A historical account of the key moments in South Africa to sentencing children under the age of 18 convicted of crimes

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Abstract

Punishment of crimes is as old as society itself. In South Africa, punishment of children continues to raise complex historical debates. For example, corporal punishment has long been abolished, but with the increase on crimes committed by children, there is a perception that it had a deterrent effect. It is important to trace key moments of the history of sentencing children. Key moments refer not to the whole history of sentencing practice but rather relate to developments that have an impact on sentencing of children.

Tracing history of sentencing must promote an understanding of sentencing of children at present and the near future. As far back as the 1950s to the 1960s until the present, courts sentencing decisions have grappled with the age factor in an attempt not to treat children under the age of 18 as adults. This article seeks to contribute to an understanding of the past and present sentencing practices in order to promote balanced sentencing decisions.

Keywords: Sentencing children under the age of 18; Key moments; Sentencing in historical context; Corporal punishment; Balanced sentencing decisions; Sentencing patterns, trends and shifts.

Introduction

In this article some key moments are outlined over 60 years of sentencing children under the age of 18 convicted of serious crimes in order to draw a better understanding for the future. The reference to children under the age of 18[1] seek to be specific rather than use of categories such as youth, minor, juvenile, age 21 and the word juvenile is not used in historical meaning of the word as it were in the literature but it refers to under 18s in this article. In order to achieve the objective of a balanced sentencing, the authors look at how the age factor, crime seriousness, the degree of severity of the sentence, prior record, gender, race and class have been understood in judicial sentencing decisions and their relevance at present.

During the years of political upheaval in the mid-1970s, and during the emergency years of the mid-1980s, the sentencing patterns for children did not remain the

1 Republic of South Africa (RSA), Child Justice Act No. 75, Section 4(2), 2008, p. 22.

same, and the types of crimes for which they were punished for, were different. For example, public violence and the expanded common purpose doctrine, apartheid state introduced new crimes of a quasi-political nature, related to children public violence and protests, is a perfect point that sentencing is not immune from a socio-political context.

Reflecting on important recent and historical penal developments and penal statistics requires an understanding that takes into consideration the legal and socio-political context of South African sentencing.[2] There are noticeable historical developments that have brought about changes on child sentencing practices. For example the US case of re Gault,[3] Child Justice Act referred to above, Constitution,[4] Penal Inquiries,[5] 1994-multi-party democracy, crime trends and the coming into power of the National Party government in 1948 are viewed in this article as the key moments that have shaped the child justice momentum in South Africa.

South African sentencing law has been based on the idea that the principle of proportionality is applicable to child offenders.[6] Proportionality refers to the fact that punishment should fit the crime. This is related to the general principle established in Zinn case whereby the Supreme Court of Appeal held that in imposing a sentence: "what has to be considered is the triad consisting of the crime, the offender and the interests of society". Similarly, Cilliers emphasises that every case should be judged on its own merits, in order to reach a balance between the crime, the criminal and the interests of society.[7] However this is not to suggests that these factors are unique to cases dealing with child offenders.

Midgley argues that, historically, the philosophy of juvenile justice did not effectively balanced welfare elements and criminal procedures in dealing with child offenders, however now these are constitutional imperative applicable to all under the age of 18.[8] This article does not discuss proportionality and child best interests because of its scope but as evident in the article, sentencing child offenders cannot escape the constitution and child sentencing principles such as imprisonment as a last resort, short period of time and the best interest of the child.

2 J Midgley, "The sociology of crime in South Africa: Studies in the cross cultural replication of criminological models", *Criminology & Penology,* 61, 1977, p. 245.

3 B Feld, "Abolish the juvenile court: Youthfulness, criminal responsibility and sentencing policy", *The Journal of Criminal Law and Criminology*, 88(1), 1997, p. 101 (As in re Gault 387 U.S.1 (1967)).

4 RSA, The Constitution of the Republic of South Africa, Act 108 of 1996 (Pretoria, Government Printers).

5 RSA, Report of the Commission of Enquiry into the Penal System of the Republic of South Africa, 1976. p. 129.

6 D van Zyl Smit, *Sentencing and punishment, constitutional law of South Africa,* Revision Service 5 (Cape Town, Juta, 2004), p. 3.

7 MGT Cloete & R Stevens, Criminology (Pretoria, Southern Book Publishers 1990), p. 201.

8 J Midgley, *Children on trial: A study of juvenile justice: South African studies in criminology* (Cape Town, NICRO, 1975), p. 66; CD Magobotiti, "An analysis of judicial sentencingapproaches to persons convicted of serious crimes" (Dphil, UNISA, 2009), p. 159. See also section 28(1)(g)(2) of the 1996 Constitution.

South African sentencing children under the age of 18 in a some historical context

In order to comprehend with the sequence of penal development during the period under discussion, it is important to reflect briefly on the earlier years, namely that sentencing methods tended to take a physical form – the violent infliction of pain – and were executed publicly, in the form of hangings and torture, particularly in the Cape in the 18th and 19th centuries, during which these practices in respect of slaves were common.[9] The colonial situation gave rise to the spread of floggings and the passing of laws to induce slaves to become loyal to their owners before slavery was abolished in the Cape on 1 December 1834.[10]

These penological trends filtered through the whole of South Africa, where imprisonment gained significant momentum, although backed up by physical violence to maintain coercion.[11] The cohesive nature of imprisonment sentence was earlier uncovered by the Venter Report.[12] Pete[13] describes corporal punishment as cruel or inhuman punishment as it involves the intentional, direct infliction of physical pain on a human being by another, on orders of the state (courts) to instigate fear. It is going to be seen in the preceding discussions how different courts, Commissions of Inquiry and other authors perceived corporal punishment.

Elsewhere in the United States of America, the ruling of the American Supreme Court in re Gault case[14] brought about procedural changes in juvenile jurisprudence and jurisdiction to ensure formal safeguards during the trial of children in a manner that entrenches individualised sentencing practices rather than the previous welfare approach or treatment.[15] The influence of this case is observed across juvenile jurisdiction and jurisprudence thereby causing shifts or changes in other jurisdiction on how child offenders should be treated.[16] As suggested by Feld earlier the American Supreme Court jurisdiction had historically dealt with children from a welfare approach with elements of retribution but since Gault case there was a shift in the

9 B McKendrick & W Hoffman, *People and violence in South Africa* (Cape Town, Oxford University Press. 1990), p. 74.

10 B McKendrick & W Hoffman, *People and violence in South Africa*, p. 75.

11 D van Zyl Smit & R Offen, "'Corporal punishment' joining issue", *South African Crime and Criminology*, 8(69), 1984, p. 13.

12 H Venter, Die geskiedenis van die Suid Afrikaanse gevangenisstelsel: 1652-1958, (Pretoria, University of Pretoria, HAUM print book, 1959), p. 3.

13 S Pete, "The politics of imprisonment in the aftermath of South Africa's first democratic election", *South African Journal on Human Rights,* 14, 1998, p. 430.

14 B Feld, "Abolish the juvenile court: ...", *The Journal of Criminal Law and Criminology*, 88(1), 1997, p. 101 (As in re Gault 387 U.S.1 (1967)).

15 B Feld, "Abolish the Juvenile Court: ...", 1997, p. 79. Gault was a 15 year old, placed in custody for allegedly making obscene telephone calls to the neighbour and his defence which the court held was that his procedural rights were violated.

16 D van Zyl Smit, "Sentencing children convicted of serious crime", Article 40, *The dynamics of youth justice and the convention on the rights of the child in South Africa*, 3(4), 2001, p. 4.

jurisprudence or child justice system which became more concerned about the criminal procedures.

In the South African jurisdiction Midgley[17] and Van Zyl Smit[18] as cited above, noted developments in juvenile justice system or jurisprudence which also begun to emphasise procedural approaches, although it should have been effective, if it was combined with the welfare elements to accommodate different social circumstances of child offenders.

In 1879 the Reformatory Institutions Act was enacted and gradually a juvenile reformatory system developed in Cape Town. After the becoming of the Union of South Africa in 1910, the Prisons and Reformatories Act,[19] was passed. Midgley pointed out above that the Criminal Procedure Act,[20] introduced numerous amendments pertaining to court procedures in respect of juvenile courts. These involve summons, appearance and plea, legal representation, verdict and sentence, separation of children from adults, separation of children who have committed criminal offences from children who presents family and welfare related problems. While the Children's Act,[21] introduced few changes in respect of procedural matters, it reduced the maximum age in the context of criminal culpability from 19 to 18 and criminal responsibility from 10 to 7 years of age.[22] This suggests that persons under the age of 18 convicted of serious crime could be considered less culpable and could be punished appropriately. Their age factor should reduce the degree of culpability compared to their adult counterpart hence a lesser sentence could be appropriate for a child offender.

By 1950, two years after the National Party government had taken power in 1948, a significant number of discriminatory apartheid laws had been entrenched.[23] These laws were perceived as repressive and were met by organised black resistance, particularly from the period 1950 to the early 1960s.[24] Foster, Davis and Sandler explain that the growth of opposition to the discriminatory, suppressive laws resulted from the intensity of state legislation being perceived as curbing individual liberty. On this basis it is likely that the judicial sentencing methods used during

17 J Midgley, *Children on trial: A study of juvenile justice: South African studies in criminology* (Cape Town, NICRO, 1975), p. 66.

18 D van Zyl Smit, *Sentencing and punishment, constitutional law of South Africa* (Eds, Revision Service 5) (Cape Town, Juta, 2004), p. 3.

19 RSA, Prisons and Reformatories Act, No. 13, 1911, p. xi.

20 RSA, Criminal Procedure Act, No 56, 1955, p. 168.

21 RSA, Children Act, No. 33, 1960, p. 16.

22 J Midgley, *Children on trial: A study of juvenile justice...*, p. 68.

23 D Foster, D Davis & D Sandler, *Detention and torture in South Africa* (Cape Town, David Phillip, 1987), p. 12; H Corder, *Judges at work: The role and attitudes of the South African appellate judiciary, 1910-1950* (Cape Town, Juta, 1984), p. 148.

24 M Lobban, *A crime against humanity: Analysing the repression of the apartheid state* (Cape Town, David Phillip, 1996), p. 2.

the 1950s presented mammoth challenges.[25]As a consequence, criminal courts were overburdened with carrying out this work and trying to deal with the competing social interests from this time on.

Bundy,[26] as quoted by Murray and O'Regan, a renowned historian, captures this dilemma:

> Law is not neutral, it reflects existing interests and the distribution of power in any society. The law of 19th and 20th century South Africa favoured the propertied and employing classes, there was little neutral about the Master and Servant Laws, the 1913 Land Act, the Urban Areas Act, the Group Areas Act or the Prohibition of Illegal Settlements Act. These and many others expressed in statute form the asymmetrical property and power relations one might sum up as, I am an owner, you are a tenant, he is a squatter.

This suggests that sentencing does not take place in a historical vacuum. In this regard, law makers enact certain legislation to respond to the perceived crime and criminality at a specific period and locality. While one might question the merit of this argument, perhaps it is important to understand the connection between property and criminal punishment. For example there is always a purpose when the Minister introduces a bill in parliament as a member of the political Executive Authority or Cabinet Member to amend the existing legislation or introduce a new law.

Davis endorses a similar point, namely that security law tend to entrench established order.[27] The evolution of the penal system in a society reflects the power relations at a particular period.[28] Conditions under which criminal courts have operated since the period 1950 to 1969 as well as the methods of sentencing reflect factors such as racial discriminatory laws and the people's resistance to it became prevalent at the time.[29]

In the context of children, Midgley recognises the impact of the development of juvenile model or philosophy which seek to grapple with what constitutes juvenile crime or delinquency.[30] The impact of the juvenile justice model relate to the guidance on the approaches of judicial members hence there were difficulties on how juveniles were treated. Midgley's study findings above indicate that there was apparent failure in the juvenile justice to effectively combine the welfare needs and the criminal procedural approach to children in conflict with the law based on their personal circumstances. By way of example and to give a broader picture, this was

25 H Corder, *Judges at work: The role and attitudes of the South African appellate judiciary…*, p. 4.

26 C Murray & C O'Regan, *No place to rest – Forced removals and the law in South Africa* (Cape Town, Oxford University Press, 1990), p 5.

27 D Davis & M Slabbert, *Crime and power in South Africa – Critical studies in criminology* (Cape Town, David Phillip. 1985) p. 47.

28 M Faucault, *Discipline & punish: The birth of the prison* (New York, Pantheon Books, 1977), p. 90.

29 D Foster, D Davis & D Sandler, *Detention and torture in South Africa* (Cape Town, David Phillip, 1987), p. 12.

30 J Midgley, *Children on trial: A study of juvenile justice…*, p. 143.

the case in Europe and its former colonies before the development of the reformist movement.[31]

Judicial corporal punishment in South Africa from 1950 to 1969

In 1952 the state enacted a new piece of legislation known as the Criminal Sentences Amendment Act.[32] Section 338(2) of this Act provided for mandatory whipping to be imposed by the courts in addition to sentences of imprisonment. Corporal punishment was specifically carried out through "cuts, whipping, flogging, caning or lashes and strokes"[33] applied in accordance with this Act. Persons under the age of 18 could receive corporal punishment as a sentence for crimes such as rape, housebreaking, robbery and assault. It is important to note the mandatory nature of the Act despite the 1947 Commission Report (known as the Lansdown Commission)[34] which recommended that corporal punishment should be retained but only imposed in rare cases involving serious crimes and children from stable homes. It resolved that corporal punishment was a deterrent "of special efficacy for African children" because institutional facilities were limited for them and lack of alternative sentences to magistrates. On the one hand the British Cadogan Report of 1938 abolished corporal punishment in juvenile and other criminal courts in that country a decade ago.[35] This report pointed out that there was no evidence that corporal punishment served as a deterrent to offenders or to others. The report found that 75% of young offenders who had been whipped were reconvicted within a period of two years, and there was recidivism of 45% in respect of those placed on a probation sentence. The report's conclusion was that those subjected to whipping tended to commit violent crimes. Van Zyl Smit and Offen concur on the notion of a "cycle of violent behaviour".[36]

In the South African context, in 1947 the Smuts government ordered an inquiry into matters concerning the penal system.[37] This inquiry included an investigation into prison overcrowding, crime trends and the deterrent effect of punishment. The 1947 Lansdown Commission of Inquiry on Penal and Prison Reform recommended the retention of corporal punishment with certain limitations.[38] The Commission acknowledged the fact that most civilized countries in the world had abandoned corporal punishment as a sentence option. The Commission held that to a certain

31 J Midgley, *Children on trial: A study of juvenile justice...*, p. 127.
32 RSA, Criminal Sentences Amendment, Act No. 33, 1952, p. 17; J Midgley, "Corporal punishment and penal policy", *Journal of Law and Criminology,* 73(1), 1982, p. 397; S v Williams and Others 1995 (3) SA 632 (CC).
33 J Midgley, "Corporal punishment and penal policy", *Journal of Law and Criminology*, 73(1):388-403, 1982, p. 397.
34 RSA, UG 47/1947, Report of the penal and reform commission, p. 129.
35 J Midgley, *Children on trial: A study of juvenile justice...*, p. 114.
36 D van Zyl Smit & R Offen, "'Corporal punishment' joining issue", *South African Crime and Criminolgy*, 1984, p. 13.
37 B McKendrick & W Hoffman, *People and violence in South Africa...*, p. 201
38 RSA, Report of the penal and reform commission, p. 131.

extent corporal punishment had a deterrent effect on offenders, particularly those who were accustomed to lawlessness. The 1947 Commission of Inquiry proposed 5 strokes for child offenders, 8 for adults and that no person should be whipped more than twice because of the harm it may cause and inefficiency of strokes thereof. Before whipping was carried out, a medical practitioner should have examined the offender and declared the offender both physical and mentally fit for the punishment. Midgley[39] pointed out that the 1947 Lansdown Commission of Inquiry's penal reforms were never implemented and the penal problem remained. Probably there was no political will as alluded to above. In 1974 after 26 years later another Commission was established which became known as the Viljoen Commission of Inquiry.

Section 338(2) of the Criminal Sentences Amendment Act,[40] imposed limitations on the sentencing discretion of courts in cases where corporal punishment was a sentencing option. The Act provided for whipping to be imposed as a sentence for a variety of crimes, including murder, rape (in cases where the death penalty had not been imposed), arson, robbery, housebreaking, public violence or sedition, and culpable homicide involving assault with intent to rape or rob. Lack of discretion implies that the individual offender's circumstances were not taken into account optimally. In order to illustrate this point, Midgley[41] indicated that magistrates were unhappy about their inability to exercise discretion particularly in cases whereby the individual circumstances indicated that a sentence of corporal punishment was not suitable.

Midgley further states that courts were overburdened. Between 1952 and 1954 the number of offenders sentenced to corporal punishment increased significantly, from 8,724 to 13,873. The patterns of sentencing over this period revealed an increase in crime rates in respect of serious offences. Midgley acknowledges that the prosecution rate for serious crimes increased by 37% between 1950 and 1958.

The limitations of judicial sentencing discretion in respect of the mandatory imposition of strokes in terms of section 2 of the Criminal Sentences Amendment Act,[42] posed some challenges with regard to the interpretation of the provisions that permit departure from the prescribed strokes under special circumstances. In R v Mokganedi the accused was convicted by the magistrate of the crimes of housebreaking with intent to steal and theft. He was sentenced to four months' imprisonment with hard labour and a whipping of 10 strokes. However, the reviewing judicial officer found special circumstances in this case: "The first special circumstance is the youthfulness of the accused, he is 18 years of age. The second

39 J Midgley, "Corporal punishment and penal policy", *Journal of Law and Criminology*, 73(1), 1982, p. 396.
40 RSA, Criminal Sentences Amendment, Act No. 33, 1952, p. 19.
41 J Midgley, "Corporal punishment and penal policy", *Journal of Law and Criminology*, 73(1), 1982, p. 397.
42 RSA, Criminal Sentences Amendment, Act No. 33, 1952, p. 20.

special circumstance is the fact that between three and four months ago he received a whipping of 10 strokes, and that has proved to have been useless deterring him". On this basis the Judge suspended the sentence of whipping and reduced the number of strokes because of special circumstances yet noting the extreme gravity of the offence. The court held that the reduced five strokes would be suspended for a period of two years, provided that the accused was not convicted of any offences during that period. Lastly, the sentence of four months with hard labour was confirmed.

Another case relevant to the Criminal Sentences Amendment Act[43] was that of R v Modise and Mkasa.[44] Section 4(2) of the Act allows for the sentence of strokes to be suspended under special circumstances. The court held that its approach was premised on the fact that corporal punishment should not be imposed frequently or loosely in order to promote an effective deterrent. Be that as it may, this case does not entirely restore wide discretionary powers.[45]

Subsequently, in 1958 the number of those who were whipped increased to 18,542, although judicial officers were unhappy about their inability to apply discretion on the basis of the merits of each case.[46] Whipping was the sentence most frequently imposed.[47]

In light of judicial criticism, legislation was enacted which brought some reforms to the use of corporal punishment in 1959, in the form of the Criminal Law Amendment Act.[48] This Act provided some limitations to the imposition of whipping on a first offender, adults could not be whipped on more than one occasion within a three-year period and offenders who were sentenced to a statutory minimum period of imprisonment were exempted. These shifts in legislation limited the number of whippings imposed by the courts. During the period 1963-1964, the number of persons whipped dropped to 16,889.[49]

Subsequently, in 1965 the Criminal Sentences Amendment Act of 1952 which prescribed corporal punishment for specific cases such as housebreaking and robbery as mentioned above was repealed by the Criminal Procedure Amendment Act.[50] This development and shift reveal a decline in the pattern of whipping sentences, which dropped to 8,888 for the period 1965-1966. By this time Criminal Sentences Amendment Act had been in operation for 13 years.

43 RSA, Criminal Sentences Amendment, Act No. 33, 1952, p. 21.
44 R v Mokganedi 1952 (3) SA 848 (T).
45 R v Modise and Mkasa 1952 (3) SA 850 (T).
46 J Midgley, "Corporal punishment and penal policy", *Journal of Law and Criminology,* 73(1), 1982, p. 397.
47 J Midgley, "Sentencing in the Juvenile Court" *South African Law Journal,* 91(4), 1974, p. 459.
48 RSA, Criminal Law Amendment, Act No. 16, 1959, p. 19.
49 J Midgley, "Sentencing in the Juvenile Court" *South African Law Journal,* 91(4), 1974, p. 460.
50 RSA, Criminal Procedure Amendment Act, No. 96, 1965, p. 14.

Its impact appears to be confirmed by a Supreme Court Justice:[51]

> Within comparatively recent times corporal punishments of quite horrifying severity were inflicted and I for one do not believe that the deterrent effect of such punishments justified the suffering and indignity which were inflicted on those so punished.

Sentencing patterns reveal that courts mostly imposed combined sentences of imprisonment and whipping and there were very few cases where offenders were sentenced to only corporal punishment. Consequently, the post-1965 period was marked by a decline in the application of corporal punishment in the approaches of sentencing due to the judicial discretion restored by the Act.[52] In this context there was an increasing trend of Supreme Court rulings on the sentences imposed. The trend is not so much about the numbers of those rulings but the gravity of their argument.

Between 1952 until 1965 criminal courts had less discretion regarding the imposition of whipping with respect to the crime of housebreaking. Housebreaking was one of the offences dealt with under the mandatory Criminal Sentences Amendment Act of 1952.

One of the first cases decided in the aftermath of the Criminal Amendment Act, No 96 of 1965, is that of S v Kumalo and Others.[53] The accused had pleaded guilty to and had been convicted of housebreaking with intent to steal and theft, and each had been sentenced to five months' imprisonment and a whipping of six strokes. The case law confirms that corporal punishment was not successful as a deterrent and left sentencing discretion to the courts. In reviewing the judgment in Maisa, Judge Kennedy concurred with the trial court that: "The sentence imposed was not as severe as to warrant the court substituting its own discretion for that of the trial court". However, Judge Fannin in his dissenting minority view, in S v Kumalo *et al* above, reflected:

> I am of the opinion that whipping is a punishment of a particularly severe kind. It is brutal in its nature and constitutes a severe assault upon not only the person of the recipient but upon his dignity as a human being. The severity of punishment depends to a very large extent upon the personality of the judicial officer charged with the duty of inflicting it, and over that the court ordering the punishment can have little, if any, control.

One can distil from these judgments a trend by judicial officers to show some predicament with the notion of justifiably appropriate punishment taking into account the circumstances of each specific case. In S v Maisa, Judge Hiemstra

51 J Fannin, (dissenting), in S v. Kumalo et al, 1965 (4) S.A. 566, 574

52 J Midgley, "Corporal punishment and penal policy", *Journal of Law and Criminology,* 73(1), 1982, p. 399.

53 S v Kumalo *et. al.*, 1965 (4) SA 565 (N).

reflected on the elements of discretion when corporal punishment ought to be imposed, including the age of the accused, aggravating circumstances connected with the offence and previous convictions and severity. The offender was sentenced for the crime of housebreaking with intent to steal and theft. It remains to be seen whether sentencing approaches in the 1970s could indicate similar sentencing complexities raised above.[54]

Judicial corporal punishment from 1970 to 1979

According to Steyn in 1970 there were about 34,000 (out of 100 per capita) young offenders sentenced to whipping.[55] Midgley noted that 57% of all convicted young persons were punished to corporal punishment as revealed by his study of sentencing in the juvenile court in Cape Town.[56] The above author further relates that his study revealed that the youngest person to be whipped was nine years old, this despite the normal trend to only impose corporal punishment on those over the age of 12 and most frequently on persons between the ages of 16 and 17 years old. Hood above observed that corporal punishment was frequently imposed on juveniles compared to the steady decline on adult. It is difficult to explain the frequency of the imposition of corporal punishment but Midgley argue that the Criminal Procedure

Act was vague when prescribed that juveniles should receive "a moderate correction of whipping not exceeding 10 'cuts'".[57]

Midgley and Newman[58] point out that sentences of corporal punishment were imposed by the courts in respect of 4399 mostly male juvenile offenders during the period 1971-1972. Of the above number, 91,6% of whippings were imposed by the lower courts and the rest by the Supreme Court. According to the South Africa's Statistical Report of the Commissioner of Prisons at the end of June 1972, 4 955 or 54% of the 91 488 prisoners in prison were juveniles under 18 years of age.[59]

Following this report, the Viljoen Commission of Inquiry[60] recommended that the imposition of whipping should be reduced to five strokes, and that offenders should not be whipped on more than two occasions in order to restrict its application and

54 S v Maisa 1968 (1) SA 271 (C).

55 JH Steyn, "The punishment scene in South Africa: Developments over the past decade and the prospect for reform", *Crime, criminology and public policy* (Cape Town, NICRO, 1974), 1974, p. 554.

56 J Midgley, "Sentencing in the Juvenile court", *South African Law Journal,* 91(4), 1974, p. 457.

57 J Midgley, "Corporal punishment and penal policy", *Journal of Law and Criminology,* 73(1), 1982, p. 400. "He noted that the term 'cuts' mentioned in the statute was 'brutally appropriate' for a whipping will often cause bleeding or scarring being administered on the naked buttocks of the child – a cane not no more than one-metre-long and one millimetres in circumference and cuts are given by the police in police station, court and prison warder in prison".

58 J Midgley, J Steyn & R Graser, *Crime and punishment in South Africa* (Johannesburg, McGraw-Hill. 1975) p. 17.

59 RSA, Statistical Report of the Commissioner of Prisons, 1971-72 (Government printers, 1972), p. 92.

60 RSA, Report of the Commission of Inquiry into the Penal System of the Republic of South Africa, 1976, p. 36.

achieve the Commission's goal of improving the penal system. Corporal punishment should be imposed only in respect of violent crimes or defiance of lawful authority. Subsequently, after the Commission's report was presented in parliament in January 1977, a new Criminal Procedure Act[61] was passed which replaced the 1955 Criminal Procedure Act.[62] This Act considered some of the recommendations of the commission, although not all the commission's penal reforms were accepted by parliament. For example, the recommendation in respect of a maximum of five lashes was changed to seven. The recommendation that whipping should not be imposed on more than two occasions did not apply to juveniles. The recommendation to confine corporal punishment to serious crimes was not accepted. One notes that the legislature could only implement the Viljoen recommendation moderately rather than in toto.

In terms of the cited author above, during the 1976-1977 township schools uprising, the majority of children were whipped for participating in politically motivated activities. By 1977-1978 corporal punishment convictions reached a total number of 39 142 which is high (2%) out of the total of 43 913 cases.[63] These high figures appear to correspond with the implementation of legislation after the recommendations of the Viljoen Commission, as shown above. Indeed, figures can be attributed to the wide use of corporal punishment and suggest a decrease in the use of other sentencing options that do not directly inflict physical pain or punishment. Midgley agrees with this idea and states that a survey of South African juvenile courts undertaken between 1968 and 1971 revealed that courts tended to adopt approaches that were premised on excessively punitive sentences. They most frequently applied corporal punishment while other types of punishment were not frequently imposed. Both Viljoen and Lansdown Commissions of Inquiry recommended that corporal punishment be retained as a deterrent particularly for black children due to lack of alternative institutional facilities for them.[64]

Corporal punishment in the South African apartheid context raised perceptions of racial biasness with regard to their pattern of imposition.[65] But statistical patterns of disparities along racial lines were sketchy, although it is claimed that the degree to which the sentence of cuts[66] ('cuts' broadly refers to whipping, flogging, caning or lashes and strokes given) was applied in comparison to other forms of sentence differed between races.[67] For example, where whites offenders were found guilty, 16.3% were sentenced to cuts, while African child offenders was 71.6%. For

61 RSA, Criminal Procedure Act, No. 51, 1977, p. 152.
62 J Midgley, "Corporal punishment and penal policy", *Journal of Law and Criminology,* 73(1), 1982, p. 402.
63 L Muntingh, "A criminal justice crisis, sentencing trends in South Africa", *Crime & Conflict,* 4 (Summer, Cape Town, NICRO, 1996), p. 22.
64 J Midgley, *Children on trial: A study of juvenile justice...*, p. 186.
65 B McKendrick & W Hoffman, *People and violence in South Africa...*, p. 80.
66 J Midgley, "Corporal punishment and penal policy", *Journal of Law and Criminology,* 73(1), 1982, p. 400.
67 J Midgley, "Corporal punishment and penal policy", *Journal of Law and Criminology,* 73(1), 1982, p. 397.

Coloured juveniles the percentage sentenced to a whipping was 56.8%.[68]

Similar findings were concluded in a study of Umlazi in the Durban area conducted in 1980/81, namely that race was a major factor when considering whether the juvenile is likely to be whipped and how many cuts will be administered.[69] Midgley,[70] Pete and Sloth Nielsen's studies concur that a whipping sentence was more likely to be imposed on black juveniles (Africans) and Coloureds than on Asians and whites'. The Asian children involved tended to be a small number which was difficult for Midgley's study to draw final conclusion.[71]

Hutchinson's study found that the racial disparity were likely to be associated with the lack of suitable sentencing options available for race groups other than white juveniles.[72] Hutchinson pointed to discrepancies in the lack of welfare social services which would enable the judicial officer to utilise them for sentencing, for instance in the Western Cape there were no Reformatory Schools available for African juveniles hence many of them were sentenced to whippings by the courts. This trend is not surprising given racial discriminatory laws at the time. Racial whipping disparities were also revealed by a parliamentary written reply to Mr Tony Leon by the then Minister of Justice, Mr Kobie Coetzee, when he said that: "there was an increase of 18% in the rate of corporal punishment over the previous 12 months. Of these, over 90% were black offenders". The Minister of Justice, Mr Kobie Coetzee further indicated that between 1 July 1987 and 30 June 1988, corporal punishment was administered to 26 983 blacks, 305 Indians, 13 459 Coloureds and 1186 whites.[73] This further confirms the extent of the use of corporal punishment and the race factor.

Corporal punishment was imposed by the courts on 4 399 mostly male juvenile offenders during 1971-1972.[74] From 1972 to 1991 38 324 persons under the age of 18 were sentenced to whipping, while in 1992, 35 745 were whipped. During the 1980's corporal punishment was increasingly seen as more inhumane and cruel and academics who have studied repetition rates have concluded that whipped offenders were more likely to be reconvicted than when other sentences were imposed.[75] Similarly, Scharf and Burman argued that whipping practices by the court structures might have been the reason for the levels of violence that developed in townships

68 B McKendrick & W Hoffman, *People and violence in South Africa...*, p. 81.
69 S Pete, "Punishment & race: The emergency of racially defined punishment in colonial Natal", *Natal University Law & Society Review,* 1(2), 99, 1984, p. 32.
70 J Midgley, *Children on trial: A study of juvenile justice...*, p. 109.
71 J Midgley, *Children on trial: A study of juvenile justice...*, p. 118.
72 D Hutchinson, *Juvenile justice, criminal justice in South Africa* (Cape Town, Juta & Co. Ltd, 1983), p. 12.
73 K Owen, "Lash of the whip in our jails", *The Star,* 23 September 1990, p. 16.
74 J Midgley, J Steyn & R Graser, *Crime and penal statistics in South Africa: Crime and punishment in South Africa* (Johannesburg, McGraw-Hill, 1975), p. 17.
75 D van Zyl Smit & R Offen, "Corporal punishment", *South African Crime and Criminology*, 1984, p. 14.

during unrest in 1985 and 1986.[76] It remains to be seen in the section to follow if sentences other than corporal punishment will be overwhelmingly perceived as a deterrent.

Sentences other than corporal punishment

From the 1950's until the 1980's, imprisonment was widely used as an alternative to corporal punishment by South African courts, without considering other sentencing options as prescribed by the statutes such as caution and discharge, suspended or postponed sentence, probationary supervision, committal to a reform school and fines.[77] With respect to the age factor, there were only 5% of 16-to-17-year-old offenders who were sentenced to imprisonment. No person under the age of 16 years was imprisoned and only two women offenders were sentenced to imprisonment. Midgley asserted that many of those sentenced to imprisonment were convicted of crimes against the person rather than crimes against property. He goes on to say that the presence of previous convictions and the degree of gravity of the offence were strongly associated with the imposition of prison sentences. This lead to accused under 18 years of age and under the same circumstances to have been committed to reform schools, but in both situations the sentence would have a custodial purpose. It appears from the empirical trends that the gravity of the offence and criminal record of the accused tended to override the age factor in juvenile cases.

Midgley notes that the serious crimes of murder and rape were not tried in juvenile courts but rather in the Higher Court for the purpose of imposing custodial sentences, while committal to reform schools was designed for those children convicted of serious crimes. This practice exists even now hence perception still exists that children are tried and sentenced as adults thereby crime seriousness 'override the matter of jurisdiction'.[78] The previous conviction factor and the gravity of the crime seem to have been the major deciding factors for a sentence to reform schools. The majority of convicted persons committed to reform schools were 15 years of age, while less than 21% of such persons had two previous convictions and 50% had three previous convictions.

The sentence of probationary supervision was seldom imposed with regard to young offenders due to lack of the welfare elements in the philosophy of the juvenile justice.[79] Section 342(1) of the Criminal Procedure Act, states that:[80] "any court in which a person under the age of eighteen years is convicted of any offence may,

76 W Scharf & S Burman, "Informal justice & people's courts in the changing South Africa", *Unpublished Report,* 1989, p. 8.

77 J Midgley, Sentencing in the Juvenile court, *South African Law Journal,* 91(4), 1974, p. 460.

78 RSA, Section 51(1), 51(2), 51(6), 51(5)(b) and 53A (b), Criminal Law Amendment Act, No. 105, 1997 as amended by section 1 of the Criminal Law (Sentencing) Amendment Act No. 38, 2007, pp. 3-6.

79 J Midgley, *Children on trial: A study of juvenile justice...*, p. 106.

80 RSA, Criminal Procedure Act, No. 56, 1955, p. 37.

instead of imposing any punishment on him for that offence, order that he be placed under the supervision of the probation officer". During this period approximately five convicted child offenders were placed under the supervision of a probation officer. Most of these child offenders were convicted of property crimes. Those convicted were younger than 15 years of age; two had no previous conviction and three had one previous conviction each.[81] There are some from these statistics that can help uncover the entire reasoning of the sentencers.

Midgley cited above states that fines were imposed on 6% of persons convicted in terms of the jurisdiction of the juvenile court. By contrast, fines tended to be more frequently imposed on older offenders than on younger offenders. The gender pattern shows that women were more often fined than their male counterparts. Fines were most frequently meted out to first offenders. The penalty of a fine was seldom imposed on property offenders or those convicted of crimes against the person. Midgley,[82] Pete,[83] Hutchinson,[84] and Sloth Nielsen[85] quoted above also claim that there was a perception of class bias in the use of fine sentence with an option to imprisonment. This manifested indirectly as upper classes' children could afford fines and escape imprisonment while the working class children could not afford fine, consequently fall into sentence of imprisonment. The economic divide is not surprising in a class society such as South Africa.

As described by section 352(1)(a) and (b) of Act 56 of 1955, suspended and postponed sentences were meant to reinforce a degree of restraint on the offender's conduct subsequent to conviction, through the prescription of some condition of acceptable behaviour for the period for which the sentence was suspended or postponed. A minority of child offenders received a lesser sentence of this nature. Only 10% of convicted boys received postponed sentences compared to 60% of convicted girls. On the whole, few suspended sentences were imposed. This picture could be attributed to the use of corporal punishment for boys and the courts use of suspended and postponed sentences for girls and boys perceived criminal behaviour to warrant "harsh punishment".[86]

Midgley further observes that judicial sentencing approaches reflect less frequent use of caution or reprimand as the accused's age increases, in the case of the Cape Town juvenile court at the time. While 8% of those convicted were cautioned, of these 23% were very young offenders.[87]

81 J Midgley, "Sentencing in the Juvenile court", *South African Law Journal,* 1974, p. 458.
82 J Midgley, "Sentencing in the Juvenile court", *South African Law Journal,* 1974, p. 459.
83 S Pete, "Punishment & race: The emergency of racially defined punishment in colonial Natal", 1984, p. 33.
84 D Hutchinson, *Juvenile justice, criminal justice in South Africa*, 1983, p. 13.
85 B McKendrick & W Hoffman, *People and violence in South Africa...,* p. 85.
86 J Midgley, "Sentencing in the Juvenile court", *South African Law Journal,* 1974, p. 457.
87 J Midgley, "Sentencing in the Juvenile court", *South African Law Journal,* 1974, p. 458.

Younger offenders, particularly those under the age of 12, were mostly given conditional sentences or transferred to the children's court, although a certain number were dealt with punitively by the courts.[88] It is pointed out that of 35 social inquiry reports presented to the juvenile court, there was only one recommendation to the magistrate that the child be transferred to the children's court. Pre-sentence reports tend to show patterns of rigidity in the majority of cases rather than an individualized approach.

By 1977-1978 the number of young offenders who were cautioned was 12 996.[89] In 1987-1988 this number was 10 576, in 1988-1989 it was 8 975, in 1991-1992 it was 7 679, in 1992-1993 it was 7 331 and in 1993-1994 it was 6 696. The number of suspended sentences for 1977-1978 was 46 848, for 1987-1988 it was 48 578, by 1992-1993 it was 64 799 and in 1993-1994 it was 64 898. The number of fines imposed were 26 134 in 1977-1978, it was 31 192 in 1987-1988 and in 1993-1994 only 24 761 convicted persons received this punishment. As shown by the figures patterns of the use of fines show a consistent decrease over the years, while patterns of the application of suspended sentence have shown a consistent increase. The imposition of caution has shown a consistent drop in numbers over the years. These trends and shifts probably reflect the application of non-custodial sentences at various times and convictions with regard to the nature of crimes.

The 1980's saw an unprecedented resurgence of political protest, mostly led by the youth, against repressive state measures, with rapid participation in mob or crowd killings in the townships of those associated with state agencies.[90] By this time South African sentencing was characterised by wide judicial sentencing discretion with few rights for child offenders.[91] Skelton suggests that, similarly to the 1970s, during the period 1984 to 1988 judicial officers applied the doctrine of common purpose widely for conviction of crowd-related murder in township violence. For example, certain non-custodial sentences and short-term imprisonment approaches were not equally explored by judicial officers, who instead adopted a one-sided approach other than a balanced one.[92]

Muntingh opines that the trend since 1977-1978, 1987-1988 to 1993-1994 is that sentencing figures in 1977-1978 was 337 635 which was more than the numbers of sentenced persons in 1993-1994 which was 318 068 and this represent a difference of

88 J Midgley, *Children on trial: A study of juvenile justice...*, p. 121

89 L Muntingh, "A criminal justice crisis, sentencing trends in South Africa", *Crime & Conflict,* 4 (Summer, Cape Town, NICRO, 1996), p. 22.

90 D Hansson & D van Zyl Smit, *Towards justice? Crime and state control in South Africa, 1990* (Cape Town, Oxford University Press, 1990), p. 239.

91 CJ Davel, *Children's rights in a transitional society*, 1(Pretoria, Protea Book House, 1999), p. 105.

92 CJ Davel, *Children's rights in a transitional society*, 1, p. 107.

19 567 cases.[93] These figures for 1993-1994 also represent a decrease of 5.4% from the previous year. Muntingh also revealed that imprisonment without the option of a fine that is not suspended was high in 1978-1979 in the level of 22% (79 537) but decreased to the level of 15% (57 760) in 1988-1989. These sentencing figures broadly suggest a steady decline in prison related sentences, although there was a perception that prisons are overcrowded and this perception existed up until the adoption of the Constitution.

Constitutionality of corporal punishment in South African sentencing

In S v Williams *et al*[94] the Constitutional Court found corporal punishment to be unconstitutional on 9 June 1995. The argument behind the judgment interpretation was that corporal punishment violates sections 10, 12(1)(d)(e) and 28(1)(g)(2) of the Constitution, of which the latter is part of children's rights.[95] In this case, the Constitutional Court reasoned that, in accordance with subsection 12(1)(e), judicial corporal punishment infringes on everyone's right not to be treated or punished in a cruel, inhuman or degrading manner. Terblanche observes that the use of corporal punishment as a sentence has been the only one for juveniles declared unconstitutional by the Constitutional Court in its early opening work since the opening by former President Nelson Mandela on 14 February 1995.[96]

The post-1996 period presented South African sentencing with new challenges premised on notions of rights and constitutionality, which constituted a departure from previous years. During this period, serious crimes, particularly by young persons, tended to be on the increase, and the Bill of Rights brought major shifts in the sentencing regime.[97]

Sentencing approaches after the adoption of the Constitution and the Child Justice Act

Van Zyl Smit notes that the transitional developments from 1990 until the adoption of the 1996 Constitution represent a turning point in South African criminal law, when rights-based sentencing, proportionality, legality, fairness, equality and constitutionality of sentences received wider attention.[98] Developments in the child justice legislation show major shifts in the evolution of juvenile justice. Such developments involve attempt to integrate elements of welfare, child rights and less

93 L Muntingh, "A criminal justice crisis, sentencing trends in South Africa", *Crime & Conflict,* 4 (Summer, Cape Town, NICRO, 1996), p. 22.
94 S v Williams *et. al.*, 1995 (3) SA 632 (CC).
95 RSA, The Constitution of the Republic of South Africa, Act 108, 1996.
96 SS Terblanche, "Twenty years of constitutional court judgments: What lessons are there about sentencing?", *Potchefstroom Electronic Law* (20), 2017, p. 2.
97 CJ Davel, *Children's rights in a transitional society*, p. 98.
98 D van Zyl Smit, *Sentencing and punishment, constitutional law of South Africa*, p. 21.

punitive measure in the child justice system

In 2008, Parliament passed the Child Justice Act,[99] It represented progress from the stagnation and divide between different lobby groups and Members of Parliament within the Portfolio Committee on Justice and Constitutional Development on either entrenching restorative (non-punitive) and retributive paradigm during the legislation making process.[100] The Child Justice Act entrenched section 28(1)(g)(2) of the Constitution which provides that 'every child has the right not to be detained except as a measure of last resort and when imprisonment is imposed as a last resort, should be for the shortest appropriate term, it further emphasise that a "child's best interests are of paramount importance".[101] As such, child justice legislation recognised the entrenched rights in the Constitution and the International Instruments which provide protection for the interests of accused children.

Prior to the enactment of the Child Justice Act, the court inter-alia, relied mostly on section 28(1)(g)(2) of the Constitution regarding sentencing of children. The principle of last resort and the best interest of the child as entrenched in section 28(1)(g)(2) finds expression in the Child Justice Act.[102] This principle is also used in sentencing.[103] This principle was applied in Centre for Child Law v Minister of Justice,[104] whereby the Constitutional Court considered whether children aged 16 and 17 years should be subjected to minimum sentence legislation. Cameron children's crimes should be judged with less culpability compared with their adult counterpart. The Judge referred to youthfulness and future possibilities as suggesting elements requiring a forward looking approach as part of utilitarian sentencing theories proposing, more specifically, rehabilitation.[105] The sought amended section 51(6) of the Criminal Law (Sentencing) Amendment Act 38 of 2007 was declared unconstitutional in the Centre for Child Law v Minister of Justice. The Court's remedy in order the minimum sentence not to be applicable to offenders under the age of 18 was to set the maximum penalty for children at 25 years rather than life sentence. The above case endorsed the principle that children should be treated different from adults as prescribed in section 28(g)(i) of the Constitution.

99 RSA, Child Justice Act, No. 75, 2008 (Pretoria Government Printers), p. 1. This Act came into effect on 1 April 2010.

100 CJ Davel, *Children's rights in a transitional society*, pp. 102-104.

101 CJ Davel, *Children's rights in a transitional society*, p. 104.

102 RSA, Child Justice Act, No. 75, 2008, p. 92. Section 69(1) provide a list of factors mitigating against imprisonment as a sentence and desirability of keeping the child out of prison.

103 J Sloth-Nielsen, "Deprivation of children's liberty 'as a last resort' and 'for the shortest period of Time' how far have we come ? And can we do better?", *South African Journal of Criminal justice*, 26(3), 2013, p. 328.

104 Centre for Child Law v Minister of Justice and Constitutional development 2009 (2) SACR 477 (CC).

105 CD Magobotiti, "An assessment of life sentence without parole for people convicted of killing the police officers on duty in South Africa", *Journal for Juridical Science,* 42(1), 2017, p. 68.

Similarly, in Brandt[106] the Supreme Court of Appeal held that child offenders had to be treated differently compared to adult offenders because they have a greater chance of being rehabilitated. The Supreme Court of Appeal emphasised that, when sentencing child offenders, the following principles should be considered from the start: The "last resort", "shortest appropriate period of time of imprisonment" "the best interests standard" rather than minimum sentence approach.

Another recent case is that of Mpofu versus The Minister of Justice and Constitutional Development and Others[107] as argued by Skelton the age factor is in issue, thereby the majority decision of the Constitutional Court dismissed his appeal against his sentence of imprisonment for life because he could not prove that he was below the age of 18 years at the time of the commission of the crime.[108] Mpofu had killed a person in the commission of robbery and had a prior conviction for robbery. According to Skelton, the judgment as a whole is relevant to the Child Act, regarding how child justice courts should consider the appropriate sentence for serious crime and the relevant age should be the age of commission of the crime. On the contrary, section 77(1)(a) of the Child Justice Act,[109] provides that a court may not impose a sentence of imprisonment on a child who is under the age of 14 years at the "time of being sentenced". This is different from the Mpofu judgment which refers to the "time of the commission of the offence".[110] Skelton believe that Mpofu judgment is relevant should this section come under judicial scrutiny in the future. The Constitutional Court confirmed the importance of the age factor as the departure point when sentencing child offenders and the fact that the age at which the offence was committed is the relevant age for sentencing.[111]

Similarly, with the earlier cases, Table 1 below illustrates the relevance of the age factor of the sentenced children for the period January 1995 to February 2011 and for the year 2010 which is calculated separately. According to Muntingh and Ballard, the average age profile has remained the same during the period under review.[112] Table 1 also shows that children aged 16 and 17 years represents significant numbers compared to the rest of categories. This picture seems to be compatible with the judicial decisions as discussed above, namely the attempt to imprison child offenders as the last resort. There is a substantial increase on the 14 year olds from 1.7 in

106 Brandt v S 2005 (2) SA 1 (SCA).

107 Mpofu v The Minister of Justice and Constitutional Development and Others CCT 124/11 2013 ZACC 15

108 A Skelton, "Sentencing of child offenders in serious cases", Article 40, The dynamics of youth justice & the convention on the rights of the child in South Africa, 15(1), 2013, p. 2. In Mpofu case the Centre for Child Law entered as amicus curiae.

109 RSA, Child Justice Act, No. 75, 2008, p. 100.

110 A Skelton, "Sentencing of child offenders in serious cases", Article 40, The dynamics of youth justice & the Convention on the Rights of the Child in South Africa 15(1), 2013, p. 2.

111 A Skelton, "Sentencing of child offenders...", Article 40, The dynamics of youth justice & the Convention on the Rights of the Child in South Africa 15(1), 2013, p. 5.

112 L Muntingh & C Ballard, Report on children in prison in South Africa. University of the Western Cape Community Law Centre, 2012, p. 15.

1995 to 2011 to 1.9 in 2010 probably the increase represents an increase in the commission of serious crimes.

Table 1: Sentenced children under the age of 18

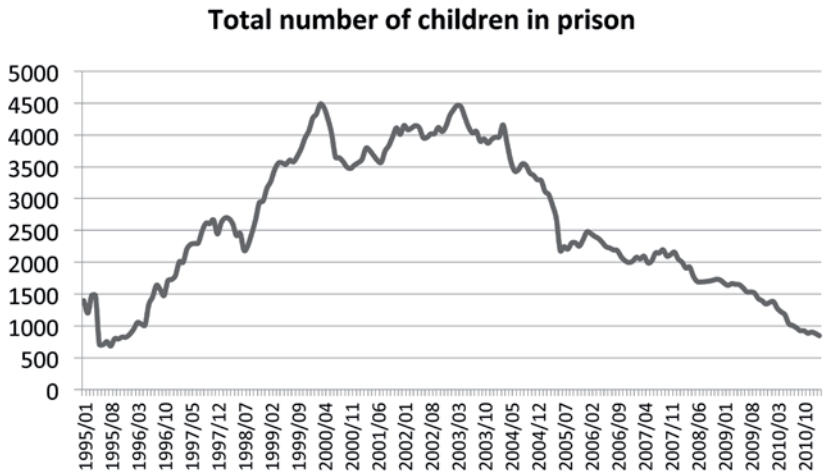
Age	7-13 years	14 years	15 years	16 years	17 years
1995-2011	0.4	1.7	8.0	26.4	63.5
2010	0.1	1.9	8.3	25.4	64.4

Source: L Muntingh & C Ballard, Report on children in prison in South Africa for the period January 1995 to February 2011 and for the year 2010, 2012, p. 15.

In 2016-2017 financial year the Annual Report[113] of the Department of Correctional Services, reported that the average number of sentenced female children under the age of 18 is 1 while it is 147 for males. This represents a big gender difference and involvement in crime.

Image 1 shows a number of children in prison for the period January 1995 to February 2011. A sharp decline is evident in post 2003 to 2011. This is not surprising judging by the reported levels of conviction during the same period under review, although juvenile crime has become more violent with longer sentences compared to the pre-1994.[114]

Image 1: Total number of children in prison



Source: L Muntingh, & C Ballard, Report on children in prison in South Africa, 2012, p. 12.

113 RSA, Department of Correctional Services, Annual Report (Pretoria, Government Printers, 2016/2017 financial year, Vote 18), p. 26.

114 L Muntingh, "A criminal justice crisis, sentencing trends in South Africa", *Crime & Conflict,* 4 (Summer, Cape Town, NICRO, 1996), p. 22.

Conclusion

More than 60 years of historical sentencing patterns have shown some intense moments characterised by the judicial pursuit to discharge appropriate sentencing decisions in accordance with the history, conditions and penal laws of the time. In this article, sentencing empirical studies and statistics have revealed subtle differences in criminal courts decisions during different historical moments, and the age factor, best interests of the child, crime seriousness and sentence severity have become matters of concern and theorising. Perceived differences on race, class and gender and an emphasis on crime seriousness and prior record in sentencing decision making are revealed in the article during the pre-1994 period.

In the 1950s and 1960s there was political shifts, changes in international penal jurisprudence and the local legislative changes which influenced the levels of crime and judicial sentencing practices. This is suggested by the increase in figures for the imposition of corporal, imprisonment and non-custodial sentences.

In the late 1980s, corporal punishment was increasingly criticised by the academics, student movements, political activists and public interests lawyers, and there was increased international pressure on South Africa's human rights violations and the fact that it seem to lack a deterrent effect and was inhuman or degrading as portrayed by the case law particularly the Supreme Court of Appeal judgments. Discerning judgments were pronounced in this court even before the 1970s. This suggests that sentencing courts do read the signs of the times, regardless of personal views or penal philosophy and complied.

During post 1994 period sentencing decisions and legislation process suggested an attempt to strike a balance in accordance with the Constitution and the discourse seemed to favour the politics of the centre. This commitment even prevailed before the official abolishment of corporal punishment in 1995. For example, there were certain moments in history, 1989-1992 whereby dramatic changes took place in sentencing practices for juveniles, namely that, without any legislative intervention, whippings, normally the most common sentencing choice, disappeared. There was a child-saving momentum within the community of children's rights practitioners and academics gravitating towards restorative justice and diversion for trivial crimes, although this was not the case for serious crimes. Community punishments or diversions were not explored enough in this article due to its focus on serious crime.

Both Image 1 and Table 1 statistics on sentenced children from 1995 to 2011 have shown that there is a noticeable beginning to charting a way towards a restorative approach for both trivial and serious crimes committed by children. This could be associated with the impact of Child Justice Act and section 28(g)(2) of the constitution which prescribe that children should be detained as a last resort

and with a short period of time. However, this remains complex to understand in the light of prevalence of violent crimes committed by children and imposed long sentences. Be that as it may, lessons from the key moments suggests that various sentencing measures should be applied by the courts with the available human and material (facilities) resources for the purpose of rehabilitation.