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**A CRITICAL ANALYSIS OF THE IMPACT OF THE CONSTITUTION ON THE
LEGAL POSITION OF UNMARRIED FATHERS IN SOUTH AFRICAN LAW**

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CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND TO THE STUDY

This study is concerned with the glaring inequalities and unfair discrimination in respect of parental obligations and rights that an unmarried father endures, both at common law and under customary law in relation to his children born out of wedlock. The legal position of a child born out of wedlock in South African law is based on the philosophy that '*een moeder maakt geen bastaard*', meaning that a child born out of wedlock is related to its mother and her relations, but not to its unmarried father.¹ The unmarried father had no parental rights, nor any right to be maintained by his children who could also not take his name, domicile, religion or have intestate rights against him.² However, it must be noted that, this position changed with the enactment and coming into operation of the Children's Act 38 of 2005.

Consequently an unmarried father has often been treated as a third party or an outsider in relation to his children.³ The common law simply ignored the 'blood tie' between the unmarried father and his children. This has been unfortunate because, for the overwhelming majority of black communities, the 'blood tie' is treasured and protected. Although unmarried fathers were not and are still not recognised as parents, they were and are still expected to discharge the duty of support and are also considered as related to their children in determining degrees of relationship. It is acknowledged that it is in the best interests of a child to be maintained by both parents

¹ *Green v Fitzgerald* 1914 AD 88 p 99; Van Heerden in *Boberg's Law of Persons and the Family* 390; Spiro *Law of Parent and Child* 450.

² Spiro *ibid* n 1.

³ *Bethell v Bland* 1996 2 SA 194 (W).

but the unmarried father is treated unfairly if the law recognises and enforces such a duty but denies him the biological relationship simply because he might not have married the mother, or failed to satisfy the requirements for acquisition of parental rights and responsibilities or failed to reach an agreement with the mother for the acquisition of a parental responsibility agreement.⁴ Although the enactment of the Children's Act 38 of 2005⁵ and subsequent repeal of unacceptable legislative enactments have tremendously improved the common law position of an unmarried father, unequal treatment between parents in matters relating to their children still exists.⁶ An unmarried father is still not in the same position as an unmarried mother and married couples in relation to his children.⁷ This discrimination and unequal treatment are unfair and it impacts negatively on an unmarried father's self-worth as a parent. It is submitted that unmarried fathers need to have someone on their side. They need to feel appreciated and should not be punished for not marrying the mother of their children. Once they feel appreciated, it is assumed that they will take the responsibility for rearing and caring for their children seriously. There is a need to do away with outdated rules of the common law and embrace social change and modernity.⁸

⁴ Sections 20 and 21 of the Children's Act 38 of 2005.

⁵ Section 20 *ibid*.

⁶ In terms of the Children's Act the mother acquires rights and responsibilities without considering her marital status but a distinction is made on the ground of marital status when it relates to an unmarried father.

⁷ However, an unmarried father who lives with his partner in a permanent life-partnership acquires full responsibilities and rights in respect of the child. (Section 21(1)(a) of the Children's Act 38 of 2005).

⁸ Although an unmarried father now acquires full responsibilities and rights in respect of his children, it is clear from the provisions of section 21(1)(b) of the Children's Act that he must meet all the requirements to automatically acquire such parental rights and responsibilities.

Furthermore, the 'new' constitutional dispensation necessitates an evaluation of the existing law because the Constitution enshrines a Bill of Rights which is a cornerstone of democracy in South Africa and applies to all law and binds all organs of state.⁹ The Bill of Rights basically requires that all laws must be in accordance or in line with the Constitution and therefore, the state may not pass any law that is inconsistent with the Bill of Rights. The courts are required to interpret the law in accordance with the Constitution and, where necessary, the courts must declare the law that is inconsistent with the Bill of Rights to be invalid.¹⁰

One of the most fundamental aspects of all human rights, is the right to equality. Section 9(1) provides the basic principle behind the right to equality.¹¹ However, in order to give effect to this provision, subsections (3) and (4) provide that neither the state nor any other person may discriminate unfairly against anyone on the basis of race, gender, sex, pregnancy, marital status, religion, conscience, culture, language and birth. Therefore, any discrimination on one or more of the grounds set out above will amount to unfair discrimination unless the contrary is proved.¹² It is against this background that the position of an unmarried father in relation to his children born out of wedlock will be critically evaluated under the common law and customary law. It will also be shown that although an unmarried father under current legislation on parental rights and responsibilities acquires full parental responsibilities and rights, such acquisition is conditional and therefore unfair. For example, in terms of the

⁹ Sections 7 and 8 of the Constitution of the Republic of South Africa.

¹⁰ Section 2 of the Constitution of the Republic of South Africa.

¹¹ It provides: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

¹² Section 9(5); *Harksen v Lane* 1998 1 SA 300 (CC).

Children's Act 38 of 2005¹³ an unmarried father has full parental responsibilities and rights in respect of the child if he has satisfied the requirements as outlined in section 21 but the same is not required of a married father and furthermore, there is discrimination also with the mother of the child, who does not have to meet the requirements. This consequently is in sharp contrast to the values and principles embodied in the Constitution in particular human dignity and the achievement of equality.

South African courts, as part of the international community, are also expected to consider international law when interpreting any legislation.¹⁴ Therefore, it is imperative in dealing with the issue of parental rights and responsibilities of the unmarried father, that the legislature and the courts discharge this mandate. However, although South Africa has ratified some international conventions relevant to the protection of children and their families, it is very clear in some instances that unmarried fathers are still unfairly discriminated against by South African law and some of these conventions. Such discrimination still persists in our family law.¹⁵

It is, therefore, submitted that there is a need to re-evaluate the law and provide possible solutions. It is against this background that this thesis sets out to critically evaluate the common law as well as current law on parental rights and responsibilities of unmarried fathers in relation to their children born out of wedlock on aspects of parental rights, the position of unmarried fathers under customary law and the impact

¹³ 38 of 2005.

¹⁴ Section 233 of the Constitution.

¹⁵ For example, allocation of parental rights and responsibilities is still conditional as far as an unmarried father is concerned.

of the Constitution on parental rights and responsibilities of unmarried fathers. Furthermore, it will determine the status of international human rights instruments relevant to family law issues affecting the rights and responsibilities of unmarried fathers in South Africa as well as determining whether South Africa effectively conforms to international standards and trends in the sphere of children's rights and their parents particularly with respect to unmarried fathers.

1.2 PROBLEM STATEMENT AND SUBSTANTIATION

1.2.1 *Broad perspectives*

This study is a critical evaluation of the impact of the Constitution¹⁶ on parenting rights of unmarried fathers in South Africa. It is mainly concerned with the child-focused perspective adopted in the children's clause contained in section 28 of the Constitution and its implications for the relationship between unmarried fathers and their children. The current legislation and practices on parental responsibilities and rights are examined in an historical perspective.¹⁷ The study also takes into account South Africa's international obligations to promote gender equality and to advance the best interests of the child.¹⁸ It will be argued that the common law, pre-constitutional legislation and customary law, discriminate unfairly against unmarried fathers by denying them automatic parental rights and responsibilities.¹⁹ This

¹⁶ The Constitution of the Republic of South Africa, 1996.

¹⁷ Children's Act 38 of 2005 (as the main legislation).

¹⁸ Article 15 of the United Nations Convention on the Elimination of all Forms of Discrimination against Women (1979); Art 3 of the United Nations Convention on the Rights of a Child (1989).

¹⁹ It is submitted that current legislation (section 21 of the Children's Act) denies unmarried fathers unconditional parental rights and responsibilities over their children. The father must, however, be married. That is to say that married fathers must also fulfill the condition of marriage in general. In this sense, their acquisition also depends upon their marital status. (section 19 and 20).

discrimination is unfair and inconsistent with section 9 of the Constitution.²⁰ Furthermore, such unfair discrimination cannot be justified under section 36 of the Constitution.

Historically, unmarried fathers have been discriminated against by the South African common and customary laws. They have been granted few, if any, rights to their children born out of wedlock.²¹ This differential treatment given to unmarried fathers in respect of rights of guardianship, care, contact, and the right to consent or to veto the adoption of their children, constitutes unfair discrimination against unmarried fathers on the grounds of gender and marital status. The differential treatment also discriminates unfairly against their children on the basis of birth, by denying children born out of wedlock the right to parental care in relation to their natural fathers.²² The traditional images of a nuclear family life both deny unmarried fathers parental rights while at the same time imposing support obligations. This denial and imposition rest on the assumption that unmarried fathers are not lawful fathers of their children and are irresponsible. For example, various legislative enactments required fathers to be married before they could independently exercise any parental rights over their children.²³

²⁰ The equality clause contained in section 9(3) of the Constitution prohibits, amongst others, discrimination on the basis of sex, gender, marital status and birth.

²¹ For example, various legislative enactments such as section 3 of the Children's Status Act 82 of 1987 (now repealed); section 1 of the Guardianship Act 192 of 1993 (now repealed); see also *Bethell v Bland* 1996 2 SA 209G-211B which required fathers to be married before they could independently exercise any parental rights over their children. See also Goldberg 'The Right of Access of a Father of An Extra-Marital Child: Visited Again' 1993 110 *SALJ* 261 p 274.

²² Section 28(1)(b) of the Constitution.

²³ Section 3 of the Children's Status Act 82 of 1987 now repealed by the Children's Act 38 of 2005, Section 1 of the Guardianship Act 192 of 1993 repealed; see also *Bethell v Bland* 1996 2 SA 209G-211B and equally Goldberg *op cit* n 21 p 274.

At common law the father of a child conceived or born in wedlock shared parental responsibilities and rights with the mother. However, the father of a child born out of wedlock had no parental rights over his child, this being reserved exclusively to the mother.²⁴ Accordingly, extra-marital birth resulted in certain limitations being placed on the unmarried father's competencies, rights, and duties towards the child. For example, section 3 of the Children's Status Act 82 of 1987 expressly excluded and isolated natural fathers of children born out of wedlock by depriving them of parental rights. This section also conflicted with the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which stipulates that the State should take all appropriate measures to ensure that men and women have 'equal rights and responsibilities as parents irrespective of their marital status in matters relating to their children.'²⁵ It will be argued that unmarried fathers should not only be involved in the upbringing of their children when it relates to financial matters, they should also be given the opportunity to give emotional support and guidance and play an active and positive role in the lives of their children, particularly during the formative years of their lives.²⁶

Although the 'blood tie' gave the biological parent, usually the mother, the first obligation to care for the child unless she was an unfit parent,²⁷ it is submitted that, children, whether born in or out of wedlock, need their fathers. Fathers have an important parental role to play at every stage of development of their children. For

²⁴ Spiro *op cit* n 2 p 450.

²⁵ Article 16 paragraph (d) and (f). South Africa has signed and ratified this Convention, Goldberg *op cit* n 23 p 261.

²⁶ It is submitted that with the provisions of section 21 of the Children's Act 38 of 2005 unmarried father's are at-least given this long overdue opportunity.

²⁷ Barton and Douglas *Law and Parenthood* 14.

example, during pregnancy and birth, the natural father plays a crucial role in the transition of the family. Fathers can be perfectly adequate caretakers of infants after birth by performing most of the functions that mothers do. Their parenting styles, often different from those of mothers, contribute to the infant's physical, social, and cognitive development.²⁸ If the father has acknowledged paternity, he should be given the opportunity to develop a relationship with his child. Failure to do so might result in the child lacking male role models although some people may argue that even if fathers are absent, there may be other male role models in the family like uncles.²⁹ It is submitted that a girl will often have problems of approval in relationships because in choosing partners, girls usually look for someone who has the same qualities as their fathers and boys often develop identity crisis when the father is absent.

The maternal preference that was implicit in the denial of an inherent right of contact to unmarried fathers in respect of their children under the common law has engendered the reproduction of substantive gender inequality.³⁰ The problem with this maternal preference was that it reinforced the message and stereotypes that the law (and society at large) considered that child care was a mother's duty and that fathers should not involve themselves with child care because it was simply not their job and/or because they were incapable or unfit for the job.³¹ The premise that mothers were better caretakers in the era of increasing participation by women in the economy

²⁸ Wayne 'Human Development Specialist and Members of the CEMP 09 Planning Team' November 1998 Department of Family and Consumer Sciences, North Carolina State University 9.

²⁹ It is submitted that the opinion that is articulated here was conceived before the provisions of section 21(1)(b)(i) of the Children's Act 38 of 2005.

³⁰ Wolhuter 'Balancing the Scales-Access by a Natural Father to his Extra-Marital Child' 1977 (8) *Stell LR* p 65.

³¹ Cronjé and Heaton *The South African Law of Persons* 74; *Van der Linde v Van der Linde* 1996 3 SA 509 (O) at 515.

required re-examination in light of the equality provisions of the Constitution and in the light of a constitutional guarantee that every child shall have the right to family or parental care and not maternal care only.³² The maternal preference was also rejected in the case of *Madiehe (born Ratlhogo) v Madiehe*³³ where the court said that, the criteria for awarding care of young children is the best interests of the child. The parent who can provide what is in the best interests of the child is the proper person to be awarded care.³⁴ The court further held that, care of young children is a responsibility as well as a privilege and it has to be earned. It is not a gender privilege or right.³⁵ However, the court further stated that because of the physical demands made on the mother in carrying the child and giving birth, the court may well, in case of doubt, favour the mother. In *Van Pletzen v Van Pletzen*³⁶ it was held that to decide which is the most suitable parent to exercise care over a minor child it is an important consideration which a parent cannot only offer the most security, but also which parent would be in the best position to attend to the child's physical care and also ensure that the child develops properly on a moral, cultural and religious level. The assumption that a mother is of necessity in a better position to care for a child than the father belongs to an era from the past. It is now accepted that 'mothering' is not just a component of a woman, but it is part of a man's being, and that a father, depending on the circumstances, possesses the capacity and capability to exercise care over a child

³² Section 28(1)(b).

³³ 1997 2 ALLSA 153 (B) 157.

³⁴ At 157E.

³⁵ At 157F.

³⁶ 1998 4 SA 95 (O).

just like the mother.³⁷ The same sentiments were expressed recently, in the case of *P v P*³⁸

Where it was held that, in determining what care arrangement will best serve the children's interests, the Court is not looking for the 'perfect parent' - doubtless, there was no such being. The Court's quest is to find 'the least detrimental available alternative for safeguarding the child's growth and development.'³⁹ In *K v M*⁴⁰ the best interests of the children was also considered and neither the mother nor the father were preferred in the award of care.

The denial by law of an unmarried father's the right to interact with his child deprived such child the opportunity to develop a normal parent-child relationship with the father. This situation also deprived the child of the knowledge of both sides of his or her parentage, which will assist in developing his or her sense of identity and personal worth.

The common law was filled with sexual prejudices and biases against an unmarried father.⁴¹ For example, the care of minor children was often entrusted to the mother, even a mother under the age of majority had no impediments regarding the care of her child born out of wedlock. The law did not make a sustained effort to encourage the attenuated paternal role in families. The common law and customary law had adopted a punitive stance towards fathers because of their options not to marry their children's

³⁷ At 101B-D/E.

³⁸ 2007 5 SA 94 (SCA).

³⁹ At 102A.

⁴⁰ 2007 4 ALLSA 883 (E).

⁴¹ *Van der Linde op cit* n 31 at 514H-515B.

mothers.⁴² Fatherhood seemed to have remained a legal concept defined by marriage or the courts rather than the product of the parent's own care and concern for the child. Through legislative enactments, the state continues to discriminate unfairly against unmarried fathers. For example, the Children's Act 38 of 2005 confers automatic parental rights and responsibilities on fathers of children born out of wedlock when certain conditions have been satisfied.⁴³ However, there is a need for unconditional and presumptive parental rights and responsibilities irrespective of the 'merits of the father'. Such automatic and unconditional rights should have been included in the Act.⁴⁴ The absence of such unconditional rights to all fathers amounts to unfair discrimination against unmarried fathers and married fathers. Certainly, there are unmarried fathers who do not deserve parental rights just as there are married fathers and many married and unmarried mothers who do not equally deserve such rights.

It will be argued that, the biological connection between a parent and a child is unique and worthy of constitutional protection because if the father grasps the opportunity to develop that biological connection into a full and enduring relationship, this will result in happy, well- balanced children who will grow into responsible parents.⁴⁵

⁴² At common law an unmarried father had no relationship with his children born out of wedlock except that he was obliged to maintain them, in effect, he had no parental rights, however, with the coming into operation of the now repealed Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, he did not acquire automatic rights in respect of the child but he was afforded the opportunity to apply for such rights if that was in the best interests of the child. Secondly, in customary law a natural father acquires rights only if he pays damages for seduction and *isondlo* (a fee for raising or maintaining a child).

⁴³ See section 21 of Act 38 of 2005.

⁴⁴ Children's Act 38 of 2005.

⁴⁵ Section 28 of the Constitution gives effect to such protection.

1.2.2 *Specific areas of concern*

1.2.2.1 *An unmarried father's duty of support*

As far as the obligation to support children born out of wedlock is concerned, there are a few anomalies in our law.⁴⁶ Although the duty to support is generally a reciprocal one, under the common law, a child born out of wedlock needs not maintain his natural father in the appropriate circumstances because in South Africa our law does not regard the natural father as a parent unless he was married to the mother.⁴⁷ This discriminates unfairly against the father and is therefore unconstitutional.

It is also accepted that there is a reciprocal duty of support between a child born out of wedlock and his blood relations on the mother's side. It had unjustly been found that the same is not applicable to blood relations on the father's side.⁴⁸ This common law rule was unfair, unacceptable and in conflict with the equality clause contained in section 9(1) of the South African Constitution which provides that all are equal before the law and all have the right to equal protection and benefit of the law. It was also in conflict with the provisions of section 9(3) which prohibits unfair discrimination on the grounds of, among other factors, birth. It also conflicted with the provision of the Children's Act 38 of 2005 which makes the child's best interests the paramount concern in all matters relating to the child.⁴⁹ It is submitted that a violation of the child's constitutional rights is unreasonable and unjustifiable.⁵⁰ In accordance with the

⁴⁶ Davel and Jordaan *Law of Persons Students Textbook* p 114.

⁴⁷ Spiro *op cit* n 24 p 404.

⁴⁸ Davel and Jordaan *op cit* n 46 p 115.

⁴⁹ Section 9 of Act 38 of 2005.

⁵⁰ Cronjé and Heaton *op cit* n 31 p 71.

decision in *Motan v Joosub*,⁵¹ children born out of wedlock have a duty to support their maternal grandparents, but not their paternal grandparents. It is submitted that this decision is unconstitutional on the grounds that it unjustifiably violates the natural father the right to equality before the law and equal protection and benefit of the law.⁵²

1.2.2.2 *An unmarried father's right to consent to adoption*

As far as the unmarried father's right to consent to adoption was concerned, the major limitation in the relationship between the father and his child born out of wedlock arose when the mother wished to place the child for adoption. The Child Care Act 74 of 1983, which governs adoption in South Africa, requires, amongst others, that consent to an adoption be given by both parents of a legitimate child to be adopted, or by the child's mother if born out of wedlock, and by the child if he or she was older than 10 years and understood the nature and import of such consent.⁵³ The fact that an unmarried father had undertaken to fulfil his parental responsibilities towards the child was irrelevant.⁵⁴ This position was illustrated in the interpretation of section 18(4)(d) of the Child Care Act 74 of 1983 in the case of *Fraser v Children's Court, Pretoria North, & Others*⁵⁵ whereby the mother of a child born out of wedlock arranged for the child's adoption even before the child was born. Mr Frazer, the

⁵¹ 1930 AD 61.

⁵² Cronjé and Heaton *op cit* n 50 p 71.

⁵³ Section 18(4) (d) as amended, see also Heaton 'Should the consent of the father of an illegitimate child be required for the child's adoption? A suggestion for the reform of South African Law' 1989 *CILSA* 346ff.

⁵⁴ Mosikatsana 'The unwed father and his child' 1996 *CILSA* p163.

⁵⁵ 1997 2 SA 261 (CC).

child's natural father, brought an unsuccessful application in the Witwatersrand Local Division of the High Court to prevent the adoption from proceeding. On appeal to the Constitutional Court, Mahomed J, declared section 18(4)(d) of the Child Care Act which denied unwed fathers the right to consent to or to veto the adoption of their natural children as unconstitutional because it discriminated unfairly against the unmarried fathers on the basis of gender and marital status.

Parliament was given an opportunity to correct the defect in the Act. In 1998, the Adoption Matters Amendment Act 56 of 1998 was passed. The amended section requires consent to be given by both parents of a child to adoption even if the child was born out of wedlock. It must be noted that not all fathers were notified. Only those who had shown interest in the children or whose identity had been disclosed by the child's mother would receive this notification. It is submitted that, this position was not in keeping with the recognition of the fact that children born out of wedlock also have two parents irrespective of the circumstances of their birth.

1.2.2.3 *An unmarried father's right of contact*

As far as contact between the natural father and child born out of wedlock was concerned, there was unfair discrimination because the father acquired no parental responsibilities and rights in respect of the child. Since contact was seen as one of the incidents of parental responsibilities and rights, the father acquired no inherent right of contact in respect of his child. This had been illustrated in a number of decided cases.⁵⁶

⁵⁶ *Wilson v Eli* 1914 WR 34; *Dauids v Davids* 1914 WR 142 and *Matthews v Haswari* 1937 WLD 11.

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The denial of such automatic contact was legislatively entrenched by the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997. The Act did not reverse the existing legal position pertaining to guardianship, care and contact. Basically, what it did was to establish definitively that such fathers did not have any rights or powers over children born out of wedlock. Like at common law, the point of departure was that the father of a child born out of wedlock did not have parental authority but could approach the court for an order granting him rights if it was in the best interests of the child. It is indisputable that the child's best interest must always be of paramount importance. However, the point is the child's best interests are not necessarily served by separate rules in respect of parental rights over children born in and out of wedlock. Compliance with the requirement that the child's best interests must be paramount dictates that the marital status of the child's parents has to be irrelevant.⁵⁷ There is need for children to remain under care and to maintain links with their parents, including an unmarried father.

From a constitutional perspective, the different treatment between the child's parents also amounts to unfair discrimination against a child born out of wedlock on the basis of social origin and birth.⁵⁸ In effect, in the case of a child born out of wedlock, the law decides in advance that the child is not entitled to a relationship with both parents.⁵⁹ This furthermore infringes the provision in the Children's Act 38 of 2005 and the Constitution which entitles children to parental care, not only maternal care.⁶⁰

⁵⁷ Cronjé and Heaton *op cit* n 52 p 73.

⁵⁸ Sections 9(3) of the Constitution.

⁵⁹ Cronjé and Heaton *op cit* n 57 p 73.

⁶⁰ Section 28(1)(b) of the Constitution and section 7(1)(f) (i) of Act 38 of 2005 respectively.

The present position as outlined in the Children's Act 38 of 2005 discriminates unfairly against the father of a child born out of wedlock on the basis of his marital status.⁶¹ Although an unmarried father automatically acquires rights and responsibilities if he complies with the conditions mentioned in the Act he is nevertheless required if he does not comply with the conditions to apply to court to acquire such rights while the father of a legitimate child automatically has responsibilities and rights in respect of the child.⁶² The present position also discriminates between sexes and genders.⁶³ From the father's perspective, this argument is based on the view that the law favours mothers of children born out of wedlock over fathers because mothers automatically had parental rights over their children born out of wedlock while fathers did not.

The Constitution and the United Nations Convention on the Rights of the Child consider the welfare of the child as primordial.⁶⁴ The emphasis on the welfare of the child coincides with the notion that contact is no longer a right of a parent but of the child.⁶⁵ Although emphasis must be on the best interests of the child, in the automatic acquisition of parental rights and responsibilities the emphasis is rather on the blood tie and if it is not in the interests of the child the parental rights and responsibilities

⁶¹ Section 20 of the Children's Act grants a married father automatic parental rights and responsibilities whereas an unmarried father is denied of such rights and acquires full parental rights and responsibilities if he satisfies the requirements as outlined in section 21.

⁶² Section 20 of Act 38 of 2005.

⁶³ Section 9(3) of the Constitution.

⁶⁴ Section 28(2) of the Constitution and article 3 of the United Nations Convention on the Rights of a Child (1989).

⁶⁵ Wolhuter *op cit* n 30 p 65.

can be taken away. Accordingly, the child has the right to know and be cared for by his or her parents. It is therefore, generally desirable that a child develops contact or bonds with his or her natural parents, unless such benefit is outweighed by detrimental factors.

Though developments such as the recognition and application of the best interests of the child principle appear to protect the child and promote equality, this is not necessarily the case given that our common law and statutory law equate the child's best interests with the natural role of the upbringing of the child by the mother. That is why in almost all cases of contact by an unmarried father, the determining factor had always been the financial contribution he had made in the upbringing of the child and the contributions he had made to the mother.⁶⁶ These arguments clearly indicate that our law continues to regard a father as an emotionally distant figure of authority and a breadwinner who cares financially but not emotionally for his family. It was manifestly unfair to compel the father of a child born out of wedlock to pay support and deny him the right to see his child.⁶⁷ There is changing public policy attitude towards birth out of wedlock and there is a need to abolish the other discriminatory practices between children born in and out of wedlock and between married fathers and unmarried fathers. This sentiment was also expressed by Van Zyl J in *Van Erk v Holmer*⁶⁸ which case conferred on the father of a child born out of wedlock an inherent right of contact. The court based its decision on changing mores and attitudes

⁶⁶ Bonthuys 'Of Biological Bonds, New fathers and the best interests of the child' 1997 4 *SAJHR* 622.

⁶⁷ It is submitted that it is unfair to impose conditions as outlined in section 21 on an unmarried father to acquire responsibilities and rights in respect of his children whereas he is a natural parent.

⁶⁸ 1992 2 SA 636 (W).

to cohabitation and the need to abolish the remaining discrimination between children born in and out of wedlock.⁶⁹

1.2.2.4 *An unmarried father and guardianship*

With regard to guardianship, the Children's Status Act 82 of 1987 provided that if the mother of a child born out of wedlock was unmarried and a minor, the guardianship of the child, unless a competent court decided otherwise, be vested in the guardian of the mother,⁷⁰ and the care of that child, unless a competent court decided otherwise, be vested in that mother.⁷¹ If the mother of a child born out of wedlock was under the age of 21, but acquired the status of a major, guardianship and care of the child shall, unless a competent court directed otherwise, vest in that mother.⁷² In terms of the Act, a child born out of wedlock was legitimated in all respects if the parents were married at any time after birth.⁷³ This applied even if the parents could not have been legally married to each other at the time of conception or birth.

It is submitted that there was no mention of the biological father in section 3 and the impression created was that the mother or the guardian was the only parent of a child born out of wedlock unless, of course, the child was legitimated in terms of section 4. Section 3 also violated the equality clause in the South African Constitution and the prohibition against discrimination. It also deprived the child's right to know his/her father and the right to be taken care of by both parents. The Act unfairly discriminated

⁶⁹ At 649I-650A.

⁷⁰ Section 3(1)(a) of Act 82 of 1987 (repealed).

⁷¹ Section 3(1)(b) of Act 82 of 1987 (repealed).

⁷² Section 1(2) of Act 82 of 1987 (repealed).

⁷³ Section 4 of Act 82 of 1987 (repealed).

only against fathers as it only recognised the father's guardianship where the child was born in wedlock. It is further submitted that marriage as a prerequisite for subsequent legitimation of children, was unfair on unmarried fathers as it violated their right not to marry, which is protected by International Conventions.⁷⁴ This section also conflicted with the provisions of CEDAW⁷⁵ which require that the State should take all appropriate measures to ensure that men and women have "the same rights and responsibilities as parents, irrespective of their marital status in matters relating to their children."⁷⁶ Although the Guardianship Act⁷⁷ was amended in 1993, the common law position remained unchanged as it still endorsed maternal preferences.

The issues that I have outlined above will be examined within the South African constitutional framework and other international trends. It will be argued that the differential treatment given to fathers and mothers in conferring parental rights constitutes unfair discrimination on the basis of gender, birth and marital status.⁷⁸ It will further be argued that our law, especially family law, should abandon the western and christian values that rely on marriage and marital status in conferring parental rights and responsibilities. Emphasis should rather always be on the blood tie. Those who choose not to marry should be respected for their choices.

⁷⁴ The discussion on the relevant provisions in this regard will be analysed under the heading International Conventions in chapter 5 below.

⁷⁵ The Convention on the Elimination of All Forms of Discrimination Against Women (1979).

⁷⁶ Art 16 paragraph (d) and (f).

⁷⁷ Act 192 of 1993 now repealed.

⁷⁸ Section 9(3) of the Constitution.

1.3 AIMS AND OBJECTIVES OF THE STUDY

1.3.1 *Broad aims*

There was a wide gap between the law as it is and social reality. This gap has been thrown into sharper relief by the introduction of the new constitutional dispensation with emphasis on gender equity, equality between men and women and the prohibition of unfair discrimination. The imperatives of the new Constitution necessitate a re-look at the old laws and institutions, with a view to bringing them in line with the Constitution proclaimed as the supreme law of the land.⁷⁹ An exhaustive review of existing works on the subject has revealed that most of them were undertaken prior to 1994, hence are outdated. Even some of those introduced after 1994, failed to take cognisance of changes in social norms and values. In view of the above, this research aims to broadly review the existing national and international laws and general practices with the ultimate aim of making a modest contribution to the existing store of knowledge, and to provide workable solutions to some of the most pressing issues in, our 'new' family law. More specifically, this study aims to meet the following objectives.

1.3.2 *Specific objectives of the study*

The specific objectives of this study are to:

- evaluate the position of unmarried fathers in relation to their children under customary law and determine specifically whether Tswana customary law also discriminates unfairly against unmarried fathers;

⁷⁹ Section 2 of the Constitution .

- evaluate customary law and the common law positions of unmarried fathers in relation to their children born out of wedlock on issues of guardianship, care, contact, maintenance, adoption and succession rights;
- evaluate current legislation on parental responsibilities and rights;
- evaluate the impact of the Constitution on parent-child relationship;
- assess the equality clause in relation to the institution of the family and parent-child relationship;
- determine whether South African family law promotes values and ideals embodied in International Conventions in relation to parents and children's rights; and
- make a contribution to the current debate on fatherhood and the promotion of children's rights in relation to their fathers.

1.4 BASIC HYPOTHESES

Is there equity and fairness in the manner in which the law treats unmarried fathers?

This is an issue which the thesis will critically investigate on the basis that there are gaps in both the available literature and current practice on the parental rights of unmarried fathers in South African law.

1.5 RESEARCH METHODOLOGY

Research methodology is defined as a “strategy or plan of action that links methods to outcomes, governs our choice and use of methods.”⁸⁰ Creswell identifies three

⁸⁰ Creswell *Research Qualitative, Quantitative and Mixed Methods Approaches* 4.

approaches to research methods namely qualitative, quantitative and mixed methods.⁸¹

1.5.1 The qualitative method uses simple data collection methods and the method is fundamentally interpretive in nature. In analysing the data, the researcher's personality will play a significant role in the production and interpretation. The researcher's identity, values and beliefs cannot be entirely eliminated from the process.⁸² However, researchers can proceed on the basis that they can exercise sufficient control over their attitudes to allow them prepare them to operate in a detached manner so that their investigation is not clouded by personal prejudices. In this case, the researcher needs to suspend personal beliefs for the purposes of the production and data analysis.

1.5.2 The quantitative method is probably the most popular research method as it uses quantitative statistical data analysis and is deductive in nature. Hypotheses are often used in this method. In testing these hypotheses, the researcher needs to devote time, effort and considerable skill in the process of subjecting data to statistical analysis and to producing appropriate graphs and tables to represent the results. However, the advent of a personal computer and powerful statistical software packages has altered this process.⁸³ Provided the researcher has a vision of the pros and cons, and

⁸¹ Creswell *ibid* n 80 p 4.

⁸² Denscombe *The Research Guide for small-scale social research projects* 208.

⁸³ Denscombe *ibid* n 82 p 177.

appreciates the limitations to what can be concluded on the basis of the data collected, good quantitative research need not require advanced statistical knowledge.⁸⁴

1.5.3 The third research method is called the mixed method. This method contains properties of both qualitative and quantitative methods in a single study without one method overriding the research.⁸⁵

For the purpose of this study and in light of the above discussion on methods of research, this study used the qualitative approach. It mainly involves the analysis of legal materials as found in primary and secondary sources. Documented information will be used in this research. Such documents include books and academic journal articles⁸⁶, decided cases, legislation and documents on international Conventions. A huge amount of information relevant to this research topic is held in documents and access is relatively easy and cheap and documents generally provide a source of data which is permanent and available in a form that can be verified by others. Therefore, only sources that are relevant and significant were utilised.

Furthermore, a historical survey of our common law will help in providing the background of the inequalities between 'parents' that exist in our family law. Such inequalities should be reckoned within a constitutional framework. It will shed light on the rights of both parents and the importance of developing and nurturing the

⁸⁴ Denscombe *ibid* n 83 p 177.

⁸⁵ Creswell cautions researchers against the use of this method because it requires skills to blend properties of the two research methods which are not similar. (Creswell *op cit* n 80 p 77)

⁸⁶ They contain the accumulated wisdom on which the research should be built and also the latest cutting-edge ideas which can shape the direction of the research.

relationship with their children. No interviews were conducted as the research is not intended to investigate emotions, experiences and feelings of aggrieved unmarried fathers.

1.6 LITERATURE REVIEW

A review of academic writings and decided cases reveals that existing studies on the subject have been carried out prior to the coming into effect of the new constitutional dispensation and are based on the common law which is outdated and still discriminates against married couples, unmarried mothers and unmarried fathers. For example, in the Roman-Dutch authorities, no relationship appears to have been recognised between the father and an illegitimate child, that is, the mother of a child born out of wedlock had parental responsibilities and rights in respect of such child and the natural father had no such parental rights.⁸⁷ It was assumed that an illegitimate child had no father but retained its bond with its mother on the basis of the cognate or blood relationship between them. In this regard the principle evolved that the illegitimate child falls under the parental power and guardianship of the mother, since a mother does not bastardise her own children.⁸⁸ This principle has been accepted in our law.⁸⁹ On the aspect of contact by the natural father, Boberg states: 'The natural father's right over the child was one of reasonable contact.'⁹⁰ Spiro implicitly adopted the view that the father's right of contact was not an inherent one.⁹¹ He believed that the sole question to be asked was what is in the best interests of the child? In Spiro's

⁸⁷ Boberg PQR *The Law of Persons and the Family* 334-349.

⁸⁸ *Van Erk op cit* n 68 at p 638A.

⁸⁹ See generally the cases discussed on page 25-26 below on old authorities.

⁹⁰ Boberg PQR *The Law of Persons and the Family* 334.

⁹¹ *Spiro op cit* n 47 p 457.

interpretation, the right to contact can never be inherent in the relationship between a father and his extra-marital child- it must be decided upon casuistically.⁹² Barnard states that, there is no relationship between a father and his extra-marital child, apart from the former's obligation with the mother, to support the child.⁹³ Bonthuys⁹⁴ criticises the new emphasis on the importance of the biological bond between father and child and new representations of fatherhood as emotional caring and nurturing as embodied in the case of *Van Erk v Holmer*.⁹⁵

Decided cases also do not deviate from the common law position. In the older cases, the mother of a child born out of wedlock was granted care as of right.⁹⁶ However, the natural father of a child born out of wedlock could not claim care as of right,⁹⁷ although there are cases where a natural father of a child born out of wedlock was granted care while the mother was still alive.⁹⁸ The courts recognized at the same time that the mother was *prima facie* or ordinarily entitled to the care of her child born out of wedlock.⁹⁹ In *Edwards v Fleming*,¹⁰⁰ it was held that the mother of a child born out of wedlock was the guardian of that child but that such guardianship could be

⁹² Goldberg *op cit* n 23 p 261.

⁹³ Barnard, Cronjé and Olivier *The South African Law of Persons and Family Law* 72.

⁹⁴ In Bohler *et al* 'Access to children born out of wedlock- A narrative approach' 2000 25(2) *Journal for Juridical Science*: 76.

⁹⁵ 1992 2 SA 636 (W).

⁹⁶ Spiro 'Custody orders in respect of minors with one parent' 1985 *THRHR* 18.

⁹⁷ In *Docrat v Bhayat* 1932 TPD 125 a father claimed, by right, custody of his illegitimate child after the death of the mother. It was held that although the father had *locus standi* he did not have the right to care because he had no parental rights and responsibilities. Nevertheless the court proceeded to consider whether the father would not be a better custodian than the *de facto* custodian, *Rowan v Faifer* 1953 2 SA 705 (E).

⁹⁸ *Dauids v Dauids* 1914 W.R 142; *Mariam v Potchi* 1916 37 NLR 363.

⁹⁹ Spiro *op cit* n 96 p 20.

¹⁰⁰ 1909 TH 232 at 324-5.

interfered with if the welfare of the child was in danger. In *S v S*,¹⁰¹ it was decided that in the absence of official interference with parental responsibilities and rights, the mother exclusively had parental responsibilities and rights over her child born out of wedlock. The best interests of the child were the yardstick, and the issue was whether it was established that the interests of the child required that there must be contact by a specific person. In *F v B*,¹⁰² it was held that the Court would intervene 'in exceptional cases where considerations relating to the interests of the child compelled it to do so.'¹⁰³ *Douglas v Mayers*¹⁰⁴ decided that there was no inherent right of contact for an unmarried father. The father, in the same way as other third parties, had a right to apply for contact which would only be granted if the court was satisfied that it was in the interests of the child to do so. *F v L and Another*,¹⁰⁵ decided that contact was an incident of parental responsibilities and rights which an unmarried father did not automatically acquire over his extra-marital child. Therefore, the former had no *prima facie* right of contact to the latter. In *F v B*,¹⁰⁶ it was held that the father of a child born in wedlock had a right of contact to his child. The father of a child born out of wedlock had no such right even if he and the child's mother had been living together as husband and wife at the time the child was born. In both cases, the Court would intervene with the *de jure* position in exceptional cases in which considerations relating to the interests of the child compelled it to do so. In both cases, the degree of proof required, was the same. The point of departure from the available literature is

¹⁰¹ 1993 2 SA 200 (W) at 204-205.

¹⁰² 1988 3 SA 948 (D).

¹⁰³ At 949G-950C.

¹⁰⁴ 1987 1 SA 910 (Z).

¹⁰⁵ 1987 4 SA 525 (W).

¹⁰⁶ 1988 3 SA 948 (D).

that, this research focuses on the impact of the current constitution on the position of unmarried fathers in relation to their children born out of wedlock at both common law and under customary law, on which specific literature is found wanting. However, recent publications brings to the fore the changes brought by the Children's Act 38 of 2005 on the parent-child relationship.¹⁰⁷

1.7 SCOPE OF THE STUDY

This study is made up of six interrelated chapters. Chapter one is the introduction which serves to indicate the nature and scope of the study. It includes the definition and substantiation of the problem under investigation, aims and objectives of the study and the research methodology. The aim is to lay the foundation on which the analysis takes place.

Chapter two presents the position of children born out of wedlock in relation to their father under customary law particularly in the Tswana custom. The status of such children on issues of succession, adoption, care, guardianship, maintenance and contact will be examined. The aim is to compare such position with the position at common law and also determine whether customary law complies with the current constitutional norms and values.

Chapter three deals with the rights of unmarried father's under the common law. Here, an analysis of the common law is looked at. The position of unmarried fathers towards their children born out of wedlock on issues of guardianship, care, adoption, maintenance, contact and succession rights is also analysed in this chapter. This is

¹⁰⁷ Robinson JA *et al Introduction to Family Law* 249.

followed by a discussion of the current statutory law on the same issues in order to see whether new legislation has improved the common law position of unmarried fathers in relation to their children.

Chapter four gives an overview of the constitutional provisions specific to the issue of parental rights. This chapter outlines in detail, specific constitutional provisions impacting on unmarried father's rights, interpretation of rights and limitations of rights.¹⁰⁸ In conclusion, a determination is made on whether the current position complies with constitutional values and norms.

Chapter five deals with international instruments and the status of such instruments in South African law. Since South Africa is a signatory to some international conventions, it is determined whether it promotes values and ideals embodied in such conventions in relation to parental rights particularly of unmarried fathers in relation to their children born out of wedlock.

Chapter six constitutes conclusions and recommendations for further research and law reform as proposed by the researcher.

1.8 DEFINITION OF TERMS

Some of the technical terms that are used in this study are defined below and the rationale is to give the reader a better understanding of the terms in the study and, secondly, to familiarise the reader with the legal meaning of these terms.

1.8.2 *Customary law*

¹⁰⁸ Sections 36 and 39 of the Constitution.

Customary law means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of these people.¹⁰⁹

1.8.3 *Family group*

Family group is a group of families whose family heads can trace their relationship through the male line.¹¹⁰ This group is also often referred to as a clan.

1.8.4 *Family head*

Family head means the head of the family, that is to say, a man who has married one or more wives by customary rites.

1.8.5 *Lobolo*

Lobolo means property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xurna*, *lumalo*, *thaka*, *ikhazi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.¹¹¹

1.8.1 *Parental responsibility and rights*

Parental authority or parental power referred to the legal rights, powers, duties and responsibilities parents had and exercised in respect of their minor children and their

¹⁰⁹ Section 1(1) of the Recognition of Customary Marriages Act 120 of 1998.

¹¹⁰ Bekker *Seymour's Customary Law in Southern Africa* 11.

¹¹¹ Section 1 of the Recognition of Customary Marriages Act 120 of 1998.

children's property.¹¹² However, in terms of the Children's Act 38 of 2005 'parental authority has been replaced by the term 'parental responsibilities and rights.

1.9 SUMMARY

This chapter has provided a framework of the thesis and laid a foundation for the discussions that follow in the succeeding chapters. It achieved this objective by providing a background to the study, identifying the aims and objectives, outlining the research method applied and providing the scope with the analysis of the relevant literature.

¹¹² Cronjé and Heaton *South African Family Law* 265; Van Heerden *op cit* n 1 p 390; Bosman and Van Zyl *Children, Young Persons and their Parent's* in Robinson *The Law of Children and Young Persons* 49 at 52, Spiro *op cit* n 47 p 20 and Barnard, Cronjé and Olivier *op cit* n 93 p 72. However, the Children's Act uses the term "parental responsibilities and rights" rather than parental authority or parental power. This is an international trend in children's rights.

CHAPTER TWO: PARENTAL RIGHTS AND RESPONSIBILITIES OF UNMARRIED FATHERS UNDER CUSTOMARY LAW

2.1 INTRODUCTION

A start with a discussion on parental rights and responsibilities of unmarried fathers under customary law is necessary because customary law forms part of South African law, besides it is the law regulating the activities of the majority of black South Africans who constitute the focus of this study. Despite its importance as part of South African law, customary law has nevertheless not been granted the status it deserves as it has often been disregarded. For example, the courts began applying the common law system of maintenance to everyone, including Africans in the country from the 1940's without much regard to customary law despite the fact that under customary law, all children, whatever the nature or manner of their birth, are absorbed into the family, be it the family of the mother's husband, of her father or of the child's natural father.¹¹³

However, customary law obligations were imposed on the natural father only if he had acquired parental rights and responsibilities over the child. In consequence, the natural father had no duty to support his children unless he acquired full parental rights.¹¹⁴ Section 211(3) of the Constitution mandates the courts in this regard to apply customary law when it is applicable, however, subject to the Constitution and any legislation that specifically deals with customary law. This limitation in the application of customary law has led to an increased reliance on statutory enforcement

¹¹³ Bennett T W *Customary Law in South Africa* (2004) p136.

¹¹⁴ Bennett *ibid* n 113 p 136 argues that such a father can only acquire parental rights by paying either a fine or *lobolo* for the mother of the child.

in terms of the Maintenance Act 99 of 1998¹¹⁵ and the Child Care Act 74 of 1983,¹¹⁶ which were applicable to all.¹¹⁷ The Constitution also makes express provision for the direct recognition of customary law when that law is applicable. It is therefore, important to give an account of how customary law applies to parental rights and responsibilities of unmarried fathers and especially how the courts have interpreted parental rights under customary law in the light of the Constitutional provisions and other statutes that preceded the adoption of the Constitution. This point is significant in that it establishes the imperative to explore the interface or relationship between the application of customary law and statutory law in the form of the Children' Act 38 of 2005 in the context of the present discussion, that is, the issue of parental rights over children by unmarried fathers.

Secondly, the majority of South Africans are black people who are still practising their customs. Therefore, if more emphasis and recognition could be given to their customs and cultural practices in the sphere of family law, we might improve the position of black children born out of wedlock and their fathers. In view of the above, this chapter aims at a discussion of critical issues under customary family law. An analysis of the fundamental nature of customary law will be made under the following headings:

1. Understanding customary law.
2. The sources of customary law.
3. Developments in the recognition and application of customary law.

¹¹⁵ Section 15 of Act 99 of 1998.

¹¹⁶ 74 of 1983 (repealed).

¹¹⁷ In the case of the latter criminal prosecutions are made possible by section 50(2) and in the case of the former the duty is enforced in special maintenance courts by way of civil actions.

4. Parental rights under customary law.
5. Classification of children and resulting parental rights under customary law.
6. Application of parental rights by Tswana communities.
7. Summary.

2.2 ANALYSIS OF THE FUNDAMENTAL NATURE AND CHARACTERISTICS OF CUSTOMARY LAW

2.2.1 *Understanding customary law*

Customary law is the law that is generally applicable to the majority of the black population of South Africa. It consists of a set of rules which arises or comes from the social practices of a particular group of people. Social practices are the things that people do namely: their actions and behaviours. Social practices that are common or widespread in a particular community are called 'customs'.¹¹⁸ Its main source of origin is custom. It has developed through the ages consistently being observed by the communities where it is practiced.¹¹⁹ It focuses on the protection of the individual through his or her family. The family to which a person belongs is thus of cardinal importance in determining the rights of a person. However, for a custom to become part of customary law, members of that community must regard it as legally obligatory or binding. In other words, it becomes necessary or compulsory because it is a rule of law. The law provides that you must behave in a certain way and failure to comply results in some form of sanction.¹²⁰

¹¹⁸ Meintjes-Van der Walt *et al Introduction to South African Law* 144.

¹¹⁹ For details read : Maitufi 'The Best Interests of the Child and African Customary Law' in Davel *Introduction to Child Law in South Africa* 137; Bekker *op cit* n 110 p 14; Kleyn and Viljoen *Beginner's Guide for Law Students* 96.

¹²⁰ Meintjes-Van der Walt *op cit* n 118 p 144.

It is submitted that, there are two forms of customary law viz; official customary law and living customary law.¹²¹ Official customary law consists of those rules of customary law which have been written down, in customary law codes, legislation and case precedents. These rules are rigid and unable to adapt to changing circumstances. It is also submitted that official customary law did not necessarily describe customary law when it was first recorded. On the other hand, living customary law consists of the social practices of a particular group of people, and which members of that group regard as legally obligatory. To that extent the living customary law is flexible, it responds to changing social, economic and political circumstances.¹²²

2.2.2 The sources of customary law

Whereas the sources of official customary law are textbooks, written codes, legislation and decided cases, the most important source of 'living customary law' are the people who practice this law. However, these practices differ considerably from place to place, and they change constantly over time. In such circumstances, a court that is not part of the community it serves, cannot possibly know the law. Therefore, those who practice living customary law can appear before the court and give evidence about customary law. This was illustrated in the case of *Van Breda v Jacobs*¹²³ where the court held that a local custom may be deemed obligatory, and thus part of the law, once witnesses attested to the existence of a repeated practice that was reasonable, certain, uniform and well established.

¹²¹ Meintjes-Van der Walt *ibid* n 120 p 150.

¹²² Meintjes- Van der Walt *ibid* n 121 p 150.

¹²³ 1921 AD 330.

2.2.3 *Developments in recognition and application of customary law*

Until recently, African customary law was given limited recognition in South Africa but with the advent of the Constitution of the Republic of South Africa, a paradigm shift in the approach to customary law was necessitated and the recognition thereof was enhanced. Thus, section 211(3) provides:

“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

In other words, when the rules governing internal conflicts of law indicate that customary law is applicable to the facts of a particular case, the court is bound to apply that law, but always subject to the Constitution and any relevant legislation.¹²⁴

This obligation, however, is subject to three important qualifications:

Customary law must be ‘applicable,’ must be compatible with the Constitution and it has not been superseded by ‘any legislation that specifically deals with customary law’. However, it must be emphasized that customary law focuses on the protection of the individual through his or her family clan. The family clan to which a person belongs is thus of cardinal importance in determining the rights of a person and although custom is its main source of origin, customary law has been codified in the course of time, and some of its principles have been repealed by legislation.¹²⁵ The courts also, in their interpretation of customary law, have developed it. For example, in matters of care and guardianship, although a father or husband acquires both custody and guardianship over his children, the courts have considered what is in the best interests of the children in matters affecting them. The courts have further modified customary law and allowed the children’s mother to be joined in any action involving their custody. Again, any arrangement suggesting the “sale of a child”-

¹²⁴ Bennett *op cit* n 113 p 78.

¹²⁵ Maithufi *op cit* n 119 p 137.

namely, the transfer of rights against payment or consideration, would not be enforced on the ground that it was against public policy and good morals.¹²⁶ In the past, marriages under customary law had not been recognised in South Africa as valid marriages and have been termed ‘customary unions’ to distinguish them from civil marriages. This meant that children born to these marriages were regarded as born out of wedlock.¹²⁷

The Births and Deaths Registration Amendment Act 40 of 1996 has, however, for the first time provided for children born of African customary unions or marriages by religious rites not to be registered at birth as ‘extra-marital’ children.¹²⁸ This was followed by the Child Care Amendment Act 96 of 1996, which included African customary unions and marriages concluded in accordance with a system of religious law subject to specified procedures as legally recognised marriages for the purposes of the Act.¹²⁹ The Recognition of Customary Marriages Act 120 of 1998¹³⁰ now confers full recognition of customary marriages and regulates celebration, registration, proprietary consequences and dissolution of such marriages. Customary marriages are defined by the Act as marriages in accordance with customary law.¹³¹ The recognition of customary marriages in section 2(1) of the Act as valid marriages ‘for all purposes’ has the effect that children born of such marriages are henceforth to

¹²⁶ Bennett *op cit* n 124 p 311.

¹²⁷ www.wice.co.za ZALC-Issue Paper 13 Project 110 (Review of customary law affecting children).

¹²⁸ Children born of African customary unions are now registered as legitimate children.

¹²⁹ Child Care Amendment Act 96 of 1996 and Child Care Act 74 of 1983.

¹³⁰ Sections 4, 7 and 8 of the Recognition of Customary Marriages Act.

¹³¹ Section 1 of Act 120 of 1998.

be regarded as 'legitimate' children and the Act is retrospective to marriages concluded before the coming into operation of the Act.

Under customary law, once *lobola* (bride wealth) had been paid, the child was considered legitimate and part of the father's family; if not, the child belonged to the mother's family.¹³² Furthermore, section 9 of the Age of Majority Act¹³³ provides that 'despite the rules of customary law,' the age of majority of any person is determined in accordance with the Act. This means, at least for a woman who enters into a customary marriage, that such a woman will no longer be regarded as being under the marital power of her husband, but as a major in her own right.¹³⁴

There can be no doubt that the South African Constitution recognises the importance of customary law to the majority of South Africans. The courts are now constitutionally obliged to apply customary law.¹³⁵ However, it must be emphasized that sometimes notions of African custom do not fit altogether well with the culture of rights that we are so avidly attempting to promote in our society. Furthermore, African customary law is based on the concept of human dignity, derived not necessarily through the relentless pursuit of individual liberty, but rather through membership of a group.¹³⁶ However, the Constitution protects the 'right to culture,' which is entrenched in the Bill of Rights. In this regard, section 30 of the Constitution provides:

¹³² Bennett *op cit* n 126 p 307.

¹³³ 57 of 1972.

¹³⁴ ZALC *op cit* n 127.

¹³⁵ Section 211(3) of the Constitution.

¹³⁶ Bennett *op cit* n 132 p 89.

“Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provisions of the Bill of Rights.”

A right to culture may therefore be exercised if it does not conflict with other provisions of the Bill of Rights, more particularly for the purpose of this thesis, the right to equality and treatment and protection and the recognition of black custom on issues of awarding parental rights and responsibilities. Similarly, section 31 provides that people who belong to a cultural community have the right to enjoy their culture. Section 31 also adds that this right may not be exercised in a manner inconsistent with the Bill of Rights. In essence, the Constitution gives the people the right to practice and use their customary law provided that the rules of customary law are not ‘inconsistent’ with any provision of the Bill of Rights. This recognition would be facilitated by the provisions of section 211(3) of the Constitution, which mandates the courts to apply customary law whenever that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. Again, section 39(2) mandates the courts to develop rules of customary law in a way that promotes ‘the spirit, purport and object of the Bill of Rights.’

From the interpretation of the above provisions, it is clear that customary law is recognised and applied in appropriate cases. However, this recognition means that customary law was thrown into competition with the fundamental rights provisions of the Bill of Rights which may result in a number of conflicts especially between the right to equality, parental rights, children’s rights and various customary law rules that make women subordinate to men. In conclusion, it is submitted that this interface between customary law, statutory law and the Constitution (Bill of Rights) has elevated the common law even further above customary law because first, the

common law is seen to be easily and readily accessible and well developed, second, judicial officers are not well conversant with the rules of customary law, and consequently prefer to apply the common law rules to disputes.

2.2.4 Parental rights and responsibilities under customary law

The concept of parental rights and obligations has never been a problem in customary law. Bennett has submitted that children have no special favoured position in relation to their parents or other relatives; on the contrary, a child's interests might well be subordinated to those of the family.¹³⁷ However, the legal disadvantages of birth out of wedlock are not as great in customary law as they used to be in the common law. For example, the natural father's rights at common law and customary law differ remarkably. According to the former, a natural father had no inherent rights to his children. To acquire contact, or care and guardianship, he had to obtain a court order,¹³⁸ whereas under customary law the natural father acquires rights by simply paying *isondlo* and seduction fee in private negotiations with the father or the child's guardian.¹³⁹ *Isondlo* signifies both the transfer of parental rights and responsibilities and compensation for bringing up a child. Lawful wedlock (which was critical to defining the status of illegitimacy at common law) is irrelevant in customary law. But bride-wealth is relevant because if it has been paid, the children have a secure status in their father's family as 'legitimate' offspring if it has not been paid they belong to their mother's family.

¹³⁷ Bennett *op cit* n 136 p 295.

¹³⁸ Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 repealed, Bennett *ibid* n 129 p 310.

¹³⁹ Bennett *op cit* n 137 p 295.

It is submitted that this should not necessarily be the case children must feel secure about their status in their father's family even if *lobola* has not been paid because there is a blood tie and it is the child's best interest to know both sides of his or her parentage. Marriage is also one of the most important criteria determining a person's rights under customary law. Thus, in determining the rights of children, the first question is normally whether the child's parents are married or not.¹⁴⁰ In general terms, the position of a mother determines the position of a child in the family group. A child is associated with the family to which the mother belongs. Once married, a child's mother is 'transferred' from the family of the father to that of her husband. A family is defined in terms of marriage. A marriage under customary law is not only a personal relationship between spouses but also brings about a special relationship between the families of the spouses. The result is that both family groups acquire rights and obligations for which they are collectively responsible.¹⁴¹

Therefore, it is clear from the discussion above that although customary law seems to discriminate unfairly against unmarried fathers just like the common law, the issue of parental rights could be easily decided through the application of indigenous law as the incidence of illegitimacy is more prevalent in the black communities but an unmarried father would still be disadvantaged if he decides not to marry the child's mother. However, problems encountered in family law particularly in the sphere of equality of parents and their rights towards their children could be minimised if customary law adapts to changes in family dynamics.

¹⁴⁰ Maithufi *op cit* n 125 p 140.

¹⁴¹ Bekker *op cit* n 110 p 96.

Notwithstanding the above broad aspects of parental rights, proper acquisition of parental rights under customary law is based on classification of children. Therefore, the status of children determines the relations with their parents. The following discussion will therefore focus on such classification and the status of such children particularly in relation to their unmarried fathers.

2.2.5 Classification of children and resulting parental rights and responsibilities under customary law

2.2.5.1 Children of legally married couples

A child born of African parents who are married by customary law is legitimate. It belongs to its mother's house within the father's family home. In effect, the child belongs to the father.¹⁴² This fact is expressed in a saying that cattle bring forth children, and that the children belong where the cattle are not.¹⁴³ This means that while the *lobola* cattle are with the woman's people, her children must be with her husband's people.¹⁴⁴ The payment of *lobola* for the woman gives her husband a legal right over her offspring. The general rule is that the children of a married woman belong to the man who paid *lobola* for her. It is immaterial whether that man is dead or whether his wife has been impregnated by another man, or whether a seed-bearer gives birth to the children. Thus, if a widow continues to live at her husband's family home, any children born to her belong to her deceased husband's family home. However, the position articulated above has been changed by the Recognition of

¹⁴² Bekker chapter 7 'Children and Young Persons in Indigenous Law' in Robinson *op cit* n 141 p187, Bekker *op cit* n 110 p 234-5, Maithufi *op cit* n 140 p 142.

¹⁴³ Bekker *ibid* n142 p 187.

¹⁴⁴ Bekker *ibid* n 143 p 187.

Customary Marriages Act 120 of 1998 which grants spouses in a customary union equal status and capacity within their marriage.¹⁴⁵

2.2.5.2 *Children of an unmarried woman*

The general principle in customary law is that children born to an unmarried woman belong to her guardian or his successor.¹⁴⁶ Such children belong to its mother's home. She does not acquire guardianship over them as she is also under the guardianship of her father. Her father is entitled to claim a fine for her pregnancy.¹⁴⁷ The mother's people look after the child, feed and clothe the child as they do with other children of the household. Such child is usually not considered when the estate of its mother's father is distributed. But inherits the mother's cattle when she dies, and also lives upon the cattle paid as damages for seducing her. The marriage is conducted by the mother's people, and if the child is a girl they receive *bogadi* given when she gets married. This position clearly discriminates unfairly against an unmarried father, he does not have any rights to the child he is treated as if he does not even exist. The same can also be said of the mother of the child, she also does not have parental rights and responsibilities.

Among the Cape Nguni, if the fine has been paid and the natural father has also paid *isondlo*, such a father is entitled to claim care of the child.¹⁴⁸ Among the Sotho-Tswana group, however, payment of a fine for pregnancy gives the natural father no right to the child. It is interesting to note that Tswana custom recognises the part

¹⁴⁵ Section 6.

¹⁴⁶ Bekker *op cit* 144 p 188.

¹⁴⁷ Bekker *ibid* n 146 p 188.

¹⁴⁸ Bekker *ibid* n 147 p 188.

played by a man in procreation, but distinguishes clearly between physiological paternity and legal paternity.¹⁴⁹ Furthermore, it is submitted that a man may be a natural father of a child, but he cannot claim that child, nor has he any claims upon him, unless certain legal conditions have been fulfilled. Of these the most essential is marriage, and above all, the payment of *lobolo*. It is only if he has given *bogadi* for its mother that a man is fully entitled to any child he begets by her.¹⁵⁰ However, this process does more than to establish a man's rights to his own children. It transfers the whole reproductive power of the woman from her own family to his. Therefore, if the man decides not to pay *bogadi*, he forfeits all the rights towards his child, in essence his rights towards the child are dependent on the fulfilment of the above condition which it is submitted as unfair, as it interferes with the right of the man to choose who to marry and to some extent the right to choose who to associate with. The position becomes even more drastic and unfair should an unmarried woman contract a marriage with a man who is not the child's father and her husband acquires a right to the child, who is regarded as entirely legitimate because the natural father failed to pay *lobolo* for the child.

2.2.5.3 *Children born to a widow*

Children born to a widow may be divided into several categories.

(a) Children born of an *ukungena* relationship with one of her late husband's relatives; these children are entirely legitimate and belong to her house, and so to her late husband's heir.¹⁵¹

¹⁴⁹ Physiological paternity is when a person is a natural parent of a child and legal paternity can be established where rights and responsibilities accrue to a parent or any other person by law.

¹⁵⁰ Schapera *A Handbook of Tswana Law and Custom* 169.

¹⁵¹ *Ukungena* relationship is a relationship that is created under customary law between the widow and

(b) Children born of a widow from promiscuous intercourse and during the subsistence of her marriage, whether while staying at her late husband's family home or away from it belong to her house, and so to her late husband's heir.¹⁵² It is submitted that this customary practice disregards the unmarried father as a parent and violates the child's right to know and be cared for by his or her parents which is guaranteed in our Constitution and other international human rights instruments. Children should be afforded the opportunity to know both sides of their parentage, whether they are born out of wedlock should be irrelevant. A child's best interests should be the paramount consideration in every matter concerning the child. Customary practices that are in conflict with this standard should be declared unconstitutional.

(c) Children born to a widow on her second marriage by customary rites; a widow's marriage with her late husband's people is dissolved if her guardian should give her away in a second customary marriage to another man; any children she may, thereafter, bear fall into the category of children of a wife. Her new husband is entitled to the children he has by her, although he has no claim at all to either the property or the children of her first husband.

2.2.5.4 *Adulterine children*

Those are children born to a woman of a customary marriage during the subsistence of the marriage from a man other than her husband. There is a presumption that children born of a married woman are her husband's children. The presumption can

her late husband's brother. The husband's brother or any adult male relative takes the position of the late husband in all respects including procreation of children.

¹⁵² Schapera *op cit* n 150 p 169.

be rebutted only by convincing evidence to the contrary.¹⁵³ Adulterine children belong to the woman's husband. The natural father has no right to such children.¹⁵⁴

It is clear from the discussion above that the broadly accepted customary law does not acknowledge and recognise parenting rights and responsibilities of unmarried fathers just like the common law. If a fine and *isondlo* or *bogadi* in Tswana custom has been paid, such father is entitled to claim care of the child even if the marriage is not concluded. However, both systems still use the marriage institution as a basis for conferring rights to children. This can be seen in the exposition below on aspects of guardianship and care. However, adoption, maintenance and inheritance rights will also be discussed as aspects impacting on the relationship between an unmarried father and his children under customary law.

2.3 APPLICATION OF PARENTAL RIGHTS AND RESPONSIBILITIES BY TSWANA COMMUNITIES

The Tswana community has been chosen in this thesis firstly because the researcher is a *Motswana* and well conversant with the norms and standards of behaviour of the *Batswana* people. Secondly, the notion of the family from which parental rights are derived among the *Batswana* is founded upon marriage just like the common law. Among the *Batswana*, payment of a fine for pregnancy gives the natural father no right to the child. It is interesting to note that *Batswana* custom recognises the part

¹⁵³ Bekker *op cit* n 148 p 188.

¹⁵⁴ This rule was emphasised in *Lucingo v Mgiqika* 4 NAC 40 where the assessors stated the following:

'If a married woman has a child by an adulterer, it is the child of the husband, if the husband takes no steps to obtain possession of the child, his heir, after his death, can claim it. He does not lose his right to it, whether it be a male or female child.' (See Bekker *ibid* n 145 p 188) If the husband should repudiate the child and send it back to its mother's people, it will belong to the wife's father, under whose guardianship it will be. (Bekker *ibid*) This clearly deprives the natural father any parenting rights towards his child. This practise is unconstitutional and does not enhance the best interest of the child standard.

played by a man in procreation, but distinguishes clearly between physiological paternity and legal paternity.¹⁵⁵ A man may be a natural father of a child, but he cannot claim that child, nor has it any claims upon him, unless certain legal conditions have been fulfilled. Of these the most essential is marriage, and above all, payment of the *bogadi*. It is only if he has given *bogadi* for its mother that a man is fully entitled to any child he begets by her.¹⁵⁶ However, for a better understanding of how customary law is applied and practised among the Tswana, there is a need to categorize the different aspects of parental rights. For that purpose, the discussion that follows will focus on a few of those critical aspects of parental rights.

2.3.1 *Guardianship and care*

Under Tswana law and custom, the duty of a father to the care of his children born in wedlock was absolute, and could not be taken away from him merely because they might do better in the care of another of his relatives.¹⁵⁷ This position was, however, later modified by the courts in exercising their discretion as upper guardian of all minors. The courts began to consider the interests of children in matters affecting them. In the case of *Hlope v Mahlalela*,¹⁵⁸ the court held that the 'best interests of the child' was the main criterion to be employed in disputes relating to the care of children, to the exclusion of any rule of customary law. This case indicates the court's willingness to protect the child's interests above any applicable rule of law be it customary law or common law.

¹⁵⁵ Schapera *op cit* n 152 p 169.

¹⁵⁶ Schapera *ibid* n 155 p 169

¹⁵⁷ Bekker *op cit* n 153 p 227.

¹⁵⁸ 1988 1 SA 409 (T).

Where it is shown that the father is not a fit and proper person, by reason of his ill-treatment or neglect, to have the care of them, care of the children will normally be awarded to the mother.¹⁵⁹ In the case of young children whose mother and father are living apart, the court may give them into the care of the mother until they are able to live away from her without harmful results, unless it appears that she is not a fit and proper person to take care of them.¹⁶⁰ A father who has been deprived of the care of his child loses only the right to care but he retains all other rights that may accrue through the child, for example, *bogadi* payable for a daughter.¹⁶¹

However, the above position has been interpreted in the light of the constitutional provisions and other events that preceded the adoption of the Constitution. South African courts are obliged, when interpreting any legislation and in developing the common law, to promote the spirit, purport and objects of the Bill of Rights.¹⁶² Thus, besides the 'best interests of the child' as a criterion to be employed in all actions or matters involving children either in terms of the common law or customary law, the spirit, purport and objects of the Bill of Rights must also be considered in the development of the common law and customary law relating to children.¹⁶³

¹⁵⁹ *Hlope v Mahlalela* *ibid* n 158 at 458G-J.

¹⁶⁰ *Motlounq v Motaung* 1980 NAC (N-C) 159 and *Mabuza v Nhlapo* 1980 NAC (N-E) 141.

¹⁶¹ *Bekker op cit* n 157 p 228.

¹⁶² Section 39(2) of the Constitution.

¹⁶³ Section 28(2) of the Constitution, section 211(3) of the Constitution provides that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Section 39(2) contains a provision with regard to the interpretation and development of the common law and customary law. Every court or tribunal is to promote the spirit, purport and objects of the Bill of Right in the interpretation of legislation and in the promotion and development of customary law or common law. Consequently, both customary law and common law have to be developed with this purpose in mind.

The position under customary law was that the guardianship of a child vested in its father if he was married to the mother or in his heir if the father was deceased.¹⁶⁴ This was the position where a customary marriage existed between the child's parents. Children brought into the marriage by the wife, irrespective of who their natural father might have been, were also included.¹⁶⁵ In the case of an unmarried woman, the guardianship of her children vested in her father or guardian, since she is regarded under customary law as a minor.¹⁶⁶ Thus the guardian of such children was their mother. Because a customary marriage was not regarded as a valid marriage,¹⁶⁷ children of such a marriage were formerly regarded by the common law as having been born out of wedlock.¹⁶⁸

The position changed with the promulgation of the Births and Deaths Registration Amendment Act 40 of 1996, the Child Care Amendment Act 96 of 1996 and the Recognition of Customary Marriages Act 120 of 1998, in terms of which the definition of marriage was amended to include a customary marriage.¹⁶⁹ These Acts thus consider these children to be on the same level as the children of civil marriages

Section 39(3) provides for the protection of rights or freedoms arising or accruing from either customary law, common law or legislation, provided that they are not inconsistent with the Bill of Rights. Rights conferred by customary law or common law which are inconsistent with the Bill of Rights are therefore unenforceable and unconstitutional.

¹⁶⁴ Maithufi *op cit* n 140 p 145.

¹⁶⁵ Maithufi *ibid* n 164 p 145.

¹⁶⁶ However, since a woman is no longer a perpetual minor under customary law, it is submitted that this rule now only applies to the children of an unmarried woman who is still a minor. (section 6 of the Recognition of Customary Marriages Act 120 of 1998).

¹⁶⁷ Before the Recognition of Customary Marriages Act 120 of 1998.

¹⁶⁸ Maithufi *op cit* n 165 p 145.

¹⁶⁹ Section 1(b) of the Births and Deaths Registration Amendment Act 40 of 1996.

and therefore legitimate.¹⁷⁰ If *bogadi* had been paid the husband and his family group have full parental rights to any child born to a wife during marriage.

The rationale for this rule is that upon the payment of *bogadi* the reproductive capacity of the woman are transferred to her husband's family and this legitimises children. Thus, the father or husband acquires both custody and guardianship over the children. The general rule under customary law is that such children belong to the father's family and the father is their guardian. This rule is, however, subject to the criterion of the best interests of the child laid down in the Constitution. The court applied this standard in the case of *Hlope v Mahlalela*.¹⁷¹

Maithufi submits therefore that, the 'best interests of the child' criterion, irrespective of the type of marriage contracted, and irrespective of whether or not parents are married or *lobola* has been fully provided, applies to all disputes concerning children.¹⁷² The principles of customary law relating to the position of children therefore apply, subject to the provisions of section 28 of the Constitution of South Africa. Issues relating to the care or guardianship of children cannot be determined or made subject to the delivery or non-delivery of *lobola*.¹⁷³ It is also submitted that in recent times the issue of payment of *lobola* is seen by many as a money making scam, where parents are charging prospective husbands huge sums of money, some cannot afford these amounts, consequently they cannot marry and this results in cohabitation.

¹⁷⁰ Maithufi *op cit* n 168 p 145.

¹⁷¹ 1988 1 SA 409 (T).

¹⁷² Maithufi *ibid* n 172 p 145.

¹⁷³ This position is further endorsed by section 6 of the Recognition of Customary Marriages Act which gives full equal status and capacity to a wife in a customary marriage to acquire assets and dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

When children are born out of these relationships without payment of *lobolo*, it will be unfair to deprive their natural father's parental rights. It will also not be in the best interests of the children involved, as they would be deprived of their right to be raised and cared for by both parents.

2.4 ADOPTION

Both male and female children may be given in adoption;¹⁷⁴ they then belong to the person adopting them. Such a child would for all intents and purposes become the child of its adoptive parents.¹⁷⁵ The customary procedure as described by Bekker is as follows:¹⁷⁶

“Since adoption entails an alteration in the status of a child, the relatives both of the family head giving the child and the adoptive parent, must be called to a meeting at which the adoption takes place. Thereafter, the matter must be reported to their chief. If these formalities are not observed, the alleged adoption is invalid, except where, in the case of the adoption of a female child, at any rate, there is no dispute between the parties concerned that the adoption did take place.”

Once the above procedure has been followed, a valid adoption under customary law exists but such adoption is not recognised as the law would still require the parties concerned to comply with the provisions of Chapter 4 of the Child Care Act 74 of 1983.¹⁷⁷ Chapter 4 of the said Act required, amongst others, that consent to an adoption be given by both parents of a legitimate child who was to be adopted, or by the child's mother if he/she was born out of wedlock and by the child if he or she was

¹⁷⁴ Bekker *op cit* n 161 p 236.

¹⁷⁵ Bekker *ibid* n 175 p 228.

¹⁷⁶ Bekker *ibid* n 176 p 228.

¹⁷⁷ This position of the law however, was not applied by the court decision in the case of *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TCA) where an unmarried woman had assumed full responsibility for a related child and had marked the occasion by slaughtering a sheep and a goat. The court found that this ceremony constituted a valid adoption under customary law. In *Zibi* 1952 NAC 167 (S) the court held that the institution of an heir was a custom peculiar to Africans and that there was no need to comply with adoption legislation.

older than 10 years and understood the nature and import of such consent.¹⁷⁸ However, this position was altered in 1998 by the Adoption Matters Amendment Act¹⁷⁹ which now requires consent to be given by both parents of a child to its adoption even if the child is born out of wedlock. This position is further reinforced by the Children's Act 38 of 2005. It must be noted that not all fathers will be notified but only those who show or have shown some interest in the children, who have acquired parental responsibilities or whose identity has been disclosed by the child's mother.

However, Bennett submits that, on the basis of *Zibi and Kewana* cases, it could be argued that the Child Care Act 74 of 1983 is inapplicable because the customary idea of adoption does not correspond to the statutory institution.¹⁸⁰ Furthermore, in *Metiso v Pandongelukfonds*¹⁸¹ the court refused to declare the customary adoption invalid for failing to comply with all the statutory requirements and found the adoption to be in the child's best interests.¹⁸² Bekker submits that, there is no reason why an adoption under customary law should not be recognised.¹⁸³ Although in some tribes customary law provides for the adoption of a child, adoption in Tswana customary law is different and temporary in nature, the child's status does not change. According to Schapera it is very common for a child to be sent to live for a while with some

¹⁷⁸ Heaton 'Should the consent of the father of an illegitimate child be required for the child's adoption? A suggestion for the reform of South African Law' 1989 *CILSA* 346.

¹⁷⁹ Act 56 of 1988.

¹⁸⁰ Bennett *Customary Law in South Africa* (2007) 321.

¹⁸¹ 2001 3 SA 1142 (T).

¹⁸² In this case, the mother failed to give consent for the adoption because she had previously abandoned the child to its adoptive parent.

¹⁸³ Bekker *op cit* n 176 p 228.

paternal or maternal relative, particularly with its mother's father or brother.¹⁸⁴ The child is generally taken to their home soon after weaning, and may live for a number of years, helping in the domestic work. This is sometimes done simply as a sign of the attachment between the two families, and so that the child may enjoy the use of the *bogadi* cattle given for its mother.

If *bogadi* has been paid the parents of the child are its natural guardians, and they have the sole right to decide whether it should stay with them or go to a relative. The relatives cannot claim as of a right that the child should come and stay with them. The decision is a privilege of the parents, and depends upon the intimacy and friendliness of the relations between the two families. It is submitted that the above Tswana adoption procedure as illustrated by Schapera clearly disregards the rights of an unmarried father because if he has not paid *lobola*, he does not have any say in matters involving his children as relatives are preferred over him. This violates the child's right to parental care that includes the right to be cared for by both natural parents.¹⁸⁵ The customary law rule is therefore unconstitutional. Payment of money should not be made a prerequisite for the acquisition of parental rights.

These instances of temporary adoption do not make any difference to the child's status at its own home or its parent's claim over it.¹⁸⁶ The adoption procedure in Tswana customary law is temporary, the adopted child does not sever the link with his or her natural parents. However, when it comes to the adoption of a child born out of

¹⁸⁴ Schapera *op cit* n 156 p 173.

¹⁸⁵ Section 28(1)(b) of the Constitution.

¹⁸⁶ Schapera *op cit* n 184 p 173.

wedlock, the natural father and his family are not consulted in the matter because the unmarried father acquires rights and responsibilities over the child only if *lobola* or a fine has been paid by him to the family of the mother. Clearly this discriminates unfairly against an unmarried father who does not wish to marry the mother of his child.

2.5 MAINTENANCE

Under customary law, maintenance is an obligation that results from consanguinity (relatives of the same blood) and affinity (persons related by marriage).¹⁸⁷ However, the parents share the task of caring for the children. The father is legally responsible for ensuring to the best of his ability, that he is able to provide them with food and clothing. A husband who wilfully fails to provide adequately for his children may be charged in the *lesika* court,¹⁸⁸ at his wife's instance, and may be reprimanded or even punished for his negligence. Therefore, there is a legal obligation upon parents married by customary law to maintain their children.¹⁸⁹ The obligation can be enforced by means of the machinery created by the Maintenance Act 99 of 1998, which is directed at the enforcement of maintenance obligation when the duty in question exists at the time of the issue of the maintenance order and is expected to continue.¹⁹⁰ The duty extends to such support as a child reasonably requires for his or

¹⁸⁷ Bennett *op cit* n 180 p 317.

¹⁸⁸ Lesika court is a Tswana expression which literally translated means the court of a family group or clan. The male elder of the family who plays an important role in unifying and developing the structure of the family presides over this court. He always reconciles members of the group in case of disputes and misunderstandings.

¹⁸⁹ Generally speaking, the natural father of an illegitimate child is not liable for its maintenance, but in the Cape Nguni tribes, where the natural child of an unmarried woman has been born and maintained at her guardian's family home, the child's father, having paid the fine for causing the woman's pregnancy, may claim its custody on tendering payment for *isondlo* to her guardian.

¹⁹⁰ Section 15(1) of 99 of 1998.

her proper upbringing, and includes the provision of food, clothing, accommodation, medical care and education.¹⁹¹ The duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.¹⁹² The effect of the application of this Act means that an unmarried father as a natural parent can be summoned to pay maintenance to his child born out of wedlock irrespective of whether he had paid *lobola* or not. The sense of injustice would even be more compounded if the child is a girl, because her guardian, not the natural father would be entitled to claim her *lobola* when she marries notwithstanding the fact that the natural father has been paying maintenance.¹⁹³ It is submitted that if customary law can be excluded in favour of the common law, then there is no justifiable reason to deny the unmarried father any unconditional parental rights over his children born out of wedlock even if a fine or *lobola* has not been paid.

2.6 INHERITANCE RIGHTS

Although adulterine and illegitimate children are not discriminated against in customary law in respect of maintenance and the provision of bridewealth, distinctions do remain in the field of succession. Customary law discriminates against female children in matters of inheritance and children born out of wedlock. The two basic principles of succession in customary law are primogeniture of males through males and universal succession. This means that the eldest male succeeds the deceased. He inherits not only the assets but also the liabilities and responsibilities. Women do not participate in the intestate succession of deceased estates. In a

¹⁹¹ Section 15(2).

¹⁹² Section 15(3)(a)(iii).

¹⁹³ Bennett *op cit* n 187 p 317.

monogamous family, the eldest son of the family head is the heir. If the deceased is not survived by any male descendants, his father succeeds him. If the father does not survive him, an heir is sought among the father's male descendants related to him through the male line.

The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriach which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family. Extra-marital children are not entitled to succeed to their father's estate in customary law. They however, qualify for succession in their mother's family subject to the principle of primogeniture. The eldest male extra-marital child qualifies for succession only after all male intra-marital children and close male members of the family. Cases in this regard have been decided since the coming into operation of the new constitutional dispensation. In *Mthembu v Letselela*,¹⁹⁴ the question to be decided was:

'whether the whole system of devolution of the estate on intestacy under customary law is discriminatory and therefore unconstitutional'¹⁹⁵

In this case the deceased and the child's mother were alleged to have contracted a customary marriage in that part of *lobola* had been furnished. The deceased's father averred that as no customary marriage existed between the deceased and the child's mother, he was the only heir of the deceased in accordance with the rule of primogeniture.¹⁹⁶ The child's mother, on the other hand, alleged that, as the deceased was the father of her daughter, her daughter was the only intestate heir in terms of the

¹⁹⁴ 1998 (2) SA 675 (T) 936F-J.

¹⁹⁵ 939F-J.

¹⁹⁶ 940D-E.

Intestate Succession Act,¹⁹⁷ since the rule of primogeniture was discriminatory against women and other children of the deceased in terms of the Constitution.¹⁹⁸ She also alleged that this rule was contrary to public policy and natural justice as envisaged by the Law of Evidence Amendment Act 45 of 1988.¹⁹⁹

However, the court did not rule in favour of the applicant on the basis that the rule of primogeniture was not discriminatory on the basis of sex or gender.²⁰⁰ The court further remarked that even if this rule was prima facie discriminatory, this had been refuted by the concomitant duty of support of the heir in customary law, as he was obliged to maintain the widow and other children (minor children including daughters) of the deceased.²⁰¹ It is submitted that this decision contravenes article 3 of the African Charter which provides that children are entitled to enjoy the rights and freedoms recognised and guaranteed in the charter 'irrespective of the child's or his/her parent's or legal guardians race, ethnic group, colour, sex, birth or other status.'

The importance of protecting children from discrimination on the grounds of sex is acknowledged in the African Charter on the Rights of the Child. State parties are

¹⁹⁷ 89 of 1987.

¹⁹⁸ Chapter 2 of Act 108 of 1996.

¹⁹⁹ S 1(1) of the Law of Evidence Amendment Act provides as follows:

'Any court may take judicial notice of the law of foreign State and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty; Provided that indigenous law shall not be opposed to the principles of public policy or natural justice; Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.'

²⁰⁰ The court intimated that, as much as customary law is acknowledged as a system existing parallel to the common law by the Constitution and the freedom granted to persons to choose the system governing their relationships, it cannot be accepted that the succession rule is necessarily in conflict with s 8 now s 9, neither is it contrary to public policy or natural justice.

²⁰¹ 937C.

expressly required to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child in particular those customs and practices discriminatory to the child on the grounds of sex or other status.²⁰² The UNCRC also asserts that children, by reason of their physical and mental immaturity need special safeguards and care. Maithufi also submitted that it is regrettable that the court was not called upon to use the 'best interests of the child' as a criterion in the determination of the rights of the daughter in this case.²⁰³ He further submitted that the applicant's chances of success relied on the utilization of this criterion and not on the constitutionality or otherwise of the application of the rule of primogeniture.²⁰⁴

The court declined the invitation to develop the customary law of succession because that would not only affect customary law of succession but also the customary family law rules. The court held the view that such development should rather be undertaken by Parliament.

Fortunately the Constitutional Court recently had the opportunity to decide on the validity of section 23²⁰⁵ of the Act²⁰⁶ and the principle of primogeniture central to the

²⁰² Article 21(1)(b) of the African Charter.

²⁰³ Maithufi in Davel *Introduction to Child Law in South Africa* p147.

²⁰⁴ *Ibid* n 203 p 147.

²⁰⁵ Section 23 of the Act provides as follows:

“(1) All movable property belonging to a Black and allocated by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.

(2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).

(3) All other property of whatsoever kind belonging to a Black shall be capable of being devised by will.

(4) ...

(5) Any claim or dispute in regard to the administration or distribution of any estate of a deceased Black shall be decided in a court of competent jurisdiction.

(6) In connection with any such claim or dispute, the heir, or in case of minority his guardian, according to Black law, if no executor has been appointed by a Master of the Supreme Court shall be

customary law of succession in the cases of *Bhe and Others v The Magistrate, Khayelitsa and Others*,²⁰⁷ in *casu*, the matter came before the Constitutional Court as an application for confirmation of an order of the Cape High Court. It was jointly brought by Nontupheko Maretha Bhe (Ms Bhe) and the Women's Legal Centre Trust. Mrs Bhe brought the application in the following capacities: (a) on behalf of her two minor daughters, (b) in the public interests, and (c), in the interests of the female descendants, descendants other than eldest descendants and extra-marital children who are descendants of people who die intestate. The deceased and Ms Bhe had a relationship and lived together. Until his death, the youngest of the two minor children lived with him and Ms Bhe in the temporary shelter. The deceased supported

regarded as the executor in the estate as if he had been duly appointed as such according to the law governing the appointment of executors.

(7) Letters of administration from the Master of the Supreme Court shall not be necessary in, nor shall the Master or any executor appointed by the Master have any powers in connection with, the administration and distribution of-

(a) ...

(b) any portion of the estate of a deceased Black which falls under subsection (1) or (2).

(8) A Master of the Supreme Court may revoke letters of administration issued by him in respect of any Black estate.

(9) Whenever a Black has died leaving a will which disposes of any portion of his estate, Black law and custom shall not apply to the administration or distribution of so much of his estate as does not fall under subsection (1) or (2) and such administration and distribution shall in all respects be in accordance with the Administration of Estates Act 24 of 1913.

(10) The Governor General may make regulations not inconsistent with this Act-

(1) prescribing the manner in which the estates of deceased Blacks shall be administered and distributed;

(2) defining the rights of widows or surviving partners in regard to the use and occupation of the quitrent land of deceased Blacks;

(3) dealing with the disherison of Blacks;

(4) ...

(5) prescribing tables of succession in regard to Blacks; and

(6) generally for the better carrying out of the provisions of this section.

(11) Any Black estate which has, prior to the commencement of this Act, been reported to a Master of the Supreme Court shall be administered as if this Act had not been passed, and the provisions of this Act shall apply in respect of every Black estate which has not been so reported."

Note: Paragraphs not reproduced were deleted by subsequent legislation.

The above provisions should be read with section 1(4)(b) of the Intestate Succession Act which provides as follows:

"Intestate estate" includes any part of an estate in respect of which section 23 of the Black Administration Act 38 of 1927 does not apply."

²⁰⁶ Black Administration Act 38 of 1927.

Ms Bhe and the two children and they were depended on him. After the death of the deceased, the father of the deceased was appointed representative and sole heir of the deceased estate by the magistrate in accordance with section 23 of the Act and the regulations.

Under the system of intestate succession flowing from section 23 and the regulations, in particular regulation 2(e), the two minor children did not qualify to be the heirs in the estate of their deceased father. According to these provisions, the estate fell to be distributed according to 'Black law and custom'

The deceased father made it clear that he intended to sell the immovable property to defray expenses incurred in connection with the funeral of the deceased. Fearing that the applicant and her daughters would be homeless, the applicants approached the Cape High Court and obtained two interdicts *pendelite* to prevent (a) selling of the immovable property for the purposes of off-setting funeral expenses; and (b) further harassment of Ms Bhe by the father of the deceased. The applicants challenged the appointment of the deceased's father as heir and representative of the estate in the High Court. He opposed the application. The Magistrate and the Minister, cited as respondents, did not oppose and chose to abide the decision of the High Court. The High Court concluded that the legislative provisions that had been challenged and on which the father of the deceased relied, were inconsistent with the Constitution and therefore invalid. The order of the High Court, in relevant part, reads as follows:

'1. It is declared that s23 (10)(a), (c) and (e) of the Black Administration Act are unconstitutional and invalid in that reg 2(e) of the regulations of the Administration and Distribution of the Estates of Deceased Blacks, published under Government Gazette 10601 dated 6 February is consequently also invalid.

2. It is declared that s 1 (4)(b) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid insofar as it excludes from the application of s1 any estate or part of any estate in respect of which s23 of the Black Administration Act 38 of 1927 applies.

3. It is declared that until the foregoing defects are corrected by competent legislature, the distribution of intestate black estates is governed by s1 of the Intestate Succession Act 81 of 1987.

It is declared that the first and second applicants are only heirs in the estate of the late Vuyu Elius Mgolomane, registered at Khayelitsha Magistrate's court under reference No 7/1/2-484/2004,'in *Charlotte Shibi v Mantabeni Freddy Sithole and Others (the Shibi case)*, the case concerns an application for the confirmation of the order of the Pretoria High Court. The applicant was Ms Shibi whose brother, the deceased, died intestate and was not married nor was he a partner to a customary union. He had no children and, when he died, was not survived by a parent or grandparent. His nearest male relatives were his two cousins, the first and second respondents respectively. Since the deceased was an African, his estate fell to be administered under the provisions of section 23(10) of the Act. The Magistrate of Wonderboom decided to institute an inquiry in terms of regulation 3(2) in order to determine the person or persons entitled to succeed to the property of the deceased.

However this inquiry was subsequently abandoned to await the conclusion of a case which was then before the Pretoria High Court and which was later reported as *Mthembu v Letselela and Another*.²⁰⁸ This High Court case concerned a challenge to the constitutional validity of the customary law rule of primogeniture and of section 23 of the Act (Black Administration Act supra). The application in Mthembu was

²⁰⁸ 1998 2 SA 675 (T).

dismissed by the High Court and the Magistrate in Shibi case abandoned the inquiry and without notice to Ms Shibe, appointed one of the cousins (Matabeni Sithole) as representative of the deceased estate. In terms of the system flowing from the provisions of section 23 of the Act and the regulations framed under it, in particular regulation 2(e), the estate of the deceased fell to be distributed according to custom. Ms Shibi was, in terms of that system, precluded from being the heir to the intestate estate of her deceased brother.

In the High Court Ms Shibi challenged the decision of the Magistrate and the manner in which the estate had been administered. She sought an order declaring her to be the sole heir in the estate of the deceased. She also claimed damages and other related relief against the first and second respondents as well as against the minister.

The High Court set aside the decision of the Magistrate and declared Ms Shibi to be the sole heir. It then issued an order similar to that given by the Cape High Court in the Bhe case, and, in addition, awarded damages against the deceased's two cousins, that is first and second respondents in this case.

The third case was an application for direct access to the Constitutional Court brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust. The South African Human Rights Commission is a state institution supporting democracy under Chapter 9 of the Constitution. Its mandate is, among other things, to "promote respect for human rights and a culture of human rights and to take steps to secure appropriate redress where human rights have been violated". The Women's Legal Centre Trust is a non-governmental organisation whose stated core objective "is to advance and protect the human rights of all women in South Africa" To this end, it has established the Women's Legal Centre, in order to conduct

public interest litigation including constitutional litigation to advance the human rights of women.

The application for direct access sought in this case was granted in the interests of justice. The court took various considerations into account in this application. Viz; firstly, that the challenged provisions govern the administration and distribution of all intestate estates of deceased Africans. Secondly, the impact of the provisions falls mainly on African women and children, regarded as arguably the most vulnerable groups in our society. The provision also affect male persons who, in terms of the customary law rule of primogeniture, are not heirs to the intestate estate of deceased Africans. The court was of the view that many people are therefore affected by these provisions and it is desirable that clarity as to their constitutional validity be established as soon as possible.

These three cases were heard together in the Constitutional Court as they were all concerned with intestate succession in the context of customary law.²⁰⁹ The South African Human Rights Commission and the Women's Legal Centre Trust were acting in their own interests as well as in the public interests. Apart from the provisions declared invalid by the Cape and Pretoria High Court, the applicants sought the invalidation of the whole of section 23 of the Act, alternatively subsections (1), (2) and (6) of section 23 because of their unconstitutionality as they are inconsistent with the equality provision (section 9), the exclusion of women from inheritance on the grounds of gender is a violation of section 9(3) of the Constitution.

²⁰⁹ Para 5 Case CCT 69/03.

It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under the constitutional order.

The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution. It basically implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of and to control property.

To the extent that the primogeniture rule prevents all female children and significantly curtails the rights of male extra-marital children from inheriting, it discriminates against them too. These are particularly vulnerable groups in our society which correctly places much store in the well-being and protection of children who are ordinarily not in a position to protect themselves. In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture is also in violation of section 9(3) of the Constitution.

It also limits the rights of women to be considered for succession to the position and status of the deceased family head. They are excluded regardless of their availability and suitability to acquit themselves in that position. They are overlooked in circumstances where they may be the only child of the deceased. Nor does it matter that they have contributed to the acquisition or preservation of the family property.

The rights of children under section 28 of the Constitution are also compromised. Two prohibited grounds of discrimination are relevant in this case. The first relates to sex and the second relates to prohibition of unfair discrimination on the ground of 'birth' in section 9(3).

It is clear from the decision of the three cases above that the serious violation by the provisions of section 23 of the rights to equality and human dignity cannot be justified in our new constitutional order. It is submitted that customary law has thus acquired the status it never had before because it is now recognised and endorsed as a system of law. *In Alexkor Ltd and Another v Richtersveld Community and Others*²¹⁰ the following was stated:

"While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to the common-law, but to the Constitution."

Adjustments and developments to bring its provisions in line with the Constitution to accord with the 'spirit, purport and objects of the Bill of Rights' are mandated. Discriminatory rules of customary law can now be subjected to constitutional scrutiny.

Although ultimately customary law is recognised in our law, it has not reached a stage where it could be applied wholesomely on every aspect of family law particularly on issues of parental rights and responsibilities. The reason for this conclusion is that most rules of customary law are not entirely codified hence the sources of customary law are often scarce or unreliable. Judicial officers are not schooled in customary rules and norms. This inadequacy makes it very difficult to apply customary law even in deserving cases where the rules are easily accessible. It is submitted therefore that on issues of parental rights and responsibilities particularly on the relationship between

²¹⁰ 2003 (12) BCLR 1301 (CC) at para 51.

the unmarried father and his child, customary law be applied only when the parties agree that their dispute be settled in accordance with customary law rules.

2.7 SUMMARY

From the discussion in this chapter, it has emerged that, although ultimately customary law is recognised in our law, it has not reached a stage where it could be applied wholesomely on every aspect of family law particularly on issues of parental rights and responsibilities. The reason for this conclusion is that most rules of customary law are not entirely codified hence the sources of customary law are often scarce or unreliable. Judicial officers are not well schooled in customary rules and norms. This inadequacy makes it very difficult to ascertain or apply customary law even in deserving cases where the rules are easily accessible. It is submitted therefore that on issues of parental rights and responsibilities particularly on the relationship between the unmarried father and his child, customary law should be applied only when the parties agree that their dispute is to be settled in accordance with customary law. It is also submitted that because of globalisation and South Africa becoming a partner in international treaties and Conventions, parental rights and responsibilities of parents towards their children cannot be resolved by the application of customary law rules alone. In the next chapter we will deal with parental rights of unmarried fathers under common law and statutes.

CHAPTER THREE: ANALYSIS OF THE LEGAL POSITION OF AN UNMARRIED FATHER IN TERMS OF CIVIL LAW

3.1 INTRODUCTION

Although customary law is practised by the majority of South Africans, it is not the only system of law that is applicable in South Africa. The common law as received, also forms part of South African law and is unfairly applied to all South Africans. In private law, particularly family law, statutory law which is based on the common law is often applied notwithstanding the existence of and accessibility of customary law. That is why it is imperative to discuss the parental rights of unmarried fathers under the common law and to compare such position with the rights of married couples.

The legal position of an extra-marital child under the common law is based on the philosophy that '*een moeder maakt geen bastaard*' (i.e. a mother does not beget a bastard), that is, as far as the mother and her relations are concerned, South African law places the extra-marital child on the same footing as a legitimate child.²¹¹ Although recent legislation has done much to clarify and improve the situation, children born out of wedlock are subjected to a number of legal shortcomings in respect of their fathers and paternal relations.²¹² Such shortcomings

²¹¹ *Green v Fitzgerald* 1914 AD 88 at 99 and Van Heerden *op cit* n 112 p 390; Spiro *op cit* n 91 p 450.

²¹² For example section 3 of the Children's Status Act 82 of 1987 now repealed; section 1 of the Guardianship Act 192 of 1993 now repealed, Natural Fathers of Children born out of Wedlock Act 86 of 1997 now repealed; Intestate Succession Act 81 of 1987; Law of Succession Amendment Act 40 of 1996, Domicile Act 3 of 1992; the Births and Death Registration Amendment Act 40 of 1996; the Child Care Amendment 96 of 1996 and the Adoption Matters Amendment Act 56 of 1998 now repealed and the current Children's Act 38 of 2005. See also *Bethell v Bland* 1996 2 (W) at 209G-211B; Davel *op cit* n 207 p 33; Goldberg *op cit* n 92 p 261; Carmen Nathan 1980 *THRHR* at 293.

can be seen in legal prescriptions relating to guardianship, care, contact, adoption disputes, maintenance and succession rights.

The aim of this chapter is to give a detailed exposition of the position of an unmarried father in relation to his children born out of wedlock at common law. Furthermore, the current South African position on the rights and responsibilities of unmarried fathers which is governed by legislation will also be discussed. The Children's Act 38 of 2005 has ushered in a new era in South African law in terms of the relationship between parent and child. The Act has moved away from the concept of parental authority to the concept of parental responsibilities and rights. This Act looks at South African law relating to parent and child from a different perspective. The focus of the law is no longer on parental authority and the rights of the parents over their children but on children's rights.²¹³ The best interest of the child principle is of paramount importance in the Act.²¹⁴ Parental authority as it was used before the commencement of the Children's Act, would be the umbrella under which such a discussion takes place.²¹⁵ Specific areas of the discussion will focus on care, guardianship and contact, as aspects of parental responsibilities and rights of unmarried fathers. Adoption, maintenance and succession rights as other legal matters impacting on the relationship between an unmarried father and his children born out of wedlock will also be discussed.

²¹³ Paizes 'The Position of Unmarried Fathers in South Africa: An Investigation with Reference to a Case Study' 41.

²¹⁴ S 7(1) of Children's Act 38 of 2005.

²¹⁵ Act 38 of 2005.

of South African common law although legislative changes had been effected from time to time.²²¹

At common law, both parents of a legitimate child were possessed of the parental power. However, that did not mean that their power had always been equal. In fact, the father's authority was superior to that of the mother which, it is submitted, followed from the marital power of the husband over his wife.²²² While the management of the minor's property and the control of the minor's education belonged solely to the father, the mother shared control of the minor's person with the father but in case of differences of opinion, the father's authority prevailed.²²³

3.3.1 *Care*

3.3.1.1 *A general overview*

Care of a child implies control over the person of the child; in other words, it means control over the child's day-to-day life. It also entails assuming responsibility for the child's upbringing and education, including deciding with whom the child may associate and ensuring the child's safety.²²⁴ This entails that the custodian may, *inter alia*, decide where the child was to reside, which school the child was to attend, whether the child should undertake tertiary education, what religious education the child should receive, in what language to teach the child, and what medical treatment

²²¹ The introduction of the South African Constitution and particular section 28, certain international conventions, for example, the Convention on the Rights of the Child which was ratified by South Africa in 1995 and the recent promulgation of the Children's Act 38 of 2005 which replaced the common law concept of parental authority by introducing parental rights and responsibilities of parents. These add additional dimension to parental power and the parent-child relationship.

²²² Spiro *op cit* n 91 p 450.

²²³ *Calitz v Calitz* 1939 AD 56.

²²⁴ Hahlo *The South African Law of Husband and Wife* 394-396; Cronjé and Heaton *South African Family Law* 208-209; Bosman and Van Zyl *op cit* n 112 p 54-56; Robinson *et al Introduction to South African Family Law* (2002) p 228.

the child should receive.²²⁵ It also included the right to discipline the child. The custodian enjoyed a broad discretion in respect of the exercise of the responsibilities and rights encompassed by care in which the court was reluctant to interfere.

3.3.1.2 *Care of children born out of wedlock*

Care and control of a child born out of wedlock in common law rested with the mother of the child.²²⁶ Even the minority of the mother was no hindrance where the care and control (safekeeping) of the child born out of wedlock was concerned.²²⁷ However, none of the incidents of parental authority automatically attached to the father of a child born out of wedlock but the court would always act in the best interests of the child. If it was in the best interest of the child to award care to the father, this was done.²²⁸ There were indeed cases where the natural father of a child born out of wedlock was granted care while the mother was still alive.

²²⁵ Cronjé and Heaton *op cit* n 220 p 279; *Edwards v Fleming* 1909 TH 232 234-5; *Docrat v Bhayat* 1932 TPD 125 126; *Matthews v Haswari* 1937 WLD 110 112; *September v Karriem* 1949 3 SA 687 (C); *Douglas v Mayers* 1987 1 SA 910 (ZH); *F v B* 1988 3 SA (D) 953D; *W v S* 1998 1 SA 475 (N) 494-5.

²²⁶ See also *Govu v Stuard* 1903 24 NLR 440 447; *Camel v Fleming* 1909 TH 5; *Docrat v Bhayat* 1932 TPD 125 126; *Matthews v Haswari* 1937 WLD 110 at 112 Shreiner A.J as he then was, pointed, out that, being an illegitimate child, the 'legal' custody, until some special order of court was made, rested with the mother. *Dhanabakium Subramanian and Another* 1943 AD 160, per TINDALL, JA, at p 166; *September v Karriem* 1949 3 SA 687 (C); *Rowan v Faifer* 1953 2 SA (E) 705; *Engar and Engar v Desai* 1966 1 SA 621 (T); *Ex Parte Van Dam* 1973 2 SA 182 (W); *Nokoyo v AA Mutual Insurance Association Ltd* 1976 2 SA 153 (E); *Bailey v Bailey* 1979 3 SA 128 (A); *Basseti v Louw* 1980 2 SA 225 (W); *Douglas v Mayers* 1987 1 SA 910 (ZH); *F v B* 1988 3 SA 948 (D) 953D; *W v S* 1 1988 1 SA 475 (N) 494-5; *B v S* 1995 3 SA 571 (A) at 575G-H; *Bethell v Bland* 1996 2 SA 194 (W). Davel *op cit* n 212 P 35.

²²⁷ S 3(1)(b) and S 3(2) of the Children's Status Act 82 of 1987; *Bethell v Bland* 1996 2 SA 194 (W) 207.

²²⁸ See *Rowan v Faifer* 1953 2 SA 705 (E); *Ex parte Van Dam* 1973 2 SA 182 (W); see also Cronjé and Heaton *Casebook on the Law of persons* 98-100.

In *Dauids v Dauids*,²²⁹ care of a child born out of wedlock was given to the natural father, and in *Mariam v Potchi*,²³⁰ care was left with the natural father, who was the respondent. The reason advanced by the court was that it was against the welfare and interests of the children to award care to their mothers.

In *Ghadadhur v Rajkuar*,²³¹ the matter was referred back to the magistrate's court, but the reasoning was strongly in favour of the father of a child born out of wedlock. The court was of the view that it was not bound to give children born out of wedlock to their mother as the natural guardian. The paramount consideration is the best interests of the children themselves and a good reason for depriving the mother of care was the fact that she capriciously refused to marry their father and thus legitimise their status.

In *Basetti v Louw*,²³² the applicant and the respondent were the father and mother of a son born out of wedlock. The couple had decided not to marry. They could have married with the intention of divorcing immediately thereafter, that is, attempt a collusive divorce in order to legitimate the child and create parental power for the father. They concluded an agreement whereby the mother retained care and the father acknowledged his paternity of the child and agreed to pay maintenance for the child's support. He also undertook to secure his obligation in case he died before his duty of supporting the child came to an end through an insurance policy. The agreement further provided that the child should not be removed by his mother from the

²²⁹ 1914 W.R 142.

²³⁰ 1916 NLR 363.

²³¹ 1924 NLR 155.

²³² 1980 2 SA 225 (W).

Republic without the father's written consent. The mother undertook not to give up custody or allow the child to be adopted without the prior written consent of the father. The applicant then lodged an application in court for the agreement to become a court order and Margo, J, granted the request. The court effected the agreement between the natural parents which provided for the acquisition of the father's permission when adoption or removal of the child from the Republic was to be considered. The court was of the opinion that such *locus standi* on the part of the father would be beneficial because his participation in the deliberations could mean an investigation into the merits of the case in order to determine exactly where the interests of the child lay.

In *Rowan v Faifer*,²³³ the mother as a natural guardian of a minor born out of wedlock, applied for an order requesting the child's father to whom she had willingly given the child, to hand the child back to her. The court ordered that although the respondent had no right to care and to control the child, he did have *locus standi* to oppose the application.²³⁴ The court was of the opinion that his *locus standi* served a useful purpose because of the fact that his involvement had the effect that the merits of the case were investigated to determine where the interests of the child would lie. If the child's interests demanded, care and control could be granted to the father. The court was of the opinion that although a father of a child born out of wedlock child had no right to care, he had *locus standi* to appear on the issue of care but pointed out that it did not intend to convey that such a father could never be granted care. For it was clear that, in a proper case, the court as the upper guardian of all minors might

²³³ 1953 2 SA 705 (W) at 710.

²³⁴ The natural father has clearly *locus standi in judicio* if he is the respondent or if he has the right to apply for contact or care.

find that the father was well placed to have care. Gardner, JP; referred to the power of the court, in the absence of a decree of divorce or order of separation, to deprive the natural guardian of children born in wedlock of care, where there are special grounds for doing so. Furthermore, there appeared to be no reason why the court should not act similarly in the case of children born out of wedlock.²³⁵

The court allowed the father to remain the care giver since it found that the removal of the child might endanger its health which had caused great concern, and that it was in the best interests of the child to remain where it was at the time. The judge referred to the power of the court, in the absence of a decree of divorce, to deprive the natural guardian of the care of legitimate children where there are special grounds for doing so, and then went on to say that there appeared to be no reason why the court should not act similarly in the case of illegitimate children.²³⁶

Other important circumstances that could not be ignored were whether the father had established a relationship with the child, whether the mother and father were living together in a *de facto* marriage, whether the mother and father wished to get married and whether the father sincerely wanted to have a relationship with his child. The interests of the child required that he/she should remain with the father pending the institution of an action for care by the mother, whereby facts would be thoroughly investigated with the aid of oral evidence.²³⁷

²³⁵ At 711.

²³⁶ *Ibid* at 710.

²³⁷ *Ibid* at 710.

The High Court, as upper guardian of all minors, could deprive the mother of the care of her child if it was in the best interests of the child. In *Edwards v Fleming*,²³⁸ it was held that the mother of a child born out of wedlock was the guardian and that guardianship could be interfered with if the welfare of the child was in danger.²³⁹ In *September v Karriem*,²⁴⁰ the court even dismissed the application of the mother of a child born out of wedlock and placed the child in the care of a stranger because the court was of the opinion that this was in the best interests of the child. In *Docrat v Bhayat*,²⁴¹ the father of a child born out of wedlock applied for care and control of the child after the mother's death. It was outrightly ruled that the father had no *locus standi* where it concerned the care and control of the child born out of wedlock. The court stated that the following was required before it would interfere in the care of the child:

"As a rule, the court will not deprive the guardian of custody unless the court has evidence before it proving that he does not have means to provide for the child adequately, or that there is something against his character which makes him an unfit and improper person to have such custody, or that there are some other special reasons advanced."²⁴²

It would seem from the application of the common law that although a distinction was made regarding care of children and their parents, the courts nevertheless resorted to the principle of the best interests of a child born out of wedlock rather than to any

²³⁸ 1909 TH 232.

²³⁹ In this case, the mother of a child born out of wedlock made a document in which she gave the child into the care of F 'for ever'. Mason J said:

"It is quite clear that a contract which practically makes a child a chattel cannot be enforced, not necessarily because it is an immoral contract, but because in these matters the welfare of the child is the determining consideration, and because the enforcement of such contracts would create conditions resembling slavery. The law in these cases is that the mother of a child born out of wedlock is its right and proper guardian, and therefore she has the superior claim, unless her character is such as to endanger the welfare of the child." (at 234-5).

²⁴⁰ 1959 3 SA 687 (C) at 261H.

²⁴¹ 1932 TPD 125.

²⁴² At 126-127.

rigid principle. Yet, they recognized at the same time that the mother was *prima facie* or ordinarily entitled to the care of her child born out of wedlock. In *Van Deil v Van Deil*,²⁴³ the court explained the meaning of “the best interests” as follows:

“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 in the matter cannot be ignored.”

South Africa is extremely heterogenous without consensus on lifestyle, morality, child-rearing practices or religion, and consequently there is a lack of agreement on what values should inform the choice of alternatives for a child.²⁴⁴ Julia Sloth-Nielson on the other hand, submits that the ‘best interests of the child’ demand that all children should receive equal treatment without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, ethnic or social origin, property, disability, birth or other status.²⁴⁵ Furthermore, the Convention on the Rights and Welfare of the Child goes further to prohibit discrimination on account of particular traits of the child’s parents or legal guardian.

The power of the court to interfere with parental authority and grant an order regarding care is far-reaching, but in the final instance, the best interests of the child should be the paramount consideration. In *Fletcher v Fletcher*,²⁴⁶ the court granted

²⁴³ 1966 4 SA 201 (C).

²⁴⁴ Clark 2000 *STELL LR* 8 submits that there is no agreement on which of the factors used are the most important to a child’s best interest or how to weight competing norms and she is of the view that it is probably misleading to suggest that the standard is determinative of what is best for any given child.

²⁴⁵ Sloth- Nielson 1995 *SAJHR* 409.

²⁴⁶ 1948 1 SA 130 (A) 134.

care of a seven year old son and a five year old daughter to the father.²⁴⁷ The court authoritatively laid down that the best interests of the child were paramount considerations. In *French v French*,²⁴⁸ the court outlined four categories for consideration in determining the best interests of a child viz; first, the child must feel welcome, wanted and loved. Secondly, the fitness of the proposed custodian to guide the moral, cultural and religious development of the child must be evaluated. Thirdly, material considerations relating to the child's well-being are also considered and fourthly, consideration may be given to the wishes of the child. The court may even grant a father sole custody.²⁴⁹ The court may not grant the application unless it is satisfied that it is in the best interests of the child and until it has considered the Family Advocate's report and recommendations if the Family Advocate has initiated an enquiry in terms of the Act.

In *Bethell v Bland*,²⁵⁰ the court held that the natural father was in a "special position" that is favoured over other third parties. This was a case where the maternal grandfather brought an application for the custody of a child born out of wedlock whose mother was still a minor.²⁵¹ The paternal grandparents brought a counter application, and the natural father intervened.²⁵² In his decision, Wunsh, J, referred to

²⁴⁷ The facts were briefly as follows: three years after his marriage to W, H joined the army. He was taken prisoner, and returned four years later to find that W had had a miscarriage six months previously. In granting H a divorce and awarding him care of the parties children, the trial judge based his decision primarily on the 'personalities' of the parties. The court was unable to say, in the evidence, that it was clearly in the interests of the children that they should be given to their mother.

²⁴⁸ 1971 4 SA 298 (W) 299.

²⁴⁹ S 2(6).

²⁵⁰ 1996 2 SA 194 (W).

²⁵¹ *Ibid* n 250 p 207.

²⁵² *Ibid* n 251 p 207.

the natural father and the maternal and paternal grandparents as third parties or outsiders who lacked an inherent right to the custody of the child.²⁵³ However, it was found that the biological relationship and genetic factors placed the natural father in a favourable position over other “outsiders.”²⁵⁴ Nevertheless, the court’s readiness to award care to the natural father was clearly due to the fact that it was the maternal grandparents, rather than the mother herself, who were vying for care of the child. It is evident from this case that although none of the incidents of parental authority automatically attaches to the father of an extra-marital child, the court will always act in the best interests of the child. If it is in the best interests of the child to award care to the father, this will be done.

In *Coetzee v Singh*,²⁵⁵ care was also granted to the father of a child born out of wedlock on the grounds that this was in the child’s best interests. With the introduction of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, the court was empowered to grant guardianship or care or contact to the father of an extra-marital child if this was in the best interests of the child. In *Chodree v Vally*,²⁵⁶ the natural father enjoyed a “preferential position” if the child was born in a committed relationship.²⁵⁷ There is also authority for the viewpoint that the natural

²⁵³ 209. The same was said by Tebbutt AJ in *Kaiser v Chambers* 1969 SA 224 (C) at 228E-G.

²⁵⁴ *Ibid* n 253 at 228E-G.

²⁵⁵ 1996 3 SA 153 (D).

²⁵⁶ 1996 2 SA 28 (W) 32. Wunsch J seemed to limit the father’s status as a “favoured third party” to “committed” relationships, such as religious marriages not recognised by our law. Palmer “Are some fathers of extramarital children in a better position than others?” 1996 *SALJ* 579 582 points out that a religious marriage and a committed relationship do not necessarily co-exists. The same is, of course, true of all other types of marriage. See also Bonthuys *op cit* n 66 p 13.

²⁵⁷ Wunsch J further remarked that: “Where a child is born of a committed relationship, such as a religious marriage not recognized by the law, the father has a preferential position as against non-parents when the grant of contact is concerned. The biological relationship and genetic factors must

father may apply to the High Court for care if that is in the best interests of the child. This was illustrated in the case of *Coetzee v Singh*.²⁵⁸ In this case, the child had been in his father's care for three years. The father could provide better accommodation and educational facilities for the child, and the mother had waived her right to care in the best interests of the child.

At common law, the court would sit as upper guardian of all minor children. From this point of departure, the principle of the best interests developed. The court in exercising its jurisdiction, does not proceed from the theory that the applicant, whether a natural father or mother, has a cause of action against the other or indeed against anyone. The court acts as *parens patriae* to do what is best in the interests of the child. It is not adjudicating a dispute between adversary parties to compose their differences or to determine rights "as between a parent and a child," or between one parent and another. The concern is the child. After 1994, the court still sits as upper guardian but now the Constitution compels it to safeguard the interests of the child. There has been a steady progression from the application of the maternal preference rule to the best interests principle. The assumption that a mother is necessarily in a better position to care for a child than the father is now increasingly regarded as an outdated concept and also, the discourse of equality invoked by the Constitution further strengthens the position of fathers, including unmarried fathers.²⁵⁹

In determining what is in the best interests of the child, the court must decide which of the parents is well placed to promote and ensure the physical, moral, emotional and

favour him as a provider of love and other emotional support."

²⁵⁸ 1996 3 SA 153 (D) at 154A.

²⁵⁹ Clark *op cit* n 244 p 8.

spiritual welfare of the child. Checking the marital status of the parents and whether the unmarried father acquired parental responsibility over the child should not be relevant in such determination. It is submitted that the decisions that have been discussed above primarily confirmed the common law position and have subsequently been entrenched by legislative provisions which are discussed below. These legislative provisions have been repealed by the Children's Act and drastic changes have been effected regarding the position of the unmarried father.²⁶⁰

Although only the mother had care over a child born out of wedlock, but the father could apply for care in terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997,²⁶¹ it was clearly stipulated in the Children's Status Act 82 of 1987 that status as a minor was no impediment regarding care of the child. This was an unfortunate situation as the law automatically excluded an unmarried father. Granting care to the mother was based on outdated child upbringing patterns that favoured mothers over fathers. Although the unmarried father could apply for care in terms of the Act, it is submitted that such care should have been automatic for both parents unless proven that this would not be in the best interests of the child concerned. It is further submitted that unmarried fathers should have been given a chance to assert their parenthood and that acquisition of parental responsibilities and rights over their children should not be approached with suspicion. They should equally be trusted like the mothers of the children.

Within the framework of the current law, custody has been replaced with 'care.' Care is defined more extensively and it includes, amongst others, providing the child with a

²⁶⁰ See schedule 4 repealed legislation and Children's Act 38 of 2005.

²⁶¹ Section 2(1) and S 2(5).

suitable place to live, living conditions that are conducive to the child's health, well-being and development, and the necessary financial support, the list is not exhaustive.²⁶² The parental responsibilities that a person may have towards a child include the responsibility and the right to care for the child.²⁶³ Therefore, the unmarried father who does not have parental responsibilities and rights towards the child in terms of section 20 and an unmarried father who has not acquired parental responsibilities and rights in terms of section 21 or failed to acquire parental responsibility by a court order, is not entitled to the care of the child. However, the unmarried father's duty to contribute to the maintenance of the child is not affected.²⁶⁴

It is submitted that the unmarried father who does not have 'care' of his child is deprived of the opportunity to guide and have significant influence in his/her upbringing. Safeguarding and promoting the well-being of the child also entails giving the child the opportunity to form and develop enduring relationships with both parents. The guiding and directing of the child in religious and cultural education is of primary concern. These are some of the aspects that are crucial in the development of the child and often create conflicts between parents. It is submitted therefore that, to deprive an unmarried father of the opportunity to be part of the decision making regarding the education, religious and cultural education of his child is unfair. Certainly, parents whether married or unmarried, will always be concerned, for example, about the religious education that their children will adopt in future. In the same vein, a parent who is the caregiver, guides, advises and assists the child in

²⁶² See further section 1(1)(a)-(j) of the Children's Act 38 of 2005.

²⁶³ Section (18)(2)(a).

²⁶⁴ See sections 21(2).

decisions to be taken by the child. This does not always imply that the caregiver who in this context assumed to be the mother will always give the child good advice. If she does, it is obvious that the child will always make choices based on her mother's preferences. A father's role is also crucial in guiding and directing children, particularly young male adolescents who need their fathers for advice on issues their mothers might not have any knowledge. It cannot be disputed that there are other male role models who could give advice in the extended family, others who are caregivers. It is in the best interest of the child to be guided by one's own father if alive and willing to participate.

3.3.2 *Guardianship*

3.3.2.1 *A general overview*

Guardianship refers to the capacity a parent has to administer his/her child's estate on the child's behalf and to assist the child in the performance of juristic acts, supplements any deficiencies in his or her judicial capabilities.²⁶⁵ The administration of the child's estate includes *inter alia*, acquiring and controlling assets and incurring and satisfying debts on the child's behalf. The child is the owner of all the property in his or her estate regardless of the source of the property. The parent only administers the child's property and does not have a usufruct over it unless the testator who bequeathed the property to the child stipulated that this would be the case.²⁶⁶

²⁶⁵ Davel *op cit* n 226 p 33, Cronjé and Heaton *op cit* n 112 p 205, Bosman and Van Zyl *op cit* n 112 p 53, Boberg *op cit* n 90 p 313, Sinclair and Heaton *op cit* 112.

²⁶⁶ Cronjé and Heaton *ibid* n 265 p 205.

3.3.2.2 Guardianship of children born out of wedlock

In case of a children born out of wedlock the common law provided that only the mother had the right of guardianship over the child.²⁶⁷ However, if the mother was unmarried and herself a minor, she could not be the child's guardian.²⁶⁸ In *Edwards v Fleming*,²⁶⁹ the mother of a child born out of wedlock established a document in which she gave the child into the custody of Fleming 'for ever'. The mother, thereafter, applied to the court for the return of her child. Mason J expressed himself as follows in this respect.²⁷⁰

"It is quite clear that a contract which practically makes a child a chattel cannot be enforced, not necessarily because in these matters the welfare of the child is the determining consideration, and because the enforcement of such contracts would create conditions that look like slavery... Moreover, the law in these cases stipulates that the mother of an illegitimate child is its right and proper guardian, and therefore, she has the superior claim, unless her character is deemed as to endanger the welfare of the child."

In *W v S*,²⁷¹ the court expressly stated that although the court, as upper guardian, had a wide discretion in this regard, it was also clear that interference would take place only if it was reasonable and if the order could be properly monitored. In light hereof, the court refused to issue an order whereby the child would be compelled to call his natural father "Daddy" and also refused to order the mother to register this child with

²⁶⁷ In *Van Rooyen v Werner* 1892 (9) SC 425 431 De Villiers CJ commented as follows in this respect: "As to illegitimate children, the mother alone and not the father, was recognized as the natural guardian." "The mother, and not the father, of an illegitimate child was generally speaking, the natural guardian of the child." *Edwards v Fleming* 1909 TH 232 234-5; *Docrat v Bhayat* 1932 TPD 125; *Mathews v Haswari* 1937 WLD 110, *Dhanabakium v Subramanian and Another* 1943 AD 160, 166; *Willes Principles of South African Law* 130; *Engar and Engar v Desai* 1966 1 SA 621 (T) 625H; *Ex parte Van Dam* 1973 2 SA 182 (W); *Nokoyo v AA Mutual Insurance Association Ltd* 1976 2 SA 153 (E); *Fv L* 1987 4 SA 525 (W); *Fv B* 1988 3 SA 948 (D) 953D; *Davel op cit* n 265 p 33.

²⁶⁸ *Dhanabakium v Subramanian & Another* 1843 AD 160, 166 per Tindall, JA, it was held that the mother of an illegitimate child who is herself a minor cannot be the child's guardian.

²⁶⁹ 1909 TH 232.

²⁷⁰ At 234-5.

²⁷¹ 1988 1 SA 475 (N) 495 (N).

the father's surname.²⁷² Since the mother of a child born out of wedlock has parental responsibilities and rights over that child, in the absence of an application by the natural father, she is responsible under the common law for the administration of that child's estate and legal transactions. A child born out of wedlock is registered under his/her mother's surname²⁷³ but the child's father may consent to the child bearing his surname.²⁷⁴ In *W v S*,²⁷⁵ the father of a child born out of wedlock applied for an order obliging the mother to take steps to change the child's surname to that of the father. The mother opposed the application and since the father did not present any evidence before the court demonstrating that the change of surname would be in the child's best interests, the order was rejected.²⁷⁶ This clearly shows the insensitivity of our courts to the situation of an unmarried father. It is important for a child to know both sides of

²⁷² Davel and Jordaan *op cit* n 46 p 321.

²⁷³ S 10(1)(a). Prior to the Births and Deaths Registration Amendment Act 40 of 1996, children born outside marriage were referred to in the principal Act as illegitimate children. Furthermore, children born to parents who were parties to either a customary union or a religious marriage not recognised as a marriage under the Marriage Act 25 of 1961 were dealt with as extra-marital children for the purposes of birth registration. The amending Act of 1996 introduced a definition of 'child born out of wedlock' which excludes from the definition children whose parents were 'married' at the time of the child's conception or any other time prior to the child's birth. In addition, section 1(2) was added to the principal Act providing that, for the purposes of the Act, 'marriage' includes a customary union and a religious marriage recognised by the Minister of Home Affairs. As a result, children born into customary unions or religious marriages not recognised as valid marriages under the Marriage Act may nonetheless be registered under the general provisions of the Act rather than under the provisions dealing with children born out of wedlock. See Boberg *op cit* n 90 p 313.

²⁷⁴ S 10(1)(b), as substituted by s 2 of the Birth and Deaths Registration Amendment Act 40 of 1996. Prior to 4 September 1998 (date of commencement of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997), the mother of an extra-marital minor child could, by application to the Director-General of Home Affairs, change the child's surname without reverting to the child's father, even in a case where the child was initially registered under the father's surname, (s 25(1)(c) of the Births and Deaths Registration Act 51 of 1992), prior to its substitution by s 11(b) of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. However, since the commencement of the latter Act, the natural father's written consent for a change of his extra-marital child's surname is required in cases where the child has been registered under the father's surname (s 11(b) of the Act, substituting s 25(1)(c) of the Births and Deaths Registration Act 51 of 1992. See Belinda Van Heerden 'Legitimacy, illegitimacy and the Proof of Parentage in Boberg *op cit* n 222 p 396.

²⁷⁵ 1988 1 SA 475 (N) 492.

²⁷⁶ Cronjé and Heaton *op cit* n 266 p 60.

his or her parentage and carry both names. The father failed to provide evidence to the effect that it would be in the best interests of the child to bear his surname but there is a need to balance the interests of the child with the parent's interests. It is submitted that a common ground should have been reached by the court and a child be given a 'double-barrel' surname representing both sides of his/her parentage and therefore securing the identity of the child.

It is, however, possible to register the child under the surname of the natural father, but this can only be done at the request of both the mother and the natural father and on condition that the father admits his paternity in writing.²⁷⁷ Where the child is registered under the natural father's surname, it remains possible for the mother to apply to the Director-General of Home Affairs for the alteration of the surname at any time.²⁷⁸ The consent of the natural father was not required for such an alteration. However, the Natural Fathers of Children Born out of Wedlock Act required that the natural father grants his written consent to the alteration unless a court grants an exemption from consent. As far as domicile²⁷⁹ is concerned, prior to the introduction of the Domicile Act 3 of 1992 on 1 August 1992, every person's first domicile (of origin) was acquired automatically at birth.²⁸⁰ If the child was legitimate, his or her

²⁷⁷ S 10(1)(b) of the Births and Deaths Registration Act 51 of 1992.

²⁷⁸ S 25(1)(c) of the Births and Deaths Registration Act 51 of 1992.

²⁷⁹ Domicile is defined by Cronjé and Heaton *op cit* n 276 p 37 as the place where a person is legally deemed to be constantly present for the purpose of exercising her rights and fulfilling her obligations, even in the event of her factual absence. A person's domicile plays a significant role in many fields of private law. For example, the question of whether a child is legitimate or extra-marital is determined by the law of the child's domicile of origin. Cronjé and Heaton *op cit* n 276 p 37. A person's *lex domicilii* is also important in the law of succession. It is for instance the law of intestate succession of the country in which the deceased was domiciled at the time of her death which determines how her/his movable property should devolve if she/he dies intestate. Cronjé and Heaton *ibid* n 276 p 37.

²⁸⁰ S 8(2) and (3) of the Domicile Act 3 of 1992.

domicile of origin was the father's domicile at the time of his or her birth; if the child was born out of wedlock, the domicile was his or her mother's. However, there is no longer any need to distinguish between a legitimate child and a child born out of wedlock, or between a natural child and an adopted child, for the purpose of determining domicile.²⁸¹ The Children's Status Act 82 of 1987 amended the law relating to paternity, guardianship and the status of certain children, and provided for matters connected therewith. Section 3 (2) provided as follows:

"If the mother of an extra-marital child was unmarried and a minor, the guardianship of that child shall, unless a competent court directs otherwise, be vested in the guardian of that mother, the custody of that child shall, unless a competent court directs otherwise, be vested in that mother. If the mother of an extra-marital child was under the age of 21 years but acquired the status of a major, the guardianship of the child shall be vested in her, unless a court directed otherwise."²⁸²

The High Court may terminate the mother's guardianship of her child if the court deems it necessary in the interests of the child. In terms of section 4, a child born out of wedlock is legitimated in all respects if the parents get married or marry after birth.²⁸³ This was applicable even if the parents were not legally married at the time of her conception or birth.

It is submitted that there was no mention of the biological father in section 3 and the impression created was that the mother or guardian was the only parent of the children born out of wedlock unless of course legitimated in terms of section 4 by subsequent marriage. Section 3 also violated the equality clause of the South African Constitution of 1996 regarding the prohibition against discrimination. An unmarried father was

²⁸¹ Section 2(3) of the Domicile Act.

²⁸² This section expressly excludes and isolates natural fathers of children born out of wedlock by depriving them of parental authority. It is also in conflict with the instructions of CEDAW in Article 16 paras (d) and (f) which states that the state should take all appropriate measures to ensure that men and women have "the same rights and responsibilities as parents irrespective of their marital status in matters relating to their children."

²⁸³ Act 82 of 1987 now repealed.

unfairly discriminated against on the ground of marital status. It also deprived the child's right to know and be cared for by both parents. It is further submitted that marriage as a prerequisite for subsequent legitimation of children is unfair discrimination against unmarried fathers as it violates their right not to marry as protected by International Conventions.²⁸⁴ However, guardianship is now regulated by the Children's Act and parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right to act as guardian of the child.²⁸⁵ In terms of this Act, the guardian of a child must administer and safeguard the child's property and property interests, assist or represent the child in administrative, contractual and other legal matters and consent or deny to consent as required by law.²⁸⁶ A non-exhaustive list of issues for which the consent of all persons that have guardianship of a child is required, is contained in the Act.²⁸⁷ Where more than one person has guardianship over a particular child, each of them is competent to exercise independently and without the consent of the other, any right or responsibility arising from such guardianship.²⁸⁸

It is clear from the provisions of the Children's Act that the unmarried father who does not have parental responsibilities and rights or whose parental responsibilities and rights have been terminated would not have guardianship over his child. The position of the law, it is submitted, is unfair and inequitable towards an unmarried

²⁸⁴ The discussion on the relevant provisions in this regard will be analysed under the heading International Conventions below in chapter 5.

²⁸⁵ Section 18(2)(c).

²⁸⁶ Section 18(3).

²⁸⁷ Section 18(3)(c).

²⁸⁸ Section 18 (4).

father and not in the best interests of the child especially when property is involved. It is unfair because being a guardian of a child entails among others taking care of the property interests of the child and a person other than a child's parent might not discharge this responsibility adequately.

3.3.3 *Contact*

3.3.3.1 *A general overview*

Contact had been defined as non-custodian parent's right and privilege to see, visit, spend time with, have contact with and enjoy the company of his or her child.²⁸⁹ The courts in various decisions have also defined contact as an incidence of parental rights and responsibilities, a general right to see and speak to a child and enjoy its company while the child was in the continued care of the caregiver and it had also been interpreted as to include the removal of the child from the physical control of the caregiver.²⁹⁰ However, it is interesting to note that in all the attempts to define contact, it had been defined in the context of a legitimate child. Within the framework of the Children's Act 38 of 2005 the 'term' access has been replaced with the word 'contact.' According to the Act, 'contact' means maintaining a personal relationship with the child and if the child is living with someone else, contact will entail communication on a regular basis with the child including visiting the child, being visited by the child or communicating with the child by post or by telephone or by other forms of electronic communication.²⁹¹

²⁸⁹ Cronjé and Heaton *op cit* n 279 p 280.

²⁹⁰ *Oosthuizen v Rix* 1948 2 PH B65 (W); *Myers v Leviton* 1949 1 SA 203 (T); *Marais v Marais* 1960 1 SA 844 (C) 845-846; *D v L* 1990 1 SA (W).

²⁹¹ Section 1(1) or 'contact.'

3.3.3.2 *Contact by the natural father to a child born out of wedlock*

The common law did not provide for contact by the natural father to his children born out of wedlock nor any authority on a non-custodian parent's rights of contact to a legitimate child. The assumption has been that since the father of a child born out of wedlock acquired no parental responsibilities and rights in respect of the child, and contact was seen as one of the incidents of parental responsibilities and rights, the natural father acquired no right of contact in respect of his child.²⁹²

However, it was held, on the basis of the authority of *Matthews v Haswari*,²⁹³ that the father of a child born out of wedlock does have a right of reasonable contact to such child. In *casu*, a mother claimed the return of her child born out of wedlock from the father who had removed the child from her care. The father resisted the application on the basis that the mother was not fit to have care. In the case of *Wilson v Ely*,²⁹⁴ the applicant and the respondent were married according to Muslim rites, had four children and thereafter, the applicant left the respondent. She placed one child in the care of a school. The respondent removed the child because "it came to him voluntarily and in rags and tatters". The return of the child was ordered to the mother and it was said that in the circumstances of the case, the father was entitled to contact as it was also his duty to provide maintenance. It is submitted that in this case contact was granted on the erroneous basis that it was, in effect, in return for the payment of maintenance.²⁹⁵

²⁹² Davel *op cit* n 265 p 36; *Fv L* 1987 4 SA 525 (W) 526-7; *B v S* 1995 3 SA 571 (A) 574-5.

²⁹³ 1937 WLD 110.

²⁹⁴ 1914 WR 34.

²⁹⁵ Cronjé and Heaton *Casebook on the South African Law of Persons* 123.

In both cases, the court was of the opinion that the father of a child born out of wedlock has a right of reasonable contact to that child.²⁹⁶ In *Dauids v Dauids*,²⁹⁷ care of the child born out of wedlock was granted to the father and the mother obtained a right of reasonable contact. In this case, the parties marriage had been in accordance with Malay rites and was not recognised in South African law. The best interests of the child formed the basis for the court's awarding care to the natural father, leaving the mother with a right of reasonable contact.²⁹⁸

The common law position was subsequently improved by the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997. However, this Act largely confirmed the common law. Section 2 of the Act required the father to approach the High Court for an order granting him contact to, care or guardianship over his child. Such order could only be granted "if it is in the best interests of the child". Although this Act²⁹⁹ did not give the natural fathers of children born out of wedlock automatic right of contact as envisaged by *Van Erk v Holmer*,³⁰⁰ it clearly defined the procedures to be followed by such fathers in applying to the High Court for contact rights to their children.³⁰¹ The basis of the court's decision in *Van Erk's*³⁰² case was that in view of changing social mores and public policy, any child should be granted a right to form a relationship with both parents regardless of whether one or the other is married to a

²⁹⁶ Spiro *op cit* n 91 p 458, Boberg *op cit* n 112 p 334. It has often been conceded that a court may grant reasonable access to a father if it is in the interests of the child.

²⁹⁷ 1914 WR 142.

²⁹⁸ Van Heerden in *Boberg's Law of Persons and the Family* 406.

²⁹⁹ Act 86 of 1997.

³⁰⁰ 1992 2 SA 638 (W).

³⁰¹ Section 2(1).

³⁰² *Van Erk v Holmer* n 300.

third party'. Furthermore the court's view was also that no restrictions should be placed on the right of contact of a father to his children born out of wedlock, the law should move towards the eradication of the distinction between married and unmarried fathers.³⁰³

(a) *The procedure in terms of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 was as follows:*

A natural father of a child born out of wedlock could make an application to the court for an order granting him contact rights, care or guardianship, on conditions determined by the court.³⁰⁴ An application for such rights was not to be granted unless the court was satisfied that it was in the best interests of the child,³⁰⁵ if any inquiry was instituted by the Family Advocate, the court had to consider the report and recommendations of the Family Advocate.³⁰⁶

The Court had a wide range of powers to establish what was in the best interests of the child. The court could initiate an investigation it deemed necessary to be carried out and could order any person to appear before it.³⁰⁷ It could order parties or any one of them to pay the costs of the investigation and appearance.³⁰⁸ The Act focused sharply on the conflicting interests of a natural father applying for contact rights, care

³⁰³ At 648-649.

³⁰⁴ Section 2(1) of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997.

³⁰⁵ Section 2(2)(a).

³⁰⁶ Section 2(2)(b).

³⁰⁷ Section 2(3).

³⁰⁸ Section 2(3).

or guardianship and a party applying for an order of adoption of the child.³⁰⁹ Such application appeared in a court in the course of any proceedings relating to a natural father on issues of contact rights, care or guardianship of his child born out of wedlock, that an application for an order of adoption of the child concerned had been made in terms of the Child Care Act 74 of 1983, the court was obliged to request the Family Advocate to furnish such request with a report and recommendations.³¹⁰ The court could suspend the proceedings regarding the natural father's application on such conditions as it deemed appropriate.³¹¹

The Natural Fathers of Children Born Out of Wedlock Act listed various circumstances to be taken into account by a court adjudicating on an application of a natural father for rights of contact, care or guardianship.³¹² These circumstances, although separately listed, all had a bearing on the central question, namely, that the court had to be satisfied before granting a natural father's application aforesaid that it was in the best interests of the child.

(b) *The circumstances taken into account were:*

- the relationship between the applicant and the natural mother and in particular, whether either party had a history of violence against or abusing each other or the child;³¹³

³⁰⁹ Bosman-Swanepoel, Fick and Strydom *op cit* n 265 p 53.

³¹⁰ Section 2(4)(a).

³¹¹ Section 2(4)(b).

³¹² Section 2(5).

³¹³ Section 2(5)(a). The interests of the child would not be served if he or she would to be exposed to a natural father considered to be abusive.

- the relationship of the child with the applicant and the natural mother, or either of them, or with proposed adoptive parents (if any) or any other person;³¹⁴
- the effect that separating the child from the applicant or the natural mother or proposed adoptive parents (if any) or any other person was likely to have on the child;³¹⁵
- the attitude of the child in relation to the granting of the application;³¹⁶
- the degree of commitment shown by the applicant towards the child, and in particular, the extent to which the applicant contributed to the lying-in expenses incurred by the natural mother during childbirth, expenditure in connection with the child's maintenance from birth till the date an order (if any) regarding payment of maintenance by the applicant for the child was issued and the extent to which the applicant complied with such order;³¹⁷
- Whether the child was born of a customary union concluded according to indigenous laws or customs or a marriage concluded under any religious law,³¹⁸ and
- any other fact that in the opinion of the court could be taken into account.³¹⁹

³¹⁴ Section 2(5)(b). It is clear that the Act contemplated on the possibility that a natural father might seek to enforce his rights under the Act against proposed adoptive parents. In such cases, it became mandatory for the Family Advocate to intervene.

³¹⁵ Section 2(5)(c).

³¹⁶ Section 2(5)(d). It is submitted by Bosman-Swanepoel, Fick and Strydom *op cit* n 309 that the older and more independent the child, the more weight will be attached to the attitude of the child as is the case in custody disputes concerning previously married parents.

³¹⁷ Section 2(5)(e). A sense of responsibility is required of a natural father wishing to exercise his rights under the Act. A natural father who has shown total commitment, including financial commitment, towards his child from the very beginning and throughout, must have a better chance of success than an irresponsible father who shirks his duty towards his child.

³¹⁸ Section 2(5)(f).

³¹⁹ Section 2(5)(g). The Court had a wide discretion to make any order which it may seemed fit to do.

The Act did not reverse the existing legal position pertaining to guardianship, care and contact. Basically, what it did was to establish that such fathers did not have any rights or powers over their children born out of wedlock. It must be noted however that the Act went beyond the decision of *Van Erk v Holmer*,³²⁰ because a natural father of a child born out of wedlock could apply for guardianship and care in the same way as contact.³²¹ In *F v B*,³²² it was emphatically stated that reasonable contact would only be granted to the father of a child born out of wedlock if he could indicate that it was in the best interest of the child. The court explained this by stating that the *de jure* position (namely that there is no legal bond between the father and his child born out of wedlock) could only be interfered with if the interests of the child necessitate such access.

However, in *Douglas v Mayers*,³²³ a case whereby the father sought contact as a matter of an inherent right, the court held that such a father was placed in the same position as third parties and had a right to claim contact, which would only be granted if the court was satisfied that it was in the child's best interests.³²⁴ Contact was an incident of parental responsibilities and rights which an unmarried father did not acquire over his child born out of wedlock. On the one hand, the court further emphasised the fact that a father acquired parental responsibilities and rights over his natural children in three ways: first, conception or birth from a legal marriage, secondly, legitimation and, thirdly, adoption. A mother, on the other hand, acquired

³²⁰ 1992 2 SA 636 (W).

³²¹ Davel *op cit* n 292 p 38.

³²² 1988 3 SA 948 (D).

³²³ 1987 1 SA 910 (Z).

³²⁴ 914D-E.

her parental responsibilities and rights through childbirth. She cannot give birth to a bastard. Consequently, the applicant did not acquire parental rights over the child. He could therefore, not have acquired any incidents of parental responsibilities and rights and he could not acquire them by having the child declared his natural offspring. The conclusion was, therefore, that the applicant did not have any *prima facie* right of contact with the child. The second issue was whether a natural father had the right to bastardise his child who was, by virtue of at least two legal presumptions, deemed to be the child of another.³²⁵ The court was of the opinion that the applicant had no right to interfere with the mother's choice as she had indicated that the second respondent was the father. Interference was only acceptable if it was in the interests of the child, which was not the case in this instance.

In *Fv B*,³²⁶ the court also qualified the best interests of the child as a paramount consideration by stating that contact would only be granted 'in exceptional cases where considerations relating to the interests of the child compel it to do so'. It must be pointed out that in *Douglas*' case it was found that it would not have been in the best interests of the child to grant the right of reasonable contact to the father. Although these cases held that the best interests of the child were paramount considerations in deciding whether or not to allow contact by the father, the cases also added further qualifications which resulted in the father of an illegitimate child having

³²⁵ A child born to or conceived by a married woman is presumed to be legitimate, ie the law presumes that the woman's husband is the child's father. This rule is expressed in the maxim *pate rest quem nuptiae demonstrant*. The second presumption is by virtue of section 1 of the Children's Status Act 82 of 1987 which provides that a man is presumed to be a father of a child born out of wedlock only if it is proved by way of judicial admission or otherwise that he had sexual intercourse with the child's mother at a time when the child could have been conceived. (see Cronjé and Heaton *The South African Law of Persons* p 49-50).

³²⁶ 1988 3 SA 948 (D).

a very difficult onus to discharge in order to be successful in his attempt to obtain the right of contact.

It was also held in *F v L*,³²⁷ whereby the applicant applied for an order to declare him the natural father of a child so that he would obtain the right of reasonable contact to the child. The mother of the child and her spouse (respectively the first and second respondents) denied that the applicant was the father of the child and opposed the application. It was evident that the first respondent gave birth to this child three weeks after her marriage to the second respondent. The applicant alleged that he was the natural father of the child because during the time in which conception could have taken place, he had engaged in sexual intercourse with the mother of the child. The mother of the child admitted that she had sexual intercourse with the applicant but declared that during that time, she also had sexual intercourse with the second respondent. She further supported the second respondent's allegation that he was the father of the child. The applicant and the first respondent terminated their relationship approximately one month later. The court concluded that the applicant had no *prima facie* right to have himself declared the natural father of his illegitimate child. He was, by law, liable to maintain the child unless his liability was destroyed by the choice exercised by the mother in selecting the second respondent as the father. Therefore, an unmarried father had no *prima facie* right of contact with a child born out of wedlock because he failed to prove that he was the father. Apart from the duty to maintain an illegitimate child, the father had, according to the common law, no further rights or duties with regard to such child.³²⁸ The duty to maintain such a child was therefore

³²⁷ 1987 4 SA 525 (W).

³²⁸ *F v L* 1987 4 SA 525(W); *Van Erk v Holmer* 1992 2 SA 638E-H; see also Jordaan 1988 *THRHR* 392 393-4.

independent of parental rights and responsibilities and did not grant the father the right of contact.³²⁹

It was further expressly stated in *B v P*³³⁰ that, contact was an encroachment of care rights. The facts were briefly as follows: The appellant was the father of an illegitimate child. When the child was born in 1979, the appellant and respondent were living together. In 1984, they ceased living together and the child had been living with the mother ever since. The mother permitted the appellant to see the child and take her to his home until February 1989, when, she refused to let him see or speak to the child anymore. He then applied for an order declaring that he was entitled to reasonable contact to the child. The application was dismissed in the court *a quo*.

Upon his appeal to the full bench of the Transvaal Provincial Division of the High Court, it was held that the appellant had to prove on a preponderance of probability that the contact was in the best interests of the child and that it would not unduly interfere with the mother's right of care. Contact is further regarded as an incident of parental responsibilities and rights which in the eyes of the law the unmarried father was deprived of.³³¹ This position was confirmed by the Appellate Division in *B v S*,³³² where the appellant and the respondent lived together and when they separated, the respondent was already pregnant. Although they again lived together for a while afterwards, they finally separated a few months after the child's birth. The appellant

³²⁹ *F v L* at 526-7.

³³⁰ 1991 4 SA 113 (T).

³³¹ See also *S v S* 1993 2 SA 200 (W) at 204. According to this case a natural father did not have parental responsibilities and rights as far as contact with his children born out of wedlock is concerned.

³³² 1995 3 SA 571 (A).

was present at birth, contributed towards the hospital expenses and paid maintenance for the child. When they finally separated, they agreed that the appellant could have contact with the child. However, the relationship between the appellant and respondent deteriorated to such an extent that the respondent refused the appellant any contact. The court in this case agreed with the decision in the case of *B v P*³³³ where it was held that the father of a child born out of wedlock did not have an inherent right of contact to the child. He could acquire such right by proving, on a preponderance of probabilities that contact would be in the best interests of the child and would not interfere unduly with the mother's right of care.³³⁴

The court held that although South African law did not accord a father an inherent right of contact with his illegitimate child, it, however, acknowledged the fact that the child's welfare was central in the matter of such contact and that contact was therefore available to the father if that was in the child's best interests. The father of a child born out of wedlock is in the same position as third parties, he has a right to claim and will be granted contact if he can satisfy the court that it is in the best interests of the child. The onus is on the applicant, in this case the father, to satisfy the court on the matter. The court will not intervene unless there is very strong reason compelling it to act as such. The court concluded that the "practical reality is that the father of an illegitimate child is not unfairly discriminated against". The court based its conclusion on the argument that neither party bears any onus of proof in first-time contact disputes because the litigation is not adversarial but is rather in the form of a judicial investigation. Based on this litigation, the best interests of the child must always be

³³³ 1991 4 SA 113 (T) at 114.

³³⁴ At 115H-117F.

the determining factor. The appellant refused to pay maintenance but took out an insurance policy and named the child as a beneficiary. The appellant approached the court *a quo* for an order granting him contact. Howie JA held:

“Having no parental authority, such a father is bereft of the very power from which any supposed inherent right of access could have originated *ex-lege*.”³³⁵

However, contact will be granted to the natural father if the court deems it to be in the child’s interests.³³⁶ In *B v P*,³³⁷ the interests of the child were considered the most important consideration. Another consideration to which attention was also given in this case was whether such an order will not interfere with the rights of the custodian parent. In *Van Erk v Holmer*,³³⁸ Van Zyl J sought to radically alter the position in respect of a father’s right of contact to his illegitimate child. The natural father of an illegitimate minor was granted contact to the child, following recommendations of the Family Advocate. The parents of the child were previously cohabitees, although he was bound by the full bench decision in *B v P*,³³⁹ Van Zyl J (sitting as the only judge) held that, although the common law was silent on the right of the father of an illegitimate child to have contact with his child, this did not mean that he had no such right. He further said that there was no justification for distinguishing between legitimate and illegitimate children. And therefore there was no justification for distinguishing between the fathers of legitimate and illegitimate children. He further emphasized that, although payment of maintenance was not a *quid pro quo* for exercise of the right of contact, it was manifestly unfair to compel the father of an illegitimate child to pay maintenance and to deny him the right to see his child. Van Zyl J concluded:

“The time has come for the recognition by the courts of an inherent right of contact by the natural father to his illegitimate child³⁴⁰ which right, would be taken away only if the contact should be shown to be contrary to the best interests of the child.”³⁴¹

³³⁵ *B v P* 1991 4 SA 113 (T).

³³⁶ *Ibid* n 335.

³³⁷ 1991 4 SA 113 (T).

³³⁸ 1992 2 SA 636 (W).

³³⁹ 1991 4 SA 113 (T).

³⁴⁰ 1992 2 SA 636 (W).

³⁴¹ At 649I-650A.

The court took the view that the lack of parental responsibilities and rights by a natural father did not impede the recognition of an inherent right of contact, since the latter was not necessarily an incident of the former. The decision of *Van Erk v Holmer*,³⁴² albeit overruled by the decision in *B v S*,³⁴³ requires consideration since it exemplifies the emergence of an ideology of formal equality.³⁴⁴ The court found that due to the fact that cohabitation is a frequent occurrence, it is immoral to penalize the children born from such unions by placing curbs on the rights of contact by their fathers.³⁴⁵ The court based its conclusions on the absence of common law authority regarding the natural father's right of contact, such as the need to prevent discrimination between natural and legal fathers, and between legitimate and extra-marital children, and the changed social perception of co-habitation outside marriage. The judge seems to have been sensitive to the fact that more was involved in the dispute than the vindication of legal rights. He repeatedly referred to the dynamics of the relationships involved- a dynamic which could be fully captured in the reductive language of the law of rights.³⁴⁶

The court gave a similar opinion in the case of *Chodree v Vally*³⁴⁷ whereby the existence of a committed relationship, such as extra-legal religious marriages, coupled with a biological link between the father and the child, place the father in a preferable position over outsiders in relation to the child. The court further held that it is

³⁴² 1992 2 SA 636 (W).

³⁴³ 1995 3 SA 571 (A).

³⁴⁴ Wolhuter *op cit* n 30 p 65 at 89.

³⁴⁵ Wolhuter *ibid* n 344 p 65.

³⁴⁶ *Ibid* n 345 p 89.

³⁴⁷ 1996 2 SA 28 (W) at 34E-J.

“generally to the advantage of a child to be in communication with both parents.”³⁴⁸

However, this inherent right of contact of the unmarried father was not recognized in other decisions.³⁴⁹

In *S v S*,³⁵⁰ the fact that contact was a consequence of parental responsibilities and rights was again emphasized, giving the mother the right to allow contact to the child and to control contact to others. In *casu*, the applicant (father) and the respondent (mother) engaged in an intimate relationship while both of them were still involved in other relationships. As a result of the relationship the respondent became pregnant. When this happened, she terminated the relationship with her other boyfriend. The applicant, however, refused to terminate his other relationship. Nevertheless, the respondent moved in with the applicant, but by the time the child was born, the parties were no longer living together. After the child’s birth, the applicant showed very little interest in the child. He saw the child’s mother only twice and this just in passing. The applicant initially denied paternity and refused to pay maintenance for the child but after the respondent approached the Maintenance Court and DNA tests performed, the applicant paid maintenance for the child. The applicant thereafter applied to the high court for an order granting him to have contact with his child. The respondent was at that stage living with her previous boyfriend, who was, for all intents and purposes, the father of the child. According to the respondent, the applicant was seeking contact merely as a *quid pro quo* for the payment of maintenance and not because he really

³⁴⁸ *Ibid* n 347.

³⁴⁹ *S v S* 1993 2 SA 200 (W) 204G; *B v S* 1993 2 SA 211 (W) 214E-F. Flemming DJP and Spoelstra J, sitting as single judges, respectively, rejected it and considered themselves bound by *B v P* 1991 4 SA 113 (T).

³⁵⁰ *S v S* 1993 2 SA 200 (W) 204G.

desired to see the child.³⁵¹ The best interests should be the predominant consideration and it ought not to be “cluttered by preconceived notions about the fairness of law.”³⁵²

In *B v S*,³⁵³ Spoeltra JA held and submitted that the decision in *B v P*³⁵⁴ was that the court had to be satisfied that “a very strong and compelling ground” existed, that would render contact in the best interests of the child. This unfortunate position has not only been the subject of debate in the cases, various academic writers have expressed their opinions.³⁵⁵ The opinion was that every child should have a right to a balanced upbringing that involved inputs from both mother and father (provided that they were fit and proper persons).³⁵⁶ If the father is not a fit and proper person to have such contact, the mother or any other interested party can always approach the court and prove, on a balance of probabilities that it is in the best interests of the child that the father should lose his inherent right of contact. Such right of contact should be based on paternity (as in the case of the duty to pay maintenance) and not on legitimacy. The legal status of parents should, therefore, only be relevant to regulate their position *inter se* and not with regard to their relationship with children.³⁵⁷ The natural father should have an inherent right of contact to his children without resorting

³⁵¹ *Ibid* n 350 at 204-205.

³⁵² *Ibid* n 351 at 205.

³⁵³ 1995 3 SA 571 (A).

³⁵⁴ 1991 4 SA 113 (T).

³⁵⁵ See Bedil 1987 *Annual Survey of South African Law* 94,95; Boberg 1988 (18) *BML* 35,38; Jordaan 1988 (51) *THRHR* 392; Van Onselen 1991 *De Rebus* at 500; Ohannessian and Steyn 1991 *THRHR* 245, 258; Eckard 1992 *TSAR* 122, 132; Sonnekus and Van Westing 1992 *TSAR* 232; Clark 1992 (8) *SAJHR* 565; Hutchings 1993 (56) *THRHR* 310; Goldberg 1993 (110) *SALJ* 261 and 416.

³⁵⁶ Van Onselen *ibid* n 355 p 500.

³⁵⁷ Boberg *op cit* n 355 p 35, 36.

to expensive litigation, and the problem of contact should be resolved from the viewpoint of the child's needs.³⁵⁸ According to Eckard,³⁵⁹ the need for reform is particularly necessary in the light of the current explosion in the incidence of "common law" marriages or cohabitation which indicates that "the time has come to no longer consider marriage certificate as a predetermining factor within the context of rights of contact."³⁶⁰

In the light of the uncertainty about whether a father has (or should have) an inherent right of contact with his illegitimate child, the South African Law Commission decided to investigate the position with a view to possible legal reforms.³⁶¹ Their working paper contained two different proposals in respect of the father's right of contact.³⁶² The first recommendation was the retention of the current position, that the father does not have an inherent right of contact but may obtain such a right on application to the High Court. The second recommendation was that the father be given an inherent right of contact, which could be removed or restricted by the court.

In essence, the position as regulated by the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, merely confirmed the common law position by declaring that the court may grant the father rights of contact and/ or care and/ or guardianship

³⁵⁸ Ohannessian and Steyn *op cit* n 355 p 245, 258.

³⁵⁹ Eckard *op cit* n 355 p 122, 123.

³⁶⁰ Eckard *ibid* n 359 p 123.

³⁶¹ Project 38 of 1985.

³⁶² Working paper 44 Project 79: "Report on the Rights of a Father in Respect of his Illegitimate Child."

if it was in the child's best interests.³⁶³ This gives the court the discretion which might not necessarily favour the unmarried father but which would be in the best interest of the child. However, this position of the unmarried father had now been changed by the Children's Act 38 of 2005. In terms of this Act, it is in the best interest of the child to remain in the care of his or her parent, family and extended family and to maintain contact with his or her family, extended family, culture or tradition.³⁶⁴ An unmarried father is regarded as a family member only if he had acquired parental responsibilities and rights towards the child.³⁶⁵ The parental responsibilities and rights that a person may have towards the child include the responsibility and the right to maintain contact with the child.³⁶⁶ It is clear that a father, who has acknowledged paternity of his child born out of wedlock, is guaranteed contact without any application to the court as would have been required by the Natural Father of Children Born out of Wedlock Act 86 of 1997. However, if the unmarried father did not acquire parental responsibilities or those parental responsibilities have been terminated, the Act excludes him as a parent and as a family member.

It is submitted that the South African family law does not recognise the blood tie between an unmarried father and his children. An unmarried father is treated as a third party. This position of the law is unfortunate because in African culture, blood link is treasured and protected. The role of the extended family and other strangers who might have acquired parental responsibilities and rights are acknowledged but they

³⁶³ S 2(1) and s 2(5) of Act 86 of 1997.

³⁶⁴ S 7(1)(f)(i) and (ii).

³⁶⁵ See the definition in chapter 2 on interpretation, objects, application and implementation of the Act.

³⁶⁶ S 18(2)(b).



are not in the same position as the child's biological relation. It is also not in the best interests of the child to maintain contact with outsiders and not with his or her father unless such contacts would be detrimental to the child's best interests.

3.4 ADOPTION

3.4.1 *A general overview*

Adoption is a formal process whereby parental responsibilities and rights over a child are terminated and vested in another person or persons, namely, the adoptive parent or adoptive parents.³⁶⁷ The legal relationship between a child and his or her birth parents is terminated.³⁶⁸ This relationship includes the duty of support and the right of intestate succession.³⁶⁹ Current South African law does not have separate rules for the adoption of children born out of wedlock and those born in marriage. The only difference between them is the issue of consent which will be discussed below. Adoption is regulated in chapter 4 of the Child Care Act.³⁷⁰ However in future adoptions will be regulated in terms of chapter 15 of the Children's Act 38 of 2005 which is not in operation yet. The most important requirement for the adoption of a child in terms of this Act is that the proposed adoption must serve the interests and welfare of the child.³⁷¹ This provision is also in accordance with the fundamental

³⁶⁷ See section 1 of the Child Care Act 74 of 1983 for the technical definition.

³⁶⁸ Davel *op cit* n 321 p 38.

³⁶⁹ Section 20(1), read together with sections 1(4)(e) and (5) of the Intestate Succession Act 81 of 1987. if, however, a child is adopted by a married person whose spouse is the parent of that child (that is, a stepparent adoption), then the adoption order does not terminate any rights and obligations existing between the child and such parent: Section 20(1), read together with section 17(c), and with section 1(4)(e)(ii) of the Intestate Succession Act 81 of 1987.

³⁷⁰ As amended by the Child Care Amendment Act 96 of 1996 and section 1 of the Welfare Laws Amendment Act 106 of 1997, the Adoption Matters Act 56 of 1998 and the Child Care Amendment Act 13 of 1999 now repealed.

³⁷¹ Section 230(1)(a).

principles enshrined in the South African Constitution that a child's best interests are of paramount importance in every matter concerning the child.³⁷² This is also the requirement of section 18(4)(c) of the Child Care Act³⁷³ which sets the 'best interests' of the child as the standard for adoptions.³⁷⁴ This consideration is ultimately the deciding factor and is not to be measured only by money or physical comforts. It includes all factors that will affect the child's future.³⁷⁵

3.4.2 *Adoption of children born out of wedlock*

The consent of both parents is required in the case of the adoption of a child born out of wedlock. However, such consent is only required if the father has acknowledged paternity in writing and has declared his identity and whereabouts.³⁷⁶ The unmarried father's consent was initially not a requirement in terms of the Child Care Act 74 of 1983; the Act required only the consent of the mother.³⁷⁷ Therefore, the common law disadvantaged an unmarried father. However, as a result of the decision of the court in *Fraser v Children's Court, Pretoria North*,³⁷⁸ the consent of both parents is now required.³⁷⁹ The unmarried father must be informed that he may apply to adopt the child but such notification can only be done if the father's whereabouts are known.

³⁷² Section 28(2).

³⁷³ Act 74 of 1983, now repealed.

³⁷⁴ See also *Naude v Fraser* 1998 4 SA 539 (SCA) also reported in 1998 8 BCLR 945 (SCA) and (1998) 3 ALL SA 239 (SCA). Section 28(2) of the Constitution of the Republic of South Africa 108 of 1996 should also be borne in mind here. It requires that the child's best interests must be of paramount importance in every matter concerning the child. See also CRC art 12 and 21.

³⁷⁵ *Re J (An Infant)* 1981 2 SA 330 (Z) 337.

³⁷⁶ Section 19A of the Child Care Act 74 of 1983.

³⁷⁷ Section 18(4)(d) of Act 74 of 1983.

³⁷⁸ 1997 2 BCLR 153 (CC).

³⁷⁹ Section 19A(1).

3.4.3 *The consent that was required*

Where a child was born out of wedlock, the consent of the mother and the natural father were required provided that such natural father had acknowledged his paternity in writing and made his identity and whereabouts known.³⁸⁰ This section had for many years provided that the mother had to consent to the adoption of her children born out of wedlock, irrespective of whether she was a minor or married, or whether she was assisted by her parent, guardian or spouse. Only the consent of the mother of a child born out of wedlock was required for the adoption of that child.

The father of a child born out of wedlock did not have the right to consent to or veto the child's adoption. His role was the same as that of third parties. This section was consistent with the common law rule that *een moeder geen bastaardt* which gave the mother of an illegitimate child the sole right to its adoption. It was also consistent with the provisions of section 3 of the Children's Status Act,³⁸¹ which placed guardianship and care of a child born out of wedlock in the mother unless she was a minor. The section also reinforced traditional sex roles in the family by attributing to the mother of a child born out of wedlock the role of primary care-giver and excluding the natural father from sharing in the parenting responsibilities. It also reinforced the notion of the traditional family which discriminated against cohabitants or live-in partners.³⁸²

³⁸⁰ Section 18(4)(d) of the Child Care Act 74 of 1983.

³⁸¹ 82 of 1987.

³⁸² The Act has now been repealed but not in whole.

In *W v S*,³⁸³ the court was not even prepared to grant an order for the natural father of a child born out of wedlock to be notified if the adoption of such child was considered. The fact that the unwed father had undertaken to fulfil his parental responsibilities towards the child was irrelevant. However, in *In re McLeod*,³⁸⁴ the court found that it was in the interests of the two children born out of wedlock that they be adopted by their natural father.³⁸⁵

In *Basetti v Louw*,³⁸⁶ the child's natural parents agreed that the father should pay maintenance and the mother not give the child up for adoption without his consent. The applicant then applied to the court for the agreement to be made an order of the court Margo J; granted the order. However, the effect of the order was not to transfer guardianship from the mother to the father. His consent would, therefore, not even be sought on the basis of any such guardianship, and his consent would equally not be necessary for the child's adoption. Their agreement could not change the position of the law whereby only the mother's consent was necessary for the adoption of the child if it is illegitimate (unless she deserted the child).³⁸⁷

It was also decided in *W v S*³⁸⁸ that, *Basetti* did not uphold the proposition that an unmarried father had specific rights to consent to the adoption of his natural child, which could be made an order of court. It merely recognised that an agreement

³⁸³ 1988 1 SA 475 (N) 496-7.

³⁸⁴ 1972 2 SA 383 (RA) 385.

³⁸⁵ See Mosikatsana *op cit* n 54 p 163; Heaton *op cit* n 295 p 346ff.

³⁸⁶ 1980 2 SA 225 (W).

³⁸⁷ Section 18(4)(d) of the Child Care Act 74 of 1983.

³⁸⁸ 1988 1 SA 475 (N).

between two parents granting the unmarried father the right to consent to adoption could be made an order of court. After the enactment of the South African Constitution of 1996, it was inevitable that this position had to change. The *Fraser v Children's Court, Pretoria North and Others*³⁸⁹ case pioneered the amendment of section 18(4)(d) of the Child Care Act. Section 18(4)(d) clearly conflicted with the equality clause contained in section 9 of the Constitution by distinguishing between unmarried fathers and fathers of children born in wedlock. It also unfairly discriminated between unmarried fathers and mothers of extra-marital children. The section discriminated between the rights of a father in certain unions. For example, unions which had been solemnised in terms of the tenets of the Islamic faith were not recognised in South African law because such systems allow polygamous marriages.

Consequently, the father of a child born out of an Islamic religious union would not have the same rights as the mother in adoption proceedings because of the provisions of section 18 of the Child Care Act. The child would not have "legitimacy" status and the consent of the father to the adoption would therefore not be required. However, fathers of children born from Black customary unions had greater rights than similarly placed fathers of children born from marriages contracted according to Islamic religions rites. This was a clear breach of the right to equality in section 9 of the Constitution.

This section also discriminated unfairly against fathers of certain children on the basis of their gender or marital status. There is a popular assumption that a child has a biological relationship with its mother who nurtures him/her during pregnancy and

³⁸⁹ 1997 2 SA 261 (CC).

that develops a bond with the child which is not comparable to that of a father. Every mother was given an automatic right of guardianship, subject to section 19 of the Child Care Act, to withhold her consent to the adoption of the child and that was denied to every unmarried father, regardless of the age of the child or the circumstances.³⁹⁰ Subject to section 19 of the Child Care Act, the consent of the mother was always necessary, but not that of the father.

The effect of section 18(4)(d) of the Act was that the consent of the father would, subject to section 19, be necessary where he was or had been married to the mother of the child and never necessary in the case of fathers who had never married. This implied that the consent of a father, who, after marriage to the child's mother, had shown no interest in the welfare of the child, would, subject to section 19, always be necessary. On the other hand, the father who had not married the mother but who had been involved in a stable relationship with the mother, and had shown real interest in nurturing and development of a child, would not be entitled to consent to the adoption of such child.

By denying the father of a child born out of wedlock the right to be informed of, or be made part of the adoption process, section 18(4)(d) violated the unmarried father's right to procedural fairness provided for in section 33(1) of the Constitution.³⁹¹ Section 9 of the Constitution provides for formal gender equality as it treats both unmarried mothers and fathers equally. Substantive equality would require

³⁹⁰ The denial was based on an unmarried father's failure to acknowledge himself as the father of the child or had, without good cause, failed to discharge his parental duties with regard to the child.

³⁹¹ Section 33 (1) and (2) provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and anyone whose rights have been adversely affected by administrative action, has the right to be issued with written reasons.

recognition that mothers are more closely connected to their children and fathers should be granted parenting rights if they demonstrate a willingness of parenthood. Although it is essential that the law recognises the relationship between an extra-marital child and its natural father, both formal and substantive equality between unmarried parents may potentially subordinate women. What should be done is to ensure that the unmarried father bears equal responsibility for the child's upbringing and becomes more involved in the daily activities of child's upbringing.

Parliament was given an opportunity to correct the defect in the Child Care Act 74 of 1983. In 1998, the Adoption Matters Amendment Act 56 of 1998 was passed. The amended section 18(4)(d) subsequently required consent to be granted by both parents of a child regarding adoption even if the child was born out of wedlock. The consent of the father was required if the court deemed it "expedient" and this implied that he had to be notified of the pending adoption application and of the fact that his consent was required. It must be noted that not all fathers were to be notified but only those who showed or had shown or had demonstrated some interests in their children or those whose identity had been disclosed by the mother. By requiring notice of the pending adoption to be given to the father, the law treated the father not as a parent of the child but merely as a third party who deserved to be heard. This was not in keeping with the recognition of the fact that an illegitimate child also had two parents.

The above discussion clearly indicates that South African Law prior to the new constitutional dispensation provided no special protection to the father of a child born out of wedlock when matters of adoption were considered. However, section 17(d) of the Child Care Act 74 of 1983 as amended by section 3 of the Adoption Matters

Amendment Act, provides expressly for adoption by the natural father of a child born out of wedlock.

Where the child to be adopted is above ten years, his or her own consent is required. The court must be satisfied that he or she understands the nature and import of such consent.³⁹² In the case of an application for the adoption of a foster child by a person other than the foster parents, the foster parents must state in writing that they do not wish to adopt the child. If they fail or refuse to make this statement within one month after being called upon to do so, the statement can be dispensed with.³⁹³

3.4.4 Position under the Children's Act 38 of 2005

The provisions of the Children's Act relating to adoption are similar to those that were set out in the Child Care Act 74 of 1983. Like the Child Care Act 74 of 1983, the Children's Act 38 of 2005 proceeds from the premise that both parents must consent to their child's adoption, regardless of whether or not the child was born in or out of wedlock, and permits dispensing with the parent's consent on certain grounds.³⁹⁴ Failure to respond to a notice of the proposed adoption and failure to discharge parental responsibilities are also grounds for dispensing with consent. But in terms of the Act, these grounds apply to anyone who has parental responsibilities in respect of

³⁹² Section 18(4)(e).

³⁹³ Section 18(4)(g).

³⁹⁴ S 233(1)(a) of the Children's Act 38 of 2005 and the grounds of dispensing with the consent of the father correspond largely to those indicated by section 19 of the Child Care Act 74 of 1983, that is, failing to acknowledge paternity and the child having been conceived through incest or rape. The section makes provision for various ways in which a man can acknowledge paternity, namely:

“giving a written acknowledgement that he is the biological father of the child either to the mother or to the clerk of the children's court before the child reaches of paternity to the child's mother or the child age of six months;
by voluntarily paying maintenance for the child,
by paying damages in terms of customary law,
by causing his particulars to be entered in the child's birth registration in terms of the Births and Deaths Registration Act 51 of 1992.”

the child, not just the parents of a child born out of wedlock. As the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 did not automatically grant the father any rights but simply empowered the court to grant the father rights if it is in the best interests of the child, this merely confirmed common law.³⁹⁵ The Children's Act 38 of 2005 replaced the provisions of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 by a new set of rules which, *inter alia*, automatically confer parental responsibilities and rights on certain fathers of extra-marital children.³⁹⁶ In terms of the Children's Act 38 of 2005, the biological father will automatically have parental responsibilities and rights 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, consents to be identified or successfully applies in terms of section 26 of the Act to be identified as the child's father, pays damages in terms of customary law; contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period of time.³⁹⁷

It is submitted that the above conditions as set in the Act for the unmarried father for acquisition of parental responsibilities and rights are unfair and unwarranted as mothers acquire such parental rights and responsibilities automatically upon the birth of the child. Therefore, it would mean that if the unmarried father did not satisfy any of the conditions and consequently lacked the required parental responsibility his

³⁹⁵ Now repealed; see also Cronjé and Heaton *op cit* n 220 p 63.

³⁹⁶ Section 21.

³⁹⁷ Sections 21(1)(a)(b).

consent for the adoption of his child would not be required. This is a violation of an unmarried father's rights as a parent. This also undermines the whole concept of fatherhood. There is a need to encourage fathers to take responsibility of caring for their children. The Act goes further to stipulate that if an unmarried father has consistently failed to fulfil his parental responsibilities towards the child during the last 12 months, then his consent to the adoption of his child is not required.³⁹⁸ This requirement is absurd as there might have been reasons beyond the control of the unmarried father that contributed to his non-fulfilment of these parental responsibilities. Although it is crucial and important for the unmarried father to discharge his responsibilities towards his children, it is unreasonable for the law to place a time frame for compliance and at the same time, divest the unmarried father of his responsibilities and rights. He might have been struggling to get a job and given the present economic climate in South Africa, it is not easy to find a job within 12 months unless a person is highly skilled.

Furthermore, depriving an unmarried father of the opportunity to give or withhold consent to the adoption of his child simply because he failed to respond to a notice of the proposed adoption within 30 days is unfair.³⁹⁹ The adoption of a child does not only have serious legal implications but emotional scars. It is submitted that the unmarried father should at least be given enough time to consider the decision regarding his child's adoption or even a decision to adopt the child himself.⁴⁰⁰ This cannot depend on a twelve months period if it is a lifetime decision that requires

³⁹⁸ Section 236(1)(d).

³⁹⁹ Section 236(1)(f).

⁴⁰⁰ Section 239.

enough time for careful consideration and possible counselling. It is submitted that an unmarried father be given reasonable chance to exercise this right.

3.5 MAINTENANCE

3.5.1 *A general overview*

Maintenance, support or alimony is used interchangeably under the common law to denote not only the necessities of life, such as food, clothing and shelter, but also to extend to education and care during sickness, which the child must be provided with as requirements for proper upbringing.⁴⁰¹ The present South African position on maintenance is based on the common law, and this duty takes effect by law upon the child's birth. This applies regardless of whether the child is born in or out of wedlock.⁴⁰² This means that the common law does not distinguish between the maintenance obligation of children born out of wedlock and the maintenance obligation for children born in wedlock. Although maintenance has not been defined in the Act and still retains its common law meaning, the concept of parental responsibilities and rights also includes the responsibility and right to contribute to the maintenance of a child.⁴⁰³ Basically, maintenance entails providing a child with food, shelter, clothing education and medical expenses.

(a) The parent's duty of support

A parent's duty to support their children whether legitimate or born out of wedlock was established in Roman and Roman-Dutch Law, and has been affirmed in many

⁴⁰¹ Spiro *op cit* n 296 p 397.

⁴⁰² S 15(3)(a) of the Maintenance Act 99 of 1998.

⁴⁰³ Section 18(2)(d) of Act 38 of 2005.

decisions of our courts.⁴⁰⁴ The parental duty of support seems to be founded on the blood relationship (paternity rather than legitimacy).⁴⁰⁵ Although the natural father of a child born out of wedlock is regarded in law as unrelated to the child, he is liable to maintain it.⁴⁰⁶ The responsibility has been said to arise from a 'sense of natural justice, from filial and parental dutifulness and from blood affection.'⁴⁰⁷ Deriving neither from implied contract nor from the parental power,⁴⁰⁸ it originates *ex lege* and creates an obligation *sui generis*.⁴⁰⁹

⁴⁰⁴ Boberg *op cit* n 298 p 240; *R v Davies* 1909 EDC 149 at 155, *Adams v Abrahams* 1918 CPD 24 at 25-6; *R v Van der Westhuizen* 1924 370 at 372-3; *R v Rantsoane* 1952 3 SA (T); and *R v Mofokeng* 1954 1 SA 487 (O), 489 where it was apparent that the absence of a duty to maintain in accordance with the customary law was not a defence. *S v Pitsi* 1964 4 SA 583 (T); *Lamb v Sack* 1974 2 SA 670 (T) at 671-3, *Tate v Jurado* 1976 4 SA 238 (W) 241, *Williams v Shub* 1976 4 SA 567 (C) at 570; *Van Der Harst v Viljoen* 1977 1 SA 795 (C) at 798; *Sager v Bezuidenhout* 1980 3 SA 1005 (O) at 1009; *Louw v Van Rensburg* 1982 3 SA 36 (SWA) at 39; *Douglas v Mayers* 1987 1 SA 910 (ZH) 912J; *F v L* 1987 4 SA 525 (W) 525E; *Van Zyl v Serfontein* 1989 4 SA 475 (C) 477G.

⁴⁰⁵ Boberg *ibid* n 404 p 240.

⁴⁰⁶ Boberg *ibid* n 405 p 240.

⁴⁰⁷ Boberg *ibid* n 406 p 240.

⁴⁰⁸ Boberg *ibid* n 407 p 240; *Davel op cit* n 368 p 42; *Spiro op cit* n 401 p 385; Brigitte Clark 1992 55 *THRHR* 277, 1993 *CILSA* 606, Voet distinguishes between maintenance due 'under contract or legacy, and that which is supplied 'in virtue alone of family duty and the corresponding behest of law'. The distinction between duties of support arising *ex contractu* and those arising *ex lege* is important in relation to a dependant's action against a third party who has negligently killed the person who was maintaining him or her. Such an action cannot be based on a contractual duty of support. The duty must arise *ex lege* by virtue of the relationship of the parties; *Nkabinde v SA Motor & General Insurance Co Ltd* 1961 1 SA 302 (D); *Amod v Multilateral Motor Vehicle Accidents Fund* 1977 12 *BCLR* 1716 (D). The distinction is also relevant to the means by which the duty of support may be enforced. The duty of support arises even if the child is born as a result of an unwanted pregnancy.

In *Administrator Natal v Edouard* 1990 3 SA 581 (A), the Administrator was ordered to compensate the parents for the costs of the maintenance and support of a child who was born after the hospital doctors had failed to perform a sterilization in terms of a contract undertaking to do so. The court held that this merely enabled the parents to fulfil their duty of support. It did not transfer the duty to the Administrator. A duty of support can also come about *ex contractu* under circumstances in which no such common-law or statutory duty exists. Such a contractual duty of support is regulated by the general principles of the law of contracts: see for example *Smit v Smit* 1980 3 SA 1010 (O); *Union Government v Ocean Accident & Guarantee Corp Ltd* 1956 1 SA 577 (A).

⁴⁰⁹ See *In re Estate Visser* 1948 3 SA 1129 (C) and *Vermaak v Vermaak* 1945 CPD 89.

(b) *The requirements for the duty are:*

- the ability on the part of the person obliged to provide maintenance to do so;⁴¹⁰
- the inability on the part of the person entitled to maintenance to maintain himself or herself; and
- a relationship between the person entitled to maintenance and the person obliged to provide maintenance, on the basis of which the law imposes a duty of support.⁴¹¹

(c) *The scope of the duty of support*

The scope of the duty of support depends on the circumstances of each case. The extent to which maintenance must be provided, depends on the social status and financial position of the family.⁴¹² A child may therefore be entitled to more than just the basic necessities of life.⁴¹³ In appropriate circumstances, a child may be entitled to a university or other possible post-school education even if it goes beyond maturity. The issue of the parent's educational duty particularly with regard to post-school education (such as university education) was investigated in detail in *Smit v Smit*⁴¹⁴ and summarized in these words by Judge Flemming:⁴¹⁵

⁴¹⁰ *Ncubu v National Employers General Insurance CO Ltd* 1988 2 SA 190 (N); *Spiro op cit* n 408 p 385.

⁴¹¹ See in general Van der Vyver and Joubert *Persone-en Familiereg* at 630; *Spiro ibid* n 410 p 392; *Davel op cit* n 408 p 50; *Robinson op cit* n 220 p 239; *Cronjé and Heaton op cit* n 220 p 210, and the cases referred to.

⁴¹² *Cronjé and Heaton ibid* n 411 p 210.

⁴¹³ See *Gliksman v Talekinsky* 1955 4 SA 468 (W); *Chamani v Chamani* 1979 4 SA 804 (W); *Smit v Smit* 1980 3 SA 1010 (O); *Mentz v Simpson* 1990 4 SA 455 (A) and *Ncubu v National Employers General Insurance Co Ltd* 1988 2 SA 190 (N)

⁴¹⁴ 1980 3 SA 1010 (O).

⁴¹⁵ At 1021C-D.

“I will assume that it firstly has to be recognized that the parent in the final analysis is entrusted with a discretion, the existence of which is of particular importance with regard to tertiary education and allows not only a discretion about the provision or not of such education, but also the termination or not of education of which part has commenced.”

In the case of *Mentz v Simpson*,⁴¹⁶ the court made the following statement with regard to university training:

“The statement that a parent is not legally obliged (unless he consents to do so) to pay for his child’s university education is not in accordance with my conception of the law. It is true that the duty of support includes the obligation to provide the child with a suitable education. However, this depends on issues such as the child’s intellectual capacity, the financial and available resources of the family this may extend to university education.”

In *Theiss v Theiss*,⁴¹⁷ the Appellate Division held that a caregiver parent is entitled to decide whether a child on leaving school should receive further education. In this case, it seems that the attempt by the mother to compel the father to provide maintenance for further education failed because insufficient information had been furnished to the court *a quo* as regards the child’s intellectual ability, the standard of living and income of the parents.⁴¹⁸

3.5.2 *The duty to support a child born out of wedlock*

A child’s right to be supported by both parents is not affected by the fact that he or she is born out of wedlock.⁴¹⁹ The father’s obligation in this regard is no less onerous than the mother’s, and the liability is apportioned between them in proportion to their respective means.⁴²⁰ All children should be treated equally as far as their right to

⁴¹⁶ 1990 4 SA 455 (A).

⁴¹⁷ 1977 1 PH B4 (A).

⁴¹⁸ *Boberg op cit* n 408 p 245; *Richter v Richter* 1947 3 SA 86 (W) at 92; see also *Ex Parte Jacobs* 1982 3 SA 276 (O) at 278.

⁴¹⁹ *Cronjé and Heaton op cit* n 412 p 148- 151; *Davies v R* 1909 EDC 149; *A v M* 1930 WLD 292; *Sager v Bezuidenhout* 1980 3 SA 1005 (O); *Lamb v Sack* 1974 2 SA 670 (T); see also s 15 (3) (a) (iii) of the Maintenance Act 99 of 1998.

⁴²⁰ Clark in *Boberg’s Law of Persons and The Family* p 241.

maintenance by their fathers is concerned. The views expressed by Barry J in *A v M*,⁴²¹ to the effect that a distinction must be drawn in this regard between legitimate and extra-marital children and that the extra-marital child was not entitled to maintenance from his or her father on the same scale as a legitimate child were rightly rejected by Trengrove J in *Lamb v Sack*.⁴²² This case concerned a dispute between the mother (appellant) and the father (respondent) of an illegitimate child about the payment of the child's maintenance. The respondent lodged a complaint with the maintenance officer whereby he sought to have his contribution reduced.

The appellant lodged a counterclaim asking for the respondent's contribution to be increased. An enquiry by the maintenance court resulted in the reduction of the respondent's monthly contribution. The appellant appealed against this order. The respondent's attitude to the appeal was that he was required to make a much bigger contribution towards the maintenance of the child than he was legally obliged to do.

He submitted that, although the duty of support ordinarily rests on both parents, the natural father of an illegitimate child is, as a matter of public policy, never called upon to make more than a nominal contribution towards maintenance of such children unless the mother is indigent. It must be noted that although the Judge in the *Lamb's* case was dealing specifically with the rights of a child of divorced parents to maintenance, it seems to be clear that according to the Roman-Dutch law authorities, these principles apply with equal force to the apportionment, *inter se*, of the respective shares of the joint obligation, which also rests upon the natural parents of

⁴²¹ 1930 WLD 292 at 293-4.

⁴²² 1974 2 SA 670 (T) at 671-3.

an illegitimate child to support such child.⁴²³ In *Zimelka v Zimelka*,⁴²⁴ the court came to the conclusion that the custodian father (who earned R 12 000 a month) did not require a contribution from the mother (who earned R 1 400 a month) and who contributed by having the children in her care for two-and-a half to three months each year.⁴²⁵ In the case of *W v S*,⁴²⁶ the court held that the extent of the maintenance required by the extra-marital child is determined not by a child's status, but by the child's reasonable needs in the circumstances, provided that the 'circumstances' taken into account by the court include the financial resources, earning capacity, standard of living and other relevant details of both parents. The equality of parental obligations was stressed in the above cases. Maintenance which was claimed for a child born out of wedlock also included the lying-in expenses.⁴²⁷ In *Card v Sparng*,⁴²⁸ it was explained that lying-in expenses are included and must be borne by both parents in relation to their respective means because these expenses are also incurred to the

⁴²³ *Union Government v Warneke* 1911 AD 657 at 663, 668-9; *Hartman v Krogscheepers* 1950 4 SA 421 (W) at 423.

⁴²⁴ 1990 4 SA 303 (W).

⁴²⁵ See also *Osman v Osman* 1992 1 SA 751 (W); *Tate v Jurado* 1976 4 SA 238 (W) at 241H; South African Law Commission Report on the "Investigation into the Legal position of Illegitimate Children" Project 38 October 1985.

⁴²⁶ 1998 1 SA 475 (N) at 495-6.

⁴²⁷ According to *Boberg op cit* n 418 p 420 the South African courts have used the term 'lying-in expenses' in both a narrow and a wide sense. In its narrow meaning, 'lying-in expenses' covers those expenses directly occasioned by the birth of the child, such as medical and hospital expenses and the purchase of necessities for the baby. However, in a number of cases, maintenance for the mother for the period before, during and after her confinement has been included under and regarded as forming part of the lying-in expenses: see also *Spies Executors v Beyers* 1908 TS 473 479-80 where it was held that such an action, in so far as only pecuniary loss (i.e lying-in expenses, maintenance for the child while it lived, and funeral expenses) was claimed, lay also against the estate of the seducer after his death, *Kalamie v Armadien* 1929 CPD 490; *Macdonald v Stander* 1935 AD 325 330; *Botha v Peach* 1939 WLD 153 at 155-6; *Jacobs v Lorenzi* 1942 CPD 394 at 400; *Lourens v Van Viljoen* 1967 1 SA 703 (T) at 713; *Van der Harst v Viljoen* 1977 1 SA 795 (C); *Sager v Bezuidenhout* 1980 3 SA 1005 (O) at 1009 and *Louw v Van Rensburg* 1982 3 SA 36 (SWA).

⁴²⁸ 1984 4 SA 667 (E) 671.

advantage of the child.⁴²⁹ Maintenance in respect of a child born out of wedlock also includes arrear maintenance.⁴³⁰ If the mother marries a third party out of community of property, she remains responsible together with the natural father, for the support of her extra-marital child.⁴³¹ If she marries in community of property, her means generally consists of an undivided indivisible half share of the joint estate.⁴³² The duty to support children born out of wedlock also rests on the estate of a parent after his or her death.⁴³³ In *Carelse v Estate De Vries*,⁴³⁴ the plaintiff was seduced by a married man with children after he promised he would marry her. It was only after the birth of her first child that she discovered that he was married. However, she remained his mistress until his death twenty-one years later. During this period, six other children were born from the relationship. De Vries maintained the mistress and the children until his death. De Vries's estate was sufficient enough for the maintenance of his legitimate children. Contrary hereto, the plaintiff was very poor. The court decided that as mother and guardian of the children, she was entitled to claim maintenance from the estate of the natural father until when the children were self-supporting.⁴³⁵

⁴²⁹ See cases referred to in fn 404 above, and in *Sager v Bezuidenhout* 1980 3 SA 1005 (O), where there was no clear proof of the actual maintenance which the mother had required for herself, the court was nevertheless prepared to estimate and award a reasonable amount in respect of it.

⁴³⁰ *Farrel v Hankey* 1921 TPD 590 597; *Woodmead v Woodmead* 1955 3 SA 138 (SR) 141; *Herfst v Herfst* 1964 4 SA (W) 130-1; *Tate v Jurado* 1976 4 SA 238 (W) 240A.

⁴³¹ Marriage out of community of property creates a separation of the spouse's property for the duration of the marriage. The spouses are not liable for each other's debts, save from the exception pertaining to household necessities.

⁴³² Cronjé and Heaton *op cit* n 419 p 211.

⁴³³ See Spiro *op cit* n 410 p 390; *Kramer v Findlay's Executors* 1878 8 Buch 51; *Spies v Executors v Beyers* 1908 TS 473; *Secretary for Inland Revenue v Brey* 1980 1 SA 472 (A) at 480; *Van Zyl v Serfontein* 1992 2 SA (C) at 456-8.

⁴³⁴ 1906 23 SC 532.

⁴³⁵ The court motivated this as follows at 538: "to do more would be against the policy of the law, which discourages all illicit relations between the sexes: to do less would be absolute cruelty to the innocent illegitimate offspring, besides being a gross injustice towards the mother in throwing upon her the whole burden of maintaining the children, for whose existence the deceased was primarily

On the death of either parent, that parent's duty to support the extra-marital child fell on his or her deceased estate. If parents or their estates were unable to render support, the duty passed on to the child's maternal grandparents⁴³⁶ in spite of a contrary decision of the Appellate Division.⁴³⁷

In *Motan v Joosub*,⁴³⁸ the appellant was married to the respondent's son by Mohammedan rites. She and the respondent's son had four children all minors at the time the action came before the court. As the union between the appellant and the respondent's son did not constitute a valid marriage according to the prevailing law, their children were illegitimate. The appellant claimed maintenance for the children from the respondent. She averred, *inter alia*, that the respondent, being the paternal grandfather of the children, was liable to support his son's illegitimate children. The respondent, however, denied any liability. Subsequently, the appellant excepted against this plea but the exception was dismissed and it was held that the paternal grandfather of the illegitimate children was under no duty to support them. In reaching the decision Wessels JA, traced the developments of our law in this respect and concluded that Roman-Dutch Law did not place any liability on the paternal grandfather to maintain his son's illegitimate children. He further argued that the maternal grandfather of an illegitimate child was fully aware that it was his daughter's

responsible.”

⁴³⁶ Boberg *op cit* n 427 p 253; *Motan v Joosub* 1930 AD 61; *Lloyd v Menzies* 1956 2 SA 97 (D) at 101-2; Spiro *op cit* n 433 p 395 fn 95.

⁴³⁷ According to *Motan v Joosub* *ibid* n 436 p 61 not to the child's paternal grandparents. It is also argued that extra-marital children have a duty to support their maternal grandparents, but not their paternal grandparents. However, Boberg is of the view that this position also applies to the child's paternal grandparents, on the basis of the recent constitutional and international legal development in South Africa.

⁴³⁸ 1930 AD 61.

child, and if called upon for support, proof of the nexus *sanguinis* was at hand. If however, the paternal grandfather was called upon to pay, he might perhaps be sufficiently certain in those cases where the woman was the son's concubine where they lived together as husband and wife, but in no other case could he be certain. According to the Judge, to hold therefore that the paternal grandfather was liable to maintain every illegitimate child of his son would be to impose on him a burden which could be difficult for him to take off.

However, this decision has been criticised by various academic writers. Cronjé and Heaton⁴³⁹ cite Van der Heever⁴⁴⁰ who concluded, after an analysis of Roman-Dutch Law, that there was indeed authority for holding the paternal grandparents of an illegitimate child liable for the support of the child. He submits that "this decision is so patently wrong that it should be reconsidered",⁴⁴¹ for it is based on legislative considerations and methods which are, moreover, unsound. It is contrary to public policy and humanity, and should, if necessary, be rectified by the legislature.⁴⁴² Davel and Jordaan and Boberg point out that it is illogical to argue (as Wessels JA did) that the paternal grandfather cannot be certain that the child is in fact his son's.⁴⁴³ Before any liability to support a grandchild can be placed on a grandparent, it must first of all be proven that the person is in fact the grandparent of the child. It could easily be

⁴³⁹ Cronjé and Heaton *op cit* n 432 p 211.

⁴⁴⁰ Boberg *op cit* n 436 p 253.

⁴⁴¹ *Ibid* n 440 p 253.

⁴⁴² Cronjé and Heaton *op cit* n 439 p 211.

⁴⁴³ Davel and Jordaan *op cit* n 46 p 361; Boberg *op cit* n 436 p 341 fn 53.

argued today that the decision of the court in *Motan v Joosub*⁴⁴⁴ is unfair and unacceptable as it is clearly in conflict with our common law and public policy.⁴⁴⁵

However, the Cape Provincial Division of the High Court recently in the case of *Peterson v Maintenance Officer*⁴⁴⁶ declared this rule unconstitutional on the grounds that it unjustifiably violated the extra-marital child's right not to be unfairly discriminated against on the grounds of birth and his right to dignity, and failed to afford paramountcy to the child's best interests. The court's extension of grandparent's duty of support to paternal grandparents is supported. Unfortunately, it is still unclear whether a child born out of wedlock is obliged to support his or her father and paternal grandparents. It is also still unclear whether a grandparent's duty of support passes to his or her deceased estate.

Although the common law does not distinguish between maintenance of children born in wedlock and of children born out of wedlock by their parents, the extra-marital child must support his/her mother and relations, the position as far as the child's father and his family are concerned, is not quite clear. Some authors are of the opinion that the father and his relations may not have a right to claim maintenance from the extra-marital child.⁴⁴⁷ Cronjé and Heaton have argued that, this opinion seems to be based on the fallacious argument that the father of an extra-marital child is unrelated to his child. What the father actually lacks is parental authority- not a relationship to the child. This is illustrated by the fact that he is treated exactly like the father of a

⁴⁴⁴ Boberg *ibid* n 443 p 341.

⁴⁴⁵ *Ibid* n 444 p 341.

⁴⁴⁶ 2004 1 ALL SA 117 (C), 2004 2 BCLR 205 (C).

⁴⁴⁷ Cronjé and Heaton *op cit* n 442 p 70 fn 235.

legitimate child for purposes of determining the degrees of relationship.⁴⁴⁸ Furthermore, denying the father and his blood relations the right to claim maintenance from his extra-marital child would constitute unfair inequality before the law and unequal protection and benefit from the law. It is equally an unfair discrimination based on birth and conflicts with the provisions of the Constitution on children's rights. The Constitution enshrines the child's interests as a major concern thus rendering the unfair discrimination against an unmarried father unconstitutional.⁴⁴⁹

Although maintenance at common law is not a component of parental power, it is nevertheless an important aspect of the parent-child relationship because the father of a child born out of wedlock has a duty to support the child although he did not automatically have parental rights and responsibilities over the child and such duty could even continue long after parental rights and responsibilities had been terminated. The irony is that although the duty of support is generally reciprocal, according to the common law, a child born out of wedlock need not maintain his/her natural father.⁴⁵⁰

It is also accepted that there is a reciprocal duty of support between a child born out of wedlock and his/her blood relations on the mother's side but, unjustly, it has been held that the same is not applicable to the blood relations on the father's side.⁴⁵¹ Not

⁴⁴⁸ Cronjé and Heaton *ibid* n 447 p 70.

⁴⁴⁹ S 9(1) of the South African Constitution guarantees equality before the law and equal protection and benefit of the law. In accordance with the decision of *Motan v Joosub* it is also argued that extra-marital children have a duty to support their maternal grandparents, but not their paternal grandparents. This rule it is submitted, is unconstitutional on the ground that it unjustifiably violates the right to equality before the law and equal protection and benefit of the law, see also s 9 (3) and (4) of the South African Constitution, 1996.

⁴⁵⁰ Davel *op cit* n 368 p 38.

⁴⁵¹ Davel *ibid* n 450 p 38.

allowing the father and the blood relations to claim maintenance from the extra-marital child does constitute unacceptable inequality before the law and unequal protection and benefit of the law is unfair discrimination and therefore unconstitutional.⁴⁵²

Furthermore, it is indeed in the best interests of the child to be maintained by both parents irrespective of their marital status but it is unfair to enforce the duty against an unmarried father if he had been denied parental rights and responsibilities. The fact that an unmarried father is merely considered a source of finance is purely exploitative. The bond that an unmarried father shares with his children or (any father) is more than a financial one. It is also submitted that, if customary law was given the recognition it deserves and applied in deserving cases on maintenance, the burden and the discrimination on an unmarried father could be minimised. Under customary law, as indicated in chapter two, the responsibility to maintain children is not only the parent's responsibility but also the responsibility of the extended relatives of the father and mother.

3.6 UNMARRIED FATHER AND SUCCESSION RIGHTS

3.6.1 *A general overview*

Before the Intestate Succession Act 81 of 1987 came into effect, the South African system of intestate succession had to be construed from a variety of common law and statutory rules. The law of intestate succession according to the common law practice may be found in two different systems that applied in Holland.⁴⁵³ *The Aasdomsrecht*

⁴⁵² Cronjé and Heaton *op cit* n 448 p 70.

⁴⁵³ De Waal *et al* 'Introduction to the law of Succession' p 14-15.

applied to the north of the River Yssel while the *Schependomsrecht* to the south.⁴⁵⁴ It was undoubtedly the *Schependomsrecht* that had the greatest influence on South African law. Discussion of the succession rights of children born out of wedlock in relation to their natural fathers is necessary in order to show how the common law treated natural fathers differently from other parents.

3.6.2 Intestate succession

The relationship of a parent and child has a bearing on succession. Succession may be intestate where the deceased left no valid will⁴⁵⁵ or testate, in terms of a valid will. At common law, there was a certain order of priority. This depended on whether a person qualified to succeed *ab intestato* or was entitled thereto in a particular case, or with regard to the parents and their children. Children born out of wedlock, being not related to their (natural) father in law, were not entitled to intestate succession *vis-à-vis* the (natural) father and his relatives and *vice versa*, whereas they were entitled to intestate succession *vis-à-vis* their mother⁴⁵⁶ and her relatives and *vice versa*. The legal position of the extra-marital child at common law within the framework of intestate succession was thus derived from the notion that '*een moeder maakt geen bastaard*'.⁴⁵⁷ An illegitimate child could not be the intestate heir to his natural father

⁴⁵⁴ De Waal *ibid* n 453 p 14-15.

⁴⁵⁵ Or the will that the deceased has left is invalid for non-compliance with statutory formalities, or the beneficiary predeceased the testator or testatrix, or the beneficiary has been declared unworthy to inherit or the beneficiary has repudiated, or it does not deal with the whole of his or her estate. See however, the Intestate Succession Act 81 of 1987 and further De Wall *et al Law of Succession Students Handbook* chapter 2.

⁴⁵⁶ Spiro *op cit* n 436 p 395.

⁴⁵⁷ *Green v Fitzgerald* 1914 AD 88 and the authorities quoted there, *Dhansay v Davids* 1991 4 SA 200 (C). Wunsh 1991 *Annual Survey* 203, See also the exposition in Erasmus and De Waal 1989 par 40, Van der Merwe and Roland 1990 107-111. This rule implied that no distinction existed between the position of the extra-marital child and the legitimate child respectively *vis-à-vis* the mother and blood relations on the mother's side. This rule also implied that the extra-marital child could not inherit intestate from his or her natural father or his family, and they in turn could not inherit

or his paternal blood relations, and similarly his natural father and his paternal blood relations could not be his intestate heirs.⁴⁵⁸ But the same disqualification did not apply to the illegitimate child's mother and her maternal blood relations. This is why an illegitimate child could be the intestate heir of the mother and maternal blood relations, and *vice versa*.⁴⁵⁹ As far as testamentary succession was concerned, the principle of freedom of testation applied in respect of both legitimate and illegitimate children. Parents were free to disinherit their children and *visa versa*, provided, in the latter instance, they had the capacity to execute a last will. In conclusion, under the common law it is clear that, the law favoured mothers of children born out of wedlock over fathers because mothers automatically had parental responsibilities and rights over their children born out of wedlock while fathers did not. This disparity was discriminatory and unfair in terms of the equality clause in the Constitution.

Although an unmarried father was not treated the same as mothers and married couples in relation to their children as far as succession rights were concerned, the common law rules have been adapted on numerous occasions by legislation, these rules and later statutory adaptations were revoked in their entirety by the Intestate Succession Act. This Act, which came into effect on 18 March 1988, consolidates the common law and statutory rules that were previously spread over a number of sources.⁴⁶⁰ But the Act also brought about several far-reaching adaptations to the

intestate from him or her,

⁴⁵⁸ See *Fitzgerald v Green* 1911 EDL 432 486-8; *Green v Fitzgerald* 101; *Estate De Klerk v Rowan* 1922 EDL 334 337; *Secretary for Inland Revenue v Brey* 1980 1 SA 472 (A) 480E; *F v L* 1987 4 SA 525 (W) 528.

⁴⁵⁹ De Waal *et al Law of Succession Students Handbook* 23.

⁴⁶⁰ Intestate Succession Act 81 of 1987.

South African law on intestate succession.⁴⁶¹ It also appears to have eradicated all restrictions on the capacity of extra-marital children to succeed upon intestacy. The common law position was modified in the Intestate Succession Act. Section 1(2) of the Act reads as follows:

“Notwithstanding the provisions of any law or the common law, but subject to the provisions of this Act and section 5(2) of the Children’s Status Act, illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.”⁴⁶²

The essence of this section is to abolish illegitimacy as a bar to inherit to a blood relative of the intestate estate of another blood relative. It is thus clear that illegitimacy is no longer a disqualification in the law of intestate succession. It is submitted that although there has been improvements in the field of intestacy as far as illegitimacy is concerned, rules on intestacy, just like legislation on maintenance, recognise only the economic value of the unmarried father’s estate. Whether the unmarried father had a relationship with his child is irrelevant. The unmarried father should not only be seen as an economic aspect but as a parent who acquires unconditional automatic parental responsibilities upon the birth of his children.

3.7 PARENT-CHILD OUT OF WEDLOCK RELATIONSHIP

The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.⁴⁶³ However, if the biological mother of the child is an unmarried minor who does not have guardianship in respect of the

⁴⁶¹ Seeing that the Act is not retrospective (s1(1)), it deals only with the position of a person who dies wholly or partially intestate after the Act came into effect. The legal position of a person who died intestate before the Act came into effect is still dealt with in terms of the old system.

⁴⁶² This section has been repealed. It has been replaced by section 40(3) of the Children’s Act 38 of 2005.

⁴⁶³ Section 19 of the Children’s Act 38 of 2005.

child,⁴⁶⁴ and the biological father of the child does not have guardianship in respect of the child, the guardian of the child's (biological) mother is also the guardian of the child.⁴⁶⁵ It is very clear from the essence of section 19 that the Children's Act 38 of 2005 has retained the common-law privileges and rights that the biological mother enjoys over her children.⁴⁶⁶ It is further clear that there has been a successful attempt in the Act Children's Act to move away from the use of common law terminology and depart from the use of expressions such as 'illegitimate child' or 'child born out of wedlock.'⁴⁶⁷ The perspective is different and the focus is now on the child and the responsibilities of parenthood, whether married or not.⁴⁶⁸

With regard to the unmarried father, he acquires full parental responsibilities and rights in respect of the child if at the time of the child's birth, he is living with the mother in a permanent partnership; or if he, regardless of whether he has lived or is living with the mother:⁴⁶⁹

- 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;⁴⁷⁰
- contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and⁴⁷¹

⁴⁶⁴ Section 19(a).

⁴⁶⁵ Section 19(b).

⁴⁶⁶ See 3.2 on guardianship of children born out of wedlock under the common law discussion.

⁴⁶⁷ Paizes *op cit* n 218 p 42.

⁴⁶⁸ Paizes *ibid* n 467 p 42.

⁴⁶⁹ S21 (1)(a).

⁴⁷⁰ S21 (1)(b)(i).

- contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.⁴⁷²

If an unmarried father at the time of the birth of the child was living with the mother of the child as a partner, he will have an inherent right of contact, care and guardianship.⁴⁷³ Partnership means that the parties were living in a *de facto* husband and wife relationship and chose not to get married.⁴⁷⁴ This, in essence, means that an unmarried father not only has inherent right of contact, but should equally have an inherent right of guardianship and care over the child. However, these positive steps introduced by the Act can only be enjoyed by an unmarried father if he complies with certain conditions as outlined in section 21(1)(a) or (b) above. This situation puts unnecessary pressure on an unmarried father who has failed to meet the conditions. It is submitted that although the Children's Act has attempted to improve the position of unmarried fathers in South African law, unequal treatment between parents still exists. There are many married fathers who can hardly maintain their children but have nevertheless acquired automatic parental rights and responsibilities simply because they are married. It is unfair to consider marital status of fathers in the acquisition of parental rights and responsibilities.

⁴⁷¹ S21 (1)(b)(ii).

⁴⁷² S 21(1)(b)(iii).

⁴⁷³ In terms of section 1(2) of the Children's Act, the word 'access' is replaced with the word 'contact' and the word 'custody' is replaced with the word 'care.'

⁴⁷⁴ Paizes *op cit* n 468 p 42.

3.8 SUMMARY

This chapter has been concerned with how the common law and subsequent legislative enactment continue to favour the unmarried mother and married couples over the unmarried father. This is further demonstrated by the allocation of parental responsibilities and rights to parents in the Children's Act. Although the focus of the law is no longer on parents, the Act still allocates parental responsibilities on the basis of father's marital status. However, there have been positive improvements with regard to contact between the unmarried father and his child. The Act has moved away from the position taken in *B v S*⁴⁷⁵ and recognised not only that unmarried fathers should have an inherent right of contact, but also that they should have an inherent right of guardianship and care. However, it is submitted that unmarried fathers should not only be granted inherent rights of contact, guardianship and care but, they should also be granted inherent rights in all aspects relating to their children born out of wedlock.

With regard to adoption, the position of unmarried fathers has improved, though not adequate enough compared to the position of the mother and the married father. Illegitimacy is also no longer a disqualification in the law of intestate succession. The Children's Act 38 of 2005 is a major breakthrough in parent-child relationship. The Act does not only enhance children's rights but also grants unmarried fathers rights and responsibilities that they never had under common law. Despite the shortcomings, unmarried fathers are now better placed in relation to their children born out of wedlock. However, it is submitted that they should be accorded the same rights and privileges as the mother enjoys over their children in our law and such rights and

⁴⁷⁵ 1995 3 SA 571 (A).

responsibilities should not be conditional. In the next chapter, the impact of the Constitution on parental rights and responsibilities will be elucidated.

CHAPTER FOUR: ANALYSIS OF THE IMPACT OF THE CONSTITUTION ON THE LEGAL POSITION OF UNMARRIED FATHERS

4.1 INTRODUCTION

The previous chapter has shown how the legislature, despite constitutional principles, continues to differentiate between married and unmarried parents in the enactment of legislation that basically entrench the common law. This is clearly illustrated in the continued use of various legislative enactments that had a negative impact on aspects of parental rights and responsibilities.⁴⁷⁶ However, the Constitution is there to counteract such challenges and to address them adequately in accordance with its norms and values.

The Constitution of the Republic of South Africa is the supreme law of the country.⁴⁷⁷ It was adopted by the people of South Africa to make a fresh start, to usher in a new multi-racial, non-sexist multi-party democracy. It was imperative that there be a clean break with the past evil system of apartheid and such system be replaced with a new form of government founded on new constitutional values. In addition, the Constitution incorporates a Bill of Rights which contains a set of values that must be respected whenever ordinary law is interpreted, developed or applied.⁴⁷⁸ The Bill of Rights is regarded as a cornerstone of democracy in South Africa.⁴⁷⁹ It enshrines the rights of all people in our country and affirms the democratic values of human

⁴⁷⁶ For example, in the Children's Act 38 of 2005 the difference between a married parent and an unmarried parent is still maintained in awarding parental rights and responsibilities.

⁴⁷⁷ Section 2 of the Constitution.

⁴⁷⁸ *Carmichele v Minister of Safety and Security and Another* 2001 4 SA 938 (CC).

⁴⁷⁹ Section 7(1) of the Constitution.

dignity, equality and freedom.⁴⁸⁰ The Bill of Rights applies to the rules of private law. It applies to legislation, common law and customary law that regulate private relationships. Therefore, private law rules which, for example, treat people unequally must comply with the limitation clauses in the Bill of Rights.⁴⁸¹

In addition to providing a background to the Constitution for the purposes of establishing its status and role, this chapter also aims at analysing the impact of the Constitution on the legal position of unmarried fathers in South African law. For that reason, the chapter is divided into the following subheadings, namely: a brief exposition of the law generally before 1994, the impact of specific constitutional provisions on parental rights and responsibilities of unmarried fathers; the application of the Constitution; the right to equality: section 9; the stages of enquiry into a violation of the equality clause; listed and analogous grounds of discrimination; limitation of rights; the relationship between section 9 and 36 and interpretation of such rights.

4.2 A BRIEF GENERAL EXPOSITION OF THE LAW BEFORE 1994

Before 1994, effective protection of human rights through the courts was virtually impossible.⁴⁸² Constitutional law was dominated by the doctrine of parliamentary sovereignty. According to this doctrine, Parliament could make any law it wished and no person or institution (including the courts) could challenge the laws duly enacted by Parliament. The Common law provided some protection for individual rights but it

⁴⁸⁰ Section 7(1) of the Constitution.

⁴⁸¹ *NCLE v Minister of Justice* 1999 1 SA 6 (CC), *NCLE v Minister of Home Affairs* 2000 2 SA 1 (CC).

⁴⁸² De Waal, Currie and Erasmus *The Bill of Rights Handbook* 2.

was not enough. As opposition to apartheid grew, the government frequently proclaimed states of emergency which saw the suspension of the few civil liberties that had survived years of ruthless cutting backed by discriminatory and 'security legislation.' The interim Constitution Act 200 of 1993 was the result of a lengthy and difficult process of negotiation between representatives of the apartheid state and its opponents. The interim Constitution was formally adopted as an Act of the pre-democratic Tricameral Parliament, ensuring the continuity of the South African state. Landmark elections were held in 1994 and the new Parliament and Government of National Unity were established and began to function in accordance with the provisions of the interim Constitution which came into force on 27 April 1994.

With regard to the position of unmarried fathers in relation to their children born out of wedlock on aspects of parental responsibilities and rights, maintenance, adoption and inheritance rights the position was governed by the common law. This had been adequately discussed in chapter three above. Customary law was not recognised as a system of law before 1994, hence issues of parental rights even though they existed under customary law were mostly decided in accordance with the common law.

4.3 THE IMPACT OF SPECIFIC CONSTITUTIONAL PROVISIONS ON PARENTAL RIGHTS AND RESPONSIBILITIES OF UNMARRIED FATHERS

4.3.1 *General perspectives*

Although the South African Constitution incorporates a Bill of Rights, the family as an institution is not constitutionally recognised or protected. However, the right of a child to a family or parental care may be interpreted to include or refer to care in the

context of a family, and as such requires the state to respect the institution of family as the most basic unit in society within which such care can be provided.⁴⁸³ This would imply that the state, in taking discretionary administrative and other decisions that affect the family and especially children's right to parental care, should have regard to the protection of the cohesion of the family as a goal in itself.⁴⁸⁴ It is against this background that the parental rights and responsibilities of unmarried fathers are analysed in terms of the constitutional imperatives under the following relevant subdivisions:

- Section 7 which provides for the state's duty to respect, protect, promote and fulfil the rights in the Bill of Rights.
- The right to equality is guaranteed in section 9 which prohibits any discrimination on a non-exclusive list of grounds. Discrimination on the basis of birth is also expressly forbidden. The ground 'birth' could be interpreted to include illegitimacy and marital status of parent's as a ground on which children suffered in the past.⁴⁸⁵
- The rights in the Bill of Rights are not absolute. They are subject to limitations as articulated in section 36 which states that these rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- With regard to constitutional interpretation of rights, section 39 stipulates that when interpreting any legislation, and when developing the common law or

⁴⁸³ Davel *op cit* n 541 p186.

⁴⁸⁴ De Waal *op cit* n 482 p 2.

⁴⁸⁵ Section 9 of the Constitution.

customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Consequently, both customary law and common law have to be interpreted and developed with this purpose in mind.

Before April 1994, the application of customary law was regulated by law and it was only applied if it was really ascertainable with sufficient certainty.⁴⁸⁶ However, the Constitution presently provides as follows with regard to the application of customary law:

“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”⁴⁸⁷

In essence, the Constitution obliges the courts in South Africa to apply customary law where that law is applicable, subject to the Constitution and any legislation that deals specifically with customary law. The provisions of the Constitution as well as any legislation dealing with customary law have to be borne in mind in the application and interpretation of customary law. The various constitutional provisions that are outlined above will be discussed below in the context of the parental rights and responsibilities of the father of an extra-marital child in South African law.

4.3.2 *The application of the Constitution*⁴⁸⁸

The Constitution provides that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of the state.⁴⁸⁹ What is

⁴⁸⁶ Customary law is the legal system that is generally applicable to the majority of the black population of South Africa. Its main source of origin is custom. It has developed through the ages consistently being observed by the communities where it is practiced, the now repealed Black Administration Act of 1927, Black Laws Amendment Act 76 of 1963 for example and subsequently Law of Evidence Amendment Act 45 of 1988.

⁴⁸⁷ S 211(3) of the 1996 Constitution.

⁴⁸⁸ Section 8 of the 1996 Constitution.

designated by this provision, therefore, is that 'law' means positive law which includes statutory law, common law and customary law. There are two forms of application that are envisaged by the Bill of Rights that is firstly, direct application that entails the imposition of duties by the Bill of Rights on specified actors. The breach of such duty is a violation of a constitutional right. Secondly, there is indirect application which occurs where there is a provision of ordinary law (legislation, common law or customary law), that mediates between the Bill of Rights and the actors who are subject to that law.

The Bill of Rights performs this traditional task of protecting individuals against the state by compelling all three branches of state to respect its provisions. However, the Bill of Rights goes further than the traditional function. It recognises that private abuse of human rights may be as pernicious as violations perpetrated by the state.⁴⁹⁰ For this reason, the Bill of Rights is not confined to protecting individuals against the state. In certain circumstances the Bill of Rights protects individuals against abuses of their rights by other individuals.⁴⁹¹ Broadly speaking, section 8(1) describes the circumstances under which the conduct of the state may be challenged for being inconsistent with the Bill of Rights. Section 8 (2), on the other hand, deals with the circumstances, in which the conduct of private individuals may be attacked for being inconsistent with the Bill of Rights. Together, these sections determine when the Bill of Rights directly imposes duties.⁴⁹² Section 8(2) and (3) provide for the application

⁴⁸⁹ Section 8 of the Constitution.

⁴⁹⁰ De Waal *op cit* n 484 p 456.

⁴⁹¹ This is the so-called horizontal relationship. Horizontal application of the Bill of Rights means that individuals are accorded rights by the Bill but also in certain circumstances, have duties imposed on them by the Bill to respect the rights of other individuals. (See De Waal *ibid* n 465 p 46 fn 21).

⁴⁹² De Waal *op cit* n 488 p 46.

of the Bill also in private law matters. Therefore, any private law rule that discriminates unfairly against individuals on any ground will be inconsistent with the Bill of Rights and therefore invalid. It is therefore submitted that any differentiation between married couples, unmarried mothers and unmarried fathers on matters of acquisition of parental rights over their born whether born in or out of wedlock as will be shown below is in conflict with the Constitution and cannot be justified.

4.3.3 *The right to equality: Section 9*

Equality is a fundamental principle of our law and it is important in the discussion on parental rights and responsibilities because equality between men and women and the people of all races is guaranteed. Subsections (3) and (4) provide that neither the state nor any other person may discriminate unfairly against any other person on the basis of any one or more of the following grounds:

“ race, gender, sex, pregnancy, marital status, ethnic or social origin, colour sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Discrimination on one or more of the grounds set out above will be presumed unless the contrary is proved.⁴⁹³ There can be no doubt that the guarantee of equality lies at the heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. Equality is fundamental to the nature and content of the Bill of Rights and to the maintenance and propagation of human rights in a democratic body politic, particularly in an acutely divided society.⁴⁹⁴ Its importance lies in its first listing in chapter 2, thereby giving it *de facto* a “position of pre-eminence”.⁴⁹⁵ Thus,

⁴⁹³ Section 9(5) of the Constitution.

⁴⁹⁴ See Devenish *A Commentary on the South African Bill of Rights* 35 fn 313.

⁴⁹⁵ Devenish *ibid* n 494 p 35.

although legally the sequence of the rights is not determinative of their status in relation to one another, “the drafters of chapter 2 listed equality first in order to stress its primary significance”.⁴⁹⁶ The clause has both vertical and horizontal application, prohibiting unfair discrimination by the state towards individuals and between individuals *per se*.⁴⁹⁷ Equality, notwithstanding that it is symbolically the most important right in the Constitution, is however, a highly problematic concept that is riddled with all kinds of difficulties.⁴⁹⁸

4.3.4 *The stages of enquiry into a violation of the equality clause*

In *Harksen v Lane*,⁴⁹⁹ the Court articulated the now famous ‘two stage’ enquiry⁵⁰⁰ into allegations of violations of the equality clause as follows:⁵⁰¹

- *First stage*

Does the provision differentiate between people or classes of people? If so, the court must ask whether the differentiation is rationally connected to a legitimate government purpose. If there is no rational connection then there is a violation of section 9(1).⁵⁰² The next question is: Does the differentiation amount to ‘discrimination’? If it is on a specified ground in section 9, then discrimination will have been established. If it is not on a specified ground, then whether or not there is unfair discrimination will depend upon whether, objectively, the ground is based on

⁴⁹⁶ Devenish *ibid* n 495 p 35.

⁴⁹⁷ Section 9 of the Constitution; *Harksen v Lane* 1998 1 SA 300 (CC).

⁴⁹⁸ *Harksen v Lane ibid* n 497 para 33.

⁴⁹⁹ *Harksen v Lane ibid* n 498 para 33.

⁵⁰⁰ Para 54.

⁵⁰¹ De Waal *op cit* n 492 p 202.

⁵⁰² See also *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC).

attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.⁵⁰³

- *Second stage*

If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.⁵⁰⁴

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3) and (4). If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.⁵⁰⁵ This is now understood to be the third stage.

The structure of the enquiry as set out above appears quite systematic: one first considers whether there has been a violation of the right to equality before the law and then considers whether there is unfair discrimination.⁵⁰⁶ If the equal treatment right in section 9(1) has been violated there will be no need to consider whether there has been a violation of the non-discrimination rights.⁵⁰⁷ However, the Court has held that it is neither desirable nor feasible to divide the equal treatment and non-discrimination components of section 9 into watertight compartments: the equality right is a

⁵⁰³ *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC).

⁵⁰⁴ See also *Ferreira v Levin* 1996 2 SA 984 (CC).

⁵⁰⁵ *S v Lawrence* 1997 4 SA 1176 (CC).

⁵⁰⁶ De Waal *op cit* n 501 p 203.

⁵⁰⁷ De Waal *ibid* n 506 p 203.



composite right.⁵⁰⁸ Moreover, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁵⁰⁹ the Constitutional Court held that a court need not ‘inevitably’ perform both stages of the enquiry. This was because the first-stage rational basis inquiry would be ‘clearly unnecessary’ in a case in which a court holds that the discrimination is unfair and unjustifiable.⁵¹⁰ In other words, in those cases in which a court finds that a law or conduct unjustifiably infringes section 9(3) or (4), there is no need to first consider whether the law or conduct is a violation of section 9(1).⁵¹¹

Section 9 can, therefore, be said to identify three ways in which a law or conduct might differentiate between people or categories of people. First, there is what the Constitutional Court terms ‘mere differentiation’, which, while it does treat some people differently to others, does not amount to violation of section 9(1). Mere

⁵⁰⁸ De Waal *ibid* n 507 p 203 and *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 22.

⁵⁰⁹ 1998 6 BCLR 726 (WLD).

⁵¹⁰ De Waal *op cit* n 508 p 203.

⁵¹¹ This position was illustrated in *Hoffman v South African Airways* 2001 1 SA 1 (CC) where the Court appeared to skip the enquiry into whether differentiation amounts to discrimination and moved straight to the question of the unfairness of the conduct. This case dealt with an airline’s policy of not employing HIV-positive persons as cabin attendants. It was argued that the policy amounted to unfair discrimination on the listed ground of disability. The Constitutional Court avoided that argument, preferring to deal with HIV-status discrimination as an analogous ground. The Court reasoned that the determining factor in deciding whether discrimination is unfair was its impact on the people affected. For people to be denied employment because of their HIV-positive status without regard to their ability to perform the duties of the position from which they have been excluded was a violation of their dignity. The Court noted a ‘prevailing prejudice’ against HIV-positive people. In such a context, any further discrimination against them was ‘a fresh instance of stigmatisation’ and an assault on their dignity. The discrimination could not be justified as fair, because it was based on ill-informed prejudice against people with HIV. The fact that some people with HIV would not be healthy enough to work as cabin attendants did not justify a blanket policy of refusing employment to anyone with HIV. ‘Prejudice’, according to the Court ‘can never justify unfair discrimination.’

differentiation will fall foul of s 9(1) unless it has a rational connection to a legitimate government purpose. De Waal, Currie and Erasmus submit that the equality provision does not prevent the government from making classifications and from treating some people differently to others.⁵¹² This is because, as we have seen, the principle of equality does not require everyone to be treated the same but simply that people in the same position should be treated the same.⁵¹³ The government may therefore classify people and treat them differently to other people for a variety of legitimate reasons. It is impossible to regulate the affairs of the inhabitants of a country without differentiation and without classifications that treat people differently and that impact on people differently. Not every differentiation amounts to unequal treatment.

Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. In other words, differentiation is permissible if it does not amount to unfair discrimination. Mere differentiation will be valid as long as it does not deny equal protection or benefit of the law, or does not amount to unequal treatment under the law in violation of s 9(1). The law will violate s 9(1) if the differentiation does not have a legitimate purpose and if there is no rational connection between the differentiation and the purpose. As the Constitutional Court puts it in *Prinsloo v Van der Linde*:⁵¹⁴

“They further submitted that, in regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate government purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional state. The purpose of this aspect of equality is therefore, to ensure that the state is bound to function in a rational manner. Accordingly, before it can be said that mere differentiation infringes s 8(1) it must be established that there is no rational relationship between

⁵¹² De Waal *op cit* n 510 p 202.

⁵¹³ It is submitted that in respect to acquisition of parental rights and responsibilities emphasis is still on the marital status of the biological parents and therefore an unmarried father is discriminated against on the ground of marital status.

⁵¹⁴ 1997 3 SA 1012 (CC).

the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8.”⁵¹⁵

Second, there is differentiation which amounts to unfair discrimination (prohibited by s 9(3) and (4)). Even where there is a rational connection between a differentiation and a legitimate government purpose, the differentiation will still violate the equality clause if it amounts to unfair discrimination.⁵¹⁶ Third, is the category of law or conduct that can be called fair discrimination: law or conduct that discriminates but which does not do so unfairly, taking into account ‘the impact of the discrimination on the complainant and others in his or her situation.’⁵¹⁷

4.3.5 *Listed and analogous grounds of discrimination*

Discrimination is differentiation on illegitimate grounds. Section 9(3) contains an extensive list of prohibited grounds of differentiation.⁵¹⁸ Differentiation on one of these grounds is always considered to be discrimination. The section also enumerates the grounds of birth and marital status, concerning which unfair discrimination is prohibited.⁵¹⁹ This is obviously intended to protect children and to ensure that they do not suffer discrimination as a result of the status of, and the relationship between their parents. This provision is clearly in accordance with the trend in international law

⁵¹⁵ *Ibid* n 514 para 25.

⁵¹⁶ *Prinsloo* *ibid* n 515 para 25.

⁵¹⁷ If the discrimination is held to be unfair, nevertheless the measure may still be redeemed if it has been made in terms of a law of general application as required by the limitation clause and is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” as encapsulated in section 36(1).

⁵¹⁸ The grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

⁵¹⁹ Discrimination on the basis of birth is also expressly forbidden in sections 9(3) and 9(4). The ground ‘birth’ could be interpreted to include illegitimacy, a ground on which children suffered discrimination in the past.

instruments.⁵²⁰ The inclusion of marital status is important since it has proved to have a meaningful effect on the practice of discrimination in relation to sexual orientation,⁵²¹ both gays and lesbians, as well as the rights of unmarried men and women, as spouses, and as unmarried mothers and fathers.⁵²²

Section 9(4) indicates that the principle of equality applies horizontally as well as vertically by stating that no person may unfairly discriminate, whether directly or indirectly, on the grounds enumerated in section 9(3). Section 9(4) also provides that national legislation must be enacted to prevent or prohibit unfair discrimination.⁵²³ However, the right guaranteed in section 9(4) is not dependent upon the existence of such legislation. It is also clear that section 9(5) shifts the onus of proof in regard to evidence and therefore as soon as *prima facie* proof of discrimination is established, which means differentiation or distinction on the grounds specified or even implied in section 9(3) by a party, this must be regarded as sufficient proof of unfair discrimination until the contrary is proved. Therefore, allocating parental rights and responsibilities conditionally on unmarried fathers amounts to unfair discrimination on the ground of marital status. In this regard a presumption of invalidity is operative or establishes a rebuttable presumption that discrimination on any of the grounds

⁵²⁰ See the CRC, ECHR, UDHR, CEDAW etc.

⁵²¹ De Waal *op cit* n 512 p 350. A good example of the analysis of unfair discrimination on an analogous ground is provided by the decision of the Constitutional Court in *Harksen v Lane* 'Marital status' is a ground listed in s 9(3) that was not listed in the interim Constitution. *Harksen* Was, however, decided under the interim Constitution and discrimination on this ground could therefore not be presumed unfair. see De Waal *op cit* n 512 p 257.

⁵²² However, although the position of an unmarried father had been drastically changed by the repeal of the Natural Fathers of Children Born Out of Wedlock Act 87 of 1997, it is clear from the wording of section 21(1)(b) of the Children's Act 38 of 2005 that an unmarried father must meet all the requirements to automatically acquire parental rights and responsibilities.

⁵²³ "Unfair" discrimination is prohibited in terms of section 9(4). This suggests that "fair" discrimination is sanctioned. This is apparently a unique aspect of the South African equality clause.

enumerated in section 9(3) constitutes unfair discrimination. The onus is then on the party concerned to prove that its actions do not amount to unfair discrimination in terms of section 9(3)/(5).⁵²⁴

The differentiation between the child's parents also amounts to unfair discrimination against the extra-marital child on the ground of social origin and birth for, in the case of an extra-marital child, the law, in effect, decides in advance that the child is not entitled to a legal relationship with both parents. This furthermore infringes the provision in the children's rights clause that entitles children to parental and not just maternal care.⁵²⁵ From the perspective of parents, the present legal position amounts to inequality before the law as well as unfair discrimination on the ground of marital status, sex and gender. Although section 21(1) of the Children's Act 38 of 2005 automatically awards an unmarried father parental rights and responsibilities and such rights are conditional. However, if an unmarried father fails to satisfy the conditions he is compelled to approach the court if he wants to have contact to (or guardianship or care of) his child and to convince the court that contact will be in the child's best interests, while a father who is or was married to the child's mother does not have to convince the court that granting him a right of contact will be in the best interests of the child for he automatically has such a right. Regardless of whether or not one chooses to call the father's burden an onus of proof, the result is that unmarried fathers are discriminated against on the ground of their marital status because they

⁵²⁴ The provisions of section 9 thus encompass a two-fold enquiry. viz: (a) the applicant either individually or as part of a group of persons has been treated differently; and (b) the differentiation is based on one of the specified grounds expressly enumerated in section 9(3). Once this is proved then discrimination is deemed to be established and unfair as required by section 9(5). In the context of access disputes, it must be first established by the father of an extra-marital child that the denial of an inherent access constitutes discrimination on the ground of gender, sex, marital status and birth. According to Goldberg 1996 *THRHR* at 292) the inclusion of terms "gender or sex" makes it clear that it is impermissible to unfairly discriminate against men or women whether on the basis of biological features or patterns of behaviour.

⁵²⁵ Section 28(1)(b).

have to do something that fathers of legitimate children do not have to. Married fathers are also discriminated against on the basis of gender and sex in relation to the mother.

The fact that fathers of children born out of wedlock display varying degrees of commitment to their children, ranging from complete lack of interest to full responsibility, does not justify the discrimination because fathers of legitimate children show the same varying degrees of commitment to their children.⁵²⁶ One of the factors section 2(5) of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 instructed the court to consider, in deciding whether to grant contact, care or guardianship to the father was, the degree of commitment he had shown towards the child.⁵²⁷ The court must, in particular, take into account the extent to which the father contributed to the mother's lying-in expenses and the maintenance of the child).⁵²⁸ If an unmarried father failed to make contributions he was automatically not considered in the allocation of parental rights. This amounted to unfair discrimination and not in the best interest of the child in that, in any matter concerning a child in relation to his or her parents, the parent's marital status should determine the outcome.

The position also discriminated between the sexes because it favoured the mother of a child born out of wedlock over the father of a child born in wedlock. Furthermore, those who are opposed to the equal rights for unmarried parents point out that

⁵²⁶ Pantazis 'Access between the natural father and his illegitimate child' 1996 *SALJ* (8) 13.

⁵²⁷ Now repealed.

⁵²⁸ Section 2(5) of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 repealed.

unmarried mothers are still the primary caretakers of children born out of wedlock and argued that the mother's primary responsibility for child-care justified exclusion of the father from automatic rights in respect of the child.⁵²⁹ Therefore, it is argued, placing the burden on the father to approach the court should he wish to gain rights in respect of the child conforms to the notion of real equality for women.

However, it is submitted in this context too, the application of the primary-caretaker test is not supported. As it relies heavily on past behaviour it offers no hope to fathers who have been excluded from their child's lives. Furthermore, because women are most often primarily responsible for child-care, the primary-caretaker test would change neither parent's position. The law would still be seen as sending the message that child-care is a mother's duty and that fathers are incapable of or are unsuited to child-care.⁵³⁰ Moreover the child's constitutional right to parental care would still not be given effect to. From both a children's-rights and a gender-equality perspective, full unconditional sharing of parental rights and responsibilities should operate regardless of whether the child is born in wedlock or out of wedlock. Equal rights and responsibilities for parents would also conform to CEDAW and the UNCRC.⁵³¹ CEDAW requires states parties to take measures in "recognition of the common responsibility of men and women in the upbringing and development of their children"⁵³² and to ensure that men and women have "the same rights and

⁵²⁹ See Cockrel *The Law of Persons and the Bill of Rights* as well as the sources that he cites in fn 7; Clark 1992 *SAJHR* (55) 568; Palmer 1996 *SALJ* 579 580.

⁵³⁰ See in this regard Goldberg *op cit* n 23 p 261; Van Heerden in Boberg *op cit* n 298 p 428; Clark *op cit* n 408 p 568.

⁵³¹ South Africa ratified CEDAW in December 1995 and it came into effect on the 16 January and the UNCRC on June 1995.

⁵³² Art 5.

responsibilities as parents, irrespective of their marital status, in matters relating to their children.” The UNCRC also requires recognition of the common responsibilities of parents for the upbringing and development of their children.⁵³³

It is submitted that our law, particularly family law, should abandon its traditional reliance on marriage and marital status as conferring parenting rights. Emphasis should always be on the rights of both children and parents. However, it must be noted that current law has partially abandoned this stance in that an unmarried father in terms of the Children’s Act 38 of 2005 can under certain conditions acquire the rights automatically without an application to court. Equality in family law demands neutrality rather than the imposition of ideologies or behavioural patterns of any dominant group upon others. The premise of our law should be of equal responsibility for parenting and equal rights of contact with children by parents. The emphasis on the welfare of the child coincides with the notion that contact is no longer a right of a parent but that of a child.⁵³⁴ Accordingly, the child has a right to know and be cared for by his or her parents. It is therefore generally desirable that a child develops a contact or bond with his or her natural parents, unless such benefit is outweighed by detrimental factors.⁵³⁵

⁵³³ Art 16(d).

⁵³⁴ See *Van Erk v Holmer op cit* n 342 p 645C-D and Article 7(1) of the UNCRC.

⁵³⁵ Sonnekus and Van Westing *op cit* n 355 p 232 argue that it is in the interests of the child to know his or her biological father since this contributes to the development of the child’s sense of self-worth and origin; and that a child who grows up without his or her biological father at some time or another develops a need to know that father.

4.3.6 *Limitation of rights: Section 36*⁵³⁶

The Constitution and the UNCRC consider the best interests of the child as a paramount consideration in all matters concerning a child. It is against this background that it seems apparent that fathers of children born out of wedlock who allege that their fundamental rights to equality have been violated, will bear the onus of proving that the interests or activity, is the right to be placed on an equal footing with the mothers of such children, falls within the protection of Chapter 2 of the Constitution, and that the failure to recognise unconditional parental rights of such fathers, constitutes an infringement or violation of such a right. Once that onus is proved, the state will have to prove that the limitation is justified in terms of section 36. Fundamental rights and freedoms are not absolute. Their boundaries are set by the rights of others and by the legitimate needs of society.⁵³⁷ There can be no peace and order in any community when individual rights can be exercised without limitation at all times.⁵³⁸ In terms of all Bills of Rights it is possible to limit rights under specific circumstances and in a particular way for the protection of some public interest or the rights of others.⁵³⁹ The limitation clause does not only authorise the limitation of rights, but usually also lays down strict requirements for doing so. Most modern Bills of Rights expressly provide for the limitation of rights and this is the approach adopted in the South African Bill of Rights as well.⁵⁴⁰ Section 36 of the South African Constitution contains a general limitation clause that applies to all rights.⁵⁴¹ It states

⁵³⁶ Constitution of the Republic of South Africa 1996.

⁵³⁷ De Waal *op cit* n 521 p 338.

⁵³⁸ Rautenbach and Malherbe *Constitutional Law* 315.

⁵³⁹ Rautenbach and Malherbe *ibid* n 538 p 315.

⁵⁴⁰ Rautenbach and Malherbe *ibid* n 539 p 315.

⁵⁴¹ Chapter 2 of the Constitution.

that “these rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in a democratic society based on human dignity, equality and freedom, taking into account all relevant factors.”⁵⁴²

The following are the established criteria for limitation:

(a) *Law of general application*

What is required by this section is that a limitation of a fundamental right must find expression in “law of general application”. In order to determine whether there has been a violation of a provision of the Bill of Rights, both relevant sections, setting out the right in question, and section 36 must be considered together. In doing so, the courts adopt a two stage process. This involves asking the question: Has there been an infringement of a right protected by the Bill of Rights? The nature and content of the fundamental right must be interpreted according to the principles of constitutional interpretation as set out in section 39 of the Constitution, in which democratic values and social policy play a crucial role. Section 39(1) provides:

“When interpreting the Bill of Rights, a court, tribunal or forum:

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.”

Section 39(1)(b) states that a court must consider international law. The word ‘must’ is imperative and it therefore obliges the court to have regard to such law, but not necessarily to apply the norms of international law.⁵⁴³ The sources relating to international law are detailed and very extensive and are found in a legion of international declarations and conventions. The most significant of these are UDHR (1948), ICCPR (1966) and the ICESCR (1976). Besides these, there are also regional

⁵⁴² Section 36(1) of the Constitution.

⁵⁴³ Devenish *op cit* n 496 p 622.

international Conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights and the African Charter on Human and Peoples Rights (1981) that must be considered.

Section 39(1)(b), set out above, obliges the courts to have regard to international law. This peremptory instruction brings international human rights law into the adjudication of analogous issues in South Africa. It is submitted that this situation is problematic since international law does not operate under a system of precedent and there are inevitably conflicting rules and principles found in it. Section 39(1)(c) also states that a court of law may consider foreign law. The courts have the discretion in this regard because the word ‘may’ which has a permissive as opposed to peremptory connotation is used. The definition and scope of the right is the prerogative of the judiciary. This scope is increased by the values-based method of interpretation authorised by section 39(2) of the Constitution, which stipulates:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights.”

(b) Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom

This stage, which only becomes operative if there has been an infringement of the relevant fundamental right, involves first asking whether the policy underlying the act or omission which caused the infringement is reasonable and justifiable in a free, open and democratic society, and secondly, whether an acceptable method has been used for its implementation.⁵⁴⁴ The essence of section 36 is that, once it is established that

⁵⁴⁴ Devenish *ibid* n 543 p 545. However, Devenish submits that what is reasonable and justifiable in a democratic society “is an illusive concept- one that cannot be precisely defined by the Courts”, as

a law of general application infringes a right protected by the Bill of Rights, the State or the person relying on the law may argue that the infringement constitutes a legitimate limitation of the right.⁵⁴⁵

4.4 RELATIONSHIP BETWEEN SECTION 9 AND SECTION 36

The crucial adjudication of the content and justifiable limitation of rights in a democratic society is always a seminal issue in any legal system.⁵⁴⁶ In a legal and political system based on the supremacy of the Constitution, it constitutes the very essence of the jurisprudence of the legal system.⁵⁴⁷ Section 36 provides for the limitation of rights in chapter 2. It states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors including:

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

far as a limitation on a fundamental right is concerned, and will depend on the circumstances of each particular case. He further submits that there is no quantitative legal yardstick, since the quality of reasonableness of the provision under challenge “must be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right”. The executive in relying on a limitation in relation to a fundamental right must be able to defend its curtailment both legally and democratically. The executive must be able to defend its conduct by rational argumentation, thereby justifying its conduct in accordance with the ethos of the Constitution, based, as it is, on universal moral and ethical values.

⁵⁴⁵ De Waal *op cit* n 537 p 162.

⁵⁴⁶ Devenish *op cit* n 544 p 542.

⁵⁴⁷ Devenish *ibid* n 546 p 542.

The issue of discrimination on account of sex was considered in the decision of *Brink v Kitshoff No.*⁵⁴⁸ in which the Court was called upon to decide whether section 44 of the Insurance Act⁵⁴⁹ violated the right to equality by depriving married women of the benefits of life insurance policies ceded to them or made in their favour by their husbands. The Act contained no similar limitation on the effect of a life insurance policy ceded or effected in favour of a husband by a wife. The Court held that the provision unfairly discriminated against her on the grounds of sex and that such discrimination was not justified under the limitation clause (section 33(1) of the Interim Constitution). The Court further said:

“Such discrimination needs eradication from our society. The preamble of our constitution states the need to create a new order in which there is equality between men and women as well as equality between people of all races.”⁵⁵⁰

The Court took the view that different treatment in section 44 of the Act between married women and married men disadvantages married women and not married men. It thus constituted unfair discrimination on account of sex.⁵⁵¹ By analogy, the different treatment between unmarried and married fathers in the context of contact with their children constitutes unfair discrimination on the ground of marital status since it disadvantages unmarried fathers and not married fathers.⁵⁵² Furthermore, since the differential treatment between legitimate and extra-marital children disadvantages extra-marital children and not legitimate children, it constitutes unfair discrimination on account of birth. However, since the difference in treatment between unmarried

⁵⁴⁸ 1996 6 BCLR 725 (CC).

⁵⁴⁹ Act 27 of 1943.

⁵⁵⁰ *Brink v Kitshoff op cit* n 546 p 769 para 40.

⁵⁵¹ 769D-F.

⁵⁵² *Ibid* n 551 p 769D-F.

women and unmarried men disadvantages women by burdening them with the sole responsibility for child-rearing and unmarried men, by denying them contact with the child, this constitutes unfair discrimination on the ground of sex.⁵⁵³ It is submitted that it is in the best interests of an extra-marital child to be afforded an opportunity to have contact with his or her father and to deny him or her this right as a justifiable limitation of his right to equality in terms of section 36(1) is unfair and discriminates against such a father in his capacity as a parent. The broader goal of equality involves taking cognisance of differences between groups and individuals.

According to Van Onselen, it appears that within our legal system, acknowledging such differences is at most used for the “exclusion” rather than the “inclusion” of other groups.⁵⁵⁴ He submits that every child should have a right to a balanced upbringing that involves input from both the mother and father (provided that they are fit and proper persons). He finds the unfairness resulting from the absolute duty to maintain without any rights as a parent difficult to understand. He pleads for a situation where the father is entitled to make an application to court for an order granting him the status of “participating parent if he is able to pay maintenance and willing and able to play an active role to the child, provided that such an input would have a positive effect on the child.”⁵⁵⁵

Titian Loenen submits that what is guaranteed is not just formal equal treatment that is blind to social and economic disparities between groups and individuals but

⁵⁵³ *Ibid* n 552 p 769D-F.

⁵⁵⁴ Van Onselen *op cit* n 355 p 499-500.

⁵⁵⁵ *Ibid* n 554 p 499-500.

substantive equality that take such differences into account.⁵⁵⁶ Formal equality means sameness of treatment, the law must treat individuals in the same manner regardless of their circumstances. Substantive equality takes these circumstances into account and requires the law to ensure equality of outcome. Formal equality does not take actual social and economic disparities between groups and individuals into account. Substantive equality on the other hand requires an examination of the actual and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld.

Johan de Waal submits⁵⁵⁷ that one of the most important indications that the substantive conception of equality was envisaged by the Constitution is the declaration in section 9(2) that equality includes the full and equal enjoyment of all rights and freedoms. Differentiation on the basis of the grounds listed in section 9(3) is presumed to be unfair discrimination. An example of gender discrimination would be prejudicial treatment arising out of parenting roles or stereotypical views of women's capabilities in the workplace.⁵⁵⁸ The Constitutional Court has held that the listed grounds relate to attributes or characteristics that impact on human dignity.

This was illustrated in the case *Prinsloo v Van der Linde*,⁵⁵⁹ where the Constitutional Court acknowledged the centrality of human dignity to the prohibition of unfair discrimination. It was the Court's opinion that unfair discrimination principally means

⁵⁵⁶ Titian Loenen in Jagwath and Kalula 'Equality Law: Reflections from South Africa and Elsewhere' First published as 2001 *ACTA JURIDICA* 198.

⁵⁵⁷ De Waal *op cit* n 545 p 184.

⁵⁵⁸ De Waal *ibid* n 557 p 184.

⁵⁵⁹ 1997 3 SA 1012 (CC).

treating persons differently in a way that impairs their fundamental dignity as human beings who are inherently equal in dignity.⁵⁶⁰ Section 8(1) of the Interim Constitution Act 200 of 1993 provides that 'every person shall have the right to equality before the law and to equal protection of the law' and that '(2) no person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language'.

The applicant contended that the differentiation between defendants in veldt fire cases and those on other delictual matters had no rational basis. The Court held that the idea of differentiation was at the heart of equality jurisprudence in general and that of section 8 rights in particular. Section 8 distinguished between differentiation that did not involve unfair discrimination and that which did. The former involved the differentiation necessary for the efficient government of the modern state in the interests of all people, which was impossible without classification that treated and impacted on people in different ways. For such 'mere' differentiation not to infringe section 8, a rational relationship was required between the differentiation in question and the government purpose proffered to validate it.

The state could not regulate in an arbitrary manner or manifest naked preferences that served no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. But while such a rational relationship was a necessary condition for the differentiation not to infringe

⁵⁶⁰ *Ibid* para 25.

section 8, it was not a sufficient condition, for the differentiation could still constitute unfair discrimination if a further element, to be found in section 8(2) of the Interim Constitution Act 200 of 1993, was present. On the facts, the Court pointed out that the purpose of the Forest Act 122 of 1984 was to prevent veldt fires, that the state had a legitimate interest in doing so, and that there was a rational relationship between the purpose sought to be achieved in s 84 of the Forest Act 122 of 1984 and the means chosen to do so.⁵⁶¹ Furthermore, the differentiation between owners and occupiers of land in fire control areas and those who occupied land outside such areas could not by any stretch of the imagination be seen as impairing the dignity of the owner or occupier of land outside the control area. Accordingly, it also did not constitute unfair discrimination of the second kind mentioned in s 8(2). No breach of s 8(1) or 8 (2) was thus established. The same sentiment was echoed in *President of the Republic of South Africa v Hugo*,⁵⁶² where the Court said:

“At the heart of the prohibition against unfair discrimination lies the recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of a particular group. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that, that is the goal of the Constitution should not be forgotten or overlooked.”⁵⁶³

The Constitutional Court held that the Presidential Act 17 of 1994, issued pursuant to the President’s powers under section 28(1)(k) of the Interim Constitution that provided remission of sentence to certain categories of prisoners was not a violation of section 8 of the interim Constitution. In particular the Court held one category of prisoners to which the remission was granted with certain exceptions namely “all

⁵⁶¹ Paragraphs 39 and 40 at 1028H/I and 1029F/G.

⁵⁶² 1997 4 SA 1 (CC) para 41.

⁵⁶³ *Ibid* n 562 para 1.

mothers in prison on 10 May 1994 with minor children under the age of 12 years” was not a violation of the respondent’s right not to be discriminated against unfairly. The Court found that although the exercise of the powers may have been discriminatory, the discrimination was not unfair and thus did not violate the equality clause. The Court reasoned that two groups of people had been affected by the Presidential Act:

“Mothers of young children had been afforded an advantage early release from prison, and fathers had been denied that advantage. The President released three groups of prisoners as an act of mercy. The three groups disabled prisoners, young people and mothers of young children were groups which were particularly vulnerable in our society and, in the case particularly of the disabled and mothers of young children, groups which had been the victims of discrimination in the past. The release of mothers would in many cases have been of real benefit to children and that was the primary purpose of their release. The impact on the prisoners was to give them an advantage. As mentioned, the occasion the President chose for this act of mercy was 10 May 1994, the date of his inauguration as the first democratically elected President of South Africa.”⁵⁶⁴

It was submitted that it was indeed true that fathers of young children in prison were not afforded early release from prison but this, according to the Court, did not constitute a disadvantage, nor restrict or limit their rights or obligations as fathers in any permanent manner. It cannot be said for example, that the effect of the discrimination was to deny or limit their freedom, for their freedom was curtailed as a result of their conviction, not as a result of the Presidential Act 17 of 1994. That Act, merely deprived them an early release to which they had no legal entitlement. Furthermore, the Presidential Act 17 of 1994 did not preclude fathers from applying directly to the President for remission of sentence on an individual basis in the light of their own special circumstances. In his affidavit, the President made clear that fathers of young children could still apply in the ordinary way for remission of their sentences in the light of their particular circumstances.⁵⁶⁵ The Presidential Act 17 of 1994 may have denied them an opportunity it afforded to women, but it could not be

⁵⁶⁴ *Ibid* n 562 para 96.

⁵⁶⁵ *Ibid* n 564 para 76.

said that it fundamentally impaired their rights of dignity or sense of equal worth. The impact upon the relevant fathers was, therefore, in all circumstances of the exercise of the Presidential power, not unfair. The respondent, therefore, had not justified his complaint under s 8(2) of the Interim Constitution. This judgment is exemplary in illustrating how the equality clause operates and impacts on the issue of gender. In his dissenting judgement, Kriegler J. held that the Presidential Act 17 of 1994 amounted to unfair discrimination. He held that the generalization of “stereotyping” used in the Presidential Proclamation, namely that women are the so-called primary care-givers, serves to perpetuate gender inequality in our society. Under only two conditions, according to Kriegler J, could reliance on discriminatory generalizations constitute unfair discrimination: first, where there was a strong indication that the advantages flowing from the perpetuation of a stereotype compensate for the obvious disadvantages and secondly, where there is a connection between discriminatory action and the advantage to the previously disadvantaged.⁵⁶⁶ Mokgoro J, also expressed the same sentiments, when she held:

“Denying fathers release from prison on the basis of a stereotype about their aptitude in child rearing was an infringement of their dignity and equality. She was not persuaded by arguments that mothers of young children were more disadvantaged than others in the penal system and held that there was no correlation between the nature of the disadvantage and the measures amounted to unfair discrimination.”⁵⁶⁷

The opinion of the minority judgement was that the benefits to a few were outweighed by the serious disadvantage to society as a whole. The discrimination was thus, as far as the minority was concerned, unfair. I fully agree with the minority opinion because the law cannot disadvantage the society as a whole for the benefit of women.

⁵⁶⁶ *Ibid* para 83.

⁵⁶⁷ *Ibid* n 566 para 83.

South Africa is a signatory to various international conventions committed to the promotion of gender equality. Article 6(1) of CEDAW⁵⁶⁸ directs States Parties to take all appropriate measures to ensure that men and women have the “same rights and responsibilities as parents irrespective of their marital status, in matters relating to their children. Similarly article 18(1) of the CRC⁵⁶⁹ requires State Parties to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of their children.⁵⁷⁰

This guarantee of equality, based on human personality, is as applicable to children as to adults. Discrimination based on a parent’s status would be inconsistent with the guarantee of equality in the Constitution as would discrimination based directly on the child’s status. South Africa is a signatory to both these conventions and has thus in principle committed itself to the promotion of the values and ideals embodied therein. Efforts were also made in recent years to realise some of these commitments and the most serious effort is the establishment of the Commission on Gender Equality⁵⁷¹ and the opening of the Office on the Status of Women in the Presidency. These institutions have as their function to ensure that the constitutional imperatives underpinning gender equality and social political commitments are translated into real

⁵⁶⁸ It is the first international instrument to define gender discrimination. It came into effect in 1981. South Africa signed it on the 29th January 1993 and ratified it on 15th December 1995.

⁵⁶⁹ This is the most important international human rights instrument on children’s rights. This Convention was adopted by the United Nations General Assembly on 20 November 1989. It constitutes a significant and fairly exhaustive charter on the rights of children. By 20 April 1995, over 174 countries had ratified this instrument. It was signed by former President Nelson Mandela in January 1995 and ratified by the National Assembly in June 1995.

⁵⁷⁰ A comprehensive discussion on this aspect will be dealt with below in the discussion of international instruments and their status in South Africa.

⁵⁷¹ The Commission established in terms of the Gender Equality Act 37 of 1996.

and meaningful government programmes thereby making non-sexist society a reality.⁵⁷²

4.5 INTERPRETATION OF THE BILL OF RIGHTS: SECTION 39

Section 39(1) demands an interpretation which promotes the values which underlie an open and democratic society based on freedom and equality. Section 39(1) refers to the use of international law and foreign law. In *S v Makwanyane*,⁵⁷³ the Court stated that both binding and non-binding international law may be used as tools of interpretation:

“International agreements and customary international law provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparative instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.”⁵⁷⁴

These remarks make it clear that the Constitution permits reference for purposes of interpretation to international human rights law in general.⁵⁷⁵ The Constitution is not confined to instruments that are binding on South Africa.⁵⁷⁶ It must be noted that section 39(1)(b) states that court ‘must’ consider public international law and section 39(1)(c) states ‘may’ consider foreign law. There is an injunction to consider applicable international law, but not to consider foreign law.⁵⁷⁷ Devenish submits that the scarcity of local precedents addressing fundamental rights makes it necessary that

⁵⁷² CEDAW Training Manual November 1997.

⁵⁷³ 1995 3 SA 391 (CC).

⁵⁷⁴ Chaskalson J at para 36-7.

⁵⁷⁵ De Waal *op cit* n 558 p 141.

⁵⁷⁶ De Waal *ibid* n 575 p 160.

⁵⁷⁷ De Waal *ibid* n 576 p 160.

international and foreign law be employed to resolve jurisprudential issues precipitated by the justiciability of the provisions of the Bill of Rights.⁵⁷⁸

Section 39(2) has little to do with the interpretation of the Constitution, but concerns the interpretation of statutes and the development of the common law and customary law. While the section does not concern the 'interpretation' of the Constitution, it is crucial to the 'application' of the Constitution.⁵⁷⁹ Section 39(2) should therefore be read with section 8⁵⁸⁰ since it provides for indirect application of the Bill of Rights to law. Section 39 has critical consequences for the interpretation of all South African statute law, common law and customary law. In effect it authorises a value-coherent or teleological methodology of interpretation and the supplanting of the jurisprudence of positivism with a new jurisprudence that will have inherent in it a compelling element of natural law.⁵⁸¹ This provision is not merely an exhortation to the courts to seek and discover the values underlying the Bill of Rights, rather it is a prescription to apply the values encompassed in the Bill of Rights in the process of all interpretation.⁵⁸² It is submitted that section 39(2) must inexorably effect a complete transformation of our jurisprudence, since our common law and African customary law are to be infused with a culture of fundamental rights and liberal democratic values, more especially the values of race and gender equality.⁵⁸³

⁵⁷⁸ Devenish *op cit* n 547 p 621.

⁵⁷⁹ De Waal *op cit* n 577 p 143.

⁵⁸⁰ The application clause.

⁵⁸¹ Devenish *op cit* n 578 p 621.

⁵⁸² Devenish *ibid* n 581 p 621.

⁵⁸³ Devenish *ibid* n 582 p 621. He further submitted that section 39(2) authorises a departure from literalism in the interpretation of law and that regard be had to the 'spirit, purport and objects' of the bill of rights in the process of interpretation of any law. He quotes Currin and Kruger comment

Section 39(3) simply confirms that the Bill of Rights does not prevent a person from relying on rights conferred by legislation, the common law or customary law. But since the Bill of Rights is supreme law, such rights may not be inconsistent with the Bill of Rights.⁵⁸⁴

4.6 SUMMARY

It is indeed clear that, after the enactment of the Constitution it has been inevitable that the common law position of unmarried fathers in relation to their children born out of wedlock had to change, particularly on aspects of parental authority. Their disadvantaged position as compared to mothers and married fathers has been illustrated in the discussion of the common law in chapter three. The discrimination endured by unmarried fathers at common law is outlawed by section 9 of the Constitution. This is further enhanced by the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which aims at the eradication of social and economic inequalities, especially those that are systematic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of South Africans.⁵⁸⁵

in regard to the corresponding section of the interim constitution, that section 35(3), that it paved the way for the courts to abandon their 'stale, positivists style of interpretation and substitute thereof a value oriented interpretive theory.' It is further submitted that section 39(2) has significant implications for interpretation and adjudication even in those circumstances where the constitution itself is not directly involved. Therefore, where persons before a court or a tribunal do not allege the violation of a justiciable right, and even where the constitution may not be of direct application to a dispute or question to be adjudicated on, the values and principles encapsulated in section 39(2) should clearly influence how the matter should be resolved. (See Devenish *ibid* n 580 p 621.)

⁵⁸⁴ De Waal *op cit* n 579 p 143.

⁵⁸⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Section 28 of the Constitution has an impact on the relationship between children, their parents and the state. Implicit in that is the entrenchment of the concept of the 'best interest of the child' in the section 28(2). However, the current Children's Act 38 of 2005 that regulates the relationship between the children and their parents and the state is still lacking in the sense that parental responsibilities are still awarded to parents on the basis of their marital status. I therefore, submit that such continued discrimination is unjustified. The Constitution shapes the ordinary law and must inform the way legislation is drafted by the legislatures and interpreted by the courts and the way the courts develop the common law, it is important that in future when legislation is formulated such as the current Children's Act 38 of 2005 it must conform to the Bill of Rights because the Constitution is there to safeguard the rights of citizens in the ever changing society. It guarantees and regulates the rights and freedoms of individual it is an expression of the will of the people. The next chapter will make a determination on whether South African law particularly family law complies with international standards and norms in the sphere of children's rights.

CHAPTER FIVE: THE LEGAL POSITION OF UNMARRIED FATHERS IN SOUTH AFRICA: COMPLIANCE WITH INTERNATIONAL TREATY OBLIGATIONS

5.1 INTRODUCTION

Having analysed the constitutional imperatives of the legal position of unmarried fathers in South African law in the previous chapter, the purpose of this chapter is to establish and determine the status of international human rights norms relevant to family law issues affecting the legal position of unmarried fathers in South African law and to analyse critical issues affecting them. It is also necessary to determine whether South African law is within and effectively conforms to international standards and trends in the sphere of children's rights. Lastly, it is also imperative to establish whether the South African state has discharged its international obligations imposed by various international conventions in the protection of children and their families generally and parental rights of unmarried fathers in particular. To achieve the above objectives, the chapter is divided into three main parts:

- An overview of relevant international instruments and their application to South Africa.
- Relevant treaties already ratified by South Africa.
- Treaties signed by South African government but not yet ratified.

5.2 AN OVERVIEW OF RELEVANT INTERNATIONAL INSTRUMENTS AND THEIR APPLICATION TO SOUTH AFRICA

5.2.1 *Interpretation of South African law: An international law friendly approach*

Children, their welfare and rights, have been a central concern of the United Nations since its creation in 1945.⁵⁸⁶ However, they were not accorded special protection in international human rights instruments or in domestic constitutions, until the adoption of the Universal Declaration of Human Rights in 1948.⁵⁸⁷ The situation has, however, changed significantly in the past three decades, as an endeavour has been made to formulate and adopt appropriate safeguards for children who are exposed to socio-economic maladies, violent conflicts, exploitation, malnutrition and all other forms of disability. This special protection is embraced in the following international instruments:⁵⁸⁸

The International Covenant on Civil and Political Rights, 1966;

The International Covenant on Economic, Social and Cultural Rights, 1966;

The European Social Charter, 1969;

The American Convention on Human Rights, 1969;

The African Charter on Human and People's Rights, 1981; and

Convention on the Rights of the Child,

1989.

In the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1948, it was recognized that children must be the subject of

⁵⁸⁶ Olivier chapter 10: 'The Status of International Children's Rights Instruments in South Africa' in Davel *op cit* n 481 p 199.

⁵⁸⁷ Devenish *op cit* n 583 p 37.

⁵⁸⁸ *Ibid* n 587 p 37.

special care and attention.⁵⁸⁹ Since then, the United Nations has protected children's rights in general international treaties such as the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, 1966 and in 1989 Declaration on the Rights of the Child. Although the Declaration is not an international treaty, it has been a guide to private and public action in the interests of children. Asserting that 'mankind owes to the child the best it has to give',⁵⁹⁰ the Declaration is a solid moral framework for children's rights to-day as it was forty years ago.⁵⁹¹ In South Africa it was only in 1989 that the Department of Foreign Affairs in conjunction with the South African Law Commission made an assessment of the compatibility of existing South African law with most of the important international human rights instruments.⁵⁹² The purpose of this comparative study was to initiate a process of national law reform in order to align South African law with international human rights standards, which would enable the country to participate in the international human rights arena.⁵⁹³ The outcome of the study showed disparities between South African law and international law which necessitated that major amendments to South African law were necessary before South Africa could consider becoming a party to the majority of international human rights instruments. The obstacle in adopting international human rights standards was the 1983 Interim Constitution which entrenched racial discrimination.⁵⁹⁴ However, the position only

⁵⁸⁹ Art 25.

⁵⁹⁰ Art 3.

⁵⁹¹ Devenish *op cit* n 588 p 387. However, the Declaration has since been captured into the Convention on the Rights of the Child.

⁵⁹² Olivier *op cit* n 586 p 197.

⁵⁹³ Olivier *ibid* n 592 p 197.

⁵⁹⁴ *Ibid* n 593 p 197.

improved when the De Klerk government in 1993 ratified the Convention on the Rights of the Child and subsequently in 1995 the Convention on the Elimination of All Forms of Discrimination Against Women, which has an indirect influence on the well-being of children.⁵⁹⁵ The coming into operation of the 1993 Constitution Act 200 of 1993 placed the present government in a position to become a State Party to most of the remaining international human rights instruments.⁵⁹⁶ The responsibility to comply with international law has been confirmed and entrenched in the final Constitution.⁵⁹⁷ The Constitution makes it mandatory for the courts, in their interpretation of any legislation, to consider international law.⁵⁹⁸

5.2.2 Importance of considering international law

By ratifying various international conventions, South Africa has indicated its intention to become a party to and to be bound by the obligations imposed by these international treaties. In instances where South Africa is not bound by a treaty it is mandatory in terms of the Constitution that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.⁵⁹⁹ The Constitution also imports an international and comparative friendliness in its requirement that a right may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁶⁰⁰ It is

⁵⁹⁵ South Africa ratified the CRC in January 1993. For the effect of ratification see the discussion of the Convention on the Rights of the Child in the next subheading, CEDAW adopted by the General Assembly of the United Nations on 18 December 1979, and also see Davel *op cit* n 584 p198.

⁵⁹⁶ Olivier *op cit* n 594 p 197.

⁵⁹⁷ Act 108 of 1996.

⁵⁹⁸ Section 233 of the Constitution.

⁵⁹⁹ Section 39(1)(b).

⁶⁰⁰ Section 36(1).

submitted that one of the major ways in which to determine 'an open and democratic society based on human dignity, equality and freedom' is to embark upon a comparative study on how other open and democratic states treat similar issues.⁶⁰¹

In *S v Makwanyane*,⁶⁰² the Court stated that both binding and non-binding international law may be used as tools of interpretation. In essence, what is emphasized in this case is that the Constitution permits reference for purposes of interpretation to international law in general. It is not confined to instruments that are binding on South Africa.⁶⁰³ The Court further held that comparative human rights jurisprudence will be of great importance while an indigenous jurisprudence is developed. Another rationale for considering international law is that international co-operation as well as globalisation requires that international human rights as well as social policies be considered. It is further argued that national courts increasingly confront issues with international, comparative and foreign law dimensions, and that, the inadequacy of local jurisprudence on particular issues makes recourse to international and comparative standard inevitable.⁶⁰⁴ It is submitted that consequently the common law and statutory law particularly on acquisition of parental rights by unmarried fathers will be enhanced.



⁶⁰¹ Olivier *et al Introduction to Social Security* 164.

⁶⁰² 1995 3 SA 391 (CC).

⁶⁰³ See De Waal *op cit* n 584 p 160.

⁶⁰⁴ Olivier *op cit* n 601 p 164-165.

5.2.3 *Constitutional provisions on international law*

The Constitution plays a pivotal role in the implementation of international children's rights. This can be seen first in the regulation of the relationship between international law and South African law and, secondly, the Bill of Rights contains provisions concerning children's rights.⁶⁰⁵ In order for international agreements to become law in South Africa they must be signed by the national executive, approved by parliament and enacted into law as national legislation.⁶⁰⁶ Secondly, customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.⁶⁰⁷ The Constitution further provides for the binding effect of international agreements entered into by South Africa.⁶⁰⁸ Similarly, the Bill of Rights contained in the Constitution incorporates an interpretation clause that is important for interpretation purposes.⁶⁰⁹ The interpretation clause requires that a court, tribunal or forum, when interpreting the Bill of Rights, must promote values that underline an open and democratic society based on equality, human dignity and freedom. The courts are also obliged to consider international law when interpreting the Bill of Rights. Hence unincorporated provisions of children's rights agreements to which South Africa is a party, agreements to which South Africa is not a party and instruments of soft law⁶¹⁰ should be taken into consideration when interpreting the

⁶⁰⁵ Sections 28, 231 and 232.

⁶⁰⁶ Section 231.

⁶⁰⁷ Section 232.

⁶⁰⁸ Section 231(5).

⁶⁰⁹ Section 39.

⁶¹⁰ 'Soft law' is defined as rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects. (David M "Soft Law", "Hard Law", and European Integration: Toward a Theory of Hybridity) http://en.wikipedia.org/wiki/Soft_law

provisions of the Bill of Rights pertaining to children's rights.⁶¹¹ In essence, section 39 of the South African Constitution requires that various international instruments be considered when interpreting South Africa's domestic law. This sentiment is further strengthened by the existence of a common law presumption which requires a court to interpret legislation consistent with international law.⁶¹² This common law presumption is given force by section 233 of the Constitution which provides 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." It is clear from the above discussion that the South African Constitution fully acknowledges and embraces international law. Hence the earlier assertion that the interpretation of South African law has an international law friendly approach which means that in interpreting any legislation the courts are required to consider international norms and standards. Therefore, in the field of family law particularly on the relationship between an unmarried father and his children born out of wedlock, the courts should always consider international trends.

5.3 RELEVANT TREATIES ALREADY RATIFIED BY SOUTH AFRICA

How South African law compares with international standards on the protection of children's rights in relation to their parents and families, particularly how it treats unmarried fathers, can be seen in the detailed discussion of international instruments protecting children's rights below.

⁶¹¹ Olivier in Davel *op cit* n 586 p 200-201.

⁶¹² Olivier *op cit* n 611 p 166, section 233 of the Constitution.

5.3.1 *United Nations instruments*

5.3.1.1 *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1965*

Among the various international Conventions and Declarations which reflect the importance of the family and the situation of women in it, the Convention on the Elimination of All Forms of Discrimination Against Women remains the most comprehensive piece of international legislation addressing issues of gender and family. It is the first international instrument to define gender discrimination. It came into effect in 1981. South Africa signed it on the 29 January 1993 and ratified it on the 15 December 1995.

The purpose of CEDAW is to set out in more detail what is meant by the prohibition of sex discrimination from the perspective of equality between women and men. It addresses a range of programmatic and policy aspects of the specific problem. The Convention adopts a format modelled on ICESCR, but contains a number of innovations reflecting developments in the 15 years since that Convention had been adopted. The important characteristics of the Convention relevant to the discussion include the following:

(a) *Scope*

Like ICESCR, the Convention begins by defining discrimination on the basis of sex. The article obliges States both to refrain from sex-based discrimination in their own dealings and take measures towards achieving factual as well as legal equality in all spheres of life, including by breaking down discriminatory attitudes, customs and

practices in society.⁶¹³ It affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for human dignity of the human person.⁶¹⁴

(b) Protection of the family

The rights of equality before the law in the area of marriage and family life are guaranteed in the convention.⁶¹⁵ It is therefore, submitted that even though the Convention has an indirect influence on the wellbeing of children, it nevertheless guarantees equality in the area of family life. This guarantee would be beneficial to the unmarried father who is deprived of parental rights and responsibilities by the common law.

(c) State obligations

The Convention explicitly requires States to suppress all forms of trafficking in women and exploitation of prostitution, even though these phenomena may implicitly fall within the prohibition of slavery and forced labour contained in other instruments.⁶¹⁶ Furthermore, states are obliged to ensure equal participation of women with men in public and political life.⁶¹⁷ The Convention, in Part V, requires all States Parties to report regularly to the Committee on the Elimination of Discrimination against Women, which it established to monitor implementation of the treaty's

⁶¹³ Art 2.

⁶¹⁴ Art 5.

⁶¹⁵ Articles 15 and 16.

⁶¹⁶ Art 16.

⁶¹⁷ Articles 7 and 8.

provisions.⁶¹⁸ Article 16 treats the specific question of gender and family and it directly addresses gender discrimination in the family. It provides that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women-

- the same right to enter into marriage;
- the same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- the same rights and responsibilities during marriage and at its dissolution;
- the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children, in all cases the interests of the children shall be paramount; and
- the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of their children, or similar institutions where these concepts exist in national legislation, in all cases the interests of the children shall be paramount;
- the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of

⁶¹⁸ See The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies, fact sheet no 30 p 9-10.

charge or for a valuable consideration. For states to comply, they must do more than promulgate laws that profess equality between spouses.⁶¹⁹ States must use legislation to eliminate unequal treatment such that all families, regardless of their particular composition, are protected from discrimination and violence. It is submitted that, this cannot be realised as long as national law still discriminates against certain family forms as it the case with the nuclear family and the African extended family. However, the Convention on the Rights of the Child establishes the obligation of States to recognize gender equality in parental responsibilities on the understanding that the child's interests are paramount.⁶²⁰ CEDAW urges State Parties to eliminate gender discrimination and ensure the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children. The same rights and responsibilities with regard to guardianship, wardship, trusteeship of children, or similar institutions where these concepts exist in national legislation, in all cases should be enjoyed equally by all parents as it is in the interests of their children.⁶²¹

States must enact legislation to ensure that both fathers and mothers, independent of their civil status or whether they live with their children share the same rights and obligations towards them. The provisions impose a positive obligation on member states to take steps to ensure the elimination of discrimination. Despite the formal recognition of the principle of equal parental rights of parents in respect of their children, laws that violate Article 16 of CEDAW continue in force in South African family law in respect to unmarried fathers. In its preamble CEDAW specifically

⁶¹⁹ Art 16.

⁶²⁰ Art 16(d) and (f).

⁶²¹ Art 2.

acknowledges the existence of discrimination against women and makes it clear that continued existence of such discrimination violates the principles of equality of all persons and respect for human rights and dignity. However, women in essence are given priority in the protection of their human rights above men and this amounts to preferential treatment that tends to discriminate against men. For example, there are more organisations in South Africa which supports and fights for women's rights only.

(d) Implications of the Convention for South Africa on parental rights and responsibilities of unmarried fathers

This Convention obliges the government to take the necessary steps to end discrimination against women and to report its progress at regular intervals. The CEDAW Committee meets in January of each year at the UN Headquarters in New York to review country reports on the status of women submitted by countries that have agreed to and signed the convention. The major interest of CEDAW is non-discrimination against women and girls and this differentiates it clearly from other international conventions.⁶²² Article 15 addresses equal rights for men and women, and forms the basis for the argument that women's fundamental rights must be recognised in the family as well as in the workplace and in national politics. This article without expressly referring to the family, guarantees certain rights that will benefit women with respect to family. It provides:

"States Parties shall accord to women equality with men before the law. It should also be recalled that all women, independent of their civil status, should enjoy the same rights as men."

⁶²² In the year 2000 the UN General Assembly in their 23rd session to mark Beijing +5 reviewed all that has been achieved in the past decade and articulated new strategies for the 21st century. Some of the areas to focus on are health, violence, globalisation, economy, human rights and political empowerment based on the principle of eliminating discrimination against women and girls.

In other words, married and unmarried women will enjoy the same rights and receive equal protection under the law. This principle was implied in Article 1 of the Convention that defined discrimination against women as:

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any field.”

Although States Parties have a responsibility to protect all types of families and the rights of parties within such families, it seems that the South African common law and statute law recognize only the nuclear family and families that have been created by marriage.⁶²³ Thus a family is defined in terms of a relationship that arises from marriage. This definition does not only exclude the unmarried father but also leaves out many types of families such as *de facto* unions, those headed by women and those headed by children. The definition in fact reinforces international law on its biased stance against unmarried fathers. However, for the purposes of this study the protection and the recognition of the nuclear family will be challenged as such family excludes the unmarried father. The physical composition of the family is less important than what the family provides. Families must provide a supportive, salutary, non-discriminatory and secure environment for the socialization of children and for the well-being of all its members. For this, full recognition of the rights, responsibilities and contributions of both parents in their children's lives is required.

The contribution of men to the family should not be limited simply to the provision of maintenance, nor should women have exclusive responsibility for child rearing tasks.

⁶²³ The nuclear family in South African law results from the union of one man and one woman in marriage that subsequently produces children. However, recently recognition has been given to polygamous marriages in terms of the Recognition of Customary Marriages Act 120 of 1998 and civil unions in terms of the Civil Union Act 17 of 2006.

In addition, special consideration must be given to those families whose composition varies from the traditional form. Gender inequality and discrimination exists at some level within all families as far as gender roles are concerned. However, in both the cultural and legal domains, discrimination is particularly pronounced against families whose structure is considered 'unconventional'. The use of the very term 'unconventional' when describing 'incomplete' nuclear families implies discrimination.⁶²⁴ Gender stereotyping and gender-based inequality in the family begins with the issue of child-care and child-rearing. Ideally, it is in the best interests of children to be able to have contact with and rely on both parents for support and nurturing. At present, their reliance is conditioned by gender imbalances as manifested in the bifurcation of father's and mother's responsibilities.⁶²⁵ The prevailing power structure tends to undervalue the domestic contributions of women and reduces male contributions to just economic support to the family. Gender stereotypes may ultimately have negative consequences for both sexes, as well as for any children. Thus, while women may have felt greater part of unjust gender imbalances, men should be given the right and privileges to enhance and improve their participation in the family as well.

The right of a child to family or parental care as outlined in the Constitution does, however, show preference for care in the context of a family and as such requires the state to respect the institution of the family as the context within which such care can be provided.⁶²⁶ This would imply that the state, in taking discretionary administrative

⁶²⁴ See Gender and Family: www.undp.org/rblc/gender/legislation/family.htm.

⁶²⁵ Gender and Family *ibid* n 624.

⁶²⁶ Section 28(1)(b).

and other decisions that affect the family and, especially children's access to family, should have regard to the protection of the cohesion of family as a goal in itself. Such a constitutional obligation to respect the institution of family has been read into section 10 of the Constitution, the right to human dignity, by the Constitutional Court in the *Dawood* case; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others*⁶²⁷ in the context of administrative decisions regarding the status of adult aliens which had the effect of separating them from their families. The Court decided the case on the basis of the right to human dignity of the applicants themselves and further that, although the right to family life is not expressly mentioned in the Bill of Rights, such right is constitutionally protected. The right to family life is recognised in international treaties and receives protection in a variety of ways, while marriage and the family are of vital importance to society. The right to enter into and sustain permanent intimate relationship is part of the right to dignity. Legislation that prohibits the right to form a marriage relationship infringes the right to dignity and any legislation that significantly impairs the ability of spouses to honour obligations to one another would also limit such a right. Section 25(9)(b) of the Aliens Control Act 96 of 1991 was therefore declared invalid.

It is required by the Constitution that international instruments should be ratified by South Africa before the obligation to consider them are complied with. Unfortunately these international instruments define a family in the context of marriage and therefore discriminate against unmarried fathers and they do not recognise them as parents to their children unless they have signed a parental recognition agreement.

⁶²⁷ 2003 SA 936 (CC), 2000 8 BCLR 873 (CC), (2000 1 SA 997 (C).)

This unwarranted position deprives unmarried father's family life with their children. It is worthy to note that the traditional nuclear family based on one man and woman and adopted or biological children, does not reflect the reality of South African society. Children are part of a family, should have two parents, and have a right to be influenced in their upbringing by each of the two parents they have, a right to the affection of the two parents that can never be nullified or substituted by the fact that their parents are not married. What is important is to preserve the relationship between the child and the non-caregiver parent and to always consider the best interests of the child without severing the parent-child relationship. The two cannot be separated. The denial of an unmarried father automatic and unconditional parenting rights and responsibilities is the most drastic of all possible state intrusions into the family relationship. In all countries, efforts must be made to ensure that both parents are able to have contact with their children. This includes recognition of children born in *de facto* unions as well as those born out of wedlock.

It is submitted that CEDAW prohibits the discrimination against women, not discrimination on the basis of sex and thus it discriminates against men. It allows for preferential treatment. However, it also provides for an obligation

'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.⁶²⁸

This is a positive step in the realisation of equal treatment between men and women in respect of their children.

⁶²⁸ Art 5.

5.3.1.2 *The International Covenant on Civil and Political Rights (ICCPR) 1966*

The Convention was adopted by the United Nations General Assembly by Resolution 2200A (XI) in December 1966 and entered into force in May 1976. South Africa ratified the Covenant on 10 December 1998. The elimination of gender discrimination is also a cornerstone of the International Covenant on Civil and Political Rights.

Article 26 reads:

“All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The scope of Article 26 is very broad, as is affirmed by its supervising organ, the Human Rights Committee (HRC).⁶²⁹ In General Comment Number 18 on non-discrimination the HRC states clearly that Article 26 ‘prohibits discrimination in law or in fact in any field regulated and protected by public authorities.’⁶³⁰ Titia Loenen submitted that the prohibition of discrimination is not limited to rights that are covered by the ICCPR.⁶³¹ The particular significance of the Covenant lies in the following:

(a) *Principles*

The General Comment emphasises the positive duty to realize equal rights for all, which means taking all kinds of measures to achieve this.⁶³² Such measures may also

⁶²⁹ Loenen in Jagwanth and Kalula ‘Equality Law: Reflections from South Africa and Elsewhere’ 2001 *ACTA JURIDICA* 198.

⁶³⁰ *Ibid* n 629 p198.

⁶³¹ *Ibid* n 630 p198.

⁶³² *Ibid* n 631 p198.

encompass (temporary) preferential treatment.⁶³³ The HRC reiterates some of these points in its General Comment number 28 on equality of rights between men and women (Article 3 of the ICCPR) in even bolder words: Art 26 “requires states to act against discrimination by public and private actors in all fields’.⁶³⁴ This all-embracing duty to eliminate discrimination seems to reflect the idea that the State is responsible, one way or another, wherever discrimination occurs.

(b) Protection of the family

The Covenant also recognizes the family as the fundamental basic unit of society which is entitled to protection by the society and the state, it even goes further to recognize the right of men and women to marry and found a family. Article 23 reads as follows:

“ss1. The family is the natural and fundamental group of society and is entitled to protection by society and the State.
ss2. The right of men and women of marriageable age to marry and to found a family shall be recognised.
ss3. No marriage shall be entered into without the free and full consent of the intending spouses.
ss4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during the marriage and at its dissolution.”

In the case of dissolution, provision shall be made for the necessary protection of children. In essence, what is protected here is the nuclear family based on marriage. The rights of the unmarried father, the best interest of the child standard nor parental rights and responsibilities are not mentioned in the Covenant. Therefore it is submitted that the application of this covenant on aspects of parent-child relationship in international law is lacking although discrimination is prohibited in general terms.

⁶³³ *Ibid* n 632 p198.

⁶³⁴ *Ibid* n 629 p 199.

(c) *Implications for South Africa on parental responsibilities and rights of unmarried fathers*

Although the Covenant does not expressly cater for the protection of the relationship between children and their parents, it does recognise the inherent dignity and equal and inalienable rights to all members of the human family.⁶³⁵ It is submitted that the unmarried father is included as a human being and a member of the human family. State Parties are also required to ensure that all individuals within their territories and subject to their jurisdiction enjoy these rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶³⁶ It is clear from the ordinary interpretation of Article 2 that discrimination is outlawed on any of the grounds stipulated in that article. However, although the Covenant does not expressly provide for the recognition of parental right and responsibilities of unmarried fathers, it outlaws discrimination. Therefore, South Africa as a State Party is obligated to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the Covenant and that includes the right of the unmarried father to be treated equally with unmarried mothers and married couples in allocation of parental responsibilities and rights over their children. Although an attempt in this regard has been made in terms of the Children's Act 38 of 2005, an unmarried father is not fully on par with married couples and unmarried mothers.

⁶³⁵ The Preamble.

⁶³⁶ Art 2.

5.3.1.3 *Convention on the Rights of the Child (1989)*

This Convention was adopted by the United Nations General Assembly on 20 November 1989. It was ratified by South Africa in June 1995. States that ratify the Convention are responsible for ensuring that its provisions are implemented.⁶³⁷ In some instances, however, what the Convention requires is not that the state itself should assume the full burden of protecting rights but that it should ensure that other individuals do so; in such instances, the role of the state is to assist others in the discharge of their responsibilities and to take appropriate action where they fail to do so.

In its Preamble, the Convention on the Rights of the Child recognises explicitly that as a fundamental group in society and as a natural environment for the growth and well-being of children, the family should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.⁶³⁸ It also recognises that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness and understanding. These principles are reinforced by several provisions in the Convention itself which emphasize the state's obligation to support parents in their child-rearing duties, the importance of contact between parents and children, the child's right to protection from harm and the right of the child who is deprived of a family to alternative care, protection and assistance.⁶³⁹ The goals to be achieved under this Convention are as follows:⁶⁴⁰

⁶³⁷ Art 4.

⁶³⁸ Preamble to the Convention on the Rights of the Child.

⁶³⁹ Art 2 and 14.

⁶⁴⁰ Art 42.

- It creates new rights under international law for children where no such rights existed, including the child's right to preserve his or her identity and the right of indigenous children to practice their own culture;
- It enshrines rights in a global treaty which had, until the Convention's adoption only been acknowledged or refined in case law under regional human rights treaties. For example, a child's right to be heard either directly or indirectly in any judicial or administrative proceedings affecting that child, and to have those views taken into account;
- It also creates binding standards in areas which, until the Convention's entry into force, were only non-binding recommendations. These include safeguards in adoption procedures and the rights of mentally and physically disabled children or;
- It imposes new obligations in relation to the provision and protection of children. These include the obligation on a state to take effective measures to abolish traditional practices prejudicial to the health of children and to provide for rehabilitative measures for child victims of neglect, abuse and exploitation; and
- The Convention also adds an additional express ground under which State Parties are under a duty not to discriminate against children in their enjoyment of the Convention's rights.

Implementation of the Convention is evidenced by the provision made for the establishment of a Committee on the Rights of the Child.⁶⁴¹ The Committee consists

⁶⁴¹ Art 43.

of ten experts elected by secret ballot by the States Parties. Members serve for a term of four years and meet annually. The principal function of the Committee is to oversee the system of periodic reporting.⁶⁴² It is a requirement of the Convention that States undertake to submit to the Committee reports on the 'measures they have adopted which give effect to the rights recognized and on the progress made on the enjoyment of those rights'. The initial report is required to be submitted within two years of the entry into force of the Convention for the State concerned. Subsequent reports must be submitted every five years. The reports submitted should indicate 'factors and difficulties', if any, affecting the 'degree of fulfilment' of the Convention obligations. The Committee may request further information relevant to the implementation of the Convention. States shall make their reports widely available to the public.

The significance of the Convention to our study is illustrated in a number of ways. In addition to provisions on implementation, the fundamental premise underlying the Convention on the Rights of the Child is that children are entitled to not only the same basic human rights as adults but certain additional rights because "childhood is entitled to special care and assistance."⁶⁴³ Other important illustrations of the significance of the Convention which are discussed below include:

⁶⁴² See in this regard Articles 44-45.

⁶⁴³ Schulz 'The Hague Child Abduction Convention and the United Nations Convention on the Rights of the Child' in *Family Life and Human Rights* edited by Peter Lodrup and Eva Modvar 721.

(a) *Scope*

First, the Convention indicates international acceptance of the view that the rights of children are not adequately defined and protected by the existing regime of human rights treaties. A separate treaty on children permits a wide range of their specific needs and interests to be addressed rather than the more limited *foci* of the relationship between the family, and more specifically the adult members of the family, and the state. Secondly, the Convention covers not only civil and political rights but also social, economic, cultural and humanitarian rights. Thirdly, the implementation system under the Convention which involves the establishment of a Committee on the Rights of the Child should permit the development of specifically child-oriented human rights jurisprudence.⁶⁴⁴ Fourthly, significant to South Africa in terms of making the other rights stipulated in chapter 2 of the Constitution, especially applicable to children. For example, rights to freedom of conscience, expression, religion, association and privacy also apply to children.⁶⁴⁵ In that respect the Convention on the Rights of the Child is concerned with the following:⁶⁴⁶

- The participation of children in decisions affecting their own destiny and their participation in community life;
- the protection of children against discrimination and all forms of torture, cruel, inhuman and degrading treatment and punishment, neglect and exploitation;
- the prevention of harm to children, the development of preventative health care and the prevention of child abduction; and

⁶⁴⁴ Schulz *ibid* n 643 in 1991 (5) *International Journal of Law and the Family* p133.

⁶⁴⁵ Devenish *op cit* n 591 p 374.

⁶⁴⁶ See Van Bueren in Davel *op cit* n 611 p 203.

- the provision of assistance for children's basic needs, including rehabilitation for child victims of a wide range of abuse and neglect and the provision of equal access for children to cultural and recreational activities.

(b) *State Obligations*

States Parties are required to use their best efforts to ensure 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 will be their basic concern.⁶⁴⁷ This obligation requires state parties to ensure that in formulating legislation on family law the principle of equal and common parental responsibilities is embodied and the recognition of both parents in the upbringing and development of their children. The unmarried father should be seen as a parent and be given equal recognition.

Article 9 of the CRC requires that children should not be separated from parents except where competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. It should be noted that this provision permits a child to be separated from his or her parents on the basis that competent authorities subject to judicial review have determined that this is in the his or her best interests. Despite the wording of Article 9, it seems unlikely that the Convention actually contemplated removal of children from their parents simply on the basis that it was in their best interests to be removed to other caregivers. Guidance

⁶⁴⁷ Art 18(1).

on the kinds of instances in which such intervention might be accepted is provided by the second sentence of Article 9(1) which gives, as examples of where separation may be necessary, cases involving abuse or neglect of the child by both parents. A more restricted approach is also indicated by provisions such as those in Article 7 which refer to the right of the child to know and be cared for by his or her parents. It therefore seems unlikely that national legal systems which employ more restrictive criteria than a simple best interest test to determine when a child can be removed into public care will be found to be in breach of the Convention.

The CRC further requires States Parties to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or any other person who has the care of the child.⁶⁴⁸

It further provides that 'a child temporarily deprived or permanently deprived of his or her 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 and States Parties shall in accordance with their national laws ensure alternative care for such child.'⁶⁴⁹

⁶⁴⁸ Art 19.

⁶⁴⁹ Art 20(1) and (2).

(c) *Parental Obligations*

The Convention has four guiding principles which, according to the Committee on the rights of the child, must inform the implementation of the Convention provisions in all areas: the principle of non-discrimination, the best interests of the child and the child's right to be heard.⁶⁵⁰ Parental obligations and their implication on the rights and responsibilities of the unmarried father will be analysed in the context of articles 2, 3, 5 and 7 below.⁶⁵¹

Article 5 provides:

"States parties shall 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 Convention."

The reference in Article 5 to the members of the extended family or community doubtless reflects the influence of countries in which kinship and community networks have a more prevalent role in relation to the upbringing of children than in Western countries where the nuclear family predominates.⁶⁵² There is, however, no express recognition of the role of the extended family.⁶⁵³ Indeed a preference for the nuclear family structure may be implicit in Article 18 that provides which states are to use their best efforts to ensure recognition of the principle that both parents shall have common responsibilities for the upbringing and development of the child. Walsh⁶⁵⁴ further submits that the Convention does not therefore clearly favour one particular

⁶⁵⁰ Art 2 and Art 3 which provide: "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." See also Art 12.

⁶⁵¹ CRC.

⁶⁵² See Walsh 'The United Nations Convention on the Rights of the Child' 5 1991 (5) *International Journal of Law and the Family* 173.

⁶⁵³ Articles 3 and 8.

⁶⁵⁴ Walsh *op cit* n 652 p173.

family structure. However, its provisions do reflect a perception of children as part of a unit of persons which has primary responsibility for them and, therefore, children are not to be regarded as children of the state. Article 7 provides that the child has the right to know and be cared for by his or her parents. It is submitted that reference by the Article to parents would ordinarily be interpreted to mean care by natural parents irrespective of their marital status.

Article 2 is a very broad non-discrimination clause, which not only prohibits discrimination against children on the basis of the child's status but also prohibits discrimination on the basis of the family's status. It provides that, States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. The notable departure from other human rights treaties in terms of the listed categories of prohibited discrimination is that the categories apply not only to the direct subjects of the Convention, namely, children, but also the child's parents or legal guardians.⁶⁵⁵

This is supplemented by Article 2(2) under which appropriate measures shall be taken to ensure that the child is protected from all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members. This is to protect children from the effects of discrimination or punishment ostensibly aimed at their parents, guardians or family.

It is also interesting to note the reference to 'his or her' which complements the general use of gender-neutral language in the Convention which is a departure in

⁶⁵⁵ See McGoldick 'The United Nations Convention on the Rights of the Child' 1991 *International Journal of Law and the Family* 135.

treaty drafting. In essence, what is required is that, in implementing the Convention States Parties must refer to the requirements of Article 2 of the Convention which places them under a duty to 'respect and ensure', the rights in the Convention. The term 'respect' implies a duty of good faith to refrain from actions which would breach the Convention. The duty to 'ensure', however, requires State Parties to take whatever measures are necessary in order to enable children to enjoy their rights.⁶⁵⁶

The obligation to 'respect and ensure' follows the equivalent Article in the ICCPR which has been interpreted by the Human Rights Committee as involving positive as well as negative obligations.⁶⁵⁷ As with the ECHR, the obligation applies in respect of any child 'within its jurisdiction'. The obligation is not therefore limited to children within the territory of the state. This is not only important as a general principle but also because a number of rights in the Convention have international aspects or make provision for their international regulation, for example, in the context of refugees, custody, adoption and armed conflict.

(d) Implications of the best interest principle for South Africa

Underpinning the Convention on the Rights of the Child are two new principles of interpretation in international law:⁶⁵⁸ the best interests of the child, and the evolving capacities of the child. Article 3 of the Convention is of fundamental importance to the whole Convention because it contains the general standard which underpins the application of the rights guaranteed. It provides:

⁶⁵⁶ Van Bueren chapter 11: 'The United Nations Convention on the Rights of the Child: An Evolutionary Revolution' in Davel *op cit* n 646 p 211.

⁶⁵⁷ McGoldick *op cit* n 656 p 134.

⁶⁵⁸ See Van Bueren in Davel *op cit* n 656 p 204.

“In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Although the standard is simple to state, it can be exceptionally difficult to apply because of the range of personal, social, economic and other factors that determine the perception of what is in the ‘best interests’ of the child. Even if that determination is made it is only ‘a consideration’ and not ‘the primary consideration.’ However, the standard of the best interests of the child being a primary consideration is to be applied universally.

Van Bueren submits that the best interests principle as articulated in Article 3(1) of the Convention, does not create rights or duties but it is only a principle of interpretation which has to be considered in all actions concerning children.⁶⁵⁹ She further submits that, the Article has an advantage, unlike Article 2(1), of operating as a principle to be considered in relation to each of the rights in the Convention and, importantly, residually to all actions taken by South Africa concerning children. If it is true that the best interest principle does not create rights and duties but it is only a principle to be considered in all actions concerning children, then the courts in interpreting the allocation of parental rights and responsibilities in terms of section 21 of the Children’s Act should give due consideration to the rights of an unmarried father.⁶⁶⁰

Factors considered in determining what is in the best interest of the child are endless and will depend on each particular factual situation. These include the opinions of the

⁶⁵⁹ *Ibid* n 658 p 204.

⁶⁶⁰ 38 of 2005.

child and members of the child's family, the child's sense of time, the need for continuity, the risk of harm, and the child's needs. The rights in the Convention may be used as a signpost by which the best interests of the child may be identified.⁶⁶¹ Hence under the Convention the child is given a greater role in deciding what is in the child's best interests than in the traditional approach.⁶⁶² Therefore, the inclusion of best interests of the child in the Convention on the Rights of the Child suggests that this traditional concept has been remoulded. It is respectfully submitted that the South African Constitution Act 108 of 1996 complies with international law as section 28(2) emphasizes the paramountcy of the child's best interests. Article 9 of the Convention on the Rights of the Child provides:

"A child shall not be separated from his or her parents except when necessary for the best interest of the child."

Article 9 also enumerates the circumstances in which separation of a child from his or her parents against their will is appropriate. The examples suggested in the Convention are cases involving abuse or neglect by the parents or where the parents are living separately and a decision on residence needs to be made. In separation proceedings 'all interested parties shall be given an opportunity to participate in the proceedings and make their views known.'⁶⁶³ This provision requires the child to have an opportunity to participate but not necessarily to have separate representation.⁶⁶⁴ If a child is separated from one or both parents the state is to respect the right of the child

⁶⁶¹ See Van Bueren in Davel *op cit* n 658 p 205.

⁶⁶² Van Beuren *ibid* n 661 p 205.

⁶⁶³ Art 9(2).

⁶⁶⁴ See McGoldick *op cit* n 657 p 141.

‘to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.’⁶⁶⁵

However, Article 18 of this Convention emphasises that the parents have the primary responsibility for the upbringing and development of the child. States are required to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or legal guardians have the ‘primary responsibility’ in this regard and the ‘best interests’ of the child is to be ‘their basic concern’. That the responsibility is ‘primary’ rather than exclusive suggests that the secondary responsibility will lie with the state. For the purpose of guaranteeing and promoting the Convention rights, states, ‘shall render assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions facilities and services for the care of children.’⁶⁶⁶ States shall also take appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.⁶⁶⁷ In contrast, section 28(2) of the South African Constitution states that “a child’s best interests are of paramount importance in every matter concerning the child”. The ‘best interests of the child’ demand that all children should receive equal treatment without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, ethnic or social origin, property,

⁶⁶⁵ Art 9(3).

⁶⁶⁶ Art 18(2).

⁶⁶⁷ Art 18(3).

disability, birth or other status. That the child should not suffer discrimination on account of any of these traits could be regarded as axiomatic.⁶⁶⁸

The Convention further outlaws discrimination on account of particular traits of the child's parents or legal guardian. The extension of the listed categories not just lie to the direct subjects of the Convention, that is, children, but also to the child's parents or legal guardians. The drafters regarded it as necessary in order to protect children from the effects of discrimination against their parent's guardians or family.⁶⁶⁹ Discrimination against children occurs not only when there is discrimination between adults and children but also between different groups of children. For example, discrimination between children born in wedlock and children born out of wedlock or discrimination on the basis of gender of the children. It is submitted that although the Convention spells out that there should be no discrimination against children based on the status of their parents South African children are discriminated against on the basis of their parent's marital status. Children of married parents have legal protection to maintain relationships with both parents, whereas children of unmarried parents are legally protected to only maintain their relationship with their mother because she acquires automatic parental rights and responsibilities upon their birth. Both parents have common responsibility for the upbringing and the development of their children.⁶⁷⁰ The Article refers to both parents without distinction. When two people have a child they are both parents but in accordance with our law a mother is a parent,

⁶⁶⁸ See Sloth-Nielson 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South Africa' 1995 *SAJHR* 409.

⁶⁶⁹ *Ibid* n 668 p 409.

⁶⁷⁰ Article 18 n 663.

a father, who is married to the mother is another parent and an unmarried father is not a parent and not even part of the family unless he has recognised the child.

(e) Implications for South Africa's law on parental responsibilities and rights of unmarried fathers

Although in South African law an unmarried father has recently been granted automatic parental responsibilities and rights in respect of his children born out of wedlock it is unfortunate in that the unmarried father is still required to satisfy certain requirements as outlined in terms of the Children's Act 38 of 2005 or alternatively enter into a parental responsibility and rights agreement with the mother. In such a situation, the unmarried father will have no remedy under the Convention if the mother refuses to reach an agreement with him and the court does not find it in the best interest of the child to award parental responsibilities and rights to him. Another situation would be where the child is a product of a 'one-night-stand' encounter, the mother might know the father but decided not to disclose the birth of the child to him nor disclose the father's identity.⁶⁷¹ The child will be deprived of the right to know and be raised by both his or her parents and the child's right to maintain regular contact with both parents,⁶⁷² although a family will not be established in a 'one night stand', unless where the parties have decided to live together, the father should have rights and responsibilities. If he does not have the rights and responsibilities, the implication is that national legal system fails to uphold the child's right to maintain regular contact with his/her father in such circumstances. The situation conflicts with the Convention on the Rights of the Child as it clearly provides in the Preamble that it

⁶⁷¹ A 'one-night-stand' is where the couple have met for the first time either at a bar, party or after a social gathering and later had sex which resulted in a pregnancy.

⁶⁷² Articles 9 and 18 of the *CRC*.

is essential for the well-being of the community and therefore “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”. The purpose of the right is to ensure that the state, neither wittingly nor unwittingly, unjustifiably interferes with the integrity of the family unit.⁶⁷³ However, the right is subject to reasonable curtailment, including the separation of a child from his or her parents, if it is in the best interests of the child. It is submitted that, from the wording of the Convention on the Rights of the Child, there is no requirement that the best interests of the child are the only or the principal consideration as long as it is one of the main considerations, therefore, there is no reason why our law and our courts continue to put emphasis on discriminatory and unfair procedural demands on the part of the unmarried father to secure parental rights towards his children born out of wedlock. The formulation of the Article gives considerable discretion to the courts and other authorities to determine what weight to give to the best interests of the child vis-à-vis other considerations.

It is further submitted that South Africa, as a signatory to this Convention, has incurred a binding obligation to refrain from acts which would defeat the object and purpose of the Convention. As a State Party, South Africa should also review its legislation in order to ensure that domestic law is consistent with the Convention. Progress has been made in this regard in that the ‘best interest’ standard has now become incorporated as a general standard in the South African Constitution. The law of parent and child have also been reformed to give effect to the child’s right to parental care, with special attention being given to the rights of children born out of

⁶⁷³ Devenish *op cit* n 645 p 379.

wedlock who should not suffer discrimination on account of the circumstances of their birth. Ratification also establishes a legal framework for the recognition of children's rights that would contribute to the improvement of children's lives in South Africa particularly in relation to their fathers.

5.3.2 Regional instruments

5.3.2.1 *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950*

The European Convention on Human Rights was adopted after the Second World War in order to ensure the protection of human rights in Europe. From its original membership of ten states, the membership of the Council of Europe, for which ratification of the ECHR is a prerequisite, now stands at forty-four states. It introduced a particular legal order straddling national and international law. Its aim is not to act as a substitute for national systems but rather to guarantee "the respect of human rights and their further development" within Member States.⁶⁷⁴

Although the European Convention is not *per se* relevant to South African law it will serve a useful purpose in the analysis of the child's right to respect for family life under Article 8 and the existing similarities between ECHR and CRC. It has been acknowledged that this Convention although it has been successful in the protection of human rights it was not written with the interests or rights of children in mind.⁶⁷⁵

⁶⁷⁴ See Kilkey 'Effective Protection of Children's Rights in Family Cases: An International Approach in *Family Life and Human Rights* edited by Peter Lodrup and Eva Modvar 347 and Marie-Therese Meuldres-Klein in *Family Life and Human Rights* 484.

⁶⁷⁵ Kilkey *ibid* n 674 p 347.

Reference to children and their parents in the Convention is very limited. However, the European Court of Human Rights often uses the Convention on the Rights of the Child and other international treaties as an interpretation tool when applying the ECHR in children's cases.⁶⁷⁶ Accordingly, all ECHR states are bound to give preference to treaties, like the Convention on the Rights of the Child, to which they are a party, to the extent that they set higher standards, nevertheless, of protection than the European Convention.⁶⁷⁷ Article 53 does not expressly oblige or empower the European Court of Human Rights to police those higher standards. The provision does make it clear that the ECHR must give way to any higher human rights standards as to which states have committed themselves.⁶⁷⁸ The particular significance of the Convention to the present study relates to:

(a) *Family obligations*

The notion of the family is mentioned once in Article 8. This provision guarantees to everyone the right to respect for private and family life and prescribes the limited circumstances in which these rights can be interfered with by public authorities, notably where it is necessary to protect health or morals, or the rights and freedoms of others. The essential object of Article 8 of ECHR is to protect the individual against arbitrary action by public authorities. Where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be

⁶⁷⁶ Council of Europe's Convention on the Legal Status of Children Born Outside Wedlock in 1975, 1959 Declaration on the Rights of the Child, UNESCO Convention against Discrimination in Education.

⁶⁷⁷ Kilkey *op cit* n 675 p 349.

⁶⁷⁸ Article 53 provides: "nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

developed and legal safeguards must be created to render a child's integration into his or her family possible from birth.⁶⁷⁹ It basically requires the State to take the necessary efforts, where appropriate, to balance between the right to respect for family life and the legitimate aim served by interfering with it in order to avoid a violation of this provision. In its application of this test, the European Court on Human Rights has held consistently that "consideration of what is in the best interests of the child in every case is of crucial importance."⁶⁸⁰ Notwithstanding the absence from Article 8 of the best interests principle, the Court consistently reviews national measures in the light of Article 8 requirements by considering whether the impugned measure's interfere with parent's rights (to respect for family life) can be justified as being in the child's best interests.⁶⁸¹ Basically, there is family life where there is a lawful and genuine marriage, but also other relationships of sufficient permanence enjoy the same protection as marriage in this context.⁶⁸² Family life can also exist between a non-married mother and her child, and with the child's father. From its earliest days, the European Court on Human Rights has refused to tolerate a difference in treatment based exclusively on marital status, and has set out clear principles in a number of well known European cases.⁶⁸³ According to the provisions

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⁶⁷⁹ See *Verschraegen in Family Life and Human Rights op cit* n 674 p 936.

⁶⁸⁰ See *Kilkey op cit* n 677 p 352

⁶⁸¹ *Ibid* n 680 p 352.

⁶⁸² *Verschraegen op cit* n 679 p 936.

⁶⁸³ *Markex v Belgium* 31 Eur.Ct.H.R. (ser.A), 2 Eur.H.R Rep 330 (1979); *Johnston v Ireland* 9 Eur.H.R Rep 203 (1987); *Keegan v Ireland, Kroon v The Netherlands* 1994 IIHRL 89; *Inze v Austria* 10 Euro.H.R.Rep 394 (1987); *Mazurek v France* 34406/54 ECHR 2000-11 and *Gnahore v France* 40031/98 38 ECHR 2000.

of Article 8, a child born out of wedlock had lesser rights than a child born in wedlock as regards the right to inherit or receive gifts from the mother.⁶⁸⁴

Although the European Court on Human Rights found that a number of provisions in Belgian law violated the Convention,⁶⁸⁵ it also made some statements of a more general nature in so far as it pointed out that Article 8 makes no distinction between the 'legitimate' and the 'illegitimate' family and that members of the "illegitimate family shall enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family."⁶⁸⁶ The right to respect of family life was seen to imply the right of the child to be integrated in a family from the moment of birth onwards. This was seen as a positive obligation derived from an effective respect for family life. The necessity to recognise the child as a condition for the establishment of maternity was considered to be an infringement of Article 8 and of Article 14 of the European Convention.⁶⁸⁷ The effect of Article 8 was also well articulated in the case of *Gnahore v France*⁶⁸⁸ where the Court said for a parent and his child, being together represents a fundamental element of family life. The Court also emphasized, the interests of the child must rise above all other considerations. The Court further acknowledged that the best interest presents a double aspect. On the one hand, it is certain that to guarantee to the child development in a healthy environment is a paramount consideration and that Article 8 would in no manner authorize a parent to take

⁶⁸⁴ See Danelius in *Family Life and Human Rights op cit* n 674 p 154.

⁶⁸⁵ *Markcx v Belgium* 31 Eur.Ct.H.R. (Ser.A).

⁶⁸⁶ *Verschraegen op cit* n 682 p 936.

⁶⁸⁷ See Kirsten Schiwe at p 686 in her paper titled 'Legal Provisions that allow Women to give birth anonymously-Apt to be exported from France to Germany' in *Family Life and Human Rights op cit* n 674.

⁶⁸⁸ 40031/98 38 ECHR 2000.

measures prejudicial to the health and development of his child. On the other hand, it is clear that it is as much in the interest of the child that the links between him and his family are maintained, except where it would be detrimental to the child. To break the link amounts to cutting the child off from his or her roots.

The result is that the interest of the child is the paramount consideration and only in exceptional circumstances can there be a rupture of the family link, and all efforts must be made to maintain the personal relations and, if necessary, at the proper time, to reconstitute the family. Family life is not only determined by blood relationship, but also by other criteria such as cohabitation, mutual care, and regular visitation by the biological parent.⁶⁸⁹ The birth of a child creates family life with both parents even if they do not live with each other or if their relationship has ended.⁶⁹⁰ Article 5 of Protocol No. 7 provides for equality between spouses and in their relations with their children and explicitly requires states to take such measures as are necessary in the interests of the child.⁶⁹¹ The relationship of children with their parents is protected under article 8 of the ECHR and that protection is independent of legitimacy of birth or of adoption. However full protection is guaranteed when parents and children live

⁶⁸⁹ However, in *Price v United Kingdom* case no 12402/86 at p 30 the Court held that cohabitation is not a prerequisite for family ties to fall within the scope of the concept of 'family life.'

⁶⁹⁰ This can be illustrated in the two cases- *Berrehab and Cilitz*, both cases Netherlands- concerned foreign men, one Moroccan and one Tuck, who had been granted residence permits in the Netherlands because of their marriages to a women resident in the Netherlands. The marriages ended in a divorce, and as a result thereof the residence permits were withdrawn. Each of the two men had a child with his wife in the Netherlands, and they were anxious to keep contact with their children. The refusal to let them stay in the country was in these circumstances disproportionate.

⁶⁹¹ This protocol was signed at Strausbourg on 22 November 1984 and the article reads as follows: "Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children."

together and when there is dependency of the child on his or her parents.⁶⁹² Implicit in the child's right to family life is the fact that children should enjoy regular and frequent contact with the parents with whom they do not reside.

Article 9 of the CRC requires that children shall not be separated from parents except where competent authorities, subject to judicial review, determine that such separation is necessary for the best interests of the child. This requirement is reflected clearly in both the text of Article 8 (ECHR) and its case law. In particular, it requires that any interference with family life, such as removal of children from the family or restrictions or prohibitions on contact, be in accordance with the law. This has been interpreted by the Court to require not only that it have a legal basis under domestic law, but also that where such decisions are taken by an administrative authority, such as a social services or care department, this discretion must be subject to judicial control. The similarity with the Article 9 CRC requirement is therefore very clear.⁶⁹³

The fundamental link between a parent and child means that where a family no longer lives together, continued contact between parents and their children is desirable and should in principle remain possible.⁶⁹⁴ There is thus a right of mutual contact guaranteed to parents and children under Article 8 of the Convention, which means that a decision denying or regulating such contact will interfere with family life and

⁶⁹² Verschraegen *op cit* n 686 p 936 argues that, the protection of Article 8 includes the right to recognise a biological child. The degree of protection depends on several factors: the age of the child (minor or major), the degree of affinity (child-parent, grandchild-grandparents, nephew/niece-uncle/aunt), and that contact of the parent having visitation rights with the child living with the parent holding caregiver rights.

⁶⁹³ See Kilkey *op cit* n 681 p 359.

⁶⁹⁴ Kilkey *ibid* n 693 p 358.

require justification by considerations pertaining to the child's best interests under Article 8(2).

However, it was an unfortunate situation for an unmarried father in South African law, where the common law denied him the automatic right of contact with his children. It must be noted that the father will have no remedy under the Convention if the mother decides to refuse contact. However, although the South African Constitution also does not expressly provide for the protection of family life, South Africa's obligations in terms of international covenants to protect the family as a fundamental unit of society and to enforce the right to marry and raise a family render it necessary to evaluate the position of the unmarried father. However, in recent years there had been tremendous developments in our law as pertaining to the protection of the family, an entity not included for protection in the Constitution. The protection of the right to family received attention and was acknowledged by the Constitutional Court in the cases of *Dawood and Another v Minister of Home Affairs*; *Shalabi and Another v Minister of Home Affairs*; *Thomas and Another v Minister of Home Affairs*⁶⁹⁵ in the context of interpreting the Aliens Control Act.⁶⁹⁶

A decision to deprive parents and children from mutual contact on a permanent basis must be supported by particularly strong reasons in order to be compatible with the CRC. It is clear from the interpretation of articles 8 and 12 of the ECHR that a family that is protected is the nuclear family which is founded on marriage and, as such, excludes the unmarried father. The assumption that a family exists only in marriage and that an unmarried father is not a member of his child's family is not only wrong

⁶⁹⁵ 2000 8 BCLR 837 (CC); 2000 3 SA 936 and 2000 1 SA 997 (C); Kilkey *ibid* n 694 p 358.

⁶⁹⁶ Aliens Control Act 96 of 1991.

but also artificial. In view of the express prohibition of discrimination on account of marital status and the absence of a right to a family or the right to marry in the South African Constitution, the jurisprudence of the ECHR contains the same flaws as the law of contact in South Africa. Consequently it should not apply to the South African dispensation.

However, the Court in the cases⁶⁹⁷ acknowledged various clauses in the Constitution that require nurture and protection of the fundamental constitutional values of human dignity, equality and freedom. The Court also noted that there is no express right to marry and raise a family and no specific protection of the family life in the South African Constitution. The Court further stressed that “South African Families are diverse in character and marriages can be contracted under several different legal regimes, including African customary law, Islamic personal and the civil law.”⁶⁹⁸ The Court observed that the definition of the family also changes as social practices and traditions change. Sinclair has submitted that these words reflect the Court’s commitment to recognize a variety of family forms as units that resemble traditional families and that deserve legal protection.⁶⁹⁹

(b) Prohibition against discrimination

As far as discrimination is concerned, Article 14 of the ECHR prohibits discrimination when exercising one’s rights pursuant to the ECHR.⁷⁰⁰ It is

⁶⁹⁷ See fn 695.

⁶⁹⁸ *Ibid* n 691.

⁶⁹⁹ Sinclair ‘Embracing New Family Forms, Entrenching Outmoded Stereotypes’ in *Family Life and Human Rights op cit* n 680 p 818.

⁷⁰⁰ The articles provides:

submitted⁷⁰¹ that Article 14 is not a general principle of equality but it is a part of every provision of the ECHR.⁷⁰² Thus it has no independent character and cannot be invoked in an isolated way. In general, the provision has a defensive character: positive duties cannot be deduced from Article 14. The grounds of discrimination are not enumerated in an exhaustive way, but the discrimination must be related to the person concerned.⁷⁰³ There must be a certain degree of discrimination. It is further submitted that discrimination will be found if there is no objective and reasonable justification for the different treatment. The test for such justification is the purpose and objective of the alleged discrimination and common European opinions.⁷⁰⁴ The discriminatory measure must be reasonably proportional to the objective pursued, which means that the degree of the discrimination may not be disproportional. Discrimination will basically be found when a measure or provision treats a person differently from other persons in similar situations (for example, married-unmarried mothers, illegitimate-legitimate children) and there is no objective and reasonable justification for the different treatment in the light of international treaties or other national laws.

However, the European Commission has been unwilling to decide definitely that a natural father has an inherent right of contact. It has held that whereas the concept of

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

⁷⁰¹ Verschraegen *op cit* n 692 p 938.

⁷⁰² Verschraegen *ibid* n 701 p 938.

⁷⁰³ Like in section 9 of the South African Constitution and Verschraegen *op cit* n 702 p 938.

⁷⁰⁴ Verschraegen *ibid* n 703 p 938.

family life in Article 8(1) clearly encompasses a legitimate father's right of contact, it does not necessarily clothe a natural father with the same right since 'normal family ties' do not always exist between a natural father and his child. Although the Commission assumed, albeit without deciding, that a natural father has an inherent right of contact, it held that interference with the right may be justified in terms of Article 8(2) if it is in the best interests of the child. Furthermore, the Commission took the view that the differential treatment between unmarried and divorced fathers that is consequent upon this approach does not constitute discrimination in terms of Article 14 since it is 'justified by objective reasons and is proportionate to the aim it is sought to realise, namely the protection of the interests of a child born out of wedlock. The preference accorded to a legal marriage, is, moreover, evident in Article 12 of the ECHR, in terms of which the rights to marry and to found a family are entrenched. It is clear from the interpretation of Article 8 and 12 of the Convention that a family that is protected is the nuclear family that is founded on marriage and as such excludes the unmarried father and denies him parental rights.

It is submitted that the notion of family life in the context of the ECHR does not depend on civil status. Heterosexual cohabitation, in contrast to homosexual cohabitation, has been affirmed as constituting 'family life'.⁷⁰⁵ With regard to children, the best interests standard prevails,⁷⁰⁶ notwithstanding its absence in Article 8(2), the Court consistently undertakes the review of national measures in the light of Article 8 requirements by considering whether the interference with parent's rights (to

⁷⁰⁵ *Verschraegen op cit* n 704 p 939.

⁷⁰⁶ This position is the same as the South African position where the interests of the children are of paramount consideration in all matters concerning the children.

respect for family life) which the impugned measure causes can be justified by being in the child's best interests.

(c) Implications for South Africa on the rights and responsibilities of unmarried fathers

It is submitted that the jurisprudence of the European Court of Human Rights is progressive and consistently changes with the times and it will benefit South Africa tremendously in the development of its human rights law generally if we can borrow or adopt. However, when it comes to the protection of the unmarried father's relationship with his children born out of wedlock, the jurisprudence of the European Convention is still lacking. The unmarried father is excluded from acquiring automatic parental rights and responsibilities by Article 8 as it is often assumed that 'normal family ties' do not exist between an unmarried father and his child. The family that is also protected in terms of Articles 8 and 12 is the nuclear family that is founded upon marriage and therefore the unmarried father is automatically excluded.

5.3.2.2 The African Charter on the Rights and Welfare of the Child, 1990

The African Charter on the Rights and Welfare of the Child is another important instrument dealing with children's rights and it also prohibits racial and gender discrimination.⁷⁰⁷ It came into operation after its ratification by 15 member states.⁷⁰⁸ South Africa ratified it on 9 July 1996. It is a regional human rights instrument adopted by the defunct Organisation of African Unity. It is a relatively new international treaty, whose objectives are to enhance children's rights in Africa and to

⁷⁰⁷ Doc. CAB/LEG/24.9/49 (1990).

⁷⁰⁸ 1990.

reconcile Western juristic thought and African cultural values. The Charter codifies children's rights in Africa. It is based on three major principles:⁷⁰⁹

(1) The principle of the best interests of the child standard which is identified as the criterion against which a State Party has to measure all aspects of its law and policy regarding children. The African Charter on the Rights and Welfare of the Child states that in all actions concerning children, the best interests of the child 'shall be the primary consideration.'⁷¹⁰ This Article differs from the CRC's article 3(1) that refers to the best interests of the child as 'a' (rather than 'the') primary considerations in all actions concerning children.

(2) The principle of non-discrimination - as in many other international human rights instruments, the principle of non-discrimination is clearly established as an overriding principle. Children are entitled to equal enjoyment of the rights under the Charter, irrespective of their birth status and who their parents are. Some of the grounds on which discrimination is outlawed are birth or other status of the child, the parent or legal guardian. Although the marital status of the parent is not explicitly mentioned as a ground for non-discrimination, it may be included under 'birth' and 'other status,' making discrimination between legitimate children and illegitimate (or 'marital' and 'non-marital') children contrary to the Charter.⁷¹¹ Articles 1, 2, 3, of the Charter prohibit racial and gender discrimination. Article 18(3) of the Charter also supports

⁷⁰⁹ Viljoen chapter: 12 'The African Charter on the Rights and Welfare of the Child' in Davel *op cit* n 611 p 219.

⁷¹⁰ Art 4.

⁷¹¹ See Viljoen in Davel *op cit* n 709 p 219.

Articles 1-3 of the Charter and complements the provisions of CEDAW on non-discrimination.

(3) The primacy of the Charter over harmful cultural practices and customs.⁷¹² In Africa children often form part of a rural traditional setting where customs rather than formal law prevail. However, the African Charter on the Rights and Welfare of the Child asserts its own primacy above culture and customs that are prejudicial to the health or life of a child and discriminatory to the child on the basis of sex or other status.⁷¹³ The Charter is particularly significant in respect of the following issues:

(a) *Protection of the family*

The role of the family as the basis of society and the natural unit within which children are reared is acknowledged by the Charter under discussion.⁷¹⁴ Children are therefore, entitled to enjoy parental care and the right to reside with their parents. Every child is entitled to the enjoyment of parental care and protection.⁷¹⁵ This is also confirmed by the Charter which provides that every child is also guaranteed the right to reside with his or her parents and prohibits any separation against a child's will from his parents except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child. Children are entitled to enjoy parental care and the right to reside with their parents.⁷¹⁶

⁷¹² Viljoen *ibid* n 711 p 219.

⁷¹³ *Ibid* n 712 p 219.

⁷¹⁴ Art 18(1).

⁷¹⁵ Art 19(1).

⁷¹⁶ Art 19(2).

The Charter does not specifically provide for parental responsibilities and rights but it acknowledges that every child is entitled to parental care and not to be separated from his/her parents unless it is in the best interests of such a child.⁷¹⁷ However, it is submitted that the African Charter is modelled on European principles that award parental responsibilities and rights on the basis of marital status of the parents at the time of birth of the child. Consequently, if the parents are not married in accordance with the principles of the applicable African custom or in accordance with the common law, the unmarried father is deprived of automatic parental rights and responsibilities.⁷¹⁸

This position is discriminatory, and inconsistent with the statement in the Charter's Preamble which proclaims to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. However, the realisation of human rights in Africa is faced with unique obstacles, *inter alia*, abject poverty, ignorance, pervasive illiteracy, and lack of political will amongst certain African leaders who view human rights doctrine as euro-centric and unsuited to the African context. The cultural differences between Africa and Europe and other western nations have serious implications for human rights. One such difference is the principle of community that features prominently in

⁷¹⁷ Parents remain primarily responsible for the 'upbringing and development' of children (Art 20). In this process, the best interests of the child must remain their basic concern. Parents have the responsibility of securing living conditions that make the child's development possible. But, as in the case of obligations imposed on the state, this responsibility is inherently limited, in this case by the parent's ability and financial capacity. (Viljoen *op cit* n 713 p 222)

⁷¹⁸ A valid customary marriage is required to be in existence before a man could acquire rights over his children under African culture or *isondlo* should have been paid. At common law unmarried fathers do not acquire responsibilities and rights by operation of the law.

African culture.⁷¹⁹ The structure of African traditional society is closely connected to family law. The family unit is central to traditional thinking and as such this area of customary law is particularly well developed. However, the family in traditional context is an extended family which is largely alien to western doctrine and very complicated. Family law impinges on almost all areas of community life, a reality that must be taken into account when implementing the Charter.⁷²⁰ Discrimination between men and women exist within the family and it arises as a result of the traditional conception of marriage. In cultural context an African marriage is the coming together of two families rather than individuals, this notion makes it very difficult to award and enforce parental rights and responsibilities in modern society.

(b) Implications of the 'child's best interests' principle

The 'best interests' of the child is identified as the criterion against which a State Party has to measure all aspects of its law and policy regarding children.⁷²¹ The African Charter on the Rights and Welfare of the Child states that in all actions concerning children, the best interests of the child 'shall be the primary consideration'.⁷²² In South Africa this principle is legislatively entrenched.⁷²³

⁷¹⁹ See Davel 'The African Charter on the Rights and Welfare of the Child: Realizing Children's Rights in Africa', unpublished paper presented at The International Society of Family Law 11th World Conference- Copenhagen/Oslo- 2002.

⁷²⁰ See Nicholson 'Human Rights: Their realization within the context of African Customary Marriage' unpublished paper presented at The International Society of Family Law 11th World Conference- Copenhagen/Oslo 2002.

⁷²¹ Art 4.

⁷²² Art 4.

⁷²³ See sections 9 of Children's Act 38 of 2005 and s 28(2) of the South African Constitution.

(c) Parental obligations

Parents are responsible for the upbringing and development of their children.⁷²⁴ This includes both married and unmarried parents. However, such responsibility is limited by the parent's ability and financial capability.⁷²⁵ The family is considered to be the natural unit and basis of society where children are entitled to enjoy parental care and the right to reside with their parents.⁷²⁶ The Charter clearly provides that every child is entitled to the enjoyment of parental care and protection and should, whenever possible, have the right to reside with his or her parents and if separated, such child should have the right to maintain personal relations and direct contact with both parents on regular basis.⁷²⁷ The inference that can be drawn from the interpretation of the last mentioned Article is that an unmarried father is included as a parent although he is not regarded as family in terms of Article 18.

(d) State obligations

The African Charter on the Rights and Welfare of the Child provides for a supervisory body, the African Committee of Experts on the Rights and Welfare of the Child and States Parties are required to nominate persons to serve on that Committee.⁷²⁸ The main function of the Committee is to promote the African Charter on the Rights and Welfare of the Child, it is responsible for the protection of the rights under the African Children's Charter and the Committee also receives, and examines state reports

⁷²⁴ Art 20 of the African Children's Charter.

⁷²⁵ Art 20(1)(b).

⁷²⁶ Arts 18 and 19.

⁷²⁷ Art 19.

⁷²⁸ Viljoen in Davel *op cit* n 717 p 225.

submitted periodically under Article 43.⁷²⁹ States Parties are also required to submit reports to the Committee. However, this has not been generally observed by States Parties. States Parties are also expected, in accordance with their means and national conditions, to take all appropriate measures to assist parents and other persons responsible for the child, and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing, housing and child-rearing.⁷³⁰ Furthermore, States Parties are required to take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to their children during marriage and in the event of its dissolution. In case of dissolution, provision is made for the necessary protection of the children.⁷³¹ It is clear from the provision that the family that is envisaged is the nuclear family founded on marriage, the unmarried father is therefore excluded and his interests over his children are ignored. However, it is interesting to note that the provision further provides that 'no child shall be deprived of maintenance by reference to the parent's marital status.'⁷³² This implies that although an unmarried father is not recognised as a child's family by the Charter, he is nevertheless required to contribute to child's maintenance. This position of the Charter is unfair and discriminatory.

⁷²⁹ Arts 33 to 36 of the African Charter on the Rights and Welfare of the Child.

⁷³⁰ Art 20(2) (a)(b).

⁷³¹ Art 18(2).

⁷³² Art 18(3).

(e) Implications for South Africa on the responsibilities and rights of unmarried fathers

By ratifying the African Charter on the Rights and Welfare of the Child, states automatically accept the competence of the African Charter on the Rights and Welfare of the Child Committee to examine state reports and to receive individual and inter-state communications. This might not be a problem for South Africa as it ratified the CRC in 1995 and such ratification played a pivotal role in protecting children's rights in the Constitution. Therefore, the applicability of the African Charter on the Rights and Welfare of the Child in South Africa is minimal because the rights of children and responsibilities of their parents are already well defined and protected in the CRC and that have contributed tremendously in the development of South African law.

5.4 TREATIES SIGNED BY THE SOUTH AFRICAN GOVERNMENT BUT NOT YET RATIFIED

The essence of a signed but not ratified treaty is that South Africa assumes an international obligation to refrain from acts which would defeat the object and purpose of the treaty and that the state undertakes to review all domestic law and policy to ensure that its legislation and policies comply with the obligations imposed by the treaty, at the moment of ratification.⁷³³

5.4.1 *Universal Declaration of Human Rights (1948)*

The Universal Declaration of Human Rights is not a treaty but a non-binding Declaration in international law. South Africa, as part of the international community, must conform to the Declaration. It was adopted by the United Nations General

⁷³³ Olivier *et al op cit* n 612 p 164.

Assembly Resolution (111) of 10 December 1948. In its Preamble, the Universal Declaration of Human Rights reaffirms the dignity and worth of the human person and the equal rights of men and women in its determination to promote social progress and better standards of life in larger freedom. It provides that everyone is entitled to all rights and freedoms as set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷³⁴ This Article emphasises non discrimination at any level of human existence. Furthermore, all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination.⁷³⁵

(a) Protection of the family

The Declaration provides that everyone has the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.⁷³⁶ The family is acknowledged as the natural and fundamental group unit of society and is afforded protection by society and the State.⁷³⁷ This Article recognises the right to form a family and stresses that all members of the family should be treated equally at the formation, duration and dissolution of the family unit. The Article clearly excludes the unmarried father as a parent. He does not have

⁷³⁴ Art 2.

⁷³⁵ Art 7.

⁷³⁶ Art 16(1).

⁷³⁷ Art 16(3).

automatic parental rights and is not regarded as family to his children nor afforded an opportunity to enjoy family life with them.

However, Article 25(2) of the Declaration makes a commonsensical statement that all children should be afforded the same level of security regardless of their parent's marital status.⁷³⁸ The obvious ramifications of this, in conjunction with the principle that a child has a right to a meaningful relationship with both parents, is thus that unmarried fathers should be afforded the same rights and responsibilities to a meaningful relationship with their children, as married fathers and married mothers and unmarried mothers. Furthermore, provision of 'special care and assistance' is being reserved only for mothers and children.⁷³⁹ This amounts to gender discrimination that contradicts previous Articles and suggests that mothers are either more vulnerable, less capable, or are of greater significance.⁷⁴⁰

Although the Declaration outlaws discrimination based on the grounds listed under article 2, it is interesting to note that these rights may in no case be exercised contrary to the purposes and principles of the United Nations.⁷⁴¹ Whether the unmarried father has parental rights and responsibilities would ultimately depend on the interpretation of the best interest principle as embodied in the Convention on the Rights of the Child. All children, whether born in or out of wedlock enjoy the same social

⁷³⁸ It provides as follows:

'Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.'

⁷³⁹ Art 25(2).

⁷⁴⁰ Specifically articles 2 and 16.

⁷⁴¹ Art 29(3).

or other status.⁷⁴³ The States Parties to the Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in that Covenant.⁷⁴⁴

(a) *Protection of the family*

The Covenant is significant in the sense that the family is acknowledged and protected as the natural unit and fundamental group unit of society, particularly for its establishment while it is responsible for the care and education of dependant children.⁷⁴⁵ It requires that marriage be entered into with the free consent of the intending spouses.⁷⁴⁶ Article 10(3) provides that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination on reasons of parentage or other conditions. Although the Covenant is silent on specific rights of children, this article could be interpreted in a manner that would acknowledge and enhance such rights. States Parties are obliged not to discriminate for reasons of parentage or other conditions. The ICESCR contains an equality provision that prohibits discrimination on a limited number of grounds.⁷⁴⁷ The list consists of the same grounds as mentioned in article 26 of the ICCPR. Unlike the latter, the non-discrimination provision of the ICESCR only applies to the rights enunciated in the Covenant itself.⁷⁴⁸

⁷⁴³ Art 2(2).

⁷⁴⁴ Art 3.

⁷⁴⁵ The notion of the family is also defined in the context of marriage in the Covenant consequently the unmarried father is disadvantaged in this regard as he is deprived of the family life with his children born out of wedlock.

⁷⁴⁶ Art 10(1).

⁷⁴⁷ See art 2.

⁷⁴⁸ Loenen *op cit* n 556 p 199.

protection under the Declaration. However, the Declaration is silent on the rights and duties of parents towards their children. In circumstances like these, what would be given preference would be the responsibilities as outlined in the Convention on the Right of the Child.

(c) Implications for South Africa on the responsibilities and rights of the unmarried father

Although the Declaration offers a common standard for nations to achieve basic human rights for all it is submitted that the Declaration is of a limited application with regard to the rights and responsibilities of unmarried fathers because it is modelled on the common law and still has its emphasis on marriage as a pre-requisite in the establishment of a relationship between father and child. Therefore, even though the Declaration prohibits discrimination on various grounds including birth or other status, it also recognises the rights of men and women to marry and form a family.⁷⁴²

*5.4.2 International Covenant on Economic, Social and Cultural Rights (ICSECR)
1976*

This Covenant was adopted by the United Nations General Assembly by resolution 2200A(XXI) of December 1966, it entered into force on January 1976. South Africa signed this Covenant on 3 October 1994 but has not yet ratified it. The Covenant requires States Parties to undertake to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth

⁷⁴² Articles 2 and 16.

(b) Implications for South Africa on the rights and responsibilities of unmarried fathers

The Covenant advocates equal rights for all, prohibits discrimination and although South Africa is not a States Party to this Covenant it is required under the Vienna Convention on the law of Treaties not to do anything contrary to the Covenant. It implies therefore that discrimination against an unmarried father will not be tolerated. In the same vein equality for all would mean that an unmarried father needs to be treated on an equal footing with the unmarried mother and married couples on all aspect relating to his children and that would include legislation dealing with aspects of parental responsibilities and rights. However, it is unfortunate that the Covenant like others, although it protects the institution of the family, what indeed is envisaged is the nuclear family based on marriage and automatically excludes the unmarried father.

5.5 SUMMARY

It must be noted that once a state has agreed to respect a human rights treaty by ratifying that treaty, the main duty of that state is to adapt its national laws and policies to conform with its obligations under the treaty. It is submitted that South African legislation, particularly legislation relating to protection of children and children's rights, compares favourably with international norms and standards. The best interests of the child principle, and the principle of non-discrimination which not only prohibit discrimination against children on the basis of the child's status but also prohibits discrimination on the basis of family status, have been incorporated to a

certain extent not only in the Constitution but also in various legislative enactments.⁷⁴⁹

Thus implementation of obligations, in terms of international law, mainly occurs by way of legislation. The Convention on the Rights of the Child played a significant role in the drafting process of the South African Constitution, culminating in a comprehensive provision on children's rights. This clearly shows how international law served as a useful guide and model to be followed in developing South African law. Therefore, it is submitted that South Africa, to a certain extent, complies with international standards and norms. However, what needs to be done is to continue improving the current legislation on parenting rights and responsibilities of parents by removing the existing distinction between married fathers, married mothers, unmarried mothers and unmarried fathers.

⁷⁴⁹ See for example, the current Children's Act 38 of 2005.

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODDUCTION

The purpose of this chapter is to provide conclusions and recommendations. This thesis was aimed at a critical analysis of the legal position of unmarried fathers at common law and under the new constitutional dispensation. An analysis of Constitutional provisions specific to the issue of parental rights was undertaken. Such position was compared with the position of the unmarried father under African customary law. In addition, the study also analysed relevant current legislation and its implications for the relationship between unmarried fathers and their children. Furthermore, the study also examined and established whether South African law complies with international standards and norms in the protection of children and their families. This was undertaken with a view to determining whether South Africa as a States Party, to some of the international conventions has discharged the obligations imposed by these instruments in the protection of children, particularly in their relationships with their unmarried fathers. As stated above, the subsequent discussion focuses on the writer's conclusions derived from the main issues in the thesis. The emerging recommendations from the issues raised and analysed are provided accordingly.

6.2 THE MAJOR CONCLUSIONS OF THE STUDY

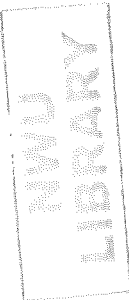
6.2.1 The common law and an unmarried father

It is a major finding and conclusion of this study that the common law has over the years, not only marginalised unmarried fathers but victimised and dehumanised them. This has been illustrated by the fact that although the common law acknowledged that unmarried fathers do have responsibilities towards their children the common law

denied them the opportunity to form permanent and sustainable relationships with them. Unmarried fathers were treated unfairly and unequally on legal prescriptions relating to guardianship, care, contact, and in other aspects such as adoption disputes, succession and maintenance of their children born out of wedlock as compared to married couples and unmarried mothers. At common law care of a child born out of wedlock rested with the mother of that child, even the minority of the mother was no hindrance.

The law excluded an unmarried father simply because he was not married to the child's mother. However, sometimes if the mother was not suitable as a caregiver parent, an unmarried father was awarded care if it was in the best interests of the child. It is submitted that this position was unfair and unjustified as an unmarried father is a parent and should have been given the same rights and responsibilities like the mother and should not have been used as an alternative if the mother was not suitable. On the aspect of guardianship, the common law also provided that only the mother had the right of guardianship over the child born out of wedlock. However, if the mother was unmarried and herself a minor, she could not be the guardian of the child nor could the guardian be the father of the child. Again an unmarried father was excluded from being the guardian of his children. Furthermore, although adoption was not recognized as a means of creating the legal relationship between parent and child, an unmarried father's consent was initially not a requirement in terms of the Child Care Act 74 of 1983. The Act required only the consent of the mother.⁷⁵⁰ Therefore, statutory law also disadvantaged an unmarried father as a parent in favour of the mothers. On matters of contact, the common law did not provide for contact by the

⁷⁵⁰ Section 18(4)(d).



natural father with his children born out of wedlock on the basis that since an unmarried father acquired no parental authority in respect of the child, and contact was seen as one of the incidents of parental authority, the father acquired no contact in respect of his children. However, it had often been conceded that a court may grant reasonable contact to a father if it was in the best interests of the child. This position was unfair as an unmarried father did not acquire contact as of right but only if the court considered it to be in the interests of the child.

It is, therefore, submitted that the common law was biased towards women and did not encourage fatherhood as women were and are still regarded as the better parent to cater for the children. Women were generally and are still given priority over men when it comes to aspects of parental authority and this tends to alienate men, particularly unmarried fathers. Thus, it is my view that unmarried fathers often refuse to pay maintenance because they resent the position they find themselves in. They often resort to violence to assert their parental rights and this clearly puts the children at a disadvantage. Furthermore, such alienation has given rise to public perceptions that unmarried fathers do not care for their children. This is not true as more and more fathers are taking interest in the welfare of their children.

However, the situation has improved tremendously with the enactment of the Children's Act 38 of 2005. Unmarried fathers are now in a better position. The Act has moved away from the concept of parental authority to the concept of parental responsibilities and rights. This Act looks at the South African law relating to parent and child from a different perspective. Although the focus of the law is no longer on parental authority and the rights of the parents over their children and the best

interests of the child principle is of paramount importance in the Act, the Act still allocates parental rights and responsibilities on the basis of the parents marital status, the distinction between married couples, unmarried mother and unmarried fathers, an unmarried father is still maintained. Furthermore, even though an unmarried father has automatic care, guardianship and contact with his children born out of wedlock in terms of the Act, it is unfortunate that an unmarried father acquires these rights and responsibilities only if certain conditions have been satisfied.

The allocation of automatic parental rights and responsibilities to all parents merely improved the common law but failed to address the plight of unmarried fathers *in toto*. There is still no equity and fairness in the manner in which the law treats the unmarried father because in order for an unmarried father to acquire rights and responsibilities he is required to satisfy the requirements as outlined in the Act whereas married couples and an unmarried mother acquire such rights automatically. This creates a particular emerging challenge for the attention of the legislature. The South African law family law is to a certain extent father-unfriendly and based on stereotype assumptions that men are not interested in children and that fathers are naturally ill-suited to parenting. Although an unmarried father acquires automatic parental rights and responsibilities in terms of section 21 of the Children's Act 38 of 2005 subject to the fulfilment of certain conditions, without the co-operation of the mother of the child, a 'liberated female' may still elect to bear a child with no intention of permitting the father to play a role as part of the family at all. In such a situation our current law actually encourages the single parent scenario.⁷⁵¹ An unmarried father is now expected to approach the courts to assert his rights because

⁷⁵¹ Van Onselen *op cit* n 355 p 500.

the mother is possessed of awesome legal predominance. Worse still, some women use the weak legal position of the father to extort money from the father in exchange for so-called 'favours' of contact with the child.⁷⁵²

6.2.2 Customary law and an unmarried father

In the past, customary law was not recognised as part of South African law but the new constitutional dispensation gives complete recognition to customary law as a source of South African law and mandates the courts to apply customary law when that law is applicable. It has been argued that the courts are now constitutionally obliged to apply customary law. In respect of family law, particularly on parental rights, it is a finding of this study that under customary law, an unmarried father has no absolute right to the children he procreates, however, he may acquire parental rights and responsibilities by marrying the mother or simply by paying *isondlo* in private negotiations with the father of the unmarried mother or her guardian. *Isondlo* signifies the transfer of parental rights and responsibilities and compensation for bringing up the child. However, without payment of *isondlo* or *lobola* for the mother of the child, the unmarried father has no rights over the child.

Unlike the common law where an unmarried father is expected to support his children whether born in wedlock or out of wedlock and irrespective of whether the unmarried father has acquired parental responsibilities and rights, under customary law, an unmarried father has no duty to support his children unless he acquires full parental rights. It is submitted that, this rule is not sustainable as it is not be in the best interest

⁷⁵² Van Onselen *op cit* n 751 p 500.

of the child not to be supported by his or her father simply because the father has not acquired parental rights.

In order to enforce the unmarried father's support obligations under customary law, the courts often ignore customary law and enforce such support obligations by common-law system of maintenance. It is often argued that the child's best interests are better secured when the court is involved but it is submitted that such intervention undermines customary support obligations within the extended family. The extended family plays a meaningful role in assisting an unmarried father where he is unable to support his child and it is in the child's best interest to allow them to do so.

At common law unmarried fathers can approach the courts to acquire rights and responsibilities over their children, customary law is silent in this regard. It is submitted that if the unmarried father is obliged to submit to the statutory procedure to acquire rights to his natural child, then it would be unfair if he is also required to pay *isondlo*.

Although customary law is recognised as a system of law in South Africa, its sources are not readily accessible and well understood. In deciding issues of family law, the courts often resort to the use of the common law. This tendency, although it is adopted to protect the interests of children, undermines customary law and hinders its development as a source of law equal to the common law.

6.2.3 *The Constitution and an unmarried father*

The Constitution of the Republic of South Africa is the most important instrument not only in the recognition and protection of children's rights but also in the protection of rights of all South African citizens and this includes an unmarried father. However, children are afforded special protection by section 28. This protection has been further enhanced by the promulgation of the Children's Act. The South African Constitution incorporates a Bill of Rights which applies to all law, binds the legislature, the executive and the judiciary. Furthermore, the Bill of Rights requires an interpretation that promotes the values that underlie an open and democratic society based on human dignity, equality and freedom. It is on the basis of the above assertions that the study concludes that the Constitution has had a tremendous impact on the common law parent-child relationship. Such impact can be seen in the discussion below.

The Constitution outlaws, amongst others, discrimination on the ground of 'birth'.⁷⁵³ Therefore, it is submitted that even though illegitimacy is not specifically listed as a ground of discrimination in section 9, it is covered by the listed ground of birth. Consequently any form of differentiation between the children on the ground of the marital status of their parents is presumed unfair discrimination until the contrary is proved. Therefore, it will be unconstitutional for the common law to continue with the distinction between legitimate and illegitimate children or to allocate parental rights and responsibilities to parents on the basis of their marital status. However, this position has been changed by statutory law.

⁷⁵³ This argument also extends to the parental rights of unmarried fathers who are unfairly discriminated against on the ground of marital status. This study asserts that unmarried father should also be treated as a 'father.'

The Constitution does not protect the right to family life, family life is protected under the right to dignity and it entails the responsibility of parents and family to provide and care for their children. It is submitted that such 'care' within the context of the family has, in accordance with the common law and statutes excluded, the unmarried father in favour of the nuclear family. This view tends to undermine other forms of families prevalent in South Africa and ignores the role that the father can play in the development and upbringing of his child. Such exclusion amounts to discrimination on the ground of marital status and is therefore, unconstitutional.

The 'care' that is afforded to a child in terms of section 28 of the Constitution also includes care by the extended family. Although this is a positive improvement in the law because the extended family has always received recognition under customary law and it is in the best interests of the child to widen the scope of people who can contribute to the child's care, it is submitted that the unmarried father should also be seen as family and not be seen to always be competing with outsiders for the care of his children.

Although the right to 'parental care' implies care by both natural parents, the common law does not protect 'care' by both natural parents where the parents are unmarried. In most cases, mothers are preferred over the fathers and, it is submitted, this tendency perpetuates gender stereotyping which often requires only women to shoulder the sole responsibility for caring for the children. This situation disadvantages an unmarried father and does not promote gender equality. It amounts to discrimination and can no longer be permitted in our present constitutional dispensation based on equality.

The 'best interests of the child' test has been constitutionally entrenched by section 28(2) of the Constitution and this test has also been used by the courts to articulate and justify the interests of parents. It is therefore submitted that it is in the best interests of the child to afford unmarried fathers as parents the opportunity to properly care for their children. Unmarried fathers can discharge this obligation only if the law allows them to nurture the relationship and acquire automatic parental rights and responsibilities over their children.

In conclusion it is submitted that the Constitution has indeed exposed the discriminatory nature of the common law on the relationship between an unmarried father and his children and furthermore the existing embedded primitive, biased societal attitudes towards unmarried fathers. However, it remains to be seen whether the courts in interpreting parental rights and responsibilities, would have regard to the norms and values enshrined in the Constitution.

6.2.4 Domestication of South Africa's international law obligations

The South African Constitution mandates the courts to use international law and foreign law because international law provides a framework within which the Bill of Rights can be evaluated and understood. It is therefore a finding and a conclusion of this study that South Africa acknowledges and embraces international law. In the field of family law, South Africa has ratified, for example, the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. By its ratification South Africa made a solemn undertaking to make sure that its domestic law is consistent with the provisions of these Conventions, if not South Africa is obliged to take the necessary steps to enact such legislative reforms. It is a

finding of this study that the most glaring compliance with international law obligations particularly in family law can be seen in the incorporation of the best interest of the child requirement in the South African Constitution.

The child's best interests standard is also protected by other instruments including the Hague Convention on the Civil Aspects of International Child Abduction. South Africa is a signatory to this Convention and this resulted in Parliament passing the Hague Convention on the Civil Aspects of International Child Abduction Act which incorporated the Convention into law. It is also a finding and a conclusion of this study that the Act also provides that children should enjoy the various rights contained in the treaties without distinction as to birth or other status. This provision suggests that states are obliged to remove the stigma of illegitimacy.

Since South Africa ratified the Convention on the Elimination of All Forms of Discrimination against Women and undertook to eliminate gender discrimination and ensure the same rights and responsibilities of parents irrespective of their marital status in matters concerning their children, the common law previously violated CEDAW. Such violation is evident in the allocation of parental rights and responsibilities to natural parents which still depends on their marital status as far as the unmarried father is concerned. In essence, it is submitted that South African legislative reforms have not completely eliminated sex-based discrimination and therefore legal equality between men and women in all spheres of life is not completely achieved. Although the right to family life is recognized in international treaties and protected in various ways, the family is still defined in the context of marriage hence the nuclear family is envisaged. Therefore, an unmarried father is

automatically excluded. This situation amounts to discrimination on the ground of marital status and furthermore denies an unmarried father the right to family life with his children which it is submitted, is not in the best interests of the child.

Generally, the elimination of discrimination and equality of all persons before the law permeates all treaties surveyed for this study. It is submitted that South Africa has done fairly well to realize this obligation not only in its Constitution but in other statutory legislative enactments.

It is submitted in conclusion that although South Africa generally complies fairly well with international norms and standards in the field of family law, particularly on children's rights, there is a need to make sure that men and women are afforded the same rights and responsibilities over their children irrespective of their marital status.

6.3 RECOMMENDATIONS

In line with the broad conclusions, I would propose the following recommendations discussed below.

Although the common law serves as a guide in the identification and enforcement of parental rights and responsibilities, there is a need to deal with parental rights in a more practical and modern way to begin to see both parents as equal partners in rearing and directing the lives of their children irrespective of their marital status. Issues such as the parent's biological attributes, for example, the tendency to presume the centrality of the mother and the relative unimportance of the father in the lives of their children should be irrelevant and there must be minimal state interference. There

is a need for automatic presumption of parental responsibility irrespective of the 'merit' of the father. This should have been included in the Children's Act,⁷⁵⁴ its absence indicates a clear discrimination against fathers. Clearly there are unmarried fathers who do not deserve parental responsibility just as there are married fathers and many married and unmarried mothers who do not deserve it.

The South African Human Rights Commission must play an active role in the promotion of human rights for all and, in particular, in its programmes it should promote the rights of men. Emphasis, focus and resources are often diverted to causes that promote the rights of women and children because they are seen as the most vulnerable and disadvantaged. This practice not only alienates men and often leads to resentments but it is also discriminatory. The dominance of the mother's legal position interferes with the development of a balanced mother/father relationship *vis-à-vis* the child. The father will always be scared of losing his 'privilege' of family involvement and will thus be inhibited. It is submitted that the law should change to recognize the value of fathers in the lives of their children. The child is not a mere creature of the state, those who nurture him or her and direct his or her destiny have the right to enjoy and enforce their rights as parents. It is not in the best interests of the child for the state to initially deprive the child of the relations with his/her father.

Although the South African Law Reform Commission is commended for its efforts in addressing the issue of parental rights and responsibilities of unmarried fathers, it is recommended that the Commission should in future consider revisiting the same with a view to removing existing inequalities between parents.

⁷⁵⁴ 38 of 2005.

It is further recommended that the Family Courts through their interpretation of the law must promote the concept of fatherhood. The South African Law Reform Commission should also recommend enactment of a new law relating to parenthood. This should be done in order to try and “normalise” family law because family values, especially among blacks (African), have been eroded by apartheid through racial discrimination and the migrant the labour system. Men have lost not only their sense of dignity but also the commitment and love for their families. There are aspects of life which only men can teach their children, particularly teenage boys, which women have no idea of. That is why in the African culture there is a rite of passage to manhood where teenage boys leave their homes for some time, to go the “mountains” where they are taught by the elders how to become real men apart from undergoing the rite of circumcision.

It is also recommended that the Office of the Family Advocate and the Department of Social Welfare must play a major role in rebuilding families. In making recommendations to the courts on issues affecting children and their parents the Family Advocate and social services personnel should not be punitive and biased against unmarried fathers but rather embrace them and work towards the establishment of the shattered relationship between the unmarried father and his child. This endeavour would automatically promote fatherhood and lead to better parenting. Judicial officers should be continuously work-shopped on the interpretation and implementation of the Children’s Act. The requirement of *isondlo* under customary law as a prerequisite for acquisition of rights by the unmarried father over his children must be reconsidered. The practice is discriminatory and not in line with the Constitution. Family courts should apply customary law on issues of maintenance

where the unmarried father is unable to maintain because under customary law maintenance obligations are absorbed into the family. This practice will promote the best interests of the child.

6.4 FINAL REFLECTIONS

Marriage and the family are vital social institutions which provide security, support, companionship, and give individual members a sense of belonging and pride. It also play an important role in the rearing of children, however, the current South African law continues to discriminate against the unmarried father despite the constitutional mandate which contemplates different ways and legal conceptions of the family. What constitutes family life should change as social practices and traditions change. The legal position of the unmarried father in relation to his children born out of wedlock before the commencement of the Children's Act is in effect retained because although the unmarried father has full parental responsibilities and rights such rights are conditional in terms of section 21. It is also very clear from the wording of section 21 (1)(b) that the unmarried father must meet all the requirements to automatically acquire parental responsibilities and rights. It is submitted that these requirements are unjustified. If the unmarried father has made a decision not to marry the mother, he should not be punished. Would it not be in the best interests of the child if the unmarried father is just seen as a parent and given unconditional and automatic parental responsibilities and rights? However, the unmarried father should only be denied such rights if that would not be in the best interests of the child.

The current law seems to be harsh and unsympathetic towards unmarried fathers. Certainly if the law can afford to allow people of the same-sex to marry and even

adopt children, surely it should not be difficult to recognise an unmarried father merely as a parent who is worthy of parental responsibilities and rights over his children. Therefore, there is an urgent need to reassess discrimination against the unmarried father because such discrimination impacts negatively on an unmarried father's dignity, parenthood and fatherhood.

It is envisaged that in future a study will be conducted as a follow-up of this study where permission should be sought from the Minister of Justice and Constitutional Development to access court records of unmarried fathers who are paying maintenance and those who have refused to pay. Furthermore, structured interviews with such unmarried father's will be undertaken. The aim of the study will be to give unmarried fathers a structured voice in an attempt to regain their dignity and pride and equal recognition as parents in South African Family law.

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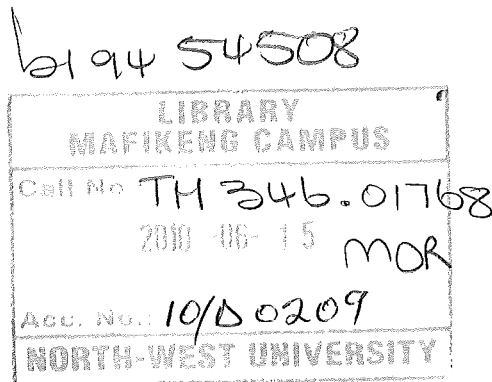
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ABSTRACT

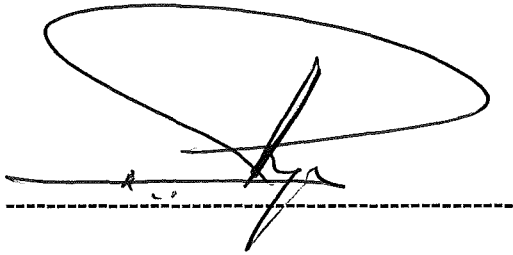
The purpose of this thesis is to analyse parental rights and responsibilities of unmarried fathers in South African law and the impact of the new constitutional dispensation on such rights and responsibilities. The thesis also evaluates the status of human rights instruments relevant to family law issues affecting the rights of unmarried fathers. This was mainly achieved through rigorous analysis of contemporary literature, case law, legislation and pertinent legal documents. Although some legislative enactments were repealed lately, the thesis reveals gaps relating to unequal treatment between unmarried fathers, married couples and unmarried mothers on aspects of guardianship, care, contact, adoption, maintenance and inheritance rights. In particular there is no equity and fairness in the manner in which the law treats an unmarried father because in order for an unmarried father to acquire rights and responsibilities over his children he is required to satisfy the requirements as outlined in the Children's Act 38 of 2005, whereas married couples and unmarried mothers are not required to do the same.

Furthermore, customary law also denies an unmarried father rights over his children although he may acquire parental rights and responsibilities by marrying the mother or simply paying *isondlo*. In the main, the thesis reveals that the constitution not only exposes the discriminatory nature of the common law on the relationship between an unmarried father and his children but furthermore corrects the existing embedded primitive, biased societal attitudes towards unmarried fathers.

Consequently and despite current efforts to improve the position of an unmarried father in relation to his children born out of wedlock at common law and under customary law, the thesis reveals that inequalities still exist in terms of acquisition of parental rights and responsibilities by parents over their children. Finally, and within the context of family law, recommendations are made for addressing these inequalities between parents, strengthening of families, promoting fatherhood and parenthood through sustainable programmes by government institutions, relevant role players and revisiting the Children's Act 38 of 2005 to properly relate the rights and responsibilities of parents regardless of their marital status.

DECLARATION BY SUPERVISOR

I, Professor Philip F Iya do hereby declare that this thesis by Neo Lenah Morei for the degree of Doctor of Laws (LLD) be accepted for examination.

A handwritten signature in black ink, consisting of a large, sweeping oval shape at the top, followed by several sharp, intersecting lines that form the letters 'PFI'. The signature is written over a solid horizontal line, which is itself above a dashed horizontal line.

PROFESSOR PHILIP FRANCIS IYA

November 2008

DECLARATION BY STUDENT

I, Neo Lenah Morei, declare that this thesis for the degree of Doctor of Law (LLD) at the North-West University, Mafikeng Campus hereby submitted, has not previously been submitted by me for a degree at this university or any other university, that it is my own work in design and execution, and that all material contained herein has been duly acknowledged.

The law is stated as at 31 July 2008.

SIGNED-----

NEO LENA H MOREI

November 2008



DEDICATION

This work is dedicated to my late grandparents Mary Bafedile Huba and Petrus Ranko Morei who taught me to believe in myself and my God-given potential, to my mother Mmakgetse Bogatsu and to my precious children Remofilwe and Realeboga. They provided me with immeasurable physical, moral and spiritual support without which the possibility of completion of this work would have been far too remote.

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It pleases me to thank and acknowledge my mentor, Professor Melvin Mbaio former Director of the School of Post-graduate Studies and Research and currently the Executive Dean, Faculty of Law, for his guidance, patience, encouragement and his fatherly disposition forging me to go ahead despite insurmountable obstacles. Thank you for nurturing dreams in me because you cared.

Then, a special thanks to my mother for her prayers, love and understanding my desires and dreams, and for the support and encouragement she provided.

In memorium a sense of obligation to my late grandparents for their inspiration which urged me forward during my formative years.

To my son Remofilwe and my daughter Realeboga: The joy you've brought into my life has superseded my highest dreams and thank you for filling my life with joy and giving me so much to pray about.

Finally, thanks to the Almighty God for giving me knowledge, strength, wisdom and His grace.

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
<i>BML</i>	Businessman's Law
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
<i>CILSA</i>	Comparative and International Law Journal of Southern Africa
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
<i>LQR</i>	Law Quarterly Review
<i>MBL</i>	Modern Business Law
<i>SAJHR</i>	South African Journal on Human Rights
<i>SALJ</i>	South African Law Journal
<i>Stell LR</i>	Stellenbosch Law Review/ Stellenbosse Regstydskrif
TAC	Treatment Action Campaign
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg/Journal of Contemporary Roman-Dutch Law
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law
<i>TWR</i>	Tydskrif vir Regswetenskap/ Journal of Juridical Science
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child