

Keynote address

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Justice Sisi Khampepe

Thank you for that kind introduction. And special thanks to Prof Anne Skelton of the Centre for Child Law for inviting me to give this keynote address at this prestigious event. I am truly humbled to have been asked.

This conference is a celebration of the dedication of the **phenomenal work** that has been done by the Centre for Child Law, over the last 20 years in furtherance of the realisation of a better South Africa. A South Africa, that protects and promotes those who are among the most precious and the most vulnerable in our society, **our** children.

The Constitution of South Africa makes express provision for children's rights in section 28. Recognising the special place that children occupy in our society, the **Constitution** provides rights beyond that afforded to every other person within this country's borders. Every child, it says, has **rights**. To a name and nationality from birth. To family and pre-natal care. To basic nutrition, shelter, health care, and social services. To be protected from maltreatment, neglect, abuse or degradation. To be protected from exploitative labour practices. These rights are in addition to other rights under the Constitution, which are afforded to all persons. Everyone, including every child, has the right to dignity. Everyone, including every child, has the right to privacy. And everyone, including every child, has the right to equality and non-discrimination. Most importantly, section 28(2) of the Constitution states "a child's best interests are of paramount importance in every matter concerning the child".

But these words have no meaning unless they are **brought** to life. The past system of apartheid caused much trauma, oppression, hatred, and sadness. Throughout the duration of that oppressive system, **children** were there. Children suffered. Some were detained without trial. Some were tortured and assaulted. Many faced discrimination. It was the mobilisation of the youth in the 1976 riots, and the horrific deaths that resulted, that shed light on the atrocities of the apartheid system and undoubtedly contributed to its eventual downfall. As a member of the Truth and Reconciliation Commission, I heard many accounts of the **pain** and **suffering** endured by children during those years. The most innocent, the newest members of our society had horrific harms inflicted upon them by people who believed them to be inferior human beings. **Through it all**, children raised their voices to be heard.

It is public interest institutions like the Centre for Child Law, who have been at the forefront of the promotion, realisation and advancement of children's rights for the last 20 years and who have succeeded in breathing life into the rights enshrined in our Constitution. The Centre for Child Law seeks to make these rights real for all children, including children with disabilities, migrant children, and undocumented children.

It is **my** view that this work is not just for the benefit of the children, but the **entire nation**. The legacy of apartheid creates a context in which the Centre for Child Law's use of effective public interest litigation, has been crucial to advance the capacity of other similar public interest organisations to use the law as an instrument to promote and protect children's rights. This is crucial to how our society advances, and to how it heals.

And so we must ask ourselves the question posed in the theme of this conference. What does it mean to imagine children constitutionally? This year's conference deliberations canvas a range of themes, from the constitutionalisation of children's rights to corporal punishment, to child justice and sexual offences, and to migration.

There have been a number of cases that have been decided by the Constitutional Court that deal with these very topics. As a judge on the Court, it has been my honour to preside over some of them, and to play a role, however small, in the advancement of children's rights in this country.

Today, I was asked to speak specifically about the Constitutional Court's judgment in *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*. This is a unanimous judgment penned by myself in which the Constitutional Court opted to protect children's sexual development by holding that it was unconstitutional to criminalise consensual sexual activity of children between the ages of 12 and 16. As I wrote in the judgment:

"Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development ... We must be careful ... to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development."

The case was primarily concerned with Part 1 of Chapter 3 of the Sexual Offences Act, which criminalised the performance of certain consensual sexual acts, by both adults and children, who are between 12 and 16 years old. Section 15 of that Act created the offence of "statutory rape" in relation to the commission of "sexual penetration". Sexual penetration, was widely defined in the Act to include vaginal, anal and oral sexual intercourse, as well as some forms of masturbation by another person.

Under the Act, statutory rape would be found to be committed in two instances. First, if an adult or a child who was 16 years or older engaged in consensual sexual penetration with an adolescent, and second, if adolescents engaged in consensual sexual penetration with each other. In the case of the latter, both children had to be prosecuted. Both children were at risk of being found guilty of having statutorily raped the other. The Act also created the offence of statutory sexual assault in relation to the commission of a “sexual violation.” The term “sexual violation” included broad references to “direct or indirect contact” including some forms of masturbation by another person, petting, kissing and hugging.

Similarly to the offence of statutory rape, statutory sexual assault could be committed in two circumstances. First, if an adult or a child who was 16 years or older engaged in consensual sexual violation with an adolescent; or second, if adolescents engaged in consensual sexual violation with each other. Again, in the case of the latter, both of the children involved had to be prosecuted.

For statutory sexual assault alone, a “close-in-age” defence was afforded to those who had an age difference of not more than two years between them. In other words, if a sexual violation, such as kissing or petting or mutual masturbation, took place between a 12-year old and a 15-year old, both would have committed an offence in terms of section 16, and both would have been prosecuted. In addition, the Act created a statutory obligation and an offence for the failure to report sexual offences against children.

Before the Constitutional Court, the Centre for Child Law, on behalf of the applicants, submitted that the breadth and formulation of the impugned provisions of the Act harmed the very children they were intended to safeguard. It was the Centre for Child Law that brought forward the context the Court needed to realise the full potential effects of the provisions -- early exposure of minors to the harshness of the criminal justice system, the chilling effect of the exposure on the development of a proper understanding of, and healthy attitudes to, sexual behaviour.

Astutely, the Centre for Child Law relied extensively on an expert report by the late Professor Alan Flisher, a child psychiatrist at the University of Cape Town, and Ms Anik Gevers, a clinical psychologist specialising in child mental health at the University of Cape Town. The report compiled information about the sexual development of children. It came to the conclusion that the impugned provisions the Act sought to criminalise, are activities that are potentially healthy if they are conducted in ways in which the individual is emotionally and physically ready and willing. The report cited the importance of supportive relationships with adults to help children make healthy decisions, and went on to explore the various social and psychological effects the impugned provisions may have had on children’s development, including sparking shame, embarrassment, anger and regret.

The second and third amici, the Women's Legal Centre Trust and the Tshwaranang Legal Advocacy Centre both provided important submissions with respect to the right to equality in section 9, and the disproportionate impact of the impugned provisions on girl children. The rights of girls to access health care services, and reproductive health care, in particular, was argued to have been violated.

In order to come to the determination it did, the Constitutional Court had to consider whether there was a limitation of rights in the circumstances, and if so, whether the limitations were reasonable and justifiable in terms of section 36 of the Constitution, and if not, what the appropriate remedy would be.

In the judgment, I quoted Justice Sachs's words in *S v M (Child for Centre Law as Amicus)*. His words **give expression** to the weight of children's rights and the importance of the framework through which to view the rights of children. In that decision Justice Sachs wrote:

"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. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood."

We **must** start with this framework when we imagine children constitutionally. We **must** start from a place where we envision children as individual rights-bearers, and not mere extensions of their parents or mere reflections of what limitations we may wish to legally impose at the outset. When we **breathe life** into the mere words and promises that make up constitutional rights, **each child** takes form as its own person, with its own journeys and personalities. Importantly, as I set out in the judgment, the Constitutional Court was not tasked with giving an answer as to whether children should or should not engage in sexual conduct. The Constitutional Court was also not tasked with deciding whether Parliament may set a minimum age for sexual conduct. Rather, the Constitutional Court was asked to address the narrow issue of whether it is constitutionally permissible for children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith. That is **what** the judgment purported to do.

In the judgment, I found that the impugned provisions of the Act infringed on children's rights to dignity, privacy and violated the guiding principle of the best interests of the child.

With respect of the violation of the right to dignity, I took note of the Constitutional Court's previous findings in *De Reuck* and *S v M* that children's dignity rights are of special importance and are not dependent on the rights of their parents. It was **obvious** to me, and other members of the Court, that the criminalisation of consensual sexual conduct is not neutral—it is a form of stigmatisation which is degrading and invasive, and has significant impact on one's self-worth and dignity.

The violation of the right to privacy was likewise clear. The creation of these offences created a legal sanction for police officers, prosecutors and judicial officers to scrutinise and assume control over the intimate relationships of adolescents. The **intrusion** was exacerbated by the reporting obligations of trusted third parties in section 54. I also found that the intrusion upon privacy rights, in an interconnected fashion, further impacted upon the violation of the dignity rights of children.

With respect to the best interests of the child as protected in section 28(2), there are at least two separate roles created by the provision: it is a guiding principle in each case, and it is a standard against which to test provisions or conduct which affect children in general. Even if applied flexibly, it was **clear to me** that the best interests of the child was violated because subjecting the conduct of children, the numbers of which the expert report stated would be in the majority of adolescent of South Africans, to the harshness and risks associated with the criminal justice system, could not be said, to be in the best interest of the child.

The judgment is one of the ones of which I am most proud. Not only does it underscore that children are fundamental bearers of human rights, it recognizes that the criminalization of conduct can be an overly harsh consequence. The judgment recognises that while criminalizing conduct may be intended to keep people safe, including the most vulnerable in our society, the criminal justice system, is not always well-equipped for that purpose. With the uncontradicted social and psychological evidence before the Court, **I simply could not find**, that the means chosen by Parliament, in this instance, were rationally connected to the dream of a South Africa that we all want to see. **Rather**, ensuring that our laws promote healthy development in our young people is fundamental to curbing some of the issues that plague our society today, including all forms of gender-based violence. It was through the superb engagement of the Centre for Child Law that the Court was able to fully understand, and capture, the implications of the impugned provisions of the Sexual Offences Act.

The Teddy Bear Clinic judgment then formed the pretext for a subsequent case, decided just one year later, *J v National Director of Public Prosecutions*. Here the Constitutional Court found that it was unconstitutional to require automatic placement of child offenders on the

Sex Offenders Register. The Court stepped in to prevent the harrowing consequences that the criminalisation of our young people can have. Here again, imagining children constitutionally meant less harsh consequences.

The law has developed in all realms of children's rights over the last twenty years. For instance, over the course of its existence, the Constitutional Court has heard more than one case involving corporal punishment.

In *S v Williams*, six young people were sentenced to receive "moderate correction" of a number of strokes with a light cane, a sanction meted out in terms of section 294 of the Criminal Procedural Act. It was in that case in 1995 that the Constitutional Court declared judicial corporal punishment unconstitutional, finding that it violates dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. The Constitutional Court found that juvenile whipping violated the dignity of the juvenile as well as that of the person administering the whipping.

In the case of *Christian Education South Africa v Minister of Education* the Constitutional Court was again called to deal with the issue of corporal punishment, this time in schools. Parliament passed a law prohibiting corporal punishment in all schools. The question was whether Parliament had unconstitutionally limited the rights of parents of children in independent schools who sought to consent to "corporal correction." The Court was unanimous. In a judgment penned by Justice Sachs in 2000, the Court found that although religious and community rights had been limited, the limit was justifiable in an open and democratic society. No exemption would be provided for schools which, although they were independent, functioned in the public domain.

And just last week, the Constitutional Court heard the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* in which the Centre of Child Law appeared as amicus. The case concerns the appeal of a High Court judgment and order handed down in October 2017 which found that the common law defence of reasonable chastisement for parents charged with assaulting their children is unconstitutional and no longer applies in the law. An application for leave to appeal against the judgment to the Constitutional Court seeks to have it overturned. Again, here, the Court will have to consider the full breadth of the Constitution and what the appropriate balance is between freedom of religion and the constitutional rights of children.

The Centre for Child Law continues to utilise the law to protect and advance children's rights. Next year this Court will hear an application brought by the Centre for Child Law, in *Centre for Child Law and Others v Media 24 Limited and Others*, to confirm an order of constitutional invalidity of certain provisions of the Criminal Procedure Act insofar as they fail to protect the anonymity of children as victims of crimes during

criminal proceedings, and whether their identity should remain protected after they turn 18.

The breadth of these cases demonstrates the hard work that the Centre for Child Law does to ensure the rights of children are protected in multiple settings and to ventilate the full content of their constitutional rights. It also demonstrates the painstaking way that public interest litigation occurs. As issue after issue is raised, so comes a slow ventilation of the content of rights.

I am deeply proud of the jurisprudence of the Constitutional Court, and humbled by the role I have been able to play in it. But I also recognise that the Court cannot operate alone. Without litigants, the Constitutional Court building will stand empty and the promises of the Constitution will stand unfulfilled.

The incorporation of special provisions that protect children's rights in our constitution sheds light on the importance of children in the project of reconciliation. As I have previously said, reconciliation is like a tree that needs to be watered continuously, until it grows, and takes firmly to root. Without the full ventilation of children's rights as constitutionally guaranteed, we will never be able to have our tree take root. We will never see it grow tall and strong, for generations to come. And we will never be able to enjoy the benefits of the shade the tree will provide.

This conference is a celebration of 20 years of important, influential work. The Centre for Child Law has much to be proud of. But it is also a time to reflect and strategize for the next 20 years. We live in a violent society where the rights of women and children are still under threat.

This calls for vigorous action on the part of institutions such as the Centre for Child Law.

Children make up about 35 percent of the Country's 57.73 million population. So the challenges facing the Centre for Child Law are immense. In looking forward, it is also important for institutions such as the Centre for Child Law to remember that, as much as we look to the Courts to be the bastion of our democracy and the upholder of the rights entrenched in our Constitution, litigation can only take us so far. We must not forget that sometimes engagement with government and mobilisation can have much greater and more immediate effectiveness. Even when using litigation to realise children's rights, it is important to utilise those wins in the right manner, with the correct follow through so as to ensure that they are not just once off wins, but can be used to build upon and to realise even greater achievements.

In imagining children constitutionally, the Centre for Child Law must continue to stir the imagination of all South Africans, that we may dream to wake up one day in a country where the rights of all children are **equally protected**. That one day we may look into the faces of all of our

young ones with **pride**, with a sense of **accountability**, and have them know we **love them**, we **hear them**, and we **will always fight for them**.

Thank you again for allowing to me address you all here today and I hope that you enjoy the remainder of what I don't doubt will be an extremely fulfilling conference.