

**THE RIGHTS AND BEST INTERESTS OF CHILDREN CONCEIVED THROUGH  
RAPE: THE MISSING MAINTENANCE OF RAPIST FATHERS IN SOUTH AFRICA**

by

**INDIO ANAIS FRIEDMANN**

FRDIND001

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

in fulfillment of the requirements for the degree

MASTER OF LAW (LLM) COURSEWORK & DISSERTATION (HUMAN RIGHTS  
LAW)

Department of Public Law

**SUPERVISOR: MATHABO BAASE**

Word count: 23083

**10 February 2024**

Research dissertation/ research paper presented for the approval of Senate in fulfilment of part of the requirements for the <qualification for which the student is registered> in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Law dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

**SIGNED:**

Signed by candidate

**DATED:** 10 February 2024

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## ACKNOWLEDGEMENTS

It was in the infancy of my studies when my lecturer, Dr Lize Mills, taught me about the children who fell through the cracks of society, the children born of rape. It is to her that I owe my interest in pursuing the topic of this dissertation, together with her inspiring and ongoing work in this area of law.

I would like to extend my greatest thanks to my supervisor, Mathabo Baase. Her gentle, yet steadfast support allowed this dissertation to come into being in a way that felt authentic and meaningful. I am incredibly appreciative of her constructive contribution over the last year.

To my loved ones, I am grateful for your encouragement and understanding throughout this writing process.

## ACRONYMS

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women

CRC Committee on the Rights of the Child

ICESCR International Covenant on Economic, Social and Cultural Rights

NDPP National Director of Public Prosecutions

OAU Organisation of African Unity

UDHR Universal Declaration of Human Rights

UN United Nations

UNICEF United Nations Children's Fund

UNTS United Nations Treaty Series

UNICEF United Nations Children's Fund

USA United States of America

## ABSTRACT

The global shift in recognising children as independent rights holders demand that States Parties must adhere to the best interests of the child principle, obliging them to adopt legislative measures that align with children's rights as outlined in international law. Accordingly, South Africa's legislative frameworks, including the Children's Act 38 of 2005 (Children's Act), emphasise a child-centered approach, requiring all child-related decisions to be grounded in the best interests of the child. However, there is a notable absence of international and domestic guidance regarding the rights and best interests of children conceived through rape. It is within this context that this dissertation argues that South Africa's current legislation fails to adequately provide for children born of rape. Such a failure violates international and constitutional obligations owed to children. This dissertation examines this current legislative lacuna in South Africa concerning such children, specifically focusing on the Children's Act and Maintenance Act 99 of 1998 (Maintenance Act).

The Children's Act, in section 1(a), excludes rapist fathers from the definition of a parent, thereby denying them parental responsibilities and rights, including the responsibility to contribute to the child's maintenance. While seemingly aimed at protecting the child's best interests, this legal stance creates a lacuna, leaving children born of rape without maintenance from the rapist father. Maintenance is a crucial factor determining a child's well-being and opportunities, encompassing rights such as adequate living standards, education, healthcare, housing, and dignity. The existing legislation only entitles children born of rape to maintenance from the biological mother, unlike children born of consent who can receive dual maintenance. Moreover, this differential treatment based on the manner of conception raises concerns of unfair discrimination. Due to these consequences, amendments to the Children's Act and Maintenance Act are necessary to ensure maintenance obligations from rapist fathers, irrespective of the child's birth status. By analysing international and domestic perspectives, this research highlights the child's right to receive maintenance as part of their best interests, challenging the current exclusionary provision in its current form.

## TABLE OF CONTENTS

CHAPTER I: INTRODUCTION.....	1
CHAPTER II: INTERNATIONAL CHILD LAW .....	4
(a) <i>From conception to Convention</i> .....	4
(b) <i>The right to parental care</i> .....	6
(i) <i>Conditions of care</i> .....	6
(ii) <i>Care and Regional Law</i> .....	9
(iii) <i>Financial care</i> .....	10
(iv) <i>The child born of rape</i> .....	11
(c) <i>The Best interests of the child</i> .....	12
(i) <i>Sources</i> .....	12
(ii) <i>A right, principle, and rule of procedure</i> .....	13
(iii) <i>Application</i> .....	15
(iv) <i>Critique</i> .....	17
CHAPTER III: SOUTH AFRICAN LEGISLATIVE FRAMEWORKS .....	19
(a) <i>The rights and best interests of the child</i> .....	19
(i) <i>The constitutional child</i> .....	19
(ii) <i>Substantive elements of children’s rights</i> .....	21
(b) <i>The Children’s Act 38 of 2005</i> .....	22
(i) <i>Children at the centre</i> .....	22
(ii) <i>Best interests assessment</i> .....	24
(c) <i>Constitutional Court commitment</i> .....	25
(i) <i>Child-centric courts</i> .....	25
(ii) <i>Rights-based approach</i> .....	25
(iii) <i>Case considerations</i> .....	26

(iv) <i>Confronting criticism</i> .....	30
CHAPTER IV: PARENTAL RESPONSIBILITIES AND RIGHTS .....	31
(a) <i>The Children's Act 38 of 2005</i> .....	31
(i) <i>Parenthood</i> .....	31
(ii) <i>Categories of parental responsibilities and rights</i> .....	32
(iii) <i>Acquisition of parental responsibilities and rights</i> .....	35
(b) <i>The child born of rape</i> .....	36
(i) <i>Rationale for exclusion</i> .....	36
(ii) <i>The best interests of the child born of rape</i> .....	39
(iii) <i>Case consideration</i> .....	40
(c) <i>Missing maintenance</i> .....	43
(i) <i>Grounds for maintenance</i> .....	43
(ii) <i>Consequences of exclusion from maintenance</i> .....	45
(iii) <i>Counter-arguments</i> .....	48
CHAPTER V: SUGGESTIONS .....	49
(a) <i>Legislative reform: amendment, reading in</i> .....	49
(b) <i>Interpretation: reading down</i> .....	51
CHAPTER VI: CONCLUSION .....	51
BIBLIOGRAPHY .....	54

## CHAPTER I: INTRODUCTION

Current legislation in South Africa suggests that children who are born from rape are treated differently in terms of the Maintenance Act 99 of 1998 (Maintenance Act).<sup>1</sup> This differentiation arises from section 1(a) of the Children's Act 38 of 2005 (Children's Act), excluding rapist fathers from the definition of a parent,<sup>2</sup> thereby preventing them from acquiring parental responsibilities and rights.<sup>3</sup> These responsibilities and rights include caring for the child, maintaining contact, acting as a guardian, and contributing towards the child's maintenance.<sup>4</sup> While ostensibly serving the rights and best interests of the child,<sup>5</sup> this position results in a legal lacuna, preventing children born of rape from receiving maintenance from the rapist father. Maintenance profoundly impacts a child's well-being, opportunities, and quality of upbringing.<sup>6</sup> It enables the fulfillment of rights such as adequate living standards, education, healthcare, housing, and dignity.<sup>7</sup> Legislatively, the child born of rape is only entitled to maintenance from the biological mother, unlike the child born of consent which can receive dual maintenance. The law's treatment raises concerns of unfair discrimination as it indirectly differentiates between children on the basis of birth,<sup>8</sup> by making the provision of maintenance relative to the manner of a child's conception. This result is at odds with South Africa's international and constitutional obligations surrounding the rights and best interests of all children. To better protect the child born of rape, legislative reform must expressly impose the parental responsibility and duty to contribute maintenance on the rapist father.

---

<sup>1</sup> The Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 (SORMA). Section 3 of SORMA defines rape as: 'Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape' available at [https://www.saps.gov.za/resource\\_centre/acts/downloads/sexual\\_offences/sexual\\_offences\\_act32\\_2007\\_eng.pdf](https://www.saps.gov.za/resource_centre/acts/downloads/sexual_offences/sexual_offences_act32_2007_eng.pdf), accessed 18 December 2023.

<sup>2</sup> Section 1(a) of the Children's Act 38 of 2005 (Children's Act). Parent is defined as: 'Parent, in relation to a child, includes the adoptive parent of a child, but excludes— the biological father of a child conceived through the rape of or incest with the child's mother.'

<sup>3</sup> Section 18(2) of the Children's Act.

<sup>4</sup> Ibid section 18(2)(a)-(d).

<sup>5</sup> Lize Mills 'Born from bad memories: considering the best interests of children conceived as a result of rape and incest' (2023) 48 *JJS* 111.

<sup>6</sup> Ibid at 127.

<sup>7</sup> These rights will be discussed further when considering the international law, constitutional law and statutory frameworks of child rights.

<sup>8</sup> See grounds of discrimination in section 9(3) of the Constitution of the Republic of South Africa, 1996.



Known for its significant levels of rape,<sup>9</sup> South Africa reported 42 780 cases of rape in the 2022/2023 crime statistics.<sup>10</sup> With this territory comes the reality of unwanted pregnancies. Studies have shown that among adolescent girls and young women, unintended pregnancies were higher in survivors of rape, as opposed to those having never experienced rape.<sup>11</sup> Statistically speaking, one can deduce that a significant number of children are conceived as a result of the rape of adolescent girls and young women. In anticipation of this, legal safeguards are available to these girls and women who, due to rape, have conceived a child. One such safeguard is the severing of the legal relationship between the rapist father and the child through the exclusionary provision in section 1(a) of the Children's Act. While this protects the mother and child from further trauma and potential harm, the absolute exclusion also absolves the rapist father's duty to pay maintenance, acting contrary to the child's best interests.

Despite the prevalence of rape-related pregnancies, there is a notable absence of research on the best interests of these children and the parental responsibilities and rights of rapist fathers in South Africa.<sup>12</sup> Legislative guidance is limited to the exclusionary provision of a rapist father's parentage in the Children's Act. Moreover, the exclusionary provision has yet to face judicial or legislative scrutiny. Thus, there is a need for further clarification on its application. This dissertation aims to contribute to rape-conception literature and law by addressing this legal anomaly. It proposes legislative amendments to recognise the rapist father's parental responsibility to maintain the child, emphasising the child's right to receive maintenance in line with their rights and best interests.

The central research question of this dissertation examines the extent to which existing legislation makes provision for children born of rape. Sub-questions consider the rights and best interests of such children in alignment with South Africa's international and constitutional obligations and the need for legislative recognition of maintenance owed by the rapist father.

---

<sup>9</sup> Indiran Govender 'Gender-based violence – An increasing epidemic in South Africa' (2023) 65 *S Afr Fam Pract*, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10091185/>, accessed 27 December 2023.

<sup>10</sup> South African Police Service 'Crime statistics' available at <https://www.saps.gov.za/services/crimestats.php>, accessed 27 December 2023. It is crucial to note that this number only represents rape cases that were reported. The true number of cases would greatly exceed those reported.

<sup>11</sup> Anthony Ajayi & Henrietta Ezegebe 'Association between sexual violence and unintended pregnancy among adolescent girls and young women in South Africa' (2020) 20 *BMC Public Health*, available at <https://doi.org/10.1186/s12889-020-09488-6>, accessed 27 December 2023. Further, the statutory rape of children ages 10-17 is often disguised as teenage pregnancies. See Ndivhuwo Mukwevho 'Statutory rape driving high numbers of teen pregnancies' *Health E News: Journalism for Public Health* 22 April 2022, available at <https://health-e.org.za/2022/04/22/statutory-rape-driving-high-numbers-of-teen-pregnancies/>, accessed 27 December 2023.

<sup>12</sup> Mills op cit note 5 at 111.

While this dissertation endeavours to provide a comprehensive understanding of the rights and best interests of the child born of rape, it is essential to acknowledge its constraints. This dissertation critically assesses the legislative position of the child born of rape in terms of the legal uncertainty surrounding the rapist father's maintenance. This assessment is conducted through the lens of internationally and domestically understood rights owed to children and the best interests of the child principle. This dissertation does not focus on the merits of the principle but briefly engages with specific academic criticism levelled at its employment. The rights considered are limited to conditions of parental care, adequate living standards, dignity, and discrimination. Further, technical aspects regarding the retrieval of maintenance from an incarcerated rapist father fall beyond the scope of this dissertation. However, this dissertation will address this technicality to some extent to illustrate that it is not entirely impossible.

This dissertation is grounded in doctrinal and literature-based research, engaging with primary and secondary resources. Primary resources include international and regional law, together with explanatory commentary. Constitutional provisions, read with their enacting statutes, are used to identify current legal positions in South Africa. Various case law extrapolates the judicial understanding of these legal positions and principles. Secondary resources, such as journal articles, books, newspapers, theses, and online resources, are relied upon for critical evaluation.

This dissertation comprises six chapters. Following the introductory chapter in Chapter I, Chapter II considers international child law regarding the right to parental care, adequate living conditions, and shared maintenance responsibility. In the absence of explicit provisions in international law addressing children born of rape, Chapter II also undertakes an examination of the best interests of the child principle to address the needs of these children. Chapter III explores the South African legislative frameworks on the rights and best interests of the child. This chapter commences by unpacking the impact of the constitutional entrenchment of children's rights. Following this, the Children's Act 38 of 2005 is analysed for its objectives to protect and fulfil the constitutional rights of the child, guided by the legislative assessment of the best interests of the child. Finally, this chapter considers Constitutional Court jurisprudence for its contribution to developing children's rights and the understanding of the best interests principle. Chapter VI delves into parental responsibilities and rights, elaborating on categories and their acquisition according to the Children's Act. Subsequently, this chapter critically examines the legal position of the child born of rape, considering what is in the best interests of such children and addressing the impact of the rapist father's missing maintenance.

Following this examination is an evaluation of counterarguments surrounding the rapist father's ability to pay maintenance. Chapter V proposes legislative reforms, advancing amendments, and possible interpretations of the Children's Act and Maintenance Act to ensure recognition of the rapist father's duty to contribute towards the maintenance. To conclude, Chapter IV consolidates the findings of this dissertation and addresses the research question proposed above.

As the point of departure, this dissertation must establish the international legislative provisions relating to the rights and best interests of the child.

## CHAPTER II: INTERNATIONAL CHILD LAW

### *(a) From conception to convention*

The United Nations Convention on the Rights of the Child (Convention),<sup>13</sup> affords all children the rights outlined in the Universal Declaration of Human Rights (UDHR).<sup>14</sup> The Convention stands as the first comprehensive body of international law that is aimed at protecting the rights of every child on an individual and collective scale.<sup>15</sup> The majority of United Nations (UN) members have acceded to the Convention, establishing it as the most embraced human rights treaty to date.<sup>16</sup> Considered the centrepiece of children's rights,<sup>17</sup> the Convention recognises the child as an independent rights holder.<sup>18</sup> This recognition departs from the once welfarist and paternalistic understanding of children.<sup>19</sup> With this, the status of children has transformed from being objects of parental control to subjects of dignity and individuality.<sup>20</sup> Moreover, careful consideration is now given to the vulnerability associated with childhood.<sup>21</sup> The Convention outlines child-specific requisites such as special safeguards and care, family, harmonious development, physical and mental immaturity, and co-dependence.<sup>22</sup>

---

<sup>13</sup> United Nations Convention on the Rights of the Child (Convention), adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3.

<sup>14</sup> See preamble of the Convention. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, accessed 18 December 2023.

<sup>15</sup> Karin Soder 'The Convention on the Rights of the Child' (2009) 12 *NY Univ Law Rev* 445.

<sup>16</sup> United Nations Committee on the Rights of the Child 'Background to the Convention' available at <https://www.ohchr.org/en/treaty-bodies/crc/background-convention>, accessed 18 December 2023.

<sup>17</sup> Lawrence Leblanc 'The Convention on the Rights of the Child' (1991) 4 *LJIL* 283.

<sup>18</sup> United Nations Committee on the Rights of the Child in General Comment No. 7 2005 on 'Implementing child rights in early childhood' CRC/C/GC/7 (2005) (General Comment No. 7) para 3.

<sup>19</sup> Lize Mills 'Failing Children: The court's disregard of the best interests of the child in *Le Roux v Dey*' (2014) 131 *SALJ* 848.

<sup>20</sup> Warren Binford 'The constitutionalisation of children's rights in South Africa' (2016) 60 *NYLSLR* 336.

<sup>21</sup> Wouter Vandenhoele 'Children's rights from a legal perspective' in Wouter Vandenhoele, Ellen Desmet, Didier Reynaert, Sara Lembrechts (eds) *Routledge International Handbook of Children's Rights Studies* (2015) 50.

<sup>22</sup> Preamble of the Convention.

Underdeveloped countries plagued with socio-economic and political battles heighten childhood vulnerability, often at the expense of these special safeguards.<sup>23</sup>

Four overarching principles guide the Convention: the views of the child, non-discrimination, the right to life, survival and development, and the best interests of the child.<sup>24</sup> As described by the United Nations Children’s Fund (UNICEF), these principles are grounded in the value of childhood and the equality in opportunities needed for adequate child development.<sup>25</sup> To give effect to these principles, States Parties must establish appropriate legal safeguards concerning care and protection. These include the domestic adoption of legislative, administrative, and other measures aimed at protecting and advancing the rights of the child.<sup>26</sup> It is crucial that States Parties turn to these four guiding principles in ensuring due recognition of the child as a rights holder and for due respect to the rights thus held.

From the growing consciousness of children’s rights perspectives, the dimensions of parental rights principles were redrawn to reflect parental responsibilities owed to children rather than owned by parents.<sup>27</sup> Further, international law qualifies the parent-child relationship with the legal responsibility to act in the child’s best interests.<sup>28</sup> These shifts are evident in UNICEF’s Implementation Handbook for the Convention on the Rights of the Child (Handbook).<sup>29</sup> The Committee on the Rights of the Child (Committee),<sup>30</sup> has established the intended interpretation of the obligations contemplated within the Convention.<sup>31</sup> The Handbook frames parental responsibilities and rights from the child’s perspective, namely, the

---

<sup>23</sup> Ibid. See Sandra Ferreira ‘The best interests of the child: From complete indeterminacy to guidance by the Children’s Act’ (2010) 73 *Tydskr Suid-Afrik Reg* 204.

<sup>24</sup> Respectively, articles 12, 2, 6 & 3(1) of the Convention.

<sup>25</sup> United Nations Children’s Fund (UNICEF) ‘Four principles of the Convention on the Rights of the Child’ 24 June 2019, available at <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child>, accessed 18 December 2023.

<sup>26</sup> Article 4 of the Convention.

<sup>27</sup> Hodgkin, Rachel & Newell Peter et al (ed) *Implementation handbook for the Convention on the Rights of the Child (2007) UNICEF 232-233* (The Handbook). The Handbook at 232 states that: ‘Most nations of the world have a history of laws and customs that assumes parental “ownership” of children – an assumption that parental rights over children could be exercised for the benefit of the parents alone. These laws and customs are now being rethought in many parts of the world. The Convention requires that current legal principles of parental rights be translated into principles of parental responsibilities – the legal responsibility of parents to act in the best interests of their children.’

<sup>28</sup> Ibid at 232-233. See article 3(1) of the Convention.

<sup>29</sup> Ibid.

<sup>30</sup> Established on the 27<sup>th</sup> of February 1991, the Committee on the Rights of the Child is a body of the United Nations consisting of 18 independent experts who have ‘high moral character and recognized competence in the field of human rights.’ These experts serve for four years with the mandate of monitoring States parties’ implementation of the Convention. See for further information at United Nations ‘Committee on the Rights of the Child’ available at <https://www.ohchr.org/en/treaty-bodies/crc/introduction-committee>, accessed 3 January 2023.

<sup>31</sup> The Handbook op cit note 27 at XI. See further explanation at XIII: ‘The Handbook provides a detailed reference for the implementation of law, policy and practice to promote and protect the rights of children.’

duties and rights ascribable to children.<sup>32</sup> This dissertation discusses the child's right to parental care and supporting provisions in light of the above.<sup>33</sup> Accordingly, this discussion considers the international law position on the right to parental care and interrelated rights surrounding adequate living conditions. Such international law position forms the basis of the duty of support owed to children universally, including children conceived through rape.

*(b) The right to parental care*

*(i) Conditions of care*

The Convention contains several provisions that speak to the child's right to parental care and an adequate standard of living.<sup>34</sup> This chapter briefly discusses these rights, considering the caretaking duty owed by both parents to their children and the importance of financial support in realising a standard of adequacy. Article 18(1) of the Convention states:

1. 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.

Article 18(1) reflects the principle of shared parental responsibility that is characterised by the consideration of the child's best interests.<sup>35</sup> The importance of a common responsibility is affirmed by the Handbook, emphasising that both mothers and fathers should be responsible for the everyday care of the child, together with the financial responsibilities of parenthood.<sup>36</sup> This notion reflects provisions within the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>37</sup> CEDAW maintains the common responsibility of men and women regarding the development and care of children.<sup>38</sup> The importance of equal parental responsibility is manifest considering the increasingly common occurrence of single-

---

<sup>32</sup> Ibid at 232.

<sup>33</sup> Article 7 of the Convention.

<sup>34</sup> For further detail, see Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996, available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>, accessed 18 December 2023.

<sup>35</sup> Article 18 must be read with article 5, namely, parental and familial rights and duties and the evolving capacities of the child, article 3(2) regarding protection and care of the child and article 27 regarding a child's adequate standard of living. See the Handbook op cit note 27 at 231.

<sup>36</sup> The Handbook op cit note 27 at 235.

<sup>37</sup> United Nations General Assembly Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted 18 December 1979, entered into force 3 September 1981, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>, accessed 18 December 2023.

<sup>38</sup> Article 5(b) of CEDAW. See preamble wherein it states that the women's role within the upbringing of children cannot be a ground of discrimination and that the role of both parents is a shared one.

parent households, disproportionately headed by mothers.<sup>39</sup> In light of this, article 16 of CEDAW obligates States Parties to take measures to eliminate discrimination within family relations, specifically ensuring the same rights and responsibilities that serve the child's best interests.<sup>40</sup>

Another provision related to parental care is article 7 of the Convention, which asserts the child's right to be cared for by both parents, directly after birth.<sup>41</sup> Article 7 is shaped as a right owed to the child, rather than their parents.<sup>42</sup> The Handbook justifies such an assertion.<sup>43</sup> It notes that complementary to article 7, article 18 also concerns parental responsibilities rather than parental rights.<sup>44</sup> However, the child's right to be cared for by both parents is qualified by the inclusion of the phrase 'as far as possible' in article 7(1).<sup>45</sup> This qualification caters to circumstances where State authorities have determined to exclude or qualify the parental care by a parent/s based on not being in the child's best interests.<sup>46</sup> Moreover, article 9 of the Convention stipulates that a child must not be separated from their parents,<sup>47</sup> and must maintain contact,<sup>48</sup> unless it is contrary to the child's best interests.<sup>49</sup> With this understanding, the provision of parental responsibilities and rights is always grounded in the child's best interests. Notably, the State must first afford respect to the parents' rights, duties, and responsibilities enshrined within the Convention.<sup>50</sup> Thus, the parental figure primarily bears the responsibility for caretaking.<sup>51</sup> However, parent/s are disqualified where such care is inadequate, resulting in

---

<sup>39</sup> The Handbook op cite note 27 at 235.

<sup>40</sup> Article 16(1)(d) of CEDAW.

<sup>41</sup> Article 7(1) of the Convention.

<sup>42</sup> The Handbook op cite note 27 at 108.

<sup>43</sup> *Ibid* at 232.

<sup>44</sup> *Ibid*.

<sup>45</sup> Article 7(1) of the Convention.

<sup>46</sup> The Handbook op cit note 27 at 109.

<sup>47</sup> Article 9(1) of the Convention.

<sup>48</sup> *Ibid* at article 9(3).

<sup>49</sup> See further discussion in Mills op cit note 5 at 119.

<sup>50</sup> Article 5 of the Convention.

<sup>51</sup> *Ibid* at articles 18(1) & 27(2). Article 27 provides the meaning of caretaking which states:

'1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.'

the responsibility of caretaking falling on the State.<sup>52</sup> Therefore, the State holds accountability for the care and protection of the child's well-being, contingent on the parent's fulfilment of their responsibilities and rights owed to such child.<sup>53</sup>

International law ascribes the acceptable benchmark for childcare according to the components and conditions that form an adequate standard of living for the average child. A crucial provision in this respect is article 27 of the Convention. This article confirms the need for a standard of living that is adequate for all components of a child's development – physical, mental, spiritual, social, and moral.<sup>54</sup> The responsibility for creating living conditions conducive to such development lies primarily with the parents, aligned with their financial and other capacities.<sup>55</sup> Section 27(3) specifically emphasises the importance of living conditions related to clothing, housing, and nutrition.<sup>56</sup> However, the care of children is seen in a more holistic light.<sup>57</sup> The child's upbringing must also provide opportunities for cultural, physical, social, moral, mental, and spiritual development.<sup>58</sup> Article 6 of the Convention recognises the inherent right to life of every child, the quality of which is underscored by the adequate development and survival of the child. Article 19(1) of the Convention asserts that the child has the right to be protected against 'all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s).' As established, children are entitled to the rights outlined in the UDHR.<sup>59</sup> Accordingly, children also have the right to adequate living standards through the provision of housing, clothing, food, and medical care.<sup>60</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) further recognises this right.<sup>61</sup> Herein, States Parties are obliged to take measures towards its realisation.<sup>62</sup>

---

<sup>52</sup> Ibid articles 3(2) & 27(3). The Handbook op cit note 27 at 395.

<sup>53</sup> Ibid articles 3(2), 18(1)-(2) & 27(3). Should a parent/s fail in their fulfilment of their parental responsibilities and rights, the State must step in to caretake the child through various measures.

<sup>54</sup> Ibid article 27(1).

<sup>55</sup> Ibid article 27(2).

<sup>56</sup> Ibid article 27(3). See the Handbook op cit note 27 at 394. See article 24 of the Convention which provides further detail on the elements necessary for adequate living conditions.

<sup>57</sup> Mills op cit note 5 at 127.

<sup>58</sup> Article 27(1) of the Convention.

<sup>59</sup> UDHR op cit note 14.

<sup>60</sup> Ibid at article 25. See the Handbook op cit note 27 at 394.

<sup>61</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted 16 December 1966, entered into force 3 January 1976.

<sup>62</sup> Ibid at article 11(1).

Complimenting the Convention, the legislative framework for the regional protection of children's rights is the African Charter for the Rights and Welfare of the Child (Charter).<sup>63</sup>

*(ii) Care and Regional Law*

While the Convention addresses the universal protection of children's rights, the Charter caters to the contextual circumstances of the African child.<sup>64</sup> However, the symbiotic relationship between the Convention and Charter allows them to supplement each other, providing depth and breadth to the recognition of children's rights.<sup>65</sup> The Convention offers a general and broad application that adapts to a specific and nuanced application through the Charter.<sup>66</sup> Although the Charter mirrors the substance within the Convention, it has played an expansionary role in consolidating children's rights.<sup>67</sup> This expansionary role results from the shortcomings addressed by the Charter, together with mapping out the distinct challenges of the African child.<sup>68</sup>

The Charter explicitly provides the child with the right to parental care and protection in article 19. Article 20 provides for parental responsibilities where parents have the primary childcare responsibility.<sup>69</sup> Such responsibility is characterised by prioritising the best interests of the child as the central concern,<sup>70</sup> and ensuring the provision of living conditions necessary for the proper development and upbringing of the child.<sup>71</sup> Article 5 expresses the right to life and the protection, survival, and development of the child. Again, the State must intervene in cases where parents do not fulfill or inadequately fulfill their parental responsibilities.<sup>72</sup>

Part of parental care relates to the furnishing of maintenance. Arguably, the provision of financial resources is the most effective manner to attain the conditions necessary for an adequate standard of living.

---

<sup>63</sup> Organisation of African Unity (OAU) African Charter on the Rights and Welfare of the *Child* (Charter), adopted 11 July 1990, entered into force 29 November 1999, 1520 UNTS 217.

<sup>64</sup> Preamble of the Charter. Danwood M Chirwa 'The merits and demerits of the African Charter' in (2002) 10 *Int J Child Rights* 157.

<sup>65</sup> Benyam D Memzur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SAPL* 5.

<sup>66</sup> *Ibid* at 6.

<sup>67</sup> *Ibid* at 14.

<sup>68</sup> Binford *op cit* note 20 at 341.

<sup>69</sup> Article 20(1) of the Charter

<sup>70</sup> *Ibid* at article 20(1)(a).

<sup>71</sup> *Ibid* at article 20(1)(b).

<sup>72</sup> *Ibid* at article 20(2).



*(iii) Financial care*

It is a common fact that food, clothing, water, shelter, and other components needed for survival require a degree of monetary expenditure. The financial responsibility to obtain these resources is not placed on the child but instead falls on the parent in the form of a legal duty to support.<sup>73</sup> Article 27(4) of the Convention reflects this financial responsibility, wherein the child's right to maintenance is contained, along with the provision for the recovery of maintenance from the parents.<sup>74</sup> States Parties must ensure measures to hold those financially responsible for the child liable through the payment of maintenance.<sup>75</sup> The 'physical, mental, spiritual, moral and social development,'<sup>76</sup> considered throughout article 27, speaks to other articles within the Convention. Correspondingly, the child's development must be to the 'maximum extent,'<sup>77</sup> and to the 'fullest potential.'<sup>78</sup> The living conditions in which a child is reared determine the quality of the child's development.<sup>79</sup> The Handbook recognises that a 'child's development cannot be divorced from his or her conditions of living.'<sup>80</sup> More often than not, achieving a standard of adequacy of these living conditions is further dependent on the financial ability of the child's parents. Mills states:

The socio-economic conditions in which a child grows up play a vital role in the child's life, survival and development. Poverty and a lack of resources, as well as parental care have an effect on the child's standard of living, education, the quality of the right to play and rest, access to information, and his or her health.<sup>81</sup>

Such assertion is echoed by General Comment No. 7 on 'Implementing child rights in early childhood,'<sup>82</sup> wherein it describes the undermining effect that a lack of financial resources may have on the well-being and developmental opportunities of the child.<sup>83</sup> The recovery of maintenance from an absent parent, most commonly the father, may allow for the dramatic improvement of a child's living conditions.<sup>84</sup> Often, a single-parent and, thus, single-income household results in a higher likelihood of poverty or financial constraints.<sup>85</sup> Therefore, a

---

<sup>73</sup> However, there are exceptions to this social norm, such as emancipated children.

<sup>74</sup> Article 27(4) of the Convention.

<sup>75</sup> *Ibid* at article 27(4).

<sup>76</sup> *Ibid* at article 27(1).

<sup>77</sup> *Ibid* at article 6.

<sup>78</sup> *Ibid* at article 29. The Handbook *op cit* note 27 at 393.

<sup>79</sup> *Ibid* at 393. See article 27 of the Convention.

<sup>80</sup> *Ibid* at 394.

<sup>81</sup> Mills *op cit* note 5 at 127.

<sup>82</sup> General Comment No. 7 *op cit* note 18.

<sup>83</sup> *Ibid* para 26.

<sup>84</sup> The Handbook *op cite* note 27 at 401.

<sup>85</sup> *Ibid* at 235.

single-income household may lead to non or partial fulfillment of parental responsibilities and rights concerning the child's physical, intellectual, and psychological development.<sup>86</sup> As a result, reliance is placed on the State to caretake the child as required.<sup>87</sup> Accordingly, receiving maintenance from both parents will better realise the child's right to development to the maximum extent and fullest potential, as envisaged by the Convention. Moreover, the recovery of dual maintenance is in the best interests of the child, as contemplated in article 3(1) of the Convention.<sup>88</sup>

Although article 18(2) of the Charter concerns marital relations, it is relevant to note the underlying message within this provision, this being the equality of parental responsibility. Herein, States Parties have an onus to take positive steps to secure the equality of parental responsibilities and rights.<sup>89</sup> However, when practically envisioned, certain categories of children fall through the cracks of such equality, namely, the child born of rape.

*(iv) The child born of rape*

Despite the above provisions relating to parental care in both the Convention and Charter, when turning to the extent that international law makes provision for the child born of rape, there is silence. Accordingly, the international law position on the child's right to parental care, where a child has been conceived through rape, has not yet been established. Thus, there is a lack of guidance as to how States Parties should address the parental responsibilities and rights of rapist fathers, specifically concerning the duty of maintenance. Domestic jurisprudence around the world has dealt with this issue in different ways, resulting in different outcomes. For example, many states in the United States of America (USA) do not terminate the parental responsibilities and rights of rapist fathers in the apprehension of infringing the rights to family, life, and liberty in the Fourteenth Amendment to the Constitution of the USA.<sup>90</sup> Others, such as Namibia, do not provide for the automatic rights of custody, access, and guardianship.<sup>91</sup>

---

<sup>86</sup> Ibid at 232.

<sup>87</sup> See articles 3(2), 18(1)-(2) & 27(3) of the Convention.

<sup>88</sup> Samantha Smith *Stolen Sperm: Should the Law Absolve an Involuntary Father from the Duty to Furnish Child Maintenance?* (LLM dissertation, University of Cape Town, 2015) 4. See The Handbook op cit note 27 at 401. To be discussed further, article 3(1) of the Convention, namely the best interests of the child principle, is a primary consideration in all child-related decisions and must form the basis of legislation surrounding children, including procedures of maintenance.

<sup>89</sup> Article 18(2) of the Convention.

<sup>90</sup> Mills op cit note 5 at 112. It must be noted that the USA is not a party to the Convention.

<sup>91</sup> Section 104 of Namibia's Child Care and Protection Act 3 of 2015 (Namibian Act). See further explanation in Legal Assistance Centre 'Chapter 9: Parental rights and responsibilities for children outside marriage' in Guide to Namibia's Child Care and Protection Act 3 of 2015 at 46, available at: [http://www.lac.org.na/projects/grap/Pdf/9-Parental\\_Rights\\_and\\_Responsibilities\\_Outside\\_Marriage.pdf](http://www.lac.org.na/projects/grap/Pdf/9-Parental_Rights_and_Responsibilities_Outside_Marriage.pdf), accessed 16 December 2023.

However, the rapist father can approach a court for an order that would grant him these rights, should it be in the best interests of such a child.<sup>92</sup> Regarding the provision of maintenance, Namibia's Child Care and Protection Act 3 of 2015 explicitly states that the person who has committed the rape has the duty to maintain the child conceived through such rape.<sup>93</sup> In contradistinction to these positions, South Africa's Children's Act has provided for a default blanket exclusion on the rapist's parental responsibilities and rights, omitting an explicit provision of maintenance.<sup>94</sup> The rationale behind such a position is that it is in the child's best interests to exclude a rapist father from attaining parentage.<sup>95</sup> Accordingly, the South African legislative provision is grounded in the best interests of the child principle, as understood by international law and embodied within domestic law.

The best interests of the child principle, the golden thread of international children's rights, has been extensively provided for in international and regional law instruments. Thus, this dissertation examines the principle for its reliance as the rationale behind excluding parental responsibilities and rights. The principle functions as a standard, right, and principle of interpretation in all matters concerning children, including the child born of rape.

*(c) The Best interests of the child*

*(i) Sources*

The universal consolidation of children's rights brought into existence a minimum standard to be upheld by signatories in protecting children's rights.<sup>96</sup> At the very essence of this standard is the commitment to ensuring the realisation of the best interests of the child.<sup>97</sup> Article 3 of the Convention describes the principle as a primary consideration in all actions involving children. Herein, it states:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other

---

<sup>92</sup> Ibid.

<sup>93</sup> Mills op cit note 5 at 137. See section 106(2) of the Namibian Act.

<sup>94</sup> Section 1(a) of the Children's Act.

<sup>95</sup> Mills op cit note 5 at 111.

<sup>96</sup> UNICEF 'History of child rights' available at <https://www.unicef.org/child-rights-convention/history-child-rights>, accessed 18 December 2023.

<sup>97</sup> Lindinette Basson *Perspectives on the Best Interests of the Child: Developments in the Interpretation and Application of the Principle in the South African Law Relating to Custody* (LLM Thesis, Stellenbosch University, 2004) 61.

individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services, and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4(1) of the Charter contains the best interests of the child principle, reiterating the Convention's primary status accorded to the principle in all actions concerning children.<sup>98</sup> The mutuality of the parent-child relationship is given particular emphasis in ensuring that the best interests of the child lie at the root of the parental role.<sup>99</sup> Despite certain linguistic and contextual differences, the quintessence of the Convention and Charter remains the primacy of the child's best interests. However, there is little explanation for its intended meaning and application.<sup>100</sup> Thus, these international and regional law instruments can only function as the starting point for understanding the best interests of the child principle. In response to the need for clarity, the United Nations Committee on the Rights of the Child (Committee) issued General Comment No. 14 'On the right of the child to have his or her best interests taken as a primary consideration' (General Comment No. 14).<sup>101</sup> General Comment No. 14 frames the current international practice and understanding on the interpretation and application of the best interests of the child.

*(ii) A right, principle, and rule of procedure*

General Comment No. 14 offers direction for the practical realisation of the child's best interests by providing a normative framework for its interpretation and assessment.<sup>102</sup> The best interests approach in child-centered decisions is not an all-inclusive and generalised one. Instead, it considers the specificity of the child and their circumstances.<sup>103</sup> Hence, the nature of the inquisition is individualistic and context-sensitive, requiring a case-by-case analysis.<sup>104</sup> This nature alludes to the degree of flexibility and adaptability that characterises the best

---

<sup>98</sup> Of relevance to note but of no critical concern in this dissertation, is the linguistic difference between article 3(1) of the Convention and article 4(1) of the Charter. The Convention uses 'a' primary consideration, in comparison to the Charter's 'the' primary consideration. There is some debate as to whether 'a' proposes a weaker construct of the best interests principle, thus the Charter placing more significance on the principle as the preeminent and overriding factor. See for further discussion in Memzur op cit note 65 at 8-9.

<sup>99</sup> Elvis Fokala 'Calibrating children's rights to participate in a family setting 30 years after the adoption of the Convention on the Rights of the Child and the African Children's Charter' (2020) 34 *SJ* 118.

<sup>100</sup> Jean Zermatten 'The best interests of the child principle: Literal analysis and function' (2010) 18 *IJCR* 485.

<sup>101</sup> United Nations Committee on the Rights of the Child 'General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1) CRC/C/GC/14 (General Comment No. 14).

<sup>102</sup> Mills op cit note 19 at 848.

<sup>103</sup> Ibid.

<sup>104</sup> General Comment No. 14 para 48. The Handbook op cit note 27 at 39.

interests standard.<sup>105</sup> The Committee affirms the best interests of the child as a three-fold concept: a right, principle and rule of procedure.<sup>106</sup>

Existing as a right, the best interests of the child are assessed as a primary consideration in decisions involving children,<sup>107</sup> and a balancing of their interests.<sup>108</sup> Thus, the child has an invokable substantive right to have their best interests taken as the primary consideration.<sup>109</sup> Moreover, States Parties are obligated to fulfil this right.<sup>110</sup> As a principle, the best interests of the child can act as an interpretive legal tool that favours the interpretation that most effectively realises the child's best interests.<sup>111</sup> Lastly, it is also a rule of procedure through which decisions impacting an individual child or group of children must be grounded in a child conscious decision-making process.<sup>112</sup> This process necessitates a child-impact assessment.<sup>113</sup> In such an assessment, the decision-maker provides a justification for the proposed realisation of the child's best interests.<sup>114</sup> The justification must base itself on the decision's criteria and how the decision-maker weighs the child's interests against other relevant factors.<sup>115</sup>

The scope of the best interests principle (embodying all three concepts) extends to all of the States Parties' governmental and administrative bodies, including the legislature, judiciary and executive.<sup>116</sup> The legislature must create, interpret, and amend child law to maximally safeguard the child's best interests.<sup>117</sup> Legislation surrounding the provision of parental responsibilities and rights must align with the standard envisioned by international law. The best interests principle is also the superimposing standard to which all child-related decisions by the judiciary are subject. The Convention and Charter extended their historical scope of application to 'all actions' concerning children.<sup>118</sup> Moreover, omission suffices as action.<sup>119</sup> In this way, States Parties must take positive steps towards entrenching the best interests principle

---

<sup>105</sup> Ibid paras 32, 39 & 50.

<sup>106</sup> Ibid para I.A.

<sup>107</sup> Zermatten op cit note 100 at 485.

<sup>108</sup> The Handbook op cit note 44 at 39.

<sup>109</sup> General Comment No. 14 para 6(a). The Handbook op cit note 44 at 39.

<sup>110</sup> Ibid para 6(a).

<sup>111</sup> Ibid para 6(b).

<sup>112</sup> Ibid para 6(c).

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid paras 13-16, 25-29.

<sup>117</sup> Ibid.

<sup>118</sup> Meda Couzens 'The best interests of the child and the Constitutional Court' (2019) 9 *CCR* 365.

<sup>119</sup> General Comment No. 14 para 18.

in every avenue of decision-making, be it legislative, administrative, executive, or administrative.

*(iii) Application*

General Comment No. 14 prescribes the method of assessment and implementation of the best interests principle.<sup>120</sup> The Committee sets out specific parameters in giving effect to the best interests of the child.<sup>121</sup> These parameters include understanding children as rights holders,<sup>122</sup> and the nature of these rights as being ‘universal, indivisible, inter-dependant and interrelated.’<sup>123</sup> Further, States Parties have a positive duty to take active measures to respect, protect, and promote the Convention’s rights.<sup>124</sup> This duty includes the right for the child to have their best interests considered in the prescribed manner.<sup>125</sup> Lastly, decisions must examine the actions’ immediate and extended impact on a child’s development.<sup>126</sup> As a signatory to the Convention, States Parties must consider these parameters when developing child law on a domestic level.

Decision-makers follow a two-step process to ascertain the best interests of the child.<sup>127</sup> The two-step process consists of the best-interests assessment and the best-interests determination.<sup>128</sup> As the first step, the best-interests assessment evaluates and balances the specific circumstances of the particular child by considering all relevant factors.<sup>129</sup> After identifying each factor, the decision-maker defines its substantial meaning and designates its value in relation to other factors.<sup>130</sup> The second step, the best-interests determination, is a formal procedure ensuring legal safeguards for determining the child’s best interests based on the assessment’s outcome.<sup>131</sup>

General Comment No. 14 emphasises the individuality of every case by the need to appreciate each child’s unique factual context and characteristics.<sup>132</sup> This case-by-case approach considers factors from the child’s age to their socio-cultural context, including the

---

<sup>120</sup> Ibid para 10.

<sup>121</sup> Ibid para 16.

<sup>122</sup> Ibid para 16(b).

<sup>123</sup> Ibid para 16(a).

<sup>124</sup> Ibid para 16(d).

<sup>125</sup> Ibid.

<sup>126</sup> Ibid para 16(e).

<sup>127</sup> Ibid para 47.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid paras 46(a) & 47.

<sup>130</sup> Ibid para 46(a).

<sup>131</sup> Ibid 46(b) & 47.

<sup>132</sup> Ibid paras 48-49.

presence or absence of parents and environmental safety.<sup>133</sup> These factors provided in General Comment No. 14 are relational and non-exhaustive.<sup>134</sup> Therefore, decision-makers may be guided by but are not limited to those listed.<sup>135</sup> For the purpose of this dissertation, the following elements find relevance: the preservation of the family environment and maintaining relations,<sup>136</sup> care, protection, and safety of the child,<sup>137</sup> the right to health,<sup>138</sup> and vulnerability.<sup>139</sup> The preservation of the family environment and maintaining relations,<sup>140</sup> must be qualified in this context. This element is only relevant to the extent that the Committee promotes shared parental responsibilities as being in the child's best interests, justifying a shared duty towards maintenance.<sup>141</sup> The deciding criterion in the provision of parental responsibilities is what is considered to be in the best interests of the child.<sup>142</sup> Arguably, a dual maintenance provision is in the best interests of any child. The second relevant element is the child's care, protection, and safety.<sup>143</sup> Article 3(2) of the Convention places a duty on States Parties to ensure the child's well-being.<sup>144</sup> The term 'well-being' is interpreted widely to extend beyond the physical and includes a holistic understanding encompassing safety, development, basic materials, affection, quality education,<sup>145</sup> and emotional needs.<sup>146</sup> Again, dual maintenance allows for greater financial capacity to achieve the standard and criterion of well-being as described. Third, as envisioned in article 24 of the Convention, the child's right to health may relate to accessing adequate healthcare facilities, treatments, and information.<sup>147</sup> Connected with the abovementioned well-being of the child, the adequacy of medical treatment may be subject to the parent's financial constraints. Again, dual maintenance holds the potential to access better health resources. Finally, the element of vulnerability highlights a child's exposure to abuse.<sup>148</sup>

---

<sup>133</sup> Ibid para 48.

<sup>134</sup> Ibid para 49. See paras 53-79 for a full discussion on the listed elements.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid para 67.

<sup>137</sup> Ibid para 71.

<sup>138</sup> Ibid paras 77-78. See further in United Nations Committee on the Rights of the Child in General Comment No. 15 on 'The right of the child to the enjoyment of the highest attainable standard of health' (art. 24) CRC/C/GC/15 (2013) (General Comment No. 15).

<sup>139</sup> Ibid para 76.

<sup>140</sup> Ibid para 67.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid para 71.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid para 79.

<sup>146</sup> Ibid paras 71-74.

<sup>147</sup> Ibid paras 77-78.

<sup>148</sup> Ibid para 76.

While these elements provide guidance and hold the potential to shape the approach toward child-centred decision-making, the best interests of the child principle varies in its employment within other bodies of law. These varied interpretations are assigned meaning following the contextual nuances surrounding the principle's application. States Parties can tailor the extent of care and protection measures according to their individual needs.<sup>149</sup> States Parties consider the appropriateness of such measures with respect to the rights and duties of the child's parents or legal guardians.<sup>150</sup> This consideration serves as an acknowledgement of the complex interplay between parent and child. While States Parties are obliged to respect the responsibilities and rights of parents, so too must there be respect for the realisation of the child's rights. Accordingly, no uniform meaning exists regarding the interpretation and subsequent application of the best interests principle. Instead, its consideration is apropos to its unique context and jurisdiction, wherein supporting legislation and interpretation tools exist. However, the lack of a definite criterion has raised scholarly criticism concerning the weaknesses of the best interests of the child principle.

*(iv) Critique*

The best interests principle faces critique due to its ambiguity and inherent indeterminacy.<sup>151</sup> The result of such vagueness is by reason of the principle's subjective interpretation and application.<sup>152</sup> Further, the relative nature of societal values and customs creates obstacles in securing an objective benchmark for assessment.<sup>153</sup> However, to quell such critique, the provenance of the principle's strength lies in the very characteristic of its flexibility.<sup>154</sup> The principle is not ambiguous or uncertain in its intended meaning and interpretation. As this dissertation has demonstrated, clear and extensive guidelines exist within General Comment No. 14 regarding its envisioned application. Moreover, the facts and context of each case will determine its meaning.<sup>155</sup> Rather, the indeterminacy rests in the lack of uniform criterion the principle must meet. Arguably, this is not a weakness, but instead allows the principle to become a tool designed to attend to the individualistic and case-by-case approach envisioned by General Comment No. 14.<sup>156</sup> In fact, Zermatten describes the principle as the Convention's

---

<sup>149</sup> Article 3 of the Convention.

<sup>150</sup> *Ibid* at article 5.

<sup>151</sup> Zermatten *op cit* note 100 at 494.

<sup>152</sup> Ferreira *op cit* note 23 at 207.

<sup>153</sup> *Ibid*.

<sup>154</sup> Zermatten *op cit* note 100 at 494.

<sup>155</sup> Ferreira *op cit* note 23 at 207.

<sup>156</sup> Zermatten *op cit* note 100 at 495.



‘jack of all trades,’ for it holds substantial utility and responsiveness through its broad scope in application that can adjust to the relative circumstance of any child.<sup>157</sup> Another critique is that the best interests of the child is ‘a’ primary consideration, rather than ‘the’ primary consideration. However, its very consideration is still sufficient to warrant maintenance in rape-conceived cases. Thus, as ‘the’ or ‘a’ primary consideration, the best interests of the child remain the centrepiece for the international law of the child. So too must it be the point on which children’s rights turn in the domestic law of States Parties, including that of South Africa.

South Africa ratified the Children's Rights Convention on the 16th of June 1995, coinciding with its national public holiday, Youth Day.<sup>158</sup> Soon after, the African Charter on the Rights and Welfare of the Child was ratified on the 7<sup>th</sup> of June 2000.<sup>159</sup> As a signatory to both, South Africa is bound by these international and regional children’s rights instruments,<sup>160</sup> resulting in the legal duty to uphold the standards set within.<sup>161</sup> Accordingly, States Parties are obliged to adopt national legislation to give effect to the rights of the child, as contemplated within the Convention and Charter.<sup>162</sup> Moreover, pre-existing domestic legislation must align with the rights and principles of the Convention.<sup>163</sup> To this effect, legislative amendment may be necessary to ensure full compatibility and compliance of domestic law with the Convention.<sup>164</sup> Through legislative compliance and enactment, international agreements become enforceable laws in South Africa.<sup>165</sup> As a result, international and regional law is averred for its leading role in the evolution of children’s rights and jurisprudence within South Africa.<sup>166</sup> This

---

<sup>157</sup> Ibid.

<sup>158</sup> United Nations Treaty Collection ‘Status of treaties – The Convention on the Rights of the Child’ available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en), accessed 18 December 2018. South African Government ‘Youth Day’ available at <https://www.gov.za/youth-day>, accessed 18 December 2023.

<sup>159</sup> African Committee of Experts on the Rights & Welfare of the Child ‘Ratifications Table’ available at <https://www.acerwc.africa/en/member-states/ratifications>, accessed 18 December 2023.

<sup>160</sup> Section 231(5) of the Constitution. Mills op cit note 19 at 849.

<sup>161</sup> Julia Sloth-Nielsen ‘Children’s rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child’ (2002) 10 *Int J Child Rights* 138.

<sup>162</sup> Article 4 of the Convention states that States Parties must enact legislation for the implementation of the Convention. Article 1 of the Charter contains the obligation on States Parties to adopt legislative measures reflective of the Charter’s provisions. See also General Comment No. 5 para 1.

<sup>163</sup> General Comment No. 5 paras 1 & 18.

<sup>164</sup> Ibid.

<sup>165</sup> Section 231(4) of the Constitution. See Ursula Kilkelly & Ton Liefaard ‘Legal implementation of the UNCRC: Lessons to be learned from the constitutional experience of South Africa’ (2019) 52 *DJ* 524.

<sup>166</sup> Sloth-Nielsen op cit note 161 at 137. Julia Sloth-Nielsen ‘Children’s rights jurisprudence in South Africa - a 20 year retrospective’ (2019) 52 *DJ* 504. Sloth-Nielsen states at 504 that ‘the CRC [Convention] and ACRWC [Charter] - together with non-binding sources of international law - had substantively informed and enriched the jurisprudence of South African courts, such that it was claimed that South Africa may have crossed an invisible

evolution is evident by the constitutional consolidation of children's rights within the Bill of Rights,<sup>167</sup> and the commitment towards realising such rights within the Children's Act 38 of 2005. Therefore, the South African legislative frameworks concerning the rights of the child, as guided by the best interests of the child, must be discussed.

### CHAPTER III: SOUTH AFRICAN LEGISLATIVE FRAMEWORKS

#### *(a) The rights and best interests of the child*

##### *(i) The constitutional child*

The constitutionalisation of children's rights began with the inclusion of the 'children's rights provision,'<sup>168</sup> in section 28 of the Constitution of the Republic of South Africa, 1996. Section 28 functions as an umbrella provision, encompassing a host of rights to which children are entitled.<sup>169</sup> One is the right for a child to have their best interests considered paramount in every matter concerning that child.<sup>170</sup> Section 28 enjoys an elevated status due to its placement within the Bill of Rights, where rights are fundamental and have mechanisms for direct enforcement.<sup>171</sup> For this reason, children's rights have acquired a level of justiciability and legal influence,<sup>172</sup> thus enabling children to invoke their substantive rights before a court of law.<sup>173</sup> As a result of this judicial invocation, the courts play a fundamental role in understanding and enforcing children's rights.<sup>174</sup> The placement triggers obligations regarding the implementation and interpretation of the Bill of Rights, including section 7(2) of the Constitution, which requires the state to respect, promote and fulfil the rights within the Bill of Rights.<sup>175</sup> The scope of the Bill of Rights applies to all law and is binding on the legislature and other governmental bodies.<sup>176</sup> Furthermore, the interpretation of legislation must promote the 'spirit, purport and objects of the Bill of Rights.'<sup>177</sup> Consequently, all law and its subsequent interpretation, therefore, must give due respect to the rights of the child within the Bill of

---

line from being a dualist to a monist state regarding the incorporation of international law in so far as children's rights were concerned.'

<sup>167</sup> Section 28 the Constitution. Sloth-Nielsen op cit note 161 at 139.

<sup>168</sup> Kilkelly op cit note 165 at 522.

<sup>169</sup> Section 28(1) of the Constitution.

<sup>170</sup> Ibid section 28(2).

<sup>171</sup> Ibid chapter 2.

<sup>172</sup> Sloth-Nielsen 2002 op cit note 161 at 139. See also Sloth-Nielsen op cit note 166 at 502.

<sup>173</sup> Kilkelly op cit note 165 at 522.

<sup>174</sup> Ibid.

<sup>175</sup> This must be read with section 38 of the Constitution, which relates to the enforcement of rights within court and the entitlement to appropriate relief where rights are unjustifiably breached.

<sup>176</sup> Section 8(1) of the Constitution.

<sup>177</sup> Ibid section 39(2).

Rights. In strengthening this obligation, courts, or the appropriate forum, must consider international law when interpreting the Bill of Rights.<sup>178</sup> Additionally, section 233 of the Constitution gives preference to any reasonable interpretation of legislation that accords with international law.<sup>179</sup> Considering the above constitutional imperatives, the interpretation of legislation or the Bill of Rights, concerning children's rights, compels courts and decision-makers to draw upon both the Convention and Charter. Therefore, the interpretation must accord with the meaning as understood by these international instruments. These provisions serve as the platform for considering international law in any dispute involving children.<sup>180</sup> As a result, the Convention's presence within the child's constitutional rights is reinforced with its international law understanding heavily relied upon in judicial and legislative settings.<sup>181</sup> As a result of the above constitutional provisions, children's rights enjoy increased protection due to their placement within the Bill of Rights, the respect afforded to international agreements, together with remedial provisions, and the quality of justiciability. In turn, this presumes that all children, regardless of individual distinction in background, status, and birth, are afforded the same constitutional protection of their rights. This presumption is further evidenced in section 9 of the Constitution, which is inclusive of a non-discrimination clause. Section 9 states that:

- 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- 9(2) Equality includes the full and equal enjoyment of all rights and freedoms...
- 9(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and *birth* (emphasis added).

Despite an elevated status, the rights contained within the Bill of Rights are still subject to limitation where justified. Section 7(3) of the Constitution, read with section 36, the limitation clause, prescribes the potentiality for restriction. Accordingly, where a conflict of interests arises, it may be justified to realise a right, while simultaneously limiting another. Sloth-Nielsen explains that the constitutional entrenchment and supremacy of children's rights results in the ability to 'enforce children's rights in the face of conflicting lower laws and policies,'<sup>182</sup> which include circumstances concerning the competing rights of the child.

---

<sup>178</sup> Ibid section 39(1)(b).

<sup>179</sup> Note the use of the peremptory language of 'must' in this section.

<sup>180</sup> Sloth-Nielsen op cit note 161 at 140.

<sup>181</sup> Kilkelly op cit note 165 at 528.

<sup>182</sup> Sloth-Nielsen op cit note 166 at 520.

(ii) *Substantive elements of children's rights*

Many scholars regard section 28 as a robust children's rights provision, one that echoes the principles of the Children's Convention.<sup>183</sup> While section 28(1) delineates certain rights guaranteed to all children,<sup>184</sup> the list is non-exhaustive.<sup>185</sup> When considering an inquiry into a child born of rape, the most relevant rights include the child's right to family or parental care,<sup>186</sup> basic nutrition, shelter, healthcare and social services,<sup>187</sup> and protection from neglect, abuse, maltreatment, and degradation.<sup>188</sup> These rights are further expanded in national legislation and will be elaborated on when discussing the Children's Act 38 of 2005.<sup>189</sup>

Section 28(2) embodies the best interests of the child principle, as understood by and received from international law. Herein, it states that 'a child's best interests are of paramount importance in every matter concerning the child.' Much like its international law conception, the best interests of the child has evolved to become a Constitutionally protected right, procedural rule, and principle of interpretation in South Africa.<sup>190</sup> Accordingly, all legislation must conform to this standard. While similar in conception, section 28(2) departs from the primacy afforded by international law by using a standard of paramountcy, thus representing a more compelling formulation.<sup>191</sup> Naturally, the use of the word 'paramount' holds greater

---

<sup>183</sup> Kilkelly op cit note 165 at 522 & 527. Sachs J in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 16 notes the firm foothold of the Convention within section 28. Therefore, it serves as an acknowledgement to the international obligations imposed on South Africa.

<sup>184</sup> Section 28(1) of the Constitution states that every child has the right—

- (a) to a name and a nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that—
  - (i) are inappropriate for a person of that child's age; or
  - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- (g) 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;
- (h) 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; and
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

<sup>185</sup> *Minister for Welfare and Population Development v Fitzpatrick and Others (Fitzpatrick)* 2000 (7) BCLR713 (CC) para 17.

<sup>186</sup> Section 28(1)(b) of the Constitution.

<sup>187</sup> *Ibid* section 28(1)(c).

<sup>188</sup> *Ibid* 28(1)(d).

<sup>189</sup> See page 22 below.

<sup>190</sup> Kilkelly op cit note 165 at 533.

<sup>191</sup> *Ibid* at 527-528.

weight in comparison to the weaker construct of ‘primary.’<sup>192</sup> Courts have interpreted section 28(2) as existing independently of other rights.<sup>193</sup> With this understanding, the ‘best interests clause,’<sup>194</sup> in section 28(2), finds application to the rights contained within section 28(1) and other Constitutional rights.<sup>195</sup> In essence, the ambit of section 28(2) covers section 28(1) but extends beyond to other rights within constitutional and national legislation.<sup>196</sup> The constitutional status and scope of applicability of section 28(2) being to ‘every matter concerning the child’ results in the further application of the best interests of the child to all law, decisions, and other rights.<sup>197</sup> The children’s rights provision (section 28) sits alongside other constitutional rights owed to children.<sup>198</sup> These include the rights to equality, dignity, access to adequate housing, healthcare, food, water, social security, and basic education.<sup>199</sup> Should these constitutional rights be a relevant contention in any child-related dispute, the best interests of the child principle must again find application.

The constitutionalisation of children’s rights is accompanied by the enactment of legislation that confirms this changed understanding of children’s rights.<sup>200</sup> The Children's Act 38 of 2005 serves as the legislative manifestation of the constitutional duty committed to fulfilling the rights of the child.

*(b) The Children’s Act 38 of 2005*

*(i) Children at the centre*

The constitutional entrenchment of children’s rights heightened their prominence within South African law through the enactment of child-centred legislation.<sup>201</sup> The Children’s Act aimed to repeal its parent-centred predecessors and implement constitutional imperatives.<sup>202</sup> It sought to give effect to children’s rights as circumscribed by the Constitution and informed by

---

<sup>192</sup> Jacqueline Heaton ‘An individualised, contextualised and child-centred determination of the child’s best interests, and the implications of such an approach in the South African context’ (2009) 34 *JJS* 4.

<sup>193</sup> Sloth-Nielsen op cit note 161 at 139.

<sup>194</sup> Ann Skelton ‘Too much of a good thing? Best interests of the child in South African jurisprudence’ (2019) 52 *DJJ* 563.

<sup>195</sup> Sloth-Nielsen op cit note 166 at 506.

<sup>196</sup> Sloth-Nielsen op cit note 161 at 139.

<sup>197</sup> Skelton op cit note 194 at 563.

<sup>198</sup> Kilkelly op cit note 165 at 526.

<sup>199</sup> Sections 9-10, 26(1), 27 & 29 of the Constitution.

<sup>200</sup> Kilkelly op cit note 165 at 522.

<sup>201</sup> *Ibid.*

<sup>202</sup> Mills op cit note 5 at 119.

international law.<sup>203</sup> The preamble of the Children’s Act underscores its intent to implement children’s constitutional rights,<sup>204</sup> respecting section 28 of the Constitution, while acknowledging the influence of international law instruments.<sup>205</sup> When considering the objects of the Children’s Act,<sup>206</sup> there is an emphasis on protecting and advancing children’s constitutional rights.<sup>207</sup> Additionally, South Africa must fulfil its international law obligations towards the well-being of all children.<sup>208</sup> The Children’s Act is tasked with, among other responsibilities, giving effect to a child’s rights to parental care,<sup>209</sup> protection from abuse,<sup>210</sup> discrimination, and harm,<sup>211</sup> and promotion of their well-being.<sup>212</sup> Accompanying this, the Children’s Act emphasises the importance of a family environment synonymous with happiness, understanding, and love.<sup>213</sup>

The benchmark used to assess the actions, laws, and decisions taken with regard to meeting the above obligations, is the best interests of the child principle.<sup>214</sup> Encapsulated within various provisions, the principle specifically finds a home in section 9. Herein, it states:

‘[the] Best interests of the child [is] paramount.— In all matters concerning the care, protection, and well-being of a child, the standard that the child’s best interest is of paramount importance must be applied.’

The above confirms the constitutional standard of paramountcy of the child’s best interests in cases involving a child’s care, well-being, and protection.<sup>215</sup> Considering the general provisions of the Children’s Act, Heaton describes section 6 as establishing a ‘child-centred approach’ to be taken concerning law, legal matters, and state actions.<sup>216</sup> Much like the conceptions of section 7(2) and 39(2) of the Constitution, section 6(2)(a) requires the child’s best interests to

---

<sup>203</sup> Thomas Walsh ‘Advancing the interests of South Africa’s children: A look at the best interests of children under South Africa’s Children’s Act’ (2011) 19 *Mich St U Coll L J Int’l L* 231. See preamble of the Children’s Act.

<sup>204</sup> Rushiella Songca ‘Evaluation of children’s rights in South African law: the dawn of an emerging approach to children’s rights?’ (2011) 44 *CILSA* 344. See preamble of the Children’s Act.

<sup>205</sup> *Ibid.*

<sup>206</sup> See objects clause in section 2 of the Children’s Act.

<sup>207</sup> Section 2(b)(i)-(iv) of the Children’s Act. See section 28(1) of the Constitution.

<sup>208</sup> Section 2(c) of the Children’s Act.

<sup>209</sup> *Ibid* section 2(b)(i).

<sup>210</sup> *Ibid* section 2(b)(c).

<sup>211</sup> *Ibid* section 2(f).

<sup>212</sup> *Ibid* section 2(i).

<sup>213</sup> *Ibid* preamble. Songca op cit note 204 at 344.

<sup>214</sup> Memzur op cit note 65 at 18.

<sup>215</sup> Section 9 of the Children’s Act states ‘[The] Best interests of [the] child [are] paramount — In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.’

<sup>216</sup> Heaton op cit note 192 at 2-3.

be protected, respected, promoted, and fulfilled in all child-related matters.<sup>217</sup> Furthermore, section 6(2)(c)-(d) states, respectively, that the child must be treated fairly and equitably,<sup>218</sup> and protected from unfair discrimination on any ground, specifically mentioning the child's family member as a relevant ground.<sup>219</sup> To be further expanded upon, these principles will play a central role when considering the law's treatment of children born of rape.<sup>220</sup>

*(ii) Best interests assessment*

Where the Children's Act requires the best interests principle to be applied, section 7 identifies various factors to consider in its employment. This establishes an acceptable standard of parental care. When considering the acquisition of parental responsibilities and rights, invoking the best interests of the child standard demands a consideration of relevant factors listed in, but not confined to, section 7 of the Children's Act. This section serves as an acknowledgment of international child law's interpretive practice on conducting a best-interests assessment, as established in General Comment No. 14.<sup>221</sup> The merits of section 7 extend further, with Heaton arguing that the indeterminacy critique against the best interests principle is mitigated by the section's factors, offering certainty in a best interests determination.<sup>222</sup> The interpretation of the best interests of the child principle aligns with its international law counterpart. In this context, any deliberation on the allocation of parental responsibilities and rights must consider the factors within section 7 of the Children's Act, along with any other relevant circumscribing factors. Crucially, the determination of parental responsibilities and rights must prioritise the child's best interests in accordance with these factors.

While the universal standard of the best interests of the child is accounted for within the Constitution and subsequent legislation, its understanding has been tailored to the South African context. Through case law, Constitutional Court jurisprudence has provided greater clarity on its interpretation and application.

---

<sup>217</sup> Couzens op cit note 118 at 370. The notion of a criterion of measurement is synonymous with the list of factors set out in *Mcall v Mcall* 1994 (3) SA 201 (C).

<sup>218</sup> Section 6(2)(c) of the Children's Act.

<sup>219</sup> Ibid section 6(2)(d).

<sup>220</sup> See page 37 below.

<sup>221</sup> See page 13 above.

<sup>222</sup> Heaton op cit note 192 at 6. South African Constitutional Court precedence has watered down the potency of these criticisms. In *Fitzpatrick* supra note 185 paras 17-18, Goldstone J welcomes the principle's flexibility, confirming that the principle has never been fitted with 'exhaustive content' in international, foreign, or South African law.

(c) *Constitutional Court commitment*

(i) *Child-centric courts*

As previously established, South African courts are constitutionally obliged to engage meaningfully with international law.<sup>223</sup> Moreover, by virtue of constitutional placement, the justiciability of children's rights has allowed children to become the primary subjects of child-related cases.<sup>224</sup> The net effect is a children's rights precedent rich with the jurisprudential value of the Convention.<sup>225</sup> As a result, Constitutional Court jurisprudence, informed by the Convention and South African legislation, has played a pivotal role in developing children's rights.<sup>226</sup> As Kilkelly comments, this has allowed for aligning South African jurisprudence with the international law obligations and expectations imposed on the courts.<sup>227</sup> Accordingly, Mills opines that there exists a 'strong and powerful basis for a child-centred approach in all court proceedings concerning a child.'<sup>228</sup>

(ii) *Rights-based approach*

South Africa's first constitutional decade saw the prioritisation of parents' rights when claims under section 28 of the Constitution arose.<sup>229</sup> However, the shift towards a rights-based approach regarding children yielded Constitutional Court jurisprudence recognising the child as an independent rights holder.<sup>230</sup> Consequently, children are owed the right to parental care and other rights enumerated within the Constitution's section 28 and Children's Act.<sup>231</sup> As explained by Binford, decisions involving parental responsibilities and rights were no longer framed exclusively from the viewpoint of the parents' rights.<sup>232</sup> Instead, the courts began to acknowledge that:

Children held their own unique rights to parental care under section 28(1)(b) of the Constitution, and that these rights had to be balanced with parental rights and the best interests of the child [in section 28(2) of the Constitution].<sup>233</sup>

---

<sup>223</sup> Sections 39(1)(b) & 233 of the Constitution. Sloth-Nielsen op cit note 166 at 501.

<sup>224</sup> Kilkelly op cit note 165 at 522-523.

<sup>225</sup> Sloth-Nielsen op cit note 166 at 519. See Couzens op cit note 118 at 363.

<sup>226</sup> Kilkelly op cit note 165 at 529.

<sup>227</sup> Ibid at 535-536. See interpretation clause in section 39 of the Constitution. See further in Ann Skelton 'South Africa' in Liefaard, T and Doek, J E (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015).

<sup>228</sup> Mills op cit note 19 at 849.

<sup>229</sup> Kilkelly op cit note 165 at 530. For further discussion, see Sloth-Nielsen op cit note 166 at 502.

<sup>230</sup> Kilkelly op cit note 165 at 531.

<sup>231</sup> Section 28(1)(b) of the Constitution & section 18 of the Children's Act.

<sup>232</sup> Binford op cit note 20 at 347.

<sup>233</sup> Ibid.



In this way, disputes involving a child's right to parental care in section 28(1)(b) must consider the best interests of the child in section 28(2). With this in mind, the best interests of the child principle has undergone consistent judicial refinement over many years. Owing to the constitutional status of section 28(2), courts and decision-makers must apply the principle even in the absence of precedent and prescribed circumstances.<sup>234</sup> Courts have utilised Section 28(2) in various forms. Couzens describes the courts' systematised use of section 28(2) as an auxiliary tool where legislation is deficient or lacks interpretive guidance.<sup>235</sup> Section 28(2) is also applied as a 'self-standing right' and 'guiding principle.'<sup>236</sup> The best interests principle has been relied upon in an array of contexts, including cases surrounding the right to parental and familial care.

Averred by Heaton, the proper approach towards establishing the best interests of the child is guided by section 28(2), together with Constitutional Court jurisprudence.<sup>237</sup> Certain landmark Constitutional Court and Supreme Court cases have provided a greater understanding of the best interests principle, assigning a certain degree of substance and procedure over many instances of its employment. This development has culminated in a relatively and increasingly consistent judicial interpretation and application of the best interests of the child in cases with similar factual circumstances.<sup>238</sup> Thus, this chapter considers these cases for their potential application in circumstances where a child has been conceived as a result of rape. This consideration offers guidance in addressing the best interests of the child born of rape, precisely where the right to maintenance is concerned.

### *(iii) Case considerations*

Early court decisions saw a cautious yet steadfast commitment to employing the best interests of the child principle.<sup>239</sup> In *Fletcher v Fletcher*,<sup>240</sup> a custody-related dispute, the court first recognised the best interests of the child as the preeminent consideration within custody cases and matters concerning the child.<sup>241</sup> This notion was further expanded upon within *Mcall v*

---

<sup>234</sup> Section 8(1) of the Constitution. Basson op cit note 97 at 170. Sloth-Nielsen op cit note 166 at 516.

<sup>235</sup> Couzens op cit note 118 at 363.

<sup>236</sup> Sloth-Nielsen op cit note 166 at 506.

<sup>237</sup> Heaton op cit note 192 at 3.

<sup>238</sup> Couzens op cit note 118 at 363.

<sup>239</sup> Skelton op cit note 194 at 578.

<sup>240</sup> 1948 (1) SA 130 (A).

<sup>241</sup> Bernard Bekink & Mildred Beking 'Defining the standard of the best interests of the child: Modern South African perspectives' (2004) 37 *DJ* 23.

*Mcall*,<sup>242</sup> through the development of a criterion of measurement.<sup>243</sup> Herein, the court established a list of factors against which to assess the best interests of the child.<sup>244</sup> In *Jooste v Botha*,<sup>245</sup> the court warned that the use of this standard should be as a guideline rather than a substantive principle.<sup>246</sup> However, later precedent firmly rebutted this position,<sup>247</sup> as seen in *Minister for Welfare and Population Development v Fitzpatrick and Others (Fitzpatrick)*.<sup>248</sup> Herein, the principle reached a significant milestone through Goldstone J's acknowledgment of the best interests of the child as being independent to the rights contained within section 28(1) of the Constitution.<sup>249</sup> The implication of this is the creation of two distinct sets of children's rights within the Bill of Rights, namely, section 28(1) and section 28(2).<sup>250</sup> Thus, this allows for the interplay of their application and limitation when contested. For example, the right to parental care in section 28(1)(b) from a rapist father may be limited to give effect to the best interests of the child born of rape as provided in section 28(2).

The best interests of the child continued to grow in legitimacy, as evidenced by its description as an 'expansive guarantee' in *Sonderup v Tondelli and Another*,<sup>251</sup> and *LS v AT and Another*.<sup>252</sup> Crucially, in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others ('De Reuck')*,<sup>253</sup> the court found section 28(2) to be as susceptible as any other right in the Bill of Rights to limitation where it is deemed reasonable and justifiable.<sup>254</sup>

In the Constitutional Court case of *S v M*,<sup>255</sup> the construction of the 'constitutional child',<sup>256</sup> was further imagined.<sup>257</sup> Briefly, the facts concerned the fraudulent conduct of a single mother who faced imprisonment.<sup>258</sup> In avoiding a prison sentence, the mother petitioned the court for an order of correctional supervision by relying on the best interests of her children.<sup>259</sup> She based

---

<sup>242</sup> 1994 3 SA 201 (C).

<sup>243</sup> Ibid at 204J-205F. Bekink op cit note 241 at 23.

<sup>244</sup> Ibid.

<sup>245</sup> 2000 (2) BCLR 187 (T).

<sup>246</sup> Ibid at 22.

<sup>247</sup> Couzens op cit note 118 at 367.

<sup>248</sup> 2000 (7) BCLR 713 (CC).

<sup>249</sup> Ibid para 17. As echoed in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others (De Reuck)* 2004 (1) SA 406 (CC) paras 54-5; *LS v AT and Another* 2001 (2) BCLR 152 (CC) para 29.

<sup>250</sup> The first set of rights are contained within section 28(1) of the Constitution and the second within section 28(2) of the Constitution.

<sup>251</sup> 2001 (1) SA 1171 (CC) para 29.

<sup>252</sup> 2001 (2) BCLR 152 (CC) para 22.

<sup>253</sup> 2004 (1) SA 406 (CC) paras 54-5;

<sup>254</sup> *De Reuck* supra note 249 para 55. This refers to the limitation clause in section 36 of the Constitution.

<sup>255</sup> 2008 (3) SA 232 (CC).

<sup>256</sup> Sloth-Nielsen op cit note 166 at 504.

<sup>257</sup> *S v M* supra note 183 para 18; Sloth-Nielsen op cit note 166 at 504.

<sup>258</sup> *S v M* supra note 183 para 2.

<sup>259</sup> Ibid.

this appeal on her being their primary caretaker.<sup>260</sup> This case has been a prominent contributor to developing and interpreting the best interests principle. It will serve useful in approaching the enquiry of this dissertation as the rights of the family concerning parental care were under constitutional scrutiny. Moreover, the court gave regard to the utility of international and regional law in domestic courts in understanding section 28 of the Constitution.<sup>261</sup> The importance of the court's use of international law cannot be judicially understated, particularly when the court is dealing with novel or unprecedented cases. Echoing *De Reuck*, Sachs J in *S v M* confirms one cannot see the concept of paramountcy in its literal sense.<sup>262</sup> Rather, it must be viewed as how to apply it genuinely 'without unduly obliterating other valuable and constitutionally-protected interests.'<sup>263</sup> Thus, it is not absolute and overriding of all other considerations, nor does it sit atop a hierarchy as the trump of other rights.<sup>264</sup> However, there is no uncertainty concerning the creation of legally enforceable rights within section 28.<sup>265</sup> What remains is the question as to what reasonable constraints can be placed on the exercise of these rights.<sup>266</sup> The best interests of the child may be subject to limitation provided for in section 36 of the Constitution. Through this, the courts may weigh the best interests of the child against other constitutional rights.

As discussed previously, when confronting criticism levelled at the principle, Sachs J deems the implicit uncertainty of the best interests of the child not as its weakness but rather as its source of strength.<sup>267</sup> Its contextual nature and inherent flexibility allow for tailoring the best interests of a particular child to the factors applicable to their personal circumstances.<sup>268</sup> Thus, a pre-determined formula is inherently against the core of the best interests of the child.<sup>269</sup> Sachs J famously describes that 'A truly principled child-centred approach requires a close and

---

<sup>260</sup> Ibid.

<sup>261</sup> Centre for Child law '20 years of children constitutionally – and advocacy for strategic litigation children's rights in South Africa' at 25 available at <https://centreforchildlaw.co.za/wordpress21/wp-content/uploads/2019/03/CCL-20-Year-Publication-1.pdf>, accessed 20 May 2023. See Sachs J in *S v M* supra note 183 at para 16 'Secondly, section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC). Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice.'

<sup>262</sup> *S v M* supra note 183 para 25.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid para 26.

<sup>265</sup> Ibid para 14.

<sup>266</sup> Ibid para 15.

<sup>267</sup> Ibid para 24. See discussion on criticism above at page 17.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid.

individualised examination of the precise real-life situation of the particular child involved.’<sup>270</sup> With this in mind, Sloth-Nielsen outlines a four-step process when embarking on a best interests assessment, according to *S v M*.<sup>271</sup> The first step is contemplating the child’s interests.<sup>272</sup> The second step envisages the ‘retention in the inquiry of any competing interests.’<sup>273</sup> The third step is the proper allocation of weight to the child’s interests.<sup>274</sup> As the fourth step, the decision-maker independently evaluates the interests of the parents and child.<sup>275</sup>

Section 28(2) of the Constitution has been relied upon as an independent right and interpretive tool in numerous child-related cases. Such cases include, respectively, *J v National Director of Public Prosecutions & Another (Childline South Africa & Others as amici curiae) (J v NDPP)*,<sup>276</sup> and *Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae) (Raduvha)*.<sup>277</sup> *J v NDPP* concerned the constitutional analysis of a child sex offender’s mandatory registration in the National Register for Sex Offenders.<sup>278</sup> The Court affirmed section 28(2) as an independent right with an ‘undoubtedly wide’ ambit.<sup>279</sup> Moreover, it remains the starting point in any matter involving children.<sup>280</sup> The Court relied on section 28(2) as their judgment’s singular argument and reasoning.<sup>281</sup> In *Raduvha*, the legal issue concerned the wrongful arrest of a child in terms of section 40 of the Criminal Procedure Act 51 of 1977 (‘CPA’).<sup>282</sup> Herein, the Court confronted the paramountcy of the best interests of the child and applied it interpretively rather than as a right.<sup>283</sup> A few crucial consequences emerged from this case. First, there is reliance on section 39(2) of the Constitution. This section requires the interpretation of legislation to ‘promote the spirit, purport and objects of the Bill of Rights.’ Consequently, it allowed section 28(2) to be given effect through the interpretation of the CPA.<sup>284</sup> Second, Couzens explains the Court’s use of the best interests provision as both an abstract and concrete tool.<sup>285</sup> Thus, it was used to interpret deficient legislation regarding

---

<sup>270</sup> Ibid.

<sup>271</sup> *S v M* supra note 183. Sloth-Nielsen op cit note 166 at 516 where paras 22, 26 and 32 are referred to.

<sup>272</sup> Ibid.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> Ibid.

<sup>276</sup> 2014 (7) BCLR 764 (CC).

<sup>277</sup> 2016 (10) BCLR 1326 (CC).

<sup>278</sup> *J v NDPP* supra note 276 para 1.

<sup>279</sup> Ibid para 35. See for further discussion in Couzens op cit note 118 at 378.

<sup>280</sup> Ibid.

<sup>281</sup> Couzens op cit note 118 at 379.

<sup>282</sup> Ibid. *Raduvha* supra note 277 paras 1 & 4-5.

<sup>283</sup> Couzens op cit note 118 at 379 & 382.

<sup>284</sup> Ibid at 381. *Raduvha* supra note 277 paras 63-65.

<sup>285</sup> Ibid.

arrested children and to examine the lawfulness of conduct.<sup>286</sup> Third, Couzens illustrates that section 28(2) was utilised as a ‘fall-back provision’ to achieve an interpretation of the law that was ‘child-sensitive,’ specifically where there were legislative gaps.<sup>287</sup> Accordingly, the Courts confronted section 28(2) from dual viewpoints. In *J v NDPP*, as an independent right. In *Raduvha*, it is a ‘principle or constitutional standard’ that guides the interpretation of the legislation in question, in essence, an interpretative tool.<sup>288</sup>

*(iv) Confronting criticism*

As demonstrated by the above case law, the courts have followed particular application patterns. First, establishing a violation of specific rights and employing the best interests principle to strengthen this initial violation.<sup>289</sup> Second, to cater for matters not covered within other rights.<sup>290</sup> However, the court’s employment of the best interests of the child does not evade criticism.<sup>291</sup> Scholarly arguments citing indeterminacy and judicial leeway have some ground when considering its potential for bias and discriminatory application.<sup>292</sup> This lack of certainty is primarily attributed to the court’s avoidance to delineate the content of section 28(2) expressly.<sup>293</sup> Despite the prevalence of the principle in jurisprudence, Mills demonstrates that no ‘systematic examination’ or ‘elaboration of children’s rights’ exists.<sup>294</sup> Interpretative complications may arise due to the inconsistency in terminology that describes the best interest of the child.<sup>295</sup> Such terminology is as an independent right, principle, or standard. The inconsistency is problematic when considering the content and effect of implementation slightly varies amongst these terms.<sup>296</sup> Moreover, the court’s readiness to consider section 28(2) as an independent right is at odds with their explicit reluctance to assign its fixed content.<sup>297</sup> Accordingly, the true nature of section 28(2) has yet to face a thorough judicial investigation.<sup>298</sup>

---

<sup>286</sup> Ibid.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Skelton op cit note 194 at 558

<sup>290</sup> Ibid.

<sup>291</sup> Songca op cit note 204 at 347.

<sup>292</sup> Ibid at 348.

<sup>293</sup> Couzens op cit note 118 at 363.

<sup>294</sup> Mills op cit note 19 at 857.

<sup>295</sup> Ibid.

<sup>296</sup> Jacqueline Heaton *South African Family Law* 3 ed (2011) at 278.

<sup>297</sup> Couzens op cit note 118 at 364.

<sup>298</sup> Heaton op cit note 296 at 278.

Despite the slight nuances in the application of the best interests, a catch-all provision still exists when interpreting legislation. As mentioned, section 39(1)(b), read with section 233 of the Constitution, obliges the court to engage with and ‘prefer any reasonable interpretation’ consistent with international law when interpreting legislation. Accordingly, the best interests of the child principle is always framed in terms of its international law understanding and tailored through Constitutional Court jurisprudence.

The constitutionalisation of children’s rights and the Constitutional Court’s commendation of the best interests of the child brought about an evolutionary approach toward the parent-child relationship.<sup>299</sup> Parental authority transitioned into parental responsibilities and rights, thus focusing on the child’s right to parental care rather than parental power.<sup>300</sup> Songca explains the transference in the parent-child relationship as a withdrawal from authority and an embrace towards care.<sup>301</sup> This movement has contributed to promoting the best interests of the child principle.<sup>302</sup> As discussed, the child’s right to parental care receives constitutional endorsement through its guarantee in section 28(1)(b) of the Constitution. The omnipresence of the best interests principle in section 28(2) of the Constitution results in the provisions of the Children’s Act being subject to its paramountcy and proper consideration. Accordingly, so too is the acquisition of parental responsibilities and rights, as circumscribed by the Children’s Act, subject to being in the child’s best interests.

#### CHAPTER IV: PARENTAL RESPONSIBILITIES AND RIGHTS

##### *(a) The Children’s Act 38 of 2005*

##### *(i) Parenthood*

Parenthood is brought about by two parents participating in consensual sexual intercourse, resulting in the conception of a child.<sup>303</sup> Thus, Smith contends that the acquisition of parental responsibilities and rights is ‘therefore simplified on the basis that both parties consented to becoming parents.’<sup>304</sup> Yet, biological parenthood is not always synonymous with legal parenthood.<sup>305</sup> The legal understanding of parental responsibilities and rights is examined below to understand its distinction from biological parenthood in certain instances.

---

<sup>299</sup> Songca op cit note 204 at 345.

<sup>300</sup> Ibid at 346.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid.

<sup>303</sup> Smith op cit note 88 at 1.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

Conferred by the Children’s Act, the phrase ‘parental responsibilities and rights’ canvasses parents’ duties towards their children.<sup>306</sup> According to section 18(1) of the Children’s Act, a person is accorded full or specific parental responsibilities and rights if one qualifies as a parent in terms of section 1 of the Children’s Act.<sup>307</sup> Section 1 states:

“Parent,” in relation to a child, includes the adoptive parent of a child, but excludes—  
 (a) the biological father of a child conceived through the rape of or incest with the child’s mother;  
 (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and (c) a parent whose parental responsibilities and rights in respect of a child have been terminated.

As such, a parent is defined as any biological or adoptive parent of a child but excludes certain categories of persons, one of these being the rapist father.<sup>308</sup> Section 1, read with section 18(2) of the Children’s Act, characterises parental responsibilities and rights as the right and responsibility to care,<sup>309</sup> maintain contact,<sup>310</sup> act as guardian in decision-making,<sup>311</sup> and contribute towards maintaining the child.<sup>312</sup>

*(ii) Categories of parental responsibilities and rights*

The Children’s Act establishes an understanding of the elements of care that are to be upheld by parents or guardians.<sup>313</sup> Care involves the obligation to nurture and safeguard the

---

<sup>306</sup> Mills op cit note 5 at 120.

<sup>307</sup> Songca op cit note 204 at 346.

<sup>308</sup> Ibid.

<sup>309</sup> Section 18(2)(a) of the Children’s Act’s definition of ‘care’ states ‘in relation to a child, includes, where appropriate—

(a) within available means, providing the child with  
 (i) a suitable place to live;  
 (ii) living conditions that are conducive to the child’s health, well-being and development; and  
 (iii) the necessary financial support;  
 (b) safeguarding and promoting the well-being of the child;  
 (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;  
 (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child’s rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;  
 (e) guiding, directing and securing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development;  
 (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development;  
 (g) guiding the behaviour of the child in a humane manner;  
 (h) maintaining a sound relationship with the child;  
 (i) accommodating any special needs that the child may have; and  
 (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child’

<sup>310</sup> Section 18(2)(b) of the Children’s Act.

<sup>311</sup> Ibid section 18(2)(c).

<sup>312</sup> Ibid section 18(2)(d).

<sup>313</sup> See full definition of care in section 1(a)-(j) of the Children’s Act.

constitutional and statutory rights of the child.<sup>314</sup> Relevant to this discussion, care necessitates a suitable living space, including conditions promoting the child's development, well-being, and health.<sup>315</sup> Care requires the protection of the child from exposure to abuse-related behaviour and discrimination.<sup>316</sup> Importantly, care includes the duty to furnish financial support within the available means.<sup>317</sup> The above components of care aim to protect the child's rights to dignity and physical well-being, ensure suitable living conditions, and provide guidance in various spheres of childhood.<sup>318</sup> Moreover, these components aim to create and maintain a healthy relationship between child and parent.<sup>319</sup> Although not a legal obligation, parental care implies an extension beyond its physical understanding.<sup>320</sup> This extended care requires meeting a child's emotional needs, providing guidance and direction, and being the child's 'most immediate exemplar.'<sup>321</sup> The caveat of care is, again, that the best interests of the child is the paramount consideration in all child-related matters.<sup>322</sup>

The second parental responsibility and right relates to maintaining contact with the child.<sup>323</sup> Contact involves the continued maintenance of a personal relationship and communication through visitation.<sup>324</sup> Where this may not be possible, contact can occur through alternative means.<sup>325</sup>

The third parental responsibility and right is guardianship. As the default position, guardianship rests with the child's biological parents.<sup>326</sup> The courts may also confer guardianship onto legally designated persons.<sup>327</sup> Section 18(3) of the Children's Act gives further meaning to guardianship as having control over administration matters, safeguarding property interests, contractual or legal assistance, representation, and consent in life-defining matters.<sup>328</sup>

---

<sup>314</sup> Definition of care in section 1(d) of the Children's Act. See the general principles of the Children's Act in chapter 2.

<sup>315</sup> Ibid section 18(2)(a), read with the definition of care in section 1(a)(i)-(ii) – (b).

<sup>316</sup> Ibid section 1(c).

<sup>317</sup> Ibid section 1(a)(iii).

<sup>318</sup> Ibid section 1(a)(i)-(ii) & section 1(1)(a)-(j).

<sup>319</sup> Ibid section 1(1)(a)-(j).

<sup>320</sup> *Jooste v Botha* supra note 245 at 194J-195A. Mills born op cite note 5 at 121. See *S v M* supra note 183 para 34.

<sup>321</sup> *S v M* supra note 183 para 34.

<sup>322</sup> Definition of care in section 1(j) of the Children's Act. See general proviso regarding the best interests principle.

<sup>323</sup> Ibid section 18(2)(b), read with the definition of contact in section 1.

<sup>324</sup> Ibid the definition of contact in section 1(a)-(b)

<sup>325</sup> Ibid.

<sup>326</sup> Ibid the definition of guardianship in section 1.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid section 18(3)(a)-(c).



The fourth and focal parental responsibility and right is the duty to contribute towards the maintenance of the child.<sup>329</sup> This statutory regulation differs from the common law duty of support. Prior to the Children's Act, maintenance concerned the common law duty of support imposed on both parents and owed to their children.<sup>330</sup> A person has the duty to support, provided three conditions are met.<sup>331</sup> These conditions necessitate that the claimant cannot support themselves, and the person furnishing the maintenance must have sufficient financial resources.<sup>332</sup> Last, a legal relationship must exist between the claimant and the person furnishing support.<sup>333</sup> An automatic duty of support exists where there is a parent-child relationship.<sup>334</sup> The common law duty of support is characterised by arising *ex-lege* or by operation of law.<sup>335</sup> This duty is jointly conferred on both parents, each expected to contribute proportionately based on their individual financial means and living standards.<sup>336</sup> This duty is statutorily integrated into different aspects of parental responsibilities and rights within the Children's Act and is further regulated by the Maintenance Act 99 of 1988 (Maintenance Act). Section 18(2)(d) of the Children's Act contains the parental responsibility and right to contribute towards the maintenance of the child. Again, the degree to which a parent is obligated to maintain is proportional in nature and, in essence, based on their financial capacity.<sup>337</sup> To be discussed further, in terms of section 21(2), the unmarried father's duty to contribute towards the maintenance of the child is unaffected.<sup>338</sup> Thus, it will continue to exist whether or not he acquires the other parental responsibilities and rights of care, contact, and guardianship.<sup>339</sup> Accordingly, the duty to contribute towards maintenance still accrues to the biological father irrespective of marital status or eligibility in acquiring any other parental responsibilities or rights. Section 15(1) of the Maintenance Act confirms that the duty to support is one that parents have incurred jointly on a *pro-rata* basis.<sup>340</sup> Support in this sense

---

<sup>329</sup> Ibid section 18(2)(d).

<sup>330</sup> Heaton op cit note 296 at 67. This is further fleshed out within the Maintenance Act 99 of 1988 (Maintenance Act). Section 15(1) of the Maintenance Act confirms that a maintenance order enforces the common law duty of support. Section 15(3) of the Maintenance Act provides that both parents are jointly obligated to financially maintain their child.

<sup>331</sup> P Q R *Boberg's Law of Persons and the Family* (1999) at 233.

<sup>332</sup> Ibid at 233.

<sup>333</sup> Ibid at 234.

<sup>334</sup> Ibid at 240. Smith op cit note 88 at 7.

<sup>335</sup> Ibid.

<sup>336</sup> Smith op cit note 88 at 7.

<sup>337</sup> Ibid.

<sup>338</sup> Although the Children's Act does not specify who qualifies as a father in this section, the definition of a parent in section 1 includes an adoptive legal father, as well as biological.

<sup>339</sup> See emphatic wording of section 21(2) of the Children's Act which states that 'This section does not affect the duty of a father to contribute towards the maintenance of the child.'

<sup>340</sup> Section 15(3)(a)(i)-(ii) of the Maintenance Act.

may be in the form of financial assistance or the provision of necessities that contribute towards a proper living.<sup>341</sup> Necessities include food, education, clothes, medical care, and accommodation.<sup>342</sup> Accordingly, both parents have the legal responsibility to care for their child and are held to account for their personal maintenance contribution to support their child's upbringing.<sup>343</sup>

*(iii) Acquisition of parental responsibilities and rights*

Following the commencement of the Children's Act, avenues for acquiring parental responsibilities and rights have been expanded and further qualified.<sup>344</sup> Section 18(1) makes provision for the acquisition as having full or specific parental responsibilities and rights. Thus, a parent's acquisition may not always be an all-inclusive exercise but may demand partial possession where circumstances deem it necessary.<sup>345</sup> Such a decision is based on the best interests of that particular child. Section 19(1) automatically confers the biological mother with full parental responsibilities and rights, irrespective of her marital status.<sup>346</sup> However, this position is distinguishable from the biological father, where the extent of his acquisition varies pursuant to his marital status and commitment towards the child.<sup>347</sup> Given this, a biological father receives full parental responsibilities and rights where he is married or formerly married to the biological mother during the child's conception, birth or within the timeframe between conception and birth.<sup>348</sup> However, section 21 of the Children's Act furnishes parental responsibilities and rights to unmarried fathers under certain conditions. These conditions include the fact that the father must have lived with the mother in a permanent life partnership when the child was born.<sup>349</sup> Second, the father consents or applies to be identified as the child's father.<sup>350</sup> Third, the father either contributes or has made a *bona fide* attempt to contribute towards the upbringing and maintenance of the child for a reasonable period.<sup>351</sup> The Children's Act provides for alternative acquisition methods in the event of a father not fulfilling the above-

---

<sup>341</sup> Ibid section 15(2).

<sup>342</sup> Ibid.

<sup>343</sup> Thandi Antonia Mdluli & Kola O Odeku 'Perspective on the implementation of the transformative child maintenance interventions in South Africa' (2022) 11 *Perspectives of Law and Public Administration* 276.

<sup>344</sup> Anna Louw *Acquisition of Parental Responsibilities and Rights* (LLD Thesis, University of Pretoria, 2009) 1.

<sup>345</sup> Heaton op cit note 296 at 66.

<sup>346</sup> Section 19 of the Children's Act.

<sup>347</sup> Ibid section 20. Louw op cit note 344 at 127.

<sup>348</sup> Ibid section 20(a)-(b).

<sup>349</sup> Ibid section 21(a).

<sup>350</sup> Ibid section 21(b)(i).

<sup>351</sup> Ibid section 21(b)(ii)-(iii).

mentioned requirements.<sup>352</sup> For example, the father may enter a parental responsibility and rights agreement with the mother.<sup>353</sup> Such agreement may see a varying degree in the provision of parental responsibilities and rights.<sup>354</sup> Again, such agreement is subject to being in the child's best interests, as assessed by the family advocate or court.<sup>355</sup> Other methods may include approaching a designated court to attain contact and care.<sup>356</sup> Another is approaching the High Court to acquire guardianship as the upper guardian of all children.<sup>357</sup> Should the latter circumstances be the case, the unmarried father's standing must be grounded in 'having an interest in the care, well-being and development of a child.'<sup>358</sup> Accordingly, the court will make its findings on these factors, including whether it is in the best interest of that child.<sup>359</sup>

Just as parental responsibilities and rights are acquired, so may they be excluded, terminated, extended, suspended, restricted, or varied.<sup>360</sup> Again, the best interests of the child is fundamental to an order determining any such variation.<sup>361</sup> In the case of a child born of rape, the parental responsibilities and rights of a rapist father cannot legally come to fruition. Such an outcome is by virtue of his exclusion from the definition of a parent in section 1 of the Children's Act. This results in the automatic exclusion from qualifying for the acquisition of parental responsibilities and rights in any of the abovementioned provisions. Against this background, the position of the child born of rape is discussed to ascertain the effect and rationale of section 1's exclusionary provision of parentage.

*(b) The child born of rape*

*(i) Rationale for exclusion*

Conforming to the definition of a parent in section 1 of the Children's Act remains the threshold for acquiring parental responsibilities and rights in South African law. Herein, a parent is defined to the exclusion of 'a biological father of a child conceived through the rape of or incest with the child's mother.'<sup>362</sup> A rapist father fails to meet the threshold of parentage, which ultimately results in his *ab initio* exclusion from qualifying as a legal parent for the purpose of

---

<sup>352</sup> Ibid sections 22-24.

<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid section 22(5).

<sup>356</sup> Ibid section 23(1)(a)-(b).

<sup>357</sup> Ibid section 24.

<sup>358</sup> Ibid sections 23(1) & 24(1).

<sup>359</sup> Ibid sections 23(2)(a) & 24(2)(a).

<sup>360</sup> Ibid section 28.

<sup>361</sup> Ibid section 28(4)(a).

<sup>362</sup> Ibid section 1(a) definition of 'parent.'

acquiring parental responsibilities and rights.<sup>363</sup> The implication of this exclusion is two-fold. First, to qualify as a father is not to have conceived the child through the act of rape. Second, to acquire parental responsibilities and rights is to foremost qualify as a ‘parent’ in terms of the Children’s Act. In essence, a qualified parent receives parental responsibilities and rights, and an unqualified parent, in this context, does not. Accordingly, where a child has been fathered through the act of rape, the father is excluded from claiming paternity.<sup>364</sup> As a result, the biological mother will retain full parental responsibilities and rights over this child.<sup>365</sup>

In examining the rationale behind this legal exclusion, Mills argues that this ‘approach promotes the best interests and rights of the child and balances these rights with those of the child’s biological mother and father.’<sup>366</sup> Moreover, this exclusion serves the paramountcy of the best interests principle and accords to the international and constitutional obligations imposed on South Africa.<sup>367</sup> The denial of a relationship with the rapist father can be viewed as a reasonable and justifiable limitation on the child’s right to parental care, as provided within section 28(1)(b) of the Constitution. This limitation is possible due to section 7(3) of the Constitution. This section enables the operation of all rights within the Bill of Rights, including the child’s constitutional rights, to be subject to a potential degree of limitation when considering its relationship with other rights.<sup>368</sup> Section 36 of the Constitution provides for an exercise of limitation. Known as the general limitation clause, it states that rights in the Bill of Rights may be limited where it is reasonable and justifiable.<sup>369</sup> One assesses certain considerations when embarking on a limitation analysis in terms of section 36. First, what the nature of the right and the significance of the limitation’s purpose is.<sup>370</sup> Further, what the nature and scope of the limitation is.<sup>371</sup> Thereafter, one must observe the connection between the

---

<sup>363</sup> Louw op cit note 344 at 53.

<sup>364</sup> UNICEF & Department of Social Development South Africa ‘The Children’s Act explained: Booklet 1: Children and parents: responsibilities and rights’ at 19, available at: <https://www.unicef.org/southafrica/media/1276/file/ZAF-childrens-act-explained-booklet-1-2009.pdf>, accessed 6 January 2024.

<sup>365</sup> Mills op cit note 5 at 112. Section 19 of the Children’s Act states that if the mother is a minor, her parents will have full parental responsibilities and rights over the child.

<sup>366</sup> Ibid at 111.

<sup>367</sup> Ibid at 113 & 133. See section 9 of the Convention which regards the separation of child and parent to be grounded in contact being contrary to the child’s best interests. See factors to be considered in the determination of a child’s best interests in section 7 of the Children’s Act.

<sup>368</sup> Louw op cit note 344 at 24.

<sup>369</sup> Section 36(1) of the Constitution. See also section 7(3) of the Constitution which states: ‘The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.’

<sup>370</sup> Section 36(1)(a)-(e) of the Constitution.

<sup>371</sup> Ibid.

limitation and its purpose and whether there are less restrictive means to achieve the same purpose.<sup>372</sup>

To briefly demonstrate and allude to the central conflict of interests within this dissertation, the right to parental care,<sup>373</sup> in the context of a child born of rape, must be balanced with the child's right to be protected from potential maltreatment, neglect, abuse, or degradation.<sup>374</sup> When considering the above limitation analysis, this dissertation argues that the right to parental care by the rapist father may be reasonably and justifiably limited to realise the child's right to be protected from the potential abuse that may ensue from the rapist father during the child's lifetime.<sup>375</sup> This limitation gives effect to the child's right to a safe, stable, and caring family environment,<sup>376</sup> free from the threat of maltreatment, neglect, abuse, or degradation and protection against all forms of violence.<sup>377</sup> The well-being of a child, both in the physical and mental sense, is directly affected by exposure to experiences and the environment surrounding the child's upbringing.<sup>378</sup> Moreover, it is logical that a rapist father should not acquire the parental responsibilities and rights of care, contact, or guardianship as the very manner of conception was unlawful and the nature violent.

The survivor mother's trauma is further compounded when rape results in pregnancy. Accordingly, the exclusion also serves to protect the survivor mother from further trauma and victimisation in having to co-parent with her rapist.<sup>379</sup> The continuous contact with the rapist father would hinder the survivor mother's road to overcoming the physical, psychological, and emotional effects of rape.<sup>380</sup> The likely result of continued contact is lasting psychological trauma. Such trauma can significantly affect the ability to raise a child according to adequate standards. Moreover, it would negatively impact the child's right to effective parental care,

---

<sup>372</sup> Ibid.

<sup>373</sup> Section 18(2) of the Children's Act, read with section 28(1)(b) of the Constitution.

<sup>374</sup> Section 28(1)(d) of the Constitution.

<sup>375</sup> Ibid.

<sup>376</sup> Louw op cit note 344 at 104.

<sup>377</sup> Section 28(1)(d) of the Constitution. See article 19 of the Convention regarding the child's right to be protected against all forms of violence.

<sup>378</sup> Mills op cit note 5 at 127-128. See discussion by Mills on the effects of exposure to violence on children as considered in E Jouriles, W Norwood, R McDonald R, J Vincent J & A Mahoney 'Physical violence and other forms of marital aggression: Links with children's behavior problems' (1996) 10 *J Fam Psychol* 223-234, available at <https://doi.org/10.1037/0893-3200.10.2.223>. See further in F Bentivegna & P Patalay 'The impact of sexual violence in mid-adolescence on mental health: A UK population-based longitudinal study' (2022) 9 *Lancet Psychiatry* 874-883, available at [https://doi.org/10.1016/S2215-0366\(22\)00271-1](https://doi.org/10.1016/S2215-0366(22)00271-1).

<sup>379</sup> Judith Lewis 'The Stability Paradox: The two-parent paradigm and the perpetuation of violence against women in termination of parental rights and custody cases' (2020) 27 *MJGL* 330.

<sup>380</sup> Ibid at 331 & 373.

ultimately not being in the child's best interests. It is within this context that the best interests of the child fathered through rape must be examined.

*(ii) The best interests of the child born of rape*

When considering the relevant factors in section 7 of the Children's Act, the exclusionary provision promotes the best interests of the child born of rape. This promotion is evidenced through a theoretical exercise of the best interests assessment. Relevant factors include the nature of the personal relationship between the child and parent/s,<sup>381</sup> and the attitude of the parent/s towards the child.<sup>382</sup> Further factors are the exercise of parental responsibilities and rights,<sup>383</sup> and the capacity of the parent/s to provide for the child's needs.<sup>384</sup> Such provision also includes emotional and intellectual needs.<sup>385</sup> The assessment must consider the child's background and other relevant characteristics.<sup>386</sup> Other factors include the child's physical and emotional security, as well as the intellectual, emotional, social, and cultural development.<sup>387</sup> There is also a need for the child to be brought up in a stable and caring family environment, protected from any physical or psychological harm.<sup>388</sup> Harm may take the form of subjecting or exposing the child to 'maltreatment, abuse, neglect, exploitation, or degradation or exposing the child to violence or exploitation, or other harmful behaviour.'<sup>389</sup> The last factor considers whether there is a history of family violence involving the child or family member.<sup>390</sup> When weighing up these factors, it is in the best interests of the child to exclude the rapist father from acquiring parental responsibilities and rights. Arguably, the presence of the rapist father creates risk for the child's stability, safety, development, emotional well-being, and exposure to violence, amongst other harmful consequences.<sup>391</sup> Considering the international, constitutional, legislative, and judicial understanding of the rights and best interests of the child born of rape, the rationale to deny parental responsibilities and rights is grounded in the inability of such a

---

<sup>381</sup> Section 7(1)(a)(i) of the Children's Act.

<sup>382</sup> *Ibid.*

<sup>383</sup> *Ibid* section 7(1)(b)(ii).

<sup>384</sup> *Ibid* section 7(1)(c).

<sup>385</sup> *Ibid.*

<sup>386</sup> *Ibid* section 7(1)(g)(iii)-(iv).

<sup>387</sup> *Ibid* section 7(1)(h).

<sup>388</sup> *Ibid* section 7(1)(k)-(l)(i)-(ii).

<sup>389</sup> *Ibid* section 7(1)(l)(i)-(ii).

<sup>390</sup> *Ibid* section 7(1)(m).

<sup>391</sup> It can be argued that in the majority of reported cases, the logical conclusion is that rapists are violent and thus need to be separated from the child conceived through their act of sexual violence. However, there may be circumstances where this may not be the case. For example, some fathers may have been wrongfully accused and convicted. Some fathers may have been mentally unstable during the act of rape but have since been placed on medication or received treatment. Thus, it is important that this dissertation recognises these nuanced instances.

father to provide an adequate standard of parental care, particularly concerning a safe upbringing.<sup>392</sup>

Surprisingly, South African courts have yet to directly adjudicate a case concerning the acquisition of the parental responsibilities and rights of a rapist father. Nor have courts faced a substantive challenge on the exclusionary provision that defines a parent in section 1 of the Children's Act.<sup>393</sup> Despite this, it is wholly conceivable that a matter will likely arise in time. In anticipation of this, decision-makers will need to confront the legal position of a child born of rape and how the law protects or should further protect such a child. As already examined, both international and domestic law are deficient in its regard of children conceived through the act of rape. With a lack of guidance on the practical application of the exclusionary provision, the fundamental conditions crucial to its workability remain unexplained. Further, it is unclear whether a rape conviction is required for the exclusion of the rapists' parental responsibilities and rights to apply.<sup>394</sup> Despite this vacuum in jurisprudence concerning rapist fathers, the best interests of the child principle has been extensively interpreted and applied in a host of other legislative and judicial contexts. Accordingly, in the absence of legislative and judicial direction, the best interests principle may be relied on to provide guidance on applying the exclusionary provision. For example, the best interests of the child principle has been considered in cases surrounding the sentencing of parents, as seen in *S v M*.<sup>395</sup> It has also been used by the court in determining the outcome in *MM v AV*,<sup>396</sup> where a mother attempted to invoke the exclusionary provision in bad faith.

### *(iii) Case consideration*

The reliance on the definition of a parent in section 1 of the Children's Act became a point of contention in the case of *MM v AV*. However, the context in which it was contemplated differed considerably to this dissertation. Notwithstanding the contextual difference, this case bares relevance for the court's application of the best interests of the child principle, where a rape

---

<sup>392</sup> Mills born note 5 at 128 states that: 'The South African legislature ostensibly decided to exclude such a man from the definition of a parent, in terms of sec. 1 of the Children's Act, since it is of the view that a rapist or incestuous father will not be able to provide a child with an adequate standard of parental care, and that a child's rights to identity, health, development, and freedom from violence and abuse would be too negatively affected by the involvement of such a man in the child's life.'

<sup>393</sup> However, to be discussed in further detail, a mother did attempt to rely on this provision in *MM v AV* (2010) ZAWCHC 228.

<sup>394</sup> Mills op cit note 5 at 132.

<sup>395</sup> Heaton op cit note 192 at 4. See above discussion above of *S v M* supra note 183 on page 28.

<sup>396</sup> There are two judgments, *MM v AV* (2010) ZAWCHC 228 (*MM v AV* (1)) and *MM v AV* (2011) ZAWCHC (*MM v AV* (2)).

allegation was made with the intent to terminate the parental responsibilities and rights of a father. Here, the Court confronted whether the mother (the respondent) was entitled to employ the exclusionary provision in section 1.<sup>397</sup> Thereafter, it was asked whether it was in the best interests of that particular child for his father (the applicant) to be regarded as the biological father for the purposes of maintaining his parental responsibilities and rights.<sup>398</sup> Briefly, the consensual nature of the sexual intercourse that brought about the birth of child, ‘M,’ (the son of the parties), was in dispute.<sup>399</sup> Both the father and mother, who were allegedly intoxicated on the night of conception, claimed that the other party had raped them.<sup>400</sup> The mother’s argument followed that due to the conception resulting from the father’s rape, he is unable to maintain his parental responsibilities and rights listed in section 18 of the Children’s Act. Thus, she relied upon section 1’s definition of a parent that excludes rapist fathers.<sup>401</sup> Significantly, the mother’s allegation of rape was only raised when the child, M, was nine years old.<sup>402</sup> Thus, the father had assumed uninterrupted parental responsibilities and rights for the entirety of the child’s life until this point.<sup>403</sup> The child had also accepted this as fact.<sup>404</sup> It must be noted that the question surrounded the *continuation*, rather than the *acquisition* of parental responsibilities and rights. The court held that the mother herself had consistently recognised the respondent as the father of M.<sup>405</sup> This was based on her actions and facts related to M’s birth certificate, the father’s maintenance contributions, involvement in decision-making, and history of agreed contact between the parties.<sup>406</sup> Facts of the troubling effect the mother’s new marriage had on the deteriorating nature of the parties’ relationship were also brought to light.<sup>407</sup>

Against these factual circumstances, Cloete J approached this case by first noting the obligation in section 2 of the Constitution.<sup>408</sup> Section 2 states that courts must ‘interpret all legislation in the context of the provisions of the Constitution of the Republic of South Africa, and with due regard to the constitutional context in which such legislation is set.’<sup>409</sup>

---

<sup>397</sup> *MM v AV* (1) para 14.

<sup>398</sup> *Ibid* para 24.

<sup>399</sup> *Ibid* para 2.

<sup>400</sup> *Ibid* paras 1-2.

<sup>401</sup> *Ibid* para 3.

<sup>402</sup> *Ibid* para 18.

<sup>403</sup> *Ibid*.

<sup>404</sup> *Ibid* para 19.

<sup>405</sup> *Ibid* paras 16 & 18.

<sup>406</sup> *Ibid*.

<sup>407</sup> *MM v AV* (2) supra note 396 para 6.

<sup>408</sup> Section 2 of the Constitution states that: ‘The Constitution is now the supreme law in our country (section 2 of the Constitution). It is therefore the starting point in interpreting any legislation. Indeed, every Court must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.’

<sup>409</sup> *MM v AV* (1) supra note 396 para 22.



Accordingly, the child's constitutional rights were placed as the central concern.<sup>410</sup> Cloete J identified relevant constitutional provisions, these being section 28(1)(b), 'every child has the right to parental care,' and section 28(2), 'a child's best interests are of paramount importance.'<sup>411</sup> The Court further identified the right to dignity in section 10 and the limitation clause in section 36 of the Constitution.<sup>412</sup> Cloete J agreed with the approach advanced by the Constitutional Court in *S v M*.<sup>413</sup> Using such approach, it was concluded that the paramountcy of M's best interests dictates that the exclusion of the father from the definition of a parent could not be in M's best interests.<sup>414</sup> Despite the position on the exclusion of rapist fathers being unequivocal, the mother was not entitled to rely on it.<sup>415</sup> The mother's dishonest and *mala fide*,<sup>416</sup> use of the provision became evident following the application of the best interests of the child to the case's contextual factors. However, the Court refused to make a blanket determination on the interpretation and application of the exclusionary provision.<sup>417</sup> The Court stated that it did not need to:

Make a 'blanket' finding as to whether the exclusionary provision of a 'parent' in sec. 1 of the Children's Act only has application where it is expressly stated in the Act (as contended by the applicant), or whether wherever the words 'parent' or 'parental' appear in the Act, a biological father of a child conceived through the rape of the child's mother is expressly excluded (as contended by the respondent).<sup>418</sup>

Regarding whether a rape conviction is required for the denial of fatherhood, the Court noted it also did not need to establish 'which party bears the onus to prove or disprove the respondent's allegation that she was raped by the applicant.'<sup>419</sup> Instead, the legal issue surrounded whether it was in the best interests of that particular child for his father to be regarded as the parent for the purposes of maintaining his parental responsibilities and rights.<sup>420</sup> This judgment showcases that despite an established peremptory legal rule regarding exclusion, where it is in the child's best interests based on the particular facts of a case, the exclusionary rule may be deviated from.<sup>421</sup> This deviation can occur only after carefully balancing the

---

<sup>410</sup> Ibid para 23.

<sup>411</sup> Ibid.

<sup>412</sup> Ibid.

<sup>413</sup> Ibid para 29. See above discussion of *S v M* supra note 183 on page 28.

<sup>414</sup> Ibid para 30.

<sup>415</sup> Ibid para 41.1.

<sup>416</sup> *MM v AV* (2) supra note 396 paras 52 & 59.

<sup>417</sup> *MM v AV* (1) supra note 396 para 14.

<sup>418</sup> Ibid para 14.

<sup>419</sup> Ibid paras 3 & 14. Mills op cit note 5 at 132.

<sup>420</sup> Ibid para 24.

<sup>421</sup> Mills op cit note 5 at 134.

relevant interests as to what is truly in the child's best interests.<sup>422</sup> The court placed a significant emphasis on the balancing of rights argument contemplated in *S v M*.<sup>423</sup> The child-sensitive nature of section 28 of the Constitution was also highlighted.<sup>424</sup> Reviewing this case, the best interests of the child principle played a decisive role in its outcome. Moreover, the consideration of the unique contextual factors allowed for this role to be played. Averred by Mills, the above judicial and legislative approach aligns with 'protecting the best interests of the child as its primary concern, while recognising the rights of the victim mother.'<sup>425</sup>

While this case does show the interplay between the best interests of the child and the exclusionary provision in a judicial setting, many uncertainties surrounding the exclusionary provision remain.<sup>426</sup> For instance, while the mother is protected from co-parenting with her rapist, she is also burdened with the sole responsibility of child-rearing. Accordingly, the Children's Act fails to directly address the duty of a rapist father to contribute towards maintenance.<sup>427</sup> As a result of his exclusion as a parent and disqualification from acquiring parental responsibilities and rights, the rapist father is *prima facie* absolved of the duty to contribute towards the maintenance of the child conceived. Thus, South Africa's exclusionary provision regarding maintenance recovery falls short of its international and constitutional obligations towards the care and best interests of children.<sup>428</sup>

(c) *Missing maintenance*

(i) *Grounds for maintenance*

On a *prima facie* reading, resulting from the rapist father's exclusion as a parent,<sup>429</sup> he is consequently unable to acquire parental responsibilities and rights. One such responsibility is the duty to contribute towards maintenance.<sup>430</sup> Moreover, section 2(1) of the Maintenance Act clearly states that its provisions only apply to persons furnished with the legal duty to maintain another person.<sup>431</sup> As such, rapist fathers are not legally recognised as parents and do not attain the legal duty to maintain their children.<sup>432</sup> However, Mills avers that even in the face of the

---

<sup>422</sup> Ibid.

<sup>423</sup> See above discussion of *S v M* supra note 183 on page 28

<sup>424</sup> *MM v AV* (1) supra note 396 para 28.

<sup>425</sup> Mills op cit note 5 at 133.

<sup>426</sup> Ibid at 138

<sup>427</sup> Ibid at 136.

<sup>428</sup> See preamble of the Maintenance Act.

<sup>429</sup> Section 1 of the Children's Act.

<sup>430</sup> Ibid section 18(2)(d).

<sup>431</sup> See page 34 for a full discussion on maintenance.

<sup>432</sup> Section 2(1) of the Maintenance Act.

termination or *ab initio* exclusion of parental responsibilities and rights in terms of the Children's Act, it does not necessarily result in the automatic falling away of all other common law and legislative relationships.<sup>433</sup> Thus, there may be room for interpretation in still recognising the common law duty of support owed by biological parents, irrespective of parental status.<sup>434</sup> Such interpretation is evident when considering section 2(2) of the Maintenance Act, which states that 'this Act shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons.'

Section 15 of the Maintenance Act contemplates the duty of parents to support their children. Herein, maintenance orders may be issued in regarding the 'enforcement of the common law duty of the child's parents to support that child as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.'<sup>435</sup> Section 15 further states that:

(2) The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education.

(3) (a) Without derogating from the law relating to the support of children, the maintenance court shall in determining the amount to be paid as maintenance in respect of a child, take into consideration—

- (i) that the duty of supporting a child is an obligation which the parents have incurred jointly;
- (ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and
- (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.

While the above provision allows for the enforcement of maintenance orders against parents with respect to their child, again, it is only applicable to individuals legally defined as parents in section 1 of the Children's Act. The logic then follows that as a result of the rapist father's blanket exclusion as a parent, a maintenance order cannot apply and thus would fall short of any legal effect. This result leaves the child born of rape without any recourse for maintenance and unable to enforce the duty of support owed by the rapist father. However, Mills advances that the rapist father may still be under the duty to contribute towards maintenance in terms of the Children's Act.<sup>436</sup> Such argument is based on section 21 of the Children's Act, which concerns the conditional acquisition of parental responsibilities and rights of biological fathers. Regardless of whether the father acquires or not, section 21(2) states that 'this section does not affect the duty of a father to contribute towards the maintenance of the child.' Hence, this

---

<sup>433</sup> Marius Johannes De Waal & Lize Mills 'What it means to be a parent: Implications for family law and the law of intestate succession' (2021) 3 *Tydskr Suid-Afrik Reg* 569.

<sup>434</sup> *Ibid.* See above at page 34 for discussion on the common law duty of support.

<sup>435</sup> Section 15(1) of the Maintenance Act.

<sup>436</sup> Mills op cit note 5 at 136. De Waal & Mills op cit note 433 at 569.

suggests that maintenance persists despite the inability to acquire parental responsibilities and rights. Thus, the rapist father may still be obligated to contribute towards the child's maintenance.<sup>437</sup> Mills' assertion is supported by her reliance on *GM v KI*,<sup>438</sup> a Gauteng High Court decision wherein the court stated:

The responsibility of an unmarried father to maintain his child continues to exist as a duty which is distinct and independent from whether or not he has acquired parental rights and responsibilities by operation of s 21, and that the common-law position relating to the obligation to pay maintenance (ie that it existed separately from the parental authority) is thus preserved by the Act.<sup>439</sup>

Despite the above uncertainties, it is abundantly clear that children need to receive sufficient maintenance to achieve the conditions indispensable to an adequate standard of living.<sup>440</sup>

*(ii) Consequences of exclusion from maintenance*

The gatekeeper of adequate living conditions is the ability to access financial means.<sup>441</sup> Dual maintenance from both mother and father may better realise the child's right to life, survival, and development.<sup>442</sup> This may also enable the realisation of interconnected rights, such as nutrition, healthcare, education, clothing, water, shelter, housing, and dignity.<sup>443</sup> The ability to access these rights directly translates into the ability to access opportunities in life, essentially creating a snowball effect. For instance, access to quality education and proper housing and nutrition will contribute to the child's current development and future success. The ability to attain an adequate standard of living directly impacts their right to live a dignified life.<sup>444</sup> As discussed, one cannot detach the adverse impact of poverty and low-income housing in childhood from the provision of parental maintenance.<sup>445</sup> Through this reasoning, dual maintenance and shared parental responsibility concerning maintenance are in the best interests of all children.<sup>446</sup> Using the previously examined legislative and judicial understanding of the best interests of the child,<sup>447</sup> a blanket prohibition on all parental responsibilities and rights of rapist fathers cannot be in the child's best interests.

---

<sup>437</sup> Section 21(2) of the Children's Act states that 'this section does not affect the duty of a father to contribute towards the maintenance of the child.' Mills op cit note 5 at 136.

<sup>438</sup> *GM v KI* 2015 (3) SA 62 (GJ). Mills op cit note 5 at 136.

<sup>439</sup> Ibid para 20. Mills op cit note 5 at 136.

<sup>440</sup> See page 10 above.

<sup>441</sup> Ibid.

<sup>442</sup> As contained within section 28(1) of the Constitution, international law, Children's Act, Bill of Rights in general.

<sup>443</sup> Sections 10, 24, 26, 27, 28(1) & 29 of the Constitution.

<sup>444</sup> Ibid section 10.

<sup>445</sup> Ibid chapter 2. See page 10 above.

<sup>446</sup> Smith op cit note 88 at 4.

<sup>447</sup> See chapter II & III above.

Another consequence that ensues is the law's differential treatment of children born of rape. As discussed, children are rights holders. Among these rights is the right to equality and non-discrimination. All humans are entitled to equality under section 9 of the Constitution. Section 9(1) enshrines the right to be equal before the law in its benefit and protection. Section 9(2) contains the full and equal enjoyment of all rights and freedoms. Regarding section 9(3), the state may not unfairly discriminate against any person directly or indirectly on the basis of various listed grounds, one of these being birth.<sup>448</sup> In section 9(4), the state has a constitutional obligation to enact national legislation to prevent or prohibit unfair discrimination. Section 9(5) provides that 'discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'<sup>449</sup> When approaching a section 9 violation, it is helpful to turn to the High Court judgment of *Gaum and Others v Van Rensburg N.O. and Others (Gaum)*.<sup>450</sup> Mirroring Constitutional Court jurisprudence, the court provided a test to establish unfair discrimination.<sup>451</sup> First, it must be assessed whether the conduct in question differentiates between people or classes of people.<sup>452</sup> Thereafter, one must inquire whether such differentiation amounts to unfair discrimination.<sup>453</sup> Where discrimination occurs on one of the listed grounds in section 9(3), there is a presumption of unfairness.<sup>454</sup> Following this finding, it must be asked whether the conduct can be justified under section 36 of the Constitution.<sup>455</sup> To establish unfairness, the determining factor is the impact on members of the group in question.<sup>456</sup> Other factors include whether there is a listed ground, the 'nature of the action and the purpose sought to be achieved by it must be considered.'<sup>457</sup> In essence, whether the discrimination is worthy of an important societal goal.<sup>458</sup> One must consider the complainant's position in society and whether they have been subject to previous patterns of disadvantage.<sup>459</sup> Van der Walt explains that for differentiation to amount to discrimination, the

---

<sup>448</sup> See birth as a prohibited ground of discrimination in section 1 of the Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA) Act 4 of 2000.

<sup>449</sup> Ibid.

<sup>450</sup> 2019 (2) All SA 722 (GP) paras 66-82.

<sup>451</sup> Ibid para 66.

<sup>452</sup> Ibid with reference to *Prinsloo v van der Linde and Another* 1997 (3) SA 1012 (CC) page 554 & *Harkson v Lane NO* 1998 (1) SA 300 (CC) para 53. See full discussion in Johannes Jacobus van der Walt 'Constitutional Law: The meaning of (unfair) discrimination' *Without Prejudice* June 2019 at 36.

<sup>453</sup> Ibid.

<sup>454</sup> Ibid.

<sup>455</sup> Ibid.

<sup>456</sup> Ibid para 70.

<sup>457</sup> Ibid.

<sup>458</sup> Ibid.

<sup>459</sup> Van der Walt op cit note 452 at 37.

ground on which the differentiation occurred must possess the potential to undermine human dignity.<sup>460</sup> Alternatively, it must affect them adversely in a comparably serious manner.<sup>461</sup>

In accordance with the above test, it must be established whether the exclusion from acquiring a rapist father's maintenance amounts to unfair discrimination against the child born of rape. First, the Children's Act has created two categories of children, differentiating between those born of rape and those born of consent. Second, discrimination has occurred based on the listed ground of 'birth' in section 9(3), leading to a presumption of unfairness. This unfairness is grounded in the impact on dignity and other comparable adverse effects on the child born of rape, who will likely face economic vulnerability due to financial exclusion. These children automatically face a singular-income household, while those born of consent receive a dual-income household. Financial capacity is the gatekeeper to achieving adequate living conditions and allowing the child to develop to their fullest potential. The provision of maintenance affects the child's quality of life and access to opportunities. The child born of rape holds a vulnerable position in society not only due to their youth but as a result of the circumstances surrounding their conception. Such a child may face difficulties concerning their reception and acceptance by their mother, family, and society.<sup>462</sup> Further, the law handicaps the provision of child maintenance, likely resulting in economic vulnerability. The nature and purpose sought to be achieved by the exclusionary provision is one that is designed to protect children born of rape and their survivor mothers. While this is an important societal goal, it does not necessitate a legislative exclusion from the parental duty of support owed to such children. Financial exclusion will impose a significant financial burden on the survivor mother. This burden may shift onto the state where child support grants will be sought to compensate for the loss of maintenance from the rapist father. Considering the above, there exists unfair discrimination against children born of rape concerning the provision of maintenance. Arguably, there exists no factual basis that supports the fairness of differentiating between children born of rape and consent within this context. Discrimination without any factual justification for fairness is inherently unfair.<sup>463</sup> Dual maintenance should be owed to all children, irrespective of birth status. The child fathered through rape should not be punished for the conduct of the rapist

---

<sup>460</sup> Section 10 of the Constitution states: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

<sup>461</sup> Van der Walt op cit note 452 at 36.

<sup>462</sup> Mills op cit note 5 at 130. See full discussion from 128-131.

<sup>463</sup> *Gaum* supra note 450 para 37.

father. As stated by Sachs J in *S v M*, ‘...in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.’<sup>464</sup>

Consequently, this position contradicts South Africa’s international obligations towards children. Article 2 of the Convention, as one of its overarching principles, prohibits all forms of discrimination. Specifically, article 2(1) identifies the prohibition of discrimination on the basis of birth. The Committee emphasises that the right to non-discrimination is proactive, expecting States Parties to enact legislative measures to protect children from discrimination.<sup>465</sup> Accordingly, there must be due recognition of equality in opportunity for children born of rape.<sup>466</sup>

*(iii) Counter-arguments*

It remains uncertain whether a conviction of rape is mandated by the Children’s Act to deny a biological father of parenthood.<sup>467</sup> In *MM v AV*, the court refused to clarify this position and instead decided the matter according to the best interests of the child.<sup>468</sup> However, should the exclusion of parentage be conditional to a conviction of rape, certain complications may arise in the ability of the rapist father to furnish maintenance. Incarceration would inhibit the rapist father from earning an income, preventing the child born of rape from receiving maintenance arising out of the father’s income. While this is a matter of concern, and notwithstanding its significance, an in-depth discussion on the practicalities of maintenance retrieval falls beyond the scope of this dissertation. However, it would be remiss if engagement, albeit brief, is not made with such a complication.

Imprisonment does not absolve the duty of support owed to children, despite the effect on the rapist father’s ability to earn an income. There may be certain avenues around this problem. First, it cannot be assumed that all rapist fathers are poor or do not have sufficient financial resources. The father may have savings, assets, or other economic initiatives, such as trust funds or investment accounts.<sup>469</sup> Moreover, a parent’s assets, such as vehicles and valuables, may be seized and auctioned to retrieve the proceeds needed to pay maintenance.<sup>470</sup>

---

<sup>464</sup> *S v M* supra note 183 para 18.

<sup>465</sup> Ibid article 2(2). See also General Comment No. 14 para 41.

<sup>466</sup> United Nations Committee on the Rights of the Child ‘Background to the Convention’ available at <https://www.ohchr.org/en/treaty-bodies/crc/background-convention>, accessed 21 June 2023.

<sup>467</sup> Mills op cit note 5 at 132.

<sup>468</sup> Ibid at 133.

<sup>469</sup> Western Cape Government ‘All you need to know about child maintenance’ available at <https://www.westerncape.gov.za/general-publication/all-you-need-know-about-child-maintenance>, accessed 19 December 2023.

<sup>470</sup> Ibid.

Accordingly, a court can now attach the assets of a parent who fails to pay maintenance.<sup>471</sup> Where a parent cannot afford maintenance but there exists assets or trust funds, these must be liquidated in order to furnish the required maintenance.<sup>472</sup> In the recent High Court judgment of *TCM v LRMM*,<sup>473</sup> a father could not receive proceeds from the sale of his house until his maintenance arrears of R200 000 were paid.<sup>474</sup> Second, the duty to support does not cease if a parent does not have money or an income due to unemployment.<sup>475</sup> The duty ‘becomes actionable the moment the parent secures payment.’<sup>476</sup> It remains dormant until future possession of money or earnings begins. Thus, depending on the length of the father’s sentence, he could be ordered to pay maintenance once he is released. Third, if a parent/s is unable to pay maintenance, it could be possible that such maintenance may be claimed from the biological grandparent/s.<sup>477</sup>

It is evident that there is a need for clarity and certainty in the application and nuances surrounding the exclusionary provision of parentage. The Children’s Act neglects to explicitly address the provision of maintenance for children conceived through rape. In light of this failure, this dissertation puts forward the following suggestions.

## CHAPTER V: SUGGESTIONS

### (a) *Legislative reform: amendment, reading in*

Considering the lacuna in South African literature and jurisprudence surrounding the child born of rape, it is useful to turn to Namibia’s Child Care and Protection Act (Namibian Act). Herein, the definition of a parent mirrors the Children’s Act by excluding a biological father when the child is conceived through rape.<sup>478</sup> However, an entire part of the Namibian Act is dedicated to the nuances of the parental responsibilities and rights of children born out of wedlock and ‘other

---

<sup>471</sup> Kabous Le Roux ‘Child maintenance: Courts may now attach assets to force payment’ *Cape Talk* 5 April 2022, available at <https://www.capetalk.co.za/articles/442437/child-maintenance-courts-may-now-attach-assets-to-force-payment>, accessed 19 December 2023.

<sup>472</sup> *Ibid.*

<sup>473</sup> *TCM v LRMM* 2022 (3) SA (HC).

<sup>474</sup> Le Roux *op cit* note 471.

<sup>475</sup> Hamlet Haneke ‘Child Maintenance – The duty exists, but what if there is no income?’ *Schoeman Law: Family Law, Publications*, 8 October 2020, available at <https://schoemanlaw.co.za/child-maintenance-the-duty-exists-but-no-income/>, accessed 19 December 2023. See section 15(3)(ii) of the Maintenance Act.

<sup>476</sup> *Ibid.*

<sup>477</sup> Department of Justice and Constitutional Development ‘Maintenance FAQ’ available at <https://www.justice.gov.za/vg/mnt-faq.html>, accessed 19 December 2023.

<sup>478</sup> Section 1(a) of Namibia’s Child Care and Protection Act (Namibian Act), available at <https://www.lac.org.na/laws/annoSTAT/Child%20Care%20and%20Protection%20Act%203%20of%202015.pdf>, accessed 21 December 2023. See above at pages 11-12. See section 104 for the parental responsibilities and rights of children born outside marriage as a result of rape.



children.<sup>479</sup> Within this part, it makes express provision for the rapist father's legal duty to maintain the child. Section 106(2) of the Namibian Act states:

A person conceived as a result of rape or incest does not have the legal duty to maintain a parent who was convicted of the rape or incest or does not have any legal duty to maintain that parent's relations, but the person who committed the rape or incest has a duty to maintain the child conceived as a result of that rape or incest.

In agreement with Mills, the South African legislature should include provisions in the Children's Act comparable to section 106(2) of the Namibian Act.<sup>480</sup> Should the matter arise in court, it may be possible for a court to read in a proviso to section 1(a)'s definition of a parent.<sup>481</sup> Similarly, the legislature may amend this section to insert a revised definition of a parent.<sup>482</sup> This dissertation suggests the following amendment or reading in of section 1(a) takes place:

1. "*parent*", in relation to a child, includes the adoptive parent of a child, but excludes—
  - (a) the biological father of a child conceived through the rape of or incest with the child's mother;
    - (i) *this section shall not affect the father's duty to contribute towards the maintenance of the child conceived through the rape or incest with the child's mother in terms of section 18(2)(d) of this Act.*
    - or*
    - (i) *the father of a child conceived through rape or incest will still acquire the duty to contribute towards the maintenance of the child conceived through rape or incest in terms of section 18(2)(d) of this Act. (Emphasis added)*

Another suggestion would necessitate amending legislation that governs child support. The common law duty of support is given legislative effect through section 15 of the Maintenance Act.<sup>483</sup> This dissertation recommends the following amendment to section 15(3)(a) takes place:

- 15 (3) (a) Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration –
- (i) that the duty of supporting a child is an obligation which the parents have incurred jointly;
  - (ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and
  - (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.

---

<sup>479</sup> See sections 96-111 in part 3 of the Namibian Act.

<sup>480</sup> Mills op cit note 5 at 137.

<sup>481</sup> See section 172 of the Constitution regarding the powers of courts in constitutional matters. Michael Bishop 'Chapter 9 Remedies', in Stuart Woolman & Michael Bishop (eds) Constitutional Law of South Africa 2 ed (Service 5) 108-9, available at <https://constitutionalawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap09.pdf>, accessed 24 December 2023.

<sup>482</sup> See for example Children's Amendment Bill (B19-2023) available at [https://www.parliament.gov.za/storage/app/media/Bills/2023/B19\\_2023\\_Childrens\\_Amendment\\_Bill/B19\\_2023\\_Childrens\\_Amendment\\_Bill.pdf](https://www.parliament.gov.za/storage/app/media/Bills/2023/B19_2023_Childrens_Amendment_Bill/B19_2023_Childrens_Amendment_Bill.pdf), accessed 24 December 2023.

<sup>483</sup> Smith op cit note 88 at 71.

*(iv) that the duty exists irrespective of whether a child is conceived through the act of rape or incest. (Emphasis added)*

The result of the above suggestions is the partial acquisition of a rapist father's parental responsibilities and rights. In this way, the law recognises the rapist father as a parent only insofar as acquiring a limited duty to financially maintain the child.

*(b) Interpretation: reading down*

Where a common or statutory law is inconsistent with the Constitution and the rights within, it may be possible to interpret that law to conform with the Constitution.<sup>484</sup> Accordingly, section 21(2) of the Children's Act may be construed as a ground of maintenance for rapist fathers.<sup>485</sup> Carnelley states that:

As far as the father of a child conceived through rape or incest is concerned, he would be regarded as an unmarried father who did not qualify as a parent with the parental responsibilities and rights of s 21(1). However, as stated above, his maintenance duty would continue in the light of s 21(2). To hold otherwise would be contrary to the (financial) interests of the child.<sup>486</sup>

However, Mills advances that the likely practical implication that ensues from retrieving maintenance for the care of the child is that the survivor mother may need to be in contact with the rapist father.<sup>487</sup> Such contact may cause the mother and child further psychological and emotional harm. Accordingly, the law must make provisions to ensure maintenance recovery does not inflict further trauma.

Ultimately, the legislature has omitted to consider the position of the rapist father concerning his financial duty to support. The judiciary has yet to face a matter on these merits. In the future, should a court be confronted with parental responsibilities and rights of a child conceived from rape, some sense of clarity surrounding the practical application of section 1(a)'s definition of a parent is necessary.

## CHAPTER VI: CONCLUSION

South Africa's current legislation fails to make the necessary provision for children born of rape. Section 1(a) of the Children's Act denotes a blanket exclusion from parentage for the rapist father. The result is the exclusion of all parental responsibilities and rights, including the

---

<sup>484</sup> Bishop op cit note 481 at 86-1.

<sup>485</sup> See argument by Mills above at page 43.

<sup>486</sup> Marita Carnelley 'Liability for the payment of public school fees' (2011) 14 *PELJ* 39, available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812011000600003#not036](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812011000600003#not036), accessed 21 December 2023.

<sup>487</sup> Mills op cit note 5 at 136.

duty to contribute towards the maintenance of the child born of rape. This legislative lacuna violates the international and constitutional obligations owed to children. By considering international and domestic perspectives on the rights and best interests owed to children, the child born of rape has the right to receive maintenance from the rapist father, irrespective of birth status.

Following the introductory chapter in Chapter I, Chapter II commenced with a discussion on the shift in the global perspective of children as independent rights holders. This shift transformed the parent-child relationship into the legal responsibility to act in the child's best interests. Yet, international and regional law are silent on the issue of rapist fathers and their parental responsibilities and rights. Despite this vacuum, States Parties are still under an international obligation to adopt appropriate legislative measures to realise the rights within the Convention and Charter. These rights relate to the child's well-being, development, quality of life, and adequacy of parental care. The expected standard of parental care is underscored by adequate living conditions and a shared parental responsibility towards the child's maintenance. Further, these rights are given effect through the law and decision-making of States Parties. The standard to be upheld when determining child-related matters is what is considered to be in the best interests of the child. The best interests of the child is a multifaceted concept that exists as a right, an interpretive tool, and a principle underlying decisions. It holds the potential to address the needs of all children across a variety of contexts, irrespective of birth status. Using this as the lens through which to assess the individual context of each case, the child's best interests are always prioritised.

Chapter III explored the legislative frameworks on the rights and best interests of the child within the South African context. Through domesticating international law and constitutionalising children's rights, South Africa's legislation has made provision for the rights and best interests of the child. The Children's Act was enacted to implement children's rights by circumscribing measures for parental care, protection, and development. It establishes a child-centred approach by requiring any child-related decision to be grounded in a best interests assessment. Constitutional Court jurisprudence has given judicial meaning to the principle in cases concerning the parental care of children. However, despite the wide range of adjudication concerning the rights of children and the best interests principle, there exists no guiding case law and precedent regarding the parental responsibilities and rights owed to children born of rape.

Chapter VI examined the legal position and acquisition of parental responsibilities and rights. The assignment and nature of parental responsibilities and rights are decided according to various provisions in the Children's Act. Such a decision is ultimately rooted in what is in the child's best interests. Accordingly, the rapist father's exclusion from parentage is considered to be in the best interests of the child in light of the child's right to be protected from potential harm. This exclusion further serves the interests of the survivor mother. However, the practical application of the exclusionary provision remains vague. It is unclear whether a rape conviction is required for its employment. Further, it does not provide for the duty of maintenance to persist over and above the disqualification of parental responsibilities and rights. The Children's Act and Maintenance Act do not expressly provide a ground of maintenance for such a child. Financial exclusion hinders access to adequate living conditions, stifling a child's development to its full potential and maximum extent. Thus, dual maintenance and a shared parental responsibility towards maintenance are in the best interests of every child. Another consequence ensuing from the exclusion is the law's differential treatment of children born of rape. Such differential treatment amounts to unfair discrimination on the basis of birth, according to section 9(3) of the Constitution. The distinction affects the child's right to equality, childhood opportunity, dignity, and economic stability. The effect of missing maintenance is at odds with South Africa's international and constitutional obligations towards children.

Lastly, Chapter V proposed various suggestions pertaining to legislative reforms. The exclusionary provision in section 1(a) of the Children's Act must be amended to read in an express duty on the rapist father to financially maintain the child born of rape. The Namibian Child Care and Protection Act contains a template that can be inserted to impose a financial duty. Further, the Maintenance Act must be amended to recognise the duty of support as existing irrespective of the child's conception. In the alternative, section 21 of the Children's Act holds the potential to be interpreted in such a way as to recognise the maintenance of rapist fathers. Through these suggestions, clarity can form regarding the dual responsibility of both parents to furnish maintenance to their child, without a distinction in birth status. This will allow for the full potential of the child's development and create greater opportunities in life. In this way, South Africa can meet its international and constitutional obligations owed to children. In this way, the child's best interests are truly paramount.

## BIBLIOGRAPHY

### Primary Sources

#### *Constitution*

Constitution of the Republic of South Africa, 1996.

Fourteenth Amendment to the United States Constitution, 1868.

#### *Statutes*

##### South Africa

The Children's Act 38 of 2005.

The Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.

The Maintenance Act 99 of 1998.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Children's Amendment Bill (B19-2023) available at [https://www.parliament.gov.za/storage/app/media/Bills/2023/B19\\_2023\\_Childrens\\_Amendment\\_Bill/B19\\_2023\\_Childrens\\_Amendment\\_Bill.pdf](https://www.parliament.gov.za/storage/app/media/Bills/2023/B19_2023_Childrens_Amendment_Bill/B19_2023_Childrens_Amendment_Bill.pdf), accessed 24 December 2023.

##### Namibia

Child Care and Protection Act 3 of 2015.

#### *Cases*

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

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

*GM v KI* 2015 3 SA 62 (GJ).

*Gaum and Others v Van Rensburg N.O. and Others* 2019 (2) All SA 722 (GP).

*Harkson v Lane N.O.* 1998 (1) SA 300 (CC).

*J v National Director of Public Prosecutions & Another (Childline South Africa & Others as amici curiae)* 2014 (7) BCLR 764 (CC).

*Jooste v Botha* 2000 (2) BCLR 187 (T).

*LS v AT and Another* 2001 (2) BCLR 152 (CC).

*MM v AV* 2011 JDR 0154 (WCC) (23 November 2010) (*MM v AV* (1))

*MM v AV* 2011 JDR 1574 (WCC) (23 November 2010; 16 November 2011) (*MM v AV* (2)).

*Mcall v Mcall* 1994 (3) SA 201 (C).

*Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC).

*Prinsloo v van der Linde and Another* 1997 (3) SA 1012 (CC).

*Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae)* 2016 (10) BCLR 1326 (CC).

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

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

*TCM v LRMM* 2022 (3) SA (HC).

### ***International Law***

International Covenant on Economic, Social and Cultural Rights Adopted 16 December 1966, entered into force 3 January 1976, United Nations, Treaty Series, vol. 993, p. 3.

Organisation of African Unity (OAU), African Charter on the Rights and Welfare of the Child, adopted July 1990, entered into force November 1999, 1520 UNTS 217.

United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted 18 December 1979, entered into force 3 September 1981, United Nations, Treaty Series, vol. 1249, p. 13, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>, accessed 18 December 2023.

United Nations Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3.

United Nations General Assembly, the Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, accessed 18 December 2023.

United Nations Committee on the Rights of the Child in General Comment No. 5 (2003) on ‘General measures of implementation of the Convention on the Rights of the Child CRC/GC/2003/5 (2003).

United Nations Committee on the Rights of the Child in General Comment No. 7 2005 on ‘Implementing child rights in early childhood’ CRC/C/GC/7 (2005).

United Nations Committee on the Rights of the Child in General Comment No. 14 on ‘The right of the child to have his or her best interests taken as a primary consideration’ (art 3, para 1) CRC/C/GC/14 (2013).

United Nations Committee on the Rights of the Child in General Comment No. 15 ‘The right of the child to the enjoyment of the highest attainable standard of health’ (art. 24)’ CRC/C/GC/15 (2013).

### Secondary Sources

African Committee of Experts on the Rights & Welfare of the Child ‘Ratifications Table’ available at <https://www.acerwc.africa/en/member-states/ratifications>, accessed 18 December 2023.

Ajayi, Anthony Idowu & Chinelo Ezegebe, Henrietta ‘Association between sexual violence and unintended pregnancy among adolescent girls and young women in South Africa’ (2020) 20 *BMC Public Health* 1 - 10, available at <https://doi.org/10.1186/s12889-020-09488-6>, accessed 27 December 2023.

Basson, Lindinette *Perspectives on the Best Interests of the Child: Developments in the Interpretation and Application of the Principle in the South African Law Relating to Custody* (LLM Thesis, Stellenbosch University, 2004).

Bekink, Bernard & Bekink Mildred ‘Defining the standard of the best interests of the child: Modern South African perspectives’ (2004) 37 *De Jure* 21- 40.

Bentivegna, F & Patalay, P ‘The impact of sexual violence in mid-adolescence on mental health: A UK population-based longitudinal study’ (2022) 9 *The Lancet Psychiatry* 874 - 883, available at [https://doi.org/10.1016/S2215-0366\(22\)00271-1](https://doi.org/10.1016/S2215-0366(22)00271-1).

Binford, Warren ‘The constitutionalisation of children’s rights in South Africa’ (2016) 60 *New York Law School Law Review* 333 - 363.

Bishop, Michael ‘Remedies’, in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 5) chapter 9, available at <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap09.pdf>, accessed 22 December 2023.



Carnelley, Marita 'Liability for the payment of public school fees' (2011) 14 *Potchefstroom Electronic Law Journal* 34-60, available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812011000600003#not036](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812011000600003#not036), accessed 21 December 2023.

Centre for Child law '20 years of children constitutionally – and advocacy for strategic litigation children's rights in South Africa' available at <https://centreforchlldlaw.co.za/wordpress21/wp-content/uploads/2019/03/CCL-20-Year-Publication-1.pdf>, accessed 20 May 2023.

Chirwa, Danwood M 'The merits and demerits of the African Charter' in (2002) 10 *International Journal of Children's Rights* 157 - 177.

Couzens, Meda 'The best interests of the child and the Constitutional Court' (2019) 9 *Constitutional Court Review* 363 - 386.

Department of Justice and Constitutional Development 'Maintenance FAQ' available at <https://www.justice.gov.za/vg/mnt-faq.html>, accessed 19 December 2023.

De Waal, Marius Johannes & Mills, Lize 'What it means to be a parent: Implications for family law and the law of intestate succession' (2021) 3 *Tydskrif vir die Suid-Afrikaanse Reg (Journal for Contemporary Roman-Dutch Law)* 562 - 571.

Ferreira, Sandra 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) 73 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 201 - 213.

Fokala, Elvis 'Calibrating children's rights to participate in a family setting 30 years after the adoption of the Convention on the Rights of the Child and the African Children's Charter' (2020) 34 *Speculum Juris* 115 - 117.

Govender, Indiran 'Gender-based violence – An increasing epidemic in South Africa' (2023) 65 *South African Family Practice*, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10091185/>, accessed 27 December 2023.

Haneke, Hamlet ‘Child Maintenance – The duty exists, but what if there is no income?’ *Schoeman Law: Family Law, Publications*, 8 October 2020, available at <https://schoemanlaw.co.za/child-maintenance-the-duty-exists-but-no-income/>, accessed 19 December 2023.

Heaton, Jacqueline ‘An individualised, contextualised and child-centred determination of the child’s best interests, and the implications of such an approach in the South African context’ (2009) 34 *Journal for Juridical Science* 1 - 18.

Heaton, Jacqueline *South African Family Law* 3 ed (2011) Durban: LexisNexis.

Hodgkin, Rachel & Newell Peter et al (ed) *Implementation handbook for the Convention on the Rights of the Child* (2007) *UNICEF*.

Jouriles E, Norwood W, McDonald R, Vincent J & Mahoney A ‘Physical violence and other forms of marital aggression: Links with children’s behavior problems’ (1996) 10 *Journal of Family Psychology* 223 - 234, available at <https://doi.org/10.1037/0893-3200.10.2.223>.

Kilkelly, Ursula & Liefwaard, Ton ‘Legal implementation of the UNCRC: Lessons to be learned from the constitutional experience of South Africa’ (2019) 52 *De Jure Law Journal* 521 - 539.

Leblanc, Lawrence ‘The Convention on the Rights of the Child’ (1991) 4 *Leiden Journal of International Law* 281-292.

Legal Assistance Centre ‘Chapter 9: Parental rights and responsibilities for children outside marriage’ in *Guide to Namibia’s Child Care and Protection Act 3 of 2015*, available at [http://www.lac.org.na/projects/grap/Pdf/9-Parental\\_Rights\\_and\\_Responsibilities\\_Outside\\_Marriage.pdf](http://www.lac.org.na/projects/grap/Pdf/9-Parental_Rights_and_Responsibilities_Outside_Marriage.pdf), accessed 16 December 2023.

Le Roux, Kabous ‘Child maintenance: Courts may now attach assets to force payment’ *Cape Talk*, 5 April 2022, available at <https://www.capetalk.co.za/articles/442437/child-maintenance-courts-may-now-attach-assets-to-force-payment>, accessed 19 December 2023.

Lewis, Judith 'The Stability Paradox: The two-parent paradigm and the perpetuation of violence against women in termination of parental rights and custody cases' (2020) 27 *Michigan Journal of Gender & Law* 311 - 402.

Louw, Anna *Acquisition of Parental Responsibilities and Rights* (LLD Thesis, University of Pretoria, 2009).

Mdluli, Thandi, & Odeku, Kola O 'Perspective on the implementation of the transformative child maintenance interventions in South Africa' (2022) 11 *Perspectives of Law and Public Administration* 273 - 286.

Memzur, Benyam D 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *Southern African Public Law* 1 - 29.

Mills, Lize 'Born from bad memories: considering the best interests of children conceived as a result of rape and incest' (2023) 48 *Journal for Juridical Science* 111 - 144.

Mills, Lize 'Failing Children: The court's disregard of the best Interests of the child in *Le Roux v Dey* (2014) *South African Law Journal* 847 - 864.

Ndivhuwo Mukwevho 'Statutory rape driving high numbers of teen pregnancies' *Health E News: Journalism for Public Health* 22 April 2022, available at <https://health-e.org.za/2022/04/22/statutory-rape-driving-high-numbers-of-teen-pregnancies/>, accessed 27 December 2023.

P Q R *Boberg's Law of Persons and the Family* (1999) Juta, Cape Town.

Skelton, Ann 'South Africa' in Liefwaard, T and Doek, J E (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015).

Skelton, Ann 'Too much of a good thing? Best interests of the child in South African Jurisprudence' (2019) 52 *De Jure Journal* 557 - 579.

Sloth-Nielsen, Julia 'Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child' (2019) 10 *International Journal of Children's Rights* 137 - 156.

Sloth-Nielsen, Julia 'Children's rights jurisprudence in South Africa - a 20 year retrospective' (2019) 52 *De Jure* 501 - 520.

Smith, Samantha *Stolen Sperm: Should the Law Absolve an Involuntary Father from the Duty to Furnish Child Maintenance?* (LLM dissertation, University of Cape Town, 2015).

Soder, Karin 'The Convention on the Rights of the Child' (2009) 12 *New York City Law Review* 443 - 446.

Songca, Rushiella 'Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 340 - 359.

South African Government 'Youth Day' available at <https://www.gov.za/youth-day>, accessed 28 December 2023.

South African Police Service 'Crime statistics' available at <https://www.saps.gov.za/services/crimestats.php>, accessed 27 December 2023.

United Nations Children's Fund 'History of child rights' available at <https://www.unicef.org/child-rights-convention/history-child-rights>, accessed 18 December 2023.

United Nations Children's Fund 'Four principles of the Convention on the Rights of the Child' 24 June 2019, available at <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child>, accessed 18 December 2023.

United Nations Children's Fund & Department of Social Development South Africa 'The Children's Act explained: Booklet 1: Children and parents: responsibilities and rights'

available at <https://www.unicef.org/southafrica/media/1276/file/ZAF-childrens-act-explained-booklet-1-2009.pdf>, accessed 6 January 2024.

United Nations ‘Committee on the Rights of the Child’ available at <https://www.ohchr.org/en/treaty-bodies/crc/introduction-committee>, accessed 3 January 2023.

United Nations Committee on the Rights of the Child ‘Background to the Convention’ available at <https://www.ohchr.org/en/treaty-bodies/crc/background-convention>, accessed 21 June 2023.

United Nations Treaty Collection ‘Status of treaties – The Convention on the Rights of the Child’ available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en), accessed 18 December.

Vandenhoe, Wouter ‘Children’s rights from a legal perspective’ in Wouter Vandenhoe, Ellen Desmet, Didier Reynaert, Sara Lembrechts (eds) *Routledge International Handbook of Children’s Rights Studies* (2015) 27 - 59.

Van der Walt, Johannes Jacobus ‘Constitutional Law: The meaning of (unfair) discrimination’ *Without Prejudice* June 2019 36 - 37.

Walsh, Thomas ‘Advancing the interests of South Africa's children: A look at the best interests of children under South Africa's Children's Act’ (2011) 19 *Michigan State University College of Law: Journal of International Law* 201 - 250.

Western Cape Government ‘All you need to know about child maintenance’ available at <https://www.westerncape.gov.za/general-publication/all-you-need-know-about-child-maintenance>, accessed 19 December 2023.

Zermatten, Jean ‘The best interests of the child principle: Literal analysis and function’ (2010) 18 *International Journal of Children’s Rights* 483 - 499.

## **Plagiarism Declaration**

“This thesis/dissertation has been submitted to the Turnitin module (or equivalent similarity and originality checking software) and I confirm that my supervisor has seen my report and any concerns revealed by such have been resolved with my supervisor.”

**Name: Indio Anais Friedmann**

**Student number: FRDIN001**

**Signature:**

Signed by candidate
---------------------

**Date: 10 February 2024**