

**JUVENILE COURTS : PROBLEMS
AND DILEMMAS**

PETRUS JACOBUS JOHANNES PIENAAR

**JUVENILE COURTS : PROBLEMS
AND DILEMMAS**

by

PETRUS JACOBUS JOHANNES PIENAAR

BA(UNISA), BA(HONS)(PU FOR CHE),

MA(PU FOR CHE), BA(HONS)(UNISA),

D.LITT ET PHIL(UNISA),

B PHIL(PU FOR CHE), TED(HTC)

*A dissertation submitted to the Faculty of Arts in
fulfilment of the requirements for the degree of*

MASTER OF ARTS

in the Department of Criminal Justice at the

UNIVERSITY OF ZULULAND

Supervisor : Prof P J Potgieter

December 1993

THE JUVENILE COURT, WITHOUT ABROGATING ITS VERY FUNCTION, HAS TO ENABLE THE OFFENDER TO FEEL ACCEPTED AND RESPECTED WITH ALL HIS FAULTS, AND INDEED, IN SPITE OF THEM. THIS, IF GENUINELY DONE WITHOUT A MORALIZING, PATRONIZING, PUNITIVE OR REJECTING ATTITUDE, CAN BECOME A MOST VALUABLE INSTRUMENT. SUCH AN ATTITUDE BY NO MEANS EXCLUDES THE IMPOSITION OF PUNISHMENT. NOR DOES IT SHRINK BACK FROM STRESSING THE STERN ATTITUDE THE COURT MUST TAKE BECAUSE OF DELINQUENT BEHAVIOUR OF THE OFFENDER.

JUDGE DAVID REIFEN

1972

To ensure that the rights of the juvenile to be protected against the court are fully enshrined in the judicial system - (My italics)

ACKNOWLEDGEMENTS

The researcher wishes to express a special debt of gratitude to the following institutions and persons for assisting him with his investigation:

Professor P J Potgieter for his splendid and meticulous assistance, continual encouragement, methodological efficiency, multitude of invaluable recommendations, friendliness (undiminished by the passing away of his wife, Rita), and positive criticism in the completion of this investigation.

The Human Sciences Research Council and, more especially, its Co-operative Programme on the Youth, for its financial support.

Dr Johan Olivier, the Youth Programme manager, for his advice, patience and administrative assistance.

The Department of Justice, more specifically, Mr J J Noeth, the Director-general, for the ready and helpful manner in which he gave me permission to interview officials of his Department.

The argumentation line of this investigation was sparked of by the Chief Justice of the Ciskei Mr Justice B de V Pickard. I am glad of this opportunity to express my gratitude to him.

All chief magistrates and magistrates for their invaluable support and willingness in completing the questionnaires. Their constructive criticism, generous assistance and time were highly appreciated and extremely helpful. It is hoped that what follows is an accurate representation of what they wrote and said.

All other respondents, who supplied me with information on various aspects and contributed pieces of themselves to me. Also a widening number of individuals who have influenced my thinking.

The University of Fort Hare for logistic assistance to conduct my field work. Prof J N V Maqashalala, Dean, for his assistance and encouragement.

My staff for their aid and the climate of encouragement they provided and for coping with my duties under sometimes difficult circumstances.

The project co-workers, Prof C Dlamini (University of Zululand), Adv. Y Kellerman (Family Advocate), Prof J R du Plessis (University of Fort Hare) and Mr P Visser (Senior Lecturer, University of Fort Hare) for their insightful discussions concerning the investigation and their constant encouragement and helpful advice.

Mr Roy Jennings for the excellent way he corrected the language.

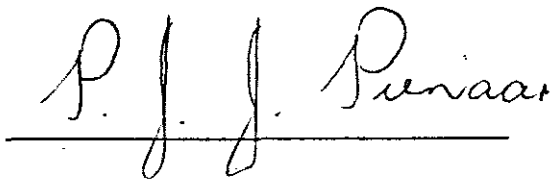
Mesdames Lizette van der Merwe and Yvonne de Milander who so ably and patiently typed this report and made my work much easier than it otherwise might have been.

Mrs Sarie Pienaar for the admirable way in which she classified the data and for her unfailing love, understanding and moral support extended to me while preparing the manuscript.

Needless to say, the errors that remain are mine.

DECLARATION

I hereby declare that the dissertation "Juvenile Courts : Problems and Dilemmas" represents my own work both in conception and execution. All the sources that I have used or quoted have been acknowledged by means of complete references.

A handwritten signature in cursive script that reads "P. J. J. Pienaar". The signature is written above a solid horizontal line.

P J J PIENAAR

DEDICATION

TO MY WIFE, SARIE

A special person in my life whose splendid love and gracious support kept me researching.

TABLE OF CONTENTS

	PAGE
ACKNOWLEDGEMENTS	(i)
DECLARATION	(iii)
DEDICATION	(iv)
LIST OF TABLES	(ix)
LIST OF FIGURES	(xii)
LIST OF CASES	(xiii)
LIST OF APPENDIXES	(xiv)
EXECUTIVE SUMMARY	(xv)
SAMEVATTENDE OPSOMMING	(xviii)

CHAPTER 1

BACKGROUND TO INVESTIGATION

1.1	Introduction	
1.1.1	Statement of Problem	1
1.1.2	Aims of investigation	4
1.1.3	Rationale of the investigation	5
1.1.4	Organization of the investigation	5
1.2	Methodological account of investigation	6
1.2.1	Introduction and Procedure	6
1.2.2	Research assumptions	7
1.2.3	Argumentation line	8
1.2.4	Delimitation of investigation	8
1.2.5	Methods of data collection	9
1.3	Key Concepts	13
1.4	Resume	17

CHAPTER 2

THE ACCUSATORIAL AND INQUISITORIAL APPROACHES TO CRIMINAL ADJUDICATION : JUVENILE COURTS

2.1	General impressions	18
2.2	Various approaches of criminal proceedings in juvenile court	21
2.3	Substantial characteristics of the accusatorial approach	21
2.4	Substantial characteristics of the inquisitorial approach	23
2.5	The inquisitorial approach in the German criminal courts	26
2.6	Resume	27

CHAPTER 3

THEORETICAL CONTEXT OF INVESTIGATION - SENTENCING PRINCIPLES

3.1	Introduction	28
3.2	The nature of criminal punishment for juvenile offenders	28
3.3	Retribution as a sentencing principle	31
3.4	Retributive justice and the juvenile offender	32
3.5	Retribution and its application to juvenile offenders	34
3.6	Rehabilitation as a sentencing principle	38
3.7	Problems with the practical implementation of rehabilitation - theory on juvenile offenders	42
3.8	Retributive justice versus rehabilitative treatment	44
3.9	Resume	48

CHAPTER 4

THE PRE-TRIAL JUDICIAL INVESTIGATION AS PART OF INQUISITORIAL- ACCUSATORIAL PROCEDURE IN THE SOUTH AFRICAN JUVENILE COURTS

4.1	Introduction	49
4.2	A proposed model for pre-trial judicial investigation	50
4.3	Arguments for the implementation of the pre-trial judicial investigation	53
4.4	Resume	58

CHAPTER 5

ANALYSIS OF DATA

5.1	Introduction	59
------------	---------------------	-----------

5.2 Analysis of responses by magistrates regarding adjudication of juvenile offenders (Assumption 1)	60
5.3 Significant findings	67
5.4 Analysis of responses by magistrates regarding sentencing of juvenile offenders (Assumption 2)	68
5.5 Significant findings	82
5.6 Analysis of responses by magistrates regarding the pre-trial investigation in the juvenile court (Assumption 3)	83
5.7 Significant findings	85

CHAPTER 6

SUMMARY FINDINGS, RECOMMENDATIONS AND FUTURE DIRECTIONS

6.1 Summary of Findings	87
6.2 Recommendations and future directions	88
References	90
Appendix	97

LIST OF TABLES

TABLE		PAGE
1	JUVENILE COURTS SEEM TO ADOPT ONE OF FOUR DISTINCT APPROACHES IN THE ADJUDICATION PROCESS	61
2	IN NO COUNTRY WOULD ONE FIND A SYSTEM WHICH IS PURELY ACCUSATORIAL OR INQUISITORIAL; IN ALMOST ALL COUNTRIES ONE WOULD FIND A MIXED SYSTEM WITH A MARKED EMPHASIS ON THE ONE OR THE OTHER APPROACH	61
3	DO YOU THINK THAT A JUVENILE OFFENDER WHO HAS A SUBSTANTIAL RECORD OF PREVIOUS CONVICTIONS SHOULD HAVE HIS SENTENCE INCREASED ABOVE THE NORMAL LEVEL FOR THE OFFENCE HE HAS COMMITTED?	62
4	IF YOU HAD A PARTICULAR SENTENCING OBJECTIVE IN MIND, WOULD YOU FEEL JUSTIFIED IN MAKING NO ALLOWANCE FOR MITIGATING CIRCUMSTANCES IN ORDER TO ACHIEVE THIS OBJECTIVE?	62
5	WOULD YOU SAY THAT A JUVENILE OFFENDER HAS A RIGHT TO HAVE HIS SENTENCE REDUCED IF THERE ARE MITIGATING CIRCUMSTANCES?	63
6	DO YOU REGARD REFORMATORY SCHOOLS AS OUTDATED?	63
7	DO YOU SUBSCRIBE TO THE NEW NOTION OF THE DEPARTMENT OF CORRECTIONS TO PLACE JUVENILE OFFENDERS IN JUVENILE PRISONS?	64
8	CHILDREN UNDER THE AGE OF 14 SHOULD NOT BE REFERRED TO THE JUVENILE COURT ON THE GROUND THAT THEY HAD COMMITTED OFFENCES	65
9	WOULD YOU SAY THAT KNOWLEDGE OF CRIMINOLOGY AND PENOLOGY COULD HELP THE MAGISTRATE IN DEALING WITH JUVENILE CRIME?	66

10	WHAT IMPORTANCE DO YOU ATTACH TO THE FOLLOWING SENTENCING OBJECTIVES?	69
11	HOW WOULD YOU DESCRIBE THE PURPOSE OF SENTENCING PRINCIPLES?	71
12	WHAT DO YOU THINK ARE THE MOST IMPORTANT CONSIDERATIONS FOR A SENTENCE?	72
13	WHAT IS THE MOST IMPORTANT?	72
14	WOULD YOU NORMALLY ASSUME IMPRISONMENT TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?	73
15	WOULD YOU NORMALLY ASSUME COMMUNITY SERVICE TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?	73
16	WHAT GENERAL SENTENCING OBJECTIVE WOULD YOU HAVE IN MIND WHEN FACED WITH THE FOLLOWING TYPES OF CASES?	74
17	WOULD YOU CHANGE YOUR SENTENCING OBJECTIVE IF TOLD THAT A SENTENCE OF IMPRISONMENT IS RARELY APPROPRIATE FOR A JUVENILE SHOPLIFTER WITH NO PREVIOUS CONVICTIONS?	74
18	WOULD YOU SAY THAT CORPORAL PUNISHMENT IS EFFECTIVE AS:	75
19	WOULD YOU SAY THAT A FINE IS EFFECTIVE AS:	75
20	WOULD YOU SAY THAT PROBATION IS EFFECTIVE AS:	76
21	WOULD YOU SAY THAT COMMUNITY SERVICE IS EFFECTIVE AS:	76
22	WOULD YOU SAY THAT IMPRISONMENT IS EFFECTIVE AS:	77
23	MAGISTRATES PERCEIVED EFFECTIVENESS OF SENTENCING ON JUVENILE OFFENDERS	77

24	WOULD YOU NORMALLY ASSUME CORPORAL PUNISHMENT TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?	78
25	WOULD YOU NORMALLY ASSUME A FINE TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?	78
26	WOULD YOU NORMALLY ASSUME PROBATION TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?	79
27	WOULD YOU CONTEMPLATE IMPOSING A COMMUNITY SERVICE ORDER AS:	79
28	WOULD YOU NORMALLY ASSUME IMPRISONMENT TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?	81
29	MAGISTRATES REGARDING PROBATION OFFICERS AND CRIMINOLOGISTS AS HELPFUL IN EXPLAINING OR POINTING OUT RELEVANT SENTENCING PRINCIPLES	85

LIST OF FIGURES

FIGURE	PAGE
1. Magistrate's form of training in the application on sentencing principles	70
2. Communication of magistrates to different sources about sentencing principles	70
3. Magistrates perceived retributive and rehabilitative effectiveness of sentences on juvenile offenders	70
4. Magistrates perceived retributive and rehabilitative appropriateness of sentences on juvenile offenders	70

LIST OF CASES

CASES	PAGE
R v K 1956 3 SA 353 (9)	44
R v Hodgert 1956 2 SA 2 (17)	44
S v Dyk 1969 1 SA 601 (c)	44
S v Kukarie 1972 2 SA 907 (o)	43
S v C 1974 2 SA 680 (k)	44
S v J 1975 3 SA 146 (o)	44
S v S 1977 3 SA 305 (o)	44
S v M 1978 3 SA 557 (Tk)	44

LIST OF APPENDIXES

PAGE

- 1 Questionnaire : Magistrates - Adjudication and sentencing
of juvenile offenders

97

EXECUTIVE SUMMARY

This investigation examined certain problems and dilemmas in the juvenile court. Three problem areas were included:

- The accusatorial - inquisitorial view as the main approach in the juvenile justice system.
- The rehabilitative - retributive approach and its application to juvenile offenders. (Magistrates' sentencing objectives and their application to juvenile offenders.)
- The possibility of the application of the pre-trial judicial investigation in the juvenile court.

In addition, a number of items were simultaneously included in the investigation and, where applicable, are included in this report.

The research questionnaires were delivered by hand to a number of magistrates in the Eastern Cape, Orange Free State and Transvaal. After a few weeks the questionnaires were collected and unstructured interviews were conducted with some of the magistrates. A total of 39 questionnaires were collected and use was made of the descriptive statistical technique to summarize and condense the data to measurable units. Because of the explorative-descriptive nature of the investigation the results can only be generalized to Eastern Cape, Orange Free State and Transvaal.

The following are the more significant findings:

1. Adjudication of Juvenile Offenders

- 10,3% of magistrates accepted the accusatorial, 25,6% the inquisitorial, 33,3%

the accusatorial - inquisitorial, and 30,8% the inquisitorial - accusatorial approaches.

- 82,1% of magistrates agreed that in no country would one find a system which is purely accusatorial or inquisitorial.
- a substantial record of previous convictions is to 74,4% of magistrates on aggravating circumstances.
- The majority 89,7% of magistrates would feel justified in making allowance for mitigating circumstances if they had a particular sentencing objective in mind.
- 89,7% of magistrates would regard mitigating circumstances as a juvenile's right to have sentence reduced.

2. Sentencing of Juvenile Offenders

- 74,3% of magistrates rated reformation as a sentencing objective for juvenile offenders, as 'very important'.
- 74,3% of magistrates rated the need to expose the juvenile offender to treatment.
- 64,1% of magistrates rated the sentencing principle of protecting society from juvenile crime and helping the juvenile offender's development as complementary.
- The most important factor which influences magistrates in reaching a sentence of community service is where the offender will benefit, 84,6%.

- 61,5% of magistrates kept punishment in mind for assault on police.

The results demonstrate that the rehabilitative - treatment objective and the retributive - punishment objective are the main objectives of sentencing in the juvenile court.

3. Pre-trial judicial investigation in juvenile courts

- Approximately 74,4% of magistrates were in favour of pre-trial judicial investigation.
- 71,8% of magistrates agreed that probation officers, and 71,8% agreed that criminologists can be helpful in the juvenile court.
- Finally, one can accept that the majority of magistrates in this investigation support the implementation of a pre-trial judicial investigation in the juvenile justice system.

SAMEVATTENDE OPSOMMING

Hierdie ondersoek het sekere probleme en dilemmas ten opsigte van die jeughof ondersoek. Met die oog hierop is die volgende drie probleem areas uitgesonder:

- Die akkusatories - inkwisoriese sienswyse as die hoofbenadering in die kriminele regspleging vir jeugdiges.
- Die rehabilitasie - vergeldings benadering en die toepassing daarvan op die jeugoortreder. Hoe die beginsels van vonnisoplegging deur landdroste op die jeugoortreder van toepassing gemaak word.
- Die moontlikheid van geregtelike voorverhoorondersoeke in die jeughof.

'n Aantal besonderhede is terselfdertyd in die ondersoek, en waar van toepassing, ook in die verslag ingesluit.

Die navorsingsvraelyste is per hand aan 'n aantal landdroste in die Oos-Kaap, Vrystaat en Transvaal afgelewer. Na afloop van 'n paar weke is die vraelyste ingevorder en insiggewende onderhoude is met sommige landdroste gevoer.

In totaal is 39 vraelyste ingevorder en 'n beskrywende statistiese tegniek is gebruik om die gegewens op te som en tot meetbare eenhede saam te vat.

As gevolg van die eksploratief-onderzoekende en beskrywende aard van die ondersoek, kan die uitslag slegs ten opsigte van die Oos-Kaap, Vrystaat en Transvaal veralgemeen word.

Hier volg 'n aantal betekenisvolle bevindinge:

1. Skuldigbevinding van die jeugoortreder

- 10,3% van die landdroste het die akkusatoriese, 25,6% die inkwisoriese, 33,3% die akkusatoriese - inkwisoriese en 30,8% die inkwisoriese - akkusatoriese benadering aanvaar.
- 82,1% van die landdroste stem saam dat in geen land 'n suiwer akkusatoriese of inkwisoriese stelsel te vinde is nie.
- 'n Substansiële rekord van vorige oortredings word deur 74,4% van die landdroste as verswarende omstandighede beskou.
- Die meerderheid, 89,7% van die landdroste maak voorsiening vir versagende omstandighede indien hulle 'n sekere vonnis in gedagte het.
- 89,7% van die landdroste beskou versagende omstandighede as die jeugdige se reg om sy vonnis te versag.

2. Vonnisoplegging van die jeugoortreder

- 74,3% van die landdroste beskou rehabilitasie as 'n vonnis baie belangrik by die jeugoortreder.
- 74,3% van die landdroste het die behoefte uitgespreek om jeugoortreders aan behandeling bloot te stel.

- Om die samelewing te beskerm teen jeugmisdaad en om die jeugoortreder se ontwikkeling aan te help, word deur 64,1% van die landdroste as beginsels van vonnisoplegging gesien.
- Dat die jeugoortreder sal baat by gemeenskapsdiens word deur 84,6% van die landdroste gesien as 'n baie belangrike faktor.
- 61,5% van die landdroste hou straf in gedagte waar die polisie aangerand word.
- Die bevindinge bewys dat straf met rehabilitasie en vergelding as doel, die belangrikste benadering is by vonnisoplegging in die jeughof.

3. Geregtelike voorverhoorondersoek in die jeughof

- Presies 74,4% van die landdroste was ten gunste van 'n geregtelike voorverhoorondersoek.
- Toesighoudende beamptes is deur 71,8% van die landdroste as van groot hulp in die jeughof beskou. Dieselfde persentasie 71,8% landdroste sien kriminoloë in dieselfde lig.
- Ten slotte kan aanvaar word dat die meerderheid van die landdroste in die ondersoek, die inwerkingstelling van die geregtelike voorverhoor ondersoek in die juridiese sisteem vir die jeug, ondersteun.

CHAPTER 1

BACKGROUND TO THE INVESTIGATION

1.1 INTRODUCTION

1.1.1 STATEMENT OF THE PROBLEM

When the juvenile court came into existence at the start of the twenties¹, in most of the Western Countries, it was on the basis of several considerations that did not form a really consistent philosophy.

- i) The most important point was the notion that children/juveniles could not be held accountable for their actions in the same way as adults;
- ii) The children's/juvenile court was expected to have a special mission of protection towards dependent, neglected, and abused children, introducing thereby the notion of children's/juveniles' special needs within a court system; and
- iii) Finally, there was a notion that the mixing of children/juveniles within penal institutions could only be harmful to their moral development.

¹ Taft, D. R. & England, R. W. Jr. (1964). Criminology. Fourth Edition. New York : MacMillan Comp. 367.

The juvenile court itself originated almost simultaneously in Cook County (Chicago) and in Denver in 1899, a school law in the latter city having been adopted two months earlier than the Illinois law, which was the first true state juvenile court act.

See also Faust, F. L. & Brantingham, P. J. (1979). Juvenile justice Philosophy. Readings, cases and comments. Second Edition. Minnesota : West Publishing Co. 32.

Giallombardo, R. (1966). The juvenile court. Second Edition. New York : John Wiley & Sons. 401.

Priestley, P. Fears, D. & Fuller, R. (1977). Justice for juveniles. London : Routledge and Kegan Paul Ltd. 1.

Thornton, W. E. (Jr) & Voigt, L. (1992). Delinquency and justice. New York : McGraw Hill Inc. 368.

From the beginning the children's/juvenile court has been confronted with conflicting demands, rooted in those inconsistencies that led to its existence. Was the court to emphasize the interest of society at large, protecting it against harmful behaviour of its children/juveniles, or should the court respond in the first place to the needs of children/juveniles, irrespective of the nature of their behaviour? The above-mentioned demand has become one of the great challenges of modern times as well as the control/treatment of child/juvenile offenders and the protection of children in abusive behaviour criminal trials.

This challenge is fivefold:

- i) effectively to control the rising incidence of juvenile crime;
- ii) to rehabilitate juvenile offenders;
- iii) to create non-stigmatized programmes for the re-entry of children/juveniles into society;
- iv) effectively to control the rising incidence of abusive behaviour against children/juveniles; and
- v) to render effective protection for the child/juvenile in court without any interference into the procedure of cross-examination.

Yet this challenge have been difficult to meet. The traditional reasons for such limited success with juvenile offenders include the lack of sufficient resources, limited knowledge of effective treatment methods, adjudication and sentencing approaches, inefficient management of child/juvenile institutions, etc.

Notwithstanding these specific problems, one of the most crucial problems in the juvenile legal system has been the position (rights) of the child/juvenile and the impact of such due process requirements on the child/juvenile and the state.

In many instances, the lack of direction in children/juveniles involved in the criminal justice process reflects the continuing debate over the proper policy to

be followed by the law enforcement and judicial officials of the system. A consequence of this is that, although the juvenile offender often commits as serious a crime as an adult, their subsequent arrest, trial and incarceration are also quite similar.

This accusatorial² (legalistic, adversarial, punitive, justice) option maintains the approach that the juvenile justice system is actually an adversary system in which defense counsel provides the young offender with due process protections in his battle against the state. The accusatorial approach is based on a certain conception of individual responsibility, implying sanctions to protect society and a guarantee of legal rights and due process.³

The accusatorial view is by no means the only approach which operates in the juvenile judicial system. In contrast there is the inquisitorial approach⁴ which is based on the '*parens patriae*' philosophy of justice, arguing that the juvenile offender is in reality a child, with specific needs independent of his behaviour, who has not been properly socialized and whose behaviour, regardless of what form it takes, is symptomatic of some personality problem. This rehabilitation-oriented approach suggests that juvenile justice should be used as a delivery system for treatment, and that its jurisdiction be extended rather than curtailed. This system discounts the accusatorial nature of the juvenile legal system into an informal decriminalized juvenile court and the use of diversion programmes under the auspices of the court.

In this *excursus* the philosophy of dealing with children and juveniles in the legal system (i) falls between the accusatorial and inquisitorial adjudicatory approaches, not advocating elements of both, but (ii) proposing the introduction of a pre-trial judicial investigation before the 'case' is referred to an actual trial,

² Also called the legalistic, adversarial, punitive or justice approach.

³ Senna, J. J. & Siegal, L. J. (1976). *Juvenile law*. Minnesota : West Publishing Co XI, 1-3.

⁴ Also called the rehabilitative, treatment etc.

and (iii) analyzing the magistrates' sentencing objectives with regard to a rehabilitative-retributive sentencing model.

Although legal decision making has reflected an uncertainty over how to deal with the child/juvenile in the legal system, it is the assumption of this investigation that the implementation of the pre-trial judicial investigation accords with the spirit of the principle of the rule of law in the juvenile justice system and will alleviate certain problems.

This investigation brings together all these leading problems and provides an extensive analysis of the notions of magistrates with regard to the accusatorial and inquisitorial adjudicatory approaches, retributive justice and rehabilitative treatment objectives, and the pre-trial judicial investigation and seeks to determine the need for it and to propose its implementation to the Law Commission as part of the law and procedure within the legal system, in order to develop a better understanding of the child/juvenile in the juvenile justice system. For, unless law is viewed in such a way as to permit its optimum effectiveness in the task it has with respect to the social order⁵, our society will be forgoing some effective tools - at a time when effective tools are desperately needed. This investigation would aim to discount these effective tools to stimulate new and more successful thinking on ways of bridging the chasm between the accusatorial and inquisitorial approaches in adjudication, retributive and rehabilitative sentencing approaches, with particular attention to the alleviation of the growing pains of the juvenile justice process with an effective frame of reference.

1.1.2 AIMS OF THE INVESTIGATION

In general terms the aim of the investigation project is therefore to present a synoptic description of the views of the respondents (magistrates) concerned with

⁵ Evan, W. M. (1962). Law and sociology. New York : The Free Press of Glencoe. 56-60.

particular focus on their views on dilemmas in the juvenile court. In specific terms it aims, firstly, to describe the accusatorial and inquisitorial approaches in criminal procedure with regard to juveniles.

Secondly, to describe the sentencing principles enunciated by the juvenile courts such as retribution and rehabilitation.

Thirdly, to examine the desirability of the implementation of the pre-trial judicial investigation in South African courts involving juvenile crime.

Fourthly, and derived from the second, is the dichotomy between the approaches - should the court emphasize the interest of society at large, protecting it against harmful behaviour of its juveniles, or should the court respond in the first place to the needs of juveniles, irrespective of the nature of their behaviour?

Fifthly, to investigate the above-mentioned adjudication and sentencing objectives and approaches empirically by interviewing magistrates.

The juridical setting in our present magistrates courts' increases the above-mentioned possibilities to a much larger sense than has hitherto been realized. It is an exploration of these dynamics of the juvenile court in a changing South Africa, that this investigation aims for and is devoted to.

1.1.3 RATIONALE OF THE INVESTIGATION

The nature and mode of the investigation is to enlist an interdisciplinary spectrum of researchers in order to expose a certain unbalanced functionalism typifying the prevailing milieu and atmosphere of the juvenile court in general.

This, it is hoped, will help to unravel the confusing picture of juvenile justice which can give further rise to positive changes in the law relating to juvenile offenders and children in the criminal justice process.

1.1.4 ORGANIZATION OF THE INVESTIGATION

When the investigation was initially proposed, the intention was to undertake research into a number of dilemmas and problems of the juvenile court. As the study proceeded it became more evident that the research should zoom in on the most prevalent problem, namely the desirability of the implementation of the pre-trial judicial investigation in South African juvenile courts. A number of other problems affect the pre-trial judicial investigation, such as accusatorial and inquisitorial approaches in adjudication and the retributive and rehabilitative approaches in sentencing, were also investigated.

Although the issue of pre-trial judicial investigation and its possible effects is frequently discussed and commented upon, very little, if any, scientific information actually exists on its principles and applicability. A more incisive study was not possible since the explorative-descriptive nature of the investigation placed a real restriction of the particular problem. Newly gathered information should therefore prove to be of considerable practical importance.

1.2 METHODOLOGICAL ACCOUNT OF INVESTIGATION (Research Design)

1.2.1 INTRODUCTION AND PROCEDURE

In this section the methodological dimension of the research that has been undertaken amongst magistrates has been explicated. More specifically the most important decisions and steps that had to be taken are briefly described.

The appropriate methodological account of the investigation is particularly difficult to describe because the approach to the study is explorative-descriptive⁶,

⁶ Although the investigation has been described as explorative-descriptive it should be clear that everything methodologically possible was made use of to obtain as objective and comprehensive a picture of the juvenile court.

in that it is intended to explore and describe the dilemmas in the South African courts involving juvenile crime. The methodology is worsened, as has been mentioned *supra*, because very little scientific knowledge exists on its principles and applicability, not to mention the lack of any theoretical framework⁷.

It describes the findings of a research project which examined viability the of the implementation of a pre-trial judicial investigation to solve these dilemmas. The study has a somewhat qualitative⁸ character, although it changes to a more quantitative or empirical one. Criminal justice research requires not only a full array of qualitative or quantitative approaches but also theoretical as well as methodologically sound studies to maintain its academic respectability.

1.2.2 RESEARCH ASSUMPTIONS

From the standpoint of the explorative-descriptive character of the investigation, use was made of the following assumptions instead of hypotheses:

Assumption 1

In a large number of our juvenile courts the adjudication of children/juveniles follows an accusatorial-inquisitorial approach.

⁷ The only introductory knowledge about the pre-trial judicial investigation is to be found in the Criminal Procedure Act 51 of 1977, S12, describing preparatory examination. If an attorney-general is of the opinion that it is necessary for the more effective administration of justice.

⁸ According to Frank Hagan. (1982). Research methods in criminal justice and criminology. New York : MacMillan Publishing Co Inc. 9, research in human sciences are often dichotomized as being in the quantitative or qualitative tradition. Research in the quantitative tradition - or positivism - uses research techniques developed and used by the natural sciences. Researchers in the positivistic mould often use crime statistics or data from surveys which can be statistically analysed or used in experimental designs. Research in the qualitative tradition - or anti-positivism - usually reflects an historical, intuitive or observational approach (Weber's *verstehen*) which is foreign to the natural sciences.

See also Lötter, J.M. & Ndabandaba, L.B.G. (1990). Crime and its impact. Pretoria : HSRC. 10.

Assumption 2

In a large number of our juvenile courts the sentencing of children/juveniles follows a rehabilitative-retributive (treatment-punitive) approach.

Assumption 3

The only way to amend the accusatorial-inquisitorial approach to a more inquisitorial-accusatorial approach is by means of the implementation of a pre-trial judicial investigation.

1.2.3 ARGUMENTATION LINE

In most of our courts the administration of justice for children/juveniles follows an accusatorial - inquisitorial approach in the adjudicating phase and rehabilitative-retributive approach in the sentencing phase. The only way to amend these approaches to a more inquisitorial-accusatorial approach and rehabilitative approach is by bridging the gap by means of the introduction of a pre-trial judicial investigation into the juvenile legal system for certain offences, to provide for the evidence to be preserved for the purposes of any subsequent trial, and to provide for matters incidental thereto.

1.2.4 DELIMITATION OF INVESTIGATION

1.2.4.1 Spatial Delimitation

For the purpose of the proposed investigation, it has been decided to delimit the investigation to 55 magistrates (20 black and 35 white) in the Eastern Cape, Border Area, Orange Free State and Transvaal. In this way the role of the researcher as an important variable was ruled out.

1.2.4.2 Variable Delimitation

The investigation took the form of a pilot study, because of its explorative-descriptive character, whose aim is to ascertain which are the salient field problems and the important variables. One of the aims of the investigation is to give a clearer notion of which variables will be of greatest importance. Only after such preliminary empirical results, one will be able to limit the variables which are relevant to the problem.

1.2.4.3 Time Delimitation

Emphasis was placed on the time factor. The fieldwork was conducted in the beginning of 1993 in order to make the unitary character of the investigation somewhat simpler.

1.2.5 METHODS OF DATA COLLECTION

1.2.5.1 Documentary investigation consists of

- systematic screening of textbooks and periodicals relating to the topic of juvenile courts
- analyzing of law reports
- an inventory of research which investigated by empirical means the juvenile courts. Defined in this way the field was not very wide.

A systematic documentary perusal was undertaken by the screening of textbooks, periodicals, law reports and research reports to construct a theoretical base to serve as a frame of reference.

The documentary investigation served four purposes

1. to orientate me with respect to the research problem

2. to determine the best method to be used to collect the data and to avoid mistakes
3. to construct a theoretical base to serve as a frame of reference
4. to derive assumptions from the theory to be tested.

This section refers to research where the researcher has no control over the data to be studied, very importantly, there exists a relationship between the context of the past and the context of the present, although it might be seen as a "multi reality". From the literature it was clear that certain problems do exist in the juvenile court.

1.2.5.2 Preliminary interviews

After the documentary search the different co-workers were visited and consulted. Before the scheduled visit a theoretical framework of the research as well as the research questionnaire were send by fax. During these *sine qua non* visits positive cross- fertilization took place - in passing it may be noted that any future research to be done should always include co-workers who are knowledgeable and enthusiastic because their invaluable ideas formed the backbone of this investigation.

1.2.5.3 Research questionnaire and personal interviews as data-gathering techniques

In addition to the literature review of available juvenile court studies which provided valuable information, more specifically use was made of information obtained from self-report questionnaires and unstructured (informal) interviews.

The respondents were requested, *inter alia*, to indicate by means of a self-report questionnaire whether there are dilemmas prevailing in the juvenile court.

The research questionnaire consists of 72 questions on the topic.

- i. a personalized letter explaining the purpose of the survey
- ii. a letter of permission from the Director-General of Justice to interview magistrates
- iii. a copy of a constructed interview
- iv. a stamped return-addressed envelope

Use was made of close-ended and open-ended questions as well as a combination of the two types of questions. The questions were arranged in the order of the a priori assumptions. Each assumption was surrounded by a number of questions dealing with the specific assumption and arranged in such an order to support the argumentation line. The questionnaires were delivered by hand to a number of magistrates⁹ in the Eastern Cape, Orange Free State and Transvaal. After a few weeks the questionnaires were collected and unstructured interviews were conducted with some of the magistrates.

Confidentiality and anonymity were promised by the researcher to the respondents and it was stressed that no identifying marks were to be made on the questionnaires. On completion, the questionnaires were personally collected and placed in a sealed cardboard container.

⁹ While researchers often experience difficulty when access to bureaucratic organizations such as governmental departments is sought, this was not the case in the present investigation. Permission was obtained from the Director General of Justice for the investigation to be conducted amongst magistrates without any difficulty. Along with the introductory letter a letter of permission of the Director-General, Department of Justice was included.

1.2.5.4 Sampling technique

Because of the nature of the investigation being an explorative-descriptive investigation and because of the time limit it was impossible to select a sample which consists of 55 magistrates selected in such a way as to be representative of all the magistrates in the RSA. Because of the preliminary nature of the investigation the sample that was taken in a non-probability manner (not at random) was adequate and suitable for generalizations. At the same time the readers should keep in mind that if the results are in any way generalized they can only be generalized for Eastern Cape, Orange Free State and Transvaal.

1.2.5.5 Analysis of data

The statistical classification and analysis of the data was done at the University of Orange Free State, Bloemfontein.

Use was made of the descriptive statistical technique to summarize and condense the data to measurable units. In order to determine the factors affecting the function of juvenile courts, the data was analysed statistically. In cases where the specified dependent (response) variable was categorical, \log^{10} linear modelling was used, as well as tables to give a statistic profile. One appendix round out this report. Appendix A includes the research questionnaire.

¹⁰ Although all explanatory variables that are considered should ideally be included in the same model, this could not be done in the case of log linear modelling as the number of observations were too limited. Lötter & Ndabandaba, supra 190.

1.3 KEY CONCEPTS:¹¹

"Adjudicated". Having been the subject of completed criminal or juvenile proceedings, and convicted, or adjudicated a delinquent, status offender, or dependent.

"Arraignment". The appearance of a person before a court in order that the court may inform the individual of the accusation(s) against him or her, and to allow the accused to enter a plea.

"Arrest". Taking a person into custody by authority of law, for the purpose of charging him or her with a criminal offence or for the purpose of initiating juvenile proceedings, which terminate with the recording of a specific offence.

"Child" means any person whether male or female under the age of 14 or reputedly or allegedly or apparently under the age of 14.

"Complainant" means any child or other person against or in respect of whom any abusive offence has or is suspected or alleged or reported to have been committed and includes any parent or guardian of any such child.

"Complaint". A formal written accusation made by any person, often a prosecutor, and filed in a court, alleging that a specified person(s) has committed a specific offence(s).

"Correctional Institution". A generic name proposed in this terminology for those long-term adult confinement facilities often called "prisons".

¹¹ Curzon, L. B. (1988). Dictionary of the law. London : Pitman Publishing.
Gould, J. & Koll, W. L. (1964). A dictionary of the social sciences. London : Tavistock Publication Ltd.
Hardy Ivamy, E. R. Mozley & Whiteley's 1988. Law dictionary. Durban : Butterworths.
Orland, L. (1973). Justice, punishment treatment. The correctional process. New York : The Free Press.
Purseley, R. D. (1984). Introduction to criminal justice. Third Edition. London : Collier MacMillan Publishers.
Also see Bersani, C. A. (1970). Crime and delinquency. London : The MacMillan Co.

"Court". An agency of the judicial branch of government, authorized or established by statute or constitution, and consisting of one or more judicial officers, which has the authority to decide controversies in law and disputed matters of fact brought before it.

"Crime or Criminal Offence". An act committed or omitted in violation of a law forbidding or commanding it for which an adult can be punished, upon conviction, by incarceration and other penalties, or a corporation penalized, or for which a juvenile can be brought under the jurisdiction of a juvenile court and adjudicated a delinquent or transferred to adult court.

"Criminal Justice Agency". An court with criminal jurisdiction and any other government agency or subunit, which defends indigents, or of which the principal functions or activities consist of the prevention, detection, and investigation of crime; the apprehension, detention, and prosecution of alleged offenders; the confinement or official correctional supervision of accused or convicted persons; or the administrative or technical support of the above functions.

"Criminal Proceedings". Proceedings in a court of law, undertaken to determine the guilt or innocence of an adult accused of a crime.

"Defence Attorney". An attorney who represents the defendant in a legal proceeding.

"Delinquent Act". An act committed by a juvenile for which an adult could be prosecuted in a criminal court, but for which a juvenile can be adjudicated in a juvenile court, or prosecuted in a criminal court if the juvenile court transfers jurisdiction.

"Detention". The legally authorized holding in confinement of a person subject to criminal or juvenile court proceedings, until the point of commitment to a correctional facility or release.

"First possible opportunity" means the first possible opportunity, irrespective of normal office, court or working hours, and "as soon as possible" has a corresponding meaning.

"Hearing". A proceeding in which arguments, witnesses, or evidence are heard by a judicial officer or administrative body.

"Investigation Magistrate" means any Magistrate appointed as an investigation Magistrate by the Director-General of the Department of Justice for purposes of this decree.

"Judge". A judicial officer who has been elected or appointed to preside over a court of law, whose position has been created by statute or by constitution, and whose decision in criminal and juvenile cases may be reviewed only by a judge of a higher court and may not be reviewed *de novo*.

"Judicial Officer". Any person exercising judicial powers in a court of law.

"Juvenile". A person subject to juvenile court proceedings because a statutorily defined event was alleged to have occurred while the person's age was between 14 and 17, the statutorily specified limit or original jurisdiction of a juvenile court.

"Juvenile Court". A cover term for courts that have original jurisdiction over persons statutorily defined as juveniles and alleged to be delinquents, status offenders, or dependents.

"Offender" means any person who has or is alleged or suspected to have, committed an offence.

"Offence". An act committed or omitted in violation of a law forbidding or commanding it.

"Penalty". The punishment annexed by law of judicial decision to the commission of a particular offence, which may be death, imprisonment, fine, or loss of civil privileges.

"Police Official" means any member of the South African Police.

"Probation". The conditional freedom granted by a judicial officer to an alleged offender, or adjudicated adult or juvenile, as long as the person meets certain conditions of behaviour.

"Prosecutor". An official employed by government whose official duty is to initiate and maintain criminal proceedings on behalf of the government against persons accused of committing criminal offences.

"Rule of Law" The regular law of the land predominates over and excludes the arbitrary exercise of power by the government, all people are equally subject to the law administered by the ordinary courts and the law is derived from individuals' rights as declared by the courts.

"Sentence". The penalty imposed by a court on a convicted person, or the court decision to suspend imposition or execution of the penalty.

"Trial". The examination of issues of fact and law in a case or controversy, beginning when the court officials have been selected, or when the first witness is sworn, or the first evidence is introduced in a court trial, and concluding when a verdict is reached or the case is dismissed.

"Victim". A person who has suffered death, physical or mental suffering, or loss of property as the result of an actual attempted criminal offence committed by another person.

"Witness" means any person (other than a complainant on or in respect of whom an abusive offence has, or is alleged or suspected to have been committed) who is able and competent to give evidence concerning such offence.

"Youthful offender". A person, adjudicated in criminal court, who may be above the statutory age limit for juveniles (17 years) but is below a specified upper age limit, for whom special correctional commitments and special record sealing procedures are made available by statute.

RESUME

In sum, Chapter 1 attempts to give an overview of the methodological problems and strategies concerning the research problem and the most important decisions and steps that had to be taken. The methodological context of this investigation is particularly difficult because of its explorative-descriptive nature and goals. It is hoped that Chapter 1 will demonstrate to the reader how the investigation was executed.

Chapter 2 links up with the theoretical context of Assumption 1, i.e. in a large number of our juvenile courts the adjudication of children/juveniles follows an accusatorial-inquisitorial approach.

CHAPTER 2

THE ACCUSATORIAL AND INQUISITORIAL APPROACHES TO CRIMINAL ADJUDICATION : JUVENILE COURTS

2.1 GENERAL IMPRESSIONS

One important function of science is to unravel challenging problems and questions for the future and at the same time to propose important considerations which will assist the actual process of finding answers.

The juvenile court was intended to have a special mission of protection towards juveniles. From the beginning the juvenile court has been confronted with conflicting demands, rooted in the inconsistencies that led to its creation.

Was the court to emphasize the interest of society at large, protecting it against harmful behaviour of its juveniles, or should the court respond in the first place to the needs of juveniles, irrespective of the nature of their behaviour?¹

During the 1960's and early 1970's, when many groups were demanding their civil rights, the juvenile court process was questioned in several important matters brought to the

¹ The first juvenile courts were established on the premise that it was the court's right and duty to intercede on a child's behalf in order to eliminate undesirable social influences leading to antisocial behaviour. From 1899 until the mid-1960's, the juvenile courts exercised the authority and enforcement power granted to them but placed little emphasis on the legal rights of the accused. The criminal justice process was characteristic of adult criminal proceedings where punishment became the centre of court philosophy. The mandate given to juvenile courts was so broad, and juvenile codes were written in such general terms, that some of the behaviour of nearly all American youths could have brought them to the attention of the juvenile court. Discretionary practices of police and court workers were applied arbitrarily, coercively and in a discriminatory manner. Once a youth came under the juvenile court's jurisdiction, officials could do as they wished, under the philosophy that their decisions would serve the best interests of the child. Kratcoski, P.C. & Kratcoski, L. D. (1986) Juvenile delinquency. Second Edition. New Jersey : Prentice-Hall Englewood Cliffs. 79.

U.S. Supreme Court². The decisions of the Court had far-reaching effects in altering court procedure and philosophy. The *parens patriae* principle gave way to a new philosophy guaranteeing youth their rights under the Constitution, answering their need for treatment, guidance, punishment or rehabilitation and protecting the community.

Contemporary thinkers³ are divided as to the direction the juvenile court should now take. Some believe that the present situation should continue, some believe that it should cease from jurisdiction over all but the most serious offenders. Others⁴ feel that the juvenile court has not brought about any changes in the juvenile offenders and should be abolished. The dispute about the future role and function of the juvenile court has not yet been resolved.

From the beginning the juvenile court has been confronted with conflicting demands, rooted in the inconsistencies that led to its existence. Was the court to emphasize the interest of society at large, protecting it against harmful behaviour of its children/juveniles, or should the court respond in the first place to the needs of children/juveniles, irrespective of the nature of their behaviour.

The first option has been summarized as the "punitive (justice) model" and is based on a certain conception of individual responsibility, implying sanctions to protect society, and a guarantee of legal rights and due process.

The second option may be labelled as the "treatment (rehabilitative) model" and is based on the needs of the child/juvenile independent of his behaviour. It emphasizes treatment by professionals and implies great discretionary powers of decision of administrative agencies.

² Thornton & Voigt, *supra* 368.

³ *Ibid.*

⁴ Kratcoski & Kratcoski, *supra* 85.

It is only fair to admit that juvenile courts have come under the increasing pressures of conflicting demands. On the one hand there are those who claim that the court is not the right institution to intervene in the lives of children/juveniles; other structures should take its place. On the other hand there are those who expect the court, if not to solve, then at least to make a substantive contribution to the solving of society's problems with its unruly young people.

Despite the general consensus that the juvenile court should be a special court with its own philosophy and not "a replica of a court for adults" as Judge David Reifen⁵ says, there are important issues about the need for adequate presentation of evidence, proper representation by counsel, and protection against excessive sanctions sometimes given under the rubric of humanitarian motives and individualized treatment. Unfortunately, too often is "treatment" a form of punishment or institutional neglect. Reifen is convinced that the juvenile court *per se* constitutes a dynamic situation which accords its potentialities of punishment and treatment a special nature.

Juvenile crime and judgements about the disposition of juvenile offenders are of increasing concern to the laymen as well as to criminologists, lawyers, and probation officers. The functions and procedures of the juvenile court have become controversial issues especially since the Gault decision⁶ in the U.S.A.

⁵ Reifen, D.C. (1972). The juvenile court in a changing society. Jerusalem Weidenfeld and Nicolson vii.

⁶ In 1961 the Juvenile Court Act in California restored a more formal, adversarial mode to juvenile court proceedings, and the Supreme Court's decision in the Gault case prompted many states to introduce due process amendments. In the landmark case of *In re Gault*, 387 U.S. 1 (1967), the court decided that the concept of fundamental fairness be made applicable to juvenile delinquency proceedings. In other words, the Supreme Court ruled that the due process clause of the Fourteenth Amendment required that certain procedural guarantees were essential to the adjudication of delinquency cases. It then specified the precise nature of due process by indicating that a juvenile who has violated a criminal statute and who may be committed to an institution in which his freedom may be curtailed is entitled to: (1) fair notice of charges against him; (2) right to representation by counsel; (3) right to confrontation and cross-examination; and (4) the privilege against self-incrimination.

The *Gault* decision, and particularly the constitutional right of a juvenile to the assistance of counsel, has completely altered the juvenile justice system. Instead of dealing with children in a genign and paternalistic fashion, the court must process juvenile offenders within the framework of appropriate constitutional procedures.

On the basis of these introductory remarks and assumptions, an *excursus* of the most important perspectives to criminal procedure in the juvenile court will be analyzed.

2.2 VARIOUS APPROACHES OF CRIMINAL PROCEEDINGS IN A JUVENILE COURT

In most countries the administration of criminal adjudication for juveniles follows one of two models: the accusatorial or adversative (punitive) model, or the inquisitorial or non-adversative (treatment) model. While the former is the model of the Anglo-American countries, the latter can be found on the European continent⁷.

It must be stressed *ab initio* of this *excursus*, that in almost no developed country today would one find a system which is exclusively accusatorial or exclusively inquisitorial⁸. In almost all countries one constantly finds a 'cocktail' system with a marked stress on either of the two approaches. It must also be emphasized that any relation of difference between the accusatorial and inquisitorial approaches as having distinguishing qualities is theoretical or rather hypothetical.

Let us therefore examine each approach in the light of research which has been done or which could be done in South Africa without ignoring underlying questions, complications or details.

2.3 SUBSTANTIAL CHARACTERISTICS OF THE ACCUSATORIAL APPROACH

The theoretical construction of the accusatorial approach is based upon the following characteristics:

See also Senna & Siegel, *supra* 267 268.

Coffey, A. R. & Renner, V. E. (1975). Criminal justice as a system : Readings. New Jersey: Prentice-Hall Inc. 174.

Hudson, B. (1987). Justice through punishment. London : MacMillan Education Ltd. 142.

⁷ Herrmann, J. (1978). "Various models of criminal proceedings." SACC. 2

⁸ Snyman, C. R. (1975). "The accusatorial and inquisitorial approaches to criminal procedure, some points of comparison between the South African and continental systems. CILSA. 100.

- (i) A system in most common law countries whereby parties and their representatives have primary responsibility for finding and presenting evidence⁹.
- (ii) The Anglo-American accusatorial system has been branded as being too much like a contest between two parties opposing each other¹⁰, party-centered¹¹. The parties present their case to the magistrate or judge.
- (iii) To prepare the trial, not only the prosecution but also the defence has to collect its own evidence. Often the defense has no, or only a limited, right to pre-trial discovery and inspection of the files of the prosecution¹².
- (iv) The evidence brought before the juvenile court must be accurate and reliable: hearsay evidence inter alia is not admissible.¹³
- (v) Each side presents evidence, which is challenged by cross-examination¹⁴ (interrogation) of the witnesses - an exhibition of confrontation and accusation. In order to give his verdict, the presiding officer merely relies on what he has been told by the opposing parties, and they, in order to favour their own argument, can influence the truth. The result is that the final verdict of the magistrate/judge cannot be described as reflecting the material truth, but at most ... the formal truth¹⁵. Their decision can only be supported by evidence which has been introduced to them¹⁶. In many particular cases it becomes a contest

⁹ Curzon, supra 6.

¹⁰ Snyman, supra 108.

¹¹ Herrmann, supra 5.

¹² Ibid.

¹³ Morris, A., Gilles, H. & Geach, H. (1980). Justice for children. Bristol : The MacMillan Press Ltd. 100.

¹⁴ The incredible standard of cross-examination of public prosecutors and defence counsels in South Africa is very impressive and has become an art in its own right, with an untouchable sovereignty, promoted to the level of the proverbial 'holy cow'. Any attempt to change the principles of cross-examination will be met with an unsympathetic resistance.

¹⁵ Snyman, supra 108.

¹⁶ Morris, supra 100.

where the different parties aim to 'win the case' with no consideration for truth and justice. This contest can metaphorically be compared with a boxing competition where points can be scored under the jurisdiction of the referee and the judges.

- (vi) Cross-examination of witnesses is a challenge to the presented evidence and conducted in court by a standard procedure. An accused cannot be forced to testify: since the accused is a party to the contest neither the prosecution nor the judge has a right to put questions to him as long as he refuses to testify¹⁷.
- (vii) The role of the magistrate/judge in the first part of the accusatorial juvenile trial is mainly visually 'passive' (quiescent). He has to listen to the evidence that is presented to him and he has to make an effort to hear the arguments of the different parties. Eventually he is not constrained to be entirely inactive. He may rule on the admissibility of evidence and on the correctness of the conduct of the parties¹⁸. He may interfere or mediate to contribute to the progress of the trial. He also has the jurisdiction to put additional questions to witnesses and to call witnesses who were not called by either of the parties.¹⁹

2.4 SUBSTANTIAL CHARACTERISTICS OF THE INQUISITORIAL APPROACH

The theoretical construction of the inquisitorial (inquisitio - a searching after) approach is based on the assumption that the court hearing is an investigation rather than the settlement of a dispute. The characteristic elements of the inquisitorial approach are described below.

¹⁷ It has to do with the right of the accused to refuse to testify on the grounds that he may incriminate himself by doing so.

¹⁸ Herrmann, supra 5.

¹⁹ Ibid.

- (i) According to C.R. Snyman²⁰ the most obvious discrepancy between the continental inquisitorial system and the Anglo-American accusatorial system is in the function and duty of the *judge* or presiding officer during the trial. The continental judge plays a much more active role during, and sometimes before, the trial. These trials are 'judge-centered'²¹, for it is he who introduces and draws forth the evidence by first questioning the witnesses or the accused, and who decides upon the order in which the evidence is taken. In cases of a serious or complicated nature, the investigation of the case before it comes to trial is led by an *investigating judge*²². His function is not the same as that of the trial judge²³. He does not have to decide upon the guilt of the accused, but only to determine whether there is adequate cause to authorize a trial by a competent court. He can be assisted by the police services. His investigation must be carried out within the provisions of the procedural rules controlling this portion of the criminal procedure²⁴. One of the principle tasks of the investigating judge is to examine and consider all factors which may free the accused from accusation and blame.
- (ii) The investigating judge must invite the accused to co-operate with him in the investigation, and he may for this purpose interrogate the accused²⁵. The latter may prefer to say nothing, but his silence cannot be held against him at a later stage: he is exercising his right to remain silent.²⁶
- (iii) In the inquisitorial system the office of the public prosecutor is expected to take on the task of investigating the suspicion that a crime has been committed and to

²⁰ Snyman, supra 103.

²¹ Herrmann, supra 5.

²² Snyman, supra 103.

²³ Ibid. 104.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Du Plessis, J. R. (1988). "An inquisitorial system in practice - visits to German criminal courts. SALJ. 304.

decide whether there is enough evidence against the accused to justify a trial²⁷. Though part of the Department of Justice, it is nevertheless the function and duty of the public prosecutor to look diligently for the truth of the matter²⁸. He is not a party opposing the accused, and in his quest for the truth must also consider all factors which may free the accused from all blame. The public prosecutor plays a comparatively minor role at the trial and may only ask questions with the leave of the judge.

- (vi) Another substantial characteristic of the accused pertains to the pre-trial judicial interrogation of the accused. The rationale for this investigation is not to decide upon the guilt of the accused, but merely to ascertain whether there are sufficient grounds of suspicion to justify a court trial. The existence of the pre-trial judicial interrogation is defended by *inter alia* the consideration that such procedure offers greater protection to the accused than an investigation merely by the police²⁹. The pre-trial judicial interrogation can be summarized as follows: the accused must be informed of the accusation against him and the applicable penal *provisio*; he must be warned by the investigating judge that he is under no obligation to respond to the charge; he must also be informed of his right to have a legal counsel; the accused is asked some personal questions about himself; he may also be asked whether he has any previous convictions; thereupon the accused is given the opportunity to state his version of the facts bearing upon his guilt; the main idea of his interrogation is to afford him an early opportunity of clearing him of any suspicion³⁰; all questions are asked by the investigating judge; the accused may, during the interrogation, be confronted with the complainant or a witness.

²⁷ Snyman, *supra* 103.

²⁸ Snyman, *supra* 103.

²⁹ *Ibid* 104.

³⁰ *Ibid*.

2.5 THE INQUISITORIAL APPROACH IN THE GERMAN CRIMINAL COURTS.

J.R. du Plessis³¹ summarizes the inquisitorial system in the German Criminal Courts as follows:

At the commencement of the criminal trial the accused tells the court about himself. The judge may also question him about certain events in his life. The questioning elaborates chronologically around the biography and ends before the alleged commission of the crime. The prosecutor then reads the charge. This is a statement of the crime with which the accused is reproached and consists mainly of a fairly detailed summary of the evidence giving rise to the reproach. The accused's right to silence is then explained to him. Then follows the stage of surveying and acceptance of the evidence. Such evidence may be oral, documentary or real. Witnesses, including expert witnesses, are called and the accused is allowed to give further evidence. The accused is allowed to confront his accusers and also given the opportunity of responding to the evidence. Witnesses may also respond to the responses of the accused and this can result in a conversation between the judge, accused and witnesses as well. It is an excellent procedure for arriving at the truth. The accused is also given the right to address the court after both counsel have addressed the court at the end of the trial. Questioning is mainly done by the presiding judge. The evidence of every witness is also led by the presiding judge, he cross-examines witnesses where necessary, calls for comments by the accused, questions him and the witnesses on his comment and is actively involved in most of the proceedings, besides keeping a watchful and controlling eye over the rest. A German prosecution has three stages; (1) investigation; (2) application by the prosecutor for permission to proceed to trial; (3) the trial. At stage (2) a court of professional judges, with the same jurisdiction as the court before which the trial is proposed to be held, evaluates the evidence. Unless a fairly strong case can be made out against the accused on the probabilities, the court will not allow him to be placed on

³¹ Du Plessis, *supra* 305-309.

trial. One result of this is that many of the more serious trials end in a predictable conviction. This is by no means to suggest that the accused is prejudged. It is merely a result of the sifting process at the second stage, where prosecutions that ought not to go to trial are halted. The presiding judge does all the questioning. The public prosecutor has the right to question with a view to having the accused convicted, as opposed to the judge, whose questioning should be impartial. The defender cross-examines witnesses and has the difficult task of re-examining the accused. The standard of cross-examination of prosecutors or defenders is not impressive -the cross-examination is not the art which it is in the Anglo-American countries. The last witnesses at the German trial are usually the expert witnesses, who, up to that stage, are allowed to take part in the proceedings. Once they have given their evidence and been questioned, they are dismissed. At the close of the evidence the court is addressed by the prosecutor and defender. The prosecutor sets out his grounds for asking for a conviction, as well as his assessment of a fitting sentence. The defender would naturally ask for an acquittal if that is in any way to be expected, or for a lenient sentence. At the close of the trial, the court goes into recess, and as soon thereafter as possible the verdict and sentence are pronounced simultaneously in open court.

The proceedings in a German court can therefore be summed up as follows: an elaborated investigation denoting an inquiry for truth or fact not only by questions, but by every other means of procuring information.

2.6 RESUME

In sum, Chapter 2 addresses the theoretical context of Assumption 1 about the accusatorial-inquisitorial approach in the adjudication process of juveniles.

An important next step would seem to be to give an analysis of the theoretical context of Assumption 2, i.e. in a large number of our juvenile courts the sentencing of children/juveniles follows a rehabilitative - retributive (treatment-punitive) approach.

CHAPTER 3

THEORETICAL CONTEXT OF INVESTIGATION - SENTENCING PRINCIPLES RETRIBUTION vs REHABILITATION FOR THE JUVENILE OFFENDER

3.1 INTRODUCTION

Punishment theories consider the various assumptions regarding the desirable objectives¹ of punishment and the rationale that should support sentencing - punishment or treatment.

According to Rabie and Strauss² the theories of punishment have played an important role as far as criminal law is concerned. They have traditionally been developed as moral justification of punishment and have been instrumental in the classification of the nature of punishment. They have reflected the purpose of punishment and prevention and in this respect have been of paramount importance to every official in the child/juvenile justice process.

These theories encompass the moral claims as to what justifies the practice of punishment and prevention. Before discussing the theories of punishment I should like to turn to a brief outline of the nature of criminal punishment and to examine in what way it is compatible with the juvenile justice philosophy.

3.2 THE NATURE OF CRIMINAL PUNISHMENT FOR JUVENILE OFFENDERS

Punishment is the sanction³ of the criminal law, and not only stipulates⁴ what

¹ Grupp, S. E. (ed)(1971). Theories of punishment. London : Indiana University Press. 3, 5.

² Rabie, M. A. & Strauss, S. A. (1985). Punishment. An introduction to principles. Cape Town : Lex Patria. 18.

³ Ibid. 6.

⁴ Visser, P. J. & Vorster, J. P. (1987). General principles of criminal law through the cases. Durban : Butterworths. 9.

behaviour must be made criminal, but also lays down what must be done with persons who commit crimes.

In Visser and Vorster⁵ Du Toit supplies the following definition of punishment:

"..... 'n straf of vonnis kan dus basies omskryf word as die nadelige sanksie wat die veroordeelde beskuldigde deur 'n geregshof opgelê word na 'n verhoor en skuldigbevinding aan 'n misdryf, en wat deur die Staat ten uitvoer gelê word sonder dat die oortreder beheer daarvoor kan uitoefen."

3.2.1 Certain important aspects of punishment:

- 3.2.1.1. Criminal punishment can be applied only to someone who has been found guilty of the committing of a crime.⁶
- 3.2.1.2. Criminal punishment is an institutionalised sanction, prescribed by the authority, consisting of the community's condemnation⁷ and disapproval of the conduct of the offender and involves stigmatisation, infliction of suffering and drastic consequences for offenders.
- 3.2.1.3. It is important to notice that punishment has a moral justification provided that the moral theory is correct and that the theory is correctly applied.
- 3.2.1.4. We might see punishment as an attempt to demonstrate to the offender that his act was wrong, not only to mean the

⁵ Visser & Vorster, *supra* 9.

⁶ Rabie & Strauss, *supra* 8.

⁷ *Ibid* 10.

See also Fletcher, G. P. Rethinking criminal law. Boston : Little Brown & Comp. 409, 140.

act is wrong but to show him its wrongness⁸.

- 3.2.1.5. The ultimate aim of punishment is the protection of society through the prevention of criminal offences by drastic legal sanctions which must have a retributive character to combat reprehensible conduct.
- 3.2.1.6. Punishment should have a retributive element, otherwise it would mean that no penalty remains to express society's condemnation of the offender and his conduct in a meaningful way.⁹
- 3.2.1.7. Our courts continually refer to the fundamental requirements of our criminal justice that an accused person is entitled to a fair and just trial in accordance with prescribed legal principles, and that in the adjudication of a criminal case any unfairness or injustice must be avoided. The element of mercy, a hallmark of civilized and enlightened administration, should not be overlooked.¹⁰
- 3.2.1.8. The effectiveness of punishment is increased by
- the assertion of the certainty of punishment;
 - the notion of the severity of punishment;
 - the importance of the celerity of punishment; and
 - the cognitive knowledge of prescribed punishment. This cognitive knowledge is crucial if only because it is central in

⁸ Cohen, E. D. (1988). Philosophers at work. An introduction to the issues and practical uses of philosophy. New York : Holt Rinehart and Winston Inc. 118. There are some things whose wrongness we cannot show by doing the same to him. To act in such a matching fashion would only make things irremediably worse.

⁹ Rabie & Strauss, supra 12.

¹⁰ Steyn, J. H. (1973). The punishment scene in South Africa. Unpublished. 538.

the deterrence approach - an individual cannot be deterred from committing a crime unless he or she knows the prescribed punishments.

Of the many aspects of punishment mentioned supra the following are of vital importance to the juvenile offender:

- to demonstrate to him that his act was wrong and to show him the wrongness;
- the effectiveness of punishment will be enhanced by such aspects as certainty, severity and celerity;
- the cognitive knowledge of prescribed punishments for criminal offences.

A systematic endeavour to teach these young people about the moral *judicatio* of punishment as well as society's acceptance and condemnation of good and bad behaviour respectively, should be top priority for every official or agency dealing with them. To teach juveniles their moral responsibilities can become the most effective secondary way of bringing delinquent juveniles to a realization of the wrongness of their acts.

3.3 RETRIBUTION AS A SENTENCING PRINCIPLE

Retributive justice¹¹ is the theory of punishment based on a supposed moral link between wrong-doing and justice.

¹¹ Consult Allen, H. (1987). Justice unbalanced. Gender psychiatry and judicial decisions. Philadelphia : Open University Press. 54 - 88
Ewing, A. C. (1970). The morality of punishment. New Jersey : Patterson Smith and Company. 87 - 119.
Gibbs, J. P. (1975). Crime punishment and deterrence. New York : Elsevier Scientific Publishing Co. 82.
Moberly, W. (1968). The ethics of punishment. London : Faber & Faber Ltd. 33.
Robin, R. (1980). Introduction to the criminal justice system principles procedures practice. New York : 291.
Thomas, D. A. (1970). Principles of sentencing. London : Harper and Row Publishers. 35.

Offenders, it is claimed, ought to be punished under law in proportion to their guilt and the injury inflicted on the victims.¹²

Retribution means that the injustice which has been brought about by the commission of the crime is wiped out by the imposition of an equivalent evil upon the offender.¹³

It is sometimes said that retribution¹⁴ is a reflection of the community's condemnation of a crime. Failure to punish a criminal may bring the system of justice into disrepute and encourage people to take the law into their own hands. Retribution, therefore, is said to be the only true theory of punishment because it relates punishment directly to the idea of justice.

The essence of retribution is the belief that the offender deserves to suffer because he voluntarily and knowingly transgressed the precepts of the criminal law and should be punished.

The essence of punishment can only be explained from a retributive basis, as the only theory of punishment which ensures that justice will prevail. The emphasis should not primarily be on the offender and society's reaction towards him, but rather on society at large, and its protection.¹⁵

3.4 RETRIBUTIVE JUSTICE AND THE JUVENILE OFFENDER

There is substantial agreement that the outstanding characteristics of retributive justice are:

¹² Curzon, supra 247.

¹³ Visser & Vorster, supra 9.

¹⁴ Rabie & Strauss, supra 21, points out that retribution should not be confused with revenge. The basic difference between the two is that revenge knows no balance between the injury done by the person taking revenge and the injury done to him.

¹⁵ Rabie & Strauss, supra 22.

- 3.4.1 intentional inflicting of suffering upon an offender in the form of pain and inconvenience to the extent which he deserves¹⁶ - to inflict suffering on an offender seems merely to be adding the evil of suffering to the evil of the offence. In all of our daily relations we are rewarded for being good and attractive and penalised for not being so.
- 3.4.2 the condemnation of the offender and his crime; this is an expression¹⁷ of the community's resentment and disapproval of the offender and his conduct. Grupp¹⁸ refers to this as society's collective expression and natural feeling of revulsion toward and disapproval of criminal acts. It is the retributive response which gives meaning to the label "criminal", which places him in a lower status than that of law-abiding citizens. Thus, retribution is a way in which people can express their feelings and it is of no use to ask them to suppress these feelings. The emphasis should not primarily be on the offender and our reaction towards him, but rather on society at large and its protection.¹⁹
- 3.4.3 Retribution is tempered by the fact that punishment must always relate to the blameworthiness²⁰ of the accused as well as to the nature and extent of the act itself. This view is based on the assumption that there should be an adequate proportion between the punishment and the harm done to society. If there is an adequate proportion between the punishment of the accused and the seriousness of his crime, retribution will amount to atonement for his crime.

¹⁶ Rabie & Strauss, supra 20.

¹⁷ Cohen, supra 118, refers to this matter as the expressive function, wherein the community condemns the crime.

¹⁸ Grupp, supra 5.

¹⁹ Rabie & Strauss, supra 22, and Garland, supra 10, points out that the sociology of punishment concentrates on the relationship between punishment and society.

²⁰ Visser & Vorster, supra 9, and Rabie & Strauss, supra 20.

Rabie and Strauss²¹ point out that the notion that punishment must be deserved, is important in that it reflects proportion as pointed out above. There seem to be two different proportions involved, viz. a proportion between the punishment and²² the offender's blameworthiness and a proportion between the punishment and the harm that the offender has inflicted upon society. The determination of the proportion between the severity of the punishment and the severity of the offence in the light of the blameworthiness of the offender and the harm he has done to society and for which he is responsible, is of great importance, since it requires that justice be done towards the offender and society; that is to say, it connects punishment with justice.

3.5 RETRIBUTION AND ITS APPLICATION TO JUVENILE OFFENDERS

This is not so much a plea for neglecting the factors of reformation and deterrence as for making punishment more retributive. It is a plea for the proper understanding of

²¹ Rabie & Strauss, supra 20.

²² According to Rabie & Strauss supra 21, the theory of retribution has frequently been criticised, and has even been described as "barbaric", because of a crude revenge basis with which it is sometimes - on account of its equation with the *lex talionis*, or at least with the brutal treatment of offenders - associated. It has however, long been recognised that retribution does not - indeed mostly cannot - imply that the punishment be equal in kind to the harm that the offender has caused. All that it does imply, is that there should be an adequate proportion between the punishment and the seriousness or gravity of the crime. It has, however, been pointed out that a quantification of what the offender deserves is very difficult, if not almost impossible, to make.

Retribution should not be confused with revenge. The basic difference between the two is that while revenge knows no balance between the injury done by the person taking revenge and the injury occasioned to him, retribution implies, as has been pointed out, that punishment be proportional to the gravity of the crime.

An absolute theory such as retribution presupposes an absolute concept of the State. Today, however, a functional concept of the State is generally accepted, which implies that a duty is imposed on the State to exercise its power on behalf of its subjects and to prevent and combat crime with a view to protecting the community. The purpose of the State accordingly is not merely to ensure justice; therefore it cannot be the purpose or justification of punishment. In other words, the emphasis should not primarily be on the offender and our reaction towards him, but rather on society at large, and its protection.

Although retribution as the only justification for punishment today has very few supporters, retributive considerations continue to play an important role. The essence of punishment, as has been pointed out, can be explained only from a retributive basis, while retribution is the only theory of punishment which ensures that justice will prevail also in relation to the offender.

retribution as, on the one side, the primary ground of punishment, but, on the other side, the setting of limits within which retributive justice can be exercised for the purposes of reformation/treatment.

It seems kinder to think of reformation alone and to forget about retribution, but in the end this is to forget moral responsibility²³. If a just view of punishment is to be taken, it must be remembered that the normal adult has a certain ultimate responsibility for his deliberate actions: if he acts wrongly he deserves his punishment.

Retributive punishment communicates to the recipient juvenile offender a message of how wrong what he did was and might be seen as

3.5.1 an attempt to demonstrate to the juvenile offender that his act was wrong.

The most powerful way to show that his act was wrong is to do the same to him. Apart from the immorality of such a 'revenge act', there are some things whose wrongness we cannot show by doing the same to him : it would only make things irremediably worse²⁴;

3.5.2 to show him the wrongness; the problem with juvenile offenders is that their ability to realize the wrongness of their deeds is not fully developed and they are so far outside the moral realization that most of the time there is nothing left to do but deter them;

3.5.3 the moral improvement²⁵ of the juvenile offender.

The courts should not be given an unrealistically large role in stemming the rising tide of juvenile crime. An assumption by society that the courts are going to solve the problem is naive. Something has to be done about the home life and the larger

²³ Grupp, supra 18.

²⁴ Cohen, supra 118.

²⁵ Ibid.

environment of those juvenile offenders in terms of the values of the South African society.

Adults neglect the important functions of teaching juveniles morals and of being an example to them - there is a proliferating phenomenon of emotional starvation and they therefore plunge into deviant behaviour as an escape from their empty lives.

In many cases these juvenile offenders have never been connected to 'correct' values and have become disconnected from 'correct' values. The purpose of punishment, through the juvenile court, is an attempt to (re) connect them in order to produce some significant and positive effect on their lives in such a way that the correct values will be internalized by the juvenile offenders.

Sprinthall and Sprinthall²⁶ remark that it is perhaps of great value to refer in this respect to Lawrence Kohlberg's Theory of moral growth. He found that moral development occurs in a specific sequence of stages regardless of culture or subculture, continent or country. This means that one can no longer think of moral character in either/or terms, or assume that character is something one does or does not have. Instead of existing as fixed traits, moral character occurs in a series of developmental stages²⁷.

²⁶ Sprinthall, N. A. & Sprinthall, R. C. (1990). Educational psychology. A developmental approach. New York : McGraw-Hill Publishing Co.

²⁷ In other words, what Piaget identified as stages of cognitive development, and what Erikson suggested as being stages of personal development, Kohlberg described as stages of moral development. He identified six stages of moral growth, each distinctly different. Stage 2 obedience and moral decisions are based on very simple and physical material power. The survival of the fittest. Stage 1 behaviour is based on the desire to avoid severe physical punishment by a superior power. Stage II actions are based largely on satisfying one's own personal needs - egocentrism. The idea is to figure out ways, how to make trades and exchange favours. The orientation is materialistic in that moral ideas are expressed in instrumental and physical terms. If you can get away with things you are successful. There is little regard for other people and genuine empathy is lacking. These two stages are sometimes classified together as the pre-conventional stage of moral development. Stage III is characterized by social conformity. At this stage a person makes moral judgements in order to do what is nice and what pleases others. The egocentrism of Stage II is replaced by the ability to empathize, to feel what others may be feeling - to increase in social-role-taking perspective. He will go along with the majority consensus or social convention.

Stage III behaviour conforms strictly to the fixed conventions of the society in which we live.

To conclude, it is for the juvenile court to decide how to (re)connect the disconnected juvenile offender to the correct values. Although this is less desirable it is an alternative way - if the juvenile chooses not to give correct values effect in his life, then others must try.

The implementation of an extraordinary pre-trial judicial investigation, with a '*parens patriae*' type of investigating magistrate can act as an instrument for bringing the juvenile offender to the realization of the wrongness of his acts, not only by showing him them, but also indicating to him how he can build and edify his whole life and existence.

Sometimes it is a case of trying to please everyone.

At Stage IV, the individual looks to rules, laws, or codes for guidance in dilemma situations. Civil- and criminal-law codes in our society represent a more stable and comprehensive system of resolving moral dilemmas, than attempting to solve such questions on the basis of social conventions, community popularity, and what the leading crowd decides is the "nice" thing to do. Laws and rules as codified wisdom can be viewed as a positive glue, providing a society with stability and cohesion by guarding against quickly changing social customs. The laws or rules represent society's attempt to set the same standards of conduct for all its citizens. Moral judgements are made by individuals in accordance with those rules. A person thinking at this level, then, does not simply look out for number one (Stage II), or follow the leading crowd (Stage III), but rather makes decisions that square with the existing legal codes. Difficulties arise, however, with this rigid, law-and-order orientation. What do we do when the laws conflict or are unclear? Lawyers have a saying that difficult and complex social problems make for "bad" laws. The laws relating to poaching, for example, protect the wild life against poachers, with severe sentences, but what about the child that was killed by a negligent driver?

In the Kohlberg scheme Stages V and VI are called the stage of postconventional morality, the highest stage of moral development. An individual at the stage of postconventional morality behaves according to a social contract (Stage V) or according to a universal principle such a justice (Stage VI). Moral thinking and judgements are complex and comprehensive. Each situation is examined carefully in order to derive general principles to guide behaviour appropriate for all. There are never any easy solutions to complex human problems and moral dilemmas. Judgements and decisions are neither simply situational and conveniently relative, nor easy and fixed in their application of a rule. At this level, we have to account simultaneously for all the situational aspects, motivations, and general principles involved.

At stage V the principles are usually written as a document of assumptions or a declaration of ideas. Reasoning at this level requires the ability to think abstractly (to view laws as a system of governance), to weigh competing claims, to take into account both the logical and emotional domains, to take a stand and yet remain open to future, more adequate interpretations of social justice.

At Stage II the principles of social justice are universal, yet not necessarily in written form. The principles are abstract, ethical, universal and consistent - these are universal principles such as equality of human rights, and respect for the dignity of human beings as individual persons. Sprinthall and Sprinthall 171-179.

3.6 REHABILITATION AS A SENTENCING PRINCIPLE

Investigators differ in their views of the concept of rehabilitation because of the numerous goals set for rehabilitation. Roux²⁸ describes it as follows: Rehabilitation envisages the reorientation, re-education or reform of an offender with a view of self-improvement, self-uplifting, greater self-control, greater acceptance of responsibility towards himself and at hers, if necessary, the actualization of a personality change and changed way of life so that he is able to take his place again as a citizen of standing in society. A realistic view²⁹ of rehabilitation is embodied in the idea that there are degrees of rehabilitation and that not all offenders are equally rehabilitatable.

Korn and McCorkle³⁰ describe the concept of rehabilitation in three different senses: the punisher's aim or objective; the methods used to achieve them; and their influence or effect on the offender rehabilitated.³¹

The ultimate aim of rehabilitation is to accomplish the reintegration of the temporarily suspended individual back into the main stream of social life³², preferably a life at a higher level than before, just as soon as possible. Here the emphasis is placed not on

²⁸ Roux, J. 1973. Die gevangenis rehabilitasieverwagtings. Misdaad, straf en hervorming VOL. 2. 17.

²⁹ Penology study guide. PNL201G. (1982). Pretoria : University of South Africa. 91.
See also Garland, D. (1990). Punishment and modern society a study in social theory. Oxford : 186.

³⁰ Korn, R. R. & McCorkle, L. W. (1965). Criminology and penology. New York : Holt Rinehart & Winston, 533. See also Garland, D. (1990). Punishment and modern society. Oxford : Clarendon Press. 186. Pointing, J. (ed) (1981). Alternatives to custody. Oxford : Basil Blackwell. 15.; Bean, P. Punishment, A philosophical and criminological inquiry. Oxford : Martin Robertson.

³¹ Korn & McCorkle, supra 594-595, elaborates as follows : 1. Rehabilitation is first, an intention in the minds of those attempting to achieve it. It is a motive, a desire to attain certain objectives, which may be defined both in positive terms, as the resumption of acceptable social living, and in equally valid negative terms, as the refraining from illegal behaviour. 2. Rehabilitation is also a pattern of activities engaged in by the correctional agent. In this sense of the term, rehabilitation consists of things done to the offender. 3. Rehabilitation, finally, is a changed condition within the offender, as manifested by his concrete and specific behaviour and by his relations with others. It is what he feels, what he says, and, most important, what he does in the incidents of his subsequent daily life. In short, it is what follows the correctional activities.

³² Grupp, supra 252.

the crime itself, the harm caused or the deterrent effect which punishment may have, but on the person and the personality of the offender³³.

According to this theory an offender commits a crime because of some personality defect, or because of social, psychological and criminogenic factors in his past, or because he acts under undesirable influences³⁴. This theory stems largely from the recent growth of Criminology, Sociology, Psychology and Social Work.

The legislator should apply the rules of social hygiene in order to reach the roots of criminality³⁵. Social hygiene is worth as much in the field of civilization as it is in the medicine for the public health. The great value of practical hygiene³⁶, especially of social hygiene, which is greater than individual hygiene, is the application of an effective treatment³⁷ and therapy to bring about a favourable change in society and the offender. All the participants in this effort are imbued with what may be called a therapeutic attitude.

³³ Snyman, *supra* 22.

³⁴ Visser & Vorster, *supra* 10.

³⁵ Grupp, *supra* 232.

³⁶ *Ibid.*

³⁷ When looking at juvenile crime analytically, we realise that we are looking at a morality model versus a medical model. The humanistic assumption towards the crime problem is governed by a medical model or vice versa. Crime as a deviancy is not in the first instance seen as immoral, but as a disease and quite often as 'normal' behaviour when you take into consideration the undesirable influences under which people live. What should actually be a moral problem becomes a medical problem. Endless explanations are given as causes of crime without touching on the moral cause. The influence of the medical model can be noticed in a large number of issues as well as in the rehabilitative theory of punishment. The most important impact of the medical model is the exemption of man's responsibility or the exception/justification of man's irresponsibility. His behaviour is not seen as a moral fault or defect but as a disease or illness and a disorganized unfair world is to be blamed for it - the offender then becomes a victim, not an immoral being.

It is not strange that when people grow up with this notion, they tend to blame society for the deeds, instead of looking at the problem as ethical and moral disobedience. Man's exemption from his responsibility is not a consequence of a disease but a consequence of a moral choice. What implications does the medical model have for the offender and society? It will mean that society must change and not the person himself, which will give him cause to blame everybody and circumstances around him except himself without the realization that in most cases he has to accept the moral blameworthiness for his deeds and their consequences. (my italics)

What it is desirable to accomplish is the reintegration of the temporarily suspended individual back into the main stream of social life, preferably a life at a higher level than before, just as soon as possible³⁸. The supreme aim of the rehabilitative perspective is the reformation of juvenile offenders, not the infliction of vindictive suffering. These 'substitutes for punishment' will help to prevent the development of juvenile crime, because they go to the root cause in order to do away with the effects.

Certain aspects of the rehabilitative theory are undoubtedly commendable, such as:

- It focuses attention on the offender as an individual.
- The main objective is to change the juvenile offender's attitudes and to help him cope with his circumstances, gain insight into his own motivations, reorient his feelings and achieve a measure of selfcontrol³⁹.
- Criminal behaviour is the product of antecedent causes. Knowledge of the antecedents of criminal behaviour makes possible a rehabilitative approach to the scientific treatment of the juvenile offender.
- It is assumed that efforts at reform should be aimed primarily at the juvenile offender's social and psychological readjustment.
- Rehabilitation is a way for society to protect itself by repelling criminal acts against itself or its members, and to offer the peace and security which are indispensable to the pursuit of its affairs and those of its members.
- The legal provisions for the protection of society must be based not so much upon the gravity of the particular act for which a juvenile offender happens to be tried, as upon his personality, that is, upon his

³⁸ Grupp, supra 252.
See also Greenberg, D. F. (1977). Corrections and punishment. Beverly Hills : Sage Publication Inc. 30.
Killinger, G. G. & Cromwell, P. L. (1978). Introduction to corrections. Selected readings. Minnesota : West Publishing Co. 352.
Roberts, A. R. (ed). (1981). Social work in juvenile and criminal justice settings. Illinois : Charles C Thomas Publisher. 49 - 51.
Walker, N. (1980). Punishment, danger and stigma. Oxford : Basil Blackwell Publisher Ltd. 148.

³⁹ Grupp, supra 256.

dangerousness, his personal assets, and his responsiveness to a treatment programme.

- The elementary truth must never be overlooked, that measures depriving young persons of their liberty against their will are essentially punitive in nature no matter how well-intentioned the authorities administering those measures are⁴⁰.

Essentially our juvenile offenders are youngsters who have failed persistently in just about everything they have tried, largely because their families have not given them much emotional support, because they have been shunted from place to place Their families have broken up, usually. They have been in foster homes, industrial schools and reformatories. They have been in other institutions, and they have no continuity in their lives and have no opportunity to settle down anywhere to develop any kind of roots. When the juvenile offender is institutionalised and taken out of normal society, the most significant effect may be to further weaken the juvenile's already far too weak bond to society. For others the institution may afford them the first real chance to forge a normal bond to society. This has been the case with many juvenile offenders who, by committing crimes, were trying to digest or escape intolerable home conditions. Moreover, while the juvenile offender may have a weak bond to normal, legitimate society, he often has a strong bond to the quasi-criminal youth subculture, such as gangs.

⁴⁰ Grupp, supra 259.

See also Midgeley, J. Steyn, J. H. & Graser, R. (1975). Crime and punishment in South Africa. Cape Town : Nicro. 253

Tomasevski, K. (1986). Children in adult prisons. London : Frances Pinter Publishers. 15, 77.

Trojanowicz, R. C. & Morash, M. (1987). Juvenile delinquency concepts and control. 4th ED. New Jersey : Prentice Hall Inc. 193.

Smykla, J. O. (1984). Probation and parole crime control in the community. New York : MacMillan Publishing Company. 202 - 206.

Martin, F. et al. (1981). Children out of court. Edinburg : Scottish Academic Press Ltd. 248 - 249.

Reid, S. T. (1981). Correctional System : An introduction. New York : Holt Rinehart and Winston. 376.

Tappan, P. W. (1960). Crime, justice and correction. New York : McGraw Hill Book Company. 259.

3.7 PROBLEMS WITH THE PRACTICAL IMPLEMENTATION OF THE REHABILITATION THEORY ON JUVENILE OFFENDERS

- 3.7.1 To detain⁴¹ a juvenile offender until he has been reformed may involve a punishment totally out of proportion to the social harm he has caused and to his own moral blameworthiness.
- 3.7.2 A related problem concerns the protection of individual liberties and rights. If an offender were to be detained until reformed⁴², who would determine when he had reached that 'rehabilitative' stage? I am of the view that a detained person should, irrespective of the nature of the offence for which he was sentenced, have certain rights to protect him from further improper means of incrimination, deprivations⁴³, and inadequate safety, to which all offenders are exposed. Every person who is detained shall have the right to be detained under conditions consonant with human dignity⁴⁴.
- 3.7.3 Reformatory measures must not ignore the other purpose of punishment as described supra. The ultimate aim of punishment is the protection of society through the prevention of criminal offences and therefore use must be made of legal sanctions which must have a retributive and deterrent character to combat reprehensible conduct. To suspend the sentence of a juvenile given to violence on condition that he undergoes psychiatric treatment may lead to his rehabilitation⁴⁵, but the court must be satisfied that the public will be protected while the process of rehabilitation is taking place.

⁴¹ Burchell, E. M. & Hunt, P. M. A. (1983). South African criminal law and procedure. Cape Town : Juta and Co Ltd. 79.

⁴² Ibid 79.

⁴³ Robin, G. D. (1980). Introduction to the criminal system : Principle, procedure and practice. London : Harper & Row Publishers. 405.

⁴⁴ Government's Proposals on a charter of Fundamental Rights. 2 February 1993. 15.

⁴⁵ Burchell & Hunt, supra 79.

3.7.4 The legislature has over the years gradually added to the list⁴⁶ of available punishments various forms of punishment aimed at rehabilitation. Unfortunately the list of the above-mentioned punishments is by no means adequate for the judge or magistrate in sentencing the juvenile offender. It is with mixed feelings that one reads the following in the Government's Proposals on a Charter of Fundamental Rights: "These rights also provide that inhuman punishment may not be imposed upon anyone. In the light of prevailing conceptions in other legal systems this will probably entail that corporal punishment, which at present is still a permissible form of punishment in the Republic, will be in conflict therewith and will have to fall away."⁴⁷

In *S v Kukarie* 1972 2 SA 907 (o) 911 is bevind dat aan 'n jeugdige nie die verligte vonnis weens besit van dagga wat indertyd nog bestaan het, opgelê hoef te word nie en dat behandeling meer effektief as bestraffing sou wees.⁴⁸ One common notion in the current thinking with reference to the fact that we do not know how to rehabilitate the juvenile offender is also the fact that we do not really know the causes of crime. Criminal behaviour is the product of antecedent causes. Knowledge of the antecedents of criminal behaviour is essential for scientific control and treatment of that behaviour.

3.7.5 It is also a fact that no one actually knows how one should rehabilitate the offender; juvenile corrections are frequently used to teach young offenders certain skills and to educate them but this does not in itself mean that a person can be taught to refrain from criminal behaviour.

⁴⁶ Two important additions of this kind were made in 1959 when sentences of periodical imprisonment and imprisonment for corrective training were instituted.

⁴⁷ Government's Proposals, supra 17

⁴⁸ See also Hiemstra, V. G. (1987). Suid-Afrikaanse strafproses. Durban : Butterworths. 585-586 and 657.

Various forms of rehabilitation are even now being tried in some progressive courts and corrections and reformatories over the country - educational, social, religious, recreational, and psychological treatments.

Hiemstra⁴⁹ says "Die individuele omstandighede van die beskuldigde moet noukeurig in ag geneem word, nie alleen vir sover hulle tot die daad aanleiding gegee het nie, maar ook vir sover die beoogde straf hom persoonlik sal affekteer. Sy rehabilitasie moet voor oë gehou word."

3.7.6 When the rehabilitative environment is introduced to an individual who is not only angry and unsocial and generally hostile but who has a public record of having been caught and convicted for something heinous, the atmosphere immediately changes⁵⁰. No matter how obvious his suffering, sympathy and therapeutic idealism will not always be sufficient to neutralize the suspicion and negative feelings aroused in him as well as in all staff members working with him.

3.8 RETRIBUTIVE JUSTICE VERSUS REHABILITATIVE TREATMENT

The aim here is to argue two propositions concerning the 'rights' of the complainant and the accused which will put retribution and rehabilitation as aims of punishment in perspective. First, that the essence of retribution, which is morally justified, is the right of society and that the offender deserves to be punished because he voluntarily and knowingly trespassed the principles of the criminal law and because it is the only theory of punishment which ensures that justice will prevail.

Second, that every convicted juvenile offender shall have the right to be exposed to a therapeutic environment to help him cope with his antecedent circumstances and

⁴⁹ Hiemstra, supra 585.

See also R v K 1956 3 SA 353 (a) R v Hodgert 1956 2 SA 2 (n) S v Dyk 1969 1 SA 601 (c) S v C 1974 2 SA 680 (k) S v J 1975 3 SA 146 (o) S v S 1977 3 SA 305 (o) S v M 1978 3 SA 557 (Tk)

⁵⁰ Grupp, supra 251.

criminal behaviour with the supreme aim of the reformation of the juvenile.

The main elements of retributive justice are:

First, the ultimate aim of retributive punishment is the protection of society through the prevention of criminal offences with drastic legal sanctions which must have a retributive character.

Second, retributive punishment should have a retributive element, otherwise it would mean that no penalty remains to express society's condemnation of the offender and his conduct in a meaningful way.

Third, retributive punishment involves the belief that the offender deserves to suffer because he voluntarily and knowingly trespassed the principle of the criminal law and should be punished so that the injustice which has been brought about by the commission of the crime is wiped out by an equalizing sanction upon the offender. This relates punishment directly to the idea of justice.

Fourth, retribution encompasses the moral claim as to the prevention of crime through cognitive knowledge which is central in the deterrence-approach.

The main elements of rehabilitative treatment are:

First, the main objective is to change the juvenile offender's attitudes and to help him cope with his circumstances, gain insight into his own motivations, reorient his feelings, become self controlled so that he will become socially and psychologically readjusted.

Second, the ultimate aim of rehabilitation is to accomplish the reintegration of the temporarily suspended individual back into society.

Third, that rehabilitation is a way that society should protect itself by a treatment-orientated programme which must have a preventive character.

At this stage, it is not proposed to compare the pros and cons of retributive punishment with rehabilitative treatment because it has been done for many years already. Although it seems that there are numerous differences and discrepancies between the two theories, a number of common denominators can be found:

- 3.8.1. Both theories emphasize the principle of the protection of society.
- 3.8.2. Both theories emphasize the principle of knowledge of the antecedents of criminal behaviour before and after sentencing.
- 3.8.3. Both theories emphasize the principle that a restraint is exercised on a convicted individual. A retributive restraint which focuses on the past and a therapeutic restraint which focuses on the present.
- 3.8.4. Both theories emphasize the principle of rehabilitation, except for the fact that retributive punishment would want to achieve this with the infliction of punishment, while rehabilitation would want to achieve this through treatment.
- 3.8.5. Both theories emphasize the principle of restricting the individual's freedom of movement and limitations on personal liberty.

The main differences are:

First, it should be noted that retributive punishment, unlike rehabilitative treatment, is a justification which is related to maintaining and restoring a fair distribution of benefits

and burdens. There is an attempt at some equivalence⁵¹ between the advantage gained by the wrongdoer and the punishment meted out.

Second, it should be noted that retribution, unlike rehabilitation, wants to bring about change in the juvenile offender by imposing unpleasant restrictions on him.

Third, it should be noted that in retributive justice, unlike rehabilitation, the juvenile offender earns his freedom and nothing comes to him through compassion, but through a desire to control and restrict him.

Fourth, unlike rehabilitation, retributive justice does not always treat a juvenile offender as a human being, e.g. not being informed by the presiding officer regarding the obtaining of legal assistance⁵², being sentenced to inhuman punishment, etc.

It has been pointed out that these assumptions have so many principles in common that one can regard them as inseparable with degrees of difference.

All punitive measures for the protection of society must be based not only upon the severity of the particular act for which a juvenile offender happens to be tried, but also upon his personality, that is, upon his dangerousness, his personal assets and his responsiveness towards punishment. The court should utilize every scientific instrumentality for the rehabilitation of the juvenile offenders. One can say therefore that punishment must efficiently conclude with rehabilitation to accomplish the reintegration of the juvenile offender back into the main stream of society.

In the majority of cases, composed of minor crimes committed by juveniles belonging to the most numerous and least dangerous class of occasional criminals, the only form of repression will be a rehabilitative measure which is more rehabilitative than punitive.

⁵¹ Cohen, supra 126.

⁵² Singh, P. (1992). The right to legal representation after arrest. Lawyers for human rights. Vol 3. 31.

The great value of practical retribution, especially of retributive justice, and rehabilitative treatment, can only be recognized after the marvellous scientific discoveries concerning the origin and primitive causes of the most dangerous behaviour, i.e. criminogenic behaviour.

It is the blind worship of either retributive justice or rehabilitative treatment which is to blame for the spectacle which is witnessed in this country when legislators neglect the rules of social 'hygiene' and wake up with a start when juvenile crime becomes acute, and they know of no better remedy than either an intensification of retributive justice or of rehabilitative treatment.

The fundamental conviction at which this investigation can arrive is that the great value of retributive justice, and the great value of rehabilitative treatment, imply a programme where they are applied collaboratively.

3.9 RESUME

In sum, Chapter 3 addresses the theoretical context of Assumption 2, i.e. in a large number of South Africa's juvenile courts the sentencing of children/juveniles follows a rehabilitative - retributive (treatment - punitive) approach.

The next step would seem to be to give a description of the theoretical context of Assumption 3, i.e. the only way to amend the accusatorial - inquisitorial approach to a more inquisitorial - accusatorial approach is by means of the implementation of a pre-trial judicial investigation.

CHAPTER 4

THE PRE-TRIAL JUDICIAL INVESTIGATION AS PART OF INQUISITORIAL-ACCUSATORIAL PROCEDURE IN THE SOUTH AFRICAN JUVENILE COURTS

4.1 INTRODUCTION

No single instrument in our hands so neatly typifies the modern juvenile justice philosophy as does the pre-trial judicial investigation. Its only reason for being is to depict the intimate dynamics of one particular individual juvenile offender's behaviour and to enable the court to process a well-considered decision with regard to the juvenile's adjudication and sentencing.

This is an idealistic thought, of course. Admittedly, the pre-trial judicial investigation cannot always be so penetrating in its analysis for adjudication, nor can ideal rehabilitative-treatment proposals always be found and used by the court. Nevertheless, the potential is there, and if the juvenile court is going to move swiftly on to an enlightened, consistent investigative methodology, then everyone of us can make a major contribution to that progress by striving for the highest level of quality in the pre-trial judicial investigation. The pre-trial judicial investigation will, of course, properly borrow from other disciplines, such as psychology, psychiatry, criminology, social work, etc. to form an integrative investigation. The pre-trial judicial report provides a window to the juvenile offender that can help to gain understanding. Through it the magistrate will learn not only about the juvenile defendant, but also about the numerous professions which can assist in the rehabilitative-retributive treatment of juvenile offenders. Also, in the course of making the investigation, the investigating magistrate will take what is called a "line" position with a sizeable variety of people¹ in the community, and in this way these contacts can do much to create a good image of the juvenile courts.

¹ Carter, R. M. & Wilkens, L. T. (Edd). (1970). Probation and parole. New York : John Wiley & Sons Inc. 83 - 84.

An investigation of the pre-trial judicial investigation in the juvenile courts has recently been inspired by the Chief Justice of the Ciskei, Mr Justice B. de V Pickard² after he formulated a decree on the pre-trial judicial investigation of abusive offences. The aim of this decree is to provide for an extraordinary pre-trial judicial investigation into certain abusive offences, to provide for the evidence to be preserved for the purpose of any subsequent trial and to provide for matters incidental thereto. In studying this decree one realizes that it is going to be a landmark decree in the years to come not only for abusive offences, but also for the juvenile court. Although this decree was ingeniously formulated for the pre-trial judicial investigation of abusive offences, only a few alterations need to be made to suit the situation in the juvenile courts.

4.2 A PROPOSED MODEL FOR PRE-TRIAL JUDICIAL INVESTIGATION

Without detracting from the above-mentioned decree's reputation or contents, the following pages summarize those provisions of the decree which will be fitting for a juvenile trial

4.2.1 Duties of police official in relation to offences

A police official to whom the offence is reported shall as soon as possible inform an investigating magistrate of the occurrence, the alleged nature, time and place of commission of the offence, inform the investigating magistrate when and in what circumstances and by whom the offence was reported, the identity of complainant and of any witnesses and the identity of the offender, and do all things to assist the investigating magistrate in procuring their attendance before him.

² Mr. Justice B. de V. Pickard. Pre-trial judicial investigation of abusive offences decree. 1990. No 172, Vol 18 (Decree No 46 of 1990).

4.2.2 Investigation proceedings

Whenever an investigating magistrate is informed of the commission or suspected commission, he shall make himself available at a venue to be determined by him where it is convenient to examine the complainant as a witness in private and request a police official to bring the complainant to that venue, interview the complainant in private with no other person present and take from the complainant a statement regarding the alleged offence.

4.2.3 Appearance of juvenile offender

As soon as possible after the investigating magistrate has complied with the provision of the previous section, the police official shall cause the juvenile offender to be brought before such magistrate in private for the purposes contemplated in the said section. The investigating magistrate shall, before questioning the juvenile offender, note his observations regarding the juvenile offender, and inform him of the allegations made against him.

The investigating magistrate may adjourn the proceedings from time to time and when the juvenile offender again so appears before him, require him to answer any further questions which he may deem necessary in order to achieve a fair and thorough investigation of the offence. Provided that it shall not at any time be competent for the magistrate to cross-examine the juvenile offender in any manner calculated to destroy his credibility.

4.2.4 Other evidence of offence

After the investigating magistrate has, in relation to his investigation complied with the forgoing provisions, he shall request the police official concerned to bring before him all other persons who ought to be examined as witnesses in order to

complete the investigation. Such police official shall thereupon bring each such witness before such magistrate at a convenient time and place until the magistrate is satisfied that his investigation is complete.

4.2.5 Defence witness

A juvenile offender may, at any stage of any proceedings under this decree, request the investigating magistrate to examine as a witness any person specified by him who is competent and compellable to give evidence in his defence and the investigating magistrate shall make every reasonable effort to give effect to such request.

4.2.6 Legal representation allowed at investigation

Any person shall be entitled to the assistance of a legal adviser at any time during his examination by an investigating magistrate.

4.2.7 Investigating magistrate to submit report on investigation to attorney-general

At the conclusion of his investigation the investigating magistrate shall submit a report to the attorney-general. After the receipt of such report the attorney-general or his representative may take a statement from any witness in relation to the offence or may request any police official to do so: provided that no such statement may be taken from the juvenile offender.

4.2.8 Attorney-general may arraign the juvenile offender for trial or decline to prosecute

After considering the report submitted to him the attorney-general may arraign the juvenile for trial before any court having jurisdiction or decline to prosecute such offender.

4.2.9 Procedure where accused is arraigned for trial

Where a juvenile offender is arraigned for trial, the investigating magistrate or any other magistrate of that district shall advise the juvenile offender of the decision of the attorney-general and commit the accused for trial. The report prepared by the investigating magistrate shall, upon production in the court in which the accused is to be arraigned, together with an affidavit by the investigating magistrate verifying the correctness of such record, be received as evidence in, and form part of the record of the trial of the accused in that court.

Nothing in this section contained shall prohibit or prevent the prosecution of the accused from presenting any evidence on any aspect of the charge against the accused or the court from hearing any evidence; or prohibit or prevent the prosecutor or the accused or the court from calling any witness, whose evidence was admitted by the investigating magistrate at his investigation, for examination or cross-examination as the case may be; or oblige the accused to give evidence at the trial; or prevent the court from coming to any conclusion contrary to any of the observations of the investigating magistrate in his report to the attorney-general.

No investigating magistrate shall preside at any trial arising from his investigation of any offence.

4.3 ARGUMENTS FOR THE IMPLEMENTATION OF THE PRE-TRIAL JUDICIAL INVESTIGATION

As a preventive measure to combat juvenile crime: The juvenile court has the potential for preventing as well as producing and perpetuating juvenile crime³. The latter comes into existence as soon as the juvenile court is not responsive to the needs of the total

³ Trojanowicz & Morash, supra 193.

community, and in fact indiscriminately prosecutes and processes children and juveniles from certain segments of the community. The indiscriminate labelling can affect both the juveniles' attitudes towards themselves and the community's attitude towards them. Unfair social exclusion from society, the negative self-concept and subjective adult attitudes can contribute to their deviant behaviour in the community.⁴

Court procedure should be equitable,⁵ attentive and sensitive to the possible negative consequences of hasty and ill-considered court decisions. Realistic, humane, progressive, and appropriate methods of processing and treating juveniles are necessary, if the law and the court are to be effective components in the juvenile justice system to combat juvenile crime.

4.3.1 Prevention efforts based on the judiciary (judicial system) should therefore seek to:

4.3.1.1 make use of a police officer who impresses the juvenile as being an understanding but firm adult who will be fair. Such a person can have a positive impact and can be one of the major factors in influencing juveniles to alter their behaviour and divert their energy into acceptable channels,⁶ and try to deflect them from actual court hearings;

4.3.1.2 make use of a social worker who will not readily provide excuses for illegal behaviour of juveniles but instead will help in the clearing out of negative attitudes towards a moral life;

⁴ Trojanowicz & Morash, *supra* 193.

⁵ *Ibid.*

⁶ Adopt a treatment-punitive model which is based on the needs of the juvenile independent of his behaviour. It emphasizes treatment by professionals and implies great discretionary decision powers of the judicial agencies. The juvenile court is not expected to solve society's juvenile crime problems, but at least to make a substantive contribution towards them.

- 4.3.1.3 point out the need for the police officer, the social worker and the special witness to have greater insight into one another's professions and to update their role with new models for training, placing obstacles in the way of potential juvenile criminals so that they will find it difficult or impossible to commit an offence; and
- 4.3.1.4 adopt a treatment-punitive model which is based on the needs of the juvenile independent of his behaviour. It emphasizes treatment by professionals and implies great discretionary powers of decision on the part of the judicial agencies. The juvenile court is not expected to solve society's juvenile crime problems, but at least to make a substantive contribution towards their solution.

The reason for the greater emphasis on a treatment-punitive (rehabilitative-retributive) preventive model is not only that many of the purely preventive programmes have not had adequate results, but also that they suffer from a lack of attempts by the juvenile court administration to deal with the problem as a problem which has escalated to a very serious and critical level.

4.3.2 **The accelerating juvenile crime rate:** According to Glanz, Mostert and Hofmeyr⁷ a total of 98,558 convictions were obtained for persons between the ages of 7 and 20 years, whereas the total number of convictions for persons aged 21 years and older stood at 291,420. If one examines the data contained in Table 8 (see footnote) it is evident that the total conviction rate per 100,000 of the respective population is 1,104 for young people and 1,892 for adults. One must, however, consider the fact that crimes committed by very young juveniles are often dealt with in an informal manner, such as by teachers, neighbours and school principals.

⁷ Glanz, L. Mostert, W. P. & Hofmeyr, B. E. (1992). An analysis of South African crime statistics. Pretoria : H S R C. 35.

A smaller proportion of offences committed by young persons than of those committed by adults may therefore actually come to the attention of the police. While it is correct to conclude that the total conviction rate for young people is lower than the rate for adults, it is clearly evident that young males are found guilty of serious crime at a considerably higher rate than adult males.

These above-mentioned accelerating juvenile crime statistics are exacerbated by the mere fact that the conviction rates of murder and attempted murder, rape and attempted rape, aggravated assault, robbery and motor vehicle theft are the highest for persons between the ages of 7 and 20 years.

Regardless of the above-mentioned crime statistics, it is still the opinion of this researcher that the incidence of delinquent behaviour can probably be reduced by a subsequent and appropriate criminal justice system for juveniles. In short, it might be said that it matters which youths are placed into which type of juvenile court, and that careful selection may lead to higher rates of success in a treatment-punitive prevention programme.

- 4.3.3 The pre-trial investigation gives protection to rights:** This investigation of the case, before it comes to trial, is led by an investigating magistrate. His task is not to decide upon the guilt of the accused but merely to make certain about the grounds of suspicion for ordering an actual trial. He is assisted by the police in the investigation which must be carried out strictly within limits of the procedural rules. Though this system of pre-trial judicial investigation of a case is undoubtedly a relic of the old common law inquisitorial system, its reintroduction is supported by *inter alia* the consideration that such procedure gives greater protection of the rights of the accused than an investigation merely by the police.

The above-mentioned pre-trial investigation is somehow reminiscent of the system

of preparatory investigation⁸ in South Africa.

I agree *in toto* with C.R. Snyman that in the light of the controversy in South Africa regarding the appropriateness of the pre-trial interrogation of an accused person by a judicial officer, it is of particular interest, at least to the South African lawyer⁹, to have some closer look at this interrogation of the accused by the continental investigating judge. This is perhaps the most significant part of the judicial investigation procedure.

It is this researcher's belief that this system can work for the juvenile accused in South Africa and is in the interests of the juveniles of South Africa. First, the juvenile must be informed of the accusation against him and the applicable penal provisions; secondly the juvenile must be warned by the investigating judge that he has the right to remain silent; thirdly, he must be informed of his right to have his own legal counsel, and the latter may be present during the interrogation; fourthly, the juvenile is asked some personal details, such as his name, age, profession, income, address, etc, - he may also be asked whether he has any previous convictions; fifthly, the juvenile is then invited to state his version of the facts bearing upon his indictment. All questions are asked by the investigating judge. The juvenile's legal representative and the prosecutor may only ask questions with the permission of the judge, who cross-examines witnesses where necessary and keeps a watchful eye over all proceedings. It is, however, no occasion for argumentation with the juvenile. Unless a fairly strong case can be made out against the juvenile on the probabilities, the court will not allow him to be placed on trial.

⁸ Criminal Procedure Act 51 of 1977 SS 123 - 124.

⁹ Snyman, *supra* 104-105.

4.4 **RESUME**

In sum, Chapter 4 addresses the theoretical context of Assumption 3, i.e. the only way to amend the accusatorial - inquisitorial approach to a more inquisitorial - accusatorial approach is by means of the implementation of a pre-trial judicial investigation.

The next step would seem to be to give an analysis of the empirical context of Assumptions 1, 2 and 3 in Chapter 5.

CHAPTER 5

ANALYSIS OF DATA

5.1 INTRODUCTION

Public awareness of the juvenile criminal justice system has been shaped, in large part, by media accounts of heinous juvenile crimes or juvenile defendants of great notoriety. Just as "dog bites man" stories are traditionally not news neither are accounts of the day-to-day working of the juvenile criminal justice system. As a result, the public is not aware that the courts have different approaches in their adjudication and sentencing of juveniles; that juvenile offenders continue to be detained with adults; that the juvenile courts are overcrowded because of the increase in the juvenile crime rate; and that the elements of effective caseflow management emphasize the need for early identification of more complex cases whose timely disposition will require more judicial officials and officials with judicial commitment and court responsibility. Observation during this investigation however, has disclosed that regardless of the shortage of judicial officers, the internal court efforts usually involve effective court decisions which enhance the quality of justice by imparting rationality.

As a postscript, after months of work with magistrates, it should be emphasized that we are greatly indebted to our present judicial officials, but the time has come for a substantial revision of their numbers, to make the present judicial system more acceptable for the immediate future.

The statistics presented in this Chapter describe the reaction of magistrates to questions about the present juvenile justice system and a number of the problems experienced. This approach by no means provides all the answers, but it does allow the investigator to focus on specific problem areas. Through the application of more advanced statistical

techniques, future investigations will be able to infer more relationships. In the words of Mr Justice Harlan F Stone.¹

The statistical method of dealing with human problems cannot be relied on as mathematical demonstration leading to specific conclusions, but it may be used to indicate tendencies, to mark out the boundaries of a problem and to point out the direction which should be given to a particular investigation of a non-statistical character.

In sum, from the earliest studies by such legal giants as Pound and Frankfurter to the present day, transaction or flow statistics have been recognized as the most powerful diagnostic tool to measure the performance of systems for the administration of criminal justice.

5.2 ANALYSIS OF RESPONSES BY MAGISTRATES REGARDING ADJUDICATION OF JUVENILE OFFENDERS (ASSUMPTION 1)

This section describes the investigating results obtained from 39 magistrates (29 white and 10 black) which are relevant to Assumption 1 of the investigation.

Assumption 1

The accusatorial - inquisitorial view is the main approach which operates in the juvenile judicial system in the R.S.A.

Because of the statistics obtained from the various magistrates a picture is developed of their responses to questions relating to their perceptions on the adjudication of juvenile offenders.

¹ Wickersham Commission, Report on criminal statistics. 1968. Montclair : N J Patterson Smith. 28.

TABLE 1

JUVENILE COURTS SEEM TO ADOPT ONE OF FOUR DISTINCT APPROACHES IN THE ADJUDICATION PROCESS:

APPROACHES	MAGISTRATES	
	<i>N</i>	%
Accusatorial	4	10,3
inquisitorial	10	25,6
accusatorial-inquisitorial	13	33,3
inquisitorial-accusatorial	12	30,8
TOTAL	39	100

When confronted with a definite choice among the different approaches, 4 (10,3%) magistrates accepted the accusatorial, 10 (25,6%) the inquisitorial, 13 (33,3%) the accusatorial-inquisitorial, and 12 (30,8%) the inquisitorial-accusatorial approaches. The responses to this question indicate some kind of equilibrium between the notions of accusatorial-inquisitorial and inquisitorial-accusatorial.

TABLE 2

IN NO COUNTRY WOULD ONE FIND A SYSTEM WHICH IS PURELY ACCUSATORIAL OR INQUISITORIAL; IN ALMOST ALL COUNTRIES ONE WOULD FIND A MIXED SYSTEM WITH A MARKED EMPHASIS ON THE ONE OR THE OTHER APPROACH.

RESPONSE	MAGISTRATES	
	<i>N</i>	%
Yes	32	82,1
No	7	17,9
TOTAL	39	100

32 (82,1%) Magistrates agreed that in no country would one find a system which is purely accusatorial or inquisitorial. It has been indicated in Chapter 2 that in the Anglo-American Countries the accusatorial system prevails, while the inquisitorial system is to be found in the Continental Countries.

TABLE 3

DO YOU THINK THAT A JUVENILE OFFENDER WHO HAS A SUBSTANTIAL RECORD OF PREVIOUS CONVICTIONS SHOULD HAVE HIS SENTENCE INCREASED ABOVE THE NORMAL LEVEL FOR THE OFFENCE HE HAS COMMITTED?

RESPONSE	MAGISTRATES	
	<i>N</i>	<i>%</i>
Yes	29	74,4
No	10	25,6
TOTAL	39	100

A substantial record of previous convictions is to 29 (74,4%) of magistrates an aggravating circumstance. It is the duty of the juvenile court to take action to ensure that further offences by the same juvenile will not be committed. When a juvenile court is confronted with such a problem, it must ask the question about the effectiveness of its handling of juvenile offenders. There can be no disagreement with the notion that when the juvenile courts are dealing with such intricate problems in the personality of juveniles and their relationship to society, they should consult with experts in this field - even better if they possess or acquire the necessary qualifications for handling such problems. This is unfortunately too often merely an opinion not put into practice.²

TABLE 4

IF YOU HAD A PARTICULAR SENTENCING OBJECTIVE IN MIND, WOULD YOU FEEL JUSTIFIED IN MAKING NO ALLOWANCE FOR MITIGATING CIRCUMSTANCES IN ORDER TO ACHIEVE THE OBJECTIVE?

RESPONSE	MAGISTRATES	
	<i>N</i>	<i>%</i>
Yes	4	10,3
No	35	89,7
TOTAL	39	100

The majority 35 (89,7%) of magistrates would feel justified in making allowance for mitigating circumstances if they had a particular sentencing objective in mind.

²

Reifen, supra 127.

TABLE 5

WOULD YOU SAY THAT A JUVENILE OFFENDER HAS A RIGHT TO HAVE HIS SENTENCE REDUCED IF THERE ARE MITIGATING³ CIRCUMSTANCES?

RESPONSE	MAGISTRATES	
	<i>N</i>	<i>%</i>
Yes	35	89,7
No	4	10,3
TOTAL	39	100

These results indicate that 35 (89,7%) of magistrates would regard mitigating circumstances as a juveniles right to have his sentence reduced.

TABLE 6

DO YOU REGARD REFORMATORY SCHOOLS AS OUTDATED?

RESPONSE	MAGISTRATES	
	<i>N</i>	<i>%</i>
Yes	14	35,9
No	25	64,1
TOTAL	39	100

Most of the magistrates 25 (64,1%) accepted the reformatory schools as important in the criminal justice process for juveniles. David Reifen⁴ stated that it cannot be overlooked that the removal of the juvenile offender from his own home and environment, only after

³ See, Bean, P. (1981). Punishment. Oxford : Martin Robertson & Company Ltd. 97 - 108.

Sutherland, E. H. & Cressey, D. R. (1970). Criminology. Philadelphia : J. P. Lippincott Company. 322.

Tarde, G. (1912). Penal philosophy. New Jersey : Paterson Smith Co. 488.

Thomas, D. A. (1970). Principles of sentencing London : Heineman Educational Books Ltd. 44.

Du Plessis, J. R. & Kok, L. (1981). An elementary introduction to the study of South African law. Third Edition. Cape Town : Juta & Co. Ltd. 152.

⁴ Reifen, supra 168.

careful investigation, may sometimes be effective in their rehabilitation; sometimes a court has no alternative.

TABLE 7

DO YOU SUBSCRIBE TO THE NEW NOTION OF THE DEPARTMENT OF CORRECTIONS TO PLACE JUVENILE OFFENDERS IN JUVENILE PRISONS?

RESPONSE	MAGISTRATES	
	<i>N</i>	<i>%</i>
Yes	34	87,2
No	5	12,8
TOTAL	39	100

The statistics in Table 5 reveal that 34 (87,2%) of magistrates subscribe to the new notion of the Department of Corrections to place juvenile offenders in juvenile prisons and not in adult prisons. Sentencing juveniles to prison⁵ is not acceptable because it is not in keeping with the purpose of sentence on the juvenile.

The critics of the juvenile court⁶ maintain that it is a dismal failure because of the continued detention of the juveniles with adults and the institutionalization of youthful offenders.

Some children are detained because they are abused or neglected and have no place to go. Other children in detention have committed non-criminal status offences. The detention of juveniles in adult prisons has been criticized on the ground that, in prison, non-criminal and youthful offenders will learn techniques and attitudes that can lead to criminal involvement.

The detention of juveniles in adult prisons, however is often the result of a lack of alternatives. If diversionary programmes or undeveloped and separate juvenile detention

⁵ According to Thornton & Voigt, *supra* 397, with regard to juveniles in adult prisons.

⁶ *Ibid* 397.

facilities are missing, it is difficult for the court to change its detention and institutionalization practices.

TABLE 8

CHILDREN UNDER THE AGE OF 14 SHOULD NOT BE REFERRED TO THE JUVENILE COURT ON THE GROUND THAT THEY HAD COMMITTED OFFENCES

RESPONSE	MAGISTRATES	
	<i>N</i>	<i>%</i>
Yes	15	38,5
No	24	61,5
TOTAL	39	100

In a juvenile court one is repeatedly confronted with the difficult question of what to do with juveniles under the age of 14 years⁷ who have committed offences. A total of 24 (61,5%) of the magistrates indicated that these juveniles should be tried by a juvenile court, while 15 (38,5%) said that they should not be referred to juvenile court. These figures indicate a tendency toward a notion that the disposition of juvenile offenders under the age of 14 years can best be administered by a juvenile court.

7

It is important to obtain clarity about the age at which a juvenile can be held liable for his actions. In this respect the court therefore refers to the culpability of the juvenile. This culpability is assessed according to the juvenile's capacity to differentiate between right and wrong and to govern his actions accordingly. The following categories of culpability are recognized by our law.

- A juvenile under seven years is not culpable (*doli incapax*) for any action or omission, therefore, he cannot be prosecuted or held responsible for any action.
- A juvenile between 7 and 14 years is refutably culpable (*doli capax*). Evidence has to be led that such a juvenile is not culpable (*doli incapax*).

These age limits regarding criminal culpability are sometimes criticised because of the arbitrary nature of their establishment. This is so because the law also changes in relation to the development of the members of the society in which it functions, the Viljoen Commission of Inquiry into the Penal system of South Africa therefore recommended that the age limit for release from criminal culpability be increased to 10 years (par 5.1.7.9). This suggestion is still open for debate.

TABLE 9

WOULD YOU SAY THAT KNOWLEDGE OF CRIMINOLOGY AND PENOLOGY COULD HELP THE MAGISTRATE IN DEALING WITH JUVENILE CRIME?

RESPONSE	MAGISTRATES	
	<i>N</i>	<i>%</i>
Agree	36	92,3
Disagree	3	7,7
TOTAL	39	100

36 (92,3%) Magistrates agreed that knowledge of criminology and penology could help the magistrate in dealing with juvenile crime.

In the past Criminology and Penology have advocated the approach that the juvenile offender is not an entity by himself because of the mere fact that he is likely to be influenced by the conditions of his environment. When the juvenile court has to deal with the juvenile offender, it again has to take into account some or all of these antecedent factors. It is perhaps for this reason that the juvenile court is regarded as being more "offender-minded" than "offence-minded".

What would you regard as the most difficult aspect in the adjudication of the juvenile offender?

- (i) Owing to the AGE of the juveniles, they cannot themselves always assist the juvenile court.⁸
- (ii) The REASONS why the juvenile offender has committed the offence and what should be done to keep him away from such behaviour. It would be inappropriate, however, for the magistrate to make use of his own impressions before knowing details of the background of the juvenile.

⁸ Reifen, supra 98 says that at this point we must consider the matter of self-incrimination. If the magistrate in the juvenile court is alert to the possibility of self-incrimination, he will recognize and appreciate a basic factor, namely, that many a juvenile has a need to tell the court of what he has done. This can be considered a part of the need for reparation and the magistrate must yield to such a desire.

- (iii) The establishment by the prosecutor of a **TENDENCY** to criminal behaviour before proof of previous convictions.
- (iv) Striking a **BALANCE** between retributive punishment and rehabilitative treatment for the juvenile offender.

Most of the magistrates proposed that the above-mentioned problems could be rectified by the preparation of,

- (i) a thorough pre-trial judicial report;
- (ii) appropriate time to gather such appropriate data;
- (iii) proper places of safety for detention;
- (iv) application of conventional supervision, and
- (v) the appointment of an attorney for every accused juvenile.

5.3 SIGNIFICANT FINDINGS

5.3.1 When confronted with a definite choice among the different approaches, 10,3% of magistrates accepted the accusatorial, 25,6% the inquisitorial, 33,3% the accusatorial - inquisitorial, and 30,8% the inquisitorial - accusatorial approaches. The responses to this question indicate that some kind of equilibrium exists between the notions of accusatorial - inquisitorial and inquisitorial - accusatorial. Therefore Assumption 1 cannot be accepted or rejected.

5.3.2 82,1% of magistrates agreed that in no country would one find a system which is purely accusatorial or inquisitorial.

5.3.3 A substantial record of previous convictions is to 74,4% of magistrates an aggravating circumstance.

- 5.3.4 The majority 89,7% of magistrates would feel justified in making allowance for mitigating circumstances if they had a particular sentencing objective in mind.
- 5.3.5 35 (89,7%) of magistrates would regard mitigating circumstances as a juvenile's right to have sentence reduced.
- 5.3.6 Most of the magistrates 64,1% accepted the reformatory schools as important in the criminal justice process for juveniles.
- 5.3.7 87,2% of magistrates subscribe to the new notion of the Department of Corrections to place juvenile offenders in juvenile prisons and not in adult prisons.

5.4 ANALYSIS OF RESPONSES BY MAGISTRATES REGARDING SENTENCING OF JUVENILE OFFENDERS (ASSUMPTION 2)

This section describes the investigating results obtained from the 39 magistrates which are relevant to Assumption 2 of the investigation.

Assumption 2

In a large number of our juvenile courts the sentencing of children/juveniles follows a rehabilitative - retributive (treatment - punitive) approach.

Because of the statistics obtained from the various magistrates a picture is developed of the response to questions relating to their perceptions on the sentencing of juvenile offenders.

TABLE 10

WHAT IMPORTANCE DO YOU ATTACH TO THE FOLLOWING SENTENCING OBJECTIVES?

OBJECTIVE	LEVEL OF IMPORTANCE									
	<u>Very Important</u>		<u>Quite Important</u>		<u>Some Importance</u>		<u>Little Importance</u>		<u>No Importance</u>	
	(N)	%	(N)	%	(N)	%	(N)	%	(N)	%
Reformation	29	74,3	8	20,5	1	2,6	-	-	1	2,6
Punishment	9	23,1	19	48,7	11	28,2	-	-	-	-
General deterrence	14	35,9	17	43,6	6	15,4	4	10,3	4	10,3
Individual deterrence	19	48,7	12	30,8	2	5,1	2	5,1	-	-
Protection of society	17	43,6	18	46,2	3	7,7	1	2,6	-	-
Reparation	14	35,9	12	30,8	8	20,6	3	7,7	2	5,1

Taking magistrates as a group there is little difference among the numbers attaching at least some importance to the objectives of sentencing for juveniles with the exception of general deterrence; reformation 38 (97,4%), punishment 39 (100%), general deterrence 35 (89,7%), individual deterrence 33 (84,6%), protection of society 38 (97,4%), and reparation 34 (87,1%). The most significant finding is that 74,3% rated reformation a sentencing objective for juvenile offenders, as 'very important'. This is surprising in view of the high percentage of punishment and individual deterrence.

Figure 1

Magistrates form of training in the application of sentencing principles

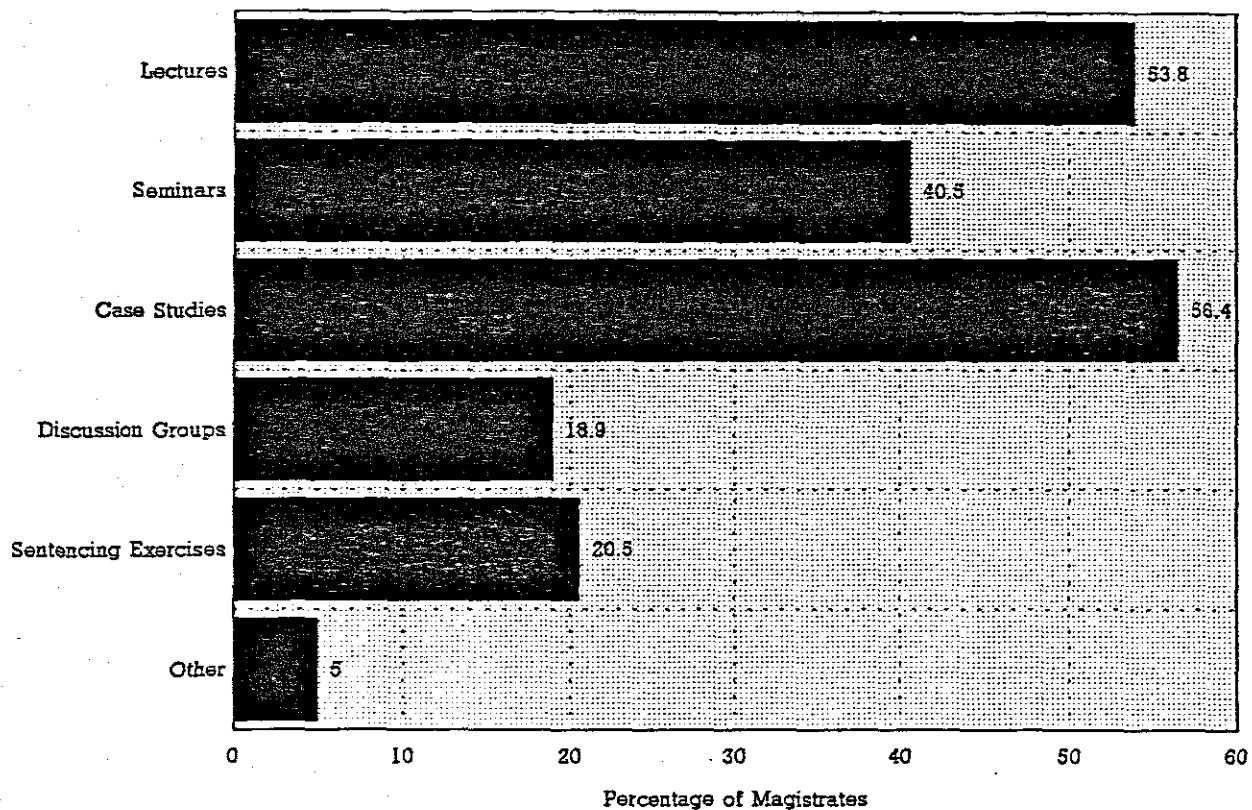


Figure 2

Communication of Magistrates to different sources about sentencing principles

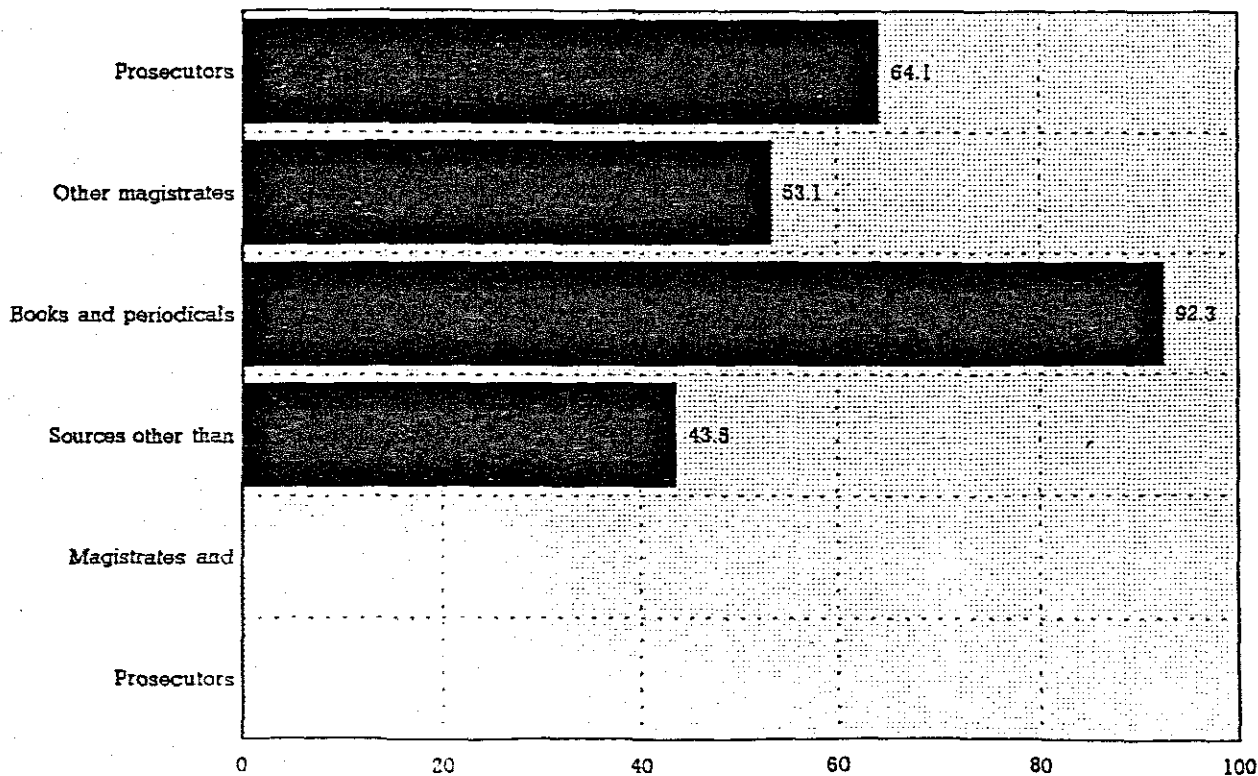


Figure 1 : Magistrates' form of training in the application of sentencing principles

The magistrates were asked what form their training in the application of sentencing principles took. According to Figure 1, the following forms were described : lectures 53,8%, seminars 40,5%, case studies 56,4%, discussion groups 18,9%, sentencing exercises 20,5% and other means 5,0%.

Figure 2 : Communication of magistrates to different sources about sentencing principles

According to Figure 2, a high proportion of magistrates stated that there were alternative means, apart from daily contact with prosecutors and the magistrates, whereby they obtained information on sentencing principles, books and periodicals 92,3% and other sources 43,5%. It was clear, however, that magistrates obtained most of their information on sentencing principles through daily contact with prosecutors and other magistrates.

TABLE 11

HOW WOULD YOU DESCRIBE THE PURPOSE OF SENTENCING PRINCIPLES?

APPROACH	MAGISTRATES	
	N	%
To achieve a just solution to a case	7	18,9
To ensure punishment of the offender	3	7,7
To assist in assessing the appropriateness of the sentence to the offence	3	7,7
To assist in assessing the appropriateness of the sentence to the offender	10	25,6
To provide guidelines to assist sentencers in exercising their discretion when imposing sentence	16	41,0
To ensure treatment for the offender	8	20,6

Again these results (Table 11) indicate that the purpose of sentencing principles were rated by the magistrates in the following order:

to provide guidelines to assist sentencers in exercising their discretion when imposing sentence 16 (41,0%), to assist in assessing the appropriateness of the sentence to the offender 10 (25,6%), to ensure treatment for the offender 8 (20,6%), to achieve a just solution to a case 7 (18,9%), to ensure punishment of the offender 3 (7,7%), and to assist in assessing the appropriateness of the sentence to the offence 3 (7,7%).

TABLE 12

WHAT DO YOU THINK ARE THE MOST IMPORTANT CONSIDERATIONS FOR A SENTENCE?

OBJECTIVE	IMPORTANCE									
	Very Imp.		Quite Imp.		Some Imp.		Little Imp.		Not Imp.	
	<i>N</i>	%	<i>N</i>	%	<i>N</i>	%	<i>N</i>	%	<i>N</i>	%
Demands of victims of crime for justice	12	30,8	20	51,3	4	10,3	1	2,6	2	5,1
Need to protect juvenile offenders against severe punishment	8	20,5	19	48,7	4	10,3	2	5,1	6	18,9
Need to give juvenile offender penalty he deserves	18	46,2	11	28,2	6	15,4	3	7,7	1	2,6
Need to deter juvenile offender and others from engaging in similar activity	26	66,7	10	25,6	2	5,1	-	-	1	2,6
Need to expose the juvenile offender to treatment	29	74,3	1	2,6	9	23,1	-	-	-	-

Taking magistrates as a group there is little difference among the numbers attaching at least some importance to the needs of victims of crime and the needs of the juvenile offender : the demands of victims 36 (92,3%), the need to protect juvenile offenders against severe punishment 31 (79,5%), the need to give the juvenile offender penalty he deserves 35 (89,7%), the need to deter juvenile offender and others from engaging in similar activity 38 (97,4%), and the need to expose the juvenile offender to treatment 39 (100%). The most significant findings are that 74,3% and 66,7% rated the need to expose the juvenile offender to treatment and the need to deter the juvenile offender and others from engaging in similar activity, respectively as very important.

TABLE 13

WHAT IS THE MOST IMPORTANT?

APPROACH	MAGISTRATES	
	<i>N</i>	%
Protecting society from juvenile crime	2	5,1
Helping the young offender development	12	30,8
They are complementary	25	64,1
TOTAL	39	100

It is apparent that the sentencing principles of protecting society from juvenile crime and helping the juvenile offender's development are seen as complementary by the majority

of magistrates 25 (64,1%). The overall pattern tends to support the view that magistrates place the interests of the juvenile high on their priority list.

TABLE 14

WOULD YOU NORMALLY ASSUME IMPRISONMENT TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?

APPROACH	MAGISTRATES	
	Agree	%
Where the offence is serious	20	51,3
Where the offender has a criminal record	19	48,7
Where you wish to punish the offender	2	5,1
Where you wish to deter the offender	3	7,7
Where you wish to deter others	4	12,8
Where you wish to protect society from the offender	25	64,1

Many factors are considered by magistrates in reaching a sentencing decision (imprisonment) in a juvenile trial. This investigation found, for example, that the magistrates in decisions appeared to be most heavily influenced by the criminal record 19 (48,7%), seriousness of the offence 20 (51,3%) and their wish to protect society from the juvenile offender 25 (64,1%).

TABLE 15

WOULD YOU NORMALLY ASSUME COMMUNITY SERVICE TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?

APPROACH	MAGISTRATES	
	Agree	%
Where you think the offender will benefit	33	84,6
Where the offence is serious	1	2,6
Where the offender has a criminal record	3	7,7
Where the offence is less serious	16	4,1
Where you wish to deter the offender	8	20,6
Where you wish to deter others	6	15,4
Where you wish to punish the offender	4	10,3

Factors which influenced magistrates in reaching a sentence of community service are the following: where the offender will benefit 33 (84,6%), where the offence is less serious 16 (41,0%) and where they wish to deter the juvenile offender 8 (20,6%).

TABLE 16

WHAT GENERAL SENTENCING OBJECTIVE WOULD YOU HAVE IN MIND WHEN FACED WITH THE FOLLOWING TYPES OF CASES?

APPROACH	MAGISTRATES RESPONSES									
	Reform		Punishment		General Deterrence		Individual Deterrence		Protection of Society	
	N	%	N	%	N	%	N	%	N	%
Shoplifting	17	43,5	8	20,5	11	28,2	6	15,3	9	23,7
Driving whilst disqualified	10	25,6	9	23,07	8	20,5	8	20,5	19	48,7
Possession of cannabis	19	48,7	7	18,9	7	18,9	9	23,7	5	12,8
Assault on police	7	18,9	24	61,5	7	18,9	6	15,3	4	10,2
Criminal damage	7	18,9	15	38,4	7	18,9	8	20,5	10	25,8

Less important than the above factors in Table 16, but still making a contribution to the decision, were the offence type. Reform has been kept in mind for shoplifting 17 (43,5%) and possession of cannabis 19 (48,7%). Punishment has been kept in mind for assault on police 24 (61,5%). General and individual deterrence were kept in mind for each of shoplifting, driving whilst disqualified, possession of cannabis, assault on police and criminal damage in more or less equally ranging from 6 (15,3%) to 11 (28,2%). Protection of society is high on the list for driving whilst disqualified 19 (48,7%), criminal damage 10 (25,8%) and shoplifting 9 (23,7%). This section failed to explain fully the sentencing decisions made by the magistrates.

TABLE 17

WOULD YOU CHANGE YOUR SENTENCING OBJECTIVE IF TOLD THAT A SENTENCE OF IMPRISONMENT IS RARELY APPROPRIATE FOR A JUVENILE SHOPLIFTER WITH NO PREVIOUS CONVICTIONS?

RESPONSE	MAGISTRATES	
	N	%
Yes	22	56,4
No	17	43,6
TOTAL	39	100

Interestingly 22 (56,4%) of the magistrates would change their sentencing objective of imprisonment for a juvenile shoplifter with no previous convictions, giving reformation as the reason. The remaining 17 (43,6%) would not change their sentencing objective

of imprisonment because they did not think that imprisonment was an applicable sentence for shoplifting.

TABLE 18

WOULD YOU SAY THAT CORPORAL PUNISHMENT IS EFFECTIVE AS:

APPROACH	RESPONSE	
	<i>N</i>	<i>%</i>
A treatment	-	-
A punishment	24	61,5
A general deterrent	-	-
An individual deterrent	14	35,9
None of the above-mentioned	1	2,6
TOTAL	39	100

The results demonstrate the total decline of the rehabilitative value of corporal punishment in the eyes of the sentencers, and 12 (30,8%) magistrates perceive corporal punishment as an effective punishment. It is also significant that a large majority 14 (35,9%) of magistrates regard corporal punishment as an effective deterrent.

TABLE 19

WOULD YOU SAY THAT A FINE IS EFFECTIVE AS:

APPROACH	RESPONSE	
	<i>N</i>	<i>%</i>
A treatment	-	-
A punishment	10	25,6
A general deterrent	6	15,4
An individual deterrent	6	15,4
None of the above-mentioned	17	43,6
TOTAL	39	100

The results demonstrate the total decline of the rehabilitative value of a fine in the eyes of the sentencers, while 10 (25,6%) perceive a fine as an effective punishment. It is also significant that a larger majority 17 (43,6%) does not regard a fine as treatment or a punishment.

TABLE 20

WOULD YOU SAY THAT PROBATION IS EFFECTIVE AS:

<u>APPROACH</u>	<u>RESPONSE</u>	
	<i>N</i>	<i>%</i>
A treatment	28	71,8
A punishment	-	-
A general deterrent	2	5,1
An individual deterrent	9	23,1
None of the above-mentioned	-	-
TOTAL	39	100

The results demonstrate the effective and rehabilitative value of probation 28 (71,8%) in the eyes of the sentencers, while all the magistrates agree that probation cannot be used as a punishment. Only 9 (23,1%) regard it as an effective individual deterrent.

TABLE 21

WOULD YOU SAY THAT COMMUNITY SERVICE IS EFFECTIVE AS:

<u>APPROACH</u>	<u>RESPONSE</u>	
	<i>N</i>	<i>%</i>
A treatment	18	46,2
A punishment	4	10,3
A general deterrent	4	10,3
An individual deterrent	13	33,3
None of the above-mentioned	-	-
TOTAL	39	100

The results demonstrate the effective and rehabilitative value of community service in the eyes of the sentencers, 18 (46,2%), while only 4 (10,3%) magistrates perceive it as an effective punishment. It is also significant that a large majority of magistrates 13 (33,3%) regarded it as an effective individual deterrent.

TABLE 22

WOULD YOU SAY THAT IMPRISONMENT IS EFFECTIVE AS:

<u>APPROACH</u>	<u>RESPONSE</u>	
	<i>N</i>	<i>%</i>
A treatment	-	-
A punishment	14	35,9
A general deterrent	10	25,6
An individual deterrent	10	25,6
None of the above-mentioned	5	12,8
TOTAL	39	100

The results demonstrate that no magistrates perceive imprisonment as an effective treatment, while 14 (35,9%) regard it as an effective punishment. 10 (25,6%) Regard it as an individual deterrent, and 10 (25,6%) as a general deterrent.

TABLE 23

MAGISTRATES PERCEIVED EFFECTIVENESS OF SENTENCING ON JUVENILE OFFENDERS

<u>APPROACH</u>	<u>MAGISTRATES</u>									
	Corporal Punishment		Fine		Probation		Community Service		Imprisonment	
	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>
A treatment	-	-	-	-	28	71,8	18	46,2	-	-
A punishment	24	61,5	10	25,6	-	-	4	10,3	14	35,9
A general deterrent	-	-	6	15,4	2	5,1	4	10,3	10	25,6
An individual deterrent	14	35,9	6	15,4	9	23,1	13	33,3	5	12,8
None of above-mentioned	1	2,6	17	43,6	-	-	-	-	5	12,8

These results are interesting in that they demonstrate that the rehabilitative treatment objective and the retributive punishment objective are the main objectives of sentencing in the juvenile court. Significant is the fact that probation 28 (71,8%) and community service 18 (46,2%) were rated as the treatment sentences and corporal punishment 24 (61,5%) and imprisonment 14 (35,9%) were rated as punitive sentences. Only 10 (25,6%) magistrates rated a fine as a punishment.

TABLE 24

WOULD YOU NORMALLY ASSUME CORPORAL PUNISHMENT TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?

APPROACH	RESPONSE	
	<i>N</i>	<i>%</i>
Where the offence is less serious	1	2,6
Where you wish to deter the offender	12	30,7
Where you wish to deter others	-	-
Where you wish to punish the offender	26	66,7
TOTAL	39	100

The results demonstrate the total decline of the rehabilitative value of corporal punishment in the eyes of the sentencers, and 26 (66,7%) magistrates perceive corporal punishment as an effective punishment.

TABLE 25

WOULD YOU NORMALLY ASSUME A FINE TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?

APPROACH	RESPONSE	
	<i>N</i>	<i>%</i>
Where the offence is less serious	20	51,3
Where you wish to deter the offender	8	20,5
Where you wish to deter others	1	2,6
Where you wish to punish the offender	10	25,6
TOTAL	39	100

The majority of the magistrates, 20 (51,3%) perceive a fine an appropriate sentence where the offence is less serious, while 10 (25,6%) magistrates use it as an effective punishment.

TABLE 26

WOULD YOU NORMALLY ASSUME PROBATION TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?

<u>APPROACH</u>	<u>RESPONSE</u>	
	<i>N</i>	<i>%</i>
Where do you think the offender will benefit	30	76,9
Where you wish to deter the offender	9	23,1
Where you wish to deter others	-	-
Where you wish to punish the offender	-	-
TOTAL	39	100

The results demonstrate the rehabilitative value of probation 30 (76,9%), while all the magistrates agree that probation cannot be used as a punishment. Only 9 (23,1%) magistrates regard it as an appropriate individual deterrent.

TABLE 27

WOULD YOU CONTEMPLATE IMPOSING A COMMUNITY SERVICE ORDER AS:

<u>APPROACH</u>	<u>RESPONSE</u>	
	<i>N</i>	<i>%</i>
An alternative to imprisonment	20	51,3
A sentence in its own right	15	38,5
An alternative to a fine where the offender has limited means	4	10,3
TOTAL	39	100

The results demonstrate the rehabilitative value of community service order 20 (51,3%), while 15 (38,5%) magistrates perceive it as an appropriate punishment.

Figure 3

Magistrates perceived retributive and rehabilitative effectiveness of sentences on juvenile offenders.

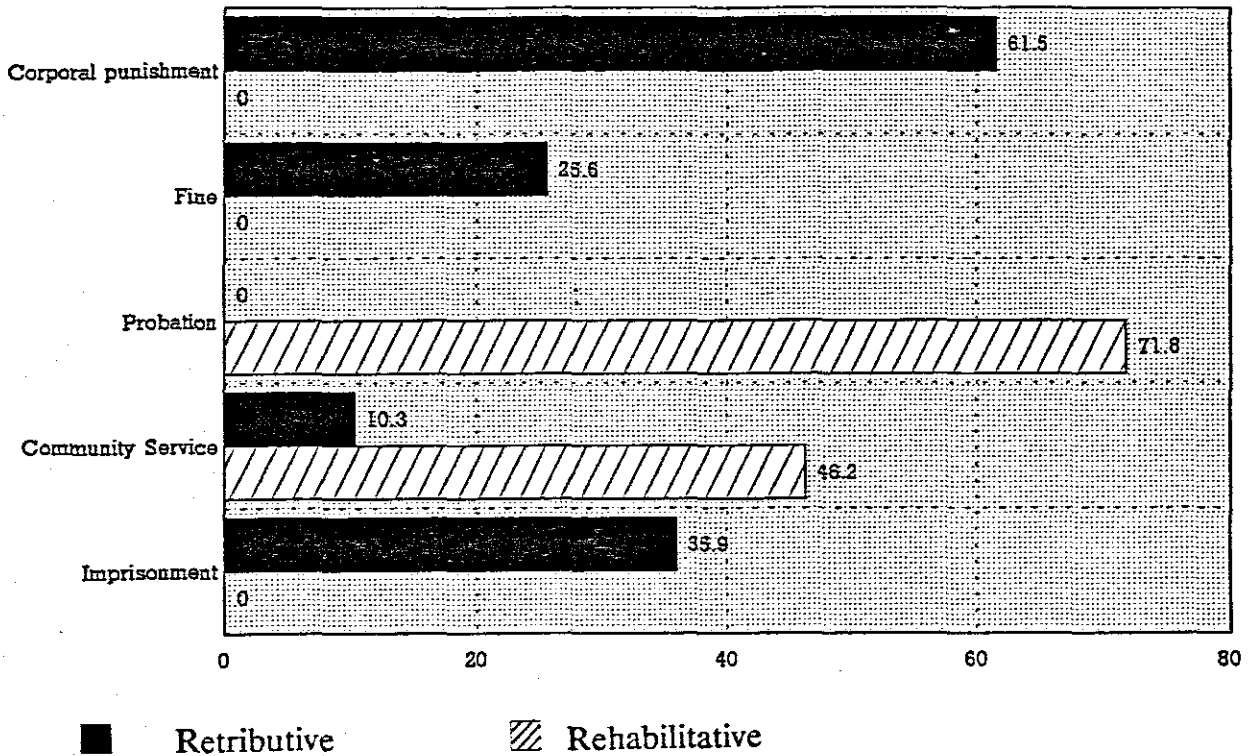


Figure 4

Magistrates perceived retributive and rehabilitative appropriateness of sentences : juvenile offenders.

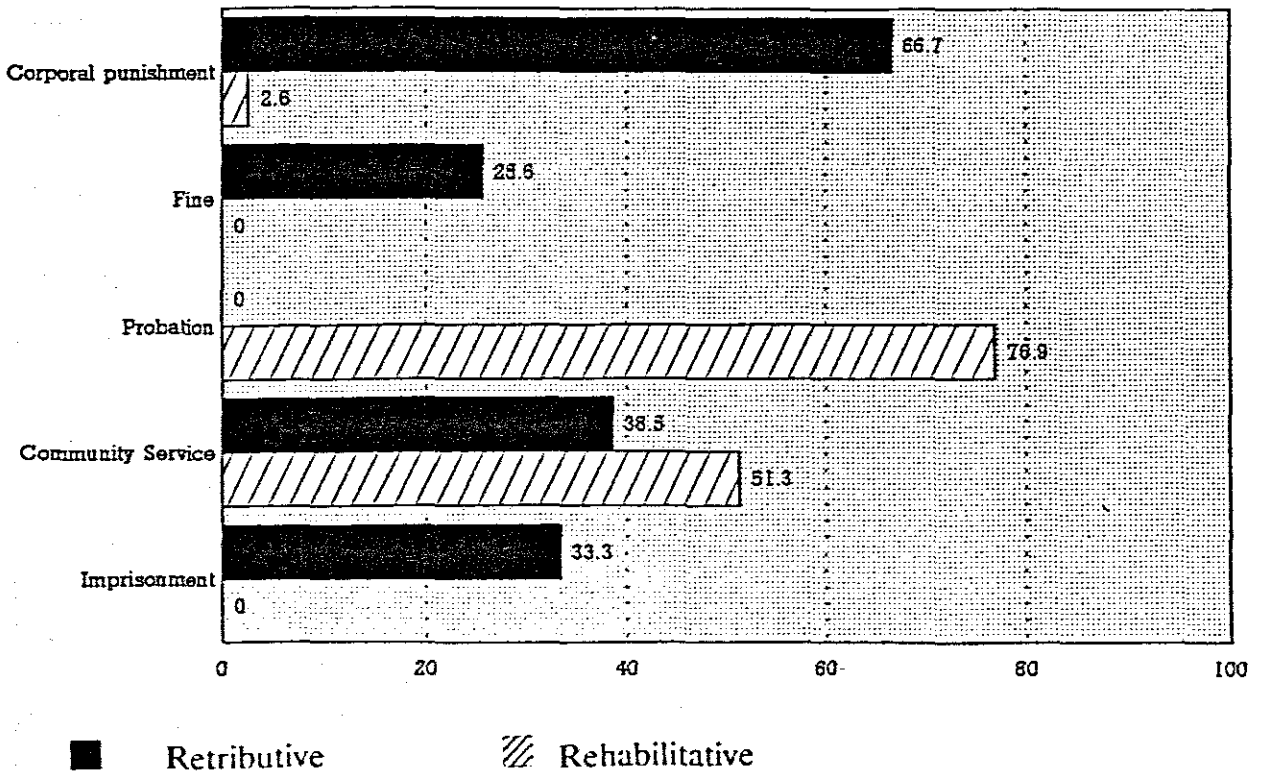


Figure 3 & 4 : Magistrates' perceived retributive and rehabilitative effectiveness of sentences on juvenile offenders (Figure 3) and magistrates' perceived retributive and rehabilitative appropriateness of sentences on juvenile offenders (Figure 4)

The statistics in Figure 3 and Figure 4 in fact display a similar pattern with regard to the effectiveness and appropriateness of the different sentences. The retributive effectiveness and retributive appropriateness of corporal punishment differ by 5,2%, the retributive effectiveness and retributive appropriateness of a fine indicate no difference, the retributive effectiveness and the retributive appropriateness of imprisonment differ by 2,6%. The rehabilitative effectiveness and the rehabilitative appropriateness of probation differ by 5,1% and the rehabilitative effectiveness and rehabilitative appropriateness of community service differ by 5,1%.

TABLE 28

WOULD YOU NORMALLY ASSUME IMPRISONMENT TO BE THE APPROPRIATE SENTENCE IN THE FOLLOWING TYPES OF CASES?

APPROACH	RESPONSE	
	<i>N</i>	<i>%</i>
Where you wish to use it as a treatment	-	-
Where you wish to deter the offender	12	30,8
Where you wish to deter others	10	25,6
Where you wish to punish the offender	13	33,3
None of above-mentioned	4	10,3
Total	39	100

The results demonstrate that no magistrates perceive imprisonment as an effective treatment, while 13 (33,3%) regard it as an appropriate punishment. 12 (30,8%) Magistrates wish to use it as an individual deterrent, and 10 (25,6%) as a general deterrent.

5.5 SIGNIFICANT FINDINGS

- 5.5.1 74,3% of magistrates rated reformation as a sentencing objective for juvenile offenders, as 'very important'.
- 5.5.2 41,0% of magistrates describe the purpose of sentencing principles as guidelines to assist sentencers in exercising their discretion when imposing a sentence.
- 5.5.3 74,3% of magistrates rated the need to expose the juvenile offender to treatment.
- 5.5.4 64,1% of magistrates rated the sentencing principles of protecting society from juvenile crime and helping the juvenile offender's development as complementary.
- 5.5.5 Magistrates in a sentencing decision (imprisonment) appeared to be most heavily influenced by the seriousness of the offence 51,3% and criminal record 48,7%.
- 5.5.6 The most important factor which influences magistrates in reaching a sentence of community service is where the offender will benefit 84,6%.
- 5.5.7 61,5% of Magistrates kept punishment in mind for assault on police.
- 5.5.8 The results demonstrate the total decline of the rehabilitative value of corporal punishment in the eyes of the sentencers, and 30,8% of magistrates perceive corporal punishment as an effective punishment for juveniles.

- 5.5.9 The results demonstrate the total decline of the rehabilitative value of a fine in the eyes of the sentencers, while 25,6% perceive a fine as an effective punishment for juveniles.
- 5.5.10 The results demonstrate the effective and rehabilitative value of probation in the eyes of the sentencers 71,8%.
- 5.5.11 The results demonstrate the effective and rehabilitative value of community service in the eyes of the sentencers 46,2%.
- 5.5.12 The results demonstrate that no magistrates perceive imprisonment as an effective treatment, while 35,9% regard it as an effective punishment.
- 5.5.13 The results demonstrate that the rehabilitative-treatment objective and the retributive-punishment objective are the main objectives of sentencing in the juvenile court. The overall pattern in the Tables tends to support the view that magistrates regard the rehabilitative-treatment of the juvenile as of prior importance to their retributive-punishment.

THESE RESULTS SUPPORT ASSUMPTION 2.

5.6 ANALYSIS OF RESPONSES BY MAGISTRATES REGARDING THE PRE-TRIAL JUDICIAL INVESTIGATION IN THE JUVENILE COURT (ASSUMPTION 3)

This section describes the investigating results obtained from 39 magistrates which are relevant to Assumption 3 of the investigation.

Assumption 3

The only way to amend the accusatorial - inquisitorial approach to a more inquisitorial

-accusatorial approach is by means of the implementation of a pre-trial judicial investigation.

Because of the statistics obtained from various magistrates a picture is developed of their responses to questions relating to their perceptions on the pre-trial judicial investigation in the juvenile court.

5.6.1 Criminal proceedings can be filed against juveniles between the ages of 14 and 17 who have committed offences, but only if a pre-trial judicial investigating report had been compiled by an investigating Magistrate.

The Yes-response was 22 (56,4%) and the No-response was 17 (43,6%).

5.6.2 Criminal proceedings can be filed against juveniles and young offenders between the ages of 14 and 20 who have committed offences, but only if a pre-trial judicial investigation report has been compiled by an investigating Magistrate.

The Yes-response was 13 (33,3%) and the No-response was 26 (66,7%).

5.6.3 Who should head the police investigation?

23 (59%) feel that the police official, and 16 (41,%) that the public prosecutor should head the investigation.

5.6.4 Magistrates can no longer make detailed decisions about the punishment or treatment appropriate for the juvenile without a detailed report by the probation officer.

The Yes-response was 21 (53,8%) and the No-response 18 (46,2%).

5.6.5 Do you think that a pre-trial judicial investigation such as the preparatory examination (Criminal Procedure Act 51 of 1977 SS 123 - 143) will assist you in adjudicating juvenile offenders?

The Yes-response was 29 (74,4%) and the No-response 8 (20,6%).

Noted : Two magistrates were unable to specify a reason and are excluded.

TABLE 29

MAGISTRATES REGARDING PROBATION OFFICERS AND CRIMINOLOGISTS AS HELPFUL IN EXPLAINING OR POINTING OUT RELEVANT SENTENCING PRINCIPLES.

SUBJECTS	RESPONSES OF MAGISTRATES							
	Very helpful		Quite helpful		Not particularly helpful		Not helpful at all	
	<i>N</i>	%	<i>N</i>	%	<i>N</i>	%	<i>N</i>	%
Probation Officers	9	23,1	19	48,7	8	20,6	3	7,7
Criminologists	8	20,6	20	51,3	8	20,6	3	7,7

28 Magistrates (71,8%) agreed that probation officers, and 28 magistrates (71,8%) agreed that criminologists can be helpful in the juvenile court.

5.7 SIGNIFICANT FINDINGS

Thus, once the reasons for the implementation of a pre-trial judicial investigation have been monitored, the data can be reduced to the following:

5.7.1 That criminal proceedings can be filed against juveniles between the ages of 14 and 17 years who have committed offence but only if a pre-trial judicial investigation has been compiled by an investigating magistrate was supported by 22 (56,4%) magistrates.

- 5.7.2 A pre-trial judicial investigation such as the preparatory examination (Criminal Procedure Act 51 of 1977 SS 123 - 143) would be of assistance in adjudicating juvenile offenders. Approximately 29 (74,4%) of the magistrates were in favour of a pre-trial judicial investigation.
- 5.7.3 71,8% of magistrates agreed that probation officers, and 71.8% agreed that criminologists can be helpful in the juvenile court.
- 5.7.4 Finally, one can accept that the majority of magistrates in this investigation support the implementation⁹ of a pre-trial judicial investigation in the juvenile justice system.

THESE RESULTS SUPPORT ASSUMPTION 3.

⁹

One would like to see its implementation from the assumption that it is the right of the juvenile offender to have criminal proceedings filed against him, but only if a pre-trial judicial investigation report has been compiled by an investigating magistrate - my italics

CHAPTER 6

SUMMARY OF FINDINGS, RECOMMENDATIONS AND FUTURE DIRECTIONS

6.1 SUMMARY OF FINDINGS

6.1.1 Adjudication of Juvenile Offenders

When confronted with a definite choice among the different approaches, 10,3% of magistrates accepted the accusatorial, 25,6% the inquisitorial, 33,3% the accusatorial-inquisitorial, and 30,8% the inquisitorial-accusatorial approaches with regard to juvenile justice. The responses to this question indicate that some kind of equilibrium exists between the notions of the accusatorial-inquisitorial and inquisitorial-accusatorial.

Assumption 1, therefore, which assumes that in a large number of our juvenile courts the adjudication of children/juveniles follows an accusatorial-inquisitorial approach, cannot be accepted or rejected. We can, therefore, accept the notion that the magistrates' accusatorial-inquisitorial approach in the adjudication process of juveniles could change to a more inquisitorial-accusatorial approach.

6.1.2 Sentencing of Juvenile Offenders

The results demonstrate that the rehabilitative-treatment and the retributive-punishment objectives are the main objectives of sentencing in the juvenile court. The overall pattern in the Tables tends to support the view that magistrates regard the rehabilitative-treatment of the juvenile as of prior importance to their retributive-punishment. These results support Assumption 2, which assumes that in a large number of our juvenile courts the sentencing of children/juveniles follows a rehabilitative (treatment-punitive) approach.

6.1.3 Pre-trial Judicial Investigation

74,4% of magistrates were in favour of a pre-trial judicial investigation. Finally one can accept that the majority of magistrates in this investigation support the implementation of a pre-trial judicial investigation in the juvenile justice system.

These results support Assumption 3, which assumes that the only way to amend the accusatorial-inquisitorial approach to a more inquisitorial-accusatorial one is by means of the implementation of a pre-trial judicial investigation.

6.2 RECOMMENDATIONS AND FUTURE DIRECTIONS¹

6.2.1 The need for a Bureau of Criminal Statistics

The establishment of such a bureau, with the objective of collecting and disseminating data that will give us a systemwide picture of criminal justice operations, will fill a major vacuum in the existing statistical activities of the Department of Justice. We have considerable data about the numbers of crimes known to the police and the number cleared by arrest as well as the populations of the prisons. No comparable national statistics are available about the intervening steps in the process - about what happens between arrest and sentencing. Such statistics could, if available, provide the Bureau of Criminal Statistics with data on their operations to begin to fill that void, and could provide information necessary for national decision making on criminal justice policies and priorities. The court reports could also provide a basis for informing the public about the realities of law enforcement and criminal justice. Such information could also generate public and legislative support for reforms where needed.

¹

These recommendations and future directions were obtained from the 'open' questions in the questionnaires and during the unstructured interviews which were conducted with some of the magistrates.

6.2.2 Suggestions for future descriptive and multivariate research

The statistics presented in this report provide only a snapshot of the criminal juvenile justice system with regard to adjudicating and sentencing. We have begun to gain some insights into how the system functions in a number of jurisdictions, but a great deal remains to be learned about the nerve centre of the philosophy of the juvenile justice system : investigation, prosecution, adjudication, and sentencing. Further investigation could investigate the following problem areas.

6.2.3 The extent and prediction of recidivism

An analysis of recidivism to determine if the level of recidivism amongst juvenile offenders is typical. Future investigation could also determine if recidivism patterns vary by crime type or by disposition of prior arrests. One factor that might be added to those selection criteria is a recidivism probability estimate that arises from a multivariate analysis of factors related to recidivism. For each juvenile defendant, an estimate indicating his relative likelihood of recidivism can be computed. (With automated systems, that estimate could be displayed for prosecutors on the terminal screens.)

6.2.4 Sentencing patterns and sentencing disparities

The percentage of convicted juveniles who are sentenced to some or other punishment or treatment varies substantially across the country. One reason why such variations exist seems to be that magistrates seldom know how their colleagues sentence. Further research could focus on what factors are related to certain sentences for juvenile offenders.

Our jurisdictions have no formal mechanism by which magistrates can learn about sentences meted out by other magistrates in their jurisdiction. This lack of information may contribute to disparities in sentencing, since it is unlikely that magistrates, working independently, would sentence consistently. A magistrate, for example, recently stated

"everyone has his own sentencing philosophy and every magistrate is an individual magistrate. I don't know what other magistrates are doing." Courts in some cities have instituted "sentencing councils" in which magistrates can meet to discuss sentencing practices and problems. These "council meetings", however, often have to compete for time on crowded judicial schedules.

6.2.5 Determinants of the decision to drop a case

Most of the recorded reasons for terminations are related to a lack of cooperation by witnesses, disappearance of the complainant and insufficient evidence. Multivariate analysis of many factors in a case (such as whether the arrest was made at the scene, whether tangible evidence was recovered, whether the victim was a business, whether a gun or other weapon was used, the relationship between the victim and the juvenile defendant, the criminal history of the defendant, and the number of lay witnesses) would provide more insights into why those problems occur.

6.2.6 Determinants of plea

Magistrates have indicated in the interviews that the most common disposition for the juvenile is a plea of guilt. Do sentences imposed vary according to whether the conviction was by plea or trial? Future cross-jurisdiction research could investigate what factors are related to disposition by plea. Such factors might include work-load of the prosecutor, number of witnesses and codefendants in the case, whether tangible evidence was recovered, the criminal history of the juvenile defendant, and the seriousness of the offence. The findings of such a study would make it possible for prosecutors who are considering a change in their plea to see the effects of such changes.

6.2.7 Management and compliance with speedy trial requirements

During the investigation it was alarming to notice the court backlog and delay, while thoughtful management was applied by officials in major efforts to reduce this problem.

Caseflow management² connotes supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition, regardless of the type of disposition. "Caseflow management" contemplates active oversight by the court of the progress of all cases filed. A goal of active caseflow management is to make the sequence and timing of these events more predictable and more timely (this focus involves time management). A well-designed caseflow management system virtually assures that each case will receive the type and amount of court attention³ required by its nature and complexity. In all the areas where this investigation took place the courts were overloaded, especially on Mondays, but the most remarkable feature is that excellent litigation is still done by the courts. If ever there is the slightest idea to rationalize this section of the Department of Justice, one can only hope that more officials will be appointed in the judicial system because the court and especially the magistrate's court is going to fulfil an enormous task in the years that lie ahead.

6.2.8 Family Courts

A number of factors affect the introduction of family courts such as:

- the diversity of the prosecution in jurisdictions relating to children and juveniles across South Africa;
- the increase in risk to the child because of offences and abusive offences committed against them;

² Solomon, M. & Somerlot, D.K. 1987. Caseflow management in the trial court. Chicago : American Bar Association. 3.

³ According to Solomon and Somerlot, supra 5, court management of case progress as part of an organized predictable system should assure:

1. equal treatment of all litigants by the courts;
2. timely disposition consistent with the circumstances of the individual case;
3. enhancement of the quality of the litigation process; and
4. public confidence in the court as an institution.

- the high divorce rate involving a large number of children;
- from the standpoint of cost-effectiveness it can increase the probability of an early and fair disposition of the case where children appear to be caught up in a backlog;
- from just a cursory look at the efforts of family advocates, a step in the right direction, it appears to have a very effective and appropriate impact on the overall flow of divorce cases by reducing its pending case load; and
- the judicial system as a whole will benefit from the capabilities of legal experts in identifying problem areas surrounding children, and in developing policies and procedures to remedy these problems.

Such norms could be readily developed, monitored, and updated over a period of time.

One can only hope that family courts will be implemented in the shortest possible time, with the jurisdiction of a higher court founded on the philosophy of bringing justice to all children.

REFERENCES

- Allen, H. 1987. Justice unbalanced : Gender, psychiatry and judicial decisions. Philadelphia : Open University Press.
- Andenaes, J. 1974. Punishment and deterrence. New York : Michigan University Press.
- Bean, P. 1981. Punishment. A philosophical and criminological inquiry. Oxford : Martin Robertson and Company Ltd.
- Berzani, C.A. (Ed) 1970. Crime and delinquency. London : The MacMillan Company.
- Burchell, E.M. & Hunt, P.M.A. 1983. South African criminal law and procedure. Cape Town : Juta and Co Ltd.
- Carter, R.M. & Wilkins, L.T. 1970. Probation and parole. New York : John Wiley & Sons.
- Coffey, A.R. & Reuner, V.E. 1975. Criminal justice as a system : Readings. New Jersey : Prentice Hall Inc.
- Cohen, E.D. 1989. Philosophers at work : An introduction to the issues and practical uses of philosophy. New York : Holt, Rinehart and Winston, Inc.
- Criminal Procedure Act 51 1977. SS 123 - 124.
- Curzon, L.B. 1988. Dictionary of law. Third Edition. London : Pitman Publishing.
- Du Plessis, J.R. 1988. An inquisitorial system in practice - visits to German criminal courts. SALJ.
- Du Plessis, J.R. & Kok, L. 1981. An elementary introduction to the study of South African Law. Second Edition. Cape Town : Juta & Co. Ltd.
- Evan, W.M. (Ed) 1962. Law and sociology : Exploratory essays. New York : The Free Press of Glencoe.
- Ewing, A.C. 1970. The morality of punishment. New Jersey : Patterson Smith and Co.
- Faculty of Law, UNISA. 1987. Law of persons and family law. Cape Town : Juta & Company Ltd.
- Faust, F.L. & Brantingham, P.J. (Ed) 1979. Juvenile justice philosophy readings, cases and comments. Second Edition. Minnesota : West Publishing Co.
- Fletcher, G.P. 1978. Rethinking criminal law. Boston : Little, Brown & Comp.
- Garland, D. 1990. Punishment and modern society : A study in social theory. Oxford : Clarendon Press.
- Giallombardo, R. 1966. The Juvenile Court. Second Edition. New York : John Wiley & Sons.
- Giallombardo, R. 1972. Juvenile delinquency : A book of readings. Second Edition. New York : John Wiley and Sons, Inc.

- Gibbs, J.P. 1975. Crime, punishment and deterrence. New York : Elsevier Scientific Publishing Company.
- Glanz, L. 1992. Managing crime in the new South Africa. Pretoria : H.S.R.C.
- Glanz, L. Mostert, W.P. & Hofmeyr, B.E. 1992. An analysis of South African crime statistics. Pretoria : H.S.R.C.
- Gould, J. & Koll, W.L. 1964. A dictionary of the social sciences. London : Tavestock Publications Ltd.
1993. Government's Proposal on a Charter of Fundamental Rights. 2 February 1993
- Greenberg, D.F. 1977. Corrections and punishment. Beverly Hills : Sage Publication Inc.
- Grupp, S.E. (Ed) 1971. Theories of punishment. London : Indiana University Press.
- Hagan, F.E. 1982. Research methods in criminal justice and criminology. New York : MacMillan Publishing Co., Inc.
- Hardy Ivamy, E.R. 1988. Mozley and Whiteley's Law Dictionary. Tenth Edition. London : Butterworth and Co.
- Herrmann, J. 1978. Various Models of Criminal Proceedings. SACC.
- Henman, R.J. 1990. Sentencing principles and magistrate's sentencing behaviour. Sydney : Avebury.
- Hiemstra, V.G. 1977. Suid-Afrikaanse Strafproses. Durban : Butterworths.
- Hudson, B. 1987. Justice through punishment. London : MacMillan Education Ltd.
- Korn, R.R. & McCorkle, L.W. 1965. Criminology and penology. New York : Holt, Rinehart and Winston, Inc.
- Kratcoski, P.C. & Kratcoski, L.D. 1986. Juvenile delinquency. Second Edition. New Jersey : Simon and Schuster, Inc.
- Killinger, G.G. & Cromwell, P.L. (Edd.) 1978. Introduction to corrections : Selected readings. Minnesota : West Publishing Co.
- Lötter, J.M. & Ndabandaba, L.B.G. 1990. Crime and its impact. Pretoria : HSRC.
- Martin, F.M. et al. 1981. Children out of court. Edinburgh : Scottish Academic Press Ltd.
- Midgley, J. 1975. Children on Trial : A study of juvenile justice. Cape Town : NICRO.
- Midgley, J, Steyn, J.H. & Graser, R. 1975. Crime and punishment in South Africa. Cape Town : Nicro.
- Moberly, W. 1968. The ethics and punishment. London : Faber and Faber Ltd.
- Morris, A. et al. 1980. Justice for children. London : MacMillan Press Ltd.

- Orland, L. 1973. Justice, punishment, treatment : The correctional process. New York : The Free Press. A Division of MacMillan Publishing Company, Inc.
1982. PENOLOGY : Study Guide I for PNL201-G. Pretoria : University of South Africa
- Pickard, B. de V. 1990. Offences decree No 46 No. 172 Vol. 18.
- Pitts, J. 1990. Working with young offenders. London : MacMillan Education Ltd.
- Pointing, J. 1986. Alternatives to custody. Oxford : Basil Blackwell.
- Priestley, P. et al. 1977. Justice for juveniles : The 1969 Children and Young Persons Act : A case for reform? London : Routledge and Kegan Paul Ltd.
- Pursley, Robert, D. 1984. Introduction to criminal justice. Third Edition. London : Collier MacMillan Publishers.
- Rabie, M.A. & Strauss S.A. 1981. Punishment : An introduction to principles. Fourth Edition. Cape Town : Lex Patria Publishers.
- Reid, S.T. 1981. Correctional System : An introduction. New York : Holt Rinehart and Winston.
- Reid, S.T. 1982. Crime and criminology. Third Edition. New York : Holt, Rinehart and Winston.
- Reifen, D. 1972. The Juvenile court in a changing society. Young offenders in Israel. London : Wiedenfeld and Nicolson.
- Roberts, A.R. (Ed.) 1981. Social work in juvenile and criminal justice settings. Illinois : Charles C. Thomas Publisher.
- Robin, G.D. 1980. Introduction to the criminal justice system. Principles, procedures & practice. New York : Harper and Row Publishers.
- Roux, J. 1973. Die gevangenis rehabilitasieverwagtings. Misdaad, straf en hervorming. Vol. 2.
- Sanders, W.B. & Daudistel, H.C. (Ed) 1976. The Criminal justice process. A reader. New York : Praeger Publishers.
- Senna, J.J. & Siegel, L.J. 1976. Juvenile Law. Cases and comments. Minnesota : West Publishing Company.
- Simmonds, N.E. 1986. Central issues in jurisprudence, justice, law and rights. London : Sweet and Blackwell Ltd.
- Singh, P. 1992. The right to legal representation after arrest. Lawyers for Human Rights, Vol 3 Nov. 1992. A.
- Smykla, J.O. 1984. Probation and parole : Crime control in the community. New York : MacMillan Publishing Company.
- Snyman, C.R. 1975. The Accusatorial and Inquisitorial approaches to Criminal Procedure, some points of comparison between the South African and Continental Systems. CILSA.

- Snyman, C.R. 1989. Criminal Law. Second Edition. Durban : Butterworths.
- Solomon, M. & Somerlot, D.K. Caseflow management in the Trial Court 1987. American Bar Association, Chicago.
- Spiro, R. 1971. Law of parent and child. Third Edition. Cape Town : Juta.
- Sprinthall, N.A. & Sprinthall R.C. 1990. Educational psychology - a developmental approach. New York : McGraw-Hill Publishing Co.
- Steyn, J. H. 1973. The punishment scene in South Africa. Unpublished.
- Sutherland, E.H. & Cressey, D.R. 1970. Criminology. Eight Edition. Philadelphia : J.B. Lippincott Co.
- Taft, D.R. & England, D.J.R. R.W. 1964. Criminology. Fourth Edition. New York : The MacMillan Company.
- Tappan, P.W. 1960. Crime justice and correction. New York : McGraw-Hill Book Company, Inc.
- Tarde, G. 1912. Penal philosophy : New Jersey : Patterson Smith Co.
- Thomas, D.A. 1970. Principles of sentencing. London : Heinemann Educational Books Ltd.
- Thornton, W.E. (Jr.) & Voigt, L. 1992. Delinquency and justice. Third Edition. New York : McGraw-Hill, Inc.
- Tomasevski, K. 1986. Children in adult prisons. An international perspective. London : Frances Pinter Publishers.
- Trojanowicz, R.C. & Morash, M. 1987. Juvenile delinquency : Concepts and control. Fourth Edition. New Jersey : Prentice Hall, Inc.
1976. Report of the Viljoen Commission of Inquiry into the penal system of the RSA. R.P. 78/1976. Pretoria : Government Printer.
- Visser, P.J. & Voster, J.P. 1987. General principles of criminal law through the cases. Second Edition. Durban : Butterworths.
- Walker, N. 1980. Punishment, danger and stigma. Oxford : Basil Blackwell Publisher Ltd.
1968. Wickersham Commission, Report on Criminal Statistics. Montclair : N.J. Patterson Smith.

APPENDIX 1

QUESTIONNAIRE : MAGISTRATES -

ADJUDICATION AND SENTENCING OF JUVENILE OFFENDERS

GENERAL QUESTIONS

				CODE	RESULT		
1.	In what year were you appointed to the Bench?	1967	1968	1969	1972	1975	1977
		1	2	2	1	1	1
		1979	1980	1981	1986	1988	1989
		2	2	2	3	5	1
		1990	1991	1992			
		6	2	6			
2.	Have you been a Magistrate elsewhere?	Yes		1	17		
		No		2	20		
3.	If a Magistrate elsewhere, for how long?	Not applicable		0	19		

4.	Who was responsible for providing your training in the application of sentencing principles?						

5.	What form did this take?	Lectures		1	21		
		Seminars		2	15		
		Case studies		3	22		
		Discussion groups		4	7		
		Sentencing exercises		5	8		
		Other (specify)		6	2		

6.	How often do you attend training sessions involving the use of sentencing exercises?	Frequently		1	0		
		Occasionally		2	12		
		Rarely		3	16		
		Never		4	10		
7.	How often are sentencing principles considered in these sentencing exercises?	Not applicable		0	8		
		Frequently		1	13		
		Occasionally		2	6		
		Rarely		3	6		
		Never		4	1		

SENTENCING PRINCIPLES: COMMUNICATION TO PUBLIC PROSECUTORS AND MAGISTRATES¹

8.	Do you feel that the public prosecutor plays an important part in influencing your consideration of sentencing principles?		
	Important	1	27
	Not important	2	12
9.	Would you normally ask his advice on a matter involving a sentencing principle or would you expect him to advise you on this?		
	Ask advice	1	10
	Expect advice	2	29
10.	Do you think the public prosecutors are helpful in explaining or pointing out relevant sentencing principles?		
	Very helpful	1	6
	Quite helpful	2	18
	Not particularly helpful	3	12
	Not helpful at all	4	3
11.	Are the public prosecutors available for you to discuss any matter concerning sentencing principles with them?		
	Always	1	11
	Frequently	2	8
	Occasionally	3	6
	Rarely	4	6
	Never	5	8
12.	How often do you rely on other Magistrates to provide you with information regarding sentencing principles?		
	Frequently	1	3
	Occasionally	2	18
	Rarely	3	14
	Never	4	0

SENTENCING PRINCIPLES: COMMUNICATION TO MAGISTRATES BY ALTERNATIVE MEANS

13.	Are there other ways in which information concerning sentencing principles is communicated to you apart from public prosecutors and Magistrates?		
	Yes	1	30
	No	2	9
14.	Specify answer in previous question		
<hr/>			
15.	Would you say that you obtain more information about sentencing principles from sources other than prosecutors and Magistrates?		
	Yes	1	18
	No	2	10
	About the same	3	11

¹ Henmann, R. J. (1990). Sentencing principles and magistrates' sentencing behaviour. Sydney : Avebury. 208 - 238.

16.	Have you read or referred to any books or periodicals dealing with sentencing principles?		
	Yes	1	36
	No	2	1
17.	Do you regard it as part of your function to inform yourself about sentencing principles?		
	Yes	1	37
	No	2	2
18.	Do you think the probation officers are helpful in explaining or pointing out relevant sentencing principles?		
	Very helpful	1	9
	Quite helpful	2	19
	Not particularly helpful	3	8
	Not helpful at all	4	3
19.	Do you think the criminologists are helpful in explaining or pointing out relevant sentencing principles?		
	Very helpful	1	8
	Quite helpful	2	20
	Not particularly helpful	3	8
	Not helpful at all	4	3

ADJUDICATION OF JUVENILE OFFENDERS

20.	Children under the age of 14 should not be referred to the juvenile court on the ground that they had committed offences		
	Yes	1	15
	No	2	24
21.	Criminal proceedings can be filed against juveniles between the age of 14-17 who had committed offences, but only if a pre-trial judicial investigating report was compiled by an investigating Magistrate.		
	Yes	1	22
	No	2	17
22.	Criminal proceedings can be filed against juveniles and young offenders between the ages of 14-20 who had committed offences, but only if a pre-trial judicial investigation report was compiled by an investigating Magistrate.		
	Yes	1	13
	No	2	26
23.	Who should head the police investigation		
	Police official	1	23
	Public prosecutor	2	16
24.	Magistrates can no longer make detailed decisions about the punishment or treatment appropriate for the juvenile without a detailed report by the probation officer		
	Yes	1	21
	No	2	18

25. Juvenile courts seem to adopt one of four distinct approaches in the adjudication process:
- | | | |
|------------------------------|---|----|
| - accusatorial | 1 | 4 |
| - inquisitorial | 2 | 10 |
| - accusatorial-inquisitorial | 3 | 13 |
| - inquisitorial-accusatorial | 4 | 12 |
26. In no country one would find a system which is purely accusatorial or inquisitorial - in almost all countries one would find a mixed system with marked emphasis on leaning towards either of the two approaches.
- | | | |
|-----|---|----|
| Yes | 1 | 32 |
| No | 2 | 7 |
27. What could be added to the present system to divert it towards a more inquisitorial system?
- _____
- _____
- _____
28. Do you think that a pre-trial judicial report such as the preparatory examination (Criminal Procedure Act 51 of 1977 SS 123-143) will assist you in adjudicating juvenile offenders.
- | | | |
|-----|---|----|
| Yes | 1 | 29 |
| No | 2 | 8 |
29. If answer is 'no', what would you propose?
- _____
- _____
- _____
30. What would you regard as the most difficult aspect in the adjudication of the juvenile offender?
- _____
- _____
- _____
31. What can be done to rectify the above-mentioned problem?
- _____

SENTENCING: OBJECTIVES WITH REGARD TO JUVENILE OFFENDERS

What is the most important?

Protecting society from juvenile crime	1	2
Helping the young offender development	2	12
They are complementary	3	25

33. What do you think are the most important considerations for a sentencer?

	Very Imp	Quite Imp	Some	Little	No	Imp
<u>Result</u>	12	20	1	2	1	
Demands of victims of crime for justice	1	2	3	4	5	
Need to protect juvenile offenders against sever punishment	8	19	4	2	6	
Need to give juvenile offender penalty he deserves	1	2	3	4	5	
Need to deter juvenile offender and others from engaging in similar activity	18	11	6	-	-	
Need to expose the juvenile offender to treatment	1	2	3	4	5	
	26	10	2	-	-	
	1	2	3	4	5	
	29	1	9	-	-	
	1	2	3	4	5	

34. What importance do you attach to the following sentencing objectives?

	Very Imp	Quite Imp	Some Imp	Little Imp	No Imp
<u>Result</u>	29	8	-	1	-
Reformation	1	2	3	4	5
	9	19	11	-	-
Punishment	1	2	3	4	5
	14	17	4	4	-
General deterrence	1	2	3	4	5
	19	12	2	-	4
Individual deterrence	1	2	3	4	5
	17	18	3	1	-
Protection of society	1	2	3	4	5
	14	12	8	3	2
Reparation	1	2	3	4	5

35. How would you describe the purpose of sentencing principles?

To achieve a just solution to a case	1	76
To ensure punishment of the offender	2	3
To assist in assessing the appropriateness of the sentence to the offence	3	3
To assist in assessing the appropriateness of the sentence to the offender	4	10
To provide guidelines to assist sentencers in exercising their discretion when imposing sentence	5	16
To ensure treatment for the offender	6	8

36. The retributivist defends the desirability of a punitive response to the juvenile offender by saying that the punitive reaction is the pain the juvenile deserves, and that it is highly desirable to provide for an orderly, collective expression of society's natural feeling of revulsion toward and disapproval of criminal acts.

Yes	1	22
No	2	17

37. Do you agree with the following statement:
Retribution must however be viewed within the cultural context and the punitive response and its interpretation are relative to time and place.

Yes	1	32
No	2	7

38. Do you think that the motives of deterrence are by themselves sufficient to justify punishment for juveniles?

Yes	1	12
No	2	27

39.	Do you think that the motives of reformation are by themselves sufficient to justify punishment for juveniles?		
	Yes	1	17
	No	2	22
40.	Do you think that reformation is really procured through punishment?		
	Yes	1	18
	No	2	21
41.	Do you think that there exist sufficient help to be of sufficient length to enable the juvenile to be properly treated?		
	Yes	1	7
	No	2	32
42.	If 'Yes', give motivation		

43.	If 'No', give motivation		

44.	Some people challenge the assumption that the criminal justice process deters juvenile criminal behaviour		
	Agree	1	21
	Disagree	2	18
45.	Would you say that knowledge of criminology and penology could help the magistrate in dealing with juvenile crime?		
	Agree	1	36
	Disagree	2	3

SENTENCING OBJECTIVES AND THEIR APPLICATION TO JUVENILE OFFENDERS

46.	Would you normally assume imprisonment to be the appropriate sentence in the following types of cases?		
	Where the offence is serious.	1	20
	Where the offender has a criminal record	2	19
	Where you wish to punish the offender	3	2
	Where you wish to deter the offender	4	3
	Where you wish to deter others	5	5
	Where you wish to protect society from the offender	6	25

47. Would you normally assume community service to be the appropriate sentence in the following types of cases?

Where you think the offender will benefit	1	33
Where the offence is serious.	2	1
Where the offender has a criminal record.	3	3
Where the offence is less serious.	4	16
Where you wish to deter the offender.	5	8
Where you wish to deter others.	6	6
Where you wish to punish the offender.	7	4

48. What general sentencing objective would you have in mind when faced with the following types of cases?

	Ref.	Pun.	G.D.	I.D.	Prot. Soc.
	17	8	11	6	9
Shoplifting	1	2	3	4	5
	10	9	8	8	19
Driving whilst disqualified	1	2	3	4	5
	19	7	7	9	5
Possession of cannabis	1	2	3	4	5
	7	24	7	6	4
Assault on police	1	2	3	4	5
	7	15	7	8	10
Criminal damage	1	2	3	4	5

49. Would you change your sentencing objective if told that a sentence of imprisonment is rarely appropriate for a juvenile shoplifter with no previous convictions?

Yes	1	22
No	2	17

50. If Yes, please specify the change.

Not applicable	0	13
Reformation	1	16
Punishment	2	2
General deterrence	3	3
Individual deterrence	4	2
Protection of society	5	1

51. If No, please specify why:

Not applicable	0	16
Penalty contemplated	1	3
Other penalty contemplated	2	6
Other (specify)	3	0

52. Would you change your sentencing objective if told that a sentence of imprisonment is rarely appropriate for a juvenile shoplifter with no previous convictions?

Yes	1	22
No	2	12

53. If yes, please specify the change.

Not applicable	0	5
Reformation	1	16
Punishment	2	1
General deterrence	3	2
Individual deterrence	4	2
Protection of society	5	0

54.	If no, please specify why.		
	Not applicable	0	16
	Penalty contemplated	1	2
	Other penalty contemplated	2	5
	Other (specify)	3	1

55. How do you feel about young offenders who are sentenced to prison where they have to spend their time amongst adult prisoners?

56.	Do you subscribe to the new notion of the Department of Corrections to place juvenile offenders in juvenile prisons?		
	Yes	1	34
	No	2	5

57.	Do you regard reformatory schools as outdated?		
	Yes	1	14
	No	2	25

58. Motivate your answer

SENTENCING: MAGISTRATE'S PERCEIVED EFFECTIVENESS OF SENTENCES ON JUVENILE OFFENDERS

59.	Would you say that a fine is effective as:		
	A treatment	1	0
	A punishment	2	10
	A general deterrent	3	7
	An individual deterrent	4	10
	None of above-mentioned	5	15
60.	Would you say that probation is effective as:		
	A treatment	1	19
	A punishment	2	6
	A general deterrent	3	5
	An individual deterrent	4	6
	None of above-mentioned	5	3
61.	Would you say that imprisonment is effective as:		
	A treatment	1	1
	A punishment	2	19
	A general deterrent	3	13
	An individual deterrent	4	10
	None of above-mentioned	5	3
62.	Would you say that community service is effective as:		
	A treatment	1	15
	A punishment	2	11
	A general deterrent	3	6
	An individual deterrent	4	15
	None of the above-mentioned	5	0
63.	Would you say that corporal punishment is effective as:		
	A treatment	1	0
	A punishment	2	23
	A general deterrent	3	6
	An individual deterrent	4	15
	None of the above-mentioned	5	1

SENTENCING: MAGISTRATES PERCEIVED APPROPRIATENESS OF SENTENCES ON JUVENILE OFFENDERS

64.	Would you normally assume a fine to be the appropriate sentence in the following types of cases?		
	Where the offence is less serious	1	18
	Where you wish to deter the offender	2	6
	Where you wish to deter others	3	5
	Where you wish to punish the offender	4	15
65.	Would you normally assume corporal punishment to be the appropriate sentence in the following types of cases?		
	Where the offence is less serious	1	4
	Where you wish to deter the offender	2	17
	Where you wish to deter others	3	6
	Where you wish to punish the offender	4	23
66.	Would you normally assume probation to be the appropriate sentence in the following types of cases?		
	Where you think the offender will benefit	1	28
	Where you wish to deter the offender	2	9
	Where you wish to deter others	3	3
	Where you wish to punish the offender	4	4
67.	Would you contemplate imposing a Community Service Order as:		
	An alternative to imprisonment	1	15
	A sentence in its own right	2	23
	An alternative to a fine where the/ offender has limited means	3	4
68.	Do you think that a juvenile offender who has a substantial record of previous convictions should have his sentence increased above the normal level for the offence he has committed?		
	Yes	1	29
	No	2	10
69.	Would you say that a juvenile offender has a right to have his sentence reduced if there are mitigating circumstances?		
	Yes	1	35
	No	2	4
70.	If you had a particular sentencing objective in mind, would you feel justified in making no allowance for mitigating circumstances in order to achieve this objective?		
	Yes	1	4
	No	2	35
71.	How would you regard the effect of a plea of guilty as a mitigating circumstance?		
	No effect	1	0
	Not much effect	2	8
	Some effect	3	19
	Substantial effect	4	12

72. Are there any other legal constraints in the
sentencing process which you would like to mention?
Not applicable

0
