

9 The Legal Status of Children's Rights in Zimbabwe

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1 Introduction

Child law and children's rights are relatively new phrases in Zimbabwean legal terminology. This is partly because children are largely viewed as objects of parental care and state protection. The characterisation of children as 'property' is also evident in the way the family, society and the state construct childhood as no more than a period of paternalistic socialisation. Thus children are rarely consulted when decisions affecting them are made. They are deemed to be incompetent to make rational decisions that are in their best interests or consistent with adult thoughts. This thinking is deeply entrenched in social, cultural and educational practices which underestimate children's abilities to think and act on their own thoughts in an orderly and intelligent manner. Historically, the Lancaster House Constitution did not help at all in efforts made towards dismantling the idea that children are merely objects of social and parental control. This is because it shielded oppressive customary laws from constitutional provisions and therefore ensured the ongoing observance of traditional norms that violate children's rights.¹

The new Constitution – adopted in 2013 – calls for a change of perspective as it portrays children as being entitled to protection, provision and participation rights. It also constitutionalises a number of children's socio-economic rights. More importantly, it is clear that the constitutionalisation of children's rights is a direct response to legal developments at the international level. Whilst the exact scope and meaning of the rights entrenched in the new Constitution has not been fully, if at all, explored, it is beyond doubt that these rights have significant implications for the protection, participation and autonomy of children. Further, it is common cause that these rights impose obligations, both direct and indirect, on parents, the family and the state. Third, the fact that the new Constitution has horizontal effect means that non-state actors should also respect, promote and fulfil children's rights. Besides, the supremacy of the Constitution suggests that the obligations imposed by children's constitutional rights deserve serious consideration when decisions affecting children are made.

Against this background, this chapter explores the legal status of children's rights under the current Zimbabwean Constitution, the Children's Act and other relevant laws. Due to space constraints, sporadic reference is made to equivalent provisions of international and regional instruments entrenching children's rights to ensure that readers have full knowledge of positive developments at the international and domestic levels.

The chapter is divided into five broad sections of which this introduction is the first.

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¹ See section 23 of the Lancaster House Constitution.

In section 2, the chapter identifies and briefly discusses various categories of children's rights in national and international law. These categories include protection, provision and participation rights.

Section 3 identifies participation and protection as dominant or overarching themes in children's rights and demonstrates that the concept of the evolving capacities of the child can be used to reconcile these seemingly oppositional themes. It is demonstrated that the degree to which every child is entitled to protection or autonomy largely rests on the evolving capacities of the child.

Section four describes in great detail the scope and legal content of each of the rights enumerated in section 81(1)–(3) of the Constitution. All the rights are examined in the order in which they appear in the Constitution. In terms of the Constitution, every child has the rights to equal treatment before the law, including the right to be heard;² to a given name and family name;³ to the prompt provision of a birth certificate;⁴ to family or parental care or to appropriate care when removed from the family environment;⁵ to be protected from sexual exploitation, from child labour and from maltreatment, neglect or any form of abuse;⁶ and to education, health care services, nutrition and shelter.⁷ Apart from these largely positive rights, children also have negative constitutional rights not to be recruited into a militia force or take part in armed conflict or hostilities;⁸ not to be compelled to take in any political activity;⁹ and not to be detained except as a measure of last resort.¹⁰

When a child offender is detained as a measure of last resort, they have a triad of positive rights to be detained for the shortest period of time; to be kept separately from detained persons over the age of 18 years; and to be treated in a manner and kept in conditions that take account of the child's age.¹¹ In addition to these sets of rights, the Constitution also codifies two rights of very broad application which have implications for the manner in and extent to which children enjoy all other rights. These include the child's rights to have their best interests taken as a paramount consideration in every matter concerning the child and to be adequate protection by the courts, in particular by the High Court as their upper guardian. All these rights are discussed in section 4 of this chapter, and section 5 concludes the discussion.

2 Categories of Children's Rights

This section discusses the different categories of rights and briefly investigates how each category deals with the relationship between the child, the parent and the state.

² Section 81(1)(a) of the Constitution.

³ Section 81(1)(b) of the Constitution.

⁴ Section 81(1)(c) of the Constitution.

⁵ Section 81(1)(d) of the Constitution.

⁶ Section 81(1)(e) of the Constitution.

⁷ Section 81(1)(f) of the Constitution.

⁸ Section 81(1)(g) of the Constitution.

⁹ Section 81(1)(h) of the Constitution.

¹⁰ Section 81(1)(i) of the Constitution.

¹¹ Section 81(1)(i)–(iii) of the Constitution.

In international human rights law, children's rights have been divided into three broad categories. These include provision or socio-economic rights, protection rights and participation or empowerment rights.¹² These categories of rights should be read holistically as they are indivisible, interrelated and mutually reinforcing. Each set of rights largely represents specific interests of children, with provision rights broadening the child's interest in developing optimally, participation rights promoting the child's interest in making decisions once competent to do so and protection rights emphasising the child's interest in being protected from harm, neglect, violence, degradation and all forms of exploitation. Protection in the decision-making context largely comes in the form of parental duties and the responsibility of the state in ensuring that parental duties are exercised in the best interests of the child.

2.1 Provision Rights

These are rights to the provision of goods and services. The Constitution recognises the indivisibility of children's rights¹³ and acknowledges that rights are more than injunctions against the state.¹⁴ The provision or socio-economic rights are largely derived from and broaden the scope of the right to life, survival and development.¹⁵ The Zimbabwean Constitution provides for the rights to "education, health care services, nutrition and shelter".¹⁶ Rights to provision are important in fostering the child's physical and intellectual development. Their importance must be seen against the indivisibility of human rights and the need to adopt a holistic approach to children's rights.¹⁷ Thus, the inclusion of socio-economic rights in the overall design of the Constitution emphasises the link between the provision of certain goods, balanced growth and full citizenship. Apart from their role in enhancing the child's physical and intellectual development, provision rights rarely raise tensions between different players in society.

2.2 Protection Rights

Protection rights are intended to promote the child's basic right to life, survival and development. The Constitution contains provisions entrenching the child's right to be "protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse".¹⁸ These rights require both state and non-state actors to protect children from all forms of exploitation, maltreatment, neglect and abuse. More importantly, however, children are protected from potential

¹² See, for example, P. Alderson, *Young Children's Rights: Exploring Beliefs, Principles and Practice*, 2nd edition (2008) p. 17.

¹³ On the indivisibility of human rights, see CRC General Comment No. 5, paras. 6 and 25.

¹⁴ R. L. Barsh, 'The Convention on the Rights of the Child: A Re-assessment of the Final Text', 7 *New York Law School Journal of Human Rights* (1989–1990) p.142, at p. 143.

¹⁵ See L. J. LeBlanc, *The Convention of the Rights of the Child* (1995) p. 65.

¹⁶ Section 81(1)(f) of the Constitution.

¹⁷ On indivisibility and universality of human rights, see generally J. W. Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights', 30 *Human Rights Quarterly* (2008) p. 948.

¹⁸ Section 81(1)(e) of the Constitution.

violations of rights in the criminal justice system, especially when they are alleged to have committed an offence.

Just like the Child's Rights Convention (CRC), section 81(1)(i) of the Constitution provides that a child should not be "detained except as a measure of last resort and if detained, to be detained for the shortest appropriate period of time; to be kept separately from detained persons over the age of eighteen years and to be treated in a manner and kept in conditions, that take into account the child's age". Children are also protected against the harmful effects of armed conflict, and the state is bound to ensure that those below the age of 15 years do not directly participate in armed hostilities.¹⁹ At the domestic level, the fact that the state has not incorporated some of the rights protected at international law does necessarily mean that children may not, for instance through using the best interests principle, be protected from practices which threaten these rights.

Protection rights represent minimum conditions of treatment to which children are entitled and with which the state and private persons must comply. Accordingly, the state may not rely on resource constraints or other excuses to justify its failure to comply with the minimum levels of protection envisaged in the Constitution. Protection rights seek to prohibit practices that endanger the child's right to life, survival and development. Neglectful and abusive parents or caregivers have the potential to harm children physically and emotionally, and the state may intervene by moving children into alternative care to remedy the problem.²⁰ As noted by Wald, protection rights "encompass claims that the state should more actively protect children from harm [caused] by adults, especially their parents".²¹ Protection rights require the state not only to refrain from engaging in conduct that infringes these rights but also to prevent natural and juristic persons from infringing these rights. When violations of rights have already occurred, the state should take measures to ensure that they would not happen again.

2.3 Participation and Autonomy-Related Rights

Participation and autonomy-related rights relate to every citizen's rights to express their views freely and to influence decision-making in all matters that concern them. They constitute an acknowledgment that people (including children) are "active, creative beings in charge of, or at least struggling to shape their lives. People must not simply be protected against attacks by the state or other citizens, they must be empowered to act and to lead autonomous lives."²² In the category of participation

¹⁹ Section 81(1)(g) of the Constitution stipulates that "every child has the right not to be recruited into a militia force or take part in armed conflict or hostilities". For levels of protection at international and regional law, see Articles 38(1)–(4) of the CRC and 22(1)–(3) of the African Children's Charter.

²⁰ For empirical evidence supporting this view, see M. Barry, 'Minor Rights and Major Wrongs: The Views of young People in Care', in B. Franklin (ed.), *The New Handbook of Children's Rights* (2001) pp. 239–254.

²¹ M. Wald, 'Children's Rights: A Framework for Analysis', 12 *University of California, Davies Law Review* (1979) p. 255, at pp. 261–262.

²² J. Donnelly and R. Howard, 'Assessing National Human Rights Performance: A Theoretical Framework', 10 *Human Rights Quarterly* (1988) p. 214, at pp. 234–235.

rights falls the right to be heard; freedom of expression; access to information; freedom of thought, conscience and religion; and freedom of association and assembly. This set of rights is constitutionally protected as belonging either to everyone or specifically to children.

One may also add in the category of participation-related rights the rights to privacy and education. Apart from the right to be heard, which is protected as part of the rights specifically applicable to children, the other participation-related rights are protected as rights that are held by everyone, including children. These rights have direct implications for the triangular relationship between the child, the parent and the state, particularly in the context of decision-making.

3 Protection and Autonomy as Overarching Themes in Children's Rights

For over 50 years, child protection and autonomy have stood out as overarching themes in the children's rights movement. This is largely because children's rights to protection and autonomy have been cast as 'polar opposites' and not two sides of the 'same coin'. On one side of the ledger are protagonists of children's rights to protection who are of the view that children need to be protected from an array of social, cultural, political and economic problems that bedevil families and communities within which they live. These are traditionally known as the 'child savers'.²³ Most of the 'child savers' largely consider children as vulnerable, immature and in need of protection from parents/guardians, society and the state. More importantly, the majority of protectionists argue that for children to enjoy the greatest benefits and to develop optimally, it is imperative for society and the state to confer on parents the autonomy to direct, guide and bring up their children as they see fit.²⁴ Over time, however, the 'child savers' also began to emphasise the need to protect children not only from strangers but also from parents and even children themselves in some instances.²⁵ Under the protective approach to children's rights, paternalistic intervention is justified in the name of advancing the best interests of the child.

On the other side of the ledger are advocates of children's rights to participation, autonomy and liberation. This group of theorists consider the right to self-determination as the most important of all children's rights.²⁶ From the perspective of child liberationists – often referred to as 'kiddie libbers' – the protective approach to rights is undesirable because it impairs the dignity and status of the child.²⁷ Under this approach to children's rights, the child's status should never be determined by

²³ See generally D. Platt, *The Child Savers* (1989). See also B. C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* (1999) p. 51.

²⁴ See H. Foster and D. Freed, 'A Bill of Rights for Children' *Family Law Quarterly* (1972) pp. 343–347 and M. Jones and L. A. Marks, 'The Dynamic developmental Model of the Rights of Child: A Feminist Approach to Rights and Sterilisation', *The International Journal of Children's Rights* (1994) p. 265, at p. 270.

²⁵ J. E. Coons and R. H. Mnookin, 'Towards a Theory of Children's Rights', in I. F. G. Baxter and M. A. Eberts (eds.), *The Child and the Courts* (1978) p. 391, at pp. 391–392.

²⁶ See generally R. Farson, *Birthrights: A Bill of Rights for Children* (1974) and J. Holt, *Escape from Childhood: The Needs and Rights of Children* (1974).

²⁷ H. Cohen, *Equal Rights for Children* (1980) p. viii.

their age, and all rights extended to adults should also be extended to children, including the very young.²⁸ Theorists who elevate liberation and autonomy over protection often seek to limit the control exercised by parents, guardians and the state over children and to vest on children themselves decisional autonomy over many if not all aspects of life. Any version of paternalistic control of children's lives and decisions is viewed as unnecessary, arbitrary, oppressive and unjustifiable.

The contrast often made between autonomy and protection as 'polar opposites' patently overlooks the sophisticated nature of the relationship between these two complimentary themes of children's rights. In reality, a well-balanced theory of children's rights should have elements of both protection and autonomy. As such, children's autonomy and protection should be seen as phases in the continuum of a child's development and life course. To enjoy better protection from harmful conduct or practices, children need to be heard and to have their perspectives taken into account when protective measures are adopted by parents, society and the state. By the same token, if a child wishes to take an autonomous decision that endangers his or her life, parents and the state have the authority to veto that decision on the basis that it violates the child's protection rights and undermines the child's best interests. In addition, child protection creates platforms for children to express their views freely and without fear of reprisals and victimisation. Therefore, there are overlaps between different categories of children's rights, and the enjoyment of all of them makes optimal development a possibility.

The distinction between children as independent individuals seeking autonomy and as dependents requiring protection has been characterised as "perhaps the most difficult and controversial issue in children's rights".²⁹ The tension between participation/autonomy rights and protection rights is most evident in provisions which cast the child as an autonomous agent and those that describe the parent or guardian as the person responsible for guiding the child in exercising his or her legal rights. Naturally, the tension is between the child's right to autonomy and the parent's right to control their child's upbringing, growth and development.³⁰ The protection of child participation rights in section 81(1)(a) of the Constitution (an equivalent of Article 12 of the CRC) and parental rights in section 60(3) of the Constitution (an equivalent of Article 5 of the CRC) embodies the enduring tension between children's personal autonomy claims and parents or the state's duty to protect children from themselves. Whereas section 81(1)(a) of the Constitution and Article 12 of the CRC recognise the child as a potentially autonomous person with the ability to participate fully in society and as an individual separate from the family,³¹ section 60(3) of the

²⁸ See generally M. D. A. Freeman, *The Rights and Wrongs of Children* (1983) pp. 22–23.

²⁹ E. Evatt, 'Children's Rights and the Legal Regulation of Families', Paper presented at the Third AIFS Australian Family Research Conference, Ballarat, 1989.

³⁰ See Article 9 of the African Children's Charter stating as follows:

(1) Every child shall have the right to freedom of thought conscience and religion;
(2) Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child;
(3) States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

³¹ C. Barton and G. Douglas, *Law and Parenthood* (1995) p. 42.

Constitution and Article 5 of the CRC cast the child as a member of the family subject to parental control and guidance in light of the child's individual capacities.

To bring out the contrast between participation (in the sense of autonomy) and protection, and to demonstrate how national and international law resolves this potential conflict, it is imperative to refer to key provisions of the Constitution and the CRC. To begin with, section 60(3) of the Constitution provides that "parents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare". This provision allows parents to take several measures to protect children and to advance children's rights according to their own value system, subject of course to the caveat that the measures adopted by parents may not prejudice any of the rights of the child. It allows parents to disregard the wishes of the child if those wishes undermine the child's rights to health, safety, welfare and other protection rights. Section 60(3) of the Constitution domesticates Article 5 of the CRC, which is the umbrella provision codifying parental responsibilities and rights.³²

For purposes of balancing protection and autonomy, it is important to note that international law and, to a limited extent, domestic law declare that the exercise of parental responsibility should be consistent with the child's evolving capacities. Article 5 of the CRC provides that:

States Parties shall respect the *responsibilities, rights and duties* of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the *evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.³³

This provision requires states parties to respect the parental responsibility and right to provide *appropriate* direction and guidance in the exercise by the child of the rights in the CRC. Parents thus have the right to guide children in the latter's exercise of their right to participate in decision-making. It was intended to address the protection to be accorded to the parental right and duty to provide direction and guidance to the child, in light of the child's evolving capacities. The direction and guidance to which the child is entitled should be provided in a manner consistent with the evolving capacities of the child. In exercising their rights and responsibilities to guide and direct children, parents may not ignore the evolving capacities of the child. As the child grows up, parents must, in Locke's words, reduce the "rigour of parental government" or the level of control over the child's life. It is evident, from the provisions referred to in this section, that while children are seen as separate

³² See *Technical Review of the Text of the Draft Convention on the Rights of the Child*, UN Doc. E/CN.4/1989/WG.1/CRP.1/Add.1, 5 at 7.

³³ Emphasis added. Article 14(2) of the UNCRC also states that:

States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.³³

individuals with rights of their own, the importance of parents, guardians and members of the extended family to the child's development is also recognised.³⁴

The concept of the evolving capacities of the child ground both parental control and the child's relative autonomy from paternalistic decisions. It plays an important role in maintaining the balance between child participation and protection through the exercise of parental responsibility and state intervention.³⁵ It recognises that children experience rapid growth in their "physical, cognitive, social and emotional functioning", pass through zones of rational autonomy before attaining adulthood and vary in the ages at which they become capable of making particular decisions.³⁶

As an emancipatory concept, the evolving capacities of the child seeks to broaden youth autonomy and encourage children to assume responsibility for their actions. With age and maturity, the consequences of children's decisions increase and diversify until they reach the age of majority, when they begin to fully exercise the totality of their rights. As the child's capacities evolve, the child plays a central role in defining what is in his or her best interest, authorising courts, in limited instances, to override parental preferences.³⁷ When a child is sufficiently mature to be rationally autonomous in making a particular decision, it would be inconsistent with the concept of the evolving capacities of the child to insist that her views be co-terminus with parental preferences.³⁸

The concept of the evolving capacities of the child also grounds parental control and state intervention. The primary responsibility of parents is to protect children from the immaturity of their youth and to help them make difficult decisions in life. The CRC, the African Children's Charter and the Zimbabwean Constitution recognise children's vulnerability and immaturity as grounds for entrenching children's right to special protection. As observed above, the child's protection rights provide a solid reason for limiting the child's desire to exercise personal autonomy in the decision-making process.

The protective dimension of the evolving capacities of the child entails, among others, protection from personal decisions that negatively affect the child's own life, survival and development. In many contexts, the child's un(der)developed capacities require the parent and the state to shield the child against unsound personal decisions. In most cases, the child's long-term interests are not promoted by giving effect to his or her present desires and preferences. In an adult's case, present autonomy takes precedence over future good (the adult has the right to choose). With children, future good *often* takes precedence over present autonomy (adults

³⁴ See A. B. B. Munir, 'Child Protection: Principles and Applications', 2 *Child Abuse Review* (1993) p. 119, at p. 122.

³⁵ G. Lansdown, *The Evolving Capacities of the Child*, UNICEF Innocenti Research Centre, Florence, 2005, p. 15.

³⁶ See CRC General Comment No. 4, paras. 1 and 7, and CRC General Comment No. 7, para. 17.

³⁷ See L. Krappman, 'The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child)', 18 *International Journal of Children's Rights* (2010) p. 501, at pp. 506–509 and CRC General Comment No. 4, para. 17.

³⁸ R. Hart, 'The Evolving Capacities for Children to Participate', in V. Johnson *et al.* (eds.), *Stepping Forward: Children and Young People's Participation in the Development Process* (1998) pp. 27–31.

have the right to override the child's free choice if such choice threatens the child's best interests, life and gradual development into responsible adulthood).

There is hardly any consensus about the nature and extent of the protection to which children are entitled in the context of personal decision-making. For the very young, most decisions are justifiably taken by adults exercising parental responsibilities and rights. The rationale for ceding control of young children to parents is that children generally lack the capacity to make decisions in ways that maximise their stock of the good. Through the idea of the evolving capacities, international law recognises that an immature child needs to be protected from their own actions when such actions threaten the child's basic right to life, survival and development. The protective dimension of the evolving capacities of the child does not only ensure that incompetent children are not given the burden to make complex decisions in their life course, but also prevents parents from putting children in the middle of adult conflicts.³⁹ The fact that children's capacities are 'evolving' authorises parents to invoke the protective dimension of the child's evolving capacities to evaluate whether the child's views promote the present and future good of the child, often referred to as their best interests.

However, the protective element of the evolving capacities of the child does not justify the total exclusion of children from the decision-making world as this undermines the participation rights of children, particularly adolescents.⁴⁰ In Freeman's words, "to take children's rights more seriously, requires us to take more seriously both the protection of children and recognition of their autonomy, both actual and potential".⁴¹ Finally, whether the exercise of parental responsibility is 'appropriate' largely depends on whether it is justified by the child's (in)capacity to make the decision in question. To be appropriate, parental responsibility should protect children from exercising autonomy rights during earlier stages of their life course, enhance their capacities for autonomy as they grow up and allow for relative autonomy from parental control when the child acquires the capacities to make particular decisions in their best interests.

4 Children's Rights under the New Constitution

4.1 The Rights to Equal Treatment before the Law and to Be Heard

In terms of section 81(1)(a) of the Constitution, every child has the right to equal treatment before the law, including the right to be heard. To fully engage with what this provision entails, it is necessary to divide the right into two separate but related

³⁹ See I. Thery, 'The Interest of the Child and the Regulation of the Post-Divorce Family', in C. Smart and S. Sevenhuijsen (eds.), *Child Custody and the Politics of Gender* (1989) p. 78, at p. 92.

⁴⁰ See generally J. Miller, *All Right at home: Protecting Respect for the Human Rights of Children in the Family* (1998).

⁴¹ M. Freeman, 'Whither Children: Protection, Participation, Autonomy?', 22 *Manitoba Law Journal* (1994) p. 307, at p. 324.

sections: the first dealing with the right to equal treatment before the law and the second unpacking the legal content of the right to be heard.

4.1.1 The Right to Equal Treatment before the Law

Every child has the right to equal treatment before the law. This right should be read in light of the broader constitutional framework for equality as provided for in section 56(1)–(6) of the Constitution and the provisions of relevant international and regional instruments. When it comes to equal treatment before the law, children should enjoy better protection than adults, especially in light of their vulnerability and limited capacity for rational decision-making. For example, it can be argued that statutory provisions authorising the imposition of corporal punishment as a sentence to be imposed on male juvenile offenders violates the equal protection and benefit of the law clause. In addition, these laws also violate the non-discrimination clause. This is because the laws in question directly subject young male offenders to a condition to which other people are not subjected and indirectly accords to all other categories of persons a privilege or advantage which young male offenders are not accorded.⁴² The unfair treatment experienced by male offenders in the penal context appears at two levels, that is as a manifestation of both age-based and sex-based discrimination.

The child's right to equal treatment before and protection of the law came to the spotlight in *Bhila v. The Master of High Court and Others*.⁴³ In this case, the applicant as the surviving spouse was appointed as executrix of her husband's deceased estate. Upon processing the estate, the applicant who had advertised the estate got to know that her late husband had three children born out of wedlock. The three children or their guardians then sought to inherit from their late father's estate. The first respondent (the Master) then appointed a neutral executor who subsequently prepared a distribution plan in terms of which the matrimonial property was awarded to the applicant as the surviving spouse. The rest of the property which included a Borrowdale house was then treated as free residue of the estate. Upset by this distribution plan the applicant raised an objection with the first respondent. However, the first respondent directed that the distribution plan as given by the second respondent be advertised and the surviving spouse made an application for this distribution plan to be set aside.

Mwayera J, for the Court, held that the common law position of excluding children born out of wedlock violated the constitutional rights to equal protection of the law and freedom from discrimination. Drawing inspiration from *Smyth v. Ushewokunze and Anor*,⁴⁴ the learned judge held that the provisions of the Constitution must be given a purposive interpretation so as not to strangle the right that is being protected. With regards to the constitutional position on equality and non-discrimination, the Court held that:

⁴² See section 56(4) of the Constitution.

⁴³ HH 549-15.

⁴⁴ 1997 (2) ZLR 544.

To seek to discriminate the third to fifth respondents on the basis of them being children born out of wedlock would not only be unfair and unjust but undemocratic for it would amount to punishing innocent children in an inhuman manner for an iniquity beyond their control. An “iniquity” by those who sired them at no request by the said children let alone their consultative input, would surely be discrimination which no civilised democracy would legally sanction.⁴⁵

The Court was at pains to emphasise that the question whether or not children born out of wedlock can inherit *ab intestato* from the estate of their father was sufficiently answered by the provisions of the Constitution. It then pointed out that section 56(3) of the Constitution explicitly provides for every person’s right not to be treated in an unfairly discriminatory manner regardless of whether they were born in or out of wedlock. To the Court, it was patent that section 56(3) outlawed discrimination on the basis of being born out of wedlock, and therefore the third to fifth respondents had a right to equality and non-discrimination.⁴⁶ Accordingly, excluding children or descendants of a deceased from inheriting from the estate of their father *ab intestato* on the basis that they were born out of wedlock is *ultra vires* the Constitution.⁴⁷ In perhaps some of the most important passages against discrimination based on prohibited grounds, the Court held that:

The current constitution outlaws any sort of discrimination against children on the basis that they are born in or out of wedlock ... The reasoning where children born out of wedlock were viewed as “devils, bastard illegitimate” is unacceptable and has been overtaken by dynamics in culture, society and legal development. Social and legal dictates clearly show that no child should be punished by virtue of not having been sired in a registered union or marriage. It is not in dispute the third to fifth respondents are the late’s children thus his descendants and beneficiaries to the estate. The fifth respondent is a juvenile and again well protected by the law, section 81 of the constitution clearly spells out the rights of children. The constitution outlaws rules, conduct, practice and law which is discriminatory. Hence the third-fifth respondents as off spring/descendants/children/progeny albeit out of wedlock are also entitled to a share of the free residue just like the children/descendants or off springs born in wedlock.⁴⁸

The right to equal treatment before the law does not prevent parents, society and the state from treating children differently from adults or from treating different children differently.

However, it is necessary to emphasise that when children of different ages or backgrounds are treated differently by state institutions, there must be a legitimate government purpose behind the differentiation as otherwise the courts will declare the conduct of the relevant person or body invalid and unconstitutional. For instance, the state may adopt laws or policies that extend to children with disabilities or from poor backgrounds the right to attain basic state-funded education as a measure designed to bridge the skills gap between children from poor backgrounds and those from elite backgrounds. Affirmative action measures or policies in favour of underprivileged individuals or groups are permissible in terms of section 56(6) of the

⁴⁵ *Bhila v. The Master of the High Court*, p. 5.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, p. 6.

⁴⁸ *Ibid.*, pp. 6, 7 and 8.

Constitution, provided that they are meant to address circumstances of genuine need. The legitimate government purpose would then immunise the affirmative action measure against the charge that it offends the non-discrimination clause.

4.1.2 The Right to Be Heard

Section 81(1)(a) of the Constitution protects the child's right to be heard as part of the right to equal treatment before the law. This section explores the content of section 81(1)(a) of the Zimbabwean Constitution and explains in some detail the scope of the child's right to be heard in all matters affecting them. In this part of the chapter, particular focus is given to the key aspects of the child's right to be heard.

4.1.2.1 The Duties to Ensure That the Child Expresses Views Freely and to Give Due Weight to the Views of the Child

Participation rights recognise that children have perspectives of their own, that they are at liberty to elect not to express the views they form and that their unique vulnerability to adult or peer pressure may unduly influence their decision-making.⁴⁹ The Constitution seeks to ensure that children do not become mouthpieces for parroting the views of other people. The more grave the problem, the greater the freedom (to choose whether to be involved) to be granted to the child. When the child participates through an intermediary, the intermediary must ensure that the child expresses her own opinion freely, has not been subjected to external pressure and receives all, not partial or condensed, information to enable the child to make an informed choice.⁵⁰ The duty to ensure that the child expresses views freely requires the decision-maker to inform the child of all available alternatives, the likely decisions to be made, the possible consequences of each decision and the conditions under which the child will express their own views.⁵¹

Listening to children speak is one thing, taking what they say seriously is another. Children's views should be accorded 'due weight', and this suggests going beyond tokenistic ventures towards achieving full participation.⁵² Giving 'due weight' means analysing the child's views, giving them feedback on how their views have been interpreted, informing them the extent to which their views have influenced the final outcome and providing them with the opportunity to challenge the analysis of the findings and to participate in follow-up processes, if any.⁵³ Giving 'due weight' requires 'real change',⁵⁴ not only to the way we envision children's views but to the weight we accord those views. However, it does not mean that the child's preference

⁴⁹ See L. Steinberg and E. Cauffman, 'Maturity of Judgment in Adolescence: Psychological Factors in Adolescent Decision-Making', 20:3 *Law and Human Behaviour* (1996) p. 249.

⁵⁰ R. A. Washak, 'Payoffs and Pitfalls of Listening to Children', 52:4 *Family Relations* (2003) p. 373, at p. 375.

⁵¹ See CRC General Comment No. 12, para. 25.

⁵² R. Hart., *Children's Participation: From Tokenism to Citizenship*, Innocenti Essays No. 4 (UNICEF International Child Development Centre, Florence, Italy, 1992) pp. 9–10.

⁵³ See CRC General Comment No. 12, para. 134.

⁵⁴ See CRC General Comment No. 5, para. 12.

should be given systematic pre-eminence, but that their view will be considered in light of the nature of the problem and the degree to which it represents the child's interests and the interests of others – parents and other members of the family for instance. If the decision to be taken, for example inter-country adoption, has imminent and heavy consequences on the child, the child's views deserve considerable attention.

Lastly, whether a child is competent enough to have their views given determinative weight depends on the seriousness of the decision to be made and the risks associated with it. As demonstrated above, respecting children's evolving capacities is not synonymous with extending absolute autonomy to children. Competence is not an all or nothing concept in terms of which the subject either lacks it or possesses it. It is task-specific, and there is no concrete stage at which the child can be regarded as categorically capable of making all decisions and therefore free from parental control. The capacities of the child and the nature of the decision to be made influence the degree of autonomy to be given to the child in exercising his or her rights.⁵⁵

4.1.2.2 The Application of the Right to Be Heard in Domestic Courts

There have also been domestic developments in the area of child participation in decision-making. In *Hale v. Hale*,⁵⁶ the Court emphasised that it was important to give the children concerned an opportunity to be heard before making a final determination on whether the best interests of the child required a shift in the court-sanctioned custody arrangement. Tsanga J, for the Court, made the following remarks:

In any event it would also seem to me that this issue regarding the children's schooling cannot be dealt with satisfactorily without hearing the views of the children themselves, especially the two older children who are already at the boarding school in question. I say this because a particularly noteworthy aspect of the new Constitution is that it grants both parents and children rights ... Yet all these rights that undoubtedly impact on parents now have to be balanced against those which our Constitution also gives to children. This is even more so where parents as in this case, are not in agreement as to what is best for the child. Constitutionally, as of right, children are no more at the margins and periphery of decisions affecting them. They effectively have a right to be part of those decisions.⁵⁷

According to the Court, section 81(1)(a) “effectively gives a ‘voice’ to children on matters that concern them” and commendably incorporates into our legal system the spirit of the equivalent provision of the CRC.⁵⁸ Accordingly, the Constitution

⁵⁵ As Kleinig once wrote, “a child is likely to be able to decide with the requisite rationality whether and what games it will play, before it is able to decide whether and who to marry”. See J. Kleinig, ‘Mill, Children and Rights’, 8:1 *Educational Philosophy and Theory* (1976) p. 1, at p. 7.

⁵⁶ HH 271-14.

⁵⁷ *Ibid.*, pp. 8–9.

⁵⁸ *Ibid.*, p. 9.

advances the notion of child participation and inclusion in decision-making processes affecting children.⁵⁹

The Court also observed that the best interests principle, which has traditionally been the traditional criteria used by our courts in matters concerning children, has not only been constitutionalised but also exists amidst certain rights extended to children by the Constitution. More importantly, however, the Court emphasises that the best interests principle cannot be interpreted in a vacuum but derives its meaning from the rights set forth in the Constitution, including the right to be heard. To quote the Court:

Thus the principle of the best interests of the child, said to be paramount in every matter concerning the child under s 81(2) of the Constitution, is now also better placed to take its specific character and meaning from the rights that are accorded children by our Constitution. Pertaining to this case, *it is their best interests that they be heard, especially for the older children who are in boarding school and have an appreciation of the issue. Their views are necessary to obtain an order for the court to make an informed decision that takes into account their experiences with boarding school. My assumption here is that having already spent time at the boarding school they are able to comprehend the issue at stake and exercise their right to be heard on what they think is best for them. Given that participation has to be age appropriate, in practice courts have often achieved participation through a judge or judicial officer speaking to the children themselves or where it is not practical through child welfare professionals giving their report.* The youngest child Oscar may not be able to exercise this right due to his age, thus a welfare report that is done in consultation with those at his nursery would fulfil the purpose.⁶⁰

There are two vital points from this and other paragraphs in the Court's judgment. First, the Court emphasises that gone are the days when adults would decide what is best for children without giving the very children an opportunity to be heard. At the heart of this observation is a subtle claim that even if the best interests of the child are viewed as a protective concept, then children cannot be better protected by marginalising them when decisions to protect them are made. More likely, however, the Court's merging of child participation rights and the best interests principle appears to be inspired by the indivisibility, independence and interrelatedness of children's rights – a move away from an understanding of children's rights as discrete silos towards a holistic perception of all the rights extended to children. This argument about the Court's approach to children's rights is buttressed by Tsanga J's idea that all the rights entrenched in section 81(1)–(3), including the right to be heard, provide the context against which the best interests principle ought to be interpreted.

The second vital point relates to the Court's enunciation of the concept of the evolving capacities of the child. Its observations that "participation has to be age appropriate" and that "the youngest child may not be able to exercise this right due to their age" formally import the concept of the evolving capacities of the child into the Zimbabwean legal system. The evolving capacities concept justifies near-autonomous decision-making by the child provided the child has competences to

⁵⁹ Article 12(1) of the CRC, also cited in the judgment, provides that "a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of that child being given due weight in accordance with the age and maturity of the child".

⁶⁰ *Hale v. Hale*, pp. 9–10, emphasis added.

make the decision in question. It recognises that children experience rapid growth in their “physical, cognitive, social and emotional functioning”, pass through zones of rational autonomy before attaining adulthood and vary in the ages at which they become capable of making particular decisions.⁶¹

4.2 The Right to a Name and a Family Name

The right to a name is one of the most fundamental human rights and is important to the realisation of children’s rights. The right to a name is primarily enforceable against parents, and, to a limited extent, the state.⁶² A name is an important element of an individual’s identity.⁶³ Theoretically, the right could be enforced against parents who either fail to name their children or take the necessary steps to facilitate recognition and registration.⁶⁴ The obligation to give a child a name and family name lies with his/her parents or guardians. However, in order to give requisite effect to the right to a name, the state has an obligation to regulate the attribution of names. The right to a name is protected in section 81(1)(b) of the Constitution which states that “[e]very child ... has the right to be given a name and a family name”. The two names play an important role in establishing an individual’s identity and, depending on the applicable laws, in determining the child’s nationality or citizenship.

For all persons, including children, nationality is a right that is of fundamental importance to their well-being and ability to lead a dignified life. States determine which people are their nationals and which ones are not.⁶⁵ The right to a name and a family name acts as a gateway to acquiring nationality while nationality acts as an enabling right without which it is often impossible to exercise many other rights. Accordingly, denying children a particular name or nationality can have a significant impact on all other child rights including their access to education, healthcare, free movement and family life.

4.3 The Right to the Prompt Provision of a Birth Certificate

Section 81(1)(c) provides that every child has the right to the prompt provision of a birth certificate provided that the child is either born in Zimbabwe or born outside the country to Zimbabwean citizens by descent. Birth registration is widely regarded as a gateway to the attainment of other fundamental rights because it facilitates access to essential services such as education and health care.⁶⁶ Children with no birth certificates do not exist before the law, and are in danger of remaining on the margins of society, or being shut out altogether. Children who legally exist (from an official

⁶¹ See CRC General Comment No. 4, paras. 1 and 7, and CRC General Comment No. 7, para. 17.

⁶² S. Woolman and M. Bishop, *Constitutional Law of South Africa*, vol. 3, 2nd edition (2014), p. 42–3.

⁶³ I. Ziemele, ‘Article 7: The Right to Birth Registration Name and Nationality and the Right to Know and Be Cared for by Parents’, in A. Alen *et al.* (eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (2007) para. 20.

⁶⁴ Woolman and Bishop, *supra* note 62, p. 42–3.

⁶⁵ See Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930.

⁶⁶ J. Todres, ‘Birth Registration: An Essential First Step toward Ensuring the Right of All Children’, 10:3 *Human Rights Brief* (2003) pp. 32–35.

perspective) are less likely to be exploited or trafficked than those who do not.⁶⁷ Birth registration therefore diminishes the risk of the abduction or sale of or trafficking in children.⁶⁸ Without birth registration, domestic proof of identity may be difficult, if not impossible, to obtain.⁶⁹

Birth registration facilitates the early identification of vulnerable children such as those with disabilities,⁷⁰ thus allowing them to access state support and assistance at the earliest possible level.⁷¹ Birth registration is also of particular importance in redressing the inequalities experienced by indigenous children.⁷² Elsewhere, it has been observed that birth registration is not only a record of fact, it also unlocks essential civil and constitutional rights, both for the child and for their parents.⁷³ Harm to children can result from a deficient system of birth registration.

International law requires that registration takes place ‘immediately after birth’.⁷⁴ A state’s obligations in relation to birth registration include the duty to register the birth of children born abroad to any of its nationals.⁷⁵ Thus, birth registration is compulsory in Zimbabwe.⁷⁶ However, the Birth and Death Registration Act is fraught with a number of provisions and omissions that make it a less comprehensive piece of legislation. The Act does not make it a right for a child to be registered at birth. In addition, the requirements for a guardian, a parent or a witness to register a child does not take into consideration the socio-economic realities on the ground, such as the fact that some children are double orphans and that they may not have guardians. More so, few people who are non-relatives would want to be burdened with registering such children.

4.4 The Right to Family or Parental Care or to Appropriate Care When Removed from the Family Environment

4.4.1 The Right to Family or Parental Care

Section 81(1)(d) of the Constitution guarantees the right of every child “to family or parental care”. It should be noted that parental care has been interpreted in the case law not only to refer to natural parents, but also to adoptive parents, foster parents and step-parents.⁷⁷ In the case of *SW v. F*, the Court held that the right to parental care was not a bar to adoption “where the care of the natural parents was lacking or

⁶⁷ CRC General Comment No. 7, para. 36(h).

⁶⁸ HRC General Comment No. 17, para. 7.

⁶⁹ CRC General Comment No. 3, para. 32.

⁷⁰ CRC General Comment No. 9, para. 56.

⁷¹ Todres, *supra* note 66, p. 35.

⁷² CRC General Comment No. 11, para. 41.

⁷³ L. Schafer, *Child Law in South Africa* (2011) p. 118.

⁷⁴ See Articles 6 of the African Charter and 7 and 8 of the CRC.

⁷⁵ For example, Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: The Philippines, CRC/C/15/ Add. 259 (2005), at paras. 36–37.

⁷⁶ Section 10 of the Birth and Death Registration Act [Chapter 5:02].

⁷⁷ *SW v. F*, 1997(1) SA 796 (O).

inadequate”.⁷⁸ At common law, a parent (or other person) who has the custody of a minor child is entrusted with the care of the child's person and the decision-making power in respect of the child's day-to-day life, upbringing and education.⁷⁹ Similarly, guardianship is widely construed to include custody, and embraces the care and control of the minor's person as well as the administration of their property and business affairs. Where custody and guardianship are separated, the custodian parent has the care and control of the minor's person, while the guardian parent administers the child's property and business affairs (i.e. 'guardianship' in the narrower sense).⁸⁰

In the case of *Jooste v. Botha*,⁸¹ the Court considered, amongst other things, what is included in a child's right to family or parental or appropriate alternative care. The Court stipulated that the family means a father, mother and child or it can mean the extended family, which includes grandparents, aunts and uncles. The Court interpreted the term 'parental care' to mean care supplied by a custodian parent. In the case at hand, the three kinds of care were defined rigidly:

(a) family care is where the child is part of a family, whether nuclear or extended; (b) parental care is where there is no family and only a single parent; (c) alternative care is where the child is removed from the family environment.⁸² The Court must be incorrect in claiming that a single-parent household is not a family or that two parents provide family care and not parental care.⁸³

The child's right to family or parental care is emphasised in other provisions of the Constitution. At the national level, section 60(3) of the Constitution provides that “[p]arents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare”. What immediately emerges from this provision is that parents and families, ahead of all others, are the default bearers of the responsibility to make decisions concerning the care, religion and education of the child. There is an element of autonomy from state control which attaches to this responsibility. Sections 60(3) and 81(1)(d) of the Constitution echo both the presumption that children enjoy their rights better when supported by adult members of the family and that states should rarely exercise coercive intervention in matters concerning the child's family life and parental care unless the parents act in a manner that threatens the child's rights to education, health care services, nutrition and shelter.

At a deeper level, however, most of the provisions cited above portray the family as a mini-state in which parents are entitled to exercise wide authority in making decisions affecting children. This is most evident from provisions which state that

⁷⁸ *Ibid.*, at 799B-C.

⁷⁹ H. R. Hahlo, *South African Law of Husband and Wife*, 5th edition (1985) p. 394.

⁸⁰ See *Uzoingwe and Another v. Immigration Department Principal Director and Another*, HH 337-16 HC 499/16 [2016] ZWHHC 337.

⁸¹ 2000 (2) SA 199 (T), 208D-E 2000 (2) BCLR 187 (T) ('*Jooste*').

⁸² *Ibid.*, at 208D-G.

⁸³ Woolman and Bishop, *supra* note 62, pp. 42-6

states parties should ‘respect’ the rights and responsibilities of parents responsible for guiding children seeking to exercise the enumerated rights.⁸⁴ As a negative concept, the duty ‘to respect’ fits in well with the traditional liberal view of the family as a private institution. Generally, the duty to ‘respect’ implies that parents have wide powers to determine what constitutes ‘appropriate child care’ and to provide for the material needs of their children. Nonetheless, parental autonomy is theoretically limited on two fronts: first, by the state’s duty to intervene (in the best interest of the child) to protect abused or exploited children’s basic rights and, second, by the evolving capacities of the child.

4.4.2 The Right to Appropriate Care When Removed from the Family Environment

Section 81(1)(d) of the Constitution enshrines the child’s right to “appropriate care when removed from the family environment”. Under normal circumstances, children should grow up under parental or family care, but they may be removed from the family environment if the best interests of the child would be compromised by the child’s continued residence at the family home. Removal from the family home becomes a solution if it is shown that the child is suffering from neglect, maltreatment, economic or sexual exploitation or abuse at the hands of the persons in whose hands the child’s care has been entrusted.

In *Mukundu v. Chigumadzi & Others*,⁸⁵ the Court had to decide whether it was appropriate to grant full custody to the children’s maternal grandmother or whether custody had to be accorded to the children’s biological father. The facts of the case were that the maternal grandmother of the two children involved sought an order granting her their custody and guardianship. The first respondent, the biological father of the children, opposed the application despite the fact that he had not been involved in their lives since his separation from their late mother in 2005. He lived in the United Kingdom with his wife and child from a subsequent marriage. Uchena J held that the first respondent’s conduct did not show that he had the best interests of the children at heart and that the applicant had shown deep concern for her daughter’s children by taking care of them and putting them back in school.⁸⁶ The Court narrated the first respondent’s neglect of his children in the following terms:

The disposition of a litigant is judged from his conduct as demonstrated by what he has done or not done and not by what he promises to do in the future. The first respondent has in the past neglected his children to the extent of their having to drop out of school until the applicant had to seek SOS’s intervention. He neglected them and their mother to the extent of denying them education, health care services, nutrition and shelter. He left them in that condition until the applicant came to their rescue. He therefore has demonstrated his attitude towards his children. He has contrary to the provisions of s 81 (1)(f) [of the Constitution] exposed them to lack of education, shelter and nutrition. When they came back from his homestead in Murehwa they were not going to school and had been starving, as their mother was sick and could no-longer fend for them as the first respondent had abandoned them. The first respondent now opposes

⁸⁴ For a detailed discussion of the state’s duty to respect the rights of parents, see CRC General Comment No. 4, para 18.

⁸⁵ (HC 7048/15) [2015] ZWHHC 818 (15 September 2015).

⁸⁶ *Ibid.*, p. 2.

his daughter's chance to get sound education. He clearly does not have her best interest at heart. The court as the upper guardian of all minors cannot be swayed by the whims of a parent who has for years displayed that he does not care about the welfare of his children.⁸⁷

Uchena J emphasised that in deciding whether to remove children from the care of parents, the Court had to be guided by the best interests of the child as entrenched in section 82(2) of the Constitution and regional child rights instruments.⁸⁸ To this end, the Court should not be detained by the feelings and protestations of the parties. As upper guardian of minors, the Court has a duty to adequately protect the rights of a child and “[i]n appropriate cases the court may have to protect the children from harmful conduct by the child’s own biological parents”.⁸⁹ Apart from recognising that children sometimes need protection from harmful conduct by their biological parents, the Court reiterated that the case did not arise from a contest between the litigants’ rights over minor children but from which person would better promote the best interests of the child as a paramount consideration in all decisions concerning children.

4.5 The Right to Be Protected from Exploitation, Child Labour, Maltreatment, Neglect or Any Form of Abuse

4.5.1 Protection from Economic Exploitation

There are many obstacles to improving children’s protection from violence, exploitation, neglect and abuse. The rights of the child appear to be the least contentious of all human rights in the world, particularly as they pertain to protection from violence, exploitation and abuse. Under the Constitution, children are protected from economic and other forms of exploitation. Further, Zimbabwe’s Children’s Act⁹⁰ contains the same prohibition in sections 10 and 10A and makes it a punishable offence to use a child in begging or to intentionally absent them from school and engage them in some income-generating work when the child is reasonably expected to be in school. All this speaks to children’s rights to be protected from exploitation, abuse and neglect.

The Children’s Act prohibits child participation in hazardous economic activities. It defines hazardous work in relation to a child or young person as any work that is likely to interfere with their education, make them contact hazardous substances or working in underground mines, exposure to electronically powered hand tools or cutting tools, night shift jobs or exposure to extreme heat, cold or whole body vibration. These multiple forms of economic exploitation are prohibited by the Constitution and the Children’s Act. Therefore, it would be an offence for the state, families and non-state actors to engage in activities that tend to suggest that the child is being required to carry out work for the economic benefit of another.

⁸⁷ *Ibid.*, p. 3.

⁸⁸ *Ibid.*, p. 5.

⁸⁹ *Ibid.* To this end, the Court relied on section 81(3) of the Constitution which provides that “[c]hildren are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian”.

⁹⁰ Chapter 5:06 of the Laws of Zimbabwe.

4.5.2 Protection from Sexual Exploitation

The term sexual exploitation covers a multitude of situations or practices and a comprehensive range of acts which fall within the broad offence of sexual exploitation of children.⁹¹ Generally, the offence of sexual exploitation of a child is committed when a person unlawfully and intentionally engages the services of a child, with or without a child's consent, for financial or other reward, favour or compensation to either the child or a third person for purposes of engaging in a sexual act with the child, irrespective of whether the sexual act is committed or not,⁹² or by committing a sexual act with the child.⁹³ This definition casts the net as wide as possible by including not only the actual commission of a particular sexual act under certain circumstances as punishable conduct but also soliciting the services of a child merely for purposes of engaging in a sexual act with the child. The perpetrator or victim may either be male or female. In *S v. Ndlovu*,⁹⁴ the Bulawayo High Court commented on sexual exploitation of children in the following terms:

Sexual abuse of children is viewed in a very serious light. This type of conduct is very common thus exposing children to untold trauma and incurable diseases. Contrary to the view held by the learned trial magistrate, the Sexual Offences Act protects children equally be they girls or boys. The definition of a young person in section 2 clearly states that this means a boy or girl under the age of sixteen. Some of the old cases give the impression that abusers of boys should be treated more leniently than abusers of girls. It is clear that in those days the abuse of boys was not as prevalent as that of girls. In this day and age I do not find any legal basis for the distinction. Sexual abuse of all children is prevalent and should be viewed in a very serious light.

By protecting children from all forms of sexual exploitation, the Constitution imports the country's international legal obligations into the domestic legal system.

A few cases have applied the constitutional provisions on the sexual exploitation of children to concrete factual situations. In *S v. Peter Chigogo*,⁹⁵ Tsanga J stated that children should be protected from abuse and offenders should not be given lenient sentences. Writing in the context of sexual abuse, Tsanga emphasised that "[t]he continued lenient attitude towards grown men who abuse young girls and then get off lightly with their offence on the basis of 'intended marriage' of the complainant is not in consonance with the spirit of the Constitution in discouraging the marriage of girls below the age of 18".⁹⁶ Unfortunately, the trend of giving lenient sentences to paedophiles appears to be a common practice in Zimbabwe. In *S v. Banda*, *S v. Chakamoga*,⁹⁷ both accused were married mature adults, more than 30 years old, who had sexual intercourse with young girls aged 15 years, about half the accused persons' ages. They both impregnated the young girls. Both accused were charged

⁹¹ UNHCR, *Abuse and Exploitation* (2001) p. 10.

⁹² Section 17(1)(a) of the South African Sexual Offences Amendment Act.

⁹³ Section 17(1)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁹⁴ HB-66-03, p. 3.

⁹⁵ HH 943-15.

⁹⁶ *Ibid.*, p. 2.

⁹⁷ HH 47-16.

with contravening section 70 of the Criminal Law Code, having sexual intercourse with a young person. Both were tried by the same magistrate, and sentenced to two years imprisonment of which one year was suspended for five years on the usual conditions for such cases, each remaining with one year effective imprisonment.

On review, the High Court lamented that the sentences handed down trivialised the protective measures for young persons prescribed in our law and in the current international framework for safeguarding young persons.⁹⁸ The Court noted that various provisions of the Constitution protected children from “economic and sexual exploitation ... and from maltreatment, neglect or any form of abuse”.⁹⁹ Charehwa J, for the Court, observed that the best interests principle required courts to hand down appropriate sentences that deter those preying on children to refrain from doing so in order to give the maximum protection accorded to children by law. In the eyes of the learned judge, courts should consider the message they are sending to the general public when sentencing predatory adults who sexually exploit young persons who are more than twice the age of the child. In the judge’s view, sentencing super predatory paedophiles to limited periods of imprisonment tended to suggest that were it not for section 70 of the Criminal Law Code, the sexual exploitation of children would be perfectly acceptable in our society.¹⁰⁰

4.5.3 Protection from Child Labour

Section 81(1)(e) of the Constitution provides that children have a right to be protected against economic exploitation and child labour. Section 10A of the Children’s Act narrowly deals with this matter by prohibiting a parent or guardian from causing or permitting their children to absent themselves from school in order to engage in employment for gain, prevents any person from employing for gain a child when the child might reasonably be expected to attend school and outlaws the employment of children in hazardous occupations. This provision should be expanded to prohibit child labour more generally in accordance with the constitutional provision and the provisions of section 11 of the Labour Act.¹⁰¹

It should be noted that although there is no absolute prohibition on the employment (broadly understood) of children, it is subject to important restrictions.¹⁰² Human rights bodies and institutions have traditionally found child labour harmful and ‘child work’ acceptable.¹⁰³ The United Nations Children’s Fund makes a distinction between ‘dangerous and exploitative work’ and ‘beneficial work’. Dangerous and exploitative work is that which is carried out full-time and at too early an age.¹⁰⁴ Child

⁹⁸ *Ibid.*, p. 1.

⁹⁹ Sections 19(2)(c) and 81(1)(e) of the Constitution.

¹⁰⁰ *S v. Banda, S v. Chakamoga*, p. 3.

¹⁰¹ Chapter 28:01 of the Laws of Zimbabwe.

¹⁰² L. Schafer, *Child Law in South Africa Domestic and International Perspective* (2011) p. 139.

¹⁰³ See generally S. N. Mishra and S. Mishra, *Tiny Hands in Unorganised Sector: Towards Elimination of Child Labour* (2004) p. 15.

¹⁰⁴ T. Nhenga-Chakarisa, ‘What Does the Law Seek to Protect and From What? The Application of International Law on Child Labour in an African Context’, 10 *African Human Rights Law Journal* (2010) p. 180.

labour exists where the working day is very long and working conditions are very harsh. Child labour is carried out in unsafe working conditions, it is not sufficiently paid for, it involves excessive responsibility, and it undermines the child's dignity and self-esteem.¹⁰⁵ Beneficial work, on the other hand, is that which promotes or stimulates a child's physical, cognitive and social development without interfering with scholastic or recreational activity or rest.¹⁰⁶

An emphasis on the distinction between work and labour may be useful if one is looking for a way to ban some forms of child labour.¹⁰⁷ The work-labour distinction also implies that all profit-motivated activities are harmful to child development and all gratuitous activities are benign.¹⁰⁸ It does not consider children in family situations as exploited.¹⁰⁹ This understanding of labour implies that it is paid employment, whereas a great deal of children's work is not remunerated for and is not productive.¹¹⁰ Once something is classified as child labour, it is identified as bad and therefore has to be abolished.¹¹¹ It evokes an emotional reaction rather than a careful consideration of the actual situation of the child.¹¹²

The idea of establishing minimum ages for many things reflects the general concern that children should be specially protected.¹¹³ The Zimbabwean Constitution appears to follow the minimum age approach. This approach implies that "a child who is below the minimum ages stipulated by the Convention would be engaging in child labour if they do the work prohibited for their age. These minimum age standards express an ideal of childhood as a privileged phase of life, properly dedicated only to play and schooling, and with an extended period of dependence during which economic activity is discouraged or actually denied."¹¹⁴ Whilst this is a positive development for purposes of protecting children, it tends to negate children's contribution to the country's social and economic development.

4.5.4 Protection from Maltreatment, Neglect or Any Form of Abuse

Section 81(1)(e) of the Constitution of Zimbabwe enshrines the child's right to protection from "maltreatment, neglect or any form of abuse". Unfortunately, none of these terms are defined in the Declaration of Rights nor has much judicial effort been dedicated to unpacking the tinted lenses of the differences that exist between them.

¹⁰⁵ *Ibid.* See also E. Ochaíta *et al.*, 'Child Work and Labour in Spain: A First Approach', 8 *International Journal of Children's Rights* (2000) p. 15, at p. 19 and UNICEF, *Child Protection from Violence, Exploitation and Abuse*, available at <http://www.unicef.org/protection/index_childlabour.html> (accessed 18 June 2008).

¹⁰⁶ Nhenga-Chakarisa, *supra* note 104, p. 179.

¹⁰⁷ J. C. Andvig, 'Child Labour in Sub-Saharan Africa: An Exploration', 2 *Forum for Development Studies* (1998) p. 327, at p. 328.

¹⁰⁸ Nhenga-Chakarisa, *supra* note 104, p. 181.

¹⁰⁹ *Ibid.*

¹¹⁰ L. Abernethie, 'Child Labour in Contemporary Society: Why Do We Care?', 6 *International Journal of Children's Rights* (1998) p. 81, at p. 91.

¹¹¹ Nhenga-Chakarisa, *supra* note 104, p. 181.

¹¹² M. F. C. Bourdillon, *Earning a Life: Working Children in Zimbabwe* (2000) p. 9.

¹¹³ Nhenga-Chakarisa, *supra* note 104, p. 182.

¹¹⁴ *Ibid.*, 184.

Although there are many references to section 81(1)(e) in reported judgements, it has mainly repeatedly been used by courts to elucidate the context in which legislation was made, instead of as a primary weapon of attack against abusive tendencies or treatment.¹¹⁵ In Yacoob J's view, the scope of the obligation to protect children from maltreatment, abuse, neglect and degradation normally includes passing laws and creating enforcement mechanisms against degradation and providing for the prevention of such occurrences.¹¹⁶ No matter how compelling these observations may be, they do not solve the prevailing definitional challenges arising from the phrase 'maltreatment, neglect or any form of abuse'.

Neglect of a child can be defined as "failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs".¹¹⁷ The Children's Act provides that a parent, guardian or other person caring for a child is guilty of an offence if that parent or other person assaults, ill-treats, neglects, abandons or exposes him or allows, causes or procures them to be assaulted, ill-treated and neglected.¹¹⁸ A person who is legally liable to maintain a child is guilty of an offence if the person, while able to do so, fails to provide the child with adequate food, clothing or lodging for them or failed to pay for the maintenance of a child or person who has been placed in an institution,¹¹⁹ fails to provide or pay for dental, medical or surgical aid or other effective remedial care necessary for their health or well-being.¹²⁰ The offences carry heavy penalties, with a fine not exceeding level ten or imprisonment not exceeding five years.¹²¹ Neglect must be 'deliberate', thus adding a *mens rea* requirement to the act that constitutes a violation of the child's right to freedom from any form of abuse or neglect.¹²²

Child abuse, a generic term for various forms of ill-treatment of children and neglect of the rights of children, involves any form of harm or ill-treatment deliberately inflicted on a child. The term is amply defined in the South African Children's Act to mean:

- Assaulting a child or inflicting any other form of deliberate or calculated injury to a child;
- Sexual abuse of children or allowing the child to be sexually abused;
- Bullying by another child;
- Labour practices that exploit children; or
- Exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.¹²³

These elements cast the net of harmful practices that constitute 'abuse' very wide to ensure that children are adequately protected from all forms of abuse. To ensure the adequate protection of children from abuse, it may be important for certain

¹¹⁵ L. Schafer, *Child Law in South Africa Domestic and International Perspectives* (2011) p. 132.

¹¹⁶ *Government of South Africa v. Grootboom*, para. 78.

¹¹⁷ Woolman and Bishop, *supra* note 62, 47-25.

¹¹⁸ Section 7(1) of the Children's Act [Chapter 5:06].

¹¹⁹ Section 7(2)(a) of the Children's Act.

¹²⁰ Section 7(2)(b) of the Children's Act.

¹²¹ Section 7(5) of the Children's Act. See also *S v. Nyirenda*, HB-86-03 and *S v. Fikizolo*, HB-131-04.

¹²² Wolman and Bishop, *supra* note 62, 47-25.

¹²³ See section 1(1)(a)–(e) of the Children's Act of South Africa Act 30 of 2005.

professionals and the government to deliver services to child victims of physical or mental abuse or neglect, assist children temporarily or permanently separated from their parents or families, provide special support services to children with disabilities and ensure the protection of children from economic exploitation, drug abuse and sexual exploitation.¹²⁴ This implies that there are overlaps between child abuse, economic exploitation, sexual exploitation, maltreatment and other practices that are harmful to children.

A causal link may exist between the use of corporal punishment on children, on the one hand, and, on the other, physical or emotional abuse and the negative development of children.¹²⁵ Section 241 of the Criminal Law Code authorises 'moderate corporal punishment' of children by parents, guardians and school teachers. Section 7 of the Children's Act also confirms the right of parents and guardians to 'administer reasonable punishment'. Nonetheless, there are no bright lines between 'moderate corporal punishment' and child abuse. This creates room for parents or guardians to cross the line between acceptable corporal punishment and child abuse. If a parent or guardian unreasonably assaults his or her child, he or she will be prosecuted under the Criminal Law Code for murder or culpable homicide if the child dies or assault if the child does not die.

4.6 Children's Socio-Economic Rights

Socio-economic rights are fundamental rights that protect the human dignity of individuals by way of securing and protecting the social, economic and cultural welfare and interests of human beings.¹²⁶ Accordingly, Zimbabwe is bound to ensure that its citizens enjoy the full complement of socio-economic rights, thereby further providing for domestic remedies for violations thereof.¹²⁷ Socio-economic rights are therefore at the core of the achievement of the constitutional objective set out under section 8 of the Constitution which is to establish "a sustainable, just and democratic society in which people enjoy prosperous, happy and fulfilling lives". This section examines the protection of children's socio-economic rights under the current Constitution.

The current Constitution responds appropriately to the historical anomaly of neglecting socio-economic rights.¹²⁸ Children's socio-economic rights are protected at two possibly three levels under the prevailing constitutional framework. First, they

¹²⁴ See, for example, the social welfare programmes described in the South African Department of Social Development's Annual Report for 2007/08, presented to the Portfolio Committee on Social Development, November 2008, at pp. 12–24.

¹²⁵ A. Smith *et al.*, *The Discipline and Guidance of Children: A Summary of Research*, 2004, pp. 15–17. See also *Global Initiative to End All Corporal Punishment of Children, Ending Legalised Violence Against Children: Global Report 2008*, Association for the Protection of All Children, 2008, pp. 7–10.

¹²⁶ J. Mavedzenge and D. Coltart, *A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-Economic Human Rights* (2014) p. 32.

¹²⁷ N. Ndlovu, *Protection of Socio-Economic Rights in Zimbabwe. A Critical Assessment of the Domestic Framework under the 2013 Constitution of Zimbabwe* (2016) p. 7.

¹²⁸ *Ibid.* See also Chapter 4 of the 2013 Constitution which contains the Declaration Rights that entrenches, among others, socio-economic rights as justifiable rights.

are provided for as part of the socio-economic rights that are conferred on ‘everyone’, including children. Accordingly, the rights to an environment that is not harmful to every person’s health or well-being,¹²⁹ to freedom from eviction,¹³⁰ to basic state-funded education,¹³¹ to access to health care services,¹³² to sufficient food and to safe, clean and potable water¹³³ belong to everyone and can be vindicated on behalf of children. At this level, the enjoyment of most of the socio-economic rights is subject to progressive realisation within the state’s available resources.

Secondly, children’s socio-economic are protected as part of the rights that are only extended to persons under the age of 18 years. Section 81(1)(f) of the Constitution provides that “[e]very child has the right to education, health care services, nutrition and shelter”. At this level, the enjoyment by children of socio-economic rights is not, theoretically at least, subject to progressive realisation within available resources. Third, children’s socio-economic rights are protected as part of the national objectives stipulated in section 19(1)–(3) of the Constitution. The legal status of national objectives remains questionable because they are not part of the justiciable Declaration of Rights entrenching directly enforceable entitlements. Nonetheless, the Constitution provides that courts must pay due regard to the national objectives when interpreting the rights protected in the Declaration of Rights.¹³⁴

As has been shown above, the Constitution is not short of provisions protecting children’s socio-economic rights. However, the degree to which children actually enjoy the socio-economic rights stipulated in the Constitution remains a subject of contestation. The prevalence of school drop outs and child-headed households, the number of children dying from treatable diseases, the number of children working or living in the streets, the plight of orphans, children with disabilities and other vulnerable groups of children and the huge number of children who end up resorting to marriage as a means to escape poverty and marginalisation tend to suggest that large scale violations of children’s rights are still taking place. In addition, thousands of homes have been demolished in Zimbabwe’s towns without the authorities investigating the manner and extent to which these demolitions negatively affect children’s access to education, food and water, health care services and many other socio-economic rights.

More recently, the courts clarified most of the outstanding constitutional issues relating to children’s socio-economic rights. In *Zimbabwe Homeless People’s Federation and Others v. Minister of Local Government and National Housing and Others*,¹³⁵ the Supreme Court of Zimbabwe had the opportunity to interpret and apply the child’s right to shelter as protected in section 81 of the Constitution. To begin with, the Court observed that it is immediately apparent that the right to shelter imposes on the state the obligation to avail access to adequate shelter progressively

¹²⁹ Section 73(1) of the Constitution.

¹³⁰ Section 74 of the Constitution.

¹³¹ Section 75(1) of the Constitution.

¹³² Section 76(1) of the Constitution.

¹³³ Section 77 of the Constitution.

¹³⁴ See sections 8(2) and 46(1)(d) of the Constitution.

¹³⁵ SC 94/2020.

within the limits of the resources available to it.¹³⁶ Drawing inspiration from *Government of the Republic of South Africa v. Grootboom*,¹³⁷ the Court emphasised that although socio-economic rights should be realised progressively within available resources, the state remains bound to move as expeditiously and effectively as possible towards the goal of full realisation of these right, with full use of the maximum resources available.¹³⁸

More importantly, however, the Court emphasised that the state's obligation to provide shelter to children is not contingent upon the absence of parental care or other appropriate care under section 81(1)(d) of the Constitution. The obligation of the state in this respect is not negated or diluted by the primary duty of care ordinarily imposed upon parents.¹³⁹ However, the Court did concede that under normal circumstances, where children are living with their parents, the parental duty of care proportionately reduces the state's correlative child care obligations. However, where the parents themselves are financially or otherwise incapacitated from fulfilling their parental obligations, it then becomes incumbent upon the state to intervene and perform its own obligation to ensure that the children's welfare is adequately addressed and safeguarded.¹⁴⁰ In Patel J's words, "the primary duty of care reposed with parents in respect of their own children does not operate to absolutely absolve the State of its underlying obligation of care towards those children".¹⁴¹ These findings are groundbreaking in the sense that they portray 'parental' care as a joint responsibility between parents and the state, thereby ensuring that even children who live with their parents get additional support in order to have access to the goods and services needed for a minimally decent life.

4.7 The Rights Not to Be Recruited into a Militia Force or to Take Part in Armed Conflict or Hostilities

Section 81(1)(g) of the Constitution enshrines every child's right not to be recruited into a militia force or to take part in armed conflict. This right has two components: first, the right not to be recruited into a private or dissident armed group and, second, the right not to take part in armed conflict or hostilities. The protection of these twin rights follows gradual legal developments at the international and regional levels, although it is arguable that our Constitution contains refined versions of these rights. Unlike international human rights, the Constitution protects all children (that is persons below the age of 18 years) and does not confine the application of the relevant rights persons below the age of 15 years. Accordingly, children who are captured and fall within the hands of the enemy while unlawfully taking part in hostilities are entitled to special protection from any further attack and victimisation by the opposing forces.

¹³⁶ *Ibid.*, p. 11.

¹³⁷ 2001 (1) SA 46 (CC) para 45.

¹³⁸ *Zimbabwe Homeless People's Federation and Others v. Minister of Local Government*, p. 11.

¹³⁹ *Ibid.*, p. 23.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

In the Zimbabwean context, there is need to impose an absolute ban on the recruitment of children of whatever age into the national armed forces, especially given the realities of human rights abuse suffered by children in armed forces where they “risk being killed, injured or permanently disabled”¹⁴² and are “sexually assaulted, raped, forced to become wives of commanders, and ... exposed to drugs and forced labour”.¹⁴³ All children deserve maximum protection from the negative effects of participation in armed forces. Therefore, it should not matter whether the armed forces that have recruited them belong to the state or militia forces. The Constitution offers better protection in that it requires the state to ensure that children do not participate in hostilities, and it does not matter whether the participation is direct or indirect. The law should protect all children under the age of 18 years “from any involvement in hostilities – direct or indirect – and any recruitment into armed forces, whether compulsory or involuntary”.¹⁴⁴ If interpreted progressively and in line with the principle of the best interests of the child, the Constitution patently gives a higher standard of protection to prevent child participation in armed conflict.

4.8 The Right Not to Be Compelled to Take Part in Any Political Activity

The child’s right not to be compelled to take part in any political activity is primarily couched in negative terms and refers to all political activities, whether campaigning for or joining or forming a party. This suggests that the general expectation is that no child should be required to directly or indirectly take part in political activities as they have a choice on whether or not to do so. The fact that children have to make an election on whether or not they should participate in politics implies that the relevant provisions of the Constitution only address the situation of those children with the capacity for rational action. In other words, only adolescents who are sufficiently mature to be rationally autonomous have the right to take part in political activities. The very young or those who lack the capacity to understand the benefits, risks and social implications of involvement in politics may not be required to take part in political activities.

4.9 The Right Not to Be Detained Except as a Measure of Last Resort and Conditions Governing Detention of Child Offenders

This section investigates the scope of children’s rights in the criminal justice context as provided for in the Constitution. The focus is on the child offender’s right not to be detained except as a means of last resort. In essence, the general rule is that no child offender should be lightly caged. However, the law foresees circumstances when the demands of justice and fairness may call for the imprisonment of the child offender. When it becomes necessary to cage a child for committing a crime, the court should ensure that the conditions of detention comply with at least three

¹⁴² UNICEF, *Machel Study 10 Year Strategic Review: Children and Conflict in a Changing World*, 2009, p. 151.

¹⁴³ B. D. Mezmur, *Children’s Rights in Africa: A Legal Perspective* (2008) p. 200.

¹⁴⁴ R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, UNICEF, 2007, pp. 9 and 660.

explicitly stipulated constitutional requirements or standards. These requirements include the idea that the child offender should be detained for the shortest appropriate period, the child offender should be kept separately from adult offenders and the child offender should be treated in a manner and kept in conditions that take account of the child's age. These requirements, or rather rights, are discussed immediately after an examination of what the phrase 'detention as a last resort' means.

4.9.1 The Right Not to Be Detained Except as a Measure of Last Resort

At international law, deprivation of the liberty of youth offenders is permitted as a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases.¹⁴⁵ In the same measure, section 81(1)(i) of the Constitution provides for the child's right not to be detained except as a means of last resort and, if detained, to be detained for the shortest appropriate period of time. It is vital to note that the Constitution does not prohibit the imprisonment of young offenders but requires that the courts consider other alternatives before imposing custodial sentences. Accordingly, the fact that a sentence of imprisonment should be imposed as a means of last resort implies that sometimes it is necessary to impose custodial sentences on youth offenders. The words 'as a measure of last resort' mean that juvenile offenders should be deprived of their liberty only if they have committed serious crimes or persist to commit serious offences.¹⁴⁶ It also implies that deprivation of liberty can only be imposed in cases where there is 'no other appropriate response' to the child's delinquent behaviour.¹⁴⁷

In *S v. C (A Juvenile)*,¹⁴⁸ the Harare High Court correctly observed, in the context of rape trials, that generally speaking juveniles should not be sent to prison, but in cases where there are aggravating features – such as multiple counts, transmission of sexually transmitted diseases to the victim, serious psychological and or physical trauma, a high degree of violence or force used during the rape and the use of a weapon during the rape – effective imprisonment might be called for especially if the juvenile offender is between 16 and 18 years.¹⁴⁹ However, the Court was at pains to emphasise that the periods of imprisonment should vary according to the age and the moral blameworthiness of the offender.¹⁵⁰

Even before the adoption of the current Constitution in 2013, there were indications that local courts were slowly moving away from imprisonment as a sentence for youth offenders who committed minor crimes. In *S v. CM (A Juvenile) and Another*,¹⁵¹ the two cases (dealt with simultaneously) involved two youth offenders who had been convicted of theft after diverting different sums of money towards their own use

¹⁴⁵ See Rule 2 of the United Nations Rules for the Protection of Juveniles Deprived of Liberty 1990.

¹⁴⁶ See Rule 17.1(c) of the Beijing Rules.

¹⁴⁷ *Ibid.*

¹⁴⁸ HH 718-14.

¹⁴⁹ *Ibid.*, p. 9.

¹⁵⁰ *Ibid.*

¹⁵¹ Judgment No. 67/2003, Case No. HC 1546/2003 and Case No. HC 1547/2003.

without their employers' consent. In *S v. CM*, a 16 year old had been sentenced to 18 months imprisonment with ten months suspended on condition of restitution, and in *S v. ZD* (referred to above as another), a 17 year old had been sentenced to 24 months imprisonment with 18 months suspended on condition of restitution.

On review, Ndou J, for the Bulawayo High Court, held that in both cases the sentences were not individualised by carrying out meaningful pre-sentence investigations.¹⁵² Given that the accused persons were both juvenile first offenders, the trial magistrate should have considered non-custodial sentences.¹⁵³ In the circumstances, the trial court appeared to have "paid lip service" to the well-established "principle that imprisonment is a severe and rigorous form of punishment which should be imposed only as a last resort and where no other form of punishment will do".¹⁵⁴ Given that the ultimate effective sentence was below 24 months, the Court should have sentenced both accused persons to community service.¹⁵⁵

More importantly, the Court reiterated that there is no room for instinctive sentencing in our jurisdiction, and the sentence must fit the crime and the offender, be fair to both the state and the accused person and be blended with an acceptable measure of mercy.¹⁵⁶ Ultimately, the Court substantially reduced the imposed sentences and ordered that they be immediately released from prison. In *S v. TM (A Juvenile)*,¹⁵⁷ a 16 year old was convicted of house breaking with intent to steal and theft, and escaping from lawful custody in contravention of the Criminal Procedure and Evidence Act.¹⁵⁸ The accused was convicted of both counts and sentenced to undergo prison terms of seven months and five months respectively. Of the total 12 months imprisonment, five months were suspended on condition of good behaviour. Ndou J stressed that he was "perturbed by the imprisonment of the 16 year old juvenile first offender. It is trite that juveniles should not be sentenced to custodial sentences unless there is absolutely no alternative."¹⁵⁹ He then reduced the sentences for both counts to three months imprisonment and ruled that since the juvenile had served the sentences, the juvenile was entitled to immediate release.¹⁶⁰

As such, every sentencing court dealing with youth offenders ought to be given discretion in sentencing them in order to give effect to the conditions of international law and the Constitution pertaining to the individualisation of sentences and the need

¹⁵² *Ibid.*, p. 2.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* In this respect, the Court referred to *S v. Kashiri*, HH-174-94, *S v. Gumbo*, 1995(1) ZLR 163 and *S v. Sikhunyane*, 1994(1) SACR (TL).

¹⁵⁵ For this principle, see the cases of *S v. Sithole*, HH-50-95 and *S v. Santana*, HH-110-94.

¹⁵⁶ *S v. CM (A Juvenile) and Another*, p. 3. See also *S v. Sparks and Another*, 1972 (3) SA 396 (A).

¹⁵⁷ Judgment No. HB 65/2003, Case No. HC 1472/2003 and CRB ZVI 313/02.

¹⁵⁸ Chapter 9:07 of the Laws of Zimbabwe.

¹⁵⁹ *S v. TM (A Juvenile)*, p. 3. The Court was following *S v. Ncube and Another*, HB-9-87, p. 1, where Blackie J, for the same Court, held that "[o]ur courts have repeatedly said that teenage minors should not be sentenced to terms of imprisonment unless there is absolutely no alternative". See also *S v. Mbewe*, HH-323-87, p. 2, where Sansole J held that "it is the policy of these courts to do as much as is reasonably practical to keep juvenile first offenders out of prison".

¹⁶⁰ *S v. TM (A Juvenile)*, p. 4.

for proportionality to be applied to the youth offender, the offence they would have committed and the circumstances surrounding the commission of the offence. This means that the court should start with 'a clean slate' when sentencing a child offender and not be required to impose the prescribed minimum sentence. Minimum sentences are inconsistent with the constitutional principle of 'detention as a last resort', especially where they are mandatory. This is precisely because the twin concepts of detention as a last resort and best interests of the child raise serious questions about the appropriateness of custodial sentences for child offenders.

4.9.2 Where Imprisonment Is Strictly Necessary, It Should Be for the 'Shortest Appropriate Period' of Time

The Constitution does not only regulate the circumstances under which incarceration as a sentencing option should be pursued but also regulates the nature and duration of the incarceration. Section 81(1)(i) requires particular focus to be placed on the youth offender and their needs rather than on the rigid starting point of the statutorily ordained periods of imprisonment. The appropriateness of a particular custodial sentence for a particular offender depends not only upon society's interests as embodied in the length of the incarceration vis-à-vis the offence, the offender and the circumstances in which the offence was committed but also on the goals the sentencing judge wishes to achieve by imposing a particular sentence. The Constitution prescribes that when dealing with child offenders, the overriding goal should not be the infliction of pain and punishment on the child but their rehabilitation and reintegration into society.

Section 81(1)(i) of the Constitution envisages that the sentence imposed on a child offender should reflect the desirability of promoting the child's reintegration and assuming a constructive role in society. That is why the Constitution places restrictions on the circumstances under and period for which children can be deprived of their liberty.¹⁶¹ However, these objectives should always be counter-balanced with public safety concerns and the enduring value of proportionality.

Clearly, there are circumstances in which the juvenile offender must at least be committed to a custodial institution (jail for instance), and what is left for discussion is the appropriate duration of custody. In cases of pre-meditated violent murder, for instance, what usually matters is not whether the child has been jailed 'as a last resort' but whether the duration of incarceration is the 'shortest appropriate' one for the crime. The central word in the relevant constitutional provisions seems to be 'shortest appropriate' because it emphasises not only the proportionality but also the suitability of a particular sentence in the circumstances.¹⁶² In the case of juveniles, 'appropriate' should mean that the applicable law should preserve judicial discretion

¹⁶¹ Cf. section 81(1)((i)(i) with Article 37(b) of the CRC and Rule 17(b) of the United Nations Standard Minimum Rules for the Administration of Justice (The Beijing Rules), adopted by General Assembly Resolution 40/33 of 29 November 1985.

¹⁶² Rule 17.1(a) of the Beijing Rules states that the "reaction taken shall always be in proportion not only to the circumstances and gravity of the offence but also to the circumstances and needs of the juvenile as well as the needs of society".

to justify especially downward departures from statutorily prescribed sentences in light of children's psychological immaturity and need for reintegration.¹⁶³

There are indications that judges are prepared to review harsh sentences imposed on young offenders and to ensure that a convicted child offender is incarcerated for the shortest appropriate period of time. In *S v. Mtetwa*,¹⁶⁴ the accused, aged 17 years, was convicted of eight counts of unlawful entry into premises and eight counts of theft. For purposes of sentencing, the counts for both unlawful entry and those for theft were paired alongside into eight counts. The accused was sentenced to an effective nine years in prison. On review, the Harare High Court admitted that the Court *a quo* was indeed faced with an unrelenting offender who had the propensity to commit crimes. Tsanga J, for the Court, observed that while the convictions were proper, the sentence induced a profound sense of shock for a young offender.¹⁶⁵ Drawing inspiration from the Constitution, the Court held as follows:

The sentence appears to be clearly dictated by the need to protect the public from a perceived delinquent and incorrigible young criminal offender. *Yet the risks of incarcerating such a young offender over a lengthy period of time should not be so easily sacrificed at the altar of expediency as our courts have always emphasised. Our Constitution adopts the principle that juveniles should be detained for the shortest possible time and only as a last resort – an obligation that is found in international law as exemplified by article 37 (b) of the [CRC] to which we are a party. Section 81(h)(i) of the Constitution ... provides that a person under 18 has the right “not to be detained except as a measure of last resort”. Also, if detained he or she has the right to be detained for the shortest appropriate period. Giving a 17 year old an effective 9 year sentence runs contrary to the letter and spirit of this Constitutional imperative when it is considered that he had not committed any violent offences such as robbery, murder, or rape. From the point of view of children’s rights custodial punishment is regarded as criminally damaging for children due to the criminogenic influences of prison. The Constitution also places emphasis on the best interests of the child being paramount at all times in matters involving children (emphasis added).*¹⁶⁶

Tsanga J thought, rightly so, that with a nine year sentence the child offender would spend a substantial part of his youthful life in prison. Accordingly, the lengthy prison term meant that the child had been sentenced as an adult offender and lacked justification, especially in light of the child offender's home background (there were indications from the probation officer's report that family ties and lack of proper supervision might have predisposed the accused to anti-social behaviour).¹⁶⁷ Tsanga J insisted that “[r]ather than rushing to impose adult punishment in the form of a lengthy prison sentence that may merely accentuate his path to becoming a hardened criminal, it seems to me at 17, he could have been given a chance by being referred to an appropriate juvenile institution for rehabilitation”.¹⁶⁸ In addition,

¹⁶³ A. Moyo, 'Youth, Competence and Punishment: Reflections on South Africa's Minimum Sentencing Regime for Youth Offenders', 26:1 *SA Public Law* (2011) p. 229, at pp. 240–241.

¹⁶⁴ HH 112-15.

¹⁶⁵ *Ibid.*, p. 2.

¹⁶⁶ *Ibid.*, pp. 2–3. See section 81(2) of the Constitution. Clearly the magistrate did not fully take into account these Constitutional provisions which emphasise the duty to respect and protect children's rights in dealing with children under the age of 18

¹⁶⁷ *Ibid.*, pp. 3 and 4.

¹⁶⁸ *Ibid.*, p. 4.

the learned judge held that a prison sentence of nine years effectively removes the accused from society by locking him up and throwing away the keys for a very long time.

Ultimately, the Court sentenced the accused to three years imprisonment for all counts, of which one year was suspended for five years on condition that the accused did not during that time commit any offence involving unlawful entry for which he is sentenced to a term of imprisonment without the option of a fine.¹⁶⁹ Imprisonment for the shortest appropriate time requires sentencing courts to ensure that the child does not unnecessarily spend a good 'chunk' of their time serving prison terms. Although a strictly punitive approach to youth crime is undoubtedly outlawed by the Constitution, these instruments do not necessarily bind courts to sacrifice proportionality and public safety on the altar of reintegration, rehabilitation and restoration. If the sentences that are ordained by the sentencing statute range from a very short to a very long period of imprisonment, the Constitution requires the sentencing judge to impose the shortest custodial period possible on the child offender.

4.9.3 The Right to Be Kept Separately from Detained Persons over the Age of 18 Years

International instruments provide for the right of every accused juvenile person to be separated from adults during pre-trial and post-conviction detention.¹⁷⁰ In line with international human rights instruments and standards, section 81(1)(i) of the Constitution also provides for the child's right to be kept separately from detained persons over the age of 18 years. This requirement is the basic floor, and the state is required to provide for separate custodial institutions for children and adults. More importantly, however, the separation of adult and youth offenders serves as a mandatory precondition for ensuring that youth offenders are later afforded treatment that takes their age and immaturity into account. When carrying out human rights reporting, states parties have the obligation to pay the necessary attention to this mandatory standard and to stipulate what measures have been taken to separate juvenile offenders from adult offenders.¹⁷¹

The principle that young offenders deprived of liberty should be separated from adults implies that such offenders should not be placed in an adult prison or other facility for adults. As the Committee on the Rights of the Child would have it, "[t]here is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate ... States parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices."¹⁷² Section 63(2)(c) of the Prisons Act also stipulates youth offenders as a group of prisoners that should be kept separate from other categories

¹⁶⁹ *Ibid.*, p. 5.

¹⁷⁰ See Articles 37(c) of the CRC and 10(2)(b) of the ICCPR.

¹⁷¹ HRC General Comment No. 21, para. 13.

¹⁷² CRC General Comment No. 10, para. 85.

of offenders. There is sufficient evidence demonstrating that if child offenders are detained in the same facilities with their adult counterparts, the relevant places of institutional confinement serve as schools for crime, degrade young offenders' amenability to treatment and irreversibly psychologically damage innocent children.

4.9.4 The Right to Be Treated in a Manner and Kept in Conditions That Take Account of the Child's Age

If a child offender is committed to a custodial institution for any offence, they retain their right to be treated in a manner and kept in conditions that take into account the child's age. From the outset, the Constitution makes it clear that it would be unacceptable to keep child offenders in prison conditions that are similar to those under which adult offenders are kept.¹⁷³ The right to be treated in a manner and kept in conditions that take into account a child offender's age is a necessary result of the principle that children should be kept in separate institutions and not be mixed up with adult prisoners. The segregation of young offenders from adult offenders would not serve any purpose if the treatment accorded to them (young offenders) was not appropriate to their age and legal status with regards to conditions of detention. The right to be treated in a manner and kept in conditions that take account of the child has been partly interpreted to mean that youth offenders should have shorter working hours and have constant contact with the outside world, particularly relatives, with the aim of furthering their reformation and rehabilitation.¹⁷⁴

International and regional instruments do not explicitly state the sort of treatment to be afforded to juvenile offenders of any particular age, but simply declare that such treatment should take the child's age into account.¹⁷⁵ This is a necessary flexibility device that allows states parties to accord very young offenders – especially those who are just a few years above the minimum age of criminal responsibility – treatment that resembles the kind of treatment they would be accorded in a normal family environment. The Zimbabwean Constitution also follows this route and reiterates the legal content enshrined in international instruments. The sort of treatment to be afforded to juvenile offenders of different ages “is to be determined by each State party in the light of relevant social, cultural and other conditions”.¹⁷⁶ All persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice and all forms of deprivation of liberty.

Mere separation of youth offenders from adult offenders does not in itself guarantee rehabilitation and is not sufficient to ensure that the child is prepared for eventual re-integration into the community. The treatment to which young offenders are subjected should be different from the treatment to which adult offenders are subjected. The conditions of confinement and the manner in which the child is treated should be age-appropriate, i.e. it should take into account not only the vulnerability and fragility of young offenders of different ages but also their amenability to

¹⁷³ See Articles 37(c) of the CRC and 10(3) of the ICCPR.

¹⁷⁴ HRC General Comment No. 21, para. 13.

¹⁷⁵ See Articles 37(c) of the CRC and 10(3) of the ICCPR.

¹⁷⁶ HRC General Comment No. 21, para. 13.

treatment, rehabilitation and re-integration into the community. Juveniles deprived of liberty should not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and should be kept in conditions that improve their readiness to reform and amenability to 'treatment'.

4.10 The Right to Have One's Best Interests Considered as Paramount in Every Matter Concerning the Child

The principle of best interests of the child is one of the four pillars of children's rights under international law. The Zimbabwean Constitution provides that "[a] child's best interests are paramount in every matter concerning the child".¹⁷⁷ What this exhortation means exactly remains a subject of continuous debate in many jurisdictions. Our legal system, like many others, elevates the best interests of the child to the status of a foundational principle of children's rights. This is demonstrated by the fact that decision-makers are required to promote not the overall but the 'best' interests of the child. At the practical level, the best interests principle applies to a broad range of judicial, administrative, legislative, policy and other measures that have a bearing on children's lives.¹⁷⁸ It also applies to family proceedings such as divorce, care and contact, deportation, education, health care, budgeting and many more.¹⁷⁹

Arguably, the principle is related to the interest theory of rights as it is premised on the notion that children have interests that are so important that it will be wrong for the state to deny them access to goods and services which promote the realisation of these interests.¹⁸⁰ Raz observes that "a law creates a right if it is based on and expresses the view that someone has an interest which is sufficient ground for holding another to be subject to a duty", and that for a legal rule to confer a right, it should be motivated by the fact that "the right holder's interest should be protected by the imposition of duties on others".¹⁸¹ Thus, an individual has a right if his or her interest is a ground for having rules which require others to behave in specific ways in relation to these rules.

Both international and domestic law revolve around the philosophy that the best interests of the child, not those of parents or caregivers, is the leading factor to be considered when decisions affecting the child are made. According to the Committee on the Rights of the Child, the phrase 'primary consideration' implies "that the child's

¹⁷⁷ Section 81(2) of the Constitution.

¹⁷⁸ See Article 3(1) of the CRC, CRC General Comment No. 7, para. 13 and CRC General Comment No. 5, paras. 12 and 45–47.

¹⁷⁹ See, for instance, Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: United Kingdom*, CRC/C/15/Add.34 (1995), para. 11 and *Concluding Observations of the Committee on the Rights of the Child: Togo*, CRC/C/15/Add.83 (1997), paras. 34 and 50.

¹⁸⁰ See N. MacCormick, 'Children's Rights: A Test Case for Theories of Right', 62 *Archiv fur Rechts- und Sozialphilosophie* (1976) p. 305, at p. 311; S. Human, 'The Theory of Children's Rights', in T. Boezaart (ed.), *Child Law in South Africa* (2009) p. 243, at p. 249; and J. Raz, 'Legal Rights', 4:1 *Oxford Journal of Legal Studies* (1984) p. 1, at pp. 13–14.

¹⁸¹ Raz, *ibid.*

best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness.”¹⁸² These characteristics revolve around the vulnerability of the child and underline the importance of extending protection to them.

Evaluating what is ‘best’ for the child is a difficult task and involves the consideration of many competing factors. Some of the relevant factors include the child’s physical, emotional, social and educational needs, age, sex, relationship with parents and caregivers; their family and social background; the child’s identity (sex, sexual orientation, national origin, religion and beliefs, cultural identity and personality);¹⁸³ the importance of stability in the child’s upbringing; the need to preserve the family environment and to maintain family relations; the views and attitude of immediate family members; whether the decision to be made promotes the care, protection and safety of the child; the gravity of the child’s vulnerability; the impact of a particular decision on the life, survival and development of the child; and the child’s views, understanding and sense of direction.¹⁸⁴ Further, the interests of other children, parents and the state also play an important role in determining what is in the best interests of a particular child. Which factors are to be considered and the weight to be attached to each of them will depend on the circumstances of each case.¹⁸⁵

Nonetheless, the fact that the best interests principle is a ‘primary’ consideration does not mean that it surpasses all other interests and factors. The adjective ‘primary’ simply means that when making decisions affecting children, persons and institutions should consider the effect such decisions will have on children. During the drafting of the CRC, it was emphasised that there are situations in which the competing interests of, among other things, “justice and society at large, should be of at least equal, if not greater, importance than the interests of the child”.¹⁸⁶ Against this background, it has been suggested that “the child’s best interests should be *the* primary consideration in matters directly affecting children and a primary consideration in matters in which children are affected only indirectly or in which others are also affected directly”.¹⁸⁷ This approach recognises that the best interests principle should not be regarded as an overriding factor in every case as other parties involved may have equal or superior interests in certain contexts. Nonetheless, all actions affecting children should give high priority and greater weight to the best interests of the child.¹⁸⁸

The best interests principle performs different functions. The first function, discussed by Parker, is that in all matters not regulated by positive rights in international or

¹⁸² See CRC General Comment No. 14, para. 37.

¹⁸³ See CRC General Comment No. 6, para. 20.

¹⁸⁴ CRC General comment No. 15, para. 12 and CRC General Comment No. 14, paras. 52–79.

¹⁸⁵ See CRC General Comment No. 14, para. 49.

¹⁸⁶ See UNCHR, *Technical Review of the Text of the Draft Convention on the Rights of the Child*, E/CN.4/1989/WG.1/CRP.1, 1989, p. 14.

¹⁸⁷ D. Chirwa, ‘Children’s Rights’, in D. Chirwa, *Human Rights under the Malawian Constitution* (2011) p. 193, at p. 201.

¹⁸⁸ See CRC General Comment No. 14, paras. 39–40.

domestic instruments, the best interest standard “will be the basis for evaluating the laws and practices of States Parties”.¹⁸⁹ Second, the principle may be used to justify, support or clarify a certain approach to matters arising under provisions protecting children’s rights. Thus, the best interests principle is not just one of the factors to be considered when implementing children’s rights but also an aid to meaning construction and interpretation. In this way, section 81(2) of the Constitution should not be seen as an attempt to create specific obligations but instead to prescribe a general principle that should inform decision-making in connection with all actions concerning children. Third, the best interests principle (as a mediatory concept) can “assist in resolving conflicts where these arise within the overall framework of the Convention”.¹⁹⁰ In other words, the best interests principle justifies the (in)correctness of the parent, society or the state in preferring one decision over another.

The last two functions are very important in the context of any attempt to balance the competing rights of parents, mature children and the state. The concept of protection intrinsic in the best interests of the child necessitates great levels of parental intrusion into the domain of child autonomy, especially when the child is immature and of tender age. Thus, the level of decisional autonomy to which a child is entitled or the amount of control which a parent and the state can lawfully exercise depends on which of the two better promotes the best interests of the child. If, by exercising relative autonomy rights, the child would endanger their basic interests in life and survival, such autonomy would not be in the best interests of the child and the state may limit the child’s autonomy.¹⁹¹ Accordingly, the best interests principle serves to ensure that children are not abandoned to their autonomy rights as this endangers their other basic rights.¹⁹² More importantly, the principle may also serve to limit parental rights and to bring the state into the family home to defend the child’s interests. This is because the state is permitted to intervene if parental care does not match the standards of care prescribed in international and domestic law.

4.11 The Right to Adequate Protection by the Courts, Particularly the High Court as Upper Guardian of All Minors

In terms of section 81(3) of the Constitution, children have the right to adequate protection by the courts, particularly the High Court as their upper guardian. The child’s right to adequate protection by the courts arises from a number of separate but interrelated considerations: first, the immaturity or lack of capacity for rational action and, second, the vulnerability that arises from this immaturity. Besides the

¹⁸⁹ S. Parker, ‘The Best Interests of the Child – Principles and Problems’, 8 *International Journal of Law and the Family* (1984) p. 26, at p. 27.

¹⁹⁰ P. Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’, in P. Alston (ed.), *The Best interests of the Child: Reconciling Culture and Human Rights* (1992) p. 1, at p. 16. See also CRC General Comment No. 14, para. 33.

¹⁹¹ See Z. W. Falk, ‘Rights and Autonomy – Or the Best Interest of the Child?’, in G. Douglas and L. Sebba (eds.), *Children’s Rights and Traditional Values* (1998) p. 111, at p. 113.

¹⁹² See generally B. C. Hafen, ‘Individualism and Autonomy in Family Law: The Waning of Belonging’ *Brigham Young University Law Review* (1991) p. 1.

vulnerability related to the general lack of capacity for rational action, the frailty and fragility of many children, particularly the very young, means that the majority of them are not able to physically defend themselves or take steps that are necessary to defend their legal rights. Even after acquiring the capacity to distinguish between right and wrong or to sense that their rights might have been unjustifiably infringed, the complexities of the legal processes to be followed to claim or enforce these rights often require that an adult enforce these rights on behalf of the affected child or children. Ultimately, the duty to stand on the side of the child to make a determination that the child's rights have been violated vests in the judiciary as the branch of the state empowered to make decisions that bind both the state and private persons.

Another compelling factor for vesting the protection of children in the courts is that the persons or institutions often entrusted with parental responsibility over children sometimes grossly violate children's rights. The legal framework governing the parent-child relationship "assigns child care responsibilities to parents, and thereby avoids public responsibility for children".¹⁹³ Since parents are legally presumed to know what is best for their children and bear the obligation to determine and to do what is good for them,¹⁹⁴ there is no need for the state to enter into the private family home except in cases of extreme exploitation, abuse or neglect.¹⁹⁵ Conferring the ultimate responsibility for protecting children on the courts, especially the High Court, is tantamount to making a claim that the state is aware that there are instances when the child's immediate caregivers – whether parents or relatives – violate the rights of the very children they are meant to protect. In such cases, it is important to allow the state through the courts to intervene in the family to protect the best interests and enumerated constitutional rights of the child.

The protection of children's rights, parental responsibility and family values does not imply that the state should abdicate its role as the protector of all children within its territorial borders. Generally, the concept of state intervention through the courts arises from four strands: first, from the need to prevent the child from exercising autonomy rights in ways that threaten the very child's other basic rights and interests. This strand recognises that children are not the best persons to be entrusted with their own protection and may exercise autonomy rights in ways that are detrimental to their best interests, sometimes with the full blessing of their parents. Second, state intervention arises from the need to protect children against the unreasonable exercise of the responsibilities and powers that attach to the office of parenthood. The abuse of these responsibilities and powers may be perpetrated by parents, guardians, caregivers, family members or anyone holding parental responsibilities and rights. Thus, state intervention through judicial decision-making is primarily intended to ensure that the state protects and promotes children's rights at the family and other social levels.

¹⁹³ M. Minnow, 'Rights for the Next Generation: A Feminist Approach to Children's Rights', *Harvard Women's Law Journal* (1986) p. 1, at p. 9.

¹⁹⁴ See J. J. Rousseau, *His Educational Theories Selected from Emile, Julie and Other Writings* (1964) p. 92.

¹⁹⁵ See generally J. Goldstein, 'Medical Care for the Child at Risk: On State Supervision of Parental Autonomy', 86 *Yale Law Journal* (1977) p. 645.

The child's right to adequate protection by the courts has been invoked in a number of local cases and reference is made to some of these cases. In *Mudzuru and Another v. Minister of Justice and Others*,¹⁹⁶ the Constitutional Court held that children are entitled to effective protection by the Court which is the upper guardian of the rights of children and whose duty it is to enforce the fundamental rights designed for their protection. It also held that the history of the struggle against child marriage sadly shows that there has been, for a long time, lack of common social consciousness on the problems of girls who became victims of early marriages.¹⁹⁷ Ultimately, the apex court would abolish child marriages on the basis that it violated sections 81(1) and 78(1) of the Constitution which, read together, stipulated that persons below the age of majority cannot found a family. In the process, the Court declared certain provisions of the Marriage Act, particularly section 22(1) thereof, to be invalid and unconstitutional.

Apart from declaring child marriage to be a violation of children's rights, domestic courts have also invoked their power to adequately protect children from sexual exploitation. In *S v. Banda, S v. Chakamoga*,¹⁹⁸ both accused were married mature adults, more than 30 years old, who had sexual intercourse with young girls aged 15 years, about half the accused persons' ages. They both impregnated the young girls. Both accused were charged with contravening section 70 of the Criminal Law Code, having sexual intercourse with a young person. Both were tried by the same magistrate, and sentenced to two years imprisonment of which one year was suspended for five years on the usual conditions for such cases, each remaining with one year effective imprisonment. On review, the High Court took the opportunity to narrate, in broad terms, the role of judges in protecting children from sexual exploitation and advancing their best interests. The Court explicitly relied on, among others, section 81(3) of the Constitution in coming to the conclusion that the decision of the court *aquo* trivialised the rights of the child. Charehwa J, for the Court, held as follows:

More particularly, the specific obligation placed on the courts, and the High Court in particular, by s 81 (3) made me consider that it may be high time that the courts had a serious relook at the sentencing regime for sexual offences so that the message is clearly sent that the courts, in the discharge of their protective mandate for young persons, find that it is totally unacceptable to sexually exploit young persons. This is especially pertinent for offences committed against those young victims aged between 12 and 16 who were directly or impliedly assumed to have "consented" to the sexual violations. The courts must be seen to apply the law in a manner that achieves the intended aim of the legislature in these cases: that is, to effectively protect children from predatory older persons and ensure the eradication, or seriously attempt to eradicate the problem.¹⁹⁹

The Court further underlined that sentencing an old man over 30 years of age to an effective 12 months imprisonment for having sexual intercourse with a young person of 15 years of age can hardly be aimed at deterring other older men from preying on

¹⁹⁶ Judgement No. CCZ 12/2015.

¹⁹⁷ *Ibid.*, p.53.

¹⁹⁸ HH 47-16.

¹⁹⁹ *Ibid.*, p. 3.

young and immature persons, who are swayed by the offer of one or two dollars in these harsh economic times.²⁰⁰ In the Court's view, the very fact that a young person 'agrees' to sexual intercourse with a much older men for such a paltry amount is clear evidence of her immaturity and incapacity to make an informed choice or decision. The age difference and the unequal power dynamics attendant would be considered as aggravating factors.²⁰¹ A promise to marry, or even eventual marriage of the child would, in the Court's view, not be mitigatory as it would effectively deny the child an opportunity for optimal development.²⁰² Charehwa J was at pains to reiterate that judicial officers should never look with favour on much older men who 'marry' or intend to marry these children for purposes of sentencing as this attitude from the bench would seem to be promoting child marriages, which the Constitution and international instruments to which Zimbabwe is a party clearly frown on.²⁰³ Finally, the Court held that:

It is up to judicial officers to show that the courts will not tolerate predatory older men who prey on young persons by handing down appropriately severe sentences. The prevalence of these types of offences, the consequential incalculable damage they cause in preventing young persons from attaining their full potential, the damage to the social fabric, coupled with its impact on national development and the need to conform to international standards in the protection of children ought to be additional grounds for handing down deterrent sentences.²⁰⁴

The cases discussed above revolve around the role of the courts in ensuring adequate protection of children from child marriages and sexual exploitation. However, the child's right to adequate protection by the courts covers all aspects of life, including protection from violence in the family home (this could require the abolition of corporal punishment in the family); protection from personal decisions that threaten the child's life; survival and development; protection in the child justice context; protection in the schools and health care facilities; protection from recruitment into the armed forces of a particular country; protection from harmful social and cultural practices; protection from maltreatment, neglect or any form of abuse; and many other contexts. Like the principle of the best interests of the child, the child's right to adequate protection by the courts is implicated in all of the issues pertaining to the enjoyment by children of their rights.

5 COVID-19 and Children's Rights

Zimbabwe, like many other countries, was forced to take drastic and urgent measures in order to control the spread of COVID-19. Such measures included extended lockdowns which meant school and business closures as well as restrictions on freedom of movement. These measures were necessary as they had the effect of limiting rights of citizens including children. In a policy brief issued a few

²⁰⁰ *Ibid.*, p. 5.

²⁰¹ *Ibid.*, p. 5. See also *S v. Nare*, 1983 (2) ZLR 135 (H) and *S v. Ivhurinosara Ncube*, HH 335-13, p. 3.

²⁰² *Ibid.*, p. 5. See also *S v. Peter Chigogo*, HH 943-15, p. 2.

²⁰³ *S v. Banda*, *S v. Chakamoga*, p. 6. In *S v. Onismo Girandi*, HB 55/12, the need to send a signal to society that courts will descend heavily on child sexual abusers was emphasised, with the Court exhorting that a sentence of not less than two years should be imposed.

²⁰⁴ *S v. Banda*, *S v. Chakamoga*, pp. 6–7.

months after the pandemic had started, UNICEF warned that the effects of COVID-19 on children's rights would potentially be "catastrophic".²⁰⁵ This section briefly considers the impact that COVID-19, in particular the measures that were taken to curb its spread, had on the rights of children in Zimbabwe.

One of the rights that were severely affected by the measures taken to minimise the spread of COVID-19 was the right to education.²⁰⁶ In the shadow of the pandemic, a silent intellectual or cognitive genocide is being committed against billions of school children across the globe. Schools have been forced to close so as to ensure the protection of learners as well as teachers and parents from possible infection. In the current crisis, 191 countries have compulsory school closures and approximately 1.5 billion children are out of school.²⁰⁷ The pandemic has driven about 297 million children out of school across Africa and about 75 per cent of learners have limited or no access to interactive and internet-based learning materials, with the digital divide exacerbating the exclusion of many children from poor families, especially in Sub-Saharan Africa.²⁰⁸ This includes more than 120 million girls who have been affected by school closures across the continent.²⁰⁹ This presents serious challenges for girls from the poorest households who are likely to be the hardest hit and their education severely set back, unless immediate and comprehensive measures are taken to push back the current crisis.

Currently, more than two-thirds of African countries have introduced national distance learning platforms, although the learning materials placed on these platforms are only accessible in one or two major languages, thereby excluding the vast majority of learners.²¹⁰ Only 15 countries are offering distance instruction in more than one language.²¹¹ Most of these distance learning platforms also use digital and online media. Increased digitalisation of schooling is likely to widen inequalities between children as those from poor economic backgrounds are least likely to have access to smartphones, television and the internet.²¹² This is particularly disadvantageous to children, especially given that almost one third of the world's young people, most of them in sub-Saharan Africa, are already digitally excluded.

²⁰⁵ UNICEF, *Policy Brief: The Impact of COVID-19 on Children's Rights*, <<https://www.unicef.org/zimbabwe/media/2631/file/Policy%20Brief:%20The%20Impact%20of%20COVID19%20on%20children.pdf>>, p. 4.

²⁰⁶ See Zimbabwe Education Cluster Humanitarian Response & COVID-19, accessed at <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/zimbabwe_education_cluster_situation_report_8_06.08.2020.pdf>, p.1, where it is stated that 3.5 million learners were affected by the closure of schools due to COVID-19 during the period ranging from 10 July 2020 to 6 August 2020.

²⁰⁷ A. B. Albrechtsen and S. Giannini, 'COVID-19 School Closures Around the World Will Hit Girls Hardest', UNESCO, 31 March, available at <<https://en.unesco.org/news/covid-19-school-closures-around-world-will-hit-girls-hardest>>.

²⁰⁸ J. Sloth-Nielsen, 'Children's Rights and Digital Technology: Focus on African perspectives', 2020, PowerPoint presentation on file with the author.

²⁰⁹ UNESCO, 'Education: From Disruption to Recovery' available at <https://en.unesco.org/covid19/education-response>.

²¹⁰ African Child Policy Forum, *Under siege: Impact of COVID-19 on girls in Africa*, 2020, 18.

²¹¹ UN, *The Impact of COVID-19 on Children: Policy Brief*, 2020.

²¹² OECD, *Combating COVID 19's Effect on Children*, 2020.

The usefulness of current Edtech initiatives to replace face-to-face schooling depends on open access materials, connectivity and resources to cover data costs. Zimbabwe has not moved an inch towards broadening access to internet enabled devices, access to energy especially in the rural context, or distribution of resources for data costs, thereby further marginalising children from poor families in the educational context.

In the urban areas, some of the schools have, however, been able to mitigate the effects of the indefinite closure of schools by continuing teaching through online platforms. As such, even though they were also deprived of access to the resources in their schools as well as physical learning, learners from these schools were able to continue learning. Children with disabilities and those from poor homes and remote rural areas were disproportionately affected, for them learning has been completely paused for the entire period during which schools have been closed.²¹³ This affects not only access to education, but slows the intellectual, emotional and social development of children.

Restrictions on movement also had the effect of limiting the child's right to healthcare. The deployment of security forces to enforce the lockdown made it difficult for people including children to get access to healthcare as it was required that one should have a document that shows that they are exempted from restrictions on freedom of movement.²¹⁴ Even when one makes it to the healthcare facility, health care practitioners often required that they should submit negative COVID-19 test results before they could receive medical attention. For most, this was an insurmountable barrier to healthcare as the COVID-19 tests are too expensive for the majority of the parents.²¹⁵

Another aspect of children's right to health affected by the lockdown relates to "mental health and social development".²¹⁶ Being forced to stay at home for protracted periods with no access to friends and communal environments negatively affects the psychological well-being of children. This is made worse by the lack of dissemination of age-sensitive and gender sensitive medical information explaining how the virus is spread as well as how to protect oneself. Most of the information is not packaged in such a manner as to be understood by children of varying ages. Restrictions are often imposed on children's rights without there being made

²¹³ See Zimbabwe Education Cluster Humanitarian Response & COVID-19, accessed at <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/zimbabwe_education_cluster_situation_report_8_06.08.2020.pdf>, p. 1.

²¹⁴ G. Murewanhema and R. Makurumidze, 'Essential Health Services Delivery in Zimbabwe during the COVID-19 Pandemic: Perspectives and Recommendations', *Pan African Medical Journal* (2020), available at <<https://www.panafrican-med-journal.com/content/series/35/2/143/full/>>.

²¹⁵ C. D Chikwari, 'Coronavirus in Zimbabwe', 11 August 2020, available at <<https://www.thinkglobalhealth.org/article/coronavirus-zimbabwe>>, shows how expensive this test was by comparing it to the salary that was received by a nurse during that period; the COVID-19 test was approximately USD 60 whereas the salary of a nurse was less than USD 30.

²¹⁶ UNICEF, *Policy Brief: The Impact of COVID-19 on Children's Rights*, accessed at <<https://www.unicef.org/zimbabwe/media/2631/file/Policy%20Brief:%20The%20Impact%20of%20COVID19%20on%20children.pdf>>, p. 4.

available “age-appropriate, accurate, regular and accessible information in a language that they were able to understand”.²¹⁷ The constant use of terms such as ‘quarantine, social distancing, sanitiser’ and many others create a language barrier that excludes young children from taking part in curbing the pandemic.

Measures taken to curb the spread of COVID-19 affected various other children’s rights. The closure of schools had the effect of removing children from the protection of the school environment and thereby exposed them to abuses such as child labour as well as physical, emotional and sexual abuse and violence. With parents forced to stay at home, the child’s rights to adequate food and shelter were also affected.²¹⁸ This has been particularly worsened by the fact that the country has a very high unemployment rate and the majority of caregivers rely on the informal sector for livelihoods. The urban poor – living from hand to mouth and relying on informal sector activities that require them to be out of their homes – have been hard hit by the pandemic and stay at home orders.

Lengthy lockdowns and restrictions on freedom of movement have prohibited commercial activities in the informal sector and made them ‘illegal’. This has led to loss of livelihoods in a country where around 90 per cent are employed in the informal sector. These factors drive children from poor families to the margins of society, especially in a country with no social safety nets or unemployment benefits. Even in the context of COVID-driven unemployment, the majority of those affected by lockdown restrictions belong to groups that are already vulnerable – women, PWDs, the poor and the like. Mention should also be made that PWDs and the urban poor – many of whom are vendors who sell their wares in the streets – also have had their livelihoods severely affected. By the same token, children born of or cared for by families or individuals belonging to these categories of persons confront pronounced challenges in every aspect of life.

6 Conclusion

By entrenching a mini-Declaration of Rights for children, the Constitution follows developments at both the international plane and in other foreign jurisdictions. The insertion into the Constitution of a separate section entrenching children’s rights echoes the adoption at the international level of separate instruments – such as the CRC and the African Children’s Charter – protecting children’s rights. At a deeper level, the constitutional protection of children’s rights embodies a paradigm shift from

²¹⁷ UNICEF, *COVID-19 and the Impact on Children’s Rights: The Imperative for a Human-Rights Based Approach*, accessed at https://d3n8a8pro7vhmx.cloudfront.net/childrightsconnect/mailings/851/attachments/original/UNICEF_COVID-19_and_Child_Rights_Imperative_for_a_Human_Rights_Approach_Final_April_2020.pdf?1588854658, p. 4.

²¹⁸ See United Nations in Zimbabwe, *Immediate Socio-Economic Response to COVID-19 in Zimbabwe: Framework for Integrated Policy Analysis and Support*, 2020, pp. 10 and 13, where it is stated that about 2.2 million of Zimbabweans are employed in the informal sector, with such a large population having been most affected by lockdown measures, this had an impact on the food security of quite a number of Zimbabwean households.

social perceptions of children as dependent persons with no rights to the legal status of children as holders of rights. The strength of the CRC and the Zimbabwean Constitution arises from the fact that these instruments offer special protection to children *qua* children, not just as members of the family or the societies in which they live. They all portray the child as a separate person entitled to rights emanating not from their relationships with others but from their separate personhood as an individual. This means that the child is entitled to assert their rights against other persons, parents and the state.

This chapter discussed different categories of children's rights. It was demonstrated that international and national human rights law divide children's rights into three broad categories. These include provision or socio-economic rights, protection rights and participation or empowerment rights. These categories of rights should be read holistically as they are indivisible, interrelated and mutually reinforcing. Each set of rights largely represents specific interests of children, with provision rights broadening the child's interest in developing optimally, participation rights promoting the child's interest in making decisions once competent to do so and protection rights emphasising the child's interest in being protected from harm, neglect, violence, degradation and all forms of exploitation. Protection in the decision-making context largely comes in the form of parental duties and the responsibility of the state in ensuring that parental duties are exercised in the best interests of the child.

Apart from discussing children's rights to provision, participation and protection in different contexts, this chapter also investigated the scope of children's rights in the criminal justice system. These rights include, among others, the child's right not to be detained except as a means of last resort. Whilst the general rule is that no child offender should be caged, the law foresees instances when the demands of justice and fairness may call for the imprisonment of the child offender. However, when it becomes necessary to cage a child for committing a serious crime, the Court should ensure that the conditions of detention comply with at least three explicitly stipulated constitutional requirements or standards. These requirements include the idea that the child offender should be detained for the shortest appropriate period, kept separately from adult offenders and treated in a manner and kept in conditions that take account of the child's age. These rights were discussed in some detail, and it was shown that the courts do refer to the relevant provisions when they make decisions.

The constitutional protection of children's rights paves way for the present and future enforcement of children's rights in this country. It is patent that the legal regulatory framework for children's rights is more than adequate and protects all categories of children's rights. Like at the international level, the best interests of the child remains the paramount consideration under our law and enables the courts to make decisions in whatever way they consider 'best' for children. In addition, the Constitution emphasises that children are entitled to adequate protection by the courts, in particular by the High Court as the upper guardian of all minors. However, it remains to be seen whether the courts will actively perform their duty to protect children from the harm that is often occasioned by strangers, parents, caregivers and the state. To perform their functions adequately, parents, courts and the state

should make joint efforts towards promoting children's rights in line with international and domestic law. As has been suggested above, the enforcement of the concept of the evolving capacities of the child enables decision-makers, including parents, courts and the state, to promote all sets of children's rights.