Guideline 19 of the UN Guidelines for the Prevention of Child Delinquency (Riyadh Guidelines), 1990 45/112, A/RES/45/112 (1990), which states that 'where possible, every juvenile should have the right to contest any fact or opinion contained in his or her file to permit rectification of inaccurate, unfounded or unfair statements...'

¹¹ *S v M* 2008 (3) SA 232 (CC) para 42.

¹² T Harris & C Bezuidenhout 'A Psychocriminological Investigation into Risk Factors Contributing to Youth Sex Offending' 2010 *ASAJ* 28 at 32.

¹³ *J v NDPP* supra note 2 para 35.

minors, and anything that is not in accordance with the Constitution is invalid and unconstitutional. As a result, the NRSO registration of child sex offenders should be declared null and void. Anything that jeopardises a child's well-being and development is contrary to the child's best interests.

Registration compromises child offenders' growth in terms of relationships and intimacy skills, perhaps serving to increase their risk of re-offending.¹⁴ Clinical psychologists assert that the label of ex-perpetrators for minors, whose sense of identity is delicate and developing, may 'become a self-fulfilling prophecy'.¹⁵ Children, as they grow, become less likely to reoffend, especially if they receive treatment and rehabilitation without the trauma of stigmatisation and humiliation.¹⁶ A register clearly has a negative psychological effect on the child sex offender. The realm of the best-interests provision is undeniably broad, and it must be safeguarded and championed. Concerns raised by research question three must be addressed, and adequate attention must be paid to children involved in the criminal justice system.

Emotional or psychological abuse may be caused by the registration of child offenders, because of the stigma and humiliation. The fact that the register may infringe the minor's dignity may cause degradation, and also limit the child's social development, well-being, and psychological growth. The register attempts to limit contact with other children and labels the child as a sex predator. One can argue that such limitations are fair given the nature of the crime and the effects of the crime on the victim, but such a view should also contemplate other surrounding circumstances for the commission of the crime, such as age, background, and the justice system's objectives. Previous research has shown that poor social perceptions of this group of offenders can lead to increased anxiety, pessimism, and depression among offenders, as well as impaired rehabilitation success.¹⁷ Recent research, however, suggests that a shift away from

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ C Hargreaves and B Francis 'The Long Term Recidivism Risk of Young Sexual Offenders in England and Wales—Enduring Risk or Reputation?' (2004) 42 *JCJ* 164 at 165.

¹⁷ M Rothwella, D Fidob & N Heym 'Perceptions Around Adult and Child Sex Offenders and their Rehabilitation as a Function of Education in Forensic Psychology Independent of Traditionalism and Perpetrator Sex' (2021) 2 *Forensic Science International: Mind and Law* 1 at 5.

traditional perspectives and stigmatisation of sexual offenders may have an impact on successful rehabilitation and reintegration of people with sexual convictions back into society.¹⁸ Failure of the justice system to assist minor sex offenders to become law-abiding citizens and to protect their constitutional rights amounts to child degradation and maltreatment. The clear distinction between minors and adults drawn by the Constitution recognises the child's greater bodily and psychological susceptibility.

The dictum in *Johannes v S*¹⁹ (hereinafter referred to as '*Johannes*') stated that '[t]he inclusion of the particulars of child offenders could not pass constitutional muster, and that the inclusion disregards the special dispensation for child offenders, which is part of our law'.²⁰ Although this assertion was directed at the automatic registration of child sex offenders, it is still applicable broadly and in this discussion. There is extensive agreement that South African constitutional law embodies a legal framework for child justice that complies with both international and domestic law requirements.²¹

Chapter four of the study showed that the NRSO in many instances violates children rights to freedom, integrity, and a fair hearing and that they are not to be treated or disciplined in a degrading, cruel or inhumane manner. In the Constitution, human dignity may be considered a discrete right and a founding value in the Constitution.²² Accordingly, this addresses questions five and six of the research questions, establishing the fact that the register infringes the rights of a child offender and is not justifiable.²³ No law, punishment, or sanction (including the NRSO) should deprive the child of its right to dignity. A dignity-based jurisprudential legal system should use such jurisprudence to encourage the development of the concept of inclusive morality in the child justice system. The same guidelines should apply to the humiliation,

¹⁸ Ibid.

¹⁹ 2013 (2) SACR 599 (WCC) (hereinafter referred to as '*Johannes*').

²⁰ Ibid.

²¹ These requirements reinforced the policy and practice that had emerged over the previous decades and provided a comprehensive procedural system for children in conflict with the law.

²² See section 1 and section 9 of the Constitution respectively.

²³ E Cameron 'Dignity and Disgrace—Moral Citizenship and Constitutional Protection' at 5, available at https://www.concourt.org.za/images/phocadownload/justice_cameron/Oxford-Dignity-and-Disgrace-June%202012-revised%20final.pdf, accessed on 18 April 2018.

stigmatisation, and degradation that comes with the register. Dignity has an important public dimension.²⁴ Legislators have attempted to establish a legal system that treats children as independent rights holders, whereas the register is marked by the internalisation of shame and humiliation for minor perpetrators. This illustrates the NRSO's unconstitutionality and the essential position of the child justice system's constitutional order.

The equal protection of the law ought to be extended without restraint to child sex offenders. The Constitutional Court established an inextricable connection between dignity and equality.²⁵ Fair trial and protection are discussed in chapter four of this research. The register not only fails to separate the registration periods of children and adults, but it also fails to create distinct removal procedures for children and adult offenders in the register. As a result of their immaturity and lack of capacity, children are not protected from maltreatment and degradation. This subjects child offenders to a humiliating experience, labelling, humiliation, and stigmatisation as a result of the register. Many constitutional rights are violated by the register, including a child's right to equality, the right to a fair trial, the right to protection, and the right to privacy.

On the other hand, the state retains authority to punish or treat the child perpetrator or exercise reasonable supervision over the behaviour of minors, especially with the growing numbers of child sexual abuse cases. This creates tension between the substantive or procedural law of the register and the constitutional rights of the minor perpetrators. SORMA and the Amendment Act adopted the view that minor sex perpetrators were criminals and a threat to society, and should be treated, sanctioned and punished accordingly. These two pieces of legislation impose a number of restrictions on the offender including access to and authority over children. Section 50(2) of SORMA was ruled unconstitutional and was consequently repealed by the Amendment Act, but the constitutional challenges to the NRSO remain. Another issue is that the NRSO is unnecessarily capturing children who are low-risk or low-level offenders, disregarding their constitutional rights in the name of a futile project.

²⁴ See *S v Makwanyane* 1995 (3) SA 391 (CC) (hereinafter referred to as '*Makwanyane*') 308, where Mokgoro J explained that Ubuntu generally 'translates as humaneness'.

²⁵ *Ibid.*

Chapter four goes on to reveal the unconstitutionality of the register in the light of the (neglected) constitutional values of Ubuntu and restorative justice. The sanctions of the register are harsh and fail to offer a child the chance of rehabilitation as required by restorative justice.²⁶ The application of these principles would have demonstrated that the register was not appropriate for child sex offenders, regardless of its aims and objectives. The child justice system is based on a restorative justice model by focusing on reintegrating minors back into society with as little interaction with the criminal justice system as possible.²⁷ There is no reason why Ubuntu cannot be applied.²⁸ The humaneness and sense of community in a child are undermined by the indefinite sanctions and stigmatisation associated with the register. Ubuntu is too broad for individual entitlement because it has many facets, but at the same time its role in the South African criminal justice system is important.²⁹ Ubuntu was invoked to great effect in *S v Makwanyane*³⁰ (hereinafter referred to as ‘*Makwanyane*’) by invalidating the death penalty and reinforcing constitutional principles when sentencing an offender.³¹ A child deserves reintegration into the community, not constant humiliation and separation.

As covered in chapter five, the USA has adopted extreme measures for registration, while the measures adopted in Australia, Kenya and the UK are quite similar to those applied in South Africa. Although the NRSO may seem lenient compared to the foreign registers, one must remember the importance of our Constitution in the context of the legal and political history of South Africa. Past historical injustices demand the protection of the most vulnerable and worst-affected groups, especially child offenders in South Africa, to provide strong protection to those groups that were neglected during apartheid; thus, child offenders constitute a special case, and

²⁶ P Stevens ‘Recent Developments in Sexual Offences against Children – A Constitutional Perspective’ (2016) 19 *PER/PELJ* 1 at 25.

²⁷ See paragraph 1 of art 40 of the United Nations Convention on the Rights of the Child, 1989 U.N. Doc. A/44/49 (1989) (CRC).

²⁸ D Cornell & K van Marle ‘Exploring Ubuntu: Tentative Reflections’ (2005) 15 *AHRLJ* 195 at 219.

²⁹ J Y Mokgoro ‘Ubuntu and the Law in South Africa’ at 1, available at https://www.researchgate.net/publication/26633677_Ubuntu_and_the_law_in_South_Africa, accessed 1 April 2018.

³⁰ 1995 (3) SA 391 (CC).

³¹ *Makwanyane* case supra note 24.

any unjustified limitation of a right, even in exceptional circumstances, cannot be tolerated. In any event, the positive impact of NRSO is debatable.

The registers have transposed child offenders from offenders to victims on a global scale as a result of the negative effects of being registered as a national sex offender.³² Nevertheless, countries remain legally obliged to treat children involved in the child justice system compassionately and humanely.³³

While the operation of these registers differs greatly, their negative effects are the same. No matter the extent to which the register is amended, the harm suffered by children remains the same, intertwined with other local domestic laws but differing in detail. For example, Australia does not prioritise the best interests of minors in cases involving children. As a result, the approach to child rights differs. However, registers have proven to be a retributive sanction around the world, and registration of child offenders remains contentious, with numerous negative consequences documented. The above analysis of other registers shows that while provisions concerning child sex offenders have developed over time, none has clearly established a solid and convincing precedent for registration of child sex perpetrators.

The dignity of a child offender, and his/her rehabilitation into society should be upheld, while also taking the nature of the offence and the victim into account. This means that minors should be registered if they pose a perceptible harm to society and all rehabilitation efforts have been exhausted, although the likelihood of such an occurrence or predicament is extremely low. However, it is debatable whether the publication of the register information would be effective in combating sexual crimes against vulnerable groups, given a decade of mixed results. Furthermore, publishing the names of sex offenders may lead to recidivism and violence against offenders. The study of other foreign registers that publish the names of sex offenders, such as those in the United States, has revealed negative societal consequences such as violence and recidivism. Publication increases the likelihood of vigilantism and vengeance in the community.

³² Rothwella, Fidob & Heym op cit note 17 above at 1.

³³ G Van Bueren 'A Curious Case of Isolationism: American and International Child Criminal Justice' in S Dillon (ed) *International Children's Rights* (2010) 650 at 652 and 655.

The NRSO focuses only on employment restriction, which may be regarded as a flaw since it does seem to protect children and disabled people from all sorts of vulnerable situations, such as family conflict. On the other hand, employment restrictions affect only a few minor sex offenders since the law prohibits child labour, and many will still be in school or under rehabilitation programmes. In South Africa, the register focuses on employment rather than school enrolment, leaving many students vulnerable. Many young sex offenders are enrolled in schools, where they may endanger other students and people with mental disabilities. However, one could argue that applying the register to students would result in significant discrimination and could become a draconian sanction.

Despite the best efforts by child protection institutions, the prevalence of sexual crimes against minors in South Africa remains the highest in the world.³⁴ Of the 124 526 sexual abuse cases reported in the three years from 2015 to 2018, minors were the victims of a disturbing 41 per cent, which is almost half of sex-related cases.³⁵ Referring to the statistics of the South African Police Service for the year 2010/11, more than 50 per cent of the 56 272 sexual offences cases reported involved children.³⁶ In the 2011/12 financial year, sexual offence cases reported involving children constituted 40 per cent. The statistics show there has not been much improvement in preventing sexual crimes against children, although there was a drop of 10 per cent in the financial year 2011/12, which may be attributed to the introduction of the NRSO in 2009. However, since 2012 the rate of sexual crimes committed against children remains high.

Child rights have become a national priority in South Africa over the last two decades. Child offenders who commit sexual crimes have piqued the public interest. Because many lack criminal capacity, child offenders are well-known for their immaturity, susceptibility, and need for guidance in the criminal justice system.³⁷ The attention and special treatment required for this group of minors has been well discussed with reference to the CJA and the Children Act, with

³⁴ L Townsend, S Waterhouse & C Nomdo ‘Court support workers speak out: Upholding children’s rights in the criminal justice system’ (2014) 48 *AJOL* 75.

³⁵ N Andersen ‘Shocking stats reveal 41% of rapes in SA are against children’ *The South African* 18 May 2018 available at <https://www.thesouthafrican.com/rape-statistics-41-children/>, accessed on 10 May 2018.

³⁶ *Johannes* supra note 19 para 88.

³⁷ *S v Solani* 987 4 SA 203 (NC) 220E-F was cited in Boezaart op cit note 42 above at 376–377.

further reference to international instruments. There are various South African organisations offering programmes and services to adolescent sex offenders.³⁸ Although such laws and measures are important for the prevention and management of maltreatment and abandonment of minors, insufficient attention has been directed at scrutinising minor sex offender rights in context of the NRSO.

Although South Africa has made significant progress and continues to be progressive in its mission to promote minors' rights, the inclusion of children in the NRSO may be considered a step backwards because it does not prevent recidivism, nor does it facilitate their recovery or reintegration into society, which is in violation of many international rights, constitutional rights, and the principles of the child justice system.³⁹ The legislators who drafted the NRSO provisions failed to have due regard to the CRC and the Constitution, and in the process neglected to recognise the importance of promoting child-defined rights in the child's best interests. Such failure is at the core of the substantive argument in matters concerning a child.

A child offender should enjoy all the rights set forth under international and domestic law. Every child, regardless of criminal status, is eligible to enjoy these rights, without status distinction, discrimination or any other ground.⁴⁰ Child perpetrators must enjoy special protection and resources, and services must be offered, by law and by other means, to allow them, like every other child, to grow physically, spiritually, socially, psychologically and morally in a safe and natural way and under conditions of liberty and dignity.⁴¹ When drafting laws that concern minors, the best interests of the minor should be the paramount consideration.⁴² The application of the NRSO to minor sex offenders is unconstitutional for various reasons, and the Constitution is clear that anything that is in contradiction to constitutional values is unconstitutional and

³⁸ B Stout 'Applying Effective Practice Principles to Work with Child Sex Offenders in South Africa' *Acta Criminologica: Southern African Journal of Criminology* 14 at 16. Examples are Childline in KwaZulu-Natal and SAYStOP, which started in the Western Cape.

³⁹ *Johannes* supra note 19 para 66.

⁴⁰ See Principle 1 of the Declaration of the Rights of the Child, 1959 G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

⁴¹ *Ibid.*

⁴² *Ibid.*

invalid.⁴³ Therefore, a general application of the substantive law and procedural law of the register limitation is not reasonable and justifiable, in an open and democratic society as set forth in the Constitution.⁴⁴

II RECOMMENDATIONS – THE AMENDMENT OF THE REGISTRATION OF CHILD SEX OFFENDERS

It is understandable that sexual crimes against children are punished with serious and severe measures such as the NRSO because of their impact on society. However, the negative impacts and the infringement of constitutional rights by the register of child offenders are disturbing. South Africa must arrange for more legal administrative infrastructure essential to ensure that children, both victims and offenders, are granted the protection contemplated by the Constitution as vulnerable members of society. The inclusion and removal of children from the NRSO is highly and widely contentious. There is an urgent need for child protection stakeholders to intervene and represent children through reforms, amendments and research initiatives that promote the rights of child perpetrators, thereby encouraging rehabilitation of the aforementioned child offenders. Professional collaboration and advisory service programmes should ensure the implementation of international standards for the protection and promotion of the rights of child perpetrators, the reinforcement of the rule of law, and the development of the administration of the child justice system.

These include:

- ‘the recognition of children as holders of rights;
- the recognition of child rights (domestic and international);
- the desirability of promoting the child reintegration and taking the child’s presumed constructive role in society into account;
- the need for the establishment of a specialised criminal justice system for children who are in conflict with the law;
- advocacy for children to respect the fundamental human rights of others; and

⁴³ See section 2 of the Constitution, which declares it supreme.

⁴⁴ See section 36 of the Constitution.

- the need to create alternative dispositions to institutional care in a manner appropriate to children's well-being and proportionate both to their circumstances and the offence'.⁴⁵

In consequence, the NRSO provisions should be amended to allow for the complete removal of child sex offenders from the register which deprives them of their constitutional rights, causes stigmatisation neglects their best interests and exposes them to criminal justice at a young age. The *Johannes* case held that the register is an unconstitutional sanction, and even after the promulgation of the Amendment Act, it should not be applied to children.⁴⁶ Rather, the courts should apply constitutional values such as Ubuntu and restorative justice when sentencing a child sex offender.

A register is a retributive sanction for a child sex offender. While the court in the *Makwanyane* case acknowledges retribution as a reasonable dimension of punishment, it should not be given much recognition, especially when it comes to issues with minors, given South Africa's developing human rights culture and spirit, and the role played by Ubuntu in society.⁴⁷ The Constitutional Court held that the main purpose of punishment is prevention and rehabilitation, not revenge, while the register focuses only on prevention of sexual crimes and ignores rehabilitation. The court stressed a need for 'humaneness, empathy and compassion',⁴⁸ which are inherently part of the multi-layered philosophy of Ubuntu. The same values are in the best interests of the minor. On balance, the child offender's continued registration violates his or her human dignity and security, as well as constituting a punishment that renders registration inhumane and degrading.⁴⁹ Continuous incarceration of child offenders and records retained on the register for years or a lifetime are harsh, inhumane and degrading actions and they therefore encroach on a number of the child's rights.

⁴⁵ In *Johannes* supra note 19 para 52 cited Article 40(3) of the CRC that states that government should establish institutions, authorities, laws and procedures precisely appropriate to child offenders.

⁴⁶ N Mollema 'Impotent? The Prospects of the National Register for Sexual Offenders' (2015) 36 *Obiter* 476 at 480.

⁴⁷ *Makwanyane* supra note 24 at 129.

⁴⁸ *Ibid* 130–131.

⁴⁹ *Du Plooy v Minister of Correctional Services* 2004 3 All SA 613 (T) at 29 cited in C Himonga, M Taylor & A Pope 'Reflections on Judicial Views of Ubuntu' (2013) 16 *PER/PELJ* 372 at 395.

Recent research findings may have an impact on the successful rehabilitation and re-integration of those who have been convicted of sexual offences back into society.⁵⁰ Negative social attitudes towards child sex offenders have been shown in the past to raise anxiety, pessimism, and depression among offenders, as well as reducing rehabilitation success.⁵¹ The findings suggested that using forensic psychology education to modify the general public's beliefs of risk, needs, and rehabilitation of people who have committed sexual offences could be beneficial, perhaps reducing risk and recidivism among child sex offenders.⁵² Therefore, rehabilitation should be fixed. The register hinders rehabilitation of child offenders through the stigma that comes with it.⁵³

Restorative justice through reconciliation brings together the minor offender's family, the victim, and the offender's community as a whole, providing a platform for the offender to demonstrate accountability for wrongdoing while also providing a sense that justice has been served to both parties. The goal of involving parents, families, and the community is to ensure the re-integration of the minor perpetrator into society after being exposed to the criminal justice system and to assist him/her to live a normal life.⁵⁴ Family and community interventions are important to minor offenders after having left the system.⁵⁵ This means the minor offender will be punished in a manner that promotes reconciliation with the victim. It is further argued that such objectives reflected in registration conflict with the duties imposed by the spirit of the CJA, which envisions a justice system that gives special recognition to minor perpetrators after they have paid their debt to the community, and that they be given a chance to reintegrate into society as a worthy member of the community.⁵⁶ The objectives of restorative justice are closely linked to the purpose

⁵⁰ Rothwella, Fidob & Heym op cit note 17 above at 5.

⁵¹ Ibid.

⁵² Ibid.

⁵³ P Stevens 'Protecting the Vulnerable? Assessing the Constitutionality of The National Register for Sex Offenders in Respect of Juvenile Sex Offenders – *S V IJ* 2013 2 SACR 599 (WCC) and *J v National Director of Public Prosecutions* 2014 2 SACR 1 (CC) 13' (2014) 17(6) *PER/PELJ* 2779, at 2797.

⁵⁴ J Gallinetti 'Getting to Know the Child Justice Act' *Child Justice Alliance* available at <http://www.childjustice.org.za/publications/Child%20Justice%20Act.pdf>, accessed on 19 January 2018 at 10.

⁵⁵ See the Preamble to the Child Justice Act 75 of 2008 (hereinafter referred to as the 'CJA').

⁵⁶ *Johannes* supra note 19 at para 66.

of rehabilitation, whereas a register mainly focuses on protecting the victim while punishing the child offender. A register hinders restorative justice.

The resources allocated to the maintenance and updating of the register should instead be allocated to improving the child offender to become a law-abiding citizen in terms of rehabilitation and reformation programmes.⁵⁷ There has been no discernible decrease in sexual crimes against minors in South Africa since the register's inception. This clearly demonstrates the register's failure to aid in the reduction of sexual crimes against vulnerable groups in South Africa. Huge resources would be required to enable child protection stakeholders to work together to protect the rights of child offenders during criminal proceedings. The funds allocated for the upkeep of the register should rather be used to fund training programmes for all departments that deal with child offenders, such as the judiciary, law enforcement, and the health sector, all involved in rehabilitation programmes and treating the victim, which would offer a reasonable prospect of reducing sexual crimes against children, since these reformed children would not develop into adult offenders.⁵⁸ It is a waste of resources to fund a scheme that has not reduced the number of sexual offences against children; funders would be better served by supporting more progressive rehabilitative schemes.

The waste of resources is compounded by the fact that there are two similar registers with almost identical functions in operation at the same time. A National Child Protection Register (hereinafter referred to as the 'NCPR'), created under chapter 7 of the Children's Act, seeks to achieve the same objectives as the NRSO. The NRSO is an unnecessary duplication of the NCPR.⁵⁹ Nonetheless, the NCPR focuses on the victim and does not necessarily monitor the offender. Both registers have failed to achieve their objectives since sexual crimes against children remain high.⁶⁰ Since both structures are alike, there is a financial and human resource overlap in

⁵⁷ Mollema op cit note 46 above at 480.

⁵⁸ G Da Costa, G M Spies & LCoetzee 'Contributory Factors to Child on Child Sexual Abuse: Perceptions of Diverted Female Youth Sex Offenders' (2014) 15 *ASAJ* 35 at 43.

⁵⁹ Mollema op cit note 46 above at 478.

⁶⁰ Z Jooma '*The National Register for Sexual Offenders: The Solution to Protecting Children in South Africa?*' (Unpublished LLM thesis, University of Pretoria, 2010) 34–39.

keeping both schemes up to date.⁶¹ It is absurd that a government, with so few resources to assist the vast majority of sexual assault victims, is funding the registration, reporting, and investigative processes of two nearly identical registers that are not yielding any results in terms of reducing sexual crimes. The funds could be used for long-term care and treatment of abused children, as well as the rehabilitation of sex offenders. Furthermore, both registers fall short of their goal of protecting victims.⁶² The Justice Portfolio Committee ought to have combined the two registers by amending the functions of the NCPR, which has now been overshadowed by the NRSO. Furthermore, the NRSO needs to follow the example of the NCPR, which mandates that the names of minor offenders should not be registered but should be recorded somewhere for future reference or may be registered only when they are adults.⁶³

There is an immediate need to rule out completely the registration of children who were sentenced or served their sentences prior to the implementation of SORMA. Retrospective application impacts negatively on the minor's constitutional rights and is contrary to the best interest of the child. Section 42(1) states that

*'[a] National Register for Sex Offenders containing particulars of persons convicted of any sexual offence against a child ... whether committed before or after the commencement of this Chapter and whether committed in or outside the Republic, must, within six months after the commencement of this Chapter, and, in accordance with the provisions of this Chapter and the regulations made thereunder, be established and maintained by the Minister.'*⁶⁴

This is contradictory to both international principles and the domestic principle of limiting child involvement in courts. The register's retrospective effect is a serious violation of the minor's rights and harmful to the child's welfare. The prevention of child participation in courts is an important aspect of crime prevention in society. Young people can develop non-criminogenic attitudes by engaging in legal, socially beneficial behaviours and embracing a humanistic

⁶¹ Ibid.

⁶² Jooma op cit note 60 above at 40.

⁶³ Mollema op cit note 46 above at 478.

⁶⁴ Also see section 50 (1) (a) (iii) - (iv) of SORMA.

orientation toward community and life perspectives.⁶⁵ Amendment of the retrospective effect is critical in achieving rehabilitation and reformation.

It is important to consider amending the register to align with the Constitution. Some of the consequences associated with the register, such as stigmatisation, have devastating effects on the life of youths as they will be marginalised and denied employment, thus making rehabilitation difficult. It would be amiss to stigmatise children for their entire lives for a childhood mistake, conduct, or behaviour they could be helped to reform or rehabilitate. The other reason is to protect the minor from the harmful criminal justice system and systems such as the NRSO. Restorative justice must be invoked when sentencing a child, to enable the minor to comprehend the consequences and accept responsibility for the damage caused. This means that a child would be treated differently from adults, in a way that is more lenient. Thus, children would be punished for their transgressions but in a way that accommodates their surroundings, their age, and their future as law-abiding citizens.

Conversely, the register does not take the emotional and psychological needs of the child into consideration. In all cases, the registration of minor sex perpetrators is a violation of the right to protection from degradation and ill-treatment.⁶⁶ Researchers have indicated that child sex offenders have a higher potential for rehabilitation than adults because of their difference in pathology and cognitive skills.⁶⁷ Therefore, a register may expose a child offender to various psychological problems when the child is at a stage that demands protection in order to rehabilitate and reform. As this constitutes a vital aspect of the right to equal and humane care and is necessary for the readiness of children to move back into the community, interaction with the outside world and the broader community must be accommodated and made possible. This is also necessary for the process of rehabilitation. Because a register is a punitive sanction, it is not recommended for child offenders because it does not accommodate their circumstances and age and provides no plan for rehabilitation, thus violating the principles of several international instruments and

⁶⁵ Guideline 1 of the UN Guidelines for the Prevention of Child Delinquency (the Riyadh) 1990 45/112, A/RES/45/112 (1990).

⁶⁶ *J v NDPP* supra note 2 para 33.

⁶⁷ Stevens op cit note at 2797. Also see Ibid.

constitutional rights. As a result, the registration of child offenders' should be revised in line with the suggestions that have been made above.

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Mr Tanaka Davin Dhumbura (217080619)
School Of Law
Howard College

Dear Mr Tanaka Davin Dhumbura,

Protocol reference number: 00004522

Project title: AN EXAMINATION OF CHILD SEX OFFENDERS AND THEIR CONSTITUTIONAL RIGHTS WITH REGARD TO THE NATIONAL REGISTER FOR SEX OFFENDERS IN SOUTH AFRICA.

Exemption from Ethics Review

In response to your application received on 21 October 2019, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

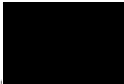
In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Peaceful Phungula
Academic Leader Research
School Of Law

UKZN Research Ethics Office
Westville Campus, Govan Mbeki Building
Postal Address: Private Bag X54001, Durban 4000
Website: <http://research.ukzn.ac.za/Research-Ethics/>

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