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children's law centre

Children's Law Centre Annual Lecture 2017

"Realising Children's Rights under South Africa's Bill of Rights"

Professor Ann Skelton
Member of the UN Committee on the Rights of the Child
Professor of Law at the University of Pretoria and Director of the Centre for Child Law

Chair
The Honourable Mr Justice Colton

Monday 9th October 2017

1997-2017 CELEBRATING 20 YEARS CHAMPIONING CHILDREN'S RIGHTS
20 Years Anniversary


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CHILDREN'S LAW CENTRE ANNUAL LECTURE 2017

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The Inn of Court, Old Bar Library
Royal Courts of Justice, Belfast

Monday 9th October 2017

ANNUAL LECTURE WELCOME

Paddy Kelly
Director, Children's Law Centre

Lord Justices, members of the judiciary, colleagues and friends, on behalf of the Children's Law Centre I would like to welcome you to our 2017 Annual Lecture. This is a very special event for us marking as it does the Centre's 20th Anniversary. The Children's Law Centre has been on an amazing journey over the last 20 years, from a single empty room in University Street in September 1997 to our wonderful new home on the Ormeau Road; which you are all very welcome to come and visit. More importantly the increased recognition of and respect for children's rights now as opposed to 20 years ago, is significant. CLC has undoubtedly played a pivotal role, along with many in this room, in securing such progress. While we still have much to achieve, today we celebrate how far we have come.

The Children's Law Centre's Annual Lecture has played an important role in the children's rights discourse in this jurisdiction since our inaugural lecture in 2006 which was delivered by Baroness Hale who as you will all be aware, took up appointment in September as President of the Supreme Court. We are indebted to her for her many thoughtful judgements and lectures.

Marking our 20th Anniversary we are absolutely delighted that Professor Ann Skelton, who is a member of the UN Committee on the Rights of the Child, is with us today to deliver the 2017 Annual Lecture. Professor Skelton you are very welcome to Belfast. We very much appreciate that you have deferred your return home to South Africa following a 4 week sitting of the Committee in Geneva, to deliver our Annual Lecture. Given your other role as Director of the Centre for Child Law in Pretoria, a sister organisation to the Children's Law Centre, it is particularly fitting that you are here to help us celebrate our 20th Birthday.

I would also like to thank Mr Justice Colton for kindly agreeing to chair today's lecture. We appreciate very much his giving so freely of his time to preside over this afternoon's event and to meet with Professor Skelton yesterday evening.

The focus of today's lecture is very timely. We are just 6 months short of the 20th Anniversary of the Good Friday Agreement which recognised the need for rights protection by way of a Bill of Rights for Northern Ireland which would provide a critical cornerstone upon which to build peace. Since 1998 the Children's Law Centre and youth@clc have

actively advocated for a strong and inclusive Bill of Rights to protect and realise the rights of all children in this jurisdiction. Such a Bill could better ensure without discrimination the rights of children with mental health needs, children requiring clinical, medical and other therapeutic interventions, disabled children, those with additional learning support needs and all other vulnerable children to enjoy access to health services, family support and educational provision to meet their individual needs. We envisioned the Bill as giving effect to the UNCRC in domestic law and critically cementing the peace process, ensuring post 1998 generations could grow up in peace, allowing them to enjoy their childhoods and realise their full potentials.

NI has changed significantly since 1998 but unfortunately, and despite the best efforts of CLC, youth@clc and many others in this room, the promise of a Bill of Rights has not as yet been delivered. This gap has denied our most vulnerable children the armoury of a strong rights framework that would ensure their enjoyment of rights without discrimination and better facilitate the vindication of those rights.

Professor Skelton, we are grateful that your Committee in its recommendations to the UK government, recognised in 2008 and again in 2016, the importance of a strong Bill of Rights for NI in bringing home the UNCRC.

In 2008 the Committee recommended

11. … that the State party continue to take measures to bring its legislation into line with the Convention. To this aim, the State party could take the opportunity given in this regard by the development of a Bill of Rights in Northern Ireland….., and incorporate into them the principles and provisions of the Convention, e.g. by having a special section in these bills devoted to child rights.

And again in 2016

7. The Committee recommends that the State party:
(b) Expedite the enactment of a bill of rights for Northern Ireland, agreed under the Good Friday Agreement.

CLC believes that the time for a comprehensive NI Bill of Rights incorporating the UNCRC has come. The need to deliver a Bill of Rights for NI has been highlighted in the current negotiations for the re-establishment of our devolved institutions. The looming threat of the repeal of the Human Rights Act 1998 alongside the loss of rights protections as a result of BREXIT has focused minds on the imperative to address the potential rights deficit that will result. The Bill of Rights as promised in the Good Friday Agreement is

the obvious vehicle to ensure the hard won gains in the promotion and protection of children's rights. As hopefully we move closer to the enactment of a strong inclusive bill of rights for NI incorporating the UNCRC we have much to learn from you and your colleagues in South Africa as to how your Bill of Rights has been engaged in ensuring children's rights protections. We very much look forward to hearing today about your work in realising children's rights under South Africa's Bill of Rights.

Friends you will be glad to hear that Professor Skelton has kindly provided us with a copy of her lecture in advance. You will therefore be able to pick up a copy of Professor Skelton's lecture at the registration desk straight after the lecture.

Before I hand over to Mr Justice Colton, I would like to again thank our friends and colleagues at the Bar for their support for the work of the Children's Law Centre by hosting today's lecture and the reception which follows. This is a very fitting venue for our lecture and we remain grateful to our colleagues at the Bar for allowing us to hold our Annual Lecture here.

I would also like to thank all the staff at the Bar Library and all CLC staff for their help in the organising of today's 20th Anniversary lecture.

THANK YOU.

CHILDREN'S LAW CENTRE ANNUAL LECTURE

Realising children's rights under South Africa's Bill of Rights

Professor Ann Skelton*

1 INTRODUCTION

A Bill of Rights enshrined in a new Constitution was central to the negotiations to move South Africa from an Apartheid State to multi-party democracy. In December 1991, a negotiation process known as the Convention for a Democratic South Africa (CODESA) began its work, and the parties agreed on a process whereby a transitional constitution, with an interim Bill of Rights would be drafted and then following elections, an elected constitutional assembly would decide on a final Constitution and Bill of Rights. CODESA broke down but was replaced by a multi-party negotiating process, which came up with a set of constitutional principles, and an interim Constitution and Bill of Rights. Following the elections, the Constitutional Assembly received thousands of submissions on the Bill of Rights, and the final Constitution containing the final Bill of Rights was enacted in 1996, two years after the first democratic elections.

The Bill of Rights in the interim Constitution contained a special section for children, s 30.[1] However, it was not as expansive as s 28 of the final Constitution turned out to be. The expansion of the clauses was due, in most part, to a very active children's rights movement in South Africa. During the Constitutional Assembly process that culminated in the final Constitution, there were calls for written and oral submissions on all aspects of the Bill of Rights. Children's rights organisations made excellent use of these opportunities, and this resulted in the broader reach of s 28 of the final Constitution.

Some important changes that were made, such as 'the right to parental care' being amended to read: 'Every child has the right … to family care or parental care, or to appropriate alternative care when removed from the family environment'.[2] The word 'shelter' was added to s 28(1)(c). Protection from abuse and neglect was expanded to

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1 Constitution of the Republic of South Africa, Act 200 of 1993, commenced on 27 April 1994. During the negotiations to establish a new constitutional state in South Africa, it had been agreed that there would be an interim Constitution and that a process would begin immediately to draft a final Constitution through a participative process that was driven by the Constitutional Assembly.

2 Section 28(1)(b) of the final Constitution.

provide protection from 'maltreatment, neglect, abuse or degradation'.[3] The provisions relating to child offenders were significantly improved by the inclusion of a child's right 'not to be detained except as a measure of last resort' and 'only for the shortest appropriate period of time', as well as 'to be kept separately from detained persons over the age of 18 years'.[4] The right of a child to have a legal practitioner assigned to him or her in civil proceedings was also an addition introduced into the final Constitution.[5]

South Africa's Bill of Rights[6] has been hailed internationally as a good example of a constitution providing for the protection and advancement of children's rights.[7] The Constitution contains a special section on children's rights, namely s 28, which sets out rights specific to children. However, children also benefit from the other rights in the Constitution, except for those that are out of their reach due to age limitations, such as the right to vote. All the rights in the South African Bill of Rights are justiciable, including socio-economic rights.

2 LITIGATING UNDER THE BILL OF RIGHTS

2.1 Constitutional supremacy

Section 1 of the Constitution declares that a founding value of the state is 'supremacy of the Constitution'. This means that all law and conduct has to be in keeping with the Constitution. This, together with the imperatives set by international and regional legal instruments that South Africa has ratified, has led to a substantial amount of law-making since the South African regime change in 1994. In the field of child law, new statutes have been passed that affect every aspect of children's rights.[8]

It is constitutional supremacy that gives life to the fact that any law or conduct can be measured against the Constitution, and if it is found not to comply with the Constitution, then it can be declared invalid by a court.[9] The superior courts derive power directly from the Constitution to adjudicate on constitutional compliance of law and conduct. This means that such courts can override conduct by the executive arm of government and

3 Section 28(1)(d) of the final Constitution.
4 Section 28(1)(g) of the final Constitution.
5 Section 28(1)(h) of the final Constitution.
6 Chapter 2 of the Constitution of the Republic of South Africa, 1996.
7 Alston & Tobin Laying the Foundations for Children's Rights (2005) 7.
8 South African Schools Act 84 of 1996; Children's Act 38 of 2005; Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and Act 5 of 2015; the Child Justice Act 75 of 2008. There are many other Acts that have less direct impact on children's lives - too many to list here. There are also some Acts that affect children that are in need of amendment, e.g. the Births and Deaths Registration Act 51 of 1992, the Immigration Act 13 of 2002, the Refugees Act 130 of 1998 and the Marriage Act 25 of 1961.
9 The courts that have the power to decide on the constitutional validity of law or conduct are the High Courts, the Supreme Court of Appeal and the Constitutional Court; see *Masiya v Director of Public Prosecutions, Pretoria* 2007 (5) SA 30 (CC).

can declare invalid aspects of laws passed by the legislature. However, there is a delicate balance premised on the separation of powers doctrine, which restricts the role of the courts in relation to the other arms of government.

2.2 Standing

The Bill of Rights applies a broad approach to standing. Section 38 of the Constitution, which applies where someone is alleging that a right in the Bill of Rights has been or may be infringed, sets out the rules on standing.
A matter may be brought by:
(a) persons[10] acting in their own interest;
(b) persons acting on behalf of other persons;
(c) persons acting on behalf of a group or class of persons;
(d) persons acting in the public interest; and
(e) associations acting in the interests of their members.

It is therefore evident that children can act in their own name and can litigate all the way to the Constitutional Court. The case of *MEC for Education, KwaZulu-Natal v Pillay*[11] was brought by the mother of Sunali, a teenage girl, who claimed her daughter had been discriminated against on the grounds of culture and religion because she wore a nose stud, contrary to the school rules. The school claimed that the fact that Sunali had not given evidence at the equality court and had not deposed to any affidavits was fatal to the case. Responding to this point, Chief Justice (as he then was) Langa observed as follows:

> *It is always desirable, and may sometimes be vital, to hear from the person whose religion or culture is at issue. That is often no less true when the belief in question is that of a child. Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf.*[12]

The *Pillay* court found, however, that the fact that the mother had brought the case on Sunali's behalf was not fatal to the case because there was sufficient evidence on the record to show that it was Sunali's own views about religion and culture that had led her to keep

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Where law or conduct is declared invalid, that finding must be confirmed by the Constitutional Court.

10 'Persons' includes bodies vested with legal personality.

11 2008 (1) SA 474 (CC).

12 Paragraph [56]. Chief Justice Langa also refers to dicta by Judge Sachs in his 'postscript' to *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) where, at para [53], he said that 'actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure'. In *Antonie v Governing Body, Settlers High School* 2002 (4) SA 738 (C), a 15-year-old Rastafarian girl successfully brought an application in her own name to challenge the school governing body's decision to find her guilty of serious misconduct for wearing her hair in dreadlocks.

wearing the nose stud in defiance of school rules.

Another example is a case called *Centre for Child Law v Minister of Justice and Constitutional Development*.[13] The Centre brought the application in its own interest, on behalf of all 16 and 17-year-old children at risk of being sentenced under the new provisions on minimum sentences, and in the public interest. In the High Court, the Minister had unsuccessfully challenged the centre's legal standing and contended that the issues were purely academic. In the Constitutional Court, the Minister abandoned this aspect of the challenge. Cameron J expressed the view that this was the correct approach. He went on to clarify as follows:

> *Although the Centre did not act on behalf of (or join) any particular child sentenced under the statute as amended, its provisions are clearly intended to have immediate effect on its promulgation. So the prospect of children being sentenced under the challenged provisions was immediate, and the issue anything but abstract or academic. The Centre's stated focus is children's rights, and in this case it has standing to protect them. It was thus entitled to take up the cudgels. To have required the Centre to augment its standing by waiting for a child to be sentenced under the new provisions would, in my view, have been an exercise in needless formalism.*[14]

In the case of *Centre for Child Law v Hoërskool Fochville*,[15] the Supreme Court of Appeal framed this idea of children's standing in terms of the principle of participation - a central principle of the Convention on the Rights of the Child. In that case, a group of children were represented collectively by the Centre for Child Law. The court examined children's standing rights in international and regional law, and paid particular attention to the right of children to participate and to have their views and interests aired and taken seriously. The broad approach of the Constitution and the courts regarding standing in South African constitutional litigation is of enormous value.[16]

2.3 Mootness and ripeness

The constitutional principle of ripeness guards against the court getting involved in a case that is prematurely brought and which might be abstract in nature because it does

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13 2009 (2) SACR 477 (CC).

14 Paragraph [12]. The court added that because a High Court had already made a finding of invalidity on a constitutional issue, it may be incumbent on the court to hear the matter even in a situation where the applicant lacked standing. See further *Lawyers for Human Rights v Minister of Home Affairs 2004* (4) SA 125 (CC).

15 2016 (2) SA 121 (SCA).

16 By contrast, an application to Northern Ireland Court of Appeal brought by the Commissioner for Children to develop the common law to exclude the defence of reasonable chastisement of children was rejected due to lack of standing because she could not be classed as a victim under the UK Human Rights Act (*Northern Ireland Commissioner for Children and Young Peoples' Application* [2009] NICA 10).

not deal with a live issue. Mootness, on the other hand, is a principle aimed at avoiding the court concerning itself with cases that no longer affect the interests of the parties concerned. Both ripeness and mootness are linked to the timing of the case.

With the regard to mootness, in *Masiya v Director of Public Prosecutions, Pretoria*,[17] the court held that whilst it was mindful of the fact that a Bill had been introduced into Parliament which would change the definition of rape to include anal penetration, which was the relief sought in *Masiya*, any further delay would not be in the public interest. The Minister's representatives were not able to say precisely when the law would be passed and put into operation, and the court accordingly made an order broadening the definition of rape to include anal penetration of females.[18] In *AD v DW*,[19] the parties agreed on an order that would pave the way for the adoption of a child in the children's court. Justice Sachs grappled with the question of whether it was in the interests of justice for leave to appeal to be granted once an agreement between the parties about the child at the centre of the dispute had been made an order of court. In his view, although the determination of the best interests of the specific child was no longer a live issue before the court, there were strong reasons for dealing with other issues raised in the application for leave to appeal.[20] Leave to appeal was therefore granted and these issues were dealt with in the judgment.[21]

2.4 Costs orders

Another favourable factor is the approach of the court to costs in constitutional litigation. The general rule is that where the litigation raises genuine constitutional issues, private litigants bringing an application against the state are not at risk of a costs order against them, even if they are unsuccessful.[22] If they are successful, however, they are entitled to costs.[23] This makes it possible for a broader range of public interest litigants, including those who work on children's issues, to approach the courts in order to enforce and advance the rights in the Bill of Rights. Where a case is between two private parties, the rule does not apply and the costs will follow the decision. However, the courts might refuse to make a costs order against a public interest litigant which has been unsuccessful against a private party if there are exceptional circumstances, including the factor of the

17 2007 (5) SA 30 (CC.
18 Paragraphs [77] and [78]. The limitations of the order (that it only related to female victims) have subsequently been overridden by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which provides gender-neutral offence definitions.
19 2008 (3) SA 183 (CC).
20 First, the Supreme Court of Appeal had divided sharply on certain aspects of the case and, secondly, it was in the interests of the many children 'whose future will be at stake in days to come' for further guidance to be given on these disputed issues.
21 Paragraphs [19] and [20].
22 Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC).

'chilling effect' such orders would have on public interest litigation.[24] Litigators bringing cases for children against school governing bodies, for example, should take a cautious approach and be well prepared to argue against a costs order.[25] Even in cases where the respondent is a state entity, it is important to be meticulous in the manner of litigation because the court may depart from the rule on costs orders.[26]

2.5 Jurisdiction

The Constitutional Court has jurisdiction over all constitutional matters and any other matter of general public importance that it accepts for hearing.[27] The court is generally not a court of first instance, and it is only in exceptional cases that an application can be brought directly to the Constitutional Court.[28]

In the normal course, the matter will start out in the High Court, where an order may be sought declaring a legislative provision to be inconsistent with the Constitution and therefore invalid. However, the High Court, or even the Supreme Court of Appeal, making a declaration of constitutional invalidity will not have the last word because s 167(5) of the Constitution requires the Constitutional Court to confirm any order of constitutional invalidity that is made, and that order is of no force or effect until it has been confirmed by the Constitutional Court.[29] The Constitutional Court is a court of appeal and can hear appeals against orders of constitutional invalidity made by any court which come directly to the Constitutional Court without having to go via the Supreme Court of Appeal. Since the Seventeenth Amendment of the Constitution, the court may also hear an appeal of any matter where it grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance.[30]

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23 *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC). Litigation must not be frivolous or reckless, and if it is, the courts may then follow the general rule regarding costs.

24 Du Plessis, Penfold & Brickhill *Constitutional Litigation* (2013) 132.

25 For example, in the High Court matter *Governing Body, Hoërskool Fochville v Centre for Child Law* 2014 (6) SA 561 (GJ), a costs order was made against the Centre for Child Law. The Centre for Child Law appealed on the merits and won, causing the costs order to fall away.

26 This may occur even where litigation was neither reckless nor frivolous. See, for example, *Lawyers for Human Rights v the Minister in the Presidency* 2017 (1) SA 645 (CC) where the Constitutional Court refused leave to appeal a costs order because they disapproved of the manner in which the litigation was pursued, in particular, that the application was brought on an urgent basis six weeks after a 'crackdown operation' (Lawyers for Human Rights wanted to prevent such future operations) and the state was given little time to respond to the papers.

27 Previously, the Constitutional Court was the highest court of appeal for constitutional matters only, while the Supreme Court of Appeal was the highest court for all other matters. The Constitution Seventeenth Amendment Act of 2012 broadened the court's jurisdiction by substituting s 167(3) of the Constitution. It came into operation on 23 August 2013.

28 See Du Plessis, Penfold & Brickhill *Constitutional Litigation* 82–90 for a discussion of examples of cases brought by way of direct access. See further *President of the Republic of South Africa v South African Dental Association* 2015 (4) BCLR 388 (CC) (the court granted direct access, setting aside a legal provision which was promulgated in error).

2.6 The admission and role of the amicus curiae

The role of the *amicus curiae* in South African constitutional litigation is notable. The Superior Court Rules and the Constitutional Court Rules allow for a person (including a juristic person) who has an interest in the matter to be admitted as an *amicus curiae*. The rules envisage all prospective *amici curiae* being given notice of matters where violations of rights are alleged; this is done through the issuing of a written notice that is pinned up on court notice boards.

After first attempting to obtain consent from the parties for the admission, the *amicus* must then make a substantive application, on notice of motion, applying for admission,[31] which will generally be granted if the applicant can show an established interest in the matter and can convince the court that the issues to be canvassed in the amicus' submissions will be useful to the court and will be different from those of other parties.

The court may give direction for the amicus to provide written or oral submissions. As a matter of practice, where a court admits an *amicus curiae*, it usually permits oral as well as written submissions.

Although the *amicus curiae* is not a party to the proceedings,[32] it is recognised as a litigant, and all court papers must be served on the amicus by the other litigants. The role of the *amicus* in the constitutional era is broader than the common-law conception, which was limited to the courts inviting *amici* to assist the court or to assist a litigant, a role in which neutrality was considered to be desirable. Since the advent of the Constitution the *amicus* curiae can choose a side, and can urge a particular outcome, though it cannot raise a new cause of action.[33] *Amici curiae* have played a significant role in providing information and argument regarding law and facts, and this has been very evident in the protection of children's constitutional rights[34] - as it has in many public interest matters. In the case of

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29 Interim relief can be granted in appropriate cases. Cross-appeals of declarations of invalidity are also permitted and go directly from the High Court to the Constitutional Court.

30 Section 167(3)(b)(ii), which was inserted by the Constitution Seventeenth Amendment Act of 2012.

31 Although rule 16 of the High Court Rules, rule 16A of the Supreme Court of Appeal Rules and rule 10 of the Constitutional Court Rules imply that if the parties have consented the court will automatically admit the *amicus*, in practice the courts require a formal application to be made, whether consent has been granted or not. Rules 16 and 16A also require that when any person is raising a constitutional issue, notice must be given to the registrar, who will stamp it and cause it to be displayed on the court notice board for 20 days. Rule 31 of the Constitutional Court Rules gives guidance on the admissibility of documents canvassing factual material, which is also relevant to the *amicus curiae*. See further Murray 'Litigating in the public interest: intervention and the amicus curiae' 1994 SAJHR 240; Klaaren 'Becoming friendly with the Constitutional Court: an interpretation of the court's amicus curiae rules' 1995 SAJHR 499; Budlender 'Amicus curiae' in Woolman et al (eds) *Constitutional Law of South Africa* (2006) chap 8.

32 *Hoffman v South African Airways* 2001 (1) SA 1 (CC) para [63].

33 *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC).

Children's Institute v Presiding Officer, Children's Court, Krugersdorp,[35] the Constitutional Court found that rule 16A of the Uniform Rules of Court is not a bar to *amici curiae* adducing evidence in the High Court, and that the High Court can use its discretion in deciding what evidence it will permit.

2.7 Application of international and regional law

Section 39(1) states that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It further provides that a court undertaking such an interpretation **must consider international law and may consider foreign law**. The court will obviously look at the text in the Bill of Rights as well as the context,[36] but will be aided in interpretation by the application of values.[37] The fact that the courts must consider international law has provided an important opportunity to interpret the provisions of Bill of Rights within the broader context of important instruments,[38] such as the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and other relevant instruments. A perusal of the specific wording of these international sources by the court may lead to positive interpretations. For example, in *S v M*[39] the Constitutional Court noted that the phrase 'a child's best interests are of paramount

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34 In S v M 2008 (3) SA 232 (CC), the amicus' submissions set out the effects of imprisonment of primary caregivers on their children as evidenced by local and international research, drew attention to an important provision in the African Charter on the Rights and Welfare of the Child that had direct relevance to the case, and made legal arguments regarding the application of the best interests of the child. In AD v DW 2008 (3) SA 183 (CC), the Centre for Child Law was the only other litigant besides the applicant, as the respondents had given notice that they would abide, and the Department of Social Development only became involved at the stage of the Constitutional Court hearing. The Centre for Child Law played the role of providing a historical context, an international law perspective, as well as aiming to outline the practice of inter-country adoption as it was being carried out in South Africa at the time. Other examples of Constitutional Court cases involving children's rights in which the submissions of the amicus had a significant impact on the judgment include: Johncom Media Investments Ltd v M 2009 (4) SA 7 (CC); Governing Body of the Juma Musjid Primary School v Essay NO 2011 (8) BCLR 761 (CC); Van der Burg v National Director of Public Prosecutions 2012 (2) SACR 331 (CC); MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School 2013 (6) SA 582 (CC); Coughlan NO v Road Accident Fund 2015 (4) SA 1 (CC); J v National Director of Public Prosecutions 2014 (2) SACR 1 (CC); AB v Minister of Social Development 2016 (2) SA 27 (GP).

35 2013 (2) SA 620 (CC).

36 The context may be narrow (such as considering other words in the text) but may also be broader (such as the context of the facts of the specific case) or very broad (such as considering the history of the country and the need to transform).

37 Consideration of values assists the courts in deciding what the purpose of the right is, which, in turn, assists them in determining the scope of the right.

38 For a discussion on the use of international and regional law, see Skelton 'The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' 2009 AHRLJ 482; Ngidi 'The role of international law in the development of children's rights in South Africa: a children's rights litigator's perspective' in Killander (ed) International Law and Domestic Human Rights Litigation in Africa (2010) 173–191; Skelton 'South Africa' in Liefaard & Doek (eds) Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence (2015) 13–30.

39 2008 (3) SA 232 (CC).

importance'[40] is stronger than the language used in the UN Convention on the Rights of the Child or the African Charter on the Rights and Welfare of the Child, and this led the court to describe the wording in s 28(2) as being 'emphatic'.[41]

The case of *C v Department of Health and Social Development*.[42] This case concerned the separation of children from their parents due to concerns that they were in need of care and protection. The factual context was that the children were removed from their parents, who were working or begging at the side of the road. The parents approached the High Court for relief and their children were returned to them. They further challenged the law as being unconstitutional because it did not allow for automatic review of decisions by social workers or police to remove children from their parents. They based their case in part on art 9 of the UN Convention on the Rights of the Child and art 19(1) of the African Charter on the Rights and Welfare of the Child, which provide that a child should not be separated from his or her parents unless necessary for the best interests of the child and **subject to judicial review**, with an opportunity to participate in the proceedings. The majority of the Constitutional Court upheld the challenge and found the law was unconstitutional in so far as it failed to provide judicial review of decisions to remove a child from his or her parents. The majority also found that the right of automatic review was intrinsic to a fair process which allowed children's best interests to be properly considered.

The courts also pay attention to **general comments such as those issued by the UN Committee on the Rights of the Child**. For example, in Director of Public Prosecutions v Minister of Justice,[43] the court quoted General Comments No 3 and No 5 and relied extensively on the UN Economic and Social Council's Guidelines on Justice Matters involving Child Victims and Witnesses of Crime.

In the 2014 case of *J v National Director of Public Prosecutions*,[44] the Constitutional Court had to consider the constitutionality of a section of the Sexual Offences Act which required that the details of all sex offenders, including children, be placed automatically on the National Register for Sex Offenders (with no opportunity to make argument why this should not occur). The court pointed to the UN Committee on the Rights of the Child's **General Comments No 10 and No 12**, in particular the requirement that there must be **participation** at every stage of the justice process, and the law was declared unconstitutional insofar as it related to child sex offenders.

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40 Section 28(2) of the Constitution.
41 Paragraph [25].
42 2012 (2) SA 208 (CC).
43 2009 2 SACR 130 (CC).
44 2014 (2) SACR 1 (CC) para [40].

2.8 Exploring the content of rights

When the court is dealing with the infringement of a particular right in the Bill of Rights, the exact meaning of the right has to be explored in order to determine if the impugned law or conduct is inconsistent with the constitutional right concerned. In *Christian Education South Africa v Minister of Education*,[45] the applicants argued that the law prohibiting corporal punishment in schools limited their rights to freedom of religion in terms of s 15. Justice Albie Sachs found that although the law did, on the face of it, limit the religious freedom of parents, that limitation was reasonable and justifiable - given that on the other side of the equation, the court had to weigh children's best interests and their right to be protected from degrading treatment, and violence from public or private sources.

Section 39(2) provides that when interpreting any legislation and when developing the common law or customary law, a court must promote the spirit, purport and objects of the Bill of Rights. The principle of avoidance means that a dispute can be resolved through the application of ordinary legal principles, allowing for an 'indirect application' of the Bill of Rights. The court may, instead of declaring law or conduct to be invalid because it does not conform to the Constitution, interpret the law as far as possible to reflect a constitutional meaning without it becoming unduly strained. This approach is not limited to common law and is also used to interpret statutes.[46] The general rule is that a constitutionally compliant interpretation must be attempted first, and only if this is not achievable can the court then go on to consider constitutional invalidity.[47]

The s 39(2) approach was typified in the case of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.[48] The High Court[49] had struck down several legal provisions pertaining to children giving evidence as victims and witnesses in criminal matters and read in certain words to cure the defect. None of the High Court's findings of invalidity was confirmed by the Constitutional Court. Instead, the Constitutional Court engaged in a constitutional reading of the provisions and found that they were capable of being read in a manner that accorded with the spirit, purport

45 2000 (4) SA 757 (CC).

46 Chaskalson, Marcus & Bishop 'Constitutional litigation' in Woolman et al *Constitutional Law of South Africa* (2007) 3-1.

47 Woolman (in Woolman & Botha 'Application' in Woolman et al Constitutional Law of South Africa (2005) 31-89) challenges this perception. He explains that because s 39(2) (unlike its precursors ss 35(2) and 35(3) of the interim Constitution) does not distinguish between indirect application and reading down, '[c]ourts have erroneously assumed that when courts are asked to read legislation in light of the spirit, purport and object of the Bill of Rights, they are *always* charged with the task of attempting to read legislation so that it conforms to the demands of a particular right or set of rights. But this cannot be so.' (Emphasis in the original.)

48 2009 (2) SACR 130 (CC).

49 *S v Mokoena; S v Phaswane* 2008 (2) SACR 216 (T).

and objects of the Bill of Rights. According to Justice Ngcobo this requirement, and the proper approach thereto in interpreting legislation, is often overlooked by courts.[50] With regard to the case at hand, the court held that the provisions declared to be invalid by the High Court must be construed consistently with s 28(2) and, where possible, interpreted so as to exclude a construction that would be inconsistent with the principle of the best interests of the child.[51]

2.9 Limitation of rights

All rights in the Bill of Rights can be limited. If the limitation or the infringement is found to be reasonable and justifiable then it is not unconstitutional. Section 36 of the Bill of Rights sets out the test for determining whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. A valid limitation of a right in the Bill of Rights can only be done through 'a law of general application'. A two-stage approach is used in constitutional limitations analysis. In cases where there is direct application of the Constitution, the court considers two issues. The first is whether a right in the Bill of Rights has been limited or infringed. If the answer to the first inquiry is that a right has been limited or infringed, then the court moves on to the second issue: is the limitation reasonable and justifiable? The factors to be taken into account when deciding this are set out in s 36 as follows:

(a) the nature of the right;
(b) the importance and purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.[52]

2.10 Remedies

Remedy pertains to the resolution of a problem that has been brought before a court. The Constitution provides that a court may grant '**appropriate relief' which must be 'just and equitable'**. The Constitutional Court has indicated that a public-law remedy not only grants relief to the litigant, but also vindicates the Bill of Rights and aims to prevent future infringements.

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50 The court (para [84]) described the proper approach to be taken as follows: legislation should be read, as far as is possible, to promote values of human dignity, equality and freedom (para [83]); where legislation is capable of more than one plausible construction, the one which brings the legislation within constitutional bounds must be preferred.

51 Paragraph [84].

52 See Currie & De Waal The Bill of Rights Handbook 6 ed (2013) 162–172 for a very useful applied summary of the limitations process.

If a particular law or conduct has been found to be invalid because it limits a right in the Bill of Rights (and the limitation of the right has been found not to be reasonable and justifiable in terms of s 36) then an **order of invalidity** is required. The declaration of law or conduct to be invalid may have far-reaching consequences, so the Constitution allows for various measures to manage the impact of constitutional invalidity. The first of these is 'severance'. This means that the court will declare invalid only those parts of the law that cause the infringement - sometimes the wording allows for this to be done in a neat manner by sections being struck out, but sometimes it is necessary to sever the unconstitutional provisions from within a section, whilst leaving the remainder of the section on the statute book. An example of this arises from the order in *Centre for Child Law v Minister of Justice and Constitutional Development.*[53] The Constitutional Court's order had to declare the minimum sentences legislation invalid, but not in its entirety. The case confined itself to the application of minimum sentences to 16 and 17-year-olds.[54] **The court therefore declared the impugned provisions invalid 'to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence'**, which allowed the provisions to continue to apply to adult offenders.[55]

Another way in which the court can manage the effects of a declaration of invalidity is by **reading words into the text**.[56] One of the most extensive reading-in remedies that the court has granted was in the case of *C v Department of Health and Social Development, Gauteng*[57] where the court found the Children's Act unconstitutional because it did not provide for a court to review the removal of a child by authorities. The court read in various sections to allow for judicial review to take place on the next court day after the child's removal.

However, the court will generally not prefer an approach that has multiple readings in and excisions to the extent that what remains is incoherent. In such cases, it would be better to apply for **the order of invalidity to be suspended to give the legislature time to mend the problem.**

A suspension of an order of invalidity is also appropriate where there is a need to consult or to undertake a broader process of law reform. The court sets time frames in this regard.[58] In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional*

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53 2009 (2) SACR 477 (CC).
54 Children below the age of 16 years were excluded by the law from the operation of the minimum sentencing provisions.
55 Paragraph [78], para 1(a) of the order.
56 This is also referred to as 'reading down'.
57 2012 (2) SA 208 (CC).
58 The court sometimes will allow extensions of the time frames set, but may also grant interim relief; see, for example, *Minister of Justice and Constitutional Development v Nyathi* 2010 (4) SA 567 (CC).

Development[59] the court was asked strike down sections of the Sexual Offences Act which criminalised consensual sexual activity between adolescents. The court found that it was too complex to achieve justice through a reading in and referred the matter back to Parliament for an amendment of the Sexual Offences Act within 18 months.[60]

Where the court suspends an order of invalidity, it very often couples the suspension order with an **interim regime** which applies until the legislative amendments have been effected. In *Teddy Bear Clinic*, for example, the court ordered that no child between 12 and 16 years could be charged with an offence related to consensual sexual interactions.

Generally, where a court makes an order of constitutional invalidity, its effect is retrospective, meaning that the effect goes back to when the law first came into operation. However, the court frequently limits the disruptive effect of this by making its orders of invalidity non-retrospective. In *J v National Director of Public Prosecutions*,[61] the court declined to give an order urged by the amici curiae that the names of children already on the sex offender's register should be expunged and that there should be a moratorium on any further registrations pending the law reform. It instead directed the respondents to provide information about the particulars of the children who were on the (confidential) register so that they could be provided with legal advice and assistance. In the judgment, the court advised Parliament to consider a provision to allow child offenders to motivate for the removal of their names from the register.[62]

In addition to (or instead of) the remedy of a declaration of invalidity, the court may also grant a declaration of rights. This may be useful as a mechanism because it allows the courts to clarify the right but leaves the decision on how to realise the right to another arm of the state.[63]

Interdictory relief is also available as a constitutional remedy. Interdicts may prohibit certain conduct or may order certain things to be done. The relief may be temporary[64]

59 2014 (2) SA 168 (CC).

60 *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC) followed soon afterwards, and in this case, too, the court suspended the order of invalidity, matching the time frame to that of the *Teddy Bear Clinic* case as it was the same Act that was to be amended. Parliament brought a last-minute application for an extension of time, attracting criticism (and a costs order) from the court (*Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* 2015 (10) BCLR 1129 (CC)). The extension was granted and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 was passed and came into operation in July 2015.

61 2014 (2) SACR 1 (CC).

62 Hansungule ('Protecting child offenders' rights: testing the constitutionality of the National Register for Sex Offenders' 2014 SA Crime Quarterly 23) criticises this remedy and suggests that the court should have set out a structured order that would address the issue of the child offenders already on the register and those at risk of going on the register in the period of suspension.

63 Du Plessis, Penfold and Brickhill *Constitutional Litigation* (2013) 196.

64 This option is sometimes used by the High Court to provide interim relief pending the confirmation of an order of constitutional invalidity by that court.

or may be granted as part of a final order. A **new remedy that has emerged in the Bill of Rights litigation era is that of a structural interdict, also referred to as a supervisory order**. This directs that the infringement of rights must be put right under the supervision of the court.[65] In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*,[66] the court was very concerned about a lack of equipment - such as closed circuit television, so that children could testify in a separate room - as well as about the limited availability of trained intermediaries to assist with children's testimony. The Constitutional Court's order thus included a structural interdict, supervised by the court, which required the Minister to furnish information regarding the lack of court equipment and staff, and to indicate plans towards rectification of the shortfall. The Minister was ordered to serve his report on the other parties and *amici curiae*, who were permitted to respond. This supervisory order was more limited than some because the court did not make an order for the services to be provided under its supervision. However, the information provided was effectively used by the Centre for Child Law in a follow-up study five years after the order.[67] Supervisory orders have been increasingly used at the High Court level where the government has repeatedly failed to deliver on availability of reform schools, conditions in schools of industry, school furniture and textbooks.[68]

Monetary awards for damages are sometimes granted in cases that involve bill of rights issues. A good example is *MR v Minister of Safety and Security*,[69] which was a claim for damages arising from the arrest and detention of a 15-year-old girl. The case had been dismissed by the court a quo on the basis that the arrest and detention were unlawful. On appeal, the Constitutional Court found that police officials arresting children must consider their best interests and only detain as a last resort. The court thus found that the Minister of Police was liable to pay the damages. The court was inclined to make the order for damages itself, and gave the parties time to decide on the quantum. As they failed to do so, the court remitted the matter back to the High Court for determination of the amount of damages to be paid.[70]

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65 Roach & Budlender ('Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?' 2005 SALJ 325) provide a helpful analysis with regard to when it is appropriate for a court to grant structural interdicts: that past proven non-compliance is not a prerequisite (e.g. Sibiya v Director of Public Prosecutions, Johannesburg 2005 (5) SA 315 (CC)); that structural interdicts are suitable where the consequences of even a good-faith failure to comply with a court are so serious that the court should be at pains to ensure effective compliance; and that a structural interdict may be necessary to ensure compliance with a court order where the order is so general that it is difficult to define with precision what the government is required to do—either because of the general nature of the right or because the court is anxious to leave the state with latitude regarding compliance.

66 2009 (2) SACR 130 (CC).

67 Centre for Child Law Making *Room: Facilitating the Testimony of Child Witnesses and Victims* (2015).

68 *S v Z and 23 Similar Cases* 2004 (2) SACR 410 (E); *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T); *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM); Section 27 v Minister of Education 2013 (2) SA 40 (GNP).

69 2016 (2) SACR 540 (CC).

70 Ibid paras 72-74.

The Constitutional Court has been cautious in its approach to constitutional damages, applying this remedy only where no common-law form of damages is available to the litigant. The principles it developed in *Fose v Minister of Safety and Security*[71] are that constitutional damages would not, as a general rule, be paid in addition to common-law damages, and that even where common-law damages were not applicable, this did not automatically mean that constitutional damages would be awarded for a violation of human rights. The courts also paid out constitutional damages in cases relating to non-payment of social grants, with back-payment and interest.[72]

Where court orders are not carried out, the affected party can bring an application for contempt of court. There is an ongoing debate about whether specific officials can be held personally accountable for failure to carry out orders.[73]

3 INTERPRETING CHILDREN'S RIGHTS

3.1 Protection and autonomy

Two underlying and inter-linked themes in children's rights are, first, the need for protection and, secondly, the recognition of autonomy. Young children are highly dependent due to their lack of capacity and general vulnerability and this means that protection of children is a priority during the early years. Parents and other caregivers play an important role in guiding and socialising their children as well as in providing the first line of support for them. However, children are separate human beings and individual rights bearers, so they should not be seen as mere extensions of their parents.[74] As they grow older, their capacity gradually develops. The Convention on the Rights of the Child recognises this as 'evolving capacity'. The need for protection of their rights continues throughout childhood and they continue to need assistance with the achievement of their rights due to the fact that their capacity is not fully developed until adulthood. However, parental responsibilities and rights diminish as the child grows older, and the effect of this is that as children grow into adolescents, they are likely to exercise the right to choose their religion, express their views, aspire to more personal privacy and make decisions about their relationships with others. The ongoing need for protection and the concurrent development of autonomy creates a mild tension in children's rights, though both approaches are compatible if it is understood that the need for protection of rights is not dislodged by children's gradually developing autonomy.

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71 2001 (4) SA 938 (CC).
72 Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237 (CC).
73 See *Currie & De Waal Bill of Rights Handbook* 205-206 and the cases discussed there.
74 Skelton 'Children' in Currie & De Waal Bill of Rights Handbook (5th ed) 598, 601. This idea has been considerably strengthened by the dicta of Judge Sachs in S v M 2008 (3) SA 232 (CC) para [18]: 'If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them'.

The Constitutional Court has given recognition to autonomy by encouraging children who are of sufficient age and maturity to participate in litigation - in the cases of *Christian Education South Africa v Minister of Education*[75] and *MEC for Education, KwaZulu-Natal v Pillay*[76] (as described above in the discussion on 'standing'). In addition, in *Christian Lawyers Association v Minister of Health*,[77] the High Court was concerned with the constitutionality of a law that permits girls below the age of 18 years to choose whether to terminate their pregnancies, provided that they have the intellectual and emotional capacity for informed consent. This case has been described as having been 'animated' by the concept of autonomy.[78] The court found that the Choice on Termination of Pregnancy Act 92 of 1996, which was based on the girl's capacity to decide rather than a specific age, promoted the best interests of the child because it was flexible and recognised that decisions taken to terminate pregnancy would depend on her intellectual, psychological and emotional maturity rather than her chronological age.[79] In *Centre for Child Law v Minister of Justice and Constitutional Development*,[80] a deliberate strategic choice was made not to rely on brain science evidence used in the United States Supreme Court cases on the death penalty and life imprisonment because South African courts had long understood, even prior to the Constitution, that children are different and that society cannot ascribe full moral culpability to them. This proved correct, and the Constitutional Court declared minimum sentences unconstitutional for those who are below the age of 18 at the time of the crime. In the subsequent case of *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*,[81] the autonomy argument that adolescents deserve privacy and dignity in their nascent sexual decision-making also succeeded in the Constitutional Court. This is not a contradiction because a theory of children's rights must be flexible enough to encompass protection of children against harsh punishment when they commit crimes, while also allowing for their evolving capacities to be recognised so that they can begin to make decisions as they move through adolescence.[82]

3.2 Section 28(2): best interests of the child

Section 28(2) provides that '[a] child's best interests are of paramount importance in every matter concerning the child'. This wording is derived from, but is more emphatic

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75 2000 (4) SA 757 (CC).
76 2008 (1) SA 474 (CC).
77 2005 (1) SA 509 (T) (2005 case).
78 Friedman, Pantazis & Skelton 'Children's Rights' in Woolman et al Constitutional Law of South Africa (2009) 47-3.
79 Christian Lawyers Association 2005 (1) SA 509 (T) 528.
80 2009 (6) SA 632 (CC).
81 2014 (2) SA 168 (CC).
82 Skelton 'Balancing autonomy and protection in children's rights: a South African account' 2016 Temple Law Review 887 at 903.

than, similar provisions contained in international law.[83] The best-interests principle was established in South African law in the 1940s,[84] but its influence did not previously extend beyond the ambit of family law and welfare proceedings. It is clear that s 28(2), following the lead of the international instruments, intends to expand the meaning and application of best interests to all aspects of the law that affect children. Section 28(2) has indeed become a key provision in Bill of Rights jurisprudence. It has helped to develop the meaning of some of the other rights in the Bill of Rights. It has also been used to determine the ambit, and to limit, other competing rights. Section 28(2) should not be regarded merely as a principle that helps interpretation of other rights. It is a right in itself. Despite the emphatic words 'of paramount importance', it does not serve as a trump to automatically override other rights, and as a right in a non-hierarchical system of rights, is itself capable of being limited. This section of the paper will now explore some of the important findings that the Constitutional Court has made regarding best interests.

In the case of *Minister of Welfare and Population Development v Fitzpatrick*,[85] the court declared s 18(4)(f) of the Child Care Act[86] to be invalid because it prohibited the adoption of a South African child by non-citizens. The court found that the law was too restrictive because it limited the best interests of the child, which would sometimes be achieved through being adopted by non-South African parents. As Judge Goldstone pointed out in *Fitzpatrick*, s 28(1) is not exhaustive of children's rights:[87]

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

This was the Constitutional Court's first clear enunciation of, first, the fact that s 28(2) does not only refer to the rights enumerated in s 28(1) but also that s 28(2) is a right, and not just a guiding principle. As much as s 28(2) is a self-standing right, it also appears alongside and strengthens other rights. Thus, the Constitutional Court has drawn best interests of the child into cases pertaining to the right to family or parental care;[88] international child abduction;[89] child pornography;[90] the right to housing or shelter and eviction;[91] adoption of children by unmarried fathers,[92] by same-sex couples[93] and by foreign couples;[94] inheritance under customary law;[95] the right to access health care

83 Article 3 of the UN Convention on the Rights of the Child and art 4 of the African Charter on the Rights and Welfare of the Child.
84 *Fletcher v Fletcher* 1948 (1) SA 130 (A).
85 2000 (3) SA 422 (CC).
86 74 of 1983(now repealed).
87 Paragraph [17].

in the form of preventive anti-retroviral medicines;[96] the right to social assistance;[97] the right of children to privacy and dignity;[98] the testimony of child victims and witnesses;[99] the right not to be evicted from a public school on private property without consideration of best interests;[100] the right of children to have their removal from families reviewed by a court;[101] the right of children not to be treated as criminals for engaging in consensual sexual activity;[102] the right of child sex offenders not to be automatically placed on the sex offenders register; and the rights of children not to be detained except as a measure of last resort.[103]

In the case of *AD v DW*,[104] the court had to weigh up the best interests of the child against other important international-law principles pertaining to inter-country adoption. In the Supreme Court of Appeal,[105] the majority judgment had given substantial weight to the principle of subsidiarity, which is a rule that requires inter-country adoption to be subsidiary to domestic solutions - in practice it requires that sufficient efforts must be made to find a suitable family placement for a child in his or her country of origin before proceeding with inter-country adoption. This principle had not been followed in the AD v DW case. The Constitutional Court found that, important as the subsidiarity principle

88 Bannatyne v Bannantyne 2003 (2) SA 363 (CC) - the court held that the best-interests requirement obliged parents to properly care for their children, but also obliged the state to create the necessary legal and administrative framework to ensure appropriate care (in this case related to the payment of maintenance). See also S v M 2008 (3) SA 232 (CC) in which the court considered the best-interests principle together with the right to family and parental care in the situation where the children might be deprived of such care if their primary caregiver was imprisoned. The court found (at para [30]) that s 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect on children as far as it can.'

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

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

91 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC). *Van der Burg v National Director of Public Prosecutions* 2012 (2) SACR 331 (CC).

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

93 *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).

94 *AD v DW* 2008 (3) SA 183 (CC) where best interests was the overriding factor in a bid by a couple from the United States to adopt a South African child.

95 *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC).

96 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

97 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC); Coughlan NO v Road Accident Fund 2015 (4) SA 1 (CC).

98 Johncom Media Investments Ltd v M 2009 (4) SA 7 (CC).

99 *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC).

100 *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC).

101 *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC).

102 *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC).

103 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC); MR v Minister of Safety and Security 2016 (2) SACR 540 (CC).

104 2008 (3) SA 183 (CC).

105 *De Gree v Webb* 2007 (5) SA 184 (SCA).

was, it was of less importance than the best interests of the child, particularly as the child was almost three years of age and her adoption by anyone other than the applicants seemed unlikely. The court found that the best interests of each child must be examined on an individual basis and not in the abstract. Justice Sachs stressed that **'child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of each case'**.[106]

3.3 Limitation of rights and the paramountcy principle

In the High Court matter of *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*,[107] the court held that the ban on pornography did not contravene the applicant's rights to privacy and freedom of expression because of the paramountcy of the best interests of the child, which limited the ambit of that right. The Constitutional Court[108] did not allow best interests to limit the ambit of the rights to freedom of expression, and found instead that the laws banning child pornography did infringe those rights. However, the court applied the best interests principle to justify the limitation of the rights. Thus, to summarise, the law banning child pornography limits rights to privacy and freedom of expression, but this limitation is justifiable due to the importance of the purpose of protecting children's best interests. The law is therefore not unconstitutional.

It was also in *De Reuck* that the Constitutional Court made it clear that the word 'paramount' in s 28(2) did not mean that children's best interests could never be limited by other rights. The court pointed out that the general approach it had adopted was that constitutional rights are 'mutually interrelated and interdependent and form a single constitutional value system'. In keeping with this approach, the court stated that '[s] 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36'. This laid to rest the idea that, because of the paramountcy principle, children's best interests could act as a trump, always overriding other rights.

This left uncertainty about the exact meaning of 'paramount importance'. The Constitutional Court's judgment in *S v M*[109] took up this issue. The case arose in the context of a criminal appeal. A single mother of three children was facing a prison term for fraud, albeit only a short period linked to a provision allowing release into the community under correctional supervision by the prison commissioner.[110] The application for leave

106 *AD v DW* para [55]. In the same paragraph, the court further stated that technical matters, such as which party bears the onus of proof, should play a diminished role in matters where the courts are guarding the best interests of a child.
107 2003 (3) SA 389 (W).
108 2004 (1) SA 406 (CC).
110 2008 (3) SA 232 (CC).

to appeal was premised on the claim that the sentencing of primary caregivers should take into account the effects of imprisonment on their children. The competing rights, therefore, were the rights of children to have their entitlement to parental care, together with their best interests, considered and protected, on the one hand, and the rights of the community to be protected from the effects of crime, on the other.

In attempting to define meaning in the words 'paramount importance', Justice Sachs commented that the very expansiveness of the paramountcy principle appears to promise everything but deliver little in particular.[111] The best-interests concept is indeterminate, resulting in professionals and judges having different understandings of what it means. Justice Sachs went on to say that, whilst accepting this problem of indeterminancy, the court recognised that it is precisely the contextual nature and inherent flexibility of s 28 that constitutes the source of its strength. The determination of best interests will depend on the circumstances of each case, and this is not a weakness but a strength. A truly child-centred approach requires an in-depth consideration of the needs and rights of the particular child in the 'precise real-life situation' he or she is in. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child.[112]

The process of weighing up the best interests of the child was spelt out in *S v M*, building on the previous jurisprudence.[113] A more difficult question is establishing what Justice Sachs refers to as 'an operational thrust for the paramountcy principle'. Writing elsewhere, I have observed that *S v M* went further than any previous judgment in explaining paramountcy, though it still defines the principle more by stating what it is not, rather than what it is.[114] It is not an 'overbearing and unrealistic trump',[115] it cannot be interpreted 'to mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations'. Justice Sachs concludes that 'the fact that the best interests of the child are paramount does not mean that they are absolute'.[116] To acknowledge all of these realities is important because if the best-interests principle is spread 'too thin' it risks becoming devoid of meaning instead of promoting the rights of children as was intended.[117]

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111 A sentence in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977. 112

112 This idea was first articulated in *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) para [18], and the court has restated this position subsequent to S v M in the judgment of AD v DW 2008 (3) SA 183 (CC) para [55].

113 *Fitzpatrick; De Reuck* (2004 (1) SA 406 (CC)); *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

114 Skelton 'Severing the umbilical cord: a subtle jurisprudential shift regarding children and their primary caregivers' 2008 *Constitutional Court Review* 351.

115 Paragraph [26].

116 Ibid.

117 Paragraph [25].

The judgment concludes that sentencing officers should pay appropriate attention to the children of a primary caregiver and take reasonable steps to minimise damage. On paramountcy, the court states as follows:

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

Centre for Child Law v Minister of Justice and Constitutional Development[119] adds a further insight in this regard. Justice Cameron made the point that the constitutional injunction that a 'child's best interests are of paramount importance in every matter concerning the child' does not entirely preclude sending child offenders to prison, though this must always be done as a measure of last resort. According to Justice Cameron, paramountcy means that 'the child's interests are "more important than anything else", but not that everything else is unimportant'.[120] In *J v National Director of Public Prosecutions*,[121] the court found that s 28(2) (best interests of the child) is the correct framework for analysing the child offender's rights, and the court expressly points to General Comment No 12, which enjoins state parties to ensure that children's best interests are upheld at all stages of the justice process. The order declares the impugned provision 'invalid to the extent that it unjustifiably limits the right of child sex offenders to have their best interests considered of paramount importance'. In *MR v Minister of Safety and Security*,[122] the court found that when a police official is considering arresting a child, he or she must do so cognisant of the child's best interests.

One critique that may be levelled at the Court is a tendency to put everything into the 'best interests' basket, it is important for the court to articulate specific rights. I prefer the judgments where the court is very specific about the rights that are breached. For example, in the minimum sentences case, the court found that the impugned provisions breaches the young offender's rights in terms of s 28(1)(g) (detention as a measure of law resort and for the shortest appropriate period of time). Judge Cameron had the following to say regarding why children should be treated differently from adults:

> *We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to*

118 Paragraph [42].
119 2009 (2) SACR 477 (CC).
120 *Centre for Child Law v Minister of Justice and Constitutional Development* para [29].
121 2014 (2) SACR 1 (CC).
122 2016 (2) SACR 540 (CC).

error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.[123]

The court went on to acknowledge that children can and do commit very serious crimes, and that the legislator has legitimate concerns about violent crimes committed by under 18s. The court pointed out that the Constitution does not prohibit Parliament from dealing effectively with such offenders - the fact that detention must be used only as a last resort in itself implies that imprisonment is sometimes necessary. However, the Bill of Rights mitigates the circumstances in which such imprisonment can happen - it must be a last (not first or intermediate) resort and it must be for the shortest appropriate period.

If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time.[124]

4 CONCLUSION

A Bill of Rights is a first crucial step in articulating a rights framework. But it is clear that without purposive interpretation by the courts, the rights in a Bill of Rights can remain unfulfilled. The case law referred to in this paper demonstrates a commitment by the South African courts towards interpreting and applying these paper rights to the real-life situation of children's everyday reality. The approach to children in litigation encompasses both the need to protect children and to advance their rights. The South African courts have begun to develop an understanding of children's autonomy, but tend to rely on best interests where more specific rights also apply. The broader framework of international law and regional law, which our courts are obliged to consider when interpreting rights in the Bill of Rights, provides a rich source of information for the guidance of interpretation. South Africa's Bill of Rights has proven to be an enabling platform for the realisation of children's rights.

123 Paragraphs [26]–[28].
124 Paragraph [31].