# 33

## Children’s Rights

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33.1 INTRODUCTION

The provisions of s 30 of the Constitution of the Republic of South Africa Act 200 of 1993 derive from a number of international instruments, of which the following are the most important: the Universal Declaration of Human Rights (1948); the European Convention on Human Rights (1950); the United Nations Declaration of the Rights of the Child (1959); the European Social Charter (1961); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the American Convention on Human Rights (1969); the African Charter on Human and Peoples' Rights (1981); the African Charter on the Rights and Welfare of the Child (1990); and, pre-eminently, the United Nations Convention on the Rights of the Child (1989).  

In common law the key determinant of judicial decisions in matters affecting children is the children’s best interests. This standard is constitutionalized in s 30(3). The common-law standard has been criticized as being open-ended and indeterminate: ‘The choice is inherently value-laden; all too often there is no consensus about what values should inform this choice.’  

But the various international instruments described above are helpful in supplying these values. The best interests of children are paramount in s 30. They would, for example, trump parental rights, subject of course to limitation under s 33.

33.2 LEGAL IDENTITY

One reason why the right to a name is important to a child is because s 9(6) of the Births and Deaths Registration Act 51 of 1992 provides that ‘[n]o person’s birth shall be registered unless a forename and a surname have been assigned to him’.

Azhar Cachalia et al4 assert that the right to a name includes the right to have one’s birth registered by the state ‘[g]iven that the right to a name is associated with the right to have that name registered’. This position is supported by art 7 of the Convention on the Rights of the Child and art 24(2) of the International Covenant on Civil and Political Rights, which require registration of birth.5


3 The importance of expressly protecting children’s rights is demonstrated by the dismal showing of the US Supreme Court on the subject (Homer H Clark Jr ‘Children and the Constitution’ (1992) University of Illinois LR 1). ‘[W]hat has emerged in the Court’s treatment of children is a good faith parental or state official standard. In accordance with this standard, discretion is left to the family and others acting parens patriae and, barring the extreme of abuse and neglect, no one is in the position to second guess such discretion’ (Roger J R Levesque ‘International Children’s Rights Grow Up: Implications for American Jurisprudence and Domestic Policy’ (1994) 24 California Western International LJ 193 at 208). See also Suzan Gluck Mezey ‘Constitutional Adjudication of Children’s Rights in the United States Supreme Court, 1953–92’ (1993) 27 Family Law Quarterly 307.


The child’s right to nationality is indistinguishable from its right to citizenship, since the effect of s 5 of the interim Constitution is to abolish the old distinction between nationality and citizenship. Section 5(3) states that a South African citizen shall ‘be entitled to enjoy all rights, privileges and benefits of South African citizenship’.

‘It is clear that the rights of “citizenship” in this provision are intended to include the rights of citizens abroad, i.e. the rights attached to nationality.’

The right to nationality is recognized in several international documents. The chief concern of these provisions is to reduce statelessness, which arises through differences in states’ nationality laws and the loss of a nationality without the acquisition of another. The general principle of these provisions is given detailed effect in a number of treaties, of which the United Nations Convention on the Reduction of Statelessness (1954) is the most important.

‘The general aim of international initiatives in this area has been to ensure that any restrictive rule regarding citizenship be made inoperative if it would have the effect of rendering a child stateless.’

The question is whether s 30(1)(a) of the interim Constitution, in accordance with this aim, ‘imposes obligations upon the state to grant its own nationality retrospectively upon a stateless child who would otherwise not be regarded as a national’. The answer may lie in the differences in wording of the South African and some of the international provisions. The Convention on the Rights of the Child and the International Covenant on Civil and Political Rights state that every child has ‘the right to acquire a nationality’ (emphasis added). This implies ‘that a child merely possesses a right to be considered eligible for the acquisition of a nationality upon satisfaction of domestic law requirements’. Article 7(2) of the Convention on the Rights of the Child further provides that ‘States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field’. Against this, the South African provision grants a right to nationality simpliciter, not making it subject to the requirements of domestic law (currently the South African Citizenship Act 88 of 1995). However, s 5 of the interim Constitution provides for the regulation of South African citizenship by an Act of Parliament. It could be that s 5 qualifies s 30(1)(a), thus treating adults and children in the same way, but reducing the efficacy of s 30(1)(a). Or s 30(1)(a) may create an exception to s 5, making special provision for the statelessness of children because of their particular vulnerability.

3 See P Weis _Nationality and Statelessness in International Law_ 2 ed (1979) 161–9 for a detailed exposition of the treaties.
6 Hodgson ‘Child’s Right to Legal Identity’ 125.
An example of what the practical effect would be if the latter view were to be adopted: s 10 of the Citizenship Act or ministerial action in terms of it may be unconstitutional because it may render a child stateless.¹

Article 8 of the Convention on the Rights of the Child asserts ‘the right of the child to preserve his or her identity, including nationality, name and family relations’. Section 30(1)(a) of the interim Constitution may be interpreted to protect a general right to legal identity. Identity may be familial (e.g. the right of an adopted child to know who its true biological parents are), tribal (e.g. the right to be brought up by a family of the same race), biological (e.g. the right to medical information about oneself), and political (e.g. the right against inter-country adoption).²

### 33.3 Parental Care

The right to parental care ought to be viewed in the light of the divisive effect of apartheid on family life. It reflects the following philosophy, taken from the Preamble to the Convention on the Rights of the Child:

> ‘The family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community’.

Further,

> ‘the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding’.

The purpose of the right is to invalidate any executive administrative action or legislation which separates children from parents.³ The most useful foreign jurisprudence here is the interpretation of art 8 of the European Convention on Human Rights, which protects the right of everyone to respect for their family life.⁴ This jurisprudence may be categorized as follows.

#### (a) Admission and expulsion

Generally, respect for family life does not include the right of family members to live together in a state. This right is only infringed if joint residence is impossible in all countries or cannot reasonably be expected, having regard to factors such as the ties of the family members to the country, their level of integration in the country where they live, the age of the children,

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¹ Section 10 of the South African Citizenship Act 88 of 1995 states that whenever the responsible parent of a minor has in certain circumstances ceased to be a South African citizen, the Minister of Home Affairs may order that the minor, if he was born outside South Africa and is under the age of 18 years, shall cease to be a South African citizen.


⁴ Article 9 of the Convention on the Rights of the Child provides that ‘a child shall not be separated from his or her parents . . . except when . . . necessary for the best interests of the child’.

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and the economic and cultural consequences of their removal from their place of residence.\(^1\) Against this must be weighed the interests of the state in its immigration policy.\(^2\)

\((b)\) Detention

The starting point is that the separation between a detainee and his family, and the distress resulting from it, are inherent in detention. The question is then whether the interference with the detainee’s right of family life goes beyond what would normally be accepted in the case of an ordinary detainee.\(^3\) The right to parental care puts a new perspective on the detainee’s right of access to her family in South African law.\(^4\)

\((c)\) Divorce

Section 30(1)(b) of the interim Constitution adds little to our common law in this respect. The European Commission recognizes that divorce usually results in custody being awarded to one parent only, thereby restricting the child’s life with the other parent. The Commission does, however, recognize that the non-custodian parent has a right of access to her child, unless such deprivation can be justified, such as to protect the child’s health and morals.\(^5\) The right to parental care may strengthen the argument for joint custody in our law.

\((d)\) Illegitimacy

The interim Constitution does not refer explicitly to illegitimate children, even in the sections on equality and children’s rights. Foreign and international law, however, regards discrimination on the grounds of illegitimacy as unfair. In *Minister of Home Affairs v Fisher*\(^6\) the Privy Council interpreted the fundamental rights and freedoms in the Bermudan Constitution generously to protect illegitimate children despite no mention of such protection. Its reasons: the broad and ample style of the Constitution, which laid down principles of width and generality; the influence of international documents which protect children without discrimination as to birth, on the drafting of the Constitution; and the fact that the context in which the right in question appeared clearly recognized the unity of the family as a group. The European Convention on the Legal Status of Children Born out of Wedlock\(^7\)

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\(^2\) See *Berrehub v The Netherlands* 11 EHRR 322. Article 10 of the Convention on the Rights of the Child enjoins that: ‘[A]pplications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner.’


\(^4\) For the South African position sans the interim Constitution, see Dirk van Zyl Smit *South African Prison Law and Practice* (1992) 195–200. For the detained child’s right of access to his parents, see the discussion on the criminal justice system below, § 33.7.

\(^5\) X v the Netherlands (1963) 6 Yearbook of the European Convention on Human Rights 262 (father denied custody because he had molested his daughter).

\(^6\) *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 (PC).

provides guidelines for the treatment of illegitimate children by the law. The US Supreme Court has subjected state classification by illegitimacy to a form of intermediate standard of review under the Fourteenth Amendment’s equal protection clause.\(^1\)

In the South African interim Constitution non-discrimination against illegitimate children is prohibited by the equality section (s 8) as well as a broad construction of the children’s rights section. Section 8(2) refers to ‘social origin’ as a ground on which discrimination is forbidden. According to the technical committee on fundamental rights during the transition,\(^2\) ‘[s]ocial origin is deemed to encompass “birth”, “class” and “status”’. To the extent that African customary law discriminates against illegitimate children in matters of succession\(^3\) it may be unconstitutional.\(^4\)

The right to family life contained in art 8 of the European Convention includes the right to recognition of the legal relationship between the illegitimate child and its parents:

‘[W]hen the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life . . . in particular, [to] . . . render possible, as from the moment of birth, the child’s integration in its family.’\(^5\)

Johnston v Ireland\(^6\) considered this observation applicable not only to the mother–child relationship but also to the case of parents who live together with their child in a family relationship over many years (para 72, p 225).

Thus in Marckx v Belgium\(^7\) the court found that the Belgian law on illegitimacy was contrary to art 8 read alone, as well as in conjunction with art 14, which prohibits discrimination on the ground of birth. This law had three objectionable aspects. It required the mother formally to recognize her illegitimate child in order to create a legal relationship between her and the child. It denied the child, even after such recognition, legal relations with the mother’s parents, such as a right to support by them. And it gave the illegitimate child fewer rights of succession than the legitimate child. In relation to the third aspect the court found that family life also comprises property relations.

In South African common law the father does not have a right of guardianship, custody or access to his illegitimate child. Where the mother loses any of these rights they may be granted to the father, but he does not have a stronger claim than any other suitable person. The effect of the Marckx judgment has not been to invalidate the German law, which is broadly similar to the South African law outlined above, in B, R & J v Federal Republic of Germany.\(^8\) The German law was held by the Commission to be in the best interests of the

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2 Tenth Report.
4 For reform suggestions on illegitimacy in general, that may motivate constitutional action, see Brigitte Clark & Belinda van Heerden ‘The Legal Position of Children Born out of Wedlock’ in Sandra Burman & Eleanor Preston-Whyte (eds) Questionable Issue: Illegitimacy in South Africa (1992) 36. The impetus for such reforms may be strengthened by the constitution.
5 Marckx v Belgium 2 EHRR 330, par 31.
6 Johnston v Ireland 9 EHRR 203.
7 2 EHRR 330.
illegitimate child. It corresponded to the general reality — that usually the mother maintains the tie with her child while the father is often unwilling to assume family obligations.\(^1\)

\(\textit{(e) Adoption and foster care}\)

Article 8 of the European Convention, which protects the right to family life, has been interpreted to incorporate adoptive families within its protection.\(^2\) Section 20 of the Child Care Act 74 of 1983 gives effect to this view in South African law by abolishing, in law, the tie with the biological parents and re-establishing it with the adoptive parents. The right to parental care may influence adoption law by preferring the biological parent in adoption procedures. For example, the courts may interpret s 19 of the Child Care Act more strictly — s 19 lists circumstances in which the parent’s consent to adoption may be dispensed with.

There is no European case law on the right to care by the foster parent.\(^3\) If the right to parental care were interpreted to include the foster relationship, then Chapter 6 of the Child Care Act may be affected. For example, the decision of the appropriate Minister under s 33(3) of the Child Care Act as to whether a child should remain in foster care would need to take account of s 30(1)(b) of the interim Constitution.

\(\textit{(f) Child in care}\)

The Strasbourg Court and Commission have generally declined to set aside a decision that a child is in need of care, on the basis that such a decision is justified in order to protect the child.\(^4\) But the case law is useful for the safeguards it creates as to how this decision is taken and implemented. Hence, the parents must be fully informed and must be heard before the decision to place the child in custody is taken. The parents must be able to lodge an appeal against the decision.\(^5\) In addition, the care measures may not be of excessive duration.\(^6\) ‘[T]he family relationship is not terminated by reason of the fact that the child has been taken into public care’:\(^7\) any restrictions on a parent’s access to her child must not be disproportionate.\(^8\)

\(^1\) \textit{B, R & J v Federal Republic of Germany} 27 Yearbook of the European Convention on Human Rights 102 at 110. Article 18 of the Convention on the Rights of the Child requires states ‘to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child’ (emphasis added). In \textit{Michael H v Gerald D} 491 US 110, 109 S Ct 2333 (1989) the US Supreme Court denied an illegitimate girl a constitutional right to maintain a filial relationship with her biological father: her claim did not have support in the history and traditions of the US. On the constitutionality of the South African law on access between the father and his illegitimate child, see Angelo Pantazis ‘Access Between the Father and His Illegitimate Child’ (1996) 113 SALJ (forthcoming).

\(^2\) Van Dijk \textit{Theory and Practice of the European Convention} 379.

\(^3\) Van Dijk \textit{Theory and Practice of the European Convention} 379.

\(^4\) Van Dijk \textit{Theory and Practice of the European Convention} 383.

\(^5\) \textit{O, H, W, B and R v United Kingdom} 10 EHRR 82.

\(^6\) \textit{Eriksson v Sweden} 12 EHRR 183.

\(^7\) \textit{Nyberg v Sweden} 14 EHRR 890 at 894, par 103.

\(^8\) \textit{Margaretu and Roger Andersson v Sweden} 14 EHRR 615.
Several aspects of the South African legislation and practice on child care could be challenged as violations of the right to parental care. For example, no provision is made in the Child Care Act for the compulsory legal representation of children; there are no definite time limits within which the children’s courts must hold their inquiries; there is no right of appeal against the decision of the children’s court; there is little attempt at rehabilitation of the child’s family after its removal; children are often sent to institutions which are far from their homes, limiting their parents’ access to them.\(^1\)

The right to parental care may mean that children have a right not to be in care.\(^2\) The courts would have to consider the non-interventionist argument, which is based on the evidence of the trauma that the child suffers on removal from his parents and of the inadequacies of institutionalized care.\(^3\)

Read together with s 30(1)(c), the right to parental care may also include the right to be cared for by the state where the natural parents are unable or unwilling to care for their children. The Dickensian conditions of some child care institutions could then amount to inadequate parental care.\(^4\) So might the arrest of children for being homeless under municipal ‘nuisance’ laws, without their being placed under appropriate state care.\(^5\)

33.4 SECURITY, BASIC NUTRITION AND BASIC HEALTH, AND SOCIAL SERVICES\(^6\)

The debate on socio-economic rights has been well captured in recent South African writings.\(^7\) The socio-economic rights in s 30(1)(c) are included in the body of the bill of rights and not merely as directive principles of state policy. The approach that gives most meaning to such socio-economic rights is that of Etienne Mureinik:

‘[Judicial review] would not require judicial expenditure; the judges would merely have to review expenditure by some other organ of government, and scrutinize its justification, deferring, in case of doubt, to any judgment of that organ for which a plausible defence could be offered . . . Only dishonest or irrational means would be set aside.’\(^8\)

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1 For excellent accounts and evaluations of the South African child care system, see M J C Olmesdahl *Discretion, Social Reality and the Best Interests of the Child* (1987), Inaugural lecture delivered at the University of Natal, Durban on 15 October 1986; and the report by Fiona McLachlan *Children: Their Courts and Institutions in South Africa* (1986).


3 Olmesdahl *Discretion, Social Reality, and the Best Interests of the Child* 23.

4 See Olmesdahl *Discretion, Social Reality, and the Best Interests of the Child* and McLachlan *Children: Their Courts and Institutions*.


8 Mureinik ‘Beyond a Charter of Luxuries’ 474.
What if the government makes no effort to realize a right contained in s 30(1)(c)? There is precedent in the United States for judicial review of administrative inaction ('agency inaction').

'This issue arises in several contexts, from complete failure to implement a programme, to substantial inaction attributable to agency priorities, to particular challenges to the agency’s choice (or nonchoice) of regulatory, enforcement, or investigation targets.'

An alternative approach to the rights in s 30(1)(a) is to treat them as directive principles of state policy. Here the Indian experience is helpful. The courts have used the non-justiciable directives in the Indian Constitution to uphold a number of statutes which limit fundamental rights.

33.5 Neglect or Abuse

In 1989 the US Supreme Court held that a state’s failure to protect a child from his father after receiving reports of possible abuse did not violate the child’s substantive due process rights under the Fourteenth Amendment to the Constitution. The ‘[p]urpose of the due process clause was to protect the people from the state, not to ensure that the state protected them from each other’. In contrast, s 30(1)(d) in the interim Constitution ‘is aimed against executive or administrative action or legislation which renders children vulnerable to neglect or abuse’. Thus a child in the position of Joshua DeShaney would succeed in a South African court.

The right to be free from abuse may have implications for the rules of evidence and procedure where the child is a witness. For example, the refusal to admit a child’s hearsay statements or to allow a child to testify by closed circuit television in child abuse cases may be unconstitutional.

2 Bertus de Villiers ‘Directive Principles of State Policy and Fundamental Rights: The Indian Experience’ (1992) 8 SAJHR 29 at 49. See also Bertus de Villiers ‘The Socio-Economic Consequences of Directive Principles of State Policy: Limitations on Fundamental Rights’ (1992) 8 SAJHR 188. Only the general attitude of the Indian courts is helpful in the interpretation of s 30(1)(c) of the South African Constitution. There is little case law on the articles in the Indian Constitution which are most like s 30(1)(c) in the South African Constitution: arts 39(f) and 47. In Sheela Barse v Secretary, Children Aid Society AIR 1987 SC 656 the court ordered a child care home and the state to regulate the home in accordance with the Directive Principles of State Policy. In Ramchandra Tandi v State AIR 1994 Orissa 228 the court directed the state to grant recognition and financial assistance to the deaf and dumb section of a school, in accordance with art 39(f) of the Indian Constitution.
3 On the definition of child abuse see Freeman The Rights and Wrongs of Children 104–14.
4 DeShaney v Winnebago County Department Social Services 489 US 189, 109 SCt 998 (1989).
5 DeShaney v Winnebago County Department Social Services 489 US 189, 109 SCt 998 (1989) at 199.
6 Cachalia Fundamental Rights in the New Constitution 102.
7 A possible test: ‘[A] state actor must exercise reasonable professional judgment in conducting the investigation [into alleged abuse] and in the decision to act or not to act after the investigation.’ Catherine C Young ‘Abused Children: The Supreme Court Considers the Due Process Right to Protection’ (1990/91) 29 Journal of Family Law 679 at 701.
9 Idaho v Wright 110 SCi 3139 (1990).
CHILDREN’S RIGHTS

The literature\(^1\) minimizes the efficacy of the law, especially the criminal law, to eliminate the problem of child abuse. There are three explanations for child abuse:

1. The **psychological** interpretation: the abuser is psychologically sick. The solution: psychiatric treatment.

2. The **sociological** interpretation: the environment, especially poverty, in which the abuser lives is to blame. The solution: the eradication of poverty.

3. The **cultural** interpretation: our society sees children as objects. Violence is common in relations between the weak and the strong, such as that between parent and child. The solution: the recognition of children as human beings in their own right, such as children’s rights gives.\(^2\)

Section 30(1)(d), read with the protection of certain socio-economic rights in s 30(1)(c), may place an obligation on the state to initiate programmes, therapeutic and educational, that tackle child abuse on the basis of these explanations. In this way constitutional law gives the law greater scope than the common law or statute to combat the problem.

Section 30(1)(d) also prohibits state institutions from abusing children in their care.\(^3\)

33.6 LABOUR\(^4\)

The most important existing law is s 52A of the Child Care Act (as amended) and s 17 of the Basic Conditions of Employment Act 3 of 1983 (as amended). Subject to ministerial exemption, no child under the age of 15 may be employed. Measured against the most important international documents on the subject — the International Labour Organization Minimum Age Convention and Recommendation (no 146) of 1973\(^5\) — the legislation is inadequate and rigid. Like the legislation, the Convention provides that the minimum age for admission to employment\(^6\) should be at least 15 years.\(^7\) The Convention goes further, however, in the following ways, and it is the lack of this sophistication that makes the local legislation unsatisfactory:

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3. For an account of such ill-treatment, see McLachlan Children: Their Courts and Institutions.
4. Section 12 of the interim Constitution (the prohibition of servitude) may also be relevant. The protection in s 30(1)(e) is in addition to that in s 27(1) (fair labour practices). Generally, see J Loffel ‘Survey of Child Labour in South Africa’ in International Conference on the Rights of the Child 85; B Mahandla ‘Survey of Child Protection Legislation in South Africa’ in International Conference on the Rights of the Child 131–3; Assefa Bequele & Jo Boyden (eds) Combating Child Labour (1988); and James Challis & David Elliman Child Workers Today (1970).
6. The Convention covers all kinds of employment, whereas s 30(1)(e) of the interim Constitution is opposed only to exploitive labour practices.
7. Article 2(3).
The competent authority may allow exceptions to the above prohibition. ‘Permits so granted shall limit the number of hours during which and prescribe the conditions in which employment or work is allowed.’¹

The minimum age for dangerous work is 18 years. Notwithstanding this, government may ‘authorize employment or work as from the age of 16 years on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity’.²

National laws may permit employment of persons 13 to 15 years of age on certain ‘light work’. The competent authority ‘shall prescribe the number of hours during which and the conditions in which such employment or work may be undertaken’.³

There are three basic requirements for the effective enforcement of the Convention: the provision of appropriate penalties; the identification of the persons responsible for compliance with these provisions; and the prescription of registers of employees under 18 years of age.⁴ Inspectors should investigate child employment.⁵

Conditions under which children under 18 work must be satisfactory. These are enumerated.⁶

National development policies and programmes should be adopted which alleviate family poverty ‘to make it unnecessary to have recourse to the economic activity of children’. Schooling should be promoted.⁷

These standards give content to s 30(1)(e) of the interim Constitution. They may be used to declare the current law unconstitutional for its failure to protect children adequately. Or they can be used to strike down administrative action under it. For example, the advertising industry has been exempted by ministerial decree under s 52A of the Child Care Act.⁸ No conditions of employment have been laid down, thereby completely removing the protection of the Act for children employed in advertising.

In addition, s 30(1)(e) of the interim Constitution, read together with the protection of socio-economic rights in s 30(1)(c), argues in law for the national development programmes discussed above.

Another way of using s 30(1)(e) is suggested by the Indian Supreme Court. Article 24 of the Indian Constitution prohibits the employment of a child below the age of 14 years in any factory, mine or other hazardous employment.

‘The Supreme Court has emphasized in [People’s Union for Democratic Rights v India AIR 1982 SC 1473] that art 24 embodies a fundamental right which is plainly and indubitably enforceable against every one.’⁹

¹ Article 8 of the Convention.
² Article 3 of the Convention. Section 11 of the Mines and Works Act 27 of 1956 prohibits juveniles under 16 from working underground.
³ Article 7 of the Convention.
⁴ Article 9 of the Convention.
⁵ Part V of the Recommendation.
⁶ Part IV of the Recommendation.
⁷ Part I of the Recommendation.
33.7 CRIMINAL JUSTICE SYSTEM

Section 30(2), read together with s 25, guarantees the rights of children in detention whether awaiting trial or sentenced. These rights are best identified in two international documents: the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules); and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (PJL Rules).

The amendments to the Correctional Services Act 8 of 1959 by the Correctional Services Amendment Act 17 of 1994 brought some of South African law into line with these international standards:

(a) Section 29(1) of the Correctional Services Act provided that an accused under 18 could not, before his conviction, be detained in prison or a police cell or lock-up unless his detention was necessary and no suitable place of safety was available. In practice large numbers of children were imprisoned. Beijing Rule 13.1 requires that ‘[d]etention pending trial shall be used only as a measure of last resort’. In accordance with this rule, the Correctional Services Amendment Act amended s 29 of the Act to forbid the detention of an unconvicted child in prison subject to stricter exceptions.

(b) Section 29(3) of the Correctional Services Act prohibited an imprisoned child under 18 from associating with an imprisoned person over 21. But exposure to prisoners in the 18–21 age category may be just as harmful to children as exposure to over-21 prisoners. Beijing Rule 13.4 provides that ‘[j]uveniles under detention pending trial should be kept separate from adults’. In accordance with this rule, the Correctional Services Amendment Act prohibits association with prisoners over 18.

Measured against the standards in the above international documents, the South African law may still be unconstitutional in, inter alia, the following respects:

(a) Section 50 of the Criminal Procedure Act 51 of 1977 requires that the parent or guardian of a person under 18 be notified of and required to attend criminal proceedings against such a person, provided that: (i) the parent can be reached or traced without undue delay and (ii) the parent is known to be within the same magisterial district as the court. These conditions provide an easy means of securing the child’s attendance in court without parental presence. Beijing Rule 10.1 provides: ‘Upon the apprehension of a juvenile, her or his parents shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.’ Measured against this rule, the

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2 See above, Du Toit ‘Criminal Procedure’ ch 27 for a discussion of the rights conferred by s 25.


6 The vulnerability of children in an institutionalized setting to negative influences provides another argument for the minimum use of institutionalization as a form of sentence; cf Beijing Rule 19.1.
South African legislation should place the *onus* on the police to locate the parent, or alternatively to notify ‘an adult relative of the young person who is known to the young person and is likely to assist him’.  

(b) Section 25(1)(c) of the interim Constitution protects the right to legal representation, to be informed thereof, and to provision thereof by the state where substantial injustice would otherwise result. Most accused children are not legally represented, even though many would qualify for legal aid. At the least, s 30(2) obliges state officers to explain to children their right to a lawyer and the provision of legal aid where applicable.

(c) Section 25(1)(b) and (d) of the new Constitution require detention to be effected in proper conditions. Internal policy of the Correctional Services Department, on the treatment of sentenced juveniles, prescribes a programme on, inter alia, the education, training and recreation of youth. It does not, however, apply to all juveniles and the department does not consider it to give rise to enforceable rights, being rather in the form of privileges and indulgences. No rights are given by any law to awaiting trial juveniles, apart from the right to be held separately from adult prisoners. The UN resolutions on juvenile justice provide great detail on what are proper conditions of detention. The basic objective of institutional treatment of juveniles should be ‘to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society’. The Rules for the Protection of Juveniles Deprived of their Liberty contain rules for such concerns as: the preparation of psychological and social reports to identify the proper level of care; the physical environment and accommodation; education, vocational training and work; recreation; religion; medical care; notification of illness, injury and death; contacts with the wider community; limitations of physical punishment; disciplinary procedures; inspection and complaints; return to the community; and careful recruitment of personnel.

The question arises whether s 30(2) protects children in detention alone, or whether it also treats children differently from adults in the courtroom. The section requires the former expressly because of the appalling treatment of children in detention under apartheid’s laws. The UN resolutions include the protection of children in court. It is submitted that s 30(2) should be so interpreted. Freeman writes that we treat children differently from adults in the criminal justice system for two reasons. First, ‘children [are] seen as not altogether responsible for their behaviour’. Secondly, the ‘doctrine of *parens patriae* is that the state has an

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1 Section 9 of the Canadian Youth Offenders Act. See S v Kondile 1995 (1) SACR 394 (SE) (inadmissibility of confession of juvenile offender who had not been offered the assistance of his parent or guardian before making the confession).


4 Beijing Rule 26.1. This objective should also inform the detention of children in institutions other than prisons, such as places of safety.

5 On the detention of children under security and emergency legislation, see the papers presented at the *International Conference on Children, Repression and the Law in Apartheid South Africa*, Harare, September 1987; and Lawyers Committee for Human Rights *The War Against Children* (1986). Note that the right in s 30(2), in addition to those in s 30(1)(d) and (e), is additionally protected in s 33(1)(au) and cannot be suspended in a state of emergency: s 34(5)(c).

6 Freeman *The Rights and Wrongs of Children* 74.
overall parental responsibility towards those of its members who are unable to care for and protect themselves’. These reasons are equally applicable to the child on trial.

33.8 CHILDREN’S RIGHTS UNDER THE FINAL CONSTITUTION

(a) Section 28(1)(a): the right to name and nationality

This right is discussed in relation to the interim Constitution above. The discussion applies equally to the situation under the final Constitution.

(b) Section 28(1)(b): the right to family, parental or alternative care

IC s 30(1)(b) provided for the child’s right to ‘parental care’. Although IC s 30(1)(b) did not expressly protect the child’s right to be cared for by the extended family or to foster care or adoption, this chapter proceeded on the basis that such protection was implicit in the section. FC s 28 has removed any uncertainty by making specific reference to the child’s right to ‘. . . family care, parental care or appropriate alternative care when removed from the family environment.’ The child’s constitutional right to family care was interpreted in SW v F, where it was decided that the child’s right to parental care contained in IC s 30(1)(b) (FC s 28(1)(b)) did not preclude an adoption order.

(i) Family care

The right to ‘family care’ includes the right to be cared for by the extended family. South African common law and statute have historically recognized only the nuclear family. The extended family received recognition only under customary law. The inclusion of the extended family under the right to ‘family care’ is a welcome improvement and is consistent with current law reform efforts aimed at including the extended family in providing for the child’s welfare.

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1 Freeman The Rights and Wrongs of Children 75.
2 For the problems in the juvenile court, see above, § 33.7. On the due process rights of a child facing expulsion from school, see Goss v Lopez 419 US 565, 95 SCt 729 (1975). See also below, Kriel ‘Education’ § 38.3(b). Juvenile whipping as a criminal sentence (in terms of s 294 of the Criminal Procedure Act 51 of 1977) is unconstitutional: S v Williams 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC). Although a violation, inter alia, of s 30 was argued, the court found it unnecessary to address the argument because s 10 and s 11(2) were sufficient to dispatch the offending provision. See above, Van Zyl Smit ‘Punishment’ § 28.2(d)(ii).
3 This section was written by Tsepho Mosikatsana alone.
4 Above, § 33.2.
5 Note that the citizenship provisions of the final Constitution are contained within s 3.
6 See the discussion above, § 33.3.
7 1997 (1) SA 796 (O) (Malherbe J).
9 See, for example, South African Law Commission Access to minor children by interested persons Report (Project 100) (June 1996). The Law Commission states that the common-law position which grants the parents exclusive rights of access is not always conducive to the best interests of the child. It has proposed draft legislation granting the extended family the right to seek access through the courts. This draft legislation is entitled the Proposed Bill on the granting of visitation rights to grandparents of minor children and provides the following in s 2: [continued on page 33–14]
(ii) **Parental care**

This right is discussed in relation to the interim Constitution above.\(^1\) The discussion applies equally to the situation under the final Constitution.

In *V v V*, a father of two minor children sought an order for the sole custody of his children with limited access to the mother. He opposed her claim for joint custody even though they had been exercising *de facto* joint custody for the past two years pursuant to a separation agreement. He was prepared to allow her supervised access, but contended that she could only have unsupervised access if a psychiatrist certified that it was in the best interests of the children that she have access and that such access should be subject to the condition that no third person would sleep under the same roof as her during the period when she had access. His reason for seeking to impose such a restriction on the mother’s access was in part based on the fact that she was involved in a lesbian relationship and he did not want her to exercise access when her lover was sleeping over because he was concerned that if his son and daughter were raised in a lesbian household, they would grow up with a gay and lesbian orientation.

Foxcroft J underlined the importance of FC s 28 and international conventions which influenced the development of the common law with regard to the protection of children’s rights.\(^3\) He also stated that while at common law the right to access was a parental right, in terms of FC s 28(1)(b) questions of access had also to be approached from the perspective of the child’s right to parental care. As it was in the best interests of the children for them to continue to live with both parents, the court made an order of joint custody.\(^4\)

\(^{2}(1)\) If a grandparent of a minor child is denied access to the child by the person who has parental authority over the child, such grandparent may apply to court for an order granting him or her access to the child and the court may grant the application on such conditions as the court thinks fit.

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

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

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

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

Section 2 is comparable to s 16(1), (3) and (8) of the Canadian Divorce Act RSC 1985, c 3 (2nd supp). For a commentary on grandparent visitation rights in Canada, see Tshepo L Mosikitatsana ‘Third party parenting rights in custody and access disputes’ in J McLeod (ed) *Child Custody Law & Practice* (1992) 26–1/26–24.

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1 Above, § 33.3.
2 1998 (4) SA 169 (C).
3 At 176D.
4 In the course of his judgment, Foxcroft J pointed out that the Constitution did not permit unfair discrimination against lesbian mothers in custody cases. He accordingly resisted an invitation to follow *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), where the court had structured an order regulating a lesbian mother’s access to her children to protect the latter from ‘the wrong signals’ they might receive from their mother’s intimate relationship with her partner. The *V v V* decision demonstrates the positive influence of the equality clause in promoting non-discrimination in the parenting rights of same-sex couples. See further below, Bronstein ‘Family Law’ § 34.9.
Alternative care

The right to alternative care includes the right to adoptive or foster care and the right to be cared for by the state where the child concerned is in need of care. These rights are discussed in relation to the interim Constitution above.1 The discussion applies equally to the situation under the final Constitution.

Section 28(1)(c): the right to basic nutrition, shelter, basic health care and social services

The rights protected by FC s 28(1)(c) were also protected by IC s 30(1)(c) and are discussed in that context above.2 Note, however, that the child’s right to security in IC s 30(1)(c) is not repeated within FC s 28(1)(c). The reference to ‘security’ might have been considered unnecessary in view of the protection of the right to ‘security of the person’ already granted under s 12 of the final Constitution.3

Section 28(1)(d): the right to be protected from maltreatment, neglect, abuse or degradation

Section 28(1)(d) restates a right which was conferred by IC s 30(1)(d) and which is discussed above in that context.4 There is, however, a subtle shift from IC s 30(1)(d) to FC s 28(1)(d). Whereas the former granted a right ‘not to be subject to neglect or abuse’, the latter grants the right ‘to be protected from maltreatment, neglect, abuse or degradation’. The obligation on the state (and possibly on private parties with responsibility for the child)5 to take positive steps to protect the child from harm is clearer in the final Constitution.

Existing legislation goes some way to fulfil this obligation. There have been some legislative attempts aimed at dealing with the problem of the physical and sexual abuse of children. For example, the Sexual Offences Act 23 of 1957 criminalizes sexual intercourse with minors. The difficulty with most child protection laws is that they do not clearly define what constitutes ill-treatment, neglect or abuse, and as such they allow for class and cultural bias in the enforcement process.6

Section 42(1) of the Child Care Act places an obligation on dentists, medical practitioners, nurses and social workers to report child abuse. Section 42 is limited in its reach in that it restricts the responsibility for reporting child abuse to specific health professionals and social workers. It excludes other professionals who may come into contact with children, such as mental health professionals, teachers, day-care workers, and priests.7

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1 Above, § 33.3(e–f).
2 Above, § 33.4.
3 However, s 28(1)(c) does, in other respects, duplicate protections which children could already have claimed under s 26 and s 27 of the final Constitution. The general right to freedom and security of the person is discussed below, Currie & Woolman ‘Freedom and Security of the Person’ ch 39.
4 Above, § 33.5.
5 See above, Woolman ‘Application’ § 10.3(b).
7 Van Dokkum op cit 171–2.
In an effort to remedy the deficiency in s 42 of the Child Care Act the lawmaker enacted s 4 of the Prevention of Family Violence Act 133 of 1993, which creates an obligation on ‘... [a]ny person who examines, treats, attends to, advises, instructs or cares for any child’ to report the ill-treatment of such child to the police, commissioner of child welfare or to a social worker.¹

Chapter 3 of the Child Care Act 74 of 1983 provides mechanisms for the removal of abused or neglected children from their families to places of safety. Sections 11 and 12 of the Child Care Act empower police officers, social workers and other authorized persons to remove children, with or without a warrant, from their homes to places of safety. The above provisions also authorize the forcible entry of premises for the removal of children. It is acknowledged that in certain instances it may be necessary to remove children urgently from abusive situations; however, it is suggested that ss 11 and 12 may give rise to constitutional challenges.

Section 14 of the Child Care Act sets out criteria for the removal of children from their homes. The criteria for the removal of children under s 14(4)(b) of the Child Care Act were objectionable in that they operated on a model requiring a finding of parental guilt that the parent or guardian was unable or unfit to have custody of the child. Section 14(4)(b) has been amended by the Child Care Amendment Act 1996. The amendments contained in subsec (4)(aB) of s 14 no longer require a finding of parental guilt. The amended Act operates on child-centred criteria.²

The criminal trial process has also been reformed to facilitate child witnesses who are victims of abuse to testify against their abusers in a non-intimidating and child-friendly setting. Section 170A of the Criminal Procedure Act has reformed the adversarial nature of the criminal trial to facilitate child complainants giving evidence in court against their abusers. This provision makes it possible for children to give evidence by video link or from behind a one-way mirror as long as the accused can observe and hear the child witness. This provision also makes it possible for cross-examination of child witnesses to be conducted through an intermediary.³ It is hoped that these reforms will facilitate the prosecution of child molesters.

¹ Van Dokkum op cit 172.
³ In K v The Regional Court Magistrate NO & others 1996 (1) SACR 434 (E) the procedures of s 170A were held not to interfere with the constitutional right of an accused to a fair trial. See also PJ Schwikkard ‘The abused child: A few rules of evidence considered’ in R Keightley (ed) Children’s Rights (1996) 155–62. In S v Stefaans 1999 (1) SACR 182 (C) the magistrate had granted a s 170A application that a sixteen-and-a-half year old rape complainant give evidence through an intermediary without hearing evidence from a social worker and without receiving the social worker’s report in which she recommended that the intermediary procedure be followed. On appeal to the Cape Provincial Division it was decided that the magistrate had erred in deciding that the intermediary procedure should be applied merely because the complainant would be subjected to ‘unnecessary’ stress in open court rather than ‘undue’ stress and because he failed to conduct an adequate investigation to determine whether there were factors justifying the application of the intermediary procedure. The court also warned of the inherent dangers in applying the intermediary procedure set out in s 170A which might prejudice the accused’s right to a fair trial. The court set out general principles to be followed by a court faced with the application of the intermediary procedure.
(e) Section 28(1)(e) and (f): the right to be protected from exploitative labour practices

FC s 28(1)(e) and (f) grant rights which were also conferred by IC s 30(1)(e) and which are discussed above in that context.\(^1\) As in the case of the rights of children against abuse and neglect,\(^2\) there has been a shift from interim to final Constitution in the formulation of the labour rights of children. Under the final Constitution the right is ‘to be protected from exploitative labour practices’ and imposes a clearer obligation on the state and private parties to prevent this harm to children. Another important difference between the interim and final Constitutions is the greater potential for horizontal application of the labour rights of children in the latter.\(^3\) Thus children may have direct constitutional remedies (including the possibility of constitutional damages claims) against private parties who abuse their labour rights.\(^4\)

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1 Above, § 33.6.
2 See above, § 33.8(d).
3 See above, Woolman ‘Application’ § 10.3(b).
4 See generally above, Klaaren ‘Remedies’ ch 9. In relation to the issue of constitutional damages against private parties, see Fose v Minister of Safety and Security & others 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) generally and para 87 in particular.
CHILDREN’S RIGHTS

(f) Section 28(1)(g) and (h): the rights of children in police custody/detention

Many of the criminal justice rights of children protected by FC s 28(1)(g) and (h) were protected by IC s 30(1) and are discussed above in that context. A significant addition in the final Constitution is the right ‘not to be detained, except as a measure of last resort’, and then to ‘be detained only for the shortest appropriate period of time’. This right will have important implications for the granting of bail to children and the sentencing of children. In regard to the former, children will not be adversely affected by the shift from IC s 25(2)(d) to FC s 35(1)(f).

(g) Section 28(1)(h): the right to civil representation

FC s 28(1)(h) confers on children the right to legal representation at state expense in civil proceedings affecting them wherever substantial injustice would otherwise result. Children’s rights to legal representation in criminal proceedings are already provided by FC s 35(3)(g), which applies to all people.

The realization of the child’s constitutional right to legal representation in proceedings of the Children’s Court has been made possible by the 1996 amendments to s 8 of the Child Care Act. In terms of s 8A(1) of the amended Act a child is entitled to legal representation at any stage of the proceedings under the Act. Section 8A(2) of the amended Act requires a Children’s Court to inform a child who is capable of understanding, at the commencement of any proceedings, that he or she has the right to request legal representation at any stage of the proceedings. Sloth-Nielsen and Van Heerden point out that practical problems may arise in the implementation of this provision where a child, owing to his or her age, is incapable of understanding or instructing counsel. They also note that it is not clear what the responsibility of the Children’s Court is when a child makes a frivolous request for legal representation. Would the court deny such a request? Another issue not obviously addressed by the amendments is the responsibility of the Children’s Court where a child refuses legal representation as often happens in criminal trials. Must the court insist that the child’s best interests require legal representation despite such refusal?

1 See above, § 33.7.
2 Section 28(g).
3 See further below, Van Zyl Smit ‘Sentencing and Punishment’ ch 28.
4 Section 25(2)(d) conferred a right to be released ‘unless the interests of justice require otherwise’. Section 35(1)(f) shifts the onus on to the arrested person by conferring the right to be released only ‘if the interests of justice permit’. The issue of bail is discussed further above, Snyckers ‘Criminal Procedure’ § 27.4(d).
5 See further above, Snyckers ‘Criminal Procedure’ §§ 27.3(f) and 27.5(h).
6 Act 74 of 1983.
8 Ibid.
9 Ibid.

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amended Act\(^1\) suggests that there is no such obligation on the Children’s Court to provide representation and that the matter always remains within the discretion of the presiding officer.

Section 8A(3) of the amended Act is noteworthy in that empowers the Children’s Court to approve ‘. . . that a parent may appoint a legal practitioner for his or her child for any proceeding under this Act, should the children’s court consider it to be in the best interest of such child’. This provision may undermine the child’s autonomy and create potential conflict of interests particularly ‘where parents (who may be akin to defendants in a removal inquiry) are empowered to appoint a legal representative for the child’.\(^2\)

The amendments to the Child Care Act are a welcome innovation for Child Welfare Commissioners, who are now empowered to arrange child legal representation in appropriate cases, but, notwithstanding, the Act increased child representation in the Children’s Court may be frustrated by financial constraints.\(^3\) Furthermore, the amendments are confined to Children’s Court proceedings. Section 28(1)(h) requires comparable legislation to provide for representation of children who are involved in civil proceedings in the ordinary courts.

The main protection afforded minors in civil proceedings is the common-law right to sue or be sued with the assistance of a guardian. This right was attenuated by Wessels AJ in *Vista University (Bloemfontein Campus) v Student Representative Campus, Vista, & others*,\(^4\) dispensing with this right in an urgent application where there was a need to protect innocent students who would benefit from the order. The applicant university sought an interdict restraining the respondents, some members of whom were minors, from disrupting the functions of the university. The minors were not cited duly assisted by their guardians. The judge invoked the provisions of FC s 173 empowering a High Court to amend the common law in so far as it is necessary to dispense with the minor’s right to sue or be sued with the assistance of a guardian in an urgent application. The court also invoked its common-law power as the upper guardian of all minors, including the innocent students who would benefit from the order. It was further stated that it would be impossible for the applicant to cite all the minor students duly assisted by their guardians. The interdict was granted against the respondents with the further order that those students who were minors and wished to oppose the application not be allowed to do so unless they are duly assisted by their guardians.

The decision in *Vista University* has set an unfortunate precedent in eroding the common-law protection afforded to minors in civil proceedings and it is apparently in conflict with the general thrust of FC s 28(1)(h). This calls for legislation to reinforce the right of minors to be duly assisted by their guardians in all civil proceedings.

\(^1\) Section 8A(4) states the following: ‘A children’s court may, at the commencement of a proceeding or at any stage of the proceeding, order that legal representation be provided for a child at the expense of the state, should the children’s court consider it to be in the best interest of such child.’


\(^3\) Ibid.

\(^4\) 1998 (4) SA 102 (O), 1998 (4) BCLR 514 (O).
(h) Section 28(1)(i): children’s rights with respect to armed conflict

FC s 28(1)(i) confers on children the right ‘not to be used directly in armed conflict, and to be protected in times of armed conflict’. The section gives effect to several international obligations resting on South Africa. Article 77 of Protocol No 1 to the Geneva Convention No 4 provides that children should not take a ‘direct part in hostilities’. Section 38(2) of the Convention on the Rights of the Child places an obligation on state parties to ensure that children under fifteen do not participate directly in hostilities. Like the Geneva Convention and the Convention on the Rights of the Child, s 28(1)(i) confines itself expressly to direct participation in armed conflict. This is to be regretted. The International Committee of the Red Cross unsuccessfully opposed the inclusion of the word ‘direct’ in Protocol No 1 to the Geneva Convention as it would appear to condone indirect participation such as transporting munitions to the battlefield, which is as dangerous as direct combat.\(^1\) While the drafters of the final Constitution did not extend the protection of s 28(1)(i) to all forms of participation in armed conflict, concerns of the sort voiced by the Red Cross are addressed in the second clause of the section: the right to be protected in times of armed conflict. This right ensures that children cannot be used indirectly in armed conflict in circumstances that would expose them to danger.

An important aspect of children’s participation in armed conflict is their recruitment for military service. In terms of s 3(1)(b) of the Defence Act\(^2\) the minimum age for recruitment to the South African National Defence Force is 17. Given that the rights conferred by s 28 extend to all persons under the age of 18,\(^3\) it is possible that s 3(1)(b) may be unconstitutional.

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

FC s 28(2) (previously contained in IC s 30(3)) constitutionalizes the common-law standard of the child’s best interests. It provides that a child’s best interests are of paramount interest in every matter concerning the child.\(^4\)

The constitutional best interests standard has been interpreted in *Hlophe v Mahlalela & another*,\(^5\) where the applicant sought custody of his minor child who had been in de facto custody of her maternal grandparents, the respondents, after her mother’s death. The parties were married according to Swazi customary law and subsequently in a civil marriage. The court was unable to ascertain what the applicable Swazi law and custom provided in the circumstances. It decided, however, that any doubt as to the applicable legal principle was effectively removed by IC s 30(3) (now FC s 28(2)) and decided the matter in favour of the applicant on the basis of the best interests of the child.\(^6\)

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3. Section 28(3) defines a child as ‘a person under the age of 18 years.’
4. See the discussion of the indeterminacy of this standard above, § 33.1.
5. 1998 (1) SA 449 (T).
6. At 459D/E–G.
Is the principle of best interests paramount in any matter involving a child? When is the standard applicable? While courts have not explicitly discussed this issue, there must be some limit (even if only relevancy) to the applicability of the best interests principle as entrenched in FC s 28(2). None the less, at least in matters involving children, the best interests principle has been applied to legal issues beyond a substantive determination of the welfare of the child. It has been used in issues such as granting an interdict preventing removal of a child pending custody action and, in Hlophe v Mahlalela, deciding whether common law or customary law was applicable. The Constitutional Court has used the best interests of the child standard to inform its interpretation of the ‘interest of justice’ standard in FC s 167(6). The court denied an application for special leave to appeal from a decision of the Supreme Court of Appeal upholding the validity of an adoption.  

1 For example, it could hardly be argued on behalf of children suing in delict that they should be compensated by the defendants in cases where they are unable to prove fault and causation, simply because that would be in their best interests.

2 See W v F 1998 (9) BCLR 1199 (N).

3 According to the court, ‘[c]ontinued uncertainty as to the status and placing of the child cannot be in the interests of the child’: Fraser v Naude & others 1998 (11) BCLR 1344 (CC) at para 9.