



**AN IMPLEMENTATION ANALYSIS OF THE CHILD JUSTICE ACT 75  
OF 2008 WITH SPECIFIC FOCUS ON CHILD JUSTICE COURTS IN  
SOUTH AFRICA**

BY  
**HOPE MHANGO CHIKUKULA**  
**(217077528)**

Submitted in partial fulfilment of the requirements for the degree of  
**Master of Social Science (Policy and Development Studies)**

College of Humanities  
University of KwaZulu-Natal,  
Pietermaritzburg

2022

**SUPERVISOR: Dr. Desiree Manicom**

# **COLLEGE OF HUMANITIES**

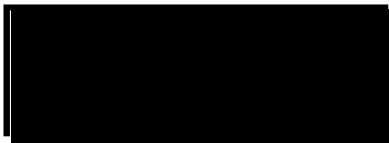
## **SCHOOL OF SOCIAL SCIENCES**

### **DECLARATION – PLAGIARISM**

I, HOPE MHANGO-CHIKUKULA declare that;

1. The research reported in this thesis, except where otherwise indicated, is my original research.
2. This thesis has not been submitted for any degree or examination at any other university.
3. This thesis does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
4. This thesis does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:
  - a. Their words have been re-written but the general information attributed to them has been referenced
  - b. Where their exact words have been used, then their writing has been placed in italics and inside quotation marks, and referenced.
5. This thesis does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the source being detailed in the thesis and in the References sections.

Signed:

A black rectangular box used to redact the signature of the author.

Date: 16<sup>th</sup> Nov.2022

## ACKNOWLEDGEMENTS

As the author of this thesis, I would like to acknowledge the following;

- Dr. Desiree Manicom for your enthusiasm, direction and patience throughout my study. The implementation of the comments and suggestions has made this thesis what it is today, otherwise it belonged to the recycle bin.
- My loving father and mother, my two beautiful sisters Faith and Grace, and my awesome brother Timothy. Your advice, support and patience while I was away have helped a lot to achieve this and to be the man I am.
- Clepertton Chirwa, Siyabonga Nxumalo, Thabani Zungu, Mawande Mazibuko, Rudolph Madlala, Mark Rieker, Saul Mwale, William Chisa, Chikondi Chakumbira, Andrew Chilenga, Ntobeko Nzondi and Happiness Mzonde. Thank you for your motivation, technical and spiritual support rendered.
- My fellow class-mates in PODs class. All your contributions have made me stronger and knowledgeable.
- To all my friends too numerous to mention from His People Church, Kanin'ga CCAP and outside the University. Thank you for your support especially during the difficult times when I was sick and when I go robbed. Without you all, life could have been a misery. To all my relatives, thank you for wishing me the best and for your prayers.
- Above all, I'm very grateful to the Lord Almighty for the life, strength and grace He gave me throughout my school work. I am a testimony of what He has done and all I can say is 'Soli Deo Gloria.

## **DEDICATION**

This dissertation is dedicated to all the young ones facing injustice and are rejected by their families, friends and society around the world. Though life might seem to be an impossible task to endure but God specifically created you for a purpose and there still chance for you to make it in life.

## **ABSTRACT**

Children committing crime is a major issue throughout the world, as a result, societies came to agreement that children in conflict with the law must be respected in line with the signed treaties through formulating a child justice system that handles cases of child offenders. In South Africa, the Child Justice Act 75 of 2008 was introduced to protect the rights of child offenders as stated in the Constitution. After examining the official figures from annual reports on the implementation of the Child Justice Act 75 of 2008, it indicated that from the total number of children arrested, some children did not go through the child justice courts. The study aimed at investigating the implementation of the Child Justice Act 75 of 2008 to see whether child justice courts are operating in accordance with the Act and attempts to find out the roles and experiences of street-level bureaucrats and children in conflict with the law to uncover any other issues related to the implementation of the Act in the courts. Regarding research design, the study employed a qualitative secondary analysis of primary and secondary data, making it desktop research. The researcher collected and analyzed existing documents, legislations, previous research studies and reports involving issues around implementation of the Act and the use of child justice courts in South Africa as its case study. After analyzing the data given and linking up with the theories of the study, the research established that despite the existence of the Act, barriers related to the implementation of the Act included lack of capacity building, lack of commitment and lack of an integrated management system due the lack of co-operation between stakeholders. The findings revealed challenges faced by the implementers were lack of resources and working in a stress loaded working environment where the demand for services is high. The findings also revealed that the child offenders have access to legal representation but find challenges in getting to know information about their court trials, lengthy period of trial and detention in prison, and in receiving restorative programs. Due to the inadequate resources and structures available, there still need for adjustments to be made in the provision of child justice and this can work if the government adjusts its policies and putting more efficiency in implementing the Child Justice Act whereby child rights will be recognized and promoted.

## ACRONYMS

ACRWC:	African Charter on the Rights and Welfare of the Child
CJA:	Child Justice Act 75 of 2008
CSA:	Correctional Services Act, 111 of 1998
CPA:	Criminal Procedure Act of 1977
DCS:	Department of Correctional Services
DGs ISCCJ:	Directors-General Intersectoral Committee on Child Justice
DJCD:	Department of Justice and Constitutional Development
DSD:	Department of Social Development
ICCPR:	International Covenant on Civil and Political Rights
IGR:	Inter-Governmental Relations
JCPS:	Justice Crime Prevention and Security
JICS:	Judicial Inspectorate for Correctional Services
MIS:	Monitoring Information Systems
NGO:	Non-Governmental Organization
NICRO:	National Institute for the Crime Prevention and Re-integration of offenders
NPA:	National Prosecuting Authority
NPF:	National Policy Framework
PCJF:	Provincial Child Justice Fora (PCJF)
PI:	Preliminary Inquiry
RAPCAN:	Resources Aimed at the Prevention of Child Abuse and Neglect
SAPS:	South African Police Service
UNCRC:	United Nations Conventions on the Rights of a Child
UNODC:	United Nations office on Drugs and Crime

## TABLE OF CONTENTS

<b>DECLARATION – PLAGIARISM.....</b>	<b>i</b>
<b>ACKNOWLEDGEMENTS .....</b>	<b>ii</b>
<b>DEDICATION.....</b>	<b>iii</b>
<b>ABSTRACT.....</b>	<b>iv</b>
<b>ACRONYMS .....</b>	<b>v</b>
<b>LIST OF TABLES .....</b>	<b>ix</b>
<b>CHAPTER 1 .....</b>	<b>1</b>
<b>INTRODUCTION.....</b>	<b>1</b>
<b>1.1 Background and outline of research problem.....</b>	<b>1</b>
<b>1.2 Key questions.....</b>	<b>2</b>
<b>1.3 Objectives of the study.....</b>	<b>2</b>
<b>1.4 Research Methodology and methods .....</b>	<b>3</b>
<b>1.4.1 Case study .....</b>	<b>3</b>
<b>1.4.2 Sampling method .....</b>	<b>3</b>
<b>1.4.3 Data collection methods.....</b>	<b>4</b>
<b>1.4.4 Data analysis.....</b>	<b>4</b>
<b>1.5 Limitations of the study.....</b>	<b>5</b>
<b>1.6 Structure of the dissertation .....</b>	<b>5</b>
<b>CHAPTER 2 .....</b>	<b>6</b>
<b>LITERATURE REVIEW .....</b>	<b>6</b>
<b>2.1 Introduction.....</b>	<b>6</b>
<b>2.2 Children in conflict with the law .....</b>	<b>6</b>
<b>2.2.1 Causal factors for children committing crimes.....</b>	<b>7</b>
<b>2.2.2 Experiences of child offenders in criminal justice systems worldwide .....</b>	<b>9</b>
<b>2.2.3 Children in conflict with the law in South Africa .....</b>	<b>10</b>
<b>2.3 Child justice courts .....</b>	<b>13</b>
<b>2.3.1 History of child justice courts internationally.....</b>	<b>13</b>
<b>2.3.2 Operations of child justice courts worldwide.....</b>	<b>15</b>
<b>2.3.3 History of child justice in South Africa.....</b>	<b>17</b>
<b>2.4 Conclusion .....</b>	<b>19</b>

<b>CHAPTER 3.....</b>	<b>21</b>
<b>THEORETICAL AND CONCEPTUAL FRAMEWORK .....</b>	<b>21</b>
3.1 Introduction.....	21
3.2 Public Policy .....	21
3.3 Types of Public Policies .....	22
3.4 Policy Implementation.....	22
3.4.1 The 5C Protocol factors in implementing policy.....	23
3.4.2 Brinkerhoff and Crosby’s factors in policy implementation .....	24
3.5 Intergovernmental Relations in policy implementation.....	25
3.5.1 Factors for successful inter-departmental collaboration .....	26
3.5.2 Barriers to inter-departmental collaboration in implementing policy .....	26
3.6 Street-Level Bureaucracy .....	28
3.6.1 Characteristics of street-level bureaucrats.....	28
3.6.2 Challenges of street-level bureaucrats .....	29
3.7 Restorative Justice .....	30
3.7.1 Programs offered under Restorative Justice to children in conflict with the law .....	31
3.7.2 Application of Restorative Justice in the child justice process .....	32
3.7.3 Principles of Restorative Justice in South Africa.....	32
3.8 Conclusion .....	33
<b>CHAPTER 4.....</b>	<b>35</b>
<b>POLICY AND LEGISLATIVE FRAMEWORK FOR THE CHILD JUSTICE SYSTEM</b>	<b>35</b>
4.1 Introduction.....	35
4.2 International guidelines Agreements and Conventions on Child Justice .....	35
4.2.1 The International Covenant on Civil and Political Rights (ICCPR) of 1966 .....	36
4.2.2 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) of 1985.....	36
4.2.3 United Nations Convention of the Rights of the Child (UNCRC) of 1989.....	37
4.2.4 United Nations Guidelines for the prevention of Juvenile Delinquency (Riyadh Guidelines) of 1990.....	38
4.2.5 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNJD L Rules) of 1990.....	38
4.3 African frameworks on child justice .....	39
4.4 South African frameworks for child justice .....	39



4.4.1 Criminal Procedure Act of 1977 .....	40
4.4.2 Constitution of Republic of South Africa of 1996 .....	40
4.4.3 The White Paper for Social Welfare (1997) .....	41
4.4.4 Probation Services Amendment Act 35 of 2002 .....	42
4.4.5 Correctional Services Act 111 of 1998 .....	42
4.4.6 Children’s Act 38 of 2005 .....	43
4.4.7 Child Justice Act 75 of 2008 .....	43
4.4.8 National Policy Framework on Child Justice (2018) .....	47
4.5 Conclusion .....	49
CHAPTER 5 .....	51
FINDINGS AND ANALYSIS .....	51
5.1 Introduction .....	51
5.2 Implementation of the Child Justice Act 75 of 2008 .....	52
5.2.1 Factors impacting on policy implementation .....	52
5.2.2 Barriers to inter-departmental collaboration .....	54
5.3 Experiences of street-level bureaucrats implementing the Child Justice Act .....	58
5.3.1 Co-operation between street level bureaucrats .....	58
5.3.2 Challenges of Street-level Bureaucrats .....	59
5.4 Experiences of children in conflict with the law .....	61
5.5 Conclusion .....	64
CHAPTER 6 .....	66
CONCLUSION .....	66
BIBLIOGRAPHY .....	69

## **LIST OF TABLES**

<b>Table 1:List of top 10 crimes committed by children: 2015/2016-2019/2020.....</b>	<b>11</b>
<b>Table 2:Government structures for the implementation of the Child Justice Act 75 of 2008</b>	
<b>.....</b>	<b>48</b>

# **CHAPTER 1**

## **INTRODUCTION**

### **1.1 Background and outline of research problem**

Children are born innocent but due to broken families, poor financial conditions and the lack of moral training, children adopt delinquent behaviours and end up being in conflict with the law (Gray, 1999: 376). In South Africa, child offenders reportedly make up 43% of prison inmates nationally, charged with various criminal offenses ranging from rape, assault, robbery, and shoplifting (Department of Justice & Constitutional Development, 2019:49). A longitudinal study conducted by Barbarin and Richter (2001: 4) found that the impact of the culture of violence during apartheid era led to children developing behaviour that was immoral and delinquent. During the 1970s and 1980s, thousands of children were exposed and subjected to torture and detention without trial or any legal representation (Monyatsi, 2018: 21). The realisation that children should be treated differently was advocated in many reform movements both in South Africa and internationally during that time, hence many efforts were initiated to establish a separate child justice system. However, it was only after the ratification of the Convention of the Rights of a Child (CRC) on 16 June 1995 that South Africa embarked on the journey to develop separate legislation for children that come into conflict with the law (Monyatsi, 2018: 22). The Child Justice Act 75 of 2008 was introduced to children in conflict with the law. It was provided to protect the rights of children as provided for in the South African Constitution (Skelton, 2013:123). The 2008 Act makes provision for the child justice court not to stigmatize children whose offences are not serious and allows children to be assisted in their communities through diversion rather than being taken to the court (Skelton, 2013:123).

However, despite the introduction of the Act, there are instances in which children are detained and awaiting trial without passing through the child justice courts. The 2019/20 Annual Report on the implementation of the Child Justice Act reported that at the preliminary inquiry phase of the child justice process that out of the 13,381 children arrested, 5193 were referred to a child justice court representing 39% of preliminary inquiries registered during this reporting period were referred to the child justice court for plea and trial (Department of Justice and Constitutional Development, 2019:24). A total of 1,313 preliminary inquiries were withdrawn, while 844 of the inquiries were struck off the roll (Department of Justice and Constitutional Development,

2019:24). These statistics illustrate that the majority of children arrested are not referred to a child justice court which ultimately means that the intended additional provision for the protection of children, is not implemented.

It is within this context that this study aimed to investigate the implementation of the Child Justice Act 75 of 2008 and the operation of the child justice courts in accordance with its' mandate (Child Justice Act) in South Africa. To do this, the study explores the experiences of street-level bureaucrats working in the child justice court as well as the experiences of children in conflict with the law.

## **1.2 Key questions**

The key questions underpinning the study were as follows:

1. What is the legislative framework for the child justice court?
2. What are the structures, systems and processes involved in the implementation of the Child Justice Act 78 of 2008 in regard to Intergovernmental Relations?
3. What are the experiences of the street level bureaucrats in implementing the Child Justice Act 78 of 2008 in relation to accessing minors to the child justice court?
4. What are the experiences of children in conflict with the law at the child justice courts?
5. What are the implementation issues that the child justice court face in complying with the regulations of the Child Justice Act 78 of 2008?

## **1.3 Objectives of the study**

In terms of objectives, the study sought to investigate and understand;

1. To find out the legislative framework for the child justice court.
2. To explore the structures, systems and processes involved in the implementation of the Child Justice Act 78 of 2008 in regard to Intergovernmental Relations.
3. To find out the experiences of the street level bureaucrats in implementing the Child Justice Act 78 of 2008 in relation to accessing minors to the child justice court.
4. To find out the experiences of children in conflict with the law at the child justice courts.
5. To highlight any implementation issues that the child justice court face in complying with the regulations of the Child Justice Act 78 of 2008.

## **1.4 Research Methodology and methods**

Babbie & Mouton (2001:104) define research methodology as “the methods, techniques and procedures that are employed in the process of implementing the research design.” The study employed qualitative approach to research. Qualitative research tries to find out the facts, beliefs, views, and opinions coming from the respondents (Du Plooy-Cillers et al, 2014:122). Qualitative is significant because “it helps to generate depth understanding associated with ideographic concerns” (Du Plooy-Cillers et al, 2014:122). In addition, “qualitative approach attempts to tap the deeper meanings of particular human experiences and is intended to generate theoretically richer observations that are not easily reduced to numbers” (Du Plooy-Cillers et al, 2014:122). Therefore, the study used qualitative research methodology to unpack views, opinions and experiences of the implementers and child offenders in the child justice courts.

### **1.4.1 Case study**

This research employed a case study approach to research design. A case study is “a research strategy and an empirical inquiry that investigates a phenomenon within its real-life context” (Mouton, 2000:98). “Case studies are based on an in-depth investigation of a single individual, group or event to explore the causes of underlying principles” (Babbie & Mouton, 2001:112). The case in this study was an in-depth investigation of child justice courts and the experiences of both the key implementers the Act and the child offenders in South Africa.

### **1.4.2 Sampling method**

Sampling refers to “the activity of choosing units from a group of interest in order to make fair generalizations inferred from the sample which was studied” (Heaton, 2004:39). There are two types of sampling techniques which are: probability and non-probability (Mouton, 2000:67). “Probability sampling is based on the randomization principle which means that all members of the research population have an equal chance of being part of the sample population whereas non-probability sampling does not provide a leveled playing ground for selection but rather it is based on the researcher’s subjective judgement” (Mouton, 2000:67). This study used purposive sampling, a non-probability sampling technique. According to Babbie & Mouton (2001:90), “purposive sampling method is based on some pre-determined characteristic where the researcher selects the sample subjective based on this characteristic.” Purposive sampling was used in this

study where the researcher selected a sample of secondary studies and primary documents that answered the research questions for the study.

#### **1.4.3 Data collection methods**

The study used document review as a method of data collection. “This is a formalized technique of data collection involving the examination of existing records or documents” (Mouton, 2000:54). The researcher collected and analyzed existing documents such as legislations, secondary studies, and reports about the Child Justice Act 75 of 2008. The study used primary as well as secondary data. Primary data refers to “an original document or first held account of an event which was written or created during the time under study” while secondary data refers to “sources that explain analyze and interpret primary data” (Bishop, 2007:1). Primary data used include: South African Constitution, National Policy Framework of Child Justice of 2018, Correctional Services Act, United Nation frameworks on child justice, Child Justice Act 75 of 2008 legislation and official reports from Non-Governmental Organizations such as National Institute for the Crime Prevention and Re-integration of offenders (NICRO), Save the Children, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN). Secondary data gathered include reports from law and social-work journals, parliament reviews on the implementation of the Child Justice Act 75 of 2008 and Annual Reports from the Department of Justice and Constitutional Development (DJCD), Social Development (DSD) and Correctional Services (DCS) on the Implementation of the Child Justice Act of 2008.

#### **1.4.4 Data analysis**

In this study, qualitative secondary analysis was conducted on the data gathered documentation review. Qualitative secondary analysis is “the use of qualitative data collected by someone else for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns” (Tate & Happ, 2018:1). It is also defined as “the collection as well as formulation of systematic conclusions concerning the characteristics and meaning of the recorded material in the form of books, reports or policy” (Babbie & Mouton, 2001: 48). Qualitative Secondary analysis provides an opportunity to maximize data utility and provides an efficient alternative to collecting data from new groups or the same subjects (Tate & Happ, 2018:1).

In this study, qualitative secondary analysis focused on the contextual meaning of texts which came from journals, official government publications and from the answers that the researcher generated from the respondents in the research journals.

### **1.5 Limitations of the study**

In the study, some data collected was insufficient in answering some research questions. This made analyzing data difficult, a common challenge found in conducting qualitative secondary analysis (Tate & Happ, 2018:4). In addition, some of the publishers on the internet are reluctant to give away the complete details freely, so data availability was generally restricted and in completed. In some instances, the researcher had to pay, establish trust and gain rapport from the authors/owners of the information.

### **1.6 Structure of the dissertation**

This study is divided into six (6) chapters;

- 1) **Chapter 1:** This chapter provides a background to the study and discusses the research methodology used in the study.
- 2) **Chapter 2:** This chapter provides an overview of the existing body of literature on the child justice system and children in conflict with the law at international, regional and local level.
- 3) **Chapter 3:** This chapter discusses the study's theoretical framework which includes policy implementation theory, intergovernmental relations, street-level bureaucracy and restorative justice.
- 4) **Chapter 4:** This chapter presents the policy and legislative framework for child justice in South Africa.
- 5) **Chapter 5:** This chapter presents the study findings and analysis in relation to the research questions.
- 6) **Chapter 6:** This chapter provides the conclusions of the study based on the research findings to answer the research questions.

## **CHAPTER 2**

### **LITERATURE REVIEW**

#### **2.1 Introduction**

This chapter explores the literature on children in conflict with the law and the child justice system. It begins by conceptualizing the term ‘child,’ ‘children in conflict with the law’ and examines the factors which cause children to commit crimes globally and in South Africa by providing statistics of crimes committed by children. The experiences of child offenders in the child justice courts in different societies are also discussed in this chapter. The chapter also defines the concept of ‘child justice’ and discusses the development of child justice systems internationally and in South Africa. The chapter also examines operations of child justice courts emphasizing on their challenges and issues surrounding them.

#### **2.2 Children in conflict with the law**

To understand what children in conflict with the law is, there is need to unpack the term by firstly defining the word ‘child’. According to McGowen (2016:13), a child is “a person who is not yet an adult, or a person who because of age does not have the capacity to take on the onerous obligations associated with adulthood.” On the other hand, Pinchbeck & Hewitt (2010:20) argue that a child is “a person who is not independent and has no objective capacity to enter into any legal contract without assistance of an adult or guardian.”

Apart from scholars, international conventions and laws have also various definitions of a child. The United Nations Convention on the Rights of the Child (UNCRC) in Article 1 defines a 'child' as “a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger.” This applies to all children, regardless of their race, religion or abilities; or in the present context, the circumstances of their life and emphasizes that the best interests of children must be the primary concern in making decisions that may affect them. This means that when adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and laws (Knowles, 2010:3). In addition, Pinchbeck & Hewitt (2010:20) state that, “It should be noted that while societies generally agree that a child is a person who is not yet an adult, there is no consensus on the exact age at which a child transitions from childhood to adulthood.” Pinchbeck & Hewitt (2010:20) explain that instead, “the definition of childhood is influenced by legal capacity, religious, cultural, physical and psychological practices



and beliefs.” In contrast, South Korea defines a child as “persons under 19 years of age” according to article 2(1) of the Act on the Protection of Children and Juveniles from Sexual Abuse (2010).

In Africa, a child means “every human being below the age of 18 years” according to Article 2 of the African Charter on the Rights and Welfare of the Child (ACRWC), which has been rightly lauded for offering higher standard of protection for children than its universal counterpart, the UNCRC. In South Africa, section 28(3) of the constitution states that “a child means a person under the age of 18 years,” which is similar to the definition of ACRWC and the UNCRC.

The definition of ‘children in conflict with the law’ also varies from country to country. Knowles (2010:3) describes ‘children in conflict with the law’ (also known as juveniles) as “a person who is not yet considered an adult who performed a crime,” while Mays and Winfree (2006:399) define a juvenile “as people who have not reached their majority ages of 18 to 21 depending on state and law.” The UNICEF Child Protection Report (2018:4) refers to ‘children in conflict with the law’ as “anyone under the age 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence.” This definition is based on the UNCRC’s definition of a child, which is also like ACRWC’s definition. In South Africa, the Child Justice Act of 2008 does not specifically provide a definition of children in conflict with law. The following sub-sections discusses the factors resulting to children to be conflict with the law, their experiences in the courts and a discussion around child offenders in South Africa.

### **2.2.1 Causal factors for children committing crimes**

According to Tonry & Doob (2004: 23), the criminal career of such youths begins during adolescence and reaches its pinnacle during their mid-twenties. Violence and insecurity perpetrated by and against young people are caused by various factors that work simultaneously to create situations of social instability. These factors can include the availability of firearms, the abuse of alcohol, large-scale migration to urban areas and overpopulation, drug trafficking, weak educational and policing systems, unequal distribution of wealth, and the frustration of many young people faced with unemployment and socio-political exclusion (UNODC & World Bank, 2017). In many households, the tension fueled by social exclusion and financial hardship has been vented on the most vulnerable members of the family, such as women and children. A report of the United Nations Office on Drugs and Crime and World Bank (UNODC & World Bank, 2017) states “evidence suggests that children who witness domestic violence are more likely to engage

in delinquent and violent behavior in the future.” According to McCarney (2018:52), being subject to violence as a child is also associated with a higher probability that children and young people will engage in delinquent and violent behavior, as well as increased risk of children and youth abandoning the home and joining their peers on the street.

Reports show that in recent years, manifestations of discontent by youth have become increasingly violent (UN-HABITAT, 2016: 146). Not only is the proportion of violent crimes committed by young people on the rise, but youth are also increasingly likely to be victims of violent crimes, as research in the Caribbean reveals (UNODC & World Bank, 2017). In addition, there seems to be a link between excessively high urban growth rates and violence in cities, with violence becoming an increasingly urban phenomenon (McCarney, 2018:53). McCarney argues that violence is acquiring more visibility than in the past, with much of it carried out on the streets, often in densely populated neighborhood. Whitehead & Lab (2013:34) have a different view stating that migration has led to overpopulation and to the consequent formation of slums, “off-limits” areas and “no man’s lands,” in which even security forces fear to enter. “According to estimates in 2012, one out of every three city dwellers, nearly one billion people lived in slum conditions. Slums, characterized by social exclusion and lack of social support systems, are distinctive of developing countries; sub-Saharan Africa is the region with the highest percentage of its urban population living in slums (71.8%), followed by Southern Asia (57.4%), Eastern Asia (34.8%) and Latin America and the Caribbean (30.8%)” (Whitehead & Lab, 2013:34).

Throughout the African continent, delinquency tends to be attributed primarily to poverty, malnutrition, and unemployment (UNODC & World Bank, 2017). “These factors are the result of marginalization of juveniles in the already severely disadvantaged segments of society.” (UNODC & World Bank, 2017). Rapid population growth has been experienced in Africa, and the population seems to be getting correspondingly younger over time. Chama (2016:34) coupled with the fact that few new jobs are developed in Africa, which has resulted in half of all families living in poverty. “Many of the urban poor live in slum and squatter settlements with unhealthy housing. In addition, one of the most serious problems is the great number of street and orphaned children, whose numbers have been growing because of continuous and multiple armed conflicts, the advent of HIV/AIDS, and the breakdown of the traditional tribal culture and family influence on children. Juvenile delinquency is on the rise, with the primary offenses being theft, robbery, smuggling,

prostitution, the abuse of narcotic substances, and drug trafficking among young offenders” (Chama, 2016:34).

### **2.2.2 Experiences of child offenders in criminal justice systems worldwide**

Some studies have examined children’s experiences in the court rooms. One longitudinal study in Germany followed children through the assessments and trial cases they went. This study revealed that the aftermath of the court trial and proceedings caused psychological problems for a child (Frost et al, 2016:5). “Children were traumatized due to how the social workers, the police and legal aid-officers addressed and dealt with them. It shows that the courts officials do not spend time to establish a rapport and to gain a genuine understanding of the child’s case” (Frost et al, 2016:5).

A study done in Cebu (Philippines) shows that almost half (47.3%) of the children alleged that they were forced by the police to admit to the crimes even if they were innocent. “Amina na lang gud na para Madali (Just to admit it so that we can proceed faster),” was one remark heard by most of the children while they were in the precincts (Wan Chun et al, 2015:550). All this was done just to prove that the police are working on the ground and capturing criminals (Wan Chun et al, 2015:550). In addition, Wan Chun et al (2015)’s study reveals that 65% of children do not have access to legal aid and complain about their cases taking long period of time to complete. “a female offender gave an account of her one-time encounter with a private lawyer provided by her co-defendants. The case has been heard four to five times but so far, she has not been able to talk to her lawyer. For those who decided to defend their cases, many discovered that the case would drag on for months until they have grown weary and would simply admit to the offence just to get over with.” (Wan Chun et al, 2015:552).

In Mali, children are frequently confused by court language and fell largely detached from proceedings, sometimes not fully understanding the implications of their sentence until later. “The language used in court is not particularly youth-friendly, and many youth aren't fully aware of their rights in the juvenile court process, and what happens if they're adjudicated delinquent {the term for being found guilty in juvenile court}” (Fagan & Kupchik, 2011:29). However, Fagan & Kupchik (2011:29) revealed that the child offenders feel appreciated when efforts were made by judiciary and others in court to explain what was happening in ways they could understand (Fagan & Kupchik, 2011:29).

This studies from different authors will aid in answering the study's fourth research question which seeks to find out the experiences of child offenders in the South African courts. The next section discusses the profile of children in conflict with the law in South Africa.

### **2.2.3 Children in conflict with the law in South Africa**

Adolescents in South Africa are becoming more involved in acts of delinquency, both as perpetrators and as victims. Consulted reports from Save the Children (2011) reveals that lately the average age of people committing crime is reducing; whereas it was 22 years of age in 1988, in 1990 it had dropped to 17 years (Lansdown, 2011:33).

In 1937 the juvenile crime figures for the Johannesburg court showed that 43 out of 883 convictions were for liquor- or alcohol- related offences. In 1938 successful convictions increased and 94 juveniles were convicted in the 1 230 cases heard. A study conducted by the Human Sciences Research Council (HSRC, 1975) regarding the conviction rates of juvenile offenders aged 7 to 20 years for the period 1969 to 1970 shows the following rates per 10 000 of the groups population: whites 69; Indians 83; blacks 125; colored's 390. All these juveniles were mainly convicted for economic offences in the following proportions to all offences per group: blacks 52, 6%, colored's 47, 6%, Indians fractionally less at 46, 2% and whites 41, 2%. The difference in rates of conviction is credited to social, economic and other circumstances rather than intrinsic factors. HSRC (1975:18) attributed the high rate of juvenile crime among colored adolescents, largely as a result of disorganized urbanization within the colored communities, meaning that the areas in which colored people lived did not have the infrastructure and facilities of the white areas, which can be estimated as increasing the crime risk factors.

According to the Central Statistical Service (Now Statistics South Africa), the total number of crimes committed by youths under the age of 21 between 1 July 1990 and 30 June 1991 was a sum of 95 398. Amongst these adolescents, 11 of every 1000 individuals aged 7 to 20 years were found guilty of a serious offence (Lansdown, 2011:33).

According to Regoli et al, (2013:58), "the number of 2 026 awaiting trial prisoners in 1999 were adolescents, with a further 1 375 adolescents serving prison sentences." Figures from the SAPS Annual Report (2006) show that for the year 30 April 2004 to 1 May 2005 there were 9 494 sentenced juveniles (from ages 18-21 years) that were incarcerated in South African prisons. In

the same period there were 9 079 juveniles awaiting trial. The report also indicates that 1 137 adolescents (under the age of 18 years) were sentenced and 1 217 were not sentenced or awaiting trial (SAPS, 2006).

In the recent years, the Department of Justice and Constitutional Development compiled a report on the top ten crimes allegedly committed by children who appeared in preliminary inquiries indicated in the table below;

**Table 1:List of top 10 crimes committed by children: 2015/2016-2019/2020**

No.	Offences	2015/2016		2016/2017		2018/2019		2018/2019		2019/2020	
		No. of cases	%	No. of cases	%	No. of cases	%	No. of cases	%	No. of cases	%
1	Assault with intention to do grievous harm	2457	13.2%	1549	12.8%	2019	15.1%	2508	18%	2690	18.6%
2	Theft	2663	14.3%	1351	11.2%	1353	10.1%	1495	11%	1604	11.1%
3	Assault	1475	7.9%	899	7.4%	989	7.4%	1249	9.20%	1504	10.4%
4	Rape	1612	8.7%	1053	8.7%	1255	9.4%	1184	8.70%	1458	10.08%
5	Household breaking with the intent to steal	1629	8.8%	1057	8.7%	1194	8.9%	1177	8.60%	1117	7.7%
6	Robbery	994	5.4%	606	5.0%	705	5.3%	749	5.50%	705	4.9%
7	Possession/use of drugs	2535	13.6%	1961	16.2%	1934	14.3%	1303	9.60%	688	4.8%
8	Robbery with aggravating circumstances	476	2.6%	4330	3.5%	471	3.5%	527	3.90%	651	4.5%
9	Murder	462	2.5%	379	3.1%	416	3.1%	451	3.30%	621	4.3%
10	Malicious injury to property	730	3.9%	488	4.0%	525	3.9%	568	4.20%	589	4.1%

Source: Department of Justice and Constitutional Development Annual Report (2019/2020).

Table 1 shows that during the past five reporting years, assault with the intent to do grievous bodily harm and theft consistently remained as the first top two of the top ten charges allegedly committed by children appearing at preliminary inquiries (DJCD Report, 2020:11). Charges relating to the possession/use of drugs were one of the top three charges against children for the previous four reporting periods, but during this reporting period it was replaced by assault, which is a crime with an element of violence. From these figures, it can therefore be deduced that South Africa's child population is becoming violent at an early age (DJCD Report, 2020:11).

Orphanhood is acknowledged as an enormous visible risk factor for children taking the streets and getting entangled with criminal activities (Chama, 2016:34). "Maree (2008) found that a fractured family, lack of parental supervision and life on the streets were social risk factors that cause crime in South Africa. Further social risk factors that were reported was a parent and sibling criminality or antisocial behavior" (Chama, 2016:34).

A study conducted by Mandisa (2017:64) states that "poverty and low socio-economic context are thought to provide risks for negative outcomes among children growing up especially in single-parent households." In addition, Mandisa (2017:64) states that due to the low level of parental income, children are encouraged to engage in theft or selling drugs such as Nyaope to get their families out of poverty in South Africa. Another study by Koch & Wood (2012:45) supports Mandisa's idea of crime resulting from the child's upbringing. "Children from disharmonious broken families appeared more likely to offend or engage in crime because they do not build up internal inhibitions against socially disapproved of behaviour" (Koch & Wood, 2012:45). Koch and Wood conclude that a family structure that includes two adults is more likely to contribute to positive child outcomes since emotional and practical stresses involved with childrearing can be shared comparing to a single or divorced household where parental control is reduced which may result children having greater opportunity to experiment with alcohol, drug substance abuse and engage into deviant acts. In contrast, a study by Engelbrecht (2011:77) states that the quality of school that a child attends to may determine the likelihood of them associating with poor behaving peers while at school. "Children in low-class education systems tend to be bullied and join different cliques to fit in, which might involve indulging in deviant acts such as teasing, stealing and beating up fellow students" (Engelbrecht, 2011:77). These studies show that criminal behavior can be acquired from primary and secondary aspects of socialization and can easily nurtured due to the

surroundings or situations children are in. The next section in the literature review discusses child justice courts, its origins, how they operate and the challenges they face in the criminal justice system.

### **2.3 Child justice courts**

McCarney (2008) defines a child justice court as “a special court which deals with under-age defendants charged with crimes or who are neglected or are out of the control of their parents.” Similarly, McKeithen (2006) defines a child justice court as “a court designed to handle or process cases involving children who have been charged with delinquent or unruly offenses.” A child justice court is part of what can be termed the ‘Juvenile Justice System’ which is a counterpart to the adult criminal justice system. In order for children’s rights to be respected and to be treated differently, a separate criminal justice system known as ‘Juvenile Justice’ or ‘Child Justice’ was established. According to Whitehead & Lab (2013:10), “juvenile justice is the area of criminal law applicable to persons not old enough to be held responsible for criminal acts.” Winterdyke (2015:21) observes that in most countries, the juvenile justice law applies to those under 18 years old and further argues that “juvenile justice is administered through a juvenile or family court, but however, it is important to note that juvenile courts do not have jurisdiction in cases in which minors are charged as adults.” While similarities exist between the child justice system and the adult justice system, the child justice system has different rules, different terminology and even a different focus than the adult system (Whitehead & Lab, 2013:10). A child justice court ensures that individual needs and circumstances of children in conflict with the law are assessed and balances the rights/responsibilities of the child, the victim and the community.

#### **2.3.1 History of child justice courts internationally**

Todres et al (2006:326) observed that in mostly rural societies of Europe and America around the 19th century, parents and communities punished children who committed crimes. Whitehead and Lab (2013:26) indicate that, “historically, children did not enjoy any special treatment; instead, they were regarded as property of their parents or society from birth to the age of five and held similar status as any other property in society. Children were typically disciplined by force, sometimes brutally.” Prior to the 1800s, any child over the age of 7 was treated like an adult if the child committed a criminal act, including going to adult prison (Todres et al, 2006:326). During the 1800s, separate detention facilities were created to house convicted children. Lawmakers and

social scientists discovered that children housed with adults became more likely to commit crimes than before they entered prison (Todres et al, 2006:326).

The first juvenile court was established by the year 1899 in U.S.A (Whitehead &Lab 2013:26). There were several factors that different scholars pinpointed for the court to be established. According to Regoli, et al (2013:368), the juvenile justice system in America was created with the main aim of reforming the U.S. policies regarding youth offenders. The scholars further observed that since that time, several reforms aimed at both protecting the 'due process of law' rights of youth, hence diverting the youth from getting into prison. Regoli et al (2013:368) added that around that time, changes in the perception of childhood led to new ideas about the ways in which the delinquent and vulnerable youth should be handled by the state. From the 1880s onwards, campaigners began to call for the introduction of a special court to handle cases involving children and young people (Whitehead & Lab 2013:27). Regoli et al (2013:368) further stated that attention to the psychological problems of childhood and how these differ from those suffered by adults, resulted in the setting up of the Child Study Movement, founded in 1893 by James Sully, a British psychologist. The movement attracted other experts such as the American psychiatrist G. Stanley Hall and it also provided a forum for amateur readers alike to explore the psychology and psychiatry of the youth. The Child Study Movement encouraged the view that all children were individuals, and should be treated as such by parents, teachers, medical and social professionals (Regoli et al, 2013:369). The Child Study Movement and ideas about the 'scientific' application of welfare had an important influence upon the establishment of the Cook County Juvenile Court. Cox (2007:30) stated in detail that the court was founded in Chicago, Illinois in 1899 by female reformers connected with the city's Hull-House Settlement and its Women's Club. "The reformer's aim was to provide individual treatment for troubled children and to neutralize the impact of poor adult influence" Cox (2007:30). They believed that dysfunctional families were the principal cause of juvenile delinquency. According to Cox (2007:30), "the women attached to the Cook County Court in turn were highly influential in shaping other courts across the United States, although an alternate model was presented by Ben Lindsay, the self-appointed juvenile judge of Denver, Colorado. Lindsay was a firm proponent of developing 'character' among those young men who attended his court, of instilling in them the middle-class values of duty, courage, independence and self-control."



The developments in USA caused a stir among reformist circles in the UK and inspired the establishment of the first British juvenile court in Birmingham in 1900. According to Regoli et al (2013:369) cited from Leman (1984) that the establishment of the court in America influenced and was a starting point of efforts that finally bore fruit in the Children Act of 1908 in England, one of several reforms of the Liberal Governments from 1906 to 1914. Regoli et al (2013:369) concluded that while the Act made the law clearer in certain areas, it further extended the power of the state to determine family matters, and it formally introduced the juvenile court to the British legal systems. However, the spreading of the courts was disturbed by the outbreak of the First World War in 1914 which created new problems for those involved in the juvenile courts. Whitehead & Lab (2013:29) cited from Herz (1996) that they were stretched to the limit by the rise in juvenile crime that occurred during the war, although the courts had made progress in establishing a new model for dealing with the delinquent and vulnerable young. Despite that, the British government continued to commit to the task of reducing and ideally preventing juvenile delinquency after the First World War, especially as the Home Office became more comfortable with the changes introduced by the Children Act of 1908 (Whitehead & Lab, 2013:29).

British courts shared much in common with their American counterparts in terms of a belief that the delinquent young needed to be saved in order to protect the wider society. As on the other side of the Atlantic, the causes of juvenile delinquency were in the failure of character and of the failure of the family. A good outcome that came from the establishment of the child courts in the UK is that child courts drew upon a diverse range of intellectual influences. According to Whitehead & Lab (2013:30), they owed much to the development of the social and socio-medical sciences, notably criminology, psychology and psychiatry. These disciplines developed partly as an attempt to discover the causes of and solutions for deviant behaviors and social problems used in many juvenile and child justice systems in the world. It was after the Second World War that the United Nations sat down and came up with international legal instruments which are seen as the world's leading frameworks within which children in conflict with the law should be managed.

### **2.3.2 Operations of child justice courts worldwide**

In Bangladesh, the child justice system highly associate with the police, child courts, and corrections (Ferdousi, 2013:494). Every district or metropolitan area has at least one juvenile court to deal with the issues associated with the children or juveniles who come in contact or conflict

with the law. According to the Children Act of 1974, the language of the court is the easiest language so that children can understand the whole process in the court. The timeframe for the completion of the trial is fixed and tribunal needs to give its final verdict with 365 days of the juvenile's first appearance in the court (Ferdousi, 2013:494). However, Fedousi reviews the common challenge found is that the police were not satisfied with the child courts improving the justice system for children in conflict with the law. "One of the police officers stated that some children are found here with very small issues and if one looks deep in the issue, it is discovered that there was no issue but one just wants the child to be here and the court has pass that issue" (Ferdousi, 2013:494). In addition, it was found that some child offenders did not go through the court system but were sent directly to the reformatory centre. This shows that once children have committed crimes, they are diverted to the police and instead of the police referring them to 'safety homes' waiting to be trailed, they are directly referred to the reformatory centre, leaving children who are not convicted. Making matters worse, some children may not even have committed the crime, hence depriving their rights (Ferdousi, 2013:494).

In China, a child justice court does not indicate any particular court here. Rather, it is a kind of tribunal which is attached to the activities of courts at various levels (Rapp, 2016:8). Supreme Court has established a separate steering division for the juvenile tribunals in the jurisdiction of its office (Rapp, 2016:8). Only police are entitled to arrest the juveniles. Police after arresting them, need to send the juveniles to the procurator and the procurator after maintaining a file-based system evaluate the whole case and take decisions accordingly. According to Rapp (2016:7), "He can allow a conditional no prosecution to avoid spending time in jail while keeping the juveniles under the surveillance. If the juvenile can comply with the rules he can get a release, otherwise, the procurator can cancel the option and send that accused to the further legal process." Cases begin in the juvenile court with the issuance of a criminal complaint either by the public procurator or by a public citizen (Rapp, 2016:8). The hearing may be conducted by a bench or a single judge in grassroots court and only by a bench in an intermediate court. The main challenge that exists in the tribunals is the workload of cases. "Each procurator has an average workload of 20-to 25 cases per month relating to children as victims. This results to court hearing taking ages to be heard in court since the procurators are overwhelmed" (Rapp, 2016:8).

In Malawi, the child justice court is established under section 132 of the Child Care, Protection and Justice Act (Chagwenje, 2014:7). The child justice court, which has original jurisdiction over child related matters, or such other matters as may be prescribed by law, is subordinate to the High Court Grade Magistrates or lower ranking magistrates as may be designated by the Chief Justice from time to time, and such designation must be gazette (Chagwenje, 2017:6) The child justice court, although presided over by magistrates, is separate and independent of the general magistrate courts. Here, the social welfare officer (probation officer) is central in all the court proceedings (Chagwenje, 2014:7). The Malawi Government established four child justice courts in four cities of the country with regard to protecting the rights of children who are in conflict with the law (Chagwenje, 2017:6). In spite the country having built the structures, it still will not accommodate for all cases of child happening in the country because there are over 24 districts and different cases and offences happen which need intervention of child-friendly courts and procedures to follow. Due to child courts being far from other districts, the cases are referred to the nearest courts such as magistrate court which is part of the adult criminal justice system; as a result, children at the end of the day suffer (Chagwenje, 2017:6).

All these challenges are highlighted in figuring out implementation issues regarding use of child justice courts in South Africa as part of the research question in this study. The next section looks at the dawn of child justice in South Africa.

### **2.3.3 History of child justice in South Africa**

During the pre-colonial era, under African customary law, childhood was not defined by age but by other defining characteristics such as circumcision or the setting up of a separate household (Maithufi 2000:140). Bennett (1999) adds on that during this period, the welfare of children was tied up with the communal welfare of the extended family, tribe or group, and children's interests might well be subjugated to the broader interests of the group as a result, children were sometimes given over to other relatives to look after cattle or provide companionship, and a common method of surviving lean years was the pledging of girls in marriage. Colonisation in South Africa caused the customary law system to be over-laid by the Roman Dutch and English legal systems (Maithufi 2000:141). Corporal punishment, deportation (to Robben Island, for example) and imprisonment for crimes became commonplace (Saffy 2003:16). Further evidence of the influence of the welfarist approach was the provision in the Prisons and Reformatories Act 13 of 1911 which introduced industrial schools (Saffy 2003:16). "Although the Act relied heavily on institutional

care, it was the first piece of legislation that established the principle that children and young adults should not be imprisoned. However, due to a lack of facilities, this did not in effect protect all children from imprisonment. These protections were built upon by the Children's Protection Act 25 of 1913, which allowed for arrested children to be released by a police official. The Act also provided the option for children to be held in places of safety during the investigation of the offence" (Saffy 2003:16). Maithufi (2000:141) also argues that during this time, an important procedure included in both the 1911 and the 1913 Acts was the power of the court to decline to proceed with a trial in any case concerning a child, and to commit such a child to a government industrial school. This allowed for a 'bridge' to be built between the criminal justice system and the system for children in need of care. However, at no stage was there a court established along the lines of the Illinois juvenile court model, and the majority of child offenders in South Africa remained in a punitive criminal justice system. The 1937 Children's Act established the children's court but this did not have criminal jurisdiction, though cases could be referred to it from the criminal court (Saffy, 2003:16).

During the 1970s and 1980s, Le Roux (2004) stated that thousands of young people were detained in terms of the emergency regulations for political offences, causing a national and international outcry. "At the time, political organizations, human rights lawyers and detainee support groups rallied to the assistance of many of these children. Their efforts centered on children involved in political activism, but during this period there were equally large numbers of children awaiting trial on crimes which were non-political in nature but which could invariably be traced to the prevailing socio-economic ills caused by Apartheid" (Le Roux, 2004). By the end of the 1980s, the number of political detentions waned, but the country's police cells and prisons continued to be occupied by large numbers of children caught up in the criminal justice system (Saffy (2003:17).

The 1989 Harare International Children's Conference provided a springboard for the development of the child rights movement in South Africa. "Because of the focus on the struggle to achieve basic human rights in South Africa, the call for a fair and equitable child justice system emerged somewhat later than in many comparable countries. The first intensive calls for such reforms came about in the early 1990s and emanated from a group of NGOs who went into courts, police cells and prisons to provide assistance to juveniles awaiting trial" (Le Roux, 2004). According to Skelton (2005: 349), a few NGOs initiated a campaign to raise national and international awareness

about young people in trouble with the law. They issued a report which called for the creation of a comprehensive juvenile justice system, for humane treatment of young people in conflict with the law, for diversion of minor offences away from the criminal justice system and for systems that humanized rather than brutalized young offenders. “A further initiative was launched in 1992 by NICRO and constituted an important milestone in child justice history. NICRO decided to offer courts alternative diversion and sentencing options that aimed to promote the emerging restorative justice concepts specifically focused on youth” (Skelton, 2005:350).

The democratisation of South Africa in 1994 resulted in legislative changes in respect of children who found themselves in conflict with the law. Skelton and Courtney (2013:217) further point out that these vigorous efforts by NGOs resulted in draft proposals for a new justice system in 1993. “Among the significant developments was the ratification of the United Nations Convention on the Rights of the Child by the South African government in 1995. The ratification of the UNCRC gave direction for a legislative and policy framework towards the protection of children. However, a caution was sounded that in the absence of clear guidelines concerning diversion and alternative sentencing, there are substantial inconsistencies and contradictions regarding the cases that are considered” (Skelton & Courtney, 2013:217). Le Roux (2004) points out that in 1998, the Minister of Justice instructed the South African Law Reform Commission to investigate and develop a draft Bill on children in conflict with the law. This project was completed by the year 2000 and a draft Bill was tabled in Parliament in 2002 (Skelton & Courtney, 2013:217). It was not until 2009 that this Bill was passed by Parliament and not until 1 April 2010 that the Child Justice Act 75 of 2008 was implemented. The 12-year lead-up to the overhaul of the justice system for children in conflict with law speaks volumes to the progress made in ensuring that South Africa has an adequate regime in place that would take the vulnerabilities of children into account (Skelton, 2005:352). The current regime is not completely ideal and has its flaws, which are both substantive and operational in nature. However, it is a much better system than the one in operation prior to the Child Justice Act.

## **2.4 Conclusion**

This chapter has defined children in conflict with the law as any person below the age of 18 who have faced the criminal justice system for committing an illegal act. Children commit crime due to several factors such as orphan hood with no or little supervision from guardians to teach them

the moral ways of living, economic hardship in their families and peer pressure from gangs, resulting to the rise of child offenders. The chapter discloses that children in conflict with law experience poor treatment from the court officials, low access to legal aid and court language being hard to understand by the offenders. Statistical reports reveal that theft and assault continue to be the most common acts of crime committed by children in South Africa. Factors that result to children committing crime include orphanhood, lack of parental income/poverty and peer groups and gangs that children join and learn deviant behavior. The chapter also defines a child justice court as a special court that applies to people not reaching adulthood and the chapter examines the operations of child justice courts in other countries. Challenges faced in operating child justice courts include overload of cases to be processed and lack of court infrastructures. Finally, the chapter discusses the historical developments of child justice system and the courts in South Africa which took place from pre-colonial era up to the development of the child justice Act of 2008 which came into action in 2010.

## **CHAPTER 3**

### **THEORETICAL AND CONCEPTUAL FRAMEWORK**

#### **3.1 Introduction**

This chapter discusses the theoretical and conceptual framework for the analysis of the implementation of the Child Justice Act 75 of 2008 with a specific focus on child justice courts. To begin with, the chapter discusses policy implementation by firstly presenting a description of public policy, the policy cycle and the types of public policy. The chapter then proceeds to outline the factors that can affect implementation using; Brinkerhoff & Cosby's tasks and Brynard's 5C protocols (Content, Context, Capacity, Commitment, Clients and Coalition). Intergovernmental relations will also be used to analyze the implementation of the CJA by looking at the factors and barriers to implementing intergovernmental relations. Street-level bureaucracy is also discussed in the chapter by examining the characteristics and challenges of street-level bureaucrats from Lipsky's theory. Finally, the chapter concludes with a discussion of restorative justice by outlining its aims, programs offered, principles, contexts when it is applied and the people involved in restorative justice.

#### **3.2 Public Policy**

Public policy is described by Parsons (1953:3) as "that dimension of human activity which is regarded as requiring governmental or social regulation or intervention, or at least common action." Parsons (1995:13) adds on that policy does not always follow a path of intended activity and can therefore result in unintended consequences. According to Cochran and Malone (2010:6), "it is the process where government decides whether to act or not to solve a specific problem." It is a course of action by government designed to achieve certain results (Cochran & Malone, 2010:6). The Child Justice Act 75 of 2008 is a piece of legislation or a course of action that aims to protect the rights of the child as provided for in the constitution and to prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children.

There are different stages of policymaking, the first of which is problem identification. This involves identifying a policy problem that is at hand (Cochran et al, 2009). According to Parsons (1995:13), the agenda setting stage refers to the process whereby government recognizes the

identified policy problem and comes up with solutions to solve the problem. The policy formulation stage seeks to identify the goals and objectives of the policy and how these goals and objectives will be achieved (Cochran and Malone, 2010:7). There are various key players involved in the different stages of the policy making process such as cabinet, public servants, the media, political parties, legal systems, the public as well as interest groups (Cochran and Malone, 2010:7). However, the government is the only one that has decision making powers (Cochran and Malone, 2010:7). According to Cochran and Malone (2010:7), once the policy has been adopted or approved it is said that the information contained in the policy document is turned into reality in order to achieve the aims and objectives of the policy. This policy stage is referred to as policy implementation (Cochran and Malone, 2010:7).

### **3.3 Types of Public Policies**

There are several types of public policies, with different purposes. These include distributive, redistributive and regulatory policies (Anderson, 1997). Distributive policies are involved in legislation surrounding government funding into public goods or services that provide for the common good (Anderson, 1997:15). Redistributive policies involve the deliberate efforts by the government to shift the allocation of wealth, income or property among broad classes or groups. Regulatory policies provide the framework for setting the standards of what is lawful and what is not allowed in a bid to guide the behavior of individuals or groups in a society (Anderson, 1997:16). The Child Justice Act 75 of 2008 is an example of a regulatory policy because it regulates the care of child offenders regarding the nature of support, assistance to be offered and guidelines in protecting children from all forms of violence, maltreatment, or exploitation.

### **3.4 Policy Implementation**

Cloete and de Coning (2011:135) define policy implementation as “the process through which policy decisions are operationalized as it is essentially about putting decisions into effect.” Cargo and DeGroff (2009:47) define policy implementation as “a complex change process where government decisions are transformed into program, procedures, regulations or practices aimed at social betterment.” Furthermore, implementation is characterized by the actions of multiple-level agencies and institutions (Cargo and DeGroff, 2009:48). Implementation comes after a decision has been made on which policy to implement; once a decision has been made for a policy to be adopted, that policy has to be implemented. In implementing a policy, some problems might arise



due to the model or approach being used. This section discusses the factors that affect policy implementation and discusses intergovernmental relation in implementing policy.

### **3.4.1 The 5C Protocol factors in implementing policy**

Colebatch (2006:311) argues that often, there is a divergence between policy implementation on paper and in practice. The reason for this is that implementation on paper often represents the ideal, however in reality there are various circumstances which prevent the policy implementers from achieving it (Colebatch, 2006:311). The circumstances which shape the way in which a policy is implemented are discussed below.

- (a) Content:** Brynard (2005:656) argues that the content of a policy is important, not only in the strategies it uses to achieve its objectives, but also in its stating of the objectives, in and of themselves, and how it aims to go about achieving those objectives (Brynard, 2005:659).
- (b) Context:** This looks at in where policy implementation takes place will be influenced by the larger context of the social, political, economic and legal environment in society (Brynard, 2005:659). This does not necessarily mean that the broader context must be disregarded, however we must be cognizant of how this affects the implementation process, most importantly through the institutional hallways through which implementation must pass and the endorsement of clients and coalitions (Brynard, 2005:659).
- (c) Commitment:** This refers to the dedication of the politicians, managers and stakerholders in implementing a policy (Brynard, 2005:659). Cloete et al (2018: 208) states that the success of policy implementation is depended on full commitment by all actors during implementation. “Commitment is important at all policy levels where policy passes, whether at street or state levels. Yet, the most logical policy imaginable, which may pass a cost/benefit analysis with high marks, can be developed by government” (Cloete et al, 2018: 208).
- (d) Capacity:** Brynard, defines capacity as the structural, functional and cultural ability to put into effect the policy goals of the government (Brynard, 2005:660). In essence, it is about the ability of which government sets out (Brynard, 2005:660). Capacity is a direct reference to the tangible resources, be they in the form of material, financial,

human, technological, logistical which are able available at the disposal of government (Brynard, 2005:660).

- (e) **Clients and coalition:** This looks at the importance of government forging coalitions of interest groups and thought leaders, as well as other non-state actors who advocate for the implementation of a specific policy (Brynard, 2005:661). Policies that enjoy the support of their constituents are likely to be stable and enjoy successful implementation.

### **3.4.2 Brinkerhoff and Crosby's factors in policy implementation**

Brinkerhoff & Crosby (2002: 24) recognized that the policy implementation process employs a set of tasks to be performed during implementation in order to achieve the identified policy objectives. The tasks as identified by Brinkerhoff & Crosby (2002:24) comprise of: policy legitimization, constituency building, resource accumulation, organisational design, mobilizing resources and monitoring progress and impact.

#### **(a) Policy Legitimization**

The policy needs to be seen by the stakeholders as a legitimate intervention. Individuals or groups need assert that the proposed policy reform is a necessary intervention to their problem or issues (Brinkerhoff & Crosby, 2002:25). An adequate constituency for the introduction of a policy must be developed. Those individuals or groups who will benefit from the new intervention are the constituents of a policy.

#### **(b) Constituency building**

This refers to the creation and mobilization of positive stakeholders in favor of the new policy (Brinkerhoff & Crosby, 2002:25). This will ensure support for the policy and could enable its implementation against those who oppose the policy.

#### **(c) Resource accumulation**

The policy implementation process requires policy stakeholders to facilitate and provide the necessary support to the policy being implemented. To capacitate the policy implementation stakeholders, there is a vital need to conduct adequate accumulation and allocation of resources. Policy requires human, technical, and financial resources to be put in place and to be channeled in the appropriate directions (Brinkerhoff & Crosby, 2002:25).

#### **(d) Organization design and modification**

The introduction of a new policy is likely to necessitate modifications in the organization. This may encounter resistance of the new tasks which need to be implemented. The resistance could also be towards the structural modifications that are required to execute the policy changes. New units such as policy planning, monitoring and evaluation or their advisory groups may be created which do not fit within the organization's hierarchical culture (Brinkerhoff & Crosby, 2002:25).

#### **(e) Mobilizing Resources**

Effective and efficient production as well as the efficient use of resources may also be because of the new policy. Nevertheless, it is not all policy change strategies that result in positive benefits, some may result in negative impacts (Brinkerhoff & Crosby, 2002:25).

These factors are relevant to the study as they are used in assessing secondary data in highlighting any implementation issues regarding the use of child justice courts in South Africa. The next section outlines Intergovernmental Relations, its factors, and barriers to successful interdepartmental collaboration in implementing policy.

### **3.5 Intergovernmental Relations in policy implementation**

Intergovernmental relations refer to “a set of various formal and informal processes as well as structures and institutional arrangements for cooperation when national, provincial and local spheres of government interact” (DPLG, 2007:9). Opeskin (1998:44) defines IGR as “relations between central, regional, and local government that help in the achievement of common goals through cooperation.” Intergovernmental relations aim to; (1) promote and facilitate cooperative decision-making, (2) coordinate and support priorities, budgets, policies and activities across interrelated functions and, (3) ensure a smooth flow of information within government and communities, with the ultimate aim of enhancing the implementation of policies and programs (Opeskin, 1998:44).

In South Africa, intergovernmental relations have grown popularly as a strategy employed by the government to encourage and facilitate cooperative government and decision-making by ensuring that the different policies and programs in all government spheres hearten the delivery of public services to achieve in gathering the needs of citizens in a way that is effective and efficient

(Baatjies, 2010). The principles of chapter 3 of the constitution guide all spheres of government on how they should engage in intergovernmental relations to efficiently allocate services to the citizens (DPLG, 2007:10). This requires the national, provincial and local governments to function as a whole in the execution of government plans and policies. Thus, it stipulates the involvement of departments in the implementation of a policy or legislation. One of the main aims of the CJA is to promote co-operation and collaboration between government departments and institutions exist to ensure an integrated and holistic approach in the implementation of the Act. In order for this to be achieved, section 94 (1) of the Act makes provision for the establishment of the inter-sectoral committee for child justice. The child justice court involves stakeholders from different government departments to ensure the protection and rights of children in conflict with the law are well preserved.

### **3.5.1 Factors for successful inter-departmental collaboration**

Intergovernmental relations are mechanisms used to enhance coordination and cooperation in policy implementation. The child justice court involves stakeholders from different government departments to ensure the protection and rights of children in conflict with the law are well preserved. Nevertheless, there are two factors necessary for the successful intergovernmental relations which are;

- (a) Culture cooperation, mutual respect and trust.
- (b) Capacity development relative to human/financial and technological resources (Reddy, 2001:22).

These factors are crucial to enhance intergovernmental relations for effective policy implementation.

### **3.5.2 Barriers to inter-departmental collaboration in implementing policy**

There are various factors that cause policy implementation to fail in the collaboration of inter-governmental departments and systems of which are discussed below.

- (a) **Lack of an integrated monitoring system:** DPLG (2007:11) states that the inputs, activities and entire governmental collaboration processes need to be monitored to allow the implementing agents to track the progress of the policy whilst ensuring that the policy is producing the desired results. Failure to monitor provincial and

departmental activities results to chaotic challenges in the implementations of programs that need to be delivered to the required stakeholders in the implementation progression (Ile, 2010:35).

- (b) Lack of capacity building and clarification of roles:** If policy actors are not capacitated and do not have the skills, a program or policy can be unsuccessful despite having all systems put in place. Ile (2010:35) points out that the policy implementers should have knowledge about the policy that they are implementing. Lack of knowledge and training about the policy being implemented could lead to poor service delivery, making the inter-organizational structures redundant (Ile, 2010:35).
- (c) Lack of resources:** The delivery of services requires policy stakeholders to facilitate and provide the necessary support to the policy being implemented to capacitate the policy implementation stakeholders as stated by Ile (2010:35). Policy requires human, technical, and financial resources to be put in place and to be channeled in the appropriate directions. Baatjies (2010:23) states that lack of human and financial resources can lead to implementation failure. The resources which are available must be effectively and efficiently among the policy actors used for implementation processes around the inter-sectoral departments (Baatjies, 2010).
- (d) Lack of commitment:** The commitment of policy actors results towards successful coordination and provision of services to the beneficiaries. DPLG (2007:12) states “participation and obligation are very vital to an effective and accountable system of government.” Lack of dedicated staff also hinders successful policy implementation as the staff may not be committed to what they do (Baatjies, 2010:24). According to Baatjies (2010:24), sometimes staff is available but are not fully committed to implementing the policy. Ile (2010:35) points out that “the commitment of stakeholders is influenced by a range of factors, including the context, the policy content and stakeholders’ needs and resources, level of knowledge of the policy, and their relative power and influence.” In addition, Baatjies (2010:24) states that “a high rate of absenteeism results to day-to-day implementation activities not being achieved due of staff shortages. This delays the process of implementation and can sometimes lead to poor coordination of service delivery.”

Overall, Parson (2005:45) argues that implementation that involves many stakeholders has the potential for conflict and dysfunctionalities. The research utilizes these factors and challenges outlined above as guidelines to assess and highlight any implementation issues that the child justice court face in complying with the regulations of the Child Justice Act 78 of 2008 which is one of the research questions indicated in this study. The next section discusses Street-Level Bureaucracy, the characteristics and challenges that street-level bureaucrats face.

### **3.6 Street-Level Bureaucracy**

Lipsky (1980:4-8) defines street-level bureaucrats as the people who form the link between citizens and government. Street-level bureaucrats are public servants. Street-level bureaucrats are the implementing agents; the people who put government policies into practice. Therefore, street level bureaucrats play a critical role for citizens because whatever the street-level bureaucrat delivers to the citizens, is that which the citizens get from government (Lipsky, 1980).

#### **3.6.1 Characteristics of street-level bureaucrats**

##### **(a) Strong co-operation with colleagues**

Lipsky (1980:76) is further of the view that “street level bureaucrats often have relatively good relations with other workers.” This means that the peer structures in street level bureaucracies often are quite strong. Street level bureaucrats work in isolation, but they seek and receive support from other workers.

##### **(b) Optimal utilization of resources**

Another characteristic of street level bureaucrats is that they also tend to work only on segments of the process; in the name of efficiency, convenience, or optimal utilization of resources the world of social services has become more and more specialized (Lipsky, 1980:77).

##### **(c) Alienation**

Alienation is another defining characteristic of the street level bureaucrats’ work. Remarkably this alienation “not only affects their commitment to jobs and clients, but, as it also affects the quality of their vocational experiences, it is a significant statement about public policy itself, considering the millions of people who are engaged in street level employment” (Lipsky, 1980:75). Alienation distinguishes the work done by street level bureaucrats from other jobs as there is the issue of discretion which street level

bureaucrats have to apply in respect to the services they provide to their clients (Lipsky, 1980:76). Street level bureaucrats are alienated not only from other workers but also from clients. Notably “street level bureaucrats are alienated from their clients in four particular respects in that, they tend to work only in segments of the product of their work; they do not control the outcome of their work; they do not control the raw materials of their work and they do not control the pace of their work” (Lipsky, 1980:76). Furthermore, “alienated work leads to dissatisfaction with the job [and] job dissatisfaction affects commitment to clients and to the agencies for which they work” (Lipsky, 1980:79).

**(d) Conflicting and ambiguous goals regarding tasks**

Another defining characteristic of street level bureaucrats is that they “work in jobs with conflicting and ambiguous goals” (Lipsky, 1980:79). However, “agency goals may be ambiguous because they have accumulated by accretion and have never been rationalised, and it remains functional for the agency not to confront its goals conflicts” (Lipsky, 1980:79).

### **3.6.2 Challenges of street-level bureaucrats**

Street-level bureaucrats face various challenges as they perform their day-to-day tasks which will be discussed below.

**(a) Inadequate resources**

The first one is that of scarce resources (Lipsky, 1980:29). Street level bureaucrats are expected to perform a huge task with scarce or limited resources. The scarcity of resources manifests in different forms (Lipsky, 1980:29). For example, scarce resources can be reflected in the way street-level bureaucrats have to deal with or assist a number of clients. The processes of delivering services to clients are, as a result, considerably slowed (Lipsky, 1980:29). Furthermore, if the street-level bureaucrats are not capacitated or trained to perform their jobs or duties, this will impact on their performance and undermine their ability to deal with tasks that are stressful in nature (Lipsky, 1980:29).

### **(b) Demanding working environment**

Street level bureaucrats work is often under pressure or environments where the demand for service tends to increase to meet supply (Lipsky, 1980:74). “As much as they operate under conditions of limited resources, they are still expected to be supplying or rendering services on time to their clients or citizens. The street-level bureaucrats can work under pressure and with limited resources” (Cohen & Gershgoren, 2015:269). Despite that, Lipsky (2010:2) points out that street level bureaucrats have the ability to provide benefits and allocate sanctions to the citizens. “Since they work in overwhelming environments which results in them creating coping mechanisms that create a conducive and manageable workspace and workload for them to perform their daily duties” (Lipsky, 2010:2).

Lipsky’s theory of street-level bureaucracy is used in this study to understand the experiences of the police, probation officers and legal aid officers in accessing minors into the child justice system. The next section discusses the concept of Restorative Justice, programs offered under Restorative Justice, how it is applied in the child justice system, and its principles.

### **3.7 Restorative Justice**

Restorative Justice is “an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation” (Mangena, 2015:3). According to Omale (2006:34), Restorative Justice is defined as a “systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities caused or revealed by the criminal behavior.” As opposed to simply seeking vengeance by punishing the offender, this approach seeks to restore what has been destroyed, make right the wrong, and correct the imbalance (Sherman & Strang, 2009:2). Such an approach is furthermore consistent with both formal and traditional criminal justice systems.

Restorative Justice aims to empower victims by providing them with a forum whereby their voices are heard and respected (Hand et al, 2012:458). It actively involves victims, offenders and community members in the process. They represent a shift away from a purely punitive approach and include any number of initiatives that operate within a restorative justice mind-set, philosophy



or framework (Hand et al, 2012:458). According to Roche (2002: 517), they operate in the interest of both adult and youth offenders, within and outside the criminal justice system. Criminal justice practitioners can make their work more restorative by integrating as many restorative elements as possible. This is done through diversion, which is described as “the court’s decision to permit children to remain with their parents or guardians subject to specific conditions and limitations based on clear and convincing evidence that a child is deprived or in need of treatment or rehabilitation” (Berg, 2012:47).

### **3.7.1 Programs offered under Restorative Justice to children in conflict with the law**

The following below are programs offered under restorative justice to children in conflict with the law:

- (a) Victim offender mediation (VOM):** The victim and offender may be given the opportunity to meet in a safe and structured setting to engage in a discussion about the crime committed against the victim with the assistance of a trained mediator (Mangena, 2015:6). The victim participates in the process on a voluntary basis from the beginning to the end of the VOM. The mediator merely facilitates the discussion which encourages the offender to learn about the crime’s impact and to take responsibility for harm caused by the offence (Hand et al, 2012:461).
- (b) Family and Victim Offender Group Conferencing (FGC and VOC):** This process brings together the victim, offender, and family, friends and key supporters of both in deciding how to address the aftermath of the crime (Mangena, 2015:6). This aims to afford the victim an opportunity to be directly involved in responding to the crime, increasing the offender’s awareness of the impact of his or her behavior and providing an opportunity to take responsibility for it (Mangena, 2015:6).
- (c) Dialogue, Peace and Sentencing Circles:** According to Hand et al (2012:461) these are restorative justice processes designed to develop consensus among the stakeholders including victims, community members, offenders, judicial officers/judges, prosecutors, legal aid officers, police and court workers on an appropriate outcome that addresses the concerns of all interested parties. Skelton (2013:124) adds that these sentencing circles and dialogue promote healing of all affected parties, giving the offender the opportunity to make amends.

### **3.7.2 Application of Restorative Justice in the child justice process**

Clark (2012:80) states how Restorative Justice can be used at the following stages of criminal justice process:

- (a) Pre-Reporting:** disputes between parties that have potential to escalate to criminal or civil process can be dealt with through Restorative Justice processes or program. This could include victim support work done before formal intervention in the Child Justice Court (Clark, 2012:80).
- (b) Pre-Trial:** Restorative Justice processes or programs can be adopted after the charge has been laid and before the trial date. The prosecutor may decide to refer the matter for Restorative Justice and accept an agreement that is reached thus for example, diverting the case from the formal court hearing. If there is no agreement the matter may be referred to the child justice court (Clark, 2012:80).
- (c) Pre-Sentence:** Restorative Justice process or program can be included as part of the sentencing process. This can inform the actual sentence arrived at, with various outcomes being stated as conditions of a postponed or suspended sentence (Clark, 2012:80).
- (d) Post-Sentence:** Restorative Justice process or programs may be introduced after the sentence has been passed in the child justice court or as part of a correctional program for rehabilitation, reintegration or prerelease program (Clark, 2012:80).

### **3.7.3 Principles of Restorative Justice in South Africa**

In the sphere of restorative justice, South Africa has made a name for itself and has gained a global reputation. Skelton (2013:126) outline the values and principles of Restorative Justice below;

- (a) “Restorative Justice processes must comply with the rule of law, human rights principles and the rights provided in the South African Constitution
- (b) All parties (especially victims and offenders) must be provided with complete information as to the purpose of the process, their rights within the process and the services rendered to them.
- (c) All Restorative Justice processes should involve careful preparation of the participants in processes and programs, including legal representatives.

- (d) Referral to Restorative Justice processes is possible at any stage of the criminal justice system, with particular emphasis on pre-trial diversion, plea and sentence agreements, pre-sentence process, as part of the sentence, and part of the reintegration process, including parole.
- (e) Victims and offenders should be allowed access to legal advice at any stage of the proceedings.
- (f) All the role-players who are responsible for the facilitation of Restorative Justice processes should be adequately trained or experienced.
- (g) Restorative Justice programs should be monitored (through internal processes) and evaluated (through independent research) to promote continuous improvement.
- (h) Restorative Justice programs should have documented procedures for the management of disclosures relating to other offences.
- (i) Duration of all court proceedings and detention should occur in the shortest time possible in safeguarding the best interest of the child” (Skelton, 2013:126).

Section 1(1) of the Child Justice Act 75 of the 2008 defines Restorative Justice as “an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.” Under section 1 (1) of the Act’s aims is to expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed and to assist with the rehabilitation and the reintegration of the child offender back into his/her family and society so that he/she can grow up to make a useful contribution to society. The Restorative Justice concept is used in this study to assess the child justice court’s procedures and processes in dealing with children in conflict with the law by examining the experiences of the child offenders in the court which is the first research questions in this study.

### **3.8 Conclusion**

This chapter has presented the conceptual and theoretical frameworks of the study. The chapter described public policy as a process where government decides whether to act or not to solve a specific problem. It describes the types of public policies and classifies the Act as a regulatory

policy. The chapter presented the policy cycle consists of several stages, one of which is policy implementation, simply defined as the transformation of what is written down in policy documents into reality. The 5C protocol or variables that affect policy implementation are; content, context, capacity, commitment and clients/coalitions. Brinkerhoff & Crosby's set of task of implementing policy comprise of: policy legitimization, constituency building, resource accumulation, organisational design, mobilising resources and monitoring progress and impact.

The chapter also presented Intergovernmental Relations in line with policy implementation which provides for the establishment of intergovernmental structures as well as the promotion of co-operation and collaboration between government departments and institutions in implementing the CJA. The barriers regarding interdepartmental/co-operation of departments are lack of integrated monitor structures, lack of capacity and clarification of roles in provinces, lack of resources and lack of commitment. Street-level bureaucrats were defined in the chapter as the people who form the link between citizens and government, and the challenges that they faced is scarce resources and working under pressure. Restorative Justice is a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities and examples of restorative programs include victim offender mediation and group conference.

## **CHAPTER 4**

### **POLICY AND LEGISLATIVE FRAMEWORK FOR THE CHILD JUSTICE SYSTEM**

#### **4.1 Introduction**

As children committing felonies became an issue of global concern, an increasing number of nations began to look for ways to remove child offenders from the adult criminal court system. It became imperative for nations around the world to develop an international framework which would guide nations in establishing their own child justice systems since children are regarded as one of the most vulnerable groups of people in the society. Wakefield (2011:168) states that currently, there is a wide range of international and regional instruments that are designed to protect children in conflict with the law given their vulnerability. This chapter looks at the policy and legislative framework of the child justice courts and the rights of children in conflict with the law. Various legal frameworks are outlined and discussed beginning with frameworks at the international level, an example of which is United Nations Convention of the Rights of the Child (UNCRC) of 1989. This is followed by outlining the African Charter on the Rights and Welfare of the Child (ACRWC) of 1990 which is at regional level and the chapter ends by looking at South African frameworks such as the Children's Act 38 of 2005, Child Justice Act 78 of 2008 and the National Policy Framework of Child Justice (2018). Therefore, this chapter answers the following research questions:

- (a) What is the legislative framework for the child justice court?
- (b) What are the structures, systems and processes involved in the implementation of the Child Justice Act 78 of 2008 in regard to Intergovernmental Relations?

#### **4.2 International guidelines Agreements and Conventions on Child Justice**

The idea for a separate child justice system has its roots in the United States of America with the passage of the Juvenile Court Act (1899) in the state of Illinois. This is also discussed in the literature review chapter. Due to the early developments of the Child Justice System in the USA, it influenced the development of international norms and standards on child justice standards which are enshrined in several international instruments (Whitehead & Lab 2013:26). The international frameworks for child justice discussed in this chapter are; International Covenant on Civil and Political Rights (ICCPR) of 1996, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) of 1985, United Nations Convention of the

Rights of the Child (UNCRC) of 1989, United Nations Guidelines for the prevention of Juvenile Delinquency (Riyadh Guidelines) of 1990, United Nations Guidelines for the prevention of Juvenile Delinquency (Riyadh Guidelines) of 1990 and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNJDL Rules) of 1990.

#### **4.2.1 The International Covenant on Civil and Political Rights (ICCPR) of 1966**

The ICCPR was adopted by the general assembly of the United Nations in 1966 which outlines the basic standards on child justice and made provisions in terms of the management of child justice (Wakefield, 2011:169). Article 10(2) (b) of the ICCPR puts emphasis on the separation of accused child offenders from adults as well as the speedy adjudication of their cases. It further stresses that states should institute trial procedures for child offenders that would take account of the offender's ages and the desirability of upholding their rehabilitation. The ICCPR prohibits the death penalty as a sentence on offenders below the age of 18 years on article 10 (3) (a). However, despite the ICCPR covering some aspects of child justice, there was a need to have an all-encompassing framework on child justice at international level which states could utilize for guidance in establishing and operating their own national child justice systems (Wakefield, 2011:169). The need for such a legal instrument manifested itself in the UNCRC and ACRWC which are discussed later in the chapter.

#### **4.2.2 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) of 1985**

These rules were adopted by the UN in Beijing in China in 1985. Rule 5.1 states that “*the Juvenile Justice System shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence.*” This is a very important principle as it provides for the welfare of the young offenders. Rule 14.2 and Rule 15.1 of the Beijing Rules state that judicial proceedings must aim to serve the best interest of the child and has the right to be legally represented in the court. Rule 15.1 further stresses the importance of continuous and specialized training for police officers who deal with children. These provisions are to ensure that police officers are equipped with knowledge on how to effectively administer child justice programs. The provisions also state that the release of a child should be considered as soon as possible following arrest and further states that a judge or other competent official/body (for example, a magistrate or police officer) shall without delay consider

release of a juvenile who is arrested. Rule 30 concludes that research and evaluation of newly developed child justice systems are imperative to constantly develop in order to meet the changing realities.

#### **4.2.3 United Nations Convention of the Rights of the Child (UNCRC) of 1989**

The UNCRC is the key international legal instrument for the protection of children's rights. "Most of the extensive enunciation of the international standards relating to the protection of children's rights has been made possible by the UNCRC" (Wakefield 2011:171). The UNCRC entreates States Parties to respect and to accord each child within their perquisite to the enjoyment and protection of the rights enshrined in the convention without discrimination of any kind, which is highlighted in Article 2. Article 37 (b) of the UNCRC further state that at no time should a child be deprived of his/her liberty unlawfully or arbitrarily. Should a child be arrested, detained, or imprisoned it shall be in conformity with the law and shall be used as the only as a measure of last resort and for the shortest appropriate period of time. However, should a child be deprived of his/her liberty, he/she shall be treated with humanity and respect for inherent dignity of the human person, and in a manner which takes into cognizant the needs of persons of his/her age. Every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his/her family through correspondence and visits, save in exceptional circumstances, (UNCRC, Article 37). Though most of the articles recognizes the use of diversionary measures in handling children in conflict with the law, article 40 of the UNCRC stipulates that such a child shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his/her liberty before a court of law and to a prompt decision on any action. In addition, article 40(3) of the UNCRC urges countries to institute applicable legislations which precisely handle child offenders. Therefore, being a signatory to the ratification of the UNCRC, means that South Africa agreed to abide by the signed treaty which include developing a specialized legal framework and infrastructure such as child justice courts to cater for children accused of crimes.

Basing on what is illustrated above, it is imperative to note that the UNCRC is the cornerstone of child justice. This is because it is premised on the principle of 'best interest of the child' which encompasses all the needs of the child as it only demands for a service that puts the needs of the child first. This means that, countries that are parties are obliged to promote the establishment of

laws, procedures, authorities and institutions specifically applicable to children who are in conflict with the law.

#### **4.2.4 United Nations Guidelines for the prevention of Juvenile Delinquency (Riyadh Guidelines) of 1990**

The Riyadh Guidelines were first elaborated at a meeting held by the Arab Security Studies and Training Center (ASSTC) in Riyadh and thus designated as the Riyadh Guidelines (Winterdyk, 2015:35). It is further indicated by Martin (2005:24) that the Riyadh Guidelines were adopted by the UN General Assembly in 1990 as a response to the question of what to do about children committing criminal offences within the context of development. The Riyadh Guidelines offer a comprehensive and proactive approach to prevention of delinquency and the social reintegration of children at risk of being abandoned, neglected and abused. Guideline 58 states that “*law enforcement and other relevant personnel, of both sexes, should be trained to respond to the special needs of young persons and should be familiar with and use, to the maximum extent possible, programs and referral possibilities for the diversion of young persons from the justice system.*” This provision is significant in that it takes cognizance of the necessity to respond to the needs of children in conflict with the law, thus providing programs that help them to be responsible citizen and re-integrate them with the community through judges, police officers and social workers being trained and equipped with knowledge on the rights of offenders.

#### **4.2.5 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNJDL Rules) of 1990**

These rules were adopted by the General Assembly in December 1990 (Martin, 2005:26). They aim to ensure that juvenile detainees and offenders receive fair treatment which is considerate of their age and stage of development (Martin, 2005:26). The JDL Rules support the CRC in its provision that imprisonment should always be used as a measure of last resort. The detention of juveniles before trial at a child justice court is also discouraged. Rule 17 states “*detention before trial shall be avoided to the extent possible and limited to exceptional circumstances.*” This necessitates the use of different forms of alternative sentences which are non-custodial. Rule 38 and 39 provides for accessibility of education to all children in conflict with the law. Regarding children of compulsory school age, the rules state that such education must be provided outside of the detention facility (Martin, 2005:26). Thus, children of compulsory school going age should not



be detained but released into the care of their parents and be provided with possible diversionary options which will encourage them to take responsibility for their wrongful actions and learn skills which will help enforce law-abiding behavior. The next section discusses the African framework on Child Justice which is highly influenced by the previous international frameworks discussed above.

#### **4.3 African frameworks on child justice**

At a regional level, The African Charter on the Rights and Welfare of the Child (ACRWC) is a major legislative legal instrument that voices out on the protection of children's right. It was adopted by the Organization for African Union (OAU) now referred to as Africa Union (AU) assembly of heads of state and government in July 1990. "South Africa ratified it on 7<sup>th</sup> of January 2000" (Badenhorst, 2015:22). The African Charter increases the protection of children in numerous areas. For example, article 17 of the Charter concerns the administration of juvenile justice and advocates for separate legislations and infrastructures in dealing with juveniles. Article 17(2)(c) further states that *"all juveniles have the right to special treatment, in a manner that does not undermine their dignity and that torture, inhuman or degrading treatment or punishment is prohibited and that juveniles should be kept separately from adult prisoners."* The next section discusses the South African frameworks which comply to the some of the international frameworks highlighted.

#### **4.4 South African frameworks for child justice**

The juvenile justice landscape in South Africa has undergone numerous reforms and influences up to date. Historically, youth offenders accused of crimes received no special treatment, instead they received the same treatment as adult offenders. The democratization of South Africa in 1994 resulted in legislative changes in respect of children who found themselves in conflict with the law. The changes in legislation were necessary since children were previously dealt with in terms of the medical model and were "treated", punished, or labelled for their misbehaviors and transgressions. This implied a paradigm shift from the retributive system with a focus on punishment to a restorative justice approach, which promoted accountability and reconciliation.

#### **4.4.1 Criminal Procedure Act of 1977**

Prior to 1994, the Criminal Procedure Act of 1977 was developed in managing all matters related to criminal law, including that of child offenders. The law provided the legislative framework and procedure for the effective management of criminal matters. Sections 77, 78 and 79 of the CPA provide for procedures relating to the management of court processes and custody of remand detainees where mental illness affects the criminal proceedings. As South Africa transformed into a more democratic country during the mid-1990s, the Act was amended to be more accommodating to the needs of child offenders. Key aspects that reflected this transformation included the creation of child justice courts at district magistrate court level that were separate from other criminal courts, the creation of after-hours courts to minimize the time spent by young offenders in police custody and the greater use of diversion options for first-time child offenders. The Act however had its limitations, in that it did not ensure consistency and fairness in the management of children as offenders in the child justice system. For example, Section 77(6)(a) does not allow a presiding officer to: *(i) Determine whether an accused person continues to be a danger to society; (ii) evaluate the individual needs or circumstances of that person; or (iii) consider whether other options are more appropriate in the individual circumstances of the accused.* As a result, section 77 has a particularly harsh impact on children because the presiding officer has no discretion to consider alternative options such as the range of diversionary options set out in section 53 of the Child Justice Act 75 of 2008.

#### **4.4.2 Constitution of Republic of South Africa of 1996**

The preamble of the Constitution of the Republic of South Africa acknowledges the injustices of the past, especially for children in conflict with the law including those who died in detention owing to the absence of proper protection. It is for this reason that the authors of the constitution deemed it fit to dedicate section 28 of the Constitution to children, including those who are in conflict with the law. Section 28 focuses on the basic principles of human rights of children and reinforces principle of ‘the best interest’ of the child. Section 28 (1) (h) of the constitution indicates that *“every child has a right not to be detained, except as a measure of last resort and that children have a right to special protection and interventions that respect their age and development.”* This portion of the constitution provides for the protection of children including those who are in conflict with the law and it makes an important provision regarding the use of imprisonment as a measure of last resort. This is consistent with the provisions of the CRC, which also advocate that

imprisonment should be used as a measure of last resort. Section 28(1)(a) emphasizes the separation of children from adult offenders, while section 28(1)(b) stresses that children must be treated in a manner suitable to their age and kept in conditions which take into account of the child's age, while Section 28(1)(h) requires that the state, at their expense, must assign a legal practitioner to the child, in civil proceedings affecting the child in the court.

#### **4.4.3 The White Paper for Social Welfare (1997)**

The White Paper for Social Welfare (1997) provides specific guidelines aimed at the providing children offenders with social services (Roestenburg and Oliphant, 2012). It states that *“juveniles are connected to their families, communities and their culture, thus, there is a need to provide rehabilitative services which should aim to strengthen these ties. It also states that diversion and effective alternative sentencing programs aimed at preventing reoffending should be developed from within the community”* (White Paper for Social Welfare, 1997). These programs are aimed at reducing the overall rate of crime in SA. The White Paper provide awareness to preserve family and community ties to help child offenders escape criminal offending behavior, and for the Child Justice Courts to offer diversion programs, which are central to these efforts as they also enforce the strengthening of these ties in families and communities. The White Paper for Social Welfare (1997) supports the provisions of the Constitution of the Republic of SA and the CRC in its agreement that children should be held in custody only as a measure of last resort. It also supports the provisions of the Child Justice Act by stating that children in conflict with the law should be released into the care of their parents or guardians to await trial in their homes instead of awaiting trial in prison (White Paper for Social Welfare, 1997). Regarding diversion services, the White Paper states that: *“child offenders should be diverted away from the CJS as way of complying with the Beijing Rules; Welfare and other organizations will make arrangements regarding the development and rendering of diversionary services and; the Department of welfare will support the development of legislation that will legitimize diversion in all magisterial districts”* (White Paper for Social Welfare, 1997). The results of the latter provision are seen in the enactment of the Child Justice Act of 2008, indicating that suggested recommendations in the White Paper are receiving consideration and monitoring.

#### **4.4.4 Probation Services Amendment Act 35 of 2002**

The Probation Services Amendment Act 35 of 2002 was signed into law by the president in 2002, falling under the Ministry of Social Development who are responsible for appointing probation officers (social workers who specialize in crime prevention and treatment of offenders). The Probation Services Amendment Act provides a legislative framework for a range of activities provided for by the Probation Services Act No. 116 of 1991. Section 3 and 4 of the Amendment Act states the role of probation officers where they are signed to provide the establishment of restorative justice programs, investigate the circumstances of an accused person and the provision of a pre-trial report on the desirability, or otherwise, of prosecution. Section 4 specifically focuses on the role of the probation officer to provide mandatory assessment of every arrest child who remains in custody before his or her first appearance in court. The Probation Services Amendment Act is not the only legislative framework that looks into probation officer's duties, the Child Justice Act 75 of 2008 also reinforces the role of probation officers with emphasis on assessment which are further outlined in the CJA section.

#### **4.4.5 Correctional Services Act 111 of 1998**

The Act allows for the detention of children in prison but makes it clear that all children younger than 14 may not be held in prison. The Act also makes reference to ensuring opportunities for young, imprisoned offenders to receive further education and training during the period that they are in prison. Imprisonment of child offenders is taken as a last resort. The detention of children in correctional centers should only be used as a measure of last resort as set out in section 28(1)(g) of the Constitution. The following below are the guidelines it has in regard to dealing with children in conflict with the law;

- (a) *“Children must at all times be detained separately from adults, this includes during the transportation of inmates”* (Section 7).
- (b) *“Children must also be detained in accommodation that is appropriate to their age”* (Section 7).
- (c) *“When a child is admitted to a correctional centre or having been transferred from one correctional centre to another, the Department of Correctional Services must inform the necessary authorities who have a statutory responsibility towards the education and welfare of children”* (Section 13{6}{c}{i}).

#### **4.4.6 Children's Act 38 of 2005**

The Children's Act 38 of 2005 is a comprehensive addition to the general child rights framework. The Act encompasses a range of different child-law issues and measures, including the establishment on children's courts. According to Section 42 (8) of the Children's Act 38 of 2005 states that; *"the children's court hearing must, as far as practicable, be held in a room which;*

*(a) furnished and designed in a manner aimed at putting children at ease*

*(b) conducive to the informality of the proceeding and the active participation of all persons involved in the proceedings, without compromising the prestige of the court*

*(c) not ordinarily used for the adjudication of criminal trials and*

*(d) is accessible to disabled persons and persons with special needs."*

The social worker who has assessed the child plays a critical role in making sure that the matter is converted from criminal court to children's court. It is worth noting that child justice courts are different from children's courts, which are established in terms of the Children's Act 38 of 2005. Children's courts are aimed at protecting the general welfare and well-being of children. This includes the care, support and adoption of children, as well as the care of children in care centers and similar institutions. Section 45(2) specifically declares that *"a children's court does not have jurisdiction to try any person on a criminal charge."* Though noting that these sections of the Children's Act do not specifically deal with children in conflict with the law per se, however, the Act stipulates any matter involving a child which may include a criminal matter. The relevance of this Act in the management of children in conflict with the law is the provision in the Act that allows for the conversion of criminal matters involving children from criminal court to children's court as well as proceedings, actions or decisions made by state actors which concern children.

#### **4.4.7 Child Justice Act 75 of 2008**

The Child Justice Act 75 of 2008 became operational on the 1st of April 2010 after many years of civil society engagement and parliamentary reviews (Badenhorst, 2015:34). The Act deals with issues such as age and criminal capacity, pre-trial detention, pre-trial assessment, preliminary enquiry, diversion, the child justice court, sentencing, legal representation, and the expungement of records. Section 15 of the Act applies to three categories of children: children below the age of

10 years, children older than 10 years but younger than 18 years, and individuals older than 18 years but younger than 21 years. The Act establishes a criminal justice system for child accused, separate from the criminal justice system, which continues to apply for adult accused. While the Act primarily aims to keep children out of detention and away from the formal criminal justice system mainly through diversion, the Act provides for child offenders to be tried and sentenced in child justice courts. The CJA makes provision regarding the role of key-players (police, probation officers and the Legal-Aid), preliminary inquiry process and trial in courts.

#### **(a) Street-level bureaucrats in the child justice courts**

There are various key players involved in the different stages of the policy making process (Cochran and Malone, 2010:269). The CJA identify key role-players that deal with accessing minors in the court and each role player have roles and responsibilities in the child justice environment.

##### **i. Police**

Section 33(2)(c) of the CJA provides that when children are transported to and from court, they must be kept separate from adults but only as far as is reasonably possible. If they are not, then the police official must provide reasons to the presiding officer. In terms of section 33(1) and (2), no child may be subjected to wearing leg-irons when they appear in court. Also, they must be kept separate from adults in the holding cells, and girls be kept separately from boys.

##### **ii. Probation officer**

Section 35 of the Child Justice Act provides guidelines for a probation officer on fundamental areas to address during assessment which include; *“To collect information about any previous conviction, previous diversion or pending charge in respect of the child and Determine whether a child is in need of care and protection.* “The courts have consistently held that pre-sentence reports by probation officers are necessary for sentencing purposes (Sloth-Nielsen, 2014:140). The Act now confirms this by requiring, in section 71(1)(a), that a child justice court must request a pre-sentence report from the probation officer before imposing a sentence.

### **iii. Legal Aid**

Chapter 11 of the CJA seeks to give effect to section 35 of the Constitution which accords certain rights to detained persons and persons accused of committing crimes. Section 35(2) states that everyone who is detained, including every sentenced prisoner, has the right to *“have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”* Likewise, section 35(3) accords every accused person the right to a fair trial which includes the right to *“choose and be represented by a legal practitioner and to be informed of this right promptly”* and to *“have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”*

### **(b) Processes and systems in the child justice court**

#### **i. Preliminary Inquiry**

In order to facilitate and manage children who come into conflict with the law, Section 43 of the Act focuses on the preliminary enquiry which is aimed at preventing children from getting lost in the system, and to ensure that an individualized response is used in each case. It is usually at the assessment and preliminary inquiry phase that the decision to divert a child is made. Section 48(2) of the CJA states that at the beginning of a case, a preliminary inquiry will be held within 48 hours of the child’s arrest, before the first court appearance. The preliminary inquiry will be attended by different people, such as: magistrate, child offender, parents of the child, prosecutor, probation officer, arresting police officer and a legal aid attorney as stated in section 44 of the Child Justice Act. In the event where a child in conflict with the law is not diverted, his or her case may be referred to the Child Justice Court for trial and sentencing. Section 47 to 48 display the legal steps that should be followed when a child is suspected of committing an offence:

- (a) *“A child is suspected to have committed an offence will be apprehended by the police and depending on the seriousness of the alleged offence the child may be warned, summoned or arrested to appear at a preliminary inquiry.*
- (b) *The child and his/her parents or care givers will be informed of the charges against the child, the child’s rights; the immediate procedures to be followed and the date, time, place where the child must appear in court.*

- (c) *Every child who is alleged to have had committed an offence must be assessed by a probation officer.*
- (d) *The parent or care givers or police bring the child to court.*
- (e) *A preliminary inquiry will be held to inquire into the matter and to decide on how the appropriate way to deal with the child.*
- (f) *At the preliminary inquiry; if the child is in need of care or protection, the matter will be referred to the children's court which will determine suitable interventions. If the child accepts responsibility, it may be recommended at the preliminary inquiry that the child be diverted. If the child does not complete or comply with the diversion, he/she will be brought back to court. If no diversion order is made by the court or the child is not found to be a child in need of care and protection the case is referred to the Child Justice Court for trial. If the matter has been referred for trial in the Child Justice Court, the preliminary inquiry magistrate will decide on the detention or release of the child pending the finalization of the criminal case."*

ii. **Trial in court**

The Child justice Act defines a child justice court as *"any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child."* A child justice court is tasked in terms of Section 63(4)(a)(b) of the Child Justice Act to ensure that *"the best interests of the juvenile are upheld during the proceedings."* The court must thus elicit any additional information relevant to the case, and must ensure that during all stages of the trial *"the proceedings are fair, and not unduly hostile; and are appropriate to the age and understanding of the juvenile."*

Regarding sentencing, Section 66(1) of the CJA expressly states that *"a child justice court must conclude all trials of juveniles as speedily as possible; and must ensure that postponements are limited in number and duration"* in section 66(1) of Act 75 of 2008. The child justice court must, after the conviction of a juvenile, impose a sentence in accordance with the CJA. Section 69 of the CJA expresses the objectives of sentencing in a child justice court as:

- (a) *"Encouraging accountability;"*



- (b) *“Promoting individualised sentencing by application of proportionality principles;”*
- (c) *“Promoting reintegration of the child into the family and community;”*
- (d) *“Ensuring that rehabilitation conditions specified in the sentence assist in communal*
- (e) reintegration;” and*
- (f) *“Using imprisonment only as a measure of last resort and for the shortest possible*
- (g) period.”*

The CJA encourages the imposition of combined sentences to give effect to the objectives of the sentencing outline above. According to Terblanche (2016: 3), this section effectively amounts to the "jurisdictional" provision of the new child sentencing system. *“It not only mandates child justice courts to impose their sentences in terms of the Act, but also provides the first set of boundaries (or the first part of the framework) within which sentencing should take place”* (Terblanche, 2016: 3)

#### **4.4.8 National Policy Framework on Child Justice (2018)**

Section 93(1)(a) to (d) of the CJA requires that the Cabinet member responsible for the administration of justice (currently the Minister of Justice and Correctional Services) must, after consultation with those Cabinet members responsible for Safety and Security, Correctional Services, Social Development, Education and Health, hence the establishment of the National Policy Framework (NPF). The NPF is an overarching framework for the implementation of the Act with as aim to ensure a uniform, coordinated and co-operative approach and is supported by relevant national directives, standing instructions, standing operating procedures, guidelines, and circulars of the relevant government departments and institutions concerned. This is the same principles of chapter 3 of the constitution which guide all spheres of government on how they should engage in intergovernmental relations to efficiently allocate services to the citizens (DPLG, 2005:3). Below is a table that describes the government structures that play a role in the implementation of the CJA.

**Table 2 Government structures for the implementation of the Child Justice Act 75 of 2008**

<p><b>Justice Crime Prevention and Security (JCPS) Inter-Ministerial Committee</b></p> <ul style="list-style-type: none"> <li>• Responsible for the monitoring of the Act's implementation</li> <li>• Tables annual Reports on the implementation of the Act in Parliament</li> </ul>
<p><b>Directors-General Intersectoral Committee on Child Justice (DGs ISCCJ)</b></p> <ul style="list-style-type: none"> <li>• Promotes co-operation and collaboration between government departments and civil society to establish an integrated and holistic approach to the implementation of the Act</li> <li>• Members consist of the Director-Generals, National Directors and National</li> </ul>
<p><b>Commissioners of governmental Departments responsible for child justice</b></p> <ul style="list-style-type: none"> <li>• Meetings are held bi-annually (minimum)</li> <li>• National Operational Intersectoral Committee on Child Justice (OP ISCCJ)</li> <li>• Act as an advisory and support structure for the DGs ISCCJ to ensure the effective implementation of the Act</li> <li>• Members consist of the National Departments, Provincial Child Justice Fora (PCJF) and representatives of relevant Civil Society Organizations</li> <li>• Meetings are held bi-monthly</li> </ul>
<p><b>Provincial Child Justice Fora (PCJF)</b></p> <ul style="list-style-type: none"> <li>• Ensure the effective monitoring and implementation of the Act on provincial level</li> <li>• Members consist of National Departments, Provincial Child Justice Fora (PCJF) and representatives of relevant Civil Society Organizations</li> </ul>

(Department of Justice and Constitutional Development, 2020:10)

The NPF states that implementation and monitoring of the Act is thus dependent on the close collaboration between respective departments that are tasked with rendering services to children in conflict with the law, namely the Departments of Justice and Constitutional Development (DJCD), Correctional Services, Social Development, Basic Education and Health, as well as Legal Aid South Africa and the National Prosecuting Authority (NPA). *“This need for collaboration between government departments, and between government departments and the non-*

*governmental sector and civil society highlights significant changes made by the Act in the manner in which children's cases are managed"* (National Policy Framework on Child Justice Act, 2018:27). The NPF is aligned to the broad objectives of the CJA, and in particular relative to the following:

- a) *"Protecting the rights of children as provided for in the Constitution, 1996;*
- b) *promoting the spirit of ubuntu in the child justice system;*
- c) *providing special treatment for children in the child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults;*
- d) *preventing children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion, and*
- e) *promoting co-operation amongst government departments and between Government departments and the non-governmental sector and civil society to ensure an integrated and holistic approach in the implementation of the Act"* (National Policy Framework on Child Justice Act, 2018:9).

#### **4.5 Conclusion**

The purpose of this chapter was to discuss the international, regional and national legal instruments that ensure the promotion of child justice and the protection of children in conflict with the law. The United Nations were instrumental in the formulation of treaties and conventions that resulted the establishment of a child justice system. Legal frameworks such as the UNCRC and the Riyadh Guidelines highlight instituting infrastructure and skilled personnel specifically in dealing with children in conflict with the law. The development of international instruments served as a guide towards the treatment of child offenders in South Africa. This chapter answers the first research question regarding the legislative framework of the child justice court which is the Child Justice Act 75 of 2008 and highlights the developments in South Africa regarding the child justice system which have created an enabling environment for role players to act "in the best interest of the child" within the criminal justice system. The separation of children from adult offenders, the detention of children as a measure of last resort and for the shortest possible period are some of

the key provisions indicated in the CJA. For the Act to be implemented will depend on the effective co-operation between government departments such as the Department of Justice and Constitutional Development, Department of Social Development and Department of Correctional Service which answers the second research question.

## **CHAPTER 5**

### **FINDINGS AND ANALYSIS**

#### **5.1 Introduction**

This chapter presents the findings and analysis of the research. The aim of this study is to investigate the implementation of the Child Justice Act 75 of 2008 to see whether the child justice courts are operating in accordance with the legislative mandate (Child Justice Act 75 of 2008) in South Africa and to present a policy analysis of the implementation issues of the Act in the child justice courts. The study sought to answer the following key research questions:

1. What is the legislative framework for the child justice court?
2. What are the structures, systems and processes involved in the implementation of the Child Justice Act 78 of 2008 in regard to Intergovernmental Relations?
3. What are the experiences of street level bureaucrats in implementing the Child Justice Act 78 of 2008 in relation to accessing minors to the child justice court?
4. What are the experiences of children in conflict with the law in relation to child justice courts?
5. What are the implementation issues that the child justice court face in complying with the regulations of the Child Justice Act 78 of 2008?

Chapter 4 in this thesis provided an analysis of the frameworks for the child justice system in South Africa using primary and secondary documents to provide findings to the first two research questions.

This chapter presents the finding for research questions 3, 4 and 5. The findings are drawn from secondary South African studies on child justice courts. In particular, the study used published studies in journals such as Schoeman & Thobane (2015), Wakefield (2015), McGrann & James (2010), Waterhouse (2020), Badenhorst (2015), Tarichia,(2018), Courtenay & Hansungule (2014), Townsend et al (2014) and Muntingh & Ballard (2016). Government reports from DJCD were used in the study. In addition, reports from NGOs such as NICRO, Save the Children, UNICEF and RAPCAN were used in the study.

## **5.2 Implementation of the Child Justice Act 75 of 2008**

The implementation of the Child Justice Act 2008 involves several stakeholders (both private and public) taking action to pursue policy goals. This section outlines the factors that affect policy implementation and specifically explores the barriers to inter-departmental collaboration in implementing the Child Justice Act 2008.

### **5.2.1 Factors impacting on policy implementation**

The secondary studies' findings are analyzed below using the 5C protocol and Brinkerhoff & Cosby's set of task factors.

#### **(i) Clients and Coalitions**

Brynard, (2005:661) refers to clients and coalitions as groups or organizations whose interests are enhanced or threatened by the policy. Wakefield (2015:09) reveals that there is a huge involvement and contribution from non-governmental organizations to ensure a holistic approach in the implementation of the Act, especially on the functioning of the child justice courts.

*“Amnesty International and SANCRC are providing expertise in collaboration with the department of Social Development and Department of correctional services in supervising Ethokomala Reform School (Mpumalanga), Bloemfontein Secure Care Centre, and Bhisho Child and Youth Care Centre regarding the process of the case of children who have committed offences and are waiting for their trials to be processed” Wakefield (2015:09).*

Amnesty International is an international NGO that aims at the protection of human dignity and advocates for the rights of marginalized group of people including children while the South African National Child Right Coalition (SANCRC) is a civil society organization that advocate for a stronger system of child rights governance, an effective national childcare and protection system in South Africa (McGrann & James, 2010:272).

In addition, the Inter-Departmental Annual report on the Implementation of the Child Justice Act (2021:22) states that the Child Justice Alliance focused on several activities after the first year of the implementation of the Act.

*“Child alliance facilitated workshops and produced research reports to child and youth care centre heads and provincial coordinators of where these that specifically have children detained and sentenced to its facilities (previously reform schools). The purpose of this workshop was to discuss with the child and youth care centre heads, the presiding officers at the child justice courts, the provisions related to the sentencing of children to child and youth care centres and their mandate in ensuring that the best interests of children are taken into account when presiding officers deal with the trials of child offenders.” DJCD (2021:22)*

NICRO, another NGO which specializes in social crime prevention and offender re-integration for adults and children has also been integrally involved in the child justice system and collaborates with the Department of Justice and Constitutional Development and the Department of Social Development. Smit Arina, the program Director for NICRO made a presentation at International Expert Consultation on Restorative Justice for Children in Indonesia (2013) and stated that;

*“Our offices in Bellville, Malfikeng, Paarl, De Aar, Midlands and Benoni are no longer operational due to children not been kept in the stationed youth care centres. The fifth annual report on the implementation of the Act does not mention why children are held in police lockup or what this means.....within the broader context of awaiting trial children, it is clear that child and youth care centres are the preferred custodial method according to the act so that they go the court to get diverted. The drop in the number of children entering the child justice system and the resulting to drop in the number of children being diverted also affects the sustainability of the diversion services provided for by NICRO and other Civil Society Organisations” Arina (2013).*

## **(ii) Resource accumulation**

Brinkerhoff & Cosby points out that the policy implementation process requires several policy stakeholders to facilitate and provide the necessary support to the policy being implemented. Courtenay & Hansungule, (2014:151) noted that different government departments needed

resources for implementing the CJA to achieve its' intended objectives and saw the government taking that path.

*"The Parliamentary Portfolio Committees on Justice and Constitutional Development and Correctional Service presented a budgetary allocation on the establishment of national and provincial governance child justice structures. They also emphasized on the efforts to build the staff capacity if the Child Justice Act is to be implemented effectively. This included the additional appointment of 111 SAPS officials, 50 legal aid attorneys and 100 probation officers to all over the country and they will have to undergo training"* Courtenay & Hansungule, (2014:151).

### **5.2.2 Barriers to inter-departmental collaboration**

Various government departments (DJCS, DSD, DCS and NPA) work together in the implementation of the CJA in attempts to preserve the rights of children in conflict with the law in accessing the child justice court. The ISCCJ is charged with the responsibility to manage all implementation operations of the child justice courts as indicated by NPF in the policy and legislative framework chapter of this study. Section 9(1) of the Child Justice Act provides a supportive mandate for co-operation and collaboration between different government departments. This discussion below presents barriers to interdepartmental cooperation in the implementation of the Act.

#### **(i) Lack of an integrated monitoring system**

Ile (2010:35) states that failure to monitor provincial and departmental activities results in chaotic challenges in the implementation of programs that must be deliver to the required stakeholders in the implementation progression. Waterhouse (2020) in one of his parliamentary reviews on the implementation of the Child Justice Act found that there was no data regarding the success and challenges of the implementation of the Child Justice Act. Waterhouse stated that:

*"the provisions regulating the monitoring of the Act's implementation is an attempt to address concerns about past disparity between policy and legislation that hampered the implementation of laws aimed at protecting*



*and promoting basic human rights. For instance, the number of assessments conducted and the offences committed by children assessed must be recorded and reported on by the Department of Social Development”* (Waterhouse, 2020:10).

Wakefield (2015:46) states that the effective monitoring of the Act’s implementation was also hampered by the failure to establish an effective integrated information management system within the court. The 2013-2014 Annual Report on the Implementation of the Act mentioned that an integrated information management system was only piloted in the Pretoria and Temba Magistrate’s court on 8th July 2013 (Department of Justice and Constitutional Development, 2020:11). It also reported that since then 68% of the courts received training and it is estimated that current systems usage stands only at 50%.

*“Since the system was only introduced in mid-2013, no accurate statistics from the PCJF exist to document the number of children entering the justice system or of the services rendered to these children”* (Wakefield 2015:46).

In addition, there is a lack of a uniform reporting framework and regular reports from DJCD and DCS (NCOP Security and Justice, 2020:34). According to Waterhouse (2020:19), this impacted on the lack of available information to include in the annual parliamentary reports that were submitted after the year 2013 being extracted from annual departmental reports, strategic plans and budgets.

*“These reports are generally focused on macro level operational issues and highlight the activities that took place during the reporting period but fail to reflect the operational challenges experienced by governmental and civil society practitioners who are directly responsible for putting the Act into practice”* (Waterhouse, 2020:19).

Badenhorst (2015:34) also pointed to the lack of a monitoring system which would provide statistics for the implementation of the CJA:

*“From the submissions of the various reports to Parliament since the implementation of the Act it is clear that the statistics presented only focused on diversions and related statistics and do not reflect statistics on issues such as the number of assessments of children, the number of*

*preliminary enquiries or the number of children awaiting trial. According to the South African Police, they charged a total of 19 487 children during the period 1 April 2014 to 30 June 2014 (the first quarter) it appears that only 3 321 children were diverted during this period (SAPS annual report, 2014:5). This immediately raises the question as to what happened to the other approximately 16 000 children in the child justice system? Effective monitoring of the implementation and application of the Act will be very difficult, if not impossible, without accurate, reliable and available statistics. It also raises the question whether the integrated information management system as envisaged by section 96(1)(e) of the Act has been established and implemented” (Badenhorst, 2015:34).*

**(ii) Lack of capacity building and clarification of roles**

Ile (2010:35) states out the policy implementers should be knowledgeable about the policy they are implementing. Consequently, the absence of knowledge and training about the policy could lead to poor service delivery, making the inter-organizational structures redundant. A study by Tarichia (2018:12) indicates that due of the lack of training of the probation officers, affects the way in which h children in conflict with law are dealt with by probation officers.

*“The majority of participants specified lack of training on the CJA as a challenge, because they had to implement legislation that they had no understanding of. Due of the fact that probation officer work in a multi-disciplinary team in court, poor or lack of understanding of the Act affects their self-esteem in that they are not to be on par with the rest of the other professionals in court in terms of their understanding of the Act” (Tarichia, 2018:12).*

Probation officers are the one of the key implementers of the Act, and their lack of understanding of the Act impacts on the effective implementation of the Act especially on accessing minors into the child justice courts.

Furthermore, Wakefield & Waterhouse (2018) noted some challenges with the way Legal Aid South Africa represents children in court. In a report delivered by one of the directors at Legal Aid SA in Eastern Cape Province stated that:

*“There are inconsistencies in the interpretation of section 83 of the Act. Some child justice court magistrates are of the opinion that the child cannot waive his or her right to legal representation, and therefore the trial cannot proceed without the presence of a legal representative. Others are of the opinion that the court cannot force the child to have a legal representative and therefore proceed with the trial where the child indicates that he or she does not wish to have a legal representative.”* Wakefield & Waterhouse (2018:11)

In addition, Schoeman & Thobane (2015:44) conducted research with the Legal Aid in the Free-State and they reported that there was a lack of uniformity and knowledge between stakeholders in dealing with children in conflict with law. Responses given from the participants were as follows;

- a) *“Magistrates in different courts working differently.”*
- b) *“Police do not know what to do and expect social workers to do more, for example: assess after hours.”* and
- c) *“The involvement of the SAPS and social workers that do not know the correct protocol to follow”* (Schoeman & Thobane, 2015:44)

Schoeman & Thobane (2015) concluded that the lack of training, resources and specialized court structures are issues that generally hamper the provision of services rendered to protecting the rights of children in conflict with the law which are mainline factors as portrayed by Brynard (2010:19).

### **(iii) Lack of Commitment**

Baatjies (2010:24) states that lack of dedicated staff hinders successful policy implementation as the staff may not be committed to what they do. Brynard (2005:660) sees commitment as a crucial variable affecting the implementation process. Schoeman & Thobane (2015) conducted a study with 15 police officials from Gauteng and Free-State provinces whose perceptions about applying the CJA were investigated. One of the major

challenges that they pointed to was the lack of commitment amongst SAPS and Legal Aid. One of the participants of the study stated:

*“There’s no probation officers and legal aid officer who are willing to work with when a case arrives at the station”* (Schoeman & Thobane, 2015:45)

Schoeman & Thobane observed that;

*“Most officers are demotivated to perform their duties and task due to their income/salary not tallying with the high demands of services to be rendered”* (Schoeman & Thobane, 2015:45).

Lispky (1980:30) argues that increased workload can result in demotivation and is one of the causes of alienation which is a condition that street-level bureaucrats experience.

Furthermore, a report from the Department of Justice and Constitutional Development indicated that national and provincial meetings were not attended by all stakeholders and that there is a need for better inter-departmental collaboration in order to improve compliance with the Child Justice Act.

*“This lack of regular attendance and commitment was mentioned during the DGs’ ISCCJ meeting that was held on 27 September 2018”* (Department of Justice and Constitutional Development, 2020:12).

### **5.3 Experiences of street-level bureaucrats implementing the Child Justice Act**

This section examines the experiences of the police, probation officers and legal aid officers as street level bureaucrats who deal with children in conflict with the law at the Child Justice Court.

#### **5.3.1 Co-operation between street level bureaucrats**

In a report delivered from one of the directors at Legal Aid SA in Eastern Cape Province reported that;

*“Because of the nature of their work, legal aid officers rely on the support from other colleagues such as the probation officers and clerks as they work under conditions that are confined within their profession....”* Wakefield & Waterhouse (2018:11).

In addition, Schoeman & Thobane (2015) in their study of 10 probation officers from Gauteng and Free-state provinces found that:

*“In order for probation officers to deliver some of the services, they depend on others – for assessment of the child suspected of committing the crime and for making recommendations at the preliminary stage, thus not possible for the probation officers to control the outcome of the case or even to know when a case will be finalized.....that way we are on one consensus and its easier to access cases and less pressure occurs”* (Schoeman & Thobane, 2015: 38).

The above finding shows that in-order for street-level bureaucrats to effectively implement services, they rely on their colleagues from the other departments (SAPS, DJCD, DSD and DCS) in the provision of information and resources.

### **5.3.2 Challenges of Street-level Bureaucrats**

Lipsky (1980:29) states that there are various challenges that are faced by street-level bureaucrats. The findings regarding the challenges are presented below:

#### **(i) Inadequate resources**

Tarichia (2018) noted practical challenges facing probation officers. A study in Johannesburg Metro Region in Gauteng Province had 35 probation officers where Tarichia interviewed them to get their perception and experiences of their role in the child justice system.

*“resources such as photo-copying machines are not working yet we need to print reports and take them to court and you get told the government vehicles are not available. How are you expected to work? You get to court late, and the magistrate will throw tantrums at you.”*

Under the same, Courtenay & Hansungule, (2014:151) also found out SAPS is not equipped with enough tools and means in dealing with child offenders in accessing child justice courts. In their study, five police officers from Polokwane police station from Limpopo were interviewed regarding their experience in handling child in conflict with the law. Four of five of the respondents raised issues regarding lack of resources with one of them stating:

*“We have been finding challenges transporting children from the police station to the courts in town due to no cars or pick-ups, some haven’t been serviced for a while and that delays the assessment reports to be given to*

*the probation officer...this results in poor performance, and we are not awarded yearly bonus due to such inconveniences”*

In addition, Townsend et al (2014) interviewed a legal aid officer’s experience in providing legal representation of children in conflict with the law in Vredenburg, Western Cape. The respondent stated that;

*“The assessment, preliminary inquiry, trial or other proceedings in which the child is involved, are delayed when stationary is lack to issue a report and a certificate for the expungement of a criminal record of a child.....sometimes the database is corrupted in our offices due to a network server issue or due to unexpected shutdown of electricity which wrecks all records and results to my slow pace”* (Townsend et al, 2014:78)

Moreover, a report delivered from one of the directors at Legal Aid SA in Eastern Cape Province reported that:

*“.... they do experience the same fatigue, lack of resources and having to make decisions regarding providing services to the public in dealing with minors.”* (Wakefield & Waterhouse 2018:11).

The above findings show the extent of how street-levels face scarce resources in the working space which hinder them to work effectively and implement the CJA in accessing child offenders to the Child Justice Courts. As Baatjies (2010) states that resources are essential to policy actors for the effective implementation of a policy.

## **(ii) Demanding working environment**

Another challenge faced by street level bureaucrats outlined by Lispky is that they work under pressure or in environments where the demand for service tends to increase to meet supply. Tarichia (2018) reports from his study that;

*“The environment in which probation officers work is so traumatic and emotionally stressful in such a way that others take their frustrations on their families and that their work performance is also affected because their work is emotionally demanding and there are no support structures to assist them, which discourages them resulting to the delay of trials and work at their own pace”* (Tarichia, 2018:11).

In addition, Courtenay & Hansungule, (2014:152) show that police officers at Polokwane Station are affected by organizational restrictions such as workload and inadequate systems of management.

*“Police officers investigating child abuse are prone to high levels of work stress which places them at a greater risk of psychological harm than the general population. It is therefore unsurprising that these very high expectations can in some instances, impact on the sense of well-being and job satisfaction of the police officer”* Courtenay & Hansungule, (2014:152).

#### **5.4 Experiences of children in conflict with the law**

Muntingh & Ballard (2016) in collaboration with RAPCAN and NICRO conducted a study which interviewed 19 children from a number of prisons where children (sentenced and unsentenced) were detained. These prisons were; Brandvlei, Cradock, Emthonjeni, Kroonstad, Pollsmoor, Port Elizabeth, Rustenburg and Westville. Interviews were conducted using a semi-structured interview schedule, a checklist on infrastructure, conditions of detention and services to children was used by Independent Visitors of the Judicial Inspectorate for Correctional Services (JICS) at 41 prisons. The findings from the study highlighted issues which relate to the Principles of Restorative Justice.

##### **(i) Legal representation**

Skelton (2013:126) indicates that victims and offenders should be allowed access to legal advice at any stage of the proceedings. Muntingh & Ballard’s study show that most participants were assisted with legal representation in the court. One of the children stated that:

*“after I was done giving my information to the probation officer, within a few hours I was assign to a lawyer that would help me in court (participant, 15)”*- Muntingh & Ballard (2016: 60).

##### **(ii) Lack of understanding of court proceedings**

Another principle that Skelton (2013:126) states is that all parties must be provided with complete information as to the purpose of the process, their rights within the process and the services rendered to them. According to Muntingh & Ballard (2016:60), many children

stated that they found the trial confusing and did not properly understand what was happening. This they described in a variety of ways as indicated in the excerpts below:

*“I had a private attorney and was tried in the High Court in Grahamstown. I did not really understand what was happening; the judge and the interpreter are all talking at the same time – Die ding by die hof was deurmekaar (It was very confusing at the court.)-Participant, age 17)” – (Muntingh & Ballard (2016: 61).*

Another response states:

*“The confusion around and lack of understanding of the trial process resulted because I did not have an interpreter in isiZulu, my home language” (Participant, age 16 years) - (Muntingh & Ballard, 2016: 61).*

Muntingh & Ballard (2016) observed that a recurring theme from the interviews was that the children saw their legal aid officers only at court, leaving very little time to discuss their cases in detail. The interviews also revealed that some legal representatives made little effort to explain the court process and what was happening with the trial.

*“My lawyer didn’t explain everything to me, and I only saw her at court, we did not consult at any other time. Sometimes the magistrate would explain to me what was going on. (Participant age 16)”- (Muntingh & Ballard, 2016:61).*

*“My lawyer only saw me when I went to court and she didn’t ever explain to me what was happening. She only asked me questions sometimes about the offence (Participant, age 15)”- (Muntingh & Ballard, 2016:61).*

It was also evident that children were unclear about their sentencing:

*“The magistrate came to our cell and said to us that we are guilty in this case and we must plead guilty. He said that the police found us inside the house and that we are guilty. If we plead guilty then we get a small sentence. But he sent me here to Pollsmoor because my younger brother got many sentences before, but he wrote down my name – so they say now that I did all those other crimes and that is why I am here at Pollsmoor. But my lawyer*



*also said I could appeal my case (Participant, age 17)” – (Muntingh & Ballard (2016: 61).*

### **(iii) Duration of Court trial**

“The conclusions and duration of all court proceedings should occur in the shortest time possible” is one of the principles of restorative justice highlighted by Skelton (2013:126). Section 64 of the CJA sets out the restorative requirements for conducting trial in a child justice court. Emphasis is placed on ensuring that the best interests of the child are served and that the child understands the proceedings in the court. Despite the right to have one’s trial commence and concluded without undue delay, the children interviewed reported that their trials took between three months and two years to complete:

*“I can’t remember how long the trial lasted. And there were two charges against me and I can’t remember how long each trial lasted. It was all very ‘deurmekaar.’ I was first arrested in 2006, but I can’t remember how long it took to get to court. I was at the court very often (Participant, age 17).” (Muntingh & Ballard, 2016: 56).*

Another child participant stated that;

*“The trial took 2 years. It was a very difficult time, and very confusing for me (Participant, age 16).” (Muntingh & Ballard, 2016: 56)*

It may indeed be argued that when stretched out over such a long period that it is more than likely that a child will lose interest and feel more the victim than the offender (Muntingh & Ballard (2016: 57). Of more concern is the fact that they were in custody during this time and it seems unjustifiable to keep a child for two years awaiting trial in prison. The child whose trial took two years ultimately received a prison sentence of two years (Muntingh & Ballard (2016: 57).

### **(iv) Monitoring progress of restorative justice programs**

Restorative Justice programs should be monitored and evaluated (through independent research) to promote continuous improvement (Skelton, 2013: 126). Furthermore, under section 73 of the CJA, restorative justice sentences allow the court convicting the juvenile

delinquent of an offence to sentence the juvenile to attend “*a family group conference, victim-offender mediation, or any other form of restorative justice process in accordance with the definition of restorative justice.*” According to section 73(4)(a)(b); “*child justice court that has imposed a restorative justice sentence is obliged to request the probation officer concerned to monitor the juvenile delinquent’s compliance with the sentence,*” while providing the court with progress reports indicating such compliance. According to Muntigh & Ballard (2016:57), children were interviewed on the court sentences and children from Port Elizabeth, Rustenburg and Cradock received and attended restorative programs where there were constantly checked and supervised by social workers and reports compiled. However, one child from Westville prison stated;

*“I was told to go through family conference group for the next 21 days but up to now, nothing has occurred and I have been here for 3months now (participant, 16)”* (Muntingh & Ballard, 2016: 57)

From Brandvlei prison, it was reported that sentenced inmates with further charges are not permitted to attend to counselling or therapeutic classes as part of victim-offender mediation programs as they pose a security risk and the school building is less secure than the lock-up section (Muntingh & Ballard, 2016: 57).

## **5.5 Conclusion**

This chapter presented the findings from secondary studies and the findings were analyzed using the 5C protocol and Brinkerhoff & Cosby’s set of task to assess the factors affecting the implementation of the Act, Inter-governmental Relations to highlight any implementation issues regarding the Court complying to the CJA, Street level bureaucracy to find out the experiences of the court officials in implementing the CJA and the Restorative Justice concept in finding out children in conflict with law’s experiences of the child justice system.

The results of the study found that coalitions such as NICRO and SANCRC play a big role in the operations of child justice courts and factors in that resources allocation from the government and NGOs (human and material) help in the provision of activities and services that enhance the implementation of the Act thus strengthen the accessibility of children in the child justice court.

Barriers to inter-departmental collaboration such as lack of capacity of resources and lack of commitment were identified. Furthermore, the lack of an integrated management system due the

lack of co-operation between stakeholders has a detrimental impact on the effectiveness of the Act since it directly influences the operational aspects of services within the child justice system.

The findings reveal that the common challenge faced by the implementers is lack of resources. Another challenge the findings state is that the police, probation officers and legal attorneys work in a stress loaded environment (revealed as an attribute of street level-bureaucrats) where the demand for services is high, resulting to work dissatisfaction causing commitment levels to decline thus being a barrier to the implementation of the CJA. The findings also reveal the child offenders have access to legal representation but find challenges in getting to know information about their court trials, lengthy period of trial and detention in prison, and in receiving restorative programs.

## **CHAPTER 6**

### **CONCLUSION**

The study investigated the implementation of the Child Justice Act 75 of 2008 with a specific focus on the Child Justice Courts. The study sought to investigate and understand:

1. The legislative framework for the child justice court.
2. The structures, systems and processes involved in the implementation of the Child Justice Act 78 of 2008 in regard to Intergovernmental Relations.
3. The roles and experiences of the street level bureaucrats in implementing the Child Justice Act 78 of 2008 in relation to accessing minors to the child justice court.
4. The experiences of children in conflict with the law at the child justice courts.
5. Any implementation issues that the child justice court face in complying with the regulations of the Child Justice Act 78 of 2008.

The study shows that the child justice courts are governed by the Child Justice Act 75 of 2008. The CJA was promulgated to create a separate criminal justice system to promote the rights and needs of juvenile delinquents. The main objective is to divert juvenile delinquents away from the criminal justice system. However, the CJA acknowledges that diversion may be unsuitable, inadequate and unsuccessful, hence the creation of child justice courts for sentencing juvenile delinquents. The CJA does have an outline of the roles and responsibilities of key role-players in dealing with children in conflict with the law pre-trial or during the court proceedings in ensuring that the child offenders have access to justice and are well protected.

For the child justice court to function, findings reveal that it will involve the collaboration of government departments and organizations. The oversight of the Act's implementation is guided by the Child Justice Act's National Policy Framework, which aims to ensure the uniform, coordinated and co-operative implementation of the Act by all governmental and non-governmental stakeholders (Department of Justice and Constitutional Development, 2020). To achieve this, the framework aims to strengthen partnerships between all stakeholders by promoting co-operation and communication facilitated by the DGs ISCCJ and monitored by JCPS through the provision of annual reports.

Findings from the study highlight that the roles and the practitioner's (police, probation officers and legal aid officers) experience in the rendering of services to children in conflict with the law are largely not recognized in the annual oversight reports to Parliament. The study reveal that the role of the SAPS is to transport the child offender to the child justice court and separate them from the adult cells ensuring the protection of a child's rights. The probation officer is there to collect information about the child and to initiate the preliminary inquiry at the court. The legal aid officer's role is to represent the detained child at the court as part the rights a child has. Experiences that the key implementers encounter include busy working environment where the demand for services is high, resulting to work dissatisfaction causing commitment levels to decline, lack of staff and infrastructural resources.

The research also examined the experiences of children in conflict with the law. The findings display that despite the establishment of child justice courts, access to justice is still a major challenge to child offenders. The study revealed that children are not aware of the court procedures and do not understand their rights to be exercised in court, longer periods of trial in the court, poor court sentences that aim at resorting the child's wellbeing and poor treatment from the court officials.

Lastly, the implementation issues the research uncovered were the lack of a uniform reporting framework and regular reports from government departments regarding cases of children in conflict with the law at the courts, insufficient knowledge and skills from the key implementers in dealing with child offenders at the court and lack of dedicated staff towards accessing minors in the court due to the issues raised when looking at the experiences the key implementers.

In conclusion, due to the inadequate resources (both human and material) and structures available, child justice courts still have a long way for them to improve the child justice system. Strategic and operational challenges associated with some of the Act's provisions and the lack of a uniform information collection system remains a continual challenge. This is exasperated by the search for an answer to explain the significant decrease in the number of children entering the criminal justice system and number of diversion orders as highlighted in chapter one (Department of Justice and Constitutional Development, 2020; Wakefield & Waterhouse, 2014).

It is recommended that a resolute effort be made to establish a system whereby practitioners can register challenges they experience. Such a system could be implemented together with the integrated information management system. This will contribute to creating an inclusive and transparent governance system that is in touch with the needs of service providers. In addition, higher investments are required to address the capacity gaps for human resources, infrastructures and facilities. This includes separate court structures, more employed staff and more training on the act need to be deployed according to agreed standard which will help in the promotion of child justice in South Africa.

## BIBLIOGRAPHY

Anderson J., 1997, *Public Policy-making, An introduction*. 3rd (ed).USA: Houghton Mifflin Company

Baatjies, R.C. 2010. *The evolution and prospects of our intergovernmental approach: a local government perspective*. [Online]. Available from: <http://ddp.org.za/programme-events/local-government/conference/2010-provincial-government-and-development-in-sa-post-1994-quo-vadis/Adv%20RC%20Baatjies%20%20The%20evolution%20and%20prospects%20of%20our%20intergovernmental%20approach.pdf/view?searchtermgovernance>

Babbie E., Mouton J., 2001, *The practice of Social Research*, Capetown: Oxford University Press Southern Africa (Pty).

Badenhorst C., 2015, *Overview of the implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good intentions, questionable outcomes*. Open Society Foundation for South Africa

Barbarin OA., and Richter L.M, 2001, *Mandela's children*, London: Routledge

Berg, S. 2012. *Child diversion programme minimum standard compliance in the Western Cape: An explorative study*. Masters dissertation, University of South Africa. Pretoria

Bishop, L., 2007, *A reflexive account of reusing qualitative data: beyond primary/secondary dualism*, Sociological Research [Online], *Special Section on Reusing Qualitative Data*, 12(3) <http://www.socresonline.org.uk/12/3/2.html>

Brinkerhoff, D.W. and Crosby, B., 2002, *Managing Policy Reform: Concepts and Tools for Decision-Makers in Developing and Transitioning Counties*. Bloomfield: Kumarian Press

Brynard, P, 2005, Policy Implementation: Lessons for Service Delivery, *In Journal of Public Administration*, Vol 40(4), Pp 649-664.

Burchell, E and Hunt P, 1997, South African Criminal Law and Procedure. Vol. 1 *General Principles of Criminal Law*. Juta and Co, Ltd. page. 153 – 161

Clark, J. N. (2012). Youth violence in South Africa: The case for a restorative justice response. *Contemporary Justice Review*, 15(1), 77–95

Cloete, F. & de Coning, C. 2011. Improving public policy: theory, practice and results. 3rd Edition. Pretoria: Van Schaikdgc

Cochran, L.C. and Malone, E.F. 2014. Public Policy Perspectives and Choices.

Cohen, M. and Gershgoren, S. 2016. The Incentives of Street Level Bureaucrats and Inequality in Tax Assessments. *Journal of Administration and Society*. 48 (3): 269-270

Courtenay, M. & Hansungule, Z. 2014. *Protecting the rights of children in conflict with the law: A review of South Africa's Child Justice Act* (Pp. 153-165). In P. Proudlock. (Ed). South Africa's progress in realising children's rights: A law review. Children's Institute, University of Cape Town & Save the Children South Africa, Cape Town.



De Vries, M. 2013. The challenge of good governance. *The Innovation Journal: The Public Sector Innovation Journal*, 18(1): 1-9

Department of Justice and Constitutional Development Annual Report, 2017-2018. Republic of South Africa.

Department of Justice and Constitutional Development, 2010, Child Justice Act, 2008 (Act No 75 of 2008), National Policy Framework.

Department of Justice and Constitutional Development. 2013-2014, *Annual Departmental Report on the Implementation of the Child Justice (Act 75 of 2008)*

Department of Justice and Constitutional Development. 2019-2020, *Annual Departmental Report on the Implementation of the Child Justice (Act 75 of 2008)*

Department of Justice and Constitutional Development, 2020/2021, Inter-departmental annual reports on the implementation of the Child Justice Act, 2008 (Act No 75 of 2008). National Policy Framework

DPME, 2013. *A Framework for Strengthening Citizen-Government Partnerships for Monitoring Frontline Service Delivery*. Department of Performance Monitoring and Evaluation

DPLG, 2007, Practitioners Guide to the Intergovernmental Relations System in South Africa, Intergovernmental Relations Toolkit, Department of Provincial and Local Government

Du Plooy-Cillers F., Davis C., and Bezuidenhort R.M., 2014, *Research Matters*, Capetown: Juta.

du Toit C., and Hansungule Z, 2015, S v SN unreported, case no. 141114/14 (WCC): Sentencing child offenders after they turn 18, *SA Crime Quarterly*, (54), 65-72. <https://dx.doi.org/10.4314/sacq.v54i1.6>

Fagan J., Kupchik A., 2011, *Juvenile incarceration and the pains of imprisonment* (Duke Forum for Law & Social Change, Columbia Public Law Research Paper No. 11-263). New York, NY: Columbia Law School.

Frost M, Fagan, J., & Vivona, T. S., 2016, "Youth in prisons and training schools: Perceptions and consequences of the treatment-custody dichotomy". *Juvenile and Family Court Journal*. p40: 1–14

Gallinetti, J., 2009, *Getting to know the Child Justice Act*. Western Cape, Child Justice Alliance.

Gallinetti, J., 2009, *Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime* in Boezaart T (ed) *Child Law in South Africa* Cape Town, Juta

Gray MMA., 1999, Crime Prevention in schools: a multidisciplinary research project, *Social Work*. 34 (4).

Hand, C. A., Hanks, J., & House, T., 2012, Restorative justice: The indigenous justice system. *Contemporary Justice Review*, 15(4), 449–467

Hargrove, H., 2007, Restorative justice: Yesterday, today and tomorrow – making sense of shifting perspectives in crime control and criminal justice in South Africa. *In Act Criminological* 20 (1)

Heaton, J., 2004, *Reworking Qualitative Data*, London: SAGE Publications.

Hodgkin, R. & Newell, P., 2007, *Implementation handbook for the Convention on the Rights of a Child*, Open Society Foundation for Europe.

Howett, M. and Ramesh, M., 1995, *Studying public policy: Policy Cycles and Policy Subsystems*. Toronto: Oxford University Press.

Hupe, P. and Hill, M. 2007. Street-level Bureaucracy and Public Accountability. *Public Administration*, 85 (2): 279-299.

Ile U., 2010, *Strengthening intergovernmental relations for improved service delivery in South Africa: Issues for consideration*, University of the Western Cape, Bellville 7535.

KwaZulu Natal Department of Social Development Annual report 2014/2015

Labuschagne, JMT, 2001, Criminal Responsibility of Children in International Human Rights Law. SAYIL. Vol. 26. 2001 p. 198 – 202

Liefaard T, Access to justice for children: towards a specific research and implementation agenda, 2019, *International Journal for Children's Rights* P.195-227

Lipsky, M., 1980, *Street-Level Bureaucracy. Dilemmas of the Individual in Public Services*. New York: Russell sage Foundation

Madernather, N., 2005, *Significant factors contributing to juvenile offending*. Master of Arts. Pretoria: University of South Africa.

Mangena F (2015) Restorative justice's deep roots in Africa. *South African Journal of Philosophy* 34(1): 1-12

McCarney, 2008, International justice for children, in Council of Europe.

McGowen, R., 2006, The image of justice and reform of the criminal law in early nineteenth-century England. *Buffalo Law Review*, 32.

McGann, James G., 2010, *Democratization and Market Reform in Developing and Transitional Countries: Think Tanks as Catalysts*. Routledge. p. 272. ISBN 9781135224936.

Monyatsi, T., 2008, Identifying the needs of participants in the Khulisa diversion programme, [http://wiredspace.wits.ac.za/bitstream/handle/10539/5094/MonyatsiT\\_MA%20Dissertation.pdf?sequence=1](http://wiredspace.wits.ac.za/bitstream/handle/10539/5094/MonyatsiT_MA%20Dissertation.pdf?sequence=1).

Mouton J., 2000, *How to succeed in your masters and doctoral study: A South African guide and resource book*. Pretoria: Van Schaik Publishers.

Mpya M.N, 2013, *An appraisal of the efficiency of implementation mechanisms with regards to the International Children's Rights Law*, Masters, University of South Africa. Pretoria

Muntingh, L & Ballard, C, 2016, Report on Children in Prison in South Africa, Community Law Centre, University of Cape town.

NCOP Security and Justice, 2020, Child Justice Act implementation: Inter-sectoral Committee, Young in Prison, Child Justice Alliance inputs.

Nyquist, O., 1960, *Juvenile Justice: A Comparative Study with Special Reference to the Swedish Child Welfare Board and the California Juvenile Court System*. London: Macmillan

O'Toole L., 2000, Research on Public Policy Implementation: Assessments and Prospects'(in) *Journal of Public Administration, Research and Theory* 10 (2): 263-288.

Omale D (2006) Justice in history: An examination of 'African restorative traditions' and the emerging 'restorative justice' paradigm. *African Journal of Criminology and Justice Studies* (2): 33–62

Opeskin, D., 1998, *The Reform of Intergovernmental Fiscal Relations in Developing and Emerging Market Economics*, Washington DC: World Bank.

Parsons, W. (1995). *Public Policy: An Introduction to the Theory and Practice of Policy Analysis*. Cheltenham,UK.

Pinchbeck, I. and Hewitt M., 1973, *Children in English Society*, vol. 2, *From the Eighteenth Century to the Children Act 1948*. London.

Reddy, P.S., 2001, Intergovernmental Relations in South Africa: *Politea Journal*, Vol 20, Pp 21-39.

Republic of South Africa (2009). Child Justice Act No. 75 of 2008. Pretoria. Government Gazette, No. 32225. Government Printer.

Republic of South Africa, The Probation Services Amendment Act, Act 116 of 1991, Pretoria: Government Printer.

Roche, D. (2002). Restorative justice and the regulatory state in South African townships. *British Journal of Criminology*, 42(3), 514–533

Schoeman M, & Thobane M., 2015, Practitioners' perspective about the successes and challenges in the implementation of the Child Justice Act, *Southern African Journal of Criminology: Acta Criminologica* 28(3) Pp. 34 to 49.

Sherman, L. W., & Strang, H. (2009). Crime and reconciliation: Experimental criminology and the future of restorative justice. *Acta Criminologica*, 22(1), 1–14

Skelton A (2013) The South African Constitutional Court's restorative justice jurisprudence. *Restorative Justice: An International Journal* (1): 123–127

Sloth-Nielsen, J 'Justice officials as role players' in *Child Justice in Africa: A Guide to Good Practice*, 2014, pp 136-142.

Sloth-Nielsen, J 'Paper weight or powertool: the proposed preliminary inquiry procedure' Article 40, Vol 6, No 2, 2014, pp 3 to 5.

Smit, Arina, Programme Director Nicro South Africa, Presentation held at International Expert Consultation on Restorative Justice for Children, Bali Indonesia, 26-28 June, 2013

South African Police Service. (2014). Crime Research and Statistics.

Tate J. & Happ M., 2018, Qualitative Secondary Analysis: A case Exemplar, *J. Pediatr Health Care HHS Public Access* 32(3):308-312.doi:10.1016/j.pedhc.2017.09.007

Terblanche SS, 2012, The Child Justice Act: a detailed consideration of Section 68 as a point of departure with respect to the sentencing of young offenders, *Potchefstroom Electronic Law Journal*, 15:5, 436–638.

Terblanche, S.S ‘The child justice act: procedural sentencing issues’ (2016) 16 (1) *Potchefstroom University Electronic Law Journal* 1-32

The Department of Provincial and Local Government, 2005. Practitioners Guide to Intergovernmental Relations in South Africa

Thomson G., 2016, *To what extent do South Africa and Scotland comparatively respect, protect and fulfil children’s rights in the context of youth justice and in light of their international and regional obligations?* Masters, University of Cape Town (UCT), Cape Town.

Townsend L., Waterhouse and Nomdo C, Court Support Workers speak out; upholding children’s rights, 2014, 48 *SA Crime Quarterly* P.75-88

Tshehla, B. (2004). The restorative justice bug bites the South African criminal justice system. *The South African Journal of Criminal Justice*, 17(1), 1–16.

United Nations Convention on the Rights of the Child (UNCRC), 1989.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985.

Van Bueren G., 1995, *The International Law on the Rights of the Child*, Dordrecht: Kluwer

Wakefield, L. 2011. Is the Act working for children? The first year of implementation of the Child Justice Act. *SA Crime Quarterly*, 38: 45-50

Wakefield. L. & Waterhouse, S. 2018. Monitoring the Child Justice Act: Oversight of National Parliament. *Article 40*, 1(1): 8-14.

Wakefield. L. 2015, *The Third and Fourth Year of implementation of the Child Justice Act: Where Are We Headed?*, Child Justice Alliance, Cape Town, Open Society Foundation for South Africa.

Wan-Chun, Lambert K, Eric G., 2015, "Comparative/International Research on Juvenile Justice Issues: A Review of Juvenile Justice Specialty Journals". *Journal of Criminal Justice Education*. 26 (4): 545–562.

Waterhouse, S. 2011. Parliament reviews the implementation of the Child Justice Act. *Article 40*, 13 (2): 2-5



Winterdyke J.,2002, *Juvenile justice systems: International perspectives* (2nd ed.). Toronto,