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Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution

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CHILDREN'S RIGHTS AND FAMILY AUTONOMY IN THE
SOUTH AFRICAN CONTEXT: A COMMENT ON CHILDREN'S
RIGHTS UNDER THE FINAL CONSTITUTION

Tshepo L. Mosikatsana*

This Article investigates the nature and extent of the protection granted to children's rights in the South African Constitution. It concludes that the child-centered approach of the Constitution entitles children, as independent actors, to certain fundamental rights. Acknowledging both the parent-centered nature of the existing South African legal framework and the entrenched support for practices, many rooted in indigenous law and tradition, that contribute to the oppression of children, the author argues that the constitutionalization of these rights will contribute to the betterment of children in South Africa, proving to be more than mere moral exhortation. Under apartheid in South Africa, children, who were treated only as objects of parental concern and not as independent actors, were left to the mercy of the state. As a result, they lost any claim to their fundamental rights. This Article argues that recognition of the inalienable rights of children, in fact and not just in the Constitution, is the critical step in improving children's lives and ensuring the future of a democratic South Africa. Specifically, constitutionalization provides a basis for challenging racially structured and parent-centered child welfare laws and practices.

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INTRODUCTION

*Mothers and fathers of South Africa we are the voices of your
children those who live and those yet to be born*

*We are the undernourished the under-educated, the homeless
and the naked*

*The voiceless victims of the infant mortality plague that has
seen so many of us young ones buried before reaching the age
of one,*

We are your children

*We call upon you today,
on our knees we implore you
to please create for us a new day
a new beginning, a new South Africa.¹*

1. LETTA MBULU, UNITY SONG (words and music by Caiphus Semenya).

The 1996 Constitution² marks a watershed moment in the process of democratization in South Africa. This event has particular significance for South Africa's children, as a result of the Constitution's focus on children's rights in section 28.³ The longstanding acceptance of private or parental responsibility for child welfare in South African law⁴ makes the constitutionalization of public or state responsibility for child welfare such an innovative accomplishment. The magnitude of the transformation worked by section 28 is most striking when viewed in contrast to the South African State's historically antagonistic relationship with children.

Children, particularly Black children,⁵ were the main victims of human rights violations under the apartheid regime.⁶ As one scholar has noted,

2. S. AFR. CONST.

3. S. AFR. CONST. § 28. Section 28 refined and reinforced the children's rights clause introduced by section 30 of the interim Constitution. S. AFR. CONST. § 30 (1993).

4. See P.Q.R. BOBERG, *THE LAW OF PERSONS AND THE FAMILY* 315-17 (1977) (describing how parental power is acquired and lost in South Africa); Raylene Kneightley, *Children and the Legal System: An Overview of Issues Raised by Contributors*, 1996 ACTA JURIDICA 1, 1 (introducing a discussion of the constitutionalization of the rights of the child).

5. According to apartheid policy, which found expression through the Population Registration Act 30 of 1950 (repealed 1991) and Proclamation 123 of 1967, Proc. R123/1967, a South African child was classified at birth as belonging to one of four racial categories: Black (referring exclusively to Africans), Colored (mixed-race), Asian, or White. *Id.* The first three categories were designated non-White. This classification determined a child's life prospects, including the child's future health, education, employment opportunities, and final place of burial (because cemeteries were segregated as well). *Id.* The government further reinforced racial segregation by passing several acts of legislation. See, e.g., Reservation of Separate Amenities Act 49 of 1953 (providing for separate public facilities, including restaurants, restrooms, and transport); Group Areas Act 41 of 1950 (providing for segregated residential areas); Prohibition of Mixed Marriages Act 55 of 1949 (prohibiting marriages between Blacks and Whites); and Immorality Act 5 of 1927 (punishing Blacks and Whites who engage in sexual relations with each other with as much as five years in prison). For a discussion of the system of racial classification in South Africa, see Alan Mabin, *Comprehensive Segregation: The Origins of the Group Areas Act and Its Planning Apparatuses*, 18 J. S. AFR. STUD. 405 (1992); see also INTERNATIONAL DEFENSE AND AID FUND FOR SOUTHERN AFRICA, *CHILDREN UNDER APARTHEID* 7-8 (1980) (discussing the plight of interracial children); S.D. Girvin, *Race and Race Classification*, in *RACE AND THE LAW IN SOUTH AFRICA* 1, 1-10 (Allen J. Rycroft ed., 1987) (discussing the deleterious effects of the Population Registration Act of 1950); M.K. Robertson, *Black Land Tenure: Disabilities and Some Rights*, in *RACE AND THE LAW IN SOUTH AFRICA*, supra, at 119, 119-38 (discussing how different racial groups receive differential treatment in occupation and ownership of immovable property).

6. See June Sinclair, *South Africa: Children and Political Violence; Divorce and the Division of Property*, 29 J. FAM. L. 411, 412-13 (1991); see also JOHN KANE-BERMAN, *SOWETO: BLACK REVOLT, WHITE REACTION* 41-46 (1978) (describing how officers could detain prisoners indefinitely without allowing others to have access to them).

the *apartheid* regime in South Africa . . . embarked on a deliberate campaign of repression directed at African township children. Although accurate statistics are hard to achieve, the most reliable count available reports in the period between 1984 and 1986 that 312 children were shot dead by the police, another 1,000 or so wounded, an additional 11,000 detained without trial and almost invariably tortured, 18,000 more arrested on charges arising from political activities, and 173,000 held in police cells supposedly awaiting trials. Although the notion of child extends until the age of 18, many of the South African children targeted by the police were far younger, frequently as young as 11 and even younger on occasion.⁷

On June 16, 1995, the anniversary of the Soweto uprisings,⁸ South Africa announced the ratification of the United Nations Convention on the Rights of the Child.⁹ This act, together with the inclusion of a section on children's rights in the Constitution,¹⁰ pro-

7. Richard Falk, *Targeting the Children of South Africa: A New Crime of State*, 1 AFR. J. INT'L & COMP. L. 13, 13 (1989); see also Chris Nicholson, *Children in Detention, in EMERGENCY LAW: PAPERS PRESENTED AT A WORKSHOP IN JOHANNESBURG* 53-60 (Nicholas Haysom & Laura Mangan eds., 1987).

8. KANE-BERMAN, *supra* note 6, at 1-10.

On the morning of Wednesday 16 June 1976, twenty thousand Soweto schoolchildren marched in protest against a decree by the South African government's Department of Bantu Education that Afrikaans had to be used as one of the languages of instruction in secondary schools. . . . Police vehicles raced to the scene. . . no order from the police to the marchers to disperse was heard, and a senior police officer admitted at the time that no warning shots had been fired either. . . . The first child to be shot was evidently a thirteen-year-old schoolboy called Hector Petersen. . . . Then, in the words of one newspaper, 'All hell broke loose'. . . Within two months of 16 June, at least 80 black communities all over the country had expressed their fury; within four months the number had risen to 160.

Id. at 1-2.

9. *Convention on the Rights of the Child*, G.A. Res. 25, U.N. GAOR, 44th Sess., U.N. Doc. A/736 (1989) [hereinafter *U.N. Convention*]. The Convention on the Rights of the Child transformed general concern with child suffering into public international law. *Id.* In this respect it contrasts with the following two declarations: the Declaration of the Rights of the Child 1924, adopted by the League of Nations in 1924 (League of Nations Doc. A. 127 (1924)); and the U.N. Declaration of the Rights of the Child 1959 (G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959)). Declarations proclaim agreed upon principles but are not legally binding. A U.N. Convention, however, is binding on the countries that ratify it.

10. S. AFR. CONST. § 28.

vided proof that South Africa had renounced its oppressive past and would pursue a policy directed at improving child welfare. By ratifying the Convention, South Africa committed itself to the full implementation of the rights contained therein.¹¹ Additionally, the Constitution's children's rights provision incorporated some of the provisions of the UN Convention, bringing the influence of international human rights jurisprudence into South African law.¹²

Most constitutional democracies, including Canada and the United States, have no children's rights clause in their constitutions. Nonetheless, these countries have been able to promulgate laws and pursue policies that are child-centered.¹³ It is this child-centered approach, seen by some as a Western approach, that the drafters of the new Constitution brought to South Africa. An analysis of this effort to import a child-centered approach into South African law and of its potential for success in the context of existing legal and cultural structures is the focus of this paper.

The principal components of the South African legal system are the common law¹⁴ and statutes. Although customary or indigenous

11. These rights divide into the following three broad categories: 1) Protection: Children have a right to protection from cruelty, abuse, neglect, and exploitation. 2) Participation: Children have a right to play an active role in society and to have a say in their own lives. 3) Provision: Children have a right to have their basic needs met. See *U.N. Convention*, *supra* note 9.

Part of the enforcement mechanism is contained in article 43 of the Convention, which establishes a committee of independent experts, and article 44, which places an obligation on state parties to submit periodic reports to the committee on the status of children's rights in their territory. *Id.* art. 43, 44. Article 45 permits the committee to request technical assistance from UNICEF and other specialized agencies. *Id.* art. 45.

12. The incorporation of international human rights law and international law into South Africa's municipal law is demonstrated in the Constitution by sections 39(1), 231, 232, and 233. Section 39(1) provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must promote the values that underlie an open and democratic society based on human dignity, equality and freedom . . . must consider international law . . . may consider foreign law." S. AFR. CONST. § 39(1). Section 231 provides that international agreements form part of South African law. *Id.* § 231. Section 232 provides that customary international law is part of South African law. *Id.* § 232. Section 233 admonishes South African courts to interpret legislation in a manner consistent with international law. *Id.* § 233. See also John Dugard, *The Influence of International Human Rights Law on the South African Constitution*, in 49 CURRENT LEGAL PROBLEMS 305, 307-12, 322 (Michael Freeman ed., 1996) (describing the role of international human rights law in development and operation of New South African democracy).

13. See T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 96 (1995). "In economically developed, industrialized societies, while self-sufficient individualism is the ideal, children enjoy a privileged position. Biological parents bear full responsibility for rearing children while . . . still a minor child's interests are always preferred to its parents." *Id.*

14. Common law refers to the Roman-Dutch colonial legal system and judicial precedent. For a discussion of the common law as a source of law, see DUARD KLEYN

law must be recognized and treated as a vital part of the legal reality in South Africa, it has traditionally occupied a position of secondary importance.¹⁵ The existing network of South African laws and practices pertaining to the rights of children is not, in theory or reality, child-centered. Indigenous law is rooted in the protection of the family, and its focus generally is on the community rather than on the individual.¹⁶ Similarly, much of the common law and the older statutory law is parent-centered.¹⁷ The most important statute for the advancement of children's rights in South Africa is the Child Care Act,¹⁸ which, like much of municipal law that addresses the objectives of section 28, predates the Constitution. Most of the pre-constitutional child and family welfare laws tended to be patriarchal¹⁹ and also conferred benefits along racial lines.²⁰ Constitutionalization of children's rights provides independent ideological justification for reforming the racist and anti-feminist aspects of these laws. Likewise, Section 28 provides an opportunity to enact new laws that foster the democratic, child-centered goals of the Constitution. This significant potential for reform notwithstanding, efforts to realize these constitutional promises nevertheless must take place within an existing legal structure that is hostile to such ideals.

A key question for the success of Section 28 is whether its child-centered regime is compatible with the communalism of African

& FRANS VILJOEN, BEGINNER'S GUIDE FOR LAW STUDENTS 85-90 (1996); see also LOURENS M. DU PLESSIS & A.G. DU PLESSIS, AN INTRODUCTION TO LAW 16-75 (1992) (arguing that it was inevitable that South African law would grow from Roman-Dutch law); H. R. HAHLO & ELLISON KAHN, THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND 329-31 (1968) (outlining the history of South African law as it relates to Roman-Dutch law); W.J. HOSTEN ET AL., INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY 337-46 (1995) (discussing Roman-Dutch law at the Cape of Good Hope from 1652 to 1795).

15. Customary law (also referred to as indigenous law) is derived mainly from current social practices. According to § 1(1) of the Law of Evidence Amendment Act 45 of 1988, customary law supplements the common law. The courts have discretion to apply customary law, which should not be applied if it conflicts with the common law. *Id.* For a discussion of the interaction between the common law and customary law, see BENNETT, *supra* note 13, at 51-65; see also KLEYN & VILJOEN, *supra* note 14, at 93-94 (comparing the common law to customary law); HOSTEN ET AL., *supra* note 14, at 1248-69 (arguing for the use of the comparative method when looking at indigenous law and the common law).

16. HOSTEN ET AL., *supra* note 14, at 1259-61.

17. *Id.* at 616-20.

18. Act 74 of 1983 as amended by the Child Care Amendment Act 96 of 1996. For a discussion of the Child Care Act, see H. M. BOSMAN-SWANEOEL & P.J. WESSELS, A PRACTICAL APPROACH TO THE CHILD CARE ACT (J. J. Scherman, Trans., 1995).

19. See J. Julyan, *Women, Race and the Law*, in RACE AND THE LAW IN SOUTH AFRICA, *supra* note 5, at 139, 143.

20. See K. Govender, *Race and Social Rights*, in RACE AND THE LAW IN SOUTH AFRICA, *supra* note 5, at 229, 231.

culture.²¹ Specifically, we do not yet know whether the fact that section 28 borrows heavily from the UN Convention on the Rights of the Child means that the Constitution contains an individualistic concept of rights, founded in Western liberalism, that is incompatible with an African communalistic way of living.

One potential conflict between indigenous law and the child-centered norms trumpeted in the Constitution concerns the age of majority. Under indigenous law there are neither fixed criteria for determining the status of childhood nor a set age for the attainment of majority.²² The attainment of majority under indigenous law depends largely on physical and intellectual maturity, initiation, marriage, and the establishment of a separate household.²³ Both the UN Convention on the Rights of the Child and the Constitution state that adulthood begins at age eighteen.²⁴ The Convention does not compel states to pass legislation fixing an age of majority; consequently, there is no international legal basis for introducing a specific age for the termination of minority under indigenous law.²⁵

This constitutional conflict could have serious practical implications. T.W. Bennett argues that, because the attainment of majority under indigenous law does not depend on the attainment of a predetermined age, a child's legal status could be manipulated by its guardian to withhold certain rights that come with majority.²⁶ In such an event, sections 9(3)²⁷ and 28(2)²⁸ of the Constitution could be

21. "The African tradition is quite different. Here the welfare of the extended family predominates. Children have no especially favored position in relation to their parents or other relatives; to the contrary, a child's interests might well be subordinated to those of the family." BENNETT, *supra* note 13, at 96 (footnotes omitted).

22. See J. C. Bekker, *Children and Young Persons in Indigenous Law*, in *THE LAW OF CHILDREN AND YOUNG PERSONS IN SOUTH AFRICA 190-92* (J.A. Robinson ed., 1997); BENNETT, *supra* note 13, at 101-02.

23. Bekker, *supra* note 22, at 191; see also BENNETT, *supra* note 13, at 101-02 (discussing various criteria for determining the status of childhood in South Africa).

24. Article 1 of the U.N. Convention states that "a child means every human being below the age of eighteen years." *U.N. Convention*, *supra* note 9, at art. 1. Section 28(3) of the Constitution states that the word "child" "means a person under the age of 18 years." S. AFR. CONST. § 28(3).

25. Age of Majority Act 57 of 1972 could achieve this purpose, but the courts have not applied the Act consistently. See BENNETT, *supra* note 13, at 102.

26. BENNETT, *supra* note 12, at 102.

27. This section prohibits discrimination on the basis of age. S. AFR. CONST. § 9(3).

28. This section makes the child's best interests paramount in all matters concerning the child. S. AFR. CONST. § 28(2). For a discussion of the best interests standard in South African law, see generally Anne Palmer, *The Best Interests Criterion: An Overview of its Application in Custody Decisions Relating to Divorce in the Period 1985-1995*, 1996 ACTA JURIDICA 98; Tshepo L. Mosikatsana, *Gay/Lesbian Adoptions and the Best Interests Standard: A Critical Analytical Perspective*, 1996 ACTA JURIDICA 114.

invoked to modify parent-child relations under indigenous law in order to attain a more favorable situation for the child.²⁹ Bennett asserts that a strict application of the Age of Majority Act, or some other instrument reflecting international law and its embodiment in the South African Constitution would be insufficient.³⁰ Bennett believes in the need for a system to regulate the control of family property, best achieved through statute, that would lead to protection of children's interests through detailed planning and careful deliberation.³¹ Thus, the claims of competing legal systems may once again require children to rely on the political process to protect their rights.

Though increased allocation of resources to children's care and education can improve these children's life prospects, children's interests cannot be met fully unless the children are treated as independent legal subjects rather than as objects of adult concern.³² The argument that providing rights for children necessarily will have a negative impact on the family as a unit is misguided because it relies on an anachronistic model of society that focuses solely on adults. The framers of the new Constitution rejected this model by including Section 28. They recognized that children's entitlement to protection of their human rights is not weaker because they are not adults. The phrase "children's rights" is appropriate because children have been excluded in the same manner as women and, in a similar fashion, have been denied certain fundamental rights. The difficulty with granting children rights is that their physical, emotional, and intellectual immaturity cause dependence on adults to assist children in exercising those

29. The application of the Constitution to parent/child relations is made possible by section 9(4), which provides for the horizontal application of constitutional provisions. For a discussion of the horizontal application of the Constitution, see *De Klerk v. Du Plessis*, 1995 (2) SA 40 (T); see also *Baloro v. University of Bophuthatswana*, 1995 (2) SA 197 (B); M.L.M. Mba, *The Province of the South African Bill of Rights Determined and Redetermined—A Comment on the Case of Baloro & Others v. University of Bophuthatswana & Others*, 113 S. AFR. L.J. 33–45 (1996) (arguing that a definitive judgment has yet to be handed down on the question of whether the Bill of Rights extends to embrace infractions of the rights and freedoms enshrined in the bill involving ordinary individuals).

30. BENNETT, *supra* note 13, at 104–05. Bennett states that “[i]f the courts were simply to apply the Law of Majority Act to Africans, some of the inequities of the current regime could be remedied by putting an end to a person’s incapacity at a reasonable age. More, however, is needed.” *Id.* Bennett’s belief that “more . . . is needed” stems from his conviction that indigenous and customary law must be integrated carefully into the new South African legal structure, recognizing the different problems that the alteration of each separate practice raises. *Id.* at 104.

31. *Id.*

32. PENELOPE LEACH, *CHILDREN FIRST* 203 (1994).

rights, unlike other rights recipients such as women.³³ As Onora O'Neill has written, the fact that children "cannot claim their rights for themselves . . . is no reason for denying them rights. Rather it is reason for setting up institutions that can monitor those who have children in their charge and intervene to enforce rights."³⁴

Another potential concern involves the effect that a child-centered approach would have on the family. Is it appropriate to give children rights without cementing their obligations to their families? Does the protection of children's rights without protecting the family as a basic unit erode family autonomy?

A child-centered approach to children's rights may have a Western origin, but it has been incorporated into the South African Constitution and can and should be enforced within South African society.

I. THEORETICAL BASIS FOR CONSTITUTIONALIZING CHILDREN'S RIGHTS

This article examines childhood from a critical analytical perspective, adopting a non-traditional, child-centered approach that studies childhood as a discrete social phenomenon rather than a part of the family institution. To overcome some of the limitations of a formalistic approach to the study of childhood, this Article employs a socio legal perspective that integrates commonly segregated disciplines such as law, sociology, and political science.

Most social theories of children's studies are parent-centered.³⁵ Such theories rely upon the positivist functionalist approach that studies children as the concern of adults.³⁶ This approach seeks to provide a context for the study of childhood. Noted social scientist Talcott Parson views the family as the site for socialization, a process whereby parents transmit social values to their children to instill conformity.³⁷ Failed socialization results in deviance.³⁸ Implicit within functionalist theory is the deficit model of childhood, which views childhood both as a transitional phase to becoming an adult and as a means of ensuring stability through social and cultural

33. See Julia Sloth-Nielsen, *Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa*, 1996 ACTA JURIDICA 6, 7.

34. Onora O'Neill, *Children's Rights and Children's Lives*, in CHILDREN, RIGHTS AND THE LAW 24, 24 (Philip Alston et al. eds., 1993).

35. See, e.g., BENNETT, *supra* note 12; Boberg, *supra* note 3; O'Neill *supra* note 33.

36. TALCOTT PARSONS & ROBERT F. BALES, *FAMILY, SOCIALIZATION AND INTERACTION PROCESS* (1955). In Chapter II, Parsons analyzes the relationship between the structure of the American family and the socialization of the child. *Id.* at 35-131.

37. *Id.*

38. *Id.* at 144-46.

reproduction.³⁹ Such an approach rests on weak sociological foundations because it views children as objects of adult concern and not as self-conscious social actors.

The critical analytical approach⁴⁰ is child-centered in that it studies childhood as a fixed social category, and it locates young people in society within the variable of class. Children are viewed as oppressed, disempowered, and marginalized, not allowed to make decisions affecting their own lives.⁴¹ Giving children rights provides them with institutional means to influence these decisions. Article 12 of the UN Convention on the Rights of the Child, the basis for section 28 of the Constitution,⁴² promotes a child-centered approach and is consistent with the goals of the critical analytical perspective.⁴³ The Constitution states that children and young persons must be permitted to express their views on matters that affect them.⁴⁴

Although children are a nonvoting constituency, it is hardly surprising that a child-centered approach is gaining momentum in South Africa. One reason is that the youth of South Africa played a special role in spearheading the struggle for liberation from apartheid.⁴⁵ These contributions to the processes of political transformation received national recognition through South Africa's designation of June 16th as Youth Day, the ratification of the UN

39. See Ian Butler, *Children and the Sociology of Childhood*, in *A CASE OF NEGLECT? CHILDREN'S EXPERIENCES AND THE SOCIOLOGY OF CHILDHOOD* 1, 8 (Ian Butler & Ian Shaw eds., 1996) ("[In] a deficit model. . .[.] childhood is understood only as a transitional process, en route to becoming an adult.") [hereinafter *A CASE OF NEGLECT?*]; see also Lesley Pugsley et al., *I Don't Eat Peas Anyway! Classroom Stories and the Social Construction of Childhood*, in *A CASE OF NEGLECT?*, *supra*, at 56, 56 ("[C]hildhood is seen as an incremental, staged quest toward. . .adulthood.").

40. The critical approach builds on the achievements of "new criminologists." See generally I. TAYLOR ET AL., *THE NEW CRIMINOLOGY: FOR A SOCIAL THEORY OF DEVIANCE* (1973), who borrow from the Marxist tradition by including in the sociology of youth the variable of class. By applying the category of class to deviant youth, one views such youths as social actors demonstrating a form of resistance. *Id.*

41. See Howard Williamson, *So Much for 'Participation': Youth Work and Young People*, in *A CASE OF NEGLECT?*, *supra* note 39, at 162, 162 ("[Children] are oppressed, disempowered and excluded from any platform on which the real decisions affecting their lives are made.").

42. S. AFR. CONST. § 28.

43. See *U.N. Convention*, *supra* note 9, art. 12.

44. S. AFR. CONST. § 28.

45. South African youth resorted to boycotts of apartheid institutions such as schools. They also instigated rent and economic boycotts that culminated in violent confrontations with the police and military. Many of the children from Soweto and other parts of the country eventually fled into self-imposed exile in the neighboring countries of Lesotho, Botswana, and Swaziland. For a discussion of the role of the youth in the struggle against apartheid, see KANE-BERMAN, *supra* note 6, at 47-68; CHILDREN UNDER APARTHEID, *supra* note 5, at 95-118.

Convention on the Rights of the Child, and the inclusion of section 28 in the Constitution.⁴⁶

A further explanation for the constitutionalization of children's rights may be the moral legitimacy that the concept of children's rights enjoys. Commenting on the constitutional negotiation process that led to the inclusion of a children's rights provision in the Constitution, Julia Sloth-Nielsen states: "Unlike other fundamental rights, where compromises between political parties had to be sought, there was no disagreement about either the desirability or ultimate formulation of the section on children's rights."⁴⁷ Disagreement does arise, however, in discussions of the implementation of newly constitutionalized rights.

II. CRITIQUE OF CHILDREN'S RIGHTS

The unanimous political support for the inclusion of a separate provision for children in the Constitution has not translated into universal support for the specific details of the provision. There have been discordant voices in legal academic circles⁴⁸ and generally among the populace.⁴⁹ The process that yielded the constitutional protection of children's rights has been criticized, as have the concurrent theoretical debates on the need for and implications of constitutionalization.⁵⁰ Some commentators argued that the initial proposals offered weak protections. For example, Du Plessis and Corder stated that

the Technical Committee's initial proposals for a clause on children's rights were rather thin. In the Seventh Progress Report, for instance, the proposed clause read as follows: "Every child shall have the right to security, basic nutrition and basic health services and not to be subject to neglect, abuse or child labor."

It was during the discussion of this report in the Negotiating Council that a representative of the previous S[outh] A[frican] Government remarked that "two pages

46. See Sloth-Nielsen, *supra* note 33, at 6-10.

47. *Id.* at 8.

48. See Michael King, *Against Children's Rights*, 1996 ACTA JURIDICA 28 (criticizing the limited ability of children's rights to protect children from anything but the most severe harms).

49. Richard Stengel, *A Land Singing Twin Anthems*, TIME, May 8, 1995, at 40 (S. Afr. ed.).

50. See King, *supra* note 48; see also LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 186 (1994) (criticizing the limits of children's constitutional right to parental care).

are devoted to the rights of 'criminals' but only two lines to the rights of children'"⁵¹

Others have argued that despite the uncontested moral legitimacy enjoyed by the concept of children's rights, the constitutionalization of children's rights is merely safe political rhetoric that will not translate into substantive benefits for children.⁵² In this view, the rights rhetoric is not a meaningful way of delivering social programs for children.⁵³ It is stated that giving children rights in the Constitution, such as the right not to be maltreated or abused, will not affect how parents behave towards their children.⁵⁴

The inclusion in the Constitution of socio-economic rights in section 28(1)(c) has attracted criticism. Many believe that second generation rights⁵⁵ should not be protected in a document that focuses mainly on first generation rights.⁵⁶ The difficulty with second generation rights is said to stem from the fact that the Constitution includes no mechanisms for their enforcement.⁵⁷ The structure of

51. DU PLESSIS & CORDER, *supra* note 50, at 186.

Prompted by these remarks, the Negotiating Council instructed the Technical Committee to attend to the extension of the clause on children's rights. The Technical Committee welcomed this opportunity, and proceeded to act on a series of submissions from the National Children's Rights Committee which incorporated principles derived from international instruments on children's rights[.] The Technical Committee was in the end satisfied that the clause it proposed . . . included all the rights of children which can be cited in [such] an instrument[,] . . . with the exception of a reference to a right to a compulsory minimum education.

Id.

52. See King, *supra* note 48, at 30–31. See also O'Neill, *supra* note 34 (arguing that, to be effective, children's rights must be cast as obligations of the state, not as freedoms from state coercion).

53. See King, *supra* note 48, at 48–49.

54. See DU PLESSIS & CORDER, *supra* note 50, at 186.

55. Second generation rights are economic and social rights; first generation rights are legal and political rights. BENNETT *supra* note 13, at 99.

56. See Sloth-Nielsen, *supra* note 33, at 7.

57. It was said of the interim Constitution that

[o]ne of its major difficulties [was] that it was a preponderantly second-generation provision in predominantly first-generation environment. Neither Chapter 3 nor the transitional Constitution itself suggests how second-generation entitlements are to be enforced. Can a court, for instance, order the State to provide all persons under the age of 18 years with a basic nutrition and basic health and social services?

DU PLESSIS & CORDER, *supra* note 50, at 186.

South African democracy belies such claims, as the Constitutional Court has identified such mechanisms. The socio-economic rights contained in the Constitution include the rights to basic nutrition, shelter, basic health care services, and social services⁵⁸ as well as the right to be protected from maltreatment, neglect, abuse, and degradation.⁵⁹ A constitutional command compelling the legislator to provide free medical care to pregnant women and children does not necessarily create a subjective right to medical care or basic nutrition. The lawmaker must first create legislation fulfilling this right. This raises several questions. What happens if the lawmaker does not execute such a law or executes it inadequately? Can the courts offer guidelines as to the way in which the legislator can execute the directive? In *Fraser v. Children's Court*,⁶⁰ the Constitutional Court did offer such guidelines. It ruled that the legislative command contained in section 8 of the Constitution establishing equality between children born in wedlock and extramarital children was binding and required the lawmaker to comply.⁶¹ Failure to comply within a period of two years would violate the Constitution.⁶² The High Court may also invoke its inherent powers to enforce socio-economic rights.⁶³

Concern also has been expressed over the implications of constitutionalization for the state. It is argued that giving the children's rights provision a justiciable character imposes an unrealistic burden on the State and, consequently, on parents.⁶⁴ It is also asserted that courts are given the power to make decisions concerning the allocation of fiscal resources to various constituencies, decisions which some contend belong with elected officials.⁶⁵ Granting the courts the power to enforce socio-economic rights does not constitute an inappropriate interference in the political process. A court hearing a constitutional challenge concerning the right to basic nutrition or basic health care services, will have to determine whether the level

58. S. AFR. CONST. § 28(1)(d).

59. *Id.* § 28(1)(e).

60. 1997 (2) SA 261, 273 (CC).

61. *Id.* at 273.

62. *Id.* at 282-84.

63. Allen J. Rycroft, *The Protection of Socio-Economic Rights*, in *ESSAYS ON LAW AND SOCIAL PRACTICE IN SOUTH AFRICA* 267, 278-79 (Hugh Corder ed., 1988).

64. See Dennis H. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. HUM. RTS. 486 (1992); Sloth-Nielsen, *supra* note 33, at 24-25.

65. DION A. BASSON, *SOUTH AFRICA'S INTERIM CONSTITUTION* 46 (1994); see also FIROZ CACHALLA ET AL., *FUNDAMENTAL RIGHTS IN THE NEW CONSTITUTION* 102 (1994) (criticizing socio-economic rights for allowing judiciary to allocate economic resources).

of the services delivered meets the basic needs.⁶⁶ If it does not, the court will find a prima facie infringement of the right and inquire into whether the violation is justifiable in an open and democratic society.⁶⁷ If the infringement cannot be justified, the court will order the state to comply with its obligations.⁶⁸ The Court, however, will not make decisions of implementation and resource allocation that should be left to local officials. As Erika de Wet notes:

This does not mean that the court will be interfering with the allocation of resources. It will not be able to tell the state *how* it should relieve the basic needs. It will only be able to indicate to the state that it is constitutionally bound to ensure the basic needs of children which must be met before the state begins to allocate funds for any other projects and expenditure.⁶⁹

Many question whether the children's rights provision creates justiciable rights or merely consists of directive principles. Those who oppose giving section 28 rights a justiciable character argue that the concept of a children's rights provision in the Constitution is not to create justiciable rights but to create directive principles that will reinforce the unassailability of the concept of human rights.⁷⁰

At the minimum, constitutionalization legitimates political discourse on children's rights and provides political justification for government expenditure on social programs for children. It also enables the rights claimants, who are children, to make substantial claims against the State using the law as a sword. It further enables children to use the law as a shield to protect themselves from erosion of social benefits by the State. Constitutionalization, however, has much greater potential. It can create justiciable rights that children may enforce against the state. The plain language of section 28 of the Constitution reinforces this notion: "Every child has the *right* . . ."⁷¹

66. See ERIKA DE WET, *THE CONSTITUTIONAL ENFORCEABILITY OF ECONOMIC AND SOCIAL RIGHTS* 104–05 (1996). De Wet notes that it is not clear how a court should determine what is a basic right, but that this determination will be a minimal standard. *Id.*

67. See Pierre de Vos, *The Economic and Social Rights of Children and South Africa's Transitional Constitution*, 10 S. AFR. PUB. L. 233, 247 (1995) (proposing that governmental failure to regulate housing markets to ensure access by all persons where there is a constitutional right to housing should "constitute a prima facie infringement of that right").

68. See DE WET, *supra* note 66, at 104–05.

69. *Id.* at 256.

70. See Sloth-Nielsen, *supra* note 33, at 17 & 17 n.66; Davis, *supra* note 64, at 486.

71. S. AFR. CONST. § 28 (emphasis added).

The reference to "right" implies that the drafters meant to create an enforceable claim.⁷²

In a democracy, the courts are not the only forums for compelling the State to act in a socially responsible manner. Socio-political factors, such as the voting power of the poor and the political clout of both social democrats and child welfare advocates, must be included in the enforcement equation. The poor constitute the majority of South Africa's population, and their children are the main beneficiaries of social welfare programs.⁷³ As a political interest group, the poor are unique because they have sufficient voting power to compel the government to respect the rights enshrined in section 28 of the Constitution.

Constitutionalization also offers the government political justification for providing social welfare benefits to children as they compete for scarce resources with the homeless, the aged, and the unemployed. In addition to political justification, constitutionalization also provides the government with useful moral and legal justifications for its social welfare expenditures when conservatives and liberals demand fiscal restraint through reduced expenditures on social programs.⁷⁴ The provision of free medical care for children under six years and pregnant mothers as well as the nutritional feeding scheme established by the President shortly after the 1994 elections demonstrate substantive outcomes, mainly benefiting the poor, that are built upon the framework of the constitutional reforms.⁷⁵

III. DO CHILDREN NEED RIGHTS?

Rights skeptics such as King and O'Neill argue that the protection of children's rights in conventions and constitutions is merely a moral

72. See DE WET, *supra* note 66, at 104-05; see also Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, 8 S. AFR. J. HUM. RTS. 451, 458 (1992); Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. HUM. RTS. 464, 469-74 (1992); Michael D.A. Freeman, *Taking Children's Rights More Seriously*, in CHILDREN, RIGHTS AND THE LAW, *supra* note 32, at 53-54.

73. See Sloth-Nielsen, *supra* note 32, at 12-14; John Kruger & Shirin Motala, *Welfare*, in FIRST CALL: THE SOUTH AFRICAN CHILDREN'S BUDGET 65, 107-08 (Shirley Robinson & Linda Biersteker eds., 1997) (stating poverty rates in South Africa remain very high and referring to a 1993 study estimating the number of poor people at 18 million or 45.7% of the total population).

74. See generally Michael King, *Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention*, 57 MOD. L. REV. 385 (1994) (commenting on the symbolism of acknowledging that children have rights).

75. See Sloth-Nielsen, *supra* note 33, at 12-14; see also Julia Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law*, 11 S. AFR. J. HUM. RTS. 401, 401 (1995).

exhortation and that the granting of rights to children is not a successful way of eliminating the mistreatment of children.⁷⁶ King states that

[i]f we search globally for the causes of the most widespread and most severe suffering to children, we find not deliberate acts by adults to cause children harm, but rather such general calamities as war, disease, poverty, natural disasters, and family breakdown. Even if we restrict our search to the harmful effects of government decisions, we hardly ever find that there was any deliberate intention to damage children.⁷⁷

King suggests that law be coupled with other social systems, such as politics and economics, to create a system that would be more effective in securing the welfare of children.⁷⁸ He contends that this new system could provide economic incentives to companies not to employ children as well as to allocate greater resources to children's care and education through families.⁷⁹

Law, as a closed system, is ineffective in meeting the needs of children and should be coupled with other systems; however, this reality does not preclude granting children rights. The constitutionalization of children's rights provides the basis for operation of the political and economic incentives and disincentives that King discusses.⁸⁰ King's approach to child welfare is parent-centered in that it treats children as objects of adult concern. King's rights skepticism is premised on the functionalist approach that views the family in terms of the public/private dichotomy, a common theme in liberal legal discourse.⁸¹ Public and private spheres of activity are characterized as separate, with parent/child relations labeled a largely private and unregulated sphere of family life.⁸²

76. King, *supra* note 48, at 39-40; see also O'Neill, *supra* note 34, at 35-40 (arguing that the rhetoric of rights rarely can empower children).

77. King, *supra* note 47, at 43-44.

78. *Id.* at 45-48.

79. *Id.* at 47-48. King does warn of risks involved in this approach. Putting pressure on governments and corporations to elicit the desired approach toward children and their rights can have unpredictable effects, and many attempts to couple politics and/or economics with the law have not been successful. *Id.* at 45-48.

80. *Id.* at 43-48.

81. For a discussion of the public/private dichotomy and its implications for parent/child relations, see Andrew Bainham, *The Privatisation of the Public Interest in Children*, 53 MOD. L. REV. 206, 206-09 (1990); see also DIANA GITTINS, *THE FAMILY IN QUESTION* (1985) (challenging the family ideology to create equality among men, women, and children).

82. Bainham, *supra* note 81, at 206; KATHERINE O'DONOVAN, *SEXUAL DIVISIONS IN LAW* 2-20 (1985).

The functionalist position is inaccurate, largely because child rearing is a public function. Consequently, parent/child relations should not be viewed as operating outside the public sphere of activity.⁸³ The failure to regulate parent-child relations by giving children rights would reinforce existing inequalities in parent-child relations and idealize the family as a safe haven for children.⁸⁴ In South Africa, child abuse, both within and outside the family structure, is commonplace. Child sexual and physical abuse is on the increase.⁸⁵ Under apartheid, the government denied Black children most educational opportunities.⁸⁶ Their labor was exploited by farmers and merchants.⁸⁷ In addition, because Black children participated in the armed struggle against apartheid, they were the victims of police and military brutality.⁸⁸ To curb these abuses and the resulting detrimental effects, the new South African Government had to grant children several rights. Children cannot be involved in armed conflict.⁸⁹ They can be detained only as a measure of last resort.⁹⁰ Children are entitled to legal representation.⁹¹ They should be protected from exploitative labor practices.⁹² They have a right to a name and nationality.⁹³ Children also are entitled to protection from maltreatment, neglect, abuse, or degradation.⁹⁴ In the following pages, this Paper will examine the ways in which these rights are recognized and enforced. The background to their inclusion in South African constitutional and statutory law will be studied as will remaining

83. John Eekelaar, *What Is "Critical" Family Law?*, 105 L.Q. REV. 244, 254-58 (1989).

84. See Christopher Lasch, *The Family as a Haven in a Heartless World*, in FAMILY IN TRANSITION 80 (Arlene S. Skolnick & Jerome H. Skolnick eds., 1980).

85. CARMEL MATTHIAS, REMOVAL OF CHILDREN AND THE RIGHT TO FAMILY LIFE: SOUTH AFRICAN LAW AND PRACTICE 24 (1997) (stating that "[i]n 1995, 28,482 cases of crime against children were reported." This represented an increase of 20.4% over the previous year's figure, which had risen by 37.6% since 1993.).

86. Tshepo L. Mosikatsana, *The Role of Local Government in the Democratisation of Sporting, Cultural, Educational and Recreational Opportunities*, in A PRACTICAL GUIDE TO HUMAN RIGHTS IN LOCAL GOVERNMENT 55, 61 (Shadrack Bo Gutto ed., 1996); see also SEAN JONES, ASSAULTING CHILDHOOD: CHILDREN'S EXPERIENCES OF MIGRANCY AND HOSTEL LIFE IN SOUTH AFRICA 163-206 (1993); CHILDREN UNDER APARTHEID, *supra* note 6, at 35-43.

87. CHILDREN UNDER APARTHEID, *supra* note 6, at 45-54.

88. Charlene Smith & Fred Khumalo, "Suffer The Children": *Refugees & Disrupted Schooling in Natal*, in PATTERNS OF VIOLENCE: CASE STUDIES OF CONFLICT IN NATAL 259 (Anthony Minaar ed., 1992).

89. S. AFR. CONST. § 28(1)(i).

90. *Id.* § 28(1)(g).

91. *Id.* § 28(1)(h).

92. *Id.* § 28(1)(e).

93. *Id.* § 28(1)(a).

94. *Id.* § 28(1)(d).

obstacles to their enjoyment by the children of South Africa. This examination will reveal the logic of South Africa's child-centered approach and the implications of this approach for parent-child relations in South Africa.

A. The Child's Right Not to Be Used in Armed Conflict and to Be Protected in Times of Armed Conflict

During the 1976 uprisings, a large number of Black children were involved in the armed struggle against apartheid and died as a result of conflicts with the military and the police.⁹⁵ Their experiences contrast with the assertion of King and others that most of the harms suffered by children are not the result of deliberate governmental acts.⁹⁶ If, as King suggests, children do not suffer at the hands of the government, it is easier to refute child-centered policies by suggesting that protection should not come directly from the government. Section 28(1)(i)⁹⁷ of the Constitution protects children against abuses similar to those suffered under apartheid.

There is a developed body of international law concerning the role of children in armed conflict. It is a problem that is not unique to South Africa. During the Iran-Iraq war, children were involved in armed conflict and were considered a powerful fighting force because of their lack of fear.⁹⁸ Article 77(2) of Protocol Number 1 to the Geneva Convention Number 4 provides that children should not take a "direct part in hostilities."⁹⁹ Protocol Number 2 contains a broader prohibition, forbidding the direct or indirect participation of children under fifteen years of age in hostilities.¹⁰⁰ Article 38(2) of the Convention on the Rights of the Child places an obligation on state parties to ensure that children under fifteen do not participate directly

95. Smith & Khumalo, *supra* note 88, at 259-64.

96. King, *supra* note 48, at 43-44.

97. Section 28(1)(i) provides that children have the right "not to be used directly in armed conflict, and to be protected in times of armed conflict." S. AFR. CONST. § 28(1)(i).

98. GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 336 (1995).

99. International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 847 (1987) [hereinafter ICRC]. The International Committee of the Red Cross unsuccessfully opposed the inclusion of the word "direct" as it would appear to condone indirect participation such as transporting munitions to the battlefield, which is as dangerous as direct combat. VAN BUEREN, *supra* note 98, at 334.

100. ICRC, *supra* note 99, at 1367. Van Bueren describes the duty on states found in protocol no. 2 as being "absolute." VAN BUEREN, *supra* note 98, at 334.

in hostilities.¹⁰¹ The African Charter on the Rights and Welfare of the child prohibits anyone under eighteen from participating directly in hostilities.¹⁰² Islamic law may prohibit the participation in *jihad* of those under fifteen.¹⁰³

The experiences of South African Black youth during the 1976 uprisings and throughout the violent political struggle against apartheid illustrate the importance of extending the prohibition on the involvement of children under a certain age to indirect participation and internal conflicts. A large number of Black children died in internal conflicts with the military and the police. Chikane describes the structural origins of violence and its psychological and normative effects on Black children in the following terms:

[Conditions in the townships] have affected children more than many people realize. The world of the township child is extremely violent. It is a world made up of tear gas, bullets, whippings, detention, and death on the streets. It is an experience of military operations and night raids, of road-blocks and body searches. It is a world where parents and friends get carried away in the night to be interrogated. It is a world where people simply disappear, where parents are assassinated and homes are petrol bombed. Such is the environment of the township child today.¹⁰⁴

The international limit for participation in armed conflict is, effectively, fifteen years. In terms of sections 3(a) and 3(b) of the Defence Act,¹⁰⁵ the minimum age for cadet training and in the South African Defense Force is twelve and the minimum recruitment age for military service is seventeen.¹⁰⁶ Section 37(5) of the Constitution, which sets out the table of non-derogable rights, is child-centered in that it creates a non-derogable right for children under fifteen to avoid military service and it is consistent with the international standard for military service.

101. *U.N. Convention, supra* note 9, art. 38(2). The Convention provides that "States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities." *Id.* art. 38.

102. *Id.* at 335.

103. *Id.* at 334.

104. As quoted in Jones, *supra* note 86, at 143.

105. § 3(a) & (b) of Defence Act 44 of 1957.

106. *Id.*

B. *The Rights of Children in Police Detention/Custody*

During the struggle for liberation in South Africa, the State violently oppressed many Black children who were responsible for spearheading the resistance against apartheid. Children were detained arbitrarily under conditions that were in violation of most relevant international instruments: article 37(c)¹⁰⁷ and article 40(1)¹⁰⁸ of the UN Convention on the Rights of the Child,¹⁰⁹ the United Nations Guidelines for the Prevention of Juvenile Delinquency,¹¹⁰ the United Nations Standard Minimum Rules for the Administration of Juvenile Justice,¹¹¹ and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty.¹¹²

107. *U.N. Convention, supra* note 9, art. 37(c). Article 37(c) provides that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances." *Id.*

108. *Id.* art. 40(1). Article 40(1) states that

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Id.

109. See Evadne Grant, *Protective Custody of Juvenile Witnesses*, 5 S. AFR. J. HUM. RTS. 221, 226-27 (1989) (referring to principles 2, 6, and 7 of the *U.N. Declaration on the Rights of the Child*); See also Falk, *supra* note 7, at 19 (arguing that South African forces have violated provisions relating *inter alia* to custody of child offenders).

110. G.A. Res. 112, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/45/112 (1991) (Riyadh Guidelines). The guidelines require governments to prevent children from being victimized or abused, *id.* ¶ 53, and from being subjected to harsh or degrading punishment. *Id.* ¶ 54. Similarly, states must train law enforcement officials to respond to children's special needs and divert children from the criminal justice system. *Id.* ¶ 58.

111. UNITED NATIONS, UNITED NATIONS STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE (Beijing Rules), U.N. Doc. A/RES/40/33 (1985). These standards require the state to impose criminal penalties on juvenile offenders in a racially non-discriminatory manner. *Id.* § 2.1. Under the Standards, a government's juvenile justice system must also emphasize the well-being of the juvenile, *id.* § 5.1, and provide basic procedural safeguards including presumption of innocence, right to counsel, and right to the presence of a parent or guardian. *Id.* §§ 7.1, 15.1, 15.2. The Minimum Rules also call for parental notification upon apprehension, *id.* § 10.1, diversion from the criminal justice system wherever possible, *id.* §§ 11.1-11.4, a speedy trial on charges, *id.* § 20.1, and use of detention pending trial and incarceration as punishment only as a last resort. *Id.* §§ 13.1, 17.1, 19.1.

112. G.A. Res. 113, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/45/113 (1991) (JDLs). In addition to the protections called for in the previ-

One of the aims of the Constitution and post-Constitution statutes was to bring South Africa into compliance with the above mentioned international instruments. Section 28(1)(g) of the Constitution was enacted to protect the rights of children in police detention or custody.¹¹³ Section 50(4) of the Criminal Procedure Act¹¹⁴ creates an obligation for investigating officers to notify the parent or guardian of the arrest of a person under eighteen years, if such parent or guardian can be reached without undue delay.¹¹⁵ Section 29 of the Correctional Services Act¹¹⁶ was amended by the Correctional Services Amendment Act¹¹⁷ to bring the juvenile justice system in conformity with the child-centered approach adopted in the above mentioned international instruments.

Section 29(1) of the Correctional Services Act,¹¹⁸ as amended in 1994, proscribed detention in prison or a police cell or lock up of a person under eighteen years accused of committing an offense, unless his detention was necessary and no suitable place of safety was available.¹¹⁹ Section 29(2) of the Correctional Services Amendment Act made it possible for young offenders to be detained only in police cells or lock-ups, and not in a prison, for up to twenty-four hours prior to the first court appearance.¹²⁰ This detention would only be permissible if the young offender could not be released into the care

ously cited resolutions, the JDLs require that juvenile detention and incarceration facilities meet requirements of health and human dignity including, proper food and medical care. *Id.* ¶¶ 31, 31, 37, 49. The JDLs also require notification of parents or guardians in the event of changes in the juvenile's health status, *id.* ¶ 56, and limitations on the use of force during confinement. *Id.* ¶ 64.

113. Section 28(1)(g) stipulates that every child has the right

not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age.

S. AFR. CONST. § 28(1)(g).

114. § 50(4) of Criminal Procedure Act 51 of 1977, amended by § 37 of Correctional Services and Supervision Matters Amendment Act 122 of 1991.

115. *Id.*

116. Correctional Services Act 8 of 1959.

117. Correctional Services Amendment Act 17 of 1994.

118. § 29(1) of Correctional Services Act of 1959.

119. Julia Sloth-Nielsen, *No Child Should be Caged—Closing Doors on the Detention of Children*, 8 S. AFR. J. CRIM. JUST. 47, 52 (1995).

120. *Id.*

of a parent or guardian.¹²¹ Section 29(3) of the Correctional Services Amendment Act prohibits the detention of young offenders under eighteen years of age in the same cells as persons over twenty-one years.¹²²

Practical problems impeded the implementation of the child-centered vision embodied in section 29 of the Correctional Services Amendment Act. When section 29 took effect at midnight on May 8, 1995, most of those who would be called on to implement the Act were still unaware of the reform.¹²³ In addition, there were few available places of safety.¹²⁴ Courts, unable to remand children to custody, were forced to release them on their own recognizance or in the care of a parent or guardian on the understanding that they would reappear for trial.¹²⁵ Many of the children did not return to court on their trial dates.¹²⁶ Imprecise drafting also hindered the implementation of child-centered goals of section 29. Section 29 prohibits the detention of unconvicted juveniles in police cells or prisons, but does not address the issue of convicted juveniles awaiting sentencing. As a result, children were likely to spend prolonged periods in detention while awaiting sentencing.¹²⁷ Perhaps the most troubling dilemma involved juveniles charged with the commission of serious offenses, as places of safety were not thought to be equipped to hold potentially violent inmates.

The implementation of section 29 also met with widespread public resistance because many perceived the criminal justice system to be soft on escalating violent youth crime. In response to this public outcry, the amendments to section 29¹²⁸ that prohibited the detention of unconvicted juveniles in prisons or police cells were replaced by Act 14 of 1996.¹²⁹ The rights originally given to children in this child-centered statute were severely scaled back.¹³⁰

121. *Id.*

122. *Id.*

123. Julia Sloth-Nielsen, *Juvenile Justice Review 1994-1995*, 8 S. AFR. J. CRIM. JUST. 331, 332 (1995).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 333.

128. The amendments were introduced by Correctional Services Amendment Act 17 of 1994.

129. Correctional Services Amendment Act 14 of 1996. For a detailed discussion of the background and process of amendment, see generally Julia Sloth-Nielsen, *Pre-Trial Detention of Children Revisited: Amending s 29 of the Correctional Services Act*, 9 S. AFR. J. CRIM. JUST. 60 (1996).

130. Section 29(5)(A) of Correctional Services Amendment Act 14 of 1996 substituted section 29(5) of Correctional Services Amendment Act 17 of 1994 by stating:

In *State v. Williams*,¹³¹ the Constitutional Court contributed to the effort to bring juvenile penal laws into accord with international jurisprudence by declaring judicial corporal punishment to be unconstitutional on the grounds that it is cruel, inhuman, and degrading.¹³² By doing so, the Court reinforced the child-centered ideals set out in the Constitution. Following the Constitutional Court decision in *Williams*, Parliament sought to entrench these child-centered ideals by proposing the Abolition of Corporal Punishment

[a] person referred to in subsection (1)(B) who is accused of having committed an offence shall before his or her conviction and sentence, not be detained in a prison or a police cell or lock-up unless the presiding officer has reason to believe that his or her detention is necessary in the interests of the administration of justice and the safety and protection of the public and no secure place of safety, within a reasonable distance from the court, mentioned in section 28 of the Child Care Act, 1983 (Act No. 74 of 1983), is available for his or her detention: Provided that such a person may only be detained in a prison (but not a police cell or lock-up) if he or she is accused of having committed an offence or category of offences mentioned in Schedule 2, or any other offence, in circumstances of such a serious nature as to warrant such detention: Provided further that such a person shall be brought before the court that made the order of such detention every 14 days to enable such court to reconsider the said order.

Id. § 29(5)(A). Sections 29(5A)(A) and (B) were inserted by Act 14 of 1996:

(A) In considering whether the interests of the administration of justice and the safety and protection of the public necessitate the detention of a person referred to in subsection (1)(B) in a prison (but not a police cell or lock-up) the presiding officer shall, in addition to any factor which he or she deems necessary, take into account the following factors, namely—

(i) the substantial risk of absconding from a place of safety mentioned in section 28 of the Child Care Act, 1983 (Act No. 74 of 1983);

(ii) the substantial risk of causing harm to other persons awaiting trial in a place of safety; and

(iii) the disposition of the accused to commit offences.

(B) Before the detention of a person in terms of subsection (5) is ordered, oral evidence shall be presented by the State with regard to the factors referred to in paragraph (A).

Id. § 29(5A)(A) & B.

Section 29(8) of the Correctional Services Amendment Act, which was also inserted by Act 14 of 1996 provides that “[f]or the purpose of this section, an unconvicted person shall be construed as a person who has not been convicted or sentenced.” *Id.* § 29(8)

131. *State v. Williams*, 1995 (3) SA 632 (CC).

132. *Id.* at 658.

Bill,¹³³ the aim of which is to repeal all laws that still provide for judicial corporal punishment. On November 6, 1996, the South African Schools Act,¹³⁴ which contains a prohibition of corporal punishment in schools, was enacted. Nonetheless, there is opposition to making corporal punishment unconstitutional from those like David Benatar who suggest that judicial corporal punishment may not *necessarily* be cruel or unjust or excessively degrading.¹³⁵ Corporal punishment in the home and in schools continues to be practiced. As with the struggle over confinement, this debate over corporal punishment demonstrates some of the practical obstacles to full implementation of the Constitution's child-centered approach. While not to be disregarded, such obstacles may be overcome by structural changes and educational programs.

C. The Child's Right to Legal Representation

Employing a child-centered approach, section 28(1)(h) of the Constitution protects a child's right to legal representation.¹³⁶ The 1996 amendments to section 8 of the Child Care Act were meant to implement this innovation.¹³⁷ Under subsection 8A(1) of the amended Act, a child is entitled to legal representation at any stage of the proceedings under the Act.¹³⁸ Subsection 8A(2) of the amended Act requires a children's court to inform children, at the commencement of any proceedings, that they have the right to request legal representation at any stage of the proceedings.¹³⁹

133. Abolition of Corporal Punishment Bill 20 of 1997.

134. South African Schools Act 84 of 1996. Section 10 of that Act provides that "no person may administer corporal punishment at a school to a learner[,and][a]ny person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault." *Id.* § 10.

135. David Benatar, *The Child, the Rod and the Law*, 1996 ACTA JURIDICA 197.

136. Section 28(1)(h) provides that every child has the right "to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result." S. AFR. CONST. § 28(1)(h).

This section furthers the objectives of section 37(d) of the Convention on the Rights of the Child, which states that state parties shall ensure that

[e]very Child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

U.N. Convention, supra note 9, art. 37(d).

137. § 2 of Child Care Amendment Act 96 of 1996.

138. § 8A(1) of Child Care Act 74 of 1983.

139. § 8A(2) of Child Care Act 74 of 1983.

This statute does not realize fully the Constitutional guarantee of legal representation for children. First, the child's right to counsel appears to be limited to child care proceedings because the court is not obliged to extend the right to legal representation to the child in cases that do not come under the Child Care Act.¹⁴⁰ Second, the provision fails to address adequately the practical problems that may arise during implementation. For example, a child may be incapable of understanding or instructing counsel. The Statute does not define clearly what the responsibility of the Children's Court is when a child makes a frivolous request for legal representation. The court could deny such a request;¹⁴¹ likewise, the court could insist that the child's best interests require legal representation despite a refusal. One reading of section 8A(4)¹⁴² of the amended Act suggests that there is no such obligation on the children's court in such situations. Third, it is clear that, in operation, the child's legal representation is discretionary on the part of Commissioners of Child Welfare.¹⁴³ Finally, this provision may undermine the child's autonomy and create potential conflict of interests, particularly "where parents (who may be akin to defendants in a removal enquiry) are empowered to appoint a legal representative for the child."¹⁴⁴

The 1996 amendments to the Child Care Act have been hailed as a welcome innovation because Child Welfare Commissioners are empowered to arrange child legal representation in appropriate cases. It is important to note, however, that the amendments may not result in increased child representation in the Children's Court, due to the emphasis on cost and the fact that the child's right to legal representation is essentially at the discretion of the Child Welfare

140. Both child removal and adoption cases, in which parties generally seek legal representation, come under the Act. Noel Zaal, *When Should Children Be Legally Represented in Care Proceedings? An Application of Section 28(1)(h) of the 1996 Constitution*, 114 S. AFR. L.J. 335, 341 (1997); see also Julia Sloth-Nielsen & Belinda Van Heerden, *The Child Care Amendment Act 1996: Does It Improve Children's Rights in South Africa?*, 12 S. AFR. J. HUM. RTS. 649, 650 (1996) (describing limits of guidance in application of amended provisions).

141. See Zaal, *supra* note 140, at 336; see also Sloth-Nielsen & Van Heerden, *supra* note 140, at 650.

142. § 8A(4) of Child Care Act 74 of 1983. The section states that "[a] children's court may, at the commencement of a proceeding or at any stage of the proceeding, order that legal representation be provided for a child at the expense of the state, should the children's court consider it to be in the best interest of such child." *Id.*

143. See Zaal, *supra* note 140, at 335-36; see also Sloth-Nielsen & Van Heerden, *supra* note 140, at 650. Subsection 8A(3) is worthy of note in that it empowers the children's court to approve "that a parent may appoint a legal practitioner for his or her child for any proceeding under this Act, should the children's court consider it to be in the best interest of such child." *Id.* § 8A(3).

144. Sloth-Nielsen & Van Heerden, *supra* note 140, at 650.

Commissioners.¹⁴⁵ The amendments clearly do not render completely operational the child-centered norm expressed in section 28(1)(h).

D. *The Right to Be Protected from Exploitative Labor Practices*

1. The Problem of Child Labor

Child labor is fairly common in poor countries, and South Africa is no exception. South Africa has been systematically underdeveloped by successive apartheid policies.¹⁴⁶ A majority of the population still lives in abject poverty.¹⁴⁷ In South Africa, largely among the underclasses where children are considered to be an economic resource, there are strong economic constraints against eliminating child labor, powerful vested interests in maintaining the current state of affairs, and widespread cultural and legal support for the use of children's work.¹⁴⁸ South African indigenous law and common law both recognize a child's duty to provide support for indigent parents.¹⁴⁹ Though fairly common, child labor remains hidden from public view. It tends to be intermittent and to take place in the informal sector (including domestic work and family business enterprises).¹⁵⁰

145. Zaal, *supra* note 140, at 334–36; Sloth-Nielsen & Van Heerden, *supra* note 140, at 650.

146. A. Bequale, *Combating Child Labor*, 10 CONDITIONS WORK DIG. 7, 8 (1991).

147. Lorraine Eide, *Current Crisis Facing Children in South Africa and the Efforts to Overcome It*, 34 HOWARD L.J. 37, 38 (1991).

148. Jo Boyden & Victoria Rialp, *Children's Right to Protection From Economic Exploitation*, in IMPLEMENTING THE CONVENTION ON THE RIGHTS OF THE CHILD: RESOURCE MOBILIZATION IN LOW-INCOME COUNTRIES 183 (James R. Himes ed., 1995).

149. See, e.g., BOBERG, *supra* note 4, at 267–70, 273 n.81. The South African courts tend to interpret the indigence requirement strictly. *Id.* at 310–12. Boberg suggests that a less strict interpretation be placed upon the requirement of indigence when it is necessary to found a dependant's action against a third party. A stricter interpretation should be applied where the duty of support is necessary to found a claim for maintenance by a parent against a child because neither has wronged the other and the court must strike a balance between the needs of the parties and their respective resources. *Id.*

150. In a discussion of the implementation of international labor standards, H. T. Dao states that the national provisions frequently fall short of international standards because they do not reach into the sectors where children are actually working. H.T. Dao, *International Labour Standards and Their Implementations*, 10 CONDITIONS WORK DIG. 57, 68 (1991).

In one case concerning Convention No. 138, the minimum age provisions only cover industrial undertakings. . . . In one case related to Convention No. 138, family undertakings are exempted from the legal provisions on minimum age In a case relating to the application of Convention No. 77, it has been found that undertakings employing less than 20 workers are not covered in one country Industrial homeworkers and persons in domestic service are

2. Legislative Interventions

The final Constitution, together with national legislation, set minimum standards for child labor. Many South African children are employed at low wages with no benefits and are expected to perform various harmful tasks.¹⁵¹ Subsections 28(1)(e) and (f) of the Constitution,¹⁵² which address the problem of child labor and the economic exploitation of children, incorporate the child-centered ideals of article 23 of the Convention of the Rights of the Child.¹⁵³ Children are provided with constitutional protection against exploitative and unfair labor practices that require children to perform work or provide services that are age inappropriate or that place their well-being; education; physical or mental health; or their spiritual, moral, or social development at risk.¹⁵⁴

exempted from the relevant provisions in two cases concerning respectively Convention No. 138 (minimum age) and Convention No. 78 (medical examination in non-industrial occupations) . . . Relevant national provisions are frequently not applicable to persons who work outside an employment relationship in cases related to Convention No. 138 on minimum age (seven cases) and Convention No. 58 on minimum age for employment at sea (one case).

Id.

151. BOSMAN-SWANPEOEL & WESSELS, *supra* note 18, at 82.

152. S. AFR. CONST. § 28(1)(e), (f).

153. U.N. Convention, *supra* note 9, art. 32. Article 23 reads:

(1) States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

(2) States Parties shall take legislative, administrative, social and educational measures to ensure that implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

154. S. AFR. CONST. § 28(1)(e), (f). The Constitution recognizes that each child has the right to be "protected from exploitative labor practices; [each child also has the right] not to be required or permitted to perform work or provide services that . . . are inappropriate for a person of that child's age . . . or place at risk the child's well-

The terms of subsections 28(1)(e) and (f) are enforced through various pieces of national legislation,¹⁵⁵ including Chapter 6 of the Basic Conditions of Employment Act.¹⁵⁶ Chapter 6 prohibits the employment of children of school-going age (under fifteen).¹⁵⁷ Section 49 of the same bill prohibits all forced labor.¹⁵⁸ Section 52A of the Child Care Act prohibits the employment of children under fifteen.¹⁵⁹ Section 111 of the Merchant Shipping Act prohibits the employment of a person under eighteen as a trimmer or fireman on a ship.¹⁶⁰ Section 12 of the Security Officers Act prohibits the employment of persons under eighteen as security officers.¹⁶¹ Section 32(1) of the Minerals Act prohibits the employment of children under sixteen underground in any mine.¹⁶²

At least for the present in South Africa, child labor is a fact of life that many accept. A blanket prohibition simply does not reflect reality. The Minister may, by publishing a notice, prevent any employment from being prohibited.¹⁶³ Employment of children in the advertising industry is exempted.¹⁶⁴ Once again, child-centered norms are forced to conform to reflect the reality of law and society in South Africa.

3. The Limits of Legislative Interventions

Legislative intervention provides a limited and ineffective response to a hidden and pervasive problem such as child labor. Labor laws are designed essentially to regulate the formal sector, where both strict regulation and monitoring are feasible. However, because most children are employed in the informal sector, labor laws can only be one part of an effective response to this problem.

being, education, physical or mental health or spiritual, moral or social development." *Id.*

155. The provisions of subsections 28(1)(e) and (f) of the Constitution must be read in conjunction with section 23(1), which provides that "[e]veryone has the right to fair labor practices." S. AFR. CONST. § 23(1). Section 13 protects everyone, including children, against slavery, servitude, or forced labor. *Id.* § 13.

156. §§ 43–48 Basic Conditions of Employment Act of 1998

157. *Id.*

158. *Id.* § 49.

159. § 52A of Child Care Act 74 of 1983.

160. § 111 of Merchant Shipping Act 57 of 1951.

161. § 12 of Security Officers Act 92 of 1987.

162. § 32(1) of Minerals Act 50 of 1991.

163. Angelo Pantazis, *Children's Rights*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 33-10 (Chaskalson et al. eds., 1996).

164. § 17 of Basic Conditions of Employment Act 3 of 1983; Pantazis, *supra* note 163, at 33-10.

The task of eliminating child labor is complicated by the widespread cultural support for child labor and public indifference to the problem. Constitutional and legislative interventions that prohibit child labor are criticized as providing a Western response to an African problem.¹⁶⁵ It is argued that the protection of children from economic exploitation by international law is dictated by Western legal concepts and that subsections 28(1)(e) and (f) of the Constitution, in protecting children from exploitative labor practices, incorporate the language of international law.¹⁶⁶ It is also argued that subsections 28(1)(e) and (f) reflect the individualist values of an industrialized society and that they conflict with the more communal African tradition.¹⁶⁷ It is further argued that the Constitution undermines family autonomy in that it gives children rights without stating their obligations to their families.¹⁶⁸ It is also contended that the fiscal and economic challenges facing an underdeveloped economy such as South Africa's are not taken into account.¹⁶⁹ In a country

165. See BENNETT, *supra* note 13, at 98 (asserting that the children's rights movement has embraced Western norms). It is clear that the fight against child labor originated in Western industrialized nations and that it has evolved there as well. Boyden & Rialp, *supra* note 148, at 187-88.

166. Bennett identifies two significant international norms in section 30 of the interim Constitution. "A 'child' is deemed to be a person under the age of 18 years[,] . . . and in all matters concerning children their best interests are the paramount consideration." BENNETT, *supra* note 13, at 100.

167. Bennett looks at a number of the conflicts that arise between communal African tradition and the individualist values enshrined in the Constitution in a section entitled, "Implication of Fundamental Rights for Customary Law." *Id.* at 101-12.

168. Bennett notes that although children are granted rights upon which parents cannot infringe, parents are still responsible for raising and caring for children. *Id.* Du Plessis and Corder point out that "the right to parental care is a constitutional right of the child. Nowhere in chapter 3 is any parental right (or a right to family life) proclaimed." DU PLESSIS & CORDER, *supra* note 50, at 186.

169. Davis, *supra* note 64, at 479. Eliminating child labor in South Africa will be costly. See Boyden & Rialp, *supra* note 148, at 210-19.

The way in which children are reared in South Africa is all too often dictated by poverty. A prevalent and unhappy reality, poverty has the unfortunate effect of distorting the application of constitutional rights. Children from affluent backgrounds can expect to undergo a lengthy period of education before moving out into the world. In contrast, poorer children must, for the sake of survival, begin work at the earliest possible age. What constitutes neglect of a child in a wealthy family, therefore, would almost certainly not be neglect in a family subsisting on the poverty datum line. The Constitution has no provisions, however, that would permit such economic cleavages to influence the interpretation/limitation of fundamental rights. [Section 36] allows limitation only by *laws* of general application

with so much poverty, is it reasonable to expect children not to work?

Contrary to popular perceptions, child labor is not economically efficient. Children tend to be employed in the informal sector at low wages and under exploitative conditions.¹⁷⁰ Their work tends to be marginal, intermittent, and casual. Children tend to consume more than they earn. To combat child labor successfully, the government, as King suggests, must couple law with politics and economics by forming alliances with non-governmental, voluntary, and grassroots organizations.¹⁷¹ It also will have to provide assistance to families so as to reduce their reliance on child labor. The constitutional protection and subsequent legislation are not enough to end a well-established practice that, to some extent, has been protected by the parent-centered legal structure of South Africa. The subject of child labor law presents another illustration of the difficulties involved in imposing child-centered norms on South Africa.

E. *The Right to a Name and Nationality from Birth*

The Constitution protects a child's "right . . . to a name and nationality from birth."¹⁷² The child's right to a name and nationality, and the right to have his or her name and other basic family information registered, comprise a child's right to a legal identity. The child's right to a legal identity also should be viewed as an extension of the child's right to human dignity, which is articulated in section 10 of the Constitution and is a non-derogable right.¹⁷³ Every child has a right to know of his or her origins. The right to an identity has important psychological and emotional content because a name connects a child to his or her family.

1. Name

The right to a name contained in section 28(1)(a) of the Constitution incorporates some basic principles from articles 7(1)¹⁷⁴ and

BENNETT, *supra* note 13, at 101 (citations omitted); see also WILLEM SCHURINK ET AL., CENTRE FOR HUMAN RIGHTS, EXPLORING SOME DIMENSIONS OF CHILD LABOUR IN SOUTH AFRICA (1997).

170. See VAN BUEREN, *supra* note 98, at 263-64.

171. King, *supra* note 48, at 45-48; see also Boyden & Rialp, *supra* note 148, at 184 (asserting that the government's challenge is to create and sustain coalitions against child labor).

172. S. AFR. CONST. § 28(1)(a).

173. *Id.* § 10.

174. U.N. Convention, *supra* note 9, art. 7(1). Article 7(1) of the Convention provides that "[t]he child shall be registered immediately after birth and shall have the

8(1)¹⁷⁵ of the Convention on the Rights of the Child. While these principles also are spelled out in the Births and Deaths Registrations Act of 1992,¹⁷⁶ this Act also reinforces patriarchal ideology. For example, section 9(2) provides that, where the child is born in wedlock, registration will be "under the surname of the father of the child concerned."¹⁷⁷ Section 10(1), dealing with the registration of a child born out of wedlock, provides that "[n]otice of birth of a child born out of wedlock shall be given . . . under the surname of the mother."¹⁷⁸ These provisions discriminate unfairly against those born out of wedlock by denying them ties with their fathers¹⁷⁹ and conflict with the gender equality provision contained in section 9(3) of the Constitution.¹⁸⁰

The constitutional right to have a name at birth has important implications for adopted children's searches for their parents' identities. This situation is especially true for adopted children whose racial and cultural identity differs from that of their adoptive parents.¹⁸¹ Section 25 of the Child Care Act permits an adopted child's

right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents." *Id.*

175. U.N. Convention, *supra* note 9, art. 8(1). Article 8(1) of the Convention provides that "States parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." *Id.*

176. Births and Deaths Registration Act 51 of 1992. Section 9(6) of the Act provides that "[n]o person's birth shall be registered unless a forename and a surname have been assigned to him." *Id.* § 9(6).

177. *Id.* § 9(2).

178. *Id.* § 10(1).

179. Tshepo L. Mosikatsana, *Is Papa a Rolling Stone? The Unwed Father and His Child in South African Law—a Comment on Fraser v. Naude*, 29 COMP. & INT'L L.J. S. AFR. 152, 154 (1996); see also Kenneth Hughes, *Law, Religion, and Bastardy: Comparative and Historical Perspectives*, in QUESTIONABLE ISSUE: ILLEGITIMACY IN SOUTH AFRICA 1, 2-4 (Sandra Burman & Eleanor Preston-Whyte eds., 1992) (describing social and legal impacts of such discrimination).

180. S. AFR. CONST. § 9(3). In *Fraser v. Children's Court*, 1997 (2) SA 261 (CC), the court decided that section 18(4)(d) of the Child Care Act, which denied unwed fathers the right to consent to the adoption of their children, was unconstitutional to the extent that it discriminated unfairly between wed and unwed fathers. Though the *Fraser* decision is cast in terms of parental rights, it implies that similar discrimination between legitimate and illegitimate children violates the Constitution's equality provision. For a comment on the *Fraser* decision, see Mosikatsana, *supra* note 179, at 164.

181. Tshepo L. Mosikatsana, *Examining Class and Racial Bias in the Adoptions Process and the Viability of Transracial Adoptions as a Policy Preference: A Further Reply to Professors Joubert, Pakati and Zaal*, 4 S. AFR. J. HUM. RTS. (forthcoming 1997); see also Tshepo L. Mosikatsana, *Transracial Adoptions: Are We Learning the Right Lessons from the Americans and Canadians?—A Reply to Professors Joubert and Zaal*, 112 S. AFR. L.J. 606, 613-16 (1995) (arguing that transracial adoptees may suffer identity crises from loss of racial or cultural identity). *But cf.* Noel Zaal, *Avoiding the Best Interests of the Child*, 10 S. AFR. J. HUM. RTS. 372 (1994) (arguing that considerations of cultural identity should be secondary to placing a child in the best available home). See also

surname at birth to be changed to that of the adoptive parent or parents.¹⁸² Unless special provision is made under national legislation for accessing the birth records of adoptees, section 25 can operate to undermine the rights of adoptees to know of their legal identity at birth. Some commentators argue that adopted children who are denied information about their birth parents are being denied peace of mind and mental health.¹⁸³

The Child Care Act makes information regarding an adopted child's identity at birth more readily available than it has been under previous legislation. The child's constitutional right to a name at birth should be interpreted to prevent adoptees' rights to their birth records from being subject to ministerial discretion. Constitutionalization of this issue would help mitigate health consequences to the adopted child and maintain the protection afforded birth parents by the current discretionary system because the adoptees' rights must be limited by the birth parents' rights to privacy, contained in section 14 of the Constitution.¹⁸⁴

D.J. Joubert, *Interracial Adoptions: Can We Learn from the Americans?*, 110 S. AFR. L.J. 726 (1993) (acknowledging that cultural differences in transracial adoptions should be considered but should not be conclusive).

182. § 25 of Child Care Act 74 of 1983.

183. Ingrid Baer, *Adoptees Searching for their Origins*, in PARENTHOOD IN MODERN SOCIETY 241, 243 n.5, 244 n.6 (John Eekelaar & Peter Šarcevic eds., 1993) (discussing the importance to adoptees of learning about their origins); see also Jonathan Klaaren, *Access to Information*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 24-1 (Matthew Chaskalson et al. eds., 1996) (arguing generally that people should have a right of access to information except in very few circumstances).

The strongest argument, although not the only argument, for the right of the child to

access to genetic history is that such access minimi[z]es genealogical bewilderment, as the process of identification with others can be incorporated into the self-image. Genealogical bewilderment may occur where children either do not have any knowledge of their biological parents or possess only uncertain knowledge... [t]he resulting state of confusion and uncertainty 'fundamentally undermines' children's sense of security, thus affecting their mental health... [w]ithout knowing about one's origins and genealogy it is difficult if not impossible to understand one's characteristics and potential. In the case of adopted children, this extends to two sets of genealogies. By denying access there would appear to be an implied challengeable assumption that adopted children have less need than others to know their genealogical make-up.

Geraldine Van Bueren, *Children's Access to Adoption Records—State Discretion or an Enforceable International Right?*, 58 MOD. L. REV. 37, 42 (1995).

184. S. AFR. CONST. § 14. See David McQuoid-Mason, *Privacy*, in CONSTITUTIONAL LAW OF SOUTH AFRICA, *supra* note 183, at 18-1, 18-7 (arguing that privacy rights permit individuals to make important life decisions without state interference); see

2. Nationality

The protection of the child's right to nationality has a special significance for South Africa. The apartheid State denied Black children a common citizenship with Whites and relegated them to second class citizenship through racist, non-child-centered legislation.¹⁸⁵ The forced removal and homeland policies assigned Black children to a homeland on the basis of their ethnic and tribal origin. The political rationale for the homeland policy was to deny Blacks citizenship rights in the country of their birth. Articles 7 and 8 of the UN Convention on the Rights of the Child obligates South Africa to provide a common citizenship for all and to eradicate past discriminatory practices.¹⁸⁶

Section 3(1) of the Constitution incorporates the provisions of articles 7 and 8 of the UN Convention by providing for a common citizenship for all South Africans.¹⁸⁷ Section 3(2) provides that all South African citizens are "equally entitled to the rights, privileges, and benefits of citizenship; and equally subject to the duties and responsibilities of citizenship."¹⁸⁸ Section 3(3) of the Constitution states that "[n]ational legislation must provide for the acquisition, loss and restoration of citizenship."¹⁸⁹ The South African Citizenship Act,¹⁹⁰ which was enacted pursuant to section 3(3) of the Constitution, provides for the acquisition of South African citizenship by birth or descent.¹⁹¹

also Van Bueren, *supra* note 183, at 44-45 (arguing that the privacy rights of children should be considered in addition to the rights of adults).

185. Examples of such legislation are the Population Registration Act 30 of 1950; Proclamation 123 of 1967; Group Areas Act 41 of 1950; and Reservation of Separate Amenities Act 49 of 1953, amended by Acts 10 of 1960 and 38 of 1972. The Separate Amenities Act was repealed by Act 100 of 1990. Discriminatory Legislation Regarding Public Amenities Repeal Act 100 of 1990.

186. *U.N. Convention*, *supra* note 9, arts. 7, 8.

187. S. AFR. CONST. § 3(1).

188. *Id.* § 3(2) (emphasis added).

189. *Id.* § 3(3).

190. South African Citizenship Act 88 of 1995.

191. *Id.* Section 2 confers South African citizenship on any person who acquired South African citizenship by birth prior to the commencement of the Act; who is born in the Republic on or after the commencement of the Act; or who is born outside the Republic and one or both of his parents, or his mother if he is born out of wedlock, was at the time of his birth in the service of the Government of the Republic was a representative or employee of an employer resident in the Republic, or was in the service of an international organization of which the Government of the Republic was a member. *Id.* § 2.

Section 3 confers South African citizenship by descent on any person who, immediately prior to the commencement of the Act, was a South African citizen by descent; or who is born outside the Republic on or after the commencement of the

The Constitution and the South African Citizenship Act use the term "citizen."¹⁹² Section 28(1)(a) of the Constitution, which borrows heavily from the U N Convention on the Rights of the Child, uses the term "nationality."¹⁹³ The difference has no policy implications. The terms "nationality" and "citizenship" may be used interchangeably because in practice they refer to the same notion.¹⁹⁴ "Nationality" is an international law term which describes the legal relationship between a state and an individual for purposes of international relations, whereas "citizenship" is a constitutional law term that describes the legal relationship between a state and an individual for the purposes of their internal relations.¹⁹⁵

*F. Section 28(1)(b): The Right to Family Care, Parental Care, or
Appropriate Alternative Care When Removed from the Family
Environment*

Section 30(1)(b) of the interim Constitution provided for the child's right to "parental care;"¹⁹⁶ however, it was unclear whether the right to parental care included the child's right to be cared for by the extended family or to foster care or adoption.¹⁹⁷ Section 28(1)(b) of the final Constitution resolves this ambiguity by making specific reference to the child's right "to family care or parental care, or to appropriate alternative care when removed from the family envi-

Act and one of his or her parents was a South African citizen and the child's birth is registered in terms of section 13 of the Births and Deaths Registration Act 51 of 1992; or whose parent has been granted a certificate of the resumption of previous South African citizenship and such child has entered the Republic for permanent residence prior to becoming a major and his or her birth must be registered within one year of issue of the certificate or such longer period as the Minister may approve; or to a person who is adopted by a South African citizen and his or her birth is registered under section 13 of the Births and Deaths Registration Act 51 of 1992. *Id.* § 3.

192. *Id.*; S. AFR. CONST. §§ 3, 19, 20, 21, 22, 47, 174, 193. *But see* § 28 (using "nationality").

193. S. AFR. CONST. § 28(1)(a).

194. In practice, the terms usually are used interchangeably because those persons with the citizenship of a particular state usually hold that state's nationality. A distinction between the terms sometimes was made in a colonial context whenever a colonial power was not prepared to afford all its subjects equal status. In South African law, however, no distinction is made between citizenship and nationality. All South African citizens also have South African nationality. The reference to nationality in the provision on children's rights has no practical implications. I.M. RAUTENBACH & E. F. J. MALHERBE, *CONSTITUTIONAL LAW* 43, 43-44 (2d ed. 1996).

195. *Tshwete v. Minister of Home Affairs*, 1988 (4) SA 586, 614 (A); RAUTENBACH & MALHERBE, *supra* note 194, at 43.

196. S. AFR. CONST. § 30(1)(b) (1993) ("Every child shall have the right . . . to parental care . . .").

197. *Mosikatsana*, *supra* note 28, at 130-31; *see also Mosikatsana*, *supra* note 179, at 163.

ronment.”¹⁹⁸ This formulation is helpful because it clearly identifies protected rights.

1. Family Care

The right to “family care” includes the right to be cared for by the extended family. The South African common law and statute recognized only the nuclear family.¹⁹⁹ For example, in *Bethell v. Bland*,²⁰⁰ the maternal grandfather brought an application for the custody of a child born out of wedlock whose mother was still a minor.²⁰¹ The paternal grandparents brought a counter application, and the natural father intervened.²⁰² In his decision Judge Wunsh referred to the natural father and the maternal and paternal grandparents as third parties or outsiders who lacked an inherent right to the custody of the child.²⁰³ However, it was found that the biological relationship and genetic factors placed the natural father in a favorable position over other “outsiders.”²⁰⁴

Though the right to family care is framed in child-centered terms, it comports with a fundamental norm of indigenous law:²⁰⁵ recognition of the extended family.²⁰⁶ The inclusion of the extended family under the right to “family care” in section 28(1)(b) of the Constitution is a welcome improvement, and it is consistent with current law reform efforts aimed at including the extended family in providing for the child’s welfare. Acknowledging that the common law position of granting the parents exclusive rights of access is

198. S. AFR. CONST. § 28(1)(b).

199. Mosikatsana, *supra* note 28, at 120–21.

200. 1996 (2) SA 194 (W).

201. *Id.* at 196.

202. *Id.*

203. *Id.* at 209.

204. *Id.*

205. This has been articulated by T.W. Bennett:

In certain instances construction of a basic right in terms of African cultural norms would not amount to a limitation, but rather to an extension. The word “parental,” for instance, as understood by the common law, normally denotes a child’s biological father and mother. In the African system of kinship and family relations, however, ‘parental’ might include more remote kinfolk, who for social purposes are classified as playing parental roles, an interpretation that has the effect of widening a child’s support network.

BENNETT, *supra* note 13, at 101.

206. *Id.* at 96.

not always in the best interests of the child,²⁰⁷ the Law Commission has proposed draft legislation granting the extended family the right to seek access to the child through the courts.²⁰⁸ The right to family care demonstrates the possibility of implementing the Constitution's child-centered norms through traditional legal forms.

2. Parental Care

The right to parental care includes the child's right to be cared for by both natural parents. Most legislation²⁰⁹ and judicial prece-

207. SOUTH AFRICAN LAW COMMISSION, PROJECT 100, THE GRANTING OF VISITATION RIGHTS TO GRANDPARENTS OF MINOR CHILDREN 19 (1996).

208. The legislation would provide the following:

(1) If a grandparent of a minor child is denied access to the child by the person who has parental authority over the child, such grandparent may apply to court for an order granting him or her access to the child and the court may grant the application on such conditions as the court thinks fit.

(2) Any other person who alleges that there exists between him or her and a minor child any particular family tie or relationship which makes it desirable in the interest of the child that he or she should have access to the child, may, if such access is denied by the person who has parental authority over the child, apply to court for an order granting him or her access to the child and the court may grant such application on such conditions as the court thinks fit.

(3) The court shall not grant access to a minor child as contemplated in subsection (1) or (2) unless the court is satisfied that it is in the best interest of the child.

(4) For the purposes of subsection (1) or (2) the court may refer any application to the Family Advocate referred to in section 1 of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 van 1987), for investigation and recommendation.

(5) The provisions of section 4(3) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 van 1987), shall *mutatis mutandis* apply with regard to proceedings concerning the application by grandparents or other interested persons for access to a minor child as contemplated in this section.

Id. Section 2 of the proposed bill is comparable to subsections 16(1), (3), and (8) of the Canadian Divorce Act, Divorce Act, R.S.C., ch. 3, § 16(1), (3), & (8) (1985) (Can.). For a commentary on grandparent visitation rights in Canada, see Tshepo L. Mosikat-sana, *Third Party Parenting Rights in Custody and Access Disputes*, in CHILD CUSTODY LAW & PRACTICE 26 (James G. McLeod ed., 1992).

209. For example, section 3 of the Children's Status Act, which provides for the guardianship of and custody of children born out of wedlock, provides

(1) If the mother of an extra-marital child is unmarried and a minor—

dent²¹⁰ does not protect the child's right to be cared for by both natural parents if the parents are unwed or married according to the tenets of a non-Christian religion.²¹¹ The common law rule, which denies fathers inherent rights of access to their children on the basis of gender and marital status, is inconsistent with section 9(3) of the Constitution.²¹² The rule denies children born out of wedlock or in non-Christian marriages access to their natural fathers, which amounts to discrimination on the basis of the circumstances of a person's birth under the Constitution.²¹³

In an effort to bring the common law position in line with the equality provisions of the Constitution, Parliament has passed the Natural Fathers of Children Born out of Wedlock Act 86 of 1997.²¹⁴ Section 2 of the Act deals with "[a]ccess to and custody and guardianship of children born out of wedlock by natural fathers."²¹⁵ Discrimination against fathers in non-Christian marriages on religious

(a) the guardianship of that child shall, unless a competent court directs otherwise, vest in the guardian of that mother;

(b) the custody of that child shall, unless a competent court directs otherwise, vest in that mother.

(2) If the mother of an extra-marital child is under the age of 21 years but acquires the status of a major, the guardianship and custody of that child shall, unless a competent court directs otherwise, vest in that mother.

§ 3 of Children's Status Act 82 of 1987.

Section 18(4)(d) of the Child Care Act 74 of 1983 denied an unwed father the right to consent to the adoption of his child. In the *Fraser* case, the Constitutional Court declared this provision to be unconstitutional. *Fraser v. Children's Court*, 1997 (2) SA 261, 263 (CC). For a commentary, see Mosikatsana, *supra* note 179, at 152.

210. See, e.g., *B. v. S.* 1995 (3) SA 571 (A) (noting that the law does not accord fathers' access to their illegitimate children); *S. v. S.* 1993 (2) SA 200 (W) (declaring that, in the absence of official interference with parental authority, the mother has exclusive parental authority over her child born out of wedlock); *B. v. P.* 1991 (4) SA 113 (T) (stating that the father of an illegitimate child must show compelling reasons why he should be granted right of access to the child); *F. v. B.* 1988 (3) SA 948 (D) (holding that the father of a child born out of wedlock has no right of access to his child even if the parents had been living together at the time of birth); *W. v. S.* 1988 (1) SA 475 (N) (holding that the father of an illegitimate child has no prima facie right of access to the child); *F. v. L.* 1987 (4) SA 525 (W) (holding that a father of an illegitimate child has no parental authority and no right of access to the child). *But see Van Erk v. Holmer*, 1992 (2) SA 636 (W) (holding that the best interests of the child dictate equal treatment for fathers of legitimate and illegitimate children).

211. See, e.g., *Chodree v. Vally* 1996 (2) SA 28 (W) (noting that the father of a child not born of a marriage recognized by civil law had no inherent right of access to the child).

212. S. AFR. CONST. § 9(3); see also *supra* text accompanying note 180.

213. S. AFR. CONST. § 9(3).

214. § 2 of Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

215. *Id.* § 2.

grounds is contrary to section 15(1) of the Constitution.²¹⁶ Section 15(1) eliminates any legal basis for the discrimination between fathers in Christian marriages and fathers in non-Christian marriages.²¹⁷ Section 15(3) enables parliament to pass legislation authorizing the recognition of non-Christian marriages.²¹⁸ Exercising this power, Parliament has introduced the Births and Deaths Registration Amendment Act, which was assented to on August 29, 1996, and took effect on September 5, 1996.²¹⁹ The Act amends the principal Act in section 1 so as to define "child born out of wedlock" and to make provision for the recognition of customary unions and non-Christian marriages.²²⁰ Similarly, section 1(d) of the Child Care Amendment Act has amended the definition of marriage to include customary unions and non-Christian marriages,²²¹ and the Basic Conditions of Employment Act²²² also has extended the definition of family to include "the employee's spouse or any other person who cohabits with the employee [and] the employee's parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling."²²³ In *Fraser v. Children's Court*,²²⁴ Judge Mahomed noted that the discrimination against fathers in non-Christian marriages is no longer valid.²²⁵

The right to parental care is the child's right, not the parents' right.²²⁶ Where the parents are married according to a civil or Christian marriage, some legislative attempt has been made at recognizing parental rights through the notion of joint parental responsibility.²²⁷ Parenting rights and the right to family life have not been constitutionalized in South Africa. There is no provision in the South African Constitution like section 14(3) of the Namibian Constitution,

216. "Everyone has the right to freedom of conscience, religion, thought, belief, and opinion." S. AFR. CONST. § 15(1).

217. *Id.*

218. *Id.* § 15(3).

219. Births and Deaths Registration Amendment Act 40 of 1996.

220. *Id.*

221. § 1(d) Child Care Amendment Act 96 of 1996.

222. §§ 43–48 Basic Conditions of Employment Act of 1998.

223. *Id.* § 28(5).

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

225. *Id.* at 273.

226. DU PLESSIS & CORDER, *supra* note 50, at 186.

227. For example, section 1(1) of the Guardianship Act 192 of 1993 grants both parents equal rights to the guardianship of their children. Sections 6(3) of the Divorce Act 70 of 1979 and 5(1) of the Matrimonial Affairs Act, as amended by section 16 of the Divorce Act, empower the courts to grant joint custody orders where appropriate. For an interpretation of these provisions where joint custody was denied, see *Pinion v. Pinion*, 1994 (2) SA 725 (D); *Schlebusch v. Schlebusch*, 1988 (4) SA 548 (E). For an interpretation where joint custody was granted, see *Venton v. Venton*, 1993 (1) SA 763 (D); *Kastan v. Kastan*, 1985 (3) SA 235 (C) (granting joint custody).

which provides for the protection of the family as the basic unit of society.²²⁸ The constitutional protection of the right to family life creates obstacles to State intervention on behalf of children and women who are being abused, and interferes with the goals of a child-centered approach.

3. Alternative Care

The right to alternative care includes the right of a child to adoptive, foster, or institutional care.

a. Adoptions

The child's right to adoptive care is provided for in section 20 of the Child Care Act.²²⁹ Section 20 provides that, upon adoption, the adoptive child becomes the lawful child of the adoptive parents as though the child had been born to those parents during a lawful marriage.²³⁰ The right should be viewed as the child's right to be cared for by the adoptive parents and not as the prospective adoptive parents' right to adopt; however, the right has not always been interpreted in this manner.

In *Fraser*, the mother of an extra-marital child arranged for the child's adoption before the child was born.²³¹ Mr. Fraser, the child's natural father, brought an unsuccessful application in the Witwatersrand Local Division of the High Court to prevent the adoption from proceeding.²³² On appeal to the Constitutional Court, Judge Mahomed declared that section 18(4)(d) of the Child Care Act, which denied unwed fathers the right to consent to or veto the adoption of their natural children, was unconstitutional because it discriminated unfairly against unwed fathers on the basis of their gender and marital status.²³³

The Constitutional Court decision in *Fraser* was parent-centered and only addressed the competing property interests that the natural parents had in their natural child. Judge Mahomed did not consider what was in the child's best interests. Section 28(2) of the Constitution instructs that "[a] child's best interest is of paramount importance in

228. Gretchen Carpenter, *Possible Amendments to the 1996 Bill of Rights—What, Where and Why?*, 1 HUM. RTS. & CONST. L.J. OF S. AFR. 9 (1997).

229. § 20 of Child Care Act 74 of 1983.

230. *Id.* § 20. See BOSMAN-SWANEOEL & WESSELS, *supra* note 18, at 56–57.

231. *Fraser v. Children's Court*, 1997 (2) SA 261, 266 (CC).

232. *Id.*

233. *Id.* at 273–74; see Mosikatsana, *supra* note 179, at 152.

every matter concerning the child."²³⁴ Thus, the child's right to adoptive care should not be subordinated to the potentially competing property interests of the natural parents in their child, as happened in *Fraser*.²³⁵ This decision is another demonstration of the unwillingness among many in South Africa to embrace a child-centered approach.

b. Foster Care

Section 15(b) of the Child Care Act provides for the placement of children into foster care.²³⁶ Section 290(1)(b) of the Criminal Procedure Act provides for the placement of convicted juveniles in foster care.²³⁷ This legislation creates the basis for recognizing a child's right to foster care.

It is conceivable that there may be situations where a foster parent and child may form a psychological bond or where continued foster care would be in the child's best interest. This situation would usually occur when the foster child is a member of the family or where the foster child has been in care for an extensive period of time. Section 18(4)(g) of the Child Care Act mandates the approval of any adoption of a foster child by the foster parents, who in some cases are the only "psychological parents" some children have.²³⁸ Such a statement shall be dispensed with if it is not forthcoming within a month. The requirement for such a statement is merely a gesture of courtesy, as no child shall be excluded from adoption under circumstances where adoption would be in the child's best interests.²³⁹ It could be argued that some foster parents may invoke their due process rights contained in section 33 of the Constitution in

234. S. AFR. CONST. § 28(2).

235. 1997 (2) SA at 273-74.

236. § 15(b) of Child Care Act 74 of 1983.

237. § 290(1)(b), (d) of Criminal Procedure Act 51 of 1977. See BOSMAN-SWANEPOEL & WESSELS, *supra* note 18, at 44-45.

238. § 18(4)(g) of Child Care Act 74 of 1983. The section reads:

A children's court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied. . . in the case of an application for the adoption of a foster child by a person other than his foster parent, that the foster parent consented in writing to the adoption of the child: Provided that such consent shall not be necessary if the foster parent refuses or fails, within one month after being called upon in writing by an assistant of the children's court to do so, to indicate to him in writing whether he so consents or not.

Id.

239. BOSMAN-SWANEPOEL & WESSELS, *supra* note 18, at 53.

asserting the right "not to be deprived by state action of the care of a child with whom they have established a stable relationship 'except in accordance with the principles of fundamental justice.'"²⁴⁰

In the United States of America, the courts have not been consistent in deciding whether to accord due process protections to foster parents before allowing the removal of the child by welfare officials, even where there was a family bond between foster parent and child. In *Smith v. Organization of Foster Families for Equality and Reform*,²⁴¹ the court decided, without determining whether the foster care relationship created a constitutionally protected liberty interest, that New York procedures were adequate to protect whatever liberty interest the foster parents might have.²⁴² Several U.S. courts have decided that there is no constitutionally protected liberty interest in the relationship between a child and his or her foster parents.²⁴³ Consequently, due process need not be fulfilled before a state welfare agency removes the child from the foster home. However, in *Rivera v. Marcus*,²⁴⁴ the court stated that:

there would appear to be instances in which a liberty interest should be recognized where long-term family relationships evolve out of foster home placements. It seems clear that, as with a biological parent and child, strong, loving, emotional and psychological ties can develop among members of a long-term foster family.

240. Nicholas Bala & J. Douglas Redfearn, *Family Law and the "Liberty Interest": Section 7 of the Canadian Charter of Rights*, 15 OTTAWA L. REV. 275, 292 (1983) (discussing rights under a similar provision of Canadian Charter of Rights and Freedoms) (quotation marks omitted).

241. 431 U.S. 816 (1977).

242. *Id.* at 855. The *Smith* court stated:

Finally, the § 392 hearing is available to foster parents, both in and outside New York City, even where the removal sought is for the purpose of returning the child to his natural parents. Since this remedy provides a sufficient constitutional pre-removal hearing to protect whatever liberty interest might exist in the continued existence of the foster family when the State seeks to transfer the child to another foster home, *a fortiori* the procedure is adequate to protect the lesser interest of the foster family in remaining together at the expense of the disruption of the natural family.

Id.; see also *Sherrard v. Owens*, 484 F. Supp. 728, 742 (W.D. Mich. 1980), *aff'd* 644 F.2d 542 (6th Cir. 1981) (finding that Michigan procedures for revoking home licenses were constitutionally adequate because there is no liberty right connected to the operation of a foster home).

243. A right to due process was denied in *Drummond v. Fulton County Dep't of Family*, 563 F.2d 1200 (5th Cir. 1977); see also *Kyees v. County Dep't of Pub. Welfare*, 600 F.2d 693 (7th Cir. 1979).

244. 533 F. Supp. 203 (D. Conn. 1982).

Any arbitrary state interference with those ties surely can result in harsh and lasting consequences to the foster child and to the foster family members. In these special circumstances, it would seem that a preremoval hearing which comports with constitutional standards may be required.²⁴⁵

The decision in *Rivera* parallels section 18(4)(g) of the Child Care Act. It tempers parental rights with a child-centered approach that favors taking the child from the foster parents and placing him or her in another home, if that is in the child's best interests.

c. Institutional Care

Where a child cannot be placed with an adoptive or foster family, he or she will be placed in a state institution. A child's right to institutional care when removed from the family environment is protected in pre-constitutional legislation. Subsections 15(c) and (d) of the Child Care Act provide for the placement of children into institutional care.²⁴⁶ Section 290(d) of the Criminal Procedure Act provides for the placement of convicted juveniles in institutional care, as provided in the Child Care Act.²⁴⁷

The right to family, parental, and alternative care recognizes the importance of the family in meeting the needs of children. In South Africa, as in most Western countries, experience has shown that the family may be far from ideal. Unemployment, poverty, illiteracy, addiction, criminality, and family breakdown combine to create a situation where children are more likely to be abused.²⁴⁸ Section 28(1)(d) of the Constitution protects children from maltreatment, neglect, abuse, or degradation.²⁴⁹ This constitutional protection gives added support to legislation that protects a child's right to alternative care when removed from his or her family.

G. The Right to Be Protected from Maltreatment, Neglect, Abuse, or Degradation

Section 28(1)(d) of the Constitution, granting children the right "to be protected from maltreatment, neglect, abuse or degrada-

245. *Id.* at 206.

246. § 15(c)-(d) of Child Care Act 74 of 1983.

247. BOSMAN-SWANEPOL & WESSELS, *supra* note 18, at 44-45; see § 290(d) of Criminal Procedure Act 51 of 1977.

248. LEACH, *supra* note 32, at 219.

249. S. AFR. CONST. § 28(1)(d).

tion,"²⁵⁰ is derived from article 19(1) of the Convention on the Rights of the Child.²⁵¹ Article 19(1) requires that

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.²⁵²

Reports of the sexual abuse of children in South Africa have increased.²⁵³ On March 17, 1997, President Mandela listened to children's concerns on the *Felicia Mabuza-Suttle Talk Show*.²⁵⁴ The children's major concern was the increase in incidents of sexual abuse.²⁵⁵

There have been legislative attempts to deal with the problem of the physical and sexual abuse of children. For example, the Sexual Offenses Act 23 of 1957 criminalizes sexual intercourse with minors.²⁵⁶ The difficulty with most child protection laws, however, is that they do not define clearly what constitutes ill-treatment, neglect,

250. *Id.*

251. *U.N. Convention, supra* note 9, art. 19(1).

252. *Id.*

253. The importance of the problem is evidenced by the fact that in August 1996, Minister of Welfare and Population Development Geraldine Fraser-Moleketi delivered a message from Nelson Mandela concerning the commercial sexual exploitation of children to the World Congress Against Sexual Exploitation of Children. Nelson Mandela, Statement to the World Congress Against Sexual Exploitation of Children (Aug. 27, 1996). In a recent press release, Human Rights Watch Women's Project and Human Rights Watch/Africa called on "the South African government to intensify its efforts to protect women from violence and to improve the state's response to such abuses, with particular attention to the medico-legal system." Human Rights Watch Women's Project and Human Rights Watch/Africa, Press Release (Aug. 13, 1997). The organizations report that

[o]f the 27,056 rapes reported in 1993, only 8,998 were prosecuted; of the cases brought to court, 4,753 resulted in convictions, just 17.5% of the total. Since 1993, the number of rapes reported has nearly doubled, to 50,481 in 1996; of these 21,863 were prosecuted, yet only 4,100 led to a conviction, or 8.1% of the cases reported. While the percentage of cases has increased, the rate of conviction has fallen.

Id.; see also BINAIFER NOWROJEE & BRONWEN MANBY, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA: STATE RESPONSE TO DOMESTIC VIOLENCE AND RAPE (1995); Neil Van Dokkum, The Statutory Obligation to Report Child Abuse and Neglect, 1996 ACTA JURIDICA 163, 179 (stressing that child abuse is a growing problem in South Africa).

254. *Felicia Mabuza-Suttle Show* (SABC television broadcast, March 17, 1997).

255. *Id.*

256. § 14 of Sexual Offenses Act 23 of 1957.

or abuse. This lack of definition results in class, cultural, and moral biases in the reporting and enforcement process.²⁵⁷

Section 42(1) of the Child Care Act placed an obligation on dentists, medical practitioners, nurses, and social workers to report child abuse.²⁵⁸ Section 42(1) of the Child Care Act was limited in its reach in that it restricted the responsibility for reporting child abuse to specific health professionals and social workers, while excluding other professionals who would come into contact with children, such as mental health professionals, teachers, day care workers, and priests.²⁵⁹ Section 42 has now been amended by the Child Care Amendment Act to include teachers or "any person employed by or managing a children's home, place of care or shelter."²⁶⁰

Section 4 of the Prevention of Family Violence was enacted in an effort to remedy the deficiency that existed in Section 42 of the Child Care Act prior to its amendment in 1996.²⁶¹ Section 4 of the Prevention of Family Violence Act obligates "[a]ny person who examines, treats, attends to, advises, instructs or cares for any child" to report the ill-treatment of such child to the police, the Commissioner of Child Welfare, or a social worker.²⁶²

Chapter 3 of the Child Care Act provides mechanisms for the removal of abused or neglected children from their families to places of safety.²⁶³ Sections 11 and 12 of the Child Care Act empower police officers, social workers, and other authorized persons to remove children from their homes to places of safety, with or

257. See, e.g., *A. v. R. Kinder-en-Kindersorgvereniging*, 1996 (1) SA 649 (T) (discussing a situation where an investigator of child abuse reported no cause for concern after making only a cursory investigation); see also N. Van Dokkum, *The Statutory Obligation to Report Child Abuse and Neglect*, 1996 ACTA JURIDICA 163, 175-77 (describing underreporting of child abuse in White middle-class families).

258. § 42(1) of Child Care Act 74 of 1983.

259. *Id.* See Van Dokkum, *supra* note 257, at 171-72.

260. § 15(a) of Child Care Amendment Act 96 of 1996.

Notwithstanding the provisions of any other law, every dentist, medical practitioner, nurse, or social worker or teacher, or any person employed by or managing a children's home, place of care or shelter, who examines, attends or deals with any child in circumstances giving rise to the suspicion that that child has been ill-treated, or suffers from any injury, single or multiple, the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease, shall immediately notify the Director-General or any officer designated by him or her for the purpose of this section, of those circumstances.

Id.

261. § 4 of Prevention of Family Violence Act 133 of 1993.

262. See *id.*; Van Dokkum, *supra* note 257, at 172-73.

263. §§ 10-16 of Child Care Act 74 of 1983.

without a warrant.²⁶⁴ The forcible entry of premises is also allowed.²⁶⁵ Certain circumstances may require removal of children from abusive situations, however, actions taken pursuant to sections 11 and 12 may give rise to constitutional challenges based on the infringement of the right to privacy.²⁶⁶

Section 14 of the Child Care Act sets out criteria for the removal of children from their homes.²⁶⁷ Under the original version of the Act, a finding of parental guilt was required. This requirement was unsatisfactory because the parent or guardian had to be unable or unfit to have custody of the child.²⁶⁸ Fortunately, section 14(4)(b) has been amended to give it a child-centered focus.²⁶⁹ A finding of parental guilt is no longer required.²⁷⁰ Insofar as it only requires a "child in need of care," the amended Act operates on child-centered criteria.²⁷¹

The criminal trial process also has been reformed to enable child witnesses who are victims of abuse to testify against their abusers in a non-intimidating and child-friendly setting. Section 170A of the Criminal Procedure Act has reformed the criminal trial process to enable child complainants to give evidence in court against their abusers without all of the harshness of the adversarial process.²⁷² This provision makes it possible for children to give evidence by video link or from behind a one-way mirror as long as the accused can observe and hear the child witness. This provision also makes it possible for cross examination of child witnesses to be conducted through an intermediary.²⁷³ In *Klink v. Regional Court Magistrate*,²⁷⁴ the constitutionality of providing for the questioning of a child witness through an intermediary was challenged.²⁷⁵ There the Court decided that

[i]t is . . . possible that the forcefulness and effect of cross-examination may, to some extent, be blunted when an intermediary is interposed between the ques-

264. *Id.*

265. *Id.*

266. Van Dokkum, *supra* note 257, at 247.

267. § 14 of Child Care Act 74 of 1983.

268. *Id.*

269. § 5 of Child Care Amendment Act 86 of 1991 (amending § 14 of Child Care Act 74 of 1983).

270. *Id.*

271. *Id.* § 5(b).

272. § 170A of Criminal Procedure Act 51 of 1977.

273. Karen Müller & Mark Tait, *The Child Witness and the Accused's Right to Cross Examination*, 3 J. S. AFR. L. 519, 526-30 (1997); see also P.J. Schwikkard, *The Abused Child: A Few Rules of Evidence Considered*, 1996 ACTA JURIDICA 148, 155-62 (describing the Act's effect on the adversarial nature of the trial).

274. 1996 (3) BCLR 402 (SE).

275. *Id.*

tioner and the witness. But this does not mean that the accused is denied the right to a fair trial, for in deciding whether his rights have been violated it is also necessary to take into account the interest of the child witness.²⁷⁶

Advances in technology, such as the Internet, have made it even more difficult to detect and report child sexual abuse. The nature of interaction on the Internet, particularly the anonymity of the user, has made it possible for children to access pornographic materials and to interact with adult users. The South African lawmakers and educators need to be aware of the negative potential of the Internet, and they need to place controls on the accessibility of sexual materials to children and prohibit child pornography on the Internet.²⁷⁷

IV. CHILDREN'S RIGHTS AND FAMILY AUTONOMY

Child-centered approaches to rights discourse are often opposed by adults who perceive children's rights as extraneous and inconsistent with family or parental autonomy.²⁷⁸ Parent-centered approaches, which seek to insulate the family from state interference, are premised on the public/private dichotomy.²⁷⁹ Because the family performs a public function by rearing children, it is inaccurate to view the family as operating outside the public sphere.²⁸⁰ Non-regulation would reinforce existing inequalities in parent/child relations and idealize the family as a safe haven for children.²⁸¹ Where families fail to meet their obligations towards their children, it is appropriate for the state to interfere. Accordingly, section 28(1)(c) empowers the state to protect the child's right to basic nutrition, shelter, basic health care, and social services.

276. *Id.* at 411-12.

277. L. C. Haupt, *Children Exploring Cyberspace: Protecting Children Against the Dark Side of the Internet* (visited Apr. 19, 1998) <<http://members.smartnet.co.za/~wybrand/LIEZL.html>>. *But see* *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (ruling the U.S. Congress's attempt to criminalize transmission of non-obscene, indecent material to children a violation of constitutional protections of freedom of speech).

278. LEACH, *supra* note 32, at 204.

279. Bainham, *supra* note 81, at 206; *see also* GITTINS, *supra* note 81.

280. Eekelaar, *supra* note 83.

281. Lasch, *supra* note 84.

A. *The Right to Basic Nutrition, Shelter, Basic Health Care, and Social Services*

The right to nutritional well-being, shelter, health, and social services is recognized in international law, in article 24(2)(c) and (e)²⁸² and article 27(3)²⁸³ of the UN Convention on the Rights of the Child. Section 30(1) of the interim Constitution provided for the right to "security, basic nutrition and basic health and social services."²⁸⁴ The reference to *security* was unnecessary in view of the protection of the right to "security of the person" already granted under section 11 of the interim Constitution.²⁸⁵ This confusion has been cleared in section 28(1) of the Constitution by the deletion of any reference to the right to security.²⁸⁶ Section 28(1)(c) provides that "[e]very child has the right to basic nutrition, shelter, basic health care services and social services."²⁸⁷

Both international human rights law and municipal law recognize that the implementation of economic, social, and cultural rights are subject to resource constraints and will be achieved only over time. For example, article 4 of the Convention on the Rights of the Child refers to the obligation of state parties regarding economic, social, and cultural rights to "undertake such measures to the maximum extent of their available resources."²⁸⁸ Article 24(1) refers to "the highest attainable standard of health."²⁸⁹ Article 28(1) explains that

282. *U.N. Convention, supra* note 9, art. 24(2)(d)–(e). This article provides that the State shall take appropriate measures

[t]o combat disease and malnutrition, including within the framework or primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; [and]

[t]o ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents.

Id.

283. *Id.* art. 27(3). Article 27(3) states in part that "States Parties . . . shall[,] in case of need[,] provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." *Id.*

284. S. AFR. CONST. (1993) § 30(1)(c) (emphasis added).

285. S. AFR. CONST. § 11 (1993). Section 11 is now section 12 of the Constitution. S. AFR. CONST. § 12.

286. S. AFR. CONST. § 28(1)(c).

287. *Id.*

288. *U.N. Convention, supra* note 9, art. 4.

289. *Id.* art. 24(1).

the "States Parties recognize the right of the child to education, and with a view to achieving this right progressively."²⁹⁰ The rights in section 28(1)(c) of the final Constitution also are worded in a restrictive manner,²⁹¹ referring only to basic needs and restricting rights holders to children.²⁹² Human rights activists and children's rights advocates may argue, with some justification, that "many of the problems of violations or neglect of economic, social and cultural rights have more to do with power relationships in society, or a lack of 'political will,' than with resource constraints."²⁹³

Under common law²⁹⁴ and statute,²⁹⁵ and even under international law,²⁹⁶ parents bear the primary responsibility to provide support for their children. The state has a positive duty to prevent parents from infringing upon this right.²⁹⁷ However, where parents fail, section 28(1)(c) of the final Constitution places the obligation on the state to ensure the realization of this right.²⁹⁸ The Social Pensions Act governs the state's obligation where parents fail to meet their primary responsibility.²⁹⁹ The state provides a small monthly maintenance allowance scheme which is administered by the Department

290. *Id.* art. 28(1).

291. S. AFR. CONST. § 28(1)(c).

292. de Vos, *supra* note 67, at 255 (internal quotation marks omitted) (citation omitted).

293. David Parker, *Resources and Child Rights: An Economic Perspective*, in IMPLEMENTING THE CONVENTION ON THE RIGHTS OF THE CHILD: RESOURCE MOBILIZATION IN LOW-INCOME COUNTRIES 33, 34 (James R. Himes ed., 1995).

294. VAN LEEUWEN, CENSURA FORENSIS 1.1.10.1 (1662); Union Gov't v. Warneke 1911 AD 657; Lesbury van Zyl, *Maintenance*, in FAMILY LAW SERVICE 1 (I.D. Schafer ed., 1988).

295. See, e.g., Maintenance Act 23 of 1963.

296. Article 18 of the U.N. Convention on the Rights of the Child states that "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern." *U.N. Convention*, *supra* note 9, art. 18 (emphasis added).

297. Section 50 of the Child Care Act 74 of 1983 and section 11 of the Maintenance Act 23 of 1963 make it an offense for any person who fails to provide a child with sufficient maintenance while able to do so. For instructive decisions, see *State v. Diedericks*, 1972 (4) SA 266 (NC) (holding that a charge of failure to maintain can be sustained only when a responsible person is in a position to provide maintenance for a child yet fails to do so); *State v. Boshoff*, 1971 (1) SA 314 (T) (discussing a charge of failure to maintain a child when the paternity of the child is in doubt); *State v. Jeggels*, 1962 (3) SA 704 (C) (upholding a father's conviction for failure to maintain his child); see also Bridgette Clark, *Children's Right To Support—A Public Responsibility?*, 1996 ACTA JURIDICA 82, 93-96 (arguing that reliance on private law remedies is not effective); BOSMAN-SWANEOEL & WESSELS, *supra* note 18, at 81.

298. de Vos, *supra* note 67, at 256.

299. Social Pensions Act 37 of 1973.

of Welfare.³⁰⁰ There are two types of grants under the scheme: a parental allowance and a child's allowance.³⁰¹

Following the report of the Lund Committee on Child and Family Support, which recommended the scrapping of the R 430 per month parental allowance and the reduction of the R 135 a month child allowance to R 75 per month, Welfare Minister Geraldine Fraser-Moleketi proposed legislation implementing the Lund Committee recommendations.³⁰² The Welfare Minister's plan was severely criticized by non-governmental organizations, such as the Black Sash and the Poverty Reduction Monitoring Services of the Institute for a Democratic South Africa, for placing fiscal concerns above child welfare.³⁰³ The United Nations, in proclaiming a "new ethic" as part of the Declaration made at its World Summit on Children held in September 1990, stated

[t]he mental and physical growth of a child cannot be asked to wait until the interest rate falls, or until commodity prices recover, or until debt repayments have been rescheduled, or until the economy returns to growth, or until after a general election or until a war is over . . . In our time, for the first time, we have the chance to begin shielding the lives and the normal growth of children from the worst excesses, misfortunes, and mistakes of the world into which they are born.³⁰⁴

The parental allowance is awarded to South African Citizens who have been resident in the country for five years.³⁰⁵ The applicant parent must be unmarried, divorced, or widowed.³⁰⁶ There is no entitlement for a woman with children on family benefits when she is cohabiting with a man.³⁰⁷ "If married, her husband must have deserted her for over three months and be entitled to a state pension, he must have been declared unfit for work for more than six months

300. Clark, *supra* note 297, at 85.

301. *Id.*

302. Rafiq Rohan, *Minister's Grant Plan Opposed*, SOWETAN, Apr. 22, 1997, at 11.

303. *Id.*

304. UNICEF, THE STATE OF THE WORLD'S CHILDREN 27 (1991), *quoted in* Ian Butler, *Children and the Sociology of Childhood*, in A CASE OF NEGLECT?: CHILDREN'S EXPERIENCES AND THE SOCIOLOGY OF CHILDHOOD 1 (Ian Butler & Ian Shaw eds., 1996).

305. Clark, *supra* note 297, at 85.

306. *Id.*

307. Tshepo L. Mosikatsana, *A Socio-Legal Analysis of the Saskatchewan Matrimonial Property Act SS 1979, c-M6.1 from 1974-1988* (unpublished M.A. thesis University of Regina 1989) 86-87.

or sentenced to jail for more than three months.”³⁰⁸ To receive a child’s allowance, the applicant must prove that the child’s father is deceased, disabled, or has disappeared.³⁰⁹ South African welfare policies are based on the patriarchal family model and its assumptions of male dominance and female dependency. Such policies reinforce gender inequality.

[T]he sexual exclusivity required of the wife in a traditional patriarchal marriage, which thereby guarantees economic support, is reproduced with the state then assuming the husband’s economic role. Where a woman is viewed as having formed a potentially sexually exclusive relationship with a man, the state will withdraw, thereby transferring the economic burden that flows from the sexual relation to this new source of support. . . . The effect on the sole-support mothers is to constrict their realm of private action and punish them economically where they transgress the presumptions of the male breadwinner model of human relationships. This attitude is more than bourgeoisie morality; it is the strictest application of patriarchal control to women of childbearing capacity who otherwise exist outside a relationship with a man. . . . Further, in its relation with single-mother-led families, it actively replicates the exchange of exclusive sexual service for economic support, on which the dependency equation is based.³¹⁰

South African welfare policies, like those of most Western countries, are out of step with social reality in so far as they are based on assumptions of female dependency and they are contrary to the equality provisions contained in section 9(3) of the Constitution.

B. Section 28(2): *The Supremacy of the Best Interests of the Child*

Section 28(2) of the final Constitution announces that “[a] child’s best interests are of paramount importance in every matter concerning the child.”³¹¹ This principle suggests that children’s best

308. Clark, *supra* note 297, at 85.

309. *Id.*

310. Margaret Leighton, *Handmaids’ Tales: Family Benefits Assistance and the Single-Mother-Led Family*, 45 U. TORONTO FAC. L. REV. 324, 327 (1987) (citations omitted).

311. S. AFR. CONST. § 28(2).

interests trump all other considerations.³¹² The best interests standard is implicated in all matters affecting the child, such as custody, access, and adoption. It is an indeterminate standard, and is for the most part subject to judicial discretion. The indeterminacy of the best interests standard has enabled the courts to interpret it in a manner that reinforces societal prejudices in custody and access disputes in favor of heterosexual parents over homosexual parents³¹³ and mothers over fathers.³¹⁴

The current constitutional context has led to a re-examination of the judicial application of the best interests standard as preferring mothers over fathers. For example, in *Van der Linde v. Van der Linde*,³¹⁵ Judge Hatting discarded the primary caretaker presumption as anachronistic and reflective of another time.³¹⁶ He explicitly favored equal parenting rights.³¹⁷ He commented that mothering is not gender specific and that it is indicative of function rather than persona.³¹⁸ A father can be just as good a "mother" as the biological mother, and naturally a mother can be just as good a "father" as the biological father.³¹⁹ The quality of a parental role is not determined by gender.³²⁰ The *Van der Linde* case clearly reflects the overarching influence of the Constitution in the development of South African equality jurisprudence and consequently, the growing influence of the child-centered norms and values.

A reading of various legislation, such as the Child Care Act³²¹ and the Termination of Pregnancy Act,³²² points to a duality in approach when dealing with children's rights. On the one hand, section 28(g) of the Constitution, read with sections 18(c) and 39(4) of the Child Care Act, apply a parent-centered standard that views children as dependent and incapable of making independent decisions about their lives.³²³ In other words, someone makes the determination as to what is in the child's best interests.³²⁴ Section

312. Helen Reece, *The Paramountcy Principle: Consensus or Construct?*, in 49 CURRENT LEGAL PROBLEMS 266 (Michael Freeman ed., 1996).

313. See, e.g., *Van Rooyen v. Van Rooyen*, 1994 (2) 325 (W); Mosikatsana, *supra* note 28, at 114.

314. Reece, *supra* note 312, at 271-74.

315. 1996 (3) SALR 509 (O).

316. *Id.* at 514-15.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. Child Care Act 74 of 1983.

322. Termination of Pregnancy Act 92 of 1996.

323. S. AFR. CONST. § 28(g).

324. For a discussion of the best interests test, see Palmer, *supra* note 28, at 98; see also Mosikatsana, *supra* note 28, at 119.

39(4) of the Child Care Act restricts the right to consent to surgical procedures to persons above eighteen years old.³²⁵ Minors over fourteen years of age can consent only to medical and non-surgical procedures.³²⁶ Minors under fourteen years of age cannot consent to either, as they require parental consent.³²⁷

The provisions of section 39(4) of the Child Care Act are clearly parent-centered and are inconsistent with section 2 of the Choice on Termination of Pregnancy Act 92 of 1996, which permits minors, regardless of age, to consent to abortion, even against the wishes of their parents or guardians.³²⁸ This Act promotes autonomous decision-making on the part of children in matters affecting their life circumstances or health.³²⁹

CONCLUSION

Constitutionalization of children's rights in section 28 of the Constitution marks a watershed period in the history of South Africa, and it represents a meaningful attempt to provide a constitutional framework for a child-centered law reform program. It also provides a basis for challenging racially oppressive and parent-centered apartheid laws which undermine the child's best interests. Prior to the implementation of the Constitution, the South African welfare policies were racially structured, patriarchal, and parent-centered. Black children were denied basic human rights such as education, nutrition, and health care. They were denied South African citizenship under the homelands policy, and their families were removed forcibly from their lands. They were victims of police brutality, and they were detained for long periods without trial under conditions that were in violation of international law.

Constitutionalization provides a basis for challenging the racially structured and parent-centered child welfare laws which are not in the best interests of the child. For example the child's constitutional right to nutrition contained in section 28(1) formed the basis for the attack on Minister Geraldine Fraser-Moleketi's attempt to lower the child allowance. It also provided the ideological basis for the Children's National Feeding Scheme and the Children's Fund set up by the President in furtherance of the political culture of children's rights.

325. § 39(4)(a) of Child Care Act 74 of 1983.

326. *Id.* § 39(4)(b).

327. *Id.* § 39(4); see also Charles Ngwena, *Health Care Decision-Making and the Competent Minor: The Limits of Self Determination*, 1996 ACTA JURIDICA 132, 139-40 (describing the effect of § 39(4) on minors).

328. § 2 of Choice on Termination of Pregnancy Act 92 of 1996.

329. *Id.*

Other rights contained in the Constitution that have succeeded in promoting a child-centered legislative program include the following rights: 1) not to be involved in armed conflict; 2) not to be detained except as a measure of last resort; 3) to have legal representation; 4) to be protected from exploitative labor practices; 5) to have a name and nationality; and 6) to be protected from maltreatment, neglect, abuse, or degradation.