A MEASURE OF LAST RESORT?

Child offenders and life imprisonment

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The main principle when sentencing children is that imprisonment should be a measure of last resort and only for the shortest appropriate period of time. However, contrary to international and foreign law in this regard, South Africa continues to sentence children to life imprisonment. The aim of this article is to contrast our current sentencing practices with regard to life imprisonment for children, with the sentencing principles set out in South African common law and in international law. Furthermore, the article sets out the negative effects of a mandatory life sentence in terms of the minimum sentences legislation.

One of the main focus areas of the Centre for Child Law is the promotion of the principle that the imprisonment of child offenders must always be a measure of last resort. To this end the Centre started an investigation to determine how many children who were under the age of 18 when they committed the crime, are serving a sentence of life imprisonment. Persons who may have been below the age of 18 at the time of the offence were interviewed, and records of those court proceedings examined.

It was found that 32 such prisoners are currently serving life sentences.[1] Of the 32 prisoners, 17 are in KwaZulu Natal, three in the Free State, three in the Eastern Cape, four in Mpumalanga, one in North West and four in Gauteng. Some of them were as young as 14 and 15 when they committed their crimes.

Sentencing children to a term of life imprisonment is in contradiction with the constitutional principle of imprisonment as a measure of last resort and only for the shortest appropriate period of time.[2] The Constitution also places an obligation on courts to interpret our common law in accordance with international law.[3] Furthermore, South Africa has a long history of case law in which the principle is firmly established that youth is always a mitigating factor and that children cannot be measured against the same standards as adults.

When looking at the number of children sentenced to life imprisonment one has to question why this is happening. Are their crimes extraordinary to such an extent that it justifies a deviation from established common law and from our obligations in terms of international law?

International law

The principle of imprisonment as a measure of last resort and only for the shortest appropriate period of time is included in various international documents and treaties. This constitutional imperative is reinforced by the principles of proportionality and rehabilitation with regard to child offenders and replaces more retributive principles.

The most important treaty is the Convention on the Rights of the Child of 1989 (hereafter the CRC).

Article 37 of the CRC states that:

> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment of punishment. Neither capital punishment, nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
>
> (b) ...The arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time.

The UN Standard Minimum Rules for the Administration of Justice (the Beijing Rules) stress that the principle of proportionality and the wellbeing of the juvenile should be the guiding factors during sentencing. Imprisonment should only be imposed when there is "no other appropriate response" and "shall be limited to the possible minimum".[4]

The principle of imprisonment as a measure of last resort is reiterated in guideline 46 of the UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines). Furthermore, the best interests of the young person should always be of paramount importance.

The UN Rules for the Protection of Juveniles Deprived of their Liberty makes it clear from the outset in rule 2 of its Fundamental Perspectives that deprivation of liberty must be limited to exceptional cases and early release must be a possibility.

The African Charter on the Rights and Welfare of the Child (hereafter the ACRWC) does not expressly include the principle of imprisonment as a measure of last resort nor does it have a section prohibiting life imprisonment for children. It does, however, state that the 'essential aim' of juvenile justice shall be the reformation, reintegration into family and social rehabilitation of the child.[5] This implies that life imprisonment is not appropriate since it is not consistent with the main objective of release and reintegration of the child into the community.

Practice in other countries

Canada

In 2002 Canada enacted the Youth Criminal Justice Act which states very strongly that children may only be sent to prison if there are no other appropriate alternatives, and that imprisonment may only be imposed for violent offences, in exceptional cases when there are aggravating circumstances, or when there is a pattern of convictions against the child. Judges must consider alternatives such as a combination of imprisonment and correctional supervision before direct imprisonment.

If direct imprisonment is the only appropriate sentence, the maximum period of imprisonment is seven to ten years, depending on whether it was first or second-degree murder. The period to be served continuously before becoming eligible for parole is six and four years respectively.[6] The Act therefore removes the possibility of a life sentence for children.

England and Wales

In England and Wales, it used to be the case that children who were convicted of serious violent offences for which adults would be sentenced to life imprisonment, were sentenced to be detained 'during Her Majesty's pleasure'. Such a child would be eligible for release when it was recommended by the parole board in consultation with the trial judge and the Lord Chief Justice, but the final power to release the child was vested in the Secretary of State.

In practice, the trial judge would recommend a minimum period to be served, which was confirmed or varied by the Lord Chief Justice before being relayed to the Secretary of State. However, there was no statutory provision mandating or requiring the trial judge to set a minimum period of imprisonment and it was at the discretion of the Secretary of State whether the child should be released, even if the parole board recommended release.

This practice resulted in a situation where children imprisoned 'during Her Majesty's pleasure' were being treated the same as persons serving a mandatory life sentence.[7]

The European Court of Human Rights found that this practice violated the European Convention on Human Rights.[8] In particular, it was found that it was cruel and inhuman punishment to detain children without any certainty about when they might be released. The situation was exacerbated by the possibility that the Secretary of State might veto a recommendation for early release from the parole board.

The legislation was amended and the trial judge must now set the minimum period of time that must be served, after which the child must be considered for parole and early release. If the parole board recommends release, the Secretary of State must release the child.[9]

Germany

German legislation relating to the imprisonment of children is specifically based on the Beijing Rules and states that the administration of child justice is based on the principles of 'minimum intervention' and prison as a sanction of last resort. For very serious crimes such as murder and rape, children between the ages of 14 and 17 may be sentenced to a maximum of ten years. Furthermore, sentences must always run concurrently and may never run cumulatively.[10]

Australia

In Australia each state has its own criminal and sentencing legislation but in general, Australia is one of very few countries that still holds the possibility of life imprisonment for children in its current legislation.[11] Legislation in New South Wales states that mandatory life sentences do not apply to persons below the age of 18;[12] however, trial judges still have the power to impose a discretionary life sentence.

The Young Offenders Act of 1997, in the same state, created a very intricate system of sentencing for serious violent offences, allowing a judge to sentence a child to imprisonment for a period to end within six months of the child turning 21. In a recent shocking and particularly vicious case of racially motivated murder and assault, a 17 year-old offender was sentenced in this way to three and a half years' imprisonment.[13] This seems to indicate that the Young Offenders Act will act as a guideline for sentencing instead of having a discretionary life sentence imposed.

Africa

In Uganda a child may not receive a sentence of detention for a period exceeding three years when convicted of a crime that for adults is punishable by death. This is according to the Children's Statute of 1996, which also incorporates the principle of imprisonment as a measure of last resort.[14]

One of the basic children's rights enshrined in the Children's Act 8 of 2001 of Kenya states that no child may be subjected to life imprisonment.[15] When reading the chapter on child justice it becomes clear that Kenya does not allow imprisonment of children at all. At worst, children are sentenced to reform or borstal schools.[16]

In Lesotho, no person below the age of 18 may be imprisoned unless there are substantial and compelling reasons and imprisonment may never be longer than 15 years. Furthermore, the Children's Protection Act of 1980 also states that imprisonment is a measure of last resort and for the shortest appropriate period of time.

According to the Namibian Constitution no person under the age of 16 may be imprisoned.[17] However, they have indicated in a report to the UN Committee on the Rights of the Child that they do allow life imprisonment for children.[18]

The South African experience

Historically both the courts and legislature always made a distinction between adults and children when it came to the sentencing of very violent and serious crimes. According to the Criminal Procedure and Evidence Act of 1917, a judge could use his discretion to impose any other sentence than the death penalty when sentencing a person below the age of 16 who had been convicted of murder.[19]

In 1955 the phrasing was amended to give the judge the discretion to impose any sentence other than the death penalty when it was found that there were extenuating circumstances.[20] In 1959 the

minimum age of 16 was raised to 18 by the Criminal Law Amendment Act 16 of 1959. This continued to be the position in South Africa until the Criminal Law Amendment Act 107 of 1990 removed the death penalty for persons below the age of 18.[21]

As far back as 1908 in *R v Jantjies,*[22] the court found that a fitting sentence for a 12 year-old boy who had murdered his friend, was a sentence of two years in reform school. In *S v Whitehead*[23] the court found that a sentence of 22 years amounts to life imprisonment and that a more appropriate sentence for a 17 year-old would be 15 years. The court opined that any term of imprisonment of almost 25 years should only be imposed in the most exceptional circumstances, and was very unusual in our law.

In *S v Maimela*[24] the trial court convicted a 16 year-old boy of murder, and found that there were no extenuating circumstances that would justify imposing any other sentence than the death penalty. On appeal the court found that, even though age may not always be a mitigating factor when the offender is under the age of 18, it must always be taken into account when the court is exercising its discretion with regard to the death penalty. The court has to examine to what extent the youthfulness of an offender under the age of 18 makes the death penalty inappropriate.

In the famous 'scissors' murder case, *S v Lehnberg,*[25] the judge found that being young means being immature, lacking life experience, being reckless, and is a mental state in which one is very easily influenced. Furthermore, you cannot measure children against the same standard used for adults. Although *Lehnberg* was also about when it would be appropriate to impose the death penalty, it has become the *locus classicus* on youth as a mitigating factor and has been followed consistently in subsequent judgements.[26]

Even when there were severe aggravating circumstances did the court exercise leniency due to youthfulness. In *S v Willemse,*[27] an 84 year-old woman was repeatedly raped, stabbed and eventually thrown into a well on her farm. One of the offenders was 14 at the time and the court of appeal found that the sentence of ten years' imprisonment was shockingly inappropriate and that he should instead be sent to reform school.

Impact of the minimum sentences legislation

Minimum sentences were introduced in 1997 through section 51 of the Criminal Law Amendment Act 105 of 1997. The Act created a sentence of mandatory life imprisonment, to be imposed when a person is convicted of a crime listed in Part I of Schedule 2 of the Act, unless there were substantial and compelling reasons to justify deviating from the minimum sentence.[28] Minimum sentences do not apply to persons below the age of 16, but if a presiding officer wants to impose a minimum sentence on a 16 or 17 year-old s/he may do so, provided that the reasons for doing so are recorded.[29]

This section led to widespread confusion about whether minimum sentences automatically apply to children who were 16 or 17 when they committed the crime, in the same way that they apply to adults. Before the death penalty was abolished there was a clear legal distinction between adults and children, but when the death penalty fell away and minimum sentences were introduced, it appeared that children and adults were in an equal position before the law. This may explain why children were receiving as harsh a sentence as life imprisonment.

The basic rule is that imprisonment should be a measure of last resort for child offenders. Minimum sentences are not a measure of last resort, they are a measure of first resort, and do not allow an individualised approach to sentencing as required by international law.

The question was resolved in 2004 in the case of *S v B*[30] in the Supreme Court of Appeal, where it was held that minimum sentences and specifically life imprisonment do not automatically apply to children of 16 or 17. The court emphasised that the traditional aims of punishment must be re-evaluated in light of the Constitution and international law relating to child offenders, including the principles of rehabilitation, proportionality and the best interest of the child.

According to the trial transcripts, most of the children serving life were sentenced between the time that minimum sentences were introduced, and 2004. It is therefore conceivable that the incidence of children being sentenced to life imprisonment may decrease now that the Supreme Court of Appeal has clarified the law.

It is however discouraging that records were found of children who were 14 or 15 when they committed a crime, and were sentenced to life imprisonment in terms of the court's common law jurisdiction.

Impact of the Correctional Supervision Act 111 of 1998

A further problem is that there is no mechanism that provides for the early release of children who were sentenced to life imprisonment. Article 37 of the Convention on the Rights of the Child only prohibits life imprisonment without the possibility of release. Life imprisonment without the possibility of release does not exist in South Africa, but a person serving life must serve 25 years before he or she may be considered for parole.[31]

The legislation in this regard makes no distinction between adults and persons who were below the age of 18 when they committed the offence. Although it is not without the possibility of release, it is clearly not for the shortest appropriate period of time and it also neglects to take the principles of rehabilitation, individualised sentencing and best interests of the child into account.

Conclusion

The Child Justice Bill, which was introduced to parliament in 2002, prohibits life imprisonment for any person under 18 and focuses on diversion, non-custodial sentences and restorative justice (see the previous article on the Bill in this issue). Another possible solution to limit the imposition of life imprisonment on child offenders, is to amend the minimum sentences legislation to completely exclude all persons below 18, or at least create a mechanism whereby persons who were below the age of 18 when they committed the crime may become eligible for early release.

Life imprisonment should only be imposed when a person poses a threat to society and cannot be rehabilitated. Sentencing a child to life imprisonment means that we no longer recognise that their youthfulness contributed to reckless and immature behaviour and that such behaviour can be corrected through rehabilitation. This flies in the face of constitutional values and international law.

The reasons why we have to make exceptions for young offenders were well summarised by a Canadian criminal court judge:

> Their degree of responsibility and blameworthiness is less because of their immaturity, their susceptibility to negative influence, and their natural tendency to impulsive ill-considered behaviour. Further, youthful offenders possess greater potential for rehabilitation because their character is not well formed and there is a greater chance that deficiencies can be corrected. These factors lead to the accepted conclusion that youth sentencing should be less severe than for adults and that the emphasis should be placed on rehabilitation.[32]

Endnotes

1 Findings according to information sent by the office of the Inspecting Judge of Prisons in 2005.
2 Section 28(1)(g) of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter "the Constitution").
3 Section 39 op cit.
4 Rule 17.1(b). Notably the commentary to rule 17.1(b) explains that retributive sanctions may have some merit in cases of severe offences by children but "should always be outweighed by the interest of safeguarding the well-being and future of the young person".
5 Article 17(3) of the ACRWC.
6 Section 42 Youth Sentences of the Youth and Criminal Justice Act of 2002.
7 D A Thomas, Sentencing: Detention during Her Majesty's pleasure – Offender convicted of murder committed when under 18, *Criminal Law Review*, 2001, p 839.
8 *Hussain v The United Kingdom* (1996) EHRR 1. A subsequent amendment to the Crime (Sentence) Act 1996 stated that the Secretary of State must set the minimum period to be served. If the parole board recommended release after this period had been

served the Secretary had no discretion in the matter and was obliged to release the child. This section was also found to be against the European Convention on Human Rights. *T v The United Kingdom* (2000) 30 EHRR 121. The Secretary of State is part of the executive branch of government and the exercise of a judicial function was found to violate the principle of separation of powers.

9 Parliament enacted section 61 of the Criminal Justice and Court Services Act 2000 which inserted section 82A into the Powers of Criminal Courts (Sentencing) Act 2000. Section 53 of the Children and Young Persons Act 1933 was consolidated as section 90 of the Powers of Criminal Courts (Sentencing) Act 2000.

10 German Juvenile Justice Act of 1990.

11 Human Rights Watch, The death penalty and life imprisonment without the possibility of release for child offenders who were less than 18 years of age at the time of their offence, and juvenile justice models of rehabilitation, *Commission on Human Rights*, 62nd Session.

12 Section 61 of the Crimes (Sentencing Procedure) Act of 1999.

13 *R v MD* [2005] NSWCCA p 342.

14 Section 94(1)(g) and 94(4) of the Children's Statute of 1996.

15 Section 18 of the Children's Act 8 of 2001.

16 Op cit Section 190 and 191.

17 Section 15(5) of the Constitution of Namibia.

18 Initial Report of the State Parties due in 1992: Namibia 22/01/93 CRC/C/3/Add.12.

19 Section 338 of the Criminal Procedure and Evidence Act 31 of 1917.

20 Criminal Law Amendment Act 56 of 1955.

21 The death penalty was declared unconstitutional in *S v Makwanyane* 1995 3 SA 391 (CC) and subsequently abolished by the Criminal Law Amendment Act 105 of 1997.

22 1908 22 EDC 382.

23 1970 4 SA 424 (A).

24 1976 2 SA 587 (A).

25 1975 4 SA 553 (A).

26 Followed in *S v Tshisa en 'n ander* 2003 1 SACR 171 (O) *S v Willemse* 1988 3 SA 836 (A).

27 1988 3 SA 836 (A).

28 Schedule 2 of Part I lists the crimes for which a person convicted of such a crime must receive a sentence of life imprisonment. Crimes include murder which was planned or premeditated, rape of a girl under 16 or when the accused raped the victim repeatedly or when the victim was raped by more than one accused in the furtherance of a common purpose.

29 Section 51(3)(b) of the Criminal Law Amendment Act 105 of 1997.

30 *S v B* 2006 1 SACR 311 (SCA).

31 Section 73 of the Correctional Supervision Act 111 of 1998.

32 *R v L (D)* 2005 ONCJ 386 at para 20.