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*Erasmus*

**Justice in the Shadows:  
Gangsterism and Underdevelopment in South Africa  
Understood through Legal Consciousness and the Legal  
Culture of the Criminal Justice System**

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# Contents

<b>Chapter 1 Gangs, Governance, and Elusive Justice</b>	<b>1</b>
1.1 Introduction	1
1.2 Research Problem	2
1.3 Significance and Justification of the Study	3
1.4 Research Objective	4
1.5 Research Questions	4
1.5.1 Main Question	4
1.5.2 Sub-Questions	4
<b>Chapter 2 Bringing Injustice to Light</b>	<b>5</b>
2.1 Introduction	5
2.2 Gangsterism vs. Organized Crime	5
2.3 Social Reproduction	7
2.3.1 Access to Capital	8
2.3.2 Reproduction of Power	8
2.4 Legal Culture	9
2.4.1 Rule of Law	10
2.4.2 Legal Pluralism	11
2.5 Legal Consciousness	12
2.5.1 Constraints on Agency	12
2.5.2 Legal (Dis)Engagement	13
2.6 Chapter Conclusion	124
<b>Chapter 3 Methods and Research Design</b>	<b>15</b>
3.1 Introduction	15
3.2 Methodology	15
3.3 Research Methods	15
3.3.1 Qualitative Interviews	15
3.3.2 Ethnographic Observation	177
3.4 Secondary Research	158
3.5 Thematic Analysis	158
3.6 Reliability and Validity of the Research	15
3.7 Positionality	159
3.8 Ethical Considerations	20
3.9 Limitations and Practical Challenges	15
<b>Chapter 4 Findings and Analysis</b>	<b>21</b>
4.1 Introduction	21
4.2 Reality of Lawlessness and Social Crisis	21
4.2.1 Power in Poverty	21

4.2.2	Crisis of Social Reproduction	22
4.3	The Meanings of Justice	23
4.3.1	Restorative Justice	24
4.3.2	Pluralistic Legal Engagement	24
4.4	Empty Justice	25
4.4.1	Public Opinion	25
4.4.2	Rigid Laws and Legal Procedures	17
4.4.3	Ghost Protocol	177
4.5	Transfers of Responsibility	28
4.5.1	Power Imbalances	28
4.5.2	Abuse of Power	29
4.5.3	Accountability	30
4.5.4	Outsourcing Governance	30
4.6	Changing Legal Culture by Shifting Consciousness	31
4.6.1	Establishing a Trust Fund	31
4.6.2	Against Minimum Sentencing	32
4.6.3	Interdisciplinary Legal Practices	32
4.6.4	Opportunities for All, Not Just Children	33
4.6.5	Building Bridges Between Community and Government Practitioners	33
	<b>Chapter 5 Conclusion</b>	<b>35</b>
	<b>References</b>	<b>36</b>

## List of Tables

<b>Table 2.1</b> Longitudinal Analysis of Sentence Lengths 1995-2010	5
<b>Table 2.2</b> Percentage distribution of households' knowledge of their neighbours' name by their trust in neighbours, 2017/18	7
<b>Table 2.3</b> Comparing homicide rates among young men in four countries and globally	7
<b>Table 2.4</b> Racial breakdown of sentenced offenders	5

## List of Figures

<b>Figure 2.1</b> Percentage distribution of households' satisfaction with police services in their area and the way in which courts generally deal with perpetrators of crime, 2013/14 – 2017/18	7
<b>Figure 3.1</b> Percentage distribution of households' perceptions of violent crime levels in their areas of residence in the past three years, 2017/18	8

## List of Maps

<b>Map 3.1</b> Wynberg district and regional court jurisdiction	9
<b>Map 3.2</b> Map of gang territories used by Wynberg court (2023)	10

## List of Appendices

<b>Appendix 1</b> Criminal Procedure and Crime Prevention Legislation since 1994	41
<b>Appendix 2</b> Child Justice Legislation	43
<b>Appendix 3</b> Policy Frameworks Related to Gang Crime <b>Error! Bookmark not defined.</b>	
<b>Appendix 4</b> Institutions and Organizations Compiling the Criminal Justice System	45
<b>Appendix 5</b> Data Points and Interview Guide	49
<b>Appendix 6</b> Interview Participants	51

## List of Acronyms

CJA	Child Justice Act
CPA	Criminal Procedure Act
CSO	Civil Society Organization
CYCC	Children and Youth Care Centres
DCS	Department of Correctional Services
DOJ&CD	Department of Justice and Constitutional Development
DSD	Department of Social Development
JICS	Judicial Inspectorate for Correctional Services
LHR	Lawyers for Human Rights
NDP	National Development Plan 2030
NGO	Nongovernment Organization
NICRO	National Institute for Crime Prevention and Reintegration of Offenders
NPA	National Prosecuting Authority
POCA	Prevention of Organized Crime Act
SA	South Africa
SAPS	South African Police Service
UCT	University of Cape Town
UN	United Nations

## **Abstract**

Gangsterism and its associated violent crime have long been a social phenomenon that characterizes public perceptions of fear and safety in South Africa, particularly in the areas surrounding Cape Town. Despite government efforts to curb widespread gang activity, it continues to persist as prison sentences fail to rehabilitate offenders, expose them to more violence and gang culture, and deprive and their offspring from the attainment of social, cultural, and economic capital necessary for social advancement. This study explores the role of the criminal justice system in the social reproduction of gangsterism and related criminality that characterize South Africa's "lawless" society and lack of social development. The concepts of legal culture and consciousness are employed to examine the workings of the justice system as backed by the rule of law to find out how people's agency and engagement with the law are shaped by legal structures and social realities. These findings explain how justice and development are inhibited by law, perpetuating a crisis of social reproduction in the form of widespread gangsterism and associated criminality. This reality is explained by the tension between social structures and agency expressed through varying degrees of legal (dis)engagement by legal actors as well as the wider public. The multiple forms of adherence to and systems of law result in legal pluralism that undermines the authority of legal legitimacy, or rule of law. Delivery of justice is omitted by artificial efforts made by the state that lack meaningful positive impact, instead maintaining oppressive power structures. Responsibilities ascribed to those working within the justice system are impossible to fulfil amongst structural shortcomings and power inequalities, so there is a pattern of outsourcing individual tasks and wider governance. Suggestions for legal actors to alter the current oppressive practice of law feature activated consciousness of one's power to make a difference, and using it to shift norms and practices around the legal culture of criminal justice.

## **Relevance to Development Studies**

This study brings attention to the potential of the criminal justice system as an agent for social repair, and its current function as a debilitating influence on social stability and development. Rather than safeguarding human rights, legal functions carry out systematic human rights abuses from arrest to post-sentencing. In this way the law is not operating as a vehicle of social betterment, but rather, of social deprivation. Legal structures continue to disadvantage certain populations and define their ability for social and economic advancement. To address the cycle of criminality and social disorder, this study is one of many using the notion that the widely accepted retributive form of justice is cruel and outdated, calling for reform if not total transformation of the criminal justice system in South Africa and beyond.

**Keywords** legal consciousness, legal culture, rule of law, pluralism, social reproduction

# Chapter 1

## Gangs, Governance, and Elusive Justice

*Law and justice are not always the same. When they aren't, destroying the law may be the first step toward changing it.*

- Gloria Steinem, 1972

### 1.1 Introduction

People familiar with South Africa are also familiar with its dangerous reputation. When living in South Africa and interacting with people, you find that it takes little to no prompting for them to begin speaking about the crime in South Africa and how dangerous it is, often accompanied with a mention or plan of leaving to another country/continent. This sentiment is not new – it's as old as apartheid itself, particularly the end of apartheid that followed with a new republic and promise of social and political transformation. The new democratic Constitution (1996) created a republic based on freedom and equality, emphasizing the rights of all. It is a progressive and cohesive document, yet the issues in South Africa lay not in policy, but in implementation. Initial legislative frameworks prioritized, among other things, the elimination of violent crime (du Plessis and Louw, 2005). All this to say, crime has been perceived as an issue since the dawn of the new South Africa.

Even with a constitution and policy frameworks prioritizing human rights, particularly the rights of vulnerable groups, South African legal institutions still functionally violate and deprive people of their human rights.<sup>1</sup> Apart from policy reform, government responses to the issues of criminality, particularly gang violence, have taken the forms of collaborative government strategizing, rehabilitative youth programs, and even guerilla military tactics,<sup>2</sup> yet there seems to be no sign of disruption in the cycle of violence perpetuation and consequential deterioration of the social order in South Africa (Pinnock, 2016). Extreme institutional failures have enabled illegitimate and illegal activities to thrive, operating in place of the legitimate government and legal structures that traditionally maintain legal authority and social order (GI-TOC, 2022). Gangs have arisen as an alternative to legitimate state governance that traditionally maintains legal authority, especially in low-income areas where law and order are all but non-existent, such as the Cape Flats (Parliamentary Monitoring Group, 2017 and Standing, 2006). The entrenchment of gang violence in the day-to-day operation of society leaves people throughout the country, across ethnic and geographic/community lines, with a sense of “lawlessness”<sup>3</sup>, with little to no trust in state mechanisms to protect and prevent violence (Stats SA, 2018, Ch. 8).

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<sup>1</sup> U.S. Department of State Bureau of Democracy, Human Rights, and Labor (2021)

<sup>2</sup> Anti-Gang Strategy of 2017; (Al Jazeera, 2019)

<sup>3</sup> See comments section of News24 (2023)



Considering legal failures to hold perpetrators accountable, provide rehabilitation, and prevent further crime,<sup>4</sup> the public has accordingly become disengaged with the rule of law. While some express legal disengagement by relying on private sources of security, others express it by turning to crime, thus continuing the cycle of violence and criminality. Understanding human agency and structural limitations through the legal consciousness of legal professionals as well as others engaging with the court system illustrates the larger image of the legal culture of South Africa's criminal justice system to understand why it is resistant to change, and how it contributes to the crisis of social reproduction manifesting itself in gangsterism and associated violence and criminality. If not properly addressed, gangsterism will continue to contribute to social decline in the form of criminalized governance that undermines the rule of law and the integrity of the state – further crippling communities and society (GI-TOC, 2022).

## 1.2 Research problem

Legal failures characterized by structural limitations and weak rule of law are not only failing to secure justice and right social ills; they are perpetuating the problem by sending people from crime-ridden areas through a crime-inducing mechanism, the criminal justice system, that spits them out worse off than when they went in (Ward and Bakhuis, 2017). These failures of the system are serving to reinforce a crisis of social reproduction and legal disengagement that manifests in the form of generational gang violence by depriving current and future generations of opportunities outside a life of crime (Pinnock, 2016).

A clear example of the criminal justice system's continued negligence of progressive strategies for social development is shown in the case of the Laughing Boys murders in Hanover Park, Cape Town, that occurred in February of this year (2023). The defendants that stood accused of multiple homicides were aged 25, 26, 26, 27, 35, 49, and 67 (Williams, 2023). In their defense, the defendants plead for mercy as they told stories of sad upbringings featuring absent fathers and drugs. It didn't take long for the prosecutor to strike down this argument, retorting with rationale of reason and agency (Evans, 2023). The judge ultimately agreed and, in sentencing, made a point to say "Crime is not the person. Crime is the things that you do. And it's the things that you do that can't go unpunished when it is so in conflict with the law," before proceeding to sentence all the gang members accused to multiple life sentences (aside from those who were acquitted), (ibid). Most of these men had only lived a quarter of their lives, before having the rest taken away for the sake of 'justice.'

The judge's contradictory acknowledgement of social circumstances followed by the decision to follow the letter of the law is indicative of a larger issue at play pointing to a foundational flaw in the legal culture of the criminal justice system. In this case, three lives were robbed, with another three taken for punishment (Evans, 2023). Surely lives are saved by keeping dangerous people off the street, and the family of the victims can rest knowing their case was solved, but is this really justice? Everything about the situation is tragic, and it's even more tragic to know how commonplace this story is. People and communities lose their loved ones every day to gang violence. The only government department that has

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<sup>4</sup> (Stats SA, 2018, Ch. 7 and 8)

authority over gangs, the Department of Justice and Constitutional Development, makes almost no effort to leverage this position to make a difference in the way gangsterism is handled (DOJ&CD, 2023).

In her speech about anti-gang prevention strategies, the Minister of Social Development, Lindiwe, Zulu, "... Spoke of Specialised Community-based Probation Services, which includes diversion, pre-trial and pre-sentence psycho-social support to children and youth in conflict as well as psycho-social support as early intervention programmes to create resilience amongst children," (SA News, 2022). The fact that the offenders from the Laughing Boys murders did not receive any sympathy or social services serves as evidence that government agendas are not being met by the criminal justice system.

Clearly there is a disconnect between law and policy in relation to the South African government's approach to gang-related violence, but why is this the case? The answer is sought by studying the legal practices and perceptions/interactions with legal systems from the perspective of those working within it.

### **1.3 Significance and Justification of the Study**

The significance of this study is to acknowledge the criminal justice system's role as an agent of social change, whether that change be positive or negative. Gangs and associated violence and crime are both a symptom and a cause of the social degradation and systemic inequalities being perpetuated by the legal system. The gang issue has become so severe that schools in multiple South African provinces have had to close because of gang violence outbreaks that resulted in injury or death of teachers and students alike (Shipalana, 2022 and Nowapane, 2022). As a result, children/youths are given even less opportunities for safe outlets as they are left to idle at home and on the streets in the absence of the availability of other recreational activities (i.e. sports and clubs), (Pinnock. 2016). Those who want to pursue educational success are barred from doing so, even if they have no gang association. School closures attributed to gang violence are an indirect cause of the legal system's inability to contain or alleviate the problem. Directly, prison sentences denying rehabilitation bar criminal offenders from educational and income opportunities essential to survive and thrive in society, a deficit that is passed on to future generations of marginalized youth. Not only does it fail to halt the issue of social decay, the criminal justice system also partakes in its recreation by further exposing people to violent environments and eliminating opportunities for capital attainment necessary for empowerment and social sustenance. Addressing the root causes of gangsterism and related crime is the only way to address it, which calls for meaningful social development to close opportunity gaps and address poverty. The justice system can do this by mobilizing its power to primarily execute considerations towards human rights over strict legal application enforcing the retributive punishment that is central to human rights abuses and generational deprivation of capital.

My own justification for pursuing this study stems from my experience working for the District Attorney's Office a Victim Advocate in the U.S. As someone who was working within the legal system, but with sociological training rather than legal, I noticed differences in the way those working within the criminal justice system (particularly judges and lawyers) vary in their temperament and sympathies, but also in how they interpret and apply law. It

occurred to me that this may explain why reform hasn't reached the courtroom in South Africa. Does it have to do with the way laws are written, or the way they are implemented? Would more laws make a difference, or obscure policy and procedure? Is legal culture in South Africa such that there is no room for progressive interpretations of the law based on social development? In short, I am drawing on my background in criminal law and sociology to explore legal restraints that are preventing the legal system from adapting to match the government's progressive human rights agenda backed by international legal bodies and civil society organizations (CSOs).<sup>5</sup>

## **1.4 Research Objective and Questions**

The purpose of this research is to analyse the South African criminal justice system and its role in society as an agent for social repair using legal-sociological concepts to inform and improve current policies and practices that currently contribute to social degradation in the form of generational poverty, violence, and gangsterism. Legal culture comprised of individual perceptions of justice and delivery, particularly from the view of legal actors, can be analyzed to find the barriers to progressive social change within the criminal justice system that prevent efforts to amend the institutional flaws obscuring the path to social justice and development.

### **1.4.1 Main Research Question**

How does the legal culture of South Africa's criminal justice system reproduce the crisis of social reproduction related to gangsterism and resistance to social development?

### **1.4.2 Sub-Questions**

- How does pluralism affect legal engagement and the rule of law?
- How do structural constraints impact legal consciousness and agency?
- How does legal culture inhibit social reparation and development initiatives?

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<sup>5</sup> (LHR, 2023)

# Chapter 2 Bringing Injustice to Light

## 2.1 Introduction

Despite longstanding efforts to curb the issue of organized crime, rates of criminality related to gangsterism have continued to soar (GI-TOC, 2022). Scholars and politicians have recognized that issues of violence and criminality are largely the result of deep-rooted social inequalities that can be traced back to South Africa's history of conquest. This history of conquest lingers, now under the guise of criminal justice, with black populations being the most criminalized and underserved populations (Modiri, 2018 and Cameron, 2020). The consensus amongst scholars is that African majority of people in South Africa were liberated from one legitimate form of segregation just to be brought into another, arguably more dangerous, form of discrimination - one that is harder to dispute as it is the law of justice and retribution that hardly anyone would counter.

With historical context in mind, it is possible to dismantle the different components that make up the criminal justice system and analyze how they contribute to its operation, and to what end. By employing the concepts of legal culture and legal consciousness, we can isolate the structures and attitudes that perpetuate the legal system to understand how and why it negatively impacts marginalized groups, as well as its potential for social betterment. Legal consciousness investigates the way people experience, understand, and act in relation to law, as well as how they use it to advance either justice or personal (undemocratic) aims. This is where legal (dis)engagement and power structures are scrutinized – through the lens of human agency (Chua and Engel, 2019). The theory of legal consciousness is supplemented by that of legal culture, which also considers structural realities and power relations when describing the shared standards, beliefs, values, attitudes that characterize the legal system of South Africa (Weeks, 2021). From both legal consciousness and culture, we can evaluate the strength of public observance to the rule of law, and further the extent and forms of (dis)engagement with it.

## 2.2 Gangsterism vs. Organized Crime

According to the Prevention of Organised Crime Act (1998):

“Criminal gang” includes any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.<sup>6</sup>

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<sup>6</sup> “Pattern of criminal gang activity” includes the commission of two or more criminal offences referred to in Schedule 1 [Outlined in Criminal Procedure Act],” (POCA, 1998)

The prevalence of gangsterism and related crime is a major factor contributing to public perceptions of lawlessness and rampant criminality in South Africa (News 24, 2023). Gangs began to form prior to the demise of the Apartheid regime as community protectors, backed by the faith and support of the communities they served. As criminality became a more prominent feature of gang activity, by way of government criminalization of certain activities and the introduction of prison culture into gang culture, gangs morphed into the ruthless criminal enterprises they are today (Pinnock, 2016). As gangs emerged as entities with more support than government institutions amongst the majority population resisting Apartheid control, they landed themselves on the government agenda as a threat to state rule. “Gangsterism” is now a political label by which the issue is framed as one of moral crisis, rather than the social crisis that it is. The now tightly intertwined nature of gangs with criminality have made it practically synonymous with “organized crime” according to South African policymakers, who correlate anti-gang measures to anti-crime (Standing, 2006). This assumption is inherently ignorant and combative of social realities putting many citizens, particularly children and youths who are young and impressionable, in a position where gangs are the only option to survive.

It is true that gang violence is a salient social reality in South Africa, and particularly the areas surrounding Cape Town,<sup>7</sup> but the problem isn’t as simple as it seems. Since Apartheid, gangs have evolved into a predatory mechanism that prey on the lives of vulnerable children and young people constrained by the contextual realities of poverty and deep-seated social inequalities. Policy actions taken to address gangs and organized crime in South Africa are most notably the *Prevention of Organized Crime Act of 1998* and the Anti-Gangsterism Strategy of 2017.<sup>8</sup> The creation of POCA in 1998 set the standard for harsh criminalization and penalties for gang members, drawing from the American understanding and approach to gangs and criminality that treat gangs as military combatants, with emphasis on tactical intelligence rather than rehabilitation (Thomas, 2022). Treating fellow citizens who fell victim to social marginalization as enemy combatants removes the political necessity to afford gang members basic human dignity and a chance at life.

With the recent facilitation of the National Anti-Gangsterism Strategy in 2017, government departments are beginning to recognize the deep-seated societal issues that perpetuate gang membership and related violence. In a recent press release, Minister Lindiwe Zulu of the Department of Social Development made promises to “scale-up collaborative interventions that empower young people and [the] communities in which they live to deal effectively with gangsterism and associated challenges.” To accomplish this, DSD claims to have “adopted a whole of society approach<sup>9</sup> by working with a number of key partners such as the Department of Basic Education, the South African Police Service and the Department of Justice [and Constitutional Development], among others, to implement social behavioral

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<sup>7</sup> (Pinnock, 2016 and Standing, 2006)

<sup>8</sup>Appendix 1 and 3

<sup>9</sup> “Whole of society approach” as outlined in the National Development Plan 2030 (2012)

	1995	2010	Difference	%
Between 5 and 7 Years	14 392	8 020	-6 372	-44%
Between 7 and 10 Years	12 395	14 777	2 382	19%
Between 10 and 15 Years	6 099	20 625	14 526	238%
Between 15 and 20 Years	2 732	12 435	9 703	355%
More than 20 Years	1 983	10 761	8 778	443%
Life Sentence	433	9 947	9 514	2197%

Table 2.1: Longitudinal Analysis of Sentence Lengths 1995-2010 (Jules-Macquet, 2014)

the crucial strategic initiatives referenced by DSD Minister Zulu (DOJ&CD, 2023).

The public acknowledgement by government of socio-contextual reasoning driving gang memberships and criminality is a step towards the norm-setting of understanding criminality through the lens of humanity and compassion. Despite this optimistic turn for positive social development, public fears of crime demand for harsh penalties by way of longer sentences, some even calling for the return of the death sentence (Cameron, 2020). Criminal penalties are harsh enough, with many people in prison serving 10 years to life (Table 2.1). What the public fails to realize is that harsher penalties will not deter crime, but social development will. The eradication of economic destitution defined by social inequality will alleviate many of the social ills that accompany such conditions including substance abuse, illicit income generating activities, and fractured community cohesion<sup>10</sup> (Pinnock, 2017). While this fact is the basis of the new strategy against gangsterism, public opinion dictates political decision, placing more resources towards appeasing public demands for retribution as opposed to social restoration.

Knowledge of neighbour's name	Trust your neighbour to watch your house		Total
	Do not trust neighbour	Trust neighbour	
Do not know neighbour's name	85,6	14,4	100
Know neighbour's name	9,6	90,4	100
<b>Total</b>	<b>13,5</b>	<b>86,5</b>	<b>100</b>

Table 2.2: Percentage distribution of households' knowledge of their neighbours' name by their trust in neighbours, 2017/18 (Stas SA, 2018)

change programs focusing on prevention, early intervention statutory, reintegration and aftercare services,” (SA News, 2022). This proclamation has been followed up with little to no evidence of such services. In fact, to date there seems to have been no effort by the Department of Justice and Constitutional Development (DOJ&CD) to adopt

## 2.3 Social Reproduction

The concept of social reproduction attributed to Pierre Bourdieu (1986) describes the social processes by which communities are reproduced and individuals are shaped via culture and identity based on objective social structures and power distribution. Bourdieu’s theories apply directly to legal consciousness and culture in that they explain the recurrence of systematic injustice by identifying tensions between structure and agency, internalized by legal consciousness and manifested via actions and decisions made by legal professionals and criminal offenders alike. The process of social reproduction maintains the social distribution of power, or capital, among social classes and defines an individual’s *habitus*, described as one’s cognitive and motivational capacities based on structural realities (Bourdieu, 1977). Bourdieu (1986) describes three forms of capital that determine power distribution; economic capital (money and property rights), cultural capital (educational and social qualifications), and social capital (connections, or social network). It is asserted that material (economic) capital can

<sup>10</sup> Table 2.2

present itself in the immaterial forms of cultural and social capital, and vice versa. This means all three are equally crucial for social prosperity, and having one aids in the pursuit of obtaining the others.

### 2.3.1 Access to Capital

High rates of gangsterism and violence in South Africa are not a crisis of morality, as declared by Swartz and Scott (2013), but a crisis of social reproduction based on severe shortages of opportunities for capital procurement. In his book *Gang Town*, Don Pinnock (2016) proclaims, “Fixing the gang problem means solving the adolescent problem.” On an individual level, social drivers of gangsterism are identified to include a lack of positive role models (particularly male role models), relationships with adults in gangs, substance abuse and violence within the family, and lack of social opportunities (counselling, education, health care, housing, recreational activities, etc.). All of these realities create an environment that limits identity development and agency, making gang membership the most appealing and prevalent option to secure income and respect (Ward and Bakhuis, 2010). As the criminal justice system takes opportunities for capital attainment away from the current generation, future generations are deprived from any potential of power that would have been transmitted from fathers and elders that have surrendered their lives to criminality that leads to imprisonment with little chance of social reintegration. This deprivation of all forms of capital via the removal of large populations from society and validation of retribution that ignores humanity is creating the next generation of violent criminal who practice the same legal disengagement in response. As the generational cycle of violence and criminality continue, it continues to serve as a direct barrier to social development initiatives targeted at poverty-reduction and social equality. This crisis is salient in the fact that young men aged 15-29 are more likely than any other age group to die by violence - a fact that is true globally, but especially so in South Africa (Table 2.3).

Country	Homicide rate among young men (per 100,000)	Age cohort	Year measured	Source
Global	21.2	15–29	2008	UNODC (2011)
South Africa	184	15–29	2000	Seedat et al. (2009)
Jamaica	188	15–29	2004	Cunningham et al. (2008)
Brazil	98.3	20–29	2007	Isfeld (2010)
USA	13.1	15–24	2007	Xu et al. (2010)

Table 2.3: Comparing homicide rates among young men in four countries and globally (Swartz and Scott, 2014)

### 2.3.2 Reproduction of Power

Bourdieu (1986) asserts that capital, in any form, equates to power. For this reason, unequal distribution of capital gives certain individuals social superiority over others. The resulting hierarchy represents the current structure of the social world, defining the set of constraints inscribed in the reality of world order which then determine chances of success in life (Bourdieu, 1977). The elite members of society situated at the top of the social hierarchy maintain power via dominance over social, cultural, and economic capital and the structures that reproduce the distribution of power. Put simply, social reproduction is the generational transmission of power.

The process of obtaining an education by virtue delays entry into the job market until one has sought the proper qualifications that are conditional for accessing many positions, particularly dominant ones (Bourdieu, 1986). As such, those with the ability to complete such

a process must have economic capital to pay for education or at least be able to afford to make time for studies while balancing work and other responsibilities. This reality is an example of the structural processes maintained by the hegemonic elite by which power (or access to capital) is distributed in a way that only a privileged few can access it, keeping education and subsequent economic and social gain out of reach from the majority who cannot afford to access it. By maintaining a criminal justice system that requires extensive social, economic, and cultural capital to navigate it, those in possession of such capital safeguard the institutions that give them power at the expense of those whose power is taken away by this system.

Those of the legal profession are in possession of the social and cultural capital necessary to be qualified as power holders entrusted with the enforcement of the law. Of course, there is a hierarchy amongst power holders in the stratification of power positions, but ultimately all legal professionals have social superiority over those engaging in the justice system for reasons other than occupation. Given its highly complex and grave nature, the sanctity of the law and legal institutions are protected by legal professionals from outsiders who they have deemed not to have enough technical expertise to make authoritative judgements of the social world based on the valuation of law in a given legal culture (Weeks, 2021). Just as described in the process of social reproduction, the knowledge of law, or *jurisprudence*, is recreated by the way law is taught and practiced (Bourdieu, 1987, cited in Weeks, 2021). It is a form of knowledge that few in society have access to other than those with the capital to obtain it. The authoritative power of law is passed on by the people and social structures reproducing its knowledge and implementation, maintaining fractional strength of the rule of law.

## 2.4 Legal Culture

Legal culture refers to the shared standards, beliefs, values, and attitudes that characterize a legal system that is maintained through social structures and *habitus* of legal professionals (Weeks, 2021). The current outlay and workings of the legal system in South Africa are remnants of the colonial past, built for the express purpose of disenfranchising colonized populations. The justice system’s involvement in people’s lives extends far beyond the public sphere and into their domestic settings. The law places itself within the household and reorders family relationships by dictating the fate and social trajectory of men in marginalized communities, redefining family dynamics in a way that encourages social breakdowns (Merry, 1990). Social deterioration keeps these communities in economic, social, and cultural poverty by rerouting capital to higher society at the expense of those at the very bottom of social hierarchy. This is the way by which law maintains hegemonic power relations attributed to social disparity and inequality.

Races	Sentenced	%	National Population <sup>10</sup>
Asian	619	1%	2.5%
Coloured	20364	18%	9%
Black	89329	79%	79.5%
White	2155	2%	9%
<b>Total</b>	<b>112467</b>	<b>100%</b>	<b>100%</b>

Table 2.4: Racial breakdown of sentenced offenders (Jules-Macquet, 2014)

In a retributive system of justice, the aim of legal prosecution is usually to punish someone by depriving them of freedom, either limited or in totality. Thus, the very nature of retribution is to subordinate and further deprive people of the economic, cultural, and social



capital necessary in order to exist and excel in society. As mass incarceration of black and colored people in South Africa persists (Table 2.4), generations within these communities are being deprived by current and future prospects for capital accumulation, keeping them in a position of poverty and social marginalization. In this sense, the criminal justice system is inhibiting social development and poverty reduction as well as identity development, causing the crisis of social reproduction that uniquely manifests itself in the form of gangsterism emerging amongst destitution and criminality.

### 2.4.1 Rule of Law

“For the United Nations (UN) system, the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

The rule of law is fundamental to international peace and security and political stability; to achieve economic and social progress and development; and to protect people’s rights and fundamental freedoms. It is foundational to people’s access to public services, curbing corruption, restraining the abuse of power, and to establishing the social contract between people and the state. Rule of law and development are strongly interlinked, and strengthened rule of law-based society should be considered as an outcome of the 2030 Agenda and Sustainable Development Goals (SDGs),” (UN, 2023).

The term “rule of law” typically refers to the strength of legal power and supremacy of the constitution in a given society. For many in the legal profession, rule of law is the standard by which society governs its behavior, maintaining social order (Andrews, 2020). It is easy to say that rule of law in South Africa is weak or non-existent. However, this is a reductionist way to view the situation. Many scholars contend that the relation between law and South African society is more complicated than it seems. Weeks (2021) examines the rule of law in South Africa and its history as it was applied during colonialism and apartheid, and now. In the past, law was used instrumentally as a weapon to control colonized populations and legalize human rights abuses, operating under the guise of rule of law when, in reality, the force that was being implemented was rule *by* law. The law was used as a tool of colonial hegemony prior to the current constitution, but the lack of institutional transformation in the wake of democracy in South Africa has created a form of rule of law that manifests as a “dis/empowerment paradox” – the paradox of a progressive rights regime co-existing with extreme inequality and persistent poverty. Accordingly, though new systems and structures have been built to supplement those pre-existing for the purpose of instituting progressive laws focused on human rights, the basic nature of the institutions wielding hegemonic power makes it difficult for new structures to function properly. There are opportunities for people to access the legal system and assert the rights they are granted by the constitution, but most often the

legal system serves its own purpose and fails to make a widespread positive social impact. The criminal justice system in South Africa, especially existing in a context where political corruption is so prevalent, has lost legitimacy and is therefore often not trusted.

Rule of law is weak in that many people do not respect the law, evidence by high crime rates and the various forms of legal disengagement pointing to the fact that the public does not trust the government to perform its functions (Figure 2.1). However, the fact that people continue to take their matters to court willingly or are forced to be subject to criminal proceedings leads to the conclusion that rule of law is still intact, but more in the way of its brute force as an ongoing imposition as rule *by* law. The fact that people engage with the legal system willingly to resolve personal problems does not necessarily imply that they do so because they believe in the law’s ability to protect and serve. Even in societies with weak rule of law, such as that of South Africa, people still depend on formal legal institutions and processes to assert power over their claims in disputes when they lack the ability to use the alternative form of power – violence (Merry, 1990).

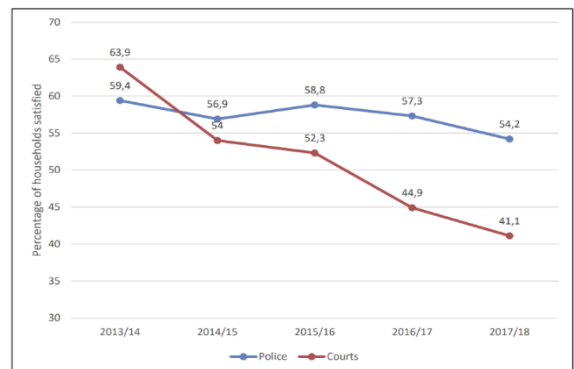


Figure 2.1: Percentage distribution of households' satisfaction with police services in their area and the way in which courts generally deal with perpetrators of crime, 2013/14 – 2017/18 (Stats SA, 2018)

## 2.4.2 Legal Pluralism

The hazy nature of the rule of law’s strength in South Africa is partly attributed to its pluralistic legal culture, which the judiciary is complicit in composing throughout the past and present. The Western Roman-Dutch and British legal systems that were imposed during colonialism maintain a legal culture that reflections historical continuities of the past into the present. As it did back then, customary law still operates alongside the official European law, which colonial governments embraced by infusing colonial values into traditional customs as a form of “native administration,” (Weeks, 2021). Rather than merging into one universal standard over time, the rule of law was observed in three different ways: official (blend of Western and customary), academic, and living (ibid). Legal culture was not unified after the end of apartheid either. Morals and values in society still differ, giving everyone a different perception of morality and norms.

In a culturally heterogenous society such as that of South Africa, it is not possible to have a universally agreed-upon to set of laws to establish social behavior. The absence of objective realities or meaning borne out of a collective consciousness<sup>11</sup> calls for a form of law and order that respects all cultural differences in legal values. As it stands, the justice system recognizes differences in cultural meaning but neglect their validity when it comes to the implementation of justice and punishment. As the system with the most legitimate social power, European law is the strongest of the different pluralities and will be the ultimate disciplinarian, determining the fate of individual lives and generations to come.

<sup>11</sup> (Bourdieu, 1977)

South Africa's legal culture now encompasses not only different forms of legitimate rule of law as it did during Apartheid, but also illegitimate rule in the form of illicit criminal activity taking claim over areas of the country that is disadvantaged and disillusioned by formal legal authority, forced to exist absent of its protection and subject to the control of criminal violence. This fractionalization of legal culture virtually eliminates the authoritative power of law as its democratic backing is undermined by undemocratic governance. Without democratic legality intact, the only form of governance that can thrive is nonstate criminal governance. What is left of the power of the rule of law is adherence by those who still believe in what it stands for, holding on to its potential to instil social transformation and stability.

## 2.5 Legal Consciousness

Placing an individual within a context of lawlessness and structural disadvantages will shape their *habitus* according to these pervasive issues. Marginalized social actors tend to possess a legal consciousness that is resistant to formal legal structures driving them to evade law in their daily lives (Chua and Engel, 2019). Those who disengage with the legal system by way of criminality do so often under the duress of constricting social structures and norms. Many people perceive law as a “shadowy presence,” a mechanism of “power and compulsion,” (ibid). Its pervasive, unquestioned nature leaves an impression of restriction, an invisible force keeping society in order. This is the feeling of law's power over one's social life and actions, perceived as an intrusive force because of its intrusive nature. This feeling is especially pervasive in communities that are not homogenous, which lack informal social control in the form of social cohesion that makes them subject to forceful, formal rule (Merry, 1990).

### 2.5.1 Constraints on Agency

As a collective, society's *habitus* is the compilation of individual and collective practices that are continuous of the past,<sup>12</sup> and deeply inscribed in historical and social relations of the neighborhood or community (Parkes, 2007). South Africa's history, colored by conquest, violence, and inequality, has culminated into a way of living in accordance with a legal system that is designed to systematically deprive black and colored majority populations of power and capital in order to control them and keep them in a lower social position than the minority Western colonial population to sustain dominion (Modiri, 2018). Those who have been generationally marginalized over time construct their self-image and worldview within the limits of the social structures they have access to. Constraints of decision-making and identity development leave young people with little option but to adopt the violent identity that formal legal structures over time have prescribed to them, or to resist it (Ward and Bakhuis, 2010). The processes that restrain the agency of those engaged with the justice system, both civil society and legal professionals alike, sustains the social hierarchy of power inequality that allows some to thrive in society, and systematically derives the rest of the forms of capital that keeps them in the thralls of poverty and criminality throughout time.

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<sup>12</sup> (Bourdieu, 1977)

The relationship between law and social practices manifests itself at the law-culture-society-nexus (Chua and Engel, 2019). People's positionality within this nexus defines their consciousness in relation to law, and the way they act accordingly (often subconsciously). The average citizen who lacks knowledge of the law has a stronger perception of law as an invisible force that pushes them to disengage with it to escape its restrictive force. Those with legal knowledge giving them the power to navigate legal systems have a more complicated internal consciousness of law and justice that at times puts morality in conflict with law. The deep-rooted effect of social conditioning in observance to legal supremacy makes rigid interpretation of law more compelling than the will to act according to one's own morality when a situation brings the two moral subscriptions into conflict.

## 2.5.2 Legal (Dis)Engagement

Weak rule of law undermines the legitimacy of formal governance and legal structures, giving rise to alternative forms of governance and social order. Amongst the struggles for power outside of the structures of formal capital acquirement emerges an alternative form of capital – violence. Violence is described as moral capital - a social asset used to assert power and control - and is indicative of a moral crisis (Hobsbawm, 1969, cited in Swartz and Scott, 2013). The rules that accompany the use of violence serve as proof that it isn't simply a manifestation of social disorder, but an organized and socially reproduced structure that has become the basis of the social order by which social positions and distribution of capital are negotiated in contexts characterized by lawlessness. These rules are inscribed in the social fabric of society and reflect not only the exercise of agency in a heavily constrained social situation, but also dually the same practice of justice in the form of retribution by which the criminal justice system operates,<sup>13</sup> affirming similarities in legal consciousness defined by legal structures.

Legal professionals wield a form of social power that is possessed by few in society and are tasked to use this power in the interest of justice based on the values of rule of law. Lawyers grapple with ideas of whom they should serve and how, including how to mediate tensions between their clients' needs, their own beliefs, legal definitions of justice, and their obligations to wider society (Abel, 2004, cited in Matthews, 2022). Rigid legal structures and statutes makes it nearly impossible to accommodate all factors into legal decisions, though it allows for just enough agency to make space for the misuse and abuse of power. Legal professionals are neutral arbiters who are mandated to interpret and apply the law objectively. Lawyers play a significant role in shaping of political and social outcomes as brokers of legal and social capital (Matthews, 2022). Those operating in circumstances where democratic institutions reinforce structural inclusion, or systemic injustice, face an internal struggle between expanding justice while maintaining their belief in the just function of the law (ibid). The crux of power and agency is where legal professionals exert their power for the advancement of democratic rights, or for selfish personal aims.

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<sup>13</sup> (Parkes, 2007)

## 2.6 Chapter Conclusion

Law has the power to both demand and resist change,<sup>14</sup> a potential which lies in the hands of those who practice it and reproduce its knowledge. As it continues to bar efforts at social and individual development, the public accordingly responds by disengaging which creates the conditions of pluralism and undermined rule of law that appear as lawlessness and social disorder. Conflict challenges the status quo that maintains hegemonic power distribution and can lead to the creation of a new social order (Merry, 1990). The same way law can be interpreted and applied in a way that is undemocratic, it can also be used to advance rights and eventually shift norms to reflect a society that places the most value upon the rights and empowerment of all, not just those who can afford it. The law's impact on social change is measured through the lens of human agency, and the extent to which it can be exercised (Chua and Engel, 2019). Those in the legal profession have a degree of discretion to which they translate the law, but they are tightly constrained by its rigidity. Even so, legal actors can use the power and discretion they do have to resist hegemonic system of legal rule to liberate the masses.

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<sup>14</sup> (Matthews, 2022)

# Chapter 3

## Research Methods and Design

### 3.1 Introduction

The methodology chosen for this research study was heavily influenced by my experience and familiarity with courtroom settings as well as the culture and terminology of criminal law in South Africa given its similarities to the American criminal justice system, both of which are largely based on British common law (Thomas, 2022). By spending time in court and speaking to legal professionals who work daily in court I was able to compile a detailed image of the culture and consciousness that goes into legal functions within and beyond the courtroom. Time in the field supplemented with qualitative interviews, statistics, and secondary research amount to a study that is fortified by various forms of cross-referencing and brings attention to the criminal justice system as an institution worthy of utility for the advancement of social and economic advancement towards the overall goal of greater social development in South Africa and, eventually, other countries whose justice systems produce anything but justice.

### 3.2 Methodology

I chose to use the criminal justice system as key point of reference to measure legal culture and consciousness because it is the most explicit and direct form of legal interaction for most people. The criminal justice system refers to all part of law enforcement, from the police involved in arrests to prison correctional officers, and all those in between who are employed by an institution involved in criminal law and work regularly within its bounds. However, this research study focuses on those working in court and with gang members sentenced by the court to narrow focus down to the legal consciousness and practices that comprise legal culture resistant to reformation.

Understanding gang membership and violence as a form of legal disengagement and a crisis of social reproduction frames the issue at the crossroads of law and society, which must both be studied and related to each other in order to get a clear picture of how and why the historical cycle of criminality in the form of gangsterism persists. Between court observation and discussions with legal professionals, I evaluated the strength of the rule of law based on legal consciousness and culture. This evaluation is used to understand the extent to which gang activity is a response to law and, further, how the inadequacy of the criminal justice system is enabling and contributing to the social reproduction of gang violence leading to social degradation and disorder.

### 3.3 Research Methods

Data points were drawn up based largely on my own experiences and observations of institutional failures and shortcomings in court, backed by literature reaffirming particular

miscarriages of justice in the regular practice of law. Interview participants were selected based on these data points and with the intent to provide an all-inclusive image of the different functions of criminal justice within the courtroom and beyond to pinpoint where legal mishaps occur.<sup>15</sup>

### 3.3.1 Qualitative Interviews

Legal culture within legal spaces, particularly criminal courts, was evaluated based on common perceptions of law, or legal consciousness, of those who work within it including lawyers, magistrates, probation officers, social workers, and NGO workers. As legal experts, their perceptions and analysis were invaluable. The bulk of my research was conducting interviews with over 20 people involved in the legal system in some capacity. The interviews were semi-structured, though I quickly found people becoming impassioned as they spoke and naturally touched on all the data points<sup>16</sup> with little to no prompting. This made it even more evident when patterns started to arise that people are facing the same challenges and have similar perceptions of the legal system and its systematic disadvantages.

The first few people I interviewed were from NGOs and universities who work in the field of law but adjacent to criminal law, who were referred by a university contact. These first few participants opened the door for me to explore more legislation and speak to more involved people. I was connected to NGOs in Cape Town, which is where most of the interviews took place. These initial participants, in addition to those whom I first came across in the Wynberg court, introduced me to more legal professionals willing to participate in my study in a snowball method that amounted to over 20 interviews with different key informants, though I was unable to include them all in this paper given word constraints, having to prioritize them according to relevance to the study.<sup>17</sup> I had originally thought I would speak with academics, NGOs, attorneys, and maybe magistrates. In the end, I was able to interview a diverse range of legal professionals involved in the criminal justice system from policy to post-sentencing, but due to time restrictions I was unable to get a hold of informants from certain key agencies, namely police (SAPS) and high court personnel (NPA and judiciary).

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<sup>15</sup> Appendix 5

<sup>16</sup> Appendix 5

<sup>17</sup> Appendix 6

### 3.3.2 Ethnographic Participant and Court Observation

I set out to interview professionals involved in court and to observe court myself. When I began interviews, I hoped that someone would offer to take me to court with them, but alas, time was running out and that opportunity did not come. So, I decided to take matters into my own hands.

The first time I wandered into a courthouse, the Cape Town Magistrate Court, I confidently approached a man in an attorney's robe and asked him where I could find arraignments. He looked at me puzzled and ask what I was talking about. I explained the type of hearing I was looking for and that is when I learned that "arraignments" in South Africa are referred to as preliminary hearings or bail applications.

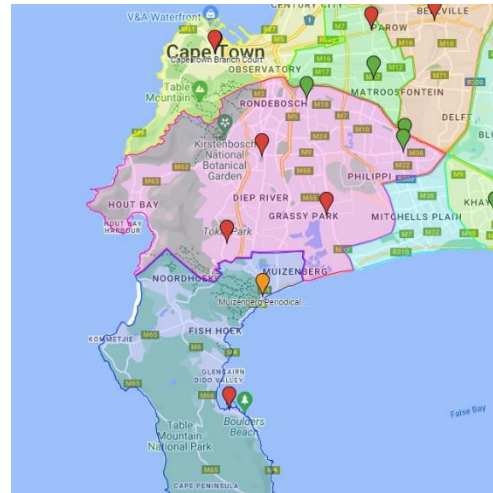
I wandered around the courthouse and found some prosecutors to speak to, who instructed me in which districts I could find more gang-related crimes, as most Cape Town city crimes are drug-related. After reviewing the map of Cape Town court jurisdictions, I found that Wynberg covers the most communities that are infamous for gang activity, covering much of the Cape Flats and townships reaching as far as Imizamo Yethu and Nyanga (Map 3.1).

My next court visit was to Wynberg. I was ready to look like I belonged now that I knew that "arraignments" don't exist here. Despite my confidence, I was instantly stopped in the hallway by a prosecutor who noticed that I was out of place. The only other white women in the courthouse were magistrates, so seeing a young white woman in that environment was unusual to people – especially one who is sitting in the court gallery alongside

offenders and family members awaiting their cases. I was lucky to be stopped by this prosecutor because he quickly became my court connection. He was extremely helpful in introducing me to other people in the court and letting me know which court rooms would be best for me to sit in on. Something very valuable I learned from the people I met in court were the similarities and differences between the American and South African criminal court systems. They were very keen to learn how things work in the U.S., and in return I learned in detail the processes and legislation surrounding the court hearings I was witnessing.

Wynberg Court houses both the District and Regional courts, both of which I was able to observe. Over the course of a month, I managed to spend 20+ hours in court where I got to experience the reality of the system that I have gathered so much information on.

However, the amount of time spent in court could not be enough unless I was able to follow



Map 3.1: Wynberg District and Regional Court Jurisdiction [highlighted in red] (DOJ&CD, 2023)



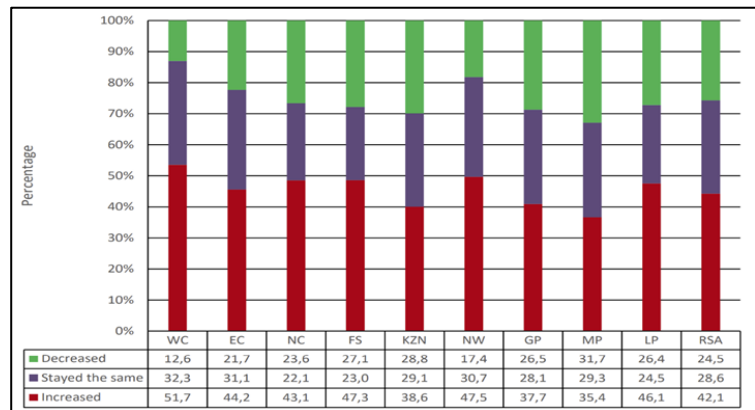
Map 3.2: Map of gang territories used by Wynberg court (2023)



a case from start to finish, which is impossible because a trial itself, independent of prior hearings, will take months or years to be complete.<sup>18</sup> My time in court was essential, but my time speaking to the people who spend every day in court was even more valuable.

### 3.4 Secondary Research

Quantitative data is used to paint the background and context of crime, violence, and gangsterism in South Africa. To identify an issue of criminal justice, crime statistics and surveys are utilized to highlight a lack of safety provision, discontent with the legal system, and high rates of criminality<sup>19</sup> and recidivism, especially amongst children and young people.<sup>20</sup> In addition to



**Figure 3.1: Percentage distribution of households' perceptions of violent crime levels in their areas of residence in the past three years, 2017/18 (Stats SA, 2018)**

providing background information, existing literature is used to obtain the perceptions of victims, defendants, and communities to have a wholistic understanding of legal culture and consciousness. Any form of “culture” is the culmination of collective values and practices, so it is essential to consider the viewpoints of all involved. Perceptions of victim, perpetrator, and community members in terms of the law are obtained from existing literature and evidence shared by research participants.

### 3.5 Thematic Analysis

Interviews and court observations clearly displayed thematic patterns that I used to analyze findings. These patterns fall along a spectrum of structure and agency, along which justice is situated. These patterns were presented through the repeated mentions and direct observation of the shared challenges of legal professionals who exercise their will to help others but are met with obstacles characterized by the lack of resource and knowledge capacities, lack of meaningful justice (“checking boxes”), unequal power dynamics, and lack of institutional collaboration. Those are the main themes of the research, but the story is not all bad. One additional theme arises as a beacon of hope, and that is the presence of restorative justice working alongside the formal retributive system.

<sup>18</sup> (Participant 6, Regional Court Prosecutor, 2023)

<sup>19</sup> (GI-TOC, 2021)

<sup>20</sup> (The Message Trust South Africa, 2023)

### **3.6 Reliability and Validity of Research**

The validity of the research generated in this study is secured by the mixed-method approach that affirms social realities and facts based on reputable literature sources and first-hand accounts cross-referenced with the support of ethnographic observation and quantitative statistics. This method of triangulation upholds the reliability of information that is affirmed by the emergence of similar themes from different sources of data.

### **3.7 Positionality**

As an American, my accent is clear to most people, but my motivation to study the criminal justice system in South Africa is less clear. I introduced myself to all my participants and gave them legitimizing information about myself including information about my research and studies, as well as my experience as a social worker for victims of crime in the U.S. One point I had to make very clear to people was that this is not my first time in South Africa. My motivation to research in the context of South Africa comes from my experience living and studying in Stellenbosch and Cape Town for over a year between 2018-2019, giving me intimate knowledge of the culture and society (particularly having volunteered with various organizations exposing me to different populations as well as studying Social Dynamics in the context of South Africa). In deciding between the U.S. and SA for research, I decided it was better to study SA given the extent of my involvement in the U.S. criminal justice system, which may influence my objectivity. Additionally, the contacts available to me in the U.S. are the people I used to work with, which may affect data with the presence of bias on both sides of interviewer and interviewee.

My experience as social worker for victims at the District Attorney's Office in Boston (USA) made me well versed in criminal law and court procedure. In my time at the DA's Office, I worked in two courts located in high-crime areas on the southern outskirts of Boston. I worked closely with prosecutors and quickly learned the court process to be able to advise and inform the victims I was advocating for. I found that as someone knowledgeable but somewhat removed from the legal process, I was able to notice patterns in how law was interpreted and applied in a way that was largely absent from the consciousness of my coworkers that were hardwired by formal legal education. In a similar way, my positionality as a non-citizen of South Africa, brought with my knowledge of the legal system that is independent of formal legal training, offers a unique perspective of the workings of the criminal justice system as they portray cultural and social realities that many may take for granted.

Racial divides are an ever-present reality of South African society. As a white American woman, I had to consider how I may be viewed by others. When it came to interviews, after introducing myself and my background, people spoke to me with no issues and under the assumption that I have a base understanding of South African society, politics, and law, rather than as someone who is experiencing it for the first time. Part of this was also because I was referred to all research participants by someone who vouched for me, so there was already an established layer of competency. However, from looks alone, people in the courthouse were often curious as to what I was doing there and often asked if I need help

or if I am there to support someone (both professionals and laypeople alike). Some people assumed I worked there and asked where they can find certain offices or court rooms, speaking to the social power given to appearance alone.

### 3.8 Ethical Considerations

Each research participant consented to participation and was given an initial disclaimer on the intent of use of their information after being explained the nature and focus of the study. Interviews were not recorded, but instead I took notes with the permission of those being interviewed. I opted to omit all names unless a participant specified otherwise. Though the people I spoke to are not technically vulnerable groups, there is a level of risk to working in criminal justice, especially as it comes to those working with gang perpetrators. In any case, a letter of ethical clearance was obtained and offered for participant review in case of any ethical doubts.

### 3.9 Limitations and Practical Challenges

The biggest challenges I faced had to do with logistics of the court. It was very hard to hear what was being argued and said in court, in addition to the different, strong accents and casual switching to Afrikaans. Some of this became better in time after becoming accustomed to the accents and volume. Other times I depended on those in court (the prosecutor or someone sitting near me in the gallery) to clarify what I had heard. The drawn-out nature of court formalities describes in detail the issues being discussed, giving the ability to refocus into the matter at hand without missing crucial information, even when some words or phrases are lost in communication.

Navigating the court infrastructure was difficult as the building itself has fallen to decay in the face of resource deficiencies. Most of the elevator buttons did not work,<sup>21</sup> bathrooms lacked toilet paper and soap, random exits and sections of the building were out of use, and directions to court sessions and offices were not clear. These issues were easy enough to circumvent with some pre-planning and guidance navigating the building by someone who worked there, though they could be bigger barriers to the public for reasons of disability, language, medical condition, etc. Otherwise, it was easy to find people to ask for directions and guidance as to which courts were hosting which hearings and matters.



Image 3.1: Missing Elevator Button in Wynberg Courthouse (2023)

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<sup>21</sup> Image 3.1

## **Chapter 4**

### **Findings and Analysis**

#### **4.1 Introduction**

The findings derived from this research are based on participant interviews and supported by court observations. There were clear patterns of perceptions and observations amongst legal actors working in various parts of the criminal justice system. Not only did every participant mention structural issues inhibiting the functioning of the legal system, most also spoke of the same nuances in legal practices stemming from structural constraints on the agency of legal practitioners and their ability to affect positive social impact. Interviews and observation of court hearings revealed more detailed factors underlying the culture of law and collective legal consciousness, clearly impacting legal functions and the resulting influence on wider society. These include varied meanings in the definition of justice and adherence to the rule of law, checking boxes to meet protocol, and the loose fulfilment of responsibilities by different powerful roles leading to the offloading of those responsibilities onto workers in lower positions. Each of these findings corresponds with the research sub-questions relating back to the main question. Findings show that the answers fall along a spectrum of structure and agency, within which power is made and remade. There was a general feeling and reference to the lack of agency faced by all participants to varying degrees. Secondary research provides a thorough and accurate depiction of the structural restrictions and failures of criminal justice that were confirmed by field research and interviews.

#### **4.2 Reality of Lawlessness and Social Crisis**

The first finding confirms the theories and assertions made by the literature used for secondary research. There was no dispute from interview participants that there is a public perception of lawlessness and fear of crime that predominate South African social and legal consciousness. One NPA prosecutor said the role of the criminal justice system is to make people feel safe, like the law is protecting them, and safeguard from injustice. By not achieving any of these aims, the system is not doing its job and can rightly be characterized as broken (Participant 5, District Court Prosecutor, 2023). In this light, the illegitimacy of law is justified, although violence as an alternative is not, which is why rule of law is still relied upon to keep social order and protect citizens. Recognition of the reality of social decay was accompanied by indications as to what factors accompany this phenomenon, mostly pointing to policy shortcomings due to lack of resources. The resulting conclusions drawn by many were that weak rule of law, corruption, and apartheid created these conditions and continue to restrict legal functions that should protect the public and safeguard human rights.

##### **4.2.1 Power in Poverty**

Socio-economic factors of the country as a developmental state limit the availability of knowledge and resources. South African crime is strongly intertwined with factors that the state with limited resources cannot address alone (Participant 8, DSD Deputy Director, 2023). The entire system of criminal justice is shaped by a context where knowledge and resources are often lacking. Structural incapacities largely inhibit the ability of institutions to implement policies. A Department of Social Development probation officer said it is impossible to implement child justice and protection laws because there are not enough social

workers for the number of incoming cases (Participant 7, DSD Probation Officer, 2023). Lack of knowledge amongst legal professionals, particularly police and judges, also makes for legal decisions that are irrational or plainly illegal (Participant 1, JICS, 2023). One human rights attorney described an instance where a judge made a ruling unaware of a more recent policy update, and when challenged he said simply “Let the Constitutional Court deal with it,” (Participant 10, LHR, 2023). This participant also described coming across many police officers who make unconstitutional arrests simply because they do not know the law.

Operational issues attributed to structural incapacity obscure the rights of individuals. The participant who pointed this out works for the Judicial Inspectorate of Correctional Services (JICS) and mentioned it in reference to inmate rights, but it applies to all those involved in the court unwillingly (Participant 1, JICS, 2023). For example, children are never supposed to spend the night in jail, a social worker must assess them immediately, but lack of staffing capacity and high caseloads make it impossible for social workers to be immediately available (Participant 7, DSD Probation Officer, 2023). Even when policy is adhered to seamlessly, there are still grey areas that leave room for people to fall through the cracks anyway.

In the context of poverty and inequality, structural constraints limit the degree to which law and justice can be executed. People lacking the (economic, cultural, and social) capital to access the law and courts are systematically barred from achieving a right to legal claim and the help and protection it offers. There are many factors that can get in the way of a person’s ability to navigate the criminal justice system. There are some obvious things like the high cost of quality legal representation. Other, more subtle, or indirect things that disadvantage regular people, including families, victims, and witnesses, include the fact that one has to take a whole working day off to be in court (Participant 9, Restorative Justice Practitioner, 2023). Considering these barriers to accessing justice, the people in society most heavily afflicted by poverty and inequality are the ones who are marginalized from the liberty and resources that would allow them to escape this historical continuity of slavery and apartheid. Generational destitution has created social conditions defined by broken communities and families.

#### **4.2.2 Crisis of Social Reproduction**

In an interview with a social worker, socio-economic circumstances and drugs are pointed to as the main drivers of gang crime, both of which prompt the desperate need to make money. He cites high unemployment rates amongst nonskilled black workers and low rates of school matriculation. He says for every 10 kids in grade R only 4 will finish high school, and the rest are pregnant, addicts, or dead. Even fewer can afford higher education to gain employable skills. In the face of these struggles, gangs offer assistance including paying school fees, providing for poor and vulnerable groups, and even provided legal assistance for those members who are arrested (Participant 7, 2023). As a social crutch, gangs garner even more support and reliance from the community, strengthening their hold on social control within these communities.

The prevalence of gangsterism specifically as a form of legal disengagement is explained by a nongovernment legal practitioner, Participant 12, who works with youth offenders in a restorative justice prison program. This practitioner, as with other interviewees and literature, highlighted the role of intergenerational trauma and forced removals dating back to apartheid and slavery that displaced communities from their families, homes, and sense of belonging that maintained social cohesion. Broken families and communities arose as a result. Participant 12 cited a quote that appears in *Gang Town* (Pinnock, 2016) when saying simply, “If communities and parents don’t raise a child, the streets and gangs will.” They point out that crime impacts the fabric of society, breaking down community trust. (Restorative justice is used to dismantle thinking processes that are wired with violence, teaching

young offenders healthy ways to cope and communicate, giving them a chance to learn a safer and more fulfilling way of life outside of criminality.

Scholars and legal practitioners agree that prisons do not serve the prescribed goal of rehabilitation, a reality highlighted by high rates of recidivism.<sup>22</sup> Instead, they perpetuate gangsterism and violence by putting already marginalized people, especially young people, in an environment ruled by prison gangs where one must join a gang for their own protection. Exposure to violence and manipulation by adult offenders drives kids are further into the clasp of gang life colored by crime and violence. Just as it has pervaded prisons and communities, gangsterism too plagues youth care centers and exposes previously nonviolent children to power and violence (ibid). Court professionals and restorative justice practitioners point to the fact that children's care and detention centers lack the safe environment they are meant to provide. Gangs have pervaded these spaces, making contact with them unavoidable. Probation officers will highlight if a child is a gang member so that social workers at the Children and Youth Care Centres (CYCC) position inmates strategically to prevent gang wars within facilities. The *Child Justice Act of 2008* and *Children's Act of 2005* are used to keep youths out of prison before they are transferred to Pollsmoor at the age of 21 to finish their sentences. However, the reality is that all child centers are full, even in Pollsmoor Prison. Youths are sent to adult section of Pollsmoor where they are influenced and bullied by adults into joining gangs for protection. Kids in gangs (inside and outside of prison) will also take blame for crimes they didn't commit on behalf of adult perpetrators – the mindset is that you can commit crime as much as you want as a kid without punishment and your record will be expunged by the age of 29 (Participant 7, DSD Probation Officer, 2023).

People removed from society and put into prisons still present a social problem by continuing to influence and perpetuate violence, but also by being unable to provide for family members including children. Reverend Jonathan Clayton of Hope Prison Ministry points out that keeping prisoners locked up forever deprives children of fathers, making the next generation of criminals who grow up in the same socio-economic circumstance as their antecedents characterized by social depravity in the absence of the capital necessary for survival.

### 4.3 The Meanings of Justice

Legal (dis)engagement comes in many forms as a manifestation of legal consciousness and agency within harsh structural realities. The definition of justice that each person believes in is shaped by their identity and morality, making justice impossible to deliver uniformly. The retributive justice system lends the power to make life altering decisions on behalf of others when it comes to upholding justice, giving little power to the regular people seeking justice and aid. Citizens engaging in the justice system without knowledge and training in law lack the cultural capital to navigate its complex systems and are subjected to insubordination from the instant they begin the criminal justice process (Merry, 1990). Those working within the criminal justice system (dis)engage with the law in ways that maintain the power granted to them by social and cultural capital while trying to influence different outcomes for themselves and/or the people they serve. Though operating in two opposing social spheres dominated by different rules for obtaining power, legal professionals and criminal offenders face similar challenges as it comes to exercising individual will in relation to legal structures, though their engagement tactics are starkly opposite. It is within the struggle for agency that we can see the process of creation and reproduction of power and identity based on social position and capital (Bourdieu, 1986).

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<sup>22</sup> There is no official statistic on recidivism, though it is estimated to be between 55%-97% (Schoeman, 2010).

### 4.3.1 Restorative Justice

Restorative justice is a prevailing form of justice practiced by civil society organizations involved in the rehabilitation of prisoners and youth involved in gangsterism and violent crime. Legal practitioners in these organizations support this system of justice that considers the best interest of all parties involved in a conflict and allows all a chance to confront, heal, and move past their issues. The goal is for perpetrators gain an understanding of the impact of those behaviors and take accountability, while victims and families get to confront the person who ruined their lives and have a chance to gain closure and heal (Participant 11, Restorative Justice Practitioner, 2023). The community as a whole benefits from the healing and restoration brought on by the restorative justice process, healing the wounds that would otherwise fuel the generational trauma that fuels violence, substance abuse, and other destructive behaviors (Restore, 2023). Some prisoners who partake in restorative justice practices find empowerment that gives them the strength to leave gangs without incident (ibid), exemplifying a shift in legal engagement that still rejects law in the form of retribution but embraces an alternative form of legal justice.

Those who practice and execute law have a unique form of legal consciousness that presents as a struggle between power and morality, stuck between the spectrum of structure and agency. Lawyers grapple with ideas of whom they should serve and how, including how to mediate tensions between their clients' needs, their own beliefs, legal definitions of justice, and their obligations to wider society (Abel, 2004, cited in Matthews, 2022). Restorative justice is growing in popularity in South Africa as legal professionals express disengagement with the law in a way that still subscribes to legality. One of the magistrates that was interviewed was working on getting their master's degree in restorative justice, showing a rejection of the retributive justice system that lacks the ability to improve individual lives and society as a whole.

### 4.3.2 Pluralistic Legal Engagement

Different perceptions and types legal (dis)engagement have created a pluralistic legal culture, whereby rule of law lacks unified authority and is undermined altogether. Legal professionals rely on common standards of "justice," "reasonableness," and "best interests" to argue claims, which are subject to legal interpretation (Matthews, 2022), providing a narrow gap where law can be exercised toward the advancement of rights. Open legal standards are based on objective truths, which paradoxically don't exist in pluralistic legal systems. No matter how issues are framed, those who harness the power to make life-altering decisions (namely judges and magistrates) can only interpret legal arguments in a way that fits within the realm of their own identity and worldview. Judicial decisions are often met with discontent and disagreement, a reality pointing to the fact that justice has a different meaning for everyone, though legal professionals are tasked with implementing an "objective" form of justice that meets legal standards.

One bail hearing I observed was a gang-related case of murder that had been pending for 2 years. What made it obvious that this was a gang case was that there were 6 defendants, each with a private attorney, and each with prominent tattoos marking their gang membership. Prison number gang tattoos were visible on some of the defendants, telling me that they had joined prison gangs while waiting in remand for the last 2 years. All the defendants were under 30, with a few being minors at the time of the offense. Without a trial-ready case, the judge ruled to keep the defendants in remand "in the interest of justice." As these young men remain exposed to gangs and inhumanity in prison, particularly in these formative years of their life, their chances of rehabilitation or reintegration into society become slimmer. In this case, the "interest of justice" is not the interest of those young men or their families, nor

is it necessarily that of the community. The legal culture of the justice system that values punishment over humanity prioritizes the letter of law over any interest of justice.

## 4.4 Empty Justice

Those working within the justice system can see that many of the measures taken to follow the law's approach to justice are meaningless, and often harmful. On CSOs providing restorative justice services, one practitioner commented that diversion programs are limited because they must be granted government accreditation to operate, entailing a long and difficult process that is effectively blocking more CSOs from being able to provide essential services that the state lacks the capacity to deliver (Participant 13, Restorative Justice Practitioner, 2023). Legal professionals who entered the legal field with the goal of helping others are finding themselves to be a part of the process of debilitating hegemonic force that hurts the very people they seek to help. The high-positivist nature of legal interpretation<sup>23</sup> within South Africa makes it such that the motions of justice are more important than its actual realization, thus reflecting political agendas more than the humanity and compassion of those who fight every day for the rights and protections of citizens. A salient example of this reality is the fact that the Department of Correctional Services officially follows a restorative justice guideline,<sup>24</sup> but practically there is no such effort given the lack of capacity and political will (Participant 11, Restorative Justice Practitioner, 2023).

Participants in the NPA and in magisterial positions alike said that social worker reports are taken with high value to determine someone's sentence, factoring considerations of social circumstance including age, previous convictions, and education level. According to a magistrate, these social circumstances are used to determine prospects for the future and ability to rationalize (Participant 2, District Court Magistrate, 2023). In this way, consideration of social circumstances ignore social realities limiting the scope of future possibilities, instead gauging one's ability to access capital and further depriving those lacking the social power granted by the possession of capital.

Children and young people are making up more and more of the demographic of criminal offenders (Participant 4, Legal Aid Public Defender, 2023). Child policies are comprehensive and followed quite strictly throughout the court process, yet rates of re-offense are still astronomical<sup>25</sup>. Laws are not enough to address the issue of generational poverty and violence which are at the root of the crime and gangsterism in SA. With little prospect for a future in education or corporate success, many young people in poor and marginalized communities turn to crime to obtain necessary resources.

### 4.4.1 Public Opinion

It has been established that the public consciousness of law is one of unruliness and rampant criminality. Throughout history the government has employed tactical legal responses to periodic public cries for harsher law and order, even if crime rates show little change (du Plessis and Louw, 2005). This is particularly true when it comes to the government's commitment to tackling the crisis of gangsterism. Though it has always been an issue, demands for increased safety measures have made gangsterism a hot-button political issue following South

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<sup>23</sup> (Weeks, 2020)

<sup>24</sup> *Department of Correctional Services White Paper on the Policy of the Department of Correctional Services (1994); Correctional Services Act 111 of 1998; Department of Correctional Services White Paper on Corrections in South Africa 2005* (Cameron, 2020)

<sup>25</sup> (The Message Trust South Africa, 2023)



Africa's transition to a post-apartheid republic (Thomas, 2022; Participant 3, District Court Magistrate, 2023). Strict sentencing laws and criminal procedures were put into place by the political elite whose job it is to appease the public rather than see to the meaningful delivery of justice and rehabilitation. These are the laws that constrict the agency of legal professionals, who must follow the protocol and check boxes to keep their jobs, though the outcomes often lack impactful positive change in the lives of individuals and populations at large who are caught within the law's grasp.

#### 4.4.2 Rigid Laws and Legal Procedures

Strict policies are in place to carry out functions of justice and rehabilitation, but the reality is that high case numbers and lack of staff and other resources prevent legal practitioners from being able to devote enough time and discretion to ensure meaningful implementation. In an interview with a lobbyist involved with the creation and passage of the Child Justice Act, they relayed a story of a farm kid in a nearby community charged with 8 counts of theft. The community had wanted to help the child via restorative justice as a resolution to his case, but because he was charged with so many counts the law made it impossible to resolve the case short of prosecution. Outdated statutes such as the *Criminal Procedure Act of 1977*, which mandates all criminal justice practices and protocols, do not consider current social circumstances (Participant 2, District Court Magistrate, 2023). The CPA is remnant of apartheid-era legal structures, quite literally operating as a continuation of past systemic social deprivation.

Rigid interpretation of the law and structural constrictions characteristic of the legal culture place severe limits on the ability of lawyers, judges, and other legal actors to do their jobs in a way achieves meaningful impact. Political agendas are achieved while those involved in the daily functions of the legal justice system struggle to assert power and exercise free will, oftentimes feeling disillusioned and disempowered by the law as a result. On the structural failures of the justice system, a policy consultant on the Anti-Gangsterism Strategy (2017) says initiatives to combat gang violence have mostly fizzled out, but skilled prosecutors can sometimes make a difference by exercising their power to make up for shortcomings of government and policy (Participant 14, Criminology Professor, 2023). A district court magistrate explained their power as an independent judicial officer is limited by the obligation to apply law as it is, as well as lack of resources and services (including availability of counselling, mediation, and other alternatives to retribution), (Participant 2, District Court Magistrate, 2023). A district court prosecutor also expressed such limitations but navigates structural challenges by using his own time to train police on taking statements and conducting investigations with the purpose of teaching them how to build stronger cases that can be prosecuted (Participant 5, District Court Prosecutor, 2023). Otherwise, the majority of cases are thrown out due to lack of investigation,<sup>26</sup> letting dangerous people back on the street with a renewed confidence of knowing they got away with murder.

Minimum sentencing, a law put in place that constraints judicial discretion in sentencing, was enacted temporarily during the post-apartheid transition as public perceptions painted an image of a crime wave which didn't really exist. In reality, murder picked up around 2012 with an influx of firearms, including police selling arms (Participant 13, Restorative Justice Practitioner, 2023; Participant 1, JICS, 2023; GI-TOC, 2022). The government addressed public dissent with a harsh reaction to crime, which still negatively impacts the justice system to this day (Participant 1, JICS, 2023). Overcrowding caused by mandatory imprisonment has a trickle-down effect which constrains the capacity of the rest of the system to function, with all branches of the system dealing with overwhelming numbers of cases (Cameron,

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<sup>26</sup> (Participant 5, District Court Prosecutor, 2023); Observed in court

2020). Short-sighted policy implementations that seek to ease public dissent have unintended consequences that have a ripple effect touching all of society.

Because of the *Child Justice Act of 2008*, prosecutors argue for diversion for youth offenders by default, unless they have committed a Schedule 1 crime<sup>27</sup> or if victims disagree with diversion (Participant 5, District Court Prosecutor, 2023). The purpose of diversion is to remove kids from gang influence and develop skills for resilience against substance abuse and crime, life skills, anger management, and navigating family disputes. Ultimately, it was admitted by the prosecutor that they don't actually know if the programs work, putting their faith in probation officers to recommend programs that work. However, it seems that many do not, with most children coming back on another offense (Participant 7, DSD Probation Officer, 2023).

Even when lawyers and judges try to avoid unjust outcomes through strategic litigation, they are ultimately strapped by rigid laws and political pressure. One district court magistrate spoke of their judicial power as being relatively flexible (aside from minimum sentencing) depending on interpretation, although they do get a lot of pressure from higher-ups on what to do (Participant 2, District Court Magistrate, 2023). This statement acknowledges differences in the way the law is applied, and that real constraints on interpretation exist. The legal culture that has evolved over time into its current operational form leaves little room for interpretation, requiring a strict positivist application of the law (Weeks, 2020). This social reality is the biggest inhibitor of social progression of law. It has people enforcing laws that they recognize to be unjust, though still conform to for the sake of their job and the complex processes of legal consciousness that hardwire legal training. A DSD probation officer affirms this reality by stating that, "The state doesn't care who is saved, only that the boxes are being checked," before adding, "That is why we become victims in South Africa." For all the children sent through diversion and provided with some of the only resources available to change their behaviors, most of them do not (Participant 7, DSD Probation Officer, 2023). Systems in place to ensure the quality control of government justice departments largely lack enforcement power,<sup>28</sup> presenting the same dilemma of checking boxes without much meaningful impact. As long as the motions are made, as far as political aim is concerned, justice is being served.

As social workers, probation officers are tasked with investigating the families and backgrounds of offenders to then recommend courses of action for rehabilitation or factor into sentencing. Of course, these are just recommendations, and lawyers and judges must follow the letter of the law. However, it was noted that social workers especially have a high pressure to produce output, so their suggestions are not always the best, on top of the fact that limited resources limit options for services available (for example, there are no halfway houses to accommodate recovering addicts and very few diversionary programs, with NICRO being the main supplier), (Participant 2, District Court Magistrate, 2023).

#### **4.4.3 Ghost Protocol**

Despite government claims to incorporate gangsterism strategies in the criminal justice process, no procedure seems to exist other than keeping rival gang members apart. In all my interviews with legal practitioners there was hardly any mention of the Anti-Gang Strategy of 2017. There are strict laws around child criminal offenders and child protection<sup>29</sup> which must be adhered to when dealing with children. The CJA requires children who commit serious offenses be detained in Child and Youth Care Centers. These are the same care

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<sup>27</sup> Criminal Procedure Act (1977)

<sup>28</sup> (Participant 8, DSD Deputy Director, 2023)

<sup>29</sup> Child Justice Act (2008) and Children's Act (2005)

centers where children who have been removed from their home environments are kept and are supposed to be a “place of safety.” When these centers are full, children are put into Pollsmoor (Participant 7, DSD Probation Officer, 2023). Though there is a youth detention center at Pollsmoor, overcrowding puts many young offenders in the adult section<sup>30</sup> - a clear violation of the CJA, but little can be done under the circumstances of scarce resources.

The conception of the Anti-Gangsterism Strategy relied on holistic enforcement of anti-gang policies that featured multidisciplinary cooperation amongst institutions involved in criminal justice, especially the South African Police Service and the Department of Community Safety. SAPS has the most influence over gangs, but they constantly fight with the Department of Community Safety over whose problem it is (Participant 14, Criminology Professor, 2023). The DOJ&CD has only a small role in the strategy against gangsterism, with DSD seemingly interacting the most with this strategy via regular contact with young offenders and investigation into their backgrounds. The overall implementation of the Anti-Gangsterism Strategy did not go according to plan due to lack of sufficient resources and support from the top. The police Anti-Gang Unit still exists, but with only a fraction of the force they had a few years ago (ibid). As anti-gang efforts have dwindled, gang wars have morphed into a new and formidable form of social catastrophe that is met with acute political response (Al Jazeera, 2019).

## 4.5 Transfers of Responsibility

Government responsibilities of public security, justice delivery, and social development are offloaded onto non-government organizations, particularly civil society organizations. Power imbalances characterize the way legal actors can function in their roles, either limiting or enabling discretion and empowerment of certain players. Aspects of the justice process that cannot be accommodated by the court system become the burden of civil society. These aspects are supported by foreign aid and donations, not by government aid - fully removing government involvement in these practices other than being the accreditors of programs they have no technical knowledge of, which is more of a barrier than an aid (Participant 12, Restorative Justice Practitioner, 2023).

Professionals working within the justice system are focused on completing their tasks and meeting policy objectives, unintentionally ignoring the necessity of a wholistic approach to complex, multi-faceted issues. There is a lack of cooperation between different institutions that creates wide gaps through which justice delivery falls. Lack of emotional intelligence is also a factor in this, by which legal actors refuse to cooperate with others for the purpose of having the most power and glory (Participant 11, Hope Prison Ministry, 2023). Individualized efforts operating in isolation are much less effective at accomplishing any meaningful impact than collective efforts, which garner the strength to tackle systematic issues.

### 4.5.1 Power Imbalances

The cultural value of respect for social power within the legal system gives the impression that authority should not be questioned. Judges who are challenged by lawyers take it as a sign of disrespect,<sup>31</sup> rather than an essential function of the checks and balances of justice. In cases where complaints against powerful figures are handled, the individual at fault has too much social power to be dispelled and will just be reassigned to cause damage

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<sup>30</sup> (Ibid)

<sup>31</sup> (Participant 5, District Court Prosecutor, 2023)

elsewhere (Participant 5, District Court Prosecutor, 2023; Participant 2, District Court Magistrate, 2023).

When speaking of the hierarchical power dynamic in court, a district court prosecutor described a clear lineage of social order that has the judge/magistrate on the top, then prosecutors, and then defense attorneys, with members of the public having the least amount of power within the courtroom. To assert the demand for respect, magistrates must be referred to by all as “Your Worship” and judges as “My Lord/Lady.” Judges rely on and expect prosecutors to make sure the court session runs smoothly, requiring them to take on additional responsibilities that aren’t necessarily in their job description. This includes making sure police, witnesses, and interpreters are present. If something goes wrong, magistrates will take their frustration out on the prosecutor in an unfair expression of loss of control (Participant 5, District Court Prosecutor, 2023).

Trials do not involve a jury, only a judge to decide on conviction and sentencing. This prosecutor described trials as fair for the most part, with the disclaimer that magistrates can make or break a case. Their role is to just listen while arguments are made for both sides, but they often get involved and ask questions that can be the difference between innocent and guilty. As the strongest player on the field, it is up to the judge to be the referee and make sure things are working, the buck of responsibility stops with them. They are the ones responsible for deciding a perpetrator’s fate, and they do so based on their mood and bias (ibid).

#### **4.5.2 Abuse of Power**

The nature and amount of power held by legal professionals is such that there is little to no oversight of its use, outside of long, complex, and often empty processes of complaint procedures and appeals. Abuses of power, including but not limited to corruption, have to do with the way humans internalize power and control. One informant who had served as a policy advisor for restorative justice noted a serious challenge of emotional intelligence amongst public officials, which he found as he worked with and built relationships with senior officials in charge of government ministries (Participant 11, Restorative Justice Practitioner, 203).

In all of my interviews, the entity receiving the most accusations for corruption was the police (SAPS). Though instances of corruption occur at all levels, police are more prominently featured in consciousness as gang colluders, likely given the instances around 2012 of police being found supplying guns to gangs and taking bribes (GI-TOC, 2022). Police failures are also the more obvious occurrence in the shortcomings of justice, with direct and immediate consequences that give wider society the perception that they are incompetent and lack integrity. These issues are extremely problematic because the rest of the judicial system relies on police ability to investigate, which they do poorly, making cases impossible to prosecute (Participant 5, District Court Prosecutor, 2023). One informant who worked with police and government ministers on the Anti-Gang strategy addressed the failures of SAPS by asserting that there are gang informants inside the police, but it largely depends on the area and prevalent gangs there that influence police susceptibility to corruption. If a gang has more force over a community than the police, it is often found that police will not investigate, making it impossible for detectives to investigate. In areas where police are not tied up with gangs, it is still difficult for them to make arrests because the community will protect the gang members at all costs, including by physically attacking police (Participant 14, Criminology Professor, 2023). All this is to say that though corruption does exist within the justice system, it varies by consciousness and context, making up less of the reality than popular narratives make it seem.

### 4.5.3 Accountability

Tales of systematic mishaps and abuses of power prompted questions of accountability. There are institutions in place to enforce human rights throughout the legal system, however, not much can be really enforced. JICS is an institution with the express purpose of inspecting prisons to ensure they function to uphold rights and humane conditions. The outcomes of JICS findings are not legally binding, and ultimately rely on cooperation from DCS. A JICS worker says that DCS is usually cooperative, but their relationship with JICS is inherently antagonistic so cooperation is dependent on the fickle nature of power relationships between individuals (Participant 1, JICS, 2023). Inspectoral reports conducted by JICS (of adult prisons) are sent to parliament for them to act. Chapter 9 institutions perform a similar function, only in juvenile centers. Chapter 9 institutions are independent Human Rights Commissions that provide oversight structures established by the UN Mandela Rules, which outline how children should be managed, particularly those who commit crime (Participant 8, DSD Deputy Director, 2023). One government official at DSD noted that the role of Ch. 9 oversight is to provide feedback on gaps that are identified that will be raised to the institutions concerned, serving an important monitoring function that keeps democratic power functioning in check. These reports are compiled and presented to the Vienna Conference, not to parliament. In addition to external monitoring by Ch. 9 institutions, government organizations also have internal monitoring mechanisms to close gaps in due diligence and provide internal guidance. DSD has a mandate of “secure care” that includes the running and internal monitoring of programs, though of course there can be grey areas when self-monitoring (Participant 8, DSD Deputy Director, 2023).

### 4.5.4 Government Outsourcing

Within the tight confines of authoritative subordination and resource deficiencies, legal actors are extremely limited in their ability to carry out the responsibilities of their job. During interviews I came across two major policy initiatives they were headed by NGOs/CSOs (including academics); legal action to make JICS an independent oversight body<sup>32</sup> and the passage of the Child Justice Act, which fulfilled a gaping void in protocol and mechanisms in place to care for child offenders and offer them a chance at life through diversion from the harsh penalties of prosecution (Participant 8, DSD Deputy Director, 2023). The JICS initiative comes from litigation brought forward by Sonke Gender Justice, who argue that keeping the judicial inspectorate dependent on funds from DCS (the very department they audit) is blocking human rights (Participant 1, JICS, 2023). A few informants describe their own involvement or the involvement of other civil society actors in taking up public interest litigation, pointing to an active civil society committed to protecting its people.

The state relies not only on the services of those outside of its employment, but also on handouts sourced from foreign aid. As said by a participant, “South Africa depends on foreign aid to empower its own people,” (Participant 7, DSD Probation Officer, 2023). Foreign aid packages designated for development purposes used to be sent straight to NGOs, with some accounts tracking withdrawals to monitor corruption, as with the Princess Diana fund. These funds are now sent to the state, where money disappears without explanation. The political nature of financial support means that NGOs lacking state support will not receive funding (ibid). State support of NGOs is officially endorsed by a seal of accreditation which will allow the program to exist and run within the formal justice system (Participant 12, Restorative Justice Practitioner, 2023). With no accreditation, programs struggle to operate as legitimate social services.

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<sup>32</sup> *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* (2019)

## 4.6 Changing Legal Culture by Shifting Consciousness

*“It is the spirit and not the form of law that keeps justice alive.”*

- Earl Warren, 1955

This section provides suggestions to be advocated for or acted upon by individuals working in civil society organizations and as well as those working within the legal justice system. The easiest and most effective way to prioritize human rights and humanity is to make it a regular practice. Legal culture needs to reflect more humanity and empathy to dismantle antagonistic power dynamics and halt further victimization and traumatization throughout the court process. The purpose of these suggestions is to begin a norm-setting process by which society’s approach to law and justice functionally reflect the socially reparative aims that are cited in the National Development Plan 2030 (2012), by which all criminal justice institutions are obliged to prioritize. These suggestions are; advocating for the establishment of a trust fund, avoiding minimum sentencing, incorporating interdisciplinary actors into legal practices, providing diversion and alternative justice opportunities to all offenders, and taking initiative to build bridges between government and nongovernment providers of justice. Not only can justice providers in South Africa take initiative to embrace human rights and alternative justice in the performance of their daily functions, but these practices can also be used by justice providers globally with consideration towards their individual contexts.

### 4.6.1 Establishing a Trust Fund

The government provides little by way of support for development, particularly of the criminal justice system, and lack of governance proves to be a challenge for implementation of development initiatives. Though practitioners often lobby for new legislation to address social issues, which has proved somewhat helpful in establishing guidelines for procedure, it is clear that legislation only goes so far, and much of the problem lies in implementation.

Participant 7 expressed that SA can do better if resources were aligned to where they are needed most. As it stands, the state is looking only at statistics and chasing numbers when it comes to the provision of justice, ignoring systematic shortcomings in part attributed to lack of qualified staff, heavy caseloads, lack of support systems, and incapacity for the justice system to accommodate the quantity of people and cases coming through.

CSOs can expand their capacity to rehabilitate criminal offenders if provided with monetary support. A corruption-proof mechanism for funding is necessary to provide government support towards the effort to contain crime that seems to evade everyone. This is possible by establishing a fund that is only accessible by those qualified to use the funds for the purpose they are prescribed, monitored by an independent party that lacks access to the funds, but serves only as oversight. This of course would require further inquiry into what qualifications are required, but barring government access should minimize risk of state capture. Civil society organizations can appeal to (international) donors to make funds conditional such that they can only be granted if deposited into such a trust fund. CSOs are a crucial part of bridging the divide between institutions and the wider public. Expanding their capacity with government support would allow the provision of alternative justice and diversion for more people than just children.

## 4.6.2 Against Minimum Sentencing

Reforms to the criminal justice system call for corruption-proof democratic structures led by civil society, who already shoulder the responsibility of meaningful justice delivery and social reparations. CSOs are equipped with knowledge, expertise, and community ties that give them a different type of power that is inclusive and backed by community approval, with some degree of legal legitimacy granted by institutional accreditation. They are free from the strict practices that govern the courts and maintain hegemonic power. This is a freedom that could be afforded to court workers if the legal culture shifted to allow for more agency, which would also have to be accompanied by the elimination of harsh sentencing and criminal procedure laws, or at least major amendments to those laws. Minimum sentencing should also be advocated against, though as long as it exists legal actors within the court system can use law to work around such minimums or at least push the boundaries of legal interpretation to avoid harsh punishments in cases of young or first-time offenders. This would entail more utilization of diversionary programs, and even pushing the boundaries of legal definitions and interpretations to challenge the strict norm of following the letter of the law.

Moving away from minimum sentencing normalizes alternative justice that is socially productive and reparative. The availability of different forms of justice would allow for greater strategic litigation and keep more options for justice available to fit each person's individual circumstance. By pushing the limits of legal interpretation and court manner, power structures can begin to be dismantled.

## 4.6.3 Interdisciplinary Legal Practice

Consciousness that perceives law as a malicious entity is reproduced by people's negative experiences with the law and courts. This could change if court users were treated with sensitivity and respect, rather than being re-traumatized and feeling disempowered throughout the criminal justice process. As it stands, highly emotional people in precarious situations receive callous treatment throughout the justice process and little to no emotional support. Legal culture enforces the operation of justice processes completely absent of emotion and humanity, actively discouraging the expression of emotion throughout criminal proceedings (Merry, 1990). This reality emphasizes the need for interdisciplinary application of law that includes community/CSO and social work assistance that makes the court process easier for everyone involved, not just victims and offenders, by handling the more delicate aspects of casework that lawyers are not trained to manage (such as trauma and mental condition). The fusion of social work and alternative justice practices with legal practices will begin to normalize trauma-informed care<sup>33</sup> and compassion in court to better manage people acting outside of the socially acceptable norms. Humanity is an essential part of correctional service, giving people the opportunity to see themselves complex beings driven defined by more than their social prescription. When reduced to one identity by society and law, it is inevitable for someone to start to align themselves with that identity.<sup>34</sup>

There is currently a large deficit in justice system integration given the lack of cooperation amongst stakeholders.<sup>35</sup> Legal practitioners recommend programs for diversion without knowing whether they work, and non-government justice practitioners don't know if courts and legal practitioners are functioning the way they are supposed to. There is a vacuum of knowledge between what happens in court, and what happens outside. Seemingly, only probation officers have knowledge of what occurs inside and out. There needs to be a holistic,

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<sup>33</sup> (Participant 9, Restorative Justice Practitioner, 2023)

<sup>34</sup> (Ward and Bakhuis, 2010)

<sup>35</sup> (Participant 7, DSD Probation Officer, 2023; Participant 14, Criminology Professor, 2023)

interdisciplinary approach that people with expertise on trauma and community relations. With greater involvement from periphery legal professionals such as social workers, criminal psychologists, and non-government legal practitioners towards the effort of community justice, practices of legal delivery can be accessed more fairly and implemented with more humanity. Individuals confined to the structural bounds of poverty and state-perpetrated social deprivation should be recognized as victims of law's harsh rule and treated with compassion in acknowledgement of that fact.

#### **4.6.4 Opportunities for All, Not Just Children**

The availability of alternative justice mechanisms should be open to all, not just special groups. Anyone can be rehabilitated if given the chance, but depriving people of that chance is depriving them of the essential human right to life. Following down a path of crime with no interruption will guarantee a life in prison, or early death.<sup>36</sup> Judicial shortcomings prompt a call for policy reform, which ensures the implementation of protocols that grant special considerations for certain situations, such as the child justice system created by the Child Justice Act. This act guarantees child offenders certain opportunities and considerations created to ensure their rights are respected and they are given opportunities to seek a life outside of crime. These policies are strictly adhered to, though implementation is inevitably an issue given structural shortcomings, and impact is almost non-existent. Young offenders that are not minors are treated the same as older adults because there is no special protocol in place for them, despite their strong potential for rehabilitation given their young age.<sup>37</sup> No special protocol means young adults fall into the same space as hardened older adults who take advantage of the youngsters and seal their fate as gang-involved criminals. There are few programs that offer these populations a chance at diversion or rehabilitation because they are not the political focus of efforts at anti-gangsterism. A DSD probation officer noted that many child offenders are almost adults, but it is hard to define who is “in need of care and protection” when it comes to older children (Participant 7, DSD Probation Officer, 2023). Diversionary services should be the default action for all offenders with the intent of affording the opportunity for rehabilitation to all who come across the law.

#### **4.6.5 Building Bridges Between Community and Government Practitioners**

Social reproduction of gangsterism begins at home and is encouraged by wider society. Childhoods defined by violence, abuse, absent parents, and no skills for healthy emotional processing deeply entrench social and moral crises within the family. In communities lacking social cohesion and associated informal social control, neighbors aren't looking out for each other, and individual family units are left without any backdrop of support (Pinnock, 2016). Interventions at the level of the community in the form of government and nongovernment cooperation are necessary to help families in need of support, whether it be with child-rearing, income generation, mental health, etc. Macro-level social development begins with the reparations and fortification of familial and communal relationships. Lack of social welfare policies leave the public with no safety net, another void that is left for civil society to fill and calling for urgent community empowerment.<sup>38</sup>

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<sup>36</sup> (Participant 7, DSD Probation Officer, 2023)

<sup>37</sup> Social workers don't deal with anyone over 18 (Participant 7, DSD Probation Officer, 2023)

<sup>38</sup> (Participant 9, Restorative Justice Practitioner, 2023)



The community is an under-utilized resource with the power to provide social services and information for the purpose of seeking justice outcomes for all.<sup>39</sup> Individual and community empowerment starts within the household. Government should be collaborating with communities and CSOs to provide individual support for troubled community members in need of help. This type of collaborative practice would foster social cohesion at all levels of society which will eventually normalize and reproduce cooperative justice practices that empower historically marginalized groups. As it stands, there is little cooperate between CSOs and government institutions, though CSOs are always open to collaborations (Participant 12, Restorative Justice Practitioner, 2023). Government legal practitioners can take the step on their own to reach out to nongovernment justice providers to begin a relationship that will bridge divides and fill gaps in the delivery of formal justice.

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<sup>39</sup> (Participant 7, DSD Probation Officer, 2023)

## Chapter 5

### Conclusion

South Africa's criminal justice system explored through legal culture the legal consciousness of those working within it to understand how it contributes to social degradation in the form of generational criminality related to gangsterism by preventing the possibility for social development. The nuances perceived by legal professionals in the criminal justice system interrogate the causes of systematic failures while confirming popular scholarship and perceptions on the causes of systematic shortcomings and injustices. This study found that gangsterism arises as a unique form of legal disengagement in areas where social cohesion is fractured and legitimate governance is weak or non-existent, creating the social conditions that pervade the public perception of the "lawlessness" of South African society. Though South Africa has many laws in place, their efficacy is perverted by structural incapacities, weak rule of law, protocols lacking meaningful impact, and transfers of responsibilities. Just as criminal law can use its reach to dissolve social development, it can also be used to spark it. Legal enforcers have the most control over gangs, particularly police and courts, so it is their departments that should be in charge of tackling the gang crisis. This can only be done by addressing the root causes of poverty and inequality by shifting consciousness in the practice of law to reflect a *de facto* practice of law that prioritizes social and human development.

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## **Appendix 1: Criminal Procedure and Crime Prevention Legislation since 1994**

1995

1. Criminal Procedure Second Amendment Act, 1995 (Act 75 of 1995)

1996

2. Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996)
3. International Co-operation in Criminal Matters Act, 1996 (Act 75 of 1996)
4. Proceeds of Crime Act, 1996 (Act 76 of 1996)
5. Extradition Amendment Act, 1996 (Act 77 of 1996)
6. Criminal Procedure Second Amendment Act, 1996 (Act 85 of 1996)
7. Criminal Procedure Amendment Act, 1996 (Act 86 of 1996)
8. Judicial Matters Amendment Act, 1996 (Act 104 of 1996)

1997

9. Criminal Procedure Second Amendment Act, 1997 (Act 85 of 1997)
10. Criminal Law Amendment Act, 1997 (Act 105 of 1997)

1998

11. Judicial Matters Amendment Act, 1998 (Act 34 of 1998)
12. Criminal Matters Amendment Act, 1998 (Act 68 of 1998)
13. Witness Protection Act, 1998 (Act 112 of 1998)
14. Domestic Violence Act, 1998 (Act 116 of 1998)
15. Prevention of Organised Crime Act, 1998 (Act 121 of 1998)
16. Judicial Matters Second Amendment Act, 1998 (Act 122 of 1998)

1999

17. Prevention of Organised Crime Amendment Act, 1999 (Act 24 of 1999)
18. Prevention of Organised Crime Second Amendment Act, 1999 (Act 38 of 1999)

2000

19. Protected Disclosures Act, 2000 (Act 26 of 2000)
20. National Prosecuting Authority Amendment Act, 2000 (Act 61 of 2000)
21. Judicial Matters Amendment Act, 2000 (Act 62 of 2000)

2001

22. Special Investigating Units and Special Tribunals Amendment Act, 2001 (Act 2 of 2001)
23. Criminal Procedure Amendment Act, 2001 (Act 17 of 2001)
24. Criminal Procedure Second Amendment Act, 2001 (Act 62 of 2001)

2002

25. Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002)



26. Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act 70 of 2002)

2003

27. Criminal Procedure Amendment Act, 2003 (Act 42 of 2003)

2004

28. Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004)

2007

29. Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007)

30. Criminal Law (Sentencing) Amendment Act, 2007 (Act 38 of 2007)

2008

31. Regulation of Interception of Communications and Provision of Communication-related Information Amendment Act, 2008 (Act 48 of 2008)

32. National Prosecuting Authority Amendment Act, 2008 (Act 56 of 2008)

2010

33. Criminal Law (Forensic Procedures) Amendment Act, 2010 (Act 6 of 2010)

34. Regulation of Interception of Communications and Provision of Communication-related Information Amendment Act, 2010 (Act 21 of 2010)

2012

35. Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2012 (Act 6 of 2012)

36. Criminal Procedure Amendment Act, 2012 (Act 9 of 2012)

2013

37. Prevention and Combating of Trafficking in Persons Act, 2013 (Act 7 of 2013)

38. Prevention and Combating of Torture of Persons Act, 2013 (Act 13 of 2013)

39. Judicial Matters Second Amendment Act, 2013 (Act 43 of 2013)

2015

40. Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2015 (Act 5 of 2015)

41. Criminal Matters Amendment Act, 2015 (Act 18 of 2015)

2017

42. Protected Disclosures Amendment Act, 2017 (Act 5 of 2017)

2020

43. Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act, 2020 (Act 15 of 2020)

44. Cybercrimes Act, 2020 (Act 19 of 2020)

(DOJ&CD, 2021)

\*White Papers not included

## Appendix 2: Child Justice Legislation

Child Justice Act, 2008 (Act 75 of 2008) [English / Setswana]

- Child Justice Amendment Act, 2019 (Act 28 of 2019) [Eng/Set]  
Commencement, 19 Aug 2022, as per GG 46752, RG 11475, GoN 2400, 19 Aug 2022

Child Justice Act: Regulations: Amendment of General Regulations, Regulation 13 & Annexure A-Form 1 & 2 (English/Setswana) GG 46751, RG 11474, GoN 2399, 19 Aug 2022

- Child Justice Act (75/2008): Regulations relating to child justice, GG 33067, Notice 251, 31 Mar 2010

Children's Act, 2005 (Act 38 of 2005) and its regulations

\*Distinct from Criminal Justice procedure

(DOJ&CD, 2023)

## Appendix 3: Policy Frameworks Related to Gang Crime

### Policy Frameworks

<b>National Crime Prevention Strategy (1996)</b>	<p>This National Crime Prevention Strategy [...] requires the development of wider responsibility for crime prevention and a shift in emphasis from reactive "crime control"; which deploys most resources towards responding after crimes have already been committed, towards proactive "crime prevention" aimed at preventing crime from occurring at all.</p>
<b>Anti-Gangsterism Strategy (2017)</b>	<p>The framework for National Anti-Gangsterism Strategy is based on four pillars, namely:</p> <ul style="list-style-type: none"> <li>- Pillar one: Human Development;</li> <li>- Pillar two: Social Partnerships;</li> <li>- Pillar three: Spatial Design; &amp;</li> <li>- Pillar four: Criminal Justice Process.</li> </ul> <p>These should include law enforcement, social crime prevention and environmental design programmes and projects, that address all factors involved in gang-related crime.</p> <p>State Departments employ various legal instruments and policies that guide their work in relation to addressing gangsterism and its criminal and social manifestation. They include the Department of Social Development (DSD), the Department of Basic Education (DoBE), the SAPS, the Department of Justice and Constitutional Development (DoJCD), the National Prosecuting Authority (NPA), as well as the Department of Correctional Services (DCS).</p> <p>The National Anti-Gang Strategy is formulated and aligned to the National Development Plan (NDP) Vision 2030, to ensure that all people living in South Africa are and feel safe. The NDP recognises that crime and violence are not just security issues but have deep social and economical roots and consequences. Addressing this problem requires a holistic approach and involvement of all government departments (Portfolio Committee on Police, 2017).</p>
<b>National Development Plan 2030</b>	<p>The NDP aims to eliminate poverty and reduce inequality by 2030. According to the plan, South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society.</p>
<b>Integrated Crime and Violence Prevention Strategy (2022)</b>	<p>The ICVPS proposes sustainable mechanisms for an integrated 'whole of government' and 'whole of society' approach to the prevention of crime and violence. Roles and responsibilities for specific government departments and institutions provide clear guidance from where to expand sector or departmental specific projects and interventions.</p>

## Appendix 4: Institutions and Organizations Compiling the Criminal Justice System

### Government bodies

<b>South African Police Service (SAPS)</b>	<p>The South African Police Service is governed by:</p> <p>Chapter 11 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) that stipulates the South African Police Service has a responsibility to –</p> <ul style="list-style-type: none"> <li>- prevent, combat and investigate crime;</li> <li>- maintain public order;</li> <li>- protect and secure the inhabitants of the Republic and their property;</li> <li>- uphold and enforce the law.</li> <li>- create a safe and secure environment for all people in South Africa.</li> <li>- prevent anything that may threaten the safety or security of any community</li> <li>- investigate any crimes that threaten the safety or security of any community</li> <li>- ensure criminals are brought to justice; and</li> <li>- participation in efforts to address the causes of crime.</li> </ul> <p>The South African Police Service Act 68 of 1995</p> <ul style="list-style-type: none"> <li>- To provide for the establishment, organisation, regulation and control of the South African Police Service; and to provide for matters in connection therewith.</li> </ul>
<b>Legal Aid South Africa</b>	<p>Legal Aid South Africa was established in terms of Section 2 of the Legal Aid South Africa Act, 2014 (Act 39 of 2014), to provide legal aid and legal advice to eligible people at the State's expense. The entity is mandated to ensure access to justice and the realisation of people's right to legal representation, as envisaged in the Constitution.</p>
<b>National Prosecuting Authority (NPA)</b>	<p>Section 179(2) of the Constitution empowers the National Prosecuting Authority to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings.</p> <p>In the criminal justice system, the NPA plays a vital role in preparing and conducting criminal prosecutions. Prosecution is the core function of the NPA, which is initiated by police investigations. This information is provided to prosecutors in police cases. Next, one of four steps are taken:</p> <p>Abandon prosecution without further action.          Ask the police to investigate the case further.          Avoid prosecution and choose alternative dispute resolution mechanisms.          Initiate criminal proceedings by drafting an indictment against the accused.</p> <p>If the decision is made to prosecute, dependent on the severity of the alleged criminal offence, the police docket is transferred to prosecutors' office in the district or district court where the criminal offence occurred or the pertinent Higher Court.</p>

<p><b>Department of Justice and Constitutional Development (DOJ&amp;CD)</b></p>	<p>The Department of Justice and Constitutional Development (DoJ&amp;CD) derives its mandate from a number of Acts, in addition to the mandate it derives from the Constitution of the Republic of South Africa, 1996.</p> <p>These Acts, and the Constitutional Framework, assign functions to the department, such as the establishment of magistrates' courts, and the appointment of magistrates and other judicial officers; the establishment and functioning of the Special Investigating Unit (SIU) and the National Prosecuting Authority (NPA), including the Asset Forfeiture Unit (AFU); the conducting of criminal proceedings; the prosecution of organised crime and corruption, and the forfeiture of assets obtained through illicit means; the provision of witness protection to vulnerable and intimidated witnesses and their related persons in judicial proceedings; the establishment and functioning of bodies responsible for legal aid, law reform and rulemaking; the appointment of masters of the high courts; the management of third-party funds; the administration of the Guardian's Fund and deceased and insolvent estates; the regulation and provision of legal advisory services to government departments; the promotion, protection and enforcement of human rights; the protection of vulnerable groups; and the provision of support to Chapter 9 institutions.</p> <p>The National Development Plan (NDP) sets out a vision for building and maintaining safe communities in South Africa through, among other things, strengthening the criminal justice system. This vision is expressed in terms of Priority 5 (social cohesion and safe communities) of government's 2019 – 2024 Medium Term Strategic Framework (MTSF). The work of the DoJ&amp;CD is directly aligned with this priority in that a well-functioning criminal justice system provides relief to victims of crime, protects vulnerable groups and swiftly acts against perpetrators of corrupt activities.</p>
<p><b>Department of Social Development (DSD)</b></p>	<p>The Department of Social Development derives its core mandate from the Constitution of the Republic of South Africa:</p> <ul style="list-style-type: none"> <li>- Section 27 (1) (c) of the Constitution provides for the right of access to appropriate social assistance to those unable support themselves and their dependants.</li> <li>- In addition, Section 28 (1) of the Constitution sets out the rights of children with regard to appropriate care (basic nutrition, shelter, health care services and social services) and detention.</li> <li>- Schedule 4 of the Constitution further identifies welfare services, population development and disaster management as functional areas of concurrent national and provincial legislative competence.</li> </ul>
<p><b>Department of Correctional Services (DCS)</b></p>	<p>Contributing to a just, peaceful and safer South Africa through effective and humane incarceration of inmates, rehabilitation and social reintegration of offenders.</p>

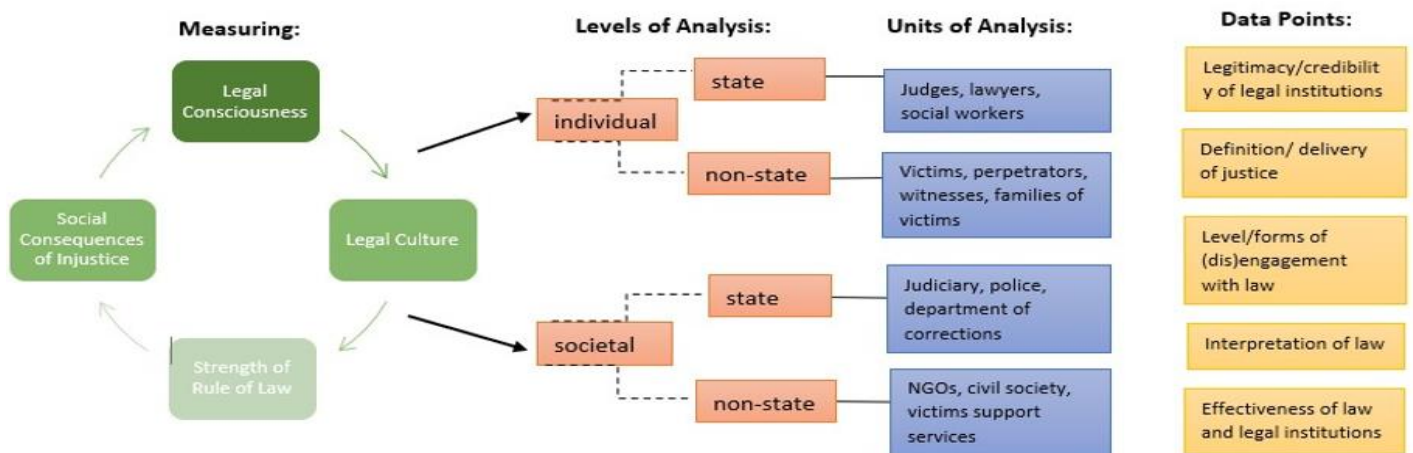
## Non-Government bodies

<b>Lawyers for Human Rights (LHR)</b>	LHR employs a holistic approach to social justice and human rights enforcement that includes strategic litigation, advocacy, law reform, human rights education, and community mobilisation and support.
<b>National Institute for Crime Prevention and Re-integration of Offenders (NICRO)</b>	<p>NICRO is the South African National Institute for Crime Prevention and the Reintegration of Offenders. NICRO remains the only national non-government organisation providing comprehensive crime prevention services across South Africa. NICRO is the main provider of diversion services for children in South Africa, providing diversion services since 1992.</p> <p>NICRO's research indicates that the diversion it has provided has a very high success rate in preventing re-offending, and in reintegrating children into their families and communities. NICRO handles more than 10 000 diversion cases each year in all nine provinces. NICRO has five diversion programmes:</p> <ul style="list-style-type: none"> <li>- The Youth Empowerment Scheme (YES), a life-skills programme of 6 weeks;</li> <li>- Pre-Trial Community Service (PTCS), in terms of which the offender performs community service at a non-profit organisation;</li> <li>- Victim-Offender Mediation (VOM), in which the victim and offender meet and work out a mutually acceptable agreement;</li> <li>- Family Group Conferences, which are similar to VOM, except they involve the families of the victim and offender in the process; and</li> <li>- The Journey, aimed at high-risk children; the programme lasts between three and 12 months and involves life-skills training amongst other things.</li> </ul>
<b>Hope Prison Ministry</b>	Hope Prison Ministry provides training programs and counseling to all those affected by crime: incarcerated and formerly incarcerated people, their families, their victims, and correctional officers.
<b>Restorative Justice Centre</b>	<p>RJC is passionate about the value that restorative justice, conflict transformation and peacebuilding have for South Africa at the present time. To this end we promote better understanding of these concepts wherever possible and work for increased implementation of related services. We are convinced that they can help us address the progression from conflict to violence and to crime that we see so often.</p> <p>The Restorative Justice Centre approach is inspired by a unique blend of perspectives from the Christian tradition and academic disciplines, as well as developments in the fields of conflict transformation, peace studies, criminology, social work and law. We understand restorative justice as being part of the tradition of non-violence. This blend shapes our unique identity as a professional faith based organisation.</p>
<b>Restore</b>	<p>RESTORE justice healing hope was set up in 2012 as a trust to help facilitate the work being done for young people at conflict with the law. The central focus is around the education and practice of restorative justice to provide an alternative to the punitive criminal justice system.</p> <p>Restorative justice is an approach that focuses on the needs of victims, offenders, and the involved community. Victims can take an active role in the process, while offenders are encouraged to take responsibility for their actions.</p>

	<p>RESTORE designs and runs programmes and initiatives for sentenced inmates in the belief that the destructive cycle of crime can be broken.</p> <p>We believe in a message of hope and restoration that can positively affect broken individuals, families and ultimately entire communities.</p>
<b>The Message Trust</b>	<p>Community Transformation: Our Community Hubs provide a safe environment for young people to engage in after school programmes including life skills, discipleship, educational support and fun-based youth activities.</p> <p>Prisons and Enterprise: Our prisons and enterprise team provide a Christ centred holistic approach to break the cycle of crime and gangsterism amongst young people. We provide a support system from prison, to reintegration, through to employment, offering long term care for each individual we work with.</p>

\*Lists are non-exhaustive, particularly that of non-government bodies

## Appendix 5: Data Points and Interview Guide



### Data points obtained by observing the following:

- Types/number of crimes (including probation/Conditions of release violations)
- Patterns in sentencing, Conditions of release, and other court decisions as well as interpretation of statutes
- Sympathy of judges (and other biases)
- Victim rights, involvement, and victim considerations (namely safety and well-being)
- Access to justice (for victims to be involved in their case and perpetrators to have quality representation)
- Availability of translation services
- Availability/quality of social workers and prosecutors
- Behaviors exhibited by victims and defendants
- Laws and statutes utilized by prosecution and judges
- Powers and limits of prosecution and judges

### Interview Guide

#### Court

1. What are the most common types of cases you deal with?
2. How are those particular crimes most commonly handled? Or does it vary, and how?
3. How much influence do you feel like you have over the court process?
4. How much influence do you think victims and defendants have?
5. What are the most common issues you see or deal with (in court)?
6. Do you think court outcomes are usually fair and reasonable?
7. How have things changed since COVID?

#### Victims and defendants

1. Are there any common behaviors or circumstances you've noticed in victims and/or defendants?
2. To what extent are victims/defendants involved in the handling of their case?



3. How often do defendants (or victims/witnesses) follow court orders?
4. How are victims' rights exercised?

#### Law

1. Are constitutional rights regularly upheld/respected?
2. Do you think the laws are fair/reasonable?
3. Where does the law fall short (in protecting/granting rights)?
4. Are there similarities/differences in the way law is practiced in different areas?

#### Bigger picture

1. What is the most important component of the court/criminal justice system in your opinion?
2. Do you think the system is doing a good job?
3. What are the consequences of institutional/systematic failures?
4. What improvements could be made?

## Appendix 6: Interview Participants

Participants	Title/Institution/Organization
Participant 1	JICS
Participant 2	Magistrate (District Court)
Participant 3	Magistrate (District Court)
Participant 4	Legal Aid SA (Public Defender)
Participant 5	NPA (District Court Prosecutor)
Participant 6	NPA (Regional Court Prosecutor)
Participant 7	DSD Probation Officer
Participant 8	DSD Deputy Director
Participant 9	Restorative Justice Practitioner (The Message Trust); formerly NICRO
Participant 10	LHR Attorney (Strategic Litigation and Detention Monitoring Unit)
Participant 11	Restorative Justice Practitioner (Hope Prison Ministry)*
Participant 12	Restorative Justice Practitioner (Restore)
Participant 13	Restorative Justice Practitioner (Restorative Justice Centre)
Participant 14	Professor (UCT, Department of Criminology)

\* Two of these participants served as policy consultants and collaborators within the above-listed government departments. One was a key player in the passage of the Child Justice Act and one was essential in the creation of the Anti-Gangsterism Strategy of 2017.

\* Participant 11, Reverend Jonathan Clayton, explicitly consented to the use of his name in this study