

ADVANCING THE INTERESTS OF
SOUTH AFRICA'S CHILDREN:
A LOOK AT THE BEST INTERESTS OF CHILDREN
UNDER SOUTH AFRICA'S CHILDREN'S ACT

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INTRODUCTION.....	202
I. THE SOCIO-ECONOMIC HISTORY OF THE CHILDREN OF SOUTH AFRICA	203
A. Pre-Colonial Period.....	203
B. Colonial Period.....	205
C. Post-Independence and Segregation.....	207
D. Apartheid Era.....	208
E. Post-Apartheid Era.....	211
F. The Socio-Economic Impact of South African History.....	213
II. CHILDREN AND THE ROMAN-DUTCH HERITAGE IN SOUTH AFRICAN LAW	213
III. INTERNATIONAL EFFORTS AFFECTING THE CHILDREN OF SOUTH AFRICA	220
A. United Nations Declaration of the Rights of the Child	222
B. United Nations Convention on the Rights of the Child	225
C. World Children's Summit of 1990	228
D. The African Charter on the Rights and Welfare of the Child.....	229
E. Children's Charter of South Africa.....	230
F. The Impact of International Agreements.....	231
IV. THE SOUTH AFRICAN CHILDREN'S ACT	232
A. The Best Interests of the Child in the Balance	236
B. The Impact on Customary Law Related to Children.....	240
C. Specific Substantive Provisions.....	241
V. REFLECTIONS ON SOUTH AFRICA'S CHILDREN'S ACT: AN AMERICAN PERSPECTIVE	244
A. The Currents of American Society	245
B. Nationwide Legislation and Law Reform	247
C. Constitutional Protection.....	248
CONCLUSION	249

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”

Nelson Mandela

INTRODUCTION

There is no one in a better position to speak to South Africa’s soul than Nelson Mandela. The road he walked—from the small village of Mvezo in Eastern Cape Province¹ to the prison on Robben Island² to the presidency of the Republic of South Africa—compels us to give him that distinction. Although appropriate treatment of children is an obvious moral mandate, Nelson Mandela clearly saw the importance of children’s rights to a successful society. Mandela, a tireless advocate for unity in his country, recognized that if the children of his country were not treated equally nor provided protection under the law, the society he hoped for could not be built in South Africa. Mandela served as president of South Africa from 1994 to 1999. Since the very beginning of his presidency, there developed in that country a growing movement committed to children’s rights.³ The movement recognized that children are among the most vulnerable members of South African society.⁴ During the early years of the Mandela presidency, the government of South Africa began a review of the laws governing the treatment of children in various contexts—including divorce, paternity and child protection.⁵ South Africa’s Children’s Act of 2005 is the culmination of this review.⁶

This comprehensive piece of legislation, designed to protect children, emerged from the meeting of three separate currents in South African society. The first current was the socio-economic conditions brought about by the policies of segregation and apartheid. Those official government

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1. NELSON MANDELA, *LONG WALK TO FREEDOM* 3 (1995).

2. *Id.* at 382.

3. Briefing from S. Afr. Dep’t of Justice & Constitutional Dev. to U.S. People to People Delegation 7 (Oct. 7, 2009) (on file with author) [hereinafter Briefing to People to People Delegation].

4. *Id.*

5. *Id.* at 15.

6. *See Id.*

policies brought hardship and misery to the lives of many South African children. The second was the Roman–Dutch legal system—brought to the country during the colonial period and developed throughout the legal history of the country. As it developed post–independence, the legal system began to express the ideal that children’s interests were to be protected. While not always realized in practice, the courts were at least expressing those ideals in their legal opinions. The third current was the impact on South Africa of international conventions and declarations from transnational organizations. Throughout the Twentieth Century and into the Twenty–First, various international agreements came into existence whose main focus was to advance the cause of children. South Africa frequently signed on to those child-centered accords. As a result, South Africa created for itself a number of obligations that needed to be fulfilled domestically.

This Article will focus on the Children’s Act of South Africa in an effort to learn how well it serves the ideals of Mandela and the children of that nation. This analysis will occur in five parts. First, the socio–economic history of the children of South Africa will be discussed. Not simply the plight of children under apartheid, but a discussion of where they were before apartheid and where they have been since its fall. Second, an examination of the legal system’s development in South Africa will occur. Specifically, the history of children under the law of South Africa will be discussed. Third, an analysis will take place concerning some of the international efforts to help children and where South Africa fits in those efforts. Fourth, this analysis will briefly review the Children’s Act and how its provisions are designed to protect children; finally, a reflection on the Act will be offered from an American perspective.

I. THE SOCIO-ECONOMIC HISTORY OF THE CHILDREN OF SOUTH AFRICA

A. Pre–Colonial Period

An inherent problem with textbooks used in schools is that they often begin a discussion of a former colony’s history at a time when the first Europeans arrived. The country of South Africa is no different.⁷ As with many former colonies, however, such a beginning for South Africa is simply incorrect. In fact, modern man’s history in South Africa’s is quite ancient. Hominids originated in South Africa approximately three million years ago.⁸ Around one million years ago homo erectus replaced those first hominids.⁹ Notably, “[t]he earliest fossils . . . [found] anywhere in the

7. See MANDELA, *supra* note 1, at 24 (noting that the standard South African text books claim the history of South Africa “began with the landing of Jan Van Riebeck at the Cape of Good Hope in 1652.”).

8. See LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 6 (3d ed. 2001).

9. READER’S DIGEST, *Illustrated History of South Africa: The Real Story* 19 (Dougie Oakes ed., 3d ed. 1995).

world[, which] some physical anthropologists attribute to modern Homo sapiens[,] come from [the] Klasies River mouth in . . . eastern Cape Province on the Natal-Swaziland border.”¹⁰ They are dated to 50,000 years old.¹¹ “By the beginning of the Christian era, human communities [of hunter gatherers] had lived in South[] Africa . . . for . . . thousands of years.”¹² “The basic social [structure of these hunter gathers] was the nuclear family, but several families usually [grouped themselves into larger] bands”¹³ People from the various bands would often intermarry.¹⁴ These early human communities in southern Africa were the ancestors of the Bushman culture, groups of indigenous hunter gatherers who were still present in South Africa when the first Europeans arrived.¹⁵ Although exact dates are uncertain, pastoralism eventually arrived in South Africa.¹⁶ That arrival could have been as early as 2,500 years ago and probably came from immigrants from the north.¹⁷ These pastoralist Bushmen became known as Khoikhoi (men of men) as opposed to the hunter–gatherer Bushmen which became known as San.¹⁸ Eventually, these two groups intermarried and their descendants became known as “Khoisan.”¹⁹

Early in the Christian era, Bantu speaking people began arriving in South Africa from the north.²⁰ “Between the fourth century . . . and the . . . eighteenth century [of the Christian era], Bantu speaking [hunter gathers] . . . ” were building successful communities in eastern South Africa.²¹ While there is certainly evidence that some Bantu speakers intermarried with the Khoisan, it is specifically the “Bantu–speaking . . . [peoples]” who are “the ancestors of the majority of . . . [modern South Africans].”²² Many of the currently existing South African tribes trace their origins to these people—including the Zulu, Xhosa, Swazi, and many more.²³ These are just some of the aboriginal tribal groupings that the Europeans encountered when they arrived on the South African cape and moved inland.

10. THOMPSON, *supra* note 8, at 6.

11. *Id.*

12. *Id.*

13. *Id.* at 7.

14. *See id.*

15. THOMPSON, *supra* note 8, at 6.

16. *Id.* at 11–12.

17. *Id.* at 12.

18. READER’S DIGEST, *supra* note 9, at 20–21.

19. HISTORY OF SOUTHERN AFRICA 21 (2003).

20. *Id.* at 26.

21. THOMPSON, *supra* note 8, at 15–16.

22. *Id.* at 10.

23. HISTORY OF SOUTHERN AFRICA, *supra* note 19, at 26 (“Bantu–speakers who came to South[] Africa included two main groups: the Nguni, who today include the Swazi, Xhosa, and Zulu, and the Tswana–Sotho, the ancestors of today’s people of Botswana and Lesotho.”).

Although they had not yet experienced the influx of European colonialism, the indigenous people of South Africa had experienced the arrival of new settlers from the northern part of Africa. Indeed, conditions for children in such tribal societies is not ideal, yet the arrival of European colonialism was going to have a much more profound impact on the people in southern Africa and, therefore, on the children of southern Africa.

B. Colonial Period

It was not until the late fifteenth century that this European encounter occurred. The first European to round the Cape of Good Hope was the Portuguese mariner, Bartholomew Dias in 1487.²⁴ He anchored briefly in Mossel Bay, which is approximately 170 miles further east than the cape.²⁵ He went “another 170 miles along the [southern] coast [of Africa] to Algoa bay before [turning around and] returning to [Portugal].”²⁶ It was left to another Portuguese sailor, Vasco De Gama, to round the Cape and travel up the eastern coast of Africa to Mombasa in modern Kenya.²⁷ Although the Portuguese were the first Europeans to pass by the southern tip of Africa, it would be the Dutch who came to stay. In 1652, the Dutch East India Company set up a service station in South Africa to provide supplies and rest to Dutch merchants trading in the east.²⁸ The first commander in charge of the company on the Cape was Jan van Riebeeck.²⁹ He had been instructed to build a fort and supply the Dutch fleets with food and drink as they passed back and forth around the Cape.³⁰ The Dutch had no intention of creating a permanent settlement there, but simply needed a stopover point for the fleet on its way to the eastern empire of the Netherlands.³¹ However, after a few years the colony began to acquire an evident level of autonomy.

In 1657 the company released nine of its employees from their employment contracts and gave them land just south of Table Bay.³² The purpose of this move was to have them grow crops and sell them back to the company at fixed prices.³³ “In the years that followed, the company [released] more [employees] on similar [terms].”³⁴ It also brought immigrants into the area and allowed them to create their own settlements.³⁵

24. THOMPSON, *supra* note 8, at 31.

25. *Id.*

26. *Id.*

27. *Id.* at 1.

28. *Id.* at 32–33.

29. THOMPSON, *supra* note 8, at 33.

30. *Id.* at 32.

31. *Id.* at 33.

32. *Id.* at 33–35.

33. *Id.* at 35.

34. THOMPSON, *supra* note 8, at 35.

35. *Id.*

By 1793 the company records reflected that 4,032 men, 2,730 women and 7,068 children were living in that colony.³⁶

It should come as no surprise that Europeans taking over land in southern Africa caused displacement of the people who already lived there—and that such displacement caused tension between the Europeans and indigenous communities. The Europeans gave the local pastoralists the option of withdrawing from the land they lived on—which had abundant fresh water and rich soil—or serving the Dutch.³⁷ Clearly these were not attractive options for people who had lived on the land for generations. The Dutch also started importing black slaves from other parts of Africa in order to help develop the infrastructure of the colony.³⁸ “By the time van Riebeeck [handed command] over . . . to his successor in 1662, the colony had become a . . . racially stratified society.”³⁹

During the time that the Dutch East India Company controlled the Cape, the “white [settlers] and their diseases [wiped out] most of the . . . [Khoisan people] . . . in . . . western . . . South [] Africa.”⁴⁰ “White people did not [start moving into] the eastern part of [S]outh[] Africa . . . until the late eighteenth century.”⁴¹ The British gained control of the Cape Colony in 1795 and, after briefly surrendering it back to the Dutch, they came to stay in 1806.⁴² As with the Dutch, the British viewed the Cape as merely a stopover point on the way to Asia.⁴³ What they did not realize was that they had inherited a very complex and racially structured society. Racial conflict continued not only between whites and blacks, but also between whites of Dutch origins who called themselves Afrikaners, and whites of British or other European origin.⁴⁴ The British rule lasted for slightly more than one hundred years. The South African War, known as the Boer War to the British, began in 1899.⁴⁵ While the war came to a successful military conclusion for the British in 1902,⁴⁶ the turmoil that it left in its wake continued until 1910 when Great Britain granted sovereignty to the Union of South Africa.⁴⁷ It was a “British dominion with [a prime minister of its own and] a population [consisting] of [four] million Africans, 500,000 [coloreds], 150,000 Indians and [1.2 million] [w]hites.”⁴⁸

36. *Id.*

37. *Id.* at 33.

38. *Id.*

39. THOMPSON, *supra* note 8, at 33.

40. *Id.* at 70.

41. *Id.*

42. *Id.* at 52.

43. *Id.* at 52-53.

44. THOMPSON, *supra* note 8, at 53-56.

45. *Id.* at 141.

46. *Id.* at 143.

47. *Id.* at 152-53.

48. *Id.* at 153.

The years prior to independence had been difficult on South African children of all races. The children of indigenous peoples were displaced and destroyed by war and diseases just like their parents. While perhaps to a lesser degree, a similar fate awaited children of white settlers during this colonial period. During the Boer Wars alone, nearly 28,000 Afrikaners—most of them children—died of various diseases including dysentery and measles.⁴⁹ While the situation for white children was destined to improve in the immediate aftermath of independence, the situation for black children would not see improvement for quite some time.

C. Post-Independence and Segregation

The era between independence in 1910 and the beginning of Apartheid in 1948 was characterized by increasing segregation between the races.⁵⁰ “[T]he white population consolidated its control over the [government and] strengthen[ed] its grip on the black population”⁵¹ Black people were being turned into manual laborers working in the fields, the mines, and in the factories.⁵² Black farmers were moved off of their land or turned into renters and sharecroppers.⁵³ During this period in time, black South Africans adopted many strategies for dealing with their situation. In an effort to simply survive day-to-day, many black men would leave their homes for long stretches of time simply to obtain employment.⁵⁴ This left the women at home to maintain the integrity of the community and raise the children.⁵⁵ During this period, “[o]ver one-fifth of the children [of black South Africans] died within their first year of life.”⁵⁶ Fewer than thirty percent of those children were receiving any formal education.⁵⁷

The basis for future trouble in the black community was also laid during this period. As a result of men leaving their homes for long periods of time, black children were victimized by broken families. Fathers were absent and mothers were overextended. These problems would be compounded as the government tightened its grip in the apartheid era. The black community—the largest in the country—was seeing its most basic social structures undermined by government policies.

49. THOMPSON, *supra* note 8, at 143.

50. *Id.* at 154–86.

51. *Id.* at 154.

52. *Id.* at 155.

53. *See id.*

54. THOMPSON, *supra* note 8, at 155–56.

55. *Id.* at 171–72 (noting that labor migration disrupted African families causing women to “assume responsibilities [as] household heads [which had] previously [been] reserved to men”).

56. *Id.* at 164.

57. *Id.*

D. Apartheid Era

In 1948 the National Party came to power in South Africa's parliamentary elections. That electoral victory signaled the dawn of a more strident segregation policy. The National Party was a right-wing party that had opposed South Africa's involvement in World War II on the side of the Allies.⁵⁸ Rather, they had urged South Africa's wartime government to join the war on the side of Germany.⁵⁹ Their rise to power in 1948 was the death knell for any future peaceful transition to majority rule. The legislation passed by the National Party parliament "extended the . . . laws of the segregationist era and tightened...the administration of those laws."⁶⁰ Through a series of prime ministers from 1948 until the early 1990's, the National Party government continued a policy of legalized oppression and marginalization of black and colored South Africans.⁶¹ This policy came to be known as apartheid and touched the lives of all South Africans—regardless of race.

While such policies impacted all members of society, it invariably had the most negative impact on black and colored individuals and their children. Children were hit especially hard by apartheid. One commentator noted:

If there is a group in South Africa which has consistently had their rights denied it is our children and in particular black children. From conception the black child's life is characterized by hunger and malnutrition, insecurity and trauma, instability, family breakdown and dislocation of communities, a lack of primary health care and educational opportunities; and the absence of adequate housing, electricity, running water and sanitation.⁶²

To understand the precarious position of black children during apartheid, it is helpful to look at four basic problem areas: mortality rates, poverty, quality of education and violence.

Mortality rates among black children were more than five times higher than among whites.⁶³ By the time apartheid ended, twenty-three out of every one thousand white children died in their first year of life.⁶⁴ For black children the story was quite different. In the first year of life, 140 out of every one thousand black children died.⁶⁵ The most common causes of

58. MANDELA, *supra* note 1, at 110.

59. *Id.*

60. THOMPSON, *supra* note 8, at 189.

61. *Id.* at 187–220.

62. ERIC ATMORE, APARTHEID AND SOUTH AFRICA'S CHILDREN 1–2 (1992), available at <http://www.eric.ed.gov/PDFS/ED365441.pdf>.

63. *Id.* at 3.

64. *Id.*

65. *Id.*

child death in the black and colored communities were “gastro–enteritis, measles and tuberculosis, which were caused in large measure by the poor socio–economic conditions under which these children had to live.”⁶⁶

In the black and colored communities, apartheid also left a legacy of hunger and disease associated with malnutrition.⁶⁷ One commentator noted:

Approximately a third of black, coloured and Asian children below the age of 14 years are underweight and stunted for their age. In some areas, e.g. in parts of the Ciskei and Chatsworth in Durban, the situation is worse, (rising to 60 – 70% or more).⁶⁸

This level of poverty, deeply rooted in the black and colored communities, would have understandably left scars on these segments of society.

Apartheid also caused an educational crisis among the black and colored people of South Africa. The educational system reflected the deeply racist policies of apartheid. One commentator noted that by the time apartheid ended, for every one hundred black children entering the first grade only seventy–nine passed to the second grade.⁶⁹ Only forty–nine percent passed to the seventh grade.⁷⁰ For whites there was a stark contrast. Fully ninety–eight percent of all white children completed twelve years of education by the time apartheid ended.⁷¹ By the fall of apartheid there was also a substantial difference in the per capita spending on education for blacks and whites. South Africa spent R3,739.00 on education for whites and R930.00 on education for blacks.⁷² Not only are these figures disturbing, but they also have a long–term impact on the ability of blacks to increase their earning capacity and be successful in running a representative democracy.

Violence against children was not uncommon. “In 1987 . . . the International Commission of Jurists sent four Western European lawyers to South Africa.”⁷³ In their report, they noted that “an undemocratic government has extended the executive power of the state so as to undermine the rule of law and destroy basic human rights We stress particularly the widespread use of torture and violence, even against children, which is habitually denied by the government and thus goes unpunished, though plainly illegal.”⁷⁴ One can only speculate about the

66. *Id.* at 5.

67. *Id.*

68. ATMORE, *supra* note 62, at 5 (citing John Hansen, *Food and Nutrition Policy With Relation to Poverty: The Child Malnutrition Problem in South Africa* 7, Carnegie Conf. Paper, No. 205 SALDRU, University of Cape Town, 1984).

69. *Id.* at 4.

70. *Id.*

71. *Id.* at 3.

72. *Id.*

73. THOMPSON, *supra* note 8, at 236.

74. *Id.*

long-term impact on a society of a government that chose to inflict such widespread violence upon its children. According to one commentator, “children may be socialized into vandalism or find themselves having to adopt violent measures as a matter of survival and, in the process, losing any sense of right and wrong. The impact on children’s minds and values of the physical violence that they witness and experience, not least at the hands of the police, is a matter of grave concern.”⁷⁵

One event that brings to light the tragic impact apartheid had on the black children of South Africa was the Soweto uprising and the events that led to it. It brought together the legal and social oppression black children experienced at the time with the sheer violence that was perpetrated on them by the government. In 1976, an uprising of school children began in the Soweto Township in response to the government’s policy that black secondary school children in urban areas should all be taught in the country’s two official languages: Afrikaans and English.⁷⁶ In Soweto there were not enough teachers that spoke Afrikaans—so the English language was predominant.⁷⁷ Yet, the education department decided to enforce the policy anyway and required that social studies and mathematics be taught in Afrikaans regardless of whether or not a sufficient number of teachers were available.⁷⁸ At the same time the education department made that decision, the government abolished the final year of primary school for black students—reducing the number of years required for primary school completion from thirteen to twelve.⁷⁹ The action resulted in a merger of senior primary school classes with junior secondary school classes.⁸⁰ Overcrowding issues arose,⁸¹ and on June 16, 1976 a student protest erupted.⁸² Fifteen thousand school children gathered in Soweto to protest these policies and the impact those policies would have on their education.⁸³ The students did not want “to learn and the teachers did not want to teach in the language of the oppressors.”⁸⁴ The police confronted this group of school children and opened fire without warning.⁸⁵ The children fought back with sticks and stones.⁸⁶ Hundreds of children were injured, two white men were stoned to death and a black boy named Hector Pieterse lost his life

75. *Id.* at 201-02.

76. JOHN ALLEN, RABBLE-ROUSER FOR PEACE 156 (2006).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. JOHN ALLEN, RABBLE-ROUSER FOR PEACE 156 (2006).

82. MANDELA, *supra* note 1, at 483.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

from the bullet of a police officer.⁸⁷ Hector Pieteron became one more symbol for the victimization of blacks by the white minority.⁸⁸

It was events like this that brought the attention of the world to South Africa and ultimately caused many members of the international community to push for economic sanctions against the government of South Africa.⁸⁹ On February 11, 1990 Nelson Mandela was released from incarceration—the culmination of the efforts of many people.⁹⁰ Shortly thereafter, discussions got underway that would eventually lead to an interim constitution and a full participatory democracy.⁹¹ In April 1994 a nationwide election was held and Mandela was elected as the first president of a fully democratic South Africa.⁹² Work was then begun on a new constitution, which was to follow closely the various provisions set out in the interim constitution.⁹³

While it seemed as if the democratic elections in South Africa had finally delivered the country from the evils of apartheid, it was the results of apartheid policies that South Africans in the immediate post-apartheid era would still have to deal with. The newly elected government would have to deal with a population wherein a large segment was poorly fed. A similarly large portion had poor health care. The population was frightened by violence that was often times state sponsored, and also the majority of South Africans were illiterate.

E. Post-Apartheid Era

Against this backdrop of abuse and neglect of South Africa's children by the apartheid government, the democratically elected government of South Africa made significant commitments to the welfare of children. The commitment to change this socio-economic dislocation of children started with a constitution that contained a bill of rights expressly recognizing

87. MANDELA, *supra* note 1, at 483.

88. Proof of this symbolism can be seen in the Hector Pieteron memorial just a short distance away from the site where he was killed. Included are a stone monument, photographs and a plaque in Hector's honor. Next to this monument is the Hector Pieteron Museum, which is dedicated to the events of those days.

89. ALLEN, *supra* note 76, at 177–79.

90. *Id.* at 313-17 (noting that after Mandela's release from imprisonment, Arch Bishop Desmond Tutu, quoting God's promise of liberty to Moses, wrote the following to Anglicans in Cape Town: "The road ahead may be long and hazardous but at long last it seems that what so many have prayed and fasted for, sacrificed and died for, were imprisoned, banned and went into exile for [it]...seems more attainable than ever before.").

91. MANDELA, *supra* note 1, at 594. On December 20, 1991, the first formal negotiations occurred between the government, the African National Congress and other South African parties. *Id.* The Convention for a Democratic South Africa, known as CODESA, had as one of its goals the writing of a new constitution. *Id.* at 594–95.

92. THOMPSON, *supra* note 8, at 263–64.

93. *Id.* at 269.

political and social rights for children.⁹⁴ In fact, South Africa's Constitution was "the first in the world to make an express commitment to children's socio-economic rights."⁹⁵ It included not only the classic civil and political rights contained in the United States Bill of Rights, but also substantive economic and social rights. These rights included *inter alia*—basic nutrition, shelter and basic health care services.⁹⁶

Despite this substantial legal commitment made to children, the reality for South African children was something less. In 2001—five years after the constitution was adopted—there were over nineteen million children in South Africa.⁹⁷ At that time, "the most significant challenges facing children were poverty,⁹⁸ child abuse and violence,⁹⁹ HIV/AIDS,¹⁰⁰ and a lack of access to services."¹⁰¹ In the year 2000, many of South Africa's children reported being denied access to basic education because they could not afford to pay school fees or purchase school uniforms.¹⁰² In the same year, over 1.2 million children of school age were not attending school.¹⁰³ The reasons related mostly to poverty in their homes.¹⁰⁴ Violence in schools was also a problem—especially for girls.¹⁰⁵

While the new Constitution and its Bill of Rights were designed to protect children from such social ills, the problem was that the economic realities of the country made it difficult to enforce those rights under law. For example, one "clause . . . gave children the right to security, rudimentary nutrition, and basic health services."¹⁰⁶ Yet, the government was ill equipped financially to ensure those services were provided.¹⁰⁷

94. S. AFR. CONST. ch. 2, 1996.

95. UNITED NATIONS CHILDREN'S FUND [UNICEF], REFORMING CHILD LAW IN SOUTH AFRICA: BUDGETING AND IMPLEMENTATION PLANNING 33 (2007) available at http://www.unicef.org/southafrica/SAF_resources_qachildsupport.pdf [hereinafter REFORMING CHILD LAW IN SOUTH AFRICA].

96. S. AFR. CONST. ch. 2, § 28 (1), 1996.

97. CHILDREN'S INSTITUTE UNIVERSITY OF CAPE TOWN, RAPID ASSESSMENT: THE SITUATION OF CHILDREN IN SOUTH AFRICA 4 (2003) [hereinafter RAPID ASSESSMENT].

98. *Id.* (Three out of every four children in South Africa live in Poverty, and thirty percent of the country's total population experiencing food uncertainty.).

99. *Id.* In the year 2000 there were over 72,000 crimes committed against children; the most common type of crime was common and aggravated assault, and the second most common type of crime was sexual crimes—rape being the most prevalent. *Id.* at 5.

100. *Id.* at 4. The infant mortality rate due to HIV/AIDS continues to increase among South Africans under five years of age. *See Id.* at 5.

101. RAPID ASSESSMENT, *supra* note 97, at 4.

102. *Id.* at 5.

103. *Id.*

104. *Id.*

105. *Id.*

106. THOMPSON, *supra* note 8, at 257.

107. Briefing from Bianca Robertson – Community Law Centre, Univ. of the W. Cape to U.S. People to People Delegation (October 12, 2009) (noting that one of the key challenges in implementing the services required under the South African Children's Act is

F. The Socio-Economic Impact of South African History

As one of the three currents leading to the passage of South Africa's Children's Act, the impact of socio-economic forces on the lives of South Africa's children really is self-evident. The majority of children in this society found themselves in such difficult straights that—in a society striving to rejoin the world community—the problem could hardly be ignored. South Africa was a land that saw the earliest human beings emerge from the jungle. Yet, from the arrival of Europeans to the departure of the National Party from the political scene in South Africa, society was increasingly polarized and resources unevenly divided. It started with dislocations resulting from the settler's need for quality land and—over a period of 340 years—resulted in the injustices of apartheid.

II. CHILDREN AND THE ROMAN-DUTCH HERITAGE IN SOUTH AFRICAN LAW

The legal system in South Africa is a direct reflection of the changing colonial rule that South Africans experienced. It is, in a very real sense, several different legal systems layered on top of each other to form a complete whole. The first layer was already present when Europeans arrived in South Africa. That is, the indigenous people already had their own form of conflict resolution and methods of fostering the success of children. Those forms of conflict resolution continued even after Europeans arrived with their systems of law. The continued struggle between these various systems has been a trademark of the South African legal system and has had a clear impact on the treatment of South African children.

In African pre-colonial societies, the head of the clan was often the one who dispensed justice and resolved conflict between disputing members.¹⁰⁸ This form of individual justice would likely include disputes about care of children and possession of children if the parents were unable to care for them. Yet the resolution of these types of disputes did not focus so much on the interests of the child as an individual, but on the family as a whole.¹⁰⁹ The overall care and welfare of children in these tribal communities belonged to the tribe as a whole.¹¹⁰ These traditions were generally oral traditions—as there was no particular need for a written standard protecting

that the need for services far outweighs the capacity of the state to respond financially) (on file with author).

108. READER'S DIGEST, *supra* note 9, at 24–25 (stating that although the word 'chief' often implies an autocratic ruler, this was seldom the case in Khoikhoi society. The Chief was assisted by a council of clan heads in dealing with matters such as interclan disputes and relations with other groups. Individual justice was normally dealt with at a gathering of all the males of a particular clan).

109. CHILD LAW IN SOUTH AFRICA 227 (Trynie Boezaart ed., 2009) [hereinafter CHILD LAW].

110. See T. W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 295 (2004).

the welfare of children, because it was tended to by all members of the family or tribe.¹¹¹ This traditional system of resolving conflict and settling family matters continues even to this day. In South Africa, these traditional systems are known as “customary law.”¹¹² African customary law has been defined as “those rules of conduct which the persons living in a particular locality have come to recognize as governing them in their relationships between one another and between themselves and things.”¹¹³ “Customary law derives from social practices that the community concerned accepts as obligatory.”¹¹⁴ The European legal systems that were brought to South Africa were essentially layered on top of the customary law. The current South African Constitution specifically protects customary law and requires the courts to enforce customary law as long as it is not inconsistent with the Constitution.¹¹⁵

As the Dutch started to form colonies on the cape, they brought with them the Roman–Dutch legal system.¹¹⁶ The Dutch legal system traces its roots to the old Roman legal system.¹¹⁷ At the time the Dutch arrived on the cape, that legal system viewed the father as the primary protector of a child’s welfare.¹¹⁸ Thus, a father’s interests in and rights to a child were superior to the mother’s rights.¹¹⁹ The application of this principle was usually seen in the context of custody cases in divorce.¹²⁰ The British also brought with them their common law system.¹²¹ Under the English system that came with the British in 1795, the Roman–Dutch law remained the basic common law in South Africa.¹²² Regarding issues of child welfare, the position of the English common law was similar to the Roman–Dutch system. That is, the father’s rights were superior to the rights of the

111. See BENNETT, *supra* note 110 at 2 (noting that customary law was unwritten and uncodified). See also T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 61–62 (1995) (noting that in some regions of Africa, attempts were made by colonial governments to codify customary law).

112. Allison D. Kent, Note, *Custody, Maintenance, and Succession: The Internalization of Women’s and Children’s Rights Under Customary Law in Africa*, 28 MICH. J. INT’L L. 507, 513 (2007).

113. *Id.* (citing A.A. KOLAJO, CUSTOMARY LAW IN NIGERIA THROUGH THE CASES 1 (2000)).

114. BENNETT, *supra* note 110, at 1.

115. S. AFR. CONST. ch. 12, 1996.

116. Johanna Margaretha Kruger, *Judicial Interference With Parental Authority: A Comparative Analysis of Child Protection Measures* (Nov. 2003) (unpublished L.L.D. thesis), available at <http://uir.unisa.ac.za/dspace/handle/10500/2545>.

117. *Id.* at 47.

118. *Id.* at 56–57.

119. *Id.*

120. Hans Visser, *Some Ideas on the “Best Interests of a Child” Principle in the Context of Public Schooling*, J. CONTEMP. ROMAN DUTCH L. 459 (2007).

121. Kruger, *supra* note 116, at 56.

122. *Id.*

mother.¹²³ Children were viewed as the property of the father, and the best interests of the child were irrelevant to any discussion custody cases.¹²⁴ In deferring to a father's superior position in raising children, one court noted that a "father knows far better as a rule what is good for his children than a Court of Justice."¹²⁵ According to one commentator,¹²⁶ the 1892 case of *Van Rooyen v Wemer*¹²⁷ accurately summarized the Roman–Dutch rule prevailing in South Africa:

Firstly, as to the father, he is the natural guardian of his legitimate children until they attain majority. During his lifetime he alone may appoint tutors to take his place after his death, during his children's minority . . . He alone is entitled to their custody, has control over their education, and can consent to their marriage. On the other hand he is bound to maintain them until they can maintain themselves. He no longer enjoys a life interest in any part of their property, but where they have means of their own, derived either from their own earnings, or other-wise, he can recoup himself for his expenses of maintenance out of such means. He has the right to administer their property, but he may lose this right by allowing them to live apart from him, and openly to exercise some trade or calling. Until they have thus been virtually emancipated, or until they become majors, either by marriage, or by attaining the age of twenty-one years, he has the management of their property, except such property as has been left to them by others and placed under a different administration.¹²⁸

Near the end of British colonial rule, however, the prevailing view of children as the property of a father started to change. Several South African appellate court cases demonstrate this shift. In the 1907 case of *Cronje v Cronje*,¹²⁹ the custody of three children was at issue.¹³⁰ The children were ages fourteen, ten, and eight years.¹³¹ The court found that the mother was living in an adulterous relationship, but also that the father was not mentally healthy and likely unable to care for the children.¹³² The court opined that "[t]he father, as the natural guardian of the children, is by law entitled to their custody; but that, of course, is subject to any order the Court may make."¹³³ It went on to note that "[i]n all cases the main consideration for

123. Muthucumaraswamy Sornarajah, *Parental Custody: The Recent Trends*, 90 S. AFR. L.J. 131 (1973) [hereinafter *Parental Custody*].

124. Nancy Voigt Wedemeyer, *Child Custody: A Central Issue*, in DIVORCED FATHERS: RECONSTRUCTING A QUALITY LIFE 105, 106 (1984).

125. *In re Agar–Ellis*, [1883] Ch.D. 317 at 338 (Eng.).

126. Kruger, *supra* note 116, at 56–57.

127. (1892) 9 SC 425.

128. *Id.* at 428.

129. *See Cronje v. Cronje* 1907 TS 871 (S. Afr.).

130. *Id.* at 871.

131. *Id.*

132. *Id.* at 873–74.

133. *Id.* at 872.

the court in making an order with regard to the custody of the children is, what is best in the interests of the children themselves.”¹³⁴ The court noted that the best interest of the child is the main consideration in South African law as well as in English law.¹³⁵ Another case arising near the end of British rule, *Tabb v Tabb*,¹³⁶ involved a post-divorce custody matter.¹³⁷ The court started out by recognizing the principle that “[b]y our law a father is the natural guardian of his children, and therefore *prima facie* entitled to their custody.”¹³⁸ Yet, in contrast to this long held principle, the court went on to indicate that:

No doubt it is as a general rule best that children of tender years should be left under the care of their mother; because her love induces her to give that personal attention and supervision to their physical and moral welfare which a mother can most effectively supply. And therefore courts often give the custody of children to mothers who have been found guilty of matrimonial offences, provided that their character is not such as to make it prejudicial to the moral welfare of the children that they should remain with them.¹³⁹

In the end, the court in *Tabb* did not affirm the trial court’s awarding of child custody to the mother because her employment prevented her from being fully attentive to the child’s needs.¹⁴⁰ Yet it is a clear indication that the legal preference for the father was changing—to one in which children of “tender years” were more likely to end up living with the mother. Finally, *Kramarski v Kramarski*,¹⁴¹ was a 1906 case involving the custody of three children ages seven, six, and three.¹⁴² The wife left her husband, taking the three children with her.¹⁴³ She went to live with her three brothers.¹⁴⁴ The husband filed suit against the brothers and his wife alleging that he had been wrongfully prevented from having access to his wife and his children.¹⁴⁵ In discussing custody of the children, the appellate court first noted that “[p]*rima facie* a husband is always entitled to the care and custody of his children, even though the marriage was celebrated out of this country.”¹⁴⁶ However, the court went on to state as follows:

134. *Id.*

135. *Cronje*, 1907 TS at 873–74.

136. 1909 TS 1033 (S. Afr.).

137. *Id.* at 1034.

138. *Id.*

139. *Id.*

140. *Id.* at 1036.

141. 1906 TS 937 (S. Afr.).

142. *Id.* at 937.

143. *Id.* at 938–39.

144. *Id.*

145. *Id.* at 939.

146. *Id.* at 941.

In the present case the children are of tender years—there is no question of that. *Prima facie*, therefore, as the Court has more than once laid down, it is better for children of tender years to be under the care of the mother, especially where the mother has a home, as she has in this case with her brothers, and the father has no fixed abode.¹⁴⁷

All three of these cases signaled a shift in the South African legal system away from a father-oriented approach. However, it would not be until after independence that a transformation to a “best interests” standard would be complete.

Despite the changes signaled by *Cronje*, *Tabb*, and *Kramarski*, the Roman-Dutch principle that fathers had superior rights when it came to children remained intact after independence. In the 1939 case of *Calitz v Calitz*,¹⁴⁸ the appellate court of South Africa expressed the current position in South Africa as follows:

Although the *patria potestas*¹⁴⁹ of the Roman law was not recognized in the Roman-Dutch law and the parental power belongs to the mother as well as the father, there is no doubt that under our law, at any rate as it exists today in the Union, the rights of the father are superior to those of the mother.¹⁵⁰

It was not until *Fletcher v Fletcher*¹⁵¹ that a definite departure can be seen from the Roman-Dutch law.¹⁵² The *Fletcher* case was a divorce matter pled upon the basis of adultery by the wife.¹⁵³ There were two children, ages seven and five.¹⁵⁴ The trial court had awarded custody of the children to the father.¹⁵⁵ In affirming the trial court’s award of custody to the father, the

147. Kramarski, 1906 TS at 941–42.

148. 1939 AD 56.

149. *Patria potestas* is a term from the Roman law meaning “parental authority.” BLACK’S LAW DICTIONARY 1014 (5th ed. 1979) (stating that this term “denotes the aggregate of those peculiar powers and rights which, by the civil law of Rome, belonged to the head of a family in respect to his wife, children (natural or adopted), and any remote descendants who sprang from him through males only.”).

150. See *Calitz*, 1939 AD at 61. (Despite this overarching principle favoring fathers, the *Calitz* court also recognized that the principles favoring the father over the mother could be overcome by proof that the physical or moral well-being of the child would be endangered if custody were to be given to the father.)

151. 1948 (1) SA 130 (A) (S. Afr.) [hereinafter *Fletcher*].

152. See Sornarajah, *supra* note 123, at 136 (noting that the case of *Fletcher v. Fletcher* “marks a definite departure from the Roman-Dutch law”).

153. *Fletcher*, *supra* note 151, at 141.

154. *Id.*

155. *Id.* at 142–43.

appellate court finally recognized the rule that in custody matters, “the children’s interests must undoubtedly be the main consideration.”¹⁵⁶

In this family court realm, the apartheid government of South Africa continued the transformation of the standard governing custody of children. In 1953, the Matrimonial Affairs Act was enacted.¹⁵⁷ That law stated, *inter alia*,

Any provincial or local division of the Supreme Court or any judge thereof may –

(a) on the application of either parent of a minor in proceedings for divorce or judicial separation in which an order for divorce or judicial separation is granted; or

(b) on the application of either parent of a minor whose parents are divorced or are living apart, if it is proved that it would be in the interests of the minor to do so, grant to either parent the sole guardianship . . . or sole custody of the minor¹⁵⁸

This act clearly resolved any further dispute about the appropriate standard to be applied in custody cases in the context of a divorce. Thus, the South African parliament put an end to the Roman–Dutch standard of paternal preference and required courts to look at the child’s interests.

As the apartheid era came to an end, a new Constitution was written to guide the affairs of the democratically elected government.¹⁵⁹ The Constitution contained a bill of rights modeled after various other constitutions from around the world. In a very strong statement on behalf of children, the people of South Africa included in their Constitution a bill of rights that contained specific provisions for the protection of children and advancement of their rights.¹⁶⁰ Those specific Constitutional provisions on behalf of children have been “hailed internationally as a good example of a Constitution providing for the protection and advancement of children’s rights.”¹⁶¹

As a general principle, the Constitution guaranteed that “[a] child’s best interests are of paramount importance in every matter concerning the child.”¹⁶² But the Constitution did not stop there. A complete list of substantive rights afforded to South African children was also

156. *Id.* at 134. See also Sornarajah, *supra* note 123, at 136 (noting that “until 1948, the year of the decision in *Fletcher v. Fletcher*, it could not with certainty be said whether there was one rule governing all custody problems”).

157. See *Parental Custody*, *supra* note 123, at 137.

158. *Id.* (quoting §5(1) of the Matrimonial Affairs Act 1953).

159. See generally S. AFR. CONST., 1996.

160. See *infra* notes 163-167 and accompanying text.

161. CHILD LAW, *supra* note 109, at 265.

162. S. AFR. CONST. ch. 2, § 28(2), 1996.

enumerated.¹⁶³ Other rights were also provided to children by implication. That is, all South Africans were guaranteed the right to “a basic education.”¹⁶⁴ They were also guaranteed the right to have access to health care services¹⁶⁵ and sufficient food and water.¹⁶⁶ By implication, children are protected under those provisions by virtue of their citizenship in South Africa.¹⁶⁷

163. *Id.* Under the South African Constitution of 1996, every child has the right:

- (a) To a name and a nationality from birth;
- (b) To family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) To basic nutrition, shelter, basic health care services and social services;
- (d) To be protected from maltreatment, neglect abuse or degradation;
- (e) To be protected from exploitative labour practices;
- (f) Not to be required or permitted to perform work or provide services that –
 - (i) Are inappropriate for a person of that child’s age; or
 - (ii) Place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
- (g) Not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child’s age;
- (h) To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- (i) Not to be used directly in armed conflict, and to be protected in times of armed conflict.

Id. §§ 28(1)(a)–(i).

164. S. AFR. CONST. ch. 2, § 29, 1996.

165. *Id.* § 27(1)(a).

166. *Id.* § 27(1)(b).

167. The basis for including such substantive rights in the South African Constitution can be seen from some of the legislative history of the document:

The struggle for democracy in South Africa was not limited to claims for political rights. It included claims for social and economic rights such as land, housing and education. As such, social and economic rights were always recognized as human rights. To deny the acceptance of these rights as full human rights in the final constitution means that the text will not reflect the aspirations and values of the majority of the population.

Submission of the Ad-Hoc Committee for the Campaign for Social and Economic Rights to the Theme Committee on Fundamental Rights 1 (April 1995) (S. Afr.).

Thus, the legal system in South Africa is a composite of customary law, Roman–Dutch law, and finally British common law. As one commentator put it:

[w]hether we cherish the idea or not, during its prolonged sojourn in South Africa the old “two layer cake” has collected a third layer, English law. As Lord Tomlin put it in the otherwise somewhat suspect case of *Pearl Assurance Company v. Union Government* [[1934] AC 570 (PC) at 579], “it would be idle to assert that development of the Roman-Dutch law in the territories now constituting the Union has not been affected appreciably by the English law.”¹⁶⁸

This layered system of law—developed over centuries of colonialism—ultimately arrived at the conclusion that the best interest of the child should be the touchstone in dealing with child related issues. It should be noted that the legal system was dominated by white judges,¹⁶⁹ thus the focus of the jurisprudence undoubtedly had been built in the midst of some inevitable biases.¹⁷⁰ Yet, the mechanics of addressing a child’s best interests had arrived.

III. INTERNATIONAL EFFORTS AFFECTING THE CHILDREN OF SOUTH AFRICA

The international community has made several attempts to advance the interests of children and protect them from various forms of abuse and neglect. These efforts occur not only in the form of conventions, protocols, and charters on behalf of children, but also in the form of agreements that simply advance the protections for human rights in general. While a discussion of all such agreements is beyond the scope of this article, there are a few specific efforts that are noteworthy in the development of children’s law in South Africa.

From the time of independence from Great Britain in 1910 to the democratic elections in 1991, the relationship between South Africa and the international community has certainly ebbed and flowed. Jan Smuts, an author and South African statesman during the first half of the twentieth century, was instrumental in the creation of both the League of Nations and

168. H.R. HAHLO & ELLISON KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND* 584–85 (1968).

169. THOMPSON, *supra* note 8, at 265.

170. MANDELA, *supra* note 1, at 149. Nelson Mandela relates the story of appearing in court on behalf of the accused in a criminal case and being asked by the magistrate, “where is your certificate?” The “certificate” being no more than the equivalent of a law school diploma that no attorney ever carries to court. Because he did not have the certificate the magistrate “refused to hear the case, even going so far as to ask a court officer to evict me.” Mandela noted that this was clearly a violation of court practice and he attributed it to his color. *Id.* at 150.

the United Nations.¹⁷¹ He wrote the Preamble to the United Nations Charter and is the only signatory of both the League of Nations and United Nations Charters.¹⁷² South Africa was one of the original fifty-one founding members of the United Nations—which came into existence on October 24, 1945.¹⁷³ Since its inception, membership in the organization has grown to 192 States.¹⁷⁴ Despite its positive participation in formation of the international organization, in 1946 the government of South Africa—led by then-President Jan Smuts—was condemned by a large majority in the United Nations General Assembly for its racist policies.¹⁷⁵ While he had long been an advocate of South Africa's racial segregation, as his presidential tenure came to an end this international pressure caused Smuts to start advocating for more liberal racial laws.¹⁷⁶ Yet all of those efforts were too little too late—as the National Party came to power in 1948 and started to construct apartheid.¹⁷⁷

By 1974 pressure from member states in the United Nations reached a point at which apartheid could no longer be ignored.¹⁷⁸ The United Nations General Assembly decided on November 12, 1974 to suspend South Africa from participating in its work—due to international opposition to the policy of apartheid.¹⁷⁹ During the late 1970s and early 1980s United Nations Security Council sanctions were instituted against South Africa, and it was barred from officially participating in almost all United Nations related bodies.¹⁸⁰ Financial support was also given by the United Nations to national liberation movements.¹⁸¹ Notably, both the Pan African Congress and Africa National Congress obtained observer Missions at the United Nations with United Nations financial support.¹⁸² It was not until the

171. See JAN SMUTS – BRITISH SOUTH AFRICAN STATESMAN 5 (2008) [hereinafter JAN SMUTS].

172. *Id.* at 5.

173. S. AFR. DEP'T OF FOREIGN AFFS., *Permanent Mission of South Africa to the United Nations*, S.AFR. MISSIONS IN N.Y., <http://www.southafrica-newyork.net/pmun/> (last visited Oct. 24, 2010) [hereinafter *Permanent Mission*].

174. *Id.*

175. JAN SMUTS, *supra* note 171, at 27.

176. THOMPSON, *supra* note 8, at 181. Near the end of his tenure as president, Smuts noted that “‘segregation has fallen on evil days.’” *Id.* “[T]he [Smuts] government [also] appointed numerous committees and commissions, staffed by reform-minded white people, to investigate the racial problems of the country and to [make] plan[s] for the future.” *Id.* One such report exposed the problems of migrant labor, noting that it was “‘morally, socially, and economically wrong’ and looked forward to ‘its ultimate disappearance.’” *Id.*

177. *Permanent Mission*, *supra* note 173.

178. THOMPSON, *supra* note 8, at 214. From 1952 onward, the General Assembly of the United Nations passed annual resolutions condemning apartheid. *Id.* By 1967, the General Assembly had created both a Special Committee on Apartheid and a Unit on Apartheid. *Id.*

179. *Permanent Mission*, *supra* note 173.

180. *Id.*

181. *Id.*

182. *Id.*

democratic elections in South Africa in April 1994 that the way was paved for complete normalization of South Africa's relations with the United Nations and the reintegration of that country with that world organization.¹⁸³ Since then, South Africa has participated actively in all aspects of the work of the United Nations.¹⁸⁴

A. United Nations Declaration of the Rights of the Child

One of the first organized international efforts to protect children in the Twentieth Century occurred in the League of Nations in 1924.¹⁸⁵ A document known as the Declaration of the Rights of the Child—more commonly referred to as the Declaration of Geneva—was adopted by the Save the Children Union in Geneva, Switzerland on February 23, 1923.¹⁸⁶ Drafted by Eglantyne Jebb, it was brought before the General Assembly of the League of Nations in 1924.¹⁸⁷ That body approved it in November 1924 and named it the World Child Welfare Charter.¹⁸⁸

The World Child Welfare Charter consisted of five very basic principles to protect the children of the world community:

1. The child must be given the means requisite for its normal development, both materially and spiritually.
2. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succored.
3. The child must be the first to receive relief in times of distress.
4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.

183. *Id.*

184. *Id.*

185. Thoko Kaime, *The Foundations of Rights In the African Charter On the Rights and Welfare of the Child: A Historical and Philosophical Account*, 3 AFR. J. LEGAL STUD. 120, 121 (2009).

186. *International Alliance, SAVE THE CHILD. CANADA*, http://www.savethechildren.ca./index.php?option=com_content&view=article&id=199&Itemid=271&lang=en (last visited Oct. 22, 2010).

187. *Id.*

188. *UNICEF-Company History, FUNDING UNIVERSE*, <http://www.fundinguniverse.com/company-histories/United-Nations-International-Childrens-Emergency-Fund-UNICEF-Company-History.html>.

5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.¹⁸⁹

While these principles are very basic needs in the life of a child, they are important needs that can be traced through future international agreements and into the South African Constitution of 1996. That is, basic food, health care, and shelter are mandated by both documents. Promoting a child's material and spiritual well-being—as well as protecting the child from exploitation—are also part of both treatises.

After World War II, several non-governmental organizations lobbied the United Nations to endorse the World Child Welfare Charter.¹⁹⁰ Thus, on November 20, 1959 the United Nations General Assembly asserted “that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”¹⁹¹ Pursuant to this assertion, that organization adopted a standard of ten principles for the protection of children which were based upon the World Child Welfare Charter.¹⁹² Those ten principles were as follows:

1. The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.
2. The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.
3. The child shall be entitled from his birth to a name and a nationality.
4. The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including

189. Geneva Declaration of the Rights of the Child of 1924, League of Nations O.J. Spec. Supp. 21, at 43 (Sept. 26, 1924), available at <http://www.un-documents.net/gdrc1924.htm>.

190. *The State of the World's Children 1996: Fifty Years For Children*, UNICEF <http://www.unicef.org/sowc96/50years.htm> (citing the Geneva Declaration of the Rights of the Child, G.A. Res. 14/1386, U.N. Doc. A/RES/14/1386 (Nov. 20, 1959)).

191. Declaration of the Rights of the Child pmbl., G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, at 19 (Nov. 20, 1959).

192. Declaration of the Rights of the Child, *supra* note 191.

adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

5. The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition.
6. The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.
7. The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

8. The child shall in all circumstances be among the first to receive protection and relief.
9. The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

10. The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his

energy and talents should be devoted to the service of his fellow men.¹⁹³

This document became known as the United Nations Declaration of the Rights of the Child (DRC).¹⁹⁴ It is the forerunner of the United Nations Convention on the Rights of the Child. The World Child Welfare Charter and the DRC form the basis for the advancements in children's rights worldwide. As was the case with the World Child Welfare Charter, when reviewing the South African constitution of 1996, some of the substantive rights in the DRC can be clearly identified.¹⁹⁵ In fact, some of the rights afforded children under the DRC can be identified in the South African Children's Act.¹⁹⁶

B. United Nations Convention on the Rights of the Child

On November 20, 1989 the United Nations General Assembly adopted the Convention on the Rights of the Child (CRC).¹⁹⁷ It came into force on September 2, 1990 after it was ratified by the requisite number of nations.¹⁹⁸ The CRC sets out the specific obligations of signatory nations in protecting the civil, political, economic and social rights of children. Under the CRC, a child is generally defined as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."¹⁹⁹ It recognizes that every child has some very basic rights

193. *Id.*

194. *Id.*

195. *Id.* (stating that a child "shall be entitled from his birth to a name and a nationality."). The South African Constitution indicates that each child has the right to "a name and a nationality from birth." S. AFR. CONST. ch. 2, § 28(1)(a), 1996. The South African Constitution affords children the right to "basic nutrition, shelter, basic health care services and social services." *Id.* § 28(1)(c). Declaration of the Rights of the Child, *supra* note 191 (stating that a child "shall have the right to adequate nutrition, housing, recreation and medical services.").

196. *See* Children's Act § 38 of 2005 [hereinafter Children's Act] (stating that one objects of the Children's Act is to promote "the sound physical, psychological, intellectual, emotional and social development of children."). Declaration of the Rights of the Child, *supra* note 191 (mandating that a child be enabled "to develop physically, mentally, morally, spiritually and socially.").

197. Convention on the Rights of the Child pmb., *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (recognizing the importance of principles set down by the Geneva Declaration and the 1959 version of the Declaration of the Rights of the Child: "Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959. . . .").

198. UNTC – Convention on the Rights of the Child, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Jan. 5, 2011).

199. *Id.* at art. 1.

such as the right to life²⁰⁰ and the right to be raised by his or her parents within a given social or cultural grouping.²⁰¹ It also recognizes that every child has the right to a relationship with both parents and that parents have the right to exercise their parental responsibilities.²⁰² The CRC recognizes that children have the right to be free from abuse and neglect²⁰³ and to have their opinions heard and acted upon when appropriate.²⁰⁴ Legal representation must also be provided to children in any judicial dispute regarding a restriction on the child's liberty.²⁰⁵ The convention also forbids capital punishment for children.²⁰⁶ The CRC protects these rights by mandating that signatory states:

[R]espect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.²⁰⁷

Of clear relevance to South Africa is the fact that neither race nor color could be used as a basis to deny children the very basic rights afforded to every human being. The CRC also mandated that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."²⁰⁸

The world community seemed to be communicating that no longer would children be viewed as mere chattel to be treated like any other piece of property. Consideration of the best interests of the child required that a child be looked at as a human being who had his or her own interests.

As of January 2010, 194 countries have ratified it—including all member states of the United Nations except Somalia and the United States.²⁰⁹ Further, Somalia's cabinet ministers have indicated their intent to ratify the convention in the near future.²¹⁰ The United Nations Committee on the Rights of the Child is the organization within the United Nations that monitors compliance with the CRC.²¹¹ Within two years of initially

200. *Id.* at art. 6(1).

201. *Id.* at art. 7(1).

202. *Id.* at art. 9.

203. *Id.* at art. 19(1).

204. Convention on the Rights of the Child, *supra* note 197, art. 12.

205. *Id.* at art. 37(d).

206. *Id.* at art. 37(a).

207. *Id.* at art. 2(1).

208. *Id.* at art. 3(1).

209. *See id.*

210. *Somalia to Join Childs Rights Pact: UN*, THE SOMALILAND TIMES, Nov. 20, 2009, available at <http://www.somalilandtimes.net/sl/2009/408/21.shtml>.

211. Convention on the Rights of the Child, *supra* note 197, at art. 43(1).

ratifying the CRC and thereafter one time every five years, the signatory nations are to submit to the Committee a report on “the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights.”²¹² Every two years, the Committee is to provide to the General Assembly of the United Nations a report on its activities.²¹³

Two additional protocols were adopted on May 25, 2000.²¹⁴ The first restricted the ability of signatory states to involve children in military conflicts.²¹⁵ The second prohibited the sale of children, child prostitution, and child pornography.²¹⁶ Both protocols have been ratified by more than 120 states.²¹⁷ With the finalization of the Convention on the Rights of the Child in 1989 came enthusiasm for reform on the international level as well on the national level of various countries.²¹⁸ Children had become independent subjects entitled to rights—not just objects of parental rights and protection.²¹⁹

South Africa ratified the CRC on June 16, 1995, before the date that its new Constitution was ratified.²²⁰ Under the new Constitution, treaties are to be viewed as legally binding once ratified.²²¹ Thus, by signing on to this accord, the South African government was undertaking a significant responsibility to its children. Yet, by following up the ratification of the CRC with the implementation of a Constitution that reiterated the significance of children’s rights, South Africa demonstrated that it was among the world’s leaders in advancing the case of children.²²² As can be seen with prior international declarations, many provisions of the CRC appear in the South African Constitution and the South African Children’s

212. *Id.* at art. 44(1).

213. *Id.* at art. 44(5).

214. See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000) [hereinafter *Optional Protocol on Children in Armed Conflict*]; see Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000) [hereinafter *Optional Protocol on Sale of Children*].

215. Optional Protocol on Children in Armed Conflict, *supra* note 214.

216. Optional Protocol on the Sale of Children, *supra* note 214.

217. Convention on the Rights of the Child, *supra* note 197.

218. REFORMING CHILD LAW IN SOUTH AFRICA, *supra* note 95, at 3.

219. *Id.*

220. Convention on the Rights of the Child, *supra* note 197.

221. S. AFR. CONST. ch. 14, § 231(2), 1996.

222. One important aspect of effectively constitutionalizing children’s rights is that those rights are justiciable, i.e., if a government fails to ensure the safeguard of those rights, those deprived of their rights can approach the courts for relief. REFORMING CHILD LAW IN SOUTH AFRICA, *supra* note 95, at 4. The constitutions of Albania, Ecuador, Ethiopia, Gambia, Ghana, Moldova, Namibia, Romania, Poland, Slovenia, South Africa, Uganda and Thailand all provide mechanisms for enforcing children’s rights, but only a few of those provide that those rights are immediately justiciable. *Id.* South Africa’s 1996 constitution provides for just such a right. *Id.*

Act. In assessing South Africa's success in advancing the substantive rights of its children through legislation, one commentator noted that "South Africa continues to lead much of the rest of the world in legislative progress and protective laws that safeguard the well-being of children."²²³

C. World Children's Summit of 1990

On September 29-30, 1990 a World Summit for Children was held at the United Nations in New York.²²⁴ It was the largest gathering of world leaders in history.²²⁵ It included seventy-one heads of state and government and eighty-eight other senior officials—mostly at the ministerial level.²²⁶ The stated purpose of the Summit was to "undertake a joint commitment and to make an urgent universal appeal to give every child a better future."²²⁷ South Africa, however, was not represented at that summit.²²⁸ It continued to be excluded from the operations of the United Nations because the worldwide struggle against apartheid was continuing.²²⁹

Over the two day summit, the World Declaration on the Survival, Protection and Development of Children was adopted.²³⁰ The document recognized that several challenges faced the children of the world. It expressed that "[e]ach day, millions of children suffer from the scourges of poverty and economic crisis—from hunger and homelessness, from epidemics and illiteracy, from degradation of the environment."²³¹ It also noted that "[e]ach day, 40,000 children die from malnutrition and disease, including acquired immunodeficiency syndrome (AIDS), from the lack of clean water and inadequate sanitation and from the effects of the drug problem."²³² And in a clear reference to the problems of South Africa, the Declaration noted:

Each day, countless children around the world are exposed to the dangers that hamper their growth and development. They suffer immensely as casualties of war and violence; as victims of racial discrimination, *apartheid*, aggression, foreign occupation and annexation; as refugees and

223. *Children's Bill 'a Major Step'*, NEWS24.COM <http://www.news24.com/SouthAfrica/News/childrens-bill-a-major-step-20071106>, (last visited Nov. 11, 2007) (citing Macharia Kamau, representative of UNICEF in South Africa).

224. REFORMING CHILD LAW IN SOUTH AFRICA, *supra* note 95, at 10.

225. *Information Publications*, UNICEF, <http://www.unicef.org/wsc> (last visited Nov. 6, 2010).

226. *Id.*

227. United Nations World Summit for Children, Sept. 29-30, 1990, *World Declaration on the Survival, Protection and Development of Children*, § 1, available at <http://www.un-documents.net/wsc-dec.htm> [hereinafter *World Declaration of 1990*].

228. REFORMING CHILD LAW IN SOUTH AFRICA, *supra* note 95, at 10.

229. *Id.*

230. *World Declaration of 1990*, *supra* note 227.

231. *Id.* § 5.

232. *Id.* § 6.

displaced children, forced to abandon their homes and their roots; as disabled; or as victims of neglect, cruelty and exploitation.²³³

These were the challenges facing the world's children—which the world's political leaders needed to meet. South Africa's apartheid system was specifically targeted as one of those challenges.

In its effort to embrace past efforts to help children, the Summit specifically recognized the positive impact the Convention on the Rights of the Child had on children.²³⁴ It noted that the CRC “provides a new opportunity to make respect for children's rights and welfare truly universal.”²³⁵ It recognized that improvements in the international climate—such as the movement that created the CRC—could significantly improve the plight of children.²³⁶ The opportunity to help children was further seized upon by the Summit when it adopted a Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children. The Plan of Action called for the various signatory nations to *inter alia* report on their progress in implementing the Plan of Action.

Despite the fact that South Africa did not participate in the Summit, its new democratically elected government picked up the standard of the Plan of Action. Efforts were made by South Africa to bring itself into compliance with the goals set out at the Summit. To that end, in 2001 South Africa prepared an End-Decade Report on Children to report on its progress in complying with the goals of the Plan of Action. Clearly, the post-apartheid government was trying to rehabilitate its reputation and improve the plight of its children.

D. The African Charter on the Rights and Welfare of the Child

In 1990 the Organization of African Unity (OAU) adopted the African Charter on the Rights and Welfare of the Child.²³⁷ Called the “African Children's Charter,” it required ratification of at least fifteen of the organization's members before it could enter into force.²³⁸ Not until November 29, 1999 did the requisite number of member states approve its terms.²³⁹ South Africa ratified the document on January 7, 2000.²⁴⁰ The

233. *Id.* § 4. (emphasis added).

234. *Id.* § 8.

235. *Id.*

236. *World Declaration of 1990, supra* note 227, § 9.

237. Laila Gad, Taking Harmonization Forward: What Can the AU Commit To?, Report to Regional Symposium on Harmonization of Laws on Children in Eastern and Southern Africa 4 (May 9-10, 2007).

238. African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, art. 47(3) (1990) (entered into force Nov. 29, 1999) [hereinafter African Children's Charter].

239. CHILD LAW, *supra* note 109, at 331.

three anchoring principles of the African Children's Charter are "the best interests of the child, the principle of non-discrimination, and the primacy of the Charter over harmful cultural practices and customs."²⁴¹

The African Children's Charter notes that in all actions concerning children, the best interests of the child "shall be the primary consideration."²⁴² Under the Charter, children are entitled to equal enjoyment of the rights guaranteed by the Charter regardless of who they are or who their parents are.²⁴³ Some of the grounds on which discrimination is outlawed include fortune, birth, or other status of the child, parent, or guardian.²⁴⁴ Demonstrating the desire by participating nations to outlaw certain customary practices deemed harmful to children, the Charter outlaws customs that are prejudicial to the health or life of the child and discriminatory to the child based on sex or other status.²⁴⁵ Yet the most relevant provision to South Africa at the time it was drafted was the reference to the assistance to be provided to children living under apartheid:

States parties shall undertake to provide whenever possible, material assistance to such children and to direct their efforts towards elimination of all forms of discrimination and *Apartheid* on the African continent.²⁴⁶

As with the World Declaration that came out of the World Children's Summit, the OAU's African Charter on the Rights and Welfare of the Child was specifically targeting apartheid as harmful to the development of children.

E. Children's Charter of South Africa

An International Summit on the Rights of Children in South Africa was held on May 27 – June 1, 1992 in Cape Town, South Africa.²⁴⁷ It was held as a part of the International Summit on the Rights of Children in South Africa held later in June of that same year.²⁴⁸ The Summit brought together over 200 children from around South Africa.²⁴⁹ They represented various

240. *Id.* at 348.

241. *Id.* at 336.

242. African Children's Charter, *supra* note 238, at art. 4.

243. *Id.* at art. 3.

244. *Id.*

245. *Id.* at art. 21(1).

246. *Id.* at art. 26(3) (emphasis added).

247. International Summit on The Rights of Children in South Africa, *The Children's Charter of South Africa*, pmb. (June 1, 1992), available at http://www.naturalchild.org/advocacy/south_africa/childrens_charter.html.

248. *The Children's Charter of South Africa*, NATURAL CHILD PROJECT, http://www.naturalchild.org/advocacy/south_africa/childrens_charter.html (last visited Nov. 6, 2010).

249. *Id.*

races, classes, genders, and disabilities.²⁵⁰ The discussion focused on the various problems they were facing as children in South Africa.²⁵¹ They spoke about the fact that apartheid was still affecting them and that children were not being treated with respect and dignity in South Africa.²⁵² This Summit occurred after the release of Nelson Mandela—but before a democratically elected government took office. With that transitional period as a background, the Summit noted the following:

It is [a]cknowledg[ed] that, at the present time, children have not been placed on the agenda of any political party, or the existing government or within the CODESA negotiations and are not given the attention that they deserve.²⁵³

From this Summit came a framework for children's rights in South Africa. Known as the Children's Charter of South Africa, the framework asserted that "all children are created equal and are entitled to basic human rights and freedoms and that all children deserve respect and special care and protection as they develop and grow."²⁵⁴ Yet, the Children's Charter also noted that "within South Africa, children have not been treated with respect and dignity, but as a direct result of apartheid have been subjected to discrimination, violence, and racism that has destroyed families and communities and has disrupted education and social relationships."²⁵⁵

Despite this bleak assessment by her own children—and based partly upon its commitment to the international accords noted prior—South Africa set out to transform international principals into concrete domestic laws. As referenced above, South Africa's Constitution provides an extensive list of fundamental rights that are guaranteed to all of its citizens—including children.²⁵⁶ However, it was not until 2006, with enactment of the Children's Act of 2005, that South Africa fully realized the goals set out in the CRC.

F. The Impact of International Agreements

The impact of international agreements on the development of the South African Constitution of 1996 and the South African Children's Act cannot be overemphasized. The rights afforded children in both documents mirror the rights enumerated by the international agreements that preceded them. More obviously, the South African Children's Act has as one of its specific

250. *Id.*

251. *Id.*

252. *Id.*

253. *Children's Charter of South Africa*, *supra* note 247, at pmb1.

254. *Id.*

255. *Id.*

256. *See supra* notes 162–67 and accompanying text.

objectives to “give effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic.”²⁵⁷ As one of the currents that led to adoption of the Children’s Act, the force of international agreements was specifically enumerated by the South African Legislature in the Act.²⁵⁸

IV. THE SOUTH AFRICAN CHILDREN’S ACT

In the United States, the importance and relevance of a given piece of legislation to our society can often be picked up from the legislative history of that legislation. The goals of proponents and concerns of opponents are often revealed in the debates that occur and the reports that are prepared by drafting committees. South Africa is no different. In that respect, the South Africa Law Reform Commission (SALRC) is an important starting point. The SALRC was established by the South African Law Reform Commission Act 19 of 1973.²⁵⁹ The purpose of the SALRC is:

“[t]o do research with reference to all branches of the law of the Republic and to study and investigate all such branches in order to make recommendations for the development, improvement, modernisation or reform thereof [i]n short, the Commission is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.”²⁶⁰

In 1997, the South African Law Reform Commission was asked to investigate and review South Africa’s Child Care Act of 1983.²⁶¹ The functioning and principles underlying that Act had been the subject of debate among practitioners, social workers, and child and youth care

257. Children’s Act, *supra* note 196, § 2(c).

258. *Id.* (identifying the impact that some of the international agreements discussed above have had on the formation of South Africa’s policy toward children by noting:

the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child.

259. SA Law Reform Commission Thirty Fifth Annual Report 2007/2008, 14 (2008) (S. Afr.).

260. *Id.*

261. SA Law Commission Report Review of the Child Care Act, 1 (Dec. 2002) (S. Afr.) [hereinafter SALRC Report]. The Child Care Act of 1983 can be viewed as a forerunner of the Children’s Act. However, the Child Care Act of 1983 was far less comprehensive and covered far fewer areas of child related issues. *Id.* at 29. Thus, in a sense, the Children’s Act is not simply a revision of prior law, but a departure from it.

workers since it came into operation in 1987.²⁶² The SALRC was asked to review that Act and make recommendations to the Minister for Social Development for reform of this law.²⁶³ From the beginning of the process, however, the Commission viewed its mandate as broader than simply reviewing the Child Care Act of 1983.²⁶⁴ Socio-economic forces in South Africa had resulted in a desire by the people for greater protection of substantive rights. These socio-economic forces had been building since the first Europeans arrived on the Cape. International protocols and conventions, which were adopted by South Africa, encouraged and indeed mandated such protections on behalf of children. The legal system in South Africa as a whole had arrived at a place in its historical development wherein the best interest of the child was the guiding principle. These three currents started to converge now that apartheid had ended. The SALRC undertook its review in that environment. The Commission viewed its mandate as one that included a review of all statutory, customary, common, and religious laws affecting children.²⁶⁵

The process of review included the publication of an issue paper in May 1998.²⁶⁶ That paper was followed by a series of research papers on specific areas such as the parent-child relationship, children living with HIV/AIDS, children living on the street, children in residential care, and child protection.²⁶⁷ In December 2001 a lengthy discussion paper was issued by the SALRC outlining the Commission's preliminary findings and recommendations.²⁶⁸ After further deliberations and revisions, in 2002, the SALRC issued a final report on its review of the Child Care Act of 1983.²⁶⁹

One of the most basic issues to address was who would be covered by the new Children's Act, i.e., what was the definition of a child? In a country as diverse and culturally rich as South Africa, the question was not necessarily easy. As it analyzed this issue, the SALRC reviewed the test of childhood under various international protocols and under the laws of various other countries.²⁷⁰ They also reviewed the various standards that existed within South Africa itself.²⁷¹ In the end, the recommendation made by SALRC and the one adopted in the Children's Act was consistent with the international trend, i.e., a child is defined as a person under the age of eighteen.²⁷²

262. SA Law Commission Issue Paper 13 Review of the Child Care Act, 25 (Apr. 1998) (S. Afr.) [hereinafter SALRC Issue Paper].

263. SALRC Report, *supra* note 261, at 1.

264. *Id.* at 3.

265. *Id.*

266. *Id.* at 1.

267. *Id.*

268. SALRC Report, *supra* note 261, at 2.

269. *Id.*

270. SA Law Commission Discussion Paper 103 Review of the Child Care Act, 52-54 (Feb. 2002) (S. Afr.) [hereinafter SALRC Discussion Paper].

271. *Id.*

272. *Id.* at 53-54.

It was to benefit this group of South Africans that in June 2006 President Thabo Mbeki signed into law Act Number 38 of 2005—the South African Children’s Act.²⁷³ It was the culmination of many years of work by South Africans committed to the concept that protecting children was essential to the success of their republic. South African children were to be treated as individuals with rights of their own rather than simply relying on parents for protection. As one South African judge noted:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his parents, umbilically destined to sink or swim with them.²⁷⁴

To that end, the Act was a very comprehensive piece of legislation. It contained twenty-two chapters and addressed, in one act, custodial rights in family court situations,²⁷⁵ child protection,²⁷⁶ termination of parental rights,²⁷⁷ adoption,²⁷⁸ kidnapping,²⁷⁹ trafficking of children,²⁸⁰ and surrogacy.²⁸¹

The purposes of the Act were very clearly delineated. According to its terms, the Act was designed with the following goals in mind:

- (a) to promote the preservation and strengthening of families;
- (b) to give effect to the following constitutional rights of children, namely-
 - (i) family care or parental care or appropriate alternative care when removed from the family environment;
 - (ii) social services;
 - (iii) protection from maltreatment, neglect, abuse or degradation; and
 - (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
- (c) to give effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic;
- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- (e) to strengthen and develop community structures which can assist in providing care and protection for children;

273. Children’s Act 38 of 2005 (S. Afr.).

274. *M v. S* 2008 (3) SA 232 (CC) at para. 18, cited in CHILD LAW, *supra* note 109, at 242.

275. Children’s Act, *supra* note 196, at ch. 3.

276. *Id.* at chs. 7, 9.

277. *Id.* at ch. 3 § (28).

278. *Id.* at chs. 15, 16.

279. *Id.* at ch. 17.

280. Children’s Act, *supra* note 196, at ch. 18.

281. *Id.* at ch. 19.

- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) to provide care and protection to children who are in need of care and protection;
- (h) to recognize the special needs that children with disabilities may have; and
- (i) generally, to promote the protection, development and well-being of children.²⁸²

These goals were designed by the SALRC because the Child Care Act of 1983 did not contain such goals and a need for them existed.²⁸³ That is, such a list was needed to guide decision-makers in implementing the provisions of the new Act.²⁸⁴ Such guidance would also be needed by decision-makers when determining how they should allocate scarce social resources and services to the children who are most at risk and how they can ensure that the needs of the most vulnerable children are met.²⁸⁵ The SALRC also opined that such a clearly formulated list of goals was needed because of the recent rise in the number of reported cases of child abuse and neglect as well as the crisis faced by South Africa with the HIV/AIDS pandemic.²⁸⁶

After setting forth these goals for the Act, the SALRC recommended—and the legislature adopted—a separate chapter devoted exclusively to outlining the general principles to be used as a guide when interpreting the Act. The prefatory comments to the general principles chapter are very enlightening. They note:

- (1) The general principals set out in this section guide –
 - (a) The implementation of all legislation applicable to children, including this Act; and
 - (b) All proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.²⁸⁷

These prefatory comments make the Act an incredibly sweeping piece of legislation—given that the Children’s Act is intended to guide all aspects of legislation related to children and is intended to guide all actions by any organ of the state when dealing with children’s issues.

282. *Id.* at ch. 1, § 2.

283. SA Law Commission Executive Summary Review of the Child Care Act, iv (Dec. 2001) (S. Afr.) [hereinafter SALRC Executive Summary]. SALRC noted that in determining what basic goals should be set for the new piece of legislation, various sources could be used. *Id.* Such goals could “be derived from international law such as the African Charter on the Rights and Welfare of the Child, from policy documents . . . , from South African common law and case law, as well as from accepted social work practice. *Id.*

284. *Id.*

285. *Id.*

286. SALRC Executive Summary, *supra* note 283, at iv.

287. *Id.*

The central focus of the chapter on general principles is that “[i]n all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.”²⁸⁸ While the Act does not specifically set forth a definition of the best interest of the child, it does set forth a list of factors that must be weighed in the balance in a given set of circumstances. This is the set of factors that must be considered when analyzing a child’s best interests in any court proceeding, governmental action or legislative process involving a child.

A. The Best Interests of the Child in the Balance

In its Discussion Paper of 2002, the SALRC addressed the existence of a dispute about whether the “best interest of the child” standard should be left to courts to define or whether legislative input was appropriate.²⁸⁹ The SALRC came down squarely on the side of legislative input. It noted:

The commission is convinced of the need to include guidance to the courts and other users of the new children’s statute as to what exactly it means when it is said that a particular decision or action must be in the best interests of a particular child. In this regard, we recommend that such guidelines be included in the body of the substantive act, ideally following on the confirmation that in all matters concerning children, the best interests of the child shall be paramount.²⁹⁰

The way in which the SALRC arrived at its recommended standard for best interest of the child is notable. Understandably, it started by looking at South African judicial precedent. Specifically, it discussed two court cases. The first was the 1994 case of *McCall v McCall*²⁹¹ and the second was the 1991 case of *Märtens v Märtens*.²⁹² In *McCall*, the appellate court, in its discussion of the appropriate method to assess the best interest of the child, held as follows:

In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

288. Children’s Act, *supra* note 196, at ch. 2, § 9.

289. SALRC Discussion Paper, *supra* note 270, at 81.

290. *Id.* at 85.

291. 1994 (3) SA 201 (C) (S. Afr.).

292. 1991 (4) SA 287 (T) (S. Afr.).

- (a) The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) The ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
- (f) The ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) The mental and physical health and moral fitness of the parent;
- (i) The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
- (j) The desirability or otherwise of keeping siblings together;
- (k) The child's preference if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) The desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy...should be placed in the custody of his father; and
- (m) Any other factor which is relevant to the particular case with which the Court is concerned.²⁹³

The SALRC report then turned to the parental custody case of *Märtens v Märtens*. In that case the appellate court relied on earlier case law when setting out this shorter list of guidelines:

1. The sense of security of the children, involving an examination of the extent to which a parent makes the children feel wanted and loved;
2. The suitability of the custodian parent involving an examination of the character of the custodial parent, with particular reference to the ability of the parent to guide the moral, cultural and religious development of the children;
3. Material consideration relating to the well-being of the children; and
4. The wishes of the children.²⁹⁴

This analysis of prior judicial precedent in South Africa seems quite normal for a legislative consulting body such as the SALRC. The analysis

293. SALRC Discussion Paper, *supra* note 270, at 80–81 (citing *McCall v McCall* 1994 (3) SA 201 (C) (S. Afr.)).

294. SALRC Discussion Paper, *supra* note 270, at 81 (citing *Märtens v Märtens* 1991 (4) SA 287 (T) (S. Afr.)).

that followed, however, demonstrates the extent to which South Africa is open to ideas from the outside. That is, the SALRC turned to a discussion of three foreign sources for analyzing the best interests of a child.

The first foreign source that was discussed was the Canadian Special Joint Committee on Child Custody and Access.²⁹⁵ The report issued by that Committee was entitled *For the Sake of the Children*.²⁹⁶ This Committee listed fourteen separate factors that ought to be considered in analyzing a child's best interests in custody cases.²⁹⁷ Many of those factors are similar to the ones ultimately adopted by South Africa's legislature.

Next, the SALRC turned to a discussion of Australia's child custody statute.²⁹⁸ That statute had twelve factors that needed consideration by a court when addressing a child's best interests.²⁹⁹ It is significant to note that, while the discussion paper issued by the SALRC was over 1,300 pages long, the discussion of this Australian legislation was little more than one page in length. Yet, the SALRC noted that "such a list can be adapted to South African circumstances with little difficulty."³⁰⁰ It then recommended that South Africa adopt a list of factors that is virtually identical to the Australian statute.

The Act that was eventually signed into law reflected a list of fifteen factors—slightly longer than the Australian version. Those factors are part of the chapter on general principles—and are as follows:

7. (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-
 - (a) the nature of the personal relationship between-
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
 - (b) the attitude of the parents, or any specific parent, towards-
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
 - (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
 - (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-

295. SALRC Discussion Paper, *supra* note 270, at 82.

296. *Id.*

297. *Id.*

298. *Id.* at 83.

299. *Id.* at 83–84.

300. *Id.* at 84.

- (i) both or either of the parents; or
- (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child—
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's—
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by—
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behavior; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behavior towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.

(2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child.³⁰¹

8. (1) The rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.

(2) All organs of state in any sphere of government and all officials, employees and child has in terms of the Bill of Rights.³⁰²

301. Children's Act, *supra* note 196, at ch. 2, § 7.

302. *Id.* § 8.

It is ironic that—in light of South Africa’s unique history and the stated desire to Africanize its legislation—such a wholesale adoption of a foreign family code would have occurred. Especially that such a foreign code would be from a non-African country. Yet this might be seen as simply an indication that South Africa is open to ideas from foreign sources without any parochial concerns or prejudice.

The factor that is notably missing from the above list is “the wishes of the child.” However, as an indication of the importance of the child’s wishes, the South African Children’s Act sets forth that factor in a separate section immediately following the above list of factors. It notes that “[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”³⁰³ Thus, the voices of children are to be heard in any matter involving them.

B. The Impact on Customary Law Related to Children

Customary law remains a very real part of South African jurisprudence, albeit a difficult one to manage because of its basis in oral tradition. Nevertheless, nothing in the South African Children’s Act changes that legal reality. As related above, customary law is defined as “those rules of conduct which the persons living in a particular locality have come to recognize as governing them in their relationships between one another and between themselves and things.”³⁰⁴ While the Constitution makes it very clear that such customary laws are enforceable, some of that customary law could have very negative consequences for children. To that end, the South African Children’s Act specifically prohibits some of the most egregious customary law practices and provides that “every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.”³⁰⁵ In Africa as a whole, some of those practices include such things as female genital mutilation, killing of baby twins, arranged marriages, male primogeniture, and child marriages.³⁰⁶

Thus, the Children’s Act of South Africa remains faithful to its multilayered legal system but attempts to limit some of the most harmful aspects of tribal law. As one commentator put it, “[c]ustomary law is an active and integral part of the South African community and its application is bound to bring about some challenges to the courts. There is no doubt that within the constitutional dispensation, in any dispute where parties rely

303. *Id.* § 10.

304. *See* Kent, *supra* notes 115–17 and accompanying text.

305. Children’s Act, *supra* note 196, at ch. 2, § 12.

306. CHILD LAW, *supra* note 109, at 337 (noting that many of these practices are specifically prohibited by the Children’s Act.).

on customary law pertaining to or affecting children, such law will have to be measured against the best interest of the child.”³⁰⁷

C. Specific Substantive Provisions

As mentioned above, the South African Children’s Act addresses a broad range of child related issues including the rights and responsibilities possessed by parents and those filling the role of parents. The Children’s Act indicates that under the law of South Africa, a person may have the following rights and responsibilities regarding a child: the right to care for a child; the right to maintain contact with the child; the right to act as guardian of the child; and the right/responsibility to contribute to the maintenance of the child.³⁰⁸ These basic rights are the ones addressed in various sections of the Act and can be possessed and exercised by parents, relatives or—under certain circumstances—third parties.³⁰⁹ In addition to outlining the rights of parents, the Act also has various substantive provisions that impact the rights of children and define the mechanisms for enforcing those rights.

The Act addresses the operation of children’s courts³¹⁰ and methods for addressing children in need of care and protection.³¹¹ The provisions related to children in need of care and protection not only set out the circumstances under which a child will be found in need of care and protection but also the procedures to be followed when such a finding is made. In addition, the Act creates two nation-wide registers for purposes of monitoring cases involving children in need of care and protection:

- (1) The Director-General must keep and maintain a register to be called the National Child Protection Register.
- (2) The National Child Protection Register consists of a Part A and a Part B. National Child Protection Register.³¹²

Part A of the Register is used to keep a record of abuse or neglect inflicted on specific children—as well as a record of the circumstances surrounding such abuse or neglect.³¹³ This information is to be used to

307. *Id.* at 242.

308. Children’s Act, *supra* note 196, at ch. 3, § 18(2).

309. *Id.* § 22 (noting that “the mother of a child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child, with . . . any other person having an interest in the care, well-being and development of the child.”).

310. *Id.* at ch. 4, § 45 (stating that children’s courts may adjudicate most issues related to children including *inter alia* maltreatment, abuse, neglect, degradation, exploitation, paternity, support, and adoption).

311. *Id.* at ch. 9.

312. *Id.* at ch. 7, § 111.

313. *Id.* § 113.

protect these children from further abuse or neglect.³¹⁴ Part B of the Register is established for the purpose of having a record of people who are unsuitable to work with children in order to protect children in general from abuse by this population of individuals.³¹⁵

The South African legislature also addressed a chronic health problem for children in that country when it included in the Children's Act several provisions related to HIV/AIDS.³¹⁶ That public health menace has impacted large numbers of South African children.³¹⁷ If a particular child has not actually been killed or infected with HIV/AIDS, then the child has likely been affected by the illness in other ways.³¹⁸ Testing children for HIV/AIDS is addressed in Chapter 7 of the Children's Act:

- (1) Subject to section 132, no child may be tested for HIV except when—
 - (a) it is in the best interests of the child and consent has been given in terms of subsection (2); or
 - (b) the test is necessary in order to establish whether—
 - (i) a health worker may have contracted HIV due to contact in the course of a medical procedure involving contact with any substance from the child's body that may transmit HIV; or
 - (ii) any other person may have contracted HIV due to contact with any substance from the child's body that may transmit HIV, provided the test has been authorized by a court.
- (2) Consent for a HIV-test on a child may be given by—
 - (a) the child, if the child is—
 - (i) 12 years of age or older; or
 - (ii) under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a test;
 - (b) the parent or care-giver, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
 - (c) the provincial head of social development, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
 - (d) a designated child protection organization arranging the placement of the child, if the child is under the age of 12 years and is not of sufficient maturity
 - (e) the superintendent or person in charge of a hospital, if—

314. Children's Act, *supra* note 196, § 113.

315. *Id.* at § 118.

316. *Id.* at § 130–133.

317. SALRC Issue Paper, *supra* note 262, at 47 (noting that between 2010–2015 it is estimated that 25% of the children in South Africa will be HIV positive).

318. *Id.* (noting that HIV/AIDS in adults will have the impact of causing incapacitation and death in the caregivers for children as well as in educators, health care staff and other essential service providers).

- (i) the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test; and
 - (ii) the child has no parent or care-giver and there is no designated child protection organization arranging the placement of the child;
- or
- (f) the children's court, if
 - (i) consent in terms of paragraph (a), (b), (c) or (d) is unreasonably withheld; or
 - (ii) the child or the parent or care-giver of the child is incapable of giving consent.³¹⁹

The very notion that a child-centered law like the South African Children's Act needs to specifically address the rights and obligations of children and government institutions in testing for HIV/AIDS demonstrates the severity of the problem and the extent to which the people and government of that nation recognize the issue they are facing. This growing menace to the lives of Africa's children was also addressed at the World Children's Summit³²⁰ and identified in the Children's Charter of South Africa.³²¹

Domestic and inter-country adoptions are also regulated by the Children's Act. The focus of the inter-country adoption provisions was to give effect to the Hague Convention on Inter-Country Adoptions.³²² The Act notes that the Hague Convention has been enacted by the South African legislature and its provisions are "law in the Republic."³²³ In a step that seems to implicate its own sovereignty, the South African legislature included the provision that "[t]he ordinary law of the Republic applies to an adoption to which the Convention applies but, where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails."³²⁴

The Children's Act also addresses the issues of Child Abduction and Child Trafficking. Both issues are addressed by adopting international accords to which South Africa is a signatory nation. The Hague Convention on International Child Abduction has been adopted and is recognized as "the law in the Republic."³²⁵ The United Nations Protocol to Prevent

319. Children's Act, *supra* note 196, at ch. 7, § 130.

320. *Id.* at pmbl.

321. *Children's Charter of South Africa*, *supra* note 247, at pt. 2, art. 8 (noting that "[a]ll children have the right to education on issues such as sexuality, AIDS.").

322. Children's Act, *supra* note 196, at ch. 16, § 254(a).

323. *Id.* at § 256(1).

324. *Id.* at § 256(2).

325. *Id.* at ch. 17, § 275.

Trafficking in Persons has also been adopted.³²⁶ It too is recognized as “the law in the Republic.”³²⁷

The final topic addressed by the Act is surrogate motherhood.³²⁸ Prior to the Children’s Act, South Africa did not have any statutory guidance in surrogate situations.³²⁹ Thus, the only way that a couple commissioning a surrogate mother could become the parents was through an adoption after the birth of the child.³³⁰ In addition, any agreements that were made between a surrogate and a commissioning couple would be unenforceable as against public policy.³³¹ The Children’s Act changed that situation and put in place specific laws governing surrogacy including, *inter alia*, the enforceability of surrogacy agreements as long as they are in writing.³³²

Clearly, in crafting the South African Children’s Act, policymakers in that country wanted to protect the best interests of the child. They did so in essentially three ways: First, they established a list of criteria that courts must weigh in the balance when determining what is in the best interests of children. Second, they respected the customary law of the indigenous people while at the same time precluding the enforcement of that customary law if it is harmful to children. Third, they set out some substantive provisions to specifically address certain aspects of child related law. Given the manner in which the SALRC workshopped the legislation and discussed the various currents of South African society, the Act clearly reflects the experience of that country and its children.

V. REFLECTIONS ON SOUTH AFRICA’S CHILDREN’S ACT: AN AMERICAN PERSPECTIVE

Although there has certainly been some criticism of the South African Children’s Act, it has been a success if for no other reason than the fact that it put children’s issues at the forefront of discussion and debate. It is an example of a country trying to improve the situation of children within its borders—when those children have been routinely subjected to all forms of racism, abuse and neglect. While it is very much a “South African” piece of legislation, there are some very informative reflections that can be made on the Act.

326. *Id.* at ch. 18, § 282.

327. *Id.*

328. Children’s Act, *supra* note 196, at ch. 19.

329. SALRC Report, *supra* note 261, at 55.

330. *Id.*

331. SALRC Discussion Paper, *supra* note 270, at 162–63.

332. Children’s Act, *supra* note 196, at ch. 19, § 292(1)(a).

A. The Currents of American Society

The extent and depth of the three currents that led to the South African Children's Act are specific to that country. The United States has not undergone some of the socio-economic troubles that faced South Africa. Yet there was a period in United States history when members of our society with colored skin were treated with the same level of dehumanizing conduct that people of color met in South Africa. The United States Constitution initially viewed a black person as being equal to three-fifths of a white person.³³³ Native Americans, those who resided in this land before white settlers, were not counted as individuals under the United States Constitution.³³⁴ These groups—and their children—faced issues similar to the ones faced by South African blacks during apartheid. For the children of black slaves in the American South, mortality rates were very high:

In the United States in 1850, 51 percent of all black deaths were children younger than nine. Until age fourteen, the mortality rate of slave children was twice that of the white population. A slave infant was 2.2 times more likely to die than a white baby, and white children between five and fourteen survived 1.9 times more often than did slave children of the same ages.³³⁵

Life was very short for the average child of a black slave. If the child's life was not short, it was generally marked by poverty and malnutrition. One commentator, noting the specific level of malnutrition on the part of slave children in Appalachia, indicated that "slave children were malnourished in patterns that parallel conditions in contemporary poor nations."³³⁶ What is more startling is the fact that in Appalachia this malnutrition was part of the profit generating strategy of white masters.³³⁷ For the same group of Appalachian slaves, education was almost non-existent. By 1870, five years after the ratification of the XIII Amendment to the United States Constitution, three quarters of black Appalachians were illiterate.³³⁸ Violence was also a daily event for black children in the American South—especially in the immediate aftermath of the Civil War.³³⁹

Although this socio-economic oppression did not change overnight, the passage of Amendment XIII to the United States Constitution in 1865

333. U.S. CONST. art. I, § 3.

334. *Id.*

335. WILMA A. DUNAWAY, *THE AFRICAN-AMERICAN FAMILY IN SLAVERY AND EMANCIPATION* 141 (2003).

336. *Id.* at 148.

337. *Id.* at 145.

338. *Id.* at 255.

339. *Id.* at 243–49.

started to change some of these patterns.³⁴⁰ However, unlike the elective process which swept away apartheid, the American transition out of the era of slavery was accompanied by the bloodiest conflict in our nation's history. Even then, Jim Crow laws re-enforced a situation of *de facto* racial separation in our country until the 1960's. Perhaps the singular difference between these two currents in South Africa and the United States is the percentage of the population that was affected. In South Africa the racist policies of apartheid hit 84% of the population by the end of apartheid.³⁴¹ The remaining percentage was white. In the United States the percentage of African Americans is significantly smaller. That smaller percentage of racially oppressed people would not have the same political influence when set free as did the same group of people when set free in South Africa. The children in both situations would have been impacted, but the ground swell of support for sweeping change along the lines of an American Children's Act would have been substantially less in the United States at the end of the slavery era.

The societal current seen in the South African court system's progression to a "best interest of the child" standard was also seen in American jurisprudence.³⁴² As with South Africa, the United States was impacted by English common law. Unlike South Africa, the United States was largely unaffected by Roman Dutch law. Nevertheless, the English law of paternal preference was brought to the United States during the colonial period. Just as in South Africa, the American courts struggled with this preference and eventually transitioned away from it. The transition generally occurred in the form of replacing the paternal preference with a maternal preference, or "tender years" doctrine. That doctrine would then be ultimately replaced with a "best interests" standard. Thus, both nations followed that same path in their jurisprudence.

One striking difference between the South African progress toward development of the Children's Act and the experience of the United States is the reception received by international agreements in the two nations. As a society, the United States of America was built with input from other countries and other cultures. We have been able to take the best from other countries and other cultures and combine it into something better and something all our own. Yet, in the realm of accepting input from beyond our borders on children's issues, we have been less than receptive. The

340. Amendment XIII to the United States Constitution prohibited slavery and involuntary servitude, except as a punishment for a criminal conviction, within the borders of the United States. U.S. CONST. amend. XIII.

341. THOMPSON, *supra* note 8, at 221–22 (noting that by the end of the 1970s, the proportion of white people in South Africa was 21% of the total population).

342. For a more complete discussion of the American transition from British Common Law to the "best interest of the child" standard, see Thomas J. Walsh, *In the Interest of a Child: A Comparative Look at the Treatment of Children Under Wisconsin and Minnesota Custody Statutes*, 85 MARQ. L. REV. 929, 930–33 (2002).

United States still has not adopted the Convention on the Rights of the Child. It shares that distinction with Somalia. President Barak Obama has indicated that the failure of our country to adopt the CRC is embarrassing.³⁴³ Other examples could be given, but just in the context of this discussion we can see the rejection by the United States of the Charter for the League of Nations. Yet it was the League of Nations that participated in the initial advancement of children's issues by passing the World Child Welfare Charter. President Woodrow Wilson, very much a proponent of that organization, was unable to convince the United States Congress that participation was in our national interests.

The reasons for this disinterest by United States policy makers are varied. Yet, it is often the case that the true value of something depends entirely on what it is compared with. In that sense, looking at the legislative actions of other countries and of international organizations would help the United States continue the process of infusing new ideas into our nation. The SALRC recognized that very fact when it opined that "[i]nternational instruments on children's issues, by their very nature, represent a common pool of wisdom, and a culmination of efforts to ensure recognition of children's rights."³⁴⁴ South Africa was very willing to look at the community of nations to see if someone might be doing it better. A review, for example, of the South African Children's Act by United States policymakers may assist in legislative efforts to protect and advance the interests of children in this country. As one American commentator noted, "[m]uch of the product of our courts and lawyers could be improved by taking more of an international and comparative view."³⁴⁵

B. Nationwide Legislation and Law Reform

The Children's Act is different from what would be found in the United States because, as a general rule, family related issues are seen in this country as being within the purview of state legislatures and state courts. Clearly, that creates inefficiencies for practitioners and those that use the system. Fifty different sets of laws dealing with family court, child protection, termination of parental rights and adoption makes a complex legal situation within the United States. Certainly the history of the United States is different than that of South Africa. American history brings to its citizens a different political reality—including the desire of individual states to maintain the rights and independence they historically had before our Federalist system came into being. Yet, it is interesting to note that the

343. Patrick Geary, *United States: Is Obama's Win Also a Victory for Children's Rights?*, CHILDREN'S RIGHTS INFO. NETWORK (Nov. 7, 2008), <http://www.crin.org/violence/search/closeup.asp?infoID=18874>.

344. SALRC Issue Paper, *supra* note 263, at 33.

345. Russell J. Weintraub, *The Need for Awareness of International Standards When Construing Multilateral Conventions*, 28 TEX. INT'L L.J. 441, 442 (1993).

Commission which drafted the Child Custody Jurisdiction and Enforcement Act opined that “[a]s with child support, state borders have become one of the biggest obstacles to enforcement of custody and visitation orders.”³⁴⁶

Despite that political and social history, there have been a number of efforts in various realms to create uniform laws that would be applicable throughout the American Union. These efforts have occurred in various areas of the law, but in the family court realm they include the Uniform Child Custody Jurisdiction Act and its successor the Uniform Child Custody Jurisdiction and Enforcement Act, the Parental Kidnapping Prevention Act, the Uniform Interstate Family Support Act, and the Uniform Adoption Act, just to name a few. As opposed to South Africa, however, most of these efforts to create uniformity across the country have been through independent organizations rather than by a government entity.³⁴⁷ That results in the need for such an organization to lobby each state legislature for passage of the uniform legislation. It also results in each state legislature having the ability to change the uniform law before it is passed. Thus, each state may have their own version of the “uniform” law. South Africa’s Law Reform Commission does not have a counterpart doing similar work in the United States. Several states have law reform committees whose purpose is to review laws within those states.³⁴⁸ Yet nothing similar exists on a nationwide basis. The process used by SALRC to assess existing law and propose changes is based heavily on the workshop model.³⁴⁹ This brings input from across the country and across different groups of interested parties. Such a commission in the United States would be beneficial to assist in bringing some uniformity not only in family law matters, but also in the myriad of other areas of the law in the United States.

C. Constitutional Protection

One of the most notable differences between the treatment of children in South Africa versus the treatment of children in the United States is the

346. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT Prefatory Note (1997).

347. See New South Wales L. Reform Comm’n, *Law Reform Links*, LAWLINK.NEW.GOV.AU, http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_links (last visited Oct. 24, 2010) (noting that the American Law Institute and the National Conference of Commissioners on Uniform State Laws are examples of law reform commissions on a nationwide basis).

348. *Id.* (noting that the following law reform commissions operate on a state to state basis: California Law Revision Commission, Connecticut Law Revision Commission, Massachusetts Law Reform Institute, Michigan Law Revision Commission, New Jersey Law Revision Commission, New York State Law Revision Commission, Oregon Law Commission).

349. SALRC Discussion Paper, *supra* note 270, at 2–4.

constitution of each nation. As mentioned above, the South African Children's Act builds upon very fundamental protections expressly afforded to children in South Africa's Constitution. One could read the South African Constitution as a virtual mandate for the creation of a Children's Act. When looked at from that vantage point the creation of such a comprehensive piece of legislation regarding children seems almost to be expected.

The Constitution of the United States is significantly different. Our Constitution was created in a different era—with different motivations and different historical imperatives. It has a Bill of Rights that is applicable to children, but does not specifically outline child related rights or child related obligations of the State. This is not surprising, as in 1787 America was more concerned about how it was going to govern itself than it was with specifically caring for its children. With the exception of non-white children as mentioned above, the children of colonial America were generally cared for commensurate with the standards of the time and place in which they were born. It simply was not an overriding concern. Further, child related issues have generally been addressed on a satisfactory basis by statutory law within each state.

CONCLUSION

Nelson Mandela believed that the soul of a society could be seen in the way it treats its children. The South African Children's Act allows the outside world to take a look at the soul of South Africa. The socio-economic currents that have been flowing in the part of the world that makes up South Africa brought the population to the point where it demanded broad protections for its children. The legal system adequately arrived at a point when it was already looking to protect the best interests of children. These factors combined with the desire of that country to fulfill international obligations it had undertaken as a member state of the United Nations and the African Union.³⁵⁰ The process undertaken by South Africa and the legislative results it achieved on behalf of children are models for other countries around the world.

The financial resources to implement that framework are far from complete. UNICEF cautioned that “major implementation challenges remain in translating the act into concrete actions to improve the care and protection of South Africa's children.”³⁵¹ Yet, the legal framework to advance the cause of children is in place. In its review of the Act, the Southern African Catholic Bishops Conference noted as follows:

350. Briefing to People to People Delegation, *supra* note 3, at 15.

351. *UNICEF Welcomes Children's Act*, NEWS24, Aug. 4, 2008, <http://www.news24.com/SouthAfrica/News/Unicef-Welcomes-Childrens-Act-20080408> (quoting Macharia Kamau, representative of UNICEF in South Africa).

The Act puts children's issues squarely on the agenda: it emphasises that services to children must be prioritised by government at all levels, and that all spheres of government should review their services and budgets, and co-operate with each other, to ensure that children get the services they need. All of this is most welcome and, although there are certain provisions with which the Church must take issue, the Act has the potential to have a strongly positive impact on the lives of children, especially the most vulnerable.³⁵²

In many respects the South African Children's Act represents some of the very same values and principals embodied in the family codes of the several United States of America. It asserts a commitment to the best interests of the child in legal proceedings and to the protection of children who are victims of abuse or neglect. In other respects, however, the Children's Act is a foreign piece of legislation that would not fit in with American jurisprudence. Yet in all respects it reveals the character of the South African people and reflects well on the soul of that nation.

352. S. AFR. CATH. BISHOPS' CONF., PARLIAMENTARY LIAISON OFF., *THE CHILDREN'S ACT* (Feb. 2006), *available at* http://www.sarpn.org.za/documents/d0001962/BP153_Childrens-Act_Feb2006.pdf.