

# **State infringement of the responsibilities and rights of parents with regard to the reproductive health of their children**

**W Sambo**

**21435820**

Dissertation submitted in partial fulfilment of the  
requirements for the degree *Master of Laws* in Comparative  
Child Law at the Potchefstroom Campus of the North-West  
University

Supervisor: Prof JA Robinson

November 2014

## **ACKNOWLEDGEMENTS**

First and foremost, I would like to thank God for giving me the opportunity to study the child law programme and for enabling me to conduct this research in good health from start to finish. Secondly, I would like to express my sincere thanks and gratitude to my research supervisor, Prof JA Robinson, for his guidance, support, advice and suggestions throughout the duration of this research. Above all I cherish his "open door" policy that provided me the motivation I needed to finish my research.

Special appreciation also goes to Mrs Rosena Nhlabatsi for her invaluable support and willingness to provide advice for my research and her impeccable patience to explain for hours on end how to draft a good research document.

Heartfelt thanks go to members of my family for their unflinching moral support, without which the academic year would have been painfully long. Thus, Mr Sambo, Mrs Sambo, Sangwani Sambo and Nyengo Sambo all deserve my deepest appreciation for their best wishes and moral support.

## **ABSTRACT**

This research seeks to contribute to the debate on the state infringing upon the responsibilities and rights of parents with regards to the reproductive health of their children. The qualitative method of research is used. The researcher analysed the right of the child to participate in conjunction with best interests of the child, as well as the reproductive rights of children. Furthermore, the argument is based on the provisions of the South African legislation that deals with the reproductive rights of children. This legislation includes the *Children's Act 38 of 2005* and the *Choice on Termination of Pregnancy Act 92 of 1996*.

The crux of the discussion is on access to contraceptives provided to children without parental consent, as it is provided for in section 134 of the *Children's Act 38 of 2005*, as well as the lack of consent needed in the *Choice on Termination of Pregnancy Act 92 of 1996* for a girl with no specification of age. The debate is on the fact that the responsibilities and rights that parents have towards their children are not considered. They are not involved in the major decisions that the children who are under their care and guidance have to make. Due to this finding, it has been recommended that it is very imperative to allow the parents to be involved in matters that pertain to their children's reproductive rights. This means that as children are informed about their reproductive rights, the parents must be involved as well, so as to make informed decisions relevant to the issues that their children encounter.

**Key words:** Reproductive health, best interests of the child, parental responsibilities and rights, termination of pregnancy, provision of contraceptives.

## OPSOMMING

Hierdie navorsing het ten doel om by te dra tot die debat oor die staat se inmenging in die verantwoordelikhede en regte van ouers met betrekking tot hulle kinders se reprodktiewe gesondheid. Die kwalitatiewe navorsingsmetode is gebruik. Die navorser het die kind se regomaan besluitneming deel te neem, met inagneming van die beste belang van die kind, asook die reprodktiewe regte van kinders ontleed. Voorts is die argument gebaseer op die bepalinge van Suid-Afrikaanse wetgewing wat betrekking op die reprodktiewe regte van kinders het. Hierdie wetgewing sluit die *Kinderwet Nr 38 van 2005* en die *Wet op die Keuse van Beëindiging van Swangerskap Nr 92 van 1996* in.

Die kruks van die bespreking is kinders se reg op toegang tot voorbehoedmiddels sonder hulle ouer(s) se toestemming, soos daarvoor voorsiening gemaak word in artikel 134 van die *Kinderwet Nr 38 van 2005*, asook die gebrek aan toestemming vereis vir 'n meisie in die *Wet op die Keuse van Beëindiging van Swangerskap Nr 92 van 1996*, sonder melding van 'n spesifieke ouderdom. Die debat berus op die feit dat ouers se verantwoordelikhede en regte ten opsigte van hulle kinders nie in ag geneem word nie, deurdat hulle nie geken word in die belangrike besluite wat die kinders onder hulle sorg en leiding moet neemnie. As gevolg van hierdie bevinding, word daar aanbeveel dat dit van die uiterste belang is om daarvoorvoorsieningtemaakdatouers byaangeleenthede wat met hulle kinders se reprodktiewe regte verband hou betrokkesalwees. Dit beteken as kinders oor hulle reprodktiewe regte ingelig word, die ouers betrokke moet wees om ingeligte besluite te neem wat relevant is tot die kwessies wat hulle kinders mag ervaar.

**Sleutelwoorde:** Reprodktiewe gesondheid, bestebelang van die kind, ouerverantwoordelikhede en -regte, beëindiging van swangerskap, verskaffing van voorbehoedmiddels.

## INDEX

ACKNOWLEDGEMENTS .....	i
ABSTRACT .....	ii
OPSOMMING .....	iii
INDEX .....	iv
LIST OF ABBREVIATIONS .....	vi
CHAPTER 1 .....	1
INTRODUCTION AND HYPOTHESIS.....	1
1.1 Introduction.....	1
1.2 Aim of the research.....	3
1.3 Research methodology.....	4
1.4 Outline of the chapters.....	4
CHAPTER 2 .....	5
THE RESPONSIBILITIES AND RIGHTS OF PARENTS IN RESPECT OF CHILDREN'S RIGHTS .....	5
2.1 Introduction.....	5
2.2 Parental responsibilities and rights .....	7
2.3 Legislation regarding parental responsibilities and rights .....	10
2.3.1 Care.....	12
2.3.2 Contact.....	13
2.3.3 Guardianship.....	14
2.3.4 Maintenance.....	15
2.4 Brief perspective on the parent-child relationship.....	15
2.5 Conclusion .....	17
CHAPTER 3 .....	19
THE REPRODUCTIVE HEALTH OF CHILDREN.....	19
3.1 Introduction .....	19
3.3 The right to participation .....	25
3.4 The Constitution and the best interests of the child .....	33
3.5 Introduction to reproductive rights of children in South Africa .....	34
3.5.1 Legislation relating to consent to treatment and reproductive health of children ...	36
3.6 Reproductive rights of children .....	43
3.7 The role of the state with reference to children's reproductive rights .....	45
3.8 Conclusion .....	48

CHAPTER4 .....	50
CONCLUSIONS AND RECOMMENDATIONS .....	50
4.1 Introduction .....	50
4.2 Recommendations.....	51
BIBLIOGRAPHY .....	53
Literature.....	53
Case Law.....	58
Legislation and government publications .....	58
International instruments.....	59

## **LIST OF ABBREVIATIONS**

ACRWC	African Charter on the Rights and Welfare of the Child
ART	Article
BOR	Bill of Rights
CC	Constitutional Court
CRC	Convention on the Rights of the Child
DOE	Department of Education
ICESCR	International Convention on the Economic Social and Cultural Rights
S	Section
TPA	Choice on Termination of Pregnancy Act
UNICEF	United Nations International Children's Emergency Fund

## CHAPTER 1

### INTRODUCTION AND HYPOTHESIS

#### 1.1 Introduction

Section 28 of the Constitution of the Republic of South Africa, 1996(hereafter the Constitution) entrenches the basic rights of children. Rights specifically provided for include, *inter alia*, basic health care services and social services. Section 28(2) also provides for the best interests of a child as being of paramount importance in every matter concerning the child.<sup>1</sup> In addition, the Children's Act 38 of 2005 (hereafter the Children's Act) was enacted to give effect to the rights of children entrenched in section 28 of the Constitution. This Act defines a child as a person under the age of 18 years and it furthermore provides in section 6(3) that if it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child. Section 13(b) of the Children's Act provides that a child may have access to information regarding his or her health status. Furthermore in section 27(1)(a) of the Constitution stipulates that everyone has the right to access health care services including reproductive health care. The Bill of Rights enshrined in the Constitution (hereafter the BoR) provides in section 7(2) that the state<sup>2</sup> must respect, protect, promote and fulfil all the fundamental rights in the BoR and that any law contrary to the provisions in the Constitution is null and void.<sup>3</sup>

Keeping the above exposition in mind, it will be argued that regardless of the encompassing nature of the provision in section 28(2) the best interests of the child in practice are not always protected and maintained as envisaged in section 28(2) of the BoR. This argument is illustrated by specific legislation pertaining to children that have been promulgated. In this respect, the Choice on Termination of Pregnancy Act 92 of 1996 (hereafter the TPA) stipulates that a woman means any female person of any age, without specification of age, can have her pregnancy terminated. This provision in the TPA is in contrast with provisions of the Children's Act, which provide for a child to be over the age of 12 years to dispose of the necessary capacity to

---

1 S 7 of the Children's Act provides practical implementation of the constitutionally-entrenched right of children to have the best interests treated as a paramount consideration.

2 The term 'state' is used for purposes of convenience in this study and includes *mutatis mutandis* the legislature, courts and the executive.

3 S 2.

consent to certain medical procedures.<sup>4</sup> In fact, authors argue that physicians are not trained to be sufficiently knowledgeable to establish whether young girls are capable of giving proper and informed consent when having their pregnancies terminated.<sup>5</sup> Since the coming into operation of the TPA the statistics in terms of abortion have greatly increased. In 2011 alone, there is a record of about 77 771 legal abortions in South Africa, furthermore in 2012-2013 they performed almost 90,000 abortions which is almost 20,000 abortions over the previous year.<sup>6</sup> This is worrying as abortions have escalated over the years.<sup>7</sup>

The TPA further stipulates that a minor can terminate her pregnancy without parental consent.<sup>8</sup> In addition it provides that a doctor can advise a minor girl to get consent from her parents, but if her parents disagree she can still go ahead and terminate her pregnancy.<sup>9</sup> Section 28(1)(b) of the Constitution also highlights that every child has a right to parental care. This clearly reflects that parents have responsibilities and rights regarding the development of a child. A parent can assist a child in promoting his or her rights.<sup>10</sup> Parental responsibilities and rights is a Constitutional right as already alluded to in section 28(1)(b) of the Constitution and this right can be infringed upon. When this section is compared to the TPA it can be argued that the state is indeed infringing upon parental responsibilities and rights by allowing girls without specification of age to abort without their parent's consent. *Prima facie* it appears that by deciding that a child is mature enough to give informed consent without parental consent, is infringing upon parental responsibilities and rights. The well-known English case of *Gillick v West Norfolk and Wisbech Area Health Authority and Another*<sup>11</sup> (hereafter *Gillick*) serves as an excellent example in point. This case was a bench mark judgment on child law development. It dealt with a dispute between a mother of five daughters under the age of 16 and the local health Department, which had issued a memorandum giving doctors authority to advise

---

4 S 129(2)(a) Children's Act.

5 Mason D 2011 *Termination on Pregnancy and Children* <http://www.scielo.org.za/scielo>.

6 Sapa 2012 *Government worried about escalating abortions* <http://www.sowetanlive.co.za/news/>.

7 Sapa 2012 *Government worried about escalating abortions* <http://www.sowetanlive.co.za/news/>.

8 S 5(1).

9 S 5(3) of the TPA.

10 Du Preez WR 2011 *The Medical Treatment of Children and the Children's Act* 38 of 2005 <http://www.upetd.up.ac.za>.

11 [1986] 1 AC 112, [1985] 3 All ER 402, [1985] 3 WLR 830, [1986] 1 FLR 224, [1986] Crim LR 113, 2 BMLR 11.

girls under the age of 16 on contraception and to supply contraceptives to them without consent from their parents.

To elaborate further on the discussion, the so called four P's will be highlighted. The 1924 and the 1959 Declarations on the Rights of the Child of the United Nations introduced the first three P's: protection, provision and prevention rights. These three P's are comprised of provision rights that children have to be provided for to realise their basic needs and these include, among others, the right to health care and the right to education. Protection and prevention rights are aimed at protecting children from any harmful acts and to be prevented from encountering such harmful acts. The three P's were identified because it was stated in both Declarations that men and women recognise that mankind owes the child the best it had to give. Furthermore, it was expressed that children had to rely on adults to ensure that their rights were protected. Essentially this gave rise to the introduction of the fourth P, which was established in the United Nations Convention on the Rights of the Child in 1989 (hereafter CRC). The CRC clearly reflects recognition in modern development which realises that children were previously treated as objects. It became evident that children needed to participate in decisions regarding their own destiny. Hence the fourth P participation was introduced. This P allows children to participate in matters that affect them by affording them the right to be heard.<sup>12</sup> The fourth *P* was applied in *Gillick*.

## **1.2 Aim of the research**

The aim of the research has been to consider the extent to which the state infringes upon the responsibilities and rights of parents regarding decisions in respect of their children's right to reproductive health. As outlined in the introduction to this research study, the objectives are as follows:

- discussing the responsibilities and rights of parents in the parent-child relationship;
- discussing the reproductive health rights of children in South Africa and the role of the state in relation to children's reproductive rights; and making recommendations to limit the infringement of the state upon the responsibilities and rights of parents in respect of their children's reproductive

---

<sup>12</sup> Art 12 of the CRC.

rights. Furthermore, the research determines whether the state infringes upon the responsibilities and rights of parents with regard to the reproductive health rights of their children when it enacts legislation that excludes parental consent in this respect. In developing an argument the research will consider the four P's more comprehensively.

### **1.3 Research methodology**

The research was largely characterised by literature study. The nature of the material used included legislation, decided cases, Journal articles, electronic sources and text books which were of great significance to the research.

### **1.4 Outline of the chapters**

The points of departure of this study are diverse due to the different nature of the contents of the respective chapters. However it may be accepted as fundamental that the best interests of children are of paramount importance in all matters concerning them. Chapter 2 discusses parental responsibilities and rights which identify the parent-child relationship for legal purposes. With reference to section 28(1) (b),<sup>13</sup> parents are called upon to care for their children and assist them in all matters that would concern them, including matters regarding their reproductive health. In chapter 3 the child's right to be heard in relation to his or her right to reproductive health are discussed. By using the so-called four P's it may be endeavoured to explain that the state infringes upon the responsibilities and rights of parents regarding the reproductive rights of their children. Focus will be on the provisions in the Children's Act and the TPA. Furthermore it will be argued that the family is a unique institution and must be recognised as such by the legislature. Moreover, this relationship should not be infringed upon if it is not in the child's best interests. Finally, in chapter 4 the conclusions reached in chapter 2 and 3 are applied to explain the best interests of children with regard to their reproductive health in view of legislation indicating the state infringing upon the parent-child relationship.

---

13 The Constitution.

## CHAPTER 2

### THE RESPONSIBILITIES AND RIGHTS OF PARENTS IN RESPECT OF CHILDREN'S RIGHTS

#### 2.1 Introduction

The Universal Declaration of Human Rights as well as the United Declaration on Human Rights Defenders stipulate that everyone shall strive by teaching and education to promote respect for rights and freedoms in order to secure effective observance.<sup>14</sup> To this end every state has the responsibility of ensuring that children's rights are protected.<sup>15</sup> In South Africa, state protection of children's rights is achieved through policy-making by the executive, law-making by parliament and through interpretation and application of the laws by the courts.<sup>16</sup> Parents also have the responsibility to protect their children.<sup>17</sup> In some circumstances, the role of the state in ensuring the protection of children's rights is often viewed with variant views. One such view pertains to the right of children's reproductive health.<sup>18</sup> Since children grow and develop in the care of the family circle,<sup>19</sup> some parents hold the view that reproductive health issues are better decided and policed within the family environment and parents must have the freedom to raise their children with no or little meddling from government or other outsiders.<sup>20</sup> The state as a law-making body shall respect, protect and promote rights including that of children<sup>21</sup> and parents must ensure that the wellbeing of their children is well protected within the confines of the law.<sup>22</sup>

The concept of a parent-child includes both parents who are married, and parents who are not married.<sup>23</sup> Under the common law dispensation a parent's authority was determined by his or her marital status which served to determine a parent's authority over the child.<sup>24</sup>

---

14 *The Universal Declaration of Human Rights* <http://www.un.org/en/documents/udhr/>.

15 S 7 of the Constitution.

16 *In casu A beginner's guide* <http://www.parliament.gov.za>.

17 S 28(1) (b) of the Constitution.

18 S 134 of Children's Act, art 3 of the CRC and see also the TPA.

19 S 28(1) (b) of the Constitution.

20 Woodhouse B *A delicate balance: the role of government in protecting children's rights within the family* 1.

21 S 7(2) of the Constitution.

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

23 Heaton Commentary on the *Children's Act* 3-3.

24 Robinson JA *et al Introduction to South African Family Law* 250.

In terms of the interpretation clause contained in section 1(1) of the Children's Act 'parent' in relation to a child includes the adoptive parent of a child, but excludes;

- a) the biological father of a child conceived through the rape of or incest with the child's mother;
- b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- c) a parent whose parental responsibilities and rights in respect of a child have been terminated.<sup>25</sup>

The Children's Act replaced the parental authority of parents with the notion of parental responsibilities and rights. It also endows people other than the biological parents of a child with parental responsibilities and rights.<sup>26</sup> However, foster parents, agencies and stepparents are not given similar responsibilities and rights.<sup>27</sup>

This chapter will explore the responsibilities and rights that parents have towards their children in relation to their reproductive health. The responsibility of the state in this regard will be explored in order to analyse whether the state is infringing upon the responsibilities and rights of parents in the protection of the reproductive rights of their children. A modern phenomenon which has become of particular relevance for the subject under discussion relates to the right of the child to be heard. As this right of children is of particular importance for the study, it will be considered in chapter 3.

By way of introduction one should refer, albeit briefly, to the development that had taken place in connection with parental responsibilities and rights. Such responsibilities and rights are currently largely provided for by statutory prescripts.<sup>28</sup> For the greater part of the history of South African law, however, the parental authority, as it then was, of the married father was dominant.<sup>29</sup> Later the law

---

25 38 of 2005.

26 S 23 and s 24 of Children's Act state that anyone with interest in the care and development of the child may apply to the High Court or Children's Court for an order to grant them contact with the child or care of the child. The court considers certain factors before granting such an order, such as the child's best interests, the relationship between the child and the applicant, the level of commitment of the applicant and many other factors. In the event that the child already has a guardian and the applicant applies for the order, they have to provide reasons as to why the child's guardian is not suitable for the position of a guardian over the child.

27 Chapter 5 of Children's Act.

28 Chapter 3 of Children's Act.

29 Louw *Acquisition of parental responsibilities and rights* 32-34, see also Skelton A in Boezaart *Child Law in South Africa* 62.

recognised the rights of mothers even though the married father had retained guardianship for almost the entire 20<sup>th</sup> century.<sup>30</sup>

It needs no further elaboration that parental responsibilities and rights are important for raising children.<sup>31</sup> Section 28(1)(b) of the Constitution for instance gives recognition to this truism by providing for the right of every child to family care or parental care. The Children's Act consolidates the law relating to children and parents. It recognises the child's right to family and parental care on the one hand, and provides for parental responsibilities and rights to be acquired on the other.<sup>32</sup>

For the sake of convenience reference will first be made to the concepts parental care, contact and guardianship as it has been developed by courts after which the relevance of these concepts will be shown in respect of the reproductive health of children.

## **2.2 Parental responsibilities and rights**

Firstly, "[a] right can be defined as a justified claim on someone, or on some institution, for something which is owed".<sup>33</sup> On the other hand a responsibility may involve having a legal obligation and making decisions for another.<sup>34</sup> With reference to parental responsibilities and rights when caring for a child, where appropriate, parents should care for the child within available means, provide a suitable place to live, and provide a conducive environment to the child's health and wellbeing.<sup>35</sup>

Under article 27 of the United Nations Convention on the Rights of the Child, 1989 (hereafter CRC), every child has the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. This right is also provided for under article 11 of the International Convention on the Economic Social and Cultural Rights, 1966 (hereinafter ICESCR), as well as article 25 of the Universal Declaration of Human Rights (hereafter UDHR). Elements of this right include the provision of food, shelter, medical care and housing. Irrespective of whether parents

---

30 Louw *Acquisition of parental responsibilities and rights* 32-34, see also Skelton A in Boezaart *Child Law in South Africa* 62.

31 Hausheer *et al Parental responsibilities* 1.

32 Chapter 3 of Children's Act.

33 Orend B *Human rights: concept and context* 17.

34 Bridgeman *Responsibility, law and the family* 235-236.

35 Chapter 3 of Children's Act.

are divorced, married or have never been married, they have a duty and responsibility to maintain their child according to the Children's Act.<sup>36</sup>

The court, as upper guardian of all minors, in its jurisdiction has the power to terminate any or all parental responsibilities and rights and furthermore an application may be brought in to suspend or terminate the responsibilities and rights and then assign care and contact to someone else.<sup>37</sup> The court can interfere in instances where it is justified, for instance in a situation of ongoing abuse.<sup>38</sup> Parents have the responsibility and the duty to ensure that children have an adequate standard of living whether they are married, divorced, or never been married.<sup>39</sup> In common law 'parental power' referred to the rights, duties and responsibilities of parents towards their children.<sup>40</sup> This was mainly in respect to matters involving custody, guardianship and rights of access which had to be exercised in the best interests of such children.<sup>41</sup> In the Children's Act, the term 'parental power' has been replaced with the notion of parental responsibilities and rights.<sup>42</sup>

Under section 30(1) of the Children's Act, more than one person may hold parental responsibilities and rights in respect of the same child.<sup>43</sup> The Act describes the responsibility of parents according to their marital status.

a. Parental responsibilities and rights of a mother

A biological mother, whether married or unmarried, has full parental responsibilities and rights in respect of her children. In instances where the biological mother is a minor and has no guardianship in respect of the child and the biological father does not have guardianship either, guardianship is vested in the minor's mother.<sup>44</sup>

b. Rights of a married biological father

The biological father of a child has full parental responsibilities and rights in respect of the child. This applies if he is married to the child's mother, or if he

---

36 Chapter 3 of Children's Act.

37 *M M v A V* (2901/2010) [2011] ZAWCHC 425.

38 Bekink *Child divorce* 186 see also Bekink and Brand *Constitutional and International Protection of Children's Rights* 185.

39 Fortin J *Children's rights and the developing law* 285.

40 Robinson *et al Introduction to South African Family Law* 260-261.

41 Robinson *et al Introduction to South African Family Law* 260-261.

42 Chapter 3 of Children's Act.

43 38 of 2005.

44 S 19 of Children's Act.

was married to the mother at the time of the child's conception or the time of the child's birth or anytime between the child's conception and birth.<sup>45</sup> This includes fathers married to the mother before the birth of the child. The father's responsibilities and rights are the same as that of the biological mother as soon as he marries the mother of the child, or in instances where they were once married but are currently divorced.<sup>46</sup>

c. Rights of an unmarried biological father

As illustrated previously the mother of a child has full parental responsibilities and rights over her child. The Natural Fathers of Children Born out of Wedlock Act<sup>47</sup>, which has been repealed by the Children's Act, stated that natural fathers did not automatically acquire rights, but rather had to bring an application to court for access to or guardianship or custody of the child. This Act has been repealed in section 21 of the Children's Act, which states that the unmarried biological father has full responsibilities and rights in respect of his child under the following circumstances:

1. if at the time of the child's birth he is living with the mother in a permanent life-partnership;
2. 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 to be identified as the child's father or pays damages in terms of customary law;
3. if he contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; or
4. if he contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.<sup>48</sup>

It must be noted that in instances where the biological father does not have responsibilities and rights in respect of the child, the mother of the child who has such parental responsibilities and rights may enter into an agreement with him. This agreement takes effect only if the High Court made an order to such effect or if it is

---

45 S 20 of Children's Act.

46 S 20 of Children's Act.

47 86 of 1997.

48 S 21 of Children's Act.

registered by the family advocate.<sup>49</sup> For this order to be granted the court must be satisfied that it is in the best interests of the child.<sup>50</sup> The court can either confirm or terminate the agreement.

d. A child conceived by artificial insemination

When the process of artificial insemination occurs, the biological parents of the child born through this procedure acquire parental responsibilities and rights in respect of the child.<sup>51</sup>

e. Adoption

Regarding adoption parental responsibilities and rights fall on the adoptive parents and not the biological parents. The adoption must be in the best interests of the child.<sup>52</sup>

### **2.3 Legislation regarding parental responsibilities and rights**

The Constitution in section 28 1(b) of the Constitution provides that:

Every child has the right to family, care or parental care, or to appropriate alternative care when removed from the family environment.

This section signifies that the wellbeing of every child must be considered by his or her parents, guardian or custodian given to that child.<sup>53</sup>

In section 18(2) of the Children's Act it provides that the concept of parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right to care for the child, to maintain contact with the child, to act as a guardian of the child and contribute to the maintenance of the child.<sup>54</sup>

The nature of parental responsibilities and rights was highlighted in the case of *Government of the RSA v Grootboom*.<sup>55</sup> This case dealt with applicants, including children, who had moved unlawfully onto private land as a result of the appalling conditions which they lived in. As a result they were evicted from the private land, and subsequently camped on a sports field in the vicinity. They applied to court

---

49 S 22(4) of Children's Act.

50 S 22(5) of Children's Act.

51 S 40 of Children's Act.

52 S 242 of Children's Act.

53 Boezaart *Child Law in South Africa* 64.

54 S 18(2) of Children's Act.

55 2001 1 SA 46 (CC).

requesting for adequate housing until they could obtain permanent accommodation. The order was granted according to section 28(1) (c) of the Constitution, which guarantees the right of children to shelter only when there is no care in that regard. Furthermore it was held that when it comes to family care or parental care as provided in section 28(1) (b)<sup>56</sup> a child has the right to family or parental care in the first place, and a right to alternative care only when it is lacking, meaning that the primary duty to fulfil the children's socio-economic rights as in section 28(1) (c) rests on the parents or family, failing which the duty falls on the state. *B v M*<sup>57</sup> dealt with making decisions that affect the child in an instance where the mother wanted to relocate with her children from her previous marriage. She then applied to court for an order to relocate because the father of the children refused to consent to the relocation. At that time, the Guardianship Act<sup>58</sup> required that both parents had to consent to the relocation when one of them wanted to relocate to another country.

The court took guidance from previous cases that dealt with relocation and applied the principles to the matter at hand. The court considered the challenges that would be faced if it were to grant or refuse the mother's relocation application. The court in the end decided that although the mother has to consider the father's wishes, such wishes do not have to be the key consideration in her decision whether to relocate or not. Courts took the view that the right to freedom of movement and family life of the applicants is always a factor that should be considered by the court. To this effect it was found that it has been accepted in South African jurisprudence that married people should be free to create their own livelihood post-divorce, uninterrupted by the needs of the other spouse. This case illustrates the importance of parental responsibilities in that in this instance the relocating parent had to consult the other parent because they need to take cognisance of the child and how the responsibilities towards the child's interests would be administered.<sup>59</sup> Expanding on

---

56 The Constitution.

57 2006 9 BCLR 1034 (W).

58 192 of 1993 as repealed by the Children's Act.

59 Robinson JA *Reflections on the conflict of interests of children and parents* 405- 407. Borrowing from English Law, we also see the value that has been placed on the parent-child relationship. With reference made to parental responsibilities and rights, Bainhaim states that "parents have rights because they have responsibilities and they have responsibilities because they have rights". He further argues that children are members of a family and not just simply individuals. Furthermore, their interests form part of the family as a collective unit. Departing from this explanation, Bainhaim states that the child is one participant in a process in which the interests of all participants are relevant. Herring concurs with Bainhaim and states that the law should focus

parental responsibilities and rights, in *Jooste v Botha*<sup>60</sup> it was held that the parent-child relationship with regard to the parental responsibilities and rights consists of the economic aspect of providing for the child's physical needs and the intangible aspects of providing for the child's developmental, psychological and emotional needs.

Section 18<sup>61</sup> lays down four elements that explain the concept of parental responsibilities and rights. These include the responsibility and rights to take care of a child, to maintain contact with the child, to act as guardian of the child and to contribute to the maintenance of the child.<sup>62</sup> Previously maintenance was seen as a responsibility to support, irrespective of the presence of parental authority.<sup>63</sup> This meant that payment of maintenance for a child did not relate to any rights regarding parental authority. Parental responsibilities and rights are discussed as follows:

### **2.3.1 Care**

Previously under common law, custody as it was known then was included in the notion of parental power and this implied that parents had control over the child's day-to-day life.<sup>64</sup> This included the provision of food, clothes, medical care and shelter. In addition it included the power to chastise and the power over associations of the child. Furthermore both parents had custody of their child.<sup>65</sup> The High Court, being the upper guardian of all minors had, and still has, the power to order that custody be revoked from one or both parents.<sup>66</sup> Currently, the definition of care is broader as it includes various facets of caring for a child. This includes maintaining the child through financial support among others, promoting the wellbeing of the child and guiding and directing the child.<sup>67</sup> "Care", in relation to a child, includes, where appropriate-

(a) within available means, providing the child with-

---

more on the relationship between parents and their children. He furthermore explains that if the relationship between parents and children is preserved, the child's welfare will be protected while at the same time the rights of the parents will be considered. These viewpoints point out the importance regarding the relationship between parents and their children.

60 2000 2 SA 199 (T).

61 Children's Act.

62 S 18 of the Children's Act.

63 Boezaart (ed) *Child Law in South Africa* 65.

64 Robinson *et al Introduction to South African Family Law* 261.

65 Robinson *et al Introduction to South African Family Law* 261. See *inter alia* Bosman and Van Zyl *Law of Children and Young Persons* 54-56.

66 Robinson *et al Introduction to South African Family Law* 261-262.

67 Robinson *et al Introduction to South African Family Law* 262.

- (i) a suitable place to live;
- (ii) living conditions that are conducive to the child's health, well-being and development; and
- (iii) the necessary financial support;
- (b) safe guarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development; guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

The parental responsibilities fall on both parents to ensure that the child has a suitable and conducive place to live within their available means.<sup>68</sup> All these responsibilities and rights are meant to be shared by both parents.<sup>69</sup> In instances where the parents are separated, the parent with the custody of the child is to assist the child with decisions such as that of their reproductive health, like contraceptives and abortion.<sup>70</sup> In similar vein, both parents have a responsibility to ensure that the child's wellbeing is promoted.<sup>71</sup>

### **2.3.2 Contact**

Section 1(1)<sup>72</sup> defines contact as maintaining a relationship with the child. The concept of contact is child-centred. This includes regular communication with the child if the child is living with someone else. Contact also includes visiting the child

---

68 Boezaart (ed) *Child Law in South Africa* 66.

69 Boezaart (ed) *Child Law in South Africa* 66.

70 Boezaart (ed) *Child Law in South Africa* 66.

71 Boezaart (ed) *Child Law in South Africa* 66.

72 Children's Act.

on a regular basis. It is the child's right to have contact with his or her parents.<sup>73</sup> In *B v S*<sup>74</sup> it was held that when it comes to contact, it depends on the best interests of the child and not on the position of the father. The court's argument was on the position of the unmarried father with regard to contact with his child and the court held that:

In Roman-Dutch law an illegitimate child fell under the parental authority, and thus the guardianship and custody, of its mother; the father had no such authority. South African law does not accord a father an inherent right of access to his illegitimate child. It recognises that the child's welfare is central to the matter of such access and that access is therefore always available to the father if that is the child's best interests.<sup>75</sup>

### **2.3.3 Guardianship**

Section 18(3)<sup>76</sup> defines a parent who is also a guardian as any person with whom the child has developed a relationship based on emotional or psychological attachment, as well as a person who has responsibilities and rights towards the child.<sup>77</sup> This section stipulates that a guardian must safeguard the property of the child and furthermore must assist the child in administrative matters such as legal matters and contractual matters that concern the child.<sup>78</sup> Since the enactment of the Guardianship Act<sup>79</sup> in 1994 both parents have guardianship of the children born from their marriage. This is still the case in the Children's Act. This means that any parent can exercise any right or power without the consent of the other parent. Such consent is required in respect of:

- a minor child contracting a marriage;
- child adoption;
- migrating with a child to another country; and
- application for a passport if the child was under 18.<sup>80</sup>

When there is a dispute with regard to consent and the issue is taken up to court, the court can override a guardian who is unreasonably withholding such consent, thus making the other guardian to act on the issue without consent of the one in dispute.

---

73 Boezaart (ed) *Child Law in South Africa* 67. See also *B v S* 1995 (3) SA 571 (A) 582.

74 1995 3 SA 571 (A).

75 *B v S* 1995 3 SA 571 (A).

76 Children's Act.

77 See Van der Merwe (ed) *Introduction to the law of South Africa* 140.

78 Boezaart (ed) *Child Law in South Africa* 67-68.

79 192 of 1993 as repealed by the Children's Act.

80 Robinson *et al* *Introduction to South African Family Law* 263.

This mostly occurs in relocation cases where a parent is moving from South Africa to another country.<sup>81</sup>

### **2.3.4 Maintenance**

Maintenance is an element of parental responsibilities and rights.<sup>82</sup> For this right to be exercised parents must have the means to provide maintenance. Furthermore, the relationship between the person entitled to maintenance and the person obliged to provide maintenance must be of such a nature that the law imposes a duty of support.<sup>83</sup> Maintenance is also known as the duty to support. This is a very important aspect of the parent-child relationship. The requirements involved in the duty to support include:

- parents having proper means to provide maintenance; and
- the child must reasonably require the maintenance and must not have the necessary means to support him or herself.<sup>84</sup>

This duty commences at conception and ends when a child is self-sufficient after which it is expected that the child can support him- or herself. The duty to support is dependent on the financial position of the child's parents.<sup>85</sup> This means that a child cannot claim for support over the limit of what the parents can provide.<sup>86</sup> Furthermore, in *Bannatyne v Bannatyne*<sup>87</sup> it was emphasised that children have a right to proper parental care as alluded to above.

### **2.4 Brief perspective on the parent-child relationship**

The procreation of a child reflects the closest possible interconnection between two individuals.<sup>88</sup> The parent-child relationship however should not be understood with sole reference to this biological aspect.<sup>89</sup> In fact, as an institution the family reflects very specific and unique structure. Procreation indeed indicates a biological substratum to the relationship, yet it does not render a complete picture of the family

---

81 Boezaart (ed) *Child Law in South Africa* 68.

82 Boezaart (ed) *Child Law in South Africa* 68.

83 Robinson JA *et al Introduction to South African Family Law* 265.

84 Visser and Potgieter *Introduction to Family Law* 210.

85 Van Schalkwyk in Boezaart (ed) *Child Law in South Africa* 56- 58. See Robinson JA *et al Introduction to South African Family Law* 265.

86 Van Schalkwyk in Boezaart (ed) *Child Law in South Africa* 56- 58. See Robinson JA *et al Introduction to South African Family Law* 265.

87 2003 2 SA 363 (CC) 375E.

88 Dooyeweerd *Dewijsbegeerte der wetsidee* Vol III 267.

89 Dooyeweerd *Dewijsbegeerte der wetsidee* Vol III 267.

institution.<sup>90</sup> The aspect of love between parent and child completes the unique identity of the relationship. It can be described as an all-inclusive unity (*consortium omnis minoritatis*) rather than an arbitrary association formed for a specific purpose. Within the relationship love reflects a communal relation implying mutual duties and responsibilities of a specific character.<sup>91</sup>

Despite the intimate nature of the relationship it is one typically reflected by positions of subordination (hence the concept of parental *authority* as it developed historically.<sup>92</sup> In this respect love serves a qualification of the authority (ability to act prescriptively) of a parent in the sense that it displays an element of assertiveness. Authors therefore warn that should parents abandon their moral authority and factually behave as comrades of their children, it is the very aspect of love that is violated.<sup>93</sup> It must be borne in mind that the unique authoritative character of love implies the immaturity of children.<sup>94</sup>

The intertwined nature of the relationship is reflected in the legal subjectivity of the child in the sense that it is legally closely bound up with that of his or her parent. This connection manifests itself in external legal relations.<sup>95</sup> It is trite that a child of a young age lacks capacity to act independently in civil law and needs to be represented. It may therefore be argued that for purposes of private law there is an intertwinement of the legal subjectivity of the child and that of his or her parents.<sup>96</sup> The child's personal lack of capacity to act in civil legal activity is supplemented by that of his or her parent. Juridical reproach joins the legal actions of one with the rights and duties of the other.<sup>97</sup>

---

90 Robinson JA *Reflections on the conflict of interests of children and parents* 417.

91 Robinson JA *Reflections on the conflict of interests of children and parents* 417.

92 Dooyeweerd *Dewijsbegeerte der wetsidee* Vol III 278.

93 Robinson JA *Reflections on the conflict of interests of children and parents* 417-418.

94 Hoggett B *et al The family, law and society cases and materials* 425. See *inter alia* *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986. Beyond biological and psychological justification for protecting parent-child relationships and promoting child's entitlement to a permanent place in a family of his own, there is justification for a policy of minimum state intervention. The law does not have the capacity to supervise complex and interpersonal bonds between the child and the parent. As *parens patriae* the state is too crude to become an adequate substitute to flesh and blood.

95 Robinson JA *Reflections on the conflict of interests of children and parents* 418.

96 Robinson JA *Reflections on the conflict of interests of children and parents* 418.

97 Dooyeweerd *Dewijsbegeerte der wetsidee* Vol III 278.

It may therefore be concluded that the significance of the legal ability of a child to take part in legal intercourse is pushed into the background.<sup>98</sup> The child's legal subjectivity is interwoven with that of his or her parents, which inter-wovenness is constitutive to the legal subjectivity of the child.<sup>99</sup> The relationship consequently is one between unequal members of a communal whole. It is clear therefore that the legal subjectivity of the child should not be considered apart from the bonds with his or her parents.<sup>100</sup>

From this exposition of a parent-child relationship it is abundantly clear that there is a legally recognised need for parents *qua* guardians to act for their children and on their behalf.<sup>101</sup> However, it also speaks for itself that due to the inter-wovenness of the legal subjectivity of parents and (especially young) children.<sup>102</sup> It would be fundamentally wrong to adopt an approach in terms of which the best interests of the child are viewed in pure individualistic fashion.<sup>103</sup> In fact, the same argument holds true for the child's right to make decisions regarding his or her reproductive health, and more specifically a girl's right to decide upon abortion. Having laid a foundation on the responsibilities and rights of parents towards their children, the next section explores specific responsibilities and rights that parents have towards their children with regard to their reproductive rights, as well as the role of the state in the rights of children.

## **2.5 Conclusion**

It is clear from the above discourse that parents and guardians play an important role when it comes to their children. It has been discussed that every child has a right to a family environment where they are protected, loved and maintained. Furthermore, the emphasis on responsibilities and rights of parents reflects both recognition of parental responsibilities towards children and acknowledgement of the validity of parental rights. Parental rights are there to protect children within the family against third parties, this is clearly stipulated in section 28(1)(b) of the Constitution.<sup>104</sup> With reference to the mentioned section, parents have the responsibility to care for their

---

98 Robinson JA *Reflections on the conflict of interests of children and parents* 418.

99 Robinson JA *Reflections on the conflict of interests of children and parents* 418.

100 Dooyeweerd *Dewijsbegeerte der wetsidee* Vol III 280.

101 Hoggett B *et al The family, law and society cases and materials* 424-427.

102 Hoggett B *et al The family, law and society cases and materials* 424-427.

103 Hoggett B *et al The family, law and society cases and materials* 424-427.

104 Children have a right to family or parental care.

children within their means and assist them in any legal matters that would concern them. One would therefore expect that parents should be involved in the process of guiding their children in respect of their reproductive health. This is discussed in the next chapter.

## CHAPTER 3

### THE REPRODUCTIVE HEALTH OF CHILDREN

#### 3.1 Introduction

Until the latter half of the 20<sup>th</sup> century children were not considered as bearers of rights. As such they were not equal to adults and were treated as objects and not as subjects of rights.<sup>105</sup> The Geneva Declaration of the Rights of the Child (hereafter 1924 Declaration)<sup>106</sup> stated that mankind owes to the child the best it has to give. It declared that due to their physical and mental immaturity, children needed special safeguards. Furthermore, it laid down the most basic needs of a child as follows:

The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured.<sup>107</sup>

The 1924 Declaration was therefore a starting point in the development of children's rights. It was the first international instrument that dealt directly with children.<sup>108</sup> This instrument was followed by the 1948 Universal Declaration of Human Rights (hereafter the UDHR) which affirmed that human rights must be respected. Since children are also human beings, this Declaration included them. The 1959 Declaration of the Rights of the Child (hereafter the 1959 Declaration) was adopted by the United Nations General Assembly. This Declaration expanded on the rights of children as already highlighted in the 1924 Declaration. It included the principles of freedom from discrimination, cruelty and neglect. The changes brought about by this Declaration reflected a transition from children being passive recipients to active bearers of human rights. The 1959 Declaration was the basis of the CRC which was adopted 30 years later. The CRC and the African Charter on the Rights and Welfare of the Child, 1990 (hereafter the ACRWC) expanded on the rights that were to be afforded to the child.<sup>109</sup>

These two instruments provide for the best interests of the child to be a fundamental principle. The principle is provided for under article 3 of the CRC, as well as article 4

---

105 Zermatten *The best interests of the child* 2.

106 1924 Declaration.

107 1924 Declaration.

108 Van Bueren (ed) *The International Law on the Rights of the Child* 12.

109 Preamble of the ACRWC. See also the Preamble of the CRC.

of the ACRWC.<sup>110</sup> Furthermore, recognising that children are subjects of rights, one of the fundamentally entrenched rights in the CRC is participation in matters and affairs that affect them.<sup>111</sup> Together with the right to be heard, these bestow on children the right to express their views on matters affecting them.<sup>112</sup>

The primary aim of this chapter is to discuss the child's right to be heard in conjunction with the best interests of the child as entrenched in section 28(2) of the constitution. Section 39 of the constitution provides *inter alia* when a court interprets a provision of the BoR it must consider international law and may consider foreign law. Recognising that one of the fundamental principles of the CRC is the best interests of the child, this chapter briefly highlights that it is in the best interests of children that they are allowed to participate in the making of decisions on matters that affect them. In addition, this chapter will analyse the challenges in the application of participation in connection with the rights of children and the controversy that surrounds it.

For the sake of better understanding of the legal position reference, albeit briefly will be made to views from the so called helping profession.

### **3.2 The recognition of children as bearers of rights**

The concept of children's rights is relatively new. Until the 20<sup>th</sup> century children were not regarded as bearers of rights. Rather, any discussion of children's rights dwelled on 'protection' rights, such as the prohibition of child labour. Children were thus regarded as objects of pity.<sup>113</sup> However, during World War I many lives were claimed and as a result millions of children were orphaned. In response to this the intergovernmental organisation League of Nations was formed to protect basic human rights.<sup>114</sup> During the same period the first instrument aimed at protecting children's rights was drafted. This was the Declaration of the Rights of the Child. It was an instrument comprising of the following five principles:

---

110 Art 3 of the CRC and see also art 4 of the ACRWC.

111 UNICEF *Participation rights* [http://www.unicef.org/crc/index\\_30177.html](http://www.unicef.org/crc/index_30177.html).

112 See *inter alia*, Freeman M *Law and childhood studies: current legal issues* 403.

113 Van Bueren (ed) *A History of the International Law on the Rights of the Child* 1-2.

114 *History of Children's Human Rights* <http://www.childrensrighswales.org.uk>.

1. A child must be given means important to their development both spiritually and materially.
2. A hungry child must be fed and a sick child must be nursed.
3. When in distress, a child must be considered first.
4. A child must be given the option of earning a livelihood and must be protected from being exploited.
5. A child must be brought up in a way that his talent must be used to serve fellow men.<sup>115</sup>

These principles were adopted by the League of Nations in 1924. Although the 1924 Declaration was a major stepping stone in the recognition of children as bearers of rights, it fell short of protecting children as it was merely a compilation of a few guidelines to be followed by countries. It was therefore not internationally enforceable and hence not binding on states.<sup>116</sup>

Realising that the 1924 Declaration was not enough to prevent the atrocities that children suffered during World War II<sup>117</sup>, the international community was prompted to formulate and adopt the UDHR. Although children's rights were implicitly included, the international community recognised the vulnerability of children and saw the need for children to have special safeguards. As a result the second Declaration of the Rights of the Child was adopted by the United Nations in 1959. This was an extended version of the 1924 Declaration as it contained the following 10 principles:

1. Every child with no exception of race, colour, language, family and birth has access to the outlined principles.
2. By enactment of the law a child shall enjoy special protection to enable him or her to develop mentally, physically, emotionally, socially and spiritually.
3. Every child shall have a right to a name.
4. Every child shall benefit from a social security and this includes having access to health services, water, housing and recreation and through this they shall be offered special protection.

---

115 Van Bueren (ed) *A History of the International Law on the Rights of the Child* 7.

116 *UNICEF Company History* [www.fundinguniverse.com](http://www.fundinguniverse.com).

117 *UNICEF Company History* [www.fundinguniverse.com](http://www.fundinguniverse.com).

5. A child who is handicapped in any manner either physically or mentally shall be given special treatment with regard to education and care.<sup>118</sup>
6. Every child needs love and understanding for the enhancement of their full development. Furthermore, where possible every child shall grow in the care and responsibility of their parents. A child of a tender age shall not be separated from their mother unless in exceptional circumstances. For those children without care and support and without a family, society and public authority shall extend special care for these children. Furthermore the state shall provide payment in providing care for these children. This principle highlights the fact that children shall have a family and environment that provides care for them.<sup>119</sup>
7. Every child is entitled to free and compulsory elementary education. They shall be given equal opportunities to enable them to develop their abilities, to have a sense of social and moral responsibility and to become a useful member of their society. In promotion of this right, the child's best interests will be of paramount consideration.<sup>120</sup> This principle developed as a result of the history where children were mostly used as objects other than subjects, exposing them to child labour in order to fend for their family's needs. As a consequence it was developed to prevent such practices and furthermore to give children the right to develop their intellect so that they not only benefit from the society, but furthermore the society benefits from them.<sup>121</sup>
8. In times of trouble or danger, every child shall be the first to receive protection and relief. This shall be done in any and in all circumstances.
9. Every child shall be protected from neglect, cruelty and exploitation of any form. Furthermore no child shall be admitted to any form of employment before an appropriate minimum age and shall not be subject to any employment that is harmful to their health and wellbeing. This principle was developed to protect the children from neglect and cruelty. This came about as a result of the treatment children got before the introduction of

---

118 1959 Declaration.

119 1959 Declaration.

120 1959 Declaration.

121 1959 Declaration.

the Universal Human Rights, when they were treated on the same level as animals.<sup>122</sup>

10. Every child shall be protected from practices that may be detrimental to that child, such as any form of discrimination and shall be loved and in return they will spread peace and understanding.<sup>123</sup> Apart from expanding the principles, the 1959 Declaration also increased duty bearers by placing the duty to protect children's rights upon voluntary organisations.<sup>124</sup>

During the same period the United Nations Human Rights Commission was working on a more comprehensive binding international instrument to encompass all rights of children. The need to draft a uniform convention on the rights of children came about when the United Nations deemed it necessary to create uniformity in international standards because at that time different countries had their own way of dealing with the protection of children.<sup>125</sup>

The states involved in the drafting of the CRC realised that effective prevention of discrimination against children required positive legislation regarding the rights of a child.<sup>126</sup> Several organisations and states were opposed to a binding treaty on the rights of a child, but as time went by delegates in the process of adopting the CRC realised how important the drafting was. Thirty years later the CRC was adopted.

The CRC became the first international instrument that incorporated the full range of human rights inclusive of civil, cultural, economic, political and social rights. It outlines 54 articles and includes two optional protocols.<sup>127</sup> Every right outlined in the CRC is inherent in human dignity and of relevance for the harmonious development of every child. The CRC provides protection for children's rights by setting standards in health care, education, legal, civil and social services.<sup>128</sup> The CRC has four core principles, namely non-discrimination, devotion to the best interests of the child, the

---

122 1959 Declaration.

123 1959 Declaration. The 10 principles in the 1959 Declaration were added and expanded from the 1924 Declaration which had provided a summarised outline.

124 Van Bueren (ed) *A History of the International Law on the Rights of the Child* 9-11.

125 Van Bueren (ed) *A History of the International Law on the Rights of the Child* 13-14.

126 Van Bueren (ed) *A History of the International Law on the Rights of the Child* 9-11.

127 LeMoyne 2013 <http://www.unicef.org>.

128 LeMoyne 2013 <http://www.unicef.org>.

right to life, survival development and respect for the views of the child.<sup>129</sup> South Africa ratified the CRC in 1995.<sup>130</sup>

The incorporation of children's rights into national law is meant to provide for the necessary environment and means to enable children to develop to their full potential.<sup>131</sup> Articles of the CRC, including the foundational principles from which all rights are to be derived, require provision of particular resources, skills and contributions necessary to ensure the survival and development of children to their maximum capability.<sup>132</sup> In addition, these articles require the establishment of means that will be used to protect children from neglect, exploitation and abuse. This responsibility rests on all duty bearers as indicated by the CRC.<sup>133</sup>

The CRC brought three main consequences regarding the rights of children. Children are now seen as subjects of rights and not objects; the realisation that through participation children make a contribution in matters that concern them, and finally that there is a growing demand for better information about all aspects regarding children's rights.<sup>134</sup>

The constitutional dispensation of a state determines whether a monist or dualist approach applies when an international instrument is to be incorporated into national law. In terms of the monist system the provisions of an international treaty apply directly as domestic law of that particular state when a state ratifies such treaty.<sup>135</sup> A dualist system on the other hand is one whereby international law does not become a part of domestic law simply by ratification of a treaty.<sup>136</sup> Domestic legislation is required to incorporate the provisions of a treaty into municipal law. A clear example in point is South Africa. It applies the dualist system<sup>137</sup> so that for instance, the CRC does not apply directly domestically, but rather its provisions are embodied in the

---

129 UNICEF *Company History* <http://www.fundinguniverse.com>.

130 Reynolds L *The rights of a child: a challenge for health professionals* 2.

131 *In casu* 2010 *Rights-based approach to development and child rights programming* <http://www.plan-academy.org> 23.

132 *In casu* 2010 *Rights-based approach to development and child rights programming* <http://www.plan-academy.org> 23.

133 *In casu* 2010 *Rights-based approach to development and child rights programming* <http://www.plan-academy.org> 23.

134 Ennew J *The History of Children's Rights: Whose story?* par 20.

135 Dugard J *International law* 47.

136 Dugard J *International law* 47.

137 S 231 of the Constitution.

Children's Act.<sup>138</sup> When national governments agree to undertake the obligations of the CRC through its ratification they commit themselves to protecting and ensuring children's rights to the international community. With regard to such commitment states are required to develop their actions and policies in a way that is inclusive of its core principles.<sup>139</sup>

The section that follows is a discussion of how the application of the principle of the best interests of the child has been applied in South Africa. This principle is a primary consideration in respect of children's rights.

### **3.3 The right to participation**

Section 10 of the Children's Act provides that every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning him or her, such child has the right to participate in an appropriate way and views expressed by him or her must be given due consideration. This provision clearly bears out on the notion that children are bearers of rights. It also recognises that children of different ages and development do not dispose of the same levels of autonomy. This study discusses the so called four P's to illustrate this provision. As indicated *supra* the four P's can be summed up as a classification of children's rights as they refer to provision, protection, participation and prevention.<sup>140</sup> These are discussed as follows:

- Provision rights

These are rights that children have to be provided with to realise their basic needs and these include *inter alia* the right to health and the right to education.<sup>141</sup>

- Protection and prevention

These are rights that are aimed at protecting children from any harmful acts and furthermore they prevent children from encountering such harmful acts.<sup>142</sup>

- Participation rights<sup>143</sup>

---

138 Dugard J *International law* 47.

139 LeMoyné 2013 <http://www.unicef.org>.

140 Boezaart T (ed) *Child Law in South Africa* 314.

141 Art 24, 26 and 28 of the CRC. See *inter alia* Boezaart T (ed) *Child Law in South Africa* 314.

142 Art 16, 19 and 37 of the CRC. See also Boezaart T (ed) *Child Law in South Africa* 314.

143 Art 10 of CRC

These rights allow children to participate in making their own decisions and to participate in matters that affect them.<sup>144</sup> Furthermore this right advocates for children to express themselves.<sup>145</sup> Article 12 of the CRC recognises children as legal subjects in that it allows them to express their own views as well as the opportunity to be heard. Besides establishing the right to participation the article empowers children to influence decisions taken in respect of them within the community, school, family or any establishment.<sup>146</sup>

An additional *P* that is under consideration is known as perception.<sup>147</sup> This refers to the perception that people have on the rights of children.

Child participation is also provided for under the ACRWC.<sup>148</sup> It was commented that participation of children can entail participation in civil society either through adult-led civil society organisations that report to the Committee, or through child-led organisations. Furthermore it was highlighted that children may be involved in State Party reporting process through participating in consultations that are structured by their government or civil society organisations.<sup>149</sup> Children's participation in report writing is significant for many reasons it benefits them, their families and the community. Children involved in making decisions about matters that affect them and are informed about their rights often take on the responsibility of informing others in their community about the knowledge they have acquired.<sup>150</sup> However, it is a controversial issue because it is often deemed that children cannot make their own decisions without parental guidance. As a result debate exists on whether it is in the best interests of a child to have a right to participate in issues that concern him or her. It has been questioned whether the right extends to situations where their opinions are different from those of adults.<sup>151</sup>

---

144 Art13 of the CRC. See Boezaart T (ed) *Child Law in South Africa* 314.

145 Art 13 CRC 1989.

146 Lansdown G *Every Child's Right To Be Heard* 5.

147 This is one of the *Ps* that scholars are considering on including.

148 Art 7.

149 Save the children *Advancing Children's Rights* 57.

150 Save the children *Advancing Children's Rights* 57.

151 Boezaart T (ed) *Child Law in South Africa* 314-315.

The Committee on the Rights of the Child<sup>152</sup> considers that recognising the right of the child to participate is beneficial for the child's personal development. Through participation children gain confidence and thus are able to express their views openly. Furthermore, the more children participate the greater the impact on their own development and thus it is believed that they would be able to understand and make decisions that affect them.<sup>153</sup> Furthermore, article 12 imposes no age limit on the right of the child to express her or his views, and furthermore it discourages States parties from introducing age limits in law or in practice as this would restrict the child's right to be heard.<sup>154</sup> In addition it is not necessary for a child to have comprehensive knowledge of all aspects of the matter affecting him or her, but that they should have sufficient understanding so as to be capable of appropriately forming his or her view on the matters that affect them.<sup>155</sup>

The intention underlying article 12<sup>156</sup> was to emphasise that the child is an active subject of rights. Other articles of similar intention include articles 13, 14 and 15 of the CRC.<sup>157</sup> The significance of the right to participation is that it grants children the autonomy necessary for self-development and better decision-making. Furthermore, children acquire skills and gain confidence when they are given an opportunity to participate.<sup>158</sup> However, a limitation to autonomy is crucial if participation leads to a negative effect in the life of the child.<sup>159</sup>

The CRC requires that children must be heard in a broad scope of decisions, including any judicial and administrative proceedings affecting them. Although states are left with the discretion as to how the child's views should be heard, whether

---

152 This is a body of 18 independent experts that are responsible for monitoring and ensuring the implementation of the CRC by its state parties. Furthermore, the committee ensures that state parties provide reports on the progress of the implementation of the CRC within their state.

153 Lansdown G *Every Child's Right To Be Heard* 5.

154 UN Committee on the Rights of the Child no. 12 of 2009.

155 UN Committee on the Rights of the Child no. 12 of 2009.

156 CRC.

157 Art 13- The child shall have the right to freedom of expression

Art 14- State parties shall respect the right of the child to freedom of thought, conscience and religion.

Art 15- State parties shall recognise the rights of the child to freedom of association and to freedom of peaceful assembly.

158 Lansdown G *Every Child's Right To Be Heard* 5. See *inter alia* Kränzl-Nagl R *et al children's participation in school and community*.

159 Lansdown G *Every Child's Right To Be Heard* 5-11.

through a representative or an appropriate body, the obligation is to convey the views of the child.<sup>160</sup>

Article 1 of the CRC defines a child as “[e]very human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. Since there is a wide gap between age 1 and 18, different levels of development require different approaches in the exercising of the right to participation. In this regard the CRC recognises the importance of the family unit to a child and states that parents have the most vital responsibility of bringing up and guiding their children.<sup>161</sup> Therefore, parents are encouraged to deal with rights issues with their children “[i]n a manner consistent with the evolving capacities of the child.”<sup>162</sup> This means that depending on a child's age and maturity parents are to involve their children in matters pertaining to them in a manner that they will understand.<sup>163</sup>

From the above discussion it appears that article 12 of the CRC can be broken down into a number of issues. It concerns a child who is capable of forming his or her own views.<sup>164</sup> Article 12 does not set any lower age limit on a child's right to express his or her views freely, because it is clear that children can form their own views from an early age.<sup>165</sup> The views of the child must be given due weight in accordance with the age and maturity of the child. This places a positive obligation on duty bearers at every developmental level of the child to listen to, and take the views of children into consideration. Particularly when deciding how much weight should be given to a child's view in any particular matter, the twin criteria of age and maturity must be considered.<sup>166</sup> Finally, the right to participation is to be assured even in matters that are not explicitly covered by the CRC as long as they have a particular interest for the child or may affect his or her life.<sup>167</sup>

---

160 Lansdown G *Every Child's Right To Be Heard* 5-11.

161 LeMoyné 2013 <http://www.unicef.org>.

162 Art 5 of the CRC.

163 Lansdown G *Every Child's Right To Be Heard* 5.

164 See also Hodgkin R and Newell P *Implementation Handbook for the Convention on the Rights of the Child* 153.

165 See *inter alia* Hodgkin R and Newell P *Implementation Handbook for the Convention on the Rights of the Child* 153.

166 Hodgkin R and Newell P *Implementation Handbook for the Convention on the Rights of the Child* 150-155.

167 Hodgkin R and Newell P *Implementation Handbook for the Convention on the Rights of the Child* 155.

Commenting on article 12 the Committee on the Rights of a Child succinctly stated that:

Recognising the right of the child to express views and to participate in various activities according to his or her evolving capacities is beneficial for the child, the family as well as the community and the state. To speak, to participate and to have their views taken into account are the three phases that describe the enjoyment of the right to participate from a functional point of view. The new and deeper meaning of this right is that it should establish a new social contract, one of which children are fully recognised as right holders who are not only entitled to receive protection but also have the right to participate in all matters affecting them, a right which can be considered as a symbol for their recognition as rights holders.<sup>168</sup>

From this commentary it is clear that the significance of article 12 of the CRC lies in the fact that not only must children be given the opportunity to express their views freely, but also that their views must be heard and given due regard.<sup>169</sup> Although international law has recognised the importance of child participation, controversy still exists in respect of whether children must be given the right to participation.<sup>170</sup> Arguments against the right include:<sup>171</sup>

1. children require experience and competence in order to effectively participate;
2. children need to know responsibility before they can be granted rights;
3. the right will take away their childhood;
4. children will not have respect for their parents; and
5. specific to Africa, the right to participation is considered as an alien concept imposed by Western jurisdictions.<sup>172</sup>

Children's right to reproductive health is one of the most argued when it comes to participation. It has been questioned whether the right extends to situations where opinions of children differ from those of adults. *Gillick v West Norfolk and Wisbech*

---

168 Hodgkin R and Newell P *Implementation Handbook for the Convention on the Rights of the Child* 150 See also *Committee on the Rights of the Child*, Report on the forty-third session, September 2006 Day of General Discussion, Recommendations, Preamble.

169 Hodgkin R and Newell P *Implementation Handbook for the Convention on the Rights of the Child* 150.

170 Boezaart T (ed) *Child Law in South Africa* 314-315.

171 *UNICEF Every Child's Right To Be Heard* <http://www.unicef.org>.

172 *UNICEF Every Child's Right To Be Heard* <http://www.unicef.org>.

*Area Health Authority*<sup>173</sup> is an English judgment which constitutes a benchmark internationally with respect to child participation in reproductive health issues.

In *Gillick* the issue was whether a notice issued by the Department of Health and Social Security stating that children below the age of 16 may have access to contraceptives is lawful. This notice gave children under the age of 16 the right to receive contraceptives without parental approval.<sup>174</sup> In the appellate court Parker LJ decided that the notice issued by the Department was unlawful on the basis that a child under age of 16 could not validly give consent without their parent's consent. As such the child's consent was invalid.<sup>175</sup> In agreement Eveleigh LJ stated that the notice was unlawful on the ground that it violated the parental role and responsibility of raising a child.<sup>176</sup> In the High Court the House of Lords acknowledged the *Gillick* test which was used for establishing whether a child had the capacity to provide valid consent to treatment. Concerning this argument Fraser LJ addressed the dilemma of providing contraceptives to girls without the consent and knowledge of their parents.

His main concern was that a girl is likely to go ahead with sexual intercourse, with or without contraception. If the doctor is satisfied that she understands his advice then her best interests would require her to receive treatment without her parents' consent. Furthermore, Fraser LJ's argument is aimed at ensuring that the girl understands the advice that is given to her with respect to contraception and at the same time look at the appropriateness of parental involvement. In addition, with regard to contraceptive treatment Fraser LJ opined that it would be important to involve the parents, but if the child refused and her physical and mental health was at stake, there would be no need to ask for parental consent.<sup>177</sup> He substantiated his reasoning for forgoing parental consent with the best interests of the child principle. He stated that it would only be justified in a medical context for a doctor to treat the child without consent of his or her parent if it would be in the child's best interests. Templeman LJ stated that sexual intercourse with a child under 16 is unlawful, but had the following to say towards the recognition of a child's consent in respect of contraceptives:

---

173 AC 1986 112; 1985 3 All ER 402.

174 *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 533; 1985 3 All ER.

175 *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 533; 1985 3 All ER.

176 *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 133; 1985 3 All ER.

177 *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 171; 1985 3 All ER.

I accept also that a doctor may lawfully carry out some forms of treatment with the consent of a child patient and against the opposition of a parent based on religious or other grounds. The effect of the consent of the child depends on the nature of the treatment and the age and understanding of the child.<sup>178</sup>

On the other hand Scarman LJ argued that the child must not only understand the nature of what he or she is doing, but also be able to evaluate its consequences. Such understanding would require intellectual and conventional maturity. Therefore when a child attains a sufficient understanding to be capable of making up his own mind in matters that would require decision, the parent's autonomy over that child simply terminates.<sup>179</sup> This is an important point regarding the extent to which the right to participation should be granted. The issue of understanding the consequences of one's action concurs with the criteria of age and maturity in the exercise of the right to participation. While this case shows that children have the right to have their views heard, it also recognises the responsibilities and rights of parents in guiding the children on issues that affect them.

On the concept of parental authority Scarman LJ's position was that parental rights derive from parental duty and that they only exist as long as they are needed for protection of the child. Fraser LJ's opinion in this regard was that the right of a parent to control a child is not there for the parent's benefit, but rather for the benefit of the child and that is justified only if they enable the parents to perform their duty towards the child. Furthermore, Fraser LJ's opinion was whether the child was capable of understanding and expressing his or her own wishes regarding a matter. This implied that the child's right to make any decision was dependent on sufficient understanding in making such decision. Scarman LJ's argument stems from the point that for as soon as the child is capable of making up his mind on matters that would require a decision, parents' right to control their children, particularly in making decisions on their behalf, simply terminates.<sup>180</sup>

---

178 *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 112; 1985 3 All ER.

179 *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 189; 1985 3 All ER.

180 The main views in the *Gillick* case were those of Scarman LJ and Fraser LJ. Scarman LJ's view was "[i]f the law should impose upon the process of growing up fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change." On the other hand Fraser LJ's view "[i]t is contrary to the ordinary experience of mankind in Europe to say that a child or young person remains under the complete control of his parents until he attains age of majority.

Similar views have been expressed by various authors who believe that due to their immaturity children require parental protection. Freeman argues that respect for children as persons requires that society provides a childhood for every child and not adulthood for every child.<sup>181</sup> He further points out that children are incapable and immature of making sound decisions for themselves. His main viewpoint is that parents have the fundamental obligation to ensure that children make well informed decisions on matters that affect them.<sup>182</sup> Parental guidance is therefore crucial in the decision-making process and such decision should be in the best interests of a child.<sup>183</sup> Similarly, Hafen states that parents have a very significant role in guiding the development of their children's capacity to mature. He therefore advocates strongly for parental responsibility over their child.<sup>184</sup> The decision of the court was that the decision of making contraceptives readily available should rest on the medical profession. It is suggested that *in casu* the doctor *qua* state official acts as decision-maker in the place of the parent.<sup>185</sup> This decision raises concerns regarding the nature of the legal relationship between parents and children and the role of the state in regulating decision-making within the family.

In contrast some scholars have the view that children must be allowed to make their own decisions as this helps shape them when they become adults and furthermore they argue that it boosts their self-confidence as well as teach them responsibility.<sup>186</sup> For instance, advocates of children's rights such as John Holt argue that children are not incompetent, but are made incompetent by adult attitudes and not only are they able to understand and participate in many decisions; they have a right to be consulted on matters that are going to have an effect on them.<sup>187</sup>

It is suggested that the exposition that the child's right to participate depends on his or her age and ability to understand particular matters is indeed correct. Therefore a

---

In practice the most wise parents relax their control gradually as the child develops and encourage him to become increasingly independent."

181 Boezaart T (ed) *Child Law in South Africa* 252-255. See also Freeman *The Rights and Wrongs of Children* 40-69.

182 Boezaart T (ed) *Child Law in South Africa* 252-255.

183 Boezaart T (ed) *Child Law in South Africa* 252-255.

184 Boezaart T (ed) *Child Law in South Africa* 260-261.

185 *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 112; 1985 3 All ER.

186 Arts E *The UNCRC, Children's Rights and whether they need they need to be protected from making decisions in their live.*

187 Arts E *The UNCRC, Children's Rights and whether they need they need to be protected from making decisions in their live.*

balance needs to be struck between parental guidance and the right of the child to participate. It is believed that such a viewpoint will not only recognise children as subjects of their rights, but also ensure that their best interests are considered.<sup>188</sup>

### 3.4 The Constitution and the best interests of the child

It is trite that the best interests of the child are a primary consideration in all actions that concern him or her. This includes protecting the child's life, survival, development and respecting the views of a child as provided for in article 12.<sup>189</sup>This principle is found in section 28(2):<sup>190</sup>

A child's best interests are of paramount importance in every matter concerning the child.

In *Minister of Welfare and Population Development v Fitzpatrick*<sup>191</sup>, the Constitutional Court stated that the best interests of the child is an entrenched right; section 28(2) creates an independent right among other rights listed in section 28(1).<sup>192</sup>This approach has been applied in many instances, including child participation in religious matters<sup>193</sup> and the conflict between a minor and a parent with regard to consenting to medical treatment.<sup>194</sup> It is important to note that the court is the upper guardian of all children and therefore has the authority to establish what is in the best interests of children and ensure that such interests are safeguarded.<sup>195</sup>This holds true especially in instances where the vulnerability of children are exposed, such as in divorce matters.<sup>196</sup> In fact, in *Fitzpatrick* the court held that the best interests of children are not only a guideline or a mere principle, but a protected fundamental right in the true sense of the word. However, this right is limited just as the Constitution provides in section 36 and it has to be balanced with other rights. Against this background it was held by Sachs J<sup>197</sup> that when it comes to promoting

---

188 Arts E *The UNCRC, Children's Rights and whether they need they need to be protected from making decisions in their live.*

189 CRC1989.

190 The Constitution.

191 2000 (3) SA 422 (CC) C-D.

192 The Constitution.

193 *Kotzé v Kotzé*2003 3 SA 628 (TPD).

194 *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 112; 1985 3 All ER.

195 *Girdwood v Girdwood* 1995 4 SA 698 (C).

196 *Kotzé v Kotzé*2003 3 SA 628 (TPD) and *McCall v McCall* 1994 3 SA 201 (C) 205 B-G

197 *S v M* 2008 (3) SA 232, 2007 (2) SACR 539 (CC).

the rights of children they should not be seen as a negative pursuit against the rights of others, but rather if there are competing rights then the rights of children are to always be of paramount consideration.<sup>198</sup>

The linkage between the principle of best interests of a child and the right to participation has resulted in debate in respect of whether it is in the best interests of the child that he or she be allowed to make decisions affecting his or her life.<sup>199</sup> This chapter affirms that in order for the best interests of the child to be determined, it is necessary that the child be heard. However, this does not necessarily mean that a child must be granted complete responsibility for decisions that he or she makes. The spirit of article 12 is to enable consultation and growing participation rather than to hand over all decision making power to the child.

The following discussion examines the reproductive rights of children in South Africa with particular reference to legislations on the reproductive rights of children.

### **3.5 Introduction to reproductive rights of children in South Africa**

The right of a child to participate extends widely in every part of a child's life, including their reproductive health. Internationally the reproductive health concept has gained recognition since the 1980s.<sup>200</sup> The concept of reproductive health is defined by the World Health Organisation (hereafter WHO) as:

A state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity, reproductive health addresses the reproductive processes, functions and system at all stages of life.<sup>201</sup>

Therefore, reproductive health implies that people, including children, are able to have a safe sex life and that they have the freedom and capability to reproduce or not. Furthermore it implies that people must have access to information on their reproductive health.<sup>202</sup>

---

198 Davel CJ *Commentary on the Children's Act Revision Service* 2-7, 2-11.

199 Bonthuys E *The Best Interests of the Child in the South African Constitution* 2-26.

200 Pati RN *Reproductive child health* 1.

201 *In casu Reproductive Health* [http://www.who.into/topics/reproductive\\_health/en/](http://www.who.into/topics/reproductive_health/en/).

202 UN Programme of Action adopted at the International Conference on Population and Development, Cairo, 1994.

One of the reasons why South Africa adopted the Children's Act<sup>203</sup> was to provide children with the right to access reproductive health services so as to address the HIV pandemic.<sup>204</sup> In order to ensure responsible and safe sex among adolescents, government put in place a free condom distribution programme in schools. School authorities have the sole discretion to decide whether to distribute them or not. This programme has not been accepted by parents who feel that government through the education authorities is by passing the views of parents in respect to the reproductive health of their children.<sup>205</sup>

Therefore some parents dispute the laws and policies when it comes to matters of their children's reproductive health. More especially when it comes to issues that surround children and adolescents with regard to their sexual health<sup>206</sup> there is serious disagreement.<sup>207</sup> When it comes to parental consent with regard to the reproductive health of children, there are two kinds of consent.<sup>208</sup> Such include active consent, which requires a response from parents, and passive consent, which assumes parental affirmation unless the parents state otherwise. The ratio underlying active consent conveys that active parental involvement in decisions regarding reproductive health should reduce risks in certain behaviour.<sup>209</sup> It is suggested that active consent should be the form of consent regarding reproductive health issues of children as it allows parents to get involved in the decision making of their children's reproductive health.<sup>210</sup>

The main focus of this chapter is to examine the provisions in South African legislation on the reproductive health of children and to identify possible gaps in current legislation.

---

203 38 of 2005.

204 Han J and Bennish M *Condom access in South African Schools: Law, Policy and Practice* 1.

205 Han J and Bennish M *Condom access in South African Schools: Law, Policy and Practice* 1.

206 Sexual health is defined as a state of physical, emotional, mental and social wellbeing related to sexuality, not merely the absence of disease, dysfunction or infirmity WHO, 2002.

207 Zuch M *et al Changes of the law on consent in South Africa: implications for school based adolescent sexual and reproductive health research* 2.

208 Zuch M *et al Changes of the law on consent in South Africa: implications for school based adolescent sexual and reproductive health research* 2.

209 Zuch M *et al Changes of the law on consent in South Africa: implications for school based adolescent sexual and reproductive health research* 2.

210 Boonstra H and Nash E *Minors and the Right to Consent to Health Care* 4-5.

### **3.5.1 Legislation relating to consent to treatment and reproductive health of children**

This section highlights legislation that is in place allowing children to consent to treatment and other related matters affecting their reproductive health without the involvement of their parents or guardians.

In respect of children's access to healthcare and individual treatment three distinct issues need to be considered and these include the child's involvement in decision-making, access to confidential medical counselling and consent to treatment.<sup>211</sup> With regard to decision-making, children should always be included in discussions and decisions which concern their own healthcare. It is important to take cognisance of their level of understanding when involving them in decisions that will involve their healthcare. It often happens that medical practitioners neglect to involve children in matters of their health and rather inform their parents and guardians about their condition.<sup>212</sup> This is because it is usually assumed that children are incapable of making their own decisions especially in matters of their healthcare and thus the decision is left to their parents or guardians who are presumed to know best.<sup>213</sup> In addition, many cultures regard children as lacking in sufficient competence to recognise the significance of including them in such processes. However, the state has an obligation to ensure that children participate actively in planning programmes for their own health and development.<sup>214</sup>

#### **3.5.1.1 Children's Act 38 of 2005**

This Act, as amended by the Children's Amendment Act 41 of 2007, came into force in 2010. The objective of the Act is to give effect to certain rights of children as contained in the Constitution. Furthermore, the Act was enacted to provide for family care, parental care and a proper environment so that children may be cared for and protected. The Preamble of the Children's Act stipulates that the Constitution seeks to improve the quality of life of all its citizens including children and furthermore it seeks to protect children's rights and to improve their lives within their communities

---

211 Lansdown G *Every Child's Right To Be Heard* 92.

212 Lansdown G *Every Child's Right To Be Heard* 92.

213 Lansdown G *Every Child's Right To Be Heard* 92. It is clear that this approach latches on to the prevention and provision P's as explained in the beginning of this chapter.

214 Lansdown G *Every Child's Right To Be Heard* 92.

as it is undesirable to protect them in isolation from their families and the community.<sup>215</sup>

In addition, the Act stipulates that it is necessary to protect children so that they can assume responsibilities in their community and so that they grow up in a family environment that has a happy, understanding and loving atmosphere. Section 10 of the Children's Act stipulates that every child of a particular age, maturity and stage in development has the right to participate in matters that concern the child and the child's views must be given due consideration.<sup>216</sup> Moreover a child has the right to access information on health care. This is stipulated for in section 13 which states that every child has the right to access information on health including treatment, disease sexuality and reproduction. In addition they have the right to confidentiality regarding their health status.<sup>217</sup>

The following sections contain a breakdown of section 13 of the Children's Act and it is referred to here only for the sake of completeness. The gaps in this legislation will be discussed from the following sections:

*Section 129*<sup>218</sup>

- (1) Subject to section 5(2) of the Choice on Termination of Pregnancy Act, 1996 20 (Act No. 92 of 1996), a child may be subjected to medical treatment or a surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), **(3), (4), (3), (6)** or **(7)**. This section is applicable in instances when the child immature enough to understand and make such a decision. Furthermore it is applicable in instances where the guardian of the child is incapable of making such a decision or is deceased.
- (2) A child may consent to his or her own medical treatment or to the medical treatment of his or her child if –
  - (a) the child is over the age of 12 years; and
  - (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.
- (3) A child may consent to the performance of a surgical operation on him or her or his or her child if –
  - (a) the child is over the age of 12 years; and
  - (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and

---

215 Children's Act.

216 Lansdown G *Every Child's Right To Be Heard* 92.

217 Children's Act.

218 Children's Act.

(c) the child is duly assisted by his or her parent or guardian.

**Section 130<sup>219</sup>**

(2) Consent for an HIV test on a child may be given by –

(a) the child, if the child is –

(i) 12 years of age or older; or

(ii) under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a test.

**Section 133<sup>220</sup>**

(2) Consent to disclose the fact that a child is HIV-positive may be given by –

(a) the child, if the child is –

(i) 12 years of age or older; or

(ii) under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a disclosure.

**Section 134<sup>221</sup>**

(1) No person may refuse –

(a) to sell condoms to a child over the age of 12 years; or

(b) to provide a child over the age of 12 years with condoms on request where such condoms are provided or distributed free of charge.

(2) Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or caregiver of the child if –

(a) the child is at least 12 years of age;

(b) proper medical advice is given to the child; and

(c) a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.

(3) A child who obtains condoms, contraceptives or contraceptive advice in terms of this Act is entitled to *confidentiality* in this respect, subject to section 105.

### **3.5.1.1 Condom access in South African schools; analysis of Section 134**

As already established the South African government has put laws in place in order to protect its citizens inclusive of children. For example the Basic Education Laws Amendment Act 15 of 2011 was enacted to redress the educational injustices of the past in South African schools.<sup>222</sup> Therefore a national contraception policy guideline was issued by the South African Department of Health with the aim of preventing pregnancies and the transmission of sexual infections as a critical part to protect

---

219 Children's Act.

220 Children's Act.

221 Children's Act. Furthermore S 305 of the Children's Act stipulates that failure to comply with this section is an offence.

222 This legislation however does not provide for any disposal of contraceptives in schools.

children.<sup>223</sup> With regard to section 134 debates have arisen in respect of providing condoms for a particular age group of children in schools without parental consent.<sup>224</sup> The main concern arises from parents, guardians and the community.<sup>225</sup>

With regard to consent to health services it is imperative to understand what consent entails. Consent is described as the manifestation of a person's will.<sup>226</sup> There are four requirements that are required for consent to be valid. These include; the consent must be given by a person who is capable in law to give such consent. This means that a person must have the legal capacity to give such consent.<sup>227</sup> The consent must be informed and individuals must understand the information they are given as well as the consequences of acting on such information. The consent must be clear, meaning that the patient as well as the health adviser must understand what is being consented to before and after the treatment.<sup>228</sup> Finally the consent must be provided freely and may not be forced onto a person.<sup>229</sup> Parents have full responsibilities in respect of their children. This also includes consent to reproductive aspects of their children's lives.

It has already been established that the overarching legal document in South Africa that governs children's rights to access contraceptives is the Children's Act. The Act contains rights relevant to youth health programmes which were not present in the Child Care Act of 1983.<sup>230</sup> Such includes that every child, with no specification pertaining to age, has the right to access to information on the prevention and treatment of ill-health and disease, sexuality and reproduction. For instance, a 12-year-old child can consent to HIV-testing and children under 12 years with sufficient maturity to understand the implications of the test can consent to the HIV-testing.<sup>231</sup> Section 134 stipulates that no person may refuse the sale of condoms to a child of 12 years or older or refuse to provide such a child with condoms which are distributed free of charge on request of the child. In considering children's rights it is important to

---

223 Mahery P *et al* *A guide to the Children's Act for Health professionals* 17.

224 Mahery P *et al* *A guide to the Children's Act for Health professionals* 17.

225 Mahery P *et al* *A guide to the Children's Act for Health professionals* 17.

226 Mahery P *et al* *A guide to the Children's Act for health professionals* 9.

227 Mahery P *et al* *A guide to the Children's Act for health professionals* 9.

228 Mahery P *et al* *A guide to the Children's Act for health professionals* 9.

229 Mahery P *et al* *A guide to the Children's Act for health professionals* 9.

230 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 25-28.

231 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 25-28.

understand their stages of development and their ability to understand issues relating to matters of their sexuality and reproduction. Matters relating to sexual reproduction bring conflict into their minds as they are still developing.<sup>232</sup> Furthermore, children have a conventional way of thinking.<sup>233</sup> This means that their views and expectations are influenced by societal pressures and are not stable.<sup>234</sup> The child is still in search of his or her own identity so that bombarding his or her mind with such a great responsibility as to give consent to matters of contraceptives may confuse him/her and lead him or her to believe that society condones premarital-activity.<sup>235</sup> In addition to the Children's Act, the South African Department of Education (DOE) established policies that govern condom distribution in schools. This however remains the focus of debate in the South African community.<sup>236</sup>

The DOE policy came about as a result of a national debate from which it emerged that local schools must decide on their own whether they should allow condom access in schools or not. This decentralisation reflects the mechanics of how this policy should be implemented. The Minister of Education is the one that determines national policy which in turn drives policy and implementation at provincial level. This is then referred back to the DOE offices which then pass the policy to local schools.<sup>237</sup>

The ultimate governance of every public school vests in its school governing body which consists of parents, school staff and students. In the case of condom distribution in schools the policy of decentralisation has been poorly communicated as most members of the governing body are unaware of any policies on condom

---

232 Ross E and Ncube M *Reproductive health issues emanating from the Children's Act no.38 of 2005 as amended in 2008. A pilot study of the rights of parents versus rights of children* 68-69.

233 Ross E and Ncube M *Reproductive health issues emanating from the Children's Act no.38 of 2005 as amended in 2008. A pilot study of the rights of parents versus rights of children* 68-69.

234 Ross E and Ncube M *Reproductive health issues emanating from the Children's Act no.38 of 2005 as amended in 2008. A pilot study of the rights of parents versus rights of children* 68-69.

235 Ross E and Ncube M *Reproductive health issues emanating from the Children's Act no.38 of 2005 as amended in 2008. A pilot study of the rights of parents versus rights of children* 68-69.

236 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 25-28.

237 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 25-28. See also South Africa Department of Education 1999 *National policy on HIV/AIDS, for learners and educators in public schools, and students and educators in further education and training institutions* [http://wced.wcape.gov.za/branchIDC/special\\_ed/hiv\\_aids/National\\_policy\\_on\\_HIV-AIDS](http://wced.wcape.gov.za/branchIDC/special_ed/hiv_aids/National_policy_on_HIV-AIDS).

distribution in schools.<sup>238</sup> Government officials, with inclusion of the DOE, believe that the distribution of condoms in schools is in appropriate. Education policy must be made according to defined procedures, including notice and publication in the Government Gazette. However, condom access is a negative right which means that the government is not imposing an obligation to distribute condoms. It is a policy to ensure safe sex practice to those already sexually active children.

The main concern with this provision is that there is no monitoring mechanism on how schools ensure that the condoms are distributed to children within the age limit as provided. It is suggested that the procedure that should be followed before implementing condom distribution should first include the parents and guardians with the help of non-governmental organisations facilitating the discourse. Secondly, schools should involve the larger part of the community to engage with them on the policy of condom distribution and their take thereof. Finally, after engaging all the relevant groups, the school governing body must ultimately decide whether to proceed with the distribution or not. This approach should encourage parental support and better communication between child and parent.<sup>239</sup>

It is important to note that once a school decides to provide access to condoms, it has to come up with ways of distributing them. For instance, at a particular school condoms were placed in the principal's office for proper monitoring of distribution. This mechanism did not work as the condom box remained untouched after a year since no student requested for a condom.<sup>240</sup> Students feared that authority figures would discover that they are sexually active and therefore they would be scolded for having sex. As a result many students suggested that they place unmonitored dispensers in the toilets and classrooms. It was believed that, with proper education, the condoms would be used appropriately while others disagreed to this and said that this would encourage a misuse of the condoms.<sup>241</sup>

---

238 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 25-28. See *inter alia* National Education Policy Act 27 of 1996 <http://www.info.gov.za/acts/1996/a27-96>.

239 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 25-28.

240 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 25-28.

241 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 25-28.

It has been realised that implementation of condom distribution cannot be easily ascertained as children will still be reprimanded for the use thereof and still be regarded as too immature to engage in such activities.<sup>242</sup> Furthermore the involvement of parents with regard to condom distribution would lead to an open relationship between the parents and the children with regard to discussing issues of sexuality and reproduction. This in turn would show respect for the responsibilities and rights that parents have over their children, because in the end the decision of the school governing body in distributing the condoms will depict the consensus that the community has over such an issue.<sup>243</sup>

### **3.5.1.2 The Choice on Termination of Pregnancy Act 92 of 1996**

This Act stipulates in the latter part of the Preamble that it is promoting reproductive rights and freedom to all women to choose whether they want to have early, safe termination of pregnancy in accordance with her own beliefs. Furthermore, the Act defines a woman as any female of any age. The Act does not provide any particular age for such termination. This indicates a lacuna and it is submitted that all legislation that address the reproductive health of children must borrow from the Children's Act where the age of consent is prescribed.<sup>244</sup> In addition this Act provides that the only consent required for such termination is the consent of the pregnant woman. These provisions will be under scrutiny in this sub-section with regard to the reproductive health of children and parental involvement in that regard.

A woman may terminate her pregnancy upon request during the first 12 weeks.<sup>245</sup> After this period elapses from the 13<sup>th</sup> week onwards if the medical practitioner is of the opinion that the pregnancy would cause a risk of injury on the woman's physical and mental health as well as that of the foetus the termination of pregnancy would only be carried out by the medical practitioner in those circumstances.<sup>246</sup> In addition if the pregnancy is as a result of incest or rape and also if the pregnancy would significantly affect the social or economic circumstances of the woman the termination of pregnancy would only be carried out by the medical practitioner.<sup>247</sup> In circumstances where a medical practitioner consults with the woman and is of the

---

242 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 25-28.

243 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 25-28.

244 S 134 of Children's Act.

245 S 2 of the TPA.

246 S 2(b) of the TPA.

247 S 2(b) of the TPA.

opinion that if the pregnancy continues it would pose a risk to the woman's physical or mental health, or to the foetus' physical or mental health, then the termination of the pregnancy may only be carried out with the consent of the medical practitioner.<sup>248</sup>

Recognition of the so called fourth p is found in section 5(3) of the TPA where it is provided that in case of a pregnant minor a medical practitioner may advise the minor to consult her parents or guardian before the termination of the pregnancy. If the parents or guardian of the minor refuses such termination to proceed, the minor can still proceed with the termination.<sup>249</sup> In comparison to the provision of contraceptives as provided for in section 134<sup>250</sup> it is difficult to reconcile the fact that regardless of the age limit regarding contraceptives, there is no age limit with regard to termination of pregnancy. It is suggested therefore that these provisions provide ample evidence of the state infringing upon the responsibilities and rights of parents and infringing upon their family values, as well as providing guidance to their children with regard to the reproductive health of their children.

According to commentators regarding section 134 children have a conventional way of thinking and therefore are immature to make decisions with regard to their reproductive health.<sup>251</sup> Why then should immature children who do not have the capacity to reason and discern such matters be given the opportunity to terminate their pregnancy without the consent of the people who have been given full responsibilities and rights to ensure protection of their wellbeing? When it comes to policies on protecting the sexual conduct of children the same age limit must be set for all policies.

### **3.6 Reproductive rights of children**

With reference to the state interfering with parental responsibilities and rights, it has been argued by various authors that the state crosses its boundaries and infringes

---

248 S 2 (c) of the TPA.

249 S 5 (3) of the TPA. This section came under scrutiny in *Christian Lawyers Association v National Minister of Health* 2005 516 D where it was determined that in the context of giving consent it should be determined on a case by case basis by the medical practitioner and this should be based on the emotional and intellectual maturity of the concerned individual than on the inflexible age.

250 Children's Act.

251 Ross E and Ncube M *Reproductive health issues emanating from the Children's Act 38 of 2005 as amended in 2008. A pilot study of the rights of parents versus rights of children* 68-69.

upon the responsibilities and rights of parents. This is portrayed in the following examples:

The English decision in *Gillick* has been observed as a landmark case in children's rights. A child who is mature enough has autonomy to make decisions falling in the sceptre of such autonomy.<sup>252</sup> This much is clear from the decision. However, it is suggested that this development diminishes the influence of parents in a situation of potential serious impact in the child's life. In fact, it appears that decisions and legislation of this nature are indicative of the state infringing upon the parent-child relationship since the influence of parents is now seriously inhibited. In South African law the Children's Act bears out on *Gillick* as explained above. It is submitted that the provisions in the Act pertaining to children's health fail to promote a democratic and open type of relationship between parents and children. It is in any case doubtful whether the best interests of a girl child are properly served by these provisions and it may appear that the parent-child relationship is not protected as is required by the Constitution.<sup>253</sup>

Despite the misgivings set out in the previous paragraph it is important that children should receive medical advice and counselling. However, their right to give medical consent must be clearly distinguished. In terms of the Children's Act<sup>254</sup> children over 12 years are legally entitled to seek medical counselling without parental consent in order to protect their wellbeing and safety. This may be of particular importance in circumstances where there is child abuse at home. When it comes to medical treatment, section 129 of the Children's Act and article 12 and article 5 of the CRC<sup>255</sup> must be taken into consideration. Article 5 of the CRC stipulates that parents must provide appropriate direction and guidance to their children. It must be provided in a manner consistent with the evolving capacities of the child. This means that children

---

252 *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 112; 1985 3 All ER and see also Ethics Department *Parental responsibility: guidance from the British Medical Association* 4.

253 S 28 (1) (b) of the Constitution.

254 S 129.

255 Article 12 states state parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.. Article 5 stipulates that state 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 present Convention.

who are competent should be able to exercise rights themselves. It further states that the government must respect the responsibilities and rights of the parents or guardians to provide direction to the child in his or her exercise on the rights provided by the CRC. Furthermore, any guidance given to the child must take cognisance of the evolving capacities of the child.<sup>256</sup> This means that while children acquire capacity they are then entitled to an increasing level of responsibility for the regulation of matters affecting them. For instance every child has the right to the best possible health, and access to health services. While the child is young, parents have the responsibility and right to give consent to medical treatment and services on behalf of the child. However, as the child acquires greater level of understanding and competence, the right to give consent should transfer from the parent to the child.<sup>257</sup>

For the sake of interest reference may be made to the position in the Netherlands. As point of departure parents are legally obliged to make medical decisions for all children below the age of 12.<sup>258</sup> For children between ages 12 to 16 the consent of both parents is required for medical action, but if the parent refuses consent the doctor can carry out the treatment if the child insists.<sup>259</sup> This is required as a result of the recognition that the parental role decreases gradually as the child's capacity evolves.

### **3.7 The role of the state with reference to children's reproductive rights**

In order to ensure a child's wellbeing and interest a state must *inter alia* enact a coherent framework of laws and policies to establish an encompassing protection system for the child.<sup>260</sup> Such may include the implementation of international treaties and conventions. When a state through enactment of its laws and policies promotes the ideal of respect for the rights of children it creates a climate in which state intervention is less necessary.<sup>261</sup> On the other hand, state intervention is crucial for the protection of the rights of a child in various circumstances such as abuse or neglect. With regard to international law, section 231(4) of the South African

---

256 Lansdown G *Every Child's Right To Be Heard* 36-37.

257 Lansdown G *Every Child's Right To Be Heard* 36-37.

258 Lansdown G *Every Child's Right To Be Heard* 81-98.

259 Lansdown G *Every Child's Right To Be Heard* 81-98.

260 S 28 of the Constitution.

261 Woodhouse B *A delicate balance: the role of government in protecting children's rights within the family* 6-7.

Constitution provides that an international convention becomes law when it is enacted into law by national legislation. This provision consequently also pertains to the rights of children contained in the CRC and the ACRWC.<sup>262</sup>

In terms of section 7(2) of the Constitution the state must protect, promote and fulfil the BoR.<sup>263</sup> It is trite that this means that the state must put measures in place to ensure that children's rights are given effect. To realise such rights and to fulfil the obligations as set out by the Constitution the state must implement legislation.<sup>264</sup> These responsibilities apply equally to the rights of children. The state is responsible to ensure that children's rights are protected, promoted and fulfilled.<sup>265</sup>

With reference to the reproductive health rights of children the state has put legislation in place, such as the TPA and the Children's Act, which both give effect to the reproductive health rights of children. By doing so the state is fulfilling its obligation to protect, promote and fulfil the rights of the child. However, can it truly be said that the state is so fulfilling its obligations to (girl) children if it enacts laws that permit abortion and contraceptives irrespective of age?<sup>266</sup> It is submitted that Mrs *Gillick's* argument that although it is important for the state to protect an individual's right to privacy, the parents should be the ultimate decision-makers regarding the wellbeing of their children, indeed reflects a sound understanding of the parent-child relationship which better serves the best interests of the child.

The importance of the right to participation for children cannot be underestimated. It is suggested that the best place for children to express their views is their home, as it is a safe and supportive environment where they feel valued and respected. In

---

262 S 231 of the Constitution.

263 In *Glenister v President of the Republic of South Africa* 2011 7 BCLR 651 (CC) para 105 it was said that this provision extends beyond a mere negative obligation not to act in a manner that will infringe or restrict a right. Rather it entails positive duties on the state to take deliberate reasonable measures to give effect to all the fundamental rights contained in the Bill of Rights. Furthermore in their majority judgment Moseneke DCJ and Cameron J noted it is a requirement that the steps the state takes to respect, protect, promote and fulfil the constitutional obligations must be reasonable and effective.

264 Boezaart T (ed) *Child Law in South Africa* 206-207.

265 See *inter alia* Quynh TT *et al Rights based approach to development and child rights programming* 23: The state's obligation to respect, protect and fulfil rights:- Respect: States must not interfere directly or indirectly with the enjoyment of the rights; Protect: states must take measures that prevent third parties from interfering with the enjoyment of the right; Fulfil (facilitate): states must adopt appropriate legislative, judicial, administrative and other measures towards the full realisation of the right; Fulfil (provide): states must directly provide assistance or services for the realisation of these rights.

266 TPA and Children's Act.

addition it prepares the child for participation in society.<sup>267</sup> However, the exercise of the right to participation differs internationally.<sup>268</sup> In certain jurisdictions children are in essence not truly regarded as bearers of rights and are consequently expected to obey and accept parental authority unconditionally. In some African jurisdictions for example, children are viewed as inferior and are never allowed to challenge their elders or give opinions in matters that affect them. In such societies, parents are typically said to own their children and having control over them.<sup>269</sup> This typically is an instance where the state should interfere in terms of the CRC as it is to protect, promote and fulfil the rights and freedoms of a child. In South African law as indicated *supra*, both the Constitution and the Children's Act strongly emphasise the position of the child within the family environment by making specific provision for the child's participation in all matters that affect him or her, also within the family environment.

With specific reference to parents' exclusion from decisions regarding the child's right to make decisions regarding abortion, it will be argued later on that South African law in essence does not protect and further the best interests of the child. While it is true that the rights of children to intellectual freedom become meaningless in instances where they are prevented from obtaining such freedom, (for instance by being treated as objects)<sup>270</sup>, the state should not interfere with regard to the values and beliefs of parents in the process of educating their children. Rather it is to ensure that the wellbeing of the child is considered.<sup>271</sup>

The CRC requires that the state should provide appropriate assistance to parents with regard to their responsibilities towards their children.<sup>272</sup> This would involve matters such as counselling where parents are encouraged to establish a positive relationship with their children to enhance their children's understanding of their

---

267 Lansdown G *Every Child's Right To Be Heard* 81-98.

268 Lansdown G *Every Child's Right To Be Heard* 81-98.

269 Lansdown G *Every Child's Right To Be Heard* 81-98.

270 Woodhouse B *A delicate balance: the role of government in protecting children's rights within the family* 6.

271 *Kotzé v Kotzé* 2003 3 SA 630 (TPD) was a case about parents imposing religion on their child and in this case the court held that as upper guardian of all minors it had an absolute right and authority to establish what is in the best interests of the child and to ensure that such interests are effectively protected.

272 Art 3(2).

rights. In order to balance the responsibilities and rights of parents to guide their children and the right of children to participate the state must put in place laws backed up by information on how parents can effectively offer guidance to their children without having to deny them total enjoyment of their rights.<sup>273</sup> When the state enacts such laws it should consider the parent-child relationship as it protects the interests of the child. This should be done because this relationship is a *consortium omnis minoritatis* <sup>274</sup> which contain mutual duties and moral responsibilities of a unique kind.<sup>275</sup>

### **3.8 Conclusion**

This section has discussed the right of the child to participation against the background of the best interests of the child. The interplay between articles 3 and 12 of the CRC has also been examined. The application of the right of the child to participate has been illuminated and a foundation has been laid with regard to the responsibilities and rights of parents in the exercise of the reproductive health rights of children. Furthermore, the Children's Act and TPA that govern the protection of children's reproductive health and sexuality have been discussed. The chapter discusses how such provisions overarch the responsibilities and rights that parents and guardians are given over their children. In addition the chapter highlights that the mentioned legislation excludes parental consent with regard to their children's health in matters concerning their reproductive health.

From the study in this chapter it has emerged that there was inadequate consultation with the parents before the promulgation of the Children's Act.<sup>276</sup> Thus there is dissatisfaction among parents and guardians regarding children having access to contraceptives without their consent and involvement in the decision-making process. Furthermore, it has been discovered that the TPA does not specify a minimum age or other requirements for sole determination termination of pregnancy. In essence this allows any girl irrespective of her age to terminate her pregnancy without parental consent. It is therefore recommended that section 28(1)(b) be

---

273 Lansdown G *Every Child's Right To Be Heard* 81-98.

274 This means a unique identity of a relationship which is described as an all-inclusive unity of a relationship.

275 Robinson JA *Reflections on the conflicts of interests of children* 417.

276 Han J and Bennish M *Condom access in South African schools: Law, Policy and Practice* 28.

reconsidered to allow for the responsibilities and rights of parents to be respected in matters relating to the reproductive health of their children.

This chapter has further exposed the need for a harmonised framework for an effective implementation of children's right to reproductive health. The role of the state in the lives of children was discussed. Finally it is important to involve children in discussions and decisions that concern their health care, but this must be done in consistency with the child's level of understanding. It is argued that when children actively participate in their own health decisions it produces a positive outcome for them in the sense that it makes them feel more respected, gives them confidence and encourages cooperation.<sup>277</sup>

---

277 Lansdown G *Every Child's Right To Be Heard* 81-98.

## CHAPTER 4

### CONCLUSIONS AND RECOMMENDATIONS

#### 4.1 Introduction

The contents of this dissertation bear testimony to the fact that the parent-child relationship is a truly unique one deserving of special legislative measures to protect it. It further highlights the fact that children should not only be seen as bearers of the first so called three p's but that children should be recognised as bearers of the right to participate in decisions regarding their own lives.

The first objective sought to examine the responsibilities and rights of parents and guardians towards their children within the parent-child relationship. Reference has been made to the well-known judgement of *Gillick* where it has been decided that children of a certain age and understanding have the autonomy to make decisions regarding their reproductive health without the consent of parents. The argument of court makes it clear that in decisions of this nature it must be ensured that the girl child understands the advice given to her in respect of contraceptives. Simultaneously the appropriateness of parental involvement must be considered. Furthermore it has been found that parental authority (as then was) only exists as long as it is needed for the protection of the child.

The second objective discusses the right of the child to participate as well as the best interests of the child which is a constitutionally entrenched right. In addition, challenges that surround child participation and the child's best interests were analysed. *Gillick*<sup>278</sup> was also referred to in this instance. It was concluded that in order for the best interests of the child to be determined, it is necessary that the child be heard. However, a child should not be granted complete responsibility for decisions that he or she makes. Rather, the spirit of article 12 is to provide for consultation and progressive participation than to afford complete decision-making power to the child. Furthermore the responsibility of the state was discussed and how the state infringes upon the parent-child relationship regarding children's reproductive health was also discussed. With regard to this objective highlighted the importance of the guidance of parents and guardians with regard to the reproductive health of their children.

---

278 *Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 112; 1985 3 All ER 402.

The final objective considered provisions of South African legislation that relate to the reproductive rights of children. Lacunae in this legislation were pointed out. The legislation discussed includes the Children's Act<sup>279</sup> and the TPA.<sup>280</sup> Particular attention was paid to section 134 of the Children's Act which deals with access to contraceptives including condoms and the omission of any age requirement in the TPA. The conclusion pertaining to this objective is that the rights of parents must be respected and they should be afforded a greater responsibility to make decisions affecting the health and wellbeing of their children. Similarly to provisions pertaining to reproductive health that are set on 12 years in the Children's Act a minimum age should be stipulated for purposes of abortion.

In addition, it was discussed how these provisions infringe on the responsibilities and rights of parents and guardians. From the findings of the objective, scholars discovered that the community which includes parents and guardians is not fully informed regarding the provisions in the Children's Act and let alone section 134 of the Act. Furthermore the TPA does not provide a specific age of a girl who can consent to abortion. This was seen as lack of proper drafting of the two legislations as there is no form of consistency with regard to the reproductive rights of children.

#### **4.2 Recommendations**

It is suggested that the following suggestions may serve to improve current legislative provisions with regard to the reproductive health of children:

1. The parent-child relationship should be recognised by the legislature as a truly unique one. Responsibilities and rights of parents and guardians must be respected and the legislature should refrain from infringing upon the parent-child relationship if it is not in the best interests of the child to do so. The reason for this recommendation is that parents have the responsibilities and right to care for their children and within their means to raise them in a safe environment.<sup>281</sup> Therefore the legislature must recognise parents' interests in the wellbeing of their children. This aim maybe achieved by the legislature recognising that parents are the primary care givers of their children and that

---

279 38 of 2005.

280 92 of 1996.

281 S 28(1)(b) of the Constitution.

the state's role is secondary in the sense that it must guard that parents abuse their responsibilities and rights to the detriment of their children.

2. The legislature must revise the TPA. The fact that it does not explicitly provide a particular minimum age for children to terminate their pregnancies, yet denying parents the opportunity to be involved in decisions in this respect, is viewed as a major omission. The consequences of this omission are that a girl of any age may terminate her pregnancy. This is in contrast with the Children's Act<sup>282</sup> that provides for free condom access only for children of age 12 and above. The justification behind this age limit is to prevent unwanted pregnancies of younger children. The age limit should also be applicable to the TPA and should be set with consideration to the maturity of the child and her ability to understand the decision she is making and the implications thereof.
3. Furthermore, it is suggested that provision should be made for the court as upper guardian of all children to adjudicate upon termination of pregnancy of minor girls. Factors to be weighed by the court should include both the best interests of the child and reasons advanced for refusal by the parents. It follows per definition from this recommendation that the child's right to be heard and participate in any proceedings regarding her pregnancy will be of particular relevance.

---

282 S 134.

## BIBLIOGRAPHY

### Literature

Bekink *Child divorce*

Bekink M *Child divorce: a break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents* (2012) 15 PER Journal.

Bekink and Brand *Constitutional and International Protection of Children's Rights*

Bekink B and Brand D "Constitutional protection of children" in Davel CJ (ed) *et al* Introduction to child law in South Africa (2000) Juta Cape Town

Boezaart (ed) *Child Law in South Africa*

Boezaart T *Child Law in South Africa* (Juta Pretoria 2009)

Boonstra H and Nash E *Minors and the Right to Consent to Health Care*

Boonstra H and Nash E *Minors and the Right to Consent to Health Care* (2000) 3 Guttmacher Report on Public Policy.

Bonthuys E *The Best Interests of the Child in the South African Constitution*

Bonthuys E *The Best Interests of the Child in the South African Constitution* (2005) 20 Oxford Journals

Bosman and Van Zyl *Law of Children and Young Persons*

Bosman and Van Zyl *Law of Children and Young Persons* 1997 Durban Butterworth

Bridgeman *Responsibility, law and the family*

Bridgeman J *et al Responsibility, law and the family* 2008 London: LexisNexis Butterworth

*Committee on the Rights of the Child, Report on the forty-third session*

*Committee on the Rights of the Child, Report on the forty-third session 2006*

Davel *Commentary on the Children's Act Revision Service*

Davel CJ *Commentary on the Children's Act Revision Service 2010*

Dooyeweerd *Dewijsbegeerte der wetsidee Vol III*

Dooyeweerd *Dewijsbegeerte der wetsidee Vol III 1935*

Dugard J *International law*

Dugard J *International law 4<sup>th</sup>ed 2005*

Ennew J *The History of Children's Rights: Whose story?*

Ennew J *The History of Children's Rights: Whose story? 2000*

Ethics Department *Parental responsibility: guidance from the British Medical Association*

Ethics Department *Parental responsibility: guidance from the British Medical Association (2008) BMA Journal*

Ferguson *Reproductive rights*

Ferguson *Reproductive rights 2009*

Freeman *The Rights and Wrongs of Children*

Freeman *The Rights and Wrongs of Children (1983) 13 Journal of social policy*

Freeman M *Law and childhood studies: current legal issues*

Freeman M *Law and childhood studies: current legal issues (2012) 13 Oxford scholarships*

Fortin J *Children's rights and the developing law*

Fortin J *Children's rights and the developing law 2<sup>nd</sup>ed (Cambridge University Press 2005)*

Hausheer *et al* *Parental responsibilities-Switzerland*

Hausheer *et al* *Parental responsibilities-Switzerland* 2014

Han J and Bennish M *Condom access in South African Schools: Law, Policy and Practice*

Han J and Bennish M *Condom access in South African Schools: Law, Policy and Practice* (2009) 6 journal pmed

Heaton *Commentary on the Children's Act 3-3*

Heaton J *Parental responsibilities and rights* in Davel CJ and Skelton AM (ed) *Commentary on the Children's Act 2007* (Juta& Co Kenwyn)

Hoggett B *et al* *The family, law and society cases and materials*

Hoggett B *et al* *The family, law and society cases and materials* 3<sup>rd</sup>ed 1991 (Butterworth, London)

Hodgkin R and Newell P *Implementation Handbook for the Convention on the Rights of the Child*

Hodgkin R and Newell P *Implementation Handbook for the Convention on the Rights of the Child* 3<sup>rd</sup>ed 2007

Kränzl-Nagl R and Zartler U *Children's participation in school and community*

Kränzl-Nagl R and Zartler U *Children's participation in school and community* 2010

Lansdown G *Every Child's Right To Be Heard*

Lansdown G *Every Child's Right To Be Heard* (2011) 52 Journal of school psychology

Mahery P *et al* *A guide to the Children's Act for health professionals*

Mahery P *et al* *A guide to the Children's Act for health professionals* (4<sup>th</sup> ed) 2010

Orend B *Human rights: concept and context*

Orend B *Human rights: concept and context* 2002 Broadview press

Pati RN *Reproductive child health*

Pati RN *Reproductive child health* 2002

Quynh TT *et al Rights based approach to development and child rights programming*

Quynh TT *et al Rights based approach to development and child rights programming* 2010

Reynolds L *The rights of a child: a challenge for health professionals*

Reynolds L *The rights of a child: a challenge for health professionals* (1999) 89 SA medical Journal

Robinson JA *et al Introduction to South African Family Law*

Robinson JA *et al Introduction to South African Family Law* 2013

Robinson JA *Reflections on the conflict of interests of children and parents*

Robinson JA *Reflections on the conflict of interests of children and parents* 2013

Ross E and Ncube M *Reproductive health issues emanating from the Children's Act no. 38 of 2005 as amended in 2008*

Ross E and Ncube M *Reproductive health issues emanating from the Children's Act no. 38 of 2005 as amended in 2008. A pilot study of the rights of parents versus rights of children* 2010 The South African Journal of Bioethics and Law

Skelton A in Boezaart *Child Law in South Africa*

Skelton A in Boezaart *Child Law in South Africa* (Juta Pretoria 2009)

Save the children *Advancing Children's Rights*

Save the children *Advancing Children's Rights* (2<sup>nd</sup> ed) 2010

UN Programme of Action adopted at the International Conference on Population and Development, Cairo 1994

UN Programme of Action adopted at the International Conference on Population and Development, Cairo 1994

Van Bueren *The International Law on the Rights of the Child*

Van Bueren *The International Law on the Rights of the Child* Fordham International Law Journal 1995

Van Bueren (ed) *A History of the International Law on the Rights of the Child*

Van Bueren (ed) *A History of the International Law on the Rights of the Child* (1995) 19 Fordham International Law Journal

Van der Merwe (ed) *Introduction to the law of South Africa*

Van der Merwe (ed) *Introduction to the law of South Africa* (2004) 121 SA Law Journal

Van Schalkwyk in Boezaart (ed) *Child Law in South Africa*

Van Schalkwyk in Boezaart (ed) *Child Law in South Africa* (Juta Pretoria 2009)

Visser and Potgieter *Introduction to Family Law*

Visser PJ and Potgieter JM 2<sup>nd</sup>ed *Introduction to Family Law* 1998

World Health Organisation

World Health Organisation (2002) health report

Woodhouse B *A delicate balance: the role of government in protecting children's rights within the family*

Woodhouse B *A delicate balance: the role of government in protecting children's rights within the family* (1999) International conference on children's rights ministry of education Tokyo, Japan

Zermatten *The best interests of the child*

Zermatten *The best interests of the child: Literal analysis, function and implementation* (2010) 18.4 International Journal of Children's Rights

Zuch M *et al* *Changes of the law on consent in South Africa: implications for school based adolescent sexual and reproductive health research*

Zuch M *et al* *Changes of the law on consent in South Africa: implications for school based adolescent sexual and reproductive health research* (2012)  
12 *BMC International Health and Human Rights*

### **Case Law**

*Bannatyne v Bannatyne* 2003 2 SA 363 (CC) 375E

*B v M* 2006 9 BCLR 1034 (W)

*B v S* 1995 3 SA 571 (A)

*Christian Lawyers Association v National Minister of Health* 2005 516 D

*Gillick v West Norfolk and Wisbech Area Health Authority* AC 1986 112; 1985 3 All ER 402

*Girdwood v Girdwood* 1995 4 SA 698 (C)

*Glenister v President of the Republic of South Africa* 2011 7 BCLR 651 (CC)

*Government of the RSA v Grootboom* 2001 1 SA 46 (CC).

*Jooste v Botha* 2000 2 SA 199 (T).

*Kotzé v Kotzé* 2003 3 SA 628 (TPD)

*McCall v McCall* 1994 3 SA 201 (C) 205 B-G

*Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC)  
C-D

*M M v A V* (2901/2010) [2011] ZAWCHC 425

*S v M* 2008 (3) SA 232, 2007 (2) SACR 539 (CC)

### **Legislation and government publications**

Child Care Act 74 of 1983

Children's Act 38 of 2005

Children's Amendment Act 41 of 2007

Choice on Termination of Pregnancy Act 92 of 1996

The Constitution of the Republic of South Africa, 1996

Basic Education Laws Amendment Act 15 of 2011

### **International instruments**

African Charter on the Rights and Welfare of the Child 1990

Declaration of the Rights of the Child 1924

Declaration of the Rights of the Child 1959

United Nations Convention on the Rights of the Child 1989

### **Internet sources**

Anonymous *A beginner's guide* [http:// www.parliament.gov.za](http://www.parliament.gov.za) (date of use 07 Sep 2014)

Anonymous *National Education Policy Act 27 of 1996* <http://www.info.gov.za/acts/1996/a27-96> (date of use 12 Nov 2014)

Anonymous *Rights-based approach to development and child rights programming* 2010 <http://www.plan-academy.org> (date of use 22 Oct 2014)

Anonymous *Reproductive Health* [http://www.who.into/topics/reproductive\\_health/en](http://www.who.into/topics/reproductive_health/en) (date of use 6 Mar 2014)

Anonymous *The state: what it is and what's its role?* <http://www.socialistrevolution.org> (date of use 07 Sep 2014)

Arts E 2014 *The UNCRC, Children's Rights and whether they need they need to be protected from making decisions in their live* <http://hubpages.com> (date of use 02 Feb 2015)

Du Preez WR 2011 *The Medical Treatment of Children and the Children's Act 38 of 2005* <http://www.upetd.up.ac.za> (date of use 24 Apr 2013)

Hammarberg T *The principle of the best interests of the child- what it means and what it demands from adults* <http://wcd.coe.int> (date of use 6 Mar 2014)

*History of Children's Human Rights* <http://www.childrensrighswales.org.uk> (date of use 6 Mar 2014)

<http://unchildrights.blogspot.com> (date of use 6 Mar 2014)

LeMoyne R 2013 <http://www.unicef.org> (date of use 6 Mar 2014)

Mason D 2011 *Termination on Pregnancy and Children: Consent and Confidentiality Issues* <http://www.scielo.org.za/scielo> (date of use 24 Apr 2013)

*National Education Policy Act 27 of 1996* <http://www.info.gov.za/acts/1996/a> (date of use 12 Nov 2014)

South Africa Department of Education 1999 *National policy on HIV/AIDS, for learners and educators in public schools, and students and educators in further education and training institutions.* [http://wced.wcape.gov.za/branchIDC/special\\_ed/hiv\\_aids/National\\_policy\\_on\\_HIV-AIDS](http://wced.wcape.gov.za/branchIDC/special_ed/hiv_aids/National_policy_on_HIV-AIDS) (date of use 12 Nov 2014)

Sapa 2012 *Government worried about escalating abortions* <http://www.sowetanlive.co.za/news/> (date of use 18 Feb 2015)

UNICEF Company History <http://www.fundinguniverse.com> (date of use 6 Mar 2014)

*UNICEF Every Child's Right to Be Heard* <http://www.unicef.org> (date of use 6 Mar 2014)

*UNICEF Participation rights* <http://www.unicef.org> (date of use 22 Oct 2014)

## **Thesis and dissertation**

Louw AS *Acquisition of parental responsibilities and rights* (LLD-dissertation  
University of Pretoria 2009)