JUVENILE SENTENCE AND INTERVENTION OPTIONS IN SOUTH AFRICA

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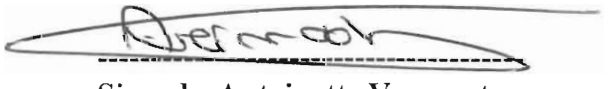
DECLARATION OF ORIGINALITY

I hereby declare that this thesis, unless specifically indicated to the contrary in the text, is my own original work which is made available for photocopying, and for inter-library loan.



Signed: Antoinette Vermooten

JUVENILE SENTENCE AND INTERVENTION OPTIONS IN SOUTH AFRICA

INTRODUCTION

In common with many other countries in the world, South Africa is faced with an ever increasing number of juvenile offenders being held in overcrowded prisons.[1] There are currently more than eight thousand juveniles serving sentences and more than five thousand awaiting trial in South African prisons. Of the four categories utilised by the Inspecting Judge of Correctional Services, the category of aggressive offences has the highest occurrence for both juveniles serving sentences and those awaiting trial.[2] (See Tables 1 and 2.)

Since the landmark Constitutional Court judgment in *S v Williams and Others*[3] a substantial body of interest has developed around juveniles in conflict with the law. Much of this interest originated from a concern that the criminal justice system has failed to address the needs of children in conflict with the law. In addition there is some unease about the position of the un-sentenced child in the criminal justice system.[4] However, despite all the reforms and initiatives that have taken place in South Africa since 1995, as late as 1998 children were still

1. Dissel A 'Alternative Sentencing in South Africa' (1997) 4 *Reconciliation International* 1-2. (H:/alternative%20sentencing%20in%20South%Africa%20-%2Amanda%20).
2. Fagan H 'Annual Report of the Office of the Inspecting Judge 2003-2004' (2004).
3. 1995 (3) SA 632 (CC).
4. See note 1 above at 1-2.

being subjected to judicial proceedings and conditions of confinement that violated international standards.[5]

Table 1: Juveniles serving sentences in South African prisons - October 2004

Age of child	Economic offence	Aggressive offence	Sexual offence	Narcotic offence
7 - 13	7	9	2	0
14	60	52	9	2
7 - 16	660	601	203	16
15	186	132	50	6
16	407	408	142	8
17 - 18	3 240	3 938	1 008	115
17	696	875	234	19
18	2 544	3 063	774	96

Table 2: Juveniles awaiting trial in South African prisons - October 2004

Age of child	Economic offence	Aggressive offence	Sexual offence	Narcotic offence
7 -13	3	4	1	0
14	40	40	7	2
7 -16	358	363	124	13
15	101	84	30	5
16	214	235	86	6
17 -18	1 374	2 171	640	39
17	264	423	130	8
18	1 110	1 748	510	31

The government has recognised the urgency of attending to the needs of the child in conflict with the law. This concern is reflected in President Mandela's statement in 1998 that '... *the government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we will proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the last resort in the case of juvenile offenders*'.[6]

5. Human Rights Watch World Report 'Children's Right – Juvenile Justice' (1999) *Human Rights Watch* 1-6. (http://www.hrw.org/worldreport99/children/child3.html).
6. Quoted in South African Law Commission document 'What do you think about ... young people in trouble with the law' (1998) 1-7.

Traditionally, the sentences handed down upon conviction may involve a fine, imprisonment, suspended sentences or correctional supervision. Responding to the government's urgent call to attend to the problem of juvenile justice, the South African Law Commission – hereafter (SALC) – began to develop a child justice system that strived to prevent children from entering deeper into the criminal justice process while holding them accountable for their actions by means of diversion programmes. These diversion options include restorative justice principles that focus on reconciliation and restitution, rather than on retribution and punishment. Offenders are encouraged to understand the harm they have caused. The emphasis is on compensation for the victim by the offender with the object of reintegrating into society both the victim and the offender as productive members of safe communities.[7] The proposed system by the SALC provides for the criminal prosecution of children who are accused of serious or violent offences, as well as those who repeatedly commit offences.

In the proposed system the imprisonment of children awaiting trial will be permissible in certain defined circumstances, but will also honour the constitutional provisions that the imprisonment of children should be as a measure of last resort for the shortest appropriate period of time.[8]

Furthermore, the proposed system aims to encourage a degree of specialisation in child justice practices. The proposals also include service providers and non-governmental organisations for a distinct and unique system of criminal justice that treats children differently, in a manner

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7. South African Law Commission (SALC) *Discussion Paper No 79 on Juvenile Justice Project 106* (1998) 17-21.
8. Section 28 (1)(g) of the Constitution of the Republic of South Africa Act No 108 of 1996.

appropriate to their age and maturity, and which develops mechanisms and processes designed to achieve the goal.[9]

The proposed future child justice system also aims to address problems in the administration of child justice, particularly in relation to the diversion and pre-trial release of children from custody.

Following on the work of the SALC,[10] the Child Justice Bill, which fosters the inclusion of restorative justice, was released in August 2000. When writing this thesis in 2005, this Bill is still awaiting parliamentary ratification. The Bill is aimed at creating a consistent system for responding to youth crime by consolidating current practices and legislation with international standards.[11] Furthermore, the Bill attempts to incorporate the African concept of '*ubuntu*' into South Africa child justice legislation. The idea of '*ubuntu*' encompasses issues of human dignity and respect with the understanding that the individual's humanity is wrapped up in the dignity and humanity of other people. Imbued with the spirit of 'ubuntu,' the Child Justice Bill is heavily weighted towards diversion.[12] The Bill also includes victim-offender mediation and family group conferences (FGC) as alternative options to remove children from the court process.[13] Although currently Family Group Conference diversion options are used in South Africa, the lack of legislative recognition results in the inconsistent use of this option.

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9. South African Law Commission (SALC) *Discussion Paper No 79 on Juvenile Justice Project 106* (1998).
10. The Project Committee has, since its first meeting in early 1997, produced an Issue Paper, a Discussion Paper with a Draft Bill attached, and a Report and Bill.
11. Parker L 'Juvenile Justice Reforms Still Pending in South Africa' (2004) *Restorative Justice.Org* 1-2. (www.restorative justice. org). (H:/Juvenile%20Justice%20Reforms%20Pending%20in%20South%20Africa.htm).
12. Ibid.
13. Ibid.

In addition to the initiatives for reform discussed above, the South African Government subscribes to international standards. The international standards for children in the justice system are *inter alia* reflected in the African Charter on the Rights and Welfare of the Child,[14] Article 40 of the Convention on the Rights of the Child,[15] and the United Nations Standards Minimum Rules for the Administration of Juvenile Justice (the so-called Beijing Rules).[16]

The UN Convention on the Rights of the Child (CRC) was signed by South Africa in November 1993 and was ratified on 16 June 1995. The preamble reaffirms that children need special care, including legal protection. It places special emphasis on the role of the family in caring for the child and also emphasises the importance of respecting the cultural values of a child.[17] The Convention imposes obligations in relation to the provisions and the protection of children.[18]

The abovementioned principles of the CRC are reflected in section 28 of the Bill of Rights in the South African Constitution.[19] The Bill of Rights also guards against discrimination against the child, protects vulnerable young people, and gives young persons the right to express their opinions.[20]

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14. African Children's Charter on the Welfare of the Child (1999).
15. The United Nations Convention on the Rights of the Child (1989).
16. Minimum Rules for the Administration of Justice (Beijing Rules).
17. Skelton A 'The major sources of children's legal rights' *Children and the law* (1998) 26-27. (http://www.lhr.org.za).
18. Van Bueren G 'The United Nations Convention on the Right of the Child: An Evolutionary Revolution' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 203-213.
19. Constitution of the Republic of South Africa Act no 108 of 1996.
20. Section 9(3) of the Constitution of the Republic of South Africa Act No 108 of 1996 The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 14: Everybody has the right to privacy, which includes the right not to have (a) their person home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringe Section 16: Everybody has the right to freedom of expression, which includes (a) freedom of the press and other media; (b) freedom to

The Beijing Rules state that, where possible, appropriate diversion should take place. This entails that juveniles should be diverted rather than put through formal trials. This means that the police, prosecution and other agencies should be empowered to dispense juvenile cases at their discretion without recourse to formal hearings. However, the juvenile or his/her parent or guardian has to consent to diversion and community programmes should be developed.[21] In South Africa the concept of diversion is also a central principle of the new juvenile justice Bill. Its aim is the referral of children away from the criminal justice system and their reintegration into society.[22]

Articles 17 and 18 of the African Children's Charter provide specific protection to children in three respects, namely the right to education, the protection of the family as a unit and basis of society, and the protection of children's rights.[23] Children are more likely to be victims of human rights violations than adults, and African children are more likely to be victims than children on the other continents.[24] Article 4 of the African Children's Charter states that in all actions concerning a child, the best interest of the child '*shall be the primary consideration*'.[25]

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receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.

21. Muntingh LM and Skelton A 'Diversion' (2004) *Child Law Manual for Judicial Officer* D7-D18.
22. South African Law Commission (SALC) *Report on Juvenile Justice Project 106* (2000).
23. Viljoen F 'The African Charter on the Rights and Welfare of the Child' (2000) In Davel CJ (ed) *Introduction to Child law in South Africa* 214-231.
24. Ibid.
25. Article 4 of the African Children's Charter on the Welfare of the Child (1999).

2. KEY QUESTIONS TO BE ANSWERED IN THIS STUDY

From the above discussion a number of questions arise with regard to the concept of sentencing juveniles as reflected in the international treaties. In the first instance, what exactly do the international treaties stipulate in terms of sentence and intervention options for juveniles, and does the South African Constitution also reflect these stipulations? Secondly, how do the current South African juvenile sentencing policies and practices compare with the international standards, and how are these principles applied in the South African juvenile justice system? Thirdly, does the Bill incorporate the international principles and in what respects is it an improvement on current juvenile sentencing practices? Furthermore, what do the international instruments stipulate about diversion and restorative justice and how does the current South African juvenile justice policy and practice reflect the international principles? Finally, will the Child Justice Bill be an improvement on current policies and practices?

3. AIMS OF THE STUDY

To answer the questions above about sentencing, the following international instruments will be studied: The African Children's Charter, the United Nations Convention on the Rights of the Child, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules). After a description of the international instruments the South African Constitution will be studied to determine whether the international guidelines are reflected in the Bill of Rights and the Child Justice Bill.

Secondly, to determine how the current South African juvenile sentence policy and practice compares with international standards, case law will be analysed to investigate the sentences that were previously imposed on juvenile offenders. Furthermore, current legislation will be analysed to determine the options available for sentencing juvenile offenders. These options will then be compared to the Juvenile Justice Bill to determine whether they are in line with the international standards.

4. LAYOUT OF THE THESIS

Chapter 1 contains an analysis of the international treaties for guidelines on sentence and intervention options and investigates whether the South African Constitution reflects these international standards.

In Chapter 2 the international stipulations regarding diversion and restorative justice are described, and the current South African juvenile policy and practice are evaluated against the international principles.

Chapter 3 compares the current South African juvenile sentencing policies and practice system with the international standards, and determines how these principles are applied in the South African juvenile justice system. The incorporation of these in the Bill is evaluated. Finally, the Child Justice Bill is studied to determine whether it is an improvement on current policy and practice.

Finally, an overall discussion of sentence and intervention options, and diversion and restorative justice as alternative sentencing methods follows in Chapter 4. In addition, recommendations regarding diversion options are made.

5. METHODOLOGY

A qualitative approach was followed for this study. Journals, books and articles, discussion documents of the Law Commission, Internet research and case law relating to the topic were studied to collect the necessary information. The latest statistics were gathered through the annual reports of the relevant Departments.

CHAPTER 1

RELEVANT INTERNATIONAL INSTRUMENTS

1.1 INTRODUCTION

The objective of this chapter is to determine what the international treaties of which South Africa is a signatory, stipulate in terms of sentence and intervention options for juveniles. The influence of international law on the South African Constitution pertaining to the child in conflict with the law is also examined.

1.2 BACKGROUND

According to section 28(3) of the Constitution of the Republic of South Africa No.108 of 1996 a child refers to a person under the age of 18 years. South Africa has never previously had any separate system for dealing with children under the age of 18 in conflict with the law. Young offenders were treated as young adults by the justice system.

In 1992 non-governmental organisations (NGOs) began to voice their concern about the number of young children awaiting trial on criminal matters in prisons and police cells.[1]

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1. Cassim F 'Sentencing the Juvenile' (1997) *LLM Thesis* University of South Africa 1-12.

The NGOs drew media attention to the conditions under which children were being held in prison. Members of these organisations visited the prisons and police cells where juveniles were awaiting trial. The media, in a carefully orchestrated campaign, highlighted the stories of the children they met. The public thus became aware of the juveniles who were incarcerated and awaiting trial, and this elicited a sympathetic response.[2]

In May 1995 an amendment to section 29 of the Correctional Services Act 8 of 1959 regarding child detention was promulgated.[3] This was the first move made by the South African Government in its attempt to deal with the issue of children awaiting trial. However, little was done to develop the infrastructure needed to make the law practicable, such as allocating different places of custody where children could be kept.[4] However, this legislation was not successful, because alternative facilities were either not available or not secure enough, with the result that children often escaped and absconded.

The Correctional Services Act 14 of 1996 followed, which gave birth to the new section 29.[5] The new amendment was published on 10 May 1996 and allowed for children over the age of 14 and under 18 years charged with serious offences to be held in prison for no longer than 14 days while they were awaiting trial.[6]

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2. Ibid.
3. Sloth-Nielsen J 'Child Justice and Law Reform' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 383-461.
4. Ibid.
5. Section 29 5(a) of the Correctional Services Act 14 of 1996: a person referred to in subsection (1)(b) who is accused of having committed an offence shall before his or her conviction and sentence, not be detained in a prison or a police cell or lock-up unless the presiding officer has reason to believe that his or her detention is necessary in the interest of the administration of justice and the safety and protection of the public and no secure place of safety, within a reasonable distance from the court is available for his or her detention.....'
6. Ibid.

In 1998 the Inter-Ministerial Committee (IMC) developed a series of Interim Policy Recommendations which set out a framework for transforming the child and youth care system, and the youth justice system. The IMC made recommendations and focused on four levels of transformation.[7] The first level was prevention and explored the option of community-based programmes in order to prevent children from entering the criminal justice system. The second level was early intervention and highlighted the importance of reception, referral and diversion. The third level referred to the court statutory processes and recommendations. The fourth level encompassed the continuum of care and promoted the idea of children being placed in the least restrictive and most empowering situation possible. In the meantime the Minister of Justice appointed nine project committees under the auspices of the South African Law Commission to draft proposals for a new child justice system. This resulted in a draft Bill that was released on 8 August 2000.[8]

The national reform to child justice legislation was also stimulated and influenced by international developments in this area. Pressure by NGOs compelled the government to consider international standards in the form of various international treaties.

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7. See note 3 above 383-46.
8. South African Law Commission (SALC) *Summary of the Discussion Paper No 79 on Juvenile Justice Project 106* (1998) 1.

1.3 INTERNATIONAL TREATIES

A combination of international law, including international conventions, and a variety of statutes lay down fundamental rights for children. In recognition of children's special needs and vulnerabilities, these laws provide for how children should be treated, protected, educated and cared for.

South Africa has ratified a number of conventions, namely the African Charter on Human and People's Rights, which predated the African Children's Charter, Article 40 of the Convention on the Rights of the Child, and the United Nations Standards Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).[9]

1.3.1 The African Charter

In 1981 South Africa adopted the African Charter on Human and People's Rights, which provides specific protection to children in Africa.[10] However, more than a decade had to pass before the required number of states ratified the African Charter, causing it to come into force in 1999.[11] The adoption of the African Children's Charter was the first step that South Africa took to acknowledge that a child had certain rights that needed to be protected.

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9. The United Convention on the Rights of the Child was ratified by South Africa on 16 June 1995. The African Charter on the Rights and Welfare of the Child was ratified by South Africa on 7 January 2000. The 1985 Beijing rules were adopted by the United Nations on 29 November 1985.
10. Viljoen F 'The African Charter on the Rights and Welfare of the Child' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 214-231.
11. Ibid.

The African Children's Charter has three anchoring principles, namely the best interest of the child, the principle of non-discrimination, and the primacy of the Charter over harmful cultural practice and customs.[12] Article 4 of the African Children's Charter states that in all actions concerning children, the best interest of the child '*shall be the primary conside-ration*'.[13] Children are entitled to equal rights under the Charter, irrespective of whom their parents are or who the children are.[14] The Charter asserts its own primacy above culture and customs that are prejudicial to the health or life of a child and discriminatory to the child on the basis of sex or other status.[15]

Furthermore, the African Charter provides special protection for children in three respects:[16]

a. Article 11 (1) protects the right to education: '*Every child shall have the right to an education*';

b. Article 18 (1) protects the family as the natural unit and basis of society: '*The family shall be the natural unit and basis of society: it shall enjoy the protection and support of the state for its establishment and development*'; and

c. Article 7 protects the freedom of expression: '*Every child who is capable of communicating his or her own views shall be assured the right to express his*

12. Ibid.
13. Article 4 of the African Children's Charter.
14. See note 10 above at 215-217.
15. Ibid.
16. Viljoen F 'The African Charter on the Rights and Welfare of the Child' (2000) In Davel CJ (ed) *Introduction to Child law in South Africa* 216.

opinion freely in all matters and to disseminate his opinion subject to such restrictions as are prescribed by law'.

1.3.2 The United Nations Convention on the Rights of the Child 1989 (CRC)

International conventions, law and treaties brought a revolution to the administration of child justice in South Africa. One such convention is the United Nations Convention on the Rights of the Child to which South Africa became a signatory in 1989. The CRC came into force on 2 September 1990.[17]

In 1995 South Africa ratified the Convention on the Rights of the Child (CRC). The CRC contains two Articles on child justice, namely:

a. Article 37 which reads as follows: '*State parties shall ensure that*

   i. *no child shall be subjected to torture or other cruel inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years of age*;

   ii. *no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*;

   iii. *every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner,*

17. Ibid.

which takes into account the needs of a person, of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so, and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; and

iv. *every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such actions*'.[18]

b. Article 40 of the CRC provides that State parties need to recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others. It takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Article 37 of the CRC places obligations on state parties to protect a child against inhuman or degrading treatment or punishment. Furthermore it limits the detention or imprisonment of a child offender. It also promotes the child's reintegration in society.

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18. The United Nations Convention on the Rights of the Child (1989).

Article 40(3) of the CRC obliges state parties to establish law, procedures, authorities and institutions specifically applicable to children in conflict with the law. The CRC has placed strong emphasis on the child as an individual with inalienable human rights. The child's right not to be detained except as a measure of last resort, and if detained, that it be limited to the shortest appropriate time, and the desirability of diversion, became a binding treaty with the signing of the CRC, that has forced the process of law reform in South Africa.

The United Nations Convention on the Rights of the Child (CRC) is concerned with the so-called four p's: the **participation** of children when it comes to decision making; the **protection** of the child against discrimination and all forms of torture; the **prevention** of harm to children; and **providing** assistance for a child's basic needs.[19]

The five goals of the Convention on the Rights of the Child are firstly, to create new rights under international law for children where no such rights exist; secondly, the Convention enshrines rights in a global treaty which has until the Convention's adoption only been acknowledged in case law; thirdly, the Convention creates binding standards for the administration of juvenile justice, and lastly the Convention imposes new obligations in relation to the provision and protection of children.[20]

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19. Van Bueren G 'The United Nations Convention on the Rights of the Child: An Evolutionary Revolution' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 202-213.
20. Ibid.

1.3.3 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)

The Beijing Rules[21] provide that in all cases – except those involving minor offences – social inquiry reports detailing the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed should be submitted before a competent authority renders a final disposition prior to sentencing the juvenile.[22]

Rule 17.1 (b) of these rules requires that '*restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum*'.[23]

Rule 17.1 (c), which is of direct relevance to long-term imprisonment, permits the deprivation of liberty where the juvenile is adjudicated of a '*serious act involving violence against another person ... unless there is no other appropriate response*'.[24]

Rule 5 (1) of the Beijing rules asserts that the aim of a juvenile justice system is to promote and ensure the well-being of the juvenile and '*to ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence*'.[25]

The Beijing Rules provide guidance that is relevant to the sentencing process. Section 17(1) of the rules ensures that the reaction to a child offender shall be in proportion not only to the circumstances and the needs of the child offender, but also to the needs of

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21. United Nations Standards Minimum Rules for the Administration of Justice (1985) (Beijing Rules).
22. Rule 16 of the Beijing Rules.
23. Rule 17 of the Beijing Rules.
24. Ibid.
25. Rule 5 of the Beijing Rules.

society. The restriction on the personal liberty of the child offender shall be imposed only after careful consideration, and shall be limited to the possible minimum. Furthermore, the Beijing Rules promote the well-being of the juvenile as the guiding factor in considering an appropriate sentence.

The incorporation of the abovementioned treaties into the SA Constitution and the Juvenile Justice Bill will be discussed below.

1.3.4 The South African Constitution

Section 28 of the Bill of Rights of the Constitution of the Republic of South Africa, Act 108 of 1996 protects the rights of children. The aim of the Bill of Rights is to safeguard, protect and promote the rights it incorporates.[26] Section 28 (1)(b) stipulates that every child in trouble with the law has the right to a legal representative. Children are entitled to have legal representation not only during criminal proceedings, but also in civil matters that will affect them. Section 28(1)(g) contains a presumption against institutionalisation and requires a detained child to be '*treated in a manner, and kept in conditions*', that take account of the child's age. This section also awards children the right to be kept separately from persons over the age of 18 years while in detention and the right not to be detained except as a measure of last resort.[27] This stipulation is in accordance with Articles 37 and 40(3) of the UN Convention on the Rights of the Child. Section 28(2) states that '*a child's best interests are of paramount importance in every*

26. Bekink B and Brand D 'Constitutional Protection of Children' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 169-201.
27. Section 28 of the Constitution of the Republic of South Africa Act No 108 of 1996.

matter concerning the child'.[28] The rights that a juvenile enjoys under section 28 of the Constitution are in addition to those rights contained in sections 12 and 35 of the Constitution. Section 12(e) specifically prohibits any '*punishment*' that may be construed as cruel, inhuman or degrading.[29] Again this is in line with Article 37 of the CRC.

Section 35 of the Constitution contains five sub-sections that deal with detained and accused persons. Section 35(1)(f) states that '*Everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions*'. Section 35(2) of the Constitution includes '*sentenced*' persons within the category of detained persons. If section 28(1)(g) is read with sub-sections 12 and 35, it is clear that the right not to be detained should be interpreted to include the right not to be sentenced to a term of imprisonment as a form of punishment except as measure of last resort and then for the shortest possible period.[30] This reflects the CRC's recommendation in Articles 37 and 40(3). It may thus be concluded that the content of section 28 of the Constitution clearly reflects the essence of the Convention on the Rights of the Child.

1.3.5 The Child Justice Bill

The Child Justice Bill,[31] recently introduced in Parliament, proposes the creation of a new and separate criminal justice procedure for children. The Bill aims to create an opportunity for diverting the child from court procedures and provides a wide range of sentencing options as an alternative to imprisonment to ensure that children take

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28. Ibid.
29. Section 12 of the Constitution of the Republic of South Africa Act No 108 of 1996.
30. Constitution of the Republic of South Africa Act No 108 of 1996.
31. The Child Justice Bill. (www.Childjustice.org.za) or (File://A?Child Justice Alliance the bill.htm).

responsibility for their actions.[32] The new system creates a mechanism to ensure that juveniles who are in conflict with the law are protected. Chapter 9 of the Bill sets out specific sentencing options. Section 85(1) of the Bill states that the court should request a pre-sentence report prior to the imposition of sentence.[33] Section 88 was drawn up to protect children's rights throughout the diversion process. This stipulation is in accordance with Article 40(3) of the UN Convention on the Rights of the Child. Section 92 gives directives about when a sentence of imprisonment may be imposed on a juvenile offender. The Bill prohibits certain forms of punishment.[34] The Constitutional Court held that corporal punishment administered to juvenile offenders in terms of the Criminal Procedure Act 51 of 1977 was unconstitutional because it encroached upon the child's right not to be treated in a cruel, inhuman and degrading manner.

The Convention on the Rights of the Child is the most important instrument defining and consolidating human rights standards for children. The enactment of the Constitution created a framework within which significant changes were brought about in juvenile justice. Enforcement by way of legally binding instruments is an effective method of protecting children rights. The obligations contained in international instruments are enforced through the legal systems of the state parties. The government remains accountable at an international level to enforce and honour the treaty at a domestic level.[35] Section 231(4) of the Constitution of the Republic of South Africa provides that

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32. Woods C 'Diversion in South Africa: A review of policy and practices, 1990-2003' (2003) *Institute for Security Studies* 1-21.
33. The South African Law Commission (SALC) Summary of the Discussion Paper No 79 on Juvenile Justice Project 106 (1989) 17-21.
34. Ibid.
35. Olivier M 'The Status of International Children's Rights Instruments in South Africa' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 197-201.

any international agreement becomes law in the Republic when it is enacted into law by national legislation.[36]

The role the courts have to play in the promotion and development of a new culture founded on the recognition of human rights, which are enshrined in the Constitution, was stressed in *S v Williams.*[37] In the *Williams* case the Constitutional Court found that the institutionalised use of violence by the state on juvenile offenders constitutes cruel, inhuman and degrading punishment. Sentencing policies have been influenced by both the Constitution and by international law. Section 12 of the Constitution prohibits punishment that is cruel, inhuman or degrading.

In *S v Kwalase*[38] the influence of international law upon the sentencing of children was expressly referred to. The court referred to the South African Constitution, the United Nations Convention on the Rights of the Child and the importance of considering the principles contained in the Beijing Rules. The court held that:

> '*the judicial approach towards the sentencing of juvenile offenders must therefore be re-appraised and developed in order to promote an individualised response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the needs and interests of the juvenile offender. If at all possible, the judicial officer must structure the*

36. Constitution of the Republic of South Africa Act No 108 of 1996.
37. 1995 (7) BCLR 861 (CC).
38. 2000 (2) SACR 135 (CPD).

punishment in such a way as to promote the reintegration of the juvenile concerned into his or her family and community'.[39]

The court gave guidelines to judicial officers in this case that should be followed when deciding on an appropriate sentence. These guidelines are in line with international law. Firstly, the nature and gravity of the offence and the needs of society should be considered. Secondly, imprisonment should be limited as a form of punishment. Lastly the aim of sentence should be the promotion of the reintegration of the juvenile offender into his or her family and community.

S v Z[40] has thusfar been the most influential judgement in the articulation of a child sentencing policy. In that case, Justice Erasmus held that sentence should be tailored to the personal circumstances of each child.[41] Three important rules were laid down by the court: firstly, the younger the child offender, the more inappropriate a sentence of direct imprisonment: secondly, direct imprisonment is especially inappropriate for a juvenile offender who is a first offender; and thirdly, short term imprisonment is seldom appropriate for a child offender.

In *S v R*[42] the aim of sentencing shifted from retribution to rehabilitation. This development was recognised and hailed by Kriegler J as being the introduction of a new phase in our criminal justice system, allowing for the imposition of finely tuned sentences without resorting to imprisonment with all its known disadvantages to both the

39. Ibid at 139 E.
40. 1999 (1) SACR 427 (ECD).
41. 1999 (1) SACR 427 (ECD).
42. 1993 (1) SA 475 (A).

prisoner and the broader community.[43] Subsequent to the ratification of the Convention on the Rights of the Child the South African Government recognised that child justice reform – as identified by the National Programme of Action (NPA) – was a key objective.[44] The National Programme of Action (NPA) is responsible for legislative developments in South Africa. It also co-ordinates all efforts relating to children development by non-governmental organisations and Public Service departments. Furthermore the NPA deals with policies and plans to promote the implementation of the principles of the CRC.[45]

1.4 CONCLUSION

The fundamental rights of the child are laid down in a number of international conventions. South Africa became a signatory to these international treaties, which impose new obligations on South Africa to protect the child in conflict with the law. These treaties and international law brought about a revolution in the administration of juvenile justice. The CRC is the most important instrument, defining and consolidating human rights standards for the child in conflict with the law. Section 28 of the Constitution reflects and protects these fundamental rights. The juvenile justice Bill proposes a new and separate criminal justice procedure for the child in conflict with the law. The Bill aims to create a mechanism to ensure that the child in conflict with the law is protected.

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43. 1993 (1) SA 476 (A) at 487.
44. Viljoen F ' The African Charter on the Rights and Welfare of the Child' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 217.
45. Olivier M 'The Status of International children's Rights Instruments in South Africa' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 200.

CHAPTER 2

DIVERSION AND RESTORATIVE JUSTICE

2.1 INTRODUCTION

As adversarial, retributive justice systems are failing across the world the question could rightly be asked: *What is justice?* and *What is justice supposed to do?* The justice scales, often found in justice departmental logos, stem from the ancient Greeks who first used the scales as a symbol for justice. The Greeks had an understanding that justice was about restoring the balance.[1] Restorative justice is thus a way of dealing with people in conflict with the law in a manner that promotes tolerance, healing and understanding and balance.[2] To follow this approach it becomes necessary to consider options other than mere punitive measures, and ultimately divert children away from the formal court procedures. In this chapter the concepts of restorative justice and diversion will be analysed and the feasibility of the application of these in the South African juvenile justice system will be evaluated.

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1. Braken N and Batley M ' Family Group Conference: Putting the Right Wrong' (undated) *A Practice Research Study and Implementation Manual* 17-22.
2. Manjoo F ' Family Group Conference in South Africa' (Undated) *Mini-dissertation submitted in part fulfilment of Honours Degree in Criminology* UDW 1-56.

2.2 RESTORATIVE JUSTICE

Society creates deviant sub-cultures by labelling people as deviant, thereby causing them to be shamed, thus alienating them from society.[3] Rather than alienating offenders from society, re-integrative shaming helps to integrate offenders back into society. Therefore, even though the offender is held responsible for what he or she has done and is shamed, the shaming is done in a way that is reaffirming and forgiving, and not stigmatising.[4]

The theoretical foundation of the term *restorative justice* was created by Braithwaite a leading Australian theorist on crime and shaming.[5] It refers to a theory of justice that relies on reconciliation rather than punishment. Restorative justice provides an alternative way of looking at and dealing with crime. Existing justice systems, by and large, take a retributive approach in dealing with crime. This emphasises the use of punishment, and results in increasing incarceration rates as well as discontent on the part of victims, offenders and the community in the criminal justice system.[6]

Several principles govern restorative justice. Restorative justice acknowledges that crime is first and foremost an offence against human relations and secondly a violation of the law. In principle restorative justice recognises that crime is wrong and should not occur, but when it does, it opens the door to both opportunities and dangers.[7]

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3. Ibid.
4. See note 2 above at 1-8.
5. Ibid.
6. See note 1 above at 18.
7. Ibid.

On the one hand the opportunity to recognise that an injustice has occurred and that equity needs to be restored. On the other hand the danger is that the victim, offender and community all end up further alienated.[8] The purpose of restorative justice is to meet the needs of and to promote healing for all involved.[9] Furthermore, restorative justice aims to handle most crimes in a co-operative manner. There should be co-operation between the offender, the victim and the community.[10] Restorative justice is not a particular programme, it is rather a way of thinking about crime and justice, and as such should influence the daily practice of justice.[11]

2.3 ORIGIN OF THE CONCEPT OF RESTORATIVE JUSTICE

The concept of restorative justice emerged in New Zealand in the cases of juvenile offenders. The adoption of the principle of restorative justice is the key principle of the 1989 New Zealand Children Young Persons and their Families Act. The New Zealand diversionary process responded to the over-representation of poor working class and Maori children in the juvenile justice system, and strengthened the role of the family and traditional family groups for Maori children.[12] The principle of restorative justice is also found in African models of justice reflected in the Sotho practice of the *lekhotla* , the aim of which is to restore what has been lost through an offence.

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8. Ibid.
9. Muntingh LM and Skelton A 'Diversion' (2004) Child *Manual for Judicial Officers* D8-D18.
10. Ibid.
11. Setlatjile D and Batley M 'Restorative Justice Principles and Implications for Practice' (2004) *Child Manual for Judicial Officers* H1-H12.
12. Sloth-Nielsen J 'Child Justice and Law Reform' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 420.

In this process the offender, family members and support people of the offender and the victim become involved, and decisions are taken by consensus.[13]

The theory of restorative justice translates into various restorative interventions. The Victim Offender Mediation, the Family-Group Conferences and the well-known Truth and Reconciliation Commission are examples of restorative justice.[14] According to Braithwaite, a leading Australian theorist on crime, restorative options should always be the first course of action that is chosen. If this fails, then deterrence should be applied and lastly custodial options.[15]

In South Africa the notion of a child justice system modelled on restorative justice principles was first proposed in 1994 in the White Paper for Social Welfare.[16] However, it was not until 1997 that acceptance of the idea of restorative justice began to appear in official policy documents. The Issue Paper,[17] Discussion Paper[18] and Report on Juvenile Justice[19] of the Law Commission proposed restorative justice for the new child justice system in South Africa.

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13. See note 1 above at 18-20.
14. Ibid.
15. Ibid.
16. Department of Welfare 'White Paper for Social Welfare' (1997).
17. South African Law Commission *Issue Paper No 9 on Juvenile Justice Project 106* (1997).
18. South African Law Commission *Discussion Paper No 79 on Juvenile Justice Project 106* (1998).
19. South African Law Commission *Report on Juvenile Justice Project 106* (2000). (www.wits.ac.za.salc/salc/html).

2.4 DIVERSION

In diversion, *prima facie* cases are referred away from the criminal justice system with or without conditions.[20] Diversion could further be described as the channelling of children away from the formal court procedure into reintegrative programmes.[21]

2.4.1 Aims of diversion

According to Muntingh and Skelton the aims of diversion may be summarised as follows:[22]

a. To encourage the child to accept responsibility for the harm he or she has caused to the complainant in committing the offence.

b. To promote the reintegration of the child into the community and his/her family.

c. To identity the underlying problems that motivate the juvenile to commit offences.

d. To prevent the child offender from obtaining a criminal record.

e. To provide education, and to rehabilitate the child offender.

f. To prevent the stigmatisation of the juvenile offender by preventing the process of formal court procedure.

g. To identify underlying problems and motivations for the offending behaviour.

h. To facilitate a simpler and speedier processing of cases.

i. To structure reunification.

(www.wits.ac.za.salc/salc/html).

20. Wood C 'Diversion in South Africa: A Review of policy and practice, 1990–2003' (2003) *Institute for Security Studies* 1-21.
21. See note 9 above D 9.
22. Ibid.

The effect of diversion is the promotion of the restorative justice philosophy. It encourages the child offender to be accountable for the harm caused by him or her. When action is taken against the child, the needs of the child are considered as well as the reintegration of the child into the community or family. Furthermore diversion provides an opportunity for the victim to express his views regarding the impact of the offence and encourage restitution to the victim. Diversion aims to reconcile the child and those who was affected by the harm caused.[23]

2.4.2 International Framework for Diversion

The United Nations Convention on the Rights of the Child has elevated diversion to a legal norm, and it has been binding on South Africa since its ratification. With regard to child offenders Article 40 3(b) of the Convention provides that '*Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected*'.[24]

Diversion is furthermore also addressed in the Beijing Rules. Rule 11 enunciates the following principles on diversion:[25]

a. Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in Rule 14.1.

23. Sloth-Nielson J 'Child Justice and law Reform' (2000) In Davel CJ (ed) *Introduction to child Law in South Africa* 388.
24. Article 40 3 (b) of the United Nations Convention on the Rights of the Child (1989) and Sloth-Nielsen J 'Child Justice and Law Reform' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 418.
25. Rule 11 of the Beijing Rules.

b. The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for the purpose in the respective legal system and also in accordance with the principles contained in these rules.

c. Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parent or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

d. In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.

The Beijing Rules provides guidelines on diversion. It ensures that diversion should be considered when dealing with a child offender. Furthermore it places an obligation on agencies, police and the prosecutor to take an informed decision when dealing with the child offender. It also promotes the development of programmes to meet the specific need of the child offender.

2.4.2 Development of diversion in South Africa

Since 1990 South Africa has not made a great deal of progress in the field of child justice and in the development of programmes for diversion.[26]

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26. See note 9 above at D12-D13.

In 1992 the National Institute for Crime and the Reintegration of Offenders (NICRO) began to introduce the process of diversion of children from the criminal justice system. The NICRO programmes are still being applied as the only diversion options. The state has done little to promote diversion programmes and has neglected its obligation in this regard.

2.4.3.1 The NICRO Programmes and Statistics of Referrals

NICRO provides the bulk of diversion services in South Africa. The services currently being offered are pre-trial community service, Youth Empowerment Schemes, Victim-Offender Mediation, Family Group Conferencing and a programme called '*the Journey*'.[27]

2.4.3.2 Pre-trial Community Service

When a child offender is charged with minor property-related offences the charges against the juvenile are withdrawn on condition that the child performs a certain number of hours community service. The number of hours range from 10 to 120. If the child fails to comply with the conditions of the community service, the prosecutor may reinstitute the charges.[28]

2.4.3.3 Youth Empowerment Scheme

This is a six-week life-skills course. A group of about 20 juveniles attend the course for six weeks one afternoon a week. The parents attend the first and last sessions. In this course

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27. Muntingh LM 'The Development of Diversion Options for Young Offenders' (1997) 12 *Institute for Security Studies* 1-11. (http://www.iss.co.za/Pubs?Monographs/No12/Muntingh.html).
28. Ibid.

conflict management, responsible decision-making and parent-child relationships are promoted and improved.[29]

2.4.3.4 Victim-Offender Mediation

This is a face-to-face meeting between the offender and the victim. The aim is to mediate an agreement between the two parties that will satisfy their needs. Restitution may be monetary, community service or attendance of a diversion programme. Mediation offers the victim and the child offender the opportunity to meet each other with the assistance of a trained mediator. They would discuss the crime and come to an agreement.[30]

2.4.3.5 Family Group Conference (FGC)

The aim of the FGC is to serve as an intervention and prevention measure to prevent further offending behaviour.[31] This option is more suitable for juvenile offenders who show a pattern of problematic behaviour. The child offender, the parents, or family of the offender, and a social worker meet. This programme is used for the diversion of criminal cases, and also for the protection and discipline of the child offender.

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29. Ibid.
30. Ibid.
31. Ibid.

2.4.3.6 The Journey

This entails a high-impact programme for high-risk child offenders who need long-term intervention. The programme is not for all youth, and careful selection is needed. Candidates need to have the emotional and mental capability to be able to compete in the programme and they should also be physically healthy. This programme is suitable for first or repeat offenders. The child is taken out of his or her community and put in the wilderness to deal with his or her childhood problems. The overall number of cases being diverted to NICRO programmes continues to increase. A total of 9 446 cases were referred for diversion in 1998/99 and in 1999/2000 the number increased to 9 984. In 2004 the number of children diverted was 15 060.[32] Muntingh gives the 1999-2000 diversion statistics for the different provinces as follows. (Table 2.1)[33]

Table 2.1: Proportional distribution of diversion cases (percentage) per province and number of children diverted in 2004[34]

Province	1998/99 %	1999/00 %	% change	Number/children diverted 2004
W Cape	32.0	24.8	-7.2	2 933
E Cape	18.6	16.3	-2.3	1 408
KZ Natal	19.2	22.1	2.9	3 194
Free State	6.0	5.8	-0.2	1 209
N Cape	4.9	5.4	0.5	602
Gauteng	13.4	19.6	6.2	4 167
Mpumalanga	2.6	2.4	-0.2	530
N West Prov	3.0	2.6	-0.7	421
Northern Prov	0.2	0.9	0.7	601

32. Smith A ' NICRO National Programme Manager Report, 2004' (2004).
33. Muntingh LM ' Sentence and diversion statistics 1999-2000' (2001) 3 *Article 40.* (http: www.communitylawcentre.org.za/children/2001art40/vol3.no3.stastistics.php).
34. Smith A ' NICRO National Manager Report' (2004).

It is clear from these statistics that diversion is not evenly used in all the provinces, as 69.2% of these were from only three provinces, namely the Western Cape, Eastern Cape and Kwa-Zulu Natal.[35] It remains a reason for concern that proportionally fewer cases are referred for diversion in the other provinces, especially when it is taken into account that 45% of the population resides in these four provinces.[36] The number of children diverted in 2004 shows an increase in Gauteng.

2.5 THE ROLE OF THE NATIONAL PROSECUTING AUTHORITY AND THE DEPARTMENT OF SOCIAL DEVELOPMENT

Diversion is sanctioned by section 6 of the Criminal Procedure Act 51, 1977 and may be used where the offence committed is minor in nature.[37] The role of the prosecutor is important when it comes to diversion. The decision as to whether to prosecute or divert lies with the Director of National Prosecution. Prosecutors are central to the administration of criminal justice in South Africa. They act as *dominus litis*, meaning they decide which cases to prosecute or withdraw. If the child offender does not comply with the condition of diversion, the prosecutor will reinstitute the prosecution. The office of the National Director of Public Prosecutions has issued policy directives regarding diversion that should be followed by prosecutors in South Africa.[38]

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35. Ibid.
36. Ibid.
37. Dissel A 'Alternative Sentencing in South Africa' (1997) *Centre for the study of Violence and Reconciliation* 1-4. (http://www.csvr.org.za.articles/artdiss2.htm).
38. Anderson AM 'Restorative Justice, the African Philosophy of Ubuntu and the Diversion of Criminal Prosecution' (undated) 1-12. (http://www.isrcl.org/Papers/anderson.pdf).

The Probation Services Amendment Act 35 of 2002 requires that a probation officer has to assess a child offender after being arrested and charged.[39] The probation officer will make recommendations to the prosecutor on whether to divert the case or to prosecute the child offender. Diversion has mostly been effected by the withdrawal of criminal charges by the prosecutors on condition that the juvenile offender completes any one of the NICRO programmes.

2.6 THE INTER-MINISTERIAL COMMITTEE ON YOUNG PEOPLE AT RISK

Proposals for legislative inclusion of diversion were first submitted in November 1997 when the Inter-Ministerial Committee on Young People at Risk (IMC) circulated its Interim Policy Recommendations for the transformation of the juvenile justice system.[40] This was the first document to formally acknowledge the limited availability of diversion programmes.

The IMC policy recommendations advocated for diversion to be provided at a range of levels. These levels started at a simple caution for lesser offences, and continued to more restrictive intensive programmes for the more serious offences.[41]The Project Committee produced an Issue Paper in May 1997, containing submissions on diversion.[42]

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39. Probation Services Amendment Act 35 of 2002.
40. Inter-Ministerial Committee on Young People at Risk *Interim Policy Proposals for the Transformation of the Child and Youth Care System* (1997) 40-47.
41. See note 12 above at 422.
42. South African Law Commission *Discussion Paper No 79 on Juvenile Justice Project 106* (1998).

Feedback was captured in the Discussion Paper released in December 1998, which included a draft version of the Bill.[43]

2.7 THE CHILD JUSTICE BILL

The drafting of the Child Justice Bill was central to the development and the formalisation of child justice in South Africa. One of the key objectives of the Bill was to promote the expanded use of diversion in a consistent and just manner.[44]

In the Bill diversion is defined as *the referral of cases of children alleged to have committed offences away from formal court procedures with or without conditions* .[45] According to Section 1(xii) of the Bill a diversion option means *a plan, programme or prescribed order with a specified content and of specified duration and includes an option which has been approved, in terms of the regulations to this Act, by the Office for Child Justice* .

The importance of diversion is reflected in the Bill. An entire chapter is devoted to the regulation of diversion. Sections 48 to 55 deal with the following: purposes of diversion and the minimum standards applicable to diversion, record keeping, offences qualifying for diversion, diversion options, Family Group Conference, Victim-Offender Mediation or other restorative justice processes, and the powers of prosecution.[46]

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43. See note 12 above at 392.
44. Institute for Security Studies 'Diversion in South Africa A review of policy and practice 1990-2003' *Issue Paper 79.* (www.wits.ac.za.salc/salc/htm).
45. Ibid.
46. Ibid.

The Bill states that diversion should only be initiated in cases where there is sufficient evidence to prosecute. However, if the decision has been taken to proceed with the trial, diversion has to be considered for all children over the age of 10 years. A child below 10 years is referred *via* a conference to diversion.[47]

2.7.1 Procedures

The mechanism and procedure provided for by the Bill to facilitate the referral of children into suitable diversion options are reflected in Figure 1.1.[48]

From the diagram it is clear that the proposed legislative procedures of compulsory assessment of a child will streamline the diversion of a juvenile offender s case. A probation officer will carry out the assessment within 48 hours of the juvenile s arrest.[49] The main goal of the assessment is to make recommendations on the appropriateness of diversion.[50]

The second phase is the introduction of a preliminary inquiry to increase the number of children considered for diversion. The Bill proposes that this inquiry should be presided over by a district magistrate. The purpose of the meeting is to ensure the possibility and appropriateness of diversion.[51]

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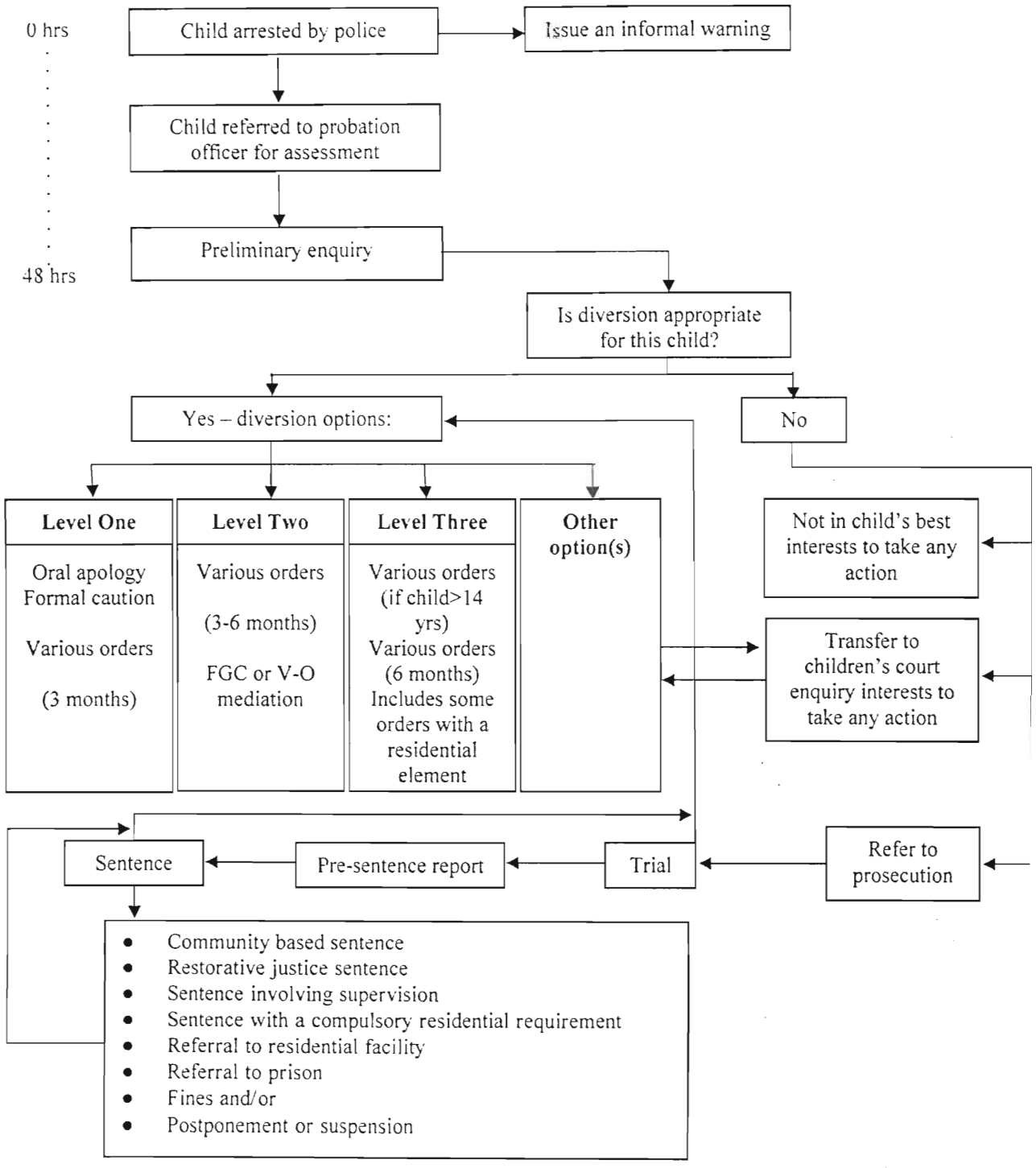
47. See note 37 above at 1-12. (http;//www.pmg.org.za/docs/2003/viewminute).
48. South African Law Commission *Report on Juvenile Justice Project 106* (2000). (http://sss.law.wits.ac.za/salc/report/project106.htm).
49. Gaglanetti J 'Update on the Child Justice Bill (2002) 4 *Article 40.* (http://www.law.wits.ac.za/salc/report/project106.htm).
50. See note 20 above at 5.
51. South African Law Commission *Summary of the Discussion Paper 79 Project 106* (1999) 27-28. (http://www.law.wits.ac.za/salc/report/project106.htm).

Figure 2.1: Procedure proposed by the Child Justice Bill for the referral of children for diversion



2.7.2 Diversion options

The Bill proposes furthermore an expanded range of diversion options that have been categorised into three levels, depending on the seriousness of the offence. Figure 2.2 indicates the diversion options available in the Bill.[52]

Table 2.2: Diversion options

Level one	Level Two	Level Three
Oral or written apology	Oral or written apology	Child to be under 14 years
Formal caution	Formal caution-with or without conditions	
Supervision or guidance 3 months	Supervision or guidance 6 months	
Reporting order 3 months	Reporting order 6 months	
Compulsory school attendance order 3 months	Compulsory school attendance order 6 months	
Family time order 3 months	Family time order 6 months	
Positive peer association order 3 months	Positive peer association order 6 months	
Good behaviour order 3 months	Good behaviour order 6 months	
Place prohibiting order 3 months	Place prohibiting order 6 months	
Counselling or therapy 3 months	Counselling or therapy 6 months	Referral to programme with a residential element 6 months
Vocational or educational centre placement order (max 5hrs/week) 3 months	Vocational or educational centre placement order (max 6hrs/week) 6 months	Vocational or educational centre placement order 6 months (max 35hrs/week)
Symbolic restitution	Community service(50 hrs) 6 months	Community service (250 hrs) 12 months
Restitution of specific object	Service or benefit or payment to an organisation	
	Family group- conference or victim offender mediation	
	Combination of any two of above options	Counselling or therapy in conjunction with any above

52. Woods C 'Diversion in South Africa: A review of policy and practice, 1990-2003' (2003) *Institute for Security Studies* 5-6.

Level one is the least onerous and includes oral apologies, formal caution and other orders that may not exceed three months. Level two includes a few additional restorative justice diversion options, namely Family Group Conferences and Victim-Offender Mediation. Level three describes orders for serious offences or for repeating offenders with a residential element. Level three applies only to a child offender who is older than 14 years.

During the parliamentary discussions of the Bill it was decided that children who committed certain schedule three offences would be excluded from diversion. These schedule three offences include murder or attempted murder, rape or attempted rape, robbery or attempted robbery where there are aggravating circumstances, robbery or attempted robbery that involves the taking of a motor vehicle, any offence related to the illicit possession of or trafficking of dependence producing drugs or any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments, as well as any offence relating to the possession of an automatic or semi-automatic firearm, explosives or armaments.[53]

Schedule 3 offences in the Bill rule that a child arrested for possession of, or trafficking in, illegal substances should be prosecuted. Substance abuse is, however a very prevalent offence amongst children. Juvenile offenders are arrested for possession of cannabis, tik and mandrax on a daily basis. As this is more of a social problem than criminal conduct, diversion should be seriously considered for this type of offence. However, general diversion for these children is seldom the correct option. They should rather be diverted to a

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53. See note 20 above at 7.

drug-specific rehabilitation programme to serve both as an intervention and a prevention measure.

2.7.3 Diversion orders

It is apparent that the Bill has moved away from the concept that diversion always involves referring a child to a specific programme, and provides for new diversion orders acknowledging the dignity and well-being of the child. The Bill insists that any diversion option that is considered should consist of a predetermined content and duration and that the diversion programme should be registered.[54]

a. Supervision and guidance order[55]

The supervision and guidance order involves placing a child offender under the supervision and guidance of a mentor (school teacher, parent, relative etc) or peer role model in order to monitor and to give guidance regarding the child s behaviour.

54. Ibid.
55. Woods C 'Diversion in South Africa: A Review of policy and practice, 1990-2003' (2003) *Institute for Security studies* 7.

b. Reporting order[56]

The reporting order requires a child to report to a specified person (police officer, school principal, or probation officer) at a time specified in order to enable the person to monitor the child offender s behaviour.

c. Compulsory school attendance order[57]

This order requires a child to attend school every day for a specified period of time. The child offender is to be monitored by a specified person (teacher, parent, relative).

d. Family time order[58]

This order requires a child to spend a specified number of hours with his/her family. Options such as attending church or helping with household chores may be specified in this order.

e. Positive peer association order[59]

This order requires a child to associate with persons who are able to improve the child s behaviour, for instance a sports group.

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56. Ibid.
57. Ibid.
58. Ibid.
59. Ibid.

f. Good behaviour order[60]

This order requires a child to abide by agreements between him and his/her family or to comply with a certain standard of behaviour, such as no drinking, or a specific time to arrive at home.

2.8 DIVERSION: RELEVANT CASE LAW

The first judicial reference to diversion came about in *S v D*.[61] This case involved four children who were charged for the possession of cannabis. An application was made for a special review on the grounds that some weeks earlier a substantially similar matter was diverted. The Cape High Court expressed its approval for the idea of diversion, but ruled that the prosecutor had the right to proceed with criminal charges against the children. The court held that there was no right to diversion, even where diversion had been decided upon previously in the same jurisdiction in relation to substantially similar matters.[62]

In *S v Z and Others*[63] Justice Erasmus cited with approval the guidelines on diversion issued by the Director of Public Prosecution and suggested that before the commencement of trials involving child offenders, the court should advance the referral of accused juveniles to diversion programmes in appropriate cases.

60. Ibid.
61. 1997 (2) SACR 673 (C).
62. Sloth-Nielsen J 'Juvenile Justice Review 1999-2000' (2001) 14 *South African Journal of Criminal Justice*. 385-403.
63. 1999 (1) SACR 427 (ECD).

In an unreported High Court decision in *M v The Senior Public Prosecutor Randburg and Another,*[64] two juvenile offenders were charged with shoplifting. One child was sent to diversion and the other child was prosecuted. The prosecutorial discretion was challenged in court. The High Court held that the discretion of the prosecutor had not been properly exercised. The court referred the matter back to the prosecutor to consider diversion. Deputy Judge President Fleming referred to the correctness of decisions not to prosecute because of the human potential of the child and the harm that prosecution could do to children who are immature. This case supports the idea that a pre-trial procedure should be held to consider whether diversion is appropriate, and to formulate the content of diversion as provided for in the Report and the draft Bill.

In *S v Jacobs*[65] the Judge, in reviewing a sentencing decision, referred to the desirability of legislation on assessment and diversion.

These cases suggested not only emerging judicial support for diversion as a matter of good policy, but, in addition in *S v Z*, to the desirability of active judicial participation in the furtherance of the ideal of diversion. It is clear from the case law that the courts realise the importance of diversion. The court went so far as to question the prosecutor s decision not to send a child offender for diversion. If children are not treated alike, reasons for adopting a different course of action may have to be furnished by prosecutors. Nevertheless the court accepted that the prosecutor as *dominus litis*, had the right to proceed with criminal charges against the child offender.

64. See note 62 above at 385-403. (www.SA.apc.org.users/clc/children/index/htm). Case 3284/00 (WDL) unreported.
65. 2000 (2) SACR 310 (C).

The underlying rationale for arriving at individual diversion decisions is rarely made public. Often it seems as though diversion comes about through corridor negotiations with attorneys or the parents of the child offender. The decision of the High Court in *M v The Senior Prosecutor Randburg and Another*[66] constitutes a further advance in the march towards formalising the diversion process in a legitimate process of the criminal proceedings involving the child offender.[67]

2.9 FEASIBILITY OF DIVERSION

According to Lukas Muntingh,[68] deputy national director of NICRO, diversion is not without its problems and pitfalls. Diversion programmes widen the net of the criminal justice system. Consequently more children will become part of the criminal justice system. This will lead to an increase in the caseloads of the courts. A second problem raised by Muntingh arises from the discretion of the different role players in the diversion process. The decision-making is left to individual role players. Decisions regarding the case to be diverted, the number of hours community service that should be rendered, and the evaluation of the child's performance are all taken by individual role players. Presently the expertise and knowledge of the decision-makers are of great concern. A third problem is that the current practice of diversion could impact on the child's human rights.

For instance, the child offender has to admit guilt before he or she may be considered for diversion. The child may then admit the offence just to be diverted. From society s

66. 3284/00 WDL unreported.
67. See note 9 above at D10-D18.
68. Ibid.

perspective, diversion may not express society s disapproval of the offence the child committed. The community may well feel that justice is failing them. Muntingh furthermore addresses the court s side: if the court is informed that the child has already been given the opportunity of diversion previously, the court might then assume that the child is appearing for more serious offences.

Sloth-Nielsen[69] expresses the opinion that the feasibility of diversion depends on the co-operation of the child. If the offender refuses to acknowledge some responsibility for the offence, the matter cannot be dealt with in a restorative justice process. Without the child s co-operation it will be very difficult to facilitate a meeting between the victim, and the offender. For this mediation process to be successful, the facilitator should be skilled and should be regarded as trustworthy by all parties. Furthermore, the community should be educated to understand the restorative justice process. The author, like Muntingh, mentions the aspect of the infringement on human rights through diversion.

The procedural rights inherent in a formal court hearing, the requirement that the State needs to prove the commission of the offence beyond reasonable doubt, and the privilege against self-incrimination are forfeited when the child offender agrees to diversion.[70] The diversion decision is not ordinarily subject to judicial scrutiny. The child may be coerced to acknowledge guilt in order to be diverted. Furthermore, the content of diversion programmes could give rise to allegations that children s rights have been infringed upon.[71]

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69. See note 9 above at D10-D18.
70. See note 27 above at 3-6.
71. See note 62 above at 385.
72. See note 12 above at 423-427.

Sloth Nielsen[72] supports the feasibility of the Bill. She argues that the Bill achieves four essential goals in relation to diversion. The Bill strengthens the referral process for diversion; it ensures that children are channelled into the most suitable diversion option; it provides for the statutory inclusion of procedures for restorative justice; and it regulates diversion to protect children s rights.

2.10 SUMMARY AND CONCLUSION

In this chapter different aspects relating to the concepts of restorative justice and diversion were discussed. The feasibility of implementing these concepts in the South African juvenile justice system was assessed. Restorative justice recognises that an injustice has occurred and that equity needs to be restored. This should be done through the promotion of tolerance, healing and understanding. To follow this approach it becomes necessary to consider options other than punitive measures for child offenders, and rather divert children away from the formal court procedure into re-integrative programmes.

The importance of diversion is recognised by the High Courts of South Africa. This is reflected in various reported and unreported cases. Recommendations following these court cases are, for instance, that the court should advance the referral of juveniles to diversion programmes, that a pre-trial procedure should be held to consider whether diversion is appropriate, and that legislation on assessment and diversion should be promulgated.

The South African juvenile justice system is at a crucial stage of development. The Draft Child Justice Bill is central to the development of the juvenile justice system. It is imperative that the South African youth is managed in a way that is caring and that promotes self-worth. Although diversion and restorative justice should go a long way towards achieving these objectives, neither of these is a cure-all. By the same token there are no guarantees that offenders will not re-offend.

CHAPTER 3

SOUTH AFRICAN SENTENCING POLICY AND PRACTICE

3.1 INTRODUCTION

The common law has long recognised youthfulness and immaturity as factors which play a mitigating role in sentencing.[1] A court will not punish an immature child in the same way as it would do an adult.

The South African courts have articulated several reasons for the rule that youthhfulness should serve to mitigate sentence.[2] First, tender age affects the consideration of the moral culpability of the juvenile offender. Already in 1922 in *S v Smith*[3] the desirability of reforming the child through education and rehabilitation was expressed. Justice Wessels stated that '*the State should not punish a child of tender years as a criminal and stamp him as such throughout his after life, but it should endeavour by taking him out of his surroundings to educate and uplift him and to make him gradually understand the difference between good conduct and bad conduct*'. Secondly, in *S v Lehnberg and Another,*[4] Justice Rumpff stated that the degree of development of the child, the life-skills of the child and the fact that a child can be easily in-

1. Sloth Nielson J 'Child Justice and Law Reform' (2000) In Davel CJ (ed) *Introduction to Child Law in South Africa* 383-461.
2. Ibid.
3. 1922 TPD 199.
4. 1975 (4) SA 553 (A).

fluenced were also factors that the court should take into consideration when deciding on sentence.

In the third instance, the age and maturity of the accused at the time of sentence is relevant when determining a sentence which will suit the needs of the individual child offender.[5] Justice Van Heerden, in *S v Kwalase*,[6] makes a distinction between the age of the child when he or she committed the offence and the age of the child at sentencing. In the *Kwalase* case the facts illustrated this distinction. The accused was convicted of an offence committed when he was 15 years old and was sentenced only when he attained the age of 17 years. This difference in age influenced the judge's motivation for sentence.

Fourthly, the rationale for the proposition that the sentence should fit the needs of the individual accused is illustrated in the often-cited case of *S v Jansen*.[7] In that case Justice Botha stated that: '*The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted personality being eventually returned to society*'. In *S v Mashasa en Ander*[8] the Court of Appeal also emphasised that when sentencing a child the inevitable negative effect of a very long term of imprisonment should be guarded against.

The aim of this chapter is to consider current South African sentencing policies and practices by the courts. This will be done against the background of the international standards. Current South Africa legislation will be analysed to determine what options are available for sentencing the juvenile offender. This will be followed by indicating how the South African

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5. See note 4 above at 561 A.
6. 2000 (2) SACR 135 (C).
7. 1975 (1) SA 425 (A) at 428 A.
8. 1991 (2) SACR 308 (A).

Constitution has influenced reported cases. The Juvenile Justice Bill will be discussed with reference to the available sentence options.[9]

3.2 INTERNATIONAL STANDARDS FOR THE SENTENCING OF CHILDREN AND REFLECTIONS ON THE SOUTH AFRICAN CONSTITUTION

The '*best interest of the child*' is the most important principle laid down in Article 3 of the United Nations Convention on the Rights of the Child (CRC).[10] Article 40(1) of the CRC[11] provides that the objective of sentencing is the promotion of the child's reintegration in society to assume a constructive role in his or her community. According to Article 40 (4)[12] a child's well-being is not merely a primary consideration, but has to be ensured.

In international law the main principles of sentencing are proportionality and the minimal use of the deprivation of liberty. In terms of Article 5(1) [13] of the CRC the aims of a juvenile justice system are to '*emphasise the well-being of the juvenile and ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence*'.

Rule 16 of the Beijing Rules[14] not only takes a child's developmental stage into consideration, but also emphasises the importance of considering the background of the juvenile offender

9. South African Law Commission *Issue Paper No 9 on Juvenile Justice Project 106* (1997).
10. Article 3 of the United Nations Convention on the Rights of the Child (1989).
11. Article 40 of the United Nations Convention on the Rights of the Child (1989).
12. Ibid.
13. Ibid.
14. Rule 16 of the Beijing Rules.

'*the background and circumstances in which the juvenile was living or the conditions under which the offence had been committed, shall be properly investigated so as to facilitate judicious adjudicating of the case by the competent authority*'.

It is, therefore, important that the court takes into consideration the background of the juvenile offender when deciding on an appropriate sentence.

Article 37(a) of the CRC[15] and Rule 17.1 of the Beijing Rule[16] refer to the principle of proportionality. These principles give clear guidelines that the sentence should be in proportion to the circumstances and gravity of the offence. In the stated Rule 17.1(a) the sentence '*shall always be in proportion to the circumstances and the gravity of the offence, but also to the circumstances and the needs of the juvenile as well as the needs of the society*'.

In South Africa the Constitution influences the punishment of the juvenile offender. The Constitution lays down given principles in accordance with international standards, which the courts now have to apply. Judges have to take the constitutional principles into consideration and may not solely apply the common law principles. Of special relevance to South-Africa is the international law principle that '*detention should be a matter of last resort, and when imposed, used for the shortest appropriate period of time*'. This provision is included in section 28(1)(g) of the Constitution.[17]

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15. Article 37 of the United Nations Convention on the Rights of the Child (1989) and Rule 17 of the Beijing Rules.
16. Rule 17 of the Beijing Rules.
17. King B J 'Juvenile Sentence' (2004) *Justice College Manual* 1-31 and section 28 of the Constitution of the Republic of South Africa Act 108 of 1996.

Furthermore section 39(1) of the Constitution[18] provides that a court, when interpreting the Bill of Rights, has to consider international law and may consider foreign law.

The duty imposed on the courts by the CRC is that detention has to be considered as a last resort. Therefore, the court has to consider other measures to deal with the child in conflict with the law.

3.3 CURRENT SOUTH AFRICAN LEGISLATION REFERRING TO SENTENCE OPTIONS FOR JUVENILE OFFENDERS

3.3.1 Sentence options

The Criminal Procedure Act 51 of 1977 provides for a range of alternative sentences other than imprisonment that may be imposed on offenders who are under the age of 18 years. The relevant sections of this Act will be discussed below.

3.3.1.1 Fine

In terms of section 290 imposing a fine on children under the age of 18 years is not an appropriate sentence unless the child is earning a salary. Few children earn a salary and fines are generally paid by the parents of the child. Consequently it is not the child being punished, but his or her parent.

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18. Constitution of the Republic of South Africa Act No 108 of 1996.

Furthermore, where a fine is set with an alternative of imprisonment, the concern is that poverty could cause a child to be imprisoned.[19]

3.3.1.2 Postponement of Sentence

Section 297(1) of the Act[20] refers to conditional and unconditional postponement of passing of sentence. Section 297(1)(a)(i) makes provision for the court to postpone the passing of sentence for a period not exceeding five years upon **conditions** as are available for the suspension of sentence. Section 297(1)(a)(ii) provides for the postponement of the sentence **unconditionally**, but the Court can call the child offender to appear before the expiration of the relevant period.

Section 297(1)(c) of the Act[21] provides that the court may, in its discretion, discharge a child with a caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction. The disadvantage of this stipulation is that, before the court can sentence a juvenile in terms of this section, the offender has to go through the court process where he or she will be charged, a hearing will follow and, if convicted, will have a criminal record that will harm and stigmatise the young offender.

Section 297(2) of the Act[22] provides that if the period of **conditional** postponement has expired and the court is at the end of the period satisfied that the conditional postponement

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19. Skelton A 'The Major sources of children's legal rights' *Children and the Law* (1998) 146-158. (http://www.ihr.org.za)
20. Criminal Procedure Act 51 of 1977.
21. Ibid.
22. Ibid.

has expired and the conditions have been kept, the accused shall be discharged without the passing of sentence and the discharge has the effect of an acquittal, except that the conviction is recorded as a previous conviction.

Section 297(3)[23] provides that if the period of **unconditional** postponement has expired and the accused had not been called before the court for the imposition of sentence, he or she would have been deemed to be discharged with a caution.

The type of punishment referred to in section 297 is particularly appropriate for cases of youth offenders. The court has the option of adding **conditions** for the postponement of the sentence and the juvenile offender may, for instance, be sent on a rehabilitation programme, life skills programme, or be placed under the supervision of a social worker. To determine an appropriate sentence the court has to be innovative and preventative, and rehabilitation should be a priority.

3.3.1.3 Minimum Period of Imprisonment

In terms of section 284 of the Criminal Procedure Act[24] the minimum period of imprisonment is not less than four days, unless the sentence is that the person concerned be detained until the rising of the court.

This sentence option is seldom used and the submission is made that it is outdated. Furthermore, child offenders will still have to stand trial, be convicted and will receive a sentence.

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23. Ibid.
24. Ibid.

3.3.1.4 Dealing with convicted Juveniles

Section 290 Act 51 of 1977[25] provides ways of dealing with convicted juveniles and states as follows:

1. Any court in which a person under the age of 18 years is convicted of any offence may, instead of imposing punishment upon him for that offence -
   a). order that he be placed under the supervision of a probation officer or a correctional official; or
   b). order that he be placed in the custody of any suitable person designated in the order; or
   c). deal with him both in terms of paragraphs (a) and (b); or
   d). order that he be sent to a reform school as defined in Section 1 of the Child Care Act, 1983, (Act 74 of 1983).

2). Any court which sentence a person under the age of 18 to a fine may, in addition to imposing such punishment, deal with him or her in terms of paragraphs (a), (b), (c) or (d) of Sub-section (1).

3). Any court in which a person over the age of 18 years but under the age of 21 years is convicted of any offence may, instead of imposing punishment upon him for that offence, order that he be placed under the supervision of a probation officer or a correctional official or that he be sent to a reform school as defined in Section 1 of the Child Care Act, 1983.

It is important to note that in this section two categories of juveniles are recognised, namely those under the age of 18 and those over the age of 18, but under the age of 21 years. The legislature clearly intended to create the legal basis for an order subjecting the juvenile offender to the obligatory control and custody of a probation officer.

The sentence referred to in section 290 is suitable where the child lacks parental control and commits a crime. This sentence affords the court the opportunity of establishing such control without bringing the juvenile into contact with negative elements. The problem with this sentence is the shortage of social workers, and the lack of control by social workers. The submission is made that the child offender who has been placed under the supervision of a social worker be given the opportunity to go on a life skills programme, anger management programme, drug rehabilitation programme or any other programme developed by the social workers to address the special needs of the child offender. This would constitute a potentially useful sentence option which allows for community involvement.

Section 290(d)[26] allows the court to send an accused under the age of 18 years to a reform school. Sentencing a child offender to a reform school is a severe punishment that should be considered carefully by the court. Generally a reform school is not a place for a first offender.[27] It is important that a report of a social worker be obtained before sending a child to a reform school. This type of sentence is available after a child offender has been convicted for any type of offence. The intention of the legislature was that this sentence should not be imposed for first offenders. In *S v M*[28] Justice Knoll held that '*committal to a reformatory ought only to be resorted to where a juvenile has shown clear criminal proclivities, such as by repeatedly committing offences, or by committing an offence of a grave character*'.

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25. Ibid.
26. Ibid at section 290 (d).
27. S v Z and Others SACR 1999 (1) 436 C.
28. 1998 (1) SACR 384 (C) at 386 D.

An order under section 290 shall lapse after the expiration of a period of two years after the date on which the order was made, or after the expiration of such shorter period as the court may determine at the time of making the order.[29] Before sending a child offender to a reform school the court has to consider the possible negative influence of the environment of such a school on the child. A second disadvantage of this sentence option is the lack of availability of space in reform schools. It often happens that a child, after being referred to a reform school, has to wait for up to six months or longer for admission. The practice is that the child is kept in custody pending removal to the reform school. Furthermore, the staff at reform schools needs special training to work with children with behavioural problems. The syllabi at reform schools need to be changed to meet the special needs of these children, and should include, for instance, life-skills development, anger management, image building, and substance abuse programmes.[30]

3.3.1.5 Correctional Supervision

The court may in terms of section 276(1)(h)[31] sentence a child offender to a period of correctional supervision. When imposing this sentence the court needs to have probation and correctional supervision officer's report.

This sentence is justified when the court is of the opinion that the offence justifies the imposition of imprisonment for a period not longer than three years with or without the option of a fine.

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29. Criminal Procedure Act 51 of 1977.
30. Dissel A 'Sentencing Options in South Africa' (1995) *Occasional Paper Series* 13.
31. Criminal Procedure Act 51 of 1977.

The sentence or correctional supervision is a community-based punishment which could include the following: placement under house arrest, performance of community service, participating in treatment programmes and the payment of victim compensation. In terms of this section the court has the power to impose conditions that the juvenile undergoes certain programmes, such as a life-skill, orientation or a drug programme.[32]

All the options referred to above are perhaps not really appropriate for child offenders. For instance, house arrest is a very demanding sentence for a young child.[33] Secondly, when community service is considered, it should be borne in mind that the age of the child offender is important to prevent child labour.

Problems related to the use of correctional supervision are the lack of community agencies to which offenders may be referred, and the shortage of sufficient and professional staff.[34] Correctional officials have difficulties in monitoring the probationers in rural areas.[35] This sentence is appropriate for a child offender if he or she is ordered to undergo certain programmes that could educate him or her, and may serve as prevention and intervention services.

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32. Dissel A 'Sentencing Options in South Africa' (1995) *Occasional Paper Series 2-95.* (http:// web.uct.ac.za/depts/sjrp/publicat/sentence.htm).
33. See note 19 above at 158.
34. See note 32 above at 13.
35. Dissel A and Mnyeni M 'Sentencing Options in South Africa' (1995) 13. (http://web.uct.ac.za/depts/sjrp/publicat/sentenc.htm).

3.3.1.6 Committal to a Treatment Centre

In terms of section 296 of the Act[36] the court may, in addition to or instead of any sentence, order the child to be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act of 1992, if the court is satisfied that the child is fit for treatment. The court may furthermore impose a suspended sentence and add a condition that the child has to undergo treatment at a treatment centre.[37] This form of sentence is appropriate for a child who has an addiction problem. Unfortunately the lack of institutions to accommodate the child offender limits the court's discretion in this regard. A further problem is that child offenders are placed with adults who may exert a negative influence on the child.

3.3.1.7 Referral to a Children's Court

Section 254, of the Criminal Procedure Act[38] stipulates that the court has the discretion to refer the juvenile offender to a children's court. Referral is appropriate when the child is found to be in '*need of care*' as defined in section 14 of the Child Care Act 74 of 1983. The order directing the conversion of the trial into a children's court enquiry may be issued before or after a conviction of the juvenile offender.[39]

When a case is converted to a children's court enquiry, the conviction falls away. It is important that the magistrate should obtain a probation officer's report before sentencing the

36. Criminal Procedure Act 51 of 1977.
37. Ibid at section 296.
38. Criminal Procedure Act 51 of 1977.
39. Ibid.

child offender. In the report the social worker may also recommend that the child be sent to the children's court for an enquiry.

The lack of social workers and the number of child offenders who need to be assessed every day make it difficult for social workers to obtain all the necessary information. Consequently a child offender who should be brought before the children's court, is brought before the criminal court. Therefore, it is important that the magistrate and the prosecutor are actively involved in investigating the possibility that the child offender might be a child '*in need of care*'.[40]

3.3.2 Minimum Sentences

In terms of Section 51 of the Criminal Procedure Act[41] certain minimum sentences are prescribed for various serious offences. If an offence that was committed falls into a certain scheduled offence, the court has to impose the minimum sentence for that offence, and this may even be imprisonment. However, the age of the child should be determined before applying the minimum sentence rule. Sub-section 6 of the Act[42] reads: '*The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question*'.

40. Ibid.
41. Criminal Law Amendment Act 105 of 1997.
42. Ibid.

In terms of Section 51(3)(b) of this Act the legislature draws a clear distinction in respect of the imposition of a sentence on a child who was 16 years of age or older, but under the age of 18 years at the time of the commission of the act which constituted the offence in question.[43]

The legislature forces the trial court to provide specific and conscious reasoning, and to motivate that special circumstances exist that justify the imposition of the minimum sentence on a child between 16 and 18 years of age.[44]

In *S v Nkosi*[45] the provisions of the Criminal Law Amendment Act 105 of 1997 were discussed and interpreted. The court stated that this should be interpreted through the prism of the Bill of Rights and in light of the values underlying the Constitution of the Republic of South Africa.[46] The Criminal Law Amendment Act differentiates between three classes of offenders, namely adults, children under the age of 16 and children who are between 16 and 18 years old at the time of the commission of the offence.

The court in Nkosi held that the Minimum Sentence Act[47] is not applicable to a child offender under the age of 18 years.[48] The court referred to the constitutional principle that in all matters concerning a child the '*best interest of the child is of paramount importance*'.[49] The court laid down the following principles that should apply in guiding a court's discretions on the suitability of an appropriate sentence for a child offender.[50]

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43. Ibid.
44. Ibid.
45. 2002 (1) SA 494 (WLD).
46. Ibid at 495 E.
47. Criminal Law Amendment Act 105 of 1997.
48. See note 45 above at 500 C-D.
49. Section 28 (2) of the Constitution of the Republic of South Africa Act 108 of 1996.
50. See note 45 above at 500 D 501 C.

'Wherever possible a sentence of imprisonment should be avoided, especially when the child is a first offender. Imprisonment for the child offender should be a measure of last resort, where no other sentence can be considered appropriate. When imprisonment is imposed it should be for the shortest possible period of time. When direct imprisonment is imposed, the court has to take into consideration the nature and gravity of the offence, the needs of society and the need and interest of the child offender. If possible judicial officers must impose a sentence that will promote the rehabilitation and reintegration of the child offender into his or her family and community. Life imprisonment may only be considered in exceptional circumstances where the child offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.'

In *S v Daniels and Others*[51] an unreported judgement delivered in May 2001 in the Cape High Court, Justice Griessel pointed out that the provisions of the Minimum Sentence Act did not apply to a child below the age of 16 years at the time that he or she committed the offence. It was common cause between the State and the defence in this case that the provisions of section 51(3)(b)[52] were not applicable to the accused who was aged between 16 and 18 years.[53] However, in another unreported judgement, *S v Blaauw,*[54] delivered on 2 May 2001, Cape High Court judge, Justice van Heerden, discussed the international instruments and held that detention should be a measure of last resort. The court held that the imposition of prescribed minimum sentences upon children aged below 18 years would offend the constitutional principle that detention should be a measure of last resort, because minimum sentences imply the use of imprisonment as a first resort. Judicial officers were permitted to

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51. Unreported May 2001 RC 75/01.
52. Criminal Law Amendment Act 105 of 1997.
53. Sloth Nielsen J 'Minimum Sentence for Juveniles Cut Down to Size' (2001) 21. *South African Law Journal* 1-12.
54. Unreported May 2001 SS 159/2000.

deviate from the prescribed minimum sentence if the court was satisfied that there were substantial and compelling circumstances for doing so.[55]

A court is, therefore, free to apply the usual sentencing criteria in deciding on an appropriate sentence for a child between 16 and 18 years old. The prescribed sentence may be imposed by the court if the circumstances of the case justify it. These circumstances would have to be exceptional; because the courts would then sentence the child offender as if he or she were an adult.

3.4 INFLUENCE OF THE CONSTITUTION ON REPORTED CASES: SENTENCE AND PRE-SENTENCE REPORTS

After the adoption of the Constitution new standards regarding sentences for juvenile offenders were laid down by the Cape High Court. In S *v Z and Others*[56] reference was made to the case of children under the age of 18 who were convicted of housebreaking and theft. The magistrate's court had sentenced the children to a suspended term of imprisonment. Justice Erasmus proceeded to investigate the conditions under which children served their sentences of imprisonment. The judge visited the St Alban Prison in the Eastern Cape where most juveniles were held. His observations included the following:

a. There were opportunities for children to mingle with adults.

b. Persons clearly older than 20 years were present in a cell supposedly holding juveniles.

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55. See note 45 above at 495 A.
56. 1999 (1) SACR 427 (ECD).

c. Not all children were attending prison-school for a variety of reasons, for instance, pupils could only be admitted to school at the beginning of the school year, implying that it was seldom an option for those serving short-term sentences.

d. Prisoners were mostly kept unoccupied in the cells.

The case gave rise to three subsidiary rules that should guide the exercise of judicial discretion when imposing a sentence of imprisonment.[57] Firstly, the younger the child offender, the more inappropriate the application of imprisonment. Secondly, imprisonment is especially inappropriate where the child offender is a first offender; and thirdly, imprisonment is seldom appropriate in cases involving a juvenile offender. The court held further that when direct imprisonment would not be an appropriate sentence, then neither would a suspended term of imprisonment be appropriate.[58] A child offender who commits an offence for the first time should not be sentenced to direct imprisonment, and direct imprisonment is consequently inappropriate. Short-term imprisonment is also rarely appropriate for first offenders.[59] In this decision the judge acknowledged the importance of inter-sectoral collaboration between the different departments to ensure an effective juvenile justice system.[60] The constitutional principle was applied that the child should not be sentenced to prison, but, if appropriate, for the shortest possible time.[61]

In *S v Nkosi*,[62] the court also laid down principles to give guidance when deciding on the suitability of an appropriate sentence for a child offender:[63]

57. See note 56 above at 429 A.
58. Ibid.
59. Ibid.
60. See note 54 above at 429 B.
61. Section 28 (1)(g) of the Constitution of the Republic of South Africa Act 108 of 1996.
62. 2002 (1) SA 494 (WLD).
63. See note 62 above at 495 A.

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

b. Imprisonment should be considered as a measure of last resort and where no other sentence could be considered appropriate.

c. Where imprisonment is considered appropriate, it should be for the shortest possible period, and also considering the nature and gravity of the offence and the needs of society, as well as the particular needs and interest of the child offender.

d. If possible, the judicial officer should structure the punishment in such a way to promote rehabilitation and reintegration of the child concerned into her or his family or community.

e. The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.

In the more recent case of *S v Phulwane and Others,*[64] Justice Bosielo recognised and acknowledged the principle that the sentence of a juvenile should fit the needs and the interests of the particular juvenile offender. Furthermore, the court held that youthful offenders should be sentenced to ensure their rehabilitation and integration with their family and community.

The court acknowledged the constitutional principle that the best interest of the child is of paramount importance.[65]

64. 2003 (1) SACR 631 (T).
65. See note 64 above at 634 F.

A number of court cases have emphasised the importance of a pre-sentence report containing the background information of the accused. The desirability of pre-sentence reports was referred to in the earlier case of S *v H.*[66]

In that case the court set out the procedure that ought to be followed by the courts prior to sentencing a juvenile offender, particularly where a probation officer is called to:

a. '*Ensure the presence of the accused's parent or mother of the juvenile.*

b. *Ascertain from the probation officer the following: What services and supervision can be afforded to the accused within his or her present environment to provide him/her with the necessary guidance and discipline he/she may need to boost his/her confidence; to what extent such services and supervision are likely to prove beneficial to the accused; what facilities exist at a reformatory for catering for the particular needs of the accused; what negative influences are present at a reformatory and what role such negative influences are likely to play in the case of the accused.*

c. *Allow the parent or parents of the accused the opportunity of questioning the probation officer in relation to the investigations and recommendations.*

d. *Afford the parent or parents of the accused the opportunity of giving or leading evidence relative to the recommendations of the probation officer.*

e. *Call for such further evidence or investigation, as the court considers necessary to arrive at a proper sentence.*

f. *Consider the appropriate punishment to be imposed in the light of all the circumstances, bearing in mind that to send an accused to a reform school is a*

66. 1978 (4) SA 385 (E).

drastic measure which should not lightly be embarked upon, and is generally undesirable in the case of a first offender'.

Furthermore, in *S v Petersen*[67] confirmation was given at the highest level, the Appeal Court, that no term of imprisonment may be imposed on a person who had committed an offence whilst under the age of 18 before a pre-sentence report was obtained.

This principle was confirmed in *S v M and Others*,[68] where the court emphasised the importance of obtaining a probation officer's report before sentencing a juvenile offender. The need for a pre-sentence report, even where the accused was over the age of 18 years at the time of commission of the offence, was a further step towards the recognition by the court in that the court should be well informed before sentencing a child offender.

In another recent case, *S v Cloete and Others*,[69] the court gave guidance as to what background information should be placed before the court in the pre-sentence report, and reiterated the importance of a pre-sentence report. The court held that, the younger the child, the more important it is to obtain background information such as the education, intelligence and general mental state of the child before sentence is imposed. Secondly, depending on the circumstances of the case, a probation officer's report should be requested for all juvenile offenders under the age of 18 years, and, thirdly, it might be necessary to obtain a probation officer's report in cases of an offender who is 18 years old, or even older than 18 years of age. Lastly, courts should consider other factors, such as the nature of the offence, previous convictions and the period between the commitment of the offence and the trial.

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67. 2000 (1) SACR 16 (SCA).
68. 2003 (2) SACR 212 (T).
69. 2003 (2) SACR 489 (O).

3.5 PROVISIONS FOR SENTENCING IN THE CHILD JUSTICE BILL[70]

The sentencing framework of the Bill rests on community-based sentences and sentences with a residential element.[71] Community-based sentences refer explicitly to the diversion options set out in Clause 87. The Bill also provides for supervision and guidance orders which may be imposed on a child offender for a period of up to three years. The court may impose level three diversion options as a form of sentence.[72] After the conviction of a juvenile offender the court is also empowered to refer the matter to a Family Group Conference (FGC) or another restorative justice process.[73] The court may use the recommendations emanating from the FGC as a guideline in formulating an appropriate sentence. However, Clause 88(4) of the Bill states that, where the sentence imposed differs in a material respect from the sentence agreement by the participants during the FGC, reasons for deviating from the sentence has to be noted by the court.

Another form of a community-based sentence is provided for in Clause 92 of the Bill, namely correctional supervision, which may be imposed on a child offender of 14 years or older. The Bill also provides for the suspension and the postponement of sentences. However, the conditions upon which the passing of sentence may be postponed or suspended are linked to the different diversion options available in the Bill.[74] Furthermore, the Bill states in Clause 93, that a court may not sentence a child offender to pay a fine.[75]

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70. South African Law Commission (SALC) *Issue Paper* (1999) and Bill.
71. See note 1 above at 452.
72. Clause 87 of the South African Law Commission (SALC) *Issue Paper(* 1999).
73. See note 1 above at 452.
74. See note 1 above at 452-453.
75. See note 1 above at 454.

Residential sentences consist of prison sentences for juvenile offenders. However, the Bill states that no sentence of imprisonment may be imposed on a juvenile offender unless as a first step the presiding officer is satisfied that such sentence is justified by the seriousness of the offence; secondly, the protection of the community justifies direct imprisonment; and lastly the severity of the impact of the offender on the victim justifies a residential sentence.

The Bill gives the concrete framework that detention should be used as a matter of last resort.[76] If the child has previously failed to respond to a non-residential sentence, a residential sentence may be imposed.[77] Prison sentences may only be imposed if the following factors are present: the child must have been 14 years of age or older at the time he committed the offence; there have to be '*substantial and compelling*' reasons for imposing a sentence of imprisonment, either because the child has been convicted of an offence which is serious or violent or because the child failed previously to respond to alternative sentences.[78] However, no imprisonment may be imposed in respect of an offence listed in Schedule 1 of the Bill and no sentence may be imposed as an alternative to any other sentence. [79]A child may be sent to a reform school for a period of not less than six months, and not longer than two years.[80]

76. See note 1 above at 453-454.
77. Ibid.
78. Ibid.
79. Ibid.
80. Ibid.

3.6 CONCLUSION

In Chapter Three the current South African sentencing policy and practice by the courts was described against the background of the international standards. Current South African legislation, namely the Criminal Procedure Act 51 of 1977, provides for a range of alternative sentences other than imprisonment that may be imposed upon offenders who are under the age of 18 years, and section 51 of Act[81] refers to certain minimum sentences. This was followed by a discussion indicating how the operation of the South African Constitution had influenced judicial decisions. In the cases that were discussed, it was evident that the court has acknowledged the international treaties that were signed and that the best interest of the child was a paramount consideration. Available sentence options as provided for in the Juvenile Justice Bill were also referred to.

From the discussion in this chapter it is clear that even before the adoption of the Constitution, the juvenile offender was treated differently by the courts. The courts recognise the young offender's special needs and youthfulness. Immaturity has also been recognised as a mitigating factor by the courts.

It could thus be concluded that development is indeed taking place in the South African youth justice system. It remains important, however, to bear in mind that the South African youth should be managed in a way that is caring and promotes self-worth. One way of doing this is by following restorative justice principles. Intervention as a means of prevention of crime, as opposed to retributive ways of punishing, should be the guiding principle.

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81. Criminal Law Amendment Act 105 of 1997.

CHAPTER 4

DISCUSSION AND CONCLUSIONS

4.1 INTRODUCTION

The aim of this chapter is to provide a final reflection on and some conclusions regarding:

a. the international instruments for the protection of a child in conflict with the law;

b. the concept of diversion and restorative justice and its implementation in the Juvenile Justice Bill; and

c. the South African sentencing policy and practice.

4.2 THE INTERNATIONAL INSTRUMENTS

The dissertation was introduced with a discussion of the international instruments, namely the African Children s Charter, the United Nations Convention on the Rights of the Child (CRC), and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the so-called Beijing rules.) The reflection of the international principles in the South African Constitution was pointed out with an overview of the Bill of Rights in section 28 of the Constitution. The first chapter was concluded by a short discussion of the Child Justice Bill.

4.2.1 The African Children's Charter[1]

The African Children s Charter provides specific protection for children living in Africa. It addresses specifically the situation of children living under problems prevalent in African society, and problems emanating from the socio-economic conditions in this continent[2]. The Charter has three anchoring principles, namely the best interest of the child, non-discrimination, and primacy over harmful cultural practices.[3] The best interest of the child is the one principle that is also reflected in the other international instruments, the South African Constitution and the Child Justice Bill.

The Charter requires that a child offender be entitled to *special treatment* . The child s sense of dignity and worth should be protected. It states that a criminal case against a child should be determined *as speedily as possible* .[4] Furthermore, the Charter specifically provides that the rehabilitation of the child should be the essential aim of treatment during the trial and also after conviction.[5] It also guarantees every child the right to be afforded legal representation.[6]

However, the Charter has a number of weaknesses in relating to juvenile justice.[7]

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1. The African Children Charter.
2. Viljoen, F 'The African Charter on the Rights and Welfare of the Child' (2000) In CJ Davel (ed) *Introduction to Child Law in South Africa* 218.
3. See note 2 above at 219.
4. Article 17 (2)(c)(iv) and Art 40(2)(b)(iii) of the CRC uses the phrase 'without delay'.
5. Article 17(3) of the African Children's Charter.
6. Article 172 (c) of the African Children's Charter.
7. Chriwa DN 'The merits of the African Charter on the Rights and Welfare of the Child' (2000) *The International Journal of Children's Rights* 10 (2) 157-177.

First, it grants the court the discretion to prohibit the press and the public from the trial.[8] Therefore the court still has a discretion to allow press releases of a case involving a juvenile offender. Secondly, it does not provide for alternative measures of punishment in that there are no provisions declaring that imprisonment should be a measure of last resort and for the shortest period of time. Lastly, the Charter does not incorporate all rights contained in the administration of justice, namely the right against self-incrimination, punishment, and the right of a child victim to be compensated for a miscarriage of justice.[9]

Fortunately the weaknesses in the Charter are cured in that all African states have ratified the United Nations Convention on the Rights of the Child and are thus bound by the provisions of that instrument.

4.2.2 The United Nations Convention on the Rights of the Child (CRC)[10]

The CRC is the most important and comprehensive international instrument dealing with the rights of the child.[11] By ratification of the CRC, South Africa has taken on an obligation under international law to give effect to its provision in domestic law. The three principles of the CRC safeguard the child who is in conflict with the law.[12] These are the right not to be detained except as a measure of last resort, and if detained, for the shortest appropriate period of time, secondly the recognition of the desirability of diversion and lastly the requirement that reintegration of the child into society should be a primary consideration. More

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8. Article 17 2 (c) of the African Children's Charter.
9 See note 7 above at 167.
10 The United Nations Convention on the Rights of the Child 1989.
11. Van Bueren G 'The United Nations Convention on the Rights of the Child: An Evolutionary Revolution' (2000) in CJ Davel (ed) *Introduction to Child Law in South Africa* 202-205.
12. Hamilton C 'Implementing children's rights in a transitional society' (1999) In Davel CJ (ed) *Children's Right in a Transitional Society* 19. and Article 3 of the CRC.

specifically, Article 37(a) of the CRC states that *"no child shall be subjected to torture or other cruel inhuman or degrading treatment or punishment"*.[13] This article of the CRC has a significant influence in formalising future legislation and in court decisions dealing with a child in conflict with the law.[14] First, the CRC stipulates that neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by a person below 18 years of age; secondly, no child shall be deprived of his or her liberty unlawfully or arbitrarily; thirdly, the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period; fourthly, every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance.[15] The CRC goes further in stipulating that a child has the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority.[16] Lastly, the child has the right to a prompt decision on any action where the child is involved.[17]

In the history of acknowledging the necessity of the protection of children, the acceptance of the CRC by the global community of nations was a watershed.[18] The CRC has become a very important instrument to take into consideration when dealing with a child in conflict with the law. The courts often reflect the standards laid down by these instruments in their judgements. Consequently it has been interwoven in the application of the law. It has furthermore become the benchmark for the new Juvenile Justice Bill. Unfortunately many presiding officers in the courts are not yet familiar with these principles. Much more training and education is needed

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13. Article 37 (a) of the Convention on the Rights of the Child (CRC) 1989.
14. See note 7 above at 158.
15. See note 7 above at 166.
16. See note 7 above at 166-177.
17. Ibid.
18. Freeman M A and Veerman P (eds) 1992 *The Ideologies of Children's Rights* London 1-5.

to empower judges and magistrates in this regard. It is, however not only the officials who need to be empowered. According to Freeman the Convention is a beginning and not an end to the quest for the development of regulations for the protection of children. He is of the opinion that one needs to look beyond conventions and rather towards the empowerment of children.[19]

4.2.3 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)[20]

The Beijing Rules have served as guiding principles by which juvenile justice should be administered by the countries that signed this convention.[21] Rule 5 of the Beijing Rules asserts that the aim of the juvenile justice system is to promote and ensure the well-being of the juvenile. This means that the well-being of the child should be emphasised in legal systems that follow the criminal court model, thus avoiding mere punitive sanctions. The second objective of the Beijing Rules is "proportionality," referring to the consideration of the gravity of the offence in relation to the personal circumstances of the child offender.[22] Rule 16 stipulates that, in all cases except minor offences, social enquiry reports detailing the background and circumstances of the juvenile should be submitted before sentence. Rule 17 ensures that there is no deprivation of the child's liberty without careful consideration. Deprivation of liberty is permitted only when there is no other appropriate response.[23]

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19. Ibid.
20. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).
21. National Report of the United Nations Minimum Standard 30. http://www.austlii.edu/au/au/special/rsjproject/rsjlibrary/rciadic/national/vol4 79.html.
22. Ibid.
23. Rule 17 of the Beijing Rules.

4.2.4 Comparison of the African Charter, the CRC and the Beijing Rules

When the African Charter and the CRC are compared, the following becomes apparent:

a. The African Charter takes a more collective approach and blends the child's rights with those of the community and family, while the CRC promotes a more individualised approach to the rights of the child. [24]

b. The African Charter follows the CRC in codifying the 'best interest of the child principle.' However, the Charter goes a step further by stating that the best interest of the child needs to be the 'the primary consideration' in all actions where the child is involved. [25]

The three international instruments have in common the following principles referring to juvenile justice:[26]

a. The best interest of the child principle, meaning that "*decisions shall be taken on the principle of non-discrimination and in the best in interest of the child.*"[27]

b. The primary aim of justice is rehabilitation and re-integration of the child into society.

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24. See note 7 above at 160.
25. Chirwa D M ' The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) *The International Journal of Children's Rights* (10) (2) 136-157.
26. Tubeh A 'The best interest of the child' *Amnesty International* 1998. http://web.amnesty.org/library/Index/ENGACT760061/1998?open&of=Eng.364.
27. Ibid.

c. If a child is detained he or she shall have contact with his or her family. A child offender should be detained separately from adults and has to be treated with respect.

d. A separate juvenile justice system should be established apart from the system for adult offenders.

e. Children have the right to prompt decisions on their case.

f. Cruel, inhuman or degrading treatment, including corporal punishment, capital punishment and life imprisonment without the possibility of release are prohibited.

4.2.5 The South African Constitution Act 108 of 1996

The South African Constitution provides a framework for the protection of children's rights (Bill of Rights). As such it could be set as an international example to which other countries could refer.[28] Legislation has to be compared and measured against the Bill of Rights. The Constitution is important for the implementation of children's rights in that it regulates the relationship between international law and South African law. The children's rights clause of the South African Constitution states in section 28(1)(g) that every child has the right *"not to be detained except as a measure of last resort and, in addition to the right the child enjoys under section 12 and 35, the child may be detained only for the shortest possible appropriate period of time."*[29]

28. Bekink B and Brand D ' Constitutional Protection of Children' (2000) In CJ Davel (ed) *Introduction to Child Law in South Africa*' 195.
29. Section 28(1)(g) of the Constitution of the Republic of South Africa 108 of 1996.

The similarities between section 28 of the South African Constitution and the principles of the international instruments are clear:

a. The *'best interest of the child'* principle is reflected in all three international instruments and the Constitution as a guiding principle for decisions;
b. the juvenile justice system must function separately from that of adult offenders;
c. the child's right not to be detained except as a measure of last resort;
d. the child's right to legal representation;
e. the child's right to a prompt decision about his/her future;
f. prohibition of cruel, inhuman or degrading treatment.

4.2.6 The Child Justice Bill

Because of the struggle to achieve basic human rights for all people in South Africa, the focus on the need for a fair and equitable juvenile justice system emerged later than in many other countries. Currently South Africa is in the process of reforming its juvenile justice system. The new Juvenile Justice Bill is centred on the development of a new juvenile justice system. The Bill reflects all the important principles of the African Charter, the CRC, the Bill of Rights and the principles of the South African Constitution. The aim of the Bill is to create a separate criminal justice procedure for children and to provide mechanisms to ensure that the child who is in conflict with the law is protected.

The key changes to our current juvenile justice system as reflected in the Bill are the following:[30]

a. compulsory assessment of a child by a probation officer as soon after the arrest of the child as possible;
b. a preliminary enquiry to ensure that every effort is made to deal with the child in the most appropriate way;
c. child justice courts have to adjudicate the cases of child offenders and address the needs of children;
d. diversion as an option for channelling a child away from formal court proceedings;
e. compulsory legal representation for children.

4.3 DIVERSION AND RESTORATIVE JUSTICE

In chapter two the concept of restorative justice and diversion was discussed. Both the CRC and the Beijing Rules have created frameworks for diversion. Article 40(3)(b) of the CRC elevated diversion to a legal norm. Rule 11 of the Beijing Rules contains the principle of diversion, namely that diversion should be considered as opposed to a formal trial. It also states that the different role players in decision making in children's cases should be empowered to make informed decisions on diversion, the juvenile should give consent to diversion, and community programmes should be developed.

30. Sloth Nielsen J 'Child Justice and Law Reform' (2000) In CJ Davel (ed) *Introduction to Child Law in South Africa* 415-456.

The development of diversion in South Africa could be traced back to 1992 when the National Institute for Crime and Reintegration of Offenders (NICRO) introduced the process of diversion.[31] This institution provides the bulk of diversion services in South Africa, such as youth empowerment schemes, victim offender mediation, family group conferencing, and a programme called "The Journey." To date NICRO is the only service provider for diversion. NICRO is, however, not able to deal with the vast number of child cases. Consequently the courts do not refer most juveniles for diversion. This practice contradicts the ideal of the protection of the child's rights as visualised by the Bill of Rights. There is thus a clear need for more such institutions to be established. Services of these institutions should then be well co-ordinated and regulations should be put in place to control these services.

The South African juvenile justice system is at a crucial stage of development. It is vital that our youth should be managed in a way that is caring and that promotes self-worth. A way of doing this is by following the restorative justice principles as opposed to retributive ways of punishing.

Authors on the subject are generally in agreement that the introduction of diversion by the Bill is an improvement of child justice in South Africa. As the Bill limits the discretion regarding diversion, ways and means will have to be devised to make it work. In this respect the following aspects also need to be addressed, namely:

a. specialised training should be given to the various role players, including magistrates, prosecutors, social workers, law enforcement officers and NGOs;

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31. See note 30 above at 421.

b. the content and appropriateness of programmes that have an influence on the success of diversion should be investigated and the success measured in field studies;

c. as boys and girls may not necessarily react in the same fashion to a specific programme, programmes should be developed to meet gender specific needs;

d. drug specific programmes for possession of or trafficking in illegal substances should be developed and a child offender should be diverted when arrested for this offence. The National Drug Master Plan that indicated that the use of illegal substances leads to other offences, such as housebreaking, robbery and theft; underscores the desirability of such a programme; [32]

e. both human and financial resources should be made available to develop and implement the different diversion options.

4.3 THE SOUTH AFRICAN SENTENCING POLICY AND PRACTICE

The South African Constitution is a reflection of international standards for the sentencing of children. The principle of the CRC that *"detention should be a matter of last resort, and when imposed, used for the shortest appropriate period of time"* was included in Section 28(1)(g) of the Constitution. Another important principle, namely *"the best interest of the child"* was given effect to in reported case law.[33]

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32. National Drug Master Plan was prepared by the Drug advisory Board at the request of the Minister for Welfare and Population Development in February 1999. http://www.info.gov.za/otherdocs/1999/drugplan.pdf.
33. Section 28 of the Constitution of the Republic of South Africa Act 108 of 1996.

Currently the Criminal Procedure Act 51 of 1977 deals with convicted juvenile offenders, and provides for a range of sentences, namely postponement of sentence, conditionally or unconditionally, suspension of sentence, placement of the child under supervision of a social worker, correctional supervision or referral of the child offender to the children's court. Section 290 of the Act provides options to deal with a child under the age of 18 years. These options include the placement of the child under the supervision of a probation officer, the placement of the child in the custody of any suitable person, or the referral of a child to reform school. Currently the court may also impose correctional supervision. A child can be ordered to be detained at a treatment centre in terms of the Drug Dependency Act of 1992. The Court is empowered with the discretion to refer the juvenile offender to a Children's Court when the child is found to be *"in need of care."* [34]

The Criminal Law Amendment Act 105 of 1997 prescribes certain minimum sentences for various serious offences. However, the minimum sentence stipulation is not applicable to children under the age of 18 years. The legislator acknowledges further that a child who was between 16 and 18 years old when the crime was committed should be treated differently.[35]

The new standards for juvenile sentences after the adoption of the Constitution were referred to in *S v Z and Others.*[36] The court held that when direct imprisonment would not be an appropriate sentence, then neither would a suspended term of imprisonment be appropriate. A child offender who commits an offence for the first time should not be sentenced to direct imprisonment, and direct imprisonment is inappropriate.[37]

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34. Section 254 of the Criminal Procedure Act 51 of 1977.
35. Criminal Law Amendment Act 105 of 1977 and S v Nkosi 2002 (1) SA 494 (W).
36. 1999 (1) SACR 427 (ECD).
37. See note 36 above at 429.

In the cases of *S v Nkosi*[38], *S v Phulwane*[39], and *S v Petersen*[40] the judges made reference to the international and constitutional principles when dealing with juvenile offenders. The court in these cases acknowledged the principle that the 'best interest of the child' is of paramount importance. In *S v Cloete and Others*[41] the court gave guidance as to the importance of the pre-sentence reports and what information should be provided to enable the court to come to an appropriate sentence.

The primary aim of justice is the rehabilitation and re-integration of the child into society. The Bill furthermore protects a child from cruel, inhuman or degrading treatment, capital punishment and life imprisonment. The Bill also creates a separate juvenile justice system.

4.5 CONCLUSION

Much development in juvenile justice has taken place since South Africa ratified the international treaties. The Constitution of South Africa provides a true reflection of accepted international human rights standards. Central to the protection of the child is the Bill of Rights, which provides powerful protection for children in conflict with the law. When section 28 of the Constitution is compared with international standards it may be concluded that it is a true reflection of the intention of the international standards to protect a child in conflict with the law. The principles of the international instruments are acknowledged by the South African courts when sentencing a juvenile offender. Furthermore, diversion, as an intervention option, is enforced and regulated through the

38. 2002 (1) SACR 135 (W).
39. 2003 (1) SACR 631 (T).
40. 2000 (1) SACR 16 (SCA).
41. 2003 (2) SACR 489 (O).

new Juvenile Justice Bill. Juvenile sentence and intervention options in South Africa are thus now in line with the international standards. The concern is, however, the lack of knowledge of many presiding officers in acknowledging these principles in their judgements. It is important that judicial officers should be educated to take an informed decision when dealing with the juvenile offender. Furthermore, the lack of resources for the proper implementation of these principles creates a problem. Financial resources and manpower should be budgeted for and allocated to ensure the proper development and administration of juvenile justice in South Africa.

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