

CHAPTER 3

STATUTORY DEVELOPMENT OF THE PARTICIPATORY RIGHTS OF CHILDREN IN LEGAL MATTERS AND THEIR RIGHT TO LEGAL REPRESENTATION AND CUSTOMARY LAW IN THE PRE-CONSTITUTIONAL ERA IN SOUTH AFRICA

3 1 Early South African history

3 1 1 Introduction

The path which the legal participation of the child followed through the centuries has been neither steady nor clear. Fortunately the development of the right to participation of the child did not remain static.

During the early stages of the development of South African law, the child's participation in legal matters was influenced by Roman-Dutch law and the steady and increasing influence of English common law. The development of local custom became more noticeable toward the latter part of the pre-constitutional era. The developments have to be investigated to determine to what extent a distinguishable children's jurisprudence has come into its own.

The period prior to the new democratic constitutional dispensation in South Africa needs to be examined to determine to what extent child participation and representation in legal matters had developed. Of importance is the influence of the English common law and the effect it had on the child's participatory rights and right to legal representation as derived from Roman-Dutch law that founded the common law in South Africa. It is also necessary to determine the influence of statutory law on the child's participatory right and legal representation. The introduction of adoption of children to the South African jurisprudence will be discussed and how this development influenced the participation of children in legal matters affecting them.

The aim of this chapter is to give a brief overview of the development of the child's participatory right and right to legal representation, highlighting only those circumstances that are central to such development. In some instances, statutory developments affecting children implied their participation in legal proceedings affecting them. However, generally the child's right to be heard was not prominent and his/her voice remained unheard.¹

3 1 2 Pre-colonial period

This period did not specifically have the interests of children at heart in legal matters affecting them other than was found in the day-to-day activities in family life. It appears that during the early days of the pre-colonial period recorded history did not reflect any incentives for children's rights other than that which the settlers brought with them from their various countries of origin.² The traditional customary law in Southern Africa flourished during this period and in itself presented developments and adaptations as contact with other cultures ensued.³

The welfare of children was dependent on the prescripts associated with the particular custom of the extended family of the child.⁴ More often than not children's rights were subordinated to the interests of the family group. The reason for this was that the welfare of children was inextricably woven into the communal welfare of the extended family, tribe or group.⁵ The customary law

¹ However, it does not mean that the child never participated. The child's right to participation in legal matters, as a right derived from Roman-Dutch law, remained and was adapted to meet South African requirements.

² This in itself represented wide diversity of people with an array of cultures from France, the Netherlands, Germany, East Africa, Malaysia, and the West-Indies, as well as the various indigenous groups in South Africa and the English settlers from Great Britain. See in this regard Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* (PhD thesis 1964 UCT).

³ See 3 2 *infra*.

⁴ Maitufi "The Best Interests of the Child and African Customary Law" in Davel *Introduction to Child Law in South Africa* (2000) 137 highlights the development of customary law through the ages consistently being observed by communities where it is practised and especially the protection of the individual (here the child) through his family.

⁵ Skelton and Proudlock in Davel and Skelton *Commentary on the Children's Act 1-2*. See also Bennett *Customary Law in South Africa* (2004; hereafter Bennett *Customary Law*) 307

applicable to children helped to prepare children for their adult lives and many of the rules of customary law are still relevant today in families that follow customary law.⁶

3 1 3 Colonial period

Towards the latter half of the nineteenth century development in children's rights became noticeable.⁷ The first children's home in South Africa was established in 1815.⁸ Thereafter in 1862 the Anglican Church opened an orphanage for girls and in 1868 it founded the "House of Mercy for Wayward Girls". The Dutch Reformed Church opened an orphanage for boys and girls in 1882.⁹ One of the first statutory interventions is to be found in the Cape Colony. This ordinance was enacted on 5 July 1833¹⁰ substituting the Orphan Chamber in the Cape Colony with the Master of the Supreme Court among others to administer the estates of minors.

Various statutory provisions were introduced at intermittent stages to safeguard the interests of children.¹¹ The Cape Parliament introduced legislation obliging

who explains that customary law tends to reflect the concerns of an agrarian society and in traditional customary law children at least would expect to find a home and a family. See also Ngidi "Upholding the Best Interests of the Child in South African Customary Law" in Boezaart *Child Law in South Africa* 225.

⁶ Skelton and Proudlock in *Commentary on the Children's Act* 1-2. However, Bennett *Customary Law* 83 is less optimistic about the survival of "traditional" customary law in present day South Africa.

⁷ See Bosman-Swanepoel and Wessels *'n Praktiese Benadering tot die Wet op Kindersorg* (1995) hereafter Bosman-Swanepoel en Wessels *Wet op Kindersorg* 1 refer to some of the statutory developments affecting the rights of the child. This development paved the way for the eventual statutory development in which the participatory rights of children became evident. See also Skelton and Proudlock in *Commentary on the Children's Act* 1-3.

⁸ Skelton and Proudlock in *Commentary on the Children's Act* 1-2 refer to Theal *History of South Africa since 1795: The Cape Colony from 1795 to 1828* (Vol 5) (1964) 286-288. See also Bosman-Swanepoel and Wessels *Wet op Kindersorg* 1.

⁹ Skelton and Proudlock in *Commentary on the Children's Act* 1-3.

¹⁰ Ordinance 105 of 1833.

¹¹ This was part of the aftermath of the "child-saving movement" which began during the nineteenth century in Europe and had reached South Africa. See Skelton *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (LLD thesis 2005 UP) 327-329; Skelton and Proudlock in *Commentary on the Children's Act* 1-3 - 1-4. It may be argued that this focus on children as victims of their circumstances was the forerunner of the later Children's Act 31 of 1937 and ensuing

widows or widowers to ensure the safeguarding of the inheritances of minor children before entering into marriage.¹² The Masters and Servants Act¹³ introduced apprenticeship of children requiring the child's consent if over sixteen years of age.¹⁴ The Act required the consent of children over the age of sixteen years to be apprenticed for a term not exceeding five years in any trade¹⁵ and not to be transferred without the consent of the child if older than sixteen years.¹⁶ The Cape Colony introduced the Reformatory Institutions Act¹⁷ which determined that convicted children should only be sent to or detained at any reformatory institution until the child has attained the age of sixteen years.¹⁸

In the Cape Colony destitute children were dealt with in The Deserted Wives and Children Protection Act¹⁹ which protected children by criminalising the failure to support a child by any person who was wholly or in part liable for their support.²⁰ This appears to be the first piece of legislation in South Africa that

children's codes culminating in the present Children's Act 38 of 2007. For a discussion of the participatory rights of children entrenched in the Children's Act of 2007, see 5 4 5 *infra*.

¹² Minor's Inheritance Act 12 of 1856.

¹³ 15 of 1856, which commenced on 4 June 1856.

¹⁴ Skelton and Proudlock in *Commentary on the Children's Act* 1-3 mention that the Act provided dependent children to be placed under the guardianship of suitable persons, and taught a trade. The authors add (1-3) that the practice of apprenticeship, which developed in English child welfare, eventually found its way to South Africa in the Masters and Servants Act referred to above. This notion of apprenticeship to address the plight of dependent children is also referred to by Geffen in *The Laws of South Africa Affecting Women and Children* (1928) hereafter *Geffen Women and Children* 315-316.

¹⁵ Ch III s 4 where the phrase "[a]ny minor of the *full age of sixteen years* or upwards" created the impression that a child of sixteen years was regarded as old enough to decide what trade he or she wanted to ply. (Emphasis added.)

¹⁶ Ch III ss 3, 4 and 12.

¹⁷ 7 of 1879. Proc no 11 of 1882 in Gazette 27 January 1882 established the Porter Reformatory.

¹⁸ Ss 2 and 3 of the Act. From the wording of the Act, it appears that the intention of the legislature was that for the purposes of the reformatory, children were regarded only as such until the age of sixteen years. Bosman-Swanepoel and Wessels *Wet op Kindersorg* 2 draw attention to the fact that the children who were sent to the reformatories could also be apprenticed until they attained the age of sixteen years. See also Skelton and Proudlock in *Commentary on the Children's Act* 1-3.

¹⁹ 7 of 1895. The purpose of the Act was among others to ensure that a father or mother maintains his or her children. S 1 provided for the penalty for neglecting to provide for his or her family.

²⁰ S 1 read: "Every person being able wholly or in part to maintain ... his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect ... his or her family ... shall have become destitute shall be deemed to be an idle and disorderly person."

dealt with the maintenance of children.²¹ Further statutory developments affecting the rights of children during the period prior to the unification of South Africa did not focus on the participation rights of children. The aim was to safeguard children against the prevailing social evils of the time, for example the Destitute Children's Act.²²

Writing at the beginning of the twentieth century Anders and Ellson²³ concluded that children under seven years of age could not commit crime because they lacked "the power of volition".²⁴ The same authors also mentioned that a child under the age of seven years was irrebuttably presumed incapable of *mens rea*.²⁵ Children between the ages of seven and fourteen years were presumed

²¹ S 2 specifically referred to a father who "deserts any child, being under fifteen years of age or leaves it [sic] without any adequate means of support". In the case of a child, the complaint could be lodged by the child's mother or any "reputable" person (s 2).

²² 24 of 1895. See Skelton 328; Skelton and Proudlock in *Commentary on the Children's Act* 1-4 draw attention to the Care of Neglected Children Act 24 of 1895 as the first comprehensive piece of legislation dealing with care and protection of children, which was cited as "The Destitute Children's Relief Act of 1895" and did not provide for any child participation during the inquiry of a magistrate to determine whether the child was a "destitute child".

²³ *The Criminal Law of South Africa* (1915) hereafter Anders and Ellson *Criminal Law* 8 who submitted that children below seven years were not criminally liable because they lacked the knowledge that what they were doing was wrong. The authors at 18 explain that the presumption could be rebutted by evidence that clearly showed intent. The Crown also had to clearly and distinctly prove malice for every event where the child was under the age of fourteen years.

²⁴ Anders and Ellson *Criminal Law* 7-8 where they discuss *mens rea* and criminal liability. The authors 8 refer to *R v George* 2 EDC 392, also cited as *Queen v George* (1882) 2 EDC 392. Because of the ages of the children this case needs further explanation. In this case, three children, George aged "about" seven years, Dunge aged "about" five years and Ubani aged nine years were tried and convicted in the court of the Resident Magistrate for the district of Stutterheim. The charge preferred against them was theft of a sheep. They were found guilty and sentenced to receive lashes with a cane. George and Ubani were to receive fifteen and Dunge five lashes with a cane. The case was submitted for review on 5 December 1882 to the Eastern Districts Court of the Colony of the Cape of Good Hope. The records of George and Ubani showed a previous conviction for theft of a sheep on 23rd December 1881 (George would then probably have been "about" six years old). The court of review, correctly, refused to certify the conviction of young Dunge but was willing to certify the conviction of the other two boys. The record submitted by the magistrate revealed that Dunge was "too young to ask questions". The court of review further held that the conviction of Dunge had to be quashed, and the sentence set aside because, with reference to *Marsh v Loader* (14, CBNS 535), "an infant under seven years cannot incur the guilt of felony". The fortunate part was that the execution of the sentence had been stayed until the conviction and sentence was confirmed on review. See also Tredgold *Handbook of Colonial Criminal Law* (1904) hereafter Tredgold *Colonial Criminal Law* 51.

²⁵ *Criminal Law* 18, referring to *Queen v George* and *Queen v Lourie* (1892) 9 SC 432 where a child of twelve years sold bread without a licence and was convicted of contravention of s 6 of Act 13 of 1870. On review, the Court quashed the conviction because in the absence

to be *doli incapax*, but the presumption could be rebutted with evidence to the contrary beyond a reasonable doubt.²⁶

3 1 4 Statutory development after unification

In South Africa, the main influences in the determination of the age group of a child and the effect the age of the child has on the participation rights of the child originated from Roman-Dutch law,²⁷ English law,²⁸ legislation,²⁹ customary law and the Constitution.³⁰

Though Roman-Dutch law was introduced in the colony of the Cape of Good Hope as common law,³¹ the development of independent rights for children remained a distant vision. From the Cape Colony, Roman-Dutch law was

of the child knowing that what he was doing was forbidden, he could not be criminally punished for the offence. Compare further Tredgold *Colonial Criminal Law* 51.

²⁶ Tredgold *Colonial Criminal Law* 51 is of the view that the child must have sufficient knowledge or malicious intent to know what it was doing was wrong.

²⁷ Roman-Dutch law has remained the common law in South Africa. See Lee *Introduction* 43 45; Hahlo and Kahn *Legal System* 132-133 578.

²⁸ Mainly through the introduction of legislation such as Ord 62 of 1829 whereby the age of majority in the Colony of the Cape of Good Hope was determined at twenty-one years. Compare Lee *Introduction* 23.

²⁹ There were numerous items of legislation introduced during the development of the South African jurisprudence for children. The following are among such pieces of legislation: Prisons and Reformatory Act 13 of 1911, where s 2 had two definitions for "juvenile", one being any person under the age of sixteen years and the other being a person under eighteen years; the Children's Protection Act 25 of 1913 in which a child was defined as "[a] person under the age of sixteen years and shall include 'infant'", infant was defined as "[a] person under the age of seven years"; the Adoption of Children Act 25 of 1923 in which a child was defined as "[a] boy or girl who is ... under the age of sixteen years"; the Children's Act 31 of 1937 in which a child was defined as "[a] person under the age of nineteen years and includes an infant", infant was defined as "[a] person under the age of ten years"; the Children's Act 33 of 1960 in which a child was defined as "[any] person, whether an infant or not, who is under the age of eighteen years"; the Child Care Act 74 of 1983 in which a child was defined as "[any] person under the age of 18 years".

³⁰ The Constitution of the Republic of South Africa, 1993, hereafter the interim Constitution and the Constitution of the Republic of South Africa, 1996, hereafter the Constitution.

³¹ Lee *Introduction* 9 referring to *Fitzgerald v Green* 1911 EDL 432 493 holds the view that there is a presumption in favour of the general custom of Holland rather than that of any other province as part of the common law of the country. See *Campbell v Hall* (1774) 98 ER 1045 1047: "The laws of a conquered country continue in force, until they are altered by the conqueror". Compare further De Wet "Die Resepsie van die Romeinse-Hollandse Reg in Suid-Afrika" 1958 *THRHR* 84, "Die Romeins-Hollandse Reg in Suid-Afrika na 1806" 1958 *THRHR* 239; Hahlo and Kahn *The Union of South Africa The Development of its Laws and Constitution* (1960) hereafter Hahlo and Kahn *Union of South Africa* 17; Hahlo and Kahn *Legal System* 575; Spiro *The Law of Parent and Child* (1985) hereafter Spiro *Parent and Child* 5.

received in the Crown Colony of Natal,³² Transvaal³³ and the Orange Free State.³⁴ The common-law principle of the father or guardian representing the child in legal matters was introduced in South Africa.³⁵

The Children's Care and Protection Act³⁶ may be regarded as the first legislation in which the plight of children was addressed.³⁷ The aim of this Act was to provide better protection for children. Although the Act brought about significant improvement in the care and protection of the child, it lacked the same commitment regarding his/her participation in matters affecting him/her.³⁸ The Act allowed an order to be made in the absence of the child thereby limiting his/her participation in the proceedings before the court.³⁹ The placement of the child by the court could only be considered until he/she attained the age of eighteen years.⁴⁰

³² Cape Ordinance 12 of 1845. See also De Wet 1958 *THRHR* 242; Hahlo and Kahn *Legal System* 57.

³³ De Wet 1958 *THRHR* 239 246 reveals that article 31 contained in the thirty-three articles drawn up in 1844 refers to the "Hollandsche wet" to be implemented in legal matters where there is no provision in any of the remaining articles. He adds (247) that this provision was considered by the Volksraad during September of 1859 and the Volksraad decided that "Het Wetboek van Van der Linden [*Koopmans Handboek*] blijft (voor soover zulks niet strijdt met den Grondwet, andere wetten of Volksraadbesluiten), het Wetboek in dezen Staat". He further adds (247) that in instances where Van der Linden does not deal with a legal matter with sufficient clarity the "Wetboek van Simon van Leeuwen [*RHR*] en de Inleiding van Hugo de Groot" will be binding. See also Hahlo and Kahn *Legal System* 576.

³⁴ De Wet 1958 *THRHR* 239 and 245 mentions that Roman-Dutch law was inducted into the Constitution of the Orange Free State on 10 April 1854. See Hahlo and Kahn *Legal System* (576) who mention that the State adopted Roman-Dutch law as the "Hoofwet" of the State.

³⁵ The provision of s 14 of the Children's Act 38 of 2005 has introduced further possibilities, see discussion 5 4 5 3 and 5 4 5 4 *infra*.

³⁶ 25 of 1913 assented to by the Governor-General in English and commenced on 1 October 1913 by proc 164 published in GG 391 of 15 July 1913.

³⁷ Bosman-Swanepoel and Wessels *Wet op Kindersorg* 4 highlight the negative influence which industrialisation and urbanisation had on the family. The authors also refer to the influence of the similar legislation in England prior to this legislation, which dealt exclusively with children in need of care. Geffen *Women and Children* 341 hailed the Act as a "children's charter". See Skelton and Proudlock in *Commentary on the Children's Act* 1-5.

³⁸ Discussed by Geffen *Women and Children* 341-362.

³⁹ S 11(3) of the Act. There is no indication that the court was obliged to record the reason for the absence of a child from the proceedings.

⁴⁰ S 11(1) of the Act. S 11(7) of the Act allowed the court to refer the child to a school of industry or other certified institution. The possibility of referring a child to a school of industry without affording the child the opportunity to participate in the proceedings was thus not excluded.

At the direction of a local authority,⁴¹ a medical officer or medical practitioner could examine the person of a child in order to determine whether he/she needed to be cleansed.⁴² The Act specifically endorsed the right to punish children.⁴³ The Act also provided for the court to order that the parent or guardian of the child pay any fine imposed on a child.⁴⁴ The Act further provided that the magistrate of the district could take steps in safeguarding infants in the district thereby ensuring the interests of the child.⁴⁵

The Adoption of Children Act⁴⁶ legalised adoption for the first time in South Africa.⁴⁷ Until the promulgation of this Act⁴⁸ adoption had been attempted by private arrangement,⁴⁹ testamentary provision⁵⁰ and even contractually.⁵¹ None of these methods of adoption had any legal foundation.

The Adoption Act for the first time required direct participation of a child in matters affecting him/her.⁵² If the child was older than ten years he/she had to consent to his or her adoption.⁵³ The consent of the parent or guardian was

⁴¹ This was by virtue of s 16(4) of the Act.

⁴² S 16(1) of the Act. The child had no say in whether this examination was required or not.

⁴³ In s 19 of the Act allowance is made for parents, teachers, and any other person *in loco parentis* to administer punishment to a child.

⁴⁴ S 15 of the Act.

⁴⁵ Ch II deals with the protection of infant life. S 23(1) obliges a magistrate to keep in mind the best interests of the child when an infant is removed from the care of a person.

⁴⁶ 25 of 1923 to provide for the adoption of children, hereafter the Adoption Act. The Adoption Act was assented to on 20 June 1923 and commenced on 1 January 1924 by Proc no 244 in GG of 30th November 1923. The Governor General signed the Dutch text. Ferreira 24 informs that the Adoption Act was modelled on the *Infants Act* 86 of 1908 of New Zealand. The Adoption Act provided only for the adoption of children below the age of sixteen years (s 4(1)(c)).

⁴⁷ S 8(1) of the Adoption Act. See *Robertson v Verrell and Verrell* 1931 TPD 178 179; *Ex parte Foreman* 1940 CPD 266; *Cohen v Minister for the Interior* 1942 TPD 151 153 154. Proc no 244 in GG of 30 November 1923.

⁴⁸ Proc no 244 in GG of 30 November 1923.

⁴⁹ *Edwards v Fleming* 1909 TH 232; *Rex v Du Plessis* 1922 TPD 191.

⁵⁰ *Robb v Mealey's Executor* (1899) 16 SC 133 136.

⁵¹ See in this regard *Fibinger v Botha* (1905-1910) 11 HCG 97.

⁵² With this provision the child's participatory right was acknowledged. S 8(1) of the Adoption Act provided that the adopted child would for all purposes be deemed in law to be the child of the adoptive parent as if "born in lawful wedlock" of the adoptive parent.

⁵³ S 4(1)(d) of the Adoption Act provided that a child of ten years and older had to consent to his or her adoption. S 4(1)(c) of the Adoption Act prescribed that the magistrate could confirm the adoption only if he was satisfied that the child's "welfare and interests" would be promoted with the child's adoption. This requirement would be a forerunner for the "best interests of the child" in later years. In terms of ss 1 and 4(1)(c) of the Adoption Act any

required for the adoption of a child,⁵⁴ but the consent of the parent or the guardian could be dispensed with in given circumstances.⁵⁵ However, the consent of the child could not be dispensed with. This direct participation of the child has remained with subsequent adoption legislation and was later incorporated in the Children's Act of 1937⁵⁶ and thereafter in the Children's Act of 1960,⁵⁷ which repealed the former Act.⁵⁸ The Child Care Act of 1983⁵⁹ repealed the Children's Act of 1960 and introduced new measures to be considered when filing for the adoption of a child.⁶⁰ One of the objectives of the Adoption Act was the protection of children in South Africa.⁶¹

The Children's Act of 1937⁶² repealed the Adoption of Children Act.⁶³ The attendance of children at children's court proceedings as well as the presence of the child's legal representative was assured for the first time.⁶⁴ The child's right to consent or dissent to adoption was retained in the terms of the Children's Act of 1937.⁶⁵ A new provision in the Children's Act of 1937 was the allowance for an access order⁶⁶ after the adoption of the child and for the

child under the age of sixteen could be adopted if the magistrate was satisfied that the adoption would promote the "welfare and interests" of the child.

⁵⁴ S 4(1)(e) of the Adoption Act.

⁵⁵ S 9(1) of the Adoption Act.

⁵⁶ Ch VII of Act 31 of 1937. S 69(2)(e) of the Act required a child over the age of ten years to consent to his or her adoption.

⁵⁷ Ch VII of Act 32 of 1960. S 71(2)(e) of the Act required a child over the age of ten years to consent to his or her adoption.

⁵⁸ Children's Act 31 of 1937.

⁵⁹ Ch 4 of Act 74 of 1983 dealt with adoption of children and s 18(4)(e) required a child over the age of ten years to consent to his or her adoption.

⁶⁰ However, it did not remove the participatory right of children regarding their adoption. The Children's Act 38 of 2005 expanded the child's participation in his or her adoption even further, see 5 4 5 2 and 5 4 5 3 *infra*.

⁶¹ Ferreira 26. This coincided with the general tenor globally. See Declaration of the Rights of the Child in 1924, discussed in 5 2 2 3 *infra*. See also Heaton 23 who points out that globally the aim with adoption is to serve the interests of the child who is to be adopted.

⁶² 31 of 1937. For the sake of convenience the year in which the Children's Act was promulgated will be used in reference because of the repetitive use of the title "Children's Act" in later years.

⁶³ 25 of 1923.

⁶⁴ S 6(3) of the said Act prescribed the attendance of the parent, guardian or person *in loco parentis* of a child "or of the attorney or counsel of such a child, parent, guardian or person *in loco parentis*" together with the child.

⁶⁵ S 69(2)(e) of this Act. As with the Adoption Act, the child's consent if older than ten years was required.

⁶⁶ S 72 of this Act.

rescission of an adoption order.⁶⁷ Neither of the two orders allowed the participation of the child as a party to the proceedings.⁶⁸

The Children's Act of 1937 was repealed by the Children's Act of 1960.⁶⁹ The child's right to be a party to the proceedings was retained as well as the right to legal representation.⁷⁰ However, where children were transferred from one institution or control to another there is no indication of the child's participatory right in this administrative control.⁷¹ The child's consent for adoption was retained if he/she was older than ten years.⁷² As with the previous Acts,⁷³ the child did not have a right to apply for rescission of the adoption.⁷⁴ The right of access to the adopted child for two years after the adoption order was available to certain persons without the child's right to veto such access.⁷⁵

As the deficiencies in the statutory provisions for children became evident, legislative amendments and new legislation were introduced to address the shortcomings. The General Law Amendment Act of 1965⁷⁶ introduced the provision that the High Court could consider consenting to the alienation or mortgaging of the property of the unborn fideicommissary.⁷⁷ The Administration

⁶⁷ S 73 of the Children's Act 31 of 1937 only provides for the guardian, parent and adoptive parent of the child as well as the Minister to bring an application for rescission.

⁶⁸ This is indicative of the parent-centred approach of the Children's Act of 1937 and the approach that prevailed in child-related legal matters in general.
⁶⁹ 33 of 1960.

⁷⁰ S 8(3) of the Children's Act of 1960. The questioning of a child or pupil who allegedly absconded as determined in s 54(3)(a) of the said Act further ensured the child's participatory right in proceedings affecting the well-being of the child.

⁷¹ S 50 of the Children's Act of 1960.

⁷² S 71(2)(e) of Children's Act of 1960.

⁷³ The Adoption Act and the Children's Act of 1937.

⁷⁴ S 76(1) of the Children's Act of 1960 allowed the parents of the child, guardian of the child at the time of the adoption, the adoptive parents, and even the Minister the right to apply for rescission of the adoption.

⁷⁵ S 75 of the Children's Act of 1960 had a proviso that the court "shall not make such a direction if it will *probably* be to the detriment of the child". (Emphasis added.)

⁷⁶ Act 62 of 1965. This piece of legislation followed on the judgment in *Ex parte Swanepoel* 1953 (1) SA 280 (A).

⁷⁷ S 33(1) which provided that "[w]hensoever under a will or other instrument any unborn person will be entitled to any interest in immovable property which is subject to any restriction imposed by such will or other instrument, any provincial or local division of the Supreme Court [now the High Court] may grant its consent on behalf of any such unborn person (whether conceived or not) to the alienation or mortgage of such property as if such unborn person were a minor *in esse*".

of Estates Act⁷⁸ introduced two provisions to be considered when dealing with the interests of unborn children in the law of succession safeguarding the interests of the unborn child.⁷⁹

The Child Care Act⁸⁰ repealed the whole of the Children's Act of 1960,⁸¹ although it retained the definition of a child as a person under the age of eighteen years.⁸² The child's right as a party⁸³ to the proceedings was retained as well as his/her right to legal representation.⁸⁴ Later amendments to the Child Care Act further emphasised the participatory rights of children.⁸⁵ The Child Care Act was amended to allow children of fourteen or older to consent to his or her own medical treatment or that of their child without the assistance of their own parent or guardian. In adoption matters the child retained the right to consent to his or her adoption.⁸⁶ The child, however, still did not have the right

⁷⁸ 66 of 1965.

⁷⁹ S 44 of the said Act provides that if an unborn child is entitled to any movable property or money after being born and the movable property or money is subject to the usufructuary or fiduciary rights of someone else, the movable property or money cannot be delivered or paid out to the person who has usufructuary or fiduciary rights. The fiduciary must first provide security to the satisfaction of the Master of the High Court that the property will be delivered or the money delivered to the unborn child when the child becomes entitled to it. S 94 provides that the Master may approve subdivision of land on behalf of the unborn heir. However, the Master will only approve the subdivision if he or she is satisfied that the subdivision is equitable and fair.

⁸⁰ 74 of 1983 was assented to on 15 June 1983. The Act commenced on 1 February 1987 as published in GN R2612 in GG 10546 of 12 December 1986.

⁸¹ Except insofar as it related to the appointment of probation officers and the establishment, maintenance and management of industrial schools and reform schools.

⁸² This was in line with international instruments dealing with children, see 5 2 2 *infra* for a discussion of the international instruments dealing with children.

⁸³ Reg 4(1) of the regulations in terms of the Child Care Act prescribed that a child "shall have the same rights and powers as a party to a civil action in a magistrate's court in respect of examining witnesses, adducing evidence, and addressing the court".

⁸⁴ S 9(1)(iii) of the Child Care Act.

⁸⁵ S 39(4)(b) of the Child Care Act inserted in 1991 by the Child Care Amendment Act 86 of 1991 allowed children over the age of fourteen to consent to such medical treatment himself or herself without the assistance of his/her parents. Consent for medical operations could be given by persons over the age of eighteen years in terms of s 39(4)(a) of the Child Care Act. As from 1 July 2007, a person over the age of eighteen is regarded as a major in terms of s 17 of the Children's Act 38 of 2005.

⁸⁶ S 18(4)(e) of the Child Care Act. The provision that the child be above the age of ten years and understands the nature and import of such consent was included. The latter part of the section clearly underlined that the child's consent had to be informed consent. The Adoption Act, Children's Act of 1937 and Children's Act of 1960 only referred to the consent of the child thereby at most implying that the child had to give an informed consent.

to apply for the rescission of his or her adoption.⁸⁷ The unmarried mother, herself still a child,⁸⁸ could consent to the adoption of her child without the assistance of her parents or guardian.⁸⁹

As the recognition of the child's right to participation and representation in legal matters became more prominent, legislation was introduced to accommodate this and certain amendments were incorporated in the Child Care Act.⁹⁰ Various statutory measures were introduced to relax the requirement of parental consent to legalise their children's participation in legal matters affecting themselves. In addition certain statutory provisions calling on the participation of a child were also introduced. The following are examples of such provisions and will indicate how the participation of children in legal matters increased: A child may witness a will from the age of fourteen years⁹¹ and execute a will from age sixteen.⁹² Girls over the age of fifteen years no longer require the consent of the Minister of Home Affairs to get married.⁹³ A child of sixteen years may also be a depositor at a financial institution.⁹⁴ The Human Tissue Act⁹⁵ provides for any

⁸⁷ S 21 of the Child Care Act again only mentioned the parent or the guardian of the child at the time of the adoption. The adoptive parent or parents and with the consent of the Minister the children's court assistant was included as a party who could apply for the rescission of the adoption. This led to Van der Vyver and Joubert *Persone- and Familiereg* (1991) 604 605 suggesting that the child could, with the intercession of the social worker notify the children's court assistant of his or her grievance and leave it up to the children's court assistant to apply for the rescission of the adoption. This would only be an option if the adoption was not in the best interests of the child. The Children's Act of 2005 addressed this lacuna and now specifically includes the child among those who can apply for such rescission; see discussion 5 4 5 3 *infra*.

⁸⁸ Below eighteen years and within the definition of a "child" in terms of the Child Care Act.

⁸⁹ S 18(4)(d) of the Child Care Act. The wording of s 18(4)(d) regarding the consent of the minor mother of a child born out of wedlock was so phrased to counter the finding of the Appeal Court (as it was then) in *Dhanabakium v Subramanian* 1943 AD 160 166 where the court held that a minor cannot be the guardian of her child.

⁹⁰ The comparison between the relevant sections affecting the child's various fundamental rights found in the Child Care Act and the Children's Act 38 of 2005 will be discussed in 5 4 *infra*.

⁹¹ S 1 of the Wills Act 7 of 1953.

⁹² S 4 of the Wills Act 7 of 1953.

⁹³ S 26 of the Marriage Act 25 of 1961. See also Spiro *Parent and Child* 180 181; Hahlo *The South African Law of Husband and Wife* (1985) hereafter Hahlo *Husband and Wife* 89 91; Sinclair, assisted by Heaton, *The Law of Marriage* vol I (1996) hereafter Sinclair assisted by Heaton *Law of Marriage* 338; Heaton "Capacity to Perform Juristic Acts: Marriage and Other Acts" in Van Heerden *et al Boberg's Law of Persons and the Family* (1999) 835.

⁹⁴ In terms of s 87(1)(a) of the Banks Act 94 of 1990 and s 88(1) of the Mutual Banks Act 124 of 1993 if allowed by the statutes of the bank. Such a child may execute the necessary documents, cede, pledge, borrow against and generally deal with his or her deposit, enjoy

child older than fourteen years and capable of executing a will to donate, by means of a will or document signed in the presence of at least two competent witnesses, his or her body or tissue thereof for the purposes of the Act.⁹⁶ The Choice on Termination of Pregnancy Act⁹⁷ provides for a female child to consent to the termination of her pregnancy within the prescribed periods set out in the Act.⁹⁸

The Child Care Act was amended in 1996⁹⁹ to include legal representation for children.¹⁰⁰ However, section 8A and the corresponding regulation 4A were never put into operation.¹⁰¹ The amendment was met with divergent views and no specific reason was put forward as to why the provisions remained inoperative.

3 1 5 Conclusion

Children's rights were still in their fledgling stages. Although there was ongoing statutory development securing the protection of children, in the main the common law still dictated the participation of a child in legal matters. The legal

all the privileges and be liable for all obligations and conditions applicable to depositors as if he or she were a major.

⁹⁵ 65 of 1983.

⁹⁶ S 2(1)(a) of the Act prescribes that such a donation may be for his or her body or any specific tissue thereof to be used after his or her death for any purpose referred to in s 4(1) of the Act. S 2(1)(b) of the Act prescribes that consent may also be given to a post-mortem examination of his or her body for any of the purposes referred to in s 4(1) of the Act.

⁹⁷ 92 of 1996. This Act is included because it was assented to on 12 November 1996 and commenced on 1 February 1997, three days before the Constitution of the Republic of South Africa, 1996 was signed into law on 4 February 1997.

⁹⁸ S 5(3) of the said Act. The Act does not prescribe a specific age but it may be accepted that it will apply to a girl who has reached her reproductive age, which is regarded as twelve years in terms of the common law. Compare Sloth-Nielson "Protection of Children" in Davel and Skelton *Commentary on the Children's Act 7-35* where she discusses the implications of s 129 of the Children's Act 38 of 2005. The provisions of s 129 of the Children's Act of 2005 are discussed in 5 4 5 2 *infra*.

⁹⁹ Child Care Amendment Act 96 of 1996, which was assented to on 12 November 1996.

¹⁰⁰ S 2 inserted s 8A in the Child Care Act. S 2 was amended by s 2 of the Adoption Matters Amendment Act 56 of 1998. Reg 4A of the regulations was published in terms of s 60 of the Child Care Act and inserted by GN R416 in GG 18770 of 31 March 1998.

¹⁰¹ S 8A and reg 4A must be read collectively. Although the rest of the Child Care Amendment Act 96 of 1996 came into operation on 1 April 1998, s 8A and reg 4A never entered into force. The new reg 4A would only come into effect on the date of commencement of s 8A which has not yet occurred. See further discussion in the child's participatory and representation rights in legal matters 5 3 2 *infra*.

representation of children remained a thorny issue and the common-law requirement for the appointment of a curator *ad litem* was the guiding principle in this respect.

3 2 The influence of customary law on the participatory rights of children in South Africa during the pre-1994 constitutional era

3 2 1 Introduction

The aim is to determine to what extent the child in customary law has benefited from the transition in traditional customary law to the culmination of the recognition children's rights in the new Constitution of South Africa.¹⁰² The reality of customary law is highlighted in the 1996 Constitution of South Africa.¹⁰³ However, it is important to emphasise that the discussion which follows is that of a general overview of customary law relating to children. The focus remains on the participatory rights of the child in legal matters and the child's right to legal representation.

The influence of legislation¹⁰⁴ affecting the rights of the child need be considered in order to distinguish between pre-1994 constitutional development and post-1994 constitutional development. I would include the dates for clarity sake.

¹⁰² The dawning of the new constitutional era in South Africa has etched itself in the customary law of present South Africa.

¹⁰³ S 39(2) provides: "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." (Emphasis added.) S 211(3) reflects the recognition of customary law with the provision that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

¹⁰⁴ Here the Black Administration Act 38 of 1927 immediately comes to mind. In addition there is the influence of the Natal Code of Bantu Law Proc R151 of 1967; the Age of Majority Act 57 of 1972; the Child Care Act 74 of 1983; the KwaZulu Law on the Code Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987.

3 2 2 Defining a “child” in customary law

The determination of who is regarded as a child in customary law is important as is the moment when childhood and the stages of childhood start. Of equal importance is to determine until when childhood continues. Interwoven in this determination of the legal consideration of childhood is how customary law views a child.

Human¹⁰⁵ refers to four important factors that need to be considered when determining who a child is. In the first instance there is the diversity of social, historical and cultural factors which combine to form the social construction of a child. Secondly, the divide between childhood and adulthood varies depending on the activity which is required.¹⁰⁶ Thirdly, reference to everyone below the age of majority as children obscures the diversity of the various stages of childhood, especially in a heterogeneous society¹⁰⁷ and lastly, the position of a child may vary from one country to another and especially from one culture to another.¹⁰⁸

3 2 2 1 The beginning of legal subjectivity

In customary law legal subjectivity starts with live birth.¹⁰⁹ It commences with the separation of the child from the mother and the drawing of the first breath by the child. This is referred to as *moya*. If these conditions have been met with,

¹⁰⁵ *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid-Afrikaanse Reg* (LLD thesis 1998 US) 38-39 with reference to Franklin *Rights of Children 7* and Franklin *Handbook of Children's Rights 7*.

¹⁰⁶ For centuries puberty has been the guiding division between a young child and a child being regarded as capable of marriage and procreation.

¹⁰⁷ Human 38 with reference to Franklin *Handbook of Children's Rights 8*; Franklin *Rights of Children 7-8*; Rodham “Children under the law” 1973 *Harvard Educational Review* 488.

¹⁰⁸ Human 39.

¹⁰⁹ According to Coertze *Family Law and Law of Succession* (1990) hereafter referred to as Coertze *Bafokeng Family Law* 199 a person (and as such a child) only becomes a legal entity if he or she is born alive. Hartman *Aspects of Tsonga Law* (1991) hereafter Hartman *Tsonga Law* 92 explains that legal subjectivity commences when the process of birth has been completed. The author adds that the child's birth is only considered to be complete after the child has emerged from the mother's body and the tied-off umbilical cord has fallen off unaided. This may occur from seven to ten days after the birth of the child. Bennett *Customary Law in South Africa* (2004) hereafter Bennett *Customary Law* 294 contends that survival at birth is the minimum condition for the commencement of legal personality.

then only is the child regarded as a person (*motho*) and a legal subject who may claim certain rights and privileges.¹¹⁰ However, customary law regards the beginning of life as more than the advent of legal subjectivity for the birth of every baby is regarded as a gift (*nyiko*).¹¹¹

Not only does the child have to be born alive, but there have to be witnesses present at the birth of the child.¹¹² It is important that the child's birth be witnessed by at least two persons other than the mother herself. The witnesses of the birth are the mother's mother-in-law and attendant midwives.¹¹³ The father of the child is only informed of the birth and gender of the child after the customary determination of paternity has been concluded.¹¹⁴

3 2 2 2 The protection of the unborn child's interests

It would appear that customary law never considered the protection of the unborn child's interests. Bennett refers to the widely differing views when the common law and customary law are compared.¹¹⁵ Myburgh mentions that customary law does not deal with the abstract and there is no reference to any fictitious time-fixing notion for the benefit of the unborn child.¹¹⁶ The customary

¹¹⁰ This also ties in with the definition of birth contained in s 1(1) of the Births and Deaths Registration Act 51 of 1992 where "birth" in relation to a child, means the birth of a child born alive. See further definition of "still-born" and "still-birth" contained in s 1(1) of the Births and Deaths Registration Act, 51 of 1992. Compare the Australian law's definition of "birth" which includes "stillbirth", see 6 4 3 1 *infra*.

¹¹¹ Hartman *Tsonga Law* 93.

¹¹² Bennett and Peart *A Sourcebook of African Law for Southern Africa* (1991) hereafter Bennett and Peart *Sourcebook* 338 mention that a child was considered to be a person soon after birth. Van Tromp "Xhosa Law of Persons" in Bennett and Peart *Sourcebook* 339 explains that a human being surviving its birth in isiXhosa is referred to as *umntu*. If still-born or deceased before the umbilical cord has been cut, the child is not considered to have been *umntu*.

¹¹³ Hartman *Tsonga Law* 92 mentions that one of the reasons for the presence witnesses is to ascertain the paternity of the child during parturition and to determine who the first is born in the case of twins.

¹¹⁴ Hartman *Tsonga Law* 93.

¹¹⁵ *Customary Law* 294, especially n 2 where he mentions that customary law has never raised the issue due to the fact that technical questions about prenatal rights (interests would be a better term to use here) and duties did not arise in pre-colonial times.

¹¹⁶ *Indigenous Law* 8 where the author reminds us that customary law does not know anything similar to the *nasciturus* fiction. The author also draws attention to the strong resemblance between customary law and Germanic law in this regard. Coertze *Bafokeng Family Law* 199 argues that it is unknown for an unborn child to be awarded compensation in Bafokeng

law does not know of any legal process similar to the *nasciturus* fiction to protect the interests of the unborn child.¹¹⁷

3 2 3 Adoption in customary law¹¹⁸

The intended result of an adoption is to create a family relationship which has full legal recognition between the parent and a child who is not his or her biological child.¹¹⁹ Bennett¹²⁰ highlights the fact that there are significant differences between adoption in Roman law and the customary law equivalent institution.¹²¹ He adds that in the first place private arrangements may not

law. Bennett and Peart *Sourcebook* 389 found that in customary law there was no question of attributing rights to a child *en ventre sa mère* mainly because technical questions involving prenatal rights and duties never arose and accordingly there is little recorded on the topic. Bennett *Customary Law* 294 n 2 opines that customary law did not raise the issue of attributing rights to the unborn child, because technical questions about prenatal rights and duties did not arise in pre-colonial times.

¹¹⁷ Hartman *Tsonga Law* 92 explains that Tsonga law does not regard the unborn foetus as a potential legal subject.

¹¹⁸ Compare Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* (LLD thesis 2009 UNISA) 20-23.

¹¹⁹ S 20(2) of the Child Care Act provided that “[a]n adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he [or she] was born of that parent during the existence of a lawful marriage”. See also Schäfer “Children, young persons and the Child Care Act” in Robinson *The Law of Children and Young Persons in South Africa* (1997) 78; Bekker *Seymour’s Customary Law in Southern Africa* (1989) hereafter Bekker *Seymour’s Customary Law* 236; Bennett *Customary Law* 319. For the reception and development of adoption in South Africa, see 5 4 5 3 *infra*.

¹²⁰ *Customary Law* 319 comments that the customary institution of adoption has greater similarity to the Roman law concept of *adoptio*. The change of the *filiusfamilias* by way of *capitis deminutio minima* from one agnatic family to another is what Bennett has in mind when he adds that the customary institution of adoption was simply to perpetuate the adoptor’s bloodline, hence the reference to this custom as “the institution of an heir”. For adoption in Roman law, see 2 1 2 *supra*. Compare Bekker *Seymour’s Customary Law* 236. The ambit of this thesis, however, does not allow for an in-depth discussion regarding the development of adoption in customary law and is aimed at the participation of the child in customary adoption only.

¹²¹ Eg Bekker *Seymour’s Customary law* 236 mentions that where the adoption of a girl is regarded as a private matter, the adoption of a boy is regarded as a public matter. In *Nongqayi v Mdose* 1942 NAC (C&O) 34 the court held that the adoption process for a child is when the child “is given over on certain conditions ... [if I] give my child over to someone else, I call my relatives, that man also has to call his relatives, and then I give the child over in the presence of the parties. We then go to the Chief and report to him. When this has been done the child belongs to the person to whom it [sic] has been given and he would be entitled to any dowry and fines paid for if the child it [sic] is a female”. Compare also *Mokoatle v Plaki* 1951 NAC (S) 283. In *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (T) 776 the court held that the Children’s Act 1960 did not adapt or replace adoption under customary law. This was also the view in *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) 1150 where the court held that a customary adoption was valid irrespective of the fact that there had been a formal defect in the customary adoption. See also *Zibi v Zibi*

necessarily coincide with the best interests of the child.¹²² Secondly, the adoptive parent may make payments to the child's natural parents which may give the impression of trafficking in children. However, of greater importance is the lack of the child's involvement in customary adoption as his/her consent is never required.¹²³

It may be argued that the child's best interests¹²⁴ should prevail if a customary adoption does not accord with the statutory provisions of the Children's Act.¹²⁵

1952 (2) NAC 167 (S) 170 where the court held that it was unnecessary to comply with the statutory provisions of the Adoption of Children Act 1925. In *Maneli v Maneli* [2010] JOL 25353 (GSJ) the court accepted that a child of twelve years had been adopted in terms of Xhosa customary law when she was eight months old. There are a number of differences between the customary law and the provisions of the Children's Act 38 of 2005 and its predecessors. See in this regard Seymour *Native Law and Custom* (1911) 130-134; Whitfield *South African Native Law* (1948) hereafter *Whitfield Native Law* 68-69, 74, 352 and 363; Stafford and Franklin *Principles of Native Law and The Natal Code* (1950) hereafter Stafford and Franklin *Principles of Native Law* 68, 184; Schapera *A Handbook of Tswana Law and Custom* (1970) hereafter Schapera *Tswana law* 173-175; Coertze *Bafokeng Family Law* 216-218; Hartman *Tsonga Law* 113; Kerr *The Customary Law of Property and of Succession* (1990) hereafter Kerr *Customary law* 134; Myburgh *Indigenous Law* 85, 87, 95-96; Bekker *Seymour's Customary Law* 236, 283-285, 286; Olivier, Olivier and Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) hereafter Olivier *et al Privaatreg* 462; Olivier, Bekker, Olivier and Olivier *Indigenous Law* (1995) par 145(b), par 145 n 17; Bennett *Customary Law* 319-320; Ferreira 22.

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Customary Law 320.

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It appears that the child's participation, even if the child is older than ten years, has never been a requirement. Bennett *Customary Law* 320 mentions that the customary law falls short of art 21 of the Convention on the Rights of the Child and art 24 of the African Charter on the Rights and Welfare of the Child when the child's best interests are considered. See also Coertze *Bafokeng Family Law* 217. For a comparison of children's participation in their adoption in terms of the Children's Act, see 5 4 5 3 *infra*.

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The basis for the finding in *Metiso v Padongelukfonds* at 1150. See also *Maneli v Maneli* [2010] JOL 25353 (GSJ) pars [21]-[22] [43].

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Bennett *Customary Law* 321 bases his argument on the finding in the *Zibi* and *Kewana's* cases which may well be. However, this was before the Children's Act of 2005 became operative in its entirety from 1 April 2010. The finding in *Metiso* supports the development of customary law, keeping in mind the provisions of s 39(2) of the Constitution "[w]hen ... developing ... customary law ... every court ... must promote the spirit, purport and objects of the Bill of Rights" and s 211(3) of the Constitution "[t]he courts must apply customary law when that law is applicable subject to the Constitution and any legislation that specifically deals with customary law". The best interests of the child in customary adoption, based on Bennett's argument (321), may now be juxtaposed with the participatory rights of the child as secured in s 10 of the Children's Act of 2005. The court's finding in *Maneli* par [23] that an adoption in Xhosa customary law should be deemed to be a legal adoption in terms of the common law (which does recognise adoptions) and the Constitution of South Africa (which does not address adoptions) only exacerbates the problem. It appears that the court at par [18] accepts that the Bill of Rights does not eschew the existence of a Xhosa customary law of adoption. The facts of the case do not reflect how the young girl (who was an orphan) was adopted in Xhosa tradition. At par [5] the court mentions that the

The problem of children not required to consent in customary adoption was not considered in *Metiso*.¹²⁶ In *Kewana* the young boy was about nine years old when the customary adoption was effected.¹²⁷

3 2 4 The effect of customary law on the capacity of the child

The difference in approach between the Roman-Dutch law and the customary law regarding the status of the child is founded on the family as a single unit in Roman-Dutch law and on the extended family in customary law.¹²⁸ The family in customary law extends beyond the family unit of the father, mother and children. It is because of this extension that the relationship between the child and his or her family and especially his or her father is influenced.

The status of the child found in the discussion of the previous legal systems was affected by a number of factors such as the child being born of married or unmarried parents, gender, age, paternal or parental authority. The customary law does not allow for such intricate distinctions. This does not mean that the status of the child is not important; it only conveys that which is necessary to allow a system of personal relationships to highlight how the child is viewed in customary law.

Various factors such as gender, age, standing within the family structure (rank) and marriage are of importance to determine the social and legal status of a

parties formally accepted parental responsibilities for the child and is thereafter accepted and regarded by society as the parents of the child.

¹²⁶ It appears from *Metiso*, at 1149, that the children were older than ten years due to the fact that the mother had for “die afgelope 12 jaar geen belangstelling in hulle getoon ... nie” and the father having died shortly after the children’s birth.

¹²⁷ At 772 where the court mentions that “he informed the gathering that ... the boy Andile (then aged about nine years) was accepted and recognised as the child of Nolungephi”. The necessity for any consent therefore did not arise.

¹²⁸ The extended family may even extend beyond consanguinity and affinity ties to group identity. See Ngidi “Upholding the Best Interests of the Child in South African Customary Law” in Boezaart *Child Law in South Africa* (2009) 225 who alludes to the important fact that a child’s position is mainly determined by the status of his or her parents and that the individual child is protected through his or her family.

child in customary law.¹²⁹ From the factors mentioned by some of the writers on customary law there appear to be certain common denominators. Important factors which stand out, for purposes of the present discussion, are legitimacy, age and parental authority.

Although major statutory enactments after unification in 1910 affected the child's participation and legal representation,¹³⁰ the culmination of the child's right to participation and legal representation only came about with the introduction of the new constitutional dispensation in 1994.¹³¹

3 2 5 Parental authority

The father in customary law may in some instances be viewed as a *paterfamilias* with the authority of the father that prevailed in early customary law.¹³² The Tswana proverb *Motsala-motho ke modimo wa gagwê* says it all “[a]

¹²⁹ Writers on customary law have varying views regarding the various factors that determine status in customary law. Whitfield *Native Law* 47-80 discusses personal status. Based on his discussion the following may be regarded as factors influencing status: age, legitimacy, gender, rank, marriage and tribal membership. Hartman *Tsonga Law* 1 regards racial affinity, nationality, domicile, age, gender, legitimacy and marriage as factors determining a person's status. Olivier *et al Indigenous Law* 1 list the following as factors determining personal status, rights and obligations: tribal membership, “political” status, gender, age, marriage and legitimacy. Coertze *Bafokeng Family Law* 134 discusses the Bafokeng legal system where the concept of personal status is dominated by factors such as gender, seniority and marital status; Bennett and Peart *Sourcebook* 147 refer to three criteria used to differentiate status namely gender, age and generation; Bekker *Seymour's Customary Law* 47 does not provide specific factors but refers to marriage and minority. Bennett *Customary Law* 298 observes that the two main factors indicating status are age and gender.

¹³⁰ Notably the Black Administration Act 38 of 1927.

¹³¹ Previously attempted constitutional enactments did not affect the rights of the child in legal matters. 27 April 1994 heralded a completely new era in the child's right to participation and representation in legal matters; notably the rights contained in the Bill of Rights in ch 2 of the Constitution. For a discussion on the child's participatory rights in legal matters and legal representation, see 5 4 5 and 5 4 6 *infra*.

¹³² Olivier *et al Indigenous Law* par 45 are of the opinion that the father's position is comparable with that of the *paterfamilias* of Roman law, with the exception that the father does not have right of life and death. Coertze *Bafokeng Family Law* 131 indicates that the father is the head of the *lapa* unit (*tlhōgō ya lapa*) and has authority over all the members. He adds (196-197) that parental (reference is to parental authority but in practice it borders on paternal authority) authority embraces the exercise of natural guardianship over the person and possessions of the child including the duty of support until the child attains majority. Bekker *Seymour's Customary Law* 227 agrees that in original customary law the father's right to the custody of his children's was absolute. However, he adds (*op cit*) that the court as upper guardian has modified original customary law to some extent. Bennett

child's parent is its god". Children owe their father obedience; they must respect his authority and willingly do whatever they are told.¹³³ The father is regarded as the guardian of any children born of his wife.¹³⁴ However, with time the court as upper guardian of all children, inclusive of children governed by the principles of customary law, tended to the interests of the children. In doing so the customary law was modified to some extent and presently even more so with recent legislative developments.¹³⁵

Customary law views the legal implications and the social responsibility of parental authority collectively. Although the customary law writers refer to parental authority, it is the legal consequence of the father's parental authority that is of importance to the child during his/her minority.¹³⁶ It becomes clear

Customary Law 295 concurs that the father as head of the family has wide and unspecified powers over his children.

¹³³ Olivier *et al Indigenous Law* par 45 observe that the father represents the family in all its dealings and exercises authority over the children. The father gives his daughter in marriage and plays a leading role in choosing a wife for each of his sons.

¹³⁴ S 27(1) of the Code of Zulu Law.

¹³⁵ Bekker *Seymour's Customary Law* 227 with reference to the following case law *Nguaje v Nkosa* 1937 NAC (T&N) 98; *Mhlala v Mhlala* 1938 NAC (T&N) 112; *Mokgatle v Mokgatle* 1946 NAC (T&N) 82; *Mkize v Mkize* 1951 NAC (NE) 336 in which the court held that upon divorce, when deciding the custody of a child born of a customary union, the paramount consideration is the best interests of the child; *Gumede v Gumede* 1955 NAC (NE) 85 the court held that the father as guardian is entitled to the property rights in his nine-year old daughter unless he was found not to be a fit and proper person to have custody; *Mdakane v Mdakane* 1956 NAC (NE) 155 (incorrectly cited as 159) the court held that best interests of the children should determine in whose custody children were to be placed; *Mabuza v Nhlapo* 1980 AC (NE) 141; *Motloung v Mokaka* 1980 AC (NE) 159.

¹³⁶ Whitfield *Native Law* 253 explains the father's position as follows: "The head of the kraal family ... is the husband and father. He is the owner of the establishment or *umninimzi* ... he is ... [the one] who administers the domestic laws and exercises authority within his household." Stafford *Native Law* 107 says "[t]he kraal head is the paterfamilias ... he controls all inmates of his kraal". Stafford and Franklin *Native Law* 93 refer to s 44(1) of the Code of Zulu Law which reads: "Under native law a father is the natural guardian of his legitimate minor offspring." Schapera *Tswana Law* 176 points out the father is the founder and legal head of his family. Coertze *Bafokeng Family Law* 205 explains that in Bafokeng law all women are perpetual minors and the mother's parental control is subject to the supervision of her husband and "for the most part, parental authority is vested in the father alone". Hartman *Tsonga Law* 100 explains that the "phenomenon of patria potestas – that is the devolution of familial authority through the father ... is encountered in all societies (including the tribes of Gazankulu) which are organised on the basis of paternal hegemony". Bekker *Seymour's Customary Law* 70-90 sets out the rights and responsibilities of the family head explaining that the family head (father) is not a despot, he has control over his family but the family members have a collective interest in the affairs and property of the family.

from the early twentieth century that changes in the prevailing socio-economic climate necessitated changes in customary law in South Africa.¹³⁷

It is the child's father who represents the child, incurs liabilities, sues and is sued on behalf of his child.¹³⁸ The father's consent is a prerequisite for the marriages of his sons and daughters.¹³⁹ The parents or guardians must also consent to the initiation of both boys and girls.¹⁴⁰ Circumcision in most cultures is considered the central point of initiation. It is also considered indispensable for adulthood in the cultures requiring it for initiation. Children caught up in the traditional customary law have no say in the circumcision ceremony and have to abide by the decision of their parents.¹⁴¹

3 2 6 Age

In customary law the two main factors highlighting status are age and gender.¹⁴² Gender is easily distinguished but not so age. Because age does not allow for

¹³⁷ Bennett *Customary Law* 323.

¹³⁸ This changed with commencement of the Recognition of Customary Marriages Act 120 of 1998 on 15 November 2000. The Children's Act, which became fully operational on 1 April 2010, accords equal parental responsibilities and rights to both parents allowing parents to be guardians of their children unless explicitly excluded by an order of the court. Furthermore, the age of majority has been lowered to eighteen years for both genders. For a discussion on parental responsibilities and rights for both parents and the effect of the child's age on his capacities, see 4 5 2 *infra*.

¹³⁹ Traditionally the consent of the boy or girl was not required for a valid customary marriage. However, as Olivier *et al Indigenou Law* par 17 correctly point out, families would be reluctant to force a marriage against the will of boy or girl. See further Bennett *Customary Law* 199-202 who agrees that although the consent of the bride-to-be was strictly speaking irrelevant, this seldom occurred. The Recognition of Customary Marriages Act 120 of 1998 now specifically requires the consent of the prospective spouses in section 3(1)(a)(ii).

¹⁴⁰ Schapera *Tswana Law* 41. Bennett *Customary Law* 300 does not mention whether a child has to consent to undergo an initiation ceremony but at 302 comments that children are in no position to contest decisions made for them by their parents regarding circumcision. At most the child's consent may be implied. The participatory rights of children are now entrenched and female genital mutilation has been outlawed and provinces Limpopo such as with its Circumcision Schools Act 6 of 1996 and Eastern Cape with its Traditional Circumcision Act 6 of 2001 have legislated on the circumcision of boys.

¹⁴¹ Bennett *Customary Law* 302. However, this has all changed with requirement of s 12(9)(a) of the Children's Act of 2005 that the child must consent to his circumcision if older than sixteen years. As Ngidi in *Child Law in South Africa* 238 indicates s 12 of the Children's Act entails bold provisions not to be found in the Constitution. For a discussion of the child's participatory rights in general brought about by the Children's Act, see 5 4 5 2 *infra*.

¹⁴² Bennett *Customary Law* 298 refers to these two observable facts as factors marking status and therefore capacity in customary law.

delineating a precise criterion for distinguishing status,¹⁴³ customary law has devised a system of age grading to assist in the determination of the child's status.¹⁴⁴ In customary law, as in all other areas of jurisprudence, there is no universal criterion for the termination of childhood and the commencing of adulthood.¹⁴⁵ It can be accepted that the capacities required for legal participation may be acquired gradually.¹⁴⁶ The clear age division found in Roman-Dutch law and received in South-African law is not found in traditional customary law.

Customary law does not attach the same importance to age in determining legal capacity as does the law in other societies.¹⁴⁷ Age does not have the same importance in the legal sense in customary law either. However, customary law

¹⁴³ Status is here equated with capacity.

¹⁴⁴ Bennett *Customary Law* 298 explains that in all cultures common interests draw people of similar age together in groups which, in anthropology, are termed age groups. See also Van Tromp "Xhosa Law of Persons" in Bennett and Peart *Sourcebook* 341 where he discusses the two stages in the life of a Xhosa person which marks off his legal status, to wit attaining puberty and marriage. The two stages cover three periods; the first being birth to initiation which may be divided into two stages, from birth to the time he is capable of herding cattle and from then to initiation.

¹⁴⁵ Bennett *Customary Law* 298 draws a comparison between children in affluent societies and poorer societies. In the former children may receive education for a longer period when compared with children who need to start working at an earlier age. He refers to this phenomenon as flexible social categories which are determined by complex interplay of cultural stereotypes and socio-economic circumstances of a particular society.

¹⁴⁶ Bennett *Customary Law* 298 refers to the common-law distinction of criminal accountability of children under seven years of age and children between seven and fourteen. He correctly indicates that those children less than seven years of age are regarded as *doli incapax*; but incorrectly that those children between seven and fourteen years are regarded as *doli capax* until the contrary is proved. The correct common-law principle is that children between the ages of seven and fourteen are presumed *doli incapax* but this presumption can be rebutted by evidence beyond a reasonable doubt. For a discussion of criminal accountability in the Roman-Dutch, see 2 4 8 *supra* and for criminal accountability in South African law, see 4 4 1 4 and 4 4 2 4 2 *infra*.

¹⁴⁷ Olivier *et al Indigenous Law* par 5 declare that in customary law age as such is not an automatic criterion for the determination of majority and the possession of rights, privileges and obligations. See further Bennett "The status of children under customary law: The age of majority" in Sanders *Southern Africa in need of Law Reform* (1981) 18; Bennett *Customary Law* 298 explains that a person (child) does not necessarily attain all adult capacities at the same time and for all purposes. Because age does not provide a clear-cut criterion for distinguishing status, these capacities may be acquired gradually and for different purposes.

regards the natural development of the child as important and allocates different tasks according to the stage of development of the child.¹⁴⁸

3 2 6 1 Stages of childhood in customary law

The Roman-Dutch law division of children into categories of age groups such as *infans* and *minor* is not found in traditional customary law.¹⁴⁹ Traditional customary law devised a different system of determining when children were to be regarded as infants, young children and pubescent.¹⁵⁰

According to Bennett, childhood may be subdivided into two stages; from birth to age six or seven years and from age six or seven years to initiation.¹⁵¹ Upon reaching the age of six or seven¹⁵² the child is regarded as having sufficient rational ability to receive instruction. At this stage a minor rite of passage may be performed.¹⁵³

Customary law did not view age as an automatic criterion in attaining majority.¹⁵⁴ Going from childhood to adulthood was achieved by initiation and

¹⁴⁸ Overall children should have a carefree childhood learning through observation and experiencing the growth, antics and tribulations which children usually have during normal childhood.

¹⁴⁹ Though different criteria are used, the end result is still the same. A child of six years is not attributed the same responsibility as a child of twelve years. The accountability of children of different ages is not the same as applied in Roman-Dutch law but the distinction is clear.

¹⁵⁰ Hartman *Tsonga Law* 103 explains how early Tsonga law distinguished the various stages of development a child went through. The first stage was that of infancy which is from birth (*xihlangi*) to the stage when the child learns to walk. Then as a young boy (*mufana*) the next stage is from seven years when he is allowed to herd up to puberty when the young boy is ready to attend initiation. After initiation the boy is referred to and known as a young man (*jaha*). Hartman further explains the various developmental stages of girl, referring to a pre-puberty girl as *xinhwanyetana* and after puberty as *nhwanyana*.

¹⁵¹ *Customary Law* 299. Among the Xhosa this early childhood stage to the age of six or seven years is referred to as having no “eyes to see” and therefore being unable to distinguish between right and wrong. This first period corresponds with the common-law period where the child is regarded as *doli incapax*.

¹⁵² This stage would probably rather endure to age seven due to the accepted perception that children are to be regarded as children for as long as possible.

¹⁵³ Bennett *loc cit* explains that the child’s ears are pierced or slit to signify an “opening of the ears”.

¹⁵⁴ Bennett “The Status of Children under Indigenous Law: The Age of Majority” in Sanders *Southern Africa in need of Law Reform* (1981) hereafter Bennett in Sanders *Southern Africa in need of Law Reform* 18 explains that “[a]ge is not the only criterion of attaining the

rites of passage.¹⁵⁵ This uncertainty was addressed in certain communities by statutory intervention,¹⁵⁶ but it was not until the Age of Majority Act was promulgated that uniformity throughout South Africa was achieved.¹⁵⁷ The general view is that a minor son becomes an adult when he marries and sets up his own household.¹⁵⁸ Young boys after puberty and initiation are regarded as young men who are eligible to marry and therefore it may be argued that minority, albeit not in legal terms, is terminated.¹⁵⁹ According to Bennett it is not clear whether traditional customary law allows attainment of majority by way of emancipation tacit or otherwise.¹⁶⁰ Bekker on the other hand points out that a

capacities of a major. The status of the head of family, in indigenous law, is achieved by the actions of the individual over a considerable period of time. Moreover, indigenous law reserves majority status for men: unlike the common law, indigenous law does not permit women to exercise all the capacities of a major". Myburgh *Indigenous Law* 134 mentions that in customary law a man does not attain full majority until he is married. Bennett *Customary Law* 304 explains the difficulty with societies not governed by writing and literate bureaucracies as was predominantly found in customary law. Therefore, in customary law the transformation from one age grade to another must be related to physical processes, such as puberty, and rites of passage, such as initiation.

¹⁵⁵ Olivier *et al Privaatreg* 423, 636-637, 643; Bekker *Seymour's Customary Law* 48-49; Olivier *et al Indigenous Law* par 5 correctly explain that in theory a young man having passed puberty was regarded as an adult in the community after the initiation ceremonies. However, although the young man was regarded as having full contractual capacity, the family head still exercised full control and authority over the family property. Bennett *loc cit* highlights the difficulty in determining precise measurement of time where, as is the case in customary law, society does not have a writing and literate bureaucracy but is dependent on an oral system.

¹⁵⁶ S 39 of Procs 110 and 112 of 1879 and s 38 of Proc 140 of 1885 determined that all unmarried persons attained majority at age twenty-one. S 14 of the Code of Zulu Law prescribed that both male and female persons become majors on attaining age twenty-one or at marriage.

¹⁵⁷ Which came into operation on 2 June 1972. The Age of Majority Act 57 of 1972 has been repealed by s 313 read with sch 4 of the Children's Act with effect from 1 July 2007. For discussion of Children's Act, see 5 4 *infra*.

¹⁵⁸ This may not necessarily imply that the child has become a major. See further *Mlanjeni v Macala* 1947 NAC (C&O) 1 5 where the assessors were unanimous that in Pondo custom a youth becomes a man when he gets married.

¹⁵⁹ Olivier *et al Indigenous Law* par 5 mention that in theory a young boy may be regarded as an adult after the initiation ceremony and that he acquires full contractual capacity.

¹⁶⁰ Bennett *Customary Law* 306 holds the view that the Age of Majority Act 57 of 1972 did not abolish the common-law rules on tacit emancipation. He adds that it is debateable whether the common-law rules of tacit emancipation apply to a minor who is normally subject to customary law. However, Bennett *loc cit* adds, with reference to *Gwenya v Madondeni* 1920 NHC 20, that this question has not been raised since. Stafford *Native Law* 46 also opines with reference to the same case that tacit emancipation is unknown in customary law as practised in Natal. See also Bennett and Peart *Sourcebook* 358. In any event the lowering of the age of majority to eighteen years with effect from 1 July 2007 in terms of the Children's Act, has to a large degree now reduced this concern.

minor heir becomes tacitly emancipated before his marriage if his guardian hands him the control of his father's estate.¹⁶¹

3 2 6 2 The effect of age on the status of the child

A child's age has a profound effect on the status of the child and his or her status changes as the child grows older.¹⁶² Age not only affects the social status of the child, but also has a determinable influence on the legal capacity of the child.¹⁶³ Of interest for purposes of the present discussion are the legal implications of the child's age on his/her legal status.

With time the effect of a child's age on his/her status not only changed the social status of the child but, with colonisation and later the apartheid era, the legal status of the child was also affected. The position in traditional customary law, the influence of the common law and statutory developments and finally the constitutional influence all had an effect on the status of the child in customary law.

3 2 6 2 1 Legal capacity of the child

In order to determine what effect age has on the legal capacity of a child it is necessary to determine what legal capacity entails.¹⁶⁴ In customary law the child has the capacity to be the bearer of rights and duties.¹⁶⁵ However,

¹⁶¹ *Seymour's Customary Law* 230 with reference to *Xala v Xala* 1935 (C&O) 15.

¹⁶² Bennett and Peart *Sourcebook* 339 hold the view that every society withholds some, if not all, legal capacities from the young, until they have matured sufficiently to behave in a responsible manner.

¹⁶³ Bennett *op cit* 322 distinguishes between the capacity of the child to be the bearer of rights and duties and right of the child to perform juristic acts, such as the capacity to act in legal matters and the capacity to litigate.

¹⁶⁴ Bennett *loc cit* referring to legal capacity explains that it signifies the power to perform juristic acts and to bear rights and duties. He distinguishes between the child's proprietary capacity and delictual capacity. See Bekker *Seymour's Customary Law* 59-61, 81-82, 84-88, 239-240, 240-241. See also Olivier *et al Privaatreg* 636-640. For a discussion of the legal capacity of the *infans* and minor, see 4 4 1 1 and 4 4 2 1 *infra*.

¹⁶⁵ Olivier *et al Indigenous Law* par 18 explain that the father is entitled to the earnings of his minor son; in par 140(b)(i), with reference to delictual capacity of the child, the authors mention that young children who are regarded as *doli incapax* are not held liable for their

customary law allows very little leeway for the proprietary capacity of children as control over all property vests with the head of the household.¹⁶⁶

Bennett argues that in customary law a child's capacities to contract and to sue or be sued in court should, principally, be governed by the same considerations that determine delictual and proprietary capacity.¹⁶⁷ The contractual capacity is taken further by the Black Administration Act that superseded the customary law.¹⁶⁸

The result of the provisions referred to in the Black Administration Act was that all contractual matters and obligations not emanating from customary law would be governed by common law. This meant that a child in customary law may rely on the provisions contained in customary law if customary law governed the transaction.¹⁶⁹

deeds. See further Olivier *et al Privaatreg* 422; Bekker *Seymour's Customary Law* 59 mentions that the competency of minors to hold rights are limited but not to the extent that they do not have rights at all. Bennett *Customary Law* 322 explains how children were either partially or totally without capacity. This is not because children were not regarded as having any rights or being unable to be bearers of rights and duties, but because of the plenary powers of the head of the household. According to Bekker *Seymour's Customary Law* 328 children are competent to acquire rights although they are under legal disability.

¹⁶⁶ In older decisions in Natal, the courts held that the son's wages accrued to his father. See in this regard *Mkwanazi v Zulu* 1938 NAC (N&T) 258; *Mfazwe v Modikayi* 1939 NAC (C&O) 18 22-3; *Sitole v Sitole* NAC (N&T) 50; *Kuzwayo v Kuluse* 1951 NAC (N-E) 321. See also Bennett *Customary Law* 322 who explains that control of all property vested in the head of the homestead and this control could only be obtained by a man succeeding his father or establishing his own homestead.

¹⁶⁷ *Customary Law* 328. This will be when the child is married and has established a separate homestead.

¹⁶⁸ S 11(3) Act 38 of 1927 provides that "[t]he *capacity* of a Black to enter into *any* transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such *capacity* of any Black, be determined as if he were a *European*: Provided that –

(a) If the existence or extent of any right held or alleged to be held by a Black or any obligation resting or alleged resting upon a Black depends upon or is *governed* by any Black law (whether codified or uncoded) the *capacity* of the Black concerned in relation to any matter affecting that right or obligation shall be determined according to the said Black law." (Emphasis added.) The implication that the common law relating to majority as well as the subsequent Age of Majority Act 57 of 1972 applies to children governed by customary law is made clear from the wording of the subsection.

¹⁶⁹ Bennett *loc cit*.

3 2 6 2 2 Capacity to act

In traditional customary law children did not have any capacity to act or to enter into any transaction whilst they were under the age of puberty.¹⁷⁰ With the promulgation of the Black Administration Act, section 11(3) superseded customary law and thereby incorporated common-law principles governing capacity unless the obligation arose out of customary law. Section 11(3) was also subject to the Age of Majority Act, which meant that only persons over the age of twenty-one had full contractual capacity and *locus standi*. The contractual capacity of children under the age of twenty-one¹⁷¹ was still governed by customary law, but only if customary law governed the contract.¹⁷²

It is uncertain whether the common-law exceptions of emancipation and falsely representing to be a major and in so doing deceiving the other party were available to a minor in customary law.¹⁷³ Where the disposal of the minor heir's property was considered, the minor's guardian had to be present and if the child reached such age of understanding (usually after puberty), the child had to be included in the consultation.¹⁷⁴

Traditional customary law allowed children very little if any right to participation in engagements. It was not uncommon to find children, infants and even unborn

¹⁷⁰ This is according to Bennett *loc cit* who also observes that there are reported judgments regarding a son's powers of contractual capacity apart from the occasional comments that "kraalheads" are not liable for the so-called "shop debts" incurred by the inmates of their kraals.

¹⁷¹ Now eighteen years in terms of s 17 of the Children's Act.

¹⁷² Bennett *loc cit*.

¹⁷³ Bennett *Customary Law* 306. *Op cit* 328 n 280 adds that if common law governs capacity, then there is a strong argument in favour of the tacit emancipation of an economically independent minor.

¹⁷⁴ *Ndlala v Makinana* 1963 BAC (S) 18 where a child in his early teens who was not present during the discussion of a contract regarding his cattle he inherited was successful in claiming return of his cattle. A guardian in terms of customary law assisted the child, as curator *ad litem*, during his court application due to a conflict of interests with his customary-law guardian. See Bekker *Seymour's Customary law* 240; Bennett *Customary Law* 354.

girls given in engagement to be married.¹⁷⁵ However, the courts consistently refused to approve any claims resulting therefrom.¹⁷⁶

The traditional view of marriage entitled parents to arrange marriages for their children.¹⁷⁷ In traditional customary law the involvement and consequent consent of the girl and young man was not required.¹⁷⁸ Both the partners who intended entering into a customary marriage must at least have reached puberty.¹⁷⁹ However, as puberty is reached at different ages, this resulted in the

¹⁷⁵ A unique feature like “child betrothal” was part of the traditional customary law and found among the majority of the traditional ethnic groups in South Africa. Harries *Notes on Sepedi Laws and Customs* (1909) hereafter referred to as Harries *Sepedi Laws* 3 mentions that infant betrothal is a very old custom among the Bapedi. Van Warmelo *Venda Law* 35, at 57 mentions that in traditional Venda law girls were betrothed even before birth in a system referred to as marrying a “little toe”. Schapera *Tswana Law* 130 refer to a similar system traditionally found among the Tswana called *go ôpa mpa*, “to strike the womb”. He adds 130 that although at the time of his publication (1970) infant betrothals were still practised to some extent, this practice was fairly rapidly disappearing. See also Coertze *Bafokeng Family Law* 152 opines that infant betrothal has completely disappeared among the Bafokeng. Bekker *Seymour’s Customary Law* 99 opines that an infant and immature child’s betrothal are void *ab initio* as being contrary to public policy but when the boy or girl has grown up they can agree with or consent to the prior agreement. Olivier *et al Indigenous Law* pars 10 and 16; Mqeke and Church *LAWSA* (ed Joubert) 32 (1981) par 115 mention that betrothal of infants and young children, being contrary to public policy, are void *ab initio*. Bennett *Customary Law* 200 adds that the courts declared child betrothals contrary to public policy and therefore unenforceable.

¹⁷⁶ See in this regard *Buthlezi v Ndhlela* 1938 NAC (N&T) 175; *Gidja v Yingwane* 1944 NAC (N&T) 4 the court finding that modern civilisation recognises a girl has full liberty of choice in the matter of marriage and that this freedom is the prerogative of all women irrespective of colour or race. A father cannot be allowed to pledge his daughter as a man’s prospective wife. In this case the girl had not yet attained puberty; *Zulu v Mdhletshe* 1952 NAC (N-E) 203 where the court held that an agreement of infant betrothal is repugnant to the principle of public policy and any payments made thereunder are not recoverable; *Mngomezulu v Lukele* 1953 NAC (N-E) 143.

¹⁷⁷ Bennett *Customary Law* 209.

¹⁷⁸ Van Warmelo *Venda Law* 57 explains that in traditional Venda law the father would simply engage a girl to be married without anyone knowing for whom she was intended as wife. Schapera *Tswana Law* 128 mentions that children were never consulted at all and were informed only after the necessary arrangements had been made. See further Bekker *Seymour’s Customary Law* 99 who refers to the situation where the father negotiated an engagement without consulting the son and explains that the son could ratify the engagement at a later stage. See further Olivier *et al Indigenous Law* par 16; *LAWSA* 32 par 110.

¹⁷⁹ Kerr “Customary Family Law” in Schäfer *Family Law Service* (ed) Clark (1988) 19. Bekker *Seymour’s Customary Law* 107 explains that children under the age of puberty are incapable of consenting to a customary marriage and therefore have to reach puberty before they can enter into a customary marriage. Bennett *Customary Law* 203 mentions that today the boy and girl would at least have reached the age of puberty in order to fulfil the primary purpose of marriage, which has remained procreation. He adds *loc cit* that besides initiation, customary law has no specific rules for determining a marriageable age. This changed with the Recognition of Customary Marriages Act 120 of 1998, which entered

rule having no fixed meaning.¹⁸⁰ The consent of the bride and the bridegroom to a customary marriage was essential whether given explicitly or tacit.¹⁸¹ Where the father entered into an agreement on behalf of his son, the son was bound by the agreement.¹⁸² Because children below puberty could not legally be engaged in any agreement, they were not capable of consenting to any customary marriage. If a customary marriage was arranged by their parents, the customary marriage would only come into being if both the boy and girl become capable of consenting and actually give their consent.¹⁸³

3 2 6 2 3 Capacity to litigate

In order for a child to assert or defend his/her rights in a court of law, he or she must be assisted by or represented by his/her guardian or curator *ad litem*.¹⁸⁴ The minor heir may bring an action assisted by a curator *ad litem* against his/her guardian. Under the Code of Zulu Law a minor heir may bring an action without assistance against his/her guardian unless the court directs the

into force on 15 November 2000 by Proc R.66 dated 1 November 2000, where s 3(1) now sets the age for marriage at eighteen years. See also *Gempeza v Ntsizi* (1926) 5 NAC 103. See further *Ngcongolo v Parkies* 1953 NAC 103 (S) 104.

¹⁸⁰ The uncertainty that prevailed in traditional customary law regarding the determination of a marriageable age puberty and initiation were the only guides for determining from which stage in the child's life a child could legally enter into a customary marriage.

¹⁸¹ Kerr "Customary Family Law" in Schäfer *Family Law Service* 19. For general rule of Cape see Nguni *Mbanga v Sikolake* 1939 NAC (C&O) 31; *Mrolo v Bokleni* 1948 NAC (S) 62 63; *Ngcongolo v Pakies* 1953 NAC (S) 104 105. See Olivier *et al Indigenous Law* par 17 where the authors mention that traditionally the consent of the man (boy beyond puberty and after initiation) and girl was not required but would be reluctant to force a marriage against the will of either one. Further also pars 17-21. Bennett *Customary Law* 199 explains that strictly speaking, the consent of the spouses, especially the bride was irrelevant and one may add so much more if the intended spouses were children. The reason being that customary law marriages were treated as an arrangement between families to be negotiated by senior males and sealed by payment of *lobolo*.

¹⁸² Olivier *et al Indigenous Law* par 20; Bekker *Seymour's Customary Law* 107 mentions that the consent of the son need not be given at the time of the negotiations but until such time as the son's consent is given no customary marriage can come into existence. See also *Zimande v Sibeko* 1948 NAC (C) 21; *Ngcongolo v Parkies* 1953 NAC (S) 103; *Linda v Shoba* 1959 NAC (N-E) 22; *Mchunu v Masoka* 1964 BAC (N-E) 7.

¹⁸³ Bekker *Seymour's Customary Law* 107 further explains that the agreement by the parents to the marriage is null and void *ab initio* but the children may subsequently ratify the agreement and validate the customary marriage from such ratification.

¹⁸⁴ Bekker *Seymour's Customary Law* 60 with reference to *Mnyandu v Mnyandu* 1974 BAC (C) 459; *Mpanza v Qonono* 1978 AC (C) 136. See also Bennett *Customary Law* 354. For the child's right to legal representation, see 5 4 6 *infra*.

appointment of a curator *ad litem*.¹⁸⁵ Should the child have no guardian then a curator *ad litem* must be appointed to assist the him/her.¹⁸⁶ Children have the right to testify in tribal courts, the only exception being an infant.¹⁸⁷

It appears that legal representation was unknown in customary law, at least in the technical legal sense known to Western culture. However, this does not imply that a person may not be assisted in legal matters.¹⁸⁸

3 2 6 4 Delictual and criminal accountability

It may be accepted that very young children¹⁸⁹ could not be delictually liable for their deeds.¹⁹⁰ As a general principle whoever has authority over a homestead was liable for the wrongful acts of the people¹⁹¹ in his charge.¹⁹² This principle rested on the interdependence of delictual liability and control over property. Customary law did not make the clear distinction between the various criminal capacities of a child as provided for in the South African common law.¹⁹³

¹⁸⁵ See *Ndlala v Makinana* 1963 BAC (S) 18 n 177 *supra*. In *Nxumalo v Nxumalo* 1952 NAC (N-E) 20 the court determined that a curator *ad litem* is required only if the court considers it necessary.

¹⁸⁶ *Twala v Nzimande* 1938 NAC (T&N) 57; *Mashinini v Mashinini* 1947 NAC (T&N) 25 decided with reference to a wife being a minor “[i]t has repeatedly been laid down that a woman being a minor has no legal standing to appear in Court”. The principle regarding standing in court is the same for a child. See also Bekker *Seymour’s Customary Law* 239.

¹⁸⁷ Van Niekerk “Principles of the Indigenous Law of Procedure and Evidence as Exhibited in Tswana Law” in Sanders *Southern Africa in Need of Law Reform* (1981) 137. He adds at 135 that children are competent witnesses if they are old enough to give account of facts and account being taken of their mental development. The court has a special duty to protect a young child from undue harsh and confusing cross-examination.

¹⁸⁸ Van Niekerk in Sanders *Southern Africa in Need of Law Reform* 134 comments that in Tswana law a party is always assisted by members of his group amongst whom there is sure to be one with a flair for legal argument.

¹⁸⁹ Those under seven years, *infantes*.

¹⁹⁰ Bennett *Customary Law* 325, however, is more circumspect when he says very young children, those between six and seven years, are probably deemed in all systems of customary law to be incapable of distinguishing between right and wrong. He adds that it is difficult to know whether their guardians were also exempt because there is so little data available on social practice. Bennett, however, refers to one reported judgment, *Skenjana v Geca* 6 (1928) NAC 4, where the court held that the guardian is liable only if the wrongdoer is old enough to appreciate the consequences of his action.

¹⁹¹ That would include children.

¹⁹² Bennett *loc cit*.

¹⁹³ Prinsloo “Indigenous Criminal Law in Bophuthatswana and Lebowa” in Sanders *Southern Africa in Need of Law Reform* 91 mentions that the responsibility of a child is determined by his ability to distinguish between right and wrong and to act accordingly. A candidate

3 2 7 Conclusion

Traditional customary law was not seen to function in the interests of the child. Children featured mainly as objects of rights and powers that were secured in the heads of families who were ready to wield such powers whenever they chose.¹⁹⁴ The similarity between customary law and Germanic law is noticeable. Participatory rights remained within the collective of the family and it is only individual items of legislation that have elevated the participatory rights of children in matters affecting them. Inevitably the question arises whether sufficient thought has been given to what the social implications would be with the reduction of the age of majority to eighteen years. The diversity of the social structure of South Africa may be tested beyond what was expected.

¹⁹⁴ initiate (*lešoboro*), that is a boy of nine or ten years old is considered responsible. Bennett *Customary Law* 298 opines that various capacities may be acquired for different purposes. Bennett and Peart *Sourcebook* 359 compare the position of children in customary law with the plight of children in earlier western legal systems.