

Chapter 2

South Africa

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Abstract The Bill of Rights in the South African Constitution contains a powerful children's rights clause, the wording of which was shaped by the Convention on the Rights of the Child (CRC). Since the introduction of the Bill of Rights, the CRC has continued to wield influence through litigation. This chapter describes the favourable climate for child rights litigation provided by South Africa's constitutional democratic legal order, including progressive rules on standing, costs, and the obligation on the courts to consider international law in Bill of Rights cases and to prefer an interpretation compatible with it. The courts have embraced the CRC to the extent that a description of every case mentioning it is beyond the scope of this chapter. Cases where the CRC was clearly evoked and had an influence on the outcome of cases are discussed according to thematic groups. The courts have also used the African Charter on the Rights and Welfare of the Child, as well as UN guidelines, resolutions and general comments. The chapter concludes by observing that these sources of international law create a rich store of ideas for child rights litigators to bring before the courts, ideas to which the courts fortunately appear to be receptive.

1 Introduction to the South African Constitutional and Legal System

South Africa is a constitutional democracy. The Constitution contains a progressive Bill of Rights comprising civil, political and socioeconomic rights. These rights are justiciable—any law or conduct inconsistent with them may be declared invalid by the superior courts.

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The legal system is a hybrid one based on British common law and Roman-Dutch civil law. African customary law is recognised, provided it accords with the Bill of Rights. Procedurally, the law takes a largely common law approach, incorporating the rule of *stare decisis*, meaning the law is developed through precedents set by case law.

2 Children's Rights in the South African Bill of Rights

South Africa's Bill of Rights has been hailed internationally as a good example of a constitution providing for protection and advancement of children's rights (Alston and Tobin 2005). A range of obligations is placed on the state for the promotion, protection and realisation of children's rights. With the exception of the right to vote or stand for public office, children are entitled to all rights contained in the Bill of Rights (Friedman et al. 2009).

In recognition of children's vulnerability, section 28 provides additional protections. These include the rights to name and nationality; to family care or parental care or appropriate alternative care when removed from the family environment; to basic nutrition, shelter, basic health care services and social services; to be protected from maltreatment, neglect, abuse or degradation; to be protected from age-inappropriate or exploitative labour; not to be detained except as a measure of last resort and then only for the shortest appropriate time, separately from adults and in conditions that take account of the child's age; to legal representation at state expense in civil proceedings if substantial injustice would otherwise result; and not to be used in armed conflict. Section 28(2) provides a further layer of protection by specifying that a child's best interests are of paramount importance in every matter concerning the child. A child is a person below the age of 18 years.

3 The Influence of International Law and Foreign Law

A major factor that influenced the constitution-drafting process was South Africa's signature in 1993, and ratification in 1995, of the CRC. This signified the country's acceptance of the international body of human rights regarding children, and provided the legal backing for the children's section in the Bill of Rights. Children's rights activists and political parties relied on the CRC as an authority in their submissions to the technical committees drafting the Bill of Rights (Skelton and Proudlock 2013). The committees in turn relied on the CRC when making choices as to how the section should be worded (Du Plessis and Corder 1994). As a result, the influence of the CRC can be seen throughout the text of section 28.

Section 39(2) of the Constitution obliges courts to consider international law when interpreting a right in the Bill of Rights. Rosa and Dutschke (2006) argue that, based on this provision, the CRC is directly applicable in any case involving an interpretation of children's rights. If the text of a right in the Constitution has its

roots in an international human rights instrument, the courts should prefer ‘any reasonable interpretation of legislation that is consistent with international law’.¹ As will be demonstrated in this chapter, the South African courts have frequently relied on the CRC.

South Africa is described as having a monist legal system because section 231(4) of the Constitution states that an international agreement becomes law once it is enacted by national legislation. The CRC has not directly been enacted into law, although the Preamble to the Children’s Act 38 of 2010 does refer to the CRC and other instruments. At the same time, the courts are enjoined to ‘consider international law’.² According to the international law expert John Dugard, a treaty that has been signed and ratified is binding on South Africa, regardless of whether it has been signed into law (Dugard 2005). Sloth-Nielsen and Kruuse (2013) argue that South Africa has ‘crossed the line from dualism and monism’ in relation to child law. Part of the evidence for this, in their view, is that the courts go further than referring to binding instruments by invoking even ‘soft law’ in their judgments. The courts have also frequently relied on and cited the African Charter on the Rights and Welfare of the Child (ACRWC).³

The Constitution provides that the court *must* consider international law, and *may* consider foreign law, when interpreting the Bill of Rights.⁴ Foreign law would include examples of legislative approaches from other countries, legal research and, in particular, foreign case law.

In the field of children’s rights the Constitutional Court has relied far less on foreign law than international law. There are examples, which will be considered in this chapter, where the Court has made reference to Canadian, United States and European Union case law, but it has been sparing compared to the significant attention paid to the international law. This may point to the fact that the South African Bill of Rights is unique in certain respects and has a powerful children’s rights clause. Case comparisons with foreign jurisdictions are hence arguably of limited application. The Constitutional Court seems confident to build its own child rights jurisprudence, but roots it in international and regional law.

4 Children and Children’s Rights Organisations as Litigators

The South African Constitution takes a broad approach to the question of who may bring cases before the courts. Section 38 of the Constitution, which applies where someone is alleging that a right in the Bill of Rights has been or may be

¹ S 233.

² S 39(1).

³ South Africa ratified the ACRWC in 2000.

⁴ S 39(1).

infringed, sets out the rules on standing. A matter may be brought by (i) persons acting in their own interest, (ii) persons acting on behalf of other persons, (iii) persons acting on behalf of a group or class of persons, (iv) persons acting in the public interest, and (v) associations acting in the interests of their members.

It is therefore evident that under South African law children can act in their own name and litigate all the way to the Constitutional Court. The case of *MEC for Education, KwaZulu-Natal v. Pillay*⁵ was brought by the mother of Sunali, a teenage girl, who claimed that her daughter had been discriminated against on the grounds of culture and religion because she wore a nose stud contrary to school rules. The respondent claimed that the fact that Sunali had not given evidence nor deposed to any affidavits was fatal to the applicant's case. The Court found that this was not fatal, even though it would have liked to hear from Sunali herself. Langa CJ observed as follows⁶:

It is always desirable, and may sometimes be vital, to hear from the person whose religion or culture is at issue. That is often no less true when the belief in question is that of a child. Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf.

Langa CJ also referred to Sachs J's 'postscript' to *Christian Education SA v. Minister of Education*,⁷ a case about corporal punishment in schools. Noting that the Court would have liked to hear from the children, Sachs said their 'actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure'. These judgments demonstrate the Constitutional Court's understanding of children's right to participate.

In the case of *Centre for Child law v. Minister of Justice and Constitutional Development and Others (NICRO as amicus curiae)*,⁸ section 38 of the Bill of Rights was invoked. The Centre brought the application in its own interest, on behalf of all 16- and 17-year-old children at risk of being sentenced under the new provisions on minimum sentences, and in the public interest. In the High Court the Minister had unsuccessfully challenged the Centre's legal standing, contending that the issues were academic. In the Constitutional Court the Minister abandoned this aspect of the challenge. Cameron J approved of this, and made the following clarification:

Although the Centre did not act on behalf of (or join) any particular child sentenced under the statute as amended, its provisions are clearly intended to have immediate effect on its promulgation. So the prospect of children being sentenced under the challenged provisions was immediate, and the issue anything but abstract or academic. The Centre's stated focus is children's rights, and in this case it has standing to protect them. It was thus

⁵ 2008 (1) SA 474 (CC).

⁶ Para. 56.

⁷ 2000 (4) SA 757 (CC).

⁸ 2009 (6) SA 632 (CC).

entitled to take up the cudgels. To have required the Centre to augment its standing by waiting for a child to be sentenced under the new provisions would, in my view, have been an exercise in needless formalism.⁹

The broad approach to standing has been important in children's rights cases. By contrast, an application to the Northern Ireland Court of Appeal brought by the Commissioner for Children to develop the common law to exclude the defence of reasonable chastisement of children was rejected due to lack of standing because she could not be classed as a victim under the UK Human Rights Act (*Northern Ireland Commissioner for Children and Young Peoples' Application*).¹⁰

Another favourable factor is the courts' approach to costs in constitutional litigation. The rule is that where the litigation raises genuine constitutional issues, the applicants are not at risk of a costs order against them if they are unsuccessful; if successful, they are entitled to costs [*Biowatch v. Registrar Genetic Resources (Centre for Child Law & Others as Amici Curiae)*].¹¹ Thus, a broader range of public interest litigants, including children and child rights organisations, can approach the courts in order to enforce and advance the rights in the Bill of Rights.

In the early days of litigation under the Bill of Rights, several cases were brought by adults in which children's rights were invoked but were not necessarily central (Sloth-Nielsen 2002). During the second decade of litigation, children's rights organisations became more active in bringing litigation before the courts (Sloth-Nielsen and Mezmur 2008). Interventions by various *amici curiae*—friends of the court—have proved to be an effective vehicle, because in South Africa the *amicus curiae* plays a significant role and can shape the outcome of a case through written and oral submissions (Budlender 2006).

5 Cases Relying on the CRC

South African courts have embraced the CRC to such an extent that it goes beyond the scope of this chapter to discuss all of the many judgments referring to it. The chapter therefore focuses on Constitutional Court judgments, as well as those of High Courts where the reasoning was directly influenced by the CRC.

The Constitutional Court has clearly stated that section 28 of the Constitution must be seen as responding in an 'expansive' way to the international obligations as a State party to the CRC, and that the CRC has become the international standard against which to measure legislation and policies.¹² In what follows, the cases that have relied on the CRC are discussed under a number of themes. Dominant among them, and cutting across private and public law cases, is the principle of the

⁹ Para. 18.

¹⁰ 2009 NICA 10.

¹¹ 2009 (6) SA 232 (CC).

¹² *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), para. 16.

best interests of the child. Other crucial subject areas are children's right to family care and alternative care, socioeconomic rights, the right to education, and children in the criminal justice system.

5.1 Best Interests

The best interests principle has been an established principle in South African law since the 1940s,¹³ but its influence was previously limited to family law and care proceedings. It is clear that section 28(2), following the lead of the international instruments,¹⁴ expands the meaning and application of section 28(2) to all aspects of the law that affect children.

The Constitutional Court has delivered several important judgments regarding the best interests of the child and what the principle means. In *Minister of Welfare and Population Development v. Fitzpatrick and Others*¹⁵ the Court declared section 18(4)(f) of the Child Care Act¹⁶ invalid because it prohibited the adoption of a South African child by non-citizens. The Court found the law too restrictive because it limited the best interests of the child, which would sometimes be achieved through the child's being adopted by non-South African parents. The Fitzpatrick case made it clear that section 28(2) does not only refer to the rights enumerated in section 28(1) but that section 28(2) is also a right, not merely a guiding principle.

In addition to being a self-standing right, it also strengthens other rights. Thus, the Constitutional Court has drawn the best interests of the child into cases pertaining to the right to family or parental care¹⁷; international child abduction¹⁸; child pornography¹⁹; the right to housing or shelter²⁰; adoption of children by unmarried fathers,²¹

¹³ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

¹⁴ Art. 3 of the CRC, art. 4 of the ACRWC.

¹⁵ 2000 (3) SA 422 (CC).

¹⁶ Act 74 of 1983.

¹⁷ *Grootboom v Government of South Africa* 2001 (1) SA 46 (CC); *Bannantyne v Bannantyne* 2003 (2) SA 363 (CC); *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); *C and Others v Department of Health and Social Development and Others* 2012 (2) SA 208 (CC).

¹⁸ *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

¹⁹ *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC).

²⁰ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC). See also *Van den Burg* 2012 (2) SACR 331 (CC) where the court applied best interests in a case where parents were facing forfeiture of their home to the state because they refused orders to stop operating a tavern on the premises.

²¹ *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC).

by same-sex couples²² and by foreign couples²³; inheritance under customary law²⁴; the right to access health care in the form of preventive anti-retroviral medicines²⁵; the right to social assistance²⁶; the right of children to privacy and dignity²⁷; the testimony of child victims and witnesses²⁸; the rights of children to be detained only as a measure of last resort²⁹; and the right of children to a basic education.³⁰

In the case of *AD v. DW*³¹ the Court weighed up the best interests of the child against other important international law principles pertaining to inter-country adoption. In the Supreme Court of Appeal, the majority judgment had given substantial weight to the principle of subsidiarity encapsulated in article 21(2) of the CRC, which requires that sufficient efforts must be made to find a suitable family placement for a child in his or her country of origin before proceeding with inter-country adoption. This principle had not been followed in the case at hand. It is interesting that the *AD v. DW* case is one where the Court looked at foreign case law, in this instance in an attempt to better understand the concept of subsidiarity. The Court referred to the EHRR case of *Pini and others v. Romania*³² and to a judgment of the British Columbia Supreme Court, *J (AL) v. M (SJ); ALJ v. SJM*.³³ However, little turned on the foreign law because ultimately the Court's approach was that, as important as the subsidiarity principle is, it is less important than the best interests of the child.

This decision demonstrates the power of the best interests clause in South Africa's Bill of Rights. Moreover, the Court found that the best interests of each child must be examined on an individual basis and not in the abstract. Sachs J stressed that '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 each case'.³⁴

²² *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC).

²³ *AD v DW (Centre for Child Law as Amicus Curiae, Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC).

²⁴ *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 480 (CC).

²⁵ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

²⁶ *Khosa v Minister of Social Development; Mahaule v Minister of Social Development* 2004 (6) SA 505 (CC).

²⁷ *Johncom Media Investments Limited v M (Media Monitoring Project as Amicus Curiae)* 2009 (4) SA 7 (CC).

²⁸ *Director of Public Prosecutions, Transvaal v Minister of Justice* 2009 (2) SACR 130 (CC).

²⁹ *Centre for Child Law v Minister of Justice (NICRO as Amicus Curiae)* 2009 (6) SA 632 (CC).

³⁰ *Governing Body of the Juma Masjid Primary School v Essay NO (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC).

³¹ Note 23 above.

³² 2005 40 EHRR.

³³ (1994) 98 BCLR (2d) 277.

³⁴ Note 23 above, para. 55.

Section 28(2) has also been used to limit rights. *Sonderup v. Tondelli*³⁵ dealt with the rule of ‘peremptory return’ in the Hague Convention on the Civil Aspects of International Child Abduction, meaning that as a general rule children must be returned to their countries of origin as soon as possible so that the courts in those countries can deal with the legal disputes concerning care and contact. The rule was found by the court to satisfy the long-term best interests of all children. If a child’s short-term best interests were limited by the Hague Convention, such limitation would be justifiable in terms of section 36 of the Constitution, largely because of the important purpose of the Convention to protect all children from the negative effects of their being unlawfully moved across international borders.

In *De Reuck v. Director of Public Prosecution (Witwatersrand Local Division)*³⁶ the Constitutional Court made it clear that the word ‘paramount’ in section 28(2) does not mean that children’s best interests can never be limited by other rights. The High Court judgment of *De Reuck* had found that a child’s best interest is the single most important factor to be considered when balancing or weighing competing rights concerning children and that all competing rights must defer to the rights of children unless unjustifiable.³⁷ This was overruled by the Constitutional Court. To say that section 28(2) of the Constitution ‘trumps’ other provisions of the Bill of Rights was ‘alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system’.³⁸

The Court thus found that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to reasonable and justifiable limitations and that it was over-simplistic to interpret the child’s best interests as a concept always overriding other competing rights. However, in the *De Reuck* case the Court found that while, on the face of it, the law banning child pornography limits rights to privacy and freedom of expression, this limitation is justifiable due to the importance of the purpose of protecting children’s best interests.

The meaning of ‘paramount importance’ was expanded upon in *S v. M.*³⁹ A single mother of three children was facing a short term of imprisonment for fraud. She appealed, claiming that when sentencing primary caregivers the courts should take into account the effects of imprisonment on the caregivers’ children. The competing rights, therefore, were, on the one hand, children’s rights to parental care and consideration of best interests, and, on the other, the rights of the community to be protected from crime.

Sachs J pointed out that the very expansiveness of the paramountcy principle appears to promise everything but deliver little in particular. The best interests concept is indeterminate, resulting in various interpretations. Sachs J went on to

³⁵ 2001 (1) SA 1171 (CC).

³⁶ 2004 (1) SA 406 (CC).

³⁷ 2003 (3) SA 389 (W), para. 10.

³⁸ Note 19 above, para. 55.

³⁹ Note 12 above.

say that it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. The determination of best interests will depend on the circumstances of each case, and this is not a weakness but a strength. A truly child-centred approach requires an in-depth consideration of the needs and rights of the particular child in his or her ‘precise real-life situation’; applying a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child.

A more difficult question is establishing what Sachs J referred to as ‘an operational thrust for the paramountcy principle’. *S v. M* went further than any previous judgment in explaining paramountcy, though it still defines the principle more by stating what it is not rather than what it is (Skelton 2008). It is not an ‘overbearing and unrealistic trump’, and it cannot 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’. Sachs J concluded that ‘the fact that the best interests of the child are paramount does not mean that they are absolute’. Acknowledging these realities is important because if the best interests principle is spread ‘too thin’, it risks becoming devoid of meaning instead of promoting the rights of children as it was intended to do.⁴⁰

The *S v. M* case has attracted worldwide attention (Robertson 2012), and has been followed in South African law in a range of criminal matters relating to sentencing and bail decisions (Skelton and Courtenay 2012). The Constitutional Court’s analysis of best interests and paramountcy has been applied in a wide array of cases across the public law/private law spectrum. In a similar case heard in 2011, the Constitutional Court narrowed the scope of the judgment to single primary caregivers in a case where a mother still living with the children’s father was facing prison. The Court nevertheless saw fit to appoint a curator *ad litem* to investigate and report on the children’s circumstances.

In *Centre for Child Law v. Minister of Justice*, which will be discussed in more detail later, Cameron J made the point that the constitutional injunction that a ‘child’s best interests are of paramount importance in every matter concerning the child’ does not entirely preclude sending child offenders to jail, though this must always be done as a measure of last resort. According to Cameron J, paramountcy means that ‘the child’s interests are “more important than anything else”, but not that everything else is unimportant’.

5.2 Family Care, Parental Care and Appropriate Alternative Care

Many children in South Africa live in the care of extended family members rather than their biological parents, which explains the rather unusual arrangement of section 28(1)(b) placing ‘family care’ in front of ‘parental care’. The Bill of Rights

⁴⁰ Para. 42.

does not include a right to family life, although the courts have forged such a right using the right to dignity.⁴¹ The people who do have a clearly expressed right to family are children, making the concept of family life in the Bill of Rights a uniquely child-centred one. Section 28(1)(b), like the best interests right, has been used frequently by the courts in cases relating to parenting and same-sex couples, to interventions by the state that separate families (for example, deportation, imprisonment and forfeiture of the family home), and to drawing the line regarding the state's obligation on socioeconomic rights.

An important case regarding separation of children from their parents rested on a lacuna in the Children's Act to do with automatic review of decisions to remove children from their parents where there are concerns that they are in need of care and protection.⁴² The factual context was that children were removed from parents who were working or begging at the side of the road. The parents approached the High Court for relief, and their children were returned to them. They further challenged the law as being unconstitutional because it did not allow for automatic review of decisions by social workers or police to remove children from their parents. They based their case in part on article 9 of the CRC (and article 19(1) of the ACRWC) to ensure that a child is not separated from his or her parents unless necessary for the best interests of the child and subject to judicial review, with an opportunity to participate in the proceedings.

The Court split three ways. The majority of the Constitutional Court upheld the challenge, finding that the law was unconstitutional insofar as it failed to provide judicial review of decisions to remove. The majority judgment, penned by Yacoob J, held that while removal of children was not per se an infringement of the right to parental care, removal without the opportunity to review did amount to a rights violation.

A separate but concurring judgment, written by Skweyiya J, went further, finding that any removal of a child is, on the face of it, a rights violation but one which may be reasonable and justifiable depending on the facts; however, it could never be reasonable if it was not subject to immediate review by the courts. Skweyiya J referred to article 19(1) of the ACRWC and article 9(1) of the CRC dealing with the separation of a child from parents, and the conditions related thereto. The judge also referred to the Canadian Supreme Court case of *New Brunswick [Minister of Health and Community Services v. G(J)]*,⁴³ which held that parents' participation is essential in hearings to determine whether the state should take children into care. In addition, the Constitutional Court noted that although South African law allows a general right of review of any administrative action, this would be too onerous for parents and children, and review should therefore happen automatically, not only at the behest of the affected parties.

⁴¹ *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC); *Booyesen v Minister of Home Affairs* 2001 (4) SA 485 (CC).

⁴² *C and Others v Department of Health and Social Development and Others* 2012 (2) SA 208 (CC).

⁴³ 1999 (3) SCR 46.

A minority judgment written by Jafta J gives rise to some concern with regard to international law. While recognising that the international and regional instruments are binding, the judge found that although the right of review of such decisions is clearly set out in the CRC, there is no specific right to review of removal decisions set out in section 28 of the Constitution. The minority thus found that a constitutional challenge could not be mounted on that basis.

It is submitted, however, that this is a narrow, legalistic interpretation of how the Bill of Rights' provisions should be read against international law. Children do have the right to family and parental care in the Bill of Rights. All persons have a right to just administrative action as well as the right to be heard. It is the amalgamation of these rights which indicates why the right of review must be safeguarded in law. In the minority view, the current law had sufficient safeguards to prevent wrongful removal. However, the facts of the case clearly demonstrated that, despite the legal provisions, social workers and police had violated the rights of children and parents in the manner by which they removed the children; the facts also showed that no automatic right of recourse was open to these parents and children. The apparently protective law was, in other words, ineffective.

The majority of the Court correctly saw that the right of automatic review was intrinsic to a fair process that allows children's best interests to be considered properly. The law was therefore changed to incorporate provisions requiring that the matter be brought before court on the first court day after removal and that the parent and child be notified and be present. In future this would allow parents (and children of sufficient age and maturity) an opportunity to ask the children's court to reconsider the decision to remove the child, and, where appropriate, reverse the order.

5.3 Children's Socioeconomic Rights

5.3.1 Children Living with Their Parents

One of the Constitutional Court's most famous judgments is *Government of the Republic of South Africa v. Grootboom*,⁴⁴ which concerned a group of people who challenged the government's policy on housing. They based their argument in part on the fact that some of the families had children, and that children, in terms of section 28(1)(c), have a right to shelter which, unlike the right to housing in section 26, is unqualified; this means that it does not contain terms such as 'progressive realisation' or 'within available resources'.

The Constitutional Court began its examination of the question whether children had a direct and immediately enforceable right by considering the CRC. Yacoob J, writing for a unanimous Court, found that the CRC seeks to impose obligations on States parties to ensure the proper protection of children's rights. The court found that the state delineates these obligations by ensuring that parents fulfil their

⁴⁴ 2001 (1) SA 46 (CC).

obligations in relation to their children. This appears to be linked to article 18 of the CRC which places the primary responsibility to care for children on their parents. The court found that the obligation to provide shelter therefore falls first to parents.

In turn, the obligations on the state in relation to children who live with their parents or families are limited to providing the legal framework to prevent abuse and neglect, and, more broadly, to providing families with access to housing and other services. The full obligation would rest on the state only where parental care was ‘lacking’. The Court did in fact find that all the families had a right to housing, a right to be realised progressively when sufficient funds became available, and that the government’s plan was unreasonable. However, it declined to prioritise families with children, as it was of the view that children should not be used as ‘stepping stones’ for the realisation of the socioeconomic rights of their parents.

The *Grootboom* judgment left space to explore the possibility that children’s socioeconomic rights would be directly and immediately enforceable (and not subject to progressive realisation) if they were ‘lacking parental care’. The *Treatment Action Campaign (TAC)* case⁴⁵ dealt with access to treatment to avoid mother-to-child transmission of HIV-AIDS. The Court held that the state is obliged to ensure the protection of children’s section 28 rights when the implementation of the right to parental or family care is lacking—and the *TAC* case dealt with children born in public hospitals to indigent mothers.

So, whilst *Grootboom* had ruled that children living with their parents would have to look to their parents rather than the state for the fulfilment of their section 28(1)(c) rights, in the *TAC* case the Court found that, although these children were living with their mothers, the latter were not able to provide medical treatment to them, and that it was the state’s responsibility to do so.

5.3.2 Children Not Living with Their Parents

Since the judgments of *Grootboom* and *TAC*, the Centre for Child Law brought two matters before the High Courts which developed the law in this regard. The first case⁴⁶ dealt with unaccompanied foreign children who had come to South Africa from neighbouring countries on their own. The case determined that they were without parents and were therefore immediately entitled to social services. The second dealt with children in the care system who had been placed by a Court order in a school of industries, a secure residential care centre where they were physically and psychologically neglected and abused.⁴⁷ The Court made a series of orders to ensure their safety and protection. Although the state argued that it had insufficient funds, the Court was adamant that children who are wards of the state have an enforceable right to social services.

⁴⁵ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (CC).

⁴⁶ *Centre for Child Law v. Minister of Home Affairs* 2005 (6) SA 50 (T).

⁴⁷ *Centre for Child Law v. MEC for Education, Gauteng* 2008 (1) SA 223 (T).

In both cases the Court laid emphasis on the fact that if children are not living with their parents, they have a direct and immediate claim on the state for the fulfilment of their socioeconomic rights. The CRC was specifically invoked in the case about unaccompanied foreign children, with the judge pointing out that it affords every child the right to health, social security and education.

5.3.3 Education

An important socioeconomic right for children is the right to education. Until recently, education litigation has centred mainly around governance questions regarding admissions and language policy. However, in recent years the focus of litigation has moved to direct consideration of the right to a basic education, including issues of availability and accessibility. The right to education is included in the Bill of Rights at section 29, which guarantees everyone the right to a basic education. The section does not include any internal qualifiers such as ‘progressive realisation’ or ‘within available resources’.

In *The Governing Body of the Juma Musjid Primary School and another v. Essay NO and Others (Centre for Child Law and Another as Amici Curiae)*,⁴⁸ the Court interpreted section 29(1)(a), as follows (at para. 37):

It is important, for the purposes of this judgment, to understand the nature of the right to ‘a basic education’ under section 29(1)(a). Unlike some of the other socioeconomic rights this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.

The Court also contextualised section 29(1)(a) within the broader international and regional human rights framework. Nkabinde J referred to the CRC, the ACRWC, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, as well General Comment 13 issued by the Committee on Economic, Social and Cultural Rights. She quoted articles 28 and 29 of the CRC in full in footnotes. In particular, she drew attention to the fact that article 29(1) of the CRC spells out that the right to a basic education is aimed at promoting and developing a child’s personality, talents and mental and physical abilities to her or her fullest potential.

In a different case, an organisation called the Western Cape Forum for Intellectual Disability⁴⁹ challenged the constitutionality of a policy that excluded children with severe intellectual disabilities from accessing education. The High Court invoked article 23 of the CRC, pointing out the obligations it creates to provide properly for disabled children. The Court also quoted from article 13(1) of

⁴⁸ Note 30 above.

⁴⁹ *Western Cape Forum for Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC).

the ACRWC, which provides the right of mentally or physically disabled children to special protection measure that ensure their dignity and promote self-reliance and active participation. The court handed down a structured interdict requiring a plan and regular reports to ensure the required programmes would be provided.

In South Africa, work on the justiciability of children's rights to education is at a relatively early stage of development. The next few years will no doubt see cases being brought on the complex issues of quality and equality in education (Skelton 2012). The country's education system is failing to produce the required results (Spaull 2013), making this a crucial area of work, one in which international law and foreign law are likely to be highly influential.

5.4 Children in the Criminal Justice System

5.4.1 Child Offenders

The South African Courts have paid particular attention to articles 37 and 40 of the CRC, together with the non-binding instruments relating to juvenile justice. A raft of cases has incorporated these into South African jurisprudence.⁵⁰

In an early case of the *Constitutional Court*, *S v. Williams*,⁵¹ judicial whipping of child offenders was declared unconstitutional. The Court did consider foreign case law,⁵² and noted judgments from neighbouring countries.⁵³ It went on to remark that it was necessary to follow a purposive approach in South Africa, a country which had been 'subjected to an unprecedented wave of violence' and where the political negotiations that resulted in the Constitution demonstrated a rejection of violence.⁵⁴

In particular, the courts have paid attention to the principle incorporated in section 28(1)(g) of the Constitution (modelled on article 37(b)) that the detention of children should be a measure of last resort and that, if they are detained, it should be for the shortest appropriate period of time.

The *Centre for Child Law v. Minister of Justice*⁵⁵ was a challenge to the constitutionality of the minimum sentences law, insofar as it applied to 16- and 17-year-olds. The Constitutional Court held that the minimum sentencing legislation should

⁵⁰ *S v Z en vier ander sake* 1999 (1) SACR 427 (E); *S v Kwalase* 2000 (2) SACR 135 (C); *S v Nkosi* 2002 (1) SA 494 (W); *Director of Public Prosecutions, Kwa-Zulu Natal v P* 2006 (1) SACR 243 (SCA) and *S v N* 2008 (2) SACR 135 (SCA); *S v B* 2006 (1) SACR 311 (SCA).

⁵¹ 1995 (3) SA 632.

⁵² *Tyrer v United Kingdom* (1979–1980) 2 EHRR 1; *Ireland v United Kingdom* (1979–1980) EHRR 25; *Cosans v United Kingdom* (1980) 3 EHRR 531 (particularly the dissenting judgment of Klecker J).

⁵³ *Ex Parte Attorney-General, Namibia: In re corporal punishment by organs of state* 1991 (3) SA 76 (NmSC); *S v F* 1989 (1) SA 460 (ZHC).

⁵⁴ *S v Williams* par 51 and 52.

⁵⁵ 2009 (6) SA 632 (CC).

not apply to children aged 16 and 17 years old. The majority of the Constitutional Court found that the minimum sentencing legislation limited the discretion of sentencing officers by directing them to hand down long sentences (including life imprisonment) as a first resort. Furthermore, the legislation discouraged the use of non-custodial options, prevented courts from individualising sentences, and was likely to cause longer prison sentences. All of these features of the law amounted to an infringement of child offenders' rights in terms of section 28(1)(g).

In addition to relying on article 37(b) on which the section is based, the Court found that the following instruments 'count in favour of the view that minimum sentences should not be applied to child offenders': the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs); and the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines). The court specifically emphasised Rule 17(1)(a) of the Beijing Rules, which in relation to sentencing provides that '[t]he reaction taken shall always be in proportion not only to the circumstances and gravity of the offence but also to the circumstances and needs of the juvenile as well as the needs of society'. The court also quoted article 40(1) of the CRC in full in a footnote.

From all of these instruments the Court distilled the following principles: proportionality; imprisonment is a measure of last resort and for the shortest period of time; children must be treated differently from adults; and the well-being of the child is the central consideration.⁵⁶ The international principles are 'amply' embodied in the Bill of Rights, which leads directly to the conclusion by the Court that the law was unconstitutional.

The Court's interpretation of the last resort principle is interesting. The judgment pointed out that the Constitution does not prohibit Parliament from dealing effectively with child offenders—the fact that detention must be used only as a last resort in itself implies that imprisonment is sometimes necessary. However, the Bill of Rights mitigates the circumstances in which such imprisonment can happen. It must be a last (not a first or intermediate) resort, and it must be for the shortest appropriate period. The Court stated:

If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time.⁵⁷

The Court referred to the US Supreme Court case of *Roper v. Simmons*⁵⁸ to support the contention that children are less culpable than adults and that they are more susceptible to outside pressures, including peer pressure, than adults. It went on to cite with approval the Canadian Supreme Court case of *R v. B (D)*⁵⁹, in which the

⁵⁶ Para. 61.

⁵⁷ Para. 31.

⁵⁸ *Roper, Superintendent, Potosi Correctional Centre v Simmons* 543 US 551 (2005).

⁵⁹ 2008 SCC 25.

Court allowed a challenge based on the Canadian Charter of Rights to a law sentencing young offenders to adult penalties in serious cases unless the young offender could justify why an adult sentence should not be imposed. In this case, foreign law, as well as international law, was used to good effect.

Another criminal case that relied on the CRC dealt with the requirement that children should be tried in a closed court environment.⁶⁰ The case was a murder trial where the victim was an infamous right-wing leader. One of the two charged was a 15-year-old boy. The media wanted to sit in on the trial due to enormous public interest in the matter. The general rule is that children's trials must be held in private, though the law allows applications to be made. Relying on article 40 of the CRC, the judge upheld the general principle that for the child accused the courtroom should be closed and entry be permitted only in exceptional circumstances. The Court allowed the media to watch the trial via closed-circuit television, but took care to ensure that the child's identity was protected.

5.4.2 Child Victims

In a case dealing with testimony by child victims and witnesses,⁶¹ the Court placed significant weight on international law. First, it reiterated that section 28(2) (best interests) was no doubt inspired by international and regional instruments. The court pointed out that, in language substantially similar to section 28(2), article 3(1) of the CRC proclaims that in all actions concerning children, whether undertaken by public or private institutions, courts of law, administrative authorities or public bodies, the best interests of the child will be 'a primary consideration'. The ACRWC is similar but refers to 'the primary consideration'. The court then quoted General Comment 5 of the UN Committee on the Rights of the Child, which states that the principle was introduced because children, due to their relative immaturity, are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect them (para. 13).

The Court proceeded to highlight General Comment 3 of the UN Committee, which says the following about article 3:

Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are and will be affected by their decisions and actions.

The ECOSOC Guidelines on Justice Matters involving Child Victims and Witnesses of Crime were used by the Court to gain a better understanding of the special protection and assistance children need in order to prevent the hardship and trauma that may arise from their participation in the criminal justice system. The Court concluded by setting its own guidelines, based on international law, on how the courts should deal with child victims' testimony in the future.

⁶⁰ *Media 24 Ltd v National Prosecuting Authority: In re S v Mahangu and another* 2011 (2) SACR 321.

⁶¹ *Director of Public Prosecutions, Transvaal v Minister of Justice* 2009 (2) SACR 130 (CC).

6 Using the CRC and ACRWC Conjunctively

In some cases the courts have considered both the CRC and the ACRWC and utilised small differences in wording to the advantage of children (Skelton 2009). In the case of *Bhe*,⁶² which dealt with the rule that girls and children born outside of marriage would be overlooked in intestate succession in favour of male heirs born within marriage, the wording of article 3 of the ACRWC (which includes non-discrimination on the basis of not only the child's status but also that of the parents) was pivotal to the Court's decision that the marital status of parents could not be a basis for the discrimination against children.

In *S v. M*,⁶³ the Court relied on article 30 of the ACRWC for its finding that the best interests of the child should be central to a determination of whether to send a primary caregiver to prison. Article 30 has no counterpart in the CRC. It provides that states shall undertake to provide special treatment to mothers who have been accused or found guilty of infringing the penal law and shall in particular ensure that a non-custodial sentence will always be the first consideration when sentencing such mothers. The Court found this clause highly persuasive.⁶⁴

7 Conclusion

The judgments discussed in this chapter showcase the extent to which the Constitutional Court's jurisprudence has embraced the CRC, together with General Comments of the UN Committee and other soft law relating to children's rights. In addition, the courts tend to consider the CRC and ACRWC together, and at times the wording of one of them is able to fill a gap left by the other. The ability to draw on both the CRC and the ACRWC in this way, and to fill in detail through reference to soft law and general comments, gives South African child rights litigators a rich store-cupboard from which to draw. The courts have utilised foreign law, though to a lesser extent than it has international law. This may be due to the differences between foreign law and the South African Bill of Rights, with its strong emphasis on best interests of the child. The Constitutional Court shows signs of being very comfortable to chart its own jurisprudential path in child law rather than follow the lead of other jurisdictions. However, it bases its interpretation of the Bill of Rights on a close reading of international child rights law.

The work of child rights litigators is evident in the abovementioned discussion: in many instances it is their efforts which have delivered the CRC to the doors of the courts. It is gratifying that, as evidenced by the judgments, those doors have been opened wide to receive and disseminate international children's rights concepts.

⁶² Note 23 above.

⁶³ Note 11 above.

⁶⁴ Para. 31.

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