

Children seeking justice: safeguarding the rights of child offenders in South African criminal courts

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SUMMARY

This contribution makes an argument for the use of witness tools as prescribed in section 170A of the Criminal Procedure Act 51 of 1977 in criminal cases involving child offenders if they choose an active defense. The argument based on the assumption that children who violate the law are themselves victims and their vulnerability is already elevated by the time they experience the criminal justice system. The use of witness tools in the criminal justice system is in the best interests of the child because the flexible nature of the best interest determination allows for a case-by-case approach that takes into account the unique characteristics and lived experiences of each individual child. Thus, this contribution advocates the use of section 28(2) of the Constitution to implement and interpret safeguards under section 170A of the Criminal Procedure Act. This approach to child justice ensures the establishment of the truth and is an essential component of a fair trial and in line with the ethos enshrined in the Constitution.

1 Introduction

The effects of violence in South Africa continue to devastate many lives including those of children. Children both commit and are victims of a significant number of crimes and therefore constitute an expressly vulnerable population both as perpetrators and as victims.¹ In addition, children experience violence in all settings from the privacy of their homes to their neighbourhoods and from communities to their schools.² Moreover, many children experience a co-occurrence of different forms

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

2 Clark “Youth violence in South Africa: the case for a restorative justice response” 2012 *Contemporary Justice Review* 77-95; Hargovan “Child justice practice: The diversion of young offenders” 2013 *SA Crime Quarterly* 25-35; Songca “The africanisation of children’s rights in South Africa: Quo Vadis?” 2018 *IJARS* 77-95.

of victimisation during their childhood known as poly-victimisation.³

Research,⁴ documents that the majority of crimes committed against children are of a sexual nature. Some of these studies show that sexual violence by and against children is on the increase.⁵ Unfortunately, accurate, disaggregated and reliable data is difficult to find.⁶ A paucity of data indicating the age and the number of successful prosecutions makes it difficult to establish with precision the effectiveness of the criminal justice system, and the actual numbers of children who are either victims or perpetrators of sexual offences.⁷ Shortcomings in the legal and clinical definitions of sexual abuse, under-reporting of sexual crimes due to lack of centralised record systems and/or registers has further compounded the problem.⁸

Regardless of these shortcomings, contemporary research reveals high child sexual abuse prevalence rates,⁹ and an increase in the number of children who commit sexual offences against other children.¹⁰ Many child offenders fall into the highest vulnerability category because of previous sexual abuse victimisation apart from neglect or abuse.¹¹ Consequently, violence against and by children has resulted in a number of children being in contact with the criminal justice system as perpetrators, complainants or witnesses of crime.¹² The rise in sexual crimes by and against children has magnified their vulnerability and heightened the concern for their safety and development. Advancements in child statutes and criminal law in South Africa, aimed at protecting

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- 3 Leoschut & Kafaar "The frequency and predictors of poly-victimisation of South African children and the role of schools in its prevention" 2017 *Psychology, Health & Medicine* 1-13. Poly-victimisation occurs when children experience abuse in the context of other forms of maltreatment and victimisation. The victims of such form of victimisation are poly-victims.
 - 4 Hesselink & Dastile in *Vulnerable Children in South Africa: Legal, social development and criminological aspects* (2016) 12-13.
 - 5 Clark 2012 *Contemporary Justice Review* 78; Artz *et al* "Optimus Study South Africa: Technical Report, Sexual Victimization of Children in South Africa" 2016 http://www.cjcp.org.za/uploads/2/7/8/4/27845461/08_cjcp-report_2016-d.pdf accessed 10 July 2018. The national study shows that 34% of children are victimised before the age of 17.
 - 6 Townsend, Waterhouse & Nomdo "Court support workers speak out: Upholding children's rights in the criminal justice system" 2014 *SA Crime Quarterly* 76-77; Artz *et al* (2016) 6-8; Leoschut & Kafaar 2017 *Psychology, Health and Medicine* 1-13.
 - 7 See Artz *et al* (2016) 96.
 - 8 See "Justice for child victims and witnesses of crime" 2008 Centre for Child Law, Faculty of Law, University of Pretoria *PULP* 3-5.
 - 9 Artz *et al* (2016) 13, the study reveals that around 18 000-20 000 child sexual abuse cases are reported each year to the police.
 - 10 See Hall "Children with harmful sexual behaviours-what promotes good practice? A study of one social services department" 2006 *Child Abuse Review* 273-284; Songca & Karels "Judicial and legislative responses to sexual crimes committed by and against children and the potential use of restorative justice practices" 2016 *Litnet Akademies* 444-478.
 - 11 Matthias "Protecting child witnesses: New developments and implications for social workers" 2011 *Social Work* 195-204.
 - 12 Songca 2018 *IJARS* 78.

children as a vulnerable group from various crimes including those of a sexual nature emanate from these concerns.¹³

Various policies and legislation¹⁴ developed over the past two decades supply protections for children especially those who go through the criminal justice system. Some of the protections allow the child in legal proceedings to give evidence in a separate room other than the courtroom; they also make provision for children to make use of a closed circuit television and or an intermediary. Regarding the latter measure (which will be discussed in detail below), the author argues that intermediary services must be availed to child offenders. A humanised and fair criminal justice system engenders the fundamental rights of children in conflict with the law as well as those of children who are victims or complainants.¹⁵

In addition, a humanised system ameliorates mental and psychological hardships associated with the criminal justice process. Increased levels of crimes committed by and against children result in increasing number of children giving evidence in criminal courts. Thus, the purpose of the present article is to make a case for the use of intermediaries in sexual cases involving children in conflict with the law. Currently, this intervention only benefits child witnesses or child victims.¹⁶ The author further argues that the principles of dignity, the best interest of the child and the child's right to participate are amiable to current approaches to children's rights and considered in deciding on whether to use intermediaries in cases involving child offenders.

The author argues that the vulnerable status of a child persists regardless of whether the child is a victim or an alleged offender. In the context of South Africa, this is of particular importance considering that children in conflict with the law are in most instances poly-victims and thus vulnerable to all forms of abuse and other social ills during childhood.¹⁷ The article starts by providing a brief analysis of risk factors for victimisation of children especially during childhood that may account for their delinquent behaviours or personalities.

13 In *Teddy Bear for Abused Children and RAPCAN v Minister of Justice and Constitutional Development* 2014 1 SACR 327 (CC) para 1 Khampepe J stated that children are special members of our society, therefore, any law that affects them must take into consideration their vulnerability and need for guidance. Moreover, she noted that courts have a duty to ensure that children receive the support and assistance essential for their growth and development.

14 For example sections 170A of the Criminal Procedure Act 51 of 1977 (hereinafter the Criminal Procedure Act); the handbook for professionals and policy makers on justice on matters involving child victims and witnesses of crime 2009 UNOCDC; the Children's Act 38 of 2005; the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the Child Justice Act.

15 Handbook for professionals and policymakers on justice matters involving children child victims and witnesses of crime 1.

16 S 170A of the Criminal Procedure Act, discussed below.

17 Hesselink & Dastile 1-32; Art *et al* (2016) 33.

After providing a brief analysis of victimisation in the context of child sexual abuse, the article evaluates the difficulties children experience in legal proceedings highlighting the inimical effects of the adversarial system on children. Next considered is an analysis of the right to protection of child offenders in the South African legal system as they participate in criminal proceedings. In the final instance, the article argues for the use of intermediaries,¹⁸ in criminal cases involving children in conflict with the law. In this regard, the article makes specific recommendations regarding amendments to section 170A of the Criminal Procedure Act.

2 Understanding child victimisation

Research informs us that children commit and are victims of significant portions of offences.¹⁹ Therefore, as stated above, many children go through the criminal justice system either as victims, witnesses or as offenders. This part of the contribution provides a brief exposition of risk factors for victimisation of children during childhood that may account for their delinquent behaviours or personalities. Understanding child victimisation and providing appropriate and targeted interventions will go a long way in stemming the vulnerability of children to victimisation and consequent delinquent behaviours. A child's development and appreciation of right and wrong begin at home; therefore, children need stable families and loving responsible adults who will protect them in order to thrive.²⁰

Structural violence and direct violence are the primary causes of crime in South Africa.²¹ Structural violence is a manifestation of poor socio-economic conditions emanating from inequality and poverty.²² Structural violence is a less visible form of violence, but its consequences are devastating and help explain why South Africa has elevated levels of direct violence.²³

Many researchers²⁴ have identified factors such as unemployment, HIV/AIDS and lack of education as causes of poverty. They have also reported high rates of unemployment among the youth, which pose a risk for offending or may lead to abuse or neglect.²⁵ Unemployment and

18 Selected provisions of s 170A of the Criminal Procedure Act discussed below.

19 Clark 2012 *Contemporary Justice Review* 77-78; Artz *et al* (2016) 12; Bekink "The testimonial competence of children: A need for law Reform in South Africa" 2018 *PER/PELJ* 1-32; Songca 2018 *IJARS* 78-79.

20 Hesselink & Dastile 1; The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) Arts 12, 13, 15 & 17.

21 Songca 2018 *IJARS* 77.

22 Songca 2018 *IJARS* 78-80.

23 Songca 2018 *IJARS* 80-81.

24 Songca 2018 *IJARS* 80-81; Hesselink & Dastile 8-12; Songca 2018 *IJARS* 11.

25 Songca 2018 *IJARS* 11.

poverty may result in familial and parental stress that may result in various forms of child abuse.²⁶

Direct violence poses multiple risks for children, which may account for delinquent behaviours. Individual crimes against children such as neglect, physical and sexual abuse are examples of direct violence emanating from structural violence. Hence, children who grow up in poverty experiencing economic exclusion are likely to engage in delinquent behaviour to try to fill the void left by the exclusion.²⁷

Social norms and values emanate from cultural practices and beliefs that in turn guide the choices and reactions of people in a community.²⁸ Some cultural beliefs establish risk factors for children who grow up in families that ignore their rights to self-determination.²⁹ Various forms of abuse thrive in environments where children, due to fear of reprisals from family members, stigmatisation or fear of persecution do not report incidents of sexual abuse.³⁰ Structural violence, direct violence and cultural beliefs all constitute significant causes for youth crime in South Africa.³¹

The discussion above illustrates that research exists to explain the causes of violence within families that has helped to establish the link between violence and delinquent behaviour of children. Furthermore, research has proven a nexus between forms of structural violence, such as poverty, and direct violence. Nevertheless, these factors do not adequately explain why the youth commit heinous crimes.³² The identified shortcomings illustrate the complex and interconnected nature of victimisation. They also show that victimisation of children is not a once-off incident, it occurs throughout childhood. Thus, the author supports the view that researchers should refrain from merely focusing on individual types of child victimisation. She supports the view held by some researchers that victimisation studies should focus on all forms of

26 Hesselink & Dastile 1-2.

27 Clark 2012 *Contemporary Justice Review* 80-84.

28 Clark 2012 *Contemporary Justice Review* 80-84; also Hesselink & Dastile 2-3.

29 In some cultures, children are viewed as the property of adults or perpetual minors and are denied their fundamental human rights and recognition as human beings. The belief in some cultures that men have right to own and discipline women and children contributes to domestic violence and in some instances to the sexual abuse of children. See Hesselink & Dastile 2-3. Nevertheless, in *S v M* the court recognised the child's right to dignity as an element of the child's right to self-determination. The court stated "... if a child is to be constitutionally imagined as an individual with distinctive personality, and not merely as a miniature adult awaiting to reach full size, he or she cannot be treated as a mere extension of his or her parents ...". See also *Teddy Bear for Abused Children v RAPCAN supra*.

30 Hesselink & Dastile 2.

31 Clark 2012 *Contemporary Justice Review* 84.

32 Clark 2012 *Contemporary Justice Review* 81.

victimisation that may occur during childhood. Resultantly, this shift in focus will assist researchers in identifying appropriate interventions.³³

The Achilles heel of victimisation studies is that they leave out the gamut of adversities that children incur during childhood.³⁴ It is not surprising that the recent national study on victimisation reveals that children between the ages of twelve to 22 experience various forms of victimisation mostly within their homes.³⁵ Children who have been victimised exhibit high levels of aggression and are likely to engage in delinquent behaviours.³⁶

In conclusion, the author is of the view that poly-victimisation studies reveal the complex nature of child victimisation that requires unique and innovative interventions that mirror children's lived experiences. The criminal justice process is one of the interventions used to redress the harm caused by offending. The primary objective of the criminal process, including cases involving children, is the establishment of the truth. Other aims include the preservation of dignity of both the victim and the child offender and the protection of the child from secondary victimisation in criminal processes. Our criminal justice system steeped in adversarial process requires that proceedings take place in the presence of the accused.³⁷ Nevertheless, the harmful effects of the adversarial system on children are well documented and discussed below.

3 Children seeking justice in South African criminal courts

The adversarial (also known as the accusatorial) and inquisitorial systems are the two major systems of legal procedure for establishing facts.³⁸ None of these systems is still in their purest form; for instance, investigation of issues and the manner in which procedures are applied is different.³⁹ The inquisitorial model is judge centred, and the presiding officer plays a more active role. Under this model, the judge rather than the parties is responsible for developing the evidence, calling and questioning of witnesses for example.⁴⁰

33 Leoschut and Kafaar 2017 *Psychology, Health & Medicine* 1.

34 Leoschut and Kafaar 2017 *Psychology, Health & Medicine* 1.

35 Leoschut and Kafaar 2017 *Psychology, Health & Medicine* 2; Songca 2018 *IJARS* 77-78.

36 Hesselink & Dastile 26-27.

37 S 158 of the Criminal Procedure Act.

38 See Strier *What can the American adversary system learn for an inquisitorial system of justice?* (1992) 109-111; Schwikkard, Skeen and Van der Merwe *Principles of Evidence* (1997) 365-367.

39 Hoffmann and Zeffert *The South African law of evidence* (1989) 471-474; see also Schoeman *A training program for intermediaries for the child witness in South Africa* (PHD dissertation 2006 UP) 30-31.

40 Hoffmann and Zeffert 471-474.

In contradistinction, the adversarial system has its own distinguishing characteristics. First, the parties are responsible for presenting their own evidence in support of their cases; secondly, cross-examination and confrontation processes are the hallmark of the adversarial system.⁴¹ In the adversarial system, cross-examination of the witness takes place in the presence of the accused. Giving evidence in the presence of the accused premised on the assumption that it is the best way to establish the truth, establishing the witness's credibility and guarding against the wrongful conviction of the accused undergirds the adversarial system.⁴²

The first important feature of the adversarial system relevant to this discussion is cross-examination. The right to cross-examination and its concomitant techniques is originally a common law principle embodied in statutory law and regarded as a fundamental requirement for a fair trial and an inherent right of the accused.⁴³ Cross-examination is essential for the establishment of the truth and regarded as "the greatest legal engine ever invented for the discovery of the truth".⁴⁴ The right to cross-examination is trite in South Africa and curtailing it inappropriately or interfering with it may render a trial unfair.⁴⁵

Nevertheless, research findings reveal that cross-examination and the techniques employed do not facilitate the establishment of the truth especially where children appear in court proceedings.⁴⁶ The techniques employed are often hostile and intended to confuse the witness and undermine his or her credibility.⁴⁷ Moreover, South African courts acknowledge the inadequacies of criminal procedures in meeting the needs of child witnesses. In *Klink v Regional Magistrate*,⁴⁸ the court

41 Muller & Tait "The child witness and the accused's right to cross-examination" 1997 *Journal of South African Law* 519; Cassim "The rights of the child witness versus the accused's right of confrontation: a comparative perspective" 2003 *CILSA* 67-70; Songca 287-294; Schoeman 30-35.

42 See Key "The child witness: The battle for justice" 1988 *De Rebus* 54; Muller and Tait 1997 *J.S.Afri.L* 520; Muller and Tait "Section 158 of the Criminal Procedure Act 51 of 1977: A potential weapon in the battle to protect child witnesses" 1999 *SACJ* 58; Songca 288-289;

43 Hoffmann and Zeffert 456-457; Schwikkard, Skeen and Van der Merwe 365-367. S 158(1) of the Criminal Procedure Act underpins the right to confrontation by stating that "Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused." See also sections 166 (1) of the CPA 51 of 1977. Section 35(3)(i) of the Constitution provides that the accused has the right to adduce and challenge evidence. Court have held that this section 35(3)(i) embodies the accused's right to cross-examine state witnesses, see eg *S v Msimango* 2010 SACR 544(GSJ) para 27.

44 Wigmore *Evidence I Trials at Common Law* (1979) 1367; see also Muller & Tait *J.S.Afri.L* 520 1997; Zeffert and Paizes *The South African law of evidence* (2009) 906-907, on the shortcomings of cross-examination.

45 Hoffmann and Zeffert 456-457; see also *S v Msimango supra*.

46 See Schwikkard, Skeen and Van der Merwe 365-366; Key 1988 *De Rebus* 53 -55.

47 *Klink v Regional Court Magistrate supra*.

48 *Klink v Regional Court Magistrate supra*

highlighted the challenges of child witnesses of sexual offences in legal proceedings thus:

“... child witnesses experience significant difficulties in dealing with the adversarial environment of a court-room; that a young person may experience difficulty in comprehending the language of legal proceedings and the role of various participants; and that the adversarial procedure involves confrontation and extensive cross-examination”.⁴⁹

On its part, the right to confrontation implies that the person who testifies against the accused must do so in his presence. In *S v Motlala*,⁵⁰ Colman J held that the right to confrontation means that in addition to the accused knowing what the state witnesses are saying or have said about him or her, the accused must be able to observe their demeanour and they must give evidence in the presence of the accused.⁵¹

In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*,⁵² the Constitutional Court took notice of the unsuitability of the adversarial system involving children especially in a democratic dispensation.⁵³ It argued that the techniques employed in this system were unsuitable for children including the circumstances under which they gave evidence. It noted that children were at times subjected to the most humiliating and brutal treatment, which was at variance with the ethos of human dignity, achievement of equality and advancement of human rights espoused in the Constitution of the Republic of South Africa.⁵⁴ Ngcobo J ruled that our constitutional democracy has introduced a new ethos that seeks to guide and protect children through legislation that guides and enforces their rights and liberties.⁵⁵

The author discusses some of these statutory protections below, while arguing that challenges encountered by children in adversarial proceedings are similar whether they appear as witnesses or children in conflict with the law or accused of committing crimes. As a result, the author argues that child offenders must also enjoy protections provided under section 170A of the Criminal Procedure Act.

3 1 The rights of victims versus the rights of the accused

The Constitution is a vehicle of social justice and through its Bill of Rights; it enshrines the rights of people including those of children.⁵⁶ The

49 *Klink v Regional Court Magistrate supra*

50 *S v Motlala* 1975 1 SA 814 TPD (T).

51 *S v Motlala supra*.

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

53 *Director of Public Prosecutions Transvaal, v Minister for Justice & Constitutional Development supra*.

54 Act 108 of 1996.

55 Act 108 of 1996.

56 S 28 of the Constitution outlines the rights of children and guarantees their protection.

Constitution is an instrument of social change that seeks to transform our legal system.⁵⁷ It is the supreme law anchored on important values of human dignity; equality and freedom and thus introduces a new moral code that should permeate our legal system.⁵⁸ As stated above, the Constitution has entrenched the rights of children in section 28; in addition, the Constitution outlines several procedural rights of detained, arrested and accused persons, including those of children.⁵⁹ Section 35(3)(e) states that the accused has the right to be present when tried. The provision does not explicitly use terms such as ‘confront’ or ‘face-to-face’, however, researchers assert that this right extends to confrontation; it allows the accused to see witnesses and to observe their demeanour.⁶⁰ Although the right to confrontation is an old established rule of the law of criminal procedure in South Africa, constitutional developments resulted in the adaption of the rule allowing the child to participate effectively in courtroom proceedings.⁶¹

The Constitution does not explicitly guarantee the rights of victims in the criminal justice system. This omission has created the misperception amongst the public that there is undue emphasis on the rights of the alleged criminals and thus statutory protection of their rights facilitates crime.⁶² These narratives pit the rights of the accused against those of victims and/or witnesses in criminal proceedings.⁶³

The criminal process entails two competing interests, that of the accused and the victim. For example, the accused has a right to a fair trial and enjoys other rights contained in the Constitution; legislation and international instruments protect victims of crime.

Notwithstanding, the author argues that the issue is not whether the accused has more rights than the victims or *vice-versa* because they both have rights,⁶⁴ what is crucial is the balancing of the right of the accused

57 Songca 2018 *IJARS* 79.

58 *Director of Public Prosecutions Transvaal v Minister for Justice & Constitutional Development supra*.

59 S 35 of the Constitution.

60 Muller “An inquisitorial approach to the evidence of children” 2003 *Crime Research in South Africa* 2. S 158 (1) of the CPA encapsulates the right to confront by providing that “Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.”

61 *Klink v Regional Court Magistrate supra*. For example, s 170A was inserted in the Criminal Procedure Act by section 3 of the Criminal Law Amendment Act 135 of 1991 to protect witnesses and complainants giving evidence in courtroom proceedings.

62 Meintjies-Van der Walt “Towards victims’ empowerment strategies in the criminal justice process” 1998 *South African Criminal Justice Journal* 157-172.

63 See De Klerk *The role of the victim in the criminal justice system: A specific focus on victim offender mediation and the victim impact statements* (LLM dissertation 2012 UP) 2-3.

64 For example, various policies and legislation such as the Service Charter for victims of crime, the minimum service standards for victims of crime 2004 compliment the protections afforded to witnesses and victims of crime.

to a fair trial and the interests of the victim.⁶⁵ The author supports the view that the discovery of the truth and the fundamental principle of justice must be the determining factor.⁶⁶ Fair procedures benefit both the accused and the victims in criminal processes. The manner in which parties are treated must be reflective of the ethos espoused in the Constitution including upholding principles of a fair trial. In balancing, the different rights the court must take into account all the relevant factors, including the facts of each case to ensure fairness to both the child offender and victim.⁶⁷

The author argues that the application of the principles of human dignity and equality must ensure the continued development of children and their protection from the traumatising effects of the adversarial process. Moreover, the point of departure in cases involving children must be section 28(2) of the Constitution, which applies equally to both the accused and the victim.

The supremacy of the Constitution and its transformative elements necessitated an overhaul of various statutes to reflect its ethos especially towards children. The call for the protection of children from the consequences of the adversarial system magnified its shortcomings. In *Klink v Regional Court Magistrate* the court took judicial notice of the importance of cross-examination, however, the court could not ignore the deleterious effects of cross-examination on child witnesses leading the court to state, *inter alia* that the ordinary procedures of the criminal justice system were inadequate to meet the needs and requirements of the child witness.⁶⁸ The court noted that the system needed adaptations to enable it to function effectively and serve its ultimate purpose of establishing the truth; hence, it was of the view that section 170A served that purpose.⁶⁹

Moreover, the law until recently was indifferent to the mental stress and indignity suffered by children giving evidence in court proceedings.⁷⁰ In most instances, children were required to give evidence in the presence of the accused, subjecting them to the most brutal and humiliating treatment by being required to relate traumatic events in the most intimate detail.⁷¹ It is trite that children are vulnerable and need special protection and support appropriate to the age, level of

65 In *S v Zuma* 1995 2 SA 642 (CC) the court stated “[I]n any democratic criminal justice system there is a tension between ... bringing criminals to book ... and ensuring that justice is manifestly done to all ...[b]ut none of that means sympathy for crime and its perpetrators.”

66 Muller and Tait 1997 *Journal of South African Law* 528.

67 *Klink v Regional Court Magistrate supra*; Schoeman 49.

68 *Klink v Regional Court Magistrate supra*.

69 *Klink v Regional Court Magistrate supra*

70 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*.

71 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*, Songca “Revisiting section 170A of the Criminal Procedure Act 51 of 1977” 2010 *THRHR* 402-414.

maturity and unique needs to obviate further hardship and trauma that may emanate from their participation in criminal processes.⁷²

Thus, in South Africa, a child's best interests are of paramount importance in every matter concerning the child.⁷³ In addition, the Constitution enumerates protective measures for children in conflict with the law.⁷⁴ Sections 28 and 35⁷⁵ of the Constitution reflect society's belief that children are vulnerable and in need of special protection at all times.⁷⁶ In reality, children who encounter the criminal justice system do not always enjoy these rights and entitlements fully. The criminal justice system continues to pose challenges for children who encounter the system as witnesses, complainants or offenders.

The author is of the view that the Child Justice Act 75 of 2008 (hereinafter the Child Justice Act) ameliorates the concerns to a certain degree – most notably in relation to limitations on cross-examination and compulsory legal representation. It nevertheless does little to protect a child offender from the harsh reality of the courtroom as a physical space, or the trauma associated with testifying in a criminal court process.

Given these concerns, including that most child offenders are poly-victims,⁷⁷ the author opines that the best interests' principle requires the protection of both complainants and child offenders from the harm and trauma that may result from participation in sexual offence cases. Section 170A inserted in the Criminal Procedure Act allows children to testify through an intermediary to protect them from undergoing 'undue mental stress or suffering while giving evidence in court.

The relevant provisions of Section 170A discussed below include constitutional protections available to children participating in criminal processes. The author argues that child offenders are equally vulnerable and in line with their rights to a fair trial require similar protections in criminal proceedings.

72 Songca 2010 *THRHR* 402-403.

73 S 28 of the Constitution; see also Bekink "Kerkhoff v Minister of Justice and Constitutional Development 2011 SACR 109 (GNP): Intermediary appointment reports and a child's right to privacy versus the right of an accused to access information" 2017 *PER/PELJ* 1.

74 S 35 of the Constitution.

75 S 35 of the Constitution outlines various protections for arrested, detained and accused persons, these protections are applicable to alleged child offenders.

76 Simon "Pre-recorded videotaped evidence of child witnesses" 2006 *SACJ* 56-78.

77 See discussion above.

4 Statutory measures to protect children under section 28 of the Constitution

South Africa's constitutional democracy seeks to improve the lives and rights of children. The Constitution based on the foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law is the supreme law of the land.⁷⁸ In terms of the supremacy laws, any law or conduct that is inconsistent with it is invalid.⁷⁹ Section 39(1) of the Constitution provides that, when interpreting any legislation, every court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.⁸⁰ The provision requires an interpretation of laws that upholds the values of the Constitution similarly, section 39(2) of the Constitution, requires an interpretation of laws, that promotes the spirit, purport and objects of the Bill of Rights.⁸¹

In line with the above constitutional provisions, and relevant to this submission, section 28(1)(d) of the Constitution provides that every child has the right to be "protected from maltreatment, neglect, abuse or degradation" and section 28(2) provides that "a child's best interests are or paramount importance in every matter concerning the child". The latter provision recognises children's vulnerability and their need for special protection.⁸²

Section 28 (2) was inspired by international and regional instruments on the protection of children, in particular the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Charter).⁸³

Article 3(1) of the CRC provides that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".⁸⁴

The African Charter similarly proclaims:

78 S 2 of the Constitution, 1996.

79 S 2 of the Constitution, 1996.

80 Schoeman 47.

81 See Ngcobo J in *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*.

82 Songca 2018 JARS 82.

83 In *S v M* 2008 3 SA 232 (CC) para 16, Sachs J states that section 28 is based on international instruments of the United Nations in particular the Convention on the Rights of the Child; see also *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*.

84 Art 3(1) of the CRC.

“... In all judicial or administrative proceedings affecting a child who is capable of communicating his/her views, the opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative ...”⁸⁵

Ratification of these conventions created obligations for South Africa relating to the protection of children and their rights; as a result, it is obliged to give effect to these instruments and to take all appropriate legislative and other measures to give effect to these instruments.⁸⁶

The common denominator between the African Charter, the CRC and section 28 of the Constitution is the right of the child to be a child and his or her right to enjoy special care.⁸⁷ Courts are bound to give effect to the provisions of section 28 of the Constitution and to refer to regional and international instruments on the protection of children.⁸⁸ In addition, when interpreting legislation, they must use an interpretation of the legislation that is consistent with international law.⁸⁹

5 The best interest principle as a right

The best interest principle is a common law rule that has found expression in case law and legislation.⁹⁰ Thus, contemporary foundations of children’s rights and South African jurisprudence categorise the best interest as a right going further than the common law principle.

The courts at different times have defined and explained the role of the best interest principle by, for example, pronouncing that the starting point for matters concerning the child is section 28(2).⁹¹ Moreover, courts have ruled that the best interests of the child principle creates a right that is independent and extends beyond recognition of other

85 Art 4.

86 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*. In *S v M supra* Sachs J noted that the convention (CRC) has, since its introduction, become the international standard against which to measure legislation and policies and it has established a new structure, modelled on children’s rights, within which to position traditional theories on juvenile justice.

87 Songca 2010 *THRHR* 408.

88 *S v M supra*.

89 *S v M supra*.

90 S 7 of the Children’s Act gives content to the best interest of the child principle and in terms of section 9 of the Children’s Act, the child’s best interests are of paramount importance in all matters concerning the child. However, courts have pronounced that the fact that the best interest of the child are paramount does not mean that they are absolute, see *S v M* 2008 3 SA 232 (CC) 250B

91 *J v National Director of Public Prosecutions supra; Sonderup v Tondelli* 2001 1 SA 1171 (CC) the court interpreted section 28(2) as giving a guarantee that a child’s best interests would be paramount in every matter concerning the child.

children's rights in the Constitution.⁹² Resultantly, section 28(2) must be interpreted so as promote the foundational values of human dignity, equality and freedom.⁹³ Thus, section 28(2) as part of the Bill of Rights, protects the dignity of the child and promotes the child's worth and freedom by proclaiming that 'a child's best interests are of paramount importance in every matter concerning the child'.

In *Director of Public Prosecution, Transvaal v Minister for Justice & Constitutional Development*, the court outlined the application of the best interest principle in the context of the Economic and Social Council of the United Nations (ECOSOC) Guidelines.⁹⁴ The court pronounced that in terms of the ECOSOC Guidelines, complainants and victims must receive special assistance and protections in order to prevent hardships and trauma that may arise from their participation in criminal proceedings.⁹⁵ Moreover, in the context of the best interests of the child the Guidelines make provision for the safeguarding of the rights of the accused, and recognises the right of every child to have his or her interests given primary consideration.⁹⁶ The latter includes the child's right to protection and to a chance for harmonious development.⁹⁷

After taking into account the provisions of the CRC and ECOSOC, the court held that it had to apply the best interest principle; taking into account the consequences of its decision on the child. The court pronounced that the best interest principle requires the child protection from the trauma that may arise from giving evidence in court. Thus, the child must testify out of sight of the alleged perpetrator and in a friendly atmosphere. The protection afforded to the child requires professionals to assist the child and for the child to be treated as a unique and valuable human being, with his or her individual needs.⁹⁸ In the courts view, what is required is individual justice tailored to the needs of the individual case;⁹⁹ the courts successfully inter knitted the test of undue mental

92 *J v National Director of Public Prosecutions supra*.

93 Bosman-Sadie and Corrie *A practical approach to the Children's Act* (2010) 48.

94 UN Economic and Social Council (ECOSOC) Resolution Guidelines on Justice in Matters involving Child Witnesses of Crime 2005/20 July 2005.

95 *Director of Public Prosecutions, Transvaal v Minister for Justice supra*.

96 *Director of Public Prosecutions, Transvaal v Minister for Justice supra*.

97 *Director of Public Prosecutions, Transvaal v Minister for Justice supra*. The Guidelines include the right of child victims and witnesses to be treated with dignity and compassion (para 10); the right to be informed of the availability of protective measures (para 19); and to be protected from hardship during the justice process (para 29). The court recognised the child's right to a harmonious development in the *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) para 26.

98 See *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) wherein the court expressed the same view.

99 *Minister of Welfare and Population Development v Fitzpatrick supra*; see also *Klink v Regional Court Magistrate supra*; *Director of Public Prosecutions, Transvaal, v Minister for Justice & Constitutional Development supra*.

stress or suffering with the best interest of the child test.¹⁰⁰

In conclusion, the object of the adversarial system or prosecution is to establish the truth and ensure a fair trial for all parties. As shown above, the adversarial system is unsuited for young children and the techniques employed do not facilitate the establishment of the truth. Moreover, constitutional developments have introduced an approach to children that recognises their vulnerability and recognise that children be treated with dignity and compassion. As a result, the author argues that protections under section 170A be availed to child offenders or children in conflict with the law. Section 170A facilitates children's participation and encourages children to give evidence freely in line with the prescripts of a fair trial and section 28(2) of the Constitution.

5 1 The right to participate in criminal proceedings

Section 28 of the Constitution does not expressly provide for the right of the child to participate.¹⁰¹ Nevertheless, the given interrelatedness and interdependence of children's rights, the right to participate articulated in the Children's Act,¹⁰² provides:

“Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has a right to participate in an appropriate way and views expressed by the child must be given due consideration.”¹⁰³

Thus, the author argues that the appointment of an intermediary enhances the participation of children in criminal proceedings and is in their best interests. The intermediary by relaying questions to the child in a manner consistent with the mental and emotional development of that child facilitates the child's participation in judicial processes.¹⁰⁴ Furthermore, the use of intermediaries not only protects the child from unnecessary trauma, it ensures that the court receives evidence that is freely presented, and more likely to be true and better understood by the court.¹⁰⁵

5 2 Protections available to children in the South African criminal courts under section 170A of the Criminal Procedure Act

Empathy towards children giving evidence in criminal courts resulted in various amendments and review of legislation relating to child witnesses

100 Fambasayi *The right to protection of children testifying in criminal proceedings* (LLM dissertation 2016 North-West University) 15.

101 Fambasayi 15.

102 S 28 of the Children's Act 32 of 2005.

103 S 10 of the Children's Act.

104 Muller & Tait 1977 *Journal of South African Law* 528.

105 *Kerkhoff v Minister of Justice supra*; see also *Klink v Regional Court Magistrate supra*.

and children in conflict with the law. For example, section 170A,¹⁰⁶ authorised the appointment of an intermediary. The criterion for appointing an intermediary is whether giving evidence in court is likely to expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings.¹⁰⁷ The court may subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.”¹⁰⁸

The primary purpose for an intermediary is to shield the child from intimidation or hostility of cross-examination.¹⁰⁹ In terms of Criminal Procedure Act, the intermediary must convey the general purport of any question to the witness,¹¹⁰ and examination or – re-examination of the witness has to take place only through the intermediary.¹¹¹ The intermediary is an expert who possesses the necessary skills in dealing with children. The intermediary helps the child to narrate his or her experiences, but cannot amend the meaning of the questions, change the questions or ask his or her own questions.¹¹² The section takes into account that giving evidence in court, before adults and strangers is a stressful experience for children, which often results in a child being unable to narrate his or her experiences in court.¹¹³ Thus, an intermediary acts as a conduit between the child and the court enabling the child to relate his or her story.

The intermediary has two important functions. The first is to ensure that the child witness, who has to be in a separate room from the courtroom, is in the company of someone who can engage his or her attention, and relate all the questions put by the parties and the court.¹¹⁴ Secondly, the intermediary, unless the court directs otherwise, is obliged to convey to the child witness the general purport of a party’s original question in a way that is appropriate to the child’s stage of development.¹¹⁵ Thus, the powers of the intermediary are limited. The author argues that the intermediary must play a more active role in the

106 Criminal Procedure Act 51 of 1977 as amended by the Criminal Law Amendment Act 135 of 1991; s 170A commenced on 30 July 1993. The Children’s Act recognises that children are vulnerable by extending the use of intermediaries beyond criminal matters into the realm of care and parental responsibility cases dealt with under the Children’s Court. See s 61 of the Children’s Act 38 of 2005.

107 S 170A of the Criminal Procedure Act.

108 S 170A of the Criminal Procedure Act. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 inserted “biological or mental” before the age of eighteen years.

109 Meintjies-Van der Walt 1998 SACJ 165.

110 S 170A(2)(b) of the Criminal Procedure Act.

111 S 170A(a) of the Criminal Procedure Act.

112 Schwikkard and Van der Merwe 376; Fambasayi 10; *Kerkhoff v Minister of Justice supra*.

113 *Klink v Regional Court Magistrate supra*.

114 *Klink v Regional Court Magistrate supra*.

115 *Klink v Regional Court Magistrate supra*; *Kerkhoff v Minister of Justice supra*.

interests should paraphrase or explain questions to the child to improve the efficacy of the evidence given.¹¹⁶

Southwood J in *Kerkhoff v Minister of Justice* confirmed that the purpose of section 170A of the Criminal Procedure Act is to protect child witnesses and/or complainants from psychological stress and trauma that may result from their participation in sexual offence cases if it is in their best interests.¹¹⁷ Consequently, the Criminal Procedure Act protects child witnesses or complainants from undue mental stress or trauma in criminal proceedings.¹¹⁸

The Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister for Justice*, also considered the following factors pertinent to the discussion. First, in considering the need for a section 170A procedure, the court evaluated the effect of a trial on children and concluded that the appointment of an intermediary was pivotal in sexual offence cases to assuage mental stress or suffering.¹¹⁹ Secondly, the court held that in every trial where a child is to testify as a witness or complainant, the court must inquire into the desirability of appointing an intermediary. In this regard, section 170A does not require the child's exposure to mental stress or suffering before the provision is invoked.¹²⁰

In addition, the court ruled that an enquiry into the appointment of an intermediary must occur at the commencement of the trial and the overriding consideration must be to prevent the child from exposure to undue stress that may result from testifying in court.¹²¹ The enquiry has a narrow focus, namely whether it is in the best interest of the child to appoint an intermediary.¹²²

The court pronounced that section 170A not only protects child complainants from unnecessary trauma, it ensures that the court receives evidence that is freely given and more likely to be true and better understood by the court.¹²³ Moreover, the court noted that given

116 Cooper and Mattison "Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model" 2017 *The International Journal of Evidence & Proof* 351-370.

117 The preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, acknowledges that children are among the most vulnerable members of society.

118 Schwikkard and Van der Merwe 375-378; *Kerkhoff v Minister of Justice supra*.

119 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*, the court adopted the same procedure in *Kerkhoff v Minister of Justice supra*.

120 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*; *Kerkhoff v Minister of Justice and Constitutional Development supra*.

121 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*; *Kerkhoff v Minister of Justice supra*.

122 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*; *Kerkhoff v Minister of Justice supra*.

123 *Kerkhoff v Minister of Justice supra*.

the vulnerability of the child witness, the fairness of the trial was likely to be enhanced rather than impeded by the use of section 170A procedures. Finally, the court stated that these special procedures should not be seen as justifiable limitations on the right to a fair trial but as conducive to a trial that was fair to all.¹²⁴

Section 170A(3) allows the child who testifies through an intermediary to do so in a separate room away from the accused and in a child friendly room. However, the provision ensures that the accused and the court are able to see and hear child.¹²⁵

Nevertheless, researchers¹²⁶ argue that the intermediary model does not go far enough to shield the child from the hostile courtroom environment. For example, the child still re-lives and relates the traumatic events of his or her experience when testifying through the intermediary.

Unfortunately, application of section 170A of the Criminal Procedure Act is limited to complainants and witnesses of sexual abuse crimes. The author is of the view that there appears to be no justification for limiting the section to complainants and witnesses only. Research reveals that children who give information outside the courtroom experience less stress than those who do so in the courtroom.¹²⁷ Therefore, it would be in the interests of all children in general and justice in particular for them to testify outside the adversarial framework of the courtroom.¹²⁸

The author concludes this part of the contribution by arguing that the reasons proffered for the application of this procedure are equally relevant to cases involving child offenders. Children in conflict with the law are vulnerable and likely to suffer harm or mental stress from testifying in court. The procedures outlined in section 170A of the Criminal Procedure Act should assess the vulnerable status of child offenders. Research findings,¹²⁹ show that vulnerability in the criminal justice system is not limited to children who are victims or complainants of sexual offences. Vulnerability is determined by the child's unique circumstances, such as age, social and economic background,¹³⁰ and whether the child is a poly-victim. In addition, similar to child witnesses and complainants, child offenders are unfamiliar with the judicial processes and language used in the courtroom and thus unlikely to give evidence freely. Amendments to section 170A are required, first, to do away with judicial discretion and avail the services of intermediaries in all child sexual abuse cases. Secondly, the role of the intermediary should

124 *Kerkhoff v Minister of Justice supra*; *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*.

125 *Klink v Regional Court Magistrate supra*; *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*.

126 Simon 2006 SACJ 61.

127 Muller 2003 *Crime Research in South Africa* 3.

128 Muller 2003 *Crime Research in South Africa* 3.

129 Cooper & Mathisson 2017 *IJE&P* 361-367.

130 Cooper & Mathisson 2017 *IJE&P* 361.

be extended and guidelines for intermediaries be developed. Lastly, intermediaries must be available to child offenders,¹³¹ and the guiding principle must be the establishment of the truth and the fundamental principles of justice in line with the ethos of the Constitution and contemporary studies on child victimisation.

6 Conclusion

The South African criminal justice system is adversarial in nature. Research shows that the adversarial system, including cross-examination is traumatic for children. Contemporary research reveals that children are vulnerable and need special protection and assistance while giving evidence in the courtroom. Section 170A of the Criminal Procedure Act protects child complainants and witnesses of sexual offences from the harsh effects of cross-examination by allowing them to give evidence through an intermediary. The use of an intermediary enhances their participation and ensures that the court receives evidence that is accurate and freely given. The author argues that the use of intermediaries is in the best interests of all children and must therefore be available to all children in courtroom proceedings including child offenders.

¹³¹ In Northern Ireland, Article 4 of the *Criminal Evidence (Northern Ireland) Order 1999* sets out vulnerable witnesses eligible for assistance on the grounds of age or incapacity and includes vulnerable defendants as eligible to apply services of an intermediary.