The best interests of children of primary caregivers to be sentenced: a comparative study

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THE BEST INTERESTS OF CHILDREN OF PRIMARY CAREGIVERS TO BE SENTENCED: A COMPARATIVE STUDY

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DEDICATION

I dedicate this project to my beloved princesses **PHAKAMILE MAKILE** and **KWEKWEZI MAMSWATI**.

DECLARATION

I, the undersigned Bongani Stanley Nkosi hereby declare that this thesis is my own unaided work in design and content.

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Abstract

Every child has the right to care. The commission of an offence by the child's primary caregiver and her resultant imprisonment may infringe or place the right of the child to care at risk of infringement. The incarceration of the child's caregiver may lead to the child being deprived of care as there may be no one to care for the child. International children rights instruments impose the duty to act in the best interests of the child in every matter that concerns the child on the court as well. The sentencing of the child's primary caregiver is itself a matter that involves the child and that directs the court to consider the right of the child to care when imposing a custodial sentence on the child's primary caregiver. The prescript of the best interests of the child has altered the traditional approach to sentencing. The court has the obligation to take into account the right of the child to care when imposing a custodial sentence on the child's caregiver. The landmark *dictum* of *S v M* has since established guidelines for the sentencing of a child's caregiver.

The guidelines for the sentencing of the child's primary caregiver are not always adhered to much so to the detriment of children of caregivers. In some of the cases where the guidelines for the sentencing of the child's caregiver have been complied with, the placement of the children in appropriate alternative care was often left to the Departments of Social Development or Correctional Services and was without appropriate supervision by the court. The procedure that social workers follow in putting a child in alternative care is unsuitable for the child of a caregiver that stands to be sentenced to a custodial sentence or that is jailed.

The placement of children in alternative care without appropriate supervision by the court has the potential of infringing their right to care. The placement of children in appropriate alternative care is often intended, where possible, to avoid confining children with their imprisoned caregivers. The prison environment is at most uncongenial for children.

The Children's Act creates possibilities for the care of the child of an imprisoned caregiver. The child may be cared for by a person or persons that he is familiar with and who is or are able to perpetuate the child's religion, heritage, language and culture

and such care makes it unnecessary to resort to other forms of alternative care such as institutional care.

The placement of the child of an incarcerated caregiver in appropriate alternative care requires that the mandate of the Family Advocate be amended. At present, the Family Advocate operates from the private law sphere. The Family Advocate should be an integral part of the sentencing of the child's caregiver and must be authorised to assist the child's primary caregiver to identify and to enter into a parental responsibilities and rights agreement with a person or persons who will care for the child during her term of imprisonment.

Keywords: child; best interests of the child; caregiver; court; sentencing; imprisonment South Africa; India; England

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CA-Engl	Children Act (England)
CCA	Child Care Act
CCPA	Child Care and Protection Act
CCP	Code of Criminal Procedure
CorJA	Coroners Justice Act
CSA	Correctional Services Act
CStA	Children's Status Act
CSAA	Correctional Services Amendment Act
CRC	Convention on the Rights of the Child
DCS	Department of Correctional Services
DSD	Department of Social Development
ECHR	European Convention on Human Rights
FLRA	Family Law Reform Act
GA	Guardianship Act
GLFAA	General Law Further Amendment Act
GuA	Guardianship Act
GWA	Guardians and Wards Act
HMGA	Hindu Minority and Guardianship Act
HRA	Human Rights Act (England)
IMPIYM	Infants and Mothers Policy/ Infants and Young Mothers Policy
JJCPCA	Juvenile Justice (Care and Protection of Children) Act
KA	KwaZulu Act on the Code of the Zulu
KNC	KwaZulu Natal Code
MA	Marriages Act
MAA	Matrimonial Affairs Act
MBU	Mother and Baby Unit
MCU	Mother and Child Unit
MPM	Model Prison Manual
NCCS	National Commissioner for Correctional Services

NFCBOWA	Natural Fathers of Children Born Out of Wedlock
PSO	Prison Service Order
SGC	Sentencing Guidelines Council
UDHR	Universal Declaration of Human Rights

Table of Contents

CHAPTER 1 **1**

1 Introduction **1**

1.1 Background to the Study **1**

1.2 Sentencing of a Caregiver, the Best Interests of a Child and the Child's Need of Care **2**

1.3 Definitions and Explanations **5**

1.4 Comparative Study **7**

1.5 Methodology **8**

1.6 Research Question **9**

1.7 Aims of Research **9**

1.8 Hypotheses **9**

1.9 Limitation of the Study **10**

1.10 Outline of Chapters **10**

CHAPTER 2 **11**

2 The Best Interests of The Child Against the Background of Relevant International Instruments **11**

2.1 Introduction **11**

2.2 Best interests of the child **11**
2.2.1 Convention on the Rights of the Child 11
2.2.2 African Charter of the Rights and Welfare of the Child 12
2.2.3 Nature and application of the best interests of the child 13

2.3 South Africa **14**
2.3.1 Constitution 14
2.3.2 Children's Act 38 of 2005 17

2.4 India **18**

2.5 England **19**
2.5.1 Children's Act (1989) 19

2.6 Conclusion **23**

CHAPTER 3 **25**

3 The Influence of The Child's Best Interests on His Care **25**

3.1 Introduction **25**

3.2 International instruments **28**
3.2.1 Convention on the Rights of the Child 28
3.2.1.1 Parental / Family Care 28
3.2.1.2 Alternative Care 30
3.2.2 African Charter of the Welfare of the Child 31
3.2.2.1 Parental / Family Care 31
3.2.2.2 Alternative Care 32
3.2.3 Alternative Care Settings 33
3.2.3.1 Kinship Care 34
3.2.3.2 Foster Care 36
3.2.3.3 Institutional Care 37
3.2.3.4 Kafalah 38
3.2.3.5 Adoption 39

3.3 South Africa **39**
3.3.1 Parental / Family Care 39
3.3.1.1 Children's Act 41
3.3.1.1.2 Alternative Care 41

3.4 Customary law **44**

3.5 India **44**
3.5.1 Background 44
3.5.2 Child Care and Protection Act of 2005 45
3.5.3 Alternative Care 48
3.5.3.1 Alternative Care Settings 49
3.5.3.1.1 Foster Care 49
3.5.3.1.2 Institutional Care 51

3.6 England **52**
3.6.1 Background 52
3.6.2 Parental / Family Care 53
3.6.3 Alternative Care 55
3.6.3.1 Alternative Care Setting 55
3.6.3.1.1 Foster Care 55

3.7 Conclusion **57**

CHAPTER 4 **58**

Parental Responsibilities and Rights and The Best Interests of the Child **58**

4.1 Introduction **58**

4.2 Guardianship **59**
4.2.1 South Africa (Guardianship prior to the Children's Act) 60
4.2.1.1 Children born within marriage 60
4.2.1.2 Child born out of wedlock 63
4.2.1.2.1 Unmarried mother 63
4.2.1.2.2 Unmarried father 63
4.2.2. South Africa (Guardianship in terms of the Children's Act) 64
4.2.2.1 Child born within marriage 66
4.2.2.2 Child born outside marriage 66
4.2.2.2.1 Unmarried mother 66
4.2.2.2.2 Unmarried father 67
4.2.2.3 Non-parents 67
4.2.3 Observations on guardianship 68

4.3 Care **69**
4.3.1 Care (née custody) prior to the Children's Act 69
4.3.1.1 Child born within marriage 71
4.3.1.2 Child born out of wedlock 72
4.3.1.2.1 Unmarried mother 72
4.3.1.2.2 Unmarried father 73
4.3.1.3 Non-parents 74
4.3.2 Care in the Children's Act 74
4.3.2.1 Unmarried father 77
4.3.2.2 Interested person 80
4.3.2 Observations on care 82

4.4 Contact **84**
4.4.1 Contact (née access) prior to the Children's Act 84
4.4.1.1 Forms of access 85
4.4.2 Contact in terms of the Children's Act 88
4.4.2.1 Unmarried father 88
4.4.2.2 Interested persons 89
4.4.3 Observations on contact 90

4.5 Customary law as practised in South Africa **91**
4.5.1 Guardianship 91
4.5.1.1 Definition of guardianship 91
4.5.1.2 Contents of guardianship 92
4.5.1.2.1 Before marriage of the spinster 93

4.5.1.2.2 After marriage of the spinster 93
4.5.1.3 Observations on guardianship 94
4.5.2 Customary Law: Care 95
4.5.2.1 Definition of care 95
4.5.2.2 Contents of care 95
4.5.2.3 Observations on care 96
4.5.3 Customary Law: Contact 97
4.5.3.1 Definition of contact 97
4.5.3.2 Contents of contact 98
4.5.3.3 Observations on contact 99

4.6 India 99
4.6.1 Guardianship 99
4.6.1.1 Guardianship in terms of Hindu law 102
4.6.2 Custody 104
4.6.3 Islamic law as practised in India 105
4.6.4 Parsi and Christian law 108
4.6.5 Contact 109
4.6.6 Observations on Indian law 109

4.7 England 110
4.7.1 Guardianship and care 110
4.7.1.1 Married parents 110
4.7.1.2 Unmarried mother 111
4.7.1.3 Unmarried father 111
4.7.1.4 Subsequent marriage of the mother 112
4.7.1.5 Parental responsibilities and rights agreements 113
4.7.1.6 Residence order 115
4.7.2 Parental responsibilities and rights of a step-parent 116
4.7.3 Acquisition of parental responsibilities and rights by non-parents 117
4.7.4 Observations on parental responsibilities and rights 118
4.7.5 Contact 118
4.7.5.1 Observations on contact 119

4.8 Conclusion 119

CHAPTER 5 122

The Incarceration of Primary Caregivers and the Best Interests of The Child 122

5.1 Introduction 122

5.2 Prison conditions 124
5.2.1 South Africa 124

5.2.2 India 125
5.2.3 England 126

5.3 Legislative and policy provisions on the incarceration of caregivers with their children 127
5.3.1 South Africa 127
5.3.1.1 Correctional Service Act 127
5.3.1.2 Policy Provisions 130
5.3.1.2.1 Separation of children from the primary caregivers 132
5.3.1.2.2 Mother and Child Units 134

5.4 India 134
5.4.1 Model Prison Manual 134
5.4.2 Confinement of children with their primary caregivers 135

5.5 England 140
5.5.1 Rules on babies and young children 140
5.5.2 Young Offenders Institute Rules 141
5.5.3 Prison Service Rules 141
5.5.4 Mother and Baby Units 142
5.5.4.1 Statement of purpose of MBUs 143
5.5.4.2 Criteria for admission 143
5.5.4.3 Types of admissions 145
5.5.4.4 Separation 146
5.5.4.5 Foreign nationals as primary caregivers and emergency separations 149
5.5.4.6 Responsibilities of caregivers towards their children 149
5.5.4.7 Reintegration of caregivers and her children upon release 152

5.6 Conditions of children confined with the caregivers 153
5.6.1 South Africa 154
5.6.2 India 154
5.6.3 England 155

5.7 Conclusion 155

CHAPTER 6 160

The Best Interests of The Child *Qua* Consideration Upon Sentencing of His Primary Caregiver 160

6.1 Introduction 160

6.2 South Africa 162
6.2.1 Sentencing of caregivers before *S v M:* the *Zinn* triad 162
6.2.2 Guidelines for the sentencing of primary caregivers in *S v M* 165
6.2.3 Adherence to the guidelines for the sentencing of caregivers post-*S v M* 170

6.3 India **179**
6.3.1 Introduction 179
6.3.2 Constitution of India 180
6.3.3 Code of Criminal Procedure Act 2 of 1974 180
6.3.4 Indian Penal Code 45 of 1860 181
6.3.5 Probation of Offenders Act of 1958 181
6.3.6 Sentencing of primary caregivers 182

6.4 England **187**
6.4.1 Human Rights Act 187
6.4.2 Sentencing of caregivers 187

6.5 Conclusion **197**

CHAPTER 7 **202**

Conclusion and Recommendations **202**

7.1 Introduction **202**

7.2 International Children's Rights Provisions **203**

7.3 Municipal Provisions Pertinent to the Protection and Advancement of the Right of the Child to Care **206**
7.3.1 South Africa 206
7.3.2 India 209
7.3.3. England 211

7.4 Balancing the Best Interests of The Child with the Crime, the Offender and the Community's Interest **212**
7.4.1 South Africa 213
7.4.2 India 215
7.4.3 England 216

7.5 The Confinement of The Child with his Primary Caregiver **218**

7.6 Recommendations **220**

REFERENCE LIST **1**

CHAPTER 1

1 Introduction

1.1 Background to the Study

It is trite that the state has the duty to uphold law and order in its jurisdiction by holding people who commit crime accountable. The process of holding people who infringe criminal law provisions responsible requires that offenders be 'sentenced' properly.[1] In order for the sentence to be appropriate, it is a requirement that a court must have regard to and balance certain factors. The traditional South African approach to sentencing of an offender has been the consideration of 'the offence, the offender and the protection of the community'.[2]

Sentencing has always been considered the 'most difficult part of a criminal trial'.[3] It may even become more complex when an offence is committed by an offender who is also a child's primary caregiver. It would appear that an additional factor then needs to be considered and balanced in the sentencing process, namely the right of the child to care.[4] Ratification of international children's rights instruments such as the *Convention on the Rights of the Child*[5] has since resulted in state parties to such instruments incurring obligations of acting in the best interests of the child in every matter that concerns the child. Sentencing of a child's caregiver is itself a matter that

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1 S 274(1) of the *Criminal Procedure Act* 51 of 1997 (hereafter referred to as Criminal Procedure Act). See also Van Zyl Smit *Sentencing and Punishment* 49.

2 *S v Zinn* 1969 2 SA 537 (A) para A. See also *S v De Kock* 1997 2 SACR 171 (T) para 124, *S v Khumalo* 1984 3 SA 327 (A) para 330, *S v B* 1985 2 SA 120 (A) para 124 and *S v Nkambule* 1993 1 SACR 136 (A) para 146 C. In, for instance, *S v Matyityi* 2011 1 SACR 40 (SCA) the state successfully appealed against a sentence of 25 years imposed on three accused who were *inter alia* convicted with murder and rape. In substituting the sentence of 25 years imprisonment with imprisonment for life at para 16 the court stated that 'the traditional triad of the crime, the criminal and the interests of society would have been better served'. Instead the trial court emphasised the personal interests of the individual respondent above all else. In doing so it failed to strike the appropriate balance. It thus imposed a sentence that was disproportionate to the crime and the interests of society. In *S v Malgas* 2001 1 SACR 469 (SCA) para 478 it was pointed out that 'all factors (traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role, none is excluded at the outset from consideration in the sentencing process'.

3 Joubert *Criminal Procedure Handbook* 325; Terblanche *A Guide to Sentencing in South* Africa 128 and Kruger *Hiemstra's Criminal Procedure* 28-2.

4 Article 3(2) of the *Convention of the Rights of the Child* (1989); s 28(1)(b) of the *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the Constitution).

5 *Convention on the Rights of the Child* (1989), hereafter referred to as the CRC.

involves the child which requires a course of action that serves the best interests of the child. The prescript of the best interests of the child requires that the right of the child to care be taken into account when his primary caregiver is sentenced and that it be balanced with all other relevant factors when deciding on the punishment of the caregiver. The relevance of the right of the child to care during sentencing is eloquently expressed in the *dictum* of Sachs J in *S v M.*[6] It was among others pointed out that:

> [n]o constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. Thus, even if the state cannot itself repair disrupted family life, it can create positive conditions for repair to take place and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. Section 28(2) requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect on children as far as it can.[7]

Balancing the right of the child to care with the factors in the so-called *Zinn*[8] triad as highlighted above, requires the sentencing court to take into account modern developments regarding the care of the child that have become relevant and to be alert to the fact that the child may be imprisoned with the primary caregiver in appalling conditions.

1.2 Sentencing of a Caregiver, the Best Interests of a Child and the Child's Need of Care

For sentencing purposes, it is important to bear in mind that the family environment is considered a fundamental natural milieu necessary for the growth and well-being of a child. It should ideally provide 'an atmosphere of happiness, love, peace and understanding'.[9] The family environment should be 'secure and free from violence,

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6 ZACC 2008 3 SA 232 (CC)) (hereafter referred to as *S v M*).

7 *S v M* para 20.

8 1969 2 SA 537 (A).

9 Para 5 of the preamble of the *African Charter on the Rights and Welfare of the Child* (1990) (hereafter referred to as the ACRWC).

fear, want and avoidable trauma'.[10] It has to be 'an environment that enables the child not only to enjoy his childhood but also to maximise opportunities for the full development of his potential'.[11] The family environment should provide for maintaining and promotion of the child's culture, religion, language and heritage.[12] The child should be capable of enjoying childhood, to 'freely engage in recreational activities and to take part in cultural life and the arts'.[13]

The concept of care has received considerable attention in international instruments. Caring for the child among others entails ensuring that the child attends school regularly, that he is fed and clothed and that his spiritual and emotional needs are taken care of. It also includes 'securing interaction of the child with his siblings,[14] uncles, aunts, cousins, grandparents, neighbours and with other persons such as his extra-marital father'.

According to the CRC and the ACRWC, 'childhood is entitled to special care and assistance'.[15] This is a moral rather than a legal obligation.[16] Parents, family members and alternative carers are expected to love and to care for the child and also to offer him proper guidance to enable him to be a responsible adult.

Interests of society may require separation of the child from his primary caregiver. Incarceration of the child's caregiver does not result in a child being less dependent on care. The child must continue to be cared for even when a custodial sentence is imposed on his caregiver.

The standard of the best interests of the child directs the court to respect, promote, protect and fulfil the right of the child to care. Article 20(1) of the CRC makes provision 'that a child who is temporarily or permanently deprived of his family environment, or

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10 Para 5 of the preamble of the ACRWC.
11 Para 7 of the preamble of the CRC.
12 Art 20(3) of the CRC.
13 Art 31(1) of the CRC.
14 Child Information Gateway *Determining the Best Interests of the Child* 3.
15 Art 25(2) of the *United Nations Declaration of Human Rights* (1948) (hereafter referred to as the UDHR) recognises childhood and motherhood to be entitled to special care and assistance.
16 In *Jooste v Botha* 2000 2 SA 199 (T) a child born out of wed-lock sued his father for damages on the basis that his father did not admit that he was his son, did not show any interest in him, did not communicate with him and did not offer him love or recognition. At para 206 F H, the court concluded that 'there exists no legal obligation on parents to love their children'.

in whose own best interests cannot be allowed to remain in that environment**,** shall be entitled to special protection and assistance provided by the state'. Article 20(2) compliments article 20(2) by requiring state parties to 'ensure alternative care for such a child in accordance with their national laws'. Guidelines for the alternative care for a child deprived, or at risk of being deprived of care, have been adopted at international level. These guidelines are not binding on state parties to the CRC, however, their implementation is monitored by the Committee on the Rights of the Child (hereafter referred to as the CRC Committee). The prescript of the best interests of the child mandates the court to diligently seek ways of 'respecting, protecting, promoting and fulfilling the right of the child to care when it imposes a custodial sentence on his primary caregiver'.[17]

South Africa,[18] India[19] and England[20] have ratified the CRC. South Africa and England, in addition to being state parties to the CRC, have respectively also ratified the ACRWC[21] and the ECHR.[22] The ACRWC and the ECHR are African and European regional instruments strengthening the protection and advancement of human rights. The court's obligation of protecting and advancing the right of the child to care is interwoven with the child's best interests being a primary consideration and are derived from articles 3 and 20 of the CRC. These articles are discussed in Chapter 3 below.

Article 4 of the CRC *inter alia* mandates state parties to 'undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRC'. The right of the child to care *inter alia* emanates from ratification of the CRC. In South Africa it is a constitutionally entrenched right whilst in India and England it is an integral part of their statutory law. Article 4 complements

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17 *S v M* para 20.

18 United Nations 2016 https://treaties.un.org/Pages/ViewDetails.aspx?src =IND&mtdsg_no=IV-11&chapter=4&clang=_en, ratified on 16 June 1995.

19 United Nations 2016 https://treaties.un.org/Pages/ViewDetails.aspx?src =IND&mtdsg_no=IV-11&chapter=4&clang=_en, ratified on 11 December 1992.

20 United Nations 2016 https://treaties.un.org/Pages/ViewDetails.aspx?src =IND&mtdsg_no=IV-11&chapter=4&clang=_en, ratified on 16 December 1991.

21 University of Minnesota 2017 www.umn.edu ratified on 7 January 2000.

22 European Court of Human Rights (hereafter referred to as ECHR). England ratified the ECHR in 1951, European Court of Human Rights *Annual Report* 2018 1.

the standard of the best interests of the child. The prescript of the best interests of the child directs state parties to act in the best interests of the child in every matter that concerns the child.

The focus of the study considers the legislative measures that have been adopted by South Africa, India and England to give effect to the protection and promotion of the right of the child to care upon the sentencing of his primary caregiver. Given the fact that a custodial sentence may be imposed on the caregiver if called for by the gravity of the offence, the study considers how a court ought to apply the best interests of the child to balance the right of the child to care with the offence, the offender and the protection of the community. The study further considers the extent to which the sentencing court takes into account modern developments regarding the care of children that have become relevant.

1.3 Definitions and Explanations

Although the CRC,[23] ACRWC,[24] the Constitution and the *Children's Act* [25] define a child as a person below the age of eighteen years, this study focuses on a sub-category of children, namely those below the age of six years. In South Africa a caregiver may retain her child in prison until the child is 'two years of age'.[26] The Indian position varies between states, but the maximum age a child may be confined with his primary caregiver appears to be until he is 'six years old'.[27] In England the child may be confined with his caregiver until he reaches the 'age of eighteen months'.[28]

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23 Art 1.

24 Art 2.

25 38 of 2005, hereafter referred to as the Children's Act.

26 S 20 of the *Correctional Service Act* 111 of 1998 (hereafter referred to as the CSA) as amended by s 14(a) of the *Correctional Services Amendment Act* 25 of 2008 (hereafter referred to as the CSAA).

27 Casemine 2008 https://www.casemine.com/judgement/in/5609ace0e4b014971140fe88. Union territories and state unions have variance on the minimum and maximum age a child may be confined with his caregiver. In Andaman and Nicobar Island for example, a child may be confined with his primary caregiver up to when he is five years of age, in Assam and Chhattisgarh, up to when he is six years of age, in Bihar when he is between the ages of two and five years and in Himalaya Pradesh when he is four years of age.

28 S 8.7 of the *Prison Service Order 4801* updated on 13 April 2019 (hereafter referred to as the PSO).

Reference to a child is in the masculine gender. Recognition is given to the fact that a child of a caregiver may also be female. Furthermore, the noun child is used in the singular form unless indicated otherwise.

The concept of best interests of the child is used inclusive of relevance to the paramountcy of the welfare of the child. Recognition is given to the fact that the standard of the best interests of the child is not, unlike in South Africa, a constitutionally entrenched right in India and England.

The concept of 'care'[29] includes, except where indicated differently, family or parental care and alternative care.

Family care refers to care of the child by a family member or members, including care provided by relatives or non-relatives or by the child's 'extra-marital father'.[30]

Constitutional right refers to a right that is entrenched in the Constitution that the state must 'respect, protect, promote and fulfil'.[31]

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29 S 1 of the Children's Act.
Care in relation to a child, includes, where appropriate:
(i) 'within available means', providing the child with
- 'a suitable place to live';
- 'living conditions that are conducive to the child's health, well-being and development' and
- 'the necessary financial support';
(ii) 'safeguarding and promoting the well-being of the child';
(iii) 'protecting the child from maltreatment, abuse, neglect, degradation, discrimination', exploitation and any other physical, emotional or moral harm or hazards';
(iv) 'respecting, protecting, promoting and securing the fulfilment of and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of the Children's Act';
(v) 'guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development; Guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development';
(vi) 'guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age; maturity and stage of development';
(vii) 'guiding the behaviour of the child in a humane manner';
(viii) 'maintaining a sound relationship with the child';
(ix) 'accommodating any special needs that the child may have and generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child'.

30 Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa with Specific Reference to Guardianship, Care and Contact* 141, a family is defined as a 'group of parents and their children and can also consist of relatives'.

31 S 7(2) of the Constitution.

Parental responsibilities and rights (previously in the South African context known as 'parental authority')[32] means 'caring for the child, maintaining contact with the child, acting as guardian of the child and contributing to the 'maintenance of the child'.[33]

Primary caregiver or caregiver for the purpose of this study refers to a mother of the child only. It thus excludes the father who may indeed also be a 'caregiver'[34] who would ordinarily live with the child and who would ensure that the child is 'fed, attends school and is cared for'.[35] The terms primary caregiver and caregiver are used interchangeably.

Correctional centre refers to an institution responsible for detaining the caregiver and the child and includes 'any facility offered to the primary caregiver by the institution'.[36]

Mother and Baby Unit[37] or Mother and Child Unit[38] means a 'unit within a correctional centre that accommodates a caregiver and the child'.

English law refers to laws that have application in England and Wales. Recognition is given to the fact that the United Kingdom includes England, Wales, Northern Island and Scotland.[39]

Under this heading reference must also be made to statutes in the different jurisdictions. In order to avoid confusion, when legislation is similar in the states of comparison, it is referred to differently to reflect the particular jurisdiction's legislation.

1.4 Comparative Study

The study adopts a comparative approach and investigates if and the extent to which courts in the states of comparison respectively apply the best interests of the child to balance the child's right to care with the offender, the offence and the protection of

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32 Boezaart *Child Law in South Africa* 63, parental authority includes guardianship, custody and access; Schäfer *Child Law in South Africa Domestic and International Perspectives* 214.

33 S 18(2) of the Children's Act. For further reading see Louw *Acquisition of Parental Responsibilities and Rights*.

34 Robinson 1998 *Obiter* 333. The author states that 'the use of the word care in the Constitution is a radical departure from the parental authority notion of the common law'.

35 See also *S v S (*Centre for Child Law as *Amicus Curiae*) (CCT 63/10) [2011] ZACC 7, 2011 (2) SACR 88 (CC), 2011 (7) BCLR 740 (CC) (29 March 2011) para 47.

36 S 1 of the Children's Act.

37 Ss 1, 2, 3 ,4 ,5 ,6 and 7 of the PSO.

38 S 20(3) of the CSA.

39 Project Britian 2013 http://projectbritain.com/britain/uk.htm.

society. It further considers the extent to which the prescript of the best interests of the child has influenced new developments regarding the care of the child that have become relevant in the sentencing of caregivers. Customary international law has to be taken into account by a court when sentencing a primary caregiver.

Similarities and differences between the jurisdictions of South Africa, India and England will be considered. The similarities are that all three states have ratified relevant international instruments such as the CRC and have since incorporated some of its provisions in their national laws.[40]

Indian and English law have been selected as jurisdictions of comparison due to the difference in their approach to implementing the provisions of the CRC into their national law. The lesson to be learnt from Indian law will become clear in paragraph 5.4.2 below. The country has ratified the CRC but has ever since failed to implement its provisions in a coherent manner. This failure leads to legal uncertainty very much to the detriment of children.[41] The provisions of the CRC have also been incorporated into English law but contrary to the situation in India, serious strides are being taken to align their domestic provisions with the prescripts of the CRC. In paragraph 5.5 below it will be illustrated that this approach serves the best interests of children in general but specifically the child of a primary caregiver who stands to be sentenced.

1.5 Methodology

This study comprises primarily a desktop literature study. Sources reviewed include international and regional instruments pertaining to the rights of the child of a caregiver who stands to be sentenced or who is imprisoned for committing an offence(s). It further considers legislation, case law, policies, orders, charters, manuals, circulars and directives that concern the child of a primary caregiver facing a sentence of incarceration.

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40 S 28 of the Constitution, for example, mirrors some of the provisions of the CRC.

41 See *R.D Uphadyay v State of Andhra Pradesh* 1996 3 SCC 422. See also Kumar D Date Unknown http://www.legalservicesindia.com/article/2591/Protection-of-Children's-Human-Rights-in-India:-A-Critical-Analysis.html and Thukral EG Date Unknown http://www.indiatogether.org/combatlaw/vol3/issue1/crights.htm.

1.6 Research Question

The research question posed in this study is:

How should the court give effect to the best interests of the child when sentencing the child's caregiver?

1.7 Aims of Research

The aims of the research are as follows:

(i) to conduct a comparative approach of South Africa, India and England regarding the consideration of the best interests of the child in the sentencing of his primary caregiver;
(ii) to examine the right to care and the best interests of the child within an international framework and to establish its relevance in the sentencing of his caregiver;
(iii) to describe and analyse the different legal frameworks guiding the sentencing of primary caregivers in South Africa, India and England;
(iv) to conduct an exposition of the confinement of children with their caregivers in South Africa, India and the England as well as a brief overview of conditions in prisons and its effect on the development of infant children; and
(v) to identify areas for development in current legal frameworks and practices regarding the sentencing of primary caregivers and make recommendations in order to prevent the child's exposure to the environment of incarceration and to optimally realise the young child's right to alternative care.

1.8 Hypotheses

In their mandate to maintain law and order through imprisoning offenders, courts insufficiently consider the best interests of the child and his right to alternative care when sentencing the child's caregiver.

Although the parent-child relationship is a natural relationship that should be protected and advanced by the state, it is not in the best interests of the child to be confined with his primary caregiver who is sentenced to a jail term.

1.9 Limitation of the Study

The study does not extend to the following instances:

(i) a child whose father offender is a primary caregiver,

(ii) a child of a caregiver above the age of six years but below the age of eighteen years,

(iii) a child in need of care and protection.[42]

1.10 Outline of Chapters

Following the introduction in Chapter 1, Chapter 2 examines the right to care and the best interests of the child within an international framework. The focus is on the incorporation of international law into national law.

Chapter 3 explores the development of the notion of care in South Africa, India and England through the prescript of the best interests of the child. It seeks to establish the extent to which the ratification of international children rights instruments by the states of comparison has propelled their revision of municipal laws concerned with the child.

Chapter 4 centres on the development of the parent-child relationship to serve the best interests of the child.

In chapter 5 the confinement of children with their primary caregivers in South Africa, India and the England comes under discussion.

Chapter 6 deals with the sentencing of primary caregivers in South Africa, India and England.

Chapter 7 contains the Conclusion and Recommendations.

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[42] A child in need of care and protection will be discussed briefly in chapter 3. A child who stands to be deprived of care due to the sentencing of his caregiver is not included in the category of children in need of care in terms of s 150 of the Children's Act.

CHAPTER 2

The Best Interests of The Child Against the Background of Relevant International Instruments

2.1 Introduction

This chapter focuses on the international and legislative framework for the provision of protection and advancement of the right of the child to care within the prescript of the best interests of the child. This approach is required by reason that South Africa, India and England ratified the CRC, in addition South Africa and England have ratified the ACRWC and the ECHR. Furthermore, section 28(2) of the Constitution as well as the Children's Act[43] reflect the norms and values that require that the best interests of the child be considered in every matter that involves the child. The chapter further provides for the methods by which international law may become part of municipal law and demonstrates how the standard of the best interests of the child has propelled the three states of comparison to align their domestic provisions concerned with the child in the footing of such children's rights instruments.

2.2 Best interests of the child

2.2.1 Convention on the Rights of the Child

Article 3(1) of the CRC makes provision 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'.[44] The CRC does not offer a precise 'definition of the best interests of the child'[45] and the Working Group that drafted the CRC did not discuss further definition of the concept. It is a concept that has been the subject of more academic

43 38 of 2005.
44 Art 3(1) of the CRC.
45 United Nations High Commissioner for Refugees *Guidelines on Formal Determination of the Best Interests of the Child Provisional Release May 2006* 6.

analyses[46] than any other in the CRC and it is not new either in international law[47] or in national laws of states.[48] Van Bueren[49] contends that 'not only must the CRC be interpreted and applied in conjunction with other international legal norms but also all actions that concern children must meet international standards'.[50] The concept of the best interests of the child, according to Van Bueren, 'lacks clarity and indeterminacy'. Indeed its lack of clarity, which some may regard as its flexibility and as a virtue is 'essential in the case-to-case approach which the best interest standard requires'.[51]

2.2.2 African Charter of the Rights and Welfare of the Child

Article 4(1) of the ACRWC states that 'in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration'. The ACRWC like the CRC does not offer clarity on the meaning to be attached to action that is in the best interests of the child. The ACRWC refers to the best interests of the child as the primary consideration. The difference between 'a paramount consideration' and 'the primary consideration' is that the former is a consideration to be made among other considerations and the latter reflects a consideration that ranks above other considerations or that overrides other considerations. Skutjye[52] clarifies a paramount consideration in the ACRWC by pointing out that 'it is intended to give more emphasis to the best interests of the child but that is not a superior consideration that overrides other considerations'.

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46 Art (9)(1) of the CRC stipulates that states 'that the separation of the child from his parents must be necessary for the best interests of the child'; art 18(1) provides that '… both parents have the primary responsibility for the upbringing of their child and the best interests of the child will be their basic concern'; art 20 states that '…a child temporarily or permanently deprived of his family environment; or in whose own best interests cannot be allowed to remain in that environment; shall be entitled to special protection and assistance provided by the state'; art 21 mentions that 'the best interests of the child shall be the paramount consideration'.

47 The *Declaration on the Rights of the Child* (1959) in its preamble provides that 'mankind owes to the child the best that it has to give' and article 2 makes provision that '…in the enactment of laws for this purpose; the best interests of the child shall be the paramount consideration'.

48 Beshir 2013 https://dppcr.files.wordpress.com/2012/09/best-interest-of-the-child-fatma-beshir-cairo1.pdf 4; Bonthuys 2006 *International Journal of Law Policy and the Family* 24.

49 Van Bueren *The International Law on the Rights of the Child* 46.

50 English 2011 http://ukhumanrightsblog.com. The child's best interests essentially lacks content.

51 *S* v *M* para 24.

52 Skutjye *Rights of African Children Under the African Charter on the Rights and Welfare of the Child: The Addition to the Universal Protection of a Child* 24.

The contention by Skutjye is concurred with. If the best interests of the child in the ACRWC were construed as superior or as overriding other considerations it would mean that, for example, an employee cannot be dismissed if dismissing him or her could not be in the best interests of the child, or a mother offender could not be sentenced to a term of imprisonment if that would not be in the best interests of the child. The 'prescript of the best interests of the child like any other rights standard or principle has limitations'.[53]

2.2.3 Nature and application of the best interests of the child

The prescript of the best interests of the child performs two functions and has seven characteristics. The two functions are control and solution. As a control criterion the best interests of the child is applied to ensure that the exercise of the rights and obligations towards the child is enabled and fulfilled. As a solution criterion it aims to 'assist a decision-maker in finding the most appropriate decision in a case involving a child'. The decision-maker should 'systematically search for solutions with the most positive or least negative impact on the child in question'.[54]

Zermatten[55] defines the best interest as '(i) a principle of interpretation that should be used in all forms of interventions regarding the child'. This principle confers a guarantee to the child that the decision that will affect his life will be examined in accordance with the principle of his best interests; (ii) as a 'concept that imposes an obligation on the state to make a decision that is in the best interests of the child'; (iii) as 'a consideration that is parallel to other rights'. Zermatten further explains the best interests of the child as '(iv) a principle that is unspecified and that requires to be clarified in practice in line with internationally accepted procedural rules of application'; '(v) a notion that is relative in space and time'. It has to take into account the scientific knowledge about the child and the pre-eminence of theories pertaining to children in

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53 S 36 of the Constitution makes provision for limitation of rights. In terms of s 36(1) 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 a democratic society based on human dignity; equality and freedom; taking into account all relevant factors; including- (i) the nature of the right; (ii) the importance of the purpose of the limitation; (iii) the nature and extent of the limitation; (iv) the relation between the limitation and its purpose; and (v) the less restrictive means to achieve the purpose'.

54 Zermatten 2010 *International Journal of Children's Rights* 498.

55 Zermatten 2010 *International Journal of Children's Rights* 498-499.

any given time period'; '(vi) a concept that involves reaching a particular decision about a certain child'. Mid and long term consequences of the action on the child should be taken into consideration; and '(vii) as a principle that is evolutionary. The projection of knowledge continues to develop and so should the principle'.

The prescript of the best interests of the child may be applied differently to achieve an act or action that serves, promotes and protects the rights of the child. According to Friedman and Pantazis,[56] it may be used 'as an aid to interpret other rights',[57] secondly, it may be used to 'determine the scope of other fundamental rights', thirdly and lastly, it may be used as 'a fundamental rights itself'. Bonthuys[58] adds three methods for the further use of the standard of the best interests of the child. The prescript of the best interests of the child may be used as 'a constitutional value', as a 'rule of law' and as a 'general guideline'. The standard of the best interests of the child, like any other right, is capable of limitation. The contention by Moyo[59] that 'when the prescript of the best interests of the child is invoked, it does not allow for any other consideration to be made', it is argued, is unfounded. Visser[60] correctly points out that 'having the standard of the best interests of the child as a super right that overrides other rights will be alien to international children's rights instruments'.[61]

2.3 South Africa

2.3.1 Constitution

Section 28(2) of the Constitution makes provision for 'the paramountcy of the best interests of the child in every matter that concerns the child'. Section 28(2) mirrors articles 3(1) and 4(1) respectively of the CRC and the ACRWC that stipulate that 'the best interests of the child are of paramount consideration in every matter that concerns the child'.[62] The rights of the child enshrined in section 28, including the paramountcy of the best interests of the child, are 'an expansive response or articulation of South

56 Bonthuys 2006 *International Journal of Law Policy and the Family* 25.
57 Visser 2007 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 459 -462.
58 Davel 2007 *Commonwealth Education Partnership* 222.
59 Moyo 2012 *African Human Rights Journal* 143.
60 Visser 2007 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 460.
61 Zermatten 2010 *International Journal of Children's Rights* 493-493; Van Bueren *The International Law on the Rights of the Child* 48.
62 Chidi *The Constitutional Interpretation of the Best Interests of the Child and the Application Thereof by the Courts* 5.

Africa's obligation arising from ratification of children's rights instruments such as the CRC of protecting and advancing the rights of the child'.[63] The prescript of the best interests of the child is a right that is 'independent' from the rights specified in section 28(1).[64]

The Constitutional Court in *S v M* extensively dealt with the paramountcy of the best interests of the child in relation to the child's right to care. It addressed concerns that the standard of the best interests of the child is indeterminate and provides little guidance to those given the task of applying it; that it is open to different interpretations by members of various professions dealing with matters concerning children such as the legal, social work and mental health professions; that its criterion may be interpreted and applied differently by different countries or by decision-makers within the same country concerned; and that it may be influenced to a lesser or larger extent by historical, cultural, social, political and economic conditions of the country concerned. The court decided that 'the indeterminacy of the standard of the best interests of the child is the source of its strength'.[65] Numerous factors may have to be considered in order to determine a course of action that is 'in the best interests of the child'.[66] The list is endless and has never been given an exhaustive content either in South Africa or in comparative international or foreign law. It therefore has to be flexible as individual circumstances require. Each case has to be decided on its own merits and a child-centred approach has to be adopted. The indeterminacy of the best

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63 *S v M* para 16.

64 Every child has the right: '(i) to a name and a nationality from birth;(ii) to family care or parental care; or to appropriate alternative care when removed from the family environment;
(iii) to basic nutrition; shelter; basic health care services and social services; (iv) to be protected from maltreatment; neglect; abuse or degradation; (v) to be protected from exploitative labour practices;(vi) not to be required or permitted to perform work or provide services that:
are inappropriate for a person of that child's age; or place at risk the child's well-being; education; physical or mental health or spiritual; moral or social development; (vii) not to be detained except as a measure of last resort; in which case; in addition to the rights a child enjoys under ss 12 and 35; the child may be detained only for the shortest appropriate period of time; and has the right to be:(viii) kept separately from detained persons over the age of eighteen years;
(ix) treated in a manner; and kept in conditions; that take account of the child's age; and
(x) to have a legal practitioner assigned to the child by the state; and at state expense; in civil proceedings affecting the child; if substantial injustice would otherwise result; and
(xi) not to be used directly in armed conflict; and to be protected in times of armed conflict'.

65 *S v M* para 24.

66 Van Bueren *The International Law on the Rights of the* Child 47.

interests is not a weakness. A pre-determined formula for 'the sake of certainty',[67] 'irrespective of the circumstances of the particular child or the real life situation of the child or children involved, will be contrary to the best interests of the child concerned'.[68]

The standard of the best interests of the child, like any other right in the Bill of Rights, is 'capable of limitation and section 36 of the Constitution equally applies to it'.[69] What is important is that in limiting the best interests of the child, regard should be had to all considerations relevant to the case or issue in question. A proper balance has to be struck between the best interests of the child and other interests such as the punishment of the primary caregiver for committing an offence or offences. The thrust of the standard of the best interests of the child was also emphasised in cases such as *J v J*[70] (hereafter referred to as *J*), *AD v DW*[71] (hereafter referred to as *AD*) and *P v P*[72] (hereafter referred to as *P*). In *J* it was pointed out that 'in determining the best interests of the child the court is not bound by procedural structures or by the limitation of the evidence presented or contentions advanced by the parties. The court may have recourse to any source of information, of whatever nature, which may enable it to resolve issues'.[73] In *AD,* it was decided that 'the court cannot be held at ransom for the sake of legal certainty'.[74] In *PP,* it was stated that 'in considering what is in the best interests of the child the court should consider everything relevant including past happenings'.[75]

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67 *De Gree v Webb* 2007 5 SA 184 (SCA) para 99. It was stated that 'the court cannot sacrifice the best interests of the child for the sake of legal niceties'.

68 *S v M* para 24.

69 Currie and De Waal *The Bill of Rights Handbook* 144–165.

70 *J v J* 2008 6 SA 30 (CPD).

71 2008 4 BCLR 359 (CC).

72 2002 (6) SA 105 (SCA) para 110 C.

73 *J* para 37 E

74 *AD* para 10.

75 *PP* para 30.

2.3.2 Children's Act 38 of 2005

Since 1818[76] South African courts have been grappling with the prescript of the best interests of the child[77] and have applied it[78] in care and maintenance matters and also in issues decisions of which were not about the welfare of the child.[79] The best interests of the child criterion is now used in every matter that concerns the child. The standard of the best interests of the child is covered in sections 7[80] and 9 of the

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76 *Simey v Simey* 1881 1 SC 171; 176. See also *Stapelberg v Stapelberg* 1939 OPD 129. The court held that 'it had to decide the matter on the facts and had to determine as to what would be in the best interests of the child'.

77 The following cases dealing with the definition and application of the best interests of the child are worth mentioning. In *Kallie v Kallie* 1947 2 SA (SR) the court held that 'the question as to what is in the best interests of the child is usually determined by considering which of the spouses would best care for the bodily well-being of the child; but which is the best fitted to guide and control her moral, cultural and religious development'. In *Van Deijl v Van Deijl* 1966 4 SA 260 (R) para 261 H it was stated that 'the interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic; social; moral and religious considerations. Emotional needs and the ties of affection must also be regarded and in the case of older children their wishes cannot be ignored'.

78 *McCall v McCall* 1994 3 SA 201 (CPD) para 205. The criteria for determining the best interests of the child was pronounced as follows: '(i) the love; affection and other emotional ties which exists between the parent and the child and the parent's compatibility with the child; (ii) the capabilities; character and temperament of the parent and the impact thereof on the child's needs and desires; (iii) the ability of the parent to communicate with the child and the parent's insight into; understanding and sensitivity of the child's feelings; (iv) the capacity and disposition of the parent to give the child the guidance which he requires; (v) the ability of the parent to provide for the basic physical needs of the child; the so called 'creature comforts'; such as food; clothing; housing and the other material needs generally speaking the provision of economic security; (vi) the ability of the parent to provide for the educational well-being and security of the child both religiously and secular; (vii) the ability of the parent to provide for the child's emotional; psychological; cultural and environmental development; (viii) the mental and physical health and moral fitness of the parent; (i) the stability or otherwise of the child's existing environment; having regard to the desirability of maintaining the *status quo;* (ix) the desirability or otherwise of keeping siblings together; (x) the child's preference; if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration, (xi) the desirability of applying the doctrine of same sex matching; (xii any other factor which is relevant to the particular case to which the Court is concerned'.

79 Davel *Introduction to Child Law in South Africa* 195; *Fitzpatrick v Minister of Social Welfare and Population Development* 2000 7 BCLR 713 (CC).

80 Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant: '(i) the nature of the personal relationship between the child and the parents; or any specific parent; and the child and any care-giver or person relevant in those circumstances; (ii) the attitude of the parents; or any specific parent; towards the child; and the exercise of parental responsibilities and rights in respect of the child; (iii) the capacity of the parents; or any specific parent; or care-giver or person; to provide for the needs of the child; including emotional and intellectual needs; (iv) the likely effect on the child of any separation from both or either of the parents; or any brother or sister or other child; or any care-giver or person; with whom the child has been living; (v) the practical difficulty and expense of a child having contact with the parents; or any specific parent; and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents; or any specific parent; on a regular basis; (vi) the need for the child to remain in the care of his parent; family and extended family; and

Children's Act. Section 7 provides a list of relevant factors to be considered in order to ascertain action or a course of action that will serve the best interests of the child. Section 9 elaborates[81] on section 28(2) of the Constitution (paramountcy of the best interests of the child in every matter concerning the child) by stating that 'in all matters concerning the care, protection and well-being of the child', it is submitted that the standard that a child's best interests are of paramount importance must be applied.

2.4 India

Many state unions and union territories have statutes that enumerate factors to be considered for determining what is in the best interests of the child. The Law Commission of India[82] has determined the factors as follows:

(i) the physical and mental condition of the child;
(ii) the physical and mental condition of each parent;
(iii) the child's relationship with each parent;
(iv) the needs of the child regarding other important people such as siblings; extended family members and peers;
(v) the role each parent has and will play in the care of the child;
(vi) the ability of each parent to maintain the relationship of the child with his other parent;
(vii) the ability of each of the parents to resolve disputes regarding the child;
(viii) the preference of the child;

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to maintain a connection with his family; extended family; culture or tradition; (vii) the child's age; maturity and stage of development; gender; background; and any other relevant characteristics of the child; (viii) the child's physical and emotional security and his intellectual; emotional; social and cultural development; (ix) any disability that a child may have; (x) any chronic illness from which a child may suffer; (xi) the need for a child to be brought up within a stable family environment and; where this is not possible; in an environment resembling as closely possible a caring environment; (xii) the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to maltreatment; abuse; neglect; exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or exposing the child to maltreatment; abuse; degradation; ill-treatment; violence or harmful behaviour towards another person; (xiii) any family violence involving the child or family member of the child; and (xiv) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child'. See also Hoffman and Pincus *Law of Custody* 17-18.

81 S 8 of the Children's Act provides for the 'application of the rights of the child as contained in the Act'. S 8(1) stipulates that 'the rights which the child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights'. S 8(2) makes provision that 'all organs of the state in any sphere of government and all officials, employees and representatives of any organ of state must respect, protect and promote the rights of children contained in this Act'. S (3) A stipulates that 'this Act binds both natural or juristic persons, to the extent that it is applicable, taking into account the nature of any duty imposed by the right'.

82 Law Commission of India *Reforms in Guardianship and Custody Laws in India Report No. 257* (May 2015) 41-42.

(ix) any history of abuse; and
(x) the health, safety and welfare of the child.

The paramountcy of the welfare of the child in India may be gleaned from, among others, section 13 of the *Hindu Minority and Guardianship Act*[83] (hereafter referred to as the HMGA) which stipulates that 'in deciding the guardianship of a Hindu minor, the welfare of the minor shall be the paramount consideration and that no person can be appointed as guardian of a *Hindu* minor if the court is of the opinion that it will not be for the welfare of the minor'. Section 19(b) of the Guardians and Wards Act[84] (hereafter referred to as the GWA) does not specifically make provision that 'the welfare of the child is paramount. The court is prevented from appointing a guardian in respect of a child whose father or mother is alive or a person who lacks interests in the welfare of the child'. Section 19(b) presupposes the welfare of the child is best taken care of by the parent or parents of the child. If the parent or parents are unable to be guardians of the child, the person to be appointed guardian should be in a position to promote the welfare of the child.

2.5 England

2.5.1 Children's Act (1989)

Section 1(1) of the Children Act (1989)[85] makes provision that 'when any court determines any question with respect to the upbringing of a child, the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration'. Section 1(1) has to be read with section 1(5) which states that:

> [w]here a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

It is submitted that the provisions of section 1(5) refer to the best interests of the child. The court has the duty to act in the 'best interests of the child in every matter that involves the child'. The welfare of the child is not to be measured by money or by

83 Of 1956, hereafter referred to as the HMGA.
84 Of 1890.
85 Hereafter referred to as the CA-Engl.

physical comfort only. The word welfare must be considered in its 'widest sense'[86] to include *inter alia* the normal[87] and religious[88] welfare of the child as well as 'ties of affection'.[89]

The paramountcy of the welfare of the child in England may best be described with reference to the New Zealand case of *Walker v Walker and Harrison*[90] quoted by the Law Commission of England and that is commonly accepted in English law. *In casu* it was held that the paramountcy of the welfare of the child is:

> [a]n all-encompassing word. It includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. More important are stability and security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents.

Parents are not bound to consider to the welfare of the child in deciding whether to 'make a career move', to 'relocate', to 'separate or to divorce'.[91] Bainham *et al*[92] quote a commentator who expressed a view on the paramountcy of the welfare of the child as follows:

> [I]t can hardly be argued that parents, in taking family decisions affecting a child, are bound to ignore completely their own interests, the interests of other members of the family and possibly, outsiders. This would wholly be undesirable, as well as an unrealistic objective.

The paramountcy of the welfare of the child does not apply in respect of Part III of the CA-Engl. The framework of Part III is structured in such a manner that the local authority's duty to safeguard and to promote the child's welfare is different from that

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86 Deed Poll Office Date Unknown https://deedpolloffice.com/change-name/children/welfare.

87 This includes racial, cultural and linguistic background of the child. See *Re M* (*Child Upbringing*) 1996 2 FLR 441. In this case an order for the return of a Zulu boy to his mother in South Africa was made. *Re M* (*Section 94 Appeals*) 1995 1 FLR 456 CA the court was concerned with the failure to address the question of race when denying contact of a mixed race girl (who was confused about her racial origin) to her black father. See also *Re P* (*A Minor*) (*Transracial Placement)* 1990 FLR 96 CA.

88 *Shelley* v *Westbrooke* 1817 Jac 266m. Shelley was denied a residence order on the basis the she was atheist. See also Re R (*A Minor*) (*Residence: Religion*) 1993 2 FLR 163 CA.

89 *Re McGrath* (*Infants*) 1893 1 Ch paras 143,148.

90 1981 NZ Recent Law 257 cited by the Law Commission Working Paper No. 96 Custody par 6.10.

91 Dickens 1981 *Law Quarterly Review* 462, 471.

92 Bainaham *et al Children: The Modern Law* 46.

imposed upon the courts.[93] A checklist for consideration of the paramountcy of the welfare of the child was recommended by the Law Commission and has since been incorporated in the CA-Engl. Section 1(3) of the CA-Engl. lists the relevant factors for consideration of the welfare of the child as follows:

> (i) the ascertainable wishes and feelings of the child concerned (considered) in a the light of his age and understanding;[94] and
>
> (ii) his physical, emotional and educational[95] and other needs.[96]

In *B v B* (*Custody of Children*),[97] for example, the court was criticised for not considering that the father of the child could care for the child despite his lack of employment. In this case the father successfully cared for his child by relying on the welfare benefits he was provided with by the state. The child should not be 'disadvantaged by issues of little weight and the concern of the court should be the security and happiness of the child and not his material prospects'.[98] If a need exists for the emotional needs of the child to require support from other siblings an order to that 'effect may be made'.[99]

Hemmatipour, Reza and Fani[100] argue that:

> (E)even though there is a drive towards recognising that the role of fathers as caregivers should be recognised it is still accepted that mothers are generally in a better position to care for children than fathers

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93 S 9 (1) and (2) of the CA-Engl. respectively restricts orders that may be made. S 9(1) makes provision that 'No court shall make any section 8 order, other than a residence order, with respect to a child who is in the care of a local authority'. In terms of s 9 (2) 'No application may be made by a local authority for a residence order or contact order and no court shall make such an order in favour of a local authority'. See also *Re M* (*A Minor*) (*Secure Accommodation Order*) 1995 3 All ER 407 CA 412.

94 This is in aligned with art 12(1) of the CRC which makes provision for state parties to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'. See also *Re P* (*Education*) 1992 1 FLR 316 CA para 321, *Re P* (*Minors*) (*Wardship Care and Control*) 1992 2 FCR paras 681, 687; M *v* M (*Minor: Custody Appeal)* 1987 1 WLR 404 CA para 411; *Re M* (*Family Proceedings Affidavits*) 1995 4 All ER 627 CA.

95 *May v May* 1986 1 FLR 325 CA.

96 This may include medical needs. See *Re W (A Minor)* (HIV Test) 1995 FLR 184.

97 1985 FLR 166 CA.

98 *Stephenson v Stephenson* 1985 FLR 1140 CA at 148; *Re F* (*An Infant*) 1969 2 Ch 238, 1969 2 All ER 766. It was held that 'in less extreme cases a parent who can offer a chid good accommodation must, other things being equal, have the edge over the one who cannot'.

99 *C v C (Minors*: *Custody)* 1988 2 FLR 291 CA at 302.

100 Hemmatipour, Reza and Fani 2014 *Research Journal of Recent Sciences* 15.

> especially when the child is very young. Courts are inclined to award the care of the child to the mother unless it is shown that she is unable to care for the child. Even though the father of the child may be in an advantageous social background, a very young child's emotional needs are generally better taken care of by the mother.

In *Re W (A Minor) (Residence Order)*[101] (hereafter referred to as *Re W*), for instance, the court as per Donaldson J with regard to maternal preference on the care of the child mentioned that:

> … [t]here is a rebuttable presumption of the fact that the best interests of a baby are served by being with the mother. The starting point is that before he becomes the child he is a baby.[102]

Maternal preference for the care of young children was also considered in *Brixey v Lynas*[103] (hereafter referred to as *Lynas*). In this case the House of Lords had to consider the weight to be attached to the care of a child of fifteen months by her mother as opposed to her father who had care of the child. In overruling the award of care to the father the House of Lords pointed out that:

> [t]he advantage of a very young child being with his or her mother is a consideration which must be taken into account in deciding where lie the best interests in care proceedings in which the mother is involved. ... Where a very young child has been living with her mother since birth and there is no criticism of her ability to care for her only the strongest competing advantages are likely to prevail.[104]

> (iii) the likely effect on him of any change in his circumstances. The court should generally guard against changing the circumstances of the child;[105]
>
> (iv) his age, sex, background and any characteristics of his which the court considers relevant;
>
> (v) any harm which he has suffered or is at risk of suffering; and
>
> (vi) how capable each of his parents and any other person in relation to whom the court considers the question to be relevant, is of meeting his

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101 1992 2FLR 332 CA 336.

102 *Re W* para 17.

103 1996 SLT 908, 1996 2 FLR 499.

104 *Lynas* para 6.

105 Section 1(3) of the CA-Engl. See also *S v W* 1980 11 *Fam Law* 81 CA; *Re G* (*Minors*) (*Ex Parte Interim Residence Order)* 1993 1 FLR 910 CA; *D* v *M* (*A Minor*: *Custody Appeal*) 1983 Fam 33 and *Allington v Allington* 1985 FLR 586 CA.

needs and the range of powers available to the court under this Act in the proceedings in question.[106]

The paramountcy principle is limited. It does not apply in the following instances:

(i) outside the context of litigation;[107]

(ii) to issues only indirectly concerning the child's upbringing;[108] and

(iii) when it is excluded by other statutory provisions.[109]

2.6 Conclusion

By virtue of being state parties to international child instruments such as the CRC the jurisdictions of comparison have undertaken the duty of placing their national laws pertaining to the child in the footing of such instruments in good faith. Obligations emanating from ratification of international children's rights instruments are binding and must be implemented in good faith since they are the yardstick with which to measure domestic legislation and policies involving the child. South Africa's ratification of the CRC has resulted in the entrenchment of the prescript of the best interests of the child as a constitutional right and in the adoption the Children's Act. Sections 7 and 9 respectively of the Children's Act enshrine an elaborate scope and content of the best interests of the child standard.

India and England, as state parties to the CRC, have also taken strides in incorporating the best interests of the child standard in their domestic laws. In India factors to be considered in determining action or a course that serves the best interests of the child are enumerated in various statutes. Sections 13 and 19(b) of the HMGA and the GWA have been revised to give effect to the 'prescript of the best interests of the child'. The

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106 *C* v *C* (*Custody of Child*) 1991 1 FLR 223 CA.

107 It does not apply to parents or to other person's day-to-day running of the affairs of the child or to long term decisions affecting the child.

108 In *Richards v Richards* 1984 AC 174, 1983 2 All ER 807 HL an application was made by a divorcing mother for the exclusion of the husband from the family home. The application was rejected on the basis it was not governed by the paramountcy of the welfare of the child. In *S v S, W v Official Solicitor* 1972 AC 24, 1976 3 All ER 107 an order for a blood test to determine paternity in respect of the child was permitted. The court found it to be central to the determination of parental rights.

109 S 6 of the *Adoption Act* of 1976 (England) obliges the court to 'consider the welfare of the child as its first consideration and not as a paramount consideration'. See also s 105(1) of the CA-Engl**.** that excludes 'maintenance from the definition of child's upbringing. In this case the paramountcy principle has no application'.

CA-Engl's provision for the best interests of the child standard has since been amended. In terms of sections 1(1) and 1(3) the court and a local authority must have regard to 'all factors relevant to the welfare of the child when dealing with a matter such as care that involves a child'.

CHAPTER 3

The Influence of The Child's Best Interests on His Care

3.1 Introduction

This chapter reviews the international framework on the right of the child to parental, family or alternative care. The discussion of care in this chapter focuses on the concept against its development in international law while that in Chapter 4 deals with the interpretation of the contents of the notion. It forms the basis for the discussion of the development of the notion of care which a court may take into account in sentencing the child's caregiver. International children's rights instruments such as the CRC prescribe that the child who cannot be cared for by his primary caregiver must be put in alternative care that promotes his upbringing, culture, religion, language and heritage. Commission of an offence or offences by the child's caregiver does not sever the child's right to care. The standard of the best interests of the child is discussed because it will be shown in Chapter 5 below that it is of relevance in the sentencing process.

Care is discussed to demonstrate that there is currently a growing need for an extended notion of alternative care due to the changing *mores* of the society and this trend reflects a shift away from traditional institutional care to provision of alternative care by the child's family members or his extra-marital father or by a person who has an interest in the upbringing, care and development of the child. The prescript of the best interests of the child requires that not only the parents of the child but also other people having an interest in his care, well-being and development may care for him. The standard of the best interests requires a widening of the scope of people responsible for the care of the child.

The right of the child to care, including alternative care, is neither 'defined by the CRC or the ACRWC, nor by the Guidelines for the Alternative Care of Children'.[110] The CRC Committee has developed alternative care guidelines to encourage 'placement of children at risk of being deprived of care or who are deprived of care, in alternative

[110] Roby *Children in Informal Alternative Care Child Protection Section Discussion Paper* 9.

care'.[111] Although the guidelines are not binding, they are intended to 'enhance the implementation of the CRC and relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so deprived'.[112] The Guidelines for the Alternative Care strive to:[113]

> (i) support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, including adoption and *kafala* of Islamic law;
>
> (ii) ensure that, while such permanent solutions are being sought, or in cases where they are not possible or are not in the best interests of the child, the most suitable forms of alternative care are identified and provided, under conditions that promote the child's full and harmonious development;
>
> (iii) assist and encourage Governments to better implement their responsibilities and obligations in these respects, bearing in mind the economic, social and cultural conditions prevailing in each state; and
>
> (iv) guide policies, decisions and activities of all concerned with social protection and child welfare in both the public and the private sectors, including civil society.

Although the Guidelines for the Alternative Care are not binding on state parties to the CRC, their implementation is monitored by the CRC Committee and state parties are encouraged to adhere to the Guidelines.[114] The CRC Committee has for instance in the past ordered jurisdictions such as Norway and El Salvador to incorporate the Guidelines in their 'domestic provisions concerned with children'.[115] The Guidelines recognise the family as the fundamental group of society and the natural environment for the growth, well-being and protection of children. Efforts must therefore primarily be directed to enabling the child to remain in, or return to, the care of his parents or when appropriate other close family members. The state must ensure that 'families have access to forms of support in the caregiving role'.[116]

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111 Save the Children 2012 https://bettercarenetwork.org.

112 Guidelines to Alternative Care of Children A/Res/64/142 I, hereafter referred to as the Guidelines for the Alternative Care.

113 Sec 2.

114 Davidson 2015 *International Journal of Child, Youth and Family Studies* 382; University of Strathclyde Date Unknown https://www.futurelearn.com/courses/alternative care/0/steps/29770.

115 Save the Children 2012 htps://bettercarenetwork.org.

116 Principle II A 3 of the Guidelines for the Alternative Care.

Care is defined as the 'competence or ability to look after the child's physical, emotional, social, health, educational and related needs'.[117] It includes 'supervising and nurturing of a child'.[118] In *M v Minister of Police*[119] (hereafter referred to as *M*), for example the concept of care was elaborated.[120] In that case it was *inter alia* held that 'parental care goes beyond providing financial support to a child. Caring for a child among others includes teaching a child how to eat; to tie shoes; to use ablution facilities; to walk; to talk; to express appreciation; and to perform homework and house chores'.[121] From the time of the birth of the child there are numerous 'duties which parents have to perform and where money is not a factor'. Caring for a child is 'a process of protecting the child and providing for his needs'.[122] Care offered by parents or by family members to the child emanates from 'love and affection'.[123] Alternative care may either be as a result of 'operation of law or through a court order'.[124] The right of the child to care may be viewed within various contexts. It may *inter alia* be considered from a generic or social angle. As a generic right it refers to 'making available physical amenities such as shelter, food and clothing to the child'.[125] As a social right it entails ensuring that the child has 'interaction with other family

117 Anon Date Unknown https://www.definitions.net.

118 The free dictionary Date Unknown https://legal-dictionary.thefreedictionary.com.

119 2013 5 SA 622 (GNP).

120 The judgment in *M* was successfully appealed against in *Mboweni* discussed below. The Supreme Court of Appeal provided a clear interpretation on the person or persons endowed with the care of the child.

121 *M* para 22.

122 Cambridge Dictionary Date Unknown https://dictionary.cambridge.org/. See also Merriam Webster Date Unknown https://www.merriam-webster.com.

123 *M* para 23.

124 In terms of art 20(2) of the CRC state parties shall 'in accordance with their national laws ensure alternative care for such a child'. Art 25(2)(a) of the ACRWC makes provision that 'state parties shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his family environment, or who in his best interests cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others foster placement, or placement in suitable institutions for the care of children'.

125 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), *Minister of Health* v *Treatment Action Campaign* 2002 5 SA 721 (CC). In these cases, the courts gave effect to ss 28 (1)(b) and (c) of the Constitution by holding the government responsible for acting in the best interests of the children concerned. It ordered the government to provide shelter, housing and other basics to the children whose parents were unable to provide for.

members' such as siblings,[126] grandparents,[127] uncles, nieces, aunts or with his extra-marital father.[128]

3.2 International instruments

3.2.1 Convention on the Rights of the Child

3.2.1.1 Parental / Family Care

The CRC among others, gives recognition to the role played by the family in rearing a child. The family component is responsible for securing proper nurturing of the child and must be supported in raising the child. The right of the child to care is not specifically mentioned in the CRC and it is derived from various provisions of the CRC. Article 7(1) states that 'the child has the right to know and to be cared for by his parents'. Article 8(1) complements article 7 by obligating the state to 'respect the right of the child to *inter alia* preserve his family relations as recognised by law without unlawful interference'.[129] The child has the right 'not to be separated from his parents against his will except when competent authorities subject to judicial review determine in accordance with applicable law and procedures that such separation is necessary[130] for his best interests'.[131] Even in instances where the child is separated from his parents the child retains the right 'to maintain personal relations and direct contact with both parents on regular basis except if it is contrary to his best interests'.[132]

State parties undertake to recognise the right of the child to a 'standard of living adequate for his physical, mental, spiritual, moral and social development'[133] and parents or other persons responsible for the child have the primary responsibility to 'secure within their abilities and financial capacities conditions of living necessary for

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126 Bartlett Date Unknown http://theattachedfamily.com; Pinel-Jacquemin and Gaudron 2013 *Journal of Communication Research* 1-46.

127 Low 2013 *Stellenbosch Law Review* 618-637.

128 For further reading see Benware *Predictors of Father-Child and Mother-Child Attachment in Two-Parent Families;* Mott *Absent Fathers and Child Development Emotional and Cognitive Effects at Ages Five to Nine*.

129 Imprisonment of the child's caregiver on the basis of committing an offence or offences is lawful action by the state that may require the preservation of the family.

130 Abuse or neglect of the child and the incarceration of the caregiver of the child are examples of actions that may result in the child being separated from his parents against his will.

131 Art 9(1) of the CRC.

132 Art 9(3) of the CRC.

133 Art 27(1) of the CRC.

his development'.[134] The term 'family environment' is not expressly used in the CRC but it is suggested that conditions of living necessary for the child's development as set out in the preamble imply a nurturing family environment. The state has a duty to 'respect the rights and duties of parents and where applicable legal guardians to provide direction to the child in the exercise of his right to freedom of thought, conscience and religion in a manner consistent with his evolving capacities'.[135] Article 16 provides that 'no child shall be subjected to arbitrary or unlawful interference with his privacy or family home or to unlawful attacks on his honour or reputation'.[136] The child shall have the right to 'protection of the law against such interference or attacks'.[137]

Duties of parents or legal guardians or members of the extended family towards the child are dealt with in articles 5 and 18. Article 5 provides that 'state parties must respect the responsibilities, rights and duties of parents or where applicable the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child to provide in a manner consistent with the evolving capacities of the child appropriate direction and guidance in the exercise by the child of the rights recognised in the CRC'. Article 18 stipulates that 'state parties must use their best efforts to ensure the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child are their basic concern'.[138] State parties must 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and must ensure the development of institutions, facilities and services for the care of the child'.[139]

134 Art 27(2) of the CRC.
135 Art 14(2) of the CRC.
136 Art 16(1) of the CRC.
137 Art 16(2) of the CRC.
138 UNICEF *Parenting in the Best Interests of the Child and Support to Parents of the Youngest Children* (2010) 16.
139 Art 18(2) of the CRC and 25(2)(a) of the ACRWC.

3.2.1.2 Alternative Care

Provision for alternative care in the CRC is influenced by three of its four themes namely 'survival', 'development'[140] and 'protection'.[141] The family is recognised as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children. The family must be afforded necessary protection and assistance so that it can fully assume its responsibilities within the community. For the full and harmonious development of his personality 'the child must where possible, grow up in a family environment and in an atmosphere of happiness, love and understanding'.

Article 20 gives recognition to the right of the child to alternative care. It provides that:

> (i) A child temporarily or permanently deprived of his family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state.
> (ii) States parties shall in accordance with their national laws ensure alternative care for such a child.
> (iii) Such care could include *inter alia,* foster placement, *kafalah* of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Provision of alternative care to the child removed from the family environment must give recognition to the child's right to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. State parties must 'respect and promote the right of the child to participate fully in cultural and artistic life and must furthermore encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity'.[142] Article 18(2) requires state parties to 'ensure the development of institutions, facilities and services for the care of children'. In placing children in alternative care, consideration must be given to 'the desirability of continuity in a

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140 Skutjye *Rights of African Children Under the African Charter on the Rights and Welfare of the Child*: *The Addition to the Universal Protection of a Child* 12-15.

141 The fourth theme is participation.

142 Art 31 of the CRC.

child's upbringing and to the child's ethnic, religious, cultural and linguistic background'.

3.2.2 African Charter of the Welfare of the Child

3.2.2.1 Parental / Family Care

Similarly to the CRC, the ACRWC acknowledges the unique and privileged position of a child. For the full and harmonious development of his personality the child should grow up in 'a family environment in an atmosphere of happiness, love and understanding'.[143] The family is recognised as 'the natural unit and basis for society and should enjoy protection and support of the state for its establishment and development'.[144]

Parents, and where applicable legal guardians, have a duty to 'provide guidance and direction in the exercise of rights of the child and best interests of the child'.[145] The child's rights *inter alia* include the right to 'education',[146] 'leisure', 'recreational' and 'cultural rights'.[147] State parties must 'respect the duty of parents and where applicable legal guardians, to 'provide guidance and direction in the enjoyment of these rights subject to their national laws and policies'.[148] Parents or legal guardians have the right to 'exercise reasonable supervision over the conduct of the child'.[149] No child shall be subject to 'arbitrary or unlawful interference with his privacy, family, home or correspondence or to attacks upon his honour or reputation'. The child has the right to 'protection of the law against such interferences or attacks'.[150] Parents or other persons responsible for the child have the primary responsibility for the upbringing and development of the child. Amongst others they have the duty to secure within their abilities and financial capacities, 'conditions of living necessary for the child's development'.[151]

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143 Para 4 of the preamble of the ACRWC.
144 Art 18(1) of the ACRWC.
145 Art 9(2) of the ACRWC.
146 Art 11 of the ACRWC.
147 Art 12 of the ACRWC.
148 Art 9(3) of the ACRWC.
149 Art 10 of the ACRWC.
150 Art 10 of the ACRWC.
151 Art 20(1) (b) of the ACRWC.

Steps must be taken by the state to 'ensure the equality of rights and responsibilities of parents with regard to the child during marriage and at its dissolution'.[152] In case of the dissolution of the marriage provision must be made for 'the protection of the child'.[153] Every child is entitled to 'the enjoyment of parental care and protection and has wherever possible the right to reside with his parents. No child may be separated from his parents unless it is in his best interests'.[154] Separation of the child from the caregiver is discussed more comprehensively in Chapter 6. However, suffice to point out that the imprisonment of the caregiver of the child is itself a matter that may require the 'separation of the child from his primary caregiver'.[155] State parties to the ACRWC must pursue the 'full implementation of the right to healthcare services and must in particular take measures to provide primary health care,[156] nutrition, drinking water[157] and other health services to the child'.[158]

3.2.2.2 Alternative Care

The preamble of the ACRWC gives specific recognition to the unique and privileged position occupied by the child in the African society. In African tradition the care of the child is a 'communal rather than an individual responsibility'.[159] The right of the child to alternative care is articulated in article 25(2) and (3).

In terms of article 25(2) the state:

> (i) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his family environment, or who in his best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include *inter alia*, foster placement, or placement in suitable institutions for the care of children; and
>
> (ii) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.

152 Art 18(2) of the ACRWC.
153 Art 18(2) of the ACRWC.
154 Art 19(1) of the ACRWC. Acts such as abuse and neglect of the child and the imprisonment of the caregiver of the child may necessitate the separation of the child from a parent.
155 Art 9(4) of the CRC.
156 Art 14(2)(b) of the ACRWC.
157 Art 14(2)(c) of the ACRWC.
158 Art 14(d) of the ACRWC.
159 Anon 1998 http://www.afriprov.org.

When considering alternative care of the child and the best interests of the child, due regard must be had to the 'desirability of continuity in a child's up-bringing and to the child's ethnic, religious and linguistic background'.[160] Article 12(1) requires state parties 'to recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts'. Article 12(2) makes provision that 'state parties must respect and promote the right of the child to fully participate in cultural and artistic life'. State parties must also encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity. Recognition of the child's right to linguistic, cultural and religious rights indicates that there is a need for a more elaborate form of care. The child's right to language, culture, religion and heritage must be advanced and protected even when the caregiver is unable to care for the child such as when she is incarcerated. A child who cannot be cared for by his primary caregiver must be placed in alternative care that ensures his right to religion, language, culture and heritage remains intact.

3.2.3 Alternative Care Settings

Alternative care of the child may be formal or informal and may be effected in various settings. The alternative care settings are flexible and may be adapted in line with the circumstances of state parties. Formal care is care provided in 'a family environment that is ordered or authorised by a competent administrative body or judicial authority'.[161] This comprises care provided in 'residences', including 'private facilities', regardless of 'administrative or judicial measures'.[162] Informal care (kinship care) is a 'private arrangement in a family environment whereby the child is cared for on an ongoing or indefinite basis by relatives or friends'.[163] The initiative is that of the child, the child's parents or another relevant person. The arrangement is ordered by an 'administrative or judicial authority or a duly accredited body'.[164] The settings within

160 Art 25(3) of the ACRWC.

161 Roby *Children in Informal Alternative Care* Discussion Paper Child Protection Section 21, 10.

162 Roby *Children in Informal Alternative Care* Discussion Paper Child Protection Section 21, 10. S 45(1)(h) of the Children's Act empowers the court to make an order for the alternative care of the child.

163 Save the Children *Guidelines for the Alternative Care of Children Policy Brief* 3.

164 UNICEF *Guidelines for the Alternative Family Care of Children in Kenya* 45.

which alternative care may take place includes 'kinship care', '*kafalah',* 'foster care', 'institutional or residential care' or 'adoption'.[165] The various forms of alternative care are discussed briefly hereunder. *Kafalah* and adoption are not discussed in detail, however. They are permanent placement that the child of a primary caregiver may not require. With the exception of India which still imposes capital punishment, the case law surveyed in South Africa and England show that on average caregivers of children serve shorter terms of imprisonment. It is submitted that the incarceration of the child's caregiver must create the possibility that the child would be reunited with his primary caregiver upon release. Alternative care must not only resemble a family setting, it must also 'preserve the child's culture and heritage and create the platform for the future reunification of the child with his primary caregiver'.[166]

3.2.3.1 Kinship Care

Kinship care is 'family-based care within the child's extended family or with persons who are known to the child, whether formal or informal in nature'.[167] Informal kinship care refers to 'arrangements made by parents and other family members without any involvement from either a child welfare agency or the court'.[168] The child may be left

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165 Art 20 (3) of the CRC. S 229(a) of the Children's Act states that 'the purpose of adoption is to protect and nurture the child by providing a safe; healthy environment with positive support; and promote the goals of permanency planning by connecting the child to other safe and nurturing family relationships intended to last a lifetime'. See also Boezaart *Child Law in South Africa* 133. It is a legal process that creates a 'legal relationship between the adoptive parents and the adopted child in the interests of the child. Adoption terminates parental responsibilities and rights of the parents of the adopted child and confer them to the adopting parents'.

166 Child Welfare Information Gateway Date Unknown *https://www.childwelfare.gov/pubPDFs/reunification.pdf:* Australian Institute of Family Studies 2007. See also California Evidence-Based Clearinghouse for Child Welfare Reunification Programs Date Unknown https://aifs.gov.au/cfca/publications/issues-relating-reunification.
https://www.cebc4cw.org/topic/reunification/

167 Kothari and Saikumar *Foster Care in India: Policy Brief* 8. The Delhi Rules list out the criteria by which foster families must be selected. The criteria encompass the health; income; standard of living; physical; mental and emotional stability and willingness of the foster family to work towards providing an environment conducive to the overall well-being of the child; Child Welfare Information Gateway *Placement of Children with Relatives* 7, in the state of Alaska, for example, the placement of the child in foster care takes into account the following factors: the restrictiveness of the setting. It must be most closely approximate to a family environment and must meet the child's special needs if any; it must be within reasonable proximity to the child's home; taking into account any special needs of the child and the preferences of the child or parent. The order of preference in awarding foster care is as follows:
(i) an adult family member; (ii) a family friend who meets the foster care licensing requirements established by the department; and (iii) a licensed foster home.

168 UNICEF *Alternative Care for Children in South Africa* v.

in the care of a 'grandparent', 'aunt', 'nephew', 'uncle' or other 'relative'.[169] In formal kinship care the child is placed in the legal custody of the state through a court order where after the particular child welfare agency then puts the child with kin. In this situation the child welfare agency acting on behalf of the state has legal custody of the child and relatives have physical custody. The child welfare agency in collaboration with the family makes legal decisions about the child, including deciding where he must live. The child welfare agency is also responsible for ensuring that 'the child receives medical care and attends school regularly'.[170]

Benefits of kinship care may include the following:

(i) It is a setting that 'preserves continuity of the family'.[171]
(ii) It is a setting that is 'preferred by children rights instruments such as the CRC and the ACRWC'.[172]
(iii) It decreases the 'trauma and stress of relocation as well as grief from separation from parents'.[173]
(iv) It reduces the 'likelihood of multiple placements'.[174]
(v) It expands 'self-sufficiency ongoing support'.[175]
(vi) It secures 'mutual care and support of the child by family members and relatives'.[176]
(vii) It is the most 'culturally appropriate and understood form of alternative care as it is based on community mechanisms and processes'.[177]
(viii) It provides 'great benefits to the child and typically children prefer this type of arrangement'.[178]

169 Child Welfare Information Gateway *Kinship Caregivers and the Child Welfare System* 5.
170 Child Welfare Information Gateway *Kinship Caregivers and the Child Welfare System* 6.
171 Nandy *et al Spotlight on Kinship Care: Using Census Microdata to Examine the Extent and Nature of Kinship Care in the UK at the Turn of the Twentieth Century* 1.
172 Art 20(3) of the CRC.
173 Roby *Children in Informal Alternative Care* Discussion Paper Child Protection Section 21, 16.
174 UNICEF *Guidelines for the Alternative Family Care of Children in Kenya* 97.
175 UNICEF *Guidelines for Early Child Development Department of Social Development Republic of South Africa (May 2006)* 13.
176 Meinjes *et al* 2003 *Centre for Actuarial Research* 10.
177 Roby *Children in Informal Alternative Care* Discussion Paper Child Protection Section 21, 31.
178 Chaitkin *et al Towards the Right Care for Children* 9.

(ix) It allows the child to 'maintain cultural, religious and linguistic links with his family and community and enables continuity, stability and a sense of identity and self-esteem'.[179]

(x) It is more 'cost-effective than institutional care'. During instances of family separation, kinship care can be an important temporary arrangement until the child's family has 'been traced and he can be reunified with them'.[180]

Potential risks of kinship care may include:

(i) It is not 'regulated and not supported by government or external agencies'.[181]

(ii) Due to poverty levels, caring for an extra child may 'become increasingly difficult for many families'.[182]

(iii) Lack of monitoring and families' inability to access support services are leading to 'children experiencing abuse, violence, neglect and exploitation'.[183]

(iv) Children are moved around from household to another and the family taking in the child may be the only one willing to do so, rather than the 'most suitable in the best interests of the child'.[184]

3.2.3.2 Foster Care

According to Breen[185] foster care occurs when 'a competent authority places the child with a family other than his own family'.[186] The family that offers foster care must ideally be 'selected, qualified, approved and supervised for providing such care'.[187] Benefits of foster care may include that the child is 'removed from a dangerous and harmful environment'[188] and that it allows the child to 'recover and thrive in a supportive, safe living situation'.[189] Risks potentially associated with foster care

179 UNICEF *Guidelines for the Alternative Family Care of Children in Kenya* 82.
180 Roby *Children in Informal Alternative Care* Discussion Paper Child Protection Section 12.
181 Ansah-Koi 2006 *Families in Society* 557.
182 Ainsworth and Semali *The Impact of Adult Deaths on Children's Health in Northwestern Tanzania* 3.
183 Varnis 2001 *Northeast African Studies* 144.
184 UNICEF *Guidelines for the Alternative Family Care of Children in Kenya* 21.
185 Breen *Policy Brief: Foster Care in South Africa: Where to From Here?* 1.
186 Breen *Policy Brief: Foster Care in South Africa: Where to From Here?* 1.
187 Child Welfare Information Gateway *Placement of Children with Relatives Placement* 7.
188 Family for Every Child *Strategies for Delivering Safe and Effective Foster Care* 4.
189 Johnson *Literature Review of Foster Care* 20; Durant *The Support and Training of Foster Parents* 23.

however, include children 'developing new behaviour problems due to not being used to new daily programmes when they are institutionalised'.[190] It also speaks for itself that such care cannot provide the traditional family model of upbringing that many children expect and desire.

3.2.3.3 Institutional Care

Institutional or residential care is provided in a 'non-family based group setting'.[191] It is a group-living arrangement for children by means of which care is 'provided by remunerated adults who would not be regarded as traditional carers within the wider society'.[192] Today the definition of residential care is more inclusive. It encompasses children's homes that are run as family-type group homes and accommodate a number of children of no relation to the person running the home. The staff may be volunteers or related to the person in charge. It is a setting that may be used as a 'measure of last resort when other settings such as foster and kinship care have failed'.[193] In institutional care the child is placed in the 'care of persons that are not of his family or that are related to him'.[194]

Benefits of institutional care may include the following:

(i) The needs of the child are 'met when he cannot live with his own family'.[195]
(ii) The homes are a place for children to 'develop and grow, as well as providing food, shelter and space for play and leisure in a caring environment'.[196]
(iii) Children with different needs are being 'looked after'.[197]
(iv) The child 'attends school regularly'.[198]

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190 HM Government 2011 *The Children's Act 1989 Guidance and Regulations Volume 4*: *Fostering Service 9.*
191 Miles and Stephenson Children in Residential Care and Alternatives 9.
192 Miles and Stephenson Children in Residential Care and Alternatives 8.
193 Australian Government 2011 https://aifs.gov.au/cfca/publications/therapeutic-residential-care-australia-taking-stock-and/definition-therapeutic accessed 16 June 2020.
194 Hart, La Valle and Holmes *The Place of Residential Care in the English Child Welfare System* 45.
195 Child Welfare Information Gateway Date Unknown https://www.childwelfare.govtopics/outofhome/group-residential-care/.
196 Durant *The Support and Training of Foster Parents* 30.
197 S 150 of the Children's Act among others define children in need of care and protection to include 'children that are neglected, abused; orphaned children, street children and children affected by HIV / AIDS'.
198 Bedford Borough Council Date Unknown http://www.bedford.gov.

Potential risks of institutional care may include:

(i) Institutional care is 'non-therapeutic'.[199]

(ii) Care of the child is often 'not exercised in the best interests of the child'.[200]

(iii) Some of these homes are 'not registered with a government department'.[201]

(iv) Residential care accommodates children from 'various backgrounds'. Some children in institutional care are 'disabled, street and homeless children, children whose parents are substance abusers, children of parents with HIV/AIDS, children whose parents are in prison, unaccompanied children, child soldiers, children of divorce and family breakdown and children deprived of good education'.[202]

(v) Children in residential care facilities often have 'developmental damage and are abused and exploited'.[203]

(vi) The damage caused by institutional care on children also affects 'physical and motor skills of the children'.[204] The damage caused to the physical and motor skills of the child may be attributed to the fact that children below the age of six are 'not offered the same care'[205] as other children 'above the age of six years'.[206]

3.2.3.4 Kafalah

Kafalah is of Islamic origin. It is the 'informal care'[207] of the child 'deprived of his family environment',[208] for example due to the imprisonment of the caregiver or being abandoned or orphaned. Under *kafalah* a family may take a child to live with them on

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199 Australian Government 2011 Therapeutic Residential Care in Australia: Taking Stock and Looking Forward https://aifs.gov.au/cfca/publications/therapeutic-residential-care-australia-taking-stock-and/definition-therapeutic accessed 16 June 2020.Therapeutic Residential Care 'is intensive and time-limited care for a child or young person in statutory care that responds to the complex impacts of abuse; neglect and separation from family. This is achieved through the creation of positive, safe, healing relationships and experiences informed by a sound understanding of trauma, damaged attachment and developmental needs'.

200 Hart, La Valle and Holmes *The Place of Residential Care in the English Child Welfare System* 33.

201 Csaky *Keeping Children Out of Harmful Institutions: Why We Should be Investing in Family-based Care?* 3.

202 *Miles and Stephenson Children in Residential Care and Alternatives* 11.

203 UNICEF *Guidelines for the Alternative Family Care of Children in Kenya* 5. See also Csaky *Keeping Children Out of Harmful Institutions: Why We Should be Investing in Family-based Care?* 6-10.

204 Browne *The Risk of Harm to Children in Institutional Care* 9.

205 HHS Public Access 2014 https://www.ncbi.nlm.nih.gov. Children who spend the first few years of their lives in institutional care often show retarded physical growth.

206 Durant *The Support and Training of Foster Parents* 16.

207 Art 20(3) of the CRC.

208 Assam and Sloth-Nielsen 2014 *African Human Rights Law Journal* 324.

a 'permanent and legal basis, but the child is not entitled to use the family's name or to inherit from the family'.[209]

3.2.3.5 Adoption

Adoption is a judicial process that 'conforms to statute in which the legal obligations and rights of a child toward the biological parents are terminated and new rights and obligations are created between the child and the adoptive parents'.[210] Adoption involves the creation of 'the parent-child relationship between individuals who usually are not naturally related'.[211] Under the draft United Nations Guidelines for the Alternative Care adoption is understood as 'permanent care'.[212]

3.3 South Africa

3.3.1 Parental / Family Care

The right of the child to family or parental or alternative care when removed from the family environment is entrenched in section 28(1)(b) of the Constitution. It is a single right that is framed in three alternatives. It may be fulfilled by family members, by parents or by alternative caregivers. The text of section 28(1)(b) is founded on the posture of the CRC and the ACRWC on the preservation of the child's family. As stated above, both the CRC and ACRWC recognise the family as the natural unit and basis of society. They make provision that the family shall enjoy the protection and support of the state for its establishment and development. In African tradition 'the care of the child is typically a communal rather than an individual responsibility'.[213] Communal responsibility in caring for the child resonates with the African adage that 'it takes a village to raise a child'.[214]

209 UNICEF *Alternative Care for Children in South Africa* vi.
210 Art 21 of the CRC.
211 Chapter 16 of the Children's Act.
212 Principle I2(a) of the Guidelines for the Alternative Care of Children. See also Bartholet 2005 http://www.law.harvard.edu; United Nations *Child Adoption*: *Trends and Policies*.
213 Chinyoka and Ganga 2017 *Educational Research International* 136.
214 Hunt 2012 https://tothemoonandbackfostering.com/blog/takes-village-raise-child/. See also Rabe 2017 *Care and Family Policy in South Africa*.

The right of the child to care had prior to the judgment in *S v M* been considered mainly in divorce, maintenance and in constitutional matters.[215] The author submits that the judgments in *S v M* and in *Minister of Police v Mboweni*[216] (hereafter referred to as *Mboweni*) are a cornerstone for the application and interpretation of the right of the child to care. In *S v M* the Constitutional Court provided an elaborate interpretation of the right of the child to care and in *Mboweni* the Supreme Court of Appeal dealt with the application of the right of the child to care.

The Supreme Court of Appeal in *Mboweni* considered the ways in which the right of the child to care may be fulfilled.[217] *In casu* mothers of two daughters whose father died as a result of assault by inmates whilst in detention in police cells sued the Minister of Police for delictual damages for loss of support and for loss of parental care as a constitutional damage.[218] The claim for loss of support and for loss of parental care as a constitutional claim succeeded in the High Court. The matter was referred to the Supreme Court of Appeal for determination of the *quantum* of the damages to be awarded.

The court had to determine whether the death of the girls' father through an unlawful act of the police entitled the daughters to a claim for constitutional damages in terms of section 28(1)(b) of the Constitution.[219] In the event it held that the daughters were entitled to a claim for constitutional damages, it had to determine the *quantum* of the damages to be awarded. In dismissing the latter claim of loss of parental or family care the court held that 'the right to care is couched in three alternatives, not as three separate and distinct rights'. According to section 28(1)(b), 'the primary responsibility of caring for the child vests in the family and in the parents if the family is unable to care for the child'. Firstly, the child therefore has the right to be cared for within the

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215 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Minister of Health* v *Treatment Action Campaign* 2002 5 SA 721 (CC).

216 2014 4 All SA 452 (SCA).

217 Recognition is given to the fact that the right of the child to care in s 28(1)(b) is framed in a manner that that the responsibility of caring for the child primarily vests in the family and becomes of the parents when the family is unable to care for the child.

218 *M v Minister of Police* 2013 5 SA 622 (GNP).

219 *Mboweni* para 3.

family, secondly to be cared for by his parents and thirdly and lastly, to be cared for in alternative care.

Robinson and Prinsloo[220] correctly argue that 'in South African law no claim for constitutional damages arises from loss of parental care'. However, they point out that 'parental care constitutes the primary care of the child and is of a *treuhand* nature'. In regard to the child being cared for within the family setting in *Mboweni* it is submitted that the court was mindful of the fact that section 28 of the Constitution is founded on the CRC and the ACRWC. Both these children's rights instruments make provision for the care of the child within a family setting. Robinson and Prinsloo make out an argument that 'there is a fundamental difference between parental or family care on the one hand and alternative care on the other. In the event the parent or parents of the child are unable to care for the child the child may be cared for by other family members'.[221] In *Mboweni* the court decided that 'alternative care presupposes the absence of family or parental care'. The rights in section 28(1)(b) may be 'fulfilled even when the child is cared for informally by a family member or members or a relative or relatives of the incarcerated caregiver'.[222]

3.3.1.1 Children's Act

3.3.1.1.1 Family / Parental Care

The right of the child to care in the Children's Act, as stated above, is expansive. The child's right to care includes guardianship and contact. The concept of parental responsibilities and rights that incorporates care, guardianship and contact is discussed in detail in Chapter 4 below.

3.3.1.1.2 Alternative Care

Even though the Children's Act does not define alternative care, seven sections are specifically dedicated to such care. Sections 2(a) and (b), 45(1)(h),[223] 46(1)(a),[224]

220 Robinson and Prinsloo 2015 *Potchefstroom Electronic Law Journal* 1672,1680.
221 Robinson and Prinsloo 2015 *Potchefstroom Electronic Law Journal* 1679.
222 *Mboweni* para 10.
223 The Children's Court may adjudicate on alternative care involving the child.
224 S 46(1)(a)(i) of the Children's Act stipulates that the Children's Court may an alternative care order; which includes an order placing a child-'(i) in the care of a person designated by the court to be the foster parent of the child'.

157(1)(b)(i) and (iii),[225] 159(2)(d),[226] 161(1)(a)(i)[227] and 305(1)(k).[228] Only sections 2(a) and (b) and 22(1)(b) are discussed briefly. Section 2(a) reads that 'the objective of the Children's Act is to preserve and strengthen families'. Section 2(b)(i) among others provides for 'the child's right to alternative care when removed from the family environment'. It is submitted that section 22(1)(b) creates the platform for the care of the child by a person other than the child's caregiver. A person who has an interest in the care, well-being and development of the child may acquire care of the child through a parental responsibilities and rights agreement. It is further argued that the wide scope of section 22(1)(b) allows for the child of an imprisoned caregiver to be cared for by family members or by his extra-marital father or by persons other than his parents during the period of imprisonment of the primary caregiver.

The differentiation between parental and alternative care made by Robinson and Prinsloo resonates with the broadening of the scope for the care of the child by persons other than the parents of the child. Placement of the child in alternative care implies that the parent or family of the child is unable to care for the child. The application of the right of the child to care as pronounced in *Mboweni* demonstrates an established principle that care of the child extends beyond his parents. The child may be cared for by family members or by persons other than his parents.

Foster care is the 'main form of alternative care recognised in South Africa'.[229] It results in the placement of the child with non-family members. It is a setting that is not supported by either the CRC or the ACRWC. The CRC and the ACRWC encourage alternative care settings that are within families or that resemble family settings and that promote the cultural, religious and linguistic rights of the child. The process that

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225 S 157(1)(b)(i) of the Children's Act states that 'the child may be left in the care of the parent or care-giver under the supervision of a designated social worker; provided that the child's safety and well-being must receive first priority' and s 157(1)(b)(iii) makes provision that 'the child may be placed in alternative care with or without terminating parental responsibilities and rights of the parent or care-giver'.

226 Views of an alternative carer need to be considered when extending an order of the Children's Court.

227 The Children's Court may make a contributory order of maintenance or treatment costs in favour of a child in alternative care.

228 It is an offence to aid or induce a child in alternative care to abscond from alternative care or to prevent the child from returning to alternative care.

229 Nonyana-Mokabane *Children in Need of Care and Protection and their Right to Family Life* 953-955.

may lead to the child being placed in foster care is cumbersome. There are presently no criteria for selection of foster care placement. This may be because social workers lack knowledge on how to conduct foster care assessments. Carter and Van Breda argue that 'inadequate assessment of foster care has the potential of compromising the right of the child to be cared for in a nurturing environment'.[230] In addition to the insufficiency of foster care assessment, it is submitted that the procedure of carrying out an investigation on the actual circumstances of the child or children concerned may also prove to be unsuitable for the child of a primary caregiver.

The child must first be declared 'a child in need of care and protection' in terms of section 150 of the Children's Act and a hearing must be held before the child may be considered for placement in foster care.

Section 150 of the Children's Act defines a child in need of care and protection as a child who:

> (i) has been abandoned or orphaned and is without any visible means of support;
> (ii) displays behaviour which cannot be controlled by the parent or caregiver;
> (iii) lives or works on the streets or begs for a living;
> (iv) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
> (v) has been exploited or lives in circumstances that expose the child to exploitation;
> (vi) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
> (vii) may be at risk if returned to the custody of the parent, guardian or caregiver of the child as there is reason to believe that he will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
> (viii) is in a state of physical or mental neglect; or
> (ix) is being maltreated, abused, deliberately neglected or degraded by a parent, a caregiver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

The court must make an order for a designated social worker to 'investigate if the child is in need of care and protection and to remove the child from the caregiver or

230 Carter and van Breda 2016 *Social Work* 210.

caregivers'.[231] A designated social worker or police officer may still 'remove the child without a court order if an urgent need to remove the child exists'.[232] Upon conclusion of the 'investigation within 90 days'[233] by a designated social worker the Children's Court must conduct a hearing to 'determine whether the child is in need of care and protection'.[234] If the child has 'no parent or caregiver or has a parent or caregiver but that person is unable or unsuitable to care for the child',[235] the child will then be 'placed in foster care with a suitable foster parent or in foster care with a group of persons or an organisation operating a cluster foster care scheme'.[236]

3.4 Customary law

Care of the child in customary law is usually vested in the head of the family or his successor and his family. In African tradition a child is valued and occupies a privileged position. The responsibility of caring for the child is not of his parents alone but of some of the members of the family such as grandparents and siblings.[237] In *Nkosi v Ngubo*[238] for example, the *KwaZulu Natal Code* (hereafter referred to as the KNC) was applied to determine the best interests of the child in care proceedings. The court held that the fitness of either parent to have care of the child has to be established. The care of the child by family members may serve as alternative care when the primary caregiver is incarcerated. The child is cared for within the family and by persons that he is familiar with.

3.5 India

3.5.1 Background

India is a sovereign secular democratic Republic, federal in form and marked by 'traditional characteristics of a federal system'.[239] It adopts a 'dualist approach to the

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231 S 151(1) of the Children's Act.
232 S 152 of the Children's Act.
233 S 155(2) of the Children's Act.
234 S 155 of the Children's Act.
235 S 156(1)(i) of the Children's Act.
236 S 156(1)(ii) of the Children's Act.
237 Hall, Ritcher, Mokomane and Lake (eds.) *Children*, *Families and the State: Collaborations and Contestations* 62.
238 1949 NAC 87 (NE).
239 Srivastava 2008 http://nyulaglobal.org, Granvilee *The Indian Constitution: Cornerstone of a Nation* 241; Anon Date Unknown htpp://www.saigon.com/heritage/states/states.html Indian

application of international law in national law'.[240] The Constitution of India[241] entrenches fundamental rights[242] and also has skeletal provisions on children's rights.[243] The Republic of India has adopted the National Charter for Children.[244] Parental responsibilities and rights include 'custody and guardianship in respect of the child and the child's property'.[245]

3.5.2 Child Care and Protection Act of 2005

The *Child Care and Protection Act*[246] (hereafter referred to as the CCPA) makes provision for the care of the child. It accords 'recognition to the care of the child in a manner that advances the best interests of the child'.[247] It recognises 'the stability of

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states are Andhra Pradesh; Arunachal Pradesh; Assam; Bihar; Chattisgarh; Delhi; Goa; Gujarat; Haryana; Himachal Pradesh; Jammu and Kashmir; Jharkhand; Karnataka; Kerala; Madhya Pradesh; Marashtra; Manipur; Meghalaya; Mizoram; Nagaland; Orissa; Punjab; Rajasthan; Sikkim; Tamil Nadu; Tripura; Uttaranchal; Uttar Pradesh and West Bengal; and the union territories are Andaman and Nocibar Islands; Chandigarh; Dadra and Nagar Havali; Daman and Din; Lakshadweep and Pondicherry.

240 Art 51 of the Constitution of India stipulates that 'the state shall endeavour to (a) promote international peace and security; (b) to maintain just and honourable relations between nations; (c) to foster respect for international law and treaty obligations in the dealings of organised peoples with one another and (d) to encourage settlement of international disputes by arbitration'. See also Kadoliya Date Unknown http://www.manuputrafast.com; Awasthi 2011 SSRN: https://ssrn.com/abstract=1771302 1- 7; Agarwal *Implementation of International Law in India.*

241 Of 1950, hereafter referred to as the Constitution of India.

242 Art 14 of the Constitution of India makes provision for 'equality before the law'; art 15 for 'prohibition of discrimination on grounds of religion; race; caste; sex or place of birth'; art 16 for 'equality of opportunities in matters of public employment'; art 17 'abolition of untouchability'; art 18 'abolition of titles'; art 19 'protection of certain rights regarding freedom of speech; art 20 'protection in respect of conviction for offences'; art 21 'protection of life and personal liberties'; art 22 'protection against arrest and detention in certain cases'; art 23 'prohibition of traffic in human being and forced labour'; art 24 'prohibition of employment of children in factories'; arts 25-28 deal with 'freedom of religion'; arts 29-30 are concerned with 'cultural and educational rights' and arts 31A-C cover 'savings of certain laws and arts 32-35 deal with 'constitutional remedies'.

243 Art 39 (f) states that 'childhood and youth shall be protected against exploitation and against moral and material abandonment'; art 45 stipulates that 'the state shall endeavour to provide early childhood care and education for all children until they complete the age of six years'; art 47 provides that 'the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health' and art 15(3) stipulates that 'the state shall not be prevented from making any special provision for women and children'.

244 Of 2003. Art 1 provides for 'the principles of survival; life and liberty'; art 2 and 3 for 'promotion of high standard of health and nutrition'; art 4 for 'basic minimum needs and security'; art 5 for 'play and leisure'; art 6 for 'early childhood care for survival; growth and development'; art 7 for 'free and compulsory education'; art 17 for 'strengthening of the family' and art 18 for 'responsibilities of both parents towards their children'.

245 S 4(2) of the GWA; *Padmaja Sharma v Ratan Lal Sharma* AIR 2000 SC 1398.

246 Of 2005, hereafter referred to as the CCPA.

247 S 2 of the CCPA.

the family unit' as an entity that can provide a safe and nurturing environment to the child.[248] It advocates for the 'support of the autonomy and integrity of the family as well as the importance of continuity in the child's care and preservation of the child's attachment to the extended family'.[249] It further takes into account the 'child's physical, emotional, religious and spiritual needs'.[250] It puts emphasis on the 'need to implement decisions relating to children timeously.[251] The least restrictive or disruptive course of action that is available and appropriate in a particular case to help the child should be followed.[252]

Section 2 reads as follows:

> Where there is a reference in this Act to the best interests of a child, the factors to be taken into account in determining the child's best interests shall include:
> (i) the safety of the child;
> (ii) the child's physical and emotional needs and level of development;
> (iii) the importance of continuity in the child's care;
> (iv) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship, a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
> (v) the child's religious and spiritual views;
> (vi) the child's level of education and educational requirements;
> (vii) whether the child is of sufficient age and maturity so as to be capable of forming his or her own views and, if so, those views are to be given due weight in accordance with the age and maturity of the child; and
> (viii) the effect on the child of a delay in making a decision.
> This Act shall be interpreted and administered so that the best interests of the child is the paramount consideration and in accordance with the following principle:
> (i) children are entitled to be protected from 'abuse, neglect and harm or threat of harm';[253]
> (ii) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
> (iii) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

248 S 3 (c)(i) of the CCPA.
249 S 3(b)(i) of the CCPA.
250 S 2(b) of the CCPA.
251 S 3(f) of the CCPA.
252 S 3(b)(ii) of the CCPA.
253 Seth 2013 *Japan Medical Association Journal* 292-297.

(iv) where the child is of sufficient age and maturity so as to be capable of forming his or her own views, those views should be taken into account when decisions relating to the child are made;
(v) kinship ties and the child's attachment to the extended family should be preserved if possible; and
(vi) decisions relating to children should be made and implemented in a timely manner.

For the purposes of this Part:

(i) any person who is the parent or legal guardian of a child, or who is legally liable to maintain the child, shall be presumed to have the custody of the child and as between father and mother, neither shall be deemed to have ceased to have such custody by reason only that the father or mother has deserted, or otherwise does not reside with, the other parent and the child;[254]

(ii) any person to whose custody a child is committed by any other person who has the care of the child shall be presumed to have care of that child;[255]

(iii) any other person having actual custody of a child shall be presumed to have the custody of the child.[256]

The objects of the CCPA are expressed in section 3 as:

(i) to promote the 'best interests, safety and well-being of children';[257]
(ii) to recognise that:
- while parents often need help in caring for children, help should give support to the 'autonomy and integrity of the family unit' and wherever possible, be provided based on mutual consent;[258]
the least restrictive or disruptive course of action that is available and appropriate in a particular case to help a child should be followed;
(iii) to recognise that child services should be provided in a manner that:
- respects the child's need for continuity of care and for stable family relationships; and
- considers physical and mental differences among children in their development; and
(iv) to recognise the special needs of children in conflict with the law.

254 S 3(4)(a) of the CCPA.
255 S 3(4)(b) of the CCPA.
256 S 3(4)(c) of the CCPA.
257 Satpathy 2012 *Yojana* 25.
258 Sharma and Levine 1998 *New Directions for Child Development* 45-67.

3.5.3 Alternative Care

The protection and advancement of the right of the child to alternative care in this jurisdiction is founded in the Juvenile Justice (Care and Protection of Children) Act (hereafter referred to as the JJCPCA) and in Rules such as Foster Care Rules adopted by state governments to support alternative care. Provisions of the JJCPCA and where applicable, some sections of the Delhi and Karnataka Foster Care Rules are outlined briefly. This is followed by a brief discussion of alternative care settings. The JJCPCA deals with children in conflict with the law and with the placement of children in alternative care. The JJCPCA prevails in all matters relating to foster care and adoption of children and overrides personal religious laws. It brings to an end the tension that often arose between the HGMA and the GMA with regard to the application of the best interests of the child standard.

In *Re: Adoption of Payal at Sharinee Vinay Pathak and his wife Sonika Sahay Pathak*,[259] for example, the court had to resolve a conflict of Hindu adoption law and of the JJCPCA. The court decided that the JJCPCA is a special enactment and that the legislature had taken care to ensure that its provisions are secular in character and that the benefit of adoption is not restricted to any religious or social group. Section 29 of the JJCPCA defines foster care 'as the placement of a child by the Child Welfare Committee for the purpose of alternate care in the domestic environment of a family other than the child's biological family'.[260] The family with whom the child is placed is 'selected, qualified, approved and supervised for providing such care'. A foster family means a 'family found suitable by a District Child Protection Unit to keep the child in foster care'.[261] Group foster care is also recognised. It refers to 'placement of children in an environment that resembles a family setting'. Group foster care strives to 'provide

259 2009 (111) BOMLR 3816.

260 In *KV Muthu v Angamuthu Ammal* AIR 1997 SC 628, the Indian Supreme Court dealt with the eviction proceedings between a landlord and a tenant. The dispute related to whether a foster son was a member of a family with whom he was placed. The Supreme Court held that a 'foster child' is essentially the child of another person but is nursed, reared and brought up by another person as his own.

261 S 30 of the JJCPCA.

personalised care and at fostering a sense of belonging and identity through family like and community based solutions to children who are deprived of parental care'.[262]

Alternative care is based on principles of the best interests of the child, family responsibility towards and safety of the child and that institutional care must be used as a measure of last resort. The best interests of the child are enunciated in section 9 and it pronounces the basis for any decision taken regarding the child. The application of the prescript of the best interests of the child is intended to ensure the fulfilment of the child's basic rights and needs, identity, social well-being and physical, emotional and intellectual development. All decisions regarding the child must be 'grounded on the primary consideration that they are in the best interest of the child and are aimed to help the child to develop his full potential'.[263] The 'primary responsibility of care, nurture and protection of the child vests in the biological family or adoptive or foster parents'.[264] All measures must be taken to ensure that 'the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system or thereafter'.[265] A child in need of care and protection must be 'placed in institutional care as a step of last resort'[266] after making a 'reasonable inquiry'.[267]

3.5.3.1 Alternative Care Settings

3.5.3.1.1 Foster Care

Placement of the child in foster care is done by the Committee established pursuant to section 27 of the JJCPCA. The functions and responsibilities of the Committee are spelled out in section 30 and among others they include:

> (i) conducting inquiries on 'all issues relating to and affecting the safety and well-being of children';[268]

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262 S 32 of the JJCPCA.
263 S 3(iv) of the JJCPCA.
264 S 3(v) of the JJCPCA.
265 S 3(vi) of the JJCPCA.
266 UNICEF and Christian Aid *Matter of Belonging: How Faith-based Organisations can Strengthen Families and Communities to Support Orphans and Vulnerable Children* 5-7.
267 S 3(xii) of the JJCPCA.
268 S 30(ii) of the JJCPCA.

(ii) directing the Child Welfare Officers or probation officers or District Child Protection Unit or non-governmental organisations to 'conduct social investigation and submit a report';[269]
(iii) conducting inquiries for 'declaring fit persons for care for children in need of care and protection; and directing placement of a child in foster care';[270]
(iv) ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's 'individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility';[271]
(v) selecting registered institutions for placement of each child requiring institutional support based on the 'child's age, gender, disability and. needs and keeping in mind the available capacity of the institution';[272]
(vii) conducting at least two inspection visits per month of residential facilities for children in need of care and protection and recommending action for 'improvement in quality of services' to the District Child Protection Unit and the State Government;[273] and
(xiii) taking *suo motu* cognisance of cases and reaching out to 'children in need of care and protection', who are not brought before it.[274]

The selection of a foster family is based on 'family's ability, intent, capacity and prior experience of taking care of children'.[275] All reasonable efforts must be made to 'keep siblings together unless it is in their best interest not to be kept together'.[276] The state government provides 'monthly funding for such foster care' through District Child Protection Units after following prescribed procedures for inspection to 'ensure the well-being of the children'.[277] The child's parents may visit the child in the foster family at regular intervals unless the Committee considers that such visits are not in 'the best interests of the child'.[278] The foster family is responsible for 'providing education, health and nutrition to the child and must ensure the overall well-being of the child in such manner as may be prescribed'.[279] The state government may make rules for the purpose of 'defining the procedure, criteria and the manner in which foster care

269 S 30(iii) of the JJCPCA.
270 S 30(iv) of the JJCPCA.
271 S 30(vi) of the JJCPCA.
272 S 30(vii) of the JJCPCA.
273 S 30(vii) of the JJCPCA.
274 S 30(xii) of the JJCPCA.
275 S 44(2) of the JJCPCA.
276 S 44(3) of the JJCPCA.
277 S 44(4) of the JJCPCA.
278 S 44(5) of the JJCPCA.
279 S 44(6) of the JJCPCA.

services are provided for children'.[280] The inspection of foster families is conducted every month by the Committee to 'check the well-being of the child and whenever a foster family is found lacking in taking care of the child, the child must be removed from that foster family and relocated to another foster family as the Committee may deem fit'.[281] Foster care is also recognised in for instance Rule 37(2) of the Delhi Foster Care Rules.[282] This rule allows for the child to be 'placed in the care of an extended family and with an unrelated family if he cannot be placed with his extended family'. The Karnataka Draft Rules on Foster Care[283] also contain similar provisions. Rule 37(1) states that foster care is for children who cannot be 'placed in adoption but are in need of family care, foster care shall be considered as an option over institutional care'. Rule 37(2) provides for 'kinship care' whereas foster placement is with the extended family. The extended family is the preferred option whereas an unrelated family is least preferred. The State Adoption Regulation Agency is involved in the planning, implementation and monitoring of foster care.

3.5.3.1.2 Institutional Care

This form of setting is seen as a measure of last resort and is mainly used for placement of children with special needs. Section 50(2) of the JJCPCA directs state governments to 'establish Children's Homes to cater for children with special needs'. Van Voorst[284] does not support a residential care setting. He argues that this setting among others,

> [d]eprives the child of a family establishment. The very nature of this institution makes it difficult to adequately support children's many different needs which extend beyond food, medical care and schooling. The child may not get the kind of love, individual attention and sense of belonging that only a family can provide. In the worst cases, the child may be subjected to a regimen that hinders his development by failing to protect him from harsh treatment or conditions resembling child labour. Sexual abuse has been reported in some institutions many of which do not have the systems or structures to monitor and prevent it. There are no international standards to govern institutional care and few

280 S 44(7) of the JJCPCA.
281 S 44(8) of the JJCPCA.
282 *Delhi Foster Care Rules* 2009.
283 Of 2010.
284 Van Voorst *Alternative Forms of Care for Children Without Parental Care*: *Prospects; Challenges and Opportunities in Developing Community Based Care Strategies in India* 18.

developing countries have up-to-date laws to regulate orphanages or certify staff.

3.6 England

3.6.1 Background

England ratified the CRC in 1990. Its ratification of the CRC enjoins it to align domestic provisions concerned with the child in the footing of the particular international children's rights instrument. Although the Constitution of England is 'unwritten'; it applies in the 'same manner as a written Constitution'.[285] England's ratification of the CRC has had a profound influence on domestic laws concerned with the advancement and protection of the rights of children. England adopts a 'dualist approach to the application of international law into domestic law'.[286] International law becomes part of English law when it has been specifically incorporated by an act of parliament. The Human Rights Act of 1998 (hereafter referred to as the HRA)[287] is the statute by which parliament 'incorporated and affiliated human rights laws with the ECHR'.[288] The HRA has since 'influenced the alignment of the CA-Engl'.[289] with the 'ECHR, the FLRA'[290] and the LA.

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285 Feldman 1999 *Australian Yearbook of International Law* 105; Uglow *Principles of Criminal Justice* 193. He mentions that 'its domestic laws are found in masses of material which include custom; statutes; existing legal rules and writings of jurists (only considered when guidance by courts is lacking)'.

286 Feldman 1999 *Australian Yearbook of International Law* 105.

287 Anon 1994 http://www.servant.unibe. The Act dealt with a wide range of human rights issues. Part 1 dealt with 'the legal framework'. S 2 of Part 2 covered 'international arrangements'. S 3 of Part 3 dealt with 'human dignity' and s 4 with 'equality'. S 12 of Part 4 dealt with 'redress and remedies'. S 15 made provision for 'personal liberty'. S 20 and 21 of Part 7 respectively provided for 'political rights'. The right to 'a home' was entrenched in s 27 of part 8 and s 28 and 29 respectively dealt with the 'right to education and culture'. For further reading see Blackburn 2012 https://www.bl.uk; De Lolme *The Constitution of England* and Editors of Encyclopedia Britannica Date Unknown https://www.britannica.com.

288 England acceded to the European Communities and to the (United Kingdom) Communities Act of 1972; De Cruz *Comparative Law in a Changing World* 107. Art 8 of the HRA is a replica of art 8 of the ECHR. It states that: (1) 'Everyone has the right to respect for his private and family life; his home and his correspondence'. (2) 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security; public safety or economic well-being of the country; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others'.

289 The CA- Engl. CA- Engl. is as a result of a review of family law guardianship and custody as was contained in the Children Act 1975 by the Law Commission of the United Kingdom (LAW COM. No.172).

290 *Family Law Reform Act* of 1987, hereafter referred to as FLRA.

In England section 85(1) of the repealed CA defined the right of the child to care in terms of parental rights and duties that the parents had in relation to the child and the child's property. Parental rights and duties were construed to include the right of access and any other element included in a right or duty. Section 85(1) did 'not specify the elements' that were included in a right or duty.[291] The CA was 'repealed' on 14 October 1991[292] and was replaced with the CA-Engl. Guardianship of the child is regulated by the GuA read in conjunction with the CA-Engl. Section 1 of the GuA accords both the 'mother and the father equal guardianship of the child and the child's property'.[293] The CA-Engl. replaced the terms 'parental rights and duties' with 'parental responsibilities and rights'.[294] Section 1(1) of the GuA puts the 'married mother of the child on the same footing as the married father in the exercise of parental responsibilities and rights'. An agreement that transfers or cedes parental responsibilities and rights to a third party by either the father or mother 'is unenforceable'. The court may, however, give effect to such an agreement if 'it is in the best interests of the child'.[295]

3.6.2 Parental / Family Care

The parent-child relationship in this jurisdiction is currently characterised in terms of parental responsibilities and rights.[296] Section 3(1) of the CA-Engl. defines 'parental responsibilities and rights as rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property'. [297] The

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291 S 85(1) of the CA-Engl. This section reads that: **'**In this Act, unless the context otherwise requires, the parental rights and duties means as respects a particular child (whether legitimate or not), all the rights and duties which by law the mother and father have in relation to a legitimate child and his property and references to a parental right or duty shall be construed accordingly and shall include a right of access and any other element included in a right or duty'.

292 Hodgins and Cannon 1991 http://www.spig.clara.net/misc/ch-act.htm.

293 Guardianship Act 192 of 1993, hereafter referred to as the GuA.

294 S 2 of the CA-Engl.

295 S 1(2) of the GuA.

296 In this jurisdiction the term parental responsibilities and rights is expressed in singular. However, it refers to responsibilities that a parent; parents or non-parents have towards the child.

297 Lowe and Douglas *Bromley's Family Law* 350 define parental care to include 'providing a home for the child; having contact with the child; determining and providing for the child's education; determining the child's religion; disciplining the child; consenting to the child's medical treatment. They further explain that parental care involves 'consenting to the child's marriage; agreeing to the child's adoption; vetoing the issue of the child's passport; taking the child outside England and consenting to the child's emigration; administering the child's property; protecting and maintaining the child; naming the child; representing the child in legal proceedings; disposing of the child's corpse and appointing a guardian for the child'.

description of parental responsibilities and rights also includes 'rights, powers and duties which the guardian of the child's estate has in relation to the child and the child's property'.[298] A guardian (other than a guardian of the estate of the child) also means a 'guardian appointed in accordance with section 6'.[299] The concepts of custody, care or in charge of, have since been substituted with the term 'responsibility' in the CA-Engl.[300] However, the FLRA however maintains the use of the terms custody, care and control. Neither the CA-Engl. nor the FLRA explains the concepts of custody, care and control. Parental responsibilities and rights entail bringing the child up, caring for him and making decisions about him but 'does not affect the parent-child relationship for other purposes'.[301]

Parental responsibilities and rights were pronounced in *Gillick v West* v *Norfolk and Wisbech Area Health Authority* (hereafter referred to as *Gillick*).[302] In this case the court was called upon to make a determination on the care of the child. It held that:

> [w]hen a court has before it a question as to the care and upbringing of a child it must treat the welfare of the child as the paramount consideration in determining the order to be made. There is here a principle which limits and governs the exercise of parental rights of custody, care, and control. It is a principle perfectly consistent with the law's recognition of the parent as the natural guardian of the child, but it is also a warning that parental rights must be exercised in accordance with the welfare principle and can be challenged, even overridden.[303]

The parent or parents of the child may 'exercise parental responsibilities and rights with another person or persons or with an institution such as a local authority'. A local authority is 'a state welfare institution responsible for caring for children in need of care' established in terms of the Childcare Act.[304] The prescript of the best interests of the child determines the awarding of parental responsibilities and rights. Sections 1, 5

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298 S 3(2) of the CA- Engl. See also Addysg and Sgiliau *Parents and Parental Responsibility*: *Guidance for Schools*.

299 In terms of s 6 of the FLRA 'the father of the child may not be appointed guardian of the child if he was not married to the mother at the time of the birth of the child'. He may however be granted guardianship in respect of the child if 'he has been issued with a parental responsibilities and rights order by the court'.

300 S 16(3) of the CA-Engl.

301 Para 2.6 of the CA-Engl. Guidance and Regulations Vol.1 Court Orders.

302 1984 QB 581.

303 *Gillick* para 44.

304 S 1 of the Childcare Act of 2006.

and 62 of the CA-Engl. express the prescript of the best interests of the child in the awarding of parental responsibilities and rights. Section 1 states that 'the best interests of the child are paramount in every matter that concern the child', section 5 requires emergency protection of the child to be 'in his best interests' and section 62 requires local authorities to 'act in the best interests of the child in every matter that affects the child'.

3.6.3 Alternative Care

Placement of children in alternative care is regulated by the CA-Engl. read with the Fostering Regulation.[305] The responsibility of putting the child in alternative care 'vests with the local authority'.[306] The local authority has 'the responsibility of safeguarding and promoting the welfare of children within its area of jurisdiction'[307] and of 'promoting the upbringing of such children by their families'.[308] Only foster care is discussed briefly. Kinship care and adoption are not discussed by reason that they are permanent placement of the child. Institutional care is also excluded because it 'offers alternative care to children who are at least ten years of age and its application is minimal'.[309]

3.6.3.1 Alternative Care Setting

3.6.3.1.1 Foster Care

Foster care may be formal or informal. With formal foster care the local authority may 'place the child with a family member that the child is familiar with',[310] with 'his relative'[311] or with 'any other suitable person'.[312] The responsibility of local authorities to improve and actively promote the life chances of children they care for is referred to as 'corporate parenting' in recognition that 'the task must be shared by the local authority in partnership with partner agencies along with the parents'.[313] The person

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305 *Fostering Regulation* 910 of 1991, hereafter referred to as Fostering Regulation.
306 S 23(1) of the CA-Engl.
307 S 17(a) of the CA-Engl.
308 S 17(b) of the CA-Engl.
309 Hart, La Valle and Holmes *The Place of Residential Care* 7; 43.
310 S 2(a)(i) *Fostering Regulation* 910 of 1991, hereafter referred to as Fostering Regulation.
311 S 2(a)(ii) of the Fostering Regulation.
312 S 2(a)(iii) of the Fostering Regulation.
313 HM Government *Children Act 1989 Guidance and Regulations Volume: 4 Fostering* Services 11.

with whom the child is placed is referred to as the 'local authority foster parent'.[314] A local authority foster parent excludes the 'parent of the child, a person who is not the parent of the child but who has parental responsibilities and rights in respect of the child'[315] and a person who was 'awarded the care of the child'.[316] It is a requirement that the person with whom the child is placed must conclude a' parental responsibilities and rights agreement with the parent or parents of the child'.[317] The local authority may dispense with the parental responsibilities and rights agreement when the parent or parents of the child 'is or are for example in hospital or in prison'.[318] Local authority foster care does not result in the permanent placement of the child. Kinship care is used for 'permanent placement of the child with a family member or a friend'.[319] Kinship care may be used for instance in respect of 'abused or neglected children who have no prospects of being reunified with their families'.[320]

The local authority foster parent must meet the following requirements:

(i) He or she must be referred by to persons who are interviewed to by the local authority. The persons who recommend the local authority foster parent must supply their 'names and addresses'.[321]

(iii) In so far as it is practicable, more information pertaining to the local authority foster parent and his or her family members must be 'obtained'.[322]

Approval of local authority foster parenting may be 'granted by the local authority in respect of a particularly named child or children'.[323] The requirements to be complied

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314 S 23(3) of the CA-Engl; s 2 of the Fostering Regulation that defines a foster parent as a person with whom the child is or is proposed to be placed.

315 S 4(b) of the Fostering Regulation.

316 S 4(c) of the Fostering Regulation.

317 Ss 8 and 9 of the CA-Engl.

318 Lawson and Raine *The Kinship Care Guide for England*: *A Guide for Grandparents; Family Members and Friends Bringing Up Someone Else's Child* 18.

319 Assim *Understanding Kinship Care of Children in Africa*: *A Family Environment or an Alternative Care Option* (University of the Western Cape 2013) 192.

320 Broad 2007 *Social Work and Social Sciences Review* 60.

321 S 4(a) of the Fostering Regulation.

322 S 4(b) of the Fostering Regulation.

323 S 5 of the Fostering Regulation.

with by a local authority foster parent are intended to 'avoid the child being cared for by a person or persons with a history of child abuse'.[324]

3.7 Conclusion

Ratification of international children's rights instruments such as the CRC has influenced the review of domestic provisions concerned with the child by the jurisdictions of comparison. The prescript of the best interests of the child embedded in article 3(1) of the CRC is now articulated in for example the constitutions of South Africa and India and in statutes such as the Children's Act, CCPA, CA-Engl. and in the FLRA. The provisions of alternative care espoused in article 20 of the CRC has also found its inclusion for instance in the Constitution, in the Children's Act and in the JJCPCA. In South Africa *Mboweni* has indicated the manner in which the right of the child to alternative care may be fulfilled.

There appears to have been a shift away from institutional care to recognition of the importance of family based care settings. It will be shown in the next chapter that the notion of parental responsibilities and rights has resulted in the broadening of the scope of the care of the child by family members, thereby opening the possibility for the child to be cared for by a person or persons that has or have an interest in his care, well-being and development. The states of comparison appear to prefer the placement of the child in a family setting that promotes the child's ethnicity, culture and heritage. The expansion of the scope for the care of the child within the framework of the prescript of the best interests of the child now establishes the possibility for a caregiver of the child who stands to be sentenced or that is incarcerated, to assign the care of the child to persons such as grandparents, aunts, uncles, relatives and the unmarried father of the child.

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[324] Mail Online 2011 https://www.dailymail.co.uk.

CHAPTER 4

Parental Responsibilities and Rights and The Best Interests of the Child

4.1 Introduction

This chapter deals with the development of the parent-child relationship in South Africa, India and England. It provides the jurisdictions' perspectives on guardianship, care and contact.[325] It further indicates the extent to which the prescript of the best interests of the child has influenced the characterisation of the parent-child relationship from parental authority over the child to parental responsibilities and rights. In South Africa the parent-child relationship is described in terms of parental responsibilities and rights, whilst in India and England it is defined in terms of 'parental responsibility'.[326] Even though parental responsibilities and rights discussed in this chapter focus more on care, it is shown that the extended notion of care and also of persons endowed with care, creates possibilities for a court to consider when assigning the care of a child to a person or persons who may care for him during his caregiver's term of incarceration.

It will be argued that the notion of care as developed in international law requires interpretation and that the components of care are discussed. As revealed in the previous chapter, the development of the notion of alternative care is sanctioned by international children's rights instruments such as the CRC. In the event of a person such as the child's primary caregiver is unable to exercise parental responsibilities and rights in respect of the child, a person who has an interest in his care, well-being and development may be assigned parental responsibilities and rights. Imposition of a custodial sentence on the child's caregiver does not terminate the child's right to care,that is trite. This chapter therefore demonstrates that the standard of the best interests of the child directs that the child should be placed in alternative care that perpetuates his upbringing, culture, heritage, language and religion. The concept of

325 In India and England the terms custody and access are used and they refer to care and contact with the child.

326 The terms parental responsibilities and rights will be used in respect of the states of comparison. The concept of parental responsibilities and rights as used in India and England creates an impression that parents have responsibilities only and not rights towards their children. See Abhang 2015 *Journal of Humanities and Social Science* 39.

parental responsibilities and rights discussed in this chapter includes guardianship, care and contact.

4.2 Guardianship

Guardianship has both a narrow wider meaning. According to Cronje and Heaton,[327] 'guardianship in the narrow sense refers to a person's capacity to administer a minor's estate on his behalf and to assist the minor in legal proceedings'[328] and in 'the performance of juristic acts'. In the wider sense it includes 'care (previously custody)'.[329] The *Oxford Advanced Learner's Dictionary* defines a guardian in law as a 'person who is legally responsible for somebody who cannot manage his or her own affairs'.[330] The *Bell's South African Legal Dictionary* explains guardianship as 'the lawful authority of one person over the person and property of another, introduced for purposes of special utility'. It further stipulates that guardianship is 'a legal custody of the person of another who by reason of his tender years or incapacity is unable to protect himself'.[331]

It is commonly accepted in all three jurisdictions under discussion that guardianship has a similar meaning. In South Africa the term guardianship is not specifically defined. In India guardianship is closely linked to custody. However, guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor.[332] In England the notion of guardianship is not encapsulated in the definition of parental responsibilities. Section 3(1) of the CA-Engl. defines parental responsibilities as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'. However, the Children Act Guidelines and Regulations Volume 1 Court Orders, describes the responsibilities of a person vested with parental responsibilities as 'entailing bringing the child up, caring for him and making decisions about him, but that it does not have

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327 Cronje and Heaton *South African Family Law* 277, 299; Schäfer *Child Law in South Africa: Domestic and International Perspectives* 224.

328 *Minister of Police v Mboweni* 2014 6 SA 256 (SCA).

329 The concept of care is discussed in Chapter 3.

330 Cowie *Oxford Advanced Learner's Dictionary* 554.

331 Milne, Cooper and Burne *Bell's South African Legal Dictionary* 341; Visser and Potgieter *Introduction to Family Law* 208; Davel *Introduction to Child Law in South Africa* 33.

332 Abhang 2015 *Journal of Humanities and Social Sciences* 39.

a bearing on the relationship of the parent and the child for other purposes'. These Guidelines and Regulations provide 'guidance to the local authority and their staff about court-related provisions set out in the Act'.[333]

4.2.1 South Africa (Guardianship prior to the Children's Act)

4.2.1.1 Children born within marriage

A child born within marriage was prior to the Children's Act treated 'differently from a child born outside of marriage'.[334] However, a distinction between a child born in marriage and a child born outside of marriage is no longer made.[335] At common law it was accepted that the father of the child had dominant guardianship in respect of the child.[336] However, at the coming into force of the GA guardianship was awarded to the mother of the child as well.[337] Thereafter each of the parents could 'exercise guardianship in respect of the child'[338] without the consent of the other except in the following instances: 'if the child wished to get married';[339] 'if the child was to be removed from the Republic';[340] 'if the child was to be adopted';[341] 'if one of the parents intended to apply for a passport and the child was specified as the child of that parent';[342] or 'if the parents intended selling or encumbering property belonging to the child'.[343]

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333 Principles (ii) and (iii) of the preface of the Children Act Guidance and Regulations Volume 1: Court Orders.

334 Louw *Acquisition of Parental Responsibilities and Rights* 64.

335 Classification of children as being born within marriage and outside of mariage was considered to place a stigma on children. See *Bhe and Others v Khayelitsha Magistrate and Others*; *Shibi v Sithole*, *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC).

336 Spiro *Law of Parent and Child* 47. See also *H v I* 1985 3 SA 237 (C), *Van Rooyen* v *Werner* 1892 9 SC 425 and *Edelstein v Edelstein* 1952 3 SA 1 (A) 10C.

337 S 1(1) of the GuA.

338 Visser and Potgieter *Introduction to Family Law* 207.

339 S 2(a) of the GuA read with S 24(1) of the MA.

340 S 2(c) of the GuA.

341 *S W v F* 1997 (1) SA 796 (O) para 799B. It was stated that 'the right if the child to care includes care by an adoptive parent'. See also *Du Toit v Minister of Welfare and Population Development* (*Lesbian and Gay Equality Project as Amicus Curiae*) 2003 (2) SA 198 (CC) para 18.

342 S 2(d) of the GuA.

343 S 2(e) of the GuA; *V v V* 1998 4 SA 169 (C) para 176 G, it was held that 'guardians take decisions regarding the child's property and person'. See also Davel *Introduction to Child Law in South Africa* 33.

Upon divorce of the parents the court as upper guardian of all minors in its jurisdiction could make an award with regard to the guardianship of the child. The award could be 'single or joint[344] guardianship'.[345] It could also be granted to one parent if agreed to by the other parent.[346] Decisions the parent could make *inter alia* included 'giving consent to the child's marriage or adoption'.[347] Single guardianship was guardianship that 'vested in one parent to the exclusion of the other'. An order of single guardianship could 'deprive the parent of his or her independent and equal powers of guardianship'.[348]

The relevance of guardianship in relation to a caregiver of a child that stands to be sentenced or that is sentenced is that it might not be possible for her to exercise her guardianship obligations. It is argued that the prison environment may make it impossible for the primary caregiver to act as a guardian of the child.[349]

In *R v H*[350] (hereafter referred to as *RH*) the parents of the child were divorced and they followed Jewish and Christian religions respectively. The father suffered from personal disorder and was found unable to act as a guardian. His exposure of the child to different religions than the Jewish religion that the child was accustomed to was found not to be in the best interests of the child. The court concluded that 'it could only deprive a parent of guardianship of the child in exceptional situations in line with the standard of the best interests of the child'.[351]

Sole guardianship was terminated when the parents of the child who 'were living apart once again lived together as husband and wife'[352] and could be 'varied or rescinded'

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344 S 18(4) of the CCA.

345 *Ex Parte Kader* 1993 1 SA 242 (W).

346 *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O).

347 Cronje and Heaton *South African Family Law* 162.

348 Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa with Specific Reference to Guardianship, Care and Contact* 188.

349 S 13(2) and (3) of the CSA regulates inmates right to have contact with the community. In terms of s 13(2) the Department must 'give inmates the opportunity, under such supervision as may be necessary, of communicating with and being visited by at least their spouses or partners, next of kin, chosen religious counsellors and chosen medical practitioners'. In terms of s 13(3) 'in all circumstances, a minimum of one hour must be allowed for visits each month'.

350 2005 6 SA 535 (C). This case was decided on 29 July 2005. The Children's Act came into force on 19 June 2006.

351 *R v H* para 549 E.

352 S 5(2) of the Matrimonial Affairs Act 37 of 1953.

in terms of section 5(6) of the Matrimonial Affairs Act.[353] The living together of the parents of the child was deemed to serve the best interests of the child.[354] It is suggested that the awarding of sole guardianship in particular situations may have served the best interests of the child. It was justified although, as it was 'rarely awarded'.[355] Although the child had the right to guardianship of both parents, it may, however, not be in the interests of the child for guardianship over him to be exercised by a parent who lacked interest in the child. With sole guardianship only one of the parents to the exclusion of the other was vested with guardianship. It was only such parent who could for instance consent to the adoption or marriage of the child. With regard to single guardianship the 'consent of the other parent was indispensable in acts that concerned the child such as marriage or adoption'.[356] In instances that required the consent of the other parent the process of adoption could not be approved without such consent. In the event the other parent unreasonably withheld consent, the court as upper guardian of all minors within its jurisdiction could replace such parent's consent.

Joint guardianship referred to an instance where 'both parents acted as guardians of the child'.[357] The matters in respect of which both parents had to act as joint guardians were similar to the matters where one of the parents could act as a sole guardian. The only difference was that with joint guardianship both parents made decisions pertaining to the child whilst with sole guardianship only one parent made such decisions. Guardianship could also be awarded to a third party who was not the natural parent of the child if doing so was in the best interests of the child.[358]

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353 Hereafter referred to as MAA.

354 Art 7(1) of the CRC among others makes provision for 'the child to be cared for by both his parents' and art 9(1) 'prohibits the separation of the child from his parents unless such separation is determined by law such as the imprisonment of the parent or parents of the child'.

355 Cronje and Heaton *South African Family Law* 162; Visser and Potgieter *Introduction to Family Law* 171; Inspiring Women 2019 https://www.inspiringwomen.co.za. Sole guardianship may be awarded in exceptional circumstances, for example where one parent shows absolutely no interest in the child or in performing his or her duties as a guardian.

356 Cronje and Heaton *South African Family Law* 162.

357 Inspiring Women 2019 https://www.inspiringwomen.co.za.

358 In *P* v *P* 2002 6 SA 105 (SCA) guardianship and custody of a ten year old girl was assigned to the girl's aunt and uncle. The court stated that guardianship and custody should not be seen as the right of the parents but rather a duty that they have towards the child. See also *Dunscombe v Willies* 1982 3 SA 311 (D).

4.2.1.2 Child born out of wedlock

4.2.1.2.1 Unmarried mother

A child born outside of marriage was not regarded in the same manner as a child born in marriage[359] so that only 'the mother was vested with guardianship'.[360] This rule was founded on the maxim that '*een moeder maakt geen bastaard'.*[361] If the mother was herself a minor, 'guardianship of her child was vested in her guardian until such time that she attained the age of twenty-one years'.[362]

4.2.1.2.2 Unmarried father

The father of an extra-marital child had 'no parental authority (as it then was) in respect of the child'.[363] However, he could apply to the 'Supreme Court (as it then was) to acquire guardianship[364] of the child'.[365] In *Ex parte Van Dam*[366] (hereafter referred to as *Van Dam*) an unmarried mother of a child made an application for the unmarried father[367] to be appointed guardian of his two sons respectively born when she was married to the father and after she was divorced from him. If she was married to him the child would be legitimate. The mother continued to have a relationship with the father of the first son after they were divorced and the second son, fathered by the same man as the first, was born. The court noted that an unmarried father of a child was not a natural guardian, but the mother was. It held that a natural guardian could not confer or award guardianship in respect of a child at will and that

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359 Classification of children as being born in marriage or outside of marriage was considered to place a stigma on children. See *Bhe and Others v Khayelitsha Magistrate and Others*, *Shibi v Sithole, South African Human Rights Commission* v President if the Republic of South Africa 2005 1 SA 580 (CC).

360 S 3(2) of the Children's Status Act 82 of 1987, hereafter referred to as the CStA. See also *Engar and Engar v Desai* 1966 (1) SA 621 and Davel and Jordaan *Law of Persons* 108-119.

361 Van Heerden *Boberg's Law of Persons and the Family* 390; Du Bois *Wille's Principles of South African Law* 219 and Louw *Acquisition of Parental Responsibilities and Rights* 32. For the definition of the maxim *een moeder maakt geen bastaard,* see Malete *Custody and Guardianship of Children*: *A Comparative Perspective of the Bafokeng Customary Law and South African Common Law* 76. With reference to Boberg she states that 'it means that as far as the mother is concerned, the law does not regard the child as born outside of marriage, his disabilities relate to the rights *vis-à-vis* his father and third parties'.

362 S 3(1) of the CStA.

363 Visser and Potgieter *Introduction to Family Law* 208.

364 S 2(1) of the NFCBOWA.

365 *Rowan v Faifer* 1953 2 SA 705 (E).

366 1973 2 SA 182 (W).

367 The mother was previously married to the father and a child was born of the marriage.

guardianship was a duty much more than a right. On the basis that the court is the upper guardian of all minors in its jurisdiction and it can 'deprive the natural guardian of a child of guardianship and award it to someone else',[368] it can act similarly in the 'case of a child born out of wedlock'.[369] The court held that the marital status of the parents at the time of the birth of the children made the circumstances special and it awarded guardianship to the father.

In *Fraser v Children's Court, Pretoria North*[370] (hereafter referred to as *Fraser*) the mother of a child born out of wedlock placed the child for adoption without the consent of the father. The father challenged the validity of section 18(4)(2) of the Child Care Act,[371] which allowed the 'parent with sole guardianship (mother) to make decisions impacting on the child without the consent of the other parent'. The court declared section 18(4)(2) of the CCA invalid. The declaration was to the effect that it discriminated against an unmarried father *vis-á-vis* a married father and that a distinction had to be made between a father who had shown no interest in the care of the child and one who demonstrated an interest in the child's welfare.[372] The court decided that though the father of a child born out of wedlock was not a natural guardian of the child he could be conferred with guardianship of the child in certain instances, such as when he applied to the High Court for guardianship. Parliament was then given two years to enact new legislation that gave recognition to the duty of an unmarried father to exercise parental authority in respect of a child born out of wedlock. The Natural Fathers of Children Born Out of Wedlock Act[373] (hereafter referred to as the NFCBOWA) was passed to give such recognition.

4.2.2. South Africa (Guardianship in terms of the Children's Act)

As mentioned previously the Children's Act repealed parental authority over the child and replaced it with parental responsibilities and rights. Section 1 of the Children's Act

368 *Van Dam* para 185D.
369 S 14(4) of the *Child Care Act* 74 of 1983, hereafter referred to as the CCA.
370 (CCT 31/96) 1997 ZACC 1 1997 2 SA 261 1997 2 BCLR 153 (CC).
371 74 of 1983, hereafter referred to as the CCA.
372 S 9(3) of the Constitution.
373 86 of 1997.

does not define guardianship. The concept of parental responsibilities and rights is referred to in section 18. Section 18 reads that:

> (i) A person may have either full or specific parental responsibilities and rights in respect of a child.
> (ii) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right:
> to care for the child;
> - to maintain contact with the child;
> - to act as guardian of the child; and to contribute to the maintenance of the child.

The Children's Act has codified guardianship. It is now a component of parental responsibilities and rights and may be exercised pursuant to section 22 or 24.[374] The Children's Act has also repealed the GA and the NFCBOWA and has abolished the classification of children as born in marriage and outside of marriage. The difference between guardianship in terms of the common law and of the Children's Act is that guardianship in terms of the Children's Act has been widened. Guardianship may be conferred on a person other than the child's parent who has an interest in his care, well-being and development.

The provisions of section 22 are not limited to guardianship but also apply to the care of the child. The requirements of section 22 are important for the exercise of parental responsibilities and rights in respect of the child. Persons other than the natural parents of a child can now have parental responsibilities and rights.[375] Section 22 creates a 'possibility that a person other than the child's parents or legal guardian may have parental responsibilities and rights'.[376] As indicated previously, the category of persons who may acquire parental responsibilities and rights in respect of the child includes, but is not limited to, uncles, nieces, grandparents, neighbours, friends, a person who has an interest in the upbringing, care and development of the child and also extends to the extra-marital father of the child. In terms of section 24 the court may 'award guardianship to a person who has an interest in the care, well-being and development of the child'. Granting of guardianship to a person having an interest in

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374 S 27 makes provision that 'a person may be appointed a guardian of a child upon the death of the parent who is vested with sole guardianship'.

375 Strode 2011 http://www.sajbl.org.za.

376 Boezaart *Child Law in South Africa* 83-84.

the care, well-being and development of the child may take place after the Family Advocate has filed a report recommending that such a person may act as a guardian of the child.

4.2.2.1 Child born within marriage

A married father has joint guardianship with the mother of the child 'if he was married to the mother of the child at the time of the child's conception'[377] or 'at the time of the child's birth'[378] or 'at any time between the conception and the birth of the child'.[379] A child conceived through artificial fertilisation is considered to be 'the child of married parents and not of the party or parties whose gamete or gametes have been used in the fertilisation'.[380] Although a distinction is no longer made between a child born in marriage and a child born outside of marriage, a child conceived through artificial fertilisation is considered a marital child.

4.2.2.2 Child born outside marriage

4.2.2.2.1 Unmarried mother

An unmarried mother has guardianship in respect of a child irrespective of her marital status as long as she is above the age of eighteen years.[381] In the event she is herself a minor guardianship of the child 'vests in her guardian'.[382] Section 22 relates to parental responsibilities and rights which includes guardianship. In terms of section 22 the 'unmarried mother of the child or other person who has parental responsibilities and rights may through a parental responsibilities and rights agreement'[383] confer 'guardianship of the child to a person or persons who have an interest in the care, well-being and development of the child'.[384] In the event the mother is a minor herself 'her guardian may enter into a parental responsibilities and rights agreement on behalf

377 S 20(b)(i) of the Children's Act.
378 S 20(b)(ii) of the Children's Act.
379 S 20(b)(iii) of the Children's Act.
380 S 40(1)(a) of the Children's Act.
381 S 28(3) of the Constitution defines 'a child as a person below the age of eighteen years' and it is in line with art 1 of the CRC and art 2 of the ACRWC.
382 S 19(2) of the Children's Act.
383 The contents of such agreement are discussed under care below.
384 S 22(1)(b) of the Children's Act.

of the child with a person or persons who have an interest in the care, well-being and development of the child'.[385]

4.2.2.2.2 Unmarried father

The position of an unmarried father was 'retained' in the NFCBOWA[386] but has been 'modified' in the Children's Act.[387] An unmarried father may now acquire guardianship in respect of the child 'if he is living with the mother in a permanent life partnership relationship';[388] 'if he consents to be identified as the father of the child';[389] 'if he applies to the High Court[390] to be identified as the father of the child by paying customary law damages';[391] 'if he contributes or has been attempting to contribute to the upbringing of the child in good faith';[392] or 'if he contributes or has attempted to contribute in good faith towards the maintenance of the child for a reasonable period'.[393]

4.2.2.3 Non-parents

Guardianship in respect of the child may also be exercised by a 'person or persons other than the natural parents of the child'.[394] Section 24 of the Children's Act creates the possibility for 'the exercise of guardianship by non-parents of the child'. The section reads that:

> (i) [a]ny person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant.
> (ii) When considering an application contemplated in subsection (i), the court must take into account:

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385 S 19(1) of the Children's Act.

386 Louw 2010 *Potchefstroom Electronic Law Journal* 168–182. The author argues that 'an unmarried father of the child is discriminated against by having no inherent parental responsibilities and rights in respect of the child'.

387 *De Rebus* 2013 http://www.derebus.org.za.

388 S 21(1)(a) of the Children's Act. See also *Volks v Robinson* 2005 (5) BCLR 446 (CC) and *Rippoll-Dausa v Middleton* 2005 3 SA 141 (C). In these cases the elements of a life partnership were described as commitment by the parties.

389 S 21(1)(b)(i) of the Children's Act.

390 Mailula 2005 *Codicillus* 18.

391 S 21(1)(b)(i) of the Children's Act.

392 S 21(1)(b)(ii) of the Children's Act.

393 *M M v A V* (2901/2010) 2011 ZAWCHC 425 s 21(1)(b)(iii) of the Children's Act.

394 *Heystek v Heystek* 2002 2 All SA 401 (T), 2002 2 SA 754 (T); *Allsop v McCann* 2001 2 SA 705 (C).

-the best interests of the child,
-the relationship between the applicant and the child and any other relevant person and the child and any other fact that should, in the opinion of the court, be taken into account.

(iii) In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the [c]hild.

4.2.3 Observations on guardianship

Prior to the coming into force of the Children's Act, courts dealt with issues of guardianship in terms of the CCA. The concept of guardianship was not defined in the CCA and its preamble showed that it was not aimed at addressing guardianship, custody and access. The preamble of the CCA made provision that its objectives were to provide for the establishment of children's courts and the appointment of commissioners of child welfare; for the protection and welfare of certain children; for the adoption of children; for the establishment of certain institutions for the reception of children and for the treatment of children after such reception; for contribution by certain persons towards the maintenance of certain children; and to provide for incidental matters. The GA did not contain stipulations for the guardianship of the child by persons other than his parents. The Children's Act has expanded the notion of guardianship through exercise of parental responsibilities and rights and a person or persons who have an interest in his upbringing, care and development may act as the child's guardian. A distinction is no longer made between a child born in marriage and a child born outside of marriage as such distinction is considered discriminatory[395] on the basis of birth and status.[396]

Guardianship may in terms of the Children's Act also be awarded to a non-parent of the child. Vesting of guardianship of the child in persons other than his parent or parents strengthens the advancement and protection of his right to family or parental care. It caters for instances where the parent or parents are unable to exercise guardianship in respect of the child.[397] In such event where the caregiver is unable to

395 *F v F* 2006 3 SA 42 (SCA) para 8.
396 S 9(4) of the Constitution prohibits discrimination on the basis of among others 'birth or status'.
397 It may have not been feasible for the father to act as a guardian of the child for the simple reason that he was no longer in the Republic.

act as a child's guardian she may conclude a parental responsibilities and rights agreement with a person or persons who have an interest in the care, well-being and development of the child.

The High Court as the upper guardian guards over the exercise of parental responsibilities and rights. Guardianship is 'a duty that parents, non-parents and the court'[398] owe to the child and it applies by operation of law or in terms of an agreement. It is contended that the current provision of guardianship in the Children's Act is in line with its objective of giving effect to the rights of the child as contained in the Constitution and to setting out principles relating to the care and protection of the child.

4.3 Care

4.3.1 Care (née custody) prior to the Children's Act

In terms of the common law custody (sometimes referred to as custody[399] and control) denoted 'a person's capacity to physically have the child with him or her and to control and supervise the child's daily life'.[400] A custodian was defined as 'a person who made most of the day-to-day decisions relating to the child'.[401] Davel[402] defined 'custody as control over the person of a child namely taking responsibility for his physical well-being, where the child lives',[403] the language in which he should be brought up, the school he should attend, whether he should proceed with tertiary education,[404] the person or persons with whom he may associate,[405] whether he may attend specific social events,[406] whether and what medical treatment he should receive as well as overseeing his spiritual development and determining his creed and so forth.[407] In

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398 Cronje and Heaton *South African Family Law* 302, the 'High Court is the upper guardian of all minors and may interfere with parental responsibilities and rights if doing so serves the best interests of the child'.

399 The term custody has been replaced by the concept of care in the Children's Act.

400 Cronje and Heaton *South African Family Law* 163.

401 Skelton *Family Law in South Africa* 242.

402 Davel *Introduction to Child Law in South Africa* 35; *Stassen v Stassen* 1998 2 SA 245 (W).

403 *Vucinovich v Vucinovich* 1944 TPD 145 para 147.

404 *Wolfson v Wolfson* 1962 1 SA 34 (SR).

405 *Gordon v Barnard* 1977 1 SA 877 (C), *H v I* 1985 3 SA 237 (C).

406 *Coetzee v Meintjes* 1976 1 SA 257 (T) para 262 B.

407 *Myers v Leviton* 1949 1 SA 203 (T) custody was defined as comprising of the following: 'the right to personal control of the minor, which personal control was reserved solely for the custodian parent, the personal control is a day-to-day affair'. As a general rule the custodian parent is

Kastan v Kastan[408] (hereafter referred to as *Kastan*) the court emphasised the 'importance of the custodian parent in making day-to-day decisions on aspects relating to the child. Determinations made by the custodian such as the education and training of the child and religious upbringing were considered to be of longer and more permanent duration'.[409]

It is suggested that a person that has an interest in the care and development of a child should enter into a parental responsibilities and rights agreement with the parent or parents of the child. The parental responsibilities and rights agreement may include details concerning: [410]

(i) contact on any special days;
(ii) public holidays or during holiday periods;
(iii) the financial responsibility to be borne by a co-holder of parental responsibilities and rights for any travel costs that may be incurred in giving effect to contact with the child;
(iv) the way in which decisions in respect of a child's life are to be exercised by bearers of parental responsibilities and rights;
(v) the roles and responsibilities of any co-holders of parental rights and responsibilities regarding the child or children's education;
(vi) health care and participation in cultural or religious activities;
(vii) contact with other family members or the extended family;
(viii) guidance of the child or children's behaviour in a manner consistent with the objectives of the Act;
(ix) the accommodation of any special needs that a child may have; and
(x) any obligation to notify the Family Advocate, the High Court, the Children's Court or any co-holder of parental responsibilities and rights of a change of address or contact details of the holder of parental responsibilities and rights or of the child and the procedure to be followed in the event of a material change in conditions relating to the holder of parental responsibilities and rights or to the child.

'entitled to have the child with him or her', in the case of a different opinion on any point of policy, relating to education, religion, holidays, place of residence, *etc* 'the will of the custodian parent prevailed, subject to the right of the other parent to satisfy the court that some other arrangement was in the best interests of the minor, that the rights of the parent who had custody was not be interfered with, nor was such parent deprived of his or her right to custody unless it be shown that he or she was unfit to continue to have custody'.

408 1985 3 SA 235 (C).

409 *Kastan* para 236E.

410 S 31 of the Children's Act**.**

4.3.1.1 Child born within marriage

The right of the parents to custody of a child was not easily interfered with by courts.[411] Upon divorce of the parents, courts were often called upon to determine the parent to have custody of the child and the parent to have access (now contact) with the child. The role of the parent to whom the custody of the child was entrusted was emphasised in cases such as *Mitchell v Mitchell*[412] (hereafter referred to as *Mitchell*), *Vucinovich v Vucinovich*,[413] (hereafter referred to as *Vucinovich*), *Bloem v Vucinovich*[414] (hereafter referred to as *Bloem*) and *Dryer v Lyte-Mason*[415] (hereafter referred to as *Lyte-Mason*).

In *Mitchell* it was found that the sole custodian had the right to regulate the child's life, to have the child with him and to draw the lines along which the child's education should proceed. In *Vucinovich* the court held that the parent to whom the custody of the child was awarded could restrict the persons the child could spend time with. In *Bloem* it was decided that an order of custody granted to one of the parents upon divorce created an assumption that the parent was in a position to guide the behaviour of the child properly. In *Lyte-Mason* it was pointed out that the parent to whom the custody of the child was awarded could control the religious education of the child.

Courts generally preferred the mother of the child when awarding custody of the child upon divorce of the parents. The mother was generally considered a better caretaker especially of a young or handicapped child and a daughter of whatever age. In *Meyers v Leviton*[416] (hereafter referred to as *Meyers*) the maternal preference in the award of the care of the child was stated thus:

> [t]here is no-one who quite takes the place of a child's mother. There is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from his own mother – an important factor in the normal psychological development of a healthy child.[417]

411 *J* v *J* 2008 6 SA 30 (C). Englishman's house is his castle'
412 1904 TS 128.
413 1946 AD 501.
414 1944 TPD 143.
415 1948 2 SA 245 (W).
416 1949 1 SA 203 (T).
417 *Meyers* paras 514J-515B.

The *Meyers* ruling was qualified to some extent in cases such as *Ex parte Critchfield*[418] (hereafter referred to as *Critchfield*). In *Critchfield* it was amongst others emphasised that:

> [g]iven the facts of the dynamics of pregnancy, it would not amount to unfair discrimination if a court considered maternity in making a care award. It would be unconstitutional to place undue (and unfair weight) upon maternity when balancing it with other relevant factors. The court must be astute to remind itself that maternity can never be, willy-nilly, the only consideration of any importance in determining the care of young children.[419]

Maternal preference in awarding custody of the child in terms of the common law continued even when the 1996 Constitution was adopted. However the 1996 case of *Van der Linde v Van der Linde*[420] (hereafter referred to as *Van der Linde*) broke rank with maternal preference in awarding the care of the child. In that case the court held that married mothers of children are not necessarily better able to be good parents on a day-to-day basis. Mothering refers to caring for a child's physical and emotional well-being and that it is not only a component of a mother's being but also that of a father. The court *inter alia* pointed out that:

> [t]he quality of a parent's role is not simply determined by gender. Consequently, a father can be just as good a 'mother' as the child's biological mother and conversely, a mother can be just as good a 'father' as the biological father.[421]

4.3.1.2 Child born out of wedlock

4.3.1.2.1 Unmarried mother

In terms of the common law a child born outside of marriage was not considered in the same manner as a child born 'in marriage' and his custody was vested in the mother alone.[422] In the event the mother of the child was herself a minor, custody of her child vested in her guardian. Vesting the custody of the child in the guardian of the mother was on the ground that the mother herself still required protection by

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418 1999 1 All SA 319 (W); 1999 3 SA 132 (W).

419 *Critchfield* paras 143 B-D.

420 1996 3 SA 509.

421 *Van der Linde* para 585B-H.

422 Davel and Jordaan *Law of Persons* 124. See also *Engar and Engar v Desai* 1966 1 SA 621 (T), *Matthews v Haswari* 1937 WLD 110 and *Dhanabaklum v Subranian* 1943 AD 160.

reason that 'she was a minor'.[423] The age of majority was previously twenty one years and vesting the custody of the child in the child's mother who was a minor herself could not have served the best interests of the child.[424] The fact that a minor was a mother to a child did not make her a major.[425]

4.3.1.2.2 Unmarried father

Prior to the adoption of the Children's Act, an unmarried father of the child did not have custody of the child. Children were categorised as 'born in marriage and born outside of marriage'.[426] The status of the child determined the rights of his parents. The unmarried father could obtain custody of the child by applying to the Supreme Court (as it then was) and could be granted custody of the child if doing so would be 'in the best interests of the child'.[427]

In *Baars v Scott*[428] for example, an unmarried father of a child applied to have custody of his son. At the time of the hearing of this case the transitional constitution was already in force. The court referred the matter to the trial court for consideration of further evidence on whether it would be in the best interests of the child to award custody of the child to his unmarried father. In *Bethal v Bland*[429] custody of an extra-marital child was removed from the child's mother and awarded to the father because he was with the support of his parents in a better position to care for the child. However this change of attitude, the common law position remained that fathers of extra-marital children did not have automatic rights of custody or guardianship of their children.[430]

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423 S 3(1)(a) of the CStA.

424 S 17 of the Children's Act has reduced the age of majority from twenty one years to 'eighteen years' so as to be in line with art 1 of the CRC and art 2 of the ACRWC which respectively define a child as 'a person below the age of eighteen years'.

425 *Weber v Santam Versekeringsmaatskappy* 1983 1 SA 381 (A). The age of puberty for a girl is twelve years. She may, with the consent of her parent or guardian as well as the Minister of Home Affairs, enter into a marriage. S 26 of the MAA. At age fifteen a girl did not require the consent of the Minister of Home Affairs to enter into marriage.

426 Boezaart *Child Law in South* Africa 70.

427 Paizes *The Position of Unmarried Fathers in South Africa*: *An Investigation with Reference to a Case Study* 22.

428 1995 4 ALL SA 392 (AD).

429 1996 2 SA 194 (W).

430 *Van Erk v Holmer* 1992 2 SA 636 (W)(hereafter referred to as *Van Erk*); *B v S* 1995 3 SA 571 (A)(hereafter referred to as *BS*).

4.3.1.3 Non-parents

In terms of the common law the court as upper guardian of all minors in its jurisdiction could grant custody of a child to non-parents if doing so would be in the best interests of the child. In *Babic v Babic*[431] for instance the custody of the children was awarded to the maternal grandmother due to the mother being of ill-health. The father of the children was divorced from the mother and was not considered fit to have the custody of the children. In *Blume v Van Zyl and Farrell*[432] (hereafter referred to as *Blume*) the custody of the child that was initially awarded to the maternal grandmother at the divorce of the mother from the father was 'varied and granted to the mother'.[433]

In *Edwards v Fleming*[434] the court considered and granted an application by the mother of the child for his return from the custody of third parties under an informal adoption agreement. The court concluded that the adoption agreement was not formal and that custody of a child ordinarily vested in the mother unless it was not in the best interests of the child.

4.3.2 Care in the Children's Act

Care replaced custody in the Children's Act and in *CM v NG*[435] it was emphasised that 'provisions on care in the Children's Act goes beyond the common law concept of custody'. In terms of section 1 of the Children's Act care in relation to a child includes, where appropriate:

> (i) within available means, providing the child with:
> - a suitable place to live;[436]
> - living conditions that are conducive to the child's health, well- being and development; and
> - the necessary financial support;
> (ii) safeguarding and promoting the well-being of the child;
> (iii)protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;

431 1946 2 PH B79 (D & CLD).
432 1945 CPD 48.
433 *Blume* para 6.
434 1909 TH 232.
435 Unreported case number 8026/2011 of 26 April 2012.
436 Boezaart *Child Law in South Africa* 65.

> (iv) respecting, protecting, promoting and securing the fulfilment of and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
> (v) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing in a manner appropriate to the child's age, maturity and stage of development;
> (vi) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
> (vii) guiding the behaviour of the child in a humane manner;
> (viii) maintaining a sound relationship with the child;
> (ix) accommodating any special needs that the child may have; and
> (x) generally, ensuring that the best interests of the child are the paramount concern in all matters affecting the child.

The nature of care of the child was for example considered in *M v Minister of Police* (hereafter referred to as *M*).[437] In that case the court provided an elaborate notion of the nature of family or parental care. It held that:

> [i]n my view, ... the content of the right to parental care goes further than just the need for financial support. From the time of the birth of a child there are numerous duties which parents have to perform and where money is not a factor. These would include teaching the child to eat, to put on clothes, to tie shoes, to use ablution facilities, to walk, to talk, to respect, to express appreciation, to do homework and perform house chores, and to be present and supportive of the child during his participation in sport and art activities. The list is endless and no attempt is made here to create a *numerus clausus*. These parental care duties are performed to assist the child in preparing for life's challenges. They could be referred to as parental guidance, advice, assistance, responsibility, or simply parenting or child nurturing.[438]

The *M* decision was taken on appeal in *Mboweni*. The court begun by analysing the right of the child to care as entrenched in section 28(1)(b) of the Constitution. Section 28(1)(b) reads as that:

> [e]very child has the right o family care or parental care, or to appropriate alternative care when removed from the family environment.

In analysing the right of the child to care the court pointed out that 'where a family unit is disrupted by the death of one of the parents or separation of the parents and

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437 2013 5 SA 622 (GNP).
438 *M* para 22.

the child is thereafter cared for by the surviving parent, there is no infringement of the right because it is being fulfilled in a different way.'[439] The court then moved further to discuss the relationship between the right of the child to family or parental care with alternative care. It found that even though the father was married to the mother of the younger girl, there was no evidence on record that suggested he lived with them. The youngest of the daughters was a baby when her father died and she may not have known him. The fact that the mothers of the daughters represented the girls in court proceedings was evidence of the fact that 'the girls continued to receive parental care'.[440]

The court emphasised that the child's right to care is couched in the alternative, not as three separate and distinct rights. Children have the right to family care or parental care or appropriate alternative care. The third of these, which presupposes the absence of the first two, demonstrates that there are alternative ways of ensuring the fulfilment of the right generally embodied in the section. The right is thus a right that the child will be cared for and it can be fulfilled in different ways. The child's right to care at least raises the possibility that the right is satisfied if any one of these alternatives exists as a matter of fact. The language of the section suggests a regression from an ideal of being raised and cared for in a family, bearing in mind that concepts of family in this country differ among different communities. The notion of what constitutes a family is also subject to evolution over time. The evolution may be from 'parental care by one or both of a child's parents, to appropriate alternative care which may mean foster care or care in an appropriate home or institution. The latter may probably be the 'least desirable situation'.[441]

The court continued to find that the fact that section 28(1)(b) expresses the right that it embodies in three alternatives, demands that in the first instance there be a proper analysis of the different elements of the right and in particular, the relationship between the right to family care and the right to parental care. Yacoob J held that 'section 28(1)(b) and (c) must be read together and that the former defines those

439 *Mboweni* para 12.
440 *Mboweni* para 14.
441 *Mboweni* para 10.

responsible for giving care, while the latter lists various aspects of the care entitlement'.[442] His approach to the three alternatives was that:

> [t]hey ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care.[443]

He continued to find that the primary obligation clearly rests on family and parents, but where they are for reasons of poverty or otherwise unable to provide necessary care, the state may be obliged to step in. Where a family unit is disrupted by the death of one parent and the child is thereafter cared for by the surviving parent, it means that 'there was no infringement of the right because the child may be cared for by family members or may be placed in alternative care'.[444]

The court decided that the right of the daughters to parental or family care was not infringed. The mothers to the daughters provided care to the girls and this was evident from the mothers representing the girls in court. The mothers' provision of care to the daughters was one of the ways of 'fulfilling the right to care as enshrined in section 28(1)(b) of the Constitution'.[445]

4.3.2.1 Unmarried father

A change with respect to the position of an extra-marital father under the common law was among others brought about by the Law Commission's recommendations published in December 2002.[446] The Law Commission had initially recommended that an unmarried father of a child should in certain defined circumstances automatically obtain parental rights and responsibilities in respect of his child. The defined circumstances were '(i) where the father has lived with the mother for at least one year after the child's birth; (ii) where the father has cared for the child with the mother's consent for at least a year; (iii) upon confirmation by a court of a parental rights and responsibility agreement; or (iv) where so ordered by the court'.[447] Although the recommendations of the Law Commission

442 *Mboweni* para 11.
443 *Mboweni* para 11.
444 *Mboweni* para 11.
445 *Mboweni* para 14.
446 South African Law Commission *Review of the Child Care Act Project 110* 64.
447 S 33 of the Children's Bill (B70-2003).

were slightly adjusted in the Children's Act, they formed the basis for its adoption. An extra-marital father does not automatically acquire parental responsibilities and rights in respect of the child. The one year period for living with the mother or for caring for the child was dropped. An unmarried father may obtain parental responsibilities and rights without concluding a 'parental responsibilities and rights agreement with the child's mother'.[448]

Section 21 of the Children's Act deals with acquisition of parental responsibilities and rights by an unmarried father of the child. He may obtain parental responsibilities and rights in respect of the child:

> (i) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or if he, regardless of whether he has lived or is living with the mother;
> (ii) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
> (iii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.
> In terms of paragraph 5(1)(a) the then Minister of Justice had to prepare a national policy framework to guide the implementation, enforcement and administration of this Act in order to secure the protection and well-being of children in the Republic.

Paragraph 5(3) reads that:

> The national policy framework binds:
> (i) all organs of state in the national, provincial and local spheres of government;
> (ii) all designated child protection organisations; and
> (iii)any other non-governmental organisations involved in implementing government or government aided programmes and projects concerning children.

In *S v J*[449] (hereafter referred to as *SJ*) for instance an unmarried father of a daughter whose mother died two months after giving birth to her was 'granted the right to reside with the girl'. The daughter had initially lived with her grandmother and step-grandfather. The court held that it was in the best interests of the daughter to reside

448 S 21 of the Children's Act.
449 unreported case number 695/10 of 19 November 2010.

with the father.[450] The girl's extra-marital father was held to have acquired 'parental responsibilities and rights' in respect of the daughter in terms of section 21 of the Children's Act.[451] The girl had settled comfortably in her home with her younger half-brother and had developed a very strong bond with her step-mother and her half-brother. She had also developed a 'warm and loving relationship with her paternal grandparents and her step-mother's parents'.[452]

In *MM v AV*[453] (hereafter referred to as *MM*) the court had to determine whether an extra-marital father had acquired parental responsibilities and rights in terms of section 21 of the Children's Act in respect of his son born in 1999 and whom he cared for jointly with the mother until in 2007. The court decided that 'since the birth of the child the father and the mother had joint care until the father had an affair with another woman'.[454] It ordered the parties to conclude a 'parenting plan to continue caring for the son'.[455] The father qualified to have parental responsibilities and rights by virtue of having contributed to the upbringing of the child.

An order for care of the child can be varied or rescinded irrespective of the person to whom it is granted. The award of care is also not determined on the basis of marital status but in accordance with the standard of the best interests of the child.[456] The current position is that section 39(4) of the Children's Act retains the position in the DA. Section 8(1) and (2) of the DA *inter alia* makes provision for the 'rescission', 'variation' or 'suspension' of an order relating to the care or guardianship of, or contact with, a child. Section 8(1) among others makes provision that 'an order for the care of a child shall not be rescinded, varied or suspended by the court without considering the report and recommendations of the Family Advocate regarding such care'. In terms of section 8(2) the court may 'vary, rescind or suspend an order of care if the parties are domiciled within the jurisdiction of the court that made the order or the applicant

450 *S v J* para 11.
451 *S v J* para 14.
452 *S v J* para 49.
453 (2901/2010) [2011] ZAWCHC 425 (16 November 2011).
454 *MM* para 6.
455 *MM* para 19.
456 In *Grgin v Grgin* 1961 2 SA 84 (W) the court dismissed an application for removal of the minor child from South Africa. It held that the parent to whom the care of the child was awarded was entitled to the protection afforded to him by an agreement which had been made an order of court.

is domiciled within the jurisdiction of the court that made the order and the respondent consents to the jurisdiction of that court'.

4.3.2.2 Interested person

In terms of section 22 of the Children's Act 'a person or persons interested in the care, well-being and development of the child'[457] may obtain 'parental responsibilities and rights' in respect of the child by successfully concluding a parental responsibilities and rights agreement with the mother of the child[458] or with 'a person who has parental responsibilities and rights in respect of the child'. It is a requirement that a parental responsibilities and rights agreement be 'registered with the Family Advocate'[459] or 'made an order of court in a divorce matter or an order of the High Court or Children's Court'.[460]

It is in the best interests of the child to continue to be cared for even when his caregiver is sentenced or imprisoned.[461] According to Mia,[462] 'the exercise of parental responsibilities and rights by people other than the parents of the child resonates with the development of the concept of a family'. In African tradition the responsibility of 'caring for the child' vests with his family.[463]

It will be argued later on that the role of the Family Advocate be extended to be involved in the sentencing of the child's caregiver. Extension of the function of the office of the Family Advocate has already taken place to include matters of 'family violence', 'maintenance'[464] and international child abduction. Imposition of a custodial sentence on the child's primary caregiver may require the caregiver to enter into a

457 S 22(1)(b) of the Children's Act.
458 Ss 22 and 30 of the Children's Act.
459 S 21(4)(a) of the Children's Act. In terms of s 22(5) the Family Advocate must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.
460 S 21(4)(b) of the Children's Act.
461 *L v Lukoto* 2007 3 SA 569 (T).
462 Rammutla *The 'Official' Version of Customary Law Vis-á-Vis the 'Living' Hananwa Family Law* 197. See also Mia Date Unknown http://www.psychology.uct.ac.za/sites/default/files/image_tool/images/117/Nabeelah.Mia.
463 Amos Date Unknown https://www.intechopen.com/books/parenting-in-south-american-and-african-contexts/parenting-and-culture-evidence-from-some-african-communities.
464 Naidu S September 2015 https://www.vukuzenzele.gov.za/.

parental responsibilities and rights agreement with a person or person that will care for the child.

Section 4(1) of the Mediation in Certain Divorce Matters Act[465] makes provision for the 'involvement of the Family Advocate in a matter that concerns guardianship of, care of or contact with the child'. The section reads that the Family Advocate shall:

> (i) after the institution of a divorce action; or
> (ii) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the DA;
> if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.

The Family Advocate is 'the legal representative of children'[466] and may also 'perform' the following functions:[467]

(i) place or register 'parenting plans';[468]
(ii) provide legal information regarding the 'responsibilities and rights of the parents';[469]
(iii) 'facilitate and monitor the agreement reached that will be in the best interest of the child';[470]
(iv) provide the courts with 'reports in litigation matters';
(v) provide recommendations to the court on 'how parents can care for the child under the circumstances';[471]
(vi) 'develop, implement and monitor a program specific to each family and their circumstance';[472] and

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465 37 of 1953.

466 *Fraser v Children's Court*, *Pretoria North* (CCT 31/96) 1997 ZACC 1,1997 2 SA 261(CC),1997 (2) BCLR 153 (CC). See also Department of Justice and Constitutional Development Date Unknown https://www.justice.gov.za.

467 Betterteam 2019 https://www.betterteam.com.

468 Department of Justice and Constitutional Development Date Unknown https://www.justice.gov.za/FMAdv/f_main.htm.

469 Department of Justice and Constitutional Development Date Unknown https://www.justice.gov.za/FMAdv/f_main.htm.

470 Department of Justice and Constitutional Development Date Unknown https://www.justice.gov.za/FMAdv/f_main.htm.

471 Department of Justice and Constitutional Development Date Unknown https://www.justice.gov.za/FMAdv/f_main.htm.

472 Department of Justice and Constitutional Development Date Unknown https://www.justice.gov.za/FMAdv/f_main.htm.

(vii) maintain an 'accurate and complete documentation of services to families'.[473]

The Family Advocate is complemented by social workers or probation officers who are in the employment of the Department of Social Development (hereafter referred to as the DSD) and who are appointed pursuant to the Probation Services Act.[474] Social workers or probation officers work in the fields of 'crime prevention, treatment of offenders, care and treatment of victims of crime and with families and communities'.[475] They conduct an investigation on the actual circumstances of children and care options available for the child whose caregiver stands to be sentenced or is sentenced.

4.3.2 Observations on care

Since 1948 courts gave recognition to the standard of the best interests of the child when awarding custody of the child. At common law it was considered that the best interests of the child would be better served by applying the so-called maternal preference rule. Under the new constitutional dispensation, however, fathers may not be unconstitutionally discriminated against and it is accepted that they may be able to fulfil the role of the mother in the child's life. Under the new dispensation it is accepted that the right of the child to care may be fulfilled in different ways and that it may also be fulfilled by non-parents. Recognition that a mother or a father or a non-parent may care for the child is indicative of new perspectives regarding the protection and promotion of the right of the child to family or parental care. The gender of a parent or interested person is no longer a determining factor for considering the care of the child.

The right of the child to care may become an issue for consideration when the caregiver stands to be jailed for committing an offence. The incarceration of the primary caregiver may make it impossible for her to fulfil her obligations towards the child. The child may have to be cared for by a family member or family members when his caregiver is imprisoned. If there is no person within the family to care for the child

473 Department of Justice and Constitutional Development Date Unknown https://www.justice.gov.za/FMAdv/f_main.htm.

474 116 of 1991.

475 Department of Social Development Western Cape 2018 https://www.westerncape.gov.za.

during the incarceration of the primary caregiver, the child may be cared for by an interested person or may be placed in family alternative care settings. It is submitted that family members or alternative carers, may be satisfying the right of the child to care.

A child is generally someone who is unable to care for himself. For survival and development a child depends on the care provided by his parents, family members, interested persons or the state. The provision of care in the Children's Act is expansive in that it extends beyond the parents of the child. It may include an unmarried biological father who qualifies to be assigned care of the child. Any person assigned with the care of the child has to be aware of the fact that caring for the child goes beyond providing food, clothing and shelter for the child. It also includes medical, educational and related needs the child may have. In *Mboweni*, for instance, the court emphasised 'the care that the mothers offered to the daughters' whose father was killed whilst in police detention.[476] It pointed out that their father's death did not deprive them of family or parental care.

Section 28(1)(b) entrenches a right that may be fulfilled in different ways. In terms of provisions of the Children's Act it may be fulfilled by a parent or parents of the child, family members such as aunts, uncles, nieces, grandparents and also by the extra-marital father. The best interests of the child enjoin the court to provide alternative care to the child who stands to be or is deprived of care. The court may consider involving the Family Advocate in the sentencing process.[477] It is submitted that the sentencing of the child's caregiver is itself a matter that brings about a legal question on parental responsibilities and rights. The court must decide on the care of the child in the event it imposes a custodial sentence on the caregiver. It will be argued below that provision should be made for the Family Advocate to be involved in the sentencing of the child's caregiver.

476 Para 14.
477 Legal Talk SA 2014 https://www.legaltalk.co.za.

4.4 Contact

4.4.1 Contact (née access) prior to the Children's Act

Access was a term that referred to the 'privileges and rights that the non-custodial parent had in respect of the child'.[478] Access included the non-custodial parent visiting or being visited by the child, spending time with the child**,** spending with and enjoying the company of the child. Visser and Potgieter[479] defined access as 'an instance where the non-custodian parent and the children had contact with each other'. The *Oxford Learner's Dictionary* defines access as 'an opportunity or right to approach (somebody)'.[480] Access was subject to reasonability.[481] Reasonable is defined as 'sound', 'moderate', 'fair' or 'logical judgment'.[482]

The right of access was often expressed as the right that the child had in respect of the non-custodial parent and not a right that the non-custodial parent had over the child. In *V v V*[483] for instance the right of the child to access to the non-custodial parent was explained as follows:

> [T]he right that the child has to have access to his parents is complimented by the right of the parents to have access to the child. It is essential that a proper two-way process occurs so that the child may fully benefit from his relationship with each of the parents in the future. Access is therefore not a unilateral exercise of a right by a child, but part of a continuing relationship between the child and the parent.

Access was a right that the child obtained upon divorce of his parents or in terms of section 2(1) of the NFCBOWA.[484] According to Cronje and Heaton,[485] 'access was best determined by the circumstances of each case'. For example, in *Shawzin v Laufer*[486] it was amongst others decided that the 'relationship that the child had with the non-custodian parent',[487] the '*bona fides* of the custodian parent',[488] the 'stability (of the

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478 Cronje and Heaton *South African Family Law* 167.
479 Visser and Potgieter *Introduction to Family Law* 170.
480 LEXICO Date Unknown https://www.lexico.com/definition/access.
481 *Bongers v Bongers* 1965 2 SA 82 (O) and *Marais v Marais* 1960 1 SA 844 (C).
482 Farlex 2004 https://legal-dictionary.thefreedictionary.com/reasonable.
483 1998 4 SA 169 (C), para 189 C-E.
484 Provisions of section 2(1) of the NFCBOWA are discussed below.
485 Cronje and Heaton *South African Family Law* 167.
486 1968 4 SA 657 (A).
487 *Bailey v Bailey* 1979 3 SA 128 (A); *Stock v Stock* 1981 3 SA 1280 (A).
488 *Edge v Murray* 1963 2 SA 603 (W).

living arrangements)', 'preferences of the child and the relationship of the child with new family members' were factors of imperative consideration in determining access.[489] The non-custodian parent could have access to the child or children at reasonable times, places and intervals. The parents could ordinarily agree on how access could be exercised. In the event of the parents not reaching an agreement the court had the power to deny the non-custodial parent access,[490] to order how access could be exercised or to impose conditions or restrictions if doing so would be in the best interests of the child.[491]

The right of access could be exercised even in instances where the child was outside the jurisdiction of the court. In *Schutte v Jacobs* [492] the mother of a four-year-old girl was granted custody of a child whom she intended to take with her to Botswana. She had secured employment in that country. The father of the child challenged the removal of the daughter from the court's jurisdiction since he considered the removal to amount to the child's deprivation of her right to access to him. The court decided that although the removal of the daughter to Botswana could curtail the child's access to the father, arrangements for the child to have access to the father could be made.

4.4.1.1 Forms of access

There were two kinds of access, namely undefined and defined or structured access. Undefined access was access to the child that was determined by the context of a particular case and was subject to reasonable terms[493] and conditions that were imposed by the custodian parent.[494] Defined or structured access usually allowed the non-custodian parent to remove the child for instance on alternate weekends and school holidays.[495] Defined or structured access had five forms namely, 'divided access', 'visiting access', 'staying access', 'non-physical access' and 'deferred

489 *Johnstone v Johnstone* 1941 NPD 279; *Mayer v Mayer* 1974 1PH B47 (C).
490 *Van den Berg v Van den Berg* 1959 4 SA 259 (W).
491 *Van Rooyen v Van Rooyen* 2001 2 All SA 37 (T).
492 2000 2 SA 478 (W). See also *Latouf v Latouf* 2001 2 All SA 377 (T).
493 *Bongers v Bongers* 1965 2 SA 82 (O), the objection to contact must be genuine, reasonable and must not go to the point of whittling down to nullity the right of contact.
494 *Tromp v Tromp* 1956 4 SA 738 (N).
495 *Kok v Clifton* 1955 2 SA 326 (W).

access'.[496] Defined or structured access was the prescription of the court on what constituted reasonable access and how it was to be exercised.

Visiting access was access that 'took place for example on a particular day or days and its frequency and duration and place were indicated with certainty'.[497] Staying access referred to 'overnight stays' by the non-custodian parent, for example, over a weekend or a holiday period.[498] If the custodian parent lived with a spouse or partner it was important that his or her spouse or partner be part of the arrangement for the staying access by the non-custodian parent so as to avoid a conflict between the custodian parent and his or her spouse or partner and the non-custodian parent. Non-physical access was considered appropriate where physical access was deemed undesirable. Deferred access was temporary denial of access or postponed access usually subject to compliance with a certain condition prescribed by court. A condition could for example be that the non-custodian parent 'curb his or her violent behaviour'[499] or abuse of alcohol.[500]

The right of access to the child could also be awarded to persons who were not parents of the child if doing so served the best interests of the child. It could be awarded to a non-parent if, for example, the child had formed a relationship with the non-parent.[501] The custodian parent had the right to control the upbringing of the child and the non-custodian parent had the right to have access to the child with the objective of maintaining his or her relationship with the child. The custodian parent could not impose unreasonable restrictions intended to thwart the non-parent's right to access to the child.[502]

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496 Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa with Specific Reference to Guardianship Care and Contact* 259-262.

497 Schäfer *The Law of Access to Children: A Comparative Analysis of the South African and English Laws* 71-72. It is appropriate for young children whose parents live within visiting access of each other. In *Tromp v Tromp* 1956 4 SA 738 (N), the father of the children was residing too far from the children. He was given access to the children during one long school holiday and one short school holiday each year. In *Wepener v Waren and Van Niekerk* 1948 (1) SA 898 (C) the father was granted access during his annual vacation.

498 *Williers v Serfontein* 1985 2 SA 591 (A).

499 *Visagie v Visagie* 1910 OPD 72; *Potgieter v Potgieter* 1943 OPD 462.

500 *Van Vuuren v Van Vuuren* 1993 1 SA 163 (T).

501 *Marais v Marais* 1960 1 SA 844 (C).

502 *Van den Berg v Van den Berg* 1959 4 SA 259; *Clutton v Clutton* 1929 EDL 174.

4.4.2.1 Unmarried father

Prior to the coming into force of the NFCBOWA that was eventually repealed by the Children's Act, an unmarried father of the child did not have the right of access to his child. This was partly because in terms of the common law children were classified as born in marriage and born outside of marriage. The child's status determined the rights that his father had. In *Van Erk* the court granted the unmarried father of the child access based on the fact that he had an inherent right of access that could only be removed if it was shown that it would not be in the child's best interests. The court went further to hold that the distinction between a child born in marriage and a child born outside of marriage could no longer be maintained. In *BS* the equality clause that was brought about by the transitional constitution was the central issue in determining whether an extra-marital father of the child had inherent rights in respect of the child. The court *inter alia* held *obiter* that:

> [i]f there are sound sociological and policy reasons for affording such fathers an inherent access right, in addition to the right they already have to be granted access where it is in the best interests of their children, then that is a matter that can only be dealt with legislatively.[503]

Courts in cases such as *Fletcher* [504] and *Meyers*[505] had already made pronouncements on the prescript of the best interests of the child. Adoption of the transitional Constitution in 1993 was a signal that South Africa was moving towards aligning domestic laws and policies concerned with children in the footing of international instruments despite not yet being a state party to the CRC that it eventually ratified in 1995. As expected, the NFCBOWA came into operation in 1997 and it among others granted an unmarried father a qualified right of access. Section 2(1) of the NFCBOWA stipulated that 'a court could on application by the natural father of a child born out of wedlock make an order granting the natural father access rights to, or custody, or guardianship of the child on the conditions determined by the court'.

503 *BS* para 583G-H.
504 1948 1 SA 130 (A)
505 Meyers v *Leviton* 1949 1 SA 203 (T).

4.4.2 Contact in terms of the Children's Act

The definition of contact is much 'broader than the common law notion of access'.[506] Contact means 'maintaining a relationship with the child',[507] 'communicating with the child on a regular basis',[508] 'visiting the child'[509] or being 'visited by the child',[510] 'communicating with the child through post',[511] 'telephone or through other electronic devices'.[512] In *Coetsee v Coetsee*[513] it was held that the right of contact can be exercised even when children are abroad. Internet and web camera facilities can be established for purposes of ensuring contact. The right of the child to contact in the Children's Act is now aligned with articles 9(3) and 19(2) respectively of the CRC and the ACRWC. Articles 9(3) and 19(2) make provision for the child to 'maintain personal relations and contact with both parents on a regular basis except if it is contrary to his best interests'.

4.4.2.1 Unmarried father

The Children's Act makes expansive provision for the right of the child to have contact with his unmarried father. In order to acquire the right of contact with the child the extra-marital father must meet the requirements stipulated in section 21[514] of the Children's Act. The child's right to contact with the parent he does not reside with such as his extra-marital father has application irrespective of whether the child 'was born before or after the coming into force of the Children's Act'.[515]

Exercise of the right of contact by an unmarried father may not amount to a disturbance of the mother of the child or her partner. It is submitted that formalisation of the parental responsibilities and rights agreement may serve the best interests of the child by reason that in the event of non-compliance the guilty party may then be

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506 Bekink 2012 *Potchefstroom Electronic Law Journal* 178-212.
507 Ss (1)(a) and 2 of the Children's Act.
508 S (1)(b)(i) of the Children's Act.
509 S (1)(b)(i)(aa) of the Children's Act.
510 S (1)(b)(i)(bb) of the Children's Act.
511 S (1)(b)(ii)(aa) of the Children's Act.
512 S (1)(ii)(bb) of the Children's Act.
513 Unreported case number 17536/2008 TPD of 30 April 2008.
514 S 21 of the Children's Act makes provision for 'acquisition of parental responsibilities and rights by an unmarried father'. These requirements have application in respect of guardianship, care and contact.
515 S 21(4) of the Children's Act.

charged with contempt of court. Contact is 'child-centred' and refusing it unnecessarily may run counter to 'the best interests of the child'.[516] In the event one of the parents is refusing the other the right of contact with the child, he or she may be criminally charged with 'contempt of court'[517] particularly when the divorce court has made a parenting plan an order of court or if the other parent has been granted the right of contact with the child.

4.4.2.2 Interested persons

The right of contact with the child may also be granted to a person other than the unmarried father. Section 23 of the Children's Act states that:

> '(i) [a]ny person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the Children's Court for an order granting to the applicant, on such conditions as the court may deem necessary-
> - contact with the child; or
> - care of the child.
>
> (ii) When considering an application contemplated in subsection (l), the court must take into account-
> - the best interests of the child;
> - the relationship between the applicant and the child and any other relevant person and the child;
> - the degree of commitment that the applicant has shown towards the child;
> - the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
> - any other fact that should, in the opinion of the court, be taken into account.
>
> (iii) If in the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court-
> - must request a Family Advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interests of the child; and

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516 *Lecler v Grossman* 1939 WLD 41; *Van Schoor v Van Schoor* 1976 2 SA 600 (A).

517 S 1(1) of the *General Law Further Amendment Act* 93 of 1963, hereafter referred to as the GLFAA, makes provision that 'any parent having care, whether sole care or not, of his or her minor child in terms of an order of court, who contrary to such order and without reasonable cause refuses the child's other parent contact, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine'. S (1) of the GLFAA was for instance enforced successfully in *Germani v Herf* 1975 4 SA 887 (W), *S v Amas* 1985 2 SACR 735 (N) and in *Laubscher v Laubscher* 2004 4 All SA 95 (T).

- may suspend the first-mentioned application on any conditions it may determine.

(v) The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child'.

4.4.3 Observations on contact

Contact is the right the child has in respect of the parent he does not reside with such as his unmarried father. It may also be conferred to 'a person who has an interest in the care, well-being and development of the child'.[518] The parents of the child, especially when they are divorced, should make use of a parental responsibilities and rights agreement to safeguard the right of the child to contact. An unmarried father of a child who qualifies to have contact with the child in terms of section 21 must be afforded such right through, for example, visits to or by the child. If the child was conceived as a result of rape of the mother by the father, it is argued that the father should not be accorded the right to contact.[519] Granting him the right of contact with the child may militate against the prescript regarding the best interests of the child. Acquisition of the right of contact with the child even by non-parents, strengthens the protection and advancement of the right of the child to family or parental care. Any person or persons who have 'an interest in the well-being of the child' should be allowed to have contact with the child especially when the child has developed a relationship with such person or persons.[520]

It is argued in Chapter 7 below that the extension of parental responsibilities and rights to non-parents creates possibilities for consideration by the sentencing court when sentencing a child's caregiver. The possibility of the caregiver entering into a parental responsibilities and rights agreement with a person interested in obtaining parental responsibilities and rights in regard to the child may in terms of section 22 of the Children's Act be an option to investigate by the sentencing court.

518 S 1 of the Children's Act.

519 The definition of a parent in section 1 of the Children's Act excludes 'a father of a child conceived as a result of the rape of the mother'.

520 S 7(1)(d)(ii) of the Children's Act.

4.5 Customary law as practised in South Africa[521]

The bulk of customary law is 'unwritten'[522] and is passed from 'generation to generation'[523] through 'oral tradition'.[524] Customary law practices vary between 'ethnic groups'.[525] Customary law remains a source of South African law and is subject to 'the Constitution and to any legislation that deals specifically with it'.[526] Variance of practice by the different groups in certain instances results in the position of customary law being more 'speculative than factual'.[527] In traditional law children belong to 'the family and the responsibility of raising them vests in the family'.[528]

4.5.1 Guardianship

4.5.1.1 Definition of guardianship

In his definition of guardianship in customary law Bennett[529] mentions that 'the husband and his family have full parental rights to any children born to the wife during the marriage provided that he or his family has fulfilled his obligation under the bride wealth agreement'. According to Boezaart,[530] guardianship in customary law is a 'right which grants competencies to and imposes duties on the guardian. It is a right that may be accorded even to third parties if doing so would serve the best interests of the child'. Whilst concurring with the definition of customary law guardianship by Bennett,

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521 The customary law position discussed includes the modification by the Children's Act and by the Constitution. See also Jobodwana 2000 *SA Public Law* 115. According to Jobodwana, 'living customary law is a body of customs and traditions that regulates the various kind of relationships between members of the community'.

522 KwaZulu Act on the Code of the Zulu hereafter referred to as the KA and the KNC and are the only customary Codes that still subsist. Statutes on customary law such as the Transkei Constitution Act 15 of 1976, the Transkei Marriages Act 21 of 1978 and the Republic of Venda Constitution Act 9 of 1979 have since been repealed.

523 Rammutal *The 'Official' Version of Customary Law Vis-á-Vis the 'Living' Hananwa Family Law* 73.

524 Olivier *et al Indigenous Law* 215.

525 In Bekker and Coertze *Seymour's Customary Law in Southern Africa* 231, a discussion can be found on the position of children of spinsters and the position of children of wives within the various tribes.

526 S 211(3) of the Constitution.

527 Bekker and Coertze *Seymour's Customary Law in Southern Africa* 231.The writers point out that '[i]t is not clear whether a minor is capable of incurring a debt, nor how far he or his kraal head is liable for it and that some customary views such as the origin of *lobolo* (bride price) is speculative'.

528 Bennett *Human Rights and African Customary Law* 96.

529 Bennett *A Sourcebook of African Customary Law for Southern Africa* 289.

530 Boezaart 2013 https://repository.up.ac.za.

Martin and Mbambo[531] point out that 'there is a risk of subordinating the interests and protection rights of the child to the broader family interests'.

In *Bafokeng* practice, for example, 'guardianship means the protector or someone who cares for another or for others'.[532] In accordance with the principle of patriarchy 'it is only males that can become guardians. Guardianship in respect of a child vests in the 'head of the family or his heir in the event he is deceased'.[533]

4.5.1.2 Contents of guardianship

Customary law does not distinguish guardianship from care. The contents of guardianship relate to 'the authority in regard to the well-being, freedom, control and discipline, care, maintenance and protection of the family members'.[534] A guardian manages the affairs of the dependent child until the child has 'sufficient intellectual maturity and experience'. Affairs of the child that the guardian may manage include 'delicts',[535] 'contracts'[536] and 'marriage'.[537] A guardian has 'unspecified authority over the family which is limited only by a requirement that he acts in the family's interest'.[538] Where a family head acts unreasonably in exercising his guardianship powers the KNC for example makes provision for an 'administrative enquiry' to be held with a view of obtaining a court order that the family head desists or be suspended if he acts foolishly or prodigally.[539] Parental rights in respect of the child are determined by the payment of '*lobolo* (bride wealth)'[540] or the payment of '*isondlo* or *dikotlo* (seduction fine)'.[541]

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531 Mbambo and Martin *An Exploratory Study on the Interplay between African Customary Law and Practices and Children's Protection Rights in South Africa* 11.

532 Malete *Custody and Guardianship of Children*: *A Comparative Perspective of the Bafokeng Customary Law and South African Common Law* 115.

533 Moodley *The Customary Law of Intestate Succession* 19; Rautenbach 2008 *Electronic Journal of Comparative Law* 1-15.

534 Malete *Custody and Guardianship of Children*: *A Comparative Perspective of the Bafokeng Customary Law and South African Common Law* 114.

535 *Pali v Diamond* 1940 NAH 39 (C&O). In this case the head of the family was joined as a defendant in a civil claim arising from a delict committed by his child. The court *inter alia* held the head of the family was joined in the action because he bears responsibility for good conduct of his family.

536 Himonga and Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Perspectives* 187.

537 Olaborede *The Cultural Practice of Child Marriage as a challenge to the Realisation of Human Rights of the Girl-Child*: *A Comparative Study of South Africa and Nigeria* 23.

538 Bennett *Human Rights and African Customary Law* 105.

539 S 30(1) of the KNC and the KA.

540 Bennett *Customary Law in South Africa* 285.

541 They discuss the variance of *isondlo* among the various tribal groups in South Africa.

Payment of '*isondlo'* or '*dikotlo'* confers parental rights to an unmarried father of the child.[542]

4.5.1.2.1 Before marriage of the spinster

Before marriage the spinster and her child are under the guardianship of the spinster's father or the heir of the spinster's father.[543] The guardian of the spinster or his heir remains the guardian of the child of the spinster until such time that the biological father obtains guardianship in respect of the child by paying *isondlo or dikotlo.* In customary family law 'a spinster remains under the guardianship of the family head or his heir'.[544] The spinster's family may retain a child or children born of the spinster and the father may claim the child or children against payment of *isondlo* or *dikotlo*.

4.5.1.2.2 After marriage of the spinster

The natural father of the child may relinquish his right to have guardianship in respect of the child which he can acquire by paying *isondlo* or *dikotlo*. The natural father may be deemed to have relinquished his right to act as a guardian for the child if he showed no interest in acting as a guardian. If the spinster marries a man other than the biological father of the child, she may either 'leave the child with her guardian or with her father's heir' or she may 'take the child with her to the husband she marries'.[545] If the child of the spinster is accepted by the husband through his marriage with the spinster, the child is 'presumed to be the child of the husband'[546] until such time that his 'biological father'[547] attains 'parental rights' over him against the payment of *isondlo* or *dikotlo* to the husband. If the husband 'rejects'[548] the child of the spinster the child continues to be under the 'guardianship of the spinster's father' or of the 'heir of the spinster's father'.

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542 Boezaart *Building Bridges*: *African Customary Family Law and Children's Rights* 397.

543 Under customary law a woman is considered a perpetual minor. Before marriage she is under the guardianship of her father, if her father is deceased, she is under the guardianship of her father's heir and during the subsistence of the marriage she is under the guardianship of her husband.

544 Bennett *Customary Law in South Africa* 285.

545 All children born of a wife in a customary marriage are regarded 'as belonging to the husband', even though they may be offspring of adulterous intercourse.

546 The subsequent marriage of the husband to the spinster legitimise the children of the spinster.

547 *Ngubentombi v Mnene* 4 NAC 49, *Tsosa v Mbulali* 4 NAC 45 and *Luphondo v Bonja* 4 NAC 51.

548 The husband marries the spinster without her children.

If the biological father of the child is deceased, his family or heir may acquire parental rights in respect of the child by paying *isondlo* or *dikotlo* to the husband. If a married woman commits adultery with a man and she bears a child out of the adulterous relationship, her husband has guardianship over the child until the child is claimed by his adulterous biological father in accordance with customary law. If the father of an adulterous child claims the child and pays any fine imposed by the husband, he assumes 'guardianship' over the child.[549]

4.5.1.3 Observations on guardianship

It is clear that in customary law the mother of the child never had guardianship in respect of the child. Guardianship in respect of the child is either with her father or her father's heir or with her husband. The mother of the child is herself under the guardianship of her father or of her father's heir. It is submitted that treating the mother of the child as a minor is discriminatory in terms of section 9 of the Constitution.[550] Bennett[551] correctly points out that 'aspects of customary law may now be challenged on the basis of gender discrimination'.[552] Section 9(2) stipulates that 'equality includes the full and equal enjoyment of all rights and freedoms'. Section 9(4) makes provision that 'no person may unfairly be discriminated against directly or indirectly on the ground *inter alia* of gender or marital status'. It is argued that as an adult the mother of the child should be enabled to exercise guardianship in respect of the child. If she is a minor it is understandable that her father should have guardianship over her and her child.

In customary law the child belongs to the family and not to his parents *per se*. Guardianship over the child is vested in the family head or in his heir. The family head or his heir must always act in the best interests of the family. By reason that the child

549 *Msotwana v Sibeko* 1942 NAC (T & N) 17; *Nkosi v Moshoen* 1954 NAC (C) 149. The claim by natural fathers for parental rights over their children was held to constitute trafficking in children because the fathers have not married the mothers.

550 See also section 27(2) of KNC. S 27(2) had since introduced an amendment to this rule. It provides that 'an unmarried mother is the guardian of the child born outside of marriage offspring'. If she is herself a minor guardianship of her minor offspring vests in 'her father' or' heir' until she attains majority.

551 Bennett *Customary Law in South Africa* 2nd ed 313.

552 The argument for non-discrimination of women is supported by arts 16(1)(d) and (f) of International Convention for the Elimination of All Form of Discrimination Against Women (1969), Art 18(1) of the CRC and section 1(1) of the GA.

is part of the family 'his best interests are catered for within the family unit'.[553] The KNC, for example, makes provision for 'removal of the family head or his heir if he is unable to act in the best interests of the family'.[554]

4.5.2 Customary Law: Care

4.5.2.1 Definition of care

As explained above, according to general customary law practice, care cannot be separated from guardianship. Care is a component of guardianship and is always exercised by the husband to whom the child belongs with the exception that 'the child may be left in the care of someone else not being the member of its family group', for instance in the absence of the family member or members that 'ordinarily care' for him.[555]

4.5.2.2 Contents of care

Care of the child is dependent on the payment of *lobolo* or *isondlo* or *dikotlo*. If *lobolo* has been paid in full the mother cares for the child whilst the child is 'under the authority of the family head'.[556] The husband or head of the kraal and his family have full parental rights over the children. If the amount of *lobolo* paid does not compensate for the number of children born of the marriage, the family of the wife may 'retain' one or more of the children for some years and allow the natural father to resume some rights over the children against 'payment of livestock'.[557] Among the majority of native communities if less than a quarter of the *lobolo* has been paid and the marriage is dissolved, the husband or head of the kraal 'stands to lose any claim to the children'. If the amount of *lobolo* is between a half or more, the husband or kraal's head rights over the children are 'secured'.[558]

A very young child living with his mother in her father's kraal is normally left in the care of his mother until he is old enough to be returned to the husband or head of the

553 Bennett *Human Rights and African Customary Law* 107.
554 S 30(1) of the KNC and the KA.
555 Bennett *Human Rights and African Customary Law* 105.
556 Bennett *Human Rights and African Customary Law* 105.
557 Holleman *Issues in African Law* 296, 306 and 314.
558 Ngema 2013 *Potchefstroom Electronic Law Journal* 408.

kraal. In the event the mother of the child takes the child with her to her father's kraal without the consent of the husband, the latter may institute an action to reclaim care of the child or to reclaim the *lobolo* paid for the mother. The action by the husband or head of the kraal to reclaim the child is made against the guardian[559] of the mother. The mother is not always joined in the action.[560]

The general rule of customary law is that a husband has an unqualified right of care in respect of the child of the customary marriage.[561] The care of the child in customary law 'takes place within the family unit'.[562] The child in respect of whom the biological father has not acquired parental rights may accompany his mother when the latter remarries subject to the second husband paying *lobolo* for the wife. The child who accompanies his mother becomes 'part of the family that his mother marries' in terms of the principle of '*oe gapa le namane'. Oe gapa le namane* is a form of traditional 'adoption of a child not fathered by the husband'.[563] It has the same consequences as adoption in western law and relieves the mother's father from maintaining the child.[564]

4.5.2.3 Observations on care

Despite the customary law position on care being 'family-centred' the family head or his heir must ensure that 'the best interests of the child' are taken care of within the family set-up.[565] The family head or his heir may be relieved of discharging family head duties if he acts in a manner that does not advance the best interests of the family including that of the child who is part of the family unit. The customary law position ensures that the child is cared for irrespective of whether his mother is married. In the

559 During the subsistence of the marriage women are under perpetual tutelage of heads of the family or their male heirs (if heads of families are deceased).

560 *Ngakane v Maalaphi* 1955 NAC (C) 123; *Mpete v Boikanyo* 1962 NAC (C) 3.

561 In Venda practice guardians of ex-wives are entitled to have care of the children of the marriage of their wards provided they restore to the husbands the full *lobolo* and any increment that may be applicable.

562 Simons *African Women*: *Their Legal Status in South Africa* 211.

563 Mokotong 2015 *Journal of Contemporary Roman Dutch Law* 344-355.

564 In *Motsepe v Khoza* Case No. 15078/12 South Gauteng High Court. In this case the concept of '*oe gapa le namane'* was confirmed. The respondent was ordered to maintain the daughter he did not father but acknowledged as his when he married the mother.

565 Martin and Mbambo *An Exploratory Study on the Interplay Between African Customary Law* 34. The care of the child by family members is in the interests of the child. The child, subject to 'assistance by the head of the kraal or his heir, should however be allowed to exercise his rights such as entering into contracts that confer a benefit on him and to acquire property in his own name. The child may use the property when he establishes his own family in future'.

event the child's mother is married the husband may opt to adopt the child in terms of *oe gapa le namane*. Once the husband has adopted the child in terms of *oe gapa le namane* he is responsible for providing care to the child. If the husband of the wife does not adopt the child through *oe gapa le namane*, the child will remain in the care of his mother's family head or heir. The court may have to consider whether the child's best interests will be served if he remains under the care of his mother's family head or heir.

Some provisions of customary law are already 'recognised' in the Children's Act.[566] Section 18 does not make it a requirement that 'parental responsibilities and rights in respect of the child must be assigned through conclusion of a parental responsibilities and rights agreement'. In customary law the responsibility of caring for the child vests with his family. Even though section 18 does not make it a requirement that parental responsibilities and rights be assigned through entering into a parental and responsibilities agreement, it is suggested that section 18 should be amended to make provision that a person vested with parental responsibilities and rights may assign such parental responsibilities and rights to another by entering into a parental responsibilities and rights agreement. A written parental and responsibilities and rights agreement shall serve as a point of reference in the event of a dispute regarding parental responsibilities and rights.

4.5.3 Customary Law: Contact

4.5.3.1 Definition of contact

Recognition of an unmarried father's right to contact with his child varies and is to a substantial extent 'determined by payment of *isondlo* or *dikotlo*'.[567] Payment of *isondlo* or *dikotlo* may either amount to transfer of parental rights to the father or it may be treated as a species of maintenance. In *Stamper* v *Nqolobe*[568] on the one hand, the Appeal Court (as it then was) held that it had a discretion whether to apply customary law or common law, although it remarked *obiter* that the natural father had no duty

566 Ss 1(4) and 47(2) recognise the *Recognition of Customary Marriages Act* 120 of 1998. Ss 21(1)(b) and 236(4) acknowledge that 'an unmarried father of the child may obtain parental responsibilities and rights by paying customary damages'.

567 Bennett *Customary Law in South Africa* 2nd ed 317.

568 1978 AC 147 (S).

of maintaining the child until he paid *isondlo* or *dikotlo.*[569] It is argued that irrespective of whether customary law was to be applied in that case, it was not in the best interests of the child not to be supported by his father. Such posture discriminated against the child on the basis of marital status. In *Gujulwa v Bacela*[570] on the other hand, the court decided that payment of *isondlo* or *dikotlo* did not put an end to the natural father's common law duties. An unmarried father of the child can obtain parental rights in respect of the child 'if he pays a customary fine to the guardian of the mother or his heir or to the husband of the mother'.[571]

4.5.3.2 Contents of contact

The right of contact in customary law is recognised through the payment of *isondlo* or *dikotlo*. Although not specifically documented in traditional law, it is submitted that the right to contact includes visiting the child or being visited by the child and maintaining a sound relationship with the child on a regular basis.[572] By paying *isondlo* or *dikotlo* the unmarried father acquires parental rights over the child. The natural father of the child forfeits parental authority when he fails or neglects to pay *isondlo* or *dikotlo*. The person who raises the child, usually the mother's father or his heir, becomes entitled to the *lobolo* paid in respect of a girl child. In customary law when a girl marries, the *lobolo* paid is received by her father or father's heir. [573] In the event the husband has adopted the child he did not father through *oe gapa le namane* he is entitled to the *lobolo* of the girl when she gets married.

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569 1978 AC 147 (S).

570 1982 AC 168 (S).

571 Malete *Custody and Guardianship of Children: A Comparative Perspective of the Bafokeng Customary Law and South African Common Law* 165.

572 *Hlophe v Mahlalela* 1998 1 SA 449 (TPD). Although this case does not directly deal with contact with the child, it has relevance in that the court decided the care of the child in terms of the standard of the best interests of the child. The natural father of the children had not concluded paying *lobolo* to the family of the mother of the children. The mother of the children died prior to *lobolo* being paid in full. The natural father brought an application for the care of the minor children. The application was opposed by the maternal grandfather who contended that the natural father was not entitled to the care of the children because he did not pay *lobolo* in full. Applying the prescript of the best interests of the child, Van der Heever AJ (as he then was) held that 'the customary rule of care of children against full payment of *lobolo* has since been excluded by the common law. Care of children is now determined in terms of standard of the best interests of the child'.

573 Koyana *Customary Law in a Changing Society* 78.

4.5.3.3 Observations on contact

The right of contact in customary law is determined by the payment of *isondlo* or *dikotlo*. The natural father of the child does not have an inherent right of contact with the child and may obtain such right when he has paid *isondlo* or *dikotlo*. By paying *isondlo* or *dikotlo* the natural father of the child becomes entitled to the *lobolo* paid in respect of a girl child when she marries. The practice of *oe gapa le namane* also ensures that the child is properly adopted and that the child becomes the child of the husband**.** Retention of a child or children of the spinster by her family against payment of *isondlo* or *dikotlo* may have the potential of separating siblings. It is submitted that sibling separation may not be in the best interests of the child or children.

4.6 India

4.6.1 Guardianship

It would appear that in Indian law guardianship and custody are not completely separate concepts or they have an overlap. Guardianship refers to a bundle of 'rights and powers that an adult has in relation to the person and property of a minor'.[574] Although guardianship is neither defined by the GWA nor the HMGA it means 'taking all legal decisions on behalf of the person and the property of the child'.[575] Decisions that involve the child *inter alia* include 'giving consent to the adoption or marriage of the child, assisting the child to enter into contracts and representing the child in legal proceedings'.[576]

In Indian law the terms natural and legal guardian are synonymous. This position is confirmed by Abhang[577] who states out that '[a]nother term used by the law is natural guardian who is the person legally presumed to be the guardian of a minor and who is presumed to be authorised to take all decisions on behalf of the minor'. The HMGA and the GWA use the term natural guardian to refer to a legal guardian. In terms of

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574 Law Commission of India Report No 257 *Reforms in Guardianship and Custody Laws in India* (Government of India May 2015) 12; Abhang 2015 *Journal of Humanities and Social Science* 39-58.

575 The National Trust Date Unknown http://thenationaltrust.gov.in/content/innerpage/guardianship.php. See also ss 4(2) and 6 respectively of the GWA and the HMGA.

576 *Chinna Venkata Reddi* v *Lakshamamma* 1964 1 SCJ 45.

577 Abhang 2015 *Journal of Humanities and Social Sciences* 39.

section 4(b) of the HMGA a guardian means 'a person having the care of the person of a minor or of his property or of both his person and property' and includes:

> a natural guardian; (ii) a guardian appointed by the will of the minor's father or mother; (iii) a guardian appointed or declared by a court; and (iv) a person empowered to act as such by or under any enactment relating to any Court of wards.

Section 4(2) of the GWA defines a guardian as a 'minor for whose person or property or both there is a guardian'. Guardianship is governed by the GWA and the HMGA. The GWA is an Act regulating guardianship over all children within the territory of India 'irrespective of their religion'.[578] Section 17(1) of the GWA, however, 'permits the court to have regard to the personal religious law of the child in dealing with guardianship'.[579] Religious laws are not limited to Hindu law but include Islamic, Parsi and Christian laws. Personal religious laws give recognition to the 'diverse religious and cultural practices' that influence national law.[580] The GWA is a 'colonial' English law[581] enactment that was intended to continue with the legacy of the common law of the supremacy of the paternal right in guardianship over children. The HMGA was enacted by the Indian legislature after India attained 'independence' from England.[582]

The provision for consideration of personal religious laws applicable to the child is noteworthy for the court hearing the matter and Abhang[583] contends that 'the court must be guided by the standard of the best interests of the child in determining the personal religious law of the child'. Article 30 of the CRC stipulates that 'in states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his group, to enjoy and to practise his own religion'. A parent or legal guardian or a person who has an interest in the welfare of

578 Statement of Object of the GWA.

579 Bajpai 2005 *Family Law Quarterly* 441-457. India is a multi-religious and a multicultural country. The different religious groups in India include the Hindus, Muslims, Christians and Parsis. Hindus constitute the majority of the population (80%), followed by Muslims (13.4%), Christians (2.3%) and others (3.8%).

580 Web India 123 2017 https://www.webindia123.com/law/family_law/personal_ laws.htm

581 Quora Date Unknown https://www.quora.com.

582 Anon Date Unknown http://www.ggdc.net.

583 Abhang 2015 *Journal of Humanities and Social Sciences* 39.

the child may assert the right of the child to his religion by 'invoking the personal religious law of the child in every matter that concerns him'.[584]

In the GWA, however, the interests of the child are 'acquiescent to those of his guardians'[585] because it is believed that guardians are in a better position to protect and advance the interests of children. It is submitted that the provision of the GWA that the interests of the child are subservient to those of his guardian is contrary to the prescript of the best interests of the child. Instances may arise where the best interests of the child must prevail above that of his guardian and the aforementioned stipulation may hinder the guardian from acting in the best interests of the child. However, in the HMGA the 'best interests of the child are of paramount consideration'.[586] The current judicial approach on guardianship is founded on the prescript of 'the best interests of the child'.[587] In terms of the GWA the court is authorised to appoint a 'guardian' for the person or property of the child or for both.[588] In appointing a 'guardian'[589] the court has to 'consider the needs of the child and what in the situation of the case appears to be in the best interests of the minor. The age, sex and religion of the minor, the character and capacity of the proposed guardian and how closely related is the proposed guardian to the minor child, the wishes if any, of the deceased parents'[590] and any existing or previous relation of the proposed guardian with the person or property of the minor child. If the minor child is old enough to form an intelligent preference, the court may consider that preference. The court shall 'not appoint or declare any person to be a guardian against his will'.[591] Section 25 of the GWA is concerned with guardianship over the child. Section 25(1) empowers the court to 'issue an order' for the return of the ward to the guardian if the ward

584 Abhang 2015 *Journal of Humanities and Social Sciences* 45.
585 S 17 of the GWA.
586 S 13 of the HMGA.
587 *Mausami Ganguli v Jayant Ganguli* 2008 7 SCC 673.
588 S 7 of the GWA.
589 In terms of s 19 of the GWA the court has the power 'not to appoint a guardian'. It may not appoint a guardian 'if the father or the mother of the child is alive or if the person proposed is unfit to be so appointed'. S 2 of the Personal Laws (Amendment) Act of 2010 now makes provision that 'the mother may be appointed a guardian of the minor'.
590 S 17(1) of the GWA.
591 S 17(1) of the GWA.

leaves or is removed from the custody of the guardian. The court can make such an order if doing so serves 'the welfare of the child'.

Indian laws on guardianship prefer the father as the natural guardian of the child to the exclusion of the mother. The *karta* (family head) was responsible for the overall control of all dependents and management of their property and therefore 'specific legal rules dealing with guardianship and custody were not thought to be necessary'.[592] The Law Commission of India has since 2015 considered the preference of the father as the natural guardian of the child. Its opinion is that there is no rational basis for according the mother an inferior position in an order of preference *vis-à-vis* the father. The preference of the father as a guardian of the child proposition may indeed be open to challenges. In the first place, it discloses an anti-feminine bias. Exclusion of the mother from being granted guardianship of her child reveals 'age-old distrust towards women and an inclination of superiority of men and of inferiority of women'.[593] The posture of the Commission is that 'there is no warrant for persisting with this ancient prejudice'. It is not only discriminatory, but it also violates the 'spirit of the Constitution'. The Commission recommends an amendment of section 6(a) of the GWA to 'constitute both the father and the mother as natural guardians of the child with equal rights'.[594]

It is clear that in Indian law the notion of custody and guardianship is not cast in stone. There is a move away from traditional approaches to a more flexible approach to serve the best interest of the child.

4.6.1.1 Guardianship in terms of Hindu law

Hindu law is discussed separately by reason that in terms of section 17(1) of the GWA the court may 'in certain circumstances have regard to the personal religious law of the child in dealing with guardianship'.[595] Personal religious laws give recognition to the 'diverse religious and cultural practices' that influence national law.[596] In Hindu law

592 Diwan *Law of Adoption, Minority, Guardianship and Custody* xv.
593 Law Commission of India *257 Report on Reforms of Guardianship and Custody Laws in India* para 2.3.5.
594 Law Commission of India *133 Report* August 1989 para 4.1.
595 Bajpai 2005 *Family Law Quarterly* 441-457.
596 Web India 123 2017 https://www.webindia123.com/law/family_law/personal_ laws.htm

the *karta* is responsible for the overall control of the wife and the children and for the management of their property. The *karta* continues to be a preferred guardian and the mother may act as a guardian of the child in exceptional situations such as when the *karta* is of ill-health or has travelled abroad.

Section 6(a) of the HMGA makes provision that:

> [i]n case of a minor boy or unmarried minor girl, the natural guardian is the father and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

Section 6(a)(1) had since been challenged as being contrary to article 14 (equality of the sexes) of the Constitution. In *Gita Hariharan v Reserve Bank of India*[597] the Supreme Court was specifically requested to interpret the words 'after him' and to determine whether 'after him' meant the mother of the child could act as the child's guardian in the absence of the father or upon the death of the child's father. Applying the paramountcy of the best interests of the child and the constitutional mandate of equality between men and women, the court decided that the absence or death of the child's father entitled the mother to be appointed as the guardian of the child. The 'absence or death of the child's father amounts to an exception that entitles the mother to act as the child's guardian'.[598]

In *Essakkayal Nadder v Sreedharan Babu*[599] the deceased mother of the children was divorced from the father and the children were no longer residing with their father. The children were looked after by their maternal aunt. The court held that even though the father was no longer staying with the children he had not ceased to be a Hindu.[600] The court reinforced the Hindu notion that the father is the preferred guardian of the minor. It decided that there was therefore no person who could replace him as the guardian of the child. The reasoning of the court was inconsistent with the prescript of the 'best interests of the child' as entrenched in section 13 of the HMGA. It failed to

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597 1999 2 SCC 228.

598 S 13 of the HGMA.

599 AIR 1992 KER 200.

600 S 6(a) of the HMGA makes provision that 'the father may be stripped of his guardianship over the child if he ceases to be a Hindu'.

take into account that the father was divorced from the mother and that since the death of the mother the children were with their maternal aunt. In *Jajabhai v Pathankhan*[601] the mother was granted guardianship of the child on the basis that she was divorced from the father.

4.6.2 Custody

It would appear that in Indian law custody is often referred to within the context of guardianship or that there is an overlap between guardianship and custody. Custody is a narrow concept that refers to the day-to-day care and control of the minor and is 'not defined in any Indian family law, whether secular or religious'.[602] In *Mohan Kumar Rayana v Komal Mohan Rayana*[603] (hereafter referred to as *Mohan Kumar*), the court was approached to determine the custody of a daughter who was forcibly removed from the mother by the father. The father was ordered to return the girl to the mother as it was in the best interests of the child to be in the custody of the mother. The court held that the father had no authority to retain a child whom he abducted from the mother. It further held that it was not in the best interests of the child to reside with the father.

In *Rosy Jacobs v Jacobs Chakramakkal*[604] (hereafter referred to as *Jacobs Chakramakkal*), the husband and the wife had two sons and a daughter prior to being divorced. Initially the father was awarded custody of the older son and the mother was awarded that of the girl and the younger son. The father applied for the custody of the daughter and son. The court declined to make an award of custody in respect of the daughter because she was already a major. The application then pertained to the younger son only. The court decided that in custody disputes the best interests of the child and not those of his parents are the determining factor. Even though the

601 AIR 1971 SC 315 2 SCR 1 1970 2 SCC 717.

602 Law Commission of India *Reforms in Guardianship and Custody Laws in India Report No 257* (May 2015) 12; Government of India Date Unknown https://archive.india.gov.in/citizen /lawnorder.php?id=16; The Brown Journal of World Affairs Date Unknown http://dl4a.org/uploads/pdf/BJWA_Gender Inequality ReligiousPersonalLaws_India.pdf and Shodhganga 2005 http://shodhganga.inflibnet.ac.in/bitstream/10603/52367/6/06 _chapter%202.pdf.

603 2009 3 Bom CR308, 2009 111 MhLj 868.

604 AIR 1973 SC 2090; 1973 3 SCR 918;1973 1 SCC 840; Sardana Date Unknown https://www.legalbites.in/law-notes-hindu-law-guardianship/.

parents have divorced parental care is the duty they owe to the children. Both parents have to cooperate and work harmoniously for their children who should feel proud of their parents and of their home, parents should bear in mind that their children have a right to expect such a 'home' from them.[605]

In *N Palanisami v A Palaniswamy*[606] (hereafter referred to as *Palanisami*), the mother of the child died soon after the child's birth and the custody of the child was vested in the child's maternal grandfather because the child's mother was not married to the father. The father of the child applied for custody of the child. The court refused to grant his application because it was not in the child's best interests. The father was found to have demonstrated no interest in the child. He furthermore has not established any relations with the child. In *Asha Wadhwa Alias Indu v Prithvi Raj Wadhwa*[607] the mother approached the court for temporary custody of a one-year-old son who was in the custody of his father. The son was in the custody of his father because he was born at the time when his mother was ill. The court declined to make a determination on the basis that the mother was due to apply for custody of the child.

4.6.3 Islamic law as practised in India

Islamic law does not draw a distinction between guardianship and custody. The terms guardianship and custody are discussed together. Guardianship and custody mean 'securing the education of the child, guiding the religion of the child and providing the child with a proper upbringing'.[608] It also includes 'looking after the welfare of the minor including his property and protecting, supervising and supporting him'.[609] Islamic law makes provision for two forms of guardianship, the '*wilayah* and *hizanat*'[610] and distinguishes guardianship in respect of a son and a daughter. In terms of the *wilayah* guardianship is exercised over the property, education and marriage of the minor. In line with the *hizanat* guardianship includes custody and refers to the rearing of the minor. The mother is not vested with guardianship in respect of the child as the

605 Jain 2015 https://www.lawctopus.com.
606 AIR 1998 Md 264,1998 3 CTC 158.
607 9 1973 DLT 496, 1974 RLR 121.
608 Agrawal and Vishista Date Unknown www.legalserviceindia.com/article/l35-Guardianship.html.
609 Agrawal and Agrawal Date Unknown http://www.legalserviceindia.com/article/l34-Custody-Laws.html.
610 Shokeen Date Unknown https://edoc.site/law-of-guardianship-muslim-law--pdf-free.html.

father or paternal grandfather has guardianship of the child. The mother retains custody of a son until he reaches the age of 'seven years' and of the daughter up to when she reaches the stage of 'puberty'.[611]

In *Suharabi* v *D. Mohammed*[612] (hereafter referred to as *Suharabi)*, the father of the child objected to the mother having guardianship of their eighteen months old daughter on the ground that she was poor. The Kerala High Court held that the mother was authorised to have the custody of the child of that age by Islamic law. It is submitted that the best interests of the child are not to be decided on the basis of parent's economic status. It would appear that in that case the mother was granted custody because Islamic law allowed her to. In *Md. Jameel Ahmed Ansari* v *Ishrath Sajeeda*[613] (hereafter referred to as *Md. Jameel Ahmed*) the Andrhra Pradesh High Court awarded the custody of an eleven-year old boy to the father on the basis that the mother of the child was under Islamic law allowed to have custody of the boy until the age of seven years only.

In 1986 in *Mumtaz Begum* v *Mubarak Hussain*[614] (hereafter referred to as *Mumtaz Begum*) the Madhya Pradesh High Court interpreted Islamic law to allow the right of custody to the mother. The court held that under Islamic law the mother has the right to custody of the minor child. It went further to mention that the child's mother was residing near the father's home. She did not leave the marital home voluntarily but was divorced by the child's father. The father was thus ordered to restore the custody of the child to the mother. In *Md. Jameel Ahmed* and *Mumtaz Begum* the court also gave recognition to the standard of the best interests of the child. Even though the court had to invoke the prescripts of personal religious law, it was able to confirm that the custody of the child is granted in line with the 'best interests of the child and not according to social status or gender' of the parent.[615]

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611 Diwan *Law of Adoption, Minority, Guardianship and Custody* xvi. The author states that 'Islamic law is the earliest legal system to provide for a clear distinction between guardianship and care and to explicitly recognise the right of the mother to care'. See also Murtaza 2012 http://sanamurtaza.blogspot.com/2012/11/guardianship-under-muslim-law.html.

612 AIR 1988 Ker 36.

613 AIR 1983 AP 106.

614 AIR 1986 MP 221.

615 *KM Vinaya v B Srinivas* (MFA No. 1729/ 2011). Judgment was delivered on 13 September 2013.

In *Nil Ratan Kundu v Abhijit Kundu*[616] (hereafter referred to as *Nil Ratan Kundu*), the court found that the welfare of a child is not to be measured merely by money or physical comfort but by the tie of affection as well. The court made an order that the guardianship of the child would vest in the mother since the father was a busy medical practitioner. The parties were ordered to comply with the parenting plan agreed upon. The plan addressed major areas of decision-making, including the child's education, health care, religious upbringing, procedures for resolving disputes between the parties with respect to child-raising decisions and duties and the periods of time during which each party would have the child 'reside or visit with him or her'.[617] Parenting plans are recognised in Indian law and are regulated by a Child Access and Custody Guidelines. Parenting plans among others, deal with custody and access. Parents, may for example agree on the 'visits' of, or to, the child during festival days, holidays and vacation.[618]

In *Carla Gannon v Shabaz Farukh Allarakhia*[619] the dispute of the parents related to the custody of their four-year-old son. The minor son was born in Australia when both his parents had residence in that jurisdiction. The father continued to be a Muslim, but the mother did not convert to Islam when the parties married. Upon divorce the father relocated to India and the mother continued to reside in Australia, her country of origin. The case was heard by the Bombay High Court because the father abducted the son and took him to India with him. The court held that irrespective of the wrongs of the parents, the best interests of the child were supreme in every matter that concerned the child. The court ordered the police to ensure that the minor son was retrieved from his father and handed over to the mother who would take him along to Australia. In *casu* the standard of the best interests of the child trumped the standard of religious law that was *prima facie* not in the best interests of the child.

In this case the custody of a minor son was in dispute between the father and the mother who were no longer residing in the matrimonial home as husband and wife. The Karnataka High Court held that for the sustainable growth of the child it was important that an order for joint custody be granted. The father was granted the right to visit the son four times a year.

616 AIR 2009 SC 732.

617 Child Rights Foundation *Child Access and Custody Guidelines* (Navi Mumbai 2014) S 3.

618 Videv 2016 https://menrightsindia.net/.

619 Criminal Writ Petition No. 509 of 2009. Judgment was delivered on 10 July 2009.

4.6.4 Parsi and Christian law

The position under these legal systems[620] is analogous to the Hindu legal system.[621] Guardianship of Parsi and Christian children is regulated by the GWA.[622] Courts may issue interim orders for 'guardianship',[623] 'custody', 'maintenance'[624] and the 'education' of the child.[625] Courts apply the 'best interests of the child' in every matter that affects the child.[626] In *ABC v* State (*NCT of Delhi*)[627] the court had to determine whether a mother of a child could be granted guardianship and custody of her child with whose father she did not want to be identified. The court took into account that the mother was a Christian and wanted the child to be raised in terms of the Christian faith. The application for sole guardianship was granted on the basis that it was in the best interests of the child. The father of the child did not object to the mother being granted sole guardianship of the child. Granting of sole guardianship to the mother was confirmation that the prescript of the best interests of the child may in certain instances deviate from established principles such as considering the attitude of the father of the child regarding guardianship.[628]

620 Personal religious laws that the court may consider when dealing with guardianship and care of the child.

621 Guardianship and custody may upon divorce be decided in terms of the *Parsi Marriage and Divorce Act* 3 of 1936.

622 S 17(1) of the GWA.

623 *Vegesina Venkata Narasiah v Chintalpati* AIR 1971 AP 134; *Satyandra Nath v B Chakraborthy* AIR 1981 Cal 701.

624 *Padmaja Sharma v Ratan Lal Sharma* AIR 2000 SC 1398.

625 S 41 of the Indian Divorce Act 4 of 1869; s 49 of the *Parsi Marriage and Divorce Act.*

626 *Mausami Ganguli v Jayant Ganguli* (2008) 7 SCC 673; *L. Chandran v Venkatalakshmi* AIR 1981 AP 1.

627 Judgment was delivered on 6 July 2015.

628 The father did not object to the mother obtaining sole guardianship of the child. The basis for such lack of objection was that the father was married to a woman other than the appellant. The court held that the requirement of disclosure of the child's father was an aspect of procedure that could be relaxed to secure the best interests of the child. Disclosure of the child's father could have had adverse repercussions to him and his family.

4.6.5 Contact

Contact is not defined by any statutes pertaining to children.[629] However, courts in various cases have defined what contact means. In *Rxann Sharma v Arun Sharma*[630] (hereafter referred to as *Rxann Sharma*), the court defined contact as to include a non-custodial parent or grandparent's court ordered privilege of spending time with the child or grandchild. In *Prabhat Kumar v Himalini*[631] (hereafter referred to as *Himalini*), it was held that the welfare of the child is determined by the advantage of care and affection the minor would receive in granting visiting rights to such members of the paternal family. The interim visitation order granted to the father and his relatives was confirmed on the strength of the reinforced relationship between the father and the child. It is clear that in Indian law the influence of the best interests of the child is causing changes to the traditional legal position.

4.6.6 Observations on Indian law

The standard of the best interests of the child appears to have influenced development of the law in this jurisdiction. In the GWA the interests of the guardian override those of the child whilst in the HMGA the interests of the child are paramount. The Law Commission of India in 2015 proposed an amendment of section 6(a) of the HMGA to accord equal rights to the mother and the father.

Personal religious laws show recognition of the prescript of the best interests of the child with regard to the equality of genders. In Hindu law the mother may also act as a guardian of the child. In *Mohan Kumar* the father of the child was ordered to return the child he forcefully abducted from the mother. In *Jacobs Chakramakkal* the best interests of the child prevailed above the interests of the parents of the child. In *Palanisami* the father of the child was refused custody on the basis that it was not in the best interests of the child. Other personal religious laws such as Islamic, Parsi and

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629 India still battles with the determination of contact arrangements. Tolle *et al Improving the Quality of Child Custody Evaluations* 2, 15. They allude to the fact that judges and other decision-makers should have guidelines relating to the implementation of the best interests of the child in contact disputes. Elhais 2011 http://www.legalservicesindia.com/article/2100/Custody-and-Parental-Responsibility.html. Hassam Elhais defines contact as visitation.

630 MANU/SC/0165/2015.

631 MANU/DE/0016/201.

Christian also recognise the best interests of the child. In *Suharabi* it was decided that the indigence of a parent does not prevent the court from awarding an order that serves the best interests of the child. In *Md Jameel Ahmed* and *Nil Ratan Kundu* the best interests of the child were found to prevail above the social status of the parents. The child's right to have contact with his extra-marital father is also recognised. In *Rxann Sharma* and *Himalini*, for example, the fathers were granted contact with the children.

4.7 England

In this jurisdiction a distinction between guardianship and care is not well-explained. The concepts of guardianship and care are discussed together under the notion of parental responsibilities and rights and the concept of contact is discussed separately.

4.7.1 Guardianship and care

4.7.1.1 Married parents

The father and the mother of the child each have 'parental responsibilities and rights in respect of the child if they were married to each other at the time of the child's birth'.[632] The time of a person's birth includes 'any time during the period beginning with the insemination'[633] resulting in 'his birth, or his conception and ending with his birth'.[634] A child born of the marriage is considered legitimate. In this jurisdiction a distinction between a child born in marriage[635] and a child born outside of marriage is made. This is despite the Law Commission recommending its 'abolition'.[636] Prior to July

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632 S 2(1) of the CA-Engl.

633 S 4(b) of the CA-Engl. does not specify that the identity of the donor should be disclosed. It states that 'references to sperm are to live human sperm, including cells of the male germ line at any stage of maturity'.

634 S 4 of the FLRA.

635 The Legitimacy Act of 1959 makes different provisions for the status of the child. In terms of s 1 the child born outside of marriage may 'be recognised as the child of a voidable marriage', under s 2 through the 'subsequent marriage of his father and mother', in terms of s 3 'through subsequent marriage or civil partnership of his parents and through adoption' in terms of s 4. The CA-Engl**.** does not make an explicit provision for a child born in marriage and a child born outside of marriage. S 5 makes reference to 'a child born outside of marriage'. It states that 'no order shall be made under that section requiring any person to make any payment towards the maintenance or education of a child born outside of marriage'.

636 The Law Commission Working Paper 74 *Illegitimacy* recommended that the distinction between a child born in marriage and a child born outside of marriage be 'abolished' but the distinction remains. S 1 of the Legitimacy Act of 1959. Legitimacy in English law includes children 'whose parents were married when they were born even though they must have been conceived before

1988[637] the father had almost 'complete autonomy over the legitimate child and his interest to the child was akin to the child being his property'.[638] He was regarded as 'the natural guardian' and the mother had no claim in respect of the child and was in no better position than a third party who had no blood relation with the child.[639] The coming into force of the CA-Engl. in 1989 repealed the father's absolute sovereignty over the child. Section 2(1) of the CA-Engl. accords equal parental responsibilities and rights to married parents.

4.7.1.2 Unmarried mother

The mother of the child has sole parental responsibilities and rights in respect of the child 'if she is not married to the father'. The child is considered 'to be born outside of marriage'.[640] Unless the father of the child enters into a parental responsibilities and rights agreement with the mother she has all the rights,[641] duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property. Parental responsibilities and rights of the mother include 'the rights, powers and duties in relation to the child and the child's property'.[642]

4.7.1.3 Unmarried father

An unmarried father does not automatically have parental rights in respect of the child. He can acquire parental rights in respect of the child by '(i) subsequently marrying the mother of the child';[643] '(ii) by taking up office as a formally appointed guardian of the child';[644] '(iii) by concluding a parental responsibilities and rights agreement with the

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the marriage and those whose parents were married at the time of their conception, even though the marriage was terminated before their birth'. See also *Knowles* v *Knowles* 1962 P 161, 1962 1 All ER 659.

637 The Law Commission (Law Com No. 172) *Family Law Review of Child Law Guardianship and Custody* Report was concluded on 25 July 1988. Its report resulted in the adoption of the CA-Engl. in 1989.

638 S 2(4) of the CA-Engl. See also The Law Commission (Law Com No. 172) *Family Law Review of Child Law Guardianship and Custody* 5.

639 S 2.2 Law Commission (Law Com No. 172) *Family Law Review of Child Law Guardianship and Custody* Report was concluded on 25 July 1988. Its report resulted in the adoption of the CA-Engl. in 1989

640 S 2(2) of the CA- Engl. See also *Parental Responsibility* (House of Commons Library 8 September 2014) 2.

641 *Barnado* v *McHugh* 1891 AC 388.

642 S 3(2) of the CA- Engl, Jarrett *Children: Parental Responsibility- What is it and How is it Gained and Lost (England and Wales)* 1.

643 S 2(1)(b) of the CA-Engl.

644 S 5(1)(a) of the CA-Engl.

mother';[645] '(iv) by obtaining a parental responsibilities and rights order';[646] '(v) by obtaining a residence order which requires a separate parental responsibilities order to be made'; [647] '(vi) by having his name registered on the birth certificate of the child';[648] or '(vii) by adopting the child'.[649] The rise of women's and children's rights movements in the nineteenth century and the shift of thinking from 'parental rights and duties'[650] towards parental responsibilities enabled the unmarried father to be included in the performance of 'responsibilities' in respect of his child as well.[651]

4.7.1.4 Subsequent marriage of the mother

The subsequent marriage of the mother to the father of the child results in the father also obtaining 'parental responsibilities and rights'[652] in respect of the child. The child must be below the age of eighteen years at the time of the marriage of his parents. The subsequent marriage of the mother by the father of the child has no effect on a child who has attained majority. At age eighteen the child 'ceases to be a minor and becomes a major'.[653] Lowe and Douglas[654] form the view that 'the marriage of the mother of the child to the father overrides prior parental responsibilities and rights agreements and orders made'.

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645 S 4(1)(b) of the CA-Engl.

646 S 4(3)(a) of the CA-Engl.

647 S 5(1)(b) of the CA-Engl.

648 S 4(1) of the CA-Engl. states that 'where a child's father and mother were not married to each other at the time of his birth, the father shall acquire parental responsibilities and rights for the child if- (1)(a) he becomes registered as the child's father under any enactments specified in ss (1A). S (1A) enactments are (a) The Births and Death Registration Act of 1953, (b) Registration of Births, Deaths and Marriages (Scotland) Act 1965 and (c) Births and Deaths Registration (Northern Ireland) Order 1976.

649 Gheera and Jarrett *Parental Responsibility* 3.

650 Jarrett *Children*: *Parental Responsibility- What is it and How it is Gained and Lost (England and Wales)* 1.

651 In *Gillick* v *West Norfolk and Wisbech Area Authority* 1984 QB 581 para 596 Woolf J stated 'that 'the interest of the parent towards the child is more accurately described as responsibilities and duties'.

652 S 2(1)(b) of the CA–Engl.

653 S 20(2) of the FLRA. Previously the age of majority was twenty one years. It was reduced to eighteen years so as to be in line with article 1 of the CRC.

654 Lowe and Douglas *Bromley's Family Law* 134.

4.7.1.5 Parental responsibilities and rights agreements

A parental responsibilities and rights agreement is an agreement that may be reached between the 'parent or parents of the child with another person or persons'.[655] The agreement, amongst others, stipulates the manner in which the child will be cared for. It may make provision for the child's education, medical operation or certain medical treatment to be received by the child. It may also include access to 'medical records' of the child, the child's 'holidays or extended stays', representation of the child in 'legal proceedings' and determining the 'religion' the child should follow. [656]

A parental responsibilities and rights agreement has to be 'filed with and be recorded by the Principal Registry'.[657] According to the Rights of Women(a non-governmental organisation assisting incarcerated caregivers),[658] 'there is no prescribed age limit on those making such agreements and this creates the possibility that it can even be made by parents or with a parent below the age of eighteen years'. Further on, 'no investigation regarding the reason underlying the conclusion of an agreement between the parties and whether the man is actually the father of the child is required'. It is also generally 'not established' whether the agreement serves 'the best interests of the child'.[659] It is submitted that not determining whether the agreement serves the best interests of the child is out of step with modern developments**.** The parental responsibilities and rights agreement becomes effective and remains valid until it is 'cancelled by an order of court or upon the child reaching the age of eighteen years'.[660]

Courts are cautious to approve parental responsibilities agreements.[661] In *Re H* (*Minors*)(*Local Authority*: *Parental Rights*) (*No 3*)[662] factors to be considered in an

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655 S 2(5) of the CA-Engl. allows for 'parental responsibilities and rights in respect of a child to be vested in more than one person at the same time'.

656 Anon Date Unknown https://childlawadvice.org.uk/information-pages/parental-responsibility/; Rights of Women Helping Women Through the Law *Children and the Law: Parental Responsibility* 2.

657 S 3(3)(a) of the Parental Responsibility Agreement Regulations 1478 of 1991.

658 Rights of Women Helping Women Through the Law *Children and the Law: Parental Responsibility* 2.

659 Rights of Women Helping Women Through the Law *Children and the Law: Parental Responsibility* 2.

660 S 91(7) of the CA-Engl.

661 The Court of Appeal signaled that not all applications for approval of parental responsibilities and rights agreements succeed.

662 1991 Fam paras 151, 158.

application for a parental responsibilities and rights agreement were pronounced and were, for example, implemented in *Re C* (*Minors*)[663] (hereafter referred to as *Re C*) in 1992. The factors to be considered for the purpose of a parental responsibilities and rights agreement are (i) the degree of commitment which the father has shown towards the child; (ii) the degree of attachment which exists between the father and the child; and (iii) the reasons for applying for the order. The test for determining the granting or refusal of a parental responsibilities and rights agreement is:

> [w]as the association between the parties sufficiently enduring, and has the father by his conduct during and since the application shown sufficient commitment to the child, to justify giving the father a legal status equivalent to that which he would have enjoyed if the parties had married?[664]

Brown P in *Re S* (*Parental Responsibility*)[665] emphasised that a parental responsibilities and rights order does not affect the day-to-day care of the child but gives recognition to the role that the father may play in the life of the child. In *Re T* (*A Minor*) (*Parental Responsibility*)[666] and *Re H* (*Parental Responsibility*)[667] the court respectively refused to grant a parental responsibilities and rights order because the father had treated the mother with hatred and violence, had demonstrated no regard for the welfare of the child and had injured his son in settings indicating deliberate cruelty and possible sadism.

In *Re P* (*Parental Responsibility*)[668] the application by the father was turned down because of his tendency to undermine the care of the child by the mother. In *Re P* (*Parental Responsibility*)[669] the court declined to interfere with the refusal of a parental responsibilities and rights order refused partly on the previous conviction of the father. The court indicated that it was entitled to take into account as relevant but not conclusive, factors such as the offence in respect of which the father was jailed and the duration of the imprisonment. In *Gillick* the court indicated that parental power to

663 1992 2 All ER.
664 *Re* (*C*) paras 86 and 93.
665 1995 2 FLR 648 CA.
666 1993 2 FLR 450 CA.
667 1998 1 FLR 855 CA.
668 1998 2 FLR 96 CA.
669 1997 2 FLR 722 CA.

control a child exists not for the benefit of the parent but for the benefit of the child. As well as embracing the idea that parents must behave dutifully towards their children, the English concept of responsibility also embodies the concept that 'responsibility for childcare belongs to parents and not to the state'.[670]

A father of the child who is not married to the mother, like any person who intends acting in the best interests of the child may apply to the High Court, County Court or to the Family Proceedings Court for a parental responsibilities order. If the paternity of an unmarried father is in 'dispute' it is incumbent upon him to prove that he is the father of the child.[671] A parental responsibilities order may 'not be made in respect of a child who is older than sixteen years unless exceptional conditions exist'.[672] A parental responsibilities order is not dependent on the parents of the child living together. It continues to be effective even if the parents are no longer living together. An unmarried father may conclude a parental responsibilities agreement with the mother of the child and it is not a requirement that he should be residing with her. A parental responsibilities and rights agreement is terminated when the child attains the 'age of majority or through a court order'.[673]

4.7.1.6 Residence order

A residence order refers to an order settling the arrangements to be made as to the person with whom the child is to live and does not re-allocate parental responsibilities between parents.[674] A residence order may not be made artificially or simply for the sake of making it. In *Re WB* (*Residence Orders*)[675] a cohabitant man intended to apply for a joint residence order but discovered that he was not the father of the child. The court refused to interfere with the residence order granted to the mother of the child holding that it would be inappropriate and quite artificial to make a joint residence order solely for that purpose. In *Re H* (*Shared Residence*: *Parental Responsibility*)[676]

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670 Lowe *National Report*: *Parental Responsibilities England and Wales* 12.
671 *Re F (A Minor) (Blood Tests: Parental Rights)* 1993 3 All ER 596 CA.
672 S 9(6) of the CA-Engl.
673 In *Re P* (*Terminating Parental Responsibility*) 1995 1 FLR 1048.
674 Changes in the residence of the child should interfere as little as possible with the relationship of the child and his parents.
675 1995 2 FLR 1023.
676 1995 2 FLR 883 CA.

the Court of Appeal upheld the making of a shared residence order to the step-father of the child. It held that the step-father should be vested with parental responsibilities because he had indicated his willingness to treat his step-son as his own child. The court found it would help alleviate the confusion in the mind of the child as he had comfort and security knowing his step-father would treat him as his own child and that the law provided a stamp of approval to the *de facto* position.

A residence order may also be joint, shared or interim. A joint residence order may be made in 'favour of a parent and a step-parent',[677] a 'cohabiting couple'[678] or 'grandparents'.[679] A shared residence order may be made in favour of, for example, a couple living together. A shared residence order may prove problematic for the child and the court should be reluctant to make it. In *T* v *T*[680] (hereafter referred to as *TT*) the court observed that:

> [t]here can be a place for a shared residence order where it will serve the child's best interests in a rather broader sense than simply fixing it when he will be in which house.[681]

4.7.2 Parental responsibilities and rights of a step-parent

A step-parent may acquire parental rights in respect of the child provided he or she is 'married' to, or is in a 'civil partnership'[682] with the other 'parent' who has parental responsibilities and rights for the child'.[683] A parental responsibilities and rights agreement with the step-parent may be concluded by either the mother or by the father of the child or by both the mother and father of the child. The step-parent may also obtain parental responsibilities and rights by 'applying to the court'.[684] A parental responsibilities and rights agreement concluded with the step-parent may be terminated by the court upon application by the person who has parental responsibilities and rights to the child[685] or on application by the child. The court can

677 *Re H* (*Shared Residence*: *Parental Responsibility* 1995 2 FLR 883 CA.
678 *Re C* (*A Minor)* 1994 Fam Law 468.
679 *Re W* (*A Minor)* 1993 2 FLR 625 CA.
680 2010 EWCA Civ 1366.
681 *TT* para 25.
682 Sec 75(2) of the *Civil Partnership Act* of 2004.
683 S 4A(1) (a) of the CA-Engl.
684 S 4(1)(b) of the CA-Engl.
685 If parental responsibilities and rights vest to the mother and the father of the child they can make the application jointly. If only one parent agrees to the termination, the court can apply s 1(1)(a)

only grant the application for termination of parental responsibilities and rights by the child if it is satisfied that the child has 'sufficient understanding to make the proposed application'.[686]

4.7.3 Acquisition of parental responsibilities and rights by non-parents

The position of non-parents differs from that of a 'step-parent'.[687] Non-parents obtain parental responsibilities and rights by being granted a 'residence order'[688] or an 'emergency protection order'.[689] Parental responsibilities and rights in the case of a non-parent is valid for the duration of the order. It is argued that the rationale behind parental responsibilities and rights being valid for the duration of the order is that the parents of the child 'do not relinquish their parental responsibilities and rights over the child'.[690] Acquisition of parental responsibilities and rights by a non-parent is 'not permanent' and gives non-parents limited parental responsibilities and rights. The non-parent cannot 'consent to an order freeing the child for adoption or for an adoption order'[691] and may not appoint a 'guardian for the child'.[692]

Parental responsibilities and rights may also be obtained by local authorities and they may share it with any parent or guardian of the child. Acquisition of parental responsibilities and rights by local authorities is through a 'contact order'[693] or 'emergency protection'[694] coupled with an 'exclusionary requirement'[695] order and is for the duration of the care order. Local authorities are not entitled to 'convert the

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of the CA-Engl. that states that 'when the court determines any question with respect to the upbringing of the child the child's welfare shall be the court's paramount consideration'.

686 S 4A (4) of the CA- Engl.

687 S 4(A) inserted into the CA-Engl. inserted by the Adoption and Children Act 1989.

688 S 10(5)(b) of the CA-Engl.

689 S 441 of the CA-Engl.

690 S 2(6) of the CA-Engl.

691 S 12(3)(a) of the CA-Engl.

692 S 12(3)(b) of the CA-Engl.

693 A contact order means an order 'requiring the person with whom a child lives', or 'is to live', to 'allow the child to visit' or 'stay with the person named in the order', or for that person and the child otherwise to 'have contact with each other'.

694 Granted pursuant to s 44(1)(a) of the CA-Engl. when there is a likelihood of the child 'suffering harm or when local authorities are conducting an investigation' in terms of s 44(1)(b). In the case of an investigation by local authorities 'access to the child by a person or persons suspected or alleged of causing harm to the child will be denied' in line with the provisions of s 6(b)(i).

695 For example, that a person named in the order leaves the child's home or particular area where the home is located and prohibits the said person from re-entering the child's home or defined area. S 44 A of the CA-Engl.

religion of the child', to 'consent to an order freeing the child for adoption', to 'consent to the adoption of the child or to appoint a guardian'.[696]

4.7.4 Observations on parental responsibilities and rights

The position of the unmarried father has been improved significantly by the CA- Engl. In terms of the AA[697] he is considered a parent for the purposes of adoption and can withhold his agreement for a proposed adoption (the child must be below the age of sixteen years) or an order freeing the child for adoption. He acquires the power to appoint a guardian for the child, he is entitled to remove the child from the care of local authority accommodation,[698] he can consent validly to the medical treatment of the child and may require full medical particulars from the child's medical practitioner,[699] he can consent to the marriage of the child, he may express preference with regard to the school at which the education of the child is to be provided, he may consent to the 'removal of the child' from the country,[700] he may sign the application for a passport by the child or may oppose the granting of a passport to the child.

4.7.5 Contact

As a general proposition a natural parent has a right of 'contact with his child'.[701] The parent's right to contact with the child also applies even in instances where the child is 'placed with a local authority'.[702] Contact is considered a 'duty rather than a right'[703] that the parent owes towards the child and has to be maintained unless maintaining it is 'contrary to the welfare of the child'.[704] A local authority may apply to the court

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696 S 33(6) of the CA-Engl.

697 See cases such as *Re PC* 1997 2 FLR 791 CA, *W v A* 1981 Fam 14, *Re B* 1996 1 FLR 791 CA and *Re L (A Minor)* 1993 1 FCR 325.

698 The father can rely on s 20(7) and (8) of the CA-Engl. to challenge the accommodation of a child in local authorities facilities. If the father is willing and able to provide accommodation or to arrange for accommodation to be provided for the child, he may object to the child being accommodated by the local authority.

699 *Re H* (*A Minor*) (*Shared Residence*) 1994 1 FLR 717 CA.

700 S 1(3)(a)(ii) of the Child Abduction Act 1984.

701 *Re KD* (*A Minor*) (*Ward Termination of Access*) 1988 AC paras 806, 827.

702 S 31 of the CA-Engl.

703 Lord Oliver in *Re KD* (*A Minor*) (*Ward Termination of Access*) 1988 AC paras 806, 827 refused to describe it as a right and held it was inappropriate to describe such a claim by the child as a right.

704 S 3(2) of the FLRA.

for a contact and supervision order. Section 2[705] of the CA-Engl. entitles the court to 'grant an application for contact and supervision order to a local authority'. Contact with the child may take place through a contact and supervision order and runs parallel to a residence order. A contact order requires the person with whom the child lives or is to live to allow the child to visit or stay with the person named in the order or for that person and the child otherwise to have contact with each other. It must be noted that contact is 'child–centered'[706] and that it may be prohibited if its exercising does not serve the best interests of the child. In *Re H* (*Minors*) (*Prohibited Steps Order*)[707] the Court of Appeal made a prohibitory step order[708] against the mother's former cohabitant because he posed a risk to the child.

4.7.5.1 Observations on contact

Parents do not relinquish their parental responsibilities even though they may have separated, divorced or are not residing with the child. The right of contact is the right the child has against the parent with whom he or she does not reside. It is a right that is child-centred and is enforceable in a court of law. The court is empowered to make an order to ensure the right of the child to contact is intact. The right of the child to contact is also enforceable even when the child is in the care of for instance a local authority.

4.8 Conclusion

In line with the obligation of aligning domestic provisions concerned with the child on the footing of international children rights instruments the three states of comparison have taken strides in protecting and promoting the right of the child to care. The

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705 A local authority may be granted contact and supervision order in respect of the child if the court is satisfied that: '(i) the child concerned is suffering, or is likely to suffer, significant harm' and '(ii) the harm, or likelihood of harm, is attributable to: the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him', or '(iii) the child's being beyond parental control'.

706 *Frame* v *Smith* 1987 CanLII 74 (SCC); (1987) 2 SCR 99.

707 1995 4 All ER 110 CA.

708 It means an order that no step which could be taken by a parent in meeting his or her parental responsibilities and rights for a child and which is of a kind specified in the order, shall be taken by any person without the consent of the court. It may include an order restraining a particular medical operation, restraining changing the surname of the child, preventing change of schooling for the child, preventing repeated removal of the child from England for periods less than a month by the residential parent and preventing the removal of the child from his home.

prescript of the best interests of the child has had a significant impact in the realignment of the parent-child relationship. There has been a shift away from parental authority over the child to parental responsibilities and rights and the provision for care of the child has been widened. Parental responsibilities and rights agreements create the possibility that the child whose caregiver stands to be sentenced or is already sentenced may be cared for by a person or persons who have an interest in the care, well-being and development of the child. The category of persons who may now care for the child *inter alia* include the extra marital father of the child, uncles, nieces, neighbours, aunts, grandparents and interested persons. A parental responsibilities and rights agreement may contain details relating to the manner in which the child will be cared for. Such agreements have to be registered and become binding on parties thereto. The person or persons who may care for the child whose primary caregiver stands to be sentenced or is jailed will be offering alternative care to the child. International instruments such as the CRC state that a child separated from his primary caregiver has the right to alternative care.

The Children's Act has since broadened the scope for the care of the child. The child may be cared for by a person who has an interests in the care, well-being and development of the child irrespective of the gender of such a person. In South Africa it has been shown that the *Meyers dictum* of maternal preference in awarding the care of the child can no longer be sustained. In Chapter 7 it is being argued that in the event the child's caregiver is unable to care for the child due to, for instance, imprisonment, the court may assign the Family Advocate to assist the child's primary caregiver to identify and to enter into a parental responsibilities and rights agreement with a person who has an interest in the care, well-being and development of the child. In India the standard of the best interests of the child has influenced the awarding of guardianship and custody of the child. Whilst the *karta* is the preferred guardian of the child there are developments towards expanding guardianship of the child to the mother as well. Notwithstanding the Law Commission of India not proposing extending guardianship and care beyond the mother, there is hope that the prescript of the best interests of the child will influence consideration of persons who have an interest in the care and development of the child. The mother may be granted guardianship of the child in exceptional circumstances. Development of the parent-

child relation through the standard of the best interests of the child is also manifest in England. In this jurisdiction the court is bound to have regard to persons who may care for the child whose primary caregiver is jailed. It is for instance a requirement that a residence order be made with the person with whom the child will reside. Emphasis is laid on the conclusion of parental responsibilities and rights agreements with a person or persons having an interest in the care, well-being and development of the child.

CHAPTER 5

The Incarceration of Primary Caregivers and the Best Interests of The Child

5.1 Introduction

This chapter deals with the confinement of children with their caregivers. The confinement of children with their primary caregivers is a practice that occurs internationally, albeit not being in the interests of the child. In sentencing the child's caregiver the court is mostly 'not alert to prison conditions',[709] to children's playing facilities, learning material and amenities such as baby food, formula, health care, social care and clothing made available to children confined with their caregivers. The confinement of children with their caregivers is 'an exceptional situation and it is a measure of last resort'.[710] Confining children with their primary caregivers should only be allowed if there is no one within the families of caregivers to care for the children during the period of incarceration or when the children are not placed in alternative care due to 'delay in the placement in alternative care or due to unavailability of alternative carers'.[711] It would appear that the investigation of alternative care is not an established practice in some jurisdictions.

The state of correctional facilities is 'an issue of current concern'[712] and prison conditions should not to be 'additional punishment'[713] to the children 'confined with their primary caregivers'.[714] Children of caregivers have not themselves committed any

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709 Quaker Council *Women in Prison and Children of Imprisoned Mothers* 1.

710 Schoeman and Basson 2009 *NICRO* 2; Tomkin *Orphans of Justice: In Search of the Best Interests of the Child when a Parent is Imprisoned: A legal analysis* 32; Couzens and Mazoue 2013 *Obiter* 431.

711 See Alejos *Babies and Small Children Residing in Prisons* 31, who found that these are often the reasons for young children's involvement with their mothers.

712 Oppler 1998 http://www.iss.co.za; Bastick and Townhead *Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners* 1.

713 Wolleswinkel Date Unknown childrenofprisoners.eu/children-inside-prison-2/; Robinson *Children Imprisoned by Circumstance* 6.

714 Penal Reform International Date Unknown www.penalreform/priorities/prisonconditions/issue/; Sarkar and Gupta 2015 *Journal of Nursing and Health Science* 86-89; *Rama Murthy* v *State of Karnataka* 1997 2 SCC 642; AIR 1997 SC 1739; *S Gujarat* v *Hounorable High Court Gujarat* 1998 7 SCC 392; AIR 1998 SC 3164 and African Commission on Human and Peoples' Rights *Report on Special Rapporteur* 13. South African prisons were for example mainly regarded as 'places of punishment for political dissidents of the apartheid regime. There was hardly any programme for rehabilitation and reintegration'.

offences. Their only sin is that they are 'children of primary caregivers who are incarcerated for committing offences'.[715] Bada points out that 'the degree of civilisation in a society can be judged by entering its jails. A society cannot be recognised as civilised unless it treats the prisoners with dignity and respect. This treatment is not possible until the society recognises and accepts basic human and fundamental rights'.[716]

Child development is an important aspect to consider in the decision to imprison a young child with his offending mother. Attachment or bonding of children with their caregivers is 'necessary for their proper development'.[717] Instead of this 'bonding or attachment taking place within family environments',[718] it now takes place in prison because caregivers are incarcerated with their children. Prison conditions are generally 'restrictive'[719] and 'inappropriate' to children confined with their primary caregivers.[720] Restraining jail conditions may have 'long term physical, mental and emotional effects on the proper development of children'[721] and may 'potentially harm children confined with their caregivers'.[722] The study by the National Institute of Criminology and Forensic Sciences in India, for instance, mention that 'children imprisoned with their caregivers often experience deprivations relating to food, clothing, healthcare and social care'.[723] These sentiments are also echoed by other institutions. For example, the Justice for Prisoners and Detainees Trust[724] points out that:

> [p]rison is like hell for grown up people. For infants and young children, it is even worse. These children are living in punitive conditions.

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715 Robinson *Children Imprisoned by Circumstance* 2.

716 Bada *et al International Obligations and Guidelines* (2011) 38. See also Dalal 2005 http://india.indymedia.org/en/2005/04/210469.shtml.

717 Munro 2007 *Amicus Curiae* 7; Batchelor 2008 http://www.dahnbatchelorsopinions .blogspot.com; Anon 2009 http://wwwsheilakitzinger.com/Prisons.htm.

718 Hamper 2014 *Ohio Northern University Law Review* 204.

719 Committee on the Empowerment of Women *Third Report (13th Lok Sabha) of Committee on Empowerment of Women on `Women in Detention'* 5. Harsh regimented prison rules that apply to adult prisoners apply to infants and young children imprisoned with their caregivers as well.

720 Quaker Council *Women in Prison and Children of Imprisoned Mothers*: *Recent Developments in the United Human Rights System* 16.

721 Quaker Council *Women in Prison and the Children of Imprisoned Mothers*: *A Briefing for Friends* 13.

722 Robertson *Children Imprisoned by Circumstance* 13; Justice for Children Trust 2010 http://www.kubata.net/html/archive /chiyou/1000501jct.asp?sector=CHIYOU

723 *Uphadyay* 3.

724 Thomas Reuters Foundation 2008 http://www.alertnet.org/thenews/newsdesk /IRIN.htm.

The National Institute for the Rehabilitation of Offenders[725] further states that:

> [t]he facilities provided to infants and young children imprisoned with their primary caregivers are very restrictive and they hamper children's psychological, cognitive and social development.

Confinement of children with their caregivers as highlighted above, is an exceptional situation and the argument is supported that it should always be a measure of last resort. In the discussion below, prison conditions, legislative and policy provisions relating to the confinement of the children with their caregivers and the units that accommodate caregivers with their children, Mother and Child Units or Mother and Baby Units in the jurisdictions of comparison, are considered.

5.2 Prison conditions

5.2.1 South Africa

In ancient societies offenders were 'not simply confined to jails. Punishment was given to offenders outside of jails. But later on, due to the growth of civilisation, incarceration became the main method of punishment'.[726] Although offenders come to jail 'as punishment and not for punishment',[727] they are certainly 'punished and degraded as well as denuded of every aspect of their responsibilities'.[728] They will be made no better, but worse, by punitive treatment designed to hurt and humiliate them. By reason that the jail environment is designed to ensure that punishment is served by primary caregivers as well, it may create a challenge for children imprisoned with their caregivers. The prison environment may thus have an adverse impact on children confined with their caregivers. It is not in the best interest of children to be exposed to conditions where they may suffer 'diverse deprivation relating to food, healthcare, accommodation, educational and recreational facilities, behavioural and emotional outcome'.[729] Children confined with their caregivers are at most deprived of love, care and affection from other family members and siblings. Family members and siblings may find it difficult to visit children confined with their primary caregivers due to, for

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725 South Africa: Innocent in Jail IRIN http://www.alertnet.org/thenews/newsdesk/IRIN.htm.

726 Mohanty *et al Indian Prison Systems* 4.

727 Ruck *Paterson on Prison* 23.

728 Dissel 1996 *Imbizo* 4–10; Datir *Prison as a Social System: With Specific Reference to Maharashtra* 1, the author states that 'prison is now a place where punishment is executed'.

729 Sarkar and Gupta 2015 *Journal of Nursing and Health Science* 86.

instance, short duration of visiting hours and tight prison security measures visitors have to undergo to have access to children confined with their caregivers.

The jail environment in South Africa is categorised by the following salient features: ever present 'eye of authority', 'overcrowding',[730] 'inadequate funding',[731] 'lack of hygienic and lack of hope',[732] 'high rate of awaiting trial offenders',[733] regular 'use of force by inmates and guards',[734] and 'poor health and lack of medical care'.[735]

5.2.2 India

Jail conditions are generally very 'poor' across India.[736] According to the South Asian Centre for Human Rights for example, they do not 'conform to international standards, as most lack basic amenities such as adequate food, drinking water, sanitation and health services'.[737] Conditions of prisons on average present a very depressing picture. They are overcrowded, unhygienic and hopeless. Far from being any kind of correctional centres they often 'produce hardened criminals who are likely to offend in future. There is also rampant corruption, extortion and poor spending on health care and welfare'.[738] The poor state of prison conditions is attributed to India's adherence to centuries' old jail manuals that leave very little scope for any innovative approach in the matter of dealing with people who end up in jail for various reasons and under various circumstances. No significant change has taken place in the general conditions in correctional facilities and in the attitudes of jail authorities. The harsh and regimented administrative rules are as applicable to children as they are applicable to their primary caregivers. The *Hindu*, India's leading English newspaper reported that

730 Bromley Briefings *Prison Factfile* 7; Munro 2007 *Amicus Curiae* 6; Dissel 1996 *Imbizo* 1; LICADHO *Prison Conditions in Cambodia 2007* 5.

731 Cilliers *The South African Prison Policy* 536. See also Committee on the Empowerment of Women *Third Report* (*13th Lok Sabha*) *of Committee on Empowerment of Women on `Women in Detention'* 5.

732 Committee on the Empowerment of Women *Third Report* (13th *Lok Sabha*) *of Committee on Empowerment of Women on `Women in Detention'* 5.

733 Pandi Govind Ballabh Pant Institute of Studies *Children of Women Prisoners in Jails*: *A study of Uttah Pradesh* (2004) 13.

734 Cressy *The Prison Studies Institutional and Organisational Change* 267; Mohanty et al *Indian Prison System* 8; Browne *The Risk of Harm to Young Children in Institutional Care* 1.

735 Quaker Council *Women in Prison and Children of Imprisoned Mothers* 7.

736 In *Rama Murthy* v *State of Karnataka* 1997 2 SCC 642, prisons conditions were identified as a challenge.

737 Asian Centre for Human Rights *South Asian Human Rights Index* (2008) 144.

738 Bada *international Obligations and Guidelines* (2011) 39-42.

'the effect of the confinement of children is catastrophic and costly to the state'.[739] India's jail administration has constantly been a subject of criticism by the media, by parliament and by the judiciary.

Prison conditions in this jurisdiction are uncongenial to the proper development of children confined with their primary caregivers. Even when children are confined with their caregivers, they have a right to food, water, sanitation and to health care services. The prescript of the best interests of children requires that the basic needs of children confined with their caregivers be met. Children confined with their primary caregivers are also entitled to have access to learning material, to toys and to play facilities. If India is unable to meet the basic needs of children imprisoned with their caregivers, it becomes doubtful that it will provide them with books, toys and playing facilities that they require for their proper development.

5.2.3 England

Prisons in this jurisdiction are 'overcrowded'[740] and awaiting trial offenders are the defining feature. Female correctional centres are no 'exception'.[741] On average prisoners spend 22 hours a day in a locked cell and this is an 'unpleasant self-explanatory experience'.[742] Measured against the Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment standards, cells are 'cramped, squalid, unsanitary'[743] and 'not suitable for habitation'.[744] The furniture is often 'broken'[745] and there is poor decoration. In some of the prisons the floor is damp, there is 'dangerous wiring, graffiti and litter and some cells are infested with vermin'.[746] The majority of cells lack ventilation and some windows could not be opened properly and at times as prisoners break the windows to have 'ventilation'.[747] Cell toilets,

739 Anon Date Unknown www.southasianmedia.net/Magazine/Journal/13_rights_of_imprisoned.htm.
740 European Parliament 2017 https://www.europarl.europa.eu 5.
741 HM Inspectorate of Prisons *Life in Prison*: *Living Conditions* para 1.7.
742 HM Inspectorate of Prisons *Life in Prison*: *Living Conditions* para 1.18.
743 HM Inspectorate of Prisons *Life in Prison*: *Living Conditions* para 1.24.
744 HM Inspectorate of Prisons *Life in Prison*: *Living Conditions* para 1.25.
745 HM Inspectorate of Prisons *Life in Prison*: *Living Conditions* para 1.26.
746 HM Inspectorate of Prisons *Life in Prison*: *Living Conditions* para 1.26.
747 HM Inspectorate of Prisons *Life in Prison*: *Living Conditions* para 1.27.

especially in the old prisons, are causes for 'concern'. The toilets often lack lids, they are 'dirty and close to the beds'.[748]

The majority of caregivers are incarcerated for 'non-violent'[749] 'petty acquisitive crimes'[750] such as theft and handling of goods. There are, however, primary caregivers imprisoned for crimes involving violence against persons.[751] On average, caregivers 'serve shorter sentences of ten months'. [752] In 2002, for example, 40 percent of primary caregivers 'served sentences of three months or less and 75 percent served sentences of 12 months or less'.[753] Sanitary needs of caregivers are not always met and this should be a 'cause for concern'.[754]

5.3 Legislative and policy provisions on the incarceration of caregivers with their children

5.3.1 South Africa

5.3.1.1 Correctional Service Act

The CSA regulates the confinement of children with their caregivers.[755] For purposes of the discussion, only provisions relevant to the confinement of the children with their primary caregiver are referred to.[756] In the preamble the Department of Correction Services (hereafter referred to as the DCS) strives to change the laws governing the correctional system, to give effect to the Bill of Rights and to recognise international principles on corrections. The relevant objectives of the CSA are provision of a correctional system, the establishment, functions and control of the DCS, the custody

748 HM Inspectorate of Prisons *Life in Prison*: *Living Conditions* paras 1.36; 1.37 and 1.38.
749 Ginn *British Medical Journal* 22.
750 Gerry and Harris *Women in Prison*: *Is the Penal System Fit for Purpose?* 11.
751 Ministry of Justice *Statistics on Women and the Justice System* 27; Women in Prison *A Response to the London Assembly Police and Crime Investigation Into Women Offenders* 3.
752 Baldwin and Epstein *Short but not Sweet*: *A Study of the Impact of Short Custodial Sentences* 5.
753 Country Report (2007) United Kingdom (England and Wales) 2.
754 Sivestri 2013 *European Prison Observatory* 39.
755 The CSA defines an inmate as 'any person whether convicted or not; who is detained in custody in any correctional center or who is being transferred from one center to another and defines a child as any person below the age of eighteen years'.
756 The CSA regulates imprisonment of prisoners. The child is confined with the primary caregiver either because he or she cannot be placed with the family of the primary caregiver or may not be placed in alternative care.

of all inmates under conditions of human dignity, respect, protection and promotion of rights and obligations of sentenced and un-sentenced inmates.

Section 20 of the CSA, as amended by section 14(a) of the CSAA, allows caregivers to 'retain their children with them until the children are two years of age'. Prior to the amendment of section 20, children were permitted to accompany their incarcerated primary caregivers up to when the children were five years of age. The rationale behind sanctioning children to stay with their jailed caregivers is to 'foster bonding between the children and their primary caregivers'.[757] Attachment of children to their caregivers is necessary for the proper development of children. According to Robertson,[758] research has suggested that 'having young children in prison with their primary caregivers can enhance bonding and avoid some of the negative impacts of separation for both caregivers and children'. The decision to have children confined with their caregivers is made by 'caregivers themselves and not by jail authorities or social welfare agencies'.[759]

Section 20 of the CSA reads as follows:

> 20(1) A female inmate may be permitted subject to such conditions as may be prescribed by regulation, to have her child[760] with her until such a child is two years of age.[761]
>
> (1A) Upon admission of such female inmate the Department must immediately, in conjunction with the DSD, take the necessary steps to facilitate the process for the proper placement of such a child.
>
> (2) The Department is responsible for food, clothing, health care and facilities for the sound development of the child for the period that such child remains in prison.
>
> (3) Where applicable, the *National Commissioner for Correctional Services* must ensure that an MCU is available for the accommodation of

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757 Rudzidzo *An Analysis of the South African Law Governing Minors Living with their Mothers in Prison* 38.

758 Robertson *The Impact of Parental Imprisonment on Children* 31.

759 Mazoue *Children Incarcerated with their Mothers*: *A Critique of the Age-Based Approach to the Separation of Children from their Mothers* 15-16.

760 S 20(1) of the CSA as amended by s 14(a) of the CSAA.

761 S 14(a) of the CSAA has since reduced the age of the child that may be permitted to reside with the caregiver in prison from five to two years. There may, however, be infants and young children above the age of two in correctional centers because they have not yet been placed in alternative care.

female inmates and the children whom they may be permitted to have with them.

Some of the shortcomings of section 20 are the following:

(i) It does not define the type of caregivers that may be allowed to have their children with them in prison. Female inmates[762] could be primary caregivers to children. Female persons may become mothers to children not only by giving birth to children, but also through surrogacy, adoption or foster arrangement. It is submitted that the category of the caregivers allowed to retain their children in prison should be clarified. The definition of the types of primary caregivers to be permitted to have their children with them is important. Female inmates should have primary caregiving responsibilities. Female inmates who have children between the ages of sixteen and eighteen may, not necessarily be vested with caregiving responsibilities to this category of children. Between the ages of sixteen and eighteen, children may, for example, be able to care for themselves. The significance of primary caregiving responsibilities was for instance highlighted is *S v S* (hereafter referred to as *SS*)[763] and in *S v M*. The prescript of the best interests of children requires that females who are caregivers provide their children with primary care. Provision of care to children is in their best interests and is consistent with their proper development.

(ii) It does not serve the best interests of children whose caregivers are detained in police stations. Police stations do not have units that may accommodate caregivers with their children. Paragraphs 7.9 and 9.1.1 of the IMPYMP do not make provision for caregivers to have their children with them in police detention. Paragraphs 7.9 and 9.1.1 respectively require that

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762 S 1 of the CSA defines an inmate as 'any person, whether convicted or not, who is detained in any correctional centre or who is being transferred in custody or is *en route* from one correctional centre to another correctional centre'. The *South African Police Services Act* 65 of 1995 does not define an inmate. Primary caregivers may also be detained in police cells. However, the police stations lack units to house a caregiver and her child.

763 In *S v S* (Centre for Child Law as *Amicus Curiae*) (CCT 63/10) [2011] ZACC 7, 2011 (2) SACR 88 (CC), 2011 (7) BCLR 740 (CC) (29 March 2011) paras 21 and 47 and *S v M* para 27, it was mentioned that 'a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly'.

primary caregivers apply in 'writing' to 'retain their children with them in prison'. In order to ensure that caregivers detained in police stations are accorded the opportunity of applying for admission in an MCU, it is proposed that, subject to availability of budgets, caregivers whose children cannot be cared for by family members when they are arrested be kept at separate units at the police station or transferred to prison. Committal of arrested persons to jail, *inter alia,* requires 'a reason and authority for the committal'.[764]

(iii) The offences in respect of which caregivers were convicted and sentenced do not seem to 'disqualify primary caregivers from retaining their children in correctional facilities'.[765] The offences in respect of which convictions were sustained should be a factor for consideration. It may not be in the best interests of children to be admitted in an MCU when their primary caregivers have a history of violence or abuse. Unless the risk of children being subjected to violence or abuse by their caregivers is minimised, 'the proper development of the children may be at risk'.[766]

5.3.1.2 Policy Provisions

The confinement of children with their caregivers is regulated by the *Infants and Mothers Policy* and *Infants and Young Mothers Policy*.[767] Admission of the children with the primary caregivers in an MCU is initiated by the caregiver. She must 'apply in writing to keep her infant with her in jail'[768] or if she prefers her child to 'remain outside

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764 S 6(2)(a) of the CSA.

765 Couzens and Mazoue 2013 *Obiter* 430.

766 Quaker United Nations Submission to the Study of the Secretary-General of the United Nations on Violence Against Women and Girls in Prison and Girls in Prison 32; Alejos *Babies and Small Children Residing in Prisons* Nations Office 35. In Canada a caregiver convicted for an offence involving a child is not eligible to take part in Mother-Child Programmes unless a psychiatric assessment determines that she does not represent danger a to the child.

767 Department of Correctional Services *B Order-1 Infants and Mothers Policy* and *Infants and Young Mothers Policy*.
The Infants and Mothers Policy is a recognition of principles enshrined in the *White Paper on Corrections in South Africa* 2005 as well as the *Department of Correctional Services Strategic Plan*. The aim of the policy was to 'ensure that care and treatment of young children in the DCS is practised in [our] Correctional Centers according to set standards'. Both documents can be obtained by written request from the DCS.

768 Paras 9.1.1 and 7.9 of the IMPYMP.

prison'.[769] Luyt and Du Preez[770] point out that 'primary caregivers often prefer to retain their children in jail because they lack supervision in open society'. Whilst an application by the caregiver commences the admission process, the needs of the child should be regarded as 'the first priority as they are not an amenity for the primary caregiver'.[771] The criteria for admission take into account the 'length of the caregiver's sentence', the 'availability of suitable care in the community and the age of the child'.[772] The 'standard of the best interests of the child' is also not stipulated as the criterion for admission and this is despite it being included as an explicit criterion on decisions pertaining to 'placement',[773] 'permanency planning',[774] 'contact and relationship between the child and the caregiver upon separation'.[775] Couzens and Mazoue[776] remain uncertain if the 'best interests of the child prescript amounts to intentional omission or a deliberate move designed to indicate that the admission of the child with the primary caregiver is not the right of the child but a measure in which the DCS has a wide degree of discretion'. The prescript of the best interests of the child should be part of the criteria for admission. It is because of the child that the caregiver may apply for admission. The child becomes the primary subject in the admission process and without the child, the caregiver will not be eligible to apply for admission in the first place. Given the fact that the IMPYMP clearly stipulates that the needs of the child are not the amenity for the primary caregiver, it would have been expected that the best interests of the child would be the apex in the criteria for admission.[777]

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769 Para 9.1.1 of the IMPYMP.

770 Luyt and Du Preez 2010 *Acta Criminologica* 107.

771 Para 3.3 and 3.4 of the IMPYMP state that the 'admission of the child with the caregiver is also seen by the DCS as an opportunity to reduce the likelihood of the caregiver lapsing into crime by helping her develop a positive relationship with the child and by providing opportunities for self-development. There are privileges derived by the primary caregivers from the presence of her child with her in prison'.

772 Para 14.4 of the IMPYMP.

773 Para 15.1 of the IMPYMP.

774 Para 1.2.7 of the IMPYMP.

775 Para 15.11 of the IMPYMP.

776 Couzens and Mazoue 2013 *Obiter* 434.

777 The prescript of the best interests of the child is entrenched in para 15.1 '(decision pertaining to placement)'; para 1.2.7 '(permanency planning)' and para 15.11 '(maintaining contact and fostering the relationship between the caregiver and the child after the placement of the child outside of prison)' of the IMPYMP.

5.3.1.2.1 Separation of children from the primary caregivers

Separation of the child from the caregiver may happen in two ways, namely refusal of admission of the child in an MCU or placement of the child in alternative care without an application for admission by the primary caregiver. The IMPYMP does not make provision for avenues that the caregiver may explore should she want to 'challenge' refusal of admission in an MCU.[778] The IMPYMP does not afford the primary caregiver the right to appeal against the refusal of admission in an MCU. The caregiver will only have the remedy of appealing administratively through the head of the correctional centre and to the NCCS or may approach the High Court by invoking the 'right to administrative action'.[779]

Placing the child in alternative care without an application for admission being made may compromise the right of the child to have his best interests considered. Separation of the child from the primary caregiver by refusal of admission or by placement in alternative care particularly of a young age without considering the best interests of the child, may be 'uncongenial for the proper development of the child'.[780] Abrupt separation of the child from the caregiver before the eighteen months age limit is considered to have long life effects on a person's ability to establish healthy relationships and to 'interact positively with the world'.[781] Azar[782] supports this statement by indicating that 'early child-primary caregiver bonding results in positive

778 *C v Department of Health and Social Development; Gauteng* 2012 2 SA 208 (CC).

779 S 33 of the Constitution; s 6 of the *Promotion of Administrative Justice Act* 3 of 2000.

780 Haiman Date Unknown www.peterhaiman.com/articles/EffectsOfSeparation ofYoungChildren.stmhl. A toddler who is reunited with his or her primary caregiver will generally develop rejection of the caregiver. The behaviour of the toddler will be saying 'I am totally dependent by nature. I am attached emotionally to you. It is from you that I learned I can trust to get my love and to get my needs met when I feel you were doing what a good primary caregiver is supposed to do: be there consistently and reliably for me so I can learn to trust in you. I won't be to trust myself unless I learn to trust in you first. But then something bad happened. You were gone when I needed you. You were away when I needed to be held. You were gone when I needed to hear the sound of just your voice. You were not there when I needed you to comfort me. The time grew longer and longer without you. You were gone. I started to cry. I could not stop crying. You should have been there to protect me. I felt so weak'.

781 Sroufe *et al Placing Early Attachment Experiences in Developmental Context* 17.

782 Azar Date Unknown www.thelizlibrary/APA-Monitor-attachment.html, with the cutting of the umbilical cord, physical attachment of the baby to the caregiver ends and emotional and psychological attachment begins. See also Onderko Date Unknown http://www.parenting/article/the-news-science-of-mother-baby-bonding and Segal; Glenn and Robinson 2018 https://www.helpguide.org/articles/parenting-family/what-is-secure-attachment-and-bonding.htm.

future outcomes for both the child and the caregiver'. Children raised in jail, compared to children raised outside prison during their primary caregivers' incarceration, generally exhibit 'measurable rates of secure attachment consistent with or exceeding population norms'.[783] A strong caring relationship can 'protect the child from the effects of deprivation and disadvantage'.[784] Admission in an MCU should be categorised into 'temporary admission', 'emergency temporary' and 'full admission'. Temporary admission may be considered when the caregiver is not yet sentenced. Emergency temporary admission may be granted when the primary caregiver is arrested or when the application for admission is being processed. Neither the IMPYMP nor the CSA makes provision for temporary and temporary emergency admission of the child in an MCU.

Separation of the child from the caregiver is regulated by the IMPYMP. Whilst the age of two years is the maximum the child may remain imprisoned with the primary caregiver, there are children above the age of two years accompanying their incarcerated caregivers. This may be the case where placement of the child in a suitable alternative care has not been secured.[785] If the length of the primary caregiver's sentence is such that the caregiver and the child will be separated, a DCS's multi-disciplinary team establishes whether it is 'in the child's interest to remain with the primary caregiver for some time or to be separated immediately from her'.[786] The child of the caregiver will only be admitted in a MCU when 'no other suitable accommodation and care are available at the point of imprisoning the primary caregiver'.[787] The admission of the child with the caregiver is seen by the DCS as an opportunity to reduce the likelihood of the caregiver lapsing into crime by helping the

783 Goshin and Byrne 2009 *Journal of Offender Rehabilitation* 271**.**

784 Ritcher *The Importance of Caregiver-Child Interactions for the Survival and Healthy Development of Young Children* 3.

785 The DCS had since set up the *Imbeleko* initiative to assist with the placement of children in alternative care. The *Imbeleko* initiative gives effect to s 20(1A) which requires that the DCS in conjunction with the Department of Social Development must take the necessary steps to facilitate the proper placement of the child.

786 Para 14.4 of the IMPYMP.

787 Para 14.4 of the IMPYMP.

primary caregiver to develop 'a positive relationship with the child'[788] and providing 'opportunities for self-development'.[789]

5.3.1.2.2 Mother and Child Units

MCUs differ in facilities and the best equipped in the country have the following salient features: they are 'cold single cells fitted with a single bed or a mattress and have a toilet and small basin'.[790] In the MCU the caregiver is 'accorded the following privileges: special care before and after birth',[791] entitlement not to be 'transferred' to another correctional centre if the health of the child does not allow for such,[792] qualification for 'personal care of the child' on a full time basis for the first three months of the child's life[793] and to 'a special diet (for pregnant women)'.[794] It is disturbing to note that the rights of the child that are entrenched in the CRC and the ACRWC are referred to as privileges. Articles 6(2) and 5 respectively of the CRC and the ACRWC entitle the child to 'the right to survival and development', article 27 stipulates that 'the child has the right to a standard of living adequate for his physical, mental, spiritual, moral and social development'. Articles 24 and 14(1) of the ACWRC confer to the child 'the right to the enjoyment of the highest standard of health and to facilities or the treatment of illness'. It is argued that the reference to the rights of the child as privileges should be amended. The rights of the child should be referred to as rights and not privileges. The child, by reason of 'his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.[795]

5.4 India

5.4.1 Model Prison Manual

Whist the Model Prison Manual (hereafter referred to as the MPM) is intended to bind all state unions and union territories, the truth is that not all state unions and union territories are not bound by it. The Supreme Court of India has come down heavily on

788 Monama *The Star* 7.
789 Para 3.4 of the IMPYMP.
790 Anon Date Unknown http://www.babiesbehindbars.org/.
791 Para 10.2 of the IMPYMP.
792 Para 10.3 of the IMPYMP.
793 Para 12.1 of the IMPYMP.
794 Para 13.3 of the IMPYMP.
795 Para 9 of the preamble of the CRC and para 6 of the preamble of the ACRWC.

the sub-human conditions obtaining in prisons. Among others it recognises that prison administration has been a matter of intense debate and criticism at various public *fora* in recent years. In many states the problems of dilapidated jail structure, overcrowding and congestion and an increasing portion of under-trial prisoners, inadequacy of prison staff, lack of proper care and treatment of prisoners have been engaging the attention of the press and social activists with a growing advocacy for the protection of human rights in the various wakes of lives. The plight of prisoners has emerged a critical issue of public policy.

Various procedures regarding the internal management of jails with a view of maintaining security and institutional discipline, institutional programmes for the specialised treatment of women, adolescents, children and mentally sick person, staff recruitment and training, need to be adopted. It is hoped that the MPM would prove a vital instrument for the states unions and union territories in streamlining their prison administration.

5.4.2 Confinement of children with their primary caregivers

The confinement of the child with the primary caregiver has to be comprehended from the backdrop of India's population and of the numerous challenges faced by children. By 16 September 2019 the Indian population stood at 1,350,486,781(slightly above 1.350 billion).[796] Challenges faced by children in this jurisdiction include 'child labour', 'child marriage', 'child trafficking', 'female feticide' and 'infanticide'.[797] The NHRC is tasked with dealing with generic human rights violations including infringement of rights of children. It is argued that in view of the population, especially the birth rate, focusing on children imprisoned with their primary caregivers may prove a difficult task. It is proposed that the mandate of the NHRC be split into two, one to focus on the specific rights of adults and the other on the particular rights of children. Once a commission on children's rights is established, protection and advancement of children's rights would gain momentum and eventually focus would also be on children confined with their primary caregivers.

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796 Indian Embassey Abroad 2019 https://www.indiaonlinepages.com. The birth rate is 22.22 per 1000.

797 Bhakhry *Children in India and their Rights* 53.

In *R.D Upadhyay* v *State of Andhra Pradesh*[798] (hereafter referred to as *Upadhyay*) the Supreme Court, held that a need exists to bring about uniformity of laws relating to prisons and a new model prison manual has to be formulated in light of the provisions of the state's prison manuals by 'identifying gaps in their provisions and administering prisons'.[799] The treatment of prisoners should be underpinned by respect for basic human rights. Recommendations made on jail reforms, international instruments to which India is party and pronouncements made by the Supreme Court should be adhered to. Despite the directions issued by the Supreme Court on the protection and advancement of the rights of children confined with their primary caregivers in *Upadhyay*, the rights of children confined with their caregivers continue to be marginalised. A probable explanation for inadequate protection and advancement of the rights of children confined with their primary caregivers is the generic human right issues the NHRC deals with. India does not have MBUs or MCUs within prisons.

Children are confined with their caregivers in general prisons. The maximum age of children confined with their primary caregivers vary from state union and union territories. In Manipur and Punjab it is up to 'twenty four months', in Orissa, Madhya Pradesh[800] and Maharashtra[801] it is up to 'four years', in Andaman, Nicobar Islands, Himachal Pradesh and Bihar[802] it is up to 'five years' and in Meghalaya, Mizoram, Karnataka,[803] Assam, Delhi, Uttar Pradesh and Tamil Nadu[804] it is up to 'six years'.

In regard to facilities and amenities made available to children imprisoned with their caregivers the study by the National Institute of Criminology and Forensic Sciences[805] in the different state unions and union territories reveals the following variances:

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798 1996 3 SCC 422. This case does not contain paragraphs. Subsequent reference will be in regard to page numbers of the case.

799 *Uphadyay* 11.

800 *Uphadyay* 8.

801 *Uphadyay* 8.

802 *Uphadyay* 6.

803 *Uphadyay* 8

804 *Uphadyay* 9.

805 February 2002.

In West Bengal, normal facilities are available. A non-formal school is run by a non-governmental organisation for 'rendering elementary education to the children'.[806] In Uttaranchal, food for children is 'provided for under the rules of the jail manual. Education is offered by government which also makes arrangement for extra-curricular activities such as sports'.[807] In Uttar Pradesh, children are allowed to accompany their imprisoned mothers up to the 'age of six years'. Upon leaving prison children are handed over to 'relatives or some trustworthy person' as selected by the District Magistrate.[808] In Assam, literary training is rendered to young children who are lodged with their jailed primary caregivers. Female teachers are also present. Instructions have been issued to 'provide sufficient study material to the children, as also adequate playing material'.[809] In Bihar, children are allowed to accompany their imprisoned mothers up to the age of two years and in special cases up to the 'age of five years'.[810] In Goa, dietary facilities are provided for children at the costs of government. The Medical Officer of the Prime Health Centre, Candolim, visits 'government prisoners and children twice a week'.[811] In Tripura, the diet of children is as per the instructions of the Medical Officer. Medical care and nursing facilities are available. Caregivers accompanied by their children are 'kept separately'.[812] In Rajasthan, a special diet is available under the rules of the Jail Manual and special medical facilities are also made available as 'per directive of the Medical Officer'.[813]

In Punjab, children below the age of one are provided with milk and sugar. Provision is also made for the twelve to eighteen months and eighteen to twenty four months categories. There is 'a play way nursery and one *aaya* or attendant who looks after the children from time to time'.[814] In Pondicherry, a special diet for children is available and is prescribed by the Medical Officer. Play facilities such as toys are provided for by 'government and by non-governmental organisations.[815] In Orissa, a special diet as

806 *Uphadyay* 9.
807 *Uphadyay* 9.
808 *Uphadyay* 9.
809 *Uphadyay* 6.
810 *Uphadyay* 6.
811 *Uphadyay* 6.
812 *Uphadyay* 9.
813 *Uphadyay* 9.
814 *Uphadyay* 9.
815 *Uphadyay* 9.

prescribed by a Medical Officer is available. Children are provided with suitable clothing. On leaving jail they are handed over to the 'relatives', or 'to some trustworthy person'.[816] In Nagaland, provisions of the Assam Jail Manual have been adopted *vis á vis* facilities for women and for 'children living with their primary caregivers'.[817] In Mizoram, a special diet is available. No proper facilities for 'education or recreation exist'.[818] In Meghalaya, all aspects of children's welfare are taken care of, according to the 'rules under the State Jail Manual'.[819]

In Manipur, provision is made for special ration above and beyond the normal labouring ration for nursing caregiver and for supplementary cow's milk for children. The Superintendent is entrusted with the 'responsibility of clothing for children allowed to reside with their primary caregivers'.[820] In Maharashtra, from the age of three to four years, children are 'weaned away from their incarcerated caregivers'. A special diet is prescribed under the Maharashtra Prison Rules. Changes can be recommended by a Medical Officer. Specific amounts of jail made carbolic soap and coconut oil are to be provided by authorities. Garments are to be provided as per the Maharashtra Prison Rules. Two coloured cotton frocks, undergarments and chaddies per child have been prescribed per year. A nursery school is conducted by the '*Sathi*', a non-governmental organisation in the female jail on a regular basis. Primary education is provided for by '*Prayas,* a voluntary organisation in Mumbai Central Prisons. A small 'nursery with cradles and other reasonable equipment' is offered in each women's ward.[821] In Himachal Pradesh caregivers of children are kept in 'a separate ward with its own toilet'.[822] In Madhya Pradesh, provision is made for a special ration above and beyond the normal labouring rations of nursing primary caregivers and cow milk is 'offered as a supplement'.[823] In Karnataka, education is looked after by various non-

816 *Uphadyay* 9.
817 *Uphadyay* 9.
818 *Uphadyay* 8.
819 *Uphadyay* 8.
820 *Uphadyay* 8.
821 *Uphadyay* 8.
822 *Uphadyay* 8.
823 *Uphadyay* 8.

governmental organisations. When children leave their jailed caregivers, they are handed over to 'relatives or to some trustworthy person, Agency or school'.[824]

In Jharkhand, special provision is made for a special ration above and beyond the normal labouring ration for nursing mothers and cow milk is 'offered as a supplementary'.[825] In Jammu and Kashmir, a special diet is offered and supplements are provided for 'breastfeeding primary caregivers'.[826] In Kerala, a special diet is made available and medical facilities as prescribed by the Medical Officer are made available. Special clothing can also be 'prescribed'.[827] In Karnataka, education is provided for by 'non- governmental organisations'.[828] In Lakshadweep, no under trial prisoner was 'lodged along with her child'.[829] In Haryana, a standard diet of rice, flour, milk and dal is provided with a special diet offered on the advice of a Medical Officer. Health issues are looked after as per the advice of the Medical Officer. Regular literacy classes are offered by two lady teachers on deputation from the State Education Department. 'Books and toys' are provided.[830] In Gujarat, a special diet and special medical facilities as prescribed by the Medical Officer are available for children. Cradle facilities are provided to the 'infants'.[831] In Delhi, children above four years are taught to read and write. They are also prepared for admission to outside schools. Sponsorship for the funding of the children's education is offered by the Community Aid Sponsorship Programme and the crèches are run by the Mahila Pratikraksha Mandal and the Navjyoti Delhi Police Foundations. Picnics are arranged by the non-governmental organisations to 'take them to places such as the zoo, parks and museums to make them familiar with the outside world'.[832]

In Chandigarh, a 'special diet' is available and medical facilities are also provided for.[833] In Chhattisgarh, normal 'food and additional milk' is offered. Medical treatment is done by part and full time doctors present in the jail. Children are sent outside for expert

824 *Uphadyay* 8.
825 *Uphadyay* 7.
826 *Uphadyay* 7.
827 *Uphadyay* 8.
828 *Uphadyay* 6.
829 *Uphadyay* 8.
830 *Uphadyay* 7.
831 *Uphadyay* 7.
832 *Uphadyay* 5.
833 *Uphadyay* 6.

medical treatment and advice if required. Non-governmental organisations provide clothes. 'Television, sport, play and recreational facilities' are also provided. In Bihar, health care and clothing is 'offered by the government. 'Toys and other forms of entertainment' are made available.[834] In Assam, literacy training is offered. Female teachers are also present. Instructions have been issued to 'make provision for sufficient study and play material'.[835] In Andra Pradesh, a special diet is 'offered' including 'proper vitamins and minerals'.[836] In Andaman and Nicobar Islands, a special diet is provided as 'prescribed by a Medical Officer'.[837] In Tamil Nadu, a special diet is available as 'stipulated by a Medical Officer'. Children under three years are treated in a crèche and those up to the age of six years in a nursery. Oil, hot water and soap are available for children. On leaving, children are handed over to 'relatives or to some trustworthy persons'.[838]

5.5 England

5.5.1 Rules on babies and young children

The confinement of babies and young children with their primary caregivers, as a result of a 'settlement compromise'[839] takes place in terms of the Young Offenders Institute Rules,[840] Prison Service Rules, the CA-Eng., Children Care Act, CRC, ECHR, Care Standard Act, Framework for the Assessment of Children in Need and their Families, and Assessing Children in Need and their Families Practice Guidance. The Children Care Act, CRC and the ECHR contain general child provisions such as children's right to family life and the right to care. As the provisions of the CA-Eng.,[841] Children Care

834 *Uphadyay* 7.
835 *Uphadyay* 6.
836 *Uphadyay* 6.
837 *Uphadyay* 6.
838 *Uphadyay* 9.
839 *CF v Secretary for the Home Department* 2004 EWHC 111 (Fam) para 57. Prisons have taken a compromised position. They accept that' the prison environment is not really suitable for children but that for very young babies it may be in their best interest to remain with their primary caregivers than be separated'.
840 Of 2010.
841 S 1 provides that when 'a court determines any question with respect to the upbringing of a child; the child's welfare must be its most important consideration and that when deciding on where the child should live; it must be presumed; unless the contrary is shown that involvement of the parent in the life of the child will further that welfare'. S 2 sets out 'parental responsibilities and rights for a child in a range of circumstances' and s 3 defines parental responsibilities and rights as 'all rights, duties, powers, responsibilities and authority which by law the parent of a child has

Act, CRC, ECHR,[842] Care, Standards Acts and the Framework for the Assessment of Children in Need and their Families and Assessing Children in Need, and their Families Practice Guidance are incorporated in the PSO, these are discussed in detail below, while the Young Offenders Institute Rules and the Prison Service Rules are mentioned briefly.

5.5.2 Young Offenders Institute Rules

The Secretary of State may, subject to any conditions he or she thinks fit, 'permit a female inmate to have her baby with her in a young offender institution and everything necessary for the baby's care may be provided there'.[843] The Governor shall ensure that 'special attention is paid to the maintenance of such relations between an inmate and her family as seem desirable in the best interests of both'.[844]

5.5.3 Prison Service Rules

The Secretary of State may, subject to any conditions he or she thinks fit, 'permit a woman prisoner to have her baby with her in a correctional facility and everything necessary for the baby's maintenance may be provided'.[845] Special attention shall be paid to 'the maintenance of such relationships between a prisoner and his family as are desirable in the interests of both'.[846]

The confinement of the child with the caregiver is based on the assumption that 'the person or persons who can care for the child' are normally his parents. A decision to allow a caregiver to retain her child in prison informed by 'prison rules and by provisions of the CRC, ECHR, HRA and of the CA-Eng.'[847] MBUs accommodate babies and young children until the reach the 'age of eighteen months'[848] and the separation

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in relation to a child and his or her property'. The mother retains parental responsibilities and rights for the child whilst the child is in the MBU to the extent that it is possible given her imprisonment.

842 S 7.10 of the PSO.

843 Rule 25 of the Young Offenders Institute Rules consolidated in 2002.

844 Rule 42(2) of the Young Offenders Institute Rules 2000.

845 Rule 12(2) of the Prison Service Rules 1999.

846 Rule 4(1) of the Prison Service Rules 1999.

847 S 7.10 of the PSO.

848 S 8.7 of the P.S.O.

of the child from the primary caregiver is determined in line with the 'length of the sentence' served by the caregiver.[849]

5.5.4 Mother and Baby Units

In line with the Prison Service Rules, the National Offender Management Service may in certain circumstances 'allow the primary caregiver to care for her baby or child in an MBU in a correctional facility'. An MBU is a designated living accommodation within a women's prison or mixed prison, which enables a caregiver, where appropriate, to 'retain her child with her'[850] until the child is eighteen months. There may be exceptional circumstances where the child may be permitted to remain in the MBU beyond the eighteen months limit in which case the approval of the Head of the Women's Team will be 'required'[851] or it may be through a court pronouncement.

In *R(P) v Secretary of State for the Home Department* and *R(Q) v Secretary of State for the Home Department*[852] the eighteen months age limit was challenged successfully. The dates of release for the respective primary caregivers were not identical. In the former case, the caregiver was due for an early release on parole and in the latter case the release date of the caregiver was too far from the eighteen months limit. The court ruled that the eighteen months limit ought not to be applied rigidly. In very exceptional cases caregivers may be allowed to retain their babies with them subject to their release being closer to the eighteen months limit. In *CF* v *Secretary for the Home Department*[853] the separation plan agreed upon by the Secretary of State and the primary caregiver was to the effect that the child would be separated from her caregiver upon reaching the age of nine months.[854] The sentence of the primary caregiver was five years imprisonment and contrary to the separation plan, the caregiver wished to retain her until she reached the maximum age of eighteen months. The case was concerned with the flexibility of the PSO, whether the separation plan agreed upon could be altered to accommodate the child until she was eighteen months of age. The court, having had regard to 'the flexibility of the PSO and

849 S 7.21 of the P.S.O.
850 S 8.7 of the PSO.
851 S 31.12 of the PSO.
852 2001 EWCA Civ 1151.
853 (2004) EWHC 111 (Fam).
854 To live with her grandparents who were capable of caring for her.

to judicial review'[855] as a means by which a decision-maker may be compelled to reconsider an earlier decision, remitted the matter to the Secretary of State for reconsideration of extension of the child's residence with the caregiver.

5.5.4.1 Statement of purpose of MBUs

The standard of the best interests of the child is the 'primary consideration in all matters relating to the child'.[856] The MBU should provide 'a calm and friendly place within the correctional facility for babies and children and the caregiver should be enabled to exercise parental responsibilities towards the child'.[857] The primary caregiver should be offered support and facilities so as to 'develop a relationship with the child and to safeguard and promote the child's welfare'.[858] The caregiver should 'take part in the regime of the prison, among others in dealing with offending behaviour'.[859] The primary caregiver should 'always show consideration for other babies and young children and caregivers in the MBU'.[860]

5.5.4.2 Criteria for admission

The application for admission of the child in an MBU is initiated by the 'primary caregiver'[861] and she may be eligible to apply for 'more than one child'.[862] The 'best interest of the child' is the primary consideration alongside the 'safety and welfare of other caregivers and babies in the unit'.[863] In determining an application for admission the following factors are taken into account: concerns about the primary caregiver's conduct and behaviour that have the potential of placing 'her own and other caregivers' safety on the unit at risk',[864] 'negative result of mandatory drugs test for

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855 *R* v *Mayor and Burgesses of the London Borough of Hackney ex p S* unreported 13 October 2000 paras 8 and 11 and *R v Mayor and Burgesses of the London Borough of Hackney ex p* (No.2) (2001) EWHC Admin 228 para 4.

856 S 4 of the PSO.

857 S 4 of the PSO.

858 S 4 of the PSO.

859 S 4 of the PSO.

860 S 4 of the PSO.

861 S 9.8 of the PSO.

862 The caregiver need not apply for admission in all prisons with MBUs. In terms of s 8.14 a decision by one MBU to 'allow or refuse admission is binding on all MBUs'.

863 S 9.8 of the PSO.

864 S 9.8 of the PSO.

illicit substances',[865] 'willingness to refrain from substance misuse',[866] preparedness by primary caregiver to sign 'a standard compact'[867] that may be tailored in line with the caregiver's 'individual needs'[868] and the primary caregiver's ability and eligibility to care for the child that should not be impaired by poor health or by legal reasons such as 'the child being in care or subject to a child protection plan emanating from his treatment by the primary caregiver'.[869]

However, there is a high rate of rejection of MBUs applications resulting in their under-utilisation. A study by O'Keffe and Dixon[870] reveals that the 'majority of caregivers' often choose not to reveal their primary caregiving status to jail authorities preferring to make their own 'informal' care arrangements,[871] caregivers expecting to receive custodial sentences are often not prepared to make the necessary arrangements for care of their children, including applying for admission in MBUs; primary caregivers being traumatised when arriving in prison causing breast milk to dry up, thus having a detrimental impact on their bond with their babies; caregivers harbouring a feeling that by retaining their babies or children in prison they are forsaking or abandoning their older children who may be living with relatives in the community; caregivers being inadequately informed about the provision available in MBUs and the benefits of residing in an MBU; some social workers within a 'pro-separation' model focusing on finding alternative care for babies and children rather than exploring fully the possibility of placement in an MBU; primary caregivers viewing themselves as incapable of effective parenting and their babies and children as being better off without them; and caregivers often being under pressure from family members to leave their babies and young children in the community.

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865 S 9.8 of the PSO.

866 S 9.8 of the PSO.

867 S 9.13 and 9.19 of the PSO stipulate the reports that the Board should have when considering the application for admission. The reports are the Local Authority Children's Services Report, Adult Social Service Report; (where appropriate), Medical Report, Personal Officer's Report and the Report from the Community Offender Management Report.

868 S 15.5 of the PSO.

869 S 9.8 of the PSO.

870 O'Keffe and Dixon *Enhancing Care for Childbearing Women and their Babies in Prison* November 2.

871 Vally 2012 https://www.independent.co.uk/news/uk/home-news/mothers-prison-babies-behind-bars-8143296.html.

The primary caregiver may, for example, be pregnant but also have a child who is below the age of eighteen months in the community whom she wants to retain in an MBU. The application for each child should be considered separately but must take into account *inter alia* 'the best interests of the child'[872] and 'sibling attachment'.[873] The decision to refuse admission or to separate must be based on 'evidence and be recorded properly'.[874] A decision by one MBU to 'allow or refuse admission' is binding on all MBUs.[875] The caregiver may, however, 'appeal against the decision to refuse her and her child admission in an MBU'.[876]

5.5.4.3 Types of admissions

There are three types of admissions in an MBU, namely, an emergency, temporary and full admission. *Temporary admission* is considered when the caregiver is not sentenced. The caregiver would have been found suitable for admission in an MBU. She would be admitted temporarily pending her sentencing. The implications arising from her sentence eventually determines her admission in an MBU. If the sentence is within the eighteen months range, her temporary admission may be 'converted into full admission'. If her sentence is beyond the eighteen months limit, 'plans for her 'separation with the child must be commenced'.[877] *Emergency temporary* admission may be granted by the Governor or Director without the full board and when it is thought desirable that the baby or child should be with the caregiver whilst the application for admission or refusal in an MBU is processed. Instances where emergency temporary admission may be made are: where the baby or child is in the care of the local authority as the result of the primary caregiver being arrested at a port or airport, where the baby or child is in the unplanned care of others necessitated by the incarceration of the caregiver and when the pregnancy of the primary caregiver is at an 'advanced stage and the baby is due imminently'.[878] *Full admission* may be granted when the primary caregiver is 'sentenced and is subject to section 2 of the

872 S 2.2 of the PSO.
873 S 30. 7 of the PSO.
874 S 9.18 of the PSO.
875 S 8.14 of the PSO.
876 S 13 of the PSO.
877 S 29.3 of the PSO.
878 S 11.7 of the PSO.

PSO'.[879] Section 2 *inter alia* stipulates that 'the best interest of the child is the primary consideration (alongside the safety and welfare of other caregivers and children in the unit'.

Refusal of admission to an MBU takes two forms, namely, that of conditional refusal and refusal per se. *Conditional refusal* is granted when the Board is willing to recommend full admission in an MBU subject to the primary caregiver complying with certain specified conditions within a stipulated timeframe. The caregiver should be provided with 'the appropriate support and assistance by staff'. A further application for admission may be 'made at the end of the stipulated period'.[880] Since the primary caregiver has no automatic right to be admitted in an MBU, admission may be 'refused when the caregiver does not meet any of the admission criteria'.[881] In *R* (*D*) *v Secretary of State for the Home Department;*[882] the primary caregiver was excluded from an MBU and was separated from her child on account of misbehaviour.

5.5.4.4 Separation

Separation of the child from the caregiver may be a condition for temporary admission in an MBU. When the primary caregiver is sentenced to a term of imprisonment that stretches beyond eighteen months, the child has to be separated from her. A 'written plan'[883] relating to the separation of the child from the caregiver is usually made when the primary caregiver and her child are admitted in an MBU. Separation of the child from the caregiver should take place before 'the child reaches the age of eighteen months'.[884] In exceptional circumstances the primary caregiver may also be allowed to retain her child beyond the eighteen months age limit. The Separation Board may propose that the child should remain in the MBU beyond the age limit of eighteen months when the caregiver serves a sentence of nineteen or twenty months. However, the Head of the Women's Team however has the final decision on whether or not to permit the caregiver to have the child with her beyond the eighteen months age limit.

879 S 2.39 of the PSO.
880 S 2.40 of the PSO.
881 S 2.41 of the PSO.
882 (2003) EWHC 155 (Admin).
883 *R v Cornwall County Council* ex p *LH* 2000 1 FLR 236 para 244C; *Re (Care; Challenge to Local Authority's Decision)* 2003 2 FLR 42 paras 37 and 45.
884 S 8.7 of the PSO.

The criteria that the Head of the Women Team applies in determining whether the child should be accommodated in an MBU beyond the eighteen months age limit should be spelled out. Presently the release of the caregiver within a month or two after the child has celebrated his eighteen months birthday seems to be a reasonable basis. The criteria may, for example, include children admitted in an MBU and who suffer from chronic illness or who are disabled. The referral for the primary caregiver to retain her child beyond the eighteen months age limit should not be made earlier than 'the child reaching six months or later than the child reaching fifteen months'.[885]

The primary caregiver has to nominate two appropriate and responsible people to care for her child in the event separation takes place. The PSO is silent on the gender of the persons to be nominated to care for her child upon separation. By reason that caring for the child is now gender neutral, the gender of the persons to be nominated to care for the child should be stated. It may not simply be assumed the persons are also female caregivers. For example, it is possible for example that the husband of the primary caregiver was abroad between the periods of incarceration of the caregiver and when the child reaches fifteen months. If the husband meets the suitability and preparedness criteria to care for the child, he should equally be considered. If the first nominated carer is not willing or able or unsuitable to care for the child the second nominated carer should be contacted. The nominated carer should be assessed for suitability and preparedness to undertake the care of the child with the appropriate Local Authority Adult or Children's Services and a report confirming the outcome of the assessment for suitability and preparedness of the carer to care for the child must be 'communicated to the prison where the child and caregiver are accommodated'.[886]

The period within which the assessment of the suitability and preparedness of the carer should be made is not stipulated, neither is the period for communicating the decision of suitability and preparedness of the carer to care for the child to the prison where the primary caregiver and the child are housed is stipulated. The assessment of the people to care for the child involves a background check. A person who has committed offences that have elements of violence or abuse against children may 'not

885 S 2.9 read with 8.7 of the PSO.
886 S 27 of the PSO.

be assessed'.[887] In the event no person is found to be suitable to care for the child, 'the care would be assigned to the Local Social Services'.[888]

Separation of the child from the primary caregiver may be 'catastrophic for the child and for the caregiver'.[889] In *P and Ors v Secretary for Home Department;*[890] (hereafter referred to as *P and Ors*) for instance it was observed that 'babies cared outside of prison are shifted between four and five different homes before their first birthday'[891] and according to Hendricks *et al*, this places them in an even more 'disadvantaged position'.[892] They are subjected to disruptive separation at an early age and would generally lack a 'secure foundation'.[893] The caregiver may lose her bond with the separated child. Upon separation of the baby, he may be placed in the care of a family member who may eventually 'bond' with him.[894] The caregiver may find it difficult to cope with the care of the child upon leaving prison. For example, she may be unfamiliar with the role she has to play in her child's life when the child was separated from her whilst she was incarcerated. Contact and visits of the primary caregiver by the child and family members may have contributed to the development of a sound relation. The period of reintegration to the community upon release may be 'challenging and chaotic for caregivers'.[895] According to Wedderburn[896] 'around one third of caregivers lose their homes and possessions whilst in prison'.[897] If the primary caregiver had lost her home and possessions, the local authority may assist with the provision of accommodation. The caregiver has to first apply for a homeless status. The local authority may then consider the application and provide her with a room in a shared house or a one-bedroom property that is generally not suitable for family living.

887 S 30.3 of the PSO.
888 S 30.4 of the PSO.
889 Covington and Bloom *Gendered Justice*: *Addressing Female Offenders* 8.
890 (2001) EWCA Civ 1151 para 53.
891 *P and Ors* para 53.
892 Hendricks *et al When Father Kill Mother*: *Guiding Children Through Trauma and Grief* 100.
893 Haiman www.peterhaiman.com/articles/EffectsOfSeparationofYoungChildren.stmhl
894 O'Keffe *Moving Mountains*: *Addressing Barriers to Employment* 22.
895 Richie 2001 *Crime and Delinquency* 371.
896 Wedderburn *Handbook on Women and Imprisonment* 21.
897 Koski and Bantley 2013 *Rivier Academic Journal* 3. A caregiver who was employed prior to being imprisoned would lose her work upon conviction and sentence.

5.5.4.5 Foreign nationals as primary caregivers and emergency separations

Previously deportation of the caregiver to her country of origin was often delayed because proper travelling documents could not be obtained without the birth certificate of the baby or child. Presently the position is that before the primary caregiver is deported, two copies of the baby or child's birth certificate together with the baby or child's photograph are kept with the primary caregiver's valuable properties. At the end of the primary caregiver's sentence, deportation of the primary caregiver is 'no longer delayed by the baby or child's birth certificate'.[898]

5.5.4.6 Responsibilities of caregivers towards their children

Once admitted in an MBU, to the extent possible, the caregiver assumes the following parental responsibilities: to 'care for the child' on day to day basis,[899] to continuously demonstrate that she is fit and proper to remain in an MBU and to be involved in 'education or parenting classes in order to develop parenting skills'.[900] Taking part in parenting skills is part of the sentencing plan, to 'maintain family contacts' for the baby or young child.[901] The primary caregiver may be 'released on temporary licence for purposes of taking the child out in the community'.[902] The caregiver who is a foreign national should be assisted and advised on 'maintaining family contact through family

898 S 33.6 of the PSO.

899 Kennedy *et al Birth Charter for Women* 3. This Charter has since 1996 been and continues to be the pillar for support for primary caregivers before and after birth. It contains 15 guiding principles. Principle 1: Caregivers should have 'access to the same standard of antenatal care as primary caregivers in the community'. Principle 2: be able to 'attend antenatal classes and to prepare for their baby's birth'. Principle 3: be 'housed; fed and moved in a way that ensures their well-being and that of their babies and young children'. Principle 4: be 'informed of their admission or non-admission in an MBU as soon as possible after arriving in prison'; Principle 5: have 'appropriate support if electing for termination of pregnancy'; Principle 6: have 'access to a birth supporter of their choice'; Principle 7: be 'accompanied by officers who have had appropriate training and clear guidance'; Principle 8: be 'provided with essential items for labour and early post-natal period'; Principle 9: 'receive appropriate care during transfer between prison and hospital'; Principle 10: be 'encouraged and supported in their chosen method of infant feeding'; Principle 11: be 'supported to express; store and transport their breast milk safely, if they are separated from their babies'; Principle 12: be given the 'same opportunities and support to nurture and bond with their babies as other primary caregivers in the community'; Principle 13: be 'entitled to additional family visits'; Principle 14: should be able to have 'access to counselling when needed'; and Principle 15: should receive 'appropriate resettlement after release from prison'.

900 S 19.7 of the PSO.

901 S 21.3 of the PSO.

902 S 21.1 of the PSO.

links'.[903] The PSO is silent on the types of links made available for the primary caregiver who is a foreign national. It is submitted that upon admission in an MBU the manner in which the primary caregiver would maintain family contact with her family, should be stipulated. Provision of links, especially video links, may be inadequate. A visit by the siblings of the child and other family members may be arranged at least once before the child is separated from the primary caregiver. The siblings of the baby or child should, where possible, have an opportunity of physically meeting with the baby or the child especially when the baby or child was born in prison.

Admission in an MBU has advantages. The caregiver may, for example, be motivated in her life both in and outside of prison and may provide the platform for the caregiver to prioritise the interests of her child. In the event the caregiver opts to advance the interests of the child above acts of criminality, the rate of recidivism is reduced.[904] The primary caregiver runs the risk of being separated from the child should she return to prison. Another advantage of MBU residence is that a strong emotional attachment is formed between the caregiver and the child. By spending more time with the primary caregiver the child develops a strong bond with her. Healthy attachment develops between the child and the primary caregiver especially between when the child is between the ages of nine and eighteen months. It is during the first two years of life that babies begin to synthesise their experiences of the world and form an understanding of how to 'relate to the world and to regulate themselves in relation to others'.[905] Normal child development may require the establishment through continuity of care by one adult caretaker, of an 'attachment bond that the baby maintains through childhood'.[906]

Residence in an MBU has the potential to prevent future emotional and psychological problems. Ritchie[907] was is able to point out that 'children accompanying their primary caregivers generally experience more stability than those in foster or state care'.

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903 S 21 of the PSO.

904 O'Keffe *Moving Mountains: Addressing Barriers to Employment* 21-23.

905 *Children of the Incarcerated*: *Collateral Victims of Crime*: A Resource Guide UF Levin College of Law Centre for the Study of Race and Race Relations (March 2015) 6.

906 Donnelly and Howard 1988 *Human Rights Quarterly* 177. They describe a family as 'the seat of socialization, a unit that nourishes the child's self-worth, dignity and belonging'.

907 Ritche 2001 *Crime and Delinquency* 370.

Another advantage of MBU residence is that the primary caregiver acquires 'adequate time to breastfeed the child'.[908] Interviews conducted in England revealed that the 'breastfeeding rate' is much higher in the local population because it is encouraged and it is the right of the child to be breastfed. The period between pregnancy and the child's second birthday is 'critical in the child's development',[909] and breastfeeding is a 'key element in shaping the health and well-being of the child'.[910] According to the International Baby Food Action Network, 'exclusive breastfeeding for six months followed by complimentary feeding practices of up to two years and beyond provide key building blocks for the survival, growth and healthy development of the child'.[911]

Disadvantages of residence in an MBU are, among others, that the children may have contact with prisoners some of whom may be hardened criminals. In England, for example, it is not possible for female prisoners to enter an MBU. They may, however, have contact with primary caregivers and their children in the gardens within the perimeter fence of the prison or in the medical centre. Despite warnings primary, caregivers often hand over their children to other prisoners whose offences are not known to them. The lives of the children may be put at risk if the offenders were convicted and sentenced for abuse of children, for violence against children or for sexually violating children. Primary caregivers who do not desist from handing over their children to other offenders should be reprimanded and be informed given notice of withdrawal of admission in the event they fail or neglect not to place the lives of their children at risk. The MBU environment often does not expose children to the outside world. In the long run these children are prevented from becoming familiar with everyday objects such as cars, animals and shopping areas. The children often do not get familiar with male figures and may even get upset when they see a bearded

908 Art 24 of the CRC makes provision for the right of the child to' the highest standard of health'.

909 World Health Organization *The Importance of Caregiving-Child Interactions for the Survival and Healthy Development of Young Children: A Review Department of Child and Adolescent Health and Development World Health Organisation* 8. The formation of an ongoing, warm relationship is crucial to the child's survival and healthy development.

910 Walker *et al* 2007 *Child Development* 1137; IBFAN Date Unknown www2.ohchr; Kent 2006 www.internationalbreastfeedingjournal.biomedcentral.com.

911 International Baby Food Action Network (2011) 2.

male officer. In order to make children of primary caregivers familiar with the 'outside world, visits to and by their siblings and by family members' should be 'encouraged'.[912]

5.5.4.7 Reintegration of caregivers and her children upon release

The prescript of the best interests of the child now 'compels correctional centres[913] to 'support the reintegration of primary caregiver and the child into society'.[914] Most caregivers incarcerated with their children are 'indigent, under-educated and unskilled and the majority of them are of colour'.[915] The majority of primary caregivers are likely to 'experience economic deprivation'[916] and 'stigma of shame of societal labelling upon release from prison'.[917] Caregivers have specific 'social reintegration needs that differ from male offenders'.[918]

Some of the challenges they face are trauma, victimisation, abuse, mental health, parental stress, family reunifications, and foster care support, urgent financial support to escape abusive relationships, housing, safety and child and family-centred general services. In order for the community to play a role in the reintegration of the primary caregiver, it should be acknowledged that prison is a highly artificial society. Conformity in a correctional centre is not always the primary caregiver's indication of compliance upon release. The society has resources that are not available to a correctional centre and the likelihood of rehabilitation and reintegration is enhanced. The community can provide support networks to the primary caregiver that does not

912 S 21.1 of the PSO recognises the 'restrictions of the prison environment and implores the Governor or Director to seek ways to provide the babies and young children with a variety of different experiences; including contact with appropriate family members; organisations and agencies such as Local Authorities; health care services; psychologists; educationalists; day care services and charities'.

913 S 8 of the 2004 White Paper on Corrections recognises the 'reintegration of offenders and their reintegration into the society can be achievable only when all stakeholders are allowed to participate in the process'.

914 Zondi 2012 *International Journal for Cross-Disciplinary Subjects in Education* 766. Some of the characteristics of reintegration are '(i) close liaison between the correctional center or community corrections office and the community'; '(ii) social reform in correctional centers is the bridging gap between institutional and community life'; '(iii) behavioural change by the offender' and (iv) 'community takes part in the reformation of the offender'.

915 Covington *A Woman Journey Home*: *Challenges for Female Offenders and their Children* 5.

916 O'Keffe *Moving Mountains: Addressing Barriers to Employment Press* 22-27. In England caregivers are offered training and education through the Employment, Training and Education (ETE) initiative so as to enable them to access employment upon release.

917 Khwela 2014 Athens Journal of Social Science 149.

918 Jules-Macquet *Exploring Female Offenders Profiles* 2; CPLO 2014 www.cplo.org.za/wp/content /uploads/2014/02/BP-352-Mothers-and-Babies-in-Incarceration-May.

exist in the correctional centre. With the assistance of her family and society at large, the primary caregiver stands a chance of leading a law-abiding life and fewer resources are spent on community correction programmes. Correction of offenders is societal responsibility. The minimum 'one hour'[919] 'supervised'[920] visit a month to the primary caregiver and her child may be inadequate. The caregiver may within the minimum of one hour per month be visited by her 'partner', 'next of kin', 'religious counsellor' or 'medical practitioner'.[921] The minimum visit has the potential of defeating the objectives of community corrections. Community corrections are *inter alia* intended to enable the caregiver to 'lead a socially responsible and crime-free life during and after incarceration'[922] and to 'rehabilitate her in a manner that keeps her as an integral part of society'.[923]

Jurisdictions such as the United States of America and England have since taken the initiative of supporting the caregiver and the child upon release from jail. The reintegration of the primary caregiver into the community is considered cardinal to the relationship between the child and the caregiver. It informs the decision to separate the child from the primary caregiver. Separation of the primary caregiver from her child is generally a much 'greater hardship for the caregiver'.[924] These caregivers often consider themselves to be 'inadequate and incompetent people that are unable to provide adequately for their children'.[925]

5.6 Conditions of children confined with the caregivers

By reason that MCUs and MBUs are located within prison the circumstances of the child confined with the caregiver have to be separated from general jail conditions. The manner in which children confined with their caregivers are viewed by prison authorities and the form of assistance offered to children confined with their caregivers by private donors is encapsulated in 5.6.1 below.

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919 S 13(3) of the CSA.
920 S 13(1) of the CSA.
921 S 13(2) of the CSA.
922 S 150(1)(a)(ii) of the CSA.
923 S 150(1)(a)(iii) of the CSA.
924 Belknap *Invisible Woman*:*Gender; Crime and Justice* 105.
925 Snyder 2009 *Women and Criminal Justice* 37-59.

5.6.1 South Africa

In view of the appalling conditions of MCUs (cold single cells fitted with a single bed or a mattress and a toilet and small basin) the DCS has set up the *Imbeleko* Project. The *Imbeleko* Project seeks to improve MCUs and to make them home-like for children below the age of two years. Through the *Imbeleko* Project the DCS strives to place children of primary caregivers in outside sustainable family structures. The DSD has as from September 2009 been roped in to 'ensure the government's child support grant is accessible to infants and young children imprisoned with their caregivers'.[926]

What is contained on paper is quite different from what actually takes place in practice. The plight of infants and young children imprisoned with their primary caregivers is ameliorated by family members, relatives and independent organisations who provide them with items such as baby formula, toys, play facilities, reading material and related items. Among the donors that alleviate the plight of babies and young children in prison with their caregivers are the Babies Behind Bars, Rheema South Family Church, Red Cap Foundation and the Cliffe Dekker Hofmeyr Attorneys.[927]

5.6.2 India

Children are confined with their caregivers in general prisons. The maximum age of children confined with their primary caregivers vary from state union and union territories and it is up to the age of six years. Most of the revenue expenditure by states on different agencies on the criminal justice system goes to the police, courts and hardly are funds available for prison reforms and the correctional system. Sarkar and Gupta[928] contend that 'many prison officials 'admit in private that the children in prison are viewed a liability and a drain to their already meagre jail budget'.

In *Upadhyay,* the Supreme Court expressed the view that the rights of children imprisoned with their caregivers continue to be marginalised. A probable explanation for inadequate protection and advancement of the rights of children confined with their primary caregivers is the generic human right issues the NHRC deals with and

926 Civil Society Prison Reform Initiative *30 Days/Dae/Izinsuku* 4.
927 Anon Date Unknown http://www.babiesbehindbars.org/.
928 Sarkar and Gupta 2015 *Journal of Nursing and Health Science* 86.

further that India does not have MBUs or MCUs within prisons. It also does not have a jail manual that has application across the country. Wealthy states and union territories such as West Bengal and New Delhi continue to provide reasonable or proper facilities and amenities to children imprisoned with their primary caregiver whilst indigent states and union territories such as Mizoram depend on external assistance from CASP, *prayas* and other non-governmental organisations.

5.6.3 England

The PSO regulates the detention of the child with the caregiver and is adjusted in line with court pronouncements. The conditions of MBUs are consistent with the proper development of the child confined with the primary caregiver. However, prison authorities in this jurisdiction need to improve the contact of the child with his siblings, family members and with the outside world. Siblings and family members need to be encouraged to visit the child in the correctional facility and the child needs to visit his siblings outside of prison. The child should also have exposure to environments outside of prison.

Despite MBUs striving to promote and to protect the right of the child to parental care, Juliet Lyan,[929] Director of the Prison Reform Trust, with regard to the confinement of the child with the caregiver noted that:

> [a]part from people who have committed extremely serious or violent offences, it is difficult to see how jailing a young primary caregiver is going to do anything other than damage her and her baby.

Frances Crook, Director of the Howard League for the Penal Reform shares Lyan's sentiments by pointing out that: [930]

> [n]o pregnant woman should be held in prison. It is outdated and inhumane practice, penalising a baby for something that is no fault of its own.

5.7 Conclusion

Confinement of the child with the primary caregiver is a world trend and will not disappear soon. The confinement of the child with the caregiver comes as a result of

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929 Russel *The Independent* 9.
930 Russel *The Independent* 9**.**

prison authorities not prioritising mother-child bonding. The confinement of the child with the primary caregiver then becomes a settlement compromise that demands *inter alia* that correctional centres ensure that the child leads a life not so different from that of a child outside of jail.

In India, owing to no uniform jail manual and policy or statutory provision on the imprisonment of the primary caregiver with the child, no distinction is made between an un-sentenced and a sentenced caregiver. Differentiation between an awaiting trial and a sentenced primary caregiver will clarity the position of the primary caregiver detained by police, as they are often detained together in the same facilities. The Indian government and jail authorities still have to commit to the improvement of the situation of children imprisoned with their caregivers. Police stations in India, similar to South Africa and England, do not have MCUs or MBUs to accommodate the primary caregiver and her child.

A further issue that is untenable in India is the fact that caregivers are still detained with their children in general prisons. The Constitution of India makes provision for specific rights of children. What is then required, is the splitting of the mandate of the NHRC. One tier of the NHRC should focus on the promotion and advancement of the rights of adults and the other on the promotion of the rights of children. The NHRC will then be able to consider the implementation of policies, charters and statutes impacting on children. At present the NHRC's mandate is undermined by the series of human rights cases of adults. Once the mandate of the NHRC extends to children specifically, a platform for dealing with every aspect of children is created. It will inevitably culminate in having MCUs or MBUs to accommodate primary caregivers and their children and to facilities and amenities being offered to children imprisoned with their caregivers. Once MCUs or MBUs are established, procedures for admission and separation can be addressed through policy or statutory provisions.

The confinement of the child with the primary caregiver has to be viewed within the lens of his best interests, as this principle has now also permeated sentencing and post-sentencing decisions affecting children. The research conducted in this chapter not only reveals shortcomings in India but also in the current South African system, with possible lessons from India and England. South Africa may, for example, learn

from England's admission processes. In South Africa the decision whether a child accompanies his incarcerated caregiver is made by jail authorities whereas in England the caregiver applies for admission. South Africa may learn from India in regard to prison conditions. The jail environment must not be so adverse as to also amount to it infringing upon the basic rights of the child. It has been shown that some jails in India are unable to meet children's basic needs such as food, water and healthcare.

Facilities, such as play and educational and amenities such as baby food, clothing and healthcare services made available to the child, are critical. In order to improve the conditions of MCUs or MBUs, it is imperative that adequate funding be made available. Even in jail the child must be able to lead a life that does not differ significantly from that of a child outside prison. In addition, agencies in social development should play a bigger role to assist caregivers incarcerated with their children. Among the assistance social development agencies may render, is ensuring that caregivers receive the 'child support grant' of R440.00.[931]

The confinement of the child with the primary caregiver may take place before or when the caregiver is sentenced. Whether an awaiting trial primary caregiver may be allowed to retain her child with her seems to be dependent on where she is imprisoned. Section 20(1) and section 1(3)(a) respectively of the CSA and the PSO, whilst permitting caregivers to have their children with them in jail, neglect to address the situation of primary caregivers detained in police cells. Police stations do not have units such as MCUs and MBUs to accommodate primary caregivers and their babies and young children pending finalisation of their cases. As police stations do not have units to accommodate primary caregivers and their children, it is proposed that such units, subject to availability of funding, be made available or alternatively, primary caregivers, subject to availability of facilities, should be transferred to female portions of prisons so as to accommodate them and their children. Notwithstanding, whilst parental care is always the preferable option, reality may necessitate interim reports evaluating the conditions and when in the best interest of the child, may require an investigation into further alternative care. Ultimately, as is argued in Chapter 6, the

931 South African Government 2014 https://www.gov.za/services/child-care-social-benefits/child-support-grant.

court should, when the accused is a primary caregiver of an infant or very young child, already during sentencing take prison practice and conditions into account.

The criterion for admission of the caregiver and the child to an MCU is an issue that South Africa has to address as a matter of urgency. In South Africa the criterion for admission takes into account the length of the caregiver's sentence, the availability of suitable care in the community and the age of the child. The caregiver's offence is not considered. Offences relating to drugs, abuse and violence should disqualify the primary caregiver from admission in an MCU. By their nature, drug, abuse and violent offences have the potential of placing the life and welfare of the child at risk. These scenarios would be excellent examples where the alternative care approach, as advocated in this thesis, could be followed with regard to the child's well-being in the caregiver's post-sentencing stage. The fact that the best interests of the child is no longer only a guiding principle in family law, but has found application in the criminal justice sphere as well.

In the event of the child remaining with the caregiver during her incarceration, the procedure surrounding admission to an MCU raises some concern on the proper consideration of the best interests of the child. The standard of the best interests of the child is also not stipulated as the criterion for admission, despite it being included as an explicit criterion on decisions pertaining to placement and permanency planning. The standard of the best interests of the child should be primary in the criteria for admission.

Another aspect crucial for improvement in a South African context, is the separation of the child from the primary caregiver. It may become relevant either during sentencing or after the caregiver being imprisoned. At present there is no provision and procedure for planned separation. The sentence served by the caregiver should be part of the criteria for separation of the child from the primary caregiver. A separation agreement should be entered into between the caregiver and prison authorities. The separation pact should be preceded by interviews with, for example siblings and family members of the caregiver. Social welfare agencies should investigate and compile a file on the care of the child, whether the child will be suitably cared for by grandparents, family members or by alternative carers. The process of

separation should be commenced at least six months after the caregiver has been allowed to retain the child with her. Abrupt separation of the child from the primary caregiver should be avoided and the caregiver should be represented during the planning of the separation. A social worker other than the one who conducts the investigation and who prepares the report on the welfare of the child should represent the caregiver.

Both South Africa and India lack strategy on reintegration of the caregiver and the child upon release from jail. This should be acknowledged and lessons from England may be valuable. The majority of caregivers would, at the time of release, have already lost employment and property. Upon release from prison steps should be taken to place primary caregivers in employment so as to enable them to support their children and to acquire property such as furniture. Employment sways caregivers away from crime and may in fact make them realise that they have the obligation of caring for their children. Reformation of primary caregivers may not only be achieved through correctional programmes but also by supporting caregivers upon release from prison. The standard of the best interests of the child should continue to be the thread that runs through all decisions and actions that involve children and their primary caregivers. The right of the child to parental care, through the primary caregiver, should be advanced and protected inside and outside a correctional facility. Notwithstanding, in all instances, there should be an awareness that sometimes alternative care might be preferable to parental care. Individual cases would necessitate an investigation in order to determine that.

This chapter provides context for the central proposal, that sentencing courts should adopt, in all instances where children younger than six years are involved, a formal process regarding a possible alternative care order.

CHAPTER 6

The Best Interests of The Child *Qua* Consideration Upon Sentencing of His Primary Caregiver

6.1 Introduction

This chapter deals with the sentencing of caregivers in the jurisdictions of comparison. It considers the extent to which international child instruments such as the CRC have influenced[932] or ought to have influenced[933] consideration of the right of children to family, parental or alternative care in the sentencing of primary caregivers. The CRC,[934] for illustration, enjoins courts, in line with their best interest being a priority, to have regard to the right of children to care and protection of their well-being, also when sentencing their caregivers, whilst at the same time taking into account 'the interest of society and offence seriousness'.[935] The ACRWC,[936] that has application in respect of South Africa, has a similar provision. The sentencing court must be alert to the possibility of the child being confined with his caregiver in abysmal prison conditions in South Africa, India and, to a lesser extent, in England.

The right of children to care may either be considered independently[937] from primary caregivers or may be considered as a mere 'mitigating factor'.[938] These approaches differ significantly. Considering the right of children to care independently requires courts to comply with obligations incurred by ratification of child rights instruments,

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932 Sentencing of primary caregivers in South Africa and England have been influenced by international child instruments such the CRC. In South Africa the CRC has shaped the sentencing of caregivers. In England, the CRC has influenced the sentencing of caregivers.

933 Despite ratifying the CRC and attending numerous seminars on children, the CRC is yet to influence the sentencing of primary caregivers in India.

934 Art 3(1) of the CRC and imposes a duty, among others, on courts to 'consider the best interests of children in every matter concerning children'.

935 Terblanche 2011 *Stellenbosch Law Review* 195-196. He expresses the view that 'protection of society through incarceration of offenders is neither as predictable nor as effective as one might think at first'. Deterrence is at 'its weakest in the case of repeat offenders, who have already proved they are not deterred by punishment'. See also *S v Fredericks* 1994 1 SACR paras 651, 653 where it was held that' imprisonment had not worked in the past, so why should it be imposed again?' See also Kemshall and Wood 2007 *Criminology and Criminal Justice* 203.

936 Art 4(1) of the ACRWC.

937 S 28(2) of the Constitution provides for the right of the child to have his or her 'best interests considered in every matter that concern' him or her.

938 Walsh and Douglas 2016 *Adelaide Law Review* 135–161.The right of the child to care or to alternative care may be considered as a 'circumstance', as an 'exceptional circumstance' or as an 'element of mercy'.

such as the CRC. On the other hand, considering it as a mitigating factor[939] requires that the child's right may be taken into account in line with the exercise of sentencing discretion and its consideration and proper weighing as a factor, are not necessarily compulsory.[940]

Sentencing of caregivers is itself a matter that affects children. The imposition of custodial sentences on primary caregivers may result in the children of caregivers having no one to care for them during their primary caregivers' period of incarceration. Depriving children of caregivers, family, or parental care, mostly, does not serve the best interests of children. In *SS,* t was held that courts, as 'custodians of both the Constitution and children'[941] are now mandated by the CRC and Constitution to have regard not only to the best interests of children, but also to 'the specific right of children to care' when sentencing primary caregivers. Courts are mandated to balance 'all the constitutional interests at stake'[942] including the right of children to care.

The three states of comparison have all ratified the CRC and South Africa and England have also ratified the ACRWC and the ECHR. The ACRWC and the ECHR are regional instruments that complement the CRC. By their ratification of child instruments, South Africa, India and England have undertaken the obligation of aligning laws and policies concerned with children to the values embodied in them, in the footing of these instruments. Articles 3(1) and 4(1) respectively of the CRC and the ACRWC, require

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939 In addition to the offender having small children, other mitigating factors that may reduce the harshness of the sanction to be imposed on a convicted offender, refer to remorse, the motive for the commission of the crime, the offender's old age and ill physical or mental health.

940 Some states in Australia follow such approach, where courts should take into account the hardship resulting from the imprisonment on the family or dependants of primary caregivers, as a mitigating factor. S 16A(2)(p) of the CA-Engl. provides that in 'determining the sentence to be passed', the court must take into account 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependents'. See also S 33(1)(o) of the CSA and s 10(1)(n) (o) of the Criminal Law (Sentencing) Amendment Act 38 of 2007. In *R v Chong*: *Ex Parte* A-G (Qld) 2008 A Crim R 200 the Attorney General of Queensland appealed against the order of parole given to *Chong* on the basis that she was the caregiver to many children, one of whom she was breastfeeding. Atkinson J provided the lead judgment that dismissed the appeal. She observed that s 9(2)(r) of the Penalty Sentences Act (1992) requires the court to have regard to 'any other relevant circumstance'. Although s 9 precluded the court from 'regarding the best interests of the child as a primary consideration', the court should regard the child or children's best interests as a 'relevant circumstance'.

941 *S v S* (Centre for Child Law as *Amicus Curiae*) (CCT 63/10) [2011] ZACC 7, 2011 (2) SACR 88 (CC), 2011 (7) BCLR 740 (CC) (29 March 2011) para 21.

942 *SS* para 63.

that the best interests of children be considered in every matter that affects them. Incarceration of caregivers is *holus bolus* a matter that concerns children.

This chapter examines the different approaches adopted in the three jurisdictions regarding the consideration of the right of children to parental, family or alternative care in the sentencing of primary caregivers.

6.2 South Africa

6.2.1 Sentencing of caregivers before S v M: the Zinn triad

Historically, the sentencing of primary caregivers in the jurisdiction of South Africa is to be comprehended in line with the *Zinn* triad that requires consideration of all factors relevant to the crime, the criminal and the interests of society. Prior to the landmark judgement in *S v M,* the right of children to care was either not taken into account at all or was inadequately considered or was mostly considered as a mitigating factor. However, the adoption of the Constitution during 1996 with a Bill of Rights and the ratification of the CRC slowly began to give impetus to the consideration of the right of children in the sentencing of caregivers.

Howells v S,[943] (hereafter referred to as *Howells*) was the first case to break rank with traditional sentencing of offenders and to (indirectly) link the sentencing of caregivers with the right of children to family, parental or alternative care. In *Howells*, the appellant was convicted with fraud totalling R100 000 and was sentenced to four years imprisonment, coupled with two years imprisonment, suspended for five years. She appealed against the sentence only. The High Court decided that the trial court misdirected itself in imposing a further two years imprisonment to the four years' imprisonment[944] as correctional supervision may not be imposed for a period 'exceeding five years'.[945] Although the appeal against sentence was dismissed, the court reduced the period of suspended sentence from two years imprisonment to one year imprisonment and took another important step. Seemingly, in an effort to mitigate the children's hardship during their caregiver's absence, the then Department

943 1999 (1) SACR 675 (CPD).
944 Para 682 i-j.
945 S 276A (2)(b) of the *Criminal Procedure Act*.

of Population Development was ordered to investigate the circumstances of the appellants' minor children and to take appropriate steps to ensure that 'the children of the appellant were properly cared for during the incarceration of the appellant'.[946]

Despite *Howells* paving the way for consideration of the well-being and ultimate recognition of their right to care of children independently from caregivers, cases, such as *S v Sinden,*[947] (hereafter referred to as *Sinden*), continued to inadequately have regard to children's best interests. In *Sinden,* the primary caregiving responsibility of the appellant towards two minor children (ages unknown), was considered as a mere mitigating factor. In this case, the appellant was convicted on 43 counts of fraud and was sentenced to six years imprisonment, two years of which were conditionally suspended. She appealed against the sentence only.

The grounds of her appeal were that the court ought to have imposed correctional supervision instead of imprisonment. It is unclear on which court document the averment that the appellant was a caregiver to two minor children was made. The appellant's primary caregiving status was never canvassed beyond the averment that she was a caregiver to two minor children. The basis of appeal by the appellant compromised possible consideration of her caregiving status as a mitigating factor. As a mitigating factor, the appellant's primary caregiving status may possibly have persuaded the court to impose a non-custodial sentence such as correctional supervision. However, the appellant's approach to correctional supervision was misplaced and illustrates the tension between the interests of society and those of a caregiver and her children. There is no legal provision that courts should impose correctional supervision in lieu of imprisonment when the seriousness of offences call for the imposition of imprisonment. Courts are vested with a sentencing discretion and have to impose sentences that are aligned with all aspects of the *Zinn* triad. The appellant ought to have contended that the sentencing court gave too little consideration or too little weight to her primary caregiving responsibilities. The appellant's primary caregiving status, if properly considered (and understood) may have persuaded the court to call for an inquiry into the situation of her minor children.

946 Para 683 b-f.
947 1995 2 SACR 704 (A).

As highlighted above, the adoption of the Constitution (with a Bill of Rights) and the ratification of the CRC had a positive impact on the advancement and protection of children's rights in general. Cases such as *Brandt v S*[948] (hereafter referred to as *Brandt*) and *Director of Public Prosecutions*, *KwaZulu-Natal v P*[949] (hereafter referred to as *P*), although not directly concerned with the sentencing of caregivers, demonstrate the preparedness of courts to break away from traditional sentencing in a broader sense and to adopt a child-centred approach in every matter that involves children. In *Brandt* the court dealt with the question whether the *Criminal Law (Sentencing) Amendment Act*[950] had application to a juvenile convicted with murder, robbery with aggravating circumstances and attempted robbery. It *inter alia* decided that:

> [t]he traditional aims of punishment… therefore have to be re-appraised and developed to accord with the spirit and purport of the Constitution.[951]

In *P*[952] the court held that:

> [w]ith the advent of the Constitution the principles of sentencing which underpinned the traditional approach must be adapted and applied to fit in with the sentencing regime enshrined in the Constitution and should be aligned with international instruments. Change of mind-set, one that

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948 2005 2 All SA 1 (SCA). In *Brandt* the appellant was convicted of murder, robbery with aggravating circumstances and attempted robbery that he committed when he was seventeen years and seven months old and to which he pleaded guilty. The sentence of life imprisonment for murder was substituted with imprisonment of eighteen years and fifteen years for robbery with aggravating circumstances and attempted robbery. The reduction of sentence was on account of his youth and on prospects of being rehabilitated.

949 2006 3 SA 515 (SCA). A girl of fourteen years was found guilty of the murder of her grandmother. She committed the murder with two adult males and the passing of sentence was postponed for a period of 36 months on condition that the accused complied with the condition of correctional supervision. The state appealed against the sentence and argued that it was lenient given the nature of the offence. The state's appeal succeeded and the sentence imposed by the trial court was set aside and replaced with the sentence of seven years imprisonment, the whole of which was suspended for five years on condition that the accused was not again convicted of an offence of which violence was an element and to 36 months of correctional supervision.

950 38 of 2007.

951 *P* para 13.

952 *P* para 14. See also *S v M* para 16 and Sarkin *Resolving the Tension between Crime and Human Rights: An Evaluation of European and South African Issues* 55 where he points out that 'although the transition to the new dispensation kept the general body of South African law and the machinery of state intact the advent of the Bill of Rights exposed all existing legal provisions, whether statutory or derived from the common law to reappraisal in the light of the new constitutional norms heralded by that transition'.

takes appropriately equivalent account of the new constitutional vision.[953]

6.2.2 Guidelines for the sentencing of primary caregivers in S v M

As alluded to above, the development of the traditional *Zinn* triad to incorporate constitutional provisions pertinent to the advancement and protection of the right of children to parental, family or alternative care in the sentencing of caregivers, was not an overnight occurrence. More than a decade after the adoption of the final Bill of Rights, the case of *S v M*, through the hierarchy of court, came before the Constitutional Court. In *S v M* a single caregiver to three minor children was convicted with 38 counts of fraud of R29 158, 69 and was sentenced to four years imprisonment. She appealed to the High Court against the sentence only. The basis of her appeal was that the sentencing court did not have regard to her personal circumstance of having primary caregiving responsibilities. The High Court quashed one conviction to the sum of R10 000 and this reduced the sum upon which the conviction was secured to R19 158 69.[954] The High Court reduced the sentence to eight months imprisonment and refused her leave to appeal to the Supreme Court of Appeal. She petitioned the Supreme Court of Appeal and her petition was turned down without any reason given. The appellant then successfully petitioned the Constitutional Court for 'leave to appeal'.[955]

The Constitutional Court had regard, *inter alia*, to the relation between the right of children to care and to the best interests of children standard, as espoused respectively in section 28(1)(b) of and 28(2) of the Constitution.[956] It was emphasised that 'section 28 requires courts, firstly, to diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril and secondly, to create positive conditions for repair of family life to take place'.[957]

Furthermore, it was pointed out that 'section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may

953 *P* para 14.
954 *S v M* para 3.
955 *S v M* para 5.
956 *S v M* para 14, 15-17.
957 *S v M* para 20-21.

threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect on children as far as it can'.[958] These considerations, the court mentioned, 'reflect in a global way rights, protection and entitlements that are specifically identified and accorded to children by section 28'.[959] They are extensive and unmistakable. Section 28(1) provides for a list of enforceable substantive rights that go well beyond anything catered for by the common law and statute in the pre-democratic era. For present purposes, it is necessary to highlight section 28(1)(b) which makes provision that '(e)very child has the right to family care or parental care or to appropriate alternative care when removed from the family environment'.

Sachs J[960] held that 'focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. It further pointed out that the issue is not whether primary caregivers should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct'.[961] He further accentuated that 'it is not the sentencing of caregivers in and of itself that threatens to violate the interests of the children. It is the imposition of sentences without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of sentencing courts to acknowledge the interests of the children, then, is not to permit errant caregivers unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm'.[962]

In that case the right of children to care was found to have been barely touched upon by sentencing courts.[963] The court found that there was therefore a need to pronounce

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958 *S* v *M* para 20.
959 *S v M* para 21.
960 *S v M* para 35.
961 *S v M* para 33.
962 S *v* M para 35.
963 *S v M* para 45.

sentencing guidelines for the sentencing of primary caregivers. The guidelines for the sentencing of a caregiver which the court must implement are that the court should:

(i) find out whether a convicted person is a 'caregiver' whenever there are indications that this might be so;[964]
(ii) a probation officer's report is 'not needed' to determine that the convicted person is a primary caregiver;[965]
(iii) if on the *Zinn*-triad approach, the appropriate sentence is clearly custodial and the convicted person is a caregiver, the court should 'apply its mind' to whether it is necessary to take steps to ensure that the children will be adequately cared for while the primary caregiver is incarcerated;[966]
(iv) if the appropriate sentence is clearly non-custodial, the court should determine the 'appropriate sentence', bearing in mind the interests of the children;[967] and
(v) if there is a range of appropriate sentences on the *Zinn*-approach, then the court should use the 'paramountcy of the best interests of the child' as an important guide in deciding which sentence to impose.[968]

The sentence imposed by the High Court and confirmed by the Supreme Court of Appeal, was set aside and was substituted with imprisonment for four years and nine months,[969] but suspended on condition that the appellant was not convicted with an offence that involves dishonesty during the period of suspension. In addition, a sentence of 'correctional supervision' in terms of section 276(1)(h) of the *Criminal Procedure Act* for three years, was imposed with the following conditions: (i) that the appellant performs service to the benefit of the community for ten hours per week for three years, the form of such service and the mode of supervision to be determined by the Commissioner for Correctional Services; (ii) that the appellant undergoes counselling on a regular basis with such person or persons and at such times as is determined by the Commissioner for Correctional Services and (iii) that the appellant must repay to each of the persons or entities that she defrauded, as identified in the charges on which she was convicted, an amount equal to the value of goods she obtained. This had to be done in the manner specified in a schedule to be determined by the Commissioner for Correctional Services based on R4 000 bail money being

964 *S v M* para 36(a).
965 *S v M* para 36(b).
966 *S v M* para 36(c).
967 *S v M* para 36(d).
968 *S v M* para 36(e).
969 Ante dated from 23 May 2003.

immediately available and payment of the balance at a rate of no less than R1 500 per month.

By extending the application of the scope of the constitutional right of the child's best interests to a mandatory consideration during the sentencing phase of primary caregivers, the judgment in *S v M* received significant (academic) reaction internationally and nationally. Tomkin considers the judgment to be 'landmark'[970] and she further states that it *inter alia* enjoins courts 'not to visit the sins of parents on their children'.[971] Rudzidzo[972] argues that courts 'have a role to play in protecting the rights of children when sentencing caregivers of young children'. Robinson[973] regards the *S v M dictum* as having set precedence that 'all South African courts must give specific consideration to the impact on the best interests of the child when sentencing a primary caregiver'. If the possible imprisonment will be detrimental to the child, then the scales must tip in favour of a non-custodial sentence, unless the case is so serious that that would be entirely inappropriate. According to Skelton and Courtenay,[974] *S v M* has 'deviated from the traditional approach to sentencing that focused on perpetrators, victims and witnesses'. They argue that the sentencing court must 'struck a balance between the interests of the children of a caregiver and the state's right to protect society'.[975] They doubt that a 'change in circumstances regarding care of minor children would justify the conversion of a custodial sentence which meets the threshold into a non-custodial sentence'.[976] Miamingi[977] and Chidi[978] make reference to 'the balancing of the right of the child to care with the protection of society in the sentencing of the child's caregiver'.

970 Tomkin *Orphans of Justice* 1.
971 Tomkin *Orphans of Justice* 20.
972 Rudzidzo *An Analysis of the South African Law Governing Minors Living with their Mothers in Prison* 9.
973 Robinson *Collateral Convicts: Children of Incarcerated Parents* 15.
974 Skelton and Courtenay 2012 *South African Journal of Criminal Justice* 180.
975 Skelton and Courtnay 2012 *South African Journal of Criminal Justice* 181.
976 Skelton and Courtnay 2012 *South African Journal of Criminal Justice* 183.
977 Miamingi *The Applicability of Human Rights Laws Dealing With the Imprisonment of Mothers in Contemporary Africa* 41.
978 Chidi *The Constitutional Interpretation of the 'Best Interests' of the Child and the Application by thereof by the Courts* 33.

The imposition of correctional supervision to the caregiver in *S v M* has been misconstrued by some academic commentators such as Moyo.[979] Whilst Moyo is alive to the *Zinn* triad for the sentencing of offenders, it would appear that he did not grasp or comprehend that the paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for 'appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned'.[980] In *S v M* both the Regional and High Courts were found to have misdirected themselves by 'considering the impact a custodial sentence would have on the caregiver's minor children insufficiently'.[981] To compel the caregiver to 'undergo further imprisonment,'[982] it is argued, would be to indicate that community resources are incapable of dealing with her moral failures. The Constitutional Court did not believe that the community resources are incapable, nor did it form the view that the community should be seen simply as a vengeful mass uninterested in the moral and social recuperation of one of its members. The primary caregiver had manifested a will to conduct herself correctly. Offenders should therefore not be excluded from correctional supervision simply because they are 'repeat offenders'.[983]

The judgment in *S v M* not only sets guidelines for courts to follow in future where children were involved as dependants of the caregiver, but cases decided before the judgment, such as *Mkoka v S*[984] (hereafter referred to as *Mkoka*), were now remitted to give due consideration to those child-centred guidelines on how the best interests of the child may be met when 'sentencing' his caregiver.[985]

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979 Moyo 2012 *African Human Rights Journal* 316.

980 *S v M* para 42.

981 *S v M* para 43.

982 Moyo 2012 *African Human Rights Journal* 340-341. He contends that' the court over-emphasised the right of the minor to children to family, parental or alternative care above the state's duty to protect the community'.

983 *S v M* para 75.

984 Unreported case number R130/2007 of 10 June 2009.

985 Robertson *Children Imprisoned by Circumstance* iii.

6.2.3 Adherence to the guidelines for the sentencing of caregivers post S v M

Knowing the guidelines for the sentencing of primary caregivers and adhering to them are two different concepts. Despite the guidelines for the sentencing of primary caregivers being ordained as the standard preoccupation of a sentencing court in *S v M*, the guidelines have often not been adhered to in subsequent decisions. This, in turn, and as it is evident from the discussion of judgments below, has resulted in the sentences imposed either reduced or substituted or in some cases being remitted to the trial court for specific consideration of the right of children to care in the sentencing of their primary caregivers. Several judgments could be traced dealing with applications by caregivers for the courts to impose, in light of the new approach in *S v M*, non-custodial sentences. They are dealt with below.

In *Williams v S*[986] (hereafter referred to as *Williams*) the appellant, a caregiver to two minor children aged twelve and sixteen, was convicted of theft of two rings worth R219.000 and was sentenced to three years imprisonment. The magistrate felt that she was not obliged to adhere to the guidelines for the sentencing of primary caregivers pronounced in *S v M* because she did not agree with them. She went further to state that the guidelines allow caregivers of minor children to 'escape punishment for their offending'.[987] The sentence of three years was on appeal substituted with imprisonment of six months suspended for five years on condition that the appellant was not convicted of theft or fraud or any attempt thereto during the period of suspension. The court further ordered that the disregard of established law by the magistrate be considered by the Magistrate's Commission.

In *Langa v The State*[988] (hereafter referred to as *Langa*), the appellant and a primary caregiver to six minor children whose ages were not specified, was convicted of two counts of murder, two counts of kidnapping and of theft and malicious injury to property. She was sentenced to life imprisonment on count 1, twenty years' imprisonment on count 2, ten years' imprisonment on counts 3 and 4 and to seven years' imprisonment on counts 5 and 7. She appealed against the sentences. Her

986 *Williams v S* unreported case number A369/2013 of 20 September 2013.
987 *Williams* para 17.
988 2010 2 SACR 289 (KZP).

grounds of appeal were, among others that the court should have taken into account that she was a caregiver to six minor children. The appeal was dismissed and the court emphasised that primary caregiving responsibilities do not afford convicted primary caregivers an escape route. Appropriate custodial sentences may still be imposed to caregivers. The offences of which the appellant was convicted were 'serious and the sentences imposed were consummate with the offences'.[989]

Although the sentencing court was found to have given due regard to the appellant's primary caregiving status, the High Court went a step further to make provision for the care of the appellant's minor children during their caregiver's incarceration. It ordered the DSD to investigate the circumstances of the appellant's minor children 'without delay' and to take all necessary 'steps'[990] to ensure that they are properly 'cared for in all respects',[991] that they remain in contact with the appellant during her period of imprisonment and to have 'contact with her', insofar as it is permitted by the DCS.[992] It is evident that *Langa* would be imprisoned for a very long time. However, the court showed awareness that proper care of the children should be prioritised, albeit in the hands of the DSD and that contact of the children with their caregiver should be aspired to. The latter remains uncertain due to the location of the correctional facility and should, in line with the values in *S v M*, also receive due attention in the post-sentencing phase.

In *Oha v State* (hereafter referred to as *Oha*), [993] the appellant, a primary caregiver to two minor children aged three and four, and an illegal Nigerian national were convicted of dealing in drugs and were sentenced to twenty five years imprisonment. They appealed against the sentence only. The appeal succeeded partially and the sentence was reduced to ten years' imprisonment and to an additional three years' imprisonment suspended for five years on condition that the appellant was not found guilty of a drug related offence. It remains unclear why the court held that 'too little weight' was given to the interests of the appellant's minor children[994] as evidence was

989 *Langa* paras 10 and 11.
990 *Langa* para 2.1.
991 *Langa* para 2.1.1.
992 *Langa* para 2.1.2.
993 Unreported case number A170/2014 of 8 May 2015.
994 *Oha* para 27.

presented that the appellant's minor children were' cared for' by her sister after the arrest of the appellant.[995] No order for contact with the primary caregiver with her children appeared to have been made.

In *Mkoka*, the appellant and caregiver to two minor children aged eight and seventeen was convicted of fraud and sentenced to three years imprisonment. She appealed against the sentence only and argued that the sentencing court inadequately had regard to the right of her minor children when imposing sentence.[996] The appellant's failure to admit guilt and to come to terms with the offence, as well as the fact that she was the 'mastermind behind the fraud, placed her outside a non-custodial sentence such as correctional supervision'.[997] The court decided that, although the sentence would have a tremendous impact on her children, she ought to have 'foreseen that the commission of the offence will land her in jail'.[998] Six months after the sentencing of the appellant, *S v M* was decided and guidelines for the sentencing of primary caregivers were pronounced. Pursuant to these guidelines, the case was remitted to the sentencing court for 'compliance with the guidelines and the adherence of a new child-sensitive approach in criminal cases'.[999]

In *Piater v S*[1000] (hereafter referred to as *Piater*) the appellant, a caregiver to minor children respectively aged twelve and fifteen, was convicted of 7 counts of fraud and 1 of theft and was sentenced to seven years imprisonment. She appealed against the sentence only. The probation officer who prepared the pre-sentence report contended that there was no one to care for the appellant's minor children if a custodial sentence was imposed. The appellant's husband arrived at home late, the 'appellant's mother was going blind and the paternal grandparents were sickly'.[1001] The appeal succeeded partially. The sentence of seven years imprisonment was reduced to four years and the NCCS was directed to ensure that a social worker in the employ of the DCS visit the children at least once every month during the first three months of the appellant's

995 *Oha* para 24.
996 *Mkoka* para 2.
997 *Mkoka* para 7.
998 *Mkoka* para 8.
999 *Mkoka* para 13.
1000 *Piater v S* unreported case number A411/2011 of 7 December 2012.
1001 *Piater* para 43.

imprisonment. It is submitted that it is insufficient to make an order for such a short time as the children's ongoing care is at stake.

In *Pillay v S*[1002] (hereafter referred to as *Pillay*), the appellant, a caregiver to six minor children aged eighteen; sixteen; twelve; eleven; eight and four, was convicted with fraud and was sentenced to five years imprisonment. Her appeal to the High Court against sentence only was dismissed and she appealed to the Supreme Court of Appeal. The basis for her appeal was that the sentencing court failed to 'consider the impact of incarceration on her dependant children'.[1003] In remitting the matter to the trial court for proper consideration of the interests of the appellant's minor children, the court pointed out that in order for a court to arrive at an informed decision concerning sentence, compliance with the guidelines for sentencing of primary caregivers is a '*sine qua non*'.[1004] The case was accordingly remitted to the sentencing court for the consideration of the interests of the appellant's minor children.

In *Noorman* v *S*[1005] (hereafter referred to as *Noorman*), the appellant, a primary caregiver to a three-year old daughter, was convicted of the murder of her partner who was the father to her minor child. She was sentenced to thirteen years imprisonment and appealed against the sentence only. The basis for her appeal was *inter alia* that the court paid inadequate attention to her primary caregiving responsibilities. The court concurred with the averment that the trial court gave little attention to the appellant's caregiving responsibilities and that the 'balancing exercise' was not achieved.[1006] In the event that courts take into account custodial sentences to be appropriate to the gravity of the offences, they should have regard to 'the actual situation of the children of caregivers'.[1007] Insufficient weight given to the actual situation of the appellant's minor child was found to be a 'misdirection' by the trial court.[1008] Although the death of the child's father was 'caused' by the appellant,[1009] the end result was that the incarceration of the caregiver will inevitably leave the child

1002 2011 2 SACR 409 (SCA).
1003 *Pillay* para 11.
1004 *Pillay* para 24.
1005 Unreported case number A532/10 of 27 January 2011.
1006 *Noorman* para 46.
1007 *Noorman* para 39.
1008 *Noorman* para 49.
1009 *Noorman* para 47.

with no one to care for her. The appeal succeeded partially. The sentence was reduced to four years imprisonment and the DSD was ordered to investigate the actual circumstances of the appellant's minor child and to take the necessary steps to ensure that the minor child is cared for by a responsible adult and that provision of care to the minor child is monitored.

In *SS,* [1010] the appellant, a primary caregiver to two minor children, a daughter aged eight and a son aged five, was convicted of two counts of uttering and fraud and was sentenced to two years imprisonment conditionally suspended for five years in respect of the count of uttering and to five years' imprisonment with conditional correctional supervision for fraud. She appealed to the Supreme Court of Appeal against the sentence on the basis that both the Regional Court and the Supreme Court of Appeal failed to establish her primary caregiving status and the result of such failure was inadequate regard to the 'best interests of her minor children'.[1011] The Supreme Court of Appeal found that there were no prospects of success in her appeal and dismissed the appeal without determining itself whether the Regional Court had regard to the right of the appellant's children to 'family, parental or alternative care'.[1012] The Supreme Court of Appeal, however did grant the appellant leave to appeal to the Constitutional Court. The Constitutional Court found that both the Regional Court and the Supreme Court of Appeal failed to have regard to 'the right of the children of the appellant to care'.[1013] Although the appellant's mother-in-law had indicated that she was no longer able to care for the minor children due to illness, the father of the children was found to be in a 'position to care' for them.[1014] The appellant was therefore not absolutely responsible for the care of the children in such a manner that the children would have no one to care for them during her imprisonment. In order to ensure that the appellant's minor children were properly cared for during the appellant's incarceration, the court ordered the NCCS to direct a designated social worker to visit the children once a month and to provide reports to the NCCS about

1010 *SS* para 2.
1011 *SS* para 2.
1012 *SS* paras 12-13.
1013 *SS* paras 36 and 38.
1014 *SS* paras 43 and 44.

the welfare of the children.[1015] The court recommended an order for the ongoing monitoring of the proper care of the children, unlike in *Piater* above.

In *Britz v The State*[1016] (hereafter referred to as *Britz*), the appellant, a caregiver to minor children whose ages were not mentioned, was convicted of 67 counts of fraud to the value of R330 000. She was sentenced to five years imprisonment, two of which were suspended conditionally for five years. In dismissing the appeal, the court held that despite the death of the appellant's mother, her husband and her father were caring for the children and a domestic worker was employed. The death of the appellant's mother had 'not deprived' the children of care. [1017]

In *S v Ngcobo*[1018] (hereafter referred to as *Ngcobo*), the accused was convicted of the murder of her concubine with whom she had two children aged sixteen and two. The court did not concern itself much with the sixteen-year-old child as she was cared for by the appellant's relative. The sentencing court accepted the submission made on behalf of the appellant that one of her cousins had undertaken to care for the two-year-old child. The court expressed its reluctance to confine the two-year-old son with the caregiver. It stated that:[1019]

> I am of the view that the child is not to be kept with you in prison as this would be tantamount to the child being imprisoned with you which is against article 30 of the ACRWC.

The awareness by the court that confining the child with his caregiver is contrary to child rights instruments is commendable. Such cognisance by the sentencing court resonates with the need to place the child of a sentenced caregiver in alternative care.

In *De Villiers v* S[1020] (hereafter referred to as *De Villiers*), the appellant was convicted of fraud totalling R10 409 000. She pleaded guilty and was sentenced to three years imprisonment from which she may be placed under correctional supervision in the discretion of the Commissioner or parole board. She was a caregiver to two minor children who were respectively seven and ten years old. The sentencing court did not

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1015 *SS* para 4 of the order.
1016 2010 2 SACR 71 (SCA).
1017 *Britz* para 13.
1018 2016 2 SACR 436 (KZP).
1019 *Ngcobo* para 15.
1020 2016 1 SACR 148 (SCA).

find it necessary to have regard to the right of her minor children to care. The court held that 'it would be wrong to overemphasise her personal circumstances and that the seriousness of the offence should be addressed'. Even though the sentencing court had two reports prepared and presented by a social worker and a Family Advocate respectively on the impact of the sentence on the appellant's minor children, the court still found it unnecessary to have regard to the right of the minor children to care. The High Court also did not deem it important to attach weight to the right of the children to family, parental or alternative care when the matter came before it on appeal.

The Family Advocate was involved in the case because he or she was dealing with the guardianship of the minor children by the appellant who frequented rehabilitation centres due to her 'addiction' to drugs.[1021] As a result of his or her involvement with the guardianship of the minor children by the appellant, the Family Advocate recommended that the children be placed in a Jewish home in Arcadia and gradually be 'reintegrated' with the grandparents of the appellant.[1022] The court ordered that the appellant should be afforded an opportunity to make arrangements for the care of her minor children during the period of her imprisonment. It is submitted that the Family Advocate ought to have been ordered by the court to assist the appellant to identify and to enter into a parental responsibilities and rights agreement with the person who would care for the minor children.[1023]

The sentencing of the child's primary caregiver after the landmark judgment in *S v M* resulted in some of the cases remitted to the sentencing court to consider the impact of the sentence of imprisonment on the children of caregivers, in orders made to the DSD and or DCS respectively to investigate the circumstances of the children of primary caregivers and to take necessary steps to secure their care and to visit the children.

The cases reviewed demonstrate that the sentencing court did not address the alternative care of the children involved adequately. Instead, the placement of the children in alternative care was delegated to either the DCS or DSD. For example, in

1021 *De Villiers* para 15.
1022 *De Villiers* para 26.
1023 See 4.7.1.5 above.

Ngcobo, one of her minor children was two years old. There was a possibility that the sentencing court could have ordered that the child be confined with her caregiver pursuant to section 20 of the CSA as amended by section 14(a) of the CSAA.

In *Mkoka* and *Pillay*, the cases were referred back to the sentencing court to adhere to the guidelines for the sentencing of a caregiver pronounced in *S v M*. In *Piater*, the NCCS was directed to ensure that a social worker in the employ of the DCS visit the children of the appellant at least once a month during the first three months of her imprisonment and further to submit a report to the NCCS as to whether the children of the appellant are in need of care and protection in terms of section 150 of the Children's Act. In *Noorman*, the DCS was ordered to immediately investigate the circumstances of the appellant's minor child and to take all such practical steps as may be appropriate to ensure that: (i) the child is properly cared for by an accountable adult during the appellant's period of incarceration[1024] and that (ii) the child's circumstances and well-being are monitored on a regular basis.[1025] In *Langa*, it was observed that the sentencing court was aware that the children of the appellant should be cared for during the incarceration of the appellant. The Registrar of the Court was ordered to immediately approach the DSD, that the department investigate the circumstances of the appellant's six minor children without delay and to take all necessary steps to ensure that the children are cared for in all aspects.

The judgments in *Ngcobo De Villiers Britz* and *Oha* reveal the preparedness of the courts to recognise the development of the parent-child relationship. The development of the parent-child relationship from parental authority to parental responsibilities and rights creates possibilities for the courts to have regard to the consideration of the care of the child when sentencing a child's caregiver. A child of a primary caregiver that stands to be sentenced or that is sentenced may now be cared for by a person who has an interest in the upbringing, well-being and care of the child. A child of a primary caregiver that stands to be sentenced or that is sentenced may now be cared for by family members or by his extra-marital father. For instance in *Ngcobo*, the court took into account that the youngest child of the appellant was cared for by the

1024 Para b(i) of the order.
1025 Para b(ii) of the order.

appellant's cousin. In *De Villiers,* the appellant was granted an opportunity to make arrangements for the care of her child during her term of incarceration. In *Oha,* the court took into account that the minor children of the appellant were in the care of the appellant's sister. In *SS*, the court ordered the NCCS to direct a designated social worker to visit the children once a month and to provide reports to the NCCS about the welfare of the children.

The developments post *S v M* illustrate that sentencing courts tend to focus on the child's right to care whilst in the process neglecting to have regard to the actual alternative care that the child will receive during his primary caregiver's imprisonment. Neglecting to consider the right of the child to alternative care had resulted in cases being remitted to the sentencing courts for consideration of the impact of a custodial sentence on the minor children. The guidelines in *S v M* further reveal that there is no specific focus on the right to alternative care concerning those infant or young children who qualify to accompany their caregivers to prison. It would appear that courts currently do not seem to view that as a matter of judicial concern and involvement. It is submitted that the guidelines in *S v M* should be further developed to include such investigation into the sentencing phase of primary caregivers.

The author argues that such judicial involvement would ideally allow the participation of the Family Advocate in alternative care matters. Although the involvement of the Family Advocate is still optional, the Family Advocate, such as in *De Villers*, may be involved in a case of guardianship of the child of the primary caregiver. The Family Advocate may in the too near future assist the child's primary caregiver to identify and to enter into a parental responsibilities and rights agreement with the person who will care for her child during her term of imprisonment. In *De Villiers* the Family Advocate was an integral part of the proceeding because there was a pending parental responsibilities and rights dispute between the parties.

According to the analysis above, no case followed *S v M* in imposing a non-custodial sentence for the sake of the children, but still conducted investigations and showed varying degrees of concern for the care of children. The emphasis seems to have been on the child's right to family or parental care and not necessarily alternative care. Despite the new dispensation since *S v M* the concern still lies with the category of

children under the age of two years old, who usually accompany their caregivers when they serve a sentence of imprisonment. Although such children may be under the care of their primary caregivers, the surrounding conditions are questionable. Although no court has expressed concern about this issue, it was explored in Chapter 5 above.

6.3 India

6.3.1 Introduction

In the jurisdiction of India, the right of children to care is considered as a mere mitigating factor in the sentencing of caregivers. Three possible explanations for this approach are contended. Firstly, India still imposes capital punishment and that this in turn, leads to some judges focusing more on the 'protection of society'[1026] and in the process, neglecting to balance the 'protection of the community with the right of children to parental, family or alternative care even in cases where the death penalty has no application'.[1027] Secondly, there is 'no structured sentencing guidelines'[1028] and, thirdly and lastly, the government has not taken the task of 'implementing' provisions of the CRC in domestic law seriously.[1029]

1026 In *Ankush Maruti* & *Ors*. *v State of Maharasthra* AIR 2009 SC 2609, the protection of society against offenders was emphasised. It was among others, pointed out that 'protection of society and stamping out criminal proclivity must be the objective of the law which must be achieved by imposing appropriate sentence'. Regard must be had to the 'circumstances of each case, the nature of the crime, the motive for the commission of the crime, the conduct of the accused, the nature of weapons used and other attending circumstances relevant'. See also *Alister Anthony Pareria v* S*tate of Maharasthra* AIR 2012 SC 3802 where it was *inter alia* stated that 'the principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence'. As a matter of law, 'proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer'.

1027 In *Sangeet* & *Anr*. *v State of Haryana* 2013 2 SCC 452 at para. 80.2, the court stated that 'in the sentencing process the crime and the criminal are equally important. Unfortunately the sentencing process has not been taken seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing'.

1028 *State of Punjab v Prem Sagar* & *Ors* 2008 7 SCC, 550 the absence of judiciary-driven guidelines in the criminal justice system was noted. The judicial system has 'not been able to develop legal principles with regard to sentencing. Except for observations on the purport and objectives of imposing punishment on an offender, guidelines on sentencing had not been issued'. In *Soman v State of Kerala* 2013 11 SCC 382, it was stated that 'giving punishment to the wrongdoer is at the heart of the criminal delivery, but in our country. It is the weakest part of the administration of criminal justice'. Law Library of Congress Date Unknown https://www.loc.gov/law/help/sentencing-guidelines/india.php; Jangiani 2007 https://www.oneindia.com/2007/07/08/use-norms-not-discretion-to-punish-crime-arc-1183876546.html 2.

1029 In *Upadhyay* 2, the Supreme Court made reference to India's 'ratification of the CRC'.

6.3.2 Constitution of India

The Constitution of India prohibits discrimination on the grounds of 'religion', 'race', 'caste', 'sex' or 'place of birth'.[1030] It requires the state to make 'special provisions' for children.[1031] It requires the state to 'give opportunities and facilities to children to develop in a healthy manner and in conditions of freedom, dignity and recognises the protection of childhood'.[1032] The Constitution further stipulates that 'no person shall be deprived of his liberty except according to procedure established by law'.[1033] The state shall incur the 'obligation of raising the level of nutrition and the standard of living of its people'.[1034]

Constitutional stipulations such as making special provision for children and recognition of childhood require implementation. The government and courts are mandated by the constitution to protect and to advance the rights of children. The right of children to care is one of the rights that require advancement and protection. Consideration of the right of children to family, parental or alternative care in the sentencing of primary caregivers is one method of giving effect to constitutional provisions.

6.3.3 Code of Criminal Procedure Act 2 of 1974

Section 235(2) read with section 248 of the *Code of Criminal Procedure* (hereafter referred to as the CCPA), makes provision that 'judges or magistrates shall hear accused on sentence when accused have been convicted of offences'. No specific provision is made for magistrates or judges to hear 'mitigation and aggravating factors'. The CCPA ought to spell out or provide guidance on the type of mitigating or aggravating factors to be taken into account in sentencing. Magistrates and judges would have regard to mitigating and aggravating factors through exercise of sentencing discretion. Guidelines on aggravating and mitigating factors enable courts to individualise and to structure their sentences. Co-operation with the police and prosecution and a guilty plea are, for example, factors that require to be clarified since

1030 Art 15(1) of the Constitution of India.
1031 Art 15(3) of the Constitution of India.
1032 Art 39 (f) of the Constitution of India.
1033 Art 21 of the Constitution of India.
1034 Art 47 of the Constitution of India.

they may be categorised as mitigating the harshness of sentences. Consideration of caregiving responsibilities has the potential of reducing the sentences imposed and of directing courts to take steps to ensure that children of primary caregivers are cared for during the incarceration of their caregivers. Courts may, for example, order prison authorities to appoint social workers to provide care to children of incarcerated caregivers.

6.3.4 Indian Penal Code 45 of 1860

Section 416 of the Indian Penal Code (hereafter referred to as the IPL)[1035] stipulates that 'if women sentenced to death are found to be pregnant, the High Court shall order the execution of the sentence to be postponed and, may, if it thinks fit, commute the sentences to imprisonment for life. The order of the High Court may be an aftermath of sentencing. It is an order made after caregivers have been sentenced to death and is intended to preserve the lives of children whose primary caregivers would be executed. The right of children to care does not arise when their caregivers stand to be executed only. It is a right that arises from the moment primary caregivers are arrested and continues up until when they are sentenced'. The IPC is silent on the provision of care to children whose caregivers would have been executed. If the right of children to family, parental or alternative care was considered in the sentencing of primary caregivers, arrangements for provision of care of the children involved would have been made.

6.3.5 Probation of Offenders Act of 1958

Sections 3 and 4 of the *Probation of Offenders Act*[1036] empower the court 'to release certain convicted offenders, after admonition or on probation of good conduct'. The requirements to be met in terms of section 3 are that 'the offence in respect of which

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1035 Act 45 of 1860.

1036 When any person is found guilty of having committed an offence punishable under s 379, s 380, s 381, s 404 or s 420 of the IPC or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the IPC, or any other law and no previous conviction is 'proved against him' and the court by which the person is 'found guilty is of the opinion that, having regard to 'the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to do so, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct' under s 4 release 'him after due admonition'.

offenders are convicted must be punishable with imprisonment of not more than two years or with a fine or both. Courts are required to have regard to the circumstances of the case including the nature of the offence and to the character of offenders'. Section 4 provides that 'when accused are found guilty of having committed an offence not punishable with death or imprisonment for life, courts may instead of sentencing them to any punishment direct their release on entering into bonds with or without sureties, to appear and receive sentences when called upon during such period, not exceeding three years, as courts may direct'.

Provisions of sections 3 and 4 respectively require courts to 'have regard to circumstances of the cases they deal with and to release on bail, offenders that are not sentenced to death or imprisonment for life'. Although the offender having children is not a circumstance *per se*, courts may have regard to their right to family, parental or alternative care when dealing with their primary caregivers. Caregivers may also be released on bond so as to be able to continue providing care to their children.

6.3.6 Sentencing of primary caregivers

The judicial trend is generally that offences punishable by death or by imprisonment for life committed by caregivers are treated in the same fashion as those committed by men. In *Sunil Dutt Sharma* v *State (Govt of NCT of Delhi)*[1037] (hereafter referred to as *Sunil*), for instance, it was stated that 'principles of sentencing evolved largely within the context of capital punishment apply to all lesser sentences as long as the judge is vested with the discretion to award a lesser or a higher sentence'.[1038] In *Mohd. Arif* @ *Ashfaq* v *Registrar*, *Supreme Court of India*,[1039] (hereafter referred to as *Mohd. Arif*), for example, it was among others pointed out that 'crime and punishment are two sides of the same coin. There are no statutory guidelines to regulate punishment'.[1040] Therefore, in practice, there is much variance in the exercise of sentencing discretion'. In *Tamilmani* v *State,*[1041] it was stated that 'judicial conclusions'

1037 Criminal Appeal No.1333 of 2013 (Arising out of SLP(Crl.) No. 7002 of 2012). Available at Indiankanoon Date Unknown https://indiankanoon.org/doc/94843825/?

1038 *Sunil* para 12.

1039 Judgement delivered on 2 September 2014.

1040 *Mohd.Arif* para 30.

1041 1997 Cri.L.J 144 (mad).

cannot be drawn in a mechanical manner. In the absence of any objective standard, the criminal justice system may be turned on the bases of sex, luck and chance.[1042]

Despite the unavailability[1043] of case law dealing specifically with the sentencing of caregivers, judgments such as *Ediga Anama v State of Andhra Pradesh*[1044] (hereafter referred to as *Ediga Anama*), *State of Tamil Nadu v Nalini*[1045] (hereafter referred to as *Nalini*) and *Upadhyay,* it is submitted that the aforementioned judgments confirm that courts hardly consider the right of children to care in sentencing primary caregivers. If taken into account, the right of children to parental, family care or alternative care, serves as a mitigating factor. In *Ediga Anama,* a caregiver was convicted of the murder of the girlfriend of her lover and her child. She was sentenced to death and appealed against the sentence only. Reference to the appellant being a caregiver to a one-year-old son was made. However, no further enquiry into the whatsoever was made about the care of the appellant's child during her incarceration. Instead, the court stated that 'the approach to sentencing involves considering the offence and the offender'.[1046] It is submitted that the enquiry into the care of the appellant's son during her term of imprisonment would possibly have revealed that the child would be cared for by the appellant's husband or by her father- in- law. In the present case, the appellant was married to another man and was engaged in a 'triangle of extra-marital affair with a widow whose girlfriend and child she murdered'.[1047] The sentence of death imposed on the appellant was commuted to imprisonment for life. The court decided that the appellant who was twenty- four-years of age when she committed the murders, was 'lured' into the fatal love web by a widow.[1048]

In *Nalini*, 26 accused stood trial for conspiracy to assassinate Prime Minister Rajiv Gandhi on May 21st, 1991. All 26 accused were sentenced to death and *Nalini* had given birth to a daughter during the trial. In dissent to the confirmation of capital

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1042 Srivastava 2008 http://nyulaglobal.org.

1043 Sites such as Indian Kanoon have been consulted and cases on sentencing of primary caregivers are scarce. Their dearth may be attributed to the fact that in sentencing caregivers, courts do not make an enquiry about the welfare minor children of primary caregivers, even when there is an indication that courts are dealing with caregivers.

1044 AIR 1974 SC 799; *Shamim Rahmani* v *State* AIR 1975 SC 1883.

1045 Judgment delivered on 11 May 1999.

1046 *Ediga Anama* para (i).

1047 *Ediga Anama* para 1.

1048 *Ediga Anama* para 14.

punishment on the strength of *Nalini* having given birth, Thomas J expressed the view that 'whilst *justicia non novit patremnee materm* (justice knows no father nor mother) is a pristine doctrine, it cannot be allowed to reign with its rigour in the sphere of sentence determination. An innocent child could still be saved from orphan hood'.[1049] The death sentence imposed upon *Nalini* was commuted to life imprisonment in 2000. Even though *Nalini* gave birth during the trial, no specific regard was made to the welfare of her child.

In *Upadhyay,* the Supreme Court had the opportunity to enquire about the protection and promotion of the right of children to care in the sentencing of primary caregivers and on the confinement of children with the caregivers. Except for reprimanding the government on its obligation to implement provisions of the CRC, the Supreme Court was oblivious that it also had the 'duty' to implement provisions of article 3(1) of the CRC when sentencing caregivers.[1050] The Supreme Court approached the protection and advancement of the rights of children to family, parental or alternative care from a prison perspective rather than from a sentencing angle. Approaching the protection and promotion of the right of children to care from a prison perspective only conceals the court's obligation to protect and to promote the right of children to care in the sentencing of caregivers. The Indian government, courts and jail authorities are all directed by article 3(1) of the CRC to act in a manner that advances and protects the right of children to family, parental or alternative care.

Sadique[1051] deals with the confinement of children below the age of six years with their primary caregivers and calls for judicial intervention to ameliorate their plight. Of the six recommendations she makes,[1052] none addresses the consideration of the right of the child to care in the sentencing of the caregiver. It is argued that scholars such as Sadique, through academic platforms, may raise awareness regarding the consideration of the right of children to parental, family or alternative care in the

1049 *Nalini* para 12.

1050 *Upadhyay* paras 6, 7 and 8.

1051 Sadique 2010 *Indian Police Journal* 27-33.

1052 Sadique 2010 *Indian Police Journal* 27-33. She recommends that the following sentences be imposed on convicted caregivers: (a) admonition; (b) fine; (c) conditional sentence (with a threat of imprisonment if there is non-compliance); (d) victim compensation; (e) confiscation and (f) community service.

sentencing of the primary caregivers compounds the protection and advancement of the right of children to care. Article 3(1) of the CRC demands that 'the best interests of children should be considered in every matter concerning children'. Writing about the confinement of children is itself a matter affecting children that has to be raised in line with the provisions of the CRC.

The Law Commission *Women in Custody Paper*[1053] did not cover the sentencing of caregivers. The Human Rights Commission[1054] and India's 2014 country[1055] report also did not address the protection of the right of children of primary caregivers in the sentencing of caregivers. The 2015 Seminar of Principal Judges on Sentencing Ethics, *inter alia,* discussed the sentencing of primary caregivers. The discussion, however, did not extend to consideration of the 'right of children to care in the sentencing of the caregivers'.[1056] It rather focused on prison conditions and on the role of the *furlough,* a facility given to prisoners to 'spend time with their family'.[1057] Sentencing of primary caregivers and the right of children to family, parental or alternative care ought to have been part of the discussion by the judges. In sentencing caregivers, judges are required to balance the right of children to care. Even if primary caregiving responsibilities is considered as a mitigating factor, courts have to conduct an enquiry regarding the situation of children of primary caregivers. In the event custodial sentences are imposed, children of caregivers require care. It is through an enquiry in the situation of children of primary caregivers that sentencing courts may for example, order social welfare agencies to ensure that children of primary caregivers are cared for during the imprisonment of caregivers. Before primary caregivers are sent to

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1053 Law Commission of India *Women in Custody Paper 35 of 1989*.

1054 The issues covered by the Human Rights Commission thus far are Prevention and Combating of Child Marriages; Child Labour; Child Abuse, Trafficking in Women and Children; Marginalised and Destitute Women of Vrindaran; Women Sheltered at the Agra Protective House; Sexual Harassment at the Workplace and in Public Transport; Registration of Marriages and Juvenile Justice 12.

1055 US Department of State Bureau of Democracy, Human Rights and Labour *India 2014 Human Rights Report* 38-48 (accessed at https://2009-2017.state.gov/documents /organization/236850.pdf). In as far as women are concerned, the following issues were reported on: Rape and Domestic Violence, Female Genital Mutilation, Other Harmful Traditional Practices, Sexual Harassment, Reproductive Rights, Discrimination and Gender-Biased Sexual Selections.

1056 Kumar V 'Seminar of Principal District Judges on Sentencing Ethics' (2-4 October 2015) (Bengalura) 1-16.

1057 *Furlough* is granted periodically for instance in every two weeks. It is considered a remission granted for no particular reason.

prison, they would have been sentenced. Any discussion pertaining to jail conditions of primary caregivers should be preceded by discussion relating to the sentencing of caregivers.

The state has the responsibility of punishing offenders. The punishment of offenders, including a caregiver of a child must take into account the right of the child to family, parental or alternative care. Advancing and protecting the right of the child to care is a duty that arises from ratification of the CRC. Article 3(1) of the CRC among others enjoins the government, the court, scholars and any person or institution that has an interaction with a child to act in the best interests of the child in every matter that involves the child.

In *Uphadyay*, the author observes that the Supreme Court squandered the opportunity of pronouncing guidelines for the sentencing of caregivers of children. Had such guidelines been formulated, a directive could have been issued to courts *aquo* to adhere to the sentencing guidelines. However, it approached the right of the child to care from a prison perspective by having regard to the adverse circumstances of children imprisoned with their caregivers. Consideration of the right of the child to care when the child is confined with the primary caregiver only amounts to misdirection on the part of the Supreme Court. The confinement of a child with his primary caregiver is preceded by the sentencing of the child's caregiver. Sentencing is therefore the appropriate stage to have regard to the right of the child to care.

Academic commentators such as Sadique, the author argues, have also neglected the duty to make a positive contribution to the advancement and protection of the right of the child to family, parental or alternative care. A scholar such as Sadique ought to have argued for consideration of the right to care in the sentencing of the child's caregiver and not when the child is confined with his primary caregiver.

6.4 England

6.4.1 Human Rights Act

In compliance with the obligation of aligning legislation and policies concerned with the advancement and protection of the rights of children imposed by the ECHR, the HRA was enacted. The HRA strives to give effect to article 8 of the ECHR and its text on the protection of family life is almost similar to that of article 8 of the ECHR. Article 8(1) of the HRA guarantees to everyone the 'right to respect for his private and family life, home and correspondence'. Article 8(2) states that 'any interference with the right to privacy and family life, home or correspondence must be in accordance with the law, must be necessary in a democratic society, must be in pursuit of one of legitimate aims such as national security, economic well-being of the country, public safety, prevention of disorder or crime, protection of health or morals and the protection of the rights and freedoms of others'.

6.4.2 Sentencing of caregivers

Section 152(2) of the *Criminal Justice Act*[1058] empowers courts to 'impose custodial sanctions when they are of the opinion that the offences, or the combination of the offences and one or more offences associated with it, is so serious that neither a fine alone nor a community sentence can be justified for the offences'. Courts may impose custodial sentences when such imposition are called for by for instance the seriousness of the offences or by the need to protect the community. The Sentencing Guidelines Council (hereafter referred to as the SGC) may, pursuant to section 170 of the *Criminal Justice Act* read with section 120 of the *Coroners Justice Act*,[1059] 'pronounce' on any[1060] 'sentencing guidelines'[1061] including in urgent cases that make it 'impractical' for it to comply with procedural requirements.[1062] The sentencing guidelines may be '(a) general in nature or limited to a particular category of offences or offenders', or be

1058 Of 2003, hereafter referred to as *Criminal Justice Act*.
1059 Of 2009, hereafter referred to as CorJA.
1060 S 120(4) of CorJA.
1061 Minson *Mitigating Motherhood: A Study of the Impact of Motherhood: A Study of the Impact of Motherhood on Sentencing Decisions in England and Wales 2014* 6.
1062 S 123(1)(b) of CorJA.

'(b) pursuant to decisions by magistrates' courts under section 19 of the Magistrates' Court Act.[1063]

The idea of the consideration of primary caregiving responsibilities in the sentencing process in this jurisdiction may be traced from interviews with magistrates in 1997 and in courts pronouncements in 2001, 2002 and 2012. In line with precedent, courts are expected to consider guidelines for sentencing of caregivers pronounced by, for example, appellate courts. Primary caregiving responsibilities are not yet the standard preoccupation of courts when sentencing caregivers. In certain instances, courts have regard to 'caregiving responsibilities as a mitigating factor'[1064] and in others, courts do not consider it. In the 1997 interviews with magistrates, over 80 per cent of them said that female offenders invariably had childcare responsibilities and that 'they believed that women with children should be kept out of jail'. The magistrates explained that, in their experience, 'women who came to courts tended to be single caregivers'.[1065] It is argued that incarcerating such caregivers might result in their children being placed into care, penalising the family rather than the offenders alone and increases the costs of maintaining the child. Indeed, most of the magistrates said that 'primary caregivers should be kept out of custody in general'.[1066]

In the 2001 case of *R* (*on the application of P and Q*) *v Secretary of State for the Home Department;*[1067] (hereafter referred to as *P and Q*) two primary caregivers challenged the maximum period of eighteen months that babies may stay in prison with their primary caregivers. The court decided that since 2 October 2000, sentencing courts have been public authorities within the meaning of section 6 of the HRA. If the passing of custodial sentences involves the separation of caregivers from their young children (or, indeed, from any of their children), sentencing courts are bound to carry out the balancing exercise before deciding that the seriousness of the offences justifies the separation of primary caregivers from their children. If courts do not have sufficient information about the likely consequences of the compulsory separation,

1063 Of 1980.
1064 Epstein 2012 *Mothers in Prison*: *The Sentencing of Mothers and the Rights of the Child* 15-16.
1065 Hedderman and Gelsthorpe *Understanding the Sentencing of Women* 45.
1066 Hedderman and Gelsthorpe *Understanding the Sentencing of Women* 46.
1067 2001 EWCA Civ 115.

they must, in compliance with their obligations under section 6(1) of HRA,[1068] ask for 'more information'.

Courts should acquire information pertaining to caregivers' dependent children and they should balance the right to care with the 'seriousness of the offences'.[1069] R (*on the Application of Stokes)* v *Gwent Magistrates Court* (hereafter referred to as *Gwent*),[1070] is another case where sentencing courts were ordered to have regard to primary caregivers' childcare responsibilities. Incarceration was then considered as an alternative to compensation since the caregiver was unable to make payments as ordered. The court decided that when considering imprisonment based on failure to pay against a primary caregiver, the impact of imprisonment on the caregiver's minor children should be the primary consideration. Imprisonment of primary caregivers may result in unknown consequences for the young children. The court should take into account the need for proportionality and ask itself whether the proposed interference with the child's right to respect for the family was proportionate to the need which made it legitimate. Committal to imprisonment must be a remedy for final resort if all else has failed.

In 2002 *R v Joanne Mills,*[1071] (hereafter referred to as *Mills*) was decided. In this case, the appellant was convicted with two counts of obtaining service (credit) on deceit and was sentenced to eight months' imprisonment. She appealed against the sentence only. Consideration of her primary caregiving responsibilities was abstract. Thou the trial court was informed that she was a caregiver to 2 minor children,[1072] it made no reference to the appellant's care responsibilities when remarking about her

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1068 S 6(1) of the HRA stipulates that 'it is unlawful for a public authority to act in a way that is incompatible with a Convention right' and s 6(3)(a) includes' courts and tribunals' in the definition of a public authority. See also Drew *Children and the Human Rights Act* 31-32 and Department for Constitutional Affairs *Review of the Implementation of the Human Rights Act* (July 2006) 3. The impact of the HRA upon the development of England law has been significantly less negative. In many instances courts would either have reached the same conclusion under common law, or found that the decision being challenged had been properly taken. And, in very many cases, human rights arguments have been rejected by the courts as being either misconceived or irrelevant to the case. See also Croft *Whitehall and the Human Rights Act 1998.*

1069 *P* and *Q* para 79.

1070 2001 All ER D 125 (Jul).

1071 2002 EWCA Crim 26.

1072 *Mills* para 8.

circumstances.[1073] The Appeal Court commended the judge's approach to sentencing despite it making no reference to her minor children's right to care. It held that 'the judge was right to commence by asking himself: was prison necessary? If he came to the conclusion it was, the next question which he had to ask himself was: if so, how long a prison was necessary? Before asking those two questions he had to consider the available alternatives, one of which was the course suggested by the probation officer'.[1074]

The Appeal Court made reference to the appellant's primary caregiving responsibilities but replaced the term of imprisonment on the ground that the appellant showed good character. It stated that: [1075]

> [i]n dealing with a primary caregiver who is the sole support of two young children, as is the case here, the judge has to bear in mind the consequences to those children if the sole carer is sent to prison.

The sentence of eight months' imprisonment was quashed and replaced with a six months community rehabilitation order. The trial court was found to have 'misdirected itself as the appellant had demonstrated good character'.[1076] The reduction of sentence by the Appeal Court demonstrates that primary caregiving responsibilities is still a mitigating factor.

In 2007, judges participated in the study conducted by the Prison Reform Trust on aggravating and mitigating factors in sentencing. In the study, aggravating and mitigating factors were categorised into Category 1 related to 'the criminal act', Category 2 to 'immediate circumstances of the offences',[1077] Category 3 to 'wider circumstances at the time of the offence',[1078] Category 4 to 'responses to the offences and prosecution,[1079] Category 5 to the 'offenders' past',[1080] and Category 6 to the

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1073 *Mills* para 12.
1074 *Mills* para 14.
1075 *Mills* para 15.
1076 *Mills* paras 17-19.
1077 Jacobson and Hough *Mitigation*: *The Role of Personal Factors in Sentencing* Prison Reform Trust 10.
1078 Jacobson and Hough *Mitigation*: *The Role of Personal Factors in Sentencing* Prison Reform Trust 10.
1079 Jacobson and Hough *Mitigation*: *The Role of Personal Factors in Sentencing* Prison Reform Trust 10.
1080 Jacobson and Hough *Mitigation*: *The Role of Personal Factors in Sentencing* Prison Reform

'offenders present and future'[1081]. Only category 2 is briefly referred to as it bears relevance. Mitigating factors immediate to the offences were stated as '(i) spontaneous offence'; '(ii) low level of recklessness or unintentional acts; (iii) provocation and (iv) pressure from others'.[1082]

In 2009 the Sentencing Advisory Panel's (hereafter referred to as the SAP) advice to the SGC on the improvement of the sentencing of caregivers was rejected by the SGC. The advice by the SAP to the SGC was to the effect that:[1083]

> (i) The statutory requirement that custodial sentences must not be imposed unless the offences are so serious that neither a fine alone nor a community sentence can be justified. Custodial sentences are likely to cause harm to children of primary caregivers.
> (ii) Courts must always obtain pre-sentence reports before sentencing caregivers to custody, wherever possible, caregivers should be granted bail whilst pre-sentence reports are prepared.
> (iii) Where an offence committed by a woman merits a community sentence, the court must not impose a custodial sentence because of a perceived lack of community sentence provision or difficulty in identifying suitable community order requirements.
> (iv) Where offences committed by primary caregivers are not serious enough to merit a community order, the appropriate sentence should be a fine or a discharge. The fact that caregivers are on a low income or in receipt of state benefits should not prevent courts from imposing a fine if this is the most appropriate sanction for an offence.

The SGC, as mentioned above, did not accept the recommendations of the SAP and six years on, neither gender factors nor the welfare of children (who are still primarily cared for by their mothers) are explicitly referred to in sentencing guidelines.

In 2015 Epstein[1084] reviewed 75 cases[1085] that dealt with the sentencing of primary caregivers and her observations is that although the right of the child to family,

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Trust 10.

1081 Jacobson and Hough *Mitigation*: *The Role of Personal Factors in Sentencing* Prison Reform Trust 10.

1082 Jacobson and Hough *Mitigation*: *The Role of Personal Factors in Sentencing* Prison Reform Trust 11.

1083 Minson, Nadin and Earle *Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 14.

1084 Epstein 2012 *Coventry University* 1-33.

1085 Court of Appeal 39, Crown Court 23, Magistrate Court 3, Women in Prison Magistrate Court 2 and Women in Prison Magistrate Crown Court 8.

parental or alternative care is not constitutionally entrenched, some courts do take it into consideration when imposing a custodial sentence on caregivers. Given the fact that case law on the sentencing of primary caregivers is scarce and not easily accessible,[1086] reference is made to cases referred to by Epstein.[1087] In *R v Shantelle Davis* (hereafter referred to as *Shantelle Davis*),[1088] the initial sentence of twelve months imprisonment was reduced to nine months suspended imprisonment. The fact that the primary caregiver had a one-year eleven- month's old severely disabled daughter had an impact in the reduction of the sentence.

In *R v Lisa Ann Dawson* (hereafter referred to as *Dawson*)**,**[1089] a pregnant caregiver to a two-year-old son had the sentence of thirty weeks incarceration converted to twelve months community service. Taking into account her primary caregiver's responsibilities, the court stated that sentencing the primary caregiver to a term of imprisonment should be carefully considered, particularly when the term will be brief. In *R* v *McClue* (hereafter referred to as *McClue*),[1090] the sentence of eighteen months imprisonment imposed on a caregiver was reduced to eight months. The court took into account the fact that the appellant's seven-year-old daughter was suffering from abandonment from her father and was emotionally vulnerable. The effect of incarceration was found to be capable of being devastating to her.

The cases referred to by Epstein have one thing in common. They all indicate that in England sentencing courts consider the right of children to care as a mitigating factor that may reduce sentences imposed. Guidelines for the sentencing of primary caregivers were, again, pronounced in *R v Rosie Lee Petherick*[1091] (hereafter referred to as *Petherick*) and the SGC gave its own interpretation to the guidelines. In *Petherick*, a caregiver of a son was convicted with dangerous driving and driving under the influence of alcohol. She was sentenced to four years nine months imprisonment.

1086 Resources such as LexisWeb.uk, BALII, Prison Reform Trust, LexisNexis, Howard League for Penal Reform were consulted and the cases, including cases used by Rona Epstein are not available. A request was also made to Epstein for copies of the cases and she rejected same.

1087 The cases referred to by Epstein, thou not detailing facts thereof, are relevant in that they deal with the sentencing of caregivers.

1088 2010 EWCA Crim 594.

1089 2011 EWCA Crim 1947.

1090 2010 EWCA Crim 311.

1091 2012 EWCA Crim 2214.

She appealed against the sentence only. Whilst the trial court was found to have properly considered the right of the appellant's child to family, parental or alternative care, the sentence was considered long and was reduced to three years ten months imprisonment.[1092] The impact of the appellant's incarceration was held 'not to be adverse to the minor child since the child was cared for by his father'.[1093] The guidelines for the sentencing of primary caregivers are that:

(i) The sentencing of caregivers engages the 'right to family life' of both the caregivers and the children, as the right is not lost automatically by reason of criminal conviction;[1094]

(ii) In a case where the right to family life applies, courts should ask three questions: (a) Is there an interference with family life? (bi) Is the interference in accordance with law and in pursuit of a legitimate aim? and (c) Is the interference proportionate given the balance between various factors? Any interference by the state with a person's right to family life must be in response to a pressing social need and appropriate to the legitimate aim pursued.[1095]

(iii) Dependent children have always been a 'factor for consideration' in the mitigation of sentence.[1096]

(iv) Courts must be informed about the 'domestic circumstances' of the caregivers and of the family life of others, especially children that stand to be affected.[1097]

(v) In a criminal sentencing exercise, the legitimate aims of sentencing must be 'balanced with the effect of sentences' that often inevitably have an impact on the family life of others. The more serious the interference the more compelling must be the justification and it cannot be much more serious than the act of separating primary caregivers from their children.[1098]

1092 *Petherick* para 27.

1093 *Petherick* para 10.

1094 Minson, Nadin and Earle *Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 10-11. See also Epstein 2012 *Coventry Law Journal* 29.

1095 Minson, Nadin and Earle *Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 10.

1096 *HH* v *Deputy Prosecutor of Genoa* UKSC 2011/0128 para 126.

1097 Epstein 2012 *Coventry Law Journal* 28.

1098 Epstein 2012 *Coventry Law Journal* 29.

(vi) If the cases stand on the cusp of custody, a fine balance must be 'struck between the right of children to care and protection of the community'.[1099]

(vii) The like hood of interference with family life inherent in a sentence of imprisonment being 'disproportionate'.[1100] Non-custodial sentences are preferred for caregivers with custodial sentences to be considered when the offences are serious or violent or when the primary caregivers represent a continuing danger. Even when that is the case, custodial sentences should only be given after considering the best interests of the children, whilst ensuring that 'appropriate provision' is made for their care.[1101] In a case which is on the threshold between custodial and a non-custodial or suspended sentence, the impact on dependent children can tip the scales and proportionate sentences can become disproportionate.[1102]

(viii) If custodial sentences cannot be avoided, the right of children to 'care' should mitigate the length of the sentences. There is no standard or normative adjustment for dependent children, but their best interests must be a primary consideration. The welfare of the children should be at the forefront of the judge's mind.[1103]

The SGC has since given the following interpretation to the statutory obligation for consideration of the right of children to family, parental or alternative care in the sentencing of caregivers:

(i) The clear intention of the threshold test is to 'reserve prison as a punishment for the most serious offences'.[1104]

(ii) It is impossible to determine definitively which features of a particular offence make it 'serious' enough to merit a custodial sentence.[1105]

1099 Epstein 2012 *Coventry Law Journal* 30. See also Minson, Nadin and *Earle Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 10.

1100 *Petherick* para 23.

1101 Rule 64 of the United Nations *Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* Resolution 2010/16.

1102 Minson, Nadin and Earle 2015 *Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 11.

1103 Epstein 2012 *Coventry Law Journal* 30.

1104 Minson, Nadin and Earle *Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 11.

1105 Minson, Nadin and Earle *Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 11.

(iii) Passing the custody threshold does not mean that a 'custodial sentence should not be deemed inevitable' and custody can still be avoided in light of personal circumstances or mitigating factors or where there is a suitable intervention in the community which provides sufficient restriction (by way of punishment) while addressing the 'rehabilitation of offenders' to prevent future crime.[1106]

(iv) The best interests of the children require that the right of children to care may be considered in the 'sentencing' of the caregiver.[1107]

It is submitted that commission of an offence by primary caregivers is itself a matter that concerns the children. The right of children to parental, family or alternative care may be considered independently from caregivers' or may be considered as a mitigating factor in line with the exercise of the sentencing discretion by the court.

In 2014 and 2015, for example, the Prison Reform Trust, in consultation with all stakeholders in the justice system such as the Law Society, Magistrates Association, Director of Public Prosecutions, Bar Council, Ministry of Justice, Crown Prosecution Services, SGC and Judicial College, prepared a discussion paper on improving *inter alia* consideration of primary caregiving responsibilities in the sentencing process. The discussion paper makes the following recommendations pertinent to sentencing of primary caregivers:

(i) The government should review the sentencing framework to ensure appropriate recognition of and provision for an offender's sole or primary care responsibilities, in relation to both custodial and non-custodial sentencing.

(ii) The government's Advisory Board on Female Offenders should review arrangements in the criminal justice system for women with primary or sole care responsibilities in light of section 10 of the Offender Rehabilitation Act of 2014 and ensure a whole of government approach to improving outcomes for caregivers and their children, including coordinated and consistent funding streams for women's services and interventions.

(iii) Sentencing guidelines should be strengthened by the addition of an 'Overarching Principle' setting out the court's duty to investigate sole or primary caring responsibilities of defendants and to take these

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1106 Minson, Nadin and Earle *Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 11.

1107 Minson, Nadin and Earle *Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 15.

responsibilities into account in sentencing decisions. This would reflect the Appeal Court's decision in *Petherick*.

(iv) Courts should establish mechanisms to ensure the provision of sufficient information to courts where the offenders have primary caring responsibilities, including a requirement for full written pre-sentence reports and local directory of women's services and interventions.

(v) When imposing non-custodial sentences, courts must inquire about and consider women's family responsibilities and ensure 'rehabilitation activity requirements' are achievable within those constraints.

(vi) Judges, district judges and magistrates should be obliged to consider non-custodial sentences for offenders with care responsibilities and in cases when imprisonment is an option should consider a community order, deferred or suspended sentence. If an immediate term of imprisonment is imposed, written reasons should be given for their decision.

(vii) Training bodies, including the Judicial College, the Law Society and the Bar Council, should ensure sufficient emphasis in both induction, training and continuing education on the balancing exercise to be undertaken when sentencing an offender with sole or primary care responsibilities.

(vii) The Equal Treatment Bench Book should be revised to include evidence about the differential impact of imprisonment on women and men, to reinforce its message that gender should not be disregarded in sentencing decisions.

(viii) The SGC should undertake or support targeted research and consultation with magistrates and judges on how sole and primary caring responsibilities are and should be taken into account in court, as well as monitoring sentencing practice and outcomes in this area more closely.

In 2017 Baldwin and Epstein[1108] interviewed caregivers who served terms of imprisonment. Several of the primary caregivers felt that their caregiving status was not given any consideration by the courts. They conclude that despite being guided and required to do so, judges and magistrates appeared to be failing in their duty to undertake a balancing exercise, in which they would consider the right of children against the necessity and appropriateness of custodial sentences.

In this jurisdiction it appears that there is no absolute clarity whether the right of the child to care is a standard preoccupation of all courts. Prior to the formulation of the

[1108] Baldwin and Epstein *Short but not Sweet*: *A Study of the Impact of Short Custodial Sentences* 11.

guidelines for the sentencing of a caregiver in *Petherick,* courts have in some cases such as *P*, *Q and Gwent* given due weight to the right of the child to care, albeit as a mitigating factor. The author submits that the tension that exists between the SAP and the SGC and between the Appeal Court and the lower courts hinders the consideration of the right of the child to care in the sentencing of the child's primary caregiver. In 2009 the SAP proposed 'ways in which the sentencing of caregivers may be improved', but these recommendations were not accepted by the SGC.[1109] In turn, the SGC gave its own interpretation of the approach to sentencing. The recommendations by the SAP were not intent on repealing the traditional approach to sentencing of offenders but on adding an element for consideration by the sentencing court. Among others, the recommendations of the SAP were to the effect that 'the right of the child to care must be taken into account when his caregiver is sentenced'.[1110]

Although in terms of the doctrine of *stare decisis*, judgments of the lower courts are 'not binding' on higher courts,[1111] the author argues that the consideration of the right of the child to family, parental or alternative care in the sentencing of his caregiver is not a direct result of adherence to precedent but of the exercise of the sentencing discretion by the courts.

Article 3(1) of the CRC mandates every court that deals with a matter that concerns a child to 'act in the best interests of such a child'. It is submitted that the Appeal Court in *Mills* ought to have taken cognisance that the judgments in *P*, *Q* and *Gwent* were in compliance with the duty to realise the right of the child to care in any matter that involves a child.

6.5 Conclusion

Through their ratification of the CRC, the jurisdictions of comparison have undertaken the onerous obligation of aligning domestic provisions concerned with children to international child law instruments. The task of placing national provisions on the

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1109 Minson, Nadin and Earle *Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 14.

1110 Minson, Nadin and Earle *Sentencing of Mothers*: *Improving the Sentencing Process and Outcomes for Women with Dependent Children* 15.

1111 PLC Dispute Resolution 2007 https://uk.practicallaw.thomsonreuters.com.

footing of the CRC entails that not only legislation, but also policies or orders have to be pronounced in such a way. It further means that courts have to give effect to provisions of international child rights instruments and that judgments delivered by courts should articulate the protection and advancement of the rights of children to care. It is not the sentencing of primary caregivers that is central to the protection and promotion of the right of children of caregivers, but consideration of the right of children to care in the sentencing of their primary caregivers. During the sentencing process, courts are required to balance the right of children to care against the seriousness of the offence(s) and the interests (and protection) of society.

In the event of courts considering the imposition of custodial sentences, the prescript of the best interests of children requires that courts should have regard to the care of the children of primary caregivers when their caregivers are jailed. The best interests of children standard does not bar courts from imposing custodial sanctions. It requires courts to have regard to the right of children to family, parental or alternative care and to take steps to ensure that the right remains intact. Children of primary caregivers may be cared for not only by family members or the extra-marital fathers, but also by persons who have an interest in the care, well-being and development of the child. As highlighted above, the exposition of cases showed that the courts' approach is currently to focus on the first category of family or parental caregivers.

In South Africa, the right of children to care should, since *S v M*, be considered independently and is now the standard preoccupation of sentencing courts. However, not all courts follow the sentencing guidelines pronounced in *S v M*. For example, in *Williams,* the guidelines were not adhered to because the magistrate did not agree with the pronouncement. Not only *Williams*, but several other cases, as highlighted above, had to be remitted to the sentencing court for consideration of the right of the child to care. It is submitted that, since *S v M* did not specifically distinguish between older children and those eligible to accompany their primary caregiver to prison on her application, sentencing courts are yet to address the form of alternative care that the infant and young child must be offered when his primary caregiver is incarcerated. The author further argues that the involvement of the Family Advocate, as discussed in Chapter 4, in assisting the caregiver to identify and to enter into a parental

responsibilities and rights agreement with the person who will care for her child or children during her imprisonment, will serve the best interests of the child. The engagement of the Family Advocate will advance the right of the child to alternative care before he enters prison with his caregiver or ensure that she spends the shortest possible time in prison.

The confinement of children in India provides a lesson for South Africa. Inadequate implementation of provisions of international conventions such as the CRC has the potential of infringing the right of children to care when their caregivers are incarcerated. In India the right of children to family, parental or alternative care is recognised as a mere mitigating factor. Owing to unstructured sentencing or lack of sentencing guidelines, courts in this jurisdiction do only occasionally consider the right of children to family, parental or alternative care when sentencing caregivers. Courts, however, do not conduct any enquiry into the welfare of children of caregivers who are placed at risk of being deprived of family, parental or alternative care because of the incarceration of caregivers. For instance, in *Edaga Enama* and *Nalini*, the relevant courts were alerted to the primary caregiving responsibilities of the appellants and yet, no further enquiry was made into the welfare of the minor children of the appellants. Foregoing the opportunity, the Supreme Court of Appeal in *Upadhyay* also failed to formulate guidelines for the sentencing of caregivers of minor children, despite article 3(1) of the CRC enjoining it to 'make an effort to protect and to advance the child's right to care'. Instead, the Supreme Court condemned the treatment of children confined with their primary caregivers and the lack of commitment by the government to protect and advance the rights of children of caregivers. The orders made by the court on the advancement of children's rights were not implemented. It is submitted that the Law Commission of India should conduct a study on consideration of the right of children to family, parental or alternative care in the sentencing process concerning primary caregivers. The study will become the springboard to propel discussions and the consideration of the right of children to family, parental or alternative care. The Human Rights Commission should raise awareness about the consideration of the right of children to family, parental or alternative care as a mitigating factor. All courts should consider the right of children to care as a mitigating factor and such

consideration will inevitably become a standard preoccupation for all courts. India can benefit substantially from adopting the developments in this regard in South Africa.

Courts in England consider the right of the child to family, parental or alternative care as a mitigating factor, alongside the personal circumstances of caregivers. Similarly to India, and despite professing the opposite in public interviews, the judiciary does not consider the right of the child to care independently from the primary caregiver. What judges and magistrates said in the interviews was not what they implemented in practice. In interviews, judges and magistrates confirmed that primary caregiving responsibilities are adequately taken into account in the sentencing of primary caregivers. The judgments that judges and magistrates pronounce, however, do not reflect sufficient consideration of the right of children to family, parental or alternative care. Despite earlier sentencing guidelines that differ slightly from those in *S v M* for the sentencing of caregivers, pronounced by the Appeal Court in *Petherick*, the guidelines appear not to be complied with. The Appeal Court has to take the initiative of ensuring that the sentencing guidelines are adhered to. It is untenable that, despite the court not considering the right of children in *Mills*, the Appeal Court still commended the trial court's approach to sentencing. As a state party to the CRC and to the ECHR, England has undertaken the obligation of securing the right of children to family, parental or alternative care when sentencing primary caregivers, but does not seem to prioritise it. Perhaps they can also, like India, benefit from the South African practice regarding older children.

Protection and advancement of the right of children to care does not prohibit courts from imposing custodial sentences in sentencing primary caregivers. However, courts, as agencies of the state, when deciding on the sentence, have the duty to balance the right of children to care with other trite factors. In the event of a custodial sentence being found as the appropriate and proportionate sentence, courts should, firstly, aim to ensure that children of caregivers are cared for by the other parent or family members and, secondly, by other persons who have an interest in the care, well-being and development of the child.

It is alarming that sentencing courts in South Africa, India and England generally lack awareness that the infant or young child of a caregiver that stands to be sentenced

has the right to be placed in alternative care. Sentencing courts should be alert to their duty to secure the placement of the child in alternative care that continues the child's upbringing, culture, language, heritage and religion. The child of a primary caregiver that stands to be sentenced has the right to rest and leisure, to participate freely in recreational and cultural activities as well as in the arts. Alternative care guidelines are binding on state parties to the CRC and are monitored by the CRC Committee. In conclusion, it should be emphasised that, although parental care is generally the preferable choice, the confinement of the infant or young child's caregiver might, in honouring the best interest of the child principle, necessitate investigations into and court orders for the child's alternative care.

CHAPTER 7

Conclusion and Recommendations

7.1 Introduction

The traditional approach to sentencing in *Zinn* reflects a consideration of the offence, the offender and the interests of society. This approach requires the court to balance each of these aspects with each other and to ensure that none of them is compromised at the expense of either or both of the other. However, the sentencing of a child's caregiver adds an extra factor to the approach. It requires the sentencing court to consider the best interests of the child and to balance it with the aspects of the *Zinn* triad.

The discussion of the sentencing process in all three jurisdictions conveys that the sentencing of the child's primary caregiver requires the court to have regard and give effect to the following considerations:

(i) The obligation to respect, protect, promote and fulfil the right of the child to care imposed on it by international children's rights instruments in line with the paramountcy of the best interests of the child;
(ii) provisions of municipal law pertinent to the protection and advancement of the right of the child to family, parental or alternative care;
(iii) the duty to balance the right of the child to care with the *Zinn* triad and to take into account developments that have become relevant for the care of the child; and
(iv) the suitability of conditions in prison to accommodate the needs of children confined with their primary caregivers.

In the South African context the requirement of balancing the elements of sentencing on an equal footing with the best interests of the child does not mean that the court is barred from imposing a custodial sentence on the child's caregiver. The court may impose a term of imprisonment on the child's primary caregiver when the gravity of the offence calls for it, that is trite. Balancing the *Zinn* factors with the best interests of the child requires the court to have regard to the right of the child to family, parental or alternative care in the sentencing process. The *Zinn* elements and the child's best

interests carry equal weight in the balancing process. It is in the interests of law and order that society be protected. However, the court must ensure that the child continues to be cared for even when it imposes a custodial sentence on his caregiver.

7.2 International Children's Rights Provisions

The best interests of the child are an integral part of international customary law. The three jurisdictions of comparison are state parties to the CRC. In addition, South Africa and England have both ratified regional instruments that complement the protection and advancement of children's rights. Ratification of the CRC by South Africa, India and England has placed a duty on these states to respect, protect, promote and fulfil the right of the child to care through adoption of among others, legislation, policies, charters and orders.

Article 3(1) of the CRC stipulates that 'in all actions involving the child whether undertaken by public or private social welfare institutions, courts of law or legislative bodies, the best interests of the child shall be a paramount consideration'. Article 3(1) among others enjoin the court to 'act in the best interests of the child in every matter that concerns the child'. Sentencing of the child's caregiver is *holus bolus* a matter that involves the child. The best interests of the child are the standard that a court must use to balance his right to family, parental or alternative care with the aspects identified for purposes of sentencing. The balancing process must be such that the right of the child to care is not emphasised at the cost of the offence, the offender and protection of society and neither should it enable primary caregivers escape from being held accountable.

The prescript of the best interests of the child obliges the sentencing court to have regard to the right of the child to care and must obviate infringing it or placing it at risk of transgression. Whilst the court cannot of itself protect children from harmful or perilous situations or avert ruptures of families, it must take steps to secure the right of the child to care. The principle of the best interests of the child directs the sentencing court to also give recognition to the placement of the child in alternative care that is allied with changes that have become significant for the care of the child. The standard of the best interests of the child must be applied to attain an act or

action that serves, promotes and defends the rights of the child. The best interests of the child may be 'applied as an aid to interpret other rights', to 'ascertain the scope of other important rights and as a fundamental right itself'. The notion of the best interests of the child, like any other right is capable of constraint. Section 232 of the Constitution makes provision that 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

Articles 3(2) and 3(3) extend the application of the prescript of the best interests of the child. Article 3(2) requires state parties to ensure that 'the child is offered protection and care as is necessary for his well-being'. Article 3(3) mandates state parties to ensure that 'the institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, the number and suitability of their staff as well as competent supervision'. The UNCHR has determined that 'the standard of the best interests of the child must be applied systematically in every matter that involves the child'.[1112] The application of the child's best interests requires the development of a rights-based approach, engaging all actors to 'secure holistically the physical, psychological, moral and spiritual integrity of the child and to promote his human dignity'.[1113]

The right of the child to alternative care is expressed in article 20(1) of the CRC. The article makes provision that a child who is 'temporarily or permanently deprived of his family environment, or in whose own best interests cannot be allowed to remain in a particular environment, shall be entitled to special protection and assistance provided by the state'. Article 20(2) directs state parties to 'secure alternative care for a child who is temporarily or permanently deprived of his family environment in accordance with their national laws'. The form of alternative care made available to the child must be capable of continuing his upbringing, ethnic, religious, cultural and linguistic background. Article 20(1) requires that 'when it is clear that the child stands to be deprived of family or parental care regard must be had to his placement in alternative

1112 UNCHR *Determining the Best Interests of the Child (May 2008)* 21.

1113 Principle 5 of the UNCHR *General Comment No.14 (2013)* on the right of the child to have his best interests taken as a primary consideration (art. 3 para 1).

care that resembles a family setting'. It is submitted that the imposition of a custodial sentence on the child's primary caregiver may constitute deprivation of the child's right to care and that alternative care resembling family care should then be an important consideration.

Article 4 of the CRC confirms the binding effect of the CRC. It mandates state parties to 'undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRC'. With regard to economic, social and cultural rights, state parties must 'undertake such measures to the maximum extent of their available resources and where required, within the framework of international co-operation'.[1114]

Placing the child who stands to be deprived of parental care in appropriate alternative care by state parties to the CRC is a practice that is encouraged by the guidelines on alternative care. Guidelines on alternative care have since been adopted at international level and although they are 'non-binding',[1115] state parties to the CRC are encouraged to adhere to the guidelines. The ACRWC and the ECHR's provisions on alternative care correspond with those of the CRC. Adherence to the alternative care guidelines is monitored by the CRC Committee. The guidelines are intended to enhance the implementation of the CRC and are of relevance regarding the protection and well-being of children who are deprived of parental care or who are 'at risk of being so deprived'.[1116] The guidelines recognise the family as the fundamental group of society and the natural environment for the growth, well-being and protection of children. Efforts must therefore be directed to enabling the child to remain in or be returned to the care of his parents or when appropriate, other close family members. States must ensure that 'families have access to forms of support in the caregiving role'.[1117]

1114 Art 4 of the CRC.

1115 Davidson 2015 *International Journal of Child, Youth and Family Studies* 382; University of Strathclyde Date Unknown https://www.futurelearn.com/courses/alternative care/0/steps/29770.

1116 Principle I1 of the Guidelines for the Alternative Care.

1117 Principle IIA3 of the Guidelines for the Alternative Care.

7.3 Municipal Provisions Pertinent to the Protection and Advancement of the Right of the Child to Care

The position in South Africa, India and England has been investigated in order to establish the extent to which these states adhere to the CRC and other instruments and the extent to which the best interests of the child and care provisions are implemented. The Indian and England's perspectives on the regulation of the confinement of children with their caregivers offers lessons to South Africa. The confinement of children in deplorable conditions in India and the detailed policy on the confinement of children in England respectively direct South Africa to make improvements on the confinement of children with their primary caregivers.

7.3.1 South Africa

On 27 April 1994 the Republic of South Africa became a democratic state. National elections that included all South Africans were held. A year earlier in 1993, a transitional Constitution was adopted to lay the foundation among others for the 1994 polls. In 1995 South Africa ratified the CRC and the final Constitution was adopted in 1996. The 1996 Constitution contains provisions for rights that are exclusive to the domain of children. Section 28(1)(b) accords the child 'the right to family, parental or alternative care' and section 28(2) makes provision for 'the paramountcy of the best interests of the child in every matter that concerns the child'.

Section 28 must be seen as 'a response in an expansive way to South Africa's international obligations as a state party to the CRC'.[1118] It has 'enlarged the scope of the best interests of the child. It now includes cases of maintenance, divorce, care, guardianship and contact'.[1119] It is submitted that the concept of the best interests of the child is now constitutionally entrenched also in the sphere of criminal law. In sentencing the child's caregiver the court has the obligation to consider the best interests of the child. In South Africa 'the best interests of the child' are a

[1118] *S v M* para 16.
[1119] *S v M* para 12.

constitutionally[1120] embedded right and courts are obliged to implement it in every case that concerns the child.

It is clear that the right of the child to care is interwoven with his right that his best interests be respected and protected. Sloth-Nielsen[1121] correctly captures the duty of the court to have regard to the right of the child to care in the sentencing of the primary caregiver. She points out that 'the court is now constitutionally bound to give consideration to the effect its judgment will have on his life'. The comprehensive and emphatic language of section 28 indicates that 'just as law enforcement must always be gender-sensitive, so must it always be child-sensitive. Statutes must be interpreted and the common law developed in a manner that favours protecting and advancing the interests of children. Courts must also function in a manner which at all times shows due respect for the best interests of the child'. Section 28 requires 'any person, institution or authority dealing with a matter that concerns a child to make best efforts to avoid where possible, any breakdown of family life or parental care that may threaten to put children at increased risk'. Similarly, in situations where rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect on children as far as it reasonably can. In order to minimise the breakdown of families it is recommended below that the Family Advocate should be involved in the sentencing of the child's caregiver. The role of the Family Advocate will be to assist the court to arrive at a well-considered decision regarding the care of the child of a primary caregiver.

The notion of protecting and advancing the right of the child to family, parental or alternative care entrenched in section 28 is also reflected in the preamble and in sections 6(2), 7, 8 and 9 of the Children's Act. Section 6(2) makes it manifest that 'all proceedings, action or decisions in a matter concerning the child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights'. The 'standard of the best interests of the child' is contained in section 7 and 'its application' in section 8. Section 8(2) makes it clear that 'all organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect

1120 S 28(2) of the Constitution.
1121 Sloth-Nielsen 1996 *Acta Juridica* 25.

and promote the rights of children contained in the Act'. It is commonplace that the sentencing of the child's caregiver is a process and the court's decision is action that falls within the ambit of section 6(2). This provision consequently requires the court to have 'regard to the paramountcy of the best interests of the child in every matter that involves the child'.

Whilst the objective of the Children's Act is *inter alia* to promote the preservation and strengthening of families, the right of the child to alternative care is formulated in a welfare manner.[1122] The right of the child to care is premised on section 150, as discussed in Chapter 3 above. It deals with a child in need of care and whose protection and alternative care is implemented as a result of an order of the Children's Court. A child who stands to be deprived of parental care arising from the imposition of a custodial sentence on his caregiver, is not necessarily 'a child in need of care and protection' as defined in section 150. The category of children in need of care and protection in terms of the provision of section 150 are children that are, for example, abused, neglected and orphaned. These children may be placed in institutional care by order of the Children's Court. It is submitted that section 150 may require an amendment to include a child who is temporarily deprived of parental care resulting from the imprisonment of his primary caregiver. It is argued that the child should, where reasonably possible, be placed in family based alternative care instead of institutional care pursuant to an order of a Children's Court.

The Constitutional Court in *S* v *M* altered the traditional approach to sentencing and pronounced on guidelines for the sentencing of a caregiver. If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the child will be adequately cared for while the caregiver is incarcerated. In *Mboweni* it was stated that the right of the child to care may be 'fulfilled in different ways'.[1123] In the event the child may not be cared for by his parents, he may be cared for by a person who has an interest in his well-being, care and development'. This is a development that the court must take into account when imposing a custodial sentence on the

1122 The Children's Act makes numerous provisions for orders that may be made by the Children's Court. It may make such orders for instance pursuant to ss 46(1)(a) and 157(b)(iii).

1123 *Mboweni* para 10.

child's primary caregiver. The Children's Act has expanded the scope of care of the child. The child may now be cared for by a person other than his primary caregiver. The Children's Act has been extended to include any person interested in the child's well-being to acquire care. It is recommended that a person who has an interest in the care and development of the child be encouraged to conclude a parental responsibilities and rights agreement with the child's caregiver through the office of the Family Advocate.

7.3.2 India

The Constitution of India does not embed rights of children specifically and the right of the child to care is not constitutionally entrenched. However, the prescript of the best interests of the child as a rule of international customary law enjoins India to adopt instruments geared towards the protection and advancement of the rights of the child in any proceeding, decision or action that concerns the child. The right of the child to care includes alternative care and is provided for by the JJCPCA and by rules such as foster care rules adopted by state governments. The JJCPCA deals with children in conflict with the law and with children in need of care and protection respectively. In India the best interests of the child and the care of the child have to be understood in terms of a welfare approach to children's rights. The JJCPCA prevails in all matters relating to foster care and adoption of children and overrides personal religious laws. It brings to an end the tension that often arose between the HGMA and the GMA in regard to the application of the best interests of the child standard. Placement of a child in alternative care is carried out by the Child Welfare Committee after it has conducted an inquiry on whether the child is in need of care and protection.

It is submitted that India's welfare approach to the protection and advancement of the rights of children, in particular the child's right to care, compromises measures for implementation of children's rights. The Constitution itself does not make specific provision for the right of the child to family, parental or alternative care. The provision of article 15(3) that the state shall 'not be prevented from adopting special measures for children' compounds the protection and advancement of rights of the child. Article 15(3) does not clarify the measures and the category of children whose rights it must

protect and promote. Children have different rights that must to be protected and promoted. Some of these rights are the right to be protected against exploitation, the right not to perform work that is inconsistent with their age and the right to be protected against abuse and neglect. It is suggested that where there is no specific legislation dealing with the advancement and protection of particular rights of children, statutes that advance and protect their rights should be adopted.

Presently India does not have a legislative framework for the promotion and protection of the right of the child to family, parental or alternative care. A statute such as the JJCPCA deals with juvenile offenders and placement of children in alternative care. It is argued that a statute that covers two different and unrelated aspects has the potential of compromising one aspect over the other. For instance, the JJCPCA focuses on child offenders rather than on the placement of children in alternative care. A survey by the Centre of Excellence in Alternative Care indicates that 'alternative care settings' are still not widely known in this jurisdiction.[1124] It is submitted that awareness about alternative care has to be raised across India. Persons and institutions that deal with children such as probation officers have to take the lead in alerting the Indian society at large about alternative care.

There are numerous factors that hinder the implementation of the right of the child to care in India. Firstly, implementation of the right of the child to care is welfare orientated as illustrated in Chapter 3. Secondly, the mandate of the NHRC makes it difficult for it to deal with specific rights of children. The NHRC deals with infringements of rights of adults and children. Bearing in mind that by 16 September 2019 the Indian population stood at 1.350 billion, it is argued that India's massive population may make the task of promoting and protecting human rights, especially children's rights by the NHRC, difficult. It is suggested that the mandate of the NHRC should be unbundled into two. One tier should focus on the protection of the rights of adults and the other on children's rights. Splitting of the mandate into two will create a platform for the advancement and protection of children's rights. Thirdly and lastly, courts appear to be unable to discharge duties imposed on them by provisions of the CRC. It

[1124] Greenfield *Assessing the Knowledge of Alternative Care Among India's Child Protection Stakeholders Centre of Excellence in Alternative Care in India 3.*

is submitted unbundling of the mandate of the NHRC into adult and children's rights, will put focus on a particular right of the child such as family, parental or alternative care.

In 2006 the Supreme Court of India in *Uphadyay* pronounced on the plight of children that are confined with their primary caregivers across the country. The court reprimanded the government for its inadequate implementation of provisions of the CRC in national law. It is argued that in the process of condemning the government for not realising the right of the child to care, the court itself failed to act in the best interests of the children involved. Article 3(1) of the CRC enjoins the court to 'make an effort to protect and to advance the right of the child to care when it is clear that such right is infringed or is at the risk of being infringed'. However, the court in *Uphadyay* made no effort to protect and promote the right of the child to care.

7.3.3. England

The right of the child to care in the HRA is responsive to England's obligations to protect and to promote the right of the child to care contained in the CRC and in the ECHR. The HRA strives to give effect to article 8 of the ECHR and its text on the protection of family life is consequently almost similar to that of article 8 of the ECHR. Article 8(1) of the HRA guarantees to everyone the right to 'respect for his private and family life, home and correspondence'. Article 8(2) states that 'any interference with the right to privacy and family life, home or correspondence' must be:

(i) in accordance with the law; or
(ii) necessary in a democratic society; or
(iii) in pursuit of one or more of legitimate aims such as national security, economic well-being of the country, public safety, prevention of disorder or crime, protection of health or morals and the protection of the rights and freedoms.

Despite the Law Commission of England recommending that children should no longer be classified as born in marriage and born outside of marriage, that differentiation is still retained. Categorisation of children as born in marriage and born outside of marriage has, however, not affected the conclusion of parental responsibilities and rights agreements by the caregiver of the child with the extra-marital father of the child, step-parent, non-parent or with an institution such as the local authority. The

court may approve a parental responsibilities and rights agreement concluded by the child's primary caregiver with a third party if such agreement serves the best interests of the child.

However, it still remains a cause for concern that substantive requirements of parental responsibilities and rights agreements are often not adhered to in this jurisdiction. There is, for example, no age limit prescribed for parties to enter into such agreements, no investigation relating to the rationale behind entering into a parental responsibilities and rights agreement is conducted and it is not a cardinal requirement that the agreement must be in the best interests of the child. It is proposed that parental responsibilities and rights agreements should focus mainly on serving the best interests of the child, a probe should be carried out to establish the reason for entering into the agreement. Furthermore, a mother of a child who is a minor herself should have the approval of her parent or parents to conclude such agreement.

Placement of the child in alternative care is regulated by the CA-Engl. read with the Fostering Regulation. The responsibility of placing the child in alternative care vests with 'the local authority'.[1125] The local authority has 'the responsibility of safeguarding and promoting the welfare of children within its area of jurisdiction'[1126] and of promoting the upbringing of such children by their families.

7.4 Balancing the Best Interests of The Child with the Crime, the Offender and the Community's Interest

Legislative frameworks for the protection and promotion of the right of the child to care have been put into place by South Africa, India and England. The best interests of the child have influenced adoption of statutes for the protection and advancement of his right to care. The balancing process has been the focus of the study and it has been established that the best interests of the child are a *sine qua non* in balancing the child's right to care with the crime, the offender and the interest of the society.

1125 S 23(1) of the CA-Engl.
1126 S 17(a) of the CA-Engl.

7.4.1 South Africa

In South Africa the best interests of the child are a constitutionally entrenched right that adds an extra element to the *Zinn* triad. The *S v M dictum,* among others, pronounced guidelines for the sentencing of a caregiver. Among the provisions of the guidelines is that if the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to the need to take steps to ensure that the children will be adequately cared for while the caregiver is imprisoned. *In casu* the sentence of imprisonment imposed was substituted with a sentence of correctional supervision with conditions. The court held that the right of the appellant's minor children to care was not considered and balanced with all the elements identified for purposes of sentencing. The primary caregiver was found to be responsible for the caring of the minor children. The court's obligation to have regard and to balance the right of the child to care with the protection of the community was expressed as follows: [1127]

> [N]o constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. Thus, even if the state cannot itself repair disrupted family life, it can create positive conditions for repair to take place and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect on children as far as it can.

The duty of the court to consider and balance the right of the child to care with the elements identified for purposes of sentencing follows ratification of the CRC. Constitutional prescripts require that a court takes into account modern developments regarding the care of the child. In imposing a custodial sentence on the child's caregiver, the court has the duty to establish whether the child will be cared for and by whom during his primary caregiver's imprisonment. The lack of court involvement in the practice as well as specialised services such as the Family Advocates complicates

[1127] *S v M* para 20.

the full realisation of *S v M*. It is recommended that the report of the Family Advocate should guide the court on action that serves the best interests of the child.

The Constitutional Court in *S v M* extensively dealt with the interplay between the right of the child to care and the elements identified for purposes of sentencing. It pointed out that the process of sentencing the child's caregiver must 'reflect a balance of the right of the child to care with the *Zinn* triad'[1128] on a 'case by case' basis.[1129] The integrity of family care must be maintained and parenting from a distance must, where possible, be avoided. The important role played by families in raising children was stated as follows:

> [T]he well-being of children depends on the ability of families to function effectively. Because children are vulnerable, they need to grow up in a nurturing and secure family that can ensure their survival, development, protection and participation in family and social life. Not only do families give their members a sense of belonging, they are also responsible for imparting values and life skills. Families create security, they set limits on behaviour and together with the spiritual foundation they provide, instill notions of discipline. All these factors are essential for the healthy development of the family and of any society.

The importance of the healthy development of not only the family, but also of any society, dictates that family or parental care of the child is preferred over institutional care. In the event that the right of the child to care is placed at the risk of infringement such as when a sentence of imprisonment is imposed on his primary caregiver, the child has a right to be placed in alternative care that promotes his upbringing, language, culture, religion and heritage. Preference of family based care is for instance reflected in the text of section 28(1)(b) of the Constitution. Section 28(1)(b) has been formulated in such a manner that the child has the right to be cared for either by his family or parents. In the event of the parent or family being unable to care for the child, he may be put in institutional care. Institutional care remains the measure of last resort when family or parental care is not feasible.

Despite the constitutional imperative as set out in the previous paragraph, it would appear that courts find it difficult to balance the right of the child to care with all the

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1128 *S v M* para 40.
1129 *S v M* para 37.

elements identified for purposes of sentencing. In *Williams*, for example, the magistrate felt that she was not obliged to adhere to the guidelines for the sentencing of primary caregivers because she did not agree with them. In *Noorman*, *Ngcobo*, *Piater* and *SS* the DSD, NCCS and DCS were respectively ordered to take steps to ensure that the children were cared for. In *Mkoka* and *Pillay* the cases were remitted to the trial courts for consideration and balancing of the right of the child to care with the *Zinn* triad.

Notwithstanding the high level of failure to balance the right of the child to family, parental or alternative care with the other elements for sentencing, cases such as *Oha* and *Britz* reflect the courts' preparedness to give recognition to modern developments regarding the care of the child. In these cases the children were cared for by family members. Whilst acknowledging that courts have begun showing preparedness to give recognition to the role that families may play in raising children, it is submitted that the notion of raising children within a family environment is not new in African society. The family unit had been and continues to be an environment where the child has interaction with his siblings, uncles, aunts, grandparents, neighbours and members of the community. Recognition by courts of the capabilities of families to raise children resonates with the adage that '[i]t takes a village to raise a child'. Article 30(d) of the ACRWC gives support to the 'role played by families in rearing children by prohibiting the confinement of children with their caregivers'. However, it is acknowledged that the child may still be confined with his caregiver if such imprisonment proves to be in his best interests. Prohibiting the confinement of children with their primary caregivers is in line with article 30(d). Furthermore, article 30(1)(f) of the ACRWC requires a prison system which has as its aim the '[r]eformation, integration and social integration of the caregiver'.

7.4.2 India

The right of the child to care is not constitutionally entrenched in this jurisdiction. However, provisions of the CRC have application in every matter that involves the child. India's obligation to respect, promote, fulfil and protect the right of the child to care is a direct consequence of its ratification of the CRC. The right of the child to care is either considered a mitigating factor or is not taken into account in the sentencing

of the primary caregiver. There are no structured sentencing guidelines for courts to adhere to. Magistrates and judges exercise unmonitored sentencing discretion. This, in turn, results in some courts being lenient in respect of serious offences and being harsh in regard to less serious cases. It is argued that the absence of structured sentencing guidelines inhibits the formulation of guidelines for the sentencing of caregivers. Adoption of uniform guidelines for sentencing of offenders will lay the foundation for formulation and implementation of and adherence to guidelines for sentencing of caregivers. In *Ediga Anama*, for example, the court did not take into consideration the appellant's caregiving responsibility to a one-year-old son.

Notwithstanding the right of the child to care not being considered independently from the caregiver, there is a glimpse of hope that in the not too distant future legal developments will lead to consideration of the right of the child to care. The *dictum* in *Nalini* reveals that some courts are alert to their duty to respect, protect, promote and fulfil the right of the child to care. In commuting a sentence of death imposed on the caregiver to imprisonment for life Thomas J expressed the view that:

> [w]hilst *iustitia non novit patrem nec matrem* is a pristine doctrine, it cannot be allowed to reign with its rigour in the sphere of sentence determination. An innocent child could still be saved from orphanhood.[1130]

7.4.3 England

Section 6(1) of the HRA prohibits a public authority from 'acting in a manner that is incompatible with a right embodied in the CRC'. Since 2 October 2000 courts have been public authorities in terms of section 6 of the HRA. However, the Appeal Court in *Mills* disregarded provisions of international instruments by failing to protect, fulfil, promote and respect the right of the child to care. In that case, notwithstanding it being on record that the appellant was a caregiver to two minor children, the court made no reference of the appellant's primary care responsibilities when remarking about her 'circumstances'.[1131] Instead the Appeal Court commended the judge's approach to sentencing by stating that:

1130 *Nalini* para 12.
1131 *Mills* para 12.

> [t]he judge was right to commence by asking himself: was prison necessary? If he came to the conclusion it was, the next question which he had to ask himself was: if so, how long a prison sentence was necessary?

A survey of case law in this jurisdiction shows that some courts take the right of the child to care into account when sentencing a caregiver. In *Dawson* a pregnant caregiver of a two-year-old son had the sentence of thirty weeks imprisonment converted to twelve months community service. In *McClue* the sentence of eighteen months imprisonment imposed on a caregiver was reduced to eight months. The court considered the fact that the appellant's seven-year-old daughter was suffering from abandonment from her father and was emotionally vulnerable. In *Shantelle Davis* the initial sentence of twelve months imprisonment was reduced to nine months suspended imprisonment. The fact that the primary caregiver had a one-yeard and eleven months-old severely disabled daughter had an impact in the reduction of the sentence.

There are other cases such as *P, Q* and *Gwent* that reflect the principles underpinning consideration of the right of the child to care by the sentencing court. In *P* and *Q* it was decided that if the passing of custodial sentences involves the separation of caregivers from their young children (or indeed from any of their children), sentencing courts are bound to carry out the balancing exercise before deciding that the seriousness of the offences justifies the separation of primary caregivers from their children. If courts do not have sufficient information about the likely consequences of the compulsory separation, they must in compliance with their obligations under section 6(1) of the HRA, ask for more information. In *Gwent* it was held that the court should take into account the need for proportionality and ask itself whether the proposed interference with the child's right to respect for the family was proportionate to the need which made it legitimate.

Structured guidelines for the sentencing of a caregiver were pronounced in *Petherick*. Among the guidelines are provisions that (i) courts have to be informed of the domestic circumstances of the caregivers and of the family life of others, especially children that stand to be affected; (ii) in a criminal sentencing situation the legitimate aims of sentencing have to be balanced with the effect of sentences

that often inevitably have an impact on the family life of others; (iii) a fine balance has to be struck between the right of children to care and protection of the community; (iv) custodial sentences should only be given after considering the best interests of the children, whilst ensuring that appropriate provision is made for their care; and (v) if custodial sentences cannot be avoided, the right of children to care should mitigate the length of the sentences.

The guidelines for the sentencing of a primary caregiver in *Petherick* are yet to be incorporated as a standard preoccupation for courts. The discussion papers on measures towards the realisation of the right of the child to care in the sentencing phase by the Prison Reform Trust in 2014 and 2015 make it clear that a need exists for the guidelines to be strengthened and for courts to monitor compliance with these guidelines. The studies propose a review of arrangements in the criminal justice system for caregivers and strengthening of the guidelines by adding an 'Overarching Principle' setting out the court's duty to investigate primary caregiving responsibilities. The studies further propose for the adoption of mechanisms to secure provision of adequate information on caregiving responsibilities, including a requirement for full pre-sentencing reports and local directory of women services and interventions.

7.5 The Confinement of The Child with his Primary Caregiver

The best interests of the child are established *ad hoc* and it may also demand that the child be imprisoned with his caregiver instead of being put in alternative care. Incarceration of the child with his primary caregiver may arise when there is no one to care for the child. The possibility of the child being confined with his caregiver requires the sentencing court to be alert to:

(i) legislative and policy provisions on the confinement of the child with his primary caregiver;
(ii) prison conditions; and
(iii) provisions pertaining to play and educational facilities and amenities like baby food, clothing and health care by prison administration to children confined with their caregivers.

South Africa, India and England allow confined caregivers to retain their children whilst in prison. In South Africa a child may accompany his jailed primary caregiver up until he is two years of age. In India a child may be confined with his caregiver up until he is six years of age and in England it is up to when the child is eighteen months old. It is only South Africa and England that regulate the confinement of the child with his primary caregiver. The CSA as amended by the CSAA and the IMPYMP respectively deal with the confinement of the child with his caregiver in South Africa. India does not have any instrument governing the confinement of the child with his caregiver. In England the confinement of the child with his primary caregiver is governed by the PSO.

The CSA as amended by the CSAA contains four provisions for caregivers and their confined children. Firstly, a caregiver is permitted to retain her child in prison; secondly, the DCS in conjunction with the DSD has the responsibility of facilitating the proper placement of the child; thirdly, the DCS has the duty to provide the child with food, health care and clothing and facilities for the sound development of the child and finally; where applicable, the NCCS has the responsibility of ensuring that both the caregiver and the child are accommodated in MCUs. The IMPYMP does not address various aspects relating to the child confined with his primary caregiver. Among the shortcomings of the IMPYMP are that:

(i) caregivers are not offered adequate information regarding admission in MCUs. In most instances, caregivers lack knowledge on their rights and responsibilities in MCUs;
(ii) the prescript of the best interests of the child seems not to be the paramount consideration in the admission process;
(iii) the application for admission into an MCU is initiated by the primary caregiver and is not considered by a board;
(iv) the offence of which the caregiver is imprisoned appears not to influence the decision to admit a caregiver with her child in an MCU;
(v) there is no planned separation of the child from his caregiver; and
(vi) no provision is made for support of caregivers to reintegrate with their communities upon release from jail.

In England the PSO covers various aspects relating to admission, separation and support of primary caregivers. South Africa may gain from England's regulation of the incarceration of caregivers and their children. It is imperative that the imprisonment of caregivers with their children be governed by a single instrument that covers aspects such as the criteria for admission in MCUs, separation and support of primary caregivers and their children.

The study has shown that jail conditions in South Africa, India and England do not conform to international minimum standards. Furthermore, the study has established that facilities such as food, healthcare, educational, play and recreational facilities made available to children confined with their caregivers in these jurisdictions are inadequate. The lives and conditions of children confined with their caregivers, especially in South Africa and India, would have been drastically adverse in the absence of assistance from non-governmental organisations. Non-governmental organisations have and continue to improve the living conditions of children confined with their caregivers.

Adverse conditions in Indian jails amply illustrate the negative effects on children confined with their caregivers. This may be the case especially when correctional centres do not make improvements on jail conditions and amenities and facilities made available to the children. South Africa may gain from England's regulation of children confined with their caregivers.

7.6 Recommendations

Recommendations made are informed by gains that South Africa may acquire from comprehensively implementing relevant provisions of the CRC and ACRWC and also from provisions of legal prescripts, policies, guidelines, orders and practices in India and England. It is through such values that the best interests of the child may be balanced properly with the other factors of sentencing. South Africa has developed the concept of the best interests of the child but it still needs refinement in some areas such as the weight to be attached to it in the sentencing process. Balancing the best interests of the child with the other aspects of sentencing requires that the guidelines

for the sentencing of primary caregivers be strengthened and that the sentencing court should always be conscious of its duty to act in the best interests of the child.

Article 3(1) enjoins public and private social welfare institutions, courts of law, administrative authorities and legislative bodies to 'act in the best interests of the child in every matter that involves the child'. The duty to act in the best interests of the child does not vest in one institution only. In regard to the sentencing of a child's caregiver the obligation to secure the right of the child to care requires the alignment of municipal provisions with international children's rights instruments. The Constitution and the Children's Act are among the legislative measures adopted by the legislature to give effect to the rights of the child. Legislative measures that have been adopted therefore require implementation by courts of law, by public and private social welfare institutions and administrative bodies such as the DCS. In interpreting the prescript of the best interests of the child in *S v M* it was *inter alia* pointed out that statutes must be interpreted and the common law developed in a manner that favours protecting and advancing the interests of children. This approach is in line with section 233 of the Constitution which 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 best interests of the child call upon the sentencing court to ensure that the child's right to care remains intact even when it imposes a custodial sentence on his primary caregiver. In the event the court imposes a term of imprisonment on the child's caregiver, the right of children to care should, where possible, mitigate the length of the sentence. In situations where rupture of the family becomes inevitable, the court is obliged to minimise the consequent negative effect on children as far as it reasonably can. Balancing of the right of the child to care with the other aspects of sentencing requires the court to engage public social welfare institutions such as social workers, probation officers and the Family Advocate. Involvement of social welfare agencies in the process of sentencing is itself action that serves the best interests of the child. It is recommended that all social welfare agencies should become an integral part of the

sentencing process in every matter that involves a caregiver sentenced to a term of imprisonment.

Whilst the DSD has assisted and still continues to assist the court with ensuring that children of imprisoned caregivers are cared for, it has been shown that its intervention is inadequate. In most of the cases surveyed, it is manifest that courts have not adequately balanced the right of the child to care with the factors of sentencing. Most of the orders made by courts were for the DSD to visit the children affected and to take steps to ensure that they were cared for. This approach, it is submitted, falls short of the requirements set out by the best interests of the child. It is an approach that that may result in a delegation of the court's duty to secure the care of children to social welfare agencies. Courts often assign social workers to take steps for the care of the children of jailed caregivers. This approach, in turn, results in courts lacking knowledge relating to the actual care that the affected children receive and of the aspects of the care offered to them. It is recommended that social workers or probation officers should investigate the actual circumstances of children of caregivers that stand to be sentenced and file reports on the children's circumstances with the Family Advocate. It is further recommended that the Family Advocate should be an integral part of the sentencing process. In order for the Family Advocate to be part of the sentencing process, it becomes inevitable that section 4(1)(a) of the MDCMA be amended to extend the mandate of the Family Advocate. At present the scope of the duties of the Family Advocate does not encompass criminal matters. The Family Advocate deals primarily with divorce and related matters such as international child abduction.[1132] The Family Advocate should assist caregivers who stand to be sentenced to identify persons who have an interest in the care and development of the children and to enter into parental responsibilities and rights agreements with such persons. The Family Advocate has expertise in relation to parental responsibilities and rights agreements and it is argued, would be in a position to monitor the successful implementation of such.

[1132] S 276(1)(a) of the Children's Act read with art 7 of the Hague Convention on the Civil Aspects of International Child Abduction (1989).

A further value that alternative care provisions of the ACRWC offer for South Africa is consideration of modern developments that the child of an imprisoned caregiver may now be cared for by grandparents, uncles, nieces, neighbours and by his extra-marital father who does not have parental responsibilities and rights in terms of the Children's Act and by a person who has an interest in the care and well-being of the child. Consideration of persons endowed with the care of the child may make it inappropriate to place children in institutional care or to incarcerate them with their caregivers. States must ensure that families have access to forms of support in their caregiving role. Families, to the extent possible, may be supported through provision of social grants.

Provisions of the CRC are clear that placement of children of jailed caregivers in institutional care should be averted where reasonably possible. Instead, children of imprisoned primary caregivers should be put in appropriate alternative care that promotes their well-being, culture, religion, language and heritage. It is recommended that the process of investigating the actual circumstances of children of caregivers that stand to be sentenced should always be aimed at promoting the child's culture, heritage, religion and language. Both the investigation of actual circumstances of the children affected and the conclusion of parental responsibilities and rights agreements through the Family Advocate should take into account persons that are familiar with these aspects of the child's culture.

State parties to the CRC are encouraged to follow the guidelines on alternative care of children deprived or at risk of being deprived of care. Although the guidelines are not binding on state parties to the CRC, they are monitored by the Committee on the Rights of the Child and state parties are encouraged to adhere to them. It is recommended that the Magistrate and Judges Commissions should, from time to time, issue circulars giving directives on the significance of complying with the guidelines for the sentencing of caregivers by all courts. Guidelines for the sentencing of caregivers have already been pronounced in *S v M*. It is submitted that adherence to the guidelines for the sentencing of primary caregivers will raise awareness of the courts' duty to secure the placement of children of caregivers in appropriate alternative care.

South Africa has much to gain from provisions of the ACRWC. Its posture on the standard of the best interests of the child is rooted in unique African ethos. Whilst complementing the CRC, the ACRWC directs that a child is entitled to special treatment. In every matter that involves the child there has to be an awareness that the situation of many African children remains critical due to socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger. In order to highlight special safeguards and care for the child, the ACRWC refers to the best interests of the child as 'the' paramount consideration in every matter that concerns him. The status of the paramountcy of the best interests of the child in the context of the ACRWC does not mean that the best interests of the child is superior in that it overrides other important considerations. The standard of the best interests of the child is capable of limitation.

Provisions of the ACRWC on alternative care are similar to those of the CRC. It is recommended that courts should be alert to prevailing socio-economic conditions of caregivers of children when imposing custodial sentences. It is not suggested that courts should not impose custodial sentences on primary caregivers, rather that they should be aware that caregivers of children may find themselves trapped in poor socio-economic conditions. Primary caregiving responsibilities may influence a reduction of the custodial sentence that may be imposed on the child's caregiver. Article 30(d) of the CRC prohibits the confinement of children with their caregivers. However, the reality is that the confinement of children with their primary caregivers is a 'practice that occurs in most countries of the world'.[1133] Article 30(d) is an indictment on courts to be conscious that children may be confined with their caregivers under squalid conditions. Whilst the confinement of children may in certain instances not be avoided such as when there is no one to care for them, article 30(d) makes it imperative for courts to have regard to 'placement of children in appropriate alternative care'. In the event that they cannot be placed, the confinement of children with their caregivers must be least damaging to their development and well-being.

It is recommended that the DCS should place children of imprisoned caregivers in appropriate alternative care. This option should be applicable in instances where there

[1133] Library of Congress Date Unknown https://www.loc.gov/law/.

had been a delay in concluding a parental responsibilities and rights agreement between the caregiver and the person who will care for the child during the trial. It is recommended that budgets for jails that have MCUs be increased to enable correctional centres to improve facilities and amenities to meet the demands of children's right to care. Jailing of caregivers with their children as shown in respect of in India conveys that when legislative bodies, courts, social welfare and administrative agencies such as prison authorities insufficiently consider the best interests of the child and do not take adequate steps to act in his best interests, the condition of children confined with their caregivers may be adverse. It is obvious that prison budgets are often inadequate to meet the needs even of adult prisoners. It therefore follows that the need of children confined with their primary caregivers for basic amenities and facilities for their proper development is not met. In India children that are confined with their primary caregivers are generally regarded as a strain to the meagre budget of correctional services. Correctional centres would not have been able to provide children confined with their caregivers with all the basic amenities such as food, healthcare and facilities like play and educational materials had it not been for the aid they received from private donors and non-governmental organisations.

Although South Africa may gain valuable lessons from England (as indicated below), not all provisions of the IMPYMP serve the best interests of the child. For example, the IMPYMP does not take into account the offence of which a caregiver who applies for admission into an MCU has been convicted of. It is recommended that the IMPYMP's admission criteria should be amended to exclude primary caregivers convicted with offences that have child abuse or violence against children as elements. The IMPYMP does not specifically state that the best interests of the child are a paramount consideration in respect of the admission of children into MCUs. It is recommended that the IMPYMP should be amended to clearly make provision for the paramountcy of the best interests of the child. Furthermore, it is recommended that the IMPYMP should be amended to allow for appeal or review of the decision not to admit a child in an MCU.

Admission into an MCU should make provision for temporary and emergency temporary admissions. Temporary admissions should be made in instances where an

application for admission into an MCU is considered and emergency temporary admission should be utilised in respect of breast feeding primary caregivers who may not be released on bail and in regard to foreign caregivers who may still be undergoing verification of their status in the Republic. It is recommended that if the custodial sentence imposed on the caregiver exceeds two years the process of separating the child from his caregiver should be commenced when the child to is due to reach the maximum age of two years. Such gradual separation, it is submitted, will make the separation process less traumatic. At present there is no stipulation regarding the stage when the child is to be separated from his caregiver. The process of separation may be traumatic when it is carried out without prior notice and preparations. Primary caregivers confined with their children should be educated in regard to the processes of admission, responsibilities in MCUs and separation from their children. Neither the IMPYMP nor the CSA makes provision for reintegration of caregivers within their communities. It may therefore not be assumed that prison programmes adequately address their reintegration into communities. It is recommended that specific programmes for reintegration of caregivers within their communities should be adopted prior to their release.

South Africa should further follow the example in England in that primary caregivers must be offered adequate information on caregiving responsibilities, including a requirement for full pre-sentencing reports and local directory of women services and interventions. Caregivers must be supported to reintegrate with the community. It is recommended that, subject to the availability of funding, correctional centres must implement programmes that equip incarcerated caregivers with skills or training such as in midwives, catering and cooking for use upon release from prison. In order to prepare primary caregivers for reintegration in society, it is recommended that they must be allowed adequate opportunities to be visited by their children and family members.

In order to make meaningful improvements to the confinement of the child with his primary caregiver in South Africa, it is recommended that a separate statute that regulates the confinement of the child with his caregiver and that reflects values from the PSO be adopted. The CSA, as amended by the CSAA, is legislation that deals with

rights and responsibilities of adult prisoners with only section 20 as amended, dealing with the confinement of the child with his primary caregiver. The new statute to govern the confinement of the child with his caregiver will inevitably result in the incorporation of provisions of the IMPYMP in line with the values derived from the PSO. The new Act will be able to cover aspects such as education of the caregiver on her duties and rights in MCUs, admission, visits to the confined child by his siblings and family members and separation of the child from his caregiver and support of the primary caregiver to reintegrate into society.

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