

Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?

R Songca*

Abstract

The article first traces the development of the generally accepted rule that children have rights, and how the Children's Act embodies this notion, specifically in relation to parental responsibilities and rights and the best interests of the child. Secondly, the manner in which African customary law finds expression in the Children's Act is also explored. It is argued that the combination of historically Western and African customary law values in the Children's Act reflects a new approach to children's rights, which has the potential of transforming the interpretation and application of the law relating to children. In the final instance, the article investigates some of the practical realities of children in South Africa. In this regard, the article makes specific recommendations regarding the phenomena of child-headed households and street children.

INTRODUCTION

It is generally understood that as human beings, children have a certain moral status.¹ As human beings, for example, they should not be abused or used directly in armed conflict. In the same vein, it is accepted that there are certain privileges available to adults which cannot be extended to children because of their youth and immaturity. For instance, in many jurisdictions, children below a certain age are by law not allowed to vote, buy alcohol, or marry. In South Africa, the age of majority is eighteen years.² A determination of what children can or cannot do, or what should or should not be done in relation to children is usually couched in a rights terminology: Do children have rights? If so, what rights do children have? The idea that

* LLB, LLM (UKZN); LLM (Georgetown Law School); LLD (UP). Associate Professor and Deputy Executive Dean: College of Law, University of South Africa.

¹ Achard *Children's rights* (2006) 1.

² *Id* at 1; Fortin *Children's rights and the developing law* (2009) 3; chapter 1 of the Children's Act 38 of 2005 stipulates eighteen as the age of majority in South Africa.

children have rights is not a new one; philosophers and lawyers have raised questions relating to the rights of children for many years.³

The purpose of this article is to show how the traditionally liberal Western notion that children have rights, has found expression in the Children's Act,⁴ specifically in relation to (i) parental responsibilities and rights; (ii) the best interests of the child standard; and (iii) how the customary law, relating to specific issues that involve children, by contrast is reflected in the Children's Act, culminating in a finely nuanced and unique Act that embraces the best of the different traditions. First considered is a brief exposition of the historical origins of children's rights and the debates that ensued there from, followed by a brief overview of how the remnants of these debates have manifested themselves over time in our legislation and the Constitution.

THE ORIGINS OF CHILDREN'S RIGHTS

Despite the fact that children have always been part of society,⁵ attitudes towards children have not always been the same.⁶ Human existence nowadays is broadly divided into two parts, namely, childhood and adulthood.

Some writers⁷ argue that the image of childhood (child images) can only be properly understood if perceived from a historical perspective. History is essential in that it shows repeated patterns and wide disparities in the way children have been treated and been expected to behave at different periods of time and in different cultural settings.⁸ Although historians hold different views regarding these child images, they nevertheless point to various significant approaches to children.⁹ For example, indifference towards children seems to have been the dominant attitude in the west during the Middle Ages.¹⁰ History reveals that during the fourth to the thirteenth century, it was not uncommon for adults or parents to abandon and kill unwanted babies.¹¹ It was only in the sixteenth century that adults began to

³ Farson *Birthrights* (1974) 20–50; Human 'The theory of children's rights' in Davel (ed) *Introduction to child law in South Africa* (2000) 152–157; Fortin n 2 above at 4.

⁴ 38 of 2005. The Children's Act came into full operation on 1 April 2010.

⁵ Verhellen *Convention on the Rights of the Child* (2000) 11.

⁶ *Ibid.*

⁷ Holt *Escape from childhood* (1974) 8; De Mause *The history of childhood* (1995) 1.

⁸ Verhellen n 5 above at 11.

⁹ *Ibid.*

¹⁰ Verhellen n 5 above at 12.

¹¹ *Ibid.*

gradually change their attitudes towards children.¹² This change of attitude towards children culminated in the emergence of children's rights movements in the middle of the nineteenth century.¹³

Issues around children's rights have over time been approached from different viewpoints. For example, philosophers of the seventeenth and the eighteenth centuries argued that a person could not be regarded as a holder of rights unless he or she had the necessary competence to exercise a choice over the exercise of that right. This viewpoint is still found in modern children's rights theory and it forms the basis of the wills theory.¹⁴ The wills theory sees a right as the protected exercise of a choice, in other words, the competence to enforce the right from another person, which children, for obvious reasons, are unable to achieve.

Liberationists support the idea of granting children rights. Holt,¹⁵ one of the most important exponents of the children's liberation movement, argues that the same rights, duties and responsibilities that apply to adults should also be relevant to children.¹⁶ In terms of a liberationists view, children should exercise their rights when and if they choose to, in precisely the same way as adults do.¹⁷ Critics¹⁸ of this view, however, argue that liberationists fail to recognise the physical, mental and cognitive limitations of young children which cannot be compared to those of adults.

Proponents¹⁹ of the interest theory, on the other hand, argue that rights are not determined by the moral capacity to act rationally. In terms of this theory, children as human beings have rights if their interests are the basis for having rules, which require others to behave in certain ways with respect to these rules. The interest theory is premised on a more general conception of

¹² *Ibid.*

¹³ Holt n 7 above at 16.

¹⁴ Hart *Bentham on legal rights* in *Oxford essays in jurisprudence* (1973) 171–201; Summer *The moral foundation of rights* (1987); Steiner *An essay on rights* (1994).

¹⁵ Holt n 7 above at 18; Fortin n 2 above at 4–7.

¹⁶ For Holt these rights should include the right to vote, to own and sell property, to use drugs and the right to choose for oneself *etcetera*. Holt's sentiments are supported by Farson (n 3 above), another liberationist, who believes that self-determination is at the heart of the matter.

¹⁷ Fortin n 2 above at 5–6; Kruger 'The evolving capacities of children and the (new) age of majority in South African law' (inaugural lecture 2010 Unisa).

¹⁸ Mill, discussed by Achard *Children: rights and childhood* (2004) 77–78; Songca & Le Roux 'The evidence of young children: establishing the truth in South African criminal courts' 2004 *SACJ* 319–323.

¹⁹ McCormick *Legal right and social democracy: essays in legal and political philosophy* (1982) 154–166.

rights, and is consequently better suited to accommodating human rights and children's rights.²⁰

Today it is generally accepted that children have rights and a body of rules informing these rights in the form of legislation has been developed in many jurisdictions. Some of these rights for children and rules embody theoretical frameworks developed by early jurists.²¹ Initially, there was no comprehensive or specific law or legislation dealing with children in South Africa.²² Currently, children's claims, duties and responsibilities are incorporated in the Constitution²³ and various statutes,²⁴ including the Children's Act. South Africa has also ratified a number of international instruments relating to children.²⁵

²⁰ Bentley 'Can there be any universal children's rights?' 2005 *International Journal of Human Rights* 107; See Kramer, Simmonds & Steiner *A debate over rights* (1998) for an in-depth discussion on the debate between choice and interest theory.

²¹ For example children's rights to self-determination as touted by Farson have found expression in the UN Convention on the Rights of the Child, and the Constitution of the Republic of South Africa (1996). Holt's welfare rights such as the right to education and, the right to housing are also embodied in the Constitution.

²² For example, issues relating to children could be dealt with in terms of the Domestic Violence Act 116 of 1998; the Sexual Offences Act 23 of 1957; the Children's Act 38 of 2005 and certain provisions of the Criminal Procedure Act 51 of 1977.

²³ Section 28 (1) provides that every child has the right –
'(1) to a name and nationality from birth; to family care or parental care, or to 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. Section 28 (2) states that '[a] child's best interests are of paramount importance in every matter concerning the child. A child refers to a person under eighteen years of age (s 28(3)).

²⁴ Recent legislation on the protection of children's rights includes the Children's Act 38 of 2005 (which replaced the Child Care Act 74 of 1983); the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the Child Justice Act 75 of 2008.

²⁵ Eg, South Africa ratified the United Nations Convention on the Rights of the Child on 16 July 1995; the African Charter on the Rights and Welfare of the Child on 7 January 2000, and the United Nations Convention on the Rights of Persons with Disabilities on 30 November 2008. This Convention elaborates in detail the rights of persons with disabilities, including children, under international law and sets out a code of implementation for governments. Children with disabilities have a prominent place in the Convention. In *S v M*, Sachs J states that section 28 is based on the international instruments of the United Nations in particular the Convention on the Rights of the Child. The judge noted that the convention has, since its introduction, become the international standard against which to measure legislation and policies and it has established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice (*S v M* 2008 3 SA 232 (CC)).

Legislative developments in South Africa

The Children's Act, referred to above, came into full operation in April 2010.²⁶ In its Preamble, it reinforces and endorses rights provided for in section 28 of the Constitution.²⁷

In addition, the Act states that in all matters concerning the protection, care and well-being of the child, the child's best interests must always be of paramount importance.²⁸ The Act embraces a notion of childhood that is based on the idea that a child should ideally grow up in a family environment and in an atmosphere of happiness, love and understanding. The Act also recognises that some children are capable of 'acting autonomously and in their own best interests'.²⁹ In this regard, the Act recognises that children are human beings and individuals and as such have a right to have a say in matters that affect them. Moreover, the Act recognises that because of their age and special circumstances, children are most vulnerable to the effects of poverty and diseases, as illustrated, for example, by the recognition in the Act of child-headed households as family units.³⁰

Complementing the Children's Act is the Criminal Law (Sexual Offences and Related Matters) Amendment Act,³¹ which affords complainants and victims of sexual abuse maximum protection when giving evidence. This Act has been comprehensively reviewed and has amended all aspects of the law relating to sexual offences. Moreover, the Act has, among other things, introduced new and expanded sexual offences against children. The Act's ultimate goal is the eradication of all sexual crimes. The Criminal Law (Sexual Offences and Related Matters) Amendment Act is strengthened by the Child Justice Act,³² adopted in 2008, which establishes a criminal justice system for children in conflict with the law and for children accused of committing offences. This Act is innovative in that it has created a new criminal justice system in terms of which matters involving children who are

²⁶ Specific provisions were enacted on the 1 July 2007. These relate to among others, the dominance of the best interests of the child, the right to child participation in any matter concerning the child and a child's right of access to court.

²⁷ For example s 2 of the Children's Act 38 of 2005 gives effect to the following constitutional rights of children: the right to family care and parental care or appropriate alternative care when removed from the family environment; protection from maltreatment, neglect, abuse or degradation etc; see also Songca 'Revisiting section 170A of the Criminal Procedure Act 51 of 1977' 2010 *THRHR* 402 404–406.

²⁸ Section 9 of the Children's Act.

²⁹ Bentley n 20 above at 119.

³⁰ Section 137 of the Children's Act 38 of 2005.

³¹ Act 32 of 2007.

³² See the General Explanatory Note. Child Justice Act 75 of 2008.

in conflict with the law are diverted away from the traditional criminal justice system. In addition, the Act has humanised the criminal justice system for children by introducing the spirit of *ubuntu*. For example, the emphasis is on the principles of restorative justice, which provides the context against which the provisions of the Act must be read.³³

Lastly, as a result of a new constitutional dispensation in 1994 when the Constitution became the supreme law of the Republic, not only is any law or conduct that is inconsistent with the provisions of the Constitution invalid,³⁴ but the Constitution also contains special provisions which deal specifically with the rights of children.³⁵ The government recognises through the Constitution that children are vulnerable to violations of their rights and that they have peculiar interests.³⁶

The discussion above has briefly alluded to how the generally accepted notion that children have rights have girded recent legislative developments relating to children in South Africa. Next considered, against the backdrop of the above discussion, is the issue of children's rights as embodied in the Children's Act, in relation to parental responsibilities and rights, followed by a closer look at how this finds expression in the best interests of the child standard. The discussion will finally turn to a brief exploration of how, by comparison to these rights-based developments, selected aspects of customary law are expressed in the Children's Act.

BRIEF OVERVIEW OF SELECTED PROVISIONS IN THE CHILDREN'S ACT

Parental responsibilities and rights

The Children's Act has introduced a new concept regarding parent and child relationships. The Act recognises expressly that parents have both rights and responsibilities towards their children,³⁷ marking a departure from the

³³ Referred to under the aims, see in particular section 2(b)(iii).

³⁴ See s 2 of the Constitution.

³⁵ Section 28; see also n 23 above.

³⁶ See Bekink & Brand 'Constitutional and international protection of children's rights' in Davel *Introduction to law in South Africa* (2000) 177. Section 28 of the Constitution.

³⁷ Section 18 of the Act. In *J v J* 2008 (6) SA 30 (C), the court held that the terms 'parental authority' and 'parental power' are replaced by the terms 'parental responsibilities and rights' and the term 'custody' by 'care'. In *LB v YD* 2009 (5) SA 463 (T) Murphy J stated that the Children's Act has introduced changes to existing laws to bring them in line with constitutional rights and values. The judge was of the view that the concept 'rights and responsibilities' corresponded broadly with 'parental authority' and its components of care.

traditional rule of parental authority in terms of which parental authority encompassed the rights and obligations which a parent enjoys in relation to his or her child, the child's estate and administration thereof, as well as the parents' duty to assist the child in legal proceedings.³⁸ Section 18(1) of the Children's Act therefore focuses on the right of the child to parental care and not on parental powers.

In terms of section 18(1), a person may have both full or specific parental responsibilities and rights in respect of a child. Parental responsibilities and rights that a person may have in respect of a child include, but are not limited to, the right and responsibility to care for the child,³⁹ to maintain contact with the child,⁴⁰ to act as guardian of the child⁴¹ and to contribute to the maintenance of the child.⁴² This shift in emphasis with regard to the parent-child relationships in the Act, by placing the responsibility on the parent to care for the child instead of parental authority over a child, promotes the best interests of the child.⁴³

Termination, extension, suspension or restriction of parental responsibilities and rights

Section 28 of the Children's Act is a remarkably liberal provision that underpins the child's right to self-determination and legal autonomy.

In terms of section 28(1)⁴⁴ an application may be made to the High Court, a Divorce Court or a Children's Court, for the suspension for a specified period of, or for the termination of some or all the parental responsibilities and rights which a specific person has in respect of the child.⁴⁵ An application may also be instituted for extending or circumscribing the exercise by a person of any or all the parental responsibilities and rights that person has in respect of a child.⁴⁶

³⁸ Robinson (ed) *The Law of children and young persons* (1997) 52.

³⁹ Section 18(1)(a).

⁴⁰ Section 18(1)(b).

⁴¹ Section 18(1)(c).

⁴² Section 18(1)(d).

⁴³ It should be noted that part of parental care or responsibility is a right which children are entitled to, such a right places a duty on parents to care for their children; see Ferreira 'The best interests of the child: from indeterminacy to guidance by the Children's Act' 2010 *THRHR* 201 211.

⁴⁴ A termination of parental responsibilities and rights may occur when the person having parental responsibility and rights wilfully fails to fulfil his/her parental responsibilities and rights when able to do so.

⁴⁵ Section 28(1)(a).

⁴⁶ Section 28(1)(b).

The Act also lists factors that must be taken into account whenever an application for termination, extension or variation of parental responsibilities and rights is brought before a court.⁴⁷ These include, among others, the best interests of the child, the relationship between the child and the applicant, the child's relationship with the particular person and any other fact the court wishes to take into account.⁴⁸

It is clear from the foregoing that, although this provision is intended to protect children who are in so-called 'toxic' or abusive relationships with adults, or to terminate or suspend parent-relations that have seriously deteriorated, it nevertheless lends itself to abuse if not properly implemented. It forces adults with parental responsibilities and rights to respond to claims made against them by their children, and if such claims turn out to be false, parental-child relationships may be damaged or impaired permanently.

Parental alienation syndrome is not uncommon among parents whose relations have broken down or in divorce cases where custody of children is being contested. Children may be alienated to such an extent that they can be manipulated into making false claims against the other parent, resulting in the termination of his or her parental responsibilities and rights. It is generally accepted that the best interests of the child standard is an important factor to be taken into account in all matters relating to the child. The section below briefly discusses the development of the best interests of the child standard in a South African context.

BEST INTERESTS OF CHILD STANDARD

The best interests of child standard is a common-law rule that has been applied by the courts over the years, mostly, however, in cases where children's rights were at stake, such as maintenance or custody cases.⁴⁹ The application of the best interests of the child standard has not been without criticism, however. It has been argued that the indeterminacy and judicial

⁴⁷ Section 28(4)(a)–(d).

⁴⁸ The court has to take into account factors listed under Chapter 2 of the Act. For example, the court has to apply the best interests of the child standard; and the court has to protect, promote, fulfil and respect the child's rights set out in the Bill of Rights. See also Bosman-Sadie & Corrie *A practical approach to the Children's Act* (2010) 48.

⁴⁹ *Fletcher v Fletcher* (1948 1 SA 130 (A) 143) the court reiterated the view that the best interests of the child must be the main consideration in matters concerning the child; in *Sonderup v Tondelli* (2001 1 SA 1171 (CC)) section 28(2) was understood as giving a guarantee that a child's best interests would be paramount in every matter concerning the child. See also Bekink & Bekink 'Defining the standard of the best interests of the child: modern South African perspectives' 2004 *De Jure* 22–23.

discretion which the best interests standard invites, may easily lead to prejudice and discrimination.⁵⁰

Section 7 of the Children's Act gives content to the application of the best interests of the child standard by listing factors that can be taken into account whenever a provision of the Act requires the best interests of the child standard to be applied. The following are examples of factors that can be taken into account by the courts namely:

- The nature of the personal relationship between the child and the parents or any specific parent, and the nature of the relationship between the child and any other caregiver or person relevant in those circumstances.⁵¹
- The need for the child to remain in the care of his or her parent, family and extended family and to maintain a connection with his or her family extended family culture or tradition.⁵² The reference to a close connection with the family, extended family culture and tradition is a specific example of an African practice that has found expression in the Children's Act.

This development is commended because courts have previously applied the best interests of the child inconsistently over the years.⁵³ Although the criteria stipulated in section 7 will assist courts in giving content to the best interests of the child principle, the view that the criteria listed in the Act should not be regarded as a closed one, should be emphasised. Courts should be at liberty to take into consideration other factors that may in a specific case be relevant to determine the best interests of the child.⁵⁴ Moreover, section 7(1) should be read with section 28(2)⁵⁵ of the Constitution, which is the source of the yardstick of the best interests of the child standard, embodied in section 9 of the Children's Act.

⁵⁰ Bonthuys 'The best interests of children in the South African Constitution' 2006 *International Journal of Law, Policy and the Family* 23.

⁵¹ Section 7bis(a)(i) and (ii).

⁵² Section 7bis(f)(i) and (ii).

⁵³ Some of these cases are examples of case law that traces the development of the current best interests of the child standard over the previous years: *B v E* 1992 3 SA 438 (T); *B v S* 1995 3 SA 571 (A); *F v F* 2006 1 ALL SA 571 (SAC); *Fletcher v Fletcher* 1948 1 SA 130 (A); *McCall v McCall* 1994 3 SA 201 (C).

⁵⁴ Ferreira n n 43 above at 212; the same sentiments were expressed by Sachs J in *S v M* 2008 3 SA 232 243, where the judge referred to a list of factors enumerated in section 7 of the Children's Act and stated that '...[s]uch factors include, but are not limited to, the nature of the relationship ...'.

⁵⁵ The section reads: 'A child's best interests are of paramount importance in every matter concerning the child.'

In *Jooste v Botha*,⁵⁶ the court had to decide in part whether, in the interests of a child, courts could compel a father to show love and care to his child. The court was of the view that the wide formulation of section 28(2) is 'ostensibly so all-embracing that the interest of the child would override all other legitimate interests of parents, siblings and third parties'. The court was of the view that if this interpretation was to be adopted, it would prevent the conscription, imprisonment or dismissal by the employer of the parent where that was not in the interest of the child.⁵⁷ The court felt that this was clearly not what the legislature intended. The court held that section 28(2) is intended as a general guideline and not as a rule of horizontal application.⁵⁸

In *Minister of Welfare and Population Development v Fitzpatrick*,⁵⁹ the court held that the best interests standard was never given an exhaustive content or meaning, therefore the particular circumstances of individual children differ and cannot be established by a pre-determined set of principles or standards.⁶⁰ In *S v M*,⁶¹ Sachs J referring to the factors enumerated in section 7(1) of the Children's Act, implied that courts may take into account additional factors, as he stated that '...such factors include *but are not limited to* ... the nature of the personal relationship between the child and the parents, the child's physical and emotional security...'.⁶²

Best interests of child paramount

Section 9 of the Children's Act reinforces section 28(2) of the Constitution by making the child's best interests of paramount importance in all matters concerning the child. The courts have grappled with the interpretation of the paramountcy principle as it relates to the best interests of child standard. Courts⁶³ at different times have argued that the rights of children trump all other rights and interests. Others have argued that a contextual approach should be applied, and the rights of other competing parties should also be considered.⁶⁴ The popular view seems to be that 'paramount importance'

⁵⁶ 2000 2 SA 199 (T).

⁵⁷ 210 C-E.

⁵⁸ *Ibid.*

⁵⁹ 2000 3 SA 422 (CC).

⁶⁰ 428F-429A.

⁶¹ 2008 3 SA 232(CC).

⁶² 243 H-I (own emphasis).

⁶³ See : *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC); *S v M* 2008 3 SA 232 (CC); *The Director of Public Prosecutions, Transvaal v The Minister of Justice and Constitutional Development* 2009 ZACC 8; *S v J* 2011 2 ALL SA 299 (SCA).

⁶⁴ *B v E* 1992 3 SA 438 (T); *B v S* 1995 3 SA 571 (A); *F v F* 2006 1 ALL SA 571 (SAC); *Fletcher v Fletcher* 1948 1 SA 130 (A); *McCall v McCall* 1994 3 SA 201 (C); Bonthuys n 50 above, 34.

should not be understood to mean that the best interests of the child is the only consideration.⁶⁵

In *S v M*,⁶⁶ the court pronounced that although the word ‘paramount’ is emphatic, it cannot be understood to mean that the direct or indirect impact of a measure or action on children must in all circumstances oust or override all other considerations.⁶⁷ The court hence held that the best interests principle was capable of limitation. Furthermore, Sachs J in *S v M* observed that the expansive nature of ‘the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular’.⁶⁸ The court conceded that although the criticism levelled at the principle could not be denied, it is precisely the contextual nature and the inherent flexibility of section 28 [of the Constitution] that constitutes the source of its strength.⁶⁹ The court held that the paramountcy principle should not be applied in such a manner that eliminates other important and constitutionally protected interests. In addition, the court held that the fact that the best interests of the child are paramount does not mean that they are absolute.⁷⁰

It is the reality that South African law consists of an assortment of so-called transplanted laws made up of a mixture of Roman-Dutch law, English common law and African customary (indigenous) law.⁷¹ However, despite this and although the majority of South Africans live according to customary law, the latter has for many decades been marginalised, never fully developed and disproportionally expressed in the country’s laws.⁷² The situation did not change until the Constitutional Court brought it on par with the common law of South Africa by affording it constitutional recognition subject to the Constitution and other legislation.⁷³ The Children’s Act was drafted by specifically including aspects of customary law, which will next be considered.

⁶⁵ Bonthuys 34.

⁶⁶ *Ibid.*

⁶⁷ 249 B–C.

⁶⁸ 248 A.

⁶⁹ 248 E.

⁷⁰ 250 B.

⁷¹ Rautenbach ‘South African common and customary law of intestate succession: a question of harmonisation, integration or abolition’ *Electronic Journal of Comparative Law* (May 2008) at: <http://www.ejcl.org> (last accessed 30 June 2011).

⁷² *Ibid.*

⁷³ *Ibid.*

EXPRESSION OF CUSTOMARY LAW IN THE CHILDREN'S ACT

Historically, South African law relating to children was based on the common law and legislation with minimal consideration, if any, to African customary law. Today however, customary law is protected by and subject to the Constitution in its own right.⁷⁴ Customary law issues pertaining to children are subject to legal scrutiny in the same way as the common law and legislation.

A large segment of South Africa's population still lives according to customary law. Customary law regulates marriages, divorce, and inheritance among others, for many communities.⁷⁵ In South Africa, the status of customary law has been constitutionally entrenched. In terms of the Constitution,⁷⁶ the institution, status and role of traditional leadership are recognised subject to the Constitution. In addition, a traditional authority that observes a system of customary law may function subject to applicable legislation and customs, including amendments to or repeal of that legislation and those customs.⁷⁷ Furthermore, the Constitution provides that courts must apply customary law where it is applicable, subject to the Constitution and relevant legislation.⁷⁸

In *Bhe v Magistrate, Khayelitsha*,⁷⁹ the judge stated that the import of section 211⁸⁰ is that customary law 'is protected by and subject to the Constitution in its own right'.⁸¹ Customary law, like any other law, must accord with the Constitution and must like any other law be respected.⁸²

⁷⁴ See s 39(3) of the Constitution; s 211 of the Constitution (1996) provides that the institution, status and role of traditional leadership are recognised subject to the Constitution. It further states that a traditional authority that observes a system of customary law may function subject to applicable legislation and customs, including amendments to or repeal of that legislation and those customs and that courts must apply customary law where it is applicable, subject to the Constitution and relevant legislation. See also *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) 926.

⁷⁵ Ambunda & Mugadza 'The protection of children's rights in Namibia: law and policy' in Ruppel (ed) *Children's rights in Namibia* (2009) 16.

⁷⁶ Section 39(3); see also s 211(1).

⁷⁷ Section 211(2).

⁷⁸ Section 211(3).

⁷⁹ 2005 1 BCLR 1 (CC) 15B–16A.

⁸⁰ Of the Constitution.

⁸¹ *Ibid.*

⁸² See *Shilubana v Nwamita* 2008 9 BCLR 914 (CC) 926 D–F.

Parental responsibilities and rights

Under customary law, parents and members of the extended family have the primary responsibility of the upbringing of the child. Moreover, according to customary law children, belong to the community. The concept that the child belongs to the group or community and not specific individuals only, is expressed in the idiom ‘a child belongs to everyone’, or a ‘child belongs to the village’. This practice is more common in rural areas where traditional child-rearing practices are still prevalent.⁸³ The idiom expresses the idea that the upbringing of a child is the responsibility not only of its parents but also of the whole community in which the child lives. Communal structures, within which children’s interests and welfare are protected, are borne from the principle of collective solidarity. Collective solidarity is a defining characteristic of a typical indigenous African community.⁸⁴

In a typical situation, members of a community share both pains and successes, members are obliged to help one another. This is coupled with the idea that there are accepted norms of behaviour which the whole community subscribe to. For example, members of the community who witness abuse of a child may intervene on behalf of the child. Such intervention may include initiating processes involving authorities that may result in the removal of the child from the abusive parent or caregiver and for his or her placement with a relative.⁸⁵

Under the common law, parents have the primary responsibility for the welfare of their children. In terms of the Children’s Act, such responsibility has now been extended to include members of the extended family and other family members, which is a typical African traditional practice.⁸⁶ In terms of the Act,⁸⁷ a family member in relation to a child includes any person with whom the child has developed a significant relationship, based on an emotional or psychological attachment which resembles a family relationship. Children at times regard their neighbours or other adults as family members, especially where an emotional bond or trust is established over time. This is also a typical African practice.

⁸³ Himonga ‘African customary law and children’s rights: intersections and domains in a new era’ in Sloth-Nielsen (ed) *Children’s rights in Africa: a legal perspective* (2008) 77–78 .

⁸⁴ Nkosi ‘Accessibility of social assistance benefits in indigenous African communities from a South African perspective’ in Ruppel (ed) *Children’s rights in Namibia* (2009) 418.

⁸⁵ Himonga n 83 above at 82.

⁸⁶ See chapter 1 of the Children’s Act.

⁸⁷ *Ibid.*

The Children's Act regards parents or other persons responsible for the child as those with the primary responsibility of the upbringing and development of the child. They have the duty to ensure that the best interests of the child are their basic concern at all times. Thus, the court may invoke the traditional practice of recognising the parental responsibility of members of the extended family or any other family member(s), if this would be in the best interests of the child, or alternatively, the Western notion of the close family.

In conclusion, it is important to note that under customary law, where a child is a victim of abuse by his or her parents, other family members and the community may intervene on behalf of the child. A decision may be made for the removal of the child from the abusive parent, and his or her placement with a relative. Family members may be requested to periodically assess the situation.

Best interests of the child under customary law

In terms of African customary law, children generally do not only belong to their parents but are part of the extended family and therefore, their welfare is inseparable from that of their families.⁸⁸

The majority of African societies in South Africa are arranged along patrilineal lines consequently, adult males from the paternal family are the most influential persons in the decision-making process relating to the child. Relationships are built along the extended family model as a result and family units are aggregated together along kinship lines to form clans.⁸⁹ This system allows a large number of people to be incorporated into the family circle.⁹⁰ The people who form part of this setting also have different rights and duties. In the traditional setting, individual members of the family look up to the group to safeguard their welfare and interests when threatened by other family members or by outsiders.⁹¹

This arrangement of family relationships has important consequences for the child and the welfare or interests of the child. One such consequence is that

⁸⁸ Bennett *Customary law in South Africa* (2008) 295.

⁸⁹ Kaime *The African Charter on the Rights and Welfare of the Child: a socio-legal perspective* (2009) 116. The clan consists of a group of people who believe themselves to be related to a common ancestor, although it may no longer be possible to trace the exact genealogical links of the group; see Bennett n 88 above at 180.

⁹⁰ Kaime n 89 above at 117.

⁹¹ Himonga n 83 above at 78.

the child belongs to the family (extended family) or kinship group.⁹² Therefore, important issues affecting the child, such as choice of a marriage partner, are not only taken by the biological parents of the child. It is expected that members of the extended family, such as uncles of the child, should also be consulted. In addition, parental rights and authority are exercised by a large number of people, and each one is entitled to make or contribute to decisions relating to the child's best interests.⁹³ These family arrangements are meant to serve the child's best interests, since it ensures that the child has access to constant care. Nevertheless, it should be noted that the family or group interests can also work to the disadvantage of the child.⁹⁴ The extended family has elements that may undermine the rights of children or facilitate the exploitation or abuse of children.⁹⁵ However, despite this, the extended family provides children with a broad base of support and care that goes beyond a child's immediate family.⁹⁶

Social and economic conditions have to some extent weakened the notion of the extended family. Nevertheless, it would be wrong to argue that it is of no relevance to the welfare of many African people in South Africa.⁹⁷

Other African values have also been integrated into the Children's Act. Section 16 of the Act articulates the responsibilities of children. In an attempt to reflect and embellish African cultural traditions and concepts of family and society, the Act recognises the responsibilities children have to their families, community, and state.⁹⁸ It is submitted that this practice mirrors the realities of many children in South Africa who live without parental care or are compelled due to circumstances beyond their control to provide for their families.

⁹² The extended family is defined as a traditional African social unit consisting of people who are genealogically related, as well as those who are related to them through marriage and whose social and economic welfare is closely associated; see Himonga n 83 above at 78.

⁹³ Kaime n 89 above at 116.

⁹⁴ Himonga n 83 above at 79.

⁹⁵ For example, allegations of abuse and exploitation are sometimes levelled against members of the extended family who take care of their relatives' children; see Himonga n 83 above at 79–80.

⁹⁶ For example, family members can provide a support system for children who are in danger of being sexually molested. Victims of rape recover more easily through relying on the support provided by the family. See Himonga n 84 above at 79.

⁹⁷ This sentiment also shared by Himonga n 83 above at 78; Kaime n 89 above at 116–117.

⁹⁸ Section 16 of the Children's Act.

Surrogacy

The Children's Act furthermore provides in a separate chapter⁹⁹ for the regulation of surrogate motherhood. Surrogate motherhood, a practice as old as mankind and very common in some African communities, has been uncomfortably received in most Western legal systems. With the comprehensive regulation of this practice in the Children's Act, another feature of customary law and practice has found application in this Act, although previously applied without difficulty in the African context. South Africa has in this regard taken a bold step, compared to other jurisdictions, in regulating a practice which is still prohibited in many other societies.¹⁰⁰ The court recently emphasised that the best interests of the child to be born following a surrogate motherhood agreement is also the yardstick against which a surrogate motherhood agreement will be evaluated.¹⁰¹

CHILDREN'S RIGHTS IN SOUTH AFRICA: UNFORESEEN CHALLENGES

The concept of childhood has found its way into our legislative framework. The Children's Act refers to a child as a person under the age of 18 years.¹⁰² Implicit in our legislation¹⁰³ is the notion that childhood should be a golden age where a child should grow up in a family environment and in an atmosphere of happiness, love and understanding. Nevertheless, the practical everyday reality of children in South Africa undermines this notion. Challenges posed by poverty, the devastation brought by HIV/AIDS and orphanage have resulted in increasing number of children living without parental care or living on the streets.

The question arises as to what extent the phenomena of street children and child-headed households are addressed in terms of existing legislation, in particular the Children's Act¹⁰⁴ and African customary law.¹⁰⁵

⁹⁹ Chapter 9.

¹⁰⁰ South Africa is one of few countries regulating surrogacy in a very comprehensive legislative manner. Although commercial surrogacy is prohibited in terms of chapter 19 of the Children's Act, altruistic surrogacy, as practised in indigenous context, is permitted.

¹⁰¹ *Ex parte WH, UVS, LG, and BJS* (case number 29936/11), delivered in October 2011 (still unreported), par 10.

¹⁰² Section 1; s 28 of the Constitution defines a child in similar terms.

¹⁰³ See the Preamble Children's Act.

¹⁰⁴ Other relevant legislative initiatives include the Social Assistance Act 13 of 2004 and the Child Care Act 74 of 1983 (as amended). A discussion of these Acts is beyond the scope of this article.

¹⁰⁵ It should be noted that space does not allow a comprehensive discussion of child-headed households and prevention and early intervention services, as provided for in the

Child-headed households

The Children's Act

Some children in South Africa live without parental care due to a number of reasons. For example, some children have lost one or both parents on account of HIV/AIDS, or as a result of being abandoned by their parents.¹⁰⁶

Although the legal recognition of child-headed households in South Africa is progressive, it has nevertheless attracted a lot of debate. Some commentators argue that a 'premature award of adult status' may deprive children in these households of their childhood.¹⁰⁷ Although these arguments are not without merit, it should equally be borne in mind that child-headed households are not a new phenomenon in South Africa. South Africans have traditionally had fluid arrangements regarding the care and residence of their children who move easily among the extended family.

Section 137(1)(a) provides a definition of a child-headed households which effectively distinguishes them from other family forms.¹⁰⁸ Under this provision, children in a household where the parents are still alive but terminally ill, or have been abandoned by their parents, fall under this definition. A child heading a household must be at least sixteen and is referred to as a 'care giver'. The provisions of the Act recognise that sixteen year-olds may be mature enough to take decisions on behalf of their siblings. Moreover, practical experience has shown that parents who are too ill cannot take care of their children, therefore this role usually falls on other children.

Provision is made for a supervising adult to assist a child heading a household.¹⁰⁹ The supervisor is designated by the children's Court or an organ of state or a non-governmental organisation and may be appointed by a provincial head of social development to work with members of a child-

Children's Act.

¹⁰⁶ Maqoko & Dreyer 'Child-headed households because of the trauma surrounding HIV/AIDS' 2007 *HTS* 722; Sloth-Nielsen *Realising the rights of children growing up in child-headed households: a guide to laws, policies and social advocacy* (2004) 2.

¹⁰⁷ Couzens & Zaal 'Legal recognition for child-headed households: an evaluation of the emerging South African framework' 2009 *International Journal of Children's Rights* 299 300; see also Sloth-Nielsen 'Of newborns and nubile: some critical challenges to children's rights in Africa in the era of HIV/AIDS' 2005 *International Journal of Children's Rights* 13. Children living in child-headed households are more likely to be malnourished or to fall ill because of poverty; they are also exposed to sexual and other forms of abuse and are likely to drop out of school.

¹⁰⁸ Couzens & Zaal n 107 above at 307.

¹⁰⁹ Section 137(2) of the Children's Act .

headed household.¹¹⁰ The designated supervisor oversees the overall management of the household and must consult the child heading the household and other sufficiently mature household members.¹¹¹ The day-to-day decisions relating to the household and its members must be taken by the child heading the household.¹¹² The need for a supervisor is crucial in cases where there are no adults to supervise the household or where members of the extended family are unable to do so. However, if there is a member of the family or extended family who has established an emotional bond with the household, it is preferable that such a member be appointed as a supervisor.

The child heading the household or the adult appointed as supervisor may collect and administer for the child-headed household any social security grant or other grant¹¹³ or other assistance the household is entitled to.¹¹⁴ Such adult is accountable to the organ of state or non-governmental organisation that appointed him or her as supervisor.¹¹⁵

A complaint mechanism provides an avenue for members of the household to lay complaints if dissatisfied with the supervising adult.¹¹⁶

African customary law

As mentioned above, most people in South Africa still practise customary law and their family relationships are built along the extended family model. It is noted that although this model is gradually in decline, it is nevertheless prevalent in rural areas. It is submitted that the extended family model and other family forms should be used as pillars for child-headed households.

For example, where a family member is involved with a child-headed household or has established an emotional bond with members of that household, such family member should be appointed as supervisor in terms of the Children's Act. Members of the child-headed household should be managed by someone they know and trust. A stranger may not understand the dynamics of the family and its beliefs and practices.

¹¹⁰ Section 137(2)(a) and s137(2) (b).

¹¹¹ Section 137(6).

¹¹² Section 137(6)(a) and s137(6)(b); this provision can be invoked to assist a child care giver who does not have an identification document.

¹¹³ In terms of the Social Assistance Act no 13 of 2004.

¹¹⁴ Section 137(5)(a).

¹¹⁵ Section 137(5)(b).

¹¹⁶ Section 137(8).

Community-based and faith organisations have taken the lead in providing assistance to child-headed households in many communities. Initiatives provided by these organisations enable families to provide care for children living in these households.¹¹⁷

Street children

Children's Act

Section 150(1)(c) stipulates that a child is in need of care and protection if the child lives or works on the streets or begs for a living. Children often abandon families and live on the streets for a multiplicity of reasons; they may leave to escape sexual abuse or domestic violence, for example.

It is submitted that the number of children on the streets can be reduced through the implementation of preventive¹¹⁸ and early intervention programmes¹¹⁹ provided for in the Children's Act.¹²⁰ These programmes are aimed at preserving a child's family structure; removal of the child is thus the last resort in the protection of the child. Section 144 identifies prevention and early intervention programmes for which the government will provide funding.¹²¹ It is also submitted that psychological, rehabilitation and therapeutic programmes be made available to children who had to take care of their deceased parents.

African customary law

Under African customary law, the notion of street children was unheard of because children belonged to their families and not only their parents.¹²² If parents were unable to look after their children for whatever reason, members of the extended family would take responsibility of these children. Unfortunately, the capacity of extended families to care for children living

¹¹⁷ See, in general, Foster 'Safety nets for children affected by HIV/AIDS in Southern Africa' in Pharoah (ed) *A generation at risk? – HIV/AIDS – vulnerable children and security in Southern Africa* (2004). See: <http://www.iss.co.za/pubs/monographs> (last accessed 20 March 2011).

¹¹⁸ Prevention refers to any strategy or programme which strengthens and builds the capacity and self-reliance of families, children, youths, women and older persons.

¹¹⁹ That target children, youths, families, *etcetera* as well as communities identified as being vulnerable or at risk, and ensure through strength-based developmental and therapeutic programmes, they do not have to experience statutory intervention of any kind.

¹²⁰ See ss 144(1) and 144(2), and also s (3) of the Act.

¹²¹ Such a programme, funded by the state and preventing the recurrence of problems in the family environment that may harm children or adversely affect their development, diverts children away from the child and youth care system and the criminal justice system.

¹²² See discussion above.

without parental care is being eroded by the high levels of HIV/AIDS related deaths and poverty.

In view of the above, there is no doubt that the provision of preventive and early intervention programmes under the Children's Act will play an important role in traditional settings, especially in reviving extended family units. People living in rural areas should be informed on how to access funding, referred to above. Introducing appropriate interpersonal relationships within the families may greatly reduce the incidence of abuse which has been identified as the main reason some children leave their homes. Other important initiatives to support families, especially in poor areas, should include income generation or employment assistance.¹²³ Traditional authorities should be used to create awareness around the availability of these programmes in rural areas.

CONCLUSION

This article sought firstly to provide an overview of the development of children's rights and the culmination of these in the Children's Act. The article also explored various examples of how African customary laws and practices have found expression in the Children's Act. The integration of both historically Western, as well as African customary values into the Children's Act, mirrors a new approach to children's rights in South African law, which, if applied with the best interests of children as the guiding factor, hold great potential of transforming the application and interpretation of the law on children, including alleviating some of the challenges faced by African children. However, despite this potential, stark challenges remain, such as the phenomena of street children and child-headed households. The article also suggests specific recommendations on how these issues may be addressed in terms of the Children's Act and the African customary law.

¹²³ Section 144(2)(b).