

## Chapter 47

# Children's Rights

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### 47.1 Introduction<sup>1</sup>

Three observations are worth making at the outset because they drive so much of the analysis that follows. First, the provisions of FC s 28 — the primary source of children's rights — are derived from a number of international instruments. The foundational text is the Convention on the Rights of the Child ('CRC'). The CRC was ratified by South Africa in June 1995. The African Charter on the Rights and Welfare of the Child ('ACRWC'), a regional instrument that was ratified by South Africa in January 2000, also informs the interpretation of FC s 28.<sup>2</sup>

Second, although it is the primary focus of this chapter, FC s 28 is not the only section that confers constitutional rights on children.<sup>3</sup> Several cases illustrate this

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1 For general discussions of FC s 28 or its predecessor, s 30 of the Constitution of the Republic of South Africa, Act 200 of 1993 ('Interim Constitution' or 'IC'), see A Cockrell 'The Law of Persons and the Bill of Rights' in *Bill of Rights Compendium* (Service Issue 13, October 2003) paras 3E9-12; J Sloth-Nielsen 'Children' in D Davis & H Cheadle (eds) *The South African Constitution: The Bill of Rights* (2nd Edition, 2006) 421; A Skelton & P Proudlock 'Interpretation, Objects, Application and Implementation of the Children's Act' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (OS, 2007) 1-8 — 1-10.

2 Although the ACRWC bears striking similarity to the CRC, it contains small but important differences. See, for example, *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC), 2007 (12) BCLR 1312 (CC) ('*S v M*') at para 31 (the Court identifies a specific provision relating to the importance of avoiding imprisonment of mothers, which appears in article 30(1) of the ACRWC, but does not have a counterpart in the CRC). See, further, B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-Sum Game?' (2008) *SAPR/PL* 1.

3 See B Bekink & D Brand 'Constitutional Protection of Children' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 177-181; J M Kruger 'The Protection of Children's Rights in the South African Constitution: Reflections on the First Decade' (2007) 70 *THRHR* 239, 241-245.

point.<sup>4</sup> In *Petersen v Maintenance Officer & Others*<sup>5</sup> the High Court considered the common-law rule that did not allow an extra-marital child to claim maintenance from the paternal grandparents (but did allow claims from the maternal grandparents) whilst children born within a marriage could claim from either set of grandparents. The court found discrimination on the ground of birth (in contravention of FC s 9(3)) a violation of the child's dignity (protected by FC s 10), as well as an infringement of the child's best interests in terms of FC s 28(2). The High

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Court accordingly developed the common law to allow the extra-marital child's claim against the paternal grandparents. Similarly, in *Christian Lawyers South Africa v Minister of Health & Others (Reproductive Health Alliance as Amicus Curiae)* the court was concerned with the constitutionality of a law that permitted girls below the age of 18 years to choose whether to terminate their pregnancies — provided that they possessed the intellectual and emotional capacity to grant informed consent.<sup>6</sup> The court rejected the challenge on the grounds that FC ss 12(2)(a) and (b),<sup>7</sup> 27(1)(a),<sup>8</sup> 10<sup>9</sup> and 14<sup>10</sup> apply to 'everyone', including girls under the age of 18 years, and that FC s 9(3) prohibits discrimination on the basis of age. Although this chapter focuses on the rights that are unique to children, it should always be kept in mind that children are protected by most of the rights in FC Chapter 2.

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4 See, for example, *Bhe & Others v Magistrate Khayelitsha & Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi & Sithole and Others*; *South African Human Rights Commission & Another v President of the Republic of South Africa & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*') at paras 95 and 53 (The Court found that the principle of male primogeniture discriminated unfairly against children on the grounds of sex and of birth by preventing them from inheriting the deceased estate of their father. The law also infringed the children's right to dignity. The case also demonstrates the importance of the international instruments: Langa DCJ remarked that the importance of not discriminating against children on the grounds of sex is acknowledged in the African Charter on the Rights and Welfare of the Child. Actually this recognition is included in the preambles of both the African Charter and the UN Convention; *Khosa v Minister of Social Development*; *Mahaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*') at para 78 (The applicants were permanent residents who sought grants provided for under the Social Assistance Act for their children who had been born in South Africa. The Court found the impugned provisions to be unconstitutional, as refusing the child support grant or care dependency grant would amount to discrimination against the children on the basis of their parents nationality.) For a detailed discussion, see L Janse van Rensburg 'The *Khosa* Case — Opening the Door for the Inclusion of all Children in the Child Support Grant?' (2005) 20 *SAPR/PL* 102.)

5 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C), [2004] All SA 117 (C) ('*Petersen*').

6 2005 (1) SA 509 (T), 2004 (10) BCLR 1086 (T) ('*Christian Lawyers (2004)*').

7 FC s 12(2)(a) and (b) read: 'Everybody has the right to bodily and psychological integrity, which includes the right — (a) to make decisions concerning reproduction; (b) to security in and control over their body.'

8 FC s 27(1)(a) reads: 'Everyone has the right to have access to — (a) health care services, including reproductive health care'.

9 FC s 10 reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

10 FC s 14 reads in relevant part: 'Everyone has the right to privacy'.

Third, children's rights can be broadly categorised as rights of protection and rights of autonomy. Childhood is a process of development. This gradual process of increasing capacity married to a balanced theory of children's rights should witness the courts' use of a combination of rights to protect their self-determination.<sup>11</sup> FC s 28(1) encompasses rights that are predominantly protective in nature,<sup>12</sup> whilst FC s 28(2) is flexible enough to include rights to autonomy. *MEC for Education, KwaZulu Natal v Pillay* indicates the willingness of courts to accept children's rights to autonomy, particularly for adolescent children.<sup>13</sup> The *Pillay* Court found that the wearing of a nose stud by a 16 year old girl, Sunali, was an expression of

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her Hindu culture and religion, that the girl sincerely identified with the practice and that the practice could be reasonably accommodated by the school granting an exemption to its code of conduct. The Constitutional Court further remarked that children of Sunali's age should increasingly be taking responsibility for their own actions and beliefs.<sup>14</sup> This conception of autonomy animated *Christian Lawyers (2004)*. In *Christian Lawyers (2004)* the High Court found that the Termination of Pregnancy Act,<sup>15</sup> which was based on capacity for informed consent rather than on a specific age, promoted the best interests of the child because it was flexible and was able to accommodate the individual position of a girl based on her intellectual, psychological and emotional maturity.<sup>16</sup>

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- 11 S Human 'The Theory of Children's Rights' in CJ Davel (ed) *Introduction to Child Law* (2000) 164. See further JM Kruger 'The Philosophical Underpinnings of Children's Rights Theory' (2006) 69 *THRHR* 436 (The author makes the point that childhood is a process of continuous change which takes place as the child matures. Ibid at 450-451. Children have rights that need to be protected long before they have the capacity to exercise their rights to autonomy. In the author's view a 'Gillick-competency test' — as devised in the English House of Lords case of *Gillick v West Norfolk & Wisbech Area Health Authority & the DHSS* [1985] 3 All ER 403 — is the most appropriate answer to what the acceptable limits of self-determination are.)
- 12 FC s 28(1)(h) provides a right for children to be legally represented in civil matters is something of an exception, because although it has been used by the courts as a protective measure in the appointment of curators *ad litem* (*Du Toit & Another v Minister of Welfare & Population Development & Others (Lesbian & Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); *S v M* (supra); *AD & Another v DW & Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC), 2008 (4) BCLR 359 (CC) ('*AD v DW*') it has also been interpreted as giving children rights to autonomy (*Soller NO v G & Another* 2003 (5) SA 430 (W) ('*Soller NO*'); *Ex Parte Van Niekerk & Another : In re Van Niekerk v Van Niekerk* (Unreported, Transvaal High Court Case Number 34054/03, 20880/02, 13 July 2004) ('*Ex Parte Van Niekerk*'). This issue will be discussed later in the chapter.
- 13 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC) ('*Pillay*'). See also *Antonie v Governing Body, Settlers High School & Others* 2002 (4) SA 738 (C) ('*Antonie*') (A Rastafarian 15 year old girl brought an application in her own name to challenge the school governing body's decision to find her guilty of serious misconduct for wearing her hair in dreadlocks which she covered with a cap. The Cape High Court set aside the decision of the school governing body, finding that it had not given adequate recognition to the principles of the Constitution, including the child's rights to freedom of expression.)
- 14 *Pillay* (supra) at para 56.
- 15 Act 92 of 1996.
- 16 *Christian Lawyers* (2004) (supra) at 528 H. See also H Kruger 'Traces of *Gillick* in South African Jurisprudence: Two Variations on a Theme' (2005) 46(1) *Codicillus* 1.

## 47.2 Name and nationality

### (a) The right to a name

The right to a name is primarily enforceable against the state. It imposes a duty on the state to recognise and to register the child's name at birth.<sup>17</sup> Theoretically, the right could be enforced against parents who either fail to name their children or to take the necessary steps to facilitate recognition and registration. In *Hadebe v Minister of Home Affairs*, the mother of a child applied to court for an order directing the respondent to amend the details of her child's birth certificate after repeated attempts over 18 months had failed to get the department's officials to make the amendment.<sup>18</sup> The High Court agreed:

[i]t is clear that if a child has, as is provided for in section 28 (1)(a) of the Constitution 'the right to a name from birth', the official of the state who is charged with doing those things that enable his or her name to be recorded must have a correlative duty to facilitate the registration of that name in the records of the state: certainly it is no part of the function of that official to place technical difficulties in the way of such registration.<sup>19</sup>

### (b) The right to a nationality

In order to understand the right of a child to a nationality, it is important to distinguish between nationality and citizenship. The concept of 'citizenship' concerns the rights and the obligations of citizens and the state. Its effect is internal.<sup>20</sup>

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'Nationality' concerns the connection between the state and the individual in the international arena.<sup>21</sup> The effect of such 'diplomatic protection' is external.<sup>22</sup>

There is no existing South African authority on the correct reading of FC s 28(1)(a). There are two possible interpretations of the section.

First, the concepts of 'nationality' and 'citizenship' could be indistinguishable. The provisions of the South African Citizenship Act 88 of 1995 would then help illuminate the meaning of this subsection. If nationality means citizenship, then the Citizenship Act would be one useful source for determining the scope of the right. This is so because the Final Constitution provides that an Act of Parliament must provide for

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17 See *Marckx v Belgium* 2 EHRR 330 (1980) (Sets out the position in the European Union.)

18 (Unreported Durban and Coast Local Division Case Number 15715/05, 14 December 2006).

19 Ibid.

20 See R Keightley 'The Child's Right to a Nationality and the Acquisition of Citizenship in South African Law' (1998) 14 *SAJHR* 411, 412-3; J Dugard *International Law: A South African Perspective* (2nd Edition, 2000) 209. See also *Kuanda v President of the RSA* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 240 (O'Reagan J, dissenting).

21 See Dugard (supra) at 208.

22 An injury to a national of a state is considered an indirect injury to the state itself, incurring state responsibility by the injuring state to the injured state. See Dugard (supra) at 298.

the acquisition, loss and restoration of citizenship.<sup>23</sup> The Final Constitution therefore anticipates that the details of the right to citizenship may be provided in legislation. If citizenship and nationality is the same thing, the details provided by the Citizenship Act would apply equally to the right to nationality.

This reading is strained at best. The distinction between nationality and citizenship is such an integral part of — and has such a clear meaning in — international law that South African jurisprudence would be ill-served if the two concepts were collapsed. Moreover, FC s 39(1)(b) enjoins the courts to consider international law when interpreting the Bill of Rights.

The better reading is one in which the concept of nationality is kept distinct from the concept of citizenship. On such a reading, FC s 28(1)(a) grants a right to nationality only. Because FC s 28 applies to all children inside South Africa, regardless of where they were born, the section simply guarantees that children resident in South Africa cannot be rendered stateless.<sup>24</sup>

One caveat is in order with regard to this preferred reading. A decision of a South African court on the question of foreign nationality is a legal fiction.<sup>25</sup> No foreign court is bound by the pronouncement of our courts on the question of the nationality of foreigners. Therefore, there seems little that the South African courts or the state could do to promote this right in respect of nationals of other countries. This problem is compounded by the fact that, for the purpose of diplomatic protection, nationality is an objective concept. Each state must determine which people are its nationals.<sup>26</sup> A national is considered an extension of the state itself. As such, a person is either objectively a national or not for the purpose of diplomatic protection.<sup>27</sup> So while any state can declare a person to be its national, such a declaration would have no practical effect if the person did not satisfy the objective test for nationality. The status of being a national in international law has no relevance other than in the context of diplomatic protection.

It would therefore not be entirely useless for the section to be interpreted in such a way as to compel the South African state to grant nationality to stateless

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children within its borders. However, such children should satisfy the international law standard to qualify as South African nationals.<sup>28</sup>

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23 FC s 3(3).

24 See Keightley (*supra*) at 424.

25 *Ibid* at 421.

26 Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930.

27 *Nottebohm (Liechtenstein v Guatemala) 2nd Phase* 22 ILR 349, 359 (1955) ('*Nottebohm*').

28 International law requires a 'real and effective link' between the national and the state invoking diplomatic protection. *Nottebohm* (*supra*) at 360.

## 47.3 Family care or parental care, or appropriate alternative care<sup>29</sup>

### (a) The meaning of 'family or parent'

Section 30(1)(b) of the Interim Constitution guaranteed the right of every child 'to parental care' simpliciter. FC s 28(1)(b) is expressly more extensive. Parental care has been interpreted in the case law to refer not only to natural parents, but also to adoptive parents, foster parents and step-parents.<sup>30</sup>

The court in *SW v F* held that the right to parental care was not a bar to adoption 'where the care of the natural parents was lacking or inadequate'.<sup>31</sup> In *Heystek v Heystek* the court ordered a husband to pay maintenance *pendente lite* to his wife that would include the maintenance of her children — his stepchildren — even though he did not have a duty under the common law or statute to support the children.<sup>32</sup> The court did not need to rely on the Final Constitution as it did to reach its decision. The parties were married in community of property and so the wife's debts were also the husband's debts. The court's second, constitutional, basis for its decision was that the constitutionalisation of the best interests of the child standard in FC s 28(2) required a broad reading of parental care. The exact rationale for this conclusion is unclear. The court does not say whether the section imposes a direct duty on step-parents to support stepchildren because they are parents of a particular 'Kind' or because this 'legal' relationship would be in children's best interests.

Though such a gloss on the court's holding may be a matter for debate, we should be inclined to interpret parental and family care in the light of the functions that parents and family perform and to recognise the many types of family that actually exist in South Africa. The courts have generally followed this line of argument. In *Jooste v Botha*, 'family' in FC s 28(1)(b) was said to include the extended family.<sup>33</sup> In *J & Another v Director General, Department of Home Affairs, & Others*,<sup>34</sup> the court a quo interpreted the children's right to family and parental care (jointly) as demanding that the first applicant, as their genetic mother, be recognised by the law as their parent where the children had been born to her lesbian partner,

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29 The most useful foreign jurisprudence here is the interpretation of art 8 of the European Convention on Human Rights (1950). Article 8 protects the right of everyone to respect for their family life.

30 See *SW v F* 1997 (1) SA 796 (O), 802F-H; *Heystek v Heystek* 2002 (2) SA 754 (T), 757C-D, [2002] 2 All SA 401 (T) ('*Heystek*'); *Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) at para 18.

31 *SW v F* (supra) at 799B-C.

32 *Heystek* (supra) at 757C-D.

33 2000 (2) SA 199 (T), 208D-E, 2000 (2) BCLR 187 (T) ('*Jooste*').

34 2003 (5) SA 605 (D) at para 22 ('*J & Another*').

the second applicant, as result of artificial insemination, using the oocytes of the first applicant and the sperm of an anonymous male donor. In terms of s 5 of the Children's Status Act,<sup>35</sup> the second applicant alone was the legal parent. The court proceeded to read in to s 5 those terms that would afford the first applicant appropriate recognition and relied on various grounds of discrimination in terms of the equality provision in granting this relief.<sup>36</sup> In *V v V*, the court rejected an argument that a mother's lesbianism should exclude her from securing the custody of her children by, in part, relying on FC s 28(1)(b).<sup>37</sup> The court refused to see her sexual orientation as something that would interfere with her status as parent or a part of a family.

In *Jooste v Botha*, the three kinds of care in FC s 28(1)(b) were defined rigidly: (a) family care is where the child is part of a family, whether nuclear or extended; (b) parental care is where there is no family and only a single parent; (c) alternative care is where the child is removed from the family environment.<sup>38</sup> The court must be incorrect in claiming that a single-parent household is not a family or that two parents provide family care and not parental care. Of greater moment is that the *Jooste* court found the common denominator for the three types of care to be the child's right to be in the care of a custodian. This interpretation construes FC s 28(1)(b) far too narrowly. A grandparent is a member of the extended family who may not have custody and yet still have the duty to support the child.<sup>39</sup> A non-custodial parent, such as a parent who loses custody upon divorce, remains a parent with parental duties. The *Allsop v McCann* court extended the definition of parental and family care a step further when it found that the constitutional duty of a non-custodial parent to provide parental care to his legitimate child under FC s 28(1)(b) was said to include the provision of religious instruction.<sup>40</sup>

The facts of *Jooste* make the flaws in the definitions it proffers that much more obvious. In *Jooste*, an 11-year-old boy born out of wedlock sued his father for delictual damages for *injuria* and emotional distress based on his father's failure to acknowledge him and to love him. (No claim for maintenance or support was made in the instant case.) One of the legal foundations for the claim was the right to parental care in the Final Constitution. The court held that since a parent must be a custodian, the child's non-custodian parent fell outside the ambit of the

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35 Act 82 of 1987.

36 The Constitutional Court also amended s 5 to make it constitutionally compliant, but did not rely on s 28(1)(b) of the Constitution to reach its conclusion. See *J & Another v Director General, Department of Home Affairs, & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC).

37 1998 (4) SA 169 (C), 190B-C.

38 *Jooste* (supra) at 208D-G.

39 But note that in *Petersen* the court did not use the right to family care to found a duty on paternal grandparents to support their extra-marital grandchild (the court did not consider the applicability of this right). The High Court relied on the rights to equality, dignity and consideration of the child's best interests.

40 2001 (2) SA 706, 713F-H (C).

provision.<sup>41</sup> But surely the child's right to maintenance by his father is a right to parental care? The object lesson of *Jooste* is that the best way to define family or parental care is not in terms of a narrow set of criteria, but in terms of generous and flexible standards. Different parents or family members may owe different degrees of care to a child. The child has the right to the care of, and to contact with, *both* parents. This general norm can create serious difficulties where the parents do not live together, particularly where they have re-married and new families have been formed. Such difficulties are on display in *B v M*.<sup>42</sup> The appellant, the custodian mother of two children from her first marriage, had been prevented by the High Court from relocating from Johannesburg to Cape Town with her second husband because the court had found that it would not be in the interests of the children to be separated from their father: the respondent. The appellant was therefore required to live apart from her new husband, and their baby was consequently separated from his own father. The court found that it was not in the interests of any of the children to be forced into this kind of separation, ordered that the 'nuclear family' be permitted to relocate as a unit, and granted ancillary orders to ensure ongoing contact between the respondent and his children. Satchwell J expressly mentioned that the Final Constitution recognises a right to family or to parental care, and that our courts should be alert to preserve and to protect family units and not to initiate or allow actions or policies which could cause permanent dislocation.<sup>43</sup>

With regard to children and the extended family, the High Court held in *Kleingeld v Heunis & Another*<sup>44</sup> that a grandparent has locus standi to apply for contact with grandchildren, but has no inherent right to contact. A court may grant such contact where there are grounds indicating that it is in the best interests of the child. The court, citing *B v S*,<sup>45</sup> reiterated that it is the child who has an inherent right to contact with family members. As there was no evidence to show that such contact

41 *Jooste* is authority for the proposition that the extra-marital child does not have a constitutional right to parental care by its father. The leading constitutional case on the issue of the relationship between the extra-marital child and its father is *Fraser v Children's Court, Pretoria North, & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC). The Court found that s 18(4)(d) of the Child Care Act 74 of 1983 to be unconstitutional because it required the mother's consent alone, and not the father's, to the adoption of the extra-marital child. The basis for this finding was the equality provision. The Court did not directly consider the children's rights section: but the best interests of the child clearly informed its thinking. In *Jooste*, the second reason that the Court held that the Final Constitution did not create the obligation claimed against the father was that the law will not attempt to enforce the impossible — love. *Jooste* (supra) at 209G-H.

42 [2006] 3 All SA 172 (T); 2006 (9) BCLR 1034 (W).

43 *Ibid* at para 170. See also *F v F* 2006 (3) SA 42 (SCA) [2006] 1 All SA 571 (SCA) ('*F v F*'). (The SCA dismissed an appeal by a custodian mother against a refusal of permission to relocate to England with her daughter. The Court stated that caution must be exercised that custodian parents should not be prevented from pursuing their lives and careers, especially as differential treatment between custodial and non-custodial parents may often result in gender discrimination. Nevertheless, on the facts of the case the court found that the relocation was not in the best interests of the child as it would separate her from her non-custodian father with whom she had a close relationship.)

44 2007 (5) SA 559 (T).

45 1995 (3) SSA 571 (A). See also *Townsend-Turner & Another v Morrow* 2004 (2) SA 32 (C), [2004] 1 All SA 235.

(which was objected to by the child's parents) would be in the best interests of the children, the court dismissed the application.

The Children's Act has codified the common law regarding parental authority. It has reconceptualised them as 'parental responsibilities and rights': (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child.<sup>46</sup> These responsibilities and rights are acquired automatically and are shared by biological mothers and married fathers, whilst unmarried fathers only acquire such responsibilities automatically in certain specified circumstances.<sup>47</sup> Once such responsibilities and rights are acquired, they must be exercised in accordance with the best interests of the child.

### **(b) The purposes of FC s 28(1)(b)**

FC 28(1)(b) has three purposes.

FC s 28(1)(b) is aimed at the preservation of a healthy parent-child relationship, and guards against intrusions of the family environment by unwarranted executive, administrative and legislative acts. To some extent it fulfils the purpose of a 'right to family life' which was excluded from the Final Constitution.<sup>48</sup> But it does so from a child-centred rather than a parent-centred perspective.<sup>49</sup> For example, the provision operated to protect the family from the state in *Patel & Another v Minister of Home Affairs & Another*.<sup>50</sup> The *Patel* court held that in deciding whether to deport the second applicant from South Africa in terms of the Aliens Control Act,<sup>51</sup> the right of his children to family or parental care had to be taken into account.

46 Act 38 of 2005 s 18(2). This section came into operation on 1 July 2007.

47 Children's Act s 21. The section came into operation on 1 July 2007. The Children's Act also allows for parental responsibilities and rights to be shared with other persons by way of an agreement in terms of s 22.

48 J Sloth-Nielsen asserts that the SA Constitution deliberately did not embrace a 'right to family life'. 'Children' in D Davis & H Cheadle (eds) *The South African Constitution: The Bill of Rights* (2nd Edition, 2006) 511. This failure was raised in *Ex Parte Chairperson of the Constitutional Assembly In Re Certification of the Constitution of the Republic of South Africa Act, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC). The Court found that the absence of this right did not preclude certification because it allowed for flexibility in the recognition of different family forms in a diverse society. Despite the non-inclusion of the right to family life, such a right has been recognised in *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC); *Booyesen & Others v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC).

49 The courts have had a tendency to interpret the child's right to family or parental care in a parent-centred manner. See M Pieterse 'Reconstructing the Private/Public Dichotomy? The Enforcement of Children's Constitutional Social Rights and Care Entitlements' (2003) *TSAR* 1, 14-16; E Bonthuys & T Mosikatsana 'Law of Persons and Family Law' (2000) *Annual Survey of SA Law* 128, 152-153. See also *B v S* 1995 (3) SA 571 (A); *T v M* 1997 (1) SA 54 (A) and *Jooste*. However, a child-centred jurisprudence is evident in a number of cases. See *Heystek v Heystek* (supra); *F v F* (supra); and *S v M* (supra).

50 2000 (2) SA 343, 350E-F (D).

51 Act 96 of 1991.

In *S v M*, the Constitutional Court found that FC s 28(1)(b) read with FC s 28(2) requires the law to make the best possible efforts to avoid, where possible, any breakdown of family life or parental care that may put children at risk.<sup>52</sup> The Court

concluded that, when sentencing a primary-care giver, a sentencing court has a responsibility to consider the effect that imprisonment will have on the children's right to family and parental care. Justice Sachs wrote that the impact imprisonment would have on any dependent children's right to care required a sentencing court to give specific and well-informed attention to ensuring that, given the legitimate range of choices in the circumstances, it imposed the punishment least damaging to the interests of the children.<sup>53</sup>

Second, it requires that care of a certain quality be given to all children.

Third, it identifies the parties who must furnish such care. In the first place, the duty falls on parents and other family members. The state's responsibility in this regard is to ensure that there are legal obligations to compel parents (and family) to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children.<sup>54</sup>

In the absence of such care, such as where the child has been removed from the family, the state has a duty to provide appropriate care. What is the position where the child lives with its parents or family but they are too poor to provide the child with adequate care? A literal reading of FC s 28(1)(b) indicates that the child would not be entitled to state support in terms of its provisions. The Constitutional Court gave the section such an impoverished reading in *Government of the Republic of South Africa v Grootboom*.<sup>55</sup> The Final Constitution cannot possibly contemplate that a child is entitled to adequate care when its family can provide it or when it is in the state's care, but not when the child is still with its family and the family is unable to provide proper care.<sup>56</sup>

## 47.4 Basic nutrition, shelter, basic health care and social services

### (a) Shelter defined

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52 *S v M* (supra) at para 20.

53 Ibid at para 33. See also *S v Kika* 1998 (2) SACR 428 (W); *Howells v S* [1999] 2 All SA 233 (C).

54 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 75 ('*Grootboom II*'). See also *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 11 (CC) at para 24.

55 *Grootboom II* (supra) at paras 76-7. See § 47.4 infra.

56 For a similar criticism of *Grootboom II*, see M Pieterse 'Reconstructing the Private/Public Dichotomy? The Enforcement of Children's Constitutional Social Rights and Care Entitlements' (2003) *TSAR* 1. In any case, the state is committed to providing all needy children with child care grants.

The Constitutional Court has been criticised for its failure to define the minimum core content of those socio-economic rights that have seized the court.<sup>57</sup> Instead of assessing the content of the right in question, the Court has simply asked whether the state had penned a 'reasonable' plan to realise a particular right.<sup>58</sup> A partial exception appears in that part of *Government of the Republic of South Africa v Grootboom* that deals with children's rights. This aspect of the judgment turns on

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the definition of shelter in s 28(1)(c). As a result, the Court could not avoid an analysis of the content of that part of the right.

The structure of FC s 28(1)(c) makes the act of defining 'shelter' less than straightforward. In terms of FC s 28(1)(c), every child has a right 'to basic nutrition, shelter, basic health care services and social services'. The insertion of the word 'basic' before 'nutrition' and 'health care', but not before 'shelter', led to a significant difference of opinion between the court a quo<sup>59</sup> and the Constitutional Court on the meaning of the section.

Unlike FC s 26, which entrenches the right to housing, and FC s 27, which entrenches the rights to health care, food, water and social security, FC s 28(1)(c) does not give any indication in its text that the rights are limited by the resources available to the state. As a result, the prevailing view prior to *Grootboom* was that FC s 28(1)(c) could be used to raise the standard of living in many communities with greater alacrity than FC s 26 or s 27.<sup>60</sup> Indeed, the applicants in *Grootboom* made this very argument. In the Cape High Court, the applicants argued that the children in their community were entitled to basic shelter — something, concrete, even if less substantial than the right to housing in FC s 26. Moreover, since it was not in their interests to be separated from their parents, their parents should be accommodated as well.

The state argued that the ordinary definition of the word 'shelter' means a 'place of temporary lodging for the homeless poor'.<sup>61</sup> The 1996 amendment to the Child Care Act defines shelter as 'any building or premises maintained to used for the reception, protection and temporary care of more than six children in especially difficult circumstances'.<sup>62</sup> According to the state, FCs 28(1)(c) refers only to a 'place

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57 See D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence' (2003) 19 *SAJHR* 1.

58 Ibid at 9-10.

59 *Grootboom v Oostenburg Municipality* 2000 (3) BCLR 277 (C) ('*Grootboom I*').

60 P de Vos 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 12 *SAJHR* 67, 87-8, 93; De Waal et al (supra) at 412; Cockrell (supra) at para 3E-13; E de Wet *Constitutional Enforceability of Socio-Economic Rights* (1996) 105-6.

61 *Grootboom I* (supra) at 287E.

62 Act 74 of 1983 (amended by Act 96 of 1996).

of safety' used to house children without parents or removed from their parents. It follows that no child has a right to be housed with her parents.<sup>63</sup>

Davis J, however, considered the reasoning of the state to apply more appropriately to FC s 28(1)(b). FC s 28(1)(b) contains the right to family care 'or to appropriate alternative care when removed from the family environment'. The definition of 'shelter' in the Child Care Act would seem therefore to apply to what is envisaged in FC s 28(1)(b). Concerning the ambit of FC s 28(1)(c), Davis J wrote:

If a child's right to shelter in terms of s 28(1)(c) implies that the right exists only in terms of being housed in a state institution, then it would not necessarily offer a significantly different right to that provided for in terms of s 28(1)(b). Accordingly s 28(1)(c) appears to provide for a right to be protected from the elements in circumstances where there is no need to remove such children from their parents.<sup>64</sup>

The court reasoned that, notwithstanding the omission of the word 'basic' before 'shelter', the ordinary meaning of the word suggests that it offers something short

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of the adequate housing contemplated in FC s 26. In the event that parents are unable to provide 'shelter' for their children, FC s 28(1)(c) imposes an obligation on the state to do so.<sup>65</sup>

Without this understanding of the meaning of shelter, the court a quo could not have found as it did. If the omission of the word 'basic' implied that the child's right to shelter meant a right to adequate housing, then the state would be subject to immense budgetary pressure. No court could impose an unqualified obligation on the state to provide housing to children on demand. As a result, Davis J adopted the view that the 'shelter' contemplated by FC s 28(1)(c) must be rudimentary. In this respect, the reasoning of the court a quo in relation to shelter is consistent with the view that FC s 28(1)(c) is not subject to progressive realisation.

Yacoob J, writing for the Constitutional Court, adopted the opposite view on the meaning of shelter:

I cannot accept that the Constitution draws any real distinction between housing on the one hand and shelter on the other, and that shelter is a rudimentary form of housing. Housing and shelter are related concepts and one of the aims of housing is to provide physical shelter. But shelter is not a commodity separate from housing. There is no doubt that all shelter represents protection from the elements and possibly even from danger. There are a range of ways in which shelter may be constituted: shelter may be ineffective or rudimentary at the one extreme and very effective and even ideal at the other. The concept of shelter in section 28(1)(c) is not qualified by any requirement that it should be 'basic' shelter. It follows that the Constitution does not limit the concept of shelter to basic shelter alone. The concept of shelter in section 28 (1)(c) embraces shelter in all its manifestations. However, it does not follow that the Constitution obliges the state to provide shelter at the most effective or the most rudimentary level to children in the company of their parents.<sup>66</sup>

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63 *Grootboom I* (supra) at 287F.

64 *Ibid* at 287H-288A.

65 *Grootboom I* (supra) at 288B.

This conclusion is subject to two criticisms. First, it ignores the use of the term 'adequate housing' in FC s 26 and 'shelter' in FC s 28(1)(c). The drafters' choice of varying terminology suggests that the two concepts have different extensions. Second, it ignores the ordinary understanding of the word 'shelter' as reflected in most dictionaries.<sup>67</sup> Of course, a court is not bound by dictionary definitions. However, in this case they provide compelling evidence of the common understanding of the difference between the two terms.

Prior to *Grootboom*, there were essentially three viable interpretations of the section: (1) the section provides children with a directly enforceable claim to shelter, which is the same as housing, with or without their parents; (2) the section provides children with a directly enforceable claim to shelter, something less than housing, with or without their parents; (3) The section provides children with a

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claim to shelter, which is the same as housing, to be supplied progressively by the state.<sup>68</sup>

Some academics had hoped for the adoption of the first definition.<sup>69</sup> The third definition was, perhaps, the least expected, but the one ultimately chosen by the Constitutional Court.

### **(b) Progressive realisation**

It is obvious from the three options delineated above that while (1) would impose less of a burden on the state than (2), there would be a burden nevertheless. Indeed, the order of Davis J in the court a quo required that the children of the applicants be provided with shelter, along with their parents, until such time as the parents could provide shelter themselves.<sup>70</sup> The basis for this order was the court's view that:

[t]he wording of section 28 differs from that of section 26 in that there is no similar qualification [that the right is subject to the resources of the state] as appears, for example, in section 26(2). Section 28(1)(c) is drafted as an unqualified constitutional right. Accordingly the question of budgetary limitations is not applicable to the determination of rights in section 28(1)(c).<sup>71</sup>

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66 *Grootboom II* (supra) at para 73.

67 In the court a quo, the respondent pointed to the *Shorter Oxford Dictionary*: shelter is defined as a 'structure affording protection from rain, wind or sun; any screen or place of refuge from the weather. A place of temporary lodging for the homeless poor.' *Grootboom I* (supra) at 287E. *Chambers Twentieth Century Dictionary* defines shelter as: a 'shielding or screening structure, esp against weather: a place of refuge, retreat or temporary lodging in distress.'

68 There is, of course, a fourth possibility: that the right is to something less than housing and that right would then be subject to progressive realisation. Since the Constitutional Court found that the right of children is to adequate housing, this interpretation adds nothing. *Grootboom II* (supra) at para 73.

69 See for example De Vos (supra) at 87-8, De Waal et al (supra) at 412, Cockrell (supra) at para 3E-13, de Wet (supra) at 105-6.

70 *Grootboom I* (supra) at 293I-J.

71 *Ibid* at 290G-291B.

By contrast, the Constitutional Court held:

The obligation created by section 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by sections 25(5), 26 and 27 of the Constitution. Each of these sections expressly obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the rights with which they are concerned. Section 28(1)(c) creates the right of children to basic nutrition, shelter, basic health care services and social services. There is an evident overlap between the rights created by sections 26 and 27 and those conferred on children by section 28. Apart from this overlap, the section 26 and 27 rights are conferred on everyone including children while section 28, on its face, accords rights to children alone. This overlap is not consistent with the notion that section 28(1)(c) creates separate and independent rights for children *and their parents* (emphasis added).<sup>72</sup>

It is clear that the Constitutional Court, rightly or wrongly, was determined to avoid the political implications, the attendant cost and future interpretive difficulties of Davis J's order.<sup>73</sup> However, if the sections are read literally, the grounds for rejecting the lower court's order are shaky at best.

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If the rights entrenched in FC ss 26 and 28(1)(c) are the same why repeat them? It might be argued that this was done merely to reinforce these rights explicitly for children. This does not explain, however, the plain textual difference between the two sections. Section 26 makes the right to housing subject to available resources. FC s 28(1)(c) does not.

The emphasised part of the last quote lays bare the motive of the Constitutional Court. In the court a quo, Davis J was at pains to point out that the child is the bearer of the rights in FC s 28, and that FC s 28 must be read as a whole: most importantly its provision related to the best interests of the child in FC s 28(2). It would be contrary to the interests of children for them to be removed from their parents and, therefore, their parents must accompany them.<sup>74</sup> The Constitutional Court, however, was not prepared to accept the real implication of the judgment of the court a quo: that FC s 28(1)(c) creates a right for parents. The court makes clear its resistance to this notion in the following passage:

This reasoning [of the court a quo] produces an anomalous result. People who have children have a direct and enforceable right to housing under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand. Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are.<sup>75</sup>

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72 Ibid.

73 This conclusion was reached on the basis that although the parents are not bearers of these rights, it would not be in the best interests of the children to be removed from their parents. *Grootboom I* (supra) at 289C-D.

74 *Grootboom I* (supra) at 288G-H and 289C-G.

75 *Grootboom II* (supra) at para 71.

The court's reasoning is hard to gainsay. The 'carefully constructed scheme for progressive realisation would make little sense if it could be trumped' in the way described. What then to make of the literal interpretation of the two sections, an interpretation that undermines the scheme for progressive realisation? Rather than claiming that the overlap of the rights is inconsistent with the notion that separate rights are created,<sup>76</sup> the court should have made it clear that a purposive, rather than a literal, interpretation of the section made it compatible with a scheme for progressive realisation of housing.

An interesting question is whether all the rights in s 28(1)(c) are subject to progressive realisation. *Minister of Health v Treatment Action Campaign* did not deal directly with that question.<sup>77</sup> However, the judgment clearly assumes that the right to basic health care in FC s 28(1)(c) is subject to progressive realisation. The Constitutional Court writes:

The provision of a single dose of nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their 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. Their rights are most in peril

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as a result of the policy that has been adopted and are most affected by a *rigid* and *inflexible* policy that excludes them from having access to nevirapine. (Emphasis added).<sup>78</sup>

The emphasised words are consistent with the approach of the court to other questions of progressive realisation. The court consider whole classes of applicants and holds that a reasonable plan to realise progressively the rights in question must accommodate the most needy applicants.<sup>79</sup> Furthermore, the plan must be balanced, flexible and targeted.<sup>80</sup> The wording of this part of *TAC* suggests that the Court considered the right to be subject to progressive realisation and that the plan to realise the right was not reasonable.

*Khosa* too failed to provide any guidance as to the progressive realisation of s 28(1)(c). The case concerned the constitutional invalidity of provisions of the Social Assistance Act<sup>81</sup> that reserved pensions, child support grants and care dependency grants for South African citizens — excluding permanent residents. The impugned sections<sup>82</sup> of the Act were said to be unfairly discriminatory, to breach FC s 27(1)(c)<sup>83</sup> and, in respect of the child-related grants, FC s 28.<sup>84</sup> The Court clearly stated that the denial of support for children in need 'trenches upon their rights under s 28(1)

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76 For an analysis of this aspect of the judgment, see Pieterse (*supra*) at 10-11.

77 *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('TAC').

78 *TAC* (*supra*) at para 77.

79 See *Grootboom II* (*supra*) at para 44.

80 See *Grootboom II* (*supra*) at para 43; *TAC* (*supra*) at para 68.

81 Act 59 of 1992.

(c)<sup>85</sup> Mokgoro J noted that FC ss 26 and 27 contain an internal limitation, and that state action must pass internal limitations requirement of reasonableness. The test of 'reasonableness' in regard to FC ss 26 and 27 is, however, different from the reasonableness requirement in the FC s 36 limitations test. The Court made no mention of the fact that FC s 28(1)(c) does not contain any internal limitation. It chose not to make any findings on the relationship between the two tests as there was no argument before the Court on it, and it was not necessary to decide the case. It appears that whilst FC s 28(1)(c) was thrown into the mix, the Court based its decision on its preferred reading of FC s 27.

### **(c) The interaction between FC s 28(1)(b) and FC s 28(1)(c)**

The interpretation of the interaction between FC s 28(1)(b) and FC s 28(1)(c) was critical to the outcomes in *Grootboom* and *TAC*. The United Nation's Committee on the Rights of the Child ('UNCRC') has interpreted the Convention on the Rights of the Child as placing the state under an obligation to provide for children whose parents are unable to do so. The Constitutional Court in *Grootboom* had a different view:

The extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa. The United Nations Convention on the Rights of

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the Child, ratified by South Africa in 1995, seeks to impose obligations upon state parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms designed to meet these obligations. It requires the state to take steps to ensure that children's rights are observed. In the first instance, the state does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The state reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programmes.<sup>86</sup>

FC section 28(1) must be read in this context. The sections encapsulate the conception of the scope of care that children should receive in our society. Subsections (b) and (c) must be read together. Subsection (b) ensures that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. Subsection (1)(b), therefore, defines those responsible for giving care. Subsection (1)(c) lists various aspects of the care entitlement.

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82 Technically, the sections had not yet come into operation, but for the sake of convenience the Court refers to them as 'impugned sections'.

83 FC s 27(1)(c) reads, in relevant part: 'Everyone has the right to have access to — social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'

84 *Khosa* (supra) at para 39.

85 *Ibid* at para 78.

86 *Grootboom II* (supra) at paras 75-6.

Despite the reference to social-welfare programmes, the *Grootboom* Court appears to conclude that parents must provide for their children and that the state's job is to make sure that they do so. So long as children are cared for by their parents, the state, according to the Constitutional Court, is not obliged to provide for them. This palpable difference between the Court's and the CRC's conception of the obligations of the state is made clear from the following extract from *Grootboom*:

It follows from ss 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in ss (1)(c) is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families. (Emphasis added).<sup>87</sup>

It could be that the highlighted words show that the Court was merely giving an example of when the state's responsibility would arise. The Court might not have ruled out an obligation on the state where a child is still in the care of her parents but cannot provide for her. However the tone of the judgment and the fact that the applicants' claim based on FC s 28 failed suggest that a child will never have a right enforceable against the state while she is in the care of her parents.<sup>88</sup> The position post-*Grootboom* but before *TAC* was as follows: If a child is with her parents, then the parent is responsible for providing all those rights contained in ss (c). The role of the state, in such cases, is to provide the legislative framework for children to enforce their rights against their parents when necessary and to realise progressively the socio-economic rights to which everyone is entitled.<sup>89</sup> If a

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child is without her parents, then ss (b) provides that the child is entitled to 'appropriate alternative care'. Once this proviso occurs, the provider of the alternative care becomes duty-bound to provide the rights contained in ss (c). If the provider is the state, which will presumably always be the case, if only temporarily, then the rights in ss (c) are enforceable against it. As soon as appropriate alternative care is found that caregiver becomes the provider of the rights.<sup>90</sup>

While the Court in *Grootboom* was concerned only with the right to shelter, it did not confine its remarks about the interaction between the two subsections to shelter. This approach does not confront the obvious differences between the various rights contained in ss (c). The implication is that, assuming a child is still in the care of her parents, she could not turn to the state for the provision of social services.<sup>91</sup> If the

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87 *Grootboom II* (supra) at para 77.

88 See Pieterse (supra) at 10.

89 *Grootboom II* (supra) at para 78.

90 The state provides support to foster parents through a cash grant and school fee exemption.

91 See FC s 28. The child would, like everyone else, have a right to social services in terms of FC s 27, subject to the resources of the state.

court was, in fact, concerned only with rights to shelter, its judgment should have been made that clear.<sup>92</sup>

In *TAC*, counsel for the state, in reliance on *Grootboom*, argued that the duty is on parents to provide health care for their children so long as the children remain in their care.<sup>93</sup> In rejecting this argument, the *TAC* Court wrote:

The state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking. 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. (Emphasis added).<sup>94</sup>

*TAC* stands for the proposition that in the case of health care, the child's parent need not be absent but simply be unable to discharge the obligations imposed by the right. If a parent can afford medicine and the other components of health care, then it is his or her duty to provide them.<sup>95</sup> If the parent cannot, then the child can turn to the state for support, assuming the state has sufficient available resources.<sup>96</sup>

In reaching this conclusion the *TAC* Court referred to *Grootboom* and reproduced its finding that '[i]t follows from ss 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking'.<sup>97</sup> The Court then quoted further from *Grootboom* and said that '[t]his does not mean . . . that the State incurs no obligation in relation to children who are being cared for by their parents or

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families.<sup>98</sup> Unlike *Grootboom*, however, the *TAC* Court did not see this obligation as being limited to legal mechanisms to force parents to comply with their duties. It was able, therefore, to reach the conclusion that the state must provide the health care that was requested.

#### **(d) The state of the law**

92 See J Sloth-Nielsen 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' (2001) 17 *SAJHR* 210, 225 (Sloth-Nielsen argues that although parents often provide amenities to their children, it is artificial to describe these as components of social services. By failing to confine its remarks to shelter and perhaps nutrition, the court invited such artificial reasoning.)

93 *TAC* (supra) at para 75.

94 *TAC* (supra) at para 78.

95 *Ibid* at para 76.

96 The potential problem of, or the solution to the problem of progressive realisation was not made explicit.

97 *TAC* (supra) at para 74.

98 *Ibid* at para 75.

The law regarding the provision of socio-economic rights under FC s 28 is as follows. First, all the socio-economic rights contained in FC s 28 should be read in the light of other socio-economic rights and are thus subject to progressive realisation. Second, the parent is the primary provider of shelter and the child is only entitled to shelter by the state when she is not in the care of her parents but in the care of the state. Third, although the parent is also the primary provider of health care, the state must step in, subject to all the requirements of progressive realisation, when the parent is unable to provide fully for the needs of a child.

At first blush, it seems plausible to separate basic nutrition and shelter from health and social services. The latter two objects seem to lend themselves more to state provision and the former more to parental provision. However, there seems no logical reason to conclude that the state should only step in when there are no parents in the case of shelter, but must step in when there are indigent parents in the case of health care. The approach of the Court does not really amount to a dichotomy between (i) services to be provided primarily by the parent and (ii) services to be provided primarily by the state. On the Court's own approach, even health care must first be provided by the parent, if she can afford it. The real dichotomy is between cases where the state must provide to children who are still in the care of their parents and cases where the state must provide only when children are not in the care of their parents. It is ultimately a distinction without a meaningfully different justification.

### **(e) Socio-economic rights of children living separately from their parents**

Post-*Grootboom II* and *TAC*, the jurisprudence confirms the direct enforceability of the socio-economic rights of children who are living separately from their parents. *Centre for Child Law & Another v Minister of Home Affairs & Others* arose from an urgent application brought on behalf of a group of unaccompanied foreign children who were ear-marked for deportation, and who were, in the meantime, being detained together with adults at a repatriation centre.<sup>99</sup> De Vos J discussed the implications of *Grootboom II*, namely that the primary duty to fulfil a child's socio-economic rights rests on the child's parents or family. However, she continued thus:

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I agree with the view held by Liebenberg<sup>100</sup> that this suggests that the State is under a duty to ensure basic socio-economic provision for children who lack family care, as do unaccompanied foreign children. There is thus an active duty on the State to provide those children with rights and protection as set out in s 28.<sup>101</sup>

She found the government's behaviour with regard to the children to be a serious infringement of s 28(1)(c).<sup>102</sup>

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99 2005 (6) SA 50 (T) ('*Centre for Child Law 2005*').

100 S Liebenberg 'Taking Stock — The Jurisprudence on Children's Socio-Economic Rights and its Implications for Government Policy' (2004) 5(4) *ESR Review*.

101 *Centre for Child Law 2005* (supra) at para 17.

102 The children had been in detention from February to September 2004, waiting for responses to set of Children's Courts inquiries.

In a different matter brought by the Centre for Child Law, the socio-economic rights of children living separately from their parents again came under scrutiny. *Centre for Child Law & Others v MEC for Education, Gauteng, & Others*<sup>103</sup> dealt with the rights of children who had been removed from their parents via care and protection proceedings and had been placed in a school of industries. The application revealed that the children were living in parlous conditions and with no access to psychological support or therapeutic services.<sup>104</sup> The respondents did not deny that the children were suffering the effects of the weather as a result of the poor quality of the building and inadequate clothing and bedding. They nevertheless opposed the applicants' plea that the children be immediately provided with sleeping bags as an interim measure until more long term remedies could be effected. Murphy J noted that the socio-economic rights provisions in FC s 28 do not contain any internal limitation subjecting them to the availability of resources. The respondent's suggestion that the Red Cross or non-governmental organisations might be approached to provide sleeping bags was given short shrift by Murphy J. He noted that the State's response reflected a fundamental misunderstanding of the State's constitutional duty: 'The duty to provide care and social services to children removed from the family environment rests upon the State.'<sup>105</sup> The High Court put in place a structural interdict which dealt with both the short term and longer term aspects of the remedy sought.<sup>106</sup>

## 47.5 Protection from maltreatment, neglect, abuse or degradation

### (a) Corporal punishment

Section 294 of the Criminal Procedure Act 51 of 1977 formerly allowed the whipping of juveniles as a possible sentence to be imposed by a court. The section did not provide an age limit below which the punishment could not be inflicted. However, judicial practice was not to impose the sentence on children below nine years

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of age.<sup>107</sup> In *S v Williams*, the applicants challenged this provision on a number of grounds. These grounds covered an alleged violation of s 30(1)(d) of the Interim Constitution — the equivalent of s 28(1)(d) of the Final Constitution. The Court did not consider this argument because it declared the statutory provision an unconstitutional violation of the prohibition against cruel and degrading

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103 2008 (1) SA 223 (T) ('*Centre for Child Law 2008*').

104 Ibid at 226G-227A (The conditions included lack of adequate clothing or bedding, concrete floors, broken windows, no heating, and the court mentioned that at that time of year the night time temperatures dropped to below zero.)

105 Ibid at 228G.

106 For more on structural interdicts, see M Bishop 'Remedies' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 9.5.

107 *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 15 ('*Williams*') relying on *S v Du Preez* 1975 (4) SA 606 (C).

punishment.<sup>108</sup> However, the reasoning of the Court suggests that the section would have been found to have violated Interim Constitution s 30 had the court been required to consider it.

Both parties agreed that whipping was unconstitutional when it was a sentence imposed upon adults. The state attempted, however, to distinguish between juvenile and adult whipping. The *Williams* Court rejected the basis for such a distinction:

Differences between adult and juvenile whipping have, in my view, little or no relevance to the enquiry. They are in any event differences of degree rather than kind. To the extent that comment is needed on the argument which has been raised, however, I am of the view that the differences are far outweighed by the similarities. There is a small difference in the dimensions of the instrument used; the adult is stripped naked and trussed, the strokes being delivered on bare flesh while the juvenile's strokes are inflicted on normal attire, without him being tied; there is no limit to the number of times a juvenile may be sentenced to receive strokes while the adult may only be so sentenced twice, and never within a period of three years of the previous sentence of strokes. Both occur in a state institution; the maximum number of strokes that may be imposed is seven in respect of both. Both involve a physical beating with a cane wielded by a State employee, a virtual stranger to the person being punished.<sup>109</sup>

The state attempted to argue that the character of a juvenile is still in the process of development and that whipping might assist in correcting bad behaviour. The *Williams* Court likewise rejected this line:

I do not agree. One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened and hardened. If the State, as role model *par excellence*, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished.<sup>110</sup>

Having found a constitutional violation, the Court turned to the question of limitation. The state argued that whipping acts as a deterrent and is preferable to jail because of the limited resources of the state.<sup>111</sup> Furthermore, it claimed that whipping is appropriate to 'grey-area crimes,' which are not serious enough for prison but too serious for softer options.<sup>112</sup> The Court rejected these arguments for two reasons.

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First, there has been a shift away from punishment as a means of correction and prevention.<sup>113</sup> The development of this process must not be seen as a weakness, as

108 IC s 11(2).

109 *Williams* (supra) at para 44.

110 *Williams* (supra) at para 47.

111 *Ibid* at para 61.

112 *Ibid* at para 62.

113 *Ibid* at para 65.

the justice system having 'gone soft.' What it entails is the application of appropriate and effective sentences. An enlightened society will punish offenders, but will do so without sacrificing decency and human dignity.<sup>114</sup>

Second, the Court's position was at least partly a result of the move to create a new juvenile justice system. The presupposition is that viable alternatives to prison exist. The Court thereby answers the problem of grey-area crimes.<sup>115</sup> The Court pointed to alternatives already on offer in the Criminal Procedure Act:<sup>116</sup>

In addition to the provisions of section 290 (*supra*), a juvenile may also be dealt with in terms of other sections of the Act, such as, section 287 [fine]; section 297(1)(a- c) [postponing sentence conditionally or unconditionally, suspended sentence subject to conditions; caution and discharge]; sections 276(1)(h) and 276A [correctional supervision]; and converting the trial to an enquiry in terms of the Child Care Act No. 74 of 1983. The latter course has 4 options, namely: (i) placing the child in the custody of a suitable foster parent; (ii) sending the child to a designated children's home; (iii) sending the child to a designated school of industries; (iv) returning the child to the parent or guardian, under supervision of a social worker.<sup>117</sup>

The judgment in *Williams* was delivered in 1995. It indicated that a complete overhaul of the law relating to child offenders was required. Now, 13 years later, the Child Justice Act seeks to provide a comprehensive plan to deal with child offenders.<sup>118</sup> The Child Justice Act is assessed below.<sup>119</sup> It should be noted that the *Williams* Court refrained from deciding on the constitutionality of corporal punishment administered by schools. The Court simply referred to two contrasting views about its acceptability abroad.<sup>120</sup> The matter was resolved the following year by the passing of the South African Schools Act. The Act banned the use of corporal punishment in schools, and provided that anyone who administers it commits an offence.<sup>121</sup>

## **(b) Christian education and corporal punishment in schools**

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114 *Williams* (*supra*) at para 68.

115 *Ibid* at para 72.

116 Act 51 of 1977.

117 *Williams* (*supra*) at para 74.

118 Act 75 of 2008 was gazetted on 11 May 2009. The Act is expected to come into operation on or before 1 April 2010.

119 See §47.7(b) *infra*.

120 *Williams* (*supra*) at para 48 citing *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112 and *Ingraham v Wright* 430 US 651, 692 (1977)(White dissenting).

121 Act 84 of 1996 s 10(1) and (2). Following *Williams*, the Abolition of Corporal Punishment Act 33 of 1997 eliminated corporal punishment as a sentence in a number of statutes and outlawed its use as punishment in customary law tribunals. Corporal punishment was also expressly outlawed in places of alternative care (eg places of safety, children's homes and schools of industry) by an amendment (inserting regulation 31A) to the Regulations to the Child Care Act published under GN R 637 in GG 20076 of 21 May 1999.

*Republic of South Africa*, the constitutionality of the ban on corporal punishment in schools, imposed by the Schools Act, was challenged by a voluntary association called Christian Education South Africa.<sup>122</sup> By the time of trial, it had limited its challenge to the fact that the definition section of the Act includes independent schools. It limited the challenge still further 'by making it applicable to the applicant's constituent schools only.'<sup>123</sup>

The applicants claimed that their rights under ss 15 and 31 of the Final Constitution, the rights to freedom of belief and practice of religion, were impaired by the ban. In support of this claim, the applicant stated that various passages of the Bible instruct parents to administer corporal punishment to their children. Since teachers act *in loco parentis* during the school day, the applicants reasoned that schools ought to be allowed to administer corporal punishment on behalf of the parents.<sup>124</sup>

In a clear and well-reasoned judgment, Liebenberg J in the court a quo enunciated the following, and now prevailing, approach to violations of the two religion clauses:

In cases of this nature a court will in the first place consider whether the belief relied upon in fact forms part of the religious doctrine of the religion practised by the person concerned. Once it has found that the belief does form part of that doctrine, the court will not embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of the belief. But, the court will then enquire into the sincerity of the person's claim that a conflict exists between the legislation and the belief which is indeed burdensome to that person.<sup>125</sup>

The application thus failed at the very first stage of analysis. The High Court found that while it was indeed a part of Christian doctrine for parents to be allowed to chastise their children, teachers were not so allowed.<sup>126</sup> Therefore, the right of schools to administer corporal punishment was not predicated on religious belief. The 'approach adopted by the applicant [was] merely to clothe rules of the common law in religious attire.'<sup>127</sup>

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122 1999 (4) SA 1092 (SE), 1999 (9) BCLR 951 (SE) ('CESA I').

123 *CESA II* (supra) at 954D.

124 *Ibid* at 956A-G.

125 *Ibid* at 958E-F. The court referred to various foreign judgments in support of its judgment. See *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church* 393 US 440, 451 (1969); *Thomas v The Review Board* 450 US 707 (1981); *In re Chikweche* 1995 (4) SA 284 (ZS), 1995 (4) BCLR 533, 538F (ZS). See *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231(CC); *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC), ('CESA II').

126 *CESA I* (supra) at 959C.

127 *Ibid* at 959E.

In *S v Williams*, the Constitutional Court left open the question of corporal punishment in schools. In *Christian Education*, Liebenberg J compared court-imposed beatings to school-imposed beatings.<sup>128</sup> The court found that the only differences between the two punishments were that the authority administering the punishment was different and that, in the case of the school, the person administering the punishment would not be unknown to the pupil. Since these differences

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were not deemed material, the court concluded that school administered corporal punishment was likewise unconstitutional.<sup>129</sup> The legislature, by passing the South African Schools Act, was simply giving effect to FC s 28(1)(d).<sup>130</sup>

Liebenberg J need not have made this last remark. Having found that the statute did not violate the rights of the applicant, no more need have been said. However, Liebenberg J wanted to make it clear that FC s 31(2) acts as an internal modifier to the right to practise religion: it thereby prohibits a person or a group from practising their religion in a manner inconsistent with other provisions of the Final Constitution.<sup>131</sup> Thus, even if the prohibition on corporal punishment was a *prima facie* violation of the right to practise religion, because corporal punishment administered by schools was a violation of another provision, FC s 31 itself was not violated.<sup>132</sup>

In the Constitutional Court, Sachs J assumed, in favour of the applicant, that a ban on school-administered corporal punishment in independent religious schools violates FC ss 15 and 31.<sup>133</sup> He then proceeded to FC s 36. The apparent rationale for skipping the rights analysis was that if the limitation were shown to be reasonable and justifiable, it would be unnecessary to take a harder line on the applicant's FC s 15 and FC s 31 claims.<sup>134</sup> While this approach is permitted by the text, the standard two-step approach of Liebenberg J is to be preferred.<sup>135</sup>

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128 Ibid at 964G-J.

129 Ibid at 965A.

130 Ibid at 965B.

131 *CESA I* (supra) at 965C.

132 For more on the relationship between the FC s 31(2), FC s 31 and other provisions in the Bill of Rights, see S Woolman 'Community Rights: Language, Culture and Religion' S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) in *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58.

133 *CESA II* (supra) at para 27.

134 Ibid at para 28.

135 For a critique of Sach's notional approach to rights analysis, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

In the course of examining the purpose of the limitation, Sachs J pointed to the obligation of the state to 'protect all people and especially children from maltreatment, abuse or degradation'.<sup>136</sup> He pointed to the constitutional requirement that in all matters concerning a child, the child's best interests are paramount.<sup>137</sup> In addition, he stated that FC s 12 — freedom and security of the person — means that all people have the right 'to be violence-free'.<sup>138</sup> The court then said the following:<sup>139</sup>

As part of its pedagogical mission, the Department sought to introduce new principles of learning in terms of which problems were solved through reason rather than force. In order to put the child at the centre of the school and to protect the learner from physical and emotional abuse, the legislature prescribed a blanket ban on corporal punishment. In its judgement, which was directly influenced by its constitutional obligations, general prohibition rather than supervised regulation of the practice was required. The ban was

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part of a comprehensive process of eliminating state-sanctioned use of physical force as a method of punishment. The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.

While the approach of the court was meant to favour the applicant and in the end did no harm, it muddied the waters by confusing the order of its analysis. It ought to have confronted these issues of maltreatment, best interest and dignity as part of its assessment of FC s 31. Had it done so, it would have been clear that Liebenberg J was correct in finding that FC s 28(1)(d) was violated and thus FC s 31 could not be. Even if the FC s 15 claim remained, doctrinal coherence would have been better served by pressing down on the faith-based attack and proceeding, if necessary, to the limitations enquiry.

The Court explicitly left the question open of the constitutionality of corporal punishment administered by parents.<sup>140</sup> The South African Law Reform Commission, in its final report on the Review of the Child Care Act,<sup>141</sup> recommended that the Children's Bill should include a clause that would remove the common-law defence of reasonable chastisement. The Children's Amendment Bill,<sup>142</sup> as first introduced in Parliament, included a stronger provision that would actually provide for an outright

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136 *CESA II* (supra) at para 40.

137 *Ibid* at para 41.

138 *Ibid* at para 47.

139 *Ibid* at para 50.

140 *CESA II* (supra) at para 48. For a critique of this piece of legal sophistry, see S Woolman 'Freedom of Association' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

141 Project 110 (December 2002) 115-116.

142 B 19-B of 2006, clause 139.

ban on corporal punishment in the home. This clause became mired in controversy, and was eventually dropped at the eleventh hour.<sup>143</sup>

The possibility remains that a constitutional challenge will be brought against corporal punishment in the home, most likely aimed at the common-law defence of reasonable chastisement. International experience with this problem may be helpful. In *A v United Kingdom*<sup>144</sup> a unanimous court ruled that repeated corporal punishment of a nine year old boy by his stepfather amounted to inhuman or degrading treatment, and that the UK government should have taken measures to provide protection by disallowing the common-law defence of moderate and justified chastisement in such cases.<sup>145</sup> In *Canadian Foundation for Children, Youth and the Law v Attorney General, Canada*,<sup>146</sup> the majority found that a law that allowed correction by parents and persons *in loco parentis* provided that the force used was

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reasonable in the circumstances and was not 'unconstitutionally vague'.<sup>147</sup> In the majority's view, the child's best interests was not an overriding principle but only one factor to be considered: the family should not be exposed to intrusion by law enforcement for every trivial spanking. In contrast, the *Canadian Foundation* minority found that the law was vague and controversial. It also concluded that the common-law defences of necessity and *de minimis non curat lex* would be sufficient to prevent parents from being prosecuted or convicted for excusable or trivial conduct. Sloth-Nielsen has expressed the view that the minority position in *Canadian Foundation* is more consistent with a children's rights approach under the Final Constitution.<sup>148</sup>

### (c) Legislative development

FC s 28(1)(d) provides that the child has the right 'to be protected from maltreatment, neglect, abuse or degradation'.<sup>149</sup> This subsection clearly imposes a positive obligation on the state to prevent harm to children. Since 1994, it has been

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143 P Proudlock & L Jamieson 'Guide to the Children's Act 38 of 2005', unpublished paper, Children's Institute (2008) 8.

144 [1998] 2 FLR 959 ('A').

145 See *A v United Kingdom* (2000) *De Jure* 146 (Argues that South Africa's common law relating to the defence of reasonable chastisement may be in need of reform). See further J Burchell & J Milton *Principles of Criminal Law* 3ed (2005) 296; B Bekink 'When do Parents go too Far? Are South African Parents Still Allowed to Chastise their Children through Corporal Punishment in the Home?' (2006) 2 *SACJ* 173, 188-191 (Raises questions about the constitutionality of corporal punishment and the defence of reasonable chastisement.)

146 *Canadian Foundation for Children, Youth and the Law v Attorney General, Canada* [2004] 1 SCR 76 ('*Canadian Foundation*').

147 The court split 6 to 3. The minority judgments were penned by Arbour, Binnie and Deschamps JJ.

148 J Sloth-Nielsen 'Children' in H Cheadle, D Davis & N Haysom (eds) *The South African Constitution: The Bill of Rights* (2nd Edition, 2006) 528.

149 Emphasis added.

the view of many lawyers that the Child Care Act<sup>150</sup> is inadequate and fails to vindicate the standards set by the Final Constitution.<sup>151</sup> Changes were made to the Act in the Child Care Amendment Acts of 1996<sup>152</sup> and 1999.<sup>153</sup> However, these alterations were temporary: The new Children's Act,<sup>154</sup> passed in 2005, has been partially brought into operation. When the Act is fully implemented it will repeal the Child Care Act as well as various other statutes.<sup>155</sup>

The Children's Act contains numerous clauses that are relevant to our understanding FC s 28(1)(d). The word 'abuse' is defined in s 1 as—

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any form of harm or ill-treatment deliberately inflicted on a child, and includes (a) assaulting a child or inflicting any other form of deliberate injury to a child; (b) sexually abusing a child or allowing a child to be sexually abused;<sup>156</sup> (c) bullying by another child; (d) a labour practice that exploits a child; or (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.

Neglect of a child is defined as 'a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs'. The Children's Act provides that a parent, guardian or other person caring for a child is

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150 Act 74 of 1983.

151 See J Sloth-Nielsen & B van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' (1996) 12 *SAJHR* 247; J Sloth-Nielsen & B van Heerden 'The Child Care Amendment Act 1996: Does it Improve Children's Rights in South Africa?' (1996) 12 *SAJHR* 649.

152 Act 96 of 1996.

153 Act 13 of 1999.

154 Act 38 of 2005. For technical reasons related to the processing of Bills provided for in FC s 75 and FC s 76 the Children's Bill was divided into two separate Bills. The first one was signed into law in 2006 as the Children's Act 38 of 2005. The second one was signed into law in March 2008, as the Children's Amendment Act 41 of 2007. The Amendment Act adds missing sections. The full Act, thus formed, is called the Children's Act 38 of 2005. On 30 June 2007 the President issued a signed proclamation (proclamation 13, 2007, GG no 30030, 29 June 2007) bringing certain sections of the Act into operation with effect from 1 July 2007.

155 Children's Act s 313 read with schedule 4 repealed (in entirety) The Age of Majority Act 57 of 1972, the Children's Status Act 82 of 1987, the Guardianship Act 192 of 1993, and the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. When the Act is fully implemented it will also repeal the whole of the Child Care Act 74 of 1983; the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, the few remaining sections of the Children's Act 33 of 1960, s 1 of the General Laws Further Amendment Act 93 of 1962, and s 4 of the Prevention of Family Violence Act 133 of 1993.

156 In addition to the provisions of the Children's Act, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 has amended aspects of the Sexual Offences Act 23 of 1957, and aspects of the Criminal Procedure Act 51 of 1997. Often referred to colloquially as the 'new Sexual Offences Act', the new legal framework provides a range of redefined sexual offences and penalties, including sexual offences against children. The Act alters the position taken in *Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another as Amici Curiae)*. *Masiya* had disappointingly extended the common-law definition of rape to include anal rape of girls but not of boys. 2007 (5) SA 30 (CC), 2007 (2) SACR 435 (CC). The new Sexual Offences Act contains a broader, gender neutral definition of rape.

guilty of an offence if that parent or care-giver (a) abuses or deliberately neglects the child; or (b) abandons the child.<sup>157</sup> A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance.<sup>158</sup>

The offences carry heavy penalties, with a fine or imprisonment not exceeding 20 years.<sup>159</sup> Neglect must now be 'deliberate', thus adding a *mens rea* requirement. Under s 50(1) of the Child Care Act negligence had been sufficient to establish the offence of 'ill-treatment'. This shift is no doubt aimed at protecting parents who neglect their children due to circumstances that are beyond their control, eg, illness or poverty.

When it is suspected that children are abused or neglected, a Children's Court<sup>160</sup> hearing will be held to decide, on the basis of a report from a social worker and any other relevant evidence, whether the child is in need of care and protection. If it is necessary to do so, then the presiding officer of the Children's Court may order the removal of the child to temporary safe care pending finalisation of the matter.<sup>161</sup> The court may, upon deciding that a child is in need of care and protection, select a solution from a very wide range of options. Some options are aimed at keeping children in families and providing services to ensure their care and safety.<sup>162</sup>

The Children's Act contains a variety of innovative strategies aimed at upholding children's s 28(1)(d) rights. The Act makes it compulsory for a wide range of professionals to report child abuse.<sup>163</sup> Controversially, the Act also establishes a

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register of persons unsuitable to work with children. Any court or any legally constituted disciplinary forum may find a person unsuitable to work with children.<sup>164</sup>

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157 Children's Act s 305(3).

158 Children's Act s 305(4).

159 Children's Act s 305(7).

160 The Children's Court has greatly increased powers. These powers are described, together with the procedural rules, in Children's Act Chapter 4.

161 Children's Act s 151. Removals may only occur without a court order on grounds that are specified in s 152.

162 See, generally, Children's Act ss 156-159. The court may also, in suitable cases, make an order that the child be placed in alternative case: eg, foster care or placement in a child and youth care centre.

163 Children's Act s 110.

164 Children's Act s 121. Any institution that employs people to work (even in a voluntary capacity) with children such as schools or child and youth care centres, have to check (via the department of Social Development) whether the prospective employee's name is on the register prior to employing anybody. Section 121 provides procedures for dealing with disputes concerning the findings.

Section 12 of the Act provides that 'every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.' The Act also specifically prohibits, to various degrees: marriage or engagement below a minimum age; marriage without consent; genital mutilation or circumcision of female children;<sup>165</sup> virginity testing;<sup>166</sup> circumcision of male children.<sup>167</sup>

#### **(d) Child pornography**

In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others*<sup>168</sup> the Constitutional Court upheld the ban on the possession and distribution of child pornography contained in the Film and Publications Act.<sup>169</sup> The Court found there to be an impairment of the rights to freedom of expression<sup>170</sup> and privacy,<sup>171</sup> but considered these limitations reasonable and justifiable.<sup>172</sup>

In reaching its conclusions, the Court relied, in part, on the duty of the state to promote FC s 28(1)(d). It highlighted the various harms that child pornography causes to children:

The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The state must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and

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165 Children's Act s 12(3).

166 Children's Act s 12(4) prohibits any testing of children below 16. However, s 12(5) permits children over 16 to consent to virginity testing after proper counselling. The test results may not be disclosed without the consent of the child, and the child may not be marked to show the result. For more on virginity testing, see E George 'Virginity Testing and South Africa's HIV/Aids Crisis: Beyond Rights Universalism and Cultural Relativism, Toward Health Capabilities' (2008) 96 *California LR* 1447.

167 Children's Act s 12(8) prohibits circumcision of children below 16 except if performed for religious purposes or medical reasons. The fact that tradition does not form the basis of an exception leaves this clause open to possible constitutional challenge. Circumcision of children over 16 is permissible with the child's consent and after proper counselling. Children's Act s 12(9).

168 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) ('*De Reuck II*').

169 Act 65 of 1996.

170 *De Reuck II* (supra) at para 50.

171 *Ibid* at paras 52-3.

172 *Ibid* at paras 56-91 (Limitation analysis of the court.) For a critique of the *De Reuck* Court's limitation analysis, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, M Bishop, J Klaaren & S Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available.<sup>173</sup>

The state argued that child pornography causes harm to children in three ways:<sup>174</sup> (a) it is used to groom children for sexual abuse when the potential offender shows the child images of other children performing sexual acts to make the abuse seem acceptable; (b) it reinforces the belief that sex with children is acceptable; and (c) it is used by paedophiles to fuel their fantasies before committing acts of sexual abuse. The Court accepted evidence from the police of (a) and concluded that although empirical evidence did not support (b) or (c), it was common sense that either (b) or (c) might occur in some cases.<sup>175</sup>

The new Sexual Offences Amendment Act (SOAA)<sup>176</sup> criminalises intentional exhibition of child pornography to either an adult or to a child.<sup>177</sup> The term '*child pornography*' is defined<sup>178</sup> widely so as to ensure that all methods that may be used to create child pornography are covered under the definition. The essence of the definition captures everything of a sexual nature related to children (or people being presented as children or even animated depictions of children) whether it is intended to stimulate erotic or aesthetic feelings or not. In addition, the display of any pornography to a child is an offence.<sup>179</sup> The Act targets both those who use children in pornography and those who benefit in any manner from the pornography.<sup>180</sup>

The Act also established a new offence of sexual grooming.<sup>181</sup> Persons may be charged for actively grooming or assisting others to groom children for the purpose of committing sexual offences with them are criminalised. Sexual grooming has already been addressed by the courts. In his minority judgment in *S v M*, Cameron JA used the term 'domestic sexual predation' to describe the situation in which a vulnerable and dependent 15 year old baby-sitter was gradually entrapped into a

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173 *De Reuck II* (supra) at para 63.

174 *De Reuck II* (supra) at para 65.

175 *Ibid.*

176 Act 32 of 2007.

177 *Ibid* s 10.

178 *Ibid* s 1.

179 *Ibid* s 19.

180 SOAA s 20(1) criminalises use. SOAA s 20(2) applies to pecuniary benefits from pornography. The Films and Publication Amendment Act 3 of 2009 was promulgated in the Government Gazette in August 2009. The Department of Home Affairs views the Amendment Act as part of its bid to end child pornography. Critics say that it paves the way for pre-publication censorship and that the exemptions provided do not go far enough to promote freedom of expression. This Act is likely to give rise to constitutional litigation.

181 SOAA s 18.

sexual relationship by an adult friend of the family.<sup>182</sup> Satchwell J has described grooming as 'an ongoing process aimed at the child accepting sexual activities.'<sup>183</sup> She explained that grooming is wrong and punishable because one of the parties can coerce the child into engaging in sexually related activities.

The constitutionality of a number of sections of the Criminal Procedure Act (as amended by the SOAA) was challenged in *Director of Public Prosecutions, Transvaal v*

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*Minister for Justice and Constitutional Development & Others.*<sup>184</sup> The provisions dealt with the procedures for the oath or admonition of child victims and witnesses, as well as their testimony being heard via an intermediary using equipment and privacy of the proceedings. The Constitutional Court employed a section 39(2) reading of the provisions, and found that although the impugned sections were not in themselves unconstitutional, they had to be read in a constitutionally compliant manner in order to fully protect children. The Court's structural interdict requires the Minister to provide information and plans regarding resources relating to the system such as the number of trained intermediaries and the requisite equipment being available at courts around the country.

## 47.6 Child labour<sup>185</sup>

The most important existing laws are s 52A of the Child Care Act (as amended) and s 43 of the Basic Conditions of Employment Act.<sup>186</sup> Subject to ministerial exemption, no child under the age of 15 years may be employed. The latter provision repeats s 28(1)(f) of the Final Constitution. Both statutory provisions exist on pain of criminal sanction.

There are a number of problems with the current situation in South Africa. First, the above statutory provisions are widely ignored: many children are illegally employed and exemption from the statutory prohibition is seldom sought.<sup>187</sup> Second, the legislative and policy framework is unsophisticated: especially when they are measured against the International Labour Organisation's Minimum Age Convention and Recommendation (1973),<sup>188</sup> and the ILO's Worst Forms of Child Labour

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182 2006 (1) SACR 135 (SCA) at paras 203-205, 260-263. Cameron JA apparently failed to recognize similar signs of grooming in a subsequent matter. See *Geldenhuys v The State* 2009 (1) SACR 1 (SCA). In *Geldenhuys*, the different ages of consent to sexual intercourse for males and females was found to be unconstitutional, with only retrospective effect. Act 32 of 2007 had already provided a prospective legislative solution to the problem of unequal treatment.

183 *S v M* 2007 (2) SACR 60 (W) at para 36.

184 2009 (4) SA 222 (CC).

185 See South African Law Commission Discussion Paper 103 *Review of the Child Care Act* (December 2001) 13.5 ('SALC *Review of the Child Care Act*').

186 Act 75 of 1997.

187 SALC *Review of the Child Care Act* (supra) at § 13.5.5.

Convention (1999).<sup>189</sup> The international documents distinguish between various age-groups and kinds of work,<sup>190</sup> set out criteria for proper enforcement of the law, and require that the conditions under which child labour can be deemed satisfactory. Third, children work largely because of poverty. Child labour will only end when measures are effected to alleviate their poverty. In the meantime, adequate social security must be provided to children. Education for poor children must be improved to protect them from abusive work. School must become a viable and attractive alternative to work and a place from which authorities can monitor the involvement of children in work.<sup>191</sup>

The Children's Act makes it an offence to use, procure or offer a child for slavery, bondage or servitude or compulsory labour for provision of services,<sup>192</sup> or to use, procure, offer or employ a child for purposes of commercial sexual exploitation, trafficking, or to in any other way involve a child in child labour.<sup>193</sup> A social service professional who becomes aware of any of these activities has a duty to report it.<sup>194</sup> Using children to commit crimes is considered one of the 'worst forms of child labour'.<sup>195</sup> In a high profile case in which a woman had hired others to murder her boyfriend's baby, the High Court recognised that the youngest accused (16 years at the time of the commission of the offence) could be seen to be a child used by an adult to commit a crime.<sup>196</sup> They were all convicted of murder. However, the two youngest (both below 18 years at the time of offence) escaped the minimum sentence of life imprisonment: both received 15 year sentences.

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188 Convention no 138 and Recommendation no 146, ratified by South Africa, available at [www.ilo.org/ilolex/english/index.htm](http://www.ilo.org/ilolex/english/index.htm).

189 Convention no 182, ratified by South Africa, available at [www.ilo.org/ilolex/english/index.htm](http://www.ilo.org/ilolex/english/index.htm)

190 For example, art 3 of the Minimum Age Convention specifies that the minimum age for dangerous work should be 18 years.

191 SALC *Review of the Child Care Act* (supra) at §13.5.2.

192 Section 141(1)(a). For more on slavery, servitude and forced labour, see S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64; S Woolman & M Bishop 'Down on the Farm and Barefoot in the Kitchen: Farm Labour and Domestic Labour as Forms of Servitude' (2007) 24 *Development Southern Africa* 595.

193 Sections 141(1)(b)-(e). See S Woolman & M Bishop 'State as Pimp: Sexual Slavery in South Africa' (2006) 23 *Development Southern Africa* 385.

194 Section 141(2).

195 See, generally, J Gallinetti *An Assessment of the Significance of the International Labour Organisation's Convention 182 in South Africa with Specific Reference to the Instrumental Use of Children in the Commission of Offences as a Worst Form of Child Labour* (unpublished LLD thesis, University of the Western Cape, 2007). FC s 35(h) read with s 92 of the Child Justice Act 75 of 2008 requires that the court undertake an assessment of the child well being whether the child has been used by an adult to commit a crime, and if so, whether the adult should be referred for prosecution in terms of s 141(1)(d) read with s 305(1)(c). The Children's Act, and the information elicited must be taken into account in determining the treatment of the child in the child justice system.

## 47.7 Children and the justice system

### (a) Imprisonment as a last resort

The requirement in FC s 28(1)(g) that children be imprisoned only as a measure of last resort and, if necessary, for the shortest appropriate period of time is also found in art 37(b) of the Convention on the Rights of the Child ('CRC'). The Committee on the Rights of the Child has stated that the CRC must be interpreted in conjunction with other international instruments.<sup>197</sup> The UN Standard Minimum Rules for the Administration of Juvenile Justice (1985), known as the Beijing Rules, is one such instrument. In terms of rule 13.1, 'detention pending trial shall be used only as a measure of last resort'. In 1994 the Correctional Services Act 8 of 1959 was amended<sup>198</sup> to conform to international standards. In terms of s 29(1) of the Act, prior to amendment, an accused below the age of 18 could only be detained before his conviction if it was necessary and no suitable place of

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safety was available. The amended section provides that an accused child below 14 cannot be detained in prison, but may be detained in a police lock-up or cell for a period not exceeding 24 hours if the detention is necessary and in the interests of justice and the child cannot be placed in the care of his parents, an institution or a place of safety. A similar rule applies to children between the ages of 14 and 18, except that the maximum period of detention is 48 hours. However, ss (5A) provides for the imprisonment of a child between the ages of 14 and 18 in certain circumstances and lists factors to consider in determining whether imprisonment is in the interests of justice. FC s 28(1)(g) has also had an impact on sentencing. In the first constitutional case to rule on the sentencing of children, *S v Williams*, the Court found that the provisions allowing for judicially ordered whipping as a sentence for children violated IC ss 10 and 11(2), but did not consider whether corporal punishment also infringed IC s 30 (the IC's children's rights section).<sup>199</sup>

The first case to set out general guidelines for the sentencing of child offenders in the new Constitution era was *S v Z en Vier Ander Sake*.<sup>200</sup> Five matters came before the High Court on review in the ordinary course: suspended sentences had been imposed upon young offenders. Erasmus J took a very energetic approach: he personally visited the juvenile section of the prison and requested a report from the Director of Public Prosecutions (Eastern Cape). As a result of its investigations, the High Court laid down certain guidelines:

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196 *S v Mfazwe & Others* Unreported decision of the Cape Provincial Division, Case Number 07/06 (28 June 2007) (Waglay J) ('When sentencing children and juveniles, especially where payment was offered to them to commit an offence, courts should see these children and juveniles not only as perpetrators of the offence but also victims of a serious form of exploitation.')

197 See *S v Kwalase* 2000 (2) SACR 135, 139b (C), [2001] 3 All SA 588 (C) ('Kwalase'); *S v Nkosi* 2002 (1) SA 494 (W), 2002 (1) SACR 125, 145e (W), [2002] 4 All SA 745 (W) ('Nkosi').

198 Correctional Services Amendment Act 17 of 1994.

199 IC s 30 did not include the provision that detention should be a measure of last resort, only that every child in detention should be detained under conditions and treated in a manner that takes account of his or her age.

200 1999 (1) SACR 427 (E) ('S v Z').

- (i) diversion<sup>201</sup> should be considered prior to trial in appropriate cases;
- (ii) age must be properly determined prior to sentencing;
- (iii) a court must act dynamically to obtain full particulars about the accused's personality and personal circumstances;
- (iv) a court must exercise its wide sentencing discretion sympathetically and imaginatively;
- (v) a court must adopt, as its point of departure, the principle that, where possible, a sentence of imprisonment should be avoided, and should bear in mind especially that: the younger the accused is, the less appropriate imprisonment will be; imprisonment is rarely appropriate in the case of a first offender; and short-term imprisonment is rarely appropriate;
- (vi) a court must not impose suspended imprisonment where imprisonment is inappropriate for a particular accused.<sup>202</sup>

The approach set out in *S v Z* was followed the following year in *S v Kwalase*.<sup>203</sup> This judgment is notable for the lengths to which the High Court went to set out

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a clear legal and philosophical framework for the sentencing of offenders below the age of 18 years at the time of the commission of their offences. Van Heerden J spelt out the centrality of the FC s 28(1)(g) right of a child not to be detained except as a measure of last resort and for the shortest appropriate period of time in sentencing procedures. This right must be interpreted in light of South Africa's international obligations, particularly the UNCRC and the Beijing Rules.<sup>204</sup> The judicial approach towards the sentencing of child offenders, Judge Van Heerden argued, had to be reappraised and developed in order to promote an individualized response that was not only in proportion to the nature and gravity of the offence, but also the offender.

In 2005, the SCA again considered sentencing of child offenders in *Director of Public Prosecutions, Kwa-Zulu Natal v P*.<sup>205</sup> The state appealed against a non-custodial sentence that had been handed down by the High Court in a case of murder committed by a girl who was only twelve years old at the time of the commission of the offence. The SCA replaced the original non-custodial sentence

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201 Diversion allows for a conditional withdrawal of charges at the pre-trial stage. If the child completes the diversion programme successfully the charges are withdrawn and the child does not obtain a criminal record. Diversion is premised on there being a *prima facie* case and an admission of responsibility for the commission of the offence. Diversion has been practised in South Africa since the 1990s but has now been given legal recognition by the Child Justice Act.

202 See also *S v S* 2001 (2) SACR 321 (T)(A similar approach appears to have underpinned the Court's decision to set aside a suspended prison term for a 15 year old girl who had falsely accused a 17 year old boy of rape because she was afraid of her father and replace it with a postponed sentence.)

203 2000 (2) SACR 135 (C).

204 The UN Standard Minimum Rules for the Administration of Juvenile Justice (1986).

205 2006 (1) SACR 243 (SCA)('P').

with a prison term of seven years suspended for five years. The judgment is disappointing. It restates the sentencing principles that were set out in *S v B*. But instead of taking the opportunity to give clear meaning to the term 'imprisonment as a measure of last resort, and for the shortest appropriate period of time' the judgment simply reiterates the principles and delivers a harsher punishment than that of the court a quo. In addition, it appears to have weakened the principle laid down in *S v Z* that suspended prison terms should not be used in cases where imprisonment is adjudged to be inappropriate.<sup>206</sup>

The long term impact of *P* cannot as yet be determined. However, there are signs that it will be interpreted positively. In *Mocumi v S*,<sup>207</sup> *P* was referred to in support of a finding that a prison term for a child offender was found to be shockingly inappropriate. In *S v M*, Sachs J stated that '*P* confirmed the need for a re-appraisal of the juvenile justice system in the light of the Constitution'.<sup>208</sup> Sachs J further summarised *P* as follows:

[It] pointed out that the overarching thesis of the international instruments and the Constitution was that child offenders should not be deprived of their freedom except as a measure of last resort and then only for the shortest possible period of time [and that] even then the sentence must be individualised so as to prepare the child offender for reintegration into society.... [T]he principles guiding the sentencing of a child are proportionality and the best interests of the child.<sup>209</sup>

The principles for sentencing child offenders were repeated and amplified by the

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Supreme Court of Appeal in *S v N*.<sup>210</sup> Cameron JA, writing for the majority, referred directly to the 'last resort' principle and provided this elucidation:

[It] bears not only on whether we choose prison as a sentencing option, but on the sort of prison sentence we impose, if we must. So if there is a legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered. Every day he spends in prison should be because there is no alternative.<sup>211</sup>

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206 For further criticism of the judgment, see S Terblanche 'Sentencing a Child Who Murders — DPP *KwaZulu Natal v P* 2006 (1) SACR 243 (SCA)' (2007) 20 SACJ 243.

207 (Unreported Northern Cape Division Case Number CASR 2/05, 30 May 2006).

208 *S v M* (supra) at para 11.

209 Ibid at para 16 n 20.

210 *S v N* 2008 (2) SACR 135 (SCA). The case concerned a 17 year old who had been sentenced for rape by the magistrates court to a period of 10 years imprisonment, four years of which were suspended. The majority of the court, after anxious deliberation, set aside the sentence and replaced it with a sentence of correctional supervision in terms of section 276(1)(i). The new sentence required the offender to spend one sixth of his sentence in prison before becoming eligible for release on correctional supervision. Maya JA's minority judgment upholds the constitutional principles relevant to sentencing of child offender. However, the judge concludes that an effective six year sentence, while 'undoubtedly robust', was an appropriate punishment under the circumstances. Moreover, it did not deny the child a chance of rehabilitation.

211 Ibid at para 39.

In addition, the courts have continued to stress the importance of a probation officer's pre-sentence report wherever it is possible that a sentence may include detention.<sup>212</sup> While not a novel legal approach,<sup>213</sup> judgments in the new constitutional era have linked the requirement to the constitutional protection of children.

Detention refers not only to prison or police cells but also to other secure places of detention such as reform schools.<sup>214</sup> In *S v Z & 23 Similar Cases*,<sup>215</sup> the court reviewed 24 cases, which were referred to by a concerned magistrate in terms of s 304(2)(a) of the Criminal Procedure Act (CPA).<sup>216</sup> In all of these cases, child offenders had been sentenced to a reform school in terms of CPA s 290, but had been in prison for long periods of time waiting to be transferred to a reform school. The court directed the department to report on a range of matters, and ordered the immediate release of 24 child offenders whose two year orders had either lapsed or would soon lapse. Other arrangements were made for those who had not spent a very long duration in prison. The matter was postponed for six months. The subsequent hearing gave rise to a further written judgment.<sup>217</sup> At the High Court's request, the Department of Education had presented a plan for structural alteration of an existing school of industries to create a reform school that could receive sentenced children. The court order included a structural interdict overseeing the Department's fulfilment of their plans. The same scenario that

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led to the *S v Z* judgments has subsequently played itself out twice again in other provinces.<sup>218</sup>

These judgments, taken in toto, have created a progressive constitutional jurisprudence on the sentencing of children. During the same period, however, the actual sentencing of child offenders moved in a contrary direction by the courts' interpretation of the minimum sentencing legislation: the Criminal Law Amendment Act (CLAA).<sup>219</sup> When the CLAA was promulgated, it did not apply to children below the age of sixteen. Sixteen and seventeen year olds were included in the ambit of the Act,<sup>220</sup> although the sentencing procedure for them was different from the procedure for adults.<sup>221</sup>

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212 *S v Z* (supra); *Kwalase* (supra); *S v J & Others* 2000 (2) SACR 310 (C); *S v Petersen & 'n Ander* 2001 (1) SACR 16 (SCA); *S v N & Another* 2005 (1) SACR 201 (CKH); *S v M & Another* 2005 (1) SACR 481 (E).

213 For the importance of a pre-sentence report, see *S v H & Another* 1978 (4) SA 385 (EC); *S v Ramadzanga* 1988 (2) SA 816 (V); and *S v Quandu* 1989 (1) SA 517 (A).

214 When the Children's Act 38 of 2005 comes into operation, the term 'reform school' will fall away. The institutions will instead be called 'child and youth care centres'. They will be specifically registered to receive sentenced children. Initially they will remain under the control of the Department of Education. But within 2 years of the Act's implementation they must be transferred to the Department of Social Development. See ss 191 and 196 of the Children's Amendment Act 41 of 2007.

215 2004 (4) BCLR 410 (E).

216 Act 51 of 1977.

217 2004 (1) SACR 400 (E)

In a string of cases, the courts debated the interpretation of the provisions related to sixteen and seventeen year olds.<sup>222</sup> *Nkosi*, for example, considered the international law and constitutional provisions, and enunciated the following principles for sentencing a child offender:<sup>223</sup>

- (i) Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender;
- (ii) imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate.

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- (iii) where imprisonment is considered, it should be for the shortest possible period given the nature and gravity of the offence and the needs of society as well as the particular needs and interests of the child offender;
- (iv) if possible the judicial officer must structure the sentence in such a way as to promote rehabilitation and reintegration; and

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218 See *S v M* and *S v S* (Unreported decision of the Northern Cape High Court, Case Nos. 435/04 and 237/04)(11 November 2005) available at [www.childlawsa.com](http://www.childlawsa.com) (The judgment arose from an urgent special review of the situation of two children who had been sentenced to reform school. By the date of review, the children had been in prison for 15 and 19 months respectively. Lacock J found that although the sentences were appropriate they could not be carried out. He set them aside and replaced them with prison terms matching the periods already served, and the children were consequently released forthwith.) See also *N & Another v the State* (Unreported decision of the Natal High Court, Case No AR 359/2006)(14 September 2006), available at [www.childlawsa.com](http://www.childlawsa.com) (In this matter, two teenage boys had been awaiting designation to reform school in Westville prison for eighteen months. Levinsohn J pointed out that the sentence was a competent one, and he therefore did not set the sentence aside. However, he released the two boys on the grounds that it was in the interests of justice to do so. Lamenting the shortage of reform schools, the judge urged magistrates who sentence young people to reform school to diarise the matter for one month, and to send the matters on special review if the children are not moved timeously. This practice was subsequently included in the Child Justice Act, s 76(4).)

219 CLAA ss 51 to 53, which came into operation on 1 May 1998. The amendment was initially intended to be a short-term measure, but has recently been further amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, which provided magistrates sentencing jurisdiction of up to 30 years imprisonment.

220 See J Kriegler 'Criminal Procedure: Legislation' (2003) *Annual Survey of South African Law* 786 (The author points out that there is no clear rationale for treating 16 and 17 year olds differently from 14 and 15 year olds. He makes this comment in relation to the rules related to automatic appeal as introduced by the Criminal Procedure Amendment Act 42 of 2003. In our view, the point he makes is equally applicable to the law on minimum sentences.)

221 CLAA s 51(3)(b) provided: 'If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.'

222 *S v N* 2000 (1) SACR 209 (W); *S v S* 2001 (1) SACR 79 (W); *S v Blaauw* [2001] 3 All SA 588 (C); *S v Malgas* [2001] 3 All SA 220 (SCA); *S v Nkosi* (supra); *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* [2003] 2 All SA 249 (T).

223 *Nkosi* (supra) at 147f-i.

- (v) the sentence of life imprisonment may only be considered under exceptional circumstances.

The applicability of minimum sentences appeared to be resolved by the Supreme Court of Appeal in *S v B*.<sup>224</sup> The case involved a 17-year-old boy who had been convicted of murder. The court *a quo* had applied the minimum sentence of life imprisonment. The appellant argued that the Final Constitution only permits children to be detained as a last resort, and that a minimum sentence implies a first resort of imprisonment. The *S v B* Court agreed and held that minimum sentences do not apply to sixteen- and seventeen-year-olds. According to *S v B*, the traditional aims of punishment for child offenders have to be re-appraised in the light of international instruments. Any sentencing court must have discretion when sentencing a child, in order to give effect to the requirement of individualisation and the need for proportionality. The SCA added, however, that when dealing with sixteen- and seventeen-year-olds, the fact that the legislature has ordained minimum sentences for specific offences should be taken into account as a weighting factor when a court exercises its sentencing discretion.<sup>225</sup>

After this case, the Criminal Law (Sentencing) Amendment Act<sup>226</sup> reinstated minimum sentences for sixteen- and seventeen-year-olds. In the *Centre for Child Law v Minister of Justice and Constitutional Development and Others*<sup>227</sup> the Constitutional Court ruled that the Final Constitution prohibits minimum sentencing legislation from being applied to children aged 16 and 17 years old. The Court confirmed the order of constitutional invalidity declaring sections of the CLAA<sup>228</sup> invalid. The majority of the Constitutional Court found that the minimum sentencing regime constrains the discretion of the sentencing officer by orienting them away from non-custodial options, by de-individualising sentences, and by conducing to longer prison sentences. This breaches their rights in terms of section 28(1)(g), and the *Centre for Child Law* Court found that no adequate justification had been provided for the limitation.

## **(b) Law reform**

The Child Justice Act provides various alternatives to imprisonment, both prior to and during trial, and at sentencing.<sup>229</sup> It is worth discussing these innovations in some detail. The Act reiterates the rule that children must be detained separately from adults. It also adds additional protections; for example boys must be

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224 2006 (1) SACR 311 (SCA), [2005] 2 All SA 1 (SCA).

225 *Ibid* at para 11.

226 Act 38 of 2007.

227 98/08 [2009] ZACC 18.

228 As amended by Act 38 of 2007.

229 Act 75 of 2008, due to come into operation on 1 April 2010.

confined separately from girls.<sup>230</sup> There are special provisions for the protection of children detained in police custody, including the requirement that they be detained in conditions that reduce the risk of harm, that they be permitted visitors and that they be cared for in a manner consistent with the special needs of children.<sup>231</sup>

The Act clearly reinforces the constitutional standard that detention, including pre-trial detention, is a measure of last resort. It provides written notice and summons as alternatives to arrest,<sup>232</sup> and places a variety of restrictions on the circumstances in which children can be arrested.<sup>233</sup> The Act articulates that a unique clause demands that 'when considering the placement of a child' preference must be given to the least restrictive option possible in the circumstances.<sup>234</sup> The detention of children younger than 14 is subject to even more stringent conditions.<sup>235</sup>

All children must be assessed by a probation officer before they appear at a preliminary inquiry.<sup>236</sup> The purpose of the assessment is to provide quality information to make decisions about how the child is to be dealt with, including the possibility of the child's case being 'diverted'. Diversion is a process of channelling cases away from the formal court system to specially devised plans or programmes.<sup>237</sup> Diversion is not treated as a conviction, and the child does not obtain a criminal record. A child can only be diverted if he or she acknowledges responsibility for the offence, and if there is a prima facie case against him or her. The procedure for diversion depends on the seriousness of the offence. A minor offence may be diverted by a prosecutor. If the case is not diverted by the prosecutor, or if the matter is more serious, then the child must appear before a preliminary inquiry. This hearing takes the place of a hearing of first appearance. The

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230 Section 28(1)(a).

231 Section 28(1)(b)-(d). The section also includes a compulsory reporting procedure if any injury or trauma is complained of or observed.

232 Sections 17 and 18.

233 Section 22. Children charged with minor offences are not to be arrested and detained, unless their parents cannot be located or they are deemed to be risk to themselves or others. If such a child is detained, he or she can be released into the care of the parent or an appropriate adult by a police official if the offence is a minor one, or by a police official with the agreement of the public prosecutor if the case is more serious. The offences are arranged according to schedules, with schedule 1 containing relatively minor offences, schedule 2 more serious ones, and schedule 3 the most serious, such as murder, rape and aggravated robbery. Police may not release a child charged with a schedule 3 offence, even with the authorisation of the prosecutor.

234 Section 26.

235 If a child is below 14 years of age or if 14 years or older but charged with a schedule 1 or 2 offence, and such child has not been released into the care of a parent or appropriate adult, then the police official must give consideration to the child being accommodated in a suitable child and youth care centre instead of being held in police cells. Chapter 5 of the Bill deals with assessment, and chapter 7 with preliminary inquiry.

236 Section 34.

237 Chapter 8 of the Child Justice Bill provides detailed provisions on diversion.

palpable difference is that all efforts are made to ensure that appropriate decisions are made about the child. A child may be diverted at this stage, failing which the matter proceeds to trial in the child justice court.<sup>238</sup> If the child does not comply with the

diversion order, and has no satisfactory explanation when brought before court, then he or she may then be tried for the offence.<sup>239</sup>

During the preliminary inquiry and trial stages, the Act retains its vigilance regarding detention. Preference is given to the release of children: but if they are to be detained they should preferably be held in a suitable child and youth care centre.<sup>240</sup> Children may only be detained in a prison to await trial if they are over the age of 14 years and charged with serious offences.<sup>241</sup> The Act stipulates that trials of children are to be concluded as speedily as possible and that postponements are to be limited in number and duration.<sup>242</sup> Children in prison are to be brought back to court every 14 days.<sup>243</sup>

The sentencing chapter<sup>244</sup> gets off to a positive start with a list of sentencing objectives: to encourage the child to understand the implications of and be accountable for the harm caused; to promote an individualised and proportionate response; and to promote reintegration of the child into the family and the community.<sup>245</sup> The chapter also embraces a range of sentencing options that can be served in the community and places great emphasis on restorative justice.<sup>246</sup> Another option is for the child to be sentenced to a child and youth care centre for 5 years.<sup>247</sup> To this end, the chapter provides for increased tariffs for residential sentences to these centres.<sup>248</sup> Section 77(1)(a) prohibits the imprisonment of children below 14 years at the time of sentence.<sup>249</sup> Children who are 14 years or older may be sentenced for up to 25 years.

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238 The Child Justice Court is any court before which a child is appearing, bound by the rules set out in the Act, and is held in camera.

239 Section 55.

240 These are secure centres that are managed by the Department of Social Development.

241 Section 30.

242 Section 66(1).

243 Section 66(2) Children in child and youth care centres are to appear every 30 days, and for those in the care of parents, postponements are not to exceed 60 days.

244 Chapter 10 of the Child Justice Act.

245 Section 69.

246 The restorative justice options offered in the Act are family group conferences and victim offender mediation. See A Skelton and M Batley 'Restorative Justice: A Contemporary South African Review' 21(3) 2008 *Acta Criminologica* 37.

## 47.8 Legal representation in civil proceedings

According to FC s 28(1)(h):

Every child has the right to have a legal practitioner assigned by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.

The Constitutional Court has referred to this section on two occasions, both in

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relation to the appointment of a curator *ad litem* for very young children.<sup>250</sup> These cases illustrate one manner in which FC s 28(1)(h) may be utilised: it is a measure to protect children caught up in litigation by ensuring that the curator *ad litem* looks after their interests.

However, of much more interest is FC s 28(1)(h)'s potential to promote the recognition of a child's developing autonomy. As they mature, children's views become more central to the resolution of conflicts concerning them. FC s 28(1)(h) provides a platform for children to be directly involved in civil litigation and for their legal representatives to place the views of the children before the court. The Children's Act confirms this new approach very directly.<sup>251</sup> Every child of sufficient age, maturity and stage of development, must be given the opportunity to participate in matters that concern him or her. Moreover, the child's views must be given due consideration.<sup>252</sup> The Act also grants every child the right to bring, or be assisted in bringing, a matter to court.<sup>253</sup>

The Constitutional Court has on two occasions noted that they would like to hear directly from children (presumably those who are of sufficient age and maturity) in

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247 Section 76(3). The section also provides for a child to be sentenced to a child and youth care centre and a prison sentence at the same time. The child is then brought back to court after the 5 years to consider release or transfer to an adult prison.

248 In terms of CPA s 290, a sentence to a reform school (now included in the term 'child and youth care centre'), could be ordered for a maximum period of two years.

249 The Child Justice Bill had proposed that the relevant age for this prohibition should be under 14 years at the time of the commission of the offence. This was changed to 'at the time of sentence' by the Parliamentary Justice Portfolio Committee.

250 See *Du Toit & Another v Minister of Welfare & Population Development & Others* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) at para 3 (Skweyiya AJ held that where there is a risk of substantial injustice to children a court is obliged to appoint a *curator ad litem* to represent the interests of children, and that this obligation flows from the provisions of FC s 28(1)(h).) See also *AD v DW* (supra) at para 11 n 5 (Court relied heavily on the report of the curatrix.)

251 See C Davel 'General Principles' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007)(Note, in particular, the authors' comments on ss 10 and 14 of the Act.)

252 Children's Act s 10. The section came into operation on 1 July 2007. The provision is based on art 12(1) of the CRC and art 4(2) of the ACRWC. For further information on the voice of the child, see A Barratt 'The Best Interest of the Child: Where is the Child's Voice?' in S Burman (ed) *The Fate of the Child* (2003) 145; D Kassan 'The Voice of the Child in Family Proceedings' (2003) 36 *De Jure* 164; JA Robinson 'The Right of the Child to be Heard at the Divorce of their Parents: Reflections on the Legal Position in South Africa' (2007) 70 *THRHR* 263.

matters where their rights were affected. In *Christian Education*, the Court commented that it would have been useful to hear the voices of children on the issue of corporal punishment in schools.<sup>254</sup> And while their actual experiences and opinions would not necessarily have been decisive, their voices and presence would have enriched the dialogue between the parties and the Court.

In *Pillay*, the Court referred to this passage and commented that legal matters involving children often exclude children. Langa CJ remarked: 'The need for the child's voice to be heard is perhaps even more acute when it concerns children of [about 16 years] who should be increasingly taking responsibilities for their own actions and beliefs.'<sup>255</sup>

In *Soller NO*, the meaning and scope of FC s 28(1)(h) was explored in some detail.<sup>256</sup> The applicant was a fifteen year old boy, referred to as K, who sought a variation of his custody order so that he could be placed in the custody of his

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father. The application was originally brought in terms of FC s 28(1)(h) on behalf of K by an attorney who turned out to have been struck from the roll for what was described as 'piratical recklessness in his approach to important litigation'. Satchwell J decided that although the attorney was unsuitable to represent K, the matter did require the assignment of a legal representative under FC s 28(1)(h). The judge went on to observe the significance of the fact that the legislature inserted FC s 28(1)(h) into the Final Constitution with the full knowledge that the Office of the Family Advocate<sup>257</sup> already existed. She further reasoned that the legal practitioner assigned in terms of FC s 28(1)(h) was surely not intended to appropriate the role and usurp the function of the Family Advocate. The judgment draws a clear distinction between the role of the Family Advocate and the role of a legal representative:

The family advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer. The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child.<sup>258</sup>

In *Ex Parte Van Niekerk*, two girls aged 13 and 11 were granted leave to intervene as parties in an application brought by their father to gain access to them. The court

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253 Children's Act s 14. A child may approach a court directly, as can anyone acting in the interest of the child, anyone acting as a member of or in the interests of a group or class, or in the public interest. These rights appear in s 15 of the Children's Act, and echo directly the standing provisions in FC s 38.

254 *Christian Education* (supra) at para 53.

255 *Pillay* (supra) at para 56.

256 *Soller NO v G & Another* 2003 (5) SA 430 (W).

257 The Family Advocate was created by the Mediation in Certain Divorce Matters 24 of 1987. Regarding the role of the family advocate, see S Burman & McClennan 'Providing for Children? The Family Advocate and the Legal Profession' (1996) *Acta Juridica* 69; N Glasser 'Can the Family Advocate Adequately Safeguard Our Children's Best Interests?' (2002) 65 *THRHR* 74; 'Taking Children's Rights Seriously' (2002) 35 *De Jure* 223; 'Custody on Divorce: Assessing the Role of the Family Advocate' in S Burman (ed) *The Fate of the Child* (2003) 108.

held that to give proper effect to the provisions of FC s 28(1)(h): 'A court is entitled to join minors as parties to proceedings affecting their best interests. Unless the children are joined as parties they will not be able to appeal against an adverse order.'<sup>259</sup> In *R v H & Another*<sup>260</sup> the court asked whether a child caught up in litigation between divorcing parents should have separate legal representation. A representative was appointed by the High Court in terms of FC s 28(1)(h) after consultation with all the parties. The lawyer later successfully applied to be joined as a second defendant.<sup>261</sup> The approach in *Ex Parte Van Niekerk* is to be preferred. It joins the children themselves as parties, not the legal representative. Such recognition gives the children better opportunities for participation.

FC s 28(1)(h) requires legal representation where a 'substantial injustice' would otherwise result. The *Soller* Court's gloss on this term is of particular significance where 'the civil proceedings concerned are of crucial importance to [the child's] current life and future developments.'<sup>262</sup>

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Whilst a fledgling jurisprudence on FC s 28(1)(h) appears to be developing, several questions are left for debate. How is the child to obtain a legal representative? In *Legal Aid Board v R*, the High Court decided that the Legal Aid Board can appoint a legal representative for a child, and that it is not necessary to approach the High Court in every case.<sup>263</sup> If the matter is an application, then should children file affidavits? If children do not give evidence in court, is it appropriate for a judge to hear them in chambers?<sup>264</sup> How does a legal representative assist a child who is too young or immature to give instructions? We currently possess no clear answers to these questions. However, given the rapid pace of development in child law we can expect them to be addressed in the not to distant future.

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258 *Soller NO* (supra) at 438 d-e. See further *Centre for Child Law (2005)* (supra)(confirmed the right of legal representation at state expense in civil cases for foreign unaccompanied minors, and separated out the role of a curator *ad litem* from that of a legal representative.)

259 *Ex Parte Van Niekerk* (supra) at para 8. The Court relied on the Canadian case of *Re Children's Aid Society of Winnipeg & AM & LC Re RAM*, 7 CRR.

260 2005 (6) SA 535 (C), [2006] 4 All SA 199 (C).

261 The lawyer asked to be joined a *nomine officio* capacity.

262 *Soller NO* (supra) at 435d.

263 *Legal Aid Board v R & Another* 2009 (2) SA 262 (D).

264 This debate is not new. And judges have differing views on the matter. See *Martens v Martens* 1991 (4) SA 287 (T); *McCall v McCall* 1994 (3) SA 201 (C). The judges found it most instructive to speak to the children in chambers. However, in *F v F*, the only SCA judgment to have dealt with this question, the court declined to hear the child in chambers. The reasons were that she had already expressed discomfort with seeing many experts in relation to the case, as well as the prospect of a child having to face five judges in chambers, and the fact that this request occurred in the context of an appeal. Furthermore, Maya AJA raised procedural concerns about whether the children's views would constitute evidence, and, if so, should there be opportunity to lead rebuttal evidence? However, the Court did acknowledge that courts must take into account the child's preferences (where she is old enough to articulate them) and the Court had ample information before them regarding such preferences.

## 47.9 Children and armed conflict

The Final Constitution includes both the right of children not to be used directly in armed conflict, and the right to be protected in times of war. The word 'directly' might be open to the interpretation that children could be employed by the South African National Defence Force to do work that would not involve them directly in armed conflict (with due regard to FC s 28(1)(f) which protects children from work that is inappropriate to their age).<sup>265</sup> Domestic legislation accords with the Final Constitution: The Defence Act provides that the minimum age of recruitment into the South African National Defence force is 18 years,<sup>266</sup> this provision may not be derogated from even in times of armed conflict.<sup>267</sup>

FC s 28(1)(i) is above the minimum standard set by art 38 of the CRC. The CRC only prohibits children under 15 years from being directly involved in armed conflict. Much stronger protection can be found in the wording of the ACRWC. The ACRWC provides that 'no child shall take a direct part in hostilities' and obliges the state to 'refrain, in particular, from recruiting the child'.<sup>268</sup> The wording of the Final Constitution is thus more closely aligned to the wording of the ACRWC. The Optional Protocol to the CRC on the involvement of children in armed conflict<sup>269</sup> (which has been signed but not ratified by South

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Africa) establishes a minimum recruitment age of 18 years and also broadens the ambit of the prohibition on the involvement of children through recruitment by armed groups that do not fall under the control of the state. The Optional Protocol opens the door to possible horizontal application against the non-State armed groups.<sup>270</sup> FC s 28(2)(i) can also potentially apply horizontally.<sup>271</sup>

## 47.10 The best interests of the child

### (a) Introduction

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265 See J Sloth-Nielsen 'Children' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law* (2nd Edition 2006) 541.

266 Act 42 of 2002 s 52(1).

267 Defence Act s 91(2)(a).

268 Art 22(2). The ACRWC defines a child as a person below the age of 18. Art 3.

269 GA/RES 54/263 (signed by South Africa on 8 February 2002).

270 For more on children in armed conflict, see B Mezmur 'Children at Both Ends of the Gun: Child Soldiers in Africa' in J Sloth Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 199-218.

271 For more on the direct horizontal application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, M Bishop, J Klaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) 31-62 to 31-74.

FC s 28(2) re-iterates the common-law standard of the best interests of the child. But it is no mere repetition. The common-law standard is applied by the High Court in its position as the upper guardian of minor children. The constitutional standard applies in 'every matter concerning the child'. Furthermore, the wording of the text indicates that the best interests of the child in FC s 28(2) is not limited to the matters in FC s 28(1). This conclusion is born out by a comparison with s 30(3) of the Interim Constitution. Interim Constitution s 30(3) said that the best interests of the child were paramount for the purposes of IC s 30 alone.<sup>272</sup>

The problems with the best interests standard are legion and legendary:

(i) it is 'indeterminate'; (ii) members of the various professions dealing with matters concerning children . . . have quite different perspectives on the concept . . .; and (iii) the way in which the 'best interests' criterion is interpreted and applied by different countries (and indeed, by different courts and other decision-makers within the same country) is influenced to a large extent by the historical background to and the cultural, social, political and economic conditions of the country concerned, as also by the value system of the relevant decision-maker.<sup>273</sup>

Even if we admit the above, it is hard to see how it could be otherwise. Values with respect to and ideas about children vary over time and place. One would not want to block the flexibility and growth of the law by a need for certainty and neatness.<sup>274</sup> The 'best' one can do is list some basic criteria and flesh out their meaning through application to specific types of situations.

### **(b) The operation of FC s 28(2)**

From the existing case law, it is clear that FC s 28(2) operates in at least three ways.

First, the concept of the child's best interests is used to interpret the protections in FC s 28(1) or vice versa; subsecs (1) and (2) are read together. For example,

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in *Bannatyne v Bannatyne*, the Constitutional Court referred to the child's right to proper parental care (FC s 28(1)(b)): it places an obligation on the state to create the necessary environment for parents to provide proper parental care.<sup>275</sup> One of the state's duties was to enforce the effective payment of maintenance. The Constitutional Court reversed a Supreme Court of Appeal decision that had failed to take the best interests of a child into account in rendering a decision concerning maintenance.<sup>276</sup>

Second, the best interests criteria may be employed to determine the ambit of another right in the Bill of Rights. Alternatively, the best interests criteria are relevant at the limitation stage of application analysis of this other right. For

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272 A Cockrell 'The Law of Persons and the Bill of Rights' in *Bill of Rights Compendium* (Service Issue 13, October 2003) at para 3E19.

273 B van Heerden et al *Boberg's Law of Persons and the Family* (2nd Edition, 1999) 502-503 (footnotes omitted).

274 See *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 (3) SA 422 (CC), 2000 (3) BCLR 713 (C) ('*Fitzpatrick*') at para 18.

275 2003 (2) SA 363 (CC) at paras 24-5.

example, the Witwatersrand High Court in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others*<sup>277</sup> held that the ban on child pornography did not contravene the applicant's rights to privacy and freedom of expression. These rights are not absolute and must be interpreted in the light of the paramountcy of children's best interests. Alternatively, if the applicant's rights were violated, the court a quo was of the view that the ban on child pornography was a constitutionally acceptable *limitation* because of what is in children's best interests. The Constitutional Court<sup>278</sup> did not allow children's interests to decide the ambit of the rights to expression and privacy. These rights were violated by the statutory prohibition. Children's interests, however, justified the limitation of the rights.<sup>279</sup> The judgment of the Constitutional Court may indicate that where children's best interests enter the analysis of a non-s 28 right, they do so only at the limitation stage. However, if a non-s 28 right is a right of a child, then the best interests criteria are inseparable from the determination of whether the challenged law or action violates the non-s 28 right. For instance, in *Hay v B & Others* the High Court read the child's right to life together with the right to have the child's best interests considered as paramount. As a result, the Court rejected the FC s 15 claim of the parents, who were Jehovah's<sup>280</sup> Witnesses and believed that their religion forbade a blood transfusion which might save the child's life.<sup>281</sup>

Third, FC s 28(2) creates a self-standing right:

Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights

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enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1).<sup>282</sup>

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276 See *Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as amicus curiae)* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) ('Du Toit'). The court found to be unconstitutional statutory provisions that did not allow for joint adoption by same-sex partners in a long-term relationship. One of the grounds for this outcome was that it was in children's best interests to be adopted jointly by suitable parents. Children would be otherwise deprived of the possibility of a family life as required by FC s 28(1)(b). *Ibid* at para 22.

277 2003 (3) SA 389 (W), 2002 (12) BCLR 1285 (W), [2003] 1 All SA 449 (W) ('*De Reuck I*').

278 *De Reuck II* (*supra*) at para 55.

279 See *Khosa* (*supra*) at para 136.

280 2003 (3) SA 492 (W).

281 See *Kotze v Kotze* 2003 (3) SA 628 (T) (High Court combined the child's right to religious freedom with its right to its best interests, and refused to make a certain clause part of a divorce order. The parties had sought to educate their child in the Apostolic Church: the offending clause was found infirm because it predetermined and constrained the child's future.)

282 *Fitzpatrick* (*supra*) at para 17.

In *Fitzpatrick*, the court decided that s 18(4)(f) of the Child Care Act violated FC s 28(2). The section proscribed the adoption of a child born of a South African citizen by persons who are not South African citizens or are persons who qualify for naturalisation but have not yet applied. The court held that the best interests of a child could lie in its adoption by non-South Africans.<sup>283</sup> Another notable illustration of FC s 28(2) as an independent right is to be found in *Sonderup v Tondelli & Another*.<sup>284</sup> In *Sonderup*, the Hague Convention on the Civil Aspects of International Child Abduction Act<sup>285</sup> was found not to violate FC s 28(2):

In normal circumstances it is in the best interests of children that parents or others shall not abduct them from one jurisdiction to another, but that any decision relating to the custody of the children is best decided in the jurisdiction in which they have hitherto been habitually resident.<sup>286</sup>

In *AD v DW*, an American couple wanted to adopt a South African child. Instead of making an application to the Children's Court, they brought an application to the High Court for sole custody and guardianship with a view to removing the child from South Africa and concluding an adoption in the USA. The case began in the High Court.<sup>287</sup> That court refused to grant the order, and referred the couple to the Children's Court, the forum where domestic adoptions are concluded.<sup>288</sup> The couple appealed both the refusal and the referral in the Supreme Court of Appeal.<sup>289</sup>

The SCA divided three to two, with four written judgments. The majority held that to grant the order sought by the applicants would result in sanctioning an alternative route to inter-country adoption under the guise of a sole custody and sole guardianship application. The majority found this approach to be an unsavoury form of by-passing the Children's Court adoption system and jumping the queue. The court held further that the appeal should in any event fail because

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283 Ibid at para 19.

284 2001 (1) SA 1171 (CC), 2001 (2) BCLR 152 (CC) ('*Sonderup*'). See also *Petersen v Maintenance Officer, Simon's Town Maintenance Court, & Others* 2004 (2) SA 56 (C), [2004] 1 All SA 117 (C) at para 20.

285 Act 72 of 1996.

286 *Re F (Minor: Abduction: Jurisdiction)* [1990] 3 All ER 97, 99j (CA), quoted in *Sonderup* (supra) at para 28.

287 *De Gree & Another v Webb & Others (Centre for Child Law, University of Pretoria, Amicus Curiae)* (2006) (6) SA 51 (W).

288 See *Minister of Welfare & Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) (Constitutional Court declared section 18(4)(f) of the Child Care Act 74 of 1983 unconstitutional. It thus opened the door to inter-country adoptions that the Court envisaged would be concluded via the Children's Court, using the Child Care Act and international law as the legal framework.) For a discussion of some of the problems experienced in the practice of inter-country adoption following *Fitzpatrick*, see A Louw 'Inter-country Adoption in South Africa: Have the Fears become Fact' (2006) 39(3) *De Jure* 503.

289 *De Gree & Another v Webb & Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA).

of the principle of subsidiarity:<sup>290</sup> insufficient efforts had been made to find suitable care for the child in South Africa and thus inter-country adoption could not proceed. The minority took a different view, holding that that as upper guardian of minors, the High Court had jurisdiction to hear the application. In their view the papers showed that it was overwhelmingly in her best interests for the order of sole custody and sole guardianship to be granted.<sup>291</sup>

The case finally found its way to the Constitutional Court. The child remained in alternative care. The Court had to find a way to ensure that a correct procedure for children was followed (to prevent unlawful adoptions or trafficking in children) whilst upholding the best interests of the individual child concerned. Justice Sachs recognised the importance of the 'subsidiarity' principle, but ultimately found that the principle must yield to the paramouncy principle. The best interests of each child must therefore be examined on an individual basis and not in the abstract:

Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case.<sup>292</sup>

The Court ruled that unduly rigid adherence to technical matters should play a relatively diminished role, because 'the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants.'<sup>293</sup>

### **(c) Paramouncy v limitation**

The use of the word 'paramount' in FC s 28(2) has led some courts to pronounce that children's interests can never be trumped by the rights of others.<sup>294</sup> The Constitutional Court in *De Reuck* decided otherwise:

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290 The principle of subsidiarity is based on the notion that inter-country adoption should be subsidiary to domestic solutions for the care of a child. The principle is reflected in numerous international instruments. Art 21 of the CRC describes inter-country adoption as 'an alternative means of child-care, if the child cannot be placed in foster care or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin'. Art 24 of the African Charter on the Rights and Welfare of the Child uses similar terminology in its description of inter-country adoption, but is somewhat more extreme: it describes inter-country adoption as being 'a last resort'. The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (1993), includes the following language in its preamble: 'Recognizing that inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.'

291 For a discussion of the judgment by the Supreme Court of Appeal, see P Moodley 'Unravelling the Legal Knots around Inter-country Adoptions in *De Gree v Webb*' (2007) 3 *Potchefstroom Electronic Law Journal*.

292 *AD v DW* (supra) at para 55.

293 *Ibid*.

294 *De Reuck I* (supra) at para 45; *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* 2003 (4) SA 160 (T), 178B-C, 2002 (4) All SA 745 (T) (although educational officials' conduct declaring a school dual-medium was not administratively fair, the decision was not set aside because the best interests of the English learners already admitted to the school under the decision were paramount). For more on this judgement, see S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa* (2009). See also S Woolman & M Bishop 'Education' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) in *Constitution Law of South Africa* (2nd Edition, OS, November 2007) Chapter 57.

[T]he approach adopted by this Court [is] that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36.<sup>295</sup>

Moreover, many of the children's rights in FC s 28, including FC s 28(2), are derogable in a state of emergency.<sup>296</sup>

Various courts have considered limitations on children's constitutional best interests.<sup>297</sup> Sometimes the reasons for such limitations are other aspects of the children's best interests. So, odd as it may sound, a child's best interests may also limit her best interests. For example, in *Sonderup*, the Hague Convention on the Civil Aspects of International Child Abduction was found to satisfy the long-term interests of children, but the Court discussed the question whether, assuming children's short-term interests were not satisfied by the Convention, such limitation could be justified under FC s 36. It was. The Court reiterated the important purpose of the Convention — that custody issues should be determined by the court which is in the best position to do so by reason of the relationship between its jurisdiction and the child. It wrote:

The Convention also aims to prevent the wrongful circumvention of that forum by the unilateral action of one parent. In addition, the Convention is intended to encourage comity between States parties to facilitate co-operation in cases of child abduction across international borders.<sup>298</sup>

Sometimes the reasons for limitations on children's best interests are the interests of other children, or children generally, or of other parties, such as parents or the state. For instance, the court in *Harris v Minister of Education* found that a ministerial notice stating that only a child who is to turn seven years' old before the 31st of December of any particular year might be admitted to grade one in that school year violated FC s 28(2). The court held that it was educationally unsound to hold back a child who was ready for school. One of the justifications for the limitation on the right to which the court applied its mind was that '[s]cholars below the age of seven years tend to clog the educational system as a result of high failure and repetition rates and that this carries financial implications for the government'.<sup>299</sup> The court held this concern not to be relevant for the independent schools which the ministerial notice covered. Had the case been brought in respect of a government school, the limitation might well have been justified.

295 *De Reuck II* (supra) at para 55 citing *Sonderup* (supra) at paras 27-30.

296 Section 37.

297 *Sonderup* (supra) at paras 29-36; *Harris v Minister of Education* 2001 (8) BCLR 796, 805-6 (T), [2001] JOL 8310 (T) ('*Harris*'); *Du Toit* (supra) at paras 31-7.

298 *Sonderup* (supra) at para 31. The approach of *Sonderup* has been followed in two subsequent Supreme Court of Appeal judgments: *Pennello v Pennello* (Chief Family Advocate as Amicus Curiae 2004 (3) SA 117 (SCA) and *Central Authority v H* 2008 (1) SA 49 (SCA). See further C Woodrow & C du Toit 'Child Abduction' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) Chapter 17.

299 *Harris* (supra) at 805C.

Sometimes the justifications for the limitations on children's rights may be a mix of the above considerations.

Since children's best interests may validly be limited, what is the meaning of the phrase 'paramount importance'? Indeed, if a child's best interests are not always supreme, what is the point of FC s 28(2)? How would it be different from a hypothetical right which protected adults' best interests? FC s 28(2) is a highly unusual provision in the Bill of Rights because it applies to a group of people across the entire domain of their existence. Most of the other rights relate to particular spheres of activity. One purpose of the provision is to create a right for children as *children* — because they are especially vulnerable and because we think they are precious and because their interests have all too often given way to the interests of others. If these considerations lie at the heart of FC s 28(2), then the section must be read to reflect the following three concerns.

First, in every matter where a child's interests are (substantially) involved, those interests must be taken into account. This requirement turns all children's matters into potentially constitutional matters.<sup>300</sup> In *J v Director General, Home Affairs*,<sup>301</sup> the Constitutional Court declared unconstitutional a statutory provision which recognised the husband of a woman who had been artificially inseminated with his consent as the child's father, but did not recognise the long-term lesbian partner of a woman who had been inseminated with the partner's consent as the parent of the child. The basis of for the finding of unconstitutionality was that the law discriminated unfairly on the basis of sexual orientation.<sup>302</sup> The Court said that since the statute was unconstitutional on this ground, it was unnecessary to consider the other grounds raised by the applicant.<sup>303</sup> With respect, the children's interests must be considered in every relevant case. Indeed, the Court, in crafting a remedy, said that its order met best interests of the child requirements.<sup>304</sup>

Second, under FC s 28(2), children's interests alone are made a constitutional right. The subsection does not create a right for others.<sup>305</sup> It does not create a right of parental responsibilities and entitlements.<sup>306</sup> The interests of persons other than children are not captured by the subsection.

Third, FC s 28(2) involves a weighing-up process of the various interests of children in order to decide what is best for them. In addition, a child's interests have a leg up *vis-à-vis* other rights and values. That said, it is important to remember that the Final Constitution does not say that a children's interests are 'paramount'. They

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300 Many reported cases suggest that FC s 28(2) serves as reinforcement for the common-law standard of the best interests of the child.

301 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) (*J v Director General*).

302 See FC s 9(3).

303 *J v Director General* (supra) at para 15.

304 *Ibid* at para 16.

305 None of the other subsections of FC s 28 provide protection for non-minors.

are of 'paramount importance'.<sup>307</sup> Indeed, the case law recognizes that they can be validly limited.

In *S v M* the court provides its clearest articulation to date on the meaning of the paramountcy principle. Sachs J comments that the very expansiveness of the paramountcy principle appears to promise everything but delivers little.<sup>308</sup> Nevertheless, the *S v M* Court recognised that it is precisely the contextual nature and inherent flexibility Constitutional s 28(2) that constitutes the source of its strength. The Court then attempted to 'establish an operational thrust for the paramountcy principle'.<sup>309</sup> The principle cannot, the Court reasoned, be interpreted 'to mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. ... [T]he fact that the best interests of the child are paramount does not mean that they are absolute.'<sup>310</sup> *S v M* dealt with the question of what the duties of a sentencing court are, in light of FC s 28(2), when the person being sentenced is the primary caregiver of minor children. Recognising the negative effects of imprisonment on the children, the judgment pronounced that sentencing officers should pay appropriate attention to the children of a primary caregiver and take reasonable steps to minimise damage:

The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned.<sup>311</sup>

## 47.11 The age of a 'child'

### (a) The beginning of a 'child'

What effect does the 'age' of a child have for the bestowal of the protections in FC s 28 (and in other sections of the Bill of Rights) before birth? The applicants in *Christian Lawyers Association of South Africa & Others v Minister of Health & Others*<sup>312</sup> argued that the legalisation of abortion in the Choice on Termination of

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306 Cockrell (supra) at para 3E21. But we do not agree with Cockrell that a right of parental responsibilities and duties cannot be located elsewhere in the Bill of Rights (consider, for example, the rights to privacy and dignity.) Some parental responsibilities and obligations must be recognised because we do not want the state to possess sole control over the standards set for our children and families. See also S Woolman '*Freedom of Association*' (supra) at Chapter (Woolman contends that association — and intimate associations such as the family — are best protected by FC s 18.)

307 But see *Reno v Flores* 507 US 292, 303-5 (1993)(Scalia J).

308 *S v M* (supra) at para 23.

309 Ibid at para 25.

310 Ibid at paras 25-26.

311 Ibid at para 42.

Pregnancy Act<sup>313</sup> violated the right to life of the foetus.<sup>314</sup> The court held that the right to life did not include the unborn child because FC s 28(3), in part, defines a child as a person under the age of 18 years. As a result, reasoned the court:

[a]ge commences at birth. A foetus is not a 'child' of any 'age'. Had the drafters of the Constitution wished to protect the foetus in the bill of rights at all, one would have expected this to have been done in section 28, which specifically protects the rights of the child.<sup>315</sup>

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The literal reading of FC s 28(3) does not, however, necessarily exclude its application to the foetus. The courts would be better served by an evaluation of the real values and interests at stake in abortion cases.<sup>316</sup>

In *S v Mshumpa* the victim was an unborn baby, who was shot (in the 38th week of pregnancy) through her mother's abdomen, resulting in a still birth.<sup>317</sup> The state argued that the common law should be developed so the definition of murder included the killing of an unborn child, as this conclusion would reflect the medical reality and the convictions of the community. The court noted that the common-law principle of being 'born alive' has never been discarded or developed either nationally or in foreign jurisdictions. It therefore came to the conclusion that no rights are conferred on an unborn child and, therefore, that a person only becomes a legal subject after birth.

### **(b) The end of a 'child'**

The Children's Act<sup>318</sup> has changed the age of majority from 21 years to 18 years. This alteration brings the concepts of 'childhood' and 'minority' in South African law into alignment. Moreover, it resolves earlier debates about whether the Age of Majority Act was unconstitutional.<sup>319</sup> The change in the law reflects a growing recognition of the autonomy of young people, and allows them, for example, to choose their life partners without parental consent once they have turned 18 years of age. Inevitably,

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312 1998 (4) SA 1113 (T), 1998 (11) BCLR 1434 (T) ('*Christian Lawyers*').

313 Act 72 of 1996.

314 FC s 11.

315 *Christian Lawyers* (supra) at 1442D.

316 For more on this case, see M O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition OS, February 2005) Chapter 37.

317 2008 (1) SACR 126 (E).

318 Act 38 of 2005. Section 17 reads: 'A child, whether male or female, becomes a major upon reaching the age of 18 years'. The section came into operation on 1 July 2007. The Age of Majority Act 57 of 1972 was repealed in full.

319 South African Law Reform Commission *Review of the Child Care Act Report* Project 110 (December 2002) 23-25; J van der Vyver 'Constitutionality of the Age of Majority Act' (1997) 114 SALJ 750, 754.

they will also lose certain protections. For example, an agreement entered into by a young person over 18 years will be enforceable against her, and the common-law action of *restitutio in integrum* will no longer be available to a person between the ages of 18 and 21.<sup>320</sup>

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320 For a more complete explanation of this change in the law and other issues relating to minority, see T Boezaart 'Some Comments on the Interpretation and Analysis of S 17 of the Children's Act 38 of 2005' (2008) 41(2) *De Jure* 245.