

## **2 + 2 = 5? Exploring the domestication of the CRC in South African jurisprudence (2002-2006)**

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### **Introduction**

South Africa commenced transition to a constitutional democracy with the adoption of an interim constitution in 1994, followed by national elections based, for the first time, on universal adult suffrage. A justiciable Bill of Rights, containing some rights accorded to children, was at the core of our new society based on values of dignity, equality and respect for the freedom and security of the person, in sharp contrast to the violence and legalised discrimination that had characterised the apartheid regime. The two years that followed the adoption of the Interim Constitution were a period of intense negotiations by a multi-party constitutional assembly to finalise the text of a final constitution, in accordance with the principles set out in the Interim Constitution. As has previously been pointed out (Sloth-Nielsen, 1996, p.326), there was a high degree of consensus amongst political parties about the children's rights to be included, to the extent that four of the six party submissions supported the extension of the children's rights clause, and indeed a number of additional rights were fashioned and ultimately adopted.

It must be recalled that South Africa was excluded from participation in international affairs because of her apartheid policies for nearly 40 years, and rejoining the international human rights community was an important objective of the transition to democracy. As we will see, international and foreign law has proved significant in the Court's review of children's rights. The foundational text in this regard is the Convention on the Rights of the Child (CRC), which South Africa signed and ratified in 1995. Second, section 28 of the Constitution is not the only section that confers constitutional rights on children. They enjoy other rights under the Bill of Rights amongst which is the right not to be discriminated against on the basis of age as spelt out in section 9(3).

In the final (1996) Constitution, section 28 embodied a dedicated commitment to children rights, containing rights that were explicitly drawn from the provisions of the CRC, as the submissions to the Constitutional Assembly from the children's rights non-governmental sector clearly indicate. To illustrate, the best interests of the child principle, the rule that deprivation of liberty be used as a last resort, and then only for the shortest appropriate period of time, the right not to be used directly in armed conflict are but three instances of the domestication of CRC standards in South African constitutional law.<sup>1</sup>

In an attempt to predict the possible impact of the constitutionalisation of children's rights in 1996, it was suggested that "the inclusion of a general standard ('the best interests of the child') for the protection of children's rights can become a benchmark for review of all proceedings in which decisions are taken regarding children. And even if, as sceptics might aver, the best interest criteria is simply an opportunity to pay lip service to the interests of children, it still provides a minimum guarantee that the interests of children cannot be ignored"(Sloth-Nielsen, 1996, p.342). It was further noted that the language of rights implies that they can be used as specialised tools of legal advocacy to claim constitutional guarantees in appropriate cases (Sloth-Nielsen, 1996, p.342).

In 2002, a five-year (i.e. 1996- end 2001), backward-looking assessment of the impact of the CRC and the constitutional children's rights clause was published (Sloth-Nielsen, 2002, 137). The key focus was on judicial decisions, as opposed to policy and legislation more generally. The article outlined the status of the CRC in domestic law, pointing not only to the act of ratification through which CRC as an international treaty could assume relevance,<sup>2</sup> but also highlighting specific constitutional provisions which either mandate, require or permit a court to have regard to international law (with preference being given to binding provisions as opposed to international law to which South Africa is not a signatory, or which constitute "soft law").<sup>3</sup> After surveying some ten decisions, drawn from both "private law" and "public law" domains, in which children's rights related themes were either directly in issue (e.g. *Christian Education South Africa v Minister of Education*, (2000 (10) BCLR 1051 (CC)) upholding a legislative prohibition on the imposition of corporal punishment in the school system, and *S v Kwalase* (2000 (2) SACR 35 (CPD)), elaborating the sentencing principles applicable to juvenile offenders), or indirectly (e.g. *President of the Republic of South Africa v Hugo* (1997 (6) BCLR 708 (CC)), concerning the constitutionality of an amnesty which benefited only incarcerated mothers of minor children aged below 12 years), a number of pertinent conclusions concerning the impact of the CRC upon the jurisprudence of the time were drawn. It is apposite to summarise these conclusions briefly.

First, it was suggested, in 2002, that the main beneficiaries of children's rights related cases were in fact adult litigants, who had sought to bolster their claims via children's rights-based arguments. Indeed, absent any *ex parte* applications or cases brought by guardian's *ad litem*, or class action law suits, or even individual cases pursued by children on their own account, children themselves had been all but invisible. Indeed, as will be mentioned below, Justice Sachs lamented in the schools corporal punishment case, that the Constitutional Court was not even appraised of the views of the scholars whose parents were seeking a confirmation of their parental right to permit the practice of corporal punishment in private schools.

Second, the article noted the absence of case law dealing with the interplay between the Constitution and customary law, an area in which it could have been expected that human rights-based challenges might arise.

A third theme related to the individual pre-disposition of some judges to raise children's rights *mero motu*, in view of their prior history in the children's rights movement, some having participated in early conferences which shaped the drafting of the constitutional clause on children's rights.

Fourth, adoption-related issues had played a prominent role in the years 1996- 2001, illustrating the "quantum of vested interests" and "huge investment in emotional energy" that oftentimes accompanies the acquisition (and we use this word deliberately) of a child. To an extent, the adoption issue links with the observation made earlier that children's rights arguments were adduced to favour adult claimants.

Finally, the disappointing outcome for children's rights advocacy heralded by the then major socio-economic rights case, *Government of the Republic of South Africa and others v Grootboom and others* (2000 (11) BCLR 1169 (CC)), in which the Constitutional Court declined to interpret the child's rights to basic nutrition, shelter, basic health care and social services to encompass a directly enforceable claim against the state for destitute children, unless such children were orphaned, abandoned or otherwise lacked a family environment, was presented. It was hinted that the honeymoon period in the new constitutional era in South Africa, with its apparent "first call for children" in the delivery

of material goods and services necessary to ameliorate the worst effects of child poverty, was possibly over.

A further period of five years has elapsed, and the need to reflect again on the impact of the children's rights clause has become apparent, chiefly due to a significant number of cases directly or indirectly involving the rights of children that our courts have been seized with in the intervening five year period. The case law covered in this article therefore dates from January 2002 – December 2006. This article therefore revisits the conclusions and suggestions made in 2002, and provides an updated review of the role that children's constitutional rights have come to play in the judicial sphere.

In order to tie the analysis closer to the CRC itself and to move away from the increasingly anachronistic "private law/public law" dichotomy that has tended to prevail in the children's rights sphere as much as any other, the analysis below is organised around the four general principles of the CRC: non-discrimination (Article 2 of CRC), the best interests principle (Article 3 of CRC, which will be covered last in view of the ubiquitous use of this standard in contemporary jurisprudence), the right to survival and development (Article 6 of CRC), and children's participation rights (Article 12 of CRC). A concluding section will assess the extent to which the conclusions drawn in 2002 remain valid, and will reflect on the possible longer term impact of children's rights litigation in South Africa.

### **The South African court system**

A few points about the South African legal system provides necessary context for the discussion on children's rights jurisprudence which follows. After 1994, South Africa's judicial system saw considerable reform and restructuring to bring it into line with the Constitution, to create mechanisms for constitutional protection, and to streamline the court system. A process of significant legislative reform retained some arrangements of the past but also created new features, and set up a five-level structure of courts. First, the District Magistrates' Courts deal with criminal and civil matters; second, above them, the Regional Magistrates' Courts deal with criminal matters only. Third, the High Courts—formerly known as Supreme Courts – have ten provincial divisions and three local divisions.

Fourth, the Supreme Court of Appeal (SCA), located in Bloemfontein, is the apex court for all non-constitutional matters. Fifth, the Constitutional Court, located in Johannesburg, is the apex court for constitutional matters. Since this article deals with the constitutional rights of children, it is necessary to describe briefly how constitutional matters are dealt with. Only the High, SCA, and Constitutional levels have jurisdiction in constitutional cases, and if a constitutional issue is raised in a District or Regional Court, the matter is suspended and referred to a High Court. While a High Court has the authority to declare legislation unconstitutional, this must be confirmed by the Constitutional Court (Afrimapan OSF, 2005, pp.173 and 174). A High Court and the SCA may also refer a matter to the Constitutional Court if they are of the opinion that it should rather be dealt with by the Constitutional Court. It is also possible for a person to have direct access to the Constitutional Court and thus avoid the filtering mechanism of the courts below (Constitution, Act 108 of 1996, section 167(6)). This, however, is rarely done, and the Constitutional Court strongly prefers that matters are first heard in the High Courts to verify that the case at hand is indeed of a constitutional nature and to distill the key issues for the Constitutional Court to consider. The Constitutional Court hears matters on argument, and no fewer than eight judges must sit in cases before the Court. The Court consists of eleven judges appointed by the State President in consultation with the National Assembly, Judicial Services Commission and the Chief Justice, who is also the

head of the Constitutional Court (Constitution, Act 108 of 1996, section 174). The Court may also invite and make use of *amicus curiae* briefs.

In the main, this article covers all the Constitutional Court and most SCA cases in which children's right have featured in the period under review, as well as some interesting High Court cases.

### **Non-discrimination (Article 2 of the CRC)**

The CRC instructs States Parties to "respect and ensure" the rights set forth in the Convention to each child "without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." It is interesting to note that the CRC, one of the most recent United Nations human rights treaties, has an unusually comprehensive version of the principle of non-discrimination. Not only does it apply the Universal Declaration's prohibited grounds of discrimination against the child, but it extends this prohibition to discrimination aimed at the child's parents or legal guardians. Hence, in addition to prohibiting discrimination that interferes with the exercise of rights because of the identity of the child, the CRC insulates the child from discrimination based on the acts or attributes of the persons with whom the child lives. Further, Article 2 addresses not only legal (*de jure*) discrimination, but also *de facto* discrimination.

The principle of equality and the rule against discrimination occupies a special place in South Africa's history. The country's system of apartheid has left a deeply divided society marked by formal and substantive discrimination, extensive poverty, a high crime rate and violence. In the preamble to the Constitution, it is specifically stated that the injustices of the country's past are recognized and that the Constitution is adopted as the supreme law of the country so as to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights. The Constitution provides an opportunity to solve these problems. Of crucial importance in practice to this political ideal will be how the courts interpret the guarantee contained in section 9 of the Constitution on equality.<sup>4</sup>

In particular, section 9(3) provides that:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (emphasis inserted)

In the period under review, cases ranging from, among others, maintenance rights, social security rights, the right to property and succession, issues pertaining to adoption and the right of same-sex partners towards children born by artificial insemination have been entertained by the courts. The question of non-discrimination fitted squarely within these cases.

In *Khosa and others v Minister of Social Development and others* (2004 (6) BCLR 569 (CC)), an issue at stake was the criteria governing eligibility for receiving the child support grant and the care dependency grant, as well as old age pensions, payable in terms of the Social Assistance Act 59 of 1992, as amended by the Welfare Laws Amendment Act 106 of 1997. The applicants were Mozambican citizens who had fled that country during civil conflict in the 1980's and who had resided in South Africa since then. The beneficiary children were, however, born in South Africa and enjoyed South African citizenship. But

for the fact that the applicants (the parents) were non- South African citizens, both they and their children would otherwise qualify for social assistance. They had, however, been refused the grants concerned on the basis that they were not South African citizens as required by the Act. The constitutionality of the relevant provisions was therefore challenged as an infringement of the children's rights under section 28 as well as an infringement of equality rights under section 9 of the Constitution. The Constitutional Court noted that social grants are targeted at vulnerable people in order to realise Constitutional objectives and in line with international obligations (para. 51). It was emphasised that basic needs have to be met to ensure that society values the fundamental dignity of the people (para. 52). The Court found that the discrimination was unfair and infringed dignity. In this regard, the Court pointed out that the Constitution mandates special protection for children and that the denial of support infringes on their rights (para. 86). In the words of the Court, in connection with children's rights:

...the children referred to in section 4(b)(ii) (relating to the child support grant) and 4B(b)(ii) (relating to the care-dependency grant) may have been born in South Africa and may be citizens, but if the primary care-giver or parent, excluding foster parents, is not a South African citizen, the grant is not payable. The respondents (both Government Departments) did not seek to support these provisions, which discriminate against children on the grounds of their parents' nationality. It was therefore conceded that citizenship is an irrelevant consideration in assessing the needs of the children concerned. Moreover the denial of support in such circumstances to children in need trenches upon their rights under section 28(1)(c) of the Constitution (para. 78).

The cost of including the affected groups was small in comparison to the overall amount that was allocated to social grants (para. 62); therefore the Court ordered that the old age pension, care dependency grant and the child support grant should be available to permanent residents too.

In *Bhe and Others v Magistrate, Khayelitsha and Others* (2004 (2) SA 544 (C)), an application was made on behalf of the two minor daughters of Ms Nontupheko Bhe and her deceased partner to allow them to inherit immovable property, namely a house, from their deceased father. It was contended that the customary law rule of male primogeniture unfairly discriminated against the two children in that they prevented the children from inheriting the deceased estate of their late father. The Court found that the principle of primogeniture as expressed in the Black Administration Act 38 of 1927 and its regulations discriminated on the basis of race and gender. This decision was confirmed by the Constitutional Court in *Bhe and Others v Magistrate, Khayelitsha and Others* (2005 (1) BCLR 1 (CC)), albeit that a different process of reasoning was employed. In relevant part, particularly regarding children's rights, Justice Langa said:

The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centrepiece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extra marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom (para. 95).<sup>5</sup>

In arriving at its decision, the Court highlights South Africa's international obligations. Not only does the Court clearly refer to the provision of the CRC on non-discrimination, it

also quotes Article 3 as the relevant provision from the African Charter on the Rights and Welfare of the Child (para. 53 and 55). At paragraph 55, Justice Langa quotes verbatim Article 2 of the CRC on non-discrimination to support the Court's reasoning and subsequent decision.

In *Petersen v Maintenance Officer, Simon's Town Maintenance Court* (2004 (2) SA 56 (C)), the High Court found the common law rule, which stated that the paternal grandfather of an extra-marital child owed it no duty of support, to result in unfair discrimination on the basis of birth status. The Court has also found a violation of the child's dignity (protected by section 10) and an infringement of the child's best interests in section 28(2). Since there was no permissible justification for this infringement, the Court developed the common law to allow the extra-marital child's claim for maintenance against its paternal grandparents where neither mother nor father was able to support the child. It is interesting to note that the discrimination ground of "birth" is explicitly provided for in section 9(3) of the South African Constitution, as it is in Article 2 of CRC.

It is well known that the status of same-sex relationships and its implications for the institution of the family is currently a hotly debated issue in South Africa. As a result, it comes as no surprise that a number of cases alleging direct and indirect discrimination on the basis of sexual orientation and marital status have found their way to the courts.

Adoption by same a sex couple is discussed in the "child participation" section below, but the following example is illustrative of the impact of the principle of non- discrimination.

In the case of *J&B v Director General: Department of Home Affairs* (2003 (5) BCLR 463 (CC)), the applicants had been partners in a same-sex life partnership since 1995. In August 2001, the second applicant gave birth to twins. They were conceived by artificial insemination. The male sperm was obtained from an anonymous donor. The female ova were obtained from the first applicant. The applicants applied to be registered and recognised as the parents of the twins. There was, of course, no legal impediment with regard to the second applicant, as the "birth mother" of the children. However, the appropriate regulations to the Births and Deaths Registration Act 51 of 1992 only made provision for the registration of one father and one mother (not two mothers). In addition, the applicants sought to have section 5 of the Children's Status Act 82 of 1987 declared constitutionally invalid on the grounds that it was inconsistent with the rights entrenched in the Bill of Rights.

The High Court agreed with the claim, struck out the words "married" where it appeared in the subsections, and read in the words "or same-sex life partner" after the word "husband". However, such an order can have no force unless it is confirmed by the Constitutional Court. Hence, the application to the Constitutional Court. The Constitutional Court found that inasmuch the provisions of section 5 and those pertaining to birth registration do not permit the first applicant, the biological mother, to become a legitimate parent of the children, they unfairly discriminate between married persons and applicants as permanent same-sex life partners, and this violates the equality clause in section 9. As far as the children are concerned, it is important to note that the learned judge in the High Court held that the statutory provision amounts to discrimination which attaches to the children on the listed grounds of social origin and birth. He went on to hold that the presumption of unfair discrimination created by section 9(5) of the Constitution applies (para. 9). Because the Government did not seek to justify the discrimination under section 36 of the Constitution, the judge held the section to be constitutionally invalid, which the Constitutional Court confirmed.

It is clear to see that section 9(3) has become the central operating concept for the right against discrimination and the main vehicle for protecting and promoting substantive equality within the determination of fairness. As shown above, the jurisprudence that comes from the courts on the basis of this provision is in accordance with what the CRC mandates. The fact that the distinction between direct and indirect discrimination has not brought about different methods of proving discrimination, different defences and different remedies (unlike in other jurisdictions, for instance, Canada), is a positive development in the protection and promotion of equality. In South Africa, the principal concern is with the effect or impact of the impugned law, and the fact that the motive, purpose or intention of the discrimination is irrelevant to the question of whether there has been discrimination, either “direct or indirect”, further helps advance the promotion and protection of children’s rights. Admittedly equal protection does not mean per se actual equality in the arithmetical sense that would negate all differentiation between categories of people. If the classification is founded on a reasonable basis, and it is truly relevant to the purpose it is meant to serve, classification and differentiation for purposes of law may well fall within a definition of equal treatment. So where there is a need to treat children differently, even if it in effect meant discriminating against others, it may squarely fit within the concept of fair discrimination and be valid.

### **Right to life, survival and development (Article 6 of CRC)**

Classified as one of the four cardinal principles of the CRC by the UN Committee, the right to life, survival and development is a cross-cutting right related to a number of provisions of the CRC. Among others, it has to do with life expectancy, child mortality, immunization, malnutrition and preventable diseases, and other related issues. It is also a concept integral to the best interests of the child. As pointed out by academic commentators, Article 6 must be interpreted as reaching beyond the mere right to life and must be interpreted dynamically to refer to the developmental processes that all children undergo in the passage to adulthood. The term “survival rights” covers a child’s survival rights to life and the needs that are most basic to the child’s existence which include an adequate living standard, shelter, nutrition and access to medical services. Ensuring survival and physical health are priorities, but states parties are reminded that Article 6 encompasses all aspects of development, and that a child’s health and psychosocial well-being are in many respects interdependent (see CRC Committee, General Comment No 7, 2005, para. 10).

The South African Constitution and subsidiary legislation incorporate an array of rights relevant to the child’s right to life, survival and development. Section 11 guarantees the right to life to “everyone”. Section 28(1)(c) guarantees every child the right to basic nutrition, shelter, basic health care services and social services (see Constitution, Act 108 of 1996, sections 26 and 27).

The 2002 article dealt with some of the previous cases that pertained to the right to life, survival and development, the most notable of which is *Government of South Africa v Grootboom* (2000 (11) BCLR 1169 (CC)). As mentioned earlier, the case failed to result in children’s claims to be provided with shelter, at state expense, being met, although the Constitutional Court found the overall state housing policy to be unreasonable, and thus in violation of the Constitution, in that it failed to provide relief for those in desperate need.

In the period currently being reviewed, some noteworthy examples have come before the courts that pertain to the right to life, survival and development.

The first case, *Hay v B* (2003 (3) SA 492), the High Court allowed a blood transfusion to

be given to an infant, despite the refusal of the treatment by the infant's parents. The Court overruled the parent's refusal of consent, in its capacity upper guardian of all minors, because the infant would die if the transfusion were not performed. The Hay Court was not prepared to 'negate the essential content' of the child's 'inviolable' right to "live as a human being, be part of a broader community and share in the experience of humanity" merely because administering the transfusion was against the wishes and the sincere belief of his parents (para. 144). The Court made it crystal clear that the "private beliefs of the parents cannot override the baby's right to life" (para. 144).

Two cases brought by the Centre for Child Law<sup>6</sup> have some degree of relevance in examining the right to survival and development. In the first case, *Centre for Child Law and Another v Minister of Home Affairs and Others* (2005 (6) SA 50 (T)), the application arose out of a situation in which a number of unaccompanied foreign children were being detained in the Lindela Repatriation Centre, pending deportation. They were accommodated together with the adults at the Centre and, when they were eventually deported, stood to be transported by truck and train to their country's border and then onto the nearest police station within their country. The method of detention, deportation and, generally, government's obligation to provide foreign children who lack family care with the rights and protections embodied in section 28 of the Constitution was put into test.

In her judgment, Judge de Vos noted that South Africa has recently celebrated the 10th anniversary of the first democratic elections and that South Africans are justifiably proud of our democracy and the principles enshrined in our Constitution. However, the lofty ideals set out in our constitution and government policy become "hypocritical nonsense" if they are not translated into action by the people who have been appointed by the government to make them a reality. Of interest here is also the fact that, after calling the way in which these children are being deported "not only unlawful" but also "shameful" (para. 23), the Court continued to mention South Africa's international obligations in general terms. In so doing, the Court lamented that "South Africa is also a signatory to certain relevant conventions. These are the CRC which affords every child the right to health, the right to social security and to education. Second, the African Charter on the Rights and Welfare of the Child, which similarly affirms every child's right to education and health care" (para. 25). Finally the Court ordered that the foreign children detained in Dyambu Youth Centre be brought before a Children's Court in order for welfare inquiries to be opened for them in terms of the provisions of section 12(2)(c) of the Child Care Act 74 of 1983 within 15 days. In addition, the order interdicted the departments concerned from bringing or admitting any further unaccompanied foreign children to Lindela Repatriation Centre, and directed that in future such children should be dealt with in terms of the Child Care Act. Regarding the children who had recently been brought to Lindela the judge said their detention is unlawful and invalid and must cease immediately.

In the second case, *Centre for Child Law and Others v MEC for Education and Others* (Luckhoff Case, No. 19559/06, 30 June 2006), the rights of children in alternative care were put to the test. The case concerned a school of industry for children placed there after a children's court inquiry had found them to be in need of care and thus falling within the ambit of the section 15(1)(d) of the Child Care Act 74 of 1983. The hostels in which the children were housed were in a state of deterioration. Most dormitories had no windows, the floors were in poor condition and there were neither cubicles to provide privacy in the showers nor doors to the toilets. The lack of ceiling boards and window glass meant that the children were exposed to freezing weather conditions in their sleeping quarters. There was no heating in the dormitories, and, in some instances, no

electricity. The children's beds consisted of old dirty foam mattresses, with one (sometimes two) thin grey blankets similar to those used in prisons. Moreover, there was a complete absence of proper psychological support and therapeutic services at the school. The children were understandably miserable.

The applicants requested that the children, who numbered about 150, each be provided with a sleeping bag at night, have the conditions in the building improved for them and be provided with proper therapeutic services. The respondent, the MEC for Education of the province, contended that providing sleeping bags for the children would be violating the equality principle of the Constitution, lest others similarly denied their rights should seek the same remedy at a very significant cost to the State. The Court roundly rejected this contention, and gave an order compelling the authorities to provide each child with a sleeping bag, and to put in place proper access control and psychological support structures. It also ordered the MEC for Education, the first respondent, to be directed to make immediate arrangements for the school to be subjected to a developmental quality assurance (DQA) process to address the poor functioning of the institution. The Court noted that psychological and social support is a critical ingredient of state care, absent parental support, and found that the lack of such a service is unacceptable. The Court questioned what message is sent to children when they are removed from their parents because they deserve better care, and yet, the authorities concerned then neglect wholly to provide that care? Importantly, the implementation of various aspects of the order related to improvements at the facility over time were secured by the imposition of a structural interdict, requiring regular reporting back to the Court on progress made.

In *Khosa*, discussed above, in extending the right to social security to the applicants, namely Mozambican citizens who are permanent residents and their children, the Court argued that "when the right to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources" (para. 44). It further highlighted that "what makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social security scheme put in place by the State to meet its obligations under section 27 of the Constitution raises the question of the prohibition of unfair discrimination" (para. 44). Although it does not make any mention of the CRC, it does directly relate to the child's right to survival and development (Article 6(2) of CRC); the child's right to benefit from social security (Article 26 of CRC); and the child's right to an adequate standard of living (Article 27 of CRC).

The last case for discussion in this section is *Minister of Health and Others v Treatment Action Campaign and Others* ((2002) (10) BCLR 1033 (CC)). It is relevant to the discussion at hand particularly because it relates to both the "right to life" as well as the "right to survival and development" as incorporated under Article 6 of the CRC. In this case an attempt was made to force the government to expand and roll out the provision of anti-retrovirals to HIV positive pregnant mothers giving birth in state clinics to prevent mother-to-child transmission of the disease. The rights concerned were everyone's right to have access to health care (section 27 of the Constitution), and children's rights to basic health care (section 28 (1)(c)). The existing programme was challenged as unreasonable because of its restriction to selected hospitals serving as pilot sites, thereby excluding an HIV/AIDS positive mother (and her child) who did not have access to these designated hospitals. Relying on the *Grootboom* precedent, the State had argued that the primary obligation to provide for the basic health care of (the unborn) children lay on their parents (para. 76). The Court rejected this submission and, by expanding the ruling in the *Grootboom* case, held that the primary obligation to provide children with basic health care no doubt rests on those parents who can afford to pay for the services (para. 77).

However, in the Court's opinion, the State is obliged to ensure that children are accorded the measure of protection arising from section 28, and, moreover, the State bears the primary responsibility as regards basic health care, for children when 'the implementation of parental or family care is lacking' (para. 79). The Court said that:

Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them (para.79).

The Court also reasoned that "in evaluating government's policy, regard must be had to the fact that this case is concerned with new born babies whose lives might be saved by the administration of Nevirapine" (para. 72). Children's "needs are 'most urgent' and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled" (para. 78). Limiting the provisions of anti-retrovirals to certain test sites would imperil mothers giving birth to vulnerable children in the public health system, and infringe their children's rights to survival and development. Although the Court said that it does not underestimate the nature and extent of the problem facing government particularly to reduce the transmission of HIV from mother to child, it nevertheless underscores "the pressing need to ensure that where possible loss of life is prevented" in the meantime (para. 131) (Emphasis inserted). It is also interesting to note that, where budgetary constraints were invoked as a legitimate reason for not implementing a comprehensive policy, this was countered by stating that "the use of Nevirapine would result in significant savings in later years because it would reduce the number of HIV-positive children who would otherwise have to be treated in the public health system for all the complications caused by that condition" (para. 116). This could be taken to indicate that the right to survival and subsequent development of the child is a more valuable and important consideration, even in the face of limited resources.

The TAC case appears to have, to a limited extent, restored the confidence of children's rights advocates that the Constitution is capable of protecting children as a vulnerable group. It can be regarded as ameliorating some of the limiting effects of Grootboom as to the scope and ambit of the constitutional socio-economic rights afforded children. However, the Court did not, in the end, conclude that children had a direct, individual entitlement to claim basic health care services (on demand, as it were); rather, it used the rights in the Constitution to conclude that the government's rigid and restrictive policy on anti-retrovirals was unreasonable because it excluded and harmed a particularly vulnerable group (para. 80) (see Sloth-Nielsen, 2004).

### **Child participation (Article 12 of the CRC)**

Although a great deal could be written about child participation in general, the focus of this paper is initially confined to the provisions of Article 12(2) of the CRC, which assures to the child "the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the rules of national law." More narrowly even than this, the discussion below is centred around legal representation, and moreover in judgements at high court level, largely in civil rather than criminal cases, dealing with this issue.<sup>7</sup>

As a backdrop to the analysis, it must be noted that section 28(1)(h) of the South African Constitution did incorporate, to a degree, the principles contained in article 12(2), providing for the child's right to have a legal practitioner assigned to the child by the State, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. Three points are apposite here: first, the criterion for assessment

as to whether state-funded legal representation is a constitutional imperative mirrors the criterion applicable to state-funded legal representation in criminal cases (i.e. whether substantial injustice would otherwise result), thereby narrowing the scope of the right by comparison to the more expansive elaboration in Article 12(2), obviously (and consciously) due to the resource constraints South Africa faces as a developing country. Second, the constitutional right is awarded irrespective of whether the child is a party to the proceedings, or is otherwise directly involved – the constitutional provision clearly contemplates instances where children are “affected” by proceedings, which must include judicial proceedings where they are not directly before court. This accords well with the wording of Article 12(2).

Third, it is possibly noteworthy that this right was not a feature of the preceding interim constitution of 1994, nor is there any available evidence a lobby for its inclusion in the final Constitution of 1996. It seems, therefore, that the constitutional drafters included this right of their own accord, which might explain why its domestication in legislation and practice has been, as will be shown, rather uneven, halting, and practically, rather fraught with problems.

Previous accounts have documented the abortive attempt to legislate more substantive criteria for the appointment of legal representatives for children in welfare oriented children’s court inquiries, via amendments in 1996 to the Child Care Act 74 of 1983 providing expressly for this. These were followed by more elaborate regulations to this Act in 1998, fleshing out how decisions were to be made by commissioners of child welfare seized with decisions in the children’s court. However, due to ongoing disputes about who would pay the costs of this legal representation, given that the Department of Justice funds legal aid services, but the Child Care Act is legislation administered by the Department of Social Development, the applicable provisions were not brought into operation, and this situation prevails to date (see Kassan, 2006).<sup>8</sup>

The Divorce Act 70 of 1979 permits a divorce court (ordinarily a High Court) to appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation (Divorce Act, Act 70 of 1979, section 6(4)). This provision pre-dates the constitutional right contained in section 28(1)(h), and raises the immediate spectre of problems occurring where the parties (i.e. the divorcing parents) are unable to meet such costs, since it does not provide for state funded legal representation. Nor is there (yet) express inclusion of the “substantial injustice” test, as provided for in the constitutional provision. It has been pointed out that courts have seldom in past years used this power to appoint legal representatives for children affected by their parent’s divorce or matters incidental thereto, e.g. variation of custody or maintenance orders, and applications brought under the Hague Convention on the Civil Aspects of International Child Abduction (which came into effect in South Africa on 1 October 1997) (see Kassan, 2006; Kassan, 2003).

However, in the period under review, i.e. 2002-2006, the previous invisibility of children in civil proceedings – and especially divorce proceedings, and those brought under the Hague Convention - has, it is submitted, altered significantly. Whilst children’s right to representation or their participation in judicial proceedings was not completely ignored in reported case law in the previous five year review, only two cases which are directly in point can be recalled: *Fitschen v Fitschen* (1997 JOL 1612 (C)), a highly contested custody case involving teenage boys and a father’s objection to their mother’s new lesbian relationship, a case in which an application for independent legal representation for the children was refused (on the basis that no domestic legislation to give practical effect to section 28(1)(h) of the Constitution had been effected, and, according to the

judge, Article 12(2) of the CRC had not been incorporated in municipal law. The judge also justified his decision on the basis that, in view of the report of a psychologist and that of the Family Advocate provided to the court, in both of which reports the children's opinions on the appropriate allocation of custody were mentioned, substantial injustice would not result if the children's views were not heard) (see Kassan, 2003, pp.64-65). Further, as mentioned, in the case of *Christian Schools South Africa v Minister of Education* (2000 (10) BCLR 1051 (CC)) (see Sloth-Nielsen, 2004; Sloth-Nielsen, 2002 for further discussion) in which a statutory prohibition on the imposition of corporal punishment in schools was upheld by the Constitutional Court, Judge Sachs lamented (in an afterword) the fact that the Court had not had the benefit of hearing the views of the affected children (learners at private Christian schools) on the matter at hand.

But children's participation rights in Article 12(2) and section 28(1)(h) have entered the judicial sphere with a bang, as an overview of some key cases illustrates. The assignment of legal representation under section 28(1)(h) fell squarely to be decided in *Soller NO v G and Another* (2003 (5) SA 430 (WLD)). The case concerned an application by a 15 year old boy for variation of a custody order that had given custody to his mother, with the father being given rights of access only. The initial application was brought on behalf of the boy by an attorney who turned out to have been struck of the roll, and was therefore unsuitable to act as the boy's legal representative. The presiding judge determined that the matter required an assignment of an alternative legal representative under section 28(1)(h), concluding that such legal representative of the child did not fulfil the same role as the office of the Family Advocate. Further, any legal representative appointed to represent the child should be "an individual with knowledge of and experience of the law but also the ability to ascertain the views of a client, present them with logical eloquence and argue the standpoint of the client in the face of doubt or opposition from a opposing party of a court. In the view of the Court, section 28(1)(h) does not allow or the appointment of a social worker, or psychologist or counsellor. What is required is a lawyer who will use particular skills and expertise to represent the child. Neutrality is not the virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador. In short, a child in civil proceedings may, where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner" (at 437J – 438A). The judge continued to point out that the legal practitioner is not a mere mouthpiece of the child – in "the course of advocating the client's views, the legal representative should provide "adult insight into those wishes" and "apply legal knowledge and expertise to the child's perspective" (at 438E-F).

Again, in *Rosen v Havenga* ((2006) 4 All SA 199 (C)) (see Skelton, 2004) a High Court raised on own initiative the question as to whether a child whose parents were divorcing should not enjoy separate legal representation, and in this regard referred directly to the CRC and the provisions of Article 12, citing the obligation to give such views due weight in accordance with the age and maturity of the child. With no objection raised by the parties or the Family Advocate, a legal representative was appointed; and she, citing a direct and substantial interest in bringing an application for a restraining order against the defendant, successfully applied to be admitted as a party to the proceedings. This case therefore illustrates that more than hearing the child's voice, the child's interests became directly protected in the legal process.

*Reardon v Mauvis* (Case No 5493/02 Durban and Coast Local Division (unreported)) also a disputed custody case, highlighted some of the practical problems to which we have already alluded. Amidst allegations of emotional instability on the part of the defendant, and sexual abuse on the part of the plaintiff, and 22 days of expert medical and other witnesses without a conclusion to the plaintiffs argument in sight, the Judge raised the

issue as to whether the child (who herself displayed significant emotional instability) should not be accorded legal representation. This was agreed by all the parties, who accepted too, that the Legal Aid Board was the necessary functionary to ensure the provision of legal representation in terms of section 28(1)(h), but in addition that the complexity of the case required the appointment of counsel of seniority, with experience in matrimonial matters. But two further judgments ensued. The first was an objection to the advocates appointed by the Legal Aid Board on the basis that they lacked the skill and expertise necessary. An order directing the Legal Aid Board to appoint a skilled senior advocate was granted. But that ruling was set aside, as there was continuous disagreement between the parties about the adequacy, suitability and experience of the choice of counsel (Kassan, 2006, pp.17-20).

The case raises clear areas of concern: first, given the budgetary constraints under which the Legal Aid Board operates, advocates have to agree to represent children at (public sector) legal aid tariffs, which do not match the fees most counsel charge private clients. Second, if “second rate” (or more junior) legal representatives intervene on children’s behalf, does that not diminish significantly an unstated objective of Article 12, namely to provide equal access to justice for children? And third, what does it say about the child’s constitutional right to legal representation if (wealthy) parents who can afford top-notch senior counsel can insist on a “Rolls Royce” model for their child’s legal representative and, by so doing, frustrate the provision of legal services altogether? (emphasis inserted). At the time of writing, the appointment of lawyers to represent children who are the victims of disputed custody and access arrangements which their parents take to litigation remains unresolved, and seemingly, the issue gets dealt with on an ad hoc and uneven basis.

An interesting reference to Article 12 of CRC arose in *Ford v Ford* ((2004) 2 All SA 396 (W)), in the SCA, a matter concerning an appeal against a refusal of a High Court of first instance to grant permission for a custodian mother to relocate to the UK. The respondent had made an application at the hearing of the appeal to hear the views of the 10 year old child on the proposed relocation of the appellant mother, basing this on the fact that almost three years had elapsed since the launch of the original application, and that her views might assist the court of appeal. He based his application squarely on Article 12 of the CRC.

But the application was, correctly in our view, rejected. The Court (per Maya AJA) agreed that the court must take the child’s wishes into account where she is old enough to articulate her preferences, but also noted that there was evidence on record that the litigation was causing her stress, and that she was “not particularly comfortable” being continually interviewed by experts. Further, the Court asked how it (the court of appeal, by definition a court of record only) was supposed to ascertain the views of the child and to record their impressions, without an intermediary, such as a psychologist, have interviewed the child properly and presented the child’s views as part of expert evidence? Assuming a unanimous bench, were these views supposed to constitute evidence (having presumably not been lead by counsel or either party)? Would the parties then be allowed to lead rebuttal evidence? The questions raised by Maya AJA go to the method of hearing the child’s views rather than the substance of the principle, but nevertheless do indicate a judicial preference for indirect receipt of children’s views via experts.

Turning to child participation in legal proceedings outside of direct legal representation, mention must be made of another cardinal way in which children’s interests have been brought to the fore, namely through the appointment of curators ad litem. Two cases are provided to illustrate. In *Centre for Child Law and Another, Ellis, v Minister of Home*

Affairs and others (2005 (6) SA 50 (T)). Ellis was an advocate appointed by the Court to represent the unaccompanied migrant children detained in a repatriation centre upon whose behalf a public interest body, the Centre for Child Law, had launched an application for their separation from detained adults, and for the opening of welfare proceedings prior to their deportation. As earlier indicated, the evidence on record was that children who are deported back to their countries of origin are loaded into trucks and taken to the train station, from where they are transported to the border, loaded onto trucks again, and taken to the nearest police station in that country. No prior investigation into their home circumstances, the availability of care-givers, and so forth preceded this operation. The curator was able to investigate the children's situation, as well as report more generally on the ongoing admission of children to the repatriation centre (para. 23)<sup>9</sup> and tellingly, to apply for the appointment of legal representatives in terms of section 28(1)(h) to "present and argue the wishes and desires of the child".

Du Toit and Another v Minister of Welfare and Population Development (2003 (2) SA 198 (CC)) concerned a constitutional challenge to a provision of the Child Care Act 74 of 1983 prohibiting joint adoption by same sex couples. This couple had lived in partnership for more than a decade, and had adopted two children some years previously, but the law permitted only one parent to be awarded custody and guardianship in the adoption process, rather than both. Successful at High Court level, the order striking down the offending provision required Constitutional Court confirmation. More correctly, this meant "reading in" the words "or permanent same sex life partner" after the reference to adoption by a spouse. A curator ad litem had, in the Court a quo, filed a thorough report concerning the welfare of the couple's adoptive teenage children, and children – born and unborn (para. 3) - generally. The Court said "where there is a risk of injustice, a court is obliged to appoint a curator ad litem to represent the interests of the children", noting further that this obligation flows from section 28(1)(h). A more detailed examination as to whether a child's legal representative fulfils, or should equate to, a curator ad litem is beyond the scope of this paper, although a preliminary assessment would conclude that this is not so. A legal representative surely does not represent the views of "non-clients", such as children generally, nor is it clear that all of the foreign child clients in the Centre for Child law case would necessarily have given their representative the same brief. However, this is a matter for a later discussion.

Child participation as a general concept (rather than legal representation in judicial proceedings) arises additionally in the context of the notion of informed consent to medical treatment. A brief reference in this regard should be made to the case of *Christian Lawyers South Africa v Minister of Health* (2004 (10) BCLR 1086 (T)) which arose from a challenge to the constitutionality of the Choice on Termination of Pregnancy Act, Act No. 92 of 1996. The applicable legislation permits a termination to be performed on any woman; and this included any girl (of whatever age) without parental consent although a child aged under 18 years has to be advised to consult her parents, guardians, family members or friends; however, the termination cannot be denied because she chooses not to do so. In resisting a challenge to the constitutionality of this provision centred around compliance with the constitutional right of the child to parental or family care in section 28(1)(b), the defendants argued that the claim was excipiable and did not disclose a cause of action. This was upheld in the High Court, in a decision which turned on the legislative requirement of informed consent for any termination, indicating that the termination of pregnancy of minors was not left totally unregulated. While stressing that valid consent can only be given by someone with the intellectual and emotional capacity for the required knowledge and appreciation, which young children would not have, there was nevertheless no rigid age fixed by the Act for this to "kick in" (Kruger, 2005, pp.1 – 14). "The Act, it was held, served the best interests of the pregnant girl child because it is

flexible to recognise and accommodate the individual position of a girl child based on her intellectual, psychological and emotional make up and actual majority” (at 1105F). Although the case could equally be reflected under the section “best interests” below, it is, in our view, more usefully conceptualised as involving self-determination and participation rights, broadly seen, in view of the reliance on informed consent.

A final mention must be made of two specific aspects of the Children’s Act 38 of 2005 (not yet in operation). The first provision, situated in Chapter 2 (General Provisions), ensures that “every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration”. This provision, once in force, will give full domestic effect to Article 12 (1) of CRC. Further, section 14 of the Act, entitled “access to court”, grants every child the right to bring, and be assisted to bring, a matter to court, provided that matter falls within the jurisdiction of the Court.

Child litigation in own name is a novel phenomenon in South Africa, but one instance has been identified: in *Antonie v Governing Body, Settlers High School and Others* (2002 (4) SA 738 (CPD)), a Rastafarian learner herself (i.e. in own name) challenged a school governing body’s decision that found her guilty of serious misconduct and suspended her for 5 days for wearing a dreadlock hairstyle and covering her head with a cap. The school decided that she had violated the school’s code of conduct that had a rule about the appearance of learners. The Cape High Court set aside the decision of the school governing body on the basis that it should have given “adequate recognition” to the values and principles in the Constitution, including the learner’s need to have freedom of expression.

The Children’s Act paves the way for an expected expansion in children’s litigation in their own interests, and precisely how this is going to develop at the level of practice and procedure remains a matter for speculation. It can be concluded, though, that child participation via legal representation and other mechanisms has come to play a markedly increased role in the civil procedure of South African judicial practice since the last overview of the impact of the CRC in South African case law.

### **Best interests (Article 3 of the CRC)**

The best interest of the child principle, elevated to an international law standard by Article 3 of the CRC, and domesticated constitutionally in section 28(2) of South Africa’s Constitution, has featured prominently in jurisprudence in the years under review, and justice cannot be done to the extent of its reach in contemporary jurisprudence without an exhaustive review of case law, especially in the private law sphere. An obvious example is the Constitutional Court case of *Bannatyne v Bannatyne and Another* where the Court stated that the best interest of the child should override in the enforcement of a maintenance order even if it meant the application of contempt proceedings. The Court indicates that “it is universally recognised in the context of family law that the best interests of the child are of paramount importance” (para. 24E), and makes explicit reference to the CRC and the African Charter on the Rights and Welfare of the Child (Para 24E, under footnote 29). Writing for a unanimous court, Mokgoro J held that, in terms of s 28(2) of the Constitution “children have a right to proper parental care...While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the state to create the necessary environment for parents to do so” (para 24). Consequently, the courts were required to ensure that maintenance orders which were designed to “vindicate children’s rights” (para 31) were properly enforced. When an applicant in the

position of appellant was able to show that, despite her best efforts to secure relief through the provisions of the Maintenance Act, Act No. 99 of 1998, the respondent had failed to pay maintenance, the High Court, pursuant to its duty to promote the best interests of the child in terms of s 28(2), should ensure enforcement even if it meant the application of contempt proceedings.

The remainder of this section part of the paper focuses selectively on four themes where the best interests principle has played an especially significant or unique role in shaping legal developments.

The first concerns the area of relocation of custodian parents, and *Ford v Ford* (already referred to) is illustrative of this ((2004) 2 All SA 396 (W)); see, too, *Jackson v Jackson* 2002 (2) SA 303 (SCA), which is also quoted extensively in the *Ford* judgment). The SCA, in assessing a very legitimate application of a custodian mother to return to her county of origin after the breakdown of her marriage in South Africa, opined that the crucial criterion was in the fact the best interests of the child, which dictated the approach of the Court. Although recognising the indeterminacy and relativity of the best interest standard (para. 8) which will have differing impacts depending on the children and their respective families, in this case relocation was refused as not being in the child's best interests, due to the "thinning" (para. 19) of the relationship with the non-custodian parent that would necessarily occur. Calling the paramountcy of the best interests criterion in this context "the central and constant consideration", the Court recognised that from a constitutional perspective, it outweighed parent's right to pursue his or her life and career, involving the latter's constitutional rights to dignity, privacy and freedom of movement (para. 11).

The second, outside of private law altogether, relates to juvenile sentencing, an area of judicial activity also dealt with in the previous five year review (see Sloth-Nielsen, 2002 discussing *S v Kwalase* 2000 (2) SACR 35 (CPD)). Two SCA cases are particularly apposite, both involving murder committed by children who at the time of the commission of the offence were aged below 18 years.

In *Brandt v S* (2004 JOL 1322 (SCA)), the appellant was 17 year and 8 months old at the time of an especially gruesome killing of an elderly and defenceless woman. The appeal (on sentence) called into question the applicability of so-called minimum sentencing legislation introduced by parliament for certain specified serious offences in 1998. Due to activism by child rights NGO's at the time, Parliament was persuaded to exclude juvenile offenders aged under 16 from the ambit of this legislation altogether, and to provide that Courts could have to motivate why when using the minimum sentencing legislation for persons convicted for the specified serious offences dealt with there whilst aged 16 or 17 years old. *Brandt* turned in the interpretation of this strangely worded provision.

Judge Ponnan, noting that he was of the view that the applicable section actually gave the sentencing judge a full discretion to decide on the form and length of sentences, even in respect of those offences covered by the minimum sentencing laws (as premeditated murder was), said:

The Constitution, read with various international instruments that have a bearing on the subject of the rights of young people in conflict with the law, furnishes the backdrop to this approach. Section 28(2) of the Constitution provides: [A] child's best interests are of paramount importance in every matter concerning the child.' That statement of general principle is the clearest indication that child offenders are deserving of special attention. More so, it would seem, in the sphere of sentencing (para. 13).

Stating directly (para. 20) that the best interest of the child dictates that a sentencing officer must apply different rules when dealing with child offenders, he attributes this to the fact that international law (CRC and the non binding instruments such as the Beijing Rules are cited) has ushered in a “revolution” for the administration of child justice (para. 16).

Following on this was a sentencing decision of the same court a year later in *DPP v P* (2006 (1) SACR 243 (SCA)), the facts of which remain newsworthy even today. P, 12 years old at the time of the offence, recruited two adult men off the street to murder, in gruesome fashion, her grandmother, and then concealed her involvement in the crime for some months. When the accused men were convicted and sentenced for their role, they raised in mitigation her part in recruiting them. She was then arrested, stood trial and was convicted. The CRC is quoted at great length in the judgment of the SCA, to which the State appealed on the basis that the sentence imposed by the High Court (a suspended sentence, on onerous conditions) was shockingly light for so serious an offence. And not only are the provisions of Article 40 of the CRC reflected, but the Court is clear that the principle that detention should be a matter of last resort is linked to the best interest of the child, which is of paramount importance in every matter concerning such child. Reaffirming the *Brandt* position, therefore, it can be concluded that the best interest principle has become a fourth element of sentencing of juvenile offenders, in addition to the traditional triad (the gravity of the offence, the circumstances of the offender and the interests of society.) It must further be noted that although the Court did find the sentence inappropriately light, the version that replaced the original sentence was to all effects the same, and the Court did not impose direct imprisonment or any other form of deprivation of liberty.

A third area to be flagged where the best interests of the child have been adduced concerns inter-country adoption, and more particularly the case *De Gree v Webb* (2006 (6) SA 33 (WLD)). The applicants, parents of 6 children of their own, sought an *ex parte* order conferring guardianship of an abandoned South African infant upon them, with the intent of removing her to the USA, where formal adoption proceedings would allegedly be pursued. The High Court judge was “concerned about the unusual order being sought” (para. 6) as it was *prima facie* an adoption (and the jurisdiction regarding adoption order rests with the children’s court at district level, and not the High Court). The Court therefore requested the Centre for Child Law to provide an amicus brief concerning the correct legal position in South Africa regarding inter-country adoption, in the course of which the views of the national Department of Social Development also came to light. Both the CRC and the Hague Convention (to which South Africa is a State Party) are elaborated extensively in the amicus brief, which is in turn quoted in considerable detail in the judgment, both as regards the best interests principle, and as regards the provisions of Article 21 of the CRC which confirms the principle of subsidiarity in relation to intercountry adoption. The application was consequently dismissed, as it was not clear that proper verification of the applicants’ background information had been done, that adequate follow-up mechanisms could be effected, and that there was no suitable prospective South African family who could adopt the child.<sup>10</sup>

Fourth, *De Reuck v DPP, Witwatersrand Local Division* (2004 (1) SA 406 CC) saw the “best interests” principle deployed to a rather different end. The case arose out of a prosecution of a film producer for a contravention of a provision of the Films and Publications Act, Act No. 65 of 1996, as amended, relating to child pornography. At the trial he challenged the constitutional validity of certain provisions of the Act on which the charges were based. Because constitutional issues were at stake, the trial was adjourned to the High Court for a ruling, and upon that’s courts dismissal of the challenge, it was taken

on appeal to the Constitutional Court.

The rights at stake were the appellant's constitutional rights to freedom of expression and to privacy, rights which the Court found could be limited by a law of general application, provided the requirements of the limitations inquiry under section 36 of the Constitution were met.<sup>11</sup> Children's interests arise, first and foremost, in answering the question as to the purpose of the limitation: because child pornography is seen as an evil in all democratic societies and is universally condemned for good reason.

It strikes at the dignity of children, it is harmful to children who are used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct (para. 60).

Affirming that dignity is a founding value of our Constitution, and that special protection for children is guaranteed by section 28 of the Constitution (the child's rights clause), the Court held that children's dignity rights are of special importance. Referring expressly to the best interests of the child principle in section 28(2), the court also pointed out (as before) that section 28(2) rights can also be subject to limitations that are reasonable and justifiable. What stands out in this case, though, is the careful enumeration of the factors and interests underlying the application of the best interest standard insofar as it related to the protection of children via prohibiting child pornography.<sup>12</sup>

### **Conclusions**

The preceding analysis of children's rights in the South Africa courts appears to indicate that virtually none of the conclusions reached at the end of 2001 remain true. First, children's interests have featured prominently in litigation, with their views being taken into account, legal representation for them being raised by judges *mero motu*, curators appointed to oversee their interests in legal proceedings, and so forth. Children's rights have been employed both as a sword (Luckhoff case, for instance) and as a shield (for example, De Reuck).

Further, customary law has been shaken to the foundations in the Bhe case, which overruled the foundational system of male primogeniture in inheritance, which lies at the root of the communitarian transfer of property that characterises traditional African legal systems. And, although the expected promise of a first call for children in the delivery of socio-economic rights was dealt a blow in Grootboom, TAC and Khosa have restored some positive meaning to the provisions of section 28(1)(c), and the High Court decision in *Centre for Child Law v Minister of Education* is indeed far reaching, both insofar as the breaches of (inter alia, socio-economic) rights the court found, and in the nature of the remedy (a structural interdict) that the court imposed.

Adoption has continued to remain on the litigation agenda, as *De Gree v Webb*, involving inter-country adoption, illustrates. The fact that the case was subsequently taken on appeal to the Supreme Court of Appeal also confirms the vested interests that appear to characterise adults' claims to acquire children.

Indeed, contrary to what Rosa concludes in her 2005 article (Rosa, 2005, pp. 23-24),<sup>13</sup> we are of the view that Sections 233 of the Constitution (which provides that a court must prefer an interpretation of legislation that is consistent with international law), and 39 (which requires international law to be considered when interpreting the Bill of Rights), have taken firm root in children's rights jurisprudence.

It remains to endeavour to provide reasons for the apparent upsurge in children's rights jurisprudence in the five years under review. The first reason, in our view, relates simply to the maturing constitutional project overall, as South African lawyers and judges become more versed in, and familiar with, constitutional litigation. Second, there can be no gainsaying that (as was noted in 2002) individual judges concern for the interests of children has played a notable role in ensuring that they do not remain entirely hidden in litigation which affects them. Perhaps the most interesting case which illustrates this is one in which judgement is yet to be handed down by the Constitutional Court, and which will therefore have to form part of the next five year review. In an appeal to that Court regarding the imposition of a custodial sentence, the Court *mero motu* raised the issue of what would happen to the appellant's children were she to be incarcerated, as she was a single mother of three young children (*M v S*, case no CCT53/06, argument heard 22 February 2007). Both a curator for the specific children potentially affected, and an *amicus curiae* were appointed to argue the constitutional interests of children generally in the sentencing appeal. The question was not only what should happen to the children practically speaking, but legally, what proper consideration a sentencing officer should ordinarily give to the welfare of the children of a convicted person when considering the imposition of any particular form of sentence.

Third, anecdotal evidence (based on informal discussions with counsel who have appeared in some children's rights related cases, but cannot be regarded as "scientific" proof) suggests that many counsel, too, inject children's rights arguments wherever possible, and that not only the constitutional provision in section 28, but in addition, the CRC (and the African Charter on the Rights and Welfare of the Child) are used to provide additional ballast. This seems to be particularly applicable to "new generation" lawyers, i.e. those whose practices have blossomed in the constitutional era.

Then fourth, substantial credit must go to public interest litigators, such as the Womens' Legal Centre (who took the *Bhe* case to the Constitutional Court), and the Centre for Child Law, established during the period covered by this review, for bringing children's interests to the fore in judicial proceedings. There is no reason to believe that the impact of public interest litigation in this sphere is going to decline or dissipate, hence the further development of a coherent and rights-based child jurisprudence seems promising.

And fifth, as the Committee on the Rights of the Child, the treaty body responsible for monitoring the implementation of the Convention has frequently stated in response to country reports, training of all involved with children is part and parcel of State Parties efforts to implement to the fullest extent the Convention provisions (see Hodgkin and Newell, 2002, p.545). This is perhaps well illustrated in the area of the administration of the juvenile justice system.<sup>14</sup> South Africa has proceeded in measurable ways over the last few years to give effect to this obligation. It is not unwarranted to mention that various training initiatives may already be showing an impact in the jurisprudence emanating from the courts.

As the title of this paper suggests, the central conclusion that we draw is that, in assessing the impact of the CRC on South African jurisprudence, the total is more than the sum of its parts. For it is not only the individual victories in cases like *Khosa* and *TAC*, or the insertion of children's voices in *Soller* and *Reardon*, nor the elaboration of a new sentencing principle for convicted children alone which sufficiently explain CRC's influence. Rather, it has become an essential frame of reference in the South African legal system, a foundation underpinning the building of our human rights system.

## Notes

1. Section 28 provides that ‘(1) Every child has the right –
    - (a) to a name and a nationality from birth;
    - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
    - (c) to basic nutrition, shelter, basic health care services, and social services;
    - (d) to be protected from maltreatment, neglect, abuse, or degradation;
    - (e) to be protected from exploitative labor practices;
    - (f) not to be required or permitted to perform work or provide services that –
      - (i) are inappropriate for a person of that child’s age; or
      - (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral, or social development;
    - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
      - (i) kept separately from detained persons over the age of 18 years; and
      - (ii) treated in a manner, and kept in conditions, that take account of the child’s age;
    - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
      - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
  - (2) A child’s best interest is of paramount importance in every matter concerning the child.
  - (3) In this section “child” means a person under the age of 18 years.
- 2 Noting specifically the provisions of article 4 of CRC which state that “States Parties shall take all legal, administrative, and other measures for the implementation of the rights recognised in this Convention,” and Article 3(1) which requires that “in all relevant actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration” (emphasis inserted), indicating the relevance of the CRC in judicial practice. See, further, Committee on the Rights of the Child’s General Comment No 5 “General measures of implementation”.
- 3 Section 39(1)(b) provides that a court forum or tribunal ‘must’ consider international law when interpreting the chapter of the Constitution that forms the Bill of Rights. Further, section 233 instructs courts to afford a preference to an interpretation of statutory law that is “consistent with international law” whenever such an interpretation would be reasonable. Moreover, courts must, when interpreting the Bill of Rights, “promote the values that underlie an open and democratic society based on human dignity, equality and freedom” (section 39(1)(a)).
- 4 It is notable that with the exception of specific restrictions on their fundamental rights imposed by their youth (e.g. the right to vote is restricted to “every adult citizen”) every child enjoys the same protection in the Bill of Rights as his or her adult counterpart.
- 5 However, it is necessary to note a previous case, *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA) where the extra-marital daughter of a Black man who died intestate challenged the validity of the customary law rule of primogeniture in intestate succession inter alia on the basis that it discriminated unfairly against her on the basis of her sex and gender. The court rejected this argument on the basis

that the distinction that excluded her from inheritance was her extra-marital status rather than her sex or gender. Regrettably the court failed to establish whether the rule discriminated unfairly on the basis of extra-marital status.

- 6 The Centre for Child Law at the University of Pretoria is an advocacy and public interest body that works to promote the best interest of children in the South African Community.
- 7 The question of legal representation in criminal proceedings necessarily involves a very large number of magistrate's court cases, where the bulk of criminal matters involving child defendants are heard. Suffice it to say that children enjoy the same constitutional rights to legal representation as do adult defendants, namely the right to legal representation at state expense "where substantial injustice would otherwise result" (article 35 (3)(g)). Recognising that child defendants are more disadvantaged than adults defendants in the criminal justice system, the (statutory) Legal Aid Board has prioritised the allocation of defenders to child accused, within the constraints of its resources, and within the confines of a transforming model of the delivery of legal aid services (which has since 1996 moved steadily from an overwhelmingly *judicare* model towards a public defender model.) The Child Justice Bill 49/2002, which is still before the South African Parliament, comprehensively sets out the criterion for deciding when legal representation for children in conflict with the law would be constitutionally required, to wit where the child is aged below 14 years, where the child is deprived of his or her liberty pending trial, and where the child faces the possibility of a sentence involving deprivation of liberty if convicted.
- 8 The Children's Act 38 of 2005, not yet in operation, contains a far more limited, and constitutionally suspect, it is submitted, provision, despite elaborate and concrete proposals initially developed by the South African Law Reform Commission in its Report on the Review of the Child Care Act (2002).
- 9 This means that the interests of children not covered by the original application were brought to the attention of the court.
- 10 It is worth mentioning here that the case was later taken to the SCA on appeal (*De Gree v Webb* (2007) SCA 87). The SCA highlighted that the appellants' suitability as adoptive parents was not in dispute. It was apparent from the evidence that they were fit and proper persons to adopt and that they were possessed of sufficient means to adequately maintain and educate the child in the case and they were caring and decent persons who for purely altruistic purposes wished to adopt her. However, in a judgment handed down on 1 June 2007 by Theron AJA in which Snyders AJA concurred, (Ponnan JA, in a separate judgment, agreed with the conclusion of Theron AJA), the Court held that while it may indeed have been in the child's best interests to be adopted by the appellants, the process the appellants had chosen was fraught with difficulties. It was held that it is not in Ruth's best interests that she be removed from the country in terms of a custody and guardianship order, without the protection and safeguards of an adoption first effected in the children's court. It was stated that the courts should not sanction an adoption procedure which is in conflict with international treaties which South Africa has ratified and which are designed to safeguard the best interests of the child.

- 11 Section 36 (1) provides for limitations of rights “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including – the nature of the right; the importance of the purpose of the limitation the nature and extent of the limitation the relation between the limitation and its purpose; and less restrictive means to achieve the purpose”.
- 12 For this reason, we do not associate ourselves with the views of E Bonthuys “The best interests of Children in the South African Constitution” 2006 International Journal of Law, Policy and the Family 23 insofar as she argues that the best interests principle is not in practice treated as a constitutional right, and that the courts use it to avoid dealing with other constitutional rights of children and families., nor that “courts generally do not view children as the independent bearers of constitutional or common law rights”.
- 13 Where she states that “[I]t is submitted that in the use of the CRC to further the realisation of children's rights through the judicial system, much is left to be desired. As seen above from the analysis of the cases affecting children's rights in the Constitution and High Courts, while the courts do often refer to the treaties themselves, the jurisprudence that has developed around the treaties, in the form of general Comments, recommendations by the UN on South Africa's country report, expert legal opinion, etc has not yet received significant judicial attention, largely, it is submitted, due to lack of awareness.”
- 14 Not only has Justice College (the training institute of the Dept of Justice) developed a Child Law Manual for magistrates, there is also one for prosecutors, now being reviewed under the auspices of the National Prosecuting Authority, but in addition Justice College presents bi-annual specialized training on child law for members of the bench. Further to this, 2005 saw the presentation of provincial workshops on restorative justice, as an element of the emerging child justice and child protection system.

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