

## CHAPTER 4

### EXPLORATION OF THE RIGHTS OF CHILDREN FROM A GLOBAL PERSPECTIVE

#### 4.1 Introduction

In the previous chapters, researcher discussed the importance of

- Working from a Child-Centered approach in order to respect children's autonomy, and
- Knowledge regarding the developmental processes of children, their needs, life tasks and capabilities.

In this chapter researcher would like to consider the extent to which children face discrimination simply by virtue of being young.

The term "children's rights" has echoed in all countries over decades as awareness grew of the importance of recognizing that children do have rights. James & James (1999:189) confirmed that listening to the voices of children, have become somewhat of a clarion call since the 1970's, both within and outside the academically world. Yet, it remains rhetoric as researcher experienced in practice as a social worker. Few people / professions would disagree that children have the right to be heard, to have privacy, to be represented legally, or that children are persons, not property. When it comes to putting the above rights into practise, the hearts of all parties involved are likely to start racing because suddenly the issue is not just academic, it is personal.

Franklin (2002:18) mentioned that in the early 1970's, children's rights were described as 'a slogan in search of a definition'. Subsequently, over the past three decades, an expansive academic awareness was noticed. The United Nations Convention on the Rights of the Child has also substantially increased public awareness of children's rights.

Freeman (1999:51) is concerned that, even with an awareness of children's rights, the emphasis has been on protecting children, rather than encouraging their active participation in decision-making processes. Researcher echoes above concern and is of the opinion that the reason behind it lies in a comfort zone for the adults. For some reason, adults believe they always have to be in control and this implies making decisions on behalf of children – justifying it with the term "acting in their best interest". Practice has proven that children are continuously exposed to being traumatized through the fact that they have to live the life decided by adults. This implies that practice is currently operating from an Adult Centered Approach in stead of a Child Centered Approach. By allowing this behaviour to continue will be to sanction negative behaviour at the cost of children's lives.

#### **4.2 Defining children's rights**

The 54 articles of the United Nations Convention on the Rights of the Child (1989) embrace a wide range of rights which are grouped under three broad categories, namely the three 'P's for provision, protection and participation. Franklin (2002:20) as well as Colton, Sanders & Williams (2001:229-230)

identified certain rights that accompany each category and it can be listed as follows:

**Provision:**

- Right to life.
- Right to adequate health care, food, clean water, shelter, security.
- Right to physical care, family life, play, recreation, culture and leisure.
- Right to education.

**Protection:**

- Right to protection against physical, emotional and sexual abuse.
- Right to protection against neglect.
- Right to protection against exploitation.
- Right to be safe from discrimination, substance abuse, injustice and conflict.

**Participation:**

- Right to a name and identity.
- Rights to privacy.
- Right to freedom of association, expression and thought.
- Right to be consulted and taken account of.

- Right to access to information.
- Right to challenge decisions made on their behalf.

Franklin (2002:20) suggested two broad distinctions in the discussion of children's rights, namely:

- Legal and Moral rights.
- Welfare and Liberty rights.

#### **4.2.1 Legal and Moral rights**

As Franklin (2002:21) explains, a *legal right* is an entitlement which is acknowledged and enforced by an existing law in a specific state. *Legal rights* is actual rights which children possess.

*Moral rights* (sometimes referred to as human or natural rights) enjoys no legal endorsement but serve as a claim for a right which it is believed children, indeed all human beings, should possess by virtue of their common humanity.

#### **4.2.2 Welfare and Liberty rights**

According to Franklin (2002:21) the distinction between welfare and liberty rights corresponds with the 'nurturance' versus 'self-determination' orientation. He further states that these two kinds of rights can conflict and are at the centre of much of the controversy which surrounds discussions of children's rights.

*Welfare rights* prioritise the provision for children's welfare needs and the protection thereof. These include rights to education, health, shelter and a minimum standard of living.

*Liberty rights* focus on children's rights to self-determination. These rights imply that children should enjoy greater freedom and rights in decision-making.

Welfare and liberty rights are very different kinds of rights – both in terms of the type of claims which rights holders are making as well as the qualification necessary to exercise them. Franklin (2002:21) explains the latter as follows:

***The possession of welfare rights – to education, health, shelter require only that the right holder possesses interests which can be preserved, protected and promoted. Claims for liberty rights – to participate in decision-making, to vote – require that the right holder must be capable of making and exercising choices. Children's claims to protection rights have rarely been contested. Their claims for liberty rights invariably are.***

### **4.3 The acknowledgement of children's rights – a global perspective**

As mentioned before, the term 'children's rights' has echoed world-wide. It is therefore important to see which international instruments influenced legislation and how different countries utilized it.

#### **4.3.1 International context**

##### **4.3.1.1 European Convention on Human Rights**

The European Convention on Human Rights was drafted in the aftermath of World War II and, as Fortin (2002:119) explains, the rights it contains reflect the determination of those living in post-war Europe to prevent a recurrence of the type of atrocities and persecution experienced by so many. Its provisions protect an individual's private life and secure his/her freedom from undue state interference. It guarantees the basic liberties deemed essential to a free and civilised society, including protection against imprisonment without a fair trial, freedom of expression and religion and the right to peaceful assembly.

This Convention has undoubtedly had an important influence on the development of all further laws. According to Fortin (2002:121), the incorporation of the European Convention into domestic law of different countries has made people think far more about their entitlement to the rights it protects. Without doubt, children can benefit from the heightened rights consciousness. Unfortunately, as Fortin (2002:121) stated:

*To date, the notion that children have rights and that these must be fully acknowledged and promoted has been regarded with some suspicion.*

Despite abovementioned suspicion, the United Nations Convention on the Rights of the Child saw the light.

#### **4.3.1.2 United Nations Convention on the Rights of the Child**

The United Nations Convention on the Rights of the Child (1989) which has attracted an unprecedented number of signatory countries to ratify its principles embraces a comprehensive set of civil, economic, social and cultural rights which it argues the global community of children should enjoy as a minimum.

Sharp & Cowie (1998:4) strongly support above and expressed the opinion that society has an obligation to establish a basic set of children's rights, which should be unacceptable or even illegal, to contravene.

Researcher deems the following articles of specific importance:

- Art 2: All rights apply to all children without exception. It is the State's obligation to protect children from any form of discrimination and to take positive action to promote their rights.
- Art 3: All actions concerning the child, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

- Art 9: The child has a right to live with his or her parents unless this is deemed to be incompatible with the child's best interest. The child also has the right to maintain contact with both parents if separated from one or both. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
- Art 12: State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.  
For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.
- Art 13: The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

One hundred and eighty six countries ratified the Convention – only Somalia and the United States of America are not signatories. As Colton, Sanders & Williams (2001:229) explain:



***By ratifying, a government signifies its intention to comply with the provisions in the Convention, and must make regular reports on its progress towards implementation to the UN Committee on the Rights of the Child.***

Ruxton (1996:22) considers the Convention a highly significant document in that it provides a comprehensive framework within which to examine the impact of all legislation, policy and practice relating to children's rights. However, he adds that a key challenge for the United Nations Committee is to establish clear interpretations of each of the articles in the Convention so that legislation and policy develop coherently. Freeman (2002: 115) shares this concern and stated:

***The Convention has to be seen as a beginning but the lives of children will not change for the better until the obligations it lays down are taken seriously by legislatures, governments and all other concerned with the daily lives of children.***

In the light of this comment, it is important to review the influence this Convention has on legislation in different countries. These countries were selected as they experience similar problems to that of South Africa.

#### 4.3.1.3 Legislation and children's rights in the U.K.

The United Kingdom signalled complete commitment to the ideals of the European Convention on Human rights by being the first European country to ratify the Convention in March 1951. It was with the practical implementation that the shortcomings in this Convention came to the fore. Fortin (2002:123-124) critically examined this Convention and identified three aspects which undermine its ability to promote children's rights. These aspects will be discussed in short:

- It has a narrow scope: Fortin (2002:123) state that it principally revolved around the basic freedoms deemed essential to individual autonomy and privacy from state interference (i.e. freedom from torture and the right to a fair trial).
- Although its provisions apply to all individuals, whatever their age, it was self-evidently never designed to provide specifically for children as a group. For instance, it could have been better worded had it been designed with children specifically in mind.
- Even applications which focus on children's rights will inevitably be brought on their behalf by adults because children are too young to cope with the procedural complication of making claims themselves. Adults acting for children are often their parents and, as Fortin (2002:124) mentioned, the adult perspective of the articles may be exploited by parents to promote their own rights, at the expense of those of their children.

In 1991 the U.K. government ratified the United Nations Convention on the Rights of the Child and it played an important role in the development of The Children Act 1989.

The Committee on the Rights of the Child responded critically to the U.K.'s implementation of the United Nations Convention on the Rights of the Child.

Fortin (2002:121) state as follows:

***Even the government's ratification of the United Nations Convention on the Rights of the Child failed to ensure that legislators took full account of the rights of children.***

The Committee on the Rights of the Child drew detailed attention to widespread improvements in British Law as well as policy still required to accomplish the aims of the United Nations Convention on the Rights of the Child.

Franklin (2002: 3 - 7) grouped the recent progress concerning children's rights in the U.K. under five broad headings:

- **Intellectually**

The discussion of children's rights has achieved a degree of respectability. Franklin (2002:3) explains:

***Instead of being dismissed as "utopian nonsense" or mere "political correctness" the idea that children possess rights***

*which adults should respect and help to promote now informs aspects of government policy and legislation, the policy of voluntary sector and charitable organisations as well as the practice of welfare professionals.*

This recently achieved respectability reflects a growing scholarly interest in the study of childhood, children and society. According to Franklin (2002:3), three assumptions inform this paradigm shift, namely:

- Childhood is judged to be a social rather than a biological construct.
- Children's social relationships are worthy of study, not merely as the construction of adults, but as the outcome of children who actively help to shape their own and others' social lives as well as the societies of which they are members.
- Ethnography provides a useful methodological approach to the study of childhood as it provides greater opportunities for children's participation and creates possibilities for a more direct voice for children in research.

- **Politically**

Children's rights have become contested territory for mainstream political parties.

- **Legally**

Franklin (2002:4) mentioned that the paternalistic notion that the “best interests of the child” must be protected has increasingly come to be supplemented by the principle that children have a right to express their views and have their wishes taken into account in legal decisions which concern them. He further states that The Children Act 1989 carefully straddles the divide between protectionist (paternalist) and participatory rights:

***Its guiding principle is that “the child’s welfare is paramount” but the legislation also supports the principle that, where possible and appropriate, the “ascertainable wishes and feelings of the child concerned” should inform decisions (Children Act, 1989: Section 1(3) (a)).***

The truth though, according to Franklin (2002:4), is that judiciary continue to interpret this latter requirement conservatively falling back on paternalistic assumptions of children’s incompetence!

The most significant legal development regarding children’s rights is the incorporation of the European Convention on Human Rights into English domestic law in 1998 through the Human Rights Act 1998 which became fully operational on 2 October 2000. The Human Rights Act forces government to review carefully any new draft legislation which directly/indirectly affects children in every context, to ensure its

compatibility with their rights, as secured by the European Convention. According to Fortin (2002:122), any government Minister introducing draft legislation into either House of Parliament must now annex a written statement confirming that it is, in his view, compatible with the terms of the European Convention (Human Rights Act, 1998: Section 19). Domestic courts may also adjust the principles of common law themselves – without waiting for Parliament – in order to accord with the demands of the Convention. So, after almost fifty years after the United Kingdom ratifies the abovementioned Convention, it became a practical reality in the lives of children.

- **Institutionally**

The development of organisations such as End Physical Punishment of Children (EPOCH) along with the appointment of more than fifty Children's Rights Officers in different local authorities offers testament to the growing commitment to children's rights. Franklin (2002:5) also mentioned that the last decade witnessed a considerable growth in the number of ombudsman or Children's Rights Commissioners. A further development, as described by Franklin (2002:5) has been the emergence of a number of institutions to enhance citizenship in the local arena. Such developments reflect the United Nations Convention on the Rights of the Child's emphasis (Article 12) on children's right to participate, but also the fact that children and young people are the major users of local government services such as schools, libraries, sport and leisure facilities, education, parks and public transport. Youth

councils and forums have been the typical institutional expression of this desire to increase young people's local involvement.

- **Internationally**

The United Nations Convention on the Rights of the Child has established a near global consensus concerning the minimum necessary rights for children. Yet, as Freeman (2002:97) pointed out, it is important not to mistake the word for the deed!

#### **4.3.1.3.1 The Children Act 1989**

The Children Act 1989 came into force in England and Wales in 1991, in Northern Ireland in 1996 and in Jersey in 2000. It does not apply under Scottish Law.

The *Families Need Fathers* website regarding the Children Act 1989 ([www.fnf.org.uk/childact.htm](http://www.fnf.org.uk/childact.htm) : 1) states the purpose of the Children Act 1989 as:

***Based upon the belief that children are generally best looked after within the family, with both parents playing a full part and without resort to legal proceedings. The welfare of the children is paramount consideration.***

Roche (2002:63) asked in what ways the Children Act 1989 can be said to have advanced children's rights. Three key decision-making principles need to be pointed out, namely the endorsement of the paramountcy principle, the

provision of the “welfare checklist” and the no order principle. These considerations can be said to have advanced both the “welfare rights” as well as “liberty rights” of children. As explained on the website ([www.fnf.org.uk/childact.htm](http://www.fnf.org.uk/childact.htm)), courts will not make orders regarding children unless the parents are in fundamental disagreement or if there are concerns about their welfare. Two important clauses though, are the ones stating that children should always be consulted (subject to age and understanding) and kept informed about what will happen to them as well as the one specifying that children’s issues must be determined as soon as possible so that minimum disruption is caused to the child’s life:

***To minimise delay the court must draw up a timetable at a preliminary hearing in respect of subsequent proceedings. The court must have regard to a prescribed Statutory Checklist of the factors to be taken into account in deciding the future of children.***

The abovementioned Statutory Checklist under Section 1(3) of the Children Act 1989, states as follows:

The court must have regard in particular to:-

1. The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding).
2. His physical, emotional and educational needs.
3. The likely effect of any change in his circumstances.



4. His age, sex, background and any characteristics of his which the court considers relevant.
5. Any harm which he has suffered or is at risk of suffering.
6. How capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of his needs.
7. The range of powers available to the court under this Act in the proceedings in question.

Researcher previously referred to Freeman who said it is important not to mistake the word for the deed. Roche (2002:72) indeed proved this when he found in his research ten years after the implementation of the Act that some of the positive hopes for the Act have failed to materialize. The roots of the 'failure'

according to Roche's research lied in the practices and attitudes of adults and professionals! Roche (2002: 73) states pertinently:

***The way in which we think about children and children's rights has to shift and in that process adult practices including professional practice centring on children will shift. The rhetoric of rights is as much about shifting our imagination as it is about specific demands for legal change. We might all benefit from taking children and their rights more seriously.***

#### 4.3.1.4 Childhood and children's rights in China

As West (2002:341) explained, attempting to look at children's rights in this country is immensely difficult simply because China contains one fifth of the world's population and 20% of the world's children. The processes of 'transition' of economic and social reform at the end of the twentieth century have had considerable impact on Chinese childhood, and provided both opportunities and problems for many children.

Children in China face a unique situation through the one-child policy, parental indulgence, educational pressure, and the increased importance of peer relationships. Many children also face difficulties which will need to be addressed using the concept of rights as a basis, such as the right to identity, to education and to protection. These issues and the impact thereof on children's rights will be discussed in short:

- **The one-child policy:**

In 1979-1980 the one-child policy was formally adopted. West (2002:332) stated that, in explaining the need for the policy the government has tried to convince the public not only that China has too many people but its population quality badly needs improvement through "prevention eugenics" meaning that marriages of mentally retarded people, close relatives and patients with hereditary diseases must be prevented to avoid births of children with severe medical problems. The policy has been seen as children's rights issue but, as West (2002:332) stated:

***The problems raised are often not the policy per se but attitudes around gender and disability (which are important rights issues), or discussions revolve around right to life/anti-abortion beliefs, or parents' reproductive rights, or a child's right to have a brother or sister.***

The policy has affected families in numerous ways. Cultural preference for a son implied that parents who have a first child who is female, or a disabled boy, may try again for a non-disabled male. Discrimination against girls was also linked to patterns of excess female mortality, deriving from less attention paid to their nutrition and health care needs in poorer areas. Unwanted girls were often adopted locally, sometimes by being abandoned on the doorstep of a childless couple. West (2002:333) pointed out that, on the other hand, adherence to the one-child policy has in many places meant love, value and future hopes placed on a single daughter, and brought some shift in perceptions of female children.

Another perspective on this one-child policy is referred to as “Little emperors and family life”. Basic to Chinese tradition is the idea of a family's physical togetherness. As West (2002:333) described it:

***You are not encouraged to defend your privacy and autonomy within the family – your letters are for any member of the family who can read, and you will be thought selfish and unnatural if you try to keep your acquisitions to yourself. The boundary you have***

***to defend is not the one around your private self but the one around the family unit.***

These relationships of sharing and cooperation have implication for children's lives and expectations. Parents have absolute rights to enter their children's private space and the children can use their parents' personal belongings as they wish. Families placed all their hopes on their one child. Boys and girls experienced both the devotion and generosity of parents, and pressure to do well. West (2002:234) mentioned that concerns over the single child family emerged in public and private:

***First, children were receiving too much love and attention, becoming "Little Emperors" within the family; second, children experiencing loneliness and difficulties in peer relationships; and third, pressures to do well, carrying the burden of the family's expectations.***

The lack of siblings has a great impact for children in the urban areas of China where the majority of children are only children. West (2002:335) emphasized the fact that competition for peer friendships may arise because of loneliness. Children also experience parental pressure, particularly on education. West (2002:335) referred to a child who said:

***Our parents don't care enough about us. They are only concerned about how well we do in school!***

According to West (2002:335), some children find school pressures intolerable, run away or harm themselves. He pointed out though that recently the government announced measures aimed at relieving overload and ensuring mental well-being of children.

- **Issues and problems:**

A few issues and problems related to children's rights are outlined:

*Separated children:* West (2002:337) referred to the question of care of children separated from or with no parents, as an important issue in China. The reason being that the so-called "welfare homes" reflect the earlier city schools. He quoted from Spence who described the practices in these schools – "teaching" children "mechanical trades" by letting them work in flour mills operating machines or, if they are too crippled to work the mill equipment, they are employed by the rope- or basket makers in hoisting the cordage and weaving the rushes.

*Disability:* Most children with disabilities are cared for in family homes and not seen much in public. Some children with severe impairments are abandoned and subsequently cared for on welfare homes which are primitive in the extreme. Apparently, foreigners are never taken to such places – even on request. West (2002:338) confirmed that few Chinese he met admitted that institutions for the handicapped exist and explained the severity of the situation for the disabled when he said:

***A deformed or mentally handicapped child represents a tragedy anywhere in the world but in China such unfortunate children bear a special burden.***

*Street children:* This phenomenon attracted attention in the late 1980's and the government has responded with the development of Street Children Protection Centres. Improper behaviour on the part of the parents, such as gambling, drug-addiction and child beating were identified as reasons for children's departure to the street.

*Child labour:* West (2002:339) reported that there are examples of exploitative child labour reported in the media in China, and many of these cases involve children who have been trafficked or kidnapped.

*Abuse:* As child sexual abuse becomes more acknowledged, there is some public recognition that perpetrators may be people known to the child, but there is considerable resistance to the notion that family might be involved. More openly discussed is the question of physical abuse, in particular the beating of children.

- **Children's rights and the law:**

China ratified the United Nations Convention on the Rights of the Child in 1991 and that same year signed the Declaration of the Plan of Action at the World Summit for Children. A National Plan of Action for children in

China was created following on from the Summit, and was the focus of attention in the 1990s. West (2002:341) listed relevant laws as:

Protection of Minors Act 1992

Adoption Act 1999

Prevention of Juvenile Delinquency Act 1999.

In the latter part of the 1990s, interest in the UNCRC (United Nations Convention on the Rights of the Child) as a framework for implementing policy on children became evident. The children's right to participation is still contested though and, as West (2002:341) confirmed, much remains to be done in promoting the idea and method.

#### **4.3.1.5 Children's rights in Australia**

Maira Rayner (2002:345) described the situation of the 4,8 million children in Australia as lucky in the sense of being within striking distance of a beach or swimming pool, have clean drinking water, health care is free and they are likely to have their own bedrooms. Should they be Aboriginal or a Torres Strait Islander, or has arrived in the country without proper travel documentation, or has a disability, or needs the care of the state however, their luck has changed.

In 1990 Australia ratified the United Nations Convention on the Rights of the Child but child poverty had grown. It missed the timetable for lodging its first report to the UN Children's Rights Committee in 1993 and since then faced significant and justified criticism on how it treats its children. Rayner

(2002:345) reported that real human rights abuses have been revealed and left without redress; indigenous infant mortality rates are more than three times higher than the rate for other Australian infants; refugee children are not accepted either. In the year 2000, Amnesty International reported one instance of a 3-year old being put in leg restraints and detained with his father in a suicide-proof cell without windows, toilet or shower for thirteen days, and being denied food and medical attention.

The question why the ratification of the United Nations Convention on the Rights of the Child did not make children's rights part of a national agenda, was investigated. Rayner (2002:348) explained that Australian laws, institutions and policies about children are divided among the original six Australian colonies, now states, and two self governing mainland territories. Each vigorously guards its sovereignty and possesses its own Governor, written Constitution, legislature, executive and judiciary. The Australian Constitution establishes a "Commonwealth" of states and territories, and a system of federal courts dealing with the laws made by the federal parliament. Australia thus has several sets of governmental arrangements; hundreds of local government bodies peculiar to each state, and legal and administrative responsibilities for children are divided among them all. The federal parliament does not have the authority to make laws binding the states about education, child protection, how offending children should be treated by the criminal justice system or, simply, children's civil and political rights. As stated in Rayner (2002:350):



***The division of legislative and bureaucratic authority over children have affected the development of children's law, policy and practice, even in terms of parental rights and responsibilities. There is no national children's policy or federal solutions to the kind of problems that have left Australia's government so vulnerable to legitimate criticism. Without a coherent, consistent and permanent voice for children at both national and state level, United Nations Convention on the Rights of the Child implementation cannot be achieved.***

According to Rayner (2002:350), children in the courts were traditionally treated as either forensic objects or persons under a legal disability. In 1975 however, this changed dramatically with regard to Australian divorce law. For the first time children had the right to be legally represented. The new legislation even required the Family court to give effect to the wishes of children as to custody and access. The problem though is that no government has made proper provision for appropriately trained legal advocates for children or adequately funded children's specialist legal services. As Rayner states:

***There seems little point in recognising a child's right to participate in decisions that affect them, thus denying the means of expressing those or any views.***

Unfortunately, children's rights are not high on the political agenda. Rayner (2002:357) confirmed that it will take the concerted efforts of parents, children and children's groups to change this. She further stated that:

***Adult institutions must take the rights of Australian children as seriously as they do the country's overseas reputation. It is bizarre that the federal government was willing to protect children's rights overseas but remains unwilling to give leadership in providing services for children that will keep Australian-based children well, happy, and help them to achieve their potential as adult citizens.***

Since 1990 Australians have, "in principle", accepted that children have human rights but in practice, not implemented them.

#### **4.3.1.6 The Bulgarian Children Act**

In 1991 Bulgaria ratified the United Nations Convention on the Rights of the Child with enthusiasm. Although it provided a serious external stimulus for reconsideration of child policy and legislation in the country, the ratification however remained only a political token.

Todorova (2000:137) described the development of above act as a battlefield for adult policies in stead of a genuine commitment to children!

Wide reaching reform in the field of family law and child protection is currently under discussion in Bulgaria and was initiated when four legislative Drafts for Child Protection were brought to Parliament. Although the intention was to bring about reform in the public protection of children, the impact was far wider, and these proposals have helped to accelerate the entire reworking of legal regulation in the area of family relation. In May 1998 these four drafts were incorporated into a single draft for a new Family code. As Todorova (2000:137) explained, on the one hand there was growing recognition of the need for such a law; on the other hand, however, it became clear that there are serious obstacles to the social and parliamentary discussions. The government refused to participate in the deliberations and this seemed to predetermine the failure to move ahead.

As a result of public pressure and the efforts of the experts, the politicians admitted that the condition of children and their rights, together with the international commitments assumed by Bulgaria, required legislative measures for the implementation of the rights recognised in the Convention. Unfortunately, according to Todorova (2000:140), this fell short of recognition of the need for state policy towards families and children to be reconstructed in harmony with the new values and social tendencies.

Todorova (2000:140-145) identified a number of problems in the development and improvement of the legislation for children in Bulgaria:

- Social necessity

The reduction of social expenditure by the state and the impoverishment of families had led to serious deterioration in the welfare of children. Access to even basic services such as health care and education was reduced. Todorova (2000:141) quoted alarming statistics from a report of the Ministry of Education:

***3% (50 000) children were dropping out of school annually due to mainly economic reasons; The number of children who began to work (usually in an unhealthy environment) before they turn sixteen, were rising progressively; There was a growing tendency of children to use drugs; Child prostitution has developed and nearly a thousand children were living on the streets where they became victims of brutal violence; The child-care establishments have accommodated about 30 000 children of whom only 4% were orphans.***

- Public care for children

Five ministries and two central committees (Ministries for Health, Education, Labour, Social Policy and Justice and the Central Commission for Children with Delinquent Behaviour, and Youth and Sport Committee) were responsible for children. There were no authorities at the local level to implement public care for children. To a large extent the policies of these ministries and committees were inconsistent and controversial – dealing with administrative issues rather than serving the interests of

children. The police had no special obligations or authorisation for the protection of children. The only provision particularly targeted at children in the Ministry for Home Affairs Act authorises the police to take into custody for delinquent behaviour, children who have run away from their homes or other places where they have been placed for reasons of safety. The absence of individually targeted social services did not allow for child protection against possible domestic violence. Todorova (2000:143) found it cumbersome that there are no known or accessible authorities in Bulgaria where cases of violence or other risk for the child can be reported. No mechanism is provided to respond to a call for help and provide the child with immediate assistance.

- Legislative situation

Todorova (2000:143) pointed out that it is a constitutional principle that both society and the state should provide care for children and she quoted from Article 14 as well as Article 47 of the Constitution where it is stated that:

***Children left without the care of their relatives shall be placed under the special protection of the state and society.***

In practice the mechanisms for implementing these principles are outdated and ineffective. Todorova (2000:143-144) states as follows:

***The current law cannot respond adequately to the social needs arising in the process of transition, especially those related to children and family.***

***Family law preserves an emphasis on the rights of the parents and therefore preserve and reproduce patriarchal relations in the family. The philosophy of the law is that the children are a part of the family, they belong to their parents and what they need is only protection and prevention from harm. In spite of the provision of a broad range of opportunities for consulting children over a number of family conflicts, there are no procedural means for hearing the voice of the child. The lowest level of change in legislation lies in the area of regulating parent-child relations.***

- Changes in the Family, Children and Childhood

Todorova (2000:145) explain that in the context of the Bulgarian cultural milieu, the child is seen as a valued member of the family. She emphasized that new legislation is expected not only to set up mechanisms for more efficient protection of the children's welfare, but also to support the emerging social relations and status changes.

The most significant reason for the failure of the debate regarding legislation, as stated by Todorova (2000:155) is the fact that there are no professional communities in Bulgaria (such as social workers and child psychiatrists) to serve children. Social work training was started only in the

1990s and the newly emerging professional community of social workers is still incapable of serious contribution to the development of universal criteria and objectives in child policy. Contacts and communication between professional – physicians, social workers and lawyers – attending to children are just beginning to emerge. In fact there are no lawyers qualified specifically to work with children.

Todorova (2000:156) concludes with the concern that, although the experts are convinced Bulgaria must have a Children Act that is expected to deal with the deficiencies of current policy, it is not easy to foresee how long the children of Bulgaria will have to wait for it.

#### **4.3.1.7 Children's rights in Belgium**

Vandekerckhove (2002:362) reported that, inspired by the United Nations Convention on the Rights of the Child, other international guidelines and examples from other countries, the Flemish Parliament on 15 July 1997 voted to enact a law establishing a Children's Rights Commissioner and the Children's Rights Commissioner's Office. The first Commissioner was officially appointed by the Flemish Parliament on 13 May 1998 and the office really began to work in January 1999. The law sets out the main principles and tasks of the new office, which is, in its broadest sense, intended to provide an independent voice for children at parliamentary level. Vandekerckhove (2002:362) describes the function of the Children's Rights Commissioner as

***A megaphone for children in a political forum where they are not represented.***

She further elaborates:

***Children may not have their own place in political life, but they are part of society, here and now. Children are certainly not formally citizens (because they lack the adult political rights which bestow citizenship), but they are citizens in as much as they experience – along with everyone else – the consequences and effects of policy decisions in their daily life. The Children’s Rights Commissioner’s Office is there to protect and promote their rights and interests.***

#### **4.3.1.7.1 The status of children**

According to Vandekerchove (2002:363), children in Belgium seem to be at an ideological crossroad and an ambiguous position:

***First, the status of children might be described as being simultaneously “not yet” on the one hand but being “already” on the other. The distinction between these two states is drawn by adults, who designate children as competent or not at different ages and in different spheres.***



To illustrate the above statement, she explained that in the area of penal law, minors have for a long time been protected in the sense that they were considered to be legally incapable of committing criminal acts. More people lately believe that juveniles should be held responsible for their criminal acts and should be punished accordingly. The debate about their responsibilities under penal law is being conducted in the justice and welfare departments, with age-limits as low as 12 being advocated. At the same time, there is a debate about the age at which young people can freely consent to and engage in sexual acts. One proposal which triggered a heated debate, was the suggestion that the age of consent be lowered from 16 to 14. So, at the same time within the same society and political climate, different notions of competence and responsibility coexist. This also implies that children do have rights but are unable to exercise them.

Researcher strongly supports the following opinion of Vandekerchove (2002:363):

***Stating that minors are people too and that they therefore should enjoy all human rights is an incomplete statement as long as they have to rely on the goodwill of adults to ensure that their rights are genuinely and effectively respected.***

#### 4.3.1.7.2 Functions of the Commissioner's Office

In general terms the Children's Rights Commissioner's Office has to monitor the implementation of the Convention on the Rights of the Child. This includes the following functions:

- Checking whether legislation is consistent with the principles of the Convention on the Rights of the Child.
- Giving advice on how the Convention can be put into practice.
- Stimulating child-friendly policies in which the social position of children can be strengthened.

Vandekerchove (2002:364) experienced that the issue of participation for children is the most debated element of the Convention on Children's Rights. From the Commissioners Office several recommendations were made to the Flemish Parliament and other authorities on a wide range of topics including family mediation, youth care, youth work, advertisements on television, sports, education and discrimination.

An important function the Commissioners' Office is fulfilling is to *inform* the public (adults as well as children) about the contents and the importance of the Convention on the Rights of the Child and raises public awareness about children's issues. As Vandekerchove (2002:364-365) explains, this is done through a number of activities such as the following:

- Annual campaign which involves activities for children and targets messages at adults and policy-makers.

- In the year 2000 a referendum for children was held with the results being sent to the newly elected community councils.
- The annual Children's Rights festival set up as an ideal city for children.
- A booklet for publication containing practical tips and information and strategies for children to claim their rights in their own communities. The rights-related themes and topics for the booklet were gathered from questions and suggestions received from children.
- A range of leaflets for different age groups were published containing information about children's rights.
- An interactive website was launched ([www.kinderrechtencommissariaat.be](http://www.kinderrechtencommissariaat.be)). (Researcher was most impressed with this website – offering children the opportunity to participate in their own lives, as well as a facility to report when their rights were violated.)

Of extreme importance for this research, is the study that the Commissioner's Offices were required by law to undertake investigation into the circumstances and living conditions of children. Vandekerchove (2002:365) commented that it was an important but difficult commitment to meet and researcher would like to emphasize the following statement:

***An effective child policy requires knowledge about children but this information is sparse and fragmentary. What, for example, are children's attitudes towards school? How important are media to them? These are questions that we have been answering from***

***an adult perspective for a long time, while the perceptions of children themselves are undoubtedly very different. Only when we begin to address issues from the child's perspective, will we be able to find the correct answers to their concerns and needs.***

Vandekerchove (2002:365) reported that throughout 2000 a substantial social inquiry has been planned and conducted with data gathered about the different ways in which children view their daily life at home, in school and in their neighbourhood. She stated:

***On completion, the study has provided essential insights into children's perspectives on the world around them. Access to such child perceptions is vital to performing the task of being a "megaphone" for children to the policy-makers.***

The Commissioner's Office has to report annually to the Flemish Parliament about all its activities and achievements. This report is due on 20 November every year and, as Vandekerchove (2002:366-367) stated:

***We take advantage of the situation to put children's rights on the political and media agenda. We realize however that making a reality of children's rights will never be possible without targeting the adult society. In the beginning it is adult society that will have to make the shift towards more child-friendly practices: parents,***

***teachers, social workers, politicians, doctors and all other adults who are related to children.***

To conclude, Vandekerchove (2002:372) stated the following:

***Promoting children’s rights is a never-ending story; travelling the same road again and again, at first having to create a “market” in the sense of getting people interested and convinced about the importance of human rights in general and children’s rights in particular. On occasions it is certainly a bumpy road but it is never boring.***

On this positive note, researcher would like to conclude the section on the international context and focus on the situation locally – keeping in mind that we do not have to re-invent the wheel.

#### **4.3.2 The South African context**

South African Law is built on legislation in the United Kingdom and benefit from utilizing their previous experience. Yet, as China, Australia and Bulgaria, South Africa ratified the United Nations Convention on the Rights of the Child but haven’t as such implemented as domestic legislation and therefore experience similar problems as abovementioned countries.

In an enquiry by the South African Human Rights Commission in April 2002, it was stated that South Africa has a comprehensive child protection policy and

statutory framework. The framework is set out primarily in the South African Constitution, a number of international instruments to which the country is party and in domestic legislation aimed at facilitating the implementation of principles espoused in the Constitution and in international instruments.

Regarding international instruments, South Africa acceded and ratified the United Nations Convention on the Rights of the Child on 16 June 1995. As stated in the Human Rights Commission Report (2002:10), by acceding to this Convention, South Africa incurred the following obligations:

- To take all appropriate legislative, administrative, social and educational measures to protect the child from forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parents(s), legal guardian(s) or any other person who has the care of the child.
- To protect children from all forms of sexual exploitation and sexual abuse by taking all appropriate national, bilateral and multinational measures to prevent:
  - The inducement or coercion of a child to engage in any unlawful sexual activity.
  - The exploitative use of children in prostitution or other unlawful sexual practice.
  - The exploitative use of children in pornographic performances and materials.

- To take all appropriate national, bilateral, and multinational measures to prevent the abduction of or the sale of or traffic in children for any purpose or in any form.
- To take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of: any form of neglect, exploitation, or abuse, torture or any form of cruel, inhuman or degrading treatment or punishment; or armed conflict. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Another international instrument South Africa acceded to on 18 November 1999 was the African Charter on the Rights and Welfare of the Child. The Human Rights Commission (2002:11) stated that by acceding to the African Charter on the Rights of the child, South Africa assumed an obligation to:

- Take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.
- Protect the child from all forms of sexual exploitation and sexual abuse and in particular take measures to prevent:
  - The inducement, coercion or encouragement of a child to engage in any sexual activity.
  - The use of children in prostitution or other sexual practices.
  - The use of children in pornographic activities, performances

and materials.

- Take appropriate measures to prevent:
  - The abduction, sale of, or trafficking of children for any purpose or in any form, by any person including parents and other care-givers or legal guardians of the child.
  - The use of children in all forms of begging.

Schurink (1992:18-19) reported that the Children's Charter of South Africa, adopted by the Children's Summit of South Africa on 1 June 1992, specified that all children of South Africa are entitled to the following rights and protections:

## PART II

- Article 1

1. All children have the right to the protections and guarantees of all the rights of the Charter and should not be discriminated against because of his/her or his/her parent's or family's colour, race, sex, language, religion, personal or political opinion, nationality, disability or for any other reason.

2. All political parties, the government, CODESA, the future government, communities, families, and parents should do everything possible to ensure that children are not discriminated against due to his/her or his/her parent's or family's colour, race, sex, language, religion, personal or political opinion, nationality, disability or for any other reason.



- Article 2

All children have the right to a name and nationality as soon as they are born.

- Article 3

1. All children have the right to express their own opinions and the right to be heard in all matters that affect his/her rights and protection and welfare.

2. All children have the right to be heard in courtrooms and hearings affecting their future rights and protection and welfare and to be treated with the special care and consideration within those courtrooms and hearings which their age and maturity demands.

3. All children have the right to free legal representation if arrested.

4. All children have the right to participate in the government of the country and special attention should be given to consultations with children on their rights and situation.

- Article 4

All children have the right to freedom to practice their own religion, culture or beliefs without fear.

- Article 5

Violence

1. All children have the right to be protected from all types of violence including: physical, emotional, verbal, psychological,

sexual, political, gang, domestic, school, township and community, street, racial, self-destructive and all other forms of violence.

2. All children have the right to freedom from corporal punishment at school, from the police, in prisons and at home.

3. All children have the right to be protected from neglect and abandonment.

4. All children have the right to be protected from township and political violence and to have 'safe places' and to have community centres where they can go for help and safety from violence.

5. All children have the right to be educated about child abuse and the right to form youth groups to protect them from abuse.

6. All persons have the duty to report all violence against, abuse of and neglect of any child to the appropriate authorities.

7. Children should not be used as shields or tools by perpetrators of violence.

8. Children have the right to say no to violence.

9. The media has the duty to prevent the exploitation of children who are victims of violence and should be prohibited from the promotion of violence.

10. All children have the right to be protected from violence by the police and in prisons.

11. Children should not be obligated or forced to follow adults in their political involvements.

12. All children have the right to be free from torture, detention or any other physical or emotional violence during apartheid or at times of unrest or war.
13. All children have the right to be protected from drug and alcohol abuse by their parents, families and others and to be educated about these forms of violence.
14. Children have the right to a special children's court and medical facilities to protect them from violence.
15. Special groups and organizations should be formed within the communities to protect and counsel victims of all types of violence.
16. No child should be held in prison or police cells at any time.

The rights included above are very much in line with the United Nations Convention on the Rights of the Child in that it includes the characteristics of *Provision, Protection as well as Participation*. Unfortunately, Article Three (as stipulated above), was excluded from section 28 regarding children in the Bill of Rights entrenched in the Constitution of the Republic of South Africa 108 of 1996.

Section 28 of the Bill of rights mainly focuses on the provision of services and protection against harm – the so-called welfare rights. The exclusion of liberty rights was confirmed by the research of Robinson & Ferreira (2000:54-67). Robinson & Ferreira investigated whether article 12 of the United Nations Convention on the Rights of the Child (1989), which provides for the right of the child to be heard, is self-executing. The conclusion is reached that article

12 is not self-executing in terms of South African law and that legislative action, rather than judicial action, is required by this provision. In practice it means that children under South African law actually have no right to express their views freely in all matters affecting them, or to be heard in any judicial and administrative proceedings. Researcher believes that the above finding should be challenged and would therefore like to discuss the Bill of Rights to determine how children's rights can be protected.

#### **4.3.2.1 Bill of Rights (Constitution of the Republic of South Africa 108 of 1996)**

In this discussion, researcher will concentrate on specific sections, or relevant parts thereof, which should be applicable and enable the professional role-players to protect (and enforce) the rights of children in practice, specifically if working from a Child Centered Approach:

- **Section 7**

**(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.**

**(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.**

When referred to “all people in our country”, it should include children. Children are also worthy of human dignity and respect. In practice however, this dignity and respect do not reflect – with the result that children have to live a life decided by adults, regardless of their views and feelings. In order to raise responsible, well-balanced adults and citizens, children need to be treated with the necessary respect and dignity.

- **Section 8**

**(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.**

**(2) A provision of the Bill of Rights binds a natural or a juristic person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.**

**(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court**

**a. in order to give effect to a rights in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and**

**b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).**

**(4) A juristic person is entitled to the rights in the Bill of Rights to the**

**extent required by the nature of the rights and the nature of that**

**juristic person.**

According to this section, there should be no excuse to exclude a person's rights in the judicial process as section 8(3) (a) empowers the court to develop such a law should legislation not give effect to that right.

- **Section 9**

**(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.**

**(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.**

**(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.**

**(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection**

**(3). National legislation must be enacted to prevent or prohibit unfair discrimination.**

It was enlightening to see that age was specifically listed as one of the grounds on which not to discriminate against people. This implies that discrimination against children, by virtue of their age, is unacceptable. It further implies that, regardless of the child's age, their views, wishes, feelings should be given serious consideration.

- **Section 10**

**Everyone has inherent dignity and the right to have their dignity respected and protected.**

- **Section 11**

**Everyone has the right to life.**

- **Section 12**

**(1) Everyone has the right to freedom and security of the person, which includes the right**

**a. not to be deprived of freedom arbitrarily or without just cause;**

**b. not to be detained without trial;**

**c. to be free from all forms of violence from either public or private sources;**

**d. not to be tortured in any way; and**

**e. not to be treated or punished in a cruel, inhuman or degrading way.**

**(2) Everyone has the right to bodily and psychological integrity, which includes the right**

**a. to make decisions concerning reproduction**

**b. to security in and control over their body; and**

**c. not to be subjected to medical or scientific experiments without their informed consent.**



These sections are of specific relevance in cases of physical, emotional and sexual abuse. When a child is abused, his/her dignity is not respected or even acknowledged. Abuse further threatens the child's right to life. Not only is the child's life physically threatened, but the psychological damage done to that child has a permanent impact on his/her life. Abuse, in any form, is a direct violation of section 12 as a whole.

- **Section 16**

**(1) Everyone has the right to freedom of expression, which includes**

- a. freedom of the press and other media;**
- b. freedom to receive or impart information or ideas;**
- c. freedom of artistic creativity; and**
- d. academic freedom and freedom of scientific research.**

This section should be utilized to allow for the provisions made in Article 12 of the United Nations Convention – allowing children to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body. From a Person-Centered Approach as theoretical foundation, researcher is of the opinion that, by allowing children to participate in their own lives, their self-actualizing tendency (which Rogers believes exists in every individual) as well as their right to autonomy is acknowledged. Section 16(1)(b) specifically should be highlighted. By

denying children a right to information which will affect their lives, is denying them their right to autonomy.

- **Section 28**

**(1) Every child has the right**

- a. to a name and a nationality from birth;**
- b. to family care or parental care, or to appropriate alternative care when removed from the family environment;**
- c. to basic nutrition, shelter, basic health care services and social services;**
- d. to be protected from maltreatment, neglect, abuse or degradation;**
- e. to be protected from exploitative labour practices;**
- f. not to be required or permitted to perform work or provide services that**
  - i. are inappropriate for a person of that child's age; or**
  - ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;**
- g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be**



- **Section 32**

**(1) Everyone has the right of access to**

- a. any information held by the state; and**
- b. any information that is held by another person and that is required for the exercise of protection of any rights.**

**(2) National legislation must be enacted to give effect to this rights, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.**

- **Section 33**

**(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.**

**(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.**

**(3) National legislation must be enacted to give effect to these rights, and must**

- a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;**
- b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and**
- c. promote an efficient administration.**

The right to information (for instance about decisions that will effect their lives) should be seriously taken into consideration when working with children. One of the basic principles in the helping professions, and of specific importance when working with children, is that of confidentiality and trust. Children need to be informed of issues that effect them (for example what impact their parents' divorce will have on their lives) in order to be able to portray their wishes and feelings. Life is about choices and one cannot make a decision without being informed. If children are not given the opportunity to make decisions while being guided and protected, they will not be able to make an informed decision as an adult.

- **Section 38**

**Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –**

- a. anyone acting in their own interest;**
- b. anyone acting on behalf of another person who cannot act in their own name;**
- c. anyone acting as a member of, or in the interest of, a group or class of persons;**
- d. anyone acting in the public interest; and**
- e. an association acting in the interest of its members.**

- **Section 39**

- (1) When interpreting the Bill of Rights, a court, tribunal or forum**
  - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;**
  - b. must consider international law; and**
  - c. may consider foreign law.**
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.**
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by law, customary law or legislation, to the extent that they are consistent with the Bill.**

Knowledge of these sections should empower professional role-players to enforce children's rights and views to be taken seriously. Furthermore, children's counselling rights (as discussed in Chapter 2) should also be recognised. The fact that Section 39(1) (b) specify that international law must be considered, is enough reason and motivation to implement the provisions of the United Nations Convention on the Rights of the Child.

#### **4.4. Determining factors impacting the implementation of children's rights**

Without doubt there are comprehensive global statutory frameworks in place to acknowledge children's rights. What need to be determined is the factors that prevent the implementation of the legislation in practice. The two determining factors seem to be the arguments around children's age and competence on one hand and the best interest principle on the other hand. Researcher is of the opinion that none of these factors are a valid excuse and do not justify that children are being discriminated against purely by their virtue of being young.

##### **4.4.1 Age and Competence**

In practice it is often found that these factors are abused in order to justify adults continuing making decisions on behalf of children. What it actually implies is a lack of knowledge regarding the developmental processes as well as the needs and life tasks of children. The professional role-players working with children, need a comprehensive knowledge base regarding all aspects of childhood. As Garbarino & Stott (1989:1) state:

***What we seek here is a perspective on children as sources of information for adults – a perspective to inform professional practice, not a cookbook to dictate it.***

Garbarino & Stott (1989:8) claim that in presenting a framework for thinking about children as sources of information, we need to take a developmental point of view that recognizes children's changing capacities in the context of a series of ongoing interactions between children and their social environments. This also confirms from a Person-Centered Approach, that children will always change, and therefore the ecological perspective of child development (as discussed in Chapter 3) refers to two kinds of interaction namely:

- Interaction of the child as a biological organism with the immediate social environment as a set of processes, events, and relationships. Rogers' Person-Centered Theory was built around his personal experience of the effects that imposing conditions of worth, has on a person's self-esteem. Proposition 1 of the Person-Centered Approach stated that every individual exists in a continually changing world of experience of which he is the centre.
- The interplay of social systems in the child's social environment that affect the child's face-to-face experiences. Here, proposition 9 and 10 of the Person-Centered Approach is of specific reference:

***As a result of interaction with the environment, and particularly as a result of evaluational interaction with others, the structure of the self is formed – an organized, fluid, but consistent conceptual pattern of perceptions of***



***characteristics and relationships of the 'I' or the 'me' together with values attached to these concepts.***

**Rogers, 1987: 498**

***The values attached to experiences, and the values which are a part of the self-structure, in some instances are values experienced directly by the organism, and in some instances are values introjected or taken over from others, but perceived in distorted fashion as if they had been experienced directly.***

**Rogers, 1987: 498**

As explained by Garbarino & Stott (1989:8):

***These interactions require from us to look both inward, to the child's developing capacities in the context of the family, and outward, to the forces that shape the social and physical contexts in which we seek information from and about children.***

In Alderson (2002:155) it is said that a central question to address is at what age children can begin to form and express views which have due weight in matters that affect them. In order to answer this question, researcher drew from research findings during the last decade the following:

- Walker (1993:59) conducted a linguistic study on questioning young children in court. She found the 'incompetence' being on the side of the adults (professional role-players) doing the questioning and not necessary the children – regardless of what age they were. As she explained:

***When the competency of a witness is an issue in a court case, two of the tests that must be met are the capacity to understand the questions propounded and the ability to give intelligent answers. For an adult witness, poorly worded questions may simply be a nuisance, but for a child, this may be a potentially serious source of miscommunication.***

In the research, Walker studied different transcripts, including the evidence given by a five-year old child. Her finding with regard to this transcript was as follows (Walker, 1993:67):

***There seemed to be nothing essentially wrong with this child's competence as a speaker or competency as a witness in a court of law.***

In conclusion, Walker (1993:78-79) stated:

***It is our adult legal system that the children are caught up in, it is our adult language in which the proceedings are conducted, and it is our adult assumptions about both law and language upon which communication in the courts is based. As adults, we are not doing as well as we might in integrating children linguistically into a system not built for them.***

***Adults – judges, prosecutors, defence counsel, police and therapists – simply do not know enough about children’s capabilities, cognitively and linguistically, and that lack of knowledge presents the opportunity for untold mischief.***

- Zilbach (1994:56) conducted a study on including children of all ages in family therapy and expressed the following opinion:

***Children are capable of serious and well-thought-out opinions about their families, and of understanding and then describing complex family mechanisms.***

- Selwyn (1996:14) stated that the public opinion and legislation have changed in the last twenty years as to the competence of children to express a view in matters that concern them and the weight attached to

these opinions. She found that practitioners do not listen to the child and therefore fail to ascertain the child's wishes and feelings. Researcher strongly supports Selwyn (1996:20), saying:

***All children should be presumed competent and allowed to express their views about an order which will have such an impact on their lives. The reports should contain the wishes and feelings of every child with the onus on the social worker to demonstrate why the child is not competent.***

- Freeman (1998/1999:50) expressed the view that children need to be taken seriously. In defending children's right to be heard, he argues for a cultural revolution in attitudes to childhood. According to Freeman, 'competence' is not an easy concept and he distinguished between levels of competence and incompetence. In his research on the competence of children, he utilized the seven levels of incompetence as identified by Beauchamp and Childress as well as Buchanan and Brock in 1989. Freeman (1998/1999:51) summarised these levels as follows:

- **The inability to give evidence.**
- **The inability to understand one's situation or relevantly similar situations.**
- **The inability to understand disclosed information.**

- **The inability to give a reason.**
- **The inability to give a rational reason.**
- **The inability to give reasons where risk and benefit have been weighed.**
- **The inability to reach a reasonable decision, as judged, for example, by reasonable person standard.**

Freeman (1998/1999:51) commented that:

***Even small children can show a preference and most children can understand a situation as well as disclosed information. Many can give reasons, though we might not be convinced by them. But how many adults get any further? If rights were to hinge on competence at any of the higher levels depicted here, few would have them!***

As part of his research, Freeman referred to studies done in 1982, comparing the response of participants aged nine, fourteen, eighteen and twenty-one to hypothetical problems of decision-making. It was found that the fourteen year olds did not differ from the adult groups on any of the major standards of competency, such as evidence of a choice, understanding of the facts, reasonable decision-making process; reasonable outcome of choice. Even the nine-year olds were as competent as the average adult according to standards of evidence

of a choice and reasonableness of choice. Freeman (1998/1999:53) concluded with the following statement:

***The more autonomy children are given, the better they are able to exercise autonomy.***

- Borland, Laybourn, Hill and Brown (1998:11) found that children have mainly been seen as ‘objects of study’, whether as subjects of experiments, or as respondents to questionnaires (the contents of which have been determined in advance by adults) so that even when they are asked their views, the areas open to discussion have already been decided for them. In other words, there is little or no recognition that children have their own perspectives on situations that concern them, and that they often have an understanding of these situations that is far more sophisticated than adults suppose.

In the above authors’ study on middle childhood, it was found that from around age eight, children were able to discuss with parents, to understand the reasons for people’s actions and have an appreciation of what was right and wrong. Researcher’s opinion that ‘competence’ is used as an excuse to deny children a right to participate in their lives, is confirmed by Borland, Laybourn, Hill and Brown (1998:133) saying:

***Children’s lack of competence and heightened vulnerability compared with adults are conventionally used as reasons***

***to exclude children from decision making even in the settings like schools in which they are centrally engaged.***

- Naudé & Maree (2001) conducted research on the decision-making capacity of a minor child in a divorce case. They recommended that the minor child's choice and ability should be evaluated consistently, in context with assessment of the following factors (Naudé & Maree, 2001:43):
  - **Current psycho-social functioning of the minor child.**
  - **Current psychological development needs of the minor.**
  - **Current emotional needs of the minor.**
  - **Possible 'vulnerability' and special educational needs of the minor.**
  - **Determining the option that will cause the least damage.**
  - **Determining that which is in the best interests of the child.**
  
- According to Ruegger (2001:26), a number of studies have shown that very young children can give a clear account of matter within their personal experience, if they are interviewed appropriately. Ruegger (2001:83) further confirmed that research with children in public law proceedings suggests that many young children are able to

differentiate between their ideal wishes and the reality of the options open to them. The conclusion in her study was that the underlying debate about the child's competence to participate directly in decision-making, are the conflicting concepts of the child's right to autonomy, including the right to make mistakes, as against their need for protection to enable them to reach maturity without impairing their ability to lead a fulfilling adult life. Ruegger (2001:95) made important recommendations:

***A shift in the way evidence is presented, both in written form and in court, so as to make the proceedings more suitable for children's participation, by encouraging shorter, clearer evidence more firmly rooted in the essential issues for decision, and a less adversarial stance would benefit all parties. Most importantly it would give real meaning to the objective underlying both international and domestic legislation of giving children a real voice in proceedings concerning them.***

- Cairns & Brannen (2005:78) state that, as long as children and young people remain politically voiceless and powerless, there will be little change to their status in society. They conducted a project attempting to promote an alternative discourse within which children and young people are seen as active citizens, who are knowledgeable about their



world and able to play a full part in decision-making processes that affect them. Cairns & Brannen (2005:78) state as follows:

***Our refusal to acknowledge the ability of children and young people to speak for themselves has left them at the mercy of unscrupulous or uncaring adults.***

They further expressed the opinion that, despite legislative requirements that children must be heard in judicial proceedings, it has had little or no effect on the politically voiceless position of children in society, and it is here that the vulnerability lies. The project '*Investing in Children*' included children from three years old to adults in their early twenties. Their vision (in accordance with the United Nations Convention on the Rights of the Child) is as follows (Cairns & Brannen, 2005:79):

***Children are seen as full human beings, right-holders who can play an active part in the enjoyment of their rights. They are not – as they have often been presented in the past – mere dependants, the property of their parents. They are not people who only become full human beings when they become adults. They are in need of protection but also have strengths. Every child is seen as important, no matter what its abilities, origins or gender. Their views and opinions are significant. They are not to be seen merely as***

***victims, workers, young offenders, pupils or consumers, but as complex and fully rounded individuals.***

The authors confirmed that a radical change in the way professional role-players think and treat children, are necessary.

- Clark & Statham (2005:45) state that most existing literature on children's participation has focused on their involvement in service planning, delivery and evaluation rather than on children's views of their own world, starting from their interests and concerns. Few studies have considered the views and experiences of young children (under five years old). They identified one of the barriers as the uncertainty about 'how to listen' to children at this age. Apart from exploring an approach useful in communicating with children, Clark & Statham (2005:54) stated the following:

***Fundamental to any approach is a belief that children, including very young children, are experts in their own lives, and that working with them to understand how they see the world and then acting on this can strengthen their identity and sense of control. Feeling understood and having their views taken seriously by adults is likely to be particularly important for children who are unable to live with their parents, and who have often experienced serious disruptions in their lives.***

A major challenge for professional role-players, are to find new and sensitive ways of engaging and communicating with young children instead of hiding behind the term 'competency' – implying children are not competent and therefore not worth listening to. From abovementioned research, the following challenges should be adhered to:

- The professional role-players' communication skills when working with children (Walker).
- A mind shift in acknowledging that children from all ages are capable of well-thought-out opinions and understanding (Zilbach).
- Ascertaining children's views and wishes (Selwyn).
- A cultural revolution in attitudes to childhood. This implies that children should be taken seriously and professional role-players should keep in mind that the more autonomy children are given, the better they will be able to exercise autonomy (Freeman).
- Giving recognition that children have their own perspectives on situations and an understanding of these situations far more sophisticated than adults suppose (Borland, Laybourn, Hill and Brown).
- Utilizing the assessment factors as stipulated by Naudé and Maree in order to evaluate the child's decision-making capacity (Naudé & Maree).
- Making court proceedings more suitable for children's participation (Ruegger).

- Children should be seen as full human beings. Every child is important, no matter what its abilities, origins or gender and their views and opinions are significant (Cairns & Brannen).
- How to listen to children – even at a very young age (Clark & Statham).

It is the professional opinion of researcher that it is easier to hide behind the term 'incompetence of a child' than to admit that the actual incompetence lies in the ability of the professional role-player to work with and to listen to children – as confirmed by above research.

#### 4.4.2 The 'best interest' principle

In 1981 a Judicial Conference on Family Law was held in Canada and judges from all levels of court were brought together to discuss a specific area of substantive law. One of the much debated issues was that of the 'best interest' principle. Justice Claire L'Heureux-Dubé expressed concern about the orders she made in court being to the benefit of the children involved. In view of this concern, the term 'best interest' was investigated. As L'Heureux-Dubé (1983:301) responsibly acknowledged:

***The law does not operate in a vacuum: it is essentially a tributary of social change, particularly in the field of family law which is so closely linked to the everyday lives of people.***

Researcher's concern in practice centres around the fact that orders are made or decisions taken on behalf of children without allowing them to participate – yet they are the ones who have to live accordingly!

Goldstein (1983:121) called the paper he delivered at the Judicial Conference “In Whose Best Interest?” and stated:

***In the eyes of the law, to be a child is to be at risk, dependent, and without capacity or authority to decide free of parental control what is ‘best’ for oneself.***

***To be an adult is in law to be perceived as free to take risks, with the independent capacity and authority to decide what is ‘best’ for oneself without regard to parental wishes. To be an adult who is a parent is therefore to be presumed by law to have the capacity, authority, and responsibility to determine and to do what is ‘good’ for one’s children; what is ‘best’ for the entire family.***

Above statement is thus a confirmation that the law discriminates against children simply by virtue of being young. Where do adults learn the capacities to make decisions or to take risks if they were not allowed to do so as children within a protective environment?

Researcher firmly believes that to have children does not make you a parent. If children grow up, resenting the fact that they were not

allowed to be participants in their own lives and judged by court as incapable to owe the right to autonomy, one need to ask the question: What kind of parents and role-models are they going to be to their own children? It is experienced in practice that this creates a vicious circle: As they were not listened to or respected when they were children, they now do not listen to their children and adopt an attitude of 'if I could survive, so can my children'.

Andrews & Gelsomino (1983:245) state that, strictly speaking, the term 'best interests' is not a legal term. As they explained:

***It is borrowed from the behavioural sciences and refers to the non-legal appraisal of what constitutes the "welfare" of a child in a particular social setting, assessed from the perspective of someone other than the child himself or a spokesman for the child's preferences. It is not the same as the child's subjective view of his or her "interests", although the two may occasionally coincide.***

Above statement confirms that, according to law, only the child's welfare rights and not his/her participatory rights, are acknowledged or taken into account. It is noted however that, in above statement, the court is aware of the fact that decisions under the term 'best interests' are made by ***someone other than the child*** and also that ***it is not the***

***same as the child's view of his/her interests!*** Andrews and Gelsomino (1983: 246) elaborate on this view, saying:

***In a legal proceeding, "best interests" is, ultimately, what a judge decides it to be.***

This confirms researcher's concern as experienced in practice that orders are made and / or decisions are taken without "hearing" the child. In this regard, it is also important to consider the value of assessments. The purpose of the assessment is or should be to determine the child's views and feelings about a given situation. Yet, again the child is exposed to adults "interpreting" of what children have said and done, based on what the professional role-player think they heard. Children have often indicated that information, contained in the reports about them, do not collaborate with what they have said but that it is the opinion of the professional role-player.

Davel & de Kock (2001:272) explain the principle that courts have to adjudicate in the best interest of a child in every matter concerning that child. This principle has for some time been applied in a number of private law disputes. It has been described as the golden thread that runs through the law relating to children. The Constitution of the Republic of South Africa raised this principle to that of a constitutional imperative. Although it sounds ideal, Davel & de Kock (2001:272) state:

***It is the content and application of the principle which seem to create problems in practice.***

Researcher strongly echo above statement and is of opinion that if the term 'best interest' are more defined, it will eliminate problems in practice.

Davel & de Kock further mentioned that clarity concerning the contents of the best interest measure, without restricting the courts when considering all relevant circumstances and facts in every particular case, is essential.

It is stated that this best interest principle is firmly entrenched in International law. Article 3(1) of the United Nations Convention on the Rights of the Child (1989:2) stipulates:

***In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.***

According to Davel & de Kock (2001:273), the African Charter on the Rights and Welfare of the Child stated it even stronger – referring to the best interest principle in Article 4(1) as *the* primary consideration.



Section 28(2) of the Constitution of the Republic of South Africa states:

***A child's best interests are of paramount importance in every matter concerning the child.***

Without doubt all the countries have good intentions although, the fact that the power to decide what is in the best interest of children, remains with adults, is problematic. The needs and wishes of children are not always considered under all circumstances and there is therefore no consistency in practice. As Davel & de Kock (2001:274) highlighted in their investigation, the most common critique against the best interest principle is that of being vague.

With referral to divorce cases, several aspects have been listed to be considered in order to make a decision with regard to custody and access decisions. The basic guideline used since 1994 was the criteria given in the case of *McCall v McCall* (1994 (3) SA 201):

- The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child.
- The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires.
- The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.

- The capacity and disposition of the parent to give the child the guidance which he/she requires.
- The ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security.
- The ability of the parent to provide for the educational well-being and security of the child, both religious and secular.
- The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development.
- The mental and physical health and moral fitness of the parent.
- The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo.
- The desirability or otherwise of keeping siblings together.
- The child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration.
- The desirability or otherwise of applying the doctrine of same sex matching.
- Any other factor which is relevant to the particular case with which the Court is concerned.

Ellis (2001:134 -136) contributed substantially in this respect with her list of considerations:

- Which parent is more likely to permit the non-residential parent free and easy access to the child?
- Which parent has better parenting skills?
- Which parent is least likely to be abusive, neglectful or unstable on the basis of a past history of psychiatric problems, alcohol or drug abuse, abusiveness or neglect with this child or other children, or a pattern of choosing partners with such a history?
- Who has done the work of primary caretaker and knows best the child's needs, aversions, likes and dislikes?
- To whom is the child more attached?
- Who has the most time and energy available to give to the child?
- Which parent has the healthier relationship with the child?
- Which parent can provide a better quality of life for the child in terms of siblings, stepparents, grandparents, home and neighbourhood, schools, church, etcetera?
- Does the child have special needs?
- Which parent is better fit on the basis of a number of factors?

Each of above criteria should be evaluated in terms of the following seven factors:

- Continuity and stability of living arrangement.
- Child's preference.
- Child's attachment to each parent.
- Each parent's sensitivity to and respect for the child.
- Parent and child gender.

- Each parent's physical and mental health.
- Parental conflict.

In the study of Davel & de Kock (2001:277), the need for a similar kind of checklist of guidelines or factors to be taken into account when the principle of best interests is to be considered, is been identified. The authors investigated some cases where the best interest principle (or lack thereof) was implemented (Davel & de Kock, 2001:279-291):

- In the past and until recently, courts thought the mother to automatically be the best parent to award custody to. In the *van der Linde versus van der Linde* (1996) case however, the court investigated whether the quality of a parental role should be decided on the grounds of gender. It was determined that a father can be an equal good 'mother' and vice versa. Unfortunately, the best interests of the children were not a consideration in this case and, as Davel & de Kock (2001:281) mentioned, parental gender should not be a consideration when determining children's best interest.
- In the *Denston versus Denston* case, custody of a four year old little girl was awarded to the father in spite of the recommendation of the family advocate and the social worker that it would be in the child's interest to remain in the care of the mother. Because the mother did not contest the fathers' application for custody, the judge ignored the recommendations

of the professional role-players as well as the needs and wishes of the child.

- Another example of the inconsistency in decisions, was the *E versus E* (1940) situation where the court determined that the father had no right to force the mother to undergo the necessary blood tests to determine paternity. In *Seetal versus Pravitha* (1983) the opposite was decided and the court decided that, as upper guardian of the child, they can order blood tests. In *M versus R* (1989) the court decided that a child has a right to identity and ordered blood tests to proof paternity. *Nell versus Nell* (1989) again proofed otherwise as the judge decided it is not within the court's jurisdiction to order such tests.

All these cases proved that the decisions regarding the best interest of the child were taken solely by the judges individually. Not in one of these cases were the children's wishes and feelings considered or were they given the opportunity to express it. Even in matters concerning a similar application (for example blood tests to determine paternity) there was no consistency in the decisions.

Researcher would like to elaborate on examples taken from literature in order to highlight the seriousness of adults-only having the power to decide on behalf of children what are supposedly to be their best interests:

- Coppock (2002:139) referred to a television programme exposing alarming statistics regarding the increase in the numbers of children and young people in Britain being diagnosed with Attention Deficit Disorder and prescribed medication to treat it. They compared the number of prescriptions that were issued for Ritalin:

1991 - 2 000

1995 - 14 700

1996 - 47 900

1999 - 158 000

Overall it is estimated that some 190 000 children in the United Kingdom are being given psychiatric drugs to control their behaviour.

As Coppock (2002:139) states:

***The power of adults, as parents and professional, to describe and define the oppositional behaviour of children and young people as “illness” or “disorder” is of great concern.***

The author further states:

***Professional discourses contain both written and unwritten assumptions about the nature of “childhood” and “adolescence” which inform judgments concerning what is deemed “acceptable” and/or “appropriate” behaviour for***

***young people. These judgments, and the various interventions that flow from them, can have profound consequences for the lives of children and young people. In many circumstances they may actually undermine or overtly breach the core principles of those initiatives intended to secure the rights of children and young people in law and through convention.***

The investigation by Coppock proved that children have little option but to submit to medical treatment considered “in their best interests”. Both the United Nations Convention on the Rights of the Child as well as the Children Act 1989 placed a duty on health professionals to seek the views of children. There is thus no valid excuse for health professionals to exclude a child or young person from actively participating in this decision-making process.

Coppock (2002:151) refers to the British Association for Community Child Health’s recommendation:

***To ensure that a child or young person has sufficient understanding and intelligence to make an informed decision about their treatment requires that adults allow them the information and opportunities for discussion they require.***

Coppock (2002:151) found in her investigation that the feelings and attitudes of the children themselves have been systematically excluded from nearly all studies. Researcher agrees with the opinion that the drugging of children to control their behaviour amounts to “technological child abuse” and it should raise profound spiritual, philosophical and ethical questions about ourselves as adults and about how we view the children in our care.

Coppock (2002:151-152) concluded with the statements by Mental Health Foundation, confirmed by Professor Steve Baldwin, clinical psychologist:

***We claim to be a child-centred society, but in reality there is little evidence that we are. In many ways we are a ruthlessly adult-centred society where children are defined almost exclusively in terms of their impact on adult lives. Our adult-centred society has tried to contain and limit the impact of children on adult life by either excluding them from much of it or blaming them for disturbing it.***

***What children need is our understanding. Occasionally they need psychotherapy, they need counselling, they need us to provide them with our best services and our best efforts to meet their needs, their health needs, their social***



***needs, their educational needs, and their interpersonal needs. What they don't need is to be drugged.***

Although this study of Coppock was done in the UK, the situation is not different in other countries – including our own! Researcher has found the same concern in her practice where children are often placed on medication, without them having a say about it, because it is decided by adults 'to be in their best interests'! It is no use to hide behind the sentence "in accordance with their age and maturity" because Alderson (2002:155) conducted research on the age children can begin to form and express views which have due weight in health matters that affect them. She came to the astonishing conclusion that even children aged three or four years showed a mature grasp of their complex condition and treatment!

- Another example of adults having the power to decide on the child's best interests is found with disabled children.

There has always been a tendency to regard disabled children as children in need of services and protection rather than as children who have rights alongside non-disabled children. Campbell (2002:196) argued that by securing the rights of disabled children would bring home rights for all children. She explained that one approach to acknowledge rights issues for disabled children has been to issue Charters of Rights that focus on disabled children. Apparently, in 1997 Chailey Heritage Hospital School produced a charter of children's rights

as part of its child protection guidelines. This eventually leads to the acknowledgement in the Children Act 1989, stating that disabled children should be regarded as “children first”. Campbell (2002:197) identified four issues of fundamental importance that should be included in the rights for disabled children, namely:

- Right to life.
- Right to protection.
- Right to information.
- Right to education.

In her study she included a comment of a disabled young person who said:

***When you are a disabled child, assumptions are made that our life is lacking in quality. These assumptions are made as soon as you are born and are used to justify discrimination.***

Campbell (2002:197) elaborates on above statement by claiming that these assumptions are made about the value of a disabled child’s life even prior to birth. To the same extent, many disabled children were denied the right to education. Again, adults have the power to decide whether children are worthy of being informed and educated!

According to Campbell (2002:205), the most significant rights issue for disabled children is their invisibility and lack of contact with the mainstream world. She stated as follows:

***Unless particular attention is paid to the inclusion of disabled children within any mainstream activity they will remain invisible and their needs and rights unmet.***

***Upholding their rights is as simple as acknowledging these rights to be the same as for all children. The simplicity of this conclusion is however predicated on a fundamental re-evaluation of disabled children as full members of an inclusive society.***

Researcher holds the opinion that adults and professional role-players do not deliberately think about the impact of their power to make decisions on behalf of children and should perhaps act with more caution in this regard.

There is a need for closer and more trusting relationships between professionals and children in order to ensure not only their protection but also to encourage their full participation in matters relating to their welfare and development. By allowing children to contribute in their lives and hear what they say, the professional role-players will be empowered to truly communicate the child's best interests. It then becomes a shared reality between the professional role-player and

child and the professional role-player does not need to be the 'all knowing authority'.

Barry (2002:252) confirmed researcher's statement when she says:

***Children and young people can only effectively participate through acquiring communication and assertiveness skills and developing self-confidence, as well as receiving adequate information and an open response from professionals.***

For this to happen, the right to protection for all children and young people needs to be ensured in practice as well as in legislation. Furthermore the children and young people must be participants with a right to provide their own assessment regarding their competencies, wishes and needs as their contribution to the decision-making process. Children and young people should be encouraged to exercise their right to participate in decisions about their welfare based on their own experiences and competencies. Barry (2002:252) emphasizes above as follows:

***Their rights to protection and participation can only be guaranteed if professionals and parents, with adequate resources and training, meet their legal obligations to work in the best interests of children and to consult with them on matters relating to their welfare.***

Researcher would like to conclude with the statement by Kufeldt (1993:163), who said:

***Unless and until we give children a voice we cannot claim that justice for children has been provided. We need to provide consistency and continuity, we need to create a climate of trust, and we need tools and opportunities for children to share their hopes, their fears, their knowledge and their wishes, with those entrusted with their care.***

***Time, courtesy and the willingness to listen are the endorsements of sincerity that a child requires of the adult in conversation. This is surely not too much to ask.***

#### **4.5 Implementation of children's rights in practice**

In order to be able to put all of above into practice, it is important to identify the 'tools' referred to by Kufeldt (1993:163). Researcher would like to focus on three specific aspects, namely:

- Skills needed to work with children.
- How to communicate with children.
- Utilizing existing resources.

#### **4.5.1 Skills needed to work with children**

Any work with a child must be based on a very thorough understanding of children's development and of the needs of the particular child. The child's needs will be identified through an assessment of the child's situation. This assessment is a continuing process and not a single event. Following the assessment, the needs must be addressed through specific activities related to specific goals, and the degree of success in meeting the needs must be evaluated both on an ongoing basis and at the end of the therapy.

It is important for the professional role-player to keep in mind that the way you work with children changes, depending upon the age of the child. As an example: with a child aged four, you get down on the floor to play with a puzzle or dolls; if the child is fourteen, puzzles and dolls will be inappropriate. Adolescents are in a transition between childhood and adulthood and are usually more interested in where they are going (adulthood) than where they came from (childhood) and this must be respected.

Colton, Sanders & Williams (2001: 55) identified specific skills needed to work with children and it can be listed as follow:

- Ability to maintain clarity of focus.
- Ability to recall the experience of being a child and to relate that to the work in hand.
- Ability to get children to talk or express themselves.

- Ability to feel comfortable in the presence of children and to have them feel comfortable with you.
- Ability to facilitate children's play.
- Ability to decentre from an adult perspective to engage the child.
- Ability to continue working uninterrupted despite the emergence of painful and disturbing material.
- Ability to respond to the different vocabulary, idioms, and expressions of children.
- Ability to be the diplomat.

Researcher would like to add:

- The ability to create a safe environment for the child to take risk to share information.
- The ability to create a trustful relationship.
- The ability to portray respect to a child.

Every professional role-player working with children, need to have (or develop) these abilities. Of utmost importance is the ability to be sincere and genuine. Children are extremely sensitive and will not respond if they sense insincerity.

#### **4.5.2 How to communicate with children**

When the issue of competence was discussed earlier in this chapter, researcher referred to the linguistic study of Walker (1993:59) on questioning young children in court. She found the 'incompetence' being on the side of

the adults (professional role-players) doing the questioning and not necessary the children – regardless of what age they were.

Garbarino & Stott (1989:10) state the following as a practice guideline in communicating with children:

***The better one's knowledge of normal child development, the better prepared one is to identify effective ways to communicate with children.***

A child's performance as a source of information will depend on particular capacities to perceive, remember, interpret, and communicate. These capacities develop in connection with more general intellectual and emotional capacities. Misunderstanding and misinterpreting developmental markers are a common mistake made by professional role-players. In order to understand children's behaviour and words, it is important to take account of the psychological factors that motivate their behaviour.

As Garbarino & Stott (1989:11) confirm:

***It is important to be critical of one's own conclusions about a child's motivation that attribute irrationality or meaninglessness to the child; consider how things might look and feel to the child.***



The child's ability to provide information depends on children's feelings about being competent, their attitudes toward adults, and the ways in which they defend themselves from difficult consequences or feelings. These issues of self-esteem and coping may influence the way children communicate. Another important factor determining the effectiveness of communicating to children, is the professional role-players' relationship with the child as well as personal characteristics such as the adult's style of interaction, tone of voice and degree of empathy. Garbarino & Stott (1989:14) pointed out a danger that adult's preconceptions can powerfully influence children by creating self-fulfilling prophecies through nonverbal cues. In other words, adults 'find' evidence that confirms their own biases.

Garbarino & Stott (1989:14) further noted that the adult's professional role will greatly influence the nature of the information obtained from the child:

***Who you are can influence what you want and value and what you get***

The same authors suggested the following:

- Asking general questions in stead of specific questions. The child is an informant of his /her own behaviour and feelings of his/her experience of an event.
- Through tests and other measurements, the professional role-player learns from the child by testing the child's response to stimuli and

comparing his/her responses to predetermined norms, standards, or established criteria.

Garbarino & Stott (1989:187-189) discussed some important issues with regard to interviewing. Adult competence, according to Garbarino & Stott (1989:16), is derived from the skill in recognising the status of a child, in formulating a context that will maximise the child's performance, and in minimizing violations of the child. Together, these factors may influence the choice of technique or tactics for eliciting information from children.

The following techniques reflect different degrees of adult direction in the encounter with the child, differences in the degree to which the adult stimulates and control the interaction:

- In observation of children's behaviour, the professional role-player, without interacting, learns from the child by watching and listening to the child's spontaneous behaviour.
- In children's play and stories, the professional role-player uses play and storytelling as a method of communicating to a child through metaphor and as a source of information from the child about his/her inner world of thought and feelings.
- In interviewing children, the professional role-player learns interactively from a child along a continuum ranging from eliciting a narrative through techniques.
- Being aware of the child's experience will help the professional role-player ask more informed, intelligent questions to which the child will be

more likely to respond in detail. Information obtained prior to the interview should be used only as a general guide to the areas the investigation will touch on and as a source of background material from which to construct questions.

- The setting in which the child is interviewed should be neutral, relaxed and relatively free from distractions. There should be cushions or mats to enable the professional role-player to sit on the same level as the child.
- A selection of tools and props to assist the child and professional role-player may be included, depending on the age of the child. The professional role-player's knowledge of the child's age, sex and background will help to select appropriate items.
- An interview kit containing familiar items selected because this could facilitate communication and help build rapport is helpful when seeking information, especially from younger children. Useful items to be included in the kit are felt-tipped markers or crayons, paper, dolls and dollhouse, puppets, play dough and toy telephones.
- Questioning techniques are important. Open questions and encouraging responses are keys to encouraging children to talk. Garbarino & Stott (1989:190) stated that to be effective, questions must be appropriate for the developmental level of the child being interviewed. There are qualitative differences in language, comprehension, reasoning, and memory between adults and preschoolers. The following suggestions are intended to ameliorate some of the difficulties in interviewing these children:

- Use sentences with only three to five more words than the number of words in the child's average sentence.
- Use names rather than pronouns.
- Use the child's terms; if necessary, elicit them. If elicitation is impossible, use various terms in your question to be sure the child understands, and monitor his/her response to be sure.
- In order to determine if you have been understood, ask the child to repeat what you have said rather than asking "do you understand?"
- Rephrase questions the child does not understand. Repeating a question may be taken as an indication that the child has given an incorrect answer and the child may change his/her answer.
- Avoid asking questions involving a time sequence.
- Be careful in interpreting responses to very specific questions. Children are apt to be very literal.
- Do not respond to every answer with another question. Merely acknowledge the child's comment. This will encourage the child to expand on his previous statements.

#### **4.5.3 Utilizing existing resources**

As mentioned before, it is unnecessary to re-invent the wheel. However it is important to learn from prior projects. In both the UK and Belgium there are several important projects running to promote children's rights.

One of the projects is called Children's Express (A voice for young people in an adult world). Williams (2002:254) explains that Children's Express's

mission is to give young people the power and means to express themselves publicly on vital issues that affect them, and in the process to raise their self-esteem and develop their potential. In its work it aims to:

- Ensure that children have the skills and support to enable them to express their views on issues that concern them.
- Bring these concerns to the attention of policy-makers and opinion formers.
- Encourage children's development as good citizens.
- Motivate adults to take an interest in children's issues.
- Provide a supportive and nurturing environment.
- Work on a national basis.
- Become a recognised and respected source of objective view on youth issues.

Currently Children's Express targets children aged 8 to 18 from areas of limited opportunity, but the programme is open to all. Work takes place after school, at weekends and during holidays. It is registered as a charity and operates like a news agency, delivering articles and broadcasts produced by teams of young people to mainstream national, regional and local media.

Another project is the work of the Save the Children's Centre for young children's rights. They believe that even the youngest child has a right to be heard and to promote that is at the heart of their work. Hyder (2002:311) explains that the goal of the Centre is to ensure that all young children have the opportunity to express their views on the matters that affect them and to

participate in the places where they spend much of their time. They also work in partnership with those adults (professional role-players) who work daily with children in their early years, play settings and schools, so that the principles of listening to children and young children's participation are embedded in everyday practice.

Cairns and Brannen (2005:78) state the following about it:

***As long as children and young people remain politically voiceless and powerless, there will be little change to their status in society.***

Through the project 'Investing in Children' they are promoting the human rights of children and young people – attempting to promote an alternative discourse within which children and young people are seen as active citizens, who are knowledgeable about their world and able to play a full part in decision-making processes that affect them.

In Belgium, the Flemish Parliament appointed and supports the "Kinderrechtencommissariaat" who are aggressively promoting the rights of children through many different projects. Ankie Vandekerchove (2005:15) is the children's rights commissioner and states their viewpoint about the importance of acknowledging children's rights as follows:

***Kinderen moeten opgroeien tot verantwoordelijke en betrokken burgers. Het klinkt zo evident. Maar hoe willen we dat realiseren als we ze tegelijk op zoveel terreinen uitsluiten? Als we kinderen kansen ontnemen om mee verantwoordelijkheid te dragen en zich mee verantwoordelijk te voelen.***

Above author confirms researcher's concern, namely: If children are continuously excluded and not given the opportunity to accept responsibility, how are they going to learn to be responsible, participating citizens?

Firstly it is the believe of the commissioner that children cannot utilize their rights if they are not aware of them. In this regard, they have published booklets called "K30 – 30 vragen en antwoorden over kinderrechten"; "Megafoon – Actietips voor kinderen en hun ouders" and "Megafoon – Actietips voor leerlingen met ideeën". A serious emphasis is placed on participation. Vandekerchove (2005: 17) states in this regard the following:

***Participatie is gewoon een recht van alle mensen. Ook van kinderen dus. Het Internationaal Verdrag van de Rechten van het Kind legde daar in 1989 de juridische grond voor. België ratificeerde het verdrag in 1991. Een hele mond vol, voor een belangrijk document dat een hele reeks mensenrechten vertaalt voor minderjarigen (iedereen onder 18 jaar). Die mensen moeten niet alleen leerlingen informeren over hun rechten. Ze moeten ze***

***ook elke dag respecteren en toepassen in de praktijk. Alleen leren over iets zonder het ook te ervaren, leidt tot minder resultaat.***

Vandekerchove confirms the importance of the United Nations Convention on the Rights of the Child – stating that people should not only be aware of the rights as stipulated in the Convention, they should also respect and implement it in practice.

In view of above opinion, the focus of the different projects are to empower children to exercise their right to participate. An example from the booklet for parents and children are the picture of the huge ear and mouth that the child have to cut out, tie a string to it and wave it around whenever they feel that nobody listens to them or do not get the opportunity to voice their opinion.

Another very important and successful project is a programme focused on schools. The programme is a practical guideline on how to implement children's right to participate in school. Two hundred and seventy schools are currently participating with great success. As one of the pupils commented:

***De school is van iedereen. Groot én klein moet kunnen meedoen op school: zijn mening zeggen en mee kiezen wat er op school gebeurt.***

***(Jeroen, vijfde klas).***



In South Africa we also have different committees and bodies who endeavour to promote the rights of children, for example a Human Rights Commission, a Children's Rights Commission, a Children's Rights clinic. It is a noted concern that children are not directly involved in any of above committees but, again, it is adult-driven. It is further researcher's considered opinion however that, instead of the different committees functioning individually, all the bodies should work together through one co-ordinating body similar to the Kinderrechtencommissariaat in Belgium. When active projects, as mentioned above, are driven from one central point, it will be more effective and ensure that everybody works towards a common goal – protecting the rights of children.

#### **4.6 Conclusion**

Children have the right to be seen, heard and taken into account even when they do not have problems or are judged to be causing problems for society. It is important to emphasize that children are part of society, here and now, and as such they deserve the relevant attention on all matters of public policy.

Creating a reality of children's rights will never be possible without targeting the adult society as well. Before being able to do so, it is adult society that will have to make the shift towards more child-friendly practices: parents, teachers, social workers, politicians, law professions, doctors and all other adults who are related to children - that means everyone.

Too often children are expected to fit into adult ways of participating when what is needed in stead is institutional and organisational change that encourages and facilitates children's voices.