



universität
wien

MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

**„ Children in Conflict with the Law in South Africa:
Investigating *Ubuntu* as a Viable Pathway towards Systemic Change.“**

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of
Master of Arts (MA)

Wien, 2018 / Vienna 2018

Studienkennzahl lt. Studienblatt /
Postgraduate programme code as it appears on
the student record sheet:

A 992 884

Universitätslehrgang lt. Studienblatt /
Postgraduate programme as it appears on
the student record sheet:

Master of Arts in Human Rights

Betreut von / Supervisor:

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ACKNOWLEDGEMENTS

This thesis would not have been possible without the support of the *Centre for Child Law* at the *University of Pretoria*. I particularly thank the director of the centre, Prof Ann Skelton, for her generosity and kindness from the outset of my time in South Africa. Stanley Malematja, an assistant attorney at the CCL, has also offered up a great deal of his time and expertise so as to assist me in my research. I am humbled by his commitment to the plight of the children he defends, and I thank him sincerely. Not only has he acted as translator when we met children who could only speak Xhosa, but he also contributed an invaluable perspective on the contemporary situation of South Africa.

Additionally, I am greatly indebted to Prof Manfred Novak and Georges Younes at the *University of Vienna*, who approved linking this study to the *United Nation's Global Study on Children Deprived of Liberty*. The letters of authorisation and official support opened several doors and allowed the thesis to develop into what it is.

The supervisor of this thesis, Dr Helmut Sax of the *Ludwig Boltzmann Institute for Human Rights*, deserves particular thanks. From the outset of the supervision period, he offered me generous support. It makes a great deal of difference to the whole experience of writing a thesis if one feels, as I did, that one's supervisor respects and encourages the views one has to offer.

Finally, I dedicate this thesis to all the children whose lives are reflected in its content. I have endeavoured to represent their views as faithfully and as thoroughly as I could. Listening to their stories and being welcomed into several of their homes was a humbling experience that I will not forget. I hope that in some small way, this thesis may contribute to improving the treatment of future children in conflict with the law.

Reina-Marie Loader
Vienna, August 2018

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LIST OF ABBREVIATIONS

African Charter	African Charter on the Rights and Welfare of the Child
Bisho	Bisho Child and Youth Care Centre
BOSASA	BOSASA Youth Development Centres – a division of the BOSASA multifunction group of companies
CA	Children’s Act
CCL	Centre for Child Law, University of Pretoria
CJA	Child Justice Act
CPA	Criminal Procedures Act
CRC	United Nations Convention on the Rights of the Child
CYCC	Child and Youth Care Centre
DE	Department of Education
DSD	Department of Social Development
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-Governmental Organisation
NICRO	National Institute for Crime Prevention and Reintegration of Offenders
<i>op. cit.</i>	<i>Opus citatum</i> = cited work
<i>s.v.</i>	<i>Sub verbo</i> = under the word, in the entry.
TRC	Truth and Reconciliation Commission
UN	United Nations
UNICEF	United Nations International Children’s Emergency Fund

CHAPTER ONE

INTRODUCTION – HONING THE RESEARCH EMPHASIS:

PROBLEM SETTING AND METHODOLOGY

'Social change begins with a conversation' – Margret J. Weatley

A. Research Question

The topic of my thesis focuses on a specific aspect of human rights, notably the rights of South African children in conflict with the law. First-hand observations conducted empirically over a period of eight months, will particularly inform this study so as to offer a perspective of change that could positively impact the lives of children. As will be demonstrated in subsequent chapters, this empirical research starkly reveals that children still suffer significant structural and social abuse and/or neglect – particularly when coming in conflict with the law. The question that this study therefore seeks to address emanates directly from this central observation and attempts to determine how a viable perspective of change may be achieved to address this problematic productively. A close analysis of the historical as well as the current legal and social context of South Africa will further inform the study's central goal. This focus includes considering the socio-political environment as well as the current status of South Africa as one of the most unequal and violent countries in the world. Moreover, in order to approach this background from a vantage point respectful of the South African experience, my research takes up a fundamental dimension of the South African Constitution that places emphasis on *ubuntu* as a restorative African philosophy. By combining basic research with empirically gathered information, I ultimately hope to offer an academically sound route towards solving the following central question: What, if any, are the relevant factors in applying the concept of *ubuntu* as a viable perspective of change in efforts to address neglect of South African children in conflict with the law? To this end, the human rights of the child will be addressed by holistically considering (a) the socio-political environment (b) the legal framework, (c) elements of restorative justice compared with *ubuntu*, (d) lived experiences of children in conflict with the law, as well as (e) attitudes within society.

B. Methodology

1. Grounded Theory

The theoretical impetus of my research methodology resembles, though not completely, that of ‘grounded theory’. Given the complexity of the research question, I have adapted the theory so as to be practically applicable to the South African context as well as the research intentions of the study. Similar to grounded theory, I have approached my empirical research phase without any preconceived hypothesis so as to base my findings on the views expressed by individuals I interview in the field. I did not know what the situation in South Africa would reveal and the type of issues I would encounter. The openness with which I approached my research, can thus be said to reflect aspects of ‘grounded theory’ as developed by American sociologists Glaser and Strauss who sought ways to substantiate the incorporation of the personal perspectives of interview subjects within a scientific framework.¹ Accordingly, my aim is also to validate the views of children on a topic that affects them directly. The argument that follows in the coming chapters is therefore based on manifold interactions with children narrating the experiences they lived through when confronted with the child justice system in South Africa. The contribution I offer results from the academic analysis of the highly personal and emotive views of children who experienced significant trauma in their lives. Creswell defines grounded theory as a ‘strategy of enquiry in which a researcher derives a general, abstract theory of process, action, or interaction grounded in the views of the participants in a study’.² Reducing the children participating in this study to research objects by merely presenting their views as abstract data is however not the intention of this study. My approach parts ways with any positivist interpretation of grounded theory in my eschewal of submitting my findings as a series of detached data. Instead, my methodology finds value in the presentation of personal accounts based on the principles of *ubuntu* which, as I will demonstrate, appreciates an understanding of communal realities derived through personal experience, story-telling (conversation) and

¹ Cf. B.G. Glaser and A. L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research*, London, Aldine Traction, 1967, Available from http://www.sxf.uevora.pt/wp-content/uploads/2013/03/Glaser_1967.pdf (accessed 01 August 2018).

² J.W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Approaches*, Los Angeles, Sage, 2009, p. 13 & 229.

empathetic interaction. The mode of presenting my findings, including my writing style, finds it stimulus in these aspects. The style of presentation is thus attuned to the goal, namely to present findings quantitatively and then to examine them as to the value they may hold for understanding complex human rights situations such as the one focused on in this study. That includes a consideration of *ubuntu* as a cultural mode already present in Africa. The results of such a methodology, I hope, reflect a sound academic strategy demonstrating how personal perspectives may point to a pathway leading to social change. Finally, given the multifaceted nature of this topic, my chosen approach is based on three pillars: primary empirical research, secondary basic research and analytical first-hand observation.

2. Narration and Story-Telling

Leading on from the above, the style in which I will present the views offered by children is motivated by the central force inherent in their cultural background. Called the mindset of *ubuntu*, it places importance on the power of story-telling to promote healing and constructive interpersonal interaction. The theoretical backing for such an approach will be expanded upon in Chapter Four, where I focus on the experiences of nine boys who were sentenced to mandatory detention at Bisho Child and Youth Care Centre in the Eastern Cape. The narration of their experiences will be undergirded by my own observations, those of experts working in the field as well as secondary resources on the topic.

C. Chapter Description

- Chapter Two (the first argumentative chapter) considers what change means within the South African context so as to set a clear foundation for a study that essentially seeks to promote change on both a systemic and an interpersonal dimension. Starting with a basic introduction to the current socio-political and economic situation of the country, the chapter offers a detailed reflection on the impact apartheid had on the geographical distribution of poverty, crime and social marginalisation – aspects of which still affect the majority of South Africans, including most children who come in conflict with the law. From here, the thesis calls attention to both the negative and positive dimensions of sudden change. By discussing the notions of communal trauma and its effect on the individual psychologies of the traumatised, this opening chapter further introduces the

complexity of working with children in conflict with the law. In this regard, two key factors by which social change affects individual development are discussed in relation to child offenders, viz. socio-political context and subjective experience. The chapter culminates in a review of theories of change germane to a human rights based approach to the topic.

- Chapter Three turns to a detailed discussion of the international, regional and national legal framework designed to put the best interests of the child at heart. Subsequently, I offer a historical overview of the development of the child justice system in South Africa. In this respect, restorative justice is discussed before moving on to the impact *ubuntu* has had on the understanding of law and human rights within the African context. Particular attention is rewarded to what *ubuntu* is and how it can serve as a companion to the human rights paradigm by promoting interpersonal interaction through a jurisprudence of care, kindness, solidarity and dignity.
- Chapter Four's investigation starts with specific case studies presenting the narration of the experiences of nine boys who underwent significant abuse and neglect both within the child justice system and in society generally. In this regard, the South African socio-economic context discussed in Chapter Two becomes particularly relevant for understanding the situation in its full complexity. Moreover, systemic and social attitudes towards children are problematised by highlighting how these children were failed on various levels.
- Chapter Five works toward the practical proposal of seven core elements of a new theory of change applicable to South Africa. Taking the results of the preceding investigation further, the final step is to specifically underscore the need to change attitudes, expand knowledge and develop skills so as to protect children in detention comprehensively. Concluding observations on *ubuntu* as a viable pathway towards systemic change lead to the proposals themselves.

CHAPTER TWO

CHANGE WITHIN THE SOUTH AFRICAN CONTEXT

As the introduction delineated, the current situation of South African children in conflict with the law has greatly been determined by wide-ranging and often traumatic changes that occurred in the country's past. It is undeniable that the development of impressive legal provisions has done a great deal to ensure that children are put at the forefront of human rights protection from the perspective of the law.³ The way in which young people are regarded within society however is a dimension that no legal framework has yet been able to solve – which in turn impacts the way in which children are treated when detained. Therefore, the socio-economic context in which children in conflict with the law find themselves must be factored into this study. What does this context look like?

According to a study of poverty by the World Bank, this relates to the fact that, despite the big changes that occurred in the country, South Africa is still the most unequal country in the world. Tracing economic development since the end of apartheid, the report reveals progress in the reduction of poverty immediately following the election in 1994. This suggests that the end of apartheid had the potential to impact the economic future of the country positively. However, 'the trajectory of poverty reduction has reversed between 2011 and 2015, threatening to erode some of the gains made since 1994'.⁴ The economic decline of the country continued under President Jacob Zuma to the extent that in 2017 the rating agency Moody's considered downgrading the economic stability of South Africa to junk status.⁵ Significant for this study, the World Bank also highlights that poverty has a strong 'spatial dimension', since it seems to be most concentrated in previously

³ I will expand on this aspect in greater depth in Chapter Three.

⁴ V. Sulla and P. Zikhali, *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities*, Washington D.C., World Bank Group, 2018, p. 21, Available from <http://documents.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf> (accessed 16 May 2018).

⁵ When Jacob Zuma was replaced by Cyril Ramaphosa in February 2018, Moody's placed the country's status one notch above junk, stating: 'The confirmation of South Africa's ratings reflects Moody's view that the previous weakening of South Africa's institutions will gradually reverse under a more transparent and predictable policy framework. The recovery of the country's institutions will, if sustained, gradually support a corresponding recovery in its economy, along with a stabilisation of fiscal strength.' See statement by Moody's Investor Service, released on 23 March 2018, Available from https://www.moody.com/research/Moodys-confirms-South-Africas-Baa3-rating-and-changes-the-outlook--PR_381164 (accessed 17 May 2018).

disadvantaged communities.⁶ The legacy of apartheid can thus still be observed in the poverty centres around the former homelands and city fringes, where the changes highlighted by the media did not come to pass. As will be seen in the chapters below, the World Bank conclusions match like a glove what I have found in the research for this study. Children interviewed for my study almost exclusively come from poverty-stricken areas and family situations that have deteriorated due to the strain of living in such dire conditions. Out of the 67 children I worked with, only one individual hails from a middle-class family, while not a single child is from an upper income environment.⁷ These figures suggest a clear link between poverty and children entering a cycle of crime.⁸ The World Bank further identifies children as particularly vulnerable to poverty – especially children below the age of 14. According to their 2015 figures, 66.8% of all children in the country live in poverty – thereby making it the highest age group affected. According to Statistics South Africa, the most recent Living Conditions Survey highlights that this ‘was a reality for over 13 million children living in South Africa’ in 2015.⁹ Children thus still are in dire need of change in their fate.

These statistics indicate *the importance of considering juvenile crime in the larger context* in order to propose a viable perspective on positive change in the reality faced by children in conflict with the law. It is thus necessary to understand clearly (a) what change means

⁶ Cf. Sulla and Zikhali, *op. cit.*, p. 24.

⁷ This is not to suggest that children from higher economic sectors do not commit crime. These figures simply indicate that they enter the system less frequently by coming into direct conflict with the law. It could be that they are not arrested as often or have access to better legal representation, resulting in charges being dropped. The selection of the children was random via assistance provided by the following organisations: Centre for Child Law, BOSASA, NICRO, Homestead and Khulisa. The sole criterion for participation was that the child should be or should have been in conflict with the law and detained at a facility. I focus on the experiences of children detained at Bisho Child and Youth Care Centre, where the most serious violations of the children’s human rights occurred.

⁸ This link between poverty and youth crime has been the subject of numerous academic studies (especially in the disciplines of sociology, criminology and economy). E.g.: G.R. Jarjoura, R.A. Triplett and G.P. Brinker, ‘Growing up Poor: Examining the Link between Persistent Childhood Poverty and Delinquency’, *Journal of Quantitative Criminology*, vol. 18, no. 2, 2002, pp. 158-187; J. Ludwig, G.J. Duncan and P. Hirschfield, ‘Urban Poverty and Juvenile Crime: Evidence from a Randomized Housing-Mobility Experiment’, *The Quarterly Journal of Economics*, vol. 116, no. 2, 2001, pp. 655-679; R.C. Kramer, ‘Poverty, Inequality, and Youth Violence’, *The Annals of the American Academy of Political and Social Science*, Sage Journals, 2000; J. Reiman and P. Leighton, *The Rich get Richer and the Poor get Prison: Ideology, Class and Criminal Justice*, 10th ed., New York, Routledge, 2016.

⁹ P. Lehohla, *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015*, Pretoria, Statistics South Africa, 2017, pp. 59-61.

in the whole South African context, (b) which social factors are applicable to the situation of children in conflict with the law, and (c) how a perspective on change from a human rights based vantage point is applicable to their treatment.

South Africa has often been defined by its ability to adapt to difficult situations and thus to change in both its positive and negative incarnations. The country has been internationally praised for peacefully bringing one of the most disgraceful systems in modern history to a fall. Many South Africans (interestingly, especially white South Africans) have come to identify themselves in terms of this revolutionary change. While South Africans and the world celebrated democracy's victory over apartheid, a silent injustice crept in through the back door cloaked in democracy while masking a vicious, yet highly sophisticated form of neo-apartheid that feeds on the poverty and vulnerability of many. While perfectly democratic in its rhetoric, the current system still benefits the rich – the predominantly, yet no longer exclusively, white population. In such a system, for a child born into a poor community, there remains little to no chance of benefiting from the elusive changes promised as the new democracy was ushered in. In the current climate with its multitude of socio-political challenges, many South Africans appear to have resigned themselves to the hopelessness of change (as I will document in Chapter Four). To them, it just does not seem possible. The challenges are too complicated and the optimism that was so apparent after the fall of apartheid has been replaced by an unproductive indifference induced by repeated disappointments when promised change never happened. Today, more people live in squatter camps than ever and crime is at an all-time high. However, South Africa has changed a great deal since the fall of apartheid – the good has become 'better good', while the bad has become 'better bad', as it is said. The change debate in South Africa seems in stalemate because of the lingering elusiveness of injustice and resulting pessimism. South Africa no longer has such a clear monster to fight as apartheid since the ogre is no longer the *political* system, but the *intrinsic* system according to which individuals evaluate themselves and each other.

A. Change – the Handmaiden of Social Justice or Social Destruction?

Consciousness of change is intrinsic to being human as indicated by the long history of the quest to define a theory of change. It can be traced back to ancient Greece with

philosophers such as Parmenides (c. 515- c. 445 BC) and Heraclitus (c. 535-c. 475 BC).¹⁰ An individual can never remain unaffected by the situational changes that occur in the world. One inevitably reacts, adapts and therefore changes one's behaviour as well. To further specify: the effects of the end of apartheid in South Africa unfold accordingly.

1. Opening Borders, Changing Industries

When the Nationalist Party was defeated, South Africa and the world celebrated freedom, equality and hope for a brighter future. The entire world reacted as the borders were opened and sanctions lifted. International investments flooded into the cities, transforming the face of the country in a matter of years. This change, however, also affected the *modus operandi* of a sinister force – namely transnational crime organisations that saw an opportunity open up. They capitalised while South Africa struggled to find its bearing as a recognised democracy in the international community. Illegal organisations settled undetected in areas where people, particularly the youth, were most vulnerable. Pinnock describes these changes succinctly:

Beyond South Africa's borders in the 1980s, however, indistinct forces were gathering which would add a disturbing new dimension. Democracy inadvertently was its hand-maiden [...] After the fall of apartheid in 1994, a door opened and the world entered. Through it poured political goodwill, investments, tourists and the criminal underworld. A new boom in the trade of illegal goods and services, effected by everyone from top government officials and businessmen to kids on the ghetto street corner, changed everything.¹¹

The emergence of transnational crime as a consequence of democracy is not the only element that shifted the safety of poor communities.¹² The travel and tourism industry of the country stood at USD27.3bn in 2016. This figure constitutes 9.3% of South Africa's

¹⁰ Heraclitus famously stated that 'No man can ever step into the same river twice, for it is not the same river and he is not the same man.' – a notion that was later taken up by both Plato and Aristotle. See: G.S. Kirk, 'Natural Change in Heraclitus', in *Mind*, vol. 60, no. 237, 1951, pp. 35-42.

¹¹ D. Pinnock, *Gang Town*, Cape Town, NB Publishers, 2016, loc. 1322. (The book was only available in Kindle and did not give page numbers for reference. Hence the use of location numbers instead).

¹² This goes to show that democracy as a mode of government cannot achieve anything in isolation. It needs to be accompanied by accountability, strong justice systems, no corruption and a committed attitude among all citizens to stand up for democratic principles. Cf. Chapter Five when I talk about transparency and accountability in this light.

entire gross domestic product. It is forecast to grow to 11.5% by 2027.¹³ Regarded in relation to other major industries, this figure places the tourism industry above agriculture.¹⁴ The bulk of the revenue is generated by wildlife industry. The impact tourism has had on population movements in the country and its dire effects on crime and the rights of children can be exemplified by my research in Vaalwater, a rural town in the Waterberg. The Waterberg is a secluded area, transformed since the end of apartheid in that old crop farms were modified into game lodges. This allowed not only a boom in conservation tourism, but also illegal poaching and associated crime. Since the end of apartheid however the new industry left workers without the necessary skills. They lost their employment en masse and thousands flocked to Vaalwater in search of jobs. Today there is a massive slum called Leseding on the outskirts of Vaalwater. On my research visits the extent of the social issues immediately became obvious.



Figure 1-2: Adultless environment - Leseding, Vaalwater

Hidden and cruel forms of human suffering were born – unemployment, lack of skills and homelessness that go hand in glove with the loss of any sense of community and a disregard for children’s rights. Leseding is plagued with aids, alcoholism, poverty, unemployment, lack of water and crime ranging from murder and rape to spousal abuse, theft and poaching. Its streets are an adultless space where toddlers are left to fend for themselves (Fig. 1-2). Consequently, children are often affected by crime, both as perpetrators and victims. Given that massive change in a social structure has a far-reaching, unpredictable impact, the question rises: How can apartheid effects, like youths in conflict with the law, be remedied without creating a new uncontrollable monster?

¹³ World Travel and Tourism Council, *Economic Impact 2017, South Africa*, Available from <https://www.wttc.org/-/media/files/reports/economic-impact-research/countries-017/southafrica2017.pdf> (accessed 14 May 2018).

¹⁴ Statistics South Africa, *How important is Tourism to the South African Economy?*, Available from <http://www.statssa.gov.za/?p=11030> (accessed 14 May 2018).

2. The Image of ‘Us’: District Six and the Group Areas Act

While the developments after apartheid shifted community spaces with unexpected negative consequences, the history of District Six illustrates how laws under apartheid forcefully changed the substructures of an entire community, thereby laying a foundation for the challenges children still face today. Apartheid brought about a profound shift in the social fabric of an entire society, since it involved a massive shift in the geopolitical landscape. Criminal exploitation of the poorer communities dramatically increased – not only due to the opportunities available for syndicates, but also because entire communities lost their sense of identity. Social networks that kept children away from crime were forcefully broken down by the implementation of the Group Areas Act when communities were segregated according to White, Coloured, Indian and Black. No other case in South Africa describes as vividly how instantaneous traumatic change destroys culture, security and a sense of self in one fell swoop as District Six in Cape Town¹⁵. Before its destruction in 1966, District Six was known among its inhabitants as *Kanaladorp* derived from the Malay, meaning ‘a town that helps one another’¹⁶ – and that is exactly how the community functioned. People who lived in District Six were predominantly working-class, barely surviving economically. While they were at work, many parents relied heavily on the assistance of the entire community to help raise their children. The streets of District Six became a safe space where children could play under the close observation of community elders. Barrow describes the atmosphere as ‘happy’ and ‘emotionally secure’ despite poverty and political oppression:

Children everywhere. Shouting, laughing, whistling, teasing, darting between old men’s legs, running between fast-moving buses and cars missing them by inches with perfect judgment. Poor, underfed children but cheeky, confident, happy and so emotionally secure in the bosem [*sic*] of their sordid surroundings. Everyone loved them. To them, it seemed, every adult on those busy streets was another mother, another father.¹⁷

¹⁵ Similar areas where removal also happened: Sophiatown, Fietas (both Johannesburg), Marabastad (Pretoria). Associated areas are Orlando, Soweto, Lenasia, Atteridgeville, Eersterust, Laudium, Vlakhfontein/Mamelodi. In all of these, entire communities were uprooted due to the Group Areas Act.

¹⁶ V. Bickford-Smith, *The Struggle for District Six: Past and Present*, Cape Town, Bundu, 1990, p. 36.

¹⁷ B. Barrow, in C. Breytenbach, *The Spirit of District Six*, Cape Town, Struik, 1970.

As the district was destroyed and people forcefully removed to the Cape Flats¹⁸, this complex network of community care came crumbling down. Children lost a public space that kept them in check and parents were forced to deal with all problems that came with poverty in the confines of their homes, which were cramped with little room to live in. Pinnock describes this situation as follows:

As the new housing pattern dispersed the kinship network, so the isolated family could no longer call on the resources of the extended family or the neighbourhood. The nuclear family itself became the sole focus of solidarity. This meant that problems tended to be bottled up within the immediate interpersonal context that produced them. At the same time, family relationships gathered a new intensity to compensate for the diversity of relationships previously generated through neighbours and wider kinship ties. Pressures gradually built up, which many newly nuclear families were unable to deal with. The working-class household was thus not only isolated from the outside, but also undermined from within. The main, and understandable, product of this isolation was fear – fear of neighbours, fear of unknown people, fear of gangs and fear of the strange dynamics of the new environment.¹⁹

Within this context of fear, alcoholism, drugs, violent gangs and abuse escalated out of control. As the democratic government took power, social deterioration was so widely engrained into the fabric of urban life that no solution has since been found. The Group Areas Act suddenly and severely changed a culture that previously ‘helped each other’ to survive hardship. It ended up creating an ogre that turned a society on itself. According to the *Oxford Dictionary (s.v.)*, ‘social change’ as a term originated in the 19th century and signifies an intense shift ‘in the customs, institutions, or culture of a society, especially due to ideological or technological factors’. District Six and similar areas illustrate how intense destruction or shifting of living spaces destroyed the customs of these communities, leaving them in turmoil. As I will argue in the subsequent chapters, the culture of violence and the isolation of children that we face today are consequences of these social changes forced on the majority of South Africa’s people.

3. The Image of Self: Resurfacing of Self-Deprecation

While the above illustrates the negative external implication of sudden change on the

¹⁸ Here in the Cape Flats I interviewed several children who came in conflict with the law and were deprived of their liberty at some point in their lives.

¹⁹ Cf. Pinnock, *op.cit.*, loc. 620-625.

social fabric of a society (transnational crime organisations, community breakdown), the impact of these factors on the psyche of individuals also needs to be considered for the purposes of this enquiry. In this regard, defining the process of change involves finding a ‘perfect moment’ – a moment of realisation which ignites transformation in an individual. When seeking to change an entire society however the individual aspect becomes more difficult. Lucille Meyer of Chrysalis Academy²⁰ notes for example that this ‘moment of realisation’ in the mindset of a vulnerable child is extremely fleeting:

We don’t really know what happens in the brain in times like that, but you can see it happening, a sort of instantaneous rewriting. I think it is also something you are experiencing in the heart. There is that silence then excitement. That is why it is so important to pay attention. You can see it even in the micro-facial expressions, the eyes, the growing smile and then just bursting over. These things happen at points of realisation. It is often just something we say.²¹

When, on one of my visits, I accompanied a group of socio-economically marginalised youths on a wilderness experience in Kwa-Zulu Natal, I witnessed such a ‘moment of realisation’. A Zulu girl, barely eighteen years old, told me that she does not have much, because she isn’t good. ‘White people have more things, because they are good, they are better.’ The inferiority complex thoroughly discussed within African Nationalism, the Black Consciousness Movement and post-colonial theory, manifests in the way this young person valued herself. A leading South African voice, Anton Muziwakhe Lembede, warned in 1946 how colonialism is altering the psychological mindset of the colonised:

Moral and spiritual degeneration manifests itself in such abnormal and pathological phenomena as loss of self-confidence, inferiority complex, a feeling of frustration, the worship and idolisation of [the] whitemen, foreign leaders and ideologies. All these are symptoms of a pathological state of mind ... the panacea of all these ills is National Freedom.²²

Robert Fatton similarly states that Africans ‘had come to believe that civilization meant

²⁰ Chrysalis Academy is an initiative of the Western Cape Provincial Cabinet founded in 2000 so as to respond to the high crime rate in the Western Cape, which is one of the highest among the provinces in South Africa. This is especially due to substance abuse and an active gang culture in Cape Town’s mainly disadvantaged communities.

²¹ Cf. Pinnock, *op. cit.*, loc. 4934-4943.

²² A.M. Lembede, *Freedom in our lifetime: The collected writings of Anton Muziwakhe Lembede*, Johannesburg, Skotaville, 1996, p. 92.

the ‘whitening’ of their soul and the rejection of their blackness’.²³ More than thirty years after Lembede, Steve Biko testified at the trial of his nine colleagues in the Black Consciousness movement that ‘the Black man in himself has developed a certain state of alienation. He rejects himself, precisely because he attaches the meaning White to all that is good ... you tend to begin to feel that there is something incomplete in your humanity.’²⁴ In their analysis of Robert Sobukwe’s contribution to the development of African Nationalism, Karis and Gerhart underscore Sobukwe’s call to Africans to rediscover the ‘inherent worth of their own people’. The main challenge South Africa faced according to Sobukwe, was to achieve ‘mental transformation among the masses’ via nation building.²⁵ Lembede’s original formulation of how Black people in South Africa internalised their oppression is therefore as salient in 2018 when I spoke to the Zulu girl in the wilderness as when he wrote it in 1946 and Biko re-invoked it in 1979.²⁶

Surprising as it may be, such a mentality remains endemic throughout the country. It finds its expression in the resignation of the many youths to their status as delinquents, but also in their preconceived notions of white people. This was communicated to me on a trail when members of my party of young, underprivileged people from rural communities expressed their surprise that I would opt to live with them as their equal. In a following group discussion, the Zulu girl reported that she realised she has the same value as white people and that she will never forget that. A simple conversation shifted something internally. The change that occurred within her was a change in mindset. It denoted a new reality in which she has an identity as a black young person that is just as good as her perceived impression of a white person. Although such a realisation needs nurturing, it illustrates that change can be engendered by a simple conversation based on the other person’s sense of self-worth. In the recognition of self-worth, a sense of dignity is born,

²³ R. Fatton, *Class and Nationalism in South Africa: A Study of Radicalization of Black Politics*, Doctoral dissertation. University of Notre Dame, Indiana, 1981, p. 115.

²⁴ M. Arnold, *Steve Biko: Black Consciousness in South Africa*, NY, Random House, 1979, pp. 22-23.

²⁵ T.G. Karis and G.M. Gerhart (eds.), *From protest to challenge: A documentary history of African politics in South Africa, 1882-1990, Volume 3: Challenge and violence, 1953-1964*. Auckland Park, Jacana, 2013, p. 123. See also: D. Hook, ‘Sobukwe and the Psychological’, *Psychology in Society*, Durban, 2016, Available from: http://www.scielo.org.za/scielo.php?pid=S1015-60462016000100002&script=sci_arttext&tlng=en (accessed 12 May 2018).

²⁶ Cf. Arnold *op.cit.*, pp. 22-23.

which in turn opens a door towards change.

The brief history of Leseding and District Six given above begins to explain why it is important to understand what change means in the South African context. It shows the necessity to consider social change not only as a *shift in the situation of a community*, but also as a factor that severely *impacts the lived experience* of individuals in that community. Developing practical methods to rehabilitate and reintegrate children in conflict with the law, one has to approach it from a position that recognises the social context in which their behaviour grew. The example of transnational crime illustrates that not all change is positive and that even positive change can hold negative implications.

B. Children in Conflict with the Law – From Community to Personal Experiences

In the light of the above, negotiating any form of personal and/or collective change means to consider the historical as well as contemporary reality, while extrapolating a desirable future towards which a society might be propelled. The graph below illustrates the simplified historical trajectory of young lives born to a country that experienced many positive and negative moments of change. The red section below the blue line indicates negative nodes of change that impacted their lives significantly. The green section above the line on the other hand represents positive nodes of change that improved the way children were treated. While these positive changes did of course enhance their ability to claim their rights, negative catalysts seem to be noticeably more frequent. Consequently, the continuing development resulting out of the various historical changes indicates a gradual, yet sustained decline in their situation, hence the slightly descending blue line.

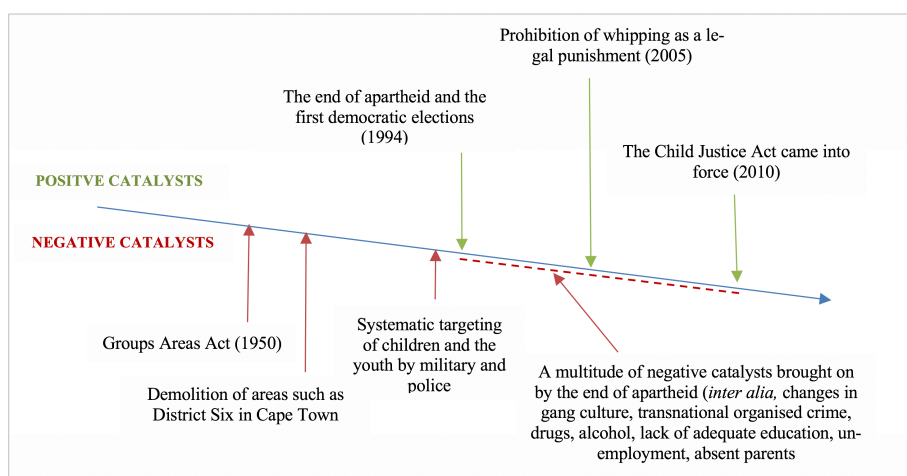


Figure 3: Trajectory of change in the lives of South African children

It is in the analysis of these nodes of change where one can begin to construct a meaningful picture explaining the situation of children in detention. What it means more concretely for human rights practice, I will argue, is that it underscores the need to develop a system that sees children in conflict with the law both as *legal personages* with rights and as *products of a complicated society* in constant flux. One should therefore not only develop norms and standards on how to deal with children when they commit crime, but one should also design mechanisms that act as a custodian of their personal development.²⁷ This is crucial in my opinion since in South Africa there exists a rather progressive system in theory, which allows for children to be sentenced to child and youth care facilities with the intention to rehabilitate. This takes the place of simply gaoling them for the duration of their sentence in juvenile sections of prisons.²⁸ When I interviewed children in detention, they repeatedly impressed upon me their hope to be rehabilitated in the effort to ultimately change their destructive behaviour (which is mostly induced by drug use and gang culture) so as to improve their prospects in life. Some children even welcomed openly being sentenced to mandatory detention as part of a diversion programme, seeing it as necessary for their journey of self-improvement. Odwa (alias), a boy sentenced to a BOSASA diversion programme with six month's mandatory detention told me:

I think if my father didn't have me arrested ... I think I would be worse by now. But this place, I am very sure when I come out on June 18th ... I will be very disciplined and a changed man. That I can assure you [...] One of my programmes I do is Metrics. It teaches you about respect and discipline and respecting others. But you must first respect yourself. Self-introspection first, then you go and respect others. You can't respect others, while you don't respect yourself.²⁹

Prior to being arrested, Odwa was involved in the satanic gang based in Johannesburg called 666. He joined at the age of eleven and quickly started engaging in anti-social behaviour. After several warnings, he was finally arrested at the age of seventeen for stealing and disseminating alcohol. The case was opened by his own father. Now that he

²⁷ In the subsequent chapters, this dimension will be unpacked by means of concrete examples I encountered in South Africa. First, these examples will serve to illustrate where the system and society have failed to support the development of the child. This will be followed by an in-depth discussion on possible ways forward and concrete recommendations.

²⁸ Chapter Three will show the impressive legal provisions that exist in South Africa to protect children.

²⁹ Interview with Odwa, Krugersdorp, 30 January 2018 (alias used for the child's protection).

is in detention, he appears to have had a moment of realisation and is making an effort to separate himself from both the gang mentality and Satanism. Although not completely successful yet, Odwa believes that detention at BOSASA helps him a great deal.

That is why I am saying, if I were outside I would be worse [...] I can say 80% of the youth outside are now in a gang, because there what you do ... people join there for money, power, all those things. But if you want to get money, if you want to be well-known, you have to sacrifice. By sacrificing you have to kill your own parents.³⁰

He openly sees his detention as a way to change and develop personally. Diversion, in short, is not a conventional form of detention, but designed to address personal growth and rehabilitation while keeping children out of the system. If they complete the programme successfully, their record is expunged, and they re-enter society with a better understanding of who they are and what they want to do in life. Although not always implemented correctly, diversion is a real alternative to formal detention, which could positively impact the lives of willing children – the degree of success depending on the commitment of each child, which can be gauged from the individual emphasis on change:

Here there are boys that don't want to change, you see, and there are boys who are trying to change. When you come, it is up to you if you want to change or if you don't want to change. Here they give you respect, they discipline you.

Odwa's hope for the future depends on his ability to develop resilience to the social factors he is exposed to in his community. According to Gisela Trommsdorff, social change and concepts of personal development are usually regarded separately in academic discourse.³¹ She maintains however that it may provide useful avenues to ensure that change does not impact destructively on the development of a society and/or child when these two concepts are considered as intrinsically linked. This is especially relevant when sudden changes in a community lead to an unexpected moment of crisis (as described in the previous section). In this regard, Trommsdorff isolates two factors that impact 'the process by which social change affects individual development'.³² On the one hand, she

³⁰ Interview with Odwa, Krugersdorp, 30 January 2018.

³¹ G. Trommsdorff, 'Effects of Social Change on Individual Development', L.J. Crockett and R. Silbereisen (eds.), *Negotiating Adolescence in Times of Social Change*, Cambridge and New York, Cambridge University Press, 2000, pp. 58-68.

³² Cf. Trommsdorff, *op. cit.*, p. 59.

suggests that contextual factors, i.e. the broader *socio-political climate* of an environment, set the course of personal development in either a positive or a negative direction. On the other hand, the *subjective experience* of change has a significant impact on an individual's development and behaviour. The former factor is particularly relevant in the South African context since, as I explained earlier, South Africa is defined by a history of traumatic changes. Before the introduction of the Group Areas Act, oppressed communities were able to protect children from the destructive change brought about by apartheid. The community acted as a *moderator* of change, which shielded children from 'an otherwise negative' development within society. But the introduction of the Group Areas Act destroyed this protective shield by destroying established community networks. Now the contextual change acted as a change *mediator*, amplifying the likelihood of children clashing with the law. Contextual changes such as those of Vaalwater and District Six either moderate or mediate the consequences of social change.³³ The success of positive moderation and prevention of negative mediation however depends on the strength of a country's institutions as well as its sense of community.

Trommsdorff also stresses the importance of the *subjective experience of change*³⁴, which is largely determined by the child's ability to cope with shifting circumstances and their potentially negative impact. Yet, as many studies indicate, children who commit crime in South Africa often do not transgress because of malicious intent, but because they suffer foetal alcohol syndrome. This is so because mothers unable to manage the hardships inflicted upon them turned to alcohol while pregnant. According to a recent study by the *Foundation for Alcohol Related Research*, seven in every hundred children in the country suffer from this syndrome – the highest in the world.³⁵ As was explained to me by Liezel Conradie, a social worker from *Homestead*³⁶, this condition impairs a child's ability to distinguish right from wrong and as a result many such children find themselves in conflict with the law.³⁷ My own research in South Africa concurred. Several of the children

³³ Cf. Trommsdorff, *op. cit.*, pp. 59-61.

³⁴ Cf. Trommsdorff, *op. cit.*, p. 63.

³⁵ Cf. Pinnock, *op. cit.*, loc. 3005-3012.

³⁶ This is an NGO in Cape Town, working preventatively with children at risk, often violent, and repeatedly in conflict with the law. Their goal is to take children out of dangerous environments and provide them with a series of programmes designed to instil a sense of responsibility and self-worth.

³⁷ Interview with Liezel Conradie, Cape Town, 18 October 2017.

I interviewed in detention and on the streets suffered from this syndrome. Usually their ability to express themselves was impaired, while they communicated either aggressively or withdrawn. All suffered from self-esteem issues, a lack of social competence and the ability to solve problems or take decisions, all requirements for effective management of change and trauma.³⁸

C. The Change Perspective – Working towards a Common Worldview

Managing change in the most productive and ethical manner is essentially what human rights work strives towards. Stachowiak notes that theories of change within the human rights paradigm entail the formalisation of processes used by practitioners to realise a common worldview. To this end, practical models need to be developed according to which one can ultimately ‘evaluate advocacy and policy change efforts’.³⁹ Human rights practitioners make certain personal assumptions as to how one should go about achieving change and approach an issue accordingly. Stachowiak argues that, when these assumptions are analysed, one can create a roadmap that could effectively manage change:

These worldviews are, in actuality, theories of change, whether or not they have been explicitly stated or documented as such. When articulated as theories of change, these strategy and belief system roadmaps can clarify expectations internally and externally, and they can facilitate more effective planning and evaluation.

Stachowiak further distinguishes between global and tactical theories.⁴⁰ The former rationalises how large-scale policy changes occur. The change resulting from global theories is often revolutionary given that radical change occurs suddenly due to violent or non-violent social action. It can also entail a process gradually building in strength over a long period of time. In this case, gradual change happens when discontent with aspects of social unevenness promotes cumulative development on a large scale. For instance, the way in which the fall of apartheid was engineered can be said to belong to a global theory

³⁸ So Trommsdorff, *op. cit.*, p. 64.

³⁹ S. Stachowiak, ‘10 Pathways for change: 10 theories to inform advocacy and policy change efforts’, *Centre for Evaluation Innovation*, 2013, p. 1, Available from <http://www.evaluationinnovation.org/publications/pathways-change-10-theories-inform-advocacy-and-policy-change-efforts> (accessed 25 March 2018).

⁴⁰ For my study, global theories are not particularly relevant, while tactical theories do carry potential.

of change since the methods involved were gradually fed by divergent pressures until a relatively quick overturning took place. Tactical theories however, are focused on specific actions within a smaller context that, in the end, act as another cog in the wheel of larger change. Here, Stachowiak isolates five core theories: Prospect Theory, Media Theory, Grassroots or Community Organisation Theory, Group Formation Theory and the Diffusion Theory (Fig. 4). These often involve changing attitudes within a society and may allow global theories to come into play. Here, addressing both cultural and individual attitudes becomes paramount for influencing community-based and region-specific change. Tactical theories are gradual in nature and require a great deal of commitment and personal capacity. The Black Consciousness Movement can for example be argued to have employed tactical theories without which apartheid could not have been toppled. Moreover, tactical theories are often interdisciplinary in nature and locally centred.⁴¹

Theory of Change	Type of Change	Process Speed
Global Theories Large Leaps Theory, Agenda-Setting Theory, Coalition Theory, Power Politics Theory, Regime Theory	Revolutionary (Radical) Structural	Instantaneous / Gradual Gradual
Tactical Theories Prospect Theory, Media Theory, Grassroots or Community Organisation Theory, Group Formation Theory, Diffusion Theory	Individual Cultural	Instantaneous / Gradual Gradual

Figure 4: Theories of Change and Types of Change

Although aspects of several tactical theories can be applied usefully, no single theory comprehensively fits the dynamics prevalent to the situation of children in conflict with the law in a South African context. The situation in South Africa that I have thus far presented requires a human rights practitioner to not only deal with the dynamics of a complicated society, but also with the diversity of individual and cultural responses. Revolutionary change has already occurred in the country, which has led to the construction of some of the best laws in the world. What is required is therefore not structural change, but change involving the attitudes of individuals across various cultural divides. From

⁴¹ D. Katz, 'Factors Affecting Social Change: A Social-Psychological Interpretation', *Journal of Social Issues*, vol. 30, no. 3, 1976, pp. 161-162, describes four types of social change: individual, revolutionary, structural, cultural. Cf. the link of change *theories* (Stachowiak) with change *types* (Katz).

this perspective, the next chapter will discuss progressive aspects of the South African legal system developed to put the best interests of the child at heart, in particular when that child has committed a crime. These laws are designed to achieve two specific outcomes: (a) to keep children out of prison by offering alternatives, and (b) to create conditions conducive to their development and rehabilitation.

As I will demonstrate in the following pages, due to certain shortcomings in both areas, these outcomes are not always achieved. What struck me most during my empirical research period is that children are not supported in their development and rehabilitation due to lack of skills and prevailing attitudes within a society that does not see the child behind the crime. Upon release, young offenders are often left to re-enter the same destructive environments that brought them to detention in the first place. This suggests that while the child is supported in theory, reality often presents a different picture. Karl Voysey of *Amandla EduFootball* echoes this when he warns against a focus on short term solutions that do not support children beyond their release back into society:

We need to think from a long-term perspective and get away from thinking short-term programmes having any influence on young people. But we also need to look at this person now, right in front of us. It is challenging for young people to go back into the environment they came from and expect them to successfully maintain an internal transition. They need to be held beyond the programme.⁴²

Sustained positive change in the behaviour of children in conflict with the law, needs a theory that includes child *reintegration*. David Abrahams, head of Social Development in the Western Cape, laments the lack of a theory focused on individual transformation:

What we need, but do not yet have [...] is a secular theory of personal transformation. A template for youth programme development [...] What changes a mindset? We don't know how to measure it. We don't know how it works. How do we find the keys of interior transformation?⁴³

Indeed, 'interior transformation' as a concept of change is methodologically elusive. What is however clear from the exploratory discussion of what change means in the South

⁴² Cf. Pinnock, *op. cit.*, location 4890-4896.

⁴³ Cf. Pinnock, *op. cit.*, location 4949-4957.

African context, is that solutions are required that value the transformative interplay between *community* and *individual* responsibility, while simultaneously promoting the rule of law and good governance in an overall system. A theory of change thus needs to be developed that would allow these three elements (individual, community, system) to function on all counts. If this equilibrium can be achieved, I will contend, sustainable mechanisms can be established that not only lift children out of a cycle of crime, but can also draw an entire society from the cusp of apathy. To this effect, the following chapter will discuss the current legal framework, particularly in relation to its restorative aspects deriving from a South African cultural worldview called *ubuntu*.

CHAPTER THREE

THE SOUTH AFRICAN LEGAL FRAMEWORK, HUMAN RIGHTS AND *UBUNTU*

A. The International and Regional Legal Framework

With the formulation of the *Geneva Declaration of the Rights of the Child* in 1924, the League of Nations highlighted the human responsibility to protect the child first and foremost. It stresses the fact that ‘mankind owes to the child the best it has to give’.⁴⁴ It also points to the necessity to provide children with the ability to earn a living while being protected from exploitation. Over half a century later, the Preamble of the *UN Convention on the Rights of the Child* (1989, CRC) similarly recognised that in order for a child’s identity to develop ‘fully and harmoniously’, he/she ‘should grow up in a family environment, in an atmosphere of happiness, love and understanding.’ For this to occur, the convention acknowledges that the traditional and cultural values with which a child grows up should be considered, while recognising the ‘importance of international co-operation for improving the living conditions of children in every country, in particular the developing countries’.⁴⁵ The Convention also discusses torture and the detention of children in the same article (Article 37), thereby not only highlighting that the dignity and needs of the child should be respected at all times, but also suggesting that the two concepts are linked.⁴⁶ Crucial to the protection of the child, Article 19(1) of the CRC states that in addition to protecting a child from torture, their protection from ‘all forms of violence’ should be ensured, which includes corporal punishment.⁴⁷ Concerned about the extent of violence still committed against the child, the CRC Committee emphasises this dimension in its General Comment No. 13 (2011).⁴⁸ What is more, Article 37(b) of the CRC specifi-

⁴⁴ League of Nations, *The Declaration of Geneva*, 1924, Available from: https://www.unicef.org/vietnam/01_-_Declaration_of_Geneva_1924.PDF (accessed 30 May 2018).

⁴⁵ United Nations, ‘UN Convention on the Rights of the Child’, cited in A. Bisset, *International Human Rights Documents*, 10th Edition, Oxford, Oxford University Press, 2016, pp. 95-96.

⁴⁶ Cf. CRC *op. cit.*, Article 37.

⁴⁷ Cf. CRC *op. cit.*, Article 19(1): Children should be protected from ‘all forms of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse...’

⁴⁸ Cf. UN Committee on the Rights of the Child, *General Comment No. 13 – The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, Available from https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 (11 August 2018). This will become particularly relevant in Chapter Four.

cally states that the deprivation of a child's liberty 'shall be in conformity with the law and shall only be used as a measure of last resort and for the shortest appropriate period of time'.⁴⁹ This idea of detention being a 'measure of last resort' forms a golden thread through several other international, regional and national standards related to the dignity of children detained.⁵⁰ As stated by the UN Committee on the Rights of the Child, the best interests principle upon which the CRC is based means moving away from 'traditional objectives of criminal justice' (i.e. repression or retribution), towards 'rehabilitation and restorative justice objectives'.⁵¹ Furthermore, Article 39 of the CRC is also often linked to children in conflict with the law, since it obliges states to help child victims of torture, ill-treatment, abuse and exploitation to recover and reintegrate into their communities. In this regard, detention is once more linked to concepts of torture and ill-treatment in a very specific way. The UN Committee on the Rights of the Child has 'made it clear that children who have been involved in crime should be considered as victims of exploitation and are entitled to the protection of Article 39.'⁵²

Covering an area with several so-called developing countries, the *African Charter on the Rights and Welfare of the Child* (1990) further specifies that while in care of the child, all state parties to the Charter should 'take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment

⁴⁹ Cf. CRC *op. cit.*, Article 37 paragraph (b).

⁵⁰ Other international documents *ad rem* to children in conflict with the law: *UN Guidelines for the Prevention of Juvenile Delinquency* (Riyadh Guidelines, 1990); *UN Standard Minimum Rules on the Administration of Juvenile Justice* (Beijing Rules, 1985); *UN Rules for the Protection of Juveniles Deprived of their Liberty* (Havana Rules, 1990); *Vienna Guidelines for Action on Children in the Criminal Justice System* (1997); *International Covenant on Civil and Political Rights* (ICCPR, 1966).

⁵¹ Cf. UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14, Available from

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 (11 August 2018).

⁵² R. Harvey and A. Lloyd, 'Youth Justice in Action: Campaign Report', *Youth Justice in Action*, 2006, p. 12. See also: UN Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, 25 April 2007, UN Doc, CRC/C/GC/10, Available from <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> (accessed 21 June 2018). For the purposes of this study the notion of the 'child offender as victim' forms a central point of interest particularly given the historical, social and economic factors at play in South Africa.

including sexual abuse'.⁵³ Article 17 of the *African Charter* stipulates that a child accused or found guilty of a crime has the right to 'special treatment in a manner consistent with the child's sense of dignity and worth'. Particularly interesting is that this article also notes that the treatment of a child in conflict with the law should *reinforce* 'the child's respect of human rights and fundamental freedoms of others.' This indicates the state's responsibility to entrench human rights principles in children's upbringing in its care. Article 17 (2a) of the *Charter* once more clearly stresses that a state should ensure that 'no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment.'⁵⁴

These obligations take on a particular significance when confronted with children in conflict with the law. How is one to reconcile having the best interests of the child at heart, while also honouring the equally important rights of victims and general society? Moreover, conventional ideas of what constitutes punishment often seem at odds with creating an 'atmosphere of happiness, love and understanding'. This becomes even more problematic when that child comes in contact with law enforcement *methods* which result in neglect, isolation and abuse within the system. Moreover, detention can stunt the development of children, since they are deliberately removed from society – an action that impacts education and the ability to relate to others. The Association for the Prevention of Torture also notes the effect of detention on well-being and development:

Detention rarely responds to children's individual characteristics and specific needs, including the need for appropriate education, contact with family and the wider community, sport and recreation. Contrarily, it often intensifies children's vulnerability to discrimination, abuse, violence, poor living conditions, inadequate health care and nutrition.⁵⁵

Additionally, not having 'contact with family and wider community' severely compromises a child's very ability to experience his/her own culture. In fact, detention could

⁵³ African Commission on Human and People's Rights, *The African Charter on the Rights and Welfare of the Child*, 1990, Available from <http://www.achpr.org/instruments/child/> (accessed 22 Feb. 2017).

⁵⁴ Cf. 'The African Charter on the Rights and Welfare of the Child', *op. cit.* Note: Chapter Four will particularly discuss how the treatment of South African child offenders in several instances constitutes especially inhuman or degrading treatment or punishment, but also in some cases torture.

⁵⁵ Cf. Association for the Prevention of Torture, *Detention Focus (Children)*, Available from https://www.apt.ch/detention-focus/en/vulnerable_groups/5/ (accessed 18 June 2018).

even forcibly *replace* a child's culture by an 'artificial prison culture' that can have serious detrimental effects on the options available to a child later on in life. To complicate this even further, the *African Charter* also emphasises the fact that cultural heritage, historical background and the values of African civilisation should 'inspire and characterise' any 'reflection on the concept of the rights and welfare of the child' – a dimension that is very rarely considered when children are detained and imprisoned. Moreover, children who are detained automatically become children at risk, since there is a significant danger that they not only fall victim to gangsterism while detained, but also suffer directly at the hands of their caretakers and/or fellow inmates.

B. The National Legal Framework

International and regional standards clearly formulate the rights of child detainees as an obligation of states. From this perspective, the development of the South African child justice system is particularly fascinating. On one hand, it incorporates both international and regional provisions in the effort to respect the various cultural sensibilities prevalent in the country. On the other hand, it deliberately seeks to address contrasting obligations of protecting detained children and ensuring the security of citizens from young offenders. Most important, it is a system that organically grew out of a moment in history when legislators were provided an opportunity to construct newly an entire legal system based on respecting human dignity and freedoms. From an international human rights perspective, this was an exciting prospect – particularly because, since the end of the Cold War in 1989, the human rights agenda was given a new breath and almost overnight became a relevant option on the international stage. The events in South Africa were a real opportunity to demonstrate the merits of a human rights based approach to legislation.

The result is nearly perfect. It would be difficult to deny that the South African legal system (particularly the Constitution) achieved its goal to promote human rights. Yet the country's journey towards its current child justice system started much earlier. A painful road, the South African legal history nevertheless provides ample evidence of the impact legal reforms based on the rule of law, democracy and human rights have on the fundamental freedoms of a detained child. Fig. 5 sets out milestones reached in the international, regional and national development of its legal system over the last century.

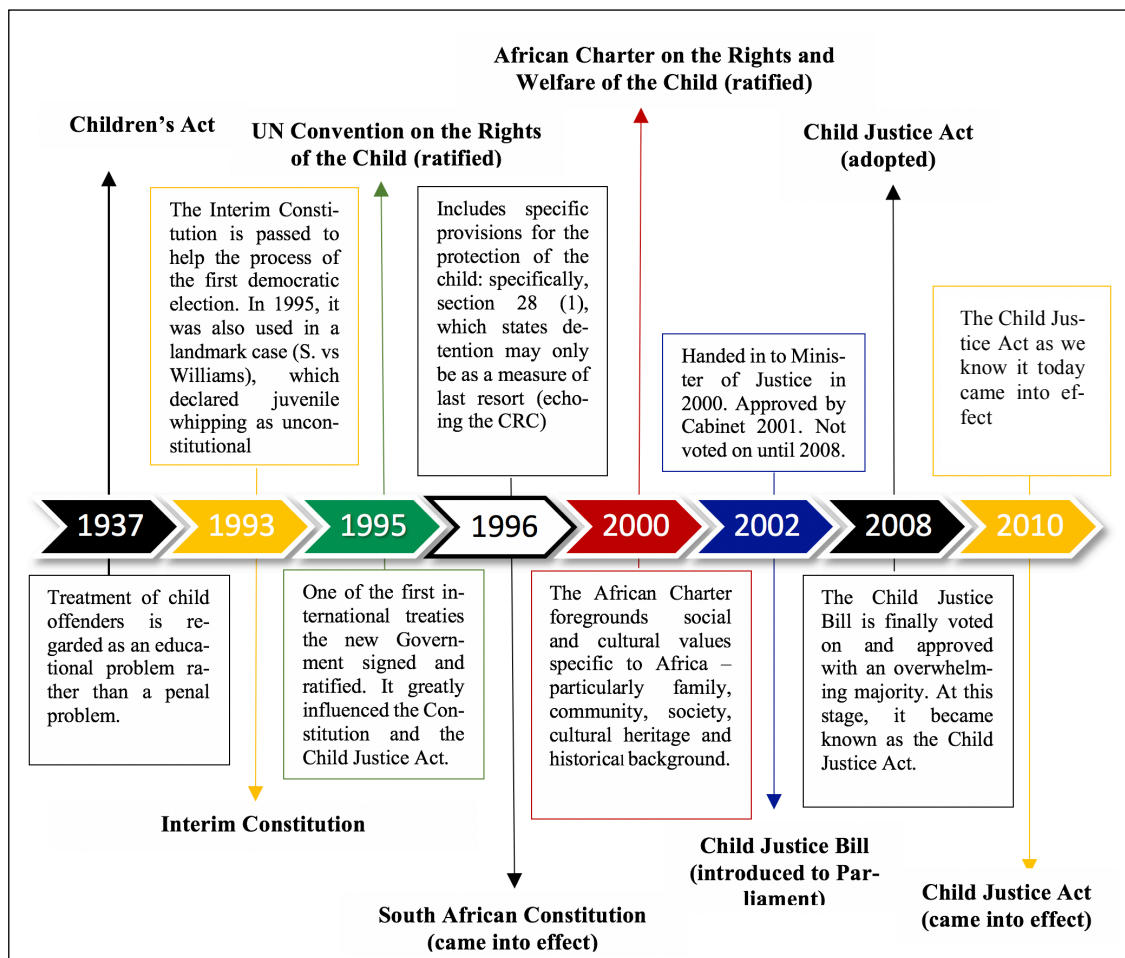


Figure 5: Milestone developments in the SA Child Justice System 1937-2018

In 1934, the *Young Offenders Bill* first suggested, under significant resistance, that children should be taken out of normal criminal procedures and educated while in detention. This bill was never adopted, yet some ideas can be found in the *Children's Act* (1937), which stipulated that the issue of children in conflict with the law should be seen as an educational challenge, rather than a penal one.⁵⁶ During apartheid however, all positive efforts to improve juvenile justice were abandoned as young people came under specific attack by the regime. The use of whipping was widely applied as a punishment by the court. It was so widespread that between 1940 and 1957 the annual sentencing of children to a punishment of whipping increased from 1,864 to 18,442.⁵⁷ It was not until 1995, after

⁵⁶ A. Skelton, 'Freedom in the Making' in F. Zimring (et al), *Juvenile Justice in Global Perspective*, New York, NYU Press, 2015, p. 338.

⁵⁷ Cf. Skelton (2015), *op. cit.*, p. 340.

a long process of legal reform and social change, that whipping was declared unconstitutional.⁵⁸ As the new Constitution came into force, the juvenile justice system sought to underline restorative elements inspired by the principles of the African cultural philosophy of *ubuntu*.⁵⁹

These efforts ultimately resulted in the passing of the *Child Justice Act* in 2008 (CJA).⁶⁰ It is an impressive legal provision that has the best interests of both the child and larger society at heart. In this regard, the *Act* endeavours particularly to ‘expand and entrench the principles of restorative justice in the criminal justice system for children in conflict with the law, while ensuring their responsibility and accountability for the crimes committed’.⁶¹ In fact, in its distinctive Preamble, it is clear that restorative justice is the driving force behind the central intention of the CJA to divert children away from the criminal justice system. Given the unique socio-political situation of the country, the Act further makes a particular effort to recognise the country’s turbulent past⁶² while also acknowledging the current challenges it is facing. It specifically mentions the country’s struggle with an extremely high crime rate.⁶³ The fact that such a statement made its way into the preamble can be attributed to the difficulty legislators faced in finding public and political support for its restorative foundation.⁶⁴ Nevertheless, it emphasises that precisely due to the ‘the realities of crime in the country and the need to be proactive in crime prevention’ it is crucial to place ‘increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for reoffending.’

The *Child Justice Act* thus negotiates directly with the historical and contemporary realities of South Africa. The following section of the chapter will build on this by considering

⁵⁸ Cf. Skelton (2015), *op. cit.*, p. 347.

⁵⁹ The following two sections of this chapter will expand on restorative justice (section C) and *ubuntu* (section D) within the framework of the child justice system.

⁶⁰ Cf. Skelton (2015), *op. cit.*, pp. 351-354. The *Child Justice Act* will be discussed later in this chapter.

⁶¹ Cf. *Child Justice Act 75 of 2008*, South Africa, Available from: http://www.justice.gov.za/legislation/acts/2008-075_childjustice.pdf (accessed 24 February 2018).

⁶² Cf. the Preamble of the *Child Justice Act*, *op. cit.*: ‘Recognising that before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children, and also that some children, as a result of circumstances in which they find themselves, have come in conflict with the law.’

⁶³ Cf. the Preamble of the *Child Justice Act*, *op. cit.*

⁶⁴ I will return to the historical reasons for this obstacle in the following section of this chapter, which sets out the historical development and particularities of the South African child justice system.

the *historical developments* and *cultural influences* out of which the child justice system developed. This leads directly on from the previous chapter that reflected on what change means within the *overall South African context*. A clear understanding of all three these dimensions will prepare a sound theoretical foundation from where to investigate in subsequent chapters the contemporary situation as it relates to (a) societal attitudes, (b) systemic challenges and (c) the views of young offenders I encountered during my empirical research in South Africa.

C. Legal Protection of Children in Conflict with the Law: A Historical Overview

It has been widely documented that enforcement measures during the apartheid regime systematically abused the rights of children along racial lines. Children were often deliberately separated from their families, arbitrarily arrested, detained, beaten and sometimes even killed during police interrogations. When student disobedience sparked the state of emergency in 1986, the few fundamental rights that black youths still had were systematically infringed upon by the governmental security forces, who launched an outright attack not only on students, but also on children as young as seven. Writing in 1989, Falk commends the young people of the country for effectively carrying ‘the main burden of resistance in South Africa’ ever since the 1976 Soweto uprising:

What is most disturbing and quite unprecedented about this pattern of reaction is for the government of South Africa to identify children of its own society as an enemy of the state, to be intimidated if possible, coerced, even killed, if necessary. What Pretoria has effectively done in recent years is to declare war against African children living in townships throughout the country.⁶⁵

The South African History Archive highlights that, as the state of emergency took effect in 1986, the majority of injured patients that entered emergency rooms across the country were between 14 and 18 years old – thereby clearly indicating that security forces were targeting children specifically. The number of children arrested and detained similarly reflected the growing brutality of the state in the face of youth resistance:

Increasingly, in the 1980s, more and more student leaders, activists and children of a very young age were detained without access to lawyers or their parents. Once in

⁶⁵ R. Falk, ‘Targeting the Children of South Africa: A New Crime of State’, *African Journal of International and Corporative Law*, vol. 1, no. 1, 1989, p. 14.

detention, they were extremely vulnerable and had little protection against police brutality. By 1986 it was estimated that about eight thousand detainees were below the age of eighteen, many of them in their early teens, but some as young as seven to ten years old. Children were subjected to the same conditions in detention as adults. They were often tortured during interrogation and were held for long periods of time.⁶⁶

In her article authored during the final years of apartheid, Fourie notes that one would most likely never know exactly how many children were detained during the height of this period as the government deliberately restricted access to statistics. Some acknowledgements were however made:

In April 1987, Minister of Law and Order Adriaan Vlok acknowledged that 1,424 children were being detained without trial under the emergency regulations. However, the government did not include in these figures the number of children that had been held for periods less than thirty days, or the number of children arrested on petty criminal charges associated with the unrest. Those acknowledged as detained without trial included girls aged twelve and thirteen years old.⁶⁷

Unsurprisingly, these figures were in actual fact much higher than the minister acknowledged. Mosikatsana provides an estimate, revealing that 312 children were shot dead by the police and 1,000 were severely wounded between 1984 and 1986. A further 11,000 children were not only detained, but subsequently also tortured for information. As many as 18,000 were arrested on suspicion of political activism, while a staggering 173,000 were detained in police cells under the justification that they were ‘awaiting trial’.⁶⁸ Falk also notes that although ‘the notion of child extends to the age of 18, many of the South African children targeted by the police were far younger, frequently as young as 11 and even younger on occasion.’⁶⁹ These figures further underscore the sheer extent to which the government focused their attention on children during apartheid. Countless children were jailed as political prisoners in penitentiaries across the country (including Robben Island) for allegedly resisting state authority. These children, as mentioned above, were

⁶⁶ South African History Archive, *The Future is Ours: Commemorating Youth in the Struggle – Child Detention*, Available from http://saha.org.za/youth/children_in_detention.htm (accessed 27 May 2018).

⁶⁷ E. Fourie, ‘The UN Convention on the Rights of the Child and the Crisis for Children in South Africa: Apartheid and Detention’, *Human Rights Quarterly*, vol. 12, no. 1, 1990, p. 110.

⁶⁸ T.L. Mosikatsana, ‘Children’s Rights and Family Autonomy in the South African Context: A Comment on Children’s Rights Under the New Constitution’, *Michigan Journal of Race and Law*, vol. 3, no. 2, 1998, p. 341.

⁶⁹ Cf. Falk, *op. cit.*, p. 13.

often held without trial and rarely given any form of legal representation throughout their time in custody.⁷⁰ Additionally, children were exposed to sentences that included whipping and long-term imprisonment that also enforced hard labour.⁷¹ Skelton recalls what she witnessed as a prosecutor during this period:

I saw many children appear in court, arrested and badly beaten up by the police, bitten by police dogs with their wounds still open [...] they were often very young, being detained without trial and kept in police cells ...⁷²

Such treatment of children was largely made possible by vague legal provisions such as the 1963 *General Law Amendment Act, Number 37* (also known as the *90-Day Act*). This particular Act was retroactively pushed through Parliament in order to detain high ranking members of the ANC without granting *habeas corpus*. Vassen notes that the wording of this Act gave the security forces (or the Special Branch as they were called), ‘the authority to arrest anyone they suspected of being engaged or involved in any act against the State and to hold them incommunicado for 90-days at a time’.⁷³ As this timeframe proved unworkable, the Act was later replaced, first by the *180-Day Detention Act (the Criminal Procedure Amendment Act, Number 96, 1965)* and then by the *Terrorism Act, Number 83* in 1967. The introduction of the latter permitted the state to detain any suspect for as long as it deemed necessary.⁷⁴

Since the *Terrorism Act* did not specify age restrictions, children also found themselves held under its wide-ranging orbit. Furthermore, in addition to not being granted adequate legal representation, arrested children were denied any possibility to report abuse or challenge the validity of their detention throughout this period. The legal process resulted in

⁷⁰ A. Skelton, ‘Juvenile Justice Reform: Children’s Rights and Responsibilities versus Crime Control’, C.J. Davel, *Children’s Rights in a Transitional Society*, Pretoria, Protea Boekhuis, 1999, p.89.

⁷¹ Penal Reform International, *Juvenile Justice in Africa, South Asia and the Caribbean: A Review of the Literature prepared for Penal Reform International*, March 1999.

⁷² World’s Children’s Prize Foundation, ‘Ane Skelton’ *Globe Magazine*, 2012, Available from: http://issuu.com/wcprc/docs/2012_90-109_eng/1?e=1438407/10747187 (accessed 20 June 2018). See also: J. Becker, *Campaigning for Children: Strategies for Advancing Children’s Rights*, California, Stanford University Press, 2017, loc. 682.

⁷³ R. Vassen, ‘Detentions without Trial during the Apartheid Era’, *South Africa: Overcoming Apartheid, Building Democracy*, Available from: <http://overcomingapartheid.msu.edu/sidebar.php?id=65-258-9&page=1> (accessed 31 May 2018).

⁷⁴ Cf. Vassen, *op. cit.*

the forcible separation of children from their families, causing thousands to end up on the streets where they were further victimised by the police, the military and the public. Surviving the streets as a young person resulted in children readily coming in conflict with state forces – the dynamic of which inevitably led to their frequent detention. The interpretation of what ‘aggression’ actually entailed was left to the discretion of individual state officials and thus often abused. Any action, however great or small, deemed an aggression towards the state was thus punishable by law. This legal loophole brought on by vague formulation and abuse of power led to a situation where children were arrested in alarming numbers. It was not uncommon during those years for example that a mere sketch by a child depicting his/her abuse by the state could be regarded as a deliberate ‘act of aggression’ and punishable by a jail sentence.⁷⁵

The above makes clear that at this point in history there were no legal provisions to protect children from harm, since they were seen as a threat. In fact, as Sloth-Nielsen points out, even as apartheid was starting to topple, separate legislation for children in conflict with the law still did not exist. This resulted in children being treated as adults with little to no consideration of their age or the severity of their crime.⁷⁶ Due to public pressure driven primarily by NGOs, human rights lawyers and detainee support groups, the number of children imprisoned for their political activism was starting to decrease by the end of the 1980s. Yet, numerous children still found themselves in the criminal justice system – not because of political activism, but due to the socio-economic conditions they were faced with throughout apartheid:

There was no strategy to ensure that these youngsters were treated humanely and with adherence to just principles [...] Because of the focus on the struggle to achieve basic human rights in South Africa, the call for a fair and equitable child justice system emerged somewhat later than in many comparable countries. The first intensive calls for such reforms in the early 1990s emanated from a group of non-governmental organisations (NGOs) who went into courts, police cells, and prisons to provide

⁷⁵ See a detailed discussion in Chapter Four, which expands on this phenomenon as it is still apparent in contemporary South Africa. See also: C. Williams, ‘Draw and Tell: Street Children in Apartheid South Africa’, *State Crime*, 2012, Available from: <http://www.statecrime.org/testimonyproject/drawandtell> (accessed 31 May 2018).

⁷⁶ J. Sloth-Nielsen, ‘The Juvenile Justice Law Reform Process in South Africa: Can a Children’s Rights Approach Carry the Day?’, *Quinnipiac Law Review*, 18/469, 1999, pp. 369-370.

assistance to juveniles awaiting trial.⁷⁷

1992 proved to be a crucial year for the development of the child justice system for several reasons. Firstly, NGOs started negotiating with prosecutors to divert children from the justice system towards restorative developmental programmes. The National Institute for Crime Prevention and Reintegration of Offenders (NICRO) took the lead by negotiating with courts despite the lack of enabling legislation. In 1992 they initiated exploratory programmes with young offenders. By the following year the organisation could publish a booklet outlining what ‘diversion’ entailed within the restorative paradigm. NICRO stressed that the South African justice system at the time was based on an outdated premise that ‘arrest, trial and conviction or pardon’ is the only legitimate ‘recourse for criminal and social justice’.⁷⁸ Muntingh and Shapiro argue that there ‘are other ways in which to treat offenders and their victims which will serve them and society in a more constructive way’.⁷⁹ This however requires a committed move away from *retributive* justice where levels of guilt and punishment are determined via an adversary relationship between state and offender towards a *restorative* system that sees non-judicial dialogue between victim and offender as a central factor for reconciliation.⁸⁰ In the latter system, the realisation of justice is ultimately measured according to whether or not ‘responsibilities are assumed, needs met and relationships healed’.⁸¹

This view on justice strongly reflects the theories developed since the 1970s by the American criminologist, Howard Zehr who is generally regarded as the father of restorative justice. In *The Little Book of Restorative Justice*, Zehr defines the concept as ‘a process to involve, as far as possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things

⁷⁷ A. Skelton and H. Potgieter, ‘Juvenile Justice in South Africa’, J.A. Winterdyk, *Juvenile Justice Systems: International Perspectives*, 2nd, Toronto, Canadian Scholars’ Press, 2002, p. 479.

⁷⁸ L. Muntingh and R. Shapiro, *Diversion: An Introduction to Diversion from the Criminal Justice System*, Cape Town, NICRO, 1993, p. 5.

⁷⁹ Cf. Muntingh and Shapiro, *op. cit.*, p. 5.

⁸⁰ The following chapter will expand on this aspect by discussing an empirically observed return to an adverse relationship with young offenders, not so much on the level of the law as on the level of societal attitudes. In this regard, there seems to be a return to valuing punishment over restoration.

⁸¹ Cf. Muntingh and Shapiro, *op. cit.*, p. 8.

as right as possible.⁸² The function of restorative justice is thus to at least:⁸³

- address the harms and needs of victims,
- hold offenders accountable to put right those harms and
- involve the victim, offenders and community throughout the process.

In another canonical text entitled *Changing Lenses* (1990), Zehr further suggests that society's perspective on what constitutes justice depends heavily on the type of 'lens' it chooses to look through (an idea that holds great potential in the quest to develop a theory of change from a restorative perspective). To achieve a common, yet alternative vision therefore a society needs to change the type of lens with which it sees and judges the world.⁸⁴ The conventional *retributive* lens notably sees crime not as an offence against society and therefore in need of prevention, but as an offence against the state and therefore in need of being chastised. The *restorative* lens on the other hand treats crime as a 'violation of people and relationships' that can be restored:

It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.⁸⁵

In essence therefore, diversion and restorative justice as a whole seek to elevate a society by empowering both victim and offender within their communitarian context.⁸⁶ Retributive justice on the other hand reflects a system that is based on one side 'winning' and the other 'losing' – which is ultimately not the desirable outcome if reconciliation and transformation is the goal. NICRO's contribution in 1992 was therefore to set the ball in motion for the development of a system that seeks to divert child offenders away from prison towards programmes that restores their relationship with both the victim and the community. This is primarily achieved through acknowledging responsibility, making amends for their actions and taking steps towards self-improvement. As Chapter Five will show, there is still significant work to be done, yet this development initiated by civil society fundamentally improved the situation of children in conflict with the law.

⁸² H. Zehr, *The Little Book of Restorative Justice*, New York, Good Books, 2014, p. 23.

⁸³ Cf. Zehr (2014), *op. cit.*, p. 17.

⁸⁴ H. Zehr, *Changing Lenses: A New Focus for Crime and Justice*, Scottsdale, Herald, 1990, pp. 179-180.

⁸⁵ Cf. Zehr, *op. cit.*, p. 181.

⁸⁶ Here one can already see the first influences of *ubuntu* – which will be discussed in greater detail later on in this chapter.

The second factor that made 1992 such a crucial year was prompted by the tragic death of Neville Snyman. Neville was a 13-year-old boy from Robertson, who was arrested with a group of friends for breaking into a shop. Their crime: stealing some sweets, crisps and cooldrinks. Since his mother was unable to get time off work to attend his court hearing, the magistrate denied Neville's release and ordered him to be detained with other young offenders all under the age of twenty-one. Here, Neville was brutally raped by his fellow cellmates and subsequently beaten to death. Skelton called the death of Neville Snyman a 'watershed moment for the movement towards reform of South Africa's juvenile justice system' since it ignited a period of public outrage and a push for reform. Prior to this moment efforts by NGOs to change the situation of pre-trial conditions garnered no results.⁸⁷ The overwhelming public outcry that accompanied Neville's death, forced the government to take action by establishing a national working committee on children in detention.⁸⁸ This was accompanied by several targeted campaigns designed by NGOs to bring the issue to even more public attention. For instance, Lawyers for Human Rights ran a campaign at the end of 1992 entitled 'Free a Child for Christmas'. This campaign was meticulously designed to elicit sympathy by means of a series of personal stories of young children – touching the hearts and minds of many a South African. Their efforts were rewarded with the release of 260 children by Christmas Day that year.⁸⁹ Concurrently, the Children's Rights Research and Advocacy Project of the Community Law Centre (University of the Western Cape), released a report called 'Justice for the Children: No Child should be Caged'. It insisted on (a) the reform of the juvenile justice system, (b) humane treatment of children in conflict with the law, (c) diversion of minor offences away from the criminal justice system and (d) family group conferencing. Crucially also, it demanded (e) 'a system that humanised rather than brutalised young offenders'⁹⁰.

⁸⁷ A. Skelton, 'Reforming the Juvenile Justice System in South Africa: Policy, Law Reform and Parallel Developments', Visiting Expert Paper of the 136th International Training Course, *Resource Material Series No. 75*, Japan, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, p. 41, Available from http://www.unafei.or.jp/english/pdf/RS_No75/No75_09VE_Skelton.pdf (accessed 14 June 2018).

⁸⁸ A. Skelton, 'Freedom in the Making', F. Zimring (et al), *Juvenile Justice in Global Perspective*, NYU Press: New York, 2015, p. 344.

⁸⁹ Cf. Skelton (2015), *op.cit.*, p. 344.

⁹⁰ South African Law Commission, *Juvenile Justice*, Discussion Paper 79, Project 106, 1999, pp. 11-12. See also: Juvenile Justice Drafting Consultancy, *Juvenile justice: Proposals for policy and legislative change*, Cape Town, Alliers Printers, 1994.

Significantly, these campaigns were also greatly assisted by sympathetic media, which in turn moulded public opinion in favour of reform.⁹¹ Although numbers of children in pre-trial detention did increase again the following year, they did manage to raise the profile of the issue, which might also account (amongst other things) for Nelson Mandela making child justice a central aspect of his government's policy when he took office in 1994. In his inaugural State of the Nation address to Parliament, Mandela repeatedly highlighted the importance of creating a 'people-centred society' which necessitates the development of a culture grounded in political liberties and human rights.⁹² Evoking the memory of the Sharpeville massacre, where several children lost their lives, the president stressed the urgency of addressing the 'plight of children' in the country – particularly those who find themselves in detention:

I would now like to say that the Government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention in prison. The basic principle from which we will proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders.⁹³

Mandela's intention to subscribe to international standards was therefore already clear in his choice of language. The following year, he put deed to word when the CRC became the first international treaty the post-apartheid government ratified.⁹⁴ Due to Mandela's personal interest in improving the conditions for children in South African prisons as well as the work done by NGOs, support for reforms became highly popular among politicians across all parties. Hamilton notes that as a result, the importance of prioritising children's rights immediately following the 1994 elections also received blanket support by the public. Passing new legislation through Parliament followed without difficulty and within the

⁹¹ C. Hamilton, 'South Africa: The fragility of the children's rights agenda', *UNICEF: Diversion and Alternatives to Detention*, Available from https://www.unicef.org/tdad/index_56499.html (accessed 13 June 2018). See also for example articles such as: S. Kraft 'Jail Torment for Children in South Africa', *Los Angeles Times*, December 18, 1992, Available from http://articles.latimes.com/1992-12-18/news/mn-2109_1_adult-prisons (accessed 15 June 2018).

⁹² P.J. Salazar, *An African Athens: Rhetoric and the Shaping of Democracy in South Africa*, Mahwah, NJ, Lawrence Erlbaum, 2002, pp. 171-180.

⁹³ Cf. Salazar, *op. cit.*, p. 180.

⁹⁴ This was followed by the *Convention on the Elimination of All Forms of Discrimination against Women* later that year, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in June 1996.

first year one of the most crucial legislative changes took place in that section 29 of the *Correctional Services Act* (1994) was altered to allow children to go home while awaiting trial. Children who committed minor offences were to be released to their parents after at most 24 hours, while children between 14 and 18 who committed a scheduled offence of a serious nature could be detained only up until 48 hours.⁹⁵ After some delay in realising this legislation, the media once more started profiling ‘the plight of vulnerable and impoverished child detainees who were being held in appalling conditions in some prisons’.⁹⁶ As a response, literally overnight on May 10, 1995, the act ‘was suddenly and dramatically implemented [...] which resulted in the immediate release of 1,500 children from prison.’⁹⁷ At face value this certainly appears to be a positive move. However, the rushed implementation, including the ban on pre-trial detention, completely blindsided the juvenile as well as the entire criminal justice system, leading to significant problems – even chaos. The reason for this was that not all children could be released to their parents and consequently had to be sent to so-called ‘Places of Safety’, which soon could not cope with the number of children that came through their doors. Due to lack of staff and training, the system soon became overwhelmed allowing many children to easily abscond:

The actual implementation of the new law was a resounding failure. Children charged with extremely serious offences were simply released pending trial, because there was no accommodation available in the designated alternatives to gaol, namely welfare-run places of safety – one institution allegedly has on average 70 escapes per month. Some juveniles have escaped only to commit further serious crimes, including murder, whilst charges were still pending against them. These have received extensive publicity.⁹⁸

This stoked growing anxieties within society about the rising crime rate, despite the fact that, as the previous chapter highlighted, the increased visibility of crime had much more to do with the practicalities of coping with democracy in a transitional society,

⁹⁵ *Correctional Services Amendment Act*, No. 17 of 1994, Available from http://www.saflii.org/za/legis/num_act/csaa1994314/ (accessed 23 June 2018).

⁹⁶ Cf. Sloth-Nielsen (1999), *op. cit.* p. 474.

⁹⁷ Cf. Hamilton, *op. cit.*, p. 4.

⁹⁸ J. Sloth-Nielsen, ‘The contribution of children’s rights to the reconstruction of society: some implications of children rights in South Africa’, *International Journal of Children’s Rights*, Netherlands, Kluwer Law International, vol. 4, 1996, p. 334.

gangsterism, transnational syndicates and other socioeconomic factors. Nevertheless, the media completely reversed the way in which it reported on children in detention. Instead of defending them as innocent victims of a flawed system, child offenders were scapegoated as dangerous thugs responsible for the sharp rise in crime.⁹⁹ In fact, Hamilton points out that newspapers blamed 80% of crime on children.¹⁰⁰ Political will started decreasing as a result of diminished public approval and in 1996 a revised amendment was passed that allowed children who committed certain crimes to be detained while awaiting trial.¹⁰¹ More attempts to change legislation to appease a fearful public were soon to follow.

In 1997, the Parliamentary Justice Portfolio Committee voted in favour of a bill that would entail significant changes to minimum sentencing – a move that was to include offenders under the age of 18. Close analysis of the proposed legislation clearly indicated the government's intention to move towards a system that favours an American mentality of 'three strikes and you're out'. This 'alerted criminal law reformists to the fact that the government was moving away from a balanced human rights approach to one in which fighting crime was the overwhelming consideration'.¹⁰² The response of non-governmental organisations was clear in its criticism of such a move by arguing unconstitutionality. Minimum sentencing would notably make imprisonment not a measure of last, but of first resort – thereby not only going against the country's own constitution, but also most other international standards, such as the CRC. These rigorous efforts of NGOs most likely led to the amendment of the bill to ultimately exclude all offenders under the age of 16 from the *Criminal Law Amendment Act*. Skelton and Potgieter point out that, unfortunately, efforts were not as successful to exclude children from stricter bail regulations.¹⁰³ The final Act notably made no differentiation according to age and personal circumstance, while exclusively considering the type of offence committed. This is an issue that children

⁹⁹ Cf. Skelton (1999), 98.

¹⁰⁰ Cf. Hamilton, *op. cit.*, p. 8.

¹⁰¹ This was due to a Private Members Bill that was put forward by a prominent member of the ANC. It proposed a temporary and extraordinary measure that would allow courts to order that 'certain children be held in prison to await trial.' Cf. Sloth-Nielsen (1999), p. 475.

¹⁰² A. Skelton and H. Potgieter, 'Juvenile Justice in South Africa', J. Winterdyk, *Juvenile Justice Systems: International Perspectives* (2nd ed.), Toronto, Canadian Scholars Press, 2002, pp. 495-496. See also: Sloth-Nielsen (1999), *op. cit.*, p. 495.

¹⁰³ Cf. Skelton and Potgieter, *op. cit.*, p. 496.

are still struggling with to this day since in practice consideration of age still seems to be overlooked at times. According to statements made to me by young offenders and their caretakers, adults often receive lesser sentences for similar crimes. Moreover, children are frequently not granted the same opportunities as their adult counterparts to early release options. One child who is currently serving a 10-year sentence for a rape that had ‘spiritual intent’ connected to Satanism at the age of 14 told me that he felt children are in certain ways treated more harshly than adults. As opposed to some of the other boys I interviewed (see Chapter Four), who were all convicted of rape as well, this child (who chose to remain anonymous) received a ten-year sentence at the age of fourteen. The sentence stipulates that the first five years are to be served at a BOSASA youth development centre in Gauteng, after which he is to be either transferred to an adult prison or, upon assessment, receive a conditional release back into society for the remainder of his sentence. He for instance believes:

[...] the *Child Justice Act* needs to change. I see some loopholes that need to be filled. Because, like with me personally the Act of 2008 says I have to sit ten years. So, I have to sit a whole five years before I can appear in court. But then a guy who did exactly the same thing that I did – who is over 18 and goes to prison – he actually just sits 2 years and 6 months or he sits one year and then he can be released. And he is what ... 45 and I am 15! I am the guy with the future. I am the guy who can actually make a difference tomorrow. But then the older guy, the guy who has already lived his life, gets released before me.¹⁰⁴

Additionally, due to fears of absconding or the smuggling of contraband, several children face the traumatising reality of not even being allowed leave to attend funerals of family members. Moreover, as noted in the previous chapter, the issue of criminal gangs escalated rapidly after the end of apartheid. The surge in crime that this led to also caused the government to adopt the *Prevention of Organized Crime Act*. The similarities between the principles contained in this act and those associated with Californian approaches to handling street gangs is evident. For instance, a judge may take into account whether the accused child ‘resides in or frequents a particular criminal gang’s area and adopts their style of dress, use of hand signs, language or tattoos’.¹⁰⁵ This naturally presents significant

¹⁰⁴ Interview with anonymous boy convicted for rape, Krugersdorp, 26 February 2018.

¹⁰⁵ Cf. Skelton (1999), *op. cit.*, p. 102.

implications if one were to consider the socio-economic and cultural dynamics into which many a child is born (an issue that will be taken up in greater detail in the following chapter).

It is clear therefore that the human rights based approach to law reform in the years immediately following apartheid has gradually been replaced by an approach that favoured a 'zero tolerance' stance on crime – an attitude overwhelmingly reflected by members of the public. On many occasions members of the general public have referred to children as thugs, *skollies* or *tsotsis* when I mentioned the importance of protecting the rights of child offenders as well.¹⁰⁶ 'If you did the crime, you should do the time', no matter what age. Such a widespread attitude within society could explain the significant delay by parliament to consider the proposed *Child Justice Bill* that favoured diversion to detention and placed restorative approaches over criminal ones. In fact, the bill was handed in to the minister of Justice in 2000 and quickly approved by Cabinet the following year. Yet, it was not voted on by Parliament until 2008 and came into effect in 2010 as the *Child Justice Act*. As mentioned earlier, this Act is an impressive milestone in the development of the child justice system in South Africa despite its controversy. Since its coming into effect however, several independent investigations suggest that its practical implementation proved a struggle.

Quantitative research conducted between 1994 and 2012 closely echoes this historical narrative in that several studies indicate an improvement in the overall situation during the first years after the end of apartheid (1994-1996)¹⁰⁷. However, as Dissel notes, UNICEF conducted a situational analysis in 1998 regarding the conditions of sentenced and unsentenced children in South Africa. The major failures they noted were generally poor conditions, deficient stimulation and severe lack of education. In fact, UNICEF

¹⁰⁶ *Skollie* is a derogative Afrikaans word with many meanings. Mostly though, it refers to an ill-mannered child or gangster who deliberately breaks the law. *Tsotsi* is slang for a young urban criminal especially from a township area.

¹⁰⁷ See: Sloth-Nielsen (1996), *op. cit.*, pp. 323-344. See also: A. Dissel, 'Children Serving Gaol Sentences: a profile on children sentenced to prison', *Centre for the Study of Violence and Reconciliation*, 1999, Available from <http://csvr.org.za/publications/1358-children-serving-gaol-sentnces-a-profile-on-children-sentenced-to-prison.html> (accessed 30 July 2018). A later study by Lukas Muntingh also suggests that the overall situation has improved with regards to the number of children in prisons, though he believes this can largely be attributed to the ineffectiveness of the criminal justice system: Cf. L. Muntingh, 'Children in Prison in South Africa 2000 to 2008', *Article 40*, vol. 11, no. 1, 2009, pp. 9-11.

spared no punches in its overall assessment when it stated that South African places of detention are ‘dehumanising, humiliating and must in the scheme of things produce hardened, bitter children without faith in the goodness of society’.¹⁰⁸ The last extensive study on the subject was done in 2012 by Muntingh and Ballard of the University of the Western Cape. Their findings painted a similarly troubling picture of excessively long pre-trial detention periods, isolation from family and unsafe integration with adult prisoners. They also noted the severe lack of education within the system where unsentenced children were completely excluded from any form of education, while sentenced children were often denied education and other stimuli as a form of punishment.¹⁰⁹ The pre-trial detention sectors are particularly brutal in this regard – as Raphael, a member of the *Wits Justice Project*, notes:

Ironically, awaiting trial detainees are theoretically innocent, but conditions are way worse for them than for sentenced offenders [...] It is more overcrowded, and there is no rehabilitation, because if you are innocent you don’t need rehabilitation. Conditions in many prisons are appalling, and overcrowding can be at a level of over 200% – with the concomitant problems such as sexual violence, TB [tuberculosis], HIV et cetera.¹¹⁰

Legally, all of these issues are forms of torture, not only in a general sense but also in a very technical sense, since that is how the law defines torture, encompassing all forms of treating people in a way that results in severe mental or physical suffering or both.¹¹¹ Likewise, the failure to provide external stimuli (including education) equals what is called ‘white torture’ in popular parlance. Children are deliberately isolated from any form of interaction or mental engagement, which could severely hinder development, while producing ‘hardened, bitter children’ who may subsequently fall victim to a culture of violence that causes them to reoffend. As one young prisoner told Dissel: ‘I know that I will steal cars again when I get out of prison. Where else can I earn so much money in

¹⁰⁸ Dissel, *op. cit.*

¹⁰⁹ L. Muntingh and C. Ballard, *Report on Children in Prison in South Africa*, Community Law Centre, University of the Western Cape, 2012.

¹¹⁰ M. van der Merwe, ‘Young In Prison: One small step out of South Africa’s hellish jails’, *The Daily Maverick*, 30 Nov. 2015, Available from https://www.dailymaverick.co.za/article/2015-11-30-young-in-prison-one-small-step-out-of-south-africas-hellish-jails/#.WK_QKxIrKV6 (accessed 30 July 2018).

¹¹¹ See the *Prevention and Combating of Torture of Persons Act* (13 of 2013), the Preamble of which even mentions the ‘shameful history’ of South Africa where ‘the torture of many of its citizens’ was not uncommon.

such a short time? What else is there for me to do?’¹¹² Moreover, in a report Van der Merwe highlights that children are

[...] locked up for 23 hours daily, being denied access to psychologists and social workers. Juveniles are detained for 120 days awaiting trial, and having to buy phone cards to talk to their families. They were given less than the international standard required amount of floor space and 85% of prison officials had no training in working with children, while 39% of child prisoners received no visits for three months.¹¹³

What is more, hardly any minor was informed of the prison rules and regulations. Very few children had any knowledge about their rights – among which education constitutes a major right that they are entitled to when detained. This fact is underscored by Muntingh and Ballard, who note that education is a constitutional right, which is intentionally denied children as a form of punishment. Similarly to the UNICEF report, the Muntingh and Ballard 2012 report suggests that, without the possibility to better themselves through education, the detriment inflicted on detained children is highly problematic. As such, the system is in dire need of reform so as to not only make it ethical, but also constitutional.¹¹⁴ Furthermore, in the year 2014/15, the *Independent Police Investigative Directorate* examined ‘145 new reported cases it described as torture, 34 cases listed as rape and 3711 cases listed as assault by police officers.’¹¹⁵ It is not clear whether any of these involved detained children, but it does reflect an endemic social problem that needs to be addressed seriously.

D. Ubuntu: A Moral Theory and the Responsibility of Care

1. Ubuntu as an Integral Part of Legal Development in South Africa

The evolution of the South African juvenile system as described above indicates that, while restorative principles are incorporated in the legal framework, adequate implementation and favourable attitudes towards child offenders are waning. Moreover, the

¹¹² Dissel, *op. cit.*

¹¹³ Cf. van der Merwe, *op. cit.*

¹¹⁴ Cf. Muntingh and Ballard, *op. cit.*, p. 71.

¹¹⁵ T. Doig and S. Mukadam, ‘Torture: alive and well in South Africa, but why?’, *The Daily Maverick*, 27 June 2016, Available from <https://www.dailymaverick.co.za/article/2016-06-27-torture-alive-and-well-in-south-africa-but-why/#> (accessed 30 July 2018).

development of a ‘culture of crime’ that can be observed over the last two decades gives cause for serious reflections as to the possible reasons. Where children are for instance removed from society to await trial, they are often exposed to more dangerous inmates, who recruit them into gangs. Sasha Grear of *Just Detention International South Africa* notes that it is at this pre-trial stage that the ‘crime you have committed, or not committed, will often determine how you are classified in the gang. If you are less violent, very young, or less strong, you are particularly vulnerable to sexual abuse’.¹¹⁶ Grear calls this concentrated prison environment ‘the university of crime’ where children are transformed into hardened criminals due to the type of social fabric into which they are forced to integrate when detained. Children develop a detached view of crime – regarding it as normal behaviour. This is how you do it ... this is life ... this is how you survive. Dissel substantiates this with evidence from actual interviews with child offenders. She documents that many children for example do not even see rape as a crime:

Vusi was asked whether any of his family members had committed any crimes, to which he replied ‘my brother is in prison, but that is not for a crime ... He is in prison for rape’. Joseph, convicted of rape said that he was ‘working’ with a 46-year-old man. This man was monitoring the children who were supposed to be robbing people on the street. This older man apparently became attracted to a woman and told Joseph to continue monitoring the other children. When the man was finished raping the woman, he called Joseph to come and rape her too. At that time the alarm went off and they were apprehended by the police.¹¹⁷

This attitude of detachment has many intellectuals, spiritual and traditional leaders in South Africa worried. They attribute this to a systematic loss of *ubuntu* – an African worldview that constitutes a ‘humanistic orientation towards fellow beings’.¹¹⁸ As such the principal belief guiding the philosophy is ‘*umuntu ngumuntu ngabantu*’¹¹⁹, which roughly translates as ‘a person can only be a person through others’.¹²⁰ Desmond Tutu

¹¹⁶ M. van der Merwe, *op. cit.*

¹¹⁷ Dissel, *op. cit.*

¹¹⁸ J.Y. Mokgoro, ‘Ubuntu and the Law in the South’, *Potchefstroom Electronic Law Journal*, vol. 1, no. 1, 1998, p. 2.

¹¹⁹ This expression is often used by Nguni speakers and the one most associated with *ubuntu*. The principle it denotes can however also be found in other African languages – especially Sotho-Tswana, in which case they say ‘*Motho ke motho ka batho babang*’. Cf. T. Metz, ‘Ubuntu as a Moral Theory and Human Rights in South Africa’, *African Human Rights Law Journal*, vol. 11, 2011, pp. 536-537.

¹²⁰ Cf. Mokgoro, *op. cit.*, p. 3.

describes *ubuntu* as a way to understand who we are as human beings. He compares it to the Cartesian concept of ‘I think, therefore I am’, in that *ubuntu* sees our sense of humanity rather as our ability to *belong* than to *think*. In other words, *ubuntu* suggests that ‘I am human because I belong’.¹²¹ If this sense of belonging is missing, society fails. Justice Mokgoro summarises the spirit of *ubuntu* as a shared value system with collective respect for human dignity at its core, which can only find expression through social interaction.¹²² Shutte, the first philosopher to formalise the meaning of *ubuntu* academically, suggests that although the basis of this worldview lies in one’s placement within a community, it still aspires to personal fulfilment. This fulfilment however is realised exclusively through selflessness.¹²³ In this sense, living for others leads to a life with meaning, which in turn results in personal fulfilment. If everyone would choose to live a life with *ubuntu*, everyone would act selflessly for the good of others, thus creating harmony and positive change.

Since the fall of apartheid, this communitarian philosophy has received significant attention at the highest level. Deemed as a viable African alternative to Western concepts of individualism, the epilogue to the interim Constitution of South Africa speaks of national unity and reconciliation by explicit mention of *ubuntu* as a means to achieve this:

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions of the past, which generated gross violations of human rights, the transgressions of humanitarian principles in violent conflicts, and legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.¹²⁴

Although the final Constitution does not directly mention the African worldview, its essence can still be traced throughout the document – especially Chapter Two, which forms the South African Bill of Rights. Metz references several occasions when the Constitu-

¹²¹ D. Tutu, *No Future without Forgiveness*, London, Rider, 1999, pp. 34-35.

¹²² Cf. Mokgoro, *op. cit.*, p. 3.

¹²³ A. Shutte, *Ubuntu: An Ethic for the New South Africa*, Pietermaritzburg, Cluster Publ., 2001, p. 30.

¹²⁴ Constitution of the Republic of South Africa, Act 200 of 1993 (also known as the Interim Constitution of South Africa), Available from http://www.sahistory.org.za/sites/default/files/constitution_of_south_africa_1993.pdf (accessed 30 June 2018).

tional Court and its members highlighted the importance *ubuntu* should have for judgements to ensure that it remains ‘the underlying motif of the Bill of Rights’.¹²⁵ Justice Sachs and Justice Mokgoro are particularly well-known for basing their judgements on the principles of *ubuntu*. In 1995, Mokgoro for instance contributed to the verdict that the death penalty is unconstitutional by invoking the values of *ubuntu*.¹²⁶ In the ruling, Mokgoro describes the African concept as the ‘one shared value that runs like a golden thread across cultural lines’. She even links it directly to the English word ‘humanity’ and the Afrikaans word ‘menswaardigheid’ (‘dignity’).¹²⁷ Bohler-Muller views Mokgoro’s ruling as a deliberate move by the court to expand the use of *ubuntu* from ‘a vague spirit that pervades the Constitution’ to ‘an ideal, which is made explicit in actual legal decisions’.¹²⁸ I would postulate that referencing *ubuntu* in this way is specifically designed to position it as a moral principle uniting the various cultures in the country under a single banner in order to enhance national unity and rehabilitation.

In the end, both the interim and final Constitutions clearly influenced the character of the *Child Justice Act*, which as mentioned in the previous section, strongly emphasises the importance of restorative, community-based options when it comes to children in conflict with the law. Skelton points out that ‘although South Africa retained a Roman-Dutch law base for the law, the lawmakers were encouraged to broaden their approach to include more restorative, more *ubuntu*-orientated ways of thinking about justice.’¹²⁹ Moreover, the Committee responsible for drafting the Act unmistakably stressed the need to

¹²⁵ T. Metz, ‘*Ubuntu* as a Moral Theory and Human Rights in South Africa’, *African Human Rights Law Journal*, vol. 11, 2011, p. 534. See also a ruling by Justice Sachs involving the eviction of 68 squatters (including 23 children), South African Constitutional Court, *Port Elizabeth Municipality v. Various Occupiers ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC)*, no. CCT/53/03, 01 October 2004, para. 37: ‘Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif in the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration of our evolving new society of the need for human interdependence, respect and concern.’

¹²⁶ This ruling went against the wishes of the majority of South Africans, who wanted to keep the death penalty as lawful punishment. It is a view still held by many South Africans.

¹²⁷ South African Constitutional Court, *S. v Makwanyane*, CCT73/94, 6 June 1995, para. 308.

¹²⁸ N. Bohler-Muller, ‘Beyond Legal Metanarratives: The Interrelationship between Storytelling, Ubuntu, and Care’, *Stellenbosch Legal Review*, vol. 18, 2007, p. 145.

¹²⁹ Cf., Skelton (2015), *op. cit.*, p. 352.

incorporate communitarian principles according to which not only the state carries responsibilities, but also families and the wider community. Only then will issues related to children in conflict with the law be protected comprehensively:

The Bill provides many opportunities and obligations to ensure the participation of parents, both in requiring their presence at formal justice processes, and involving them as far as possible in diversion and community-based sentences. This is one of the practical ways in which the aim of promoting 'Ubuntu' can be realised. Children do not live alone, they are members of families and communities [...] The Committee feels that unless we can re-establish functional families, we cannot solve all the challenges associated with children in conflict with the law. We need to rebuild society through strong families, kinship groups and communities, which will further add towards crime prevention and the prevention of children re-offending.¹³⁰

The basis of the *Child Justice Act* further reflects the example set by the Truth and Reconciliation Commission (TRC), which to date is probably the most impressive illustration of how the spirit of forgiveness can overcome revenge and guilt during moments of intense national trauma. Established under the *Promotion of National Unity and Reconciliation Act* in 1995, it had its first session (out of 1,003) in 1996. Despite some flaws, the TRC can be viewed as a remarkable illustration of *ubuntu* in action, where listening to other people's stories¹³¹ became the basis according to which justice was ultimately arrived at. Though not a court, the TRC had a quasi-legal function, approaching forgiveness from the perspective of providing a restorative space where victims, witnesses and perpetrators alike could testify to what happened during apartheid. The entire community could share in the process, either by going to the sessions in person or by watching the proceedings on television. This environment gave both victim and perpetrator the opportunity to face each other in an effort to find reparation through reconciliation. In his account of the TRC, Tutu writes:

Ubuntu means that in a real sense even the supporters of apartheid were victims of the vicious system which they implemented and which they supported so enthusiastically. Our humanity was intertwined [...] In the process of dehumanising another, in inflicting untold harm and suffering, the perpetrator was inexorably being

¹³⁰ Article 40 Editorial, 'Child Justice Bill: Comments from the Portfolio Committee on Justice and Constitutional Development', *Article 40: The Dynamics of Youth Justice and the Convention on the Rights of the Child in South Africa*, vol. 10, no. 2, July 2008, p. 6.

¹³¹ Note the significance given to the concept of story-telling (see also Chapter Four).

dehumanised as well.¹³²

Although *ubuntu* is clearly an integral part of legal development and reform, its use has not remained unquestioned. Debates revolve primarily around two key issues: Firstly, whether or not *ubuntu* should be linked so closely to human rights and, secondly, if any attempt to do so may simply amount to another move of the West to appropriate the ‘otherness’ of African identity.

2. *Ubuntu*, Human Rights and Care – Moral Theories Interlinked

The first debate recognises that ‘human rights’ is essentially a Western concept focused on individualism and the autonomy of the self. As a concept, human rights are essentially based on two moral theories that view an action to be wrong the moment when it reduces a person’s quality of life (utilitarianism) to such an extent that it severely undermines autonomy (Kantianism).¹³³ In Africa however, communitarianism comes before individualism causing human rights to be perceived apprehensively. Although the intention of the new Constitution is undoubtedly to promote equality as informed by the principles of *ubuntu*, some nevertheless feel the Constitution primarily reflects a conception of equality reached by means of a decidedly westernised approach to building a new social order. In other words, with the rise of constitutionalism in South Africa, some African voices argue that the true spirit of *ubuntu* has gradually been muffled. Critics of constitutionalism maintain that it gave birth to a selfish society of individuals that no longer finds meaning through collective development. It rather thrives on focusing on the self through the realisation of one’s own ambitions.¹³⁴ Seeing contemporary society as inherently selfish, many thus believe the original conception of *ubuntu* to be dead. Accordingly, the creation of laws is regarded an act that promotes selfishness. For example, in the context of promoting the rights of child offenders through legislation, I have come across several adults (even state prosecutors and former child offenders) who view the death of *ubuntu* as a direct result of laws restricting the ability of families, communities and care takers to legally discipline children themselves:

¹³² Cf. Tutu, *op. cit.*, p. 35.

¹³³ Cf. Metz, *op. cit.*, p. 536.

¹³⁴ Cf. Mokgoro, *op. cit.*, p. 6.

I feel the government has taken so much power and rights from the parents and given them to us as kids. And I have seen some of those kids doing unspeakable things. As rude as I was myself, but to an extent I knew my elders, I respected my elders. But the fact that they would allow kids to attack the staff and all that, and nothing is done. I can't make sense out of that.¹³⁵

The process of constitutionalisation and law-making is thus strangely seen as encroaching on the freedom of people to act as they see fit – a tendency that criminals, and especially the youth, have recognised and are now exploiting:

On that same note of *ubuntu* ... we have truly lost that as South Africans. Like now, not only are they [the government] taking the power from staff, but even outside, you see guys being robbed by kids or maybe by juveniles. That spirit of *ubuntu* used to say: 'Not on my watch. You can't do this while I am here.' But now I find that somebody is robbed in town, people just take pictures on their phones. But with *ubuntu*, that never used to happen, because you [as a criminal] had to wait until it was very, very quiet and no-one can see you. Then you can steal or you can rob someone. But today, even if you are walking in town, they can just search you while others are watching – and they are not only watching, they are recording. Doing nothing. Even if you scream. I mean, there are viral videos of ladies screaming for help and guys would just pass.¹³⁶

Due to the previously mentioned crime rate, such attitudes are understandable, but ultimately they betray a troubling interpretation (or *misinterpretation*) of *ubuntu*.¹³⁷ The interpretation nevertheless illustrates the close and therefore often confusing proximity of *ubuntu* to concepts of sovereignty in that it suggests a common belief in the importance of 'community autonomy'. As such, it also reveals a great deal about contemporary South African attitudes towards human rights. In rejecting the autonomy of human rights, proponents of communitarianism simultaneously, and paradoxically, admit the importance of human rights autonomy for realising *ubuntu*.

There is perhaps a more nuanced way of looking at human rights within the realm of *ubuntu*. Bohler-Muller describes *ubuntu* as a 'groupcentred individualism' that 'moves beyond aggressive [Western] individualism and neo-colonial imperialism'. *Ubuntu* is

¹³⁵ Interview with a former child detainee who himself now works with children in detention, Krugersdorp, 26 February 2018.

¹³⁶ Interview with a former child detainee who now works in Johannesburg as a fashion designer, Krugersdorp, 26 February 2018.

¹³⁷ The complexity of this attitude will be made more explicit in subsequent chapters as specific examples are discussed in closer detail.

therefore of decided value to the human rights paradigm, since it acknowledges the importance of individual interests, but ‘always contextualises these interests by emphasising the effects of these interests on the group’.¹³⁸ It can therefore lead to social coherence and harmony, by virtue of respecting the dignity of individuals. Letseka offers a comparable argument stating that as the antithesis of apartheid, *ubuntu* has a great deal in common with the ideals the new South African Constitution gives expression to. *Ubuntu*’s worldview notably champions ‘non-racialism, non-sexism, non-discrimination and a respect for freedom, human rights promotion and the dignity of people, inter-dependence and a deep-rootedness of a collective community.’¹³⁹ The essence of *ubuntu* is therefore a societal reflection of humaneness, personhood and shared morality that incorporates principles of autonomy just as much as it does those of community. From this vantage point, Metz provides an intriguing moral theory uniting *ubuntu* and human rights as complementing factors, both necessary to create harmonious relationships between people in a society. They are, Metz argues, two sides of the same coin.¹⁴⁰ The uniqueness of humanity resides in the capacity to communicate with each other, to enter into relationships and the ability to be kind/friendly. He interprets this dimension of *ubuntu* by isolating two recurring themes – the need for ‘identity’ and ‘solidarity’:

Part of what it is to enter into community with others is to identify with them, or share a way of life with them, by which is meant roughly enjoying a sense of togetherness and engaging in cooperative projects. Another part of communion is solidarity, or caring for others’ quality of life, which amounts to helping others for altruistic reasons and typically consequent to sympathy with them. What African thinkers typically mean by ‘community’, or at least one morally-attractive way to understand what they mean by it, is as consisting of the combination of identity and solidarity.¹⁴¹

¹³⁸ Cf. Bohler-Muller, *op. cit.*, p. 148.

¹³⁹ L.R. Johnson and P. Quan-Baffour, ‘The African Philosophy of “Ubuntu” and Correctional Education in South Africa: A Case Study’, *38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa*, Deakin University, February 2016, Available from <http://afsaap.org.au/assets/johnson-and-quan-baffour.pdf> (Accessed 30 July 2018), p. 4.

¹⁴⁰ Metz’s proposal has been criticised by Anthony O. Oyowe in an article entitled ‘Strange Bedfellows: Rethinking *Ubuntu* and Human Rights in South Africa’, *African Human Rights Law Journal*, vol. 13, 2013, pp. 104-124. He thinks that it is impossible for the human rights paradigm to reflect communitarian principles, due to its focus on individual rights. In response, Metz countered in ‘African Values and Human Rights as Two Sides of the Same Coin: A Reply to Oyowe’, *African Human Rights Law Journal*, vol. 14, 2014, pp. 306-321. Here, he convincingly defends his theory, by illustrating that Oyowe fundamentally misunderstood the multi-layered quality of the ethical proposal he is offering.

¹⁴¹ T Metz, ‘African Values and Human Rights as Two Sides of the same Coin: A Reply to Oyowe’, *African Human Rights Law Journal*, vol. 14, 2014, p. 309.

This combination, Metz argues, leads to the appreciation of human dignity as achieved through our capacity to relate to each other. In this sense, one lives a dignified life when one recognises the dignity of others and acts accordingly. To put it differently: it is the level of kindness or ‘friendliness’ with which one treats entire communities that ultimately determine one’s humanity. From this perspective, *ubuntu* means that ‘I am a person because I see and respect the dignity of others’. This perspective recently led academics to associate *ubuntu* with the development of theories of care – which in turn has great relevance to the protection of children within the child justice system. Bohler-Muller argues for the development of a ‘jurisprudence of care’ that prioritises individual backgrounds and context above the ‘creation of precedents of universal application’.¹⁴²

If we are able to achieve this level of legal and social transformation, there is real potential to develop a practical approach to training and rehabilitation that would simultaneously adhere to international human rights standards *and* African cultural ideals.¹⁴³ ‘Love and forgiveness’ as emphasised by the *ubuntu* mindset strongly echoes the previously mentioned ideals of ‘love and understanding’ contained in the CRC. From an international human rights perspective therefore, the protection of the child should include exposing children to environments that foster ‘an atmosphere of happiness’. This can only be reached if adults, societies and governments are united in creating such environments for the benefit of child development and protection. In turn, to live a life of *ubuntu* requires a mentality that believes ‘it takes a whole village to raise a child’ and that ‘any child is my child’. Such an attitude similarly places responsibility on entire communities to collectively raise children to uphold the values of *ubuntu*.¹⁴⁴ Although originating in different hemispheres and in different historical and cultural contexts, the two concepts thus logically have a great deal in common. Both seek to promote human dignity as a universal concept that applies to every individual. Human rights however seek to promote this concept within the ‘global village’, while *ubuntu* seeks to implement it within the context of the ‘local village’. The function of human rights therefore lies on the international level between states, while *ubuntu* finds its practical application on the local level within

¹⁴² Cf. Bohler-Muller, *op. cit.*, p. 134.

¹⁴³ Cf. Chapter Five where I discuss a possible way forward in light of these principles.

¹⁴⁴ Cf. Johnson and Quan-Baffour, *op. cit.*, p. 1-2.

communities. The important point is that together the two traditions can develop a synergism that needs to be tapped in efforts to protect and care for children in conflict with the law – in whichever capacity that may be.

The next chapter will demonstrate what happens if these principles are neglected, forgotten or actively rejected when children enter the care of the state as offenders. I will do so by means of a case study recounting the experiences of boys from different parts of South Africa who were sentenced to the Bisho Child and Youth Care Centre. All were sentenced after the *Child Justice Act* came into effect, yet all ended up as ghosts within the system. By analysing my own empirical observations as well as the personal statements of the young offenders, I hope to shed light on the need to reinforce the importance of restorative justice and *ubuntu* in people so as to facilitate proper care and rehabilitation. This will allow the study to present clear recommendations that see the child behind the crime, since, as Gilligan advances in *A Different Voice*, ‘human survival may depend less on formal agreement than on human connection.’¹⁴⁵ Nowhere is this truer than in society’s relationship with children in conflict with the law.

¹⁴⁵ C. Gilligan, *A Different Voice: Psychological Theory and Women’s Development*, HUP, 1982, p. 45.

CHAPTER FOUR

NARRATING TESTIMONY FROM THE PERSPECTIVE OF THE CHILD: THE BISHO BOYS

'I am happy, because I know now somehow, some way, some time, somewhere in this world there is going to be a story published according to what we went through.'
– Ernest, former child detainee at Bisho CYCC, South Africa – ¹⁴⁶

This chapter reflects on empirical information gathered in South Africa between September 2017 and February 2018. The information is presented in such a way so as to expose accurately what happened at the *Bisho Child and Youth Care Centre* (hereafter Bisho or the Centre) between 2013 and 2016. This is particularly achieved by presenting the experiences and views of the children affected by the events while they were serving their respective sentences at the Centre. Seven of the nine boys whose experiences are analysed in this study were interviewed by me during the research period stated above.¹⁴⁷ The last two were either rearrested or missing at the time, yet their stories were recounted to me by their lawyer and other relevant documentation gathered previously by the *Centre for Child Law* at the University of Pretoria. All the interviews were conducted independently in their desired languages and at a location they preferred.¹⁴⁸ The only other person present at the interviews was Stanley Malematja (University of Pretoria) who helped with translating the accounts of those boys who could only speak isiXhosa. As can be gleaned from the chart below (Fig. 6), the boys were all serving sentences between 1 and 5 years and ranged between 15 and 17 years of age.¹⁴⁹ Their crimes generally involve Section 2

¹⁴⁶ Interview with Ernest, East London, 25 September 2017.

¹⁴⁷ Every participant signed an 'Informed Consent Form' recognising their voluntary contribution and their awareness of the purpose of the study. They also recognised that they have been fully informed of their rights in relation to the study. In this regard, although being permitted to do so by each participant, I will not be using their actual names at any point during this study as a gesture of respect.

¹⁴⁸ Importantly, the children had no way of communicating with each other. For the most part, their lives did not intersect any longer due to socio-economic and geographical practicalities. They had no knowledge of what I already knew about the case and all participated on a voluntary basis. They also had nothing to personally gain by telling me what had happened to them – all of which supports the validity, authenticity and truthfulness of their statements.

¹⁴⁹ In order to demonstrate the systemic nature of some of the issues raised, I will also refer to other interviews I conducted with children at various institutions around the country. These children are currently serving sentences between 1 and 10 years. I will also at certain points refer to accounts by so-called street children who have regularly come into conflict with the law and mob justice.

and/or Section 3 offenses that necessitate mandatory detention according to the CJA.¹⁵⁰ As I will demonstrate below, the validity of the children’s narrative accounts of what happened and/or is happening to them is supported by the similarity of their accounts in terms of timeline, significant incidents and overall treatment.

NAME	DATE DETAINED	AGE DETAINED	SENTENCED	CRIME
Sabelo	13 March 2013	16 years	3 years	Two counts of robbery with aggravated circumstances
Ernest	3 December 2012	17 years	4 years	Rape
Anathi	25 April 2013	16 years	4 years	Rape
Andile (rearrested)	8 April 2015	17 years	1 year	House breaking with an intent to steal and theft
Jakes	12 June 2015	17 years	5 years	Rape and three accounts of robbery
Zach	28 October 2014	16 years	3 years	Armed Robbery
Kanelo	15 September 2015	17 years	3 years	Theft
Vuyo (not interviewed, rearrested)	14 December 2012	15 years	5 years	Rape
Xola (not interviewed, missing)	9 August 2014	17 years	3 years	Rape

Figure 6: The Bisho boys whose stories inform this study’s core empirical contribution

Since this chapter seeks to recount the experiences of children in conflict with the law, the *ubuntu* inspired role of storytelling may provide a useful vantage point to express and assess the implication of their accounts within a study on the human rights of children in conflict with the law. In 1993, NICRO already emphasised the importance of storytelling in the process of rehabilitating child offenders successfully. Muntingh and Shapiro refer to Meade when they argue that storytelling ‘is designed to provoke emotional reactions in the listener’ that could ultimately lead to a form of empathy in the listener that holds great potential when working with children.¹⁵¹ Bohler-Muller goes further by proposing

¹⁵⁰ Schedule 2 offenses include: theft, robbery (other than robbery with aggravated circumstances), malicious injury to property, assault (grievous bodily harm), public violence, culpable homicide, arson, housebreaking, poisoning or drug dealing, abduction. Schedule 3 offenses include treason, sedition, murder, extortion, kidnapping, robbery (involving aggravated circumstances or the additional theft of a motor vehicle). Cf. *Child Justice Act 75 of 2008*, pp. 60-61.

¹⁵¹ Cf. Muntingh and Shapiro, *op. cit.*, p. 52.

the need to develop storytelling as an integral part of African jurisprudence so as to base legal judgements, among other things, on the background and circumstances of accused individuals. This, I suggest, would particularly benefit decision-making where the actions of children in conflict with the law are concerned. But in order to do so, one has to listen to the stories of the accused – stories that go beyond the mere facts of the crime, to include the entire life-story of the child as well. Invoking Kearney's work on storytelling, Bohler-Muller further postulates that storytelling within the justice system could produce a progressive 'jurisprudence of care' that would 'encourage direct interchange with others through the telling of life-stories that reveal who is speaking':

Our interest in stories, according to Kearney, is 'essentially ethical in that what we consider communicable and memorable is also what we consider valuable'; 'stories make possible the ethical sharing of a common world with others.'¹⁵²

In this vein, what follows below is an attempt to 'reveal *who* is speaking', but also to reveal the social world from *where* the person is speaking. I will do so by presenting the stories of the youths in a way that incorporates their statements, that of their lawyer and my own assessment of their situation upon meeting them. The narrative presented here therefore gives the reader an informed view of what the child feels, remembers and went through. Evidence is presented in narrative format and expanded on within academic reflection that accompanies each narrative account. In this way, the stories of the children not only reveal the facts about what happened at Bisho as experienced by the children, but they also expose a social atmosphere they not only have to deal with, but often also have to survive. The intention is to demonstrate the importance of allowing children to participate in matters (including academic matters) that concern them while simultaneously generating progressive understanding that could lead to change. These narrative accounts will be presented in the first person of the speakers and will faithfully reflect the content of each interview – though minor corrections in syntax and grammar occur for clarity, logical flow, and narrative continuity. The linguistic editing of their statements is further required to allow an international readership to fully understand the implications and context of their situation. A further motivation to translate their experiences in a

¹⁵² Cf. Bohler-Muller, *op. cit.*, p. 136.

‘based-on’ narrative format is because all the children spoke in a mixture of several languages (isiXhosa, English, Afrikaans, Zulu, and street slang), including cultural idioms that change meaning depending on the tonal presentation of certain words. Furthermore, a number of children did not allow me to record their accounts out of fear and mistrust, which made a *verbatim* presentation of their narration challenging. The narrative style is therefore intended to allow their statements to communicate effectively – and in their own voices – to the broadest possible readership. The intention is to develop a methodology that would lead to a productive meeting point between narrative story-telling, human rights, academic reflection and social change. Worth noting at this point is that while the material presented in this chapter is primarily based on the independent views of the children themselves, the information is nevertheless rigorously augmented and corroborated by basic research, personal observations as well as the views of governmental officials, lawyers and experts working in the field of children in conflict with the law. Arguing from a perspective that places value on the principles outlined in the previous chapters (i.e. the principles of change and *ubuntu*) the experiences of the boys who were detained at Bisho, are analysed with regard to (a) their treatment while detained and (b) their reintegration into society thereafter.

To start with, the chapter’s first section centres on a close analysis of their treatment while in the care of the state. In this regard, a particular focus will fall on various degrees of neglect, abuse and punishment brought on either by a lack of skills or a deliberate disregard for the physical and psychological vulnerability of detained children. The second section will build on these findings by emphasising the detrimental impact of certain social situations and public attitudes on the successful rehabilitation and reintegration of children in conflict with the law. These conditions include (among others) gangsterism, lack of education, apathy as well as the effects of social isolation. Ultimately, the chapter will illustrate how the accounts of the Bisho boys paint a troubling picture – notably that, despite the strength of the legal framework described in the previous chapter, the human rights of many South African children are in practice infringed upon through manipulation, abuse and abandonment to the extent that the cycle of crime cannot be broken, but only reinforced.

A. Case Background: The Human Right to be Heard

The Bisho Child and Youth Care Centre was established in terms of Chapter 13 of the *Children's Act 38 of 2005*.¹⁵³ The Centre was generally regarded as an equipped and well-designed facility, competently managed to the extent of fulfilling its mandate without significant challenges. In 2013, this changed as the Centre was suddenly (and allegedly) closed by the government for unknown reasons. Consequently, the children were relocated to Kirkwood Prison in the Eastern Cape. A couple of months later, however, the children were simply sent back to Bisho without being informed of the reasons why. Upon their return, the boys learned that the centre was not only open and operational, but also put under new management as the Department of Social Development (DSD) assumed responsibilities for CYCC across the country. Previously, the management of CYCCs fell under the remit of the Department of Education in the province. This shift was justified by arguing that the DSD was better equipped both in terms of infrastructure and skillset, to promote and protect the interests of sentenced children.¹⁵⁴ In 2015 however, nineteen boys were once more unlawfully removed from the facility and scattered across the Eastern Cape. Bisho claimed this needed to be done because the boys were not only unruly and disrespectful, but also intent on maliciously destroying property at the Centre. In the progress report of one of the boys (Sabelo) submitted by the Centre, the management itself described the situation and the boys in the following way:

... the reason why Sabelo and the other children were removed from the Centre to the Qumbu Child and Youth Care Centre is because ever since the beginning of last year [2015], the children were displaying bad behaviour such as vandalizing the property, beating staff members, beating other children, escaping from custody, insulting officials, formation of gangsters [*sic*] and practicing of prison subculture and

¹⁵³ South Africa, *Children's Act 38 of 2005*, Available from <http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf> (accessed 4 July 2018), pp. 195-212. The *Children's Act (CA)* deals with all matters related to the protection, care and welfare of children in South Africa, while the *CJA* focuses on all matters dealing with children who come in conflict with the law. Significantly, the *CA* defines parental responsibilities, provides for early intervention, protects children with disabilities and provides for child development. It relates to the *CJA*, since it makes provisions for child courts and the establishment of CYCCs. It thus predates the *CJA* and deals with all matters related to children. The two acts thus operate in unison.

¹⁵⁴ Application to the High Court of South Africa, Eastern Cape Division, *Bisho Boys vs. State*, C-CA&R 202/16, August 2016, p. 11 (I have not listed the boys' names in the case reference due to this study's intent not to reveal their full names out of respect).

use of dagga [cannabis] in the centre.¹⁵⁵

After being bounced around several facilities without the knowledge of their families, a high court order finally sentenced several of these boys to an adult prison called Mdantsane Correctional Centre. This came about due to an incident that occurred at the Centre in late November 2015 when staff members unexpectedly went on a two-week unannounced strike that left the children locked in their dormitories without food and other forms of care. They were not so much protesting as simply staying away from the dormitories, allegedly fearing for their safety due to the violent behaviour of the boys. As a result of the strike, the boys revolted, breaking into the kitchen in order to find food and clean clothes. Moreover, due to the fact that the gates were left open, a few boys absconded, though most stayed on the premises, not wanting to cause any additional problems for themselves other than those to fend for their basic human needs. The DSD in the Eastern Cape however saw fit to bring an *ex parte* application against ten of the nineteen boys, arguing destructive behaviour inappropriate for a restorative and rehabilitative environment such as Bisho. However, an *ex parte* application can only apply if it does not negatively affect the human rights of any individual.¹⁵⁶ Such action against the boys thus raised several red flags, which led to the University of Pretoria's *Centre for Child Law* (CCL) taking on their case on a *pro bono* basis. Stanley Malematja of the CCL team who represented the boys, argues that an *ex parte* application is decidedly inappropriate in the case of the boys at Bisho because:

[t]hey existed. They have the right to be heard. Because you can't just say: 'These boys are naughty, they are unruly. Can you please just dump them into prison?' You *don't!* You don't *do* that! They [the DSD] were supposed to make a proper application where the boys get proper legal representation and their cases are brought before the court. [T]he original sentence was to Bisho, not prison. If their respective courts found that these boys were deserving of detention in prison, they would have done that. But the court, acting in the best interests of these children, sentenced them to a CYCC to go and receive certain programmes and entrusted them to the Department

¹⁵⁵ Y. Magoqwana and L. Nanto, 'Progress Report: Sabelo', *Department of Social Development*, Eastern Cape, para. 13, p. 8. (Note: These reports were only done because the court order them in 2016).

¹⁵⁶ For example, one usually finds an *ex parte* application in cases associated with a marriage in which one of the parties has been missing for more than fifteen years and the applicant wishes to remarry. Given that the person has been missing for over a decade, the court can declare the marriage annulled on account of a 'presumption of death'. It therefore does not negatively impact on any person's quality of life. It allows the applicant however to continue living his/her life to the full.

of Social Development – the guardian of the children in our democratic society. Now, this very same department is the one that drags the boys out of the facility to which they are sentenced and dumps them in a facility where they are not even supposed to be lawfully.¹⁵⁷

Given the fact that the boys were ignorant about the case and court order against them, the core of the CCL argument entailed that not only was the *ex parte* application inappropriate, but their rights were also infringed upon in that they were denied the principle of *audi alteram partem* – the human right to be heard when accused. Such an action thus amounted to a blatant disregard of the original sentences that sought to divert these children away from the criminal justice system ... as the *Child Justice Act* (CJA) stipulates. The very fact that they were sentenced to Mdantsane acted against the duties of the DSD as an authority mandated to restoratively act in the best interests of the child. In the end, the court overseeing the appeals by the CCL agreed that such an action was inappropriate. The boys were immediately released with time served. Yet, although they were released, the events that occurred in November 2015 were not investigated and dealt with – despite obvious failings on the part of the Centre. At the time of writing, the management has not changed, despite proven malpractice.

The sections below will begin to reveal only a few of the most serious violations that occurred at Bisho, so as to in the next chapter make concrete recommendations based on the findings and observations discussed here.

B. Treatment while within the System

1. Complaints

Sabelo (alias) was convicted of two counts of robbery with aggravating circumstances and sentenced to Bisho for a four-year period in 2013. Speaking to him at his home in Zwelitsha (King Williams Town), he demonstrated a high level of knowledge about his rights and the procedural requirements of the Centre, which far exceeded the awareness of the other boys. He communicated with authority and conviction, while being able to recount events in a way that allowed me to form a comprehensive understanding of what

¹⁵⁷ Interview with lawyer Stanley Malematja, University of Pretoria, 24 February 2018.

the children went through. Like the other participants, Sabelo not only spoke about his own ordeal, but made sure to always draw attention to the experiences of the other boys as well. Due to his intelligence and ability to stand up for his own rights, he was elected by the other children to represent them when they wanted to submit a complaint. Even the Centre's social workers elected him as a quasi 'board member' tasked with representing the interests of his fellow detainees. When the situation at Bisho broke down, Sabelo was also the one informing the police about their treatment. He recalls that things started spiralling downwards fast when an incident occurred that convinced the boys that neither the careworkers nor management were taking their complaints seriously.¹⁵⁸ Ernest (alias), a 17-year-old boy serving a three-year sentence for rape, also remembers the incident clearly: 'We were allowed to make one phone call a week of less than one minute. To me it was just a matter of "hello" and "goodbye". One minute was not enough and we couldn't talk in private. We had to talk in front of social workers like Ms Adams.'¹⁵⁹ Corroborating Ernest's statement, Zach (alias), an Afrikaans speaking boy, expressed deep discomfort with the way telephoning home was handled by the Centre. 'You can't talk freely', he pointed out, 'because they are just sitting there in front of you. I would usually speak to my people in Afrikaans. But that was not permitted. You have to speak in English. They want to hear what we said to our people. So, we had to start fighting for our rights.'¹⁶⁰ Not only were they not allowed to speak in their mother tongues, but the social workers also imposed a strict time limit of a single minute per child. 'If you pass one minute,' Ernest recalls, 'they would just cut the phone. They didn't even tell you time was up. They just cut the phone. Most of the time I didn't even make a call, because I knew one minute was not enough.'¹⁶¹ The boys decided together to formally complain about the telephone situation and asked to speak to a representative of the DSD.

He came, but didn't do anything himself. He just wrote down our complaints and said he was going to take it to Social Development. The next day though, we were asked to move a few chairs from school to the administration office. There I saw a piece of paper in the rubbish bin and it looked very familiar, because it was a yellow type of A4 paper. I took the paper out of the rubbish bin and I noticed these were *all*

¹⁵⁸ Interview with Sabelo, Eastern Cape, 26 September 2017.

¹⁵⁹ Interview with Ernest, East London, 25 September 2017.

¹⁶⁰ Interview with Zach, Port Elizabeth, 29 September 2017.

¹⁶¹ Interview with Ernest, East London, 25 September 2017.

of our complaints! They were shoved into a bin! I took that paper, folded it and placed it in my pocket. After that, I called Anathi [alias] and showed him the paper. The guy who came to listen to us yesterday, the head of whatever ... of social development as they claimed ... he took our complaints, but they ended up in a bin. Anathi wanted to show the other guys, but I told him not to. They will just get angry because nobody is taking us seriously, nobody is caring about us. They might vandalise the place out of anger.¹⁶²

Ernest continued by pointing out that if the boys felt that they were listened to and people cared about it, nothing that happened at Bisho would have happened, because the boys would have felt cared about. As could be expected, there were several boys at Bisho who needed special care to manage anger. Whenever they felt ignored and/or disrespected by the staff members, they would lash out. Moreover, feelings of frustration were only exacerbated by the fact that management often saw fit to punish the boys for raising complaints. Malematja for example stated that on several occasions management would respond by locking the children up for several hours so as to ‘keep them from saying anything.’¹⁶³ Being locked up simply because they voiced their concerns triggered rebellious and often violent behaviour in several boys. This in turn led the guards to respond aggressively as well, manhandling the children who exhibited defiant behaviour. Furthermore, if the staff were unable to control the situation, the police would be called and the situation would escalate even more. The result, Ernest noted, was a war between the detainees and the caretakers. ‘It was really difficult to be at Bisho. It was a nice place. It was comfortable with nice things. But our behaviour and that of the caretakers were not good. It was like a war going on. On and off, on and off.’¹⁶⁴ The situation was not improved by the fact that, as Sabelo notes, the change in management also affected their visitation rights to a significant extent.¹⁶⁵ When some of the boys first arrived at the centre in 2013, it was properly managed. For example, when family members arrived too late for visiting times, they would be provided accommodation and food. However, when the children returned to Bisho from Kirkwood Prison, visiting times were not only reduced, but parents, who often travelled long distances at significant expense, would be turned away if they arrived

¹⁶² Interview with Ernest, East London, 25 September 2017.

¹⁶³ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

¹⁶⁴ Interview with Ernest, East London, 25 September 2017.

¹⁶⁵ Interview with Sabelo, Eastern Cape, 26 September 2017.

too late. Additionally, new members of staff started calling the boys names on a regular basis. Kanelo (alias) recalled one particular careworker telling them ‘I wish you guys would just die. I mean, you guys are useless. That is why your parents don’t want you. That is why you have been dumped here. Now *we* have to come and deal with you people.’¹⁶⁶ They also swore at them about the crimes they committed. ‘You rapist!’ ‘You murderer!’¹⁶⁷ Moreover, they were not granted private consultations with visitors. On several occasions, when a child had visible bruises as a result of an assault by staff, management refused the parents permission to see their children. The anger that such disregard for their complaints and rights invoked in the children slowly started to fester – particularly with children who already had violent tendencies and gang affiliations. In 2015, when once more ignored after complaining about the lack of programmes, several children said they had enough of not being taken seriously. They started organising under the leadership of a boy who not only had anger issues, but also gang affiliations. Ernest noted that this scared the careworkers, who went on strike in response. However, acknowledging the fact that the children were not wholly innocent due to their provocative behaviour, the vandalism that occurred at the centre twice (in 2013 and in 2015) could have been avoided if the adults saw them as children, not criminals, and treated them with respect and the dignity they deserved.

2. Constant Relocation

Given the boys’ behaviour, the Centre apparently made several attempts to get rid of them by often secretly transferring them at night to other facilities. Sabelo for example was moved between facilities eight times in the space of three years. This surely cannot be conducive to a productive and rehabilitative learning environment (see Fig. 7).

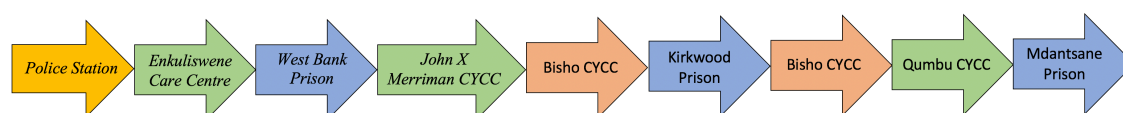


Figure 7: Between 2013 and 2016, Sabelo (and several of the other boys) was transferred eight times

He was first arrested in his village after police confronted his mother at their home about

¹⁶⁶ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

¹⁶⁷ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

what he had done. He quickly admitted all wrong-doing and was subsequently taken to *King Williams Town Police Station*. There he was brought before the magistrate within 48 hours – well in line with the regulations stipulated by the CJA.¹⁶⁸ He was then transported from King Williams Town to Port Elizabeth (252km) due to the fact that there was no facility for juveniles in his immediate area at the time. Arriving in Port Elizabeth, Sabelo was placed in *Enkuliswene Care Centre*, but was soon transferred back the way he came to East London's *West Bank Prison* (284km). Here he stayed for a period of six months while awaiting trial, though had to be moved yet again due to his status as a child. Consequently, Sabelo found himself transferred to *John X Merriman Child and Youth Care Centre* (10km), a facility specifically for children awaiting trial.¹⁶⁹ Being formally charged, the court placed Sabelo in Bisho (56km) for four years to undergo a series of rehabilitative programmes. Within two months of arriving at Bisho however, the children at the facility were told that the centre was closing and that they will be moved once more. This time, he was sent to Kirkwood Prison (307km):

When we got to Kirkwood Prison, though, some of the boys were released into the custody of their families, which confused us. When we enquired with our social workers why some were released and others not, they told us to ask the prison, as it was not their business to inform us about our imprisonment. The best we could get out of the prison management though was that we were to be returned to Bisho. I was fine with it, because my papers said I belong to Bisho and things were not good at Kirkwood. The cells were cold, we did not receive any medical treatment and social workers there told us we were not their problem.¹⁷⁰

Arriving back at a decidedly 'not closed' Centre (307km), things escalated out of control at Bisho due to the changes implemented by the new management. This came as a surprise to all the boys who had been at Bisho. Sabelo did not mind returning to Bisho because he was keen on bettering himself by attending programmes and school.

¹⁶⁸ Cf. Child Justice Act, *op. cit.*, ss. 20 (5), p. 17.

¹⁶⁹ I visited John X Merriman CYCC on 27 September 2017, but was not allowed to speak to children. The boys were kept under supervision with the clear intension not to allow accidental meeting. I was showed around the facility, which looked well taken care of and well-designed. I was not allowed to visit certain dormitories at the back of the facility. At the time of visiting, the centre had just been transferred from private to governmental management. The girls' dormitory was occupied by only one girl, who was still curled up in bed around midday. The only other person in the building was a careworker, who kept herself busy by scrolling the internet on her phone.

¹⁷⁰ Interview with Sabelo, Eastern Cape, 26 September 2017.

At Bisho, everything was better. At the time I went there the first time, it was under the management of this white guy who made sure we always had stuff to do. I felt I was really benefiting from school then. We were allowed to go to the gym, play sports, do boxing. On days we had nothing to do staff even gave us bicycles and allowed us to ride around the yard. We were also allowed to perform the drum songs we created, sing and tell our personal stories to each other. All that changed when Ms Nanto became the head of the centre when we returned to Bisho the second time. Nothing was taken seriously from then on and the programmes disappeared. We were told the programmes will change because Social Development was taking over from the Department of Education [...] We were not treated fairly from then on. So we used to ask, ‘Where is that white man? Where is he? Why is the situation like this? Our complaints are not being attended to, what is happening?’¹⁷¹

Sabelo was correct. Things did change – to nothing at all. After the children revolted in 2015 due to the situation at the Centre, Sabelo and eighteen other boys found themselves on their way to *Qumbu CYCC* (389km). Here, they were isolated from the children already detained there because they were sentenced children placed in an awaiting-trial facility. Here, they were not treated equally, especially with regard to food. They had to wait until the other children finished eating and were then given the leftovers, which they had to eat by sharing cutlery or by eating directly from the pots.¹⁷² Dubbed the dangerous trouble-makers from Bisho, the boys were loaded into vans once more and taken to Mdantsane Prisons in Fort Jackson (309km) where their case was picked up by the CCL. This means that during the period of his detention, Sabelo was transported back and forth between facilities an approximated distance of 1914km in total.

Throughout all of this, the boys were never informed why they were being transferred. As reflected in the statement above, when they asked for reasons related to their transfers, they would either be ignored or their concerns would be dismissed because they were ‘difficult child criminals’. The boys admitted that disregard for their needs regularly led them to disobedience, sometimes causing conflict to escalate out of control. In the name of maintaining order, this also resulted in disproportionate punishment. Asked whether he thought the punishment at Bisho amounted to torture, Malematja responded:

¹⁷¹ Interview with Sabelo, Eastern Cape, 26 September 2017.

¹⁷² Interview with Sabelo, Eastern Cape, 26 September 2017.

Definitely. Those boys were tortured. Definitely [...] From the day they entered Bisho Child and Youth Care Centre, they were tortured. They are victims of a broken system, because there is nothing positive that the boys narrated. I mean, some of the boys even opted to stay in prison. I mean, if prison is the better option than Bisho, then really – something is wrong.¹⁷³

The following section recounts only some of the punishment measures administered by the staff at Bisho – punishment that in the words of Ernest ‘was like being tortured’.¹⁷⁴

3. Treatment / Punishment

Anathi (alias) pointed to his leg. ‘After being accused of rape, the girl’s father stabbed me.’ Out of all the boys I interviewed, Anathi was the only one who claimed innocence. ‘Actually, only the girl’s side of the story was considered. I was never given the opportunity to defend myself. After I got stitched up from being stabbed, I stayed indoors for three days before going to court. There nobody cared to listen to me. So, in my opinion the trial was not handled fairly’.¹⁷⁵ He was subsequently sentenced in 2013 to four years correctional supervision in terms of section 76 of the *Child Justice Act* and arrived at the Centre already feeling a strong sense of injustice. But when they were transferred to the juvenile section of Kirkwood Prison (after Bisho was purportedly set to shut down) things started going from bad to worse:

[In prison] I moved with the wind and did everything that my peers did, whether it was good or bad. I was so stressed that I could not take my own decisions. We wore the same orange prison uniforms as normal prisoners – *that* unsettled me a great deal. When we got there, we were told to stand in a queue. They took our clothes, searched us and then the prison wardens were instructed to beat us. We couldn’t tell the police, because they would do the same [...] As part of our punishment, they would often wake us up really early in the morning, tell us to go outside and get undressed from the waist up. We were then made to do exercises I don’t know for how many hours – until the sun touched our bodies.¹⁷⁶

Ernest states that this type of punishment could happen any time from three o’clock in

¹⁷³ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

¹⁷⁴ Interview with Ernest, East London, 25 September 2017.

¹⁷⁵ Interview with Anathi, East London, 25 September 2017: We could not do the interview at his home, because his ‘home’ was a shebeen (local pub) where at eleven o’clock in the morning people were already drunk on beer. His aunt gave permission for him to accompany us to a more suitable environment for such a personal interview.

¹⁷⁶ Interview with Anathi, East London, 25 September 2017.

the morning. ‘At that time, it is really, really cold. As soon as the sun comes out, they would take us back into our cells. Sometimes we were beaten on our backs with a pipe if you disobeyed the orders of the prison. At Kirkwood however, I was never assaulted – I was way too careful. I didn’t want to get beaten by those guys, because ... you see people who come out of prison...They stay inside for 25 years, come out, live three months and then they die. Why do they die? They die because they get beaten by the police. It is injuries inside ... and in the world outside you can’t take it no more. Just when you start to live, then you die.’¹⁷⁷ Sometimes though (especially at Bisho and Qumbu), the children felt they needed to defend themselves, not so much from other children, but rather from their careworkers and security guards.

There was this group of employees [at Bisho] – male caretakers – who would bring sticks and pipes. The thing that I hated was that they would not punish you where you were. They would first lock you up on your own, and then come to your room as a group. A group of them. You can’t fight a group of adults! All of them would overpower you. Especially a young kid like me. I couldn’t fight back. I was assaulted many times. Especially by one guy, his name is David. He is also an employee. That guy used to beat me a lot, but I couldn’t do anything. I couldn’t fight him. The only thing I could do was to tell him: ‘You know what? If you want to beat me, beat me. But I am going to get you one day for this. I am going to get you.’ That was the only thing I told him. He really used to beat me a lot! They used to have this male group of caretakers who, if one guy did not want to beat us, they used to force him to do something to us. I thought that wasn’t nice [...] They would say, ‘We won’t leave you alone until you hit that kid.’ That was what ran through their mentality.¹⁷⁸

The careworker, David, was mentioned by several of the boys for his violent tendencies towards the children at the Centre. Zach described it: ‘There was this man there ... I will never forget ... They called him Mr David. *He* was the guy! He was the one who always wanted to beat us. He thought he was the strong guy at Bisho, thinking he could throw around his weight. He would just decide: ‘Everyone to your rooms’ and then he would tell the other workers to beat us.’¹⁷⁹ Anathi augmented this by saying that the police were often summoned to deal with the boys when the careworkers felt overwhelmed. ‘You were locked in a room, forced to lie down and the police would be called to stamp on your fingers while wearing their boots.’¹⁸⁰ What is more, Ernest, Zach and Sabelo all

¹⁷⁷ Interview with Ernest, East London, 25 September 2017.

¹⁷⁸ Interview with Ernest, East London, 25 September 2017.

¹⁷⁹ Interview with Zach, Port Elizabeth, 29 September 2017.

¹⁸⁰ Interview with Anathi, East London, 25 September 2017.

recall an incident when Xola (alias) was so severely beaten that he returned with a broken arm that never properly healed despite receiving medical treatment. Today, his arm has a huge hump where the bone was broken. Zach recounted that Xola underwent more surgery after his release from Mdantsane in the effort to correct the damage. In fact, according to the boys, Xola was beaten in a designated room set aside especially for beating the children who misbehave. Andile (alias) for instance recalled how one boy was taken to a 'small room' away from everyone before being pepper-sprayed by David. When Andile tried to prevent that, David turned around and started assaulting him too.¹⁸¹ Upon investigation, that boy who was pepper-sprayed turned out to be Kanelo (alias):

It was a Friday evening, when according to the rules of the Centre they were allowed to stay up a bit later to watch television before being taken to their rooms for lock up. That evening, however, they were instructed to go to bed much earlier. Kanelo refused and was subsequently beaten up. He also ended up in isolation with another boy called Temba (alias). The room they were taken to, Kanelo said, was in the staff area near the reception away from the dormitories (Fig. 8).

It happened that time after we were left alone and some of us went out of the Centre. We were not running away, we just went out and came back. But the police found us, they brought us back and beat us. But before they beat us, they cuffed our legs together and put us in a room near the reception. It was really painful.¹⁸²

Malematja described the effects of the cuffs as a 'python's grip'.¹⁸³ Every time the boys moved it tightened more, cutting into their flesh. During the interview, Kanelo revealed the scar around his ankle where the cuffs clearly left its mark. During their time in isolation, they were not given anything to eat for several hours before finally being each brought some food and a 'Drink-o-Pop' juice. Since he never liked the taste of 'Drink-o-Pop', Kanelo only ate the food. Temba on the other hand, ate and drank everything. Some minutes after consuming the drink, Temba started having severe stomach pain. Eventually completely crippled by the pain, he started rolling around the floor in agony, taking Kanelo with him wherever he turned. Every movement caused the cuffs to dig even

¹⁸¹ Interview with Andile, Butterworth, 28 September 2017.

¹⁸² Interview with Kanelo, Port Elizabeth, 29 September 2017.

¹⁸³ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

deeper into both of their ankles. At this point, the boys specifically started calling for the head of the centre, since they knew she was there. They passed her by the reception when taken to the isolation room. Yet, she quickly dismissed the boys proclaiming it is not ‘her fault’ that they are being treated in this way. She did not ‘tell them to escape’ and that the ‘police are only doing their job.’¹⁸⁴ She subsequently left them in the room, cuffed and in pain – seemingly immune to their legitimate pleas. The more Temba’s condition worsened, the more they pleaded for help. Nevertheless, their cries seemed to fall on deaf ears. It was not until Temba started vomiting, that the careworkers came. Realising the severity of the situation, the boy was rushed to hospital where it was determined that he consumed a poisonous substance. ‘If he didn’t arrive on time ... he would have been dead’, Ernest claimed. ‘That is when I really got afraid. I thought, this place is not good. This place is not good at all.’¹⁸⁵ Looking back, Kanelo is convinced there was something in the drink, since they were both perfectly fine up until the point the careworker brought them the ‘Drink-o-Pop’. No action was taken to determine the source of the poison or to find the person responsible.

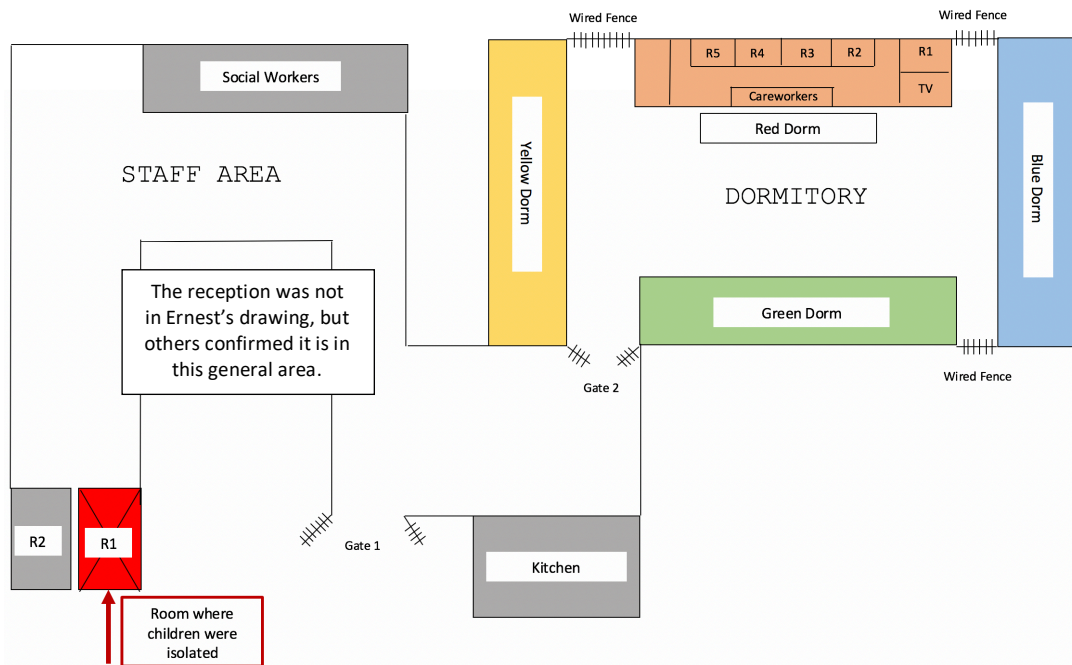


Figure 8: A rough ground level plan of a section of Bisho CYCC – Drawn from memory by Ernest and confirmed as accurate by Sabelo and Stanley Malematja

¹⁸⁴ Interview with Kanelo, Port Elizabeth, 29 September 2017.

¹⁸⁵ Interview with Ernest, East London, 25 September 2017.

Several boys referred to the isolation room in their interviews, stating that boys were often simply taken away and not seen for a while. Ernest specifically remembers boys being taken to a little room some distance away from the dormitory. While drawing a sketch of the centre's layout from memory (Fig. 8), Ernest explained:

In 'Room 1' is where people would be isolated. Just before the exit. So, the furthest end from the hostels [dormitories] where you cannot hear if someone is isolated. It is far. Most of us couldn't tell when people were in there, because if we were to hear the noise, we would stand up for ourselves. So, they took the noise far away from us. It is a medium sized room. It has two layers of cement where you could put mattresses on, but sometimes they didn't even give you mattresses. So, the boys would be walking around the room for the whole night. Or if they were not walking, they would be sitting in a corner getting cold. Sometimes in the middle of the night they would be calling out of the toilet window, like 'Help!' and stuff like that. They screamed for help. The guys in the nearest hostel could hear if someone was screaming – only in the middle of the night, when it is really quiet. From the other hostels you couldn't hear it, because the echo was not strong enough. The guys would say though: 'Yo bra, you know, last night, I heard Oscar scream. I heard Matomela screaming.' And I would say 'that is torture, they are torturing them.'¹⁸⁶

Previously, it was used as a smoking room, Jakes (alias) recalled. 'So, they decided to use it for the boys when they do wrong. They put the boys there [...] so they can feel during punishment how it feels to be alone'.¹⁸⁷ Jakes was put in that room for approximately two weeks. Referring to both the physical and psychological strain of isolation, Jakes notes: 'It is not nice. It is like you are on an island alone. It feels like that. You don't have a bed. You only take your sponge and sleep on the floor. It is not nice [...] When I was put in that room, I thought about my mother and my father. I thought a lot about them, because I am the only child, you see. I don't have sisters and brothers. I am my mother's one and only son. And I knew my mother was badly ill [...] I worried for my mother and my father and what is happening to my family.'¹⁸⁸

The psychological impact with regard to how they were treated took its toll on several of the children. Anathi notably retreated into his own world after not being allowed to attend

¹⁸⁶ Interview with Ernest, East London, 25 September 2017.

¹⁸⁷ Interview with Jakes, Port Elizabeth, 29 September 2017.

¹⁸⁸ Interview with Jakes, Port Elizabeth, 29 September 2017.

his mother's funeral. His lawyer Malematja recalls Anathi telling him during their consultation that nothing seemed important anymore. When they were transferred to Qumbu after the strike, he appeared to have given up entirely. He spent most of his time sleeping and did not want to engage with anyone. 'He was really depressed', Malematja observed, 'and didn't care what happened next.' When they were subsequently transferred to Mdantsane Prison, his depression only deepened. The move

[...] shocked him, because he never thought he would find himself in prison. Although he was never harassed or treated badly in prison, for the first two weeks he found it very difficult to come to terms with the fact that he was in prison – an adult prison for that matter [...] – for a crime he committed as a child. [Nevertheless], he said that he wished he could have been sentenced to prison from the get go, because there is the parole system. Maybe he would have been out by then, because now he is being tossed from pillar to post.¹⁸⁹

What the above already points towards is the unofficial continuation of a practice employed during the apartheid era when dealing with children in conflict with the law. In a discussion in this context, a state prosecutor of the Eastern Cape Province remarked openly that one thing to be appreciated about apartheid was that one was allowed to sentence children to corporal punishment. The disrespect with which people spoke about children in conflict with the law manifested strongly in my dealings with state officials and the adult public.¹⁹⁰ As touched upon in the previous chapter, many people do not view a stricter approach to discipline as negative. Asked whether he thinks centres have improved since 2001, one former child offender hesitated before answering:

I don't know really, I visit those kids every chance I get, and I see how unruly most of them have become and how they have lost touch with discipline and respect. I think this *Child Justice Act* also has a huge influence on that, because I feel that our system is really failing us. I don't know how people see South Africa, but from where I am, I think they are just missing the mark somehow. There used to be corporal punishment and those people who set the rules now about corporal punishment, they took power from the parents and gave it to the kids. These kids today, they can spit

¹⁸⁹ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

¹⁹⁰ I encountered this view of children in detention time and again. In the public domain, children are often framed not as vulnerable youngsters, but as criminals who have lost their vulnerability due to their status as criminals. Representatives of the DSD in the Western Cape for example told me that I cannot imagine the type of 'hardened criminals' I will be dealing with in detention. These children, the official declared, are no longer 'real children' since they are products of a 'South Africa that is becoming more and more violent'.

on the staff member and they know you won't do anything. In 2001 or 2000 that didn't happen. There was discipline. There was a proper discipline, which actually got us in line.¹⁹¹

While it is true that children with difficult backgrounds are extremely challenging when it comes to shifting their behaviour and/or view on authority, there seems to be a lack of understanding that discipline and respect do not have to be enforced through fear of being beaten, but it can be instilled through the manner in which one communicates and treats a child. Respect in a functioning society thus goes both ways. The manner in which the children were referred to – even by the public – did not connote a sense of respect or understanding for the children. In this regard, a local newspaper reporting on the 2015 strike even referred to the boys using prison terminology. Instead of emphasising their youth, the boys became ‘*inmates*’ who ‘were *doing time* for rape, murder and robbery’ (my italics). The regional secretary of the National Education, Health and Allied Worker’s Union, Siyabonga Kobese blatantly refers to them as ‘convicts’, who are threatening to ‘rape our members’ [i.e. the staff at Bisho].¹⁹² The article frames the children as a menace to society, dangerous criminal elements hell-bent on wreaking havoc and terrorising local communities. Referring to the boys in such terms betrays a mentality that only sees the children in terms of their crimes and their status as offenders.

Moreover, considering for a moment that state violence was used to subdue children during apartheid, a view as sketched above is extremely problematic. Take for instance the results of a study on state crime conducted between 1984 and 1986 where researchers collected data on the psychological impact that conflict with the law had on street children. Employing the so-called ‘draw and tell’ method a number of children in South Africa were asked to draw their experiences with law enforcement. Significantly, their drawings did not reflect feelings of safety and respect. It rather reflected fear and anger due to the violence they encountered – often in the name of discipline. Williams points out that the drawings produced during the study evidenced ‘how macro-abuse of state power

¹⁹¹ Interview with a former child detainee who now himself works with children in detention, Krugersdorp, 26 February 2018.

¹⁹² Fengu, M., ‘Search on for escaped inmate’, *Dispatch LIVE*, 10 November 2015, Available from <https://www.dispatchlive.co.za/news/2015-11-10-search-on-for-escaped-inmate/> (accessed 06 August 2018).

(apartheid) was translated into micro-abuse of street children through the police, military, governmental officials and the public.’ On the side of the public, it was also revealed how vigilante groups methodically targeted street children so as to “cleanse” white districts, with tacit police and political approval.¹⁹³

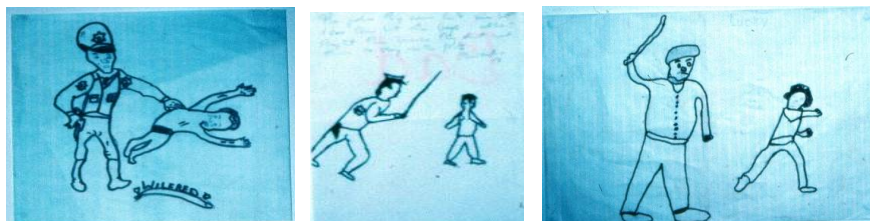


Figure 9-11: Child illustrations of state and public abuse during apartheid (© statecrime.org)

In many cases, violence was unprovoked and deliberate. A boy called Wilfred, for example, produced a drawing depicting an incident when a woman accused him of stealing her handbag. A police officer chased him and ended up severely beating him with no concern about his actual innocence (Fig. 9). Another child sketched his daily reality of being regularly targeted by the police for simply walking down the street (Fig. 10). A drawing by a child named Peter further shows the public’s complicity in the abuse of children simply for being homeless. His drawing depicts how shopkeepers and security guards (i.e. members of the public) regularly drove them away from public spaces by beating them. He specifically explained that as a kid living on the streets you have to be able to ‘run fast’, while always looking back over your shoulder so as to know ‘where the blows might come from’ (Fig. 11). What is more, when arrested, the drawings of several children showed them being crammed in the back of vans with aggressive dogs – a tactic often employed by various states as a form of psychological torture (Fig. 12).¹⁹⁴

A comparable situation faces contemporary street children who often come into conflict with the law. They are still beaten, removed and chased by police, while vigilante groups or violent mobs act independently in the name of justice. In Johannesburg for example I interviewed one of these children, who had been arrested several times in connection with his addiction to hard drugs. Ndumiso (alias) for instance, was assaulted by members of

¹⁹³ Cf. State Crime, *op. cit.*

¹⁹⁴ Cf. State Crime, *op. cit.*

the public at a taxi rank after a woman identified him as the thief who robbed her of her purse.¹⁹⁵ The police did nothing *because* he was a child addicted to drugs living on the streets. Moreover, when talking about the police and the way they treated him, nothing less than pure hatred reflected in his manner. They beat, chased, harassed, cuffed him, called him names and drenched him in water. The last thing he said before storming out of the interview room was ‘f*** the police!’

One of the most striking images of the state violence study was sketched by a boy called Morris. It illustrates his idea of hell as being life as a child in an apartheid prison (Fig. 13). In his drawing however, I recognised a reality that many children still face today – gangsterism, violence, drugs, rape and murder. It is a reality that children in contemporary South Africa fear most when coming into conflict with the law. Morris’s drawing shows the violent chaos in South African prisons as one hellish nightmare. Central to the sketch is ‘the new boy’, presumably Morris himself, being violently assaulted on a table. The symbolism clearly suggests rape as the boy is simultaneously stabbed by a man in the groin area and shot through the head by a bodiless presence. Above the table, a fellow inmate is being executed. The Pretoria Central Prison, illustrated in the drawing, routinely executed five to six political prisoners at a time – all of which was done in a way so that other prisoners could hear the execution being carried out. Williams notes how children described the sound of a person’s neck snapping as similar to the sound of a cinema seat banging upright as people stand to leave at the end of a film.



Figure 12-13: Child illustrations of state detention (© statecrime.org)

¹⁹⁵ Interview with Ndumiso, Johannesburg, 2 October 2017.

With the exception of state execution, all of the events described above were at some point relevant in the lives of the children I interviewed all across South Africa. To the boys, being sent to prison means a real possibility to be ‘made a girl’, forced into gangsterism or targeted for not ‘taking a number’. For instance, a boy interviewed in Krugersdorp, attempted suicide by tearing open his own wrists with his teeth – rather than face the possibility to be transferred to an adult prison when he turned eighteen.¹⁹⁶ Another boy, Jacob (alias), interviewed in an awaiting trial detention centre highlighted the reality that with ‘gangsterism it is either prison or death. There is no way out [...] I see no solution [...] I would rather choose death if that was the option they gave me.’¹⁹⁷

These experiences as well as the historical images above potently illuminate how children themselves experienced their treatment when in conflict with law enforcement and detention. It is clear that apartheid South Africa was a particularly brutal place for children, given the way in which the legal system was arranged to snuff out resistance and the presence of racial diversity. Yet, as the statements of the Bisho boys and other contemporary child detainees highlight, beatings are still very much a part of the way in which child offenders are dealt with when in care of the state. A final example of an event that occurred at Bisho may underscore the serious need to address institutional punishment where it intersects with the individual social attitudes of the staff themselves. When the boys were transported to Qumbu after the 2015 strike, the management summoned police to restore order and remove the boys. Ernest remembers sitting close to the gate when the police arrived:

I saw cops come in at the gate. It was violent after that. It was so violent in fact that the cops almost shot at us. The caretakers were the ones who suggested to the cops that ‘if these boys run away, shoot to kill – that is the only thing.’ I was surprised. Why is it a shoot to kill? This is not a shoot to kill premises [...] I got scared. They told us to lean against the wall. They took all our USBs, all our memory cards. The stuff we need to watch movies on the TV. They took all our stuff. They even discovered some phones and they discovered some money and drugs. They told us to strip butt naked. I got the feeling that they thought we were sticking things up our bums.¹⁹⁸

¹⁹⁶ Interview with Patrick (alias), Krugersdorp, 26 February 2018.

¹⁹⁷ Interview with Jacob, Krugersdorp, 30 January 2018.

¹⁹⁸ Interview with Ernest, East London, 25 September 2017.

What followed was a humiliating experience of being forcefully, yet intimately searched, while the entire body of staff looked on. ‘They made us beg,’ Jakes recalled. ‘What made me feel bad was that the careworkers [particularly the women] laughed at us when the police did that. They are not supposed to do that. They are supposed to look after us. It is their job.’¹⁹⁹ Zach claimed that the careworkers were taking photographs the whole time they were being searched. He said that they even shared the photos on Facebook.²⁰⁰ As soon as the policed finished their search, the boys were told to get dressed again. Then, they were cuffed to each other in pairs – by the ankles – and told to get into a van with nothing more than the clothes on their backs. They subsequently left Bisho, never to return again. Worryingly, all of this happened at night, while neither the boys nor their families understood or knew what was happening. Not even the authorities knew – only the people present at the Centre on that day knew the boys were taken away. In the morning, the boys found themselves at *Qumbu CYCC*, where the saga of punishment and mistreatment continued in the form of beatings and the limitation of food.

Apart from the actual treatment of the boys just before leaving Bisho, the troubling dimension of what occurred bears evidence of a mentality that goes beyond the institution itself. What is crucial is that it reveals a mentality rooted in the very fabric of the society of which these caretakers are a part. The mere fact that they were able to laugh at and therefore enjoy the humiliation and abuse of children speaks of a system that is failing, not due to the laws that accompany it, but due to an indifferent attitude towards the dignity and rights of children. In short, the situation at Bisho (and other centres such as Qumbu) was one of physical as well as psychological abuse. All the boys were confronted with beatings and isolation at some point during their time in detention – indicating the systemic nature of abuse within the system. Sharpening the focus of my argument, the following section discusses the widespread use of isolation as an easy solution to difficult situations. It will specifically reflect on how isolation in detention shapes a child’s sense of worth and desire for life.

¹⁹⁹ Interview with Jakes, Port Elizabeth, 29 September 2017.

²⁰⁰ Interview with Zach, Port Elizabeth, 29 September 2017: Although other boys confirmed that photos were being taken, I could not confirm whether these were actually uploaded to the Internet.

4. The Psychological Effects of Institutional Isolation

Vuyo (alias) has been in the system in some shape or form since the age of eight. I was unable to interview him personally due to the fact that he was rearrested for stabbing a neighbour shortly before his interview was scheduled. His lawyer, Malematja, however recounted the boy's experiences in particular detail. He described him as 'a boy who really has a troubled past, and I can say, a troubled present *and* future'.²⁰¹ As a young boy, Vuyo notably witnessed his intoxicated mother burn to death in the shack they shared near Benoni. His father subsequently rejected him when he found a new wife and family. This precipitated a spiralling life of crime as a means of survival. He quickly entered the system and when he was first arrested he was sent to a 'place of safety' in Benoni. Upon learning of his father's rejection, some of his siblings in the Eastern Cape decided to send for him. Unfortunately, this did not improve his situation as, after years of neglect, he came in conflict with the law more frequently. He came to Bisho in 2012 after having been tried and convicted under the *Criminal Procedures Act* (CPA) for raping another boy. This was the first error made in Vuyo's original conviction, since as a child he should have been tried under the *Child Justice Act*, not the *Criminal Procedures Act* (which is meant only for adult offenders). Upon investigation, it remains unclear as to how exactly he came to be detained at Bisho. As noted by the CCL, it is unlikely that Vuyo was sentenced to Bisho, given the fact that Section 276(1)(i) of the CPA, under which he was sentenced, would make it legally impermissible to be sentenced to a CYCC.²⁰²

Nevertheless, he somehow found his way to Bisho and once there he was immediately separated, since he was deemed a risk to the other boys, given the nature of his crime. The other children who were also convicted for rape, were not isolated in this deliberate fashion because their cases involved the raping of girls, not boys. In his pre-trial report, Vuyo's behaviour was assessed as a risk to others and particularly challenging. Nevertheless, the report emphasised that Vuyo is 'in need of care' so as to prevent him from 'becoming a regular offender'.²⁰³ He practically spent all of his time locked up alone in a single room,

²⁰¹ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

²⁰² Cf. Application to the High Court of South Africa, Eastern Cape Division, *op. cit.*, p. 22.

²⁰³ Cf. Application to the High Court of South Africa, Eastern Cape Division, *op. cit.*, p. 21.

while hearing other boys talk to each other in adjacent cells. He questioned this isolation desperately. Why could the other boys stay in four-bed cells? Why were they allowed to socialise with each other while he was not? Nobody took his complaints seriously and his loneliness escalated into desperation. Malematja pointed out that Bisho defended their decision to isolate Vuyo because ‘they don’t want him to rape the other boys’.²⁰⁴ Yet Vuyo kept on explaining: ‘I am here for rehabilitation and I am sentenced here, you can’t put me in isolation. Who do I talk to? There is nobody who I talk to. Sometimes it pains me to hear voices from other dormitories and to hear the boys are having fun [...] It really hurts me [...] This isolation is breaking me down.’²⁰⁵ Malematja asserted that this young boy was never heard, which ultimately led him to consider: ‘Why should I be in a place where I am treated differently? Definitely, I do not belong here.’²⁰⁶ The fact that he lacked any sense of belonging to the community of children he was detained with caused him to attempt suicide.



Fig. 14: Soot on cell window after suicide attempt

Vuyo managed to get hold of matches and one night set his cell alight – choosing a death similar to his mother’s (Fig. 14). He was saved from the fire, but had to be resuscitated at the centre for smoke inhalation. He was then taken to hospital. After treatment of his wounds, Vuyo was immediately brought back to Bisho where he was placed in isolation. Not once was he given counselling or guidance to help him work through his past and suicidal tendencies. Although no record exists of his ever being treated or listened to by staff or councillors at the centre, Bisho claims otherwise in Vuyo’s progress report.²⁰⁷ Despite taking responsibility for his crime and seeking rehabilitation, Vuyo was brushed off as a criminal. He was not treated as a traumatised child with an extremely troubled past. His sentence became a prolonged punishment instead of a restorative opportunity to change his life. He has been in conflict with the law most of his

²⁰⁴ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

²⁰⁵ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

²⁰⁶ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

²⁰⁷ Cf. N. Adams and L. Nanto, ‘Progress Report: Vuyo’, *Department of Social Development*, Eastern Cape, 2016, para. 11, p. 9.

life, the cycle of crime manifesting in rejection, rape, isolation, attempted suicide and the stabbing of a neighbour. It can thus be said that, having entered the criminal justice system at the age of 8 years, he is the product of a system that may be impressive in theory, yet is an ignominious fiasco in practice.

5. Preventing Rehabilitation: Opening of additional Cases as Punishment

Amazingly, despite the situation described above and the fact that Vuyo opted to deliberately end his life as a result of inadequate understanding and psychological support, the Centre was not dissuaded from also opening a criminal case of arson against the child.²⁰⁸ So, instead of providing him with a safe space to work through his suicidal thoughts, the Centre proceeded to punish Vuyo for wanting to kill himself. In addition to the *ex parte* application (see Section A above) brought against all the boys, three other cases were opened against Vuyo during his stay at Bisho. Analysing the DSD progress reports of all the boys, opening cases left, right and centre seem to be standard practice by the Bisho management when confronted with inevitable behavioural challenges in work with children in conflict with the law. Ernest, Kanelo and Xola all left the institution with a more extensive criminal record than when they arrived.²⁰⁹ Similarly, Andile accumulated four cases while detained at Bisho.²¹⁰ Andile's progress report states that he was further punished for each transgression by being placed in isolation for an undisclosed period of time. Given the statements of the boys above, it may be reasonably suspected that these periods of isolation were accompanied by corporal beatings as additional punishment. Consi-

²⁰⁸ Cases against Vuyo: Case no. 113/06/13 for escape; Case no105/11/14 for malicious vandalism (but was withdrawn); Case no. 76/10/2015 for arson. Cf. 'Progress Report: Vuyo', *op. cit.*, p. 9.

²⁰⁹ Cases against Ernest: Case no. 79/10/14 for grievous bodily harm when he allegedly beat a careworker (Mr Botsa), who tried to stop Zach from assaulting a security guard, (no case was made against Zach, who allegedly beat the security guard); cf. 'Progress Report: Ernest', 2016, para. 11, p. 7. Cases against Kanelo: Not one, but two cases of escape were brought against him (Case no 51/11/15 and Case no. 18/11/16); another case (no number stated) was brought against him for robbery at the Centre (he allegedly stole from a member of staff and a visitor); cf. 'Progress Report: Kanelo', 2016, para. 11, p. 7. Cases against Xola: Cases for escaping, vandalism and three accounts of burglary were opened, but no case numbers were recorded. Cf. 'Progress Report: Xola', 2016, para. 11, p. 8.

²¹⁰ Additional cases against Andile: Case no. 51/11/2015 for three instances of escape; another case was opened (no case number available) for allegedly assaulting staff members and other children; Case no. 29/11/2015 for common robbery; a final case was opened for vandalism (the report does not mention when). Cf. N. Adams and L. Nanto, 'Progress Report: Andile', *Department of Social Development, Eastern Cape*, para. 11, 2016, pp. 8-9.

dering for a moment that these children were sent to Bisho specifically to be diverted from the criminal justice system and to be rehabilitated according to restorative principles, the procedure described is massively counterproductive and certainly does not address the behavioural problems the boys may or may not have displayed while at the Centre. All of the children were sentenced to Bisho because they committed crimes for various reasons – mostly because they were dealing with extremely challenging personal backgrounds. Since it is the duty of all staff members (management, social workers as well as careworkers and guards) to assist these children to mend their ways, it is inexplicable that the opposite happens – making their quest to become productive members of society even more difficult and less likely. The case brought against Kanelo and Andile for allegedly ‘escaping’ Bisho during the 2015 strike, may serve as a summarising illustration of how the legal system failed the boys due to an ill-informed propensity to open cases against children as a first and not last resort. When Andile’s sentence lapsed on 8 April 2016, he was not released but transferred to West Bank Prison on the charge of escaping custody brought against him by the Bisho management. The case was against him and Kanelo who left the Centre during the staff strike in order to buy food at the local tuck shop. They were on their way back when the police found them. Explaining the situation to the police, they were taken back. Yet, upon their return, the manager was already waiting by the gate. Both boys found this strange, since the gate was left open, and second, how did Ms Nanto know to wait for them if, as she claims, she was not there to see them leave? They concluded to themselves, that the manager planned it due to the fact that she wanted the boys gone. She apparently tried to convince the police to take the boys away. Refusing to do that, the police advised her to open a case, which she did. The case however was brought before a criminal court, not a children’s court, which would have been the correct institution given the provision made by the *Children’s Act (CA)*. All matters concerning CYCCs are namely regulated by the CA so as to make sure that children do not accidentally enter the criminal justice system. As Malematja explains:

A child can abscond in two ways: either by leaving secretly without anyone knowing [...] Or when the child has been granted leave of absence from the CYCC does not return. Then a child is regarded as an abscondee. The process is that once an abscondee has been apprehended, they should be brought before a children’s court commissioner to ascertain the facts or the reasons why this child absconded. [...]

So it might be that the child absconded because security is not tight or he didn't have food [...] The Department of Social Development did not follow that process. They just went straight to the criminal court and charged Andile [and Kanelo] with escaping from lawful custody.²¹¹

If the proper process were followed, the court would have established that the gates were left open, staff were on an unannounced strike, while the children were left without food and proper care. After taking the matter on appeal to the Bisho High Court, the court found in favour of the boys and the charges were dropped on 17 February 2017.

Not only does this case point towards serious misconduct by the management of Bisho, but it also illustrates vividly how the failure to properly implement the processes provided for by a comprehensive legal framework can have serious implications for the future of a child. Both cases against the boys at Bisho highlighted in this chapter (the *ex parte* application as well as the charge of escape) raise serious misgivings about the ability of the Centre to act in the best interests of the children in their care. One could not blame anyone for developing strong suspicions that the management itself was acting with malicious intent, since how can the actions described so far not be viewed as deliberate efforts to get rid of problematic individuals when ways should be tirelessly sought to guide children to a future that contributes positively to society?

C. Social Situations and their Impact on Rehabilitation and Reintegration

During the course of the empirical research period, it became evident that there are significant failures in relation to rehabilitation and reintegration. This has a lot to do with the way in which children are treated when detained, as reflected in the previous section. But it also has a lot to do with the fact that the children do not receive any support after being released back into society. There was for example no effort made by the DSD to ensure that the boys are returned to a safe and stable environment. This was clearly reflected in the attitudes of the boys during the interviews. The boys who had relatively stable supporting families were adamant that they want to be better, go back to school and stay away from gang culture. This was particularly true for Sabelo, Ernest and Kanelo. However, other boys such as Jakes, Andile, Vuyo, Xola and Anathi, had no safe and supporting

²¹¹ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

social structure to rely on when released. Where this support structure or sense of social understanding was lacking, the boys were sad, scared or resigned. This clear antithesis calls for a logical next step, which will now be addressed. I will consider some of the burning issues in society that hinder the successful rehabilitation and reintegration of children, like the Bisho boys, who are released back into the community.

1. Gangsterism and Loss of Community

Even before the apartheid years, gangsterism was a reality in the lives of children in impoverished, oppressed and marginalised societies. It reflected an urban condition where children were left alone while their working parents were largely absent from their lives. Gangs such as the ‘Americans’, the ‘Gestapo’ and the ‘Berliners’ rose up especially in urban areas stricken by poverty and lawlessness. Most of these gangs imitated segments of Western society by whom rejection of white establishments was expressed. This admiration was especially suggested by their dress and the slang they have developed. The ‘Americans’ for instance dressed like the actors they saw in the gangster and film noir movies of the 1940s and 50s. They also became known as the ‘African Robin Hoods’, as they mostly stole goods from wealthy white men and sold it for a cheap price within their communities. The ‘Gestapo’ and the ‘Berliners’ on the other hand took their names because, in their naivety, they regarded Hitler as a hero who dared to take on the entire white establishment of Europe.²¹² While most gangs were run by adults, a number of child gangs sought to follow in the footsteps of the examples they saw on the streets. The ‘Vultures’ was one such a gang in Sophiatown near Johannesburg. The leader of the gang, Don Mattera, explained the reasons for joining: ‘The boys could be somebody at a time when society did not help them to be somebody.’ The desire for *ubuntu* as discussed earlier, is clearly noticeable in Mattera’s exposition, since, although membership of a gang ‘could not change the injustice of the society in which they lived [...] it provided the youth of Sophiatown with a strong sense of identity and belonging.’²¹³ After the struggle of

²¹² See, ‘The Gangs of Sophiatown’, *South African History Online*, 15 March 2011, Available from <http://www.sahistory.org.za/topic/gangsterism> (accessed 15 February 2018). See also D. Mattera, *Memory is the Weapon*. Johannesburg: Ravan Press, 1987, 2nd ed., African Morning Star Publications, 2007. Mattera wrote extensively about the social conditions prevalent in Sophiatown and specifically focused on the issue of gangsterism.

²¹³ Cf. ‘The Gangs of Sophiatown’, *op. cit.*

apartheid the social situation in many townships did not improve and gang culture developed into one that thrived on the exploitation of children (cf. Chapter Two on change and gangsterism). In most instances children are now *forced* to join or face the risk of being violated or killed. Today, the so-called ‘Number Gangs’ have grown in size and popularity. To become a member or to be protected by them, criminal acts such as murder, rape, assault, stabbing or robbery are part of the initiation process. To belong to a gang in contemporary South Africa requires a commitment to crime, and as such being sentenced to a prison term is regarded as a badge of honour. Unlike the ‘Vultures’ of the past, therefore, children no longer join gangs for a sense of belonging, but as a means of survival. In many ways, children are no longer scavenging ‘vultures’, but they themselves have become prey.

The reality of gang culture is something every young person needs to deal with when detained – regardless of whether they are kept in juvenile sections in prisons or in CYCCs. The mark of gang culture is tattooed on the skins of most of the boys interviewed. Their tattoos however were already quite old when they were first visited by representatives from the CCL in Mdantsane Prison. This would suggest that they must have received them in another detention centre, possibly a CYCC. In South Africa, if you do not ‘take a number’ (i.e. join a gang and have your membership tattooed on your body), you consciously expose yourself to violence. If you are ‘clean’ from a gang (without any tattoos), you are targeted and risk being raped and/or killed. The Bisho boys were forced to join gangs as a means to protect themselves. Zach for example entered his sentenced already a member of a numbers gang and was tattooed accordingly. While in detention at Bisho, he allegedly added more tattoos, which was punished by the management by placing him in isolation for an unknown period of time.²¹⁴ Several boys chose to keep the tattoos, while others tried to remove them after being released, not wanting a scarlet letter engraved on their skin of time spent in detention. Sabelo for example removed his with a knife leaving a scar on his hand where a tattoo used to be. Xola on the other hand did not escape gang

²¹⁴ Y. Magoqwana and L. Nanto, ‘Progress Report: Zach, *Department of Social Development*, Eastern Cape, para. 8, p. 6.

culture upon his release back into society.²¹⁵ Shortly before his scheduled interview, he went missing from his community without a trace. Nevertheless, we traced his home and tried to find him there, but discovered that his community drove him out. The dislike of Xola's neighbour for him could not be more obvious: 'That boy is trouble. Nobody wants him here. He is a naughty boy – running with his gang. He just causes trouble. He should stay away.'²¹⁶ Kanelo also had tattoos – some of which he also tried to remove. Malematja noted that they were not gang tattoos, but marks that suggested a more sinister story. Malematja remembers seeing Kamele for the first time in prison:

Every time I spoke to [Kanelo], I became emotional [...] I looked at his hands ... and although other boys also had the prison tattoos and everything, they said they got them voluntarily. But when I questioned Kanelo about his tattoos, you could tell he was victimised. I cannot remember what was written on his hands, but it is not something that a person voluntarily writes on their skin. Nasty things were written. You could tell that he was victimised, you know. [The boys] didn't open up as to the type of victimisation that occurred. So I couldn't tell if some were sexually abused, because they didn't say [...] I cannot put them in a corner, forcing them to like 'tell me, tell me'. That is terrible.²¹⁷

The deeply problematic nature of the gang culture that exists throughout South Africa's urban environment is exemplified by the life of Jakes. Like most of the other boys, his background and family structure greatly steered his route towards conflict with the law. What was clear from his interview in 2017 was that he still lived in fear of death every day. He yearns for a sense of safety, which he cannot find in the environment where he was born and released back into. In the pre-trial report conducted by his parole officer, Jakes's overall situation was described as 'unfavourable' and 'unconducive' to the stable development of a child. Korsten, his home district, is notably one of the most dangerous districts in Port Elizabeth. It is ruled by gangsters and human traffickers. Street corners are owned by drug dealers and pimps, while crime as well as alcohol and drug abuse are normal companions to family life. His home, which he shared with his unmarried parents, was described in the pre-trial report as 'unbecoming' and 'jaunt' where domestic violence

²¹⁵ Xola is the boy mentioned earlier, whose arm was broken by prison guards while they were beating him with batons.

²¹⁶ I visited Xola's community in Port Elizabeth on 29 September 2017. Given that he was missing, we tried to find information from his neighbours on how he is.

²¹⁷ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

and substance abuse were common. According to the report, due to his vulnerability, Jakes was ‘forced to become streetwise’, which brought him into contact with crime. Despite his hardships, the report continues that there was no sign of any ‘professional intervention to rescue him from becoming a danger not only to himself but also to society at large.’²¹⁸ His overall demeanour was described as ‘sad’ and ‘frustrated’ having ‘lost hope in his home environment and for his future’. This was also true for the boy that arrived at the interview for this study – a sad individual that sees no way out of his dire circumstances. The desperation in his speaking reflects his sheer vulnerability and lack of external support – an attitude completely understandable given the violence he has endured in his young life: While in detention, Jakes was stabbed in the head, placed in isolation and beaten by his caretakers. Zach specifically recalled the way in which Jakes seemed to be targeted during his detention period:

I myself wasn’t really beaten at Bisho. I just went my way. But Jakes, they beat him a lot – and more. Then they would leave him alone in a room and we were not allowed to see him. We didn’t see him for about two weeks or something like that. They kept on beating him. And in prison ... prison is a very different and horrible place. The people at Bisho should never have allowed us to go there. We didn’t have tickets [i.e. prison numbers], which meant we couldn’t go to school. We couldn’t attend programmes. They just scolded us there, saying we are overcrowding the prison. I remember one morning, they really beat me and Jakes. I tried to call Mr Stan, my lawyer, but they didn’t allow me to. They never wanted us to call our lawyers. The prison guards there, they just want to fight, fight, fight – particularly with me and Jakes. Jakes fought back though – a lot. He fought back against the guys that wanted to beat us for no reason. If they didn’t beat us during the night, they would get us the next morning.²¹⁹

A month after his release, Jakes was shot by his own cousin who belonged to a gang in his neighbourhood. The bullet broke his collar bone and ribs while also costing him one lung. As a result, his breathing is compromised, which limits his job prospects considerably. Recently, while his mother was looking on, Jakes was also knifed in the back by a homeless Somali man, who, while under the influence of a drug called ‘tik’, thought him to be somebody else. ‘He wanted to stab me in my neck. So, I fought him.’ Pointing to the shoulder wound, he stressed, ‘This wound was meant for my neck. As I was fighting him,

²¹⁸ Cf. Application to the High Court of South Africa, Eastern Cape Division, *op. cit.*, pp. 26-27.

²¹⁹ Interview with Zach, Port Elizabeth, 29 September 2017.

my phone fell. But I ran away. I didn't care about my phone. I was running for my life.'²²⁰ Although clearly traumatised by the experience, Jakes pointed out that the stranger was in a more difficult situation than he was himself.

But these boys who do these things are without a home. There are a lot of boys who are suffering here. A lot of boys ... a lot of boys. Look around. There are a lot of boys who suffer more than me. Who do not have a mother [...] It is not nice here. Kids! Small children every day die here. Small children. Small children, gun shots, knives ... It is hard for me to see every day how small children get shot.'²²¹

In the evenings, Jakes is mostly alone at home since his mother is now critically ill in hospital.²²² His father who is in a gang has to work nightshifts several times during the week. 'I wish I had a brother or a sister', Jakes noted, 'but my mother and father are going to die any day. So I don't have someone I can depend on. I have no one who could take care of me ... Sorry I am crying.'²²³

Many people in this neighbourhood do not have proper houses but have to make their homes in shipyard containers presumably provided by the local municipality (see Appendix). A council worker in the district highlighted the inhumane conditions children face due to the gangs: 'The 9-year-old boy of my wife's cousin is staying with us because he refuses to go home out of fear for what might happen to him in this neighbourhood. It is one of the worst areas in the whole of the northern suburbs. Only a week ago, I was driving home in a taxi with my wife. As we stopped on a corner, this guy I knew was crossing the street to fetch a five-year-old boy who was standing on the opposite side. The man was gunned down and the boy too. Seven bullets in the boy's body.'²²⁴ I was told by community members that the house next to Jakes ... his neighbour's house was attacked by a group of gunmen. The bullets rained through the side of the house killing everyone inside. The fact that Jakes did not seem to mind his harsh and degrading treatment in detention made a great deal of sense after witnessing the environment he is used to. All he wants is a place to call home and feel safe. 'The boys who ran away and broke things at Bisho didn't do it

²²⁰ Interview with Jakes, Port Elizabeth, 29 September 2017.

²²¹ Interview with Jakes, Port Elizabeth, 29 September 2017.

²²² She has lung cancer, low blood counts, meningitis, arthritis and is not expected to live much longer.

²²³ Interview with Jakes, Port Elizabeth, 29 September 2017.

²²⁴ Interview with appointed Council Guide, Port Elizabeth, 29 September 2017.

because of the actual place. It was nice. They did it because of the way they were treated by people there. Bisho itself is nice. It is not a place where you feel you are in danger or where you are lost. You see, for *me* Bisho felt like a home with only a few things short – my family, you know, people I love.²²⁵

The fact that he is nineteen now and legally no longer a child made him desperate. He wanted me to get him out of Korsten. As a minor he was legally protected from prison.²²⁶ If he were to be arrested now, there would be no legal barrier to being sentenced to an adult prison – a thought that visibly scared him. It seems only a matter of time until he is forced to defend himself against injury and possible death, which could lead to falling foul of the law again – this time as an adult. He seemed perplexed as to why such terrible things are happening to him now that he is trying to stay on the straight road: ‘It is hard. I was born with two lungs! I ask God, how can he leave me with one lung, what did I do?’²²⁷ Reflecting on his community now that he is released, Jakes broke into tears:

That is why I want to get out of this place. You see, because there is nobody here. Coloureds²²⁸ don’t care about each other. That is why I always say, I’d sooner die for a Xhosa than for a Coloured, because Coloureds do not come close to other nations. Coloureds like to put each other down when they see you have more than him.²²⁹

This view was echoed by the council worker, who stressed with exasperation that the government has completely forgotten about them here in Korsten – that *ubuntu* has been replaced by individual governmental greed. In this sense, the critics of Western constitutionalism in Africa may have a point when they warn that neglect of community well-being may lead to a loss of equality within marginalised societies. As mentioned in Chapter Three, sceptics of Western constitutionalism maintain that it produced individuals who no longer find meaning in collective development. It rather thrives on selfishness that prefers a certain materialistic focus on individual gain.²³⁰ Seen from a contemporary per-

²²⁵ Interview with Jakes, Port Elizabeth, 29 September 2017.

²²⁶ Although given the failings of the system even the sound legal framework in place in South Africa did not protect him from ultimately being placed in an adult prison.

²²⁷ Interview with Jakes, Port Elizabeth, 29 September 2017.

²²⁸ In the South African context ‘coloured’ or ‘Coloureds’ are not a derogatory term for the black communities. It rather refers to a very specific ethnic group who are referred to as Coloureds.

²²⁹ Interview with Jakes, Port Elizabeth, 29 September 2017.

²³⁰ Cf. Mokgoro, *op. cit.*, p. 6. See also, Chapter Three on the South African legal framework and *ubuntu*.

spective, one could argue that such a focus left room for the new form of gangsterism now prevalent in South Africa – one that no longer rebels against white establishments by stealing from the rich to give to poor communities (like the ‘African Robin Hoods)’. Instead, as Jakes points out, we are dealing with a form of gangsterism where people would steal from or even kill members of their own community simply because ‘they see you have more than them.’ The day before the interview, Jakes was robbed at gunpoint by two gang members on drugs because they wanted his mobile phone:

I don’t have much – because of the situation in this area [...] When they are too high [on drugs], they don’t have a full brain. They can’t think normally about what is right and wrong. They just think about this thing they want. That is how these guys are.²³¹

What seems to drive contemporary gangsterism in South Africa is not a sense of rebellion to state power, but a desire for personal gain and influence. A former member of the 27-gang told me that a drive has developed in gang leaderships to form political parties. If they were to be successful, it could have serious implications for the country, given the politics of fear evident in societies affected by the phenomenon. This may also explain the government’s recent consideration to employ the military against gangs – which would in my view be unconstitutional. The risk this brings into the lives of young people is significant, since they are usually the first to suffer when society fails.

2. Deprivation as Barrier

Andile was convicted of theft and sentenced to a year’s compulsory residence at Bisho. Both his parents are deceased and, at the time of his interview, he was staying with his aunt and eight children in a house of about four square metres. It is no surprise, that he chose to spend as little time as possible at home – opting rather to walk each day to the nearest village called Kentani. When we met him there he was visibly under the influence of a drug he must have taken a few hours before. Malematja expressed particular concern for Andile, pointing out that the lack of access to any stimulating environment significantly enhanced the changes that he might reoffend:

At the time we were defending Andile and Kanelo on the absconding charge, Andile

²³¹ Interview with Jakes, Port Elizabeth, 29 September 2017.

was out on a conditional bail, which required him to report to Kentani Police Station every Monday. We drove there. You saw how far Kentani Police Station is. But that was the only viable police station. It takes almost an hour to get there. But he complied with that condition. He reported at the police station every Monday of every week [...] Andile to me is the most illiterate of the boys. He cannot read, he cannot write. There is nothing for him really. His educational background is limited. He stopped schooling at Grade 5, which is 11 years old.²³²

To be exact, Andile's traditional hut is between Butterworth and Kentani and in the middle of a vast rural area where small shacks are scattered across the hills (see Appendix). East London, the nearest city, is a two-hour drive away, while it takes over an hour to walk to Kentani. When asked about his daily routine, he simply shrugged and said, 'I wake up, walk to town, meet friends and go back home.'²³³ This is what he does daily. The geographical spread of the poverty and isolation found in this community is overwhelming. It is not like the urban environments where thousands of people are crammed into a small area. Here, the economic inequality that affects the majority of South Africans stretches out as far as the eye can see, vividly illustrating the magnitude of the problem.

Andile's story outside of prison may not be as dramatic as that of Jakes, but the very undramatic tragedy of his situation is no less disturbing. In detention, Andile was restrained by the fact that his movement was deliberately restricted to the confines of the Centre. In freedom, paradoxically, the paralysing lack of opportunity in which he is forced to live is just as restricting in its vastness as the confines of a prison existence. Like Jakes, Andile has simply been left after his release with no additional prospects or skills upon which to build a crimeless future. This begs the question what future there is for anyone born into this environment, where there are neither chances for education nor opportunities for a job. It seems near impossible to escape this life legally. It is therefore understandable that Andile and countless youths in South Africa react to a futureless existence by turning to drugs and crime. As Malematja noted, Andile left school at the age of 11 and ended up falling victim to drug abuse at a young age which eventually brought him into conflict with the law. The concept of CYCCs was developed in order to stop the cycle of crime by offering children schooling, skills training and personal development

²³² Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

²³³ Interview with Andile, Butterworth, 28 September 2017.

programmes. According to Andile, however, none of these compulsory programmes were offered at Bisho.²³⁴ The only times he felt they were treated properly were those rare occasions when they were allowed to watch TV for a bit longer or return to their rooms later than usual. Recreational ‘treats’ were offered as an occasional reward. Restorative education and skills training were nowhere to be found. When the boys were sent to Bisho, most were told that they will be offered a range of programmes including school, life skills (on drug abuse, anger management and social emotional therapy), upholstery, welding, car mechanics, sewing as well as sports training such as rugby, soccer, gym and swimming.

We only had school and life skill programmes. None of the others were offered. There was a swimming pool, but we were not allowed to use it. The excuse the careworkers gave was that we will bully each other in the swimming pool and they do not want problems. The management also came up with excuses when we complained about the programmes not being there. Once we were punished because we demanded to do car mechanics. We were locked up in our dorms for about twenty hours because we complained. I felt I learned from the life skills programme, but it was stopped suddenly without any notice. We didn’t ask why, because we didn’t want to be punished.²³⁵

Zach highlighted that the care workers did not want them to do sports programmes. ‘There was a gym as well, but we were not allowed to use it. The careworkers used it instead. I organised our own rugby team, because there was no programme. Now, if you play rugby, you need to gym as well. The careworkers didn’t want that. So, they made us stop [...] The same with the swimming pool.’²³⁶ According to Jakes, there were ‘many things we couldn’t attend. My lawyer told me there were a lot of programmes at Bisho, but it must have changed when I got there. There was a swimming pool, but we couldn’t use it. The careworkers also didn’t want us to use the gym to lift weights, because they said it would be dangerous for them [if we get stronger].’²³⁷ This attitude regarding allowing the boys to engage in physical activity was confirmed by Malematja who visited the centre to inspect the damage and talk to the careworkers (see Appendix for photos):

They showed us the gym – and this was the surprising part. We asked, ‘Okay fine, you have a gym. The equipment is okay and everything, but are the boys allowed to use it?’

²³⁴ Interview with Andile, Butterworth, 28 September 2017.

²³⁵ Interview with Andile, Butterworth, 28 September 2017.

²³⁶ Interview with Zach, Port Elizabeth, 29 September 2017.

²³⁷ Interview with Jakes, Port Elizabeth, 29 September 2017.

One of the careworkers literally said, ‘No, because then they are going to get strong and they will start beating us down’. Then I said: ‘So, who uses the gym?’ He said, ‘The staff use the gym. [The children] are not allowed to go into the gym. What if they go into the gym and they take one of the gym bars and they start assaulting each other or assault one of the careworkers with the steel bar?’ Then I asked, ‘But when these boys leave the gym, what security is there? Are they not searched before they go to their dorms?’ He was like, ‘No, no, no. We do not want that risk. So, they are not allowed into the gym. The gym is exclusively for the careworkers.’²³⁸

Zach also raised the gym issue in relation to the careworkers: ‘We couldn’t go to the gym to lift some iron. No, the careworkers trained in the gym so that they can hit us.’²³⁹ As mentioned earlier, the situation of education and physical activity did not improve when the boys were transferred to Qumbu CYCC. There they were deliberately treated differently from the boys who were already there, i.a. by exclusion from programmes and sports activities. Due to the lack of a prison number at Mdantsane Prison, the boys could participate in no programme or activity. So, they were again prevented from furthering themselves both intellectually and physically. When Andile and the other boys were released, they were in no better situation than before entering the system. One could argue that they were worse off, because now they also had a record to their names. As highlighted earlier, several of the boys also walked out of detention with additional cases against them. The way centres seem to deal with inevitable transgressions by troubled children is to simply open another case. The only option Andile had upon release was to return to the life he left behind as if nothing changed. And indeed – shortly after the interview, Andile was rearrested for a crime and at the time of writing is awaiting sentence to an adult prison. In the cases of both Vuyo and Andile, the cycle of crime has not been broken, and it is difficult not to blame the apathy of a social system into which they were born and the lack of opportunity granted them by adults.

Proceeding a step on the basis of the empirical research presented above, the following chapter will venture to put forward concrete recommendations for the linking of human rights, principles of change, and *ubuntu*, with a view to show how that could enhance the position of the child behind the crime while unveiling the custodian in the uniform.

²³⁸ Interview with Stanley Malematja, University of Pretoria, 24 February 2018.

²³⁹ Interview with Zach, Port Elizabeth, 29 September 2017.

CHAPTER FIVE

CONCLUSIONS AND SUGGESTIONS: TOWARDS A THEORY OF CHANGE WITHIN THE SOUTH AFRICAN CONTEXT

My thesis has approached the issue of children in conflict with the law from a holistic perspective, which includes historical, legal and sociological dimensions. In this way, I have ventured to illustrate that the situation of child offenders in South Africa necessitates an awareness of the multi-dimensional nature of the issue to the extent that political and social failings must be addressed to change deficiencies in the child justice system. The final chapter will therefore draw together the arguments of the previous to propose specific suggestions for progress. Particular focus will fall on the need to develop umbrella strategies designed to advance holistic interdisciplinary thinking about the needs and treatment of children in conflict with the law. On this basis, I will present specific recommendations based on the logic of my empirical observations documented in the thesis. These will highlight the need to change *attitudes*, expand *knowledge* and develop *skills*. I will argue that these three intertwined pillars are crucial to a system designed to protect children – and by extension also an entire society.

What the previous three chapters revealed is that there is a special need to find ways of addressing problematic attitudes of several groups in society: How society reacts to crime should be addressed, which in turn impacts the mindset of officials and staff working in the system. But how children view themselves and their value to society also needs special attention. Next, I stressed the necessity for an educational/therapeutic environment where child offenders can be guided towards ‘moments of realisation’ to engender decision-making skills. I then highlighted how the attitudes of society more generally need to shift so that children could experience a sense belonging. My own experiences in South Africa have kindled an awareness that even human rights practitioners and policy makers should be mindful of their own shifting attitudes due to what they bear witness to.²⁴⁰ Given for instance the extent of harm done to the boys whose stories were narrated in the previous

²⁴⁰ This aspect was confirmed by my empirical research phase in South Africa. The more I spoke to children, the more I saw their suffering. The more I spoke to government officials, the less I respected how they deal with (or ignore) the challenges of work with children in conflict with the law.

chapter, one may be tempted to dismiss staff and management as malevolent individuals who find pleasure in exploiting the vulnerability of child offenders.²⁴¹ While they did in fact abuse, isolate and even torture children in their care, it is also important to see both the behaviour of the children and the adults as a symptom of a much larger problem rooted in the country's traumatic past.²⁴² Understanding and ultimately *changing* the situation in South Africa means to extend empathy in both directions – towards the children as well as to the adults.

It is at this intersection of the emotional (i.e. empathy) and the legal (i.e. human rights) where one may graft a holistic theory of change. Such a theory can garner positive results by virtue of the fact that it views all perpetrators (regardless of crime, status or age) as victims of a disastrous context without downplaying the seriousness of crimes committed. It simultaneously enables personal growth in harmony with the needs of society at large. The obvious culture of violence both within and outside the child justice system should thus be approached from a more empathetic vantage point. As I have argued with reference to Trommsdorff, *social change* and *personal development* should be seen as intrinsically linked if lasting change is to be achieved. It emerged in my argument (Chapter Three) that the *ubuntu* concept is a worldview with legal validity due to its recognition by the Constitution, the Child Justice Act and several cases in African jurisprudence.

Given the evidence presented, this chapter will make concrete suggestions as to how the principle of *ubuntu* could find practical application for a workable theory of change in South African society. Although the scope of my thesis does not allow for the development of a fully-fledged guide incorporating concrete practical proposals towards change, I will offer a breakdown of the core elements that should inform the formation of such a practical theory. I postulate that, without these elements, the change required in South Africa will not only be difficult, but near impossible. My final chapter will call for a system where the attitudes of people reflect the humane character of a legal framework.

²⁴¹ Cf. for example how the staff members laughed and took photos of the boys when they were stripped and beaten by the police before being shipped off to Qumbu CYCC, Chapter Four.

²⁴² Cf. Chapter Two and Chapter Three.

A. The Core Elements towards a new Theory of Change for South Africa

Restorative justice is not new in South Africa. As Chapter Three has shown, it has been part of the child justice system in some shape or form since the early nineties, which has influenced the development of legal reforms since the end of apartheid. Yet, what happened to the boys in the Eastern Cape suggests that the implementation of these ideas is still wanting, either due to inadequate understanding of what is required or to a lack of belief in the value of restorative processes. Often due process is not followed, while the individual needs of children largely remain ignored. The situation in Bisho could escalate out of control since the individuals involved chose not to subscribe (or not to subscribe wholeheartedly) to the notion that the healing of relationships and the promotion of self-esteem should replace punitive punishment.²⁴³ Such disregard for restorative principles perpetuates negative behaviour of child offenders simply because, as the Bisho boys claim themselves, feelings of rejection and neglect instil a desire to rebel.²⁴⁴

Moreover, in communities where children belong to violent gangs, fear of children cultivates antipathy towards young people who fall victim to these structures.²⁴⁵ The disrespect and violence that these gangster-ridden environments encourage are equally symptomatic of a widespread mindset that has infiltrated the very fabric of society and is made visible in the way people act towards each other. It suggests the existence of a complicated network of fractured personal relationships across several social structures with far-reaching ramifications. The interplay of personal mindsets and fractured social relationships is difficult to make tangible for the development of theories applicable in practice. I therefore propose to determine which attitudes need to be changed in the first place. In the case of children in detention, I have isolated three necessary core levels (Fig. 15):

²⁴³ Cf. Chapter Three, pp. 30-32 and the entire Chapter Four.

²⁴⁴ Cf. Chapter Four, pp. 57-58.

²⁴⁵ This is particularly well exemplified by the lives of Jakes and Xola, both of whom struggle with rejection and fractured social relationships (cf. Chapter Four, pp. 78-85).

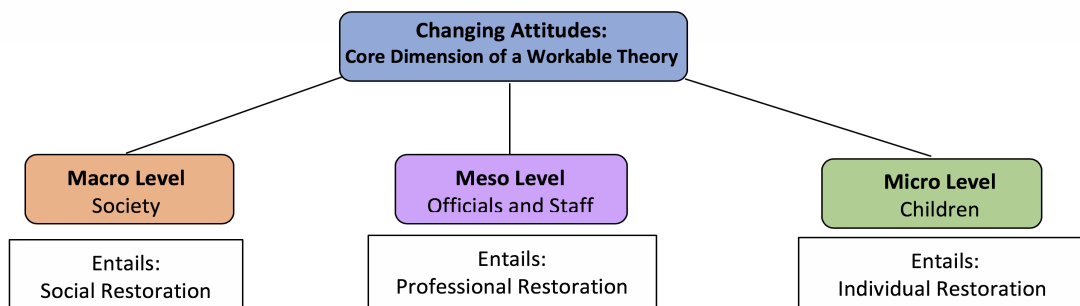


Figure 15: Changing attitudes as a core dimension of a workable theory of change

First, the larger context is to be addressed by working closely with *communities*. Since many past and contemporary traumas endure, there must be an attempt to restore lost living areas to re-establish the protective network that existed before apartheid destroyed it, and a mixture of gang culture and political indifference prevented its rebuilding (**Social Restoration**).²⁴⁶ While changing mindsets on a *macro* level (the general public) is probably the most difficult, I maintain that it is possible via a human rights based approach containing ideas important to the communities themselves, such as those expressed by *ubuntu*.

As for the *meso* level, working closely with officials and staff in the child justice system can impact attitudes in the direction of both child offenders and society – since not only are officials and staff part of society, but they directly work with the children affected. It therefore holds the potential to have immediate effect. It is thus crucial to channel resources into the training of professionals working with children. Caretakers are staff members who are in the company of the children most of all. My research has indicated that they receive little to no training on how to understand the psychology of the children they are responsible for. It should therefore not be surprising that abuse ultimately occurs. Changing the mindsets of adults working with detained children through human rights based training and educational programmes that specifically promotes restorative thinking is in my opinion of pivotal importance. Staff are often simply overwhelmed by the situations they face and understandably become afraid when faced with potentially violent children. Events at Bisho plainly illustrated this dimension, since the unannounced strike in 2015 was encouraged by the fact that staff felt unable to deal with children who started organising in response to how they were being treated. According to the boys and their

²⁴⁶ Cf. Chapter Two, pp. 7-11.

lawyer, caretakers also arrived at work drunk and confrontational – suggesting an inability to cope with the responsibilities they were given. The management at Bisho also acted in a way that suggested either serious incompetence or simple indifference to their mandate. **Professional restoration** is therefore required in order to re-establish a sense of pride within this area. Hiring caretakers should not be a mere necessity to fulfil legal requirements. It should rather be seen as an investment for the future. I have observed first-hand how a kind and thoughtful caretaker can completely shift the mindset of a child. Instilling a belief that taking care of children in detention is not just a job, but a calling would go a long way to ensure the system functions properly.

Finally, the purpose of restorative justice is to act in the best interests of the child. From what I have seen during my empirical research, those organisations who work with children on a case to case basis (*micro* level) have the best results in terms of restoration and reintegration. Such an individualised approach (**individual restoration**) is therefore vital for engendering a sense of belonging that encourages positive behaviour leading to a crime-free, productive life. Children generally look towards adults in their immediate environments to understand where they fit in. The behaviour of the Bisho boys illustrates that when children are treated negatively, they respond in kind. Engendering feelings of purpose and belonging could therefore be the golden thread to stitch wounds across divides. This is also true for every level in this model, since every person whether child, adult, model citizen or convict, responds positively to feeling valued. Addressing attitudes on the *macro*, *meso* and *micro* levels is the core of a theory seeking to change the behaviour of children in conflict with the law and the web that led them to crime.²⁴⁷

B. Ubuntu – A Viable Pathway towards Systemic Change

For the following reasons, the principles of *ubuntu* as articulated in Chapter Three form a significant part of the concept just set out: Tackling complex situations like the protection

²⁴⁷ These levels are not to be equated with those articulated by R. Goodman, D. Jinks and A.K. Woods (eds.) in *Social Sciences and Human Rights*, Oxford, Oxford University Press, 2012. They speak of macro, meso and micro levels in terms of the operational sectors *required* to effect change, whereas I use these terms to highlight *where* change needs to happen. They argue that change happens when global structures (macro), NGOs (meso) and individuals providing specific training (micro), co-operate to change a situation. I suggest that human rights practitioners develop strategies addressing the flaws present in these three dimensions of the problem.

of children in conflict with the law necessarily involves dealing with a wide variety of groups. Yet the goal is to convince individual people within these groups to act in solidarity with one another at all times. Several theorists and proponents of *ubuntu* reason that the interchange between group and individual behaviour is the crux of what the African worldview has to offer (cf. Chapter Three). It can be described by the oxymoron ‘group-centred individualism’, based on achieving personal fulfilment through social interaction.²⁴⁸ That is, a sense of identity emerges from acting in solidarity with others, which in turn leads to a humane society able to act kindly towards those who stray or are different. If such ‘meaningful relationships’ can be created between children in detention and their caretakers, much of what happened at Bisho can be avoided and such children can be given a positive impetus for the rest of their lives. But to this end the worldviews of adults, societies and governments must align. Therefore, the principles of *ubuntu* make perfect sense, since it relies on individual relationships in groups, which fosters a communal ‘atmosphere of happiness’. To attain this, I propose strategic development of seven *ubuntu* inspired aspects. They can be summarised as follows:

1. Building Human Rights Based Infrastructures

The first recommendation underlines the relation of community *identity* and *solidarity*. In order to prevent children from falling victim to crime, rebuilding social resilience is required. This means working towards strengthening *individual mental capacities* for dealing with trauma. But it also means restructuring the *spatial infrastructure of communities* to create areas where the informal social networks destroyed by apartheid can be allowed to redevelop. Such spaces are areas where children could feel safe from the pressures surrounding them (like gangsterism and drugs). This concurs with sociologist Robert Sampson who points out that rebuilding social resilience in traumatised communities entails the experience of ‘collective efficiency’.²⁴⁹ In other words, assisting communities towards positive goals by working together has strong transformative power. The same holds true for CYCCs, which are essentially small communities of children with traumatic

²⁴⁸ Cf. the arguments of Johnson, Quan-Baffour, Skelton, Tutu, Mokgoro, Shutte, Metz and Bohler-Muller discussed in Chapter Three.

²⁴⁹ Cf. Pinnock, *op. cit.*, loc. 4345-4390.

backgrounds. All of the children I interviewed referred to the spaces they were kept as essential to their feelings of security. Moreover, several also pointed out that being removed from their communities traumatised them and hindered a committed involvement in the programmes while detained. Forging a sense of community within CYCCs could successfully address this issue. The experiences of the Bisho boys also illustrate how being moved from facility to facility prevented them from evolving meaningful relationships with their fellow detainees and staff. Instead, the lack of social infrastructure isolated the boys even more and stagnated their rehabilitation. Moreover, the interviewees repeatedly articulated the need for stability, secure spaces where they can express themselves freely without fear. Shaping the physical infrastructure as well as the programmes to promote the idea that every child can achieve success when working towards a common goal with others, can have significant rehabilitative function. Moreover, it would counter hostile attitudes towards fellow detainees and the staff.

2. Interpersonal Communication and Connection

Community spaces would promote communication and personal rapport between staff and detainees, which again enhances the possibility to steer the development of the child away from criminal tendencies. This does not take too many resources to achieve. All it takes is for a caretaker or social worker to act with *kindness* by spending special time with children without reminding them of their crimes. This was clearly not done at Bisho. Instead, the children were dismantled by beatings, isolation and constant reminders that they are criminals unwanted by their families and community. The positive impact of kindness was particularly clear during an interview with Eric – a boy who suffers the cognitive effects of foetal alcohol syndrome. He recalled a caretaker who did not mock his fascination with animated films. On the contrary, he brought films to the centre and watched them with Eric. They would discuss the stories and laugh at the jokes. Today, the memory is so positively ingrained in Eric's recollection that talking about it inspired him to pause the interview, call the centre and thank the caretaker.²⁵⁰ Interpersonal connection can be developed by cultivating relationships with people and well-funded organisations willing to support children after their release. Hardly any child I interviewed was given support upon release.

²⁵⁰ Interview with Eric, Cape Town, 12 October 2017.

Most had no choice but to return to unstable, dangerous environments. Simply removing children from society without any guidance to reintegrate after release is not conducive to social cohesion.²⁵¹ Communicating to young offenders that they have a place in their communities despite their record, could prevent them from reoffending and entering the much more brutal criminal justice system.

3. Self-Expression: Creative and Sports Programmes

Within Western conceptualisation, self-expression is regarded as an individualistic act aimed at distinguishing oneself from the group. Far from being incompatible with an Afro-communitarian perspective such as *ubuntu*, self-expression is central to the ‘honouring of communal, harmonious and friendly relationships’ in a way that ultimately promotes caring for the quality of life of others.²⁵² Considering this within the context of the child justice system, self-expression in a group context has great potential. Diversion programmes already incorporate family group counselling as well as group sessions where children are encouraged to tell each other their stories. I submit there is ample room to develop this dimension in CYCCs. Over and above educational/vocational programmes, there should be more opportunities provided for children to engage *with* each other via creative and sports programmes. I emphasise this dimension, since when asking child detainees what they most valued about their time in detention, they almost exclusively mentioned the value they found in engaging with other children through music, story-telling and sports. When those elements were restricted, their behaviour and willingness to engage in programmes declined. Expressing their hopes for the future most children saw themselves not as doctors, lawyers or engineers, but as rappers, fashion designers and football players. Moreover, as soon as they found out my background in filmmaking, their faces lit up. I was even asked to stay longer to answer questions about ‘how we can tell stories with a camera’. There is great potential in goal-orientated restorative programmes that encourage children to reflect on their lives, desires and dreams via creative means, which would also provide them with skills they can apply when released.

²⁵¹ E.g. Vuyo who attempted suicide having been prevented from communicating with other children.

²⁵² T. Metz, ‘*Ubuntu* and the value of self-expression in the mass media’, *Communicatio*, vol. 41, no. 3, 2015, p. 400.

4. Self-Esteem and Personal Value

The suggestions above are geared towards a sense that child offenders also have something to offer the world. Staff at centres should be mindful not to create a sense that the children are locked up for retribution. While not disregarding their crime, more focus should be placed on how they can restore their relationship with their communities and add value back to society.²⁵³ This, I believe, can only be achieved when one creates an atmosphere where children can experience detention as a new beginning. All detainees who were in diversion programmes with mandatory detention, communicated that they see their detention as a reset button, a clean slate. They want to start over and be better people. Nurturing this desire to change is probably the single most important dimension CYCCs should focus on. Lifting a child's sense of having something to offer, allows a child to define his/her identity as more than that of an offender. It would kindle harmony and a desire to promote the well-being of society, since the child's identity is intertwined with the value he/she can offer others. Providing children with education and vocational skills is therefore crucial. Assisting them to find work or training placements upon release can similarly lift the quality of life of an entire community, not only that of the child offender. Some of the worst problems I encountered throughout my research period entail the impact of gangsterism and drug abuse on the lives of children. All of the children who were gang members or drug addicts had severe self-esteem issues and believed they are useless to society – so they gave up caring. The framework of a CYCC presents a great opportunity to correct this attitude, thereby setting in motion a mechanism to also positively change the severity of these problems within society. Changing the attitudes of the children is thus a contribution to changing the progress of society itself. Yet, this is only possible through positive reinforcement of an environment of care, which in my experience is rare within the confines of most CYCCs at present.

5. Integration instead of Isolation – the Right to Belong

Without fail, the children I met who were involved with gangs demonstrated a deep desire to be part of a community, to belong to something bigger than themselves. The fact that

²⁵³ This dimension was completely absent at Bisho, while I did encounter it frequently in children doing diversion programmes under the guidance of NGOs such as NICRO and Khulisa.

they tattooed their bodies according to the gang (sub-culture) they belong to is evidence of this desire. When a child enters a CYCC, the ideal would be that they enter an alternative environment showing the child that people have the capacity to care about each other. Jakes's statements (see Chapter Four) notably communicate a loss of trust in his fellow human beings, because he has never experienced *kindness* from others. Instead, he has felt only violence. From this context he entered Bisho, where again he was only exposed to the antagonism of others. Instead of being integrated into a system where connections with others were healed and nurtured, he entered a centre that physically as well as emotionally isolated him even further. Moreover, when the Bisho boys were moved to other centres, they were deliberately kept from integrating with other detainees and staff members, because they were 'the unruly ones'. If Bisho was managed from the beginning as an alternative microcosm of a community outside, these painful experiences that most likely drove a child to crime, could have been replaced with alternative constructive experiences. Creating positive experiences within a detention centre may sound like a 'soft' approach to crime, but in fact is a way to eliminate crime by removing its incentive. CYCCs as spaces of positive integration can impact both the emotional stability of a child, and future decisions that causing a child to reject crime. Cultivating the idea that child detainees have a right to belong despite detention would fulfil the CJA's restorative impetus, and also reflect African culture at its finest.

6. Transparency and Accountability

The *Stanford Prison Experiment* demonstrated to the world that if power relationships are unstructured and unchecked, the potential for human rights abuses increases exponentially.²⁵⁴ The same can be said of the situation at Bisho, where management and staff members were able to abuse their positions to the extent that they manipulated and exploited the children in their care with impunity. This is largely able to happen because the way in which DSD runs these centres has no transparency or accountability. During my research process, I have repeatedly sought permission to visit CYCCs, which was either ignored or delayed until my time ran out. It took me more than a year to gain formal access

²⁵⁴ McLead, S., 'The Stanford Prison Experiment', *Simply Psychology*, 2017, Available from <http://www.simplypsychology.org/zimbardo.html> (accessed 1 June 2018).

to all CYCCs for my research, yet the conditions placed on me rendered the permission useless for the available timeframe. These delays were often a result of officials not knowing who was responsible for dealing with my requests. I eventually turned to the *Human Rights Commission of South Africa* for support, but even their involvement did not speed things along. Upon receiving permission from the head office of the DSD, I was still required to also gain separate permissions from every individual province, yet nobody really knew (or wanted to say) who was responsible for dealing with my requests. With the assistance of BOSASA, a private company running several CYCCs in the country, I was able to visit private centres in Gauteng, but was stonewalled to visit governmentally run facilities despite repeated emails and telephone conversations. Most of my emails remained unanswered, while others perpetually bounced around across the DSD. When I eventually received permission from the DSD in May 2018, I was required to fund a member of the HRCSA to accompany me on every visit, which was impossible to afford as an independent researcher. I was further not allowed to do interviews without a staff member present, which was one of my main conditions to ensure independence and truthful responses. Only a single province (Mpumalanga) answered a simple question about how many children are in their care – after a delay of several of months. Moreover, requesting permission from Bisho was denied by Ms Nanto for the reason that it is ‘too dangerous’ for me to enter the Centre. I only located former detainees by circumventing the problem with the help of the CCL at the Law Faculty of the University of Pretoria. Other centres did allow me to visit their facilities, but denied me the opportunity to speak to children. Likewise, the DSD in the Western Cape also rejected my requests for unconvincing reasons. They claimed my research would not have been a problem if I only wanted to speak to the managers of their centres. Yet, because my study is based on interviewing children, my research was ‘ethically’ not acceptable – especially if I am not willing to provide them with the questions I will be asking the children in advance (!). The fact that it is so difficult to gain access to facilities as an independent researcher does not do the children in their care any favours. Transparency is the first requirement of an ethically run organisation. Other people, including the CCL and magistrates, had similar experiences (see below). Transparency involves holding people to account, which is one of the cornerstones of democracy and any human/child rights based approach. Nobody at Bisho was ever held

accountable for the failings that occurred. In fact, Ms Nanto is still the manager at the time of writing. It is beyond me that she can still be in her position, given what has transpired at the centre. If the CJA is to be successful, greater care should be taken to promote transparency and enforce accountability.

7. Legal Reforms and Policy Changes

Despite the introduction of the CJA in 2010, a number of gaps still require attention. First, as suggested above, no provisions and support mechanisms exist for the reintegration of released children. This creates a calculable risk of children reoffending and falling victim to their violent communities (cf. Vuyo, Andile and Jakes). In the current system, children are abandoned when released, which in my view sabotages the good intentions of the law. What is therefore required is a legal provision obligating the state to continue providing children with programmes relevant to their situation for a specified post-sentence period. For instance, if a child were to show specific talents for upholstery while in detention, systems should be in place to assist the child to cultivate this skill after detention. Identifying and co-operating with community businesses willing to work with the DSD would for instance be one avenue towards ensuring a child's continued and crime free development. At present, members in society willing to give child offenders a chance are scant. More should be done to protect a child from harm when released. Several children communicated a deep fear of being targeted by their communities due to the crime they were convicted for. This was especially true for children who committed rape or murder. Some children I met were ushered back into abusive family environments or gangster ridden districts – which from my perspective did not seem to raise enough concern with professionals working in the child justice system. In this regard, integrating principles from the *Children's Act* more diligently may help bridge this disconcerting gap. Secondly, the fact that the Bisho boys were able to disappear into the system without anybody knowing where they are, also shows there is a significant failing on the part of the DSD and the system as a whole. They were deliberately dumped in prison by the DSD with nobody coming to their aid. It took an independent organisation in Pretoria to stand up for the rights of these children. It is troubling to speculate what would have happened to these children had the CCL not come across their predicament. A possible solution may be to

require magistrates in child justice courts and similar functionaries to make unannounced visits to CYCCs they sentence children to.²⁵⁵ Thirdly, provisions should be made enforcing deadlines on centres to provide children with workable skills. For instance, learning how to drive would improve the employability of a child upon release. If a centre offers a driver's licence programme, it must be able to demonstrate to the magistrate within six months of commencement of the sentence, that it has made a concerted effort to assist the child in passing his/her driver's licence. Amazingly, adult prisons are managing to do this much more effectively than child and youth care centres. In other words, the Correctional Services are currently more successful at rehabilitating offenders than the Department of Social Development. Finally, the fact that the management of CYCCs has been shifted from the Department of Education to the DSD raises serious questions as to the efficiency of the DSD.²⁵⁶ Not only is the DSD operating without transparency and accountability as just argued, but they are also not delivering the basic services required by both the *Child Justice Act* and the *Children's Act*. Legally a magistrate may only sentence a child to a CYCC if there is a programme for the child's development at that centre. While the DSD may be able to promote social cohesions when managed competently, the required education for this purpose is not achieved. Moreover, there appears to be a massive imbalance between the quality of centres managed by the DSD and those outsourced to private companies such as BOSASA. Nevertheless, at the time of writing the government is considering terminating all outsourced contracts, which would place all centres under the control of the DSD. In my opinion, this places children at great risk. In order to ensure the most comprehensive management of CYCCs, it may be beneficial to introduce interdepartmental cooperation between the Department of Education (DE) and the DSD: with the DE assuming responsibilities for all academic, vocational and restorative programmes, while the DSD controls administrative duties, recreational programmes and community development initiatives.

²⁵⁵ Seeking access to Bisho in order to inform this study, I turned to the magistrate who sentenced some of the boys to the centre. I was surprised to hear that not even the magistrate was able to visit the centre upon request. Ms Nanto simply refused him access. This, I maintain, should not be allowed to happen, since independent monitoring is key to ensuring human rights compliance and order.

²⁵⁶ Cf. the statements of the children at Bisho on the disintegration of restorative programmes, Chapter Four.

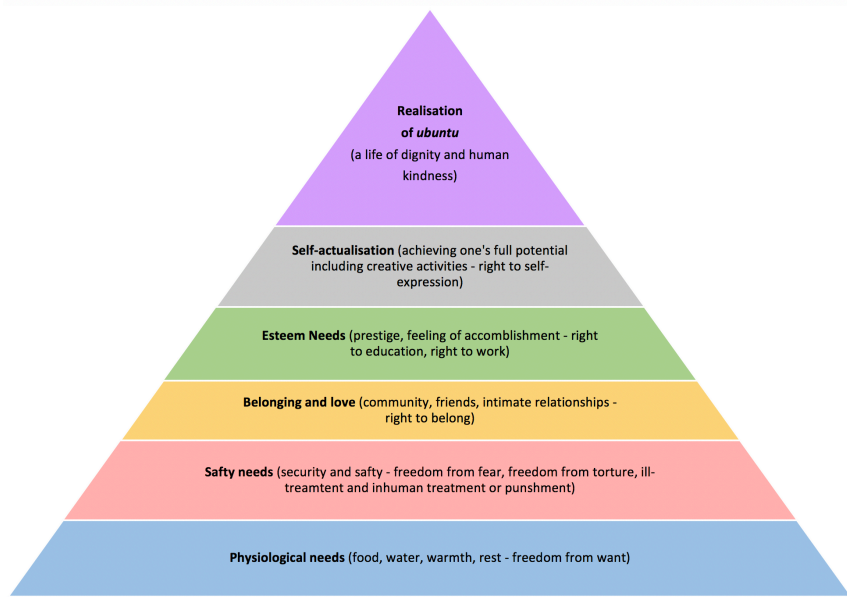


Figure 16: Ubuntu's hierarchy of needs

Perhaps the best way to finally illustrate the value of *ubuntu* as a viable pathway towards systemic change is to draw a direct comparison to *Maslow's Hierarchy of Needs*, which often informs human rights based approaches (Fig. 16). In such a comparison, human kindness and interconnectedness would form the pinnacle goal of an *ubuntu* inspired human rights based approach. From this perspective, the suggestions above as they relate to children in conflict with the law function as a foundation from where to develop concrete and practically applicable methods towards changing the current system as well as the social conditions facing the majority of South African children today.

Championing community wellbeing, empathy, kindness and restoration have the best interests of the child at heart and cultivate an 'atmosphere of happiness', dignity and respect. If these aspects were to become engrained in the mindsets of all South Africans, events such as those at Bisho can be prevented from ever happening again. I thus hope to have argued convincingly that incorporating the principles of *ubuntu* into the human rights paradigm would present ways to build on the achievements of international, regional and national child protection frameworks so as to ensure the holistic protection of children in detention – not only in South Africa, but worldwide.

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APPENDIX

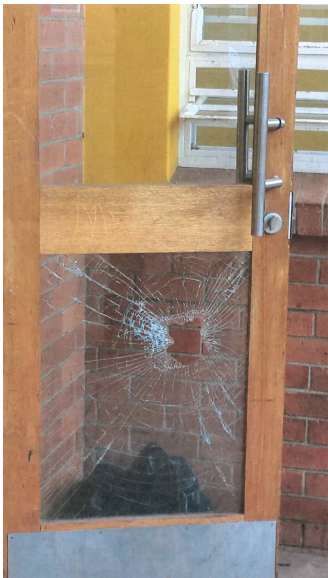
A. Bisho Child and Youth Care Centre (Photos courtesy of the *Centre for Child Law, University of Pretoria*)



Some of the damage allegedly done by the boys during the 2015 staff strike.

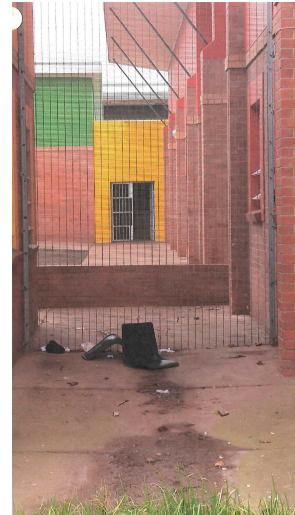


Some of the damage allegedly done by the boys during the 2015 staff strike.



Damage allegedly done as the boys broke out of their dorms after being abandoned by staff.

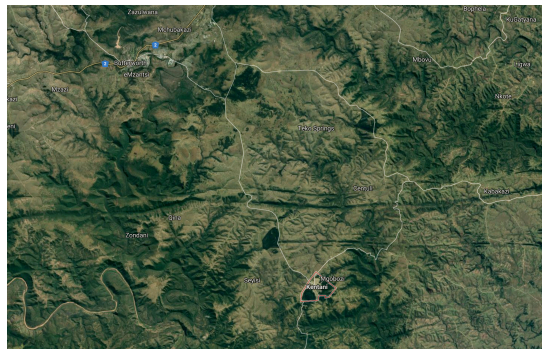
Damage allegedly done as the boys broke out of their dorms after being abandoned by staff.



B. Home Situation of Jakes and Andile



Jakes's district – Shipyard containers as homes.



The vastness of Andile's Isolation.

ABSTRACT - KURZBESCHREIBUNG

Abstract - English

This thesis focuses on a specific facet of human rights, notably the rights of South African children in conflict with the law. It approaches the topic from a holistic perspective, which includes historical, legal and sociological dimensions. In this way, the study illustrates that considering the situation of child offenders in South Africa necessitates an acute awareness of the multi-dimensional nature of the issue to the extent that overarching political and social failings should be addressed in any attempt to change deficiencies in the child justice system.

Given the South African Constitution's explicit incorporation of concepts from the African philosophy of *ubuntu*, particular attention is paid to what this worldview entails and how it can serve as a companion to the human rights paradigm. In this regard, the thesis provides a detailed argument proposing the value of specific principles associated with *ubuntu* for the promotion of interpersonal communication through a jurisprudence of care, kindness, solidarity and dignity. To this end, first-hand empirical observations and interviews conducted over a period of eight months, provide insight into the experience of the child justice system from the perspective of affected children themselves.

The specific contribution of the thesis involves the proposal of seven concrete suggestions towards systemic change. Particular focus thus falls on the need to develop umbrella strategies designed to change *attitudes*, expand *knowledge* and develop *skills*. It is argued that these three intertwined pillars are crucial to a system designed to protect children – and by extension also an entire society.

Keywords: Human Rights, Children in Conflict with the Law, South Africa, Ubuntu, Child Law, Detention, Isolation, Change Perspective, Child and Youth Care Centres

Kurzbeschreibung - Deutsch

Diese Arbeit konzentriert sich auf eine spezifische Facette der Menschenrechte, nämlich auf die Rechte südafrikanischer Kinder, die sich in Konflikt mit dem Gesetz befinden. Es nähert sich dem Thema aus einer holistischen Perspektive, welche historische, rechtliche sowie soziologische Dimensionen umfasst. Auf diese Weise zeigt die Studie, dass die Berücksichtigung der Situation von minderjährigen Straftätern in Südafrika ein akutes Bewusstsein für den multidimensionalen Charakter des Themas erfordert, sodass übergreifende politische und soziale Defizite angesprochen werden können, um damit Ausfälle in dem Kinderrechtssystem zu beheben.

Angesichts der expliziten Einbeziehung von Konzepten aus der afrikanischen Philosophie des Ubuntu in die südafrikanische Verfassung, wird besonders darauf geachtet, was diese Weltanschauung beinhaltet und wie sie als Ergänzung zum Menschenrechtsparadigma dienen kann. Diesbezüglich liefert die Arbeit detaillierte Argumente und Vorschläge, welche den Wert spezifischer Prinzipien von Ubuntu zur Förderung von zwischenmenschlichem Respekt im Hinblick auf Fürsorge, Kommunikation, Achtsamkeit, Solidarität und Würde vorschlägt. Zu diesem Zweck liefern empirische Beobachtungen und Interviews aus erster Hand, die über einen Zeitraum von acht Monaten durchgeführt wurden, einen Einblick in die Erfahrungen des Kinderrechtssystems aus dem Blickwinkel der betroffenen Kinder selbst.

Der spezifische Beitrag der Arbeit beinhaltet den Vorschlag von sieben konkreten Empfehlungen für systemische Veränderungen. Ein besonderer Fokus liegt daher auf der Notwendigkeit, grundlegende Strategien zu entwickeln, die Einstellungen verändern, Wissen erweitern und Fähigkeiten entwickeln. Es wird schließlich argumentiert, dass diese drei miteinander verflochtenen Säulen von entscheidender Bedeutung für ein System sind, das Kinder und ihre Rechte schützen soll – und damit auch eine ganze Gesellschaft.

Schlagwörter: Menschenrechte, Kinder in Konflikt mit dem Gesetz, Südafrika, Ubuntu, Kinderrechte, Haft, Isolation, Veränderungsperspektive, Kinder- und Jugendzentren