

## CHAPTER 6

### A COMPARATIVE ANALYSIS OF THE CHILD'S RIGHT TO PARTICIPATION AND REPRESENTATION IN LEGAL MATTERS

#### 6 1 Introduction

The South African Law Commission compiled a comparative review to determine the extent of the law reform initiatives<sup>1</sup> in child care and protection in both developed countries and developing countries. The countries selected for this comparative study are, with the exception of Namibia, those which were selected for the comparative review of the South African Law Commission.<sup>2</sup> Common themes<sup>3</sup> that will be investigated relate to the participation of children and their legal representation in matters involving them, as well as the best interests of the child<sup>4</sup> as a paramount or primary consideration involving children. The age of criminal accountability for children will be investigated, as well as the definition of a child and the determination of minority<sup>5</sup> at age eighteen years (the exception being New Zealand where minority ends at seventeen years).

The different countries are selected mainly because they have all ratified the Convention on the Rights of the Child and this served as common ground for their reform initiatives. The scope of the comparative report is fairly diverse representing Africa, Europe and non-African countries of the Commonwealth.

The aim of this part of the study is to determine the extent of South Africa's compliance with its international and constitutional obligations when its

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<sup>1</sup> In the African context in a country such as Kenya, the law reform process commenced as early as 1988, see Sloth-Nielsen and Van Heerden 1997 *Stell LR* 266.

<sup>2</sup> SALC Issue Paper 13 par 10 1 p 132.

<sup>3</sup> As indicated in the SALC Issue Paper 13 par 10 1 p 132.

<sup>4</sup> As part of the four general principles enshrined in the CRC, namely participation (art 12) and the best interests of the child (art 3). For a discussion of the CRC, see 5 2 2 1 *supra*.

<sup>5</sup> SALC Issue Paper 13 par 10 1 p 132 refers to "childhood". The expression "minority" and "childhood" are used interchangeably. Both the expressions refer to a person under the age of eighteen years.

Children's Act<sup>6</sup> is compared with that of the selected countries. Where developments in the selected countries' respective children's statutes are found to be more advanced, it will be compared with the Children's Act of South Africa to identify the limitations and vice versa.

All six countries that are included in the comparative study which is to follow have been influenced by English common law in one way or another. As the theme of this thesis focuses on the participatory rights of the child and the child's right to legal representation, the aim of this chapter will be to extrapolate from the English common law the origin and development of the two rights and ascertain how it was absorbed into the various jurisdictions to be discussed below.

## **6 2 Brief overview of English common law<sup>7</sup>**

### 6 2 1 Introduction

The purpose of this overview is to ascertain to what extent the development of the common law contributed to and influenced the participatory rights of children in legal matters as well as their right to legal representation. The comparative reviews of the countries which follow in this chapter all have a link with the English common law, some more so than others. The aim is to search for common ground from which to investigate the route that the various countries followed to develop their legislation with respect to the inclusion and protection of participatory rights of children and their right to legal representation in cases which affect them.

The period of reference runs from Bracton,<sup>8</sup> which was the period during the reign of Henry III (1216 to 1272) and continues up to 1700.<sup>9</sup> It will become

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<sup>6</sup> The Children's Act in its entirety will not be discussed, only those sections relating, either directly or indirectly, to child participation and representation.

<sup>7</sup> Reference hereafter will be to the common law.

<sup>8</sup> Referred to by authors such as Pollock and Maitland *The History of English Law before the time of Edward I* vol I (1898) hereafter Pollock and Maitland *History I* 206 as "the crown

evident that, although certain main features<sup>10</sup> of the Convention on the Rights of the Child have been identified for purpose of the comparative review, those features which have been identified as some of the core “rights”<sup>11</sup> of children may not be that evident in early common law.

The participation of children in common law followed its own development. In exploring the effect on the child’s participatory right in legal matters during the development of the common law, cognisance has to be taken of the influence of the canon law. The extent and the significance of the other legal influences, such as Roman law,<sup>12</sup> and its role in formulating the participation of the child in legal matters as it known today will also be examined.

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and flower of English medieval jurisprudence”. Holdsworth *A History of English Law* vol II (1936) hereafter Holdsworth *History* II 215 mentions that English law as summarised in the work of Bracton is an achievement of which any nation may well be proud. Reference to Bracton will be from Woodbine *Bracton on the Laws and Customs of England* II (1922) hereafter referred to as Bracton; reference to Bracton will be to the folio page in the Woodbine edition.

<sup>9</sup> The main commentators about this period who will be referred to are Coke *The First Part of The Institutes of the Lawes of England* vol I (1628) hereafter Coke *Institutes* I, Hale *Historia Placitorum Coronae* (1736) hereafter Hale *Historia*, and Blackstone *W Commentaries on the Laws of England* (1791) hereafter Blackstone *Commentaries*.

<sup>10</sup> The focus will be on the determining the definition of “child”, the interests of the child, participatory rights of the child and the legal representation of the child.

<sup>11</sup> These “rights” identified as principles are enshrined in the CRC and are those of non-discrimination (art 2), the best interests of the child (art 3), the right to life, survival and development (art 6) and respect for the views of the child (art 12).

<sup>12</sup> Throughout the development of common law in England, there was a desire to develop jurisprudence unique to the requirements of England. Holdsworth *History* II 141 makes an interesting comment when he says that Justinian’s Code and Digest gave the ecclesiastical legislators and lawyers training in legal technique, which rendered a service upon the growing canon law. This service was also conferred upon many other bodies of customary law during the medieval period and notably the emerging English common law. However, Holdsworth *History* II 141-142 also draws attention to the fact that, although the canon law owed the Roman law much, the Roman law could not easily be altered to meet the requirements and conditions in medieval Europe where many parts of the Roman law were inapplicable to the conditions that prevailed. The canon law on the other hand was a living and growing law. Pollock and Maitland *History* I 24 probably summarise it best when they refer to the influence of the Roman law as follows “[i]t came to us soon; it taught us much; and then there was healthy resistance to foreign dogma”.

## 6 2 2 The importance of different ages

Throughout the common law, persons who have not attained majority are referred to as infants. In the age group infant<sup>13</sup> we find no sub-divisions.<sup>14</sup> In common law, the generic term infant denotes any person who is still a minor and not a major.<sup>15</sup> The age of discretion is the same for boys and girls, namely fourteen years.<sup>16</sup> However, a girl was regarded as having attained the age of maturity when she reached the age of twelve years.<sup>17</sup>

Initially a girl of seven may become engaged to be married or to be given in marriage.<sup>18</sup> At the age of nine years, a girl may become entitled to dowry and when she attains the age of puberty,<sup>19</sup> at twelve, she may consent or refuse to get married. At the age of twelve, a girl may bequeath her personal estate by testament.<sup>20</sup> A girl who attains the age of legal discretion at fourteen may then choose a guardian and at seventeen years, she may be an executrix.<sup>21</sup>

Age as a determining factor for attaining majority was not that significant in the early stages of the development of the common law, however, it did play a role

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<sup>13</sup> Not to be confused with *infans* found in Roman law and discussed in 2 1 5 1 *supra*.

<sup>14</sup> This is contrary to Roman law as seen in 2 1 7 *supra*.

<sup>15</sup> Also referred to as “of full age” and which in common law is the age of twenty-one. See Blackstone *Commentaries* I 463.

<sup>16</sup> Coke *Institutes* I 79; Hale *Historia* I 25; Blackstone *Commentaries* I 463. Blackstone *Commentaries* I 463 draws attention to the age of discretion determined at fourteen years for boys and girls. He does, however, also indicate that a girl if she has sufficient discretion may bequeath her personal estate. A boy may only bequeath his personal estate at age fourteen if his discretion has been proven.

<sup>17</sup> Blackstone *Commentaries* I 463 equates maturity with puberty.

<sup>18</sup> Coke *Institutes* I 78b.

<sup>19</sup> Coke *loc cit*. Blackstone *loc cit* refers to the girl attaining the age of maturity.

<sup>20</sup> Blackstone *loc cit* declares that children who have attained puberty can only bequeath their personal estate if they have sufficient discretion. The age of discretion was attained at fourteen by both boys and girls. Therefore if a girl is proven to have sufficient discretion she may at the age twelve bequeath her personal belongings. This appears to have been an exception on the applicability of the age of discretion regarding girls.

<sup>21</sup> Coke *Institutes* I 78b gives an example of various ages of importance applicable to girls and boys. Eg a girl may consent to marriage at the age of twelve years, remain in wardship until fourteen years of age and at the age of twenty-one years she may alienate her lands, goods and chattels. A boy may at the age of twelve years take the oath of allegiance, at the age of fourteen years consent to marriage and choose a guardian. He is also regarded to have reached the age of discretion when he is fourteen years old. He may dispose of his lands, goods and chattels at the age of twenty-one years. See also Holdsworth *History* III 510 n7 who refers to Coke and Blackstone *Commentaries* I 463.

in determining when children could engage in certain actions.<sup>22</sup> The ages differed for boys and girls.<sup>23</sup> Boys attained puberty<sup>24</sup> at fourteen for a boy and girls at twelve years of age.

Majority was not defined in terms of age, but by common sense and maturity.<sup>25</sup> There was agreement that a definite age of majority prevailed, but no certainty as to when that age was attained was found. Uncertainty continued during the eleventh and twelfth centuries. It appears that different ages were determined for different classes of society.<sup>26</sup> During the early part of the common law, a knight became of age at twenty-one and the heir of a socman (holder of tenure in service) at fifteen.<sup>27</sup>

The age at which a child was regarded to become a major was not settled in the early development of the common law. Later in medieval common law, age played a more prominent role in the termination of a child's minority.<sup>28</sup>

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<sup>22</sup> Blackstone *Commentaries* I 463 mentions that boys who reached age twelve years could take the oath of allegiance, at age fourteen a boy could consent to marriage and choose a guardian.

<sup>23</sup> Blackstone *Commentaries* I 463 refers to children within age.

<sup>24</sup> Blackstone *Commentaries* I 463 does not refer to puberty, but uses maturity for girls at the age of twelve and discretion for boys. Holdsworth *History* III 511 refers to the ages of capacity as fourteen for boys and twelve for girls as provided in canon law.

<sup>25</sup> Holdsworth *History* III 510 explains that this uncertainty persisted during the eleventh and twelfth centuries. Bracton f86 and f86b gives an explanation of the various ages at which majority was determined in his discussion of the wardship of heirs, further commenting that there are different ages according to the different kinds of heirs and tenements. Bracton f86b mentions amongst others that if the fee (inherited estate) was a military fee the heir will only attain majority (full age) after he had completed his twenty-first year and reached his twenty-second year. If the child was the son and heir of a sokeman (also socman), he attained majority when he had completed his fifteenth year. If the child was the son of a burgess (an inhabitant of a borough with full municipal rights, a citizen) he was regarded as having attained majority when he was acquainted with money matters, able to measure cloth (fully trained in a trade) and perform other similar paternal business. Likewise a girl was regarded as having attained majority or of full age in socage (feudal tenure of land involving payment of rent or other services to a superior) when she was ready and trained in housekeeping. The attaining of majority could be before the girl had turned fourteen or fifteen years because discretion and understanding was required for majority.

<sup>26</sup> Holdsworth *History* III 510.

<sup>27</sup> Holdsworth *History* III 510; Pollock and Maitland *History* II 438 doubt whether a socman's heir could be regarded as a major after fifteen. However, by the time of Blackstone's *Commentaries* it was settled that majority was attained at the age of twenty-one years.

<sup>28</sup> Holdsworth *History* III 510 comments that majority was recognised as being attained at a fixed age but there were no rules determining what that age was. Towards the end of the medieval common law period majority was gradually being fixed at the age of twenty-one

It appears that gradually the age of twenty-one, the attaining of majority of a knight, became to be regarded as the age of majority for both male and female and was regarded as the rule for all classes of society.<sup>29</sup> Blackstone explains that full age is attained the day before the age of twenty-one is reached.<sup>30</sup>

### 6 2 3 The participatory rights of children

The child in the early development of the common law had limited say in legal matters affecting him or her.<sup>31</sup> However, judicial recognition regarding the wishes of the child was being recorded during the nineteenth century.<sup>32</sup> Attaining the age of discretion assisted children in that their wishes could be considered in access matters if the child was not in the custody of his or her father.<sup>33</sup> The enactment of the *Custody of Infants Act* 1839 provided for the petition of an infant to be heard so as to make an “order for the access ... to such infant or infants, at such times and subject to such regulations as ... shall [be] deem[ed] convenient and just”.<sup>34</sup>

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years. Childhood in common law went from birth through infancy to majority which was attained at age twenty-one. See also Pollock and Maitland *History* II 438.

<sup>29</sup> Blackstone *Commentaries* I 463; Pollock and Maitland *History* II 98; Holdsworth *History* III 510.

<sup>30</sup> *Commentaries* I 463 describes that the period of infancy is maintained until the day preceding the twenty-first anniversary of the person’s birth.

<sup>31</sup> Blackstone *Commentaries* I 460 mentions that in common law the guardian held office of both as *tutor* and *curator* as found in Roman law. Holdsworth *History* III 512 mentions that during the Middle Ages the law of guardianship was inadequate and defective due to the tension between the view that guardianship was a right for the benefit of the guardian and the later view that it involved responsibilities for the infant. For discussion of guardianship in Roman law, see 2 1 8 *supra*.

<sup>32</sup> Petit “Parental control and guardianship” in Graveson and Crane *1857 A Century of Family Law 1957* (1957) hereafter *A Century of Family Law* 62 refers to *R v Greenhill* (1836) 4 A&E 624 where the court held that the father had a right to custody “if the party be a legitimate child, too young to exercise a discretion”.

<sup>33</sup> Petit *loc cit* 62 observed that the apparent age was fourteen for boys and sixteen for girls. This is in contrast to two decisions referred to by Petit *op cit* 63 being *Hall v Hall* (1749) 3 Atk 721, where the court ordered a sixteen-year old boy to return to the school where his guardian had placed him and *Tremain’s case* (1719) 1 Strange 167, where the court ordered a fourteen-year old boy who had gone to Oxford to return to Cambridge and if required, be kept there.

<sup>34</sup> Petit in Graveson and Crane *A Century of Family Law* 58-59 mentions that the *Custody of Infants Act*, was the result of *R v Greenhill* (1836) 4 A&E 624 where the court ordered the return of the three girls aged five-and-a-half, four-and-a-half and two years to the custody of the father, commenting that “if the party be a legitimate child, *too young to exercise a discretion*, the legal custody is that of the father”. (Emphasis added.)



Puberty allowed boys to engage in a number of actions that may be legally performed by a boy such as consent to marriage; the choosing of a guardian; the bequeathing of his personal estate by testament; and at the age of seventeen years, he may be an executor.<sup>35</sup> However, Blackstone<sup>36</sup> acknowledged that there were exceptions to the general rule for which an infant does not have the capacity to act.

Brewer<sup>37</sup> in her discussion of children's consent to contracts in the late sixteenth and early seventeenth centuries highlights the inconsistencies that abounded during those periods.<sup>38</sup> The jurisdiction of common law was much narrower for many contracts, including wills<sup>39</sup> and marriages, which were governed by ecclesiastical courts for which the full age of majority was fourteen years for boys and twelve years for girls.<sup>40</sup> It is also interesting to note that children (infants) could possess land and exchange it. They needed no representation by the guardian to do so.<sup>41</sup> They did not require the assistance of their guardian to sue and they could in fact sue their guardian.<sup>42</sup>

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<sup>35</sup> Blackstone *Commentaries* I 463. Compare n 17 *supra*.

<sup>36</sup> *Commentaries* I 465.

<sup>37</sup> *By Birth or Consent Children, Law, and the Anglo-American Revolution in Authority* (2005) hereafter Brewer *Birth or Consent* 237-253.

<sup>38</sup> 237 where as an example she says that common-law lawyers changed the grounds for making legal contracts to exclude force, influence and children as part of a general effort to create a unified law about valid consent. She mentions *op cit* 239 that the most stringent measures were placed on the contractual power of children in respect of their selling of land.

<sup>39</sup> Swinburne *Treatise of Testaments and Wills* 61-62 mentions that puberty (he refers to the age of fourteen for boys and twelve for girls) was a prerequisite for making a will. He refers to the requirement of *doli capax* (which was regarded as the age of discretion for both boys and girls) and adds that boys after the age of fourteen years and girls after the age of twelve could dispose of their goods and chattels without authority or consent from their guardian or their father if they had such goods in their own name to dispose of.

<sup>40</sup> Brewer *By Birth or Consent* 240 mentions that a distinction there was made between children's ability to buy and sell goods and chattels. The ability to buy by bond (pledging to pay in the future) was binding as long as the item was "needed".

<sup>41</sup> Brewer *op cit* 242 mentions that children beyond puberty acted in their own right and they appeared in their own right in court. Compare Pollock and Maitland *History* II 440.

<sup>42</sup> Pollock and Maitland *History* II 441.

A child born out of wedlock was regarded as a *filius nullius*.<sup>43</sup> However, it appears that the effect of illegitimacy on the status of the child was not of concern in private law.<sup>44</sup>

The canonists, however, made use of the Roman law to justify the imposition of a duty on all parents to maintain their children, whether “legitimate” or “illegitimate”.<sup>45</sup> This influence of canon law, albeit through borrowing from civil law, on English family law was also noticeable in enforcing the maintenance obligation of the father through ecclesiastical remedies in the English Church courts during medieval times.<sup>46</sup>

Canon law and temporal law influenced the law of marriage in England. The development of the law of marriage during the medieval period had progressed

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<sup>43</sup> Blackstone *Commentaries* I 458-459 begins his discussion on the rights of a child born out of wedlock by saying that such a child had very few rights. The rights that he may possess are only those that can be acquired other than through inheritance. He can inherit nothing because an illegitimate child was regarded as the son of nobody. Blackstone added that a child out of wedlock cannot be an heir and cannot have heirs because he is related to nobody and has no ancestor from whom inheritable blood can be derived. Blackstone concluded at 459 that a child born out of wedlock is in all other respects on equal terms with a child born in wedlock. See further Helmholz *Canon Law and the Law of England* (1987) hereafter *Canon Law* 169-170 who mentions that comments such as “[t]he common law of England was ruthless in its denial of any rights to children born out of wedlock” has been confirmed repeatedly in case law, commentaries and law review articles.

<sup>44</sup> Pollock and Maitland *History* II 396-397 declare that illegitimacy in English law cannot be called a status or condition because the only consequence of illegitimacy is not being able to inherit either from parents or from anyone else. Because of this, it may be argued that the effect of illegitimacy on the status of the child was not that much of an obstacle.

<sup>45</sup> Helmholz *Canon Law* 173 n 21. In doing so the indirect participation of the child through his or her mother acting as guardian was acknowledged. Petit in Graveson and Crane *A Century of Family Law* 58 mentions that although a child born out of wedlock was regarded as a *filius nullius*, as regards the custody of the child it appears that the mother rather than the putative father was given custody. This would be the case at least during the stage of nurture (up to the age of seven years) and the court would order that the child be returned even as against the putative father.

<sup>46</sup> Blackstone *Commentaries* I 457 *et seq* introduces his discussion on the duty of parents towards their children born out of wedlock which “is principally that of maintenance”. He adds that although children out of wedlock are not regarded as children “to any civil purposes” they are by the ties of nature not so easily dispersed and confirms this when he explains how a mother of a child born out of wedlock may ensure that the natural father of the child is bound to maintain the child. The woman appears before a justice of the peace, when pregnant or after the birth of the child and declares under oath who the putative father of the child is. The putative father then has to give security until the birth of the child and if the child is born and the paternity is not disputed then an order to maintain the child is given. The participation of the child would then be by virtue of the mother as guardian who participated on behalf of the child in bringing the action for maintenance before the ecclesiastical court.



from a contract where the girl had very little say to where a child of the age of discretion<sup>47</sup> may by canon law consent to marriage.<sup>48</sup>

This remained the legal position until the *Age of Marriage Act* 1929 was enacted requiring both the parties entering into a marriage to have attained the age of sixteen years.<sup>49</sup> Dickey<sup>50</sup> mentions that as early as 1732 the Court of Chancery inquired into the wishes of a girl aged thirteen in order to pronounce on the person with whom she should live.

#### 6 2 4 The representation of a child in legal proceedings

Representation in legal matters other than the child as plaintiff or defendant has already been referred to.<sup>51</sup> It must be kept in mind that during the early thirteenth century there were not that many legal representatives skilled in English law.<sup>52</sup> Guardians *ad litem* were appointed as early as the seventeenth century to initiate or defend court proceedings on the child's behalf.<sup>53</sup>

During the early days of the development of the common law, the child did not have the privilege of legal representation in court.<sup>54</sup> It appears that children could sue and that they personally sued in their own names.<sup>55</sup> The problem was

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<sup>47</sup> A boy at the age of fourteen and a girl at the age of twelve years could legally consent to their marriage. See nn 18 and 20 *supra*.

<sup>48</sup> Pollock and Maitland *History* II 365-367.

<sup>49</sup> Bromley *Family Law* (1976) 30-31.

<sup>50</sup> *Family Law* 319 refers to *Ex parte Hopkins* (1732) 3 P Wms 152; 24 ER 1009.

<sup>51</sup> See 6 2 3 *supra*.

<sup>52</sup> Pollock and Maitland *History* I 214 mention that there were trained lawyers in English law who were in the King's service as justices.

<sup>53</sup> Ross "Images of children: Agency, Art 12 and models for legal representation" 2005 *AJFL* 98 n 18. However, see Helmholz *Canon Law* 235-238 reveals that evidence in the Church courts records from the fourteenth century indicate that curator *ad litem* were appointed to secure and preserve the minor's testamentary rights to personal property. Holdsworth *History* III 519 who mentions that gradually there developed a concept through which the court allowed a next friend to assist the child to institute an action due to the insufficient system of guardianship for the benefit of the child. Compare also Blackstone *Commentaries* III 427; Pollock and Maitland *History* II 440; Holdsworth *History* III 513.

<sup>54</sup> Holdsworth *History* III 513 refers to the luxury of legal representation during that period. Compare also Pollock and Maitland *History* II 440.

<sup>55</sup> Pollock and Maitland *History* II 440 opine that even if the child had a guardian, his or her guardian did not represent the child before court. Holdsworth *History* III 513 agrees with

not so much the child who could speak for himself or herself, but the child who was a baby.<sup>56</sup> A “friend” or “next friend” who may not necessarily be a family member or even a guardian would then come forward to assist the child.<sup>57</sup> A more regular procedure endured during the reign of Edward I, during the thirteenth century, with the introduction of legislation to assist children.

## 6 2 5 Criminal and delictual accountability

From approximately the fourteenth century it was accepted in common law that very young children could not be held criminally accountable for their deeds.<sup>58</sup> Conversely strict liability regarding children adhered in civil matters.<sup>59</sup> The age for *doli capax* or criminal accountability was initially fixed at twelve years during the early stages of the development of the common law.<sup>60</sup> Later on the age of criminal accountability was lowered to seven years.<sup>61</sup> Up to seven years, a child

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this. However, Blackstone *Commentaries* I 464 mentions that an infant could not be sued other than in the name of the guardian who was a party to the proceedings.

<sup>56</sup> Holdsworth *History* III 514 comments that during the period of Bracton where a person claimed a better right in the infant’s property that claim was deferred until the infant attained majority and the infant could not sue until he attained majority.

<sup>57</sup> Pollock and Maitland *History* II 441 inform that this person was referred to as *prochein amy*. Compare also Holdsworth *History* III 519-520 who mentions that the court could appoint a guardian *ad litem* who could be a court official. This, however, only partially assisted the infant.

<sup>58</sup> Hale *Historia* I 27-28 explains that a child under the age of seven (*infra aetatem infantiae*) cannot be found guilty of a felony whatever circumstances proving his or her discretion may appear. See further Blackstone *Commentaries* IV 23; Turner *Kenny’s Outlines of Criminal Law* (1966) hereafter Turner *Criminal Law* 78-79; Bevan *The Law Relating to Children* (1973) hereafter Bevan *Children* 26. See also Radzinowicz *A History of English Criminal Law and its Administration from 1750* (1948) hereafter referred to as Radzinowicz *English Criminal Law* 11-12 who draws attention to the fact that with regard to capital crimes there was little discrimination on the grounds of age .

<sup>59</sup> Holdsworth *History* III 376-377. Holdsworth *History* III 372 refers to a case during the reign of Henry VI (1422) where a child of four years was brought before court for a civil action of trespass.

<sup>60</sup> Hale *Historia* I 22-24 mentions that ancient law determined twelve years to be the age of *doli capax* as the oath of allegiance was taken at age twelve and therefore the common law did not regard children under the age of twelve years to be capable of discretion. The common law during the reign of Edward III (1326-1377) was changed by act of parliament reducing the age of *doli capax* to seven years. Blackstone *Commentaries* IV 23 prefers the expression lack of discretion and differentiates between the seriousness of the committed crime. He refers to the Saxon law where twelve years was regarded as an age where possible discretion starts. See also Radzinowicz *English Criminal Law* 12; Turner *Criminal Law* 78 n 7.

<sup>61</sup> Turner *Criminal Law* 78-79 in his comments on the criminal accountability begins with reference to the Saxon law where it was held that a child could not be guilty of a crime unless he or she had reached the age of twelve years. He then reveals “however, the law

was accepted to be *doli incapax*. This remained the age in common law until it was increased to eight by legislation.<sup>62</sup>

Hale,<sup>63</sup> in his discussion of the common law, points out that common law further distinguished between children over fourteen who were regarded as *doli capax* and fully accountable for their actions in contrast to those below fourteen. Children below fourteen and above twelve were not *prima facie* presumed to be *doli capax*.<sup>64</sup> Children above seven years and below twelve were *prima facie* regarded to be *doli incapax* and it required weighty evidence of being able to discern between good and evil before a conviction would follow.<sup>65</sup>

Blackstone explained that with infancy or nonage the child's lack of understanding was regarded as the deciding factor.<sup>66</sup> According to Blackstone children under the age of discretion ought not to be punished for whatever criminality.<sup>67</sup> However, the common law's departure from the view of the infant's lack of discretion did benefit the infant because of this lack.<sup>68</sup> The more serious

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became more severe and the age for the termination of immunity was fixed at seven years". See also Hale *Historia* I 27-28; Blackstone *Commentaries* IV 23.

<sup>62</sup> Blackstone *Commentaries* IV 23 explains that a child under seven years of age cannot be guilty of a felony. He goes on to give examples of boys of nine and ten years old, who were sentenced to death for murder, the boy of ten years was actually hanged. A girl of thirteen years was put to death by burning for killing her mistress. Another example was of a boy of eight years who set fire to two barns. He was convicted and hanged. Holdsworth *History* III 372 mentions that it was not yet settled law that a child under seven years was regarded as *doli incapax* but it was becoming settled law after Edward III's reign. Turner *Kenny's Criminal Law* 79 mentions that the change was brought about by s 50 of the *Children and Young Persons Act* 1933.

<sup>63</sup> *Historia* I 25 mentions that it was presumed in law that they were fully capable of discerning between good and evil. See also Blackstone *Commentaries* IV 22-23.

<sup>64</sup> Hale *Historia* I 26; Blackstone *Commentaries* IV 22-23 refers to this period as the doubtful age of discretion.

<sup>65</sup> Blackstone *Commentaries* IV 23 says that the child's understanding and judgment is of greater importance than the child's age and the maxim "*militia supplet aetatem*" (freely translated means "intent supplements age") finds application. See also Hale *Historia* I 27.

<sup>66</sup> Blackstone *Commentaries* IV 23.

<sup>67</sup> Blackstone *Commentaries* IV 22 points out that in Roman law children between the ages of ten and a half and fourteen were punishable if found to be accountable, but with many mitigating factors were spared the utmost rigours of the law. Compare the criminal accountability of children in Roman law 2 1 5 2 4 *supra*.

<sup>68</sup> Blackstone *Commentaries* IV 22 and 23 mentions that as the seriousness of the crime increased the law regarded the various degrees of discretion with greater caution.

the offence and circumstance the greater the discernment required of the child.<sup>69</sup>

## 6 2 6 Conclusion

The common law reflects the slow pace of development in child law. The changes brought about in other spheres of family law such as marriage are not reflected in the development of the law affecting the child in general. Participation of children in family matters was apparently far more than just marriage and engagement. Their participation in contractual transactions and the uncertainty regarding guardianship in general contributed to the participation of children in contractual matters.

However, puberty as an age demarcation was accepted in common law and formed an integral part of the child's participation. The age of discretion at fourteen years for both boys and girls, which was accepted as a uniform age, further contributed consistency in criminal accountability.

Canon law influenced family-law matters where the requirement of consent for marriage and the acceptance of puberty as a standard contributed to uniformity as far as the child's participation was concerned. The influence of canon law in securing a better arrangement for children of unmarried parents is another highlight of the development of the child's participation in legal matters.

## 6 3 African countries

### 6 3 1 Ghana

Prior to becoming a Republic the sources of law in Ghana influencing children mainly consisted of English common law, law of equity and statutes of general

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<sup>69</sup> Hale *Historia* I 26; Blackstone *Commentaries* IV 23. Both refer to a case of a thirteen-year old girl who sentenced to death for killing her mistress (*Alice de Walborough* 12 Ass 30 *Corone* 118 & 170).

application.<sup>70</sup> The Ghanaian development of a children's right statute is premised on constitutional development<sup>71</sup> and the ratification of the Convention on the Rights of the Child<sup>72</sup> and African Charter.<sup>73</sup> The Ghana National Commission on Children set out proposals in 1996 regarding the way forward in addressing the plight of children in Ghana.<sup>74</sup> A comparison will be drawn between South Africa's Children's Act<sup>75</sup> and the *Children's Act* of Ghana.<sup>76</sup> The comparison will focus on the participation of children in matters involving them as well as their right to legal representation in such matters and the application of the best interests of the child principle in matters affecting children.

### 6 3 1 1 The *Children's Act* of 1998<sup>77</sup>

The *Children's Act* is regarded as a comprehensive piece of legislation and one that other countries look to as a best practice. After Ghana had ratified the Convention on the Rights of the Child the government reviewed its policies and domestic legislation quite rapidly in order to comply with the provisions of the

<sup>70</sup> Essien Update: Researching Ghanaian Law available at <http://www.nyulawglobal.org/globalex/Ghana1.htm> accessed on 12 May 2008.

<sup>71</sup> In ch 5 of the Ghanaian Constitution the fundamental human rights and freedoms are aligned. Children's rights are entrenched in art 28 of the Ghanaian Constitution.

<sup>72</sup> Daniels "The impact of the 1992 Constitution on Family Rights in Ghana" 1996 *JAL* 192. See also *Ghana's Children – 2000 Report* by the Ghana National Commission on Children ch 1 p13 reports that the CRC was ratified on 5 February 1990; see <http://www.mowacghana.net/?q=node/9> accessed on 17 October 2009. The Fact Sheet, summarising *Ghana's Report to the UN Committee on the Rights of the Child (1997-2003)* submitted by the Ministry of Women and Children Affairs on 23 September 2007 notes that there has been a comprehensive review of all domestic legislations, culminating in the passage of the *Criminal Code (Amendment) Act* 554 of 1998, the *Children's Act* 560 of 1998 and the *Juvenile Justice Act* 653 of 2003 to conform to the CRC. There has also been the *Legislative Instrument* (L, I 1705) to operationalise the *Children's Act*, available at <http://www.mowacghana.net/?q=node/20> accessed on 17 October 2009.

<sup>73</sup> On 10 June 2005; see Viljoen in *Child Law in South Africa* 348. Ghana submitted its report on African Common Position on Children "Africa Fit For Children" on 22 August 2007 and its first report on the implementation of the ACRWC was to have been submitted in December 2007.

<sup>74</sup> *Reforming the Law for Children in Ghana: Proposals for a Children's Code* (1996); see Sloth-Nielsen and Van Heerden 1997 *Stell LR* 267.

<sup>75</sup> 38 of 2005.

<sup>76</sup> 560 of 1998. Where required a comparison will be drawn between the South African Child Justice Act 75 of 2009 and the *Juvenile Justice Act* of Ghana 653 of 2003 as well as *Criminal Amendment Code Act* 554 of 1998 to determine the development in the administration of criminal justice affecting children in the two countries.

<sup>77</sup> The Act was assented to on 30 December 1998 and notified in the *Gazette* of 5 February 1999. References to the *Children's Act* throughout this discussion will be to that of Ghana unless otherwise specified.

Convention.<sup>78</sup> The Ghanaian Constitution of 1992 obliged parliament to enact the necessary laws required to ensure the rights of children.<sup>79</sup> The Ghanaian *Children's Act* provides that for the purposes of *Children Act*, a child is a person below the age of eighteen years.<sup>80</sup> The *Children's Act*<sup>81</sup> declares its purpose succinctly in the preamble to the Act.<sup>82</sup>

### 6 3 1 1 1 The rights and the best interests of the child

The Ghanaian Constitution 1992 entrenches children's rights and the best interests of the child<sup>83</sup> and provides that for the purposes of children's rights in the constitution, a child is regarded as a person below the age of eighteen years.<sup>84</sup>

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<sup>78</sup> See Twum-Danso "Protecting children's rights" *Pambazuka News* 28 September 2006 available at <http://www.pambazuka.org/en/category/comment/37401> accessed on 17 October 2009.

<sup>79</sup> S 28(1) of the Constitution prescribes the enactment of such laws as are necessary to ensure that "(a) every child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents, except where those parents have effectively surrendered their rights and responsibilities in respect of the child in accordance with the law; (b) every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents; (c) parents undertake their natural right and obligation of care, maintenance and upbringing of their children ... [and] ... may, by law, prescribe in such manner that in all cases the interest of children are paramount; (d) children and young persons receive special protection against exposure to physical and moral hazards; and (e) the protection and advancement of the family as the unity of society are safeguarded in promotion of the interest of children". S 28 of the South African Constitution, 1996 contains a similar provision enshrining the rights of children.

<sup>80</sup> S 1 of the *Children's Act*. The South African Children's Act has a similar definition in s 1(1). In both the Children's Acts the definition of a "child" is in line with the definition in various international instruments, such as the CRC and ACRWC, applicable to both countries.

<sup>81</sup> Reference to the Ghanaian *Children's Act* throughout this discussion will be *Children's Act* or Act unless required otherwise.

<sup>82</sup> The purpose of the Act is "to reform and consolidate the law relating to children, to provide for the rights of the child, maintenance and adoption, to regulate child labour and apprenticeship, for ancillary matters concerning children generally and to provide for related matters". Sloth-Nielsen and Van Heerden 1997 *Stell LR* 267 explain that the aim of the Ghanaian *Children's Act* was to liberate itself from the colonial legislation imported from Britain because it contained a number of deficiencies and was based on the principle of social control rather than the best interests of the child. Of additional importance was that the prevailing legislation regarding children did not reflect cultural practices. The new legislation would aspire to guarantee those rights of children embodied in the CRC relevant to Ghana. Compare the preamble and objectives of the Children's Act of South Africa where the "cornerstones" of the CRC, namely participation, protection, prevention and provision are evident as discussed 5 4 2 *supra*.

<sup>83</sup> See n 78 *supra*.

<sup>84</sup> S 28(5).



The *Children's Act* complies with the four principles which underpin the Convention on the Rights of the Child; the best interests of the child,<sup>85</sup> non-discrimination,<sup>86</sup> participation of the child<sup>87</sup> and the survival and development<sup>88</sup> of children.<sup>89</sup> The *Children's Act* refers to the best interests of the child and the application of the best interests of the child principle under the heading "welfare principle".<sup>90</sup> Conversely the South African Children's Act has a wider application of the best interests of a child principle<sup>91</sup> and emphasises the child's autonomy in applying the best interests of the child standard. As part of the general principles governing the rights of the child, the *Children's Act* provides that no child may be discriminated against.<sup>92</sup> The remainder of children's rights found in Part 1 of the *Children's Act* outlines the basic rights of the child in accordance with the principles enunciated in the Convention on the Rights of the Child.<sup>93</sup>

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<sup>85</sup> S 2 of the *Children's Act*.

<sup>86</sup> S 3 of the *Children's Act*.

<sup>87</sup> S 11 of the *Children's Act*.

<sup>88</sup> Ss 4 and 8 of the *Children's Act*.

<sup>89</sup> Van Bueren *Introduction to Child Law in South Africa* 203 refers to four articles which have been identified as enshrining general principles, being arts 2 (non-discrimination), 3 (best interests of the child), 6 (survival and development) and 12 (freedom of expression). Part one of the *Children's Act* comprises twenty six sections devoted to the rights of the child of which the first fourteen sections are committed to the rights of the child and parental duty.

<sup>90</sup> S 2(1) of the *Children's Act* provides that "[t]he best interest of the child shall be paramount in a matter concerning a child". S 2(2) of the same Act prescribes in line with the provision of the ACRWC that "[t]he best interest of the child shall be *the* primary consideration by a court, person, an institution or any other body in a matter concerned with a child". (Emphasis added.) Boniface *Revolutionary Changes to the Parent-Child relationship in South Africa, with specific reference to Guardianship, Care and Contact* (LLD thesis 2007 UP) 510 expresses the view that reference to the best interests of the child as a "welfare principle" is an outmoded way of referring to the best interests of the child. This is correct because under the "welfare principle", which was advocated in the early international instruments focusing on the welfare of the child, the autonomy of the child as bearer of rights was not acknowledged, eg compare Freeman *The Moral Status of Children* 49-52; Fottrell *Revisiting Children's Rights* 2-3 and see 5 2 2 *supra* for discussion of international instruments governing child participation and legal representation in matters affecting the child.

<sup>91</sup> Compare s 28(2) of the South African Constitution regarding the best interests of the child discussed 5 2 3 1 1 and ss 6, 7 and 9 discussed in 5 5 2 *supra*.

<sup>92</sup> S 3 of the *Children's Act* provides that a person shall not discriminate against a child on the grounds of gender, race, age, religion, disability, health status, ethnic origin, rural or urban background, birth or any other status, socio-economic status or because the child is a refugee. South Africa has a similar but broader provision in the South African Constitution. Compare the equality clause, s 9 of the Bill of Rights, in the South African Constitution referred to in 5 1 *supra*. Compare further s 6(2) of the *Children's Act*. For a discussion of the general principles set out in s 6 of the South African *Children's Act*, see 5 4 4 *supra*.

<sup>93</sup> Eg the right to a name and nationality (s 4), the right to grow up with parents (s 5), the right to parental duty and responsibility (s 6), the right to parental property (s 7), the right to education and well-being (s 8), the right to social activity (s 9), the right to treatment of the

## 6 3 1 1 2 The participatory and representation rights of children

The *Children's Act* contains a number of provisions allowing a child the right to participate in proceedings concerning the child.<sup>94</sup> The *Children's Act* provides that a child has the right to form an opinion and express his or her view. This right is contained in section 11 which provides that “[a] person shall not deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his or her well-being, the opinion of the child being given due weight in accordance with the age and maturity of the child”.<sup>95</sup> South Africa accords children similar extensive rights to participate in an appropriate manner in any matter concerning them.<sup>96</sup>

From the provisions above it can be gleaned that children are given the opportunity to express their views in matters concerning them. Despite the difference in wording there is a clear intention from legislature to align this right with the equivalent found in the Convention on the Rights of the Child.<sup>97</sup> The question may be asked: to what extent does the aim of the section deviate to

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disabled child (s 10), the right of opinion (s 11), the right of protection from exploitative labour (s 12), the right of protection from torture and degrading treatment (s 13) and the right to refuse betrothal and marriage (s 14).

<sup>94</sup> Eg s 11 (the right to an opinion), s 25 (the right to apply for the discharge of a care or supervision order), s 30(5) (the right to participate in a Child Panel), s 38 (the right to legal representation and to give an account and express an opinion at a Family Tribunal), s 40 (the right to apply for confirmation of parentage), s 48 (the right to apply for maintenance through a next friend), s 70 (the right to an opinion if capable of forming an opinion and consent to adoption if at least fourteen years old).

<sup>95</sup> For discussion of art 12(1) of the CRC see 5 2 2 4 *supra*. According to Daniels 1996 *JAL* 192, s 37(3) of the Ghanaian Constitution provides that the “state shall be guided by international human rights instruments which recognize and apply particular categories and development processes”. Furthermore, s 40 of the Constitution provides that the Ghanaian government shall adhere to the principles enshrined in the aims and ideals of the CRC and ACRWC and any other international organisation of which Ghana is a member.

<sup>96</sup> S 10 of the Children's Act. For a detailed discussion of the participatory rights of a child in South Africa, see 5 3 4 and 5 4 5 *supra*.

<sup>97</sup> Boniface 516 mentions that the child should have the right to participate. A probing view is to be found in the argument of Almog and Bendor “The UN Convention on the Rights of the Child meets the American Constitution: Towards a supreme law of the world” 2004 *IJCR* 281, who, however point out that the phrasing of art 12 of the CRC is obscure on many points. Posing the following questions, how will state parties determine whether a child is “capable of forming his or her own views?” What is the precise meaning of “giving due weight?” How will in “accordance with the age and maturity of the child” be determined? More importantly they ask when will children be allowed to express themselves independently and shall they be “forced” to make do with their expression *vis-à-vis* a “representative”?

the extent that the one is to be preferred above the other?<sup>98</sup> Both the sections should be interpreted to expound the objective of article 12 of the Convention on the Rights of the Child and article 4(2) of the African Charter.

In order to determine whether a child is capable of forming a view the age, maturity and stage of development of the child should be considered.<sup>99</sup> Section 11 aspires to achieve this, although it is phrased differently. The same argument is to be found in the way the child makes known his or her views. The *Children's Act* does not mention how the child is to express his or her view, but section 11 has the same requirement for allowing the child to become involved in the matter concerning him/her. In summary, the section allows the child to form a view, to express that view, to have his/her view listened to if the child can communicate his or her view and to give the view due consideration based on the maturity of the child.<sup>100</sup>

The *Children's Act* creates forums wherein a child has the right to participate and express his or her view in the manner prescribed in the *Children's Act*. One such forum is Child Panels which have been created as a mediation forum in civil<sup>101</sup> and minor criminal matters<sup>102</sup> concerning a child.<sup>103</sup> A child has the right to express an opinion and participate in decisions affecting the child's well-being

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<sup>98</sup> One can easily get caught up in semantics and lose sight of the gist of art 12 on which the section is premised and the added guidance of art 4(2) of the ACRWC.

<sup>99</sup> Section 11 uses the ability or capacity of communication as a guide and refers to the maturity of the child.

<sup>100</sup> The same result is achieved in terms of s 10 of the South African Children's Act as discussed in detail in 5 4 5 *supra*.

<sup>101</sup> S 31 of the *Children's Act* refers to the mediation in civil matters concerned with the rights of the child and parental duties. In the *Republic of Ghana's Report to the United Nations Committee on the Rights of the Child* for the period 1997 to 2003 it is mentioned in par 4 13 pp13-14 that a Child Panel has quasi-judicial powers over all civil and limited criminal jurisdictions in matters affecting children and that the panel shall permit a child to express an opinion and participate in any decision that affects the well-being of the child. Available at <http://www.mowacghana.net/?q=node/9> accessed on 17 October 2009.

<sup>102</sup> S 32(1) of the *Children's Act* deals with mediation in minor criminal matters involving a child where the circumstances of the offence are not aggravated. S 32(2) of the Act informs that the aim of the Child Panel is to seek to facilitate reconciliation between the child and the person affected by the action of the child. S 32(3) of the Act provides for the Child Panel cautioning the child as to the implications of the child's action and that similar behaviour may subject the child to juvenile justice action.

<sup>103</sup> S 28 of the *Children's Act* describes a Child Panel as a forum which has non-judicial functions under the Act to mediate in criminal and civil matters which concern a child.

in Child Panels.<sup>104</sup> In both formats of Child Panels child participation is inferred from the provisions contained in section 30 of the *Children's Act*.<sup>105</sup>

### 6 3 1 1 3 The Family Tribunal

The other forum provided for in the *Children's Act* is the Family Tribunal.<sup>106</sup> The proceedings in a Family Tribunal are as informal as possible and are conducted by way of enquiry and are not adversarial.<sup>107</sup> The Family Tribunal has jurisdiction in all matters concerning parentage,<sup>108</sup> custody, access and maintenance of children under the *Children's Act*<sup>109</sup> or any other enactment.<sup>110</sup>

The child's rights in connection with proceedings in the Family Tribunal are provided for in section 38 of the *Children's Act*. It allows the child the right of

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<sup>104</sup> S 30(5) of the *Children's Act* provides that a Child Panel "shall permit a child to express an opinion and participate in a decision which affects the child's well-being commensurate with the level of understanding of the child concerned". South Africa does not have an equivalent forum similar to Child Panels. However, s 71 of the South African Children's Act provides for the children's court to refer a matter to any appropriate lay-forum including a traditional authority in an attempt to settle the matter out of court by way of mediation. A settlement achieved is given greater certainty and secures protection for the child. For discussion of various forums referred to in ss 69, 70 and 71 of the South African Children's Act, for settling matters out of court, see 5 4 4 *supra*.

<sup>105</sup> S 30(5) of the *Children's Act*. See also n 104.

<sup>106</sup> Ss 33 to 39 of the *Children's Act*. Family Tribunal in terms of s 33(2) of the *Children's Act* is construed to mean a District Court under the *Courts Act* 459 of 1993. The Family Tribunal consists of a panel comprised of a chairperson and not less than two or more than four members, one of whom must be a social worker appointed by the Chief Justice on the recommendation of the director of Social Welfare, see s 34 of the *Children's Act*. See further Boniface 524-526. In South Africa s 42(1) of the Children's Act provides that every magistrate's court as defined in the Magistrates' Court Act shall be a children's court and have jurisdiction on any matter arising from the Children's Act for the area of its jurisdiction.

<sup>107</sup> S 37 of the *Children's Act*. The South African Children's Act has similar provisions in ss 42(8), 52(2) and 60(3), see 5 4 4 *supra*.

<sup>108</sup> S 40(1)(a) of the *Children's Act* provides that a child may apply to a Family Tribunal for an order to confirm the parentage of the child before the child attains the age of eighteen, see s 40(2)(c) of the Children's Act. S 41(c) of the *Children's Act* provides that the Family Tribunal shall consider the refusal by the parent to submit to a medical test and s 42 of the *Children's Act* provides for an order by the Family Tribunal for an alleged parent to submit to a medical test. S 14 of the South African Children's Act provides that a child may bring and if necessary be assisted in bringing a matter to court. This could include parentage in a disputed maintenance matter. Compare also s 37 of the South African Children's Act in 4 3 1 3 *supra*.

<sup>109</sup> Part three of the *Children's Act* which also provides the extent of the child's participation. Part four of the Children's Act deals with fostering and adoption and contains provisions for the child's participation in such matters.

<sup>110</sup> S 35 of the *Children's Act*.

participation,<sup>111</sup> the right to legal representation,<sup>112</sup> the right of having the proceedings conducted *in camera*,<sup>113</sup> and the right of appeal.<sup>114</sup>

The Ghanaian *Children's Act* provides that when considering an application for custody or access, the best interests of the child shall be a consideration together with the importance of the child being with the child's mother.<sup>115</sup> The Family Tribunal shall further consider the views of the child if the views have been independently given.<sup>116</sup>

The Family Tribunal is also authorised to consider an application for a maintenance order towards the maintenance of a child.<sup>117</sup> A child may through the intervention of a "next friend"<sup>118</sup> apply to the Family Tribunal for a maintenance order.<sup>119</sup> However, there is no provision for the child to bring an application in person and the section dealing with maintenance does not provide for legal representation of a child during an application.<sup>120</sup> The *Domestic*

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<sup>111</sup> S 25 of the *Children's Act* provides for a child to bring an application for the discharge of a care or supervision order. S 38(2) of the *Children's Act* provides that a child shall "have the right to give an account and express an opinion at a Family Tribunal". The South African Children's Act has similar provisions regarding the participation of the child in children's court proceedings, see 5 4 5 *supra*.

<sup>112</sup> S 38(1) of the *Children's Act* specifies that "a child shall have the right to legal representation at a Family Tribunal". There is no specific reference to legal representation in Child Panels and as there is no general reference to legal representation in the Ghanaian *Children's Act* it may be inferred that legal representation is only allowed for a child where there is specific reference thereto. For a detailed discussion of a child's right to legal representation in South Africa in terms of s 55 of the Children's Act and s 28(1)(h) of the South African Constitution, see 5 3 4 and 5 4 6 *supra*.

<sup>113</sup> S 38(3) of the *Children's Act*. For a similar provision in the South African Children's Act, see 5 4 4 n 415 *supra*.

<sup>114</sup> S 38(4) of the *Children's Act* which includes the right of the guardian and the parent to appeal. The South African Children's Act has a similar provision see, 5 4 5 3 n 578 *supra*.

<sup>115</sup> S 45(1) of the *Children's Act*. S 9 of the South African Children's Act provides that the best interests of the child standard is paramount in all matters concerning the care, protection and well-being of a child.

<sup>116</sup> S 45(1)(c) of the *Children's Act*. Compare s 10 of the South African Children's Act.

<sup>117</sup> S 48 of the *Children's Act*. A child may independently bring an application for maintenance in South Africa, see *Govender v Armutham* 1979 (3) SA 358 (N) discussed in 4 5 3 *supra*.

<sup>118</sup> The concept of a "next friend" is derived from English law with its origin in the common law. The child is assisted by someone not necessarily his or her guardian in instituting an action. See reference to "next friend" in English common law 6 2 4 *supra*.

<sup>119</sup> S 48(2)(a) of the *Children's Act*.

<sup>120</sup> In South African context the Children's Act provides that a child has the right to access a court with jurisdiction and to be assisted in bringing such application (s 14). The child's right to legal assistance is entrenched in terms of s 28(1)(h) of the Constitution.



*Violence Act*<sup>121</sup> provides that a child with the assistance of a “next friend” may file a complaint of domestic violence.<sup>122</sup>

A child’s consent to his or her adoption is required if the child is at least fourteen years old.<sup>123</sup> An adopted child is regarded as the biological child of the adopter in terms of the *Children’s Act* and is entitled to inherit intestate from the adopter.<sup>124</sup>

Other provisions which emphasise the participation of a child in Ghana are the child’s right to engagement and marriage.<sup>125</sup> The minimum age of marriage of whatever kind is eighteen years.<sup>126</sup> Criminal accountability of a child in Ghana has been increased from seven years to twelve years.<sup>127</sup>

### 6 3 1 2 Conclusion

Although South Africa does not have a Family Tribunal, the children’s court in South Africa fulfils the above functions. The South African Children’s Act provides for the adjudication of all matters relating to the child in children’s

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<sup>121</sup> 732 of 2007 assented to on 3 May 2007.

<sup>122</sup> S 6(2) of the *Domestic Violence Act*. S 4(4) of the South African Domestic Violence Act 116 of 1998 provides that a child may unassisted bring an application for protection, see 5 4 6 1 *supra*.

<sup>123</sup> S 70(1)(c) of the *Children’s Act*. Furthermore s 72(1) of the Act provides that if it is in the best interest of the child and the child is at least fourteen years old then the child is entitled to be informed about his or her adoption and of his or her parentage. S 233(1)(c)(i) of the South African Children’s Act provides that a child of ten years or under ten years of age (s 233(1)(c)(ii)) if the child is of an age, maturity and stage of development to understand the implication of adoption can consent to his/her adoption. The provision in the South African Children’s Act is more child-centred and allows greater child participation.

<sup>124</sup> S 76(1) of the *Children’s Act*. S 242 of the Children’s Act sets out the effect of an adoption order in South Africa.

<sup>125</sup> S 14(1) of the *Children’s Act* provides that a child shall not be forced (a) to become engaged, (b) be the subject of a dowry transaction, or (c) to be married.

<sup>126</sup> S 14(2) of the *Children’s Act*. However, s 101 of the *Criminal Code Act* 29 of 1960 as amended by the *Criminal Code (Amendment) Act* 554 of 1998 provides that the legal age of sexual consent is sixteen years. This appears to be contradictory. A child of sixteen can consent to sexual activity, but may not consent to marriage. This may (and inevitably does) lead to sexual promiscuity. In South Africa the Marriage Act 25 of 1961 prescribes the required minimum ages. For a discussion, see 4 4 2 2 6 *supra*.

<sup>127</sup> S 4 of the of the *Criminal Code (Amendment) Act* 554 of 1998. See also Ghana’s *Report Africa Fit For Children – 2007*. Available at <http://www.mowacghana.net/?=node/63> accessed on 17 October 2009. Compare the increased age of criminal accountability in South Africa in 4 4 2 4 2 *supra*.



courts as determined in the Act.<sup>128</sup> A number of comparisons have been drawn between the two Children's Acts and it appears that in the majority of issues compared the South African Children's Act has enhanced the application of the child's right to participation and representation in matters concerning the child.<sup>129</sup> This is apparent in the lack of a general right to legal representation for children in matters concerning them.<sup>130</sup> Another notable distinction is the provision for the participation of younger children in adoption in South Africa. However, the resolving of conflicts in conciliatory fashion through the introduction of Child Panels obviates legal representation to a large degree.<sup>131</sup>

The lesson to be learned from Ghana is that community involvement may be the best way of ensuring the success of new child-centred legislation like the *Children's Act*.<sup>132</sup> This is especially important if one is mindful of the provision for lay-forum hearings in the South African Children's Act.<sup>133</sup> Child participation is encouraged by trust and trust is earned.<sup>134</sup>

### 6 3 2 Uganda

The Republic of Uganda as a constitutional country<sup>135</sup> ratified the Convention on the Rights of the Child on 17 August 1990<sup>136</sup> and the African Charter on 17

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<sup>128</sup> See s 45(1) of the South African Children's Act 5453 *supra*.

<sup>129</sup> Boniface 528 observes that the South African Children's Act is broader and more detailed when compared with its Ghanaian counterpart.

<sup>130</sup> In Ghana's Report of 2007 on *Africa Fit For Children* pt 6 at 7 it is said that there are no special Children's Courts in Ghana and that Family Tribunals in "almost every" regional capitol is fulfilling this task. The lack of capacity and resources are given as the reasons for failure to comply with the aims set out in their comprehensive *Children's Act*.

<sup>131</sup> Twum-Danso "Protecting Children's Rights" *Pambazuka News* available at <http://www.pambazuka.org/en/category/comment/37401> accessed on 17 October 2009 highlights the influence Child Panels have in resolving conflicts in a non-violent way. He stresses the informality of proceedings through Child Panels and the participatory approach allowing effective participation of children.

<sup>132</sup> The positive approach of Twum-Danso's article referred to in n 128 above, where he refers to the potential of the innovation of Child Panels, bears testimony to this.

<sup>133</sup> Ss 49, 70 and 71 and pre-hearing conferences in s 69. Compare De Jong in Boezaart *Child Law in South Africa* 121.

<sup>134</sup> The involvement of the community and non-governmental organisations in South Africa may yet prove to make the difference between success and failure with the Children's Act of South Africa.

<sup>135</sup> The Constitution of Uganda of 1995 commenced 8 October 1995. Tobin 2005 *SAJHR* 110-111 refers to the Constitution of Uganda as a "child rights" Constitution. See also

August 1994.<sup>137</sup> As with some other countries in Africa that have broken the shackles of colonialism, in the case of Uganda the period prior to the present constitutional era has been one of turmoil and violation of children's rights.<sup>138</sup> The specific fundamental rights pertaining to children are entrenched in section 34 of the Ugandan Constitution.<sup>139</sup>

Uganda was the first to adopt a comprehensive Children's Act with the promulgation of its *Children Statute* of 1996.<sup>140</sup> The Child Law Review

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Mubangizi "The protection of human rights in Uganda: Public awareness and perceptions" 2005 *AJLS* 168-173 on the background to the establishment of the Constitution.

<sup>136</sup> Office of the High Commissioner for Human Rights United Nations Human Rights website <http://www.unchr.ch/tbs/doc.nsf/22b020de61f10ba0c1256a0027ba1e/84941a4f79ba7> accessed on 19 October 2009.

<sup>137</sup> Viljoen in *Child Law in South Africa* 348.

<sup>138</sup> Parry-Williams "Legal reform and children's rights in Uganda – Some critical issues" 1993 *IJCR* 50-51 gives a brief summary of the background situation of Uganda and highlighting the plight of children in Uganda and the fact that little has changed in Uganda after the ratification of the CRC on 17 August 1990. Mubangizi 2005 *AJLS* 168-186 writes about human rights in general, but there can be no doubt that children are included as the most vulnerable of the vulnerable. Tobin 2005 *SAJHR* 110-111 refers to the Constitution of Uganda as a "child rights" constitution and mentions that this is part of an emerging trend where the treatment of children under national constitutions is characterised by resort to a dialogue on children's rights as opposed to the mere concerns about ensuring their care and protection.

<sup>139</sup> S 34 of the Constitution provides that-

- "(1) subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up;
- (2) a child is entitled to basic education which shall be the responsibility of the state and parents of the child;
- (3) no child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reason of religious or other beliefs;
- (4) children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development;
- (5) for the purpose of clause (4) of this article, children shall be persons under the age of sixteen years;
- (6) a child offender who is kept in lawful custody or detention shall be kept separately from adult offenders;
- (7) the law shall accord special protection to orphans and other vulnerable children."

However, the child's right to participation and representation is not entrenched as is found in s 28(1)(h) of the South African Constitution. Sloth-Nielsen *Children's Rights in Africa* 57 mentions that there are at least 34 constitutions in which children's rights feature.

<sup>140</sup> SALC Issue Paper 13 par 10 2 1 p 132. The Ugandan *Children Statute* was enacted as the *Children Act* of 1997 (Ch 59) and entered into force on 1 August 1997. Reference to the Ugandan *Children Act* will be to the *Children Act* or Act unless otherwise required. See also Sloth-Nielsen *Children's Rights in Africa* 5. Parry-Williams 1993 *IJCR* 56 mentions that the CLRC had decided to concentrate on the laws concerning child care, children and domestic relations and juvenile justice. The CLRC accepted that the best way to go about this was the determination of broad underpinning principles, namely the perception of a

Committee in Uganda (CLRC) was established in June 1990 to review existing laws concerning child welfare in relation to international and other documents on the rights of children and their welfare.<sup>141</sup>

The participatory right of children as well as their right to legal representation as set out in the *Children Act* is investigated as well as the best interests of the child principle. The child's participatory and representation rights and the best interests of the child principle will be discussed and compared where applicable with the South African Children's Act.

### 6 3 2 1 The *Children Act* 1997

The objective set out in the preamble of the *Children Act*<sup>142</sup> seeks among others to consolidate the law relating to children and to provide processes and forums for the care, protection and maintenance of children.<sup>143</sup> The *Children Act* is

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child and his or her best interests; the influence of customary law and practice; the responsibility for child care involving parents, community and the state; the emphases in non-interventionists and interventionist principles.

<sup>141</sup> According to Parry-Williams 1993 *IJCR* 49 the aim was "to propose appropriate legislation which shall be beneficial to children who are disadvantaged and/or in conflict with the law". The CLRC had decided to combine their investigation with the welfare of children and children in conflict with the law.

<sup>142</sup> See concluding observations of the Committee on the Rights of the Child: Uganda (CRC/C/UGA/CO/2) dated 23 November 2005 par 4(a) at 1 where the adoption of the *Children Act* in 2000 (previously the *Children Statute*) is referred to. Sloth-Nielsen and Mezmur "Surveying the research landscape to promote children's legal rights in an African context" 2007 *AHRLJ* 335 refer to Uganda's limited implementation of the Children's Act (1996) outside of Kampala having taken place in the eleven years since its adoption. For the contents of the *Children Act* 1997, as referred to see [http://www.saflii.org/ug/legis/consol\\_act/ca19975995/](http://www.saflii.org/ug/legis/consol_act/ca19975995/) accessed on 12 April 2008.

<sup>143</sup> The preamble provides concisely that the *Children Act* is an "[a]ct to reform and consolidate the law relating to children; to provide for the care, protection and maintenance of children; to provide for local authority support for children; to establish a Family and Children's Court; to make provision for children charged with offences and for other connected purposes". Boniface 568 says that although the *Children Act* does not specify that the aim of the Act is to apply the provisions of the CRC and the ACRWC, this is specifically provided for in the First Schedule of the Act. The First Schedule of the *Children Act* sets out the guiding principles in the implementation of the Act and in par 4(c) provides that "in addition to all the rights stated in this Schedule and this Statute, all the rights set out in the United Nations Convention on the Rights of the Child and the Organisation for African Unity Charter [what is meant is the African Charter] on the Rights and Welfare of the Child with appropriate modifications to suit the circumstances in Uganda, that are not specifically mentioned in this Act".

compact yet comprehensive and was introduced in a largely traditional and patriarchal society characterised by ethnic and religious differences.<sup>144</sup>

Part III of the *Children Act* provides a system of support for children by local authorities shifting the emphasis from social control to the best interests of the child.<sup>145</sup> It is the duty of local councils to safeguard children and promote reconciliation between parents and children.<sup>146</sup> The *Children Act* creates an elaborate system of appeals.<sup>147</sup>

### 6 3 2 1 1 The Family and Children Court

The *Children Act* introduced new innovations such as the establishment of Family and Children Courts for every district<sup>148</sup> and increased the age of criminal accountability to twelve years.<sup>149</sup> The jurisdiction of the Family and Children Court includes the authority to adjudicate in criminal charges against a child.<sup>150</sup> The Family and Children Court has the power to hear and determine

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<sup>144</sup> SALC Issue Paper 13 par 10 2 1 p 133.

<sup>145</sup> SALC Issue Paper 13 par 10 2 2 p 133. Art 3 of the *Children Act* refer to the guiding principles when dealing with the rights of the child and refers to welfare principles set out in the First Schedule of the Children Act. Par 4 of the First Schedule sets out the rights of the child and mentions that the child has the right to exercise in addition to all the rights stated in the First Schedule and the Children Act, all the rights set out in CRC and the ACRWC with appropriate modifications to suit circumstances in Uganda. It may therefore be concluded that the best interests of the child shall be *the* primary consideration in all actions concerning the child. (Emphasis added). S 28(2) of the South African Constitution provides that a child's best interests are of paramount importance in every matter concerning the child.

<sup>146</sup> S 11 of the *Children Act*.

<sup>147</sup> S 12 read with S 105 of the *Children Act*. A similar provision is found in the Ghanaian *Children Act* and the South African Children's Act, for a discussion of the South African Act see 5 4 5 3 *supra*.

<sup>148</sup> S 13 of the *Children Act*. Children's courts are a well-known feature of the South African jurisprudence. S 42(1) of the South African Children's Act provides that every magistrate's court is a children's court.

<sup>149</sup> S 88 of the *Children Act*. The age of criminal accountability had been set at seven years which was the same age determined in the English common law, see 6 2 3 2 *supra*. S 7(1) of the Criminal Justice Act 75 of 2008 in South Africa increased the child's criminal accountability to ten years, see discussion in 4 4 2 4 2 *supra*.

<sup>150</sup> S 14(1)(a) of the *Children Act*. The South African Children's Act extends the jurisdiction of the children's court in South Africa in s 45 to include matters involving care of and contact with children. For further detail, see 5 4 3 *supra*.

applications relating to child care and protection<sup>151</sup> and also has jurisdiction conferred on it by the *Children Act* or any other written law.<sup>152</sup>

Whenever possible the Family and Children Court must sit in a different building from the one normally used by other courts.<sup>153</sup> Different procedures are prescribed for this court which includes that proceedings shall be held *in camera*,<sup>154</sup> be as informal as possible and that a process by inquiry rather than an adversarial process be followed.<sup>155</sup> The Family and Children Court has the jurisdiction to make interim and final orders regarding the supervision or care of a child and shall not make such orders unless it would be beneficial for the child.<sup>156</sup>

### 6 3 2 1 2 Children's rights

The Ugandan Constitution interprets "child" as a person below the age of eighteen,<sup>157</sup> although it also provides that a child is a person below the age of sixteen,<sup>158</sup> which has apparently created a lot of ambiguity.<sup>159</sup> However, Part II of the *Children Act* contains the rights of the Ugandan child and makes specific

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<sup>151</sup> S 14(1)(b) of the *Children Act*.

<sup>152</sup> S 14(2) of the *Children Act*. In South Africa s 45 of the Children's Act prescribes what matters a children's court may adjudicate.

<sup>153</sup> S 15 of the *Children Act*. This is another innovation to move proceedings concerning children away from the adversarial atmosphere associated with courts in general. The South African Children's Act has a similar provision in ss 42(8) and 60(3), see 5 4 4 *supra*.

<sup>154</sup> Ss 16(3) and 102 of the *Children Act*. The proceedings are held *in camera* and there is a restriction on the publication of any information that may lead to the identification of the child. The South African Children's Act has a similar provision in ss 56 and 74, see 5 4 4 *supra*. South African Child Justice Act has a similar provision in s 63(5).

<sup>155</sup> Ss 16(1)(b) and (c) of *Children Act*.

<sup>156</sup> S 17 of the *Children Act*. In South African the paramountcy of the best interests of the child standard is firmly entrenched. For a discussion of the best interests of the child standard, see 5 5 *supra*.

<sup>157</sup> S 257(1) of the Ugandan Constitution refers to "a person under the age of eighteen years".

<sup>158</sup> S 34(4) of the Ugandan Constitution. S 34(5) of the Ugandan Constitution provides that for the purpose of section 34(4) "children shall be persons under the age of sixteen years".

<sup>159</sup> The second periodic report of Uganda (CRC/C/65/Add.33) dated 2 August 2003 par 83 at 31 mentions that with the submission of the initial report there was a lot of ambiguity regarding the definition of a child in Uganda. This ambiguity has been dispelled with the *Children Act* and all other statutes accordingly recognise the child as any person below the age of eighteen years.

reference to a number of rights<sup>160</sup> and defines a child as a person below the age of eighteen years.<sup>161</sup>

Section 3 of the *Children Act* refers to the guiding principles which are to be applied when making any decision based on the Act.<sup>162</sup> The First Schedule of the *Children Act* among others contains the following principles for the implementation of the Act: the welfare (best interests) of the child;<sup>163</sup> the criteria for decisions affecting the child;<sup>164</sup> and the rights of the child.<sup>165</sup> The *Children Act* provides that the child or the legal representative of the child has the right to a copy of the contents of a probation and social welfare officer's report which is to be considered by the court after a charge has been admitted by the child or proved against the child.<sup>166</sup> The Constitution of Uganda ensures that every

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<sup>160</sup> Ss 2 to 11 of the *Children Act*.

<sup>161</sup> S 2 of the *Children Act* defines a child as "a person below the age of eighteen years". S 28(3) of the South African Constitution provides that a child is any person under the age of eighteen years.

<sup>162</sup> This section refers to the welfare principles which Boniface 570 correctly describes as an "outdated" way of referring to the best interests of the child. The same principle is also found in Ghanaian *Children's Act*, see 6 3 1 1 1 *supra*.

<sup>163</sup> Par 1 provides that whenever the state, a court, a local authority or any person determines any question with respect to (a) the upbringing of a child or (b) the administration of a child's property or the application of any income arising from it, the child's welfare (best interests) shall be of *the* paramount consideration. (Emphasis added.) The importance of the child's best interests standard in South Africa is considered in 5 3 3 and 5 5 2 *supra*.

<sup>164</sup> Par 3 provides that in determining any question relating to circumstances set out in par 1(a) or (b), the court or any other person must have regard in particular to (a) the ascertainable wishes and feelings of the child concerned in the light of his or her age and understanding; (b) the child's physical, emotional and educational needs; (c) the likely effects of any changes in the child's circumstances; (d) the child's age, sex, background and any other circumstance relevant in the matter; (e) any harm that the child has suffered or is at the risk of suffering and where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs. Par 3(a) complies with provisions of art 12(1) of the CRC and goes further than the provisions set out in art 4(2) of the ACRWC.

<sup>165</sup> Par 4 provides that among others in subparagraph (c) that the child shall have the right to exercise in addition to all the rights stated in this schedule and this Act, all the rights set out in the CRC and the ACRWC with appropriate modifications to suit the circumstances in Uganda, that are not specifically mentioned in this Act.

<sup>166</sup> S 95(3) of the *Children Act*. See also s 20 regarding the interviewing of the child who is of sufficient age and understanding. However, there is no mention that a copy of the report must be made available to the child when considering a supervision order or care order by the Family and Children Court. South Africa has a similar provision in the Children's Act see s 63(3) which requires a report of a designated social worker to be prepared and a copy to be submitted to a person whose rights have been prejudiced prior to the hearing.



person is entitled to a fair hearing which includes the right in a criminal matter to be informed in a language he or she understands of the nature of the offence.<sup>167</sup>

### 6 3 2 1 3 The participatory rights of children and their right to legal representation

Throughout the *Children Act* the emphasis remains on the child's participatory right starting with the confirmation<sup>168</sup> that the children's rights, set out in the First Schedule of the Act, shall be the guiding principles in making any decision based on the Act.<sup>169</sup> In all matters to be adjudicated by the Family and Children Court the child shall have the right to legal representation<sup>170</sup> and the right of appeal shall be explained to the child, thereby confirming the child's right to have any matter reviewed by way of appeal.<sup>171</sup>

The *Children Act* provides, that where the Family and Children Court has granted an exclusion order, the court may on application by the child vary or discharge an exclusion order<sup>172</sup> or a placement order.<sup>173</sup> A child may also apply to have a supervision order or care order varied or to be discharged from such supervision or care order.<sup>174</sup>

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<sup>167</sup> S 28 of the Ugandan Constitution. No mention is made in the *Children Act* of the child's right to have the proceedings in a Family and Children Court conducted in the language of his or her choice. The South African Children's Act provides in s 61(2) for the participation of a child in children's court proceedings through the medium of an intermediary if the court finds that this would be in the best interests of the child. S 52(2)(b) of the South African Children's Act provides for the use of suitably qualified or trained interpreters, see 5 4 5 3 *supra*.

<sup>168</sup> S 3 of the *Children Act* refers to the guiding principles in the First Schedule of the Act.

<sup>169</sup> Par 4(c) of the First Schedule confirms that all the rights enumerated in the CRC and the ACRWC may be exercised with the appropriate adjustments by the children in Uganda. These rights are in addition to the rights contained in the *Children Act*.

<sup>170</sup> S 16(1)(f) of the *Children Act*.

<sup>171</sup> S 16(1)(g) of the *Children Act*.

<sup>172</sup> Ss 34(2) and 60(3) of the *Children Act*.

<sup>173</sup> S 39(1) of the *Children Act*. Ss 46(2) and 48(1)(b) of the South African Children's Act provides that a children's court may extend, withdraw, suspend, vary or monitor any of its orders, see 5 4 5 3 *supra*.

<sup>174</sup> S 39(1) of the *Children Act*. The South African Children's Act has a similar provision in s 46(2), see 5 4 5 3 *supra*.

The consent of a child of fourteen years or older is a prerequisite before a Family and Children Court may grant an adoption order.<sup>175</sup> In both the Ugandan *Children Act*<sup>176</sup> and the South African Children's Act the child has the right of appeal against the granting of an adoption order.<sup>177</sup>

A child who has absconded from his or her interim placement, foster placement or approved home to which he or she has been committed, must be interviewed as soon as possible after return to his or her placement.<sup>178</sup> If it is not in the child's best interests to be returned, an application for the variation or discharge of the order of placement may be brought before the Family and Children Court.<sup>179</sup>

The parentage of children is dealt with in Part IX of the *Children Act*. The Act allows a child with the assistance of a "next friend"<sup>180</sup> to make an application for the declaration of parentage. The application may be made at any time before the child attains the age of eighteen years.<sup>181</sup> A child in whose favour an order of parentage has been made may through a next friend make an application for

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<sup>175</sup> S 47(5) of the *Children Act* provides that if the court is satisfied that a child is able to understand the adoption proceedings then his or her views will be considered. In terms of s 47(6) of the Act the child must be older than fourteen years and it must not be impossible for the child to express his or her views. The consent provision of the South African Children's Act in ss 233(1)(c)(i) and (ii) (a child of ten years or younger) is discussed in 5 4 5 3 *supra*. The Ghanaian Children Act also provides for a child of at least fourteen years to consent to his/her adoption, see 6 3 1 1 3 *supra*.

<sup>176</sup> S 50 provides that any person, thereby implying that a child is included, who is aggrieved by *any* decision of a Chief Magistrate or High Court may file an appeal against such decision. This implies that a child may appeal whether the adoption order was granted or not.

<sup>177</sup> S 51(1) of the South African Children's Act creates the same possibility as discussed in 5 4 4 *supra*. S 243(1)(a) of the South African Children's Act provides for an adopted child to bring an application for the rescission of an adoption order within the prescribed time limits, see discussion in 5 4 5 3 *supra*

<sup>178</sup> S 64 of the *Children Act*. S 170 of the South African Children's Act allows the child greater participatory rights as well as the right to a legal representative not found in the Ugandan *Children Act*.

<sup>179</sup> See n 172 *supra*.

<sup>180</sup> See explanation of next friend in n 117 *supra*.

<sup>181</sup> S 67(2) read with s 68(1)(b) of the *Children Act*. The South African Children's Act has a similar provision in s 36, see 5 4 5 2 *supra*.

a maintenance order in favour of the child<sup>182</sup> as well as the variation of such order.<sup>183</sup>

### 6 3 2 2 Conclusion

There are a number of similarities found when comparing the Ugandan and South African Children's Acts. Some of the most prominent similarities are the result from the fact that both Acts have opted for a child-centred approach. There are more similarities than differences to be found between the two Children's Acts and that in itself is encouraging.<sup>184</sup>

Both Children's Acts confirm the child's participatory rights. The Ugandan Children Act directly incorporates the Convention on the Rights of the Child and the African Charter as guiding principles with appropriate adjustments. South Africa has with the Children's Act incorporated both the Convention on the Rights of the Child and the African Charter into the South African domestic law.

It appears from the second report of Uganda to the Committee on the Rights of the Child that Uganda<sup>185</sup> is striving to enhance the rights of children on a continual basis. There is enough evidence found in the *Children Act* to justify a conclusion that the participatory rights of the child indicated in the Convention on the Rights of the child<sup>186</sup> and the African Charter<sup>187</sup> are not just getting lip service. Reference has been made to the mediation process at local-authority level aimed at assisting the child. Moving up through the different levels of

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<sup>182</sup> S 76 of the *Children Act*. The duty to maintain a child is specified as one of the rights of the child, see part II s 5 of the *Children Act*. For the child's participatory rights in maintenance matters in South African context, see 4 5 3 and 5 4 5 2 *supra*.

<sup>183</sup> S 78 of the *Children Act*.

<sup>184</sup> Mindful of the advice given by Sloth-Nielsen and Van Heerden 1997 *Stell LR 277* that the process must be a consultative one, as broad as possible and that the style of the resulting legislation be user friendly and drafted in non-legal language.

<sup>185</sup> CRC/C/65/Add.33 dated 2 August 2003.

<sup>186</sup> The aims set out in art 12 of the CRC are discussed in 5 2 2 1 *supra*.

<sup>187</sup> The aims contained in art 4(2) of the ACRWC are discussed in 5 2 2 2 *supra*.

judicial authorities the child is presented with the opportunity to voice his or her views.<sup>188</sup>

Both South Africa and Uganda place a high premium on mediation. In Uganda this is brought about by the introduction of local councils whereas in South Africa the Children's Act has introduced lay-forum hearings<sup>189</sup> and pre-hearing conferences<sup>190</sup> where a child who is of such age, maturity and stage of development may participate and if the best interests of the child require legal representation, the court must refer it to the Legal Aid Board for consideration. The Ugandan Children Act indirectly provides for the views of the child to be received when complying with the requirement of the child's best interests.<sup>191</sup>

### 6 3 3 Kenya

The English common law was inherited from the colonial legal system prior to Kenya becoming a Republic.<sup>192</sup> The Republic of Kenya ratified the Convention on the Rights of the Child on 30 July 1990<sup>193</sup> and the African Charter was acceded to on 25 July 2000.<sup>194</sup> The Convention on the Rights of the Child was introduced into domestic law through the enactment of the *Children Act* 2001.<sup>195</sup>

As with the other jurisdictions, the aim is to investigate certain provisions of legislation in which the participatory rights of children are set out as well as their right to legal representation. Key aspects of the Kenyan *Children Act* will be

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<sup>188</sup> SALC Issue Paper par 10 2 4 p 139 where it is mentioned that although the proceedings may appear to be more formal, the Family and Children Court must ensure that the proceedings are as informal as possible and more inquisitorial than adversarial.

<sup>189</sup> Ss 49, 70 and 71 of the Children's Act.

<sup>190</sup> S 69 of the Children's Act.

<sup>191</sup> S 11 of the Ugandan *Children Act*.

<sup>192</sup> Odongo "The domestication of international standards on the rights of the child: A critical and comparative evaluation of the Kenyan example" 2004 *IJCR* 421.

<sup>193</sup> Odongo 2004 *IJCR* 419 mentions that Kenya ratified the CRC on 31 July 1990 whereas the second report of Kenya to the Committee on the Rights of the Child (CRC/C/KEN/2) dated 20 September 2005 refers to 30 July 1990.

<sup>194</sup> Odongo 2004 *IJCR* 419; Viljoen in *Child Law in South Africa* 348.

<sup>195</sup> The *Children Act* 8 of 2001 entered into force on 1 March 2002, hereafter the Kenyan *Children Act*.

discussed and where applicable compared with the South African Children's Act.

The Kenyan *Children Act* was the culmination of a long and laborious undertaking extending over a period from 1988 to 2001.<sup>196</sup> The aim<sup>197</sup> of the Kenyan *Children Act* is an ambitious attempt to bring together in one statute the public and private law provisions, and both the advantageous previous laws and new provisions in relation to children's rights.<sup>198</sup> The prominence of the Convention on the Rights of the Child and the African Charter in the preamble underpins the commitment to advance the rights of children contained in the two international instruments.<sup>199</sup>

### 6 3 3 1 The Kenyan *Children Act*

The Kenyan government sought to domesticate the Convention on the Rights of the Child and launched a process that culminated in the enactment of the *Children Act*. The Kenyan *Children Act* codifies and repeals the following

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<sup>196</sup> Sloth-Nielsen and Van Heerden 1997 *Stell LR* 266-267; Odongo 2004 *IJCR* 419-420. This is reminiscent of the time frame which hallmarked the South African Children's Act.

<sup>197</sup> The aim as set out in the preamble to the Kenyan *Children Act* which reads "to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes".

<sup>198</sup> Odongo 2004 *IJCR* 420 remarks that on the one hand it consolidates previous laws dealing with child care, protection, maintenance, guardianship and adoption, on the other hand, it contains innovative provisions relating to the rights of the Kenyan child, the establishment of child care institutions, children's courts and particular provisions in child justice and the establishment of new statutory institutions tasked with the implementation of the Act.

<sup>199</sup> Lloyd 2002 *IJCR* 183 explains that the value of regional agreements to promote and protect human rights has been supported by the United Nations because regional treaties are best placed to consider and resolve their own human rights issues whilst upholding cultural traditions and history unique to the region. Lloyd 2002 *AHRLJ* 13 emphasises that art 18(3) of the African Charter on Human and Peoples' Rights (which Kenya has ratified) provides that states parties shall ensure the protection of the rights of the child as stipulated in international declarations and conventions. The ACRWC has gone a step further and as regional instrument concerned with children's rights ensures human rights guarantees and safeguards for children, thereby fulfilling its international obligations. See discussion of the ACRWC in 5 2 2 2 *supra*.

statutes:<sup>200</sup> the *Children and Young Person's Act*,<sup>201</sup> the *Adoption Act*<sup>202</sup> and the *Guardianship of Infants Act*.<sup>203</sup>

The Kenyan *Children Act* is a very comprehensive Act comprising two hundred sections.<sup>204</sup> Features<sup>205</sup> that are common to child reform which have been identified by Sloth-Nielsen and Van Heerden<sup>206</sup> are found in the Kenyan law reform process.<sup>207</sup> There is compliance with the guideline agreed upon by Committee on the Rights of the Child providing the essence of the Convention on the Rights of the Child in that the four core rights of the Convention referred to as the “soul” of the Convention on the Rights of the Child<sup>208</sup> are contained in section 4 of the Kenyan *Children Act*.<sup>209</sup> The Kenyan *Children Act* complies with

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<sup>200</sup> Schedule six of the *Children Act*.

<sup>201</sup> Ch 141, *Laws of Kenya*.

<sup>202</sup> Ch 143, *Laws of Kenya*.

<sup>203</sup> Ch 144, *Laws of Kenya*. The South African Children's Act similarly repealed a number of child related legislation (eg the Age of Majority Act 57 of 1972, the Child Care Act 74 of 1983, the Children's Status Act 82 of 1987, the Guardianship Act 192 of 1993 and the Natural Fathers of Children born out of Wedlock Act 86 of 1997) in an attempt to consolidate child law matters in a single Children's Act.

<sup>204</sup> Comments in the SALC Issue Paper 13 par 10 2 3 are at 135 that the Kenyan *Children's Bill* (now *Children Act*) represented an ambitious attempt to consolidate all issues affecting children contained in at least 66 different statutes (par 10 2 1 at 133) is echoed in Kenya's second report to the Committee on the Rights of the Child (CRC/C/KEN/2) dated 20 September 2005 par 1 at 13 as a “bold step towards the domestication of the CRC”. See also Sloth-Nielsen and Van Heerden 1997 *Stell LR* 266-267.

<sup>205</sup> For purposes of the present discussion some features are more prominent than others. In the present instance the participation of children and the legal representation of children are kept in mind.

<sup>206</sup> 1997 *Stell LR* 267-269 observes that there appear to be at least five key reasons; the first and most important is the influence of the CRC and constitutional rights underpinning the improvement of child law; the repealing of outdated colonial legislation; the devolution of power which again benefits the participatory rights of the child; the discarding of repugnant customary practices and the embracing of the extended family, a well-known and tested concept in Africa.

<sup>207</sup> Odongo 2004 *IJCR* 420-421 refers to five salient features of the Kenyan child law reform process.

<sup>208</sup> Sloth-Nielsen 1995 *SAJHR* 408; Van Bueren *Introduction to Child Law in South Africa* 203. Odongo 2004 *IJCR* 422 refers to the four principles, but these are more than principles, they are fundamental rights that are inalienable and which each child has of right.

<sup>209</sup> These four “core” rights of the child in CRC are discussed in 5 2 2 1 *supra*. Ongoya “The emerging jurisdiction on the provisions of Act No. 8 of 2001, Laws of Kenya – The Children Act” 2007 *KLR* 221-222 refers to *MW v KC Kakamega High Court Misapplication No 105 of 2004* where the High Court ordered that the respondent submit to DNA testing in a paternity dispute finding among others that the best interests of the child is treated as a primary consideration.



the non-discrimination requirement;<sup>210</sup> the right to life;<sup>211</sup> the paramountcy of the child's best interests;<sup>212</sup> and the participatory rights requirement of the Convention on the Rights of the Child.<sup>213</sup> Innovative provisions are incorporated in the Kenyan *Children Act* such as the obligation of a step-parent for the financial support of a step-child.<sup>214</sup>

As will be indicated in the discussion to follow the provisions of the Kenyan *Children Act* throughout the Act reflect and illustrate the best interests of the child and the participation of the child in matters affecting the child.

### 6 3 3 1 1 Children's courts

The Kenyan *Children Act* introduces a children's court into the Kenyan judicial system.<sup>215</sup> The South African children's courts have been functioning for a number of years and the Children's Act just reaffirms the every magistrate's court is regarded as a children's court.<sup>216</sup> The Kenyan *Children Act* sets out

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<sup>210</sup> S 5 provides that no child shall be subjected to discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe residence or local connection. A comparable provision is found in s 9(3) of the South African Constitution. Odongo 2004 *IJCR* 424 is concerned that the rights of children found in the *Children Act* of Kenya are not entrenched in the Kenyan Constitution thereby placing them at risk of becoming redundant in the event of amendments or repeal of the *Children Act*. Tobin 2005 *SAJHR* 101 lists Kenya as one of a number of countries with Constitutions in which children are "invisible".

<sup>211</sup> S 4(1) of the *Children Act*.

<sup>212</sup> Ss 4(1) and (2) of the *Children Act*. This core right is entrenched in s 28(2) of the South African Constitution and s 9 of the Children's Act. Compare 5 2 2 1 *supra*.

<sup>213</sup> S 4(4) of the *Children Act*. South Africa acknowledges this core right in s 28(1)(h) of the Constitution and s 10 of the Children's Act.

<sup>214</sup> S 94(1) of the *Children Act* specifies that the court may order financial provision to be made by a parent for a child including a child of the other parent who has been accepted as a child of the family and in deciding to make such an order the court shall have regard to the circumstances of the case and without prejudice to the generality of the foregoing, shall be guided by the considerations set out in subs (a) to (l).

<sup>215</sup> S 73 of the *Children Act* which forum has jurisdiction to adjudicate in criminal matters, all matters concerning children including custody and maintenance matters; guardianship of children; dealing with children who are in need of special care and protection as well as the treatment of child offenders. The commitment to the functioning of the children's court is reflected in Kenya's second report to the Committee on the Rights of the Child (CRC/C/KEN/2) dated 20 September 2005 par 19 at 16 that as at date of the report Kenya had appointed 119 magistrates to serve the children's courts. For the origin of children's courts in South Africa, see 5 4 3 *supra*.

<sup>216</sup> S 42(1) of the Children's Act.

comprehensively matters regarding jurisdiction of the children's court,<sup>217</sup> the news procedures, sittings and how hearings are to be conducted,<sup>218</sup> the powers of the children's court to order that adjudication be conducted *in camera*,<sup>219</sup> the receiving of reports to assist the court and how these reports are to be received as evidence,<sup>220</sup> and in general principles regarding proceedings in the children's court.<sup>221</sup> The new innovations brought about by the South African Children's Act compare well with those introduced by the Kenyan Children Act. In both instances the aim is to encourage child participation in a child friendly atmosphere.

The Kenyan *Children Act* provides for appeals in civil and criminal matters,<sup>222</sup> the review of interim custody orders,<sup>223</sup> the variation of maintenance orders,<sup>224</sup> review, variation, suspension or discharge of any order made or the revival of any after suspension or discharge of such order.<sup>225</sup>

#### 6 3 3 1 2 The best interests of the child<sup>226</sup>

The significance for children in the Kenyan *Children Act* is the application of the best interests in all matters concerning the child.<sup>227</sup> In both the Kenyan *Children*

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<sup>217</sup> S 73 of the *Children Act*. Ss 44 and 45 of the South African Children's Act set out the geographical jurisdiction and other matters that the children's court may adjudicate.

<sup>218</sup> S 74 of the *Children Act*. Similar provisions are found in ss 52, 60 and 61 in the South African enactment.

<sup>219</sup> S 75 of the *Children Act*. Compare s 56 of the South African Children's Act.

<sup>220</sup> S 78 of the *Children Act*. S 62 of the South African Children's Act has a similar provision.

<sup>221</sup> S 76 of the *Children Act*. Compare 5 4 4 *supra* for similar provisions in South Africa.

<sup>222</sup> S 80 of the *Children Act*. Any order made or refused in terms of the South African Children's Act may be appealed in terms of s 51(1).

<sup>223</sup> S 88 of the *Children Act*. In South Africa the provision of s 46(2) the Children's Act has a similar provision.

<sup>224</sup> S 100 of the *Children Act*. In South Africa the Maintenance Act 99 of 1998 has a similar provision.

<sup>225</sup> S 117 of the *Children Act*. See n 221 *supra* regarding South Africa.

<sup>226</sup> The concern which Sloth-Nielsen and Van Heerden 1997 *Stell LR* 271 had regarding the lack of a clear statement of children's rights has been addressed in s 4 of the *Children Act* which now reflects a child-centred approach.

<sup>227</sup> Eg s 27(2)(c) the safeguarding of the best interests of the child with the transmission of parental responsibilities; s 83(1)(j) principles to be applied in making a custody order; s 125(1)(c) when considering a court order in connection with children in need of care and protection; s 187(1) consideration of the welfare of the child. The best interests of the child in South Africa is entrenched in s 28(2) of the South African Constitution and confirmed in

Act<sup>228</sup> and the South African Children’s Act the definition of a child, as referred to in the Convention on the Rights of the Child<sup>229</sup> and African Charter,<sup>230</sup> has been incorporated. Part II of the Kenyan *Children Act*<sup>231</sup> makes provision for the rights and welfare of the child.<sup>232</sup> The Kenyan *Children Act* specifies the best interests of the child,<sup>233</sup> although Odongo<sup>234</sup> informs that the best interests of the child had already been considered in the mid-seventies in a custody matter.<sup>235</sup>

### 6 3 3 1 3 The participatory and representation rights of children

The participatory rights of children are specified in the Kenyan *Children Act* and read “[i]n any matters of procedure affecting the child, the child shall be accorded an opportunity to express his or her opinion, and that opinion shall be taken into account as may be appropriate taking account the child’s age and the

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the best interests standard set out in s 7 of the South African Children’s Act, see discussion in 5 5 2 *supra*.

<sup>228</sup> S 2 defines a child as “any human being under the age of eighteen years”. S 2 also defines a “child of tender years” as a child under the age of ten years. In South Africa reference in both 28(3) of the Constitution and s 1(g) of the Children’s Act are only to children under the age of eighteen years. There is no distinction between a child of “tender years” and a “child”.

<sup>229</sup> Art 1 of the CRC.

<sup>230</sup> Art 2 of the ACRWC.

<sup>231</sup> Includes sections 3 to 19 and refers among others to the survival and best interests of the child in s 4.

<sup>232</sup> Odongo 2004 *IJCR* 422 regards part II as containing the most significant provisions. The South African Children’s Act sets out the best interests of the child comprehensively, see 5 4 4 *supra*.

<sup>233</sup> S 4(2) of *Children Act* provides that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (Emphasis added.) S4(3) of the Act further ensures that in “[a]ll judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by the Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to (a) safeguard and promote the rights and welfare of the child; (b) conserve and promote the welfare of the child; (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest”.

<sup>234</sup> 2004 *IJCR* 422 referring to the case of *Wambwa v Okumu* where the court rejected local customary law in favour of patriarchy and held that the best interests of the fourteen-year old child dictated that the mother be granted custody of the child.

<sup>235</sup> Ongoya 2007 *KLR* 248, however, concludes that the emergent jurisprudence of the Kenyan *Children Act* is uncertain and unpredictable and comments that it is wanting in depth and analysis, and at times its accuracy is patently suspect. The South African jurisprudence on the other hand is sound as discussed in 5 2 3 1 1 *supra*.

degree of maturity”.<sup>236</sup> A comparison between the two provisions according participatory rights indicates that the Kenyan *Children Act* appears to be more restricted in its application.<sup>237</sup>

The Kenyan *Children Act* specifies that where the court has to give consideration to an order regarding the child, the court has to have particular regard to the child’s wishes.<sup>238</sup> The participatory right of the child is illustrated in parental responsibilities agreements<sup>239</sup> confirmed by the court, which can be terminated by order of the court on application by among others a child with leave of the court.<sup>240</sup> Children of such age and degree of maturity have the right to apply to the children’s court for the granting of an order concerning their protection.<sup>241</sup> Any interim order<sup>242</sup> or final order<sup>243</sup> made by the children’s court

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<sup>236</sup> S 4(4). Ongoya 2007 *KLR* 240-241 gives an example of child participation in criminal law. Referring to *Medardo v Republic* [2004] *KLR* 433 where a boy aged sixteen years was a victim of sexual assault. The mother had stated under oath that she had pardoned the perpetrator as the “complainant” and his father did not wish to proceed with the case. The accused was acquitted. On appeal the High Court held that there was no age limit prescribed for a person to qualify as a complainant. However, the *Oaths and Statutory Declarations Act* (Ch 15) prescribed how to treat the evidence of children of tender years. Where a child is to withdraw a case the court would be expected to test the intelligence of the child before deciding to place him under oath. Although the mother had parental responsibilities under the *Children Act*, the responsibilities enumerated in the Act do not encompass the withdrawal of criminal charges against those who have violated the child’s rights. This affirms children’s rights to participate in affairs to which they are a party. The South African Children’s Act provides for the participation of children in legal matters affecting them as discussed in 5 4 6 *supra*.

<sup>237</sup> S 4(4) of the Kenyan *Children Act* refers to “all matters of procedure” whereas the South African equivalent in s 10 provides “in any matter concerning the child”. It is noticeable that the South African version is more in line with what is intended in art 12(1) of the CRC stating “all matters affecting the child”. See also Davel in *Gedenkbundel vir JMT Labuschagne* 20.

<sup>238</sup> S 76(2) of the *Children Act*. See also s 83(1)(d) of the *Children Act* which provides that the court in determining whether or not a custody order should be made in favour of the applicant, shall have regard to the “ascertainable wishes of the child”. S 31(1) of the South African Children’s Act require the child’s views and wishes to be considered in any major decision involving a child. See 5 4 5 3 *supra* for the participatory rights of children in the children’s court in South Africa.

<sup>239</sup> Found in part III of the *Children Act* and includes the definition of parental responsibilities (s 23); who has parental responsibilities (s 24); acquisition of parental responsibilities (s 25). In South Africa child participation is similarly provided for in parental responsibilities and rights agreements and parenting plans, see reg 8(3)(a) (Social Development) and Form 5 in Annexure A (Social Development) as well as reg 11(1) (Social Development) and Forms 9 and 10 in Annexure A (Social Development). See 5 4 5 4 *supra*.

<sup>240</sup> S 26(1)(b) of the *Children Act*. South Africa has a similar provision in s 22(6)(a)(ii) of the Children’s Act, see 4 5 2 *supra*.

<sup>241</sup> Ss 113(2)(a) and 114 of the *Children Act* reflect the various orders that the Kenyan children’s court may make such as access orders; residence orders; exclusion orders;

is subject to variation by order of the court or the rescission of such order. A child with leave from the court may apply for the variation or rescission of such interim order or final order.<sup>244</sup> A child may also with leave of the court apply for the refusal of access to any of the persons specified in the applicable section.<sup>245</sup> The South African Children's Act<sup>246</sup> provides in a number of instances that the child first obtain leave from the court before filing an application for the amendment or termination of an order.

A further indication of the participatory rights of the child is found with the requirement that a child above the age of fourteen years must give consent to his or her adoption.<sup>247</sup> In order to safeguard the interests of the child in adoption proceedings, the Kenyan *Children Act* provides for the appointment of a guardian *ad litem* by the court or upon application by the applicant in adoption proceedings.<sup>248</sup> Regarding international adoptions<sup>249</sup> the Kenyan *Children Act*

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wardship orders. The South African Children's Act provides for similar orders, see 5 4 5 3 *supra*.

<sup>242</sup> Made in terms of s 131 of the *Children Act* during a preliminary inquiry. An interim order can also be made in terms of s 48 of the South African Children's Act.

<sup>243</sup> Whether an interim supervision order in terms of s 131(10) or a interim care order in terms of 132(3) of the *Children Act*. See the discussion of the South African provision in 5 4 5 3 *supra*.

<sup>244</sup> Ss 125(2)(c), 131(5)(a) or 132(12)(c) of the *Children Act*.

<sup>245</sup> S 133(4) of the *Children Act*. In ss 133(2)(a) to (d) of the *Children Act* a rebuttable presumption of reasonable contact between a child and his parent or guardian, any person who has parental responsibility, relatives of the child or any other person as the child shall direct. Ss 22(6), 28(3)(c) and 34(5)(b) of the South African Children's Act requires the child to obtain leave from the court before filing an application for the amendment or termination of an order.

<sup>246</sup> Ss 22(6), 28(3)(c) and 34(5)(b).

<sup>247</sup> S 158(4)(f) of the *Children Act* specifies that the child must give written consent. S 159(1) provides that the court may not dispense with the consent of a child over the age of fourteen years. S 159(1)(c) of the *Children Act* reaffirms this, mentioning that a child's consent, if the child has attained the age of fourteen years, cannot be dispensed with where the child cannot be found, or is incapable of giving consent or is unreasonably withholding his or her consent. S 236(2) of the South African Children's Act provides when the consent of a child to his/her adoption is not required, namely where the child is an orphan and has no guardian or care-giver.

<sup>248</sup> S 160(1) of the *Children Act*. S 160(2) provides that the duty of the guardian *ad litem* among other is to safeguard the interests of the child, to intervene on behalf of the child and arrange for the care of the child in the event of the withdrawal of any consent in terms of the *Children Act*. S 55 of the South African Children's Act makes provision for a child's legal representation in children's court matters if it is in the child's best interests. S 28(1)(h) of the Constitution provides for a child's legal representation in civil matters.

<sup>249</sup> The terminology used in s 162 of the *Children Act* dealing with inter-country adoptions.



specifically refers to the participatory rights of the child.<sup>250</sup> The child has a right of appeal to the making or refusal of an adoption order.<sup>251</sup>

If a child is not legally represented, the court may order that a legal representative at state expense be appointed to assist the child.<sup>252</sup> Any limitation placed on legal representation for children in any proceedings before a court is based on the court's discretion, which, it may be added, must be exercised in the best interests of the child.<sup>253</sup>

The Kenyan *Children Act* does not have a test or limitation regarding legal representation in civil matters similar to the “substantial injustice” provision in section 28(1)(h) of the South African Constitution and therefore appears to be

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<sup>250</sup> S 163(1)(a) of the *Children Act* requires that every party (child) who understands the nature and effect of the adoption order for which the application is made has consented to the adoption. S 163(1)(b) of the same Act provides that the court must be satisfied that if an adoption order is made, it will be in the best interests of the child and that due consideration for this purpose be given to the wishes of the child, having regard to the age and understanding of the child. A similar provision is found in s 230(1)(a) of the South African Children's Act. The child's participation is acknowledged in s 233(1)(c) in his/her adoption if the child is of such maturity and stage of development to understand the implications of his/her consent (even if under the age of ten years).

<sup>251</sup> S 167 of the *Children Act* refers to any person thereby implying that this includes a child. S 80 of the *Children Act* provides for an appeal in any civil or criminal proceedings from the children's court to the High Court. The child's right of appeal is found in s 51(1) of the South African Children's Act.

<sup>252</sup> S 77(1) provides that where a child is brought before a court under the *Children Act* or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation. (Emphasis added.) S 77(2) provides that any cost incurred in relation to the legal representation of a child under subs (1) shall be defrayed out of monies provided by parliament. There is no distinction between the child's right to a legal representative in civil proceedings and where the child is in conflict with the law. Rules relating to child offenders issued in terms of the fifth schedule of the *Children Act* do not specifically mention legal representation for a child appearing before a criminal court, but in rule 11(3) implies such legal representation. S 79 of the *Children Act* provides for the appointment of a guardian *ad litem* where the child previously was not represented by a counsellor to safeguard the interests of the child.

<sup>253</sup> S 4(3) of the *Children Act*. Sometimes reference is made to the welfare of the child. See eg s 76(2) of the *Children Act* where the court, when considering a matter regarding the upbringing of a child, is called upon to have regard to the general principle that any delay in determining the question is likely to be prejudicial “to the welfare of the child”. The South African Children's Act affords a child legal representation in the children's court and the South African Child Justice Act that affords a child the right to legal representation where the child is in conflict with the law. This right to legal representation is founded on the Bill of Rights in the South African Constitution. For a discussion of the child's right to legal representation in South Africa, see 5 4 6 *supra*.



less restrictive.<sup>254</sup> It is however important to note that both jurisdictions present the child with a right to legal representation at state expense.

### 6 3 3 2 Conclusion

The Kenyan *Children Act* does not find the same support in the Kenyan Constitution as is the case in South Africa.<sup>255</sup> Yet the influence of the Kenyan *Children Bill* (now *Children Act*)<sup>256</sup> is noticeable in the South African Children's Act.<sup>257</sup>

There is a great deal of similarity between the Kenyan *Children Act* and the South African Children's Act.<sup>258</sup> Both the Children's Acts strive to give effect to the provisions of the Convention on the Rights of the Child and African Charter as far as the best interests of the child and child participation are concerned.<sup>259</sup> Both the Children's Acts define children as being persons under the age of

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<sup>254</sup> For a discussion of s 28(1)(h) of the South African Constitution, see 5 2 3 1 4 and 5 4 6 *supra*. The provisions of s 55 of the Children's Act are less restrictive and require only the best interests of the child to be considered, however, the final decision rests with an official of the South African Legal Aid Board.

<sup>255</sup> Keeping in mind the comments of Tobin 2005 *SAJHR* 89 that the CRC does not oblige countries in express terms to constitutionalise children's rights. Art 4 of the CRC mentions that state parties shall undertake "all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention". Tobin *loc cit* emphasises that *appropriate* legislative steps must be taken and that it is becoming increasingly difficult for a state to demonstrate that it has taken appropriate measures without some kind of constitutional recognition. (Emphasis is that of the author.) The South African Children's Act has domesticated the CRC and serves as an extension of the South African Constitution in which the core rights of the CRC has been enshrined.

<sup>256</sup> The Kenyan Children Act came into force on 1 March 2002, see Kenya's second report to the Committee on the Rights of the Child par 1 at 13.

<sup>257</sup> See SALC Issue Paper 13 par 10 2 4 p 141, discussed in 5 3 *supra*. Eg the participatory rights of the child in adoption matters and various orders relating to the custody, access, residence and care of children as well as exclusion orders and the review, variation, suspension or discharging of such orders.

<sup>258</sup> Regarding the best interests of the child the South African Children's Act has a standard which the courts can use as a guide to achieve consistency. This checklist or standard is lacking in the Kenyan *Children Act*.

<sup>259</sup> Both Acts give effect to the provisions of the CRC and ACRWC as far as child participation in legal matters affecting the child and the ACRWC as far as legal representation is concerned. Both Acts ensure legal representation of children at state expense where required. The South African Children's Act with its test of "substantial injustice" and the discretion resting with the Legal Aid Board instead of the courts compares less favourably with the Kenyan *Children Act*.

eighteen years and make provision for the best interests of the child.<sup>260</sup> Both Acts provide a child-centred approach in applying the best interests of the child.

The extent of the child's participation in the Kenyan *Children Act* is apparent throughout the Act.<sup>261</sup> The right of a child to be assigned legal representation at state expense is provided for in both Acts.<sup>262</sup> Both Acts provide for children's courts, but the Kenyan children's court has wider jurisdiction than its South African counterpart.<sup>263</sup>

As pointed out at the beginning, there is more in common between the two Children's Acts than meets the eye. Kenya, judging from the last report submitted to the Committee on the Rights of the Child, is endeavouring to further foster and secure children's rights. However, the closing comments of Ongoya on the emerging jurisprudence cannot be ignored.<sup>264</sup> There is far more to gain than lose and the Government of Kenya is committed to succeed.

## 6 4 Other Countries

The countries referred to as part of the comparative analysis are countries that share the English common law as foundation for their development of family law. It is intended to draw a comparison with their respective children's statutes and determine to what extent there has been compliance with the Convention

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<sup>260</sup> The Kenyan *Children Act* does not have a comparable standard as provided for in s 7 of the South African Children's Act or "check-list" other than what is contained in ss 4(3)(a) to (c) of the *Children Act*.

<sup>261</sup> Thereby confirming the child's right of non-discrimination provided for in s 5. Although age is not specifically mentioned, it may be inferred from the inclusion of status. This is also the case in the South African Children's Act, see discussion in 5 4 5 *supra*.

<sup>262</sup> It appears that the Kenyan Children Act only uses the best interests of the child to determine the necessity of legal representation for children in legal matters involving them.

<sup>263</sup> Discussed in 5 4 3 *supra*.

<sup>264</sup> 2007 *IJCR* 248-249 where the author makes the following proposals, some of which are relevant to the present concluding remarks, (a) that child rights practitioners ought to take test cases to the highest judicial organs in the country for purposes of securing most authoritative restatements on aspects that are currently suffering a setback because of confusing jurisprudence, (b) that the judiciary owes it to the consumers of child justice to engage in reasoned analyses of issues that come before the court with some sense of information. In this regard South African jurisprudential development in the Constitution and the Children's Act is growing at a steady pace.

on the Rights of the Child and to compare their compliance with that of South Africa. Furthermore it will be ascertained how the South African Children's act compares with the respective children's statutes of the developed countries to be discussed.

#### 6 4 1 United Kingdom and Scotland

In this chapter reference will also be made, where applicable, to the influence and development of children's rights in Scotland. The reference to the United Kingdom is appropriate in more than one way. Just as the African countries referred to in the previous sections were influenced by the law reform process in the United Kingdom,<sup>265</sup> child-law reform in South Africa was also influenced by these developments.

Fortin<sup>266</sup> points out that there appears to be two features driving the heightened awareness of children as a minority group with rights of their own in the United Kingdom. The first is its obligations under the Convention on the Rights of the

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<sup>265</sup> SALC Issue Paper 13 par 10 3 4 p 151.

<sup>266</sup> *Children's Rights v* and adds that the fact that children are, like adults, entitled to claim the rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, hereafter ECHR, has had a dramatic impact on the an adult's perception of children's status. See also Bainham *Children: The Modern Law* 29 who mentions that the CRC and the *Children Act* 1989 together "represent a fresh beginning for children in domestic and international law. During 2000 the Human Rights Act 1998 was implemented. The effect was the direct transplanting into English law the rights and freedoms guaranteed by the ... [ECHR] and conferring on children so-called 'Convention rights'. Together, these sources now represent the most important sources of English law". Fortin "Accommodating children's rights in a post-human rights act era" 2006 *MLR* 299-326 takes her argument a step further in this article concluding that the *Human Rights Act* (HRA) has introduced radical change in the United Kingdom insofar as it appears to give all children the same ECHR rights as adults. She mentions that it is not as simple as it might appear and this may be because children suffer from the disadvantage that they are seldom initiators of litigation on their own behalf. Children are more often the objects of adult litigation and in private law disputes involving adults and children, the main strategy is to accord rights (in terms of the ECHR) only to adults and arguments relating to children's interests being directed into a discussion of how infringements of adults' rights might best be justified. It is only when children themselves are the applicants that the courts find it necessary to consider their position as fully-fledged rights holders. Freeman "Why it remains important to take children's rights seriously" 2007 *IJCR* 5-23 asks very pertinent questions about children's rights and especially the participatory rights of children and how their autonomy is being affected by recent case law.

Child<sup>267</sup> and the second the implementation of the *Human Rights Act 1998*<sup>268</sup> in October 2000. As will be noted in the ensuing discussion the reform process in the United Kingdom has been ongoing since the enactment of the *Children Act 1989* and the entering into force of the *Adoption and Children Act 2002*.<sup>269</sup>

The reform process in Scotland culminated in the *Children (Scotland) Act of 1995*.<sup>270</sup> Being almost the equivalent of the South African Child Care Act,<sup>271</sup> this common ground served as a good comparison for the review process in South Africa that has resulted in the Children's Act of 2005. Of the three overarching principles<sup>272</sup> fundamental to children's rights and directing all aspects of the *Children (Scotland) Act*, the paramountcy of the child's welfare and the views of the child<sup>273</sup> are important for the present discussion.

An area of concern has been and remains the age of criminal accountability which is determined at ten years in England.<sup>274</sup> There is ongoing international pressure<sup>275</sup> for the English government to review the relatively low age of ten

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<sup>267</sup> Ratified by the United Kingdom on 16 December 1991, see Edwards in *Children's Rights in a Transitional Society* 37. However, the CRC has never been incorporated into the domestic law of the United Kingdom and according to Hale 2006 *AJFL* 120 it probably never will be because the provisions of the CRC are too broad aspirational for such incorporation.

<sup>268</sup> On 2 October 2000.

<sup>269</sup> Received Royal Assent on 7 November 2002 and entered fully into force on 30 December 2005.

<sup>270</sup> Edwards in *Children's Rights in a Transitional Society* 37-38 draws attention to the fact that Scottish family law has a degree of interest as a comparative system when considering the South African child law due to it being a mixed system like the South African system owing a great deal of its origin to Roman law, but with a lot of modern law drawn from or influenced by contact with the English common-law system. Of even greater importance is the fact that both the Scottish and the South African family laws were until recently mainly to be found as part of the common law.

<sup>271</sup> 74 of 1983.

<sup>272</sup> Edwards in *Children's Rights in a Transitional Society* 40.

<sup>273</sup> SALC Issue Paper 13 par 10 3 p 148. Edwards in *Children's Rights in a Transitional Society* 40-41 refers to the so-called "minimum intervention" principle.

<sup>274</sup> S 50 of the *Children and Young Persons Act 1933* as amended by s 16 of the *Children and Young Persons Act 1963*.

<sup>275</sup> Fortin *Children's Rights* 550 refers to various jurisdictions where the age of criminal responsibility has been increased in France (thirteen years); Germany, Austria, Italy and most eastern European countries (fourteen years); Scandinavian countries (fifteen years); Spain, Portugal and Andorra (sixteen years); Belgium and Luxembourg (eighteen years).

years.<sup>276</sup> South Africa recently raised the age of criminal accountability of children to ten years.<sup>277</sup>

#### 6 4 1 1 The United Kingdom *Children Act* 1989<sup>278</sup>

As experienced by many countries following on the English approach to reform legislation regarding children's rights, the origins the *Children Act* were complex.<sup>279</sup> The law prior to the *Children Act* was regarded as ineffective and failed to involve parents and children sufficiently in decision-making. The *Children Act* was hailed by the Lord Chancellor as the "most far reaching reform of childcare law ... in living memory".<sup>280</sup>

The *Children Act* 1989 moved the English and Welsh law towards a general children's code with the combination of public and private law aspects of children in one statute.<sup>281</sup> The *Children Act* provides certainty regarding the definition of a child providing that "child" means a person under the age of eighteen<sup>282</sup> as does the South African Constitution and Children's Act.

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<sup>276</sup> Fortin *Children's Rights* 551 mentions that the raising of the age of criminal responsibility has been a source of controversy for many years. The age of criminal responsibility in Scotland is eight years in terms of the s 41 of the *Criminal Procedure (Scotland) Act* 1995.

<sup>277</sup> S 7(1) of the Child Justice Act with effect from 1 April 2010.

<sup>278</sup> Commenced on 14 October 1991 and hereafter referred to as the *Children Act* 1989 or the *Children Act*.

<sup>279</sup> See Roche "The Children Act 1989 and children's rights: A critical assessment" in Franklin *The New Handbook of Children's Rights* 60-61 who mentions that there was a series of official reports concluding that the current law was unclear, unnecessarily complicated and characterised by procedural and substantive injustice. Added to this were child abuse cases of the 1980s which were aptly worded the "plight of children" in one of the reports following on an investigation into one of the abuse cases as "the voices of the children were not heard".

<sup>280</sup> Roche in *The New Handbook of Children's Rights* 62.

<sup>281</sup> SALC Issue Paper 13 par 10 3 3 p 143. See Bainham *Children – The New Law: The Children Act* 1 who describes the *Children Act* 1989 as "undoubtedly one of the most radical and far-reaching reforms of the private and public law affecting children". However, Fortin *Children's Rights* 212 mentions that the *Children Act* 1989 discriminates against children involved in private-law proceedings and this has been a constant source of criticism. See also Hale "Children's participation in family law decision making: Lessons from abroad" 2006 *AJFL* 119-126.

<sup>282</sup> S 105(1) of the *Children Act* which contains a proviso referred to in par 16 of schedule I. However, this proviso does not affect the child's right to participate or acquire legal representation, but has reference to extending financial support after the child has attained the age of eighteen.

The *Children Act* improved the appeal system in the United Kingdom. Anyone who was a party in the original proceedings may appeal against the making or refusal to make a care or supervision order which includes an interim order.<sup>283</sup>

6 4 1 1 1 The best interest of the child<sup>284</sup>

Section 1(1) of the *Children Act* provides that when a court determines any question with respect to the upbringing of a child or the administration of a child's property or any income arising from it, "the child's welfare shall be the court's paramount consideration". The paramountcy principle applies whenever the court has to decide any question about the child's upbringing or the administration of his or her property.<sup>285</sup>

Lowe and Douglas discuss the application of the paramountcy principle compared with the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and mention that it is

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<sup>283</sup> S 94(1) of the *Children Act*. Lowe and Douglas *Bromley's Family Law* 786-787 mention that a direction made in terms of s 38(6) of the *Children Act* may also be appealed against. Compare s 51 of the South African Children's Act, which has a similar, but less cumbersome procedure, discussed in 5 4 5 3 *supra*. In both the Children's Acts the child is regarded as a party to the proceedings.

<sup>284</sup> Reference to the principle is made against the background of the participatory rights of the child as contained in art 12(1) of the CRC and s 1(3) of the *Children Act*.

<sup>285</sup> S 1(1) of the *Children Act*. Lowe and Douglas *Bromley's Family Law* 454 find that s 1(1) might be compared with art 3(1) of the CRC which provides that in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative or legislative bodies, the best interests of the child shall be the [sic] [the authors incorrectly use the word 'the' whereas the CRC text refers to 'a'] primary consideration". They add that the CRC has not been incorporated by statute into the English domestic law and courts are not bound to apply it. However, referring to *Re P (A Minor)(Residence Order: Child's Welfare)* [2000] Fam 15 42 (454 n 33) the court held that, although the CRC may not have the force of law, it commands and receives respect. See also Fortin *Children's Rights* 31 who confirms that although the CRC is not part of English law as such, it currently exerts an increasingly powerful influence on the developing law and is often used as an international template against which to measure domestic standards. This high regard is illustrated in *Payne v Payne* [2001] 1 FLR 1052 38 where the court held that the paramountcy principle (in s 1(1) of the *Children Act*) was "enshrined" by art 3(1) of the CRC. See also Bainham *Children - The Modern Law* (2005) 29 who agrees that the CRC together with the *Children Act* and the ECHR represent the most important sources of children law. The paramountcy of the best interest of the child principle, referred to as the welfare principle in English law, was established in *J v C* [1970] AC 668 referred to by Lowe and Douglas *Bromley's Family Law* 450. S 28(2) of the South African Constitution raised the best interests standard to a principle of paramountcy and South African case law confirms this, see discussion in 5 2 3 1 1 and 5 5 2 *supra*.



difficult for the paramountcy principle to comply with the requirements of the European Convention.<sup>286</sup> The importance of this concern is to be found in the fact that the European Convention has been domesticated in the *Human Rights Act* 1998 and subsequent rulings by the court<sup>287</sup> have been that the prevailing preference for children's interests were compatible with article 8(2) of the European Convention.<sup>288</sup>

Of further importance is the application of the paramountcy principle. It appears from the wording of section 1(1) of the *Children Act* that it is of general application and not restricted only to *Children Act* proceedings.<sup>289</sup> It is also important to understand that the paramountcy principle does not have unlimited application.<sup>290</sup> Lowe and Douglas observe that the paramountcy principle does not apply outside the context of litigation.<sup>291</sup> Therefore it does not apply to parents or other individuals with respect to their day-to-day or even long-term

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<sup>286</sup> *Bromley's Family Law* 451 mention this may be the case in particular with s 8 of the ECHR, the right to respect for private and family life. The authors add that the House of Lords found in *Re KD (A Minor)(Ward: Termination of Access)* [1998] AC 806 812 that there "was no inconsistency of principle or application between the English rule and the Convention rule".

<sup>287</sup> Lowe and Douglas *Bromley's Family Law* 452 with reference to *Re L (A Child) (Contact: Domestic Violence)*; *Re V (A Child)(Contact: Domestic Violence)*; *Re M (A Child)(Contact: Domestic Violence)*; *Re H (Children)(Contact: Domestic Violence)* [2001] Fam 260 277 and *Payne v Payne* [2001] 1 FLR 1051 [38] and [57].

<sup>288</sup> However, see Fortin's concern "Children's rights: Are the courts taking them more seriously?" 2004 *KCLJ* 253-273, 2006 *MLR* 299-326 and Freeman "Rethinking Gillick" 2005 *IJCR* 201-217, 2007 *IJCR* 5-23.

<sup>289</sup> Lowe and Douglas *Bromley's Family Law* 455 give a number of examples, eg wardship proceedings, non-Convention child-abduction cases and that it is applicable in the exercise of the High Court's inherent jurisdiction. The authors add that it applies whenever the Court is considering to make a s 8 order, regardless of who the parties are, what the issue is or in which, the issue is raised. For the South African application of the best interests standard, see 5 4 4 *supra*.

<sup>290</sup> This contrasts with the best interests standard as applied in the South African context where it is applicable in all matters affecting the child by virtue of s 28(2) of the Constitution which provides that a child's best interests "are of paramount importance in every matter affecting the child". The general applicability of the paramountcy principle is reaffirmed in s 9 of the Children's Act.

<sup>291</sup> *Bromley's Family Law* 456-457 where they mention that the paramountcy principle only applies in the course of litigation and unlike art 3(1) of the CRC it has no direct application to institutions such as prison authorities, administrative authorities such as local authorities or legislative bodies. In South Africa the Children's Act has domesticated specific articles of the CRC, such as art 12, that relate to the child's participation and have incorporated the best interests principle in s 28(2) of the Constitution and therefore the same limitation will not apply, see 5 4 4 *supra*.

decisions affecting the child.<sup>292</sup> It has also been held in *Re M (A Minor)(Secure Accommodation Order)*<sup>293</sup> that the paramountcy principle does not govern an application of Part III<sup>294</sup> of the *Children Act*.

A further important limitation to the application of the paramountcy principle is that it does not apply to issues only indirectly concerning the child's upbringing. The decision of the House of Lords in *S v S, W v Official Solicitor*<sup>295</sup> established the application and in *Richards v Richards*<sup>296</sup> it was confirmed that the paramountcy principle only applies when the child's upbringing and such is directly in issue. Even where the paramountcy principle does not apply, the court retains a protective jurisdiction to prevent a child from suffering any harm, but in exercising the latter jurisdiction, the child's welfare is not necessarily the most important consideration to be taken into account.<sup>297</sup> Nor does the paramountcy principle apply if it is excluded by other statutory provisions. Therefore, even if the child's upbringing is directly in issue, the courts are not

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<sup>292</sup> Lowe and Douglas *Bromley's Family Law* 456. Bainham *Children: The Modern Law* 48 is of the view that "it can hardly be argued that parents, in taking family decisions affecting a child, are bound to ignore completely their own interests, the interests of other members of the family and, possibly, outsiders. This would be wholly undesirable, as well as an unrealistic objective". The author adds that parents are therefore not bound to consider their children's welfare in deciding, eg whether to make a career move, to move house or whether to separate or divorce. The South African Children's Act specifically caters for situations such as these with the provisions of s 31(1) of the Act requiring the views and wishes of a child to be given due consideration in any major decision involving the child, see 5 4 5 3 *supra*.

<sup>293</sup> [1995] Fam 108 115 by Butler-Sloss LJ that "[t]he framework of Part III of the Act is structured to cast upon the local authority duties and responsibilities for children in its area and being looked after. The general duty of a local authority to safeguard and promote the child's welfare is not the same as that imposed upon a court in s 1(1) placing welfare as the paramount consideration". Again the South African Children's Act in s 8(2) specifically provides that "[a]ll organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of the children contained in this Act". Lowe and Douglas *Bromley's Family Law* 457 explain that according to Butler-Sloss LJ s 1(1) was not designed to be applied to Part III of the Act. Therefore in deciding what levels of service is required to be provided pursuant to s 17(1) which provides that the general duty of every local authority is (a) to safeguard and promote the welfare of children within their area who are in need and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services *appropriate to those children's needs*. (Emphasis added.)

<sup>294</sup> Dealing with local authority support for children and family.

<sup>295</sup> [1972] AC 24.

<sup>296</sup> [1984] AC 174 HL.

<sup>297</sup> Lowe and Douglas *Bromley's Family Law* 457-459.

always bound by the paramountcy principle.<sup>298</sup> The extent of this limitation affects the *Human Fertilisation and Embryology Act* 1990<sup>299</sup> and the maintenance of children.<sup>300</sup> Another difficult area of applying the paramountcy principle is where there is more than one child. This may present itself where the applicants are children or where they are siblings.<sup>301</sup> The *Children Act* 1989 addresses delays directly.<sup>302</sup> Delays are *prima facie* regarded as prejudicial to the welfare of the child.<sup>303</sup>

The important provision for the purpose of the present discussion is found in section 1(3) of the *Children Act* which sets out the guidelines to be used in determining what would be in the best interests of the child when considering private law matters affecting the child.<sup>304</sup> The court must have a particular regard for the factors set out in section 1(3) of the *Children Act*.<sup>305</sup>

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<sup>298</sup> Lowe and Douglas *Bromley's Family Law* 463-464. Compare the view of the South African Constitutional Court in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) pars [54]- [55] where the court held that s 28(2) of the Constitution does not counter the other provisions of the Bill of Rights. In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [26] the court specifically mentioned that the paramountcy of the best interests of the child is not absolute. See discussion in 5 2 3 1 1 *supra*.

<sup>299</sup> Lowe and Douglas *Bromley's Family Law* 463 mention that although s 30 applications for parental order in terms of the said Act directly concern the child's upbringing, the court is expressly bound to treat the welfare of the child as its first but not paramount consideration.

<sup>300</sup> S 105(1) of the *Children Act* expressly excludes maintenance from the child's upbringing; the and therefore does not allow the application of the paramountcy principle where the child's maintenance is in dispute.

<sup>301</sup> See Lowe and Douglas *Bromley's Family Law* 465-467 on this controversial issue.

<sup>302</sup> S 1(2) provides that in any proceedings in which any question with respect to the upbringing of the child arises, the court "shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child".

<sup>303</sup> Bedingfield *Advocacy in Family Proceedings: A Practical Guide* hereafter Bedingfield *Advocacy in Family Proceedings* 76; Lowe and Douglas *Bromley's Family Law* 472-475. See also s 1(3) of the *Adoption and Children Act*. S 6(4)(b) of the South African Children's Act specifically addresses the avoidance of delays in any matter concerning a child.

<sup>304</sup> Lowe and Douglas *Bromley's Family Law* 468 mention that the *Children Act* which does not contain a definition for "welfare" and the "checklist" was introduced to assist, with reference to certain factors, the courts requiring them to have regard to when dealing with whatever order the court was considering.

<sup>305</sup> This has become known as the "welfare checklist". As Lowe and Douglas *Bromley's Family Law* 469 say it is not an exhaustive checklist and may rightly be regarded as the minimum requirement that will have to be considered by the court. The court must have regard in particular to (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding), see eg *Re P (A Minor) (Education)* [1992] 1 FLR 316 321 where the court observed that over the last few years the courts have "become increasingly aware of the importance of listening to the views of older children and taking into account what the children say, not necessarily agreeing with what they want nor,

The checklist set out in section 1(3) of the *Children Act* has application<sup>306</sup> in contested section 8 applications<sup>307</sup> and all proceedings under Part IV<sup>308</sup> of the *Children Act*.<sup>309</sup> Critics of the welfare principle have voiced cogent arguments against what is seen as an unduly individualistic approach with the child being viewed incorrectly in isolation.<sup>310</sup> However, as correctly concluded by Lowe and Douglas,<sup>311</sup> none of the suggestions are problem free and abandoning the paramountcy principle would enhance the vulnerability of the child even more.

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indeed, doing what they want, but paying proper respect to older children who are of an age and maturity to make their minds up as to what they think is best for them". See Lowe and Murch "Children's participation in the family justice system – Translating principles into practice" 2001 *CFLQ* 140; Fortin *Children's Rights* 79-87 203; Freeman 2005 *IJCR* 203-204. Taylor "Reversing the retreat from Gillick? R (Axon) v Secretary of State for Health" 2007 *CFLQ* 93. In discussing the Axon decision she says that this decision is concerned with the involvement of children in the decision-making process, rather than the ability of children to determine the outcome of that process; (b) his physical, emotional and educational needs; (c) the likely effect on him or her of any change in his or her circumstances; (d) the child's age, gender, background and any characteristics of which his or her guardian *ad litem* considers relevant; (e) any harm which he or she has suffered or is at risk of suffering; (f) how capable each of the parents, and any other person in relation to whom the guardian *ad litem* considers the question to be relevant, is of meeting his or her needs; (g) the range of powers available to the court under the Act in the proceedings. For the South African's standard of the best interests of the child set out in s 7 of the Children's Act, see 5 4 4 *supra*.

<sup>306</sup> In terms of s 1(4) of the *Children Act*.

<sup>307</sup> These are contact orders, prohibited steps orders, residence orders and specific issue orders as determined in s 8(1) of the *Children Act*. Lowe and Douglas *Bromley's Family Law* 481 draw attention to the fact that it is only in contested applications for s 8 orders that the checklist is applied. Thus where adults are in agreement there is no compulsion to consult the children. S 8(2) of the *Children Act* provides that "a section 8 order" means any of the orders in s 8(1) and any varying or discharge of such orders.

<sup>308</sup> These are inclusive of the making, variation or discharge of contested s 8 orders and orders mentioned in Part IV such as supervision orders, care orders inclusive of care plans and interim orders. The best interests standard in the South African Children's Act as contained in s 7 must be applied in all matters affecting the child, see 5 4 4 *supra*.

<sup>309</sup> However, Lowe and Douglas *Bromley's Family Law* 470 mention that there is nothing to prevent the courts from considering the factors if they choose to do so and regard the consideration of factors in the checklist quite appropriate in applications of acquisition of parental responsibility by a father and the appointment of a guardian.

<sup>310</sup> Lowe and Douglas *Bromley's Family Law* 471 mention the criticisms of eg Reece who suggests the abandonment of the paramountcy principle and the recognition of the child as merely one of the participants where the interests of all the participants have equal weight. Bainham suggests that the interests of the parents and children be categorised as primary and secondary interests and that the children's interests give way to the interests of the parents. Herring suggests move towards a "relationship-based welfare approach" focusing on the parent-child relationship which is based on the family concept underpinning what is regarded as fair and just requiring the child to make some sacrifices (which ironically the child inevitably does).

<sup>311</sup> *Bromley's Family Law* 472.

Section 1(5) of the *Children Act* introduces another novel approach<sup>312</sup> where the focus is on whether any court order is necessary. Because of problems associated with the application of section 1(5) of the *Children Act* it has been referred to as a “non-intervention principle” or “no order principle”.<sup>313</sup> The interrelationship between the paramountcy principle and section 1(5) orders has been an uneasy one.<sup>314</sup>

#### 6 4 1 1 2 The participatory rights of the child

The future of children under English law has traditionally been decided upon through the views of adults, that is the parents and/or professionals, notwithstanding the entrenchment of the welfare principle.<sup>315</sup> A significant change was brought about by article 12 of the Convention on the Rights of the Child and the *Children Act*.<sup>316</sup>

The participatory rights of the child are firmly embedded in the wording of section 1(3)(a) of the *Children Act*. The influence of the *Children Act* in enhancing participatory rights of the child is reflected in the provision of section 10<sup>317</sup> of the *Children Act* which provides that children may with the leave of the

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<sup>312</sup> The subsection provides that where a court is considering whether or not to make one or more orders under the *Children Act* with respect to a child “it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all”.

<sup>313</sup> Lowe and Douglas *Bromley’s Family Law* 478.

<sup>314</sup> Bainham “The privatisation of the public interest in children” 1990 *MLR* 221 suggests that the welfare principle has been hijacked by non-interventionism. Lowe and Douglas *Bromley’s Family Law* 478-479 argue that the proportion of “no orders” made under s 1(5) are relatively small. The authors further add that the children’s rights are safeguarded because not making an order in the light of parental agreement the court could overlook the child’s wishes. This could be a breach of art 12 of the CRC in the case of older children.

<sup>315</sup> This according to Lowe and Murch 2001 *CFLQ* 137 is despite the decision of *J v C* [1970] AC 668 confirming the welfare principle.

<sup>316</sup> Lowe and Murch 2001 *CFLQ* 138. See further Lowe and Douglas *Bromley’s Family Law* 480-481 who mention that the *Adoption of Children Act* 1926 in s 3(b) required the courts to give due consideration to the wishes of children having regard to their age and understanding.

<sup>317</sup> S 10(1) of the *Children Act* provides that a court may make s 8 orders of the Act in any family proceedings in which a question arises with respect to the welfare of any child if (a) an application for the order has been made by a person who (i) is entitled to apply for a s 8 order with respect to the child or (ii) has obtained leave of the court to make the application or (b) the court considers that the order should be made even though no such application



court apply for a section 8 order. The *Children Act* further provides for a child to bring applications for the termination or variation of certain orders.<sup>318</sup> The *Children Act* also allows a child affected by public-law orders to bring applications for the discharge or variation of certain orders.<sup>319</sup> The position in public-law proceedings is such that the court is obliged to have regard for the child's ascertainable wishes and feelings in *all*<sup>320</sup> proceedings under Part IV of the *Children Act*.<sup>321</sup>

The participatory rights of children are specifically provided for in the *Children Act*.<sup>322</sup> The children's right to apply for a section 8 order and thereby initiating *Children Act* proceedings on their own behalf goes much further than required in article 12 of the Convention on the Rights of the Child.<sup>323</sup> However, as

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has been made. S 10(2) provides that the court may make a s 8 order with respect to any child on application of a person as mentioned in ss 10(1)(a) or (b). S 10(8) provides that where the child applies for a s 8 order the court may grant leave if the court is satisfied that the child has sufficient understanding to make the proposed application for the s 8 order. See also s 1(4)(a) of the *Adoption and Children Act 2002* which provides that the court or adoption agency must have regard to among others "the child's ascertainable wishes and feelings regarding the decision [relating to the adoption of a child] (considered in the light of the child's age and understanding)". The *Adoption and Children Act 2002* received Royal Assent on 7 November 2002 and came fully into force on 30 September 2005; see Mackay *Halsbury's Laws of England Children and Young Persons* par 325. The South African Children's Act has similar provisions comparable to s 8 application in a number of sections, see eg s 22(6)(a)(ii), s 28(3)(c), s 34(5)(b), discussion 5 4 5 3 *supra*.

<sup>318</sup> In terms of s 4(3) of the *Children Act* the termination of a parental responsibility order made in terms of ss 4 or 4A; the termination of a guardianship order issued in terms of s 5 may be brought in terms of s 6(7)(b) of the Act; the variation or discharging of a special guardianship order may be applied for in terms of s 14D(1)(e) of the *Children Act*. All these applications are subject to the court granting leave to bring the application.

<sup>319</sup> In terms of s 39 of the *Children Act* a child may apply for the discharge or variation of care or supervision orders and s 45(8) provides for an application for the discharge of an emergency protection order. A child may, in terms of s 43(12) of the Act, apply for the discharge from a child assessment order, but not for the discharge from a secure accommodation order. Lowe and Douglas *Bromley's Family Law 715* refer to *S v Knowsley* [2004] 2 FLR 716 par [63] where the court held that judicial review would be the most appropriate remedy.

<sup>320</sup> Emphasis added.

<sup>321</sup> Lowe and Douglas *Bromley's Family Law 482* are of the view that the question whether the absence of an obligation to ascertain and consider children's views in uncontested s 8 order applications is in breach of the ECHR is debatable. Fortin "Accommodating children's rights in a post-human rights era" 2006 *MLR* 299-326 expresses her concern about family courts not recognising children's rights under the ECHR.

<sup>322</sup> S 10(1) of the *Children Act*. See n 315 *supra*.

<sup>323</sup> Fortin *Children's Rights* 224 refers to mature children and adds that the provision goes even further than the European Convention on the Exercise of Children's Rights (ECECR) which has not yet been ratified by the United Kingdom. Lowe and Douglas *Bromley's Family Law 503* regard this as one of the innovations of the *Children Act*. See also Roche



Fortin<sup>324</sup> confirms, children in the United Kingdom do not have a legal right to be consulted over the arrangements to be made for their futures.

Roche<sup>325</sup> mentions that it can be inferred from the following that the *Children Act* supports the participatory rights of children. In the first place there is the provision for children themselves applying for one of the section 8 orders.<sup>326</sup> Secondly, Rule 9.2A of the *Family Proceedings Rules* 1991 provides that a child may prosecute or defend proceedings without a “next friend” in two situations, being where the proceedings are not “specified proceedings” and the child has obtained leave from the court and where the child has instructed a solicitor who has accepted the instruction from the child having considered that the child has sufficient understanding to grasp what it means to give instructions.<sup>327</sup> Thirdly, section 38(6) of the *Children Act* provides that the child, being of sufficient understanding, may refuse to submit to a medical or psychiatric examination or assessment where the court has given such direction when making an interim order.<sup>328</sup> Finally the *Children Act* provides that a child has the right to express his or her views regarding the review of their cases by the local authority.<sup>329</sup>

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*The New Handbook of Children's Rights* 64 who opines that, although it must be said that the *Children Act* is concerned with the welfare of children and much of the Act is focused on altering the power relations between the local authority and parents as well as the recasting of the responsibilities of the courts and the local authorities, the *Children Act* has also moved towards recognising the child as a legal subject.

<sup>324</sup> *Children's Rights* 203. The South African Children's Act in s 31(1) specifically provides for the children to be involved in major decisions affecting the child, see 5 4 4 *supra*.

<sup>325</sup> *The New Handbook of Children's Rights* 64.

<sup>326</sup> Roche *The New Handbook of Children's Rights* 64; Bedingfield *Advocacy in Family Proceedings* 83.

<sup>327</sup> According to Roche *The New Handbook of Children's Rights* 64 n 23 where the child is in conflict with the guardian *ad litem*, he is under duty to take instructions directly from the child. See Lowe and Douglas *Bromley's Family Law* 502 with reference to *Mabon v Mabon* [2005] Fam 366 par [41] where the court held “that r 9.2A(4) gives children the right to apply to the court for permission to prosecute or defend the remaining stages of the proceedings without the guardian and r 9.2A(6) makes it clear that the court must grant that permission and remove the guardian if it considers that the children concerned have sufficient understanding to participate in the proceedings concerned without a guardian”.

<sup>328</sup> This is also the position with s 44(7) of the *Children Act* where the court has given the same direction in terms of an emergency protection order and further 43(8) regarding child assessment orders, pars 4(4)(a) and (b) and s 5(a) of schedule 3 regarding supervision orders. Roche *The New Handbook of Children's Rights* 65 refers to the child's refusal to submit to such medical or psychiatric assessment even where the court has directed that the child undergo the treatment, if the child is of sufficient understanding to make an informed decision. Roche says that this is in line with the *Gillick* decision. See, however, Freeman “Rethinking *Gillick*” 2005 *IJCR* 201-217. Lowe and Douglas *Bromley's Family*

Children's participatory rights in the United Kingdom received prominence with landmark decision of *Gillick v West Norfolk and Wisbech Area Health Authority*.<sup>330</sup> However, in subsequent judgments the courts entertained different interpretations to what was stated in the *Gillick* case and this has led to some controversy, to the extent that there may now be less clear guidance in English law<sup>331</sup> regarding the so-called "Gillick-competent child".<sup>332</sup> This retreat from the acknowledgment of the "Gillick-competent child" may to some extent have been stopped with recent decision of *R (Axon) v Secretary of State for Health* [2006] 2 WLR 1130. that the *Axon* case places the emphasis on a demand for teenage autonomy and ventures that the *Axon* case may pave the way to a reversal of the retreat from *Gillick*. The mother of two daughters under age sixteen challenged the Department of Health's guidance to health practitioners that children under sixteen years were owed the same duty of confidentiality as any other person. The mother sought a declaration that the duty of confidentiality owed to children was limited, such a child could only receive

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Law 784 and the authors' criticism of the decision in *South Glamorgan County Council v W and B* [1993] 1 FLR 574 where the court held that it had inherent jurisdiction to override a competent child's refusal to submit to an examination.

<sup>329</sup> S 26(2)(d)(i) of the Act.

<sup>330</sup> [1986] AC 112 where Lord Scarman, for the majority of the court, stated that "a minor's capacity to make his or her own decisions depends on the minor having sufficient understanding and intelligence to make the decision and is not determined by reference to any judicially fixed age limit".

<sup>331</sup> According to Freeman 2005 *IJCR* 202-211 with judgments such as *Re W* [1992] 4 All ER 627 634; *Re R* [1992] 1 FLR 190 199; *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386; *South Glamorgan County Council v W and B* [1993] 1 FLR 574.

<sup>332</sup> Freeman 2005 *IJCR* 201 starts his discussion with the observation that "England's *Gillick* in 1985 is rightly seen by observers the world over as a landmark in children's rights jurisprudence" adding that this ruling by the highest court in the United Kingdom held that parental rights yielded to the child's right to make his or her own decision when of "sufficient understanding and intelligence" seemed to usher in a new age and then mentions that it now appears to have been an incorrect observation. The author further observes that starting in 1992 the courts in England "have beat a hasty retreat" and indicates that there has been a move away from *Gillick*, something which is to be regretted. He calls for a new interpretation which places goals and values at the forefront and less emphasis on knowledge and understanding. However, compare Taylor 2007 *CFLQ* 83-90 who concludes (97) after her discussion of *R (Axon) v Secretary of State for Health* [2006] 2 WLR 1130 Regarding art 8 of the Convention and the impact of the *Human Rights Act* 1998 the court read down the controversial decision of European Court of Human Rights in *Nielsen v Denmark* (Application No 10929/84) (1989) 11 EHRR 175; the court held that *Nielsen* was a narrow decision concerned with restrictions on a child's liberty and place of residence under art 5 of the Convention and not a broad right to parental authority over older children. Drawing on *Gillick* the court held that any art 8 right to parental control exists for the benefit of the child and dwindles with the age and understanding of the child (par [129]). Compare also effect of the *Gillick* decision on South African law 5 4 5 2 *supra*.

advice on sexual matters without parental knowledge where disclosure would injure the child's health; the guidance was unlawful as it excluded parental knowledge to a greater degree than that permitted in *Gillick*; the guidance was unlawful as it failed to respect parental rights protected by art 8 of the European Convention for the Protection of Human Rights and Fundamental freedoms 1950 (Convention). The court found that in general a duty of confidentiality is owed to children who are *Gillick* competent and that the House of Lords had rejected similar reasoning as presented by Ms Axon. The court held<sup>333</sup> that there was an increasing *importance of the rights and autonomy of children* and that in the light of this change in attitudes any retreat from *Gillick* was unacceptable. The court rejected the second contention by following *Gillick* that the guidance should not be construed as a statute but how the medical profession would understand its meaning. (Emphasis added.)

The influence of the *Human Rights Act* cannot be disregarded, as Fortin has shown in her two comments on the aligning of the requirements of the *Children Act* with the provisions of the *Human Rights Act*. There is a clear indication that children are given the opportunity to participate in private law proceedings, the question which remains is are their views given due consideration.<sup>334</sup>

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<sup>333</sup> Pars [76] to [80].

<sup>334</sup> 2004 *KCLJ* 253-272 the author encourages courts and lawyers to start taking the rights of children in all litigation, including private-law disputes more seriously. See also Fortin 2006 *MLR* 299-326 where the author reaches the same conclusion namely that children are given the opportunity to express their views, but the court's consideration of their rights in private-law disputes leaves much to be desired. Freeman 2007 *IJCR* 6-7 is more emphatic. Using *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 FLR 374 to illustrate his concern where the question to be considered was whether parents as well as teachers could exercise their right, as they saw it, to continue the practice of corporal punishment in their Christian schools. Throughout the case it was conceived as a dispute between the State, its right to ban corporal punishment from schools, and the parents and teachers. He argues that children were the objects of concern, not the subjects in their own right. They were not represented; their views were not sought or known. The author refers to Baroness Hale's judgment at 392 which begins poignantly "[t]his is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here or in the courts below to speak on behalf of the children. The battle has been fought on ground selected by adults". Freeman mentions that there was neither a litigation friend to represent the children's rights (to express their views) nor any NGO throughout. The same concern was expressed in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par [53] 787H-788A/B by Sach J that there was no curator *ad litem* representing the interests of the children. Although both the State and the parents were in a position to speak on their behalf, neither was able to speak in their name, see 5 4 4 *supra*.

The main consideration, however, is that although the principle of involving children in family disputes is firmly acknowledged in the United Kingdom, there are still debates about how this should be done and by whom.<sup>335</sup> A CAFCASS<sup>336</sup> report was presented to the courts, but the question remains whether the courts are to receive evidence directly from children.<sup>337</sup> While the High Courts and county courts have the discretion whether or not to see the child in private; it is becoming less and less common to do so.<sup>338</sup>

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<sup>335</sup> Hale 2006 *AJFL* 121-122 where the author adds that one thing the court rarely does is hearing directly from the child and continues that the court is not equipped to do so. The same comment was made in *F v F* 2006 (3) SA 42 (SCA) pars [25] and [26] 54F/G, 54I and 55C that it was not proper for the child to express her views directly to the Supreme Court of Appeal. What is of more concern is the comment of Hale that, after an instruction was issued by Dame Butler-Sloss the previous President of the Family Division setting out ten types of cases in which the public-law system of separate legal representation could be made use of, there was such a dramatic increase that financial constraints required a further direction that only circuit judges and above could make use of orders directing the appointment of separate legal representation for children in disputed family disputes in an attempt to stem the flow from the legal aid and Children and Family Court Advisory and Support Service (CAFCASS) budgets.

<sup>336</sup> Lowe and Douglass *Bromley's Family Law* 484-485 inform that CAFCASS was set up on 1 April 2001 under the *Criminal Justice and Court Services Act 2000* hereafter the *Court Services Act*. The aim was to replace the three separate services concerned with making reports about and/or representing children in family proceedings, the Guardian ad Litem and Reporting Officer (GALRO) Service, the Family Court Welfare Service and the Children's Branch of the Official Solicitor's Department. The key aim of CAFCASS is "putting children first" by supporting children and their families in Family Courts and other settings ensuring that their voices are heard, so decisions can be reached that are in the best interests of children. The principle functions of CAFCASS are set out in s 12(1) of the *Court Services Act* and aim to (a) safeguard and promote the welfare of children; (b) give advice to any court about any application made to it in any such [family] proceedings; (c) make provision for the children to be represented in such proceedings; and (d) provide information, advice and other support for the children and their families.

<sup>337</sup> Hale 2006 *AJFL* 123 mentions that the United Kingdom's legal system has no consistent view about the presence, let alone the participation of the child at the hearing about their future. Because the *Children Act* allows the court to continue in the absence of the child, this results in the court routinely proceeding in the absence of the child. The author mentions that the tone was set in *Re C (A Minor) (Care: Child's Wishes)* [1993] 1 FLR 832 CA where the court commented on the presence of a thirteen-year old girl: "[she] is young for her 13 years and for most of [the] hearing ... she seemed preoccupied, and who can blame her, with her toys and colouring books". Further on the court held that "I would have thought myself, that to sit [in court] for hours, or it may even be days, listening to lawyers debating one's future is not an experience that should in normal circumstances be wished upon any child as young as this".

<sup>338</sup> Hale 2006 *AJFL* 123-125 expresses the view that there may be many advantages in the court being more willing to see the child. The court will see the child as a real person and not an object. Secondly, the court may learn more about the child's wishes and feelings than is possible at second- or third-hand. Thirdly, the child will feel respected. Fourthly, it is an opportunity to help the child understand the rules and finally parents may be reassured that the court has been actively involved and not just rubber-stamped the professional's report. This view, however, also has its down side.

It appears that England and Wales are in a state of transition. There is an awareness of how to involve children more and more in the court's process. However, views remain severely divided about what would be the best way to go about doing this.<sup>339</sup>

A major step in the direction of confirmation of the autonomy of the child was introduced in Scottish system with the *Age of Legal Capacity (Scotland) Act* 1991<sup>340</sup> in which the age of legal capacity was reduced to sixteen years.<sup>341</sup> This new dimension for children in Scottish law heralded new challenges to be faced. However, most of all it confirmed a reality that had been dawning during the latter stages of the twentieth century.

For purposes of the present discussion, reference is made to some of the provisions which impact directly on the participatory rights of children<sup>342</sup> in legal matters affecting them. The landmark decision in *Gillick v West Norfolk and Wisbech Area Health Authority*<sup>343</sup> also had its influence in Scotland.<sup>344</sup>

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<sup>339</sup> The concluding remarks of Hale 2006 *AJFL* 126 read “[i]t is for us, at least as much as for you, to learn lessons from overseas”.

<sup>340</sup> Entered into force on 25 September 1991 and hereafter referred to as the *Age of Legal Capacity (Scotland) Act*.

<sup>341</sup> Edwards and Griffiths *Family Law* 34 correctly refer to the uncertainty created with the full age of majority remaining at eighteen years. As the authors put it “[i]n the eyes of the law they are almost adults but not quite”. Therefore the authors refer to those falling in this ambiguous band between sixteen and eighteen years as “young person” rather than children.

<sup>342</sup> The participatory rights referred to those mentioned in art 12(1) of the CRC. Sutherland “The Convention comes to Scotland” in Cleland and Sutherland *Children's Rights in Scotland* 21 mentions that the ratification of the CRC by the United Kingdom does not make its provisions directly applicable in Scotland, but it is accepted that every attempt will be made to honour Scotland's international obligations.

<sup>343</sup> [1986] 1 AC 112.

<sup>344</sup> S 2(4) of the *Age of Legal Capacity (Scotland) Act* provides for children below the age of sixteen to consent on their own behalf to any surgical, medical or dental procedures where, in the opinion of a qualified medical practitioner, they are capable of understanding the nature and possible consequences of the procedure or treatment. See Edwards and Griffiths *Family Law* 28. The South African Children's Act has a similar provision in s 129. The difference being that the Children's Act does not distinguish between medical and dental treatment. However, the Children's act does distinguish between medical treatment and surgical operations, see discussion 5 4 5 2 *supra*.



A child over the age of twelve years has testamentary capacity including the legal capacity to exercise in writing any power of appointment.<sup>345</sup> A child over the age of twelve years has the legal capacity to consent to the making of an adoption order in relation to that child.<sup>346</sup>

The *Children (Scotland) Act* 1995 brought about some innovations which confirm the participatory rights of the child.<sup>347</sup> Section 11(7) of the Act provides that when the court considers an application for an order relating to parental responsibilities, it must allow the child an opportunity to express his or her views and to have regard to these views.<sup>348</sup> The child may elect to express his or her views on Form 9 which indicates to the child that an action has been raised and provides brief details of what the action is about.<sup>349</sup> The sheriff may also seek to obtain the views of the child by speaking to him or her privately in chambers or at the child-welfare hearing. The sheriff may also request an independent

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<sup>345</sup> S 2(2) of the said Act. For the provisions of s 4 of the Wills Act 70 of 1953 in South Africa, see 4 2 2 7 *supra*.

<sup>346</sup> S 2(3) of the said Act. S 233(1)(c) of the Children's Act in South Africa provides that a child of ten years or younger can consent to his/her adoption, see discussion in 5 4 5 3 *supra*.

<sup>347</sup> S 1(2) of the *Children (Scotland) Act* provides that a "child" refers to a person below the age of sixteen or eighteen years. For purposes of safeguarding and promoting the child's health, development, welfare, direction, maintaining personal relations and direct contact on a regular basis with a child not living with a parent, to act as the child's legal representative the age of the child is regarded as a person below sixteen years. For the purposes of receiving guidance the child is regarded as a person below eighteen years. Edwards in *Children's Rights in a Transitional Society* 39 explains that the *Children (Scotland) Act* contains three key provisions relating to the right of the child to be consulted. The three key provisions to be discussed are contained in ss 6, 11(7) and 16 of the *Children (Scotland) Act*. See also Edwards and Griffiths *Family Law* 91-92. Compare further Mays and Christie "The role of the child welfare hearing in the resolution of child-related disputes in Scotland" 2001 *CFLQ* 159-165 where the authors explain the distinction between children's hearings and child-welfare hearings. Children's hearings are regarded as quasi-criminal in nature and take place as a result of a decision taken by a public official, namely the Reporter to the Children's Panel. The child-welfare hearing occurs in civil law and takes place in private family actions.

<sup>348</sup> S 11(7)(b) of the *Children (Scotland) Act* provides that the court must take the child's age and maturity into account and as far as practicable (i) give the child an opportunity to indicate whether he wishes to express his views; (ii) if the child wishes to express his or her views to give him or her an opportunity to express them. S 11(7)(b)(iii) of the *Children (Scotland) Act* provides that in considering whether or not to make an order, taking account of the child's age and maturity, shall as far as practicable have regard to such views as the child may express. Edwards in *Children's Rights in a Transitional Society* 41-47 explains her concern with the practical implementation of s 11(7). Mays and Christie 2001 *CFLQ* 163-164 share the concerns of Edwards.

<sup>349</sup> This is written in simple language and invites the child to inform the sheriff of his or her views if any, see Mays and Christie 2001 *CFLQ* 163.



professional report, thus obtaining the views of the child through an independent third party.<sup>350</sup>

The benefit of receiving the spoken views of a child seems obvious, but the possibility of children feeling intimidated by court experience remains a reality. Where the sheriff sees the child in private in chambers highlights the fact that such information received does not have the same value as proven *viva voce* evidence. The information received via a professional report effectively distances the child from the court and presents the child's views through the "filter" of the author of the report. Keeping the views of the child confidential in order to safeguard the child may impact on the rules of natural justice.<sup>351</sup>

Edwards explains that there are three governing principles to be considered when listening to the child's voice.<sup>352</sup> Of specific importance is the provision that a child is presumed to be of sufficient age and maturity to form a view for the purposes set out in section 11(7) of the *Children (Scotland) Act*.<sup>353</sup>

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<sup>350</sup> The professional report may be from any professional such as teachers, doctors, etc. The solicitor appointed for the child may also indicate whether the child wishes to express any view and what the view entails. Edwards in *Children's Rights in a Transitional Society* 43-46 and Mays and Christie 2001 *CFLQ* 163 discuss the practical problems that have been identified with the Form 9 procedure which is used such as the Form 9 not coming to the child's attention, the child not being able to understand the contents of the Form 9, suspicion that the Form 9 may be completed by someone other than the child and thereby exerting influence over the child.

<sup>351</sup> These are some of the problems alluded to by Mays and Christie 2001 *CFLQ* 163-164. The authors refer to *McGrath v McGrath* 1999 SLT (Sh Ct) 90 and *Ross v Ross* 1999 GWD 19-863 where in both instances the courts recognised the problems which may arise in reconciling the parties' right to a fair trial with the child's right to express his or her views.

<sup>352</sup> *Children's Rights in a Transitional Society* 40-41 refers to the paramountcy of the child's welfare, the so-called "minimum intervention" requiring the court not to make an order unless it considers it better to do so than to make no order at all, and, most importantly for the present discussion, making allowances for the child's age and maturity when providing the child with the opportunity to indicate whether he or she wishes to express a view; and if such a wish is expressed, to ensure that an opportunity be given to express a view; and the court must have due regard to such views as expressed. Mays and Christie 2001 *CFLQ* 165 contend that the term "due weight", which is attached to the child's views, is vague and the potential conflict between listening to the child's views and securing the child's welfare also presents a problem. The authors further mention that both the *Children (Scotland) Act* and the CRC were designed with the idea of engaging children more fully in the legal process, however the "rules of engagement" are designed by parents, solicitors, clerks and sheriffs who may be reluctant to expose children to the adult arena. However, one has to start somewhere and receiving the views of children is as good a place as any.

<sup>353</sup> S 11(10) provides that "a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view for the purposes both of that paragraph [s

The paramountcy of the child's welfare is also reflected very clearly in the *Children (Scotland) Act*.<sup>354</sup> The child's views must be considered where any matter affecting the child in terms of the Act has to be decided at a children's hearing or by the sheriff, taking the age and maturity of the child into consideration. A child must as far as is practicable be given an opportunity to express whether he or she wishes to disclose any views regarding the matter at hand; where the child decides to reveal a view, an opportunity must be granted to do so; and regard must be had to such views provided.<sup>355</sup> Edwards explains the practical problems facing children in the divorce proceedings of their parents although in theory they are accorded the right to express their views and to have their views considered.<sup>356</sup> The provision in section 6 of the said Act attempts to secure the views of the child in circumstances where the child is affected or may be affected by a major decision.<sup>357</sup> This section takes the participation of children beyond the area of the court room. However, according to Edwards<sup>358</sup> there is reason to doubt the enforcing of any views expressed by the child who is sufficiently mature.<sup>359</sup>

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11(7)(b)] and subsection 9 [nothing in s 11(7)(b) requires a child to be legally represented, if he does not wish to be, in proceedings in the course of which the court implements that paragraph] above”.

<sup>354</sup> S 16(1) of the Act provides that where in terms of the Act a children's hearing decides or a court determines any matter with respect to a child, the welfare of that child (the best interests) throughout his or her childhood shall be the paramount consideration.

<sup>355</sup> Ss 16(2)(a) to (c) of the Act. Edwards *Children's Rights in a Transitional Society* 41 mentions that ss 11(7) and 16 are clearly intended to formally meet the demands of art 12 of the CRC.

<sup>356</sup> In *Children's Rights in a Transitional Society* 43-46 the author explains that there are three sets of problems. In the first instance the form used to inform the child which may not reach the child; secondly whether children will have meaningful opportunity to express their views; thirdly the perceived lack of confidentiality given the fact that the sheriff (judge) must record the views of the child and has the discretion to reveal what the child has communicated to the other parties.

<sup>357</sup> S 6 of the *Children (Scotland) Act* is headed “views of the child” and provides that –  
“(1) A person shall, in reaching any major decision which involves – his fulfilling a parental responsibility ... or his exercising a parental right or giving consent by virtue of that section, have regard so far as practicable to the views (if he wishes to express them) of the ... child concerned, taking account of the child's age and maturity ... a child twelve years of age or more shall be *presumed to be of sufficient age and maturity* to form a view.” (Emphasis added.)

Compare s 31 of the South African Children's Act regarding the involvement of the child in major decisions affecting the child in 5 4 5 3 and 5 4 6 2 1 *supra*.

<sup>358</sup> Edwards in *Children's Rights in a Transitional Society* 49 expresses concern over the enforcing of such “private sphere” provisions. The advisory nature of s 6 is its biggest hurdle because it cannot be monitored or enforced without drastic invasions of family

The Scottish system of children's hearing is regarded as a unique and innovative system.<sup>360</sup> It deals with children under the age of sixteen years who are in need of compulsory measures of supervision. The hearing system is focused on being child-centred; children are obliged to attend and are encouraged to speak.<sup>361</sup> However, the aim of the hearing is the child's welfare and the predicament and not the child's claims or what the child wants, but what the child needs that are uppermost.<sup>362</sup>

#### 6 4 1 1 3 The child's right to legal representation

The focus in this discussion will be on the present situation and how the change brought about by CAF/CASS has influenced the child's entitlement to a legal representative in matters affecting the child.<sup>363</sup> The chief functions of CAF/CASS among others are to "make provision for the children to be represented in such [family] proceedings".<sup>364</sup>

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privacy. See also Edwards and Griffiths *Family Law* 91-93. The provision in the South African Children's Act in s 31(1) has a similar aim, see 5 4 4 *supra*.

<sup>359</sup> Edwards and Griffiths *Family Law* 91 observe that the views of any other person who has parental responsibilities and rights should also be taken account of.

<sup>360</sup> Griffiths, Kendal and Jay "Hearing children in children's hearings" 2000 *CFLQ* 284. See further Hallett and Murray "Children's rights and the Scottish Children's Hearings system" 1999 *IJCR* 31 who refer to the rights of the child in terms of the children's *Hearings Rules* 1996. These include the right to receive notification (rule 6); the right of attendance (rule 45(1)); the right to be informed the grounds for referral, to accept them or deny them, in whole or part (rule 65(4)); the right to be accompanied by a representative (rule 11(1)); the right to be informed of the decision of the hearing and the reasons for it (rule 20(5)); the right to receive the decision and reasons in writing (rule 21(1)(b)); the right of appeal (s 55(1)); the right to be informed of the right to appeal (rule 20(5)(c)) and the right to review of supervision requirements (s 73). See also Edwards and Griffiths *Family Law* 221-245 in general.

<sup>361</sup> Griffiths, Kendal and Jay 2000 *CFLQ* 286-288 mention that there are shortcomings such as the fact that children are not entitled to a copy of the reports about them to be presented at the hearing. Although there is a lack of legal formality and it is therefore less intimidating, children still find their participation inhibited by appearing before three adult strangers and being confronted with intimate details about their lives.

<sup>362</sup> Griffiths, Kendal and Jay 2000 *CFLQ* 296 explain that the safeguarder may sometimes be of assistance with the presentation of the child's views setting out the child's behaviour in context, providing the panel with information about problems the child may be facing at home and the child's preference for a care plan if choices are available.

<sup>363</sup> Lowe and Douglas *Bromley's Family Law* 485 explain that CAF/CASS has as its main aim "putting children first" by supporting children and their families in family courts and other settings ensuring their voices are heard so that decisions can be reached that are in the best interests of children.

<sup>364</sup> S 12(1)(c) of the *Court Services Act*.

As is the case with the participatory rights of children, there is a difference in the legal representation of a child in private-law proceedings and public-law proceedings. In private-law proceedings children are not normally made parties to the proceedings and therefore will not be separately legally represented.<sup>365</sup> In public-law proceedings the child is a party to the proceedings and is usually represented by a children's guardian who in turn may appoint a legal representative.<sup>366</sup>

A "children's guardian" is to be appointed in terms of the *Children Act* in all "specified proceedings"<sup>367</sup> to safeguard the child's interests, unless the court is

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<sup>365</sup> Hale 2006 *AJFL* 120 explains that where the state intervenes in the family in the interests of the child, the child is automatically a party to the proceedings and is usually represented by a specialist social worker (known as a guardian) and her own specialist lawyer. In disputes between the parents or other family members of a child, the same arrangements may be made for children who are involved in the disputes, but this is rare. Mason "Representation of children in England: Protecting children in child protection proceedings" 2000 *FLQ* 492 makes a valid point when she says that the practice of representation rather reflects concern with children's welfare (and therefore is not child-centred). The solicitors themselves are concerned about the child's welfare and that children should not exercise their rights (to legal representation) to the detriment of their welfare and therefore are unwilling to disrupt their close-working relationship with the guardian *ad litem* in order to argue the child's views.

<sup>366</sup> The distinction between private law and public law is one of the concerns that Hale 2006 *AJFL* 123 has when she mentions that the public law system of separate representation is altogether more elaborate and expensive, therefore it is not often used in private law cases.

<sup>367</sup> S 41(6) of the *Children Act* define "specified proceedings" as any proceedings –

- (a) on an application for a care or supervision order;
- (b) in which the court has given a direction under section 37(1) and has made, or is considering whether to make, an interim care order;
- (c) on an application for the discharge of a care order or the variation or discharge of a supervision order;
- (d) on an application under section 39(4);
- (e) in which the court is considering whether to make a residence order with respect to a child who is the subject of a care order;
- (f) with respect to contact between a child who is the subject of a care order and any other person;
- (g) under Part V;
- (h) on an appeal against –
  - (i) the making of, or refusal to make, a care order, supervision order or any order under section 34;
  - (ii) the making of, or refusal to make, a residence order with respect to a child who is the subject of a care order; or
  - (iii) the variation or discharge, or refusal of an application to vary or discharge, an order of a kind mentioned in subparagraph (i) or (ii);
  - (iv) the refusal of an application under section 39(4); or
  - (v) the making of, or refusal to make, an order under Part V; or

[(hh) on an application for the making or revocation of a placement order (within the meaning of section 21 of the Adoption and Children Act 2002);]

satisfied that it not necessary to do so.<sup>368</sup> Some of the duties of the children's guardian is to advise on whether the child is of sufficient understanding for any purpose including the child's refusal to submit to a medical or psychiatric examination or other assessment that the court has the power to direct or order. If a legal representative has not already been appointed, the children's guardian is required to appoint a legal representative to act for the child.<sup>369</sup>

In the Scottish legal system the children's common-law right to acquire legal representation in civil matters without the consent of their parent or guardian flowed from four situations, namely where there was no guardian, where the guardian was unable to act, where there was conflict of interests, or the guardian refused to represent the children.<sup>370</sup> In these situations a curator *ad litem* would be appointed by the court to safeguard the interests of the child.

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(i) which are specified for the time being for purposes of this section, by rules of court.

[(6A) The proceedings which may be specified under subsection 6(i) include (for example proceedings for the making, varying or discharging of a section 8 order.)]

<sup>368</sup> Masson "Case commentary Re K (A Child) (Secure Accommodation Order: Right to Liberty) and Re C (Secure Accommodation Order: Representation) Securing human rights for children and young people in secure accommodation" 2002 *CFLQ* 87 comments that children are parties to secure accommodation proceedings and have a right to state-funded legal representation. However, children's opportunities to participate may be limited because where the child is represented by a children's guardian or a solicitor the court may direct that proceedings should take place in the absence of the child if the court considers this to be in the child's interests.

<sup>369</sup> Lowe and Douglas *Bromley's Family Law* 494 mention that if the guardian is an Officer of the Service authorised to conduct litigation and intends to conduct the proceedings on the child's behalf then a legal representative will not be appointed. The authors *op cit* 497 refer to the "tandem model" explained by the court in *Mabon v Mabon* [2005] Fam 366 [25] as "the court appoints a guardian ... who will almost invariably have a social work qualification and a very wide experience of family proceedings. He then instructs a specialist solicitor who, in turn, usually instructs a specialist family barrister". Hale 2006 *AJFL* 125 mentions that the rules provide for an older child (being of sufficient understanding and maturity) whose views differ from that of the guardian to be able to instruct his or her own lawyer. Referring to *Mabon v Mabon supra* where the court held that it should "reflect the extent to which, in the 21<sup>st</sup> century, there is a keener appreciation of the autonomy of the child and the child's consequential right to participate in the decision-making processes that fundamentally affects his family life". This procedure appears to be almost similar to the Legal Aid system in South Africa where a curator *ad litem* may be appointed by the court to safeguard the interests of the child and an independent legal representative is appointed to articulate the views and wishes of the child if the child is of such age, maturity and stage of development. For a distinction between legal representative and curator *ad litem* in South African law, see 5 4 6 2 3 *supra*.

<sup>370</sup> Edwards in *Children's Rights in a Transitional Society* 51. The requirements are similar to the South African common law. Compare Davel in *Commentary on the Children's Act 2-24* and 5 4 6 2 3 *supra*.



The children's right to legal representation is inextricably tied up with their right to participation in legal proceedings.<sup>371</sup> This right has been acknowledged in Scotland and is reflected in the *Children (Scotland) Act* 1995 which provides for the appointment of a safeguarder.<sup>372</sup> Such an appointment may be considered in children's hearings or a court in child protection cases.<sup>373</sup>

The *Age of Legal Capacity (Scotland) Act* provides that children under the age of sixteen have the legal capacity to appoint their own legal representatives<sup>374</sup> and also have the legal capacity to sue or to defend in any civil proceedings.<sup>375</sup> Roche<sup>376</sup> refers to the findings of Sawyer<sup>377</sup> in her research how solicitors assess the competence of children to participate in family proceedings and contrasts this with the Scottish system referred to above.

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<sup>371</sup> Edwards in *Children's Rights in a Transitional Society* 50 mentions that legal representation is inherently crucial for the implementation of the child's voice in legal proceedings in terms of art 12(2) of the CRC, see discussion of art 12 of the CRC in 5.2.2.1 *supra*. The author refers to art 12(2) of the CRC where mention is made of the child's right to express his or her view directly or through a representative, which need not be a legal representative. However, the question may be asked whether it serves the best interests of a child to represent a child in court without being legally qualified to do so.

<sup>372</sup> *Children (Scotland) Act* (s 41(1)). Edwards in *Children's Rights in a Transitional Society* 51 equates the safeguarder with a curator *ad litem* because they both aim to safeguard or protect the interests of child and not to present the views of the child.

<sup>373</sup> Edwards *loc cit*.

<sup>374</sup> S 2(4A) of the *Age of Legal Capacity (Scotland) Act* of 1991 provides that "a person under the age of sixteen years shall have the legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; ... a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding". Edwards and Griffiths *Family Law* 32 mention that children younger than twelve years may be able to prove that they do possess the ability to understand what is required of them to appoint a legal representative and make such an appointment. See also Edwards in *Children's Rights in a Transitional Society* 52.

<sup>375</sup> S 2(4B) of the Act. See further Edwards and Griffiths *Family Law* 30-31 where the authors mention that it may be that the parent does not condone the wishes of the child to raise an action or the child may want to sue his or her parent. It cannot be assumed as in the past that the parents are always the best guardians of the child's interests. Furthermore there is the increasing breakdown of the traditional family and the child is faced with more than one option as to which household the child should live in and what goes with such decision. The possibility of fostering or placement for adoption is another important factor. Then children may also want to go to court to vindicate their choices and they may wish to have parental rights removed from their biological parents and transferred to another relative or carer. Children may also wish to question decisions about their day-to-day care and aspects about their upbringing, matters like education, health care, religion and/or contact with their non-custodian parent.

<sup>376</sup> *The New Handbook of Children's Rights* 69.

<sup>377</sup> *The Rise and Fall of the Third Party Solicitors: Assessments of the Competence of Children to Participate in Family Proceedings* (1995) 95-96.



The Legal Aid Board of Scotland now accepts that children over the age of twelve may apply for civil-legal aid or legal-aid advice and assistance on condition that the solicitor instructed confirms that the child does indeed have a general understanding of what it means to instruct a solicitor.<sup>378</sup> A child younger than twelve years may also apply for legal aid, but the Legal Aid Board reserves the right to query the confirmation letter, for example should the Board be of the view that the child is unreasonably young.<sup>379</sup>

#### 6 4 1 2 Conclusion

The aim of the comparison is to determine where South Africa can incorporate practical lessons learnt from England and Scotland, for example the determination of a “Gillick competent” child as point of departure for the importance of a child’s view to be taken into consideration. Scotland has employed a presumption of sufficient age and maturity for a child from the age of twelve years in reaching any major decision. This may serve as a guide when the provisions of section 31(1) of the South African Children’s Act are employed to assist the court in evaluating the views of a child who elects to express a view regarding a major decision affecting the child.

The United Kingdom with the *Children Act* 1989 has to a certain degree complied with the provisions of the Convention on the Rights of the Child as far as the participatory rights of children are concerned; Scotland even more so with the innovative provisions of the *Children (Scotland) Act* 1995. However, South Africa has with the provision of section 10 of the Children’s Act

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<sup>378</sup> Edwards and Griffiths *Family Law* 33 refer to this confirmation as the “s 2 (4A) test”.

<sup>379</sup> Edwards and Griffiths *loc cit.* Edwards in *Children’s Rights in a Transitional Society* 52 questions who should evaluate the child’s general understanding of what it means to instruct a solicitor. The Act is silent on this matter and the practical implication may be that the empowerment in theory may suffer at the hands of reality. The South African situation does not appear to be any better with the present wording of s 55 of the Children’s Act which subjects the decision for granting legal aid to an administrative process, see Gallinetti *Commentary on the Children’s Act* 4-22 and 5 4 6 2 2 *supra*.

succeeded in introducing the participatory rights of the child as intended in the Convention on the Rights of the Child.<sup>380</sup>

The system in the United Kingdom advocating participation of children is not flawless. Some commentators refer to the system as extremely variable,<sup>381</sup> others express concern that direct participation of the child poses some difficulties for the family-justice system.<sup>382</sup> South Africa may experience the same difficulties, but the reality of the child's right to participation cannot be ignored.<sup>383</sup>

The *Children Act* 1989 has brought with it significant changes to the position of the child as litigant in family proceedings.<sup>384</sup> The *Age of Legal Capacity* (Scotland) Act 1991 provides that a child of sixteen years has the capacity to bring or defend any civil proceedings.<sup>385</sup> Although the South African equivalent in the Children's Act<sup>386</sup> allows every child access to a court, the common-law rule regarding a child's capacity to litigate still applies in South Africa.<sup>387</sup>

The directives contained in the checklist as set out in section 1(3) of the *Children Act* have become accepted and applied much wider than required.<sup>388</sup>

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<sup>380</sup> Arts 12(1) and 12(2) refer to a child having the right to "express views freely in all matters affecting the child" and to express his/her views in "any judicial ... proceedings affecting the child".

<sup>381</sup> Fortin *Children's Rights* 242.

<sup>382</sup> Lowe and Douglas *Bromley's Family Law* 505 ask whether it is necessary for a child to participate fully in the proceedings as if he/she were an adult. In *Mabon v Mabon* [2005] Fam 366 mentions that courts must accept that in the case of articulate teenagers the right of participation outweighs the paternalistic judgment of welfare.

<sup>383</sup> As was the case in *Soller v G* 2003 (5) SA 430 (W) 443D par [44] 443I-443J par [47] where the child, a boy of fifteen years, clearly expressed his preference to stay with his father. The court held at 446B/C pars [56] and [57] that, although the child's expressed wish to live with a parent was usually only a persuasive factor, it had in the present case become the determinant factor.

<sup>384</sup> Bainham *Children: The Modern Law* 580; Lowe and Douglas *Bromley's Family Law* 503-505.

<sup>385</sup> S 2(4B). This provision is wider than the English equivalent in *Children Act* 1989; see Edwards in *Children's Rights in a Transitional Society* 52.

<sup>386</sup> S 14, see discussion in 5 4 5 3 and 5 4 5 4 *supra*.

<sup>387</sup> This does not imply that every child has the capacity to litigate. See discussion of South African law in 4 4 1 3 and 4 4 2 3 *supra*.

<sup>388</sup> Nothing prevents the courts from considering the factors mentioned in s 1(3) of the Act in other proceedings if they so choose. See further Lowe and Douglas *Bromley's Family Law* 414 who refer to the application of the checklist in contested parental responsibility orders

In South Africa the best interests standard<sup>389</sup> has a wider application than found in England and Scotland.<sup>390</sup> Lowe and Douglas<sup>391</sup> comment that critics of the application of the welfare principle differ as to the efficacy of its application and conclude, with reference to Eekelaar<sup>392</sup> who poignantly declares that with due allowance made for the issues of children's competency and special vulnerability, that children's rights "should be respected just as adults' rights should be; certainly no less, but also no more". Fortin<sup>393</sup> in her re-assessment of the welfare principle unequivocally mentions that children are vital players in disputes involving their upbringing. Children's positions can only be strengthened if their rights are placed alongside those of their parents when their parents' rights are balanced against each other. This is illustrated in the South African case law.<sup>394</sup>

The participatory rights of children have since the advent of the *Gillick* decision<sup>395</sup> remained the focus of judicial interpretation<sup>396</sup> and academic

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in terms of s 4 of the *Children Act*. The same argument applies to s 5 applications for appointment of a guardian for the child. Lowe and Douglas *Bromley's Family Law* 470 argue that it may be prudent to do so. See eg *Re B (Change of Surname)* [1996] 1 FLR 791 CA 793 where the court held that the checklist remained a most useful aid of factors that may impinge on the child's welfare as well as *Payne v Payne* [2001] 1 FLR 1052 par [30]. S 1(4) of the *Children Act* directs the courts to take into consideration the checklist in contested s 8 applications relating to residence, contact, prohibited steps orders and specific issue orders as well as all proceedings under part IV of the Act relating to care and supervision orders. However, Fortin *Children's Rights* 248 expresses concern that case law reflects little judicial clarity over the extent to which courts should take account of children's wishes.

<sup>389</sup> Set out in s 7 of the Children's Act provides a set guidance, albeit not open-ended, for the courts to use.

<sup>390</sup> S 9 of the Children's Act provides that the paramountcy principle apply to all matters concerning the care, protection and well-being of a child.

<sup>391</sup> *Bromley's Family Law* 472.

<sup>392</sup> "Beyond the welfare principle" [2002] *CFLQ* 249.

<sup>393</sup> *Children's Rights* 251.

<sup>394</sup> A good example is found in *Soller v G* 2003 (5) SA 430 (W) and *HG v CG* 2010 (3) SA 352 (ECP) discussed in 5 4 5 1 *supra*.

<sup>395</sup> [1986] AC 112.

<sup>396</sup> Eg *Re P (A Minor)(Education)* [1992] 1 FLR 316 321 where Butler-Sloss LJ commented that the courts have over the last few years "become increasingly aware of the importance of listening to the views of older children and taking into account what children say, not necessarily agreeing with what they want nor, indeed, doing what they want, but paying proper respect to older children who are of an age and the maturity to make their minds up as to what they think is best for them, bearing in mind that older children very often have an appreciation of their own situation which is worthy of consideration by, and the respect of, the adults, and particularly including the courts". Further examples found in *Re R* [1992] 1

debate.<sup>397</sup> This challenge in balancing the views of children with their best interests has been intensified with the promulgation of the *Human Rights Act of 1998*.<sup>398</sup>

The introduction of the *Adoption and Children Act 2002* did not utilise the opportunity to align the participation of children regarding their adoption with that of the children in Scotland.<sup>399</sup> *The Adoption (Scotland) Act 1978* requires a child of twelve years or older to consent to his or her adoption.<sup>400</sup> South Africa has set the age for a child's consent to his or her adoption at ten years.<sup>401</sup> In following a less child-centred route the *Adoption (Scotland) Act* provides that a child over the age of twelve years is presumed to be of sufficient maturity to form a view.<sup>402</sup>

The main concern remains the involvement of children in private disputes between parents and other family members. Scotland has taken cognisance of the potential problems in practice relating to children involved in family-law matters and remains committed to reaching a child-centred solution.<sup>403</sup> South Africa appears to have aligned itself more with the provisions of the Convention on the Rights of the Child than is the case with the United Kingdom and

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FLR 190 199; *Re W* [1992] 4 All ER 627 634; *Re W* [1993] Fam 64 81; *Re C* [1997] 2 FLR 180 195.

<sup>397</sup> Eg Fortin 2004 *KCLJ* 253-272; Freeman 2005 *IJCR* 201-217; Taylor 2007 *CFLQ* 81-97.

<sup>398</sup> See eg Fortin 2004 *KCLJ* 253-272, 2006 *MLR* 299-326; Freeman 2005 *IJCR* 201-217, 2007 *IJCR* 5-23.

<sup>399</sup> A proposal was made which formed part of the draft *Adoption Bill* which set out the participation of the child in clause 41(7)(a) in that an adoption order could not be made unless the child "freely and with full understanding of what is involved, consents unconditionally"; see Piper and Miakishev "A child's right to veto in England and Wales – Another welfare ploy?" 2003 *CFLQ* 58. Further at 60 the authors refer to the concern of the British Association of Social Workers who argued that a child should be a party to the proceedings and a child with sufficient understanding should have the right to refuse consent to adoption.

<sup>400</sup> Piper and Miakishev 2003 *CFLQ* 57 refer to this as one of several exceptions in Scottish law to the legal incapacity of children under the age of sixteen years. The *Adoption and Children Act 2002* does not require a child to consent to his/her adoption, see Bainham *Children: The Modern Law* 288; Lowe and Douglas *Bromley's Family Law* 852;

<sup>401</sup> S 233(1)(c) of the *Children's Act* or less than ten years if the child is of such age, maturity and stage of development to understand the implications of such consent (s 233(1)(c)(ii)), see discussion in 5 4 5 3 *supra*.

<sup>402</sup> The *Children (Scotland) Act* included a similar provision in s 6(1) of the Act.

<sup>403</sup> When compared with the requirements set out in art 12 of the CRC, Scotland has complied with those provisions.

Scotland.<sup>404</sup> There has been a concerted effort by the Scottish judges to extend the participation of children by receiving them in the privacy of chambers.<sup>405</sup>

The steps taken in England and Wales to ensure legal representation for children have further enhanced the participatory rights of children.<sup>406</sup> There is every indication that CAFCASS intends to become more involved in servicing the changes brought about by the reforms introduced in the *Criminal Justice and Court Services Act* of 2001. However, the reality of financial constraints, even in developed countries, on the availability of legal aid for children cannot be ignored. This is something that should be borne in mind when children as the most vulnerable section of society are involved in litigation.

The closing remarks of Hale in her presentation at a conference convened by the Centre for Children and Young People at Southern Cross University Australia<sup>407</sup> is apposite “we are in a state of transition at present ... we are beginning to think of ways of involving the children more in the court’s process ... these views remain sharply divided about the best ways of doing this. It is for us, at least as much as for you, to learn lessons from overseas”.

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<sup>404</sup> When comparing ss 10 and 14 of the Children’s Act with its counterparts in the United Kingdom and Scotland.

<sup>405</sup> Raitt “Hearing children in family law proceedings: Can judges make a difference?” 2007 *CFLQ* 224 concludes that judicial interviews offer children a different way of being heard and have the potential to enhance their experience in participation in family-law matters affecting them. Fortin *Children’s Rights* 240 mentions that at one stage this practice appeared to be very common and favoured by many. It appears to be more acceptable in public law proceedings than private law proceedings and accepted by the senior judiciary, but doubted whether magistrates should do so. This form of child participation is not foreign to South Africa, see eg *McCall v McCall* 1994 (3) SA 210 (C) 207H-I; *Soller v G* 2003 (5) SA 430 (W) and *R v H* 2005 (6) SA 535 (C) par [30]. The emphasis on informality in South Africa’s Children’s Act would seem to make allowance for this form of participation in children’s court proceedings.

<sup>406</sup> Fortin *Children’s Rights* 223 refers to the comment of Hale LJ *Re A (contact: separate representation)* [2001] 1 FLR 715 par [31] that in difficult cases, children ought to be separately represented more often. The sentiment was echoed by Butler-Sloss P in the same case and mentioned that the new need to comply with the ECHR might provoke an increased use of guardians in private-law cases and with the establishment of CAFCASS it would be easier for children to be represented in suitable cases.

<sup>407</sup> 2006 *AJFL* 119-126.

## 6 4 2 New Zealand

### 6 4 2 1 Introduction

New Zealand ratified the Convention on the Rights of the Child in 1993<sup>408</sup> at which stage New Zealand had already embarked on rationalising legislation relating to the protection of children with the *Children, Young Persons, and Their Families Act* of 1989.<sup>409</sup> This Act has been referred to as incorporating the most far-reaching changes to the New Zealand children and young person's legislation since the *Child Welfare Act* of 1925.<sup>410</sup> Following on the *Children Act*, the legislature initiated further changes with the *Care of Children Act* 2004<sup>411</sup> which repealed the *Guardianship Act* 1968.<sup>412</sup>

The *Children, Young Persons, and Their Families Act* and the *Care of Children Act* mentioned will be discussed below highlighting the best interests of the child, the participatory rights of the child and the child's right to legal representation. The aim is to determine to what extent the two Acts referred to above comply with the provisions set out in articles 3 and 12 of the Convention on the Rights of the Child and with the provisions found in the Children's Act of South Africa.

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<sup>408</sup> 13 March; see Henaghan "New Zealand and the United Nations Convention on the Right of the Child: A lack of balance" in Freeman *Children's Rights: A Comparative Perspective* 168.

<sup>409</sup> The formation of the *Children, Young Persons and Their Families Act* 24 of 1989 entered into force on 1 November 1989 after six years of discussion and deliberation; see Tapp "Family group conferences and the Children, Young Persons and Their Families Act 1989: An ineffective statute?" 1990 *NZRLR* 82.

<sup>410</sup> Robinson "An overview of child protection measures in New Zealand with specific reference to the family group conference" 1996 *Stell LR* 314.

<sup>411</sup> 90 of 2004 which entered into force on 1 July 2005 and hereafter referred to as the *Care of Children Act*.

<sup>412</sup> S 153 of the *Care of Children Act*.



#### 6 4 2 2 The *Children, Young Persons and Their Families Act*<sup>413</sup>

The objective<sup>414</sup> of the *Children, Young Persons and Their Families Act* is set out in the preamble to the Act and among others focuses on the advance of the well-being of families and children and young persons as members of families, *whanau, hapu, iwi* and family groups. Furthermore, to make provision for matters relating to children and young persons who are in need of care or protection or who have offended against the law to be resolved, wherever possible, by their own family, *whanau, hapu, iwi* or family group.<sup>415</sup>

General principles contained in the *Children Act* serve as a guide in determining the welfare and interests of children in all matters relating to the administration or application of the Act.<sup>416</sup> In addition to the general principles contained in section 5 of the *Children Act* there are also specific principles in Part 2 of the Act which deal with the protection of children and young persons.<sup>417</sup> Boshier<sup>418</sup>

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<sup>413</sup> Reference to the said *Children, Young Persons and Their Families Act* 1989 will be the *Children Act* unless specifically required otherwise.

<sup>414</sup> S 4 sets out in detail the objectives of the Act and should be read in conjunction with the long title of the Act.

<sup>415</sup> See Robinson 1996 *Stell LR* 316 who emphasises the *well-being* of families and children as being the overriding objective of the Act as reflected in s 4 of the Act. (Emphasis is that of the author.)

<sup>416</sup> S 5 of the *Children Act* refers to the principles to be applied in the exercise of powers conferred by the Act and provide that subject to s 6, any court which, or person who, exercises any power conferred by or under the Act shall be guided by principles which include (a) the principle that, wherever possible, a child's or young person's family, *whanau, hapu, iwi* and family group should participate in the making of decisions affecting that child or young person, and according that, wherever possible, regard should be had to views of that family, *whanau, hapu, iwi* and family group; (b) the principle that, wherever possible, the relationship between the child or young person and his or her family, *whanau, hapu, iwi* and family group should be maintained and strengthened; (c) the principle that consideration must always be given to how a decision affecting a child or young person will affect the welfare of that child or young person and the stability of that child's or young person's family, *whanau, hapu, iwi* and family group; (d) the principle that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity and culture of the child or young person; (e) the principle that endeavours should be made to obtain the support of the parents or guardians or other persons having the care of a child or young person and the child or young person him or herself to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under the Act; (f) the principle that decisions affecting a child or young person should, whenever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.

<sup>417</sup> These principles are set out in detail in s 13 of the Act and are subject to the provisions that are contained in ss 5 and 6 of the Act. The principles in s 13 are also applicable to Part 3

observes that a feature of the Act is the importance it places on the protection of children and young people by securing their right to be heard and to be properly represented.

The *Children Act* has separate definitions for a child and young person. Section 2(1) of the Act defines a “child” as a boy or girl under the age of fourteen years and a “young person” as a boy or girl over the age of fourteen years, but under seventeen years, but does not include any person who is or has been married or is or has been a partner in a civil union.<sup>419</sup> The *Adoption Act* 1955 defines a “child” as a person who is under the age of twenty years<sup>420</sup> and includes any person in respect of whom an interim order<sup>421</sup> is in force, notwithstanding that the person has attained that age.

One of the innovations of the *Children Act* is family-group conferencing confirming the overall emphasis of the Act on child and family participation.<sup>422</sup> The importance of involving the family and the child in a practical non-

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(ss 150 to 270 of the Act), Part 3A (ss 207A to 207ZO of the Act) and ss 341 to 350 of the Act. The importance of the principles is self-evident.

<sup>418</sup> “Can We Protect Children and Protect Their Rights? Letting Children and Youth Speak Out for Themselves” paper presented at the 2001 World Congress on Family Law and the Rights of Children and Youth, Bath, 21 September 2001 at 1.

<sup>419</sup> The two definitions are not exclusive and s 8 of the *Care of Children Act* defines a “child” as a person under the age of eighteen years. The latter definition corresponds with the definition of a “child” found in art 1 of the CRC. Part 3A of the *Children Act* in s 207A refers to a “young person” as a person who is seventeen years old or older and to whom a guardianship order made under s 110 applies. S2 of the *Adoption Act* 1955 defines a “child” as a person under the age of twenty years. It appears that there is no uniform definition for “child” in New Zealand child-related legislation.

<sup>420</sup> S 2 of the Act. This section was amended by s 6 of the *Age of Majority Act* substituting the expression “20” for the word “twenty-one”. This definition of a “child” does not comply with the provisions of art 1 of the CRC. South Africa has a uniform definition for “child” in s 1 of the Children’s Act and s 28(3) of the Constitution.

<sup>421</sup> Referred to in s 5 of the *Adoption Act*.

<sup>422</sup> S 22(1)(a)(i) of the Act requires the attendance of the child or young person at the family-group conference unless such attendance would not be in the best interests of that child or young person to attend or for any other reason be undesirable for that child or young person to attend. S 22(1)(a)(ii) provides that if the child or young person would be unable, by reason of their age or level of maturity, to understand the proceedings then their attendance would not be required. For a general discussion on family-group conferences see Tapp 1990 *NZRLR* 82-88; Metge and Durie-Hall “Kua Tutū Te Puehu, Kia Mau: Māori aspirations and family law” in Henaghan and Atkin *Family Law Policy in New Zealand* 74-79; Robinson 1996 *Stell LR* 322-327.

adversarial format of decision-making is in line with the Maori model of extended family decision-making.<sup>423</sup>

#### 6 4 2 2 1 The best interests of the child

The *Children Act* specifically provides that the welfare and interests of children or young persons shall be the deciding factor should a conflict arise between the principles and interests of children and young persons and their family members.<sup>424</sup> The emphasis on the paramountcy of the child's welfare and the best interests of the child is maintained in the *Care of Children Act*.<sup>425</sup>

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<sup>423</sup> Metge and Durie-Hall *Family Law Policy in New Zealand* 72-73 highlight the importance of the forum and not the format when they comment "[a]n outstanding feature of the Children Young Persons and Their Families Act is the institution of Family Group Conferences as a central part of both the care and protection and the Youth Justice processes". Further on they mention that in the relatively short time since the Act was passed, family-group conferences "have come to be accepted as an important addition to the Family Court system by both Māori and non-Māori. In general, they have been effective in finding solutions to the problems of at risk children by mobilizing the resources of the wider family". See Boshier paper presented at Bath in 2001 at 2 that one of the hallmarks of the *Children Act* has been its recognition of the indigenous peoples of New Zealand, the Maori, by importing many aspects of important Maori culture into the Act. The words *whanau*, *hapu* and *iwi* are expressions which reflect a child's family and or tribal links. Those are critical in terms of the Act. In order to accommodate the competing consequences of paternalism (favouring intervention by the state) and individualism (favouring emphasis, for whatever reason, on the right to be left alone), the Act introduces a family-group conference procedure so that most family members connected with the child could meet and discuss issues before drastic action ensued. See also Boshier "Safeguarding Children's Rights in Child Protection: The Use of Family Group Conferencing in the Family Court" paper presented at the 5<sup>th</sup> World Congress on Family Law and Children's Rights, Halifax, Nova Scotia, Canada 24 August 2009. See further SALC Issue Paper 13 par 10 3 4 p 159 where mention is made of the expansion of family-group conferencing within care and protection systems in various countries in the world, including Australia, Canada, USA and England. S 70 of the South African Children's Act has included family-group conferences as one of the forums aimed at settling matters out of court, see 5 4 4 *supra*.

<sup>424</sup> S 6 of the Act provides that, with the exclusion of Parts 4 and 5 and ss 351 to 360, in all matters relating to the administration or application of the *Children Act* the welfare and interests of the child or young person shall be the first and paramount consideration with regard to the principles set out in ss 5 and 13 of the Act. Henaghan "Legally rearranging families" in Henaghan and Atkin *Family Law Policy in New Zealand* 105 refers to art 3 of the CRC which provides that in all actions concerning children whether undertaken by public or private social-welfare institutions, courts of law, administrative authorities or legislative bodies "the best interests of the child shall be a primary consideration" and agrees that "first and paramount" is arguably less exclusive than "best interests". See also Robinson 1996 *Stell LR* 318 who explains that section 6 provides that the welfare and interests of the child shall be the deciding factor when a conflict of principles and interests arises.

<sup>425</sup> S 4 of the *Care of Children Act* of 2004.

## 6 4 2 2 2 The participatory rights of the child

There are a number of provisions in the *Children Act* that highlight the child's participatory rights.<sup>426</sup> Children and young persons may attend a family-group conference unless it would not be in the best interests of the child and further subject to some exceptions.<sup>427</sup>

The participatory rights of the child are further highlighted by care agreements which the parents of children and social workers can enter into allowing children to be placed in the care of someone else and overseen by the state for a period not exceeding 28 days at a time.<sup>428</sup> However, where the placement is for a longer period no agreement for such placement can be entered into without the written consent of a child of twelve years or a young person.<sup>429</sup> Added to this, the wishes of children affected by such agreements must be obtained.<sup>430</sup>

There are various orders<sup>431</sup> which the court is entitled to make in terms of the *Children Act*. Allowing the child a say in the variation or discharge of the various

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<sup>426</sup> Some of the objectives specified in s 4 emphasise the participatory rights of the child such as 4(a)(ii) of the Act as establishing and promoting, and assisting in the establishment and promotion, of services and facilities within the community that will advance the well-being of children, young persons, and their families and family groups and that are accessible to and understood by children and young persons and their families and family groups; s 4(c), assisting children and young persons where the relationship between a child or young person and his or her parents, family, *whanau*, *hapu*, *iwi* or family group is disrupted; s 4(d), assisting children and young persons in order to prevent them from suffering harm, ill-treatment, abuse, neglect and deprivation; s 4(e), providing for the protection of children and young persons from harm, ill-treatment, abuse, neglect and deprivation and s 4(g) which encourages the promotion of co-operation between organisations engaged in providing services for the benefit of children and young persons and their families and family groups.

<sup>427</sup> Ss 22(1)(a)(i) and (ii) of the Act. See n 421 *supra*.

<sup>428</sup> S 139 of the Act.

<sup>429</sup> S 144(1) of the Act provides that no agreement shall be made under s 140 or s 142 in respect of a child of or over twelve years or a young person unless that child or young person consents in writing to the making of such an agreement subject to the child or young person being unable by reason of disability to understand the nature of the agreement.

<sup>430</sup> S 144(3) of the Act.

<sup>431</sup> The court may make the following orders affecting a child or young person: custody order in terms of s 78; order requiring the child or young person to receive counselling in terms of s 83(1)(c); service orders in terms of s 86; restraining orders in terms of ss 87 or 88; support orders in terms of s 91; custody orders in terms of s 101; guardianship orders in terms of s 110; access and exercise of other rights in terms of s 121.

orders is further confirmation of the participatory rights of the child.<sup>432</sup> Children and young persons may be present during the hearing of any proceedings in a Family Court under Parts 2 and 3A relating to children and young persons,<sup>433</sup> although many hearings concerning children and young persons take place in their absence.<sup>434</sup>

#### 6 4 2 2 3 The child's right to legal representation

The child or young person is allowed legal representation at the family-group conferences.<sup>435</sup> Boshier, however, argues that a shortcoming in the *Children Act* is the legal representation for children at family-group conferences which is only available once the proceedings have been filed in court. Therefore conferences called to consider care and protection issues before court action is initiated, will not have state-funded lawyers attending and representing children or young persons.<sup>436</sup> The South African Children's Act provides for legal representation in a matter before the court.<sup>437</sup>

Children and young persons appearing before a Family Court or a Youth Court are entitled to be legally represented<sup>438</sup> and such lawyers appointed are to be

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<sup>432</sup> S 125 of the Act provides that a child or young person or any barrister or solicitor of the child or young person may bring an application for the variation or discharge of an order referred to in s 125(a) custody orders pending the determination of any proceedings; s 125(b) order in terms of s 83(1)(c) requiring any person to receive counselling; s 125(1)(c) order made under s 84(1)(b) directing payment of reparation for any emotional harm or the loss of, or damage to property; s 125(d) any services order or interim services order made under s 86 or s 86A; s 125(e) any restraining order or interim order made under ss 87 or 88; s 125(f) any custody order or interim order made under s 101; s 125(g) any guardianship order made under s 110; and s 125(h) any order made under s 121 granting access to or conferring rights in respect of any child or young person.

<sup>433</sup> S 166(1)(c) of the Act.

<sup>434</sup> Boshier Paper presented at Bath in 2001 at 4.

<sup>435</sup> S 22(1)(h) of the Act.

<sup>436</sup> Paper presented at Bath in 2001 at 4.

<sup>437</sup> In pre-hearing conferences (s 69), family-group conferences (s 70) and other lay forums (ss 49 and 71) the court orders referral for such conferences or to such lay forums and therefore complies with the provision of s 55.

<sup>438</sup> S 159(1) of the Act provides that where a child or a young person who is the subject of any proceedings under Part 2 or Part 3A is not represented by a barrister or solicitor, the court or registrar of the court must appoint a barrister or solicitor to represent the child or young person (a) in those proceedings; (b) for any other specified purpose (including in relation to other proceedings under this Act or any other Act) considered desirable.

suitable by way of personality and training and must be in a position to talk over the issues with children and ascertain what their views are.<sup>439</sup> Boshier validly expresses some concern that presently the *Children Act* does not appear to permit legal representation for children and young persons who enter into agreements affecting them unless the proceedings are actually issued in a Family Court.<sup>440</sup>

#### 6 4 3 2 The *Care of Children Act* of 2004

The importance of the welfare and interest of the child is further illustrated in the *Care of Children Act* which repealed the *Guardianship Act* 1968<sup>441</sup> and provides new arrangements for the guardianship and care of children. In terms of the *Care of Children Act*, a “child” is defined as a person less than eighteen years of age<sup>442</sup> and guardianship of a child among others terminates at the child attaining eighteen years.<sup>443</sup>

The purpose of the *Care of Children Act* is part of the preliminary provision contained in Part 1 of the Act.<sup>444</sup> Among others the purpose is to promote children’s welfare and best interests and to facilitate the development of children by ensuring that appropriate arrangements are in place for their guardianship and care<sup>445</sup> and to recognise certain rights of children.<sup>446</sup> The *Care*

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<sup>439</sup> S 159(2) of the Act read with s 161(b)(iv) of the Act.

<sup>440</sup> Paper presented at Bath in 2001 at 4 warning that the Act may be unwise in this respect by restricting legal representation for children in order to ensure that children’s rights and wishes are correctly addressed. S 55 of the South African Children’s Act at first glance appears to place the same restriction on the legal representation for children, but all three pre-hearing conferences are ordered by the court and therefore falls within the parameters of s 55 as a matter before the children’s court. Furthermore, s 28(1)(h) of the South African Constitution has a broader application regarding the assigning of legal representation for children in civil matters if substantial injustice would otherwise result. For application of s 28(1)(h) in South Africa, see 5 2 3 1 4 *supra*.

<sup>441</sup> S 152 of the *Care of Children Act*. See Boshier “The Care of Children Act 2004 – Does it Enhance Children’s Participation and Protection Rights?” paper presented at the 6<sup>th</sup> Child and Family Policy Conference, Dunedin on 7 July 2005.

<sup>442</sup> S 8 of the Act.

<sup>443</sup> S 28(1)(a) of the Act.

<sup>444</sup> S 3 of the set out the purpose of the *Care of Children Act*.

<sup>445</sup> S 3(1)(a) of the Act.



of *Children Act* respects the views of children and recognises their right to consent or refusal to consent to medical procedures.

#### 6 4 2 3 1 The paramountcy of the child's welfare and best interests

The Act reaffirms that the welfare and best interests of the child must be the first and paramount consideration<sup>447</sup> of each particular child in his or her particular circumstances.<sup>448</sup> The child-centred approach is illustrated by the requirement that a parent's conduct may be considered only to the extent, if any, that it is relevant to the child's welfare and interest.<sup>449</sup>

When determining what best serves the welfare and the best interests of children, a court or person must take the following principles into account.<sup>450</sup> decisions affecting children should be made within a time frame that are appropriate to children's sense of time; any principles specified in section 5 of the *Care of Children Act* that are relevant to the welfare and best interests of particular children and their circumstances. Section 5 provides a "checklist" setting out the principles considered to be relevant to welfare and best interests of children.<sup>451</sup>

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<sup>446</sup> For purpose of the present discussion the participatory rights of the child and the child's right to legal representation will be referred to as one of the aims of the Act mentioned in s 3(2)(c) in respect of the views of the child.

<sup>447</sup> S 4(1) provides that this first and paramount consideration is to be had in (a) the administration and application of the Act, eg in proceedings under the Act and (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

<sup>448</sup> S 4(2) of the Act.

<sup>449</sup> S 4(3) of the Act.

<sup>450</sup> Ss 4(5)(a) and (b) of the Act.

<sup>451</sup> The principles referred to in s 4(5)(b) and set out in s 5 of the Act are (a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing; (b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationship with his or her family, family group, *whanau*, *hapu*, or *iwi* should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents); (c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child; (d) relationships between the child and members of his or her family, family group, *whanau*, *hapu*, or *iwi* should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing; (e) the child's safety must be protected and, in particular, he

## 6 4 2 3 2 The participatory rights of the child

The commencement of the *Care of Children Act* 2004 in July 2005 highlighted the next bold step in bringing the laws of child care and guardianship within the realm of a child-centred approach and emphasising the entitlement of children to certain rights in family matters affecting them.<sup>452</sup> The participatory rights of children in matters affecting them, inclusive of the right to express their views<sup>453</sup> and to have those views taken into account<sup>454</sup> in decisions affecting them are rights which place children on par with their parents and other family members.<sup>455</sup>

Boshier expresses his preference for the word “views” in section 6 of the *Care of Children Act* when compared with its predecessor section 23(2) of the *Guardianship Act* where the word “wishes” was used.<sup>456</sup> Boshier further commends the removal of the phrases “if the child is able to express them” and “having regard to their age and maturity” in the *Care of Children Act*.<sup>457</sup>

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or she must be protected from all forms of violence (whether by members of his or her family, family group, *whanau*, *hapu*, *iwi* or by other persons); (f) the child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

<sup>452</sup> Taylor 2006 *AJFL* 169 candidly comments that s 6 of the *Care of Children Act* has pushed the boundaries even further by deleting any reference to “age and maturity” criteria in the weighing of children’s views. In this regard she is supported by Boshier in his paper presented in Dunedin during 2005 under the heading “Guidance from the Act” par 3.

<sup>453</sup> S 6(2)(a) of the Act.

<sup>454</sup> S 6(2)(b) of the Act.

<sup>455</sup> However, Taylor 2006 *AJFL* 165 argues that despite the positive influence of participatory practices on children’s development and well-being, children are still infrequently consulted about parental separation and especially when their parents reach an agreement about post-separation arrangements.

<sup>456</sup> In a paper presented in Dunedin during 2005 under the heading “Guidance from the Act” par [2] the author opines that the term “wishes” is rather whimsical in its connotation, and detracts from giving weight to the child’s perspective. The term “views” implies the child has greater capacity to understand the pertaining situation and form legitimate “views”. The term “view” can also be less qualitative than a “wish” and implies that children can have a perspective, without implying that they want something to happen. S 10 of the South African Children’s Act also refers to the “views” of a child which may be expressed and must be given due consideration. See Davel *Commentary on the Children’s Act* 2-14 and discussion in 5 4 5 *supra*.

<sup>457</sup> In a paper presented in Dunedin during 2005 par [3] where he adds that both phrases tended to denigrate the consideration of the child’s views, by implying that they were incapable. He mentions that the omission of “age and maturity” is perhaps recognition that age and maturity are not linked in the same way for every child. However, Boshier is concerned that the Act does send mixed signals with a number of provisions that apply

The *Care of Children Act* specifically provides for the participation of children in a number of instances throughout the Act.<sup>458</sup> In proceedings referred to in section 6<sup>459</sup> provision is made for children to be given a reasonable opportunity to express any views on matters affecting the child<sup>460</sup> and such views expressed directly or through a representative must be *taken into account*.<sup>461</sup>

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only to children of sixteen or older. The South African Children's Act is consistent throughout with its reference to children who of such age, maturity and stage of development and where age is mentioned, eg s 129, it is at the lower level of twelve years. What is not referred to by Boshier is the provision in art 12 of the CRC to which Davel refers in *Commentary on the Children's Act* 2-13 that no age limit is set on children's right to express their views freely. The participatory rights of children in South Africa are discussed in 5 4 5 *supra*.

<sup>458</sup> S 6(1)(a) of the Act refers to proceedings involving the guardianship of, or day-to-day care for, or contact with a child; s 6(1)(b) provides for the administration of property belonging to, or held trust for a child; s 6(1)(c) refers to the application of income or property of a kind.

<sup>459</sup> In an appeal against a decision of the Family Court where the main issue was whether C should have day-to-day care of a child or whether the child should remain with S who had day-to-day care of the child for over four years and continues to care for the child. The matter on appeal reported as *C v S HC NAP CIV – 2005-441-776* [2006] NZHC 495 par [31(c)] (*in casu* a child four years and three months old) where the court held that the court has a discretion what is reasonable in terms of s 6(2)(a). It is mandatory for a child be given the opportunity to express views. A child may also express views in a non-verbal way.

<sup>460</sup> S 6(2)(a) of the Act. Compare *C v S supra* par [31(e)] where the court held that the expression "views" is consistent with art 12 of the CRC, but may be contrasted with the term "wishes" used in s 23(2) of the *Guardianship Act* (now repealed). The court added that "[a] wish may be considered to be the expression of a child's preference (for example to be in the day-to-day care of one parent rather than another). Whereas views may cover a wider range of matters such as assessment of the advantages and disadvantages of being in the care of one party or another; what the child enjoys or does not enjoy about his or her relationship with adults in question; what matters are important to the child and what are not." Referring to *R v S* [2004] NZFLR 207 [106] where that court observed "[y]oung children very rarely express wishes" Randerson CJ continued that "they [young children] may well have helpful views on matters such I have elaborated." The court par [33] held that the girl of just over four years was able to express herself verbally and she should have been asked for her views and failure to do so resulted in failure to comply with the obligation imposed under s 6 of the *Care of Children Act*, in particular the obligation to give the child a reasonable opportunity to express her views on the care arrangements was not met on the facts of this case. The process must be tailored to the particular child. In conclusion the court found that the failure to provide a reasonable opportunity for the child to express her views was not material since there was no reasonable prospect that any view obtained would have affected the outcome of the case.

<sup>461</sup> S 6(2)(b) of the Act. (Emphasis added.) Compare *C v S supra* par [31(h)] the court holding that the expression "take into account" is stronger than the common statutory formula "have regard to" but it does not oblige the decision-maker to act in accordance with any view expressed by the child. The court further adds that despite the omission in the new section to "the age and maturity of the child (in contrast to s 23(2) of the [Guardianship] 1968 Act) the legislature cannot have intended that a Court should not have regard to those factors along with such other considerations as may be relevant to an assessment of the weight to be given to the child's views." See discussion of s 10 of the South African Children's Act in 5 4 5 *supra*.

The procedure regarding a child's consent or refusal of consent to medical procedures is set out in section 36 of the *Care of Children Act*. The consent of a child of or over the age of sixteen years<sup>462</sup> has the same effect as if the child were of full age<sup>463</sup> in the following circumstances: consent or refusal to consent to any donation of blood by the child;<sup>464</sup> consent or refusal to consent to any medical, surgical or dental treatment or procedure to be carried out by a professionally qualified person on the child for the child's benefit.<sup>465</sup>

A female child, irrespective of her age, may consent to any medical or surgical procedure for the purpose of terminating her pregnancy by a professionally qualified person.<sup>466</sup> A female child may also refuse to give consent for the carrying out of any procedure to terminate her pregnancy.<sup>467</sup>

A child of or over the age of sixteen years who is affected by a decision or by a refusal of consent by a parent or guardian in an important matter may apply to a Family Court judge who may, if he or she considers it to be reasonable in the circumstances to do so, review the decision or refusal and make an order which is deemed fit.<sup>468</sup> Section 56 of the *Care of Children Act* provides that a parenting or other order may on application be varied or discharged.<sup>469</sup>

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<sup>462</sup> The determination of sixteen as the appropriate age is in line with s 8(1) of the *Family Law Reform Act* 1969 dealing with similar consents for surgical, medical and dental treatment in the United Kingdom. The South African Children's Act in s 129, where a distinction is made between children under twelve years and children twelve years or older, deals with the requirement of specific consents of children regarding surgical operations and medical treatment, see discussion 5 4 5 *supra*.

<sup>463</sup> S 36(1)(a) of the Act.

<sup>464</sup> *Ibid*.

<sup>465</sup> S 36(1)(b) of the Act includes a blood transfusion in terms of the meaning given to it by s 37(1) to be carried out by a professionally qualified person on the child for the child's benefit.

<sup>466</sup> S 38(1)(a) of the Act. The South African Choice on Termination of Pregnancy Act 92 of 1996 has a similar provision in s 5(1), see discussion 5 4 5 2 *supra*.

<sup>467</sup> S 38(1)(b) of the Act.

<sup>468</sup> S 46(1) of the Act. S 46(3) of the Act excludes the refusal to give consent to a child's marriage, civil union, or entry into a *de facto* relationship, each of which is governed by the *Marriage Act* 1955 (s 19), *Civil Union Act* 2004 (s 20) and s 46A(2) of the *Care of Children Act*.

<sup>469</sup> In terms of s 56(3)(b) of the Act such application may be brought by an eligible person including a person acting on behalf of a child. A person affected by the order may, in terms of s 56(3)(a) of the Act, bring such application. This by implication includes a child of sufficient maturity and understanding. Henaghan *Children's Rights: A Comparative Perspective* 176 argues along the same lines albeit in terms of the repealed *Guardianship*

Children do not have an express right to attend a hearing under the *Care of Children Act*.<sup>470</sup> This is in contrast to the *Children, Young Persons and Their Families Act* which allows children direct participation.<sup>471</sup> The views of children may be presented to the court through the lawyer appointed to act for the child, an interview by the judge and a report from a child psychologist.<sup>472</sup> Children's right<sup>473</sup> to have a decision of the Family Court affecting them or a refusal of consent by a parent or guardian in an important matter reviewed further strengthens their participatory right. Children to whom proceedings relate may also appeal to the High Court.<sup>474</sup>

#### 6 4 2 3 3 The child's right to legal representation

The *Care of Children Act* provides that a court may appoint or direct the Registrar of the court to appoint a lawyer to act for a child who is the subject or who is a party to proceedings under the Act.<sup>475</sup> The appointment of a lawyer is subject to the court's decision that, unless satisfied that the appointment would serve no useful purpose, the court is obliged to make such an appointment or direction for an appointment in the following proceedings:<sup>476</sup> where day-to-day

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<sup>470</sup> Act 1968, mentioning that the provision in s 11 for "any other person" to apply with permission of the court allows children to argue that they are also within this category.

<sup>471</sup> S 137 of the Act. However, s 137(i) of the Act allows the court to permit the presence of any other person which may include a child.

<sup>472</sup> Ss 22 and 166 of the Act.

<sup>473</sup> See *C v S supra* par [31(f)].

<sup>474</sup> S 46 of the Act restricts this avenue to children who are sixteen years or older. It is interesting to note that s 116(2) of the *Children, Young Persons and Their Families Act* has a similar provision whereby a young person above fourteen may seek a review of the refusal to consent to an important matter made by a guardian appointed under s 110 of the said Act.

<sup>475</sup> S 143 of the Act. See also Taylor "What do we know about involving children and young people in family law decision making? A research update" 2006 *AJFL* 169. See n 469 *supra*.

<sup>476</sup> S 7(1) of the Act which excludes criminal proceedings. See Boshier "The child's voice in process: Which way is forward?" paper presented at the Association of Family and Conciliation Courts Annual Conference, New Orleans on 29 May 2009 at 3 who says that a lawyer may be appointed in *any* proceedings involving the day-to-day care or contact that are likely to progress to a hearing. (Emphasis is that of the author.) On p 4 the author says that the role of a lawyer for the child also involves explaining the outcome of any proceedings to the child. S 55 of the Children's Act in South Africa is an issue, see 5 4 6 2 2 *supra*.

<sup>477</sup> S 7(2) of the Act. This provision leaves the decision with the court whereas s 55 of the South African Children's Act leaves the decision with an official of the Legal Aid Board.

care for the child or contact with the child is considered;<sup>477</sup> and where the proceedings appear likely to proceed to a hearing.<sup>478</sup> The lawyer is required to meet with the child to facilitate<sup>479</sup> the lawyer's duties and compliance with the child's views unless the lawyer considers it inappropriate to do so because of exceptional circumstances.<sup>480</sup>

#### 6 4 2 4 Conclusion

The development of children's rights including the participatory rights of children and their right to legal representation have come a long way in New Zealand. The enactment of the *Children, Young Persons and Their Families Act 1989* introduced a completely different approach and philosophy to child matters.<sup>481</sup> This is also the case with the South African Children's Act in which the preamble sets out the objectives of the Children's Act.<sup>482</sup>

The participation of children and young persons in processes out of court and their right to legal representation has placed children and young persons on par

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<sup>477</sup> S 7(2)(a) of the Act.

<sup>478</sup> S 7(2)(b) of the Act.

<sup>479</sup> S 7(3) of the Act requires that in order to facilitate performance of the lawyer's duties and compliance with s 6 (regarding the child's views) the lawyer must, unless he or she considers it inappropriate to do so because of exceptional circumstances, meet with the child. See *C v S supra* par [31(f)] where the court held that the *Care of Children Act* does not stipulate how opportunities are to be provided for the views of the child to be expressed. S 7(3) does not oblige the lawyer to ascertain the child's wishes. The court held *inter alia* that the opportunity given to the child to express views may be through the lawyer appointed to act for the child and that "[t]he main obligation of the lawyer is to facilitate the process [of presenting the views of the child] and, in that respect, the lawyer performs a vital role to assist the court to carry out its obligation under s 6(2)".

<sup>480</sup> Exceptional circumstances have a very wide application and could include the child not being of such age, maturity and culture to express any views or wishes.

<sup>481</sup> Boshier, in a paper presented in New Orleans 2009 par [2] at 2, mentioned that the introduction of family-group conferences moved away from the prevailing perception that the state knows best when it comes to child protection matters (and one may add the participation of children in legal matters affecting them). The Children's Act in South Africa also introduces family-group conferences (s 70), pre-hearing conferences (s 69) and other lay forum hearings (ss 49 and 71). These conferences all intend conciliation through mediation in an attempt to settle a matter out of court. S 71 excludes abuse and sexual abuse of the child to be considered at such forum.

<sup>482</sup> This includes the four cornerstones of the CRC one of which is the participation of children. The Children's Act confers more extensive rights than those referred to in s 28 of the South African Constitution. For a discussion of the objectives of the Children's Act, see 5 4 2 *supra*.



with their parents and family in having a say regarding their future.<sup>483</sup> In doing so New Zealand has indicated its willingness to adhere to the aims contained in article 12 of the Convention on the Rights of the Child.<sup>484</sup> The continued involvement of children in agreements in matters affecting them is another positive step.<sup>485</sup> To this may be added their right to apply for the variation or discharge of orders affecting them.<sup>486</sup> These all are positive steps towards empowering children in their participation in legal matters affecting them.

However, adoptions in New Zealand are still governed in terms of what has been referred to as an “outdated” *Adoption Act* of 1955.<sup>487</sup> Chapter 15 of the Children’s Act governs adoptions in South Africa and interesting innovations regarding adoptions are included in the Children’s Act.<sup>488</sup>

The child’s right to participation and representation in South Africa<sup>489</sup> reaffirms the entrenching of children’s rights in the Constitution. However, it appears that

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<sup>483</sup> Taylor 2006 *AJFL*167 explains that legal systems (including that of New Zealand) have traditionally been uncomfortable with the possibility of dealing directly with children in court processes. Therefore their views have been ascertained, interpreted and filtered through a range of different professionals, fairly late after conciliation services have failed to help parents reach agreement.

<sup>484</sup> Boshier, in a paper presented in New Orleans 2009 at 6, mentioned that s 6 of the *Care of Children Act* 2004 has given direct domestic adherence to New Zealand’s obligations under art of the CRC. Taylor 2006 *AJFL* 161 agrees that the CRC has gained momentum in case law because of its referential role as a specialist source of authority for lawyers presenting submissions and for judges deciding cases. The development of international standards and emerging jurisprudence with courts giving practical expression to the CRC’s principles are regarded as great strengths of modern family law. The Children’s Act has domesticated the CRC in South Africa and the child’s participatory rights echo throughout the Children’s Act, eg ss 6(5), 10 and 31(1)(b).

<sup>485</sup> However, compare Taylor 2006 *AJFL* 162 who mentions that one of the key findings in research studies with children is their overwhelming call for the right to freedom of speech and opportunities to express their views.

<sup>486</sup> South Africa has similar provisions in ss 46(2) and 48(1)(b) of the Children’s Act.

<sup>487</sup> Von Dadelszen “A new Adoption Act for the new Millennium” paper presented at Families in Transition Seminar at the Roy McKenzie Centre on 17 August 2009 par [3] at 2 makes the following comment: “I shall be blunt. The Adoption Act is outdated and it has become unjustly discriminatory”. In terms of s 7(2) of the Adoption Act the consent of the child is not required for that child’s adoption. The definition of a “child” in s 2 of the Adoption Act as a person under the age of twenty-one is a further a further indication of this Act not complying with the definition of a “child” in art 1 of the CRC, see nn 419 and 420 *supra*.

<sup>488</sup> Such as post adoption agreements. For a discussion of the child’s involvement in his/her adoption, see 5 4 5 3 *supra*.

<sup>489</sup> S 10 and 55 of the Children’s Act.

the child's right to legal representation in New Zealand is less restrictive than in South Africa.<sup>490</sup>

The signing into law of the *Family Courts Matters Legislation*<sup>491</sup> takes the legislative provision of a voice for children in conciliation matters yet a step further in ensuring the ability for children to utilise the conciliation arm of the court for *Care of Children Act* matters. This amendment will allow children to attend mediation with their parents where they are the subject of dispute and attend counselling with their parents where appropriate.<sup>492</sup> In South Africa, the participatory rights of children include the right to express their views in any parental responsibility and rights agreement or parenting plan if they are of such age, maturity and stage of development to do so.<sup>493</sup>

#### 6 4 3 Australia

##### 6 4 3 1 Introduction

The *Family Law Act 1975* (Cth)<sup>494</sup> created the Family Court of Australia<sup>495</sup> to govern commonwealth family law. Having ratified<sup>496</sup> the Convention on the Rights of the Child<sup>497</sup> and using the English *Children Act 1989* as a model,

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<sup>490</sup> S 55 of the Children's Act only obliges the court, having found it to be in the best interests of the child to do so, to refer the matter to the Legal Aid Board for consideration in terms of the Legal Aid Act. S 7(1) of the Care of Children Act provides that a court may appoint or direct the Registrar of the court to appoint a lawyer for a child who is the subject of or party to the proceedings.

<sup>491</sup> During September 2008.

<sup>492</sup> Boshier, in a paper presented in Canada during 2009 at par 8, refers to s 8 of the *Care of Children Amendment Act 2008* (NZ) which is not yet in operation.

<sup>493</sup> Regs 8(3)(a)/(b) and 11(1) (Social development), see discussion in 5 4 2 *supra*. If a child does not agree with the contents of a parental responsibilities and rights agreement it should be recorded on the agreement and the matter be referred for mediation in terms of reg 8(4) (Social Development).

<sup>494</sup> Dickey *loc cit* points out that the *Family Law Act* created a new code of law in respect of care and welfare for children. Reference hereafter will be to the *Family Law Act*.

<sup>495</sup> South Africa has not yet established family law courts as intended in s 45(3) of the Children's Act.

<sup>496</sup> Australia ratified the CRC on 17 December 1990. See Human Rights website <http://www.uchchr.ch/tbs/doc.nsf/22b020de61f10ba0c1256a2a0027ba1e/a1d619a20062c> accessed on 19 October 2009. Ross "Images of children: Agency, art 12 and models for legal representation" 2005 *AJFL* 101 informs that Australia signed the CRC on 22 August 1990 and it was ratified and entered into force on 16 January 1991.

Australia introduced similar legislative reform with the *Family Law Reform Act* a few years later.

The *Family Law Reform Act* of 1995<sup>498</sup> incorporated far-reaching amendments to Part VII of the *Family Law Act* which *prima facie* apply to all children<sup>499</sup> and deals with private-law provisions relating to children.<sup>500</sup> The *Family Law Act* has an extended definition of “child”.<sup>501</sup> The age of majority in Australia was governed by the common law until during the 1970s all States and Territories lowered the age of majority to eighteen years.<sup>502</sup>

However, the most significant changes have been introduced with the latest amendment contained in the *Family Law Act* is the *Family Law Amendment (Shared Parental Responsibility) Act* of 2006, which *inter alia* has as its aim a less adversarial approach to the conduct of children’s cases.<sup>503</sup> In the subsequent discussion the same sequence as in the preceding jurisdictions will be followed.

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<sup>497</sup> See 5 2 2 1 *supra* for discussion on the CRC.

<sup>498</sup> The *Family Law Reform Act* 167 of 1995 was assented to on 16 December 1995. Ss 1, 2 and 54 received Royal Assent and came into operation on 25 January 1996 (*Gazette* 1996, No S 27) and the remainder of the Act came into operation on 11 June 1996 (*Gazette* 1996, GN No 5). See Commonwealth Consolidated Acts at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/notes.html](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/notes.html) accessed on 27 October 2007.

<sup>499</sup> Dickey *Family Law* 47. The exceptions referred to will be discussed *infra* where applicable.

<sup>500</sup> Van Heerden *Boberg’s Law of Persons and the Family* 530; Rhoades “Child law reforms in Australia – A shifting landscape” 2000 *CFLQ* 117. Boland “Family law: Changing law for a changing society” 2007 *ALJ* 561 mentions that significant reforms, or a cultural change, to the determination of parenting matters were introduced with the passing of the *Family Law Reform Act* 1995 (Cth).

<sup>501</sup> S 4(1) of the *Family Law Act* defines a child as: “(a) in Part VII [which deals with children], an adopted child and a stillborn child”. The definition of “birth” in s 4(1) of the *Family Law Act* includes “stillbirth”. However, Dickey *Family Law* 56 explains that the term “child” is ordinarily limited to a living child and does not normally include an unborn child or child who has died. This definition of “child” does not coincide that found in art 1 of the CRC.

<sup>502</sup> Dickey *Family Law* 253 alludes to the following statutes enacted by the various states: *Minors (Property and Contracts) Act* 1970 (New South Wales); *Age of Majority Act* 1974 (Queensland), see now the *Law Reform Act* 1995 (Queensland); *Age of Majority (Reduction) Act* 1970 (South Australia); *Age of Majority Act* 1973 (Tasmania); *Age of Majority Act* 1977 (Victoria); *Age of Majority Act* 1974 (Northern Territories); *Age of Majority Act* 1974 (Australian Capital Territories). However, Dickey *op cit* 253 adds that for the purpose of Commonwealth law, the age of majority remains that of the common law, which is twenty-one years, unless a particular statute provides otherwise.

<sup>503</sup> Boland 2007 *ALJ* 554. S 60(3) of the South African Children’s Act has a similar provision, see 5 4 4 *supra*.

#### 6 4 3 2 The *Family Law Act* 1975 (Cth)<sup>504</sup>

The *Family Law Act* introduced a new code of law relating to the care and welfare of children.<sup>505</sup> The *Family Law Act* has been referred to as a dynamic piece of legislation due to the fact that it was amended with constant frequency.<sup>506</sup>

In 1995 the *Family Law Reform Act*<sup>507</sup> introduced major and far-reaching changes. The latest amendment to be introduced is the *Family Law Amendment (Shared Parental Responsibility) Act*<sup>508</sup> which has brought about significant changes in the common-law approach to litigation in family law and the conduct of litigation as a whole. Added to this is the introduction of Division 12A of Part VII of the *Family Law Act*.<sup>509</sup>

Nicolson<sup>510</sup> emphasises the importance of a non-adversarial approach in family law. The importance of informality in children's court proceedings in South Africa was confirmed during the 1960s. The *Family Law Amendment (Shared*

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<sup>504</sup> Hereafter referred to as the *Family Law Act*.

<sup>505</sup> Dickey *Family Law* 14.

<sup>506</sup> Bryant "The role of the Family Court in promoting child-centred practice" 2006 *AJFL* 127 comments that Part VII of the *Family Law Act* has undergone numerous changes in the past 30 years, but the fundamental aspect of Part VII has remained constant.

<sup>507</sup> Boland 2007 *ALJ* 560.

<sup>508</sup> Act 46 of 2006 which came into operation on 1 July 2006.

<sup>509</sup> Harrison *Finding a Better Way – A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Procedures* (2007) hereafter *Harrison Finding a Better Way* ix. See also Boland "Family law: Changing law for a changing society" 2007 *ALJ* 564 comments that one of the two areas of significant reform is the introduction of Div 12A which provides for a less adversarial approach to the conduct of children's cases and property cases if the parties consent to the application of the Division. See also Boland 2007 *ALJ* 562 574-576. In South Africa the conduct of proceedings in the children's court is governed by s 60 of the Children's Act.

<sup>510</sup> At the Lawasia Conference in Brisbane during 2003 at 14-15 stressed the importance of moving away from the adversarial approach in family law where the best interests of children are at stake. He further emphasised that "the adversarial system developed in England for the determination of criminal and civil cases a number of centuries ago is not an appropriate method for the determination of family disputes concerning children in the 21<sup>st</sup> century. It places undue focus on the rights of parents and *far too little focus on the rights of children*". (Emphasis added.) See Bryant "State of the Nation" Address to the 12<sup>th</sup> National Family Law Conference at Perth on 23 October 2006 at 6. See also Harrison *Finding a Better Way* 4-9; Hunter "Child-related proceedings under Pt VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us" 2006 *AJFL* 227 *et seq*; Boland 2007 *ALJ* 574.

*Parental Responsibility*) Act has addressed this aspect with a new Part VII in the *Family Law Act*.<sup>511</sup> Following on a Children's Cases Pilot (CCP) programme<sup>512</sup> the Family Court devised a set of principles underpinning the new Division 12A.<sup>513</sup>

#### 6 4 3 2 1 The best interests of the child

Before the *Family Law Reform Act* came into operation the "welfare" of the child was a paramount consideration.<sup>514</sup> According to Dickey<sup>515</sup> when considering the best interests principle, it only applies to the child who is the subject of the proceedings before the court and not any other child who may even be affected by the result of the proceedings.<sup>516</sup> Initially the *Family Law Act* did not have a

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<sup>511</sup> Boland 2007 *ALJ* 574 mentions that it had been recognised for many years that cases involving children are not strictly *inter partes* litigation and that some adaptation of the adversarial trial procedures are appropriate to determine such cases.

<sup>512</sup> Hunter 2006 *AJFL* 227 mentions that participating parties who elected to enter the CCP could *inter alia* consent to the suspension of rules of evidence. Further on *op cit* at 245 she discusses the effect of the CCP on the children's legal representatives. In general there was agreement that children's legal representatives had an enhanced and more proactive role in the CCP resulting in identifying aspects that needed to be addressed and "setting the agenda" for the court.

<sup>513</sup> Boland 2007 *ALJ* 574 sets out the following principles underpinning Div 12A for conducting child-related proceedings: (a) firstly the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings; (b) the second principle is that the court is to actively direct, control and manage the conduct of the proceedings; (c) third principle is that the proceedings are to be conducted in a way that will (i) safeguard the child concerned against family violence, child abuse and child neglect and (ii) safeguard the parties to the proceedings against family violence; (d) the fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties; (e) the fifth principle mentioned in s 69ZN, which is not included in the list referred to by Boland, is that the proceedings are to be conducted without undue delay and with as little formality, and technicality and form, as possible. S 69ZQ(1) required the court hearing the matter to decide to comply with the general duties imposed on the court.

<sup>514</sup> Dickey *Family Law* 291 mentions that the incorporation of the term "best interests" in the *Family Law Reform Act* was brought about to align it with the term of the best interests principle contained in the CRC which Australia had ratified in 1990. Furthermore the *Family Law Act* define "interests" in s 4(1) of the Act in relation to a child as including "matters related to the care, welfare or development of the child".

<sup>515</sup> *Family Law* 301.

<sup>516</sup> The South African Children's Act provides in s 154 that if there are reasonable grounds for believing that a child at the same place or on the same premises as a child placed in temporary safe care is in need of care and protection, that child may be referred to a designated social worker for investigation.



list of factors that a judge was required to take into account when considering the best interests of the child.<sup>517</sup>

The first list of criteria to be used in determining the best interests of the child came with the *Family Law Reform Act* of 1995 with the inclusion of section 68F(2).<sup>518</sup> Subsequently, the *Family Law Amendment (Shared Parental Responsibility) Act* replaced section 68F(2) with section 60CC<sup>519</sup> which is more

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<sup>517</sup> *Aldridge v Keaton* [2009] FamCAFC 229 par 110.

<sup>518</sup> The list of criteria or control list as referred to by Bekink and Bekink 2004 *De Jure* 27 (see 5 5 3 *supra*) set out in s 68F(2) of the *Family Law Act* as amended by the *Family Law Reform Act* of 1995.

<sup>519</sup> In the new Part VII of the *Family Law Act*. S 60CC(1) provides that “subject to subsection (5), in determining what is in the child’s best interests, the court must consider the matters set out in subsections (2) and (3)”. Primary considerations in subs (2) include (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. There are thirteen additional considerations listed in subs (3) which include the following:

- “(a) any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views;
- (b) the nature of the relationship of the child with:
- (i) each of the child’s parents; and
  - (ii) other persons (including any grandparent or other relative of the child);
- (c) the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
- (d) the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from:
- (i) either of his or her parents; or
  - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
- (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with both parents on a regular basis;
- (f) the capacity of:
- (i) each of the child’s parents; and
  - (ii) any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and either of the child’s parents, and any other characteristics of the child that the court thinks are relevant;
- (h) if the child is an Aboriginal child or a Torres Strait Islander child:
- (i) the child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
  - (ii) the likely impact any proposed parenting order under this Part will have on that right;
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child’s parents;
- (j) any family violence involving the child or a member of the child’s family;



prescriptive and mandates considerations which the court has to take into account in determining the best interests of the child. The child's best interests when considering making a particular parenting order is of paramount consideration.<sup>520</sup>

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- (k) any family violence order that applies to the child or a member of the child's family, if:
    - (i) the order is a final order; or
    - (ii) the making of the order was contested by a person;
  - (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
  - (m) any other fact or circumstance that the court thinks is relevant.
  - (4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
    - (a) has taken, or failed to take, the opportunity:
      - (i) to participate in making decisions about major long-term issues in relation to the child; and
      - (ii) to spend time with the child; and
      - (iii) to communicate with the child; and
    - (b) has facilitated, or failed to facilitate, the other parent:
      - (i) participating in making decisions about major long-term issues in relation to the child; and
      - (ii) spending time with the child; and
      - (iii) communicating with the child; and
    - (c) has fulfilled, or has failed to fulfil, the parent's obligation to maintain the child.
  - (4A) If the child's parents have been separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since separation occurred.
  - (5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsections (2) or (3).
  - (6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
    - (a) to maintain a connection with that culture; and
    - (b) to have the support, opportunity and encouragement necessary:
      - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
      - (ii) to develop a positive appreciation of that culture."

In *Re Brodie (Special Medical Procedure)* [2008] FamCA 334 par 180 the court reaffirmed the child's best interest as the paramount consideration and summarised the application of s 60CC of the *Family Law Act* by stating that "I am required to consider two primary considerations and several additional considerations". When comparing the "new checklist" for the determination of the best interests of the child with the South African counterpart set out in s 7 of the Children's Act, then the most apparent difference is that s 60CC of the *Family Law Act* is an open-ended list unlike s 7 of the Children's Act. See *Re Brodie (Special Medical Procedure) supra* par 187. For a discussion of s 7 of the South African Children's Act, see 5 5 2 *supra*.

<sup>520</sup> S 60CA of the *Family Law Act*. Dickey *Family Law* 291 informs that the "best interests" principle requires that a court must have regard to the best interests of the child as the paramount consideration. S 65AA of the *Family Law Act* reiterates the same principle. In *Goode v Goode* [2006] FamCA 1346 par 65 in summarising Part VII among others mentioned in point 9 that the child's best interests are ascertained by a consideration of the objectives and principles in s 60B and the primary and additional considerations in s 60CC. In point 11 of par 65 the court emphasised that the child's best interests remain the

## 6 4 3 2 2 The participatory rights of the child

The Family Law Act assures children their participatory rights in family-law proceedings and sets out in some detail how the views of children are to be expressed.<sup>521</sup> These participatory rights<sup>522</sup> were introduced with the enactment of the *Family Law Act* which sets out in some detail how the views<sup>523</sup> of the child are to be expressed.<sup>524</sup> The *Family Law Act* reflects the child's participatory

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“overriding” consideration. See also *Aldridge v Keaton* [2009] FamCAFC 229 pars 110 and 111 where the court sets out the shift in emphasis to a “strong focus on parents” in determining the best interests of the child. The South African Children's Act refers to a best interests of a child standard in s 7, see 5 5 2 *supra*. The paramountcy of the child's best interests standard is entrenched in s 28(2) of the Constitution.

<sup>521</sup> The *Family Law Act* provides that a child may institute proceedings for orders set out in the Act, such as parenting orders, maintenance orders including the variation of maintenance orders. *Dickey Family Law 273* mentions that Western Australia is excluded from this provision as well as child maintenance orders which are provided for in s 65B of the *Family Law Act*. *Dickey op cit 274* mentions that Western Australia has not yet referred its family-law powers in respect of children to the Commonwealth Parliament and therefore reference in s 65C to a child must be read as reference to a child of a marriage for Western Australia. A case relevant to the discussion is *Re Brodie (Special Medical Procedure)* [2008] FamCA 334 where a twelve-year old girl's mother applied for an order authorising her to consent to the medical treatment of her child suppressing the pubertal development of her child as a girl. In par 189 of the judgment the court held that it accepted the submissions of the Independent Child's Lawyer that Brodie (the child) is adamant that she wishes to live as a male and that she has not wavered from that position. This limitation is not found in s 14 of the South African Children's Act. Every child is assured of the right to access a court and to be assisted in bringing a matter (any matter) to court where the child is young or uncertain in approaching the court.

<sup>522</sup> The initial provision contained in s 64(1)(b) of the *Family Law Act* provided that a child of fourteen years may determine the court's order in respect of custody, guardianship of, or access to a child of marriage in that a court shall not make an order contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so. This provision was substituted with the present s 60CC(3)(a).

<sup>523</sup> Before the amendment brought about by the *Family Law Amendment (Shared Parental Responsibility) Act*, reference was made to the wishes of the child. The mentioned amendment introduced the word “views” which according to *Dickey Family Law 321* was to bring into account the child's perceptions and feelings as well as wishes. In South Africa s 10 of the Children's Act refers to the participation of the child in an appropriate way, which includes the views of children that have to be given due consideration.

<sup>524</sup> *Dickey loc cit* highlights the fact that any expressed views of a child are to be considered as provided for in s 60CC(3)(a) which requires a court in determining what is in the best interests of the child to consider: “any views expressed by the child and factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views”. *Dickey op cit 320* is correct in saying that this provision implies that any views, irrespective of the child's age are to be considered. However, the court is not bound by the views and only needs to consider the views and accord it such weight as is necessary and appropriate in the light of the surrounding circumstances. S 60CD provides how the expressed views of the child are to be treated. S 60CD(1) refers the court to par 60CC(3)(a) which requires the court to consider any views expressed by a child in deciding whether to make a particular parenting plan relating to the child. Children are also involved in parental responsibilities and rights agreements and parenting plans in

rights throughout the Act requiring and ensuring children their right to express views and to have their views considered.<sup>525</sup>

Initially with the 1975 *Family Law Act* the court was called upon to adjourn any child-related proceedings until a report has been obtained from a welfare officer, on such matters relevant to the proceedings as considered desirable by the court and which could be received and permitted the court to receive the report in evidence. Section 62 of the *Family Law Act* has now been amended and the present section 62G(2) has similar provisions reflecting the necessity of the child's views.<sup>526</sup>

There are a number of indications which reflect the participatory rights of children found in the *Family Law Act*. The following serves as examples:

- (a) a child may bring an application for a parenting order;<sup>527</sup>
- (b) a child may bring an application for a child-maintenance order;<sup>528</sup> and

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South Africa by virtue of the regulations issued in terms of the Children's Act (regs 8(3)(a) and 11(1) (Social Development). S 60CD(2)(a) provides that the court may have regard for the views which are contained in a report given to the court under s 62G(2). S 62 of the Children's Act and provides that a children's court may order the submission of professional reports which may contain the views of the child. S 60CD(2)(b) provides that the court may, in the interests of the child, order that the *interests* of the child be independently represented by a lawyer. (Emphasis added.) In the South African Children's Act s 55 obliges the court to consider the best interests of the child in deciding whether a legal representative for the child needs to be appointed.

<sup>525</sup> Eg s 62G(3A) of the *Family Law Act* provides that a family consultant who is directed to give the court a report on matters requested by the court must (a) ascertain the views of the child in relation to that matter; and (b) include the views of the child on that matter in the report. The guiding principle for receiving a child's views is found in s 60CC(3)(a) of the *Family Law Act*. S 68LA(5)(b) of the *Family Law Act* places a specific duty on the child's lawyer to ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court. South Africa has a similar requirement in s 155(2) read with reg 55 (Social Development) of the Children's Act where the views of the child must be reflected in the social workers report conforming to Form 38 of Annexure a in the regulations (Social Development) that is presented to the children's court.

<sup>526</sup> S 62G(2) provides that the reports of family consultants must consider when preparing their reports as set out in subs (3A) must amongst others (a) ascertain the views of the child in relation to the matter; and (b) include the views of the child on that matter in the report (a child cannot be required to express his or her views in relation to any matter; see s 60CE). S 60(3B) stipulates that subs (3A) is not applicable if complying with that subsection would be inappropriate because of (a) the child's age or (b) some other circumstance.

<sup>527</sup> S 65C(b) of the *Family Law Act*. See Also Dickey *Family Law* 274. South Africa does not have a similar provision in the Children's Act.

<sup>528</sup> S 66F(1)(b) or s 66F(2)(a) of the *Family Law Act*.

- (c) a child may bring an application in any kind of proceedings under the *Family Law Act*.<sup>529</sup>

The participation of children in family-law proceedings may involve direct<sup>530</sup> or indirect participation.<sup>531</sup> Direct participation of children may involve more than one form of communication, either speaking directly to a judge by way of a private interview with a judge in chambers,<sup>532</sup> a separate hearing or receiving evidence during proceedings or by way of an affidavit.<sup>533</sup> Children may also be

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<sup>529</sup> S 69C(2)(a).

<sup>530</sup> Bryant 2006 *AJFL* 128 mentions that direct methods of involving children such as being party to proceedings or children being interviewed by judges are not often used in the Australian Family Court. Bryant 2006 *AJFL* 134-135 further refers to Moloney and McIntosh "Child-responsive practices in Australian family law: Past problems and future directions" 2004 *JFS* 77 who mention that although the inclusion of s 65C can be regarded as a praiseworthy rights-based response, it causes major practice difficulties and therefore is rarely used. R 15 2(1) of the *Family Law Rules* provides that a judicial officer may interview a child who is the subject of a case under Part VII of the *Family Law Act*.

<sup>531</sup> Bryant 2006 *AJFL* 128 explains that the use of family reports and child representatives are a more common occurrence. Family reports prepared by the Family Court's counselling service are requested by the court. The *Family Law Rules* 2004 and *Case Management Directions* contain details about Family Reports. Rule 15 3 prescribes the matters to be considered when ordering a family report, which are (a) whether the case involves (i) an intricate or complex parenting case; (ii) if a child is mature enough for the child's wishes to be significant in determining a case-dispute about the child's wishes; (iii) a dispute about the existence or quality of the relationship between a parent, or other significant person, and a child; (iv) allegations that a child is at risk of abuse; or (v) family violence; and (b) whether there is any other relevant independent expert evidence available".

<sup>532</sup> In *ZN and YN and the Child Representative* [2002] FamCA 453 the court expressed some reservation to children being interviewed directly by judges. Nicholson CJ held that there may be circumstances where older children are involved that such meetings may be appropriate. See also Nicholson Lawasia Conference at Brisbane during 2003 at 7 where specific reference is made to the *ZN and YN and Child Representative* case and gives the reasons for meeting with the three children (aged fourteen, twelve and nine years) as being "the age of the older children, and because some time had elapsed since the counsellor's report [and] as a result of the counsellor's evidence, I also had some concerns about whether the children's views recorded by the counsellor represented their real views, and whether they might have changed with the passage of time". Further *op cit* 8 he inquires whether the time has come to rethink the approach of never calling children as witnesses and rightly adds that children do testify in other courts. Methods have been devised to protect children when testifying, which include giving evidence through video link from a location other than the court room. There may be children who wish to give evidence and if they do, it is difficult to see the rationale for preventing them to do so. See further Bryant 2006 *AJFL* 134; Dickey *Family Law* 322. The interviewing of children in family-law matters is no exception in South Africa as case law reflects, see *McCall v McCall* 1994 (3) SA 201 (C) 207H-I, *Soller v G* 2003 (5) SA 430 (W) par [30] and *R v H* 2005 (6) SA 535 (C) par [30].

<sup>533</sup> Bryant *loc cit*. Dickey *Family Law* 322 explains that receiving children's evidence either orally or by way of affidavit is not encouraged by the Family Court. See also the comments of Bryant 2006 *AJFL* 134 and Nicholson at the Lawasia Conference in Brisbane during 2003 at 8.

directly involved in proceedings by giving evidence. Bryant<sup>534</sup> mentions that the *Family Law Act* and the Rules appear to presuppose the understanding that direct involvement in or exposure to family litigation is damaging to children.<sup>535</sup>

The most direct form of participation would be as a party to the proceedings before court. The *Family Law Act* provides that children may initiate proceedings or respond to proceedings, or seek intervention in proceedings.<sup>536</sup> As has been indicated this direct form of participation is not used that often in Australia.<sup>537</sup>

Children's views in family-law proceedings at present are received indirectly when expressed and placed before court by means of Family Reports<sup>538</sup> and by

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<sup>534</sup> 2006 *AJFL* 135. S 100B of the *Family Law Act* determines that a child is not allowed to make an affidavit, be called as a witness or remain in court during proceedings unless the court orders otherwise. Rule 15 1(1) of the *Family Law Rules* provides that when a party wants to adduce the evidence of a child under s 100B of the Act, an affidavit must be filed wherein (a) the facts that are relied on is set out; (b) includes the name of a support person and (c) attaches a summary of the evidence to be added by the child.

<sup>535</sup> Bryant 2006 *AJFL* 135 mentions that it is exceptional for the court to exercise its discretion in favour of a child to be called to give evidence or to be present in court. Dickey *Family Law* 322 draws attention to the fact that s 60CD(2) of the *Family Law Act* allows the court to receive the views of the child by such other means as it thinks appropriate. This includes the (a) permitting the child to give formal evidence, either orally as a witness (subject to the provisions of ss 100B(1) and 100B(2) read with rule 15 01); (b) by private interview with a judge in chambers (see *Family Law Rules* 15 02); (c) by interview with a judge in the courtroom, in the presence of the parties and their lawyers (according to Dickey *loc cit* this is said to be justified by the provisions of ss 43(c) and (d) and s 97(3) of the *Family Law Act* which allows the court to proceed without undue formality and to ensure that the proceedings are not protracted); (d) by hearsay evidence presented by a party or a witness (and especially a child psychiatrist or similar expert) pursuant to the exception to the rule against hearsay in proceedings under Pt VII (see s 69ZV(2) which provides that evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay).

<sup>536</sup> S 65C(b) of the *Family Law Act*. Bryant 2006 *AJFL* 134 mentions that the child is assisted by a case guardian who is appointed by the court to manage and conduct the case on behalf of the child. See *Pagliariella and Pagliariella* (1993) FLC 92-400 where the court granted the application of a fourteen-year old child to be joined as a party to her parent's custody, access and guardian dispute. In *Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) two children were also joined as parties to their parents' proceedings.

<sup>537</sup> See nn 528 and 530 *supra*.

<sup>538</sup> S 62G(3A) of the *Family Law Act* requires a person giving a report to the court to ascertain the child's views and include those views in the report.



Child Representatives.<sup>539</sup> Admittedly, these methods of presenting children's views are a vital consideration for the court in arriving at a result that is in the best interests of the child.<sup>540</sup> However, as Bryant<sup>541</sup> concedes, available research suggests that this is not clearly understood by children<sup>542</sup> and that older children feel the need to become more directly involved in family-law matters affecting them.

#### 6 4 3 2 3 The right of the child to legal representation

A number changes relating to children's issues were introduced with the *Family Law Act*, notably section 43(c) of the *Family Law Act*<sup>543</sup> as well as the introduction of legal representation for children in certain given situations.<sup>544</sup> Separate legal representation has since then increasingly been receiving more attention.<sup>545</sup> This was a progressive step towards recognising the child's right to

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<sup>539</sup> Such as an independent children's representative appointed in terms of s 68L(2)(a) of the *Family Law Act*.

<sup>540</sup> Bryant 2006 *AJFL* 136-137 mentions that countless judgments over the last thirty years clearly confirm that the child's views have been taken into account in the consideration of determining the best interests of the child.

<sup>541</sup> 2006 *AJFL* 137. Nicholson at the Lawasia Conference, Brisbane, 2003 at 8 agrees that maybe the time has come to re-evaluate the participation of children in family-law matters in the light of Australia's commitment to the CRC and especially art 12.

<sup>542</sup> Bryant 2006 *AJFL* 136 and authority cited. South Africa has addressed this *lacuna* in the Children's Act with s 10 which is discussed in 5 4 5 *supra*.

<sup>543</sup> This addressed the need to protect the rights of children and to promote their welfare.

<sup>544</sup> Rayner "The state of children's rights in Australia" in Franklin *The New Handbook of Children's Rights: Comparative Policy and Practice* (2002) 350. S 68L of the *Family Law Act* provides that a court may grant an order for independent representation of the child's *interests* (emphasis added) in proceedings (1) under this Act in which the child's best interests are, or a child's welfare is, paramount, or a relevant consideration; (2) if it appears to the court that the child's interests in the proceedings ought to be independently represented by a lawyer, the court (a) may order that the child's interests in the proceedings are to be independently represented by a lawyer; and (b) may make such other orders as it considers necessary to secure that independent representation of the child's interests; (3) if the proceedings arise under regulations made for the purposes of section 111B, the court (a) may order that the child's interests in the proceedings be independently represented by a lawyer only if the court considers there are exceptional circumstances that justify doing so; and (b) must identify those circumstances in making the order; (4) a court may make an order for the independent representation of the child's interests in the proceedings by a lawyer (a) on its own initiative or (b) on the application of (i) the child, or (ii) an organisation concerned with the welfare of children or (iii) any other person; (5) without limiting paragraph (2)(b), the court may make an order under that paragraph for the purpose of allowing the lawyer who is to represent the child's interests to find out what the child's views are on the matters to which the proceedings relate.

<sup>545</sup> Nicholson "Children and Children's Rights in the Context of Family Law" in his address at Lawasia Conference Brisbane *Children and the Law: Issues in the Asia Pacific Region* on



express his or her view and to be assisted with legal representation in doing so.<sup>546</sup>

The full court of the Family Court of Australia addressed the role of the legal representative in a number of judgments.<sup>547</sup> As a result the full court expressed support for the development of judicial guidelines for the appointment of separate representatives.<sup>548</sup>

From these guidelines the Family Court formed a Child Representation Practice Direction Committee which worked together with other professional groups and

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21 June 2003 at 2. He added at 4 that it is only in recent years that issues relating to children's rights have begun to loom large in the family-law area in Australia.

<sup>546</sup> Bryant 2006 *AJFL* 131 refers to the discussion of the full court in *Re K* (1994) FLC 92-461 where the court considered the power to appoint a separate representative for the child; the role and function of a separate representative; the power of the separate representative to seek orders from the court and initiate appeals; the power to discharge a separate representative; and criteria for the appointment of a separate representative. Ross 2005 *AJFL* 100-105 discusses models of representation viewed against art 12 of CRC. She mentions that no similar model for child representation which has developed in the Family Court of Australia has emerged in the children's court. A direct representation model has been implemented in child protection matters in New South Wales. An interesting comparison between the *Children and Young Persons (Care and Protection) Act* 1998 and the *Family Law Act* is made by the author. S 9(b) of the *Children and Young Persons (Care and Protection) Act* highlights the requirements regarding participation as found in art 12 of the CRC. S 99(3) of the *Children and Young Persons (Care and Protection) Act* provides that a child over the age of ten years is rebuttably presumed to be capable of proper instructions to his or her legal representative. The Legal Aid Commission funds the legal representation of children in proceedings under the *Children and Young Persons (Care and Protection) Act* which usually takes place in the children's court.

<sup>547</sup> *Harris v Harris* (1977) FLC 90-276; *Bennett v Bennett* (1991) FLC 92-191; *Pagriarella v Pagliarella* (1993) FLC 92-400; *Re P (a child); Separate Representative* (1993) FLC 92-376 and *Re K* (1994) FLC 92-461. *Re P (a child)*.

<sup>548</sup> Bryant 2006 *AJFL* 132 states that separate representatives should be appointed in matters (a) involving child abuse; (b) where there appears to be intractable conflict between the parents; (c) where the child is apparently alienated from the parents; (d) where there are real issues of cultural or religious differences affecting the child; (e) where the sexual preferences of either or both the parents or some other person having significant contact with the child are likely to impinge on the child's welfare; (f) where the contact of either or both parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare; (g) where there are issues of significant medical, psychiatric or psychological illness in relation to either party or the child; (h) where it appears that neither parent is a suitable custodian; (i) cases in which a child of mature years and is expressing strong views; (j) cases where it is proposed to separate siblings; (k) custody cases where none of the parties are legally represented; (l) applications relating to the medical treatment of children where the interests of the child are not adequately represented. For a discussion the child's right to legal representation in s 28(1)(h) of the South African Constitution and in terms of s 55 of the South African Children's Act, see 5 4 6 2 *supra*.

drew up guidelines in 2003.<sup>549</sup> These guidelines are fairly comprehensive and address a number of family related matters. The guidelines in particular refer to the wishes of children.<sup>550</sup>

Further amendments were brought about by the *Family Law Amendment (Shared Parental Responsibility) Act*, inserting section 68LA that sets out the role of the independent children's lawyer which reflects the best interests of the child.<sup>551</sup> It appears that in the light of the amendments brought about by the

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<sup>549</sup> Bryant 2006 *AJFL* 133.

<sup>550</sup> Bryant *loc cit* sets out the guidelines which provide that (a) the child's representative should seek to provide the child with the opportunity to express his or her wishes in circumstances that are free from the influence of others; (b) a child who is unwilling to express a wish must not be pressured to do so and must be reassured that it is his or her right not express a wish even where another member of the sibling group does want to express a wish; (c) the child's representative should ensure that there are opportunities for the child to be advised about significant developments in his or her matters if the child so wishes, and should ensure that the child has the opportunity to express any further wishes or any refinement or change to previously expressed wishes; (d) the child's representative must take into account that the weight to be given to the child's wishes will depend on a number of factors, and is expected to be familiar with case law on the subject; (e) in preparing to make submissions on the evidence as to the weight to be placed on the wishes of the child, the child's representative may consult with the Order 30A expert, Child and Family Counsellor or other relevant expert in relation to (i) the contents of the child's wishes, (ii) the contexts in which those wishes both arise and are expressed, (iii) the willingness of the child to express wishes and (iv) any relevant factors associated with the child's capacity to communicate; (f) the child's representative is to assure that any wishes expressed by the child are put fully before the court and as far as possible, are in admissible form. This includes wishes that the child's representative may consider trivial, but the child considers important; (g) the child's representative is also to arrange for evidence to be before the court as to how the child would feel if the court did not reach a conclusion which accorded with the child's wishes. See also Ross "Images of children: Agency, art 12 and models for legal representation" 2005 *AJFL* 99.

<sup>551</sup> The significance of this amendment is reflected in the wording of the section of s 68LA which, *inter alia*, provides in subsections (4)(a) and (b) that the independent children's lawyer is not the child's legal representative and is not obliged to act on the child's instructions in relation to the proceedings. However, in terms of s 68L(5)(b) the independent children's representative must ensure that any views expressed by the child in relation to matters before the court are fully put before the court. Ss 68LA(7) and (8) provide that the independent children's lawyer may disclose to the court any information that the child communicates to the independent children's lawyer if the independent children's lawyer considers the disclosure to be in the best interests of the child even if the disclosure is made against the wishes of the child. Bryant 2006 *AJFL* 133-134 refers to the then clauses of the proposed Bill, now enacted in s 68LA and mentions that division 10 which includes s 68LA deals with the independent representation of the child's *interests*. (Emphasis added.) This is precisely what is addressed, the child's interests and not the child's views. See also Ross 2005 *AJFL* 95 who refers to the legal representation of children as agency and explains that agency may be regarded as the extent to which individual children are enabled to work with their lawyers to direct litigation.

*Family Law Amendment (Shared Parental Responsibility) Act* it will be likely that the Child Representative Guidelines will require review.<sup>552</sup>

South Africa acknowledges the child's right to legal representation in criminal matters as a fundamental right in the Constitution<sup>553</sup> and extends this fundamental right for children to civil proceedings.<sup>554</sup> The Children's Act incorporates the best interests of the child when considering legal representation for a child in children's court proceedings.<sup>555</sup> The guidelines for a child's representation in South Africa may therefore be reduced to the best interests of the child as reflected in section 7 of the Children's Act and participation of the child.<sup>556</sup>

#### 6 4 3 3 Conclusion

The *Family Law Act* in Australia ensures that the best interests of the child prevail in family-law matters. The paramountcy of the best interests of the child<sup>557</sup> is intertwined with the participatory rights of children as set out in Part VII "Children" of the *Family Law Act*. It becomes apparent that the best interests of the child and the paramountcy thereof is foremost in considering the participatory and representation rights of the child. Both Australia and South Africa incorporate considerations, in the case of Australia, or a standard in the case of South Africa. The content of the best interests under the *Family Law Act*

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<sup>552</sup> Bryant 2006 *AJFL* 134 referring to the Bill. With the enactment of the *Family Law Amendment (Shared Parental Responsibility) Act* the argument regarding the review of the Child Representative Guidelines remains.

<sup>553</sup> S 35(3)(g).

<sup>554</sup> S 28(1)(h) of the Constitution. The requirements are that the child must be affected in the civil proceedings and substantial injustice would result if legal representation is not granted.

<sup>555</sup> Thereby complying with the provisions of art 12(2) of the CRC. For a discussion of the influence of the CRC on s 28(1)(h), see 5 2 3 1 4 *supra*.

<sup>556</sup> It is submitted that the entrenched right of the child to legal representation in s 28(1)(h) of the Constitution and s 55 of the Children's Act surpasses the guidelines referred to above. For suggested guidelines in children's court proceedings and family-related proceedings, see 5 4 6 4 *supra*.

<sup>557</sup> Ss 60CA and 65AA of the *Family Law Act* both refer to best interests of the child as *the* paramount consideration. (Emphasis added.) S 28(2) of the South African Constitution mentions that the best interests of the child are of paramount importance in every matter concerning a child.

is open-ended<sup>558</sup> whereas that contained in the South African Children's Act is not.<sup>559</sup> Australia and South Africa acknowledge the paramountcy principle when applying the best interests of the child in matters involving children.

The recent amendments brought about by the *Family Law Amendment (Shared Parental Responsibility) Act* aim to ensure that family-law matters in terms of Division 12A of Part VII are less adversarial and emphasise the best interests of the child.<sup>560</sup> The effort to ensure that the result of family-law matters are less adversarial to children is also emphasised in South Africa.<sup>561</sup>

Participation in the *Family Law Act* as intended in article 12 of the Convention on the Rights of the Child has not yet fully been complied with.<sup>562</sup> Indirect participation through Family Reports and Child Representatives ensure that the views of children are presented in court.<sup>563</sup> However, the voice of the child is not yet fully presented to court.<sup>564</sup> There are indications that the results of research are being recognised. Time will tell to what extent the legislature will respond with possible further amendments to the *Family Law Act*.

Legal representation of children was first introduced with the *Family Law Act* and has been addressed in subsequent amendments. The latest amendment in

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<sup>558</sup> S 60CC(3)(m) mentions "any other fact or circumstance that the court thinks is relevant".

<sup>559</sup> S 7 contains thirteen factors each specified individually.

<sup>560</sup> Chisholm "Making it work: The Family Law Amendment (Shared Parental Responsibility) Act 2006" 2007 *AJFL* 145 refers to the Government Response 2005. This emphasis was confirmed in *Goode v Goode* [2006] FLC 93-286. See also Boland 2007 *ALJ* 574-576.

<sup>561</sup> Ss 6(4), 52(2), 60 and 61 of the Children's Act confirm the utilisation of non-adversarial procedures. As s 6(4) has general application it may be used as a guide to move towards conciliatory and problem-solving procedures where children are involved. This also seems to be the approach in Australian family-law matters.

<sup>562</sup> S 60CC(3)(a) provides that any expressed views by the child and any other factors such as the child's maturity or level of understanding that the court thinks are relevant to the weight it should give to the child's views are regarded as additional considerations. Nicholson Lawasia Conference at Brisbane during 2003 at 7 agrees that it is difficult to see how children who wish to give evidence can be prevented from doing so.

<sup>563</sup> Eg s 68LA(5)(b) provides that the independent children's lawyer must ensure that any views expressed by the child be fully placed before the court.

<sup>564</sup> Ross 2005 *AJFL* 110 makes a valid statement when she says that lawyers in common-law jurisdictions are steeped in an adversarial system which historically made certain assumptions about children and about what it means to participate as a party in a matter. Hunter 2006 *AJFL* 248 calls for further research to provide a firmer procedural basis for methods of dealing with children's cases.

2006 appears to reaffirm the right of the child to be separately represented in family-law matters.<sup>565</sup> The mentioned *Amendment Act* brought with it a name change indicating its intention to be more child-centred.<sup>566</sup> However, it does not necessarily comply with the aims of the Convention on the Rights of the Child.<sup>567</sup>

South Africa on the other hand has adhered to the prescripts of the Convention on the Rights of the Child. This is clear both in presenting the child with a right to participate<sup>568</sup> in any matter concerning the child and entrenching the child's right to legal representation in civil matters.<sup>569</sup>

## 6 5 Conclusion of the comparative analysis

The Convention on the Rights of the Child is used as a guide in this comparative study. Of the four general principles<sup>570</sup> enshrined in the Convention, the focus has been on the best interests of the child,<sup>571</sup> participation of the child<sup>572</sup> and representation of the child.<sup>573</sup> The comparison is done to determine to what extent the countries have complied with their international obligations flowing from their ratification of the Convention. This comparative review draws interesting conclusions. All the countries referred to in this review have ratified the Convention on the Rights of the Child and have submitted one or more of the required reports as required by the Committee on the Rights of the Child. The African countries have in addition also ratified the

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<sup>565</sup> However, s 68LA of the Act places emphasis on the interests of the child which may not necessarily intersect with the views of the child. S 68LA(4) specifically mentions that the independent children's lawyer is not the child's legal representative and is not obliged to act on the child's instructions in the proceedings.

<sup>566</sup> Legal representatives are now referred to as Independent Children's Lawyers.

<sup>567</sup> Art 12(2) prescribes that the child be provided the opportunity to be heard directly or through a representative.

<sup>568</sup> Art 12(1).

<sup>569</sup> Art 12(2).

<sup>570</sup> Arts 2 (non-discrimination), 3 (best interests of the child), 6 (right to life, survival and development) and 12 (views of the child and representing those views). See in general Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law" in Boezaart *Child Law in South Africa* 315-323.

<sup>571</sup> Art 3.

<sup>572</sup> Art 12(1).

<sup>573</sup> Art 12(2).

regional equivalent to the Convention of the Rights of the Child, namely the African Charter and the United Kingdom the European Convention. To date Kenya, Uganda and Ghana have submitted their respective reports in terms of the Convention on the Rights of the Child.

All the countries in the comparative study have introduced children's statutes and/or other legislation addressing the rights of children and have to some extent incorporated the Convention on the Rights of the Child into their domestic legislation.<sup>574</sup> Their intention as reflected in their respective legislation is to address and incorporate the paramountcy of the best interests of the child and the participatory rights of the child as part of the four general principles of the Convention of the Rights of the Child referred to in the comparative analysis.

The paramountcy of the best interests of the child standard in South Africa compares favourably with those of the countries used in the comparative study. Although the Children's Act in South Africa does not have an open-ended lists of factors to determine a child's best interests<sup>575</sup> it is entrenched in the South African Constitution<sup>576</sup> and enhanced by a firm foundation of case law.<sup>577</sup>

To resolve conflict in a conciliatory fashion appears to obviate the necessity for a legal representative to a large degree. It does, however, not necessarily comply with the provisions of article 12(2) of the Convention on the Rights of the Child.<sup>578</sup> Although conciliatory provisions are found in the children's statutes in Africa, Australia, New Zealand and the United Kingdom, the provisions in the South African Children's Act are more compliant with the requirements set out

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<sup>574</sup> Eg the United Kingdom and Wales and Australia have not specifically incorporated the CRC in their domestic legislations.

<sup>575</sup> Eg Australia has an open-ended list of factors to be considered in determining the best interests of the child.

<sup>576</sup> S 28(2).

<sup>577</sup> As discussed in 5 2 3 1 1 *supra*.

<sup>578</sup> This is the case with Ghana which does not provide a general right to legal representation for children.



in article 12 of the Convention on the Rights of the Child.<sup>579</sup> The comparative analysis clearly shows that children are given the opportunity, to varying degrees, to express their views. This indicates compliance with the requirements set out in article 12 of the Convention on the Rights of the Child. Australia for example focuses on the best interests of the child and receiving the views of the child through a third party. South Africa has a broader spectrum of application with the provision of section 10 of the Children's Act, than those countries evaluated in the comparative study.<sup>580</sup>

The child's right to legal representation in the comparative study indicates that South Africa compares exceptionally well in relation to its international obligations. Children in South Africa are provided with the opportunity to be heard in any judicial proceedings through a legal representative. Children in Ghana for example have no general right to legal representation. Then again in Uganda it appears that children have to meet a less restrictive requirement when their right to legal representation is considered than in South Africa. Children in Kenya are entitled to legal representation at state expense in proceedings, whether in terms of the Children Act or any other law. The discretion to grant legal representation vests in the court and not in an official of the Legal Aid Board as is the case in South Africa. In the United Kingdom the right of children to legal representation has been enhanced since the incorporation of CAF/CASS.<sup>581</sup> The view in the United Kingdom is that the child's autonomy should guide the participation of the child in proceedings and the requirement for legal representation.<sup>582</sup> This is also the interpretation in South Africa.<sup>583</sup> The comparative analysis indicates that children are normally not parties to private-law proceedings and therefore not legally represented. This

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<sup>579</sup> Ss 49, 69, 70 and 71 of the Children's Act.

<sup>580</sup> However, in par 4(c) of the First Schedule in its *Children Act* Uganda confirms that all rights enumerated in the CRC and ACRWC may be exercised by children with necessary adjustments.

<sup>581</sup> S 12(1)(c) of the Court Services Act. As Lowe and Douglas *Bromley's Family Law* 485 explain the main aim is "putting children first" in doing so ensuring that their voices be heard and decisions reached in their best interests.

<sup>582</sup> Hale 2006 *AJFL* 125.

<sup>583</sup> Ss 10 of the Children's Act and 28(1)(h) of the Constitution and is reflected in case law such as *Soller v G* 2003 (5) SA 430 (W) and *Legal Aid Board v R* 2009 (2) SA 262 (D).

matter is not directly addressed constitutionally in South Africa,<sup>584</sup> but is included in the Children's Act and is evidenced in South African case law.<sup>585</sup>

Scotland provides for children over the age of sixteen to appoint their own legal representatives and the Legal Aid Board of Scotland accepts that a child of twelve years may apply for legal aid. South Africa does not use a lower age limit as a determining factor of the child's right to legal representation. If a child is of such age, maturity and stage of development to instruct a lawyer, and if substantial injustice would otherwise result, the court will appoint a legal representative without the consent or assistance of a parent or guardian.<sup>586</sup>

New Zealand provides that children appearing before a Family Court are entitled to be legally represented. The *Care of Children Act* further provides that the court may appoint or direct the Registrar to appoint a lawyer if the child is the subject of or a party to the proceedings before the court.<sup>587</sup> The *Family Law Act* of Australia does not provide children with legal representation as a party to proceedings.<sup>588</sup> The assurance that the voice of the child be heard in judicial procedures as indicated in article 12(2) of the Convention on the Rights of the Child is therefore not that apparent in Australia.<sup>589</sup>

It appears that South Africa's constitutional obligations have been met with the entrenching of the child's right to legal representation in civil proceedings, irrespective of the limitation of substantial injustice to be present if a legal

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<sup>584</sup> S 28(1)(h) grants a child the right to legal representation in civil proceedings affecting the child if substantial injustice would otherwise result.

<sup>585</sup> Eg *Soller v G* 2003 (5) SA 430 (W); *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T).

<sup>586</sup> *Legal Aid Board v R* 2009 (2) SA 262 (D).

<sup>587</sup> The lawyer's appointment is subject to the court's decision that unless satisfied that the appointment would serve no useful purpose, the court is obliged to make such an appointment in certain proceedings such as day-to-day care for a child or contact with the child is considered.

<sup>588</sup> S 68LA(4)(a) provides specifically that the independent children's lawyer is not the child's legal representative.

<sup>589</sup> A call for further research and investigation has been made regarding the direct representation of the child in family-law proceedings focusing on presenting the views of the child directly and not editing the views to present such as being in the best interests of the child. See Ross 2005 *AJFL* 110.

representative is not assigned. None of the countries in the comparative study have a similar constitutional provision. South Africa also has a firm base of case law in which this entrenched right is discussed, analysed and confirmed. Some of the African countries, such as Kenya, have a complete lack of a consistent core of case law in such cases.

The basis of the child's best interests for legal representation in terms of the Children's Act is undoubtedly a better foundation from which to consider legal representation as proven also in the United Kingdom. In South Africa it appears at first glance that there is an improvement in the qualification for legal representation of the child.<sup>590</sup> This improvement, however, falls short when compared with countries like Uganda, Kenya, New Zealand and the United Kingdom. It is nevertheless accepted as is reflected in the comparative analysis, that South Africa has complied with its constitutional and international obligations regarding two of the four general principles<sup>591</sup> of the Convention on the Rights of the Child.

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<sup>590</sup> S 55 of the Children's Act.

<sup>591</sup> The other two principles, arts 2 (non-discrimination) and 6 (right to life, survival and development) are referred to, but not discussed in the comparative analysis.