

CHAPTER 7

CONCLUSION

7 1 Introduction

This thesis has shown that the journey featuring the child's participatory right in legal matters has been a long and arduous one. This is even more evident when one considers that children have always been and will always be an integral part of society.

The developments indicate that the consideration of the best interests of the child was consistently viewed from an adult's perspective resulting in an adult-centred point of view. The regard for the best interests of children was not of primary importance because children were asked whether they agree, but because it came to be accepted that parents or guardians knew best. It is against this background that the participatory rights of the child started to evolve.

The culmination of what children sought to attain in legal matters concerning them, not only voicing their views but having those views considered, came about with the signing into law of the Children's Act that entered into force fully during 2010.¹ This thesis critically evaluates the child's right to participate in legal matters involving children as entrenched in the Children's Act and draws two conclusions. The first being that there are practical implications concerning children's participatory rights in legal matters regarding them that need to be considered such as financial constraints and the training of people involved in the executing the child's right to participation and to be legally represented in legal matters. The second is that of the extent to which children's rights to legal representation in such matters concerning them is implemented, considering the present wording of section 55 of the Children's Act.

¹ 1 April 2010.

The recognition of the child's right to participate in legal matters allows for direct involvement of the child, him/her forming views and expressing those views, and for indirect participation through a suitable appointed or chosen representative acting on behalf of the child. The dividing line between allowing the child to express his or her views and to be assisted by a legal representative in doing so, or appointing a curator *ad litem* to protect the interests of the child and in the process receiving the views of the child, may sometimes become blurred. This aspect is considered and the practical implications especially in the children's courts are explored.

7 2 The development of the child's participatory rights

The child's participatory rights developed from Roman law prohibiting participation of children under the age of seven years, limiting those between seven and fourteen years and later those up to twenty-five years to the present day scenario found in section 10 of the Children's Act 38 of 2005. Section 10 places no lower age restriction on children in executing their right to form views, and if able, to express those views in legal matters concerning them. The participatory right of the child is further enhanced with the provisions of section 14 of the Children's Act introducing the child's right of access to any court regarding any matter affecting him/her.

However, children's participatory and representation rights only really gained ground during the latter part of the twentieth century.² When the progression of the child's participatory rights is considered, the observation of Farson³ that "children will be granted rights for the same reason as adults" is apt as far as entitlement to these rights are concerned, but not necessarily the extent thereof. This momentum becomes more evident with the comparative analysis included in this study. The recognition of the child's autonomy with the implementation of

² Freeman *Moral Status of Children* 51 refers to the child liberation movement in the 1970s.

³ *Birthrights* (1978) 31 observed that asking what is good for children is besides the point, adding that children are granted rights not because "[w]e are sure that children will become better people ... but because we believe that expanding freedom as a way of life is worthwhile in itself".

various children's statutes highlighting the child's participatory right confirms this situation.

7 2 1 Developments leading to the South African era

The recognition of the child as a person and not merely the equivalent of an object⁴ brought with it an improvement in the child's participatory rights.⁵ The influence of the *paterfamilias* initially restricted the right of children to participate in the usual sense of the word. However, it becomes evident that the child's participatory rights as reflected in his/her capacity to act, later became a greater reality. Roman law acknowledged age as the main dividing factor in according children the right to participate in legal matters involving them, resulting in an *infans* being regarded as completely incapable of performing any juristic act.

Children were increasingly granted the right to participate in legal matters affecting them, for example a minor acquired the right to choose whether an application for the appointment of a curator should be made,⁶ it was required that children entering into marriage must consent⁷ to such marriage and during the time of Justinian the child's consent to adoption was required.⁸ The dominance of the father's authority in Roman law regarding the child's right to participate in legal matters gave way to parental assistance during Roman-Dutch law. This further advanced the child's participation in legal matters.

⁴ In both Roman law and Germanic law, the father's power over his children was such that he was regarded as absolute master of his children. Initially in Roman law, the fathers as *paterfamilias* had absolute control over his children and in exceptional cases even the right of life and death.

⁵ In Roman law, the child under the authority of the *paterfamilias* could not acquire or own any property of his own.

⁶ *Inst* 1 23 2. Compare 2 1 8 2 *supra*.

⁷ Initially in both Roman law and Germanic law the father could compel his daughter to marry. The influence of Christianity later curbed the unrestrained authority of the father in Germanic law, see 2 2 3 *supra*.

⁸ See 2 1 5 2 2 *supra*.

Initially Roman law did not allow minors in power to be parties to a suit.⁹ Tutors and curators acted as procedural representatives and children who were *impuberes* and could only litigate with the approval of their tutor.¹⁰ Roman-Dutch law did not allow the summoning or issuing of a summons of an *infans* to appear in court himself or herself, as either plaintiff or defendant.¹¹ The general tenor regarding litigation involving minors was that minors had no *persona standi in iudicio*¹² and could not institute court proceedings or defend legal proceedings without the assistance of their parents or guardians.¹³

The best interests of the child progressively improved the child's right to participate and to be represented, including legal representation by way of a curator *ad litem* during Roman-Dutch law. The progression with regard to the child's participatory right was slow but sure and paved the way for the continued advance of the child's participatory rights in South Africa.

7 2 2 The period in South Africa prior to the new constitutional dispensation

Statutory intervention during the period preceding the new constitutional dispensation mainly brought about the development of the child's right to participate in legal matters concerning him/her.¹⁴ The adoption procedure allowed children direct participation if they were older than ten years. However, the participation of those younger than ten years, irrespective of whether they understood what their adoption involved, was not considered.

⁹ Kaser *Roman Private Law* 403 refers to a procedural capacity. Van Zyl *Roman Private Law* 366 mentions that it was only in exceptional cases where children who were in power of the *paterfamilias* were permitted to participate in litigation.

¹⁰ Van Zyl *loc cit.*

¹¹ Voet 2 4 4; Van der Keessel *Theses Selectae* 127, *Praelectioniones* 1 8 4.

¹² De Groot *Inleidinge* 1 4 1 explains that the exception was in criminal matters where minors had to appear in court themselves; Van Leeuwen *RHR* 5 3 5.

¹³ De Groot *Inleidinge* 1 4 1; 1 6 1; 1 7 8; 1 8 4; Groenewegen *De Leg Abr C* 3 6 3 2; Van Leeuwen *RHR* 5 3 5; Voet 2 4 4; 5 1 11; 26 7 12; Van der Keessel *Theses Selectae* 127; *Praelectioniones* 1 8 4; Van der Linden *Koopmans Handboek* 1 5 5 and 3 2 2.

¹⁴ Eg, the Adoption Act of 1923, Children's Act of 1937, Children's Act of 1960 and the Child Care Act of 1983. See 3 1 4 *supra*.

Besides acknowledging the child's direct involvement in children's court matters, legal representation for children became available for the first time.¹⁵ The general tenor of these items of legislation was, however, parent-centred. The child's voice in custody and access matters remained disquietly silent and case law of the period reflects this.¹⁶

During this period the best interests of the child were acknowledged as far back as the nineteenth century.¹⁷ The confirmation later by the Appeal Court¹⁸ dispelled any uncertainty regarding the paramountcy of the best interests of the child when involving the judiciary in matters concerning a child.¹⁹ A few years later, in the 1970s, a shift in emphasis²⁰ regarding the child's views indicated a change towards a child-centred approach in litigation between the child's parents in situations involving the child. An open-ended list comprising the best interests of the child standard²¹ encouraged the courts not only to apply the paramountcy rule concerning children, but also to consider the child's views in determining the best interests of the child.²²

7 2 3 The child's participatory right and the right to legal representation enshrined in the Constitution

Prior to the inception of the Constitution,²³ there was sporadic acknowledgment of the child's views in custody matters.²⁴ The dawning of the new constitutional dispensation in South Africa brought with it a revaluation of children's rights.

¹⁵ S 6(3) of the Children's Act of 1937.

¹⁶ See 4 5 3 1 and 4 5 3 2 *supra*.

¹⁷ *Simey v Simey* 1881 1 SC 171.

¹⁸ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

¹⁹ *Fletcher v Fletcher* at 134 and 145.

²⁰ *French v French* 1971 (4) 298 (W).

²¹ *McCall v McCall* 1994 (3) SA 201 204I-205F.

²² *Bethell v Bland* 1996 (2) 194 (W) 208H-209D; *Krasin v Ogle* [1997] 1 All SA 557 (W) 567i-569e; *Fitschen v Fitschen* [1997] JOL 1612 (C); *K v K* 1999 (4) SA 691 (C) 709A/B-H; *Soller v G* 2003 (5) SA 430 (W) pars [55] 445I/J-446A/B.

²³ Reference is to the final Constitution, signed into law by President Nelson Mandela in Sharpeville on 4 February 1997.

²⁴ Eg *French v French* 1971 (4) SA 298 (W); *Kastan v Kastan* 1985 (3) SA 235 (C); *Märtens v Märtens* 1991 (4) SA 287 (T).

The ratification of the Convention on the Rights of the Child²⁵ resulted in an obligation to align children's rights with international law and standards.²⁶ A growing urgency for the child's views to be recognised as a right resulted in the South African Law Commission²⁷ setting out to formulate a single comprehensive children's statute. The ratification of the African Charter²⁸ further promoted the rights of children and "africanised" South Africa's commitment to its children in respect of their rights.

The paramountcy of the child's best interests, having been confirmed,²⁹ was firmly entrenched in South African case law. A negative characteristic thereof was that it was still predominantly parent-centred, although there were some exceptions in case law.³⁰ On the positive side, however, the best interests of the child tempered the parent-centred pre-constitutional approach in access matters.³¹ Presently the need for hearing the child's views in family-law matters involving the child is accepted as a right.³²

The move away from a parent-centred³³ to a child-centred³⁴ approach echoes in South African case law.³⁵ With the best interests of the child standard

²⁵ 16 June 1996.

²⁶ Eg *K v K* 1999 (4) SA 691 (C); *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C); *S v Howells* 1999 (1) SACR 675 (C); *Jooste v Botha* 2000 (4) SA 199 (T); *S v J* 2000 (2) SACR 310 (C); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *Lubbe v Du Plessis* 2001 (4) SA 57(C); *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005(1) SA 580 (CC); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T); *S v B* 2006 (1) SACR 311 (SCA); *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SACR 515 (SCA); *Burger v Burger* 2006 (4) SA 414 (D); *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

²⁷ Prior to the name change to South African Law Reform Commission effective from 17 January 2003.

²⁸ 7 January 2000.

²⁹ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

³⁰ *French v French* 1971 (4) SA 298 (W) 299H; *Kastan v Kastan* 1985 (3) SA 235 (C) 236I-J; *Märtens v Märtens* 1991 (4) SA 287 (T) 294-295; *McCall v McCall* 1994 (3) SA 201 (C) 207H-J.

³¹ *B v S* 1995 (3) SA 571 (A) and *T v M* 1997 (1) SA 54 (A).

³² This is illustrated in the recent reported case *HG v CG* 2010 (3) SA 352 (ECP).

³³ Eg *Fletcher v Fletcher* 1948 (1) SA 130 (A) which serves as an example of a parent-centred approach where the focus remained on the "guilt" or "innocence" in determining the custody of the children.

entrenched in the Constitution³⁶ and overarching the development of the child's participatory rights, case law is a true reflection of the Constitution's influence on children's participation in legal matters concerning them.³⁷ This in turn echoes in the confirmation of the child's participatory rights entrenched in the Children's Act, referred to later.

The foundation of a core of case law that serves as a guide for enhancing child participation and legal representation in legal matters is important. Such a core of case law will help to strengthen the resolve to extend the child's participatory rights. South African case law in this regard is sound.³⁸

7 2 4 A comparative analysis of South Africa's international obligations regarding the child's participation and legal representation

Since the advent of the Convention on the Rights of the Child a number of countries have introduced child law reforms. The ratification of the Convention brought with it international obligations. Consequently some countries

³⁴ A number of cases since *French v French* 1971 (4) SA 298 (W) and especially from *McCall v McCall* 1994 (3) SA 201 (C) up to *HG v CG* 2010 (3) SA 352 (ECP) is indicative of receiving the views of children and confirms a child-centred approach.

³⁵ See cases referred to in 4 5 2 1 and 4 5 2 2 *supra*.

³⁶ S 28(2).

³⁷ *Fraser v Naudé* 1999 (1) SA (CC); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (C) par [17] 428C-D; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) pars [40] 780E/F-H and [41] 781A-B with *inter alia* reference to the CRC; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par [75]; *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) par [29] 1184F; *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par [20] 207; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) pars [54]-[55]; *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) pars [52]-[55] 609-610; *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) par [12] 187; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) pars [21] to [26] 247-250; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) par [130] 270D-E. See 5 2 3 1 1 *supra* for a discussion of the child's best interests as reflected in constitutional case law.

³⁸ This according to Ongoya 2007 KLR 248 is not the case in Kenya. See 6 3 3 *supra* for a discussion of the Kenyan law and especially 6 3 3 2 *supra*.

introduced principles of the Convention into their domestic legislation to honour their commitment to their international obligation in this regard.

Noticeable among the rights contained in the Convention on the Rights of the child are the child's right to express his or her views and to have those views considered in any proceedings affecting the child. The child's right to be represented when expressing his or her view focuses on the child's right to legal representation in legal matters.

The countries chosen for the comparative analysis have all ratified the Convention on the Rights of the Child. This ratification and the introduction thereof into their domestic legislation³⁹ served as a basis for the comparative analysis. The aim was to ascertain the level of achievement of the commitment to international standards with respect to the rights of children in legal matters for South Africa in comparison with the countries in the comparative analysis.

The comparative analysis indicates that, in general all, the countries have endeavoured to comply with the provisions of the Convention with the recent introduction, in some instances, of comprehensive pieces of legislation in this regard.⁴⁰ South Africa has benefitted from these developments as is reflected in its comprehensive Children's Act and the broad wording of section 10 of the Children's Act.⁴¹

The child's best interests are without exception regarded in all the countries in the comparative analysis as being of paramount or primary consideration,

³⁹ The exception being the United Kingdom and Scotland, see 6 4 1 *supra*.

⁴⁰ The Children Act 2001 of Kenya serves as an example. There has also been continuous development of initial legislation as is the case with the Care of Children Act 2004 of New Zealand as discussed in 6 4 2 3 *supra*.

⁴¹ The child's age and maturity is a common denominator found with all the children's statutes of the countries in the comparative analysis. Eg *Children Act* of Uganda (par 3(a) of the First Schedule refers to age and understanding, the Kenyan *Children Act* (s 4(4)) refers to age and degree of maturity, the *Children Act* of the United Kingdom (s 1(3)(a)) refers to age and understanding, the *Children (Scotland) Act* (s 11(7)(b)(iii)) refers to age and maturity, New Zealand's *Care of Children Act* (s 5(d)) refers to age, maturity and culture and Australia's *Family Law Act* (s 60CC(3)(a)) refers to maturity or level of understanding.

although some countries still refer to the outdated “welfare principle”.⁴² The paramount or primary importance of the child’s best interests is emphasised by all the countries in the comparative analysis.⁴³ South Africa’s consideration of the best interests of the child, contained in the Constitution⁴⁴ as of paramount importance in every matter concerning the child, is in line with that of the countries used in the comparative analysis. In addition it is entrenched as a fundamental right in South Africa.

The child’s right to legal representation in South Africa compares just as positively with the countries in the comparative analysis.⁴⁵ However, the child’s right to legal representation in South Africa is entrenched as a fundamental right, which includes civil matters.⁴⁶ It is this distinction that places South Africa ahead of the counties compared with in the analysis.

⁴² Eg the Ghanaian *Children Act* refers (s 5(2)) to the “welfare principle” when discussing the best interests of the child as does the *Children Act* of the United Kingdom (s 1(1)), the *Children (Scotland) Act* 1995 (s 16(1)). See comparative analysis in 6 3 and 6 4 *supra*.

⁴³ Some countries emphasise the importance of the child’s best interests as *the* paramount or primary consideration, see eg the Ghanaian *Children’s Act* (s 5(2)), the Ugandan *Children Act* (par 1 of the First Schedule) (Emphasis added.) See 6 3 1 1 1 and 6 3 2 1 2 *supra*. Some refer to the child’s best interests as being the court’s paramount consideration (s 1(1) of the *Children Act* 1989 of the United Kingdom, see 6 4 1 1 1 *supra*; New Zealand’s *Care of Children Act* 2004 (s 4(1)) refers to the best interests of the child being the first and paramount consideration of the court, see 6 4 2 3 1 *supra*.

⁴⁴ S 28(2).

⁴⁵ The Ghanaian *Children’s Act* does not provide a general right to legal representation in civil matters as found in s 28(1)(h) of the South African Constitution or s 55 of the *Children’s Act*, see 6 3 1 2 *supra*. The Ugandan *Children Act* (s 16(1)(f)) provides that every child has the right to legal representation in matters adjudicated by the Family and Children Court, see 6 3 2 1 3 *supra*; s 77(1) of the Kenyan *Children Act* provides that a court may grant legal representation at state expense guided by the best interests of the child, see 6 3 3 1 3 *supra*; s 12(1)(c) of the *Court Services Act* in the United Kingdom has as chief function the provision for the legal representation of children in family proceedings, see 6 4 1 1 2 *supra*; s 2(4A) of the *Age of Legal Capacity (Scotland) Act* that a child of sixteen may appoint and a child of twelve years shall be presumed to be of sufficient age and maturity to appoint a legal representative in any civil matter, see 6 4 1 1 2 *supra*; s 159(1) of New Zealand’s *The Children, Young Persons and Their Families Act* and s 7(1) of the *Care of Children Act* 2004 provides for the legal representation of children in terms of the specific Act and the latter Act provides that it is obliged to make such appointment in specified proceedings, see 6 4 2 2 3 and 6 4 2 3 3 *supra*; the Australian *Family Law Act* (s 68L) provides for the appointment of a legal representative to represent the child’s interests. Later amendments have not improved the child’s position with s 68LA(4) providing that the independent children’s lawyer is not the child’s legal representative and is not obliged to act on the child’s instruction, see 6 4 3 2 3 *supra*.

⁴⁶ S 28(1)(h) of the Constitution.

The comparative analysis therefore reveals that South Africa not only complies with the requirements of the Convention on the Rights of the Child, but also compares more than favourably with the countries referred to in the analysis. Comparative research indicates that South Africa is well on its way in enhancing children's rights overall in legal matters concerning them.⁴⁷ The general principles of the Convention on the Rights of the Child, referring to the child's participatory and representation right, have been extensively addressed in South Africa. This change was gradual and moved purposefully towards the convergence of children's rights in a Children's Act that is comparable with any of the children's statutes used in the comparative analysis.⁴⁸

7 2 5 The child's participatory right and the right to legal representation confirmed in the Children's Act

There can be no doubt that the Children's Act is the most important item of legislation for children in private law in the history of South Africa. The long and arduous route followed during the legislative process culminates in a comprehensive children's statute, which provides for an as wide as possible form of child participation in legal matters involving the child.

The Children's Act does not use a lower age limit as a determining factor to ensure a child's participation in legal matters concerning the child.⁴⁹ The intention is to allow every child who is able⁵⁰ to express his or her views in an appropriate way, the right to participation and thereby entrenching the child's participatory right. The consideration of such views is obligatory.

⁴⁷ Suggested improvements based on the comparative analysis aimed at simplifying the allocation of legal aid for children involved in legal matters.

⁴⁸ Compare 6 3 and 6 4 *supra*.

⁴⁹ This follows the general tenor of art 12 of the CRC, which does not mention age as a requirement for a child to form a view and express that view, see 5 2 2 1 *supra*.

⁵⁰ S 10 uses "age, maturity and stage of development" to describe the required ability of the child to participate. This requirement of "age, maturity and stage of development" is a golden thread through the whole Act when reference is made to the participation of the child in matters concerning the child. See 5 4 *supra* for a discussion of the Children's Act.

However, in medical treatment and surgical operations to be performed on a child, legislature has seen it fit to introduce twelve years as a dividing line resulting in children twelve years and older being able to make independent decisions regarding their medical treatment.⁵¹ Children older than twelve do, however, require the assistance of their parent or guardian when consenting to a surgical operation.⁵²

The Children's Act allows legal representation in children's court matters if the court is of the opinion that it would be in the best interests of the child to have legal representation. No lower age limit is set regarding the acquiring of legal representation. It appears that the individual presiding officer is the sole arbiter to decide whether the child qualifies for legal representation⁵³ or whether an application should be referred to the Legal Aid Board and they take the final decision, without any guidelines to assist them.⁵⁴

Children ten years or younger, if they are of an age, maturity and stage of development to understand the implications of their consent, may independently consent to their adoption. The Children's Act does not prescribe a lower age limit for the child's participation in concluding a post-adoptive agreement other than the child must be of an age, maturity, and stage of development to understand the implications of the agreement.

⁵¹ Ss 129(2)(a) and (b) of the Act provides that the child must be of sufficient maturity and have the mental capacity to understand the benefits, risks, social and other implications of the treatment. See discussion in 5 4 5 2 *supra*.

⁵² S 129(3)(c) of the Act refers to "duly assisted".

⁵³ This is Du Toit's concern in *Child Law in South Africa* 107. Sloth-Nielsen 2008 *SAJHR* 499 comments that magistrates in children's court enquiries exercise their discretion in determining whether a child appearing before them requires legal representation, which is more often the case in situations where there is conflict between the parent and the child. See 5 4 6 4 *supra* where a guide is suggested which is aimed at assisting the presiding officers in children's court proceedings and family-related matters dealt with in the children's court. It is for this reason that the standard of the child's best interests should be the only guide to determine legal representation for children in matters involving them.

⁵⁴ The concern of Gallinetti in *Commentary on the Children's Act* 4-22. When the court has decided that legal representation would be in the child's best interests then the Legal Aid Board ought to be obliged to make such appointment. This will create more certainty and consistency and enhance the child-centred approach of the Children's Act. See 5 4 6 4 *supra*.

7 2 6 How effective is the child's participatory right and right to legal representation in South Africa?

Children have the right to express their views freely.⁵⁵ Because there is no lower age limitation, this entrenched right allows a child younger than seven not only to hold a view, but also, if the child is mature enough and has reached a stage of development confirming such maturity, to be assured the right to express that view.⁵⁶ A court must consider such expressed view, although it need not meet with the approval of the court.

The Children's Act allows for an increase in the matters that a children's court may adjudicate in.⁵⁷ The provision allowing an application for the care of and contact with a child to be considered by the children's court⁵⁸ ensures that more children may have a say in their right to be cared for and have contact with their parents.⁵⁹ The child's right to access a court and to be assisted in doing so enhances the child's participatory right even further.⁶⁰ Recent case law⁶¹ has confirmed that a child may apply directly to the Legal Aid Board for a legal representative to be appointed in terms of section 14 of the Children's Act. This is a very positive enhancement of the right of the child especially as it enables children to exercise this protective right.

⁵⁵ Davel in *Commentary on the Children's Act* 2-13.

⁵⁶ Some countries like Scotland have introduced a presumption in favour of children twelve years or older to assist them with the appointment of a legal representative, see n 45 *supra*.

⁵⁷ S 45(1) of the Act. Countries such as Ghana (Child Panels and Family Tribunals), Uganda (Family and Children Court's), Kenya (Children Court's) and Australia (Family Court's) have created new fora in which to adjudicate new children's matters as introduced in their respective children's statutes. See comparative analysis 6 3 and 6 4 *supra*.

⁵⁸ S 45(1)(b) of the Act.

⁵⁹ *B v S* 1995 (3) SA 571 (A) at 581I-582A/B where the court held that "[i]t is the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted".

⁶⁰ S 14 of the Act. See Bosman-Sadie and Corrie *A Practical Approach to the Children's Act* (2010) hereafter Bosman-Sadie and Corrie *A Practical Approach* 30.

⁶¹ *Legal Aid Board v R* 2009 (2) SA 262 (D).

In terms of the Constitution⁶² and the Children's Act⁶³ children are assured a participatory right equal to that of adults in legal matters involving them. This equality includes the right to legal representation in civil matters⁶⁴ and children's court matters⁶⁵ at state expense.⁶⁶ Therefore, where the Legal Aid Board is not functional due to a shortage of suitably trained legal practitioners or simply does not have enough attorneys to supply the required service, this will negatively influence the child's right to be heard through a legal practitioner.⁶⁷

The Constitutional Court has confirmed the paramountcy of the child's best interests as a right⁶⁸ that all children have where their interests are concerned. However, this right is not absolute and is subject to the same limitation as any other fundamental right.⁶⁹ Nevertheless, a firm base of case law reflecting a child-centred approach has developed illustrating the significance of receiving the child's views and legal representation in legal matters concerning them.

Effective legal representation for children is the key to extending and ensuring the child's participatory right. Positive reports indicate that during the past two years or more there has been a marked increase in the legal representation of children due to the tremendous efforts of the Legal Aid Board.⁷⁰ This indeed creates a very positive picture.⁷¹ Based on the information contained in the

⁶² S 28(1)(h) guarantees a child the right to be heard through a legal practitioner. See discussion of 28(1)(h) in 5 2 3 1 4 and 5 4 6 2 3 *supra*.

⁶³ S 10 of the Act. For a discussion of the child's participatory right, see 5 4 5 *supra*.

⁶⁴ S 28(1)(h) of the Constitution.

⁶⁵ S 55 of the Children's Act.

⁶⁶ This is also found in jurisdictions such as Kenya, New Zealand and Australia see comparative analysis in ch 6 *supra*.

⁶⁷ Van Heerden in *Boberg's Law of Persons and the Family* 621 n 413 pointed out the reality that obvious emphasis on cost considerations may impede the increase in the level of children's legal representation in children's court proceedings and one might add family-law proceedings

⁶⁸ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [22].

⁶⁹ *S v M* par [26].

⁷⁰ Sloth-Nielsen in 2008 *SAJHR* 510-524.

⁷¹ The period covered is only for the financial year 2007/2008. *Op cit* 515 the author indicates the increase during the period April to September 2007 in Children's court matters numbering 1 729 over a period of six months compared to 2 130 for the whole 2006/2007 period. An expected increase of 31 per cent year-on-year based on the total of 2 30 cases for the whole year. It may be of concern that according to the Annual report of the Department of Justice and Constitutional Development there were 71 942 Children's court cases for the period 2006/2007 of which a total of 2 130 were dealt with by the Legal Aid

reports⁷² as well as information extrapolated and included in the Annual Report of the Legal Aid Board,⁷³ there appears to be a marked increase in access to legal representation for children throughout South Africa.⁷⁴

7 2 7 Continued progress - the way forward

When comparing the developments in South Africa with the countries investigated in the comparative review, it becomes clear that South Africa has succeeded in entrenching the four general principles of the Convention on the Rights of the Child referred to in the Children's Act and the Child Justice Act. Furthermore, the subtle difference between the functions of a curator *ad litem* and a legal representative presenting the voice of the child to the court has been addressed in South African case law.⁷⁵

Children have the right to be involved in legal matters concerning them. This right is entrenched in the Children's Act and forms part the fundamental rights to which children are entitled.⁷⁶ There must be a concerted effort from all the role-players to ensure the implementation of these rights in practice. Lack of practical and functional training of dedicated interpreters, social workers, and presiding officers could jeopardise the receiving of the child's views in children's courts and magistrate's courts and may impede the envisaged application of children's rights contained in the Children's Act.⁷⁷ The mere fact that the rights of children are enshrined in the different acts is meaningless if the exercising

Board. However, the Annual Report of the Legal Aid Board for the financial year 2008/2009 pp 19 and 31 reflects a 15% drop in representation for children in civil matters falling from 6 196 matters during the 2007/2008 financial year to 5 279 for the 2008/2009 financial year.

⁷² Sloth-Nielsen 2008 *SAJHR* 510-524.

⁷³ For the financial year 2008/2009.

⁷⁴ The Legal Aid Board granted legal assistance to 48 283 children of which 42 087 were in criminal matters and 6 196 in civil matters.

⁷⁵ See in this regard *Soller v G* 2003 (5) SA 430 (W) and *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁷⁶ S 8(1) of the Children's Act supplements the child's rights guaranteed in the Bill of Rights and s 6(2)(a) of the Act ensures that a child is entitled to have his or her rights as set out in the Bill of Rights respected, protected promoted and fulfilled.

⁷⁷ The observation of Davel in *Gedenkbundel vir JMT Labuschagne* 30 that only our combined efforts will ensure that children's voices are heard is apposite.

thereof remains elusive. This must thus be seen as an area for further development.

When allowing children a voice in processes such as family-related matters the possibility is present that it may enhance the emotional character of the proceedings.⁷⁸ To counter a possible negative emotional or other influence on children involved in family related cases, the child's right to participate will have to be handled in a sensitive and meaningful manner⁷⁹ as echoed in the Children's Act.⁸⁰ The challenge remains for courts, and in particular, the children's court, to adjust in such a way that it becomes possible for children to participate.⁸¹ Sections 10 and 14 of the Children's Act directly influence family-related matters in the magistrates and children's courts as a result of which maintenance matters and domestic violence involving children have been increasing.⁸²

The restricting effect of financial constraints on securing legal representation for children in family matters may create a real concern.⁸³ The only assurance that children have for legal representation in children's court matters is through the Legal Aid Board. The same principle applies to family-law matters involving children in magistrate's courts where section 55 of the Children's Act does not apply and the provisions of section 28(1)(h) of the Constitution find application. The availability of the required legal representatives can at this stage not be guaranteed in all cases and thus remains a risk where such support cannot be provided to children.

⁷⁸ Robinson 2007 *THRHR* 277. See eg *J v J* 2008 (6) SA 30 (C); *HG v CG* 2008 (6) SA 30 (C).

⁷⁹ *Loc cit.*

⁸⁰ Ss 6(4), 10 and 31 of the Act, see discussion of the Children's Act in 5 4 4 and 5 4 5 *supra*.

⁸¹ Bosman-Sadie and Corrie *A Practical Approach* 25.

⁸² This is based on information informally gathered from magistrates over the past two years at Justice College where I have been assisting as guest lecturer in the practical training of magistrates on the Children's Act. The following statistics were supplied by Justice College regarding the magistrates who attended 148 practical courses for the financial year 2007/2008, 232 for the financial year 2008/2009 and 209 for the financial year 2009/2010. Magistrates from all nine provinces attended the seminars over the past two years.

⁸³ This has also been a concern, for example, even in developed countries like the United Kingdom, see Hale 2006 *AJFL* 121-122 in 6 4 1 1 2 *supra*.

A child without a voice in his or her proceedings is the same as a child without hope. A child without legal representation may be in the same situation as a child trying to cross a busy street. It appears impossible and fraught with danger and uncertainty until a stranger comes and takes the child by the hand and leads him/her across the street.

Where a child is too young to voice his or her views, the best interests of the child ensure the protection of the child's fundamental rights that are now also entrenched in the Children's Act. The older the child becomes, the greater the need to listen to the child and consider the child's views, whilst being guided by the best interests of the child.

The challenge remains to assure every child the opportunity to express his or her views when it matters most for that child. When circumstances involving the child are clouded by uncertainty, the child's right to participation and legal representation stand out as a beacon of hope.