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## The Constitutionalization of Children's Rights in South Africa

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## The Constitutionalization of Children's Rights in South Africa

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## I. INTRODUCTION

When the Republic of South Africa drafted its Interim Constitution in 1993 and its final Constitution in 1996, it marked a groundbreaking moment in the advancement of children's rights. It was the first time that children's rights were robustly and comprehensively recognized in the express language of a nation's constitution. Before then, children's rights were recognized primarily through statutes, case law, and international treaties, with only occasional express recognition of specific rights, such as the right to primary education and certain family rights, in constitutions.<sup>1</sup> Additionally, a variety of courts interpreted constitutions to recognize children's rights (albeit usually limited rights both in number and scope relative to adults), but no country had promulgated a constitution that recognized children as a unique population of rights-holders with numerous specific rights beyond those held by adults.

Part II of this paper outlines the development of children's rights in South Africa within domestic, international, and historical contexts. Part III focuses on children's rights under South Africa's interim and final constitutions. Part IV identifies some of the most definitive decisions of the South African Constitutional Court in interpreting children's rights under the final Constitution. Part V questions whether the recognition of children's rights in the constitutions of post-apartheid South Africa is making a difference in the day-to-day lives of children. Part VI concludes the article.

## II. SOUTH AFRICA AND THE RISE OF CHILDREN'S RIGHTS

South Africa has inconsistently recognized children's rights over the past century. On the one hand, South Africa was an early and active leader in the recognition of children's rights in the international community. The Union of South Africa was a founding member of the League of Nations<sup>2</sup> and voted to endorse the first major international instrument recognizing children's rights, the 1924 Declaration of the

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1. In 2001, the UN Special Rapporteur on the Right to Education found that the constitutions of 142 out of 186 countries explicitly guaranteed the right to education. Katarina Tomaševski (Special Rapporteur on the Right to Education), *Annual Rep. of the Special Rapporteur on the Right to Education*, ¶¶ 66–67, U.N. Doc. E/CN.4/2001/52 (Jan. 11, 2001); *see also, e.g.*, CONSTITUTION OF IRELAND 1937, art. 42 (specifying state provision of free primary education and other educational facilities for the public good); BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 62, para. 2 (Switz.) (providing sufficient primary education and special needs education to all children). For constitutional provisions providing protection to children and families, *see* CONSTITUTION OF THE REPUBLIC OF GHANA 1992, art. 28 (recognizing the right of the family to state protection in promoting the interests of children); CONST. (1987), art. XV (Phil.) (recognizing comprehensive rights of the Filipino family); CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA 1999, art. 78 (Venez.) (recognizing children and adolescents as full legal persons, protected by special courts).
  2. 2 INTERNATIONAL SECURITY AND THE UNITED STATES: AN ENCYCLOPEDIA 717 (Karl R. DeRouen, Jr. & Paul Bellamy eds., 2008) (“South Africa was a founding member of the League of Nations and of the United Nations . . .”).

Rights of the Child (“1924 Geneva Declaration”).<sup>3</sup> The 1924 Geneva Declaration recognized children’s fundamental political, civil, economic, and social rights, presenting them all as “first-generation” rights.<sup>4</sup>

After the League of Nations was dissolved following World War II, the Union of South Africa became a founding member of the United Nations<sup>5</sup> and in March 1949 was one of twenty-one governments to send comments to the Secretary-General in support of adopting a United Nations Declaration of the Rights of the Child similar to the 1924 Geneva Declaration.<sup>6</sup> Moreover, the Union of South Africa was one of only five member states to send draft texts.<sup>7</sup> The efforts of South Africa and others were eventually successful. Ten years later, the 1959 Declaration of the Rights of the Child (“1959 Declaration”)<sup>8</sup> was adopted by the United Nations General Assembly; the vote was unanimous, and there was not a single abstention.<sup>9</sup>

The 1959 Declaration went even further than the 1924 Geneva Declaration. It recalled the 1924 Geneva Declaration and incorporated both the United Nations

3. See Declaration of the Rights of the Child, *adopted* Sept. 26, 1924, League of Nations O.J. Spec. Supp. No. 21, at 43, [http://www.unicef.org/vietnam/01\\_-\\_Declaration\\_of\\_Geneva\\_1924.PDF](http://www.unicef.org/vietnam/01_-_Declaration_of_Geneva_1924.PDF) (last visited Apr. 9, 2016) [hereinafter 1924 Geneva Declaration].

4. The final text of the 1924 Geneva Declaration reads:

By the present Declaration of the Rights of the Child, commonly known as the Declaration of Geneva, men and women of all nations, recognising that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

- I. The child must be given the means requisite for its normal development, both materially and spiritually;
- II. The child that is hungry must be fed; the child that is sick must be helped; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured;
- III. The child must be the first to receive relief in times of distress;
- IV. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation;
- V. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

*Id.*

5. See *supra* note 2 and accompanying text.

6. See Afua Twum-Danso Imoh, *The Convention on the Rights of the Child: A Product and Facilitator of a Global Childhood*, in *CHILDHOODS AT THE INTERSECTION OF THE LOCAL AND THE GLOBAL* 17, 22–23 (Studies in Childhood and Youth Ser., Afua Twum-Danso Imoh & Robert Ame eds., 2012).

7. U.N. Secretary-General, *Proposed United Nations Charter on the Rights of the Child, Rep. by the Secretary-General*, U.N. Doc. E/CN.5/111 (Mar. 8, 1949) (on file with author). The other four countries were Belgium, Denmark, the Netherlands, and the Philippines.

8. G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959) [hereinafter 1959 Declaration].

9. For greater understanding of the significance of the unanimous vote, see GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 7–12, 32–57 (1998).

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Charter<sup>10</sup> and the Universal Declaration of Human Rights,<sup>11</sup> ensuring that everyone understood that the rights it enumerated supplemented children's core rights as human beings.<sup>12</sup> Moreover, whereas the 1924 Geneva Declaration encouraged the "men and women of all nations" to accept as their duty the fulfillment and protection of children's rights,<sup>13</sup> the 1959 Declaration also called upon parents, voluntary organizations, local authorities, and national governments to recognize children's rights and "strive for their observance by legislative and other measures."<sup>14</sup> Under the 1959 Declaration, children were recognized as subjects, rather than objects, with rights to non-discrimination;<sup>15</sup> adequate nutrition, housing, and medical care;<sup>16</sup> a name and nationality;<sup>17</sup> social security;<sup>18</sup> play and recreation;<sup>19</sup> and education.<sup>20</sup> Additionally, special care was owed to disabled children<sup>21</sup> and those without a family.<sup>22</sup> At the same time the 1959 Declaration was adopted, the United Nations General Assembly unanimously passed a resolution "calling upon Governments to recognise the rights, to strive for their observance and to publicise the Declaration 'as widely as possible.'"<sup>23</sup>

Although South Africa established itself as a leader in the international community with the recognition of children's rights through the 1924 Geneva Declaration and the 1959 Declaration, the rise of apartheid policies after World War II led to a widespread failure to respect those same rights domestically. South Africa's repeated violations of human and children's rights alienated the country from the international community. For example, a resolution was presented to the United Nations Security Council in October 1974 that would have expelled South Africa from the United Nations due to its apartheid policies.<sup>24</sup> The United States, the United Kingdom, and France vetoed adoption of the resolution, and so South Africa was not expelled.<sup>25</sup> The

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10. See U.N. Charter.

11. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

12. See 1959 Declaration, *supra* note 8.

13. 1924 Geneva Declaration, *supra* note 3.

14. 1959 Declaration, *supra* note 8, at pmbl.

15. *Id.* at princs. 1, 10.

16. *Id.* at princ. 4.

17. *Id.* at princ. 3.

18. *Id.* at princ. 4.

19. *Id.* at princ. 7.

20. *Id.*

21. *Id.* at princ. 5.

22. *Id.* at princ. 6.

23. VAN BUEREN, *supra* note 9, at 10 (quoting G.A. Res. 1387 (XIV), at 20 (Nov. 20, 1959)).

24. See *Matters Concerning South Africa's Apartheid Policies*, 1974 U.N.Y.B. 106, U.N. Sales No. E.76.I.1.

25. See *South Africa and the United Nations*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/20th-century-south-africa/south-africa-and-united-nations-1946-1990> (last visited Apr. 9, 2016).

following month, however, the United Nations General Assembly suspended South Africa from the Assembly's work.<sup>26</sup> Subsequently, South Africa was unable to participate fully in the United Nations until after the democratic elections in 1994 and the country's reformation as the Republic of South Africa.<sup>27</sup>

During that time, important children's rights work was accomplished at the international level. The Year of the Child was 1979,<sup>28</sup> five years after South Africa's suspension from the General Assembly and three years after the Soweto Uprising, a peaceful march by black children (many in their school uniforms) to assert their education rights.<sup>29</sup> The demonstration became violent when the apartheid government opened fire on the students.<sup>30</sup> Ultimately, hundreds of people were killed or injured.<sup>31</sup> The apartheid regime's brutality during the Soweto Uprising is cited by some as the death knell for apartheid, as even those countries that had tolerated the government's violations of the civil rights of adults could not rationally defend the killing of innocent schoolchildren.<sup>32</sup>

The Soweto Uprising was not the only example of South Africa's failure to respect at home the same children's rights that it had advocated for internationally. Indeed, of 22,000 people detained during the State of Emergency in South Africa, forty per cent were children.<sup>33</sup> International children's rights scholar Geraldine Van Bueren repeatedly cites South Africa in her book, *The International Law on the Rights of the Child*, to provide examples of state violations of children's rights. Examples include detaining children as young as eleven years of age for attending a funeral to express their grief,<sup>34</sup> passing the Internal Security Act, which allowed "authorities

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26. However, the suspension was not a formal one under Article 5 of the UN Charter. See S.C. Res. S/11543, Draft Resolution on the Immediate Expulsion of South Africa from the United Nations (Oct. 24, 1974).

27. See G.A. Res. 48/258 (June 23, 1994).

28. VAN BUEREN, *supra* note 9, at 13.

29. The Soweto Uprising took place on June 16, 1976. Gary Baines, *The Master Narrative of South Africa's Liberation Struggle: Remembering and Forgetting June 16, 1976*, 40 INT'L J. AFR. HIST. STUD. 283 (2007).

30. *Id.* at 286–87, 291.

31. The number of casualties estimated from the Soweto Uprising ranges from 200 to 700. See DAVID HARRISON, *THE WHITE TRIBE OF AFRICA: SOUTH AFRICA IN PERSPECTIVE* 196 (1983) (citing 600 casualties); MIKE MASON, *DEVELOPMENT AND DISORDER: A HISTORY OF THE THIRD WORLD SINCE 1945*, at 240 (1997) (citing an official count of 200 and an unofficial count between 600 and 700). The most common number appears to be 176. See DIANA R. GORDON, *TRANSFORMATION & TROUBLE: CRIME, JUSTICE, AND PARTICIPATION IN DEMOCRATIC SOUTH AFRICA* 141 (2006) (citing 176 dead within the first week of the Soweto Uprising).

32. See Kimberlee Ann Scalia, *A Delicate Balance: The Effectiveness of Apartheid Reforms in the Struggle for the Future of South Africa*, 6 FLA. J. INT'L L. 177, 180 n.19 (1990) (citing Winston Nagan, *Economic Sanctions, U.S. Foreign Policy, International Law and the Anti-Apartheid Act of 1986*, 4 FLA. INT'L L.J. 85, 134 (1988)) ("After the Soweto uprising in 1976, the United Nations General Assembly called the South African government an 'illegitimate, minority, racist regime.'").

33. VAN BUEREN, *supra* note 9, at 207.

34. *Id.* at 145.

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not to inform relatives of the detention of a family member” in violation of children’s family rights,<sup>35</sup> and the impact of hunger and poor nutrition on children’s education.<sup>36</sup> Many other examples of South Africa’s widespread violations of children’s rights during the apartheid regime have been documented historically, but those in Van Bueren’s book are noteworthy because of the legal context of her analysis.<sup>37</sup>

While South Africa was violating the same children’s rights the country had recognized and advocated for earlier in the twentieth century, the rest of the world was busy drafting the UN Convention on the Rights of the Child (the “Convention”).<sup>38</sup> Drafting began in 1979 and lasted for nearly ten years.<sup>39</sup> In its final form, the Convention recognized children’s rights in four core categories: protection, provision, participation, and prevention of harm.<sup>40</sup> The treaty eventually became the most widely ratified human rights treaty in the history of the world.<sup>41</sup> In fact, every country in the world has ratified it except the United States.<sup>42</sup>

South Africa did not participate in the drafting process.<sup>43</sup> Other African countries were involved in drafting the Convention but were not proportionally and consistently represented.<sup>44</sup> The continent was strongly represented, however, among the first

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35. *Id.* at 192.

36. *Id.* at 238.

37. See Roger J.R. Levesque, *Geraldine Van Bueren, The International Law on the Rights of the Child*, 19 *FORDHAM INT’L L.J.* 832, 834 (1995) (book review) (noting that Professor Van Bueren’s legal analysis, which “directly examines the complex issues involved in . . . understanding children’s rights . . . is invaluable and would stand on its own.”). UNICEF publications also document the widespread rights violations that South Africa’s children suffered under apartheid, “including assault, torture, detention without trial, and restricted access to health care, education and protection.” UNICEF, *THE STATE OF THE WORLD’S CHILDREN (SPECIAL EDITION): CELEBRATING 20 YEARS OF THE CONVENTION ON THE RIGHTS OF THE CHILD 14* (2009).

38. See UN Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

39. See 1 OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, *LEGISLATIVE HISTORY OF THE CONVENTION ON THE RIGHTS OF THE CHILD* (2007), <http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf>.

40. See UN Convention on the Rights of the Child, *supra* note 38.

41. See *UN Lauds Somalia as Country Ratifies Landmark Children’s Rights Treaty*, UN NEWS CENTRE (Jan. 20, 2015), <http://www.un.org/apps/news/story.asp?NewsID=49845#Vk-AdIvFJUQ>; see also *Convention on the Rights of the Child Ratification*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (last visited Apr. 9, 2016).

42. While the United States has not yet ratified the UN Convention on the Rights of the Child, it signed the Convention on February 16, 1995, see *Convention on the Rights of the Child Ratification*, *supra* note 41, and was an active participant in the drafting process, 2 UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, *LEGISLATIVE HISTORY OF THE CONVENTION ON THE RIGHTS OF THE CHILD 933–35* (2007), <http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf>.

43. See 2 UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, *supra* note 42 (listing participants in the drafting process).

44. See Wilfried Grolig (Rapporteur), *Adoption of a Convention on the Rights of the Child: Rep. of the Third Comm.*, ¶ 10, U.N. Doc. A/44/736 (Nov. 17, 1989). Some histories of the drafting process attribute the underrepresentation of African countries in the drafting process to a lack of resources in post-colonial



nations that went on to sign and ratify the treaty quickly nonetheless.<sup>45</sup> In fact, of the fifty-seven countries that signed the Convention in the first month, over one quarter were African.<sup>46</sup> The Union of South Africa never ratified the Convention. It was not until the transition to a constitutional democracy that the treaty was finally signed in 1993.<sup>47</sup> The Republic of South Africa ratified the Convention on June 16, 1995, without a single reservation.<sup>48</sup>

South Africa also did not participate in the drafting or adoption of the Declaration on the Rights and Welfare of the African Child by the Assembly of Heads of State and Government of the Organisation of African Unity in 1979 (“African Children’s Declaration”).<sup>49</sup> Because the Organisation of African Unity was committed to

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Africa. See STEPHEN N. ACHILIHU, DO AFRICAN CHILDREN HAVE RIGHTS?: A COMPARATIVE AND LEGAL ANALYSIS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 28 (2010) (stating that “[t]he low participation by States in Africa, like other third world countries, was accounted for partly by the lack of trained personnel who can represent the countries in these capacities, and partly by low financial resources to commit the time and energy that are necessary to participate effectively in standard-setting activities”); see also Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 84–85 (1993) (noting that as the drafting of the Convention neared completion, fear that rumors of a Northern-Western treaty, which would not reflect concerns of less developed countries, would “prevent the Convention from being widely accepted”); Jeffrey Herbst, *International Law of War and the African Child: Norms, Compliance, and Sovereignty*, in INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP 185, 193 (Edward C. Luck & Michael W. Doyle eds., 2004) (attributing failure of African countries to engage during the drafting process to the disproportionate number of diplomatic representatives and resources between the West and African delegations). See generally Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 BROOK. J. INT’L L. 1, 25 n.168 (2008) (referencing various charges of bias and cultural imperialism related to the Convention).

45. See *Convention on the Rights of the Child Ratification*, supra note 41. The Convention was adopted unanimously by the General Assembly and broke records for the greatest number of signatories to a treaty on the first day signatures were entered. See Background Press Release, United Nations Human Rights Office of the High Comm’r, Comm. on the Rights of the Child Holds Sixty-Sixth Session in Geneva from 26 May to 13 June 2014 (May 22, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14635&LangID=E>.
46. The African countries that signed the Convention in the first month were Algeria, Burkina Faso, Côte d’Ivoire, Gabon, Gambia, Ghana, Guinea-Bissau, Kenya, Mali, Mauritania, Morocco, Namibia, Niger, Nigeria, Rwanda, Senegal, Togo, and Tunisia. *Convention on the Rights of the Child Ratification*, supra note 41. The UN Convention on the Rights of the Child opened for signature on November 20, 1989, and the first signatures were entered in January 1990. UN Convention on the Rights of the Child, supra note 38; see also Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 970–71 (2006).
47. See *Convention on the Rights of the Child Ratification*, supra note 41.
48. *Id.* The government of the Republic of South Africa announced its decision to ratify the Convention on the anniversary of the Soweto uprising (June 16) in 1995. PHILIP ALSTON & JOHN TOBIN, UNICEF INNOCENTI RESEARCH CENT., LAYING THE FOUNDATION FOR CHILDREN’S RIGHTS: AN INDEPENDENT STUDY OF SOME KEY LEGAL AND INSTITUTIONAL ASPECTS OF THE IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD 30 (2005).
49. Org. of African Unity [OAU] Dec. AHG/ST.4 (XVI) Rev. 1, Declaration on the Rights and Welfare of the African Child (Jul. 20, 1979) [hereinafter African Children’s Declaration]. “The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa, on signature of the OAU



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removing colonialism and white minority rule from the African continent,<sup>50</sup> South Africa did not become a member until May 23, 1994, less than six weeks after its first democratic election.<sup>51</sup> The African Children's Declaration was a non-binding instrument that, *inter alia*, emphasized the African child's special role in protecting African heritage, encouraged implementation and the updating of domestic legislation regarding children, and recognized the 1959 Declaration.<sup>52</sup>

South Africa also was unable to participate in the drafting of the African Charter on the Rights and Welfare of the Child ("African Children's Charter"), the regional treaty introduced in 1990 exclusively devoted to children's rights.<sup>53</sup> The African Children's Charter was the world's first regional children's rights treaty and went beyond the UN Convention on the Rights of the Child.<sup>54</sup> For example, whereas the Convention identified the "best interests of the child" as a primary consideration in all decisions affecting the child,<sup>55</sup> the African Children's Charter identified the "best interests of the child" as *the* primary consideration.<sup>56</sup> The African Children's Charter also took a bright-line approach to defining a child as anyone under eighteen years of age,<sup>57</sup> provided more express protections for girls,<sup>58</sup> and included an enforcement mechanism for children whose rights had been violated.<sup>59</sup>

The African Children's Charter not only addressed some of the shortcomings that had been identified in the Convention but also adapted the construction of

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Charter by representatives of 32 governments. A further 21 states have joined gradually over the years, with South Africa becoming the 53rd member on 23 May 1994." *Organization of African Unity (OAU)/African Union (AU)*, INT'L REL. & COOPERATION, REPUBLIC OF S. AFR., <http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm> (last visited Apr. 9, 2016).

50. See Joseph Mensah, *Organization of African Unity*, in 3 ENCYCLOPEDIA OF THE DEVELOPING WORLD 1202, 1203–04 (Thomas M. Leonard ed., 2006).
51. See *supra* note 49 and accompanying text.
52. See African Children's Declaration, *supra* note 49.
53. See African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999) [hereinafter African Children's Charter]. The African Charter on the Rights and Welfare of the Child was adopted in 1990, but because of apartheid, South Africa did not become an OAU member until 1994. See *supra* note 49.
54. See *The African Charter on the Rights and Welfare of the Child*, UNICEF, [http://www.unicef.org/esaro/children\\_youth\\_5930.html](http://www.unicef.org/esaro/children_youth_5930.html) (last visited Apr. 9, 2016); see also Warren Binford, *Discovering Mandela's Children*, TRANSITION, no. 116, Nelson Rolihlahla Mandela 1918–2013, 2014, at 51, 60; VAN BUEREN, *supra* note 9, at 10–11.
55. UN Convention on the Rights of the Child, *supra* note 38, art. 3(1).
56. African Children's Charter, *supra* note 53, art. 4(1).
57. *Id.* art. 2; cf. UN Convention on the Rights of the Child, *supra* note 38, art. 1 (identifying a child as being below eighteen years of age unless majority is attained through another law).
58. See African Children's Charter, *supra* note 53, art. 11(6) (recognizing the educational rights of pregnant girls). The UN Convention on the Rights of the Child, however, contains no provision for the rights of pregnant girls.
59. *Id.* art. 16(2) (establishing special monitoring units to provide oversight and field referral investigations, treatment, and follow-up of child abuse and neglect cases).

children's rights to Africa's unique historical and cultural context. For example, it recognized the heightened importance of family to the African child with relationships that were reciprocal and multilateral.<sup>60</sup> Under the African Children's Charter, children were viewed as having not only rights but also obligations to their families.<sup>61</sup> The Charter also recognized some of the unique challenges facing the continent and included provisions on child marriage,<sup>62</sup> child trafficking,<sup>63</sup> child labor,<sup>64</sup> children in armed conflict,<sup>65</sup> and harmful cultural practices.<sup>66</sup> With regard to South Africa, two provisions were especially key: (1) the protection against discrimination and apartheid, and (2) the obligation of states parties to provide material assistance to children affected by such practices.<sup>67</sup> The African Children's Charter was signed by President Nelson Mandela in 1997 and finally ratified by South Africa in 2000.<sup>68</sup>

It is not surprising that Nelson Mandela oversaw the signing of the African Children's Charter and the ratification of the UN Convention on the Rights of the Child as the first President of the Republic of South Africa. History makes clear that he maintained a longstanding recognition of both children and family rights; in fact, both were outlined in the Freedom Charter he co-authored in 1955 for the African National Congress.<sup>69</sup> The Freedom Charter called for the elimination of child labor

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60. *Id.* at pmb1., arts. 18–20. For example, unlike the Convention, the African Children's Charter includes a section that outlines the responsibilities of the African child to his or her "family and society, the State and other legally recognized communities and the international community." *Id.* art. 31. These include, for example, respecting and assisting parents, superiors, and elders, working for "the cohesion of the family," and preserving and strengthening "African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and [contributing] to the moral well-being of society." *Id.*

61. *Id.*

62. *Id.* art. 21(2).

63. *Id.* art. 29.

64. *Id.* art. 15.

65. *Id.* art. 22.

66. *Id.* art. 21.

67. *Id.* art. 26.

68. *See List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child*, AFR. UNION (Feb. 21, 2013), [http://www.au.int/en/sites/default/files/Welfare%20of%20the%20Child\\_0.pdf](http://www.au.int/en/sites/default/files/Welfare%20of%20the%20Child_0.pdf). The African Children's Charter entered into force after fifteen countries had ratified it. *See African Children's Charter*, *supra* note 53, art. 47(3). As of 2013, it has been ratified by 47 of the 54 recognized African countries. *See List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child*, *supra*. The only countries that have not ratified the treaty are the Central African Republic, the Democratic Republic of the Congo, the Sahrawi Arab Democratic Republic, the Federal Republic of Somalia, São Tomé and Príncipe, the Republic of South Sudan, and the Tunisian Republic. *Id.*

69. *The Freedom Charter: As Adopted at the Congress of the People, Kliptown, 26 June 1955*, AFR. NAT'L CONGRESS, <http://www.anc.org.za/show.php?id=72> (last visited Apr. 9, 2016) [hereinafter *The Freedom Charter*]. In his autobiography, Mandela presented the Freedom Charter as a group effort. *See NELSON MANDELA, LONG WALK TO FREEDOM 170–75* (First Paperback ed., Back Bay Books 2013) (1994); *see*

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and laws that separate family members.<sup>70</sup> It called for free and compulsory universal education and recognized children's rights to equal status in schools, in addition to free medical care (with special care provided for mothers and young children), and government care for orphans.<sup>71</sup> Family rights included parents' rights to educate their children and bring up their families "in comfort and security," as well as the right of working mothers to maternity leave with full pay.<sup>72</sup>

In short, South Africa had a history of international leadership in the advancement of children's rights until the nation became sidelined from the international stage due to its human rights abuses under apartheid. It also had a history of domestic recognition of children's rights among the political leaders who would come to lead the government of the Republic of South Africa. It also was part of a continent that itself was emerging as an international leader in children's rights. But there was more. South Africa also had a history of strong, proud, and vocal children who demanded that their rights be recognized both under apartheid, as in the Soweto Uprising, and during the transition to democracy.

Over 200 South African children met in the Western Cape in 1992 at the International Summit on the Rights of Children to address the violation of their rights and discuss the problems they continued to face following apartheid.<sup>73</sup> Their discussions led to the drafting of the Children's Charter of South Africa, which asserted that children were not being included in the nation's transition to a constitutional democracy,<sup>74</sup> and that children's rights were not on the agendas of either the government or any of the political parties.<sup>75</sup> In addition, children were not invited to participate in the negotiations of the Convention for a Democratic South Africa (CODESA), which was leading the transition to a new democratic nation.<sup>76</sup> When one considers the pivotal role that South Africa's children fulfilled and the price they paid in resisting the injustices of apartheid, in addition to the recognition of children's

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*also* Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 73 n.43 (1997) ("The Freedom Charter was drafted by the ANC and adopted by a mass meeting of some three thousand delegates, named the Congress of the People, in Kliptown, several miles from Johannesburg, on June 25-26, 1955.")

70. *The Freedom Charter*, *supra* note 69.

71. *Id.*

72. *Id.*

73. The International Summit on the Rights of Children in South Africa was held from May 27 through June 1, 1992, in Cape Town, South Africa. *See generally* Barbara Bennett Woodhouse, *Recognizing Children's Rights: Lessons from South Africa*, 26 HUM. RTS. 15 (1999). Children frequently shouted at the Summit, "Where is the new South Africa you all talk about? Show us, because we do not see it . . . !" *About the 'Children's Charter'*, NAT. CHILD PROJECT, [http://www.naturalchild.org/advocacy/south\\_africa/childrens\\_charter.html](http://www.naturalchild.org/advocacy/south_africa/childrens_charter.html) (last visited Apr. 9, 2016).

74. The Children's Charter of South Africa, International Children's Summit, *approved* June 1, 1992 [hereinafter 1992 Children's Charter of South Africa], [http://www.naturalchild.org/advocacy/south\\_africa/childrens\\_charter.html](http://www.naturalchild.org/advocacy/south_africa/childrens_charter.html) (last visited Apr. 9, 2016).

75. *Id.* at pmb1.

76. *Id.*

rights by both the leaders of the Union of South Africa and the emerging democracy, it is easy to appreciate why children believed they deserved a seat at the table.

In addition to insisting that children's representatives be placed on CODESA and within South Africa's existing and future governments, the Children's Charter of South Africa recognized many of the children's rights previously recognized by South Africa's former and future government leaders, including rights to name and nationality;<sup>77</sup> freedom from discrimination;<sup>78</sup> freedom of expression;<sup>79</sup> free legal representation;<sup>80</sup> freedom of religion;<sup>81</sup> cultural integrity;<sup>82</sup> freedom from violence;<sup>83</sup> freedom from wrongful detention;<sup>84</sup> a healthy and loving family life;<sup>85</sup> clean water, food security, and economic well-being;<sup>86</sup> free and universal compulsory education;<sup>87</sup> freedom from slavery and exploitative child labor;<sup>88</sup> and housing.<sup>89</sup> Many of the rights that had been previously recognized by the Union of South Africa, Nelson Mandela, and the African National Congress, and that were demanded by the children of South Africa, were included in both the interim and the final constitutions eventually adopted by the republic.

### III. CHILDREN'S CONSTITUTIONAL RIGHTS IN SOUTH AFRICA

The robust and comprehensive recognition of children's rights in post-apartheid South Africa arose from a history and culture that permeated numerous populations: previous government leaders, anti-apartheid activists, neighboring countries, and the nation's children themselves. Thus, it is not surprising that South Africa quickly distinguished itself as the nation with the most robust and comprehensive express recognition of children's rights in the world. This was true for both the Interim Constitution, which took effect in 1994,<sup>90</sup> and even more so for the final 1996 Constitution (the "Constitution"), which took effect in 1997.<sup>91</sup>

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77. *Id.* pt. 2, art. 2.

78. *Id.* pt. 2, art. 1.

79. *Id.* pt. 2, art. 3.

80. *Id.*

81. *Id.* pt. 2, art. 4.

82. *Id.*

83. *Id.* pt. 2, art. 5.

84. *Id.*

85. *Id.* pt. 2, art. 6.

86. *Id.* pt. 2, arts. 6, 9, 10.

87. *Id.* pt. 2, art. 8.

88. *Id.* pt. 2, art. 9.

89. *Id.* pt. 2, arts. 6, 10.

90. S. AFR. (INTERIM) CONST., 1993, § 30.

91. S. AFR. CONST., 1996, § 28.

## THE CONSTITUTIONALIZATION OF CHILDREN'S RIGHTS IN SOUTH AFRICA

In its Interim Constitution, South Africa included a section recognizing a variety of children's rights.<sup>92</sup> The provisions largely tracked fundamental rights embodied in the UN Convention on the Rights of the Child.<sup>93</sup> The country's 1996 Constitution expanded on those initial rights<sup>94</sup> and as a result provided greater recognition and protection to the unique rights of children than any constitution in the world.<sup>95</sup> Some are embodied in universal rights recognized in the Bill of Rights, including access to adequate housing;<sup>96</sup> health care, food, water, and social security;<sup>97</sup> and education.<sup>98</sup> Others were specifically identified as being unique to children and are largely outlined in section 28, which focuses on the special rights of children.<sup>99</sup>

In every matter concerning the child, South Africa's Constitution holds that the child's best interests are of paramount importance.<sup>100</sup> All children have the right to a

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92. S. AFR. (INTERIM) CONST., 1993, § 30.

93. In fact, children's rights advocates and others expressly relied on the Convention in submissions to the drafters of the Bill of Rights, and the technical committees relied on the Convention in selecting the wording of section 28. See Ann Skelton, *South Africa*, in *LITIGATING THE RIGHTS OF THE CHILD: THE UN CONVENTION ON THE RIGHTS OF THE CHILD IN DOMESTIC AND INTERNATIONAL JURISPRUDENCE* 13, 14 (Ton Liefwaard & Jaap E. Doek eds., 2015).

94. See S. AFR. CONST., 1996, § 28.

95. See Johan D. van der Vyver, *Municipal Legal Obligations of States Parties to the Convention on the Rights of the Child: The South African Model*, 20 EMORY INT'L L. REV. 9, 11–13 (2006); see also ALSTON & TOBIN, *supra* note 48, at 29–30.

96. S. AFR. CONST., 1996, § 26.

97. *Id.* § 27.

98. *Id.* § 29.

99. *Id.* § 28.

100. *Id.* § 28(2). The best interests standard was an established principle of South African law for nearly half a century prior to the drafting of the constitutions for the Republic of South Africa. See Skelton, *supra* note 93, at 18 (citing *Fletcher v. Fletcher* 1948 (1) SA 130 (A)). However, the principle was primarily applied in family law and dependency cases. *Id.* Thus, while recognizing that the UN Convention on the Rights of the Child did not introduce the best interests principle to South African jurisprudence, it appears that the treaty contributed to the expansion of the principle to other areas where the principle had not been previously applied, such as criminal law, social security benefits, and education law, among others. Indeed, under the Constitution, “[a] child's best interests are of paramount importance in every matter concerning the child.” S. AFR. CONST., 1996, § 28(2) (emphasis added). This language actually expands on the language of the Convention, which provides, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” UN Convention on the Rights of the Child, *supra* note 38, art. 3(1). The expansion of this language through interactions between domestic case law, international law, and constitutional promulgation and then application demonstrates the potential for dynamic interplay between domestic and international law, especially in the South African context. See *infra* note 128 (providing examples of cases in which the best interests principle has been applied). However, it is critical to note that the Constitutional Court held that the best interests of the child does not trump every other factor or right, but rather must be balanced and subjected to justifiable limitations. See Skelton, *supra* note 93, at 20 (citing *De Reuck v. Dir. of Pub. Prosecutions* 2004 (1) SA 406 (CC) (overruling a High Court judgment that interpreted section 28(2) of the Constitution to take precedence over all competing rights)).

name and nationality from birth.<sup>101</sup> Their rights to family care or parental care are protected,<sup>102</sup> and when they are removed from the family environment, they have the right to appropriate alternative care.<sup>103</sup> Every child also has rights to basic nutrition, shelter, basic health care services, and social services.<sup>104</sup> South Africa's Constitution is worded in such a way that it affirmatively obligates the nation to protect children from "maltreatment, neglect, abuse or degradation"<sup>105</sup> as well as "exploitative labour practices."<sup>106</sup> The Constitution prohibits children from being required or permitted to perform work or services that "are inappropriate for a person of that child's age" or "place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development."<sup>107</sup> The Constitution also recognizes the child's rights "not to be used directly in armed conflict, and to be protected in times of armed conflict."<sup>108</sup>

South Africa's Constitution requires the state to provide and pay for a legal practitioner to any child involved in the justice system either criminally or civilly "if substantial injustice would otherwise result."<sup>109</sup> While children in South Africa hold all of the same rights as adults when it comes to criminal proceedings, they also enjoy several additional rights by virtue of their status as children. For example, children may not be detained in South Africa except as a measure of last resort.<sup>110</sup> When they are detained, it must be for "the shortest appropriate period of time" and in facilities separate from adult detainees.<sup>111</sup> A child who is detained must be "treated in a manner, and kept in conditions, that take account of the child's age."<sup>112</sup> In addition to the rights that are unique to children under the Constitution, children also possess the same rights as the general population, including rights to, *inter alia*,

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101. S. AFR. CONST., 1996, § 28(1)(a).

102. It is important to note that the right to family life was intentionally excluded from the Constitution's Bill of Rights. See Julia Sloth-Nielsen & Belinda van Heerden, *The Constitutional Family: Developments in South African Family Law Jurisprudence Under the 1996 Constitution*, 17 INT'L J.L. POL'Y FAM. 121 (2003) (discussing South African family law). However, the child's right to family care was included in section 28. S. AFR. CONST., 1996, § 28(1)(b).

103. S. AFR. CONST., 1996, § 28(1)(b).

104. *Id.* § 28(1)(c). The child's rights to nutrition, shelter, basic health care services, and social services are presented as rights that are immediately enforceable. This immediate enforceability is a contrast to the rights of "everyone" to health care services, sufficient food and water, and social security, which are contingent on "available resources." See van der Vyver, *supra* note 95, at 11.

105. S. AFR. CONST., 1996, § 28(1)(d).

106. *Id.* § 28(1)(e).

107. *Id.* § 28(1)(f).

108. *Id.* § 28(1)(i).

109. *Id.* §§ 28(1)(h), 35(2)(c).

110. *Id.* § 28(1)(g).

111. *Id.* § 28(1)(g)(i).

112. *Id.* § 28(1)(g)(ii).

## THE CONSTITUTIONALIZATION OF CHILDREN'S RIGHTS IN SOUTH AFRICA

life,<sup>113</sup> housing,<sup>114</sup> education,<sup>115</sup> free expression,<sup>116</sup> religion,<sup>117</sup> culture and language,<sup>118</sup> equality,<sup>119</sup> and a healthy environment.<sup>120</sup>

Finally, the Constitution includes a section that expressly requires courts to consider international law when making decisions<sup>121</sup> and to favor interpretations of statutory law consistent with international law whenever reasonable.<sup>122</sup> Thus, the children of South Africa enjoy protection of their rights enumerated not only in the nation's Constitution, but also in the Convention, the African Children's Charter, and other human rights treaties ratified by the government,<sup>123</sup> such as the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict<sup>124</sup> and the Optional Protocol to the Convention on the Rights of

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113. *Id.* § 11.

114. *Id.* § 26.

115. *Id.* § 29.

116. *Id.* § 16.

117. *Id.* § 15.

118. *Id.* § 30.

119. *Id.* § 9.

120. *Id.* § 24.

121. *Id.* § 39(1)(b).

122. *Id.* § 233.

123. See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *adopted* May 25, 2000, 2173 U.N.T.S. 222 (entered into force Feb. 12, 2002) [hereinafter Optional Protocol on Child Soldiers]; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *adopted* May 25, 2000, 2171 U.N.T.S. 227 (entered into force Jan. 18, 2002) [hereinafter Optional Protocol on the Sale of Children]. It is noteworthy that South Africa has neither signed nor ratified the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, which would allow South African children and their representatives to bring complaints to the United Nations Committee on the Rights of the Child when they believe that one of their rights under the Convention has been violated. See *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure Ratification*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en) (last visited Apr. 9, 2016). South Africa is also a party to the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption. See Hague Conference on Private International Law, Final Act of the 17th Session, Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption art. 1, May 29, 1993, 32 I.L.M. 1134. For information on signatories to the Hague Convention on Intercountry Adoption, see *Convention Countries*, INTERCOUNTRY ADOPTION, <http://travel.state.gov/content/adoptionsabroad/en/hague-convention/convention-countries.html> (last visited Apr. 9, 2016). However, South Africa is not a party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89, 90(F), 98(E). For information on signatories to this Convention, see *U.S. Hague Convention Treaty Partners*, INTERNATIONAL PARENTAL CHILD ABDUCTION, <http://travel.state.gov/content/childabduction/english/country/hague-party-countries.html> (last visited Apr. 9, 2016).

124. Optional Protocol on Child Soldiers, *supra* note 123. South Africa signed the Optional Protocol on Child Soldiers on February 8, 2002, and ratified the treaty on September 24, 2009. See *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Ratification*,



the Child on the Sale of Children, Child Prostitution and Child Pornography,<sup>125</sup> at least on paper. The question is whether the decisions of South Africa's courts protect, respect, and embody these rights in post-apartheid South Africa.

#### IV. DECISIONS OF THE SOUTH AFRICAN COURTS IMPACTING CHILDREN'S RIGHTS, 1994–2014

Initial judicial decisions by South African courts held great promise for children and their advocates under the new Constitution. Because of children's rights, corporal punishment was banned both within the juvenile justice system<sup>126</sup> and in schools.<sup>127</sup> The courts recognized the importance of considering the child's best interests in a variety of contexts ranging from family law decisions<sup>128</sup> to situations not expressly considered by section 28 of the Constitution, such as the imprisonment of children's parents for criminal conduct.<sup>129</sup> Courts no longer framed custody and visitation decisions solely from the perspective of parental rights, but began to recognize that children held their own unique rights to parental care under section 28(1)(b) of the Constitution, and that these rights had to be balanced with parental rights and the best interests of the child.<sup>130</sup> Courts began to uphold the rights of juvenile defendants

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UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-b&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en) (last visited Apr. 9, 2016).

125. Optional Protocol on the Sale of Children, *supra* note 123. South Africa ratified the Optional Protocol on the Sale of Children on June 30, 2003. *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography Ratification*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-c&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en) (last visited Apr. 9, 2016).

126. *See S v. Williams* 1995 (3) SA 632 (CC) at paras. 91–96.

127. *See Christian Educ. S. Afr. v. Minister of Educ.* 2000 (4) SA 757 (CC) at para. 52.

128. *See, e.g., Fraser v. Children's Court Pretoria North* 1997 (2) SA 218 (CC) (holding the best interests of the child must be balanced in a disputed adoption case); *Naude v. Fraser* 1998 (4) SA 539 (SCA) (stating the best interests of a child must be considered as the test for sanctioning an adoption). In *Fraser v. Naude*, the Constitutional Court denied further appeal and confirmed an order to respect the best interests of the child through adoption. 1999 (1) SA 1 (CC). The Constitutional Court later determined in another case that it was in the best interests of a child to be adopted by both partners of a same-sex couple, and on that basis (among others) struck down statutory prohibitions on the adoption of children by same-sex couples. *See Du Toit v. Minister for Welfare and Population Dev.* 2003 (2) SA 198 (CC).

129. *See S v. Howells* 1999 (2) All SA 233 (C) (upholding the sentence of imprisonment for the mother but ordering that her children be provided with care during her imprisonment); *see also S v. M* 2008 (3) SA 232 (CC) (considering the best interests of the child when sentencing the mother for criminal conduct); *Minister for Welfare and Population Dev. v. Fitzpatrick* 2000 (3) SA 422 (CC) (allowing inter-country adoption to be considered when a child cannot be placed in the country of origin or with foster parents under the principle of subsidiarity).

130. *See SHADRACK B.O. GUTTO, EQUALITY AND NON-DISCRIMINATION IN SOUTH AFRICA: THE POLITICAL ECONOMY OF LAW AND LAW MAKING* 144 (Brenda Barrow ed., 2001) (citing *V v. V* 1998 (4) SA 169 (C)). The court in *V v. V* awarded joint custody to a father and a lesbian mother in the best interests of the child and in recognition of the child's right to parental care. *Id. But see Jooste v. Botha* 2000 (2) BCLR 187 (T) (finding that the child's right to parental care does not give rise to a cause of action against the parent where the parent never created a caring relationship with the child).

## THE CONSTITUTIONALIZATION OF CHILDREN'S RIGHTS IN SOUTH AFRICA

to be detained for the shortest time possible and then only as a last resort under international law.<sup>131</sup> Children's rights scholars in these early years viewed section 28 as marking "a watershed period in the history of South Africa" and believed that it would provide a child-focused legal framework.<sup>132</sup>

However, the limitations of the courts, whether by lack of will or resources, quickly became evident. In *Government of the Republic of South Africa v. Grootboom*, a number of individuals and families were evicted from land that they had illegally occupied.<sup>133</sup> They had no access to state housing, and some had been on a waitlist for housing for seven years.<sup>134</sup> Their shacks and their belongings were destroyed, and they were left without shelter, basic sanitation, and clean water during the rainy season.<sup>135</sup> A lawsuit was brought against the local municipality to provide the residents with basic housing.<sup>136</sup> The lower court held that children's right to shelter under section 28(1)(c) of the Constitution<sup>137</sup> supported the claim and ordered the municipality to provide the children and their families (since the children should not be separated from their parents) with tents, portable toilets, and access to clean water.<sup>138</sup>

The Constitutional Court reversed the Cape High Court's decision<sup>139</sup> and interpreted section 28(1)(c) differently than academics had previously.<sup>140</sup> The Court considered the provision within the context of the child's right to parental care.<sup>141</sup> In the Court's interpretation, the section did not obligate the state to provide children with "basic nutrition, shelter, basic health care services and social services," but rather to ensure that parents or other caregivers are providing these basic provisions to children.<sup>142</sup> Only when a child's parents are unable to provide for the child and the child comes into state care would the state have a direct obligation to provide for a

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131. *S v. N* 2008 (3) All SA 170 (SCA) (recognizing the rights of juvenile defendants to be detained for the shortest time possible).

132. Tshepo L. Mosikatsana, *Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution*, 3 MICH. J. RACE & L. 341, 392 (1998).

133. 2001 (1) SA 46 (CC).

134. *Id.* at para. 8.

135. *Id.* at paras. 10–11.

136. *Id.* at para. 4.

137. It is important to note that children's right to shelter under section 28(1)(c) of the Constitution is without qualification: "Every child has the right to . . . shelter." S. AFR. CONST., 1996, § 28(1)(c). This is unlike the general right to housing in section 26, which is a right "to have access to adequate housing" and obligates the state to "take reasonable legislative and other measures, *within its available resources*, to achieve the *progressive realisation* of this right." S. AFR. CONST., 1996, § 26 (emphasis added).

138. *Grootboom*, 2001 (1) SA 436 at para. 4.

139. *Id.* at para. 99.

140. See Julia Sloth-Nielsen, *Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child*, 10 INT'L J. CHILD. RTS. 137, 148–49 (2002).

141. *Grootboom*, 2001 (1) SA 436 at paras. 76–78.

142. *Id.*

child's basic necessities.<sup>143</sup> In other words, children have no greater right to the allocation of state resources than adults.<sup>144</sup> Indeed, the Constitutional Court decision expressly stated that “[t]he carefully constructed constitutional scheme for the progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand.”<sup>145</sup> Many children's rights scholars and advocates feared that the honeymoon period for children's rights in the new South Africa was over.<sup>146</sup>

The year following *Grootboom*, the Constitutional Court issued another significant decision that would have widespread impact: *Minister of Health v. Treatment Action Campaign*, which involved the provision of anti-retroviral drugs to prevent mother-to-child transmission of HIV.<sup>147</sup> The Court compelled the South African government to reformulate a health care policy in order to make an anti-retroviral drug, nevirapine, more widely available to HIV-positive mothers and their newborn babies.<sup>148</sup> The Constitutional Court expressly relied on South Africa's constitutional obligations in issuing its decision and found that the government had “to take reasonable measures within its available resources for the progressive realization of the right of mother and child to basic health care.”<sup>149</sup> After the *Grootboom* and *Treatment Action Campaign* decisions, international human rights scholars Philip Alston and John Tobin described the Constitutional Court as taking “some giant strides towards elaborating an effective methodology for the implementation of the economic, social and cultural rights provisions in the constitution, as well as the specific provisions dealing with children's rights.”<sup>150</sup>

In subsequent years, the Constitutional Court relied on children's rights to “basic nutrition, shelter, basic health care services and social services” under section 28(1)(c) of the Constitution to order that South African children whose parents are legal residents are entitled to child support and care dependency grants (previously, children were deemed ineligible if their parents were not also South African citizens).<sup>151</sup> The Constitutional Court also relied on children's rights to legal representation in section 28(1)(h)<sup>152</sup> to find that “a court is obliged to appoint a

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143. *Id.* at paras. 77, 79.

144. *See id.*

145. *Id.* at para. 71.

146. *See, e.g.*, Julia Sloth-Nielsen & Benyam D. Mezmur, 2+2=5? *Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)*, 16 INT'L J. CHILD. RTS. 1, 4 (2008).

147. 2002 (5) SA 721 (CC).

148. *Id.* at para. 135.

149. van der Vyver, *supra* note 95, at 39–40.

150. ALSTON & TOBIN, *supra* note 48, at 29.

151. *See Khosa v. Minister of Social Dev.* 2004 (6) SA 505 (CC).

152. Section 28(1)(h) of the 1996 Constitution provides that “Every child has the right . . . to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.” S. AFR. CONST., 1996, § 28(1)(h).

curator to represent the interests of the children” in a case involving adoption by a same-sex couple.<sup>153</sup> Additionally, the Court upheld the principle of the best interests of the child embodied in section 28(2) in a case involving maintenance (child support) payments.<sup>154</sup> In *Bannatyne v. Bannatyne*, the Court reiterated its analysis from *Grootboom* that although the Constitution imposes on parents the obligation to properly care for their children, the state has the obligation “to create the necessary environment for parents to do so,” and stated that the best interests of the child should take precedence in the enforcement of a maintenance order.<sup>155</sup>

The Constitutional Court again relied on the best interests of the child, as well as children’s dignity rights, in a child pornography case involving the assertion of constitutional rights to freedom of expression and privacy by a film producer who was prosecuted for violating the Films and Publications Act, Act No. 65 of 1996, as amended.<sup>156</sup> Section 36(1) of the Constitution allows for the limitation of rights “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . . .”<sup>157</sup> In its decision, the Constitutional Court first affirmed dignity as a founding principle of the Constitution generally and then held that the dignity rights of children have heightened importance.<sup>158</sup> In short, in the years immediately following *Grootboom*, it became clear that the Constitutional Court remained committed, albeit not without limitation, to interpreting a variety of legal disputes in favor of recognition of and respect for children’s rights, giving rise to a modest optimism among court watchers.<sup>159</sup>

The dignity of the child, which was the cornerstone of the Court’s decision in *Bannatyne*, was further developed in subsequent years. In the words of Albie Sachs, one of South Africa’s greatest jurists and an architect of section 28, in *S v. M*:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.<sup>160</sup>

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153. *Du Toit v. Minister for Welfare and Population Dev.* 2003 (2) SA 198 (CC) at para. 3.

154. *Bannatyne v. Bannatyne* 2003 (2) SA 363 (CC) at para. 24.

155. *Id.*

156. *De Reuck v. Dir. of Pub. Prosecutions* 2004 (1) SA 406 (CC) at paras. 62–67.

157. S. AFR. CONST., 1996, § 36(1).

158. *De Reuck*, 2004 (1) SA 406 at paras. 62–63.

159. See Sloth-Nielsen & Mezmur, *supra* note 146, at 25–26 (“The preceding analysis of children’s rights in the South African courts appears to indicate that virtually none of the conclusions reached at the end of 2001 remain true. . . . [A]lthough the expected promise of a first call for children in the delivery of socio-economic rights was dealt a blow in *Grootboom*, *TAC* and *Khosa* have restored some positive meaning to the provisions of section 28(1)(c) . . . .”).

160. 2008 (3) SA 232 (CC) at para. 18.

*S v. M* involved a single mother of three children who was sentenced to prison for four years for fraud and theft.<sup>161</sup> The Constitutional Court converted her sentence to a non-custodial one and directed courts to consider the interests of the convicted person's children when making sentencing decisions, demonstrating that the best interests of the child principle can apply even in criminal sentencing decisions.<sup>162</sup> *S v. M* was so novel in its analysis that it attracted international attention.<sup>163</sup>

Subsequent decisions, however, made clear that the analysis in *S v. M* would not necessarily apply under different facts, such as where the convicted parent is not the sole provider for the children. For example, in *S v. S*, the Constitutional Court upheld the incarceration of a mother who was the primary caregiver of her children because her husband lived in the family home and was willing to care for the children during her incarceration.<sup>164</sup> Most importantly, both decisions made clear that a sentencing court must take into consideration the impact that the incarceration of a parent would have on the children affected.

An area in which one would clearly expect a raft of decisions under the Constitution is the right to education. Surprisingly, the Constitutional Court initially gave very little consideration to children's right to education in the early years of the republic.<sup>165</sup> In recent years, however, litigation based on the right to education has increased significantly and generated a number of decisions at all levels of South Africa's court system involving issues as diverse as the right of the child to a basic education,<sup>166</sup> funding for special needs children,<sup>167</sup> staffing,<sup>168</sup> and procurement.<sup>169</sup>

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161. *Id.* at paras. 82–83.

162. *Id.* at paras. 69, 77.

163. Skelton, *supra* note 93, at 21.

164. 2011 (7) BCLR 740 (CC) at paras. 63, 65.

165. *See, e.g., Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) at para. 9 (recognizing the right to education as embodying both positive and negative rights); Julia Sloth-Nielsen & Helen Kruuse, *A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007–2012*, 21 INT'L J. CHILD. RTS. 646, 646–47, 658 (2013).

166. *See, e.g., Governing Body of the Juma Masjid Primary Sch. v. Essay* 2011 (8) BCLR 761 (CC) (holding that the state was violating students' constitutional rights by failing to provide a basic education). The Constitutional Court held that the basic right to education was an immediately realizable right, unlike some other socioeconomic rights. "The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'" *Id.* at para. 37.

167. *See, e.g., W. Cape Forum for Intellectual Disability v. Gov't of the Republic of S. Afr.* 2011 (5) SA 87 (WCC) (holding that the state could not discriminate against children with severe or profound mental disabilities in funding educational programs even when resources are limited).

168. *See, e.g., Ctr. for Child Law v. Minister of Basic Educ.* 2013 (3) SA 183 (ECG) (recognizing that staff shortages could impact the fulfillment of the child's right to education).

169. *See, e.g., M. Couzens, Procurement Adjudication and the Rights of Children: Freedom Stationery (Pty) Ltd v. MEC for Education, Eastern Cape* 2011 JOL 26927 (E), 15 POTCHEFSTROOM ELECTRONIC L.J., 2012, at 392, <http://www.saflii.org/za/journals/PER/2012/12.pdf>.

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According to Professor Ann Skelton, the director of the Centre for Child Law at the University of Pretoria and arguably South Africa's leading children's rights litigator,<sup>170</sup> constitutional litigation focused on the quality and equality of education in South Africa, while increasing,<sup>171</sup> is at a relatively nascent stage of development even twenty years after the promulgation of the Constitution.<sup>172</sup>

Nonetheless, it is increasing.<sup>173</sup> Skelton's belief in the importance of upholding education rights is shared by the Constitutional Court itself: "The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked."<sup>174</sup> Thus, it is not surprising that she and other litigators are bringing cases based upon facilities,<sup>175</sup> the rights of pregnant learners,<sup>176</sup> the timely provision of textbooks,<sup>177</sup> and more in trying to further develop a body of jurisprudence related to children's rights to education under the Constitution.

Another potential major area of children's rights jurisprudence in South Africa focuses on children's family and alternative care rights, but surprisingly, the Constitution does not expressly recognize family rights for anyone except children. Instead, the courts have had to recognize these rights through the right to dignity, which forms a cornerstone of the Constitution.<sup>178</sup> Children are entitled "to family care or parental care, or to appropriate alternative care when removed from the family environment."<sup>179</sup> This right has been interpreted by the Constitutional Court to entitle the rights-bearer to judicial review when a child is removed from parental care.<sup>180</sup> *C v. Department of Health & Social Development* involved three children in the care of their parents near a street corner.<sup>181</sup> In the first family, the father was a shoe repairman whose three-year-old daughter was on the street with him because his

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170. Wilma den Hartigh, *South Africa's Child Rights Hero*, MEDIA CLUB S. AFR. (Aug. 1, 2012), <http://www.medioclubsouthafrica.com/democracy/3021-ann-skelton-worlds-childrens-prize.html>.

171. CTR. FOR CHILD LAW, CHILD LAW MATTERS 2013: ANNUAL REPORT OF THE CENTRE FOR CHILD LAW 3–4, 7–10 (2013).

172. Skelton, *supra* note 93, at 26.

173. Chris McConnachie, *The Rise of South Africa's Education Adequacy Movement*, OXFORD HUM. RTS. HUB (Aug. 21, 2012), <http://ohrh.law.ox.ac.uk/the-rise-of-south-africas-education-adequacy-movement/>.

174. *Governing Body of the Juma Masjid Primary Sch. v. Essay* 2011 (8) BCLR 761 (CC) at para. 42.

175. *See, e.g., Maqhelana v. Gov't of the Republic of S. Afr.* No. 007/2014 (ECG) (2014).

176. *See, e.g., Head of Dep't, Dep't of Educ., Free State Province v. Welkom High Sch.* 2014 (2) SA 228 (CC) (holding that schools shall not undermine the educational rights of pregnant students in developing pregnant learner policies).

177. *See, e.g., Section 27 v. Minister of Educ.* 2013 (2) SA 40 (GNP) (finding that the constitutional right to education includes timely provision of textbooks).

178. *See* S. AFR. CONST., 1996, § 7(1).

179. *Id.* § 28(1)(b).

180. *C v. Dep't of Health & Soc. Dev.* 2012 (2) SA 208 (CC).

181. *Id.* at para. 9.



partner was still in the hospital after giving birth to another child.<sup>182</sup> The second family included a visually impaired mother of two young children, ages one and four.<sup>183</sup> The mother had to beg for a living.<sup>184</sup> The older child served as the mother's guide, and the younger child was still breastfeeding.<sup>185</sup> In a well-publicized raid, authorities removed all three children from their parents' care.<sup>186</sup> Neither family was told where their children were, and there was no automatic judicial review.<sup>187</sup>

The case went all the way to the Constitutional Court, which recognized that the removal of children from parental care without automatic judicial review implicates privacy rights,<sup>188</sup> dignity rights,<sup>189</sup> the child's right to parental care,<sup>190</sup> participation rights,<sup>191</sup> and the children's right under section 28(2) that their best interests be given "paramount importance in every matter."<sup>192</sup> One of the characteristics of this case that caught the attention of children's rights scholars in South Africa was the apparent influence of international law in the litigation. For example, Sloth-Nielsen, Kruuse, and Skelton all note the Court's reliance on both the African Children's Charter and the Convention.<sup>193</sup> *C v. Department of Health & Social Development* provides a vivid example of how the Constitutional Court applies section 39(1)(b) of the Constitution in considering international law when making decisions.<sup>194</sup>

A final area where children's rights are being constitutionalized in South Africa is criminal law. One of the best examples of the Constitutional Court's applying age-appropriate standards to youth in interpreting criminal law is *Teddy Bear Clinic for Abused Children v. Minister of Justice & Constitutional Development*.<sup>195</sup> The case involved the application of an amended law that was intended to protect children from sexual abuse,<sup>196</sup> but effectively criminalized consensual sexual activity between youths twelve

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182. *Id.*

183. *Id.* at paras. 7, 9.

184. *Id.* at para. 9.

185. *See id.*

186. *Id.* at para. 10.

187. *Id.*

188. *Id.* at para. 17.

189. *Id.* at para. 23.

190. *Id.* at para. 24.

191. *Id.* at para. 27.

192. *Id.* (quoting S. AFR. CONST., 1996, § 28(2)).

193. Skelton, *supra* note 93, at 22–23; Sloth-Nielsen & Kruuse, *supra* note 165, at 667.

194. Note that section 233 of the Constitution also requires the judiciary to interpret statutes consistent with international law when it is reasonable to do so. S. AFR. CONST., 1996, § 233.

195. 2014 (2) SA 168 (CC).

196. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.



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to sixteen years of age, including kissing and hugging.<sup>197</sup> The Constitutional Court held that the provisions of the Act in question violated children's constitutional rights to privacy and dignity and were inconsistent with the principle of the best interests of the child.<sup>198</sup> The *Teddy Bear Clinic* decision was consistent with other previous criminal law decisions, which have upheld special, age-appropriate treatment for children involved with the criminal justice system. These include decisions covering everything from the inclusion of children in sex offender registers<sup>199</sup> to the application of minimum sentences for sixteen- and seventeen-year-olds<sup>200</sup> to judicial whipping.<sup>201</sup>

In each of these cases, the world can observe the rise of children's rights in a vital and dynamic interplay between an international children's framework that South Africa actively helped to create during the first part of the twentieth century and the birth of a new constitutional democracy which returned South Africa to a leadership role globally by constitutionalizing children's rights to an extent never before witnessed, and then holding schools, the criminal justice system, hospitals, child welfare authorities, and others accountable for recognizing and honoring children's rights in their policies and procedures during the first two decades of the formation of the Republic of South Africa. Without question, the advances that the new South Africa has made vis-à-vis children's rights are breathtaking on paper despite some limitations, but have they made a difference in the lives of South Africa's children?

### V. HAS THE CONSTITUTIONALIZATION OF CHILDREN'S RIGHTS MADE A DIFFERENCE?

In 2009, UNICEF published a special edition of "The State of the World's Children" to commemorate the twentieth anniversary of the UN Convention on the Rights of the Child.<sup>202</sup> The report highlighted South Africa's progress both in trying to dismantle apartheid and including children's rights as a core element of the Constitution.<sup>203</sup> In addition to the court decisions highlighted above, South Africa's attempt to realize children's rights is exemplified in the promulgation of child-focused legislation over the past two decades, including, for example, the Children's

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197. *Teddy Bear Clinic*, 2014 (2) SA 168 at para. 22 (citing Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 § 16(1)).

198. *Id.* at paras. 79, 117 (declaring sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 unconstitutional and "invalid to the extent that they impose criminal liability on children under the age of 16 years").

199. *See J v. Nat'l Dir. of Pub. Prosecutions* 2014 (7) BCLR 764 (CC) at paras. 47–51 (holding that child sex offenders have the right to have their best interests considered paramount in all decisions, even with regard to their inclusion on lists of sexual offenders).

200. *See Ctr. for Child Law v. Minister of Justice & Constitutional Dev.* 2009 (6) SA 632 (CC).

201. *See S v. Williams* 1995 (3) SA 632 (CC).

202. UNICEF, *supra* note 37.

203. *Id.* at 14.

Act and Amendment,<sup>204</sup> the Child Justice Act,<sup>205</sup> the Criminal Law (Sexual Offences and Related Matters) Amendment Act,<sup>206</sup> the Domestic Violence Act,<sup>207</sup> the Basic Conditions of Employment Act,<sup>208</sup> and the Films and Publications Act.<sup>209</sup> This legislation further codifies both the Convention on the Rights of the Child and the African Children's Charter.<sup>210</sup> Arguably, some of the new laws were mandated by the Constitution.<sup>211</sup>

Although well intentioned, some of the new child-focused legislation actually violated children's rights as drafted or implemented.<sup>212</sup> Nonetheless, it seems clear that overall, South Africa's child-focused legislation created more detailed legal protection for children and their families and helped to fill in the lacunae that continued to exist despite the comprehensive recognition of children's rights in the Constitution and in the decisions of the Constitutional Court and other courts across South Africa. For example, whereas the Constitution was notably silent as to family rights except for children,<sup>213</sup> the Children's Act established that parents and other guardians are presumed to have the right to: (1) care for their child, (2) maintain contact with their child, (3) act as guardian of their child, and (4) provide support for their child, which of course is also a responsibility.<sup>214</sup> Consistent with African culture as embodied in the African Children's Charter, the rights outlined in the Children's Act were again reciprocal and multilateral.

In addition to complementing and reinforcing the responsibilities of parents and guardians with respect to children,<sup>215</sup> the Children's Act addressed issues of child abduction,<sup>216</sup> child trafficking,<sup>217</sup> surrogacy,<sup>218</sup> the operation of juvenile courts,<sup>219</sup>

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204. Children's Act 38 of 2005; Children's Amendment Act 41 of 2007.

205. Child Justice Act 75 of 2008.

206. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

207. Domestic Violence Act 116 of 1998.

208. Basic Conditions of Employment Act 75 of 1997.

209. Films and Publications Act 65 of 1996.

210. See Sloth-Nielsen & Kruuse, *supra* note 165, at 649.

211. See Thomas J. Walsh, *Advancing the Interests of South Africa's Children: A Look at the Best Interests of Children Under South Africa's Children's Act*, 19 MICH. ST. J. INT'L L. 201, 249 (2011).

212. See, e.g., *Teddy Bear Clinic for Abused Children v. Minister of Justice & Constitutional Dev.* 2014 (2) SA 168 (CC). The Children's Act provides an example of the perpetuation of gender bias vis-à-vis circumcision. Children's Act 38 of 2005 § 12.

213. See S. AFR. CONST., 1996, § 28.

214. Children's Act 38 of 2005 § 18(2).

215. *Id.* §§ 18–41.

216. *Id.* §§ 274–280.

217. Children's Act 38 of 2005 §§ 281–291 (amended 2007).

218. Children's Act 38 of 2005 §§ 292–303.

219. *Id.* §§ 42–75.

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children in protective custody,<sup>220</sup> abuse and neglect records,<sup>221</sup> children's rights in relation to HIV/AIDS,<sup>222</sup> and adoption.<sup>223</sup> Gains that children experienced as a result of the passage of the Children's Act included state grant support for child-headed households<sup>224</sup> and recognition of children's health and privacy rights, especially with regard to HIV/AIDS.<sup>225</sup>

In short, children's rights in South Africa are layered in the nation's culture and history, the Republic's 1994 and 1996 constitutions, Constitutional Court and lower court decisions, and the Republic's child-focused legislation. But the key question remains: Has this child-centered legal framework transformed the lives of children in post-apartheid South Africa? Yes, to a certain extent, but there is far more work to be done.

Twenty years after South Africa promulgated not one, but two of the most advanced constitutions in the world vis-à-vis children's rights, the country remains one of the most unequal in the world.<sup>226</sup> More than 25% of the population lives on less than U.S. \$1.25 per day.<sup>227</sup> An estimated 58% of children live in poverty, and the numbers are highly skewed between whites and blacks.<sup>228</sup> While only 2% of white children live in poverty, a full two-thirds of black children do.<sup>229</sup> The good news is that the percentage of children living in poverty is declining.<sup>230</sup> For example, in 2003, 73.1% of children in South Africa lived in poverty, but that percentage saw a 15% decrease by 2011.<sup>231</sup> This is largely attributed to a massive expansion of

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220. *Id.* §§ 167–179.

221. *Id.* §§ 111–128.

222. *Id.* §§ 129–142.

223. *Id.* §§ 228–273.

224. *Id.* § 137; Social Assistance Act 13 of 2004. Child-headed households are a common household formation across South Africa and have increased significantly with the rise of HIV/AIDS. Zamani Maqoko & Yolanda Dreyer, *Child-Headed Households Because of the Trauma Surrounding HIV/AIDS*, 63 THEOLOGICAL STUD. 717, 718 (2007). *But see* Helen Meintjes et al., *Orphans of the AIDS Epidemic? The Extent, Nature and Circumstances of Child-Headed Households in South Africa*, 22 AIDS CARE 40, 46–47 (2010) (discussing the results of a study indicating that the proportion of child-only households is very small, that the majority of these households have a living parent, and that child-headed homes are not necessarily a result of HIV orphaning).

225. Children's Act 38 of 2005 §§ 130–133.

226. UNICEF, *supra* note 37, at 14.

227. *Id.*

228. Nadi Albino & Lizette Berry, *Early Childhood Development Services in South Africa: What are the Next Steps?*, in SOUTH AFRICAN CHILD GAUGE 2013, at 78, 78 (Lizette Berry et al. eds., 2013). Significant disparities are also evident across provinces. Katherine Hall, *Income Poverty, Unemployment and Social Grants*, in SOUTH AFRICAN CHILD GAUGE 2013, *supra*, at 90, 90. For example, in Limpopo and the Eastern Cape, over seventy per cent of children were poor in 2011. By comparison, thirty-two per cent of children in the Western Cape were poor that year. *Id.*

229. Hall, *supra* note 228, at 90.

230. *Id.* at 90 fig.2a.

231. *Id.*

government-sponsored child support grants during that period,<sup>232</sup> an issue that has been both litigated<sup>233</sup> and legislated.<sup>234</sup> Of the more than eighteen million children living in South Africa in 2011,<sup>235</sup> over ten million received a government grant, a critical source of income to help parents and guardians meet children's basic needs.<sup>236</sup>

Another issue that has been litigated vis-à-vis children's rights is housing.<sup>237</sup> Research shows that some progress is being made in providing South Africa's children adequate housing, but much more needs to be done. Nearly 13% of infants and toddlers live in informal housing.<sup>238</sup> As of 2011, nearly four million children (21%) lived in overcrowded households, which was only a 3% decline since 2002.<sup>239</sup> Moreover, children are far more likely to live in rural areas than adults,<sup>240</sup> which is problematic. Rural areas have much higher rates of poverty than urban areas and provide less accessibility to schools, health care facilities, vibrant economies, and basic infrastructure such as clean water and proper sanitation facilities, all of which are necessary to the realization of children's rights.<sup>241</sup> More than one third of urban residents and more than one half of rural residents do not have adequate sanitation facilities,<sup>242</sup> and one third of children live in housing with no water on site.<sup>243</sup> A comparison from 2002 to 2011 "suggests that there has been little improvement" in

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232. *Id.* at 90.

233. Hilary Joffe, *Sword of Social Grants Has Two Edges*, ALLAFRICA GLOBAL MEDIA (Feb. 26, 2008, 10:40 AM) (noting that an application for an interdict against the state relating to eligibility age for a grant was withdrawn before the grant age was extended to a child's fifteenth birthday); *see also* Neil Overy, *Impact Case Study of Civil Society Interventions Around the Child Support Grant in South Africa*, in FROM ANALYSIS TO IMPACT: PARTNERSHIP INITIATIVE CASE STUDY SERIES, at 3 (2010) ("[L]itigation has been instigated by an increasingly frustrated civil society that has concluded that the right to social security, as enshrined in the Constitution, is not being effectively realized by government departments.").

234. *Child Support Grant to Be Expanded to Age 23*, SABC NEWS (June 11, 2014, 6:45 AM), <http://www.sabc.co.za/news/a/97eaf80445387868c22aefc6ab42bce/Childundefinedsupportundefinedgrantundefinedtoundefinedbeundefinedexpandedundefinedtoundefinedageundefined23-20141106>.

235. Helen Meintjes & Katharine Hall, *Demography of South Africa's Children*, in SOUTH AFRICAN CHILD GAUGE 2013, *supra* note 228, at 86, 86 ("In mid-2011, South Africa's total population was estimated at 50 million people, of whom 18.5 million were children . . .").

236. Hall, *supra* note 228, at 92 tbl.2a. In South Africa, twenty-four per cent of children do not live with either of their parents, making the role of guardians especially prevalent and important. Meintjes & Hall, *supra* note 235, at 87 fig.1a.

237. *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC).

238. Katharine Hall, *Children's Access to Housing*, in SOUTH AFRICAN CHILD GAUGE 2013, *supra* note 228, at 108, 109 fig.5c. Informal housing is defined as "informal dwellings or shacks in backyards or informal settlements; dwellings or houses/flats/rooms in backyards; caravans or tents." *Id.* at 109.

239. *Id.* at 110.

240. *Id.* at 108.

241. Katharine Hall et al., *Child Health and Nutrition*, in SOUTH AFRICAN CHILD GAUGE 2013, *supra* note 228, at 95, 97; Katharine Hall, *Children's Access to Basic Services*, in SOUTH AFRICAN CHILD GAUGE 2013, *supra* note 228, at 111, 111-12; Hall, *supra* note 238, at 108-10.

242. UNICEF, *supra* note 37, at 14.

243. *See* Hall, *Children's Access to Basic Services*, *supra* note 241, at 111.

these numbers during that period, which is especially concerning because unclean water and lack of sanitation contribute to health problems for children.<sup>244</sup>

Another area of concern is nutrition. As the *Grootboom* court made clear, it is the responsibility of parents and guardians to provide for their children's basic needs and the government's responsibility to provide an infrastructure that supports parents in their ability to do so.<sup>245</sup> Today, the consequences of that decision are widely evident with respect to child nutrition. Despite government grants, school feeding schemes, and other systems of support, over 25% of children under three years of age experience stunted growth due to malnutrition.<sup>246</sup> In some regions, such as Limpopo, as many as 48% of children in preschool are stunted, which impacts cognitive performance, school completion, and economic productivity later in life<sup>247</sup> and can perpetuate multigenerational poverty.<sup>248</sup> Once again, while the rates of stunting and malnutrition remain far too high, progress has been documented. In 2002, nearly 30% of households with children reported child hunger, but as recently as 2011, that number had declined to 13.7%.<sup>249</sup> The stunting rates among children under five years of age declined from 30% to 22% from 1993 to 2012.<sup>250</sup> Once again, an increasing number of children in South Africa appear to be having their rights realized.

In addition to *Grootboom*, one of the most high-profile children's rights cases heard by the Constitutional Court was *Treatment Action Campaign*.<sup>251</sup> Has it made a difference? Without question, children and youth across the country continue to be impacted by HIV/AIDS on a widespread basis. Approximately 18% of parent-age adults were HIV-positive in 2007, and an estimated 1.4 million children (8%) "have lost one or both parents to AIDS."<sup>252</sup> Children themselves are infected with HIV/AIDS as well. Four per cent of the country's male youth and 13% of the country's female youth have tested positive for HIV.<sup>253</sup> Indeed, 3% of South African infants are infected with HIV by their mothers.<sup>254</sup> Nonetheless, the mortality rates for both

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244. *Id.*

245. *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC).

246. Lizette Berry et al., *Getting the Basics Right: An Essential Package of Services and Support for ECD*, in SOUTH AFRICAN CHILD GAUGE 2013, *supra* note 228, at 26, 27 tbl.1.

247. See Ursula Hoadley, *Building Strong Foundations: Improving the Quality of Early Education*, in SOUTH AFRICAN CHILD GAUGE 2013, *supra* note 228, at 72, 74.

248. Hall et al., *Child Health and Nutrition*, *supra* note 241, at 98–100.

249. *Id.* at 98 fig.3b.

250. *See id.* at 100.

251. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC).

252. UNICEF, *supra* note 37, at 14. Nearly twenty-one per cent of South Africa's children were orphans in 2011, which is a substantial increase from the number of children orphaned ten years prior, especially with regard to orphans who have lost both their mother and father; that number almost tripled from the previous decade, from 350,000 to 950,000. Meintjes & Hall, *supra* note 235, at 88.

253. UNICEF, *supra* note 37, at 14.

254. Berry et al., *supra* note 246, at 27 tbl.1.

infants and children appear to be decreasing.<sup>255</sup> This decrease is largely attributed to a significant decline in infant deaths due to mother-to-child transmission of HIV/AIDS.<sup>256</sup> Without intervention, the transmission rate is projected to be between 25 and 30%, far above South Africa's current rate of less than 3%.<sup>257</sup> Before the *Treatment Action Campaign* decision, only approximately 7% of pregnant women received HIV/AIDS counseling and testing.<sup>258</sup> That number increased to nearly 50% by 2005, and by 2009, testing was nearly universal.<sup>259</sup> Some court decisions involving children's rights seem to be having a profound positive impact.

The challenges that South Africa's eighteen million children continue to face are not limited to the economy, malnutrition, and HIV/AIDS. Twenty years after the dismantling of apartheid began and children's rights were placed at the core of the republic's constitutional democracy, the insidiousness of apartheid's legacy remains evident. "Essentially, there are 'two education systems.'"<sup>260</sup> Twenty-five per cent of South Africa's children attend well-resourced, relatively high quality schools, while the other 75% are failed by their schools and learn little.<sup>261</sup> The latter schools are attended primarily by black and poor children.<sup>262</sup> Fourteen per cent of elementary school-aged children are not enrolled in school at the appropriate level, and this number increases at the secondary level to 30% for boys and 25% for girls.<sup>263</sup>

The number of young children attending school has significantly improved, but learning outcomes continue to disappoint.<sup>264</sup> For example, by the end of grade 3, the majority of children in South Africa cannot read, write, count, or calculate at grade level.<sup>265</sup> This pattern compounds over time, with only 44% of young adults reporting that they graduated from secondary school (less than half of those who did graduate did so on time).<sup>266</sup> By both international and continental standards, South Africa's

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255. Hall et al., *Child Health and Nutrition*, *supra* note 241, at 95. Recordkeeping of both births and deaths was irregular when these numbers were first being monitored, and so some early numbers suggested that the deaths of children under five years of age were actually increasing in the late 1990s and early 2000s. In recent years, birth and death registration have significantly improved and the numbers appear to be much more reliable, especially when compared to verifying data such as census and survey data. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 96.

259. *Id.*

260. Hoadley, *supra* note 247, at 73.

261. *Id.*

262. *Id.*

263. UNICEF, *supra* note 37, at 14.

264. Berry et al., *supra* note 246, at 28.

265. *See id.* at 27 tbl.1.

266. Katharine Hall, *Children's Access to Education*, in *SOUTH AFRICAN CHILD GAUGE 2013*, *supra* note 228, at 101, 106.

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educational outcomes are poor.<sup>267</sup> Nonetheless, improvement is documented. For example, 60% of children aged sixteen to seventeen years in South Africa completed grade 9 in 2011.<sup>268</sup> In 2002, only 51% had.<sup>269</sup>

While education rights litigation is still nascent, the decisions that have been issued do not show systemic reform within South Africa's schools. For example, the Constitutional Court's 2000 decision in *Christian Education South Africa v. Minister of Education* banned whipping in schools, including private Christian schools.<sup>270</sup> As recently as 2012, however, two million children in South Africa reported that they were subject to corporal punishment at school.<sup>271</sup> In short, while progress can be measured following the constitutionalization of children's rights in many areas, much work remains to realize children's rights on the ground in the day-to-day lives of South Africa's children.

Even as South Africa was preparing to adopt the Constitution, Sloth-Nielsen predicted:

[I]t is important to recognise that it is not the decision-making process in individual access, custody and guardianship cases that is going to ameliorate the daily lives of children. Real progress will be measured by rather more substantive improvements. Therefore, it is especially the inclusion of children's basic socio-economic rights in the constitution where an impact over time can be made.<sup>272</sup>

Certainly, time has suggested that Sloth-Nielsen's prediction is proving true, as many of the most profound advances in the condition of children's lives appear to be tied to the realization of their socioeconomic rights as highlighted above.

But there is another element to consider when evaluating the impact of the inclusion of children's rights in the Constitution. In the same way that both the drafters of the Constitution and the courts have frequently relied on international law in making decisions involving children's rights, including both the UN Convention on the Rights of the Child and the African Children's Charter,<sup>273</sup> South Africa's leadership in advancing children's rights appears to be having an impact beyond its borders.

Other countries in Africa are also including children's rights in their constitutions and judicial opinions, echoing South Africa's recognition and judicial interpretations of children's rights. At least seventeen African nations now have children's rights in

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267. *Id.*

268. *Id.*

269. *Id.*

270. 2000 (4) SA 757 (CC).

271. CTR. FOR CHILD LAW, *supra* note 171, at 5.

272. Julia Sloth-Nielsen, *The Contribution of Children's Rights to the Reconstruction of Society: Some Implications of the Constitutionalisation of Children's Rights in South Africa*, 4 INT'L J. CHILD. RTS. 323, 342 (1996).

273. Skelton, *supra* note 93, at 15.



their constitutions.<sup>274</sup> Although some predate South Africa, the shared recognition of children's rights at the constitutional level is helping to create a dynamic that promises to define norms both comparatively and internationally to help improve children's lives in post-colonial and post-apartheid Africa. These rights include the rights to non-discrimination,<sup>275</sup> name and nationality,<sup>276</sup> parental care,<sup>277</sup> life,<sup>278</sup> juvenile justice protections,<sup>279</sup> education,<sup>280</sup> survival and development,<sup>281</sup> and special protections,<sup>282</sup> as

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274. *See* CONSTITUIÇÃO DA REPÚBLICA DE ANGOLA Jan. 13, 2010, arts. 24, 35, 40, 80; CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO Feb. 18, 2006, arts. 41–45; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Jan. 18, 2014, art. 80; CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA Dec. 8, 1994, art. 36; CONSTITUTION OF THE REPUBLIC OF THE GAMBIA Aug. 8, 1996, § 29; CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, art. 28; MADAGASCAR CONSTITUTION DE LA IVÈ RÉPUBLIQUE Dec. 11, 2010, arts. 21–23; CONSTITUTION OF THE REPUBLIC OF MALAWI May 16, 1994, § 23; CONSTITUTION OF THE REPUBLIC OF MOZAMBIQUE Nov. 30, 1990, art. 47; CONSTITUTION OF THE REPUBLIC OF NAMIBIA Feb. 9, 1990, art. 15; CONSTITUTION OF THE REPUBLIC OF RWANDA May 26, 2003, art. 28; CONSTITUTION DE LA RÉPUBLIQUE DU SÉNÉGAL Jan. 22, 2001, arts. 20–22; TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN July 7, 2011, art. 17; INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF THE SUDAN Jul. 6, 2005, arts. 14, 32; GRONDWET VAN DE REPUBLIEK SURINAME [CONSTITUTION] Sept. 30, 1987, art. 35; TOGO CONSTITUTION DE LA IVÈ RÉPUBLIQUE Sept. 27, 1992, arts. 31, 35; CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art. 34.
275. *See* CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA Dec. 8, 1994, art. 36(4); CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, art. 28(1), (4); CONSTITUTION OF THE REPUBLIC OF MALAWI May 16, 1994, § 23(1); CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art. 34(3).
276. *See* CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA Dec. 8, 1994, art. 36(1); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA Aug. 8, 1996, § 29(1); CONSTITUTION OF THE REPUBLIC OF MALAWI May 16, 1994, § 23(2); CONSTITUTION OF THE REPUBLIC OF NAMIBIA Feb. 9, 1990, art. 15(1).
277. *See* CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA Dec. 8, 1994, art. 36(1); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA Aug. 8, 1996, § 29(1); CONSTITUTION OF THE REPUBLIC OF MALAWI May 16, 1994, § 23(3); CONSTITUTION OF THE REPUBLIC OF NAMIBIA Feb. 9, 1990, art. 15(1); CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art. 34(1).
278. *See* CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA Dec. 8, 1994, art. 36(1); CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art. 22(2) (prohibiting abortion except where authorized by law).
279. *See* CONSTITUTION OF THE REPUBLIC OF THE GAMBIA Aug. 8, 1996, § 29(3); CONSTITUTION OF THE REPUBLIC OF MALAWI May 16, 1994, § 42; CONSTITUTION OF THE REPUBLIC OF NAMIBIA Feb. 9, 1990, art. 15(5); CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art. 34(6).
280. *See* CONSTITUTION OF THE REPUBLIC OF THE GAMBIA Aug. 8, 1996, § 30; CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, art. 25; MADAGASCAR CONSTITUTION DE LA IVÈ RÉPUBLIQUE Dec. 11, 2010, art. 23; CONSTITUTION OF THE REPUBLIC OF NAMIBIA Feb. 9, 1990, art. 20; TOGO CONSTITUTION DE LA IVÈ RÉPUBLIQUE Sept. 27, 1992, art. 35; CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, arts. 30, 34(2).
281. *See* CONSTITUIÇÃO DA REPÚBLICA DE ANGOLA Jan. 13, 2010, arts. 30, 80(2).
282. *See id.* art. 80(1); CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO Feb. 18, 2006, arts. 42, 43; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Jan. 18, 2014, art. 10; CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA Dec. 8, 1994, art. 36; CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, art. 28(1); MADAGASCAR CONSTITUTION DE LA IVÈ RÉPUBLIQUE Dec. 11, 2010, art. 21; CONSTITUTION OF THE REPUBLIC OF MALAWI May 16, 1994, § 23(4); CONSTITUTION OF

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well as the right to have all matters decided per the best interests of the child.<sup>283</sup> Foreign courts are also citing both the South African Constitution<sup>284</sup> and the decisions of South African courts vis-à-vis children's rights, which together contribute to a growing children's rights jurisprudence that is long overdue.<sup>285</sup>

### VI. CONCLUSION

South Africa emerged as an international leader in the recognition of children's rights both at the beginning and at the close of the twentieth century. However, apartheid in the mid-twentieth century, and more recently, widespread inequalities in post-apartheid South Africa have prevented the nation from fulfilling its full potential to serve as the most progressive country in the world vis-à-vis children's rights.

South Africa's Constitution was the first in the world to include a comprehensive and detailed section on children's rights. Since then, judicial decisions, legislation, and socioeconomic conditions in the past twenty years suggest that South Africa's commitment to the implementation of children's rights continues to be well-intentioned but inconsistent. While measurable progress is being made in many areas that track the realization of children's rights, far more work needs to be done in areas ranging from poverty to health to housing and basic services to education.

Where a commitment to a child-centered legal framework is evident in the form of constitutional provisions, case law, and legislation, improvement in the quality of children's lives appears to be especially marked. This impact can be witnessed in the widespread provision of government grants to supplement the income of families with children and the near-universal availability of HIV/AIDS counseling, testing, and treatment to prevent mother-to-child transmission following *Treatment Action Campaign*.

Although the state has been held by the Constitutional Court to have some direct obligations to children under the Constitution, the state's obligations are often mediated by presumptive parental obligations or claims of limited resources such as those outlined in *Grootboom*. The framing of children's rights as obligatory on everyone except governments is reminiscent of the 1924 Geneva Declaration and

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THE REPUBLIC OF NAMIBIA Feb. 9, 1990, art. 15; CONSTITUTION DE LA RÉPUBLIQUE DU SÉNÉGAL Jan. 22, 2001, art. 20; INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF THE SUDAN Jul. 7, 2005, art. 14; GRONDWET VAN DE REPUBLIEK SURINAME [CONSTITUTION] Sept. 30, 1987, art. 35(3); TOGO CONSTITUTION DE LA IVÈ RÉPUBLIQUE Sept. 27, 1992, art. 31; CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art. 11.

283. See CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA Dec. 8, 1995, art. 36(2); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA Aug. 8, 1996, § 29(1); CONSTITUTION OF THE REPUBLIC OF NAMIBIA Feb. 9, 1990, art. 15; CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art. 34(1).

284. See, e.g., *Rex v. Moblomi* [2013] LSHC 27 at para. 99 (Lesotho) (discussing a child's right to counsel under the South African Constitution).

285. See, e.g., *Nandago v. S* [2010] NAHC 109 at para. 162 (Namibia) (citing *AD v. DW* 2008 (3) SA 183 (CC) (discussing the best interests of the child with respect to adoption)); *In re K & K* [2015] BWHC 1 at para. 131 (Botswana) (citing *Fraser v. Children's Court Pretoria North* 1997 (2) SA 218 (CC)).

causes one to wonder what progress has been made in the past near century if almost twenty years of judicial decisionmaking under the most progressive constitution in the world refuses to hold the state consistently accountable for the effective realization of children's rights, especially where those decisions appear to have a notable and, at times, life-saving impact.

Will the next twenty years witness further constitutionalization of children's rights in South Africa and among those countries and international bodies and organizations that are looking to the republic as the world's leader in constituting children's rights? With so much progress made and yet so much that still needs to be accomplished, the children of South Africa can only hope.