

A CRITICAL ANALYSIS OF THE CONCEPT OF THE BEST INTEREST OF THE CHILD IN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM.

MINI-DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE MASTER OF LAWS DEGREE IN HUMAN RIGHTS LAW

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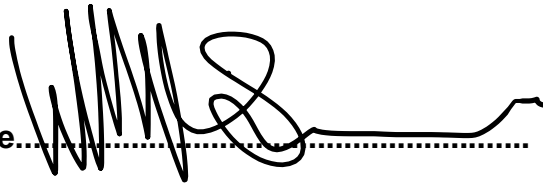


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Declaration

I Tshisikule MI, hereby state that the LLM mini-dissertation titled, “**A CRITICAL ANALYSIS OF THE CONCEPT OF THE BEST INTEREST OF THE CHILD IN THE SOUTH AFRICAN CRIMINAL JUSTICE**” herein within partial fulfilment of my LLM in Human Rights degree is my own original work, contains no plagiarism and has, to the best of my knowledge, not previously submitted by me or any other person to this or any other institution.

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Dedication

This study is the manifestation of countless and arduous sacrifices.

I dedicate it to my daughter Shothodzo Zuri Selina Tshisikule.

Abstract

South Africa continues to witness high crime rates, and children are increasingly involved in crime-related issues as witnesses, victims, or offenders. Therefore, more children are exposed to the criminal justice system processes. In light of South Africa's Constitutional supremacy, the Constitution serves as the basic norm for all laws of general application and ensures a coherent and value-based legal system. This study explored how, children and their best interests are catered for in the criminal justice processes, despite their vulnerability. The pursuit to study the best interests of children emanated from discourses that classify children's best interests under family law, and little attention is directed towards criminal justice processes that affect children, and the meagre extent to which the best interest principle and narratives are recognised, considered, and adapted to cater for children involved in criminal justice processes. Consequently, South Africa also adopted the Child Justice Act of 2008, which is heralded as a key step towards integrating and addressing all fundamental criminal justice processes related to children and significantly considering their best interests. Therefore, the study sought to examine whether children's best interests are fully captured at the legislative level in the criminal justice system. Furthermore, the study explored how the criminal justice system interprets the best interests of children developed by the judiciary in line with global trends and practices, considering that South Africa is part of the global community, and its Constitution is regarded as a framework that champions key values, rights and principles required in a functional society. The study also analysed the processes and developments implemented by the South African government to protect and promote the best interests of children in criminal justice processes.

Keywords: best interests, children, criminal justice.

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CHAPTER ONE INTRODUCTION

1.1. INTRODUCTION

The delay in the enactment of the Child Justice Act¹, intended to exclusively deal with child offenders, left them subjected to adult criminal justice processes under the Criminal Procedure Act of 1977 of South Africa.² The Children's Rights Act,³ enacted on the 1st of April 2010 is different from the Child Justice Act. The Children's Rights Act does not offer a solution or examine the process that criminal courts follow when dealing with child offenders.⁴ This Act emphasises the protection of children's rights. It, however, fell short of addressing the need to develop guidelines on how the South African Courts should deal with child offenders and consider children's best interests in criminal proceedings.

The 1993 Interim Constitution of South Africa stated that "every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age".⁵ The interim Constitution did not provide court guidelines when dealing with child offenders. However, they should not be mixed with their adult counterparts when detained. Unlike in the interim Constitution, the 1996 Constitution directs that a child should not be detained, unless it is the last resort, and such detention must be for the shortest appropriate period.⁶

Despite the inception of the Constitution of the Republic of South Africa, 1996⁷ including the Bill of Rights, entrenched with children's rights in section 28, it took South Africa approximately 11 years (1996 – 2008) to realise the need to enact the Child Justice Act that has clear guidelines aimed at protecting the best interests of child

¹ The Child Justice Act 75 of 2008, hereafter referred to as Child Justice Act.

² Criminal Procedure Act 51 of 1977, hereafter referred to as Criminal Procedure Act.

³ Children's Rights Act 8 of 2005, hereafter referred to Children's Act.

⁴ Children's Rights Act 8 of 2005.

⁵ Section 30 of the interim Constitution of South Africa, 200 of 1993.

⁶ Section 28(1) (g) of the Constitution of the Republic of South Africa, 1996, hereinafter referred to as Constitution.

⁷ Section 28 of the Constitution.

offenders in the South African Criminal Justice system. This delay led to the subjection of child offenders to a hard-core prosecution process.

The Child Justice Act of 2008 turned the situation around by creating the guidelines incorporated into the South African Criminal Justice System to specifically deal with procedures to be followed by the courts when dealing with child offenders.⁸ This Act did not only to separate the child from the adult criminal justice system but it also largely protected children's rights as envisaged in section 28 of the Republic of South African Constitution.⁹ Section 28 of the Constitution has enveloped many important children's rights. The study mostly focused on section 28(1)(g) and section 28(2).¹⁰ Section 28(1)(g) states that children should not be detained unless it is the last resort, where considered the individual should be detained for the shortest reasonable time.¹¹ The detained child must be kept separately from other detained persons who are over the age of 18 and must be treated in a manner that is considerate to his/her age.¹² Section 28(2) of the Constitution significantly considers child's best interests in every matter involving a child.¹³ Whether the child is involved as a witness, victim or offender, his or her best interests should be of primary importance to the courts.

Children's best interests gained international recognition over the years. The Constitution of South Africa states that when interpreting the Bill of Rights, one must consider international law and then foreign law may be regarded.¹⁴ Therefore, South Africa is bound by relevant international laws not by foreign laws. However, foreign laws carry persuasive value.

South Africa has several international law obligations related to children's best interests. These includes the United Nations Convention on the rights of the child (UNCRC) which has children's best interests as one of its foundational stones.¹⁵ South Africa signed this convention in 1993 and ratified it on the 16th of June 1995 and

⁸ Child Justice Act 75 of 2008.

⁹ Section 28(1) of the Constitution.

¹⁰ Section 28 (1) (g) & 28(2) of the Constitution.

¹¹ Section 28(1) (g) of the Constitution.

¹² Section 28 of the Constitution.

¹³ Section 28(2) of the Constitution.

¹⁴ Section 39 of the Constitution.

¹⁵ United Nations Convention on the Rights of the Child, hereinafter referred as the Convention.

therefore, is bound by it. Article 3 of the Convention on children's rights states that the best interests of the child should be a primary concern.¹⁶ This means that every legislative, administrative and judicial body should apply children's best interest principle by systematically considering how children's rights and interests will be affected by their actions.¹⁷

The African Charter on children's rights and welfare requires that the best interests of the child must be of primary concern in all actions concerning the child done by any person or authority.¹⁸ While the Universal Declaration of Human Rights does not specifically call out the principle of children's best interests, it does however, promote the importance of giving special care and assistance to children under article 25.¹⁹

This research investigated the impact made by the implementation of the Child Justice Act on the South African Criminal Justice System. the study also assessed whether the obligations of children's best interests (both international & Constitutional obligations) are met by the Child Justice Act in criminal proceedings dealing with the child offenders in South Africa.

1.2. PROBLEM STATEMENT

It is common knowledge that the "best interest of the child" is constantly considered in cases of custody and parent-child relationships. It has also developed to be a well-recognised concept in civil courts, dealing with family law cases. Therefore, the problem is most criminal cases dealing with minors are sent for review and they are constantly reversed. This shows a gap in consideration, interpretation, and application of the Child Justice Act inter-alia children's best interests. The problem emanated from the submission that, children's best interests cannot and should not be disregarded in criminal proceedings. This concept should not only be done when minors are serving as victims or witnesses in court but also when they are offenders. Hence, the study focused on whether the concept of "best interest of the child" in the criminal justice system is extensively addressed in the relevant legislation, particularly the Child

¹⁶ Same as above.

¹⁷ A Degol and S Dinku 'Notes on the principle of the best interest of the child: meaning, history and its place under Ethiopian Law' (2011) 5(2) *Mizan Law Review* page number 328.

¹⁸ African Charter on the rights and welfare of the Child 1990.

¹⁹ The Universal Declaration of Human Rights 1948.

Justice Act. The study also questioned whether the responsible role players in the criminal justice system (police, judiciary, and corrections) play their roles in compliance with the Child Justice Act. The Child Justice Act is the key statute for children's criminal matters and considers best interest principle in all criminal justice processes.

The study intended to illuminate the extent to which the concept of children's best interest has been provided for or furnished in the Child Justice Act and thereafter interpreted and applied when dealing with child offenders. The success of the aims of this study depended on incorporating an approach towards relevant case law review.

1.3. DEFINITION OF KEY CONCEPTS

1.3.1. CHILD

The study regards a child under the Child Justice Act in terms of Section 1 as any person who is under the age of 18 years.²⁰

1.3.2. CHILD OFFENDER

A child offender is a minor who conflicts with the law and is accused of committing an offence.²¹

1.3.3. BEST INTEREST OF THE CHILD

The best interest of the child does not have a single definition. It is generally known as a child rights principle drawn from article 3 of the United Nations Convention on children's rights which states, "...in all actions concerning children, the best interests of the child shall be a primary consideration."²² The South African Constitution also employed the principle of the best interest of the child in section 28 (2) of the Constitution which states that child's best interests are of paramount importance in every situation concerning children.²³ The principle of the best interests of children is meant for courts to give effect on what the best expectations for the child in all child-related matters.²⁴

²⁰ The Child Justice Act 75 of 2008.

²¹ D Dzik 'Vision and the juvenile delinquent' (1996) 49 (8) *Clinical and Experimental Optometry*.

²² The United Nations Convention on the Rights of the Child.

²³ The Constitution section 28(2).

²⁴ Same as above.

1.3.4. CRIMINAL JUSTICE SYSTEM

Criminal justice system is the system of law enforcement that is directly involved in apprehending, prosecuting, defending, sentencing, and punishing those who are suspected or convicted of criminal offences.

1.4. AIMS AND OBJECTIVES OF THE STUDY

The introduction of this study made a clear statement on how the Child Justice Act was initially meant to exclusively deal with the child offenders. The Child Justice Act made room for a separate criminal justice system for child offenders from the adult offenders. Although the creation of a separate criminal justice system for child offenders was imperative, the position of the best interest of the child in the Child Justice Act must be well-guarded. This is because this principle is indispensable when dealing with child-related matters.

Therefore, the **aim** of the study is to:

Assess the extent to which the South African Child Justice Act recognise and protect the best interest of the child in criminal justice proceedings.

The **objectives** of this study are to:

- (a) Investigate the full and functional concept of best interests of a child standard.
- (b) Ascertain and explore the legislative position and how South African courts deal with children's best interests in regulating child-related criminal affairs.
- (c) Deduce how South Africa (legislatively and judicially) meets the obligations and best global practices when dealing with cases that require children's best interests in criminal justice processes, and how their decisions can be used to influence the South African Criminal Justice System process that affect the best interests of children.

1.5. RESEARCH QUESTION

To what extent does the concept of the best interest of the child been employed in dealing with child offenders in criminal proceedings since the implementation of the Child Justice Act.

1.5.1. SUB-QUESTIONS

- (a) What does the principle of children's best interests entail in criminal justice proceedings?

(b) How are South African criminal justice role players dealing with the Child Justice Act provisions towards promoting the best interests of children during criminal justice processes?

(c) Does South Africa's position on the best interest of the children principle meet and comply with international law standards?

1.6. RESEARCH METHODOLOGY

There are two main methodologies which can be used in research namely, doctrinal, and empirical. This study employed the doctrinal also known as desk-based research methodology. Myeni defines doctrinal research as research carried out on a legal proposition by analysing the existing statutory provisions and cases, applying the reasoning power.²⁵ The doctrinal methodology entails the use of primary and secondary sources of law such as case law, legislation, international law and treaties, journal articles, textbooks, and other sources of legal information. Going through this expanse of information helps answer questions relating to diametrically opposing legal views which successfully bring comprehensive legal solutions. Thus, the researcher resorted to the doctrinal research methodology.

Since the research methodology to be used for this study has been established, it is imperative to unmask some of the possible limitations that might hinder the intended results of this study. The limitations are uncovered below.

1.7. LIMITATIONS OF THE STUDY

This study is mostly limited to physical and internet-based libraries, using materials such as textbooks, case laws, international laws, journal articles and media reports among others. The study does not directly confront and do a field study including criminal justice role players such as police, judicial officers and correctional custodians or children and guardians of affected children. The study is also subject to time and resource limitation; there are no adequate funds to pursue the study in a broader sense that engages all role players and affected parties.

1.8. LITERATURE REVIEW

Children's best interests issues mostly appear in academic literature, focusing on family law related aspects. Clarke wrote about the aspects of the standards of the best

²⁵ A Kharel *Doctrinal legal research* 2018.

interest of the child in family law.²⁶ She articulated that the best interest of the child is considered to be a determining factor in matters relating to guardianship, access and custody of children in South Africa.²⁷ According to Clark, the concept of the best interest of the child is one of the ground works upon which the convention on children's rights was built.²⁸ As a result, children's best interests must be of prime consideration in all child-related matters.²⁹

As this study explores the best interests of the child principle in the criminal justice system, it is important to note that the Constitution³⁰ and the Child Justice Act,³¹ are the key enabling pieces of legislation under study. The South African position is that the principle of best interests of a child is found in all human rights frameworks and should, therefore, be a primary consideration in all matters involving children.³²

Reyneke provides that the South African Constitution as the basic norm for all laws of general application provides for the adoption and development of a single, coherent value-based system and framework.³³ This entails that the coherent value-base legal system would reflect in all enabling statutes, in this study the norm of best interests of the child would be expected to reflect in an enabling statute such as the Child Justice Act.³⁴ Reyneke explores the concept of best interests of children through a school environment model, by noting that this environment consists mostly of children and on transgression of rules, forms of punishment or dealing with the transgression by focusing on punishment does not necessarily help the child offender, victim nor aid in engineering the perceptions of child witnesses in this context.³⁵ This kind of critical

²⁶ B Clark, A golden thread-some aspects of the application of the standard of the best interest of the child in south African Family law, (2000) 11 (3) *Stellenbosch Law Review* page number 328.

²⁷ As above.

²⁸ Clark 'n 25 above'.

²⁹ Same as above.

³⁰ The Constitution of South Africa, 1996.

³¹ Child Justice Act 75 of 2008.

³² I Maithufi 'The best interests of the child and African customary law' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 140.

³³ M Reyneke 'Realising the Child's Best Interests: Lessons from the Child Justice Act to Improve the South African Schools Act' (2016) 19 *Potchefstroom Electronic Law Journal* 2.

³⁴ Reyneke 'n above'.

³⁵ Reyneke 'n above'.

analysis helps this study to draw towards its objective as it clearly demonstrates that in setting up a system of justice, dealing with transgressions of rules, where the concerned parties are children, the mannerism of dealing with such transgressions should be principle-based, in the best interests of the child. When looking at the criminal justice system as whole, the question of the best interests of children being of paramount importance echoes the most and should be material basis for developing and adopting enabling legislation. These further questions the Child Justice Act's objective, inter-alia, the best interests of children as the influential or desired outcome and effect. The discourse by Reyneke is critical to this study as it provides an environment that issues formal processes of handling and dealing with children, in the context of compliance with rules and transgression as well as punishment of such children. With consideration of the mere fact of exposure to formal processes, how are such process suited, designed and influential towards the bests interests of the child, is the key question posed by Reyneke's study. Unlike this study, Reyneke does not develop his arguments further, towards an enabling statute such as the Child Justice Act.

As the Child Justice Act serves as one of the most fundamental statutes in criminal justice processes affecting children, it is also important to note its predisposition in protecting and promoting the standard and notion of best interests of children who are in contact with the criminal justice processes. In providing legislative guidance on the best interests of the child, the Child Justice Act calls upon the Constitutional Court to invoke several processes such as diversion programmes that focus on child development and channel them away from the criminal justice system while addressing the actual root cause for offending attributes, or effects of being victimised or witnessing crime.³⁶ The Act notes that in criminal justice processes, whether sentencing or mere participation of a child should have the end result of developing and assisting the child with future reintegration.³⁷ For instance, provisions on protecting bests interests of children through protecting the identity of certain child offenders, or victims in a criminal justice process, can be said to suggest that in protecting a child's identity at the criminal justice stage, the child would grow and reintegrate in the community under protection and disassociation with the crime, victimisation as may be

³⁶ Chapters 6 and 7 of the Child Justice Act 75 of 2008.

³⁷ Child Justice Act 75 of 2008.

applicable and thus, the best interests are protected and promoted. The question that would arise in this regard is whether the Act has adequately provided for the host of other issues or whether it is not being fully interpreted and applied by the role criminal justice system role players. For instance, the South African courts have been faced with a question regarding whether there is a line to the best interests of the child with regards to protection of their identity if this protection is not applicable upon turning to majority status. According to *Centre for Child Law v Minister of Justice and Constitutional Development*,³⁸ key considerations in protecting and promoting best interests of children is their physical and psychological maturity, vulnerability to influence and peer pressure, impulsiveness and prospects to develop.³⁹ This judicial observation and note, leaves room for several questions revolving around whether this is a blanket sphere under which the best interests of children revolve, particularly in criminal justice processes.

On the other hand, the United Nations and United Nations International Children's Emergency Fund (UNICEF) (adopted and running on mandate to address the short and long-term needs of children), notes that during criminal justice processes there is need to help, protect and promote the interests of all categories of children (witnesses, victims, offenders) in participating, accounting and dealing with law at the criminal justice level.⁴⁰ Key to these guidelines on protecting children is the idea that all children have similar rights with every other person.⁴¹ The promotion and protection of best interests of children (as expressed in the Convention on the Rights of Children through a rights based approach) primarily aim to ensure that children have all they need to grow, develop and learn in a safe environment and health to become full members of their community.⁴² In this regard, the justice system is regarded as a process that must always be fair in its objective to address and repair harm caused by someone who transgressed the law. As a result, child victims and witnesses are to be treated in a

³⁸ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC) 27.

³⁹ *Centre for Child Law v Minister of Justice and Constitutional Development*.

⁴⁰ United Nations Office on Drugs and Crime (UNICEF) 'United Nations guidelines on Justice in matters involving child victims and witnesses of crime'.

⁴¹ The Convention on the Rights of the Child 1989.

⁴² UNODC 'n 39 above'.

caring and sensitive manner throughout the process and each child being treated as an individual with own individual needs, wishes and feelings as echoed by Reyneke.⁴³

In considering the present day crime context, Bekink expresses that the nature of crime trends shows that children are increasingly becoming part of the larger number of crime victims and witnesses.⁴⁴ This means that children are increasingly being exposed to the criminal justice processes, which justifies and necessitates exploring what degree of emphasis has been placed on the criminal justice system processes and approach to criminal matters involving children litigants (offender, witness or victim). For instance, in the case of *S v Mokoena*⁴⁵ it was noted that all forms of vulnerable litigants must be protected from public exposure:

Vulnerable witnesses must be protected from public exposure, either because disclosure of their identity may endanger their life or limb or because the sense of embarrassment and discomfort at having to testify before an audience, particularly concerning traumatic and sexually sensitive events, may expose the witness to emotional and psychological harm.

It can be noted that the reasoning in this case, alludes and applies to circumstances of children, who are generally regarded as a vulnerable group in society. This also redirects to the objectives of this study, on whether adequate legislative provisions are in place to promote best interests of children during criminal justice processes. This also redirects to whether the role players (police, judiciary, and correctional services) are interpreting and applying the legislative provisions in a manner that realises best interests of children in criminal justice processes, to ensure that, 'as a vulnerable group' children are adequately protected during criminal justice processes to realise, protect, and promote their best interests. An illustrative example is from an argument provided by Bekink who noted that, when perusing section 28 of the Constitution which is the cardinal and basic norm from which best interests of children are derived from in South Africa, the line is not drawn clearly on the extent of protection to be afforded children. However, it may merely be implied and presumed that the best interests of the child

⁴³ Same as above.

⁴⁴ M Bekink 'The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa' (2019) 22 *Potchefstroom Electronic Law Journal*.

⁴⁵ *S v Mokoena* 2008 2 SACR 216 (T).

are of paramount importance in all matters concerning a child, in this study being a child witness, offender or victim.⁴⁶ An example by Brand and Bekink is drawn in determining the Constitutional protection afforded to child witnesses and victims during criminal justice processes, where the Criminal Procedure Act provides that specific and special measures for testimonies are to be applied such as testifying in camera, prohibition of publication of identity of child victim or witness and measures to use intermediaries.⁴⁷ The scholars (Bekink and Brand) note that despite the CPA finding fundamental relevance and application in this regard to protect the interests of child witnesses and victims, the accurate position, scope and Constitutional consistency remains questionable.⁴⁸ This gap can further be largely attributed to the gap in literature, regarding the extent to which the best interests of the child has been defined with regards to the criminal justice system dealing with child offenders, victims or witnesses.

While Clarke explored the indeterminacy of the child's best interests, what differentiates her research from this study is the fact that she addressed the importance of this notion with great fixation on private law, particularly family law. This research, however, revolves around the child's best interests in the Criminal justice system, particularly in the Child Justice Act.

Prinsloo wrote an article on the best interest of the child in relation to the protection of child victims and witnesses in the South African Criminal Justice System.⁴⁹ Similar to Clarke, he gave the synopsis on how the UN Convention on the Rights of the Child made room for resounding policy and legislative changes.⁵⁰ Regardless of this undertaking, Prinsloo ascertained that the children's rights within the criminal justice system are being neglected. Even though the Criminal Procedure Act was amended to allow for a more child friendly environment and procedures, they are still inadequate.

⁴⁶ Bekink 'n 43 above' 26-27.

⁴⁷ B Bekink and D Brand "Constitutional Protection of Children" in Davel CJ (ed) *Introduction to Child Law in South Africa* (2000) 169- 196.

⁴⁸ Same as above.

⁴⁹ J Prinsloo 'In the best interest of the child: the protection of child victims and witnesses in the South African Criminal Justice System' (2008) 9 (2) *Child Abuse Research in South Africa* 3.

⁵⁰ Same as above.

Prinsloo was inarguably thorough in his study, especially on explaining the perception that after a long series of legislative developments in the South African criminal justice system and the influence by international law, there is still a certain level of inadequacy in dealing with children.⁵¹ However, what distinguishes Prinsloo's study from this research is the fact that he focused mainly on the way in which child victims and witnesses are protected while this study places its focus on child offenders as well.⁵²

Heaton made a contribution in academic literature which outlines the suitable approach to be used when applying the concept of the best interests of the child and he evaluated the factors that are employed in determining the child's best interests.⁵³ In Heaton's view, section 28 (2) of the Constitution of the Republic of South Africa and the Constitutional Court decisions are used as the first resort for guidance concerning the correct approach to be used.⁵⁴ In her research, Heaton concluded that all factors that are shown to be relevant because they could negatively or positively affect the individual in any way should be taken into account without reducing other Constitutionally-protected rights and interests to nothing.⁵⁵

Heaton outlined the factors to be considered when determining the best interests of the child; however, her focus differs from the foci of this study. This study sought to bring clarity on the position of the best interests of the child in the South African criminal justice system. Even if both studies discussed how courts deal with the best interests of the child, this study addresses the approach used on the best interest of the child in the Child Justice Act.

Reyneke gave a scholarly view on the best interests of the child. Reyneke states that, although the contexts of school discipline and child justice differ considerably, there are a number of contact points and points that overlap.⁵⁶ Since the South African

⁵¹ Prinsloo 'n 48 above'.

⁵² Same as above.

⁵³ J Heaton 'An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) 34 (2) *Journal for juridical science* 1-18.

⁵⁴ Same as above.

⁵⁵ J Heaton 'n 52 above'.

⁵⁶ M Reyneke 'Realising the child's best interests: lessons from the Child Justice Act to improve the South African Schools Act' (2016) 19 (1) *Potchefstroom Electronic Law Journal* page number.

Schools Act 84 of 1996 came into operation, the Constitutional Court has made several pronouncements on the best interests of the child concept which are not reflected in the provisions regarding school discipline.⁵⁷ The Child Justice Act came into operation in 2010.⁵⁸ This Act provides valuable guideline on how to deal with transgressing children.⁵⁹ It is, therefore, proposed that the Schools Act should draw from the provisions of the Child Justice Act in order to refine the Schools Act with regards to the matter school discipline and to ensure its proper alignment with the Constitutional imperatives regarding the best interests of the child right.⁶⁰

Reyneke's study and the current study on the best interest of the child draws from the Child Justice Act. These two studies both agree that the Child Justice Act does provide a valuable guideline on how to deal with child offenders. However, the aim of this research is not to blindly accept that there is a valuable guideline but to assess the extent to which the South African Child Justice Act recognise and protect the best interest of the child in criminal justice proceedings.

When reviewing literature, it is important to consider foreign scholarly views such as Parker who writes about the principles and problems on best interests of the child. Parker asserts that the law firmly requires those who make decisions concerning children to act in the best interests of the child.⁶¹ At the same time, the best interests' standards are regarded as indeterminate. In his article Parker made an exploration of the indeterminacy argument and then he turned to ways in which in practice, a degree of predictable operation may still result.⁶² According to Parker, the best interests of the child is vaguely defined in the legal system and there is no clarity on how far its application stretches.⁶³ In as much as Parker explored the indeterminacy of the child's best interests, what differentiates his research from this study is the fact that he addressed the vagueness of the said notion in a broad sense. Although one could have

⁵⁷ As above.

⁵⁸ Reyneke 'n 55 above'.

⁵⁹ Same as above.

⁶⁰ Reyneke 'n 55 above'.

⁶¹ S Parker 'The best interests of the child- principles and problems' (1994) 8(1) *International Journal of Law, Policy and Family* 26.

⁶² Same as above.

⁶³ Parker S (n60 above).

tried specialising on the application of the concept in family law, this research focuses on the address of the child's best interests in the criminal justice system, particularly in the Child Justice Act.

Conward wrote an article on the juvenile justice system and how it is not necessarily in the best interests of children.⁶⁴ Conward conducted a comparative study in which she discussed the changes that have occurred in the juvenile justice system from common law to the present.⁶⁵ The purpose of her study was to demonstrate that the treatment of child offenders in the American justice system has come full circle.⁶⁶ According to Conward, the juvenile justice system is not really in the best interests of children.⁶⁷ Conward also covered the alternative measures that might be implemented to prevent juveniles from offending, provide options for rehabilitation and punish child offenders appropriately for the crimes they commit.⁶⁸

1.9. ETHICAL CONSIDERATIONS

The study considers the following ethical issues:

- Ensuring research quality and integrity
- Acquiring informed consent from participants
- Maintaining participant's confidentiality and anonymity
- Ensuring that participants will voluntarily participate in the study
- Avoiding harm to participants
- Showing that the research is independent and impartial.

1.10. CHAPTER OUTLINE

This dissertation consists of five chapters.

Chapter one: Introduction

⁶⁴ C Conward 'The Juvenile Justice System: not necessarily in the best interests of children' (1998) 33 (1) *New English Law Review Journal* 39-80.

⁶⁵ Same as above.

⁶⁶ Conward (n 63 above).

⁶⁷ Same as above.

⁶⁸ Same as above.

This chapter comprises of an introduction which gives a brief background of the study, problem statement, aim and objectives of the study, research question, brief literature review of key opinions on the subject, research methodology and all these elements serve as introduction to the study.

Chapter two: An overview of the ‘best interests’ of children concept

This chapter explores the elements of the key concept under study. This means looking at the origins, development, and adoption of the principle of children’s best interests in matters affecting children, how it has been interpreted and adopted in South Africa. The chapter drives towards capturing the best functional and applicable narrative of the concept.

Chapter three: An overview of interpretation, application, and development of the ‘bests interest of the child’ concept in South Africa’s criminal justice system

This chapter will give an assessment of how statutes have captured and considered the concept of best interests in developing and implementing laws that affect matters relating to children in criminal proceedings. The chapter also explores how South African courts have dealt with the concept of the best interests of the child in criminal justice processes before and after the promulgation of the Child Justice Act.

Chapter four: Assessing South Africa’s compliance with obligations and trends in global practice.

The chapter investigates whether South Africa complies with its international obligations concerning the handling of children during criminal justice processes and steps that South Africa has taken to fully realise and protect the concept of the best interest of the child in such criminal justice processes. This chapter puts the incorporation of international law standards and norms in the Child Justice Act to test.

Chapter five: Recommendations and conclusion

The chapter gives the general conclusion and makes recommendations.

CHAPTER TWO

AN OVERVIEW OF THE 'BEST INTERESTS' OF CHILDREN CONCEPT

2.1. INTRODUCTION

The previous chapter introduced the study, giving an overview of key aspects such as the background of the problem regarding compliance, provisions, and standard of children's best interests during criminal justice processes. The chapter also looked at the problem, the research questions to be addressed, the aim, objectives of the study and preliminary literature review.

This chapter explores the elements of the key concept of children's best interests under study. This entails the origins, development, and adoption of the principle in matters affecting children, how it has been interpreted, and developed in South Africa. The chapter drives towards capturing the best narrative of the concept functional and applicable to this study.

2.2. AN OVERVIEW OF THE BEST INTERESTS OF THE CHILD PRINCIPLE

Depending on subject and jurisprudence, the child interest principle can be a mere principle of general application or a right protected as part of fundamental rights. The following overview is broken into parts that clearly define, identify, and classify the best interest principle ensuring that it covers a wider spectrum its characteristics and nature.

2.2.1. DEFINING BESTS INTERESTS OF THE CHILD AND ITS ORIGINS

Article 3 of the United Nations Convention on the Rights of the Child (CRC) stipulates that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of primary consideration."⁶⁹ In this regard, the best interests of the child principle becomes a right in term of international law, based on the notion of fundamental rights of children. It is however important to trace and identify the origins and development of this principle before merely alluding to its standing as a fundamental right for children. One of the key issues under international law aspirations is the need to safeguard, protect and promote rights and interests of children. Therefore, adopting the best interests of the child principle in the 20th and 21st century can be regarded as part of the developments made to public policy. The

⁶⁹ Article 3 of the United Nations Convention on the Rights of the Child (hereinafter CRC)

principle is originally a doctrine and aspect of *parens patriae* replacing several doctrines on children's rights, such as mere lack of safeguard and protection of children's interests.⁷⁰ For instance, Finley noted that the origins of the principle were initiated to replace other concepts such as 'tender years' which entailed that children are not resilient such that changes to their livelihood circumstances may have an adverse impact on their well-being.⁷¹ Another assertion on the origins of the best interests principle is based on the past practices where fathers were granted sole guardianship of their children after divorce, contrary to the dominating notion that custody of children is granted to any person with whom it is in the best interests of the child. These assertions do not fully capture the origins or meaning of the principle but clarifies how the principle originated from the tenets of family law. The principle has therefore developed to its current standing through family law adjudications, but further expanded and developed through other bodies of the law such as international law. Under criminal law, the principle of best interests of the child is not confined to a particular field but provided as applicable to all child-related circumstances. Therefore, this study regards this principle under criminal justice proceedings which involves children.

The Committee on the Rights of the Child notes that when conceptualisation the 'best interests of the child' concept it is necessary to capture the elements of the principle.⁷² These elements include the views and aspirations of the child, identity, age, gender, personal history and background.⁷³ The care, protection and safety of a child, child's well-being, family environment, family relations and contact, social contacts, peers and adults are part of the best interests of a child.⁷⁴ Furthermore, circumstances of vulnerability towards safety, risks, resiliency or empowerment are also crucial to the best interests of children.⁷⁵ Other fundamental issues are the child's skills and evolving capabilities, all other basic rights and needs including health, education, development,

⁷⁰ D Hubin 'Parental Rights and Due Process' (1999) 1 *Journal of Law & Family Studies* 123–150.

⁷¹ G Finley 'Best interests of the child and the eye of the beholder' (2002) 47 *Psyccritiques* 629-631.

⁷² Committee on the Rights of the Child, General Comment No. 14 (2013), Chapter V.A.1 and par. 44

⁷³ Committee on the Rights of the Child, General Comment No. 14 (2013), Chapter V.A.1 and par. 44

⁷⁴ Same as above.

⁷⁵ Same as above.

gradual development towards adulthood and independent life.⁷⁶ This indicates that the definition and concept of children's best interests is broader within its textual sense, which makes it even broader in the practicality of its application.

In light of the above origins of the children's best interest principle, it is important to discuss some key elements of the principle that characterise it and explain how it is assessed and determined in a number of varying cases affecting children.

2.2.2. CHARACTER, NATURE, AND STANDARD FOR ASSESSING THE BEST INTEREST PRINCIPLE

As already indicated in the above discussion the international law's stance on the best interests of the child provides a more developed and expanded idea of the principle. Therefore, in discussing the character and standard to assess children's best interests, reference must be made to the position of international law in this matter. Article 3 of the Convention on Rights of the Child (CRC) provides that in order to fully engage an assessment of the best interests of a child refers to the process of evaluating and balancing all crucial elements as necessary to reach a decisive point on certain issues pertaining to a particular child or group of children.⁷⁷ The process of assessing the standards of best interests in any particular circumstance is described by the Committee on the Rights of the Child as evolving with time due to how circumstances of each child change with time, capabilities, and growth, meaning children's best interests must be constantly reassessed and aligned with the current child-related needs.⁷⁸ As a result, the assessment processes may be informal and *ad hoc* or formal aimed at looking on everyday matters and providing decisions with less severe implications for the child whose interests are to be determined.⁷⁹ Significantly, this lays foundation for the argument under study. Thus, in any matter or circumstances where affairs and the livelihood of a child is concerned such as criminal justice processes, the relevant role players must ensure that the best interests of the concerned child are the central and pivotal in determining the decision-making process.

⁷⁶ Same as above.

⁷⁷ Article 3 of the CRC.

⁷⁸ Committee on the Rights of the Child, General Comment No. 14 (2013), par. 47.

⁷⁹ Same as above.

The CRC Committee further noted that the justification behind the process of assessing and determining the best interests of the child is founded on the need to decide, safeguard, well-being, and development of the child in terms of national laws.⁸⁰ It therefore, means that the process to assess and decide on the best interests of a child is commonly conducted with the participation and oversight of public authorities and professional decision makers on children's affairs.⁸¹ This argument influenced the need to assess whether South African processes, and the relevant role players in affairs under criminal justice processes involving children religiously follow the need to assess and determine children's best interests compared to the need to address the criminal matters in question. The CRC Committee further highlighted that the key role players in the process of assessing the standard of children's best interests would have to weigh and balance all relevant elements in the case, considering all rights of the child, obligations owed to public authorities and service providers in the case of a child.⁸² The overall objective of this process is to identify and adopt an effective and sustainable solution to the affairs and livelihood of the concerned child. This study also noted and argued that the principle involves the criminal justice system processes and other health professionals as assessors of the standards to be followed in the best interest of a child involved in a criminal justice proceeding.

The assessment can also be noted as a process of collecting all relevant facts necessary to reach an informed decision on the effect of an action, measure, and decision children's affairs or future.⁸³ For instance, the child's aspirations as known, identified or assumed under the best interest model will have to become the central key perspective adopted in a matter going forward to reach an informed decision, and measure that will impact a child's future affairs. This also means that a well-executed assessment process of the best interests of a child will address and consider some key issues as follows; child and guardian's identity, as well as quality of relationship with guardian and any other close persons.⁸⁴ The consideration of case assessments

⁸⁰ Same as above.

⁸¹ Same as above.

⁸² Same as above.

⁸³ Same as above.

⁸⁴ "CBSS Guidelines Promoting the Human Rights and the Best Interests of the Child in Transnational Child Protection Cases" (PDF). Archived from the original (PDF) on 2016-03-10. Retrieved from:

on elements such as listening to the child's story from the child's personal expression, assessing child's situation, background, needs, social situation and family assessment.⁸⁵ Furthermore, conducting professional forensic examinations and interviews with the child, determining risk and security assessments and mapping sources of support, skills, potential and needs for empowerment purposes is important.⁸⁶ In light of the above, the process must further assess how to develop a lifetime project for the child, making impactful decisions in the form of a durable solution and establishing a mechanism for continued assessment of the effectiveness of the imposed durable solution.⁸⁷ Considering how several criminal cases involving children are sent for review and reversed recently, it is argued that the aforementioned processes, and elements are likely missing in criminal justice processes involving children.

The key elements considered in the assessment process are generally related to the possibility of harm outweighing all other factors. For instance, the idea that children's best interests are known by parents is regarded as a fundamental principle in deciding the best persons to satisfy the best interests of the child's survival and development by ensuring that the child remains in or maintains contact with family, cultural networks and health and education related matters among other vulnerabilities and continuity of stability in a child's life.⁸⁸ The procedural part of assessing, determining and deciding on the best interests of a child or group of children within a public authority institution, must consider the child's right to express his or her views and have such expressions considered as paramount. This also attracts a question on the mannerism of the process itself being sensitive to the needs of a child and ensuring the best and genuine position of the child is documented accurately to avoid affecting the final decision when

<https://web.archive.org/web/20160310013229/http://www.childcentre.info/public/PROTECT/Guidelines>

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_promoting_the_Human_Rights_and_the_Best_Interest_of_the_Child_in_Transnational_Child_Protection_Cases.pdf (accessed 2021 July 05)

⁸⁵ Same as above.

⁸⁶ Same as above.

⁸⁷ Same as above.

⁸⁸ United Nations High Commissioner for Refugees, United Nations Children's Fund, Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe, 2014.

considering the best interests of the child. Significantly, the protection and promotion of children's best interests in criminal justice proceedings is the key phenomenon under study.

2.3. THE APPLICABILITY OF THE PRINCIPLE IN CRIMINAL JUSTICE PROCEEDINGS

According to international law contexts the applicability of the principle of children's best interests in civil and criminal proceedings must consider key factors. The first important factor to consider the right of expression of the child's personal views with paramount importance.⁸⁹ A child is further entitled to a hearing when the decision making body is a court and such a hearing is to be expedited without delay, however, in a child sensitive manner that avoids any possibilities of secondary victimisation.⁹⁰ This also includes considering things such as child friendly mechanisms of disseminating information, language used and allowing the child to thoroughly formulate own opinion and express views without being frustrated by the process.⁹¹

The above factors are adopted and applied in light of a process where guardian or representation of a child is a fundamental right for as long as the independent representative or guardian are of competent status and equipped to represent and advocate for the best interests of the child concerned.⁹² In a formalised process where the best interest of a child are to be decided by the court or competent body, the child has a right to legal representation, legal information, defence or protection.⁹³ It follows that decisions given in child-related matters must be documented, motivated, justified and explained to provide adequate legal reasoning, connection with the best interests of the child and how, all underlying factors have been considered and balanced in the assessment process to determine a decision.⁹⁴

⁸⁹Committee on the Rights of the Child, The Rights of All Children in the Context of International Migration, Background Paper, Day of General Discussion, 2012, pp. 22–23.

⁹⁰ Same as above.

⁹¹ Same as above.

⁹² Same as above.

⁹³ Same as above.

⁹⁴ Same as above para 97.

The international law's stance in this regard is clearly and precisely recognises the importance of children's best interests in criminal justice processes by considering the rights of representation, friendly or accommodative mechanisms pertaining to language, appearance and other related issues. It however, seems that even if there is reference to the need for competent bodies and courts to not only document but also justify the rationale and reasons for making a particular decision or measure that impacts a child, this does not cover all role players in the criminal justice processes or the centrality of considering the best interest of the child from the commencement of proceedings to the end.

2.4. ADOPTION AND APPLICABILITY OF THE BEST INTERESTS OF THE CHILD IN SOUTH AFRICA

The following discussion will narrow down to how the principle of the best interest of the child fits into the South African jurisprudence.

In South Africa, the principle of the best interest of a child is found in all human rights frameworks and should, therefore, be a primary consideration in all matters involving children.⁹⁵ The adoption and applicability of the principle is however, traced back to how the principle was first introduced into customary law by the Transkei and Natal courts around the twentieth century.⁹⁶ In the case of *Fletcher v Fletcher*⁹⁷ it was held that the most important factor to consider in the decisions made on child-related matters is not determined by parents' rights or interests but the best interest of the child. Bekink and Bekink opine that the South African courts affirmed that the best interests of the child must not only be adopted but also applied as the primary consideration in child-related matters.⁹⁸ This preliminary exploration of the principle's adoption in South Africa already suggests and indicates that this principle is not interpreted or applied with strict exceptions for children although the international law standards laid above this principle are applicable in deciding the manner in which criminal justice proceedings can or should unfold to protect and promote best interests

⁹⁵ Maithufi 'The best interests of the child and African customary law' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 140.

⁹⁶ TW Bennett 'The best interests of the child in an African context' (1999) *Obiter* 145.

⁹⁷ *Fletcher v Fletcher* 1948 1 SA 130 (A) 143.

⁹⁸ M Bekink and B Bekink "Defining the standard of the best interests of the child: Modern South African perspectives" (2004) *De Jure* 22–23.

of child victims, witnesses or offenders as part of the 'durable solution'. Significantly, this affirms that children's best interests are fundamental doctrines of children affairs and should be noted as such in criminal justice proceedings. This also means that the discussion to this end suggests that the principle may not be overlooked to the detriment of the child in matters involving children, thus, inferring protection afforded to children in criminal justice proceedings may also not be overlooked unjustifiably.

By 1969 the courts were further developing and adopting the principle in South African courts as in the case of *Kaiser v Chambers*⁹⁹ where it was further noted that the child's best interests is 'a golden thread running throughout the entire fabric of South African law relating to children'. In the present-day context, South Africa has a Bill of Rights enshrined in the Constitution as of 1996 which provides for certain fundamental rights of all people including children. As a result the Bill of Rights not only adopted the best interests of the child principle, but further makes it a Constitutional imperative, which makes it part of rights that cannot be easily derogated without justification.¹⁰⁰ Section 28(2) provides that, "the best interests of a child is of paramount importance in all matters concerning a child", however, the Constitution does not define the exact meaning of the principle, which as per Bekink's observations is left to judicial interpretation and legislative promulgations.¹⁰¹ This judicial interpretation and legislative application further means that such developments to the concept cannot be limited to one area of the law or one sphere of affairs affecting children, but all child-related matters and affairs including the criminal justice processes.

Davel and De Kock assert that the adoption of the principle in South Africa and its development post-constitutionally (to suit and apply to the South African context and background) entails that there are several factors that must be considered in deciding the best interest of a child on the circumstances of each case on a case by case basis and determined individually.¹⁰² Section 39(1) (b) of the Constitution provides courts or competent tribunals with a guideline on how to adopt, interpret and apply the best interest principle by obligating these bodies to study and consult international laws and

⁹⁹ *Kaiser v Chambers* 1969 4 SA 224 (C) 228 F.

¹⁰⁰ Section 28(2) of the Constitution of the Republic of South Africa, 1996.

¹⁰¹ M Bekink "Parental religious freedom and the rights and best interests of children" 2003 *THRHR* 255.

¹⁰² T Davel and P De Kock "In 'n kind se beste belang" (2001) *De Jure* 274.

considering foreign law in deliberations and interpretations of the principle.¹⁰³ This justifies the above overview and incorporation of the best interest principle in international law. Bekink and Bekink further argued that section 28(2) imperative obligation of compliance with the best interest of the child principle is in line with the universal recognition of children's best interests of children.¹⁰⁴ As further adoption and commitment to apply the best interests of the child, South Africa ratified and acceded to the United Nations Convention on the Rights of the Child, which composes the primary framework of children's rights and their realisation within the ambits of best interests of the child.

In the above discussion, the South African adoption and application of children's best interests is in line with the international law perspective. The principle is also Constitutional imperative in South Africa. Considering these findings, the applicability of children's best interests in the processes of the criminal justice system is key in child-related matters. Courts and all involved parties in the criminal justice system must ensure compliance and protection of children's best interests. Considering these preliminary findings, the study suggests that courts must not unfold adult-like criminal justice processes where a child is victim, witness, or offender. All necessary protection on the child's identity, development, well-being, participation, health, and stability must be duly considered. In light of the above, the sustenance of such protection is questioned. At what stage can it be waived or expire as the child transition into adulthood. These key issues are further explored in the next chapter.

2.5. CONCLUSION

Children's right to their best interests is considered and protected in all child-related as a paramount universal human right for children. The right applies in diverse matters and circumstances; it considers all necessary factors in determining what may outweigh exposing a child to harm when deciding and carrying out processes involving children, formally or informally. South Africa incorporated the children's best interest principle as a Constitutional imperative status post-1996 Constitutional development. The adoption and applicability of the principle in South Africa can be preliminarily regarded as in line with universal international law standards, however the following

¹⁰³ Section 39(1) (b) of the Constitution of the Republic of South Africa, 1996.

¹⁰⁴ Bekink & Bekink 'n 100 above'.

chapter, which discusses the interpretation, and application of the principle in criminal justice process illuminates whether the principle has been fully realised and developed in practice. Therefore, the study provided credible findings on whether criminal justice role players put the best interest standards into effect and empirically make positive impact in the lives of children who get in contact with criminal justice processes.

CHAPTER THREE

An overview of interpretation, application, and development of the 'best interests of the child' concept in South Africa's criminal justice system

3.1. INTRODUCTION

The previous chapter explored children's right to their best interests. Children's best interests must be considered and protected in all child-related matters as a paramount universal human right for children. This right can be applied on diverse matters and circumstances, in consideration of all necessary factors that may outweigh exposing a child to harm when deciding and carrying out processes involving children, formally or informally. Significantly, South Africa incorporated the principle of children's best interest as a Constitutional imperative status post-1996 Constitutional development. The adoption and applicability of the principle in South Africa can be preliminarily regarded as in line with universal international law standards. This chapter narrowly explore the phenomenon by assessing how statutes are captured and considered the concept of best interests in developing and implementing laws that affect child-related matters in criminal proceedings. The chapter mainly focused on the Child Justice Act 75 of 2008 which can be regarded as the precedential law governing children's affairs within the criminal justice system as further interpreted and developed by the courts to realise the best interests of children.

3.2. THE POSITION OF CHILDREN AND THE CONNECTEDNESS OF BEST INTEREST PRINCIPLE WITH THE CRIMINAL JUSTICE SYSTEM

Children's rights have changed and developed like all other South African rights that are recognised, protected, and promoted to encourage and realise spirit, purport, and

values of the Constitution.¹⁰⁵ Children are regarded as one of the vulnerable groups in the South African society, as a result, their rights have been a point of constant review and developments. Considering all the South African developments, the development of children's rights is in diverse areas and spheres including the criminal justice system. The incorporation of children's best interests in child-related affairs, and their rights are of paramount importance and cannot be ignored.

In recent developments, South Africa has been witnessing increased crime rates, as a result, the criminal justice system is working tirelessly to deal with surge. Children are also greatly affected because statistics indicate an increased number of children in the criminal justice system. For instance, South African Police Service crime statistics indicated that there had been a 7% rise in murder cases from 20 000 cases to 40 035 cases in the years 2017-2019 alone. Other crimes such as homicide, sexual assault were recorded with an aggregate record for child-related matters in the same period.¹⁰⁶ The Shadow Minister of police for the Democratic Alliance also reported that at least 41% of the victims of 124 526 rape cases reported from 2017 to 2019 are children.¹⁰⁷ On the same note parliament also indicated that at least 2600 children were victimised and murdered in the same 3 financial years, which contributed 5% of the total amount of all murders recorded in that period.¹⁰⁸

In the decades succeeding the promulgation of the Constitution, crime increased in occurrence and nature. Songca highlighted that in South Africa crime has become more violent in nature, resulting in devastating effects on many lives including children,

¹⁰⁵ Paula Barnard, the national director of World Vision South Africa, speaking during National Child Protection Week in May 2017, stated that "Violence against children has reached epidemic proportions and like any other disease, be it HIV/Aids or Ebola, it should be treated as a national disaster and remedied accordingly" 017 <https://city-press.news24.com/News/violence-against-children-a-nationaldisaster-20170529>). A national prevalence study published in 2016 provides some data relating to the prevalence of violence against children. This study estimates that 34% of the country's children are the victims of sexual violence and physical abuse before they reach the age of 18.

¹⁰⁶ Artz et al 2016 http://www.cjcp.org.za/uploads/2/7/8/4/27845461/08_cjcp_report_2016_d.pdf). The SAPS crime stats for 2017-2018.

¹⁰⁷ SA People 2018 <https://www.sapeople.com/2018/05/16/children-are-victims-of-almost-half-of-allrapes-cases-in-south-africa-46-raped-2-murdered-daily/>).

¹⁰⁸ SA People 2018 <https://www.sapeople.com/2018/05/16/children-are-victims-of-almost-half-of-allrapes-cases-in-south-africa-46-raped-2-murdered-daily/>).

while children have also become both offenders and victims of crime in significant numbers.¹⁰⁹ Children are generally regarded as experiencing various forms of violence within and outside the home contexts such as schools.¹¹⁰ Subsequently several children are often repeatedly victimised during their childhood. However, in the same context there are high numbers of child offenders.¹¹¹

According to the statistics released by the South African Police Service (SAPS April to March 2019-2020), the most reported crimes in South Africa are contact crimes such as (kidnapping, trio crimes, murder, assault, aggravated robbery, sexual offences); contact related crimes (arson, malicious damage to property), property related crimes (burglary of residential and business places, vehicles theft, stock theft), environmental crimes, core diversion and other serious crimes that depend on police action such as (drug related crimes, possession of illegal firearms, driving while intoxicated).¹¹² The report shows that there is a comprehensive statistics of children aged between 10-17, who are in conflict with the law. In a 3-year record from 2017 to 2020 children are significantly contributing to some crime statistics. For instance, out of 21 022 murders recorded in 2020, 736 were committed by children (SAPS April to March 2019-2020). In other contexts, 2017-2020, recorded a 10.9% increase in child commission of arson, a 16.8% increase in sexual assault, a 77% increase in contact sexual offences, a 20.8% increase in carjacking, 9.4% increase in motor vehicle theft, 35% increase in commercial crimes committed by children (SAPS April to March 19-20).

To emphasise that the circumstances of children need more attention in terms of criminal proceedings, out of all the reported rape cases, only 21% were solved and only 1 in 3 child murder cases resulted in conviction.¹¹³ The point of departure in addressing the predicament is to include children in the Bill of Rights, wording all

¹⁰⁹ R Songca 'children seeking justice: safeguarding the rights of child offenders in South African criminal courts' (2019) 52 (1) De Jure Law Journal 2225-7160.

¹¹⁰ Leoschut & Kafaar "The frequency and predictors of poly-victimisation of South African children and the role of schools in its prevention" 2017 Psychology, Health & Medicine 1-13.

¹¹¹ Van der Merwe & Dawes "Toward good practice for diversion: The development of minimum standards in the South African child justice system" 2009 Journal of Offender Rehabilitation 571-588.

¹¹² South African Police Service (SAPS April to March 19-20) Crime Statistics: Crime situation report.

¹¹³ SA People 2018 <https://www.sapeople.com/2018/05/16/children-are-victims-of-almost-half-of-allrapes-cases-in-south-africa-46-raped-2-murdered-daily/>.

people entitled to protection and rights with the exception of majority status-related rights such as the right to vote.¹¹⁴ It would, therefore, be accurate to further suggest that children are according to the Bill of Rights entitled to enjoy rights and are given afforded due care and protection in criminal matters affecting several rights bestowed on them by the Constitution, as applied on the standard of best interests of the child discussed in the previous chapter.

3.3. LEGISLATIVE AND JUDICIAL DEVELOPMENTS IN PROTECTING INTERESTS OF CHILDREN IN CRIMINAL JUSTICE PROCEEDINGS

The criminal justice system wheels are automatically turned on whenever crime is committed, and the relevant institutions play their relevant roles in ensuring that crime is either prevented, combated, prosecuted, offenders detained and ultimately justice being served. The way children are treated under the criminal justice system must be in line with the Child Justice Act as the key governing framework for child-related affairs involved in the criminal justice system. The Act is applied and interpreted in various cases as shown in the following discussion.

The discussion focuses on how the Child Justice Act protects children's interests through differential mechanisms of determining criminal capacity, children's rights according to the Act's recommended mechanisms of dealing with child witnesses, offenders, and victims applicable in light of realising the best interests of children in addressing child-related criminal affairs.

3.3.1. THE CHILD JUSTICE ACT (2008)

The Child Justice Act 75 (2008) establishes a criminal justice system designed to deal with child or juvenile offenders in compliance with the Constitution and international law standards. In essence, it is the precedential framework providing an alteration in the treatment of adult offenders from child offenders through several mechanisms that are collectively a diversion programs, to objectively ensure there is increased ability to rehabilitate and reintroduce child offenders back to the society and be in the care of their parents or guardians. This restores the affected children's sense of dignity, while allowing them to recognize the need to respect other people's rights. The child Justice Act resorts to the incarceration of child offenders as the last resort. A critical analysis

¹¹⁴ Constitution of Republic of South Africa, 1996.

of the Child Justice Act in light of the surging crime rates in South Africa committed by both adults and children, and the overall objectives of the criminal justice system questions it's the effectiveness in the diversion of children from the full might of the criminal justice system, in the best interests of children. In this regard, its effectiveness is expected in combating and preventing crime generally and particularly amongst children, deterring child offenders from re-offending, and smooth reintegration in society after the initial offending conduct. The Act also guides the treatment of child witnesses and victims in the criminal justice system considering the best interest principle. In essence, the study limits Child Justice Act-related discussions to subjects and provisions channelled towards curbing adverse effects on children upon contact with the criminal justice system, in line with children's best interests.

3.3.1.1. DIVERSION PROGRAMMES' EFFECTIVENESS AND PROTECTION OF BEST INTEREST OF CHILDREN

Humanised processes and systems were developed to protect children from the overall effects of being in contact with the criminal justice system. Children are vulnerable regardless of their position (victim, witness, or offender) in the criminal justice processes. This line of argument is fundamental in considering the criminal justice system's ability to conform and align with children's needs as objectively intended by the Child Justice Act. Considering children as vulnerable members of the society has enabled the revision of the South African child justice system to be more protective towards children than being adversarial and inquisitorial, which is the general nature of South African legal system.

In recent developments, diversion programs are implemented and added as part of laws under the Child justice Act to add to other mechanisms already in place to limit the effects of children's full contact with the criminal justice system. Some of these mechanisms were drawn in line with objectives of the criminal justice system. For instance, youth restorative justice programs established in 2000 under the Restorative Justice Centre was an alternative to the criminal justice system. It was affirmed in the case of *S v Shilubane*¹¹⁵ as a fundamental innovative approach to deal with offenders especially in child-related cases. Assessment centres and one-stop child justice centres are other mechanisms preceding diversion programs where child offenders

¹¹⁵ *S v Shilubane* 2005 [JOL 15671(T)].

were protected through streamlining pre-trial services to such child offenders.¹¹⁶ Ordinarily these one-stop centres served children after being arrested.

Section 28 (1) (g) in the South African Constitution provides for children not to be detained unless detention must be used as a measure of last resort, where the detainment must be for a short period.¹¹⁷ Regardless of this Constitutional provision, South Africa records significant numbers of children detained in prisons.

Diversion was developed and adopted in South African law under the Child Justice Act to ensure and safeguard the protection of children against criminal justice subjugations.¹¹⁸ Diversion is a concept where children are channelled away from formal court system proceedings, and alternatively set for society reintegrative programs.¹¹⁹ Diversion is generally recommended where a child offender has acknowledged responsibility for the wrongful conduct in question, making it one of the fundamental qualifying grounds for the diversion of a child offender.¹²⁰ The diversion programme is directed towards ensuring that a child is channelled away from certain stigma and brutal negative effects of the criminal justice system. This substantially gives children a chance to avoid incurring criminal records. The programme is also designed to educate child offenders about the importance of taking responsibility for their actions and working towards avoiding trouble as a rehabilitative process for juveniles.

The Child Justice Act is informed by international standards, developments and trends, mainly regarding the diversionary justice model.¹²¹ Articles 37 and 40(3) of the Convention on Rights Child (CRC) provides for the liberty of child offenders and the overall juvenile administration, promoting the adoption of alternatives to criminal proceedings for children who are in conflict with the law.¹²² South Africa's stance of adopting and using the diversion program theoretically underscores the functioning of

¹¹⁶ Skelton: Resource Material Series no.75.

¹¹⁷ Section 28 (1) (g) of the Constitution of the Republic of South Africa, 1996.

¹¹⁸ Child Justice Act 75 of 2008.

¹¹⁹ Child Justice Act 75 of 2008.

¹²⁰ Child Justice Act 75 of 2008.

¹²¹ Child Justice Act 75 of 2008.

¹²² The Convention on Rights of the Child (1989) (CRC).

the juvenile justice system towards safeguarding the best interests of children. The preamble of the South African Child Justice Act of 2008 sets out that it seeks to redress and deal with injustices experienced by most children during apartheid, and the need to progressively realise the Constitutional mandate to protect children's rights.¹²³ The Act also aims to advance a humanist approach to justice for children through compassion, tolerance and fairness.¹²⁴ Section 1 of the Child Justice Act which incorporates restorative justice provides that, this is the form or approach towards justice involving children in conflict with the law, the victim, families and community members to collectively determine and deal with threats and harms, needs and obligations by accepting and taking responsibility, making restitution and determining necessary measures to combat recurrence.¹²⁵

Section 1 of the Child Justice Act refers to diversion as taking the child away from formal court processes in a criminal matter through mechanisms determined by chapter 6 and 8.¹²⁶ Diversion is regarded as a mechanism to facilitate smooth, peaceful resolution of issues while ensuring restoration of dignity of the affected parties, also regarded as the cornerstones of *Ubuntu*.

Section 51 of the Child Justice Act sets out the objectives of diversion, which include the need to prevent exposure to stigma and preserve the dignity of child offenders, their well-being and development of sense of self-worth as well as ability to contribute to society.¹²⁷ According to Section 51(a-k), diversion is also aimed at encouraging children to take responsibility and accountability for harm caused to others by their actions,. Diversion provides the opportunity to participate and compensate the victim.¹²⁸ Diversion also seeks to promote the reintegration of child offenders back into their families and community setup.¹²⁹ Diversion promotes reconciliation of child

¹²³ Child Justice Act 75 of 2008 preamble.

¹²⁴ Child Justice Act 75 of 2008.

¹²⁵ Section 1 of the Child Justice Act, 75 of 2008.

¹²⁶ Same as above.

¹²⁷ Child Justice Act 2008: Section 51(a-k).

¹²⁸ Child Justice Act 2008: Section 51(a-k).

¹²⁹ Child Justice Act 2008: Section 51(a-k).

offenders with either the person(s), or community affected by the child offender's harmful conduct.¹³⁰

Diversion models provides guidelines that classify and qualify child offenders for diversion, which is directly linked to the nature and seriousness of offence at in question. In necessitating diversion, the Child Justice Act identifies 6 diversion orders, for instance, family time order is a diversion programme allowing the child to spend certain amount of time with family or extended family.¹³¹ This order is made under the consideration that family cohesion is important in most African families and communities.¹³² Good behaviour order is another diversion model issued when a child demonstrates compliance with orders and it is linked to African notions that children are required to be respectful towards elders or parents.¹³³ Additionally, diversion is provided for under section 53 of the Child Justice Act under two options in two different levels. The first level diversion sets out for oral or written apologies to be issued by the child to the affected parties.¹³⁴ This option allows a child to accept and take responsibility for their actions. The other option place the child under a reporting order where the child is required to report either to a community chief or a specified authority within his/her residing area.¹³⁵ The second level of diversion applies to crimes of a serious nature, such as crimes in schedules 2 and 3. The diversion options available under this level include mandatory attendance of certain vocational, educational or therapeutic sessions at specified centres which can also include a requirement for periodical or temporary residence at such centres¹³⁶ Under the second level, the victims are also allowed to have a say in whether the matter can be diverted or not and

¹³⁰ Child Justice Act 2008: Section 51(a-k).

¹³¹ Child Justice Act 2008: Section 53 (2) (a-b).

¹³² Songca 'children seeking justice: safeguarding the rights of child offenders in South African criminal courts' (2019) 2225-7160.

¹³³ Songca 'children seeking justice: safeguarding the rights of child offenders in South African criminal courts' (2019) 2225-7160.

¹³⁴ Child Justice Act 2008: Section 53 (2) (a-b)).

¹³⁵ Child Justice Act 2008: Section 53 (2) (a-b)).

¹³⁶ Schedules 2 and 3 of the Child Justice Act (section 53(4) (a)-(d)).

the nature of diversion if applicable. The police officials who officiated the matter are also consulted.¹³⁷

Largely, factors necessitating diversion emanated from the notion that children are vulnerable members of the society and their involvement or contact with the criminal justice system is carefully considered under case law and legislative protections. In these considerations there are necessitating factors for diverting children from the full might of the criminal justice system, where prosecution and detention is the last resort. For instance, in the case of *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*,¹³⁸ the Constitutional Court held that the South African legal system is of an adversarial and inquisitorial nature which is not suitable for children, especially in a democratic dispensation and for the best interests of children as guaranteed under the Constitution.

3.3.1.2. THE NEXUS OF DIVERSION AND BEST INTERESTS OF CHILDREN

By targeting the key underlying issues behind the committed crime, effective diversion program significantly reduces reoffending than detaining child offenders in a prison cell but is also increase long term community safety. By carrying out effective diversion programme, the child offender is allowed to become productive and capable of being a more responsible citizen who is accountable. Empirical evidence shows that diversion is indeed effective in rehabilitating youth or child offenders while promoting youth justice; however, there are also several other child offenders who remain anti-social after diversion; barely showing signs of rehabilitation. In essence, diversion is effective because it provides several remedies and relief mechanisms for both offenders and affected parties in a restorative nature. Diversion allows actual learning of circumstances surrounding the crime or offence. The best interest of a child differs in every circumstance; however, the Child Justice Act indicates that the key reasoning behind diverting children is their positive well-being, staying in family care or ability to be reintroduced in community as fit and good standing community members who are responsible and accountable. Consequently, the general idea is to ensure children who

¹³⁷ Schedules 2 and 3 of the Child Justice Act (section 53(4) (a)-(d)).

¹³⁸ *Director of Public Prosecutions Transvaal, v Minister for Justice & Constitutional Development 2009 7 BCLR 637 (CC).*

get into conflict with law are still protected and enjoy their rights while they are nurtured into good citizens and transitioning into adulthood.

3.3.2. CRIMINAL CAPACITY OF CHILDREN VIS A VIS THEIR BEST INTEREST

In line with Constitutional and international law values and ethos, the child Justice Act was objectively sets to create, and regulate a criminal justice system for children who conflict with the law. Section 8 of the Act provided that the minimal age of criminal capacity for children. Section 7 of the Act provides that 10 years would be subject to review by the relevant Cabinet member, the Minister of Justice, and Constitutional Development, submitted via parliament.¹³⁹ A regulated child-related criminal capacity assessment is prevalent in South Africa. Any child who is believed to have committed an offence should go through a capacity assessment by a probation officer with the exception of when such assessment was dispensed based on either section 41(3) or 47(5) in the best interests of the child.¹⁴⁰

Where a child is aged between 1 and 14, an assessment for criminal capacity must be undertaken and a report issued showing whether the child has or does not have criminal capacity.¹⁴¹ According to section 20 of the Child Justice Act, this assessment should be done at the earliest opportunity or within 48 hours if the child was arrested.¹⁴² The assessment must also determine whether an expert opinion must be adopted as another mechanism to determine the criminal capacity of the concerned child. In general, this assessment determines the child's ability to distinguish between right and wrong at the time of the alleged conduct.¹⁴³ Basis for assessment includes the child's ability to appreciate own conduct at the time of the alleged conduct.

In terms of section 11(3) of the Act, requires the assessment procedure to include assessing the child's cognitive, moral, emotional, psychological, and social development.¹⁴⁴ This assessment may be requested by a magistrate presiding in the criminal capacity inquiry, or by a prosecutor or the child's legal representative.

¹³⁹ Section 8 of the Child Justice Act.

¹⁴⁰ Section 41(3) or 47(5) of the Child Justice Act.

¹⁴¹ The Child Justice Act.

¹⁴² Section 20 of the Child Justice Act

¹⁴³ Sections 35(g) and 11(3) of the Child Justice Act.

¹⁴⁴ Section 11(3) of the Child Justice Act.

According to section 97(3) psychiatrists and clinical psychologists are regarded as equally suitable and competent to undertake the criminal capacity assessment of children alleged to be in conflict with the law.¹⁴⁵ In light of this, probation officers are not empowered to assess the cognitive, moral, emotional, psychological and social development of children in their criminal capacity assessment report, in terms of Section 35 of the Act.

The Judicial Matters Amendment Act also makes it mandatory for presiding officers and the child justice court to consider the child's cognitive, moral, emotional, psychological, and social development when determining the criminal capacity of the child in question.¹⁴⁶ Therefore, probation officers cannot make conclusive assessment on the cognitive elements of a child, although a mandatory procedure for cognitive assessment is imposed.

3.3.2.1. THE NEXUS OF THE CHILD CAPACITY TEST PROCEDURAL MECHANISMS VIS A VIS CHILDREN'S' BEST INTERESTS

Considering the mechanisms and procedures to conduct a criminal capacity assessment for a child as discussed above, it is crucial to note whether the procedural mechanism is in the best interests of the child or not. It is a complex process to determine whether the procedures are in the best interest of the child when considering judicial expectations and operational imperatives. For instance, determining the criminal capacity of a child beyond reasonable doubt, without implied degrees of criminal capacity, showing there is either capacity or none.

In the case of *S v Dyk*¹⁴⁷ where a child participated in a housebreaking crime by staying outside as an onlooker while two other accused breaks into a house. When determining the criminal capacity of the child in this case, two connected issues evolved; the child may understand the wrongfulness of housebreaking, however, the child may not understand the wrongfulness of his own role in committing the crime.¹⁴⁸ As a result, the procedural mechanism in the Child Justice Act is subjected to criticism for not being in the best interests of the child, which it negates conduct specificity in determining the

¹⁴⁵ Section 97(3) of the Child Justice Act.

¹⁴⁶ The Judicial Matters Amendment Act 14 of 2014.

¹⁴⁷ *S v Dyk* (1969(1) SA 601(C)).

¹⁴⁸ *S v Dyk* (1969(1) SA 601(C)).

criminal capacity of the child. The criticism entails that the procedure shows that a child's generalized understanding of different kinds of conduct in less specific circumstances should be used to assess criminal capacity to specific conduct equivalent to crime. It is also argued that such generalised knowledge does not necessarily mean a child can discern wrong from right of own conduct in such specific circumstances. This means that the procedure is not in the best interest of the child; it is vague, and a generalised test applied to a specific conduct related to the child's criminal conduct. In this regard, the shortcoming lies in considering how the Child Justice Act intends to avoid exposing children to a rigid criminal justice system by relating closely to the various specific needs and circumstances of children who are against the law.

As indicated above, part of the assessment procedure is the cognitive development mandatory check for the child in question. However, probation officers are not qualified to undertake this assessment, as a result, there is an infrastructure and capacity challenge because the assessment largely depends on the availability of qualified clinical psychologists and psychiatrists. This challenge is a result of insufficient funding in the Department of Social Development. Consequently, assessments and reports compiled by probation officers also pose challenges. It is widely reported that probation officers carry out and compile poor criminal capacity assessments and reports, mostly due to lack of adequate training and resources. Probation officers draw conclusions based on their subjective opinions and experiences. In such cases most presiding officers request for an external/expert opinion which is not easy to acquire due to the limited number of psychologists or psychiatrists, thus, affecting the overall process through delays to reach criminal capacity assessment procedure. The criminal capacity procedural mechanisms fail to satisfy children's best interests through delays in determining the criminal capacity, and potential biased reports because probation officers are not qualified enough to undertake psychometrical assessment and issue credible reports thereof.

The procedural mechanism and the best interests of children in criminal justice is also affected by the inability to conduct holistic assessments of children's criminal capacity. Section 11(3) of the Act requires the cognitive, moral, emotional, psychological and social development assessment of the child in question, but other sections need in-

depth assessments of the child's psycho-social development and functioning.¹⁴⁹ This entails examining the connection between the biological and external environmental influences leading to the child's conduct to presumable or discernible criminal capacity. Adopting a holistic approach entails a complete assessment without isolating or limiting factors in the child's development, but all possible influential risk factors and further professional analyses of these factors' actual influence on the child's capacity to distinguish between right and wrong, and conduct oneself in light of such capacity. Although the probation officers, psychologist and psychiatrists are the prescribed assessors, they still do not possess enough capacity to undertake a full in-depth holistic assessment as required. Failure to conduct the in-depth assessment limits the best interest of child offenders because criminal capacity assessment results are subject to flaws. Therefore, the inclusion of multi-professionals' team (criminologists, occupational therapists, clinical psychologists, social workers, and others) in the assessment process would make the procedural mechanisms for criminal capacity assessment effective and serve children's the best interests.

3.3.3. THE RIGHTS OF CHILDREN IN CONTACT WITH THE CRIMINAL JUSTICE SYSTEM

According to the Child Justice Act, child offenders are entitled to several rights such as the right to see their parents, guardian, or legal guardian present.¹⁵⁰ This means, the parents or guardians should be notified of the arrest as soon as possible. The parent or legal guardian will, therefore, be entitled to also ensure that probation officer conducts an assessment as soon as possible, provide documentary evidence to support and confirm the age of the young offender, be present when the probation officer assess the child and attend the first inquiry if the matter goes to court.¹⁵¹

Secondly, the young offender is entitled to have a quick assessment as soon as he/she is arrested.¹⁵² The Child Justice Act provides that a probation officer should assess an arrested child offender's criminal capacity within 48 hours of arrest.¹⁵³ It also follows that young offenders who are under the age of 14 years may not be detained in prison, while those above 14 may be detained but only as a the last resort. Child offenders

¹⁴⁹ Section 11(3) of the Child Justice Act.

¹⁵⁰ Child Justice Act.

¹⁵¹ Child Justice Act.

¹⁵² Child Justice Act.

¹⁵³ Child Justice Act.

can be arrested, assessed, sent for trial, and then sent to a diversion programme for rehabilitation and reintegration process.

In the case of *S v Booyesen*,¹⁵⁴ the main issue was a fair trial and legal representation of a child offender, wherein the judge set aside the need for parental assistance or legal representation as an irregularity and the conviction was set aside. In *Brandt v S*,¹⁵⁵ the main issue was minimum sentencing for a youthful offender on a murder charge. The court noted that when an offender is not yet 18 and above 16, the court may do away with the minimum prescriptions for sentencing and only gave a 1-year detention sentence for this case. These cases illustrate how criminal justice system processes for youthful offenders shuns away from rigidity and opt to rehabilitate and reintegrate them in line with the need to promote, realise and protect the best interests of children as guaranteed under the Constitution. In essence, the criminal justice system is not removed from the effects and need to adhere to children's best interests in all child-related matters or affairs.

3.4. THE CRIMINAL PROCEDURE ACT ON THE BEST INTERESTS OF CHILD LITIGANTS (VICTIMS AND WITNESSES)

The Criminal Procedure Act is a fundamental and important framework governing the procedure of criminal matters. It provides guidelines on how child litigants must be handled, with reference to testifying, use of intermediaries and prohibition of publication of information that may reveal the identity of the child victim or witness.¹⁵⁶ Section 154 provides for the prohibition of certain information relating to criminal proceedings. Section 154(3) provides as follows:

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

The provision of the Act asserts that unlike other criminal litigants, children are entitled to certain sensitivity; however, the provision does not further state the scope of anonymity if applied. It also loosely excludes the victims by alluding to the accused or

¹⁵⁴ *S v Booyesen* (2002) JOL 9610 (NC).

¹⁵⁵ *Brandt v S* (2005) 2 SA 1 SCA.

¹⁵⁶ *S v Mokoena* 2008 2 SACR 216 (T).

witness under the age of 18. These provisions were painstakingly dealt with in the case of **Centre for Child Law & others v Media 24 Limited & others**.¹⁵⁷

3.4.1. CENTRE FOR CHILD LAW & OTHERS V MEDIA 24 LIMITED & OTHERS

In this case, in 1997 the kidnapper of a child was subjected to criminal processes. The Supreme Court of Appeal (SCA) heard a matter originating from an order granted in 2015 by the Gauteng Division of the High Court, Pretoria where the court gave an order in terms of section 154(3) of the CPA to protect the anonymity of the second appellant. The applicants sought the following orders that were granted in terms of section 154(3) of the CPA:

- (a) Declaring that the protection of anonymity afforded by Section 154(3) of the Criminal Procedure Act 51 of 1977 (the CPA) applied to victims of a crime who were under the age of 18 years.
- (b) In the alternative, an order was sought declaring this section of the CPA unconstitutional and invalid to the extent that it failed to confer protection on victims of a crime who were under the age of 18 years.
- (c) Declaring that children subject to this section of the CPA do not forfeit the protection offered by the section upon reaching the age of 18 years
- (d) In the alternative, an order was sought declaring this section of the CPA unconstitutional and invalid to the extent that children subject to the section forfeit the protection afforded by it upon reaching the age of 18 years.

The court ordered that although the section does not provide is for the protection for victims, it afforded such protection to victims under the age of 18.¹⁵⁸ The court further held that the scope of the protection would not continue to be available after turning 18 years; thus, dismissing other appellants requests with leave to appeal for the appellants and leave for the respondents' cross-appeal.¹⁵⁹

The context of appeal in this regard further interrogated the meaning of Section 154(3) of the CPA, which originated from how the victim was abducted a few days after birth and the trial only commenced when she was 17 years old. Considering the nationally and internationally publicity on the matter, the appellants needed the provision to either

¹⁵⁷ *Centre for Child Law & others v Media 24 Limited & others* (871/17) [2018] ZASCA 140.

¹⁵⁸ *Centre for Child Law & others v Media 24 Limited & others* 2.

¹⁵⁹ *Centre for Child Law & others v Media 24 Limited & others* 2.

be extended or redefined and amended. On appeal, the appellants sought for the court to extend the Section 154(3) ban on identity publication of child victims and extend the scope of duration for such ban into majority status age or adulthood for an indefinite period.¹⁶⁰

3.4.1.2. AVERMENTS AND LEGAL REASONING APPLIED ON EXTENSION OF SCOPE OF SECTION 154(3)

On appeal, the media representative body stood as the major opposition to the relief sought by the appellants. Both appellants and respondents agreed on the need to protect the anonymity of children on a case-by-case basis depending on what would be the best interest of each child.¹⁶¹ However, there was a challenge on the second request to extend the ban into adulthood. The respondents submitted that it presented a direct infringement on the right of the media to impart information which would need to be justified in this regard.¹⁶² In light of the court taking the initiative to extend the ban on publication of identity into adulthood, the respondents raised a second issue on the nature and extent of the limitation considering the best interests of the child as the point of departure.¹⁶³

The first set of reasoning in support of interpreting Section 154(3) which provides a ban on publication post majority status was based on the interpretation that the section creates a positive duty for the state to protect children's rights and secure their best interests in criminal processes.¹⁶⁴ In opposing this interpretation, the respondents argued that statutory interpretation requires consideration of context and language in light of Constitutional values.¹⁶⁵ By interpreting the section in this manner it leads to a determination that violates the section and attracts criminal punishment if a presumption demonstrates that the section favours individual liberty.¹⁶⁶ Furthermore, although the language of the section omits child victims, the section was meant to

¹⁶⁰ *Centre for Child Law & others v Media 24 Limited & others* 5.

¹⁶¹ *Centre for Child Law & others v Media 24 Limited & others* 6.

¹⁶² *Centre for Child Law & others v Media 24 Limited & others* 6.

¹⁶³ *Centre for Child Law & others v Media 24 Limited & others* 6.

¹⁶⁴ *Centre for Child Law & others v Media 24 Limited & others* 8

¹⁶⁵ *Centre for Child Law & others v Media 24 Limited & others* 8.

¹⁶⁶ *Centre for Child Law & others v Media 24 Limited & others*.6

protect children in criminal proceedings against disclosure of their identities without the need to imply a wider interpretation of the section.¹⁶⁷

The appellants raised the principle of on-going protection to indicate that childhood experiences impact adulthood and are a major part of concern in section 28(2) of the Constitution in light of children's best interests.¹⁶⁸ In essence, the appellants argued that by adopting such an interpretation it meant that section 28(2) of the Constitution is enacted through section 154(3) of the CPA to realise children's best interests and protect child victims, witnesses and accused from severe harm that can emanate from identity restrictions. This study adds that, this is a logical interpretation that supports the realisation of children's best interest.

Arguments against section 154(3) extension disputed the legal basis of the on-going principle and how the extension of such a ban into adulthood would limit the right to freedom of expression and freedom of the press in section 16(1)(a) of the Constitution and the principle of open justice.¹⁶⁹

3.4.1.3. COURT DECISION AND RATIONALE

In delivering the order, the court dismissed the appeal. It refused to extend the scope of section 154(3) protection into adulthood. The court reasoned that the objective of the appellants required sympathy; however, the need to determine if the law (section 154(3)) needs amendment. Therefore, nature and extent of such amendment is a task that requires the legislature and the Minister of Justice and Correctional Services' support to extend the protection on identity into adulthood.

The court considered that generally in other foreign statutes there are wider variations on extensions of child litigants' anonymity of into adulthood with certain qualifying circumstances and conditions necessary for a case-by- case extension. Some foreign statutes provide an extension on the condition of party's cooperation during the proceedings. In other cases the extension is upon qualifying for an emergency, endangerment and if the child litigant is a first timer or recurring offender in the proceedings as either accused, victim or witness. Lastly it is also determined by who may be willing to apply for the identity publication ban to be lifted if necessary. The

¹⁶⁷ *Centre for Child Law & others v Media 24 Limited & others*.8

¹⁶⁸ *Centre for Child Law & others v Media 24 Limited & others* 10.

¹⁶⁹ *Johncom Media Investments Ltd v M & others* [2009] ZACC 5; 2009 (4) SA 7 (CC).

court also reasoned that it could not rely on foreign jurisprudence in this case on how in *City of Cape Town v South African National Roads Authority Limited & others*.¹⁷⁰ The court held that where a court intends to refer and adopt a rule from foreign jurisdiction, differentiation in Constitutional context should be considered first, to consider similarities and differences in such Constitutional dispensations.¹⁷¹ This is based on how jurisprudence from a jurisdiction with far differing Constitutional values will not offer much value to a country such as South Africa because it founded on Constitutional supremacy which would be different in value. Secondly, the arguments, doctrines or precedents of foreign jurisprudence must be transplanted and interpreted through the South African Bill of Rights and values test.¹⁷²

The court also weighed and applied the limitation of rights test to determine the dual purpose of limiting media rights. The court reasoned that by extending the ban into adulthood, media rights of the would be infringed and would additionally infringe the principle of open justice. Therefore, sending the appellants' request overboard without striking a balance between all the conflicting rights and interests.¹⁷³

3.4.1.3. LEGAL IMPLICATIONS ON CHILD'S BEST INTEREST

In light of the above discussion, certain legal implications present themselves as a challenge in addressing protection of anonymity of child participants in criminal proceedings. Firstly, the Constitutional tenets showing when the ban on the publication of identity may be lifted if needs be and potentially to the best interests of the child is not clear. Secondly, section 154(3) remains a grey area considering the exceptional circumstances that require a ban on the publication of children's identity in criminal proceedings may not be lifted post adulthood, which results in ignoring the variation in sensitivity of matters that may affect children into their adulthood. Generally, the approach creates more problems than solutions because there is no attempt to transplant considerations for societal convictions on best interest of the children to enable justifiable limitation of other conflicting rights and interests such as media rights.

¹⁷⁰ *City of Cape Town v South African National Roads Authority Limited & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) para 31.

¹⁷¹ Same as above.

¹⁷² *Centre for Child Law & others* 'n 67 above' 31.

¹⁷³ Same as above 27.

3.5. CHILDREN'S ACT

Children's Act¹⁷⁴ is more inclined to family law related affairs and circumstances of the child, than on the criminal related processes, however, it remains an important framework because it repeatedly underscores children's best interests in its provisions. For instance, Section 6(2) (a) of the Act provides that in all proceedings involving children, there must be respect, protection, promotion, and fulfilment of children's best interests.¹⁷⁵ Section 7 states that when the Act requires the best interests of the child, the factors in section 7(1) are considered. Further, section 9 requires that "[i]n all matters concerning the care, protection and well-being of as child the standard that the child's best interests is of paramount importance, must be applied." Children's best interests enshrined in the Act have; a more limited scope than the Constitutional best interests, and they are applied in terms of the Act. The best interest of the child is of paramount importance in all matters concerning the care, protection, and well-being of children whether provided for in the Act or not.

Regardless of the significance of the best interest principle, the Children's Act has little relevance to the study because it mainly focuses on family and civil laws. The study focused on criminal law and procedures.

3.6. OVERALL CRITIQUE OF REGARD GIVEN TO BEST INTERESTS OF CHILDREN IN SOUTH AFRICA'S CRIMINAL JUSTICE SYSTEM: A CHILD'S INTEREST CENTRED APPROACH IN CRIMINAL JUSTICE PROCESSES

The study unpacked the elements of children's best interest principle, and this chapter has explored specific laws and judicial developments on the criminal justice approach to children's best interest. The developments made thus far shows that South Africa sought to ensure the children's best interests are important in all children related matters or affairs, including criminal justice procedures. This section will sum up the critical analysis of this chapter, showing whether children's best interests are considered in criminal justice processes.

¹⁷⁴ Children's Act 38 of 2005.

¹⁷⁵ Section 6(2) (a) of the Children's Act.

In the case of *Centre for Child Law v Minister for Justice and Constitutional Development*,¹⁷⁶ the court was challenged to determine the application of children's best interests. The application of section 51 of the Criminal Law Amendment Act 15 of 1997,¹⁷⁷ entails the minimum sentencing was applicable across adults and children without any distinction as would be necessary under the best interests of the child principle. In dealing and redressing this, the Constitutional Court referred to section 28(1) (g) of the Constitution, which mandates the judiciary as a role player in the criminal justice system to approach child-related matters considering the best interest of children approach. For instance, sneering that detention is a measure of last resort and also issued for the shortest time appropriate, considering all circumstances of the child and the offence in question.¹⁷⁸ The court declared that "sections 51(1); 51(2); 51(5)(b) and 51(6) of the Criminal Law Amendment Act 105 of 1997 were unconstitutional and invalid, to the extent that they applied to persons under 18 years of age at the time of the commission of the offence."¹⁷⁹ This case helped to readdress laws that enabled life sentences for children and minimum sentencing. Centre for Child La investigated 3 cases of children who were sentenced to 3 life terms. They were helped to lodge an appeal and eventually got released based on the law-related developments that favoured circumstances of children's interests.

Secondly, in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* it was clear that:¹⁸⁰

What must be stressed here is that every child is unique and has his or her own individual dignity, special needs, and interests. And a child has a right to be treated with dignity and compassion. This means that the child must 'be treated in a caring and sensitive manner. This requires taking into account [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity'. In short, 'every child should be treated as an individual with his or her own individual needs, wishes and feelings'.

This means the judiciary as a role player in the criminal justice system notes that, for all other role players in the same criminal justice system, every child's needs and interests may differ depending on different circumstances and other factors. Hence,

¹⁷⁶ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009(2) SACR 477 (CC) 2009(6) SA 632 (CC) BCLR 1105 (CC).

¹⁷⁷ Criminal Law Amendment Act 15 of 1997.

¹⁷⁸ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009.

¹⁷⁹ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009.

¹⁸⁰ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*.

best interest in one case may not necessarily be in another, yet, at the closing of any matter involving a child, the best interests of the child must be determined, applied, and used as the fundamental determining factor for the course of action. It is, however, complicated to conclude this study without giving reference to reports or cases that indicate that these tenets and principles are religiously followed in the criminal justice system

In the case of *S v M*¹⁸¹ the court determined the best approach when considering a sentence or imposing imprisonment on a primary caregiver of a child. The key question in the matter was whether the court should consider the children's best interest in this kind of situation. The applicant's key argument of the was that section 28 of the Constitution, in criminal justice matters can be interpreted as stating that, the effect of a custodial sentence of a primary care giver, on the child, must be considered on the backdrop of the best interests principle under section 28 of the Constitution.¹⁸² On the other hand the respondents contended that the provisions of section 28 are already taken into account considering the facts of the particular case in question.¹⁸³ The court noted that the best interest child-centred approach can be broken down as follows:
¹⁸⁴A principled child-centred approach requires a close and individualised examination of the child's real-life situation of the child in question. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.¹⁸⁵

Generally, South Africa's attempts and developments on the best interest principle is at the heart child-related criminal justice proceedings. The adoption of a framework solely meant to regulate and create a child-friendly criminal justice system illustrates the significance of children's best interests in South Africa. Although South Africa has made these advances, it is imperative to check the alignment of South Africa's legal developments with the international standards as enshrined in international human rights laws.

¹⁸¹ *S v M* 2008 3 SA 232 (CC) para 24.

¹⁸² *S v M* 2008 3 SA 232 (CC) para 7.

¹⁸³ *S v M* 2008 3 SA 232 (CC) para 7-8.

¹⁸⁴ *S v M* 2008 3 SA 232 (CC) para 48.

¹⁸⁵ *S v M* 2008.

3.7. CONCLUSION

This chapter concludes that South Africa recognises, provides for, and guarantees the protection and promotion of the best interest of the child principle. The principle is provided for under different frameworks, mostly starting with the Constitution, then the Children's Act and thereafter, the Child Justice Act, which largely speaks to the study. The chapter shows that through the Child Justice Act, the South African Constitution provides child-centred mechanisms, measures, administrative processes and guidelines for the treatment and handling of children involved in criminal justice proceedings. In essence the Child Justice Act creates a child justice system that is different from the adversarial and inquisitorial criminal justice system meant for adults. The diversion and difference are mostly attributed to the principle of best interests of the child which serve as the cornerstone to laws regulating children's affairs including criminal-related issues. The study affirms that the principle of best interests of the child is of foundational value because it was central in readdressing and developed juvenile justice laws in recent times.

CHAPTER FOUR

ASSESSING SOUTH AFRICA'S COMPLIANCE WITH OBLIGATIONS AND TRENDS IN GLOBAL PRACTICE

4.1. INTRODUCTION

The previous chapter explored the interpretation and application of the best interests of the child principle in South Africa's criminal justice system. The chapter narrowed its focus to legal developments prescribing and regulating child-related criminal matters in South Africa. The Child Justice Act was discussed as a precedential framework regulating and providing guidelines on the treatment of children who are exposed to the criminal justice system. The chapter specified that the best interest principle is a developing concept, and there is a clear directive from the law and judiciary reasoning indicating that the best interests of the child must be considered even in the most extreme and severe criminal matters for as long as a child is involved. However, there are slow developments noted in children's best interest matters, considering the surge in crime rate and the increased involvement of children in crime. The other side of this story is justified by the lawmakers and the judiciary approach under the rationale that each child's case and circumstances are unique and must be treated and assessed exclusive of others on a case-to-case basis. Regardless of these findings, the previous chapter has also clarified that the best interest principle is fundamental to certain common issues such as, detention, sentencing, criminal capacity of children, parental care, child exposure, protection of identity for child offenders, witnesses and victims, diversion of children and overall, creating a child friendly criminal justice system.

This chapter proceeds to investigate whether South Africa complies with its international obligations when handling children during criminal justice processes and steps that South Africa has taken to fully realise and protect the best interest of the child principle in such criminal justice processes. This chapter puts the incorporation of international law standards and norms in the Child Justice Act to test.

4.2. SOUTH AFRICA'S OBLIGATIONS IN TERMS OF INTERNATIONAL LAW

International law has increasingly developed towards the advocacy and advancement of human rights under various forms of laws including children's rights laws under study. This international law has in turn generated regulations, standards, and

measures to prevent occurrences of any conduct by the state or private persons and entities that may amount to the violation of integrity, dignity, freedom or basic rights as protected by the international law.¹⁸⁶ In this regard, member states are required to generally give effect to international law standards or develop domestic laws that conform to these standards. For instance, international law provides for member states to safeguard the bodily integrity and human dignity of all persons to the extent that all persons will freely enjoy, on equal basis, similar rights within similar or different circumstances.¹⁸⁷ This would mean, adults and children are to be adequately protected without limitation or discrimination based on age. It, however, also means that special attention is given to children, based on their circumstances as developing beings who are part of the community and are to be protected by the community. In section 38, the South African Constitution provides that international law must be considered in interpreting the Bill of Rights, within which section 28(2) provides for the children's best interests as of paramount importance in all matters affecting children. This obligates South Africa to utilise and consult international law in this regard, before discussing the obligations of South Africa as a signatory or state party to a particular international law instrument.

4.3. BRIEF OVERVIEW OF BEST INTERESTS STANDARD IN SOUTH AFRICA'S CRIMINAL JUSTICE SYSTEM

According to *S v M*,¹⁸⁸ it is practically impossible to create a predetermined formula for the best interest standard for children because it would be in contrary to the best interest principle. Children's circumstance must be considered on a case-to-case basis to determine the best judgement. However, some common and affirmed standards and areas of concern when dealing with children involved in the criminal justice system as either as offender, victim or witness include:

- Children to stay in parental care as in their best interest
- Detention to be a measure of last resort and for the shortest period applicable

¹⁸⁶ World bank Group: Compendium of International and National Legal Frameworks on Sexual Harassment in the Workplace 1st ed Vol 1 of 5 (2019).

¹⁸⁷ World bank Group: Compendium of International and National Legal Frameworks on Sexual Harassment in the Workplace (2019).

¹⁸⁸ *S v M* 2008 3 SA 232 (CC) para 48.

- Protecting anonymity and identity of children
- Administrative processes involving children to be attended to speedily
- Diversion from the harsh criminal justice as a fundamental program
- Minimum sentencing standards applicable to adults, not applicable to children
- Criminal capacity of children to be determined under tenacious and strict mechanisms by qualified professionals
- The involvement and roles of role players in services and institutions that deal with children for purposes of criminal justice administration

4.3.1. FACTORS NECESSITATING INVOKING THE BEST INTERESTS QUESTION

It is important to note that apart from drawing a common idea of the best interest approach in South Africa, drawing the factors that necessitate the need to invoke best interest of children in matters affecting or involving children is equally important. According to the Committee on the Rights of the Child, the best interest standard alludes to the aspirations and views, identity, age, gender, personal history and background, care and protection or safety, the well-being of the child, family environment, social and family relations and contacts of the child, peer and adults as may be applicable.¹⁸⁹ Circumstances of vulnerability such as safety, risks, resiliency or empowerment are part of the important factors necessitating the best interest of children.¹⁹⁰ Lastly, skills and evolving capabilities as enhanced and made possible through realisation of other basic rights and needs such as health, education, development and gradual development of children towards adulthood are also considered.¹⁹¹

It is not all about how far South Africa has gone in realising and developing a child's-best interest-centred approach to criminal justice but, whether the South African currently recognised and affirmed standards and supporting infrastructures align with international standards and practices in this regard.

¹⁸⁹ Committee on the Rights of the Child, General Comment No. 14 (2013), Chapter V.A.1 and par. 44.

¹⁹⁰ Committee on the Rights of the Child, General Comment No. 14 (2013), Chapter V.A.1 and par. 44

¹⁹¹ Committee on the Rights of the Child, General Comment No. 14 (2013), Chapter V.A.1 and par. 44

4.4. CHILD-CENTRED CRIMINAL JUSTICE APPROACH IN TERMS OF INTERNATIONAL STANDARDS AND PRACTICES

Several fundamental international law frameworks regulate and provide for child-related affairs. These frameworks advance fundamental standards on the best interest of children involved in criminal justice proceedings. This chapter discussed how they are recognised in one way or another in the South African criminal justice affairs of children. The study depicted the 'international standards that guides the realisation of best interests of the child as the Convention on the Rights of the Child. The study focuses on this framework based on the rationale adopted from *Brandt v S*¹⁹² where the Supreme Court of Appeal noted that this convention is the international standard against which legislation and policies are measured with regards to rights and interests of children. In terms of the CRC the best interest principle is one of the primary foundations of the convention. Furthermore, the convention noted that children are entitled to equal basic human rights afforded every other person, however, children are entitled to special care and assistance. Article 3 (1) of the convention places the best interest standard at the core or heart of international children's rights law.¹⁹³ Therefore, the best interests standard merely underpins the manner in which all rights afforded children must be applied.

4.4.1. CONVENTION ON THE RIGHTS OF CHILDREN: BEST INTEREST STANDARD

As already indicated in chapter 2 of this study, South Africa is a party state to the CRC (signed on 29 January 1993 and ratified on 16 June 1995). In terms of this convention, South Africa is obliged to recognise the prescriptions of the framework through domestication of the framework in the national laws regulating the same affairs.

In Article 3, the convention provides for the best interest of children, it notes that, "In all actions concerning children...the best interests of the child shall be a primary consideration."¹⁹⁴ It further notes that, "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being and, to this end, shall take all appropriate legislative and administrative measures."¹⁹⁵ Therefore, "States

¹⁹² *Brandt v S* [2005] 2 All SA 1 (SCA) 7.

¹⁹³ S Parker "The best interests of the child – Principles and problems" (1994) *International Journal of Law and the Family* (IJLF) 26.

¹⁹⁴ CRC Article 3(1).

¹⁹⁵ CRC Article 3(2).

Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities."¹⁹⁶ Article 3 of this fundamental framework underscores two main and important issues. Firstly, in all matters involving children, their best interests are to be considered as paramount. Secondly, all state parties under the convention are obliged to ensure these best interests are realised at national settings for protection, care and well-being of children through legislative and administrative mechanisms. The latter is also extended to service providers, institutions or facilities involved with the care and protection of children, who are regarded as role players in the South African criminal justice system such as the police, the judiciary and court officials, correctional services and extended institutions and service providers such as psychologist or social services among others. It can be summarily noted that South Africa has set conditions, measures, provisions, and judicial developments, that collectively respond to the obligations stipulated under the CRC.

4.4.2. PARENTAL CARE AND NON-SEPARATION STANDARD

In Article 9, the CRC provides that all state parties are to ensure that,¹⁹⁷

“...a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine...that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.”

The CRC further provides that even in proceedings and processes pursuant to the above cited provision, all interested parties must have an opportunity to participate in such processes or proceedings and voice their views on record.¹⁹⁸

In the South African context both the Children's Act and the Child Justice Act emphasise the importance of children staying in family care or contact.¹⁹⁹ The Child Justice does not recommend detention of children unless as a measure of last resort, and alternatively recommends that even if the child has been arrested, family must be

¹⁹⁶ CRC Article 3(3).

¹⁹⁷ CRC Article 9(1).

¹⁹⁸ CRC Article 9(2).

¹⁹⁹ Se generally the Children's Act, read together with the Child Justice Act on parental care of children.

quickly informed and the child should have family contact or be placed within family care while any other administrative processes unfold on a case-to-case basis.²⁰⁰

4.4.3. STANDARD FOR CHILDREN TO EXPRESS OWN OPINION

Article 12 of the CRC provides a standard right for practice on the importance of allowing children to express their own opinions, in as much as such the child is able to form an opinion and freely express such opinions and views, in all matters affecting the child.²⁰¹ The article further provides that when involved in proceedings of judicial or administrative nature affecting the child, the child must be afforded the opportunity to express his/her views and opinions and be heard, this done, either directly or through representation or other appropriate means.²⁰²

The Criminal Procedure Act and the Child Justice Act, underscore the importance of children, in appropriate cases and circumstances to be allowed to express their views and opinions in matters affecting them.²⁰³ The Criminal Procedure Act provides for child victims, and offenders during the criminal justice process, outlining methods and manner in which these procedures must be done in a child friendly and sensitive environment that encourages a child to express his or herself.

4.4.4. STANDARD TO PROTECT CHILDREN FROM ABUSE AND NEGLECT

Article 19 creates another fundamental standard which covers a general need to protect children from abuse and neglect. State parties are bound to promulgate the relevant laws, administrative, social and educational measures aimed at protecting children from any form of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation as may be relevant.²⁰⁴ The article further clarifies that adequate protective measures must include effective processes of establishing social programmes aimed at providing needed and necessary support for children who may necessarily need judicial involvement.²⁰⁵

²⁰⁰ Child Justice Act.

²⁰¹ CRC Article 12 (1).

²⁰² CRC Article 12 (2).

²⁰³ See generally the Criminal Procedure Act and the Child Justice Act.

²⁰⁴ CRC Article 19 (1).

²⁰⁵ CRC Article 19 (2).

While the Children's Act safeguards children against neglect and abuse in a family setup or community, the Child Justice Act safeguards the same, however within the criminal justice system and processes.²⁰⁶ While undergoing the criminal justice processes, a child can easily feel neglected or abused merely by the nature of the system. Hence the Child Justice Act repeatedly cautions on taking the child away from custodial care where generally the child will not be neglected or abused. This neglect and abuse generally refer to the needs and essentials for the child, which may differ from case to case and may be easily known to the family of the child. In this case a child must be protected from neglect and abuse in all matters affecting such a child, which include criminal justice related matters and as result, the processes are not adversarial or inquisitorial but divert from the harsh nature of the criminal justice system faced by adults.

4.4.5. STANDARD AGAINST TORTURE AND DEPRIVATION OF LIBERTY

Article 37 of the CRC articulates a set of provisions that address how children must be protected from torture, without being deprived of their freedom:²⁰⁷

- a. No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...
- b. No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time
- c. Every child deprived of liberty shall be treated with humanity and respect...and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults...and shall have the right to maintain contact with his or her family...
- d. Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of...liberty before a court or other...authority, and to a prompt decision on any such action"

The Child Justice Act does not adopt and use the same terminology with the CRC; however, it emphasises that children should not be detained, restrained, or limited. This is its approach to safeguard the right of children to freedom and against depriving them of their liberty. The Act also provides on other issues such as protection of children from cruel, degrading, and inhuman treatment which can be argued to be analogous or inclusive of the CRC protection from torture. In a collective sense, while

²⁰⁶ See generally the Children's Act and the Child Justice Act on protection of children from neglect and abuse in all matters affecting the child.

²⁰⁷ Article 37 (a-d).

undergoing criminal justice processes, South Africa ensures children are either in child friendly environment, or in the care of their family and in other instances afforded constant family contact, while avoiding any treatment that may be cruel, degrading, or inhuman or rather, torturous treatment.

4.4.6. STANDARD FOR REHABILITATIVE CARE

Article 39 of the CRC mandates state parties to take all appropriate measures in ensuring the promotion of physical and psychological recovery and social reintegration of child victims of all forms of neglect, exploitation, or abuse, torture or other forms of cruel, inhuman or degrading treatment or punishment, or armed conflicts.²⁰⁸ The aforesaid recovery and integration are further required to manifest in an environment that facilitates and fosters health, self-respect and dignity of the child.²⁰⁹

The Child Justice Act is the cornerstone of the diversion programme in South Africa. The diversion programme diverts children from harsh correctional facilities of a punitive nature and instead, redirects children to a more rehabilitative and restorative justice infused processes. Therefore, the child is allowed to undergo almost all educational processes as a form of rehabilitative care geared to allow reintegration of the child in society.

4.4.6. STANDARDS FOR ADMINISTRATION OF CHILD JUSTICE

Article 40 addresses all needs and fundamentals that should be of paramount importance in administering child justice. This provision speaks directly to core aspects of the study in as much as it relates to child justice approach. The article provides that:²¹⁰

1. "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."
2. "To this end, and having regard to the relevant provisions of international instruments States Parties shall, in particular, ensure that...
 - b. Every child alleged as or accused of having infringed the penal law has at least the following guarantees...

²⁰⁸ Same as above.

²⁰⁹ CRC Article 39.

²¹⁰ CRC Article 40 (1-4).

- ii. To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance...
 - iii. To have the matter determined without delay by a competent, independent, and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and...in particular, taking into account his or her age or situation, his or her parents or legal guardians
 - iv. Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality...
 - v. To have the free assistance of an interpreter if the child cannot understand or speak the language used
 - vi. To have his or her privacy fully respected at all stages of the proceedings"
3. "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular...
- b. whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected"
4. "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

The provisions of the Criminal Procedure Act and Child Justice Act collectively address the administration of child justice. For instance, Section 150 & 153 of the Criminal Procedure Act ensure child victims and witnesses' rights are protected in giving testimony, their identities must be kept anonymous, a mediator or interpreter or any form of assistance must be provided as may be needed for such a child to fully discharge their onus in terms of the administration of justice processes.²¹¹ On the other hand, provisions on diversion and one stop spots for children notes that the overall aim is to take away children from formal court processes and provide dispositions similar to those mandated by the CRC, such as family care or supervised care, counselling, educational and vocational training initiatives as may be necessary to ensure the well-being of children according to their circumstances.

²¹¹ Criminal Procedure Act 51 of 1977

4.5. OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

4.5.1. STANDARD ON PROTECTION OF CHILD VICTIMS

Article 8 of the Optional Protocol on the Sale of Children, child Prostitution and Child Pornography provides an articulate set of provisions for state parties to consider in the protection of child victims:²¹²

1. "States Parties shall adopt appropriate measures to protect the rights and interests of child victims...at all stages of the criminal justice process, in particular by:
 - a. Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses
 - b. Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases
 - c. Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected
 - d. Providing appropriate support services to child victims throughout the legal process
 - e. Protecting, as appropriate, the privacy and identity of child victims and taking measures...to avoid the inappropriate dissemination of information that could lead to the identification of child victims
 - f. Providing...for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation
 - g. Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims..."
3. "States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims..., the best interest of the child shall be a primary consideration"
4. "States Parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims..."
5. "States Parties shall...adopt measures in order to protect the safety and integrity of those persons...involved in the prevention and/or protection and rehabilitation of victims..."

Article 9:²¹³

3. "States Parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims..." including their full social reintegration and their full physical and psychological recovery
4. "States Parties shall ensure that all child victims...have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible

²¹² Article 8 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

²¹³ Article 9 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

4.6. OVERVIEW OF SOUTH AFRICA'S COMPLIANCE WITH INTERNATIONAL STANDARDS AND PRACTICE

According to Maithufi, the requirements to consider the best interests of the child as primary concern in all matters affecting a child is found in almost all human rights frameworks and documents.²¹⁴ This affirms the significance of this principle. However, the realisation or the elements of the principle in practice are not as certain. It can further be argued there should be guidelines on how a child can or should be protected. The study concluded that there are common standards guiding the best interest of the child, particularly in criminal justice processes.

While the Convention identifies the best interests of the child as of primary consideration,²¹⁵ the South African Constitution adopted a year before ratification and 3 years after signing the Convention, identifies the best interests of the child as paramount.²¹⁶ South Africa have taken the issue of best interests seriously by referring to it as paramount. In the dictionary the term primary alludes to “something being chief or of first importance” whereas the word paramount alludes to something “more important than anything else.”²¹⁷ Taken in a more literal form, this would mean the protection afforded in the South African Constitution is more serious and alludes to the fact that these rights take centre stage than all other rights. Such an interpretation is however argued to be unpalatable, because it further alludes that it is pointless to consider the rights and interests of other persons.²¹⁸ However, instead of referring to them as being protected at all costs, the best interests of children clearly cannot be downplayed at the international level and more seriously emphasised at the South African national level. In *M v S*,²¹⁹ the term “paramount” in the Constitution is emphatic to avoid spreading the principle of best interests too thin and risking it becoming ineffective in protecting children and becoming a form of a rhetoric phrase of weak application. However, by using of the term “paramount” the principle is not absolute.

²¹⁴ I Maithufi “The best interests of the child and African customary law” in Davel (ed) *Introduction to child law in South Africa* (2000) 140.

²¹⁵ CRC article 3.

²¹⁶ Section 28 of the Constitution of the Republic of South Africa of 1996.

²¹⁷ R Allen and A Delahunty *Oxford student's dictionary* (2002) 739.

²¹⁸ E Bonthuys “The best interests of children in the South African Constitution” (2006) *International Journal of Law, Policy and the Family* (IJLPF) 23.

²¹⁹ *M v S* 2004 1 SA 406 (CC) 432A–B.

Madala J further noted that the application of section 28(2) of the Constitution constitutes that, child's best interests must prevail unless an infringement of the relevant rights is justifiable in terms of section 36 of the Constitution.²²⁰

As the cases of children's best interests are also dealt with on a case-by-case basis, this study submits that, South Africa has set the key underpinnings for the realisation of best interests of the child as stipulated by the international law standards. Firstly, by raising the principle to the level of paramountcy. This can be further argued as the underpinning guideline and value which has inspired provisions of the Child Justice Act to take a child-centred approach to protect and promote the interests of children in criminal justice affairs and matters or processes.

#The Child Justice Act as a law of general application in South Africa, was promulgated with the sole intention to place the best interests of children at the core of criminal justice processes involving children. The Act deal with rights and interests of children in the administration of their affairs once they get exposed to the criminal justice processes either as victim, witness, or offender, although it places more emphasis on the child offenders than the other categories. It can be argued that the Child Justice Act as the paramount law prescribing detailed standards to follow the best interests of children in criminal justice matters. It is more than a fair attempt and rather an Act that underscores the significance of the standards of children's best interests by differentiating emphasis on handling children; what is to be considered in all the different processes and how the child should be viewed. On an overall note, the Act creates the perception and understanding that children are different, special and vulnerable and needs a fitting criminal justice system that diverts the child from the harsh realities of the criminal justice system and tries to comprehend and enhance protection and promote children's potential of being good and responsible citizens as they grow towards adulthood. In more than one instance and provisions, the Child justice Act, matches, and promotes some key provisions regarding the administration of child justice such as detention, liberty, need for parental care and using rehabilitative measures instead of punitive measures towards children, which are some of the key features of the Children's Rights Act.

²²⁰ *M v S* 2004.

Some scholars argued that, some factors may lead to a problem when measuring compliance of a party state to the international standard of best interest mostly because the best interests principle is extremely argued to be vague and indeterminate.²²¹ Determining the international law standards of best interests principle and in a country where customary law plays a major role is a challenge.²²² Parker argues that caution must be exercised in ascertaining the meaning of best interests principle because the concept cannot have a fixed meaning and content that is valid and applicable to all communities and circumstances is unanimous; however, should remain flexible.²²³ This affirms some of the study findings; generally, in South Africa the best interests of a child are to be determined by the facts and circumstances of each case, according to the underpinning guidelines reconciled from International standards and their relevance in the South African context. In the case of *Minister of Welfare and Population Development v Fitzpatrick*,²²⁴ the court affirmed that, the best interest of a child is a concept that must remain flexible based on how individual circumstances of each child or case will determine the factors that secure the best interests of each concerned child.

In the context of this study, the South African compliance to international standards and developments on children's best interests cannot be questioned. However, in the criminal justice sphere, South Africa has developed an entire Child Justice Law to cover the expectations. In contrast, international standards are in a brief form, which would also confirm Parker's stance; facts and circumstances of each child will determine the best interests. It is also important to consider the circumstances and context of state party. A country like South Africa has been experiencing and recording an increase in crime occurrence, where the involvement of children in crime-related matters is constantly surging either as offenders, victims, or witnesses. On a global scale, South African children are raised in environments and circumstances; hence

²²¹ E Bonthuys "Of biological bonds, new fathers and the best interests of children" (1997) *South African Journal of Human Rights* 636.

²²² Cf Clark "A 'Golden thread?' Some aspects of the application of the standard of the best interest of the child in South African Law" (2000) *Stellenbosch Law Review* 3 15.

²²³ Parker 1994 IJLF 27.

²²⁴ *Minister of Welfare and Population Development v Fitzpatrick* [2000] ZACC 6; 2000 (7) BCLR 713 (CC); 2000 (3) SA 422 (CC).

they are prone to be involved in criminal activities. For that reason, therefore, the criminal justice department had to develop and adapt to dealing with children according to their best interests.

South Africa has progressed in light of the need for measures, services and facilities for the care and protection of children according to the standards imposed through international standards. In recent developments, diversion programs have been implemented and added as part of the law under the Child Justice Act. This is an addition to other mechanisms that were already in place to limit the effects of full contact with the criminal justice system. Some of these mechanisms were drawn in line with objectives of the criminal justice system. For instance, the 'include youth' restorative justice programs were established in 2000 under the Restorative Justice Centre as an alternative to the criminal justice system. It was affirmed as a fundamental innovative approach to dealing with offenders, especially in cases of children in the case of *S v Shilubane*.²²⁵ Assessment centres and one-stop child justice centres are also other mechanisms preceding diversion programs where child offenders were protected through streamlining of pre-trial services to child offenders.²²⁶ Ordinarily these one-stop centres served as a stop after an arrest.

The Child Justice Act is informed by international standards, developments, and trends, particularly regarding the diversionary justice model. Articles 37 and 40(3) of the Convention on Rights of the Child (1989) (CRC) provides for the liberty of child offenders and the overall juvenile administration, promoting the adoption of alternatives to criminal proceedings for children who are against the law.²²⁷ The South African adoption and use of the diversion program theoretically underscores the functioning of the juvenile justice system. South Africa's Child Justice Act of 2008 preamble seeks to redress and deal with injustices experienced by most children during apartheid, and the need to progressively realise the Constitutional mandate to protect children's rights.²²⁸ The Act also aims to advance a humanist approach at justice for children through values of compassion, tolerance, and fairness. Section 1 of the Child Justice

²²⁵ *S v Shilubane* 2008 (1) SACR 295 (T).

²²⁶ Skelton: Resource Material Series no.75.

²²⁷ CRC Article 37.

²²⁸ Child Justice Act Preamble.

Act incorporates the restorative justice notion and provides that, this is the form or approach towards justice by involving children in conflict with the law, the victim, families, and community members to collectively determine and deal with threats, harms, needs and obligations by accepting responsibility, providing restitution and taking necessary measures to combat recurrence.²²⁹

It is a mandate to quickly establish the criminal capacity of the child in question at the point of exposure to the criminal justice system. In terms of section 11(3) of the Act, the assessment procedure must include assessing the child's cognitive, moral, emotional, psychological, and social development of the child.²³⁰ This assessment may be requested by a magistrate presiding in the criminal capacity inquiry, or by a prosecutor or legal representative of the child as may be applicable. According to section 97(3) psychiatrists and clinical psychologists are regarded as equally suitable and competent to undertake the criminal capacity assessment of children alleged to have been against the law.²³¹ In light of the above, probation officers are not empowered to assess the cognitive, moral, emotional, psychological, and social development of children in their criminal capacity assessment report.²³²

The Judicial Matters Amendment Act (14 of 2014) also makes it mandatory for presiding officers and the child justice court to consider child's cognitive, moral, emotional, psychological, and social development when determining the criminal capacity of such a child.²³³ In essence, probation officers cannot make conclusive assessment on the cognitive elements of a child, although a mandatory procedure for cognitive assessment is imposed. This means a more sensitive and stricter measure and approach is imposed for children who are exposed to the criminal justice system, to ensure all factors and circumstances that help the criminal justice role players to determine the best interests of each child is done effectively.

The Child Justice Act (2008) establishes a criminal justice system designed to deal with child or juvenile offenders in compliance with the Constitution and international

²²⁹ Section 1 of the Child Justice Act.

²³⁰ Section 11(3) of the Child Justice Act.

²³¹ Section 97(3) of the Child Justice Act.

²³² Section 35 of the Child Justice Act.

²³³ Judicial Matters Amendment Act (14 of 2014)

law standards. A variance in the treatment of adult offenders and child offenders is created through a host of mechanisms that are collectively set as a diversion program. This program objectively ensures that there is increased ability to rehabilitate and reintroduce child offenders back to society, under the care of their parents or guardians to restore the children's sense of dignity while also allowing them to recognize the need to respect other people's rights. In this regard, the child Justice Act resorts to the incarceration of child offenders as a measure of last resort. Humanised processes and systems were developed to protect children from the overall effects of the criminal justice system processes. Children are vulnerable, whether they are the victims, offenders, or witness. This line of argument is fundamental in determining if the criminal justice system is conforming and aligning with the needs of children as objectively intended by the Child Justice Act.

4.7. CONCLUSION

This chapter concludes that while the principle of best interests of the child comes with varying critical views and with an overall sense that, it is not easily determined, it can however be submitted that South Africa has responded to its international obligations in this regard. Legal frameworks such as the Children's Act which covers mostly, family related issues and the Child Justice Act, are adopted and geared towards addressing children's issues and affairs. While the Children's Act can further be noted as primarily regulating the civil circumstances of children, the Child Justice Act is focused on the criminal justice system for children. This chapter elaborated that, the principle of best interests of the child is key in the development of a child-interests-centred legal system and framework. The Act pays closer attention to children's circumstances with the sole objective of promoting children's rights and protect them from the harsh realities of the criminal justice system. The chapter has also clarified that, while the CRC can be noted as the precedential framework regulating and setting the yardstick of international standards for best interests of children in the criminal justice spheres, South Africa has incorporated the principle in its Constitution with emphatic emphasis on its importance better than the CRC. The South African Constitution, further apprehended and extended it through the Children's Act, then later adhered and defined it for the criminal justice proceedings of children through the Child Justice Act. The chapter also illuminated that the issues surrounding children's best interests are of utmost importance. These include the circumstances and facts on a case-to-case basis to

determine what is in the best interests of each child. Therefore, the international standards and domestic laws are a fundamental process that underpin the key guidelines of understanding the best interests of children. The following chapter concludes the study provided recommendations.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1. STUDY FINDINGS SUMMARY

Chapter one introduced the study and it comprised of the background, problem statement, aims research question, objectives, literature review and methodology employed in the study.

Chapter two explored the principle of the best interests of children. The chapter discussed the origins of the concept in common law and its historical development through various fields and the development impacted the meaning for the principle under general law. The discussions noted the the principle was developed under family law and made applicable to all children's rights as a key universal human right component. The concept is applicable in all matters affecting a child, such that its application is used to weigh outcomes that have little to no adverse effects on the well-being, health, education, safety, care, protection, health, and livelihood among other factors relating to the concerned child. This chapter was a general exploration of the concept, objectively undertaken to set an understanding of the principle devoid of any attachment to a particular field or area of law.

Chapter three narrowed the focus of the study to how the concept of best interests of children was adopted, interpreted, prescribed, and applied in the South African criminal justice system. To regulate the criminal justice processes of children, the Child Justice Act is the primary legislative framework in South Africa, which on other provisions and issues may be read together with frameworks such as the Criminal Procedure Act, Children's Act and Criminal Law Amendment Act in the South African Constitution. The chapter briefly alluded to the statistical values on the increasing crime rates child involvement in crime-related matters as either offender, victim or witness to clarify the focus on the criminal justice processes involving children Through relevant

frameworks, interpretation and application of law by the judiciary, the chapter unravelled how the Child Justice Act has been a cornerstone in the development of a child-centred criminal justice system that considers the best interests of children in all justice processes by either imposing certain duties on the role players, prescribing minimum standards for on how to treat or deal with children. It also prescribed how administrative processes must be handled in a child-best interests-centred approach. In essence, the chapter managed to show that the principle of best interest of the child is at the heart of the child-centred approach developed under the Child Justice Act.

Chapter four explained how the South African approach to best interests of children in criminal justice matters, complies or aligns with international standards. This chapter sought to validate the whole set of discussions about the best interests of children as a viable concept, its applicability in South Africa and most importantly if obligations set under international law are met by South African justice system. Therefore, as a concept, the best interest principle is not indeterminate, yet is a fundamental cornerstone to child-related guidelines in criminal justice proceedings. From an international law perspective, South Africa has realised and prescribed with a more definite and stronger emphasis on the importance of the principle. This is in contrast with the CRC, which regards it as primary, while the South African Constitution regards it as paramount. South Africa has done a better job in further safeguarding the principle in the criminal justice system by devoting an entire framework to regulate the criminal justice affairs in a child-centred approach. The South African affirmation of the CRC is regarded as precedent in the international standards of children's affairs. The chapter also indicated how South Africa has geared the child justice system and provided essential services and institutions to support the measures implemented in making a child-centred criminal justice system according to the best interest standards.

Overall, the study has achieved its objective; to fully explore the concept of best interests of children as applied in criminal justice proceedings involving children. The recommendations drawn from the study findings are outlined in the following section.

5.2. RECOMMENDATIONS

The recommendations herein were drawn and developed from the study findings. The study explored the application of the best interests of child principle in criminal justice settings. Therefore:

- South African frameworks (the Child Justice Act, Children’s Act) must have detailed provisions that cater for circumstances of victims and witnesses in detail. This recommendation is influenced by how both South African and international provisions are more inclined to portray the child as an offender, while little attention is paid to other related circumstances. The child is often portrayed as going through criminal justice processes as an offender, most of the provisions allude to these circumstances at the expense of other circumstances. For instance, where 20 different provisions in the Child Justice Act provide for the handling of child offenders, and only one provision from the Criminal procedure Act discusses protection of rights of child victims and witnesses as added through court decision.
- The law must attempt to address the vague and indeterminate aspects in the best interests principle. In this regard, this study submits that the judiciary, in further interpreting the best interest principle should clarify the intention of the legislature in making the best interest principle the cornerstone of a legal frameworks such as the Child Justice Act. This study asserts that such a judicial note would not only point to the intention of the legislature but further clarify what best interests entail such that they are a key piece of the law.
- Since South Africa is increasingly experiencing a surge in crimes and the involvement of children in criminal activities the study recommends the courts to develop an eligibility criterion. This criterion would serve a two-fold purpose; firstly, to indicate and affirm the decisions in *M v S* asserting that even through the principle of best interests is given primary attention, it is not absolute and cannot trump other rights or interests. Secondly, to serve the interests of the criminal justice system by helping it in combating and dealing with crime. This recommendation emanated from the criminogenic factors that the increased involvement of children in crime may not be an accident, mistake, or coincidence, but a matter of consequence. This is because there are no consequences accruing to children whose conduct is against the law. In as much criminal capacity and best interests are determined, the criterion would merely be a measure or yardstick set for which child’s conduct should not exceed to levels that infer trumping the rights and interests of others.

- The study also recommends and suggests that researchers should conduct similar or other studies of a similar nature to either compare or generate more refined findings and recommendations.

5.3. LIMITATIONS OF STUDY

The study's overall findings are credible and viable but could have been better without the limitations indicated below:

- Lack of research funding for the project did not allow for a more empirical approach that could have encompassed views and perceptions from role players and society on the applicability of the best interest of the child principle in criminal justice settings.
- As mini dissertation, the study could not engage and include almost all relevant materials and sources. Instead, the study carefully scrutinised and considered the sources of utmost importance, that are directly relevant to the elements under study.
- The study was also confined to one country's settings. Therefore, the overall role and application of child best interest in criminal justice system can, in future studies, be scrutinised in a more advanced note by incorporating various African or intra-continental state parties to the CRC.

5.4. CONCLUSION

The principle of best interest of a child is a universal cornerstone in discussions and prescriptions of children's affairs, rights, and interests. Apart from being a subject of criticism, primarily for lacking clarity and not being well defined, the principle is fundamental and provides essential foundations on guidelines to dealing with child-related matters. Considering the criminal justice system that is based on adversarial and inquisitorial standards, the inclusion of the principle of best interests of children limits and avoids the application of these standards through protecting and promoting children's best interests. As a part state of the Convention on Rights of the Child, South Africa has incorporated the best interest standard in its Constitution, defined it in the Children's Act and the Child Justice Act for criminal justice related matters. South Africa has met its obligations under the CRC and constantly upholds its standards by developing services, institutions, and support to enforcing the best interest principle in children's criminal justice matters.

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