

Youth, competence and punishment: Reflections on South Africa's minimum sentencing regime for juvenile offenders

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1 Introduction

Is the honeymoon over for the minimum sentencing regime for juveniles in trouble with the law? The answer must be in the affirmative. This follows the Centre for Child Law's successful application (to the Constitutional Court) for confirmation of the High Court's declaration that the Criminal Law Amendment Act 105 of 1997 (CLAA) is, to the extent it codifies the changes inserted into it by the Criminal Law (Sentencing) Amendment Act 38 of 2007 (the Amendment Act), unconstitutional. Minimum sentencing for certain serious offences first found its way into South African law through section 51 of the CLAA.¹ Minimum sentencing was introduced on 1998-05-01 as a stop-gap measure for two years, but was repeatedly extended thereafter until the Amendment Act made it permanent. Before the Amendment Act, minimum sentences could be imposed on adults and children under parts (of section 51(3)) that were more different in form than substance.² The Amendment

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¹The offences listed in Schedule 2 of the CLAA include robbery, rape and murder committed under aggravating circumstances; trafficking in persons for sexual exploitation; sexual exploitation of children or mentally challenged persons; possession of or dealing in drugs and other dependence producing substances; crimes involving dishonesty as an element (forgery for example); possession of dangerous weapons; theft; treason and sedition.

²Before the Amendment Act, s 51(3) read:

(a) If any court...is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

Act deleted part (b) of section 51(3) of the CLAA; with the result that the sentencing court – under what used to be part (a) – had to be convinced that ‘compelling and substantial circumstances’ existed to justify the imposition on 16 and 17 year olds of a sentence lesser than the prescribed minimum. However, the statute also changed its language from ‘minimum sentences’ to ‘discretionary minimum sentences’.

The Centre for Child Law made an application to the High Court to challenge the constitutional validity of the Amendment Act to the extent that it subjected 16 and 17 year olds to discretionary minimum sentences. In *Centre for Child Law v Minister for Justice and Constitutional Development*,³ the High Court held that ‘the Amendment has left Courts in applying the minimum sentencing regime with no discretion but to start with the minimum sentence, clearly not a clean slate, but imprisonment as a first resort’⁴ and declared minimum sentencing unconstitutional in respect of juvenile offenders. Accordingly, the application by the Centre for Child Law referred to above was to have the declaration of statutory invalidity confirmed by the Constitutional Court. In *Centre for Child Law v Minister of Constitutional Development (Centre for Child Law)*,⁵ the Constitutional Court (the Court) was called upon to determine whether the Amendment was inconsistent with section 28 of the Constitution, particularly the provision which states that ‘every child has the right not to be detained except as a measure of last resort, in which case ... the child may be detained only for the shortest appropriate period of time’.⁶

Cameron J, for the majority, held that adolescents should be exempt from the ‘full rigour of adult punishments’ because they are more vulnerable, still developing into mature beings, can easily be influenced by others, have more potential than adults to change their criminal behaviour and have a morally better claim to be forgiven than adults.⁷ The Court further held that ‘last resort’ literally means ‘last resort’, not first or intermediate resort (as if ‘resorts’ can be physically counted) and that ‘shortest appropriate period of time’ means imprisonment should be imposed only when it is the ‘sole appropriate option’.⁸ Consequently, the minimum sentencing statute unconstitutionally bound courts to impose consistently higher sentences because it (a) orientated courts, from the outset of the sentencing process, away from options other than imprisonment, (b) de-individualised sentencing by prescribing as a ‘starting point’ the period for which

(b) If any court ... decides to impose a prescribed sentence ... on a child who was 16 years of age or older but under the age of 18 years, at the time of the commission of the ... offence in question, it shall enter the reasons for its decision on the record of the proceedings.

³Case no 11214/08.

⁴Paragraph 9.

⁵Case CCT 98/08 [2009] ZACC 18.

⁶Section 28(1)(g) of the Constitution of the Republic of South Africa 1996.

⁷Paragraphs 28-38.

⁸Paragraphs 31-32.

incarceration is appropriate, and (c) ensured that the minimum sentences rely heavily on the discretion of judges.⁹

Then, in a surprise move, the Court described 'children as embodying society's hope for ... its future' – clearly as a justification that persons aged 18 years or older have no life to lead and have no future value to the state. Finally, the Court exploits the fact that children are disenfranchised from voting as evidence that everyone who has not celebrated their 18th birthday is unable to make sound judgments and should be legally protected from 'the full rigour of adult punishments'.¹⁰ The Court held that the Amendment infringed section 28 of the Constitution. At the limitations phase, the Court held that in the absence of statistical evidence of an increase in crime or concrete policy grounds upon which the extension of minimum sentencing to juveniles could be justified, it had to declare the relevant provisions unconstitutional.¹¹

The Court's unwillingness to probe the relevance of adolescents' psychological competence to the determination of their punishment solely on the basis of sweeping generalisations about developmental immaturity raises concern. This introduction forms Part 1 of this article. Part 2 argues that while the basic rules of South African criminal law prohibit the treatment of persons under the age of 18 years as a mentally homogenous group, it seems that the closer members of this group are to their 18th birthday the more the law attaches full criminal responsibility and punishment to their conduct. The principle of proportionality requires no less. Part 3 explores why a properly fleshed out construction of section 28(1)(g) of the Constitution does not support the view that prescribing discretionary minimum sentencing for youth offenders is unconstitutional. Unless obligatory, it is argued, minimum sentences are no restraint on judicial discretion. At length, Part 4 explains why the exclusion of children – particularly 16 and 17 year olds – from the franchise is no evidence of their incompetence to decide rationally, to vote responsibly and to commit crimes. The court's limitations analysis is accepted, in Part 5, save that the demand for justification overstepped the separation of powers doctrine and the proper place of the courts in the new constitutional dispensation. In Part 6, the article closes the discussion with a compelling case for a competence-based approach to sentencing youth offenders.

2 South African law and the role of youth in assigning criminal responsibility

Mental competence is vital to ascertaining both young and older defendants' measure of criminal responsibility and the degree of blame to be communicated

⁹Paragraphs 45-46.

¹⁰Paragraphs 37-38.

¹¹Paragraphs 64, 68 and 78.

to them through their sentence.¹² Under South African common law, punishment should be commensurate not only to the harm caused but to the moral blameworthiness of the offender.¹³ As a rule, a child who lacks the capacity to appreciate the wrongfulness of his conduct and to act in accordance with that appreciation cannot be held criminally responsible for his conduct.¹⁴ Through the common law doctrine of infancy, children under the age of seven were irrebuttably presumed to lack the capacity to understand the wrongfulness of their conduct.¹⁵ Parliament, through the Child Justice Act 78 of 2008, recently extended the absolute presumption of incapacity to all children under the age of 10.¹⁶ This means that the state cannot (as a matter of principle) furnish evidence in any court of law to prove that a child below the age of ten has committed a crime, even if the child factually kills someone and had the necessary competence.

Children between the ages of ten and fourteen are rebuttably presumed to lack the competence to commit crimes and the prosecution shoulders the burden to defeat the presumption by showing that the child understood the nature and wrongfulness of his conduct.¹⁷ Adolescents of fourteen years and older are treated as if they are adults and are therefore fully responsible for their conduct. Establishing the minimum age of criminal responsibility (MACR) at fourteen years serves three purposes: (a) it is meant to coincide with the age (of puberty for many children) at which humans roughly acquire the competence to reason,¹⁸ (b) shows that while under 14s may have intended to perform certain acts, their capacity to distinguish between right and wrong or to fully understand the wrongfulness of their conduct may be diminished and (c) to evade punishing those who, by reason of age, cannot understand the moral implications of punishment and cannot therefore be deterred by (the threat of) punishment.¹⁹ It is commonplace that the presumption of incompetence is stronger for children aged ten and under, but weaker for those nearing their 14th birthday. Clearly, South African law recognises the age-competence connection through legal age limits that mark the boundaries between 'childhood' in the strictest sense and adolescence. As children's capacities evolve, as they approach the age of 18, the case for deeming them fully criminally responsible is as strong as the case for extending adult rights – marriage and voting for example – to them.

¹²See Simons 'Negligence' in Paul *et al* (eds) *Responsibility* (1999) 52 at 88 fn 90.

¹³Burchell *Principles of criminal law* (2005) (3rd ed) 68-9 and 72-3; Snyman *Criminal Law* (1981) 130-33.

¹⁴Burchell (n 13) 366.

¹⁵*Ibid.*

¹⁶See s 7.

¹⁷Section 7(2) read with s 11.

¹⁸This can be contested and the debate can go either way.

¹⁹Kaban and Orlando 'Revitalising the infancy defence in the contemporary juvenile court' (2007) 60/1 *Rutgers LR* 33 at 35-6; see also Woodbrigde 'Physical and mental incapacity in the criminal law' (1939) 87 *Univ Pennsylvania LR* 426 at 429

Taking all under 18s as if they are 'psychologically' homogenous, the Court in *Centre for Child Law* ignored the fact that South African law presumes that adolescents are legally competent to bear full responsibility for their conduct. It was inappropriate for the Court to give 'acute effect' to the fact that the 'Constitution draws a sharp distinction between children and adults' without mentioning which category of 'children'; and to hold that this distinction is based on 'reasons relating to children's greater physical and psychological vulnerability' without stating 'to what extent, for what purpose and for which category'.²⁰ Similarly, it cannot be comprehensively insisted that the characters of children under 18 [particularly 16 and 17 year olds] are still developing and so they are excused from the 'full rigour of adult punishment'.²¹ The dilemma arises from the Court's reluctance to probe the relevance of mental competence to criminal responsibility and penal proportionality. The Court's approach in *Centre for Child Law* is inconsistent with its own approach in *Director of Public Prosecutions, Transvaal v Phaswane*.²² In that case, the Court refused to confirm a declaration of constitutional invalidity (made by the High Court) in respect of a statutory provision that had been amended to read 'mental and biological' before the word 'age'. The Court held that 'every child is unique' and that the decision on whether an individual child testifies through an intermediary depends on the child's *level of maturity*, the nature of the proceedings, the independence of the child and her wishes.²³

Per Ngcobo J, the Court also found that 'vulnerability decreases with age' and that the statutory provisions²⁴ which oblige courts to 'immediately' put on record their reasons for refusing to appoint an intermediary for a child below the age of 14, shows that under 14s need more protection than adolescents.²⁵ In contrast, the Court in *Centre for Child Law* adopts an undiluted welfare approach – in which children are aided by the state and not punished as criminals – to juvenile justice. Under the welfare approach, 'there is no need to determine whether the child had capacity to act in a culpable fashion'²⁶ because the concepts of competence, culpability and MACR are irrelevant in determining appropriate treatment for those in conflict with the law. Ironically, welfarist approaches usually open the flood gates to indeterminate committal of offenders to juvenile correctional institutions in the name of the juvenile's 'treatment needs'.

As will be shown below, this approach disregards the intricate link between competence, penal proportionality and criminal responsibility under South African law. In South Africa, children – as moral agents – are only punished for their 'willed'

²⁰See paras 26-27.

²¹See paras 35-38.

²²CCT 36/08 [2009] ZACC 8 (hereafter *Phaswane*).

²³Paragraphs 123-25.

²⁴Sections 158(5) and 170A of the Criminal Procedure Act 51 of 1997.

²⁵Paragraphs 159-61.

²⁶Walkover 'The Infancy defence in the new juvenile court' (1984) 31 *UCLA LR* 503 at 516.

or 'negligent' actions. The will or negligence may not be concrete but constructive. It is assumed that citizens of 14 years or older have some minimal level of rationality and that they can act accordingly.²⁷ Since over 14s are presumed competent to follow the law, responsibility (for them) follows autonomous choices and they are presumed to have such a degree of ownership, causation and power of command as to justify the assignment of criminal responsibility and imposition of punishment on them.²⁸ Thus, for over 14s, age and level of maturity are only reexamined as mitigating factors in locating the degree of punishment and not as factors exempting youth from some sentences. Some critics, usually determinists, argue that criminal conduct cannot be 'willed', that criminal law punishes the 'most deprived' children,²⁹ that the law condemns adolescents for broad collective responsibilities (in the sense that children commit crimes because of broader social problems),³⁰ and that the law 'employs a very low cognitive threshold – knowledge of 'right from wrong' – to establish criminal responsibility – [a yardstick that] entails only minimally rational understanding'.³¹ These issues are clearly beyond the scope of this article, but we should remember that for purposes of marking the relevance of competence to punishment, the law rests on a 'convenient and desirable' presumption that man's conduct is independent and freely willed.³² Besides, all these arguments equally apply to adults. Exercising benevolent maternalism over adolescents or widening the leniency gap is not an appropriate response to the rights of adolescents as moral agents capable of understanding and assuming accountability for personal choices.

Human development is an immensely complicated and multi-faceted process that depends on genetic, environmental, economic, social, educational and other factors. On one side of the ledger, the characteristics that distinguish adolescents from adults do not disappear when an individual reaches the 'magical' age of 18, and on the other side, some adolescents reach a level of maturity some adults will never attain. We know, for example, that poverty, exploitation, disease, abuse and ignorance may not only give rise to each other, but may also lead to arrested mental and physical development. We also know that in high resource contexts, the Internet, education, travel and high standards of living have broadened horizons for early maturation compared to the past.³³ In light of these considerations, it is inappropriate to portray 'development' as a fixed trajectory

²⁷See Morse 'Immaturity and responsibility' (1997) 88 *Journal of Criminal Law and Criminology* 15.

²⁸See Hart *Punishment and responsibility: Essays in the political philosophy of law* (1968).

²⁹George 'The progressive logic of criminal responsibility and the circumstances of the most deprived' (1994) 43 *Catholic University LR* 499.

³⁰Feld *Bad kids: Race and the transformation of the juvenile court* (1999) 285; Fox 'Responsibility in the juvenile court' (1969) 11 *William and Mary LR* 659 at 674.

³¹Feld (n 30) 98

³²Packer *The limits of the criminal sanction* (1968) 74-5; Wilson *Moral judgment: Does the abuse excuse threaten our legal system?* (1997) 40.

³³See Freeman *The rights and wrongs of children* (1983) 46.

toward maturity culminating in the acquisition of adult competences when children reach the milestone of 18.³⁴ By stating that everyone below the age of 18 is a child, the Constitution does not stipulate an age-based determination of competence. First, children's capacities are not homogeneously linked to their biological age. Access to information, varying developmental goals, and varying levels of support determine the pace at which children acquire capacities.³⁵ Criminal sanctions should go beyond the age fixed in the Constitution as a marker of majority. South African law requires courts to adopt an individualised approach (to sentencing) that factors in every child's level of maturity. For instance, the fact that the Constitution mentions 18 years as the age of majority does not mean that all under 18s who commit the same offence should be handed the same or similar punishment based on their age. Much depends on the juvenile offender's competence to appreciate the wrongfulness of his conduct and to act in accordance with that appreciation at the time he committed the offence in question.

2.1 Youth and penal proportionality

At international law, deprivation of the liberty of youth offenders is permitted as a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases.³⁶ But does this mean that in the case of youth offenders, the sentencing court should shelve the concept of proportionality? The Supreme Court of Appeal once held, rightly so, that 'even in the case of a juvenile ... the sentence imposed must be in proportion to the gravity of the offence'.³⁷ *S v Nkosi*³⁸ enumerates some important principles that should guide the sentencing court in this respect.

According to *Nkosi*, imprisonment should where possible be shelved in first offender cases; imprisonment should be imposed where no other sentence can be considered appropriate; the appropriateness and length of imprisonment should be considered in light of the nature and gravity of the offence, the needs of society and the needs of the juvenile offender; the sentence should be structured (if possible) to promote the rehabilitation and reintegration of the offender; life imprisonment may only be a possibility in exceptional circumstances and exceptional circumstances exist when the offender is a danger to society (or to himself) and an unsuitable candidate for rehabilitation.³⁹ Traditionally, the impact of the offense on the victim and society; the juvenile's prior history of

³⁴See Buss 'Rethinking the connection between developmental science and juvenile justice' 2009 (76) *University of Chicago LR* 493 at 508.

³⁵See UNCRC Committee General Comment 12 'The right of the child to be heard' CRC/C/GC/12 (2009) para 29.

³⁶See Rule 2 of the United Nations Rules for the Protection of Juveniles Deprived of Liberty 1990.

³⁷*Director of Public Prosecutions, KwaZulu-Natal v P* 2006 3 SA 515 (SCA) para 22.

³⁸2002 1 SA 494 W.

³⁹Paragraphs 505G-J; 147F-I.

delinquent conduct; substantial history of adjudication for violent offences; the need for secure confinement or out-of-home treatment; lack of remorse; lack of amenability with lesser sanctions; lack of attendance or participation in educational programmes and gang involvement constitute aggravating factors but the reverse, combined with the offender's biological or psychological immaturity, mitigate the offender's punishment for criminal acts.⁴⁰

After referring to *Nkosi*, Yacoob J made three compelling observations – although I deal with only two of them at this stage – regarding the breadth of section 28(1)(g). First, section 28(1)(g) does not require the sentence ultimately imposed on children to be *necessarily lower* than the sentence that is imposed on an adult for the same offence. Second, section 28(1)(g) [does not] require sentences imposed on youth offenders to be determined without regard to what is appropriate for adults.⁴¹ To ensure disproportionately low sentences are not imposed on children, the principle of penal proportionality would exert upward pressure on sentences imposed on children for similar crimes and require the court to consider that the legislature has substantially increased sentences being imposed on adults for the same offence.⁴² More importantly, the first observation shows that where the youth offender has the psychological capacity to fully appreciate the wrongfulness of his act and to act in accordance with that appreciation, he/she must be sentenced to a heavier sentence than is prescribed for very young or psychologically handicapped offenders.⁴³

The rationale for penal proportionality arises from the general motivations behind sentencing offenders. According to Hirsch, we sentence offenders to (a) mark the significance of the rights that have been breached and (b) to address the criminal as a moral agent, by appealing to his/her sense of right and wrong⁴⁴ – the assumption is that everyone is sufficiently rational to make this distinction. Apart from assuming that our disapproval of the offender's conduct (through hard treatment) will keep his/her predatory behaviour at bay or within reasonable limits at least, we also believe that punishment serves an educative purpose. Thus, our disapproval should give the offender (as an agent capable of moral deliberation) the opportunity to reflect on the blameworthiness of his conduct and the drive to abandon morally bad deeds in future. Whatever penal deprivation is visited on the offender should therefore mirror the degree to which the offender's conduct is socially unacceptable, otherwise law-abiding citizens and criminals for that matter,

⁴⁰See Utah Commission *Juvenile Sentencing Guidelines* (2004).

⁴¹Paragraphs 94-6.

⁴²Paragraphs 95-96.

⁴³On how legal responsibility should reflect the individual capacities – presumed or actual – of the agent, see Perry 'Risk, harm and responsibility' in Owen (ed) *Philosophical foundations of tort law* (1997) 321-346.

⁴⁴Von Hirsch 'Proportionate sentences: A desert perspective' in Von Hirsch *et al Principled sentencing: Readings on theory and policy* (2009) (3rd ed) 115 at 116.

will have no additional incentive to desist from breaking the law.⁴⁵ Balancing moral blameworthiness and the severity of punishment reflects society's attempt to ensure fairness and consistency in sentencing criminals below and above the age of 18. Penalty severity for grave offences – though retrospective and deontological rather than consequentialist – is therefore a necessary 'evil'.

Neither the South African Constitution nor, to the best of my knowledge, any other Constitution in the world requires courts to shelve the principle of proportionality when sentencing juvenile offenders. In the absence of compelling aggravating or mitigating circumstances, ordinal proportionality binds courts to impose sentences of comparable severity on criminals convicted of similar offences or respectively graded sentences on criminals convicted of crimes of varying seriousness. Consequently, the requirements of ordinal proportionality are breached 'when equally reprehensible conduct is punished markedly unequally'.⁴⁶ Even international law requires that all reactions to juvenile offenders should 'always' be in proportion to the circumstances of both the offender and the offence (Rule 17.1(a) of the Beijing Rules). A strictly punitive approach is undoubtedly outlawed by the Child Justice Act and the UNCRC does not bind courts to sacrifice proportionality and public safety on the altar of reintegration, rehabilitation and restoration.

For juveniles, the principle of proportionality suggests that the circumstances of the offender should influence the manner and form of the reaction. This seems evident from the command, in Rule 16.1 of the Beijing Rules, that (in all except minor cases) the competent authority be acquainted with all the background and circumstances of the child – through social inquiry or other pre-sentence reports – before rendering a final disposition prior to sentencing (Rule 16.1 of the Beijing Rules). Youth's vulnerability to peer pressure and impulsive behaviour do not bind courts to disregard penal proportionality when sentencing juvenile offenders (see for example CRC, 2007 para 71). Given the centrality of section 28 in determining what constitutes an appropriate response to juvenile criminality, it is important to show why the Court's interpretation of the terms 'last resort' and 'for the shortest appropriate period of time' must have been erroneous.

2.2 'Last resort' and 'shortest appropriate period of time': The correct interpretation

Fashioning a very narrow definition of 'last resort' and 'shortest appropriate period', the majority found this meant that the sentence of imprisonment must be imposed only when it is 'the *sole* appropriate option' and even then, only 'for the

⁴⁵However, this does not explain why a murderer serving life without the possibility of parole would not murder while in prison. See Posner 'Optimal sanctions: An upper limit?' in Von Hirsch (n 44) 64 at 66-67.

⁴⁶Von Hirsch (n 44) 120.

shortest *possible* period of time' (para 31).⁴⁷ This is decisive in considering not only whether incarceration is an appropriate penalty but also the nature of incarceration. Section 28(1)(g), held the majority, required a focus on the youth offender rather than on 'the rigid starting point that minimum sentencing entails' (para 32). It should be underlined that the appropriateness of a particular sentence for a particular offender depends not only upon society's interests as embodied in the length of the incarceration *vis-à-vis* the offence, the offender and the circumstances but also on the goals the sentencing judge wishes to achieve by imposing a particular sentence. Where the goal is to rehabilitate the offender through therapeutic treatment, the duration of institutionalisation may be longer than when institutionalisation is simply meant to punish him for the 'fouls' he has committed on 'society'. It is not difficult to imagine cases in which the juvenile must at least, in the circumstances, be committed to a custodial institution (jail for instance) and what is left for discussion is the appropriate duration of custody. In cases of pre-meditated violent murder, for instance, what usually matters is not whether the child has been jailed 'as a last resort' (assuming 'resorts' are countable) but whether the duration of incarceration is the 'shortest appropriate'.

Consistent with international law regulating the sentencing of children,⁴⁸ section 28(1)(g) envisages that the sentence imposed on the child should reflect the desirability of promoting the child's reintegration and assuming a constructive role in society. That is why the law places restrictions on the period for which children can be deprived of their liberty.⁴⁹ It can hardly be denied that when sentencing youth offenders, emphasis should be more on rehabilitation than retribution and on alternatives to institutionalisation rather than institutionalisation itself.⁵⁰ However, these objectives should always be counter-balanced with public safety concerns and the enduring value of proportionality. The qualification 'as a measure of last resort' means that juvenile offenders should be deprived of their liberty only if they have committed serious violent crimes or persist in committing serious offences.⁵¹ It also implies that deprivation of liberty can only be imposed in cases where there is 'no other appropriate response'.⁵² In reading article 37 of the UNCRC in light of the Beijing Rules, states should use incarceration as a measure of last resort and for the shortest appropriate period of time, 'taking into account the minimum necessary period'.⁵³ Following the literal approach taken by the Supreme Court of

⁴⁷The Court erroneously equates 'shortest appropriate' with 'shortest possible'.

⁴⁸See art 40(1) of the United Nations Convention on the Rights of the Child (UNCRC).

⁴⁹Compare s 28(1)(g) with art 37(b) of the UNCRC and Rule 17(b) of the United Nations Standard Minimum Rules for the Administration of Justice (The Beijing Rules), adopted by General Assembly Resolution 40/33 of 1985-11-29.

⁵⁰See commentary to Rule 17 of the Beijing Rules.

⁵¹See Rule 17.1(c) of the Beijing Rules.

⁵²*Ibid.*

⁵³Van Bueren *The international law on the rights of the child* (1995) 185.

Appeal in *S v B*,⁵⁴ the majority differentiates among first, intermediate and last resort; and concludes that incarceration should be imposed only if it is unavoidable.⁵⁵ 'Unavoidable' is an appropriate word. 'First, intermediate and last resort' confuse the analysis and give the false impression that resorts can be physically counted.

Yacoob J, dissenting, rightly criticises the majority's mechanical approach and holds that imprisonment as a last resort means that a child must be sentenced to 'imprisonment only if, after considering all the relevant circumstances [including the child's age, immaturity and rehabilitative potential], the court concerned concludes that there is no option but to sentence the child to imprisonment'.⁵⁶ Section 28(1)(g) does not prescribe a starting point. It is only after the juvenile's immaturity, age, amenability to treatment and vulnerability to influence are weighed against the interests of society that the court can properly determine whether incarceration is the appropriate response; and if it is, the appropriate duration of incarceration must be imposed.⁵⁷ The central word seems to be 'appropriate' (rather than 'shortest' and 'last resort') because it emphasises not only the proportionality, but also the suitability of a particular sentence in the circumstances.⁵⁸ In the case of juveniles, 'appropriate' should mean that the minimum sentencing statute should preserve judicial discretion to justify especially downward departures from minimum sentences in light of children's psychological immaturity and need for reintegration.

'Last resort' must be construed to mean that the court, after a thorough consideration of aggravating and mitigating circumstances, has concluded that deviation from the minimum sentence is inappropriate. What matters is not that the court starts with the discretionary minimum (this is by no means a concession that the impugned provisions bound courts to do so) nor what the court's initial view about imprisonment is (we cannot know the judge's initial views unless they honestly reveal them to us), but whether the sentence ultimately imposed is both unavoidable and for the shortest appropriate period within the meaning of section 28(1)(g) of the Constitution.⁵⁹ Granted that the 'shortest appropriate period of time' may be equivalent to the statutory minimum sentence, it is abundantly clear that the majority does not imagine a situation where the statutory minimum may actually be less than 'the shortest appropriate period of time'.⁶⁰ The fact of the

⁵⁴2006 1 SACR 311 (SCA) para 22.

⁵⁵Paragraph 31.

⁵⁶Paragraph s 87-88.

⁵⁷Paragraph 88.

⁵⁸Rule 17 of the Beijing Rules states in part (a) that the 'reaction taken shall always be in proportion not only to the circumstances and gravity of the offence but also to the circumstances and needs of the juvenile as well as the needs of society'.

⁵⁹See Yacoob's dissent paras 89-90.

⁶⁰See paras 88-89.

matter is: the state will prescribe minimum sentences only if it envisages circumstances where courts can impose even tougher sentences. My point is not to suggest that this is the usual reason why legislatures prescribe minimum sentences, but to argue that the circumstances under which a crime is committed may warrant the imposition of a sentence heavier than the prescribed one.

2.3 The effect of the Amendment Act (2007)

After dichotomising humans into two completely separate groups; namely ‘adults’ and ‘children’, the Court fell into the trap of concluding that the effect of the Amendment was ‘to obliterate the distinction between 16 and 17 year olds at the time of the offence, on the one hand, and adults on the other’ (para 40). This is because the ‘starting point’ for the bench is the minimum sentence. The minimum sentencing regime constrains the sentencing discretion of the courts and is designed, in three ways, to ensure that regularly grave sentences are imposed.⁶¹ To quote the Court:

First, it orientates the sentencing officer at the start of the sentencing process away from options other than incarceration. Second, it de-individualises sentencing by prescribing *as a starting point* the period for which incarceration is appropriate. Third, even when not imposed, the prescribed sentences conduce to longer and heavier sentences by weighing on the discretion.⁶²

The Court then held, erroneously it will be argued, that the discretionary minimum sentencing regime violates every child’s right to have individualised sentences imposed upon them and that it violated section 28 of the Constitution. It is difficult to see why and how, if discretionary minimum sentences violate the ‘right’ to individualised sentences in the case of children, the same sentences will sustain a constitutional challenge in the case of adults. The only notable difference is that, when sentencing children, regard must further be had to whether incarceration is the only appropriate option and, if it is, what the shortest appropriate period of incarceration would be. Just how these two conditions create an additional right to an individualised sentence only for juvenile offenders remains completely mysterious. Implicitly then, adults have no right to an individualised sentence. This cannot be true.

2.4 Minimum sentences, unless obligatory, are no constraint on judicial discretion

On one side of the ledger, discretionary minimum sentencing provisions usually register the gravity of society’s condemnation of the criminal act the accused has committed. They also record a warning – although there is little evidence this is

⁶¹Paragraph 45.

⁶²Paragraph 46.

the best way to do so – to other potential or on-the-run offenders in the same category that if they do not ‘repent’, the long arm of the law will reach them. On the other hand, extenuating circumstances counterbalance whatever potential harm is likely to be caused by prescribing discretionary minimum sentencing for serious offences. Although he seemingly wrongly assumes that all juveniles know the prescribed sentences for each crime and that all juvenile offenders are sufficiently rational to be deterrable, Yacoob J’s finding that minimum sentences do not spirit away judges’ discretion is particularly convincing. Unless they are obligatory, minimum sentences neither orientate sentencing officers away from options other than incarceration nor bind judges to impose particularly higher sentences.

Mandatory minimums have been widely criticised for turning judges into ‘sentencing machines’, especially in the context of offences related to the supply or conveyance of drugs and other dependence-producing substances; and conspiracy, incitement or attempts to commit certain offences such as burglaries, unlawful entry into premises and theft.⁶³ In sentencing defendants convicted of the conveyance of drugs, judges are bound to consider nothing but the type and amount of the drugs being conveyed and it matters not whether the offender is an innocent 15 year-old hired to carry drugs from point A to B or a self-professed ‘drug kingpin’.⁶⁴ Like sentencing guidelines, mandatory minimum sentencing statutes usually tell the courts to consider the severity of the offence – as defined by the legislature – and the offender’s criminal history. Where the statute denies courts even the slightest opportunity to depart from the prescribed sentence or its duration, the law establishes a conclusive presumption that the sentence is absolutely correct.⁶⁵ This is not the best way to occupy much needed jail space.

Mandatory minimums can lead to an unnecessary boom in the prison population, often at huge economic costs to the state, even as crime rates fall. Another downside of mandatory minimums is that ‘they shift discretion from the sentencing judge to the prosecutor’.⁶⁶ Once the defendant has been convicted, the hands of the judge are tied and the prosecutor simply refers the judge to the relevant section in the sentencing statute. This remains so regardless of the offender’s amenability to treatment or the court’s individualised assessment of risk; crime control purposes (some heavier sentences are inconsistent with the purposes for which they are imposed); the offender’s knowledge or ignorance of the minimum sentencing regime at the time he committed the offence (which is difficult to assess unless we assume offenders are very honest); the unreasonable rank-ordering of offence severity and whether the defendant is a first time offender

⁶³Sadly, all these crimes are part of Schedule 2 to the CLAA.

⁶⁴This undoubtedly compromises the courts’ discretion to individualise sentences.

⁶⁵See Frase ‘Sentencing policy development under the Minnesota sentencing guidelines’ in Von Hirsch (n 44) 270 at 272-273.

⁶⁶Spohn ‘Criticisms of mandatory minimums’ in Von Hirsch (n 44) 279 at 279.

or has expressed remorse over his conduct. As a result of the manifest unfairness of mandatory minimums, prosecutors and judges usually 'implicitly' collude to avoid the possible injustice. Spohn observes that prosecutors rarely charge defendants with offences punishable by mandatory minimums, and when they do, they enter into plea bargaining arrangements to protect the defendant from possible injustice.⁶⁷ Moreover, low indictment rates; the increase in dismissal of charges and low conviction rates are some of the informal avenues exploited by prosecutors and courts to limit the impact of mandatory minimums on criminal defendants.⁶⁸

With discretionary minimum sentences, however, all these setbacks are addressed unless the legislature exhaustively lists circumstances that do not constitute exceptional circumstances. Section 51(3) of the CLAA, as amended, states in the relevant part:

If any court ... *is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed ...*, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

This caveat renders incorrect the conclusion that the minimum sentencing statute tied the judges' hands and was therefore unconstitutional. To show its concern about the special needs and rights of children, the legislature had even changed the tone of its language by specifying that minimum sentences were no longer mandatory but discretionary.⁶⁹ By extending minimum sentences to juveniles, Parliament did not mandate the courts, either explicitly or by necessary implication, to disregard children's special needs or to make inappropriate or disproportionate dispositions that are inconsistent with the requirements of section 28(1)(g) of the Constitution. Courts can, by widening the grounds under which they are entitled to exercise sentencing discretion, overcome the 'fettering' potential of discretionary minimum sentences.

In *S v Malgas*⁷⁰ – a judgment that was approved by the Constitutional Court in *S v Dodo*⁷¹ – the SCA held that courts, under section 51, 'are a good deal freer to depart from the prescribed sentences than has been supposed ... and it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However they are to respect the Legislature's view that the prescribed periods of imprisonment are ... ordinarily appropriate when crimes

⁶⁷The downside is that the defendant may agree to enter into a plea bargaining contract in a case for which he would be acquitted.

⁶⁸Spohn (n 66) 279-282.

⁶⁹Instead of the usual 'minimum sentences for certain serious offences', the heading of the section had been changed to 'discretionary minimum sentences for certain serious offences'.

⁷⁰2001 2 SA 1222 (SCA).

⁷¹2001 3 SA 382 (CC).

of the specified kind are committed'.⁷² It further held that section 51 had limited but not eliminated judicial discretion; that in the absence of substantial justification, courts should impose the sentences ordained by the Legislature for listed crimes committed under the specified circumstances; that the stated offences should (in the absence of compelling reasons) invite a rigorous, standardised and consistent response from the courts; that the minimum sentences should not be departed from lightly; that unwarranted sympathy, aversion to incarcerating first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or co-offenders' degrees of participation do not constitute exceptional circumstances; and that the shift to the objective gravity of the offence and the need for effective sanctions does not mean other important factors are to be ignored.⁷³ Ultimately, the impact of *all* factors relevant to sentencing should be measured against the composite standard – 'substantial and compelling' – and should be such as to justify a departure from the homogenised response mandated by the Legislature.⁷⁴

The SCA in *Malgas* further held that if the sentencing court is convinced that the cumulative impact of the circumstances is such as to make the prescribed sentence unjust in the sense that (if imposed) it will be disproportionate to the offence, the offender and the needs of society, it is entitled to impose a lesser sentence.⁷⁵ In imposing the lesser sentence, regard must be had to the fact that the crime in question has been singled out for severe punishment and that the prescribed sentence constitutes a benchmark against which the lesser sentence must be measured.⁷⁶ All the findings in *Malgas* make absolute sense, especially the holding that in considering whether the departure from the stipulated sentence was warranted, the relevant circumstances should be as compelling as required by the statute. Another significant observation is that in exercising its discretion, the court should be guided by both the concept of proportionality in sentencing and the sentences ordained by the legislature. Even the majority in *Centre for Child Law* could not hold that judicial discretion should be absolute. Yacoob J, dissenting, understandably follows the reasoning in *Malgas*, and holds that when a court is convinced that incarceration is inappropriate within the meaning of section 28(1)(g) or that 'the minimum period of imprisonment prescribed exceeds the shortest appropriate period required to be imposed on children by section 28(1)(g)', the court is entitled to depart from the minimum sentence.⁷⁷ Properly interpreted, the statute does not force courts to impose sentences that are unjust in the sense that they are disproportionate (to the crime, the criminal and the

⁷²Paragraph 25.

⁷³Paragraph 25A-F.

⁷⁴Paragraph 25G.

⁷⁵Paragraph 25I.

⁷⁶Paragraph 25J.

⁷⁷Paragraph 112.

needs of society) and therefore inconsistent with the provisions of section 28(1)(g) of the Constitution.

What is particularly striking from Yacoob J's dissent is that he, unlike the majority, observes that youth offenders' psychological immaturity, vulnerability to influence and rehabilitative potential are part of the relevant factors that should feature prominently in the court's analysis on whether there are compelling circumstances that cumulatively justify a departure from the statutorily ordained minimum sentences. Consequently, a finding that the minimum sentence is heavier than one that is consistent with the proper application of section 28(1)(g) would, under the *Malgas* test, 'constitute 'weighty justification' for the imposition of a lighter sentence, and 'truly convincing reasons for a different response', ... and substantial and compelling circumstances that 'justify a departure from the standardised response', and a sentence that is unjust and disproportionate to the crime'.⁷⁸ Although the majority thought this interpretation is unduly strained, it is consistent with the injunction to prefer an interpretation which brings the impugned legislation within the confines of the Constitution.⁷⁹ Viewed thus, it is difficult to see how the Amendment Act compels courts to impose consistently higher sentences than those mandated by the Constitution or how, given that courts are expressly authorised to depart from the prescribed sentences under compelling circumstances (of which age and vulnerability to influence are obviously part), Parliament can be said to have de-individualised sentences to be imposed on juveniles in trouble with the law. With all respect, the relevant section should not have been declared unconstitutional.

3 Denying children the vote is no evidence of their incompetence to decide rationally, to vote responsibly or to commit crime

One of the Court's weakest points concerns the attempt to find inspiration from electoral laws to support the argument that those who are under 18 have no capacity to make decisions responsibly. To the Court, the fact that section 1 of the Electoral Act 73 of 1998 defines a South African 'voter' as 'a South African citizen (a) who is 18 years or older; and (b) whose name appears on the voters' role', is evidence of children's inability to make sound judgments.⁸⁰ Further, this fact entitles them to a discount on punishment. That said, this is not where the weakness resides. The weakness resides in the Court's attempt to use existing social stereotypes to perpetuate the very stereotypes that are being contested in international human rights law today. We do not disenfranchise children from the

⁷⁸Paragraph 121.

⁷⁹See s 39(2) of the Constitution.

⁸⁰Paragraph 38.

vote because the legal age of majority (18 years) is prophetic in predicting every child's competence at that age. We exclude under 18s from the vote because of our moral conviction, misplaced it is argued, that under 18s are incapable of exercising 'free' or 'rational' choice – whatever that means.⁸¹ Unfortunately, our moral conviction (whether this conviction is based on good intentions or ulterior motives does not really matter) is broad and unfactual.

While it is fairly easy to show that children are younger than adults – this is a biological fact – it is very difficult, and in some cases impossible, to show that children are less rational than adults. The cut-off is particularly arbitrary, especially in the context of voting where an 18 year old is permitted to vote and a 17 year old is not. To allude to Cohen: 'Is there really a significant difference ... between someone who is eighteen years old, and someone who is seventeen years and 364 days old?'⁸² Reluctant to engage in what Burman calls 'disciplinary tourism',⁸³ the Court relies on what the law says about itself rather than cross over to developmental psychology and other disciplines in search of a modern understanding of 'mental competence' and current challenges to assumptions that all children under 18 lack the power to be ultimate creators of their own systems of ends. The Court should have differentiated between, on the one hand, the concept of legal competence – an arbitrarily imposed threshold concept under which persons are presumed, regardless of their actual abilities, to be either competent or incompetent to decide and on the other, the concept of psychological competence (which is relatively comparative and), in terms of which one is more or less competent depending on his/her ability to exercise control over his/her environment, desires and emotions.⁸⁴ In the context of criminal law, legal competence presumes the associated existence of psychological competence on the part of the accused (X) and shoulders the burden of proof on X to prove otherwise. Legal competence does not factually mean that X is criminally responsible every time he, for instance, kills another person.⁸⁵

In the electoral context, an argument can be made that the presumption or proof of competence to commit crimes (as embodied in the MACR for example) – even if one is under the legal age of 18 – should lift the legal presumption of incompetence to vote. This poses serious issues of practicability, but the case for lowering the age of majority or presuming 16 and 17 year olds are legally competent is very

⁸¹On the meaning of 'free will' and whether it really exists, see Kane *The significance of free will* (1996); Bok *Freedom and responsibility* (1998).

⁸²Cohen *Equal rights for children* (1980) 49.

⁸³Burman 'Beyond the baby and the bathwater: Postdualistic developmental psychologies for diverse childhoods' (2001) 9 *European Early Childhood Education Research Journal* 5-22.

⁸⁴See Buchanan and Brock *Deciding for others: The ethics of surrogate decision-making* (1990) (1st ed) 27.

⁸⁵Defences of necessity, drunkenness, provocation and insanity can exonerate X from criminal responsibility even though the law attaches such responsibility to all persons of his age.

compelling.⁸⁶ Under 18s' presumed legal incompetence to vote says nothing about their psychological competence to vote responsibly⁸⁷ and cannot be used to support orthodox social attitudes concerning their overall lack of competence in all facets of life. Mitchell warns against the use of age- and stage-based linear trajectories, such as the one adopted by the Court, to support positions on the child rights discourse because such trajectories depict youth development mechanistically, and pathologically, either as patients or incompetent citizens in the making.⁸⁸ It is convenient for the Court to play the good mother when it is about excusing juveniles from criminal responsibility, but my concern is that this perpetuates stereotypes about children in the citizenship discourse. Sunstein observes that '[p]eople who insist that their status as victims entitles them to enforce their legal rights may not conceive of themselves in ways that engender equality and equal citizenship'.⁸⁹

Properly viewed, denying 16 and 17 year olds the franchise should be seen as a regrettable reflection of the fragile phase in which the political rights of the young are and an indictment to electoral systems that, while excluding this category, are labelled 'democratic'. We know that persons under the age of 18 are required to pay income taxes when they work and are allowed in many jurisdictions to drive vehicles, to marry and to sign certain legal contracts. Against this background, Lui argues that 'despite their active participation in both the critical dialogue and community solutions focused on important societal issues, youth influence is restricted to the popular sphere. ... Youth under the age of 18 cannot vote in any level of government elections, *thus eliminating the one official avenue by which to give their input*. Real opportunities for youth to be involved in decision-making are few, *even in policy areas which directly concern youth*'.⁹⁰ These are serious concerns. Invoking the arbitrary lines drawn by electoral laws as markers of competence perpetuates conceptual blind spots in the rights and citizenship discourse; promotes the disciplinary myopia that characterises the law and widens the binary divide between 'youth' and 'citizenship'.⁹¹

To Burke, 'citizenship is something to which every young person is entitled and not something which needs to be earned or taken away'.⁹² The work of extreme child liberationists – such as Farson, Holt, Aries and Schrag – has

⁸⁶See Thomas 'Towards a theory of children's participation' (2007) 15 *International Journal of Children's Rights* 199; Olsson 'Children's suffrage: A critique of the importance of voters' knowledge for the well-being of democracy' (2008) 16 *International Journal of Children's Rights* 55.

⁸⁷'Majority' and 'minority' are 'social constructions'. Until recently, the age of majority was 21 and we responded to evolving social attitudes by lowering that age to 18.

⁸⁸Mitchell 'Towards a transdisciplinary model within child and youth rights education' in Alen *et al The UN Children's Rights Convention: Theory meets practice; proceedings of the International Interdisciplinary Conference on Children's Rights 18-19 May 2006* (2006) 181 at 191.

⁸⁹Sunstein (1995) 70 'Rights and their critics' *Notre Dame LR* 70 at 732.

⁹⁰Lui *To engage or not to engage ... What is our policy?* Cited in Mitchell (n 88) 189.

⁹¹See Mitchell (n 88) 184-194.

⁹²Barry (ed) *Youth policy and social inclusion – critical debates with young people* (2005) 53.

advanced a compelling case for an inclusive pedagogy of human rights, particularly in the context of the franchise.⁹³ Where Holt grants all adult rights to persons of 'whatever' age,⁹⁴ Farson argues that the 'achievement of children's rights must apply to *all* ages, from birth to adulthood'.⁹⁵ Farson's most extreme assertions are that the very young should be allowed to vote (and to hold public office) and that a two-month old baby should administer her inherited estate.⁹⁶ Schrag also finds that society's extensive paternalist management of children 'denies to an entire class the fundamental right of freedom to pursue one's life (limited only by the equal rights of others)'.⁹⁷ Thus, we treat children and adults according to a morally undesirable double standard. Though it started in absolute terms, the emergence of an inclusive jurisprudence on citizenship clearly stretches back to at least over four decades ago, if not as back as the heyday of Kantian and Lockean philosophy. To the extent that Holt, Farson and Schrag seek to expose the assumption that children are *naturally* incompetent in all respects and that society usually underestimates children's potential, they are absolutely right. What is questionable is the connotation that *all* children are as competent as adults.

There are two further objections concerning the competence to vote responsibly. First, our very understanding of what amounts to a 'responsible electoral choice' is clearly open to contestation. If we insist that citizens meet a certain utilitarian standard of competence to be allowed to vote, we may discover that as many adults as children are deemed incompetent under that standard or that by setting that standard, we are limiting the agent's power to exercise free will and to define what constitutes 'rational choice' or 'responsible voting'.⁹⁸ Second, it is difficult to prove either that all adults invoke a good sense of responsibility in making electoral choices or that those who do, always do it every time they decide or that all children are incapable of exercising rational choice when voting or that if they are indeed incapable, they are always incapable in every other instance.⁹⁹ Therefore, it is arguable that adults should show that they deserve the presumption of competence to the extent that children merit its denial. Finally, challenges to age-based discrimination date back to 17th and 18th century writings in liberal political theory and since then, authors converge on the point that legal competence should be consistent with the child's age and level of maturity, and should not simply be based on the presumptions codified in the law itself.

⁹³Arguing for equal treatment of children in all contexts, Aries *Centuries of childhood* (1962) 128, argues that 'in medieval society, the idea of childhood did not exist'.

⁹⁴Holt *Escape from childhood* (1975) 120 and 131.

⁹⁵Farson *Birthrights* (1974) 31.

⁹⁶*Id* 172 and 185.

⁹⁷Schrag 'The child in the moral order' (1977) 52 *Philosophy* 167 at 168.

⁹⁸On the justification of paternalism see Scarre 'Children and paternalism' (1990) 55 *Philosophy* 117-124.

⁹⁹For an educative exploration of humans' (in)capacity to decide, see Archard *Children: Rights and childhood* (2004) (2nd ed) 85-97.

This is the approach adopted in the UNCRC as shown by the concepts of the evolving capacities of the child and the need to give due weight to the views of the child who has reached a 'chronological' or 'mental' age of discretion.¹⁰⁰ Consequently, exclusion from the electoral system is no evidence that citizens who are under the 'chronological' age of 18 are incapable of making informed decisions. If anything, contemporary debates on 'childhood' clearly show that today, children are considered (in theory at least) capable citizens.¹⁰¹

Empirical evidence suggests that teenage offenders' competence to make choices equals that of adults. In a competence study with 136 juvenile delinquents, Vance Cowden and Geoffrey McKee conducted a study in which mental health practitioners evaluated the delinquents. This involved a review of every juvenile's offence and school records as well as clinical interviews conducted with the offender and his family. Johnson sums up the findings of the research thus:

The study found that the percentage of competent adolescents increased with chronological age. The study showed that twenty percent of the nine- to twelve-year-olds were competent, half of the thirteen- to fourteen-year-olds were competent, and that the percentage of competent fifteen- and sixteen-year olds equalled percentages found in studies of adult competence. The Cowden and McKee study showed a clear correlation with the age of the defendant and the likelihood of competence. Thus, as developmental skills and capacities increase with age, so too does the percentage of juveniles found competent.¹⁰²

The MacArthur Juvenile Competence Study¹⁰³ also found that there are no adjudicative competence differences between 16- and 17-year olds and young adults¹⁰⁴ and capacities improve with age during adolescence.¹⁰⁵ Albeit in a different context, Freeman makes a (similar) case for presuming adolescents competent to participate in judicial proceedings on issues that affect them.¹⁰⁶

Grounding court judgments on adolescents' short-term horizons, incapacity to make sound judgments and vulnerability to peer and adult pressure, without reconciling these arguments with the discourse portraying children as full citizens is very common in children's rights talk today. Very few authors are interested in linking children's participation rights talk (where children have competences from age 0 to age 18) with children's criminal responsibility talk (where children are still

¹⁰⁰See arts 5 and 12 of the United Nations Convention on the Rights of the Child.

¹⁰¹See, eg, Taylor and Smith (eds) *Children as citizens: International voices* (2009); Alderson (ed) *Young children's rights: Exploring beliefs, principles and practice* (2008) (2nd ed).

¹⁰²Johnson 'Juvenile competence statutes: A model for state legislation' (2006) 81 *Indiana LJ* 1067 at 1078.

¹⁰³The study involved 927 youths and 466 adults (aged 18-24 years).

¹⁰⁴Grisso *et al* *Juvenile's competence to stand trial: A comparison of adolescents and adult capacities as trial defendants* (2003) 27 *Law and Behaviour* 333 at 343-346.

¹⁰⁵*Id* 356.

¹⁰⁶Freeman *The moral status of children: Essays on the rights of the child* (1997) 217-224.

developing until their mid to late 20s) because the linkage – whichever way – is decidedly fatal to the human rights project of either camp. Ignoring this inconsistency will not take us anywhere. The result is that we have a contradictory jurisprudence and a false divide between penal and constitutional law as regards adolescents. If children (say 0-14 or 15 years) are both constitutionally capable and legally incapable of committing criminal offences, adolescents (those 16 or 17 and above) are decidedly capable – either way.

My argument is not that adolescents should be held criminally responsible simply because they are treated as 'competents' in the citizenship discourse, but that there is no justification on why the level of mental competence for under 18s should not shoulder a commensurate level of punishment on adolescents who commit crimes. That said, the relevance of age as a mitigating factor has not been denied, but that should be left to the sentencing judge's discretion. It is fitting to close this section by insisting that available research on adolescents' competence to reason does not support the view that 16- and 17-years olds must be deemed psychologically incompetent both to commit crimes and to stand trial. In a manner consistent with their competences, juveniles in conflict with the law should serve sentences proportionate to the gravity of their conduct. No one alleges that all adolescents who commit heinous crimes are, by chance, mentally incompetent and should be exonerated from appropriate criminal sanctions.

4 The limitations (section 36)¹⁰⁷ analysis and the separation of powers doctrine

Under South African law, one can only proceed to the limitations analysis after holding that a provision in the Bill of Rights has been infringed.¹⁰⁸ It follows that since it has been argued that the discretionary minimum sentencing regime does not violate any provision in the Constitution, the inquiry should end there. However, it is important for the author to assume that the impugned provision violated section 28(1)(g) in order to proceed to the limitations analysis. Further, it is assumed here that if discretionary minimum sentences indeed violate section 28(1)(g), the findings of the majority are broadly correct except that the Court seems to have overstepped the separation of powers doctrine. This part is largely

¹⁰⁷Section 36(1) reads: 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 society 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 the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.

¹⁰⁸See *S v Zuma* 1995 2 SA 642.

a restatement of the Court's holding and my criticisms are limited to the separation of powers question.

The Court acknowledged that Parliament 'may not be called upon to explain its enactments' but added the proviso that where a criminal statute limits a provision in the Bills of Rights, the executive is obliged to tender an adequate justification to guide the limitations phase of constitutional analysis.¹⁰⁹ The purpose of the Amendment was to address 'growing tendencies ... that indicate that many juveniles are committing the more serious of serious offences, particularly sexual offences'.¹¹⁰ Minimum sentences were introduced to meet the 'pressing' need to counter the tidal wave of youth violence and to address safety concerns from the public. The difficulty, noted the Court, arose from the fact that the Minister's affidavit provided no facts from which the legitimacy of the government's purpose and the efficacy of its implementation could be measured. Drawing inspiration from *NICRO*,¹¹¹ the court held that although justification is not only dependent on facts, the Minister had failed to provide even 'policy objectives based on reasonable inferences unsupported by empirical data' to support the state's claims.¹¹²

Factors such as the number and frequency of the commission of scheduled offences committed by 16 and 17 year olds; the fraction of such crimes as a ratio of the total number of all scheduled crimes committed in a statistical year; whether there has been an epidemic statistical increase in scheduled offences perpetrated by juveniles and whether such offences have increased as a proportion of the total number of scheduled crimes, should weigh heavily on the scales when deciding the justifiability of the extension of minimum sentences to juveniles over the age of 16.¹¹³ Further, held the Court, it would have been appropriate had the legislature stated explicitly whether the extension of minimum sentences to juveniles was purposed to achieve ends such as deterrence or meet the demands of public outrage at juvenile crime.¹¹⁴

¹⁰⁹Ironically, many, if not all, criminal statutes somehow limit many provisions in the Bill of Rights and one wonders whether the provisions should first be 'baptised' by the courts before earning legitimacy.

¹¹⁰Paragraph 50.

¹¹¹*Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* [2004] ZACC 10; 20053 SA 280 (CC); 2004 5 BCLR 445 (CC) paras 35-36. At para 36 the *NICRO* Court held:

The party relying on justification should place sufficient information before the Court as to the policy that is being furthered, the reasons for that policy and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the Court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion.

¹¹²Paragraph 54.

¹¹³Paragraph 56. It is not clear why the government should not be required to produce evidence of a statistical rise in adult crime to justify the imposition of minimum sentences on adults.

¹¹⁴Paragraph 57. Similarly, it is arguable that the state must state the purpose of minimum sentencing for adults.

Although crime levels are unacceptably high and the public is angry at that, neither the high levels of crime nor public anger could justify the subjection of juveniles to minimum sentences.¹¹⁵ In the absence of any factual or policy justification, the Amendment (by drawing the new line of the imposition of minimum sentences at 16) violated the constitutional protection given to 17 and 16 year olds.¹¹⁶ As has become the norm in South African constitutional adjudication, the Court ultimately interpreted the Bill of Rights as embodying 'internationally accepted principles'.¹¹⁷ To the Court, the principles of proportionality; imprisonment as a last resort and for the shortest appropriate period of time; treating children differently from adults and the centrality of the well-being of the child, were a direct indication that international law restricts the application of minimum sentences to youth offenders (it has been shown this is not so). The Court held that 'no maintainable justification has been advanced for including 16 and 17 year olds in the minimum sentencing regime ... and the limitation of section 28(1)(g) is unconstitutional and must be so declared'.¹¹⁸

Albeit in a different context, the same Court once held in *Grootboom*¹¹⁹ that courts should not enquire whether other more desirable or favourable statutory or policy measures could have been adopted, but simply whether the adopted measure complies with the constitutional provision against which it is being evaluated.¹²⁰ In *Treatment Action Campaign*,¹²¹ the Court held that 'all arms of government should be sensitive to and respect [the] separation' between their functions and those that are exclusively the preserve of other arms of government.¹²² In *Phaswane*, Ngcobo J for the Court was at pains to stress that the function of courts is not to 'exercise executive or legislative functions', or to 'supervise or interfere with the exercise of legislative and executive powers' (unless these branches overstep their constitutional limits), but 'to patrol the constitutional borders'.¹²³ It cannot be maintained that every time Parliament passes legislation, the legislation should be 'legitimised' by the courts because this simply amounts to a diplomatic usurpation of the functions of the legislature and the executive in regulating sentencing and formulating sentencing policy. Nor can it be insisted that all sentencing statutes are unconstitutional unless the State provides statistical bases for the purpose for which they are enacted.

¹¹⁵Paragraphs 58-59.

¹¹⁶Paragraph 60 read with para 55.

¹¹⁷Paragraphs 61-63.

¹¹⁸Paragraphs 63-64.

¹¹⁹*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

¹²⁰Paragraph 41.

¹²¹*Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

¹²²Paragraph 98.

¹²³Paragraph 183.

If the State claims that the intended purpose of the statute is to offer an effective deterrent response to criminality, then the courts cannot second-guess the legislature on that. Some argue¹²⁴ and empirical evidence¹²⁵ tends to confirm that recidivism levels are higher among criminals who are sentenced to heavier sentences than among those who are either sentenced to lower sentences or diverted from the criminal justice system (usually in the case of children).¹²⁶ These concerns are beyond the scope of this paper but it suffices to note that researchers are at sea on whether recidivism is the result of the offenders' hardened inclination to criminal behaviour or the result of severe criminal sanctions. This also varies from offender to offender. However, my point for now is to argue that the legislature and the executive have important constitutional functions in prescribing appropriate sentences for particular crimes and that these two branches of government have no constitutional obligation to produce statistical evidence justifying the deservedness of a particular response to both adult and juvenile criminality before such response earns legitimacy.

Finally, it is important to refer to Yacoob's third observation – I have referred to the other two above – that section 28(1)(g) does not limit the role of the legislature and the executive in the determination of sentences.¹²⁷ When judicial discretion is legitimately limited – no one contends it should be illimitable – in the sentencing of children, this does not mean that the provision limiting it thereby lowers the age of majority or automatically falls foul of section 28(1)(g). As the same Court held in *Phaswane*, the solution lies not in declaring the legislation regulating judicial discretion 'unconstitutional' but in encouraging judicial officers to interpret the provision in a manner consistent with the Constitution.¹²⁸ As ever, the courts' role should be limited to 'patrolling constitutional borders'. No more, no less.

5 Conclusion: The centrality of competence in determining appropriate sentences

In defending the case against the Constitutional Court's benevolent maternalism and excessive leniency, it must be stressed, in Doek's words, that 'children [must be] regarded not only as vulnerable individuals, but also – and equally – as individuals who are developing the capacity for rational choice, more independent

¹²⁴See Doob and Webster 'Offenders' thought processes' in Von Hirsch *et al* (note 44) 71-74.

¹²⁵See Tunnell 'Choosing crime: Close your eyes and take chances' in Hancock and Sharp (eds) *Criminal justice in America: Theory, practice and policy* (1996); Von Hirsch *et al* *Criminal deterrence and sentence severity: An analysis of recent research* (1999).

¹²⁶This is by no means a concession that discretionary minimum sentencing statutes bind courts to impose such sentences.

¹²⁷Paragraphs 97-102.

¹²⁸See *Phaswane* paras 126-131, particularly paras 128-131.

decision-making and hence, a growing moral and legal responsibility'.¹²⁹ From a moral standpoint, it is indefensible to insist that children should never be held criminally responsible or that the MACRs should be increased to the age of 18.¹³⁰ For the Constitutional Court, all persons under the age of 18 are children in all contexts. A more sophisticated, 17 year old parent can murder other persons (whatever number) under aggravating circumstances and still expect a huge discount in the punishment stakes. At international law, the concept of the child's 'evolving capacities' has helped shape interventions that encourage children, in supportive ways, to assume responsibility for their actions, good or bad. Lansdown explains, in detail, that the concept of 'evolving capacities' is three-dimensional. First, as a developmental concept, it reflects the degree 'to which children's development, competence and autonomy' are furthered by the realisation of rights in the UNCRC; second, as a participatory or emancipatory concept, it entails 'children's right to respect for their capacities and the shifting responsibility for the exercise of rights from adults to children in accordance with their levels of competence' and third, as a protective concept, it recognises that in light of their still-developing competences, children are entitled to parental and state protection from exposure to potentially harmful activities.¹³¹

Treating children as if they are not moral agents but objects of protection may perpetuate the very causes of their exclusion from effective participation in the justice, electoral and other systems. From both a developmental and participatory perspective, adolescents should be presumed to have the necessary capacity to breach the penal law, to have reached the MACR once they are 14 and to be answerable as moral agents for their actions. Cipriani finds that 'children's criminal responsibility is an integral and necessary part of children's rights – a logical extension of the concept of children's evolving capacities insofar as it is an appropriate step in respecting children's progression from lesser to greater competence, which gradually prepares them for adult rights and responsibilities in society'.¹³² In a manner consistent with their competence and culpability, children should take part in repairing the harm they would have caused. This serves to educate the child.

Reiterating the relevance of competence to determining children's measure of responsibility, Rule 4.1 of the Beijing Rules states that MACRs 'shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity'.¹³³ The commentary to the rule states that a modern approach to establishing

¹²⁹Doek 'Modern juvenile justice in Europe' in Rosenheim *et al* (eds) *A century of juvenile justice* (2002) 505 at 522.

¹³⁰Cipriani *Children's rights and the minimum age of criminal responsibility: A global perspective* (2009) 34.

¹³¹Lansdown *The evolving capacities of the child* (UNICEF Innocenti Research Centre, Florence; 2005) 15.

¹³²Cipriani (n 130) 48.

¹³³See also art 40(3)(a) of the UNCRC.

the MACR would consider 'whether a child can live up to the moral and psychological components of criminal responsibility [as to be] held responsible for antisocial behaviour'. Reference to moral and psychological development suggests that particular competencies are relevant to the child's criminal responsibility and the degree to which punishment should mirror one's mental competence at the time they committed the crime in question. The commentary states that 'there is a close relationship between responsibility for criminal behaviour and other social rights [such as marriage]'. The MACR in international law is currently set at 12 years although the CRC encourages states parties to raise it with time and not to lower it where it is higher than 12.¹³⁴ At 14, South Africa is complying with its international obligations.

A properly responsive legal system should – in light of adolescents' developing competences and through proportionate sentences – teach children to be accountable for their conduct. This implies that as children acquire greater competency, independence and freedom to exercise liberty rights, the law should expect them to be responsible enough to face punishment for criminal actions they freely choose to perform.¹³⁵ A competence-based approach to sentencing children should therefore incorporate developmentally and morally appropriate responses that take into account not only the evolving capacities of the child, but also the need to avoid both unnecessarily excessive and excessively lenient sentences. Such an approach, it has been argued, places proportionality at the centre of the inquiry, while considering the mitigating role of youth – where appropriate – in light of the child's biological and mental age. After revitalising the case for the enduring role of competence in allocating responsibility and punishment, it is prudent (given the importance of avoiding the imposition of unnecessary and uneducative excruciating pain on youth offenders) to close this contribution with some disclaimers.

First, it has not been argued that criminal sanctions should disregard juveniles' right to be treated with dignity and respect or to be sentenced in a manner that reinforces their respect for fundamental rights or to be reintegrated into society in a manner that is consistent with their age and their assuming a constructive role in society.¹³⁶ Second, it has not been argued that every serious crime committed under any circumstances should necessarily translate into sentencing juvenile offenders to lengthy periods of incarceration. What has been argued is that it is incorrect to hold, *as a matter of principle*, that *discretionary* minimum sentences for juvenile offenders are unconstitutional. Finally, this article is not about whether minimum sentences prevent crime or overcrowding in the prisons,¹³⁷ but about the role of competence in determining punishment for

¹³⁴See CRC General Comment 10 (2007) 'Children's rights in juvenile justice' CRC/C/GC/10 para 32-3.

¹³⁵Cipriani (n 130) 33.

¹³⁶See art 40(1) of the UNCRC.

¹³⁷These effects say nothing about how relevant competence is in assigning criminal responsibility and determining appropriate sentences.

criminal conduct. The author is aware that there is no evidence of the deterrent effect of discretionary minimum sentences (nor of any other sentence for that matter) and that available evidence suggests that minimum sentencing has led to a boom in the prison population even as crime levels fall,¹³⁸ but these concerns – compelling as they are and unequivocally shared by the author – are beyond the scope of this article; my concern here being that competence and proportionality remain important in sentencing juvenile and adult offenders. Thus, there is no competence-based reason for deeming minimum sentences an inappropriate response to juvenile crime¹³⁹ and an appropriate response to adult crime.

¹³⁸See Sloth-Nielsen and Ehlers (2005) 'Assessing the impact: Mandatory and minimum sentences in South Africa' *SA Crime Quarterly* 14, 15-22; Terblanche (2003) 'Mandatory and minimum sentences: Considering section 51 of the Criminal Law Amendment Act 1997' *Acta Juridica* 194-220.

¹³⁹Meaning crimes committed by adolescents aged between 16 and 18 years.