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**Rehabilitation in retrograde:
Preventing the publication of children's names
after the age of 18**

by

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Submitted in partial fulfilment of the requirements for the degree

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June 2018

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Acknowledgements

- To my supervisor, Ms RLK Ozah, thank you for your patience and guidance throughout this journey. I have learnt an immeasurable amount from you. I continue to be in awe of your contributions in the realm of children's rights.
- To my family, friends, and colleagues, thank you for all your support and love.
- The financial assistance of the National Research Foundation (**NRF**) towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at, are those of the author and are not necessarily to be attributed to the NRF.
- Finally (and most importantly), to my wonderful husband, Ethan. I could not have done this without your unwavering faith in me. Thank you for your love, understanding and for always cheering me on throughout this journey.

Abstract

Children are afforded a number of protections when they encounter the criminal justice system. The need for special protection stems from the vulnerable position children occupy in society. When children form part of the criminal justice system, either by being an offender, victim, or witness, they may be subjected to harm. To mitigate against the potential harm that may be caused, our law provides that criminal proceedings involving children, should not be open to the public, subject to the discretion of the court. This protection naturally seems at odds with the principle of open justice. However, the courts have reconciled the limitation with the legal purpose it serves. For all the protection and the lengths that the law goes to protect the identity of children in this regard, it appears there is an unofficial timer dictating when this protection should end. The media have been at the forefront of this conundrum to the extent that they believe that once a child (offender, victim, or witness) turns 18 years old, they are free to reveal the child's identity. This belief, grounded in the right to freedom of expression and the principle of open justice, is at odds with the child's best interests, right to dignity and the right to privacy. It also stares incredulously in the face of the aims of the Child Justice Act and the principles of restorative justice. Measured against the detrimental psychological effects experienced by child victims, witnesses, and offenders; this research aims to critically analyse the legal and practical implications of revealing the identity of child victims, witnesses, and offenders after they turn 18 years old.

Table of contents

Declaration of originality	ii
Acknowledgments	iii
Abstract	iv
CHAPTER 1 INTRODUCTION	1
1.1. Context	1
1.2. Problem statement and research objectives	4
1.3. Research methodology	6
1.3.1. Critical	6
1.3.2. Comparative	6
1.4. Limitations	6
1.5. Structure/ Chapters	7
1.5.1. Chapter 1: Introduction	7
1.5.2. Chapter 2: International law	7
1.5.3. Chapter 3: National legislative framework	8
1.5.4. Chapter 4: A case study: a look into <i>Media 24 case 2017</i>	8
1.5.5. Chapter 5: Foreign jurisprudence	8
1.5.6. Chapter 6: Conclusion and recommendations	8
CHAPTER 2 INTERNATIONAL LAW	9
2.1. Introduction	9
2.2. International law instruments	9
2.2.1. The United Nations Convention on the Rights of the Child	9
2.2.2. To whom is the UNCRC applicable?	10
2.2.3. General Comment 10	11
2.2.3.1 Privacy	11
2.2.3.2 Dignity	12
2.3. Best interests of the child	13
2.4. The right to privacy regarding international instruments	14

2.5. The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime	16
2.6. Conclusion	17
CHAPTER 3 THE NATIONAL LEGISLATIVE FRAMEWORK	19
3.1. Introduction	19
3.2. The Constitution of the Republic of South Africa	19
3.2.1. Children as bearers of rights	20
3.2.2. The best interests of the child (section 28(2) of the Constitution)	21
3.3. Balancing of rights	22
3.3.1. The right to privacy and the right to dignity	22
3.3.2. The right to freedom of expression	23
3.3.3. Open justice	24
3.4. Aims of Child justice at a glance	27
3.5. Conclusion	28
CHAPTER 4 CASE STUDY – A LOOK INTO <i>MEDIA 24 CASE 2017</i>	30
4.1. Introduction	30
4.2. Background	30
4.3. Restorative justice	32
4.3.1. What is restorative justice?	33
4.3.2. Restorative justice in South African jurisprudence	34
4.4. Case for the Applicants	35
4.4.1. Public interest versus what is interesting to the public	35
4.5. Expert evidence	36
4.5.1. Psychological harms	37
4.6. Supporting evidence by child offenders	38
4.6.1. PN	39
4.6.2. DS	40
4.6.3. P and X – child offenders who were not identified by the media	41
4.7. Case for the Respondents	42

4.7.1. Children adequately protected	43
4.7.2. Best interests of child	44
4.7.3. Self-regulation	45
4.8. The judgment at a glance	47
4.8.1. Separation of powers	47
4.8.2. Limitation of rights	49
4.8.3. Disregard of expert evidence	51
4.9. Conclusion	52
CHAPTER 5 COMPARISON WITH FOREIGN JURISDICTION – UNITED KINGDOM (UK)	54
5.1. Introduction	54
5.2. English and Welsh laws pertaining to the identification of children pre-13 April 2015	54
5.2.1. Youth court proceedings	55
5.2.2. Crown court proceedings	55
5.3. Case law	56
5.3.1. T v Director of Public Prosecution and North East Press	56
5.3.2. R (on the application of JC and RT) v The Central Criminal Court	57
5.4. “Mary Bell orders”	59
5.5. Relevance for South African law?	61
5.6. Conclusion	61
CHAPTER 6 CONCLUSION AND RECOMMENDATIONS	63
6.1. Conclusion	63
6.2. Recommendations	64
BIBLIOGRAPHY	66

CHAPTER 1

INTRODUCTION

1.1. CONTEXT

Before the enactment of the Child Justice Act 75 of 2008 (hereinafter the **Child Justice Act**)¹, there had never been a separate procedural justice system for children in South Africa.² Internationally, however, the recognition that child offenders should be treated differently to adults is over a century old.³ The recognition of this difference and the need to develop a separate system for children was borne from the welfarist approach.⁴ This approach is underpinned by the legal doctrine of *parens patriae*, which is an English law principle that the monarchy, or any other authority regarded as the legal protectors of vulnerable classes of persons, e.g. children, should protect the interests of the said vulnerable class of persons.⁵ Essentially this approach saw no difference between children's rights and their interests. It was not until the 1950s/1960s that this welfare approach was questioned.⁶ An approach geared towards the recognition of children's rights thus came to the fore.

It is, therefore, imperative to view the history of children's rights against the backdrop of the ever-present tension between the need for protection (of children) and the recognition of (their) autonomy.

"The Constitution⁷ draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to

¹ The Child Justice Act came into operation on 1 April 2010.

² *S v Brandt* [2005] 2 All SA 1 (SCA); Skelton A (1996) "Developing a juvenile justice system for South Africa: International instruments and restorative justice" *Acta Juridica* 180.

³ Sloth-Nielsen J (2001) "The role of international human rights law in the development of South Africa's legislation on juvenile justice" (1) 5 *Law, Democracy & Development* 59.

⁴ Skelton A (2011) From Cook County to Pretoria: A long Walk to Justice for Children, vol 6, no 2; *Northwestern Journal of Law and Social Policy* 413 pg. 414 at para. 4.

⁵ *Supra* note 4 pg. 41 at para. 5.

⁶ *In re Gault* 387 US 1 (1967).

⁷ The Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter **the Constitution**).

*protect themselves, more needful of protection, and less resourceful in self-maintenance than adults”.*⁸

The view espoused here by Cameron J indeed encapsulates the extensive body of international, regional, and national legislation and case law regarding the treatment of children exposed to the criminal justice system.

While South Africa was undoubtedly influenced by the welfarist approach, it should be noted that South Africa itself, never adopted the welfare model in its entirety.⁹

Children were subject to appear in the same courts as adult offenders, but there had always been mechanisms in place to deal with children differently in certain aspects of the criminal justice system.¹⁰ Examples of this are noticeable in sentencing and court proceedings. One such example would be that at common law, youthfulness has always been a mitigating factor in sentencing.¹¹ Additionally, the privacy of child offenders or witnesses was protected by holding proceedings *in camera*, and there existed a prohibition on releasing the names of child offenders or witnesses.¹² However, it may be argued that these mechanisms and protections were insufficient, mainly before the enactment of the Constitution. The child justice system in South Africa has undergone much jurisprudential development since the early 1990s. The approach towards creating a sustainable and cohesive child justice system indeed took off after the end of Apartheid. It was standard practice to punish child offenders harshly during Apartheid, especially considering politically-motivated crimes. Therefore, there was a serious need to redress the injustices of the past. As stated above, the protections available were insufficient, particularly in the context of the emerging standards on the treatment of children according to the international law. It is thus under this rise in concerted efforts to protect children from the rigours of the criminal justice system and considering the aims of restorative justice that South

⁸ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) at para. 26.

⁹ *Supra*, note 4 pg. 417 at para. 10.

¹⁰ Burchell J & Milton J (2014) *Principles of Criminal Law* revised 4th edition at pg. 364-369; Snyman CR (2014) *Criminal Law* 6th edition LexisNexis at pg. 178-181.

¹¹ *Supra* note 10; *S v Jansen* 1975 (1) SA 425 (A); *S v Lehnberg en`n Ander* 1975 (4) SA 553 (A).

¹² Skelton A (1997) “Children, young persons and the criminal procedure” in *Law of Children and Young Persons in South Africa* Robinson JA (ed) Butterworths at pg. 161 and 172.

Africa (and other jurisdictions) are confronted with a challenging new task which needs urgent attention.

What the Child Justice Act does is cement the legal principles embodied in international instruments, common law, and case law, and pave the way for a more cohesive separate child justice system. As stated in the Preamble of the Child Justice Act, *inter alia*, ‘the possibility of diverting matters away from the formal criminal justice system...’, must be noted as the central feature of the Child Justice Act. Moreover, to further expand on the principles of restorative justice in the criminal justice system with regards to children in conflict with the law.

When viewing the traditional objects of the criminal justice system; i.e. deterrence, incapacitation, rehabilitation (restorative justice) and restitution, it may seem from a merely superficial examination, that restorative justice outweighs the other objects of the criminal justice system where children are concerned. The overriding reason for this assumption may find application in the legislative framework and case law dealing with child offenders. It is assumed that the younger the offender, the more likely it is that he or she can be rehabilitated.¹³

If the rationale behind affording children a separate criminal justice system is to shield them from the rigours of the criminal justice system and to promote the aims of restorative justice, the question must then be asked when, or whether, such protection should cease to exist. The face of the world has changed. The world has ushered in the digital age where information is but a mouse-click away. The role of print and electronic media now poses a problem which indeed was not an issue a century ago when the “child-saving”¹⁴ movement began. The debate is now whether the protection regarding the privacy of a child offender, victim or witness afforded regarding legislation should be forfeited once that child becomes an adult, i.e. turns 18 years old. Of importance for this research is the extent to which the provisions in the Child Justice Act and the Criminal Procedure Act 51 of 1977 (**Criminal Procedure Act**) protect the privacy of child offenders after the child turns 18 years

¹³ *S v Steyn* 63/86 1986 ZASCA 75.

¹⁴ “Child-savers” were welfare-oriented individuals and organisations who founded reformatories and schools of industry during the nineteenth century as alternatives to prison or deportation for children who committed crimes. Feld BC (1999) *Bad Kids: Race and the Transformation of the Juvenile Court* Oxford University Press.

old. What seemed like uncharted territory now begs exploration in part due to the story of 'Zephany Nurse'.¹⁵ This story necessitates the consideration of the possibility of protection being extended to a child beyond the age of 18. In addition to the provisions of the abovementioned statutes, there are several constitutional provisions which also come into play. Such constitutional provisions include (but not limited to): the right to freedom of expression, principles of open justice, fair trial rights, the best interests of the child, privacy, and dignity. Thus, this research will also seek to explore the tension between the need for open justice and freedom of the press against promoting the best interests of the child.

1.2. PROBLEM STATEMENT AND RESEARCH OBJECTIVES

There is a degree of uncertainty regarding whether the identity of a child offender, witness or victim can be made public once said child turns 18 years old. This discussion is not only necessitated by uncertainty but is also brought on by the dawn of the information age.¹⁶ Section 154(3) of the Criminal Procedure Act provides: *No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person*'. Furthermore, section 63(6) of the Child Justice Act cross-refers to section 154(3) of the Criminal Procedure Act regarding the publication of such information. The abovementioned provisions are problematic in so far as the media has interpreted them to mean that the protection

¹⁵ The Centre for Child Law at the University of Pretoria (**CCL**) press release: 'Pretoria High Court judgment protects the identities of child victims of crime' (dated 11 July 2017) - Zephany Nurse (known as KL in court documents) discovered at the age of 17 years and 9 months that she had been kidnapped as a baby from the Groote Schuur Hospital in the Western Cape. The media subsequently sought to reveal her identity when she turned 18, however, as she did not want her identity to be revealed, she, with the assistance of the CCL launched an urgent court application which resulted in an order that protected her identity until at least all appeals had been exhausted; http://www.up.ac.za/en/news/post_2415404-op-ed-whats-in-a-name-high-court-considers-protecting-the-identities-of-children-in-criminal-proceedings (accessed 13 July 2017).

¹⁶ "Information age" *Merriam-Webster.com* 2015 <http://www.merriam-webster.com> (accessed on 4 October 2016). The information age is regarded as a time in which information has become a commodity that is quickly and widely disseminated and easily available especially through the use of computer technology.

afforded to child offenders (and witnesses) falls away once the child becomes 18 years old.¹⁷ This problem has caught the attention of children's rights activists and has manifested in a case in South Africa, the first of its kind,— *Centre for Child Law and 4 others v Media 24 Limited and 13 others (Part A and B)*¹⁸ (**Media 24 case 2017**). In the Supplementary Founding Affidavit filed by the first applicants in *Media 24 case 2017*, the CCL,¹⁹ attention is brought to the fact that it was extremely harmful to child accused, witnesses and victims, to be identified, even after they had turned 18.²⁰ It is argued, among other things, that these children should not lose the protection afforded to them under the law once they turn 18 and that it is essential, to facilitate effective rehabilitation, that these children not be identified.²¹ The final thought in the preceding sentence is perhaps the crux of the conundrum the law governing this position finds itself in: what is the effect on restorative justice if the protection of child offenders, witnesses and victims cease to exist after the age of 18? Do the aims of the Child Justice Act thus become redundant if a newspaper article can so easily undo them? It is therefore imperative for this research that the shortfalls of legislation in this regard be analysed against the backdrop of the aims of restorative justice (which will be explored further in Chapter 4 below). Therefore, by the motivation for this study, the following must be determined:

- i. How has the law regarding the protection of children's rights developed?
- ii. How has the role of the media in court proceedings developed alongside the protection of children's rights?
- iii. What is the theoretical basis underlying the protection of children's identities in criminal matters?
- iv. Are the provisions of the Criminal Procedure Act and the Child Justice Act adequate regarding protecting the identities of child offenders, witnesses, and victims beyond the age of 18 or is there need for legal reform?

¹⁷ *Media 24 case 2017* Supplementary Founding Affidavit (hereinafter **Supplementary Founding Affidavit**) (dated 3 June 2015) at para. 29.2.

¹⁸ *Supra* note 15. 2017 (2) SACR 416 (GP). Judgment in part B of this case was handed down on 11 July 2017. However, the CCL wish to take the matter on appeal, thus the matter is still pending (as per the CCL press release dated 11 July 2017).

¹⁹ *Supra* note 15.

²⁰ Supplementary Founding Affidavit at paras. 30-139.

²¹ *Ibid.* *Supra* note 15; *Media 24 case 2017* at para. 18.

1.3. RESEARCH METHODOLOGY

1.3.1. Critical

The research objectives will be determined through a critical analysis of primary and secondary sources of law. There is also a need for anecdotal analysis through the use of newspaper and magazine articles and other forms of information age media (e.g. SNS [**Social Media Sites**]).²²

1.3.2. Comparative

This research will also be comparative. There is a need to determine whether the law as it stands in South Africa is in need of reform. It is also necessary to critically assess the current law as social circumstances change over time and the law is not stagnant. A comparison can be made between South Africa and the United Kingdom (**UK**), particularly England and Wales. The UK has considered similar matters in their courts. It, therefore, serves as a useful exercise to analyse the manner in which another jurisdiction approached the research problem. A comparison of this nature is particular, given the shared legal history between the UK and South African.

1.4. LIMITATIONS

- The only reported case²³ on this specific matter in South Africa will still be taken on appeal. Reported cases have dealt with the privacy of child offenders and witnesses under the age of 18. However, the issue of privacy of child offenders beyond the age of 18 is a relatively new one. Part A of the *Media 24 case 2017* deals with the protection of the identity of KL beyond the age of 18.²⁴ Part B of this matter was heard on 9, and 10 February 2017 in the North Gauteng High Court and judgment was passed on 11 July 2017. In this judgment, the court made it clear that the protection of a child's anonymity cannot be extended into adulthood.²⁵
- The foreign law provides no clear-cut solutions as there seems to be no consensus on the issue. There has been considerable progress in the United

²² These would include, but not be limited to, Facebook, Twitter, YouTube, Instagram, Tumblr, Snapchat and WhatsApp

²³ *Supra* note 18.

²⁴ *Supra* note 15.

²⁵ At paras 61-69.

Kingdom. The details are discussed in Chapter 5 below. South African courts are, however, not obliged to consider this.²⁶

- The social and criminological aspect surrounding this issue has been explored in greater depth than any legal analysis of the problem.
- There is the possibility of slippery slope argument. When does an adult cease to be afforded protection under legislation meant to protect children? Would it lead to a violation of other parties' rights and the rights of the children themselves when they are adults as suggested by the court in *Media 24 case 2017*?²⁷ Would an extension of protection beyond the age of 18 years lead to the possible anomalies on which the media relied on in *Media 24 case 2017*?²⁸

1.5. STRUCTURE/ CHAPTERS

1.5.1. Chapter 1: Introduction

- This chapter serves as a general overview of the research problem. This chapter will encompass the questions, aims, limitations and assumptions regarding the research topic.
- This chapter also sets out the structure in which the research will be presented.

1.5.2. Chapter 2: International law

- This chapter provides an analysis of the various international law instruments available which deal directly or indirectly with the research problem.
- These instruments are a variation of hard and soft international treaties, guidelines and comments, such as the UNCRC,²⁹ ACRWC³⁰ and General Comments³¹ etc.

²⁶ Section 39(1)(c) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal, or forum, may consider foreign law.

²⁷ At para. 67.

²⁸ Applicant's note for reply at paras 18 and 19.

²⁹ The United Nations Convention on the Rights of the Child (**UNCRC**) was adopted 20 November 1989 and entered into force 2 September 1990.

³⁰ The African Charter on the Rights and Welfare of the Child was adopted on 11 July 1990 by the African Union (AU).

³¹ General Comments provide further explanation to rights mentioned in a specific human rights treaty. General Comments are not treaties and do not need to be ratified by treaty

1.5.3. Chapter 3: National legislative framework

- This chapter will entail a discussion of the provisions available in South African law which deal directly or indirectly with the research problem.
- The provisions of the Child Justice Act, Criminal Procedure Act, Children's Act 38 of 2005 (**Children's Act**) and the Constitution will be examined in the context of the research problem. It will include a more significant look at the need to balance the rights of the child and the media/public: i.e. freedom of speech, the principle of open justice versus the rights to privacy, dignity, and the best interests of the child.

1.5.4. Chapter 4: A case study: a look into *Media 24 case 2017*

- The catalyst of this debate, while having been an issue for some time, is the case of Zephany Nurse and all subsequent litigation under it. Therefore, a look into this case and similar cases will offer guidance into how the courts should approach the issues.
- An analysis of this case will demonstrate how the rights previously set out in Chapter 2 and 3 interact in practice.

1.5.5. Chapter 5: Foreign jurisprudence

- This chapter will focus on how courts in the UK have dealt with the publication of the identity of child victims, witnesses and offenders.

1.5.6. Chapter 6: Conclusion and recommendations

- The chapter will tie in all the aspects discussed in the previous chapters and provide answers to the research problem and questions.
- The chapter will conclude with proposals for the improvement of the tenuous relationship between the media and children. The recommendations will include a proposal to ensure recognition and adherence to the regulations put in place to protect the identity of children.

parties. They are, strictly speaking not legally binding; however, they are highly authoritative.

CHAPTER 2

INTERNATIONAL LAW

2.1. INTRODUCTION

It is impossible to delve into the intricacies of this subject without first outlining the international law framework in this regard. There are several international instruments which provide for the rights of children. South Africa recognises the significance that international law plays in the development of the jurisprudence surrounding the rights of the child. This symbiotic relationship between international law and national law is accommodated for in the Constitution. Section 39(1) (b) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. Section 231(4) of the Constitution provides that *'any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'*. Furthermore, section 233 of the Constitution states that: *'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'*. The extent to which international law provides recourse to children will be reviewed in this chapter. It is also important to bear in mind that the protections provided to children under international law are only as strong as the domestic law enforcement mechanisms will allow.

2.2. INTERNATIONAL LAW INSTRUMENTS

2.2.1. The United Nations Convention on the Rights of the Child

The most prominent of these instruments is the UNCRC. The principles encapsulated in this document provide for the formulation of and adherence to the needs and rights of children. South Africa is a party to this treaty.³² The UNCRC is domesticated in South Africa through the enactment of laws that align with its provisions. The most significant example of this is section 28 of the Constitution which provides for the rights of children. There is no doubt that the UNCRC is a

³² The UNCRC was ratified by the South African government on 16 June 1995.

remarkable and revolutionary piece of legislation. The rights contained therein provide a comprehensive blueprint upon which countries can base their legislation protecting the rights of children. Being the most ratified treaty in the history of human rights speaks volumes regarding the weight of importance which human beings ascribe to the rights of children and the development thereof.³³ Unfortunately, as is the case with legislation that is seemly perfect, there will lie a challenge which will test the strength of its provisions when it comes to implementation of the rights contained therein. *Muncie* perhaps stated best that “although the UNCRC is the most ratified of all international instruments, it is also the most violated”.³⁴

2.2.2. To whom is the UNCRC applicable?

One of the arguments made by the media when reporting on matters concerning children is that a child ceases to be a child when he or she turns 18 years old. This very fact has given the media free rein to publish articles about people, now adults, who were offenders, victims, or witnesses when they were below the age of 18 years.³⁵ Article 1 of the UNCRC states; *inter alia* that ‘*a child means every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier*’. By being a treaty dealing with the rights of children, and the definition specifying who a child is, it would appear that the UNCRC only applies to a person below the age of 18 years. However, it is interesting to note that the UNCRC does not expressly state when said protection ceases to exist. There is nothing in the UNCRC that states that a child who has directly or indirectly been affected by the criminal justice system forfeits that protection upon attaining majority status.

³³ The United States of America is the only country which has not ratified the UNCRC.

³⁴ Muncie J (2008) The Punitive Turn in Juvenile Justice: Cultures of Control and Rights Compliance in Western Europe and the USA 8 (2) *Youth Justice* Youth Justice vol 8, no 2, 107-121.

³⁵ See note 195 below.

2.2.3. General Comment 10³⁶

2.2.3.1 Privacy

Article 16 of the UNCRC provides that “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation”.³⁷ Furthermore, that “the child has the right to the protection of the law against such interference or attacks”.³⁸ Article 40(2)(vii) of the UNCRC also states that parties to the UNCRC shall, in particular, ensure that every child alleged as or accused of having infringed the penal law has at least, among other things, the guarantee to have his or her privacy fully respected at all stages of the proceedings. General Comment 10 provides a mechanism to interpret the principles underlying policy relating to juvenile justice. According to General Comment 10, Article 16 of the UNCRC is meant to avoid harm caused by undue publicity or by the process of labelling.³⁹ The United Nations Committee on the Rights of the Child (**UN Committee**) recognises that there is a need to prevent the publication of information which may lead to the identification of a child [offender] because of its effect of stigmatisation, and the possible impact on his/her ability to have access to education, work, housing or to be safe.⁴⁰ The UN Committee further implores public authorities to provide measures to guarantee that children are not identifiable via, *inter alia*, press releases.⁴¹ General Comment 10 additionally states that there should be disciplinary (and when necessary) penal sanctions for journalists who violate the right to privacy of a child [in conflict with the law]. The UNCRC thus seems restricted in the sense that it also has a limitation on how long the protection of the child’s privacy should endure. Article 40(2)(vii) of the UNCRC states that that the child (who has been accused or convicted of a crime) has a right to have his or her privacy fully respected at all stages of the (legal) proceedings. The protection does not seem to extend after legal proceedings have ceased.

³⁶ 44th session of the United Nations Committee on the Rights of the Child in Geneva (January–February 2007) in which the Committee issued a general comment on the topic of *Children’s Rights in Juvenile Justice* (adopted on 25 April 2007).

³⁷ Article 16(1) of the UNCRC.

³⁸ Article 16(2) of the UNCRC.

³⁹ Pg. 18 at para 64.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

2.2.3.2 Dignity

There isn't a shortage of references to the recognition and importance of the dignity of the child within the UNCRC. The Preamble alone makes three references to the concept of dignity. The Preamble highlights that when state parties became signatories to the UNCRC, they effectively also need to consider that "...*the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity*". Articles 37,⁴² 39⁴³ and 40⁴⁴ refer to the role that reintegration plays in promoting the dignity and self-worth of a child who conflicts with the law. In providing clarity regarding the content of these provisions, General Comment 10 states that as far as children in conflict with the law are concerned, the inherent right to dignity and worth has to be respected and protected throughout the entire process of dealing with the child.⁴⁵ Fundamental to this principle is that in dealing with a child who conflicts with the law, the child's age and the promotion of the child's reintegration into society should be taken into account.⁴⁶

Defining dignity can be an arduous task not only in the realm of international law but also regarding the national law. The concept has not been defined in any major international instruments. The sources of human dignity in modern constitutionalism,

⁴² Article 37(c) of the UNCRC states that State Parties shall ensure, *inter alia*, that 'every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age'.

⁴³ Article 39 of the UNCRC provides that 'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child'.

⁴⁴ Article 40(1) of the UNCRC provides that 'States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.

⁴⁵ See pg. 6 at para 13 with particular reference to Article 40(1) of the UNCRC.

⁴⁶ *Ibid.*

the Universal Declaration of Human Rights⁴⁷ (1948) (**Universal Declaration**) and the International Charter of Human Rights (1948), recognise the concept of dignity as a basis for human rights.⁴⁸ However, these instruments refrain from providing a definition of and a theoretical basis for human dignity.⁴⁹ There have been several Constitutional Court cases in South Africa which have dealt with the protection of the right to dignity. The Constitutional Court has described the right to dignity as “*the cornerstone of our Constitution*”.⁵⁰ In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁵¹ Ackerman J recognised the difficulty of defining the concept with precision; however he stated that “*at its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society*”.

2.3. BEST INTERESTS OF THE CHILD

Article 3(1) of the UNCRC states 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’. The tenets of this article are reiterated in the Constitution (section 28) and the African Charter on the Rights and Welfare of the Child (**ACRWC**) (article 4). As is the case with a standard that must be applied in line with the circumstances of each case, there may indeed exist a conflict between the interests of a child and the interests of other persons or society at large. It is, however, important to note that the wording in Article 3 of the UNCRC (and indeed the Constitution and the ACRWC) does not, exclude balancing other considerations, which, if they are rights-based, may in certain circumstances override the best interests’ considerations.⁵²

⁴⁷ Article 1 of the Universal Declaration of Human Rights states that “*All human beings are born free and equal in dignity and rights*”.

⁴⁸ Steinmann R (2016) The core meaning of human dignity *PER* vol 19 at para. 1.

⁴⁹ *Ibid.*

⁵⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) at paras 328 - 330; *Prinsloo v van der Linde and Another* 1997 (3) SA 1012 (CC) at paras 31 - 33, *The President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at para.41.

⁵¹ 1999 (1) SA 6 (CC).

⁵² UNHCR Guidelines on Determining the Best Interests of the Child pg. 76 (May 2008) available at <http://www.refworld.org/docid/48480c342.html> (accessed on 4 September 2017).

2.4. THE RIGHT TO PRIVACY REGARDING OTHER INTERNATIONAL INSTRUMENTS

One of the main issues confronting society in the information era is the threat that technology poses to an individual's right to privacy.⁵³ Social scientists recognise the right to privacy as essential for the preservation of an individual's human dignity, including his physical, psychological and spiritual well-being.⁵⁴ In legal terms, privacy is described as an individual condition of life characterised by exclusion from publicity.⁵⁵ One could, however, argue that the rapid speed in which technology has developed over the years is at odds with the legislation drafted to afford the protection of one's privacy. While there are certain provisions which provide scope for the protection of one's privacy in the information age, it could be argued that this protection does not go far enough.

As a point of departure, we look at the International Covenant on Civil and Political Rights (ICCPR).⁵⁶ Article 17 of the ICCPR states that '*no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation*'. Furthermore, that '*everyone has the right to the protection of the law against such interference or attack*'. This provision is echoed in article 16 of the UNCRC. It is evident that (much like the South African Constitution) the right to privacy is not absolute and can be limited. While it is clear that any interference (with privacy) deemed to be "arbitrary" or "unlawful" is forbidden, it is, however, unclear to what extent an "attack upon his honour and reputation" is protected. It would appear as though this right is guaranteed to every person regardless of age regarding the ICCPR, with no express or implied expiration date.⁵⁷ However, upon a strict interpretation of the definition of a "child", the right

⁵³ Britz H & Ackermann M (2006) *Information Ethics and the Law*, Van Schaik.

⁵⁴ Burns Y (2001) *Communications law*, Butterworths, Durban.

⁵⁵ Potgieter & Visser (2015) *Law of Personality* 2nd edition LexisNexis.

⁵⁶ Adopted by the United Nations General Assembly with resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976.

⁵⁷ Article 2 of the ICCPR states that '*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*'.

appears to cease to exist once a person turns 18 regarding the UNCRC.⁵⁸ Does a person not live with his or her reputation for life? The international law thus seems incongruent with the lived reality that the publication of information may have on a child witness, victim or offender once they enter their adult years. The fear of stigmatisation does not seem to be lost on those who drafted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the **Beijing Rules**).⁵⁹ The Beijing Rules deal specifically with juveniles and young persons (those alleged to have committed or who have been found to have committed an offence). It is interesting to note that the Beijing Rules steer clear of stating a specific age to which these rules are applicable.⁶⁰

Rule 8 of the Beijing Rules provides that the juvenile's right to privacy shall be respected at all stages to avoid harm being caused to her or him by undue publicity or by the process of labelling.⁶¹ Rule 8 further provides that in principle, no information that may lead to the identification of a juvenile offender shall be published.⁶² The Commentary provided on Rule 8 recognises that '*young persons are particularly susceptible to stigmatisation [sic]*'. Criminological research into labelling processes has provided evidence of the detrimental effects resulting from the permanent identification of young persons as "delinquent" or "criminal".⁶³ The Commentary further states that it is important to protect juveniles from the adverse effects that may result from the publication in the mass media of information (about the case). The *caveat* to all this being that such interests should be protected and

⁵⁸ Article 1 of the UNCRC states that '*for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*'.

⁵⁹ Adopted by United Nations General Assembly resolution 40/33 of 29 November 1985.

⁶⁰ Commentary on Rule 2 of the Beijing Rules: *Rule 2.2 of the Beijing Rules defines "juvenile" and "offence" as the components of the notion of the "juvenile offender", who is the main subject of these Standard Minimum Rules (see, however, also rules 3 and 4). It should be noted that age limits will depend on, and are explicitly made dependent on, each respective legal system, thus fully respecting the economic, social, political, cultural and legal systems of Member States. This makes for a wide variety of ages coming under the definition of "juvenile", ranging from 7 years to 18 years or above. Such a variety seems inevitable in view of the different national legal systems and does not diminish the impact of these Standard Minimum Rules.*

⁶¹ Rule 8.1 of the Beijing Rules.

⁶² Rule 8.2 of the Beijing Rules.

⁶³ Lincoln R & Chappell D (2009) Shhh ... we can't tell you: an update on the naming prohibition of young offenders vol 20 no 3. *Current Issues in Criminal Justice* pg. 482; Braithwaite J (1989) *Crime, Shame and Reintegration* Cambridge: Cambridge University Press Cambridge.

upheld 'in principle'. This proviso, unfortunately, entrenches the cynicism regarding the limited impact of international law, particularly where enforcement is concerned.⁶⁴

The African Charter on Human and People's Rights⁶⁵ does not protect the right to privacy.⁶⁶ Article 10 of the ACRWC echoes the wording of article 16 of the UNCRC with the addition of the words '*provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children*'. The addition of these words appears to limit the child's right to privacy in so far as it relates to the rights of the parents to exercise "reasonable supervision". This deviates from the position of the UNCRC. Furthermore, Article 17(2)(d) of the ACRWC prohibits the press and the public from the trial (of a child in conflict with the law). This provision in the ACRWC is quite different from the provisions of the UNCRC. The UNCRC does not prohibit the press from the trial. It would, therefore, appear that a child in conflict with the law is afforded a stronger right to protection under the ACRWC than under the UNCRC.⁶⁷

2.5. THE GUIDELINES ON JUSTICE IN MATTERS INVOLVING CHILD VICTIMS AND WITNESSES OF CRIME⁶⁸

In 2005, the United Nations Economic and Social Council adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (the **Guidelines**). These Guidelines were developed as a useful framework for member states in enhancing the protection of child victims and child witnesses in the criminal justice system, reaffirming the view that every effort must be made to prevent the victimisation of children.^{69, 70} The Guidelines echo the sentiments of other

⁶⁴ Dugard J (2011) *International law: A South African perspective* 4th edition Juta at pg 5.

⁶⁵ Also known as the Banjul Charter. Adopted in 1998.

⁶⁶ Van der Bank CM (2012) The Right to Privacy – South African and Comparative Perspectives *European Journal of Business and Social Sciences*, vol 1, no 6, 77-86 <http://www.ejbss.com/Data/Sites/1/octoberissue/ejbss-12-1164-therighttoprivacy.pdf> (accessed on 1 September 2017).

⁶⁷ Gose M (2002) *The African Charter on the Rights and Welfare of the Child* Law Community Centre <http://dullahomarinate.org.za/childrensrights/Publications/Other%20-publications/The%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (accessed on 23 October 2017) at pgs. 73 – 74.

⁶⁸ Resolution 2005/20 adopted by the United Nations Economic and Social Council on 22 July 2005.

⁶⁹ Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, available at http://www.un.org/.../guidelines_on_justice_in_matters_involving_child_victims_and.pdf (accessed on 23 October 2017).

international instruments mentioned herein in so far as the guiding principles include the rights to dignity and privacy. The Guidelines state, *inter alia*, that ‘every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected’.⁷¹

Guideline 26 of the Guidelines provides that “*child victims and witnesses should have their privacy protected as a matter of primary importance*”. Noted is that the dissemination of information about a child victim or witness, in particular in the media, could have grave consequences for the child.⁷² Not only are there concerns regarding the safety of the child, but also the possibility of causing the child intense shame and humiliation. In some cases it might even lead to stigmatisation by the community, thereby aggravating secondary victimisation of the child.⁷³

2.6. CONCLUSION

There appear to be no mechanisms available in international law to extend the privacy of a child offender, witness and victim beyond the age of 18. However, in the same vein, it can be said that international law does not expressly state when protection afforded to a child under the various international instruments ceases to exist. There is great emphasis on restorative justice and the reintegration of a child who has directly or indirectly interacted with the criminal justice system. The body of international law provides the framework under which domestic law should seek to implement the protection of children’s rights effectively. While general comments, rules and guidelines etc. (soft international law) appear to offer no coercive power that ensures compliance, they provide significantly more detail than the UNCRC and the ACRWC and have frequently been referred to in case law.⁷⁴ It appears that much of the international instruments (while certainly providing a great foundation

⁷⁰ Bekink M 2016 LLD thesis *The protection of child victims and witnesses in terms of the Constitution of the Republic of South Africa 1996, and international instruments* at para 4.4 on pg. 214.

⁷¹ Guideline 8 (a).

⁷² *Ibid* at pg. 222.

⁷³ UN Office on Drugs and Crime (UNODC) Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime 59.

⁷⁴ Skelton A (1997) Children’s rights: Social change through the application of hard and soft international law at pg. 4 (Class notes for Constitutional and international law pertaining to children 801 (GIK 801 – a LLM module offered at the University of Pretoria) accessed 3 June 2017).

and starting point) have yet to adequately cater for the impact of the right to privacy of child offenders, witnesses and victims in the information age.

CHAPTER 3

THE NATIONAL LEGISLATIVE FRAMEWORK

3.1. INTRODUCTION

As stated in Chapter 2 above, international law finds application in domestic law where the standards imposed by international law are interpreted and incorporated into legislation.⁷⁵ Several legislative documents govern child justice in South Africa. For this discussion, the legislation that is of most relevance includes the Child Justice Act; the Children's Act and the Constitution. The Criminal Procedure Act is also relevant to the extent that the Child Justice Act did not repeal the relevant provisions.

3.2. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

Upon ushering in the new democratic dispensation in 1994, the legislative landscape of South Africa changed quite significantly. The Constitution welcomed several constitutional entitlements to children. The most significant protections can be found in section 28 of the Constitution which deals specifically with the rights of children. However, it is important to note that children's rights are not limited to section 28. Section 8(2) of the Constitution provides that a provision of the Bill of Rights bind a natural or a juristic person if, and to the extent that, it is applicable, considering the nature of the right and the nature of any duty imposed by the right. Therefore, children are also entitled to other constitutional freedoms and protections provided for in the other sections of the Bill of Rights. Of particular interest to the discussion, will be the rights to privacy⁷⁶ and dignity⁷⁷ and the best interests of the child⁷⁸ versus freedom of expression⁷⁹ of the media and the open justice principle.

⁷⁵ Section 39(1) (b) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.

⁷⁶ Section 14 of the Constitution.

⁷⁷ Section 10 of the Constitution.

⁷⁸ Section 28(2) of the Constitution.

⁷⁹ Section 16 of the Constitution.

3.2.1. Children as bearers of rights

The Constitutional Court held, *inter alia*, in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*⁸⁰ that children are the bearers of legally enforceable rights and are entitled to a realm of personal space and freedom by their evolving capacities.⁸¹ In *S v M (Centre for Child Law as Amicus Curiae)*,⁸² Sachs J held, *inter alia*, that “*individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood*”.⁸³ The conundrum that often presents itself where children’s rights are concerned is the need to recognise the autonomy of children together with the reality that children, by their being, need to be afforded special protection.⁸⁴ This very conundrum has been discussed in many cases, including *Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development and others*.⁸⁵ The court held, *inter alia*, that “[children] by virtue of their immaturity, are reliant on responsible authorities to assess and represent their rights and best interests in relation to decision affecting them, while taking account of their views and evolving capacities”.⁸⁶

If a child is exposed to the rigours of the criminal justice system, there are special protections in place to mitigate the harm that child may face. However, it is unclear to what extent and for how long a person, including children, may be affected by crime (either as the offender, victim, or witness). It, therefore, seems incongruent that a person ceases to be afforded protection after he or she turns 18 years old on the basis that the child may carry that trauma well into adulthood.

⁸⁰ 2014 (2) SA 168 (CC).

⁸¹ At 38 Khampepe J stated, *inter alia*, “*The correct approach is to start from the premise that children enjoy each of the fundamental rights in the Constitution that are granted to “everyone” as individual bearers of human rights*”.

⁸² 2008 (3) SA 232 (CC).

⁸³ *Supra* note 82 at paras 18 -19.

⁸⁴ See para. 1.1 above.

⁸⁵ 2009 (4) SA 222 (CC).

⁸⁶ *Supra* note 85 at para. 77.

3.2.2. The best interests of the child (section 28(2) of the Constitution)

The best interest of the child standard was articulated in section 28(2) of the Constitution⁸⁷ and sections 7 and 9 in the Children's Act.⁸⁸ Section 7 of the Children's Act provides that whenever a provision of the Children's Act requires the best interests of the child standard to be applied, several listed factors must be taken into consideration if relevant to the enquiry before the court.

International law also calls on state parties to take cognisance of the standard.⁸⁹ The "best interests" standard has been applied in many different circumstances and has, appropriately, never been given exhaustive content in either South African law or in comparative international or foreign law.⁹⁰ The advantage of applying the standard is that the determination of what precisely is in the best interests of the child is a factual question that has to be determined in light of the circumstances of each case.⁹¹ This flexibility should be viewed as a strength rather than a weakness.⁹² However, there will be some intersecting constitutional values and interests involved which may compete and overlap with the best interests of the child. There is, in fact, no hierarchy of fundamental rights, and the fact the best interests' standard is afforded the status of paramountcy, does not mean that it supersedes other provisions of the Bill of Rights.⁹³ The right is still subject to the limitation in terms of section 36 of the Constitution.⁹⁴ Of particular interest to this research is the extent to which it can be

⁸⁷ Section 28(2) of the Constitution states that *A child's best interests are of paramount importance in every matter concerning the child.*

⁸⁸ Section 7 of the Children's Act provides for the best interest standard and section 9 elevates the standard to that of paramountcy. This ties in with section 28(2) of the Constitution.

⁸⁹ See Chapter 2 above.

⁹⁰ *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) at para. 18.

⁹¹ *S v M* serves as a great example of this individualistic approach.

⁹² *Supra* note 82 at para. 24.

⁹³ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) 432A-G par 54; *supra* note 92 para 25 at 249D - the correct approach is to apply the paramountcy principle in a meaningful way without obliterating other valuable and constitutionally protected interests.

⁹⁴ The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;

contended that it is in the best interests of the child to not be identified by the media even after he or she turns 18 years old.

3.3. BALANCING OF RIGHTS⁹⁵

The court in *National Media Ltd v Bogoshi*⁹⁶ (a case dealing with the right to privacy versus the right to freedom of expression) stated that it would be wrong to regard either of the competing interests as being more important than the other.⁹⁷ In that case, the court held that where two competing constitutional rights come into conflict – each invoked by different parties, and seeking to intrude on the other’s right – a court must reconcile them.⁹⁸ To carry out this balancing exercise, we look particularly to section 36 of the Constitution. One weighs the extent of the limitation against the purpose, importance and effect of the intrusion and the benefit that is derived from allowing the intrusion against the loss that said intrusion would entail.⁹⁹

3.3.1. The right to privacy and the right to dignity¹⁰⁰

Section 14 of the Constitution provides that ‘*everyone has the right to privacy*’. In South African common law, the right to privacy is recognised as an independent personality right which the courts have included within the concept of *Dignitas*.¹⁰¹ It was held in *Financial Mail (Pty) Limited v Sage Holdings Limited*¹⁰² that a breach of privacy could occur by way of either an unlawful intrusion upon the personal privacy of another or by way of unlawful disclosure of private facts about a person.¹⁰³ Ackerman J listed some examples of wrongful disclosure which have been acknowledged by common law. An example of this would include (but would not be

-
- (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

⁹⁵ See para 4.8.2 below.

⁹⁶ 1998 4 SA 1196 (SCA).

⁹⁷ *Ibid* at 17.

⁹⁸ Carstens P (2008) Access to medical records without consent of patient and the publication thereof in the public domain: Issues of privacy, dignity, freedom of expression and public interest; *Tshabalala-Msimang and Medi-Clinic Ltd v Makhanya* 2008 3 BCLR 338 (W) *Obiter* 2008 at pg. 297.

⁹⁹ *Ibid* at pg. 298.

¹⁰⁰ Also see paras 2 and 2.2.3.2 above.

¹⁰¹ Neethling, Potgieter & Visser (2017) *Law of Delict* 7th edition LexisNexis at pg. 370; *supra* note 55 at pg. 217; *Bernstein v Bester* 1996 (2) SA 751 at para. 68.

¹⁰² 1993 (2) SA 451 (A).

¹⁰³ *Supra* note 102 at para. 426F; *supra* note 101.

limited to) the disclosure of private facts which have been acquired by a wrongful act of intrusion.¹⁰⁴ Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. As previously stated in Chapter 2 above, the Constitutional Court has, on many occasions, described the right to dignity as “*the cornerstone of our Constitution*”.¹⁰⁵ It was perhaps in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* that the interconnectedness of rights was best articulated. The court held, among other things, that privacy fosters human dignity as far as it is premised on and protects an individual’s entitlement to “a sphere of private intimacy and autonomy”.¹⁰⁶ About the possible publication of the identity of a child witness, victim or offender by the media, there is a balancing of rights that needs to be struck. These competing rights include the child’s best interests, privacy, dignity, equality, right to freedom of expression, media freedom and the principle of open justice.

3.3.2. The right to freedom of expression

Freedom of expression of the media plays a vital role in upholding democracy. It is of particular importance in a nation with such a young democracy which saw the stifling of press freedom under the oppressive Apartheid regime. The media, by providing the public with information, creates a platform for the exchange of ideas which is crucial for the development of a democratic culture.¹⁰⁷ Therefore the mere idea of a “blanket ban” on the publication of children’s names would bring a sense of panic to the media. This fear was evident in the arguments brought forth by the respondents in *Media 24 case 2017*¹⁰⁸ which, the applicants, in this case, called a “mischaracterisation of the case [by the respondents]”.¹⁰⁹ The applicants stated that they did not contend for a “blanket ban”. The applicants contend only for a default position where protection is given to the child victim, witness or offender concerned,

¹⁰⁴ *Supra* note 101 at 234 – 238; *Bernstein v Bester* at para. 69.

¹⁰⁵ *Supra* note 50.

¹⁰⁶ Pg. 31 at para. 64

¹⁰⁷ *Khumalo v Holomisa* 2002 5 SA 401 (CC) at 417D; see further *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) at 608H-609B; *National Media Ltd v Bogoshi* at 1209H-I in which it was said that it is the right and a vital function of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity, and thus to contribute to the formation of public opinion.

¹⁰⁸ *Supra* note 18.

¹⁰⁹ Applicants’ note for reply at paras 7–9.

unless and until a court has considered her best interests and granted permission to reveal his or her identity.¹¹⁰ This case will be explored in greater detail in Chapter 4 below.

3.3.3. Open justice

Section 152 of the Criminal Procedure Act states that “Except where otherwise expressly provided by this Act or any other law, criminal proceedings in any court shall take place in open court, and may take place on any day”. The principle of open justice is based on two considerations. Firstly, it accords with the notion of a fair trial as protected regarding section 35(3) (c) of the Constitution.¹¹¹ Secondly, members of the public have the right to access a court and want to see that justice is being done. They want to be part of a system that promotes transparency and accountability.¹¹² However, as is the case with other rights, the open court principle is not absolute and is subject to limitation - mainly where children are concerned. This is where the Criminal Procedure Act (together with Child Justice Act) comes to the forefront. Section 153 of the Criminal Procedure Act provides for the circumstances in which criminal proceedings shall not take place in open court. Section 153(1) of the Criminal Procedure Act states that:

‘In addition to the provisions of section 63(5) of the Child Justice Act, if it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof’.

Section 153(2) of the Criminal Procedure Act further provides:

‘If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused if he testifies at such proceedings, the court may direct-

¹¹⁰ Applicants’ note for reply at para. 11.

¹¹¹ Every accused person has a right to a fair trial, which includes the right to a public trial before an ordinary court.

¹¹² Joubert, JJ (2017) *Criminal Procedure Handbook* 12th edition Juta at pg. 314.

- (a) *that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary for connection with such proceedings or is authorised by the court;*
- (b) *that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court’.*

There appears to be no age restriction regarding the provisions of section 153 of the Criminal Procedure Act. One could, therefore, assume that the protections guaranteed therein apply to everyone, regardless of age. Should that indeed be the case, surely a presiding officer deciding on the anonymity of a child witness or victim can extend the protection of the identity of a person over the age of 18 by invoking section 153(2) of the Criminal Procedure Act? The court could direct that the identity of such person shall not be revealed, or that it shall not be made public for a period specified by the court. That period, therefore, does not necessarily cease when the child turns 18 years old.

Section 154 of the Criminal Procedure Act provides for the prohibition of publication of specific information relating to criminal proceedings. Again, the wording (in some instances) does not seem to indicate an age restriction to be afforded protection. Section 154(3) of the Criminal Procedure Act places an apparent restriction regarding the publishing information which may identify a person who is under the age of eighteen years at the time of criminal proceedings. Section 154(3) of the Criminal Procedure Act states that:

‘No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness¹¹³ at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person’.

¹¹³ This now also includes a child victim as per *Media 24 case 2017*. The wording of the Criminal Procedure Act did not seem to specifically say that the law regarding the prohibition of the publication of information which could lead to the identification of a child also applies to children who are victims in criminal matters.

Two interesting points can be deducted from section 154 of the Criminal Procedure Act as a whole. Firstly, even though the press is (as a default position) prohibited from publishing information which reveals or may reveal the identity of an accused under the age of 18 years or a witness (or victim); nothing prevents them from bringing forth an application to the court to deviate from the default position. The presiding officer will then exercise his or her discretion in determining whether the publication of such information would (in his or her opinion) be just and equitable and in the interest of any particular person concerned.¹¹⁴ Secondly, the legislature has identified that there are circumstances in which people could merit anonymity even after the age of 18 years.¹¹⁵ For example, in criminal proceedings relating to a charge that the accused committed or attempted to commit any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.¹¹⁶ Section 154(2)(a) of the Criminal Procedure Act states that *'where a court under section 153(3) directs that any person or class of persons shall not be present at criminal proceedings or where any person is in terms of section 153(3A) not admitted at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he is of the opinion that such publication would be just and equitable'*.

¹¹⁴ An example of this can be seen in the Eugene Terrblanche case which will be discussed in Chapter 4 below.

¹¹⁵ Also see *Johncom Media Investments Limited v M and Others* 2009 (4) SA 7 (CC).

¹¹⁶ Section 153(3) of the Criminal Procedure Act provides that: (3) In criminal proceedings relating to a charge that the accused committed or attempted to commit-

- (a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;
- (b) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or
- (c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,

the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

The principle of open justice serves to protect the public interest. The public interest may refer to the fact that as the offence has attracted such widespread attention, the public is entitled to know who committed the crime.¹¹⁷ However, there must be a clear distinction between what is in the public interest and what is attractive to the public.¹¹⁸ What may be attractive to the public should not, in an ideal world, supersede the privacy, dignity and best interests of the child in this regard.

3.4. AIMS OF CHILD JUSTICE AT A GLANCE

There was a need to create a system separate from that of the formal criminal justice system to steer children away from the harmful effects thereof. The child justice movement (in South Africa) is said to have emerged in the early 1990's. The Child Justice Act came into operation on 1 April 2010.¹¹⁹ An examination of the Preamble, the objects¹²⁰ and the guiding principles¹²¹ of the Child Justice Act reveals the necessity of such an act coming into operation. A separate system and legal reform should envisage a departure from the norm. Under this new system, it is said that the traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the *“need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care and correcting errant actions as far as possible by diversion, community-based programs, the application of restorative justice processes and reintegration of the child into the community”*.¹²²

The objects of the Child Justice Act are to, among other things, protect the rights of children as provided for in the Constitution and to provide for the special treatment of children.¹²³ The need for special protection stems from the vulnerable position children occupy in society. There is a fundamental focus on restorative justice throughout the Child Justice Act. This, however, does not detract from the principle that children in conflict with the law must be held accountable for their actions.¹²⁴

¹¹⁷ Spencer JR (2000) Naming and shaming young offenders *The Cambridge Law Journal* vol 59 no 3, 466-468.

¹¹⁸ *Lion Laboratories Ltd v Evans and others* [1984] 2 ALL ER 417 (CA) at para. 464C.

¹¹⁹ This legislation gives effect to the requirements of article 40 of the UNCRC.

¹²⁰ Section 2 of the Child Justice Act.

¹²¹ Section 3 of the Child Justice Act.

¹²² *S v CKM and Others* 2013 (2) SACR 303 (GNP) at para. 7.

¹²³ Section 2(a) and (c) of the Child Justice Act.

¹²⁴ Preamble of Child Justice Act.

Gallinetti and *Sloth Nielsen* have stated the revolutionary impact that the Child Justice Act has had not only on the criminal justice system in South Africa but particularly about children in conflict with the law.¹²⁵ The Child Justice Act provides a set of objectives in its application which include preventing stigmatisation of the child and promoting the child's dignity and well-being and the development of his or her feeling of self-worth and ability to contribute to society.¹²⁶

An act which would result in the undoing of the rehabilitation of a child (directly or indirectly affected by the criminal justice system), seems counterproductive to the aims of the child justice system as a whole. Expert evidence¹²⁷ presented in *Media 24 case 2017* included in the court papers by four experts¹²⁸ explains how the identification of children in the media can have catastrophic effects on the child concerned. The experts identify four types of psychological harm that can be caused by identification in the media, namely trauma and regression, stigma, shame and the fear of being identified.¹²⁹ The experts insisted that the psychological trauma persist even after the age of 18.¹³⁰

3.5. CONCLUSION

The Child Justice Act (in conjunction with the Criminal Procedure Act) creates a procedural framework for dealing with children in the criminal justice system. This system should ideally be one which not only accords with the international standards imposed by instruments discussed under Chapter 2 above, but it should seek to provide the mechanisms to ensure that policy sees action in practice. The echoing theme in the Child Justice Act is the aim of promoting restorative justice. It, therefore, seems counter-intuitive to the aims of restorative justice that the media would be given free rein to dredge up the past and contribute to the secondary trauma of a

¹²⁵ Sloth-Nielsen J & Gallinetti J (2011) "Just Say Sorry?" Ubuntu, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008 *PELJ* vol 14, no 4 at pg. 74; Gallinetti J (2006) What happened to the Child Justice Bill? The Process of Law Reform relation to Child Offenders SACQ No. 17 at pg. 12.

¹²⁶ Section 51 of the Children's Act.

¹²⁷ Applicant's heads of argument at paras 70–97.

¹²⁸ Professor Ann Skelton – child justice expert and Director at the CCL; Ms Joan van Niekerk – social worker and former director of CHILDLINE; Ms Arina Smit – manager at NICRO clinical unit and Dr Glada De Fabbro – child and adolescent psychologist. A report compiled by the aforementioned experts will be discussed in para. 4.5.1 below.

¹²⁹ *Media 24 case 2017* at para. 16.

¹³⁰ See para 4.5 below.

child witness, victim or offender well after they have reached adulthood. While the media plays a vital role in the maintenance of a democratic state, they must exercise great caution where matters relating to publication of information regarding children are concerned. It is clear from the legislation that the courts are vested with a power of discretion. It is up to the court to decide how the balance must be struck regarding the diverse interests of the parties involved.

CHAPTER 4

CASE STUDY – A LOOK INTO *MEDIA 24 CASE 2017*

4.1. INTRODUCTION

As stated in the previous chapters, the practical and legal implications of identifying a child offender, victim or witness in South African law have recently come to the fore in light of some disturbing media trends. One need only look at the impact of the circumstances surrounding Zephany Nurse to get a glimpse of the extent of the problem.¹³¹ If one is to conduct a search on Google for the term “Zephany Nurse”, fifteen-thousand-nine-hundred results would appear from that search alone.¹³² It would appear that the media interest in the Zephany Nurse story has yet to subside. Nevertheless, it is important to note that *Media 24 case 2017* not only looks at Zephany Nurse but several children (now adults) who would be (or have already been) adversely affected if their names are revealed to the public by the media. This chapter looks at not only the legal position, but also the impact that supporting evidence (provided by the applicants in this case) has in highlighting the realities of the child offenders, witnesses, and victims.

4.2. BACKGROUND

The CCL (the **Applicants**) brought an application to the North Gauteng High Court in two parts against the media respondents.¹³³ The media respondents in this matter are a number of publishing and broadcasting media houses: Media 24 Limited (**Media 24**); Independent Newspapers (Pty) Ltd; Times Media Group Limited; Infinity Media Networks (Pty) Ltd; TNA Media (Pty) Ltd; Primedia (Pty) Ltd; South African Broadcasting Corporation; e.tv (Pty) Ltd; Electronic Media Network (Pty) Ltd; the Citizen (Pty) Limited and Mail and Guardian Media Limited (collectively referred to as the **Media Respondents**).

In Part A, the Applicants sought interim relief for the child known as Zephany Nurse (as she is referred to as “**KL**” in the court papers, she shall henceforth be referred to

¹³¹ *Supra* note 15.

¹³² <https://www.google.co.za/search?q=zephany+nurse&oq=zephany+&aqs=chrome.1.69j57j0l5.4940j0j8&sourceid=chrome&ie=UTF-8> (accessed 19 December 2017).

¹³³ Notice of Motion dated 1 April 2015 (on file with the CCL).

as KL).¹³⁴ The Applicants sought to prohibit the publication of any information which would reveal the identity of KL (who is also an applicant to these proceedings). Furthermore, the Applicants sought an interdict to prevent a number of the Media Respondents from publishing any information which reveals or may reveal the identity of KL.¹³⁵ The situation was alleged to have been necessitated by the failure of the Media Respondents to provide undertakings that they would not identify KL upon her 18th birthday; the prospect of which had been causing KL stress.¹³⁶

In Part B of the application, the Applicants sought an order to be granted by the court with the following terms:¹³⁷

1. The protections afforded by section 154(3) of the Criminal Procedure Act should also apply to victims of a crime who are under the age of 18 years.¹³⁸
2. Alternatively, that section 154(3) of the Criminal Procedure Act is declared unconstitutional and invalid to the extent that it does not confer its protections on victims of a crime who are under the age of 18 years. To remedy the defect, the Applicants proposed that the court read in a provision so that section 154(3) of the Criminal Procedure Act is deemed to read as though it provides the following:

'(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: or of a victim of a crime under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much

¹³⁴ *Ibid* at pgs 2–3.

¹³⁵ *Ibid*.

¹³⁶ Founding Affidavit at para 76. In her supporting affidavit, KL described how the media would, *inter alia*, camp out outside her house and an incident in which television crew were at her school. In identifying the women who kidnapped her, they potentially may have led to her identification as they share a surname (press release by CCL dated 3 March 2015 [http://www.centreforchildlaw.co.za/images/files/Press%20Release/2015.03.03_CCL%20requests%20the%20protection%20of%20the%20identity%20of%20the%20child%20identified%20as%20Zephany%20Nurse.pdf] accessed 13 September 2016). Furthermore some publications also released the name of KL's school ('South African teen stolen as infant found befriending sister' LA Times (R Dixon) 6 March 2015).

¹³⁷ Notice of Motion pg. 4 – 5.

¹³⁸ *Supra* note 134 at para. 1.

of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.¹³⁹

3. Children should not forfeit the protections afforded by section 154(3) of the Criminal Procedure Act, read together with section 63(6) of the Child Justice Act (to the extent applicable) upon reaching the age of 18 years.¹⁴⁰
4. In the alternative to prayer 3 above, the court should declare section 154(3) of the Criminal Procedure Act, read together with section 63(6) of the Child Justice Act to the extent applicable, unconstitutional and invalid to the extent that children subject to the section forfeit the protections afforded by it upon reaching the age of 18 years. To remedy the defect, the Applicants proposed that section 154 of the Criminal Procedure Act be deemed to contain an additional section 154(3A) which provides:

'(3A) Children subject to section subsection (3) above do not forfeit the protections afforded by the section upon reaching the age of 18 years.'

On 21 April 2015, the court granted the relief sought by the applicants in respect of Part A of the application. It is now the contents of Part B of the application that will be investigated in greater detail.

4.3. RESTORATIVE JUSTICE

An important starting point for this debate would be to revisit the general purpose of criminal justice. In doing so, we must examine the traditional theories of punishment, namely, deterrence, retribution, rehabilitation, and incapacitation.¹⁴¹ When children encounter the criminal justice system, do we merely adhere to the traditional theories of punishment, or should the law seek to address the matter in a different manner?

The Child Justice Act (at the time that it came to the effect) is said to have ushered in a new child justice system which saw South Africa not only attempting to comply with its constitutional and international law obligation about children but also incorporating

¹³⁹ *Supra* note 137 at para. 2.

¹⁴⁰ *Supra* note 137 at para. 3.

¹⁴¹ Muthaphuli P & Terblanche S (2017) A Penological Perspective on Rehabilitation as a sentencing aim *Acta Criminologica: Southern African Journal of Criminology*, vol 30, no 4 at pg. 17; *S v Draai* 2014 JDR 2485 (FB) at para. 9.

norms relating to the treatment of children in criminal proceedings.¹⁴² Of these norms relating to the treatment of children, restorative justice is of great importance to this research. The Preamble of the Child Justice Act makes specific reference to restorative justice. It states, among other things, that the child justice system created under the Child Justice Act will aim to “*expand and entrench the principles of restorative justice (while ensuring children’s responsibility and their accountability for crimes committed) and minimise the potential for re-offending through placing increased emphasis on the effective rehabilitation and reintegration of children*”.¹⁴³

144

4.3.1. What is restorative justice?

The widely accepted definition is that restorative justice is “any process in which the victim and the offender - and where appropriate, any other individual affected by the crime - participate in the resolution of matters arising from the crime, usually with the help of a facilitator”.^{145, 146}

Restorative justice is both backwards-looking, in that it includes dealing with the “aftermath of the offence”, and forward-looking, in that it is a process that looks at the implications for the future.¹⁴⁷

The South African legislature has defined restorative justice on two occasions: the first time was in the Probation Services Act 116 of 1991 (as amended by Act 35 of 2002), where it was defined as ‘*the promotion of reconciliation, restitution and responsibility through the involvement of a child, and the child’s parents, family members, victims and the communities concerned*’.¹⁴⁸ The second time was in the Child Justice Bill.¹⁴⁹ The definition of restorative justice in this Bill is as follows: ‘*An approach to justice that aims to involve the child offender, the victim, the families*

¹⁴² *Supra* note 125 at para 1 on pg. 64.

¹⁴³ *Supra* note 125 at para 2 on pg 65.

¹⁴⁴ Section 2(b) (iii) of the Child Justice Act provides that one of the objectives of the Act is to “*promote the spirit of ubuntu in the child justice system through supporting reconciliation by means of a restorative justice response*”.

¹⁴⁵ Article 2 of United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002).

¹⁴⁶ Skelton A & Batley M (2008) Restorative Justice: A Contemporary South African Review *Acta Criminologica*, vol 21, no 3 at pg. 38.

¹⁴⁷ *Ibid* at pg. 47.

¹⁴⁸ *Supra* note 146 at pg. 38.

¹⁴⁹ B 49B 2002. It was passed by the National Assembly on 25 June 2008.

concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation'.¹⁵⁰

4.3.2. Restorative justice in South African jurisprudence

Restorative justice has also been dealt with and developed by our courts.¹⁵¹ Sachs J stated that the key elements of restorative justice had been identified as encounter, reparation, reintegration and participation.¹⁵² In *S v M*, which dealt with the duties of a sentencing court when sentencing a primary caregiver of children, Sachs J, characterised correctional supervision as providing better opportunities for a restorative justice approach.¹⁵³ He found that restorative justice recognises that the community, rather than the criminal justice agencies, is the main form in which to control crime.¹⁵⁴ He also spoke about how “*restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing*”.¹⁵⁵

*S v Saayman*¹⁵⁶ appears to offer some insight into how the courts view the concept of “shaming” and its place in the South African criminal justice system. In this case, restorative justice was examined about the concepts of “shaming” and the constitutional right to dignity.¹⁵⁷ In this judgment Pickering J agreed with the writings of Mike Batley, in which he stated that: “*the dignity and worth of both victims and offenders are integral to restorative justice.*” Mike Batley furthermore stated: “*The tragic backgrounds of many offenders, their consequent low levels of self-esteem and inability to manage their feelings of shame in constructive ways are often significant factors in their anti-social and criminal behaviour and their inability to break out of these patterns. To further humiliate and degrade them will likely reinforce these patterns, not change them, however satisfying they may appear to*

¹⁵⁰ *Supra* note 148.

¹⁵¹ *Supra* note 146 at pg. 42.

¹⁵² *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at para. 114.

¹⁵³ At para. 59.

¹⁵⁴ At para. 62.

¹⁵⁵ At para. 72.

¹⁵⁶ 2008 (1) SACR 393 (E).

¹⁵⁷ *Supra* note 151.

*members of the public and judiciary caught up in the high tide of popular punitiveness”.*¹⁵⁸

The above statement brings us squarely to some of the misgivings of revealing the names of child victims, witnesses and (especially) offenders after they turn 18. Shame is but one detrimental psychological effect that has the potential to undo the work done in the restorative justice process.

4.4. CASE FOR THE APPLICANTS

As stated in the chapters above, sections 153 and 154 of the Criminal Procedure Act provide for anonymity of persons¹⁵⁹ involved in criminal proceedings. The Applicants contend that this protection must be extended to child witnesses, victims and offenders even beyond the age of 18.¹⁶⁰ The Applicants were at pains to illustrate the psychological harm that may be caused through identification and the adverse effects it may have on the rehabilitation and reintegration of the child concerned.¹⁶¹ For this research, some of the main points of the Applicant’s argument will be explored.

4.4.1. Public interest versus what is interesting to the public

In the English case of *Lion Laboratories Ltd v Evans and others*,¹⁶² the court stated, among other things, that “there is a wide difference between what is interesting to the public and what is in the public interest to make known”. Furthermore, that “the media have private interests of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners, and they are peculiarly vulnerable to the error of confusing the public interest with their interest...”.^{163, 164}

¹⁵⁸ Batley M (unpublished paper) *Restorative Justice: An Essential Foundation for Advancing the Utilisation of Non-custodial Sentences* at pg. 20–21.

¹⁵⁹ This includes an accused under the age of eighteen years or a witness at criminal proceedings who is under the age of eighteen years (section 154 (3) of the Criminal Procedure Act). The protection is also afforded to any person, other than an accused, who is likely to suffer harm if he testifies at criminal proceedings (section 153 (2) of the Criminal Procedure Act) – no age restriction is provided for in this regard.

¹⁶⁰ *Media 24 case 2017* case at para 15 on pg. 5.

¹⁶¹ *Media 24 case 2017* case at para 18 on pg. 5.

¹⁶² *Supra* note 118.

¹⁶³ *Supra* note 162

In the case of KL, the Applicants stated that it was not in the interest of the public to know her real name.¹⁶⁵ The public interest may refer to the fact that an offence has attracted such widespread attention and as such the public is entitled to know who committed the crime. However, as the Applicants rightly pointed out, one can still publish all the facts of a case and use a pseudonym.¹⁶⁶ A prime example of this would be *NM v Smith*.¹⁶⁷ In this case, the court rejected the suggestion that there was a public interest in naming three HIV-positive women in a book, holding that the respondents "could have used pseudonyms instead of the real names of the applicants. The use of pseudonyms would not have rendered the book less authentic".¹⁶⁸

In very much the same manner, the media has been able to publish numerous articles about KL without having used her real name. The use of a pseudonym does not negate the facts. The only incentive there would be in revealing her real name to the public now would be to scratch the itch of curiosity. It adds no new value to the story other than perhaps the promise of selling more newspapers and magazines. What then remains of the child victim, witness or offender once their name is in the public domain?

4.5. EXPERT EVIDENCE

The Applicants presented expert evidence illustrating the harmful effects of identification in the form of three key experts: Joan van Niekerk;¹⁶⁹ Arina Smit¹⁷⁰ and

¹⁶⁴ Collett JA cited *Lion Laboratories Ltd v Evans and others* in *Financial Mail (Pty) Ltd and others v Sage Holdings Ltd and Another* (see note 102).

¹⁶⁵ Founding Affidavit at para. 106.

¹⁶⁶ Founding Affidavit at para. 38.3.

¹⁶⁷ 2007 (5) SA 250 (CC). In this case, a biography of Ms Patricia de Lille authored by Ms Smith (first respondent) disclosed the names of three women who are HIV positive. The applicants alleged that their names had been published in this book without their prior consent having been obtained (at para 1 *in casu*).

¹⁶⁸ Founding Affidavit at paras 45-46.

¹⁶⁹ Ms van Niekerk is social worker with over 27 years' experience. She has worked closely with some of the child offenders who provided evidence in the Applicant's case. She was previously the director of Childline and is also the third applicant (Founding Affidavit at para. 78.1).

¹⁷⁰ Ms Smit has worked with over a thousand child offenders over the past 17 years. She is the manager of the clinical unit of National Institute for Crime Prevention and Reintegration of Offenders (**NICRO**). She is also the fourth applicant (Founding Affidavit at para. 78.2).

Dr Giada Del Fabbro.¹⁷¹ Three of the key areas focused on by Applicants regarding the effects of identification were:

- psychological harms;
- Impact on witnesses and victims; and
- harm experienced by accused and offenders (particularly the impact of identification on their trials and the process of rehabilitation and reintegration).¹⁷²

4.5.1. Psychological harms

In her supporting affidavit, Arina Smit (**Smit Supporting Affidavit**) stated that identification of child offenders when they turn 18 might undo all the therapy that was provided before the child turned 18.¹⁷³ She also stated that the child might regress in respect of their self-esteem, relationships and occupational functioning.¹⁷⁴ Furthermore, the child may suffer secondary trauma when they have to explain their circumstances to people repeatedly, e.g. if looking for employment or meeting new people.^{175, 176}

A Psychological Report prepared for the Applicants by Dr Del Fabbro (**Psychological Report**) draws on her professional experience as well as considering existing literature and available data on the subject. The Psychological Report¹⁷⁷ details some detrimental consequences to identifying/naming child offenders/victims/witnesses which include (not limited to):

¹⁷¹ Dr Del Fabbro is a psychologist with considerable clinical, assessment and therapeutic experience in the field of child and (adolescent psychology) (Founding Affidavit at para 78.3).

¹⁷² Smit Supporting Affidavit at para. 19.

¹⁷³ This is also supported in Dr Del Fabbro's expert report (Founding Affidavit at para. 84.1).

¹⁷⁴ Smit Supporting Affidavit at para. 30.

¹⁷⁵ *Ibid* at para 31.

¹⁷⁶ Trauma and regression is not only limited to victims and witnesses, but also child offenders. The Psychological Report states that "...juvenile offenders are also frequently traumatised by their actions as well as their involvement in the criminal justice system" (Smit Supporting Affidavit at para. 6).

¹⁷⁷ This is reiterated in her supporting affidavit (**Del Fabbro Supporting Affidavit**) dated 1 April 2015.

- diminishing chances for rehabilitation and reform;¹⁷⁸
- social stigma;¹⁷⁹
- re-living of the original offence or trauma;¹⁸⁰
- feelings of intimidation and humiliation;¹⁸¹ and
- anxiety over possible identification.¹⁸²

4.6. SUPPORTING EVIDENCE BY CHILD OFFENDERS

As stated in the Psychological Report, one can draw on general psychological principles and research on a range of related topics to understand the psychological impact of identifying child victims, offenders and witnesses.¹⁸³ However, perhaps the most compelling indication of the impact of identification comes straight from the mouths of those children who were affected (or could be affected) by identification. In addition to KL's supporting affidavit (**KL Supporting Affidavit**) to the Applicant's Founding Affidavit (**Founding Affidavit**),¹⁸⁴ the evidence brought forth in the Supplementary Founding Affidavit touches on instances in which the media has identified children involved in criminal proceedings after they turned 18 had adverse effects for the children concerned. The difference in impact to a child will be illustrated by the antithetical tales of PN and DS (who were identified by the media) and P and X (who have (fortunately) not been identified by the media). The evidence provided by these child offenders seems to be in line with the evidence provided by the expert witnesses.

¹⁷⁸ Psychological Report at paras 34 – 39.

¹⁷⁹ Psychological Report at paras 15 – 18.

¹⁸⁰ Psychological Report at paras 6 – 12.

¹⁸¹ Psychological Report at paras 13 – 14.

¹⁸² Psychological Report at paras 40 – 43.

¹⁸³ Psychological Report at para. 2. This approach is also necessitated by the acknowledgment that there has been limited research that specifically addresses the psychological harms resulting from media coverage, although the risks of media identification are widely accepted; Jones LM, Finkelhor D & Beckwith J (2010) 'Protecting victims' identities in press coverage of child victimization' *Journalism*, vol 11, no 3, 347-367.

¹⁸⁴ *Supra* note 136.

4.6.1. PN

PN was 15 years old at the time of the murder of Afrikaner Weerstandsbeweging (AWB)¹⁸⁵ leader Eugene Terreblanche. PN and his co-accused (an adult) were charged with the crime.¹⁸⁶ It was a high profile case which garnered much public attention because it involved a controversial public figure and highlighted issues of racism and abuse.¹⁸⁷ PN was eventually acquitted of the murder but found guilty of housebreaking with intent to steal.¹⁸⁸ Media Monitoring Africa (MMA)¹⁸⁹ was granted leave to appear as *amicus curiae* as Media 24, and other media outlets launched an application to allow them access to the trial.¹⁹⁰ The submissions made by the *amicus* ensured that PN's interests would be protected while allowing the media limited access.¹⁹¹

When PN turned 18, the media subsequently published his name and photographs of him.¹⁹² This in effect undid all the work put in to protect PN. It also put his life in danger in the heated racial climate in Ventersdorp surrounding the murder.¹⁹³ In his supporting affidavit (**Bird Supporting Affidavit**) in *Media 24 case 2017*, William Bird¹⁹⁴ of MMA stated that he was dismayed that media no longer considered themselves bound by the protections conferred by section 154 (3) of the Criminal Procedure Act after the child turned 18 and believed that they were free to publish information identifying the victim/offender/witness concerned.¹⁹⁵ At the time of this research PN's whereabouts are still unknown.¹⁹⁶

¹⁸⁵ A South African right wing organisation that first came into prominence in the 1970s whose aim was, *inter alia*, to create a Boer state based on the old Afrikaner republics. <http://www.sahistory.org.za/article/afrikaner-weerstandsbeweging-awb> (accessed 7 April 2018).

¹⁸⁶ Supplementary Founding Affidavit at para. 33.

¹⁸⁷ *Ibid.*

¹⁸⁸ *S v Mahlangu* [2012] ZAGPJHC 114.

¹⁸⁹ A non-profit organisation which aims to promote ethical and fair journalism. www.mediamonitoringafrica.org (accessed 17 January 2018).

¹⁹⁰ *Media 24 v National Prosecuting Authority: In re S v Mahlangu* 2011 (2) SACR 321 (GNP).

¹⁹¹ Supplementary Founding Affidavit at paras 36 and 37.

¹⁹² Supplementary Founding Affidavit at para. 40.

¹⁹³ Supplementary Founding Affidavit at para. 34.

¹⁹⁴ Director of the Media Monitoring Africa and fifth applicant in *Media 24 case 2017*.

¹⁹⁵ Bird Supporting Affidavit at para. 25.

¹⁹⁶ Supplementary Founding Affidavit at para. 44.

4.6.2. DS

DS was accused of and charged with the murder of his family at Griekwastad in 2012. He was 15 years old at the time of the murder.¹⁹⁷ The media was given access to the trial, and while it was understood that they could not identify the child, photographs were taken of him during the trial.¹⁹⁸ During this time, articles were also published that alluded to who the murderer could be.¹⁹⁹ One such article involving DS garnered the attention of the ombudsman of the Press Council of South Africa (PCSA)²⁰⁰ (**Press Ombudsman**). A complaint was lodged with Press Ombudsman²⁰¹ regarding a *Huisgenoot* (which is a magazine published by Media 24) article published on 14 November 2013 which identified DS as the minor charged with the Griekwastad murders.²⁰² The ensuing matter before the PCSA found that there had been a violation of section 8.3 of the Code of Ethics and Conduct for South African print and online media (**Press Code**)²⁰³ which states that '*The press shall not identify children who have been victims of abuse, exploitation, or who have been charged with or convicted of a crime, unless a public interest is evident and it is in the best interest of the child.*' The sanction imposed against Media 24 was a severe reprimand. The Press Ombudsman also directed that Media 24 (*Huisgenoot*) publish a "kicker", which essentially was an apology, on its front page with the words "Griekwastad: Press Ombudsman severely reprimands *Huisgenoot*".²⁰⁴

DS was eventually found guilty and sentenced to 20 years' imprisonment for his offences. On his 18th birthday, the media released his name and photographs taken throughout the course of his trial. The selling point of the newspapers/magazines

¹⁹⁷ Supplementary Founding Affidavit at para. 45.

¹⁹⁸ Supplementary Founding Affidavit at para. 47.

¹⁹⁹ *Ibid.*

²⁰⁰ Part of an independent, co-regulatory mechanism set up by print and online media. The PCSA was adopted by the South African Press Code to, *inter alia*; provide impartial, expeditious and cost-effective adjudication to settle disputes between the press and members of the public over the editorial content of publications. (www.presscouncil.org.za – accessed 17 January 2018).

²⁰¹ *Media 24 Holdings (pty) Ltd v The Chairman of the Appeals Board of the Council of South Africa and another* 19001/2014; case number 441/2014.

²⁰² "Griekwastad: Huisgenoot By Don Steenkamp Se Voog – Oom Bennie oor seun – moet niemand dan lief wees vir hom?"

²⁰³ Which was effective up until 31 December 2015.

²⁰⁴ *Supra* note 201 at para. 4.

was advertising that they would reveal his name in their next issue.²⁰⁵ According to his supporting affidavit in *Media 24 case 2017 (DS Supporting Affidavit)*, the media coverage had severe adverse effects on DS. DS states that he, among other things, suffered trauma as a result of the immediate identification.²⁰⁶ Furthermore, he stated that the media harassed the people around him²⁰⁷ and that that he is fearful that identification will affect his prospects of employment and lead a normal life upon release.²⁰⁸

4.6.3. P and X – child offenders who were not identified by the media

Both P and X were convicted of serious offences when they were below the age of 18. P and X turned 18 some time after their court proceedings had been concluded. By then, the media interest in their cases had largely subsided.²⁰⁹ This is in contrast to KL, PN and DS who turned 18 when media interest in their cases was at fever pitch. P and X's stories demonstrate how rehabilitation of child offenders can work in practice and how anonymity can achieve restorative justice. This progress, however, could all be undone should the media be allowed to reveal information identifying them to the public.

P was 12 at the time that she was charged with the murder of her grandmother. The case garnered intense media attention. However, by the time she had reached adulthood, she had long since served her sentence, and the media interest had subsided. As a result, P was left alone to lead a normal life.²¹⁰ She now has a family. It was explained by both P and the social worker who worked closely with P (Joan van Niekerk – who also worked with X below) that her anonymity aided in her rehabilitation and healing.²¹¹ Despite the seriousness of her crime, she is fully

²⁰⁵ Supplementary Founding Affidavit at para 49. Also see para 11 – 21 of DS Supporting Affidavit. You magazine article (dated 15 August 2014) “on his 18th birthday, the South African media are officially allowed to identify the teenager dubbed ‘the Griekwastad killer’”.

²⁰⁶ DS Supporting Affidavit at para. 26.

²⁰⁷ DS Supporting Affidavit at para. 27.

²⁰⁸ DS Supporting Affidavit at para. 9.

²⁰⁹ Supplementary Founding Affidavit at para. 62

²¹⁰ Supplementary Founding Affidavit at paras 63 – 65.

²¹¹ Supplementary Founding Affidavit at para. 66.

rehabilitated. She, however, does live in constant fear of identification – particularly for the sake of her children and the fear of being stigmatised.²¹²

X (who was both a victim of crime and a child offender) was 16 years old when she was convicted of being an accessory after the fact to the murder of her parents. X's 28-year-old boyfriend committed the murder at the time.²¹³ She served out her sentence of correctional supervision in a children's home without having been identified. She passed matric with four distinctions and went on to study at university. She is now married with children.²¹⁴ She too shares the same concerns as P regarding her children and stigmatisation.²¹⁵ X's situation, however, has the added element of danger as the man who killed her parents may try to find her should he be paroled.²¹⁶ X credits anonymity with having played a vital role in her rehabilitation. X states that she was able to have a normal life and transition successfully into adulthood.²¹⁷

4.7. CASE FOR THE RESPONDENTS

Much of the criticism levied by the Media Respondents against the Applicants relates to the perceived far-reaching implications that this application (if granted) would have on the principle of open justice, media freedom and the public interest. The Media Respondents continuously mischaracterise the relief sought by the Applicants as a "publication ban".²¹⁸ This is an incorrect interpretation of section 154(3) of the Criminal Procedure Act as the prohibition on the publication of information which may reveal the identity of the child witness, the victim and/or offender do not prevent the media from reporting on the trial. The prohibition is not absolute and the courts have the discretion to permit the publication of identities if "just and equitable and in the interest of any particular person". A brief analysis of (some of) the arguments brought forth by the Media Respondents in, *inter alia*, their Answering Affidavit will now be explored.

²¹² P's supporting affidavit at paras 23-24.

²¹³ Supplementary Founding Affidavit at para. 69.

²¹⁴ Supplementary Founding Affidavit at paras 71 – 73.

²¹⁵ X's Supporting Affidavit at para. 20.

²¹⁶ Supplementary Founding Affidavit at para. 75.

²¹⁷ X's Supporting Affidavit at para. 14.

²¹⁸ Answering affidavit for the first to third respondent (**Answering Affidavit**) at paras 9 -11 (dated 26 August 2015).

4.7.1. Children adequately protected

The Media Respondents contend that the relief sought by the Applicants is unreasonable to the extent that the provisions of sections 153 and 154 of the Criminal Procedure Act and “other existing mechanisms” (common law claim for damages, interdicts and the Press Code) that protect against abuses by the press, exist.²¹⁹ The Media Respondents are of the opinion that these abovementioned mechanisms strike a balance between the rights to open justice and freedom of expression, and the rights of children. The Applicants counter this with the argument that an award for damages and/or apology does very little as the harm to the child (now an adult) has already been caused.²²⁰ The onus is placed on the child to show why they need protection from the media.²²¹ One could further argue that it would be easier for the Media Respondents to approach courts than a vulnerable group of society, which certainly may not have access to the legal resources that the media do.²²² Courts would also not be overburdened (as alleged by the Media Respondents)²²³ as there is no suggestion that section 154(3) of the Criminal Procedure Act currently overburdens courts, and the extension of protection is unlikely to result in any unjustifiable increase in the courts' workload.²²⁴ The media has demonstrated in the past that they can approach a court and request access to a trial involving a child or an adult²²⁵ – a prime example being the Eugene Terrblanche trial. Therefore it is difficult to reconcile the notion that requesting the media to approach the court to uplift the default position (i.e. preventing the media from

²¹⁹ Answering Affidavit at para. 15.2.

²²⁰ Supplementary Founding Affidavit at para. 96.

²²¹ The Applicants' Replying Affidavit (**Replying Affidavit**) at para. 156 (dated 18 May 2016).

²²² The Media Respondents attempt to demonstrate the burden faced in having to approach courts to seek “pre-publication permission” from the court (Answering Affidavit at paras 91 – 99). In para 105 of the Answering Affidavit it is suggested that “where extended anonymity protection is sought, the person that seeks such protection can apply to the Court for an interdict, and motivate for the appropriate period”.

²²³ Answering Affidavit at para. 106.

²²⁴ Replying Affidavit at para. 157.2.

²²⁵ In *Multichoice (Pty) Ltd and others v National Prosecuting Authority and Another, In re: S v Pistorius, In re Media 24 Ltd and Others v Director of Public Prosecutions North Gauteng and Others* (10193/2014/ (2014) ZAGPPHC 37, the media brought an application to the North Gauteng High Court requesting permission to broadcast the Oscar Pistorius murder trial live.

publishing information which could identify vulnerable groups of people) amounts to “an unjustifiable burden on the courts and the administration of justice”.²²⁶

Furthermore, there is the assertion that an extension of the protection afforded by the Criminal Procedure Act would result in a “blanket ban” which would, not only be contrary the principle of open justice, but also serve as an exception to the rule that applications heard in terms section 154 of the Criminal Procedure Act must be heard on a case-by-case basis.²²⁷ This assertion is devoid of truth. The Applicants support the idea of a case-by-case analysis by a court to determine whether anonymity or publicity is in the best interests of the individual children concerned.²²⁸

4.7.2. Best interests of child

The Media Respondents assert that media identification is generally beneficial to children.²²⁹ There is, however, no evidence provided by the Media Respondents to suggest that this is true. Instead what follows is a series of stories which purport to serve as proof of their alleged benefit with no supporting or context evidence for these claims.²³⁰ One such alleged example is the Van Breda family murder. MVB is the survivor of a family murder which took place on 27 January 2015 in Stellenbosch.²³¹ The Media Respondents allege that MVB has received “overwhelming support” from the community following the publicity of the crime,²³² thus demonstrating how MVB benefited from the identification. The supporting affidavit of Louise Buikman SC (**Buikman Supporting Affidavit**), who is the court-appointed curator *ad litem* for MVB, however, paints an entirely different picture. The Buikman Supporting Affidavit expresses the view that the immense media coverage has not been in the best interests of MVB.²³³ It is alleged that the media went to great lengths to obtain information to publish regarding MVB, including harassing her

²²⁶ Answering Affidavit at para. 108.

²²⁷ Answering Affidavit at paras 104 and 105.

²²⁸ Replying Affidavit at paras 25.5 and 95.2; Supplementary Founding Affidavit at para. 147.5.

²²⁹ Answering Affidavit at para. 52.

²³⁰ Answering Affidavit at para. 53.

²³¹ Buikman Supporting Affidavit at para. 6. MVB (who was 16 years old at the time of the murders) sustained serious head injuries.

²³² Answering Affidavit at para. 53.3. The Media Respondents cited a Timeslive article titled “Axe attack survivor Marli van Breda visits her school” (dated 3 May 2015) as authority.

²³³ Buikman Supporting Affidavit at para. 34.1.

at school.²³⁴ So intense was the invasion of MVB's privacy and the media's failure to adhere to the provisions of the Press Code²³⁵ that her curator had to obtain a court order against the media.²³⁶ The court order, which was framed along the lines of the Press Code, was still not complied with by the media.^{237, 238} The Buikman Supporting Affidavit further states that MVB is distressed about the on-going media attention.²³⁹ Reconciling "distress" with best interests is difficult. It is also particularly difficult to determine how knowing that a teenage girl is enjoying a rugby match at her school is of any interest to the public.²⁴⁰

4.7.3. Self-regulation

As briefly referred to in paragraph 4.6.2 above, the Press Code is a code of ethics and conduct for South African print and online media, i.e. a tool for governing ethical behaviour among journalists.²⁴¹ The Constitution of the PCSA²⁴² (as effective 1 February 2018)²⁴³ makes it clear that the PCSA, and its constituent associations, have established a voluntary independent co-regulatory system²⁴⁴ premised on a voluntary independent mediation and arbitration process to address complaints from the public about journalistic ethics and conduct.²⁴⁵

²³⁴ Buikman Supporting Affidavit at para. 32.3.

²³⁵ Para 8.1 of the Press Code requires special care in reporting on children: *'[The press must] exercise exceptional care and consideration when reporting about children. If there is any chance that coverage might cause harm of any kind to a child, he or she shall not be interviewed, photographed or identified without the consent of a legal guardian or of a similarly responsible adult and the child (taking into consideration the evolving capacity of the child), and a public interest is evident'*.

²³⁶ Buikman Supporting Affidavit at para. 10.

²³⁷ Replying Affidavit at para. 17.

²³⁸ In demonstrating the refusal to comply with the court order, para 14 of Louise Buikman's affidavit details how Huisgenoot magazine (owned by Media24) on 21 May 2015, published an article titled "Stilstil aan die heel word" The article featured a series of paparazzi-style photographs taken of MVB at a school rugby match. This was one of her first public outings since her discharge from the rehabilitation centre (Buikman Supporting Affidavit at para. 14.1).

²³⁹ Buikman Supporting Affidavit at para. 34.1.

²⁴⁰ Buikman Supporting Affidavit at para. 14.1.

²⁴¹ <http://www.presscouncil.org.za/Reports/View/press-freedom-commissions-report-5> at pg. 31 (accessed 30 March 2018).

²⁴² *Supra* note 200.

²⁴³ <http://www.presscouncil.org.za/ContentPage?code=CONSTITUTION> (accessed 30 March 2018).

²⁴⁴ *Ibid* at Preamble.

²⁴⁵ *Supra* note 243 at clause 3.1.4.

The Media Respondents are at pains to emphasise the importance of self-regulation.²⁴⁶ A baffling stance as the Applicants had not contested its value.²⁴⁷ The Applicants state that self-regulation, in conjunction with appropriate protections under the Criminal Procedure Act, has value.²⁴⁸ However, self-regulation alone is not sufficient to prevent and address the harms caused to child victims, witnesses and offenders as a result of being identified in the media.²⁴⁹ The complaints procedure under the Press Code is only backwards-looking and does not offer any immediate way to prevent a harmful publication from occurring.²⁵⁰ As upper guardians of all children, it is appropriate that the courts exercise the ability to assess whether the best interests of the child are adequately respected on a case-by-case basis. This is more in keeping with the Constitution than a position where the media make this assessment for themselves.²⁵¹ The media have on numerous occasions demonstrated an inability to assess when something is in the best interests of the child – including a flagrant disregard of court orders to that effect.²⁵²

The Media Respondents have stated that the primary function of the press is to, among other things; provide the public with accurate, reliable, and current information”.²⁵³ It is unclear how the accuracy of stories will be diminished by using pseudonyms.²⁵⁴ The bigger issue seems to be a belief by the media that self-regulation and legal provisions are mutually exclusive. The Media Respondents, therefore, view the need to approach a court for an application allowing them to print information regarding a person who was a child witness, victim or offender as an

²⁴⁶ Answering Affidavit at para 75 and supporting affidavit of Mr Franz Kruger.

²⁴⁷ Replying Affidavit states that “protection under section 154(3) and greater self-regulation are not mutually exclusive” at para. 66.2.

²⁴⁸ Replying Affidavit at para. 137.

²⁴⁹ *Supra* note 248.

²⁵⁰ Replying Affidavit at para. 35.

²⁵¹ Replying Affidavit para. 25.5.

²⁵² A court order was granted on 30 June 2015 protecting MVB from certain intrusions by the media. Despite MVB’s curator *ad litem* personally bring the court order to the attention of media publications, YOU magazine and Huisgenoot proceeded to violate the court order and the Press Code in an article titled “*Henri’s no murderer*”, published on 27 August 2015 - Buikman Supporting Affidavit at paras 17 – 20.

²⁵³ Answering Affidavit at para. 92.

²⁵⁴ *Supra* note 168.

“unjustifiable burden”.²⁵⁵ This allegation is perhaps detracting from the real motive - i.e. the profit motive.²⁵⁶

4.8. THE JUDGMENT AT A GLANCE

The court found that “*the adult extension sought [by the Applicants] falls to be dismissed for it is neither permissible nor required by the Constitution*”.²⁵⁷ Criticism of this judgment can be levied for several reasons. To be succinct, this research will address three main points: the separation of powers argument; a reluctance to explore section 36 of the Constitution in its entirety and a failure to take cognisance of the expert evidence presented by the Applicants.

4.8.1. Separation of powers

The central purpose of the separation of powers, as conceived by Montesquieu,²⁵⁸ was that it would prevent tyranny and protect liberty.²⁵⁹ The separation of powers in the South African context envisages a separation between the branches of government, i.e. the executive, legislature and the judiciary. As correctly pointed out by Ackermann J in *S v Dodo*,²⁶⁰ there is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other.²⁶¹ Ackermann J goes on to further state that:

“Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly, such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case”.²⁶²

²⁵⁵ Answering Affidavit at para. 79.

²⁵⁶ “...Stories of crimes committed against anonymous children, to whom the readers cannot establish any emotional connection, will simply not compete for readers' attention” (Answering Affidavit at para. 88).

²⁵⁷ *Media 24 case 2017* at paras 61 - 70.

²⁵⁸ Charles-Louis de Secondat, Baron de La Brède et de Montesquieu (commonly known as Montesquieu) was a French political thinker who lived during the Age of Enlightenment.

²⁵⁹ O'Regan K 2005 “Checks and Balances Reflections on the development of the Doctrine of Separation of Powers under the South African Constitution” *PER/PELJ*, vol 8, no 1 at pg.124.

²⁶⁰ 2001 (5) BCLR 423 (CC); 2001 (3) SA 382 (CC).

²⁶¹ *Ibid* at para. 22.

²⁶² *Ibid* at para. 26.

Against this backdrop, it is therefore disappointing that in *Media 24 case 2017*, so much of the judgment hinged on the argument that the courts do not have the power to change the age as stipulated in section 154(3) of the Criminal Procedure Act.²⁶³ By focusing on the literal meaning of the definition of a “child” in the Child Justice Act,²⁶⁴ the court, with respect, fails to interpret the intention of the Child Justice Act as a whole. It is the writer’s understanding that the Applicants do not seek to change the definition of “child” to include a person over the age of 18, but rather that the protection which the child (now adult) received by virtue of being in contact with the criminal justice system should endure beyond the age of 18. The following example could explain this line of reasoning: a doctor may have to adjust the dosage of medication for a disease/illness that started during childhood and endured into adulthood. The doctor would not recommend that the patient suddenly discontinue the use of the medication when he/she reaches the age of 18, but would either taper the patient off the medication over a period or adjust the dosage according to the patient’s specific needs.

In very much the same manner, while a person ceases to be a child upon reaching the age of 18, the person concerned does not immediately become divorced from the impact that the crime and the exposure to the criminal justice system had and continues to have on their psyche.²⁶⁵ This view is precisely validated by the evidence presented by the experts in this case. The tenets of restorative justice as articulated in the Child Justice Act do not cease because the legal status²⁶⁶ of the person concerned has changed.

It would therefore not be outside the realm of possibility for the court to have given cognisance to this purposive interpretation of section 154(3) of the Criminal Procedure Act. In so doing, the court would have been able to declare section 154 (3) of the Criminal Procedure Act unconstitutional – pending confirmation by the

²⁶³ *Media 24 case 2017* at para. 62.

²⁶⁴ Section 1 of the Child Justice Act states that “child” means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2).

²⁶⁵ *Ibid* at para 33. *J v National Director of Public Prosecutions and Another 2014 (2) SACR 1 (CC)* at para. 43.

²⁶⁶ The sum total of a legal subjects rights, duties and capacities (Boezaart T (2016) *Law of Persons* 6th edition Juta at pg. 7).

Constitutional Court. This would therefore not amount to an intrusion into the functions of the legislature.

4.8.2. Limitation of rights

In paragraph 67 of the judgment, Hughes J states the following:

“I am of the view that there cannot be open-ended protection in favour of children, even into their adulthood. This in my view would violate the rights of other parties and the other rights of the children themselves when they are adults. For example, as a child, having been involved in a crime, either as an accused, victim, complainant, or witness, as an adult, that child might seek to highlight awareness of their experience with others. This would not be possible, whether it was to bring awareness to others or purely to highlight the plight of such experience, as there would be a gag on such publication if the protection is open-ended even into adulthood. This would simply amount to stifling the adult's right of freedom of expression. This in my mind takes away an individual's right as an adult. This situation results in one right now thumping another.”

This paragraph, in its entirety, is problematic for several reasons. Firstly, there is no explanation given as to who these “other parties” are and the content of the rights that are supposedly being violated. Secondly, in attempting to illustrate how the child’s freedom of expression will be limited to adulthood, the court relies on one of the examples²⁶⁷ listed by the Media Respondent.²⁶⁸ There is simply no evidence brought forward to suggest that this would be the case. All the expert evidence presented has illustrated the benefits of anonymity. The court, therefore, relies on an unsubstantiated claim made by the Media Respondents to invalidate the substantiated claims of the Applicants. The Media Respondents also (inadvertently) point out the flaws in this line of thinking in paragraph 133.2 of the Answering Affidavit:

²⁶⁷ Answering Affidavit at para. 97.

²⁶⁸ Answering Affidavit at para. 99.

“While it is impossible to predict the future, the disclosure of KL's identity may serve the public interest if, for example, she decided to publicise her experience to motivate others to overcome adversity”.

The wording of this paragraph is indicative of the presumptuous and speculative nature of this argument. The Applicants correctly point out that it cannot be assumed that all activism or community interest is in the best interests of children.²⁶⁹ Moreover, there would be nothing preventing the child (now adult) from approaching the court to lift the restriction on publication for that child (now adult) to tell his/or her story. Moreover, to the extent that courts are required to exercise oversight, this is a requirement of their role as upper guardians of children and preferable and more in keeping with the Constitution than a position where the media make this assessment for themselves.²⁷⁰

Lastly, the final two sentences of paragraph 67 of this judgment frankly amount to an untenable understanding of the limitation of rights. Hughes J states that:

“...This in my mind takes away an individual's right as an adult. This situation results in one right now thumping another.”

The wording of section 36 of the Constitution is relevant in this regard:

Section 36 (1) The rights in the Bill of Rights may be limited only regarding the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

²⁶⁹ Replying Affidavit at para. 149.2.

²⁷⁰ Replying Affidavit at para. 25.5.

(2) *Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights’.*

The reasoning of the analysis made by the court presupposes that upholding the individual’s rights in section 28 (2) of the Constitution being the child’s best interest being paramount, the right to dignity found in section 10 and the right to privacy in section 14 of the Constitution respectively, would amount to a limitation of the individual’s freedom of expression upon attaining adulthood. Also, this would limit the right to freedom of expression of the media and the right to open justice regarding section 152 of the Criminal Procedure Act. The court does not launch into an enquiry regarding the reasonableness and justifiability of this limitation.²⁷¹ In so concluding that “one right now thumping another”, the court fails to critically analyse the purpose for the limitation sought by the Applicants as illustrated by the expert evidence.²⁷² Furthermore, the court fails to unpack the relation between the limitation and its purpose (which again can be substantiated by the expert evidence).²⁷³

4.8.3. Disregard of expert evidence

Perhaps the most egregious transgression of this judgment is how little the court interacted with the evidence presented by the Applicants. Even in the face of concessions²⁷⁴ made by the Media Respondents, it appears that the court is reluctant to engage with the evidence presented. No mention is made about the expert evidence beyond what the Applicants stated.

The court referred to *Johncom Media Investments v M and others*²⁷⁵ in so far as the Applicants had highlighted that the courts have time and again extended the

²⁷¹ See para. 3.3 above.

²⁷² Section 36 (1) (b) of the Constitution.

²⁷³ Section 36 (1) (d) of the Constitution – i.e. when limiting a right, there must be a good reason for the infringement (one that is reasonable and justifiable).

²⁷⁴ *Media 24 case 2017* at para. 22: “The applicants were at pains to bring it to my attention that the deferent forms of psychological harm, as alluded to in the various expert reports, was conceded by the Media respondents [writer’s emphasis]. They conceded further that the Media respondents identification or disclosure of child offenders would “hinder rehabilitation and reintegration of offenders, and may engender feelings of shame and stigma”[writer’s emphasis]. It was acknowledged by the applicants that even in the face of the aforesaid concessions the Media respondents contended that “it is not generally true that it is harmful to be known as a victim of crime”.

²⁷⁵ *Supra* note 115.

protection of anonymity in respect of children even over the age of 18.²⁷⁶ However, Hughes J concluded that this extension had been initiated in cases where it was just and equitable for the Constitutional Court to do so, as there is nothing available to cure the defect acting against the rights of the child.²⁷⁷ If the expert evidence had been considered, it is difficult to understand why it would not be just and equitable, in any circumstance, to extend a child's anonymity beyond the age of 18. Furthermore, there is nothing available to cure the defect acting against the rights of the child as all the available remedies only assist when the harm to the individual has already been done. The inadequacies of these remedies are not only illustrated by the legal arguments brought forth by the Applicants but are further bolstered by the impact of the evidence presented by the experts.

4.9. CONCLUSION

The Media Respondents, through an affidavit by a newspaper editor with no expert knowledge on matters concerning children and child justice, delivered arguments fraught with statements containing no supporting evidence and a mischaracterisation of the case. It is clear from the evidence provided by the expert witnesses that identification could cause devastating psychological effect and essentially undo all the rehabilitative work. This fundamentally goes against the ethos of the Child Justice Act and what it aims to achieve. It is therefore quite unfortunate that despite this, the court ruled against the Applicants in their bid to secure that a child's anonymity continues even beyond the age of 18 years old. The court in part felt that it would be an overreach of their power to extend the protection beyond the age of 18 and that it should be dealt with by the legislature.²⁷⁸ The court seemed to rely heavily on the definition of a "child" as described in the Child Justice Act. The court also (erroneously) gave cognisance to one of the logical fallacy arguments presented by the Media Respondents that it would prevent adults from bringing awareness to their experiences.²⁷⁹ Again, as indicated above, nothing prevents any interested party from approaching a court to ask that it allow publication of information which may identify a child witness, victim or offender – this would necessarily include the

²⁷⁶ At para. 64.

²⁷⁷ At para. 65.

²⁷⁸ *Media 24 case 2017* at para. 62.

²⁷⁹ *Media 24 case 2017* at para. 67.

witness, victim or offender himself. The matter will go on appeal²⁸⁰ – the date of which is pending at the time of this research.

²⁸⁰ Order granted on 22 August 2017.

CHAPTER 5

COMPARISON WITH FOREIGN JURISDICTION

– UNITED KINGDOM (UK)

5.1. INTRODUCTION

This section will comprise a comparison with the UK, specifically England and Wales. The South African legal system applies Roman-Dutch law, as influenced by English law (common law) as well as customary law, giving rise to a mixed legal system.²⁸¹ A comparison of this nature is therefore helpful as the jurisdiction being compared has a similar legal system to South Africa, albeit with some differences. A comparison may identify a *lacuna* in the South African legal framework to which another country may offer possible solutions. The comparison is legitimised by section 39(1) (c) of the Constitution, which states that “when interpreting the Bill of Rights, a court, tribunal or forum, may consider foreign law”. The inclusion of the word ‘may’ is indicative of the discretion that is to be exercised by the court, tribunal or forum. There is thus no obligation to consider foreign law when interpreting the Bill of Rights.

The judiciary of England and Wales has considered the identification of child victims, witnesses and/or offenders. An exposition of these considerations will be explored below.

5.2. ENGLISH AND WELSH LAWS PERTAINING TO THE IDENTIFICATION OF CHILDREN PRE-13 APRIL 2015

The Children and Young Persons Act 1933 (**CYPA 1933**) contained some statutory protections for children involved in criminal proceedings; the nature of which varied according to which court the matter was presented before.²⁸²

²⁸¹ Van Niekerk GJ (1998) A common law for Southern Africa: Roman law or indigenous African law? *Comparative and International Law Journal of Southern Africa* vol 31, no 2, 2 July 158 at pgs 159-160.

²⁸² Stone N (2007) Naming Child Defendants: In the Public Interest? *Youth Justice* 1–11 (<http://yji.sagepub.com>) (accessed 13 September 2016) at pg 2.

5.2.1. Youth court proceedings

Section 49 of the CYPA 1933 governs the position where proceedings are before a youth court.²⁸³ Section 49 of the CYPA 1933 imposes an automatic ban on the publication of any report that reveals the name, address or school or any other particulars likely to lead to the identification of any child or young person concerned (whether as an offender, witness or otherwise) in the proceedings.²⁸⁴ Section 49(4A) of the CYPA 1933 confers upon a court discretionary powers to dispense with the requirements in section 49 of the CYPA 1933 in respect of a child or young person who has been convicted of an offence where *'the court is satisfied that it is in the public interest to do so'*.

5.2.2. Crown court proceedings

Section 39 of the CYPA 1933²⁸⁵ conferred a discretionary power on the court to impose reporting restrictions on the identification of children and young persons concerned, whether as an offender, witness or victim, *'except in so far (if at all) as may be permitted by the direction of the court'*.²⁸⁶ This in effect meant that the protection of the child offender under section 39 of the CYPA 1933 required affirmative action without there needing to be a public interest at play.²⁸⁷

The difference between sections 39 and section 49 of the CYPA 1933, in so far as child offenders were concerned, was difficult to follow. Furthermore, there was a growing debate around the extension of the prohibition against publishing the identity of a child offender, witness or victim beyond the age of 18.²⁸⁸ This debate grew

²⁸³ Section 45 (1) of the CYPA 1933 provides that this is "a magistrates' court with jurisdiction to try matters involving a child or young person". This court is not open to the public.

²⁸⁴ Section 49 (1) of the CYPA 1933.

²⁸⁵ *Supra* note 282; Section 39 (1) of the CYPA 1933: In relation to any proceedings in any court, the court may direct that –

(a) no newspaper report if the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person[by or against] or in respect of whom the proceedings are taken, or being a witness therein;

(b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid;

except in so far (if at all) as may be permitted by the direction of the court.

²⁸⁶ *Supra* note 282.

²⁸⁷ *Supra* note 282 at pg. 2.

²⁸⁸ *Supra* note 282 at pg. 4.

undoubtedly in part due to several high profile cases which tested the relationship between the media, children and society at large.

5.3. CASE LAW

5.3.1. T v Director of Public Prosecution and North East Press²⁸⁹

This case dealt with the prosecution of a 17-year-old who was charged with assault. He turned 18 years old shortly after his initial appearance before a youth court²⁹⁰ where he pleaded not guilty. He subsequently changed his plea to guilty and was sentenced. The magistrate then granted an application from a local newspaper requesting that the reporting restrictions, in accordance with section 49(1) of the CYPA 1933, be lifted.²⁹¹ The decision to uplift the restriction was taken on appeal on the basis that “proceedings’ (for the purposes of section 49(1) of the CYPA 1933) are “a continuum rather than a single hearing”.²⁹² Counsel for T argued that T should have benefited from the statutory protections under section 49 of the CYPA 1933 throughout the proceedings, even though he had turned 18 by the time sentencing had concluded.²⁹³ The appeal was dismissed on the basis that, among other things, once the person concerned in the proceedings is 18 years old he or she can no longer be described as a child or young person and is no longer afforded the protections under section 49 of the CYPA 1933.²⁹⁴ The court further stated that extending the protections beyond the age of 18 years would leave a *lacuna* in, *inter alia*, section 49(4A) of the CYPA 1933 in so far as it would not apply as to enable the identification of a person who became an adult during the course of proceedings before the youth court.²⁹⁵

²⁸⁹ [2003] EWHC 2408 (Admin).

²⁹⁰ The proceedings continued in the youth court pursuant to the provisions of section 29 (1) of the Children and Young Persons Act 1963.

²⁹¹ *Supra* note 289 at paras 4 – 9.

²⁹² *Supra* note 289 at para. 24.

²⁹³ *Supra* note 289 at para. 6.

²⁹⁴ *Supra* note 289 at para. 30.

²⁹⁵ *Supra* note 289 at para. 45.

5.3.2. R (on the application of JC and RT) v The Central Criminal Court^{296, 297}

In this case, the claimants (J and T - both 17 years old at the time of the crime) had pleaded guilty to possession, without lawful reason; of an explosive substance. A third child (P) was charged with similar offences.²⁹⁸ All three had benefited from the section 39 protective order. J and T had been sentenced²⁹⁹, and P was still awaiting a retrial when he was identified after he turned 18.³⁰⁰ This case follows a judicial review of the court a quo's decision that J, T and P's section 39 orders expired automatically when they reached the age of 18.^{301, 302} Several media and press organisations who wished to report fully on the retrial of P opposed the application.³⁰³ Interestingly enough the media relied partly on the provisions under section.39 (2) and section 49 (9) of the CYPA 1933 which specify that any breach of reporting restrictions constitutes a summary offence.

As a starting point the court mentioned that, while not dealt with definitively, there had been several cases where the court had proceeded on the working assumption that protection under section 39 of the CYPA 1933 lapsed once the child in question turned 18.³⁰⁴

The appeal was dismissed for a number of reasons, including:

- The court relied on the language used in section 39 of the CYPA 1933, namely that the prohibition of identification was specified to apply to a child or young

²⁹⁶ [2014] EWCA Civ 1777.

²⁹⁷ In the *court a quo*, it was determined that an order protecting the identity of child concerned in criminal proceedings under section 39 of the CYPA 1933 automatically expired when the subject of the order turned 18 years old.

²⁹⁸ *Supra* 296 at paras 2 – 3.

²⁹⁹ *Supra* note 282 at pg. 5: Previous cases such as *R (ex parte W, B & C) v Central Criminal Court* [2001] Cr App R 2 had proceeded on the assumption that section 39 would cease to apply at age 18, this point had not been definitively determined.

³⁰⁰ *Supra* note 296 at para. 6.

³⁰¹ *Supra* note 282 at pg. 97.

³⁰² On appeal from the High Court Queen's Bench Division the Administrative Court.

³⁰³ *Supra* note 301.

³⁰⁴ *R v Central Criminal Court, Ex p W* [2001] CR App R 111 at para 38; *Venables v News Group Newspapers Ltd and others*; *Thompson v News Group Newspapers Ltd and others* [2001] Fam 430 at para. 28.

person. Therefore once the person ceases to be a child or young person, they can no longer rely on the protection of this section.³⁰⁵

- The need for rehabilitation cannot be construed from the interpretation of section 39 of the CYPA 1933.³⁰⁶ Moore-Bick LJ added that Parliament must have identified a need for protection that was common to all three classes of children mentioned in the section (i.e. witnesses, victims and offenders).³⁰⁷ To this end, it seems that the judge interprets rehabilitation as a form of protection applicable only to an offender and not necessarily to a witness and victim. Thus one cannot simply infer that parliament intended to promote rehabilitation when drafting section 39 of the CYPA 1933.³⁰⁸
- The court stated that they could not construe the best interest of the child standard (as encompassed in the UNCRC³⁰⁹) as being understood to include protection from publicity as an adult.³¹⁰
- The court was cognisant of the fact that some common law jurisdictions provided protection past the age of 18. However, they noted that even that extended protection was only applicable if expressly provided for or by necessary implication.³¹¹ The example cited was section 110(3) of the Canadian Criminal Justice Act 2002.³¹²

In the time between the judgment of the Divisional Court and this appeal, there had been some development regarding reporting restrictions particularly in light of child witnesses and victims.³¹³ The government had tabled an amendment to the Criminal Justice and Courts Bill with the effect that the Crown Court would be empowered with the discretion to impose lifelong bans on publicity in favour of only child

³⁰⁵ *Supra* note 296. See, *inter alia*, paras 28, 31 and 39.

³⁰⁶ *Supra* note 296 at para. 37.

³⁰⁷ *Supra* note 296 at para. 50.

³⁰⁸ *Ibid.*

³⁰⁹ Article 3 of the UNCRC.

³¹⁰ *Supra* note 296 at para. 36.

³¹¹ *Ibid.*

³¹² According to section 110(3); 'a young person may, after he or she attains the age of eighteen years, publish, or cause to be published information that would identify him or her as having been dealt with under this Act or the Young Offenders Act, chapter Y-1 of the revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to the Act at the time of publication'.

³¹³ *Supra* note 296 at para. 29.

witnesses and victims.³¹⁴ Sections 78 – 80 of the Criminal Justice and Courts Act 2015 came into force on 13 April 2015. These sections essentially changed the reporting restrictions provisions relating to children involved in criminal proceedings. Courts now can grant lifelong reporting restrictions for victims and witnesses under the age of 18.³¹⁵ Section 39 of the CYPA 1933 has been amended in so far as it will now only apply to civil and family proceedings.³¹⁶ Section 49 of the CYPA 1933 will continue to apply in youth courts.³¹⁷

It is clear from the appeal judgement³¹⁸ that there is a view that child offenders should be treated differently from child witnesses and victims on the basis that they have different needs.³¹⁹ To this effect, it seems somewhat unlikely that lifelong anonymity provisions will be granted to child offenders.

5.4. “MARY BELL ORDERS”

In 1968, Mary Bell (then 11 years old) killed two small children aged three and four-year-old respectively. Mary Bell was convicted of the manslaughter of each of the children because of diminished responsibility.³²⁰ The case brought about widespread interest not only in the UK but worldwide. Upon her release from detention, Mary Bell was granted a new identity.³²¹ Because of her notoriety, there have been periods in which her identity has been compromised and as a result; she has had three changes of identity in her lifetime.³²² In *X (formerly known as Mary Bell) & Y v News*

³¹⁴ *Ibid.*

³¹⁵ Section 78 of Criminal Justice and Courts Act provides for the amendment of section 45A of the Youth and Criminal Evidence Act 1999. The restriction has also been expanded to cover all online content in addition to print and broadcast media (see schedule 15 of Criminal Justice and Courts Act).

³¹⁶ Section 79(2) of the Criminal Justice and Courts Act: ‘any proceedings other than criminal proceedings’.

³¹⁷ “Anonymity in Court Proceedings – section 39 orders post 18” dated 30 January 2015 (www.yjlc.uk/anonymity-in-court-proceedings-section-39-orders-post-18 - accessed 29 January 2018).

³¹⁸ *R (on the Application of JC and RT) v The Central Criminal Court and the Crown Prosecution Service and British Broadcasting Corporation and Just For Kids (as interveners)* [2014] EWHC 1041 (QB).

³¹⁹ *Supra* note 318 at para. 36.

³²⁰ *X (formerly known as Mary Bell) & Y v News Group Newspapers Ltd and others* [2003] EWHC QB 1101 at para. 1.

³²¹ *Supra* note 320 at para. 3.

³²² *Supra* note 320 at para. 38; *re X (A Minor) (Wardship Injunction)* [1984] 1 WLR 1422.

Group Newspapers Ltd and others,³²³ she (and her daughter, Y) sought orders for lifetime anonymity protecting them from media intrusion and any disclosure of their identities, their addresses or any details which might identify them.³²⁴ An order of this nature has been informally dubbed “Mary Bell Order” by the British public – i.e. a court order forbidding publication of any information that could identify a child involved in legal proceedings.³²⁵ Interesting enough Jon Venables and Robert Thompson were the first to be granted lifelong anonymity orders upon their release.³²⁶ In February 1993, Venables and Thompson (both ten years old at the time) abducted and murdered two-year-old James Bulger in Liverpool.³²⁷ In granting lifelong anonymity to Venables and Thompson, Dame Elizabeth Butler-Sloss (then president of the High Court Family Division) admitted that her ruling was “to say the least, unusual”.³²⁸ In this case, the granting of such “exceptional” injunctions was done to protect their (Venables’ and Thompson’s) human rights.³²⁹ This was done as the court held that there was “a sense of moral outrage” about the murder and there was “a serious desire for revenge” against Jamie Bulger’s “uniquely notorious” killers.³³⁰

To date, only four people³³¹ in the UK are protected by “Mary Bell orders” – Mary Bell, Venables and Thompson and Maxine Carr.³³² As reported by the British media,

³²³ *Supra* note 320.

³²⁴ *Ibid*

³²⁵ Smartt U (2017) *Media & Entertainment Law* 3rd edition Routledge at pg. 336.

³²⁶ *Supra* note 304.

³²⁷ *R v Secretary of State for the Home Department, ex parte Venables, R v Secretary of State for the Home Department, ex parte Thompson* [1997] 3 All ER 97.

³²⁸ *Supra* note 304 at para. 460.

³²⁹ *Supra* note 304 at para. 461. With reference to article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (as set out in Schedule 1 to the Human Rights Act 1998, the freedom of the media to publish could not be restricted unless the need for such restrictions fell within the exceptions in article 10(2), which were to be construed narrowly; that the onus lay on those seeking such restrictions to show that they were in accordance with the law, necessary in a democratic society to satisfy one of the strong and pressing social needs identified in article 10(2), and proportionate to the legitimate aim pursued; that, taking into account the Convention rights secured by articles 2 and 3, the law of confidence could, exceptionally, extend to cover information as to the identity or whereabouts of individuals where its disclosure would put them at risk of serious injury or death, and in such circumstances the need for restrictions on the freedom of the media would fall within the exceptions in article 10(2); and that, accordingly, the court had jurisdiction to grant the injunctions sought, including injunctions against the whole world (read with section 12 of the Human Rights Act 1998). (See note 304 at para. 446).

³³⁰ *Ibid*.

³³¹ *Supra* note 325 at pgs 283 - 234.

it appears that the “Mary Bell Order” has been met with scathing disdain by the public who deem it to be a waste of taxpayer money.³³³

5.5. RELEVANCE FOR SOUTH AFRICAN LAW?

It is interesting to note that in R (on the application of JC and RT) v The Central Criminal Court³³⁴ and X (formerly known as Mary Bell) & Y v News Group Newspapers Ltd and others, the court seemed cognisant of the potential adverse effects of identifying child offenders. Also, in the latter case, the court seemed to credit anonymity with aiding in the rehabilitative process of X, who has to date not re-offended and has managed to live a relatively normal life.³³⁵ However, it seems that there is reluctance on the part of the court to grant anonymity beyond the age of 18 if the circumstances are not “exceptional” to limit the freedom of expression of the media and public interest.³³⁶ This reluctance parallels the South African court’s apprehensions in Media 24 case 2017.

It may serve as encouragement to the Applicants in Media 24 case 2017 that R (on the application of JC and RT) v The Central Criminal Court had a profound impact on the amendment of legislation relating to the protection of child witnesses and victims. The difficulty (in both jurisdictions) appears to lie in convincing the judiciary, legislature and “the court of public opinion” that child offenders also require protection from identification by the media beyond the age of 18.

5.6. CONCLUSION

The UK courts have a similar approach in their interpretation of provisions protecting child victims, witnesses and offenders against publication which may lead to identification. There does not seem to be a consensus that the protection extends into adulthood where child offenders are concerned. While that, unfortunately, offers

³³² Ex-girlfriend of the man convicted of the 2002 “Soham murders”, Ian Huntley.

³³³ Kirby W “The £5M MONSTER: The masses of YOUR cash spent on protecting Bulger-killer Jon Venables” 24 November 2017 <https://www.express.co.uk/news/uk/883914/jon-venables-james-bulger-murder-killer-robert-thompson-cost-uk-taxpayer-prison> (accessed 29 January 2018); Wright S and Slack J “Taxpayer will have to fund yet another £250,000 new identity for James Bulger murderer after his return to jail” 5 March 2010. <http://www.dailymail.co.uk/news/article-1255608/Yet-250-000-new-identity-Jamie-Bulger-murderer> (accessed 29 January 2018).

³³⁴ At para. 46.

³³⁵ At para. 37.

³³⁶ *Supra* note 320 at para. 61.

no comfort to the plight of child offenders in South Africa; the amendments made to the CYPA 1933, particularly section 45A, may serve as a beacon of hope for the treatment of child witnesses and victims in the South African context, should the courts choose to consider the developments made in the UK in addressing the present *lacunae*.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1. CONCLUSION

As stated in Chapter 1 above, this research had the objective of, among other things, determining whether the provisions of the Criminal Procedure Act and the Child Justice Act were adequate regarding protecting the identities of child offenders, witnesses, and victims from publication by the media beyond the age of 18. To determine this, a critical analysis of the South African legal framework needed to take place. This analysis took place in conjunction with the international provisions and a comparative study.

It is clear from this research that the Child Justice Act (in conjunction with the Criminal Procedure Act) creates a procedural framework for dealing with children in the criminal justice system. This should ideally be a system which not only accords with the international standards imposed by instruments discussed under Chapter 2 above but seeks to provide the mechanisms to ensure implementation thereof in practice. One of the key aims of the Child Justice Act is the promotion of restorative justice. It, therefore, seems counter-intuitive to the aims of restorative justice that the media would be given free rein to dredge up the past and contribute to the secondary trauma of a child witness, victim, or offender well after they have reached adulthood. While the media plays a vital role in the maintenance of a democratic state, they must exercise caution where matters relating to the publication of information regarding children is concerned. It is clear from the Criminal Procedure Act that the courts are vested with a power of discretion where the publication of children's names is concerned. It is up to the court to decide how the balance must be struck regarding the diverse interests of the parties involved (on a case-by-case basis).

The issue is far from clear-cut and appears to be one that has not been solved on an international level, let alone domestically. In looking towards international law for guidance, one notes that there appears to be no mechanisms available in international law to extend the privacy of a child offender, witness and victim beyond the age of 18. However, in the same vein, it can be said that international law does

not expressly state when protection afforded to a child under the various international instruments ceases to exist. There is an excellent emphasis on restorative justice and the reintegration of a child who has directly or indirectly interacted with the criminal justice system. The body of international law provides the framework under which domestic law should seek to implement the protection of children's rights effectively. It appears that much of the international instruments, while indeed providing a great foundation and starting point, have yet to adequately cater for the impact of media and/or public intrusion on the right to privacy of child offenders, witnesses and victims (after 18 years), particularly in the information age.

In comparison with a legal system similar to South Africa, The UK courts have had a similar approach in their interpretation of provisions protecting child victims, witnesses and offenders against publication which may lead to identification. There does not seem to be a consensus that the protection extends into adulthood where child offenders are concerned. The difference is that the UK has at least made strides in the protection of child witnesses and victims. While that, unfortunately, offers no comfort to the plight of child offenders in South Africa; the amendments made to the CYPA 1933, particularly section 45A of the CYPA 1933, may serve as a positive example regarding the treatment of child witnesses and victims by the media in the South African context. That being said, as unfortunate as the ruling was in *Media 24 case 2017*, the matter will go on appeal. While the separation of powers argument may be one of the key hesitations preventing the court from extending protections in terms of section 154 of the Criminal Procedure Act beyond the age of 18, the UK scenario has illustrated that it is not unheard of for the courts to drive more significant social change by considering issues not previously considered.

6.2. RECOMMENDATIONS

This research concurs with the arguments and the proposed relief sought by the Applicants in *Media 24 case 2017*. In addition to a declaration of invalidity and unconstitutionality of section 154(3) of the Criminal Procedure Act to the extent applicable, this research proposes that the provisions (relating to the reporting of children) of the Press Code be amended.

As pointed out in Chapter 4 above, self-regulation of the media and legal provisions are not mutually exclusive. The Press Code must undergo meaningful

transformation. Non-compliance, by the media, with the provisions of the Press Code must reflect the same sanctions as expressed in the Criminal Procedure Act. There should not be scope for the media to plead ignorance regarding the existence of a court order (as in the case of KL and MVB) and continue to publish articles explicitly prohibited by said court order. Provisions are only as strong as their enforcement. The media must be held accountable to a set of standards that consider the aims of the Child Justice Act. To have remedies available which only look backwards does not consider the long-term damage that may be caused to the child victim, witness and offender who must live with the realities of the harm. These changes would not amount to a limitation of freedom of expression or be against the principle of open justice but would instead inform a more ethical approach to reporting which is responsible and considers the inherent dignity, privacy, and best interests of a vulnerable group of society. This re-imagining of the Press Code would necessarily have to include various stakeholders and not be limited to the media.

This recommendation may inform a change in the norms of reporting practices which may alleviate some of the strain while awaiting final judgment in *Media 24 case 2017*.

BIBLIOGRAPHY

BOOKS AND CHAPTERS FROM BOOKS

- Boezaart T (2016) *Law of persons* 6th edition Cape Town: Juta
- Braithwaite J (1989) *Crime, shame and reintegration* Cambridge: University Press Cambridge
- Britz H & Ackermann M (2006) *Information, ethics and the law* Pretoria: Van Schaik
- Brown SE et al (2007) *Criminology: Explaining crime and its context* New Jersey: LexisNexis
- Burchell J & Milton J (2014) *Principles of Criminal Law Revised* 4th edition Cape Town: Juta
- Burns Y (2001) *Communications law* Durban: Butterworths
- Dugard J (2011) *International law: A South African perspective* 4th edition Cape Town: Juta
- Feld BC (1999) *Bad kids: Race and the transformation of the juvenile court* Oxford: Oxford: University Press
- Joubert JJ (2017) *Criminal procedure handbook* 12th Edition Cape Town: Juta
- Neethling J et al (2017) *Law of delict* 7th edition South Africa: LexisNexis
- Potgieter JM & Visser PJ (2015) *Law of personality* 2nd edition South Africa: LexisNexis
- Skelton A (1997) Children, young persons and the criminal procedure in JA Robinson (ed) *Law of children and young persons in South Africa* Durban: Butterworths
- Smartt U (2017) *Media & entertainment law* 3rd edition UK: Routledge
- Snyman CR (2014) *Criminal law* 6th edition South Africa: LexisNexis

JOURNAL ARTICLES

- Carstens P (2008) Access to medical records without consent of patient and the publication thereof in the public domain: Issues of privacy, dignity, freedom of expression and public interest. *Tshabalala-Msimang and Medi-Clinic Ltd v Makhanya* (2008) 3 BCLR 338 (W) *Obiter*
- Gallinetti J (2006) What happened to the Child Justice Bill? The Process of Law Reform relation to Child Offenders. SACQ No 17
- Jones LM et al (2010) Protecting victims' identities in press coverage of child victimization *Journalism*, vol 11, no 3, 347-367

Lincoln R & Chappell D (2009) Shhh ... we can't tell you: an update on the naming prohibition of young offenders *Criminal Justice*, vol 20, no 3, 476-484

Muncie J (2008) The punitive turn in juvenile justice: Cultures of control and rights compliance in Western Europe and the USA *Youth Justice*, vol 8, no 2, 107-121

Muthaphuli P & Terblanche S (2017) A penological perspective on rehabilitation as a sentencing aim *Acta Criminologica: Southern African Journal of Criminology*, vol 30, no 4, 16-32

Skelton A (1996) Developing a juvenile justice system for South Africa: International instruments and restorative justice *Acta Juridica*, vol 6, 180-196

Skelton A (2011) From cook county to Pretoria: A long walk to justice for children *Northwestern Journal of Law and Social Policy*, vol 6, no 2, 413-427

Skelton A & Batley M (2008) Restorative justice: A contemporary South African review *Acta Criminologica*, vol 21, no 3, 37-51

Sloth-Nielsen J (2001) The role of international human rights law in the development of South Africa's legislation on juvenile justice *Law Democracy & Development*, vol 59, 63

Sloth-Nielsen J & Gallinetti J (2011) Just say sorry? Ubuntu, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008. *PELJ*, vol 14, no 4, 74

Spencer JR (2000) Naming and shaming young offenders. *The Cambridge Law Journal*, vol 59, no 3, 466-468

Steinmann R (2016) The core meaning of human dignity. *PER*, vol 19, 1-34

Stone, N., 2007. Naming child defendants: In the public interest? *Youth Justice*, 1-11

Terblanche, S.S., 2007. Sentencing a child who murders – *DPP, KwaZulu-Natal v P 2006(1) SACR 243 (SCA)*. *South African Journal of Criminal Justice*, 243-255

Van der Bank, C.M., 2012. The right to privacy – South African and comparative perspectives. *European Journal of Business and Social Sciences*, vol 1, no 6, 77-86

Van Niekerk, G.J., 1998. A common law for Southern Africa: Roman law or indigenous African law? *Comparative and International Law Journal of Southern Africa*, vol 31, no 2, 158-173

LAW REPORTS

South African

Bernstein v Bester 1996 (2) SA 751

Centre for Child Law v Minister of Justice and Constitutional Development 2009 2 SACR 477 (CC)

Centre for Child Law and 4 others v Media 24 Limited and 13 others (Part A and B) 2017 (2) SACR 416 (GP)

De Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2004 (1) SA 406 (CC)

Dikoko v Mokhatla 2006 (6) SA 235 (CC)

Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development and others 2009 (4) SA 222 (CC)

Financial Mail (Pty) Limited v Sage Holdings Limited 1993 (2) SA 451 (A)

Holomisa v Argus Newspapers Ltd 1996 2 SA 588 (W)

J v National Director of Public Prosecutions and Another 2014 (2) SACR 1 (CC)

Johncom Media Investments Limited v M and Others 2009 (4) SA 7 (CC)

Khumalo v Holomisa 2002 5 SA 401 (CC)

Media 24 v National Prosecuting Authority: In re S v Mahlangu 2011 (2) SACR 321 (GNP)

Media 24 Holdings (Pty) Ltd v The Chairman of the Appeals Board of the Council of South Africa and another 19001/2014, case number 441/2014

Minister for Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC)

Multichoice (Pty) Ltd and others v National Prosecuting Authority and Another, in re: S v Pistorius, In re Media 24 Ltd and Others v Director of Public Prosecutions North Gauteng and Others (10193/2014/ (2014) ZAGPPHC 37

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)

National Media Ltd v Bogoshi 1998 4 SA 1196 (SCA)

NM v Smith 2007 (5) SA 250 (CC)

The President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC)

Prinsloo v van der Linde and Another 1997 (3) SA 1012 (CC)

S v Brandt 2005 (2) All SA 1 (SCA)

S v CKM and Others 2013 (2) SACR 303 (GNP)

S v Dodo 2001 (3) SA 382 (CC)

S v Draai 2014 JDR 2485 (FB)

S v Jansen 1975 (1) SA 425 (A)

S v Lehnberg en `n Ander 1975 (4) SA 553 (A)

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)

S v Mahlangu 2012 ZAGPJHC 114

S v Makwanyane 1995 (3) SA 391 (CC)

S v Saayman 2008 (1) SACR 393 (E)

S v Steyn 63/86 1986 ZASCA 75

S v Zinn 1969 (2) SA 537 (A)

Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another 2014 (2) SA 168 (CC)

United Kingdom

Lion Laboratories Ltd v Evans and others 1984 (2) ALL ER 417 (CA)

R v Central Criminal Court, Ex p W 2001 CR App R 111

R (ex parte W, B & C) v Central Criminal Court 2001 Cr App R 2

R (on the application of JC and RT) v The Central Criminal Court 2014 EWCA Civ 1777

R (on the Application of JC and RT) v The Central Criminal Court and the Crown Prosecution Service and British Broadcasting Corporation and Just For Kids (as intervener) 2014 EWHC 1041 (QB)

R v Secretary of State for the Home Department, ex parte Venables, R v Secretary of State for the Home Department, ex parte Thompson 1997 (3) All ER 97

re X (A Minor) (Wardship Injunction) 1984 (1) WLR 1422

T. v Director of Public Prosecution and North East Press 2003 EWHC 2408 (Admin)

Venables v News Group Newspapers Ltd and others; Thompson v News Group Newspapers Ltd and others 2001 Fam 430

X (formerly known as Mary Bell) & Y v News Group Newspapers Ltd and others 2003 EWHC QB 1101

United States of America

In re Gault 387 US 1 1967

STATUTES

South Africa

Child Justice Act 75 of 2008

Children's Act 38 of 2005

Constitution of the Republic of South Africa Act 108 of 1996

Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007

Criminal Procedure Act 51 of 1977

Probation Services Act 116 of 1991 (as amended by Act 35 of 2002)

England

Children and Young Persons Act 1933

Children and Young Persons Act 1963

Criminal Justice and Courts Act 2015

Human Rights Act 1998

Canada

Canadian Criminal Justice Act 2002

REPORTS, POLICY DOCUMENTS, GOVERNMENT AND POLITICAL PUBLICATIONS

Code of Ethics and Conduct for South African print and online media

Constitution of the Press Council of South Africa

INTERNATIONAL AND REGIONAL INSTRUMENTS

African Charter on the Rights and Welfare of the Child

United Nations Convention on the Rights of the Child

44th session of the United Nations Committee on the Rights of the Child in Geneva (January – February 2007) in which the Committee issued a general comment on the topic of Children's Rights in Juvenile Justice (adopted on 25 April 2007)

Universal Declaration of Human Rights

International Charter of Human Rights

International Covenant on Civil and Political Rights

UNHCR Guidelines on Determining the Best Interests of the Child (May 2008)

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)

United Nations Economic and Social Council adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime

United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002)

Convention for the Protection of Human Rights and Fundamental Freedoms

PAPERS PRESENTED

O'Regan K (2005) Checks and balances reflections on the development of the doctrine of separation of powers under the South African Constitution *PER/PELJ*, vol 8, no 1, 1-30

THESES

Bekink M (2016) *The protection of child victims and witnesses in terms of the Constitution of the Republic of South Africa, 1996, and international instruments* at 215, unpublished LLD thesis, University of Pretoria

CLASS NOTES

Skelton, A. 'Children's rights: Social change through the application of hard and soft international law' at pg. 4 (Class notes for GIK 801 last accessed 3 June 2017)