

MAKING JUVENILE JUSTICE INSTRUMENTS “REAL” THROUGH THE COURTS: THREE SOUTH AFRICAN CASE STUDIES

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I. INTRODUCTION

A. The Relevant International Norms and Standards for Juvenile Justice

1. UN Convention on the Rights of the Child

In international law there are established principles that guide juvenile justice. The UN Convention on the Rights of the Child (CRC) contains two important articles relating to child offenders. Article 40 describes a system that treats a child in a manner consistent with the promotion of the child’s dignity and worth, which reinforces the child’s respect for others, and promotes the desirability of children being reintegrated and assuming a constructive role in society. Article 40(2) sets out a child’s fair trial rights, and Article 40(2) requires states parties to establish special laws, procedures, authorities and institutions for children who commit crimes. The need to set a minimum age at not too low a level, to use alternative measures rather than judicial proceedings, and to have an array of dispositions are all important features of such systems.

Article 37 of the CRC is of particular importance to juvenile justice – it requires states parties to ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons under the age of 18 years. The principle of detention as a measure of last resort and for the shortest appropriate period of time is enshrined in Art 37(b). Humanity, respect and dignity are required for children deprived of their liberty and every child so deprived shall have the right to prompt access to legal and other assistance and to challenge the detention.

The UN Committee on the Rights of the Child has also added detail and provided further, up to date guidance on the relevant provisions of the CRC in their General Comment no 10, on “Children’s rights in Juvenile Justice”, which was issued in 2007. This is a comprehensive document which identifies the key principles of juvenile justice as non-discrimination, the right to life, survival and development, the right to be heard and the right to dignity. It describes the following as the core elements of comprehensive juvenile justice:

- Prevention of juvenile delinquency
- Interventions/diversion
- Age and children in conflict with the law
- The guarantees for a fair trial
- Measures
- Deprivation of liberty (pre-trial and post-trial).

The Convention is supported and strengthened by three sets of rules or guidelines, namely the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”, 1985); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“The Havana Rules”, 1990); and the United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”, 1990).¹

2. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985): “The Beijing Rules”

The first international instrument to provide dedicated attention to the issue was the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), referred to generally and

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hereafter as the Beijing Rules.² These Rules provide a framework of essential elements of a good system to deal with child offenders. The rules encompass the following:

- Countries need to set a minimum age of criminal capacity, at an age that is not too low, considering emotional and mental capacity of children
- The aim of juvenile justice is to emphasize the well-being of the child and ensure that any reaction will be proportionate to the offender and the offence.
- Encourages a high degree of discretion being granted to officials at all stages to allow for alternative measures, but discretion to be used in an accountable and judicious manner
- Diversion is encouraged.
- Specialization in the police is encouraged
- Children who are not diverted must be dealt with by a competent authority, in an atmosphere of understanding.
- Sentencing must be proportionate and must ensure that detention is a measure of last resort, corporal punishment as a sentence is prohibited.

3. United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) “The Havana Rules”

Whilst other instruments stress avoidance or limitation of detention, this instrument focuses on conditions of detention. It covers pre-trial detention, detention during trial and detention as a sentence. It is sufficiently broad to cover not only prisons and police detention, but all facilities which children cannot leave at will. The JDLs begin from the departure point that detention should be avoided, but where it occurs each child must be treated as an individual, having his or her needs met as far as possible. There is an emphasis on preparing that child for return to society from the moment of entry into the facility. The Rules deal with management of facilities including their administration, the physical environment and services they offer, appropriate disciplinary procedures, effective compliance monitoring through regular and unannounced inspections, and an independent complaints procedure.

4. United Nations Guidelines for the Prevention of Juvenile Delinquency (1990): “The Riyadh Guidelines”

These guidelines are preventive in nature, and focus on the child, the family and the involvement of the community. The document deals with “socialization processes”, education, participation of youth within community structures, the role of the media, socio-economic circumstances. The idea of prevention is located squarely within a broader development context.

A. Introduction to the Focus on South African Law

1. Overview of the Relevant South African Cases

This paper will consider how these instruments have been used in practical ways in cases heard by the South African Constitutional Court. There will be a focus on three case studies, although these are not the only cases in which the Court has utilized international instruments pertaining to children’s rights.³ Other cases concerning criminal matters in which the South African Constitutional Court has used international and regional instruments include a matter concerning the rights of children whose caregivers are facing imprisonment,⁴ the rights of child victims of crime,⁵ and a very recent case in which the Court found that

¹ There are other important guidelines and resolutions that are relevant to juvenile justice, a full discussion of which is beyond the scope of this paper: United Nations Standard Minimum Rules for Non-custodial Measures (1990) United Nations Guidelines on Justice in matters involving Child Victims and Witnesses (2005); United Nations Guidelines for the Appropriate Use and Conditions of Alternative Care for Children (2009); United Nations principles and guidelines on Access to Legal Aid in Criminal Justice Systems (2012). See further the United Nations Guidelines for Action on Children in the Criminal Justice System (1997); the Economic and Social Council resolution on supporting national efforts for child justice reform (2007), The Guidance note of the United Nations Secretary-General: United Nations Approach to Justice for Children (2008); the United Nations Resolution on Human Rights in the Administration of Justice, in Particular Juvenile Justice (2011). Furthermore there are tools produced by UNODC and UNICEF such as the Manual for Measurement of Juvenile Justice Indicators (2007), the UNODC and OSCE Criminal Justice Assessment Toolkit (2006) and the UNODC and Inter-Agency Panel on Juvenile Justice Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes (2010).

² General Assembly resolution 40/33 adopted on 29 November 1985.

³ For a full discussion of the use of the CRC and other instruments see Ann Skelton ‘South Africa’ in T Liefwaard and J Doek Litigating the rights of the child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence (2015).

⁴ S v M (Centre for Child Law as Amicus Curiae) (CCT 53/06) [2007] ZACC 18.

when deciding whether to arrest a child, a police official must apply the best interests principle.⁶ In this presentation, the first case to be discussed concerns a law which applied minimum sentences (including life imprisonment) to child offenders.⁷ The second concerned a law which criminalized consensual sex between adolescents aged 12 to 16 years.⁸ The third concerned a law which required the automatic inclusion of child offenders on the sex offender register.⁹ In all three cases, the laws were found to be unconstitutional insofar as they were applied to children. Before discussing the cases, it is important to understand the constitutional and legal system in South Africa.

2. Introduction to the South African Constitutional and Legal System

South Africa is a constitutional democracy. The Constitution contains a progressive Bill of Rights comprising civil, political and socio-economic rights. These rights are justiciable—any law or conduct inconsistent with them may be declared invalid by the superior courts. The legal system is a hybrid one, based on British common law and Roman-Dutch civil law. Procedurally, the law takes a largely common law approach, incorporating the rule of *stare decisis*, meaning the law is developed through precedents set by case law. The Constitution is the supreme law, which means that if the Constitutional Court finds any law or conduct to be unconstitutional, then it can declare that law to be invalid.¹⁰ It can read words into a statute, or strike words out. It can also declare the law invalid, but suspend that declaration so that it does not come into effect immediately, and allow the legislature time to change the law to bring it in line with the Constitution.

3. Children’s Rights in the South African Bill of Rights

South Africa’s Bill of Rights has been hailed internationally as a good example of a Constitution providing for protection and advancement of children’s rights.¹¹ A range of obligations are placed on the state for the promotion, protection and realization of children’s rights. With the exception of the right to vote or stand for public office, children are entitled to all rights contained in the Bill of Rights. So fair trial rights, for example, apply to both adults and children.

The Constitution also has a specific children’s rights section—Section 28—which includes a range of rights that pertain specifically to children.¹² A child is defined as a person below the age of 18 years. For the purpose of this paper, I will focus on the subsections that are particularly relevant to child offenders.

Section 28(1)(g) states that every child has the right not to be detained except as a measure of last resort and then only for the shortest appropriate period of time. If detained, a child has the right to be kept separately from persons over the age of 18 years, and treated in a manner and kept in conditions that take account of the child’s age.

The wording of section 28(1)(g) is clearly drawn from section 37(b) of the CRC—which contains the phrase “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”. The remainder of section 28(1)(g) is similar to that in section 37(c) of the CRC. The direction to use detention as a measure of last resort is also enunciated in the Beijing Rules at rule 13 (for detention pending trial) and rules 17(1)(c) and 19 (for detention as a sentence). Issues relating to the conditions of detention are spelled out in detail in the Havana Rules.

⁵ Director of Public Prosecutions, *Transvaal v Minister of Justice and Constitutional Development* (CCT 151/15) [2016] ZACC 24.

⁶ *Radhuvha v Minister of Safety and Security* (CCT 151/15) [2016] ZACC 24.

⁷ *Centre for Child Law v Minister of Justice and Constitutional Development* (CCT 98/08) [2009] ZACC 18.

⁸ *Teddy Bear Clinic for Abused Children v Minister of Justice* (CCT 12/13) [2013] ZACC 35.

⁹ *J v National Director of Public Prosecutions* (CCT 114/13) [2014] ZACC 13.

¹⁰ The Courts that have the power to decide on the Constitutional validity of law or conduct are the High Courts, the Supreme Court of Appeal and the Constitutional Court see *Masiya v Director of Public Prosecutions, Pretoria & Another* (Centre for Applied Legal Studies & Another as *Amici Curiae*) 2007 (5) SA 30 (CC), 2007 (3) SACR 435 (CC). Where law or conduct is declared invalid, that finding must be confirmed by the Constitutional Court.

¹¹ P Alston and J Tobin *Laying the foundations for children’s rights* UNICEF Innocenti Research Centre, Florence (2005).

¹² These include the rights to name and nationality; family care or parental care or appropriate alternative care when removed from the family environment; basic nutrition, shelter, basic health care services and social services; to be protected from maltreatment, neglect, abuse or degradation; to be protected from age-inappropriate or exploitative labour; to legal representation at state expense in civil proceedings if substantial injustice would otherwise result; and not to be used in armed conflict.

Section 28(2) of the South African Constitution provides a further layer of protection by specifying that a child's best interests are of paramount importance in every matter concerning the child. Again, the wording is reminiscent of article 3(1) of the CRC—but note that the use of the words “the paramount consideration” in section 28(2) provides stronger protection than the CRC which uses the phrase “a primary consideration”.

4. The Influence of International Law on South African Law

In addition to the influence of international law on the Constitution and the domestic laws, the Constitution also directs the courts to pay attention to international law. Section 39(2) of the Constitution obliges courts to consider international law when interpreting a right in the Bill of Rights. The Constitution provides that the court *must* consider international law, and *may* consider foreign law, when interpreting the Bill of Rights.¹³ South Africa is described as having a dualist legal system because section 231(4) states that an international agreement only becomes law once it is enacted by national legislation. The CRC has not directly been enacted into law, although the Preambles to the Children's Act 38 of 2010 and the Child Justice Act 75 of 2008 do refer to the CRC. At the same time, the courts are enjoined to “consider international law”.¹⁴ According to international law expert, John Dugard, a treaty that has been signed and ratified is binding on South Africa, regardless of whether it has been signed into law).¹⁵ Some authors have argued that South Africa has “crossed the line from dualism and monism” in relation to child law. This claim is demonstrated by the fact that the courts go further than referring to binding instruments—they even refer to “soft law” in their judgments.¹⁶

The South African Courts have paid particular attention to articles 37 and 40 of the CRC, together with the non-binding instruments relating to juvenile justice, in particular the Beijing Rules. In addition to the Constitutional Court cases, a raft of High Court and Supreme Court cases have incorporated these into South African jurisprudence.¹⁷

II. THE CASE STUDIES

A. The Case that Found Minimum Sentences Unconstitutional for Child Offenders

The South African Constitutional Court has paid particular attention to the principle incorporated in section 28(1)(g) of the Constitution (modelled on article 37(b) of the CRC) that the detention of children should be a measure of last resort, and if detained, this should be for the shortest appropriate period of time. The *Centre for Child Law v Minister of Justice*¹⁸ was a challenge to the constitutionality of the minimum sentences law, insofar as it applied to 16 and 17 year olds. The law links certain serious offences to minimum sentences (for example, a conviction for certain types of murder carries a minimum sentence of life imprisonment). The law excluded children below the age of 16 years but included 16 and 17 year olds within its ambit, even though the Constitution clearly defines a child as a person below 18 years of age. The Centre for Child Law (hereafter referred to as the Applicant), acting on behalf of children who would be sentenced under the new law, challenged the constitutionality of the provision. They argued that subjecting children aged 16 and 17 years of age to the minimum sentencing regime was in breach of the Constitution and South Africa's international law obligations.

Although the Applicant acknowledged that long sentences of imprisonment might sometimes be necessary when 16 and 17 year olds commit very serious crimes, it submitted that such sentences should only be determined by the court in accordance with the constitutional principles of “last resort” and “shortest appropriate period of time”, as well as the principles of proportionality, individualization and the best interests of the child. A court sentencing a child offender should start with a “clean slate”, and not be prescribed to by a minimum sentencing law. Even though the law empowers the court to depart from the minimum sentence if

¹³ S 39(1).

¹⁴ S 39(1).

¹⁵ John Dugard *International Law – A South African Perspective*. Juta, Cape Town (2005)

¹⁶ J Sloth-Nielsen and H Kruuse “A maturing manifesto: The constitutionalisation of children's rights in South African jurisprudence 2007–2012” 2013 *International Journal of Children's Rights* 646.

¹⁷ *S v Z en vier ander sake* 1999 (1) SACR 427 (E); *S v Kwalase* 2000 (2) SACR 135 (C); *S v Nkosi* 2002 (1) SA 494 (W); *Director of Public Prosecutions, Kwa-Zulu Natal v P* 2006 (1) SACR 243 (SCA) and *S v N* 2008 (2) SACR 135 (SCA); *S v B* 2006 (1) SACR 311 (SCA).

¹⁸ (CCT 98/08) [2009] ZACC 18.

it finds substantial and compelling reasons to do so, this nevertheless sets up long terms of imprisonment as the first (and not the last) resort. Furthermore, the impugned provisions failed to require that imprisonment be imposed for the shortest possible time, indeed they required the opposite. The minimum sentencing regime was also unconstitutional with regard to child offenders because it did not allow or require the sentencing judge to consider the principles of individuality and proportionality. Finally, the law was constitutionally impermissible because it treated children aged 16 and 17 the same as adults, at least in respect of sentencing.

One can see much evidence of the international law being used in these arguments. The “last resort” and “shortest appropriate period” have been discussed above. The “clean slate” argument is linked to the last resort principle, because a law that ties the court’s hand also limits discretion, whereas a clean slate means the court can start by considering a non-custodial sentence, and only proceed to an institutional measure if that is the only suitable option. The importance of discretion is specifically mentioned in Rule 6 of the Beijing Rules.¹⁹ The principles of individuality and proportionality are also found in the Beijing Rules.²⁰

The Applicant’s argument was bolstered by the use of comparative foreign law. The only country comparison which could be found that imposed minimum sentencing regimes on children in the same manner it does to adults was the United States,²¹ which was one of only two countries in the world at the time that had not ratified the Convention on the Rights of the Child.²² The Applicants pointed out that those countries that have undertaken law reforms since the advent of the CRC had ensured that minimum sentences either do not apply to child offenders or that if they do, the sentences are for shorter periods of time than those applicable to adults.

The Minister of Justice took the position that the law was not unconstitutional because it respected the “last resort” and “shortest appropriate period” principles, but that Parliament had determined how those principles should be applied—namely to 16 and 17 year olds, and in the scheduled crimes. Furthermore, certain features of the law—particularly the ability of the court to depart from the minimum sentence, ameliorated the effects of the law in a way that would benefit child offenders. Their youthfulness, it was argued, would often amount to a substantial and compelling circumstance. The Minister also argued that the law was not in breach of international law principles because the Convention on the Rights of the Child only prohibits life imprisonment without the possibility of parole which does not exist in South Africa.²³

The Constitutional Court held that the minimum sentencing legislation should not apply to children aged 16 and 17 years old. The majority of the Constitutional Court found that the minimum sentencing legislation limited the discretion of sentencing officers by directing them to hand down long sentences (including life imprisonment) as a first resort. Furthermore, the legislation discouraged the use of non-custodial options, it prevented courts from individualizing sentences, and was likely to cause longer prison sentences. All of these features of the law amounted to an infringement of child offenders’ rights in terms of section 28(1)(g).

In addition to relying on article 37(b) of the CRC on which the section is based, the Court found that the following instruments “count in favour of the view that minimum sentences should not be applied to child offenders”: The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing

¹⁹ Rule 6: In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.

²⁰ Rule 5: The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

²¹ This was prior to the judgment of *Miller v Alabama*, 132 S. Ct 2455 (2012). Scott et al (supra note 15 at 26) point out that in the post-Miller era laws that subject juveniles to mandatory minimum sentences on the same basis as adult offenders are problematic on proportionality grounds and are likely to be the focus of future reforms. The authors point to *State v Lyle*, 854 N. W. 2d 378 (Iowa 2014) which found that mandatory adult sentences exclude the consideration of juvenile offenders’ immaturity, which is against the principle set down in *Miller*.

²² The United States is now the only country that has not ratified the CRC, because in 2015 Somalia became the 196th State to ratify the CRC.

²³ The Applicants countered this argument by pointing out the Committee on the Rights of the Child General Comment no 10: Juvenile Justice (2007) called upon states parties ‘to abolish all forms of life imprisonment for offences committed by persons under the age of 18 years.

Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines). The court specifically emphasized Rule 17(1)(a) of the Beijing Rules which provides in relation to sentencing that “[t]he reaction taken shall always be in proportion not only to the circumstances and gravity of the offence but also to the circumstances and needs of the juvenile as well as the needs of society”.²⁴ The court also quoted article 40(1) of the CRC in full in a footnote.

From all these instruments the Court distilled the following principles: proportionality; imprisonment as a measure of last resort and for the shortest period of time; children must be treated differently from adults; and that the well-being of the child is the central consideration.²⁵ The Court found that the international principles are “amply” embodied in the Bill of Rights which led directly to the conclusion by the court that the law was unconstitutional. The Court found that children should be treated differently from adults not for sentimental reasons, but because of their greater physical and psychological vulnerability and the fact that they were more open to influence and pressure from others. The Court found it to be vitally important that child offenders are generally more capable of rehabilitation than adults. These are the premises, the Court said, on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. The court went on to explain:

We distinguish them because we recognise that children’s crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.²⁶

The Court’s interpretation of the last resort principle is interesting. The judgment pointed out that the Constitution does not prohibit Parliament from dealing effectively with child offenders—the fact that detention must be used only as a last resort in itself implies that imprisonment is sometimes necessary. However, the Bill of Rights mitigates the circumstances in which such imprisonment can happen. It must be a last (not first or intermediate) resort, and it must be for the shortest appropriate period. “If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time”.²⁷

B. The Case about Decriminalization of Consensual Sex between Adolescents

South Africa’s parliament passed new Sexual Offences legislation in 2007.²⁸ The new law had good intentions of protecting children from sexual abuse. However the case of *Teddy Bear Clinic v Minister of Justice* shows that it went too far by criminalizing all consensual sexual activity from kissing through to intercourse between adolescents aged twelve to sixteen years. The law contained a requirement that when children who are both between the ages of twelve and sixteen years indulge in any form of consensual sexual violation (penetrative or non-penetrative) and a decision is taken to prosecute them, then both must be prosecuted.²⁹ The protection of children from sexual advances by adults is clearly beneficial and had long been part of South African law (i.e., a person above sixteen years may not have sexual relations with a person below sixteen years, regardless of consent). However, the idea that if children who were both between twelve and sixteen years engage in consensual sexual activity they are both committing a crime due to their inability to consent was a new idea and a concerning one.

This “crime” was linked to a mandatory reporting provision, so parents, teachers and counsellors who knew about such activities were required to inform the police. The law exposed adolescents to the risk of prosecution, and if convicted, their names would be placed on the sex offenders register. Two children’s

²⁴ This is one of the guiding principles in adjudication and disposition under the Beijing Rules.

²⁵ Centre for Child Law v Minister of Justice at para 61.

²⁶ Centre for Child Law v Minister of Justice Para 28.

²⁷ Centre for Child Law v Minister of Justice Para 31.

²⁸ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter Sexual Offences Act).

²⁹ The minutes of the Parliamentary portfolio committee indicate that the members of the legislature were particularly proud of the gender neutral nature of this amendment – they said it would obviate what they called the ‘angry father syndrome’ which, they considered, operated unfairly against males in the old system.

rights organisations, Teddy Bear Clinic for Abused Children and Resources aimed at Child Abuse and Neglect (RAPCAN), legally represented by the Centre for Child Law, challenged this law on the basis that it unjustifiably infringed the rights of children to dignity, privacy, sexual autonomy and to have their best interests considered paramount. The Constitutional Court handed down a judgment in October 2013, declaring the law unconstitutional and therefore effectively decriminalizing consensual sex between adolescents.

In papers before the court, the Applicants made the point that adolescents (twelve to sixteen years of age) are in a special position. Physiologically, they are rapidly developing and maturing, but psychologically they are not yet fully developed and are still vulnerable to the influence of adults. It is for this reason that the Applicants accept that the legal provisions are constitutionally permissible insofar as they criminalize the sexual conduct of *adults*. However the Applicants contended that, to the extent that the sections criminalize the sexual conduct of *children*, they are unconstitutional.

The Applicants' founding affidavit placed reliance on an expert opinion which showed that the onset of puberty generally occurs before or around twelve years of age, most other physical indications of sexual maturity manifesting between the ages of twelve and sixteen years. Furthermore, intimate relationships between adolescents are "developmentally normative", with up to 87% of a cross section of Grade 8 to Grade 11 pupils in one study indicating they were or had been in an intimate relationship.

The court papers filed by the Applicant pointed out further anomalies in South African law. Whilst section 15 of the Sexual Offences Act make it a crime for children to engage in sexual intercourse, section 134 of the Children's Act 38 of 2005 provides that no person may refuse to sell or provide condoms to a child over the age of twelve years. Other contraceptives can be provided on request by a child if the child is at least twelve years of age and has been physically examined. These children are entitled to confidentiality under the Children's Act, but under the Sexual Offences Amendment Act a person who knows that a sexual offence is being committed (including statutory offences arising from consensual sexual activity) has a duty to report it to the police. Furthermore, the Termination of Pregnancy Act allows girls of any age to decide to terminate their pregnancies without parental consent, provided they have had counselling. However, if they discuss their pregnancy with anyone, that person is required to report a sexual offence.

The court papers pointed out that the above-mentioned provisions aimed to make reproductive health services available to children who need them, but are in stark contrast to the reporting requirements under the Sexual Offences Act.

In essence the Applicant's case was that while it might be reasonable for the state to take an interest in discouraging sexual activity among children between the ages of twelve and sixteen years, this could be achieved through educative approaches. There is no need for the law to criminalize sex between teenagers. The Applicants included an interesting paragraph in their papers before the court:

Indeed, the fact that the relevant aspects of the impugned provisions criminalize only children is itself of major concern. On 23 September 2011, the UN Human Rights Council adopted a resolution in which it called upon States *to enact or review legislation to ensure that any conduct not considered a criminal offence or not penalized if committed by an adult is not considered a criminal offence and not penalized if committed by a child, in order to prevent the child's stigmatization, victimization and criminalization.*³⁰

This is an example of using a UN resolution—the status of which is not strong in international law. However, this clause captured exactly the problem which the new Sexual Offences law had brought about.

The Respondent (Minister of Justice and Constitutional Development) focused on moral concerns as well as concerns about teenage pregnancy and sexually transmitted diseases. The measures were necessary in order to protect children from their own immature judgment. The Minister also claimed that although the law authorised prosecution, it did not require it and the children could, under the Child Justice Act, be diverted from the criminal justice system. This ameliorated the effects of the impugned provisions.

³⁰ UN Human Rights Council Human rights in the administration of justice, in particular juvenile justice' A/HRC/18/L.9, para 14.

However, the Applicants strongly countered this last point. They pointed out that the fact that children will often be diverted (in terms of the Child Justice Act³¹) once a decision to prosecute has been made does not avoid the substantial trauma and harm that they will endure. Before being diverted children would be exposed to the earlier process in the criminal justice system such as arrest, being required to provide detailed statements about their sexual conduct, being questioned by police and other authorities about their sexual conduct or even from being detained in police cells.

This is an interesting point, because diversion is encouraged by article 40(3)(b) of the CRC and also in rule 11 of the Beijing Rules. The Minister, in defending the law, said that diversion cured the problems in the law. Although the Applicants considered diversion to be a positive process, they disagreed that the possibility of diversion solved the problems in the law. An unconstitutional law, they said, cannot be “saved” because its application is discretionary.

On 3 October 2013 the Constitutional Court handed down a unanimous judgment which found the impugned provisions infringed adolescents’ rights of dignity and privacy and further violated the best interests principle. The court relied on the expert evidence adduced by the Applicants, and concluded that the impugned provisions criminalized developmentally normative conduct for adolescents and negatively affected the very children the law sought to protect. Thus the law was not rationally connected to its purpose. Justice Khampepe, who wrote the judgment, said that it was important to stress what the case was not about. It was not about whether children should engage in sexual conduct, nor was it about setting a lower age of consent. The case was about the narrow issue of whether it was constitutionally permissible to use criminalization to deter children’s early sexual intimacy and combat the associated risks.

Justice Khampepe underlined the dignity of children, describing the law as having placed youthful transgressors in a state of disgrace. She clearly recognised that sexual intimacy and sexual choices are part of the innermost sanctity of a person’s dignity, and she included children’s intimacy within that constitutionally protected ambit. She also clearly stated that the impugned provisions, by prohibiting consensual intimate relationships, intruded into the core of adolescents’ privacy. Furthermore, in discussing children’s best interest she found that the impugned provisions ran contrary to that best interests principle because they harmed children.

Justice Khampepe clearly understood the concerns about criminalization and stigmatization—as mentioned in the Human Rights Council resolution that was included in the Applicants’ papers. She said:

It cannot be doubted that the criminalization of consensual sexual conduct is a form of stigmatization which is degrading and invasive. In the circumstances of this case, the human dignity of adolescents targeted by the impugned provisions is clearly infringed. If one’s consensual sexual choices are not respected by society, and are criminalized, an innate sense of self-worth will inevitably be diminished.

The references to “dignity” and “self-worth” are also terms that we find in Article 10(1), which enjoins State Parties to treat every child who is accused of, charged with or convicted of a crime to be “treated in a manner consistent with the promotion of a child’s sense of dignity and worth”. In this case, the court goes further—the statute which criminalizes the Act affects children’s sense of dignity and worth is unconstitutional, and the court declared the law invalid in as far as it applied to adolescents. Although the Teddy Bear Clinic judgment does not set out the international law in the detail that the Centre for Child Law judgment does, it nevertheless embodies the juvenile justice standards.

C. The Case that Found Automatic Placement of Child Offenders on the Sex Offenders’ Register Unconstitutional

The third case study selected for discussion in this presentation is called *J v National Director of Public Prosecutions (J v NDPP)*.³² The Sexual Offences Act of 2007 established a National Register for Sex Offenders, which aims primarily to prevent persons who have been convicted of sexual offences against children from working with children.³³ The register is not public, but employers are obliged to check against the register

³¹ Act 75 of 2008.

³² 2014 (2) SACR 1 (CC).

when they are considering employing someone who will work with children—and this even applies to volunteers. Once a person is convicted of any sexual offence, his or her name must be placed on the register, the presiding officer has no discretion in this regard. The length of time the name stays on the register depends on the sentence—and anyone sentenced to more than 18 months imprisonment (including a suspended sentence) or who has more than one conviction, goes on the register for life. It is clear, therefore, that the implications of a person's name going on the register are profound.

The section applied to all sex offenders, and the constitutionality of its application to child offenders was raised by a High Court judge who was reviewing the sentence of a 14 year old boy, IJ, who had been convicted of three counts of rape and one of serious assault in which the victims were also children. He had been sentenced to five years' compulsory residence in a Child and Youth Care Centre, and depending on his behavior, a further three years in prison thereafter. The reviewing judge upheld the sentence, but was very concerned about the fact that the court ordered (as it was required to do by law) that the boy's name must be placed on the sex offenders register. The judge was of the view that this approach clashed with the approach of South Africa's Child Justice Act 75 of 2008, which is based on international standards. The preamble to the Child Justice Act specifically mentions that the law aims to establish a criminal justice system that is "in accordance with the values underpinning our Constitution and our international obligations" and it goes on to name the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Section 2 of the Act lists the objects of the Act, which include several clauses, and section 3 contains 9 guiding principles, which are modelled on international law. These are attached as annexures to this paper as annexure 1.

The case of *J v NDPP* ended up in the Constitutional Court, and there three child rights organisations known as Teddy Bear Clinic, Childline and National Institute for Crime Prevention and Reintegration of Offenders (NICRO),³⁴ made joint *amici curiae* (which means "friends of the court") submissions which were influential in the outcome of the case. The *amici curiae*'s argument emphasized the fact that the Child Justice Act rests on principles of international and regional law, as reflected in articles 37 and 40 of the Convention on the Rights of the Child and article 17 of the African Charter on the Rights of the Child.³⁵

The submissions pointed out the following important principle in the Act: "All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society". One of the objectives of sentencing, set out in 69(1)(b) of the Child Justice Act, is to "promote an individualized response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society". This was also highlighted in the court papers.

Furthermore, the *amici curiae* reminded the court that children must be treated differently from adults and they placed a significant amount of documentary evidence to the court that showed that most child sex offenders would not go on to be adult sex offenders.³⁶

³³ The Act is broader than this. Firstly, sex offenders who commit crimes against persons with mental disabilities are also included in the register. Furthermore, in addition to not being able to work with children, persons on the register, it also prevents them from adopting or fostering children.

³⁴ Represented by the Centre for Child Law.

³⁵ These instruments are elaborated on by soft international law instruments United Nations Guidelines for the Prevention of Juvenile Delinquency (1990) ('Riyadh Guidelines'); United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) ('Beijing Rules'); and by General Comment no 10 on Juvenile Justice, issued by the Committee on the Rights of the Child in 2007.

³⁶ Footnote 62 of the judgment in *J v NDPP* sets out the most pertinent of these references including: Jaffé "Child and adolescent abusers – For a rehabilitative approach driven by scientific evidence" in Council of Europe Protecting children from sexual violence: A comprehensive approach (Council of Europe Publishing, Strasbourg 2010) at 225 and 231; Lussier and Blokland "The adolescence-adulthood transition and Robin's continuity paradox: Criminal career patterns of juvenile and adult sex offenders in a prospective longitudinal birth cohort study" (2013) 42 Journal of Criminal Justice 153. Available at <http://dx.doi.org/10.1016/j.jcrimjus.2013.07.004>, accessed on 3 March 2014; Piquero et al "Sex offenders and sex offending in the Cambridge study in delinquent development: prevalence, frequency, specialization, recidivism, and (dis)continuity over the life-course" (2012) 35 Journal of Crime and Justice 412 at 412; Reingle "Evaluating the continuity between juvenile and adult sex offending: a review of the literature" (2012) 35 Journal of Crime and Justice 427; Vess et al "International sex offender registration laws: research and evaluation issues based on a review of current scientific literature" (2013) 14 Police Practice and Research: An International Journal 205 at 209; and Zimring et al "Investigating the continuity of sex offending: Evidence from the second Philadelphia birth cohort" (2009) 26 Justice Quarterly 58.

The *amici curiae* acknowledged that there may be some child sex offenders who pose a risk—but that the automatic placement of all children on the sex offenders register was unconstitutional because it did not allow for an individualized, proportionate response, and because it treated children in the same way as adults. It did not allow the constitutional principle of the best interests of the child to be a paramount consideration, because there was no discretion that allowed a court to weigh their interests. Once convicted, they automatically went on the register.

The *amici curiae* also argued that although the register was not a public one, children would nevertheless be stigmatized by their names being included on it. They further stressed the importance of a rehabilitative rather than punitive approach to child sex offending—what was required was not shaming, which excludes and isolates, but rather reintegrative processes, such as restorative justice.

The Constitutional Court found that the best interests of the child was the correct departure point to take in evaluating the matter. The court found that

[t]he contemporary foundations of children's rights and the best interests principle encapsulate the idea that the child is a developing human being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and develop her moral compass. This Court has emphasized the developmental impetus of the best-interests principle in securing children's right to 'learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood'.³⁷ In the context of criminal justice, the Child Justice Act confirms the moral malleability or reformability of the child offender.³⁸

The court then went on to list a number of key principles that arise from the “best interests” approach. Firstly, the court found that the law should generally distinguish between adults and children³⁹—and that therefore it was a problem that the law treated children and adults alike.

Secondly, the court found that the law should allow for an individualized approach to child offenders, stating that the best-interests standard must always be flexible because individual factors will secure the best interests of a particular child. Here the court referred to the principle of proportionality too, and drew attention to the fact that that principle is embedded in the Child Justice Act.

Thirdly, the court held that children should be given an opportunity to make submissions before a decision to place them on the register is made—in keeping with the principle of children's participation. Here the court goes into some detail about the international law standards. In footnote 45 of the judgment, direct reference is made by the Court to Article 12 of the CRC (right to express views and have them given due weight), and also the CRC committee's General Comment no 12 (2009): “The right of the child to be heard” CRC/C/GC/12, at paras 1 and 15, and at para 57, which states that the right extends “throughout every stage of the process of juvenile justice”. In the same footnote, the judgment also makes reference to the CRC committee's General Comment no 10 (2007): “Children's rights in juvenile justice”; CRC/C/GC/10 at paras 12 and 43–5. Paragraph 12 states that “[t]he right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile justice. The Committee notes that the voices of children involved in the juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights.

Paragraph 43 requires a child to “be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child” either directly or through a representative or appropriate body. Paragraphs 44 and 45 add more detail to this statement, emphasizing that the right applies at all stages of proceedings and that the child “should be given an opportunity to express his/her views on any ‘measure’ to be imposed”. The child is not to be treated as “a passive object”. It is significant that the South African Constitutional Court paid attention not only to the Convention, but also to the General Comments issued by the Committee on the Rights of the Child, as these documents are more up to date, and provide significantly

³⁷ This is a quote from *S v M* (Centre for Child Law as amicus curiae), a 2007 judgment of the court.

³⁸ *J v NDPP* para 36. The court uses ‘she’ and ‘her’ throughout the judgment, which while being a gender sensitive strategy also serves to remind us that girls may also be sex offenders, although J is a boy and the majority of sex offenders are boys.

³⁹ *J v NDPP* para 36.

more detail.

The court was concerned that there was no discretion for a judge in the law as it stood. This meant that children were not given any right to participate and also that the court could not of its own accord decide not to place a child on the register. The law required the registration follows automatically upon conviction.

The Court went on to look at the serious implications of having one's name on the register:

Child offenders who have served their sentences will remain tarred with the sanction of exclusion from areas of life and livelihood that may be formative of their personal dignity, family life, and abilities to pursue a living. An important factor in the realizing the reformatory aims of child justice is for child offenders to be afforded an appropriate opportunity to be reintegrated into society.

Although the Court found that the aims of the Sex Offender's Register were laudable (i.e., protecting children from being sexually abused),⁴⁰ the Court found that there were less restrictive means to achieve the aims of the register, such as allowing discretion. The court declared the impugned provisions to be unconstitutional and suspended the order of invalidity, allowing Parliament a period of 15 months to bring the legislation in line with the Constitution.

The Sexual Offences Amendment Act 5 of 2015 introduced significant amendments to the Sexual Offences Act, in line with the cases *Teddy Bear Clinic* case and *J v NDPP*.⁴¹ The law was amended in a way that made it clear that adolescents between 12 and 16 years old cannot be charged if they engage in consensual sexual interactions with one another. The amendment also changed the law so that if a child is convicted of a sexual offence his or her name does not automatically go on the register. If the prosecutor intends to request a child sex offender's name to be placed on the register, s/he must give notice of that intention, and the defence must have an opportunity to ensure that the child is properly assessed by a professional, and to make arguments why the child's name should not go on the sex offenders' register.

III. CONCLUSION

This paper has demonstrated the power of the international instruments at the country level. Where these instruments are used by advocacy groups, law makers, lawyers and courts, they can make a practical and significant impact on juvenile justice. The principles embodied in the instruments can provide guidance in legislation, and in the interpretation of laws by the courts. In South Africa, which is a constitutional democracy, the instruments have provided legal support for judges who have found laws that do not conform to the international law to be unconstitutional.

⁴⁰ The court balances the rights of child victims and offenders see Z Hansungule "Protecting child offenders rights: Testing the National Register for Sex Offenders" 2015 (50) SA Crime Quarterly 23.

⁴¹ For a discussion of the ways in which the new amendments give effect to the judgments see P Mahery "The 2015 Sexual Offences Amendment act: Laudable amendments in line with the *Teddy Bear Clinic* case" 2015 (8) 2 South African Journal of Bioethics and the Law 4; P Stevens "Recent developments in sexual offences against children – A constitutional perspective" Potchefstroom Electronic Law Journal 2016 (19) 1.

165TH INTERNATIONAL SENIOR SEMINAR
VISITING EXPERTS' PAPERS

Annexure 1 Excerpt from the Child Justice Act

CHILD JUSTICE ACT 75 OF 2008

(English text signed by the President)

as amended by

Judicial Matters Amendment Act 42 of 2013

Judicial Matters Amendment Act 14 of 2014

Legal Aid South Africa Act 39 of 2014

also amended by

Prevention and Combating of Trafficking in Persons Act 7 of 2013

[with effect from a date to be proclaimed - see PENDLEX]

Regulations under this Act

ACT

To establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the Republic; to provide for the minimum age of criminal capacity of children; to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system; to make special provision for securing attendance at court and the release or detention and placement of children; to make provision for the assessment of children; to provide for the holding of a preliminary inquiry and to incorporate, as a central feature, the possibility of diverting matters away from the formal criminal justice system, in appropriate circumstances; to make provision for child justice courts to hear all trials of children whose matters are not diverted; to extend the sentencing options available in respect of children who have been convicted; to entrench the notion of restorative justice in the criminal justice system in respect of children who are in conflict with the law; and to provide for matters incidental thereto

Preamble

RECOGNISING-

- that before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children, and also that some children, as a result of circumstances in which they find themselves, have come into conflict with the law;

AND MINDFUL that-

- the Constitution of the Republic of South Africa, 1996, as the supreme law of the Republic, was adopted to establish a society based on democratic values, social and economic justice, equality and fundamental human rights and to improve the quality of life of all its people and to free the potential of every person by all means possible;
- the Constitution, while envisaging the limitation of fundamental rights in certain circumstances, emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards, among others, the right-

- * not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time;

- * to be treated in a manner and kept in conditions that take account of the child's age;

- * to be kept separately from adults, and to separate boys from girls, while in detention;

- * to family, parental or appropriate alternative care;

- * to be protected from maltreatment, neglect, abuse or degradation; and

- * not to be subjected to practices that could endanger the child's well-being,

education, physical or mental health or spiritual, moral or social development; and

- the current statutory law does not effectively approach the plight of children in

conflict with the law in a comprehensive and integrated manner that takes into account their vulnerability and special needs;

AND ACKNOWLEDGING THAT-

- there are capacity, resource and other constraints on the State which may require a pragmatic and incremental strategy to implement the new criminal justice system for children;

THIS ACT THEREFORE AIMS TO-

- establish a criminal justice system for children, who are in conflict with the law, in accordance with the values underpinning our Constitution and our international obligations, by, among others, creating, as a central feature of this new criminal justice system for children, the possibility of diverting matters involving children who have committed offences away from the criminal justice system, in appropriate circumstances, while children whose matters are not diverted, are to be dealt with in the criminal justice system in child justice courts;
- expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed;
- recognise the present realities of crime in the country and the need to be proactive in crime prevention by placing increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for reoffending;
- balance the interests of children and those of society, with due regard to the rights of victims;

- create incrementally, where appropriate, special mechanisms, processes or procedures for children in conflict with the law-

- * that in broad terms take into account-

- the past and sometimes unduly harsh measures taken against some of these children;

- the long-term benefits of a less rigid criminal justice process that suits the needs of children in conflict with the law in appropriate cases; and

- South Africa's obligations as party to international and regional instruments relating to children, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child;

- * in specific terms, by-

- raising the minimum age of criminal capacity for children;

- ensuring that the individual needs and circumstances of children in conflict with the law are assessed;

- providing for special processes or procedures for securing attendance at court of, the release or detention and placement of, children;

- creating an informal, inquisitorial, pre-trial procedure, designed to facilitate the disposal of cases in the best interests of children by allowing for the diversion of matters involving children away from formal criminal proceedings in appropriate cases;

- providing for the adjudication of matters involving children which are not diverted in child justice courts; and

- providing for a wide range of appropriate sentencing options specifically suited to the needs of children.

CHAPTER 1

DEFINITIONS, OBJECTS AND GUIDING PRINCIPLES OF ACT (ss 1-3)

1 Definitions

-- 2 Objects of Act

The objects of this Act are to-

(a) protect the rights of children as provided for in the Constitution;

(b) promote the spirit of *ubuntu* in the child justice system through-

(i) fostering children's sense of dignity and worth;

(ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;

- (iii) supporting reconciliation by means of a restorative justice response; and
- (iv) involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the reintegration of children;
- (c) provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults;
- (d) prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion; and
- (e) promote co-operation between government departments, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of this Act.

3 Guiding principles

In the application of this Act, the following guiding principles must be taken into account:

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