Investigating the raising of South Africa's minimum age of criminal responsibility within the framework of International Law

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Declaration

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FACULTY: PRIVATE LAW
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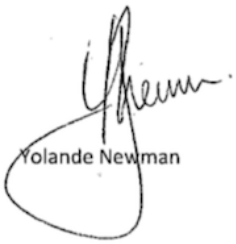

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List of abbreviations and acronyms

ACRWC	African Charter on the Rights and Welfare of the Child)
ACERWC	African Commission of Experts on the Rights and Welfare of the Child
UNCRC	(United Nations Convention on the Rights of the Child)
UN	(United Nations)
UNCRoC	United Nations Committee on the Rights of the Child
CJA	Child Justice Act 75 of 2008
MACR	Minimum age of criminal responsibility
UNICEF	United Nations International Children's Emergency Fund
OPAC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of children in armed conflict
OPSC	Optional Protocol to the Convention on the sale of children, child prostitution and child pornography
OPIC	Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
VCLT	Vienna Convention on the Law of Treaties (1969)
CONSTITUTION	The Constitution of South Africa 1996
NDPP	The National Director of Public Prosecutions

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CHAPTER 1

1. CRIMINAL CAPACITY OF CHILDREN

1.1 Research Question

Can the minimum age of criminal responsibility be raised in view of the developmental history of the concept of a minimum criminal responsibility (MACR hereinafter) when considered from a national and international position, contextualised against developments in South Africa and viewed against the backdrop of the international and regional standards and foreign law?

1.2 Problem statement

The MACR was quite recently raised by the Child Justice Act 75 of 2008 as amended but the

MACR still does not comply with international standards.

1.3 The Aim of the Study

The aim of the study is to understand the origin and motivation for fixing a MACR. To explore the fixing of the MACR from an international, regional and national perspective, a comparison will be drawn between the existing MACR internationally and South Africa's position in relation to the MACR. Recommendations will be suggested as to why it is necessary to raise the MACR to acceptable international levels and if action is required with what manner of ease it can be achieved.

1.4 Research Methodology

The current position in South Africa will be explored, with specific reference to recent reform. International and regional yardsticks will be examined. A comparison with International and Regional law will be drawn. The criminal aspect is central to the field of law where a MACR is applicable and it will be apt to start the discussion from there.

1.5 Scope of the Study

The scope of the study is limited to the national and international position in relation to the MACR and to regional law in this regard. The impact of these systems on South African law will be discussed and the resultant position of the MACR that is currently set in South Africa in relation to these systems. The study is valid until 15 October 2022. Various databases have been used that include Hein Online, Juta, Butterworths and Sabinet. Journal articles and academic commentary were used and proper references were made to acknowledge these references.

2. BACKGROUND TO STUDY

2.1 Introduction

Until the enactment of the CJA, common law provided that the minimum age for criminal responsibility was seven years of age, with a rebuttable presumption of doli incapax operating for children above seven years of age and under fourteen years of age.[1] On 1 April 2010 the new Child Justice Act came into operation and set the MACR at ten years of age which was higher than the previous seven years of age. A doli incapax doctrine, derived from the common law, was also built into the CJA and this set a rebuttable presumption that children who are below the age of ten years of age or older and under fourteen years of age are presumed to lack criminal capacity. In South Africa section 8 of the CJA created an automatic review process regarding the MACR where the Minister of Justice was required to submit a report to Parliament not later than five years after the new MACR came into operation, to determine whether the MACR must again be raised. The review period came up at the end of March 2015 and, after some delay, resulted in the coming into effect of the Child Justice Amendment Act on 17 August 2022, that raised the MACR to twelve years of age.[2]

The wording of section 8 of the CPA[3] reveals an intent of raising the MACR and does not cater for the lowering of the MACR, which is in line with recommendations by the United Nations

[1] Sloth-Nielsen "Child Justice" in Boezaart: *Child Law in South Africa* (2 ed 2018) 69.

[2] Child Justice Amendment Bill 28 of 2019.

[3] Section 8 of the Criminal Procedure Act 51 of 1977.

Committee on the Rights of the Child (UNCRoC) and the commitments of the South African government in this regard.[4] This dissertation will advance arguments in favour of removing the doli incapax doctrine, although the recent amendments to the CJA have alleviated some of the difficulties that come with the inclusion of the doctrine. This argument is in line with the clear intent of the built in review process to evaluate the raising of the MACR according to section 8 read with section 96 of the CJA as amended. Raising the MACR gives better protection to children against human rights violations and by simplifying processes it relieves the financial load of obtaining specialist reports and sourcing the right expertise to produce the reports.[5] In the briefing by the Department of Justice to the Portfolio Committee on Justice and Correctional Service on 30 October 2018 it was stated that practical challenges in respect of financial and human capacity is ever present in South Africa as the referral of every child for evaluation in relation to determining criminal capacity of the child offender, results in the clogging of the criminal justice system, causes delays and exacerbates the burden on the already overstrained mental health system, as there is not sufficient competent persons to conduct evaluations.[6]

In order to advance my arguments I will firstly consider the different perspectives that come to bear on the fixing of a MACR before moving on to discuss all the arguments in favour of a higher MACR. This will then be measured against the regional and international standards, before moving on to consider the current South African law. Finally, I will conclude with recommendations.

2.2 Different perspectives on the establishing of a MACR

There are several approaches that tend to influence the fixing of a MACR. In the discussion below, three of the most common approaches are identified – the multidisciplinary approach, the rights and best interests approach, and the decriminalisation approach. All of these approaches are important in evaluating what Parliament considered in recently raising the MACR, and what might encourage them to do so again in the future.

2.2.1 Multidisciplinary approach to the MACR

[4] United Nations Committee on the Rights of the Child General Comment 24 of 2019 "Children's rights in juvenile justice" CRC/C/GC/24 33.

[5] Skelton and Badenhorst "The criminal capacity of children in South Africa international developments & considerations for a review" (2011) Child Justice Alliance 22.

[6] Report on the Child Justice Amendment Bill (2018) Briefing to the Portfolio Committee on Justice and Correctional Services on sections 8 and 96(6) of the CJA.

The topic of a MACR for children, is a topic that is informed by multidisciplinary fields of expertise, as the topic has at its core the question about the criminal capacity of the young individual. It is a well known fact that evidence presented by expert psychology and psychiatry testimony takes the form of expert opinions about criminal capacity.7 It is a complex topic and draws primarily from specialist fields in law, psychiatry and psychology. MACR should, from a holistic point of view, be approached from the perspective of clinical, criminological, sociological and legal perspectives.

The process of establishing a MACR, draws from highly specialised fields, within already specialist fields of forensic child psychiatry and psychology[8] as well as the specialist legal field of child law. Knowledge in these fields are expanding rapidly and it is imperative that South African children should benefit from the progress in these fields, to be able to draw the concept of justice into the realm of children's best interests. This perspective can assist in fixing a general MACR or can be used to assess children on a case by case basis.

Within this multidisciplinary setting some views are9 that due to the developments in neuroscience, an individual approach would be most beneficial. Delmage contends that from a medical law point of view a developmental trajectory would be the best approach in determining criminal capacity.

A second approach that can be taken apart from a focus on the criminal capacity that forms a key component of the consideration of a MACR is to practically consider the goal that a MACR is trying to achieve.

2.2.2 Human rights and the best interests approach

7 Stevens"The role of expert evidence in support of the defence of criminal incapacity" (LLD dissertation UP 2011)673

8 Grobler "A regulatory framework for psycho-legal assessments in South Africa" (LLD dissertation 2020 UP) 10.

9 Schoeman "Determining the age of criminal capacity Acting in the best interest of children in conflict with the law" SA Crime Quarterly No. 57 • September 2016 "The test for criminal capacity, according to section 11(1) of the Child Justice Act, requires a consideration of whether a particular child could firstly distinguish between right and wrong, and secondly act in accordance with this appreciation."

Barry Goldson[10] remarked that if one takes the 'goals' of the youth justice system and considers what those goals entail and the results the goals are trying to achieve, the effect this may have on the setting of a MACR resulting in immunity against prosecution, can also be achieved in a just fashion. He stated that goals would include:

- formally ratified international human rights standards needs to be prioritised by a government
- a system of justice must be designed that keeps track of practices in Africa and that ensures compatibility between its criminal and civil law systems
- balancing conflicting interests between outcomes that are in the best interest of children that are in conflict with the law and protecting society from harm in the spirit of crime prevention and community safety considerations
- responding to children in conflict with the law's plight, coming from the most marginalised sector of society, needing healing, and targeted intervention without overemphasising recourse to criminal justice mechanisms.

2.2.3 Decriminalisation approach

Child Rights International Network (CRIN) suggests an approach that separates the concepts of criminalisation and the taking of responsibility by children. In such a system, children are allowed to take responsibility for their conduct in the spirit of restorative justice and the focus on criminal responsibility takes a step back with this approach. Children under 18 years of age are held responsible in this fashion, although not held criminally responsible in the child justice system.[11]

In South Africa in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*,[12] In an unanimous judgment by Khampepe J, the Constitutional Court ruled that sections 15 and 16 of the Criminal Law (Sexual Offences and Related matters) Amendment Act were unconstitutional. The court ruled that the rights of adolescents to dignity and privacy as well as the best interests principle (section 28(2) of the Constitution) were violated. The court accepted expert testimony in the form of evidence that

[10]Church, Goldson and Hindley "The minimum age of criminal responsibility: Clinical, criminological/sociological, developmental and legal perspective (2013) *Youth Justice* 13 2 99-101.

[11] Skelton 259.

[12] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (2013) ZACC 35.

showed that normal developmental actions of adolescents were criminalised by the Act. The court declared that the effects of the provisions were not rationally related to the State's aim of safeguarding children. The provisions were declared only unconstitutional as far as it criminalised consensual sexual conduct between adolescents but otherwise the provisions remained in force.

In S v LM and 3 others[13] Opperman J in the High Court dealt with the implementation of the concept of decriminalisation of a contravention of section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 by children, that is, possession and use of cannabis by children. Possession and use of cannabis had become considered to be socially, morally and legally acceptable for adults using, cultivating and/or possessing it in private for their own consumption. The court ruled that the criminalisation of children conducting this behaviour on the grounds of timing and age is constitutionally an untenable situation. The court further ruled that in this specific set of facts the Schools Act[14] applies and that the public health actions that were supposed to be taken, should have been in relation to the mechanisms according to this specific act.

It stands to reason that the notion of decriminalisation , relating to offences committed by children, is not a foreign concept in our law. All parties in *S v LM* were in agreement that there are other measures available in dealing with the child offenders, which will not expose them to the penal consequences of the criminal justice system, but will achieve the same objective of protecting children.[15] This decision was confirmed by the Constitutional Court in *Centre for Child Law v Director of Public Prosecutions*, Johannesburg and Others.[16]

Having discussed these different approaches to the setting of a MACR, I will now move on to the legal perspective. The long standing legal principles in this area of the law also have something to offer to the debates.

2.2.4 Criminal responsibility from a legal perspective

Although internationally the term used is criminal responsibility, the South African law refers to it as criminal capacity. This makes sense because capacity is fundamental to all criminal liability and

[13] *S v LM and 3 others* 2020 4 All SA 249 (GJ).

[14] South African Schools Act 84 of 1996.

[15] *S v LM and 3 others* 2020 4 All SA 249 (GJ) Par 28.

[16] *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* (2022) ZACC 35.

there are no exceptions.[17] There are well entrenched principles in our law that the state must prove criminal liability beyond reasonable doubt and must have a prima facie case to start a prosecution. Liability generally concerns two psychological factors that render a child responsible for his or her voluntary acts:

- Free choice, decision and voluntary action of which he or she is capable of and
- The capacity to distinguish between right and wrong, good and evil at the time of committing the act, and to act in accordance with that knowledge. [18]

Section 11 of the CJA as amended sets out what must be proved if prosecution proceeds in the Child Justice Court. The child had the capacity to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation. Another consideration that is not clear from section 11 is the requirement that children should be able to have insight into the process and that due process procedures can only be followed if the suspect or accused understands the procedures.[19] This correlates with the requirements in section 77 and 78 of the CPA and the principals as set out in the High Court matter of S v TNS, which will be discussed later in this dissertation.[20]

The child also needs to be able to understand the legal proceedings to guarantee due process.[21] This requirement is found in the CPA and although a similar provision is not incorporated in the CJA, the two acts should be read in conjunction with each other as both acts are applicable to the criminal justice system. South African criminal law accepts youth as a basis for incapacity. [22]

2.2.5 The doli incapax presumption

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[17] Grant "Capacity to appreciate the wrongfulness of one's conduct" *Critical Criminal Law* (no date) available at https://africanlii.org/book/critical-criminal-law accessed on 11 July 2021.

[18] Grant 8.

[19] Skelton 260.

[20] *S v TNS* (2014) ZAWCHC 160.

[21] Section 77 CPA.

[22] Sections 7(1) and 7(2) 11 CJA .

English law has included the doli incapax maxim for hundreds of years, its origins rooted in the period of the reign of Edward 111.[23] Roman law applied the doli incapax doctrine to children that are deemed incapable of committing offences, committing a tort, and entering into legal transactions.[24]

The doli incapax presumption has been retained recently in South Africa for children between the ages of twelve and fourteen years, where it is presumed that this group of children lack criminal capacity. The legislative adjustment replaced the doli incapax doctrine's application on ten and eleven year old children by the raising of the MACR to twelve years of age and had been in effect from 19 August 2022.[25] An evidentiary burden rests on the prosecution to demonstrate that the child had criminal capacity when she committed the crime.

2.2.6 The impact of presumptions

In criminal prosecutions the state carries the burden to prove any crime beyond reasonable doubt. The child only has to raise reasonable doubt that should on a balance of probabilities be reasonably possibly true to secure an acquittal. The child also benefits from the presumption of innocence. In relation to criminal capacity the CJA as amended states that a child is not criminally responsible when he or she is under the age of 12 years currently. The current provisions of the CJA falls short of internationally accepted standards which is currently set at a MACR of 14 years of age by the General Comment 24 (2019)[26] which replaced General Comment no 10 (2007) on children's rights in juvenile justice.

The doli incapax presumption has the effect that a child does not have to produce proof on a balance of probabilities that he or she is not criminally liable, but it is assumed from the outset that he or she does not have criminal capacity. This assumption rests securely on well known

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[23] William Blackstone, Commentaries on the Laws of England 1769 4 13 can be viewed at https://lonang.com/wp-content/download/Blackstone-CommentariesBk4.pdf accessed on 31 October 2022

[24] Murhead Towards a Legislative Reform of the Doctrine of Doli Incapax under the Nigerian Criminal Code (2009) 39 *Journal of Law, Policy and Globalisation* 95 2020 33.

[25] Government Regulation Gazette 11475 686 dated 19 August 2022 no. 46752.

[26] UNCRC General comment No. 24 2019 22.

scientific evidence and the small chance of finding a child in this age group that is criminally responsible ,does not seem to warrant all the effort and risk involved to the child.[27]

When the prosecution produces prima facie proof that the child is criminally responsible, the evidentiary onus shifts towards the child to prove on a balance of probabilities that he/she is not criminally liable. The presumption attempts to act as a safeguard towards wrongful convictions when a low MACR is in place, but this presumption does not shield the child from the possibility of arrest, detention and exposure to the criminal justice system, regardless of the fact that the child is presumed from the outset to have no criminal capacity. The child is still required to be subjected to the criminal justice system and to subject him or herself to assessment for criminal capacity and the resultant long period of waiting in the criminal justice system for the assessment results in the form of a report. In many instances the courts has to make decisions on criminal capacity without expert psychological evidence[28], which leads to the acceptance of the lower minimum age in instances where a serious crime was committed.[29] If the report indicates that the child has no criminal capacity, only then can the child be dealt with outside the criminal justice system. It stands to reason that many "innocent" children stay in the criminal justice system until they can prove that they are not criminally liable.[30]

One option in retaining the doctrine, is that investigations should first be completed concerning this vital issue of criminal capacity, before twelve and thirteen year old children are placed in direct contact with the criminal justice system and are exposed to possible human rights violations. This entails the obtaining of expert or other evidence and if evidence indicates that the child is indeed criminally liable, then only can contact with the criminal justice system be facilitated as only then a

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[27] Fitz-Gibbon ``Protections for children before the law: an empirical analysis of the age of criminal responsibility, the abolition of doli incapax and the merits of developmental immaturity defence in England and Wales." (2016) 16 4 *Criminology & Criminal Justice* 391-409 re Royal College of Psychiatrists "The neural development argument for increasing the age of criminal responsibility:finds support in the findings of the Royal College of Psychiatrists who note that "...frontal lobe maturity of the brain is not found to occur until a child is around 14 years old". McDiarmid ("An Age and Complexity: Children and criminal responsibility" (2013) 13 2 Youth Justice 145) explains that the impac of limited development of the frontal lobe prior to this age is that'"children's reasoning and risk assessment will be more impulsive than adults' reasoning until this point".

[28] UNCRC General comment no 24 43.

[29] UNCRC General comment 10 2007 "Children's rights in juvenile justice" CRC/C/GC/10 25.

[30] Cunneen, "Arguments for Raising the Minimum Age of Criminal ResponsibilityResearch Report, Comparative Youth Penalty Project" (2017) University of New South Wales available at http://cypp.unsw.edu.au/node/146 accessed on 26 October 2020.

prima facie case can be formulated. The negative impact of this approach remains as Skelton[31] points out that children who are mentally normal are pathologised and unnecessarily brought in contact with the mental health system.

It follows that arresting children committing schedule 2 and 3 offences or issuing summons or a written warning to appear in court for children for this age group may lend itself to unlawful arrest and/or malicious prosecution, due to the absence of a prima facie case that exists from the outset against the child, as a result of the effect of the presumption of absence of criminal capacity that is in place.

In the Raduvha v Minister of Safety and Security and Another,[32] the court expressed its concern on the evidence as follows: "What is more disconcerting is that the above extracts of the evidence reveal a lack of knowledge and appreciation by the police officers of their constitutional obligation when arresting a child, to consider her best interests as demanded by section 28(2). They demonstrate that the police officers did not care whether the applicant was a minor or not. Sergeant du Plessis said it expressly in testimony, that even if he knew that the applicant was a minor, he would still have arrested her. This is because he considers it to be his job to arrest. The fact that the arrestee is a minor would make no difference."

From an international perspective the General Comment 10 already urged state parties in 2007 to abandon the dual minimum age thresholds of the doli incapax presumption, and the Committee has repeated this in its 2019 General Comment 24, which means that South Africa is considerably behind in reaching its commitment to this specific international standard.

The other option is that if the doli incapax doctrine is abandoned and the MACR raised, then the Children's Act becomes applicable, which is a comprehensive piece of legislation that brings in factors like judicial oversight and targeted interventions. These interventions are tailored to each child's developmental needs and facilitate the taking of responsibility by the child through social services and various programs offered through NGO's like NICRO. The Children's Act is already applicable in relation to children under 12 years of age.

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[31] Skelton 266.

[32] *Raduvha v Minister of Safety and Security and Another* (2016) ZACC 24 5.

A further point that can be advanced is that the bringing in of the doli incapax criteria through legislation, already signifies the presence and collective acknowledgement by parliament/society that doubt exists, that the children in the specified age group can be held criminally responsible for contravening the law. Bandalli stated that the doli incapax presumption is 'inherent illogicality, its unfairness in practice and its archaic nature'.[33] Where the doctrine truly has the aim of protecting children, protecting these children could be easily and effortlessly done by raising the MACR to an acceptable standard. The acceptance of a global standard of MACR of 14 years of age[34] confirms the legitimacy of this doubt and holding on to the doli incapax criteria may be viewed as irrational in the face of South Africa's international commitment and the internal logic/rationality in relation to the principles of criminal justice.

2.2.7 Youth as a basis for incapacity

2.2.7.1 Proving criminal incapacity through Individual assessments

Individual assessments from a medico-legal perspective which assess the development of each individual child, would be more accurate and precise in establishing criminal responsibility than a general overarching MACR. The challenge with an individual approach is that it is practically impossible to have individual assessments done for all children, to determine criminal responsibility on a case by case basis, due not only to the scarce resource of specialised, qualified professionals available locally,[35] but also because of the cost implications in obtaining individual assessments and the veracity of these reports for legal purposes and the resultant strain it places on the child justice system in South Africa to obtain it. Individual assessments are also largely unnecessary, when science accepts that in the overwhelming majority of children from a certain age group, children tend to not have full criminal capacity. It would be more beneficial if funds can be directed away from individual criminal assessments and those resources channelled into

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[33] Bandalli, "Abolition of the Presumption of Doli Incapax and the Criminalization of Children" (1998) 37 2 *Howard Journal of Criminal Justice* 115.

[34] UNCRC General comment 24 33.

[35] National Youth Policy: A decade to accelerate positive youth development outcomes 2020-2030: "Inadequately resourced youth development and poorly coordinated services" 14 5.7.

improving areas of concern, as indicated by the concluding observations of the UN Committee on the CRC[36]on State Parties for South Africa.[37]

The unavailability of specialist professionals[38] able to assess children for criminal capacity in specifically rural areas, as well as the waiting period pending the evaluation and obtaining the results of the evaluation, put children through unnecessary trauma due to continuous and prolonged exposure to the criminal justice system. The setting of a well balanced MACR will assist greatly in channeling government funding that is already strained, into assisting children under the MACR in rather gaining insight into what is right and wrong and what they did was wrong, assisting them in developing a healthy response to the challenges they face. A well balanced MACR will also protect children falling under the MACR from various human rights abuses in the criminal justice system.

2.2.8 Youth as a basis for incapacity

2.2.8.1 Proving criminal capacity through a minimum age of criminal responsibility

The challenges in making use of individual assessments, illustrates the importance of establishing a general MACR, from available expert scientific knowledge and legal precedent, that will protect the best interest of children.

In South African specific context, children has been severely disadvantaged through our past of apartheid and our fledgling democratic dispensation is ravaged by corruption and misappropriation of funds, which leads to the exacerbation of poverty that impacts on children directly. Poverty will influence access to education, exposure to life skills and biologically stunt development of children in general ,due to the lack of proper nutrition[39] , which affects the emotional, mental and intellectual maturity of the child.[40] A current MACR in South Africa, that is

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[36] United Nations Convention on the Rights of the Child 1989.

[37]UNCRoC Concluding observations on the second periodic report of South Africa (2016) CRC/C/ZAF/CO/2.

[38] Report on the Child Justice Amendment Bill 2018: Briefing to the Portfolio Committee on Justice and Correctional Services October 2018 in terms of Sections 8 r/w 96(6) of the CJA.

[39]National Youth Policy 2020-2030 *Persistent challenges affecting young people* Item 5.

[40] Rule 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules).

in line with standards globally may not be in keeping with the unique landscape of experiences of children in South Africa and may prove to be too low to reflect a just and equitable approach to South African children. The Parliament of South Africa acknowledged in June 2017 [41] that "the youth are the future leaders of our country and that legislation is geared towards enabling young people to reach their potential. The youth are significantly affected by unemployment, poverty, inequality and socio- economic challenges."

It stands to reason that international standards on the MACR may be the bare minimum requirement that should be put in place for South African children and from there on research can be undertaken in a South African specific context, to establish a more justifiable and appropriate MACR in country context

2.2.9 Specialist courts

Determination of criminal responsibility for children requires child sensitive treatment of children and the assistance of trained professionals. Trained professionals would include legal professionals conversant with child law and in relation to criminal capacity the specific procedures to be followed to determine criminal responsibility and the impact the age of the child and the MACR has on it. The CJA in South Africa is a child specific instrument that draws from various parts of law which includes criminal, civil and international law. It is a special piece of legislation that has to be interpreted and understood against the backdrop of these different parts of law. The procedures in the CJA mainly determine an inquisitorial style of adjudication, that is different to the adversarial system of law in South Africa that legal practitioners are working with on a daily basis in the criminal justice system. Child sensitive processes needs to be followed to protect the fundamental principles/rights of children of participation, best interests of the child, dignity, protection from discrimination and the rule of law.

International and regional treaties also find application in South African law and current child law and child specific procedures must be interpreted in the light of the Bill of Rights and against the guidelines of section 39 of the South African Constitution. This requires that the legal professionals dealing with the child must be knowledgeable in this specialist field of child law and the procedures to be followed to be able to safeguard and implement the rights and best interest of

[41] Celebrating South African Youth (2016) 1-2 available at https://www.parliament.gov.za/storage/app/media/EducationPubs/2017/july/10-07-2016/youth-month_eng.pdf accessed on 26 October 2022.

the child. The MACR acts as a protective barrier to the violation of rights for instance the deprivation of liberty, absence of specialist courts to guarantee procedural fairness and child sensitive treatment, absence of trained professionals in child law, protection of private and family life, preserving the child's dignity and ensuring child participation in instances where it is common course that the benefit of the doubt should be offered to children in relation to criminal capacity. Children should be held responsible if indeed they did contravene the law, but the focus should shift from criminal responsibility to the taking of responsibility.

The Child Justice Act relies heavily on probation officer's input and recommendations and a classification system of criminal offences categorised under different schedules.[42] The different schedules would determine the diversion options and length of it and it contains more weightier diversion options the more serious the crime the child is charged with. [43] It creates the impression that the more serious the crime is, the more serious steps should be taken to give effect to the rehabilitation of the child. This may lead to a reluctance to divert children where the doli incapax presumption is applicable, but instead lead to children being transferred to the criminal courts without having enough evidence to overcome the evidential burden resting on the state to prove criminal responsibility. The children have to appear in child justice courts for lengthy periods to facilitate obtaining reports on criminal capacity, in an attempt to hold them responsible for serious crimes. This leads to discrimination against children that are alleged to have committed more serious crimes. When a schedule 3 offence is committed, only the Director of Public Prosecutions[44] can consent to diversion, which creates a "special" procedure for authorisation of diversion which confirms the idea that a more serious crime outweighs the responsibility to give a child the benefit of the doubt in relation to criminal capacity when it is due to that child. This may make prosecutors more reluctant to divert children as well and rather opt for the matter to be dealt with in the child justice court which in cases of schedule 3 offences are regional or higher courts.

If a well balanced and realistic MACR is not set, the existing lack of specialisation in relation to the police force, courts, prosecutors and legal representatives will negate the great progress made in relation to ensuring justice for children.

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[42] Schedules 1, 2 and 3 of the CJA.

[43] Section 53 of the CJA.

[44] Section 52(3) of the CJA.

2.2.10 Scientific approach

If juveniles are to be held accountable for their actions, it is crucial to investigate key areas of their brain development given the cognitive and cognitive elements involved in determining criminal capacity to be able to hold them responsible for their actions. An assessment to determine the criminal capacity of the child to satisfy the requirements of section 11(3) of the CJA, will have to include an evaluation of the social, psychological, emotional, moral and cognitive development of a child.[45] Brain function development begins at the rear and moves to the frontal part of the brain. Self control, reasoning, planning skills and response inhibition is the last to mature and maturation is an ongoing process before the child reaches the early twenties.[46]

In 2005 the Roper vs. Simmons US Supreme Court case represents the most notable use of neuroscience research in adolescent social policy.[47] Seventeen year old Christopher Simmons was found guilty of murdering a woman whilst committing a robbery. His defence team maintained that he did not have a particular diagnosable brain disorder but that his developing adolescent brain caused a lesser culpability on his side for the commission of the offences and that the death sentence was not applicable to him. Amicus briefs were filed by the American Psychological Association (APA) and the American Medical Association (AMA) setting out the existing neuroscience evidence which highlighted the fundamental differences in brain development between adults and adolescents relating to culpability. The AMA submissions implied a causal link among brain structure, function, and behaviour in adolescence. The Supreme Court accepted neuroimaging research and evidence proving the reduced culpability of the seventeen year old boy.

Scientific findings are more readily accepted as relevant in human rights analysis to support protection measures for children. Evidence about brain development is used to support the recommendation in General Comment 24 of 2019 for a higher minimum age of criminal responsibility:
“documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing… States parties are encouraged to take note of

[45] Skelton 265.

[46] Johnson, Blum and Gied *Journal of Adolescent Health 2009*. 216–221.

[47] Roper v. Simmons, 543 U.S. 551 (2005).

recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age".[48]

The Council for the Administration of Criminal Justice and Protection of Juveniles[49] is an consultative body to the Dutch Government that conducted research on whether it would be desirable to raise the minimum age of criminal responsibility.[50] This study was tabled in the Dutch Parliament in 2018 and concluded that "from a development perspective, the culpability of young people's behaviour depends on the development of the brain and the related development of functions, such as the ability to assess the consequences. Scientific insights regarding children's development suggest that a higher age limit should be preferred, although it remains difficult to pinpoint the exact preferable age limit." The report recommended that "It would be unfair to allow individuals to be involved in criminal proceedings that they do not understand, which could essentially boil down to a violation of the right to a fair trial…" and "...only young people who are at least 14 years or older can be considered capable of understanding the implications of criminal justice proceedings."

2.9 Conclusion

The multidisciplinary approach, the rights and best interests approach and the decriminalisation approach all point to the inescapable conclusion that the raising of the MACR is not merely an option but an imperative. To opt for a cautious approach by retaining the doli incapax doctrine does not seem to offer the protection intended but on the contrary proves to be ineffective and exposes children unnecessarily to the harmful environment of the criminal justice system.

The recent amendment to the CJA, the impact of the Constitution, the Bill of Rights and relevant case law in South African context that impacts on considerations around the fixing of the MACR will be discussed next chapter.

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[48] Lynch and Liefaard "What is Left in the "Too Hard Basket"? Developments and Challenges for the Rights of Children in Conflict with the Law" (2020) *International Journal of Children's Rights* 28 1 89-110

[49] Raad voor de Strafrechtstoepassing en Jeugdbescherming available at https://organisaties.overheid.nl/13618/Raad_voor_Strafrechtstoepassing_en_Jeugdbescherming/ accessed on 30 October 2022

[50] Liefaard and Lourijsen "Raising the minimum age of criminal responsibility and the importance of proper youth care" Leidenlawblog 21 (2018) 21 Criminal Law and Criminology available at https://www.leidenlawblog.nl/articles/outline-on-raising-the-minimum-age-of-criminal-responsibility accessed 14 October 2022

CHAPTER 2: SOUTH AFRICAN LAW

2.1 Constitution of the Republic of South Africa

The South African Constitution is often lauded as a "transformative" instrument.[51] The Child Justice Act aligns itself in this transformative respect as it has an unique review system built into section 8 read with section 7(1) and section 96(4), which provides for the MACR to be reviewed every 5 years in view of raising the MACR.

2.1.1 The Bill of Rights

The Bill of Rights contains dedicated children's rights section as part of the Constitution. Section 28(2) states that in all matters concerning children, the best interest of children should be a paramount consideration. Section 39 makes provision that international law must be considered and foreign law may be considered in the interpretation of the Bill of Rights which means that the fixing of a MACR must be weighed in the context of Section 28(2) and Section 39 in the Bill of Rights. The Government of South Africa also signed certain international treaties and section 231 of the Constitution regulates the domestic position in relation to it.

International treaties become law in the Republic of South Africa when they are enacted into law by national legislation. When the Executive concludes an international agreement, the agreement only becomes binding on the Republic when both the National Assembly and the national Council of Provinces passes a resolution accepting the agreement. The CRC was ratified in 1995. In the *Glenister v President of the Republic of South Africa* case,[52] the majority of the court ruled that when a treaty is approved by Parliament and it is "intrinsic to the Constitution itself" then it has a direct effect in terms of the Republic's obligations at international law and find domestic constitutional application.

In view of the legal effect of the CRC and the application of section 28(2) of the Constitution the fixing of a MACR must be considered against this backdrop. In *S v M (Centre for Child Law as*

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[51] McConnachie, Skelton and McConnachie "Basic Education Rights Handbook "The Constitution and the Right to a Basic Education 2017 2nd ed) 1 14.

[52] *Glenister v President of the Republic of South Africa* (2011) ZACC 6 (2011 (3) SA 347 (CC).

Amicus Curiae),[53] the Constitutional Court set out comprehensively the best interest approach and Sachs J pointed out that "the contextual nature and inherent flexibility of section 28 leant itself to a truly child-centred approach and requires an in depth consideration of the needs and rights of the particular child in the 'precise real-life situation' he or she is in." The court clarified that the best interest principle is not absolute and does not override all competing rights. This perspective was concluded with the view of the procedural rights of children when sentencing takes place and that reasonable steps to minimise damage must be taken after proper attention was given to the best interests of children.

The CRC stipulates that a MACR must be fixed and the Committee to the CRC indicated through General Comment 24 of 2019 that the MACR should be fixed at a minimum of 14 years of age. When considering that children's best interest is of paramount importance under the Constitution, the recommendation to fix the MACR at 14 years of age should be approached with the best interest of children as a starting point in the conversation of weighing up competing rights.

The Bill of Rights finds application to all children and children can expect that when the MACR is considered that it must promote the values that forms the basis of an open and democratic society and protect their human dignity, equality and freedom.[54] The MACR protects children that do not understand the criminal procedures or can take part in it in a meaningful manner or can not account for the commission of criminal offences due to a lack of criminal responsibility, from entering the criminal justice system. Children are vulnerable.[55] The MACR helps these children to be dealt with in a more dignified and child sensitive way. In the absence of a MACR that protects children with no criminal capacity, children's rights to dignity are violated, their rights in terms of

[53] *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

[54] Section 39(1) of the Constitution.

[55] *Bhe and Others v Magistrate, Khayalitsha and Others (Commission for Gender Equality as Amicus Curiae)* 2005 1 SA 580 (CC).

section 28(2), section 28(1)(g)[56] section 12[57] and section 14[58] the Constitution is violated. The courts held that "[I]t must be remembered that some attacks on human dignity are more serious than others: the violation of dignity in the context of the violation of other constitutional rights would ordinarily be regarded as more serious than otherwise."[59]

This showcases that it is important to fix a MACR higher rather than lower. A higher MACR, coupled with a progressive approach to regularly consider raising that age safeguards the majority of children in a certain age group, rather than focusing on making sure that the exceptions amongst children that may have criminal responsibility are identified.

2.2 CHILD JUSTICE ACT

2.2.1 Child Justice Act in context

The CJA was adopted in 2008 with the date for implementation set at 1 April 2010. The CJA states that it was created in accordance with the values guaranteed in the Constitution and keeping in mind the international obligations of the Republic. Another stated aim is that it intends on setting a MACR for children. In relation to a MACR both the Child Justice Act as well as the Children's Act needs to be considered as both Acts find application in relation to criminal capacity of children.

The Preamble discusses the way children were treated under apartheid, where black children in particular did not have the "opportunity to live and act like children". It also states that the

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[56] The relevant text reads as follows "not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be
i. kept separately from detained persons over the age of 18 years; and
ii. treated in a manner, and kept in conditions, that take account of the child's age

[57] 12. Freedom and security of the person
1. Everyone has the right to freedom and security of the person, which includes the right
a. not to be deprived of freedom arbitrarily or without just cause;
b. not to be detained without trial;
c. to be free from all forms of violence from either public or private sources;
d. not to be tortured in any way; and
e. not to be treated or punished in a cruel, inhuman or degrading way.

[58]Everyone has the right to privacy, which includes the right not to have— (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.

[59] *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* [2021] ZACC 41 2 referring to *Le Roux v Dey* (2011) ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC).

overarching aim of the Constitution is to bring social and economic justice and assure that action will be taken to improve the quality of life for all. Diversion is also placed centre stage in playing a prominent role as an alternative to criminal sanctions for children that comes into conflict with the law. These stated aims create the context against which the provisions of the Act must be interpreted.

In the preamble it is stated that the Act in broad terms takes cognisance of South Africa's obligations in terms of international and regional instruments relating to children, mentioning the CRC and ACRWC pertinently. Specifically it highlights that implementers must take into account raising the MACR for children.

Skelton has pointed out that during the relevant legal processes that the Child Justice Bill must take through Parliament, civil society organisations made many submissions, using international law arguments and "almost persuaded the Justice Portfolio Committee to raise the minimum age at that point in time to twelve years". She explains the Child Justice Act contains what she calls 'an unusual clause' requiring Parliament to review the minimum age, with a view to increasing it, within five years of the Act coming into operation. [60] This also shows that civil society lobbying can make a marked difference to outcomes at Parliament, which is a theme that I will return to in my recommendations.[61]

2.2.2 The Statutory presumptions in the Child Justice Act

Before 19 August 2022, Section 7(1) of the CJA placed the MACR at under 10 years of age. Section 7(2) of the CJA created a presumption that children 10 years and older and under 14 years of age were presumed to lack criminal capacity.

On 19 August 2022 Section 7(1) of the CJA fixed the MACR at 12 years of age. The doli incapax doctrine was retained in the amendment to the CJA, but the application field was changed to range between 12 and 14 years of age. An onus is placed on the State to carry the burden of prove. This burden is a burden that proof must be presented on a scale that convinces the adjudicator beyond reasonable doubt that the child has criminal capacity. The recent amendment of the CJA

[60] Skelton "Proposals for raising the minimum age of criminal responsibility" (2013) 3 *SACJ* 257.

[61] Skelton (2013) 3 *SACJ* 257-258.

makes the proving of criminal capacity necessary only for plea and trial purposes.[62] A different criteria is now used to determine if a child is suitable for diversion between the ages 12 and 14 years of age. The amendment to the CJA simplifies the position relating to children between 12 and 14 years of age in relation to diversion consideration and preliminary inquiries considerably. The CJA is read with the CPA in relation to the issue of criminal capacity Sections 77, 78 and 79. Although sections are not identical to s 11(1) of the Child Justice Act, the adjudicator is in each case required to inquiry into the same cognitive and conative abilities of the human being in-front of him.[63]

2.2.3 The background to the recent amendment to the CJA

Section 8 of the CJA commissions the drafting of a report by the Justice Minister, to provide recommendations addressing the review of the minimum age of criminal capacity after the commencement of the CJA. Section 96(6) of the Act requires that the report must be submitted to Cabinet for approval and thereafter submitted to Parliament for consideration.

The report was compiled by convening a National Experts Workshop on the Review of the MACR in February 2015 with different stakeholders.[64] According to the report very few children between ten and eleven years of age are in conflict with the law. Statistical data to this effect was collected and reflected in the report.[65] The report made a finding that neuro-scientific evidence on the brain indicates that the development of the prefrontal cortex is not achieved until the early twenties or later. The report stated that these scientific findings plays a role in establishing criminal capacity of a child. The Report also noted that the African Charter on Human and People' Rights Principles and Guidelines[66] urged states to not set the MACR below 15 years, which is even higher than the UNCRoC's recommendation that the MACR should be set no lower than 14 years.

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[62] Section 11(1) of the CJA as amended.

[63] *S v TNS* (2014) ZAWCHC 160 11.

[64] Child Justice Briefing to the Portfolio Committee on Justice and Correctional Services (2018) on 30 October 2018 unpublished stated that consultation with stakeholders included "Selected experts in the children's sector, the academia, psychologists, psychiatrists, the judiciary, the National Prosecution Authority, the Department of Health, Legal Aid SA, and different civil society organisations specialising in children's issues, including members of the Inter-Sectoral Committee on Child Justice." 5

[65] Department of Justice and Corrections "Main findings of the report of the Child Justice Briefing to the Portfolio Committee on Justice and Correctional Services" 30 October 2018 unpublished powerpoint presentation 5.

[66] Department of Justice and Corrections "Report of the Child Justice Briefing to the Portfolio Committee on Justice and Correctional Services" (2018) unpublished 5.

The report advised a cautious approach to increasing the MACR and that the MACR should be capped at twelve years of age and not higher. The report stated that increasing the MACR to fourteen years of age may be a too big of a leap without tangible evidence of the efficacy, accessibility and sufficiency of the support and programmes offered at the present time to children falling under the MACR that is in conflict with the law in terms of section 9 of the CJA. The report recommended a further review of the MACR in 5 years of the commencement of the amended CJA.

The report recommended that criminal capacity should not need to be proved for children between 10 and 14 years of age for purposes of diversion and preliminary inquiries. It also recommended that the MACR be raised to 12 years of age and the doli incapax presumption be retained for children between 12 and 14 years of age.

The Report was approved by Cabinet in February 2016 and submitted to Parliament in March 2016. The Department of Justice briefed a joint sitting of the Justice Committees on the Report in September 2016 and the Department submitted a report to the Portfolio Committee on its consultation with the National House of Traditional Leaders and a list of civil society organisations specialising in children's issues in June 2017. The National Council of Provinces accepted the Amended Child Justice Act no 75 of 2008 on 9 June 2022.[67] As will be made clear from the paragraphs below, many of the Department of Justice recommendations were accepted, and shaped the Child Justice Amendment Act.

2.2.4 The role of the Police

Section 9(1) of the CJA as amended states that when a police official has reason to believe that a child suspected of having committed an offence and is under the MACR the police official must immediately trace the parents, appropriate person or guardian and hand the child over to such a person.[68] The recent amendment replaces the term "appropriate adult" with "appropriate person" which widens the scope of people that may take care of the child. One can envision an older sister

[67] Parliamentary Monitoring Group "Fourth Session, Sixth Parliament no 21-2022 Thursday, 9 June 2022 Minutes of Proceedings of the National Council of Provinces as the first order of the day"

[68] Section 9(1)(a) and (b) of the CJA.

that is not 18 years old as yet where the child can be placed and the child will be and can feel safe and secure.

If no such person is found or such a person is not a suitable placement, the child must be handed over to a suitable child and youth care centre. In addition to that, the police official must notify a probation officer.[69] The aim of Section 9 is clearly to show that the function of the police official is to assist children falling under the MACR and secure his or her safety, rather than treat the child as a suspect or accused. It also implies that when the police encounter juvenile offenders falling under the MACR they must assist in placing the child and notifying a probation officer that takes the relevant steps.

The children should be treated according to the police official's reasonable belief as to what the children's ages are. If the police officer believes that the children are between twelve years and fourteen years of age the police officer should treat them as if they are indeed of that age. If the police official has the reasonable belief that the children are aged between fifteen years and eighteen years of age the police officials should treat the children as if these are indeed their ages and treat them in terms of Chapter 4 of the CJA. The moment the probation officer or medical practitioner has expressed an opinion on the age of the child or an age determination at the preliminary inquiry or child justice court has been made, the age determined is the age that the police official should respect as the age of the child. [70]

The Constitutional Court in *Raduvha v Minister of Safety and Security*[71] expressed several concerns surrounding the arrest and detention stage. "Section 35 of the Constitution treats arrest and detention differently and in two separate subsections. To the relevant extent, section 35(1) reads that 'everyone who is arrested for allegedly committing an offence' has specific rights."[72] Subsection (2), in turn, relates to "everyone who is detained, including every sentenced prisoner" and recognises its own set of rights. Evidently, section 35(1) and (2) draws a bright line between arrested and detained persons."[73]

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[69] Section 9(1)(b) of the CJA.

[70] Section 12(b) of the CJA.

[71] *Raduvha v Minister of Safety and Security and Another* (2016) ZACC 24.

[72] *Raduvha* 36.

[73] *Raduvha* 36.

In terms of s 40(1)(a) of the Criminal Procedure Act[74], a police officer may arrest a person without a warrant if that person has committed or attempted to commit an offence in his or her presence. The jurisdictional facts in respect of s 40(1)(a) include:

"(a) that the arrestor must be a peace officer; (b) an offence must have been committed or there must have been an attempt to commit an offence; and (c) in his or her presence." Section 9 of the CJA states that when the policeman realises that the child is under the MACR the child must immediately be handed to an appropriate person, parent or guardian. This implies that the police official's discretion to arrest is curbed by section 9 of the CJA and he or she may not arrest the child but in the spirit of the CJA secure the child. The reasoning behind this is that the child does not possess criminal capacity and cannot form mens rea.

The position for children between twelve and fourteen years of age under the amended CJA is that when the police official realises that the child offender falls between these ages, the police officers have to consider the child offender's best interests in terms of section 28(2) of the Constitution in exercising their discretion to arrest him/her. The police must also exercise their discretion to arrest and detain a child as a measure of last resort as required by section 28(1)(g) of the Constitution. It would thus appear that it is even more important for children in this age range that are presumed to have no criminal capacity and should as a matter of principle for arrest and detention purposes be considered as falling under the MACR, not to be arrested. One would expect that the attitude in terms of arrest where the presumption is that the child has no criminal capacity is to secure the child rather than arrest and detention.

The reality is that under the amended CJA criminal capacity is not a requirement for the purpose of determining access to diversion options, when the child complies with the requirements for diversion which makes arrest all the more inappropriate. This means logically that no child needs to be arrested or detained to have access to diversion due to their conflict with the criminal justice system. The sole criterion under the new amended CJA for diversion is whether the child will benefit from the diversion. A child between twelve and fourteen years is presumed to lack criminal capacity and can only be considered to have criminal capacity if the prosecutor takes the view view that criminal capacity can likely be proved and an application is brought in the Child Justice Court for expert evidence to be compiled regarding the child offender's criminal capacity and the report received which finds that the child has capacity.

[74] Criminal Procedure Act 51 of 1977.

The Constitutional Court in *Raduvha v Minister of Safety and Security* further ruled that as section 40(1) of the CPA gives police officers an option to arrest or not, the two officers should have conducted a more thorough analysis of the available evidence to decide whether the circumstances called for an arrest. This is true since being arrested severely violates a person's liberty and their right to their dignity, both of which are guaranteed in the Bill of Rights.[75]

Illustrating this point practically by way of an example is where a 13 year old child is arrested for the schedule 3 offence where she caused the death of a human being in actions that seem to indicate charges that can be preferred for murder. Section 21(3) of the CJA as amended authorises only the presiding officer at the preliminary inquiry to release the child in the care of a guardian, responsible person or parent. The prosecutor may release a child that committed Schedule 1 and 2 offences on bail in line with Section 21(2) of the CJA as amended before first appearance, but not a child that committed a Schedule 3 offence. If the doli incapax presumption is not given its due weight the child will have to wait for first appearance in the Preliminary Inquiry to apply for bail for the first time. Schedule 5 and 6 of the CPA offences overlap with the offences listed in Schedule 3 of the CJA. Therein lies a danger as courts sitting as Child Justice Courts often sit as criminal courts for adult accused person's as well. The judicial officer, prosecutor and defence attorney will have to make a conscious effort and have the expertise and knowledge to know that Schedule 6 considerations must give way to bail consideration in terms of section 21 of the CJA r/w section 25 of the CJA where a child offender is concerned. The criteria relating to bail for child offenders is different in where section 21(1) of the CJA states that preference should be given in releasing the child. This criterion is in line with Section 28(1)(g) of the Constitution that states that for the protection of the child when detained a child may only be detained as a measure of last resort and only for the shortest appropriate period of time.

The criteria in bail applications for adults charged with offences listed in Schedule 6 or Schedule 5 of the CPA fall under section 60(11)(a) or (b) of the CPA and the evidential burden is on the accused to provide evidence on a balance of probabilities whether it is in the interest of justice and if exceptional circumstances exist for the release of the accused on bail or warning. A formal inquiry must also be held by the court to consider bail for the adult accused under the provisions of the CPA. When children find themselves in the midst of a system that caters for adults most of the day, it is easy to overlook the special considerations that apply to children and children may be denied their freedom for longer periods than necessary, due to the lack of specialisation and

[75] Radhuva (2019). 43.

knowledge in the justice sphere. In the absence of the lack of expertise the raising of the MACR will provide the necessary protection against these human rights violations.

The situation relating to the doli incapax doctrine creates unequal treatment between children that are irrebuttably presumed to have no criminal capacity and those that are presumed rebuttably to have no criminal capacity. Children falling under the MACR is shielded, from the outset, from contact with the criminal justice system regardless of the crime they may have committed and children between 12 and 14 years of age that are from the outset presumed to have no criminal capacity and have no onus on them to disprove the presumption, faces the risk of arrest and detention. This is in conflict with international obligations under Article 2 of the CRC on non-discrimination as well as section 9 of the South African Constitution. If there is no proof that the child has criminal capacity and is presumed to have no criminal capacity, he or she should be treated in the same manner as a child that has no criminal capacity. This view is confirmed by the spirit of Section 12(b) of the CJA in that when a child gives his or her age, the police official must conduct his or her duties according to the given age. If the police official realises that the child is of an age where he or she is presumed to have no criminal capacity and at that stage there is no evidence to show the contrary, the child should be treated as a child that has no criminal capacity. In reality the child should have the benefit of the procedures contained in section 9 of the CJA, regardless of the schedule that the crime resort under.

In the case of the *Teddy Bear Clinic v Minister of Justice*[76] the court found that sections 15 and 16 of the Act are unconstitutional in as far as they infringe on the rights of adolescents between twelve and sixteen year of age to dignity and privacy, and that they violate the best interests of the child principle contained in section 28(2) of the Constitution. The court accepted expert evidence that showed that the sections criminalise normal developmental actions of adolescents and cause harm to the children. The court ruled that the provisions were not rationally related to the State's purpose of protecting children and declared the provisions invalid to the extent that they criminalise consensual sexual conduct between adolescents.

The relevance of the *Teddy Bear Clinic* judgment to this study is that the court made clear that to expose children to the risk of arrest and detention where they are presumed to have no criminal capacity is not rationally related to the State's purpose of protecting these children. Children under

[76] *Teddy Bear Clinic For Abused Children and Another v Minister of Justice and Constitutional Development and Another* (2013) ZACC 35.

the MACR are guaranteed protection but children that are presumed to have no criminal capacity are not afforded the less invasive options that are afforded to children under the MACR. The less invasive procedures are contained in section 9 of the CJA where the child would be shielded against the harmful impact of the criminal justice system and intervention in the life of the child would be immediate and can happen under the supervision of the probation officer and the Children's Court under the Children's Act 38 of 2005.

Section 53(2)(b) of the Children's Act provides that anybody that acts in the best interest of a child has locus standi to obtain relief from the Children's Court by way of an application for a court order. The Children's Court has the power to make supervisory orders placing a child and/or parent or care-giver under the supervision of a social worker[77], order the child, a parent or care-giver to early intervention services[78], or give a child protection order.[79] Section 144(1) states that the purpose of prevention and early intervention programmes is, to provide for psychological, rehabilitation and therapeutic programmes for children[80] and to divert children away from the child and youth care systems and the criminal justice system.[81]

To discriminate against children presumed to have no criminal capacity, in the way that they are treated when they are in conflict with the law, even for the investigative period until evidence can be procured that the twelve and thirteen year old are criminally liable, is against the provisions of section 9 of our Constitution[82] as well as our International obligations in terms of Article 2 of the CRC on non-discrimination.

2.2.5 The role of the probation officer

The probation officer must evaluate the child in terms of Chapter 5 after being notified by a police official through the provisions of section 9(1), as soon as possible but no later than seven days after being notified. The probation officer is empowered to take different actions depending on what he or she deems appropriate after the assessment of the child is done which may entail:

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[77] Section 46(1)(f) of the Children's Act 38 of 2005.

[78] Section 46(1)(g)(i) of the Children's Act.

[79] Section 46(1)(h) of the Children's Act.

[80] Section 144(1)(e) of the Children's Act.

[81] *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* (2022) ZACC 35.

[82] Section 9(1) of the Constitution.

- approaching the children's court on any of the grounds set out in section 50
- put arrangements in place for the child to receive counselling or therapy
- If an accredited programme is available and designed specifically for children that have no criminal capacity arrangements can be made for the child to be enrolled in the program
- Available support services that can allow for targeted intervention that is available can be put in place for the child
- Arrangements can be made to hold a meeting with the child and/or parents and guardians or appropriate persons to ascertain an intervention strategy.
- or the probation officer may decide not to take action if no action is needed.

Before the legislative amendment to the CJA the child had to be accompanied at the meeting by an adult, but after 19 August 2022 the child can also be accompanied by an appropriate person. The aim of the meeting is to put together a plan specifically for the individual child and relevant to the circumstances surrounding the allegations against the child. The meeting and written plan must comply with the specification stipulated in Section 9(4) and (5).

The prescriptions in Section 9 allows for accountability as the probation officer is required to record in detail, the results of the assessment and the details of the decision made in terms of section 9(3). If the child does not adhere to the prescribed plan that the probation officer set out in terms of section 9, the probation officer must approach the children's court for intervention in terms of Chapter 9 of the Children's Act. The Child Justice Act as well as the Children's Act forms an effective and practice proven alternative for children in conflict with the criminal justice system. These provisions indicate that less intrusive procedures are already in place to deal with children that have no criminal capacity and that 12 and 13 year olds can be accommodated under these provisions and rightly so, as they qualify until the State can prove that they do have criminal capacity and the necessary mens rea.

The recent Constitutional Court in the case on decriminalisation of cannabis, *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others,*[83] found that: "Instead of criminalisation, the Children's Act approaches the problem by asking: what can the State do to support this child in preventing 'further conflict with the law'. A response situated in the Children's Act does not subject the child to arrest, detention, imprisonment or, at best, diversion which still

[83] *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* (2022) ZACC 35.

leaves a child with a criminal record." Depending on each child's unique circumstances the provisions of section 150 of the Children's Act is also available to declare a child as a child in need of care and protection.[84]

2.2.6 The role of the public prosecutor

2.2.6.1 Prosecuting children between 12 and 14 years in the Child Justice Court

Section 11 of the CJA determines that the state must prove that the child could appreciate the difference between right and wrong at the time when the offence was committed and act in accordance with such an appreciation. The Section must be read with the CPA that stipulates in Section 77 that when it appears to the court that throughout criminal proceedings that an accused is because of a mental illness or mental defect not capable of understanding the proceedings so as to conduct a proper defence, an inquiry must be held after obtaining expert evidence in terms of section 79 of the CPA. The Child Justice Court must thus ensure that the child is able to understand the proceedings to ensure procedural fairness as well as be satisfied that the child can distinguish between right and wrong at the time of the commission of the offence, have an appreciation of the wrongfulness of his/her act or omission and can act in accordance with such appreciation. Due to the doli incapax presumption it is safe to say that the inference can be drawn that the child will very likely not be able to participate in a meaningful way in the criminal justice system.

In the case of *S v TS*[85] the court found that a thirteen year old had criminal capacity but the decision was overturned on review. The case also sets out that if the child offender tenders a plea of guilty and where there is doubt, especially where the child offender is benefitting from the doli incapax doctrine, a plea admitting criminal capacity will not be accepted at face value. This consideration also came to play in the constitutional decision in *De Vos NO* v Minister of Justice and Constitutional Development [86] where the court stated that a child with mental illness or intellectual disability can not be referred for diversion due to their lack of criminal capacity. This impacted heavily on the previous CJA where it entails that child offenders only have access to diversion if they have criminal capacity. The recent amendments removed that obstacle to ensure that criminal capacity need not be proved to make diversion accessible to any child offender. In *De*

[84] Section 150(1) of the Children's Act.

[85] *De Vos NO v Minister of Justice and Constitutional Development* 2015(1)SACR 489 (WCC).

[86] *ADPP KZN v Inquiry Magistrate Mkhize and Others* AR 568/12 PMB (2013).

Vos NO the CPA was amended to protect child offenders from being detained automatically due to mental illness or intellectual disability.[87] This case shows how easily a child offender can be stigmatised as having a mental illness, where it is absolutely normal for children to develop progressively and the growth of the criminal capacity can not be classified as a mental "illness".

The burden in criminal proceedings is one of proof which is beyond reasonable doubt. If one has to consider the fact that determination of criminal capacity is a multidisciplinary specialist field, it is doubtful that the burden of proof that rests on the state to prove criminal capacity can be overcome without expert evidence. In relation to the burden of proof that the state carries, it is unlikely that non-expert evidence will be able to overcome the legal threshold, to prove criminal responsibility of the child. Proceedings like this may make proceedings vulnerable to appeal or to set proceedings aside on review. This may especially be true if the defence presents evidence to prove that the child had no criminal capacity when the crime was committed.

2.2.6.2 Diversion

Section 51 of the CJA states that diversion aim to deal with a child outside the formal criminal justice system when the child qualifies for diversion. Diversion aim to encourage and teach the child to be accountable for any that she may have caused and to meet the particular needs of the individual child. Diversion aim to promote the reintegration of the child into his or her family and community and facilitate opportunity to victims to express their views on how the actions of the child impacted on their lives. Children in conflict with the law are then encouraged to give to the victims affected by the child's conduct some symbolic benefit or to deliver an object if plausible as compensation for the harm that the victim suffered. Diversion has the aim to encourage reconciliation between the child and all parties affected by the child's actions which prevent stigmatising the child and the negative effects of being subjected to the criminal justice system. As diversion limit contact with the criminal justice system it reduce the potential for re-offending and the child does not get a criminal record. Diversion aim to promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.

in *S v CKM*[88] the high court stated that the Act:

[87] De Vos NO (2015). 21.

[88] *S v CKM* 2013 (2) SACR 303 (GNP) 7.

'Introduced a comprehensive system of dealing with child offenders and children coming into conflict with the law that represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care, and correcting errant actions as far as possible by diversion, community-based programmes, the application of restorative-justice processes and reintegration of the child into the community.'

Before 19 August 2022 the prosecutor had to consider the cognitive ability of the child for diversion, which was difficult for the prosecutor to consider without expert evidence. With the new amendment to the CJA the need for expert evidence to make a decision surrounding diversion in relation to the cognitive development of the child falls away.

The following points have to be taken into consideration in terms of Section 10(1):[89]

a.The educational level, domestic and environmental circumstances, age and maturity of the child;
b. The nature and seriousness of the alleged offence;
c. the impact of the alleged offence on any victim;
d. The interests of the community;
e. A probation officer's assessment report in terms of Chapter 5;
f. The prospects of establishing criminal capacity in terms of section 11 if the matter were to be referred to a child justice court in terms of Chapter 9 of the amended CJA;
g. The appropriateness of diversion; and
h. Any other relevant factor.

The amendment of the CJA obviates the need to obtain individual expert reports to assess criminal capacity of child offenders, as it remains a challenge to source the relevant experts to compile the reports. The waiting period to obtain the reports creates a situation where the window of opportunity for the best possible intervention has long passed by the time the reports are available. What is currently readily available are the published reports of experts that suggest that 12 and 13 year old children's cognitive abilities are still developing. The evidence has been so persuasive that the UN General Comment 24 of 2019 indicates, based on available expert

[89] Section 10(1) of the CJA..

evidence, that a minimum age of 14 is preferred as a cut off point for criminal capacity. If this is to be taken into account under section 10(1)(h) of the CJA, then it should add weight in making decisions in line with the stated aim of the CJA in the preamble that considerations for diversion should take centre stage.

When the child does not qualify for diversion and the prosecutor decides that criminal capacity can not be proved, the prosecutor can cause the child to be taken to a probation officer that will deal with the child in terms of section 9 of the CJA. If the prosecutor decides that there is a prospect that criminal capacity can be proved but the child should not be diverted, the case is referred to a preliminary inquiry and thereafter to a child justice court.

The design of section 10 of the CJA is structured in a manner where a weighing of competing rights are envisioned, but the best interest of the child in terms of section 28(2) of the Constitution should be paramount when every factor is weighed and diversion should be a central consideration when the child's future is decided.

The difficulty lies with Section 10(1)(f) of the CJA as amended where the prosecutor is expected to make a decision to prosecute based on largely non-expert evidence that is available so soon in the investigative process. The danger exists that where the child offender has no criminal capacity the prosecutor will rather err in placing the case on the roll in the Child Justice Court where the offence is serious, rather than give the child offender the benefit of the doli incapax doctrine that is in operation. The effect of this approach is that the child offender need to prove his innocence (lack of criminal capacity) and stays in contact with the criminal justice system, which leads to a violation of the child's human rights and can never be considered to be in the best interest of the child, especially as there are alternatives available in relation to section 9 of the CJA and the supporting backdrop of the Children's Act.

2.2.6.3 Prosecutorial diversion

When a child between the ages of twelve years and fourteen years of age commits a schedule 1 offence the prosecutor can in terms of section 41 of the CJA, if the child satisfies the requirements laid down in section 52(1)(a)-(d), divert the matter if the child will benefit from diversion.[90] The prosecutor can also refer the matter in terms of section 9 of the CJA if the prosecutor is of the view

[90] Sections 41(1)(a) and (b) of the CJA.

that criminal capacity can not be proved in the Child Justice Court and that diversion will not be a suitable option.

Section 41 of the amended CJA states that where a child committed a Schedule 1 offence, the prosecutor may divert the matter by selecting any one or any combination of the diversion options in section 53(3) when the child complies with section 52(1)(a)-(d) and the child will benefit from diversion. The child complies where he or she consents to diversion, acknowledges responsibility, has not been unduly influenced to admit responsibility and that there is prima facie evidence against the child. The new amendment replaces the need to investigate the criminal responsibility of the child, for children who are between the ages of twelve and fourteen years for the purpose of considering diversion.

The requirement for a prima facie case in the CJA prior to the amendment, is replaced by the requirement for prima facie evidence to be present for the purposes of diversion. It is somewhat of a dichotomy as there is a requirement for a prima facie case to exist for the police to initiate criminal proceedings against the child, but for diversion purposes there is only a need for prima facie evidence to be present. The lowering of the test makes diversion more accessible to children between the ages of twelve and fourteen years and complies with the stated aims of the CJA, but still does not shield children against the harmful effects of the criminal justice system. Diversion proceedings remain intrusive and Goldson states that "Expanding the reach and deepening the penetration of the youth justice system in order to 'manage' profound contradictions in the social order is ethically unsustainable. It amounts to the criminalisation of social need and/or the governance of children through crime."[91] In *S v TS*[92], the court noted that the Child Justice Act allows for a preliminary enquiry that deals with various matters, including the child's criminal capacity. The court noted that the procedures at the preliminary enquiry tends to result in assisting parties in the criminal justice system to determine whether the child should be charged. A child will be charged when the prosecution is of the view that there is a reasonable prospect of a prosecution including a reasonable prospect of proving the child had criminal capacity at the relevant time. Once the child is charged the ordinary rules of criminal procedure apply.[93]

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[91] Goldson, B. "Unsafe, Unjust and Harmful to Wider Society': Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales." (2013) *Youth Justice* 13 2 518.

[92] *S v TS* 2015 (1) SACR 489 (WCC).

[93] *S v T* 16.

The problem with this situation is that it is clear that the criminal justice system is employed to assist the prosecution in building their case where there is no case from the outset. The Act has now been amended but the situation remains the same in where the child is charged and only in the child justice court an application is brought to obtain evidence to counter the workings of the presumption that the child has no criminal capacity.[94]

Under the CJA as amended the thirteen year old child, charged with murder and referred to in an earlier example can still take responsibility for the commission of the crime and thus qualify for diversion, but the permission of the DPP will have to be obtained. The result of this requirement is that diversion may not be so readily accessible to children that commit schedule 3 offences as the permission of the DPP will only be obtained if the prosecutor is of the view that the case merits diversion.[95] If the prosecutor decides to prosecute regardless of the child taking responsibility for the commission of the offence, on one or more of the criteria mentioned in section 10 of the CJA as amended, representations can be made by the child to the DPP against the prosecutor's decision. Throughout all these processes the child is in contact with the criminal justice system and the doli incapax presumption has become ineffective.

The Children's Act 38 of 2005 contains extensive procedures that can be followed in relation to child offenders that have no criminal capacity. These existing measures that are in place in our law seem to be adequate to deal with all children, including child offenders that have no criminal responsibility. There seems to be no real argument that can be advanced to not raise the MACR to acceptable International standards of 14 years of age against the backdrop of alternative solutions that are available. This has also been pointed out in the constitutional case of *Centre for Child Law v Director for Public Prosecutions , Johannesburg* [96] where decriminalisation of offences relating to child offenders is preferable if there are less invasive and more appropriate mechanisms to deal with the child.

2.2.6.4 The advantage of the new diversion test v the fixing of a higher MACR

It goes without saying that the MACR shields young children in totality against the impact of the criminal justice system. When children falling under the MACR commits offences they still

[94] Section 11(3) of the CJA.

[95] *Rabupape v S* 2015 (2) SACR 497 (GP); Sloth-Nielsen "Recent Developments in Child Justice "2015 *SACJ* 443.

[96] *Centre for Child Law v Director for Public Prosecutions , Johannesburg* (2022) ZACC 35.

experience intervention through social services and if necessary judicial oversight through the children's court. The police are also guided by the CJA to assist in handing the children to caretakers and notifying a probation officer to manage the situation. The amendments to the CJA makes diversion for children between twelve and fourteen years of age more accessible. It also removes the requirement to determine criminal capacity to be able to qualify for diversion.

The benefits of the amendment in this respect are that a prosecutor is not expected to make a decision on criminal capacity for the purpose of diversion, where they are not equipped with appropriate sufficient evidence to do so. Not having to consider the child offender's criminal capacity also alleviates the strain on the system when reports must be obtained of a highly specialised nature. The time it takes to obtain these reports are also eliminated. The time that passes in obtaining the reports, works against the aim of effective intervention in the child's life, the child's support structures as well as often victims and their support structures.

Even when diversion becomes more accessible the damage that is done through contact with the criminal justice system still remains and can often not be overcome. In the Teddy Bear case[97] Khampepe J held that:

"I find myself constrained to agree with the applicants that even the prospect of diversion cannot save the impugned provisions. If the adolescent charged under section 15 or section 16 is ultimately diverted from the formal criminal justice system, he or she may still be arrested and forced to interact with arresting and investigating police officials. If the adolescent is to avoid a formal criminal trial, he or she must acknowledge 'responsibility for the offence' to a magistrate. The acknowledgement is made during inquiry or trial proceedings at which various people may be in attendance, including the adolescent's guardian, the relevant probation officer and the prosecutor. The adolescent will not only experience these interactions with various institutions of state, but in the course thereof will be forced to disclose and have scrutinised details of his or her intimate affairs." The court also pointed out that the respondents reliance on prosecutorial discretion to justify the limitation of children's rights only partially solves the harm because adolescents would still be exposed to arrest and other early processes in the criminal justice system, and therefore a prosecutor "choosing to act with circumspection" does not save the provision from being declared unconstitutional.

[97] Teddy Bear Clinic for Abused Children.

A prosecutor is required as part of evaluating the suitability of prosecuting a child to consider the prospects of proving criminal capacity in the child justice court.[98] As criminal capacity is such a specialist field it is hard to imagine that it can be proved beyond reasonable doubt without the introduction of medical, psychiatric and/or psychological assessments of the child's cognitive, moral, emotional, psychological and social development as Section 11(2)(b) of the CJA requires. For the state to obtain the report the state will have to make an application in the Child Justice Court to. the court to obtain the same and only on receipt of the report the prosecutor will be able to really assess whether a prosecution will be successful.[99] To obtain these reports also proves to be challenging due to a shortage of skill available due to the inadequate number of trained officials.[100] A prosecutor is required to in terms of Section 10 of the CJA make a projection on the possibility of proving criminal capacity on evidence that excludes expert evidence. In all of this the child is in contact with the child justice system and if it turns out that the child does not have the required criminal capacity the harm done to the child can not be quantified.

The amendments to the CJA also changed the standard of proof in that prima facie case is substituted for prima facie evidence that the child committed the offence.[101] This relaxation of the standard eliminates the proving of criminal capacity to facilitate diversion if the child qualifies in all the other aspects. If the prosecutor decides to proceed with the prosecution then the standard of a prima facie case still remains, as it is trite, that it is the criminal standard for all prosecutions.[102]

2.2.6.5 Unfair discrimination

The CJA groups offences under three different Schedules where Schedule 3 contains the most serious offences, Schedule 2 less serious offences and Schedule 1 the least. Diversion options are regulated in relation to the seriousness of the offence and the more serious the offence the more

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[98] Section 10(1)(f) of the CJA.

[99] Section 11(3) of the CJA.

[100] Wakefield "Is the Act working for children? The first year of implementation of the Child Justice Act" *South African Crime Quarterly* 38 2011 45; Waterhouse "Parliament reviews the implementation of the Child Justice Act"(2011) *Article 40* 13 2 2 2; Centre for Justice and Crime Prevention; Enterprises University of Pretoria; Centre for Child Law "Impact of the Child Justice Act 75 of 2009 Final Research Report" (2019) 28.

[101] Section 52(1)(c) of the CJA.

[102] Section 58(5) of the CJA.

invasive the diversion requirements can be. The period that the order can run is also more extensive on that basis.[103]

Section 10 of the CPA requires the prosecutor to consider factors like the nature and seriousness of the offence as well as the impact of the alleged offence on any victim and the interest of the community. These factors will mitigate against the granting of diversion or if the child is diverted will influence the level of intervention in the child offender's life. These factors have no impact on the criminal capacity of the child in reality. One can foresee that even if it is clear that the prospect of proving criminal capacity is slim a prosecutor would rather refer the case to the child justice court in the case of a Schedule 2 and 3 offence to avoid a social outcry when the correct decision would be to refer the child in terms of section 9 or even divert the child. It means that when two children, where there is a slim prospect of proving criminal capacity against both of them, commit different offences that fall under different schedules, will not have the same opportunity for diversion or to be referred in terms of section 9 by the prosecutor.

This unfair treatment can be avoided by raising the MACR to 14 years of age as under the MACR all children in that age range are equal before the law. Apart from the danger of prejudice from the prosecutor's side the courts also seem to deal differently with children that commit serious offences. The court in *S v TNS*[104] found that after an evaluation of available cases it seemed that where children are charged with heinous crimes the children were convicted more easily as the expectation generally speaking is that a child should be able to distinguish right and wrong when committing the more serious offences and be able to act in appreciation of that knowledge. This may be contrary to the reality of the factual position regarding the child's criminal capacity. The court stated that "One will thus find dicta that a child will more readily be found to have criminal capacity in relation to obviously heinous crimes - offences malum in se".[105]

2.3 Case law

2.3.1 S v TS

[103] Section 53(2) of the CJA.

[104] *S v TNS* (2014) ZAWCHC 160 15.

[105] See the survey of cases in *S v Pietersen & Others* 1983 (4) SA 904 (E) 909C-G; *S v Ngobese & Others* 2002 (1) SACR 562 (W) 564g.

In *S v TS*[106] the issue of the criminal capacity of a thirteen year old child was considered at length. The case came before the court on automatic review. Charges was preferred against a thirteen year old female child offender on a count of culpable homicide. The allegation was that she caused the death of her biological father by stabbing him. The magistrate ruled that the child had criminal capacity on the evidence of a report by a child psychiatrist and clinical psychologist that was presented. The child in conflict with the law pleaded guilty and tendered a statement in terms of section 112(2), giving a full account of the incident through her legal representative. She was convicted on the basis of this plea and statement and sentenced to five years' compulsory residence in a Child Youth Centre.

The expert report indicated on the issue of criminal capacity that the accused did "understand the difference between right and wrong, within the limitations of her intellectual and developmental level, which bordered on her [having an intellectual disability]. The child generally had the capacity to act in accordance with that knowledge". The report further stated that her ability to control her impulses, however, would have been "profoundly affected" by the sense of danger provoked by her father's verbal and physical attacks. The experts were not called to testify in order to clarify the concepts.

Roger J found that "the question of criminal capacity, in relation to the unlawful killing by a child in circumstances such as those of the present case, would require one to focus on the further question whether the child had the capacity to determine the circumstances in which killing another would be justified and, if so, whether the child had the capacity, in the specific circumstances which arose, to act in accordance with her cognitive capacity."[107] If a child lacks criminal capacity in relation to the charged offence, mens rea falls away, because fault cannot be attributed without criminal capacity. The court set the conviction and sentence aside and remitted the matter back to the court to deal with it in terms of section 113 of the CPA.

The court indicated some of the mechanisms available for managing children outside the criminal justice system of which Section 11(5) read with section 9(3)(a)(i) is applicable, if the child is found to have no criminal capacity by the child justice court or an investigation in terms of section 50 of the Child Justice Act read with Chapter 9 of the Children's Act 38 of 2005. Any court in the course of proceedings involving a child who appears to be in need of care and protection may, in terms of

106 S v TS.

107 S v TS 38.

section 47(1) of the Children's Act, order that the child be referred to a social worker for investigation as provided for in section 155(2) of that Act. A children's court may make an order in relation to a child in need of care and protection is placing the child in a youth care centre as provided for in section 156(1)(h).[108] These mechanisms are available to all children that fall within the MACR and it is clear that the necessary accountability assurances exist through the respective legislation.

2.3.2 The Criminal Justice System not to replace non functioning Social Services

The magistrate in giving her reasons for her judgement and sentence noted that in regard to sentence, "while there may in theory be procedures outside the criminal justice system for ensuring that children receive adequate care, in practice it is almost non-existent in the rural area such as the Overberg". The magistrate stated that no counselling services are available and no home-bases supervision services rendered in the area in cases that she presided over. The effect of this lack of services resulted in the very same children re-offending again. The magistrate expressed alarm at the prevalence of serious crime committed in her area by juveniles. The magistrate stated that she herself has reported at a high level, the urgent need for elementary and sufficient social services but without any joy.[109]

The judge remarked "I adhere to the view indicated by my query, namely that a court's sentencing jurisdiction should not be used to impose a penalty, otherwise inappropriately harsh, because of failings in social services."[110] Even allowing children to be convicted even though they are not criminally liable remains an injustice even if it is done with the objective to intervene where social services cannot. Different legitimate structures are available to effect intervention as the judge pointed out in his judgement and a perversion of justice is not necessary even with the best of intentions to assist young children. The problems that the judiciary in the criminal justice system experience with social services, may be better addressed by the Children's Court. The Children's Court has a specific focus and the tools to monitor compliance with its own orders. It would be more appropriate to rather than subjecting children to the harsh environment of the criminal justice system, raise the MACR as it should and focus on dealing with the identified problems in the social justice system through the specialised courts.

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[108] *S v TS* 47.

[109] *S v TS* 7.

[110] *S v TS* 45.

2.3.3 The Constitutional court mentioned the same concerns in *Centre for Child Law v Director of Public Prosecutions, Johannesburg*[111]

> "In other words, the question to be answered is this: is the criminal justice system the appropriate mechanism to respond to the use and/or possession of cannabis by a child or are social systems designed to protect and promote the rights of the child more suitable?"

This case came before the court on special review and pertained to four children who tested positive for cannabis during a drug test that was arranged by the school. The children were charged in terms of Schedule 1 of the CJA, agreements were finalised between the State and parents and diversion orders were granted by the court to that effect. The children were brought back to court due to non compliance with the diversion orders and on recommendation by the probation officer referred by the court to a compulsory residential diversion programme at the Walter Sisulu Youth Care Centre or the Mogale Leseding Child and Youth Care Centre in Krugersdorp, for an unspecified period.

Many issues were ventilated but of relevance in relation to the MACR is that the High Court further remarked that the matter raised questions about the legality of the proceedings, in the light of this Court's judgement in the *Prince* case.[112] All the respondents supported the view that section 4(b) of the Drugs Act is unconstitutional insofar as it applies to a child. They also supported the argument that the Prevention of and Treatment for Substance Abuse Act[113]and the Children's Act[114] are more appropriate mechanisms to deal with cannabis related offences.[115]

The High Court held that "there are less restrictive means available to achieve the purpose of protecting the child from the use and abuse of harmful substances, including prevention, early intervention, treatment and rehabilitation processes and mechanisms provided for in the

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[111] *Centre for Child Law* 1

[112] Wakefield "Is the Act working for children? The first year of implementation of the Child Justice Act" (2011) South African Crime Quarterly38 45; *Minister of Justice and Constitutional Development v Prince (Clarke and others Intervening); National Director of Public Prosecutions v Rubin*; *National Director of Public Prosecutions v Acton* [2018] ZACC 30.

[113] Prevention and Treatment of Substance Abuse Act 70 of 2008 (PTSAA).

[114] Children's Act 38 of 2005.

[115] *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* [2022] ZACC 35.

Children's Act and the PTSAA – which are available to children both within and outside of the child justice system."

2.4 Criminalisation illegitimate when other means available

Mhlantla J in the Constitutional Court's judgement differentiated between legality and decriminalisation. The constitutional court stated that "by contrast, decriminalisation does not permit the use and/or possession of cannabis, but has the consequence that the use and/or possession does not result in a criminal conviction and punishment."[116] The court further stated that "This matter is about the consequences of the use and/or possession of cannabis by a child, and whether those consequences should be located in the criminal justice system or in social systems." The fixing of a MACR is in reality a mechanism to achieve the directing of children in conflict with the law to appropriate social systems. The court acknowledged that there can still be legal consequences for children for the use and/or possession of cannabis even if it is outside of the criminal justice system.[117]

The court encapsulates the effect of decriminalisation as follows: "[I]t is still illegal for a child to use and/or possess cannabis (whether in public or private); however, that child cannot be arrested and/or prosecuted and/or sent to a diversion programme for contravening the impugned provision."

The Court in its judgement stated that "A response situated in the Children's Act does not subject the child to arrest, detention, imprisonment or, at best, diversion which still leaves a child with a criminal record."[118] This is in essence what the fixing of a MACR achieves. The accountability factor is retained but the criminal sanction is removed. This judgement revolves around a Schedule 1 of the CJA offence but this judgement opens the possibility of fixing the MACR at 18 years of age, if the social systems are in place to facilitate it.[119] Currently the infrastructure and system is designed to deal with children under fourteen years of age that have no criminal capacity and with this decision of the court it has become clear that there is no reason why the MACR should not be

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[116] *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* [2022] ZACC 35 Par 24.

[117] *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* [2022] ZACC 35 Par 27.

[118] *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* [2022] ZACC 35 Par 85.

[119] Par 79 supra "If effective means exist, other than criminalising a child for the use and/or possession of cannabis, the Constitution requires that route to be followed."

raised to the acceptable international level. The Minister of Justice accepted that by articulating that "the criminalisation has no legitimate basis and there are other means that could be utilised to address the issue without resorting to the criminal justice system." The Minister of Social Development, Minister of Health, Minister of Basic Education and Minister of Police all supported the Minister of Justice's stance.

In *S v MM*[120] , the accused, tendered a section 112(2) of the CPA guilty plea through his legal representative and when it came to sentence it was discovered that the child was under the age of fourteen years when he committed the offence. The section 112(2) of the CPA plea made no mention of the child's criminal capacity and the matter was referred on a special review .

2.5 Admissions on criminal capacity

In this matter the Office of the Director of Public Prosecutions conceded that where a child offender is under the age of fourteen years admissions regarding criminal capacity must be contained in the plea to displace the burden that rests on the prosecution to prove criminal capacity. The matter went on review and was remitted back to the trial court to deal with in terms of section 113 of the CPA.

Sloth-Nielsen discusses the correctness of the prosecution's view on whether the admission by the child in terms of section 112(2) of the CPA relieves the state from the onus that rests on the state to prove criminal capacity. This case was heard at the stage before the current amendment to the CJA came into effect and was applicable on children between 10 and 14 years of age. She stated that the Child Justice Act provides that the onus lies on the state to rebut the presumption of incapacity applicable to children of these ages; at minimum very comprehensive indications as to the child accused's stage of development, level of education, appreciation of the wrongfulness of the act and ability to act in accordance with appreciation would need to be furnished in the section 112(2) guilty plea in order for the state to be relieved of the obligation to rebut the presumption.

The current amendment to the CJA states in section 11(1) what the criteria is that needs to be proved in relation to criminal capacity which is that the child should be able to distinguish between right and wrong at the time of the commission of the offence and act in accordance with such an

[120] *S v MM* 2018 (1) SACR 18 (GP).

appreciation. The factors as set out in section 11(2)(b) of the CJA, as amended, must also be dealt with in a plea.

Walker[121] argues that in S v TS[122] that " It is evident that, in determining whether the accused's capacity for insight had been properly established by the court a quo, the WCC did not apply the literal wording of s 11(1) of the CJA (whether the accused could distinguish between right and wrong at the time of her act), but instead applied the common-law inquiry, namely whether the accused could appreciate the wrongfulness of her own unlawful conduct, at the time and in the particular circumstances in which it occurred. Although the WCC did not refer directly to the discrepancy between the inquiry prescribed in s 11(1) and the common law inquiry, it explicitly rejected the 'right and wrong' approach as an adequate criterion for establishing a child's criminal capacity." She further argues that the practice known as 'reading down', which permits a court, faced with a provision that appears to be inconsistent with the Bill of Rights (in this case, s 28(2) of the Constitution), can possibly find application. The argument can be made that the provision is capable of such an interpretation if read with the provisions of section 77, 78 and 79 of the CPA.

2.6 Concerns about specialisation

The Child Justice Act deals with the complex topic of child offenders that are still developing. International law, domestic law, special legislation applicable to children and a multidisciplinary field of expertise plays a role in considerations surrounding the best interest of children and their rights. In In *S v N*[123] the legal representative of an accused did not realise that the accused is in fact a child in conflict with the law. The proceedings were set aside but the child spent considerable time in detention. The court raised it as a cause for concern that the attorney seemed not to have realised the implications of the accused's age, particularly in the context of the protection afforded child offenders in terms of the Child Justice Act[124] and stated that:

'Even if the attorney had only after conviction become aware of the correct age of the accused, one would have expected him to have immediately addressed the Magistrate on the issue of

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[121] Walker "Determining the criminal capacity of children aged 10 to 14 years: A comment in light of *S v TS* 2015" (2015) *SACJ* 28 3 342.

[122] Walker (2015) *SACJ* 28 3 342.

[123] *S v N* (14/2016) (2016) ZANCHC 73.

[124] *S v N* 6.

prejudice and on the possible need to submit the case for review."[125] In the *Raduvha*[126] case it was clearly illustrated the harmful effect the lack of expertise in the police force has on children and the violation of human rights that results.

In the case *of Centre for Child Law v Director of Public Prosecutions, Johannesburg*[127] that was discussed earlier, it was clear that the prosecutor, albeit well intended, did not have the knowledge that the evidence against the child offenders were inadmissible and that the Schedule under which the child offenders were charged did not allow for the type of diversion that the court eventually ordered. This case also illuminates the lack of knowledge from the judiciary in endorsing the orders that amount to serious human rights violations. In this case some of the administrative files could not be found which also indicates that the Department of Justice's systems do not accurately record and store information which leaves doubt to whether the personnel have the necessary skill to secure the integrity of processes.

The CJA makes provision for a national policy framework to be adopted in terms of section 93 of the CJA to regulate the different sectors of government that impact on the lives of child offenders.[128] The policy framework also guides the implementation and administration of the CJA[129], promotes cooperation and communication with the non government sector and civil society to foster effective partnerships to strengthen the child justice system[130] and enhance service delivery by developing a plan within available resources[131]. The policy framework must be tabled in Parliament, published in the Gazette and reviewed within three years of publication and at least every 5 years thereafter.[132] These measures assure active participation from a multi disciplinary perspective, which includes various government organisations as well as NGO's and civil society. The National Policy framework is the starting point of assuring that the knowledge is available for implementation of the CJA and the protection of children rights and securing their safety. Section 94 of the CJA assures that these role players meet regularly by creating an

[125] Sloth-Nielsen "Child Justice"(2018) *SACJ* (2018) 311 172.

[126] *Raduvh*a 24.

[127] *Centre for Child Law v Director of Public Prosecutions, Johannesburg* (2022) ZACC 35 1.

[128] Section 93(1)(a) of the CJA.

[129] Section 93(1)(b) of the CJA.

[130] Section 93(1)(c) of the CJA

[131] Section 93(1)(d) of the CJA.

[132] Section 93((2) of the CJA.

Intersectoral Committee which includes high level representation from government departments, NGO's and civil society to benefit from each other's area of expertise through support, advice and technical assistance.[133]

The NDPP issues directives on dealing with the different aspects of the CJA and must develop training courses. Training should include knowledge about the directives, social contact training in terms of child justice and uniform norms must be promoted to ensure that prosecutors are able to deal with Child Justice matters in a competent and professional manner.[134] Similar actions are required of the National Commissioner of the South African Police Service[135], the Directors-General Social Development[136], the National Commissioner of Correctional Services[137] and the Director-General Education.

Although it is clear that the CJA places a specific onus on training staff working with child offenders, it is clear from case law that there is a need to place a greater emphasis on training the current workforce, as well as employing a workforce with specialised skills, qualification and training in Child Law and the multidisciplinary fields of child care. These departments must be afforded greater capacity to be able to attract the much needed workforce and train the existing workforce.

South Africa as part of the international community is able through its participation to draw from a vast pool of expertise, resources and legal instruments which will be explored next.

CHAPTER 3: INTERNATIONAL LAW REGARDING THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

3.1. The United Nations Convention on the Rights of the Child

3.1.1 Introduction

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[133] Section 94(5)(b) of the CJA.

[134] Section 97(4)(e)(i)-(iii) of the CJA.

[135] Section 97(5)(e)(i)-(iii) of the CJA.

[136] Section 97(8)(i)-(iii) of the CJA.

[137] Section 97(8)(i)-(iii) of the CJA.

Since the declaration of rights of the child in 1959 a shift in philosophy from a predominantly welfare approach to a philosophy that includes a more human rights orientated approach regarding children rights took place.[138]

In 1983 Freeman stated that evidence in developmental psychology led to conclusions that a balanced approach between the human rights and welfare approaches are more feasible. He argued that parental nurturing and children's rights are not opposites, but rather points on a continuum. He argued for a MACR of individuals age 14 years already as far back as 1983.[139]

Poland submitted a proposal to the Human Rights Commission in 1978 which was based almost entirely on the 1959 Declaration of the Rights of the Child with the view of seeing its adoption during the International Year of the Child in 1979. The proposed text of the Convention focused almost entirely on economic, social and cultural rights and included only one civil right and did not take account of developments of new human rights instruments which had come into force. [140] A revised proposal taking into account various criticisms was submitted and formed the basis of a working group of member States that was established by the HRC from thereon.

In 1983 NGO's created a NGO Ad Hoc Group of human rights and children's organisations, that started producing joint proposals in writing that impacted hugely on the drafting process of the Convention. In 1986 UNICEF itself became involved in the substance of the drafting process and NGO submissions impacted significantly on the content of the CRC. The value of this collaboration was that child rights organisations, child organisations, intergovernmental organisations, any member state that was interested and CHR member states created a multi disciplinary informed approach, in the drafting of the CRC. The best interest of the child became central in the CRC which was a great leap in the drafting process.

While the drafting of the CRC was unfolding, other soft international law instruments were being developed through other United Nations processes. What is of relevance to this study is that in 1985 the Beijing Rules were adopted by the United Nations General Assembly and it set Standard Minimum Rules for the Administration of Juvenile Justice. Although the Rules are non binding they

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[138] Farson "Birthrights" (1974) *American Bar Foundation Research Journal* 1 6 1172-1178; Holt "Escape from Childhood: The Needs and Rights of Children" 1974 1 9-10.

[139] Freeman "Human Rights: An Interdisciplinary Approach" (2011) 89-119.

[140] International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1976).

proved to be very influential and parts of the rules were incorporated into the CRC. The Beijing Rules contain a built-in commentary under each rule which provides a useful aid to interpretation of the rules. Rule 4 of the Beijing Rules sets the requirements of the MACR, in "that it should not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity of the child."[141]

The final version of the CRC was transmitted through the Economic and Social Council in 1989 and adopted by the General Assembly whereafter it entered into force in 1990. The CRC is the result of procedures of specialisation of human rights. The CRC is the international instrument with the widest reach and the most frequently used international instrument for defining the human rights of children. The CRC brought a shift in perspective and children are seen as individual rights-holders. Children have a claim to human rights and fundamental freedoms just as any other human being. Apart from the general rights and freedoms available to children, they have special entitlements and unique rights that display their differences from adults.

3.1.2 Interpretation of the Convention: General Principals

There are four articles of the convention which are commonly referred to as the general principles underlying the treaty. They are not mentioned as such in the CRC or grouped together but at the first meeting in 1991 of the Committee of the CRC the committee used these four articles to indicate what issues had to be covered in the states' initial reports. The Committee was of the view that these four articles were overarching and needed to be seen as general principles of the convention and it was accepted by states as such and acted upon throughout the years. This was quite a major development in International law as no other treaty body has before designated general principles in a treaty that underpins the realisation of other rights in that treaty.

These general principals are:

I) Article 2 on non-discrimination
II) Article 3 best interest of the child
III) Article 6 the right to life, survival and development
IV) Article 12 on the right to be heard

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[141] Liefaard and Doek *Litigating the rights of the child: The UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015) 1.

The Office of the High Commissioner on human rights describes these general principles as an aid to interpretation of the convention as a whole and thereby to guide national programs of implementation.

Articles 2 and 6 are fundamental human rights but Article 3 is a provision uniquely to children. The Committee on the rights of the child formulated a general comment interpreting what the best interest principle means and also gave guidance on the inter relationship with the other general principles and how the best interest should be determined.[142]

The right to be heard in Article 12 refers in particular to any judicial and administrative proceedings affecting the child.The setting of a specific MACR should thus be considered and interpreted against the backdrop of these general principles and the fact that these general principles are individual rights in itself. An understanding of these general principles is important to be able to determine an appropriate MACR against the backdrop of these general principles that underpins the setting of a MACR. The best interest of the child is a unique right applicable to children, as stated in Article 3 of the CRC and is explained in the General Comment 14 of the UN Committee and will be discussed.

3.2 A closer inspection of the best interest principle (Article 3 of the CRC)

Article 3(1)1 of the CRC states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

In 2013 the UN Committee on the rights of the child issued general comment 14 of 2013. The best interest general principle is one of the fundamental principles of the Convention and applies both in the public and private sphere. It is a dynamic concept that requires a specific context assessment. [143]

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[142] UNCRC General comment 14 on the right of the child to have his or her best interests taken as a primary consideration (2013) CRC/C/GC/14.

[143] UNCRC General Comment 14 1.

The best interest principle originates from the 1959 Declaration of the Rights of the child. The best interest principle is also resident in the Convention on the Elimination of All Forms of Discrimination against women as well as in various regional instruments and national and international laws.[144] The best interest is also found in many Articles of the CRC itself" article 9,10,18,20,21,37 and 40.[145]

The best interest principle is found in the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography[146] and in the Optional Protocol to the Convention on a communications procedure[147]. The concept of the child's best interests entails the complete and full use of all the rights as contained in the Convention and the full and complete development of the child.[148] General Comment 5 indicates that States should interpret the term "develop" as a "holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development."[149] In relation to setting a MACR, this creates an onus upon states to set a MACR with a children's rights perspective as central through parliament in terms of legislation, by making funds available to be able to meet the obligation through Government and in relation to the judiciary to interpret the MACR from a children's right perspective. The MACR must be considered through the prism of the general principles in the CRC to give effect to the interpretation of a MACR that reflects children's rights appropriately. [150]

General Comment 14 made it clear that an adult's perception of "what is in the best interest of the child, cannot override the obligation to respect all the child's rights under the Convention."[151] The application of best interest requires a rights based approach to the full and comprehensive care to be taken in the development of the child. States must see their role as fulfilling clear legal obligations to each and every child.[152]

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[144] UNCRC General Comment 14 2.

[145]Articles 9, 10, 18, 20, 21, 37(c), 40(2)(b)(iii) of the UNCRC.

[146] Preamble and article 8 of the UNCRC.

[147] Preamble and article 2 and 3 of the UNCRC.

[148] UNCRC General comment 4.

[149] UNCRC General comment 5 of 2003 on "General Measures of Implementation on the Rights of the Child" CRG/GC/ 2003/5 12 referring to Article 6 of the UNCRC.

[150] UNCRC General Comment 5 2.

[151] UNCRC General Comment 14 4.

[152]UNCRC General Comment 5 par 11.

3.2.1 Best interest and the dignity of the child

The child's best interest requires that all parties should promote the dignity of the child as a human being by all actors and secure the child's physical, psychological, moral and spiritual integrity. [153] In relation to a fair MACR the child's dignity is affected if the child cannot understand the procedures or cannot be held responsible for the criminal action he or she committed due to the child's inability to understand the criminality of the action or act in accordance with that realisation or is still unable to grasp the procedures of the criminal justice system. A fair MACR will act as a safeguard that the child's dignity is not infringed by arrest and being processed through the criminal justice system and then later to be found criminally not to be responsible for his/her actions. In relation to promoting the child's dignity it is imperative that the child's criminal capacity be known as well as his criminal capacity during the commission of the undesirable action, before his/her encounter with the criminal justice machinery. It is an imperative that States must create an environment that respects human dignity and ensures the holistic development of every child.[154] A realistic MACR will ensure that the focus of Article 6 is achieved and that children from a certain age, who from general knowledge does not possess criminal capacity, right to development, are not ignored in favour of the punitive element of the criminal justice system.

3.2.2 Best interest principal as a substantive right

The best interest consideration is a substantive right.[155] The best interest right means to have the child's best interest evaluated and to take the child's best interest as a primary factor when different interests are being taken into consideration to come to a conclusion and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, group of children or children in general. In relation to setting a fair MACR the best interest of the child and children in general should have preference when weighed up against rights, such as rights of adults to safety and security for instance. If any doubt exists or if there is proof that children in general under a certain age tend to not have criminal capacity the benefit of the doubt should be weighed in favour of children as a primary consideration in weighing it against the competing right of adults. In the criminal justice system a weighing up of the best interest of children versus the safety

[153] UNCRC General comment 14 of 2013 5.

[154] UNCRC General Comment 14 of 2013 42.

[155] UNCRC General Comment 14 of 2013 par 6(a).

and security of the community at large is often encountered. The reason for the best interest principle to have a place of primary consideration, is the disadvantaged and vulnerable status of children and the fact that children's rights are often overlooked in the decision making process.

3.2.3 Best interest as fundamental interpretative legal principle

The best interest consideration is a fundamental interpretative legal principle in that where a matter is open to more than one interpretation, the interpretation that serves the best interest of the child should be chosen.[156] The CRC in its totality provides the structure that is used for interpretation. The CRC is used for interpretation in conjunction with its Optional Protocols. It is through the interpretation and implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof.[157] The South African courts often use the best interests principle in their legal interpretations, and often refer to Article 3 of the CRC when doing so.[158]

3.2.4 Best interest as a rule of procedure

The best interest consideration is also a rule of procedure where, whenever a decision is to be made that will affect a child, group of children or children in general the decision making process must include an evaluation of the possible impact the decision will have on the child or children.[159] When a MACR is set that is too low for children, the negative impact from exposure to the child justice system carries a lot of weight compared to other considerations. Procedures that support dealing with the child that committed the undesirably action, outside of the criminal justice system would be far more impactful in a meaningful and positive way on the children and society in general. "Attention must be placed on identifying possible solutions which are in the child's best interests. This implies that States are under the obligation to clarify the best interests of all children, including those in vulnerable situations, when adopting implementation measures."[160]

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[156] UNCRC General Comment 14 of 2013 par 6(b).

[157] UNRCCGeneral Comment 14 of 2013 par 32.

[158] Skelton "Too much of a good thing? Best interests of the child in South African jurisprudence" (2019) *De Jure* 52 557.

[159] UNCRC General comment 14 of 2013 par 6(c).

[160] UNCRC General Comment 14 of 2013 par 33.

The assessment and determination of the best interest of the child or children require procedural guarantees. The decision must be justified in showing how the right has been respected in the decision. State parties must explain what has been considered to be in the child's best interest, what criteria was used as the basis on how the interest of the child against other considerations was determined. In paragraph 28[161] the Committee states clearly that traditional objectives of criminal justice such as repression or retribution must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.

3.3 The Beijing Rules[162]

In the period preceding the CRC the UN adopted the Beijing Rules in 1988 which dealt with fundamental perspectives of juvenile justice and offered minimum guarantees to children in juvenile justice proceedings as well as welfare and care proceedings and status offences. In Paragraph 1.3 of the Rules, States undertake to promote the well being of the juveniles, reducing the need for intervention under the law and to deal effectively, fairly and humanely with juveniles in conflict with the law. In specific paragraph 4 addressed the topic of a MACR that must be fixed at not too low an age level, taking into consideration the facts of emotional, mental and intellectual maturity. This paragraph is the precursor to Article 40 of the CRC where attention was given to the setting of the MACR.

Standards and norms are commonly referred to as "soft law" instruments, in the sense that they provide guidance and are persuasive, but are not legally binding as is with the Beijing Rules. The MACR was not set as a specific age as the Beijing Rules only set out fundamental principles where after the CRC incorporated the principles relating to the MACR into hard law which made it binding.[163] The issuing of the Committee to the CRC's General Comments generated guidelines considered "soft law". The General Comments are persuasive and authoritative in explaining and giving further content to the specifics surrounding the MACR and provide practical guidance for the fulfilment of human rights.

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[161] UNCRC General comment 14..

[162] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985.

[163] Skelton 21.

The Rules acknowledged that criminal responsibility differs widely owing to history and culture and that there is a close relationship between criminal responsibility and responsibility for social rights and responsibilities. States committed to agree on a reasonable lowest age limit that is applicable internationally.[164] The rules encourage a high degree of discretion being granted to officials at all stages to allow for alternative measures. The expectation is then that such discretion must be used in an accountable and judicious way.[165] The Beijing Rules were drafted while the CRC drafting process progressed and specific reference is made to the Rules in the preamble of the CRC.

The difficulty in fixing a MACR with reference to the Beijing Rules were as Flattery[166] commented, that the age limits are arbitrary since there is no "magical transformation into a mature and responsible adult on a child's 12th birthday, nor a sudden understanding of what constitutes a serious offence at the age of 10." He acknowledged the need to fix a MACR but advocated for a measure of flexibility to reflect the actual understanding of the child.

Skelton and Botha, in their article on Criminal Capacity, refer to Odongo's comments that while the MACR must be set arbitrarily, individual states must not approach the setting of the MACR for their people in an arbitrary manner.[167]

Attention was given in the CRC to the setting of a MACR in Article 40 of the UNCRC which stated that States commit in subsection 3(a) to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the law. States Parties 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 and which 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.`

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[164] Commentary to Rule 4(1) on the Beijing Rules-UN General Assembly Rules 40/33 of 1985.

[165]Skelton "Child Justice in South Africa (2018)" *International Journal of Children's Rights* 26 5.

[166] Flattery J "The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System" 2010 23.

[167] Skelton and Badenhorst The Criminal Capacity of Children in South Africa International Developments & Considerations for a Review (2011) 5.https://dullahomarinstitute.org.za/childrens-rights/Publications/Other%20publications/The%20criminal%20capacity%20of%20children%20in%20South%20Africa%20-%20International%20developments%20and%20considerations%20for%20a%20review.pdf accessed on 25 September 2022.

3.4 General Comments of the Committee on the UNCRC

3.4.1 The Committee on the Convention on the Rights of the Child and the creation of soft law

The Committee on the Rights of the Child (CRC) is the body of eighteen independent experts selected by State parties to the CRC. The requirement for such an expert to be on the committee is that they must be of high moral standing and recognised competence in the field covered by the CRC.[168] The committee members also represent an equitable geographical representation of principal legal systems.

The system of receiving reports and releasing concluding observations, creates valuable soft law and provides valuable guidance to States on compliance with the CRC. The concluding observations through the practical application of the provisions of the CRC to real life scenarios provides valuable content to the provisions of the CRC and add to the interpretation and application of the Articles. In this respect the Committee's work can be likened to the function of a court that interprets the provisions of the CRC which is the founding document on child rights in the United Nations.

In the following sections of this chapter the relevant aspects of the General Comments will be discussed and then examples will be given of States that have changed their MACR in accordance with recommendations made by the Committee. In some instances, the Committee's concluding observations to specific countries also played a role in convincing states to adjust their MACR.

3.4.2 General Comment no 10 and its impact

The Committee of the CRC set guidelines in General Comment 10 of 2007,[169] aiding states to comply fully with the CRC in areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort. The Committee dealt with specifics on the MACR in Paragraph 32 and set an internationally acceptable level to below twelve years of age as the absolute minimum age and urged states to continue to increase it

[168] Article 43(2) of the UNCRC.

[169] UNCRC General comment 10 articles 24,25, 28 and 29.

to a higher age level. [170] In 1998 the Crime and Disorder Act 1998 in England and Wales, abolished the doctrine of doli incapax without raising the MACR to cover the age group that the doli incapax doctrine partially protected which seems a great risk children run where in the sense the MACR is lowered.[171] The Committee further stressed that States parties should not lower their MACR to the age of twelve. A higher MACR, for instance fourteen or sixteen years of age, contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, provided that the child's human rights and legal safeguards are fully respected.[172]

3.4.2.1 Denmark

Denmark lowered its MACR in 2010 from fifteen years of age to fourteen years of age after the issuing of General Comment 10 of 2009. The Committee in its CRC Concluding Observations criticised the lowering of the MACR and in 2012 the MACR was raised to fifteen years of age.[173]

3.4.2.2 Hungary

Hungary lowered its MACR from Fourteen to Twelve for homicide, voluntary manslaughter, battery, robbery and plundering, but for all other offences, children were held responsible from the age of Fourteen years. The MACR was increased to Fourteen years of age after theCommittee on the Rights of the Child in the CRC Concluding Observations 2014[174] criticised the change and recommended that the MACR should be raised to Fourteen for even the most serious offences.

3.4.2.3 Finland

[170] UNCRC General Comment 10 32.

[171] Goldson 2. 111–130.

[172] UNCRC General comment 10 33 .

[173] UNCRoC Concluding Observations for Denmark's 4th periodic report (2011) CRC/C/DNK/CO/4 49.b.

[174]UNCRoC Concluding observations on the combined third, fourth and fifth periodic reports of Hungary (2014) CRC/C/HUN/CO/3-5 56(b).

The MACR for Finland is Fifteen years of age and the courts can waive punishment for offences committed by people under Eighteen years of age under certain circumstances.[175]

3.4.2.4 Czech Republic.

The MACR for the Czech Republic is fifteen years of age.[176]

3.4.2.5 Bulgaria

The MACR for Bulgaria is fourteen years of age. Children aged 14 to 18 can only be held criminally liable if they have criminal capacity.[177]

3.4.3 General Comment no 24 revises the recommended MACR

In 2019 the Committee issued General comment 24 on children's rights in the child justice system which replaced General comment 10 of 2007 to reflect developments that occurred in the more than a decade since then. The Committee acknowledged that it has been demonstrated children are harmed by exposure to the criminal justice system, limiting their opportunities of transforming into responsible adults. [178] The Committee on the Global Study on Children Deprived of Liberty found that

> "children are being detained at a younger and younger age and held for longer periods of time. The personal cost to these children is immeasurable in terms of the destructive

[175] Finland Penal Code Ch. 3 Section 4(1); Ch. 6, Section 12 as referenced by CRIN "Minimum ages of criminal responsibility in Europe" available at https://archive.crin.org/en/home/ages/europe.html accessed on 27 September 2022-

[176] Criminal Code, Provision 11 as referenced by CRIN "Minimum ages of criminal responsibility in Europe" available at https://archive.crin.org/en/home/ages/europe.html accessed on 27 September 2022

[177] CRIN Minimum ages of criminal responsibility in Europe available at https://archive.crin.org/en/home/ages/europe.html accessed on 27 September 2022.

[178] General Comment 24 2 .

impact on their physical and mental development, and on their ability to lead healthy and constructive lives in society."[179]

General Comment 24 states that "documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged twelve to thirteen years due to the fact that their frontal cortex is still developing."[180] For that reason children aged twelve and thirteen years are unlikely to comprehend the consequences of their actions or to understand court proceedings. The children in this age group are also affected by their transition into adolescence.

As the Committee had previously noted in its General Comment no 20 of 2016 on the implementation of the rights of the child during adolescence, "adolescence is a unique defining stage of human development characterised by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses".[181] The Committee stated that "this is a period of great vulnerability that can carry great consequences not only for their individual optimum development, but also for present and future social and economic development."[182] Even affording adolescents in the age group twelve and thirteen years a rebuttable presumption of criminal capacity, does not shield them from the negative encounter with the criminal justice system. This is especially so if it is a well known fact that the chances of being criminally responsible in the light of current knowledge, is relatively small. In view of the best interest principal children should be afforded the benefit of the doubt in this age group to fall in the lower age range, under the MACR. Where States have a system with two minimum ages it did not prove in practice to be protective.[183]

The idea of obtaining individualised assessments of criminal responsibility has turned out to be time consuming, resulting in extended harmful contact with the child justice system and gives ample leeway to the discretion of the court, resulting in discriminatory practices. One appropriate

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[179]Nowack "United Nations Global Study on Children Deprived of Liberty Committee on the Rights of the Child " 2019 74th session of the General Assembly available at https://www.ohchr.org/en/treaty-bodies/crc/united-nations-global-study-children-deprived-liberty accessed on 24 September 2022.

[180] General Comment 24 21.

[181]UNCRC, General comment 20 on "The implementation of the rights of the child during adolescence" (2016) CRC/C/GC/20.

[182] UNCRC General Comment 3.

[183] UNCRC General Comment 20 26.

minimum age of criminal responsibility is recommended by the Committee that will eliminate these discriminatory practices.

The committee recommended that States introduce minimum legal age limits consistent with the right to protection, the best interest principle and respect for the evolving capacities of adolescents.[184]

The Committee encouraged States in 2016 to in the lights of scientific findings to increase their minimum age to at least fourteen years of age.[185] Developmental and neuroscience evidence indicated that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision making and States are encouraged not to lower MACR's that are set higher than fourteen years of age.

Adding to what the Committee had said in its General Comment no 20 on Children's Rights in Adolescence, the Committee encouraged States parties through General Comment 24 to take note of recent scientific findings, and to increase their minimum age accordingly, to at least fourteen years of age. The General Comment 24 concludes by mentioning that developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. The Committee drew the conclusion and recommended that States parties that have a higher minimum age, for instance fifteen or sixteen years of age, must not reduce their MACR for any reason whatsoever..

The Royal Society brought out a report on Neuroscience and the law[186] in 2011 and provided new insights into brain development. The report revealed that "changes in important neural circuits underpinning behaviour continue until at least 20 years of age." The report further stated that "The curves for brain development are associated with comparable changes in mental functioning (such as IQ, but also suggestibility, impulsivity, memory or decision- making), and are quite different in different regions of the brain. The prefrontal cortex (which is especially important in relation to judgement, decision-making and impulse control) is the slowest to mature. By contrast, the amygdala, an area of the brain responsible for reward and emotional processing, develops during early adolescence. It is thought that an imbalance between the late development of the

[184] UNCRCGeneral Comment 20 39.

[185] UNCRC General Comment 20 22.

[186] Brain Waves Module 4 "Neuroscience and the law RS Policy document 05/11" (2011) available at https://royalsociety.org/-/media/Royal_Society_Content/policy/projects/brain-waves/Brain-Waves-4.pdf accessed on 24 September 2022.

prefrontal cortex responsible for guiding behaviour, compared to the early developments of the amygdala and associated structures may account for heightened emotional responses and the risky behaviour characteristic of adolescence."

The report stated that due to the great individual fluctuation in the timing and patterning of the brain development individual assessments to gauge criminal capacity of adolescents were advisable.

The aim of the General comment 24 are to supply states with a modern and updated explanation of the relevant articles of the CRC in context with current developments. The General comment 24 aims to give guidance for the application of the articles in the CRC in a comprehensive and holistic way that will advance and protect children's rights throughout. A specific focus is maintained on early intervention and prevention. The Committee emphasised that contact with the criminal justice system is especially harmful to children.[187] One of the key strategies to reduce the harmful effects of contact with the criminal justice system is setting an appropriate MACR, making sure that children are appropriately treated on either side of the MACR[188] and the use of cdetention as a measure of last resort.[189]

Article 40(2)(b)(i) of the CRC states that the presumption of innocence requires that the burden of proof of the charge is on the prosecution, regardless of the nature of the offence. The child has the benefit of the doubt and is guilty only if the charges have been proved beyond reasonable doubt.[190] There should for this reason be no onus on children twelve and thirteen years of age to prove that they are not criminally liable. Even if they committed more serious offences like the Schedule 2 and 3 offences in the CJA in South Africa, they should not be brought into the criminal justice system to obtain an order for an evaluation of criminal capacity as provided for in section 11(3) of the CJA. Suspicious behaviour on the part of the child should not lead to assumptions of guilt, as it may be due to a lack of understanding of the process, immaturity, fear or other reasons. This drives the point across that general evidence of criminal capacity or mens rea of children can be very unreliable. The setting of a MACR can protect these children from abuse of their right to be regarded as innocent and to benefit from the presumption that they do not have criminal capacity.

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[187] UNCRC General Comment 24 6(c).

[188] UNCRC General Comment 24 6(c)(I).

[189] UNCRC General Comment 24 6(c)(iii).

[190] UNCRC General Comment 24 43.

Article 12 of the CRC[191] is explained by the Committee in stating that children from the beginning to the end of the process have the right to be heard directly, and not only through a representative. This right implies that the child needs to have the criminal capacity to understand the charges[192], the proceedings, possible defences, understand what is right and wrong and have insight into the situation that caused him or her to become in conflict with the criminal justice system.[193] Without these capabilities the child will not be able to communicate effectively in direct fashion with the police, probation officers, court or for that matter with his representative. Without these capabilities the child will not be able to challenge witnesses, provide an account of events and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. The child has the right to remain silent and no adverse inference should be drawn when children elect not to make statements. The fixing of a MACR that is higher rather than too low will protect children from the dangers of this type of unfair treatment in the criminal justice system.

Article 27 of the CRC recognises that an adequate standard of living is a right, in other words a necessity for the child's physical, mental, spiritual, moral and social development. This is a factor that would impact on the setting of an acceptable MACR that has its roots in an international acceptable standard and keeps in touch with States' own history and circumstances. A low standard of living will affect the development of children adversely and will require the setting of a higher MACR than the international acceptable standard. Anti social behaviour should be dealt with in family and community context and a multi disciplinary approach by professionals which may require out of home placements. These multi disciplinary services can be available through judicial monitoring and intervention.[194] The MACR is relevant as from the age from when the child committed the crime. [195] The most common MACR internationally since the ratification of the CRC by States is fourteen years of age.[196] Documented evidence in the fields of child development and neuroscience shows that maturity and the capacity for abstract reasoning is still developing in children aged twelve to thirteen years of age. This is as a result of the fact that their frontal cortex

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[191] UNCRC General Comment 24 45.

[192] Article 40 (2) (b) (ii) of the CRC as expanded upon in 47 and 48 of the General Comment 24 of 2019.

[193] Article 40 (2) (b) (iv) of the CRC as expanded upon in 46 of General Comment 24 of 2019.

[194] UNCRC General Comment 24 11.

[195] UNCRC General Comment 24 20.

[196] UNCRC General Comment 24 21.

is still evolving.[197] It is doubtful that they will be able to understand the impact of their actions or to understand criminal proceedings.

3.5 Deprivation of liberty Article 37 of the CRC and mental health of children

3.5.1. Unlawful arrest and detention

The presumption of innocence in Article 40(2)(b)(I) requires that the evidential burden for the purpose of proving the charge levelled against the accused is on the prosecution. From the outset the prosecution must have a prima facie case against the child before the child can be charged. The question arises to whether the prosecution indeed possesses a prima facie case, if a presumption exists that has the effect that a child's criminal capacity is assumed to be non-existent. Only when rebuttable evidence exists a prima facie case comes into existence. The onus that rests on the prosecution to prove a case, is one of beyond reasonable doubt which places a heavy burden on the state. When the two presumptions work in conjunction to favour the child the question arises to whether a child of twelve and thirteen years of age can be charged for an offence in the first place.

When children between twelve and thirteen year of age in South Africa commit Schedule 1 offences, which contain the least serious offences and has the lowest risk of children being deprived of their liberty, they do run the risk of arrest and deprivation of their liberty[198] if a responsible person cannot be allocated in whose care they can be released and warned for first appearance at the preliminary court they have to be detained in a place of safety and if no place of safety available a police cell or lockup.[199] In relation to Schedule 2 offences that are allegedly committed the risk of arrest and detention is even higher. The arrest and subsequent detention, if there is no prima facie case due to the presumption of no criminal capacity, is unlawful and infringes several of the human rights of children that are affected of which one is the deprivation of liberty where Article 37(b) of the CRC reads that "no child shall be deprived of his or her liberty unlawfully or arbitrarily". The remedy is civil as in the *Raduvha* case[200] but the purpose of the law is to protect children from harm.

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[197] UNCRC General Comment 24 22.

[198] Section 20(1) of the CJA.

[199] Section 27 of the CJA.

[200] Raduvha 24.

If a MACR is in effect the child is dealt with in terms of section 9 of the CJA and/or section 150 of the Children's Act if appropriate and contact with the criminal justice system is avoided.

When children are arrested and detained for committing crimes, this has an impact on them.[201] It is therefore crucially important to consider and strictly apply the international law restrictions placed on detention of children. Deprivation of liberty of children is a method that should be used as a last resort and for the shortest appropriate period of time.[202] International law recognises the family as the natural and fundamental group unit of society and it is in the best interest of the child to remain in the family.[203] Of course, this may sometimes need to be limited for the safety of the community, but the last resort principle must be strictly applied.

3.5.2. Report of the Independent Expert: Global Study on Children Deprived of Liberty

Professor Manfred Nowak, the expert who led the Global Study, states in his report as the independent expert appointed by the United Nations that placing children in institutional facilities where they are deprived of liberty is difficult to reconcile with the guiding principles of the CRC and the deprivation of children must be used only as a last resort and for the shortest appropriate period of time. [204] He states that depriving children of liberty is depriving them of their childhood.[205]

Not all children in South Africa who come into contact with the child justice system, are deprived of their liberty, and there are safeguards to prevent imprisonment of children below the age of 14 years[206] but by removing the risk of detention by setting a MACR that is higher rather than too low, you minimise the risk of children being harmed.

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[201] Holman and Ziedenberg "The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities" (2006) available at https://justicepolicy.org/wp-content/uploads/2022/02/06-11_rep_dangersofdetention_jj.pdf accessed on 11 July 2022.

[202] Article 37(b) of the UNCRC.

[203] Article 3 of the UNCRC.

[204] Nowak 19 6 .

[205] Nowak 3 4

[206] Section 30(1)(b) of the CJA.

Children are in their formative years and deprivation of liberty may have highly detrimental effects on their physical and mental health, their further development and their life. [207] Hearing directly from many children the Independent Expert to the UN found that children deprived of their liberty experience fear, isolation, trauma and harm in addition to discrimination, stigma and disempowerment

The CJA minimises the risks of harm to children and makes provision for children to be handed to their family members, appropriate persons or guardians that can take them into safe custody in a family or familiar environment. The risk of arrest and detention does exist however and setting a MACR that is not too low would remove children out of harm's way.

In the *Raduvha* case[208] a 15 year old girl child was arrested without a warrant on charges of obstructing the police when they arrested her mother for an alleged assault and breach of a protection order. The child and her mother were detained together in a cell at Brixton Police Station for a period of 19 hours and were released on warning the next day. The Public Prosecutor decided not to prosecute the matter.

Before the Constitutional Court, the applicant argued that her rights as a child were violated. The fact that her father was present throughout the arrest and went to the police station and requested her to be released into his custody meant that the decision to arrest her was irrational, and that her continued detention could also not be justified. The child argued that the police should have considered all possible alternatives when arresting and detaining her and that arrest should have been a last resort. The Centre for Child Law, admitted as amicus curiae, argued that the constitutional right of children "not to be detained except as a measure of last resort" should, in the light of international legal instruments, be interpreted broadly so as to include an arrest as well as detention. The Centre argued that the police officers failed to exercise their power of arrest properly.

During the hearing, the Minister conceded that the arrest and detention of the applicant was unlawful. It was also conceded that the police officers had failed to prove that the applicant had acted wilfully. The police officers had also failed to consider the applicant's best interests in terms of section 28(2) of the Constitution in exercising their discretion to arrest her. In addition it was

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[207] Nowak 20.

[208] Raduvha24.

conceded that the applicant's detention was not a measure of last resort as required by section 28(1)(g) of the Constitution.

In a unanimous judgement, by Bosielo AJ, the Court upheld the appeal and found that the arrest and detention of the applicant were unlawful. The court held that, despite the jurisdictional facts being present, police officers have a discretion to arrest in terms of section 40(1) of the Criminal Procedure Act. This discretion must be properly exercised in accordance with the facts of the case and the dictates of the Bill of Rights. Since the police officers failed to consider the applicant's best interests as a child in exercising their discretion to arrest her, the arrest was unlawful. The Court also held that the applicant's detention was unlawful. The applicant's father was at the station and willing to take her home. As a result, the police officers' decision to detain her was not a measure of last resort and was therefore inconsistent with section 28(1)(g) of the Constitution and invalid. In this case the child was older than 14 years, but as arrest and detention of children below 14 is still possible, the fixing of a MACR that is higher can shield children from unlawful conduct by the police, arrest and detention as the child experienced in this case.

3.6 State reporting to the CRC by South Africa

In the initial report South Africa indicated that the common law MACR of 7 years would be raised by planned legislation of the CJA to increase it to 10 years of age. In the Concluding Observation by the Committee on the CRC in February 2000 the Committee encouraged the State party to continue its efforts in the area of legal reform and to ensure that legislation fully conforms with the principles and provisions of the Convention.[209] The Committee recommended that the age of criminal capacity be increased from the proposed draft legislation that indicated ten years of age as a MACR.[210]

In South Africa's combined second, third and fourth report on measures taken between 1998 and 2013 in furtherance of its obligations under the Convention on the Rights of the Child (CRC) and the Optional Protocols on the Sale of Children, Child Prostitution and Pornography (OPSC), and on the Involvement of Children in Armed Conflict (OPAC), it was reported in relation to the MACR that the Child Justice Act changed several age-provisions to increase protection to children in the

[209] UNCRoC Concluding Observations on the second periodic report of South Africa (September 2016) CRC/C/ZAF/CO/22 10.

[210] UNCRoC Concluding observations South Africa 17.

criminal justice system, so aligning the law more closely with the CRC. The Act raised the age of criminal capacity from 7 to 10 and provided for a rebuttable presumption of criminal incapacity between the ages of 10 and 14. This meant that children under 10 were not to be arrested or prosecuted; those aged 10–14 could be arrested and prosecuted, but the prosecutor had to prove to the court that the child had criminal capacity when he or she committed the crime.[211]

Article 45 of the CRC allows community participation and community organisations throughout the country unanimously agreed that the sector produce a Supplementary report to the UN and that the National Children's Rights Committee facilitate the process that would produce the report. This is indicative of the vibrant child rights organisations in South Africa that assist the government in the transformation, reconstruction and development initiatives regarding children's rights. Civil society plays an active role in the monitoring of children's rights delivery in South Africa.[212]

In the Concluding Observations on the second periodic report of South Africa[213], the Committee noted the MACR was still at a low level of ten years of age. With reference to its General Comment No. 10 (2007) on children's rights in juvenile justice, the Committee recommended that "the State party provide effective implementation of national legislation, in line with international standards, and in particular relating to the MACR that the State expedite the review of the minimum age of criminal responsibility with a view to raising it to an internationally acceptable level."

International standards for a MACR is now at fourteen years of age in line with available knowledge, with a recommendation in both the General Comment 10 of 2007 and General Comment 24 of 2019 to abolish the doli incapax doctrine or dual system MACR South Africa falls short of the International Standards in this regard.

As part of South Africa's commitment to the international community and drawing from the available expertise from a multidisciplinary platform, some dedicated work has to be done to raise the standards to acceptable levels and to comply with South Africa's legal obligations. South Africa's participation is not limited to the international stage and the impact of regional law will be further explored.

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[211]UNCRoC Concluding observations South Africa Part 2.10 and 63.

[212] First supplementary CRC report to the UNCRoC 2.

[213]UNCRoC Concluding observations South Africa 69 21.

CHAPTER 4: THE POSITION IN REGIONAL LAW

4.1. Introduction

After the adoption of the CRC in 1989, the view was entertained that the CRC did not adequately address certain specific issues uniquely relevant to Africa. No notice was taken of African perceptions like the African conception of communitarian responsibilities and duties.[214] Viljoen observed that African nations were largely underrepresented during the drafting process of the CRC and therefore the situation exist of a CRC that does not include the African cultural context.[215] The CRC was brought into existence through unprecedented consensus which became the most noticeable feature of the international instrument. The ACRWC aimed to fill the void that existed due to a lack of input from African cultural context. The ACRWC carries the same spirit as the CRC but the ACRWC aim to afford African children additional protection in the view of their context specific vulnerability.[216]

The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted by the Heads of State and Government in 1990 and entered into force in 1999. The monitoring body of the ACRWC was established in 2002.

4.2 The African Charter on the Rights and Welfare of the Child

The preamble of the ACRWC states that the Charter is built on the principles of international law based on the rights and welfare of the child and mentions the specific international law instruments of the CRC and the Declaration of the Rights and Welfare of the African Child. The Charter qualifies these rights in that "it should be inspired and characterised by the virtues of African cultural heritage, historical background and the values of the African civilisation. "

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[214] Skelton "The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments (2009) 2 *African Human Rights Law Journal* 483.

[215] Viljoen '"Supra-national human rights instruments for the protection of children in Africa: the CRC and the ACRWC" (1998)1 99 *The Comparative and International Law Journal of Southern* Africa 205.

[216] Children's Rights in Africa : A Legal Perspective, edited by Julia Sloth-Nielsen, Taylor & Francis Group, 2008 7 Child Participation in Africa Ehlers and Frank 113.

The ACRWC refers to the requirement of the setting of a MACR.[217] The ACRWC echoes the best interest principle of the CRC and goes a step further in stating that the best interest guideline is the primary consideration and not just one of many primary considerations when the interests of children should be evaluated.[218] When a MACR is set, the best interest of children should thus be the primary consideration under the ACRWC compared to other rights. In South African context the best interest principle is entrenched in the Constitution and referred to in even stronger terms as being of paramount importance. Case law in South Africa clarified this guideline in practical terms as being the starting point of any evaluation considering the interest of children in any case where children's interest has to be considered and that the best interest of children is an independent right.[219]

In relation to the best interest of children the question arises to how we should approach the setting of a MACR from an African perspective. Article 17(4) of the ACRWC states that there shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. The subsection does not give an indication on what the MACR should be and one has to investigate further to get an indicator of what a MACR in African context would entail.

4.3. Enforcing the ACRWC

The individual complaints procedure and the authority to undertake investigative missions is part and parcel of the Charter. These individual complaints procedures and investigative missions provides an accountability mechanism that serves as an effective recourse in the absence of domestic remedies.[220]

4.4 The ACRWC and juvenile justice

In relation to the fixing of a MACR Article 17(1) is of importance in where it states that every child in conflict with the law or having been found guilty of infringing penal law shall have the right to special treatment, in a way consistent with the child's sense of dignity and worth and which

[217] Article 17(4) of the African Charter on the Rights and Welfare of the Child 1990.

[218] Article 4 of the ACRWC.

[219] *Centre for Child Law and Others v Media 24 Limited and Others* (2019) ZACC 46.

[220] Mezmur "Happy 18th birthday to the African Children's Rights Charter: not counting its days but making its days count" (2017) *African Human Rights Yearbook 1* 125-149 available at http://doi.org/10.29053/2523-1367/2017/v1n1a7 accessed on 13 July 2022.

reinforces the child's respect for human rights and fundamental freedoms of others. Article 17(4) of the ACRWC states that a MACR shall be put in place. Children that falls under the MACR must still be treated with the dignity and patience and the understanding that they are entitled to as human beings.

Article 17(2) safeguards the presumption of innocence when children are in conflict with the law ensures in that they shall be presumed innocent until found guilty, have the right to legal representation, have the right to remain silent, have the right to be informed of the charge against them in a language they understand, the right to be heard, the right to a speedy trial and the right to be held separate from adults in their place of detention.

4.5. The African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts on the Rights and Welfare of the Child[221] draws its mandate from Articles 32-46 of the African Charter on the Rights and Welfare of the Child. The ACERWC monitors the implementation of the Children's Charter through various avenues such as state party reporting, investigative visits and issuing of general comments as well as concluding observations and recommendations on the initial and periodic reports submitted by state parties.[222] State parties only started providing reports to the African Children's Committee from 2005[223]

In all the concluding observations of the different State parties, the Committee recommended that the Guidelines on Action for Children in the Justice System must be followed. These guidelines recommend a MACR of minimum twelve years of age but that State parties must strive to reach a MACR of fifteen years of age.[224]

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[221] Articles 24-29 of the ACRWC.

[222] Articles 43, 44 and 45 of the ACRWC.

[223] Mezmur '"The African Committee of Experts on the Rights and Welfare of the Child: An Update" (2006) *African Human Rights Law Journal* 6 561.

[224] African Child Policy Forum "Article 46 Guidelines on action for children in the Justice System in Africa" (2011) available at https://app.box.com/s/9zcgxr0kvdck9wf1933toagcignpr5g5 accessed on 30 October 2022.

The determination of a MACR in line with the spirit of the ACRWC is not an easy feat. Such minimum ages should be viewed against the backdrop of the best interests principle, principles of non-discrimination, as well as 'the evolving capacities of the child' principle.[225]

4.6 Concluding observations

State reporting is an important tool but also a legal obligation for states to ensure compliance with a treaty that a state has ratified. Article 43 of the ACRWC requires states to submit their initial report within 2 years of ratifying the treaty and thereafter every 3 years submit a periodic report.

In 2019 the Committee on the ACRWC brought out their concluding observations[226] to South Africa's first periodic report on the implementation of the African Charter. In relation to the MACR the Committee remarked on the MACR that was set at the age of ten years under South Africa's Laws. The Committee remarked that the probabilities is against a child of trying to live up to the moral and psychological factors of criminal responsibility when the MACR is low and the child's age is also low. The Committee recommended to the Government of South Africa to raise the age of criminal responsibility to at least twelve years of age. This recommendation has been met by South Africa by the coming into operation of the amendment to the CJA on 19 August 2022.

4.7 Foreign jurisdictions

As previously articulated, when interpreting the rights of children in the Bill of Rights foreign law may be considered in terms of section 39(1)(c) of the Constitution. To be able to understand the best interest of the child in terms of section 28(2) of the Constitution of South Africa, in relation to the intended effect of a MACR, foreign law may also be considered, and the law of other African States may be of interest to the South African legislature and courts.

Raising the MACR should go hand in hand with providing alternative measures for dealing with children in conflict with the law and it may be useful to look at foreign jurisdictions standards in

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[225] Mezmur "Happy 18th birthday to the African Children's Rights Charter: not counting its days but making its days count" (2017) 1 *African Human Rights Yearbook* 135.

[226]Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the child March 2019 35 13 available at https://www.acerwc.africa/sites/default/files/2022-09/Concluding%20observation%20for%20South%20African%20Periodic%20State%20Party%20Report.pdf.

relation to fixing a MACR as well as decriminalisation efforts. The next section discusses selected African jurisdictions that have relevant MACR provisions for comparative purposes.

4.7.1 Sudan

According to article 41(2) of the STCC[227] no domestication is required for international treaties. Sudan ratified the CRC and its optional protocols as well as the ACRWC. The Child Act 2010 sets out a comprehensive Child Justice System that decriminalised all offences against children between twelve and eighteen years of age and as of 2013 the MACR[228] was set at under twelve years of age. The Child Act 2010 creates a specialist Child Justice force in the form of police[229], prosecutors[230] and judiciary[231] that facilitates the decriminalisation drive for children twelve years and under eighteen years of age. Sudan is in the process of a transformation to a more human rights orientated state and the focus on implementing specialist structures to create a child sensitive environment to deal with children in conflict with the law outside a penal environment, is a child centred approach.

Decriminalisation is in line with the judgement of the South African Constitutional Court in the case of Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others.[232] The court asked the question of whether the consequences of contravening penal law should be located in the criminal justice system or in social systems. The applicant and the Minister of Justice in the case conceded that the criminalisation is inconsistent with the child-centred approach.[233]

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[227] Sudanese Transitional Constitutional Charter of 2019.

[228] Recommendations of the ACERWC to the Government of the Republic of the Sudan on the initial report on implementation of the African Charter on the Rights and Welfare of the Child (2013) 17 available at .https:// acerwc.africa/wp-content/uploads/2018/14/CO_Sudan_eng.pdf accessed on 26 September 2022 .

[229] Section 55 of the Child Act 2010.

[230] Section 60 of the Child Act.

[231] Section 62 of the Child Act..

[232] *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* [2022] ZACC 35.

[233] *Centre for Child Law v Director of Public Prosecutions* 35, 36 and 50.

4.7.2 Ghana

In 1992 Ghana promulgated a new Constitution which contained provisions in section 28 guaranteeing the protecting of children's rights. A Child Law Reform Advisory Committee was elected to review Ghana's existing child laws and recommend law reform, which led to the enactment of the Children's Act in 1998.[234] A Child Justice Act was enacted in 2003 dealing exclusively with child justice issues. In 2005 new legislation was adopted which amended the Criminal Code ACT 554 to bring the MACR in line with International standards. The MACR was increased from seven years of age to fourteen years of age.

4.7.3 Mozambique

Mozambique's Penal Code sets the MACR at sixteen years of age.[235]

4.7.4 Sierra Leone

Sierra Leone's Parliament enacted a long awaited and most elaborate Child Rights Act on 13 July 2007. Article 70 of the Act outlines the MACR provision as follows, 'In any judicial proceedings in Sierra Leone, a child shall not be held to be criminally responsible for his actions if he is below the age of fourteen years'.[236]

The general trend amongst states is a MACR above fourteen years of age. Nigeria set the MACR at eighteen years of age. Mali and Guinea set their MACR at eighteen years of age. Some states that set their MACR at sixteen years are Angola, Cape Verde, DRC, Equatorial Guinea, Guinea-Bissau, Mauritania and Liberia.[237] It is therefore possible to point to a wide range of African states that have a MACR of at least fourteen years of age.

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[234] Ramages *Investigating the Minimum Age of Criminal Responsibility in African legal systems* (LLM thesis 2008 UWC available at http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/2518/Ramages_LLM_2008.pdf?sequence=1&isAllowed=y.

[235] Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : initial reports of States parties due in 1996 : Mozambique CRC/C/41/Add.11, 14 May 2001, para 550 114 available at https://digitallibrary.un.org/record/458313.

[236] Article 70 of the Child Rights Act 2007.

[237]Ms Thandazile Skhosana, Senior State Law Advisor, Department of Justice on the Child Justice Amendment Bill 2018 briefing to the Portfolio Committee on Justice and Correctional Services (2018)2018.

African Charter on Human and People' Rights Principles and Guidelines urged states to not set the MACR below fifteen years

The charter received 43 signatories out of 55 African states and 39 African countries acceded as well as 39 countries deposited instruments.[238]

The Charter states in the preamble that "Minors' ' shall mean young people aged 15 to 17 years subject to each country's laws and youth and that young people shall refer to every person between the ages of 15 and 35 years. It indicates that children under 15 years falls in a specific category all by themselves, which may suggest the perception of an age for MACR for African countries to be at 15 years of age. According to the Youth Charter the instrument considers as stated in the preamble, historic injustices imposed on Africans and the conviction that the greatest resource of Africa is its youthful population and that the youth will be the saving grace of all people in Africa. In view of these considerations the Youth Charter seems to indicate that 15 years of age is the age of a MACR in African context.

4.8. African Philosophy and its place in the ACRWC

Article 46 of the African Charter states:

> To:...draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organisation of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

To understand the ACRWC and the different African instruments pertaining to children, one has to look at the different approaches and dominant themes surrounding the understanding of children from an African perspective. Not all African societies have the same conception of "child" although there are some dominant themes.[239]

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[238] List of countries which have signed, ratified/acceded to the African youth charter 26 June 2019 available at https://au.int/sites/default/files/treaties/7789-sl-AFRICAN%20YOUTH%20CHARTER.pdf accessed on 28 October 2022.

[239] Ndofirepi and Amasa "Philosophy for children: the quest for an African perspective" *South African Journal of Education* (2011) 312, 246-256.

The best definition of reaching a MACR may be found in Menkiti's statement that "we must also conceive of this [human] organism as going through a long process of social and ritual transformation until it attains the full complement of excellencies seen as truly definitive of man"[240]. Menkiti's association of the term 'excellencies' with personhood also implies that becoming a person is essentially related to developing virtue. Thus, the African conception of personhood could be thought to propose a theory of ethics``. The idea of a MACR from an African perception encompasses the normative idea of personhood that takes place through other persons — that captures the role and place of social relationships in the discourse of ubuntu.

As creations of God, we naturally grow into human beings. But the project of personhood involves pursuing and fulfilling moral completeness. God leaves the project of completing ourselves morally in our hands, to pursue the destiny of our human nature. [241] The African belief is, that African children are "citizens-in-waiting" and are "... potential bearers of rights, which they may exercise only when they have reached the age of reason". Without a long process of social and ritual transformation; which accord the child with "...the full competencies seen as fully definitive of man", children and new-borns are referred to as "it".[242] In understanding this African outlook on "becoming a human being" it seems to translate and explain why the Youth Charter refers to children (human beings) as starting from 15 years of age. This also implies the drive to education and transference of knowledge from society to the child enabling the child to understand what is right and wrong and to act in accordance with that understanding.

The profound relevance of the African way of life and thereby including the concept of Ubuntu, plays logically to the reason for the existence of a MACR in Africa. It can and should be used extensively in "…to reconstitute communities that have experienced forms of dislocation, violence and trauma." "….it provides the grammar or a framework for speaking about forgiveness, redress and reconciliation since our humanity depends on our connectedness." [243] Traditional and informal

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[240] Molefe "African Personhood and Applied Ethics" *African Humanities Series* (1st ed) (2022)19.

[241] Molefe 25.

[242]Ndofirepi, Amasa and Shumba"Conceptions of 'Child' among Traditional Africans: A Philosophical Purview" *Amon Journal of Human Ecology (*2014) 45 03 240.

[243] Ogude "Ubuntu and the Reconstitution of Community" (2019) *Indiana University Press (World Philosophies)* 207 available at: https://web-p-ebscohost-com.uplib.idm.oclc.org/ehost/ebookviewer/ebook/bmxlYmtfXzIxMzUwNzhfX0FO0?sid=aa3f0cf3-8e62-41b1-b767-3918cfe319ab@redis&vid=0&format=EB&lpid=lp_21&rid=0 accessed: 13 July 2022.

justice systems (civil/rehabilitative/educational approach to criminal justice of young people) may be adopted as an appropriate response to crime with the necessary monitoring mechanisms to ensure accountability.

In transitioning from a state of apartheid to our South African democracy the constitutional court In Raduvha[244] stated and summarised the position as follows:

".....given our dark and painful history – which we all committed ourselves to eradicate 22 years ago when we ushered in our fledgling constitutional democracy – a past characterised by oppression and repression, abuse of State power and a wholesale denial of human rights to the majority of the people of our country. A time where there was no place for the rule of law. Arrest and detention played a key role in the resolve of the government of the day to maintain its much maligned apartheid regime. The police played a central role in maintaining that regime. In facilitating this, the police resorted to brute force to arrest and detain. This was a culture within the police force. This is the culture which our Constitution aspires to eradicate and replace with a culture of human rights permeating through all facets of our lives."

Sloth Nielsen and J Gallinetti points out that at the core of the Child Justice Act is the aim of addressing the negative impact of apartheid on our South African children as stated in the Preamble to the Child Justice Act as amended. She states that the Child Justice Act "alludes to the treatment of children under apartheid,where black children in particular did not have the "opportunity to live and act like children", and the overall aspirations of the Constitution regarding values such a social and economic justice and the provision of an improved quality of life for all."[245]

The two writers argue further that the Child Justice Act "Africanises" child justice proceedings through the incorporation of the values of ubuntu in its provisions and its preamble.

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[244] *Raduvha* 6.

[245] Sloth Nielsen and Gallinetti "'Just Say Sorry?' Ubuntu, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008" (2011) *Potchefstroom Electronic Law Journal* 14(4) available at https://www.researchgate.net/publication/228256277_%27Just_Say_Sorry%27_Ubuntu_Africanisation_and_the_Child_Justice_System_in_the_Child_Justice_Act_75_of_2008 accessed 28 September 2022.

In the *Centre for Child Law v Minister of Justice and Constitutional Development* case[246] the court made it clear that the government's objectives as set out in the Preamble to the CJA as amended is relevant in determining the validity of the CJA in the face of constitutional challenge. The thrust of the CJA to be relevant in the African context is clear by the Act's references to the ACRWC and is clearly incorporated through the principles of restorative justice. The CJA makes explicit reference in its holistic and objective approach, to the situation where children came into conflict with the criminal justice system, to victims of crime as well as the importance of parents, family and even in certain circumstances the community.[247] The CJA incorporates the spirit of ubuntu into the Child Justice System, is specifically catered for by the CJA as amended and to treat and teach children, whether victims of crime or in conflict with the criminal justice system, to exhibit the principles of respect and dignity[248] that is deeply entrenched in African culture.

Goldson[249] iterates that "it is often children in greatest social need who are swept up by youth justice systems. Children in conflict with the law are not islands in time or in space, rather they live, and grow up, in social conditions and material contexts that are typically characterised by multiple and myriad forms of socio-economic disadvantage." He further states that "...wherever we may care to look, youth 'justice' systems around the world characteristically process (and punish) the children of the poor… the corollaries between child poverty, social and economic inequality, youth crime and processes of criminalisation are undeniable."

The United Nations Basic Principles[250] on the Use of Restorative Justice Programmes in Criminal Matters describes the definition of 'a restorative process' included in the Basic Principles as any process in which the victim and the offender and where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Skelton notes that restorative justice has a special resonance with African customary law processes, where disputes are treated in much the same way whether they are civil or criminal, and this tendency to avoid a strong distinction between civil and criminal wrongs is also a feature of restorative justice.Acceptance of

[246] Centre for Child Law v Minister for Justice and Constitutional Development2009 ZACC 18.

[247] Section 2(b) of the CJA.

[248] Section 2(b)(i) of the CJA.

[249] Goldson 111–130.

[250]UN Commission on Crime Prevention and Criminal Justice "United Nations Basic Principles# on the Use of Restorative Justice Programmes in Criminal Matters" (2002) E/CN.15/2002/5/Add.1 2..

responsibility, making restitution and promoting harmony are the key outcomes desired in all kinds of disputes.[251] The setting of a MACR resonates with African values and beliefs where restorative justice is paramount in dealing with child offenders, victims of crime, families and the community in a holistic fashion to bring healing instead of criminal sanctions. One can go as far as to argue that ubuntu in relation to children means decriminalisation and dealing with the root problems against an inclusive environment where everyone takes responsibility.

Restorative justice has a special resonance with African customary law processes, where disputes are treated in much the same way whether they are civil or criminal.[252] The MACR shields children against the negative impact of the criminal justice system and as the operation of the principles of ubuntu remains the same in either civil or criminal approach the civil approach should by far be preferred. The MACR guarantees the approach of the civil procedure, which has the resulting effect of avoiding further trauma. The assistance of the police is still available in assisting to bring the child offender into access to social services through section 9 of the CJA as amended.

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South Africa can draw from its own heritage as well as experiences of neighbours as discussed in this chapter, to find ways of raising the standards of justice available to its children who are now for a brief moment in time the very marginalised, but in future the ones that determine the direction of our country and our own destiny as well as their children's destinies. It would be wise and beneficial to draw some conclusions from the investigation that was undertaken and to reflect on the possibility of putting these recommendations into practice.

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[251] Skelton A "Face to face: Sachs on restorative justice" (2010) *SAPL* 25 94.

[252] Skelton 'Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' 2007 *Acta Juridica* 1 229 233-234

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

In the *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* the court stated that " it is important to consider the rights of and special protection needed by the adolescent child in the specific case. It should not be seen to mean that they need less protection; indeed, it may be that they need more, or at the very least a more specific protection. This, as the UNCRC has noted, is because reaching adolescence can mean exposure to a number of harmful things, including drug use or abuse. Adolescents may find themselves in such situations, therefore "investment is needed in measures to strengthen the capacities of adolescents to overcome or mitigate those challenges [and] address the societal drivers". If a State party fails to put such measures in place, as can be argued that South Africa has in the present case, that does not mean that children should be punished for this. What it does mean, however, is that when the legal gap is identified, all actors, such as the Legislature and the Judiciary, must remedy the situation, in line with South Africa's State party obligations, as soon as possible."

This judgement urges all roleplayers to shoulder the challenges with great haste. International and regional law, South African case law and existing statutory provisions focusing on the principles of ubuntu provide adequate guidance in facing the challenges lying ahead of us. South Africa is not on its own in the struggle to bring justice to its children as can be seen throughout the discussion and references to other states grappling with similar issues. Specific focus areas that may bring the greatest fruits and starting with low hanging fruits that can produce the most expedient results will be highlighted in the remainder of this concluding chapter.

1. Active involvement of civil society and NGO's

In the history of the CJA civil society produced comprehensive reports to track and analyse the implementation of the CJA.[253] NGO's[254] and civil society must actively be encouraged to be involved in all the reporting processes that are part of the legislative process. The contribution they bring to the table has proved invaluable in the past. In this manner government institutions

[253] University of Pretoria Enterprises and Centre for Child Law "Impact of the Child Justice Act 75 of 2008 Final Research report" (2019) 17.

[254] Open Society Foundation for South Africa "Overview of the Implementation of the Child Justice Act 2008: Good intentions, questionable outcomes" (2011) available at https://childjustice.org.za/publications/ImplementationCJA.pdf accessed on 24 October 2022

are held accountable and the expertise contributed by private individuals and NGO's and civil groups enhance the bringing of justice into the reach of child offenders. When civil society is actively involved in the legislation process, the interests of civil society are also represented and a well balanced way forward can be chartered.

The Cabinet member responsible for the administration of justice must through the national policy framework promote cooperation and communication with the non-governmental sector and civil society in order to ensure effective partnerships to strengthen the child justice system.[255] Public comment is also invited by law[256] and the public's active participation would be very beneficial for Parliament to gauge the public support for raising the MACR to acceptable international levels. NGO's must assure their availability to give input at the meetings[257] of the Intersectoral Committee that must be held by law twice a year[258], to be able to contribute to the discussions on raising the MACR at the time when the raising of the MACR has to be evaluated again, which is 5 years after the commencement of the CJA that took effect on 19 August 2022.[259]

2. Removing the Doli Incapax Doctrine

On 19 August 2022 the legislative adjustment on the CJA replaced the doli incapax doctrine's application on ten and eleven year old children by the raising of the MACR to twelve years of age which make the doli incapax doctrine still applicable to twelve and thirteen year olds.

Removing the doli incapax doctrine and raising the MACR to fourteen years of age will bring the international obligations of South Africa in line with international standards as the General Comment 24 of 2019 recommends. Children in this age range would be assisted by the police to trace their parents, guardians or be placed in the care of a responsible person and a probation officer would have been notified by the police who could take charge of the situation.

The probation officer would then act within the mandate of section 9 of the CJA as amended. The child would be shielded against the harmful impact of the criminal justice system and intervention

[255] Section 93(1)(c) of the CJA.

[256] Section 93(2)(b) of the CJA.

[257] Section 94(1)(5) of the CJA.

[258] Section 95 of the CJA.

[259] Sections 8 and Sections 96(4) and (5) of the CJA.

in the life of the child would be immediate and can happen under the supervision of the probation officer with the oversight of the Children's Court and the powers contained in the Children's Act 38 of 2005 at her disposal.

Expert reports will not be necessary and the services of experts can be employed for an age range where criminally liability is more likely to be proved and where these resources will be used in a more relevant way. The harm done by bringing the child into contact with the criminal justice system is also avoided. Children can be treated in a way that is more familiar in African context through the principals of ubuntu, restoration, mediation and family conferencing rather than criminal sanctions.

It is thus imperative that the archaic presumption of doli incapax be done away with, to raise the MACR to fourteen years of age and deal with children in a familiar African context of ubuntu, which is achieved through the application of the Children's Act. The element of accountability is retained through judicial oversight of the Children's Court. The doli incapax doctrine is largely ineffective and the harm resulting from the wrong application of the doctrine due to lack of specialisation of role players can be remedied if the MACR is raised to fourteen years of age. Resources can be freed up for the prosecution of older children where criminal capacity is in dispute or unsure and expert reports obtained.

3. Complying with International Commitments

The fixing of a MACR of fourteen years of age is in line with International Standards. In this respect the raising of the current MACR of twelve years of age to fourteen years of age as recommended by the Committee of Experts to the CRC will be in compliance with Section 28(1)(g) and Section 28(2) of the Constitution.

The reporting obligation of South Africa to the United Nations Committee on the Rights of the Child is an important tool in keeping the Government of South Africa accountable to its international commitments on child rights. In 2014 the combined second, third and fourth periodic country report was submitted to the Committee on the CRC and the State Party had to set out in this report what steps were taken to comply with the International Obligations under the CRC. Civil Society coalitions can play an important role through this reporting process by also submitting alternate reports in response to the report submitted by South Africa. Child Rights South Africa

(ARC-SA) submitted a report in 2014 in response to the report of South Africa, which the Committee received and considered and incorporated in their response to the reporting obligation of South Africa. This type of participation by civil society should be welcomed and encouraged as it enhances the process of participatory democracy and adds a dimension of extra accountability to the process of reformation in the Child Justice sector.

Raising the MACR to fourteen years of age will not require extensive changes to the existing legislation and to remove the sections pertaining to the doli incapax presumptions will simplify the Act and make it much more user friendly.[260]

4. Specialisation

The Child Justice Act is a specialist piece of equipment, that requires a certain level of specialisation from the person applying it, to know and understand the inner workings of the CJA. When the MACR is raised to 14 years of age, all the provisions in the CJA as amended, that cater for children between 12 and 14 years of age can fall away and the Act will be considerably simplified and easier to understand and execute. The doli incapax doctrine leads to a lot of confusion[261] and requiring stakeholders to deal with the highly technical nature of criminal capacity, can be eliminated.

In *Centre for Child Law v Director for Public Prosecutions , Johannesburg and Others*[262] the court stated that if there are other means to deal with child offenders than criminalisation, then the least harmful option has to be taken.[263] To be able to identify these least harmful legal options that can be made available to child offenders the workforce has to be skilled. Upskilling the workforce in all the Departments impacting on child offenders will allow the MACR ultimately to be raised to 18 years as it opens up the alternative measures that can be supplied due to the expertise of the workforce. The court dealt with a “minor” offence of possession of cannabis in this case, but the principle of weighing up the competing rights when the least harmful measures can be put in place, can be facilitated.

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[260] Centre for Justice and Crime Prevention/University of Pretoria Enterprises and Centre for Child Law 5.1.2.

[261] UNCRC General Comment 10.

[262] Centre for Child Law v Director of Public Prosecutions 35.

[263] Centre for Child Law v Director of Public Prosecutions 35.

Resources of the government can be focused on training the work force and employing skilled staff according to their mandate in terms of section 97 of the CJA as amended. In house training that is provided should be increased. Training should be provided on the CJA as amended by accredited private organisations as well as highly skilled and experienced advocates in the NPA that can transfer skills and offer mentor services. These candidates that took part in the training must be placed strategically to maximise the effectiveness of the field of training that was presented and to add value to service delivery.

Consideration should be given to employ prosecutors to deal exclusively with child offenders and these prosecutors should preferably have a high skills level due to experience or possess post graduate degrees in Child Law. The prosecutor should receive training through specialised courses in the field of sociology, psychology and international law and agreements concerning children, before allocating any cases to that prosecutor. The prosecutor should be matched with a mentor[264] for a certain period.

Prosecutors should be assisted by appointing a central person tasked with keeping statistics with the view of assisting parliament in reviewing the MACR or identify problems in the child justice system that need urgent attention. This central person should have an understanding of the value and purpose of the data and assure the integrity of the data to be able to evaluate the raising of the MACR in 5 years time. The National Prosecuting Authority should be adequately capacitated to engage with the acquiring and training of a specialist core group to work in this specialist field.

Police officials should receive specific training in the Child Justice Act and International as well as Regional Law. Police officials that is specifically trained and capacitated, should be preferred to deal with juvenile offenders and/or possess a relevant Bachelors degree or diploma. Police officials should be trained in specialised courses in the field of sociology, psychology and international law and agreements concerning children. A central person should be appointed to keep the necessary statistics and assure the integrity of the statistics whilst having a proper understanding of the purpose and value of the data to enable the integrity of the data when evaluating the raising of the MACR in 5 years time. .

[264]Centre for Justice and Crime Prevention/University of Pretoria Enterprises and Centre for Child Law 89.

Probation officers should receive training on the importance of the procedures and requirements for assessments and preliminary enquiries.[265] Reports must be reviewed before submitting it to the court and probation officers should be trained on the different diversion options and structures in the CJA to be able to advise the prosecutor and judicial officer in the best interest of the child. The probation officer should be trained and have a working knowledge of diversion service providers and diversion possibilities as well as the procedures contained under section 9 of the CJA. Probation officers should receive training in the CJA as well as international law in matters relating to child offenders. The probation officer should be assisted by a central person that collates statistics and has an understanding of the purpose and value of the data to enable that the reviewing of the MACR in 5 years time can be done in an effective way with data of high integrity.

These measures should set in place a good working alternative to the doli incapax doctrine and allow the MACR to be raised to the international level of 14 years of age.

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