# The Right of Child Offenders to Intermediary Assistance in the Criminal Justice System: A South African Perspective

**M Bekink***

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**Author**

Mildred Bekink

**Affiliation**

University of South Africa

**Email**

bekinm@unisa.ac.za

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## Abstract

The right of a child offender to participate effectively in criminal proceedings is a fundamental aspect of a right to a fair trial and is guaranteed in the *Constitution of the Republic of South Africa*, 1996 as well as in international instruments, including the United Nations *Convention on the Rights of the Child*. An argument is made that ensuring that this right is fully realised at domestic level, allowances should be made for child offenders to be included in the provisions of section170A of the *Criminal Procedure Act* 51 of 1977. Section 170A makes allowances for the use of an intermediary by witnesses and victims when presenting testimony in criminal proceedings. It is argued that the principle of the best interest of the child as well as other rights such as the right to dignity and equality enshrined in the Constitution and guaranteed in international instruments warrants the inclusion of child offenders in the enabling legislation. An interpretation and implementation of Section 170A of the *Criminal Procedure Act* in line with the Constitution and international instruments that give recognition to the child offender's vulnerability and enforce the best interests of the child offender are accordingly advocated.

## Keywords

Child offender; section 170A; *Civil Procedure Act*; fair trial; right to participation; intermediaries.

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## 1 Introduction

Safeguarding an accused's right to participate meaningfully in an adversarial criminal justice system is an integral part of ensuring that a trail is just and fair.[1] This right has even been described as "implicit in the very notion of an adversarial procedure."[2] It is therefore imperative that accused are able to participate effectively in such a system.[3] This is especially true of children, who find the adversarial criminal justice system particular cumbersome.[4] However, recent years have seen an increased focus on the need for children to be able to participate meaningfully in an adversarial criminal justice system.[5]

In South Africa this can in part be attributed to the fact that South Africa has transformed itself into a fully democratic state with the enactment of first the interim Constitution in 1993[6] and thereafter the final Constitution in 1996,[7] with a consequent transformation of the legal order. The Constitution has also changed the plight of children in that it specifically recognises that children[8] are a vulnerable group in society, have specific and unique needs, and deserve special individualised protection. Their rights are recognised as those of a separate group in section 28(2) of the Constitution, that provides that in all matters concerning the child, a child's best interests are of paramount importance.[9] Apart from the protection thus afforded to children, they are also entitled to all the rights incorporated in the Bill of Rights.[10]

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* Mildred Bekink. BA BA Hons LLB (*cum laude)* (Unisa), LLM (Pret) LLD (Unisa). Associate Professor at the Department of Mercantile Law, College of Law, University of South Africa. E-mail bekinm@unisa.ac.za. ORCiD: https://orcid.org/0000-0002-1204-4487.

1 Section 35 (3) of the *Constitution of the Republic of South Africa*, 1996 (the Constitution); Joubert *et al Criminal Procedure Handbook* 368-369.

2 *Stanford v UK* App No 16757/90 (ECHR, 23 February 1994) para 26.

3 Section 35(3) of the Constitution; Joubert *et al Criminal Procedure Handbook* 368-378.

4 *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 2 SACR 130 (CC) para 1 (hereinafter referred to as *DPP v Minster of Justice and Constitutional Development*); *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) paras 26-28.

5 Müller and Tait 1999 *THRHR* 242.

6 *Constitution of the Republic of South Africa* 200 of 1993.

7 *Constitution of the Republic of South Africa*, 1996 (the Constitution).

8 In terms of s 28(3) of the Constitution a child means a person under the age of 18 years. Any reference hereinafter to the Constitution will be to the 1996 Constitution.

9 See s 28 of the Constitution.

10 With the exception of those rights that are expressly restricted to adults, e.g. the right to vote and to seek public office (s 19(3) of the Constitution).

In recognising children's vulnerability and with the aim of improving the judicial experience for children, several developments have taken place nationally. These developments include, apart from the advent of the interim and final Constitutions, a National Programme of Action for Children,[11] a Victim's Charter,[12] amendments to existing national legislation[13] and constitutional jurisprudence. These developments recognise the seriousness of the impact of crime on children and aim to promote equal enjoyment of constitutional rights and freedoms for both the child offender and the child victim of or witness to crime.

In this regard, the *Criminal Procedure Act* provides legislative support for child victims, witnesses and offenders at court. Provisions in the *Criminal Procedure Act* enable vulnerable and intimidated victims and witnesses to give their best evidence by using a variety of special measures such as testifying in camera[14] by means of closed circuit television or similar electronic media[15] and/or via an intermediary.[16] While provisions are made in the *Criminal Procedure Act* for child offenders[17] to testify in camera and by means of closed circuit television, the Act does not afford child offenders the right to make use of an intermediary. Thus, child offenders fall outside the protection of this special measure which is believed in many instances

11 National Programme of Action Steering Committee 1996 https://www.gov.za/documents/national-programme-action-children-framework.

12 DOJ&CD *Service Charter for Victims of Crime* (the Victims' Charter of 2004).

13 *Criminal Procedure Act* 51 of 1977 as amended by the *Criminal Law Amendment Act* 135 of 1991 and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 (the *Criminal Procedure Act*); *Children's Act* 38 of 2005; *Child Justice Act* 75 of 2008 (the *Child Justice Act*). Note that the *Child Justice Act* establishes a criminal justice system for the child accused, separate from the criminal justice system for adult accused in South Africa. The Act aims to keep children out of detention and the formal criminal justice, mainly through diversion. The Act thus recognises the negative impact of criminal justice systems on children and places much emphasis on diverting children from formal justice procedures and the courts. When these interventions prove to be inadequate, the Act provides for children to be tried and sentenced in child justice courts. The focus of this article is on the latter situation. It should also be noted that the child justice courts will, as a general proposition, apply the provisions of the *Criminal Procedure Act*, except in so far as the *Child Justice Act* provides otherwise. Where the child is a co-accused with an adult, the court will apply the *Child Justice Act* to the child and the *Criminal Procedure Act* to the adult. See s 63(2) of the *Child Justice Act*.

14 Section 153(4) of the *Criminal Procedure Act.*

15 Sections 158(2) and (3) of the *Criminal Procedure Act*.

16 Section 170(A)(1) of the *Criminal Procedure Act*.

17 Although this contribution notes that there is a distinction between a child accused and a child offender, the term "child offender" will be used interchangeably with "child accused" as well as with that of a "child in conflict with the law". Where necessary the distinction will be emphasised.

to be necessary for child offenders to enable them to participate effectively in an adversarial criminal justice system.[18]

The introduction of the function of an intermediary by the insertion of section 170A(1) into the *Criminal Procedure Act* is one of the more significant interventions in respect of the protection of child witnesses and child victims.[19] An intermediary is a person specifically qualified to facilitate communication between the court and a child in a manner that is both age-appropriate and understandable to a child. The intermediary takes the child's developmental and cognitive abilities into account when conveying the meaning and contents of the court's questions to the child and acts as a "shield or barrier" between the formal criminal justice system and the child, thereby making sure that the child's rights are respected.[20] The use of an intermediary therefore provides an enabling environment for the child witness and child victim to present his or her testimony.[21]

Although special measures such as the use of an intermediary are mostly designed to shield victims and witnesses from the defendant, they also function to shield them from the court environment. While it is acknowledged that the impact of the court appearance may differ among the three classes of children, the stress of giving evidence in court may be as detrimental to the child offender as to the child victim or child witness.[22] Many child offenders who appear in court in fact find the experience extremely confusing and stressful.[23] In *S v LM*[24] the court emphasises that there can be no debate that exposure to the criminal-justice system generally is deeply traumatising for children.

The assumption underlying legislation excluding the child offender from such a measure seems to be that the child offender is less vulnerable than the non-offender. However, no empirical evidence supporting such a notion exists. On the contrary, international research into the experience of child

18 Burton, Evans and Sanders 2006 *CFLQ* 397; Songca 2019 *De Jure* 316, 318.

19 *Criminal Procedure Act* 51 of 1977 as amended by the *Criminal Law Amendment Act* 135 of 1991 and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007. For a detailed discussion on the role of intermediaries for child victims and child witnesses, refer to Bekink *Protection of Child Victims and Witnesses*. The author also discusses challenges experienced by intermediaries whilst providing reform proposals.

20 *DPP v Minster of Justice and Constitutional Development* para 96.

21 Bekink 2019 *PELJ* 13-14.

22 Burton, Evans and Sanders 2006 *CFLQ* 400.

23 Talbot *Fair Access to Justice?* 10.

24 *S v LM* 2021 1 SA 285 (GP) para 61.

offenders at court has found the following aspects to be common problems across jurisdictions:[25]

- extremely limited and often misleading knowledge of the function of criminal courts;
- a failure to separate the defence lawyer's function from that of the court authority;
- a tendency to think of legal rights as “conditional” – in that they can be withdrawn;
- a widespread assumption that, once charged, the offender must prove his or her innocence of the crime;
- a failure to consider long-term consequences – a child offender may for example not foresee the consequences of waiving his or her legal rights.

In addition, Jacobson and Talbot's extensive review of the literature surrounding offender vulnerability evidences the high prevalence of mental health problems, communication difficulties and learning difficulties among child offenders.[26] Experience of abuse is also common among child offenders. They argue and correctly so, that child offenders can even be doubly vulnerable due to a combination of their young age or development immaturity with their intellectual, behavioural, psychological or other needs.[27] They also emphasise that the manifestation of these difficulties in court is significant. For example, children with learning disabilities are likely to have limited language ability, comprehension and communication skills. They will thus have difficulty in understanding certain words or questions and recalling information, and will take longer to process information. This can impact on the quality and content of a child offender's testimony, which in turn may impact on the trial. Child offenders may even be acquiescent

25 Plotnikoff and Woolfson *Intermediaries in the Criminal Justice System* 26-2.; Jacobson and Talbot *Vulnerable Defendants in the Criminal Courts* 43.

26 Jacobson and Talbot *Vulnerable Defendants in the Criminal Courts* 37-42.

27 Jacobson and Talbot *Vulnerable Defendants in the Criminal Courts* 37; Abenaa 2018 *E&P* 1. Also seeTalbot *Fair Access to Justice?* 1. In this study it is reported that over 60% of children who offend have communication difficulties; UBS Optimus Foundation 2016 http://www.cjcp.org.za/uploads/2/7/8/4/27845461/08_cjcp_report_2016_d.pdf, 13 where it is reported that around 18 000-20 000 child sexual abuse cases are reported each year to the police.

and suggestible and under pressure may try to appease others to their own detriment. They may even plead guilty due to these factors.[28]

Hoyana and Rafferty highlight the absurdity of a scenario that may arise where a child witness testifying for the prosecution may be entitled to the assistance of an intermediary, only to appear later in another trial as the accused, and not then to qualify for the same assistance of an intermediary.[29] Birch likewise points out that the circumstances of an assault involving young victims and defendants might be ambiguous due to allegations of provocation or mutuality. In such a situation it may be a matter of chance as to who is labelled the victim and who the defendant.[30]

Children need to feel safe when they testify, regardless of whether they are victims, witnesses or offenders. Criticism has hence been levelled at the limited support offered to child offenders relative to that of child non-offender witnesses and victims. It has been argued that a child's vulnerability persists, regardless of whether the child is a victim, a witness or an alleged offender.[31] Recognising this disparity, some countries, such as Kenya, Scotland and Northern Ireland, have opted to include child offenders in their legislation offering this special measure.[32]

It is submitted that, given South Africa's high prevalence of violence, the effect it has on child offenders[33] and the difficulties experienced by these children, when having to testify in the criminal justice system, the legislature should include child offenders in the enabling legislation affording them the use of an intermediary. It is further submitted that, given South Africa's constitutional dispensation and ratification of international and regional children right's instruments, the implementation of such a special measure for child offenders would result in furthering our commitment to these instruments. Moreover, it is submitted that the Constitution already affords child offenders this right, but that it has not been given legislative effect. A

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28 Talbot *Fair Access to Justice?* 10.

29 Hoyano and Rafferty 2017 *Crim LR* 93.

30 Birch 2001 *Crim LR* 473.

31 Fairclough 2017 *E&P* 211; Songca 2019 *De Jure* 318.

32 Article 53(7) of the *Constitution of Kenya*, 2010. S 271F of the *Vulnerable Witness (Scotland) Act*, 2004; art 21A of the *Criminal Evidence (Northern Ireland) Order*, 1999, as inserted by art 12 of the *Justice Act (Northern Ireland)*, 2011, as amended by s 11 of the *Criminal Justice Act (Northern Ireland)*, 2013 (c7). Also see Cooper and Wurtzel 2014 *NILQ* 39 for a discussion hereof.

33 See Songca 2019 *De Jure* 319-321 for a discussion on the interrelatedness between the victimisation of children and the delinquent behavior of children. Also see *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) para 76, where the Constitutional Court highlights the problem with crime and recidivism affecting the child accused.

brief analysis of the constitutional rights afforded to child offenders, with specific reference to the use of an intermediary, will accordingly be undertaken. Thereafter, the current position in South Africa will be evaluated with a view to suggesting improvements to the system. Legal comparison will also be conducted with a view to enhancing the South African position.

## 2 Impact of the Constitution on a child offender's right to intermediary assistance

As indicated in the introduction hereof, children's rights have undergone a significant change since South Africa became a constitutional democracy.[34] In this regard the South African Constitution incorporates an extensive Bill of Rights. The Bill of Rights enshrines the fundamental rights of all people in South Africa and places an obligation on the State "to respect, promote and fulfil" these rights.[35] Children are also included under "all people" in South Africa. They are accordingly afforded all the rights in the Bill of Rights[36] with the exception of those rights that are expressly restricted to adults, such as the right to seek public office and to vote.[37] The Bill of Rights in addition includes a special section or children's clause, namely section 28, which affords specific protection to children.[38] The rights in the Bill of

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34 *Raduvha v Minister of Safety and Security* 2016 2 SACR 540 (CC) paras 60-61; *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 1.

35 Section 7(2) of the Constitution. See also Bekink and Brand "Constitutional Protection of Children" 173 and *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (T) 528D where the court held that ss. 10, 12(2)(a) and (b), 14 and 27(1)(a) of the Constitution apply to everyone.

36 Section 7(1) of the Constitution. Also see *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 38.

37 Section 19(3)(a) and (b) of the Constitution. Also *see Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 38.

38 Section 28 of the Constitution provides as follows:

"(1) 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

Rights are reiterated in section 28 to some degree. The general rights therefore provide the framework for the rights contained in section 28.[39] Children are thus not only protected in general as "persons or people" in the Bill of Rights but are also afforded distinct protection in terms of section 28.[40]

In line with this submission, the rights in the Bill of Rights that impact on a child offender's right to intermediary assistance will be evaluated, whereafter the specific constitutional rights of child offenders in section 28 of the Bill of Rights that contribute to the realisation of the right to intermediary assistance will be discussed.

### *2.1 The rights in the Bill of Rights as they relate to a child offender's right to intermediary assistance*

It should be noted that the Bill of Rights outlines several procedural rights of arrested, detained and accused persons, including children, in section 35 thereof. Section 35(3) affords every accused the right to a fair trial, which amongst other things includes the right to be present when being tried as well as to choose legal presentation.[41] However, as the procedural rights in section 35 find application to "everyone", no special provision is made in section 35 to accommodate children *per se.*

It is submitted by the author hereof that the rights in the Bill of Rights that are the most important or have the most significant impact on the child offender's right to intermediary assistance are the rights to equality, human dignity, and freedom and security of the person (specifically the right to be

may be detained only for the shortest appropriate period of time, and has the right to be—
(i) kept separately from 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.
(2) A child's best interests are of paramount importance in every matter concerning the child.
(3) In this section 'child' means a person under the age of 18 years."

39 Bekink and Brand "Constitutional Protection of Children" 178.

40 Friedman, Pantazis and Skelton "Children's Rights" 47-1; Skelton "Constitutional Protection of Children's Rights" 342; Bekink 2019 *PELJ* 4.

41 Section 35(3) of the Constitution.

free from all forms of violence). These rights are discussed separately below.

### *2.1.1 The rights to equality, human dignity and freedom and security of the person*

Section 9 of the Constitution affords everyone the right to equality, and section 9(1) guarantees the right to equality before the law and equal protection and benefit of the law. Section 9(3) and 9(4) describes how this equality should be realised, namely by prohibiting unfair discrimination by the state and by private entities on a non-exclusive list of grounds. Where a statute differentiates between different classes of children, i.e. child witnesses and *victims* versus child offenders, the effect of this is that such a differentiation will be scrutinised in terms of the Constitution to determine whether it complies with the prohibition on unfair discrimination.[42]

In *Centre for Child Law v Media 24 Limited*[43] the Constitutional Court *inter alia* handed down judgment in an application for the confirmation of an order of constitutional invalidity made by the Supreme Court of Appeal. The Supreme Court of Appeal declared section 154(3) of the *Criminal Procedure Act* to be inconsistent with the Constitution and invalid to the extent that it fails to confer protection on victims of crime who are under the age of 18 years.[44] While section 154(3) of the *Criminal Procedure Act* affords anonymity to an accused and a witness at criminal proceedings who are under the age of 18 years, similar protection is not offered to children under the age of 18 years who are the victims of a crime.

The Constitutional Court concurred with the Supreme Court of Appeal that there is a *lacuna* in the law as it pertains to the protection of the identity of child victims in criminal proceedings.[45] With reference to the test laid down in *Harksen* the court held that section 154(3) differentiates between classes of children,[46] whilst pointing out that the dominant provision in the Act is the

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42 Bekink and Brand "Constitutional Protection of Children" 178; Albertyn and Goldblatt "Equality" 35-69. Refer to the case of *Harksen v Lane* 1998 1 SA 300 (CC) for more on the detailed test to be followed by courts when challenged with claims of unfair discrimination. It should be noted that although the test was developed under the Interim Constitution it has been followed under the Final Constitution. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 15.

43 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC).

44 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) para 128; own emphasis added.

45 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) paras 26-27.

46 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) paras 30-31.

protection of *children*.[47] The court furthermore underlined the fact that though the three classes may each experience a particular type of vulnerability, all three types warrant protection.[48] The court indicated that those that have fallen victim to crime are no less deserving than those who have witnessed crime or those who are in conflict with the law.[49] The court accordingly concluded that "section 154(3) does not afford equal protection and benefit of the law, and the arbitrary differentiation between classes of children gives rise to a breach of the right to equality."[50] Parliament was consequently ordered to remedy the constitutional invalidity within 24 months of the date of the order. Pending parliament's remedying the constitutional invalidity, the section is deemed to include such protection.[51]

In the light of the dictum of *Centre for Child Law v Media 24 Limited*[52] it is submitted by the author hereof that to differentiate between the three classes of children, i.e. by excluding child *offenders* from the provisions of section 170A of the *Criminal Procedure Act*, may likewise be irrational and arbitrary, and therefore unconstitutional.[53]

The Constitutional Court furthermore declared section 154(3) of the *Criminal Procedure Act* to be inconsistent with the Constitution and invalid to the extent that the protection that children receive in terms thereof does not extend beyond their reaching the age of 18 years.[54]

Of particular importance to this discussion is a concern raised by the respondent, namely that the ongoing protection would be overboard as it would apply to all three classes of children notwithstanding that the competing justification for ongoing protection differed among the three classes. The court stated that although it agreed with this notion, ongoing protection is still warranted for all three classes.[55] The court highlighted that when it comes to the criminal justice system, a restorative approach is optimal for all three classes, but it is of particular importance when considering a child in conflict with the law. The court reiterated that given that we are dealing with a child accused in a country where crime is rampant and where there is a high recidivism rate, the court must do all it can to

47 Own emphasis added.
48 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) para 33.
49 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) para 41.
50 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) para 35.
51 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) para 60.
52 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC).
53 Own emphasis added.
54 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) para 128.
55 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) paras 75-76.

utilise restorative justice for child accused in order to curb the vicious cycle of crime.[56]

In *S v Ndwane*[57] the High Court applied section 63 of the *Child Justice Act*[58] to child witnesses. The court was of the view that although the section does not cater specifically for child witnesses but child accused only, there is no good reason why child witnesses should not be afforded the protection of section 63 of the *Child Justice Act*. It is submitted by the author hereof that there may similarly be no reason why section 170A of the *Criminal Procedure Act* may not be applied to child accused.

It is furthermore submitted by the author hereof that the abovementioned dictum clearly illustrates that although the three classes differ and the reasoning for protection may differ, all three classes warrant protection. Children in conflict with the law are also in need of protection. The use of an intermediary provides an enabling environment for the child in conflict with the law to present his or her testimony, similar to that of the other two classes. Such a provision should accordingly be regarded as not only an example of an equalising measure for the child offender but also as contributing to restorative justice for the child offender.

The right to dignity is enshrined in section 10 of the Constitution, which states that everyone has inherent dignity and the right to have their dignity respected and protected. The Constitutional Court underlined the importance of this right in *S v Makwanyane*[59] and stated as follows:

> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

The Constitutional Court in addition pointed out that the right to dignity is circuitously linked to other human rights.[60] In *S v M (Centre for Child Law as* Amicus Curiae*)*[61] Sachs J pointed out that every child has a dignity of his or her own, which entails that a child is to be constitutionally regarded as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size. In *S v Mokoena*[62] Bertelsmann J emphasised that

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56 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) para 76.
57 *S v Ndwane* 2012 ZAKZPHC 47 (6 August 2012) para 15.
58 *Child Justice Act* 75 of 2008.
59 *S v Makwanyane* 1995 3 SA 391 (CC) para 144.
60 *S v Makwanyane* 1995 3 SA 391 (CC) para 328.
61 *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 18.
62 *S v Mokoena; S v Phaswane* 2008 5 SA 578 (T) para 50.

this entails that at the very least the criminal procedure and the courts should administer the criminal justice system in such a fashion that children who are caught up in its workings are treated with proper respect for their dignity and their unique status as vulnerable young human beings.[63]

In *Centre for Child Law v Media 24 Limited*[64] the Constitutional Court stated that it is worth reiterating that when it comes to dignity it is imperative to understand that every child has his or her own intrinsic worth as a human being. It goes without saying that child offenders, despite being in conflict with the law, are also entitled to the right to dignity and should be treated with the necessary compassion and respect for the protection of their dignity.[65] It is submitted that the extension of the application of section 170A of the *Criminal Procedure Act* to the child offender may prove invaluable in realising the right to dignity for the child offender.

Section 12 of the Constitution guarantees the right to freedom and security of the person.[66] Of particular importance to the child offender is the right guaranteed in section 12(1)(c) of the Constitution, namely the right to be

63 *S v Mokoena; S v Phaswane* 2008 5 SA 578 (T) para 50.

64 *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) para 72.

65 *J v National Director of Public Prosecutions* 2014 7 BCLR 764 (CC) para 47; *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC) para 50; *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC) para 46.

66 Section 12 of the Constitution states that:

"(1) Everyone has the right to freedom and security of the person, which includes the right –
  (a) not to be deprived of freedom arbitrarily or without just cause;
  (b) not to be detained without trial;
  (c) to be free from all forms of violence from either public or private sources;
  (d) not to be tortured in any way; and
  (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right –
  (a) to make decisions concerning reproduction;
  (b) to security in and control over their body; and
  (c) not to be subjected to medical or scientific experiments without their informed consent."

free from violence,[67] as well as that guaranteed in section 12(1)(e), namely not to be *treated* or punished in a cruel, inhuman or degrading way.[68]

Although sections 12(1)(c) and 12(1)(e) may normally not be associated with court proceedings, it is submitted that it can be argued that exposing a child in open court to the traumatic effects of the adversarial process may amount to (secondary) violence or cruel, inhuman or degrading treatment.[69] In support of this argument the Constitutional Court in *DPP v Minister of Justice and Constitutional Development*[70] acknowledged that a court operates in an atmosphere which is intended to be imposing and foreign to a child. Unless the courtroom is appropriately adapted to the child, the effect of the courtroom atmosphere on the child may even terrify a child into silence.[71] This situation is exacerbated when the child is subjected to intensive and at times aggressive cross-examination.[72] As was indicated in the introduction hereof, this is the case regardless of whether the child encounters the system as a victim, witness or offender.[73]

Currie and De Waal define violence against an individual as a grave invasion of that individual's personal security.[74] Section 12(1)(c) guarantees the right to be protected against an invasion of an individual's personal security, whether by the State or by private individuals. It therefore places an obligation on the State to protect individuals, both negatively by itself refraining from such invasion and positively by restraining or discouraging private individuals from any invasion.[75]

It can be argued that this means that the State has an obligation to protect children from further trauma. This can be accomplished through the development of conditions that are conducive to the testifying of a child

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67 Although one may normally not associate court proceedings with violence, cognisance should be taken of the fact that General Comment No 13 of the Committee on the Rights of the Child defines violence as including *all forms* of physical or mental violence, including psychological maltreatment. It calls on all States Parties to introduce legislation and other measures to implement the rights of children in its guidelines, including treating child victims in a child-friendly and sensitive manner. Refer to Committee on the Rights of the Child 2011 https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf.

68 Own emphasis added.

69 Bekink 2019 *PELJ* 16.

70 *DPP v Minster of Justice and Constitutional Development* para 101.

71 *DPP v Minster of Justice and Constitutional Development* para 101.

72 *DPP v Minster of Justice and Constitutional Development* para 102.

73 Also see Songca 2019 *De Jure* 326.

74 Currie and De Waal *Bill of Rights Handbook* 281.

75 Currie and De Waal *Bill of Rights Handbook* 282; Bishop and Woolman "Freedom and Security of the Person" 40-49, 40-54; *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* 2020 1 SA 1 (CC) para 42.

offender in court. Songca highlights that the *Child Justice Act*[76] ameliorates the concerns to a certain degree in relation to the limitation on cross-examination and compulsory legal presentation. She points out, however, and correctly so, that it does little to protect a child offender from the harsh reality of the courtroom as a physical space or the trauma associated with testifying in a criminal court.[77] Section 170A(1) of the *Criminal Procedure Act* seeks to prevent a child from being exposed to undue stress or suffering as a result of testifying in court.[78] It is accordingly submitted by the author hereof that the application of section 170A(1) to child offenders should become a priority as it could play a fundamental role in fulfilling this obligation.

### *2.2 Section 28: Specific children's rights*

Section 28 of the Bill of Rights[79] entrenches the rights of children and affords them specific protection such as the right to a name and a nationality from birth;[80] to family care or parental care, or to appropriate alternative care when removed from the family environment;[81] to be protected from maltreatment, neglect, abuse or degradation;[82] and not to be detained except as a measure of last resort;[83] as well as providing that a child's best interests are of paramount importance in every matter concerning the child.[84]

Apart from affording the child offender the right not to be detained except as a measure of last resort as well as the right to the services of a legal practitioner at state expense, section 28 does not afford the child offender any specific right to protection during the trail. Nonetheless, the right not to be subjected to neglect, abuse or degradation is set out in section 28(1)(d) as well as the provision that a child's best interests are of paramount importance in every matter concerning the child is of particular importance to the child offender. These rights will accordingly be discussed in more detail below.

76 *Child Justice Act* 75 of 2008.
77 Songca 2019 *De Jure* 326.
78 *S v Mokoena; S v Phaswane* 2008 5 SA 578 (T) para 108.
79 See s 28 of the Constitution quoted in fn. 38 above.
80 Section 28(1)(a) of the Constitution.
81 Section 28(1)(b) of the Constitution.
82 Section 28(1)(d) of the Constitution.
83 Section 28(1)(g) of the Constitution.
84 Section 28(2) of the Constitution.

### *2.2.1 The right not to be subjected to neglect, abuse or degradation*

Section 28(1)(d) of the Constitution provides that a child has a right to be protected from maltreatment, neglect, abuse or degradation and reflects society's belief that children are vulnerable. According to Bekink and Brand, section 28(1)(d) imposes a constitutional duty on private persons, as well as the State, to refrain from these forms of treatment while also imposing a positive obligation on the State to prevent harm to children.[85]

The second obligation is of particular importance in two possible situations. Firstly, the state is required to put an end to instances of on-going maltreatment, neglect, abuse and degradation in the family or in any other context.[86] This duty is given specific legislative effect in the *Children's Act*.[87]

The second context within which the State must act to prevent the neglect, abuse, maltreatment and degradation of children is the general context of legislative and policy protection of rights. In terms of this specific context the State is under a constitutional obligation to create legislative and other measures to protect children against potential maltreatment, neglect, abuse and degradation. In *S v M*[88] the Constitutional Court highlighted the importance of such measures by stating that the State should "diligently seek whenever possible to avoid conduct of its agencies that may have the effect of placing children in peril." Examples of such legislation can be found in the *Children's Act*,[89] the *Sexual Offences Act*,[90] and the *Child Justice Act,*[91] which introduce a whole range of new offences aimed at protecting children from violence.

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85 Bekink and Brand "Constitutional Protection of Children" 188. The authors point out that the fact that the right is phrased as a right to be *protected* against maltreatment, abuse, neglect or degradation whereas a comparable right in the interim Constitution (s 30(1)(d))) only said a child should not be *subjected* to such treatment underscores the fact that s 28(1)(d) imposes a positive obligation to protect children against such treatment. This view is also held by Friedman, Pantazis and Skelton "Children's Rights" 47-24. Also see s 7(2) of the Constitution, which states that "[t]he state must respect, protect and fulfil the rights in the Bill of Rights."

86 Bekink and Brand "Constitutional Protection of Children" 188.

87 See for example chs 7 and 9 of the *Children's Act* 38 of 2005 (hereinafter the *Children's Act*).

88 *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) para 20.

89 Chapters 7 and 9 of the *Children's Act*. The National Child Protection Register serves as an example of a measure to protect children against potential abuse or maltreatment. See ss 111-128A of the *Children's Act*.

90 Chapter 6 of *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

91 See for example ss 28 and 64 of the *Child Justice Act* 75 of 2008.

Of particular consequence to the child offender are the various amendments made by the *Sexual Offences Act* to the *Criminal Procedure Act* to provide for special measures for child offenders to testify, such as testifying "in camera"; the prohibition of the publication of information that might reveal the identity of the child offender; and the testifying by means of closed circuit television or similar electronic media.[92] For the child victim and child witness this also includes the use of an intermediary.[93]

Testifying "in camera" or by means of closed-circuit television and or with the assistance of an intermediary may go a long way towards ensuring that this right not to be subjected to harm or abuse is accomplished.[94] This view is particularly pertinent if one takes into account that the definition of "abuse" in the *Children's Act* is broad and includes the prevention of "exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally."[95]

In *DPP v Minister of Justice and Constitutional Development* the Constitutional Court acknowledged that testifying in court carries with it a certain agree of mental stress or suffering and that children are often intimidated by the court atmosphere.[96] To subject the child, be that as victim, witness or offender, to the normal adversarial process of testifying in court may accordingly fall squarely within the definition of abuse in the *Children's Act*.[97] It is moreover submitted that as children in conflict with the law also experience physical and psychological vulnerability,[98] they may find the adversarial process equally intimidating and may also be likely to suffer harm or mental stress from testifying in court. Section 170A of the *Criminal Procedure Act* may also prove invaluable for child offenders in this regard.

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92 Refer to ss 153, 154 and 158 of the *Criminal Procedure Act*. S 158 was enacted in 1996 by s 7 of the *Criminal Procedure Amendment Act* 86 of 1996.

93 Section 170(A)(1) of the *Criminal Procedure Act*.

94 *S v Mokoena; S v Phaswane* 2008 5 SA 578 (T) paras 50, 87.

95 Section 1 of the *Children's Act*; also see *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* 2020 1 SA 1 (CC), where the Constitutional Court recently dealt with the right (among others) not to be subjected to maltreatment, neglect, abuse or degradation in a case dealing with the corporal punishment of children in private settings. The Constitutional Court pointed out at para 44 that the Constitution gives protection from "all forms of violence" whether from "public or private sources" in s 12(2) thereof. The Court accordingly found that even "reasonable" physical chastisement violated children's right to bodily and psychological integrity under s 12 of the Constitution.

96 *DPP v Minster of Justice and Constitutional Development* paras 96-97.

97 Bekink 2019 *PELJ* 28.

98 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC) para 26.

### *2.3 The paramountcy of the child's best interests*

Section 28(2) is a right on its own and has been described by the Constitutional Court as "the benchmark for the treatment and protection of children."[99] It should therefore not be simply regarded as a mere guideline.[100] Apart from being an independent right, this right also reinforces other rights.[101] In addition, the best interests principle has been used to determine the ambit and limits of other competing rights.[102]

Cognisance should, however, be taken of the fact that, despite the linking of the emphatic word "paramount" with the far-reaching phrase "in every matter concerning the child" in section 28(2), this right does not automatically trump all other rights. In *De Reuck v Director of Public Prosecution*[103] the Constitutional Court held that the best interest injunction is capable of limitations that are reasonable and justifiable in compliance with the limitation clause.[104] Consequently, the fact that the best interests of the child are paramount does not mean that they are absolute.[105] This right is still capable of limitation by section 36 of the Constitution.[106]

The principle of the best interests also plays an important role in jurisprudence relating to the child offender. In *J v National Director of Public Prosecutions*[107] the Constitutional Court pointed out that the starting point for matters concerning the child, including the child offender, is section 28(2), the principle of the best interests.[108] The Constitutional Court also laid out a number of key principles for applying the best interests approach to child offenders:[109]

- Firstly, the law should generally distinguish between adults and children.

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99 *DPP v Minster of Justice and Constitutional Development* para 73.

100 As was done in *Du Toit v Minister of Welfare and Population Development* 2003 3 SA 198 (CC).

101 Skelton "Children" 620.

102 *Sonderup v Tondelli* 2001 1 SA 1171 (CC)*; De Reuck v Director of Public Prosecution* 2004 1 SA 406 (CC); *Centre for Child Law v Media 24 Limited* 2020 3 BCLR 245 (CC).

103 *De Reuck v Director of Public Prosecution* 2004 1 SA 406 (CC) para 55.

104 *De Reuck v Director of Public Prosecution* 2004 1 SA 406 (CC) para 55.

105 *DPP v Minster of Justice and Constitutional Development* para 72.

106 *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 26.

107 *J v National Director of Public Prosecutions* 2014 7 BCLR 764 (CC) para 35.

108 *J v National Director of Public Prosecutions* 2014 7 BCLR 764 (CC) para 35.

109 *J v National Director of Public Prosecutions* 2014 7 BCLR 764 (CC) paras 37-39.

- Secondly, the law should make allowances for an individual approach to child offenders. This means that the best interest standard should be flexible enough to allow for individual circumstances to determine the factors that safeguard the best interest of a particular child.

- Thirdly, the child offender or his or her legal representative must be afforded an appropriate and adequate opportunity to make representations at every stage of the criminal justice process, giving due weight to the age and maturity of the child. In applying this third principle, regard should according to the Court also be given to the guiding principle of the *Child Justice Act*, namely that every child should be given an opportunity to participate in proceedings that would result in decisions affecting the child.

This judgement builds on other Constitutional Court judgements that highlight the importance of the application of the best interests principle to the position of the child offender. It also affirms the view that child offenders are not only to be distinguished from adults but are also to be regarded as individuals whose cases must be decided on their own merit and in accordance with their own individual circumstances.[110] In line with the submission, it acknowledges the importance of affording the child offender the opportunity to make "*appropriate and adequate*"[111] representations at every stage of the criminal justice process as well as to be given an opportunity to participate in the proceedings. It hence intertwines the principle of the best interests of the child with the right of child offenders to effectively participate in criminal proceedings.

In *Radhuva v Minister of Safety and Security*,[112] albeit in the context of the arrest and detention of child offenders, the Constitutional Court underlined the fact that the need for society to be sensitive to a child's inherent vulnerability lies behind section 28(2) of the Constitution. In the context of the arrest of children, section 28(2) seeks to insulate them from the trauma of arrest by demanding in peremptory terms that, even when a child has been arrested, his or her best interests must be accorded paramount importance.[113] The same sensitivity to the child offender's inherent

110 Hansungule 2014 *SA Crime Quarterly* 28.
111 Own emphasis added.
112 *Radhuva v Minister of Safety and Security* 2016 2 SACR 540 (CC) para 57.
113 *Radhuva v Minister of Safety and Security* 2016 2 SACR 540 (CC) para 57; also see *S v LM* 2021 1 SA 285 (GP) para 61.

vulnerability can be expected of society during the trial phase of the criminal justice process.

It is trite that children find the giving of evidence in court in an adversarial criminal justice system stressful and traumatic.[114] In *DPP v Minister of Justice and Constitutional Development*[115] the Constitutional Court unequivocally stated that the "best interests of the child demand that children should be shielded from trauma that may arise from giving evidence in criminal proceedings." This furthermore entails that the legal and judicial process must always be child-sensitive and must be implemented in a manner which favours protecting and advancing the interests of children.[116] It is hence submitted that the principle of the best interests of the child mandates that in the context of the trail of a child offender, the child offender should be shielded from trauma that may arise because of the trial by being included in legislation that may afford him or her the assistance of an intermediary when having to testify.

## 4 The child offender's right to intermediary assistance under the *Child Justice Act*

The *Child Justice Act*[117] was promulgated in 2010 and ushered in a new era in the criminal justice system for children in conflict with the law in that this system operates separately from the criminal justice system, which continues to apply for adult accused. The Preamble of the *Child Justice Act* acknowledges the pre-1994 difficulties experienced by children, that the statutory law at the time did not effectively approach the plight of children in conflict with the law in a comprehensive and integrated manner, and that it did not take into account their *vulnerability and special needs.*[118]

The objectives of the *Child Justice Act* are varied. Of particular importance to this contribution is section 63(4) of the *Child Justice Act*, that determines that a Child Justice Court must, during the proceedings, ensure that the best interests of the child are upheld, and to this end must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and appropriate to the age and

114 *S v Mokoena; S v Phaswane* 2008 5 SA 578 (T) paras 57-60, 69.
115 *DPP v Minster of Justice and Constitutional Development* para 2.
116 *DPP v Minster of Justice and Constitutional Development* para 74.
117 *Child Justice Act* 75 of 2008.
118 Own emphasis added.

understanding of the child.[119] This indubitably recognises the best interests principle in the field of child criminal justice.

While the Regulations to section 63(3) of the *Child Justice Act* provide the presiding officer with actions that must be followed before the plea stage, such as treating the child with care, setting the child at ease, allowing sufficient time for the child to absorb information and ensuring that the child understands the information,[120] no such actions/regulations are prescribed for the other stages of the trial or the cross-examination of the child offender.

Though these regulations may perhaps be inferred, and the presiding officer may treat the child with care etc., the court (the presiding officer) may not cross-examine the child offender as this could amount to the court's descending into the arena.[121] Moreover, in *DPP v Minister of Justice and Constitutional Development*[122] the Constitutional Court emphasised the following:

> *As pointed out earlier, questioning a child requires a special skill. Not many judicial offices have the skill* …. This illustrates the importance of using intermediaries when young children are called upon to testify. They have particular skills in questioning and communicating with children.[123]

The role of the presiding officer in section 63(4) is to ensure that the proceedings are fair and not unduly hostile and appropriate to the age and understanding of the child. One way to comply with the provisions is to make allowances for the use of an intermediary.[124] Given these provisions that support the protection of child offenders against hostile proceedings, the inclusion of the child offender in enabling legislation is clearly fitting. It is submitted that the *Child Justice Act* opens the door for the application of section 170A of the *Criminal Procedure Act* to the child offender.

Though it may be argued that the application of an intermediary for a defendant calls for a decisive break with the traditional criminal justice system, this is precisely what led to the *Child Justice Act* being placed upon the statute book.[125] In *S v M*[126] with reference to the objects of the *Child Justice Act* the court highlighted that the *Child Justice Act* sets out to prevent

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119 Section 63(4) of the *Child Justice Act*. Also see *A v S* 2019 ZAECGHC 64 (3 June 2019) para 5.
120 GN R251 in GG 33067 of 31 March 2010 (Regulations Relating to Child Justice).
121 Van der Merwe 1995 *Obiter* 197.
122 *DPP v Minster of Justice and Constitutional Development* paras 167-168.
123 Own emphasis added.
124 Wurtzel 2017 *Crim LR* 470.
125 *S v CKM* 2013 2 SACR 303 (GNP) para 7.
126 *S v M* 2021 1 SA 285 (GJ) para 70.

children from being exposed to the adverse effects of the formal justice system by using, where appropriate, processes, procedures, mechanisms, services and options more suitable to the needs of children and in accordance with the Constitution. It is submitted that this is precisely what the use of an intermediary sets out to achieve.

Some commentators have argued that the principle of restorative justice should not be confined to the diversion process only but should be adopted as an approach throughout the criminal justice system.[127] This argument is supported, and it is submitted that this should also apply to the trail process itself by making allowances for the use of an intermediary.

## 5 Position in other jurisdictions

As alluded to in the introduction of this contribution, legal comparison will also be undertaken with a view to enhancing the South African position. However, due to the ambit of this contribution, the legal comparison is restricted to the positions in Kenya and Northern Ireland.[128]

### *5.1 Kenya*

The use of an intermediary in criminal proceedings was first introduced in Kenya through the enactment of the *Sexual Offences Act*[129] in 2006. Section 31 of the *Sexual Offences Act* provides for the use of an intermediary for vulnerable witnesses.[130] A person is said to be vulnerable when the person

127 Songca 2019 *JJS* 85. Also see Skelton and Batley 2008 *Acta Criminologica* 43.

128 Note that a similar provision is also included in s 104 of England and Wales' *Coroners and Justice Act*, 2009 (c25) but is yet to be implemented. The courts have, however, since 2008 begun to order the use of intermediaries for defendants under their inherent jurisdiction to ensure a fair trial. See for example *R (C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin) para 17, where the court held that "'[t]he essential point is that any defendant in any criminal proceedings must have a fair trial. Where a defendant cannot participate effectively in the proceedings, whether in whole or in part, he will not have a fair trial"; *R (on the Application of AS) v Great Yarmouth Youth Court* [2011] EWHC 2959 (Admin); *R(TI) v Bromley Youth Court* [2020] EWHC 1204 (Admin); Hoyano and Rafferty 2017 *Crim LR* 96. Note also that so-called communication assistance is afforded to defendants in terms of s 80 of the New Zealand *Evidence Act*, 2006. Refer also to Howard, McCann and Dudley 2020 *ANZJ Crim* 265-284, where the authors indicate that findings on a study conducted on communication assistance for young people facing criminal charges suggest that it is needed and plays a valuable role in New Zealand's youth justice system.

129 *Sexual Offences Act* 3 of 2006.

130 See s 31(1) of the *Sexual Offences Act* 3 of 2006 that determines that:

"(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, *other than the accused*, who is to give evidence in those proceedings a vulnerable witness if such witness is –

(a) the alleged victim in the proceedings pending before the court;

is a child or a person with mental disabilities. Once a child witness has been declared as a vulnerable witness, the child witness is entitled to the use of certain protective measures, which include the use of an intermediary.[131] The role of an intermediary in Kenya is similar to that of an intermediary in South Africa, namely to convey the substance of any question to the vulnerable witness, to inform the court if the witness is fatigued or stressed, and to request the court for a recess.[132]

The use of an intermediary in criminal proceedings was later reproduced in 2010 in the Bill of Rights of the *Constitution of Kenya*. The *Constitution of Kenya* provides for a progressive Bill of Rights, which guarantees every person the rights or fundamental freedoms included therein.[133] Specific provision is also made for the rights of children.[134] Article 53 of the *Constitution of Kenya* makes provision for the protection of children and includes amongst others the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhumane treatment and punishment, and the rights to parental care and protection and not to be detained, except as a measure of last resort. It also provides for the overarching principle of the best interests of the child to be considered in all matters affecting the child.[135]

Article 50 of the *Constitution of Kenya* provides that every accused person, including children, has a right to a fair trial.[136] It includes amongst others the right to the presumption of innocence until proven guilty, the right to an adequate defence, the right to legal presentation and the right to have a

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(b) a child; or
(c) a person with mental disabilities."

131 See s 31(4) of the *Sexual Offences Act* 3 of 2006, that states as follows:
"(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures –
(a) allowing such witness to give evidence under the protective cover of a witness protection box;
(b) directing that the witness shall give evidence through an intermediary;
(c) directing that the proceedings may not take place in open court;
(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or
(e) any other measure which the court deems just and appropriate."

132 See s 31(7) of the *Sexual Offences Act* 3 of 2006; s 170A(1) of the *Criminal Procedure Act*.

133 For example, the right to life, equality, human dignity, and freedom and security of the person. See ch 4 of the *Constitution of Kenya*, 2010.

134 Article 53 of the *Constitution of Kenya*, 2010.

135 Article 53(2) of the *Constitution of Kenya*, 2010.

136 Article 50 of the *Constitution of Kenya*, 2010; *RMM v Republic* [2018] eKLR.

speedy trail. Of particular significance to the topic under discussion is the right afforded in article 50(7) of the *Constitution of Kenya,* which provides for the services of an intermediary for the complainant or the *accused* to communicate with the court in a criminal trial.[137] This provision stands in contrast to the general provision for intermediary assistance provided for *child witnesses* under section 31 of the *Sexual Offences Act*.[138] Unlike section 31, article 50(7) does not draw a distinction between a complainant and an accused.[139] Child offenders who require assistance to communicate with the court must in terms of this article be allowed to give evidence with the help of an intermediary. The inclusion of the article in the *Constitution of Kenya* is thus of vital significance as it acknowledges that child offenders may require special assistance to enable them to testify and to have a fair trial. In *MM v Republic*[140] the court highlighted that the whole object of conducting the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness.

It is submitted that South Africa may similarly achieve fairness with regard to the rights of child offenders and may promote their wellbeing by making allowances for them in enabling legislation to acquire the assistance of an intermediary when having to testify in court. As the Republic of Kenya deemed this right of such importance that it was necessary to include it in their Bill of Rights, a strong argument can be made for South Africa to follow this example.

### *5.2 Northern Ireland*

Between May 2013 and December 2016, the Department of Justice, Northern Ireland launched an intermediary pilot scheme for the provision of intermediaries in criminal trials for vulnerable witnesses. This scheme extended eligibility to vulnerable defendants in a bid to ensure equality of arms.[141] Article 4 of the Criminal Evidence (Northern Ireland) Order[142] sets out those vulnerable witnesses who are eligible for assistance on the grounds of age or incapacity. They must at the time of the hearing either be

137 Own emphasis. Art 50 of the *Constitution of Kenya*, 2010 provides as follows: "In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."

138 Own emphasis.

139 *MM v Republic* [2014] eKLR 4.

140 *MM v Republic* [2014] eKLR 7.

141 Department of Justice *Northern Ireland Registered Intermediaries Schemes Pilot Project* 5.

142 *Criminal Evidence (Northern Ireland) Order*, 1999.

under 18 years of age, or be suffering from mental disorder within the terms of the *Mental Health (Northern Ireland) Order*,[143] or have significant impairment of intelligence and social functioning, or have a physical disability, or be suffering from a physical disorder which is likely to diminish the quality of their evidence.[144] Note that children are eligible by virtue of their age alone. Whether or not they require the assistance of an intermediary will depend on the circumstances of the individual child. In this regard, the child's communication needs may simply relate to age.[145]

Eligibility for the accused is set out in article 21BA of the *Criminal Evidence (Northern Ireland) Order*. These vulnerable accused must at the time of the application either be under 18 years of age, or suffering from mental disorder in terms of the Mental Health (Northern Ireland) Order,[146] or have such significant impairment of intelligence and social functioning that the accused is for that reason unable to participate effectively in the proceedings as witness giving oral evidence in court. [147] The eligibility for vulnerable child accused thus arises where the child is under 18 years of age and the child's level of intellectual ability or social functioning is likely to compromise the child accused's ability to participate effectively in the proceedings as a witness giving oral evidence in court.[148]

The function of an intermediary in terms of the *Criminal Evidence (Northern Ireland) Order* is, like that of South African intermediaries, to enable complete, coherent and accurate communication.[149] In this regard the intermediary may for example:[150]

- adapt questions to the vulnerable defendant's developmental stage;
- ask short, simple questions;
- follow a logical sequence;

143 *Mental Health (Northern Ireland) Order*, 1986.
144 Article 4 of the *Criminal Evidence (Northern Ireland) Order*, 1999.
145 Cooper and Wurtzel 2014 *NILQ* 4
146 *Mental Health (Northern Ireland) Order*, 1986.
147 Article 21.B *Criminal Evidence (Northern Ireland) Order*, 1999.
148 Article 21.B *Criminal Evidence (Northern Ireland) Order*, 1999.
149 Article 21.B(4) *Criminal Evidence (Northern Ireland) Order*, 1999.
150 Lord Chief Justice's Office 2019 https://www.judiciaryni.uk/sites/judiciary/files/decisions/Case%20Management%20in%20the%20Crown%20court%20inlcuding%20Protocols%20for%20Vulnerable%20Witnesses%20and%20Defendants_0.pdf 41.

- speak slowly, allowing the defendant enough time to process questions;
- allow the defendant a full opportunity to answer without interruptions; and
- avoid complex questions.

The overriding principles of intermediary assistance for child defendants in Northern Ireland are thus to ensure that they are able to give their best evidence, understand and participate in the proceedings, and engage fully in their defence.[151]

A report on the pilot scheme by the Department of Justice of Northern Ireland in 2016 concluded that the intermediary role "continues to be essential in assisting vulnerable persons with significant communication problems during their engagement with the criminal justice process."[152] The Department of Justice accordingly recommended that it be made available beyond the Crown Courts to the lower criminal courts.[153] It has from April 2017 been extended to cover Magistrates' and Youth Courts across Northern Ireland.[154] This is evidence of Northern Ireland's commitment to broaden the availability of intermediary assistance even further. In this regard Northern Ireland's scheme for defendant children is leading the way in this field and serves as an excellent example to other countries such as South Africa.

## 6 Conclusion

As was alluded to above,[155] historically the South African justice system has never had a separate system for dealing with child offenders but has generally treated child offenders as smaller versions of adult offenders.[156] The advent of South Africa's constitutional democracy ushered in a new era and set out to change this, as it sought to transform the legal system as a

151 Lord Chief Justice's Office 2019 https://www.judiciaryni.uk/sites/judiciary/files/decisions/Case%20Management%20in%20the%20Crown%20court%20inlcuding%20Protocols%20for%20Vulnerable%20Witnesses%20and%20Defendants_0.pdf 33.

152 Department of Justice *Northern Ireland Registered Intermediaries Schemes Pilot Project: Phase II Review*.

153 Department of Justice *Northern Ireland Registered Intermediaries Schemes Pilot Project: Phase II Review*.

154 Department of Justice *Northern Ireland Registered Intermediaries Schemes Pilot Project*.

155 See para 2.1.1 above.

156 *Radhuva v Minister of Safety and Security* 2016 2 SACR 540 (CC) para 60.

whole. In *DPP v Minister of Justice and Constitutional Development*[157] the Constitutional Court highlighted that the foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms introduced a new ethos that should permeate South Africa's legal system. In line with these values, section 28(2) requires that in all matters concerning the child, a child's best interests must be of paramount importance.[158] This furthermore entails that the legal and judicial process must always be child sensitive. This means that statutes must be interpreted in a manner that favours protecting and advancing the interests of children.[159] The court moreover unequivocally stated that the "best interests of the child demand that children should be shielded from trauma that may arise from giving evidence in criminal proceedings." With regard to child victims and child witnesses when having to testify in a court of law, this entails *inter alia* having the right to intermediary assistance in terms of section 170A of the *Criminal Procedure Act*. The question this discussion set out to answer was whether the child offender should be included in the legislation.

With reference to the Constitution and relevant jurisprudence, the author argues that the use of intermediaries is in the best interest of all children and must therefore be available not only to child witnesses and or victims of crime but also to child offenders.

In *Radhuva v Minister of Safety and Security*[160] the Constitutional Court held that:

> [I]t is a fact that children commit crimes. Even heinous crimes for that matter. Sad as it might be, it is a reality of our times. Does the fact that section 28(2) demand that the best interest of children be accorded paramount importance, means that children's right trump all other right? Certainly not. All the Constitution requires is that, unlike pre-1994, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children-with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them.

The Constitution demands that we treat our children with care, compassion, empathy and understanding of their vulnerability and inherent frailties, even when they are in conflict with the law. To do so will also align South Africa with the positions of other countries leading the way, such as Kenya and

157 *DPP v Minster of Justice and Constitutional Development* para 2.
158 *DPP v Minster of Justice and Constitutional Development* para 2.
159 *DPP v Minster of Justice and Constitutional Development* 74.
160 *Raduvha v Minister of Safety and Security* 2016 2 SACR 540 (CC) para 59.

Northern Ireland. In addition, given the research evidencing the negative impact of the adversarial process on the quality of children's evidence *per se*,[161] including that of the child offender, as well as the high prevalence of mental health problems, communication difficulties and learning difficulties evidenced in the literature pertaining to offender vulnerability, to omit to include child offenders within the enabling legislation for intermediary assistance may be contrary to the values expressed in the Constitution. It is therefore submitted that the traditional testifying approach should be adapted and applied to fit a testifying regime in keeping with the Constitution. For the child offender, this means being included in the provisions of Section 170A of the *Criminal Procedure Act*.

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## List of Abbreviatons

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| ANZJ Crim | Australian and New Zealand Journal of Criminology |

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| CFLQ | Child and Family Law Quarterly |
| Crim LR | Criminal Law Review |
| DOJ&CD | Department of Justice and Constitutional Development |
| E&P | International Journal of Evidence & Proof |
| JJS | Journal of Juridical Science |
| NILQ | Northern Ireland Legal Quarterly |
| PELJ | Potchefstroom Electronic Law Journal |
| THRHR | Tydskrif vir Hedendaagse Romeins-Hollandse Reg |