2kul2Btru: What children would say about the jurisprudence of Albie Sachs

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In a recent interview framed against the backdrop of his majority judgment in *M v The State (Centre for Child Law Amicus Curiae)*[1] Justice Sachs stated: 'I started to see [the children] … as three threatened, worrying, precarious, conflicted young boys who had a claim on the court' and later, 'I see the role of judges in the world of diversity and conflict as striving for the protection of human dignity. The [Constitutional] Court is very, very important in terms of the basic norms, standards and values of the society, which continually evolve and develop.'[2]

These two statements signify, first, the critical role that the Constitution and the Constitutional Court Justices play in the protection and promotion of the Bill of Rights; second, they acknowledge that rights have to be balanced constantly against changing and competing needs and interests; and finally, they recognise that the claims made to enforce rights – and in *S v M*, the focus is on children's rights – are not abstract or theoretical interrogations, but involve living individual children who find themselves in desperate situations. These two statements further provide some broad and specific insights into Justice Sach's approach to his work at the Constitutional Court in relation to claims involving children's rights.

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[1]2007 12 BCLR 1312 (CC) (hereafter *S v M*). This matter involved an application for leave to appeal to the Constitutional Court against a sentence imposed in a criminal case where the accused, a mother of three minor children, had been convicted of fraud and sentenced to direct imprisonment. The application focused on the duties of a court when sentencing a primary caregiver, given the requirement in s 28(2) of the Constitution that the best interests of the child are of paramount importance in every matter concerning the child. The case involved an investigation into what these duties are and whether they had been observed in this particular case. In finding that s 28(2) had not been properly applied in this case, the court added a new dimension to the classic sentencing triad referred to in *S v Zinn* 1969 2 SA 537 (A), namely, the nature of the crime, the personal circumstances of the accused and the interests of the community. The Court held that children of an accused primary caregiver would weigh as an independent factor in the *Zinn* inquiry if, according to the *Zinn* approach, there could be more than one appropriate sentence, one of which was a non-custodial sentence.

[2]Kemp 'Steering a ship called dignity' *Mail and Guardian* (2009-07-3) 11.

It has been noted that judicial conservatism is a hurdle that needs to be overcome in order to realise the constitutional rights of children – '… the risk is always present that the constitutional rights of children can remain a "chimera" because of "judicial myopia"'.[3] However, it has also been recognised that the South African experience in relation to the realisation of the constitutional rights of children provides grounds for cautious optimism when measured against the failure of other countries to translate the constitutional recognition of children's rights into judicial acceptance thereof, and that judges are engaging with the content of children's rights.[4] Indeed, the South African Constitutional Court has increasingly developed the rights of children in section 28 of the Bill of Rights through such progressive judgments as *Minister of Welfare and Population Development v Fitzpatrick,*[5] *Fraser v Children's Court Pretoria North*[6] and *Tasco Luc De Reuck v Director of Public Prosecutions*[7] to name a few. However, it is argued that the jurisprudence of Justice Sachs represented in the three judgments discussed by this article has perhaps contributed the most to the enlightened constitutional interpretation of children's rights and has provided the benchmark for the positioning of children's rights in the broader South African legal system.

This view of Justice Sach's contribution to the development of a children's rights jurisprudence in South Africa is echoed by children's rights scholars. Sloth-Nielsen praises Sachs' treatment of the need to appoint *curators ad litem* in *Christian Education South Africa v The Minister of Education*[8] as an exemplary illustration of the willingness of individual judges to raise children's rights issues *mero motu*.[9] Skelton observes that the majority judgment of Sachs J in *S v M* is

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[3]Tobin, 'Increasingly seen and heard: The constitutional recognition of children's rights' (2005) 21 *SAJHR* 86 at 122.

[4]*Id* 123.

[5]2000 3 SA 422 (CC).

[6]1997 2 SA 261 (CC) (hereafter the *Fraser* case).

[7]2004 1 SA 406 (CC) (hereafter the *De Reuck* case).

[8]2000 10 BCLR 1051 (CC) (hereafter *Christian Schools* case). The central issue in this case was whether the enactment of a blanket prohibition of corporal punishment in schools violated the right of parents of children in independent schools to freely practice their religion. The main argument of the applicant was that the teacher's right to impose corporal punishment (with parental consent) was a vital element of their religion and that the blanket ban on corporal punishment contained in s 10 of the South African Schools Act constituted an interference with their religious and cultural beliefs and was therefore unconstitutional. The Minister of Education (who opposed this application) took support for the abolition of corporal punishment in schools from the equality clause, the right to human dignity, the right to freedom of security of the person (which includes the right not to be treated or punished in a cruel, inhuman or degrading way) and the entrenched constitutional rights of children to be protected from maltreatment, neglect, abuse or degradation. The Court found s 10 of the South African Schools Act to be reasonable and justifiable as the effect thereof did not substantially infringe the applicant's right to freedom of religion, belief and opinion as enshrined in s 15 of the Constitution.

[9]Sloth-Nielsen 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights* 137 at 151.

'[c]haracterised by ringing language and memorable passages, the judgment is the Court's clearest and most detailed explanation to date of the content and scope of children's rights as set out in section 28 of the Constitution'.[10]

This paper will examine a trilogy of cases in which Justice Sachs either delivered the unanimous or majority judgment and which, together, represent a clear and consistent elucidation of children's rights in South Africa, namely: *S v M*, the *Christian Schools* case and *AD and DD v DW, the Centre for Child Law (Amicus Curiae) and the Department of Social Development (Intervening Party)*.[11] However, the significance of these judgments goes further than just representing a marked contribution to the interpretation of children's rights under the Constitution and this paper seeks to highlight the jurisprudential advances that Justice Sachs accomplishes through these judgments. These judgments attained three significant achievements in interlinked ways. First, by providing an interpretation of, *inter alia*, the paramountcy of the principle of the best interests of the child and the rights of a child to parental care and dignity, they provide a clear statement of the content of children's rights in South Africa. Second, they provide important guidelines for judicial officers who are required to interpret children's rights as well as for government whose responsibility it is to implement these rights. Finally, they set out a unique approach to children's rights, which contextualises them not only in society but also in the South Africa legal system. This is an innovative contribution to legal thinking that has not previously been fully articulated in the South African constitutional jurisprudence on children's rights. Rather than discussing each of the cases in turn, they will be examined in relation to the three themes identified above.

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[10]Skelton 'Severing the umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers' (2008) 1 *Constitutional Court Review* 351 at 354.

[11]2008 4 BCLR 359 (CC) (hereafter *AD v DW*). This matter involved an attempt by the applicants, who were American citizens, to obtain an order for sole custody and guardianship over Baby R, whom they would then later adopt in the United States of America. Their attempt at the High Court and Supreme Court of Appeal had been unsuccessful on the basis that adoption fell under the exclusive jurisdiction of the Children's Court and the applicants were not entitled to circumvent the Child Care Act 73 of 1984 by applying to the High Court for sole custody and guardianship. The applicants applied to the Constitutional Court to set aside the Supreme Court of Appeal order and award them sole custody and guardianship. Although during the course of the case the parties agreed on how to resolve the matter, whereby the case was referred to the Children's Court and all the parties agreed that it was in the best interests of Baby R to be adopted by the applicants, two issues remained. First, what was the jurisdiction of the High Court to hear an application for sole custody and guardianship when the ultimate purpose of the application was to adopt the child in another country? The second issue had two components: how should s 28(2) of the Constitution be interpreted in the context of a proposed inter-country adoption and how should the subsidiarity principle be applied in light of the s 28(2) mandate? In relation to the first issue the Court held that only in exceptional circumstances would the High Court have jurisdiction to hear matters seeking relief such as in the present case. In relation to the second issue, the Court held that the subsidiarity principle was a core factor governing inter-country adoptions but that in practice what was required was a contextualised case-by-case enquiry taking the best interests of the child into account.

The interpretation of children's rights in the bill of rights

In a steady stream of cases the Constitutional Court has given meaning and life to the rights of children in section 28 of the Constitution. The judgments have dealt with a cross-section of issues including the socio-economic rights of children in *The Government of the Republic of South Africa v Grootboom*,[12] child protection in the *De Reuck* case and child justice in the recent case of *Centre for Child Law v Minister of Justice and Constitutional Development*.[13]

The critical role played by the courts in giving content to the constitutional rights of children has been heralded by children's rights scholars. Reviewing the emergence of children's rights in South African jurisprudence Sloth-Nielsen, writing in 2002, alluded to the fact that the United Nations Convention on the Rights of the Child (CRC) had played a big part in South Africa's judicial practice.[14] Six years later, Sloth-Nielsen and Mezmur note a further upsurge in children's rights jurisprudence during the period 2002-2006, and cite a number of reasons for the increase including the concern of individual judges for the interests of children which has ensured that children do not remain entirely hidden in the litigation that affects them.[15] The development of children's rights jurisprudence has not been confined to the Constitutional Court, and many important decisions have emanated from the High Courts and the Supreme Court of Appeal as well. However, the Constitutional Court is at the zenith of the South African court structure regarding constitutional matters.

The best interests of the child

The 'best interests of the child' is not a new concept, but its application was limited to family law issues and, apart from this limitation, its use in the courts was problematic prior to the constitutional era. Bonthuys argues that the apparent impartiality of the test relies on the decision of a presiding officer to determine which factors are relevant to the interests of the child and then assess the relative weight of these factors as being either 'good' or 'bad'.[16] This means that the determination of what is in the best interests of the child has ultimately lain within the discretion of the court and that is a subjective and not objective determination.

However, section 28(2) of the Constitution now provides that the best interests of the child shall be of paramount importance in every matter affecting a child. This provision constitutionalises the principle of the best interests of the child principle which was elevated to an international law standard when it was

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[12]2001 1 SA 46 (CC).
[13]CCT 98/08 [2009] ZACC 18.
[14]See Sloth-Nielsen (n 9) 152.
[15]Sloth-Nielsen and Mezmur '2+2=5? Exploring the domestication of the CRC in South African jurisprudence (2002-2006)' (2008) 16 *The International Journal of Children's Rights* 1 at 26.
[16]Bonthuys 'Of biological bonds, new fathers and the best interests of children (1997) 13 *SAJHR* 622.

incorporated in article 3 of the CRC. The Committee on the Rights of the Child (the treaty body responsible for monitoring the implementation of the CRC) has identified the best interests principle as one of the four general principles of the Convention.[17] However it has been argued that although none of the four principles is more important than the other three, the recognition of the child's best interests underpins all the other provisions in the CRC.[18] Freeman also notes that there are a number of problems with the best interests principle: it is indeterminate, and policies and principles can assert themselves from behind the 'smokescreen' of the best interests principle; different cultures inevitably operate with different concepts of what is in a child's best interests; and there is often a conflict between current (or experiential) interests of a child and future-oriented (or developmental) interests.[19] Van Bueren also points to dangers inherent in the principle such as whether it allows consideration of values other than those enshrined in the Convention and the fact that it provides no guidance on what criteria are capable of overriding the best interests of the child.[20]

These concerns have been echoed in relation to section 28(2). Currie and De Waal express unease regarding a number of issues.[21] First, they point to the uncertainty as to whether decisions will benefit a particular child in the long term because of the subjective and culture specific nature of any decision about child-rearing. Second, they note that the best interests principle has been used to further the interests of parents rather than children. Finally, they identify the complexities raised by the interaction between children rights and parents and other family members, noting that the best interests principle is apparently the only mechanism in the Constitution that provides guidance on how to regulate such interaction or relationships. In this regard, they also allude to the need for the balancing of the interests of children against competing rights of others. As will be discussed later in this section, it is precisely some of these problems that the jurisprudence of Justice Sachs has ably addressed.

Indeed, the South African legislature has attempted to provide some guidance and content for the best interests standard by including a specific provision in the Children's Act 38 of 2005 that sets out an open-ended list of factors which would guide any person, official or organ of state when making a decision in relation to a child. The factors listed in section 7 of the Act range from factors dealing with care and contact with the child's parents, the age, maturity and development of the child, the need to protect the child to whether the child suffers from a chronic illness or disability. The best

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[17]The other three being non-discrimination, the right to survival and development and children's participation rights.

[18]Freeman 'Article 3: The best interests of the child', in Alen *et al A commentary on the United Nations Convention on the Rights of the Child* (2007) 1.

[19]*Id* 2-3.

[20]Van Bueren *The international law on the rights of the child* (1995) 48.

[21]Currie and De Waal *The bill of rights handbook* (2005) 617-620.

interests standard forms part of the general principles of the Act and section 6(1) of the Act states that these principles guide the implementation of *all* legislation applicable to children (not just the Children's Act) as well as all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general. Therefore, it appears from this and the open-ended nature of the list appearing in section 7 that the factors should guide any decision affecting a child. Nonetheless, the factors listed are limited in scope, focusing mainly on family and child protection matters, and so much more guidance is required to give content to the best interests principle.

This guidance will come from our courts. Already, there is a substantial body of constitutional jurisprudence on the best interests principle. In an influential statement on the scope of the principle, Goldstone J in *Minister for Welfare and Population Development v Fitzpatrick*[22] held:

> Section 28 requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).

In essence, this judicial pronouncement confirmed that the best interests of the child constitutes a right for children, and is therefore more than a mere interpretive principle.[23]

Justice Sachs first dealt with the best interests of the child principle in the *Christian Schools* case. However, preferring to deal in greater detail with other rights afforded children, such as the right to dignity, he paid little attention to the best interests principle, save for affirming the above statement in *Fitzpatrick* and holding that the principle is not excluded in cases where the religious rights of a parent are involved.[24]

The key statement in *Fitzpatrick* regarding the best interests principle is again referred to in the *S v M* case by Justice Sachs who also examined the *De Reuck* decision and that of *Sonderup v Tondelli*[25] in discussing the best interests standard. He notes that these three decisions have established a set of children's rights that courts are obliged to enforce and he uses them as the building blocks upon which he provides the most expansive interpretation of section 28(2) by the Constitutional Court to date.

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[22]2000 7 BCLR 713 (CC) para 18.

[23]Other Constitutional Court cases have addressed the principle: in the *Fraser* case the Court held that the best interests of the adopted child, who at the time of the hearing had been living in a secure family environment for almost 3 years, outweighed the usual procedural ground for setting aside lower court decisions and in *Du Toit v Minister for Welfare and Population Development* 2002 10 BCLR 1006 (CC) the Court held that the provision of the Child Care Act 74 of 1983 that restricted the right of couples to adopt to married couples only was not in the best interests of children because it denied children the right to family life by suitably qualified same-sex couples.

[24]Paragraph 41.

[25]2001 1 SA 1171 (CC).

As a starting point, Sachs J confirms the central nature of the best interests principle in the constitutional scheme. He reaffirms the previous acknowledgement of the Constitutional Court that the principle goes further than a mere guideline and can be seen as 'expansive guarantee' that a child's best interest will be of paramount importance in every matter concerning the child.[26] However, he recognises some of the concerns with the best interests principle discussed earlier in this section, in particular the indeterminate nature of the standard.[27] Yet in his uniquely sensitive manner, Justice Sachs turns these arguments on their head and proffers the argument that the indeterminacy of the principle is not a weakness, but that the 'contextual nature and inherent flexibility of section 28' constitutes the source of its strength.[28] He reasons:

> A truly principled child centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.[29]

This statement is one of many that illustrates the insightfulness of Justice Sachs into the plight of the actual children that each case involves. It again points to the need for courts to approach each case based on its individual merits and that despite the criticism of the best interests principle, it holds much value in determining the outcome of decisions involving children. In fact, in his decision in *AD v DW*, Justice Sachs quoted this passage from *S v M*.[30] Providing further clarity and guidance, he stated that in putting this into practice, a contextualised case by case inquiry is required. Further, this inquiry needs be conducted by (in the *AD v DW* context) child protection practitioners and judicial officers who are aware and cognisant of the principles at stake as this would 'find the solution best adjusted to the child, taking into account his or her individual emotional wants, and the perils innate to each potential solution'.[31]

However, the crux of his liberal interpretation of section 28(2) in *S v M* is found in his identification and subsequent resolution of a key question, namely, what reasonable limits can be imposed on the application of the enforceable legal rules created by section 28(2).[32] Explaining the issue further, he states that '[t]he problem, then, is how to apply the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally protected interests'.[33]

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[26]Paragraphs 14 and 22.
[27]Paragraph 23.
[28]Paragraph 24.
[29]*Ibid*.
[30]Paragraph 50.
[31]*Ibid*.
[32]Paragraph 14.
[33]Paragraph 25.

In addressing this issue, Justice Sachs at the outset acknowledged that although the paramountcy principle is far-reaching, the Constitutional Court's position, set out in *Fitzpatrick, Sonderup* and *De Reuck,* is that the best interests principle is capable of limitation. He confirmed that just because the best interests of a child are paramount, it does not mean they are absolute.[34] But what is the appropriate manner in which the best interests principle can be limited or how can the best interests principle be accommodated within competing rights or interests? This has not been clearly evident from the Constitutional Court's jurisprudence, however, and Justice Sach's judgment makes a valuable contribution as to how Courts should in future approach this question.

Sachs J starts out, in relation to the case in question, by examining the approach to be taken by a sentencing court where the convicted person is the primary caregiver of minor children. He correctly identified the critical issue as being the imposition of a sentence without paying appropriate attention to the need to have special regard for the children's interests, and it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of children.[35] In doing so Justice Sachs examined the need to balance competing rights bearing in mind the context of the case and the principle of proportionality. In the *S v M* case the competing rights and/or considerations that were identified were firstly, the importance of maintaining the integrity of family care and, secondly, the duty on the State to punish criminal misconduct.

In weighing up these conflicting interests he provides a clear statement on how to balance the best interests principle against competing rights and/or considerations:

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

This 'test' provides for three steps:

- first, *consideration* of the interests of children;
- second, the *retention* in the inquiry of any competing interests because the best interests principle does not trump all other rights;
- finally, the *apportionment* of *appropriate* weight to the interests of the child.

It underscores the need to mainstream the best interests principle in all legal arenas where children are involved even where established legal rules or principles have never given regard thereto previously.

This balancing exercise was implicitly applied in *AD v DW* where Justice Sachs had to decide how to interpret section 28(2) in the context of a proposed inter-country adoption. He examined how the Supreme Court of Appeal dealt with the concept of

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[34]Paragraph 26.
[35]Paragraph 34.

subsidiarity and held that 'unduly rigorous adherence to technical matters such as who bears the onus of proof should play a relatively diminished role: the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants'. This indicates that consideration must still be given to the best interests principle while remaining cogniscant of other competing interests and that to do so, appropriate weight must be attached to the best interests principle. However, this particular statement in *AD v DW* has received criticism.[36] Sloth-Nielsen *et al* argue that the Court failed to properly address the true role of subsidiarity, and given the judiciary's failure to define it, future cases may find loopholes to bypass the structures intended to govern inter-country adoptions. This is indeed a danger. However, it is nevertheless argued that this statement provides guidance on how to balance the principle of subsidiarity with the best interests of the child.

In summary, it is submitted that the judgments of Justice Sachs have provided greater clarity on the content of the best interests principle. Though given its intrinsically problematic nature, the journey of interpretation is not over.

The right to parental care

It has been noted that section 28(1)(b) is expressly more extensive than the mere reference to 'parental care' in section 30(1)(b) of the Interim Constitution (1993).[37] Referring to a wide range of cases, Friedman and Pantazis note that parental care has been interpreted to refer not only to natural parents but also adoptive parents, foster parents and step-parents.[38] They proceed to argue that section 28(1)(b) has three purposes.[39] First, relying on the case of *Jooste v Botha*,[40] they state that the section is aimed at the preservation of a healthy parent-child relationship in the family environment and its protection from unwarranted executive, administrative and legislative acts. Second, it requires care of a certain quality to be given to children. Finally, it identifies the parties that must provide this care. This is first and foremost the child's parents and family, and in this instance the obligation on the State is to ensure that parents and the family must fulfill their responsibilities to children. In the absence of parents or the family, then the State must provide appropriate alternative care.

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[36]Sloth-Nielsen, Mezmur and Van Heerden 'Inter-country adoption from a southern and eastern Africa perspective', a paper presented at the Commonwealth Judges Forum, Windsor Park, United Kingdom, 2-5 August 2009.

[37]Friedman and Pantazis 'Children's rights' in Woolman *et al Constitutional law of South Africa* (2008) (2nd ed) 47-3.

[38]Some of the cases referred to include *Heystek v Heystek* 2002 2 SA 754, *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as amicus curiae)* 2003 2 SA 198 (CC), *SW v F* 1997 1 SA 796 and *J v Director General, Department of Home Affairs* 2003 5 SA 605 (D).

[39]Friedman and Pantazis (n 37) 47-5 to 47-6.

[40]2002 2 BCLR 187 (T).

Sloth-Nielsen notes that this provision does not afford children a right to family life but merely a right to parental care, and that the Constitution deliberately omits including such a right. However, she notes that the practical effect of this omission is of little importance given that the Constitutional Court has derived a right to family life in a number of cases.[41] One of these is the matter of *The Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).[42] In this case, the Constitutional Court considered whether or not children had an immediate claim to housing by invoking their right to shelter in terms of section 28(1)(c). The Court considered both section 28(1)(c) and section 26 of the Constitution (everyone has the right to access to adequate housing) and held that there had been no infringement by the State of the children's rights in section 28(1)(c) since the primary obligation imposed by section 28(1)(c) fell onto the child's immediate caregiver – the Court found that section 28(1)(c) did not create a direct and enforceable claim upon the State by children. The Court held that the right in section 28 (1)(c) did not create rights that are separate and independent for children and their parents. However, in coming to its decision, the Constitutional Court held that section 28(1)(c) must be read together with section 28(1)(b).[43] The Court held that section 28(1)(b) outlined those parties who are responsible for providing care to children while section 28(1)(c) listed various aspects of the child's entitlement to care under subsection (1)(b).[44] Ultimately, the Court reasoned that the Constitution contemplated that a child had the right to parental or family care in the first place, and the right to alternative appropriate care only where that was lacking and that therefore, the obligation to provide shelter in section 28(1)(c) was imposed primarily on the parents or family and only alternatively on the State.

In *S v M*, instead of expanding on the scope of application of the right contained in section 28(1)(b), as many of the previous cases have done, Sachs delves into the essence of what parental care should encompass. In a particularly insightful passage, Justice Sachs instinctively describes the role of parents in fulfilling their duty under section 28(1)(b):

> Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cellphones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on

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[41]For instance, *Dawood v Minister for Home Affairs* 2000 8 BCLR 837 (CC) and *Du Toit v Minister for Welfare and Population Development* (n 38) where, *inter alia*, the right to privacy is interpreted to embrace the avoidance of interference from family life. See Sloth-Nielsen 'Children' in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2005) 23-4.

[42]For general comment on the *Grootboom* case see Sloth-Nielsen 'The child's right to social services, the right to social security and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 *SAJHR* 210 and Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1.

[43]Paragraph 76.

[44]*Id* para 77.

> how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.[45]

While it certainly complements previous judgments of the Constitutional Court, this pronouncement takes the substance of the right to parental care to a different level than had been formulated previously. It alludes to the honour of being a parent, and the responsibility and the accountability that attaches to a parent in having to shape the life of his or her child.

Rights other than those in section 28 of the Constitution

While some of the Constitutional Court judgments have interpreted children's rights in relation to the general rights contained in the Bill of Rights,[46] most have concentrated on the rights contained in section 28. While, as has been discussed earlier in this section, the jurisprudence of Justice Sachs has contributed greatly to the interpretation of the section 28 rights of children, in the *Christian Schools* and *S v M* cases, he has innovatively dealt with the child's right to dignity (amongst others) in the Bill of Rights.

In the *Christian Schools* case Justice Sachs was faced with balancing the rights of children with the rights of their parents to freedom of religion. In holding that the parents' rights to freedom of religion were reasonably and justifiably limited under the Constitution, Justice Sachs examined the best interests of the child, the child's right to freedom and security of the person, and to equality, and stated that the 'more persuasive argument is to the effect that the state has an interest in protecting pupils from degradation and indignity.'[47] Examining a range of cases and international law, he concluded that:

> The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.[48]

Likewise, in the *S v M* case Justice Sachs clearly recognises the connection between section 28 rights and a child's dignity. He states:

> Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.[49]

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[45]Paragraph 34.
[46]For example, *S v Williams* 1995 3 SA 632 (CC) (dignity), *Khosa v Minister of Social Development* 2004 6 BCLR 569 (CC) (equality) and *J&B v Director General: Department of Home Affairs* 2003 5 BCLR 463 CC (equality).
[47]Paragraph 43.
[48]*Id* para 50.
[49]*Id* para 18.

This quote underscores the emphasis placed by Justice Sachs on the individuality of a child and places the nature of childhood at the forefront. It is a ringing statement described by Skelton as poetic,[50] and clearly indicative of Sachs' understanding of the complexities and inter-connectedness of legal rights and social issues.

Guidelines for the application and implementation of children's rights

To truly give effect to the children's rights contained in the Constitution, interpretation of rights often needs to be complemented with practical guidelines on how the right should be applied and implemented. A theoretical interpretation of a right is obviously critical, however, for there to be consistency in practice, certainty and a clear understanding of the interpreter's intention, the 'rules' of application are a crucial component that allow for the effective implementation of rights.

A commendable example of how the right not to be detained except as a measure of last resort and for the shortest appropriate period of time, as contained in section 28(1)(g), should be given effect in relation to first time child offenders (prior to the Child Justice Act 75 of 2008) was provided in the case of *S v Z*.[51] In this case the court set out general guidelines for courts when children are sentenced, and the guidelines include:

- the proper determination of the age of the child because the child's detention in prison will depend on the child's age;
- acting dynamically to obtain full particulars of the accused child's personality and personal circumstances, and obtaining a pre-sentence report; and
- adopting as a point of departure that imprisonment is inappropriate for a first offender and that short-term imprisonment is rarely appropriate.[52]

In a similar vein, Sachs provides the guidance needed for his interpretations of section 28 in both *S v M* and *AD v DW*. Both cases deal with legal rules and principles beyond the scope of children's rights' in the Constitution, namely, sentencing and the principle of subsidiarity, and he provides guidance on how to apply these legal rules in light of children's rights.

In *S v M*, Justice Sachs sets out what he considers to be the proper approach of a sentencing court where the convicted person is the primary caregiver of minor children. He approvingly cites the recommendations of the curator regarding the

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[50]Skelton (n 10) 354.
[51]1999 1 *SACR* 427 (E).
[52]For a full discussion of the case, see Skelton 'A decade of case law in child justice' Gallinetti, Kassan Ehlers *Child justice in South Africa: Children's Rights Under Construction Conference Report* (2006) 65.

four responsibilities of a sentencing court,[53] and then sets out what he believes the correct approach to be:

> Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts … Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.[54]

In the *AD v DW* case, Justice Sachs provided similar guidance regarding the application of the best interests principle and the principle of subsidiarity. He first provided guidance on how the best interests principle should be applied in practice in inter-country adoption cases: there should be a contextualised case-by-case inquiry by child protection practitioners and judicial officers to find a solution best adjusted to the child; the successful application of the best interests principle will depend on the ability of placing agencies in the country of origin to investigate adequately the viability of local placement for the child in question; and collaboration between the government and child welfare agencies in the country of origin are conducive to success in inter-country adoptions.[55]

He then sets out how the principle of subsidiarity should be applied in light of the principle of the best interests of the child. First, the overall guiding principle is that there are 'powerful considerations' that favour adopted children being brought up in their country of birth.[56] However, the subsidiarity principle must be seen as subsidiary to the best interests of the child principle – there must be an individualised approach to each child.[57] Finally, there should not be 'unduly rigid adherence' to technical legal matters as the courts' role is to guard the best interests of the child and this has to take precedence over their traditional role as arbitrators of a dispute between litigants.[58]

These two cases ably illustrate Sachs' insight into the intricacies involved in applying children's rights within the context of existing legal rules and principles and the concomitant need to provide guidelines on how the intersection between the two should be implemented in practice.

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[53]Paragraph 32. The four responsibilities are: to establish whether there will be an impact on a child; to consider independently the child's best interests; to attach appropriate weight to the child's best interests; and to ensure that the child will be taken care of if the primary caregiver is sent to prison. Sachs goes on to say (in para 33) that these are practical modes of ensuring that s 28(2), read with s 28(1)(b), is sensibly applied.
[54]Paragraph 33.
[55]*Id* paras 50 and 51.
[56]*Id* para 55.
[57]*Ibid*.
[58]*Ibid*.

The approach to children's rights in the broader legal system

Apart from interpreting section 28 rights and providing some guidance on their application, Justice Sachs' jurisprudence in these three cases has broader significance for children's rights in two ways, both of which point to an approach that indirectly favours the theory of children as being autonomous beings. The first manifestation of this is the emphasis that he places on the individual child and the second is the weight he attaches to the voice of the child.

A key area in the theoretical discourse of children's rights is the dialogue regarding the autonomy of the child and children's evolving capacities, and the implications this has for the approach that a particular legal order adopts towards children's rights. Fyfe describes the debate as being between the 'protectionists' and the 'liberationists', which two schools of thought are defined in Franklin as 'those interested in protecting children and those in protecting children's rights'.[59]

Archard's opinion is that there is a central tension in the United Nations Convention on the Rights of the Child between protection rights and participation rights.[60] He argues that the participation approach represents children as subjects or agents, capable of exercising for themselves certain fundamental powers such as freedom of expression and freedom of association. On the other hand, the protectionist approach represents children as patients or objects, potential victims of harmful treatment, and hence such rights as the right to be protected against all forms of physical or mental violence and the right to be protected from economic exploitation are invoked.

Freeman argues that the dichotomy drawn between the two approaches is 'to some extent a false divide' and should not divert attention away from the fact that the true protection of children does protect their rights.[61] He asserts that both approaches are correct to emphasise part of what needs to be recognised and both are incorrect in failing to address the claims of the other side.

Sachs' approach in the three cases under review seems to favour the liberationist approach indicated by the way he specifically refers to children as individuals in all three cases under discussion.[62] However, it is the following

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[59]Fyfe *Child labour* (1989) 166. Franklin refers to the 'protectionists' as 'caretakers' or 'paternalists'. See Franklin 'The case for children's rights: A progress report' in Franklin *The handbook of children's rights: Comparative policy and practice* (1995) 10-14.

[60]Archard *Children: Rights and childhood* (2004) (2nd ed) 60-61.

[61]Freeman 'Taking children's rights more seriously' in Alston, Parker and Seymour *Children, rights and the law* (1992) 68-69.

[62]For instance, in the *Christian Schools* case (n 8), in para 15, he states: '[t]he child, who is at the centre of the enquiry, is probably a believer, and a member of a family and a participant in a religious community that seeks to enjoy such freedom. Yet the same child is also an individual person who may find himself "at the other end of the stick", and as such be entitled to the protections of sections 10, 12 and 28.' So too, in the *AD v DW* case (n 11) at para 55: '… each child must be looked at as

dictum (quoted previously in 'The interpretation of children's rights in the bill of rights of this article) that illustrates this most movingly:

> Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.[63]

Yet, despite the emphasis on the child as an individual, Justice Sachs ultimately adopts the balanced approach that Freeman favours – which is that children's rights should be protected. This is evident when, in the following paragraph, he goes on to say that '[w]hat the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives'.[64]

Linked to the issue of the child as an individual is the notion of the 'voice of the child'. This is a key issue in the debate between the 'protectionists' and the 'liberationists', with the latter seeing participation rights as a critical component of children's rights. Article 12 of the CRC deals with the child's right to participate in all decisions affecting him or her. While this right to participate is not directly translated into the Constitution (although it is inherent in the best interests principle),[65] Sachs has been instrumental in highlighting the need for the child to express his or her views on issues that affect him or her. Indeed it is in the postscript that appears at the end of the *Christian Schools* case that Sachs lamented the fact that a *curator ad litem* was not appointed,[66] and this postscript has led to the appointment of *curators ad litem* in a range of subsequent cases including *S v M* and *AD v DW*.

As noted earlier in this paper, Sloth-Nielsen has lauded this approach and says that it 'must be cited as a shining example of an awareness of the potential for children's participation to alter the lens through which the enforcement or application of children's rights is viewed'.[67]

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an individual, not as an abstraction'.

[63]Paragraph 19.

[64]*Id* para 20.

[65]The aspect of art 12 that is represented in the Constitution is that the child has a right to legal representation – in ss 35 and 28(1)(h) – but this is a narrower construction of the participation rights found in art 12(2) of the CRC.

[66]Para 53, where he states: '[a]lthough both the state and the parents were in a position to speak on their behalf, neither was able to speak in their name. A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. 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.'

[67]Sloth-Nielsen (n 9) 151.

This then is the message that Justice Sachs seems to convey – in protecting the child and enforcing the child's rights in our legal system and under the Constitution, the child as an individual and the views of the child are fundamental considerations for any decision-maker.

Conclusion

Scepticism has been expressed that the constitutionalisation of children's rights can constitute 'safe political rhetoric that will not translate into substantive benefits for children'.[68] However, it is patently clear that the South African Constitutional Court has not allowed this to happen, and Tobin does proceed to commend the South African experience as a legitimate example of the advancement of children's rights through a constitutional framework.

While the jurisprudence of the Constitutional Court relating to children's rights is attributable to various judgments handed down by a range of Justices of the Court, the aim of this article was to highlight the significant advances made by the judgments of Justice Sachs in the three cases under discussion. While not only providing progressive and valuable interpretations of the rights afforded to children under the Constitution, he has done so with his particular style of sensitivity and humaneness. In particular Justice Sachs has elevated the principle of the best interests of the child and the dignity of children to a whole new level.

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[68]Tobin (n 3) 125.