

Article 40

THE DYNAMICS OF YOUTH JUSTICE & THE CONVENTION
ON THE RIGHTS OF THE CHILD IN SOUTH AFRICA

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Article 40(2)(b)(v):

To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that every child alleged as or accused of having infringed the penal law has at least the following guarantees:... if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial.

Criminal capacity and the teenage brain: Insights from neurological research

By Warren Binford

Wise individuals have always known that adolescence is one of the most challenging periods in human development. More than 2,300 years ago, Aristotle observed that 'the young are heated by Nature as drunken men by wine.' More recently, William Shakespeare had a shepherd

wish in The Winter's Tale that 'there were no age between ten and three-and-twenty, or that youth would sleep out the rest; for there is nothing in the between but getting wench with child, wronging the ancients, stealing, fighting.' Just last century, one of the world's leading developmental psychologists, Erik Erikson, described adolescence as the most tumultuous of life's several identity crises.

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EDITORIAL

Welcome to the first electronic edition of Article 40 and the last edition of Article 40 for 2012!

2012 is the second year in which the Child Justice Act in South Africa has been in implementation. Despite the fact that the Department of Justice & Constitutional Development has not yet presented the second year implementation report on the Child Justice Act to Parliament, many developments have taken place in the sphere of child justice in South Africa. This edition of Article 40 highlights some of those developments.

Firstly, the implementation of section 85 of the Child Justice Act which addresses the automatic review of decisions by the child justice court came under the spotlight in a recent judgment in the North Gauteng High Court. Morgan Courtenay from the Centre for Child Law at the University of Pretoria provides us with an informative case review on this judgment. At the time of writing the Western Cape High Court also delivered a judgment on the interpretation of section 85 of the Child Justice in the case of *Mosieling v S*.

Secondly, independent researcher, Dr Charmain Badenhorst provides us with a summary of her research report on the 2nd year of implementation of the Child Justice Act. You can download the entire report at: http://www.childjustice.org.za/publications/BadenhorstCJAImplementation2_2012.pdf.

The feature article for this edition is based on neurological developments in relation to criminal capacity. Prof Warren Binford, a Fulbright Scholar currently at the University of the Western Cape, but originally from Willamette University in Oregon, United States of America, writes about how the United States Supreme Court are relying more and more on neurological science when considering the criminal capacity of children.

Happy Reading!
Editorial Team

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However, the collective wisdom of thousands of years of experience observing the turbulent stage of adolescence was not enough to end the practice of sentencing children to executions and mandatory life imprisonments without opportunity for parole in the United States of America (USA). What was? Science.

The breakthrough in MRIs

Recent advances have been made in magnetic resonance imaging ('MRI'), which allows researchers to create and study three dimensional images of the brain without using radiation. This technological development allows scientists to safely monitor children's neurological development over the years. The information culled from this groundbreaking research tells not just how, but why, adolescents act the way they do from the perspective of neuroscience.

Does a neuroscience perspective matter more than civilisation's collective wisdom in persuading jurists to treat adolescents differently than adults in criminal matters? Apparently, it does, at least in the United States Supreme Court, which recently struck down a series of controversial sentencing practices involving children, including the death penalty and mandatory life imprisonment without the possibility of parole. In issuing these decisions, the U.S. Supreme Court expressly cited the recent findings of neuroscientists as a reason for their decisions.

The MRI research started with a study in the U.S. that was conducted by the government-sponsored National Institutes of Health (NIH). The study scanned the brains of over a hundred children as they matured during the 1990s. One of the most significant findings of this study was that the human brain undergoes a massive revamping between the ages of 12 and 25 years that resembles a 'network and wiring upgrade.'

Shattering previous theories

The discovery of a massive reorganisation in the human brain shattered previous beliefs about brain development in children. We used to think that maturation of the brain was nearly finished by primary school, and that the brain was simply growing in subsequent years. Adolescent behaviour (or too often, misbehaviour) was explained almost entirely by the unsteady and voluminous release of rampant hormones.

Now we know that the human brain does not grow very much after the age of six years. At that point, the brain has grown to 90 percent of its adult size. However, we failed to realise that fact because a child's head keeps growing. Now we understand that the growth is largely a result of the skull thickening, and not the brain growing.

Brain develops from back to front

Recent neurological studies also inform us that the brain matures from back to front, which is significant because the back of the brain controls more basic functions including physical movement, sight, and fundamental processing. The front of the brain, which is responsible for more advanced thinking, is the last area of the brain to develop.

“Now we know that the human brain does not grow very much after the age of six years. At that point, the brain has grown to 90 percent of its adult size.”



Teenagers use their brains differently than adults

To complicate adolescent brain development further, we now know that adolescents utilise certain regions of their brains differently than adults. Moreover, these regions of the brain are not fully developed until late adolescence or early adulthood and are closely tied to adolescent behaviour.

The first system is based in the frontal lobe (especially the prefrontal cortex), which is where cognitive control is managed. The second system involves the limbic and paralimbic regions of the brain, which is where a person's socio-emotional system is managed.

While the frontal lobe and the limbic and paralimbic regions of the adolescent brain are developing and being utilized differently than adults, there are many other changes occurring as well. For example, the corpus callosum becomes thicker throughout adolescence. This development is important because the brain's right and left hemispheres are connected by the corpus callosum, which provides communicative connections between the hemispheres to achieve advanced brain functioning.

Teenagers thinking more quickly and utilizing memory and experience

Simultaneously, stronger links are developing between the hippocampus, which serves as a 'memory directory,' and the frontal areas of the brain, which allows us to consider multiple options and set goals to achieve. Consequently, these changes facilitate our ability to take into account our memory and experiences when making decisions.

At the same time, the frontal areas of the brain become faster and develop better connections, which allow us to consider multiple factors and possibilities. This happens because the brain's axons (long nerve fibers that are used to send signals between neurons) undergo a process called myelination. Myelination essentially insulates the axons with a fatty substance called myelin (the brain's white matter), which ultimately boosts the transmission speed of the axons a hundredfold.

Meanwhile, axons rely on branchlike extensions called dendrites to communicate with neurons. The dendrites develop more twig-like fingers and heavily-used synapses grow stronger and richer. This development is critical because the synapses facilitate communications between axons and dendrites using chemicals.

The brain's synapses undergo pruning at the same time, with unused synapses withering away. The process is called synaptic pruning and the process causes the brain's cortex to

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become thinner and more efficient. This is important because the cortex, which is the outside layer of grey matter, is where we process complex thoughts and consciousness.

As a result of these changes, the human brain becomes faster, more efficient, and more complex.

Higher-level thinking is developed last

Last to develop is the frontal lobe, which is where higher-level thinking occurs. It is the largest part of the brain. The frontal lobe changes more during adolescence than at any other point in life. Its composition changes drastically during adolescence.

First, the adolescent brain forms copious amounts of neurons (the grey matter responsible for thinking) similar to what happens shortly after birth. Then the grey matter is rapidly pruned to eliminate unnecessary synapses so that the neural connections are more efficient.

While the neurons are being pruned, a process called myelination insulates the brain's circuitry with white fatty tissue. This insulation ensures that signals move more quickly through the brain and that communications within the brain are more reliable.

Within the frontal lobe is the prefrontal cortex, which does not finish developing until early adulthood. This is a problem because the prefrontal cortex is essentially the 'CEO' of the brain where the highest level thinking occurs (the 'executive functions').

The prefrontal cortex is responsible for prioritising thoughts, imagining, thinking abstractly, anticipating consequences, planning, and controlling impulses. It also manages 'response inhibition, emotional regulation, planning and organization,' 'voluntary behaviour control and inhibition,' risk assessment, reward and punishment assessment, impulse control, decision-making, 'the ability to judge and evaluate future consequences,' 'recognising deception, responses to positive and negative feedback, memory, and moral judgments.'

Thus, taking into consideration the development of the frontal lobe region alone, one sees that adolescents are at a significant neurological disadvantage.

Teenagers develop socio-emotional systems first

MRI images also show us that the socio-emotional systems in the brain begin to develop earlier and more quickly than the cognitive control systems. Thus, adolescents rely on these systems more heavily during this stage in development. In other words, their behaviour is disproportionately driven by emotion and social responses rather than rational thought.

For example, the amygdala is a neural system that helps to process emotional responses to perceived dangers. Located in the subcortical region of the brain (where social and emotional information is processed), the amygdala is associated with 'gut reactions' such as the 'fight or flight' response. This powerful system is closely connected to the prefrontal cortex but, as explained above, the prefrontal cortex is one of the last parts of the brain to develop and so it does not fully function in its modulation of the emotional and behavioural responses to stimuli. Consequently, an adolescent's emotional or behavioural response to certain stimuli may be more impulsive or aggressive relative to an adult's response to the same stimuli.

Another example can be found in the release of neurotransmitters in the brain. Adolescents undergo a significant increase in dopamine, which is associated with pleasure and motivation. Simultaneously, they experience a decrease in serotonin, which is also a neurotransmitter, but one that supports inhibitory control. As a result, adolescents experience an imbalance (relative to adults) between their dopamine levels and their serotonin levels, which creates a tendency towards riskier and more impulsive decisions. Some experts have said that it is like adolescents have fully functioning gas pedals but their brake pedals only work intermittently.

Teenagers are more susceptible to peer influence

Recent neurological research is also informing our understanding of adolescents' heightened susceptibility to peer influence. Some MRI studies suggest that the adolescent brain considers peer exclusion a very threat to the individual's existence. Indeed, the adolescent brain's response shows similarities between peer rejection and a physical threat or being cut off from one's food supply. In other words, adolescents literally think they might die when they are rejected by peers. Moreover, the adolescent brain is highly receptive to a neural hormone called oxytocin. Oxytocin makes social interactions and connections feel more rewarding. No wonder adolescents are so focused on their friends.

Teenagers overvalue rewards

One of the other findings that has surprised researchers is the weighing of risks and rewards by adolescents. Historically, it was perceived that adolescents failed to appreciate the risks of certain behaviours. However, the neurological findings suggest that adolescents do not downplay risk, rather, they overvalue rewards relative to adults. This is largely attributed

to the fact that adolescents rely more on the nucleus accumbens (which is used to process emotional responses to potential rewards) rather than the prefrontal cortex to make decisions. Thus, when adolescents are assessing risks relative to rewards when making decisions, they overvalue the potential rewards of a decision.

As though all of this is not enough, the most recent medical research also shows that factors such as stress, peer pressure and emotions amplify adolescents' cognitive limitations. Add to this the fluctuation of adolescent hormones and it is easy to understand why adolescents are so emotionally volatile. No wonder the American Medical Association advises us:

Although adolescents can and on occasion do, exhibit adult levels of judgment and control, their ability to do so is limited and unreliable compared to that of adults. Adolescents, as a group, are less capable than adults of accurately assessing risks and rewards; controlling their impulses; and recognizing and regulating emotional responses – in short, they are less consistent in their ability to self-regulate their behaviour.

As a matter of scientific certainty, '... adolescents, as a group, cannot be expected to behave or make decisions in the same way as adults.' We have always known, but now have a medical understanding of why adolescents are more impulsive, have difficulty recognising and regulating their emotions, and do not accurately assess risks and rewards compared to adults.

Teenagers' reckless behaviour is normal

For better or worse, this reckless behaviour is 'virtually a normative characteristic of adolescent behaviour,' and exists across cultures and species. One theory is that adolescents develop this characteristic as a social skill whose purpose is to help adolescents to act more independently from their parents and other adults, so that they can evolve into independent adults.

Courts recognize that teenagers have lesser criminal capacity

In the meanwhile, how does this new knowledge impact our view of adolescents and criminal behaviour? In light of these scientific findings, some view the adolescent brain as a 'work in progress' or an 'immature brain' and use this knowledge to explain the sometimes irrational behaviour of adolescents. Some portray adolescents as in a state of neurological development 'akin to mental retardation.' As a result, many legal authorities, including the U.S. Supreme Court, argue that children cannot have the same criminal capacity as adults.

The U.S. Supreme Court is relying heavily on science to change child justice

Indeed, the U.S. Supreme Court has issued three decisions since 2005 abolishing sentencing practices relying at least partially on the neurological research conducted in the past 20 years. These scientific findings were submitted in *amicus* briefs filed by the American Medical Association, the American Psychological Association, and the American Academy of Child and Adolescent Psychiatry, among others.



“Thus, taking into consideration the development of the frontal lobe region alone, one sees that adolescents are at a significant neurological disadvantage.”

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The first was *Roper v Simmons* (2005), which banned the imposition of the death penalty for criminal acts committed by children. The second was *Graham v Florida* (2010), which banned the imposition of life without parole for crimes other than murder committed by adolescents. The most recent, which was issued just this year, was *Miller v Alabama*. The U.S. Supreme Court in this case banned the imposition of mandatory lifetime imprisonment without the possibility of parole for all criminal acts (including murder) committed by children.

In all three of these decisions, the U.S. Supreme Court relied on a body of scientific research (including the neurological research described above) that found that children have a lack of maturity and sense of responsibility compared to adults. Adolescents were found to be overrepresented statistically in virtually every category of reckless behaviour. Thus, children are constitutionally different from adults for sentencing purposes the court held.

According to the *Roper* decision, adolescents' 'lack of maturity' and 'underdeveloped sense of responsibility' lead to recklessness, impulsivity, and heedless risk-taking. They 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers. They have limited 'contro[ll] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. Moreover, because a child's character is not as 'well formed' as an adult's, the child's traits are 'less fixed' and his or her actions are less likely to be 'evidence of irretrievabl[e] deprav[ity].'

In *Roper* the Court also cited studies showing that '[o]nly a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behaviour.' The *Roper* and *Graham* decisions both rely heavily on 'the evolving standards of decency that mark the progress of a maturing society.'

In *Graham*, the U.S. Supreme Court again expressly noted that 'developments in psychology and brain science continue to show fundamental differences between child and adult minds'—for example, in 'parts of the brain involved in behaviour control.' The Court

cited findings of transient rashness, proclivity for risk, and inability to assess consequences, which lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, the individual's 'deficiencies will be reformed.'

Both *Roper* and *Graham* emphasised that the distinctive attributes of youth diminish the penal justifications for imposing the harshest sentences on child offenders, even when they commit terrible crimes. Because '[t]he heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as with an adult.'

The U.S. Supreme Court also held in these decisions that deterrence does not work with children because 'the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.'

Finally, deciding that a '[child] offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but, according to the U.S. Supreme Court, 'incorrigibility is inconsistent with youth.' Indeed, the Court in *Graham* held that life imprisonment without the possibility of parole reflects 'an irrevocable judgment about [an offender's] value and place in society, at odds with a child's capacity for change.'

Our knowledge of teenage brains could impact the work of child advocates

While child advocates around the globe have celebrated the progress of the U.S. Supreme Court in bringing that nation's child justice practices more in line with the standards outlined in the United Nations Convention on the Rights of the Child and other international children's rights instruments, those same child advocates are also confronted with the potential consequences of the determination by neuroscientists that adolescents lack fully developed brains.

Will this research compromise the efforts by many child advocates to advance children's rights of participation in decisions that affect them? Will judges be less likely to trust an adolescent's decision to seek emancipation from his or her parents, to abort an unplanned pregnancy, to access birth control?

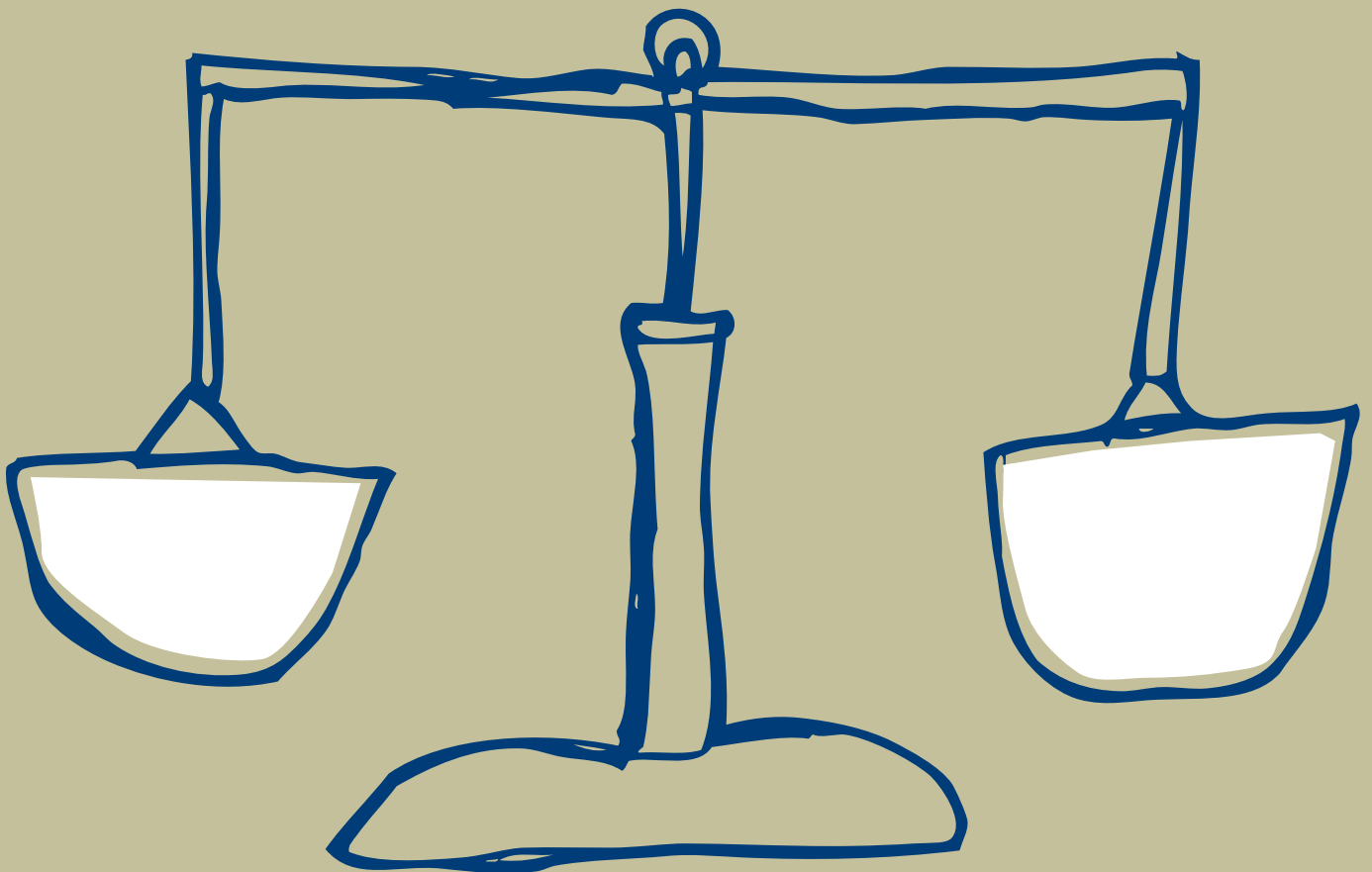
The contradictions that are embodied in the latest neuroscience research parallel the contradictions that constitute adolescence. At times an adult, at times a child, at times neither; this is the state of adolescence. It is a period of rapid and dramatic changes, requiring judicial and societal responses that are both deft and adaptable, taking into consideration the unique stage of development of each adolescent whose rights are called into question.

How will this knowledge impact the future of child justice?

Knowing this, what will the future of child justice look like in the USA? Will each child undergo a brain scan whenever they become involved with the legal system? Will judges rely on MRIs to determine capacity (criminal or participatory) based on the state of the adolescents' neurological development? Will this lead to a more individualised legal system that is science- rather than rights-based? Only time will tell. ●

What's happening after two years?

By Charmain Badenhorst



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Introduction

Section 96(3) of the Child Justice Act 75 of 2008 (The Act) provides that the Minister of Justice and Constitutional Development must, after consultation with the cabinet members responsible for safety and security, correctional services, social development, education and health –

- (a) within one year after the commencement of the Act, submit reports to Parliament, by each Department or institution referred to in section 94(2), on the implementation of the Act; and
- (b) every year thereafter submit those reports to Parliament.

In terms of the National Policy Framework based on the Act, one of the roles civil society and the non-governmental organisations is to provide information and assistance through their experience and research activities to monitor the implementation of the Act. The Child Justice Alliance (“The Alliance”) is a leading civil society network of non-governmental organisations, community-based organisations, academic institutions and individuals working to ensure that the Act is effectively implemented. In order to fulfil this role the Alliance prepared “shadow reports” for the first two (2) years of the implementation of the Act. The first report was presented to a joint meeting of the Portfolio Committees for Justice and Constitutional Development and Correctional Services on 22 June 2011.

The second report has been published but has not yet been presented to Parliament. Although the majority of implementation challenges identified in the first report in 2011 remained, it was decided to focus on three (3) themes in the second report, mainly because these issues relate to new developments emerging during the second year of implementation.

The three (3) themes included in the report were: diversion, the sentencing of children to compulsory residence in Child and Youth Care Centres and One-Stop Child Justice Centres (OSCJC).

Diversion

Since the implementation of the Act there have been numerous reports on the decreases in the number of children being diverted. These concerns were addressed in the first year implementation report by the Alliance and were also raised during the Committee meeting in Parliament in 2011. It was linked to the decreases in the number of children entering the child justice system mainly because the police do not apprehend children alleged to have committed crime and this was in turn linked to a lack of training of police officers on the Act.

In an effort to ascertain why there has been a decrease in the number of diversions, the Department of Justice and Constitutional Development conducted research to investigate the reasons. The research has been completed and a draft report has been made available to some of the role-players involved in the implementation of the Act but it has not been published to date.

Despite the fact that one of the objectives of the project was to investigate the causes of the decrease in the numbers of children being diverted since the implementation of the Act, the overall findings of the study were inconclusive and do not really take the issue any further. The question still remains: Are the decreases in the numbers of diversions as a result of fewer children entering the child justice system or have the number of children entering the system remained more or less the same but fewer of them are being diverted? The lack of accurate statistics from the police on the number of children apprehended for allegedly committing offences (and not only the number of charges against children), at the moment and before the implementation of the Act makes it difficult to answer this question convincingly and there is a definite need for accurate and reliable research in this regard.

One of the consequences of the unforeseen drop in the number of children being diverted since the implementation of the Act is the negative impact that it had on the sustainability of the diversion services provided by non-governmental organisations and civil society organisations. The research conducted by the Alliance on the 2nd year of implementation of the Act focused on 4 of the main diversions service providers in South Africa namely: The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), Khulisa Social Solutions, the Restorative Justice Centre (RJC) and Bosasa. The report clearly states that there has been a significant decrease in the number of children referred to diversion programmes to 3 of the four diversion service providers. The report has also highlights the fact that the decreases in the number of diversions have resulted in a drop in the funding for diversion services since funding is connected to the number of children diverted. This has caused a large number of office closures by NICRO and therefore a limitation in the number of available diversion programmes and services in all the Provinces. These developments impact negatively on the rights of children in conflict with the law since there are less diversion programmes available and in some instances no diversion programmes in certain areas because of the closure of offices.

Sentencing of Children to Compulsory Residence in Child and Youth Care Centres

International law and the South African Constitution provide that the detention of children should only be used as a measure of last resort and for the shortest appropriate period of time. Section 76(1) of the Act provides for the sentencing of a child, convicted of an offence, to be sentenced to compulsory residence in a Child and Youth Care Centre for a period not exceeding 5 years or for a period which may not exceed the date on which the child turns 21 of age. In terms of section 76(3) a child justice court that convicts a child of a schedule 3 offence, and which offence, if committed by an adult would have justified a term of imprisonment exceeding 10 years, may, if substantial and compelling reasons exist, in addition to a sentence of compulsory residence in a Child and Youth Care Centre (for the maximum period referred to above), sentence the child to a period of imprisonment which is to be served after completion of the period in the Child and Youth Care Centre. The sentence to imprisonment will only commence after the submission of a report by the head of the Centre to the court stating his or her views on the extent to which the objectives of sentencing have been achieved and the possibility of the child's reintegration into society without serving the additional term of imprisonment.

It is therefore very important that the heads of Child and Youth Care Centres understand their duty in these instances and that they inform children sentenced in terms of section 76(3) of the Act about the consequences of their behaviour and participation in programmes at the Centre during their compulsory residence at the Centre. In this regard, the Child Justice Alliance conducted a workshop with the heads of these Centres on 8 June 2011, to inform and sensitize them about the provisions of section 76(3) and the consequences of the provision.

The transfer of the Reform Schools and the Schools of Industry from the Department of Basic Education to the Department of Social Development that which was supposed to be completed by 1 April 2012 as required by section 196(3) of the Children's Act 38 of 2005 ("the Children's Act") has not been done.

From an audit conducted by a joint task team of the Departments of Basic Education and Social Development it has emerged that only 4 of the 9 provinces have reform school facilities namely Eastern Cape, KwaZulu-Natal, Mpumalanga and the Western Cape. The existing five reform school facilities have, in terms of section 196(1)(e) of the Children's Act, been established as Child and Youth Care Centres registered to receive sentenced children. There are no Reform Schools catering for girls and the uneven distribution of Reform Schools in the country results, among other challenges, in children sentenced to compulsory residence in Child and Youth Care Centres, and being detained for long periods of time in correctional facilities awaiting trial in these Centres. This remains a serious challenge that needs urgent attention and intervention.



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One-Stop Child Justice Centres

Section 89 of the Act provides for the establishment of One-Stop Child Justice Centres. There are currently two One-Stop Child Justice Centres in operation in South Africa, one in Port Elizabeth called the Nerina One-Stop Child Justice Centre and one in Bloemfontein called the Mangaung One-Stop Child Justice Centre. Both of these Centres were established before the implementation of the Act. Two additional One-Stop Child Justice Centres were reportedly to be launched in the course of 2012, one in Klerksdorp in the North West and one in Buffalo City in the Eastern Cape.

Although each of the existing One-Stop Child Justice Centres experience challenges unique to the specific Centre in the implementation of the Act, both are fully operational. Shared challenges being experienced by both Centres are: the fact that there are no regional courts attached to the Centres and also that the areas of jurisdiction of both Centres need to be increased as provided for by section 89(6)(a).

The establishment of regional courts at the One-Stop Child Justice Centre (even if only on a periodic basis) will ensure that children who commit serious offences and who are not diverted continue to enjoy the benefits of receiving the multidisciplinary support being offered at the Centre.

Increasing the areas of jurisdiction of both One-Stop Child Justice Centres will result in the children, currently being detained at the Child and Youth Care Centres attached to the One-Stop Child Justice Centres, but who cannot be dealt with at the One-Stop Child Justice Centres because they committed offences outside the area of jurisdiction of the One-Stop Child Justice Centre, to also receive the benefits of the services offered there. The increased areas of jurisdiction will also ensure that the One-Stop Child Justice Centres and the resources allocated to them are fully utilised.


One-Stop Child Justice Centres also experienced a significant drop in children entering the child justice system and therefore the resources in place are not fully utilised at the moment. Establishing regional courts at the Centres and increasing the areas of jurisdiction of the Centres will ensure full utilization of the allocated resources.

Conclusion

The Act has been in operation for just over two years and it is clear that various challenges in the implementation still exist and need to be addressed. It is therefore important to continue with the monitoring of the implementation of the Act and to constantly raise awareness of challenges and problems in this regard to ensure that children in conflict with the law receive the protection that they are entitled to.

The Child Justice Alliance plays a very important role in this regard by not only highlighting challenges and possible solutions in relation to the implementation of the Act, but also by educating role-players in the operation of the Act and by informing interested parties about the new developments in child justice in the international arena and locally (such as new case law). ●

Automatic review of regional court sentences



S v FM (Centre for Child Law as amicus curiae) [2012] ZAGPPHC 180 (20 August 2012)

By R. Morgan Courtenay

In the latest case dealing with section 85 of the Child Justice Act the North Gauteng High Court took the opportunity to elaborate upon whether the automatic review procedure now applied in cases of a legally represented child offender who is sentenced by a regional court. It also highlighted the importance of establishing ‘the reasons for the crime’ when trying to give effect to the spirit and purport of the Child Justice Act.

The Facts

On 24 March 2010, *FM*, then 16-years-old, was charged in the Modimolle Regional Court with raping an 11-year-old girl with an intellectual disability. *FM*, duly represented by a legal representative and assisted by his uncle, elected to plead guilty to the charge. On the strength of his statement made pursuant to section 112(2) of the Criminal Procedure Act 51 of 1977 (‘CPA’) the regional magistrate found the *FM* guilty as charged.

The matter was thereafter postponed for sentencing. The evidence of a senior probation officer was lead. Her evidence was that the accused had no previous convictions but had been previously charged and diverted on offences involving “violence”, “sexual assault” and “theft”. In mitigation evidence was lead that *FM* had grown up without a father figure. That he had abandoned school during grade 3, at the age of 12, and had for lengthy periods used the street drug “nyaope”. On the strength of the evidence before the Court, including a victim-impact report, the magistrate elected to impose a sentence of 15 years imprisonment of which 5 years thereof were suspended, on appropriate conditions, for five years.

Neither *FM* nor his legal representative appealed against his conviction or sentence. Rather, the regional magistrate, “uncertain whether cases in which sentence was imposed on a child accused by a regional

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magistrate or where a child accused was legally represented were subject to automatic review under the [Child Justice Act 75 of 2008 ('CJA')]” (sic), referred the matter on special review pursuant to section 303(4) of the CPA.

On review the Deputy Judge President, owing to importance of the questions, directed that the matter be heard before a full court of three judges. The Centre for Child Law was requested by the parties to enter as *amicus curiae*, which it dutifully did.

The Judgment

There were essentially two primary issues for determination by the full bench (Tuchten J, Molopa J and Matojane J). **First**, whether a child offender was disqualified from the protections afforded by section 85 of the CJA where he or she was legally represented; and **Second**, whether regional courts fell within the ambit of section 85 of the CJA.

It was correctly accepted by the full Court that these two questions essentially hinged on the interplay between section 85 of the CJA and section 302 of the CPA. For convenience the sections are reproduced, with my own emphasis, below.

The relevant part of section 85 of the CJA reads –

(1) *The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the offence –*

(a) *under the age of 16 years; or*

(b) *16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided in section 191(2)(j) of the Children’s Act,*

the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence.

(2) ...

The relevant part of section 302 of the CPA reads –

(1)(a) *Any sentence imposed by a regional court –*

(i) *which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children’s Act, 2005 (Act 38 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;*

(ii) ...

(iii) ...

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.

(3) *The provisions of subsection (1) shall only apply –*

(a) *with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser.*

Legal representation as a bar for automatic review

It is trite that section 302(3)(a) of the CPA expressly disqualifies accused persons from benefiting from automatic review where he or she was legally represented at trial. The question before the full bench was whether the *status quo* had been retained or whether it had been altered by the introduction of section 85 of the CJA.

In order to make this determination the Court considered the practical effect of sections 82 and 83 of the CJA, which deals with legal representation of children. It held in relation hereto that “[i]t is well nigh inconceivable under the CJA, particularly in light of the provisions of s 83(2), for a child accused competently to be unrepresented in a criminal case. It was accepted by all counsel who appeared before us that the case of a child accused who is legally represented is not disqualified for that reason alone from being subject to automatic review. In my view this must be the correct position. If it were otherwise, almost no case at all involving a child accused would be subject to automatic review”.

The Court further and importantly remarked that “[t]his measure, making it to all intents and purposes compulsory for a child to be legally represented in any criminal trial, even against the will of the child, is a sharp break with the past – even with our early post-Constitutional past. It is also an indication that the CJA requires safeguards against a potential failure of justice, of which legal representation is one, to promote the constitutionally derived value as identified in the preamble to the CJA that the plight of children in conflict with the law should be approached in a comprehensive and integrated manner that takes into account their vulnerability and special needs”.

This acknowledgment of the special protective measures contained within the CJA would set the bar for the further determination of the contested issue of regional courts being brought into the fold of automatic review.

The review of judgments of regional courts

Turning to the question of whether the sentences of regional courts are now, pursuant to section 85 of the CJA, automatically reviewable. The Court was confronted with two diametrically opposed submissions. On the one hand it was argued on behalf of the State that a linguistic interpretation of section 302 of CPA (read with section 85 of the CJA) was needed. That in accordance herewith section 302 of the CPA should not be extended beyond its traditional reach of only automatically reviewing magistrate court sentences, which met the predefined 'experience criterion', set out thereunder. On the other hand it was argued on behalf of the accused and the *amicus* that such interpretation would be, irrational and contrary to the spirit of the Constitution, in that to exclude from the ambit of automatic review cases that were more likely to attract heavier sentences would derogate from the scrutiny required in order to ensure that detention is used as a measure of last resort and for the shortest period of time. It would further run contrary to the stated purpose of the CJA, namely to "provide for the special treatment of children in a child justice system designed to break the cycle of crime" (section 2(c) of the CJA).

The Court found that there was merit to the latter argument and importantly held that "[a]lthough the child accused has always been treated with a measure of understanding of and compassion for his or her immaturity and lack of judgment, the introduction of the CJA sets new standards for the protection to which the child accused is entitled". It went further to find that "[t]he extension of the protection of special scrutiny arising from automatic review to all (as opposed to merely some) children sentenced to detention, will in my view better promote the spirit, purport and objects of the Bill of Rights because it will better promote the object identified in [section] 2(c) of the CJA".

The Court concluded that given the considerations detailed above that the section 85 of the CJA should be interpreted to provide for the automatic review of all children convicted and sentenced in terms of the CJA by a regional court subject to the qualifications detailed in section 85(1)(a) and (b) thereof.

The accused and the facts of the case

Finding that the matter was properly before it, the Court turned to the question of whether the proceedings had been in accordance with justice.

Two issues of importance arose from the Court's analysis. First, the Court – after considering *FM*'s "socio-economic circumstances" found that the impact of the hardship *FM* laboured under whilst growing up should not be discounted when determining an appropriate sentence. Moreover, that if on the other occasions that he had been diverted a deeper intervention process had been ordered, "eg the placement of the accused under the supervision of a probation officer under s 53(4)(d) of the CJA... the tragic circumstances of the offence presently under consideration might have been avoided".

Second, the Court, importantly, drew a clear distinction between the rationale of sentencing adults and children. It held that "*the accused*

should not be punished for his choice as an adult would be. It is trite that he chose to leave school, consume drugs and alcohol and commit a number of crimes. But the choices he made were juvenile choices and the primary purpose of the sentence imposed on the accused must be not to punish him for those choices but to facilitate every effort to bring him to understand the choices he made which landed him in his present predicament are wrong choices and that the world in which he lives does offer other choices and a way of life other than that in which he grew up".

The importance of these sentiments expressed by the Court cannot be stressed enough. It is the duty of all role-players at the coalface of the child justice system to be alive to this. Should they not, the goal of a system designed to break the circle of crime will never be achieved.

The Court, in considering the sentence, felt that it was unduly harsh and replaced it with a sentence of 10 years direct imprisonment.

Conclusion

The judgment of *FM* is important from a legal practitioner's point of view in that it is the first case that engages the question of whether the legally represented child offender, who is sentenced by a regional court to any form of detention, has the right to have his or her case taken on automatic review.

In answering the question positively it also sends a wider message to all disciplines operating in the child justice sector, namely, that it is no longer business as usual. The nuanced procedures and mechanisms of the CJA have truly set "new standards for the protection of children" outside of that ordinarily regarded in the traditional criminal justice system and to which a change in mindset is needed at all levels of the system.

Lastly, in its evaluation of the sentence of *FM* the Court, in emphasising the importance of ascertaining – what may be loosely defined as – 'the reasons for the crime', highlighted the need for role-players not to lose sight hereof no matter how egregious the offence in question may be. In so doing the Court confirms the need for a change in mindset as required by the CJA in dealing with child offenders. ●

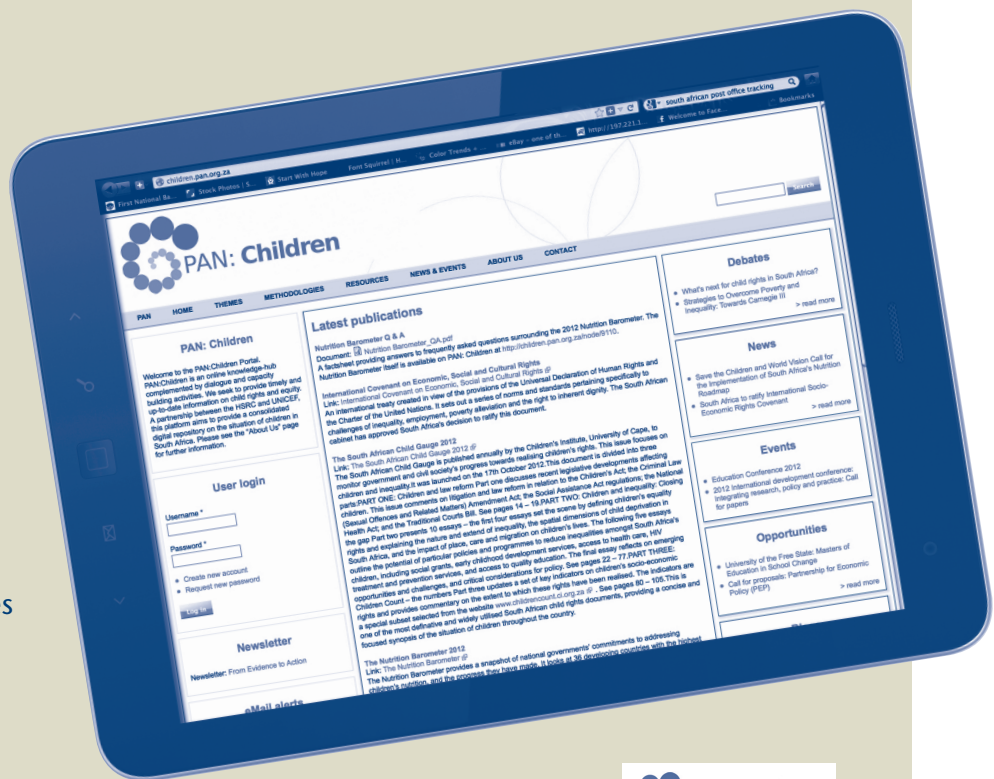


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Launch of Policy Action Network: Children!

The Policy Action Network: Children (PAN: Children) is a webportal of information resources on topical issues in relation to children in South Africa. This network was recently launched and already contains a number of interesting information resources, which also includes relevant documents on child justice. Feel free to visit and sign-up as a member at: <http://children.pan.org.za>.



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