

**The impact of the views of the child in  
family disputes where the child's wishes  
are contrary to the perceived best  
interests of the child**

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## **ABSTRACT**

It is evident from the legislation of South Africa and Australia that the best interest of the child is paramount in all matters concerning the child. However, article 12 of the *United Nations Convention on the Rights of the Child, 1989* states that the views of the child should be given due weight. The conflict arises on how to represent the best interest of the child pertaining to the child's views in legal proceedings. This is problematic because there are no clear or specific guidelines to resolve these conflicts and which concepts are best?

Both South Africa and Australia has questionable results in procedures pertaining to the views of the child. In South Africa, the courts favour the use of separate child representations for the best interest of the child to be protected whereas in Australia family reports are relied upon for the same purpose. It is clear from this that there rarely is a place for the child's direct voice in these proceedings and that representatives who are representing the child are more willing to protect the best interest rather than the views of the child.

The current application of the best interest principle can only be successful when the child's views are "silenced". The child's representation in legal proceedings ascertain what they believe is in the best interest of the child, which mostly strains the child's voice in legal proceedings. To fully respect, promote and recognise the rights of the child to participate, the best interest principle must be used in conjunction with the child's right to participate in legal proceedings. This requires further development to improve the interpretation of their views and the weight thereof when the child is involved.

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## **ABBREVIATIONS**

CRC	United Nations Convention on the Rights of the Child
The Family Act	Family Law Act of 1975
The African Charter	African Charter on the Rights and Welfare of the Child of 1990
The Children's Act	Children's Act 38 of 2005
The Committee	The Committee of Experts on the Rights of the Child
The Constitution	The Constitution of the Republic of South Africa
PAS	Parental Alienation Syndrome
UN	United Nations

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## 1 Introduction

There have been ample developments in the international law as well as South African and Australian laws to recognise the child as a bearer of rights<sup>1</sup> and not as an object<sup>2</sup> of law,<sup>3</sup> furthermore the child's special needs and protection have also been recognised.<sup>4</sup> It is still however, a well-known principle in Australia that children are seen as "discursive figures"<sup>5</sup> because they are powerless and in constant need of protection.<sup>6</sup> The principle holds true for South Africa.<sup>7</sup>

In this study, the focus is on the views of the child, the importance to listen to those views, to give due weight to the views and to consider it when a decision is made regarding the child. Despite the recognition of the importance of the child's views in both South Africa and Australia,<sup>8</sup> opposing opinions arose with regard to how the right to listen to the child's views ought to be implemented in the legal processes and under what circumstances.<sup>9</sup>

A question that arises, is to what extent the law involves children in resolving family issues? In the past, several Western jurisdictions, including South Africa and

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- 1 Preamble of *The United Convention on the Rights of the Child* of 1989; Dewar and Parker *Family Law Processes, Practices and Pressures* 10.
  - 2 Children were identified as being voiceless, children should be seen and not heard.
  - 3 Preamble of *The United Convention on the Rights of the Child* of 1989; Dewar and Parker *Family Law Processes, Practices and Pressures* 9; Newell, Graham and Fitzgerald 2009 *Report to Childwatch International's Children and the Law Thematic Study Group* 47 Bagshaw, Quinn and Schmidt 2006 *Report by the Hawke Research Institute for Sustainable Societies, University of South Australia*; Newell, Graham and Fitzgerald 2009 *Report to Childwatch International's Children and the Law Thematic Study Group* 47.
  - 4 Tobin 2013 *International Journal of Children's Rights* 396-397; Freeman *The Future of Children's Rights* 259; UNICEF 2014 [https://www.unicef.org/crc/index\\_protecting.html](https://www.unicef.org/crc/index_protecting.html); Article 4 of the *Convention on the Rights of the Child* of 1989; General comment No. 16 (2013) CRC/C/GC/16 para 24; Articles 11, 13, 17, 18, 25 and 30 of the *African Charter on the Rights and Welfare of the Child*, 1990; Freeman 2007 *International Journal of Children's Rights* (15) 16; Dewar and Parker *Family Law Processes, Practices and Pressures*
  - 5 Hosking and Ripper 2012 *Australian Feminist Studies* 175: An abstract figure characterised as a powerless innocent in need of nurturing and protection by a loving couple.
  - 6 Hosking and Ripper 2012 *Australian Feminist Studies* 175.
  - 7 General comment No. 16 (2013) CRC/C/GC/16 par 2; Elrod 2011 *Pravni Zivot* 9 970.
  - 8 Du Toit in Boezaart (ed) *Child Law in South Africa* 101 - 102.
  - 9 Winestone "Best Interest and Little Voices: Child Participation in Family Mediation Dialog" 2015 *Mediate.com*; Birnbaum and Bala *Canadian Journal Of Family Law* 17; Young and Ryrstedt 2012 *Journal of Family Law and Practice* 19; Smart 2002 *Family Court Review* 308, 309.

Australia, had a similar response in seeking to protect children from family conflicts as far as possible<sup>10</sup> and that the parents would take part on their behalf and make decisions based on what they as parents see as fit.<sup>11</sup> The argument was that parents will act on behalf of the child as they will know what is in the best interest of their child.<sup>12</sup> This is known as the welfare principle.<sup>13</sup> It is however difficult for parents to view the situation from the child's standpoint<sup>14</sup> and therefore the child may feel that her<sup>15</sup> voice is being drowned out by what the parents feels are more important.<sup>16</sup> This along with the adults who believe that a child is vulnerable and has no place in the legal system, are only some of the barriers that children face.<sup>17</sup>

This impression of vulnerability provides a basis for the "'special' human rights that are granted to children under international law."<sup>18</sup> The fact that children may lack the capacity to act in their own best interest does not affect their rights, because the rights are vested in their interest and not their capacity.<sup>19</sup> The nature and substance of these rights have been used mainly to support the development of the

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10 Parkinson and Cashmore *The voice of the child in family law disputes* 2; Fernando 2014 *Precedent (Journal of the Australian Lawyers Alliance) Issue 124* 39.

11 Sloth-Nielsen 2009 (2) *Speculum Juris* 2; Young and Ryrstedt 2012 *Journal of Family Law and Practice* 27.

12 Winestone "Best Interest and Little Voices: Child Participation in Family Mediation Dialog" 2015 *Mediate.com*; *Minister for Education v Pillay* 2008 (1) SA 474 (CC) para 494 E-G; Du Toit in Boezaart (ed) *Child Law in South Africa* 97; Smart 2002 *Family Court Review* 308: Good example of how the best interest of the child is in conflict with the participation principles.

13 Dewar and Parker *Family Law Processes, Practices and Pressures* 10; Smart 2002 *Family Court Review* 308; Voight *Is a View Different From a Wish? Considering the Child's View in Parenting Disputed in Australian Family Law Matters* 87; Moyo 2012 *AHRLJ* 149.

14 Smart 2002 *Family Court Review* 308: The child's views regarding family will differ from those of the parents.

15 For further reference the terms she and her would be used for both male and female children.

16 Smart 2002 *Family Court Review* 318.

17 Lundy 2007 *BERJ* 929-930; Dewar and Parker *Family Law Processes, Practices and Pressures* 16; see para 1.

18 Tobin 2013 *International Journal of Children's Rights* 397; Freeman *The Future of Children's Rights* 259.

19 Tobin 2013 *International Journal of Children's Rights* 397; Freeman *The Future of Children's Rights* 259; see para 1.

child's best interest<sup>20</sup> but little to no support has been given to develop the views of the child.<sup>21</sup>

The process would not become easier by including the views of the child in legal proceeding, on the contrary, it would become harder to find a solution since children are still regarded as objects of their parents' concerns and desires.<sup>22</sup> However, there are moral and legal obligations to ensure that the child's views are heard<sup>23</sup> because children can provide an unique and valuable insight about their lives and it is vital to recognise children as active members in the family.<sup>24</sup> It's important for practitioners to find ways to include children even with their opposed views<sup>25</sup> because it's necessary to give the child the space to air her views in the decision making process.<sup>26</sup>

During the scope of this study, the international standards on the child's right to participate within South African and Australian laws were compared.

## **2 The international criteria on the rights of the child**

International instrument, like the *United Nation Convention on the Rights of the Child*<sup>27</sup> (CRC) and the *African Convention on the Rights and Welfare of the Child*<sup>28</sup> (African Charter), on the rights of the child are mainly used as a tool to improve the lives of children around the world.<sup>29</sup> Although the instruments provide a framework on how these rights should be implemented,<sup>30</sup> not all State Parties have recognised

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20 Thomas and Percy-Smith *Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* 1; Hosking and Ripper 2012 *Australian Feminist Studies* 171.

21 Lansdown *Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12* 5.

22 Smart 2002 *Family Court Review* 309.

23 Hosking and Ripper 2012 *Australian Feminist Studies* 182; Article 12 of the *Convention on the Rights of the Child* of 1989.

24 Hosking and Ripper 2012 *Australian Feminist Studies* 184; Smart 2002 *Family Court Review* 308.

25 Smart 2002 *Family Court Review* 307; see para 2.

26 See below paras 26 - 28.

27 *United Nations Convention on the Rights of the Child*, 1989.

28 *The African Convention on the Rights and Welfare of the Child*, 1990.

29 Van Bueren *The International Law on the Rights of the Child* xix.

30 Implementation entails that the state should bestow the necessary resources to make it possible to realise the children's rights in the cultural, social and economic sectors; Article 7 of the

these rights.<sup>31</sup> However, those State Parties who ratified the instruments, such as South Africa in 1995 and Australia in 1990, have an obligation to acknowledge a child as vulnerable and in need of "special"<sup>32</sup> care and protection.<sup>33</sup> Therefore, an obligation rests on ratifying State Parties to protect the child by respecting her rights.<sup>34</sup> As stated above, acting in their own best interest does not affect their rights, because the rights are vested in their interest and not their capacity.<sup>35</sup>

## **2.1 The United Nation Convention on the Rights of the Child**

Children are entitled to human rights however, in 1989 it was decided that children don't only need human rights but also need special care and protection.<sup>36</sup> Therefore, this special convention was created for "every human being under the age of 18 (eighteen) years, unless majority is attained earlier, under the law applicable to the child."<sup>37</sup> The CRC was the first international instrument to legally bind the

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*Convention on the Rights of the Child*, 1989 and Article 43 of the *African Charter on the Rights and Welfare of the Child*, 1990: All the states who ratified the African Charter "shall" agree to submit reports to the Committee of Experts on the Rights of the Child (the Committee) to give feedback on the measures to give effect to the provisions of the instrument which the states have adopted.

31 Van Bueren *The International Law on the Rights of the Child* xix.

32 Tobin 2013 *International Journal of Children's Rights* 396-397; Freeman *The Future of Children's Rights* 259; UNICEF 2014 [https://www.unicef.org/crc/index\\_protecting.html](https://www.unicef.org/crc/index_protecting.html); Article 4 of the *Convention on the Rights of the Child* of 1989; General comment No. 16 (2013) CRC/C/GC/16 para 24; Articles 11, 13, 17, 18, 25 and 30 of the *African Charter on the Rights and Welfare of the Child*, 1990; Freeman 2007 *International Journal of Children's Rights* (15) 16; see paras 1 and 4.

33 This is because children have scarcer resources for emotional or physical development to help them in situation where the child's wellbeing is threatened. These children usually are innocent, and they have been viewed as objects rather than subjects of law for too long and they are entitled to special protection.

34 General Comment No. 7 (2006) Implementing Child Rights in Early Childhood CRC/C/GC/7/Rev.1 para 14; Tobin 2013 *International Journal of Children's Rights* 397; Freeman *The Future of Children's Rights* 259.

35 See para 4.

36 Freeman 2007 *International Journal of Children's Rights* (15) 16: It states that "children are especially vulnerable" and the rights laid out in the instrument rests on "human dignity and the harmonious development of every child".

37 Article 1 of the *Convention on the Rights of the Child*, 1989; UNICEF 2014 [https://www.unicef.org/crc/index\\_protecting.html](https://www.unicef.org/crc/index_protecting.html): because a human under the age of 18 (eighteen) years is regularly in need of special protection.

incorporation of human rights for children and the State Parties who ratified the instrument is obliged to protect these rights.<sup>38</sup>

The CRC contains 54 articles on the details of the rights and the application thereof and summarises the principles of a universal agreement between the members of the United Nations<sup>39</sup> (UN). This results in the equal treatment of all children, everywhere merely because the child was born as a human being.<sup>40</sup> Therefore, a set of rights for children are provided by the CRC<sup>41</sup> which imposes an obligation on the State Parties to take into account the special status of a child. The voice of the child and the focus of this study is one of the aspects dealt within these international instruments.

## **2.2 The African Convention on the Rights and Welfare of the Child**

The African Charter was formulated to protect and promote the children's rights and welfare in Africa. It is the main human rights instrument that illustrates the child's rights which must be ensured by the African countries. These children in Africa are exposed to many diverse types of abuse which make them vulnerable and are therefore in need of special protection.<sup>42</sup> A child in the African Charter<sup>43</sup> is seen

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38 General comment No. 16 (2013) CRC/C/GC/16 para 2; Seymour 2009 <https://www.unicef.org/rightsite/237.htm>.

39 Freeman 2007 *International Journal of Children's Rights* (15) 16.

40 Seymour 2009 <https://www.unicef.org/rightsite/237.htm>.

41 Article 4 of the *Convention on the Rights of the Child* of 1989; General comment No. 16 (2013) CRC/C/GC/16 para 24; General Comment No. 12 (2009) *The Right of the Child to be Heard* CRC/C/GC/12; Du Toit in Boezaart (ed) *Child Law in South Africa* 94 The prevention, protection, provision and participation has been identified as the Four principles of the CRC.

42 Articles 11, 13, 17, 18, 25 and 30 of the *African Charter on the Rights and Welfare of the Child*, 1990: This special protection according to the *African Charter on the Rights and Welfare of the Child* includes the right to: Article 11: a personality, talents physical and mental development; Article 13: ensure active participation and dignity in the community, promoting self-reliance for every child who is mentally or Physically disabled; Article 17: receive special treatment in the event that the child had broken the law and was found guilty thereof; Article 16-17: not be tortured or otherwise mistreated if the child has been imprisoned; Article 18: a family because it is the natural unit and basis for society; Article 25: get special protection in the event that the family and the child is separated from one another and the state should provide alternative family care; Hosking and Ripper 2012 *Australian Feminist Studies* 176.

43 *The African Charter on the Rights and Welfare of the Child* was adopted in 1990 and in November 1999 it entered into force.

as every human being under the age of 18.<sup>44</sup>

The African Charter's definition is broader than the CRC's definition because it has no "attached limitation or considerations".<sup>45</sup> Therefore enabling the instrument to apply to as many children as possible whereas the definition of the CRC expects to brighten the legal minimum ages<sup>46</sup> which are established for various purposes.<sup>47</sup> Although the African Charter is very similar to the CRC, the scope of the application is based on the fundamental provisions of the definition of the child,<sup>48</sup> whereas the provisions in the CRC are ambiguous and lack the protection within the African context.<sup>49</sup>

These instruments recognise children as vulnerable and the need to give them adequate protection. In the context of this study, the African charter provides a valuable instrument of the child's voice in legal proceedings, where their lives would be considerably affected and requires special protection.<sup>50</sup>

### **2.3 The views of the child and the criteria to hear it**

Listening to the child's view was highlighted by Article 12 of the CRC<sup>51</sup> and Article 4 of the African Charter,<sup>52</sup> as further explored below. Article 12 of the CRC states that a child who is capable to adopt her own points of view must be given the opportunity to express those views freely in all matters where she is concerned and these views must be given appropriate weight according to her age and maturity.<sup>53</sup> Article 12

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44 Article 2 of *the African Charter on the Rights and Welfare of the Child*, 1990.

45 Mezmur and Sloth-Nielsen 2001 *AHRLJ* 606.

46 Ramages *Investigating The Minimum Age Of Criminal Responsibility In African Legal Systems* 3: The Minimum Age of Criminal Responsibility is a concept of mental capacity and the age at which the child can classify acts to be right or wrong and the ability of the child to understand the consequences involved with these acts.

47 Mezmur and Sloth-Nielsen 2001 *AHRLJ* 606.

48 Mezmur 2008 *SA Public Law Vol. 23 Issue 1* 16.

49 Mezmur 2008 *SA Public Law Vol. 23 Issue 1* 16.

50 The African Charter is not referenced because it is only applicable in African countries.

51 Article 12 of the *United Nations Convention on the Rights of the Child*, 1989.

52 Article 4 of the *African Charter on the Rights and Welfare of the Child*, 1990; Heaton and Kruger *South African Family Law* 171; Skelton 2009 *AHRLJ* 489; Mezmur 2008 *SA Public Law* 4; Barrie *Bill of Rights Compendium* para 1B19; Mahery in Boezaart (ed) *Child Law in South Africa* 316, 319.

53 Robinson and 2000 *De Jure* 54; Barrie *Bill of Rights Compendium* para 1B19; Sloth-Nielsen *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African*

does not require that the views of the child must be heard directly in family law proceedings, but it gives clear reference to the right of the child to express her views directly or through a representation.<sup>54</sup>

However, maturity is a difficult concept and in the context of Article 12 of the CRC it is described as the child's capacity to be able to express her views on issues "in a reasonable and independent manner".<sup>55</sup> When determining maturity, the impact the matter has on the child must be considered on a case-by-case basis,<sup>56</sup> determining the weight of the view accordingly.<sup>57</sup> If the impact on the child's life is great, it would be more relevant to assess the child's maturity more appropriately.<sup>58</sup>

In terms of Article 4(2) of the African Charter the child must also be given the opportunity to express her views if she is "capable to communicate her own views".<sup>59</sup> The term "maturity" referring to the child's age and maturity is described as:

the ability to understand and assess the implications of a particular matter, and must be considered when determining the individual capacity of the child.<sup>60</sup>

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*Child and Family Law* 159; Van Heerden Boberg's *Law of Persons and the Family* 315–316; Viljoen 1998 *CILSA* 198; Robinson and Ferreira 2000 *De Jure* 54; Sloth-Nielsen 2001 *SAJHR* 216; Kaime 2005 *African Human Rights Law Journal* 230-231; Rosa and Dutschke 2006 *SAJHR* 232; Himonga and Cooke 2007 *International Journal of Children's Rights* 331–332; Mezmur 2008 *SA Public Law* 4; Sloth-Nielsen 2008 *SAJHR* 497; Sloth-Nielsen and Mezmur 2008 *International Journal of Children's Rights* 4; Bekink and Bekink 2009 (2) *Speculum Juris* 1-2; Sloth-Nielsen 2009 (2) *Speculum Juris* 94 fn 40; Van der Walt 2010 *Obiter* 718; Nhenga-Chakarisa 2010 *African Human Rights Law Journal* 169; Du Toit in Boezaart (ed) *Child Law in South Africa* 94-95; Mahery in Boezaart (ed) *Child Law in South Africa* 315, 321; CCH *Australian Master Family Law Guide* 144; Hosking and Ripper 2012 *Australian Feminist Studies* 176; Dewar and Parker *Family Law Processes, Practices and Pressures* 10.

54 Article 12 of the *African Charter on the Rights and Welfare of the Child*, 1990; Mitchell 2014 *Australian Human Rights Commission* Child participation methods in Australian family law; Kaspiew et al *Independent Children's Representatives Study: Final report* 38, 41.

55 General Comment No.12 para 30; Reyneke 2013 *De Jure* 210.

56 General Comment No.12 para 29; Reyneke 2013 *De Jure* 211.

57 General Comment No.12 para 30; Reyneke 2013 *De Jure* 210; Mahery in Boezaart (ed) *Child Law in South Africa* 322.

58 Mahery in Boezaart (ed) *Child Law in South Africa* 322.

59 Article 4(2) of the *African Charter on the Rights and Welfare of the Child*, 1990; Mahery in Boezaart (ed) *Child Law in South Africa* 338; Mahery in Boezaart (ed) *Child Law in South Africa* 338.

60 General Comment No.12 para 30; Reyneke 2013 *De Jure* 210.

But this does not necessarily mean she is capable of communicating her own views. In addition, both these international instruments state, that the best interest of the child must be the "primary consideration"<sup>61</sup> when and where decisions about the child are concerned. The "best interest of the child" in the CRC can best be described in that all actions where children are concerned, the child's best interest should be of paramount consideration in both private and public matters.<sup>62</sup>

The best interest of the child is not only used as a standard in the CRC but is also set out as a norm in the African Charter which gives more protection to children.<sup>63</sup> Article 3(1) of the CRC<sup>64</sup> states that the best interest must be the primary consideration in all actions, private or public, concerning the child in administrative, legislative bodies or the courts of law.<sup>65</sup> This principle in the CRC is not an overriding and competing concept and interests need also be considered when the child is concerned.<sup>66</sup> However, the African Charter approaches the concept of the best interest in a much stronger manner<sup>67</sup> than the CRC by purely stating that the child's best interest is the primary consideration in all matters concerning the child.<sup>68</sup>

The provisions of the African Charter must be interpreted "first and foremost"<sup>69</sup> in the best interest of the child. This principle forms part of the heart of the treaty and all other provisions should be interpreted and implemented by guiding the other provisions. The concept of the best interest principle<sup>70</sup> is intended to ensure the

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61 Article 3 of the *United Nations Convention on the Rights of the Child*, 1989; Heaton and Kruger *South African Family Law* 171.

62 Article 3(1) of the *United Nations Convention on the Rights of the Child*, 1989.

63 Mahery in Boezaart (ed) *Child Law in South Africa* 319, 336; Skujyte *Rights of African Children Under the African Charter on the Rights and Welfare of the Child: the Addition to the Universal Protection of a Child* 5.

64 Article 3(1) of the *United Nations Convention on the Rights of the Child*, 1989.

65 Article 3(1) of the *United Nations Convention on the Rights of the Child*, 1989; Heaton and Kruger *South African Family Law* 171; Mahery in Boezaart (ed) *Child Law in South Africa* 316, 319.

66 Mahery in Boezaart (ed) *Child Law in South Africa* 318- 319.

67 Mahery in Boezaart (ed) *Child Law in South Africa* 319.

68 Article 4 of the *African Charter on the Rights and Welfare of the Child*, 1990; Mahery in Boezaart (ed) *Child Law in South Africa* 319, 336.

69 Dam-de Jong 2013 *Leiden University Repository* 67.

70 For further reference, the term best interest principle refers to the paramountcy of the best interest of the child.

enjoyment of all rights recognised and the holistic development of the child.<sup>71</sup> However, this will result in a problem created by the "child-parent relationship"<sup>72</sup> and this causes a further problem in the realisation of all the rights of the child.<sup>73</sup>

As stated above, the child is not required to express her views directly<sup>74</sup> and therefore, the right to representation is fundamentally important to children in the legal process. It supports the child's legal rights and holds the potential for the child's view to be heard in the decision-making process.<sup>75</sup> There are no requirements set out in the CRC or the African Charter on how the views of the child should be expressed in the court proceedings.<sup>76</sup>

### **3 CRC Framework on "how to" listen to the child's views and to assess the best interest of the child when conflicts occur between the views of the child and the best interest of the child**

The notion that children lack the capacity to make any decisions regarding their own lives has an impact on their lives.<sup>77</sup> However, with the ample development in international law regarding the child's views, the implementation thereof in legal proceedings has yet to set a framework on how to listen to the child<sup>78</sup> and it can therefore be said that the right to participate is multi-faced and complex.<sup>79</sup> As stated above, the best interest of the child will be represented in civil procedures<sup>80</sup>

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71 *General Comment No. 14 (2013)* on the right of the child to have his or her best interest taken as a primary consideration (art. 3, para. 1) 153.

72 See para 3.

73 Kaime 2005 *African Human Rights Law Journal* 231; Hosking and Ripper 2012 *Australian Feminist Studies* 176-7: BIOC reinforces the privileged position of adults over children and that when someone makes a claim utilising the BIOC the child's voice/view are typically ignored; Hosking and Ripper 2012 *Australian Feminist Studies* 176-177: Best interest of the child reinforces the privileged position of adults over children and that when someone makes a claim utilising the best interest principle the child's voice/views are typically ignored.

74 See para 13.

75 Monahan and Young *Children and the Law in Australia* 544.

76 Mitchell 2014 *Australian Human Rights Commission* Child participation methods in Australian family law; Kaspiew et al *Independent Children's Representatives Study: Final report* 38, 41.

77 See para 4.

78 Winestone "Best Interest and Little Voices: Child Participation in Family Mediation Dialog" 2015 *Mediate.com*; Preamble of *The United Convention on the Rights of the Child* of 1989; Birnbaum and Bala *Canadian Journal of Family Law* 17.

79 Reyneke 2013 *De Jure* 220.

80 See paras 5 and 19.

however, the representatives are rarely willing or qualified to deduct, from child interviews, what is in fact in the best interest of the child.<sup>81</sup>

To respect the views of the child as a right,<sup>82</sup> an emphasis must be placed on the special needs of the child,<sup>83</sup> especially "young children who are acutely sensitive to their surroundings and very rapidly acquire understanding of the people, places and routines in their lives, along with awareness of their own unique identity."<sup>84</sup> Along with this respect, caution must be given to the rights enshrined in article 12 of the CRC,<sup>85</sup> because the impression is given that children will be given the opportunity to express their views freely and sufficiently, however there is no obligation to listen to their views.<sup>86</sup> This is only one of the barriers that child participation encounters.

### **3.1 Implementation barriers**

The implementation of child participation is subject to the cooperation of adults who play a main role in the children's lives.<sup>87</sup> Another barrier that children face is when adults are of the opinion that the child has no place in civil proceedings and therefore is not committed to article 12 and do not feel the need to comply with it.<sup>88</sup> The main reason for the reluctance to have children participate and the unsuccessful implementation of article 12 of the CRC is the limited awareness of the provision itself.<sup>89</sup> The failure to make the provision widely known is a breach of the State Party's obligation of article 42 of the CRC.<sup>90</sup>

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81 Monahan and Young *Children and the Law in Australia* 547.

82 See para 7.

83 See paras 1, 4 and 7.

84 General Comment No. 7 (2006) Implementing Child Rights in Early Childhood CRC/C/GC//7/Rev.1 para 14.

85 The African Charter is not referenced because it is only applicable in African countries.

86 Reyneke 2013 *De Jure* 220-221; Lundy 2007 *BERJ* 930.

87 Reyneke 2013 *De Jure* 222; Lundy 2007 *BERJ* 929.

88 Lundy 2007 *BERJ* 929-930; see para 5 and 19.

89 Lundy 2007 *BERJ* 230; Sloth-Nielsen 2008 *SAJHR* 26; General Comment No. 7 (2006) Implementing Child Rights in Early Childhood CRC/C/GC//7/Rev.1 paras 38-43, General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 76; Mezmur 2008 *SA Public Law* 4; Sutherland 2014 *Child and Family Law Quarterly* 161.

90 Article 42 of the *United Nations Convention on the Rights of the Child*, 1989: Make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike; Lundy 2007 *BERJ* 230; Sutherland 2014 *Child and Family Law Quarterly* 161.

Considering this, the researcher reaffirms the previous statement that the participation of a child in the legal process is subject to the cooperation of those adults who play a main role in the children's lives.<sup>91</sup> The Committee of Experts on the Rights of the Child (the Committee) observed that, if the "adults around children" do not understand the CRC's implications, the realisation of the rights set out therein is unlikely.<sup>92</sup> It must be understood that the need for awareness is an obligation which is legally binding to all State Parties who ratified the CRC.<sup>93</sup> To conceptualise the child's right to freely express her views and participate in proceedings concerning her, as set out in article 12 of the CRC, a model has been developed by Lundy<sup>94</sup> in order to ensure the involvement of children in the decision-making process where their rights would be implicated.

### *3.1.1 The framework for children to be listened to and their views to influence the outcomes*

Article 12 of the CRC provides

1. States Parties shall assure the child who is capable of forming her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of domestic law.<sup>95</sup>

The model attempts to provide a sketch<sup>96</sup> of article 12 of the CRC by summarising the wording without "sacrificing the meaning."<sup>97</sup>

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91 See para 22.

92 General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44 para 6) CRC/GC/2003/5 para 66; Lundy 2007 *BERJ* 230.

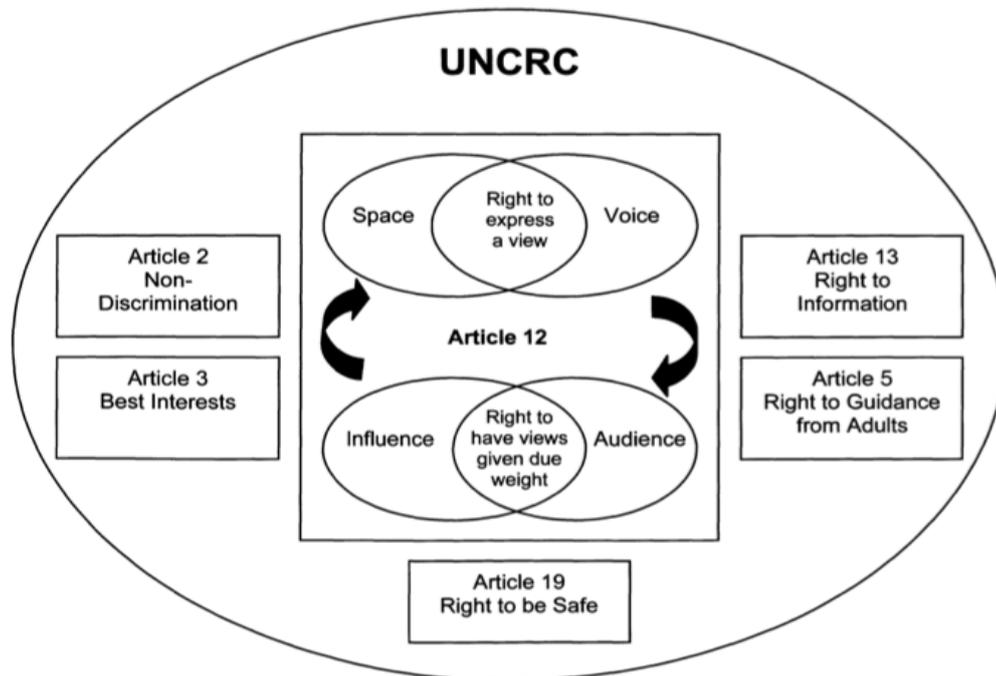
93 Article 42 of the *United Nations Convention on the Rights of the Child*, 1989; Lundy 2007 *BERJ* 230.

94 Lundy 2007 *BERJ* 231-239.

95 Article 12 of the *United Nations Convention on the Rights of the Child*, 1989; see para 13.

96 See Figure 1.

97 Lundy 2007 *BERJ* 233.



**Figure 1: Lundy's Model to ensure the involvement of children**

To better implement the child's right to express her views and have it listened to, article 12 of the CRC must be analysed. According to the research, article 12 has 2 (two) elements which are key to the implementation thereof, namely, the right to express a view and the right to give the view the due weight.<sup>98</sup> For this right to be fully realised and successfully implemented, the meaning of the individual rights enshrined in the CRC can only be understood if it is interpreted in union with all the rights protected in the CRC.<sup>99</sup> For the successful implementation of the right set out in article 12, Lundy<sup>100</sup> proposed a model which requires that 4 (four) separate factors

98 Article 12 of the *United Nations Convention on the Rights of the Child*, 1989; General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 134; Reyneke 2013 *De Jure* 221; Lundy 2007 *BERJ* 931-932; Lundy 2007 *British Educational Research J* 933. Lundy also alludes to the interrelatedness of human rights and their impact on the interpretation given to the different rights, in particular non-discrimination (a 2 CRC, s 9 of the Constitution), best interests of the child (a 3 CRC, s 28(2) of the Constitution) the right to guidance (a 5 CRC), the right to seek, receive and impart information (19 CRC) and protection from abuse (a 19 CRC, s 28(1)(d) of *the Constitution*)

99 Lundy 2007 *BERJ* 932.

100 Reyneke 2013 *De Jure* 221; Lundy 2007 *BERJ* 932.

be taken into consideration. These 4 factors are "Space, Voice, Audience and Influence."<sup>101</sup> These factors overlap each other as demonstrated below.

#### 3.1.1.1 Space

"Space" as a factor refers to a place where children would be encouraged to express their views freely and the opportunity created for children in the process of decision-making to be involved.<sup>102</sup> The term "assure" used in article 12 of the CRC, when it states that the States Parties are to assure the child's right to express her views,<sup>103</sup> is wide and ambiguous and it loses the positive obligation it imposes.<sup>104</sup> The term does not carry enough weight to indicate that "proactive steps" must be taken to make a "space" available for children to be encouraged to express their views freely.<sup>105</sup>

The purpose of this factor is for an environment to be created where the child can prepare for the future by building<sup>106</sup> her self-esteem, to take responsibility for her own actions.

According to Lundy, it is important to ask the child which matters they consider having an impact on their lives and if and how they would like to be involved in the decision-making process.<sup>107</sup> Thus, the child must be informed of her rights and the consequences that her view will have on the outcomes of the situation.<sup>108</sup>

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101 Reyneke 2013 *De Jure* 221; Lundy 2007 *BERJ* 932.

102 General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 paras 132-134; Reyneke 2013 *De Jure* 221; Lundy 2007 *BERJ* 933; Smart 2002 *Family Court Review* 310-313: Also refers to space in the sense of emotional, psychological and physical space which the child moves between and that need to be considered.

103 Article 12 of the *United Nations Convention on the Rights of the Child*, 1989; General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 4; Lundy 2007 *BERJ* 933.

104 General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 4; Lundy 2007 *BERJ* 933.

105 Lundy 2007 *BERJ* 934; General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 19.

106 Reyneke 2013 *De Jure* 221; Lundy 2007 *BERJ* 933-935.

107 Lundy 2007 *BERJ* 934.

108 General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 paras 134(h), 41; Reyneke 2013 *De Jure* 222; Lundy 2007 *BERJ* 934.

### 3.1.1.2 Voice

To raise your own "voice" proves to be difficult in some situations and therefore the model proposes that the child who chooses to express her views must be facilitated.<sup>109</sup> If article 12 of the CRC is analysed, it becomes clear that it only stipulates 1 (one) restriction.<sup>110</sup> This restriction is that the right may only be afforded to a child who has the necessary capacity to form her own views.<sup>111</sup> This restriction poses an uncertain element about what the capacity to form a view constitutes and when this article comes into consideration the right is "often replaced by the assumption that the right is dependent on the child's capacity".<sup>112</sup> This leads to the misrepresentation of the right protected in article 12.

It must be understood that the restriction is not on the child's right to express her views but rather applies to the due weight it should be given<sup>113</sup> and that the child's right is not dependent on the capacity to express a mature view but rather on the "ability to form a view".<sup>114</sup> Therefore, for the full realisation of the right of the child to express her views, resources and time must be allocated to properly prepare the child for the legal and administrative proceedings and where the capacity is lacking, support will be provided for the child.<sup>115</sup> This support, in the form of representation, should encourage child participation<sup>116</sup> and not impose, what they believe to be, the best interest of the child.

With this in mind, a clear distinction must be drawn between the child expressing her views and the child giving evidence because children form an active part of families, societies and communities and they have their own opinions, concerns and

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109 Reyneke 2013 *De Jure* 225; Lundy 2007 *BERJ* 933-935.

110 See paras 4 and 9.

111 Article 12 of the United Nation Convention on the Rights of the Child, 1989; Reyneke 2013 *De Jure* 225; Lundy 2007 *BERJ* 933-935.

112 Lundy 2007 *BERJ* 935.

113 Article 12(1) of the United Nation Convention on the Rights of the Child, 1989; Lundy 2007 *BERJ* 935.

114 Lundy 2007 *BERJ* 935; See 3.1.1.4 below.

115 General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 134(e); Reyneke 2013 *De Jure* 225; Lundy 2007 *BERJ* 935-936.

116 Reyneke 2013 *De Jure* 226; Lundy 2007 *BERJ* 936.

point of views.<sup>117</sup> To express a view is therefore different from simply reaffirming what happened in a certain circumstance. It is what the child deems to be important and what she deems as needed and therefore, processes must be in place to ensure that the child may express her views as "easily as possible".<sup>118</sup>

### 3.1.1.3 Audience

This factor requires that the views being expressed by children must be listened to.<sup>119</sup> This is in accordance with article 12 of the CRC where it states that the view of the child should be given due weight.<sup>120</sup> The Committee stated that children, especially younger children "make choices and communicate their feelings, ideas and wishes in numerous ways, long before they are able to communicate through the conventions of spoken or written language".<sup>121</sup> To understand this right one first needs to understand that children have the right express their views and have them listened to by the adults involved in the decision-making process.<sup>122</sup> Therefore, children must be given the opportunity to express their views to an "identifiable individual"<sup>123</sup> with the necessary authority to treat the child with respect and listen to the child.

The problem is that it has become evident in practice that the views of the child are not always heard or listened to. By not listening to the child's views directly, it has been argued that the process is flawed because the children feel that their views are being misrepresented or "filtered".<sup>124</sup> Listening to the child's views differs from the manner of how the child would be represented and this will influence the quality

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117 General Comment No. 7 (2006) Implementing Child Rights in Early Childhood CRC/C/GC//7/Rev.1 para 5; Reyneke 2013 *De Jure* 226.

118 Reyneke 2013 *De Jure* 226.

119 Reyneke 2013 *De Jure* 230; Lundy 2007 *BERJ* 933,936.

120 Article 12 of the *United Nation Convention on the Rights of the Child*, 1989; Lundy 2007 *BERJ* 936.

121 General Comment No. 7 (2006) Implementing Child Rights in Early Childhood CRC/C/GC//7/Rev.1 para 14; Reyneke 2013 *De Jure* 230.

122 Lundy 2007 *BERJ* 936.

123 Reyneke 2013 *De Jure* 230.

124 Mitchell 2014 *Australian Human Rights Commission* Child participation methods in Australian family law; Fernando *Family Matters* 2013 No.94 42.

of the representation given to them.<sup>125</sup> Furthermore, in the cases where the child's views are clear in a situation, the guarantee is small that this will be taken into consideration by the decision-makers.<sup>126</sup>

#### 3.1.1.4 Influence

According to article 12 of the CRC the views of the child should be given due weight although it is restricted by the child's age and capacity.<sup>127</sup> This places an obligation on State Parties to ensure that the right of the child is recognised. Due weight does not imply to just listen to the child's views, but rather to give due consideration to the child's needs which "requires real change."<sup>128</sup> Therefore, the capacity of the child should be assessed by proper measures and if the child is found to have the necessary capacity the views must be considered as a significant factor in the decision-making process.<sup>129</sup>

At this stage attention should be given to the factors which influence the weight given to the child's views for instance, what exactly the "due" constitutes in due weight and the fact that the child's capacity is linked to it and dependent on the perception of the adults. These factors make article 12 very complex.<sup>130</sup> Therefore, the challenge is to respect the views of the child.<sup>131</sup> However, the respect that these views deserve are often not given the due weight.

Furthermore, there are no provisions made for any feedback when the child expressed her views,<sup>132</sup> whether it was interpreted or misinterpreted. This however,

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125 Monahan and Young *Children and the Law in Australia* 545.

126 Lundy 2007 *BERJ* 937.

127 Article 12(1) of the *United Nation Convention on the Rights of the Child*, 1989; Lundy 2007 *BERJ* 938.

128 General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44 para 6) CRC/GC/2003/5 para 12; Lundy 2007 *BERJ* 938.

129 General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 44; Reyneke 2013 *De Jure* 232; Lundy 2007 *BERJ* 938.

130 Article 12 of the *United Nation Convention on the Rights of the Child*, 1989; General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 44; Reyneke 2013 *De Jure* 232; Lundy 2007 *BERJ* 938.

131 Reyneke 2013 *De Jure* 232.

132 Reyneke 2013 *De Jure* 232; Lundy 2007 *BERJ* 938.

is a violation of the obligation on State Parties because feedback is a vital part of the right of the child to participate in legal and administrative proceedings.<sup>133</sup> Therefore, the child who decided to express her views must be informed of the decisions that were made with regard to that expression and the reasons why the decision was made.<sup>134</sup>

Because the implementation of article 12 of the CRC is not guaranteed, it can only be monitored by implementing procedural safeguards. These procedural safeguards help make the process clear and open, creating uncomfortable conditions for adults if they impose their views on children and ignoring the child's view completely.<sup>135</sup>

### *3.1.2 Conclusion of the model*

It has become increasingly apparent that child involvement in decision-making processes is beneficial to the child's own life. Therefore, complying with article 12 is not only an obligation but also a moral and legal imperative.<sup>136</sup> In order to respect the right of the child to participate, all the factors need to be considered. There is a real threat of undermining the child's right to participate by adults just listening to the child and not providing the view due consideration.<sup>137</sup>

Therefore, when applying Lundy's model of child participation and the implementation of article 12 of the CRC it is clear that the four factors need to be met for the right to be fully recognised and respected. Thus, the child must be provided with a safe space and an opportunity to express their views to and audience who can have an influence on the decision-making process.<sup>138</sup>

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133 General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 44; Reyneke 2013 *De Jure* 232; Lundy 2007 *BERJ* 938.

134 Lundy 2007 *BERJ* 938; Reyneke 2013 *De Jure* 232.

135 Lundy 2007 *BERJ* 939.

136 Lundy 2007 *BERJ* 939.

137 Reyneke 2013 *De Jure* 235.

138 Reyneke 2013 *De Jure* 235.

### **3.2 Compliance with Article 12 of the CRC**

There has been an increase of arguments questioning the compliance with article 12 and the question of justification arose in some arguments. There are those who believe it needs justification however, the right of the child to express her views freely is a fundamental human right and was made an obligation, not only on State Parties but on the community, to ensure the recognition and fulfilment of the right.<sup>139</sup>

As stated above,<sup>140</sup> there rests an obligation on States Parties to clarify the right and to ensure its awareness.<sup>141</sup> This obligation becomes even more necessary if the right is as complex<sup>142</sup> as the right enshrined in article 12. This cannot be achieved without a variety of expertise and their guidance to provide an insight on the capacity of children.<sup>143</sup> Therefore, some guidance is needed to assess the child to ascertain whether or not she is capable of forming her own views and if these views are indeed worth listening to.

### **3.3 Conclusion**

The framework provides a sufficient understanding of article 12 and a layout of the barriers that need to be overcome before the right to participation for children can be successfully implemented. It places focus on the fact that the child's right to participate includes the right to express her views and have it considered<sup>144</sup> as well as the child's right to be informed about the outcome that the proceedings had.<sup>145</sup>

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139 General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 38; Lundy 2007 *BERJ* 940; Kaime 2005 *African Human Rights Law Journal* 228; De Bruin Child Participation And Representation In Legal Matters 401; Eldor (2011) *Oklahoma Law Review Vol* 63 664; Mezmur 2008 *SA Public Law* 1; Barrie Bill of Rights Compendium para 1B19.

140 See para 24 above.

141 Article 42 of the *United Nation Convention on the Rights of the Child*, 1989; Lundy 2007 *BERJ* 940.

142 See paras 17, 20 and 35.

143 Lundy 2007 *BERJ* 940.

144 See paras 32, 34.

145 See para 28

## 4 South Africa

What is the relevance of International Law in South Africa? By ratifying the CRC, the state and thus South Africa, acknowledges that an obligation is vested in them to protect the child's special needs.<sup>146</sup> Therefore the CRC places an obligation upon State Parties to create laws and amend the current laws so that it would fully implement the intention of the CRC.<sup>147</sup> The CRC is applicable in South African Law in terms of section 39(1)(b) of the *Constitution of the Republic of South Africa of 1996* (the Constitution) which states that when interpreting the Bill of Rights international law must be considered. In other words, South Africa is under an obligation to consider the best interest of the child in all matters concerning the child<sup>148</sup> this obligation *vis-à-vis* the right of the child to be heard. The questions arises whether the CRC merely places an obligation on the states to bring the current legal position in accordance with provisions of article 12 of the CRC and whether the article will indeed create a right for children to invoke in certain circumstances. Similarly, South Africa ratified the African Charter in 2000 and it must thus take into consideration the obligation to "respect, promote, fulfil"<sup>149</sup> the rights of children in agreement with the first article of the African Charter<sup>150</sup> and as a member state, South Africa had

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146 South Africa ratified the CRC on 16 June 1995; General comment No. 16 (2013) CRC/C/GC/16 para 2; see paras 1, 4 and 31.

147 The CRC is not self-executing and by ratifying the CRC, it becomes binding on South Africa and has "domestic application"<sup>147</sup> due to the incorporation thereof in terms of section 231(3) and (4) of the *Constitution of the Republic of South Africa* (the Constitution) According to section 231(4) of the Constitution international agreements will only become law in the Republic when if they are enacted into law by national legislation and therefore can only become enforceable if the treaty is domesticated.; Barrie *Bill of Rights Compendium* para 1B19; Robinson and Ferreira 2000 *De Jure* 55; Mahery in Boezaart (ed) *Child Law in South Africa* 324; section 231(3) and (4) of the *Constitution of the Republic of South Africa, 1996*; Barrie *Bill of Rights Compendium* para 1B19; Robinson and Ferreira 2000 *De Jure* 55; Rosa and Dutschke 2006 *SAJHR* 243 fns 120,121; Mahery in Boezaart (ed) *Child Law in South Africa* 324; ; Sloth-Nielsen *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* 159.

148 Seymour 2009 <https://www.unicef.org/rightsite/237.htm>; Robinson and Ferreira 2000 *De Jure* 54.

149 General Comment No. 2 (2014) Article 6 of *the African Charter on the Rights and Welfare of the Child* 7; Section 231 of *the Constitution of the Republic of South Africa* of 1996.

150 Article 1 of *the African Charter on the Rights and Welfare of the Child, 1990*.

to undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

In addition, all the states that ratified the African Charter, including South Africa, "shall" agree to submit reports to the Committee of Experts to give feedback on the measures to give effect to the provisions of the instrument which the states have adopted.<sup>151</sup> This way the Committee should be able to evaluate progress of the said state.

#### ***4.1 Compliance with International Law in South African National law and the South African legal framework on the views of the child***

South Africa has acted in accordance with these international instruments. In terms of section 28(1) of the Constitution, the child is recognised as vulnerable and it provides additional protection because of this fact. Section 28(2) provides protection by stating that it is of paramount importance that the best interest of the child be considered in every matter where the child is involved.<sup>152</sup> In terms of section 28(1)(h) of the Constitution the child has a right to express her views where a substantial injustice would otherwise occur and read with section 28(2) of the Constitution it places a stronger injunction on the courts to "hear" the child's views.<sup>153</sup> The Constitution<sup>154</sup> was clearly influenced by the international instruments in developing the meaning and purpose of section 28(2) of the Constitution to apply it to all legal matters concerning the child when it states that the child's best interest

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151 Article 43 of the *African Charter on the Rights and Welfare of the Child*, 1990.

152 Section 28(2) of *the Constitution of the Republic of South Africa* of 1996; Liefwaard and Doek *Litigating the Rights of the Child* 14; Barrie *Bill of Rights Compendium* para 1B19; Sloth-Nielsen 2001 *SAJHR* 211; Rosa and Dutschke 2006 *SAJHR* 242; Himonga and Cooke 2007 *International Journal of Children's Rights* 328; Sloth-Nielsen 2008 *SAJHR* 513; Sloth-Nielsen and Mezmur 2008 *International Journal of Children's Rights* 2, 23; Bekink and Bekink 2009 (2) *Speculum Juris* 94; Sloth-Nielsen 2009 (2) *Speculum Juris* 52; Van der Walt 2010 *Obiter* 720, 722; Nhenga-Chakarisa 2010 *African Human Rights Law Journal* 166; Mahery in Boezaart (ed) *Child Law in South Africa* 319; Reyneke 2013 *De Jure* 214.

153 Section 28(1)(h) of *the Constitution of the Republic of South Africa* of 1996; Du Toit in Boezaart (ed) *Child Law in South Africa* 367.

154 Sections 28(1)(h) and 28(2) of *the Constitution of the Republic of South Africa* of 1996; Du Toit in Boezaart (ed) *Child Law in South Africa* 367.

is of paramount importance.<sup>155</sup> By using the term "paramount" in this way suggests, that the best interest of the child will always be considered as the first consideration and that it could even undermine other rights.<sup>156</sup>

As far as national legislation is concerned, section 31 of the *Children's Act 38 of 2005*<sup>157</sup> (the Children's Act) places an obligation on the holder of parental rights and responsibilities to consider the views of the child in all matters where the child would be affected in a significant or an adverse way.<sup>158</sup> This obligation on the decision-maker is to consider the views of the child and discuss all the relevant aspects of any agreements, which may affect the child, with the child before it is concluded.<sup>159</sup> Furthermore, section 9 of the Children's Act<sup>160</sup> includes the best interests principle where it states that where a child is concerned, "the care, protection and well-being of the child, the standard that the child's best interests are of paramount importance must be applied."<sup>161</sup> Each case must be considered on its own merits and the factors in section 7 of the Children's Act<sup>162</sup> serves as guidelines to determine what is in each child's best interest. In section 7, 14 (fourteen) factors are laid out for a court to consider when deciding on the best interest standard of the child.<sup>163</sup> The judge in *HG v CG*<sup>164</sup> stated that these factors achieved a movement in the relationship

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155 Heaton and Kruger *South African Family Law* 171; Reyneke 2013 *De Jure* 208.

156 Clark 2017 *SALJ* 86.

157 Section 31 of the *Children's Act 38 of 2005*; Du Toit in Boezaart (ed) *Child Law in South Africa* 366.

158 Section 31 of the *Children's Act 38 of 2005*; Du Toit in Boezaart (ed) *Child Law in South Africa* 98.

159 Du Toit in Boezaart (ed) *Child Law in South Africa* 98.

160 The *Children's Act 38 of 2005*.

161 Section 9 of the *Children's Act 38 of 2005*; Clark 2017 *SALJ* 86; Heaton and Kruger *South African Family Law* 171; Van der Walt 2010 *Obiter* 723.

162 Section 7 of the *Children's Act 38 of 2005* states that the courts need to take into account the nature of the relationship between the parents; the attitude of the parents toward the child and to the exercise of parental responsibilities and rights in respect of that child; the likely effect on the child of changed circumstances such as separation from either or both parents; the need for the child to remain in the care of his or her parent, family or extended family and to maintain a connection with his or her culture or tradition; the child's age, maturity, stage of development, background, physical and emotional security and intellectual, emotional, social and cultural development; and the need of the child to be brought up within a stable environment; Heaton and Kruger *South African Family Law* 172; Rosa and Dutschke 2006 *SAJHR* 244; Okon 2012 *AHRLJ* 386; Himonga and Cooke 2007 *International Journal of Children's Rights* 326.

163 Section 7 of the *Children's Act 38 of 2005*; Heaton and Kruger *South African Family Law* 172.

164 2010 (3) SA 352 (ECP).

between the parents and the child by not only granting certain rights to the children by also allowing the child to take part in the decisions that would impact her life.<sup>165</sup>

With this guidance in mind it has become evident in practice that the views of the child are not always heard or listened to in South Africa.<sup>166</sup> To simply accept that the child's parent or guardian will act in the best interest of the child,<sup>167</sup> is one of the justifications for disregarding the views of the child.<sup>168</sup> In *Governing Body, Hoërskool Fochville And Others v Centre For Child Law*<sup>169</sup> the court gave examples where parental or guardian assistance were not required due to the fact that the child acted independently. However, it must be noted that the parental or guardian assistance in these examples were adversarial of the child's views.<sup>170</sup>

It is however not always necessary for the child to express her views directly.<sup>171</sup> It is possible to hear these views through a legal representative, social services or even, controversially, through an interview with the presiding officer,<sup>172</sup> although this rarely occurs. In most situations where children are involved in marital disputes, their views are dimmed out or "filtered"<sup>173</sup> to fit the needs of the parents. For instance, in *Soller v Greenberg and Another*<sup>174</sup> (*Soller-case*) where the couple's youngest child ran away from his mother who had the rights and obligation as the primary care giver, to live with his father.<sup>175</sup> The court held that it would be a

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165 *HG v CG* 2010 (3) SA 352 (ECP) para 6.

166 See para 33.

167 See para 3.

168 Elrod 2011 *Pravni Zivot* 9 970; see para 1.

169 *Governing Body, Hoërskool Fochville And Others v Centre For Child LAW* 2014 (6) SA 561 (GJ).

170 *Governing Body, Hoërskool Fochville And Others v Centre For Child LAW* 2014 (6) SA 561 (GJ) para 37.

171 See paras 13 and 24.

172 Elrod 2011 *Pravni Zivot* 9 973.

173 See para 33.

174 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003; Sloth-Nielsen 2008 *SAJHR* 503; Sloth-Nielsen and Mezmur 2008 *International Journal of Children's Rights* 17; Sloth-Nielsen 2009 (2) *Speculum Juris* 3; Bekink and Bekink 2009 (2) *Speculum Juris* 94-95; Du Toit in Boezaart (ed) *Child Law in South Africa* 97, 109.

175 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003 para 3.

"substantial injustice"<sup>176</sup> if the views of the child are not heard and Judge Satchwell noted that the views and wishes of the child in this matter are vital to the proceedings.<sup>177</sup> After all, the decision that the court makes will not only impact the family, but will have a direct impact on the child's life. In this matter, it became clear that "the child's interest and the adult's interest may not always intersect"<sup>178</sup> although it was thought that the parents would carry the best interest of the child at heart.<sup>179</sup> Therefore judge Satchwell held that where children are involved in civil proceedings and a substantial injustice would occur, they are entitled to separate legal representation to protect their interest.<sup>180</sup>

The main problem is the question of who should represent the best interest of the child? Would it be the parents, the child herself or a legal representative? Judge Satchwell believed that the parents would not be able to represent their child's best interest in a divorce matter where they are in a custody battle<sup>181</sup> especially in the cases of Parental Alienation Syndrome (PAS). The court appointed a separate representative for the child and found that the wishes of the child to live with his father would not be in the best interest of the child.<sup>182</sup> The judgement provided that it is not necessary to adopt the views of the child, it is simply necessary to take it into account.

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176 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003 para 3; Sloth-Nielsen *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* 159.

177 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003 para 10.

178 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003 para 8.

179 See para 3.

180 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003 paras 2, 3, 8, 9, 26 and 74.

181 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003 para 12.

182 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003 paras 2, 3, 8, 9, 26 and 74.

In *Soller v Maintenance Magistrate, Wynberg, And Others*<sup>183</sup> which is a follow-up case on the *Soller*-case, the dilemma created due to the actions of the father by not acting in the best interest of the child, but with the aim to ruin his wife.<sup>184</sup>

To add to the discussion about who decides what is in the best interest of the child and the format of listening to the views of the child, some comments about the limitations on the best interest of the child would be expedient. The best interest of the child has been the subject of several cases, most notably *S v M*<sup>185</sup> (*Centre for Child Law as Amicus Curiae*) where a conclusion was drawn that the best interest of the child may be limited and may not outweigh other rights in some circumstances. The judgement provides guidelines on how the principle of paramountcy of the best interest of the child in terms of section 9 of the Children's Act<sup>186</sup> is to be applied. For instance, the court refers to sections 28(1) and (2) of the Constitution wherein a set of rights for children are set out of which the courts are obliged to enforce at all times. It was also stated that the courts should interpret the common law in such a way that it "protects and advances" the best interest of the child.<sup>187</sup> The main consideration the courts must keep in mind is that it should always treat the rights of children with respect.<sup>188</sup> This may be seen as a new approach and implies that the rights of children must be reviewed within the parental care and responsibilities framework.<sup>189</sup> The best interest of the child has been stressed by the Constitutional Court in cases involving parental or family care.<sup>190</sup>

In conclusion, it is important that judges place some weight on the views of the child<sup>191</sup> and in any proceeding involving the child to be given an opportunity to

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183 *Soller v Maintenance Magistrate, Wynberg, And Others* 2006 (2) Sa 66 (C).

184 *Soller v Maintenance Magistrate, Wynberg, And Others* 2006 (2) Sa 66 (C) para 32.

185 *S v M* 2008 (3) SA 232 (CC); Barrie *Bill of Rights Compendium* para 1B19; Skelton 2009 *AHRLJ* 490-491; Sloth-Nielsen 2008 *SAJHR* 501.

186 Section 9 of the *Children's Act* 38 of 2005.

187 Clark 2017 *SALJ* 87.

188 Section 6(2)(b) of the *Children's Act* 38 of 2005.

189 Clark 2017 *SALJ* 87.

190 *Grootboom v Government of South Africa* 2001 (1) SA 46 (CC); Liefwaard and Doek *Litigating the Rights of the Child* 18.

191 Elrod 2011 *Pravni Zivot* 9 969.

participate.<sup>192</sup> As seen in the *Soller*-case, it is not necessary to adopt the views of the child, it is simply necessary to take it into account.<sup>193</sup> The manner of participation and the interaction between the rights of the child and the rights of the parents remain under developed in South Africa.

#### **4.2 Appropriate weight according to the child's age and maturity**

The domestic laws in line with international law guidelines require that the necessary opportunity should be awarded to the child to express her views, if she is able to communicate them, in the situations concerning her<sup>194</sup> although, this participation is subject to her age and maturity in terms of section 10 of the Children's Act<sup>195</sup> and these factors will determine the weight the court will attach to her views.<sup>196</sup> The child must be given the opportunity to freely express her views but is subject to her understanding of the implications.<sup>197</sup>

It was stated in *S v M*<sup>198</sup> that this principle is not necessarily a principle which overrides other consideration but rather demands that in each situation the appropriate weight is given to the interest of the child. It is dually submitted that the consideration of the weight has a direct influence on the child's view in legal proceedings.

The international and domestic laws require that the necessary opportunity should be awarded to the child to express her views, if she is able to communicate them, in the situations concerning her<sup>199</sup> although, this participation is subject to her age and maturity in terms of section 10 of the Children's Act<sup>200</sup> and these factors will

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192 Section 10 of the *Children's Act* 38 of 2005.

193 See para 49.

194 Article 4 of the *African Charter on the Rights and Welfare of the Child*, 1990; Mahery in Boezaart (ed) *Child Law in South Africa* 338.

195 Section 10 in Chapter 2 of *The Children's Act* 38 of 2005.

196 Mahery in Boezaart (ed) *Child Law in South Africa* 322.

197 General Comment No.12 para 30; Reyneke 2013 *De Jure* 210; see further discussion in 4.3.

198 *S v M* 2008 (3) SA 232 (CC) para 23; Skelton in Boezaart (ed) *Child Law in South Africa* 284.

199 Article 4 of the *African Charter on the Rights and Welfare of the Child*, 1990; Mahery in Boezaart (ed) *Child Law in South Africa* 338.

200 Section 10 in Chapter 2 of *The Children's Act* 38 of 2005.

determine the weight the court will attach to her views.<sup>201</sup> The child must be given the opportunity to freely express her views but is subject to her understanding of the implications.<sup>202</sup>

Maturity is a difficult concept and in the context of Article 12 of the CRC it is described as the child's capacity to be able to express her views on issues "in a reasonable and independent manner".<sup>203</sup> When determining maturity, the impact that the matter has on the child must be considered on a case-by-case basis,<sup>204</sup> in light to determine the weight of the view.<sup>205</sup> If the impact on the child's life is great, it would be more relevant to assess the child's maturity more appropriately.<sup>206</sup> Section 61 of the Children's Act<sup>207</sup> places an obligation on the presiding officer that if it was found that the child is in fact of a mature age, to allow the child to express her views in court. This decision to allow the child to participate lies with the presiding officer.<sup>208</sup>

#### ***4.3 Conflict between the best interest of the child and the views of the child***

When the views of the child were taken into consideration in the court cases mentioned, a clear conflict arose between their views and the child's best interest. This is problematic because there are no clear or specific guidelines to resolve these conflicts and the question arises which one of the concepts will carry more weight?

In terms of the Constitution of South Africa a child may express her views in a situation where a substantial injustice would occur,<sup>209</sup> it places a stronger injunction

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201 Mahery in Boezaart (ed) *Child Law in South Africa* 322.

202 General Comment No.12 para 30; Reyneke 2013 *De Jure* 210.

203 General Comment No.12 para 30; Reyneke 2013 *De Jure* 210.

204 General Comment No.12 para 29; Reyneke 2013 *De Jure* 211.

205 General Comment No.12 para 30; Reyneke 2013 *De Jure* 210; Mahery in Boezaart (ed) *Child Law in South Africa* 322.

206 Mahery in Boezaart (ed) *Child Law in South Africa* 322.

207 Section 61 of *The Children's Act* 38 of 2005; Du Toit in Boezaart (ed) *Child Law in South Africa* 99.

208 Du Toit in Boezaart (ed) *Child Law in South Africa* 99.

209 Section 28(1)(h) of the *Constitution of the Republic of South Africa* of 1996; Du Toit in Boezaart (ed) *Child Law in South Africa* 367.

on the courts to "hear" the child's views if it is read with section 28(2).<sup>210</sup> As stated above,<sup>211</sup> it is clear that the development of the Constitution<sup>212</sup> was influenced by the international instruments and when interpreting the purpose of section 28(2), the best interest of the child must be the paramount consideration.<sup>213</sup>

In the *Soller*-case<sup>214</sup> it was held that it would be a substantial injustice<sup>215</sup> if the views of the child are not heard and Judge Satchwell went further and noted that the views and wishes of the child in this matter are vital to the proceedings.<sup>216</sup> The Judge stated that where substantial injustice would result a child should be given an opportunity to express her views and that these views be exercised through a legal practitioner<sup>217</sup> because there are consequences that the legal practitioner may foresee that the child cannot foresee. After all, the decision that the court makes will not only impact the family but will have a direct impact on the child's life.

In terms of the Children's Act<sup>218</sup> as the domestic legislation an obligation is placed on the holder of parental rights to consider the views of the child where the child would be effected in a significant or an adverse way.<sup>219</sup>

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210 Sections 28(1)(h) and 28(2) of the *Constitution of the Republic of South Africa* of 1996; Du Toit in Boezaart (ed) *Child Law in South Africa* 367; see para 45.

211 See para 45.

212 Section 28(2) of the *Constitution of the Republic of South Africa* of 1996.

213 Heaton and Kruger *South African Family Law* 171; Reyneke 2013 *De Jure* 208.

214 *Soller NO v G* 2003 5 SA 430 (W); Sloth-Nielsen 2008 *SAJHR* 503; Sloth-Nielsen and Mezmur 2008 *International Journal of Children's Rights* 17; Sloth-Nielsen 2009 (2) *Speculum Juris* 3; Bekink and Bekink 2009 (2) *Speculum Juris* 94-95; Du Toit in Boezaart (ed) *Child Law in South Africa* 97, 109.

215 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003 para 3; Sloth-Nielsen *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* 159.

216 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003 para 10.

217 *Soller v Greenberg and Another* (unreported) case number 23342/02 of 02 February 2003 para 26.

218 Section 31 of the *Children's Act* 38 of 2005; Du Toit in Boezaart (ed) *Child Law in South Africa* 366.

219 Section 31 of the *Children's Act* 38 of 2005; Du Toit in Boezaart (ed) *Child Law in South Africa* 98.

#### **4.4 Right to be heard**

The child's right to receive separate representation as that of the parents is recapitulated in section 28(1)(h) of the constitution. Recent case law has shown a move towards the active participation of children in civil proceedings however numerous questions arose on the practicalities on hearing the child views in the court set-up.<sup>220</sup> These questions are the decision to appoint representation, the qualifications of said representation and how the court will hear the views of the child? These questions become even more complicated when the circumstances are considered in which the child is entitled to representation and the implementations of these rights.<sup>221</sup>

Section 28(1)(h) states that children have the right to legal representation at the states expense where a substantial injustice would occur.<sup>222</sup> From this wording it would seem that the child is only entitled to representation when a substantial injustice would occur.<sup>223</sup> The courts seem to encourage this statement until *R v H and Another*<sup>224</sup> when the judge *mero motu* appointed legal representation in terms of section 28(1)(h). The judge's main reason for this decision was the CRC and the obligation it poses under article 12 when it states that a child who is able to formulate her own views when her life is affected, should be granted the opportunity to express these views freely. These views would then be given the appropriate weight in terms of the child's age and maturity.<sup>225</sup>

However, the first reported case on why the child needed separate representation and the interpretation of this section was in the *Soller*-case where the judge stated that

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220 Du Toit in Boezaart (ed) *Child Law in South Africa* 101; see para 2.

221 Du Toit in Boezaart (ed) *Child Law in South Africa* 102; see para 2.

222 Section 28(1)(h) of the *Constitution of the Republic of South Africa*, 1996; Du Toit in Boezaart (ed) *Child Law in South Africa* 102.

223 Sloth-Nielsen *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* 229; Du Toit in Boezaart (ed) *Child Law in South Africa* 102.

224 2005 (6) SA 535 (C) 539.

225 Article 12 of the *United Charter on the Rights of the Child* of 1989; Du Toit in Boezaart (ed) *Child Law in South Africa* 102.

the significance of section 28(1)(h) lies in the recognition, also found in the Convention on the Rights of the Child, that the child's interests and the adults' interests may not always intersect and that a need exists for separate legal representation of the child's views.<sup>226</sup>

In a difficult situation where the child is in the centre of the conflict and the parents are attacking each other in court, the court will get a clear perception of what is truly going on when the child is given an opportunity or her views are dually represented in court,<sup>227</sup> because the child's perception of a family can look very different than those of an adult.<sup>228</sup>

Section 28(1)(h) states that legal representation should be provided to the child. Furthermore, the legal representative did not have to consult with either one of the parents or guardians during proceedings. The representative must use independent judgement regarding the best interest of the child's circumstances and present that to the court as seen appropriate.<sup>229</sup>

Section 28(1)(h) of the Constitution has been used by several cases with regard to the child's right to legal representation. In *Du Toit v Minister for Welfare and Population Development*<sup>230</sup> (Du Toit-case) the Constitutional court stated that all interests with regard to the child should be presented to avoid injustice to the children.

In the *Soller*-case the issue of child representation arose with regard to an application for change in care that was introduced at divorce. Regarding the facts of the case the judge stated that neither of the parents can represent the child's best interest. Furthermore, the legal representative of the case as per section 28(1)(h) has a different role than a family advocate, as the advocate is only an advisor to the court and not any party's representative. The judge stated that the

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226 *Soller NO v G and Another* 2003 (5) SA 430 (W) 434-435 para 7, 8; Du Toit in Boezaart (ed) *Child Law in South Africa* 103.

227 Du Toit in Boezaart (ed) *Child Law in South Africa* 103.

228 Smart 2002 *Family Court Review* 308.

229 Section 28(1)(h) of the *Constitution of the Republic of South Africa*, 1996; Heaton and Kruger *South African Family Law* 293.

230 2002 (10) BCLR 1006 (CC); Heaton and Kruger *South African Family Law* 191.

advocate is merely "a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer".<sup>231</sup> This is in contrast with the child's legal representative who must give a voice to the child.

The legal representative is not neutral and should argue the child's views and also provide adults with insight into these views. The representative should therefore apply legal knowledge and expertise to the child's views. Judge Satchwell concluded that the case needs a legal representative for the child and appointed a specific attorney to represent the boy.<sup>232</sup>

Another case like this is the *Legal Aid Board v R*.<sup>233</sup> In this case, a 12-year old girl requested help from the child line during a bitter divorce of her parents. The Centre for Child law was contacted as well as the Legal Aid board (Legal Aid South Africa at present) and a legal representative was subsequently appointed for the child. The girl indicated that she wanted the legal representative's help, which the mother objected to. The mother claimed that only a court or the child's legal guardians have the power to appoint a legal representative for the child.<sup>234</sup> The court rejected the objection by the mother and said that, in terms of section 28(1)(h), the Legal Aid board had the power to assist and give the girl legal representation without consent from a guardian or the court. The court stated further that the child's voice had been misheard with the arguments during the divorce and injustice would result if the child did not receive legal representation to make her voice heard.<sup>235</sup>

In *FB v MB*<sup>236</sup> the relationship between section 4 of the Children's Act and section 28(1)(h) of the Constitution was reviewed. The judge pointed out that there was no proof provided that substantial injustice would occur if there was no separate legal representation for the child, as required by section 28(1)(h). There was also no

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231 *Soller NO v G* 2003 5 SA 430 (W) para 27; Heaton and Kruger *South African Family Law* 292.

232 Heaton and Kruger *South African Family Law* 292.

233 2009 (2) SA 262 (D); Heaton and Kruger *South African Family Law* 292.

234 *Legal Aid Board v R* 2009 (2) SA 262 (D) para 10;

235 *Legal Aid Board v R* 2009 (2) SA 262 (D) para 20; Heaton and Kruger *South African Family Law* 293.

236 2012 (2) SA 394 (GSJ).

appointment of a legal practitioner by the state on the state expense. Nonetheless, the court granted this by using section 14 of the Children's Act, with specific reference to section 8(1). The court stated that section 14 is broader in scope than section 28(1)(h) and section 14 does not require substantial injustice to first occur before the appointment of a legal representation can commence for a child. The representative is also not limited to a state appointed legal practitioner.<sup>237</sup>

In *MJB v DGB*<sup>238</sup> the Supreme Court of Appeal stated that maintenance disputes between the interests of the child and parents match those of the parent claiming maintenance on behalf of the child. There will be instances where the child will have some say in maintenance. The representative of the child would depend on multiple factors like age and ability to express views. The court declined to provide concrete rules for when to appropriately appoint legal representation for a child in maintenance disputes. The court stated that the autonomous nature of the child and the child's right to express views should be heard and tested against the dispute and evaluate the part the child can play to add valuable arguments. It is long gone that children should be seen and not heard.<sup>239</sup>

#### **4.5 Summary and conclusion**

By ratifying the CRC in 1995<sup>240</sup> and the African Charter in 2000,<sup>241</sup> South Africa accepted the obligation that these instruments imposed. By amending the current laws to reflect the elements of these international laws was the first move towards promoting child rights.<sup>242</sup> The Constitution also places the best interest of the child as the primary consideration where the child's life would be affected.<sup>243</sup> Section 28(1) and section 28(2)<sup>244</sup> of the Constitution implements the most important

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237 Heaton and Kruger *South African Family Law* 293.

238 2013 JOL 30330 (SCA).

239 *MJB v DGB* 2013 JOL 30330 (SCA) para 20; Heaton and Kruger *South African Family Law* 293.

240 See para 43.

241 See para 43.

242 See para 43.

243 See para 43.

244 See para 45.

elements of these instruments, with specific reference to where a substantial injustice would occur when the views of the child are ignored.<sup>245</sup>

The best interest principle is also enshrined in the Children's Act, especially section 7 which provides 14 (fourteen) factors to determine the best interest of the child,<sup>246</sup> section 9<sup>247</sup> which includes the best interests principle and section 31 which litigates the responsibility of the parental rights holder to consider the view of the child.<sup>248</sup> These sections, with specific regard to section 7, provided a change in the relationship between the parent and the child, giving the child a voice in the decision-making process.<sup>249</sup>

In these proceedings, the voice of the child can be expressed directly or indirectly through other means, as stated above.<sup>250</sup> In the *Soller*-case, an example was provided, where the interest of the child compared to the parent differed and section 28(1)(h) of the Constitution was used to illustrate that "substantial injustice" would occur if the view of the child was ignored. Therefore, the child's view in this proceeding was vital and provides an example of how the international instruments influenced proceedings in South Africa. However, *S v M*<sup>251</sup> followed a new approach where the best interests of the child may be limited and not overweigh the other rights of the child, this judgement provided guidance on the use of the paramountcy principle as per section 9 of the Children's Act.<sup>252</sup> This new approach must be viewed in context of the parental care and responsibilities framework.<sup>253</sup>

Other than the best interest principle, the voice of the child is governed by her age and maturity in terms of section 10 of the Children's Act.<sup>254</sup> The terms age and maturity have been discussed throughout this chapter and the due consideration it

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245 See para 48.

246 See para 46.

247 See para 46.

248 See para 46.

249 See para 46.

250 See para 48.

251 See para 51.

252 See para 51.

253 See para 51.

254 See para 53.

should get on a case-by-case basis, the development of a proper framework and guidance in the regard are lacking. It has however become clear that conflict may arise between the best interest of the child and the views of the child. Therefore, this requires a balance between the weight that the best interest carries against the view of the child.<sup>255</sup> This weight is influenced by the maturity of the child which is defined in both the CRC and the African Charter as defined above.<sup>256</sup> Furthermore, section 61 of the Children's Act obliges that the presiding officer allows children with a mature age to express their views in court.<sup>257</sup>

Child representation in legal proceedings has shifted with recent case law towards a more active participation of children in court proceedings, causing multiple questions about the correct representation.<sup>258</sup> Many have argued that the legal forum is no place for a child and that they are in need of special protection.<sup>259</sup> Section 28(1)(h) provides the right to representation when substantial injustice has occurred. Therefore, with this wording, the courts assumed that representation is only required when a substantial injustice would occur until *R v H and Another*.<sup>260</sup> The judgement stated that a child who is able to formulate her own views when her life is affected, should be granted the opportunity to express these views freely and should be given due weight according to age and maturity.<sup>261</sup> The first case to provide the need for separate representation was the *Soller*-case as stated above.

In the *Soller*-case the judge also stated that legal representatives should give a voice to the child and is not a neutral party.<sup>262</sup> In another case *Legal Aid Board v R* the court found that the child may obtain legal representation without the consent of the guardian<sup>263</sup> and the legal representative also has no obligation to consult with the guardians during proceedings. In *FB v MB* the court used section 14 of the

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255 See para 60.

256 See para 56.

257 See para 56.

258 See para 61.

259 See paras 3 and 22.

260 See para 62.

261 See para 62.

262 See para 67.

263 See para 69.

*Children's Act* to increase the scope to allow legal representation of a child even when no substantial injustice occurred.

This illustrates a clear development of article 12 of the CRC and article 4 of the African Charter and the implementation thereof in South Africa's legal system. It is submitted that there is still some dire progress needed to provide the courts with a clear guidance on how to measure the age and maturity of the child which, in turn has an direct influence on the right of participation.

## **5 Australia**

Other jurisdictions are also grappling with the problem relating to hearing the voice of the child. For the purposes of this study, the focus is on Australia<sup>264</sup> that also ratified the CRC<sup>265</sup> and therefore has the same obligations as South Africa in this regard, making a comparison with the South African system expedient. Australia adopted the best interest principle as the standard in resolving family disputes and to protect the child's best interest in these situations some mandatory considerations<sup>266</sup> must be applied, one of which is the views of the child. However, the views are merely a consideration and obtaining and interpreting the views are also difficult to incorporate.<sup>267</sup>

The legal question that arises is, would it be procedurally fair when a principal party involved in a civil suit and also plays an integral part in family life, doesn't have an audience in the legal proceedings?<sup>268</sup>

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264 Alston and Brennan *The UN Children's Convention and Australia* iii; It should be noted that the *African Charter on the Rights and Welfare of the Child* of 1990 was formulated to protect and promote the African child's rights and welfare and is therefore not applicable in Australia.

265 Australia ratified the CRC on 17 December, 1990.

266 *M and S* (2007) 37 Fam LR 32; FLC 93-313 per Desau J at 33; Young and Ryrstedt 2012 *Journal of Family Law and Practice* 21: However, these considerations are merely seen as guidelines to be considered on a case by case basis.

267 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 19-20; see chapter 4.

268 Fernando 2014 *Precedent (Journal of the Australian Lawyers Alliance) Issue 124* 21, 38.

## **5.1 Compliance with International Law in Australian National law and the Australian legal framework on the views of the child**

In 2012, the *Family Law Act of 1975*<sup>269</sup> (the Family Act) was amended to include article 12 of the *CRC* by adding section 60B (4).<sup>270</sup> This inclusion was praised due to the fact that children's rights would be recognised in family law disputes.<sup>271</sup> It was argued that this inclusion of the *CRC* in section 60B (4) places an expectation on the family law courts by the Parliament, that when the rights of the child is examined it would be used as a "powerful interpretive aid" and that it would bring the need for child participation into focus.<sup>272</sup>

A concept has been developed called the "children's citizenship"<sup>273</sup> which focuses on the child's active participation in family life. The best interest principle is also applicable in Australian Law in Australia's Family Act where it states that, when a child is involved in a matter that may affect her, the best interest "should be the primary concern".<sup>274</sup> Furthermore, the concept of the best interest of the child is the base for the *Child Protection Act of 1999*<sup>275</sup> and states that "the best interest of the child is the paramount consideration in the provision of children's services".<sup>276</sup>

Although the courts in Australia are more focused on introducing the views of the child into the process through third parties<sup>277</sup> and hearing the views of the child directly are a rare occasion<sup>278</sup> notwithstanding the child's age and maturity, the

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269 *Family Law Act of 1975*.

270 Section 60B (4) of the *Family Law Act, 1975*: An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989; CCH *Australian Master Family Law Guide* 144; Fernando 2014 *Precedent (Journal of the Australian Lawyers Alliance) Issue 124* 39.

271 Fernando 2013 *USNWLawJI* 4 88.

272 Fernando 2013 *USNWLawJI* 4 88.

273 Fehlberg and Behrens *Australian Family Law: The Contemporary Context* 356.

274 Cumming, Mawdsley and De Waal 2011 *Australia & New Zealand Journal of Law & Education* 54.

275 The *Child's Protection Act, 1999*.

276 Section 5A of the *Child's Protection Act, 1999*; Cumming, Mawdsley and De Waal 2011 *Australia & New Zealand Journal Of Law & Education* 54; Fernando 2014 *Precedent (Journal of the Australian Lawyers Alliance) Issue 124* 38.

277 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 20.

278 Fernando 2014 *Precedent (Journal of the Australian Lawyers Alliance) Issue 124* 40; See paras 13, 24 and 74.

courts still have various other measures<sup>279</sup> to listen to the child such as consulting with the child through interviews or evidence from an Independent Child Representative.<sup>280</sup> There is a feeling that children do not have a place in the process.<sup>281</sup> However, by not listening to the child's views directly, it has been argued that the process is flawed because the children feel that their views are being misrepresented or "filtered".<sup>282</sup>

However, not all are opposed to hearing the views directly,<sup>283</sup> for instance, in an Australian case *Gillick v West Norfolk and Wisbech Area Health Authority*<sup>284</sup> (Gillick-case), it was stated that the question will always arise when a child is seeking advice whether that child has sufficient understanding of the law proceedings. It was further stated that this capability to communicate can be formed through the child's level of education or the articulateness of the child.<sup>285</sup> In the *Gillick-case*,<sup>286</sup> the court held that a child requires the reasoning and understanding of an adult<sup>287</sup> but this concept was taken even further when it was stated that a child may "display different levels of understanding"<sup>288</sup> in different matters. It is clear that the court has jurisdiction to hear the matter and that each matter would have to be decided on according to the merits of the case.<sup>289</sup> In *Doyle and Doyle*,<sup>290</sup> the court stated

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279 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 21: Social Sciences, Independent Child Representative, Judicial Conference (judge interviewing).

280 Mitchell 2014 *Australian Human Rights Commission* Child participation methods in Australian family law; Young and Ryrstedt 2012 *Journal of Family Law and Practice* 19.

281 Mitchell 2014 *Australian Human Rights Commission* Child participation methods in Australian family law; Kaspiew et al *Independent Children's Representatives Study: Final report* 38, 41; Young and Ryrstedt 2012 *Journal of Family Law and Practice* 19; see paras 3 and 22.

282 Mitchell 2014 *Australian Human Rights Commission* Child participation methods in Australian family law; Fernando 2013 *Family Matters* 42; Young and Ryrstedt 2012 *Journal of Family Law and Practice* 21; see paras 33, 48 and 92.

283 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 19.

284 *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112.

285 *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112 para 186.

286 *Gillick v Norfolk and Wisbech Area Health Authority and the DHSS* (1986) AC 112; Fehlberg and Behrens *Australian Family Law: The Contemporary Context* 260.

287 *Gillick v Norfolk and Wisbech Area Health Authority and the DHSS* (1986) AC paras 110-111; Fehlberg and Behrens *Australian Family Law: The Contemporary Context* 356.

288 Fehlberg and Behrens *Australian Family Law: The Contemporary Context* 356.

289 *H v W* it was stated that the child's view would be given due amount of consideration but the court has an obligation to determine the best interest of the child.

290 *Doyle and Doyle* (1992) AC para 79; Fehlberg and Behrens *Australian Family Law: The Contemporary Context: Teaching Materials* 220.

that it is appropriate to regard the views of the child and to allocate the proper weight to it as the circumstances permit.

In *H v W*,<sup>291</sup> it was stated that the child's view would be given due amount of consideration, but the court has an obligation to determine the best interest of the child as well as in the *R and R-case*,<sup>292</sup> where the presiding officer found it to be more important that the best interests of the child prevail but that due weight was placed on the children's views.

## **5.2 Appropriate weight according to the child's age and maturity**

Judges Fogarty and Kay in *H v W* stated that the child's views are important and that "proper and realistic weight should be attached".<sup>293</sup>

In Australia, legal representatives question the child's ability to give adequate instruction<sup>294</sup> and despite the fact that the views must be part of the mandatory considerations, the judges are afforded significant discretion in the weight it should carry.<sup>295</sup> Section 60 CC (3)(a) of the Family Law Act<sup>296</sup> states that the court is permitted to take any relevant factors into account when the weight of her views is considered.<sup>297</sup> The court's primary consideration is still to protect the child from harm<sup>298</sup> and this will have an influence on the discretion that the court may exercise. This does not mean that the views of the child can merely be reduced based on

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291 *H v W* (1995) AC par 81; Fehlberg and Behrens *Australian Family Law: The Contemporary Context: Teaching Materials* 220.

292 *R and R: Children's views* (2000) 25 Fam LR 712 para 31; Fehlberg and Behrens *Australian Family Law: The Contemporary Context: Teaching Materials* 221.

293 *H v W* (1995) AC para 30; Newell, Graham and Fitzgerald 2009 *Report to Childwatch International's Children and the Law Thematic Study Group* 42.

294 See paras 4, 5 and 19.

295 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 20.

296 Section 60 CC (3)(a) of the *Family Law Act*, 1975: Factors such as the child's maturity or level of understanding; Young and Ryrstedt 2012 *Journal of Family Law and Practice* 20.

297 *Russell and Russell and Anor* (2009) FamCA 28; Factors such as age, maturity and the level of understanding; Newell, Graham and Fitzgerald 2009 *Report to Childwatch International's Children and the Law Thematic Study Group* 45.

298 Section 60 CC (2)(a) and (b) of the *Family Law Act*, 1975; Young and Ryrstedt 2012 *Journal of Family Law and Practice* 20; Harrison and Woollard 1995 18 Fam LR 788 at 825 per Baker J: Explicit judicial reasoning; Monahan and Young *Children and the Law in Australia* 547; see paras 3, 5, 75 and 79.

maturity alone and that unequivocal reasoning<sup>299</sup> should be provided by the judge if the views were not considered.<sup>300</sup>

However, in some states the child may be assessed by the representative to determine whether she has the ability to instruct the legal representative with clear expression of her views but many representatives are not willing to assess children because of their belief that children will suffer harm by participation in the legal process.<sup>301</sup>

In the *Gillick-case*, for example, which concerned a mother applying to court for an order to interdict the local medical practitioner from advising her teenage daughter (16) on the use of contraceptives without parental consent. The Lord stressed that when a child is seeking advice, the parental rights will respect the child's right to express her own views when she "reaches a sufficient understanding and intelligence"<sup>302</sup> to be able to understand the implications of her decisions. This sufficient understanding and intelligence- principle is a question of fact in each case which is not dependent on a specific age<sup>303</sup> or mental capacity.<sup>304</sup> The court dismissed the mothers application in this regard and held that when a child understands the risks and nature of the treatment, she acquires the legal capacity to consent without parental consent or knowledge.<sup>305</sup> However, there are little to no guidance given to ascertain the appropriate and intelligence- principle.<sup>306</sup>

The CRC only states that when a child is able to form her own view it must be given due consideration and it sets no age limit.<sup>307</sup> This implies that the instruments places

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299 *H v W* 1995 FCA 92-598 para 81; Newell, Graham and Fitzgerald 2009 *Report to Childwatch International's Children and the Law Thematic Study Group* 42.

300 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 20.

301 Monahan and Young *Children and the Law in Australia* 547; see paras 3, 5, 12, 75 and 79.

302 *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112 para 189.

303 *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112 paras 172,173, 185 and 189; Monahan and Young *Children and the Law in Australia* 438-439.

304 Monahan and Young *Children and the Law in Australia* 438-439.

305 *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112 paras 172,173, 185 and 189

306 Monahan and Young *Children and the Law in Australia* 438-439.

307 Article 12 of the *United Nations Convention on the Rights of the Child*, 1989.

no limitations on the views of the child.<sup>308</sup> Therefore it can be deduced that the court has the discretion to allow a child to express her views based on their presumption of the child's understanding capacity.

In the *Gillick-case* the court went further when he stated that the child needs to "appreciate"<sup>309</sup> the consequences of her views. This is referred to as being "Gillick-competent".<sup>310</sup> This test of competence was preferred more by the courts than a set age.<sup>311</sup>

### ***5.3 Conflict between the best interest of the child and the views of the child***

There is a fundamental struggle to apply the best interest of the child in terms of indigenous relativity and the judge's prejudice on the matter.<sup>312</sup> Therefore, it can be deduced that judges are bias because of their own beliefs and experiences which will influence the decision-making process and therefore judges need to be educated to understand child development and the effect their own bias will have on the child.<sup>313</sup> Judges must exercise caution when they are relying on their discretion to ensure that the decision will reflect the best interest of the child and to check their decision by talking to the child to understand what she understands as the best outcome.<sup>314</sup>

A child's views must be considered by the Australian Courts, however, they do not interpret it as the right to participation.<sup>315</sup> As stated in case law above, it may be

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308 *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112 para 186.

309 *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112 paras 1888-189; Monahan and Young *Children and the Law in Australia* 439.

310 Monahan and Young *Children and the Law in Australia* 439.

311 Parkinson *Australian Family Law in Context: Commentary and Materials* 672.

312 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 22, 28.

313 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 22.

314 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 22-23.

315 Newell, Graham and Fitzgerald 2009 *Report to Childwatch International's Children and the Law Thematic Study Group* 42.

more important that the best interests of the child prevail but that due consideration must be placed in the children's views.<sup>316</sup>

It is to be submitted that there are the barriers of age and maturity and in some cases, children find it difficult to express their views to strangers who might act on their behalf.

#### **5.4 Right to be heard**

The CRC states that the child has the right to freely express her views either directly or indirectly<sup>317</sup> and the Australian law has dually been amended to reflect this. However, the right to be included in the decision-making process was limited to being expressed indirectly.<sup>318</sup> Therefore, the child's views will be expressed through social workers or psychologists who will formulate an expert report which will be handed to the court.<sup>319</sup> There are those who are represented by a separate legal representative and the child's view would depend on the way the child is being represented and the quality of the representation.<sup>320</sup> With the obligation that the CRC places on states, Australia amended the Family Act to include section 60B (4) which will recognise children's rights in family law disputes.<sup>321</sup> The purpose of this inclusion was that the courts would take the child's views into consideration and bring the need for child participation into focus.<sup>322</sup> A concept has been developed called the "children's citizenship"<sup>323</sup> which focuses on the child's active participation in family life.

This prescribed indirect manner of listening to the child's views differs from the manner of how the child would be represented and this will have an effect on the

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316 *R and R: Children's views* (2000) 25 Fam LR 712 para 31; Fehlberg and Behrens *Australian Family Law: The Contemporary Context: Teaching Materials* 221; see para 85.

317 Article 12 of the *United Nations Convention on the Rights of the Child*, 1989.

318 Monahan and Young *Children and the Law in Australia* 545.

319 Fernando 2014 *Precedent (Journal of the Australian Lawyers Alliance) Issue 124* 39.

320 *Re K* 1994 FLC 92 - 461 para 80774; Monahan and Young *Children and the Law in Australia* 545; Fernando 2014 *Precedent (Journal of the Australian Lawyers Alliance) Issue 124* 39.

321 Fernando 2013 *USNWLawJI* 4 88.

322 See para 32; Fernando 2013 *USNWLawJI* 4 88.

323 Fehlberg and Behrens *Australian Family Law: The Contemporary Context* 356.

quality of the representation.<sup>324</sup> The research done in Parkinson and Cashmore's *The voice of the child in family law disputes* has shown that children would rather express their views directly, however the representatives are there to determine the extent to which children they deem as able to do so.<sup>325</sup> The age and maturity of the child affects the attitude the representatives have towards children will have an overall effect of limiting the child's contact with the legal proceedings.<sup>326</sup>

As stated above,<sup>327</sup> it is challenging to represent a child's views effectively which require the representatives to develop knowledge and skills towards communicating, understanding and ascertaining the child's views.<sup>328</sup>

Although section 60B (4) has yet to be used in many cases, the principle of child participation has been developed through case law. These views need to be awarded the proper consideration, keeping in mind the age and maturity of the child<sup>329</sup> however, the weight these views will carry would be determined by the judge to best protect the best interest of the child.<sup>330</sup>

The courts will thus give the necessary consideration to the child's views but will not always give the order that the child wants<sup>331</sup> and the courts are of the view that the balance between the child's views and the best interest principle, the courts will favour the best interest of the child as the primary consideration.<sup>332</sup>

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324 Monahan and Young *Children and the Law in Australia* 545.

325 Monahan and Young *Children and the Law in Australia* 545.

326 Monahan and Young *Children and the Law in Australia* 546.

327 See para 20.

328 Monahan and Young *Children and the Law in Australia* 547.

329 *Doyle v Doyle* 1992 FCA 92-286 para 79,128; Fehlberg and Behrens *Australian Family Law: The Contemporary Context* 220.

330 *H v W* 1995 FCA 92-598 para 81,947; Fehlberg and Behrens *Australian Family Law: The Contemporary Context* 220.

331 *Re P (Minor)* 1992 (1) FLR 316 par 321; Fehlberg and Behrens *Australian Family Law: The Contemporary Context* 220.

332 *R v R Children's Wishes* 2000 FCA 93-3000 para 31; Fehlberg and Behrens *Australian Family Law: The Contemporary Context* 221.

## **5.5 Summary and conclusion**

The process of involving children to take part in the legal process is mainly done by third parties.<sup>333</sup> These third parties would ascertain the child's opinion and views in the matter by talking to her. This will have the effect of the third party interpreting the child's views and ascertaining the most important aspects that he believes are important.<sup>334</sup> This method can be seen with both advantage and disadvantage, such as children being involved in the legal proceedings being the former and the latter being that these third parties filter the views of the child.<sup>335</sup>

Therefore, the child's views will be expressed through social workers or psychologists who will formulate an expert report which will be handed to the court.<sup>336</sup> Other than the third party interpreting and ascertaining the child's view, the participation in the legal forum is limited. This is not only due to the parties protecting the child from harm<sup>337</sup> but also the child's age and maturity and the weight the assessor places on it. This limitation on the child's rights to participate due to the natural bias of the assessors may be resolved by regular training in interviewing skills.<sup>338</sup>

## **6 Comparison of South African and Australian jurisdictions**

The main reason for comparing the abovementioned jurisdictions are because of the various similarities they have with regard to the developments of child participation in their legal systems. The CRC<sup>339</sup> played an integral part in the development of the laws surrounding child participation and when a State Party ratify an instrument, it undertakes an obligation to protect the child by respecting

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333 See para 3.

334 See para 3.

335 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 27.

336 See para 95.

337 See paras 84 and 85.

338 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 28.

339 See paras 43 and 72.

her rights.<sup>340</sup> As stated above<sup>341</sup>, article 12 of the CRC highlights the right of the child to express her views and these views are required to be taken into account in legal and administrative proceedings.<sup>342</sup> Further protective legislation has also been developed for courts to consider the best interest principle as paramount<sup>343</sup> and although there has been ample development in child participation in the legal systems, the courts are still hesitant to hear the child express her views directly and the presiding officer would have to exercise her discretion on a case by case basis.<sup>344</sup>

Furthermore, many have questioned the effectiveness of these procedures. In South Africa, the courts favour the use of separate child representations for the best interest of the child to be protected<sup>345</sup> whereas in Australia family reports are relied upon for the same purpose.<sup>346</sup> It is clear from this that there rarely is a place for the child's direct voice in these proceedings and that representatives who are representing the child are more willing to protect the best interest.<sup>347</sup>

Another barrier that children face before being allowed an audience in legal proceedings is their age and maturity and the weight that the courts place on it.<sup>348</sup> This barrier also includes the need for children to understand the consequences of expressing her views in the legal process<sup>349</sup> and this is known as Gillick-competent. There is no court case illustrating the Gillick-competent test in South Africa, however

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340 General Comment No. 7 (2006) *Implementing Child Rights in Early Childhood CRC/C/GC//7/Rev.1* para 14; Tobin 2013 *International Journal of Children's Rights* 397; Freeman *The Future of Children's Rights* 259; Article 42 of the *United Nations Convention on the Rights of the Child*, 1989; Lundy 2007 *BERJ* 230.

341 See paras 13 and 14.

342 Section 10 of the *Children's Act* 38 of 2005; section 60B (4) of the *Family Law Act*, 1975.

343 Section 28(2) of the *Constitution of the Republic of South Africa* of 1996; sections 7 and 9 of the *Children's Act* 38 of 2005; *S v M* 2008 (3) SA 232 (CC); section 60CC(3)(a) *Family Law Act*, 1975; section 5A of the *Child's Protection Act*, 1999.

344 See paras 14 and 76; Article 12 does not require that the views of the child must be heard directly in family law proceedings, but it gives clear reference to the right of the child to express her views directly or through a representation.

345 Du Toit in Boezaart (ed) *Child Law in South Africa* 103; *R v H and Another* 2005 (6) SA 535 (C) 539; see chapter 4.

346 Fehlberg and Behrens *Australian Family Law: The Contemporary Context* 362.

347 See para 96; see chapter 5.

348 See chapter 4.2.

349 See para 27.

the principle has been included in the African Charter's definition of maturity.<sup>350</sup> As indicated throughout this study, this concept of age and maturity is difficult to ascertain and even with the Gillick-competent and the African Charter it is still measured on a case-by-case basis.

It is submitted that, as a result of this, many legal representatives, in both jurisdictions, are less willing to consider representing children because of the belief that children's views are likely to change and therefore easily dismissed.<sup>351</sup>

## **7 Conclusion (nothing about us without us)**

This study illustrates that there is a movement of child participation in the legal system however, there is still much to be done. The right to express views freely is not sufficiently appreciated.<sup>352</sup> Although the child's views reach the court process through independent representation or reports, her direct views are yet to reach the court.<sup>353</sup> This process of indirect participation where third parties ascertain, what they believe is in the best interest of the child, mostly strains the child's voice in legal proceedings. The direct involvement of the child would not only ensure her right of participation<sup>354</sup> but also ensure that her views reach the court without it being filtered through the best interest principle.<sup>355</sup>

There is a real threat of undermining the child's right of participation by adults who just listen to the child and not providing due consideration to that view.<sup>356</sup> At this stage attention should be given to the factors which influence the weight given to child's views. For instance, what exactly the "due" constitutes in the due weight and the fact that the child's capacity is linked to it and dependent on the perception of

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350 See para 15.

351 See paras 83 and 87; Smart 2002 *Family Court Review* 309.

352 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 27.

353 See para 83.

354 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 27.

355 See paras 33, 48 and 83.

356 Reyneke 2013 *De Jure* 235.

the adults. These factors restrict article 12 of the CRC and makes it very complex.<sup>357</sup> Therefore, the challenge is to respect the rights of the child and with that the views of the child.<sup>358</sup> It must be understood that the restriction is not on the child's right to express her views but rather applies to the due weight it should be given<sup>359</sup> and that the child's right is not dependent on the capacity to express a mature view but rather on the "ability to form a view".<sup>360</sup> Along with respect, caution must be given to the rights enshrined in article 12 of the CRC,<sup>361</sup> because the impression is given that children will be given the opportunity to express their views freely and sufficiently, however there is no obligation to listen to their views.<sup>362</sup> This is only one of the barriers that child participation encounters.

It is submitted that the best interest principle is viewed in the wrong context and that it is harmful to a child<sup>363</sup> and what she wants to protect<sup>364</sup> due to the lack of consideration her views are given. Furthermore, that the best interest principle lacks the requirement to give due consideration to the views of the child. It is also submitted that one cannot do what is in the best interest of a child if she was not given due opportunity to express her view.<sup>365</sup> Therefore, for the best interest principle to be successful the child's views should be "silenced" thus reinforcing the "discursive figure".<sup>366</sup> To fully respect and recognise the rights of the child, the best interest principle must be used in conjunction with the child's right to participate in legal proceedings.

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357 Article 12 of the *United Nation Convention on the Rights of the Child, 1989*; General Comment No. 12 (2009) The Right of the Child to be Heard CRC/C/GC/12 para 44; Reyneke 2013 *De Jure* 232; Lundy 2007 *BERJ* 938.

358 Reyneke 2013 *De Jure* 232.

359 Article 12(1) of the United Nation Convention on the Rights of the Child, 1989; Lundy 2007 *BERJ* 935.

360 Lundy 2007 *BERJ* 935.

361 The African Charter is not referenced because it is only applicable in African countries.

362 Reyneke 2013 *De Jure* 220-221; Lundy 2007 *BERJ* 930.

363 Hosking and Ripper 2012 *Australian Feminist Studies* 182.

364 See para 38.

365 Hosking and Ripper 2012 *Australian Feminist Studies* 182; Young and Ryrstedt 2012 *Journal of Family Law and Practice* 27.

366 Hosking and Ripper 2012 *Australian Feminist Studies* 175: An abstract figure characterised as a powerless innocent in need of nurturing and protection by a loving couple; Hosking and Ripper 2012 *Australian Feminist Studies* 184.

A real threat exists of silencing the child's views by adults who are unwilling to give due consideration by just listening.<sup>367</sup> However the model,<sup>368</sup> as set out in Chapter 3, was developed to respect the rights of the child in accordance with article 12 of the CRC by involving them in the legal proceedings. In order to fully respect and recognise the right of the child to participate it is clear that the four factors in Lundy's model need to be met. Thus, the child must be provided with a safe "space" and an opportunity to express (voice) their views to and "audience" who will duly consider and "influence" the decision-making process.<sup>369</sup>

As set out, the implementation of the model is subject to the cooperation of the decision-makers who play the main role in the child's life.<sup>370</sup> It was submitted that the reason for the reluctance to commit to article 12 is because of the belief that children have no place in legal proceeding.<sup>371</sup> This is due to the lack of awareness of article 12 itself and it was further submitted that the failure to make the provision widely known is a breach of the state's party's obligation of article 42 of the CRC.<sup>372</sup> The model mainly focused on evaluating article 12 by identifying the 2 (two) main elements thereof namely, the right to express a view and the right to give the view the due weight.<sup>373</sup>

Lundy went further when proposing the 4 (four) factors required for the successful interpretation of article 12 within the sphere of the CRC as a whole. If these factors are fully respected and implemented as the model intends, a child would be afforded a safe and comfortable "space" she needs to be able to "voice" her view, if she is able to form a view<sup>374</sup> and if she chooses to express it, to an "audience" involved in the decision-making process with the necessary "influence" to treat her rights with respect and to listen to her.

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367 Reyneke 2013 *De Jure* 235.

368 Lundy 2007 *BERJ* 231-239; See figure 1.

369 Reyneke 2013 *De Jure* 235.

370 See para 23.

371 See paras 3, 22 and 76.

372 See para 22.

373 See para 25.

374 See para 38.

The starting point towards treating children with greater respect is to recognise the validity of children's experiences, however different from those of adults and then to place oneself in their shoes. By listening to children it can bring about a "cultural shift" in terms of understanding the child.<sup>375</sup> It must be noted that there is an important difference between discriminating against children and understanding the child's circumstances, it's not just a matter of allowing children to participate but also of being attentive to what they have to say.<sup>376</sup> It is submitted that by ascertaining the child's needs, those who interview the child requires the knowledge and skill to communicate effectively and understanding what the child wants.<sup>377</sup> By providing training to communicate and sufficient interviewing skills to judicial officers as well as representatives would provide the decision-makers with a better understanding of the child's experiences and would be placed in a position to interpret the child's views more effectively.<sup>378</sup>

Only once a change of attitude occur in the judicial sphere will there be a change in the participation of children in judicial procedures.<sup>379</sup> It must be understood that the need for awareness is an obligation which is legally binding to all state's parties who ratified the CRC.<sup>380</sup> According to article 12 of the CRC the views of the child should be given due weight although it is restricted by the child's age and capacity.<sup>381</sup> It is submitted that there are little to no reliable measures or processes to determine the child's capacity with regard to her views have been established and requires further development to improve the interpretation of their views and weighting thereof when the view of the child is used in court proceedings.

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375 Smart 2002 *Family Court Review* 318.

376 Smart 2002 *Family Court Review* 309.

377 See paras 20, 48, 83 and 101.

378 Newell, Graham and Fitzgerald 2009 *Report to Childwatch International's Children and the Law Thematic Study Group* 47; Campbell *The Voice of the Child in Australian Family Law: Whose Right? Who's Wrong?*; Young and Ryrstedt 2012 *Journal of Family Law and Practice* 27.

379 Young and Ryrstedt 2012 *Journal of Family Law and Practice* 22.

380 Article 42 of the *United Nations Convention on the Rights of the Child*, 1989; Lundy 2007 *BERJ* 230.

381 Article 12(1) of the *United Nation Convention on the Rights of the Child*, 1989; Lundy 2007 *BERJ* 938.

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