THE ROLE OF THE PRESIDING OFFICER IN SOUTH AFRICAN CHILD JUSTICE PROCEEDINGS: A COMPARATIVE CRITIQUE OF PROCEDURAL MODELS

by

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DECLARATION

I declare that "*The role of the presiding officer in South African child justice proceedings: a comparative critique of procedural models*" is my original work. All the sources I have relied upon or quoted have been indicated and acknowledged using a complete reference.

Signed at Kempton Park this the 15th day of June 2023.

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ABSTRACT

This research explores the role of the presiding officer in child justice proceedings in South Africa, Germany, and Scotland. The researcher investigates the active participation of the presiding officer as a feature of the inquisitorial nature of the proceedings created by the Child Justice Act, 75 of 2008 and its associated regulations. The researcher points out recurrent controversial and procedurally problematic concerns based on the mode or model of justice, which tend toward problematising the child justice space as far as the role of the presiding officer during various stages of the process. The researcher further explores challenges in the application of best interest standard to child offenders by presiding officers and the impact it has on child justice proceedings.

The comparative analysis of different jurisdictions assists in indicating how the best interest standard is applied in practice. It also aids in pointing out the shortfall and inability of the Child Justice Act, 75 of 2008, to fulfil its primary objectives. The researcher makes recommendations and offers solutions to assist presiding officers in applying the best interest standard while prosecuting child offenders in South Africa.

KEY TERMS

Acknowledge responsibility, adult, appropriate adult, child, child justice court, presiding officer, restorative justice, child offender, fairness, court proceedings, diversion, decision-making, judicial authority.

SOTHO ABSTRACT

Phuputso ena e hlahloba karolo ea ofisiri e okametseng linyeoe tsa toka ea bana Afrika Boroa, Jeremane le Scotland. Mofuputsi o batlisisa bonkakarolo bo mahlahahlaha ba ofisiri e okametseng e le tšobotsi ea botlokotsebe ba linyeoe tse entsoeng ke Molao oa Toka ea Bana, 75 oa 2008 le melaoana e amanang le ona. Mofuputsi o supa lipelaelo tse lulang li phehisana khang le mathata a tsamaiso ho latela mokhoa kapa mohlala oa toka o atisang ho bea bothata boemong ba toka ea bana ho fihlela karolo ea mosebetsi oa ofisiri e okametseng mekhahlelong e fapaneng ea ts'ebetso. Mofuputsi o tsoela pele ho hlahloba mathata a ho sebelisoa ha maemo a molemo ka ho fetisisa ho batlōli ba molao ba bana ke liofisiri tse okamelang le phello eo e nang le eona tsamaisong ea toka ea ngoana.

Tlhahlobo ea papiso ea libaka tse fapaneng e thusa ho bonts'a hore na boemo bo botle ba phaello bo sebelisoa joang ts'ebetsong. E boetse e thusa ho supa kgaello le ho se kgone ha Molao wa Toka ya Bana ho phethahatsa maikemisetso a ona a mantlha. Mofuputsi o fana ka likhothaletso le ho fana ka litharollo tse tla thusa ts'ebelisong ea boemo bo holimo ba thahasello.

LIEKETSENG TLHOKO

Ananela boikarabelo, motho e moholo, motho e moholo ea loketseng, ngoana, lekhotla la toka ea ngoana, ofisiri e okamelang, toka ka ho nka khato, mofosi oa ngoana, toka, linyeoe tsa lekhotla, tšitiso, ho etsa liqeto, bolaoli ba boahloli.

ZULU ABSTRACT

Lolu cwaningo luhlola indima yesikhulu esingamele ekuqulweni kwamacala ezingane eNingizimu Afrika, eJalimane naseScotland. Umcwaningi uphenya ukubamba iqhaza okubonakalayo kwesikhulu esiphezulu njengesici sokuqulwa kwecala lokuqulwa kwecala okudalwe uMthetho Wobulungiswa Bezingane, wama-75 wezi-2008 kanye nemithethonqubo ehambisana nawo. Umcwaningi uveza ukukhathazeka okuphindelelayo okuyimpikiswano kanye nenkinga yenqubo okusekelwe kumodi noma imodeli yobulungisa evame ukufaka inkinga isikhala sobulungiswa bezingane njengoba nje kuyindima yesiphathimandla esiphethe phakathi nezigaba ezihlukahlukene zenqubo. Umcwaningi uqhubeka nokuhlola izinkinga ekusetshenzisweni kwezinga lenzuzo engcono kakhulu kwabenzi bobubi bezingane yizikhulu ezingamele kanye nomthelela enawo ekuqulweni kwecala lezingane.

Ukuhlaziywa okuqhathanisayo kwezindawo ezahlukene kusiza ukukhombisa ukuthi izinga lenzuzo engcono lisetshenziswa kanjani ekusebenzeni. Usiza futhi ekuvezeni ukushoda kanye nokwehluleka koMthetho Wezobulungiswa Bezingane ukufeza izinjongo zawo eziyinhloko. Umcwaningi wenza izincomo futhi anikeze izixazululo ezizosiza ekusetshenzisweni kwezinga lenzuzo engcono kakhulu.

IMIGOMO EYINGQONDO

Vuma isibopho, umuntu omdala, umuntu omdala ofanelekayo, ingane, inkantolo yezobulungiswa bezingane, isikhulu esengamele, ubulungiswa bokubuyisela esimeni, umahluleli wengane, ukulunga, ukuqulwa kwecala, ukuphambukisa, ukwenza izinqumo, igunya lezobulungiswa.

ACRONYMS & ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
Beijing Rules	The United Nations Standard Minimum Rules on the Administration of Juvenile Justice
Children's Act	Children's Act 38 of 2005
CHS	Children's Hearings Scotland
CJA	Child Justice Act 75 of 2008
Constitution	Constitution of the Republic of South Africa, 1996
CPA	Criminal Procedure Act 51 of 1977
CSO	Compulsory Supervision Order
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
JDLs	United Nations Standards Minimum Rules for the Protection of Juveniles Deprived of their Liberty
KPI	Key Performance Indicator
NGO	Non-profit organization
NICRO	National Institute for Crime Prevention and the Rehabilitation of Offenders
SALRC	The South African Law Reform Commission

UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child

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CHAPTER ONE

CONCEPTUALISATION & METHODOLOGY

1.1 INTRODUCTION

In this chapter, the researcher contextualises the research and discusses the background upon which the study is grounded. The content introduces the identified problem statement, methodology, central research concepts, research aim, objectives and values, and the limitations encountered throughout the research process. The overall purpose of the chapter is to contextualise the research question(s) and clarify the methodology used to explore them within the context of South African child justice.

1.2 RESEARCH BACKGROUND

The Child Justice Act 75 of 2008[1] came into operation on 1 April 2010. The fundamental aim of the legislation was to establish a child justice system that expands and entrenches the principles of restorative justice while ensuring that child offenders take responsibility and accountability for crimes committed, but without necessarily criminalising their conduct in the traditional sense.[2] The Act pays heed to the concept of the child's best interest and is, in essence, a national response to the United Nations Convention on the Rights of the Child.[3] The CJA recognises the need for proactive crime prevention by emphasising effective rehabilitation and reintegration of child offenders to minimise the potential for re-offending; whilst balancing the interests of children in conflict with the law and those of society, with due regard to the rights of victims.[4]

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1 The Child Justice Act 75 of 2008 (hereinafter referred to as the CJA)

2 See Annual Departmental Report on the Implementation of the Child Justice Act, 2008 (1 April 2013 – 31 March 2014).

3 Hereinafter referred to as the UNCRC.

4 Annual Departmental Report on the implementation of the Child Justice Act, 2008 (1 April 2013 – 31 March 2014).

The CJA's central premise is establishing a separate child justice system and providing a legislative framework for various processes (such as evaluating criminal capacity, restorative justice, pre-sentence reports, victim impact statements, and diversion). Before the CJA - and its entrenchment of constitutional values and principles - the position of juveniles within the criminal justice system was primarily governed by common law, which increased the risk of discriminatory practices.[5] In response, the CJA established unique processes and procedures for children in conflict with the law by:

(i) raising the minimum age of criminal capacity from 7 years to 10 years.[6]

(ii) ensuring assessment for all children in conflict with the law.

(iii) providing specific procedures for securing attendance at court and release or detention and placement of children in conflict with the law.

(iv) creating an informal, inquisitorial, pre-trial process designed to facilitate the disposal of cases in the best interests of child offenders.

(v) providing for the adjudication of matters, not diverted, in child justice courts; and

(vi) providing for a wide range of sentencing options specifically suited to the needs of children in conflict with the law.[7]

The CJA relies on qualitative and quantitative data to track a child offender's progress through the child justice system.[8] Data recording is not limited to bail but includes placement, trials, appeals and reviews and sexual offences committed by children, preliminary inquiries[9] conducted, and the number of children referred to the children's

5 Annual Departmental Report on the implementation of the Child Justice Act, 2008 (1 April 2013 – 31 March 2014).

6 As was the case in the original legislation. The minimum age was subsequently amended. The original 7-year age requirement arose from South African common law. The amendments brought about by the CJA and its subsequent iterations are discussed elsewhere in this work.

7 Annual Departmental Report on the implementation of the Child Justice Act, 2008 (1 April 2013 – 31 March 2014).

8 Section 96(1)(e) of CJA. The section empowered the Department of Justice and Constitutional Development to collect data and record point or areas that fall within the Department mandate.

9 Preliminary inquiries are conducted in terms of sections 43 – 50 read with regulation 28 of CJA.

court during preliminary inquiries (a preliminary inquiry is an informal pre-trial procedure that is inquisitorial and may be conducted in a court or any other suitable place).[10]

Below, the researcher presents a contextual data-based overview of the incidents of child justice cases, broken down into their constituent parts. This overview goes to the later argument on the role of the presiding officer in the majority (if not all) of these processes. It demonstrates the incidence of offences connected to child offenders in South Africa.

1.2.1 PRELIMINARY INQUIRIES

Chapter 7 of CJA defines the nature[11] and objectives[12] of the preliminary inquiry. The CJA requires that the preliminary inquiry be held within 48 hours of arrest if the child is arrested and remains in detention or within the time specified in a written notice or a

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10 Section 43(1)(a) and (b) of CJA.

11 In terms of section 43(1) of CJA, A preliminary inquiry –
(a) is an informal pre-trial procedure which inquisitorial in nature;
(b) may be held in a court or any other suitable place; and
(c) must be presided over by a magistrate of the district within which the child is alleged to have committed the offence.

12 In terms of section 43(2) the objectives of preliminary inquiry are to –
(a) consider the assessment report of the probation officer, with particular reference to –
(i) the age estimation of the child if the age is uncertain;
(ii) the view of the probation officer regarding the criminal capacity of the child if the child is 10 years or older but under the age of 14 years and a decision whether an evaluation of the criminal capacity of the child is suitably qualified person referred to in section 11(3) is necessary; and
(iii) whether a further or more detailed assessment of the child is needed as referred to in section 40(1)(g);
(b) establish whether the matter can be diverted before plea;
(c) identify a suitable diversion option, where applicable;
(d) establish whether the matter should be referred in terms of section 50 to a children's court referred to in section 42 of the Children's Act;
(e) ensure that all available information relevant to the child, his or her circumstances and the offence are considered in order to make a decision on diversion and placement of the child;
(f) ensure that the views of all person's present are considered before a decision is taken;
(g) encourage the participation of the child and his or her parent, an appropriate adult or a guardian in decisions concerning the child; and
(h) determine the release or placement of a child, pending –
• the conclusion of the preliminary inquiry;
• the appearance of the child in the child justice court; or
• the referral of the matter to a children's court, where applicable.

(3)(a) A preliminary inquiry must be held in respect of every child who is alleged to have committed an offence, except where – the matter has been diverted by a prosecutor in terms of Chapter 6; the child is under the age of 10 years; or the matter has been withdrawn.

summons.[13] A child's appearance at a preliminary inquiry is regarded as their first appearance before a lower court in section 50 of the Criminal Procedure Act, 51 of 1977.[14] 14 471 preliminary inquiries were held during 2010/2011, 17 822 during 2011/2012, 25 517 during 2012/2013, and 21 563 during 2013/2014, with a total of 69 893 preliminary inquiries held for the period as mentioned earlier.[15]

The data collection for the earlier annual reports, including 2013/2014, included all offenders 18 years older but under the age of 21 years. In terms of the Report,[16] the inclusion might have confused the interpretation of sections 4(2)(a) and (b) of CJA. Resultantly, the data collection tool was withdrawn on 31 March 2015 and replaced with a more detailed tool. The new data collection method included a mandatory field for the child's age at the time of the commission of the alleged offence.[17] The 2015/2016 Annual Report indicates the age at the preliminary inquiry from 0 to 9 years at 3300, 10 years of age at 29, 11 years of age at 71, 12 years of age at 133, 13 years of age at 412, 14 years of age at 1169, 15 years of age at 2467, 16 years of age at 4225, 17 years of age at 6506, 18 years of age at 246, 19 years of age at 9, 20 years of age at 6 and 21 years of age at 2.

A total of 263 offenders between 18 and 21 years were included in the Report because section 4(2) of the CJA allows offenders 18 years or older but under the age of 21 years to appear at a preliminary inquiry in respect of an alleged offence in certain instances.[18]

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13 Section 43(3)(b)(i) & (ii) of CJA.
14 Hereinafter referred to as the CPA.
15 Annual Departmental Report on the implementation of the Child Justice Act, 2008 (1 April 2013 – 31 March 2014).
16 The Implementation of Child Justice Act, 2008 – Annual Report 1 April 2015 to 31 March 2016.
17 The Implementation of Child Justice Act, 2008 – Annual Report 1 April 2015 to 31 March 2016.
18 The Implementation of Child Justice Act, 2008 – Annual Report 1 April 2015 to 31 March 2016. See also section 97 of CJA.

TABLE 1: OUTCOMES OF PRELIMINARY INQUIRIES (PI)19

Outcomes of the PI & Ages	0 to 9	10	11	12	13	14	15	16	17	18	Grand Total
Child Justice Court	26	1	5	11	61	223	477	864	1341	17	3026
Children's Court	-	-	1	5	8	9	13	29	24	0	89
Struck off Roll	2	-	2	6	10	18	51	86	148	208	531
Warrant of Arrest	1	1		2	2	6	17	28	39	2	98
Withdrawn	-	-	2	3	6	25	40	78	159	1	314
Section 41 Diversion	227	3	15	19	68	237	557	969	1398	2	3495
Preliminary Diversion	8	1	2	8	26	80	175	280	383	26	989
Pending matters	3036	23	44	79	231	571	1137	1891	3014	7	10033
Grand Total	**3300**	**29**	**71**	**133**	**412**	**1169**	**2467**	**4225**	**6506**	**263**	**18575**

In contrast to the 2015/2016 Annual Report, the 2017/2018 Inter-departmental Annual Report recorded an increase of 10.4% in preliminary inquiries. The report writers posited the increase was due to the rise in the capturing of cases in the Integrated Case Management System flowing from the training programme undertaken by the Department to improve data capturing and reporting by the court clerks and data capturers.[20] Children between the ages of 10 to 11 contributed 1% of the total number of preliminary inquiries registered during the reporting period. Children between 14 and 17 years of age contributed 94.2% of the total number of preliminary inquiries recorded. 17-year-old children were in the majority of appearances at the preliminary inquiries registered during that period.[21] A slight decrease in 13-year-old children appearing at preliminary inquiries was recorded.[22]

During 2017/2018, the Report indicates that 39% of preliminary inquiry cases resulted in a referral to the child justice court for plea and trial, of which 45.2% involved 17-year-

19 The Implementation of Child Justice Act, 2008 – Annual Report 1 April 2015 to 31 March 2016.
20 Inter-Departmental Annual Report on the Implementation of Child Justice– 2017/18.
21 Inter-Departmental Annual Report on the Implementation of Child Justice– 2017/18.
22 Inter-Departmental Annual Report on the Implementation of Child Justice– 2017/18.

old children. 26% of the recorded preliminary inquiries resulted in diversions. A total of 1 313 preliminary inquiries were withdrawn, and 844 were struck off the roll.[23]

In 2018, two outcome variables were noted. The first variable relates to cases where the preliminary inquiries did not proceed because the child was handed to the Department of Social Development for deportation.[24] The second refers to cases where the perpetrator was initially recorded as a child but was found to be an adult during the preliminary inquiry.[25]

The 2019/20 Key Performance Indicator (KPI) required finalising 85% of child justice preliminary inquiries within 90 days after the first appearance.[26] During that period, a 5.8% increase in preliminary inquiries was registered compared to the 2018/2019 fiscal year. Children aged 10 and 11 years represented 0.9% of the total number of preliminary inquiries recorded during the reporting period, whilst 16 and 17-year-olds were again the majority appearing in preliminary inquiries, at 27,7% and 39,5%, respectively.[27] Children aged 12 years represented an increase of 49% for the reporting period.[28] Children aged 13 decreased by 6% in the preliminary inquiries, and children aged 14 to 16 registered an increase of 34% combined. There was a 1% increase in preliminary inquiries registered for 17-year-old children.[29]

During 2019/2020, 50% of the cases heard at the preliminary inquiry were referred to the child justice court for plea and trial.[30] There was a noticeable increase in the number of 15- to 17-year-olds referred to the child justice court. Diversion was recorded at 28,5% during the reporting period. The majority of cases diverted during preliminary inquiries for this period concerned child offenders between 15 and 17 years old.[31]

During 2020/21, the impact of the National Lockdown on children in conflict with the law was visible, with a 39.95% decrease in the number of new preliminary inquiries

23 Inter-Departmental Annual Report on the Implementation of Child Justice– 2017/18.
24 Inter-Departmental Annual Report on the Implementation of Child Justice– 2017/18.
25 Inter-Departmental Annual Report on the Implementation of Child Justice– 2017/18.
26 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.
27 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.
28 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.
29 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.
30 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.
31 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.

compared with the previous reporting period.[32] Only 44 children aged 10 and 11 appeared in preliminary inquiries, representing 0.5% of the total preliminary inquiries registered during the reporting period.[33] The 17-year-old grouping appeared in 39% of the preliminary inquiries recorded during the reporting period. In all the child age groups, reductions in the number of new preliminary inquiries were recorded.[34] The percentage reductions recorded for the 10- and 11-year-old children were much higher than the other age groups. This may be because this age group experienced increased parental or supervisory oversight during the National Lockdown.[35]

Regarding the outcomes of preliminary inquiries recorded during the 2020/21 reporting period, 53% of the children that appeared at preliminary inquiries were referred to child justice courts for plea and trial.[36] The majority of the children referred to child justice courts were aged 17 years, followed by 16-year-olds, and 25% of children were diverted during preliminary inquiries.[37]

1.2.2 AWAITING TRIAL, BAIL, & PLACEMENT

Article 88 of the United Nations General Comment 24 of 2019[38] provides that State parties should allow the early release of detained children from custody into the care of parents or other appropriate adults in line with the global principle that detention should be imposed for the shortest reasonable period. To affect this article, the Constitution of the Republic of South Africa, 1996[39] requires that the detention of children should only be used as a measure of last resort, and the detention should be for the shortest appropriate period. In compliance with this provision, the CJA provides for the release of children in conflict with the law into the care of a parent, an appropriate adult or

32 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
33 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
34 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
35 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
36 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
37 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
38 CRC/C/GC/24. UN General Comment No. 24(2019) on children's rights in the child justice system.
39 Hereinafter referred to as the Constitution. Section 28 of the Constitution.

guardian or on the child's recognisance, or the release of such a child on bail with or without conditions.

The CJA permits the release of a detained child on bail.[40] When considering a bail application, the court must determine the following:

(a) Whether the interests of justice permit the release of the child on bail; and

(b) if so, a separate inquiry must be held into the ability of the child and their parents/guardian or appropriate adult to pay the amount of money being considered; and

(c) if it is found that the child and their parent or guardian or appropriate adult cannot pay any amount of money, the presiding officer must set appropriate conditions that do not include the payment of an amount of money for the release of the child.

Below is a statistical representation of bail and placement awaiting trial.

TABLE 2: BAIL AND PLACEMENT OF CHILDREN AWAITING TRIAL IN CHILD JUSTICE COURTS

Period	In the care of parents/guardian/appropriate adult	Bail	In prison	In Child & Youth Care Centre	Police lock-up	On warning
2011/12	4 664	261	565	1 534	174	-
2012/13	4 582	283	733	1 721	110	-
2013/14	5 314	327	789	1 440	76	-
2015/16	5 550	29	887	266	-	1 548
2016/17	4 483	16	144	924	148	630
2017/18	2 952	17	147	863	91	345
2018/19	3 911	29	173	958	93	371
2019/20	4 879	57	196	1 387	126	503
2020/21	3 320	41	49	853	40	341
Total	**39 655**	**1060**	**3 683**	**9 946**	**858**	**3 738**

[40] Section 25.

The 2015/2016 figures indicated a 2% decrease in the number of children released into the care of a parent/guardian or appropriate adult while awaiting trial from the 2011 to 2016 reporting period.[41] 67% of the total number of children awaiting trial were released into the care of a parent/guardian or appropriate adult, whilst the number of children detained in prison while awaiting trial increased by 55.9%.

In terms of the 2017/18 report, there was a decline in the number of children released into the care of a parent/ guardian or appropriate adult. There was also a decrease in the number of children released on warning.[42] A further reduction was recorded for children detained while awaiting trial in child and youth care centres and police lockups. The number of children awaiting trial in correctional facilities remained the same as the previous year.[43] Due to the duty imposed by CJA[44] to reconsider the continued detention of children during each appearance of the child in court, the number of children awaiting trial changed almost daily because of the court orders during court days.[45]

The 2019/20 Inter-Departmental Annual Report[46] recorded that 68% of child offenders awaiting trial were released into the care of a parent/ guardian or appropriate adult, and 19% were placed in a child and youth care centre. The Report also showed that 3% were awaiting trial in correctional facilities, and 7% were released on a warning. Some child offenders, primarily those between 15 and 17 years old, were detained while awaiting trial. In terms of percentage, the records show that 10-year-old children were more likely to be released on warning, 11-, 12- and 13-year-olds were more likely released in the care of a parent/ guardian or appropriate adult, and 14- and 15-year-old children were more likely released on bail, and 16 and 17-year-old children were more likely detained in correctional facilities.[47]

41 The Implementation of Child Justice Act, 2008 – Annual Report 1 April 2015 to 31 March 2016.
42 Inter-Departmental Annual Report on the Implementation of Child Justice– 2017/18.
43 Inter-Departmental Annual Report on the Implementation of Child Justice– 2017/18.
44 Section 30(4) of CJA.
45 See Inter-Departmental Annual Report on the Implementation of Child Justice– 2017/18.
46 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.
47 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.

During 2020/2021, 18% of the children awaiting trial were placed in child and youth care centres and only 1% were placed in correctional facilities.[48] 71% of child offenders awaiting trial were released into the care of a parent or guardian or appropriate adult, and 7% were released on a warning.[49] The risks of child offenders contracting COVID-19 in places of detention might have encouraged the release of children into the care of parents, guardians or appropriate adults while awaiting trial.[50]

1.2.3 TRIAL IN A CHILD JUSTICE COURT

If a charge is not withdrawn, diverted, or referred to the children's court during the preliminary inquiry, the matter must be directed to the child justice court for trial.[51] A child justice court must conclude all trials as speedily as possible, without unreasonable delay and ensure that postponements are limited in number and duration.[52] The CJA also makes provisions for diverting a matter from the formal criminal justice system at this stage. A child justice court may, at any time before the conclusion of the prosecution case, make an order for diversion in respect of the child.[53] The criminal proceedings against a child, which the child justice court has diverted, must be postponed, pending the child's compliance with the diversion order.[54] Upon receipt of a report from the probation officer that a child has successfully complied with the diversion order, and if the child justice court is satisfied that the child has complied, the court must make an order to stop the proceedings.[55]

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48 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
49 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
50 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
51 Section 49(2) of CJA.
52 Section 66(1) of CJA.
53 Section 67(1)(a) of CJA. This section has since been amended (in terms of Child Justice Amendment Act, 2019) by insertion in subsection (1) after paragraph (a) of the following paragraphs:
"(aA) A child justice court may only make an order for diversion in terms of paragraph (a) if the court is satisfied – (i) that the factors referred to in section 52(1)(a) to (d) have been complied with; and (ii) in the case of a child who is 12 years or older but under the age of 14 years, that the child will benefit from diversion. (aB) if the child justice court is of the view that the child is unlikely to benefit from diversion, or if diversion is for any reason not appropriate, the court may refer the child to a probation officer to be dealt with as a child who lacks criminal capacity, in terms of section 9 of the Act.
54 Section 67(1)(b) of CJA.
55 Section 67(2) of CJA.

TABLE 3: OUTCOME OF TRIALS IN THE CHILD JUSTICE COURTS

Period	New cases	Postponed during trial	Guilty	Not guilty	Withdrawn	Struck off the roll	Referred to Children's court	Diversion successful	Warrant of arrest
2011/12	-	-	1 128	794	1 637	1 000	-	-	-
2012/13	-	-	1 443	628	1 384	1 123	-	-	-
2013/14	-	-	1 179	650	1 179	949	-	-	-
2015/16	-	9 995	181	154	635	239	-	-	-
2016/17	-	9 616	280	143	2 628	1 031	-	-	-
2017/18	5 161	8 847	407	108	1 384	534	-	-	145
2018/19	6 338	3 673	305	41	1 990	576	50	217	209
2019/20	7 148	4 061	221	85	1 716	629	71	165	209
2020/21	4 644	2 462	125	28	1 215	483	26	77	163

The above data demonstrates the number of acquittals decreased for 2013/2014 compared with 2011/2012 and 2012/2013.[56] There was also a significant decrease in the number of guilty verdicts. The Report[57] shows that the reduced figures might be linked to the decline in preliminary inquiries recorded during the reporting. When comparing the data, it's clear that there was a significant decrease of 73% in the number of outcomes recorded in the child justice courts for 2014/2015.[58] For this period, 94% of the convictions were of child offenders between the ages of 15 and 18 years, and no convictions were reflected for children between the ages of 10 and 12.[59]

During the 2019/20 reporting period, the number of child offenders appearing in child justice courts increased to 39% compared to the previous fiscal year. The increase was

56 Annual Departmental Report on the implementation of the Child Justice Act, 2008 (1 April 2013 – 31 March 2014).
57 Annual Departmental Report on the implementation of the Child Justice Act, 2008 (1 April 2013 – 31 March 2014).
58 The Implementation of Child Justice Act, 2008 – Annual Report 1 April 2015 to 31 March 2016.
59 The Implementation of Child Justice Act, 2008 – Annual Report 1 April 2015 to 31 March 2016.

recorded from the age of 12 years and above.[60] A decrease of 21% was documented in the number of 11-year-old children appearing in child justice court compared to the 2017/18 reporting period. There was an increase of 13% in new matters referred to the child justice court and 40% in matters referred to the children's court.[61] There was a decrease of 25% in matters diverted successfully and 15% in charges withdrawn. 57% of cases were pending at the end of the reporting period. There was a decrease in the number of convictions recorded and an increase in the number of acquittals during the reporting period.[62]

During the 2020/21 reporting period, the number of child offenders referred to child justice courts decreased due to the reduction in the number of new preliminary inquiries registered.[63] The decline in new preliminary inquiries resulted in a 35% decrease in the number of cases referred to the child justice court. Fewer outcomes for diversion were successfully recorded, which might be due to diversion programmes being unable to proceed due to COVID-19-related restrictions.[64]

1.2.4 SENTENCING

The Child Justice Amendment Act 2019 provides that a child justice court may not dispense with a pre-sentence report where the court could:

(i) impose a sentence involving compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)(j) of the Children's Act, or imprisonment; or

(ii) make an order referred to in section 50(2)(c)(ii) of the Criminal Law (Sexual Offence and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).[65]

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60 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.
61 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.
62 Inter-Departmental Annual Report on the Implementation of Child Justice– 2019/20.
63 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
64 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
65 Section 71(1)(c).

The CJA also requires the child justice court to take into account several factors when considering the imposition of a sentence involving imprisonment, including:

(a) The seriousness of the offence with due regard to:
    (i) the amount of harm done or risked through the offence; and
    (ii) the culpability of the child causing or risking harm.
(b) the protection of the community.
(c) the severity of the impact of the offence on the victim.
(d) the previous failure of the child to respond to non-residential alternatives, if applicable; and
(e) the desirability of keeping the child out of prison.[66]

See below the recorded sentences imposed on children during the reporting period.

TABLE 4: TYPES OF SENTENCES IMPOSED ON CHILDREN

Type of sentence	2011/12	2012/13	2013/14	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21
Community-based sentences	795	687	753	2	2	9	7	4	2
Restorative justice sentences	405	508	402	1	3	4	2	-	1
Fines or alternatives to fines	37	78	93	7	8	6	16	6	2
Correctional supervision	302	179	188	15	21	46	53	25	9
Compulsory residence in child & youth care centres	353	335	381	17	26	39	54	43	20
Postponement or suspension of the passing of sentence	-	296	206	97	169	222	303	116	66

66 Section 69(4) of CJA.

Imprisonment	94	98	49	15	51	62	110	27	25
Total	**1 986**	**2 131**	**2 072**	**154**	**280**	**388**	**545**	**221**	**125**

The above table shows a significant decrease in the number of child offenders sentenced to imprisonment and an increase in the number sentenced to a compulsory residence in a child and youth care centre. The number of sentences to correctional supervision and community-based sentences has increased since 2011/12.[67] From the 2015/16 period, there was low utilisation of restorative justice sentences. For the 2020/2021 period, 25 child offenders were sentenced to imprisonment and 20 to compulsory residence in child and youth care centres.[68] In most cases, sentences were postponed, or the passing of the sentence was suspended with a condition prohibiting the child offender from committing other offences.[69] If the child does not comply with the suspension conditions, the penalty will be put into operation, or the court will call the child to appear for sentencing.[70]

1.2.5 APPEAL & REVIEW

An appeal by a child offender against a conviction, sentence or order must be noted and dealt with in terms of the provisions of the CPA, provided that if that child offender was, at the time of the commission of the alleged offence, under the age of 16 years; or 16 years or older but under the age of 18 years and sentenced to any form of imprisonment that was not wholly suspended, they may note the appeal without having to apply for

67 Annual Departmental Report on the implementation of the Child Justice Act, 2008 (1 April 2013 – 31 March 2014).
68 Inter-Departmental Annual Report on the Implementation of Child Justice– 2020/21.
69 Section 78(3) of CJA.
70 Section 79 of CJA.

leave.[71] The presiding officer must inform a child offender of their rights regarding appeal and legal representation and of the correct procedures to effect these rights.[72]

In terms of the CJA, a child has a right to automatic review, provided that a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre supplying a programme provided for in section 191(2)(j) of the Children's Act. Such a sentence is subject to review by a judge of the high court having jurisdiction irrespective of:[73]

(a) the duration of the sentence.
(b) the period the judicial officer who sentenced the child in question has held the substantive rank of a magistrate or regional magistrate;
(c) whether the child in question was represented by a legal representative; or
(d) whether the child in question appeared before a district or a regional court sitting as a child justice court.

TABLE 5: APPEALS AND REVIEWS

Applications	2013/2014	2015/2016	2016/2017	2017/2018	2018/2019	2019/2020	2020/2021
Appeals	9	2	3	2	10	2	2
Reviews	65	227	115	100	48	35	17
Total	**74**	**229**	**118**	**102**	**58**	**37**	**19**

During the 2011/14 reporting period, there appeared to be conflicting judgments in the Provincial Divisions of the High Court regarding the interpretation of section 85(1)(b) of the CJA dealing with the reviewability of sentences of imprisonment and compulsory residence in child and youth care centres involving child offenders 16 years or older, but under the age of 18 years. The question of reviewability of cases involving the sentencing of child offenders, who were legally represented, to a compulsory residence in a child and youth care centre came before different Divisions of the High Court, and

71 Section 84(1) of CJA. See also sections 309B, 302(1)(a)(b), 316 of Criminal Procedure Act, 1977.
72 Section 84(2) of CJA.
73 Section 85(1) of CJA.

conflicting judgments were handed down.[74] In *S v Ruiter*,[75] the Western Division of the High Court handed down a decision that, because the High Court is the upper guardian of all minors within its jurisdictional area, all cases referred to in section 85 of the CJA should always be subject to review regardless of whether or not the child offender was legally represented at the trial.

In contrast to the above judgment, in *S v JN*,[76] the Northwest High Court, Mafikeng, ordered that a sentence of imprisonment or compulsory residence imposed upon a child offender, as contemplated in section 85 of CJA, who was legally represented, was not subject to automatic review. In this case, the child offender pleaded guilty to three counts of housebreaking with the intent to steal and theft in the Swartruggens Magistrate's Court. He was sentenced to compulsory residence in a child and youth care centre for five years. The child offender was represented throughout the proceedings.

Because of the conflicting judgments, the Magistrate, Port Elizabeth, referred the matter of *S v S*[77] to the Eastern Cape Division of the High Court for a determination of whether or not proceedings where the child had been legally represented, should be subject to review proceedings in terms of section 85 of CJA. In this matter, the child offender, aged 17 years, was charged with using a motor vehicle without the consent of the owner (contravention of section 66(2) read with section 89(1) of the National Road Traffic Act, 1996) and one count of housebreaking with intent to steal and theft. The child offender was legally represented and pleaded guilty. Following the recommendation in the probation officer's pre-sentence report, the child offender was sentenced in terms of section 76(1) of CJA to a compulsory residence in a child and youth care centre.

The reviewing court decided that section 85(1)(a) and (b) applies to all cases referred to in these subsections and are reviewable despite the fact the child may have been legally represented. In this instance, the court found that the proceedings were per justice and confirmed the proceedings in the Magistrate's court. The matter of *S v LM*[78] appeared

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74 See Annual Departmental Report on the Implementation of the Child Justice Act, 2008 (1 April 2013 – 31 March 2014).
75 (2012) ZAWCHC 265
76 (Case number: 12/2012 handed down on 28 February 2012).
77 (Case number: 100/2012 handed down 30 March 2012).
78 (1) SACR 188 (WCC) 2013.

to support the view taken in *S v S*.[79] In this case, the court decided that all cases are subject to automatic review in terms of the provisions of section 85 of CJA where a child was:

(a) below the age of 16 years; or
(b) 16 years or older and under the age of 18 years, if the sentence to imprisonment was not wholly suspended, or to detention in a child and youth care centre, or
(c) If sentenced to a period of imprisonment after a suspended sentence was put into operation.

The above overview was presented to contextualise the proceedings attached to the child justice process and demonstrates the presiding officer's pervasive role in all aspects of the proceedings. These will be extrapolated in later chapters toward the central thesis of this research. The above discussion further demonstrated the extent of child offending in South Africa and the need for a well-functioning and procedurally sound system for child justice which is in concert with the universal and national best interest principle.

1.3 PROBLEM STATEMENT

The CJA requires the presiding officer to be more actively involved in child justice proceedings than would be the case in regular (read adult) criminal proceedings.[80] The latter is a departure from the largely accusatorial[81] nature of the South African criminal justice process, which functions on the axis of equality of arms and prohibits the

79 (Case number: 100/2012 handed down 30 March 2012).

80 The researcher refers to the proceedings regulated by the provisions of Criminal Procedure Act, 51 of 1977. There have been instances where the presiding officer is seen to be actively involved during the course of criminal proceedings and which lean on the inquisitorial model of criminal justice system. This is evident at the preliminary inquiry of the child justice system and pleading stage of criminal proceedings.

81 The researcher acknowledges that the South African criminal justice system is not purely accusatorial (at least in the pre-trial phase) but uses accusatorial here in its pure sense to refer to the trial stage of criminal process which will later be juxtaposed to the child justice process.

presiding officer from descending into the arena.[82] The active participation of the presiding officer is a feature of the inquisitorial nature of the proceeding created by CJA and its associated regulations. However, through this study, the researcher posits that the prescribed inquisitorial process, although designed to elicit protection for the constitutional best interest standard, may negatively affect the child offender in certain procedural instances (cf. due process rights discussed later in the research).[83]

While conducting a literature review, the researcher noted recurrent controversial and procedurally problematic concerns, primarily based on the mode or model of justice (i.e., accusatorial, inquisitorial & hybrid[84]), which tend toward problematising the child justice space as far as the role of the presiding officer during the various stages of the process. This forms the basis of the research and is aired in chapter two.

The researcher departs from the premise that the primary objective of the CJA is to protect the best interest of the child standard. By extension, the Act provides mechanisms which depart from the usual adversarial trial procedures.[85] While the latter and former are developmentally and constitutionally apt, the results must be measured for their fitness for purpose, mainly the fitness of purpose, in a constitutional democracy.

The researcher further posits that the best interest standard applied to child offenders is problematic when exercised as part of the role of a presiding officer. The effect becomes concretised when considered against the view from the literature that the best interest standard is vague and indeterminate.[86] The role of a presiding officer is doubly complicated in cases involving a child offender and a child victim.

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82 Per Lord Denning in *Jones v. National Coal Board* [1953] J. No. 136 2 Q.B. citing *Yuill v. Yuill*, [1945] P. 15, 20; 61 T.L.R.

83 The researcher will demonstrate in chapter three how the inquisitorial model of child justice may protect the child offender in some instances but also has potential to neglect due process and fair trial rights.

84 The characteristics of these modes of justice are discussed later in this work.

85 The Act's preamble provides the specific aim of the child justice system, that is, to "*establish a criminal justice system for children, who are in conflict with the law, in accordance with the values underpinning the Constitution and international obligation of the Republic*."

86 Bonthuys E "Of biological bonds, new fathers and the best interest of children" 1997 *South African Journal of Human Rights* 636.

Below, the researcher conceptualises working definitions for central themes relevant to this research.

1.4 CONCEPTUAL DEFINITIONS

1.4.1 CHILD

The term *child* refers to a young human being below the age of puberty or below the age of majority.[87] The UNCRC defines a *child* as "*a human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier*."[88] According to Karels,[89] the "…*word child indicates a certain biological state of being and in the eyes of the law such state requires stricter classification in order to be useful in the applicability of legal rights and procedures*."[90] Although the researcher concurs with Karels, he posits that a stricter platform may be necessary for such a classification to be useful.[91] Legally, the term *child* has no globally accepted definition and is defined in terms of the law of individual countries. For example, in South Africa, "*a child is defined as a person below the age of 18 years,*" which is in line with the Constitution.[92] Within the parameters of child justice, age categorisation is vital because of its effect on criminal liability.[93]

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87 English Oxford living dictionaries (date of use: 26 October 2017)).

88 The Convention on the Rights of the Child is ratified by 193 of 194 member countries. The United State of America remains the one standout. Some have argued that the non-ratification results from the sentencing regime applicable to child offenders in the USA.

89 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" (Unpublished doctoral thesis 2015) 11.

90 For example, section 1 of the Child Justice Act 75 of 2008 defines a "child" as any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older, but under the age of 21 years whose matter is dealt with in terms of section 4(2) of the same Act. *Oxford Advanced Learners Dictionary 6th Edition* defines a child as "a young human being below the age of full physical development."

91 The researcher believes that without such explanation, it remains unclear to what extent the classification can be applied.

92 Section 28 of the Constitution, 1996. See also Karels 11.

93 South Africa law categorizes child offenders into three categories *viz*. those totally incapable (under the age of 12 years), rebuttably *doli incapax* (over the age of 12 years and under the age of 14 years), and *capax* (14 years of age and older but under the age of 18 years). In addition, the Acts allows for person over the age of 18 years but under 21 years to fall under the protection of the Act in certain instances.

Article 40(3)(a) of the UNCRC[94] requires all state parties to set a minimum age of criminal responsibility to ensure juvenile justice processes are in line with human rights in general and the Convention in particular. The countries under investigation are also subject to the European Basic Rules for Juvenile Offenders Subject to Sanctions or Measures of 2008,[95] which has a similar requirement for member states. Neither document prescribes an acceptable age to set the lower or upper age limit for criminal capacity.[96]

Age is one of the fundamental issues in any juvenile justice system, and specific prescriptions can practically alter the actual setting of a lower limit. These prescriptions include the *doli incapax* doctrine, intervention before criminality, prevention of criminality, restriction of sentencing and the use of welfare as opposed to criminal justice.[97]

Doli incapax refers to the presumption that a child is incapable of committing a crime or cannot form *mens rea* as they do not yet have a sufficient understanding between right and wrong. In terms of South African child justice and, in particular, the amended Act,[98] *doli incapax* refers to a child who is 12 years or older but under the age of 14 years at the time of the alleged offence who is presumed to lack criminal capacity, unless the state proves beyond reasonable doubt that they have the requisite criminal capacity to be held criminally responsible for their actions. In South Africa, the minimum age of criminal capacity is now on par with the recommended age proposed by the UNCRC.[99]

In deciding the criminal capacity of the child, the child justice court must consider all evidence placed before the child justice court, which may include a report or evaluation by a suitably qualified person, which must consist of the cognitive, moral, emotional,

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94 UNCRC.

95 https://wcd.coe.int/ViewDoc.jsp?id=1367113&Site=CM - (date of use: 16 August 2021).

96 The African Charter on the Rights and Welfare of the Child of 1990 as well as the Convention on the Rights of the Child stipulates that a child is a person under the age of 18 years. The Charter, however, requires that individual member states determine their upper and lower thresholds of criminal capacity.

97 Hazel N *Cross-national comparison of youth justice* (The University of Salford, 2008) 7 available on www.yjb.gov.uk – (date of use: 16 August 2017).

98 Section 11(1) of the Child Justice Amendment Act, 2019.

99 United Nations Committee on the Rights of the Child, General comment number 10 (2007), available at https://www.refworld.org/docid/4670fca12.html - (date of use: 16 August 2017).

psychological and social development of a child.[100] On its own accord, the child justice court may also, at the request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child who is 12 years or older but under 14 years.[101]

In contrast, *doli capax* refers to the mental ability to distinguish between right and wrong and act following that appreciation. According to Karels,[102] "...*the upper age limit of criminal responsibility refers to the point where the law considers the person an adult and, therefore, not subject to the auspices of the juvenile justice system but rather the ordinary criminal justice if he commits a crime*." The researcher agrees with Karels' classification of the upper age limit of criminal responsibility but submits that the CJA, in certain instances, captures persons older than 18 years but under the age of 21.[103] The CJA specifies that child offenders aged 14 but younger than 18 are presumed to possess criminal capacity and are liable for their actions, provided there are no other impediments that diminish capacity.[104]

The upper age of criminal responsibility differs by jurisdiction and certain jurisdictions, such as Germany, extend juvenile status to 21 years for sentencing.[105] In South Africa, a person over 18 years but less than 21 who committed an offence when under 18 years can be subjected to the CJA in certain instances.[106] A child court can also impose a

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100 Section 11(2)(a) and (b) of Child Justice Amendment Act, 2019.

101 Section 11(3) of the Child Justice Amendment Act, 2019.

102 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" (Unpublished doctoral thesis 2015) 11.

103 See section 4(2) of the Act.

104 Such as mental illness or mental defect. Where mental illness or defect exist, the child offender is subjected to the procedure under section 77 and 78 of the Criminal Procedure Act, 51 of 1977. The CJA relies on the provisions of Criminal Procedure Act, 51 of 1977 in cases of mental illness or defect.

105 For emerging adults (18, 19 or 20 years old), the court must evaluate whether they were acting like a juvenile or as an adult, but in majority of cases, emerging adult are found to have been acting as juveniles and sentenced according to juvenile law. See also Hazel N *Cross-national comparison of* youth *justice* (The University of Salford, 2008) 36, available at www.yjb.gov.uk – (date of use: 16 August 2017).

106 See section 97(4)(a)(i)(aa) of the Act which authorizes the Director of Public Prosecution having jurisdiction to direct that the matter be dealt with in terms of section 5(2) to (4). Section 97(4)(a)(i)(aa) authorizes Director of Public Prosecutions to issue directives in case of a person who – (a) is alleged to have committed an offence when he or she was under the age of 18 years; and, (b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b).

sentence to be served in a child and youth care facility until the child reaches the age of 18 and thereafter transfer the person to an adult prison.[107]

Per the CJA, *child* refers to any person under the age of 18 years and, to a certain extent, a person who is older but under the age of 21 whose matter is dealt with in terms of the Act in specific instances (although the during the period from 18 to 21 years the person is classified as an adult and not by any fiction as a child). For purposes of the research, the definition supplied above shall be used. Once a child is involved in committing an offence, they may become known as a child offender or child in conflict with the law.

1.4.2 CHILD OFFENDER & CHILD IN CONFLICT WITH THE LAW

The CJA does not define the term *child offender*. There is no clear precedent on the originality of the term *child offender* in South Africa. The researcher concurs with Karels[108] that "…*the phrase child offender is unique to South Africa*", and different jurisdictions prefer to use terms such as *juveniles*, *young offenders*, *children in conflict with the law* or *juvenile delinquents* rather than child offender.[109] The phrase *children in conflict with the law* denotes anyone under 18 years who comes into contact with the criminal justice system as a result of being suspected or accused of committing an offence.[110]

For this research, the focus is on the child offender who comes into contact with the justice system after being suspected or accused of committing an offence. Once a child conflicts with the law, they are dealt with in terms of applicable rules of a particular child justice system.

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107 Section 76 of the Act.

108 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" (Unpublished thesis, 2015) 12.

109 See South African Law Commission Project 106 Juvenile Justice Report (2000) in this regard, where the use of delinquent, juvenile or child offender was discussed in detail.

110 Article 37 and 40 of the Convention on the Rights of the Child (1989) deals with children in conflict with the law and their rights are to be treated with the sense of dignity and care.

1.4.3 CHILD JUSTICE SYSTEM

There is no specific definition accorded to the phrase *child justice system*. The researcher posits that the term refers to the collective rules and procedures set out in a particular jurisdiction to address children in conflict with the law. Some jurisdictions, such as Germany, do not refer to the *child justice system* but prefer the term *juvenile justice system*. In the latter instance, juvenile justice refers to the area of criminal law applicable to persons not yet old enough to be held criminally responsible for criminal acts governed by state law, and most states have enacted a juvenile code.[111] The juvenile justice system intervenes in delinquent behaviour through the police, the court and correctional involvement, with the goal of rehabilitation.

In South Africa, the child justice system is regulated by the CJA. It is clear from the Act's preamble that it aims to establish a separate criminal justice system for children in conflict with the law, following South African constitutional values and international obligations.[112] The researcher posits that child justice is part of the traditional criminal justice system but is tempered according to the constitutional best interest standard, which permits justifiable deviations from the CPA. In many jurisdictions globally, one of the most evident aspects of such variation is a departure from accusatorial procedure.

1.4.4 INQUISITORIAL & ACCUSATORIAL NATURE OF CHILD JUSTICE

The inquisitorial and accusatorial nature of trial forms a central theme of this research. They determine a presiding officer's functioning (or perhaps intended functioning) in the child justice process. Resultantly, both themes are introduced here and analysed thoroughly in chapter two.

Neither system can claim a monopoly on fairness.[113] Instead, there are specific standards of fairness to which both aspire. These procedural standards of fairness (or

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111 For example, Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters, which set forth procedures and punishment methods to be followed by juvenile court in the United States of America.

112 Karels MG *et al Child Offenders in South African Criminal Justice: Concepts and Process*, 12.

113 See Dugard J "1570 Revisited: An Examination of South African Criminal Procedure and the 'Hiemstra Proposal'' 1970 *SALJ* Vol. 87 at 411. See Karels MG "Child offenders in the South African criminal justice system: a critical analysis of the applicability of the 'open justice' principle" 21.

due process rights) are laid down in the European Convention on Human Rights and Fundamental Freedoms of 1950.[114] Among these procedural standards of fairness is that an arrested person shall be informed promptly of the reason for his arrest and any charge against him; that he shall be brought promptly before a judicial officer and shall be entitled to trial within a reasonable time or to release pending trial;[115] that an impartial tribunal shall publicly try him;[116] that he shall be presumed innocent until proven guilty according to law; that he shall have adequate time and facilities for the preparation of his defence;[117] that he shall be properly defended; and that he shall have the right to examine witnesses against him and be able to obtain the attendance of witnesses on his behalf under the same as a witness against him.[118]

Concerning South African child justice, the distinction between the two systems is of unique importance because it goes to the root of how the child justice system characterises and metes out justice. Does South African child justice embrace transitional justice, or does the system cling to the archaic ideas of retribution and formality? The situation implemented by the CJA, which blends accusatorial and inquisitorial elements, challenges us to consider whether either can sustain itself within a distinctly restorative and communitarian African justice system.

In the accusatorial model, the presiding officer plays the role of an umpire who should not enter the contest between the prosecution and the defence for fear of becoming partial or losing perspective due to dust caused by the fray.[119] The role of the presiding officer is to referee the proceedings and to decide on the admissibility of evidence within a framework of rules and guidelines provided by both criminal procedure and the rules of evidence. Theoretically, the process should be public, but within child justice parameters, adversarial trial procedure ordinarily occurs behind closed doors,

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114 There are various Conventions associated with a right to fair trial such as article 10 of the Universal Declaration of Human Rights (1948 and rectified on 16 December 1949), Articles 14 and 16 of International Covenant on Civil and Political Rights of 1976.

115 Dugard 1970 SALJ Vol. 87, 412.

116 Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms of 1950.

117 Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms of 1950.

118 Article 6(3) of the European Convention on Human Rights and Fundamental Freedoms of 1950.

119 Lansdown AV and Campbell J *South African Criminal Law and Procedure* Vol V (1982) 490.

depending on the jurisdiction in question.[120] The proceedings in the child justice court are primarily oral and adversarial, although concessions are made within the CJA for inquisitorial features.[121]

In contrast, the presiding officer in the inquisitorial model is the master of proceedings. He conducts and controls the search for truth by dominating the questioning of witnesses and the accused.[122] An inquisitorial child justice system charges the presiding officer with enforcing the law and assuring public confidence in the system. This approach relies on the prosecutorial system to bring charges and evolves from a preparatory phase to the eventual punishment phase where applicable.[123] The procedural machinery of a purely inquisitorial system is secrecy driven, and, in most cases, the child offender provides the incriminating evidence required for conviction. Theoretically, no plea of guilty is accepted outright in an inquisitorial system.[124]

The South African child justice system mixes the inquisitorial and accusatorial approaches and may be labelled as hybrid. The preliminary inquiry stage is decidedly inquisitorial, confirmed by section 43(1)(a) of the CJA. The trial phase is adversarial, although it contains inquisitorial elements, such as closed procedure and the court's ability to call and recall witnesses and to question the child offender directly. Although, in *S v Gerbers,*[125] the Supreme Court of Appeal held that the discretion and the power to call witnesses or to recall the accused can be exercised by the presiding officer, regardless of whether the effect thereof is to favour the state or the accused, the researcher will argue that the power of the presiding officer in child justice trials, extends beyond this power as it is aimed at protecting the best interest standard in favour of a child accused.

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120 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle", 22.

121 Karels *et al Child offenders in the South African criminal justice system: concepts and process* 45 an onwards.

122 Snyman CR "Accusatorial and inquisitorial approaches to criminal procedure" 1975 VIII *CILSA* at 103.

123 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 22.

124 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 22

125 1997 (2) SACR 601 (SCA)

In the purely inquisitorial system, the accused child offender is questioned by the investigating judge, not the police. During the trial, the presiding judge primarily does the questioning, not the prosecution or the defence.[126] The role of the defence counsel is limited because the presiding officer holds a dominant position in gathering evidence, modifying charge sheets, and revealing issues on behalf of the child offender.[127]

For this research, the difference between accusatorial and inquisitorial child justice procedures will be dealt with extensively in chapter two. It is, however, essential to note that both systems are applicable once the child offender is in conflict with the law and accused of committing a criminal offence. It is at this stage that restorative justice begins with the aim of including the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through acceptance of responsibility, making restitution and taking measures to prevent a recurrence of the incident and promoting reconciliation.[128]

According to Damaska,[129] "…*the difference between the Continental and the Anglo-American criminal justice systems extends beyond the inquisitorial and accusatorial aspect of the public trial… the important distinction is the judicial supervision of the entire proceeding*…." The latter forms the central theme of this research, namely the role of the presiding officer in child justice proceedings from a comparative perspective.

1.4.5 PRESIDING OFFICER

In terms of CJA,[130] *presiding officer* means an inquiry magistrate or a judicial officer presiding at a child justice court. There is no difference between the terms inquiry

126 Joubert (ed) *Criminal Procedure Handbook* 12 ed (2016) 23.
127 Turner JI *Chicago Journal of International Law* (2010) 698.
128 See section 1 of the Act.
129 Damaska M 'Structure of Authority and Comparative Criminal Procedure' (1975) 84 *Yale Law Journal* 480. The researcher concurs with Damaska's views and submits that the distinction is at the core of the two models of criminal justice system. See also Karels MG *et al., Child Offenders in South African Criminal Justice: Concepts and Processes* 31.
130 Section 1 of CJA.

magistrate and presiding officer as both refer to a magistrate or a judicial officer presiding in a child justice court.

One of the most significant changes brought about by the CJA is the use of restorative justice as a mechanism to dispense justice and reconcile the imbalance created by the occurrence of a crime (or harm in restorative jargon).

1.4.6 RESTORATIVE JUSTICE

According to Karels,[131] restorative justice is not a recent phenomenon – it is simply one that did not receive much attention from academic or legal circles in Western and Euro-Centric circles[132] before the 1980s.[133] The researcher submits that the principles of restorative justice have existed and been in practice in non-European societies for many centuries but began to dominate the juvenile justice sphere in the 20th century. In South Africa, restorative justice has been legislatively incorporated into the CJA.[134]

Restorative justice allows crime victims, offenders, their families, and community representatives to address the harm caused by the crime.[135] The United Nations describes restorative justice as:

> [A]ny process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters

131 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 39.

132 See also, Makiwane PN on Restorative Justice: Bringing Justice for crime victims, at page 81 "Restorative justice is a recent development in criminal justice, and it has emerged in the last three decades, notably in New Zealand and Australia." This view is supported by Skelton and Batley "Restorative Justice: A Contemporary South African Review" 2008 21 *Acta Criminologica* 39, Endorsement of the concept in [South African] policy documents of government came early in the Welfare White Paper (1996), the National Crime Prevention Strategy (1996) and several reports issued by the South African Law Reform Commission."

133 The phrase "restorative justice" in modern usage was introduced by Albert Eglash, who in 1977 described three different approaches to justice: namely, retributive justice (based on punishment); distributive justice (involving therapeutic treatment of offenders); and restorative justice (based on restitution with input from victims and offenders).

134 See section 2(b) of the Act, which promote the spirit of Ubuntu in the child justice system. The researcher submits that the principle of restorative justice embodies the concept of Ubuntu. The term "Ubuntu" is often translated as "I am because we are" or humanity towards others."

135 Skelton and Batley 2008 21 *Acta Criminologica* 38

arising from the crime, generally with the help of a facilitator. Restorative process may include mediation, conciliation, conferencing and sentencing circles.[136]

Walgrave[137] correctly describes restorative justice as a complex domain covering a wide realm of practices, a challenging subject for legal and normative reflection and debate, and a fruitful field for theorising and empirical research. Adding to the complexities, it is submitted, are apparent similar versions of restorative justice that appear under banners such as transformative justice, relational justice, community justice and peace-making justice. The researcher, however, posits that restorative justice can be defined by use. It must focus on repairing harm rather than on what should be done (deterrence) to the offender. The latter is the distinguishing feature of all systems based on restoration – no matter the name used.

Restorative justice views crime as an act against the victim and community. It shifts the focus of justice to repairing the harm and rebalancing the scales which the criminal phenomenon has disturbed. Restorative justice theory opines that the offender also needs assistance and seeks to identify what needs to change to prevent future re-offending. Karels[138] offers four different definitions.

i. Restorative justice is a process of bringing together individuals who have been affected by the offence and having them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.

ii. Restorative justice concerns the broader relationships between offenders, victims, and communities. All affected parties are involved in the process of settling the offence and reconciliation. The key focus is on the damage and injury done to victims and communities, and all are seen as having a role to play in response to the criminal act.

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136 United Nations office on Drugs and Crime *handbook on Restorative Justice Programs* (2006) 100.

137 Walgrave L "Restoration in Youth Justice" (University of Chicago Press, 2004) 551 – 552 available at https://www.jstor.org/stable/3488354 – (date of use: 17 August 2017).

138 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 40.

iii. Restorative justice is a process that brings victims and offenders together to face each other, inform each other about their crimes and victimisation, learn about each other's backgrounds, and collectively reach an agreement on a penalty or restorative justice sanction. Restorative justice returns the conflict to victims and offenders. This empowers them to address sanctioning collectively.

iv. Crime is a violation of people and relationships. It creates obligations for the courts to make things right by ensuring the child offender's best interest is protected. Restorative justice collectively involves the victim, offender, and community searching for solutions that promote reconciliation and reassurance.

The CJA defines restorative justice as:

> An approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs, and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.[139]

The basic principles and procedural safeguards relating to the use of restorative justice entail that:[140]

i. The restorative justice process must comply with the rule of law, human rights principles and the rights provided in the Constitution.

ii. Restorative justice must promote the dignity of the victims and offenders and ensure that there is no domination or discrimination.

iii. All parties must be provided with complete information as to the purpose of the process, their rights within the process and the possible outcome of the process.

iv. Referral to a restorative justice process is possible at any stage of the criminal justice process, with particular emphasis on pre-trial diversion, plea and sentence agreement, pre-sentence process, as part of the sentence, and part of the reintegration process, including parole.

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139 Section 1 of the Act.

140 www.justice.gov.za/rj/rj.html (date of use 17 August 2017).

v. Participation in the restorative justice process must be voluntary for all parties, including the victim.

vi. The participation of children should be contingent on permission from the parent/guardian as well as their presence or the presence of another designated adult with the sole responsibility and authority to protect the rights and interests of the child.

vii. Care should be taken when dealing with the child to ensure they understand the process and participate effectively.

According to Zehr,[141] restorative justice expands the circle of stakeholders beyond the government and the offender to include victims and community members. Victims often feel ignored and neglected by the justice process because their needs, including answers to questions about the offence, are not considered.[142] On the other hand, offenders also have needs beyond their responsibilities to victims and communities, such as accountability, encouragement for personal transformation, and support for integration into the community.[143] In South African child justice, the child offender is viewed as part of the community and, therefore, a recipient of restorative justice and as a catalyst in the process.[144] Per the CJA, restorative justice is an accountability mechanism that addresses the harm caused and encourages empathy and acceptance of responsibility by the child offender.[145] Restorative justice enables the victim and offender to resolve conflict, establish accountability, and through the process, foster an appreciation for the fundamental rights of others. This process is, however, only practical with the full participation of both the victim and the child offender.

Restorative justice is not the panacea for all ills and has been criticised from numerous angles.[146] Many authors see restorative justice as a basis for diversion or alternative sanction for less serious crimes. They cannot see how it can be applied to serious crimes

141 Zehr H *The Little Book of Restorative Justice* (2003) 11.
142 Zehr H *The Little Book of Restorative Justice* (2003) 12 – 13.
143 Zehr H *The Little Book of Restorative Justice* (2003) 15.
144 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 42.
145 Zehr *The Little Book of Restorative Justice* (2003) 16.
146 See Skelton A & Boyane T Child Justice in South Africa 12 – 13 for some critique on restorative justice.

or incorporate legal safeguards.[147] By far, the biggest criticism of restorative justice is that it has the potential to infringe on constitutional rights and impede procedural formality.[148] The same tension between informal restoration and formal retributive justice is reflected in the South African child justice system.[149]

There are several procedural complications related to restorative justice in the South African child justice system, namely:

i. How restorative justice processes inevitably involve the child offender acknowledging responsibility without a formal trial which can potentially violate the right to remain silent and privilege against self-incrimination.[150]

ii. The right to be tried by a court includes the right to be subjected to procedural safeguards, such as adequate notice and time to prepare, and to the protection offered by the rules of evidence and fair trial procedures. These are not guaranteed in restorative processes and, it is submitted, are discouraged by the informality of the process itself. Although the voluntary nature of restorative justice indicates a waiver of these rights, the voluntariness of the decision to waive can be questioned when restorative justice processes are touted as an alternative to harsh punishment such as incarceration or a fine.[151]

iii. It can be argued that where a restorative justice process breaks down and the child is returned to court to stand trial, his right not to be tried for the same offence twice is violated.[152]

iv. South African sentencing practice is focused on weighing the crime, the accused's circumstances, and society's interest.[153] Where restorative

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147 Walgrave L "Restoration in youth justice" (University of Chicago Press, 2004) 544, available at https://jstor.org/stable/3488354 - (date of use: 18 August 2017).

148 See Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 43.

149 The Act.

150 The researcher will deal with the impact the violation has against the child offender in chapter three below.

151 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 44.

152 Ikpa *Journal of Law and Policy* (2007) 317. The researcher will discuss the implications of the violation of these rights in respect of child justice system in chapter three below.

153 *S v Zinn* 1969 (2) SA 537 (A).

> justice sentences are brought to the fore, the proportionality balance can be criticised because the focus of restorative practices is victim-based and requires the child offender to make good based on the victim's needs as opposed to the court's judgment of proportionality.[154]

The researcher posits that restorative justice is a hallmark of child justice. However, restorative justice must articulate the constitutional best interest standard to be effective in a constitutional state that protects fair trial rights.

1.4.7 BEST INTEREST OF THE CHILD

The best interest of the child standard is a fundamental principle of child justice and enjoys broad support. The UNCRC provides that the child's best interest shall be a primary consideration in all actions concerning the child. The researcher proceeds hereunder on the basis that the best interest standard is a tool of interpretation in the criminal process and does not itself give rise to specific rights. The framework of the CJA and CPA is formalistic. Because of this, the best interest standard interpreted on an individual basis is much more difficult in criminal law than in private law, where the only aim is protecting the child, often from the actions of others.[155] In the criminal sense, the child offender is the protagonist and is tried as a consequence of his criminal actions, which caused harm to another. This is particularly complex when the child offender harms another child – which child's best interest is to be protected in a system where often the victim is little more than a witness for the state.

Section 28 of the Constitution protects children in South Africa. For this research, the focus will be on sections 28(1)(g)-(h), 28(2) and 28(3) of the Constitution.[156]

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154 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 44.

155 The Child Justice Act seeks to protect the rights of child offenders in light of the best interest standard but the mere fact that the child has been accused of harm, unlike the situation in family law, makes the concept more difficult to apply. Further, in the criminal law field questions regarding the rights of a victim of crime, especially so where the victim is a child, present a further challenge to the best interest standard. In family law the primary focus is on care and protection of the child.

156 Constitution of the Republic of South Africa, 1996.

1.4.7.1 Section 28(1)(g) of the Constitution

Every child has the right –

i. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest possible period of time, and has the right to be –
ii. kept separately from detained persons over the age of 18 years; and
iii. treated in a manner, and kept in conditions, that take account of the child's age.

The prohibition against detention, except as a matter of last resort, is a contentious issue. A child offender accused of any schedule of crime in South Africa can be detained pending preliminary inquiry and/or trial in certain circumstances. This tension reflects the difficulty in balancing the child's rights against the interests of society, which has a right to protection from the criminal acts of others.[157]

1.4.7.2 Section 28(1)(h) of the Constitution

Every child has the right –

i. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result

1.4.7.3 Section 28(2) of the Constitution

A child's best interests are of paramount importance in every matter concerning the child.

The Children's Act 38 of 2005 [158] provides a detailed description of the meaning of the best interests of the child standard within the context of that Act.[159] The Children's Act does not adequately describe the best interest standard in criminal procedure. Still, it

[157] The researcher submits that this difficulty in balancing the rights of the child against those of society will be discussed in detail in chapter three below.
[158] Hereinafter the Children's Act.
[159] Section 7 of the Children's Act 38 of 2005

provides a platform from which the standard within a criminal justice system may be interpreted.[160]

The best interest of the child standard has been construed differently in various criminal cases before the court. In *S v M (Centre for Child Law as Amicus Curiae),*[161] Sachs J stated, *"A more difficult problem is to establish an appropriate operational thrust for the paramountcy principle….*" Sachs J warns that "*…if the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2)*."[162]

In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and others*,[163] the court stated, "…*constitutional rights are interrelated and interdependent and form a single constitutional value system.* This court has, however, held that *"…section 28(2) like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36*".

The CJA, distinct from the Children's Act, makes no direct reference to the best interest standard[164] but stipulates that the child justice process must occur within the values of the Constitution and the international obligations of the Republic. In requiring child justice to operate within both standards, the Act does not offer its support for the child's best interest as paramount. According to Currie and De Waal,[165] the South African Constitution imposes a much stricter version of best interest compared to the UNCRC, which demands only that the child's best interest is primary.

According to the court's decision in *S v M*,[166] the correct approach is to apply the paramount principle meaningfully without unduly obliterating other valuable and constitutionally protected interests. This statement is in keeping with the Constitutional

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160 See section 7 of the Children's Act 38 of 2005. See further Songca R "Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?" 2011 *Comparative and International Law Journal of Southern Africa* 340 – 359, 348.

161 2008 (3) SA 232 (CC).

162 2008 (3) SA 232 (CC) [25].

163 2004 (1) SA 406 (CC).

164 Preamble to the Act.

165 Currie I and De Waal J *The Bill of Rights Handbook*, 6th Edition (Juta, 2013).

166 2008 (3) SA 232 (CC).

Court's decision that there is no constitutional hierarchy of rights[167] and that the limitation of constitutional rights involves weighing up competing interests and assessing proportionality.[168] Accordingly, in *S v M*, the court held that "[a] *truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of that particular child involved*."[169]

Karels[170] states that the point of departure is that section 28(2) does not mandate a differential application of fixed rules to cater for the circumstances of a particular minor in a specific matter. Furthermore, the limitation of an individual child's best interests by general rules, such as those relating to limited capacity to litigate, would always be justifiable in terms of section 36 of the Constitution,[171] and the rules would, therefore, not have to deviate. The difficulty with the best interest standard arises at trial when the court is asked to balance the best interest of the child offender, the victim (where the victim is a child, this is more complex), and society's right to be protected from the criminal conduct of others.

In *J v National Director of Public Prosecutions and Another*,[172] the court pointed out that the starting point in any matter concerning the child is section 28(2) of the Constitution but acknowledged that the ambit of the section is broad. The court acknowledged that a child is a developing being "…*capable of change and in need of appropriate nurturing to enable her to determine herself the fullest extent and to develop her moral compass… In the context of criminal justice, the Child Justice Act affirms the moral malleability or*

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167 *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and others* 2007 (1) SA 523 (CC) 55; *Johncom Media Investments Ltd v M and others* 2009 (4) SA 7 (CC) 19.

168 *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

169 *Johncom Media Investments Ltd v M and others* 2009 (4) SA 7 (CC), 24.

170 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 71.

171 Section 36 permits a limitation of a right that is contained in the Bill of Rights in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-The nature of the right; The importance of the purpose of the limitation; The nature and extent of limitation; The relation between the limitation and its purpose; and Less restrictive means to achieve the purpose.

172 [2014] ZACC 13.

reformability of the child offender."[173] The court continues by reiterating the importance of the best interest principle:

> The importance of the best interest principle cannot be gainsaid, particularly when… one is dealing with children exposed to the criminal justice system. How we treat and nurture our children today, including child offenders, impacts the shared dignity of the broader community for years to come…[174]

Notwithstanding its importance, the best interest standard is not without criticism. In addition, the best interest standard has failed to provide a reliable and determined benchmark due to subjective application and a lack of objective assessment.[175] Within this ambit of criticism, the researcher will comparatively examine the role of the presiding officer in child justice processes in South Africa.

1.5 PURPOSE, AIM & VALUE OF RESEARCH

The researcher aims to explore the role of the presiding officer in child justice proceedings in South Africa by critically comparing procedural models employed by comparative jurisdictions. The primary purpose is to inform action, gather evidence for theories, and contribute to developing knowledge in the field of study. The value of this research is not only for the benefit of students and academics but for all professionals and non-professionals interested in the field of study.

1.5.1 RESEARCH AIM

This research explores the presiding officer's role in child justice proceedings in South Africa. To do this, the researcher will investigate how the presiding officer ensures that the best interests of a child offender are brought to fruition during the criminal trial process, how the presiding officer balances the right to protection against the rights of

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173 [2014] ZACC 36.
174 [2014] ZACC 47.
175 Currie and De Waal *The Bill of Rights Handbook* 6th Edition (Juta 2013) 618.

the victim and community during the child justice process, whether or not the CJA provides a platform where due process is sacrificed to the demands of the best interests standard and the effect of the predominant model of criminal justice on the role of the presiding officer and subsequent protection of the child offender in comparative jurisdictions.

1.5.2 RESEARCH PURPOSE

This research aims to persuade the reader to understand the frustration experienced by the presiding officer in dealing with child offenders. The specific purposes of this study are:

- To investigate, discover and describe the role played by the presiding officer during the child justice proceeding; and
- To discover and apply new knowledge acquired from the findings of this study, to develop strategies to lessen the burden and effectively strengthen the role of the presiding officer in child justice proceedings.

1.5.3 RESEARCH VALUE

The academic value of this study is to add to the existing body of knowledge on the child justice system in South Africa and contribute to the intellectual and practical discourse. The research intends to add to the current body of knowledge by enhancing the presiding officer's role, making recommendations, and providing solutions to the identified phenomenon. The knowledge generated through this study will benefit presiding officers at the forefront of the child justice system in South Africa.

1.6 RESEARCH QUESTION(S)

The research question is a formulation of a research issue that isolates the specifics and requires an answer. One essential characteristic of a researchable question is that data/evidence is available for collection to answer the question. The researcher identified and connected child offenders and the role of the presiding officer in the child justice process to explore whether the CJA adequately protects the best interest standard. This should answer the following primary research question: *What are the role and rights-impact of presiding officers involved in child justice proceedings, and how are these affected by the predominant model of justice in the jurisdictions of comparison*?

The researcher departs from the premise that the CJA aims to protect the best interests of child offenders but posits that such an approach cannot be at the sacrifice of the victim and community good. The researcher centralises his approach on the role of the presiding officer as the upper guardian of minors in criminal cases and, based thereon, poses the following sub-research questions:

i. How does the presiding officer ensure that the best interests of a child offender are brought to fruition during the criminal trial process?
ii. If and how does the presiding officer balance the right to protection against the rights of the victim and community during the child justice process?
iii. Does the CJA (specifically its allocation of certain rights and obligations to the presiding officer) provide a platform where due process is sacrificed to the demands of the best interest standard?
iv. Is the duty of the presiding officer to protect the best interest of a child defined sufficiently within the framework of the CJA?
v. What is the effect of the predominant model of criminal justice on the role of the presiding officer and subsequent protection of the child offender in comparative jurisdictions?

To answer the above, the researcher analyses the passive and active role of the presiding officer in pursuit of the best interest standard during criminal proceedings

against child offenders. The research thus requires an overview of the various stages of the child justice process.

The research's conceptual framework is founded on the meaning of accusatorial and inquisitorial concepts within the South African child justice process. The normative and philosophical research question is answered by determining how accusatorial and inquisitorial systems are interpreted within the context of the CJA and by comparing the South African approach to those used in Germany and Scotland.

When viewed through the comparative critique of procedural models, the predictive and evaluative research question is answered by establishing whether the South African inquisitorial child justice system succeeds in protecting child offenders and simultaneously satisfies the due process principle entrenched in the traditional accusatorial model. These avenues of inquiry are examined within the researcher's hypothesis that the CJA (and inherent fair trial rights) can be improved by providing a framework for judicial actions within the child justice system.

According to Karels,[176] "…*children who commit crime, no matter the nature of the crime, deserve a degree of protection during the criminal process …"* She, however, continues *"… that the current protection granted might, at least in some instances when viewed from accusatory/inquisitorial system perspective, be fallow*." Through this research, the researcher concurs with Karels and seeks to contribute to the body of knowledge used to protect the best interest of the child offender while at the same time ensuring that criminal justice remains equal in application, purpose and outcome.

1.7 METHODOLOGY

The research approach adopted for this work is comparative and qualitative. The methodology focuses on desktop literature studies. The research methodology includes examining both primary and secondary sources with a concentration on primary sources.

[176] Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" (Unpublished thesis 2015) 87.

Research is conducted using library database searches of specialist child justice search engines, academic journal databases, case law, and relevant legislation.

The format presents an overview of the models applicable in the comparative jurisdictions' child justice systems, concentrating on the role played by the presiding officer during child justice proceedings. The research is presented in six chapters to wit:

Chapter one focuses on key terms which are central to the research. The researcher surveys the problem statement as well as the underlying research questions. Chapter one further presents the rationale for the choice of comparative jurisdictions as well as the content of each chapter.

Chapter two contextualises South African child justice departing from a detailed historical overview of the development of the child justice system and then moving to a description of contemporary practice and the system's beneficiaries.

Chapter three focuses on the role of the presiding officer in the child justice system of South Africa, focusing on fair trial rights and their reflection in process and evidence.

Chapter four presents a comparative overview of the presiding officer's role in child justice proceedings in Germany and the protection and processes of the comparative rights for the criminal trial.

Chapter five presents a comparative overview of the presiding officer's role in child justice proceedings in Scotland and the comparative rights protection and processes for the criminal trial.

Chapter six summarises the research findings and presents recommendations and conclusions.

Deutch opines:

> The differences, which we perceive in certain aspect of any two events, are perceived against a background of similarity with others, and so is the relative uniqueness of the event. We call an event unique if it is similar in every few aspects or dimensions, and different in very many from others. Without attempting comparison, how could we know that something was unique? If something were truly unique in any aspect, how could we discuss it? We should have no words for it. We could only

> talk about its negatives, calling it ineffable, un-measurable and so on, and then we would be very close to magic or religion and very far away from science.[177]

The above view of the value of differences and similarities is essential to any research. The focus of this research is on procedural similarities and differences between child justice practices in South Africa, Germany and Scotland through the lens of the role of the presiding officer. The comparative characteristics of each of the proposed jurisdictions will be thoroughly examined. The researcher submits that child justice is best categorised by reviewing certain aspects of the underlying legal system in which it operates.[178] In this instance, the researcher uses the distinction between accusatorial and inquisitorial models as the basis for comparison.

The comparison is essential to examine the duties of the presiding officer in the child justice process within comparative jurisdictions. Whilst an alternative approach to justice is ordinarily called for when a child comes into conflict with the law, the clash between that which is legally required when processing a child offender and what a particular legal system calls for in terms of its procedural mode is in turn facilitated by its adversarial or inquisitorial character and cannot be ignored.[179]

The above factors influenced the choice of comparative jurisdictions selected for the research.

1.7.1 GERMANY: INQUISITORIAL EDUCATION-BASED JUVENILE JUSTICE

The German criminal procedural system is inquisitorial. The juvenile justice system emerged in the late 1920s with the Youth Court Act of 1923, signalling a profound change in dealing with young offenders.[180] According to Karels,[181] the link between Germany and South Africa is found in Roman law. On the one hand, Germany was

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177 Deutch K "Comparative criminal justice systems" in Fairchild E and Dammer HR *Comparative criminal justice systems 2nd edition* (Wadsworth/Thomson Learning California 2001), 6.

178 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 90.

179 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle", 90.

180 Heinrich B *et al* Perfection of the trends in juvenile justice system, 611.

181 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle", 92.

influenced by the reception of Germanic customs and South Africa, on the other, by Roman-Dutch law. The concentration on and reception of Roman Law by Germany and South Africa is a cause of interest for this research. Comparison between the South African and German child justice systems is valuable because one is accusatorial (or at least hybrid), and the other is inquisitorial and mature in functioning. A comparison with Germany will also provide rich comparative data because the German child justice system separates welfare and justice when a child commits a crime.

1.7.2 SCOTLAND: HYBRID WELFARE-BASED YOUTH JUSTICE SYSTEM

The Scottish youth justice system is more of a pure welfare approach in comparison to the South African child justice system and the German juvenile system. The system is based on the acknowledgement that children who commit offences have welfare needs that must be addressed, or children whose needs are not being met are in danger of offending.[182] What makes comparisons of the Scottish youth justice system interesting is that, in contrast to South African child justice and German juvenile justice, it deals with cases involving matters of *care* in the same way as it does with offences. In other words, in all cases, the children's hearing and the courts are to deal with a child in such a way that the child's welfare is paramount.[183] The most distinctive aspect of the Scottish system is that child hearing is invoked not only when a child has committed an offence but when it is in the child's best interest that there be some form of compulsory care.[184] The South African child justice system is dissimilar to the Scottish youth justice system because it does not focus on children's welfare before conflicting with the law.

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182 SCCJR The Scottish Centre for Crime and Justice Research (University of Glasgow, Edinburgh) 1.

183 Dood A and Torny M Varieties of Youth Justice (2004) 31 CRIME & JUST. 1. available at http://Scholarship.law.umn.edu/faculty_articles/491 – (date of use: 17 August 2017).

184 Dood A and Torny M *Varieties of Youth Justice 31 CRIME & JUST* (2004) 1. available at http://Scholarship.law.umn.edu/faculty_articles/491 - (date of use: 17 August 2017).

1.8 RESEARCH LIMITATIONS

Due to the nature of the topic under discussion, specific phrases and words are used interchangeably by the researcher but are intended to convey the same meaning as discussed hereunder:

i. The terms child offender, juvenile offender, juvenile delinquent, a child accused, and child/ren in conflict with the law are used interchangeably. The preferred term in South Africa is child offender, which is used in CJA and most South African literature on the topic. The South African Law Commission Report Project 106[185] indicates that the term child offender and child justice are preferred terms as they are more integrative of other legislation about children and lack the negative connotations attached to juvenile delinquency.[186]

ii. Footnotes to the text are made in style prescribed by the module *Doctoral Research Proposal in Law*[187] at the University of South Africa. The initial of each legal text is footnoted in full, and each subsequent reference to the same author(s) is cited in short form. The initial reference to a legal article cites the author(s) family name, initial(s), title, year of publication, journal title, and page numbers of the entire contribution. The second reference to the same author refers to the author(s) family name, year of publication, name of law journal, and specific page number referred to in the main text. Where direct quotations appear within the text, italic font is employed to draw the reader's attention thereto. Where use is made for a lengthy quotation, it is removed from the confines of the text and stands alone in a smaller, indented font, which is indicative to the reader that the words reproduced are not those of the researcher. Any direct quotation is

185 South African Law Commission Project 106 Juvenile Justice Report (2000), available at http://www.justice.gov.za/salrc/reports/r prj106 (Date of use: 11 September 2017).

186 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle".

187 DPLLW01.

preceded or terminated, depending on the context, by a footnote acknowledging the author.

iii. Any reference to the masculine personal pronoun is interchangeable with the feminine and vice-versa.

iv. The German and Scottish child justice processes are not as neatly categorised into a pre-trial, trial and post-trial phase as is the case in South Africa (as evident from chapters four and five). Again, this variance speaks to the differences in their modes and delivery of criminal justice for children. The researcher uses a fictional pre-trial, trial and post-trial categorisation in chapters four and five to conveniently analyse the procedural differences between the three jurisdictions under examination.

1.9 PRELIMINARY CONCLUSION

In chapter one, the researcher introduced the research topic and contextualised the research approach, research question(s) and methodology selected. The content provided an overview of central research questions and contextualised them by offering definitions for significant research themes. The researcher explored the meanings of various terms provided in South African child justice jurisprudence, legislation and comparative jurisdictions by providing working definitions within the research context. The researcher further elucidated his choice of comparative jurisdictions (being Germany and Scotland) to contextualise the research methodology followed in this work.

In chapter two, the researcher provides a brief overview of the development of South African child justice and then contextualises the contemporary approach, referring to the role of the presiding officer within the model of child justice employed in South Africa.

CHAPTER TWO

HISTORICAL & CONTEMPORARY REFLECTIONS ON CHILD JUSTICE – INTERNATIONAL & COMPARATIVE PERSPECTIVES

2.1 INTRODUCTION

This chapter contextualises the research topic and discusses child justice via the international law lens. The researcher provides a historical overview of South Africa's child justice system, both pre-constitutional and post-constitutional, to demonstrate the changing child justice philosophies that eventually underpinned the CJA. This chapter further contextualises the contemporary themes of South African child justice and discusses in detail the historical development of the accusatorial and inquisitorial justice system. It further explores restorative child justice and its impact on child justice and due process/fair trial rights in South African child justice. The chapter further overviews the current occurrence and incidence of child-related crime in South Africa and current statistics of child offending in South Africa. The overall aim of the chapter is to contextualise child justice in South Africa, internationally and in the comparative jurisdiction selected for this research.

2.2 CHILD JUSTICE - INTERNATIONAL PERSPECTIVES

Four international instruments directly address the rights of young people in conflict with the law. These are the United Nations Convention on the Rights of the Child, the United Nations Guidelines for the Prevention of Juvenile Delinquency, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

The UNCRC is a treaty of international law binding upon parties to the Convention that must be implemented in good faith. The Convention is not self-executing; it requires legislative enactments to make the terms of the Convention part of domestic law.[188]

In terms of the South African Constitution,[189] a court must consider international law and may consider foreign law.[190] A court must also interpret the Bill of Rights following the values of human dignity, equality, and freedom. The Constitution further provides that when interpreting any legislation, courts must give preference to any reasonable interpretation of the legislation that is consistent with international law.[191] South Africa ratified the UNCRC in 1995, and numerous reported judgments have referred to the Convention.[192]

The international instruments demonstrate what an ideal child justice system should include. The approach should aim at promoting the child's well-being and deal with each child in an individualised way.[193] The rationale is that there should be a vigilant approach to protecting due process rights. If a child goes through a criminal justice system, they should be tried by a competent authority in an atmosphere of understanding conducive to their best interests.[194] The child should be able to participate in decision-making, and the proceedings should occur within time frames appropriate to children and without unnecessary delays.[195] In deciding on the outcome of any matter involving a young offender, the presiding officer should be guided in the decision-making process by a set of principles, including the principle of proportionality, the best interests of the child, and the least possible restriction on the child's liberty.[196] Depriving children of their freedom, either while they await trial or before sentencing, should be a measure of last resort and should be restricted to the shortest possible time.

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188 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).
189 Section 39(1) of the Constitution.
190 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).
191 Section 233 of the Constitution.
192 *S v Howells* [1999] 2 All SA 234 (C); *Kirsch v Kirsch* 1999 (4) SA 691 (C); *Jooste v Botha* 2000 (2) BCLR 187 (SCA); and *S v J and Others* 2000 (3) SACR 310 (C).
193 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).
194 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).
195 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).
196 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).

South African child justice reflects the requirements of various international instruments and UN guidelines. The preamble to child justice mentions South Africa's obligations as a party to international and regional instruments relating to children, including the UNCRC and African Charter.[197]

2.2.1 UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The UNCRC recognises several juvenile rights.[198] South Africa signed the UNCRC Convention in January 1993 and ratified it on 16 June 1995.

Germany ratified the UNCRC in February 1992. Germany viewed the UNCRC Convention as a welcome development in international law aimed at improving children's situations worldwide. To support this, Germany drafted legislation to uphold the UNCRC spirit and ensure the child's well-being.[199] It established state obligations under international law that the Federal Republic of Germany fulfils following its national laws. The protection of juvenile rights is an implied reference to the fundamental rights guaranteed by the German constitution.[200]

The youth justice system of the United Kingdom also experienced a significant influence on its child/juvenile system due to the introduction of several international conventions, including the UNCRC.[201] Although the Scottish legal system has always been separated from the other United Kingdom jurisdictions, the researcher submits that article 3 of the UNCRC forms the core of the Scottish welfare approach to the youth justice system because it applies the best interest of the child standard.[202]

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197 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).

198 See Article 3(1) and 40(2)(b)(i) – (vii). Article 3(1) provides that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of primary consideration.'

199 In 1997, Germany introduced joint custody for divorced parents.

200 Grundgesetz für die Bundesrepublik Deutschland [GG]. May 23, 1949, BGBl I. Article 6 guaranteeing the family and the welfare of children, and article 1 and 2, guaranteeing human dignity and personal freedom.

201 Meivi S, 'Alternative Models of Youth Justice: Lessons from Scotland and Northern Ireland' Journal of Children's Services, vol. 6, no. 2, 106 – 14.

202 Geimer WS Ready to take the High Road – The case for Importing Scotland's Juvenile System,

Article 40 of the UNCRC deals with the administration of juvenile justice, providing:

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

Several due process rights are set out in Article 40(2).[203] These provisions, together with sections 28(1)(g) and 35 of the South African Constitution, provide protective armour for children in conflict with the law in South Africa.[204]

Article 40(3) obliges states to establish laws, procedures, authorities and institutions specifically for children in conflict with the law. Article 40(3)(b) states that whenever appropriate and desirable, measures should be established for dealing with children in conflict with the law without resorting to judicial proceedings, providing human rights and legal safeguards are fully respected. This article refers to diverting children from mainstream criminal justice into other programmes or procedures.[205]

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35 Cath. U. L. Rev. 385 (1986), available at https://heinonline.org/HOL - (date of use: 07 September 2018).

203 Article 40(2) provides that, state parties shall, ensure that:
(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
(i) To be presumed innocent until proven guilty according to law;
(ii) To be informed promptly and directly of the charges against him or her, and if appropriate, through his or her parents or legal guardians, and to have legal or appropriate assistance in the preparation and presentation of their defence;
(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardian;
(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
(v) If considered to have infringed penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
(vii) To have his or her privacy fully respected at all stages of the proceedings.

204 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).

205 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).

Article 40(4) provides for various disposition methods such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care that should be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence. The Convention specifies that no child shall be subjected to torture, cruel, inhuman or degrading treatment or punishment and that neither the death penalty nor life imprisonment without the possibility of release should be imposed upon persons under the age of 18 years.[206] Article 37 further states that any child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so.

2.2.2 UNITED NATIONS GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY

The United Nations Guidelines for the Prevention of Juvenile Delinquency[207] guides state strategies to prevent children from committing crimes. The Convention guides states on what to do about children committing criminal offences within the developmental context.[208] It advances a social policy focusing on the centrality of the child, the family and the community's involvement, which are essential to developing a juvenile justice system. The participation of a family is emphasized in Guideline 12:

> Since the family is the central unit responsible for the primary socialisation of children, government and social efforts to preserve the integrity of the family, including the extended family, should be pursued. Society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well-being of children.

The Guidelines make the point that special attention should be given to children of families affected by problems brought about by rapid and uneven economic, social and cultural change. Guideline 32 states in this regard:

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206 Article 37 of United Nations Convention on the Rights of the Child.

207 Also known as" the Riyadh Guidelines", was adopted by the General Assembly on 14 December 1990.

208 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).

> Community-based services and programmes which respond to the unique needs, problems, interests and concerns of young persons and which offer appropriate counselling and guidelines to young persons and their families should be developed or strengthened where they exist.

The Guidelines require that attention be paid to homeless children and that voluntary organisations providing services for young people should be given financial and other support by the government.[209] Youth organisations should be created or strengthened at the local level, and such organisations should become involved in management and decision-making within the community.[210]

Guidelines 45 to 51 set out the social policy framework within which governments should strive to prevent juvenile offending. Enough funds should be provided for medical services, nutrition, housing, counselling and substance abuse prevention. The Guidelines have received recognition in South Africa via the CJA. In addition, the National Crime Prevention Strategy (NCPS), published in 1996, was hailed as an excellent example of social crime prevention policy.

2.2.3 UNITED NATIONS STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice[211] supply a blueprint for the essential elements of an effective juvenile justice system. In its general principles, the Beijing Rules require that the minimum age of criminal responsibility should not be fixed too low, bearing in mind the child's emotional, mental and intellectual maturity.[212] The Beijing Rules describe the aims of juvenile justice as follows:

> The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence.

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209 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).
210 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).
211 Hereinafter referred to as Beijing Rules, adopted on 29 November 1985.
212 Rule 4.1 of Beijing Rules.

There are two critical aims of juvenile justice. The first is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which family courts or administrative authorities deal with juvenile offenders. Still, the well-being of the juvenile should also be emphasised in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions. The second objective is the principle of proportionality. This principle is well-known as an instrument for curbing disciplinary sanctions, mainly expressed in terms of just deserts concerning the gravity of the offence. The response to young offenders should be based on the seriousness of the crime and personal circumstances. The individual circumstances of the offender should influence the proportionality of the reaction, for example, by having regard for the offender's endeavour to repay the victim or their willingness to turn to a wholesome and useful life.

Rule 6 envisages more discretion being granted to officials at all stages of proceedings involving juvenile offenders, including the investigation, prosecution, adjudication and follow-up stages. The rule combines several essential features of an effective, fair and humane juvenile justice system, which include the need to permit the exercise of discretionary power at all significant levels of processing so that those who make determinations can take the actions deemed to be most appropriate in each case; and the need to provide checks and balances to curb any abuses of discretionary power and to safeguard the rights of the young offender.

In terms of Beijing Rules, accountability and professionalism are instruments apt to curb broad discretion. Thus, professional qualifications and expert training are emphasized as a valuable means of ensuring the judicious exercise of discretion in matters of juvenile offenders. The formulation of specific guidelines on the exercise of discretion and the provision of systems of review and appeal to permit scrutiny of decisions and accountability are also emphasized. Rule 1.6 states that juvenile justices shall be systematically developed and coordinated to improve and sustain the competence of personnel involved in the services, including their methods, approaches and attitudes.

Some authors believe that a judge deciding cases must, of necessity, act as a legislator since the applicable rules cannot constrain him. There is always some discretional space

in which the judge enjoys the freedom of movement, the freedom to decide that the case before him calls for the application of one principle or policy, one legislative programme, rather than another, a discretionary space in which the judge's decisional processes are not and cannot be mechanically predetermined by the applicable rules of law.[213] If judges are legislators and not adjudicators who merely apply the rules they have been authorized to apply in the cases that come before them, what is it that gives their decisions legitimacy or authority? The answer lies in legal safeguards provided to ensure that judicial discretion does not become a weapon of oppression or discrimination, which is well known in South Africa because of her apartheid past.

The Beijing Rules provide for essential procedural safeguards at all stages of the proceedings, such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority.[214] The presumption of innocence is also found in article 11 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights.

Rule 10.1 states that upon the apprehension of a juvenile, their parents or guardian shall be immediately notified of such apprehension. Where such immediate notification is not possible, parents or guardians shall be notified within the shortest possible time after apprehension. The judge or other competent official must consider the question of release without delay.[215] The Beijing Rules describe a qualified official as any person or institution, including community boards or police authorities, having the power to release an arrested person.

Mechanisms for diverting children from the criminal justice system lie at the heart of any sound juvenile justice system. The Beijing Rules centralise the principle of diversion. Rule 11.1 states that consideration shall be given, whenever appropriate, to dealing with young offenders without resorting to formal trial by a competent authority. The

213 *Journal of Legal Education* December 1986 Vol. 36 No. 4 481-484.
214 Rule 7.1 of Beijing Rules.
215 Rule 10.3 of Beijing Rules.

involvement of individuals and the community in the diversion process is also envisaged. Rule 11.3 states that diversion involving community services should only be made with the juvenile's consent or that of their parents or guardians. Rule 11.4 requires efforts to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation. The CJA creates a legal framework for South African diversion practices.[216]

The Beijing Rules provide that where a young person has not been diverted, they should be dealt with by the competent authority according to the principles of a fair and just trial. The proceeding shall be conducive to the juvenile's best interests and be conducted in an atmosphere of understanding, allowing the juvenile to participate and express themselves freely.[217]

Access to legal representation and free legal aid must be granted in countries where such assistance is provided.[218] Legal Aid South Africa is the suitable provider of such representation and fulfils this mandate.

Guiding principles of sentencing include the need for proportionality and the juvenile's well-being as central to their case consideration.[219]

2.2.4 UNITED NATIONS STANDARD MINIMUM RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY

The Minimum Standards[220] deal with children denied their liberty. This includes those held in custody during the pre-trial and trial stage and those sentenced to imprisonment.[221] The overriding message of the Minimum Standards is that young people under 18 should not be deprived of their liberty except as a measure of last resort, and each young person must be dealt with as an individual, having their needs met as

216 See Chapter 8 read with Chapter 7 (Regulations) of CJA.
217 See Rule 14.1 and 14.2 of Beijing Rules.
218 Rule 15.1 of Beijing Rules.
219 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).
220 Adopted by the General Assembly on 14 December 1990.
221 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008).

far as possible.[222] The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which the person is not permitted to leave at will, by order of any judicial, administration or other public authority.[223]

A significant portion of the Minimum Standards governs the management of juvenile facilities, including their administration, the physical environment and services they offer, and disciplinary procedures considered appropriate.[224] Compliance with Minimum Standards is assured through the requirement of regular and unannounced inspections and an independent complaints procedure. The Minimum Standards conclude with a section on the appointment and training of specialised personnel to deal with young people deprived of their liberty.[225]

2.2.5 AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

Further protection for children's rights is found in the African Charter on the Rights and Welfare of the Child.[226] It provides that the child's best interest is paramount in all actions concerning a child. South Africa is a party to the African Charter.[227] South Africa ratified the charter on 7 January 2000. Article 4 of the Charter provides that a child will be heard on any matter affecting them if they can communicate their views.[228] Certain other rights in the Charter form the core of South African constitutional rights to a fair trial.[229]

Article 17(1) states that every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and

222 See Rule 2 of the United Nations Rules of Juvenile Deprived of their Liberty.
223 Rule 11(b) of the United Nations Rules of Juvenile Deprived of their Liberty.
224 See Figure VI of the United Nations Rules of Juvenile Deprived of their Liberty.
225 See Figure V of the United Nations Rules of Juvenile Deprived of their Liberty.
226 The African Charter on the Rights and Welfare of the Child is a regional human rights treaty adopted in 1990 and came into force in 1999. It sets out rights and defines principles for the status of children.
227 On 29 September 1999 Cabinet approved that the submission of Organisation of African Unity: African Charter on the Rights and Welfare of the Child (the Charter), be submitted to Parliament for ratification.
228 See article 4 of the Charter.
229 Section 35 of the Constitution.

fundamental freedoms of others. The Charter lists some important fair trial rights in line with section 35 of the Constitution. Article 17(2)(c)(i)-(iv) state that State parties to the Charter shall, in particular, ensure that every child accused of infringing the penal law: shall be presumed innocent until duly recognized guilty; shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if they cannot understand the language used; shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence; shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal.

Surprisingly, the essential rule in the UNCRC that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily' does not appear, nor does the provision that imprisonment should be used only as a measure of last resort and for the shortest possible period. Fortunately for South African children, these important provisions are included in the Constitution. Section 28(1)(g) provides that a child has the right not to be detained except as a measure of last resort. In addition to the rights that a child enjoys under sections 12 and 35 of the Constitution, the child may be detained only for the shortest appropriate period of time and has the right to be kept separately from detained persons over the age of 18 years, and treated in a manner, and kept in conditions, that take account of the child's age.

It is clear that the majority of the principles contained in the above-surveyed treaties and rules have found their way into domestic law in South Africa. The CJA is, at least on paper, a nod toward protecting the best interests of child offenders. The problem, which forms the central theme of this research, is that the domestic law must be implemented by competent officials having due regard for all the legal prescripts. In other words, the proof of the pudding is in the eating. In the South African context, many safeguards rely on the central and inquisitorial role of the presiding officer, which is discussed at length in chapter three.

Having surveyed the international law arena applicable to child justice, it is apt to review the historical development of child justice in South Africa to demonstrate the developments that have taken place mainly due to the dawn of democracy,

constitutionalism, and the reception of customary and international law in South African domestic law.

2.3 SOUTH AFRICAN CHILD JUSTICE – HISTORICAL OVERVIEW

The researcher contextualises South African child justice through its historical development in this section. The discussion covers the pre-constitutional and post-constitutional development up to the recent Child Justice Amendment Act 2019. The overall purpose of the debate is to narrate how the child justice system came to be in South Africa and the changes brought about by constitutional dispensation.

2.3.1 PRE-CONSTITUTIONAL DEVELOPMENT

When the British occupied the Cape in 1806, they concluded that the criminal justice system was archaic. Resultantly, they introduced a new system in 1828, which regulated the conduct of criminal proceedings.[230]

Through the 1827 commission of enquiry, the system of criminal procedure in the Cape Colony was closely aligned to that of England.[231] According to Joubert,[232] "… *the recommendations resulted in the First Charter of Justice in 1827, which was replaced by the Second Charter in 1832*. He contends further that *"…the First Chapter of justice was followed by Ordinances 40 and 72, which virtually completed the anglicisation of the law of criminal procedure and evidence and which formed the foundation of our modern law, putting an end to the inquisitorial system and replacing it with the accusatorial English procedure."* The researcher submits that these events led to South African criminal procedure becoming accusatorial and moving away from the more conciliatory African approaches that existed at that time (although not formally recognised).

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230 The code was entitled "Crown Trial" See Dugard J *South Africa Criminal Law and Procedure vol IV: Introduction to Criminal Procedure* (1977) 117.

231 Joubert JJ *Criminal Procedure Handbook* (2017) 24.

232 Joubert JJ *Criminal Procedure Handbook* (2017), 24.

When focusing specifically on the development of the child justice system, according to Skelton,[233] "*No account of child justice in South Africa would be complete without reference to pre-colonial practices and the effect of African customary law*." The researcher concurs with Skelton and submits that the effect of African customary law is seen contemporarily in what we term restorative justice, which forms the core of the South African child justice system.

In customary law, offences were dealt with by traditional leaders in traditional courts. In most cases, these courts would not impose imprisonment or other forms of incarceration. Families would resolve issues to promote unity and respect for each other.[234] The customary law system was swept away by the coming of the Roman-Dutch and English legal systems.[235] The researcher opines that the CJA is a return to the African customary practices but is a mixture of Western formalism and customary law, which sometimes does not comply with issues of fitness for purpose purely because of this mixing of approaches.

The child justice system became part of the corrective approach focused on punishment rather than rehabilitation. In other words, children who committed a criminal offence would receive similar punishment as their adult counterparts. The only difference was the place where punishment was to be affected. The establishment of a reformatory for juvenile offenders in Diepkloof around 1879 led to the formation of other reform schools.[236]

The Prison and Reformatories Act[237] was the first legislation that established that children and young adults should not be imprisoned.[238] However, the Prison and Reformatories Act did not protect all children. Instead, more protection for young

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233 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008) 29.

234 The process was and still being referred to as "Ubuntu". The term refers to a quality that includes the essential human virtues, compassion, and humanity. In other words, the term emphasizes the need of and for understanding, not vengeance or victimization.

235 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008) 29.

236 William Porter was the Attorney-General of the Cape Colony and was responsible for the establishment of reformatory schools and was the anti-apartheid activist. He became the first principal for Diepkloof Reformatory when it was transferred to the Department of Education.

237 Act 13 of 1911.

238 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008) 30.

offenders was found in the Children's Protection Act 25 of 1913, which allowed arrested children to be released by police. The critical change brought by both the Prison and Reformatories Act and Children's Protection Act 25 of 1913 was the power given to the court to decline to proceed with a trial in any case concerning a child and to commit such a child to an industrial school.[239]

Protective measures similar to the Children's Protection Act of 1913 have since been survived by the advent of section 254 of the CPA.[240] The implication of section 254 is the conversion of the trial into an inquiry even after a conviction.[241] However, such conversion was not to be taken lightly and without careful consideration.[242] It is essential to point out that, although such a provision was in place, no juvenile court was established to deal with child offenders. The majority of child offenders remained in a punitive criminal justice system. This system paid minimal attention to the children and their unique needs.[243]

2.3.2 POST-CONSTITUTIONAL DEVELOPMENT

Over the years, corporal punishment dominated the system as a sentence and was based on the idea that "..*children should be birched and not branded as criminals*."[244] Only with the advent of a democratic government in South Africa in 1994 did the Constitutional Court strike corporal punishment as unconstitutional because it was cruel and unusual.[245] Before this judgement, there was no strategy to ensure child offenders were treated humanely. In 1992, non-governmental organizations (NGOs) initiated a campaign to raise awareness about children in trouble with the law and issued a report

239 Children's Protection Act 25 of 1913.
240 Act 51 of 1977. Section 254 of Criminal Procedure Act provide the court with the power to refer juvenile accused to children's court. The order directing the conversion of the trial into an enquiry may be issued before or even after a conviction.
241 See section 254(1) of Criminal Procedure Act 51 of 1977.
242 See *S v L* 1978 (2) SA 75 (C) 77.
243 Section 254 of Criminal Procedure Act 51 of 1977 has been repealed by section 64 of Child Justice Act 75 of 2008. Section 64 of the Act provides that 'If it appears to the presiding officer during the course of proceedings at a child justice court that a child is a child in need of care and protection referred to in in section 50, the court must act in accordance with that section'.
244 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008) 31.
245 See *S v Williams and Others* 1995 (7) BCLR 861 (CC).

calling for a comprehensive juvenile justice system.[246] Such a system would entail the diversion of minor offences and move children away from a criminal justice system that was brutal to them.[247]

Another initiative by NICRO, launched the same year as the NGOs campaign, offered courts alternative diversion and sentencing options aimed at promoting the emerging restorative justice concepts with more of a focus on youth offenders.[248] These programmes and sentencing options are now accepted and implemented throughout South Africa. The advent of a democratic government in 1994 also paved the way for transforming how the criminal justice system dealt with children.

The South African Law Commission was requested to undertake an investigation into juvenile justice and to make recommendations to the Minister of Justice for the reform of this area of the law. An Issue Paper was published for comment in 1997, which proposed that a separate Bill should be drafted to provide a cohesive set of procedures for managing cases in which children are accused of crimes. The Issue Paper was the subject of consultation with government and civil society role-players.

Towards the end of 1998, the Commission published a comprehensive Discussion Paper, accompanied by a draft Bill. Broad consultation was held regarding this document, with all the relevant government departments and non-governmental organisations providing services in the field of juvenile justice being specifically targeted for inclusion in the consultation process. The draft Bill encapsulated a new system for children accused of crimes providing substantive law and procedures to cover all actions concerning the child from the moment of the offence being committed through to sentencing, including record-keeping and special techniques to monitor the administration of the proposed new system.

The final proposed draft Bill differentiated from the draft Bill that accompanied the Discussion Paper and was referred to as the Child Justice Bill. The Child Justice Bill

246 Skelton A & Boyane T *Child Justice in South Africa* Issue 150 (2008) 32.
247 This statement is purely based on the researcher's opinion from the report of the NGOs.
248 The initiative was laughed by NICRO (Non-profit organisation) which specialises in social crime prevention and offender reintegration.

embodied the recommendations of the South African Law Commission for reforming the law relating to children accused of crimes in South Africa.

The primary objectives of the Bill were to protect the rights of children, promote Ubuntu in the child justice system, and encourage cooperation between the relevant government departments, other organisations and agencies involved in implementing an effective child justice system. Any court or system exercising powers conferred by the Bill was to be guided by principles.[249]

The Bill repealed the common law regarding children below the age of 14 years. The minimum age of criminal capacity was raised from 7 to 10 years. The rebuttable presumption of *doli incapax* concerning children aged ten but not yet 14 years was codified. The Bill provided that a child who, at the time of the commission of an alleged offence, was below the age of 10 years could not be prosecuted; and that a child who, at the time of the commission of a crime, was at least ten years, but not yet 14 years of age was presumed not to have had the capacity to appreciate the difference between right or wrong and act accordingly. The presumption was rebuttable if it was subsequently proved beyond a reasonable doubt that they did have the capacity at that time. The approach with the latter was intended to encourage the diversion of children in this age group in most cases whilst still preserving the prosecutor's discretion regarding the prosecution of such children.[250]

The draft Bill gave rise to the Child Justice Act, 75 of 2008, which was assented to by the President on 7 May 2009. The eventual CJA codified South African participation in and ratification of the UNCRC.

The primary objective of CJA was to establish a criminal justice system for children in conflict with the law and accused of committing offences, in accordance with the values underpinning the Constitution and international obligations of the Republic; to provide for the minimum age of criminal capacity of children; to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system; to make special provision for securing attendance at court and the release or detention and

249 South African Law Commission Project 106 (2000).
250 South African Law Commission Project 106 (2000).

placement of children; to make provision for the assessment of children; to provide for the holding of the preliminary inquiry and to incorporate, as a central feature, the possibility of diverting matters away from the formal justice system, in appropriate circumstances; to make provision for child justice courts to hear all trials of children whose matters are not diverted; to extend the sentencing options available in respect of children who have been convicted; to entrench the notion of restorative justice in the criminal justice system in respect of children who are in conflict with the law; and to provide for matters incidental thereto.[251]

The CJA came into operation on 1 April 2010. Its fundamental aim was to establish a criminal justice system that expands and entrenches the principle of restorative justice while ensuring responsibility and accountability for crimes committed, but without necessarily criminalizing conduct. It recognized the need for proactive crime prevention by emphasising the effective rehabilitation and reintegration of child offenders to minimise the potential for reoffending; whilst balancing the interests of children and those of society, with due regard to the rights of victims.

The CJA created unique processes for children in conflict with the law by ensuring assessment; providing unique methods for securing attendance at the court, the release or detention and placement of child offenders; creating an informal, inquisitorial, pre-trial procedure, designed to facilitate the disposal of cases in the best interests of child offenders; providing for adjudication of matters, not diverted, in child justice courts; and providing for a wide range of sentencing options specifically suited to the needs of child offenders.

Since the coming into operation of CJA, several cases have been dealt with by the courts regarding the interpretation of the provisions of the Act. A classical case concerned the interpretation of section 85(1)(b) of CJA dealing with the reviewability of sentences of imprisonment and compulsory residence in child and youth care centres involving children 16 years or older but under the age of 18 years. The reviewability of cases involving the sentencing of child offenders, who were legally represented, to a

[251] Child Justice Act 75 of 2008 (Preamble).

compulsory residence in a child and youth care centre came before different divisions of the High Court and conflicting judgments were handed down, as discussed in chapter one.

Another issue related to the application or interpretation of the provisions of the CJA related to diversion.[252] The use of a level one diversion option in respect of a Schedule 2 or 3 offence was considered in two cases in the KwaZulu- Natal High Court, Pietermaritzburg. In *S v Kissonduth*,[253] the 14-year-old child offender appeared in the preliminary inquiry on a charge of possession of cocaine. Following an assessment report by the probation officer and diversion service provider during the preliminary inquiry, the inquiry magistrate ordered that the child be diverted, and a supervision and guidance order was made. The matter was referred for special review by the Director of Public Prosecution. A statutory offence for which the maximum penalty is imprisonment for a period exceeding five years falls under Schedule 3 of the Act. The possession of cocaine falls within Schedule 3 of the Act, and the maximum penalty is imprisonment for a period not exceeding 15 years or a fine as the court deems fit. The reviewing court pointed out that the Act requires the Director of Public Prosecution to indicate in writing that a Schedule 3 offence may be diverted. The reviewing court also stated that supervision and a guidance order is a level-one diversion option and, therefore, unsuitable for Schedule 3 offences. The assessment reports by the probation officer and the diversion service provider failed to indicate that the child acknowledged responsibility for the offence. The diversion order by the inquiry magistrate was consequently set aside.

In *S v Mngomezulu*,[254] the court considered a special review referred by the Director of Public Prosecutions in terms of section 304(4) of the CPA. In this matter, the 16-year-old child offender was diverted on a supervision and guidance order by the inquiry magistrate during the preliminary inquiry. The charge on which the child appeared was unclear because, on the written notice, the charge was reflected as an attempted

252 Section 53(2)(a) of CJA provides that level one diversion options are applicable to Schedule 1 offences.
253 (Case number R6664/13 delivered on 8 October 2013).
254 (Case number R702/13 delivered 17 October 2013).

robbery. Still, according to the preliminary inquiry record, the prosecutor informed the inquiry magistrate that the charge was pointing of a firearm. The reviewing court considered whether the charge was robbery or robbery with aggravating circumstances and, therefore, whether it was a Schedule 2 or Schedule 3 offence. The court concluded that it did not make a difference since a level one diversion option may only be applied in respect of Schedule 1 offences. The reviewing court, therefore, set aside the preliminary inquiry proceedings resulting in the supervision and guidance order being granted in their totality.

The Judicial Matters Amendment Act, 2013 was signed into law on 22 January 2014. The amendments to the CJA effected by the Judicial Matters Amendment Act, 2013 include changes to regulate further the reporting of any injury sustained or severe psychological trauma suffered by a child while in police custody; to regulate the holding of preliminary inquiries further; to effect specific textual corrections; further to regulate the automatic review of children in some instances, and to regulate further the expungement of records of certain convictions of children.

The Judicial Matters Third Amendment Act, 2014 included section 11, which dealt with evaluating the criminal capacity of a child ten years or older, but under 14. The amendment allowed different categories of professionals to assess the various aspects of the child's development. The modification was required because psychiatrists and clinical psychologists indicated that they could not evaluate a child's moral development as part of the criminal capacity evaluation. Sections 77 and 78 of the Act were amended to effect the Constitutional Court's judgment in *Centre for Child Law v Minister of Justice and Constitutional Development*.[255] The Constitutional Court ruled that section 51 of the Criminal Law Amendment Act, 1997, was unconstitutional as it applied to children.

In March 2016, the Minister of Justice and Correctional Services tabled a report in Parliament[256] recommending that the minimum age of criminal capacity be raised to 12 years with the retention of the rebuttable presumption for children 12 years or older but under the age of 14 years, applicable to children referred to the child justice court for

[255] 2009 (2) SACR 477 (CC).
[256] In terms of section 8 read with section 96(5) of CJA.

plea and trial; the Act, particularly sections 7, 10, 11, 41, 49, 52, 58 and 67, must be amended to remove the requirement of establishing the criminal capacity of children 12 years or older, but under the age of 14 years for purposes of diversion; and section 8 of the Act be amended and retained in the Act to provide for another review of the minimum age of criminal capacity within ten years. Following these recommendations, the Child Justice Amendment Bill was tabled and approved by the National Assembly and the National Council of Provinces and sent to President for consideration.

Other vital cases dealt with by the courts directly impacted child offenders. In *Centre for Child Law and others v Media 24 Limited and others*,[257] the Constitutional Court declared section 154(3) of the CPA constitutionally invalid to the extent that the protection does not extend beyond 18 years. The declaration was suspended for 24 months to allow Parliament to correct the defect giving rise to constitutional invalidity.

In *S v NSB*,[258] the accused failed to appear in the child justice court. The court held an inquiry into the failure to appear and convicted the child offender on a charge of failure to attend court proceedings and sentenced the child to three months imprisonment. The case was sent on review. The KwaZulu-Natal High Court set aside the conviction and the sentence. Section 24 of CJA provides the procedure to be followed when a child fails to appear in court. The court should conduct an inquiry into the child's failure to appear. If it is found that the failure to appear is not the child's fault, the presiding officer may order the child's release on the same conditions or any other condition or make an order that will assist the child and their family in complying with the requirements initially imposed. If it is found that failure to appear is the child's fault, the presiding officer may order the child's release on different or further conditions or detain the child. The CJA does not provide for the conviction and sentencing of a child based on failure to appear in court. Section 170 of the CPA does not apply to children.

The Child Justice Amendment Act of 2019[259] brought about changes to regulate the minimum age of criminal capacity and to further control provisions relating to the decision

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257 (CCT261/18).

258 (Case number A476/2020).

259 On 4 June 2020, the President assented to the Child Justice Amendment Act, 2019. The Amendment Act was published in the Government *Gazette* No. 43402 on 4 June 2020.

to prosecute a child who is 12 years or older but under the age of 14 years; to further regulate the proof of criminal capacity; to further regulate the assessment report by the probation officer; to further regulate the factors to be considered by a prosecutor when diverting a matter at a preliminary inquiry; to further regulate the factors to be considered by an inquiry magistrate when diverting a matter at a preliminary inquiry; to further regulate the orders that may be made at the preliminary inquiry, and to further regulate the factors to be considered by a judicial officer when diverting a matter in a child justice court; and to provide for matter connected therewith.

The above historical overview now brings the researcher to consider contemporary issues concerning child justice, which are relevant to this study.

2.4 CONTEMPORARY THEMES: SOUTH AFRICAN CHILD JUSTICE

The contemporary structure of South African child justice gives rise to certain contentious concepts and themes – some extrinsic and some intrinsic - which are central to this research. The researcher posits that the model of justice on which the CJA turns is an inherent factor affecting the legislation's implementation. Although not explicitly mentioned in the CJA, its effect is no less apparent when comparing it to the adult criminal justice system. The concept is further relevant as it impacts presiding officers' roles and duties (and indeed reach). For that reason, it is discussed here below.

2.4.1 ACCUSATORIAL & INQUISITORIAL PROCEDURE & THEIR IMPACT ON CHILD JUSTICE

It has been pointed out[260] that distinguishing between accusatorial and inquisitorial modes of procedure is a "*metaphysical question which is now sterile and obsolete*." While the latter may have a kernel of truth, the distinction remains essential to criminal

[260] Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle"; See also South African Law Commission Project 73 (2001) 8 2.6.

procedure and evidence as branches of public law when configuring new ways of justice (or, more bluntly, novel forms of doing things), and more specifically in the arena of child justice in South Africa.

Most countries follow one of two criminal procedure modes - accusatorial (also known as adversarial) and inquisitorial (also known as continental). Karels[261] contends that "…*although there is a separation between the two systems, they have borrowed concepts from one another and have blended their approach*." The researcher agrees with Karels and submits that most systems are now primarily hybridized. This is the case in South Africa, especially regarding child justice. In other words, no system is purely accusatorial or purely inquisitorial in the traditional sense. Despite the latter, each design will display stronger leanings toward one system. This is particularly interesting in South Africa, where the child justice system leans more towards inquisitorial, but the adult process is almost purely adversarial (at least at the trial stage).

According to Roodt,[262]

> Accusatorial and inquisitorial systems rest on fundamental assumptions on the best way of achieving speedy and fair criminal trials.

Roodt[263] further avers that "…*the two systems have always differed with regards to the roles ascribed to the judge in the fact-finding phase of the trial, and the priority accorded to effective truth finding*." The researcher agrees with Roodt and submits that the distinctive features of both systems lie in the roles ascribed to the arbiter of fact. In the accusatorial system, the presiding officer assumes the role of an umpire who should not enter the arena of argument between the parties for fear of becoming partial or losing perspective due to the dust of the fray.[264] In contrast, in the inquisitorial system, the judge is the master of proceedings in that the judge conducts and controls the search for truth by dominating the questioning of witnesses and the accused.[265]

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261 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle".

262 Roodt C "A historical perspective on the accusatory and the inquisitorial systems" Vol. no. 10 (2004) 137 -158.

263 Roodt C "A historical perspective on the accusatory and the inquisitorial systems" Vol. no. 10 (2004) 137 - 158.

264 Lansdown AV and Campbell J *South African Criminal Law and Procedure* Vol V (1982) 490.

265 Snyman CR "Accusatorial and inquisitorial approaches to criminal procedure" 1975 VIII *CILSA* 103.

In South African child justice, the distinction is important because the Act mixes accusatorial and inquisitorial elements, which creates a challenge in considering whether it suffices in dealing with child offenders. This is further complicated by the inclusion of distinctly customary principles that lean toward conciliatory justice, which is neither formal nor within traditional judicial training.

2.4.1.1 The characteristics of accusatorial and inquisitorial justice systems

According to Turner,[266] the difference between the accusatorial and inquisitorial processes lies in the different responsibilities of the parties involved. In the inquisitorial system, there is a more substantial reliance on Codes than on case law. Judges can decide cases on law and policy instead of being bound by previous decisions. In contrast, with the accusatorial system, the system of precedent is vigorously enforced, and decisions of higher courts are binding on lower courts.[267] It is trite that this distinction is evident in South African child justice. The issue that arises, however, relates to the use of diversion measures ordered by a child justice court. In these instances, the order does not form a precedent because the order is not a judgment. While this is necessary for the interlocutory nature of the proceeding, it raises questions about the presiding officer's discretion when determining diversion options which appear (at least from the existing review and appeal case law) to be vastly different depending on the presiding officer in question. This raises concerns about equality as diversion options are often largely dependent on the services available in a specific jurisdiction. In essence, sentencing discretion is controlled via the checks and balances of appeal, review and precedent, but diversion implementation remains largely unchecked. While some may argue that diversion is not a sentence but rather a discretionary measure to divert a child from formal criminal justice, it nonetheless remains a task that a child offender must

266 Turner JI "Legal ethics in the international criminal defence" 2010 *Chicago Journal of International Law* 685-746: 697.

267 Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 24.

perform as a result of his acceptance of accountability, which, semantically at least, appears to be distinctly close to the concept of punishment despite the Acts contestations to the contrary.

Police investigation dominates the accusatorial system, and the defence gathers evidence to build a case for its client. In the inquisitorial system, in the pre-trial phase, the prosecutor (or investigation judge) investigates the case after the police have done the groundwork of identifying a suspect. The prosecution also helps in guiding the police in their initial investigation. The investigative judge reviews all collected evidence and decides whether a prosecution should occur or not.[268] While the situation in South Africa is mainly akin to that described above, the prosecutor may also decide to divert the child from the system before the matter is brought to trial. This raises questions once again related to prosecutorial discretion and the role of the presiding officer, where the prosecution presents the diversion for confirmation when the matter does not proceed to trial. Once again, it may be argued that the diversion before trial (at the prosecution's discretion) is not a criminal proceeding and is checked by the presiding officer's confirmation at the preliminary inquiry. Still, chances remain for the abuse of discretion in this instance. One questions the regularity and legality of a decision to divert being taken for confirmation when any normal decision not to prosecute is not checked in such a fashion. The legislation indicates indirectly that the diversion order is quasi-punishment which must be checked and balanced by the presiding officer before trial in a child justice court.

The trial stage of the accusatorial system is dominated by parties who present their cases and evidence to a passive arbiter, who then decides based on what has been submitted. In contrast, the inquisitorial system allows the judge to play an active role in controlling the court case and interrogating witnesses. The judge decides based on the evidence the judge has gathered throughout the process. The judge in the accusatorial system plays a passive role and ensures that the trial is fair and the rules of the trial are

[268] Karels MG "Child offenders in the South African criminal justice system: A critical analysis of the applicability of the 'open justice' principle" 24.

properly followed.[269] The judge is called upon to decide the guilt of an accused beyond a reasonable doubt and to pass sentence where necessary.

Judges in the inquisitorial system must ensure that the state laws (both substantive and procedural) are applied in total, and the courts' primary function is to arrive at the truth at all times.[270] This places judges in a position to know more about issues surrounding the commission of a crime and renders the trial a mere public repetition of the written materials included in the dossier compiled earlier by an investigating judge in the pre-trial stage. The judge questions the witnesses, and the accused presents evidence for the prosecution and the defence and provides any information surrounding the commission of the crime.[271] As a result, the inquisitorial trial is shorter than the accusatorial trial in that the judge plays an active role, thus limiting the possibility of parties prolonging the trial.

In South African child justice, the distinction between accusatorial and inquisitorial methods plays a significant role because the CJA displays elements of both systems. This is evident, particularly when the court is given broad inquisitorial powers to protect the best interest of the child offender, even during the adversarial trial in a child justice court. The exact influence of the distinction (or lack thereof) is discussed in chapter three and the comparative chapters four to six.

Another aspect of contemporary child justice globally is the use of restorative justice mechanisms to ensure the child's best interest. The implementation of restorative justice is modelled differently in each jurisdiction and has differing effects on the traditional view of justice and its aim. A synoptic overview of restorative justice is provided below as a central theme in modern child justice and is particularly encouraged in South African child justice.

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269 Lansdown Av and Campbell J *South African Criminal Law and Procedure Vol V*. (1982) 490.

270 See Goldstein AS ‘Reflection on two models: Inquisitorial themes in American criminal procedure’ (1974) 26 *Stan L Rev* 1009-1025 at 1018. The judicial institution, as a body responsible for discovering the truth from the moment of arrest and throughout the investigation and trial, is the central figure and is not subordinate to the wishes of the victim, the accused or the police force, and is bound only by the criminal code.

271 Ploscowe M ‘The development of present-day criminal procedure in Europe and America’ (1935) 48 *Harv L Rev* 433-473.

2.4.2 RESTORATIVE CHILD JUSTICE

Restorative justice is a criminal justice system focused on rehabilitation through reconciliation with victims and the community that suffered the harm. A restorative justice programme aims to allow offenders to take responsibility for their actions, understand the harm they have caused, redeem themselves, and discourage them from causing further damage. For victims, its goal is to provide an active role in the process and to reduce feelings of anxiety and powerlessness.[272] There is broad agreement that different values fundamentally characterise restorative justice. These include inclusion, democracy, responsibility, reparation, safety, healing and reintegration.[273]

Many restorative justice experiments have been directed at children accused of crimes. Thus, the field of child justice has been greatly enriched by the development of therapeutic justice theory and practice.[274] Restorative justice requires offenders to understand and experience the consequences of their crimes, an experience that should lead to a change in their behaviour. This makes juvenile justice vital because behavioural change is arguably more likely to occur in children. At the same time, positive results can be achieved throughout the individual's life.[275] According to Skelton,[276] it has always been difficult for juvenile justice professionals to demonstrate that a non-punitive approach can enhance public safety. A restorative justice approach provides an opportunity to define community protection more holistically.

Myriad practical projects engage in restorative justice encounters with young offenders, their victims, families, and communities. These encounters consist of face-to-face dialogues between children who have committed crimes and the people against whom those crimes have been committed. The purpose of these restorative justice processes

272 Sherman LW & Strang H Restorative Justice: The Evidence (2007) University of Pennsylvania.
273 Skelton A & Boyane T *Child Justice in South Africa* 2008.
274 Skelton A & Boyane T *Child Justice in South Africa* 2008.
275 Skelton A & Boyane T *Child Justice in South Africa* 2008.
276 Skelton A & Boyane T *Child Justice in South Africa* 2008.

is to make children understand the impact of their behaviour on others and to make agreements to put right what has been damaged as far as possible.[277]

However, some criticism is levelled against those who advocate for restorative justice. They tend to be less insistent on procedural safety for suspects and even see strict procedural rules as a stumbling block to achieving therapeutic outcomes.[278] Johnstone [279] argues that this may be because many proponents of restorative justice know the process as a non-punitive approach focused on restitution and reparation, somewhat akin to a civil law compensation claim. He warns that this approach could be dangerous because the broader context in which restorative justice operates is essentially one of crime and punishment. The whole process is organised around the idea that what has been done is a criminal wrong. If the offender fails to fulfil their obligations, they will be brought back into the criminal justice system.

Ashworth[280] shares similar views. He points out that although communities have a more significant stake in resolving criminal justice matters through restorative justice, the state nevertheless retains the responsibility to impose a framework that guarantees rights and safeguards for offenders because restorative justice processes still involve public censure and the imposition of obligations on offenders. He posits that the state owes it to offenders to exercise its power according to settled principles that uphold citizens' rights to equal respect and equality of treatment.[281] Even amongst authors who take a more relaxed view on the need for procedural rules, there is agreement that certain protections are nevertheless required.[282] One then is free to question whether restorative justice differs from the deterrent effects of punishment in traditional sentencing. One could go as far as to argue that conventional sentencing contains far more procedural safeguarding mechanisms than restorative justice practices. This is especially important in South Africa because the CJA incorporates restorative justice sentencing, which is

277 Skelton A & Boyane T *Child Justice in South Africa* 2008.
278 Johnstone G *Restorative Justice: Ideas, Values, Debates*, 2002.
279 Johnstone G *Restorative Justice: Ideas, Values, Debates*, 2002.
280 Ashworth A Responsibilities, Rights, and Restorative Justice 2002.
281 Ashworth A Responsibilities, Rights, and Restorative Justice 2002.
282 Braithwaite J *Setting Standards for Restorative Justice* 2002.

paradoxical considering the great fanfare surrounding restorative justice as a mechanism for diversion and peace-making in the CJA.

The CJA regards the promotion of the dignity and well-being of the child, the development of their sense of self-worth, and the ability to contribute to society as diversion objectives.[283] Diversion options and programmes must comply with specific minimum standards. In this regard, the CJA provides that diversion options may not be exploitative, harmful, or hazardous to a child's physical or mental health.[284]

One paper the benefits of restorative justice far outweigh the risks to due process. However, one must not operate blind to inherent risks in a process with very few procedural safeguards built into its execution. Perhaps it can be managed through standard setting, which aims to protect all the role-players involved in restorative justice processes.[285]

2.4.3 DUE PROCESS/FAIR TRIAL RIGHTS IN SOUTH AFRICAN CHILD JUSTICE

The right to a fair trial is a fundamental right guaranteed in several international human rights standards, binding and non-binding, adopted under the auspices of the United Nations and some regional inter-governmental organisations.[286] Under international human rights law, the right to a fair trial commences as soon as suspicion is laid upon someone by the investigating authorities, through the moment of arrest, during the pre-trial stages, at trial, during all appeals, and to the imposition of a punishment.[287] It also extends to proceedings arising from miscarriages of justice and compensation.[288]

283 Section 51 of CJA.
284 Section 53 of CJA.
285 Skelton A & Boyane T *Child Justice in South Africa* 2008.
286 Zilli L, Children's Right to a Fair Trial under International Law, 5 *Trinity C.L Rev*. 224 (2002).
287 Amnesty International *Fair Trials Manual* (*Amnesty International Publications* 1998).
288 Amnesty International *Fair Trials Manual* (*Amnesty International Publications* 1998).

Children in conflict with the law are entitled to all fair trial rights guaranteed under international standards.[289] The International Covenant on Civil and Political Rights (ICCPR) contains specific child/young person measures, i.e. the separation of accused juveniles from adults;[290] the speedy adjudication of cases involving juveniles; the separate incarceration of juvenile offenders from adults; an exception to the rule of a public trial and judgment where the accused is a juvenile,[291] and the requirement that the juvenile's age and the desirability of promoting their rehabilitation be taken into account.[292] A range of obligations is placed on the state to promote, protect, and restore children's rights.

The right to a fair trial, under Article 6,[293] is a fundamental principle of the rule of law, which sets out fundamental minimum rights to be satisfied before a fair trial can occur. Article 6(1) provides that in determining his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6(3)(a)-(e) provides that everyone charged with a criminal offence has the following minimum rights: to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; to have adequate time and the facilities for the preparation of his defence; to defend himself in person or through legal assistance, to be given it free when the interests of justice so require; to examine or have examined witnesses against him and obtain the attendance and examination of witnesses on his behalf under the same conditions as a witness against him; to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The Constitution also has a specific children's rights section,[294] which includes a range of rights pertaining to children. Section 28(1)(g) states that every child has the right not to be detained except as a measure of last resort and then only for the shortest

289 Article 41 of United Nations Convention on the Right of a Child clarifies that children are to benefit from any provisions which are more conducive to the realisation of the rights of the child, and which may be contained in, the law of a state party, and international law in force for that state.
290 Article 10(2)(b).
291 Article 14(1).
292 Article 14(4).
293 European Convention on Human Rights.
294 Section 28.

appropriate time. If a child is detained, they have the right to be kept separate from persons over 18 years and treated in a manner and kept in conditions that consider the child's age. The direction to use detention as a measure of last resort is also enunciated in the Beijing Rules.[295] Section 28(2) of the Constitution provides a further layer of protection by specifying that a child's bests interests are of paramount importance in every matter concerning the child.

The implications of section 28(1)(g) and the notion that the detention of children is a measure of last resort were explored in *S v LM & others*.[296] Per Opperman J, it meant that "*in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time and has the right to be kept separately from detained persons over the age of 18 years and treated in a manner, and kept in conditions, that take account of the child's age.*" Section 35 of the Constitution contains important provisions that protect the rights of arrested, detained and accused persons. It is important to note that section 35 covers a wide range of stages, starting from when a person is detained until the end of the trial. For this research, only section 35(3) and comparative provisions for comparative jurisdictions will be discussed below.

2.4.3.1 The right to be informed of the charges

Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it. In section 1(1) CPA, the *charge* consists of an indictment and a summons. In *S v Mandlazi*,[297] the court pointed out that the scheme of the Act is that the charge and several other matters about the charge must be in writing and that the charges against an accused are those identified in the charge sheet. The court emphasized that care should be taken to ensure that the prosecutor's oral formulation of the charge when the

295 See rule 13, 17(1)(c) and 19.
296 2020 (2) SACR 509 (GJ).
297 (Unreported, GP case no: A765/2016, 22 May 2018).

accused is called upon to plead in court is consistent with the written charge. The court warned that a trial might be unfair where the discrepancies confused the accused.[298]

Setting out the essential elements of an offence and the alleged misconduct of the accused that brings it within the ambit of the offence is to safeguard an accused person's fair trial right to be supplied with sufficient information to conduct their defence correctly.[299]

Like South Africa, an accused in Scotland has the right to be informed of the reasons for arrest and the general nature of the offence the accused is suspected of having committed during the arrest. Likewise, in Germany, juveniles must be informed of the charges against them, either directly or through their parents or legal guardians.[300]

Section 35(3)(a) of the Constitution is in line with Chapter 3 of CJA in that the CJA mandates a police officer to inform the child offender of the nature of the allegation.[301] A police officer must inform the child and the parent, appropriate adult or guardian, of the nature of the allegations against the child and the rights of the child, in a language that they understand and preferably in a language of their choice; in plain language by using simple vocabulary; and in a manner appropriate to the age, maturity and stage of development of the child and the intellectual capacity of the parent, appropriate adult or guardian.[302] At the preliminary inquiry, the inquiry magistrate is required to further inform the child of the nature of the allegation.[303]

Section 63(3)(a) of CJA further provides that, before plea in the child justice court, the presiding officer must, in a prescribed manner, inform the child of the nature of the allegations. A presiding officer must inform the child and explain the charge against him in the language of the child's choice or through an interpreter and in plain language, using simple vocabulary and avoiding technical words.[304]

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298 At [12].
299 *S v Livanje* 2020 (2) SACR 451 (SCA).
300 Juvenile Justice Information Portfolio – 3. State Party Reports: Germany (www.unicerf-irc.org – date of site visit – 10 August 2022).
301 See sections 18(4)(a)(i); 19(3)(a)(i); 20(3)(a) of CJA.
302 Regulation 16(2)(a)(i)-(iii) and 18(2)(i) of CJA.
303 Section 47(2)(a)(ii) of CJA.
304 Regulation 37(1)(a)(i)-(ii) of CJA.

2.4.3.2 The right to have adequate time and facilities to prepare a defence

Section 35(3)(b) of the Constitution provides that "*every accused person has a right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence*." According to Steytler,[305] the phrase *a defence* in section 35(3)(b) should be extensively interpreted. It should include all proceedings where an accused's interests may be adversely affected, namely plea proceedings, trial conduct, presentation of evidence in mitigation of sentence, and appeal or review proceedings. Therefore, the right to be prepared for one's trial embodies the right to have adequate time and facilities to prepare an effective defence.

The right to be prepared for one's trial is linked to the right not to be subjected to an unduly hasty trial and an entitlement to state assistance to prepare one's defence. Therefore, the right is connected to the right to bail, legal assistance, and information regarding criminal proceedings. This means an accused must have adequate legal representation to prepare an effective defence for his case. Similarly, an accused must receive adequate information from the prosecution regarding the state's case against him to prepare an adequate defence. Thus, the right to be prepared for one's case is an essential component of the composite right to meaningful and informed participation in the criminal process.

Although a child offender enjoys the right in section 35(3)(b) of the Constitution, there are time limits placed by the CJA relating to postponements at the preliminary inquiry and child justice court.[306] A child justice court must conclude all trials speedily as possible and must ensure that postponements in terms of CJA are limited in number and duration.[307] If a child is in detention in prison, a child justice court may, before the commencement of a trial, not postpone the proceedings for a period longer than 14 days

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305 Steytler, *Constitutional criminal procedure* 234.
306 See sections 48 and 66 of CJA.
307 Section 66(1).

at a time; if he is in detention in a child and youth care centre, a child justice court may, before the commencement of a trial, not postpone the proceedings for a period longer than 30 days at a time; has been released, a child justice court may, before the commencement of a trial, not postpone the proceedings for a period longer than 60 days at a time.[308] Whether the time limits placed by CJA result in undue haste is a question to be decided differently. Similar to South Africa, where a young person pleads not guilty in Scotland, and his case proceeds to trial, such a case should be allocated the earliest available trial date.

In contrast to South Africa, there is an agreed model for court cases involving 16- and 17-year-old children in Scotland. In solemn cases, formal accusation for those in custody is served within 80 days of appearance in court. The lengthy timescales are related to the complexity of jury cases. However, the defence agent of a young person placed on petition will receive most statements within 28 days, ensuring that the young person knows the nature and strength of the case against them at an early stage. In summary, in cases where the young person is under 16, the undertaking is signed by a parent or guardian.[309]

The purpose of section 35(3)(b) right is to ensure the equality of arms.[310] The principle represents those procedural mechanisms with which the vast inequality in power between the state and the accused is sought to be addressed.[311] Equality of arms implies that a person charged with a criminal offence shall be informed of the facts alleged against him and their legal classification; that he will be given adequate time to prepare his case; and that he will be given access to all material evidence held by the prosecution authorities which bears on his guilt or innocence.[312]

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308 Section 66(2)(a)-(c). see also section 78 of CJA.
309 Section 43 of Criminal Procedure (Scotland) Act 1995.
310 The principle of 'equality of arms' is an essential guarantee of adversarial proceedings.
311 See Mbodla "Levelling the playing field: the accused's right to an expert witness at the state expense" (2001) *South African Journal of Criminal Justice* 81-82.
312 Leigh "European Convention on Human Rights" in Weissbrodt and Wolfrum (1998) 664.

The right to be prepared is a fundamental principle of a fair trial and can only be exercised by an accused if he is aware of his rights or is informed by his lawyer.[313] An accused may invoke the right to justify a postponement if more time is required to prepare a defence. An accused should not be jeopardised in the preparation of his defence. Similarly, the accused cannot request a postponement to try to delay a case unnecessarily. The right to adequate time and facilities also applies to appeal proceedings. Therefore, courts must supply a convicted person with reasons which indicate, with sufficient clarity, the grounds for their decision to make the right of appeal meaningful.[314] Article 14(3)(b) of the ICCPR guarantees that every accused has the right to have adequate time and facilities to prepare his defence and communicate with counsel of his choosing.

The right against an unduly hasty trial is a well-recognised common law principle of a fair trial.[315] The principle underlying this right was also laid down in *S v Yantolo*,[316] where the court held that "*it is a commendable principle that justice should be done without unnecessary delay, but it is more important that a person accused of a serious crime carrying a heavy sentence or of any crime carrying a sentence, should not be placed in a position where he may be unable to assess and weigh his position, the gravity of the offence against him, the nature of the facts with which he is faced and the consequences of a plea of guilty*."

The right to have facilities implies that a claim rests amongst someone or somebody to facilitate or assist the preparation of a defence.[317] The claim rests against the state in that a positive duty is imposed on it to assist. In *S v Nkabinde*,[318] the only facilities provided to the accused to prepare his defence were a telephone line which was monitored and a consulting area which was also compromised. The court held that this

313 Steytler "The too speedy trial – or the right to be prepared for trial" (1985) *South African Journal of Criminal Law and Criminology* 158 at 159.
314 *Hadjianastassiou v Greece* (1993) 16 EHRR 219.
315 Steytler *Constitutional criminal procedure* 234.
316 [2014] ZAECGHC 61.
317 Steytler *Constitutional criminal procedure* 234.
318 1998 (8) BCLR 996 (N).

amounted to a violation of the accused's section 35(3)(b) right to be afforded adequate facilities and his right to privacy.

While the above right is trite and well aired via legal opinion in South Africa, one must question whether the restrictions and time limits imposed by the CJA as a protective measure may have inadvertently become a mechanism of difficulty. The CJA imposes time limits on criminal proceedings (pre-trial, trial and post-trial), but it can be argued that the limitations may impede the child offender's ability to adequately prepare for trial and consult appropriately with a legal practitioner. This is more problematic when the child declines legal assistance and is afforded a state-imposed watching brief as per the provisions relating to mandatory legal representation. One further question is whether a child's trial should not receive more preparation time based on the child offender's limited developmental capacity and ability to fully comprehend the gravity of the charges and consequences that may result. Although the child offender may request a further postponement, the court must ensure that the trial proceeds speedily. One cannot deny the pressure on the judiciary to ensure trials are finalised in terms of relevant KPIs. In addition, no such limits are placed on diversion practices, which seems anomalous in keeping with the principle of speedy trial. While diversion proceedings at the trial phase postpone the criminal proceeding, and there are requirements regarding court appearance, it is not unimaginable that these cases also slip through the cracks in a vastly overburdened judicial system.

2.4.3.3 The right to a trial before an ordinary court

The accused is given the right to a public trial so that justice can be seen to be done. Access to the public ensures legitimacy and is an essential safeguard of impartiality.[319] In certain instances, a court may order that the trial be held in-camera and for information not to be published.[320]

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[319] See *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others* 2000 (4) SA 621 (C).

[320] See sections 153 and 154 of the Criminal Procedure Act, 51 of 1977.

The CJA defines a child justice court as any court provided for in the Criminal Procedure Act dealing with a child's bail application, plea, trial or sentencing.[321] Chapter 9 of CJA provides for the specialised child justice courts and how trials involving children must be conducted in matters related to child offenders. In terms of section 63(3), before a plea in a child justice court, the presiding officer must inform the child of the nature of the allegations against them and their rights. Section 63(5) provides that no person may be present at any sitting of a child justice court unless their presence is necessary or the presiding officer permits them to be present.

Article 6[322] of the ECHR protects the right to a fair trial. It provides that an accused person has the right to a fair and public trial or hearing if he has been charged with a criminal offence; or if a public authority is making a decision that impacts the civil rights or obligations. The right to a fair trial includes the right to a public hearing that is held within a reasonable time, is heard by an independent and impartial decision-maker, provides all the relevant information, is open to the public (although the press and public can be excluded for highly sensitive cases), allows representation and an interpreter where appropriate, and is followed by a public decision.

The above right is limited in South Africa via the CJA in that all trials involving child offenders are closed to the public. Once again, the protective shield offered by the CJA could very easily become a sword if there are no checks and balances on the exercise of state power behind closed doors. One would want to imagine that the courts and court officials can be trusted to hold trials outside the public eye, but South Africa’s past tends to indicate that secrecy is a tool of oppression. The researcher is not suggesting that trials involving children should be open to the public. Still, he questions the presiding officer’s discretion to admit the public under certain circumstances where the guidelines for such a decision are not adequately laid down in the CJA.

321 Section 1.
322 European Convention on Human Rights.

2.4.3.4 The right to trial within a reasonable time

The accused person's right to trial within a reasonable time includes consideration of a period before the commencement of the proceedings.[323] The degree of apprehension on the part of the individual that the state is intent on prosecuting them or the extent to which the individual's liberty has been interfered with are animated by the same principles that underly the right to trial within a reasonable time.[324] The independent force of the reasonable time right within a fair trial canon must be given some meaning. A question-begging test in terms of ultimate fairness, while perhaps appropriate for a decision on the remedy, is a conceptually unsatisfactory way of establishing whether the right has been violated in the first place.[325]

Amsterdam argued that the primary form of judicial relief against denial of a speedy trial should be to expedite the trial, not to abort it. [326] The researcher supports this view and submits that it makes sense in a situation where the suspect or the accused is arrested or charged and is suffering prejudice from a failure on the part of the authorities to get the matter settled. Action on the part of the individual concerned to expedite the trial would seem required lest waiver of periods be inescapable inference.[327] But where an individual has been surprised by a prosecution after a matter of years, or is suffering under suspicion but can hardly be expected to demand to be arrested or to be informed of the actual state of the investigation, or where the delay which has already occurred is unreasonable, then expediting the proceedings may only put an end the violation, not

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323 See section 35(3)(d) of the Constitution.

324 See *Moeketsi v Attorney-General, Bophuthatswana, & Another* 1996 (7) BCLR 947, 963 (B).

325 *R v Carosella* (1997) 142 DLR (4th) 595, the majority held that a determination whether a fundamental right has been breach based upon the degree of resulting trial prejudice conflated the remedy question and the violation question. The court categorically held that the question of the degree of prejudice suffered by an accused was not a consideration to be addressed in the context of determining whether a substantive Charter right had been breached, such prejudice being relevant only to the remedy stage. Whatever the merit of this latter, rather striking pronouncement, a similar effort to distinguish the remedy question from the violation question is crucial for a proper approach to a speedy process right in South Africa.

326 Amsterdam A, 'Speedy Criminal Trial: Rights and Remedies' (1975) 27 Stanford LR 525 535.

327 *Berg v Prokureur-Generaal, Gauteng* 1995 (2) SACR 623 (T).

remedy it.[328] In such instances, a damages claim may be more appropriate than a stay of proceedings.[329]

Kriegler J[330] made it quite clear that the jurisprudence of speedy process was not merely a question of stay:

> On the contrary, the true effect and scope of the protection against unreasonable delay is much wider and more significant than and should not be obscure by the more dramatic and far-reaching remedy of a stay of prosecution. The crucial point of s 25(3)(a) is that the Constitution demonstrably ranks the right to a speedy trial in the forefront of the requirements for a fair criminal trial. That means that the state is at all times and in all cases obligated to ensure that accused persons are not exposed to unreasonable delay in the prosecution of the case against them. That, in turn, means that both state prosecutors and presiding officers must be mindful that there are constitutionally bound to prevent infringement of the right to a speedy trial. Where such infringement does occur, or where it appears imminent, there is a duty under s 7(4)(a) to devise and implement an appropriate remedy or combination of remedies.

The CJA provides an extra layer of protection on the right to trial within a reasonable time. It provides that a child justice court must conclude all trials of children as speedily as possible and must ensure that postponements are limited in number and duration.[331] If a child is in detention in prison, a child justice court may, before the commencement of a trial, not postpone the proceedings for a period longer than 14 days at a time; is in detention in a child and youth care centre, a child justice court may, before the commencement of a trial, not postpone the proceedings for a period longer than 30 days at a time; has been released, a child justice court may, before the commencement of a trial, not postpone the proceedings for a period longer than 60 days at a time. Like South Africa, in Scotland, the right to a speedy trial is a human right under which it is asserted that a government prosecutor may not delay the trial of a criminal suspect arbitrarily and indefinitely.[332]

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328 *Bate v Regional Magistrate, Randburg* 1996 (7) BCLR 974 (W).
329 *S v Pennington & Another* 1997 (4) SA 1076 (CC).
330 In *Wild & Another v Hoffert NO & Others* 1997 (2) SACR 542 (SCA).
331 Section 66(1).
332 Article 6 of the European Convention on Human Rights.

2.4.3.5 The right to be present when being tried

The accused's constitutional right to be present when tried is also contained in section 158 of the CPA.[333] This section, however, does not guarantee the physical presence of the witness and the accused in the same room. Provision is made for witness evidence via closed-circuit television or similar electronic media.[334] The circumstances in which criminal proceedings may be conducted without the accused are listed in section 159 of the CPA. Section 160 prescribes the procedures to be followed where an accused is absent.

The accused's presence at a trial is fundamental to fair practice in international law.

2.4.3.6 The right to remain silent

The right to remain silent is a fundamental human right and plays an essential role in international law.[335] It has been included in most international human rights treaties, such as the European Convention on Human Rights and Fundamental Freedoms[336] and the African Charter on Human Rights and Peoples' Rights.[337] Most domestic law also protects the right to a free and fair trial.[338]

In *Murray v United Kingdom*,[339] the court stated that while the right to silence is not absolute, it nevertheless lies at the heart of the notion of a fair trial. The court held that drawing an adverse inference from silence during trial investigations would not violate the right to remain silent. The minority judges held that the attachment of adverse inference while exercising a right to silence during a pre-trial stage is a means of compulsion in that it can constitute a form of direct pressure exerted by the police to obtain evidence from a suspect. The cooperation of the detainee can be obtained during interrogation with the threat of adverse inferences being drawn against him for remaining

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333 Section 35(3)(e).
334 *S v M* [2004] 2 All SA 74 (D).
335 Dugard J *International law: A South African perspective* (2000) 234.
336 See Article 6.
337 See Article 7 and 26.
338 Section 35 of the Constitution.
339 (1996) 22 EHRR 313.

silent. The researcher concurs with the minority judgment and submits that drawing an adverse inference from silence can impose undue pressure on the detainee and compel the detained to self-incriminate.

The African Commission drafted principles and guidelines to resolve legal problems related to human rights and freedoms.[340] These guidelines and principles are not binding on state parties but provide clarity on interpreting the right to a free trial. Part of these guidelines and principles allow the arrested or detained person to have prompt access to a lawyer. Unless the arrested or detained person waives his right in writing, he shall not be obliged to answer any question or participate in any interrogation without their lawyer being present.

There is no provision in the CJA related to the right to remain silent. Such freedom is catered for in section 35(1)(a) of the Constitution. The South African Constitution clearly distinguishes between the right to remain silent at the pre-trial and trial stages.[341] The principle that the accused person can rely on his right to remain silent at the pre-trial, trial and sentencing phase was affirmed by the South African court in *S v Dzukuda*.[342] However, the CJA seem to ignore the right of the child offender to remain silent at the pre-trial stage. One such indication is the probation officer's duty during the assessment to inquire from the child whether they intend to acknowledge responsibility for the offence.[343] Section 1 of CJA defines *acknowledging responsibility* to mean acknowledging responsibility without a formal admission of guilt. In the researcher's view, the definition is vague to the extent that it does not draw a line as to what is or what is not meant by acknowledging responsibility. Whether it means admitting an offence or implying that the child understands the consequences of their action remains a mystery. Moreover, the impact this has on the decision of the inquiry magistrate during the consideration of the assessment report is unclear.

340 Article 45 (1)(b).
341 Section 35(3)(h) of the Constitution.
342 2000 (2) SACR 443 (CC).
343 Section 39(1)(d) of CJA.

The right to remain silent in South Africa was protected before the advent of the Constitution.[344] In *S v Brown*,[345] the court held that, although the right to remain silent was recognized at common law, its constitutional status required a change in emphasis and application. It is generally accepted in South Africa that the right to remain silent at trial may be limited in appropriate circumstances. In *S v Boesak*,[346] the court held that the right to remain silent does not mean that there are no consequences attached to an election to remain silent at trial. Suppose an accused person chooses to remain silent at trial in the face of evidence calling for an answer. In that case, the court is, depending on the weight of the evidence, entitled to conclude, as happened *in casu*, that the evidence is sufficient to prove guilt beyond a reasonable doubt.

In *S v Mankamela & Another*,[347] the Constitutional Court confirmed that the right to silence, like the presumption of innocence, was firmly rooted in South African law. These rights are inextricably linked to the privilege against self-incrimination and the principle of non-compellability of an accused person to function as a witness at trial. The court found that there is nothing unreasonable, oppressive or unduly intrusive in asking an accused, who has already been shown to have stolen goods acquired otherwise than at a public sale, to produce evidence that he had a reasonable cause to believe that the goods were obtained from the owner or some person who had the authority to dispose thereof. The court held that this limitation of the right to remain silent was justified under the circumstances.

According to Dijkhorst,[348]"*… some aspects of the right to silence have become a procedural impediment, which is illogical, unnecessary, unwarranted, unworkable and costly beyond imaginatio*n". He argues that the right to be presumed innocent and remain silent should not be confused. Although both are enshrined in the Constitution and fall within the concept of a fair trial, the principle underlying the presumption of innocence is basically to eliminate the risk of conviction based on factual error. The

344 *R v Mashele & Another* 1944 AD 571 at 583-4.
345 1996 (2) SACR 49 (NC).
346 2001 (1) SA 912 (CC).
347 2000 (3) SA 1 (CC).
348 Dijkhorst K 'The right to silence: Is the game worth the candle?' (2001) 113 *South African Law Journal* 26 – 58.

researcher agrees with the author and submits that the distinction between the two concepts of the right to remain silent and the presumption of innocence should always be maintained.

According to Schwikkard,[349]"*… to draw an adverse inference against the accused on the basis of him relying on his right to remain silent at trial cannot be used as inculpatory evidence against the accused. To allow the drawing of negative inference from a constitutionally inferred right negates the existence of that right*." In the researcher's view, it is illogical to draw an adverse inference on the silence of the accused at the pre-trial stage and even more so at the trial stage, where prima facie evidence has been adduced, relying on the right to remain silent.

Under the South African child justice system, which at the pre-trial stage, is inquisitorial, the challenge lies with the expectation that the child must acknowledge responsibility for committing an offence to be diverted. In the researcher's view, this violates a child's right to remain silent. The acknowledgement of responsibility is tantamount to an admission of guilt. The legislature intended to create a belief that acknowledging responsibility may not form an admission of guilt, but the practical effect is the same. A child who has been diverted after the acknowledgement is already placed on the back foot when they return to court in the event of a mis-diversion. While the acknowledgement of responsibility cannot be used in terms of section 112 of the CPA at the continuing trial, it is clear that the acknowledgement and any subsequent diversion proceeding are known to the witnesses and the court, which must now return to impartially judge the trial where diversion fails. This interferes with the right to be presumed innocent, especially when the pre-trial diversion involved restorative justice and the victim and community were aware that the child had already acknowledged responsibility for the harm.

Germany ratified the UNCRC in February 1992, and it became effective for Germany on April 5, 1992. Germany is also a member of the EHRC. This Convention is fully applicable in Germany and ranks at a level of German statutory law, and this convention's human rights guarantees are taken very seriously.

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[349] Schwikkard PJ *Presumption of innocence* (1999) at 118-125.

One of Germany's most important evidence limitations designed to protect individuals is the privilege against compelled self-incrimination. The German Federal Code is like section 35 of the South African Constitution. Section 136(1) of the German Criminal Procedure Code states that "*at the commencement of the first examination, the accused shall be informed of the offence with which he is charged and of the applicable penal provisions. He shall be advised that the law grants him the right to respond to the accusation, or not to make any statements on the charges, and even prior to examination, to consult with the defence of his choice….*"[350] German courts may not draw inferences if the defendant refuses to answer any questions but may do so if the defendant selectively refuses to answer certain questions.

In Scottish law, a person who has been arrested (but not yet charged) is under no obligation to answer any question other than to provide their details, such as name, residential address, date of birth, place of birth and nationality.[351] This is supported by the duty on the arresting officer (ordinarily a constable) to inform an arrested person that he is under no obligation to say anything other than to furnish his details.[352] It is contended that remaining silent, where one is obliged to provide personal information, might attract additional charges depending on the circumstances. Under Scottish law, an arrested person has a right to have a solicitor present during questioning.[353] Unless the arrested person consent to being interviewed without having a solicitor present, the interview cannot continue until such person's solicitor is present.[354] Apart from the requirement to provide personal details, an arrested person has an absolute statutory right to silence, and the Scottish court of appeal has confirmed such right.[355] Once a person is charged, a constable requires court authorization to question an accused about an offence.[356]

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350 German Criminal Procedure Code available at http:www.iuscomp.org/gla/statutes/StPO.hmt#136 (date of visit 09 February 2019).
351 See section 34(4) of Criminal Justice (Scotland) Act 2016.
352 See section 3(b) of Criminal Justice (Scotland) Act 2016.
353 See *Cadder v HM Advocate* [2010] UKSC 43, and also section 32 of Criminal Justice (Scotland) Act 2016.
354 Section 32(2) of Criminal Justice (Scotland) Act 2016.
355 *Hoekstra v HM Advocate* (No. 5) 2002 STL 599 [107].
356 Section 35(1) of Criminal Justice (Scotland) Act 2016.

The Criminal Justice (Scotland) Act 2016 has protected the right to silence as required by Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms. Although the right to silence is recognized in the Scottish criminal justice system, there is no evidence to suggest its application in the children's hearings system.

2.4.3.7 The right to legal representation

The role of legal representatives in the South African criminal justice system is considered predominantly adversarial, and this depicts a battle between two supposedly equal parties with the presiding officer who plays a role of an umpire, in ensuring that the rules of conduct are implemented within the bounds of enabling legislation. This does not imply that the presiding officer remains passive during proceedings but ensures judicial impartiality, which is essential and protected during the South African criminal process. In contrast, in inquisitorial systems, the defence counsel holds multiple roles, including but not limited to legal representation. The result is better defined within an inquisitorial system where the court guides the search for truth.[357]

In the South African context, defence counsel has a dual obligation to represent the child offender professionally and abide by the duty as an officer of the court whilst at the same time being responsible for conducting themselves within the confines of their professional, ethical code of conduct. The obligation within the field of child justice is arguably more complicated because it is ambiguous and unclear.[358] Before discussing the role of the presiding officer in affording a child offender legal representation in both South African and German jurisdictions, the researcher submits that it is essential to look first at the development of the right to legal representation in Scotland[359] and, after that, compare the South African and German jurisdictions.

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357 See Hodgson J 'The role of criminal defence lawyer in adversarial and inquisitorial procedure' in T Weigend S Walther and B Grundewald (eds) *Strafverteidigung vor Neuen Herausforderugen* (2008) 45 – 59.

358 See Karels M 'The triumvirate role of legal counsel for child offenders: representative, intercessor or agent?' *SACJ* 3 2013, 276 – 300.

359 Scotland children's hearing system is an informal proceeding, therefore, the researcher elects to

In Scotland, before 2002, children, parents, and other relevant people (such as legal guardians) had always been entitled to legal representation at children's hearings.[360] It was rare for solicitors[361] to attend children's hearings. The ruling in *S v Miller*[362] by the European Court of Human Rights brought changes to the right to legal representation. The court ruled that the absence of provisions allowing children to apply for free, independent legal representation in children's hearings appeared to breach their rights to a fair trial under Article 6(1) of the European Convention on Human Rights (ECHR).[363]

The ruling in *S v Miller*[364] resulted in the Children's Hearings (Legal Representation) (Scotland) Rules 2002, allowing hearings to appoint legally qualified safe-guarders or *curator ad litem* to represent children considered as meeting specific criteria for legal representation. For example, legal representation was considered when the child was likely to lose their liberty or to help a child participate effectively in the hearing. From 2002 to 2013, it remained rare for solicitors in Scotland to attend a children's hearing.

The coming into effect of the Children's Hearings (Scotland) Act 2011 enabled the provision of legal aid to children, parents, and/ or other relevant people. The provision of representation in children's hearings is granted only if the applicant meets the financial eligibility criteria established by the Scottish Parliament.[365] The solicitors must register with the Scottish Legal Aid Board and agree to a code of practice that sets standards and competencies.[366]

Discuss legal representation issues separate from other comparable jurisdiction in this study simply because the proceeding is dissimilar.

360 See Porter R *et al* 'The Role of the Solicitor in the Children's Hearings System (2016), 11 available at www.celcis.org – (date of use 15 January 2019).

361 The researcher submits that the term 'Solicitor' is similar to terms such as, legal counsel or lawyer.

362 2001 SC 997.

363 The European Convention on Human Rights (ECHR) is an international convention to protect human rights and political freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953.

364 2001 SC 997.

365 The test applied by Scottish Legal Aid Board takes into account issues such as the complexity of the case, the legal issues involved, and the ability of the applicant to participate in the hearing without the assistance of a solicitor, as well as the financial eligibility of the applicant.

366 See Porter R *et al* 'The Role of the Solicitor in the Children's Hearings System (2016) 13, available at www.celcis.org – (date of use: 15 January 2019).

The availability of legal representation[367] does not end at the children's hearings but extends to other court proceedings concerning children.[368] In all circumstances, the Scottish Legal Aid Board has to be satisfied that certain conditions are met to warrant the provision of legal representation for a child.[369] The Scottish Legal Aid Board also assesses the substantial grounds in applications for legal assistance in making or responding to an appeal.[370]

Although legal assistance is available to children appearing before the children's hearing system, the solicitor's role is not clearly defined. This differs from the South African and German jurisdictions, where mandatory legal representation is the general rule. The researcher submits that the absence of mandatory legal representation renders the Scottish system different from the South African and German juvenile justice systems.

The right to be legally assisted in South Africa applies when a person is suspected of committing a criminal offence.[371] Section 73(1) and (2) of the CPA[372] confirm the fundamental constitutional right to legal representation, whereas section 73(2A) of the CPA seeks to ensure that an accused is timeously and comprehensively informed of the right to legal representation. In *S v Solomons*,[373] Dlodlo AJ remarked, "*It would be extremely dangerous practice for the court to assume that an accused person does not want to be legally represented. On the contrary, the court must be satisfied that the accused person's choice to undertake his defence is indeed an informed choice*." Within the ambit of the child justice system, the right to legal counsel for child offenders is

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367 Section 191 of the Children's Hearings (Scotland) Act 2011 deals with the provision of legal representation and removal of solicitors by inserting the section 28B – 28S in the Act.

368 See section 28C (2) of Children's Hearings (Scotland) Act 2011. In terms of this section, 'If assistance by way of representation has not been made available to the child for the purposes of – proceedings before the sheriff in relation to application in paragraph (a) of subsection (1), the children's hearing mentioned in paragraph (b) or, as the case may be, (c) or (d) of that subsection, and if that children's hearing is deferred, any subsequent children's hearing held under Part 11 of the 2011 Act.'

369 Section 28D (3) lists these conditions -
that it is in the best interest of the child that children's legal aid be made available, that it is reasonable in the particular circumstances of the case that the child should receive children's legal aid, and that, after consideration of the disposable income and disposable capital of the child, the expenses of the case cannot be met without undue hardship to the child.

370 See section 28D (5) of Children's Hearings (Scotland) Act 2011.

371 See section 35(2)(b) and (c) of the constitution.

372 Criminal Procedure Act 51 of 1977.

373 2004 (1) SACR 137 (C) 141e-f.

catered for by specifically sections 80 – 83 of the CJA.[374] Section 80 creates several obligations for defence counsel, including but not limited to upholding the highest standards of ethical behaviour and professional conduct.[375]

According to Karels,[376] "*The subsection appears to indicate that the child has the certainty of exclusive mandate but is thereafter qualified by the caveat that instructions are to be taken from the child only as far as the child is capable of giving them.*" The researcher concurs with Karels and submits that the implied intention of the legislature seems to afford a child a certain degree of autonomy, whilst the legal representative is expected to minimize such freedom if they consider it reasonable in the circumstance. Moreover, there is no test to determine the circumstances under which such autonomy can be limited. The absence of such measures, the researcher submits, renders the subsection ambiguous.[377] Karels uses the best interest standard to justify the legal representative interventionist approach in that it protects the child's interest, particularly at the trial stage.[378]

Section 80(1)(b) of the CJA requires any proceedings to be explained in a manner appropriate to the age and intellectual development of the child. The term 'intellectual development refers to the changes that occur due to growth and experiences in a person's capacity for thinking, reasoning, relating, judging and conceptualization. Judging from intellectual development, the defence counsel is expected to know and understand the child's capacity to understand the proceedings. The challenges imposed by the subsection imply and touch deeper at the unique skills the defence ought to have in dealing with children.[379] The lack of education and training, as well as experience in

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374 Act 75 of 2010.

375 Section 80 detail a number of requirements to be complied with by the legal representatives when representing a child, such as allowing the child, as far as reasonably possible, to give independent instructions concerning the case - section 80(1)(a) of the Act.

376 See Karels M 'The triumvirate role of legal counsel for child offenders: representative, intercessor or agent?' *SACJ* 3 2013, 276 – 300.

377 The researcher hypothetical view on this is that there should be an objective test to determine parameters in which the 'reasonable possibility' can be tested.

378 See Karels M 'The triumvirate role of legal counsel for child offenders: representative, intercessor or agent?' *SACJ* 3 2013, 276 – 300.

379 See Treiman R *et al* 'Language comprehension and production' in Healy A and Proctor R (eds) *Comprehensive Handbook of Psychology, Vol. 4: Experimental Psychology* (2003) 527, 533 – 536 for discussion on how children recognise, and process spoken words.

the education and upbringing of the child, is appalling in both the South African and German child justice jurisdictions.[380]

A further obligation created by subsection 80(1)(c) of the Act requires a defence counsel to promote diversion, where appropriate, but they may not unduly influence a child to acknowledge responsibility. The proviso protects a child offender from being influenced by a defence counsel to acknowledge responsibility.[381] The surprising point is the stage at which legal representation is envisaged and made available. The legislature saw a greater need for legal representation at the trial stage without requiring mandatory representation at pre-trial, which earlier intervention might help to prevent the child from undergoing the entire trial proceedings.[382] The reasons why the legislature could not and did not place such an obligation to provide legal representation at the pre-trial phase of the child justice proceeding remains unclear.

Section 80(1)(d)[383] imposes a similar obligation for providing legal representation at the preliminary inquiry, trial or any other proceedings involving a child. Notwithstanding these obligations, a defence counsel is also required to ensure that all proceedings are concluded without delay and that the child's best interest is upheld at all times. The best interest standard required by the subsection imposes a greater obligation on a defence counsel in that he must protect the interest of the child rather than conducting a valid and reliable defence.[384]

If the defence counsel acts contrary to the obligations created by section 80(1), the presiding officer must record their displeasure by way of an order which is considered

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380 Section 37 of Youth Court Law (Jugendgerichtsgesetz, JGG) provides that "Judges sitting in the youth courts and public prosecutors handling matters involving youths should have appropriate education and training as well as experience in education and upbringing of youths." The researcher refers to a compulsory (and not optional) education and training in South Africa for defence counsel who specialises in child justice system.

381 The meaning of the term 'acknowledge responsibility' is unclear within the context of child justice and section 1 of Child Justice Act, defines it as acknowledging responsibility for an offence without a formal admission of guilt.

382 See Karels M 'The triumvirate role of legal counsel for child offenders: representative, intercessor or agent?' *SACJ* 3 2013, 276 – 300. See also discussion on mandatory legal representation below.

383 Of the Act.

384 Karels M 'The triumvirate role of legal counsel for child offenders: representative, intercessor or agent?' *SACJ* 3 2013, 276 – 300.

an appropriate sanction. The remedial action imposed by the subsection[385] requires the presiding officer to interfere with the defence counsel's actions during the proceedings. Such interference can, particularly during a trial, be regarded as biased and might defeat the object of the adversarial system. The researcher submits that the application of section 80(2) of the Act might have dire consequences in properly administering justice.

The child offender has the right to be represented by the legal counsel of their choice and at their cost from inception until the end of proceedings.[386] In contrast, in Germany, the right to a defence counsel of their choice is shared by their statutory representative and their parents or guardian.[387] In South Africa, if the child cannot afford legal counsel of their own choice, the presiding officer is required to assist the child/youth in obtaining the assistance of legal counsel.[388]

The presiding officer must refer the child to Legal Aid South Africa if the child cannot afford legal counsel.[389] The Act entrusts the presiding officer with the duty of assisting the child in obtaining the services of state legal counsel. The primary aim of the Act is to ensure that the child is legally represented. Section 82 of the Act is equivalent to the constitutionally guaranteed right to legal representation afforded by section 35 of the Constitution.[390] However, the test applied in determining whether the accused be awarded legal counsel at the state's expense for a child offender is different from what section 35 of the Constitution demands.[391]

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385 Section 80(2) of the Act.

386 Section 81 of the Act.

387 The term ‘statutory representation’ is synonymous to the term legal representative used in Germany for a person to assist the youth offender of the youth offender.

388 See section 82 of the Act provides that, where a child appears before a child justice court in terms of Chapter 9 and is not represented by a legal representative of his or her own choice, at his or her own expense the presiding officer must refer the child to Legal Aid South Africa for the matter to be evaluated by the Board as provided for in section 22(1) of the Legal Aid South Africa Act, 2014. No plea may be taken until a child referred to in subsection (1) has been granted a reasonable opportunity to obtain a legal representative or a legal representative has been appointed – Subsections (1) and (2).

389 Section 82 of the Act.

390 Section 35 of the Constitution of the Republic of South Africa, 1996.

391 In *Legal Aid Board v The State* 2011 (1) SACR 166 (SCA), the court pointed out that in determining whether accused is entitled to legal representation at state expense, two questions must be asked: first, whether substantial injustice will occur if the accused are tried without representation; and, if so, second, whether accused are unable to afford costs of representation. The test in the South African child justice system is the best interest standard and not substantial injustice.

2.4.3.8 The right to adduce and challenge evidence

It is a fundamental principle that the accused should be allowed to present his case in court in an effective manner.[392] This will enable him to establish the truth about his guilt or innocence.[393] The right to present one's case applies to all aspects of court proceedings where the court makes a factual finding. This right is an expression of the *audi alteram partem* principle and part of the right to a fair trial. The notion of a fair and adversarial hearing requires that the accused be given an adequate opportunity to challenge and question witnesses against him and present his witnesses in court. The right to present one's case is also subject to the principle of equality of arms which guarantees that both sides will be given the same procedural opportunities to prove their cases.[394]

For the accused to present his case effectively, he must have access to statements of state witnesses to adduce and challenge evidence effectively.[395] The right to present one's case is also linked to the other rights mentioned in section 35 of the Constitution.[396] The right to present one's case contains sub-rights such as the right to cross-examine witnesses, the right to address the court on evidence to be adduced, the right to give and adduce evidence, the right to address the court at the conclusion of the evidence and the right to address the court on sentence. The right to present one's case is effectively fundamental to an accused right to a fair trial.

Cross-examination is a characteristic of the common law adversarial trial system.[397] Section 166 of the CPA provides that the accused has the right to cross-examine state

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392 Section 35(3)(i) of the Constitution.

393 *Rex v Difford* 1937 AD 370.

394 See section 9(1) of the Constitution which provides that "Everyone is equal before the law and has a right to equal protection and benefit of the law."

395 *Shabalala v Attorney-General, Transvaal* 1995 (12) BCLR 1593 (CC).

396 The right is linked to the following rights, the right to present one's case through legal representative in terms of s 35(3)(f); the right to remain silent in terms of s 35(3)(h); the right to present one's case in a language that you understand in terms of s 35(3)(k).

397 Singer "Forensic misconduct by federal prosecutions-and how it grew" (1968) *Alabama Law Review* 227 at 268.

witnesses and any witness called by the court before he presents his case for the defence. The object of cross-examination is, firstly, to obtain information favourable to the party on whose behalf the cross-examination is conducted and, secondly, to cast doubt upon the accuracy of the evidence-in-chief given against such party.[398] The right to cross-examination also exists in respect of a co-accused who has elected to testify.[399] However, the content of cross-examination must be relevant to the accused's credibility as a witness.[400]

The right to cross-examination is not absolute. The right to cross-examination can possibly be abused in a system requiring the judicial officer to play a passive role. The legislature has tried to remedy this situation with the introduction of section 166(3) of the CPA, which provides that the court may, if it appears that cross-examination is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, request the cross-examiner to disclose the relevancy of any particular line of examination. The court may also impose reasonable limits regarding the cross-examination length in line with section 166(3). The court may also order that any submission regarding the relevance of cross-examination be heard in the absence of the witness.[401] It is important to note that section 166(3)(a) does not limit the right to challenge evidence but gives the court the power to control unreasonable questioning.

The judicial officer has discretion and a duty to control undue or improper cross-examination.[402] The court also has the discretion to restrain and control the ambit of cross-examination in section 197(b) of the CPA. The discretion must be exercised in the light of the principles governing relevance.[403] Therefore, an accused cannot state that his right to a fair trial has been infringed if the court intervenes to prevent his lawyer from conducting a bullying or intimidating form of cross-examination, nor if it appears his line of questioning is directed at confusing the witness.

398 *S v Dodo* 1975 (1) SA 641 (T).
399 *R v Stannard* [1964] 1 All ER 34.
400 *S v Pietersen* [2002] 2 All SA 286 (C).
401 Section 166(3)(b).
402 *S v Cele* 1965 (1) AD 82.
403 *S v Pietersen* 2002 (1) SACR 330 (C).

Section 196 of the CPA provides the accused's right to testify in his defence and call witnesses. An accused's right to give and adduce evidence is part of an accused's right to present an effective defence. This right is fundamental to the accused's right to a fair trial. The CJA add extra protection for a child offender by mandating the child justice court to ensure that the best interests of the are upheld during all stages of the trial, especially during cross-examination of a child, that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child.[404] Whether this duty imposed on a presiding officer by CJA is practically possible remains unclear.

While the above summary of contemporary child justice issues paints a picture of the protection of the best interest standard, it is apparent that some of the more problematic issues arise from that same duty to protect a child who has ultimately been accused of a crime and harm to society. Paradoxically, the legislature must protect the child offender and yet punish and deter criminality and ensure justice is seen to be done. Unlike Scotland and Germany, South Africa has a much higher incidence of child offending, and one would hazard to guess that the specific crimes that children involve themselves in are often more heinous than those in Scotland and Germany, where violent child crime is more an anomaly than the norm.

2.5 INCIDENCE OF CHILD OFFENDING IN SOUTH AFRICA

The 2020/21 Inter-Departmental Annual Reports on the Implementation of the Child Justice Act (Act 75 of 2008) indicate children's ages at preliminary inquiries registered during the reporting period.

[404] Section 63(4)(d) of CJA.

TABLE 6: THE 2020/21 INTER-DEPARTMENTAL ANNUAL REPORTS

FINANCIAL YEAR	AGES OF CHILDREN							
	10	**11**	**12**	**13**	**14**	**15**	**16**	**17**
2015/2016	29	71	133	412	1 169	2 467	4 225	6 506
2016/2017	33	72	158	376	966	2 000	3 510	5 001
2017/2018	32	103	192	440	1 059	2 075	3 713	5 767
2018/2019	38	76	186	529	1 178	2 224	3 722	5 666
2019/2020	37	83	277	498	1 393	2 452	4 012	5 711
2020/2021	11	33	165	339	779	1 491	2 441	3 477
% CONTRIBUTION PER AGE FOR 2020/2021	**0,13%**	**0,38%**	**1,89%**	**3,88%**	**8,92%**	**17,07%**	**27,94%**	**39,80%**

The 2020/21 Inter-Departmental Annual Reports also indicate the outcomes of preliminary inquiries recorded during the period were as follows:

TABLE 7: THE 2020/21 INTER-DEPARTMENTAL ANNUAL REPORT OUTCOMES

OUTCOME OF PI	AGE OF THE CHILD								GRAND TOTAL	% CONTRIBUTION PI OUTCOMES
	10	**11**	**12**	**13**	**14**	**15**	**16**	**17**		
CHILD JUSTICE COURT	1	9	58	117	399	774	1358	1928	4644	53%

CHILDREN'S COURT	-	1	5	6	14	17	19	13	75	1%
CRIMINAL COURT - ADULT	-	-	-	2	5	19	26	42	94	1%
DIVERSION	-	4	26	68	196	415	612	878	2199	25%
PI WITHDRAWAL	4	7	29	56	61	85	114	216	572	7%
POSTPONEMENT	4	7	27	51	49	76	114	126	454	5%
RELEASED TO DSD (DEPORTATION)	-	-	-	2	1	-	1	2	6	0%
STRUCK OFF ROLL	2	5	17	33	47	80	152	203	539	6%
WARRANT OF ARREST	-	-	3	4	7	25	45	69	153	2%
GRAND TOTAL	**11**	**33**	**165**	**339**	**779**	**1491**	**2441**	**3477**	**8736**	100%

During this reporting period, 53% of the children that appeared at preliminary inquiries were referred to child justice courts for plea and trial. The majority of the children referred to the child justice court were aged 17 years, followed by 16-year-old children. 25% of children were diverted during the preliminary inquiries. Below are the statistics on the placement of children awaiting trial from the 2015/2016 – 2020/2021 reporting period.

TABLE 8: THE STATISTICS ON THE PLACEMENT OF CHILDREN AWAITING TRIAL FROM THE 2015/2016 – 2020/2021

PERIOD	IN THE CARE OF A PARENT/GUARDIAN	BAIL	IN PRISON	IN CHILD AND YOUTH	POLICE LOCKUP	ON WARNING	TOTAL PLACEMENT

	OR APPROPRIATE ADULT			CARE CENTRE			
2015/2016	5 550	29	887	266	-	1 548	8 280
2016/2017	4 483	16	144	924	148	630	6 345
2017/2018	2 952	17	147	863	91	345	5 643
2018/2019	3 911	29	173	958	93	371	5 535
2019/2020	4 879	57	196	1 387	126	503	7 148
2020/2021	3 320	41	49	853	40	341	4 644

18% of the children awaiting trial were placed in child and youth care centres and only 1% were placed in correctional facilities. 71% of children awaiting trial were released in the care of a parent/guardian or appropriate adult, and 7% were released on a warning. The risks of children contracting COVID-19 in places of detention may have encouraged the release of children into the care of parents, guardians or adults while awaiting trial. The top eight charges against children awaiting trial ranged from rape to robbery, and all have an element of violence, except for the charge of theft, and these are listed below:

TABLE 9: TOP EIGHT CHARGES AGAINST CHILDREN

NO	CHARGES AGAINST CHILDREN AWAITING TRIAL	NO OF CHARGES	%CONTRIBUTION
1	Rape	1 024	22%
2	Assault with intent to do Grievous Bodily Harm	751	16%

3	Murder	356	8%
4	Robbery with Aggravating Circumstances	319	7%
5	Housebreaking with the intent to Steal and Theft	318	7%
6	Assault	288	6%
7	Theft	251	5%
8	Robbery	218	5%

Charges of rape have the highest percentage of 22%, and assault with the intent to do grievous bodily harm contributed 16% of the total number of charges against children awaiting trial and murder charges registered 8%.

The outcomes of trials in the child justice courts recorded during the reporting period are set out below:

TABLE 10: OUTCOMES OF TRIALS 2015-2021

PERIOD	NEW CASES REGISTERED	POSTPONED DURING TRIAL	GUILTY	NOT GUILTY	WITHDRAWN	STRUCK OFF THE ROLL	REFERRED TO CHILDREN'S COURT	DIVERSION SUCCESSFUL	WARRANT OF ARREST
2015/2016	-	9 995	181	154	635	239	-	-	-
2016/2017	-	9 616	280	143	2 628	1 031	-	-	-
2017/2018	5 161	8 847	407	108	1 384	534	-	-	145
2018/2019	6 338	3 673	305	41	1 990	576	50	217	209
2019/2020	7 148	4 061	221	85	1 716	629	71	165	209

2020/2021	4 644	2 462	125	28	1 215	483	26	77	163

The decline in the number of new preliminary inquiries registered resulted in a 35% decrease in the number of cases referred to the child justice court. This also impacted the number of outcomes. Fewer diversion outcomes were successfully recorded, which may be because diversion programmes could not proceed as usual due to COVID-19-related restrictions. The recorded sentences imposed on children during the reporting period are as follows:

TABLE 11: SENTENCES IMPOSED ON CHILDREN 2015-2021

TYPE OF SENTENCE	2015/2016	2016/2017	2017/2018	2018/2019	2019/2020	2020/2021
Community-based sentence	2	2	9	7	4	2
Restorative justice	1	3	4	2	-	1
Alternative to fine	7	8	6	4	4	-
Court fine	-	-	-	12	2	2
Correctional supervision	15	21	46	53	25	9
Compulsory residence at a child and youth care centre	17	26	39	54	43	20
Postponement or suspension of the passing of sentence	97	169	222	303	116	66
Imprisonment	15	51	62	110	27	25

The decline in new cases recorded during the reporting period also resulted in fewer convictions than in previous financial years. Twenty-five children were sentenced to imprisonment, and twenty were sentenced to compulsory residence in child and youth care centres. In most cases, sentences were postponed, or the passing of the sentence was suspended. These sentences are usually accompanied by a condition that prevents the child from committing other offences. If the child does not comply with the suspension conditions, the sentence will be put into operation, or the court will call the child to appear for sentence. Notably, the well-touted restorative justice sentencing option is one of the least used sentencing options in the above report. This adds to the contention that the CJA, while restorative on paper, is ineffective in using restoration over deterrence, and one must wonder why this is the case. The researcher contends that one reason may be that presiding officers are unsure of their roles in this regard or remain untrained to implement this system of justice effectively. One reason may be that most presiding officers in South Africa are trained for the adversarial procedure and thus may not recognise their role or the value of restorative justice.

2.6 PRELIMINARY CONCLUSION

Accusatorial and inquisitorial modes of criminal procedure are the core of almost all the comparative jurisdictions analysed. South Africa, Germany and Scotland have tried to design legislation to protect the interest of child/juvenile offenders with different aims. Germany's juvenile justice system has never been dominated by a social welfare model but rather by the idea that punishment and education be reconciled within the juvenile justice framework. This is dissimilar to Scottish and South African child/youth justice beliefs. For example, the Scottish system is premised on the notion that delinquency forms part of most child's growth and that a formal, accusatory, interventionist philosophy is harmful and counterproductive.

The South African and Scottish child/youth systems aim to protect the child's best interest. Still, the Scottish system operates on the idea that early intervention is necessary to prevent children from committing a criminal offence. The South African system intervenes only when the child has committed a criminal offence. These jurisdictional differences invite scrutiny and offer a potential education incentive to investigate the comparative jurisdictions to establish whether we can learn from their system and transform the South African child justice system for best practices. One such best practice mechanism may be informed by the role of the presiding officer in the execution of justice based on the best interest of the child offender.

From the above discussion, it is clear that the presiding officer in the South African child justice system has a much more far-extended role than would be permitted in the adult criminal justice process. The position borders on inquisitorial approaches. It is doubtful whether South African presiding officers are sufficiently trained for such an approach or appreciative of their different roles when addressing a child offender compared to an adult accused.

In the next chapter, the researcher considers the role and duties of presiding officers in the child justice process in South Africa.

CHAPTER THREE

THE ROLE OF THE PRESIDING OFFICER IN SOUTH AFRICAN CHILD JUSTICE

3.1 INTRODUCTION

In this chapter, the researcher contextualises the research and discusses the role and duty of the presiding officer in the child justice system in South Africa. It presents a procedural critique over and above the points already addressed in chapters one and two. It contextualises the presiding officer's role in the child justice system's pre-trial, trial, and post-trial phases. This chapter aims to critically analyse the role and obligation imposed by the Constitution, CJA, CPA and other relevant legislation. The contents of this chapter will then be compared in later chapters to the position in Germany and Scotland.

3.2 THE PRESIDING OFFICER & CHILD JUSTICE

The CJA defines the presiding officer as an inquiry magistrate or a judicial officer presiding at a child justice court.[405] The researcher posits that the definition in the CJA fails to identify the difference between an inquiry magistrate and a judicial officer regarding their specific roles regarding the child offender. In the researcher's view, both terms seem to be no different. A judicial officer is a person with responsibilities and powers to facilitate, arbitrate, preside over, and make decisions and directions regarding the application of the law. Judicial officers are typically categorized as judges and magistrates. They are also known as persons who determine the establishment of factual circumstances. In South Africa, the terms judicial officer and presiding officer are used interchangeably.

[405] Section 1.

The CJA requires the presiding officer to perform several duties, such as considering the probation officer's report on the issue of age and criminal capacity and ordering an evaluation of the child either of their own accord or if a prosecutor or the child's legal representative requests one.[406] The presiding officer can make an age determination. This differs from an age estimation as the presiding officer sets the child's age where it is uncertain. The age estimation is just an approximation of age based on the information the probation officer collected. At this, the presiding officer gets to decide on the child's age.[407]

The presiding officer is not only limited to the probation officer's report to perform this function. He can consider any other document or statement by a person, subpoena a person to produce an additional document if necessary or call for a medical examination. Once the presiding officer has determined the child's age, they must enter it on the record of proceedings. These duties highlighted here are a few duties performed by the presiding officer. The remainder of the procedural duties are discussed hereunder.

3.3 THE PRESIDING OFFICER & THE PRE-TRIAL PHASE

3.3.1 SECURING ATTENDANCE AT TRIAL

The pre-trial[408] stage in criminal proceedings usually starts with the arrest of a suspect on a reasonable suspicion that a criminal offence was committed. The right to make an arrest is the function of the police and is regulated by the provisions of the CPA.[409] Securing a child offender to appear before the court is regulated by sections 17 to 20 of the CJA.

406 Section 11 of CJA.
407 See section 14.
408 The researcher selected few components of a pre-trial stage with the aim of focusing strictly on the role of the presiding officer in three comparative jurisdictions. Some of the components forming part of a pre-trial stage is not discussed/ investigated simply because the researcher does not want to lose sight of context to which the study is based. Moreover, some components are chronologically highlighted below for the reader's understanding.
409 See section 40 of Criminal Procedure Act 51 of 1977. The Act is applied in South African criminal justice system.

The CJA does not impose any duties to the presiding officer regarding securing the attendance of a child offender. The Act only provides for the responsibilities of the police in respect of a written notice or summons.[410] When handing a written notice to or serving a summons on the child, parent, appropriate adult or guardian, the police officer must inform them of the nature of the allegations against the child; inform them of the child's rights; explain to them the immediate procedures to be followed in terms of the Act; warn the child to appear at the preliminary inquiry on the date, time and place specified in the written notice or summons and to stay there until they are excused; and warn the parent, appropriate adult or guardian to bring or ensure that the child is brought to the preliminary inquiry on the date, time and place specified in the written notice or summons and to stay there until there are excused.[411] Section 20 of CJA provides for the duties of the police officer on the arrest of the child offender.

A child who commits an offence while under the age of 12 years lacks criminal capacity and cannot be prosecuted for that offence.[412] A child who commits a crime between the ages of 12 and 14 is presumed to lack criminal capacity unless the state proves beyond reasonable doubt that he has criminal capacity per section 11.[413] The Act contains three Schedules of offences where Schedule 1[414] represents the less serious offence, Schedule 2 serious offences,[415] and Schedule 3 most serious offences.[416]

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410 See sections 18 and 19 of CJA.

411 See also regulation 16 and 17 of CJA.

412 See section 7(1) of Child Justice Amendment Act, 2019.

413 Section 7(2) of Child Justice Amendment Act, 2019.

414 Schedule 1 represents less serious offences, e.g. theft, whether under common law or statutory provisions, receiving stolen property knowing it to have been stolen or theft by false pretences, where the amount involved does not exceed R2500; fraud, extortion, forgery and uttering or an offence referred to in the Prevention and Combating of Corrupt Activities Act 12 of 2004, where the amount involved does not exceed R1500, etc.

415 Schedule 2 represent serious offences, e.g. theft, whether under common law or statutory provisions, receiving stolen property knowing it to have been stolen or theft by false pretences, where the amount involved does exceed R2500; fraud, extortion, forgery and uttering or an offence referred to in the Prevention and Combating of Corrupt Activities Act 12 of 2004, where the amount involved does exceed R1500, etc.

416 See section 6 of the Act. See also Songca R 'Comparative study on child justice system: Any lesson for South African from Netherlands?' *Journal for Juridical Science* 2016 47 – 67.

3.3.2 THE ROLE OF A PRESIDING OFFICER IN AGE DETERMINATION & PROOF OF CRIMINAL CAPACITY

Suppose the police officers cannot determine the child's age during an arrest. In that case, the police officer is prohibited from arresting the child and must immediately hand the child over to their parents or an appropriate adult or guardian. If the absence of those mentioned above, the police officers must hand the child to a suitable child and youth care centre.[417] It is important to note that the child's age and what Schedule of offence the child is alleged to have committed determines detention or placement.[418] The police are not permitted to release the child offender on bail even when the crime committed warrants release on police bail.[419]

The Child Justice Amendment Act 2019 has raised the minimum age of criminal capacity to 12 years of age. In terms of the Act, a child below the age of 12 years cannot be prosecuted. The Act also states that a child who is 12 years or older but under the age of 14 years at the time of the alleged commission of the offence is presumed not to have criminal capacity unless it is subsequently proved beyond a reasonable doubt that the child had such capacity at the time of the alleged commission of the offence.[420] Children

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417 See section 9 of the Act.

418 A child who is 12 years old or older, but below the age of 18 years has the right not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time; to be treated in a manner and kept in conditions that take account of the child's age; to be kept separately from adults, and with boys separated from girls, while in detention; to a family, parental or appropriate alternative care; to be protected from maltreatment, neglect, abuse or degradation; and not be subjected to practices that could endanger the child's well-being, education, physical or mental health or spiritual, moral or social development – section 28 of the Act.

419 See section 24 of the Act. Section 25(1) of the Act provides that Chapter 9 of Act 51 of 1977 (that is, bail chapter) applies to an application for the release of a child on bail, except for Subsections 59 and 59A, to the extent set out in s 21(2)(b) of the Act. Section 25(2) of the Act provides that an application for the release of a child, referred to in section 21(3)(c), on bail, must be considered in the following three stages:

a) whether the interests of justice permit the released of the child on bail; and
b) if so, a separate inquire must be held into the ability of the child and his or her parent, an appropriate adult or guardian to pay the amount of money being considered or any other appropriate amount; and
c) if after an inquiry referred to in paragraph *(b)*, it is found that the child and his or her parent, an appropriate adult or guardian are – (i) unable to pay any amount of money, the presiding officer must set appropriate conditions that do not include an amount of money for the release of the child on bail; or (ii) able to pay an amount of money, the presiding officer must set conditions for the release of the child on bail and an amount which is appropriate in the circumstances.

420 Section 7(2).

who are 14 years and older continue to have total criminal capacity. This means that the *doli capax* (child has a criminal capacity) and *doli incapax* (child does not have criminal capacity) presumptions are retained while the minimum age has changed.

Per section 11, criminal capacity must be proven beyond a reasonable doubt. The presiding officer must regard the probation officer's report in deciding whether criminal capacity has been established. The presiding officer can order an evaluation of the child on their own accord or if a prosecutor or the child's legal representative requests one. Many children accused of crimes in South Africa do not know their exact ages. This is a problematic situation and must be considered against the specific socioeconomic and educational context of the majority of the South African population.

The Act proposes specific measures for determining a child's age. In section 14, the inquiry magistrate at the preliminary inquiry or a judicial officer who presides in a child justice court can make an age determination. This differs from an age estimation as the presiding officer sets the child's age where it is uncertain. The age estimation is just an approximation of the age based on the information the probation officer collected. The presiding officer gets to decide on the child's age. In determining a child's age, the presiding officer may consider the age estimation report by the probation officer or any other document or statement by a person, subpoena a person to produce additional documents if necessary or call for a medical examination if required.[421] Once the presiding officer has determined the child's age, they must enter it on the record of proceedings.[422]

Where there is uncertainty as to whether a person appearing before any other court was over or under the age of 18 years at the time of the commission of the alleged offence, the court must determine the age of that person following section 14; and where necessary alter the record to reflect the correct age of that person, following the provisions of section 16 of CJA.[423] Suppose at any stage during the proceedings that a presiding officer is satisfied based on evidence that the age of a child or adult alleged to

421 Section 14(2).
422 Section 14(3).
423 Section 15 of CJA.

have committed an offence is incorrect. In that case, the age must be altered on the record of the proceedings following section 14. If it is found that the person is a child, the proceedings must be finalised following CJA, but if he is found to be an adult, it must be completed following the provisions of the CPA.[424]

If a presiding officer believes that an error regarding age may have caused any prejudice to a person during the proceedings, the presiding officer must transmit the record of the proceedings to the registrar of the High Court having jurisdiction.[425] However, if a presiding officer believes that an error regarding age has not caused any prejudice to the person, the presiding officer must continue with the proceedings regarding the provisions of CJA per the altered age.[426]

The CJA places the presiding officer in a difficult position in dealing with age determination and proof of criminal capacity. The first difficulty is that the presiding officer is not trained in determining the developmental stages of children. How can a presiding officer – even with access to a probation report - differentiate or identify a wide variation in terms of what is considered normal caused by variation in genetic, cognitive, physical, family, cultural, nutritional, educational, and environmental factors? Learning about child development involves studying patterns of growth and development from which guidelines for normal development are construed. The lack of this professional skill by the presiding may seriously impact the ability to determine the age of the child offender as mandated by the CJA.

The second difficulty relates to the duty of ensuring a child's best interests are of paramount importance in every matter concerning the child envisaged by section 28(2) of the Constitution. How is the preliminary inquiry or child justice court to establish the operational thrust for the paramountcy principle and guard against spreading the paramountcy principle too thin or too broad? How is it to avoid risking the paramountcy principle being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the

424 Section 16(1)(a) and (b) of CJA.
425 Section 16(2) of CJA. See also sections 303 and 304 of the Criminal Procedure Act, 51 of 1977.
426 Section 16(3) of CJA.

objective of section 28(2)? The researcher posits that it is unclear whether section 28(2) can be engaged as an independent right or as a principle or constitutional standard that informs the interpretation of a statute when dealing with child offenders.

Section 28(2), construed as an independent right, has significant consequences. It extends the reach of children's rights beyond section 28(1) of the Constitution, with the advantage that the child's interests would be considered even if a specific legal issue does not squarely fit into the more specific provisions of section 28(1). Further, declaring section 28(2) a right makes section 36 of the Constitution the only way in which this section can be limited.

The problem in declaring section 28(2) as an independent right is that the court has not defined the content of section 28(2) and has seldom utilised section 36 to justify limitations to the best interests.[427] The court has systematically avoided clearly defining the legal content of section 28(2) to preserve its flexibility.[428] This is problematic because it continues to expose the child's best interest to the vagueness and indeterminacy criticism which often levelled against this standard. The broadness of the standard may represent a temptation for the courts to utilise it even when more specific legal provisions are relevant. The lack of clarity regarding these issues makes it even more difficult for a presiding officer to discharge his duties required by the CJA. The latter difficulty is carried over to the preliminary inquiry.

3.3.3 THE PRESIDING OFFICER & PRELIMINARY INQUIRY

The preliminary inquiry[429] is regarded as the first appearance of the child offender in court, where the inquiry magistrate plays an inquisitorial role. Such a position requires

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427 Bonthuys E The best interests of children in the South African Constitution 2006 *International Journal of Law, Policy and the Family* 23-43.

428 *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC).

429 Section 43 of the Act set out the purpose of preliminary inquiry as follows: to consider the assessment report and recommendations made by the probation officer; establish from the prosecutor whether the matter can be diverted before plea; Identify a suitable diversion option, if applicable; decide whether the matter should be referred to the children's court on account of a child possibly being in need of care and protection; make sure that all relevant information relating to a child is considered

the inquiry magistrate to actively participate in the proceedings to protect a child's best interest. The researcher opines that this creates difficulty for the presiding officer in exercising his duties. The first problem relates to the inquisitorial role of the presiding officer, and the second relates to applying the best interest standard as envisaged by section 28(2) of the Constitution.

It is generally accepted that in the inquisitorial system, a judicial officer controls the pre-trial stage, the investigation and the gathering of the evidence. The dossier containing the witnesses' statements and other materials is also at the disposal of the prosecution and defence. The judicial officer decides whether there are grounds for prosecution and determines which witnesses to call and conduct the questioning. As a trier of fact, an open evidence system is followed, which means that all relevant evidence is considered, thus excluding exclusionary rules. The preliminary inquiry, however, does not meet the general standard of the inquisitorial system as stipulated above, even though it is construed legislatively as an inquisitorial procedure.

The CJA does not define the inquisitorial role; it is left to the presiding officer to decide what is required to perform his duties. Further, the CJA defines the preliminary inquiry as an informal pre-trial procedure which may be held in a court or any other suitable place.[430] The nature of informality of the preliminary inquiry is also left to the presiding officer to decide to what extent such informality might be. It remains unclear how an adversarial system can be flipped to a defective inquisitorial procedure without considering its impact on the right to a fair trial. How can the presiding officer be expected to protect the child's best interests by imposing an inquisitorial role in adversarial proceedings remains a mystery.

The Act requires that the child appears before an inquiry magistrate within 24 hours when the child is detained after arrest.[431] After hearing submissions from the prosecutor and having considered the assessment report, the inquiry magistrate decides whether the child offender should be detained, placed in a child or youth care centre, released

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when decisions are made regarding diversion or release and detention; ensure that the views of all present are taken into account; and determine the release or placement of a child.

430 Section 43(1).

431 See section 20 of the Act and section 50(d) of Criminal Procedure Act 51 of 1977.

on bail, or released on their recognizance.[432] Section 11(5) of the Act provides that where the inquiry magistrate has found that the child's criminal capacity has not been proved beyond a reasonable doubt, the inquiry magistrate, if it is in the interests of the child, can cause the child to be taken to a probation officer for any further action.

A preliminary inquiry can be postponed for 48 hours for several reasons, such as finalizing a decision regarding diversion; establishing the victim's views on whether the child should be diverted; finding alternatives to detention; assessing the child where no assessment has been previously undertaken or for further investigation.[433] One postponement for 48 hours is permitted at this preliminary inquiry stage and only to facilitate diversion.[434] If a preliminary inquiry cannot be finalized at this stage, the inquiry must be closed, and the matter must proceed to a plea and trial.[435]

The inquiry magistrate can make two orders at the preliminary inquiry, namely, diversion and that the matter is referred to a child justice court for plea and trial.[436] If the case is referred for plea and trial, the inquiry magistrate must inform the child of the charges against them and refer the child to Legal Aid South Africa if the child cannot afford the services for his legal representation. The inquiry magistrate must ensure that if the child offender is on warning, warn the child, parent, or guardian to appear before a child justice court on the date specified in the remand. The same duty applies to the presiding officer when the child is on bail or when their bail conditions are extended.

3.3.4 DETENTION, RELEASE & BAIL OF CHILD OFFENDERS

Section 21 of CJA sets out the approach for releasing a child who has been arrested. When considering the release or detention of a child who has been arrested, preference must be given to releasing the child. A police official must, in respect of an offence referred to in Schedule 1, where appropriate, release a child on written notice into the

[432] See section 32 and 33 of the Act.
[433] See section 48 of the Act.
[434] Section 48(2) of the Act.
[435] Section 48 of the Act.
[436] Section 49 of the Act.

care of a parent, an appropriate adult or a guardian.[437] However, the police officer doesn't have to release the child when the child's parent or an appropriate adult or guardian cannot be located or is not available, and all reasonable efforts have been made to locate them; or there is a substantial risk that the child may be a danger to any other person or themselves.[438]

The CJA provides three options for releasing a child who has not yet been released at the preliminary inquiry or later in the child justice court.[439] A presiding officer may, in respect of any offence, release a child into the care of a parent, an appropriate adult or a guardian; concerning an offence referred to in Schedule 1 or 2, release a child on their recognisance; or if a child is not released from detention, release the child on bail. A child can only be released into the care of a parent, guardian, or appropriate adult or on his recognisance if it is in the interests of justice to release the child.[440] Section 24(3) sets out the factors which indicate whether it would be in the best interests of justice to release the child. These include the best interests of the child, whether the child has previous convictions; the fact that the child is 12 years or older but under the age of 14 years and is presumed to lack criminal capacity; the interests and safety of the community in which the child resides; and the seriousness of the offence.

If the presiding officer decides to release the child, he may release the child on certain conditions, which can include reporting to the police, attending school, residing at a particular address, being placed under a specified person's supervision and so forth.[441] If a child is released into the care of a parent, appropriate adult or guardian, the presiding officer must warn the parent, guardian or appropriate adult to appear on the next appearance date and ensure that the child complies with any conditions set.[442] If a child is released on their recognisance, the presiding officer must warn the child to appear on a specified date and at a specified time and place.[443]

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437 Section 21(2)(a) of CJA.
438 Section 22(1) of CJA.
439 Section 21(3) of CJA.
440 Section 24(2)(a) and (b) of CJA.
441 Section 24(4) of CJA.
442 Section 24(5) of CJA.
443 Section 24(6) of CJA.

If a child fails to appear on the date, time and place specified or comply with any conditions set, the presiding officer may issue a warrant for the child's arrest or cause a summons to be issued. When a child appears before the presiding officer according to this warrant of arrest or summons, the presiding officer must inquire into the reasons for the child's failure to appear or comply with the conditions and determine whether or not the failure is due to the child's fault.[444] If it is found that the failure is not the child's fault, the presiding officer may order the child's release under the same conditions; or order the child's release on any other condition; and, if necessary, make an appropriate order which will assist the child and their family to comply the conditions initially imposed. If it is found that the failure is the child's fault, the presiding officer may order the child's release under different or further conditions or order that the child is detained.[445]

Section 25 of CJA deals with bail and provides for a specific procedure. In this section, an application for the release of a child on bail must be considered in three stages, namely, whether the interests of justice permit the release of the child on bail. If so, a separate inquiry must be held into the child's ability and their parent, an appropriate adult or guardian, to pay the amount considered or any other appropriate amount. Suppose the child and their parent, an appropriate adult or guardian, cannot pay any money after the inquiry. In that case, the presiding officer must set appropriate conditions that do not include an amount of money for the release of the child on bail. However, if the child can pay an amount of money, the presiding officer must set conditions for the release of the child on bail and an appropriate amount in the circumstances.

If, after the child's first appearance at the preliminary inquiry and the child is not yet released and the court decides to continue detaining the child, the presiding officer may place the child in a suitable child and youth care centre or prison, where applicable.[446] In determining whether to place the child in a child and youth care centre, the presiding must take the following factors into account, namely, the age and maturity of the child; the seriousness of the offence in question; the risk that the child may be a danger to himself, herself or to any other person or child in the child and youth care centre; the

444 Section 24(7) of CJA.
445 Section 24(7) of CJA.
446 Section 26(3) of CJA.

appropriateness of the level of security of the child and youth care centre when regard is had to the seriousness of the offence allegedly committed by the child; and the availability of accommodation in an appropriate child and youth care centre.[447] The presiding officer must also consider the recommendations in the probation officer's assessment report.[448]

Section 30 deals with the detention of a child in prison awaiting trial. It provides that a presiding officer may only send children to prison pending trial if they are 14 years or older and charged with a Schedule 3 offence.[449] However, a presiding officer can send a child 14 years or older charged with a Schedule 1 or 2 offence to prison awaiting trial if, in addition to all the factors listed in section 30(1) and subsection (3), there are substantial and compelling reasons to do so, and these reasons must be placed on the record;[450] the detention is necessary for the interest of the administration of justice or the safety or protection of the public or the child or another child in custody; there is a likelihood that the child if convicted, could be sentenced to imprisonment; and a bail application has been postponed or refused, or the child has not complied with bail conditions once granted.

If a child is in detention awaiting trial either in a child and youth care centre or prison, the presiding officer must, at every court appearance, determine whether or not the detention is or remains necessary and whether the placement is or remains appropriate; enter the reasons for the detention or further detention on the record of the proceedings; consider a reduction of the amount of bail, if applicable; inquire whether or not the child is being treated properly and being kept in suitable conditions, if applicable; if not satisfied that the child is being treated properly and being held in suitable conditions, order that an inspection or investigation be undertaken into the treatment and conditions and make an appropriate remedial order; and enter the reasons for any decision made in this regard on the record of proceedings.[451]

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447 Section 29(2) of CJA.
448 Section 40(2) of CJA.
449 Section 30(1) of CJA.
450 Section 30(5) of CJA.
451 Section 32 of CJA.

Again, the more significant challenge for the presiding officer in determining the detention, release and bail of a child offender lies in applying the best interest standard. The main problem here is whether the presiding officer must apply section 28(2) by itself only when more specific constitutional standards are not available to justify his decision or whether the presiding officer must apply section 28(2) as the starting point in matters concerning the child. It is uncertain whether the *best interest of the child* is used to designate a certain outcome or the legal requirements arising from section 28(2). Viewed differently, one could argue that the release or detention of a child offender turns on the best interest standard as opposed to the relevant sections of the enabling legislation, which would render the decision subjective and unfair when countered against an adult in the same position. While the child's best interests are a consideration, one would be hard-pressed to find a situation where detention would ever be in the child's best interest.

Further, the community must be protected from the child offender, and such protection may warrant continued detention. Here the child's best interest must be weighed against the community's right to protection and justice. Again, the best interest standard applied to criminal cases causes an unexpected set of problems for a presiding officer to consider.

3.3.5 THE PRELIMINARY INQUIRY

Section 43 of CJA provides that the preliminary inquiry is an informal pre-trial procedure and may be held in a court or other suitable place. While this is essentially the child's first appearance in a court, the informality of the procedure and the reasons, therefore, are not clear in the Act. On the one hand, the preliminary inquiry is a formal first appearance, but on the other, the Act seems to indicate that it is an informal quasi-welfare hearing. If the informality of the preliminary inquiry is to deal with the child outside the court environment, the researcher posits that the entire process of child justice can be dealt with outside the formal court environment.

The purpose of the preliminary inquiry is to consider the assessment report and recommendations made by the probation officer; establish from the prosecutor whether

the matter can be diverted before the plea; identify a suitable diversion option; decide whether the case should be referred to the children's court on account of the child possibly needing care and protection; make sure that all relevant information relating to the child is considered when decisions are made regarding diversion or release and detention; ensure that the views of all present are taken into account; encourage the participation of the child and their parent, an appropriate adult or a guardian in decisions concerning the child; and determine the release or placement of a child.[452]

The inquiry magistrate chairs the preliminary inquiry and has the power to determine who attends.[453] The inquiry magistrate can excuse any person if it is in the interests of a child to proceed without them or if they are undermining the nature and purposes of the inquiry. The reasons for such exclusion must be recorded.[454] Two orders are made during the preliminary inquiry.[455] The first is the diversion order if the child is diverted in section 52(2) of CJA. If the child is 12 years or older, but under 14, the inquiry magistrate must first be satisfied that the child has a criminal capacity. The second is an order that the matter is referred to the child justice court for plea and trial.[456]

If such an order is made, the magistrate must refer the child to Legal Aid South Africa for legal representation if the child does not already have a legal representative. If the child is in detention, the inquiry magistrate must inform the child of the charge against them and when they must appear in the child justice court. The inquiry magistrate must also warn the child's parent, guardian, or appropriate adult to be at the next appearance.[457] If the child is not in detention, the inquiry magistrate can extend any condition of release and must warn the child, the child's parent, guardian, or appropriate adult when to appear next at the child justice court.

How the presiding officer is expected to protect the child's best interests by imposing an inquisitorial role in an adversarial proceeding remains a mystery. The further challenge for the presiding officer in the preliminary inquiry lies in applying the best interest

452 Section 43 of CJA.
453 Section 44(5) of CJA.
454 Section 44 of CJA.
455 See section 49 of Child Justice Amendment Act, 2019.
456 Section 49(2) of CJA.
457 Section 49(2)(c)(ii) of CJA.

standard. The main problem here is whether the presiding officer must use section 28(2) by itself only when more specific constitutional standards are not available to justify his decision or whether the presiding officer must apply section 28(2) as the starting point in matters concerning the child. It seems uncertain if the child's best interests are used to designate a specific outcome or the legal requirements arising from section 28(2).

3.4 THE PRESIDING OFFICER & THE TRIAL PHASE

Before appearing in a child justice court, a child or their legal representative has a right to be furnished by the state with copies of the docket to prepare for their defence. It is important to note that referring the matter to a child justice court for plea and trial does not prevent the child from being sent for diversion. If the court sees fit to divert the matter during the trial, it can do so by postponing the matter pending the child's compliance with the diversion order. If the matter is diverted, the court must warn the child that failure to comply with the diversion order may result in any acknowledgement being recorded as an admission of guilt when the trial proceeds.[458]

The researcher opines that the above is problematic because the CJA does not define the meaning of acknowledgement of responsibility. Moreover, the child offender is threatened by recording the acknowledgement of responsibility as an admission if he does not comply with the diversion order when such acknowledgement of responsibility was obtained in violation of the child offender's right to remain silent.

Section 65 of CJA provides that a child must be assisted by their parent, guardian or appropriate adult in a child justice court. However, suppose they could not be traced or located. In that case, the presiding officer can dispense with this requirement if it is in the child's best interests or is not prejudicial to the administration of justice. The presiding officer is further placed in a difficult position by CJA. The determination of the best interests of the child, as explained above, poses challenges. One such challenge is how

[458] See Gallinetti J 'Getting to know the Child Justice Act' Child Justice Alliance 48 available at www.childjustice.org.za>publications - (date of use: 13 February 2019).

the presiding officer can determine what is in the child's best interests and the legal content of section 28(2) of the Constitution within the bounds of a criminal trial. By its very nature, a criminal trial will never be in a child offender's best interest. Yet, the court is expected to use the standard to determine various matters during the plea and trial stage.

If the parent, guardian, or an appropriate adult fails to attend after being warned, they can be found guilty of an offence and fined or imprisoned for up to 3 months.[459] The parent, guardian or appropriate adult can also apply to be exempted from attending the court proceedings, and if granted, the presiding officer must exempt them in writing. If a child is not assisted by a parent, guardian or appropriate adult, then the presiding officer can, in exceptional circumstances, appoint an independent observer to help the child.[460]

Section 66 of the Act gives effect to the constitutional right to a speedy trial contained in section 35 of the Constitution by providing that all trials must be concluded as speedily as possible with as few postponements as necessary. If a child is detained in prison, the matter, before the commencement of the trial, cannot be postponed for longer than 14 days at a time. If a child is detained in a child youth and care centre, the matter cannot be postponed for more than 30 days at a time. If a child has been released, the case cannot be postponed for more than 60 days at a time.[461]

From the above discussion of sections 63 – 67, it is clear that the CJA does not preclude the regular operation of the CPA. Thus, specific procedural concerns arise regarding the applicability or not of certain sections of the CPA on child offenders. These relate to the presiding officer's role and are discussed below.

459 Section 65 of CJA.
460 Section 65 of CJA.
461 Section 66(2) of CJA.

3.4.1 MANDATORY LEGAL REPRESENTATION

The CJA[462] mandates legal representation for child offenders in any case before the child justice court. The right to legal representation cannot be waived, and no plea may be entered until the child is legally represented.[463] The proviso aims to protect a child who refuses to give instructions to an appointed legal representative or declines representation. The presiding officer may then appoint a legal representative to assist the court.[464] Regulation 48(2) lists various duties to be performed by a court-appointed legal representative.[465]

According to Karels,[466] when dealing with mandatory legal representation, *"..three aspects of section 83 requires clarification within the aims of the Act, read with the constitutional rights stipulated in section 35(3)(f) of the Bill of Rights.., (i) Does section 83 of the Child Justice Act infringe on a child offender's fair trial rights in terms of section 35(f) of the constitution and, if so, to what degree is the limitation justified in terms of the limitation clause?; (ii) Is the content of regulation 48 overly prescriptive to the extent that it disturbs the accepted definition of an attorney-client relationship?; and, (iii) Should waiver of representation not be investigated with a higher degree of procedural certainty*

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462 Section 83 of CJA.

463 Section 83(1) provides that "No child appearing before a child justice court may waive his or her right to legal representation".

464 In terms of Regulation 48(1) A legal representative appointed in accordance with section 83 of the Act must –
Attend all the court proceedings in respect of the case, unless excused by the court;
Address the court on any matter requested by the court;
Have access to the documents and statements in the docket to the extent permissible in criminal proceedings;
Ensure that the best interests of the child are upheld at all time.

465 Regulation 48(2) A legal representative appointed to assist the court may –
a) Address the court on the merits and procedural aspects of the case;
b) Address the court on the sentence to be imposed;
c) Cross-examine witness in relation to the evidence adduced by a witness;
d) Discredit the evidence of a witness;
e) Raise an objection to a question posed to the child or state witness;
f) Question the admissibility of evidence led by the state;
g) Present evidence that will be in the best interests of the child; or assist in any manner as the court may request.

466 Karels M 'Waiver of counsel in South African child justice: An autonomous exercise of rights' *Journal for Juridical Science* 2015 40(1): 35 – 49.

than currently permitted?". The researcher agrees that these questions need clarification.

In *S v CS*[467] the court remarked that "*legal representation of a child who appears before a child justice court is compulsory, if not peremptory*." The court further pointed out that some of the Act's provisions were not clearly drafted, in that, for the court to get the true meaning of the statute or some of its sections, the full provisions of the Act had to be considered.[468] The researcher submits that this also contributes to the challenges imposed by the Act in the administration of justice. One will argue that mandatory legal representation protects a child offender's interest. However, such protection cannot be guaranteed, notably when the defence counsel lacks the requisite skills (or training in child-related matters) to uphold the child's best interest.

The further challenge created by section 83[469] is the limitation of the rights of a child offender to choose a legal practitioner of choice. The wording of subsection (1)[470] clarifies that the right to legal representation cannot be waived. Whether or not the limitation imposed by section 83(1) infringes the accused's right to choose legal representation in section 35 of the Constitution[471] is still yet to be determined. The test prescribed by section 36 of the Constitution must be applied to answer this question.[472] The irony created by the Act is that by the time the child offender goes to trial, issues of capacity have already been decided.[473] Once a child's capacity to stand trial has been determined, it implies that the child offender has been adjudged to know the difference between right and wrong and can act following that appreciation. The researcher submits

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467 2012 (1) SACR 595 (E), 10.
468 2012 (1) SACR 595 (E), 12.
469 Of the Act.
470 Section 83 of the Act.
471 The Constitution of the Republic of South Africa, 1996.
472 Section 36 provides that, (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic based on human dignity, equality, and freedom, taking into account all relevant factors, including –
   a) the nature of the right;
   b) the importance of the purpose of the limitation;
   c) the nature and extent of limitation;
   d) the relation between the limitation and its purpose; and
   e) less restrictive means to achieve the purpose.
473 See section 4, 7 and 11 of the Child Justice Act.

that the child justice system cannot rely on the child to decide whether or not to be legally represented in a subsequent trial.

Section 83(2) creates an alternative to subsection (1).[474] It seems that the legislature intends to ensure that the child appearing in a child justice court is always legally represented.[475] The controversy surrounding section 83(2) is whether the duties performed by, as well as the rights of, the legal representative appointed to assist the court are similar to a self-appointed legal representative. The court attempts to justify mandatory legal representation in *S v CS*,[476] which cannot be ignored. To substantiate its assertion, the court pointed out the lack of wisdom and maturity on the part of the child and the lack of necessary experience on the part of the legal representative as the only justification for mandatory legal representation. Whilst the issues raised by the court are essential, it does not and cannot outweigh the importance of the attorney-client relationship. There is the possibility that the relationship of trust between the child and the mandatory legal representative might, from the onset, be tainted. In the researcher's view, the limitation imposed by section 83(1) and regulation 48 infringes the right of child offenders enshrined in section 35 of the Constitution.

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474 Section 83(2) provides that – If a child referred to in subsection (1) does not wish to have a legal representation or declines to give instructions to an appointed legal representative, the court must enter this on the record of the proceedings and a legal representative must, subject to the provisions of the Legal Aid Manual referred to in section 24(1) of the Legal Aid South Africa Act, 2014, be appointed by Legal Aid South Africa to assist the court in the prescribed manner.

475 See regulation 48.

476 2012 (1) SACR 595 (ECP) [14], the court assert that:
'Due to a lack of wisdom and maturity, a child accused can make blunders in the manner in which they instruct his or her legal representative. The legal representative may as well lack the necessary experience and therefore may find himself or herself floundering in the process of representing a child accused. It is for that reason and others, that the legislature saw it fit to ensure that proper application of administration of justice by not only making provisions for the child's legal representation to be in court for the benefit of the child, but to have such proceedings reviewed even in cases where the child is legally represented. The purpose for the legislation is to protect the child from the ills of either ignorance, or immaturity and to ensure the proper administration of justice in all criminal trials, which involves the child accused…'

3.4.2 DIVERSION AS A FORM OF BARGAINING – COMPARING THE CHILD JUSTICE ACT AND SECTION 105A OF THE CRIMINAL PROCEDURE ACT CONCERNING THE ROLE OF THE PRESIDING OFFICER

The CJA uses diversion to prevent children from being exposed to the adverse effects of the formal justice system.[477] Diversion involves the referral of cases away from the formal criminal court procedures where a suitable amount of evidence exists to prosecute. In terms of the CJA, diversion is achieved in three ways. Firstly, by way of prosecutorial diversion for minor offences committed. Secondly, at the preliminary inquiry, through an order of the inquiry magistrate. Thirdly, during the trial in the child justice court, through an order of the court.

Section 51 of CJA states the objectives of diversion are to deal with a child outside the criminal justice system in appropriate cases; encourage the child to be accountable for the harm caused by them; meet the particular needs of the individual child; promote the reintegration of the child into their family and community; provide an opportunity to those affected by the harm to express their views on its impact on them; encourage the rendering to the victim of some symbolic benefit as compensation; promote reconciliation between the child and the person or community harmed; prevent stigmatising the child and the adverse consequences flowing from being subject to the criminal justice system; reduce the potential for re-offending; prevent a child from having a criminal record, and promote the dignity and well-being of the child, and the development of their sense of self-worth and ability to contribute to society.

From the diversion objectives, it is clear that the primary purpose is to prevent stigmatising the child and the adverse consequences of being subjected to the criminal justice system. However, there are scenarios where a child offender will end up experiencing the negative effects of being subject to the criminal justice system, irrespective of whether it is their fault. This, in the researcher's view, defeats the entire purpose of diversion.

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477 Section 2 of CJA.

Various diversion options may be used in combination with each other.[478] An individual diversion option meeting the objectives of diversion may be developed for a particular child.[479] This allows for flexibility and creativity where a specific child's needs are not explicitly catered for by the options available.

Section 41 provides that prosecutors can divert certain matters before the preliminary inquiry. This only applies if it involves a Schedule 1 offence, and the diversion may only be to a level 1 diversion option.[480] In addition, this may only occur if the prosecutor is satisfied that certain factors are present. These factors include that the child must acknowledge responsibility for the offence; there must be a *prima facie* case against the child; the child must not be unduly influenced; and the child and their parent, guardian or appropriate adult must consent to the diversion.[481]

There are various problems created by section 52(1) of CJA. Firstly, is the requirement that the child must acknowledge responsibility. To acknowledge responsibility implies that the child must admit the offence with which they are charged. To think otherwise is to fly in the face of criminal justice. If the Act wants to temper the meaning of acknowledging responsibility for something less than guilt, it creates a problem whereby one can question the legality of diversion where there is no clear certainty if the child is guilty or not. One cannot subject a child to any procedure if the elements of the offence are not admitted. This, however, seems to be the current situation – a child is only diverted if he acknowledges, yet acknowledging is not an admission of guilt.

If there is a prima facie case and the child acknowledges responsibility, the benefit for the offender is a diversion. Moreover, if the child fails to complete diversion for whatever reason, the possibility is that they will formally face the charge in the child justice court. Is this not tantamount to plea bargaining? How can a child offender be placed in a position to choose between acknowledging responsibility and the adverse consequences of being subject to the criminal justice system? If one accepts that

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478 Section 54(2) of CJA.
479 Section 54(3) of CJA.
480 Level 1 applies to Schedule 1 offences, and if any time is applicable, may not exceed – 12 months in the case of children under the age of 14 years, and 48 months for children 14 years of age or older.
481 Section 52(1)(a)-(d) of CJA.

diversion has some characteristics of plea bargaining (i.e., reduction in punishment or no punishment for acknowledging responsibility), then one must ask why there are so many procedural safeguards built into section 105A of the CPA but very few related to diversion in the CJA. In addition, what is the effect of section 105A of the CPA on child offenders under the CJA since any admission of responsibility will trigger diversion and not a plea bargain?

Section 52(1) provides that a matter may be considered for diversion at the preliminary inquiry or later at trial before the child justice court if the child acknowledges responsibility for the offence; the child has not been unduly influenced to acknowledge responsibility; there is a *prima facie* case against the child; the child has consented to the diversion along with their parent, guardian or appropriate adult if available; and the prosecutor (concerning Schedule 1 and 2 offences) or the DPP (concerning Schedule 3 offences) indicates that the matter may be diverted.

Again, the child offender must acknowledge responsibility for the offence, which is tantamount to an admission of guilt. At the start of the preliminary inquiry, the presiding officer must, to consider diversion, ascertain from the child whether or not they acknowledge responsibility for the alleged offence. If the child does not acknowledge responsibility, no question regarding the alleged offence may be put to the child. No information regarding a previous diversion, conviction, or charge pending against the child may be placed before the preliminary inquiry. If the child does acknowledge responsibility, the preliminary inquiry proceeds.

The difficulty for the presiding officer arises from ascertaining from the child whether or not they acknowledge responsibility. Section 47(2)(a)(iii) mandates the inquiry magistrate to inform the child, at the start of the preliminary inquiry, about their rights. What happens when the child offender chooses to exercise their right to remain silent? Does the right to remain silent overshadow the benefits of diversion and the adverse consequences of being subject to the criminal justice system?

In the researcher's view, acknowledging responsibility with the view of being considered for diversion is similar to plea bargaining in section 105A of the CPA. The difference is that the provisions of CJA do not expressly indicate plea bargaining. Secondly, the

outcome of such bargaining does not necessarily end in the conviction and imposition of a sentence. Section 105A permits prosecutors, the accused, and/or their defence counsel to arrange and arrive at a concession on confession and punishments. A plea bargain is a powerful method of dodging lengthy hearings with an unsure result. The similarity here lies in the benefits achieved by the accused at the end of the process.

If the prosecutor indicates that the matter may not be diverted, the inquiry magistrate must obtain from the prosecutor confirmation that, based on the facts of the case at their disposal and after consideration of other relevant factors, there is sufficient evidence or there is reason to believe that a further investigation is likely to result in the necessary evidence being obtained, for the matter to proceed; enter the prosecutor's confirmation on the record of the proceedings, and inform the child that the matter is being referred to the child justice court. The inquiry magistrate can also ask for more information and dispense with the assessment if in the child's best interests.

The CJA further provides that a matter can be diverted at any time before the case's conclusion.[482] When a diversion order is made at the child justice court, the proceedings are postponed pending the child's compliance with the diversion order.[483] The court must warn the child that any failure to comply with the diversion order may result in any acknowledgement of responsibility being recorded as an admission in the event of the trial being proceeded with. In the researcher's view, diversion objectives no longer apply at this stage. The child offender, at this stage, is already exposed to the adverse consequences of being subject to the criminal justice system.

3.4.3 MONITORING COMPLIANCE WITH A DIVERSION ORDER AND TRIAL IN THE CHILD JUSTICE COURT

When making a diversion order, the magistrate in chambers who makes a diversion order of the court, inquiry magistrate or the child justice court must designate a probation officer or other suitable person to monitor the child's compliance with the diversion

[482] Section 67.
[483] Section 67(1)(b).

order.[484] If a child fails to comply with the diversion order, the probation officer or other suitable person must notify the magistrate, inquiry magistrate or child justice court in writing of the failure. If the child successfully completes the diversion, the probation officer or other suitable person must submit a report to the prosecutor who deals with the matter.[485]

If the probation officer or other suitable person fails to monitor the diversion or has failed to notify the magistrate, inquiry magistrate or child justice court of the child's failure to comply with the diversion order, there are specified consequences listed in terms of section 57(3)(a) and (b). If the child fails to comply with the diversion order, section 58 provides that the magistrates, inquiry magistrate or child justice court can issue a summons or warrant of arrest for the child to bring the child before the court. When the child appears in court, the magistrate, inquiry magistrate or child justice court must hold an inquiry into why the child failed to comply with diversion and determine if it was due to the child's fault.[486]

If it is found that the failure is not due to the child's fault, the magistrate, inquiry magistrate, or child justice court may continue with the same diversion option with or without altered conditions; add or apply any other diversion option; or make an appropriate order which will assist the child and their family to comply with the diversion option initially applied, with or without alteration or additional conditions.[487]

If it is found that the failure is due to the child's fault, the CJA provides the following three options. Firstly, where the matter was diverted by a prosecutor or at a preliminary inquiry, the prosecutor may proceed with the prosecution against the child. Secondly, where the child justice court diverted the matter, the presiding officer may record the acknowledgement of responsibility made by the child as an admission referred to in section 220 of the Criminal Procedure Act and proceed with the trial. The third option is that the prosecutor or child justice court must, where the matter does not go to trial,

484 Section 57 of CJA.
485 Section 57(5) of CJA.
486 Section 58(2) of CJA.
487 Section 58(3) of CJA.

decide on another diversion option that is more demanding than the original diversion option.[488]

The problem created by CJA in section 58(4)(b) is that the presiding officer is mandated to record the acknowledgement of responsibility made by the child as an admission in section 220 of the CPA and proceed with the trial. The CJA does not define the ambit of acknowledgement of responsibility and its limit. If the CJA provided a clear definition of what is meant by the term and the extent to which it can or cannot be presumed to mean admission of guilt, it would help both the child offender and the presiding officer. Only the facts alleged by the state may be admitted by the accused in terms of section 220. The section concerns the acceptance of facts alleged by the opposite and not by the accused.[489]

A child justice court must apply the provisions of the CPA to the plea and trial of a child offender.[490] The CPA [491] obliges the court to inform the child of the allegations against them and explain the proceedings' nature and process.[492] The trial in a child justice court is adversarial. However, the CJA [493] entitles the court, in certain instances, to play an inquisitorial role by eliciting information from any person involved in the proceedings and ensuring the child's best interest is protected during the entire proceedings.[494]

The Act[495] is silent on how separation of a trial is conducted in the proceedings.[496] When a child is charged with more than one offence in the same criminal proceedings, the most severe offence dictates how the child is dealt with.[497] Whether or not to grant a trial

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488 Section 58(4) of CJA.

489 *S v Dingoos* 1980 (1) SA 595 (O).

490 Section 63(1)(b) of Child Justice Act 75 of 2008. Where an adult and child are co-accused, the court is required to apply the provisions of Criminal Procedure Act to the adult and Child Justice Act to the child in the same proceedings (see also sections 153, 154 and 155 of Criminal Procedure Act 51 of 1977).

491 Section 63(3) of Child Justice Act 75 of 2008.

492 See Karels MG *et al Child Offenders in South African Criminal Justice: Concepts and Process* (2015) 134.

493 Section 63(4)(a) and (b) of Child Justice Act 75 of 2008.

494 See also Karels MG *et al Child Offenders in South African Criminal Justice: Concepts and Process* (2015) 134.

495 Child Justice Act 75 of 2008.

496 This is because a major part of Criminal Procedure Act 51 of 1977 is applicable to the trial of a child offender.

497 Section 6(2) of child Justice Act 75 of 2008.

separation is a discretional matter.[498] The primary test in deciding the separation is whether the applicant will suffer prejudice if a joint trial occurs. In *S v Majenge en 'n ander*,[499] the court held that separation of trials should only be considered when finality as to differences has been reached after all accused have pleaded. The researcher concurs with the above because, where an accused pleads guilty and the other accused pleads not guilty, the separation becomes essential to finalise the matter where the accused had pleaded guilty and to proceed with the trial of the latter accused who pleaded not guilty.[500] However, the problem arises when a child offender is co-accused with an adult, and both plead not guilty. How can the presiding officer apply the CJA to the child and the CPA to the adult in the same proceedings? This further complicates the role played by the presiding officer in the proceedings.

If the application for separation becomes successful and the case proceeds against the remaining accused, the prosecution has to decide against whom it wishes to proceed with prosecution.[501] The court has no power to determine the sequence in which the trial should take place but may suggest a particular sequence that would serve the justice's interest.[502] The prosecution can proceed on different or new charges against those accused who were separated from the trial.[503]

3.4.4 TRIAL CONDUCT AND THE ROLE OF THE PRESIDING OFFICER

In the South African adversarial trial system, the role of the presiding officer is passive. It bars the presiding officer from descending into the arena where the dust of the conflict might cloud their judicial vision.[504] However, in terms of the CJA, the presiding officer presiding in the trial, which is adversarial, is required to play a more inquisitorial role by

498 *S v Tshamano and Another* 1997 (2) SACR 359 (V).
499 1978 (2) SA 661 (O).
500 See *R v Zanele and Others* 1959 (3) SA 319 (A), where it was said that there was no statutory requirement making it necessary to order separation where there are different pleas. It was held that it was a rule of practice that separation should take place in such circumstances.
501 Joubert JJ *et al Criminal Procedure Handbook* (2017) 328.
502 Joubert JJ *et al Criminal Procedure Handbook* (2017) 328.
503 Joubert JJ *et al Criminal Procedure Handbook* (2017) 328.
504 See Joubert JJ *et al Criminal Procedure Handbook* (2017) at 333.

ensuring that the best interest of the child are upheld, and must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child.[505] The researcher submits that this inquisitorial aspect contrasts with the adversarial nature of trials in South Africa and greatly complicates the presiding officer's role.

The role of the presiding officer here is complicated in two ways. Firstly, the imposition of an inquisitorial role on the presiding officer in the adversarial trial of a child offender. This duty requires the presiding officer to ensure that the child's best interests are upheld at all stages of the proceedings. The concept of the best interests of the child is somewhat controversial. The main concerns are its alleged indeterminacy or vagueness and its potential to mask paternalistic decisions concerning children. One of the most striking features of the contemporary approach to the child's best interests is the view that some relevant bests interests provisions contain an independent right. This is so even though the relevant texts do not use explicit rights language concerning the child's best interests.[506]

The Constitutional Court has not explicitly articulated its vision concerning the child's best interests, despite the frequency with which it refers to section 28(2). As a result, in case law, section 28(2) is referred to alternatively as containing a 'standard',[507] a 'guiding principle',[508] or a 'right'.[509] Children's rights literature has pointed out that the bests interests of a child in the jurisprudence of the Constitutional Court have three functions: an interpretation tool for section 28(1) of the Constitution, a tool to establish the scope and potential limitations of other constitutional rights; and a right in itself.[510] Although the constitutional text uses the same terminology as common law, it was argued that the

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505 Section 63(4) of Child Justice Act 75 of 2008.

506 This point has been made in relation to section 28(2) of the Constitution by Visser, PJ 'Some ideas on the 'best interests of a child' principle in the context of public schooling' (70) *THRHR* 459-469. This point is also valid in relation to article 3(1) of the CRC.

507 See *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC) para 17 – 18.

508 *M v S* 2007 (12) BCLR 1312 (CC) para 22.

509 *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC) para 17.

510 Friedman A, Pantazis A, and Skelton A 'Children's Right' (2nd ed) in S. Woolman and Bishop M Constitutional Law of South Africa (Juta 2009).

constitutional concept of the best interests goes further in that it applies not only to decisions made by the high court as the upper guardian of all children but to 'every matter concerning the child'.[511]

The court has systematically avoided clearly defining the legal content of section 28(2) to preserve its flexibility. This is problematic because it continues exposing the child's best interest to vagueness and indeterminacy criticism. The broadness of the standard may represent a temptation for the courts to utilise it even when more specific legal provisions are relevant.[512] Arguably when a legally diffuse standard such as the best interests in section 28(2) comes face-to-face with well-established, hard-law legal institutions, some judges might be reluctant to give it effect.[513] Another difficulty created by the complexity of the best interests is the uncertainty regarding when the best interests are to operate as an independent right and when as a standard or guideline in making decisions.

In *Rahuva v Minister of Safety and Security (Centre for Child Law as amici curiae)*,[514] the court rejected a direct application of section 28(2) as requested by the amicus. Section 28(2) was used independently as the sole substantive Bill of Rights provision relevant for assessing the lawfulness of the arrest. However, in *J v National Director of Public Prosecutions*,[515] Skweyiya ADCJ considered as 'correct' the amici's position that "*the starting point for matters concerning the child is section 28(2)".* The court found that the mandatory registration was contrary to the child's best interests. To decide so, the court established that section 28(2) required a differentiation between adult and child offenders, an individualised treatment for the child and a consideration of the representation made by the child throughout the criminal justice process.[516]

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511 Friedman A, Pantazis A, and Skelton A 'Children's Right' (2nd ed) in S. Woolman and Bishop M Constitutional Law of South Africa (Juta 2009) at 40-47.

512 Bonthuys remarked in 2006 that to that date, although the court applied section 28(2) independently in several cases, more specific standards were relevant.

513 Couzens M ' Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) and Children's Right Approaches to Judging' 2018 (21) *Potchefstroom Electronic Law Journal*.

514 2016 (10) BCLR 1326 (CC).

515 2014 (7) BCLR 764 (CC).

516 2014 (7) BCLR 764 (CC) at para 42.

Secondly, a duty is imposed by CJA on the presiding officer to protect the child offender during all stages of the trial, especially during cross-examination, and ensure that the proceedings are fair and not unduly hostile and appropriate to the age and understanding of the child. The CJA is silent on how the trial is conducted where the child offender and an adult are charged together, and both plead not guilty to the charge. The CPA does not provide a solution in such circumstances. Even if the joint trial proceeds, there are no guidelines for the presiding officer to ensure the proceedings are fair and not unduly hostile to the child. Moreover, the CJA mandates the presiding officer to ensure that the proceedings are appropriate to the child's age. Whether the presiding officer conducting proceedings has the requisite skills to ascertain what is appropriate for the child's age remains irrelevant in terms of the CJA.

The court has the right to question a witness at any stage of the proceedings. The primary purpose of such questioning should be to clear up any points not cleared during examination-in-chief and cross-examination. In *S v Rall*,[517] the court said it is difficult and undesirable to define precisely the limits within which judicial questioning should be confined. Certain broad limitations were mentioned:

(a) the judge must conduct the trial so that his impartiality and fairness are manifest to all concerned;
(b) a judge should refrain from questioning in such a way or such an extent as to lose judicial impartiality and objectivity;
(c) a judge should desist from questioning in a way that may intimidate or disconcert a witness, affect his demeanour, or impair his credibility.[518]

There should be a clear distinction between questioning by the presiding officer and cross-examination. It is irregular for the questioning to amount to cross-examining an accused person.

During the trial, the presiding officer may also, at any stage of criminal proceedings, examine any person, other than an accused, who has been subpoenaed to attend such proceeding or who is in attendance in such proceeding and may recall and re-examine

517 1982 (1) SA 828 (A).
518 See also *S v Mosoinyane* 1998 (1) SACR 583 (T) where the general principles were re-stated.

any person, including an accused, already examined at the proceedings. The court is entitled to examine or recall and re-examine the person concerned if his evidence appears essential to the just decision of the case.[519] The power of examination given to the court is discretional, and it must be exercised judicially. In *S v Ngcobo*,[520] it was said that the section envisages a partly inquisitorial approach.

The court must exercise its powers in section 167 of the CPA, where it is necessary to discover the truth for substantial justice between the prosecutor and the accused, provided that the questioning remains within the bounds as stated in *S v Rall*. In *S v Mayiya*,[521] a medical report was produced in evidence after the complainant had given her evidence. Whilst the medical practitioner was giving evidence, it emerged that specific observations in the report were inconsistent with the complainant's version. The court held that it was obliged to exercise its powers in section 167 of the CPA and recall the complainant.

The court has an additional duty to subpoena or cause to be subpoenaed any person as a witness in criminal proceedings. It shall also subpoena a witness or cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.[522] The presiding officer has broad discretion, which is broadly similar to that of granting postponements.[523] The discretion to subpoena must be exercised judicially. In *R v Zackey*,[524] the court held that there is an investigatory side to the duties of a judge at a criminal trial. Still, where the judge sits alone, their prime function is to hear evidence adduced by the parties and give his decision accordingly.

The discretionary power to subpoena a witness becomes a duty if it appears that the evidence of the witness is essential to the just decision of the case.[525] It is for the presiding officer to decide whether the evidence is necessary. If it appears that the evidence was essential to the just decision of the case, a failure to call the witness could

519 Section 167 of Criminal Procedure Act 51 of 1977.
520 1999 (3) BCLR 298 (N).
521 1997 (3) BCLR 386 (C).
522 Section 186 of Criminal Procedure Act 51 of 1977.
523 *R v Gani* 1958 (1) SA 102 (A).
524 1945 AD 505.
525 *S v Hlongwane* 1982 (4) SA 321 (N).

be an irregularity.[526] The underlying principle is that an accused cannot be called as a witness in the accused own case, but if he elects to give evidence, he may be subpoenaed. The court must, especially during cross-examination of a child, ensure the proceedings are fair, not unduly hostile, and appropriate to the child's age.[527]

The court must manage a criminal trial in terms of the law governing criminal procedure.[528] If at the end of the state case, the state has not made out a prima facie case, the presiding officer must raise this question *mero motu*,[529] especially in the absence of an application for a discharge. This duty is not dependent on whether the accused is represented or not.[530] The Constitution compels presiding officers and all other officers of the court to play a role during a trial to achieve a fair and just outcome.[531] This was emphasized in *R v Hepworth*,[532] where the court pointed out that a criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other. A judge's position in a criminal trial is not merely that of an umpire to observe the rules of the game.

The duty of the presiding officer to protect witnesses from harsh questioning and cross-examination, particularly of a child witness, is regulated by the provisions of CPA.[533] However, the CPA does not protect a child offender. The CJA only makes provision for the presiding officer to protect the child offender from unfair and hostile proceedings.[534] The court in *K v The Regional Magistrate NO and others*[535] considered the constitutionality of section 170A of the CPA and found that the ordinary procedures of

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526 *S v B and Another* 1980 (2) SA 946 (A).

527 Section 63(4)(b) of CJA.

528 *S v Malinga* 2015 (2) SACR 202 (SCA) at [18]. See also *S v Legote* 2001 (2) SACR 179 (SCA), 184d – i.

529 The latin term "*mero motu*" means of one's own accord.

530 *S v Malinga* 2015 (2) SACR 202 (SCA), [18].

531 Section 35(3) of the Constitution.

532 1928 AD 265, 277.

533 Section 170A (1) provides that, whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

534 Section 63(4)(b).

535 1996 (1) SACR 434 (E). See also *Director of public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) where the court confirmed that section 170A is not unconstitutional.

the criminal justice system were inadequate to meet the needs and requirements of child witnesses. The court held that a proper balance between the protection of a child witness and the right of an accused to a fair trial could be achieved by permitting the witness to testify in congenial circumstances and out of sight of the accused. This would appear problematic where both the accused and the witness are children or where the accused is a child and the witness an adult. To balance those competing interests and imbalances within the confines of the CPA and CJA remains a problematic issue for the presiding officer.

Arguably, it is not clear from CJA what happens when the accused and the victim are both children and how the presiding officer is expected to safeguard the best interests of a child offender and a child victim. It is further unclear whether the presiding officer is expected to apply section 170A of the CPA and the CJA simultaneously. It has been held that where there is a conflict between the CJA and CPA, the provisions of the CJA should prevail.[536] Whether the best interests standard can be applied to both the child offender and the child victim, remain to be seen. Section 170A (2)(a) of the CPA provides that no examination in chief, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary shall take place in any manner other than through that intermediary.

At the end of the state case, the presiding officer may decide whether to grant a discharge based on the case's circumstances.[537] The discretion to discharge must be exercised judicially.[538] In *Ebrahim v Minister of Justice*,[539] it was held that refusal of an application for discharge does not constitute grounds for review where there is no proof of an irregularity in the conduct of a trial. The unwillingness to discharge an accused at the close of the prosecution's case entails the exercise of discretion and cannot be subject to appeal.[540] Suppose, in the trial court's opinion, there is evidence upon which

536 *S v LM* 2013 (1) SACR 188 (WCC).

537 Section 174 of Criminal Procedure Act 51 of 1977 provides that, if, at the closed of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

538 *S v Manekwane* 1996 (2) SACR 264 (O).

539 2000 (2) SACR 173 (W).

540 *S v Lubaxa* 2001 (2) SACR 703 (SCA), [9].

the accused might reasonably be convicted. In that case, the trial court's duty is straightforward, the accused may not be discharged, and the trial must continue. It is when the trial court believes that there is no evidence upon which the accused might reasonably be convicted that the difficulty arises.[541] However, section 174 of CPA may be redundant where the child offender was diverted before the close of the state case, has acknowledged responsibility, and later returns to court for failure to comply with a diversion order.

3.5 THE PRESIDING OFFICER & THE SENTENCING PHASE

A court has wide-ranging powers to impose sentences.[542] The Act contains provisions for all child offenders, including general principles and specific requirements on specific penalties that must be dealt with. In terms of general principles, the Act requires a child justice court to impose a sentence following Chapter 10.[543] In terms of Chapter 10, the sentencing of a child has the following objectives:

(a) encouraging the child to understand the implications of the crime and to accept responsibility for the harm;

(b) finding a balance, within the facts of the specific case, between the interests of the child and society and the seriousness of the crime;

(c) Promoting the child's reintegration into the family and community and ensuring that the child receives the required guidance and supervision, avoiding imprisonment as far as possible.[544]

At the sentencing stage, the Act requires courts to give children a second chance by imposing a sentence that promotes rehabilitation, restorative justice and reintegration. Such penalties include correctional supervision, community based-sentences, and restorative justice sentences, which involve family group conferences and victim-

541 *S v Lubaxa* 2001 (2) SACR 703 (SCA), [11].
542 Joubert JJ *et al*, Criminal Procedure Handbook (2017), 375.
543 Section 68 of the Act.
544 Joubert JJ *et al Criminal Procedure Handbook* (2017) 399.

offender mediation.[545] The degree to which judicial officers are bound to impose these sentences or opt for sentences that have a punitive or residential dimension is determined by the triadic formula of the offence, the offender, and the interests of society.[546] We have already seen in earlier chapters that parliamentary reports on child justice cases indicate that the courts continue to impose traditional sentences on a larger scale than restorative sentences as envisaged by the CJA.

According to Sloth-Nielsen,[547] "*in the context of sentencing child offender, the best interests of children, though important, are not determinative of sentencing to be adopted by the court… it is commonly accepted that the sentencing court must consider the 'triad consisting of the crime, the offender, and the interests of society in determining the appropriate response to adult and youth crime. The rationale for penal proportionality arises from the general motivations behind sentencing offenders*." The researcher supports this view and submits that a child's best interest cannot be considered in isolation from other competing interests. At all times, the court must consider the crime, the offender, and the interests of society as it would in sentencing an adult sentencing.

In *S v Brandt*,[548] the court observed that youthfulness in and of itself limits the discretion of the court to impose minimum sentences which will be otherwise appropriate when imposed on adult offenders who have committed similar crimes. The general principle of the child's best interests clearly indicates that child offenders deserve special protection, especially in sentencing. Therefore, the traditional aims of punishment, particularly regarding child offenders, have to be re-appraised and developed to accord with the spirit and purport of the Constitution.[549]

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545 Sloth-Nielsen J 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? 2013 SACJ 316.

546 Sloth-Nielsen J 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? 2013 SACJ 316.

547 Sloth-Nielsen J 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? 2013 *SACJ* 316.

548 [2005] 2 All SA 1 (SCA), [13].

549 [2005] 2 All SA 1 (SCA), [14].

The coming into operation of the CJA gave effect to the provisions of section 28 of the Constitution.[550] In terms of the Act, the presiding officer is allowed to sentence a child to imprisonment only if the child has a criminal record and there are substantial and compelling circumstances requiring such a sentence.[551] The presiding officer is not compelled to impose incarceration as a sentence, but he must exercise discretion judicially. A child sentenced to imprisonment is allowed to first spend time at a compulsory residence in a care centre before such a child may be transferred to prison.[552] The court must reconsider the original sentence when the childcare centre reports positive progress in the child's behaviour while at the centre.[553] There are other sentences a court may impose on a child offender, including fines,[554] caution and discharge,[555] and a suspended sentence. The CPA also makes provisions for compensation to the victims of crime.[556]

3.6 THE PRESIDING OFFICER & THE POST-TRIAL PHASE

Under South African law, parties dissatisfied with the outcome of a criminal trial may bring the matter before a higher court either by way of review or appeal.[557] Both review and appeals are characteristics of the South African criminal justice system. In terms of section 84 of CJA, an appeal by a child against a conviction, sentence or order must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the CPA, provided that if that child was, at the time of the commission of the alleged offence, under the age of 16 years; or 16 years or older but under the age of 18 years and has been

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550 Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child.

551 Section 77(3) of the Act.

552 Section 76(3) of the Act.

553 Joubert JJ *et al Criminal Procedure Handbook* (2017) 399.

554 Section 74(1) of the Act.

555 See Section 297(1)(c) of Criminal Procedure Act 51 of 1977. In terms of the section, where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion discharge the person concerned with caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

556 Section 300 of Act 51 of 1977.

557 Reviews and appeals in South Africa are regulated by Chapter 30 of the Criminal Procedure Act 51 of 1977. Reviews and appeals are a part of the South African legal system under criminal law. German does not have reviews but have appeal procedure as a remedy for parties dissatisfied with the outcome of a criminal trial.

sentenced to any form of imprisonment that was not wholly suspended, they may note the appeal without having to apply for leave in terms of sections 309B and 316 of the CPA. On the other hand, section 85 of CJA provides for automatic review in some instances.

Sentences imposed on child offenders are subject to automatic review in terms of section 302 of CPA unless the child has been sentenced to any form of imprisonment that was not wholly suspended or any sentence of compulsory residence in a child or youth care centre providing a programme as stipulated in section 191(2)(j) of the Children's Act[558] In such instances, the sentence will be automatically reviewed regardless of the term of imprisonment imposed or the period for which the presiding officer has held the substantive rank of magistrate.[559] Contrary to the procedure in section 302 of the CPA, in such a case, it is of no significance whether the child was represented during the proceeding or not or whether the trial was conducted in a district or regional court.[560] This was evident in *S v FM*,[561] where Tuchten J had to deal with the question of whether a matter in which a child accused who was legally represented and had been sentenced in the Regional Court was subject to automatic review under section 85 of the CJA. The court concluded that section 85(1) of the Act should be interpreted to provide for automatic review in respect of all children sentenced to any form of imprisonment not wholly suspended or any sentence of compulsory residence in a child and youth care centre.

In *S v LM*,[562] the court stated that the unclear question is whether, in respect of children of 16 years or older but under 18 years, a suspended sentence, after it has been put into operation following a breach of the conditions thereof, can be considered a sentence in the form of imprisonment that is wholly suspended for automatic review in terms of section 85(1)(b) of the Act. In an attempt to clarify this position, the court further pointed out that it is clear that there is a difference between the actual imposition of a sentence

558 See section 85 of the Act.
559 Joubert JJ *et al Criminal Procedure Handbook* (2017) 425.
560 Joubert JJ *et al Criminal Procedure Handbook* (2017) 425.
561 2013 (1) SACR 57 (GNP) [38].
562 2013 (1) SACR 188 (WCC) [48] – [50].

of imprisonment and the putting into operation of a sentence that was suspended in terms of section 297(9)(a)(ii) of the CPA.

The effect, however, of imposing a sentence of actual imprisonment and putting into operation a suspended sentence would be the same. The court believed that the purpose of the CJA was to afford children in conflict with the law "*special protection*" and "*special safeguard*". The purpose will be defeated if a sentence of imprisonment which came about as a result of the putting into operation of a suspended sentence is out of reach of a special review in section 85 of the Act.

It is important to note that not all lower court orders are subject to automatic review. These orders include but are not limited to, a situation where a person is convicted, and it appears that they have not complied with a condition of suspension imposed as part of a sentence of a previous conviction, the putting into effect of such suspended sentence is an administrative decision and is not a sentence.[563] Another scenario is where no judgment given or order by a regional court is automatically reviewable, except in the case of a child who has been sentenced in the regional court to imprisonment, which sentence was not wholly suspended, or sentenced to a compulsory residence in a child and youth facility. The automatic review is suspended when an appeal is noted.[564]

3.7 PRELIMINARY CONCLUSION

Clearly, a right to legal representation and silence is considered at the core of the effective administration of criminal justice in South Africa. The mandatory allocation of legal representation in South African child/juvenile justice signifies the importance of the legislation in protecting the purported interest of child offenders. However, the exact role of the mandatory legal representative must be developed to give effect to the best interest standard beyond merely making legislative provisions, therefore.

563 Joubert JJ *et al Criminal Procedure Handbook* (2017) 426.
564 Joubert JJ *et al Criminal Procedure Handbook* (2017) 426.

On the other hand, the right to remain silent is statutorily guaranteed. It does not seem to be recognized at the preliminary inquiry simply because the child is encouraged to acknowledge responsibility for the offence committed, tantamount to formal admission of guilt. It is, however, recognized at different stages of criminal proceedings. The explanation of the right to remain silent and the implications thereof should be applied to the preliminary inquiry in South Africa.

The challenge that needs attention is the inquisitorial duty imposed by the CJA on a presiding officer at the preliminary inquiry. As indicated above, the scope and extent of the inquisitive role are not defined in the CJA. They can potentially violate the rights of a child offender, including the right to remain silent. This is further exacerbated by the enticement of the child offender to acknowledge responsibility in exchange for evading the criminal justice system and the adverse consequences of being subjected to the criminal justice system.

The role played by the presiding officer in South African child justice is complicated by the best interest standard. As shown above, there is no legal definition of the content of section 28(2) of the Constitution. This, it is submitted, continues to expose the best interest of the child standard to the vagueness and indeterminacy criticisms. The broadness of the standard may represent a temptation for the courts to utilise it even when more specific legal provisions are relevant. In essence, the presiding officer in South African child justice must play many contradictory roles. While there is no argument with the best interest standard, it seems absurd for the umpire of fact to also be expected to act *in loco parentis* while trying a child offender. This is further complicated when the victim is a child, and the court must proceed to protect two divergent interests and ensure that justice is seen to be done.

In the next chapter, the researcher examines and compares the position of the presiding officer in the German child justice system.

CHAPTER FOUR

THE ROLE OF THE PRESIDING OFFICER IN GERMAN CHILD JUSTICE

4.1 INTRODUCTION

In this chapter, the researcher contextualises and explores the role of the presiding officer in the German youth justice system. The research aim is to examine and compare the role played by the presiding officer in the German youth justice system with the South African child justice system. The primary purpose is to inform action, gather evidence for theories, and contribute to developing knowledge in a field of study.

4.2 GERMAN YOUTH JUSTICE

Germany's youth justice system is characterized by minimum intervention, prioritising diversion and non-punitive and rehabilitative responses.[565] Germany applies a strict model, which means juveniles under 18 years cannot be prosecuted in adult criminal court or receive adult criminal sanctions, even where severe offences occur. The guiding principle of the German juvenile justice system is education and care, referring to the original right and duty of parents, which the state partly executes when a juvenile commits an offence.[566]

In Germany, the specialised youth court has jurisdiction over juveniles between 14 and 21 years old. Young adults from 18 to 21 years can receive a sentence according to juvenile law.[567] The procedures in the youth court are the same for young adults as they

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565 This is referred to as "educational measures". The term "educational measure" is often used to embody the elements listed in section 10 of the German Youth Court Act, to distinguish from formal judicial interventions and incarceration. They can include such rehabilitative measures to improve youth socialization as community service, social training courses, victim-offender mediation, and vocational training.

566 Justice Evaluation Journal available at: https://doi.org/10.1080/24751979.2018.1478443.

567 Rap S & Weijers I *The effective youth court: Juvenile justice procedures in Europe* 2014.

are for minors.[568] Under section 105 JGG, the judge is required to apply a juvenile sanction to young adults up to the age of 21 years under one of two conditions: if the moral, psychological, and social maturity of the offender is that of a juvenile, or if the type, circumstances, or motives of the offence were typical of juvenile misconduct.[569]

The German Federal Supreme Court has held that typical juvenile crimes are spontaneous acts resulting from the developmental forces of young age, including a case where a 20-year-old young adult killed his 3-month-old baby after being angered by the baby's crying.[570] The Federal Supreme Court has further ruled that a young adult has a juvenile's maturity if their personality is still developing.[571] The youth courts are, therefore, tasked with considering the young adult's maturity, developmental stage, and circumstances when determining the best avenue of treatment.[572]

Germany's youth justice system differs from the South African child justice system in that German youth justice focuses on education and care, referring to the original right and duty of parents, which the state partly executes when a juvenile commits an offence. At the same time, the South African child justice system focuses on the principle of restorative justice in the criminal justice system for children who conflict with the law while ensuring their responsibility and accountability for crimes committed. There are similarities in both systems in the emphasis on diversion and rehabilitation, but the difference is seen in the sentencing of young offenders between the two jurisdictions.

For convenience, the pre-trial, trial, and post-trial categorisation used when analysing the South African child justice law above will be used below, even though the German mode of youth justice is educational and inquisitorial throughout, which differs from the South African approach, which is inquisitorial in the pre-trial stage and hybrid in during the trial phase.

568 Rap S & Weijers I *The effective youth court: Juvenile justice procedures in Europe* 2014.
569 Justice Evaluation Journal available at: https://doi.org/10.1080/24751979.2018.1478443.
570 Justice Evaluation Journal available at: https://doi.org/10.1080/24751979.2018.1478443.
571 International Centre for Prison Studies 2010.
572 Ishida K *Young adults in conflict with the law: Opportunities for diversion* 2015.

4.3 THE PRESIDING OFFICER & THE PRE-TRIAL PHASE

Unlike South African child justice, German juvenile justice has four distinct diversion levels. Diversion without any sanction is given priority in cases of petty offences. Diversion with measures taken by other agencies (parents, the school) or in combination with mediation is the second level of diversion (diversion with education). The third level is diversion with intervention. In these cases, the prosecutor proposes that the juvenile court judge impose a minor sanction, such as a warning, community service (usually between 10 and 40 hours), mediation, participation in a training course for traffic offenders or certain obligations such as reparation/restitution, an apology to the victim, community service or a fine.[573] Once the young offender has fulfilled these obligations, the juvenile court prosecutor will dismiss the case in cooperation with the judge. The fourth level is the introduction of levels one to three in the juvenile court proceedings after the charge has been filed. In practice, the juvenile court judge will fairly often face the situation that the young offender has, in the meantime, after the prosecutor has filed the charge, undergone some form of educational measures such as mediation, which would deem a formal court sanction unnecessary. Section 47 of the Youth Court Law enables the judge to dismiss the case in these instances.

In contrast, the CJA sets out two levels of diversion linked to the schedules containing lists of offences based on the seriousness of the offence. Schedule 1 includes minor offences, Schedule 2 includes more severe violations and Schedule the most serious crimes. There are also maximum time limits for diversion set out in section 53(5), which are linked to both the diversion option level and the child offender's age. If the child successfully completes the diversion, the probation officer or other suitable person must submit a report to the prosecutor who deals with the matter.

Over time there has been a steady increase in diversion (70% from 2012) via discharge in Germany.[574] The increase was mainly attributable to diversion without intervention[575] or in combination with mediation or educational measures outside the juvenile justice

[573] Section 45(3) of Youth Court Law.
[574] Dünkel F Youth Justice in Germany Online Publication Jan 2016.
[575] Section 45(1) of Youth Court Law.

dispositions taken by the school authorities or parents. In contrast, the proportion of diversion combined with educational measures imposed by the court at the request of the juvenile prosecutor[576] has slightly reduced.[577] At a high level, this would appear to indicate that the German approach is working. In contrast, the South African approach shows an almost opposite growth rate (an increase in harsh sanctions and very little use of restorative justice or minimum intervention sanctions).

Expanding informal sanctions has proved to be an effective means not only for limiting the juvenile court's workloads but also concerning special prevention.[578] The reconviction rates of first-time offenders diverted instead of formally sanctioned are significantly lower. Even for repeat offenders, the re-offending rates after informal sanctions were not higher than after formal sanctions.[579] The South African reporting system does not lend itself to a similar comparison. It is posited that this may be because the South African system and its reporting mechanisms are still relatively immature when compared to Germany.

Once the proceedings have been initiated against the juvenile,[580] investigations should be conducted as soon as possible into the youth offender's life and family background, his development, his previous conduct and all other circumstances which can assist in assessing his psychological, emotional and character make-up.[581] The parent or guardian, the legal representative, the school and the person providing them with training should, insofar as possible, be heard.[582] In contrast, the CJA makes provisions for a decision to prosecute a child who is 12 years or older but under the age of 14 years; the responsibility of a police officer where the age of the child is uncertain, and age

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576 Section 45(3) of Youth Court Law.

577 Dünkel F Youth Justice in Germany Online Publication Jan 2016.

578 Dünkel F Youth Justice in Germany Online Publication Jan 2016.

579 Dünkel F Youth Justice in Germany Online Publication Jan 2016.

580 Section 70a of Youth Court Law provides that the juvenile must be inform that he or she is an accused person and also the next steps that are to be taken in the proceedings against him or her…

581 Section 38 (2) of Youth Court Law provides that the representative of the youth courts assistance service shall highlight the supervisory, social, and other aspects that are significant with regard to the goals and tasks of youth welfare in proceedings before the youth courts. For this purpose, they shall support the participating authorities by researching into the personality, the development and the family, social and economic background of the juvenile, and shall make a statement with regard to any potential particular vulnerability, as well as measures that are to be taken.

582 Section 43 of Youth Court Law.

estimation by probation officer [583] but does not provide for the assessment of the child psychological, emotional and character make-up unless he is subject to an age estimation during the preliminary inquiry. Although the South African approach relies on a probation officer's report, it cannot be compared to the depth and scope of the preliminary investigation in the German system, which it is posited is better constituted toward investigating the individual best interest of the youth offender.

However, in Germany, the school or person providing training cannot be heard if the juvenile fears undesirable disadvantages or loss of his training place or job. If necessary, to establish the state of his development or any other characteristics relevant to the proceedings, the juvenile must undergo examination or an expert specialising in examining juveniles can be assigned to carry out the order.[584] At this stage, the Youth Court Law mandates that the juvenile be informed of a number of the basic principles of criminal proceedings.[585] To the researcher, this approach is a nod towards legality and protecting the child's best interests. The fact that the criminal justice process is explained to the youth offender is, it is posited, a best practice to ensure maximum participation based on understanding.

If a youth penalty is expected, the public prosecutor or the president of the youth court should question the juvenile accused before charges are brought.[586] The public prosecutor may also dispense with prosecution without the judge's consent if the conditions set out in section 153 of the Code of Criminal Procedure are met.[587] The

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583 See sections 10 – 16 of CJA.

584 Section 43(2) of Youth Court Law.

585 Section 70a lists a number of things that must be conveyed to the juvenile, including, that, the parents and guardians, and legal representatives, or another suitable adult individual, are to be informed in accordance with section 67a; he or she may demand that the defence counsel participate in cases of compulsory defence counsel, may demand the postponement or interruption of his or her questioning for a reasonable period of time; in accordance with section 48, the questioning before the court handing down the ruling is to be held in camera as a matter of principle…; he or she may object to a copy of the audio and video recording of his or her questioning be given to those entitled to inspect the file in accordance with section 70c; he or she may be accompanied in the case of investigative acts by hir or her parents or guardians and legal representatives in accordance with section 67(3); he or she may demand a review of the measures and decisions in question in respect of an alleged violation of his or her rights on the part of participating authorities or of the court.

586 Section 44 of Youth Court Law.

587 Section 153(1)-(2) provides that if a misdemeanour is the subject of the proceedings, the public prosecution office may dispense with prosecution with the approval of the court competent to open

public prosecutor will dispense with prosecution if a supervisory measure has already been enforced or initiated and if they consider neither the participation of the judge nor the bringing of charges necessary.[588] In this regard, an attempt by the juvenile to achieve a settlement with the aggrieved person is considered equivalent to a supervisory measure.[589] In contrast, the CJA does not make provisions similar to section 45(2) of the Youth Court Law. However, one can see similarities between section 105A of the CPA and the German approach to prosecutorial dismissal.

The public prosecutor will propose the issuance of a reprimand of instructions or conditions by the youth court judge if the accused admits his guilt and if the public prosecutor considers that the ordering of such a judicial measure is necessary, but the bringing of charges is not required. If the youth court judge agrees to the proposal, the public prosecutor shall dispense with the prosecution.[590] Where instructions or conditions are imposed, the prosecutor must dispense with the prosecution only once the juvenile has complied with them.[591] This is similar to section 41 of CJA, which gives the prosecution power to dispense with assessment in level 1 diversion if it is in the child's best interests. The reasons for dispensing with assessment must be recorded on the court record by the magistrate in chambers, who will make the diversion an order of the court.[592]

The public prosecutor may apply to the youth court judge in writing or orally for a decision to be taken in the simplified procedure for matters involving juveniles if it can be expected

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the main proceedings if the perpetrator's guilt is considered to be of a minor nature and there is no public interest in the prosecution. The approval of the court shall not be required in the case of misdemeanour which is not subject to an increased minimum penalty and where the consequences ensuing from the offence are minimal. If charges have already been preferred, the court, with the consent of the public prosecution office and the indicted accused, may terminate the proceedings at any stage thereof under the conditions in subsection (1).

588 Section 45(2) of Youth Court Law.

589 Section 9 of Youth Court Law define supervisory measure as "the issuing of instructions". Instruction shall be directions and prohibitions by which the juvenile can conduct his life and which are intended to promote and guarantee his education. Instructions must not place unreasonable demands on the way the juvenile conducts his life – section 10(1) of the Youth Court Law.

590 Section 45(3) of Youth Court Law.

591 Section 45(3) of Youth Court Law.

592 Section 41(3) of CJA.

that the youth court judge will only impose instructions,[593] order supervision by a social worker or a probation officer,[594] apply disciplinary measures,[595] impose a driving ban, withdraw permission to drive and impose a bar not exceeding two years.[596] The youth court judge must decline to decide by simplified procedure if the matter is not suitable for the procedure, if it is probable that supervisory assistance within the meaning of section 12[597] will be ordered, or youth penalty will be imposed or if the taking of comprehensive evidence is necessary. If the youth court judge refuses to decide by simplified procedure, the public prosecutor must submit a bill of indictment.[598]

Where the public prosecutor continues with the prosecution, he should set out the principal results of the investigations in the bill of indictment[599] to ensure that knowledge of them shall, as far as possible, involve no disadvantages for the accused's education and development.[600] The charge may also be filed before a report from the youth courts assistance service[601] if it is in the juvenile's best interests, and it can be anticipated that the research outcome will be available at the beginning of the main hearing. A report

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593 Section 10 of Youth Court Law provides that instructions shall be directions and prohibitions by which the juvenile can conduct his life, and which are intended to promote and guarantee his education. Instructions must not place unreasonable demands on the way the juvenile conducts his life. In particular, the judge may instruct the juvenile to, comply with instructions relating to his place of residence, live with a family or in a residential accommodation, accept a training place or employment, perform certain work tasks, submit himself or herself to the care and supervision of a specific person (care assistance), attend a social skills training course, attempt to achieve a settlement with the aggrieved person, avoid contact with certain persons or frequenting places providing public hospitality or entertainment, and or, attend a road-traffic training course.

594 Section 12(1) of Youth Court Law.

595 Section 13 of the Youth Court Law indicates types of measures and their application. This includes, reprimands, imposition of conditions and youth detention. Section 15 lists conditions that can be imposed. It provides that the judge can require the juvenile to make good, to the best of his ability, for the damage caused as a result of the offence; apologise personally to the aggrieved person; perform certain tasks or pay a sum of money to a charitable organisation.

596 Section 76 of the Youth Court Law.

597 Where the juvenile is required to avail himself or herself of supervisory assistance in a day and night-time institution or another form of supervised accommodation within the meaning of section 34 of the Eight Book of the Social Code.

598 Section 77(2) of Youth Court Law.

599 Section 200(2) of the Code of Criminal Procedure deal with the content of the Bill of indictment. It states that the Bill of indictment shall indicate the accused, the criminal offence with which he is charged, the time and place of its commission, its statutory elements and the penal provisions which are to be applied. In addition, the evidence, the court before which the main hearing is to be held, and defence counsel shall be indicated.

600 Section 46 of the Youth Court Law.

601 Section 38(3) of Youth Court Law states that , information is to be provided as soon as possible with regard to the full research as required by subsection (2).

must be made available to the youth public prosecutor and the youth court after the charge has been filed.[602]

In contrast, South African child justice does not allow the child offender to admit guilt. Instead, it makes diversion provisions in cases where the child offender meets conditions stated in section 52 of the CJA. The condition includes the acknowledgement of responsibility by the child offender; proof that the child has not been unduly influenced in any way to acknowledge responsibility; there is a *prima facie* case against the child; and the child and, if available, their parent, an appropriate adult or guardian, consent to diversion. The similarity, however, comes where, if the prosecutor proceeds with the prosecution of the juvenile offender, such a child must be informed with sufficient details of the charge they are facing.[603]

The German pre-trial phase for youth offenders is distinctly more in-depth than that practices in South Africa. It is apparent that the South African legislature lent much from the German pre-trial approach (and perhaps that is why the South African pre-trial is largely inquisitorial), but such law lending without the necessary support to enforce its aim is moot. The German pre-trial stage invests much into examining and protecting the best interest standard and uses formal criminal court proceedings as a matter of last resort – perhaps this is a lesson that South African child justice could consider. Still, it would be contingent on better social and educational support to prevent crime instead of reacting only once it has occurred. During the German pre-trial stage, the presiding officer (or investigating magistrate) is much more involved in the child's process and progress than in the South African approach, where the presiding officer has no authority to direct the investigation against the child and is often reduced to a decider of facts presented by the presiding office and prosecutor.

602 Section 46a of Youth Court Law.
603 Section 35 of Constitution.

4.4 THE PRESIDING OFFICER & THE TRIAL PHASE

Germany has developed an effective system of private and state welfare institutions and justice institutions in juvenile crime prevention and justice.[604] The agencies organized based on the Children's and Youth Welfare Act are the community youth welfare departments and the youth services in youth court proceedings, which have a double task. Firstly, they fulfil purely welfare-oriented duties (family aid and protection of children in need of care according to the Children's and Youth Welfare Act). Secondly, they support the juvenile prosecutor and court by delivering personal and family background information for the trial, and they are partly responsible for the execution of educational measures (mediation and social training based on the prosecutor's and judge's decision).[605] In contrast, the South African child justice system does not have equivalent processes and departments related to the CJA. However, rudimentary aspects thereof can be seen in the Children's Act. This system is premised on the information gathered during the pre-trial phase in Germany, where the court has much more influence than allowable under the South African system.

The youth services in youth court proceedings are also responsible for avoiding unnecessary pre-trial detention. Therefore, they participate in the proceedings as early as possible and are immediately informed if a juvenile is placed in pre-trial detention.[606] The personnel of the youth service are social workers or social pedagogues with at least three years of university education. The personnel of private welfare institutions also have the same qualifications.[607] In some instances, the personnel include teachers, psychologists, and social workers with special training. The Federal Probation Service also provides special courses for further professional specialization.[608]

After the main proceedings have been opened, a youth court cannot declare itself to lack jurisdiction on the ground that the case should be heard by a court of the same or a

604 Dünkel F Youth Justice in Germany Online Publication Jan 2016.
605 Dünkel F Youth Justice in Germany Online Publication Jan 2016.
606 Section 72a of Youth Court Law.
607 Dünkel F Youth Justice in Germany Online Publication Jan 2016.
608 Dünkel F Youth Justice in Germany Online Publication Jan 2016.

lower level dealing with general criminal matters.[609] Moreover, the deliberations before the decision-taking court, including announcing its decisions, must not be open to the public.[610] This proviso is similar to section 63(5) of the CJA, which states that no person may be present at any sitting of a child justice court unless their presence is necessary in connection with the proceedings of the child justice court or the presiding officer has permitted them to be present.

Besides the participants in the proceedings, the aggrieved person, his parent or guardian and his legal representative, and where the defendant is subject to the supervision and guidance of a probation officer or the care and supervision of a care assistant or if a social worker has been assigned to them, the probation officer, care assistant and the social worker are permitted to be present. The judge may admit other persons for special reasons.[611] The deliberations must be public if young adults or adults are also defendants in the proceedings. The public may be excluded if this is in the supervisory interests of juveniles who are defendants.[612]

The main hearing may occur in the absence of the defendant only if this would be permissible in the general proceedings if there are special reasons to do so and with the permission of the youth public prosecution.[613] In contrast, the CJA does not have a proviso similar to this. However, the right to be present when being tried is catered for by section 35(3)(e) of the Constitution. The presiding judge in Germany can issue an order to summons the parent or guardian and the legal representative, and the legal consequences of failure to appear after being summoned are applicable.[614] The youth courts welfare office must be informed of the place and time of the main hearing before the scheduled date, and the representative of the youth courts welfare office must be permitted to speak at the main hearing or a written report by the youth assistance service may be read in the main hearing.[615]

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609 Section 47a of Youth Court Law.
610 Section 48(1) of Youth Court Law.
611 Section 48(2) of Youth Court Law.
612 Section 48(3) of Youth Court Law.
613 Section 50(1) of Youth Court Law.
614 Section 50(2) of Youth Court Law.
615 Section 50(3) of Youth Court Law.

The Youth Court Law mandates the presiding judge to exclude the accused during deliberations, which could be disadvantageous to his education and development. The presiding judge must inform the defendant of the deliberations in his absence insofar as necessary for his defence.[616] Moreover, the presiding judge may also exclude the accused's parent or guardian and a legal representative from the hearing where there is a risk of considerable educational disadvantages, where future cooperation between the persons named and youth courts is made considerably more difficult, or they are suspected of being involved in the accused's misconduct or to the degree that they have been convicted in respect of participation, or there is fear of a danger to the life, limb or liberty of the accused, a witness or another person or another considerable impairment to the well-being of the accused, or their presence will impair the ascertainment of the truth.[617]

If the parent, guardian, and legal representative are excluded for an inconsiderable part of the main hearing, the presiding judge must permit the presence of another adult individual suited to protect the interests of the juvenile for the duration of their exclusion. The juvenile should be allowed to designate an adult individual enjoying their confidence. If no adult is available for the juvenile, a representative of youth welfare must be present to care for the juvenile in the main hearing.[618] If it is found at the main hearing that the participation of defence counsel is necessary, the main hearing must be stopped until the juvenile is assigned a defence counsel.[619] There are instances where obligatory counsel must be appointed for a juvenile who does not yet have defence counsel.[620] This must be done the latest before the juvenile is questioned or an identity parade is carried out. However, this will not apply when a compulsory defence counsel exists. The similarities with the South African approach to mandatory legal representation are apparent. However, there is a greater concentration in the German system on

616 Section 51(1) of Youth Court Law.
617 Section 51(2) of Youth Court Law.
618 Section 51(6) of Youth Court Law.
619 Section 51a of Youth Court Law.
620 Section 68a of Youth Court Law.

representation throughout the process, and the child has a more significant say in who is appointed to represent their interests which is not the case in South Africa.

The Youth Court Law mandates that the questioning of the accused must be carried out according to their age, stage of development, and education. If the questioning was done outside the main hearing, a video and audio recording may be made of the questioning. If questioning is done by a person other than the judge or if the participation of a compulsory defence counsel was ordered and the defence counsel was not present, a similar video or audio recording must be made.[621]

Before the judgment can be issued, the presiding judge may issue preliminary orders concerning the supervision of the juvenile or suggest the provision of services following the Eight Book of the Social Code.[622] The judge may order temporary placement in a suitable youth welfare services home, considering the measure expected to protect the juvenile from further risks to his development, in particular, from committing further criminal offences. The temporal placement must be implemented per the rules applicable to the youth welfare service home.[623]

The presiding judge may also impose remand detention.[624] Where remand detention is imposed, the detention order must set out the reasons which demonstrate that other measures, particularly temporary placement in a youth welfare service home, are insufficient and the remand detention is not disproportionate.[625] In contrast, the CJA does not contain a similar proviso. However, it does mandate the presiding officer in a child justice court to conclude all trials of children as speedily as possible and ensure the postponement is limited in number, particularly where the child is in detention in prison or a child and youth care centre.[626]

Until the juvenile has reached 16 years of age, the imposition of remand detention due to a risk of flight is permissible only if the juvenile has already absconded from the

621 Section 70a(1) and (2) of Youth Court Law.
622 Section 71(1) of Youth Court Law.
623 Section 71(2) of Youth Court Law.
624 Section 72(1) of Youth Court Law.
625 Section 72(1) of Youth Court Law.
626 Section 66 of CJA.

proceedings or made efforts to do so or they have no fixed abode or residence.[627] The decision on enforcement of a custody order and the measures to avoid it being enforced must be taken by the judge who issued the custody order or, in urgent cases, by the youth court judge in whose district remand detention would have to be executed.[628] Temporary placement in a youth welfare service home may also be ordered under the same conditions for issuing a custody order. In this case, the judge may subsequently replace the placement order with a custody order if that proves to be necessary.[629] The proceedings must be conducted expeditiously if a juvenile is being held in remand detention.[630]

To a South African eye, the trial phase in the German system has many characteristics of the preliminary inquiry phase under the CJA. Due to its inquisitorial nature, the German trial phase is not as concerned with adversarial procedure or defence but more with determining the best interest of the youth offender in question. The presiding officer plays a much more active and participatory role than what is allowed in the South African procedure. In South Africa, for example, excluding the legal representative for any reason would be seen as an affront to the Constitution and not permissible under any circumstance. In the German system, the presiding officer assumes more of a parental role in the process and is tasked with many more duties to protect the youth offender. It is also clear that the presiding officer and all other role-players in the German system receive specialised training to execute their functions and that the team approach is distinctly multi-disciplinary, which goes to enhanced protection for the juvenile with a concentration on education and social assistance measures than the declaration of guilt and sanction. The South African approach, by contrast, concentrates on the determination of guilt during the trial phase and the presiding officer is limited to ensuring that cross-examination is not unduly hostile.

627 Section 72(2) of Youth Court Law.
628 Section 72(3) of Youth Court Law.
629 Section 72(4) of Youth Court Law.
630 Section 72(5) of Youth Court Law.

4.5 THE PRESIDING OFFICER & THE SENTENCING PHASE

There are various sentences the presiding judge can make in terms of the Youth Court Law. In certain instances, the presiding judge may leave it to the judge responsible for family or guardianship matters to select and order supervisory measures if they do not impose a youth penalty. The judge responsible for family or guardianship matters must then order the imposition of a supervisory measure, provided the circumstances on which the judgment was based have not changed.[631] The grounds for judgment must be set out, as well as the circumstances of punishment, the measures ordered, the reason for referral to the judge responsible for family or guardianship matters, and the reason for refraining from imposing disciplinary measures and punishment.[632]

The penalty levels in the German juvenile justice system play no role in determining the appropriate sentence for young offenders[633] because the primary focus of German criminal law is the offender rather than the offence. German juvenile court does not have a statutory framework as a guideline and is only restricted by the principle of proportionality as the ultimate threshold. The difference between the sentencing of adult offenders and young offenders is that a youthful offender does not receive a sentence for each offence they have committed, which is then combined into an overarching sentence. Instead, all violations of young offenders are dealt with at once as if the young offender has committed a single offence.[634] The underlying rationale is that young offenders should be treated differently because of their lack of maturity and the expectation that a young person is still reformable.[635]

631 Section 53 of Youth Court Law.

632 Section 54(1) of Youth Court Law. In certain instances, the defendant must not be informed of the grounds for the judgment if there is a cause to fear that doing so might be disadvantageous for his education and development.

633 Section 18 of Youth Courts Law.

634 See section 31 of Youth Courts Law. See also Persson M Caught in the Middle? Young offenders in the Swedish and German Criminal Justice Systems (1 ed) (Lund University, Sweden) (2017) 160.

635 Persson M Caught in the Middle? Young offenders in the Swedish and German Criminal Justice Systems (1 ed) (Lund University, Sweden) (2017) 222.

4.5.1 EDUCATIONAL MEASURES

The judge may impose educational measures[636] and prohibitions intended to govern the young offender's lifestyle and promote and guarantee the young offender's education.[637] The juvenile judge must determine the duration of instructions. The duration may not exceed two years; if the juvenile is instructed to submit himself to the care and supervision of a specific person (such as a care assistant), the duration should not exceed one year. If the juvenile is instructed to attend a social skills training course, the duration should not exceed six months.[638] The judge may amend instructions, lift them or extend their duration to no more than three years before expiry if this is conducive to supervision.[639] Again the role of the presiding officer in sentencing is not limited to mere imposition. The presiding officer plays an extended role in this form of sentencing for the duration of the sentence. This is distinctly different to the South African approach unless the child returns to the child justice court for any reason based on non-compliance with sentencing conditions.

The juvenile court aims to correct aspects of the young offender's personality that obstruct them from becoming a law-abiding citizen by imposing measures and orders per the provisions of section 12 of the Youth Courts Law, which provides supervisory

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636 These measures are does not have punitive character and may be imposed only with the consent of parent or guardian, legal representative and if the youth is sixteen years of age, such condition should be imposed with his consent.

637 Section 10 of Youth Courts Law provides that, (1) Instructions shall be directions and prohibitions by which the youth can conduct his life and which are intended to promote and guarantee his education. Instructions must not place unreasonable demands on the way the youth conduct his life. In particular, the judge may instruct the youth to:

1) comply with instructions relating to his place of residence,
2) live with a family or in residential accommodation,
3) accept a training place or employment,
4) perform certain work tasks,
5) submit himself to the care and supervision of a specific person (care assistance),
6) attend a social skills training course,
7) attempt to achieve a settlement with the aggrieved person (settlement between offender and victim),
8) avoid contact with certain persons or frequenting places providing public hospitality or entertainment, or
9) attend a road-traffic training course.

638 Section 11(1) of Youth Court Law.

639 Section 11(2) of Youth Court Law.

assistance to the youth offender.[640] The Youth Courts Law does not give the judge any statutory compliance measures to ensure that the young offender complies with any educational standards imposed but may respond to non-compliance with short-term detention for up to four weeks and only as a measure of last resort.[641]

4.5.2 CORRECTIVE MEASURES

Apart from educational measures, the court can impose corrective measures[642] when it believes that the young offender possesses a sufficient degree of responsibility and maturity to answer in some manner for their unlawful conduct, where educational measures seem insufficient.[643] Corrective measures are not criminal sanctions but may consist of a warning, the demand for an apology, the imposition of fines or compensation for the victim, short-term detention, and community service or social training courses may also be imposed. Short-term custody means placement in a separate unique facility for up to four weeks. It should feature an educational design and address the problem which contributed to the criminal conduct.[644] The judge may impose short-term detention as a means of enforcement in response to a young offender's disobedience of educational measures.[645] The focus is always on the child's education and the best interests of his current and future development. This approach is distinctly welfare-based and relies on non-criminal enforcement and consequence to ensure that the transgression does not tarnish the child into adult life. By contrast, South Africa depends on expunging juvenile records after a specific time. Still, it is doubtful if this measure is

640 Section 12 of Youth Court Law provides that, 'after hearing the youth welfare office the judge may, under the conditions set out in the Eight Book of Social Code, require the youth to avail himself of supervisory assistance: in the form of supervisory assistance by a social worker within the meaning of section 30 of the Eighth Book of Social Code, or in a day and night-time institution or in another form of a supervised accommodation within the meaning of section 34 of the Eight Book of social Code.'

641 Section 11 of Youth Courts Law – JGG.

642 Section 13 of Youth Courts Law.

643 See also Persson M Caught in the Middle? Young offenders in the Swedish and German Criminal Justice Systems (1 ed) (Lund University, Sweden) (2017) 121.

644 Section 90 of Youth Courts Law.

645 See section 11(3), 15 (3) of Youth Courts Law.

effective as it is administrative, therefore a prolonged process, and not something explained to child offenders and their families.

4.5.3 CONDITIONAL SENTENCE/PROBATION

The juvenile judge may issue a finding regarding the youth's guilt and suspend the decision to impose a sentence for a probationary period.[646] In this case, the judge finds the young offender guilty but is uncertain whether the young offender demonstrates the dangerous tendencies that justify juvenile imprisonment.[647] Suppose the young offender reoffends whilst under probation. In that case, the public prosecutor can apply to the juvenile court to reopen proceedings for the crime committed and plead for imprisonment because the young offender has demonstrated dangerous tendencies.[648] The rationale behind Section 27 of Youth Courts Law is to allow the young offender to receive suspended imprisonment under surveillance.[649]

When sentencing involves the imposition of a youth penalty not exceeding one year, the court must suspend enforcement of the sentence on probation if it can be expected that the juvenile will regard the sentence itself as a warning and, while not gaining the experience of serving a sentence, will gain from the supervisory influence of the probation and henceforth conduct himself in a law-abiding manner.[650] For the probationary suspension of the youth penalty sentence to be effective, account must be taken of the juvenile's personality, his previous life, the circumstances in which he acted, his conduct after the act, his living environment and the effects which suspension of sentence can be expected to have. The court must also suspend the probation enforcement of a more extended period of youth penalty not exceeding two years if

646 See section 27 of Youth Courts Law.
647 Persson M Caught in the Middle? Young offenders in the Swedish and German Criminal Justice Systems (1 ed) (Lund University, Sweden) (2017) 123.
648 Persson M Caught in the Middle? Young offenders in the Swedish and German Criminal Justice Systems (1 ed) (Lund University, Sweden) (2017) 123.
649 See section 27 of Youth Courts Law.
650 Section 21(1) of Youth Court Law.

enforcement is not indicated on grounds relating to the juvenile's personal development.[651]

The judge must fix the duration of the probationary period, which may not exceed three years or be less than two years.[652] The probationary period must commence on the day the decision to suspend the youth penalty enters into force. It may subsequently be shortened to one year or, prior to its expiry, be extended to a maximum of four years.[653] By issuing instructions, the judge must exercise a supervisory influence on the juvenile's conduct during the probationary period. The judge may also impose conditions on the juvenile.[654] If the juvenile gives assurances concerning his future conduct or offers to provide services to make amends for the wrong he has done, the judge must temporarily refrain from imposing instructions and conditions if it can be expected that the juvenile will comply with his assurances or offers.[655]

For a maximum of two years during the probationary period, the judge must place the juvenile under the supervision and guidance of a full-time probation officer. The judge may also place the juvenile under the supervision of a volunteer probation assistant if this appears conducive to the purposes of the supervision.[656] The judge may vary or revoke a decision to place the juvenile under the supervision and guidance of a full-time probation officer prior to the expiry of the probationary period, and he may also issue a new order placing the juvenile under supervision during the probationary period.[657]

The probation officer's role is to provide the juvenile with help and guidance. Acting in agreement with the judge, the probation officer must monitor the fulfilment of instructions, conditions, assurances and offers. The probation officer must promote the juvenile's supervision and, whenever possible, work together based on trust with the juvenile's parent, guardian, or legal representative. In the exercise of his duties, the probation officer will have the right of access to the juvenile. He may further require the

651 Section 21(2) of Youth Court Law.
652 Section 22(1) of Youth Court Law.
653 Section 22(2) of Youth Court Law.
654 Section 23(1) of Youth Court Law.
655 Section 23(2) of Youth Court Law.
656 Section 24(1) of Youth Court Law.
657 Section 24(2) of Youth Court Law.

juvenile's parent or guardian, his legal representative, his school or the person providing him with training to provide information about the juvenile's conduct.[658]

The judge can revoke the probationary suspension of youth penalty if the juvenile commits a criminal offence during the probationary period and thereby demonstrates that the expectation on which the suspension was based has not been fulfilled, seriously or persistently violates instructions or evades the probation officer's supervision and guidance; seriously or persistently violates conditions.[659] No reimbursement must be effected for services rendered by the juvenile in compliance with instructions, conditions, assurances or offers. However, if the court revokes the suspension, it may give credit against the youth penalty for services rendered by the juvenile in compliance with conditions or corresponding offers. Youth detention imposed per section 16a must be counted towards the youth penalty to the degree it was served.[660]

4.5.4 JUVENILE IMPRISONMENT

The juvenile judge is empowered to impose a youth penalty if the juvenile demonstrates harmful inclinations during the act and if such a penalty is necessary given the seriousness of the youth's guilt.[661] The guiding principles for juvenile imprisonment are that the young offender demonstrates dangerous tendencies that are likely to render the community sanctions inappropriate. According to Persson,[662] "*dangerous tendencies are defined as considerable deficiencies rooted in the personality or caused inadequate education or environmental influences which pose the risk of further offending, and which will be of a significant character without extensive education*."

The minimum duration of youth imprisonment is six months, and the maximum is five years.[663] If the act constitutes a serious criminal offence for which the general criminal

658 Section 24(3) of Youth Court Law.
659 Section 26(1) of Youth Court Law.
660 Section 26(3) of Youth Court Law.
661 Section 17 of Youth Courts Law.
662 Persson M Caught in the Middle? Young offenders in the Swedish and German Criminal Justice Systems (1 ed) Lund University (2017) 125.
663 Section 18 of Youth Courts Law.

law prescribes a maximum sentence of more than ten years deprivation of liberty, the maximum duration of the youth penalty shall be ten years.[664] The enforcement of imprisonment has to be carried out in such a way that it can have the necessary educational effect.[665] In instances where reoffending is deemed unlikely, imprisonment sentences of up to two years must be suspended.[666] Such imprisonment sentences, where reoffending is unlikely, may be paroled after the juvenile has served a third of the sentence.[667] Moreover, the law requires that a probation officer be appointed in all cases relating to youth sentencing.[668] The probation supervision period is one to three years.[669]

The youth court judge can impose youth detention.[670] Detention during leisure time must be imposed during the juvenile's weekly leisure time and counted as one or two periods of leisure time.[671] Short-term detention must be imposed in lieu of detention during leisure time if an uninterrupted period of execution appears expedient given the purpose of supervision and neither the juvenile's education and training, nor his employment, are adversely affected. A two-day period of short-term detention must be deemed equivalent to one leisure period. Long-term detention shall be at least one week and not more than four weeks.[672]

If the imposition or execution of the youth penalty is suspended on probation, youth detention may additionally be imposed, taking account of the significance of suspension on probation and the possibility of instructions and conditions to make clear to the juvenile his responsibility for the wrong that has been done and the consequences of committing further criminal offences.[673] This is necessary to initially remove the juvenile

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664 Section 18 of Youth Courts Law.

665 The young offender is always assigned a parole officer who also assist the offender in establishing a law-abiding lifestyle. See also section 18(2) of Youth Courts Law.

666 See section 21(1) and (2) of Youth Courts Law.

667 Section 88 of Youth Courts Law.

668 Persson M Caught in the Middle? Young offenders in the Swedish and German Criminal Justice Systems (1 ed) (Lund University, Sweden) (2017) 126.

669 Persson M Caught in the Middle? Young offenders in the Swedish and German Criminal Justice Systems (1 ed) (Lund University, Sweden) (2017) 126.

670 Section 16(1) of the Youth Court Law define "youth detention" as detention of a juvenile during leisure time, or short-term or long-term detention.

671 Section 16(2) of Youth Court Law.

672 Section 16(3) and (4) of Youth Court Law.

673 Section 16a(1) sentence 1 of Youth Court Law.

from his environment where there are damaging influences for a limited period and to prepare for the probationary period through treatment in the execution of youth detention, or this is necessary to exert a more emphatic educational influence on the juvenile in the execution of youth detention or to create better prospects for success for an educational influence during the probationary period.[674]

It is evident that the presiding officer in the German system has a more advanced role than the presiding officer in the South African system regarding sentencing. Moreover, the purpose of sentencing options in Germany is far more advanced than those in South Africa and aims more toward education and training than punishment and criminalisation. While South African statistics indicate that the courts remain committed to penal sentences over restorative justice sentences, Germany has proven the success of non-punitive measures with the maximum involvement of a well-trained and committed judiciary. Naturally, the German system is geared toward such intervention measures based on its inquisitorial nature and welfare approach. It is disconcerting to note that the South African legislation borrows much from the German Youth Court Law, but it appears not to have taken into account that the German law is fit for purpose because of its underlying inquisitorial and welfare character. When transplanted into South Africa and mixed with the fiction of inquisitorial pre-trial approaches, the result is not what was intended or desired. It is submitted that the German approach works because of its underlying basis but that the South African approach (and indeed presiding officers) cannot reconcile the parental role expected from them because their training and orientation are vastly different. One must further consider that the German approach relies on trained presiding officers committed to working with youth offenders. In contrast, South African presiding officers are often rotated between criminal courts, civil courts, bail courts, sexual offences courts and various other courts with no degree of specificity.

674 Section 16a(2) – (3) of Youth Court Law.

4.6 THE PRESIDING OFFICER & THE POST-TRIAL PHASE

Under the German youth law system, remedies are generally available to young offenders who wish to contest the decision of a Youth Court.[675] An exception does exist. For example, decisions which order only supervisory measures or disciplinary measures or which leave the selection and ordering of supervisory measures to the judge responsible for family or guardianship matters cannot be contested based on the extent of the measure, nor can it be contested because other or farther-reaching supervisory measures or disciplinary measures ought to have been ordered or because the selection and ordering of supervisory measures have been left to the judge responsible for family or guardianship matters.[676]

When an admissible appeal on fact and law has been submitted, the appellant may no longer submit an appeal on law against the judgment in the first-mentioned appeal. Suppose the defendant, the parent or guardian or the legal representative has submitted an admissible appeal of fact and law. In that case, none of those above may avail themselves of an appeal on law only as a legal remedy against the judgment in the appeal on fact and law.[677] The parent or guardian or the legal representative may withdraw a legal remedy filed by him only with the accused's consent.[678] Section 356a of the Code of Criminal Procedure shall apply *mutatis mutandis* insofar as a person concerned following subsection 1, is prevented from challenging a decision or following subsection 2, is unable to lodge an appeal against the ruling on the appeal on points of fact and law.[679]

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675 The researcher submits that German legal remedies serve similar purpose as the South African and Scottish appeal procedures, as it aims at addressing dissatisfaction by young offender of the decision of the youth court.

676 Section 55(1) of Youth Courts Law. Section 55(1) does not apply where the judge has ordered making use of supervisory assistance pursuant to section 12, number 2 of Youth Courts Law. Section 12(2) provides that, 'after hearing the youth welfare office the judge may, under the conditions set out in the Eight Book of the Social Code, require the youth to avail himself of supervisory assistance: in a day and night-time institution or in another form of supervised accommodation within the meaning of section 34 of the Eight Book of the Social Code.'

677 Section 55(2) of Youth Courts Law.

678 Section 55(3) of Youth Courts Law.

679 Section 55(4) of Youth Courts Law.

Where a court, in deciding an appeal on the point of law, has violated a participant's right to be heard in such a manner as to affect the outcome of the case, then upon application, it shall issue an order restoring the proceedings to the situation which applied before the decision. The application is to be filed with the court hearing the appeal on law within one week after gaining knowledge of the violation of the right to be heard either in writing or orally and is to be recorded by the court registry with reasons. *Prima facie* evidence of the time notice was obtained shall be furnished.[680]

Where the defendant has been sentenced to an aggregate penalty as a result of several criminal offences, the appeal court may, before the main hearing, declare the judgment concerning part of the penalty to be enforceable if the findings on the guilt concerning one or several criminal offences have not been contested. The order shall be admissible only if it is in the accused's recognized interest. The part of the penalty may not exceed the penalty applicable to a conviction for those criminal offences where the findings on the defendant's guilt have not been contested.[681]

An immediate complaint against a decision ordering or rejecting suspension of youth penalty is admissible if such order is to be contested alone. The same applies if a judgment is contested solely because the penalty has not been suspended.[682] Other instances where a complaint may be filed is where a decision is against the duration of the probationary period, the duration of the period of probationary assistance, a fresh order to undergo probationary assistance during the probationary period and on instructions and conditions.

The complaint may relate only to the fact that the probationary period or the period of probationary assistance was subsequently lengthened, that probationary assistance

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680 Section 356a of German Code of Criminal Procedure. Section 47 of the Code of Criminal Procedure applies to the provisions of section 356a. Section 47 provides that,
1) the application for restoration of the *status quo ante* shall not suspend execution of a court decision.
2) the court may order that the execution be postponed.
3) if restoration of *status quo ante* annuls the legal effect of a court decision, then warrants of arrest or placement orders, as well as other orders which were in force at the time the court decision took effect, shall become effective again…

681 Section 56(1) of Youth Courts Law.

682 Section 59(1) of Youth Courts Law.

was ordered afresh or that an order imposed is illegal.[683] If an admissible appeal on law only is filed against a judgment and a complaint filed against a decision relating to the probationary suspension of youth penalty ordered in the judgment, the court hearing the appeal on law only shall also have jurisdiction to hand down a decision on the complaint.[684] An order concerning the remission of the youth penalty cannot be contested.[685] An order that the guilty verdict is considered spent or that the decision to impose youth penalty shall remain suspended may not be challenged.[686]

4.7 PRELIMINARY CONCLUSION

At the core of the German juvenile system is the principle that youth should always be treated as such. Accordingly, children can never be prosecuted for acts committed before 14, nor tried as adults for acts committed before 18 years. If intervention is necessary for children younger than 14, the case may be referred to the youth welfare system. German juvenile courts have jurisdiction over 18, 19 and 20-year-olds.

German courts do not decide whether to treat a young adult as a juvenile or an adult based on the seriousness of the offence. Instead, a German court applies juvenile law if either, at the time of committing the crime, the young adult in his moral and psychological development was like a juvenile; the motives and the circumstances of the offence are those of a typically juvenile crime (for example, if it was an impulsive offence committed with peers). If either of these factors apply, the court is required to handle the case under juvenile law without regard to the seriousness of the offence. In contrast, South African child justice does not look into the moral and psychological development, motives and circumstances of the crime but focuses more on punishment for the offence committed.

By law, the primary purpose of any youth justice response in Germany is to prevent the young person from committing additional offences. The German juvenile system is also

683 Section 59(2) of Youth Courts Law.
684 Section 59(5) of Youth Courts Law.
685 Section 59(4) of Youth Courts Law.
686 Section 63(1) of Youth Courts Law.

grounded in a principle of minimum intervention, meaning that sanctions should only be imposed if absolutely necessary. For petty offences, this means that diversion without any sanction is typical. More serious offences, including some felonies, may be addressed through educational measures provided by outside agencies and/or minor sanctions by the court, such as warning, community service, reparation/restitution, an apology to the victim or a fine.

In South Africa, by contrast, a child offender who is 14 years or older at the time of being sentenced for the offence may be sentenced to imprisonment if the child is convicted of a crime referred to in Schedule 2 or 3 if substantial and compelling reasons exist for imposing a sentence of imprisonment. Moreover, a child offender referred to above may be sentenced to imprisonment for a period not exceeding 25 years. This clearly shows that the focus of CJA is punishment rather than education or restoration when the court must sentence for more serious offences. The German system is offender orientated, whereas the South African system remains offence oriented in this regard.

Most importantly, the presiding officer in the German juvenile system plays an active role throughout the proceedings to the extent that he administers the oath for witnesses, conducts questioning of the defendant during the main hearing and, to a certain extent, can exclude the parent or guardian, and even the juvenile legal representative if their presence in the proceeding could be disadvantageous to the juvenile's education and development or where they are suspected of being involved in the accused's misconduct or where their presence will impair the ascertainment of truth. In contrast, the role of the presiding officer in South African child justice is hybrid to the extent that he is expected to play a passive role in an adversarial proceeding, albeit with slight inquisitorial deviations in a nod to the best interest standard.

The researcher considers the Scottish approach to child justice in the next chapter.

CHAPTER FIVE

THE ROLE OF THE PRESIDING OFFICER IN SCOTTISH CHILD JUSTICE

5.1 INTRODUCTION

In this chapter, the researcher contextualises and explores the role of the presiding officer in Scotland's juvenile justice system. The research aims to examine and compare the role played by the presiding officer in the Scottish juvenile justice system with the South African child justice system. The primary purpose is to inform action, gather evidence for theories, and contribute to developing knowledge in a field of study.

5.2 THE SCOTTISH PRESIDING OFFICER & CHILD JUSTICE

There are no juvenile courts in Scotland. If the case involves the most severe crimes, such as homicide or rape, they go into the mainstream legal system. A children's panel system was introduced across Scotland in 1971, following a seminar report by Lord Kilbrandon, a judge, recommending a different approach to supporting children in crisis focused on welfare and protection. Nearly 13 000 children were referred to children's hearing systems in 2021, from infants to teenagers of 17 years. Almost 3560 cases going before a children's panel were cases where measures such as compulsory supervision orders (CSOs) or child protection orders in emergency, high-risks cases are considered.

The Scottish juvenile system is a welfare-driven approach with the notion that a young person involved in offending or other harmful behaviours manifests from other issues in their wider life. This approach contrasts South African child justice, which focuses on rehabilitation and corrective measures. The Scottish system is based on early intervention. Hearings are not concerned with innocence or guilt but only with the young person's welfare. The procedure takes a child-centred, and preventative approach focused on the following outcomes: helping ensure communities are safe from crime and

disorder; improving life chances for children and young people involved in or at risk of offending; and enabling all children and young people to be confidant individuals, effective contributors, successful learners, and responsible citizens. The Children and Young People (Scotland) Act 2014 has reaffirmed the importance of a child-centred approach. The priority of the whole system approach is to provide a clear focus on the early and effective intervention; the opportunity to divert young people from prosecution; court support; community alternatives to secure care and custody; managing high risk, including changing behaviours of those in secure care and custody; and improving reintegration back into the community.

There are, however, instances where the Prosecutor Fiscal decides to deal with an offence committed by a 16- or 17-year-old outside the diversion programme scheme offered as part of the children's hearing system. The assumption is that in choosing to deal with the case, the Procurator Fiscal considers it necessary to prosecute the case in the public interest. Where a case is referred to Procurator Fiscal, and there is sufficient evidence of an offence, the options can include: prosecution in court; Procurator Fiscal direct measures, e.g., fiscal warning, fiscal fine, compensation order; a diversion from prosecution or no action being taken. Criminal court proceedings should be engaged in exceptional cases and as a last resort in the public interest. From the South African statistics, this is vastly different from the South African approach, where referral to plea and trial in a child justice court is more frequent than expected. While this may be because children in South Africa are more often involved in serious offences than in petty crime (which seems to be the majority problem in Scotland), it also goes to the point that South African child justice is offence oriented while the Scottish and German approaches are offender oriented. This, it is opined, better serves the best interest standard than reliance on offence as a determinate for the severity of intervention or punishment.

The decision to refer the matter for prosecution at this stage in Scotland differs from the position in the South African child justice system, in that, in South Africa, an inquiry magistrate may make an order that the matter is referred to the child justice court in terms of section 49(2) of CJA. Moreover, a preliminary inquiry is inquisitorial, whereas

the Scottish criminal justice system is accusatorial. Most importantly, the preventative approach used by Scotland appears to be working as the number of children entering the hearings system is falling. There were 23 140 referrals in 2021, down by 2,8% year on year.[687] The number of referrals must also be viewed in light of the fact that the children's hearing system not only deals with criminal offences but also welfare and interest cases (akin to the South African Children's Court), where the CJA refers only to children accused of crimes. While the CJA allows for referrals to the children's court under the auspices of the Children's Act, the Scottish system handles all cases before the Children's Hearing system. It rarely refers to the formal criminal justice process.

For convenience, the same pre-trial, trial and post-trial phases that were used under the discussion of both South Africa and Germany are used below to discuss the Scottish approach but must be viewed in light of the fact that the majority of cases will not go before formal trial because of the Children's Hearing laws in Scotland.

5.3 THE PRESIDING OFFICER & THE PRE-TRIAL PHASE

Under Scottish law, a child aged eight years and above can be referred to the Children's Reporter on offence grounds. A child under the age of 12 years cannot be prosecuted in a criminal court.[688] A child aged 12 years or more but under 16 years may not be prosecuted for an offence, except on the instructions of the Lord Advocate[689] or at the instance of the Lord Advocate and no court other than the High Court of Scotland and the Sheriff Court[690] shall have jurisdiction over such a child for an offence.[691] Where a child is charged with any crime, the child's parents or guardian are required to attend the

687 Severin C How Scotland's youth justice system puts welfare at its heart, available at: https://www.theguardian.com/society/2019/nov/07/scotland-youth-justice-system-welfare-heart

688 See section 41a of Criminal Procedure (Scotland) Act 1995.

689 The Lord Advocate is the senior Scottish Law Officer, who is the head of the systems for the prosecution of crime and investigation of deaths in Scotland; and exercises those functions independently of any other person. All prosecutions on indictment run in the Lord Advocate's name.

690 A sheriff court is the principal local civil and criminal court in Scotland, with exclusive jurisdiction over all civil cases with a monetary value up to £100,000, and with the jurisdiction to hear any criminal case Except treason, murder and rape which are in the exclusive jurisdiction of the High Court.

691 Section 42(1) of Criminal Procedure (Scotland) Act 1995.

court before which the case is heard or determined and are required to be in attendance during all stages of the proceedings unless the court is satisfied that it would be unreasonable to require a parent or a guardian to be in attendance.[692] The parent or guardian required in attendance is the parent with parental responsibilities or parental rights[693] concerning the child, or the guardian has actual possession and control of the child.[694]

The appropriate local authority must be informed where a person who is under 16 years of age or who is 16 or 17 years of age is arrested, of the court in which the person is to be brought, the date and the general nature of the offence which the person has been officially accused of committing.[695] Where a local authority receives a notification, they shall conduct investigations and submit a report to the court, which contains information as to the home surroundings of the child, information from the education authority as to the school record, the health and character of the child, which will assist the court in the disposal of the case.[696] Any child being conveyed to or from any criminal court or waiting before or after attendance in court is prevented from associating with an adult jointly charged with any offence.[697]

Where a person is charged with an offence and the age of the person charged cannot be determined or cannot be specified in the indictment, or a complaint is brought before a court, and it appears to the court that the person is a child, the court is obliged to conduct an enquiry as to the age of that person and can take evidence to establish the age, and the age declared by the court is deemed to be the actual age of that person.[698] However, where it appears to the court that a person has attained the age of 17 years, the court shall deem a person not to be a child.[699] Suppose a young person is arrested

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692 Section 42(2) of Criminal Procedure (Scotland) Act 1995.
693 In terms of section 1(3) and 2(4) of the Children (Scotland) Act 1995.
694 Section 4(5) of Criminal Procedure (Scotland) Act 1995. The attendance of the parent or guardian shall not be required under this section in any case where the child was before the institution of the proceedings removed from the care or charge of his parent by an order of the court – subsection (6) of the same Act.
695 Section 24 of Criminal Justice (Scotland) Act 2016.
696 Section 42(8) of Criminal Procedure (Scotland) Act 1995.
697 Section 42(9) of Criminal Procedure (Scotland) Act 1995.
698 Section 46(1) of Criminal Procedure (Scotland) Act 1995.
699 Section 46(6) of Criminal Procedure (Scotland) Act 1995.

and officially charged. In that case, they may be: released unconditionally, in which case a report may be submitted to the Crown Office and Procurator Fiscal Service[700] for consideration of prosecution, released on a warning with a signed undertaking[701] that they will attend the court at a specified time and date; or in certain circumstances be kept in police custody or place of safety.[702]

5.3.1 THE CHILDREN'S HEARING SYSTEM

There are three overarching principles contained in the 2011 Act[703] which must be applied when making decisions about a child. The need to safeguard and promote the welfare of the child throughout the child's childhood is the paramount consideration; the child must be given an opportunity to express a view, and if the child chooses to express a view, panel members must have regard to the child's view, taking into account the child's age and maturity; an order can only be made if the children's hearing considers it is better for the child that a compulsory supervision order, or warrant, is made than if it is not made.

The first principle[704] is often referred to as 'the paramountcy principle, 'the welfare principle', or the 'best interests of the child principle. It applies to children's hearings, pre-hearing panels and the courts when making decisions about children. The principle reflects article 3 of the UNCRC, which states that the child's welfare should be a primary consideration of the decision-maker. This principle means that when making decisions about children and young people, every children's hearing should have as its paramount consideration, that is, above all else, the welfare of the child throughout the child's childhood. Panel members, therefore, should consider the longer-term impact of the

700 The Crown Office and Procurator Fiscal Service (COPFS) is responsible for the prosecution of crime in Scotland, the investigation of sudden deaths and complains of criminal conduct by police officers on duty.

701 If the young person refuses to sign an undertaking, the parent or guardian can be asked to sign on his or her behalf.

702 Section 22 of Criminal Justice (Scotland) Act 2018.

703 Children's Hearings (Scotland) Act 2011.

704 Section 25 of Children's Hearings (Scotland) Act 2011.

decisions they make for the child and weigh this alongside the risks and benefits of proposals in the short or medium term.

In contrast, the South African Constitution mandates that a child's best interests are paramount in every matter concerning the child.[705] Moreover, the CJA[706] outlines that the objects of the Act are to protect the rights of children as provided for in the Constitution. The differentiation factor with the Scottish system is that the CJA refers to the child's best interest only in the context of children in conflict with the law. In other words, the CJA is focused on the best interests of child offenders rather than all children, including minor victims of child offenders. This is because the child justice system is not welfare-based and is separated from welfare concerns which is not the case in Scotland which incorporates all matters concerning children under the banner of the children's hearing system. Welfare concerns in South Africa are protected under the Children's Act.

In Scotland, welfare can include all parts of a child's life, for example, the child's physical, emotional or educational needs. There is one exception to this principle. In limited circumstances, to protect members of the public from serious harm, a children's hearing may make decisions not consistence with the requirement to have the child's welfare as the paramount consideration. In such cases, the welfare of the child becomes a primary consideration. This may apply, for example, where it is necessary to authorise placement in secure accommodation for a child who has committed a serious offence against a member of the public, and the child is assessed as likely to conduct further dangerous or high-risk behaviours.[707]

Providing the child with an opportunity to participate is an essential feature of a children's hearing. This principle applies to all parts of a children's hearing, including pre-hearing panels. A child of any age should be supported to provide a view unless panel members consider that they cannot form a view. Panel members are not obliged to make a particular decision only because the child wishes it. The child's welfare is the paramount

705 Section 28(2).
706 Section 2.
707 Section 25 of Children's Hearings (Scotland) Act 2011.

consideration for panel members. If a children's hearing makes a decision different from the child's view, panel members should explain to the child why they have done so and why they did not follow the child's views in the hearing's written reasons for their decision.[708]

The process to be referred to pre-hearing starts with the local authority's referral to the Principal Reporter.[709] If, for example, a constable considers that the child needs protection, guidance, treatment or control and that a compulsory supervision order may be necessary, the child must be referred to the Children's Reporter.[710] Having received information about a child, the Reporter must decide whether there is enough evidence to support one of the section 67 grounds and, if so, whether a compulsory supervision order must be made or renewed for the child.[711] Section 67 of the Children's Hearings (Scotland) Act 2011 notes all the different grounds, at least one of which must apply before a child can be referred to a hearing.[712]

Section 67(2)(j) grounds apply only to a child over the age of criminal responsibility who has committed at least one offence. The age of criminal responsibility for a child in Scotland is eight years, meaning a child can be referred to a children's hearing on an offence ground if he was eight years old at the time of the alleged offence. The age of criminal prosecution for a child in Scotland is 12 years which means that should a child commit a very serious offence, only a child of 12 years or over will be prosecuted in an adult court of law. Children aged 8 – 11 who commit crimes are referred only to the children's hearings system.

The Lord Advocate[713] may decide that a child who has committed a grave offence will be prosecuted in court in the public interest. The Lord Advocate's Direction to the Chief

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708 Section 27 of Children's Hearings (Scotland) Act 2011.
709 Section 60 of Children's Hearings (Scotland) Act 2011.
710 Section 61 of Children's Hearings (Scotland) Act 2011.
711 Section 66 of Children's Hearings (Scotland) Act 2011.
712 For the purposes of this research the writer will only focus on section 67(2)(j) ground which is relevant here and discuss it in detail.
713 The Lord Advocate is a minister in the Scottish government and the holder of a historic office which has a range of functions associated with the maintenance of the rule of law and the proper administration of justice. The role has four main components: head of the systems of criminal prosecution and investigation of deaths; principal legal adviser to the Scottish government;

Constable sets out the circumstances when a child must be jointly reported to the Procurator Fiscal and the Reporter, confined to severe offences. There is normally a discussion between these officials before the Procurator Fiscal's decision about whether to prosecute or remit the case to the Reporter.[714] Where the statement of grounds prepared by the Reporter relates to an offence, it must have the same degree of specification as a charge and specify the nature of the offence. In contrast, the CJA only talks of the prosecutor as a decision maker regarding a child offender in deciding whether the child will be prosecuted.

When the Reporter seeks to prove a section 67(2)(j) ground in court, the standard of proof that the child has committed a criminal offence is beyond a reasonable doubt. If the Reporter considers that there is enough evidence to prove at least one of the section 67 grounds and that a compulsory supervision order may be required, then he must arrange a children's hearing.[715] It is important to note that once the Reporter has referred a child to a hearing, that is the end of their decision-making process concerning the referral.

The decision-making process then passes to the children's hearing, who will look at the situation anew and decide on the child independently. The children's hearing may decide that a compulsory supervision order is unnecessary. The process of separation of the decision-making process by the Reporter, the children's hearing and the court is one of the fundamental principles of the children's hearing system. It protects the rights of children and relevant persons by a series of checks and balances.[716]

When the Reporter has reached a decision to refer the child to a children's hearing, they must then arrange for the children's hearing to take place so that a decision can be made by a hearing about whether a compulsory supervision order is necessary. The Reporter must do the following: request the local authority to provide a report to the hearing on the background and circumstances;[717] give the child and any relevant person notice in

representing the Scottish government in civil proceedings; and representing the public interest in a range of statutory and common law civil and constitutional functions.

714 Section 67(2)(j) of Children's Hearings (Scotland) Act 2011.

715 Section 69(2) of Children's Hearings (Scotland) Act 2011.

716 Section 69(2) of Children's Hearings (Scotland) Act 2011.

717 Section 69 of Children's Hearings (Scotland) Act 2011.

writing of the date, time and place of the hearing not later than seven days before the intended date of the hearing;[718] notify the members of the hearing of the date, time and place for the hearing seven days before the intended date of children's hearing.[719]

The Reporter must give the child, relevant person and any appointed safe-guarder a copy of any relevant requirements made by the sheriff in relation to an appeal, a copy of the report or interim report prepared by the safe-guarder, a copy of any report made by the local authority, a copy of the views of the child and a copy of any report or document which is material to the hearing's consideration seven days before the intended date of the children's hearing.[720] The Reporter must also give the hearing members a copy of the statement of grounds. Any person who appears to the Reporter to have significant involvement in the child's upbringing is also entitled to information confirming the right to require a pre-hearing panel or a children's hearing to determine whether they should be deemed a relevant person.[721]

The procedure in Scotland is dissimilar to the South African child justice system for several reasons. The CJA provides for the assessment report to be compiled by the probation officer, which makes recommendations on the number of issues, such as the possible referral of the matter to a children's court in terms of section 50; the appropriateness of diversion, including a particular diversion service provider, or a particular diversion option or options, as provided in section 53.[722] Secondly, the assessment report must be considered with a particular reference to several issues, including the age estimation of the child, if the age is uncertain; the view of the probation officer regarding the criminal capacity of the child who is 12 years or older.[723] All other issues considered in the Scottish children's hearing system are not considered in the CJA, which may be because the Scottish system is not geared for criminal prosecution unless there are compelling reasons to invoke the criminal process.

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718 Rule 22 of Children's Hearings (Scotland) Rules 2011.
719 Rule 25 of Children's Hearings (Scotland) Rules 2011.
720 Rule 27 of Children's Hearings (Scotland) Rules 2011.
721 Rule 24 of Children's Hearings (Scotland) Rules 2011.
722 Section 40 of CJA.
723 Section 43 of CJA.

5.3.2 PRE-HEARING PANELS

A pre-hearing panel is a meeting of three-panel members[724] to discuss and determine any procedural matter that must be decided before a children's hearing. The following matters can be referred to a pre-hearing panel, whether a person should be deemed a relevant person;[725] whether a person should continue to be deemed a relevant person; whether the child should be excused from attending the hearing; whether a relevant person should be excused from attending the hearing; whether it is likely that the hearing will consider making a compulsory supervision order with a secure accommodation authorisation; and whether a person should be allowed to participate. In contrast, the CJA does not provide for a pre-hearing panel to determine who must be allowed to be part of the children's hearing. The presiding officer performs this function during the preliminary inquiry or at trial in the child justice court. The Scottish approach is more multi-disciplinary and does not place a burden on the presiding officer to consider aspects of childhood development for which he is likely untrained. The pre-trial burden is vastly dispersed, and decision-making is informed by those specialising in childhood development. The South African reliance on probation officers (who are social workers) is disheartening because it closes the circle of consultation to a few members who are usually already overburdened by their caseload.

Only matters referred to the pre-hearing panel must be discussed. The pre-hearing panel should not discuss the substance of the case or give any view in their reasoning about the need for a compulsory supervision order or any measures. The other matters which the pre-hearing panel can discuss are the appointment of a safe-guarder and;[726] the determination whether a referral should be made to the Scottish Legal Aid Board to arrange legal representation for the child or relevant person to enable their effective participation at the forthcoming children's hearing.[727]

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724 Section 6 of Children's Hearings (Scotland) Act 2011.

725 Section 79 of Children's Hearings (Scotland) Act 2011. One of the things considered for qualification to become a relevant person is whether that individual has a significant involvement in the upbringing of the child in question.

726 Section 2 of Children's Hearings (Scotland) Act 2011.

727 A hearing can ask the Children's Reporter to contact the Scottish Legal Aid Board with a child or relevant person's details.

The chairing member will determine the procedure at a pre-hearing panel.[728] A child, relevant person and any safe-guarder appointed have the right to attend a pre-hearing panel. Unlike a preliminary inquiry in South Africa, where a parent, guardian or an appropriate adult is mandated to attend, in Scotland, there is no duty to attend a pre-hearing panel. Other parties with a relevant contribution to the pre-hearing panel's consideration, such as a social worker or health visitor, are permitted to attend at the chair's discretion.[729] Therefore, it is not necessary for the pre-hearing panel to formally consider excusing an absent child or relevant person.[730] In contrast, the CJA mandates the child, the child's parent, an appropriate adult or a guardian, and a probation officer to attend the preliminary inquiry.[731]

Where a pre-hearing panel arranged for any purpose recommends that, for the child or any relevant person to participate effectively in the children's hearing, a solicitor must represent the child or relevant person, and it is unlikely that the child or relevant person will arrange to be represented by a solicitor or counsel the panel may do so. The child in these circumstances must have the capacity to instruct, and a child aged 12 years or over is deemed to be able to give instructions to a legal representative. A younger child may also be able to instruct.[732] It is important to note that the pre-hearing panel does not make the appointment. This matter will be considered by the Scottish Legal Aid Board, which will consider whether the criteria are met.[733]

5.3.3 CHILDREN'S HEARING

If there is a matter that a pre-hearing panel should have considered, but there has been insufficient time to arrange one, this matter/s must be dealt with at the start of the children's hearing before considering any other matter. If a pre-hearing panel had been arranged in advance of the children's hearing, all panel members would have been given

728 Rule 45(3)(c) of Children's Hearings (Scotland) Rules 2011.
729 Rule 45 of Children's Hearings (Scotland) Rules 2011.
730 Rule 45 of Children's Hearings (Scotland) Rules 2011.
731 Section 44 of CJA.
732 Rule 50 of Children's Hearings (Scotland) Rules 2011.
733 Rule 50 of Children's Hearings (Scotland) Rules 2011.

paperwork detailing what determinations were made, particularly concerning whether the child had been excused from attending the children's hearing. The determination of a pre-hearing panel in relation to this matter stands. If a children's hearing decides that they don't want to decide without the child being present, they must defer the hearing for the child to attend the next hearing.

If the child has been correctly notified, has not been excused from attending the hearing, and there is no other reason why the child has not attended the hearing, the hearing may ask the Reporter to consider making an application for a warrant to secure the child's attendance.[734] On cause shown by the Reporter, the hearing may issue a warrant to secure the child's attendance. This warrant grants the power to the police to uplift the child and bring him to the children's hearing and is a decision which should not be taken lightly.[735] Similarly, the CJA provides that if a child fails to appear on the date and time, and place specified or comply with any condition specified, the presiding officer may issue a warrant for the arrest of the child or cause a summons to be issued, for the child to appear at the preliminary inquiry.[736]

A relevant person has a right to attend any children's hearing held concerning their child. If a children's hearing decides they do not want to decide without the relevant person being present, they must defer the hearing for the relevant person to attend the next hearing. Panel members must consider whether it is in the child's best interests to do so, remembering that the relevant person cannot be compelled to attend a hearing. However, a relevant person notified of a hearing and who failed to attend for no good reason may be prosecuted and fined in court.[737] In contrast, the CJA provides that a preliminary inquiry may proceed in the absence of the child's parent, an appropriate adult, guardian or probation officer if the inquiry magistrate is satisfied that doing so would be in the child's interests.[738]

734 Section 123 of Children's Hearings (Scotland) Act 2011.
735 Section 123 of Children's Hearings (Scotland) Act 2011.
736 Section 24(7) of CJA.
737 Section 74(4) of Children's Hearings (Scotland) Act 2011.
738 Section 44(4) of CJA.

If, following a referral, a decision is taken by the Reporter to refer the child to a children's hearing; the Reporter must prepare a statement of grounds, including which of the section 67 grounds apply and the facts on which this is based.[739] At the opening of a children's hearing, the chairing member must explain to the child and each relevant person the section 67 ground specified in the statement of grounds and ask them whether they accept each ground.[740] A section 67 ground must be accepted or established before a hearing can consider the child's case. It is, therefore, crucial that the section 67 ground and the supporting statement of grounds are communicated effectively and accurately, as the child, and each relevant person must be asked whether they accept them.[741]

If the child and the relevant person accept each section 67 ground or at least one of the grounds, and if it is considered appropriate, the hearing may decide whether a compulsory supervision order[742] is required or defer deciding a compulsory supervision order until a subsequent hearing.[743] Where the child is not subject to a compulsory supervision order, and a hearing has deferred making a decision, it may, if the child's circumstances require it, make an interim compulsory order as a matter of urgency for the protection, guidance, treatment and control of the child or a medical examination order if they feel that it is necessary to do so to obtain any further information or investigation.[744]

If none of section 67 grounds is accepted, the hearing has two options: the grounds hearing must either direct the Reporter to make an application to the Sheriff for a determination; or discharge the referral.[745] If the grounds hearing directs the Reporter to make an application to the Sheriff for determination, the chairing member must explain the purpose of the application to the child and any relevant person and inform the child

739 Section 89 of Children's Hearings (Scotland) Act 2011.
740 Section 90 of Children's Hearings (Scotland) Act 2011.
741 Section 90 of Children's Hearings (Scotland) Act 2011.
742 See section 83 of Children's Hearings (Scotland) Act 2011. This section defines 'compulsory supervision order' in detail.
743 Section 91 of Children's Hearings (Scotland) Act 2011.
744 Section 92 of Children's Hearings (Scotland) Act 2011.
745 Section 93 of Children's Hearings (Scotland) Act 2011.

that he is obliged to attend the hearing at court unless excused.[746] The grounds hearing may issue an interim compulsory supervision order if it is considered necessary for the child's protection, guidance, treatment or control.[747]

Where either a children's hearing has made a decision to refer a case to the Sheriff for proof because the section 67 grounds have not been accepted, or the child or relevant person would not be able to understand an explanation of the grounds, or the child or relevant person has not understood the explanation given, the Sheriff must consider the appointment of a safe-guarder where the hearing has not appointed one. The decision must be recorded and reasons given if the Sheriff does not appoint a safe-guarder. The safe-guarder appointed by the Sheriff is to be treated as a safe-guarder appointed by the hearing for all other purposes.[748]

The application must be heard no later than 28 days after the day it was lodged, but the hearing does not need to be concluded in that period.[749] The application before a Sheriff is not to be heard in an open court, which means that the child and relevant persons are offered a degree of privacy in the proceedings.[750] Similarly, the CJA mandates that the proceedings involving a child offender not to heard in public.[751] The standard of proof for an offence committed by a child is beyond a reasonable doubt; the proof is the balance of probabilities for other grounds.[752] The Sheriff may excuse the child from attending all or part of their application if the section 67 ground concerns a Schedule 1 offence or sexual offence ground; if the attendance of the child at the hearing or part of the hearing would place the child's physical, mental or moral welfare at risk; and if the child would be unable to understand what happens at the hearing of the application.[753] South Africa can learn and adopt this exclusion of the child in proceedings that may affect the child's physical, mental or moral welfare.

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746 Section 93(4) of Children's Hearings (Scotland) Act 2011.
747 Section 93(5) and (6) of Children's Hearings (Scotland) Act 2011.
748 Section 31 of Children's Hearings (Scotland) Act 2011.
749 Section 101(2) of Children's Hearings (Scotland) Act 2011.
750 Section 101(3) of Children's Hearings (Scotland) Act 2011.
751 See section 45 of CJA.
752 Section 102(3) of Children's Hearings (Scotland) Act 2011.
753 Section 103(3) of Children's Hearings (Scotland) Act 2011.

If the child is not excused from attending their application but does not attend, the Sheriff may issue a warrant to secure the child's attendance if the hearing is to be continued to another day or the Sheriff considers that they will not attend on another day.[754] Where the Sheriff decides that one or more of section 67 grounds are established or one or more section 67 grounds were accepted at the children's hearing, the Sherriff must direct the Reporter to arrange a children's hearing to decide whether to make a compulsory supervision order.[755]

After an application for proof has been concluded and the child is referred back to a children's hearing, the Sheriff may issue an interim compulsory order if the child is not subject to a compulsory supervision order and the Sheriff is satisfied that there is a need for protection, guidance, treatment or control of the child and it is necessary as a matter of urgency.[756] If the Sheriff's interim compulsory order requires the child to reside at a place of safety, a children's hearing must be held within three days beginning with the day the child begins to reside at the place of safety. The Sheriff, in considering the making of certain orders and warrants, must only make, vary, continue, or extend the order or interim variation or grant a warrant if the Sheriff considers it more beneficial to the child to do so.[757]

At the children's hearing, if the presence of a particular person or persons is causing significant distress to the child, the hearing may exclude a relevant person or persons and /or their representatives from any part of the hearing for as long as it is necessary for the interests of the child. The hearing should take this decision, and the responsibility should not be placed on the child.[758] A representative of the press or a news agency may also be excluded from the hearing if it is necessary to obtain the views of the charge or if that person is causing or is likely to cause the child significant distress. When this exclusion has ended, the chairing member may explain the substance of what has happened in the person's absence if it is appropriate to do so.[759]

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754 Section 103(5) and (7) of Children's Hearings (Scotland) Act 2011.
755 Section 108 of Children's Hearings (Scotland) Act 2011.
756 Section 100 and 109 of Children's Hearings (Scotland) Act 2011.
757 Section 29 of Children's Hearings (Scotland) Act 2011.
758 Section 76 and 77 of Children's Hearings (Scotland) Act 2011.
759 Section 78(5) of Children's Hearings (Scotland) Act 2011.

A children's hearing can make a compulsory supervision order if the hearing considers it necessary for the child's protection, guidance, treatment or control. A compulsory supervision order is a legal document which means that the implementation authority must be involved in the child's life and ensure that the child is supported. The report should contain a care plan that deals with the child's immediate needs. The plan should outline the aims of supervision, why this is the best course of action, what the intervention will achieve, and what the child and family will expect.[760]

When making a compulsory supervision order, the children's hearing should name the period that the order has an effect. This provision allows panel members to set a date regarding the duration of the compulsory supervision order. Given the practicalities for professionals managing different expiry dates on compulsory supervision orders, panel members should consider specifying a year and calling for an early review if they wish to have the child returned to the children's hearing.[761] Panel members can make their intentions for supervision more specific by adding further specific measures to a compulsory supervision order, an interim compulsory supervision order or an interim variation of a compulsory order.[762]

When reviewing the situation of a child who is subject to a compulsory supervision order, the children's hearing must consider whether the child continues to be in need of a compulsory supervision order and if so, they may continue the compulsory supervision order, continue and vary the compulsory supervision order, or vary the compulsory supervision order. If it is considered that the child does not need a compulsory supervision order, the children's hearing may terminate the compulsory supervision order.[763]

If the children's hearing considers it appropriate, they may defer deciding whether to make a compulsory supervision order to a subsequent children's hearing.[764] Deferring making a decision usually means that the hearing has decided to postpone deciding on

760 Section 83 of Children's Hearings (Scotland) Act 2011.
761 Section 86(1)(c) of Children's Hearings (Scotland) Act 2011.
762 Section 83(2) of Children's Hearings (Scotland) Act 2011.
763 Section 83 of Children's Hearings (Scotland) Act 2011.
764 Section 138 of Children's Hearings (Scotland) Act 2011.

a future date to allow something to happen in the interim. However, the children's hearing may defer making a decision and continue the compulsory supervision order until the subsequent children's hearing.[765]

As a matter of best practice, the chairing member should inform the child, any relevant person and other parties about the duration of the compulsory supervision order, arrangements for review and the appeal rights.[766] The chairing member will advise the child and any relevant person concerning a child that the compulsory supervision order cannot last longer than one year unless there is a review, and a Reporter must initiate a review of the compulsory order within three months of the expiry of the order;[767] that the implementation authority must ask for a review hearing if there is a change of circumstances and the compulsory supervision order ought to be terminated or varied;[768] that the implementation authority must ask for a review if there is a measure attached to the compulsory supervision order which is not being complied with;[769] that the child or any relevant person may request a review of the compulsory supervision order at any time after three months after it has been made or reviewed.[770]

As soon as reasonably practicable after the decision has been made, the chairing member must make a report of the decision and a written statement of the decision and its reasons.[771] Any order, warrant or record required to be made in writing by a children's hearing or pre-hearing panel will be sufficiently authenticated if the chairing member of the hearing or pre-hearing panel signs it.[772] At the end of the hearing, the chairing member must inform the child, any relevant person and any appointed safe-guarder of their right of appeal and also, should they appeal, of their right to apply to the Reporter to have the hearing consider the suspension of the hearing's decision, where the

765 Section 139(2) of Children's Hearings (Scotland) Act 2011.
766 Section 133 of Children's Hearings (Scotland) Act 2011.
767 Section 133 of Children's Hearings (Scotland) Act 2011.
768 Section 131(2)(a) of Children's Hearings (Scotland) Act 2011.
769 Section 131(2)(b) of Children's Hearings (Scotland) Act 2011.
770 Section 132 of Children's Hearings (Scotland) Act 2011.
771 Rule 98 of Children's Hearings (Scotland) Rules 2011.
772 Rule 98 of Children's Hearings (Scotland) Rules 2011.

decision relates to a compulsory supervision order, pending the outcome of the appeal.[773]

5.4 THE PRESIDING OFFICER & THE TRIAL PHASE

The Scottish prosecution service operates under the principle of opportunity.[774] This means that the prosecutor has discretion on whether or not to bring charges in a particular case. If the charges are brought, several alternatives to prosecution are used.[775] The prosecutor may decide to bring no proceedings as well. The Scottish criminal procedure system is adversarial. Thus once the accused is charged with a criminal offence, the accused can conduct their investigation, and this will assist in casting doubt on the prosecution's case.[776] Once a decision to prosecute has been taken, the prosecutor can, at any point, decide to withdraw the case due to insufficient evidence at his disposal.[777] If the case proceeds, the accused can plead guilty or not guilty to the charge.

Similarly, prosecutors serve as the system gatekeepers in the South African criminal justice system. Not only do they evaluate the conduct of the police and the strength of the state's case, but they also present the case to the court and represent the interests of society throughout the proceedings.[778] As *dominus litis*, the prosecutor has discretion regarding prosecution and pre-trial procedures. For instance, the prosecutor may decide

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773 Section 158 of Children's Hearings (Scotland) Act 2011.

774 See Leverick F *Electronic Journal of Comparative Law* vol. 10.3 (December 2006) available at http://www.ejcl.org (date of use: 16 February 2019).

775 Prosecution decisions are taken in a two-stage process: availability of sufficient admissible, reliable and credible evidence of the commission of crime by the accused; and whether the prosecution will be in the public interest. The prosecution is "in the public interest" if the following 13 factors listed in the *Prosecution Code* are taken into account: nature and gravity of the offence; the impact of the offence on the victim and other witnesses; the age, background and the personal circumstances of the accused; the age and personal circumstances of the victim and other witnesses; the attitude of the victim; the motive for the crime; the age of the offence; mitigating circumstances; the effect of prosecution on accused; the risks of further offending; the availability of more civil remedy; the powers of the court; and the public concern.

776 This position is similar with South African criminal procedure system which is also adversarial in nature.

777 If a case is withdrawn due to insufficient evidence, the prosecution can later restart the proceedings.

778 *S v Sithole* 2012 (1) SACR 586 (KZD).

inter alia whether or not to institute a prosecution; on what charges to prosecute; in which court or forum to prosecute; when to withdraw charges, and so forth.[779] As *dominus litis*, the prosecutor is also the party who dictates the route a case will take towards being finalised.[780]

The accused can plead guilty to the offence with which the accused is charged. The prosecution has the discretion to refuse to accept any guilty plea tendered by the accused. The most likely situation where the prosecution can refuse a guilty plea is where the accused pleads guilty to a lesser offence than the one with which they are charged.[781] In *Strathern v Sloam*,[782] it was pointed out that some of the reasons why the prosecutor might refuse to accept a guilty plea, even to the exact charge specified in the indictment where there are multiple accused. It might not be possible to assign the proper degree of responsibility to each accused without proceeding to trial against each of them. However, in cases where the prosecutor accepts the guilty plea, there is no further examination of evidence, and the proceedings move directly to sentencing. The same sentencing procedure is followed as if the accused was found guilty following a full trial.[783] Similarly, in South Africa, once a guilty plea is tendered and accepted by the prosecution, the accused is found guilty, and sentencing follows.[784]

Section 196 of the Criminal Procedure (Scotland) Act 1995 provides that "*in determining what sentence to pass on, or what other disposal or order to make concerning, an offender who has pled guilty to an offence, a court shall take into account: (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty; and (b) the circumstances in which that indication was given*." If the accused

779 *S v Sehoole* 2015 (2) SACR 196 (SCA).
780 *S v Khalema and Five Similar Cases* 2008 (1) SACR 165 (C).
781 *Kirkwood v Coalburn District Co-operative Society* 1930 JC 38. See also Leverick F *Electronic Journal of Comparative Law*, vol. 10.3 (December 2006) available at http://www.ejcl.org (date of use: 16 February 2019).
782 1937 JC 76.
783 See Leverick F *Electronic Journal of Comparative Law* vol. 10.3 at 8, (December 2006) available at http://www.ejcl.org - (date of use: 16 February 2019).
784 Section 112 of Criminal Procedure Act, 51 of 1977.

pleaded guilty and a reduced sentence was not passed, the judge must give reasons in open court why a sentence discount has not been applied.[785]

Section 196 does not specify the discount the court should typically impose if an early guilty plea is pleaded. However, this has been addressed in the case of *Du Plooy v HM Advocate*.[786] In *Du Plooy*, the High Court recommended that the accused who plead guilty at the earliest possible stage in the criminal justice process should typically receive a discount of around one-third of the sentence the accused would otherwise have received. The one-third discount sentence seems to be applied by almost all Scottish judges, and the High Court in *Du Plooy* has set a precedent for accused who plead guilty at the earliest possible opportunity. The court has no direct power to influence the prosecutor to accept or refuse a guilty plea by the accused. However, suppose that a plea in mitigation is incompatible with the guilty plea. In that case, the judge might intervene and ask the prosecutor to reconsider whether the guilty plea should have been accepted in the first place.

Under Scottish law, the accused may elect to plead not guilty to the offence with which he has been charged. In Scotland, unlike the South African legal system (which requires an accused to give a plea explanation at the commencement of a trial), no plea explanation is required by the accused. When an accused pleads not guilty, a trial date is set.[787] A date is set for trial, and the case does not proceed to trial at the plea stage of a not guilty plea to allow the prosecution and defence time to organize their case and ascertain witnesses and evidence. The court decides whether the accused should be on bail or not. When the case returns for trial, the accused is allowed to change their plea to one of guilty, but if the accused does not, the case proceeds to trial by calling witnesses.

Criminal trials in Scotland are conducted under two types: a summary procedure and a solemn procedure.[788] Less serious crimes are dealt with under summary procedure, where a judge sits alone and is regarded as the master of the facts and with a duty to

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785 Section 196 of Criminal Procedure (Scotland) Act 1995.
786 2005 1 JC 1.
787 Cases are usually postponed for a period of three weeks for trial.
788 See Part IX and VII of Criminal Procedure (Scotland) Act 1995.

determine the appropriate sentence if the accused is found guilty of the offence charged. More serious crimes are conducted under a solemn procedure where a judge sits with a jury of fifteen. In this instance, the jury is the master of the facts, and the role of the judge is to impose a penalty if the prosecution has proved the accused's guilt beyond a reasonable doubt. In contrast, South Africa does not have a summary and solemn procedure. Moreover, there is no jury system in South Africa.

The summary procedure is typically used in the Scottish Justice of the Peace Court and Sheriff Court. An accused person is prosecuted on a complaint.[789] A complaint is a document which outlines the specific nature of the criminal offence that the accused will have to answer at the trial.[790] The prosecution and the defence lawyers appear before the judge once a complaint has been filed against the accused person to deal with technical and operational matters surrounding the proposed trial of the accused.[791] The judge may hear legal arguments or submissions from the prosecution and the defence to determine whether a trial is necessary. If the defence convinces the court that the charges against the accused are incompetent, the prosecution will have to abandon its case.

Where summary proceedings are brought in respect of an offence alleged to have been committed by a child, the Sheriff is obliged to sit in a different building or room from that in which the Sheriff usually sits, and no persons are allowed to be present at any of the sittings for such proceedings, except, members and officers of the court; parties to the case before the court, their solicitors and counsel, witnesses and other persons directly concerned in that case; and any other person authorized to be present.[792]

Under Scottish law, a Sheriff sitting in a summary procedure to hear a charge against, or an application relating to, a person who is believed to be a child may, if he thinks fit to do so, proceed with the hearing and determination of the charge or application, notwithstanding that it is discovered that the person in question is not a child.[793] A Sheriff

789 Section 138 of Criminal Procedure (Scotland) Act 1995.
790 Section 139 of Criminal Procedure (Scotland) Act 1995.
791 Section 144 of Criminal Procedure (Scotland) Act 1995.
792 Section 142(1) of Criminal Procedure (Scotland) Act 1995.
793 Section 142(2) of Criminal Procedure (Scotland) Act 1995.

may remand a child to obtain information about him, including an extension of remand, provided a child appears before him at least once every twenty-one days.[794] At first calling, an accused may enter a plea of guilty and such an accused may be entitled to have any sentence imposed on him by a judge discounted or reduced.[795]

An intermediate and trial date are set if the accused enters a plea of not guilty. Thus, under Scottish law, two procedural stages will come to play on a plea of not guilty.[796] On the intermediate date, the prosecution must open the proceeding and prove the case against the accused beyond a reasonable doubt. At this stage, the prosecution's task is to question the witness on the evidence they are offering to the court. At the end of the witness testimony, the defence will have the opportunity to cross-examine the witness to challenge the evidence by discrediting any prosecution witness to secure an acquittal for the accused. After cross-examination by the defence, the prosecution will have an opportunity to re-examine the witness to clear up any misunderstandings arising from the testimony.

In contrast, there is no intermediate date in South Africa. The only similarity with the Scottish system is that the prosecution opens the proceeding and provides evidence to prove the state case beyond a reasonable doubt. The defence will have the opportunity to cross-examine the witness to challenge evidence by discrediting any prosecution witness to secure an acquittal for the accused. Similarly, with the Scottish system, the prosecutor will have an opportunity to re-examine the witness to clear up any misunderstandings arising from the testimony. The CJA mandates the child justice court to ensure that during all stages of the trial, especially during the cross-examination of a child, the proceedings are fair and not unduly hostile and appropriate to the child's age and understanding.[797]

Once the prosecution has finalized its case, the defence lawyer will have an opportunity to refute the testimony of the prosecution case. The defence is under no obligation to

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794 Section 142(2) of Criminal Procedure (Scotland) Act 1995.
795 Section 196 of Criminal Procedure (Scotland) Act 1995.
796 Intermediate date purpose is to check that both defence and prosecution are ready to proceed to trial.
797 Section 63(4)(b) of CJA.

give evidence in its defence simply because the prosecution must prove its case beyond a reasonable doubt. The defence can submit a motion that there is no case to answer. However, if the defence decides to introduce evidence, this may be done to weaken the prosecution's case. At the instance of the defence, the accused may give evidence under oath. The defence lawyer will then conduct an examination, and after that, the prosecution will have an opportunity to cross-examine the accused or their witnesses. The defence will have a chance to re-examine the accused and/or witnesses to clarify any misunderstanding that may have occurred during cross-examination.

A judge's primary function is to oversee the presentation of evidence by the defence and the prosecutor and ensure that procedures are followed fairly. However, if a young person is not subject to a compulsory supervision order and is charged with a crime after their 16th birthday, the Sheriff can request advice from the children's hearing system regarding the most appropriate way of disposing of the case against a young person and can even remit the young person to the children's hearing system for disposal of the case.[798] The judge may, instead of making an order on that plea or finding, remit the case to the Principal Reporter to arrange for the disposal of the case by a children's hearing, or on that plea or finding, may request the Principal Reporter to organise a children's hearing to obtain their advice as to the treatment of the young person.[799]

In contrast, South Africa does not have a children's hearing system. Instead, a child justice court may, at any time before the conclusion of the prosecution's case, make an order for diversion in respect of a child following the provisions of section 52(5) of CJA.[800] A child justice court that makes a diversion order must postpone those proceedings, pending the child's compliance with the diversion order and warn the child that any failure to comply with the diversion order may result in any acknowledgement of responsibility being recorded as an admission in the event of the trial being proceeded with as referred to in section 58(4)(b) of CJA.[801]

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798 Section 49 of Criminal Procedure (Scotland) Act 1995.
799 Section 49(1)(a)(b) of Criminal Procedure (Scotland) Act 1995.
800 Section 67(1)(a) of CJA.
801 Section 67(1)(b) of CJA.

The child justice court must, on receipt of a report from the probation officer that a child has successfully complied with the diversion order, and if the child justice court is satisfied that the child has complied, make an order to stop the proceedings.[802] The child justice court, in the case where the court diverted the matter in terms of section 67, may record the acknowledgement of responsibility made by the child as an admission referred to in section 220 of the CPA and proceed with the trial.[803]

Where a person who is not subject to a compulsory supervision order; is over the age of 16 years; and not within six months of attaining the age of 18 years, is charged summarily with an offence and pleads guilty, or has been found guilty of the offence, the court may request the Principal Reporter to arrange a children's hearing to obtain their advice as to the treatment of the person.[804] On consideration of any advice received under subsection (6) of the same Act, the court may, as it thinks proper, dispose of the case itself; or, where on the hearing such advice, remit the case to the Principal Reporter for the disposal of the case by a children's hearing.[805]

If the offence against which an accused person is charged is serious, the accused will be tried under the solemn procedure.[806] This trial can occur in either the Sheriff's Court or the High Court of Justiciary. The role of the judge is different in a solemn trial than in a summary procedure trial. The judge sits with at least 15 jury members whose primary function is to look at the factual evidence to determine the innocence or guilt of the accused person.[807] The jury is often referred to as the 'master of the facts,' but it is the judge's task to impose a punishment should the accused be found guilty by the jury.

A solemn trial commences with the accused appearing on a petition[808] before a Sheriff. An indictment prepared by Lord Advocate must be served on the accused in a High Court trial twenty-nine days before the preliminary hearing. In a Sheriff's Court trial, the

802 Section 67(2) of CJA.
803 Section 58(4)(b) of CJA.
804 Section 49(6) of Criminal Procedure (Scotland) Act 1995.
805 Section 49(7) of Criminal Procedure (Scotland) Act 1995.
806 See Part VII of Criminal Procedure (Scotland) Act 1995.
807 See section 88 of Criminal Procedure (Scotland) Act 1995.
808 The term "petition" refers to a formal application made to a court in writing that requests action on a certain matter.

indictment must be served on the accused at least fifteen days before the first date of hearing.[809] The indictment can be served on either the accused or the defence lawyer.[810] The prosecution is not permitted to attach any notice of the accused's previous convictions to the indictment, and such can be submitted to the court in due course.[811] A list of witnesses will accompany the indictment for the prosecution on a separate sheet.[812]

The relevant trial court will receive a copy of the indictment before the document is served on the accused or on the actual day of service.[813] Concerning a Sheriff Court trial, section 68 of the Criminal Procedure (Scotland) Act 1995 gives the accused or the defence lawyer the right to inspect any production lodged by the prosecution. In a High Court trial, if the accused wishes to challenge the indictment, the competency of proceedings or the admissibility of evidence, seven days' notice must be given to the court and the prosecution before the preliminary hearing has taken place.[814]

When an accused has been fully committed for trial in that the indictment has been served, proof of service noted, and the accused is present at trial, an opportunity exists for the prosecution to question. In the presence of the accused, the prosecution will read out the charge(s) contained in the indictment to the accused, and the accused will have a right to respond.[815] The prosecution, at this stage, does not have the right to cross-examine the accused as this is not a trial. The accused is free to respond to the charge(s) if they so wish, and they will have a defence lawyer present to advise the accused in this regard.

The accused is legally obliged to attend on the first date in the Sheriff's Court.[816] The judge uses the first date to determine whether the parties are prepared to proceed to trial and to discover the evidence that the parties have agreed upon. Where the first date

809 Section 64 of Criminal Procedure (Scotland) Act 1995.
810 Section 66 of Criminal Procedure (Scotland) Act 1995.
811 Section 69(1) of Criminal Procedure (Scotland) Act 1995.
812 Section 69 of Criminal Procedure (Scotland) Act 1995.
813 Section 66 of Criminal Procedure (Scotland) Act 1995.
814 Section 70A of Criminal Procedure (Scotland) Act 1995.
815 Section 36 of Criminal Procedure (Scotland) Act 1995.
816 Section 77 of Criminal Procedure (Scotland) Act 1995.

has been concluded, the accused is expected to enter a plea of guilty or not guilty.[817] If the accused enters a guilty plea, he will have to sign a copy of the plea, which the Sheriff also signs.[818] If the accused enters a plea of not guilty, the matter will proceed to trial, and the 15 members will have to be picked and sworn in as the jury.[819] The prosecution and the defence can object to the presence of specific individuals on the jury.

The prosecutor will commence proceedings against the accused by calling the first witness for the prosecution, who the court will swear in. The procedure to conduct a trial is quite similar to a summary trial in respect of examination-in-chief, cross-examination, and re-examination of witnesses by both prosecution and the defence lawyer. Once the prosecution concludes its case, the defence can respond to the prosecution case in several ways, such as submitting to the court that there is no case to answer.[820] If the defence reaches such a conclusion, a submission can be made to the judge requesting that the charges against the accused be dismissed. If so, the jurors must be sent out of the courtroom, and the prosecution and defence lawyers will present legal arguments to the judge, who will decide the matter as the master of law alone.[821] The judge has absolute discretion to determine if the prosecution has corroborated the evidence against the accused and, if not, to dismiss the charges. In *Angus Robertson Sinclair v Her Majesty's Advocate*,[822] the accused had been charged with the murders of two girls, both aged 17 years. It was alleged that Sinclair had murdered the girls in 1977 and then dumped the bodies in a public house in Edinburg. Sinclair was eventually brought to trial in 2007. The defence lawyer successfully moved to have the charges against the accused dismissed on the ground that there was no case to answer. The trial judge eventually decided that there was no case to answer, and the prosecution case collapsed.

In contrast, at the close of the state case, in South Africa, an accused person can apply for a discharge in terms of section 174 of the CPA. Section 174 encompasses the right

817 See sections 76 and 77 of Criminal Procedure (Scotland) Act 1995.
818 Section 77 of Criminal Procedure (Scotland) Act 1995.
819 Section 88 of Criminal Procedure (Scotland) Act 1995.
820 Section 97A(2) of Criminal Procedure (Scotland) Act 1995.
821 Section 97A(4) of Criminal Procedure (Scotland) Act 1995.
822 [2007] HCJAC 27.

of an accused to be discharged from the offence he has allegedly committed where, at the close of the state's case, there is no evidence on which the court may draw the accused to the charge. The purpose of section 174 is to ensure that an accused person does not have to answer and thereby put up a defence to a case where the prosecution has not laid out sufficient evidence to establish the accused may be guilty of the alleged crime.

The defence may decide that the accused will not give evidence at the trial, and there is no requirement under Scottish law for the accused to take the oath and give testimony. If the accused decides to give evidence, the accused will testify before the other witnesses for the defence. Once the defence has concluded its case, both the prosecutor and the defence must address the jury to convince the jurors to favour their respective positions. At this stage, the judge will address the jury to emphasize that the jury members are the masters of the facts and have complete discretion when deciding the court verdict.[823] The jury will be allowed to retire and consider a verdict.[824] A jury can select one of the three available verdicts by a bare majority, and there is no requirement under Scottish law that the jurors' decision is unanimous. In contrast, no jury system is used in South Africa. The presiding officer can only decide on two verdicts, that is, the verdict of guilty or not guilty.

5.5 THE PRESIDING OFFICER & THE SENTENCING PHASE

When an accused is convicted in court, the judge will sentence the accused for the crime. Before passing sentence, the judge must determine whether the law sets out a minimum or a maximum penalty for the offence. The judge decides which factors are relevant and should be considered and how much weight to give each one when deciding on a sentence. Some of the main factors considered include the type of crime/seriousness of the crime; whether the offender has admitted guilt; how the crime affects the victim; other convictions for the offence the offender has committed in the past; the offender's age

[823] Section 99 of Criminal Procedure (Scotland) Act 1995.
[824] Section 99 of Criminal Procedure (Scotland) Act 1995.

and circumstances; and relevant sentencing guidelines.[825] Similarly, in South Africa, the presiding officer has to consider various factors before passing sentence.

A judge can give a wide range of sentences (often called disposal) in a criminal court case. This will depend on the law and the facts and circumstances of a particular case. The judge can impose a non-custodial sentence,[826] which includes absolute discharge;[827] community-based;[828] compensation order;[829] fine;[830] and a deferred sentence.[831] The judge can also give a custodial sentence as imprisonment, considered the most severe sentence if there is no other appropriate way of dealing with the offender. Detention is a form of custodian imprisonment when youths aged 16 to 21 are sent to a young offender's institution rather than an actual prison. Still, the programmes in place are aimed at people up to the age of 23 years. In the case of children under 18 years convicted of certain crimes, a judge can send the accused child offender to appear at a children's hearing. A certificate signed by the court clerk stating that the child whose case is remitted has been found guilty of the offence to which the case relates is conclusive evidence for a children's hearing that the child committed the offence.[832]

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825 Sentencing guidelines are important because judges have to take them into account when sentencing offenders' and it helps to ensure sentences are consistent, fair and appropriate. If a judge does not follow a guideline in a case where guidelines apply, the judge must provide reasons.

826 These are outcomes or sentences which are not prison sentences.

827 This means that there is no punishment. In summary cases no conviction is recorded, but for some purposes it may appear as a previous conviction. The reasons for this sentence could be that the offender was previously of good character, or the offender is very young or old.

828 This is referred to as a Community Payback Order (CPO) which is given as an alternative to a custodial sentence. It can be made up of one or more parts. This includes up to 300 hours' unpaid work for the community; supervision – working with a social worker to change offending behaviour; paying compensation to the victim of the crime; attending programmes – such as those dealing with domestic abuse or sexual offences; and receiving treatment – such as mental health, drug or alcohol.

829 Offender's may be ordered to pay compensation for an injury or distress they have caused, or for damages they have caused to property. The judge sets up the amount to be paid, which takes account of the crime and the offender's ability to pay. Offenders who don't keep up with the payment can be taken back to court and can be sent to prison or detention if the person is under the age of 21.

830 Fines are based on how serious the crime is. The judge will take into account how much the offender can pay. Offenders who don't keep up with payments can be taken into court and another sentence can be given instead. This could be a Community Payback Order (CPO) or prison or detention if the person is under the age of 21.

831 In this instance, a judge can postpone a sentence to a later date. If the offender stays out of trouble during that time the judge normally gives less severe sentence than if they get into trouble with the law.

832 See section 71 of Criminal Procedure (Scotland) Act 1995.

The court has the power to direct the Principal Reporter to arrange a children's hearing to decide whether to make a compulsory order concerning the child.[833] If the court is satisfied that the nature of the child's circumstances is such that for the protection, guidance, treatment or control of the child, it is necessary as a matter of urgency that interim compulsory supervision be made, the court may make an interim supervision order concerning a child.[834] In contrast, there are no interim or compulsory supervision orders in the South African child justice system. Moreover, once the child offender is found guilty, there is no chance that the child justice court can order diversion.

5.6 THE PRESIDING OFFICER & THE POST-TRIAL PHASE

The child, a relevant person in relation to a child, or an appointed safe-guarder, may, in terms of section 154(2) of the Children's Hearings (Scotland) Act 2011, appeal to the Sheriff against a relevant decision of a children's hearing in relation to a child.[835] An appropriate decision of children's hearing refers to the decisions listed in section 154(3) of the Children's Hearings (Scotland) Act 2011, namely, a decision to make, vary or continue a compulsory supervision order; a decision to discharge a referral by the Principal Reporter; a decision to terminate a compulsory supervision order; a decision to make an interim compulsory supervision order; a decision to make an interim variation of a compulsory supervision order; a decision to make a medical examination order; or a decision to grant a warrant to secure attendance.

In contrast, the CJA provides that an appeal by a child against a conviction, sentence or order as provided in the CJA must be noted and dealt with in terms of the provisions of chapters 30 and 31 of the CPA: provided that if that child was, at the time of the commission of the alleged offence – under the age of 16 years; or 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that

833 Section 108(2) of Criminal Procedure (Scotland) act 1995.
834 Section 109 of Criminal Procedure (Scotland) Act 1995.
835 The persons are the child; a relevant person in relation to a child; a safe-guarder appointed in relation to the child by virtue of section 30. Section 30 of Children's Hearings (Scotland) Act 2011 deals with the children's hearing duty to consider appointing a person to safeguard the interests of the child to whom the children's hearing relates.

was not wholly suspended, they may note the appeal without having to apply for leave to appeal.[836] The presiding officer must inform the child of their rights in respect of an appeal and legal representation and the correct procedures to give effect to these rights.[837]

When an appeal under section 154 is made, the Principal Reporter must lodge with the Sheriff's clerk a copy of the decision and the reasons for the conclusion of the children's hearing; all information provided under the rules under section 177[838] of the children's hearing; and the report of the children's hearing.[839] The appeal must not be heard in an open court.[840] The Sheriff may hear evidence before determining an appeal from the child; a relevant person in relation to the child; an author or a compiler of a report or statement provided to the children's hearing that made the decision; the Principal Reporter; and where the appeal is against a decision to make, grant, vary or continue an order or warrant including a secure accommodation authorization in respect of the child – the person in charge of secure accommodation specified in the secure accommodation authorization, and the chief social work officer; and any other person the sheriff may consider relevant to provide material evidence.[841]

If the Sheriff is satisfied that the decision to which an appeal under section 154 is justified, he must confirm the decision; where a decision is a decision to grant a warrant to secure attendance, he must recall the warrant; and where the decision to make an interim compulsory supervision order or a medical examination order, terminate the order.[842] The Sheriff may take one or more steps in section 156(3) of the same Act.[843] If

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836 Section 84(1) of CJA.
837 Section 84(2) of CJA.
838 Section 177 deals with procedural rules of children's hearing.
839 Section 155 of Children's Hearings (Scotland) Act 2011.
840 Section 155(3) of Children's Hearings (Scotland) Act 2011.
841 Section 155(4) - (5) of Children's Hearings (Scotland) Act 2011.
842 Section 156(1) – (2) of Children's Hearings (Scotland) Act 2011.
843 These steps are –
a) require the Principal Reporter to arrange a children's hearing for any purpose for which a hearing can be arranged under this Act,
b) continue, vary or terminate any order, interim variation or warrant which is in effect,
c) discharge the child from any further hearing or other proceedings in relation to the grounds that gave rise to the decision,
d) make an interim compulsory supervision order or interim variation of a compulsory supervision order or grant a warrant to secure attendance.

the Sheriff discharges a child, he must also terminate any order or warrant which is in effect in relation to the child.[844] The fact that the Sheriff makes continues or varies an order or grants a warrant does not prevent a children's hearing from continuing, varying or terminating the order or warrant.[845] The Children's Hearings (Scotland) Act sets guidelines regarding the time limit for disposal of appeals under section 154 against certain decisions of children's hearings.[846] The appeal must be heard and disposed of before the expiry of 3 days, beginning the day after the day in which the appeal is made.[847] If the appeal is not disposed of within that period, the authorization, condition, order, variation or warrant ceases to have an effect.[848]

As soon as it is practicable after the Principal Reporter requests an appeal, they must arrange a children's hearing to consider whether the decision should be suspended pending the determination of the appeal.[849] Where the Sheriff is satisfied that the appeal was frivolous or vexatious, he may order that, during the 12 months beginning on the day of the order, the person who appealed must obtain leave from the Sheriff before making another appeal under section 154 against a decision of a children's hearing in relation to the compulsory order.[850]

Section 160 of Children's Hearings (Scotland) Act 2011 regulates appeals to the Sheriff against a determination of a pre-hearing panel or children's hearing that an individual is or is not to be deemed a relevant person in relation to the child; and a determination of review under section 142(2) of the same Act that an individual is to continue to be deemed a relevant person in relation to a child.[851] If the Sheriff is satisfied that the determination to which the appeal relates is justified, the Sheriff is required to confirm the decision.[852]

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844 Section 156(4) of Children's Hearings (Scotland) Act 2011.
845 Section 156(5) of Children's Hearings (Scotland) Act 2011.
846 See section 157 of the Children's Hearings (Scotland) Act 2011.
847 Section 157(2) of Children's Hearings (Scotland) Act 2011.
848 Section 157(3) of Children's Hearings (Scotland) Act 2011.
849 Section 158 of Children's Hearings (Scotland) Act 2011.
850 Section 159(2) of Children's Hearings (Scotland) Act 2011.
851 Section 160(1) of Children's Hearings (Scotland) Act 2011.
852 Section 160(3) of Children's Hearings (Scotland) Act 2011.

If the Sheriff is not satisfied that an individual is or is not deemed to be a relevant person, he must quash the determination, and where a determination is a determination of a pre-hearing panel or children's hearing under section 81 the individual should not be deemed a relevant person concerning a child, make an order deeming the individual to be relevant concerning the child.[853] An appeal under section 160 must be made before the expiry of 7 days, beginning with the day on which the determination is made.[854] An appeal must be heard and disposed of before the expiry of 3 days, starting with the day on which the appeal is made.[855]

Section 161 of the Children's Hearings (Scotland) Act 2011 regulates appeals to the Sheriff against decisions affecting contact or permanence orders. An individual in relation to whom a contact order is in force regulating contact between the individual and the child; a permanence order is in force which specifies arrangement for the contact between the individual and the child; or the condition specified for the purposes of section 126(2)(b) of the same Act are satisfied, may appeal against a relevant decision of children's hearing in relation to a child.[856]

If the Sheriff is satisfied that the relevant decision is justified, the Sheriff must confirm the decision.[857] If he is not satisfied, the Sheriff must vary the compulsory supervision order by varying or removing the measure contained in the order under section 83(2)(g) of the same Act. An appeal under the section must be made before the expiry of the period of 21 days beginning with the day on which the relevant decision was made and must be heard and disposed of before the expiry of the period of 3 days beginning with the day on which the appeal is made.[858]

Section 162 of the Children's Hearings (Scotland) Act 2011 applies where a relevant order or warrant made in relation to a child includes a secure accommodation authorization. A relevant order or warrant is a compulsory supervision order, an interim

853 Section 160(4) of Children's Hearings (Scotland) Act 2011.
854 Section 160(6)(a) of Children's Hearings (Scotland) Act 2011.
855 Section 160(6) of Children's Hearings (Scotland) Act 2011.
856 Section 161(1) – (2) of Children's Hearings (Scotland) Act 2011.
857 Section 161(4) of Children's Hearings (Scotland) Act 2011.
858 Section 161(6)(a)(b) of Children's Hearings (Scotland) Act 2011.

supervision order, a medical examination order, and a warrant to secure attendance.[859] The child or a relevant person in relation to a child may appeal to the Sheriff against a relevant decision in relation to authorization.[860] A relevant decision in this instance is the decision by the chief social work officer to implement the authorization or not to remove the child from secure accommodation. An appeal under section 162 cannot be held in an open court.[861]

Section 163 of the Children's Hearings (Scotland) Act 2011 is the classical provision that deals with the appeals in a stated case to the Sheriff Principal and Court of Session against a determination by the Sheriff of an application to determine whether a section 67[862] ground is established; an application under section 110(2)[863] for review of a finding that section 67 ground which relates to the referral of the child to children's hearing is established; an appeal against a decision of a children's hearing; an application under section 98 for an extension of an interim compulsory supervision order; an application under section 99,[864] for further extension of interim compulsory supervision order. The persons who may appeal are the child; a relevant person in relation to the child; a safe-guarder appointed in relation to the child, and two or more persons mentioned under section 163(3) of the same Act.[865]

A safe-guarder[866] may not appeal against a determination by the Sheriff of a type mentioned in section 163(1)(a)(i) or (ii), or a decision of the Sheriff in terms of section

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859 Section 162(2) of Children's Hearings (Scotland) Act 2011.

860 Section 162(4) of Children's Hearings (Scotland) Act 2011.

861 Section 162(6) of Children's Hearings (Scotland) Act 2011.

862 This excludes the provision of section 67(2)(j) of Children's Hearings (Scotland) Act 2011. Section 67 lists grounds for investigation and determination by Principal Reporter related to the referral of a child to children's hearing.

863 Section 110(2) of Children's Hearings (Scotland) Act 2011 deals with an application to the sheriff for a review of the grounds of determination. The persons who may apply are, the person who is the subject of the ground's determination (even if that person is no longer a child), and a person who is, or was at the time the grounds determination was made, a relevant person in respect of the child – subsection (3).

864 Section 99 of the Children's Hearings (Scotland) Act 2011.

865 Section 176 to 184 of Criminal Procedure (Scotland) Act 1995 deals with appeals from summary proceedings in stated cases.

866 Safe-guarders are persons who are appointed by children's hearings or sheriffs when they think it is required to safeguard the interests of the child in the proceedings. Their role is to provide support and advice for the proceedings.

163(1)(b), to the Court of Session against the Sheriff Principal's[867] decision in such an appeal.[868] The Principal Reporter may not appeal against a determination by the Sheriff confirming a decision of a children's hearing.[869] An appeal under section 163 may be made on a point of law or in respect of any procedural irregularity.[870]

JS and CS v The Children's Reporter[871] relates to two appeals by way of stated case in terms of section 163 of the Children's Hearings (Scotland) Act 2011, which raised two issues, namely: what is the extent of the powers of a Sheriff in his management of a hearing on an application by a Children's Reporter to find grounds of referral established to restrict the leading of evidence; and whether what was done by the Sheriff in the case under appeal was an appropriate exercise of those powers.[872] The appeals were at the instance of JS and CS and were against a determination of the Sheriff on 4 December 2015 that grounds of referral in respect of three children were established. The appeals were originally submitted to the Sheriff Principal.[873]

The parties agreed that only two out of five issues required consideration. Firstly, whether the Sheriff erred in law by refusing to allow parents to call the children as witnesses; and secondly, did the Sheriff err in law in establishing the grounds of referral.[874] The court, after considering submissions, answered two questions in the affirmative, stating that the appellant was denied a fair hearing.[875] The Sheriff has the power to review the decision or determination imposed on a local authority where the duty is imposed on a local authority by virtue of compulsory supervision order.[876]

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867 Sheriff Principal is a judge with a judicial, quasi-judicial, and administrative responsibilities.
868 Section 163(4) of Children's Hearings (Scotland) Act 2011.
869 Section 163(5) of Children's Hearings (Scotland) Act 2011.
870 Section 163(9) of Children's Hearings (Scotland) Act 2011.
871 [2016] CSIH 74.
872 [2016] CSIH 74, [1].
873 The appeals were lodged on 31 December 2015, the day before the appellate jurisdiction was transferred from the Sheriff Principal to the Sheriff Appeals Court in terms of section 109 of the Courts Reform (Scotland) Act 2014. Section 109 amended a number of provisions related to appeals in civil and criminal cases related to Criminal Procedure (Scotland) Act 1995 as well as changes in court structure.
874 [2016] CSIH 74, [2].
875 [2016] CSIH 74, [41].
876 Section 166(1) of Children's Hearings (Scotland) Act 2011.

If the local authority is satisfied that it is not the relevant local authority for the child in respect of whom the duty is imposed, the local authority may apply to the Sheriff for a review of the decision or determination to impose the duty with or without hearing evidence. A local authority may also appeal by way of a stated case to the Sheriff Principal against the determination by the Sheriff under section 166(6)of the Children's Hearings (Scotland) Act 2011, the decision or making of an order by the Sheriff under section 166(8)(b) of the same Act.[877] Any persons mentioned in section 167(3) of the same Act may appeal by stated case to the Sheriff Principal against the determination by the Sheriff of which local authority is the relevant local authority for the child.[878] Any determination of an appeal under this section is final.[879]

In solemn proceedings, a right to appeal may be brought under the review of the High Court where any alleged miscarriage of justice, which may include a miscarriage of justice based on the existence and significance of evidence which was not heard at the original proceedings, and the jury's having returned a verdict which no reasonable jury, properly directed, could have returned.[880] In this instance, the evidence may found an appeal only where there is a reasonable explanation of why it was not so heard.[881] One of the reasons could be that the evidence was not admissible at the time of the original proceedings but was admissible at the time of the appeal. The court may admit that evidence if it appears to the court that it would be in the interests of justice to do so.[882]

Where evidence is from a person who gave evidence at the original proceedings and which is different from or additional to the evidence so given, it may not found an appeal unless there is a reasonable explanation as to why the evidence now sought to be adduced was not given by that person at those proceedings, which explanation is in itself supported by independent evidence.[883] Independent evidence means evidence not

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877 In terms of the section 166(8)(b), the sheriff may make an order for that local authority to reimburse such sums as the sheriff may determine to the local authority which made the application under subsection 166(2) for any costs incurred in relation to the duty.
878 Section 167 of Children's Hearings (Scotland) Act 2011.
879 Section 167(7) of Children's Hearings (Scotland) Act 2011.
880 Section 106 of Criminal Procedure (Scotland) Act 1995.
881 Section 106(3A-D) of Criminal Procedure (Scotland) Act 1995.
882 Section 106(3B) of Criminal Procedure (Scotland) Act 1995.
883 See Section 106(3C) of Criminal and Procedure (Scotland) Act 1995.

heard at the original proceedings from a source independent of a person referred to in section 106(3C) of the Criminal Procedure (Scotland) Act 1995 and is accepted by the court as credible and reliable.[884] Appeals against automatic sentences where an earlier conviction was quashed are regulated by section 106A of the Criminal Procedure (Scotland) Act 1995.[885]

The prosecutor may appeal to the High Court against an acquittal or a direction.[886] This can be done immediately after an acquittal where the prosecutor moves for the trial date to be adjourned for no more than two days in order to consider whether to appeal against the acquittal, in which case the court must grant the motion unless the court considers that there are no arguable grounds of appeal.[887] In order to consider whether it would be in the interests of justice to grant a motion for adjournment, the court must have regard to whether, if an appeal were to be made and to be successful, continuing with the trial would have any impact on any subsequent or continued prosecution, whether there are any arguable grounds for appeal.[888]

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884 See Section 106(3D) of Criminal and Procedure (Scotland) Act 1995.

885 Section 106A(1) applies where –

a) a person has been sentenced under section 205A of the same Act;
b) he had, at the time at which the offence for which he was so sentenced was committed, only one previous conviction for qualifying offence or a relevant offence within the meaning of that section; and
c) after he has been so sentenced, the conviction mentioned in paragraph (b) above has been quashed.

Subsection (2) applies where –

a) a person has been sentenced under section 205B(2) of this Act.
b) he had at the time at which the offence for which he was so sentenced was committed, only two previous convictions for class A drug trafficking offences within the meaning of that section; and;
c) after he has been so sentenced, one of the convictions mentioned in paragraph (b) above has been quashed.

Subsection (3) provides that where subsection (1) and (2) above applies, the person may appeal under section 106(1)(b) of this Act against the sentence imposed on him under section 205A(2) or, as the case may be, 205B(2) of this Act. Subsection (4) provides that, an appeal under section 106(1)(b) of this Act by virtue of subsection (3) above –

a) may be made notwithstanding that the person has previously appealed under that section; and
b) shall be lodged within two weeks of the quashing of the conviction as mentioned in subsection (1)(c) or, as the case may be, (2)(c) above.

Subsection (5) provides that where an appeal is made under section 106(1)(b) by virtue of this section, the following provisions of this Act shall not apply in relation to such an appeal, namely –

a) section 121; and
b) section 126.

886 Section 107A of Criminal Procedure (Scotland) Act 1995.

887 Section 107A(2) of Criminal Procedure (Scotland) Act 1995.

888 Section 107A(4) of Criminal Procedure (Scotland) Act 1995.

The court may order the detention of the person in custody only if the court considers that there are arguable grounds for appeal.[889] In an appeal brought under section 107A or 107B,[890] the High Court may review the acquittal, direction, finding, decision, determination or ruling in the proceedings at first instance if it has a bearing on the acquittal, direction or finding appealed against.[891] The test to be applied by the High Court in reviewing the acquittal, direction or finding appealed against is whether it was wrong in law.[892] The High Court must quash the appeal if the prosecutor seeks to bring a new prosecution charging the accused with the same offence as that labelled in the indictment or a similar offence arising out of the same facts as the offence labelled in the indictment. The High court must grant the prosecutor authority to do so unless the court considers that it would be contrary to the interests of justice to do so.[893]

Once a note to appeal has been received, the judge who presided at the trial is required to furnish the clerk of the court of the Justiciary[894] with a written report giving the judge's opinion on the case generally and on the grounds contained in the note for an appeal.[895] The judge who presided at the trial may provide the clerk of Justiciary any written observations that the judge thinks fit on the specified grounds.[896] The clerk must give a copy of the report to the accused, the accused's solicitor, and the prosecutor.[897] If the report has not been furnished, the High Court may call for it to be delivered within such period as it may specify or, if it thinks fit, to hear and determine the appeal without the report.[898]

The High Court may dispose of an appeal against conviction by affirming the verdict of the trial court, setting aside the verdict of the trial court and either quashing the conviction or substituting thereof an amended verdict of guilt, or setting aside the verdict of the trial

889 Section 107A(7) of Criminal Procedure (Scotland) Act 1995.
890 Criminal Procedure (Scotland) Act 1995.
891 Section 107C(1) of Criminal Procedure (Scotland) Act 1995.
892 Section 107C(1) of Criminal Procedure (Scotland) Act 1995.
893 Section 107E(1) – (3) of Criminal Procedure (Scotland) Act 1995.
894 The Principal Clerk of Session and Justiciary is the clerk of court responsible for the administration of the Supreme Courts of Scotland and their associated staff.
895 Section 113(1) of Criminal Procedure (Scotland) Act 1995.
896 Section 113A(1) of Criminal Procedure (Scotland) Act 1995.
897 Section 113A(3) of Criminal Procedure (Scotland) Act 1995.
898 Section 113(3) of Criminal Procedure (Scotland) Act 1995.

court and quashing the conviction and granting authority to bring a new prosecution in accordance with section 119 of Criminal Procedure (Scotland) Act 1995.[899] The High Court may also dispose an appeal against sentence by affirming such sentence; or if the court thinks that, having regard to all the circumstances quashing the sentence and passing another sentence, whether more or less severe in the substitution thereof.[900] Every interlocutor[901] and sentence pronounced by the High Court shall be final and conclusive and not subject to review by a court.[902]

Under Scottish law, any person convicted or found to have committed an offence in summary proceedings may, with the leave granted per section 180 or 187 of Criminal Procedure (Scotland) Act 1995, appeal to the Sheriff Appeal Court against such conviction or finding; against the sentence passed on such conviction; against his absolute discharge or admonition or any drug treatment and testing order or any other deferring sentence; against any disposal under section 227ZC(7)(a) to (c) or (c) or (e) or (8)(a) of the Act; or against any decision to remit made under section 49 of the Criminal Procedure (Scotland) Act 1995; or against both such conviction and sentence or disposal or order. The Sheriff Appeal Court may elect to exercise discretion and refer a point of law to the High Court for its opinion if it considers the point complex or novel.[903] In its application, a Sheriff Appeal Court may refer the application of a party to the appeal proceedings or on its own initiative.[904] When giving its opinion, the High Court may also provide direction as to the procedure to be followed or the disposal of the appeal.[905]

The Sheriff Appeal Court has the power to dispose of cases by remitting the cause to the inferior court with its opinion or any direction thereon; affirming the verdict of the inferior court; setting aside the verdict of the inferior court, and either quashing the conviction or, substitution an amended verdict of guilty; or setting aside the verdict of the

899 Section 118(1) of Criminal Procedure (Scotland) Act 1995.
900 Section 118(4) of Criminal Procedure (Scotland) Act 1995.
901 The term “interlocutor” in Scottish law refers to an order or decision of a Scottish court short of a final judgment. Each interlocutor is signed by the presiding judge and interlocutor sheets then form part of the process. In South African law, such procedure does not exist.
902 Section 124(2) of Criminal Procedure (Scotland) Act 1995.
903 Section 175A(1) of Criminal Procedure (Scotland) Act 1995.
904 Section 175A(2) of Criminal Procedure (Scotland) Act 1995.
905 Section 175A(3) of Criminal Procedure (Scotland) Act 1995.

inferior court and granting authority to bring a new prosecution in accordance with section 185 of Criminal Procedure (Scotland) Act 1995.[906] In *Julie Paterson v The Child Co & LW*,[907] the Sheriff Appeal Court allowed the appeal and remitted the case to the Sheriff with discretion that he should confirm the decision of the Children's Hearing dated 27 February 2018.

According to Lord Gill,[908] "…*appeals against conviction and sentence from Justice of Peace and Sheriff Courts in summary procedure should be remitted to the Sheriff Appeal Court, rather than, as previously done, the High Court of Justiciary".* Part of the recommendation is that judgments of the courts in criminal appeals should be binding on Sheriffs throughout Scotland to allow for the creation of consistency and a coherent body of case law.[909]

The Sheriff Appeal Court has exclusive jurisdiction for all appeals in summary criminal proceedings and appeals relating to bail decisions in both summary and solemn proceedings from Sheriff Courts and Justice of Peace courts. Decisions of the Sheriff Appeal Court may only be appealed to the High Court of Justiciary with the permission of the Sheriff Appeal Court or High Court.[910] The Sheriff Appeal Court can refer a point of law to the High Court of Justiciary.[911] The High Court may give permission for an appeal only if the court considers that the appeal would raise an important point of principle or practice or if there are some other compelling reasons for the court to hear the appeal.[912]

An application for permission for an appeal must be made before the end of the 14 days, beginning with the day on which the decision of the Sheriff Appeal Court was made.[913] The High Court may, in certain circumstances, extend 14 days if it is satisfied that

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906 Section 183(1) of Criminal Procedure (Scotland) Act 1995.
907 [2018] SAC 20.
908 Report of the Scottish Civil Courts Review (Volume 1: Chapter 1 – 9.).
909 Report of the Scottish Civil Courts Review (Volume 1: Chapter 1 – 9.).
910 The Scottish Criminal Justice System: The Criminal Courts (1 June 2016) by Frazer McCullum 7 available on www.parliament.scot>SB_16-46 – (date of use: 23 August 2019).
911 Section 194ZB(1) of Criminal Procedure (Scotland) Act 1995.
912 Section 194ZB(3) of Criminal Procedure (Scotland) Act 1995.
913 Section 194ZB(4) of Criminal Procedure (Scotland) Act 1995.

exceptional circumstances exist for such extension.[914] An application to the High Court for permission for an appeal under section 194ZB(1) is to be determined by a single judge of the High Court.[915] If the judge gives permission for the appeal, the judge may make comments in writing in relation to the appeal. If the judge refuses permission for the appeal, the judge must give reasons in writing for the refusal, and where the appellant is on bail, and the sentence imposed on the appellant on conviction is one of imprisonment, the judge must grant a warrant to apprehend and imprison the appellant.[916]

Where an application was considered and refused by a single judge, the appellant may apply again to the High Court for the appeal. Such application is considered by three judges of the High court, who can give or refuse permission for the appeal and provide reasons in writing for the refusal.[917] In disposing of an appeal under section 194B(1), the High Court may remit the case back to the Sheriff Appeal Court with its opinion and any decision as to further procedure in or disposal of the case or exercise any power that the Sheriff Appeal Court could have exercised concerning the disposal of the appeal proceedings before that court.[918] Every interlocutor and sentence, including disposal or order, pronounced by the High Court in disposing of an appeal relating to summary proceedings is final, conclusive, and not subject to review by any court.[919]

The Criminal Case Review Commission[920] investigates cases of those convicted of crimes whose appeals against conviction were unsuccessful. They also consider whether mistakes were made in the sentencing process. Whilst a convicted person has usually only had one opportunity to appeal, the Commission can refer the matters back to the Appeal courts for a fresh appeal.[921] The Commission plays an inquisitorial role,

914 Section 194ZB(5) of Criminal Procedure (Scotland) Act 1995.
915 Section 194ZD(1) of Criminal Procedure (Scotland) act 1995.
916 Section 194ZD(2) – (3) of Criminal Procedure (Scotland) Act 1995.
917 Section 194ZE(4) – (6) of Criminal Procedure (Scotland) Act 1995.
918 Section 194B(1) of Criminal Procedure (Scotland) Act 1995.
919 Section 194ZK of Criminal Procedure (Scotland) Act 1995.
920 The Criminal Cases Review Commission is the statutory body responsible for investigating alleged Miscarriages of justice in England, Wales and Northern Ireland. It was established by section 8 of the Criminal Appeal Act of 1995.
921 Criminal Cases Review Commission Briefing Paper Number 7448 7 January 2016 4.

independent of the courts, the prosecution and the convicted people whose cases it investigates.[922]

The test applied by the Commission in deciding whether or not to refer a case to the Appeals Courts is known as the real possibility test. The test is derived from section 13 of the Criminal Appeals Act 1995, which states that "…*a reference of a conviction, verdict, finding or sentence shall not be made… unless the commission considers that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference made*."[923] In *R v Criminal Cases Review Commission*,[924] Lord Bingham gave a judicial interpretation of the test. He remarked that the real possibility test denotes a contingency which, in the commission's judgment, is more than an outside chance or a possibility but which may be less than a probability. The commission must judge that there is at least a reasonable prospect of a conviction not being upheld.

Various criticisms were levelled against the real possibility test, with some believing that the test makes the Commission Cases Review Commission subservient to the courts of appeal.[925] A further contention is that "*the view of the Royal Commission was that any test of referral should be in line with that articulated in 1994 by the organization justice: namely 'whether there is an arguable case that there has been a wrongful conviction.'*"[926] Those in support of the test submit that the alternative of not having a real possibility test implies that the commission would be referring cases where there was not a real possibility of the Court of Appeal overturning them, which seems a slightly strange position to get into, given the attendant costs and the impact on victims.[927]

The only ground on which the Court of Appeal can allow an appeal against a conviction is where the court is of the opinion that the conviction is unsafe.[928] The criticisms against

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922 It is important to note that the Scottish Criminal Cases Review Commission investigates potential miscarriages of justice in the Scottish criminal courts and it function separate from England, Wales and Northern Ireland Criminal Cases Review Commission.

923 The researcher does not suggest that this Act apply in Scottish legal system, however, the reference is made only because of the similarities of the test applied by the Scottish Commission in referral of cases to Appeals Courts.

924 [1999] 3 ALL ER 498.

925 Cardiff University Law School Innocence Project (CCR0029) 1.3.

926 Cardiff University Law School Innocence Project (CCR0029) 1.2.

927 Criminal Cases Review Commission, Twelfth Report of Session 2014 – 2015 13.

928 Criminal Cases Review Commission Twelfth Report of Session 2014 – 2015 13.

the court of appeal are that it is overly reluctant to interfere with a properly delivered jury verdict, requiring appellants to address some material irregularity or to provide fresh evidence, which creates a high barrier for the commission to meet if a conviction is to have a real possibility of being quashed.[929] In *Regina v Pendleton*,[930] Lord Bingham pointed out that the Court of Appeal is a court of review, not a court of trial. It may not usurp the jury's role as the body charged by law to resolve issues of fact and determine guilt. Trial by jury does mean trial by jury in the first instance and trial by judges of the Court of Appeal in the second. The Court of Appeal is entrusted with a power of review to guard against the possibility of injustice, but it is a power to be exercised with caution, mindful that the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury.

The Scottish Criminal Cases Review Commission on consideration of any conviction of a person or sentence passed on a person who has been convicted on indictment or complaint may, at any time, and whether or not an appeal against such a conviction or sentence has previously been heard and determined by the High Court or the Sheriff Appeal Court, refer the whole case to the High Court.[931] The grounds in which the commission may refer a case to the High Court are where the commission believes that a miscarriage of justice may have occurred; and that it is in the interests of justice that a reference should be made.[932]

In contrast, the CJA makes provisions for automatic review in certain cases. Section 85 provides that the provisions of chapter 30 of the CPA dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of CJA: provided that if a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)(j) of the Children's Act, the sentence is subject to review in terms of section 304 of the CPA by a judge of the High Court having jurisdiction, irrespective of, the duration of the sentence; the period the judicial officer who sentenced

929 Criminal Cases Review Commission Twelfth Report of Session 2014 – 2015 13.
930 [2001] UKHL 66.
931 Section 194B(1) of Criminal Procedure (Scotland) Act 1995.
932 Section 194C of Criminal Procedure (Scotland) Act 1995.

the child in question has held the substantive rank of magistrate or regional magistrate; whether a legal representative represented the child in question; or whether the child in question appeared before a district court or a regional court sitting as a child justice court.

5.7 PRELIMINARY CONCLUSION

From the above discussion, the Scottish system focuses on the welfare of children irrespective of whether they have committed an offence. There are three overarching principles at the centre of the Scottish system, which are, the need to safeguard and promote the welfare of the child throughout childhood is the paramount consideration; the child must be given an opportunity to express a view and, if the child chooses to express a view, panel members must have regard to the child's view, taking into account the child's age and maturity; and, an order can only be made if it is considered better for the child than if no order was made.

The researcher submits that the Scottish system is the true reflection of how the best interests of the child standard are applied in practice. The bests interests of the child are not only considered when the child has committed a criminal offence. Instead, the focus is on the child's welfare before and after the child has committed a criminal offence. South Africa can adopt and develop some welfare approaches in dealing with children. This can assist in reducing the number of children committing criminal offences by getting involved in the different developmental stages of children.

One of the objectives of CJA is to create a separate justice system to ensure that child offenders are dealt with outside the adult criminal justice system. This is evident by the informal nature of preliminary inquiry and the notion of preventing children from being exposed to the adverse effects of the formal criminal justice system. The Scottish system, however, has undoubtedly created mechanisms that can help South Africa to achieve its objective of dealing with children outside the formal criminal justice system.

In the final chapter of this research, the researcher turns to his conclusions and recommendations based on the preceding five chapters.

CHAPTER SIX

CONCLUSIONS & RECOMMENDATIONS

6.1 INTRODUCTION

In this concluding chapter, the researcher returns to the initially posed research questions and answers them based on the comparative research regarding the role of the presiding officer in child justice proceedings. The researcher relies on the differences in modes of justice (i.e. inquisitorial and accusatorial) to argue that the modes influence the nature of the proceedings and that South Africa may be best aligned to receive lessons from Germany and Scotland to improve the current situation, which places an inquisitorial role onto presiding officers who are also charged with executing and umpiring accusatorial procedure. The researcher also makes certain recommendations for the consideration of the South African legislature concerning the CJA and the role of presiding officers therein.

6.2 CHAPTER SUMMARY

In chapter one, the researcher presented the research topic and contextualised the research approach, research question(s) and methodology selected. The content provided an overview of central research questions and contextualised them by offering definitions for significant research themes. The researcher explored the meanings of various terms provided in South African child justice jurisprudence, legislation, and comparative jurisdictions by providing working definitions within the research context.

In chapter two, the researcher concluded that accusatorial and inquisitorial modes of criminal procedure are the core of all the comparative jurisdictions analysed. South Africa, Germany and Scotland have tried to design legislation to protect the interest of child/juvenile offenders with different aims. Germany's juvenile justice system has never been dominated by a social welfare model but rather by the idea that punishment and education be reconciled within the juvenile justice framework. This is dissimilar to the

Scottish and South African child/youth justice approaches. For example, the Scottish system is premised on the notion that delinquency forms part of growth and that a formal, accusatory, interventionist philosophy is harmful and counterproductive.

Both the South African and Scottish child/youth systems aim to protect the child's best interest. Still, the Scottish system operates on the idea that early intervention is necessary to prevent children from committing a criminal offence. The South African system intervenes only when the child has committed a criminal offence. These jurisdictional differences invite scrutiny and offer a potential academic and practical incentive to investigate the comparative jurisdictions to establish whether we can learn from their system and transform the South African child justice system for best practices. One such best practice mechanism may be informed by the role of the presiding officer in the execution of justice based on the best interest of the child offender.

It is clear that the presiding officer in the South African child justice system has a far-extended role that would be permitted in the adult criminal justice process. The position borders on inquisitorial approaches. It is doubtful whether South African presiding officers are sufficiently trained for such an approach or appreciative of their different roles when addressing a child offender compared to an adult accused.

In chapter three, the researcher concluded that the right to legal representation and silence is considered at the core of the effective administration of criminal justice in South Africa. The mandatory allocation of legal representation in South African child justice signifies the importance of the legislation in protecting the purported interest of child offenders. However, the exact role of the mandatory legal representative must be developed to give effect to the best interest standard beyond merely making legislative provisions, therefore.

On the other hand, the right to remain silent is statutorily guaranteed. It does not seem to be recognized at the preliminary inquiry simply because the child is encouraged to acknowledge responsibility for the offence committed, tantamount to formal admission of guilt. It is, however, recognized at different stages of criminal proceedings. The explanation of the right to remain silent and the implications thereof should be applied to the preliminary inquiry in South Africa.

The challenge that requires attention is the inquisitorial duty imposed by the CJA on a presiding officer at the preliminary inquiry. As indicated above, the scope and extent of the inquisitive role are not defined in the CJA. They can potentially violate the rights of a child offender, including the right to remain silent. This is further exacerbated by the enticement of the child offender to acknowledge responsibility in exchange for evading the criminal justice system and the adverse consequences of being subjected to the criminal justice system.

The role played by the presiding officer in South African child justice is complicated by the best interest standard. As shown above, there is no legal definition of the content of section 28(2) of the Constitution. This, it is submitted, continues to expose the best interest of the child standard to the vagueness and indeterminacy criticisms. The standard's broadness may tempt the courts to utilise it even when more specific legal provisions are relevant. In essence, the presiding officer in South African child justice must play multiple roles, many of which are contradictory. While there is no argument with the best interest standard, it seems absurd for the umpire of fact to also be expected to act *in loco parentis* while trying a child offender. This is further complicated when the victim and offender are children (often the case in South Africa), and the court must proceed to protect two divergent interests and ensure that justice is seen to be done.

In chapter four, the researcher concluded that at the core of the German juvenile system is the principle that youth should always be treated as such. Accordingly, children can never be prosecuted for acts committed before 14 years of age nor tried as adults for acts committed before the age of 18 years. If intervention is necessary for children younger than 14, the case may be referred to the youth welfare system. German juvenile courts have jurisdiction over 18, 19 and 20-year-olds.

German courts do not decide whether to treat a young adult as a juvenile or an adult based on the seriousness of the offence. Instead, a German court applies juvenile law if either, at the time of committing the crime, the young adult in his moral and psychological development was like a juvenile; the motives and the circumstances of the offence are those of a typically juvenile crime (for example, if it was an impulsive offence committed with peers). If either of these factors apply, the court is required to handle the case under

juvenile law without regard to the seriousness of the offence. In contrast, South African child justice does not interrogate the moral and psychological development of the child offender or the motives and circumstances of the crime but focuses more on the nature of the act, and the potential punishment for the offence committed.

By law, the primary purpose of any youth justice response in Germany is to prevent the young person from committing additional offences. German juvenile system is also grounded in a principle of minimum intervention, meaning that sanctions should only be imposed if absolutely necessary. For petty offences, this means that diversion without any sanction is typical. More serious offences, including some felonies, may be addressed through educational measures provided by outside agencies and/or minor sanctions by the court, such as warning, community service, reparation/restitution, an apology to the victim or a fine.

In South Africa, by contrast, a child offender who is 14 years or older at the time of being sentenced for the offence may be sentenced to imprisonment if the child is convicted of a crime referred to in Schedule 2 or 3 if substantial and compelling reasons exist for imposing a sentence of imprisonment. Moreover, a child offender referred to above may be sentenced to imprisonment for a period not exceeding 25 years. This clearly shows that the focus of the CJA is punishment rather than education or restoration when the court must sentence for more serious offences. The German system is offender orientated, whereas the South African system remains offence oriented in this regard.

Most importantly, the presiding officer in the German juvenile system plays an active role throughout the proceedings to the extent that he administers the oath for witnesses, conducts questioning of the defendant during the main hearing and, to a certain extent, can exclude the parent or guardian, and even the juvenile legal representative if their presence in the proceeding could be disadvantageous to the juvenile's education and development or where they are suspected of being involved in the accused's misconduct or where their presence will impair the ascertainment of truth. In contrast, the role of the presiding officer in South African child justice is hybrid to the extent that he is expected to play a passive role in an adversarial proceeding, albeit with slight inquisitorial deviations in a disjointed nod to the best interest standard.

In chapter five, the researcher concluded that the Scottish system focuses on the welfare of children irrespective of whether they have committed an offence. There are three overarching principles at the centre of the Scottish system, which are, the need to safeguard and promote the welfare of the child throughout childhood is the paramount consideration; the child must be given an opportunity to express a view and, if the child chooses to express a view, panel members must have regard to the child's view, taking into account the child's age and maturity; and an order can only be made if it is considered better for the child than if no order was made.

The researcher submits that the Scottish system is the true reflection of how the best interests of the child standard are applied in practice. The bests interests of the child are not only considered when the child has committed a criminal offence. Instead, the focus is on the child's welfare before and after the child has committed a criminal offence. South Africa can adopt and develop some of the welfare approaches in dealing with child offenders and find a mechanism to combine the Children's Act's welfare approach and the procedural formality of the CJA. This can assist in reducing the number of children committing criminal offences by getting involved in the different developmental stages of children.

One of the objectives of CJA is to create a separate justice system and further ensure that child offenders are dealt with outside the adult criminal justice system. This is evident by the informal nature of preliminary inquiry and the notion of preventing children from being exposed to the adverse effects of the formal criminal justice system. The Scottish system, however, has undoubtedly created mechanisms that can help South Africa to achieve its objective of dealing with children outside the formal criminal justice system.

In light of the above summary, the researcher now turns to the original research questions and answers them based on comparative research.

6.3 RESEARCH QUESTION(S)

At the outset, the researcher posed the following research question (broken down from the primary research question):

Primary Research Question

What is the role and rights impact of presiding officers involved in child justice proceedings, and how are these affected by the predominant model of justice in the jurisdictions of comparison?

Sub-research Questions

i. How does the presiding officer ensure that the best interests of a child offender are brought to fruition during the criminal trial process?
ii. If and how does the presiding officer balance the right to protection against the rights of the victim and community during the child justice process?
iii. Does the CJA (specifically its allocation of certain rights and obligations to the presiding officer) provide a platform where due process is sacrificed to the demands of the best interest standard?
iv. Is the duty of the presiding officer to protect the best interest of a child defined sufficiently within the framework of the CJA?
v. What is the effect of the predominant model of criminal justice on the role of the presiding officer and subsequent protection of the child offender in comparative jurisdictions?

The conclusions below attempt to answer the above question and its sub-queries.

How does the presiding officer ensure that the best interests of a child offender are brought to fruition during the criminal trial process?

South Africa, Germany and Scotland have tried to design legislation to protect the interest of child/juvenile offenders with different aims. Germany's juvenile justice system has never been dominated by a social welfare model but rather by the idea that punishment and education be reconciled within the juvenile justice framework. This is dissimilar to Scottish and South African child/youth justice beliefs. For example, the

Scottish system is premised on the notion that delinquency forms part of most child's growth and that a formal, accusatory, interventionist philosophy is harmful and counterproductive.

Both the South African and Scottish child/youth systems aim to protect the child's best interest. Still, the Scottish system operates on the idea that early intervention is necessary to prevent children from committing a criminal offence. The South African system intervenes only when the child has committed a criminal offence. The presiding officer in the South African child justice system has a far-extended role that would be permitted in adult criminal justice. The position borders on inquisitorial approaches. It is doubtful whether South African presiding officers are sufficiently trained for such an approach or appreciative of their different roles when addressing a child offender compared to an adult accused.

In essence, the sub-query requires further research. The legislature, through the CJA, and the courts, by interpretation, have attempted to give guidelines for the implementation of the best interest standard, but it remains elusive, and the researcher submits that this is precisely because the best interest standard is difficult to balance when the child in question has committed an offence and thus caused harm to the community. While the CJA has extended the powers of the court when dealing with child offenders, the researcher submits that the trial phase remains distinctly accusatorial, and the role of the presiding officer is not clearly articulated – is the presiding officer and arbiter of fact or *in loco parentis*? The researcher submits that an examination and further research on the Scottish approach to the role of the presiding officer (or, in this case, head of the children's hearing panel) may go a long way to reforming the CJA into an instrument truly reflective of section 28 of the Constitution.

If and how does the presiding officer balance the right to protection against the rights of the victim and community during the child justice process?

The CJA focuses on the protection of the right of the child offender more than the victim and the community during the child justice process in South Africa. Even victim-offender mediation in the CJA is intended to bring a child who is alleged to have committed an offence and the victim together to develop a plan on how the child offender will redress

the effects of the offence. This process is outside the scope of the presiding officer's function. The CJA does not provide the presiding officer mechanism to balance the rights of the child offender, the victim and the community short of the traditional triad in Zinn. This would seem in contrast to the aims of the CJA in totality. Once again, South Africa could draw from the Scottish and German systems to truly integrate the community and the offender in sentencing and after the event when the offender must be reintegrated into society. As it stands, the child accused can only partake in community-based restorative interventions with the participation of the victim and the community – it would thus appear that the procedural safeguard is dependent on outside forces and not necessarily the court's role as the upper guardian of all minors.

Does the CJA (specifically its allocation of certain rights and obligations to the presiding officer) provide a platform where due process is sacrificed to the demands of the best interest standard?

The CJA prioritises the child offender's best interest to the extent that it requires the presiding officer to ensure that, during the proceedings, the child's best interest is upheld. During cross-examination, it further mandates the child justice court to ensure that the proceedings are fair, not unduly hostile, and appropriate to the child's age and understanding. The researcher submits that the unchecked emphasis on the best interest of the child offender during all stages of proceedings has the potential to sacrifice due process.

Is the duty of the presiding officer to protect the best interest of a child defined sufficiently within the framework of the CJA?

The researcher submits that the presiding officer's duty to protect the child's best interest in CJA is vague to the extent that the CJA does not define its ambit and the limitation that a presiding officer must apply in dealing with a child offender. The vagueness might lead to the best interest standard being misinterpreted or used to escape accountability. Furthermore, the best interest standard and the accusatorial/inquisitorial role confusion promoted by the CJA leaves one questioning the efficacy of legislation requiring a presiding officer to protect and punish a child offender.

What is the effect of the predominant model of criminal justice on the role of the presiding officer and subsequent protection of the child offender in comparative jurisdictions?

Accusatorial and inquisitorial modes of criminal procedure are the core of almost all the comparative jurisdictions analysed. South Africa, Germany and Scotland have tried to design legislation to protect the interest of child/juvenile offenders with different aims. Germany's juvenile justice system has never been dominated by a social welfare model but rather by the idea that punishment and education be reconciled within the juvenile justice framework. This is dissimilar to Scottish and South African child/youth justice beliefs. For example, the Scottish system is premised on the notion that delinquency forms part of most child's growth and that a formal, accusatory, interventionist philosophy is harmful and counterproductive. The role of the presiding officer in all three jurisdictions primarily focuses on the best interest of the child/juvenile offender in ensuring that the proceedings are not harmful to the well-being and development of the child/juvenile. It would appear that the inquisitorial welfare-based approach adopted in Scotland and Germany lends itself more toward protecting the best interest standard and the protection of the community and victims of crime. It is suggested that the CJA was apt in its use of inquisitorial pre-trial procedure but erred in the trial, sentencing and post-trial phases, which rely almost exclusively on the accusatorial prescripts of the CPA. The latter is evident in the fact that the CJA, from the trial stage onwards, lends almost exclusively from the CPA as opposed to developing a system of child justice that seeks to protect the best interest standard. The researcher is not suggesting that child offenders should not be prosecuted but that the CJA casts its net too wide over offence-jurisdiction instead of offender-interest-jurisdiction. Both Scotland and Germany are examples of how the best interests of a child offender can be protected by the court and yet be tempered with welfare and educational approaches which make the role of the presiding officer clear and beyond reproach. The same cannot be said of the CJA, which appears to accord the presiding officer the duty to protect the child offender to the detriment of the rights of the victim and community. It is concluded that the latter position results from the amalgamation of accusatorial and inquisitorial roles accorded to the presiding officer, making it very difficult to be the unbiased arbiter of fact.

6.4 CONCLUSIONS & RECOMMENDATIONS

The role of a police officer in all three jurisdictions, South Africa, Germany and Scotland, is to effect an arrest where a child is alleged to have committed a crime or use any other available mechanism to bring the child offender to the attention of the child justice system. Once an arrest has been made, the prosecution will be placed in charge of prosecuting the child offender. The difference in all three jurisdictions is the judicial officer's roles and duties during the initial stage of criminal proceedings. In South Africa, particularly during the preliminary inquiry, the inquiry magistrate plays an active role. The South African position is dissimilar to Germany in that the active participation of the judicial officer in Germany is seen throughout the trial, whereas, in South Africa, inquisitorial child justice is seen more during the preliminary inquiry.

In contrast, in Scotland, the judicial officer has no active participation. When the child is arrested, the prosecution decides whether to bring the child to court or refer him to the Reporter[933] of the children's hearings, who works with the local social work department. The children's hearing panel ensures that the child's best interest is protected.[934] Children's hearings are conducted outside the court environment and are informal.[935]

From all indications, there is no doubt that a presiding officer plays a vital role in the child justice proceedings of the different jurisdictions under study. In each jurisdiction investigated, a presiding officer's core function and duties lie in the justice system model employed in that particular jurisdiction. South Africa, Germany and Scotland have different ways of dealing with child justice proceedings. It is not difficult to understand their distinctive features, but the mechanisms within each system seem intrinsically linked and cannot operate without the other. To clarify, if one looks at the South African

933 The role of the Reporter is to receive referrals for children and young people who are believed to require compulsory measures of supervision; draft a statement of grounds and decide whether the child or young person needs to be referred to a Hearing; provide administration to Children's Hearings and keep a record of proceedings at Hearings; maintain the independence of Hearings and support fair process; and conduct Children's Hearings court proceedings.

934 Children's Hearing (Scotland) Act 2011.

935 Children's Hearing (Scotland) Act 2011.

child justice system, a pure accusatorial system cannot be said to exist anymore. It is submitted that a pure accusatorial system has been seen as insufficient for the South African criminal justice system to meet with a changing environment.

It is without a doubt that the South African system of criminal procedure has kept some basic principles of traditional accusatorial procedure. Still, such principles are only there to ensure that whatever the perceived evolution in the South African system, it does not go beyond the accepted methods of adversarial procedure. The basic principle that the South African child justice system maintains consistently, except in the preliminary inquiry, is the role of the presiding officer, which is believed to have the potential to ensure the trial's fairness. The role of the presiding officer in a preliminary inquiry is active, whereas, in a trial remains passive, and this dual role purports to allow parties to bring evidence that assists the court in arriving at a decision that is fair and acceptable to all parties. The increasing powers of the presiding officer, particularly the right to conduct the preliminary inquiry, the right only to question the accused during the plea of guilty but not the not guilty plea procedure, provides scope for the parties to decide the method of presenting their cases, in a manner that, although, acceptable in practice has a leaning towards the inquisitorial system.

Germany applies the inquisitorial system, which has gradually been seen to recognise some accusatorial traits, in particular plea bargaining, which has the potential to shorten the criminal proceeding. The advantage of the accusatorial slant is that it limits resources and shortens the time that should be allocated to each case. For this reason, it is submitted that the inquisitorial system alone cannot serve the best interest of the German criminal justice system in the same manner as in South Africa.

The Scottish youth system centres around the welfare approach, which relies on a hybrid model. In contrast to South Africa and Germany, the Scottish system deals with child offenders, so the child's welfare is paramount throughout childhood. A distinctive feature of the Scottish system is that the children’s hearing is invoked not just when a child has committed an offence but when it is in the child’s best interest that there be some form of compulsory care. The Scottish system, with its pre-emptive welfare approach, is, in the researcher’s view, the most appropriate way of ensuring that a child's best interest

is protected well in advance, even before a child becomes involved in offending behaviour. Whilst some form of punishment is required for the commission of a criminal offence, the critical question of balancing the best interests of a child with discipline, which aims at preventing future offending rather than helping children become better citizens, remains unanswered and requires legislative attention in Scotland.

In South Africa, the accusatorial system has seen an increasing duty imposed on presiding officers to assist indigent, unrepresented accused and child offenders in ensuring they are aware of their rights and the appropriate court procedures. This duty may be viewed as inquisitorial and a departure from the passive role of presiding officers in accusatorial proceedings.

The right to legal representation in all comparative jurisdictions is a fundamental right that the presiding officers correctly observe in criminal proceedings. Moreover, the role played by the presiding officer in the guilty plea, the plea of not guilty; and plea bargaining are strongly indicative of both inquisitorial and accusatorial elements in the comparative jurisdictions. In South Africa, it has been submitted that maintaining the accusatorial nature of these summary trial proceedings has proven difficult over the years because of the insufficient protection of the accused person during proceedings. This has resulted in adopting inquisitorial elements, such as questioning an accused during the guilty plea.

The primary objective of the CJA was to create a separate child justice system that provides an alternative to an adversarial trial and thus protects the vulnerability of child offenders. The researcher submits that the objective has not been met. Instead, the South African child justice system has blended accusatorial and inquisitorial techniques, which further confuse the role of the presiding officer and are not adept at protecting the best interest standard in criminal proceedings. Moreover, the inadequacy of the CJA is evident in the required application of the CPA to supplement gaps in the child justice system.

The CJA is founded upon section 28 of the Constitution, which provides for, amongst other things, the observation of the child's best interests in all matters concerning the child. One may argue that the duty of the presiding officer to protect an accused during

the trial from harsh questioning and cross-examination aims to ensure that children are not subjected to the harsh trial court environment due to their age, in line with section 28 of the Constitution. The researcher shares a similar view and submits that the protection by the presiding officer extends to child witnesses.

The researcher submits that a problem arises where the presiding officer is expected to safeguard the best interest of the child offender during court proceedings. Sach J[936] correctly stated that the more complex situation is establishing an appropriate operational thrust for the paramountcy principle. He further states that if the paramountcy principle is spread too thin, it risks being transformed from an effective instrument of child protection into empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2) of the Constitution. The Act makes no direct reference to the best interest standard but treats it within the context of other rights and limitations in the Bill of Rights. The researcher recommends completely overhauling the best interest standard by defining its meaning and application within the context of child justice proceedings. The researcher submits that the overhaul may assist in guiding the following: -

i. Measuring the extent to which the best interests of the child offender may be protected in the child justice proceedings;
ii. Balancing the interest of the child offender with the interest of society and the victims of crime;
iii. Determining when and under what circumstances the child offender forfeits the protection afforded by the best interest standard under the Constitution; and
iv. Guiding the role of the presiding officer in balancing the child offender's interests and the nature of the crime.

The researcher admits that there is no one-size-fits-all approach when dealing with issues related to child justice. The researcher submits that whilst the Scottish system has challenges, it goes the extra mile in ensuring that the child's interest is established not only after the commission of an offence but at an early stage. The system

936 S v M 2008 (3) SA 232 (CC).

encourages identifying children in need of care and provides due process of assessing an alternate method to deal with the particular child's circumstances. As an alternative to the above suggestion, South Africa can adapt and develop a hearing system that may help deal with child-offending behaviour.

The researcher admits that he does not possess expertise related to anti-social behaviour but submits that many socio-economic factors, such as drug abuse, lack of parenting, etc., contribute to the offending behaviour of children. The researcher submits that these factors go a long way to perpetuating the commission of crime by children. Court officials should receive specialised training in this area to ensure that their inquisitorial actions are well-informed by training.

The researcher acknowledges that there are procedural safeguards in all comparative jurisdictions to protect the rights of child offenders, such as the right to appeal and review. These rights are necessary because they ensure no irregularities or errors occur during court proceedings involving child offenders. The researcher submits that these rights may also be utilized outside the formal structure of the child justice system to ensure the best protection of the best interest standard in matters where a child is accused of a crime.

6.5 CONCLUSION

In conclusion, the research goals have been met in that the researcher has investigated, discovered, and described the role of the presiding officer in comparative jurisdictions. The researcher has also utilized the knowledge acquired from the finding of this study in formulating recommendations that can assist in effectively strengthening the role of the presiding officer in child justice proceedings in South Africa.

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