

**YOUTH AT RISK:
POLITICS, CRIME; ITS ACCESSORIES AND YOUTH JUSTICE IN SOUTH
AFRICA**

The culture of violence evident amidst South African youth today, assembled its construct, shape and form as a willful response to political turmoil. The history, context and role that the Apartheid government assumed during its reign, fragmented society according to race and class; marginalized its youth and generated the inevitable interrelation between youth violence, gang formation, crime and politics.

By:

Sharon Lisa Choritz

CHRSHA007

B.A. Rhodes University Grahamstown

LL.B University of Cape Town

Attorney of the High Court of South Africa

Supervisor: Julie Berg

This Minor Dissertation is submitted to the faculty of Law University of Cape Town for the partial fulfillment of the LLM degree 2009.

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LLM in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION

I hereby declare that I have read and understood the regulations governing the submission of dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Sharon Lisa Choritz

Date: 20 February 2009

Signed:

Signed by candidate

ACKNOWLEDGEMENTS

I am fortunate that papers such as these provide one with the platform and opportunity to voice one's gratitude towards those people, without whom, this paper would not have been possible and furthermore; without whom, my dream of its completion, would not have been achieved.

To this end, I thank my beloved and unconditional parents, Percy and Irene, whose support, encouragement and strength have made this degree possible. They have instilled within me the importance and power of education. They have supported, sacrificed and guided me throughout the achievement of my B.A. and LL.B degrees as well as this Master's degree.

Furthermore, they constitute the necessary ingredients for my recipe in success in the attainment of my title as an Attorney; my lifelong dream as well as a profession I relish in.

Thank you for your continuous dedication and commitment to me. Though I embarked upon this degree to further my knowledge and education, I wish to applaud this degree to you, my parents, for parents such as yourselves are the diamond in the haystack.

Julie Berg, my supervisor, thank you for your patience and constant concern in the juggling of my career and studies. You have been a great source of comfort and a shoulder many times to lean upon. Thank you for your valued comments, insights and genuine affection demonstrated to me. At the inception of my thesis you began this academic process with me as my supervisor; at the completion; you depart, my friend.

CONTENTS

Declaration..... Page 2

Acknowledgements..... Pages 3

Abstract..... Pages 6-9

Introduction..... Pages 10-13

Chapter 1: The Predicament of Poverty and Its Affair with Violence.....Pages 14-18

Chapter 2: The Development of Child Justice in South Africa.....Pages 19-29

**Chapter 3: The International Framework Of Child Justice: Change and Reform within Judicial Systems
.....Pages 30-43**

Chapter 4: Apartheid’s Production of Separate Spaces and Subjects..... Pages 44-51.

Chapter 5: Ghastly Girls and Belligerent Boys: Gender and Gangs in South Africa..... Pages 52-63.

Chapter 6: The Current Context of Gangs in South Africa: Theories of Gang Formation and Delinquency.....Pages 64-76

Chapter 7: Challenges facing the Criminal Justice System in lieu of youth involvement in gangs..... Pages 77-96

Chapter 8: Conclusion..... Pages 97-100

References Pages 101-108

ABSTRACT

Youth violence assumes several forms which may be attributed towards a complex set of causes inextricably linked to the oppressive past which provide an explanation towards the nature and frequency of violence incidents. Central to such causes are; the 'culture of violence' which remains firmly entrenched in our society, structural inequalities onset by the Apartheid government and the escalating unemployment rates.¹

Discourse intent upon providing explanations for the rising crime rates have emphasized unequal power relations, strong patriarchal values and entrenched conventional notions of masculinity and femininity as causal factors.² The emphasis rests upon the fact that youth violence and victimization result not only from political and socioeconomic inequality, but may also be accredited towards expressions of gender identity as well as the manner in which society construct and reconstruct such identities.³

Dominant theorists' upon this subject, reason that poor, young men associate marginalization and powerlessness experienced under the Apartheid and post-Apartheid regime as a form of emasculation, which when internalized, finds its expression through the medium of violence.⁴ The alliance between male identity and criminal violence is

¹ Burton, P(2007)P 41 and p 42.

² Simpson, G & Kraak,G. in a brief contextual analysis ;an exploration into the causes of Youth Violence in South Africa, p 38.

³ Simpson, G & Kraak, G. in a brief contextual analysis; an exploration into the causes of Youth Violence in South Africa, p 41.

⁴ *ibid*

expressed in crimes such as hijackings, assaults, gang activities, housebreakings and sexual violence committed against women and girls.⁵

Assessments of both national and international literature upon the subject of crime, delinquency and violence amongst youth have evolved along gender-specific lines. The general consensus amongst researchers are that males both perpetrate and experience the most degree of violence and that this is generally recognized as a resulting effect of masculinity.⁶

The persistent popularity of violent crime in South Africa constitutes a form of '*compensatory manhood*'⁷ which witness young men searching to salvage a sense of masculinity/male identity by partaking in crime and violence.

However, whilst it is imperative for the growth of this nation to recognize the contributing factors underlying the reasons as to why adolescents, especially males, gravitate towards subcultures, such as gangs, it is, nonetheless, imperative that such youngsters are restrained and their behaviour restricted as the violence of the Apartheid years has led to the belief among many South Africans that violence is an acceptable means of resolving conflict.

The mistreatment of our youth under the Apartheid regime is a strong indicator that the South African justice system was not implemented with young people in mind and did not function with the purpose of assuming their fidelity. The reason in part, is our

⁵ supra

⁷ Simpson, G & Kraak, G. in a brief contextual analysis ;an exploration into the causes of Youth Violence in South Africa, p 41.

⁷ Jethas, D.& Artz, L. in an exploration into the causes of youth violence in South Africa, Edited by Patrick Burton, p. 42.

inheritance of a legal system, derived from Britain, which was designed for control, not for social restoration or personal transformation. Owing to the British influence upon our law, we too adopted such approach, though it was to our detriment.⁸

Furthermore, collective adolescent behaviour particularly in the arena of gangs is little understood by law officials skilled in western legal procedures. Thus, in dealing with youth at risk it is vital that one interacts with them in a fitting and fair manner as well as a suitable forum; subscribing to the fact that we too, experienced the anxieties and turmoil accompanied by the transition to adolescence and all that it presented namely; the pressures to conform and the wish to transform.⁹ Thus with this in mind, legal personnel, assume a responsibility by virtue of their title, to ensure inhabitants' of South Africa are dealt with in a manner particular to them.

The central feature of this study was to explore the affiliation between marginalized youth, the construct of masculinity and its accompanying violence exhibited in South Africa today. This paper further serves to highlight the link between Apartheid, poverty, unemployment, unequal opportunities, gangs and crime and through the medium of this interrelated relationship; demonstrate how the effects of the past have impacted upon the opportunities for youth today.

⁸ Pinnock, D & Douglas-Hamilton,(1997) p 3-4.

⁹ *ibid*

To this end, the reader may fully embellish the reasons as to why crime, especially crimes perpetrated by youth, is of immense concern to the South African citizenry and government.

Without immediate and aggressive legislative intervention, our youth face a bleak future at best. The mayhem committed by the past government need to be remedied and initiatives need to be implemented so as to promote the values of self-reliance and economic independence to assist in the transition from adolescence to adulthood.

It remains crucial to stem this unprecedented surge of violence and crime by providing our youth with the correct guidance, supervision and opportunity to partake in society as active members rather than taxpayers' expenses.¹⁰

¹⁰ Jeffthas, D.& Artz, L. in an exploration into the causes of youth violence in South Africa, Edited by Patrick Burton, p. 42.

INTRODUCTION

The marginalization of young people in South Africa is a powerful contributor towards the violence which dominates our society. However, the shift from the ‘*politics of confrontation towards the politics of negotiation*¹¹’, coupled with the democratization of the South African society, has been matched, not by the end to such violence; but rather by a shift in the emphasis from political to criminal violence in a reaction to such marginalization.¹²

In order to reintegrate marginalized youth; a process of human development focused upon re-creating a sense of belonging and identity is crucial so that we are equipped to redress the social, economic and political imbalances created and are thus able to endow our youth with the tools necessary to assert themselves as active members of society rather than through the current medium of organized resistance.¹³

The period between the 1980’s, 1990’s and onwards brought with it a consciousness concerning the plight of children and the (mal) treatment they received in this country. It was during such times that the importance of drafting separate legislation came into fruition, so as to create a separate Child Justice System.¹⁴ In accordance with the above, the Child Justice Bill¹⁵ was accordingly drafted. The Bill would be the first piece of legislation in our country’s history to deal comprehensively with the regulation

¹¹ Simpson, G (2001) in J. Steinberg (ed), p126.

¹² *ibid*

¹³ Simpson, G (2001) in J. Steinberg (ed), p122.

¹⁴ Stout, B & Wood, C. (2004) in Dixon, B & E. van der Spuy (eds) p115.

¹⁵ Child Justice Bill (As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in Government Gazette No. 23728 of 8 August No 49 of 2002). Hereinafter referred to as Bill No 49 of 2002.

of child offenders. Furthermore, this drafting procedure has been an essential development in the field of Child Justice, in South Africa since the year of 1994.¹⁶

The Bill is considerate of the fact that prior to the advent of democracy in 1994, South Africa, did not provide equal opportunities towards its children, especially Black children, and as a result of such inequality; many children, turned to crime as a reliable means of survival.¹⁷ Furthermore, the absence of child justice legislation under the Apartheid regime resulted in a great deal of children being subjected to oppressive practices and brutal treatment both in prisons and by other criminal justice structures.¹⁸

According to Statistics South Africa, young people between the ages of 10-29 years, account for 18,952,700, or 40 per cent of the entire population which is currently estimated at 47, 390, 900 people.¹⁹ In the context of South African more than half the youth between the ages of 16-25 are unemployed.²⁰

Social and economic factors play an important role in reducing the vast numbers of the unemployed. Job creation and economic growth are two principles which demand holistic attention. These principles are elementary not simply because they generate wealth, but rather because they provide the marginalized with an option; a chance to

¹⁶ Stout, B & Wood, C. (2004) in Dixon, B & E. van der Spuy (eds) p115.

¹⁷ Bill No. 49 of 2002

¹⁸ Ibid.

¹⁹ Statistics South Africa, ' Mid-year population estimates', <http://www.statssa.gov.za> in Jeffthas, D & Artz, L. in an exploration into the causes of Youth Violence in South Africa, p 37.

²⁰ Jeffthas, D.& Artz, L, Youth Violence in an exploration into the causes of youth violence in South Africa p. 37.

attain an identity and self worth. Disadvantaged youth however continue to maintain a delinquent affiliation with subcultures such as gangs, as it is these 'structures' which provide the 'security' that so many marginalized youth seek. This may be characterized as '*functional resistance*.'²¹ Most gang members are youths defined by the South African government as 'Coloured,' and most inhabit the racial ghettos of the Cape Flats.²²

Concerns relating to crime and violence have defined life on the Cape Flats and other depressed areas for a number of years. These pressing concerns whether they are onset by an acute crisis of transition, or by the realities of poverty, are often personified in the image of the Coloured, young, destitute man in urban gangs. These anxieties are by no means exclusive to South Africa, but rather occur in areas characterized by social upheaval whereby mounting crime levels and transition are interrelated events and occurring simultaneously.

South African youth have to be seen in the context of our history. Whilst White children grew up in affluent and protected communities, their Coloured and African counterparts were forcibly removed from their homes; their net of safety and their families' lives were destroyed by a Government who was engineering what was to become a social disaster.

It is a central view of this paper that amongst the changes which ensued from an oppressive to a liberal state; the experiences of marginalization, impoverishment and

²¹ Ibid.

²² Pinnock, D (1985) p 22.

relative deprivation which lay at the heart of much of youth-based violence expressed towards the Apartheid Government in the 1980's, continues to underlie the political climate in the post Apartheid era today.²³

It is within this paradigm that this paper serves to explore the manner in which youths in crisis gravitate towards the underground world and their 'natural' affiliation towards subcultures and the likes. Owing to this affiliation; the threat of social disintegration is obvious. Constructive alternatives are therefore required in order to curb the growth of these subcultures and their accompaniments.

It has become of the essence to challenge the present situation in which crime has become one of the most attractive and common options. Through a programme of constructive participation, a significant difference can be made in the rehabilitation and ultimately, the active membership of youth in re- building a safer society. Emphasis should be placed upon both the development as well as the implementation of effective restorative justice principles, alternative sentencing and community based rehabilitation programmes, particularly for young people amongst and within marginalized communities.

²³ Simpson, G (2001) in J. Steinberg (ed), p114-139.

CHAPTER ONE

THE PREDICAMENT OF POVERTY AND ITS AFFAIR WITH VIOLENCE

'The children of any nation are its future. A country, a movement, a person that does not value its youth and children does not deserve its future' .²⁴

' Whether due to government paternalism or to simple disregard for their rights, juveniles who come into conflict with the law often face justice systems that treat them capriciously and offer fewer protections than they offer adults' .²⁵

In modern society more and more children are finding themselves in conflict with the law. This is not a problem exclusive to South Africa however; reasons why children get drawn into the criminal justice system differ from country to country.

South Africa presents its own set of reasons, amongst which include the political history; poor and unequal access to education; the high incidence of violence and the cruel reality of poverty. South Africa faces the challenge of providing workable solutions to meet this burden facing juveniles who come into the conflict with the law.²⁶ Though legislation exists; aggressive intervention is required to redress past wrongs and divert youth from the rusted bars of a prison cell towards the white-washed windows of their school classroom.

An influential opportunity for reform arose in South Africa when the former President, Nelson Mandela hastily ratified the Convention on the Rights of the Child in

²⁴ *Oliver Tambo, quote*

²⁵ Progress of Nations (1997) Special Protections Commentary: <http://www.unicef.org/pon97/protec1.htm>

²⁶ Skelton, p3.

1995. This process combined the merger of international instruments with traditional African methods of conflict resolution. Based upon the spirit of 'ubuntu', or community approach, these strategies encourage and nurture the participation of the child, family and community involvement.²⁷

Youthful offenders are made... not born and a large percentage would not be, if troubled young people had the love and support necessary from their encouraging parents, schools (including pre-schools) and communities. Most children descend into a divergence with the law because such assistance is wanting, or it simply is not accessible.²⁸ In developing countries, such as South Africa, for example, poverty forces children out of the home when they are as young as ten, sometimes even younger. They may never have the opportunity to go to school, or may have attended irregularly.²⁹

A Young offender may be accurately described as a person of either gender whom has been convicted or cautioned for a criminal offence.³⁰

In the inter-relationship between crime and development; 'youth' may be defined as the category of persons between the ages of 15 and 25. This sector of the community constitutes an essential tool for analytical purposes as interventions amongst the youth are essential in the task of reducing crime and ensuring development strategies are instituted. Nationally, according to the 2001 census, 5 per cent of the populations are below the age of 25; the figure is 47 per cent for the Western Cape.

²⁷ Ibid.

²⁸ Supra.

²⁹ Progress of Nations (1997) Special Protections Commentary: <http://www.unicef.org/pon97/protec1.htm>.

³⁰ http://en.wikipedia.org/wiki/Young_Offender, Definition of young Offender.

The parallel between age and crime has been the subject of extensive criminological analysis and debate. Smith³¹ suggested that *'probably the most important single fact about crime is that it is committed mainly by teenagers and young adults'*.³² Owing to the fact that the actions of young people are both more visible as well as more closely policed than those of alternate age groups, it is indisputable that a significant percentage of crime would be committed by young adults. Generally speaking, the peak age of offending is higher for males than their female counterparts; currently being eighteen for males and fifteen for females.³³

The alliance between youth and crime is generally one which assumes the notions of the young person as the offender as opposed to the victim of crime. Young people however, are frequently, like their adult counterparts, victims of crime. Studies focusing upon youth as victims however have not received much attention and to this end, the assumption exists that youth are the predominant causes of crime; however this is confirmed to be untrue.³⁴

It is necessary, to stress that the obvious trend in the rise of violence amongst young people is not exclusive to South Africa. It is an occurrence common to developing countries. Certainly, there may be some universal factors igniting this trend but in all likelihood there are a range of factors unique to any particular environment that aggravate, or otherwise contribute to other correlates resulting in increased violence.³⁵

³¹ Smith (1995:395) in Newburn, T(2002), in M. Maguire, R.Morgan and R. Reiner (eds).

³² Newburn, T(2002), in M. Maguire, R.Morgan and R. Reiner (eds), p 540.

³³ ibid

³⁴ supra

³⁵ Samara, T.R, (2005) 31(1).

Violence of any form or nature is converse to the ordinary moral and value codes within a society. Violence provides a legitimate threat to all that a modern society aspires to, those ideals being; (peace, individualism, emotional well-being, stability and equality) as well as it posing a threat to standards of development, equality and economic growth.³⁶

A number of theories postulated provide explanations for the onslaught of such violence, both generally and amongst young people, are commonly deliberated upon in both the public and academic forum. Some of these deliberations may include the following reasons;³⁷

- Admission to violence at every level (in the news, on television, upon the radio; in films and computer games) which simply serves to ingrain violent behaviour.³⁸
- Secondly, the Apartheid regime resulted in a disjointed generation for whom; violence was the only legitimate means of achieving change.³⁹
- Thirdly, the displacement of society under the Apartheid regime, resulted in a generation of future parents whom themselves, were products of a fragmented society and disjointed family structure, thus, they too, lacked, the essential parenting skills required, to raise healthy, successful children.⁴⁰
- Lastly, the availability of drugs and alcohol, in particular, tik (methamphetamine), is also a contributory factor assisting the violence that South Africa is witnessing

³⁶ Ward, C.L in An exploration into the causes of youth violence in South Africa, p1

³⁷ Ibid.

³⁸ Supra.

³⁹ Ward, C.L in An exploration into the causes of youth violence in South Africa, p2.

⁴⁰ Ward, C.L in An exploration into the causes of youth violence in South Africa, p3

among its young people, especially the rise in gang related activity in both the Western Cape and Gauteng.⁴¹

Cape Town youth, for example, are faced with an assortment of hardships, from violence and violence-related traumas, to an unequal distribution of the socio-economic activities, as most of the jobs are concentrated predominantly in the city centre. Thus, youths living in such depressed areas, resort to 'work' which does not require much travel, nor education.....they resort to the world of gangs and crime.⁴²

Growing up in neighbourhoods where every corner possesses a drug dealer makes it complex to resist the temptation of the drug trade and easy money. Eventually the police catch up with them. This is often the start of a life in which they know their probation officers better than their teachers.⁴³

*'Their condition is increasingly seen as being 'symptomatic of the health of the nation or the future of the race, the welfare of the family, or the state of civilization as we know it. If we want to control crime, it seems we must first tackle the youth problem.'*⁴⁴

⁴¹ Ibid.

⁴² Samara, T.R, (2005) 31(1).

⁴³ ibid

⁴⁴ Cohen, P. (1997) in Muncie, J. Sage.1999.

CHAPTER TWO

THE DEVELOPMENT OF CHILD JUSTICE IN SOUTH AFRICA

A country's justice system undergoes its penultimate test when measuring the (in) justice administered to its most vulnerable citizen; its children.⁴⁵ National and international concern regarding the treatment of the child have propelled governmental and non- governmental organizations (NGO'S) to spawn original initiatives relating to children's rights and its associated mechanisms so as to deal with child care and protection matters in South Africa.⁴⁶

Over the past few decades, there has been an increased consciousness in the playing field of children's rights upon both a national plane and international front. Rigorous efforts have been implemented in order to establish distinct and unique safeguards for children on account of their vulnerability to the violation of their human rights.⁴⁷ South Africa initiated its process of safeguarding children's rights when it established its new democratic legal order which brought with it the objective to provide greater legislative protection towards children vis-à-vis the establishment of the interim Constitution⁴⁸ and thereafter the final constitution.⁴⁹

The wording of the 1996 Constitution is noticeably similar to the text within the interim Constitution, and follows the same succession of rights. A number of children's

⁴⁵ Frank ,C and Artz, L,(1997) P 153.

⁴⁶ *ibid*

⁴⁷ Bekink, B & Brand, D.(2000) p 169.

⁴⁸ Act 200 of 1993.

⁴⁹ Act 108 of 1996.

rights were, however added to in the 1996 Constitution, and certain fundamentals of the interim Constitution were elaborated upon. For example, the right to parental care was extended upon so as to incorporate the right to family care or parental care, or to suitable, alternative care when removed from the family environment.⁵⁰

The right to shelter was included in the list of socio-economic rights as per S28 (1) (c), and the right not to be subjected to exploitative labour practices were too, expanded upon as were the rights regarding children in detention.⁵¹

The child's rights to receive appropriate legal assistance at the state's expense in civil cases whereby significant injustices may otherwise result, and the right of children not to be used directly in armed conflict as well as to be protected in times of such conflict, were noteworthy additions to the final Constitution.⁵²

An original and striking feature of this new constitutional structure was the introduction of a comprehensive Bill of Rights as a component of the Constitution itself. The intention of the Bill of Rights is to uphold, shield, promote and advance those rights it incorporates.⁵³

The Bill of Rights embodies the rights of all citizens living within the territory of the state, including the rights of adults, minors, citizens and aliens alike.⁵⁴ The Constitution is the supreme law of the land and any law or conduct inconsistent with it, is declared invalid.⁵⁵ South Africa thus subscribes to a constitutional supremacy.

⁵⁰ Sloth-Nielsen, J in Fundamental Rights of the Constitution.

⁵¹ *ibid*

⁵² *supra*

⁵³ Bekink, B & Brand, D.(2000) p 171.

⁵⁴ S 7 (1) of the Constitution Act 108 of 1996, specifically states that the Bill of Rights enshrines the rights of all the people of South Africa.

⁵⁵ Bekink, B & Brand, D.(2000) p 171.

Chapter two (2) of the Constitution incorporates a list of internationally entrenched human or fundamental rights. These rights are applicable to all people and are of universal appeal. What is regarded or protected as a fundamental right may differ from country to country as well as from legal system to legal system. Some rights are recognized as universal and have international application, and are accordingly incorporated in international human rights treaties and declarations.⁵⁶

Initially however, the concerns of human rights were assigned to national legal systems of individual states. Since the close of the Second World War however, states have gradually relinquished their primary concern at the domestic level, and human rights have become internationalized rights. It should be noted that international children's law does not replace, but rather supplements, protection at the national level.⁵⁷

Viewed from the national level, international law serves as a gravitational force, or a security net. Once a state has determined that it shall respect a human rights treaty by the endorsement of that treaty; the function of that state is to ensure it aligns its national policy with those obligations under such treaty. In this way, international human rights treaties' become the force, pulling states towards global assent.⁵⁸

Some rights in the Bill of Rights are of particular application towards certain groups of people only. Regarding children, there are two categories of rights conserving

⁵⁶ Ibid.

⁵⁷ supra

⁵⁷ Bekink, B & Brand, D.(2000) p 171.

⁵⁸ Viljoen , F. on Article 47 (3) of the African Children's Charter, chapter 12, p 215.

their rights, which are discernible from one another.⁵⁹ Firstly, there exists the general protection of children under the semblance of the general provisions of the Bill of Rights (those rights which are applicable to all citizens) and secondly; the protection afforded by the rights applicable only to children as confirmed in Section 28.⁶⁰ This detailed section pertaining to children's rights, constitutes as a sort of 'mini-charter' of rights designed solely with the best interests of the child in mind.⁶¹

The Constitution recognizes and protects the fact that children are vulnerable to violations of their rights and that they have specific and unique interests, distinct from alternate groups in society and accordingly their rights and interests are awarded and require special security, in addition to the protection to which they are entitled as ordinary citizens of South Africa.⁶²

However, certain of the rights within the Bill of Rights that are not repeated in an enhanced format in section 28 for children, are of particular significance for children. The most important examples of these rights are the right to equality⁶³ the right to education⁶⁴ and the right to personal autonomy, crafted from the rights to privacy,⁶⁵ freedom of religion⁶⁶ freedom of expression⁶⁷ and freedom of association,⁶⁸ read together. Section 28

⁵⁹ Frank ,C and Artz, L,(1997) P 153.

⁶⁰ Act 108 of 1996.

⁶¹ Frank ,C and Artz, L,(1997) P 173.

⁶² Frank ,C and Artz, L,(1997) P 153.

⁶³ Section 9 of Act 108 of 1996.

⁶⁴ Section 29 of Act 108 of 1996.

⁶⁵ Section 14 of Act 108 of 1996

⁶⁶ Section 15 of Act 108 of 1996

⁶⁷ Section 16 of Act 108 of 1996

⁶⁸ Section 17 of Act 108 of 1996.

(3) alludes to the fact that children, for the purposes of Section 28, are persons under the age of eighteen years.⁶⁹

The naked text of our Constitution provides a notable assortment of rights and other protection mechanisms for children. As such, it sets an international example. However, that said, the Constitution provides only a framework, which requires the varying institutional mechanisms to ensure they execute the provisions of this order. The constitutional rights of children must successfully be realized through legislation, policy measures as well as progressive court decisions when these alternate avenues fail.⁷⁰

Since the dawn of our new constitutional order, the South African government has been assertive in creating both legislative and policy measures in order to realize the constitutional rights of children. Our courts have also generally been progressive in their decisions relating to children, establishing the principle lay down by section 28 (2)⁷¹ of the Constitution that a '*child's best interests should be of paramount importance in every matter concerning the child*'. However, an original legal order initiated by the court process and the legislator based upon the ideal of a progressive Constitution may only have its desired effect and impact upon the lives of children provided that it is both supported and advanced by a public body that is overtly mindful of and bound by, the values and principles underlying the Constitution as well as legislation guiding such directives towards the attainment of such goals.⁷²

⁶⁹ Act 108 of 1996.

⁷⁰ Bekink, B & and Brand, D.(2000) p 196.

⁷¹ Act 108 Of 1996.

⁷² Bekink, B & and Brand, D.(2000) p 196.

The procedures for the administration of justice for children and young people in South Africa have been the subject of much debate in the past few years. Sparked initially by concerns over the large number of children in prisons and prison cells whom were awaiting trial, the juvenile justice campaigns in the early 1900's brought to public attention, the range of problems inherent in the systems responsible for the administration of justice for children and young people.⁷³ As a result a call was initiated for a comprehensive system of management for children and young people who come into conflict with the law, including the development of juvenile justice legislation.

In light of the above and prior to 1994 there was no specific legislation that guided the management of children and young people who came into conflict with the law. The administration of justice for children and young people was therefore guided by sections of various legislation, such as the Criminal Procedure Act,⁷⁴ the Child Care Act⁷⁵ the Correctional Services Amendment Act⁷⁶ and the Probation Services Act⁷⁷ amongst others; however no single and comprehensive piece of legislation existed.⁷⁸

Logically, this disorderly state of affairs proved complex to apply the legislation in a uniform and effective manner as opposed to a single, all-inclusive piece of legislation which would avoid these difficulties. Furthermore, the philosophies underlying the provisions of the existing legislation differed according to the chief policy of the day; that of restorative justice.

⁷³ Frank ,C and Artz, L,(1997) P 173.

⁷⁴ Act 51 of 1977.

⁷⁵ Act 74 of 1983.

⁷⁶ Act 14 of 1996.

⁷⁷ Of 1991.

⁷⁸ Frank ,C and Artz, L,(1997) P 163.

The Correctional Services Act,⁷⁹ intended to achieve justice through the medium of incarceration and retributive penalties; whereas when the Child Care Act⁸⁰ was passed, the 'welfare model' of juvenile justice, seeking the 'best interests' of the child had gained recognition. The inconsistencies inherent in both philosophies made room for much confusion and misapplication of the law. Both models have since, failed to address the underlying causes of crime.⁸¹

Thus the transformation of the juvenile justice system in South Africa required not only original, but fresh legislation. This new approach lies firmly rooted within the ambit of children's rights.⁸²

Piecemeal legislation has led to the formation of a fragmented and incoherent criminal justice system for young people who come into conflict with the law and it is of the essence that the rights of children gain legislative momentum.⁸³

Internationally, at a similar time frame, the Youth Justice System was also facing great inconsistencies as it had various paradigms of youth justice; though no uniform approach to implementing such paradigm.⁸⁴

Three prevailing international Youth Justice Paradigms may be distinguished and are as follows;

- Firstly, the retributive paradigm prides itself upon the value and priority of punishment. This paradigm has gained much recognition throughout the past two

⁷⁹ Act No 8 of 1959.

⁸⁰ Act No 74 of 1983.

⁸¹ Wood, C & Koch, R in a new Child Justice System. p 1.

⁸² Ibid.

⁸³ Frank, C and Artz, L,(1997) P 153.

⁸⁴ Wood, C & Koch, R in a new Child Justice System. p 1.

decades through the postulation of the theory and philosophy of the “just desserts” and crime control approaches. This theory is a proponent for harsher, more adult-like penalties for youth offenders.

- Secondly, the rehabilitative paradigm appeals to the individual and his/her specific situation and immediate personal circumstances resulting in the partaking in of criminal and anti-social behaviour. The objective of this model is to address the underlying factors, contributing towards anti-social behaviour and provide constructive methods and programmes in order to redress this imbalance.
- Thirdly, there exists a theory based upon reconciliation rather than punishment. It prides itself upon the ideals that through victim, community and offender participation, healing and restoration are facilitated. The *raison d'être* is that the response to crime cannot be effectual without the joint and active involvement of all relevant stakeholders. The task of the criminal justice system in this process would be the facilitation of this reconciliation process.

Owing to the disjointed status and position of children’s rights across on a domestic and international forum; the world community in its initial declarations upon human rights acknowledged that priority should be awarded to protecting children’s rights.⁸⁵ There continues to be sound reason for ensuring a special case for children’s rights are maintained.⁸⁶ The reasons being are that changes in society have both a

⁸⁵ Article 25 (2) of the Universal Declaration of Human Rights.

⁸⁶ UNICEF: 2001.) in Wood, C & and Koch, R in a new Child Justice System., p3.

disproportionate and often negative effect upon children and as they are the most receptive barometer to change, it became necessary to ensure that legislative order and consistency was created.⁸⁷

In the South African context, these changes predominantly occurred as a result of the Apartheid era which created a radical alteration of society through the break-up of the family structure, the shifting of employment patterns and a dwindling social welfare net. Children are sensitive to social and economic change as well as the impact of those changes which was demonstrated in South Africa.⁸⁸

Furthermore the expenditure to society of failing its children is colossal. Governments are aware of social research findings which demonstrate that children's earliest experiences both- within the family and with other caregivers'-significantly influence the future course of their development.⁸⁹ The manner at which children develop determines whether they will be a contribution or cost to society over the course of their lives.

With nearly half of the urban population in the developing world living in poverty, the predicaments of the child worsen when families relocate from the countryside to large cities. As evident throughout South Africa, desires of improved living circumstances prove to be unfulfilled, following such moves, as parents and children lose their support-systems with the inevitable break-up of extended families. Once children turn to life on the street; scavenging, begging, hawking- or worse, to a life of crime, it is not simply

⁸⁷ Wood, C & and Koch, R in a new Child Justice System. p 1.

⁸⁸ Wood, C & and Koch, R in a new Child Justice System., p3.

⁸⁹ UNICEF(2001) in Wood, C & and Koch, R in a new Child Justice System., p3.

society's responsibility but also its interest to act in such a manner so as to help rather than hinder the constructive development of the child.⁹⁰

When dealing exclusively with children accused of committing crimes, there are convincing reasons which demand that such children should be treated differently to their adult counterparts at every stage of the criminal process. Research world-wide urges that, when determining criminal capacity, a court must consider the immaturity, inexperience and impressionability of a young offender.⁹¹ Differently put, one must consider whether a child, by virtue of his or her acumen and understanding, may be held accountable for essentially anti-social behaviour.⁹²

When determining a sentence, a young persons' emotional, social, educational, psychological development as well as his well-being must be borne in mind in determining an appropriate penalty. Research demonstrates that young offenders have enhanced prospects for rehabilitation and community reintegration, and every opportunity should be afforded to maintain the young person in the community; the principle of custody, should thus, be the last sanction

What strengthens the case for the distinct treatment for the majority of South African young offenders are the ideals that children who are disadvantaged in a socio-economic, educational and financial manner, resort to anti-social behaviour; it is a consequence of poverty. However this disadvantaged state should not result in further

⁹⁰ Ibid.

⁹¹ Supra.

⁹² Wood, C & Koch, R in a new Child Justice System. p 3.

punishment, but rather restoration and assistance via the medium of the criminal justice system.⁹³

⁹³ Ibid.

CHAPTER 3

THE INTERNATIONAL FRAMEWORK OF CHILD JUSTICE: CHANGE AND REFORM WITHIN JUSTICE SYSTEMS

A 'child' according to the majority of national and international standards and instruments, refers to anyone under the age of 18 years. To this end the South African constitution demonstrates its conformity with such instruments by its reference to S (28) (3)⁹⁴ which state that '*a child means a person under the age of 18 years.*' The UN Convention on the Rights of the Child affirms its endorsement of this barometer of age as is evident in its relevant articles.

This Convention further provides for children to be awarded alternate rights as set out in the Bill of Rights, for example the right to religion, expression, conscience, association, privacy, to education and to freedom from torture or cruel treatment.⁹⁵ However, in certain respects, new obligations are imposed by the Convention in respect of children which has subsequently created binding standards in other areas whereby previously; only non-binding standards existed, for example in relation to juvenile justice.⁹⁶

It is widely acknowledged that there are four (4) innermost rights emanating from the 'pillars' of the CRC, and that, seen together, they represent the cornerstone of the children's rights philosophy of the Convention.⁹⁷

⁹⁴ Act 108 of 1996.

⁹⁵ Sloth-Nielsen, J. Fundamental rights in the Constitution.

⁹⁶ Ibid.

⁹⁷ Supra.

These rights are the prohibition against discrimination⁹⁸; the primacy of the best interest of the child⁹⁹; the right of the child to survival and development¹⁰⁰ and the child's right to participate in decisions affecting him or her, the views of the child to be given due weight in accordance with the age and maturity of the child.¹⁰¹ These rights are all relevant to the rights contained and revealed in Section 28 of our Constitution.¹⁰²

Over the past few decades there has been an ever-increasing effort to devise and establish special safeguards for children on account of their vulnerability to the violation of their human rights, more particularly insofar as they occur as a result of inadequate social conditions, armed conflict, exploitation, maltreatment, hunger and disability.¹⁰³ The notion of special childhood rights is derived from the universal acknowledgment that children, by virtue of their physical and emotional immaturity, are dependant upon both their family and community structures to ensure and maintain their safety and well-being.¹⁰⁴

To this end, a string of domestic and international instruments codify the protection and the rights to which children are entitled. Certain of these instruments are enumerated below and elaborated upon, for example; The International Covenant on Political and Civil Rights¹⁰⁵ the European Social Charter, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and People's Rights and the American Convention on Human Rights all embody explicit protection for

⁹⁸ Article 2.

⁹⁹ Article 3.

¹⁰⁰ Article 4

⁹⁶ Article 5

¹⁰² Act 108 of 1996.

¹⁰³ Sloth-Nielsen, J. Fundamental rights in the Constitution

¹⁰⁴ Ibid.

¹⁰⁵ Supra.

children. Many of the rights which are common to these international treaties are contained within Section 28 of our Constitution.¹⁰⁶

Various human rights instruments have been assumed under the auspices of the United Nations (UN) which fortify these rights. Prior to the adoption of the Convention on the Rights of the Child (CRC) in 1989, there was no comprehensive charter or treaty dealing with children's rights. The Convention was signed by the President of South Africa in January 1993 and ratified by the National Assembly in 1995.¹⁰⁷

South Africa has also ratified a regional children's rights treaty more commonly known as the African Charter on the Rights and Welfare of the Child,¹⁰⁸ which came into fruition in November 1999.

Many of the rights which are of relevance to children, are also the rights of 'everyone,' as human rights, are children's rights and the following serve as examples of international human rights instruments which either implicitly or explicitly deal with the rights of children. As previously mentioned, these instruments are as follows;

- the International Covenant on Social, Economic and Cultural Rights (ICESCR) of 1966 which refers to the rights of 'everyone' to the entitlement of the best possible standard of health attainable.¹⁰⁹ The ICESCR further recognizes the right

¹⁰⁶ Act 108 of 1996.

¹⁰⁷ Sloth-Nielsen, J. Fundamental rights in the Constitution.

¹⁰⁸ Article 47 (3) of the African Children's Charter.

¹⁰⁹ Article 12 (1) of the ICESCR in: The African Charter on the Rights and Welfare of the Child, Frans Viljoen, and p216.

that 'everyone' is entitled to an education, including the provision of free compulsory education.¹¹⁰

- The International Convention on the Civil and Political Rights (ICCPR)¹¹¹ further deals with the rights of 'everyone,' however it refers to the basic civil and political rights, though, it also refers explicitly to the rights of children. Article 24 provides that children have the right to protection and that every child must be registered at birth and for the right to acquire a nationality.
- The International Labour Organization (ILO) has adopted a number of conventions relevant to the position of the child. The most prominent is the minimum age for admission to employment.¹¹²
- In the 1940s the United Nations produced the Universal Declaration of Human Rights, which was adopted in 1948. This declaration applies to children as well as adults. However, growing awareness of the rights of children led to calls for a dedicated children's human rights treaty.¹¹³

The UN declared 1979 the International year of the Child. In the same year the Polish government submitted a draft document which led to the adoption of the Declaration on the Rights of the Child.¹¹⁴ In 1989, the UN General Assembly adopted the

¹¹⁰ Ibid.

¹¹¹ 1966.

¹¹² Viljoen, F, p 216.

¹¹³ Ibid.

¹¹⁴ Viljoen, F, p 217.

Convention on the Rights of the Child. In fact, some states that are not UN members have also ratified the Convention on the Rights of the Child.¹¹⁵

Jointly with the Convention and the UN Guidelines for the Prevention of Juvenile Delinquency, known as ‘Riyadh guidelines’ which recognizes the importance of preventing young people from being stigmatized by the Justice System;¹¹⁶ we have yet additional guidance from the UN rules for the protection of Juveniles Deprived of their Liberty¹¹⁷ and the Standard Minimum Rules for the Administration of Juvenile Justice,¹¹⁸ also known as the ‘Beijing Rules.’¹¹⁹

These rules afford guidance to member States in developing measures to shield the human rights of children in conflict with the law. Reflecting once again the importance of placing the child’s best interests at centre stage, the first of the Fundamental Perspectives of the rule is that ‘*Member States shall seek, in conformity with their respective general interests, to further the well-being of the juvenile and her or his family*’.

The Convention on the Rights of the Child is at present, the most widely ratified international human rights treaty. It is the only international human rights treaty to include civil, political, economic, cultural and social rights, and it details the requirement that every child requires a safe, happy and fulfilled childhood. The convention is a concise instrument which sets out rights that define universal principles and norms for the status of children. It not only sets out these fundamental rights and freedoms, but also

¹¹⁵ Cook Islands, Niue and Switzerland.

¹¹⁶ Adopted in 1990.

¹¹⁷ 1990.

¹¹⁸ 1985.

¹¹⁹ Real Justice for Juveniles; Special Protections Commentary p2, <http://www.unicef.org/pon79/protection.htm>

demonstrates the relevance of providing children with special assistance and protection owing to their vulnerability. It is the most complete statement of children's rights drafted and has 41 (forty one) substantive articles. It is the first legal instrument to focus exclusively upon the child, irrespective of where the child was born, to whom, and regardless of sex, religion and social origin.¹²⁰

The Convention on the Rights of the Child was drafted over a period assuming ten (10) years between 1979 and 1989. Representatives from all societies, cultures and religions contributed towards the drafting of this legislation and a working group was given the task of drafting the convention. Like all human rights treaties, the Convention on the Rights of the Child had first to be approved, or adopted, by the United Nations General Assembly.¹²¹

On 20 November 1989, the governments whom were represented at the General Assembly agreed to adopt the convention into international law. Thus this convention came into being in the year of September 1990. To this end USA and Somalia are the two countries yet to ratify this international convention! States which are party to the Convention have the duty to report to the Committee upon the Rights of the Child. The United Nations treaty supervisory body ascertains whether states are acceding to the Convention by implementing it effectively and as such accordingly reports upon their progress as well as provides recommendations. The committee comprises 18 independent

¹²⁰ Convention on the Rights of the Child, 1989.

¹²¹ UN Convention on the Rights of the Child; The Articles: www.everychildmatters.gov.uk/strategy/uncrc/article

children's rights experts who are elected in their personal capacity to four-year terms. The committee meets at quarterly intervals in Geneva, Switzerland.

Articles 1-41 of the Convention determines the rights of children and the associated obligations of governments to safeguard such rights. Article 42 insists that State Parties to publicize the principles and provisions of the Convention - to children, young people, parents and careers, and to all those working with children as well as young people.¹²²

The Convention is broad in its appeal and covers the following subjects:¹²³

- It defines children as all persons below the age of 18 years of age, unless the legal age of majority in a country is lower.
- The general principles which encompass the rights to life, survival and development, the right to non-discrimination as well as granting respect for and give consideration to their best interests, at all times children's views the views of children.
- Civil rights and is accompanying freedoms which include the right to a name and nationality; to be granted access to information as well as the right not to be subjected to torture and to be granted freedom of thought and association.
- Family environment and alternative care, including the right to live with and have contact with both parents, to be reunited with parents if separated from them and to the provision of appropriate alternative care whereby it is deemed necessary.

¹²² Ibid.

¹²³ Supra.

The Convention thus defines the basic human rights that children everywhere are entitled to which are as follows; the right to survival; to develop to the fullest potential, to protection from harmful influences and abuse and exploitation. Every right enumerated in the Convention is inherent to the human dignity as well as the harmonious development of every child.¹²⁴ The ratification of such rights confirms the commitment of national governments in ensuring these rights are protected and reaffirms that they have agreed to hold themselves accountable for this commitment before the international community.¹²⁵

Upon a more regional-specific plateau, the African Charter on Human and Peoples' Rights is one, which predates the African's Children's Charter and refers to those rights of children under the African skies. It provides for the protection of children. It deals with the rights of 'every individual' and of 'peoples' under the jurisdiction of a State Party.¹²⁶ A straightforward interpretation supports the ideology that children are also protected, both as 'individuals' and as 'people' (members of group).

The African Charter provides special or specific protection to children in three regards:

- Certain rights within the African Charter, such as the right to education¹²⁷ are of particular relevance to children than to any other segment of the population.
- The African Charter proclaims the family as '*the natural unit and basis of and any morals*'. The care of children within the context is seen as a 'virtue' in the African 'historical tradition'.

¹²⁴ UN Convention on the Rights of the Child; The Articles: www.everychildmatters.gov.uk/strategy/uncrc/article.

¹²⁵ *ibid*

¹²⁶ Viljoen, F. p 216.

¹²⁷ Article 17 (1) of the African Charter.

- States parties to the African Charter are obliged to ‘ensure’ the protection of the children’s rights as per stipulated in international declarations and conventions.¹²⁸

These provisions in the African Charter have led to the drafting of a paragraph based upon *‘the protection of children and young persons’*, particularly in respect of their socio-economic rights as note in the guidelines in the National Periodic reports.¹²⁹

These are guidelines in terms of which state parties are to frequently submit their reports.¹³⁰

These guidelines go beyond the provisions of the African Charter by, for example, requiring information about children in employment, including provisions on minimum age for employment. The guidelines further require *‘statistical and other available data showing the number of children and young persons in the various age groups who are working, and the sectors or type of work in which they re employed’*.¹³¹

The African Charter on the Rights and Welfare of the Child, like the UN Convention on the Rights of the Child, state that a child is considered as *‘every human being below the age of eighteen’*.¹³²

However, in contrast to the proposed definitions of a ‘child,’ in some society’s world-over, childhood is determined by the position the child maintains within the community rather than by his or her age.¹³³ Children still under the guidance and care of parental

¹²⁸ Article 18 (3) of the African Charter.

¹²⁹ Annexure x11 to the African Charter Commission’s second Annual Activity Report par 30.

¹³⁰ Article 62 of the African charter.

¹³¹ Paragraph 30 (f) of the Guidelines for National Periodic Reports.

¹³² Viljoen, F. p 217.

¹³³ Ibid.

authority are regarded as children irrespective of their age, while those who have assumed adult roles and responsibilities are given social rights and duties accordingly. Thus the definition, interpretation and meaning of 'child' assume alternate meanings within different contexts, cultures and societies.¹³⁴ Irrespective of the multiple meanings associated with the age of the 'child' the one most commonly used and which shall be executed for the purposes of this paper, alludes to anyone below the age of 18 years.

The age of criminal responsibility, however is usually quite different from the age of majority. The age of criminal responsibility determines that a child may be liable for his actions at the age at which a child can be expected to know the difference between right and wrong, understand the consequences of his actions and be of sufficient emotional and intellectual maturity to understand the juvenile justice process and outcomes.¹³⁵ The age of 18 however, seems to coincide with the most widely accepted benchmark however.¹³⁶

As a global apparatus, the Convention on the rights of the Child is the result of a multitude of compromises. From a legal standpoint, the need was identified for a regional human rights instrument dealing with issues pertinent to the African continent. Some of these particular issues were omitted from the Convention on the Rights of the Child, yet were identified by those involved in the drafting process of the African's children's Charter and encompass the following vital points;

¹³⁴ Viljoen, F. p 218.

¹³⁵ Sloth Nielsen & Gallinetti, J. p 32.

¹³⁶ Ibid.

- Firstly, the situation of children living under the Apartheid regime was not addressed;¹³⁷
- Secondly, disadvantages affecting the female child were neither addressed;¹³⁸
- Thirdly, practices that were rampant in African society, such as female genital mutilation and circumcision, were not mentioned explicitly;¹³⁹
- Fourthly, the gravity of the issue pertaining to socio- economic conditions,¹⁴⁰
- Fifthly, the community's inability to engage in meaningful participation in the planning and management of basic programmes for children which were not considered;¹⁴¹
- Sixth, the African concept of and towards the community's responsibilities and duties had been neglected; in Africa,¹⁴²
- Seven, the use of children as child- soldiers and the institution of a compulsory minimum age for military service are issues of serious importance;¹⁴³
- Eight, the position of children in prison and that of expectant mothers was not deliberated upon;¹⁴⁴
- Nine, the Convention on the Rights of the Child negates the role of the family in the rearing of the child and in regard to matters of both adoption and fostering.¹⁴⁵

¹³⁷ Viljoen,,F. chapter , p 216.

¹³⁸ Ibid.

¹³⁹ Supra.

¹⁴⁰ Viljoen,F p 219.

¹⁴¹ Ibid.

¹⁴² Supra.

¹⁴³ Viljoen,F p 219

¹⁴⁴ Ibid.

¹⁴⁵ Viljoen,F p 219.

The African Charter is thus best understood with reference to three significant principles: the best interests of the child; predominance of the Charter over harmful practices and customs and the principle of non-discrimination. These three principles may be considered as creating a definitive break with the original African views of the child and its role in society.¹⁴⁶

- The Best interests of the child may be identified as the yardstick against which a state Party has to evaluate all aspects of its law and policy regarding children.

Article 4 of the African Children's Charter states that in all actions concerning children, the best interests of the child' shall be of primary consideration.¹⁴⁷

- Concerning the second principle, of primacy over culture; this is a significant principle within the African continent, as in Africa, children often form part of a rural traditional setting where customs as opposed to formal laws prevail. However, in a grand leap forward; the African Children's Charter asserts its own distinct sense of primacy above culture and customs that once read detrimental to the health and well-being of the child.¹⁴⁸

- The issue of non-discrimination is an important substantive requirement in the sense that the principle of nondiscrimination is a clearly establishes and part of human rights instruments. Children are entitled to equal enjoyment of the rights under the charter.¹⁴⁹

¹⁴⁶ *ibid*

¹⁴⁷ Viljoen, F p 219.

¹⁴⁸ *ibid*

¹⁴⁹ *Supra*.

The renewed appeal in child justice, children's rights and penal reform in Africa as well as within South Africa, may be directly associated to the aspiration to align criminal justice reform within a child-rights approach and paradigm. As a consequence resulting from the need to ensure the implementation on the Rights of the Child at the domestic level, the primary points of concern for many countries, including South Africa, was the lack of a separate system in dealing with the particular needs of children in conflict with the law.¹⁵⁰

The South African Law Reform Commission began drafting legislation over a period of years. Similar law reform processes are ongoing in a number of African countries, namely, Malawi, Mozambique, Lesotho and Namibia. There has been a considerable merging of ideas existing between non-governmental organizations involved in both policy making and service delivery in the child justice field. This alliance may be considered as best practice.¹⁵¹

As the Committee on the Rights of the Child has revealed, legislative provisions are only able to assist in part of the way towards creating child friendly processes and procedures. The definitive test is whether the intentions of the legislatures seek and find expression in both the practice and delivery aspects of services towards our children.¹⁵²

To this end the Child Justice Bill was drafted in order to establish a criminal justice system for those children accused of having committed offences so as to protect the rights of children entrenched in the Constitution and as provided for in international

¹⁵⁰ Sloth-Nielsen, J in Sloth-Nielsen, J & Gallinetti, J. p16

¹⁵¹ Ibid.

¹⁵² Sloth-Nielsen, J. in Sloth-Nielsen, J & Gallinetti, J. p17.

instruments. This Bill aims to entrench diversion and restorative principles as central features of it. Furthermore, our country acknowledged that prior to our democratic dispensation, South Africa, failed to provide many of its children, particularly its black children, with the ability or the opportunity to live and act like children, owing to its social re-engineering, and as a result of the predicament so imposed by our then Government, such children gravitated towards crime.¹⁵³

Though such Constitution recognizes its obvious limitations, it shall seek out and assist children in their 'best interests' and afford them special protection should they come into conflict with the law.¹⁵⁴

¹⁵³ Bill No 49 of 2002.

¹⁵⁴ Ibid.

CHAPTER FOUR

APARTHEID'S PRODUCTION OF SEPARATE SPACES AND SUBJECTS

'These children are at risk; they are young people whose marginal position in society makes a bright future unlikely at best'.¹⁵⁵

It is often assumed that change impacts upon people's lives. It does and the impact of it is usually complex and multifaceted. Government interference, in South Africa, following the year of 1950, focused principally upon the ideology of separate development or Apartheid, whereby the Nationalist regime introduced distinct models of governance for the different racial groups.

Throughout this policy of separate development; the government 'legitimized' its violent oppression.¹⁵⁶ The governments 'justification' were, as they claim, a result of natural law.¹⁵⁷

The consequence of this beauracritic exercise in social engineering amplified the unemployment rate and dismantled the working class community's control over its children.

The collapses of social control over the youth were one of the major problems facing the working class.¹⁵⁸ Thus the construct, intent and origin of the Group Areas Act, evidently had a political dimension.¹⁵⁹

¹⁵⁵ Pinnock, D.(1984). p 56

¹⁵⁶ Jensen, S.(2008) p17.

¹⁵⁷ Ibid.

¹⁵⁸ Pinnock, D.(1984). p 30.

¹⁵⁹ Pinnock, D. (1985), P22.

Regardless of the unsystematic and inconsistent development in implementing Apartheid's separate development, the Nationalist regime was triumphant in producing distinct spaces. The Coloured 'townships' were economically and socially separated whereby they were positioned above Africans; yet below Whites. The notion of separate development was based upon the ideology that distinct racial groups should develop in accordance with their 'potential,' provided they remained separated.¹⁶⁰ These beliefs were ingrained in physical spaces, in the labour markets as well as in the transportation routes.

United with this 'repositioning', were the innate stresses accompanying it. Psychological difficulties as well as distorted coping behavioural mechanisms followed suit. Marital relations were troubled and the divorce and desertion figures were boosted.¹⁶¹ Parent-child relationships became trying- often resulting from the husband's sense of anxiety and insecurity felt in his new-founded and unwanted environment. Children were upon the streets with nothing to do.¹⁶² Furthermore, a large majority of Coloured's assumed and internalized the prevailing perception or rather the misperception of the term, '*skollie*'.

The name '*skollie*' may be translated as; a man, a Coloured and a poor.¹⁶³ The Apartheid government objectified the '*skollie*'- they made him existent. To the White rule, the Colored man represented the ills of society; he was unemployable, committed

¹⁶⁰ Jensen, S.(2008) p16.

¹⁶¹ Jensen, S.(2008) p30.

¹⁶² Pinnock, D.(1985) p 30.

¹⁶³ Jensen, S.(2008) p5.

crimes, promiscuous and destabilized families.¹⁶⁴ This construction of the 'other' 'justified' the relocation of such people to the periphery of the city thereby ensuring the 'problematic' Coloured had been dealt with.

The Government deliberately located the Coloured community away from the city; away from churches; schools and civility at large and relocated them in rural slums and in so doing the Apartheid administration produced certain identities, as well as certain spaces.¹⁶⁵

'When the regime forcibly removed thousands of Coloured's from the inner city, it also produced Coloured spaces; when it put generations of men behind bars, it produced a particular form of delinquency; when it removed children from their homes and put them into foster care or reformatories, it promoted certain forms of morality. This form of productive power assumes the superiority of certain groups over others'.¹⁶⁶

Thus it is apparent from the intentions coupled with the actions of the Apartheid government, that it directed its regime primarily towards the Coloured man. Both Coloured men and women alike personalized the term 'skollie' however, though most clearly did not fit such profile, several accepted the existence of the abstract Coloured man as the predicament. They did not however, accept the stereotype as a portrayal of themselves, but rather divided such notions as one referring to the 'other'. Young Coloured's were overtly aware of the stereotype linking criminality to their bodies.¹⁶⁷

¹⁶⁴ibid

¹⁶⁵ Jensen, S.(2008) p5.

¹⁶⁶ Jensen, S. p5.

¹⁶⁷ Ibid.

A retort to the degeneration of the nuclear family by the urban renewal plan and strategy, resulted in the emergence of a new generation of youth; tougher children with less parental control. Services were few or non-existent. Police patrols were less frequent and, the use of police vans- more impersonal. Poverty and unemployment provided liberal opportunities for the growth in crime. It is within an uncertain and inconsistent climate of political activity that juvenile offenders are born. It is a response to the discrepancy between the have's and the have not's that such juveniles conflict with the law as well as a result of the injustices introduced by the Apartheid era. ¹⁶⁸

For many youths, joining a gang became the novel manner in which to make friends; a source of income and a means by which survival in this harsh environment is manageable. With the gradual untying of the once cohesive familial web due to state coercion, the only defense youths had, were to build upon the only foundation that remained; one another. ¹⁶⁹

Nationally, however, there is no definitive definition to accurately describe gangs and gangsterism. Most studies focus primarily upon gang functioning as well as gang formation at specific junctures throughout South African history. The most received definition is that which alludes to all gang members from street level to sophisticated syndicates, though as mentioned no exclusive definition persists. ¹⁷⁰

¹⁶⁸ Supra.

¹⁶⁹ Jensen, S.(2008) p32-33.

¹⁷⁰ Understanding Gangs in South Article, Journal, page 1.

Historically, gang formation and its membership in South Africa, is intertwined with the history of Apartheid. As stated by the National Institute for Crime prevention and Rehabilitation of Offenders (NICRO 1990):

*“Apartheid legislation has greatly contributed towards the growth of gangsterism in both the African and so-called Coloured urban communities. Historically the Group Areas Act, the pass laws, the migrant labour system and the job reservation laws played a role in disturbing the careful web on internal authority and control in these areas”.*¹⁷¹

Youth violence and gang formation, as a response to the experiences of marginalization experienced by South African youth during the 1980's and 1990's, should thus be contextualized in light of our history and in terms of the history of subcultures during the period prior to such date.¹⁷²

Pinnock's (Gangs, Rituals and Rites of Passage) provide two leading explanations for the subsistence of gangs in the Western Cape. Firstly; reference is made to the racially imposed laws of the Apartheid era, resulting in forced removals, commencing in 1940 and culminating ultimately in the Group Areas Act of 1950, thus demarcating the geography of the city in accordance with the racial strata.¹⁷³

The second explanation offered is that owing to the forced removal of families, the social web and structure began to disintegrate, resulting in the formation of a street

¹⁷¹ Gastrow, P. (1998) p 2.

¹⁷² Van Onselen, C (1982) in Simpson, G. (2001), p 118.

¹⁷³ Pinnock, D. (1985).p 6.

'brotherhood.'¹⁷⁴ Thus Pinnock's early study shows how employment, public space and the state are vital to the cultural structure of masculinities of the Cape Flats.¹⁷⁵

Gangs embodied the term '*skollie*,' though gang members repudiated the term. They were seen to be the obvious verification of Coloured criminality. However, for young men, the gang represented an alternative meaning, as opposed to the one constructed by Apartheid. The gang promised unlimited riches; it promised access to drugs, women, status, respect and money.¹⁷⁶

In the Coloured townships, there were signs of gangs both far and wide; the media continuously wrote about the goings-on of the gangs and its illicit activities. In response, the government adopted innovative measures and enacted additional laws to restrain them. Any study of gangs on the Cape Flats during the 1980's alludes to the gendered aspects of men's marginalization in a system riddled with racial capitalism and the assembly of a particular type of masculinity within that context.¹⁷⁷

Young Black South Africans were the yardstick of organized marginalization, powerlessness and exclusion under Apartheid. A generation of young Black South Africans were forcibly removed from their homes unto the outskirts of society, dictated by the Apartheid government and entirely discarded by the dominant culture. They were politically unvoiced and educationally stifled by White colonial rule.¹⁷⁸

¹⁷⁴ Ibid.

¹⁷⁵ Pinnock, D. (1984) in *Gangs and Sexuality on the Cape flats* by Elaine Salo.

¹⁷⁶ Jensen, S. (1998) p5.

¹⁷⁷ Ibid.

¹⁷⁸ Simpson, G. in Steinberg, J.(ed) p22.

During the Apartheid era Black youth were exposed to violence strategically orchestrated by them with the intent to depose the Apartheid regime and its repressive laws. This ensured that the resistance movement experienced violence as common practice in their everyday life, ultimately assisting in creating a 'culture of violence.'¹⁷⁹ The policies and legislation of the Nationalist Party deprived those living in black townships the infrastructure afforded to their white counterparts. Townships became sites of severe poverty and congestion. Apartheid's dehumanizing effect extended further and beyond the racial classification of South Africans; it impacted upon the construct of gender identities, particularly amongst young Black males.¹⁸⁰

It was during the fight against this repression that young Black men were socialized into manhood, albeit in a militaristic manner. Youth united in this struggle and the notions of what it meant to be a man, were vigorously tied-into to versions of masculinity, which were demonstrated amongst well-known anti-apartheid activists; such as Nelson Mandela and Steve Biko.¹⁸¹ This period entrenched masculinity to culture. Political parties such as the Inkatha Freedom Party (IFP) implored young men to partake in the liberation struggle in the name of the Zulu tribe; known historically for resisting White rule in the country.

This socialization of these young boys and men alluded to a 'culture of violence,' through the employ of weapons so to achieve political freedom. Within the African National Congress (ANC), the AK-47 gun became inextricably linked with the ideal of

¹⁷⁹ Jefthas, D & Artz (2007)L. p41

¹⁸⁰ *ibid*

¹⁸¹ Jefthas, D & Artz (2007)L. p42.

liberation and use of the gun symbolized status and represented male affluence and power.¹⁸² Gender realities cannot be detached from class and race structures, particularly within the South African context, and the expressions of violence have to be viewed against this specific political context.

Violence and masculinity became interrelated concepts associated with the resistance movement. With the fall of Apartheid, in the early 1990s and the shift to democracy in 1994, the role of South African youth needed to be re-defined.

'The country's young people were no longer required to be at the forefront of the liberation struggle and were expected to become fully functioning members of society'.¹⁸³

The injustices of the past were not easily remedied and those at the forefront of the freedom struggle, had great difficulty integrating in and amongst society. The diplomatic dispensation advocated equality, though reality was quite different as unemployment and lack of opportunities soared, affirming feelings of inferiority. In this context, many turned to criminal activity in which violence and crime was an obvious byproduct.¹⁸⁴

¹⁸² *ibid*

¹⁸³ *supra*

¹⁸⁴ Jethas, D & Artz (2007)L. p42

CHAPTER 5

GHASTLY GIRLS AND BELLIGERENT BOYS: GENDER AND GANGS IN SOUTH AFRICA

'Boys everywhere have a need for rituals marking their passage to manhood. If society does not provide them they will invariably invent their own'.¹⁸⁵

The entangled subjects of masculinity and crime have been at the forefront of the criminological debate over the past few years. In the Sage Criminological dictionary, the traditional notion of masculinity is defined as “*a set of psychological attributes developed to understand differences between the sexes*”.¹⁸⁶ Masculinity and crime studies’ examine the ‘variety of real males’ in relation to their respective means of accessibility to power and resources. Furthermore, studies’ demonstrate how these varied groups of young men articulate themselves, some; without having to resort to violence, whilst others, actively seek it.¹⁸⁷

Masculinity is a social construct and with this notion in mind, “*a great deal of crime only makes sense when it is seen as a resource for the making of gender, and in most cases, that means it is a strategy of masculinity*”.¹⁸⁸ Just as masculinity is made, there are variants; accordingly there are different ways of enacting masculinity.¹⁸⁹

¹⁸⁵ *ibid*

¹⁸⁶ Jefferson, T(2001.) P 172.

¹⁸⁷ *ibid*

¹⁸⁸ Messerschmidt, J, (1993) p 11.

¹⁸⁹ *ibid*

In *Youth and Masculinity*¹⁹⁰ Messerschmidt places emphasis upon '*the collective processes, the internal social life of the youth groups, in the making of masculinity*'. In these processes, competitions for status, (including sexual prestige and access), and the social support for activities' are central features.¹⁹¹ Similarly, the importance of a 'public masculinity' in this arena, which is provided by group life, is prepared around the collective enactment.¹⁹²

These are pertinent features and dynamics upon which to analyze group behaviour of gang members particularly in the arena whereby males 'act -out' such violence unto females. In *Class and Ethnicity*¹⁹³ the individual identity and the accessible resources play an essential role in determining the type or the degree of the crime committed. These are analytical tools when assessing gang activity and the crimes committed as gang rape is one such crime, whereby it is a collective act, acted out in the public domain and has a definite objective: it is a gendered act, and rape becomes the means by which (as perceived by themselves) disempowered men, assert their power over women.¹⁹⁴

Young men and boys involved in gangs personify the traditional problems of power in society, those of; poverty, unemployment, violence, drugs and the social decay evident in their community and familial lives.¹⁹⁵ These young men have little or no access to traditional resources within society; they further have little contact with the riches the

¹⁹⁰ Supra.

¹⁹¹ Messerschmidt, J, (1993) p 11.

¹⁹² Messerschmidt, J, (1993) p x1.

¹⁹³ Messerschmidt, J, (1993),p x11

¹⁹⁴ Ibid.

¹⁹⁵ Vetten, L. (2000), in development update volume 3 no 2.

economy could provide and lack an education in contrast to their White, successful and educated White male counterparts.¹⁹⁶

The lack of access to resources creates a podium for exaggerated public and private displays of aggression as a manner of affirming one's status and authority within a male-dominated society.¹⁹⁷ Within this schema, crime becomes a resource for certain men, in certain situations, in order to 'achieve' masculinity.¹⁹⁸ To 'understand' crime, we must realize the impact gender; race and class practices have upon the nature of the crime committed.¹⁹⁹

In Messerschmidt's, *Crime as a Structured Action*,²⁰⁰ the relationship between action and structure as well as between race, class and gender are assessed. Crime is thus examined by focusing upon people in certain social settings- what they do to construct social relations and social structures, and how these social structures constrain and channel behaviour in specific ways.²⁰¹

Thus the focal points of Messerschmidt's approach would be that of structure and action and how they two are interrelated concepts.²⁰² Historical and social conditions shape the character and definition of sex, race and class categories' and its meanings are best understood vis- a Vis the specific social relations and historical context in which they are rooted.²⁰³

¹⁹⁶ *ibid*

¹⁹⁷ Meesechmidt, J.(1997) p 2-9

¹⁹⁸ *ibid*

¹⁹⁹ *Supra.*

²⁰⁰ Meesechmidt, J.(1997) p 2-9

²⁰¹ *ibid*

²⁰² *Supra.*

²⁰³ Meesechmidt, J.(1997) p 3

From a sociological perspective, gangs maybe interpreted as a time of great upheaval ensnared between moments of pleasure and pain; between the conventional and unconventional, and between child and adult.²⁰⁴

Gangs are both contradictory and imagined communities whose participants are young men (and, less often, young women) whom have recently attained the age of sexual maturity; however their cultures neither house nor provide them with any ritual pathway appropriate to them in order that they may become both socially and emotionally active members of society. Thus they simply become active.²⁰⁵ In this particular environment, rituals are burdened with dangers owing to the *'aggressive impulses of human beings which are accompanied by very few restraints- perhaps none at all except those few maintained by a culture deeply divided by Apartheid and poverty'*.²⁰⁶

Human desire for ritual is profound, and in our culture, it may often be frustrated. Tom Driver²⁰⁷ is of the opinion that ritualizing is in fact our first language, not our 'mother' but rather our 'grandmother' tongue and as such we do not tend to outgrow it.²⁰⁸

A ritual may be defined as shared activities that bind individuals together through *'symbolic performances that speaks of, and to, their basic values.'*²⁰⁹ In this paper the concept of performance is central to analyzing the rituals of gangs. Rituals as a

²⁰⁴ Ibid.

²⁰⁵ Pinnock, D & Douglas-Hamilton, D. (1997). p 28- 29

²⁰⁶ ibid

²⁰⁷ Driver, T (1991) p 13

²⁰⁸ Driver, T in Pinnock, D (1997) Gangs, rituals and rites of passage, p 12.

²⁰⁹ de Coppet, D (1993) p 98.

performance, unites youths together and defines them as a collective unit rather than as a group of individuals. It is a process in which youths in the gang transmit combined messages to themselves that speak of their basic values and confirms a world of meanings shared by all of them alike.²¹⁰

Ritual is also understood to be informative of the subjects' inner world.

According to Sally Falk Moor, rituals function so as to provide "*daily regenerating frames, social constructions of reality, in which the attempt is made to fix social life, to keep it from slipping into the sea of indeterminacy*".²¹¹

In light of the above, Rites of passage is a concept that was developed at the turn of the century, in the early 1900's, by the French anthropologist Arnold Van Gennep. He determined that cultures around the world have fashioned ritual ceremonies around moments of individual life crises such as birth, social puberty, marriage, fatherhood/motherhood and death. According to Van Gennep, these ritual ceremonies differ only in certain aspects from culture to culture, so he developed the concept of rites of passage to illustrate the universalized ritual process that accompany the movements from one stage to the next.

According to Van Gennep transitions from group to group, situation to situation, and from age to age, are implicit in the very act of existence so that life comes to be made

²¹⁰ ibid

²¹¹ Driver, T, (1991) p 13.

up of a succession of stages.²¹² The life crisis, of particular interest to this paper, is the moment of male puberty or adolescent. His theory is particularly useful because it describes a process through which one can understand and facilitate the needs that adolescents articulate through structures such as gangs. According to Van Gennep rites of passage are marked by three distinct phases, those phases are known as “*separation*,” “*liminality*” and “*re-incorporation*”, each defined by their own ritual ceremonies.

- ***Phase of separation***

Separation encompasses symbolic behaviour signifying the detachment of the individual from his/ her fixed point in the social structure. It is a process whereby the individual distinguishes himself or herself from the rest of the community. This stage is often symbolized by death! The idea being that the individual must figuratively ‘die’ of his old ways in order to be born afresh.²¹³

- ***Phase of liminality***

In the condition of *liminality* the state of the “passenger” is vague; transient through an unidentified realm. The initiate is neither where he was nor where he is headed. At this stage there is a postponement of rules and the individual is often compelled to do that which is forbidden.²¹⁴ Ritualized *liminality* utilizes structures of its own, quite distinct to the established structures of society. *Liminality* is an occasion whereby adolescents engage in rites of transgression which are largely defined by their impulsive avant-garde

²¹² Gluckman, M. (1962) in Gennep, (1960) p 3.

²¹³ Pinnock, D.(1997), p 15-16

²¹⁴ Stivers, R.(1982) p 105.

nature, which are not embedded in the norms of society and sometimes distinctly opposed to them.

- *Phase of incorporation*

During incorporation rituals are used to indicate the individual re-entry into the community and into the new group. They are often defined by a sharing and a coming together process.²¹⁵

These ceremonies and rituals are defined as an individual and inner progression of growth as well as a social process of continuity. Rites of passage in traditional societies demand that continuity in relationships between generations, hierarchical social structures and gender differences be valued and further, allowed expression.²¹⁶

Adolescent rites of passage, however, applaud the phase of social puberty, used, essentially, to bond members of the same gender, age or per group together “*Initiation invariably involves a shared ordeal that bonds group members. The male must be brave in the face of danger and must be steadfast in the face of pain*”.²¹⁷ In this often agonizing and risky journey young people attempt to prove themselves worthy of adulthood. Young people who engage in rites of passage to adulthood have a single goal: adult respect.²¹⁸

Looking at gangs in the context of rites of passage is significant because it is a process that adolescents across the globe seem to go through whether rooted in the structures of society or instinctively constructed by the adolescents themselves.

²¹⁵Pinnock, D & Douglas-Hamilton, D. (1997). P16.

²¹⁶ Stevens, A. in L.C Mahdi, S. Foster and M. Little *Betwixt and Between* 1987: p x1.

²¹⁷ Cohen., D.(1991).

²¹⁸ Pinnock, D.(1995).

Initiation may envelop an infinite spectrum of activities' such as the entry of the boy into university fraternities, scarifications, apprenticeship to a spiritual master- "*in each case there is conscience recognition that adolescence involves a process, a becoming, and a transformation. It is a time filled with danger and enormous potential for growth*".²¹⁹

Urban, modern society has provided young people with little rituals by which to become members of the tribe or the community. The traditional passage from childhood to adulthood in most contemporary societies has simply been posited into as abstract category called "adolescence". Defined by various psychological labels and disorders as opposed to by cultural rituals.²²⁰

However, where society does not provide adolescents with a passage to adulthood they seem to inevitably invent their own. In the urban metropolis of Cape Town's Coloured community traditional ritual has been submerged in the struggle for survival. Youth not only have to deal with the uncertainty and undefined nature of the "ghetto" streets but also with the turbulence of adolescence. By developing their own rituals and appropriating symbols; youth have constructed an unprompted and unconventional structure in order to pave the path towards their manhood. In the Coloured communities of Cape Town, these structures have emerged in the form of street gangs.²²¹ Elaine Salo (2001) in *Gangs and Sexuality on the Cape Flats* specifically examines the marginalization of the Coloured male through historical (Apartheid), socio-economic (employer preferences) and cultural factors; and how through these constructed structural

²¹⁹ Cohen, D (1991)

²²⁰ Neuman, E. in L.C Mahdi, S. Foster and M. Little *Between and Between*: 1987.p x.

²²¹ Ibid.

factors; his working definition of masculinity is contrasted in relation to hegemonic masculinity.²²² The prevailing ideology of masculinity describes the ideal man as the individual who is employed, able to provide shelter and material support for a dependant wife and children within a nuclear family. Yet Coloured, working class males' access to employment opportunities has never been and remains insecure.²²³

Although violent crime is still boys' business, violence by girls is on the rise at a much more rapid rate than its male counterpart. For both boys and girls, joining a youth gang, represent an idealized collective resolution to the lived experience of the class and race struggle.²²⁴

'Gangsters have long been a part of the culture of the Western Cape, but new role players have recently entered the fray'.²²⁵

The emergence of girl violence is as much about the sexualisation of violence as it is about juvenile crime. It is an intricate expression of these young women's self perceived power and their helplessness in the larger world. Girls, like boys, have a biological capacity to be violent. What varies; however, is the battleground, the artillery and the uniforms.²²⁶

Secondly, much of female violence within the gang constitution is a 'rational' response to the conditions in which young women find themselves. Thirdly, culture determines when our fighting is fair. The environment plays a powerful role in giving

²²²Salo E.(2000) p1.

²²³ Ibid.

²²⁴ Hannah, C.(1999) p 3.

²²⁵ Haefele, B(1998) P 19.

²²⁶ Hannah, C (1999) p 6.

shape and meaning to that instinctual urge which tells us “flight or fight” when we discover what we really want is so difficult to get..

As the socialization of girls is changing, they no longer feel the need to be submissive. Thus, females ought to be considered autonomous and responsible beings when they choose to be violent.²²⁷

Yet, the reason why girls in predominantly poor urban areas are more violent is because they have more to gain than they do to lose. This is not to suggest that middle class White girls are not violent, however as prevailing conditions worsen in marginalized communities, we are likely to see more girls turning to violence as they compete for status in a world whereby one’s gang affiliation determines where one falls on the pecking order.²²⁸

‘Gang girls are not engaging in aggression of a different kind than the Spice Girls, but a different degree. For both, it is aggression rooted in their sexuality. But Spice World is not the real world. Girl gangs illustrate how the worst social conditions can heighten female competition as well as how cooperation can be the ticket out of this conundrum. This core nuanced approach is intended to unmask the politics of female aggression, exposing the ways in which the lives of young women are often (mis) used to promote political and commercial agendas which rarely, if ever, have any direct impact on their day to day existence. Girl gangs reflect the ways in which all of us women are caught within the paradox of girl power.’²²⁹

²²⁷ Ibid.

²²⁸ Hanna, C.(1999) p 13.

²²⁹ Hanna, C.(1999) P 10.

'Although the number of women drawn into gangs is increasing, they wield no power....Female gangsters have very little respect for anybody and seldom get respect from others'.²³⁰

Women are almost completely left out of South African research on gangs. Irrespective of this wave of femininity within a male dominated- domain, media and public attention remain focused upon Coloured, male gangs in the Western Cape. Many aspects of female gang functioning and the lives of female gang members remain a mystery because relatively few researchers have considered female gangs worthy of study.²³¹

Thus unless featured in magazines articles, the voices and experiences of women gang members are absent from writings on gangs.

The emergence of girls, gangs and violence raises two questions for the Criminal Justice System. Firstly, why are girls gradually becoming more violent? Second, how should the Criminal Justice System retort to what is likely to be an ongoing trend?²³²

Gangs are studied as they are of social concern. That concern stems from typically 'masculine' acts of vandalism, violence and other threats. It was often assumed that females did not take part in such behaviour, thus early researchers omitted their inclusion in their studies. Researchers and journalists saw gangs as "quintessentially male phenomenon". However this seems to have been based on a very narrow view of what a

²³⁰ Vetten, L.(2000), p 41.

²³¹ Ibid.

²³² Hanna, C. (1999) P 5.

gang really is. Gangs, male and female differ greatly from one another. A female gang may be autonomous or allied with a male gang, or female gang members may be part of a fully gender-integrated gang. However there is simply not enough information to determine such gang structure and its affect upon the members' behavioral patterns.²³³

The law determines when gender matters. The legal system can either afford girls unique treatment or treat them on a par with their male counterparts-however it cannot serve and simultaneously nourish both requirements in any one case .In each circumstance, we are required to select the solution which best advances the long- term equality for women whilst acknowledging the current development of their advancement and in so doing, accept that neither option presented is cost-free.²³⁴

The mere fact that girls receive separate treatment to men, depending on their crime, portrays society's ambivalence regarding sex and power. While female juvenile offenders pay a higher price for minor and status offenses like shoplifting; they nonetheless receive a somewhat reduced sentence for violent crimes, comparatively speaking.²³⁵

Rites of passage allow one to overlook the criminality of gangs and perhaps by understanding the gang phenomenon from this perspective, one can release the heavy burdens of labels, such as 'gangster; 'delinquent' or problematic youth'. It is a theory that allows gang youths to remain simply adolescent.²³⁶

²³³ Moore, J & Hagedorn, J.(2001).

²³⁴ Hanna, C.(1999) P 39.

²³⁵ Ibid.

²³⁶ Pinnock, D. & Douglas-Hamilton, D.(1997) p

CHAPTER SIX

THE CURRENT CONTEXT OF GANGS IN SOUTH AFRICA: THEORIES OF GANG FORMATION AND DELINQUENCY

*'These subcultures are also versatile (involved in a variety of offenses) and
Characterized by "short term hedonism" and group autonomy, which rebels against
external restraint'.²³⁷*

The study of criminal subcultures has been fundamental in providing theoretical explanations for crime as well as for providing insight into the formation and continuance of these delinquent subcultures which exist amongst our society and threaten the very fabric and moral fiber of it. Though the theories postulated are of American descent and design; they are nonetheless theories, which are applicable to countries in which subcultures manifest themselves and are thus appropriately suited to contextualize the gang phenomenon presented in South Africa today.

These studies are predominantly male-focused as males are the chief protagonists in gang culture. An analysis of South African gangs, delivers the same conclusion; that gangs are the primary domain of young males.²³⁸

²³⁷ Leonard, E.B (1982) in E.B Leonard.. p117.

²³⁸ Ibid.

*'It is a group of people, most often youths, who together take part in violent and criminal activities for only their own benefit. They send kids into steal for them, damage property, push drugs, steal cars and attack other kids or elderly people. Gangs operate in suburban areas as well as in small and mid-sized cities.'*²³⁹

In light of the above descriptive analysis of gangs and its members, American Gang theorists, such as Albert Cohen, Walter. B. Miller, Richard Cloward, Lloyd Ohlin and Robert Merton, developed competing theories which focused upon the criminal behaviour of lower-class, pubescent boys in gangs; in order to embellish their 'manifesto' for their belligerent actions. Their theories are in essence sociological; they emphasize the inter-relationship between the structure of human society and its accompanying behaviours,²⁴⁰ as well as the association between the '*status frustrations*' experienced by the lower class communities, resulting in the participation of delinquency.²⁴¹

Albert Cohen elaborated upon this construct of delinquent subcultures by referring to the structural impediments facing the lower class communities in their attainment of success. Cohen noted that the content of the delinquent subculture posed as distinctly different to mainstream culture. Cohen's work focuses upon determining the underlying, causal factors and rationale behind the existence of subcultures in certain, cultures.²⁴² His explanation revolved around the class structure of American society, he holds the argument *that 'Gang delinquency is a group solution to status frustration*

²³⁹ Gastrow, P (1988) p 1.

²⁴⁰ Ibid.

²⁴¹ Cohen, A, Free Press, Glence, IL, (1955) in Jethas, D & Artz, L. P. 45.

²⁴² Leonard, E.B (1982) in E.B Leonard. P 118.

*experienced by lower class males who are denied status in middle-class terms and seek it in the delinquent subculture.*²⁴³

Uniting in common sentiment, such children bond together to form a unique subculture. Middle-class values are abandoned (as they are considered as a source of failure) and the children manifest a new code rewarding conflicting behaviour through “*reaction formation*”. Much of this behaviour however involves delinquent behaviour. Cohen refers to such subcultures as gangs.²⁴⁴

Cohen maintains that socialization in the middle-class is a balanced and conscious response; whereas in the working-class it is dependent- relative, upon ones peers. The ‘*status frustration*’ occurs at the occasion whereby the working-class boy confronts the ideals and values of the middle-class; which are noticeably different to the values he possesses. The inability to gain access to the middle-class, results in the boy gravitating towards subcultures for status and approval.²⁴⁵ Such subcultures renounce the middle-class norms and express disdain for its value system, whilst simultaneously craving its acceptance.²⁴⁶

Cohen’s theory holds true in relation to South Africa, as the implementation of apartheid’s regime, created a new generation of children in response to the dissimulation of their family and life as they knew it. Being isolated from mainstream ‘White’ society, they united together to mesh their own unit and brotherhood.

²⁴³ Ibid.

²⁴⁴ Haefele, B.(2003) p6

²⁴⁵ Leonard, E.B (1982) in E.B Leonard. P 119.

²⁴⁶ ibid

Juxtaposed to Cohen's theory, however, Cloward and Ohlin, offer a mixed model of gangsterism, in turning delinquency to crime and violence. They propose that the lower class youth, who emanate from financially disadvantaged backgrounds (in the quest for obtaining wealth), turn to crime. These theorists' hold that, should these adolescents live in communities whereby adult crime flourishes; they may be able to achieve this wealth by joining such subculture. Thus they mimic current practice within their communities.²⁴⁷

However, where the community is disorganized, however, and adult crime has failed in its quest to achieve success; youths often gravitate towards such '*conflict subculture of violence*'.²⁴⁸ If they cannot succeed in either subculture of violence, they may descend toward the "*retreats*" subculture, whereby goals of wealth and success are totally abandoned and life is centered around, for example around drug use.²⁴⁹

Thus; common community norms are altered to such an extent that within the criminal subculture non-utilitarian crimes become the acceptable norm.²⁵⁰ Cloward and Ohlin's theory is too demonstrative of the particularities which occurred in subculture formation in South Africa. Poverty and crime go hand in-hand thus it is not surprising that children from broken and poor communities and homes turn to crime. In the absence of an education system and other structural mechanisms' to guide such children, they turn to the one resource they are successfully able to exploit-crime.

²⁴⁷ Hewitt, J and Regoli, R. (1994) in Haefele, B (2003) p 6.

²⁴⁸ *ibid*

²⁴⁹ *Supra.*

²⁵⁰ Hewitt, J and Regoli, R. (1994) in Haefele, B (2003) p 6.

Robert Merton's Strain theory, however, proposes that the scale and nature of deviance is contingent upon the manner in which a society makes its goals (such as financial success) accessible by providing the institutionalized means (such as schooling and job opportunities) to achieve them. It is essential to conceive that no two persons are the same; in the same vein, not all people aspire to convention. Children raised in poverty, for example may seek wealth via partaking in alternate sorts of crimes, such as drugs or trafficking.²⁵¹

Merton referred to this type of deviance as "innovation" in the desire to fulfill a culturally approved goal (wealth) through the medium of unconventional means. (Drug sales).²⁵² In South Africa, we still experience the social economic divide and our country is still based upon a social stratum of race, class and gender.

Walter B. Miller too rests his theory, in opposition to Cohen and suggests that lower-class delinquent gangs are resultant from conformation to lower-class ideals. He proposes that gang affiliation is not the response to middle-class norms, but is rather common practice amongst this class.

*'Gang delinquency is not a reaction to middle-class norms, but a positive attempt to achieve status in lower-class terms.'*²⁵³

These competing theories contribute to an understanding of gang formation and its specific dynamics within the South African context as subcultural theories' provides a macro- perspective of the gang phenomenon. There are two theories, both of which serve

²⁵¹ Macionis, J and Plummer, J.(1997) P210 in Benjamin Haefele(2003) p6.

²⁵² Ibid.

²⁵³ Leonard, E.B (1982) in E.B Leonard. P 120.

to explore the dynamic of the 'deviant' in relation to the dominant structure. They are the labeling and the process-orientated theories. The 'labeling' theory²⁵⁴ classes or 'labels' the lower-class and the socially disadvantaged, as deviant as they are ensnared in gang culture and hence are different or 'other'. In South Africa, such groups include Blacks and Coloured's.

Process-orientated theories allow one to understand the rise of gangs and subcultures as a response, in part, to social change. In South Africa this is of particular importance owing to our jaded political history which witnessed the disintegration of the nuclear family, forcing children to leave their homes and eek out an alternate life- the streets. This theory attributes past events to social change.²⁵⁵

To fully comprehend gangsterism in South Africa, it is imperative to appreciate the impact of Apartheid upon the social, economic and financial development of the Black and Coloured communities. The Group Areas Act, the Pass Laws, the Migrant Labour system and Job Reservation Laws laid the foundation for gangsterism in this country.²⁵⁶

Social researchers hold the belief that young people descend into a life of crime when the social problems facing them, become acute. Crime, delinquency and gangs become the solution.²⁵⁷ Gangs therefore arise when the social relations of power in the social structures' are unequally distributed which thus limits the access of legitimate opportunities to the marginalized groups.

²⁵⁴ Becker, H (1963) p 9.

²⁵⁵ Pinnock, D (1984) Smith, K. (1988) p 11.

²⁵⁶ Haefele, B. (2003) p8.

²⁵⁷ Matza, D(1964): In Irvin Kinnes. Old Communities, 2003.

They emerge rather as ‘interest groups’ in a community that are fashioned around particular goals. These gangs prosper in areas where the collective expression of society is dependant upon the exclusion of poorer groups of people from the dominant social relations of production.²⁵⁸

*“Nationally, youth gangs and their activities’ have been a recurrent and visible indication of intense disorder in society. In essence, changes in gang structure parallel the structured changes in society. For example, gangs become more violent as a result of increased violence in society in general”.*²⁵⁹

Most gang members are youths defined by the South African government as ‘Coloured,’ and most live in the racial ghettos of the Cape Flats.²⁶⁰ Not only do they live in the surrounding areas of Cape Town, they operate from there too, for it is the area of the Cape Flats where the predicament of gang life is pervasive. Mannenberg in , a centre of gangsterism on the Cape Flats, acquired the nickname “ Murderberg” or Kill Me Quick Town.²⁶¹

Joining a gang the world-over presents the same complexity of reasons in respect of group identity they relate to issues of *identity; protection; fellowship and intimidation,*²⁶² whereas on a personal level there are a multitude of reasons as to why one would wish

²⁵⁸ Pinnock, D and Douglas- Hamilton, D in Kinnes, I. Old Communities, 2003.

²⁵⁹ Taking action to Address Gang Violence in South Africa: National Crime Prevention Research-Resource Centre, p 4.

²⁶⁰ Pinnock, D. (1985) p 21.

²⁶¹ Reed, (1994) p 155.

²⁶² Why Young People Join Gangs; Violence Prevention Institute;
<http://www.violencepreventioninstitute.org/youngpeople.html>.

to participate in gang activity; those general reasons refer to, *independence, money, power, status, access to women and resources.*²⁶³

Firstly, the issue of *identity* is central to the reasons as to why youth join gangs; the base reason is that such youth are unable to achieve an identity within the environments in which they currently reside; thus they seek this through the means of a subculture.²⁶⁴

Secondly the issue of *Protection* is an expansive one in that, joining a gang in a community whereby gang life is thriving, serves as a means of protection to one and one's family.²⁶⁵

Thirdly, the notion of fellowship or brotherhood; as gang members emanate from broken familial structures and as such they seek out this support system, affection and love through their surrogate family.²⁶⁶

The fourth and last common reason is owing to intimidation; upon membership, initiation is brutal and membership may become a dangerous activity at this adjunct of initiation. Furthermore, there is a continuous struggle for territorial domination and the lucrative drug market among gangs in our community.²⁶⁷

Gangs are well-structured and as such they are able to co-ordinate several moneymaking schemes.²⁶⁸ To understand both the crime and gang networks, it is

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Supra.

²⁶⁶ Why Young People Join Gangs; Violence Prevention Institute;
<http://www.violencepreventioninstitute.org/youngpeople.html>.

²⁶⁷ Ibid.

²⁶⁸ Haefele, B.(2003) p 9

obligatory to realize that criminals work in different levels of sophistication. Gangsterism forms a key component of the socio-economic structure within the Western Cape.²⁶⁹

It constitutes as the lowest tier of the organized crime hierarchy and should be viewed as the common factor, binding the majority of criminal activities within the Western Cape.

270

Gangs wield a vast amount of power over the narcotics trade, as they are the distribution points thereof. The selling and distribution of drugs, however is not the only way in which money is generated.

Within many of the gangs, several gang-members form housebreaking syndicates and are responsible for stealing valuables, weapons and ammunition from houses in the more affluent areas.²⁷¹ Gang activities' are varied and entertain a multitude of illicit activities and their reach is exceptionally wide.

Gangsterism in other Provinces does not necessarily conform to the typology of gangstersim found in the Western Cape as families are often involved in a culture of illicit activities- from stealing from their employers to supporting criminals by buying illegal goods. The misfortune is that the moral breadth of the community has been diverted and redirected to the criminal morality. This criminal morality has permeated through the layers in society from the clergy, to the police to local government structures and even to public officials.²⁷²

²⁶⁹ *ibid*

²⁷⁰ Mouton, in Haeefe, B. 2003, p11

²⁷¹ Operating Slasher: Gang -related murder and attempted murder. Saps Statistics. Department community Safety- Western Cape Provincial Administration. Crime Information Centre in Gangsterism in the Western Cape: in Benjamin Hafele, in Criminal Economy, Gangs and Child Abuse in the Western Cape, community Safety monitor, Journal 1/2003, p12

²⁷² Kinnes, I. <http://www.iss.co.za/Monographs/No 48/The Future.html>

In respect of the South African Context, there are four gang typologies. They are *prison gangs; defence or street gangs, family mafia and family syndicate gangs*. These typologies reflect the activities gangs partake in. An elaboration upon each such type shall be explored;

- ***The Prison Gang:***

This typology has the most ordered leadership hierarchy. It has existed since 1836. The Prison gangs have been the most ‘dynamic’ gangs on the South African setting for a vast number of years until recent history whereby the street gangs became active. Initially, the prison gang assumed a great deal of control of meager prison resources, and has since its origins had a profound impact upon the gang culture entrenched within the South African system. Two of the better known prison gangs are the 26’s and 28’s. The 26’s are the most abusive, brutal and violent gang within the prison system. They usually control the informal trade networks from within the prison. The 28’s orchestrate sexual services for prison inmates. Street gangs are largely influenced by the culture, style and ethos of prison gangs’.²⁷³

- ***The Street/Defence Gang:***

These gangs are usually controlled by young people whom exert power and authority over the remainder of the gang, irrespective of their age, though this dynamic is somewhat changing. Street gangs have changed from small time operations over protecting their territory to having accumulated ample number of both boys and girls to

²⁷³ National Crime Prevention Research-Resource Centre; Taking action to Address Gang Violence in South Africa, p4.

form part of their gang. Researchers' and social scientists estimate that there are between 80 000 to 120 000 gang members operating in Cape Town alone. They have traditionally been involved in theft, extortion, robberies and drug dealing.²⁷⁴

- ***The Family Mafia Structure:***

They comprise the remains of the extended family. The mafia consists of brothers and cousins as opposed to one's peers. They are dynamic in the illegal section of the informal business sector. Owing to their authority and influence, they entertain larger undertakings' such as large payroll jobs and large-scale warehouse or shop thefts. They are also the drug wholesalers, buying in bulk and distributing through the street gangs. They have traditionally operated in the townships of Cape Town by running taverns and shebeens. Almost all the family mafia type gangs have been led by people whom have held a senior ranking in the prison gangs at a certain time.²⁷⁵

- ***The Syndicate gangs:***

"Syndicates are best described as "powerful businessmen who are active on the wrong side of the law".²⁷⁶

They are an organized group of merchants who hold a monopoly over the illegal supply and distribution of goods, such as cars and drugs. They operate in a cautious manner and their members do not posture on street corners. Their activities' vary widely. Some are involved in the sale of stolen items, whilst others are involved in the sale of legal goods

²⁷⁴ ibid

²⁷⁵ Supra.

²⁷⁶ National Crime Prevention Research-Resource Centre; Taking action to Address Gang Violence in South Africa, p4.

in an illegal way, for example, selling alcohol via the medium of shebeens and other networks. This typology is the fastest budding of all the gangs in South Africa.²⁷⁷

Gangs are a reality and have impacted upon many countries across the globe. The expansion and advance of gangs are associated with questions of security, housing, health, resources, jobs, poverty and above all; solidarity. The predicament faced by countries, such as Kenya, United States, Colombia, India, United Kingdom, Russia and South Africa with respect to gang violence is by no means new. It has challenged the competence of governments throughout the world to address the predisposition of youths whom turn towards gangs as a solution to crises facing them.²⁷⁸

The alternatives to this criminal underworld, however, are elected by certain youth. For some, the investment in an education system is a preferred, yet tedious path. For others, cultural organizations, youth clubs, sports societies and churches provide youth with a form of culture and identity. In mapping out the violent option chosen by gangsters, it would be misleading to permit any suggestion which implies that this is the inevitable route for the majority of youngsters, for it are not. In the language of the Department of Welfare, “*these are youth at risk, whom may fall foul of the law if creative alternatives’ are not evolved for them*”.²⁷⁹

The complex process of youth subculture formation and the centrality of violence in shaping youth identity in South Africa at the end of the 1990’s presents some key

²⁷⁷ Ibid.

²⁷⁸ Kinnes, I, (2003).

²⁷⁹ *ibid*

challenges to policy makers and criminal justice practitioners. Firstly, it is important to recognize that gang structures are not unchallenged within the world of the marginalized youth. The formation of gangs and involvement in criminality is just one manifestation of the creative resilience of young Black South Africans facing persistent adversity.²⁸⁰

To this end, and in light of the above, South Africa has a grave task ahead of itself in policing the post-apartheid society. Greater legislative measures are required to address this pressing concern. However, owing to the complexity, structure and history behind gangs and its membership, this seems to be a tiresome task, requiring much commitment from all sectors of society. Whether or not the current legislation in place is effective or not in addressing the gang phenomenon specific to South Africa, shall be deliberated upon in the following chapter in its exposition of both the Child Justice Bill²⁸¹ and the Criminal Procedure Act.²⁸²

²⁸⁰ Simpson, G, (2001) in Steinberg, J (ed). p 128

²⁸¹ Bill No 49 of 2002.

²⁸² Act 121 of 1998.

CHAPTER SEVEN

THE CHALLENGES FACING THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM IN LIEU OF YOUTH INVOLVEMENT IN GANGS:

'History has shown that the battle against gangs is also the battle of ideas and resources'.²⁸³

It is a central tenet of this paper that amidst all the prescribed change which has occurred in South Africa; the experiences of marginalization, impoverishment and deprivation, which lay at the root of youth-based violence and political resistance to apartheid during the 1980's, have not only been sustained; they however continue to underscore much of the criminal violence which dominates the economic, social and political landscape in the post-apartheid era.²⁸⁴

Crime and violence have become commonplace in South Africa. Apartheid methodically shattered the alternative sources of social unity and cohesion, which marginalized youth would have ordinarily experienced. In response; they sought an alternate means of social structure and belonging; they embraced gang life. The preceding chapter elucidates the multiple reasons for joining a gang, the predominant ones being, status; money, identity and brotherhood. Though it is essential to rectify past mishaps perpetrated by our country unto its Black and Coloured youth; it remains vital to the health and welfare of the nation, to halt this cycle of crime. The Child Justice Bill²⁸⁵

²⁸³ Kinnes, I.(2000) p 3.

²⁸⁴ Simpson, G, (2001) in Steinberg, J. (Ed). p 115.

²⁸⁵ As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in Government Gazette No.23728 of 8 August 2002).

and the Prevention of Organised Crime Act (POCA)²⁸⁶ have been injected into society as social control mechanisms' to address the escalating problems of youth involvement in crimes and participation in gangs. The competence of the above legislation requires greater deliberation as well as deliverance in order to redress the prevalence of poverty, marginalization and subculture formation. Currently, the legislation in tact is a misguided policy seeking to redress past mishaps 'allocated' to Black children. However it is the contention of this chapter that the legislation alone, shall not sufficiently address the causes of gang membership; for those causes are socio-economic and political ones- introduced by apartheid' system of social reconstruction. The irony revels in the fact that marginalized youth turned to crime as a means of survival, amongst others and though the Bill²⁸⁷ highlights this, it does not address the causes- it addresses the effect- youth in conflict with the law.

The dawn of the democratic era, brought with it a country premised upon the foundations of fundamental human rights to all its citizens; children are inclusive in this category. A further commitment to children's rights was the development of the Child Justice Bill-²⁸⁸ which signified the platform for legal change, reconciliation and the promotion of '*ubuntu*'.

The Preamble to the Child Justice Bill²⁸⁹ recognizes that '*before 1994, South Africa, as a nation, had not given many of its children the opportunity to live and act like*

²⁸⁶ Act No 121 of 1998.

²⁸⁷ Bill No 49 of 2002.

²⁸⁸ Ibid.

²⁸⁹ As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in Government Gazette No.23728 of 8 August 2002).

children, particularly Black children, and that some children, as a result of circumstances, in which they find themselves, have turned to crime’.

The Bill²⁹⁰ is committed to the principles of *restorative justice and diversion*.²⁹¹ These principles represent a distinct stride towards democracy. *Restorative justice*, an essential component of the Bill, may aptly be described as a retort to crime that goes beyond simply punishing the offender.²⁹² The Bill extends itself in that it defines restorative justice as ‘*the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child’s parents, family members, victims and communities*’.²⁹³

The popularity it received both locally in South Africa as well as abroad via international principles may be attributed to the role that it denotes to the victim and its ability to reproduce traditional approaches to dispute resolution. Its popularity in South Africa is due to its affiliation with western legal procedures and the cruelty imposed by apartheid.²⁹⁴

Diversion, on the other hand, involves the referral of young offenders away from the formality of the court procedures into the attendance of a variety of programmes, once careful consideration has been awarded to each case, prior to the matter proceeding

²⁹⁰ Bill No. 49 of 2002.

²⁹¹ Ibid.

²⁹² Johnstone. G. (2002) in Stout, B. & Wood, C(2004) p21.

²⁹³ South African Law Commission, (2002:8)

²⁹⁴ Ibid.

to trial. It is also premised upon a series of levels; indicating that the more rigorous programmes shall be reserved for the more complex cases.²⁹⁵

The Bill takes cognizance of the fact that when we are dealing with child offenders we are dealing with human beings whom are not yet fully developed.²⁹⁶ The South African constitution²⁹⁷ provides that every person under the age of 18 years is a child and the Bill aligns itself with such approach.²⁹⁸ It is further premised upon the understanding that adolescence is a turbulent time in one's life and though children may commit offences during their teen-age years; most will blossom into law abiding citizens. Whilst provisions are made for the eventuality that children do commit serious offences and should be held accountable for their actions and assume responsibility thereto.²⁹⁹

The Child Justice Bill³⁰⁰ was developed by the South African Law Reform Commission. The version of the Child Justice Bill that was introduced into Parliament was Bill 49 of 2002.³⁰¹

Whilst it maintained most features of our current criminal justice process, it however, introduced a number of new concepts and procedures, some of which are presently used in practice but are not provided for in legislation. These procedures within the Bill³⁰² resulted in a distinct system of criminal justice for children who seek to

²⁹⁵ Sloth-Nielsen J. (2003) p 176.

²⁹⁶ Supra.

²⁹⁷ Act 108 of 1996.

²⁹⁸ Section 28 (3) of Act 108 of 1996.

²⁹⁹ Gallinetti, J p 107

³⁰⁰ Ibid.

³⁰¹ Skelton, A & Gallinetti, J. (2008) p 1. <http://www.cfc.org.za>.

³⁰² Bill No 49 of 2002.

balance due process rights with the rights and protection of children, whilst simultaneously providing for the interests and protection of the community.³⁰³

These procedures shall be elaborated upon and include the following;

- *Introducing a preliminary inquiry process;*³⁰⁴
- *Providing a legislative structure for the assessment of all children in the criminal justice procedure;*³⁰⁵
- *A legislative framework for diversion;*³⁰⁶
- *Raising the minimum age of criminal capacity from seven to ten years;*³⁰⁷
- *Guidelines established in law to guarantee that the detention of children, is a means of a last resort by requiring that courts first have regard to an alternative to detention prior to placing a child in a facility or a prison.*³⁰⁸

- **The Preliminary inquiry;**

The enquiry ensures it utilizes existing resources and personnel. This enquiry has a number of objectives, of which include determining whether a child may be diverted and if so, identifying a suitable diversion option; determining the release, or detention of the child and establishing whether the child should be referred to the children's court to be fall under the auspices of the Child Care Act.³⁰⁹ Such assessment is executed by a probation officer and serves an array of functions; it estimates the age of the child; establishes the possibility of diversion and whether a child is in need of care as well as

³⁰³ Skelton, A & Gallinetti, J. (2008) p 1.<http://www.cfc.org.za>.

³⁰⁴ Ibid.

³⁰⁵ Skelton, A & Gallinetti, J. (2008) p 1.<http://www.cfc.org.za>.

³⁰⁶ Ibid.

³⁰⁷ Supra.

³⁰⁸ Skelton, A & Gallinetti, J. (2008) p 1.<http://www.cfc.org.za>.

³⁰⁹ Act 74 of 1983 or in the future Act 38 of 2005.

making recommendations relating to the release or detention of a child and resolve the steps to be taken to a child below the age of 10 years.³¹⁰

- ***Providing a legislative structure for the assessment of all children in the criminal justice procedure;***

Currently, there is no legal requirement in our present criminal justice legislation which makes provision for the assessment of children whom are arrested, while assessments conducted by probation officers do occur at interim stages of the Probation Services Act.³¹¹ Assessments in the present system are not consistently applied or regulated and delays often occur.

In terms of the proposed legislation, an ***assessment*** must occur preceding the child's appearance at the preliminary inquiry and owing to the fact that a preliminary enquiry must occur within 48 hours of arrest, the assessment must occur within that time frame. The residue of the assessment amounts to recommendations submitted to the preliminary enquiry magistrate in respect of the child's supervision. This procedure will be invaluable in determining which children may be dealt with outside the criminal justice system.³¹²

- ***A legislative framework for diversion;***

Like assessment, ***diversion*** does not feature in our criminal justice legislation at present. Diversion practices have, however, been implemented in some courts since the early 1990's. Diversion involves the referral of children away from the criminal courts,

³¹⁰ Gallinetti, J p 107

³¹¹ Act 116 of 1991.

³¹² Gallinetti, J. p 108

where fitting, to encourage the child to accept responsibility for his/her actions. It allows the victim the opportunity to express his or her views upon the harm caused and promotes resolution between the offender, victim and the community. It further prevents the child from embracing a stigma or a criminal record.³¹³

The Bill advocates an assortment of diversion and *sentencing* options. These include receiving a formal caution or compulsory school attendance order and attendance of specified programmes. It is essential this practice is correctly regulated. The Bill provides definite criteria and minimum standards applicable to diversion programmes so as to ensure due process protections, the avoidance of harmful or exploitative practices and the inclusion of restorative justice elements, as well as the child's understanding of the impact of his or her behaviour upon others are regulated.

The Bill also requires that any child appearing at a preliminary enquiry must be assessed prior to that appearance, although in certain circumstances, an assessment may be dispensed with.³¹⁴

Through the process of diversion, troubled children are graced with a second chance; a chance to rectify their past mishaps through the process of diversion.³¹⁵ The Bill is constructed to encourage diversion, whilst simultaneously safeguarding the human rights of the child³¹⁶

³¹³ Ibid.

³¹⁴ Supra.

³¹⁵ Gallinetti, J. p 108

³¹⁶ Stout, B and. Wood, C. (2004) p 121.

•***Raising the minimum age of criminal capacity from seven to ten years;***³¹⁷

Under our existing law, children as young as seven can be tried in a court, however, this is very rarely done. The Child Justice Bill states that children below the age of 10 years should not face prosecution and those between the ages of 10 and 14 are presumed to lack criminal capacity, but the prosecution may bring evidence to show that a particular child had criminal capacity. 10 years of age is still considered to be a low age according to world standards, but the presumption of lack of capacity will help to protect children who are emotionally underdeveloped or immature.³¹⁸

The Bill³¹⁹ attempts to ensure the ‘fostering of children’s sense of self dignity and worth’ by treating every child in a manner appropriate to his/her age and intellectual development. This principle forms the base of the Bill’s³²⁰ provisions on age and criminal capacity.

Furthermore, regarding the *reintegration* of children accused of crimes, the Bill³²¹ attempts to reinforce children’s respect for human rights and the fundamental freedoms of others by the notion of accountability. It also attempts to safeguard the interests of victims and the community; as well as supporting reconciliation by means of a restorative justice approach, involving, all relevant stakeholders in child justice processes in order to encourage the reintegration of children accused of crimes.³²²

³¹⁷ Supra.

³¹⁸ Child Justice: Department of Social Development. Internet rtice.<http://.childjustice.gov.za/faq.htm>

³¹⁹ Bill No.49 of 2002.

³²⁰ Ibid.

³²¹ Bill No. 49 of 2002.

³²² Koch, R & Wood, C (2001)” 65:71 in Koch, R & Wood, C, in a new Child Justice System, p 4.

The concept of *reintegration*, reiterates the notion of a style of diversion in the sense that Children or youth are diverted from the criminal justice system and introduced into structured programmes.³²³ The intention is to provide suitable programmes aimed at awareness through the medium of certain life skills which shall assist in reducing the rates of recidivism, should children whom have, on a prior occasion, come into variance with the law.³²⁴

- *Guidelines established in law to guarantee that the detention of children, is a means of a last resort by requiring that courts first have regard to an alternative to detention prior to placing a child in a facility or a prison.*³²⁵

The United Nations Convention on the Rights of the Child; the Beijing Rules and Standard Minimum Rules for Juveniles' Deprived of their Liberty have been translated and adopted into domestic legal rules via both the Constitution of South Africa³²⁶ as well as encapsulated within the Bill.³²⁷

Further, such instruments are committed to ensuring the rights of children in divergence with the law are fortified in that they; *have the right to not to be detained except as a measure of last resort and if detained, for the shortest appropriate period of time*; to be treated in a manner and kept in conditions that take account of the child's age; to be kept separately from adults, and to separate boys from girls whilst in detention; to family, parental and appropriate alternative care; to be protected from maltreatment,

³²³ Ibid.

³²⁴ Zambia, South Africa and Namibia, are receiving reintegration services

³²⁵ Skelton, A & Gallinetti, J. (2008) p 1. <http://www.cfc.org.za>.

³²⁶ Act 108 of 1996.

³²⁷ Sloth-Nielsen, J (2003) P 176.

neglect, abuse or degradation; and not to be subjected to practices that could endanger the child's well-being, education, physical or mental health or spiritual, moral or social development.³²⁸

The Child Justice Bill³²⁹ affirms these two principles within subsection 28 (1) (g) of the Constitution.³³⁰ Regarding the 'last resort' principle³³¹ the presiding officers may only order the detention of a child after considering alternatives and arriving at the conclusion that the child should not be released.³³² It seeks to ensure that should such detention manifest, that it is in line with the 'shortest *time period principle*' that all trials of accused children should be considered as speedily as is possible.³³³

It further provides for professionals to manage each case upon its distinct merits and an individual basis. These professionals are equipped to deal with different cases and children differently, as the facts and circumstances dictate. If a child is generally well-behaved and has committed an offence that is not very serious, such child will probably be diverted away from the criminal justice system. Not all matters will be diverted, however. Some cases will be considered too serious to divert, whilst in other cases the history of the child may specify that diversion would not be suitable.³³⁴

³²⁸ Bill No. 49 of 2002.

³²⁹ Ibid.

³³⁰ Act 108 of 1996.

³³¹ Section 28 (1) of the Act 108 of 1996

³³² Detention in prisons is only to be considered if the child cannot be placed in secure care or a place of safety.

³³³ The Bill also follows the Constitution in providing that children must be detained separately from adults. It also seeks to ensure that boys and girls are held separately and that all children are allowed to exercise, have access to education and have visits from amongst others, their parents, lawyers and social workers'.

³³⁴ Child Justice Bill.

In light of the exposition upon the Child Justice Bill³³⁵ and in lieu of its innovative and novel concepts introduced into our justice system, this Bill³³⁶ is not without its flaws. A discerning feature of the Bill is the notion that children below the age of 10 years may not be prosecuted, though this represents a distinct shift towards a child's rights paradigm, it contributes to the fear that children will be exploited by adults in the commission of crimes. The fact is however, that we cannot fault children for this – for it is the perpetrators whom should be prosecuted and punished for using children in the commission of crimes. The Bill makes no mention of this in its section on offences and penalties. The Bill holds that any court which convicts an adult of '*inciting, conspiring with or being an accomplice to a child committing a crime must find that to be an aggravating factor when sentencing that adult for the crime concerned*'.³³⁷

An assessment of the Prevention of Organised Crime Act³³⁸ criminalizes the activities and conduct of gangs in any manner, nature and form; however the majority of gang members are youth. Thus their actions and activities in terms of this Act³³⁹ are criminal. Thus upon an interpretation of such Act,³⁴⁰ children are guilty of engaging in illicit conduct. Reference is made in terms of the Bill³⁴¹ for '*offences relating to criminal gang activities as per Chapter 4 of the Act*'³⁴² The Bill³⁴³ further alludes in Schedule 3 Part 1 to any offence relating to '*the proceeds of unlawful activities referred to in*

³³⁵ Bill 49 of 2002.

³³⁶ Ibid.

³³⁷ Child Justice: Department Of Social Development. Internet

Article: <http://www.childjustice.gov.za/faq.htm>

³³⁸ Act No.121 of 1998.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Bill 49 of 2002.

³⁴² Act No.121 of 1998.

³⁴³ Bill No 49 of 2002.

chapter 3 of the Prevention of Organised Crime Act³⁴⁴ as well as to ‘any offence referred to in section 13 (f) of the Drugs and Trafficking Act.’³⁴⁵

Chapter 4 of the Act³⁴⁶ make specific reference to gang related offences, *whereby any intention, association, participation or intimidation upon the part of the member is a criminal offence, punishable either by a fine or imprisonment.*³⁴⁷ To this end, the Bill³⁴⁸ seeks to assist such child in its criminal justice process by ensuring that it is mindful to treat that child in accordance with his/her age and in terms of the offence committed and if and where possible to divert such child from the formal process of the court procedure to a programme of structured intervention so as to prevent offending or re-offending.

A generally accepted and comprehensive definition of organized crime as per the Act³⁴⁹ is as follows:

*“A criminal gang includes any formal or informal ongoing organization, association or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity”.*³⁵⁰

³⁴⁴ Act No.121 of 1998.

³⁴⁵ Act No 140 of 1992.

³⁴⁶ *ibid*

³⁴⁷ *Supra.*

³⁴⁸ Bill No 49 of 2002.

³⁴⁹ Act No.121 of 1998

³⁵⁰ The Publication of Definitions- Organised Crime in South Africa, An Assessment. Published in Monograph No.28: Organised Crime in South Africa, August 1998.P1

In general, gangs tend to be less officially structured than syndicates. They are often territorially based, their criminal activities involve less complexity than those of syndicates; their members tend to be youths and they identify themselves by a gang name, sign or symbol. The multitude of different manifestations of criminal gangs makes it unlikely that one single definition will suffice in order to envelop all the shades and variations.³⁵¹

It becomes more challenging to describe a criminal group as a gang when some of its members are adult and the gang as a result is better organised and therefore can be better equipped to engage in more serious crimes for profit- as is the case with a growing number of gangs. Under, certain circumstance therefore, the criminal activities of gangs, do amount to organised crime.’

The Act defines and lists 34 offence types, ranging from murder to racketeering. The Act also focuses “on offences related to criminal gangs”. ‘Gang members are guilty of an offence if they willfully aid any criminal activity committed for the benefit of or in association with a criminal gang’.³⁵²

Upon a legislative level, ‘The Drugs and Drug Trafficking Act,³⁵³ makes it an offence to deal in dangerous and undesirable drugs and is punishable up to 25 years of imprisonment.³⁵⁴ This is too reiterated in the Bill in its Schedule 3 Part One as well as in Schedule 4. Reference is alluded to this Act³⁵⁵ and the in the Schedule of the Bill³⁵⁶ as

³⁵¹ ibid

³⁵² Act no 121 of 1998.

³⁵³ Act 140 of 1992

³⁵⁴ Lotter, S. in Haefele, B (2003) p 21.

³⁵⁵ Act 140 of 1992.

³⁵⁶ Act No 121 of 1998.

drug distribution serves as an exhaustive component of gang activities. Drug distribution is one of its main sources of income.

The child justice movement in South Africa emerged in the early 1990's. This movement shaped a podium within the field of criminal justice, for a range of child justice issues and original concepts to be incorporated within the child justice paradigm. The Bill makes provisions for child offenders, within the larger category of children who come into conflict with the law whom require management and greater attention.³⁵⁷ Such categories refer to children used in armed violence (COAV) and children used by adults and other older children to commit crime. (CUBA).³⁵⁸ The Bill is intended to safeguard the rights of children accused of committing crimes as well as regulating the systems whereby a child is dealt with accordingly and ensuring the role and responsibilities of all those engaged in the process are accurately defined and their functions demarcated.

“Children in organized armed violence” (COAV) is an unusual concept in the current children's rights' dialogue. It may neither be defined as child offending or as relating to children in armed conflict. Yet the brutality of its reality is very real.³⁵⁹ Little regard has been granted towards the existence and reality of organised groups whom recruit children for their use and gain in criminal activities.³⁶⁰

The second concept, within this prototype, refers to children used by adults to commit crimes (CUBAC). The first reference to children used by adults to commit crimes

³⁵⁷ Gallinetti, J, Mutingh, L & Skelton, A. chapter two, p101.

³⁵⁸ Gallinetti, J p101.

³⁵⁹ Frank, C. p 123

³⁶⁰ Frank, C. p 130.

is referred to in the United Nations General Assembly (GA) Resolution 43/121³⁶¹ upon the use of children in illicit traffic in narcotic drugs.

In respect of the ILO (International Labour Organization's) Convention³⁶² on the Elimination of the worst forms of Child Labour, article 3 encompasses CUBAC as *'The use, procuring or offering of a child for illicit activities', in particular for the production of trafficking of drugs as defined in the relevant international treaties''*.

Upon an assessment of the legislation in place, namely the Child Justice Bill³⁶³ and the Prevention of Organised Crime Act,³⁶⁴ as both pieces of legislation are relevant to addressing the issues facing our criminal justice system in respect of youth involvement in gangs. These pieces of legislation do not adequately address the pertinent underlying issues regarding gang membership that being; the remnants of apartheid's social segregation policies, which systematically marginalized Black and Coloured youth; the pervasive cycle of poverty as a result of the forced relocation away from the Cape Town CBD and into the rural slums, where overcrowding was rife and furthermore the social phenomenon of gangs and ganging as their rite of passage.

Apartheid created distinct spaces and people. It racially divided and classified society. Blacks and Coloureds were re-settled on the outskirts of Cape Town, in rural slums.³⁶⁵ As the social structures disintegrated, unemployment became rife; children left the once close unit of the home; seeking protection and security in alternate ways. Status

³⁶¹ 8 December 1988.

³⁶² No 182.

³⁶³ Bill No.49 of 2002.

³⁶⁴ Act No 121 of 1998.

³⁶⁵ Jensen,S. (2001) p44.

frustration prevailed as Black and Coloured children were seen as delinquent or 'other'. As mentioned in preceding chapters' gangs represent a rite of passage to such youth as it is the time of adolescence that is hugely creative. *'It is a time of anticipation for something indescribably 'other' - a longing for magical transformation and a rejection of the mundane'*.³⁶⁶

Robert Bly, in his book, *Iron John*³⁶⁷ noted that *'adolescence is a time of risk for boys, and that risk-taking is also a yearning for initiation'*.³⁶⁸ Traditional practices have developed over centuries as they are essential for the stability of community life. Such practices continue, as these cultures have learned from the West in that *'if a culture does not deal with the warrior energy of its young men and the spirit energy of its young women- take it in consciously, discipline it, honour it- this energy will turn up outside in the form of gangs, depression, drug abuse, wife-beating and brutality to children'*.³⁶⁹

This cycle of violence perpetuated as a result of various social-economic and political reasons gang, results in most gang members being caught and imprisoned, and thus in conflict with the law, either as a first time offender or a re-offender. Diversion, as a concept and process is introduced by the Bill, seeks to redress the harm done to all stakeholders'³⁷⁰ however whether it effectually promotes and protects the rights of children as strongly as it appears to, may not appear to necessarily be the case.³⁷¹

³⁶⁶ Pinnock D. & Douglas-Hamilton, D (1997) p 8

³⁶⁷ Bly, R (1990) in Pinnock D. & Douglas-Hamilton, D (1997) p 8

³⁶⁸ Ibid.

³⁶⁹ Bly, R (1990) p 179 in Pinnock D. & Douglas-Hamilton, D (1997) p 20.

³⁷⁰ Bill No. 49 of 2002.

³⁷¹ Stout, B. & Wood, C.(2004) p 130.

Though the Bill³⁷² provides alternate sentencing options for convicted child offenders, its main focal point is upon pre-trial diversion. Should its provisions be fully implemented, a first time offender accused of a relatively minor offence shall be dealt with in a very different approach after the introduction of the Bill³⁷³ than he/she is today. However, such transformation is absent in the matters regarding serious or repeat offenders. The probable result of this is that many children whom are repeat offenders, or that are found guilty of a somewhat serious offence, are more than likely to be incarcerated.³⁷⁴

Moreover, if detained, most are likely to be placed amongst adult offenders, as there are shortages of appropriate alternatives.³⁷⁵ This is in clear contrast to the sentiment of the Bill³⁷⁶ and the Constitution, in respect of principle 28 (1) (g)³⁷⁷. In this way, the Bill³⁷⁸ insufficiently addresses the nuances of rites of passage as well as the cycle of poverty. Furthermore as assessment and diversion have not yet been fully implemented, a child does not benefit from this procedure, but rather receives treatment in the same manner as his adult counterpart- though should an assessment have been undertaken, the reasons for offending would be brought to life and a programme of intervention; encouraged.

Interventions and programmes should be focused upon youth –in –general in the poor communities. In this way prevention may be more effective than cure as by focusing

³⁷² Bill No. 49 of 2002.

³⁷³ Ibid.

³⁷⁴ Stout, B & Wood, (2004) p130.

³⁷⁵ Ibid.

³⁷⁶ Bill No. 49 of 2002.

³⁷⁷ Act 108 of 1996.

³⁷⁸ No 49 of 2002.

exclusively upon gangsters may have a negative twist in the sense that it isolates and provides an incentive to remain together, in their current hierarchy.³⁷⁹

A second challenge posed to the Child Justice Bill³⁸⁰ and to youth is that owing to the disproportionate levels of crime in the country, there is a common feeling amongst the middle class and the business community that the government's approach to crime is not tough enough, resulting in them seeking alternate measures of safety in non-state agencies, mainly in the form of commercial private security firms.³⁸¹ This trend is emulated by the poorer communities too, who hold very little faith in the hands of law officials.³⁸² Such widespread concerns regarding high levels of crime and the states ability to reduce it, may only serve to be more profitable for the government, whom may ultimately seek to deny the limitation of its capacity and adopt a far greater punitive approach to the problem of child crime, in retort to societal claims on non-intervention.³⁸³

This approach shall be costly to children enslaved in the cycles of poverty, as the Bill³⁸⁴ currently attempts to redress this issue as it mentions in the preamble that Black children engaged in crime as '*a result of circumstances in which they found themselves*'.³⁸⁵ However if a more punitive approach to crime should be assumed, children may not necessarily receive the benefit of diversion programmes or interventions, which ensures the cycle they are used to; continues.

³⁷⁹ Scharf, W. (2001), p1.

³⁸⁰ Bill No.49 of 2002.

³⁸¹ Shearing, C & Kempa, M. (2001) in Stout, B & Wood. (2004) p130.

³⁸² Harris, B. (2001) in Stout, B & Wood, (2004) p131.

³⁸³ *ibid.*

³⁸⁴ Bill No.49 of 2002.

³⁸⁵ Preamble to the Bill,]No 49 of 2002.

The Bill's³⁸⁶ passage through Parliament could be delayed and as a result it may either be enacted in part or in full. The greatest threat to the implementation of the Bill³⁸⁷ is the supposition that there may be inadequate resources to do so.³⁸⁸

Furthermore, the fact that programmes are targeted at repeat offenders, whilst others struggle to maintain programme integrity is disquieting if we are to redress the prevailing issues to crime.³⁸⁹ This may ultimately reduce programme interventions in the long run, perhaps resulting in a greater sense of recidivism.

The responses to gangsterism locally, upon a non-legislative level, have been vast in order to stem the violence. To this end, the "*Safe School Project*", initiated by the Department of Education is implemented in schools engulfing the Cape Flats in order to assist learners at risk as well as by providing programmes to divert both the resources of time and attention to school work, thus eradicating free time, which may be spent posturing on street corners.³⁹⁰ Secondly, The Western Cape has implemented an "*Urban Renewal Strategy*", for the affected Cape Flats areas, by ensuring it provides a safer environment, whereby graffiti is eradicated, buildings are restored, CCTV is installed a greater regard is had for ensuring all public arenas are safe to inhabit at any stage or time as well as providing projects of economic efficiency, to assist these urban communities in the attainment of economic independence.

Further the Chrysalis Academy in Tokai provides a three month training programme to ex-gangsters and unemployed youth between the ages of 16 and 22. The

³⁸⁶ Bill No. 49 of 2002.

³⁸⁷ Ibid.

³⁸⁸ Sloth-Nielsen, J (1999a) p 475.

³⁸⁹ McGuire, J (1995); Lipsey (1995)

³⁹⁰ WECD- Safety at Schools in the Western Cape in Gangsterism in the Western Cape, Haefele, B, p27.

objective is to develop *youth in danger's broader outlook on life and instill them with the ability to think rationally.*³⁹¹

South Africa has finally established a child justice system that may potentially reduce crime; advance the accountability of children with a view to breaking the cycle of violence; treat children in a manner appropriate to their age whilst holding them accountable for their actions and in so doing, balance the needs of the child, the victim and society; creating a society we are able to live in.³⁹²

The above said, however, does not detract from the fact that the current strategies in place in South Africa today, are not equipped as of yet, to deal with the persisting gang problem. The Bill³⁹³ and the Act³⁹⁴ do not address the nuances of the rites of passage; poverty and the historical context in which such violence and crime originally emanated.

³⁹¹ *ibid*

³⁹² Sleton, A. & Galinetti, J (2008). <http://www.cfc.org.za>

³⁹³ Bill No 49 of 2002.

³⁹⁴ Act No 121 of 1998.

CHAPTER EIGHT

CONCLUSION

Africa's tribulations are extensive. They encompass the likes of poverty; lack of employment; deficiency in infrastructure; high debt loads; war and armed conflicts; large numbers of displaced peoples; the plague of HIV/AIDS and growing disorder in some parts of the continent as traditional social structures dissolve and crime is of increasing concern to both the South Africans citizenry and its government. South Africa has one of the highest crime rates in the world. For most South Africans, particularly the poor, crime is by no means a recent phenomenon.³⁹⁵

Given the matrix of social risk factors that South Africa's children are exposed to; the current policy framework falls short of meeting the challenges posed by the risk factors. There is much to be done from a social crime prevention perspective.³⁹⁶

Haefele³⁹⁷ argued that gangsterism is rooted in socio-economic causes and unless attention is granted to structural problems of high unemployment and poor education; it will persist. Perhaps structural changes and the re-definitions of self and group identity will temporarily lessen the pull of gangsterism, however the overall structure and purpose of gangs has changed- they have become extremely organised and have taken advantage of the obvious benefits associated with globalization and South Africa's transition into the international arena.

³⁹⁵ Gallinetti, J. & Sloth-Nielsen (2004) Sloth Nielsen, Introduction..

³⁹⁶ Redpath, J (2007)

³⁹⁷ Haefele, B.(1998) p22

The hard lesson which South Africa's young gangsters teach us is that an integrated resolution to the problem of youth criminality in South Africa must engage with the rudiments of complex and creative youth identity and culture. It must be a process of human development which is ultimately concerned with re-creating a sense of belonging with a sense of a stake in society if it is to redress the impact of marginalization.

This is about re-building the social fabric that has been so decimated by our apartheid past; it is about rebuilding and cultivating family relationships; a culture of learning and teaching in schools; alternate positive sexual identities for young men; and about redressing the legacy and impact of race-based inequity throughout South African society.³⁹⁸

Due to the recent political transition in South Africa the gang phenomenon has become both sophisticated and cosmopolitan. Currently, in South Africa there is a pressing need to develop solutions for the gang problem as our youth are gravitating towards the gang's bosom. As crime rates soar and an ever increasing number of children appear in court for increasingly violent crimes, gangsterism is forever cited as the most obvious symptom. Communities have initiated their own anti-crime forums; the South African Police Services (SAPS) have established an information bureau and gang unit.

Youth are the prevailing component of gang life and as such merit and require much protection. Furthermore, they are the most important resource to our country, without whom, our future is bleak at best. Thus upon a domestic level, the Child Justice

³⁹⁸ Simpson, G, (2001) p 128.

Bill³⁹⁹ is regarded by many activists in the field of child justice, children's rights and child protection as a progressive step to offer child offenders the opportunity to assume responsibility for their behaviour, the means to receive appropriate interventions to prevent re-offending and to be treated in a fair manner; consistent with their age and their vulnerability. The Bill is an illustration of the manner in which South Africa has embraced the concept of children's rights within the overall human rights discourse and is rising to create a culture of dignity, fairness and equality for all.⁴⁰⁰

The inclusion on children's rights in the 1996 Constitution suggests that there is a dedication to ensuring that they will outlast the period of South Africa's transition to democracy. The full realization of the Child Justice Bill and the expansion of pioneering diversion programmes are dependent relative upon the resilience of the children's rights discourse. Recent South African history suggests that the introduction of reforming legislation represents no more than the end of the beginning of a long, drawn out battle for change. The decision of the activists, practitioners and researchers responsible for designing and promoting the Child Justice Bill, to continue to work together as the Child Justice Alliance after it has become law is an important and commendable one, for one thing is certain- there can be no letting up on the struggle for children's rights.⁴⁰¹

Unfortunately legislation alone will not be able to deal with the problems of gangs or youth participation therein. What is required however is a holistic approach, socio-economic development and a crime prevention programme that incorporates rehabilitation

³⁹⁹ 49 of 2002

⁴⁰⁰ Frank, C. Foreword.

⁴⁰¹ Stout b & Wood, C.(2004) in Dixon, & E. van der Spuy (eds) p135.

for those whom wish to turn away from gang activities. History has shown that the battle against gangs is also the battle of ideas and resources.⁴⁰²

However, the greatest battle South Africa faces is the prevention of its children descending into a life of crime. These children, like any other child, desire one and the same thing; love, protection and guidance from their elders. The tragedy unfolds that when their elders desert them- they seek the identical requirements- however their source is different- for they are the armed 'brothers' of the streets spreading violence and terror throughout their communities. These are our youth at risk; children who seek ganging as their rite of passage and violence as their expression. It is these youths that have falling amidst the legislative cracks; unaided.

Democracy promised to bring with it a new era in the political, social and economic arena; in reality it granted freedom to a country enslaved by racism and prejudice; though to youth at risk- much has stayed the same, for their cycles of poverty and deprivation continue, what has changed, however, is the nature and form in which it is expressed.

⁴⁰² Kinnes, I.(2000), p 1.

REFERENCES

- Allott, A.(1977) The people as law maker: Custom, practice and public opinion as sources of law in Africa and England; *Journal of African Law*, 21: 1-23 in Stout, B and Wood, C. 2004, ' *Child justice and diversion: Will children's rights outlast the transition.*
- Becker, H.S (1963) Outsiders, The Free Press; New York,
- Bekink, B. & Brand, D. 2000. Constitutional Protection of Children in: Davel, C.J *Introduction to child law in South Africa.* Cape Town, Juta.
- Bly, R. (1990) Iron John, Dorset: Element in Pinnock, D & Douglas-Hamilton, D. 1997 Gangs, Rituals & Rites of Passage. African Sun Press with the Institute of Criminology, University of Cape Town.
- Burton, P. 2007. Someone Stole my Smile: An Exploration into the cause of Youth Violence in South Africa, Centre of Justice and Crime Prevention. Monograph Series, No.3. Cape Town. November.
- Clark, J. Hall "Subculture, Culture & Class", in Hall, S & Jefferson, T.S. Jefferson, T. Resistance through Rituals: Youth Subcultures in post war Roberts Britain (Hutchinson: London) 1977.
- Cloward, R.A. & Ohlin, L.E. Delinquency and Opportunity: A theory of delinquent gangs.
- Cohen, A.K Delinquent Boys: The culture of gangs. (The Free Press: Glencoe), 1955.
- Cohen, D Circle of Life: Rituals from the Human Family Album. (Aquarian Press: London), 1991
- Connell, R.W. 1993, The Big Picture: 'Masculinities in Recent World History,' *Theory and Society*, 22, 610.
- Connell, R.W (2000) The Men and the Boys. University Of California Press, Berkley, Los Angeles.
- De Coppet, D. Understanding Rituals, (Routledge: London), 1993.
- Dowdney, LT. Children of the Drug Trade: A case Study of Organised Armed Violence in Rio de Janeiro. 2003 Viva Rio/ISER, Rio de Janeiro.
- Downes, D & Rock, P. Understanding Deviance A guide to the Sociology of Crime and Rule Breaking, Second Edition, (Clarendon Press: Oxford), 1988.

Driver, T. The Magic of Ritual, (Harper: San Francisco), 1991.

Ehlers, L. 2006. Child Justice: Comparing the South African Child justice reform process and experiences of juvenile justice reform in the United States of America. Open Society Foundation For South Africa.

Frank, C & Artz, L. 1997. Justice: in First Call: The South African Children's Budget. Cape Town: Idasa.

Frank, C. Children's involvement in gangs and violent crime; The COAV Cities Project and its implications for South Africa. Part 2: Conference Papers.

Gallinetti, J. The use of children in illicit activities: child justice and child labour meet, Community Law Centre, University of the Western Cape. *Part 2, Conference Papers*.
Gallinetti, J, Mutingh, L & Skelton, A. Child Justice Concepts in Africa, A guide to good practice, chapter two.

Gastrow, P.1988. Taking Action to Address Gang Violence in South Africa; National Crime Prevention Research-Resource Centre, 2000.

Gluckman, M. "Les Rites de Passage", Essays on the Ritual of Social Relations, ed Max Gluckman, (Manchester University Press: Manchester), 1962.

Haefele, BW, 1998, Gangsterism in the Western Cape- Who are the role players? Crime and Conflict No 14. Summer 1998. P 19-22. Centre for Military Studies: University of Stellenbosch.

Hagedorn, J.M., 1998. Frat Boys, Bossmen, Studs and Gentlemen: A Typology of Gang Masculinities in Masculinities and Violence- Research on Men and Masculinities Series: Sage Publications Inc: California. London. New Delhi.

Hanna, C.1999.Ganging Up on Girls: Young Women and Their Emerging Violence, Arizona Board of Regents. (Arizona Law Review). Document 7 of 130.

Harris, B (2001) As for Violent Crime, that's our daily bread: Vigilante Violence during South Africa's period of Transition. Violence and Transition Series, volume 1, Johannesburg: Centre for the study of Violence and Reconciliation. In Stout, B. & C. Wood 2004, 'Child justice and diversion: Will children's rights outlast the transition?' in Dixon, B. & E. van der Spuy (eds) Justice Gained? *Crime and crime Control in South Africa's transition*. Cape Town: UCT Press.

Healey, Sarah (2000). Social Control in the Western Cape: The role of gangs in a current context. In *Taking Action to Address Gang Violence in South Africa*, National Crime Prevention Research-Resource Centre.

Hewitt, J and Regoli, R. (1994) Delinquency in Society: A child-centered Approach, London. McGraw-Hill Inc. p 167.

Jefferson, T. 2001, Masculinities in the Sage Dictionary of Criminology Pages 172-172. Sage Publications: London. California. New Delhi.

Jensen, Stephen, Gangs, Politics & Dignity in Cape Town, James Currey. Oxford, The University of Chicago Press, Chicago. Wits University Press, Johannesburg.
Kinnes, I, 2002. Controlling the Problem: Published in Monograph No. 48, From Urban Street Gang to Criminal Empires: The Changing face of Gangs in the Western Cape. June. 2002.

Johnstone, G. (2002) Restorative Justice Ideals, Values, Debates. *Cullumpton: Willan in Stout, B. & C. Wood 2004, 'Child justice and diversion: Will children's rights outlast the transition?' in Dixon, B. & E. van der Spuy (eds) *Justice Gained? Crime and crime Control in South Africa's transition*. Cape Town: UCT Press.*

Kinnes, I. Gang culture in South Africa and its impact, PHD Candidate, Department of Criminology, University of Cape Town.

Kinnes, J. (2000) The future, Gangs and Society, Irvin Kinnes; Published in Monograph No 48, From urban street gangs to criminal empires: The changing face of gangs in the Western Cape.

Koch, R. & Wood, C. (2001) A new Child Justice System: Research Gap Analysis, Institute of Criminology, and University of Cape Town in association with the Child Justice Alliance.

Leonard, E.B.1982, 'Subcultural theory', in E.B Leonard, *Women, crime and society: A critique of theoretical criminology*, Longman, New York, pp117-124.

Lipsey, M (1995) What do we learn from 400 research studies on effectiveness of treatment with Juvenile Delinquents? In. McGuire (ed), *hat Works, Reducing Reoffending* London: Wiley .in Stout, B. & C. Wood 2004, 'Child justice and diversion: Will children's rights outlast the transition?' in Dixon, B. & E. van der Spuy (eds) *Justice Gained? Crime and crime Control in South Africa's transition*. Cape Town: UCT Press.

Lotter, S. The Drugs and Drug Trafficking Act 140 of 1992. Laws of South Africa, Butterworth's, in Haefele, B. Gangsterism in the Western Cape, Who are the role players? Crime and Conflict No 14. Summer 1998. Centre for Military Studies: University of Stellenbosch.

Macionis, J and Plummer (1997) Sociology: A Global Introduction, Prentice Hall. New York. P210. Agency in Society: A child-centered Approach, London. McGraw-Hill Inc. p 167.

Mahdi, L.C, Foster, and S & Little, M (eds) (1987) Between & Between: Patterns of Masculine and Feminine Initiation, Illinois, and Open Court.

Matera, D (1987) Gone with the Twilight: A story of Sophiatown, Zed Books.

McGuire, J. (1995) What works: Reducing Reoffending? London. Wiley. Stout, B. & C. Wood 2004, 'Child justice and diversion: Will children's rights outlast the transition?' in Dixon, B. & E. van der Spuy (eds) Justice Gained? Crime and crime Control in South Africa's transition. Cape Town: UCT Press.

Messerschmidt, J, 1993, Masculinities and Crime- Critique and Reconceptualization of Theory. Rowman and Littlefield Publishers Inc: Maryland. United States of America.

Messerschmidt, J, 1997, Crime as a Structured Action: Gender, Race, Class and Crime in the Making. Sage Publishers. Thousand Oaks: California. London. New Delhi.

Moore, J. & Hagedorn, Female Gangs: A Focus on Research. U.S Department of Justice, Office of Justice Programmes, Office of Juvenile Justice and Delinquency Prevention.

Morrell, R, 1998, Of Boys and Men: Masculinity and Gender in Southern African Studies. *Journal of Southern African Studies* 24, 4.

Mouton, V. (2002) Gangsterism in the Western Cape.

Muncie, J. 1999, Youth and Crime, Sage, London, pp8-13.

Neuman, W.L. (2000) Social Research Methods: Qualitative and Quantitative Approaches (4th Ed.) Boston: Allyn & Bacon.

Newburn, T. 2002, 'Young People, Crime and Youth Justice' in M. Maguire, R. Morgan & R. Reiner (eds), The Oxford handbook of criminology, 3rd ed. Oxford University Press, Oxford, p 540-549.

Palme, L. 1997 No Age of Innocence: Justice for Children, Special Protections Commentary. *Progress of Nations Special Protections Commentary*.

Pinnock, D & Douglas-Hamilton, D. 1997 Gangs, Rituals & Rites of Passage. African Sun Press with The Institute of Criminology, University of Cape Town.

Pinnock, D, Breaking the web: gangs and family structure in Cape Town in *Crime and Power in South Africa*, edited by Dennis Davis & Mara Slabbert. Cape Town: David Philip, 1985. p22-23.

Pinnock, D. 1984. The Brotherhoods: Street Gangs and State Control in Cape Town. David Philip. Cape Town. Johannesburg

Ramatlakane, L. 2003. The Western Cape Anti-Gang Workshop, Department of Community Safety. Provincial Gang Strategy.

Reed, D, The Cape, Beloved Country: South Africa: Rethinking youth programmes in South Africa, Unpublished, 1995.

Redpath, J. 2007. Parallel Lines; Policies relevant to child safety in South Africa; Centre or Justice and Crime Prevention. Monograph Series, No 2. Cape Town.

Samara, T.R.2005, 'Youth, crime and urban renewal in the Western Cape', *Journal of Southern Rican Studies*, 31(1).

Scharf, W. 2001. Draft Practical Responses to Gangs and Organised Crime in the Western Cape; *Institute of Criminology, University of Cape Town.*

Schlegel, A. Barry, H. Adolescence: An Anthropological Inquiry, (The Free Press: New York), 1991.

Shearing, C. & Kempa, M. (2001) The role of private security in transitional democracies in M. Shaw (ed) *Crime and Policing in Transitional Societies*. Seminar Report. Johannesburg. Konrsd-Adenauer-Stiftun.

Simpson, G, 2001, 'Shock troops and bandits: youth, crime and politics', in J. Steinberg (ed), *Crime Wave*, Witwatersrand University Press, Johannesburg, pp115-128.

Skelton, A. A Decade of Case Law in Child justice, *Centre For Child Law .University of Pretoria.*

Skelton, A (2002) Restorative justice as a framework for juvenile justice reform- a South African perspective, *British journal of criminology in Stout, B and. Wood, C. 2004, Child justice and diversion: Will children's rights outlast the transition?*

Sloth-Nielsen, J & Gallinetti, J. 2004. Child Justice in Africa, A Guide to Good Practice, Community Law Centre, University of the Western Cape.

Sloth-Nielsen, J. Fundamental Rights in the Constitution: Commentary & Cases. Butterworth, Durban.

Sloth-Nielsen, J. (1999a) The juvenile justice law reform process in South Africa: Can a children's rights approach carry the day? *Quinnipiac Law Review* 18: 469-89.

Sloth-Nielsen, J (2003) The Business of Child Justice, in Burchell, J & Erasmus, A(ed) *Criminal justice in a new society: essays in honour of Solly Leeman, First Published in Acta Juridica*, Cape Town,. Juta.

Smith, K. (1988) Street Gangs A Literature Study, B.Soc.Sc (Hons), unpublished, *Institute for Sociological and Demographic Research, HSRC Pretoria*

Steyn, F. 2005. Review Of South African Innovations In Diversion and Reintegration Of Youth At Risk: A study commissioned by the Criminal Justice Initiative of the Open Society Foundation of South Africa. Open Society Foundation For South Africa.

Stout, B. & C. Wood 2004, 'Child justice and diversion: Will children's rights outlast the transition?' in Dixon, B. & E. van der Spuy (eds) *Justice Gained? Crime and crime Control in South Africa's transition*. Cape Town: UCT Press, P Stout, B (2003) *Restorative Justice in South Africa: Resolving conflict*, *British Journal of Community Justice*, 1 (3): 51-62 in Stout, B and. Wood, C. 2004, 'Child justice and diversion: Will children's rights outlast the transition.

Stivers, R. Evil in Modern Myth and Ritual, (University of George Press: Georgia), 1982.

Turner, V. (1987) Betwixt and Between: the Liminal Period in Rites of Passage in (eds) L.C Mahdi, S.Foster & M Little: *Betwixt and between: Patterns of masculine and Feminine Initiation. Illinois, Open Court*.

Van Onselen, C. Studies in the Social and Economic History of the Witwatersrand (1886-1914) Volumes 1 and 2 Longman, 1982 and Steinberg, J. The Number 2004. Jonathan Ball Publishers.

Vetten, L.2000. Invisible girls and Violent Boys: gender and gangs in South Africa in Youth in apartheid South Africa. Development Update. Volume 3.No.2 July.

Viljoen, F. The African Charter on the Rights and Welfare of the Child. Chapter 12.

Ward, C.L Young people's Violent behaviour: Social Learning in context, in *Someone Stole my Smile; An exploration into the causes of Youth Violence in South Africa*, Edited by Patrick Burton, *Centre for Justice and Crime Prevention, Monograph Series, No3, Cape Town, November, 2007, p 1-3*.

Wood, C& Koch. A New Child Justice System: Research Gap Analysis. *Institute of Criminology*, University of Cape Town in Association with the Child Justice Alliance.

WEBSITES

The Child Justice Bill (As Introduced in the National Assembly as a section 75 Bill, explanatory summary of Bill published in Government Gazette No.23728 of 8 August 2002).(Minister for Justice and Constitutional Development).

<http://www.policy.org.za/pdf.childjusticebillB49.pdf>

The Child Justice Bill; Civil Society and Advocacy

Child Justice, Department of Social Development. Internet Article.<http://www.childjustice.gov.za/faq.htm>

Female Gangs: A Focus on Research. Juvenile Justice Bulletin, March 2001.

<http://www.ncrjs.gov/html/ojjdp/jbul20133/intro.html>.

Hanna, C.1999.Ganging Up on Girls: Young Women and Their Emerging Violence,

Arizona Board of Regents. (Arizona Law Review). Document 7 of 130.

<http://web.lexis-nexis.com/universe/document>

Kinnes, I. 2000, <http://www.iss.co.za/Pubs/monograph/no48Gangwarfare.html>.

Palme, L. 1997 No Age of Innocence: Justice for Children, Special Protections Commentary. Progress of Nations Special Protections Commentary.

<http://222.unicef.org/pon97/protect1.htm>

Salo, E.2001. Gangs and Sexuality on the Cape Flats:

<http://www.uct.c.za/org/agi/newslet/vol7/elaine.htm>.Salo.

Skelton, A & Gallinetti, J (2008). The Child Justice Bill; Civil Society and Advocacy; Centre for Constitutional Rights, The F W de Klerk Foundation.

<http://www.cfcf.org.za>.

Vetten, L. 2000, Invisible girls and violent boys: Gender and gangs in South Africa:

<http://www.interfund.org.za/UpdateVol13No2.htmvol13no2art1>

www.iss.co.za/projects/main.html

www.woman24.co.za/display/article/1.337

Wikipedia, the free Encyclopedia. <http://en.wikipedia.org/wiki/Young-Offender>.

Why Young People Join Gangs, Violence Prevention Institute;
<http://www.violenceinstitute.org/youngpeople.html>

ARTICLES

Taking Action to Address Gang Violence in South Africa, 2000. *National Crime Prevention Research-Resource Centre.*

The Publication of Definitions (1998) Organised Crime in South Africa, An Assessment. Published in Monograph No.28: Organised Crime in South Africa, August 1998.
Female Gangs: A Focus on Research. Juvenile Justice Bulletin, March 2001.

Understanding Gangs in South Africa, National Crime Prevention Research-Resource Centre, Briefing Paper: Literature Review, page 1.