

# JUDGING THE JUDGES: ARE THEY ADOPTING THE RIGHTS APPROACH IN MATTERS INVOLVING CHILDREN?

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*[There are increasing calls for judges to take children's rights seriously. However, the problem with such calls is that they invariably fail to address the factors that undermine the capacity of a judge to engage with children's rights. This article seeks to respond to this gap in the literature. It offers a model of children's rights which is grounded in the provisions of the United Nations Convention on the Rights of the Child. It then examines domestic, regional and international case law and concludes that the current treatment of children's rights by judges can generally be located along a spectrum that ranges from the 'invisible' to the 'substantive'. In between these extremes lie approaches that are classified by the author as 'incidental', 'selective', 'rhetorical' or 'superficial'. All of these approaches, other than the substantive, tend to overlook, marginalise or misuse the notion of children as rights-bearers. In contrast, the adoption of a 'substantive' rights approach reflects a vision of children's rights that is consistent with the CRC. In the final section of the paper, the author considers the extent to which a judge's ability to engage with this model of children's rights is constrained by considerations such as precedent and domestic legislative frameworks. Drawing on the work of Jeremy Waldron and Ronald Dworkin, the author argues that the significance of these constraints is often overstated. He concludes that the growing recognition and acceptance of children's rights within society provide greater opportunities for judges to develop and act upon interpretative theories that are receptive to and grounded in the values that underlie the substantive model of children's rights under the CRC.]*

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## I INTRODUCTION

One of the litmus tests against which the effective implementation of any human rights treaty should be judged is the extent to which it is applied in domestic courts. While the role of the judiciary is by no means the only, nor even necessarily the most, important element in the overall scheme of enforcement measures, it nonetheless provides a very strong indication of the extent to which the relevant international norms have been internalised and brought to life within the domestic legal system. For this reason, proponents of children's rights have, in recent years, begun to focus much more systematically on the attitude adopted by the courts in relation to children.<sup>1</sup> This focus is reflected in the approach adopted by the Committee on the Rights of the Child ('CRC Committee'), the independent body of experts tasked with the responsibility for monitoring states' compliance with their obligations under the United Nations *Convention on the Rights of the Child* ('CRC').<sup>2</sup> In 2003, it called upon all judicial bodies to systematically consider 'how children's rights and interests are or will be

<sup>1</sup> See, eg, Jane Fortin, 'Accommodating Children's Rights in a Post *Human Rights Act* Era' (2006) 69 *Modern Law Review* 299; Jane Fortin, 'Children's Rights: Are the Courts Now Taking Them More Seriously?' (2004) 15 *King's College Law Journal* 253; Jane Fortin, 'Rights Brought Home for Children' (1999) 62 *Modern Law Review* 350; Julia Sloth-Nielsen and Benyam D Mezmer, '2 + 2 = 5? Exploring the Domestication of the *CRC* in South African Jurisprudence (2002–2006)' (2008) 16 *International Journal of Children's Rights* 1.

<sup>2</sup> Opened for signature 20 November 1989, 1577 UNTS 3, arts 43–4 (entered into force 2 September 1990).

affected by their decisions and actions'.<sup>3</sup> This recommendation is consistent with, and seeks to further, a vision of the *CRC* as 'a vehicle for creating a world conscience that speaks on behalf of children.'<sup>4</sup> It is also reinforced by a rapidly growing academic literature which emphasises the need for judges to take children's rights seriously.<sup>5</sup>

The problem, however, is that glib calls for judges to actively promote children's rights too often fail to take account of a range of factors which might render such an approach difficult or even impossible. There is thus a strong onus on proponents of a more active judicial approach in this area to recognise the nature and extent of these potential obstacles and to articulate a coherent vision of how these might be overcome in order to facilitate more effective and systematic judicial involvement. In order to be persuasive, any such vision would also need to reflect the empirical realities encountered by judges in their day-to-day approach to these issues.

Among the principal obstacles are the following: the continuing controversy surrounding the concept of children's rights; the relatively open-ended nature of many of the norms; and procedural impediments at the court level.<sup>6</sup> In addition, the inferior domestic legal status of an international or regional human rights treaty may also constrain the ability of a judge to engage with the provisions of such an instrument (for example, the *CRC*). Although the *CRC* has attained almost universal ratification,<sup>7</sup> its incorporation into domestic law remains the exception rather than the norm. As a consequence, an English judge must apply the provisions of the *Human Rights Act 1998* (UK) c 42 ('*Human Rights Act*'), an American judge must be guided by the provisions of the *United States Bill of Rights*,<sup>8</sup> and so on. Given this constraint, judges are simply not free to adopt what Jeremy Waldron has described as an 'autonomous' style of reasoning in order to give effect to the treaty provisions governing the rights of the child with

<sup>3</sup> CRC Committee, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44(6))*, 34<sup>th</sup> sess, [12], UN Doc CRC/GC/2003/5 (2003) ('*General Comment No 5*').

<sup>4</sup> Richard Reid, 'Children's Rights: Radical Remedies for Critical Needs' in Stewart Asquith and Malcolm Hill (eds), *Justice for Children* (1994) 19, 25, quoted in Vanessa Pupavac, 'The Infantilisation of the South and the UN Convention on the Rights of the Child' (1998) 3(2) *Human Rights Law Review* 3, 3.

<sup>5</sup> See especially Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5; Michael D A Freeman, 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law and the Family* 52; Michael Freeman, 'Taking Children's Rights Seriously' (1987) 1 *Children and Society* 299; John Eekelaar, *Family Law and Personal Life* (2007) 155–62; John Eekelaar, 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 161.

<sup>6</sup> For example, well before a matter is considered by a judge, procedural issues will have a significant influence on the way in which a dispute is presented before a court. Jane Fortin suggested regarding this issue that, for example, in the United Kingdom 'the absence of separate representation for most children in private law parental disputes probably explains why the judiciary get away with ignoring children's own specific rights in such disputes': Email from Jane Fortin to John Tobin, 15 February 2009.

<sup>7</sup> See United Nations, *Multilateral Treaties Deposited with the Secretary-General*, vol I, 389–91, UN Doc ST/LEG/SER.E/26 (2009).

<sup>8</sup> *United States Constitution* amnds I–X ('*United States Bill of Rights*').

which domestic law is supposed to comply.<sup>9</sup> They may personally have sympathy for such an approach, but when they resolve a dispute they are not ‘deciding what to do as individuals. ... [T]hey are deciding what is to be done in the name of the whole society.’<sup>10</sup>

The aim of this article is to provide some guidance for judges wishing to take children’s rights seriously within the domestic legal order. Part II of the article outlines a model of children’s rights that judges can seek to apply in resolving matters involving children. It argues that, despite claims as to the confused nature of children’s rights, it is in fact possible to articulate a coherent vision of this concept which is grounded in the values underlying the *CRC* and reflects an ‘interest’ theory of rights. In Part III, an empirical approach is developed which builds upon some key cases decided at the international, regional and domestic levels in order to illustrate the different ways in which judges have engaged with this model. It is suggested that the treatment of children’s rights by judges can generally be located along a spectrum which ranges from the non-existent (‘invisible’) to the substantive. In between these extremes lie approaches which might be classified as ‘incidental’, ‘selective’, ‘rhetorical’ or ‘superficial’. All of these approaches, other than the ‘substantive’, tend to overlook, marginalise or misuse the notion of children as rights-bearers. To that extent, they are unsatisfactory when assessed against the admonition that judicial bodies should pay systematic attention to children’s rights and interests. In contrast, a ‘substantive’ rights approach will give effect to at least some dimensions of the model of judicial implementation of children’s rights discussed in Part II.

Part IV of the article addresses the extent to which judicial discretion to engage with children’s rights is constrained by considerations such as precedent, legislative frameworks and the provisions of relevant international human rights instruments. Drawing on aspects of the work done by Jeremy Waldron and Ronald Dworkin concerning the role of judges, Part IV argues that the significance of such constraints is often overstated.<sup>11</sup> A judge’s task is not simply to apply existing legal principles in resolving a dispute but is also to engage in ‘moral reasoning about some or all of the issues posed’.<sup>12</sup> Thus moral reasoning becomes an inevitable part of each stage of the judicial process.<sup>13</sup> It is within this context that a judge may have the scope to apply elements of the substantive rights model outlined in Part II. This will be possible when a judge’s own ‘interpretative theor[y]’<sup>14</sup> is receptive to and grounded in convictions that are compatible with the values underlying the model of children’s rights.

<sup>9</sup> Jeremy Waldron, ‘Judges as Moral Reasoners’ (2009) 7 *International Journal of Constitutional Law* 2, 6.

<sup>10</sup> *Ibid* 5.

<sup>11</sup> This is not to suggest that Waldron and Dworkin have directly addressed the issue of children’s rights in their work. Indeed, Michael Freeman is particularly critical of Dworkin’s failure to even mention children’s rights in his seminal text, Ronald Dworkin, *Taking Rights Seriously* (1977): Freeman, ‘Why It Remains Important to Take Children’s Rights Seriously’, above n 5, 5.

<sup>12</sup> Waldron, above n 9, 10.

<sup>13</sup> *Ibid* 12.

<sup>14</sup> Ronald Dworkin, *Law’s Empire* (1986) 87; see also at 88.

Such an approach must never amount to the exercise of autonomous moral thought. But where there is an interpretative conundrum and the existing legal framework does not explicitly prohibit the adoption of any of the elements that characterise a substantive rights approach, there will be scope for judges to apply elements of such an approach in their decision-making. Importantly, this process does not require the formal incorporation of the *CRC* and instead focuses on judges having recourse to the values that underlie an interest theory of children's rights as advanced under the *CRC* in order to resolve disputes concerning children. Moreover, there is clearly a growing trend within many legal systems, even if it is resisted or resented in some circles, to situate issues concerning children in terms of their rights. This trend provides the type of 'general intellectual environment' in which judges can resist what Dworkin has described as the 'centripetal pressure' to maintain traditional judicial approaches<sup>15</sup> in matters involving children (or, more specifically, the welfare model) in favour of an approach that is consistent with a substantive rights approach.

## II CHILDREN AS RIGHTS-BEARERS: A CONFUSED OR COHERENT CONCEPT?

Although the recommendation of the *CRC* Committee refers to the rights of children as if the meaning of this phrase were self-evident, consensus with respect to the understanding of children's rights is far from universal. For example, the United States scholar Martin Guggenheim in his critique of children's rights asserts that this concept 'has less substantive content and is less coherent than many would suppose.'<sup>16</sup> Moreover, in his opinion, '[i]t has provided very little by way of a useful analytic tool for resolving knotty social problems.'<sup>17</sup> He therefore concludes that he is 'far less confident that children need rights or that speaking in terms of "rights" is even good for children.'<sup>18</sup> In contrast, the United Kingdom scholar Jane Fortin has argued that:

By articulating children's interests as rights, and incorporating evidence traditionally associated with ideas about their best interests, within such rights, the courts can develop a more structured and analytical approach to decision making.<sup>19</sup>

Such a polarisation in views reveals the contested nature of children's rights as a concept. Should judges accept Guggenheim's vision of children's rights as an incoherent and confused concept that is potentially harmful to children, or should they prefer Fortin's defence of children's rights as a mechanism to improve decision-making in matters concerning children? The answer to this question depends in part on the extent to which the legal landscape within a state allows a judge to engage with the notion of children as rights-bearers — an issue that will

<sup>15</sup> Ibid 88.

<sup>16</sup> Martin Guggenheim, *What's Wrong with Children's Rights* (2005) xii.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid xi.

<sup>19</sup> Fortin, 'Accommodating Children's Rights in a Post *Human Rights Act* Era', above n 1, 326.

be addressed in Part IV. It also depends on the substantive meaning given to the concept of children's rights and, while Guggenheim and Fortin may embrace the same slogan, their understanding of the concept is very different. Guggenheim's vision is wedded to the use of the rhetoric of children's rights within the US.<sup>20</sup> In contrast, Fortin locates her analysis<sup>21</sup> within the context of the *Human Rights Act* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention*').<sup>22</sup>

The analysis offered in this article proceeds from yet another perspective on children's rights in its attempt to address Hillary Rodham's oft-quoted claim that "children's rights" is a slogan in search of definition.<sup>23</sup> This perspective is grounded in the vision of children's rights that underlies the provisions of the *CRC*. Such a model is considered appropriate in this analysis for two reasons. First, it is the rights in the *CRC* that the *CRC* Committee would have all judges consider.<sup>24</sup> It therefore follows that an examination of these rights and their underlying values provides guidance for judges on how they are to perform the task required of them by the *CRC* Committee (and the *CRC*).

Secondly, the fact remains that the *CRC* is the product of a drafting process that took 10 years<sup>25</sup> and has now been ratified by all states with the exception of the US and Somalia.<sup>26</sup> As such, the considerable thought that went into its formulation and its almost universal ratification among states provide a compelling reason to consider the vision of children's rights that it offers. Moreover, the interest in the *CRC* for the purposes of this analysis does not arise simply by virtue of the legal implications that follow its ratification by states parties under international law. (Indeed, it has become easy and rather trite to say that the obligations under a treaty such as the *CRC* must be performed by states parties in good faith.)<sup>27</sup> What is more interesting is the remarkable consensus achieved among states as to the vision and values deemed appropriate for the concept of children's rights.

Despite this broad consensus among states, it is accepted that the legitimacy of this model within society may not be very secure.<sup>28</sup> Indeed, when for example

<sup>20</sup> See Guggenheim, above n 16, xiii.

<sup>21</sup> See generally Fortin, 'Accommodating Children's Rights in a Post *Human Rights Act* Era', above n 1.

<sup>22</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), commonly referred to as the 'European Convention on Human Rights'.

<sup>23</sup> Hillary Rodham, 'Children under the Law' (1973) 43 *Harvard Educational Review* 487, 487.

<sup>24</sup> See *CRC* arts 43–4; *General Comment No 5*, above n 3, [12].

<sup>25</sup> The *CRC* was adopted by the UN General Assembly in 1989: Convention on the Rights of the Child, GA Res 44/25, UN GAOR, 44<sup>th</sup> sess, 61<sup>st</sup> plen mtg, UN Doc A/RES/44/25 (1989). See also Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 16–18.

<sup>26</sup> See Detrick, above n 25, 18; United Nations, above n 7, vol I, 389–91. However, Somalia has recently announced that it intends to ratify the *CRC*: 'Somalia to Join Child Rights Pact: UN', *Reuters Africa* (online), 20 November 2009 <<http://af.reuters.com/article/topNews/idAFJ0E5AJ0IT20091120>>.

<sup>27</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 26 (entered into force 27 January 1980).

<sup>28</sup> Eekelaar, *Family Law and Personal Life*, above n 5, 30.

the Australian federal government held a parliamentary inquiry into the status of the *CRC* in 1999, 51 per cent of submissions recommended that the government withdraw from this instrument.<sup>29</sup> Ultimately, however, the Joint Standing Committee on Treaties recommended that Australia remain committed to the *CRC*<sup>30</sup> and in subsequent years there has been a modest trend towards the protection of children's rights within Australia<sup>31</sup> — a move which is consistent with a broader global trend towards the increased recognition of children's rights within state constitutions.<sup>32</sup>

This is not to suggest that the vision of children's rights under the *CRC* has been universally embraced. The fact remains that it has many detractors.<sup>33</sup> But the *CRC* does offer a model of children's rights, the underlying values of which have been widely endorsed by states. It is the features of this model and its underlying values that need to be identified before examining the extent to which judges consider the impact of their decisions on children's rights. Caution must be exercised when undertaking this task. As Philip Alston has warned, the *CRC* is 'sometimes presented ... as being a uni-dimensional document that reflects a single, unified philosophy of children's rights and contains a specific and readily ascertainable recipe for resolving' disputes involving children.<sup>34</sup> In truth, the *CRC* is far more complex and multidimensional than many of its characterisations by various commentators imply.<sup>35</sup> At the same time it is possible to identify several core values and principles of the *CRC* that are of particular relevance to judges and the way in which they adjudicate disputes concerning children.

#### A Recognition of Children as Rights-Bearers

The adoption of a specific international convention for children and the emergence of children's rights as a discourse more generally demonstrate awareness of the tendency for children's interests to be subsumed within the interests of adults. In order to isolate, although not entirely separate, children's interests from the interests of adults, and more specifically their parents, children were required to have rights which reflected their particular interests.<sup>36</sup> The subsequent emergence and recognition of rights for children in an international treaty therefore serves to identify and promote the claim of children to an

<sup>29</sup> Joint Standing Committee on Treaties, Parliament of Australia, *United Nations Convention on the Rights of the Child* (1998) ix.

<sup>30</sup> See *ibid* xii, xix.

<sup>31</sup> See, eg, *Human Rights Act 2004* (ACT) ss 11, 19–22; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 17, 23, 25, 44.

<sup>32</sup> John Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 *South African Journal on Human Rights* 86.

<sup>33</sup> See generally Freeman, 'Why It Remains Important to Take Children's Rights Seriously', above n 5, where Freeman identifies and provides a response to most of the theories that challenge the notion of rights for children.

<sup>34</sup> Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 1, 2.

<sup>35</sup> *Ibid* 3.

<sup>36</sup> Eekelaar, 'The Emergence of Children's Rights', above n 5, 169.

independent legal status with interests and entitlements that exist by virtue of their humanity. It demands that they be recognised as rights-bearers and not merely as the objects of protection, beneficence or charity.<sup>37</sup>

Importantly, this model of rights for children is not based on a choice or will theory of rights, which would emphasise a child's capacity for rational choice as a prerequisite to the enjoyment of their rights.<sup>38</sup> Instead, it reflects an interest theory of rights whereby the rights granted to children are intended to have a nexus with children's interests, albeit a particular construction of their interests.<sup>39</sup> Moreover, as will be shown below, such a model does not preclude the capacity of children to enjoy autonomy in the exercise of their rights as they mature — an approach which John Eekelaar has described as 'dynamic self-determinism'.<sup>40</sup> But it accepts that the vulnerability and immaturity associated with aspects of childhood will require measures to be taken on their behalf to secure their rights.<sup>41</sup>

From a practical perspective, the recognition of children as rights-bearers requires that judges actively identify children's claims to independent rights and not simply overlook, marginalise or subsume them within the rights or interests of their parents. It also requires that judges must give careful attention to the precise way in which the content of a child's right is to be interpreted so as to ensure their effective enjoyment. Steps must therefore be taken to ensure that the interpretative process accommodates the particular vulnerabilities of children as opposed to simply importing an adult-centric understanding as to the content of particular rights.

<sup>37</sup> See *Juridical Condition and Human Rights of the Child (Advisory Opinion)* [2002] Inter-American Court HR (ser A) No 17, 79.

<sup>38</sup> Fortin, 'Accommodating Children's Rights in a Post *Human Rights Act* Era', above n 1, 317. Cf Eekelaar, 'The Emergence of Children's Rights', above n 5, 157, where Eekelaar outlines a moral conception of rights for children in which certain conditions must be satisfied (including competency) before a child can be said to claim a right.

<sup>39</sup> Eekelaar, 'The Emergence of Children's Rights', above n 5, 171–82, which suggests that children have three types of interests: basic, developmental and autonomy. It is important to note that the catalogue of interests codified as rights under the *CRC* has been criticised by several scholars: see, eg, Zach Meyers, 'Protecting "Innocence"? Deconstructing Legal Regulation of Child Sexuality' (2007) 27 *Australian Feminist Law Journal* 51, 52 (which notes that the *CRC* 'was debated without any consultation on the part of those whose interests it purports to protect'); Michael Freeman, 'The Future of Children's Rights' (2000) 14 *Children and Society* 277, 282–5 (which identifies several interests of significance to children's lives that were not expressly included in the *CRC*); Pupavac, above n 4, 3 (which argues that the interests protected in the *CRC* reflect western sensibilities and preferences for children).

<sup>40</sup> John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 42, 54.

<sup>41</sup> See Fortin, 'Accommodating Children's Rights in a Post *Human Rights Act* Era', above n 1, 317–18, discussing the advantages of adopting an interest theory of rights with respect to matters concerning children under the *European Convention* and the *Human Rights Act*.



### B *Recognition of the Supportive Role of a Family and the Evolving Capacity of a Child*

Secondly, the recognition of an individual legal identity and sphere of entitlement for children does not translate into an automatic entitlement to independence. The model of children's rights offered under the *CRC* does not represent a total severing of their interests from those of their parents or a complete abandonment of children to their autonomy, as some commentators have inferred.<sup>42</sup> On the contrary, there is a strong presumption that the realisation of children's rights will occur within the context of the family unit in a manner which accommodates a child's evolving capacities.<sup>43</sup> This model is reflected in art 5 of the *CRC*, which demands that states:

respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the [*CRC*].<sup>44</sup>

Importantly, this deference given to parents is far from absolute and remains conditional on the exercise of parental responsibility being directed to and undertaken in a manner that is consistent with the realisation of a child's rights, including the recognition of their evolving capacity. Under such a model, the family is not a site of exclusive and unfettered parental power. There is certainly a presumption in favour of its capacity to contribute to the realisation of children's rights, but there is also recognition of the potential for parents to exercise their power in ways that are incompatible with this objective.<sup>45</sup> Further, there is an acknowledgment that the impact of this power should gradually yield to the evolving capacity of children as they mature with age.<sup>46</sup>

### C *A Requirement to Consider Children's Rights in All Matters concerning Them*

Moving beyond a construction of the family unit as a zone of presumed compatibility but potential inconsistency with the realisation of children's rights, a further feature of the model advanced under the *CRC* is the requirement that children's rights must be considered in all matters concerning them. This obligation arises by virtue of art 3(1) of the *CRC*, which provides:

<sup>42</sup> See, eg, Bruce C Hafen and Jonathan O Hafen, 'Abandoning Children to Their Autonomy: The United Nations *Convention on the Rights of the Child*' (1996) 37 *Harvard International Law Journal* 449.

<sup>43</sup> John Tobin, 'Parents and Children's Rights under the *Convention on the Rights of the Child*: Finding Reconciliation in a Misunderstood Relationship' (2005) 7 *Australian Journal of Professional and Applied Ethics* 31; *Juridical Condition and Human Rights of the Child (Advisory Opinion)* [2002] Inter-American Court HR (ser A) No 17, 79.

<sup>44</sup> See also *CRC* art 9, which provides that children must not be separated from their parents unless this is necessary for their best interests. Additionally, arts 18 and 27 recognise that parents will have 'primary responsibility for the upbringing' of their children (art 18(1)) and for securing 'the conditions of living necessary for the child's development' (art 27(2)).

<sup>45</sup> Cf *CRC* art 19(1).

<sup>46</sup> Cf *CRC* arts 12(1), 14(2).

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*<sup>47</sup>

It is the express reference to the role of courts in this provision that provides the mandate for the CRC Committee to demand that such bodies consider the impact of their decisions on children's rights. From a practical perspective, this requires a conscious assessment as to whether a matter before a court concerns children. Importantly, this notion of 'concern' must not be confined to matters of direct concern to children or matters in which children are directly involved. Such an approach would imply an unnecessary restriction into the scope of art 3 and would be inconsistent with the requirement that the interpretation of a human rights treaty should adopt an approach that contributes to the effective realisation of its object and purpose, rather than one 'which would restrict to the greatest possible degree the obligations undertaken by' a state.<sup>48</sup>

Thus in the absence of any express provision to limit the application of the best interests principle to matters of direct concern to children, there appears to be no basis upon which to adopt such a restrictive approach. From a practical perspective, this requires that judges remain actively seized of the ways in which matters before them may be of concern to a child, notwithstanding that children may not be party to the proceedings. Examples of such proceedings would include the sentencing of a parent in the criminal justice system, the deportation of a parent under refugee law or the eviction of a parent from their housing.

#### D *A Requirement to Treat a Child's Best Interests as a Primary Consideration*

The identification of matters which may be of concern to a child does not demand that a judge always resolve the dispute in a manner which is consistent with the child's best interests. Indeed, the fourth feature of the vision for children's rights articulated under the *CRC* is the requirement that, subject to only a few exceptions,<sup>49</sup> a child's best interests are not the paramount consideration but only 'a primary consideration'.<sup>50</sup> Thus, whereas the paramouncy principle would demand that children's best interests be the overriding and dominant (although not the exclusive) consideration in any judicial proceedings,<sup>51</sup> the primary interests principle does not require such a level of judicial deference.

This is not to say that the primary interests principle can be readily dismissed so as to allow a child's best interests necessarily to yield to those of other parties. On the contrary, the obligation remains significant to the extent that it first

<sup>47</sup> *CRC* art 3(1) (emphasis added).

<sup>48</sup> See, eg, *Wemhoff v Federal Republic of Germany* (1968) 7 Eur Court HR (ser A) 23.

<sup>49</sup> See, eg, *CRC* art 21, which provides that 'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration'.

<sup>50</sup> See, eg, *CRC* art 3(1).

<sup>51</sup> For a discussion of the paramouncy principle, see *State v M* [2008] 3 SA 232, 249–50 (Sachs J for Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Sachs, Skweyiya and Van der Westhuizen JJ) (Constitutional Court); Eekelaar, *Family Law and Personal Life*, above n 5, 161.

recalibrates the judicial process to demand a consideration of children's interests in circumstances where they may have been previously overlooked or marginalised. As L'Heureux-Dubé J of the Supreme Court of Canada in *Baker v Minister of Citizenship and Immigration (Canada)* noted, 'the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them.'<sup>52</sup> To do anything less would be to render the implementation of the principle illusory — a position that is inconsistent with the principles relevant to the interpretation of human rights treaties and the need to give effect to their object and purpose.<sup>53</sup> It also operates to cast a heavy burden on the actor seeking to displace a child's best interests to establish a legitimate and compelling reason for the adoption of such an approach.<sup>54</sup>

Ultimately, the inclusion of the primary interests principle within the model of children's rights under the *CRC* provides recognition of the potential for conflict between children's rights and those of their parents and the broader community. It also raises the prospect that children's rights will not always take precedence in the event of such a conflict. It therefore rejects the slogan of 'children first', which is so often invoked to advance children's interests,<sup>55</sup> in favour of a far more inclusive and nuanced process by which to balance the rights and best interests of children with the rights and interests of other groups within society.<sup>56</sup> As Eekelaar has recognised, it may be 'easier and more comforting simply to say that we are all doing what we think is best for the child.'<sup>57</sup> But such an approach 'encourages a laziness and unwillingness to pay proper attention to all the interests that are at stake' in matters concerning children<sup>58</sup> and is unlikely to produce just outcomes.

*E A Requirement to Avoid a Subjective and Speculative Assessment of a Child's Best Interests and to Ensure Appropriate Consideration Is Given to the Views of a Child*

Although the best interests principle is enshrined in the *CRC*, this is also the central principle of the welfare model that emerged in the mid to late nineteenth century and has dominated the social, legal and thus judicial treatment of

<sup>52</sup> [1999] 2 SCR 817, 864 (L'Heureux-Dubé J for L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ).

<sup>53</sup> See, eg, *Loizidou v Turkey (Preliminary Objections)* (1995) 310 Eur Court HR (ser A) 27. For a general discussion of the effectiveness principle, see Richard K Gardiner, *Treaty Interpretation* (2008) 159–61.

<sup>54</sup> Alston, 'The Best Interests Principle', above n 34, 13.

<sup>55</sup> See, eg, Nigel Cantwell, 'Is the Rights-Based Approach the Right Approach?' (Speech delivered at the Defence for Children International: International Symposium, Geneva, 22 November 2004) 1, 3–4.

<sup>56</sup> See generally Eekelaar, *Family Law and Personal Life*, above n 5, 162.

<sup>57</sup> John Eekelaar, 'Deciding for Children' (2006) 7 *Australian Journal of Professional and Applied Ethics* 66, 77.

<sup>58</sup> *Ibid.*

children ever since.<sup>59</sup> It is generally accepted that this model carried significant benefits for children relative to the previous model, which was based on the proprietary interests of a father in his children.<sup>60</sup> However, as Eekelaar notes, the welfare model ‘had its dark side. The duty to advance the interests of the vulnerable carried with it the power to decide what those interests were.’<sup>61</sup> Such paternalism is difficult to reconcile with the idea of rights for children. As such, the retention of the best interests principle within the text of the *CRC* may appear to be a curious inclusion.<sup>62</sup>

In reality, however, it is a necessary inclusion in a model of children’s rights that is not prepared to abandon children to their complete autonomy and, instead, prefers to recognise that children’s capacity to exercise their rights autonomously will evolve as they mature and develop.<sup>63</sup> This is certainly the approach adopted under the *CRC*.<sup>64</sup> At the same time, an application of the best interests principle must be accompanied by a consideration of other factors if it is to avoid the dangers associated with the historical application of this principle. First among these factors is the need to consider the views of the child. Thus, rather than leaving the best interests principle vulnerable to the potential for it to serve as a ‘proxy’ for the interests of others,<sup>65</sup> art 12(1) of the *CRC* actually mandates that ‘due weight’ be given to the views of a child in accordance with their age and level of maturity.<sup>66</sup> Indeed, art 12(2) mandates that a child must be given an ‘opportunity to be heard in any judicial ... proceedings affecting’ them.<sup>67</sup> Such views may not be determinative as to the nature of a child’s best interests, but they represent a critical ingredient in undertaking this assessment.<sup>68</sup> This emphasis on the participatory rights of a child has been described as ‘the linchpin of the [*CRC*],’<sup>69</sup> and lies ‘at the root of any elaboration of children’s rights.’<sup>70</sup> It

<sup>59</sup> The defining features of this model are that parents are required to act in their child’s best interests and that, in the event of their failure to do so, the state will intervene: see Eekelaar, *Family Law and Personal Life*, above n 5, 9–17, which traces the development of the welfarism thesis.

<sup>60</sup> See *ibid* 10–11.

<sup>61</sup> *Ibid* 13.

<sup>62</sup> See David Archard and Marit Skivenes, ‘Balancing a Child’s Best Interests and a Child’s Views’ (2009) 17 *International Journal of Children’s Rights* 1, 2.

<sup>63</sup> Freeman, ‘Why It Remains Important to Take Children’s Rights Seriously’, above n 5, 15.

<sup>64</sup> See, eg, *CRC* arts 5, 12(1), 14(2), 18, 27.

<sup>65</sup> Robert van Krieken, ‘The “Best Interests of the Child” and Parental Separation: On the “Civilising of Parents”’ (2005) 68 *Modern Law Review* 25, 39.

<sup>66</sup> See Eekelaar, *Family Law and Personal Life*, above n 5, 158–9. In outlining his moral conception of rights for children, Eekelaar also emphatically asserts that ‘attention will *always* need to be directed towards ascertaining the child’s viewpoint’: at 158 (emphasis in original).

<sup>67</sup> See generally Judy Cashmore and Patrick Parkinson, ‘What Responsibility Do Courts Have to Hear Children’s Voices?’ (2007) 15 *International Journal of Children’s Rights* 43.

<sup>68</sup> See Archard and Skivenes, above n 62, 20–1, who outline a checklist of questions by which to balance the commitments to the principle of the child’s best interests and the obligation to consider a child’s views.

<sup>69</sup> Michael Freeman, ‘Whither Children: Protection, Participation, Autonomy?’ (1994) 22 *Manitoba Law Journal* 307, 319.

<sup>70</sup> John Eekelaar, ‘The Importance of Thinking that Children Have Rights’ in Philip Alston, Stephen Parker and John Seymour (eds), *Children, Rights, and the Law* (1992) 221, 228.

therefore serves to distinguish a rights-based approach to matters concerning children from traditional welfare approaches, where children's voices remained if not completely silent and marginalised then subject to interpretation by the 'experts'.<sup>71</sup> Just as importantly, it resists the tendency — which is common in many jurisdictions — 'to view a child's rights and a child's interests or welfare as discrete matters'.<sup>72</sup> Under the model of rights advanced under the *CRC*, children actually have a *right* to demand that their best interests are a primary consideration in all matters affecting them.<sup>73</sup> The difference between the content of a child's best interests under this model, as opposed to under the traditional welfare model, is that children must play an active role — albeit not an authoritative role — in the determination of their best interests.

Beyond the views of a child, an assessment of a child's best interests must also be informed by the other rights under the *CRC*. Thus a decision cannot be said to be in a child's best interests where the outcome would be contrary to another right.<sup>74</sup> It is important to acknowledge, however, that a requirement to consider the views of a child and give consideration to the catalogue of rights under the *CRC* will not in itself always mitigate the dangers associated with the traditional application of the best interests principle. A child may lack the maturity for their views to be informative as to the nature of their best interests, or the matter may involve an issue that is not expressly addressed and thus is unable to be resolved by an application of one of the rights under the *CRC*. This raises the very real prospect that in some cases the best interests principle will occupy a zone of indeterminacy.

Despite this risk, Sachs J of the Constitutional Court of South Africa has suggested that this potential is the source of the principle's strength, because it provides a judge with the flexibility to tailor a decision to the circumstances of an individual child.<sup>75</sup> Moreover, as Sachs J rightly warns, '[t]o apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned'.<sup>76</sup> At the same time, an assessment as to the circumstances of an individual child still carries a risk that the subjective preferences of a judge will inform any assessment of a child's best interests. In an effort to minimise this potential, judges must therefore consider the availability of any empirical evidence in relation to the child specifically, or children more generally, that may be relevant

<sup>71</sup> I am grateful to Helen Rhoades for this point. See also Lawrie Moloney and Jennifer McIntosh, 'Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions' (2004) 10 *Journal of Family Studies* 71, which discusses obstacles to the inclusion of children's voices in family law proceedings within Australia.

<sup>72</sup> Archard and Skivenes, above n 62, 2, citing Fortin, 'Accommodating Children's Rights in a Post *Human Rights Act* Era', above n 1, 311.

<sup>73</sup> See *State v M* [2008] 3 SA 232, 247–8 (Sachs J for Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Sachs, Skweyiya and Van der Westhuizen JJ).

<sup>74</sup> Philip Alston and Bridget Gilmour-Walsh, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (1996) 39.

<sup>75</sup> *State v M* [2008] 3 SA 232, 248–9 (Sachs J for Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Sachs, Skweyiya and Van der Westhuizen JJ).

<sup>76</sup> *Ibid.*

to the issues before them.<sup>77</sup> This requirement to adopt an evidence-based approach to the assessment of a child's best interests operates both to reduce the indeterminacy of the principle and to mitigate the potential for judges to substitute their own subjective or speculative preferences as to what amounts to a child's best interests.<sup>78</sup> Importantly, when combined with the factors outlined above, it puts to rest the claim made by the Chief Justice of the Supreme Court of Canada that the best interests principle is incapable of 'being identified with some precision'.<sup>79</sup> This principle may not be amenable to a mathematical formula, but its contours and content are no less determinate than many other terms within rights discourse.<sup>80</sup> The key consideration for judges, therefore, when seeking to identify the best interests of a child under a rights-based model (as opposed to a welfare model) is the process they adopt. More specifically, this process must involve a consideration of: (a) the wishes of a child; (b) the relevance of any other rights under the *CRC*; (c) the particular circumstances of the child; and (d) any available empirical evidence which may be of relevance.<sup>81</sup>

Having mapped out the overarching features of the model of children's rights which is advanced under the *CRC* and which the *CRC* Committee would have judges adopt, it is now appropriate to consider the ways in which judges actually engage with this model.

<sup>77</sup> See, eg, John Tobin and Ruth McNair, 'Public International Law and the Regulation of Private Spaces: Does the *Convention on the Rights of the Child* Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23 *International Journal of Law, Policy and the Family* 110.

<sup>78</sup> At the same time, caution must be exercised when relying on empirical research in matters involving children. A lack of available evidence can be misconstrued by a court to justify actions which are not only potentially incompatible with the best interests of children but also the rights of others. Thus, for example, the European Court of Human Rights in *Fretté v France* [2002] 1 Eur Court HR 345, 369, 374, upheld a prohibition on a gay man from adopting a child on the basis that there was insufficient research to demonstrate that his sexual orientation was *not* harmful to a child. Such an approach effectively reversed the accepted onus under human rights law, which demands that the actor seeking to maintain any differential treatment must demonstrate on the basis of objective evidence that such treatment is necessary to secure a legitimate aim.

<sup>79</sup> *Canadian Foundation for Children, Youth and the Law v A-G (Canada)* [2004] 1 SCR 76, 95 (McLachlin CJ for McLachlin CJ, Gonthier, Iacobucci, Major, Bastarache and LeBel JJ), quoting *Rodriguez v A-G (British Columbia)* [1993] 3 SCR 519, 591 (Sopinka J for La Forest, Sopinka, Gonthier, Iacobucci and Major JJ).

<sup>80</sup> For example, the idea of reasonableness, which is so central to all legal analysis and particularly critical when assessing the legitimacy of limitations on rights, is hardly capable of being reduced to a precise formula.

<sup>81</sup> Chief Justice Nicholson urged me to include a fifth requirement, namely, to consider any domestic legislative provisions that seek to inform or guide an assessment of a child's best interests. Within a domestic context I would agree with this inclusion. However, the model outlined here seeks to give expression to a child's best interests under the *CRC*. At the same time, it will be suggested in Part IV that, although a judge will invariably be guided by domestic provisions in the first instance, there will often be an opportunity to make recourse to the model of rights advanced under the *CRC* in determining the content of a domestic application of the best interests principle: see especially below nn 255–67 and accompanying text.

### III DO JUDGES ADOPT THE RIGHTS APPROACH?

No attempt is made here to undertake a comprehensive review as to the treatment of children's rights by judges in domestic legal systems. Rather, the methodology adopted for this part of the article involves the examination of a small number of relatively prominent cases decided at the international, regional and domestic levels, which have been selected because of their capacity to illustrate the differing ways in which judges approach matters concerning children's rights. For ease of identification, those approaches which tend to overlook, marginalise or misappropriate children's rights have been classified into 'invisible', 'incidental', 'selective', 'rhetorical' and 'superficial' rights approaches. In contrast, those decisions which are consistent with the model of children's rights advanced in Part II are considered to provide examples of what is termed a 'substantive' rights approach to matters concerning children.

#### A *The Spectrum of Rights Approaches*

##### 1 *The Invisible Rights Approach*

Historically, judges had no reason to conceptualise disputes involving children in terms of their rights. This was a legacy of the Roman doctrine of *patria potestas* — paternal power — which entitled a father '[n]ot only ... to all the service and all the acquisitions of his child, as much as those of a slave, but [also to] the same absolute control over his person.'<sup>82</sup> Despite the emergence of rights discourse in the mid-1800s within political and social commentary, children were still excluded from this paradigm. Thus, for example, John Stuart Mill argued in 1859 in *On Liberty* that the liberty principle applied 'only to human beings in the maturity of their faculties' and disqualified from its exercise 'children [and] young persons below that age which the law may fix as that of manhood or womanhood.'<sup>83</sup> Not surprisingly, judges adopted a position that was consistent with such views. Thus for example Bowen LJ in the late nineteenth century English decision *Re Agar-Ellis; Agar-Ellis v Lascelles* warned that any move by a court to override 'the natural jurisdiction' of a father over his child 'would be really to set aside the whole course and order of nature, and it seems to me it would disturb the very foundation of family life.'<sup>84</sup>

There was a significant movement from the notion of parental possession over the course of the late nineteenth and early twentieth centuries, first with the adoption of the welfare model and more lately with the emergence of children's rights.<sup>85</sup> This paradigm shift, however, has not been universally embraced by judges, and the legacy of the parental possession doctrine remains. For example, as recently as 2004 Gummow J of the High Court of Australia in a case concerning the detention of refugee children remarked that:

<sup>82</sup> James Hadley, *Introduction to Roman Law in Twelve Academic Lectures* (1873) 119, quoted in Bryan A Garner (ed), *Black's Law Dictionary* (9<sup>th</sup> ed, 2009) 1287.

<sup>83</sup> John Stuart Mill, *On Liberty* (1859) 8.

<sup>84</sup> (1883) 24 Ch D 317, 336.

<sup>85</sup> See Eekelaar, *Family Law and Personal Life*, above n 5, 13.

The starting point is the proposition that, at common law, a right of a parent or parents to custody of children who had not reached the age of discretion (fourteen for boys and sixteen for girls) incorporates a ‘right to possession’ of the child which includes the right to exercise physical control over that child.<sup>86</sup>

This is a remarkable extract which could not be more strikingly at odds with the vision of children as rights-bearers that is articulated under the *CRC*. It thus provides a vivid illustration of what I term an ‘invisible’ rights approach in that it not only neglects to conceptualise the issue in terms of the rights of a child but affirms and embraces a vision of children in which they are primarily seen as an extension of their parents.

Importantly, the explicit affirmation of the parental possession doctrine by a court is not the defining characteristic of the invisible rights approach. Its core feature is the failure to identify that the rights of children are relevant to the dispute before the court. An archetypal example of such a matter is the English case of *R (Williamson) v Secretary of State for Education and Employment* (‘*Williamson*’), which concerned a ban on corporal punishment in schools.<sup>87</sup> In 2005 the matter finally reached the House of Lords, whereupon Baroness Hale declared:

My Lords, this is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here or in the courts below to speak on behalf of the children. No litigation friend has been appointed to consider the rights of the pupils ... No non-governmental organisation ... has intervened to argue a case on behalf of children as a whole. The battle has been fought on ground selected by the adults.<sup>88</sup>

Remarkably, prior to the case arriving before Baroness Hale, the matter had managed to traverse its way through the English judicial system without any discussion as to the relevance of children’s rights. Instead, the case had been confined to an analysis as to the nature of the religious beliefs upon which the parents relied in asserting their right to have their children subject to physical discipline in schools.<sup>89</sup> These failures to conceptualise the issue in terms of children’s rights and to adopt procedures that would recognise and take steps to accommodate the rights of children are the central characteristics of an invisible rights approach.<sup>90</sup>

<sup>86</sup> *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 57–8 (emphasis added) (citations omitted).

<sup>87</sup> [2005] 2 AC 246.

<sup>88</sup> *Ibid* 271.

<sup>89</sup> It is important to note, as Jane Fortin brought to my attention, that the UK Secretary of State had not raised the issue of children’s own rights because English law maintains that parents have a right to physically punish their children: see below n 91. Thus, procedurally, the case was presented to the English courts as if the issue for resolution had been confined to the legitimacy of the state’s attack on the religious rights of parents. This narrow position, however, did not prevent Baroness Hale from identifying the central importance of children’s rights to the issue. Had there been a procedural entitlement for children to receive separate representation, it is likely that the relevance of children’s rights would have been raised at a much earlier stage in the proceedings (assuming the involvement of competent counsel).

<sup>90</sup> Equally, as Jane Fortin explained to me, the failure to adopt appropriate procedures could contribute to the failure by a court to conceptualise the issues in terms of a child’s rights.



A question remains, however, as to whether the adoption of an invisible rights approach should matter if the outcome in a case is no different from the outcome that would have resulted had a substantive rights approach been adopted. In *Williamson*, for example, the lower courts still upheld the ban on corporal punishment in schools, with the Court of Appeal justifying its decision on the basis that parents still retained their right to punish their own children.<sup>91</sup> Moreover, in 1954 in *Brown v Board of Education of Topeka*, one of the most celebrated decisions of the Supreme Court of the United States in which educational segregation was declared unconstitutional,<sup>92</sup> Warren CJ delivering the unanimous judgment of the Court stressed the benefits of education to a society as a whole rather than the right of children to receive it.<sup>93</sup>

The reality is that significant consequences are still associated with an endorsement of these approaches. As the comments of Baroness Hale indicate, a failure to identify the relevance of children's rights to a matter before a court can also lead to a failure to adopt the procedures necessary to accommodate rights such as the right to separate representation. Moreover, the explicit affirmation by the Court of Appeal of a parental right to physically discipline a child fails to acknowledge that this practice itself is arguably inconsistent with the rights of the child.<sup>94</sup> In contrast, the danger associated with the approach of the US Supreme Court is the tendency to adopt an instrumentalist vision of children as objects of value to society rather than individuals with entitlements. So, although an invisible rights approach may not lead to a decision that is necessarily inconsistent with children's rights, it will have broader consequences for the status and vision of children within society.

## 2 The Incidental Rights Approach

In his critique of children's rights, one of Guggenheim's primary concerns is that the concept is frequently invoked to secure the interests of adults rather than children.<sup>95</sup> His concerns find support in the decisions of courts beyond the US. Thus, for example, a study by Judith Sloth-Nielsen in 2002 concerning the early treatment of children's rights under the *South African Constitution*<sup>96</sup> revealed that 'the main beneficiaries of children's rights related cases were in fact adult litigants, who had sought to bolster their claims via children's rights-based

<sup>91</sup> *R (Williamson) v Secretary of State for Education and Employment* [2003] QB 1300, 1309, 1326 (Buxton LJ), 1354–5, 1358–60 (Rix LJ), 1360, 1380–1 (Arden LJ). See also *Williamson* [2005] 2 AC 246, 273 (Baroness Hale).

<sup>92</sup> 347 US 483, 494–6 (Warren CJ for Warren CJ, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton JJ) (1954).

<sup>93</sup> See *ibid* 493.

<sup>94</sup> See CRC Committee, *General Comment No 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Articles 19, 28(2) and 37, inter alia)*, 42<sup>nd</sup> sess, [18], [26], [28], UN Doc CRC/C/GC/8 (2006).

<sup>95</sup> Guggenheim, above n 16, xiii.

<sup>96</sup> Judith Sloth-Nielsen, 'Children's Rights in the South African Courts: An Overview since Ratification of the UN *Convention on the Rights of the Child*' (2002) 10 *International Journal of Children's Rights* 137, 149–51.

arguments.<sup>97</sup> A similar trend was discerned by Fortin in her review of child protection cases in the UK, where she identified that ‘domestic courts sometimes make brief passing references to the ... rights of the children’.<sup>98</sup> On balance, however, she found that decisions concerning the removal of a child from their parents’ care typically indicate ‘that the family judiciary seldom discuss the children’s position in terms of their own [*European*] *Convention* rights.’<sup>99</sup> Such a practice is referred to in this article as an ‘incidental’ rights approach to judicial treatment of children’s rights.<sup>100</sup> Unlike the invisible rights approach, where children’s rights are nowhere to be seen in the judicial process, children’s rights are at least present within an incidental approach. Their identification, however, is not considered to be essential to either the conceptualisation or resolution of the issues before a court. Nor is their presence accompanied by any sophisticated and detailed examination as to the nature and content of the rights in question. As such they are merely incidental — a marginal feature of the judicial process that exists on the periphery.

Elements of the 2008 decision in *VM v Director of Child, Family and Community Service (British Columbia)* provide a contemporary example of an incidental judicial approach to children’s rights.<sup>101</sup> The case involved a challenge to the authorisation of a blood transfusion for two infants whose parents were members of the Jehovah’s Witness Church.<sup>102</sup> In framing the issue for determination, Brenner CJSC, in the first paragraph of the judgment, declared:

This case lies at the intersection of the rights and responsibility of parents to make sound health care decisions for their children and the duty, indeed the obligation, of the state to override that right in appropriate circumstances. This court must decide where the correct intersection lies and on which side this case falls.<sup>103</sup>

The rights of children are conspicuously absent from this conceptualisation of the issue, which is reduced to the need to reconcile the tension between the rights of the parents and the obligation of the state.

Unlike under the invisible rights approach, the rights of the children were not entirely ignored in this decision, and at one point Brenner CJSC commented that it would be ‘difficult to see how the *Charter* rights of the parents ... could trump the s 7 *Charter* rights [to life] of the infants to receive medical treatment to prevent their serious personal injury or death.’<sup>104</sup> The treatment of children’s rights, however, was incidental and, rather than offering a detailed analysis as to how a right to receive life-saving medical treatment is or should be a component

<sup>97</sup> Sloth-Nielsen and Mezmur, above n 1, 3.

<sup>98</sup> Fortin, ‘Accommodating Children’s Rights in a Post *Human Rights Act* Era’, above n 1, 301.

<sup>99</sup> *Ibid.*

<sup>100</sup> Cf *R (R) v Durham Constabulary* [2005] 2 All ER 369, 386–7, where Baroness Hale refers approvingly to the interpretation and application by the European Court of Human Rights of the provisions of the *European Convention* in light of the provisions of the *CRC*.

<sup>101</sup> [2008] 12 WWR 102.

<sup>102</sup> *Ibid* 106–7 (Brenner CJSC).

<sup>103</sup> *Ibid* 106; see also at 111.

<sup>104</sup> *Ibid* 121.

of the right to life, the Chief Justice of the British Columbia Supreme Court preferred to base his decision to allow the transfusion on the premise ‘that freedom of religion is not absolute and *may* give way to the child’s best interests.’<sup>105</sup>

It is for this reason that the deference given to the best interests of the child reflects a welfarist rather than a rights-based understanding of the best interests principle. This is because a rights-based approach would have required the Chief Justice to conceptualise the issue much more forcefully in terms of the child’s right to life (which forms part of a child’s best interests) and the extent to which its effective enjoyment could be compromised by the need to respect the rights of the child’s parents. Instead, the issue was conceptualised as being between the parents and the state, and whether the circumstances of the case warranted state intervention to secure a child’s best interests.

Although a rights-based approach also would have required state intervention on the facts of the case, its adoption would have carried two significant consequences. First, the child would have been identified much more clearly as a subject entitled to the protection of their individual rights as opposed to a passive object in a dispute between the child’s parents and the state. Secondly, the articulation of the right to life as incorporating a positive duty on states to provide life-saving treatment for children would have carried significant implications in terms of the understanding of the obligations of states pursuant to the right to life. Brenner CJSC raised the potential for this analysis when he referred to the child’s right to life,<sup>106</sup> but this reference was merely incidental and he failed to develop it any further. Instead, he preferred to revert to a welfarist understanding of the child’s best interests which was divorced from the child’s right to life, by holding that the state was justified in overriding the parental rights because this was necessary to secure the child’s best interests.<sup>107</sup>

### 3 *The Selective Rights Approach*

There is evidence of an increasing trend whereby courts are making more references to the rights of children that are protected under the *CRC*.<sup>108</sup> A feature of this trend, however, is the tendency for the adoption of what I call a ‘selective’ rights approach. This occurs when a court makes significant rather than incidental references to a particular right or rights of children in order to inform or defend its resolution of the issues. However, such an approach is selective in the sense that the analysis offered is not grounded in a comprehensive and internally coherent application of the *CRC* and its underlying model of children’s rights — only parts of the model are selected by the court. Two recent cases that provide a good illustration of such an approach are the majority decision of the

<sup>105</sup> Ibid 124 (emphasis added).

<sup>106</sup> Ibid 121.

<sup>107</sup> See *ibid* 124.

<sup>108</sup> See generally Jonathan Todres, ‘Emerging Limitations on the Rights of the Child: The UN Convention on the Rights of the Child and Its Early Case Law’ (1998) 30 *Columbia Human Rights Law Review* 159.

US Supreme Court in *Roper v Simmons*<sup>109</sup> and the opinion of Kirby J of the High Court of Australia in *Minister for Immigration and Multicultural and Indigenous Affairs v B* ('*MIMIA v B*').<sup>110</sup>

*Roper v Simmons* has been hailed as a landmark case in two respects. First, it determined that the imposition of the death penalty on a person below the age of 18 was a form of cruel and unusual punishment and thus unconstitutional.<sup>111</sup> Secondly, in forming its view, the majority of the US Supreme Court drew on international law and the provisions of international instruments such as the *CRC* to confirm its position as to the illegality of the death penalty for children.<sup>112</sup> Not surprisingly, both these aspects of the decision have attracted significant attention.<sup>113</sup> Certainly, from the perspective of the analysis in this article, the decision represents an example of a court avoiding the imposition of an adult-centric understanding as to the content of a particular right — namely, the right not to be subjected to cruel and usual punishment — in favour of an understanding which accommodated the particular vulnerabilities of childhood.

However, what has been overlooked in the commentary on the case is the incongruity caused by the majority decision's affirmation, in defence of its position, that states still had the jurisdiction to detain juvenile offenders indefinitely.<sup>114</sup> Remarkably, the US Supreme Court saw fit to embrace the first limb of art 37(a) of the *CRC*, which prohibits the death penalty for juveniles, but overlook its second limb, which prohibits 'life imprisonment' for children 'without possibility of release'.<sup>115</sup> The adoption of such a selective approach to children's rights weakens the rigour of the Court's decision and lends support to those who criticise recourse to international standards in domestic fora as a form of 'smorgasbording' in which judges conveniently select only those aspects of the system that will confirm their position.<sup>116</sup> Such a selective approach also compromises the vision of children's rights offered under the *CRC*.

<sup>109</sup> 543 US 551 (2005).

<sup>110</sup> (2004) 219 CLR 365.

<sup>111</sup> *Roper v Simmons*, 543 US 551, 567 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (2005).

<sup>112</sup> See *ibid* 578.

<sup>113</sup> See, eg, Barry C Feld, 'A Slower Form of Death: Implications of *Roper v Simmons* for Juveniles Sentenced to Life without Parole' (2008) 22 *Notre Dame Journal of Law, Ethics and Public Policy* 9; Holly Arnould, 'Lawrence v Texas and *Roper v Simmons*: Enriching Constitutional Interpretation with International Law' (2008) 22 *St John's Journal of Legal Commentary* 685.

<sup>114</sup> *Roper v Simmons*, 543 US 551, 572 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (2005). Cf at 623, where Scalia J, for Rehnquist CJ, Scalia and Thomas JJ, stated in dissent: 'If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since "the punishment of life imprisonment without the possibility of parole is itself a severe sanction," ... gives little comfort.'

<sup>115</sup> *CRC* art 37(a) provides:

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age ...

<sup>116</sup> See, eg, Justice Antonin Scalia and Justice Stephen Breyer, 'The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 *International Journal of Constitutional Law* 519, 521–2.

Another example of this selective use of children's rights is the decision of Kirby J in *MIMIA v B*. This matter involved complex issues concerning the capacity of the Family Court of Australia to make decisions regarding the detention of refugee children.<sup>117</sup> When it went on appeal to the High Court, Kirby J offered a considered discussion of Australia's obligations under international law and more specifically the requirement under art 37(b) of the *CRC* that the detention of all children be 'a measure of last resort'.<sup>118</sup> However, he ultimately rejected the submission that the detention of these children was indefinite and explained that

the period of detention had a clear terminus. This (putting it broadly) is the voluntary election of the children (through their parents) to leave Australia or the completion of the legal proceedings brought by the parents on the children's behalf ...<sup>119</sup>

Such a comment is reflective of a judicial model that is unable to separate a child from their parents and recognise the potential for a conflict of interests to exist.

Kirby J's approach stands in stark contrast to the approach adopted by the majority of the Full Court of the Family Court of Australia, who held that

children are entitled to be treated as individuals and not as the property or appendages of their parents. ... It thus seems inconceivable that their continued detention should depend upon whether or not their parents have made a request for repatriation ...<sup>120</sup>

This position represents an engagement with a substantive conception of the notion of children as rights-bearers and reveals the selective nature of the approach adopted by Kirby J. Although he was able to identify the provisions of the *CRC* relevant to the detention of children, Kirby J was unable to formulate his decision in accordance with the deeper understanding and conceptualisation of children's rights advanced by the majority in the Full Family Court.

#### 4 *The Rhetorical Rights Approach*

The 1986 decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* ('*Gillick*')<sup>121</sup> is generally seen as a watershed in the development of children's rights within common law jurisdictions.<sup>122</sup>

<sup>117</sup> See *MIMIA v B* (2004) 219 CLR 365, 408–9 (Kirby J).

<sup>118</sup> See *ibid* 424–5.

<sup>119</sup> *Ibid* 425.

<sup>120</sup> *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 30 Fam LR 181, 243 (Nicholson CJ and O'Ryan J); see also at 242.

<sup>121</sup> [1986] 1 AC 112.

<sup>122</sup> See Eekelaar, 'The Emergence of Children's Rights', above n 5, 161, 180–2. Faced with the prospect of a doctor providing contraceptive advice to a young girl without her mother's consent, the England and Wales Court of Appeal was content to maintain a parent's right to physical possession over a child (see *ibid* 124–5, 133–4, 138 (Parker LJ), 141–3 (Fox LJ); cf at 148–9 (Eveleigh LJ)), thereby, in the words of Eekelaar, 'annihilat[ing]' the prospect for any 'legal recognition of autonomy interests in children' (Eekelaar, 'The Emergence of Children's Rights', above n 5, 180). In contrast, the majority of the House of Lords was prepared to hold that a child who had attained sufficient understanding and maturity had the full capacity to enter into legal

Although this decision was made in the mid-1980s — a few years before the provisions of the *CRC* were finalised in 1989 — it is clear that its underlying values are consistent with the vision of children’s rights as offered under the *CRC*. In the first place, the young girl in question was treated as a separate legal entity with an evolving capacity.<sup>123</sup> This in turn enabled the House of Lords to acknowledge her capacity to make decisions as to her own best interests (with respect to access to information about abortion) independently of her mother’s wishes.<sup>124</sup> However, it has been suggested that the application of the test for competency in *Gillick* and similar versions which have been adopted in other jurisdictions can be used to cloak paternalistic decisions regarding treatment of children in the rhetoric of their rights.<sup>125</sup> Jamie Potter, for example, has argued that courts have regularly held children to be competent in the context of access to contraceptive advice and abortions but repeatedly denied their competency when they seek to refuse life-saving treatment despite evidence to suggest that the children in question are fully aware of the consequences of their decision.<sup>126</sup> I term such an approach the ‘rhetorical’ rights approach because it embraces the rhetoric of rights — namely, children are told that their autonomy will be respected when, in truth, a welfarist approach is adopted.

It is not suggested here that the model of children’s rights under the *CRC* necessarily demands that a judge honour the decision of a child of sufficient maturity and understanding to refuse life-saving medical treatment. Although art 12 of the *CRC* provides a child with a right to express their wishes with respect to such a matter, there is an argument that the best interests principle under art 3 still allows a court to force a child to undergo such treatment. Fortin, for example, has argued that the courts ‘can legitimately argue that society has an interest in protecting under-age minors, irrespective of competence, from their own dangerous mistakes until they attain their majority’.<sup>127</sup> Margaret Brazier and Caroline Bridge have suggested that ‘society might well adopt a sceptical approach to autonomy’ when dealing with children and thus accept the capacity of courts to vitiate their decisions when they are deemed imprudent, albeit by reference to the standards of adults.<sup>128</sup> In contrast, Penney Lewis has suggested that, where an adolescent is able to make a competent choice to refuse life-

relationships without the consent of their parents: see *ibid* 173–4 (Lord Fraser); see also at 188–90 (Lord Scarman), 195 (Lord Bridge).

<sup>123</sup> *Gillick* [1986] 1 AC 112, 173–4 (Lord Fraser).

<sup>124</sup> See *ibid* 174.

<sup>125</sup> Michael Freeman, ‘Rethinking *Gillick*’ (2005) 13 *International Journal of Children’s Rights* 201, 206–8, 211–12; Melinda T Derish and Kathleen Vanden Heuvel, ‘Mature Minors Should Have the Right to Refuse Life-Sustaining Medical Treatment’ (2000) 28 *Journal of Law, Medicine and Ethics* 109, 112–13.

<sup>126</sup> Jamie Potter, ‘Rewriting the Competency Rules for Children: Full Recognition of the Young Person as Rights-Bearer’ (2006) 14 *Journal of Law and Medicine* 64, 67.

<sup>127</sup> Jane Fortin, *Children’s Rights and the Developing Law* (2<sup>nd</sup> ed, 2003) 134.

<sup>128</sup> Margaret Brazier and Caroline Bridge, ‘Coercion or Caring: Analysing Adolescent Autonomy’ (1996) 16 *Legal Studies* 84, 109.

saving treatment, '[r]especting such a choice will be difficult, but it is preferable to arbitrary discrimination on the basis of age alone.'<sup>129</sup>

Although all of these approaches could arguably find support within the text of the *CRC*, there are clear principles that must inform the *process* by which a judge forms a decision on such matters. More specifically, if a judge decides to restrict the autonomy of a child and insist upon life-saving treatment because they strike the balance in favour of a child's right to life, the judge must not raise an expectation that a child's understanding will determine competency and thus provide a right to refuse life-saving medical treatment. Such a process would only serve to demean and disempower a child who, despite having a significant understanding of their condition and the consequences of refusing treatment, must be labelled 'incompetent' if their decision to refuse treatment is dishonoured. So, rather than create the impression that the autonomy of a child is to be determinative in the decision-making process, if a judge's decision is to favour the protection of a child's life over respect for individual autonomy, such an approach should be transparent and clearly communicated to a child.<sup>130</sup> To do otherwise is to embrace the rhetoric but not the substance of a rights-based approach when dealing with children.

##### 5 *The Superficial Rights Approach*

A further way in which judges fail to engage with the model of children's rights outlined in Part II is described here as the 'superficial' rights approach. In such cases, judges identify the central relevance of children's rights to the matters before them and children's rights feature as a core element in their reasoning. Despite this ostensible engagement with children's rights, such cases are deemed to be superficial because judges fail to consider the actual scope and nature of the rights in question and/or fail to undertake a rigorous assessment as to the manner in which these rights must be balanced against any competing considerations. The decision of the International Court of Justice ('ICJ') in the 2005 case *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ('*Armed Activities*')<sup>131</sup> provides an illustration of this first characteristic, while the 2001 decision of the European Court of Human Rights in *Dahlab v Switzerland* ('*Dahlab*')<sup>132</sup> provides an example of the second.

In relation to *Armed Activities*, it is sufficient to note that the ICJ had before it 'convincing evidence of the training in [Uganda People's Defence Forces ('UPDF')] training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control.'<sup>133</sup> This in turn gave rise to a question as to whether Uganda had failed in its obligations with respect to the recruitment of child soldiers under international law.<sup>134</sup> In addressing this

<sup>129</sup> Penney Lewis, 'The Medical Treatment of Children' in Julia Fionda (ed), *Legal Concepts of Childhood* (2001) 151, 159, quoted in Freeman, 'Rethinking *Gillick*', above n 125, 210.

<sup>130</sup> Potter, above n 126, 68–9.

<sup>131</sup> General List No 116 (Unreported, International Court of Justice, 19 December 2005).

<sup>132</sup> [2001] V Eur Court HR 449.

<sup>133</sup> General List No 116 (Unreported, International Court of Justice, 19 December 2005) [210].

<sup>134</sup> *Ibid* [215].

concern, the ICJ recited all the relevant human rights and humanitarian law instruments to which the states were party.<sup>135</sup> It then listed the specific provisions of these instruments which Uganda was alleged to have violated<sup>136</sup> and concluded that the UPDF ‘did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.’<sup>137</sup>

At no stage did the ICJ engage in any substantive analysis as to the content and scope of the international obligations concerning child soldiers which Uganda had assumed.<sup>138</sup> More specifically, its consideration of the evidence with respect to the training and recruitment of children was dissociated<sup>139</sup> from the actual content of the provisions of *Additional Protocol I*<sup>140</sup> and *Additional Protocol II*<sup>141</sup> to the Geneva Conventions, art 38 of the CRC, and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*,<sup>142</sup> none of which prohibit per se the recruitment of all children. Thus, rather than engaging in a careful analysis of the nuanced nature of the status of child soldiers under international law, the ICJ simply decided that the relevant instruments had been violated because of evidence as to the training and recruitment of children. The facts may well have justified the ICJ’s findings, but its ‘oracular’ tendencies created a void in its reasoning that undermines the legitimacy of its decision and provides a vivid illustration of a superficial rights approach in judicial reasoning.<sup>143</sup>

The decision of the European Court of Human Rights in *Dahlab* provides an illustration of the other characteristic of a superficial approach, namely, the failure to undertake a rigorous assessment as to how the rights of a child are to be balanced against other competing considerations. *Dahlab* involved a claim by a female teacher that a ban on wearing an Islamic headscarf when teaching in a public school was a violation of her right to freedom of religion.<sup>144</sup> The Court

<sup>135</sup> Ibid [217].

<sup>136</sup> Ibid [219].

<sup>137</sup> Ibid [211].

<sup>138</sup> See especially ibid [211], [218]–[219].

<sup>139</sup> Cf ibid [210] (evidence), [219] (provisions).

<sup>140</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3, arts 77(2)–(3) (entered into force 7 December 1978) (*‘Additional Protocol I’*).

<sup>141</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 611, arts 4(3)(c)–(d) (entered into force 7 December 1978) (*‘Additional Protocol II’*).

<sup>142</sup> Opened for signature 25 May 2000, 2173 UNTS 222, arts 1–2, 3(3), 4–6 (entered into force 12 February 2002).

<sup>143</sup> See Antonio Cassese, ‘The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18 *European Journal of International Law* 649, 651, which argues with respect to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits)*, General List No 91 (Unreported, International Court of Justice, 26 February 2007) that ‘the reader expecting a closely-argued decision will be left instead with the impression that the Court’s holdings have a tinge of oracularity (oracles indeed are not required to give reasons).’

<sup>144</sup> See [2001] V Eur Court HR 449, 449.



upheld the ban for reasons which included the need to protect children's right to freedom of conscience and religion. It declared that 'it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of young children.'<sup>145</sup> Moreover, it added that 'it cannot be *denied outright* that the wearing of a headscarf *might* have some kind of proselytising effect' on the children; as such, the ban was considered not to be unreasonable.<sup>146</sup>

This line of reasoning is problematic in two respects. First, it is based on speculation as to the potential effect of a teacher wearing a headscarf on her students, which is contrary to the general rule under human rights law that an interference with a person's rights must be justified on objective grounds by the state.<sup>147</sup> Secondly, it shifts the onus from the state to the teacher, who is required to prove that which is effectively beyond proof, namely, that the headscarf *does not* have some proselytising effect. This approach is considered to be an example of a superficial rights approach to the extent that the invocation of children's rights acts as a kind of trump card that effectively diverts the court's attention from the need to undertake a careful examination of the available evidence and a rigorous balancing of the competing interests in a case of this sort. Thus, unlike other approaches where children's rights may be invisible or incidental, they are not only visible but a core element of the court's reasoning. But the problem with this approach is that the treatment of children's rights is superficial with respect to the nature of the analysis adopted by the court.

## 6 *The Substantive Rights Approach*

In contrast to the preceding approaches, which tend to marginalise or misuse the notion of children as rights-bearers, what I term a 'substantive' rights approach refers to the ways in which judges engage with aspects of the model of children's rights outlined in Part II in a substantive way. Importantly, this approach is not homogenous. Instead, a number of dimensions will qualify an approach as one which gives substantive effect to at least some dimensions of children's rights.<sup>148</sup> In terms of illustrating when a decision of a judge will satisfy this test, it is convenient to examine the different areas in which consideration of children's rights may be relevant for a judge. These are identified as being: (a) the conceptualisation of the issues before the court; (b) the procedures to be adopted for the determination of these issues; (c) the meaning to be given to the content of the rights in question; and (d) the substantive reasoning by which to resolve the issues and balance the competing interests. Each is examined below.

<sup>145</sup> Ibid 463.

<sup>146</sup> Ibid (emphasis added).

<sup>147</sup> *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN ESCOR, 41<sup>st</sup> sess, Annex, [12], UN Doc E/CN.4/1985/4 (1984) ('*Siracusa Principles*').

<sup>148</sup> I am indebted to Philip Alston for this point: he stressed that, rather than being presented as a single destination at the end of a spectrum, a substantive rights approach should be more open-ended.

### B *The Conceptualisation of the Issues*

In 1967, the US Supreme Court delivered its judgment in *Re Gault*<sup>149</sup> — a decision that has been described as ‘the most important children’s rights case in history.’<sup>150</sup> Although this comment reflects a very American vision of history, it is true that the decision was a watershed in relation to the way in which courts conceptualised legal issues in matters involving children. Prior to *Re Gault*, the American juvenile justice system had operated along a welfare model in which children who engaged in criminal offences were denied due process rights.<sup>151</sup> The US Supreme Court rejected this position and declared that ‘neither the Fourteenth Amendment nor the *Bill of Rights* is for adults alone.’<sup>152</sup>

Importantly, *Re Gault* precipitated a paradigm shift in the 1960s and 1970s in the way in which the US Supreme Court dealt with matters concerning children. For example, in *Tinker v Des Moines Independent Community School District* (*Tinker*), a case which dealt with children’s right to expression in public schools, it was held that ‘[s]tudents in school as well as out of school are “persons” under our *Constitution*. They are possessed of fundamental rights which the state must respect’.<sup>153</sup> In *Planned Parenthood of Central Missouri v Danforth*, Blackmun J, considering an adolescent’s right to an abortion, proclaimed that ‘[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the *Constitution* and possess constitutional rights.’<sup>154</sup> In each of these cases the US Supreme Court was prepared to resist historical perceptions as to the status of children and affirm their independent legal status and entitlement to rights.

Commentators have lamented that this trend has not been continued in the US.<sup>155</sup> Nor has it been embraced universally by judges in other jurisdictions, as the discussion above demonstrates.<sup>156</sup> At the same time, there is still evidence of awareness among some judges as to how to conceptualise matters concerning children in terms of their rights. The extract from the judgment of Baroness Hale in the House of Lords decision in *Williamson* represents a contemporary example of such a substantive approach. It will be recalled that in relation to a ban on the corporal punishment of children in schools she declared: ‘My Lords, this is, and has always been, a case about children, their rights and the rights of their parents

<sup>149</sup> 387 US 1 (1967).

<sup>150</sup> Guggenheim, above n 16, 7.

<sup>151</sup> *Ibid* ix.

<sup>152</sup> *Re Gault*, 387 US 1, 13 (Fortas J for Warren CJ, Black, Douglas, Clark, Harlan, Brennan, Stewart, White and Fortas JJ) (1967).

<sup>153</sup> 393 US 503, 511 (Fortas J for Warren CJ, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas and Marshall JJ) (1969).

<sup>154</sup> 428 US 52, 74 (Blackmun J for Brennan, Marshall and Blackmun JJ) (1976).

<sup>155</sup> See, eg, Barbara Bennett Woodhouse, ‘The Constitutionalization of Children’s Rights: Incorporating Emerging Human Rights into Constitutional Doctrine’ (1999) 2 *University of Pennsylvania Journal of Constitutional Law* 1, 8.

<sup>156</sup> See above Part III(A).

and teachers.<sup>157</sup> Rather than simply viewing the issue as one between parents and the state, she identified that it was not only children but also their rights which were at the core of the court's concerns. Moreover, she avoided the superficial approach by ensuring that consideration was also given to the rights of parents and teachers.

Another strong example of such a substantive approach (also mentioned briefly above) is the decision of the Full Family Court in *B v Minister for Immigration and Multicultural and Indigenous Affairs*.<sup>158</sup> A critical issue before the Court was whether refugee children had the capacity to end their compulsory detention by voluntarily seeking repatriation.<sup>159</sup> As noted above, Kirby J of the High Court decided on appeal that this was a matter for their parents.<sup>160</sup> In contrast, the majority of the Full Family Court declared that: 'It is true that their parents could do so, but to regard this as a determining factor seems to us to effectively involve treating the children as the chattels of their parents.'<sup>161</sup> Moreover, they continued:

It is quite apparent that under our law children are entitled to be treated as individuals and not as the property of or appendages of their parents. They are entitled to the same rights and protections at common law and under the *Constitution* as adults subject to Australian law.<sup>162</sup>

The sentiment underlying this judicial approach reflects the model of children's rights advanced in Part II. There are numerous other examples where courts have conceptualised the issues before them in terms of the impact on a child's rights. They cover areas such as refugee law,<sup>163</sup> custody disputes<sup>164</sup> and the sentencing of parents in criminal justice proceedings.<sup>165</sup> The objective here is not to discuss these cases but to use the examples selected to illustrate what is meant by the adoption of a substantive rights approach to the conceptualisation of the issues before a court.

<sup>157</sup> *Williamson* [2005] 2 AC 246, 271. See above n 88 and accompanying text.

<sup>158</sup> (2003) 30 Fam LR 181.

<sup>159</sup> See *ibid* 242–3 (Nicholson CJ and O'Ryan J).

<sup>160</sup> See above n 119 and accompanying text.

<sup>161</sup> *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 30 Fam LR 181, 243 (Nicholson CJ and O'Ryan J).

<sup>162</sup> *Ibid*.

<sup>163</sup> See, eg, *Baker v Minister for Citizenship and Immigration (Canada)* [1999] 2 SCR 817, 863, where, in a matter concerning the exercise of a discretionary power to deport a mother of four, L'Heureux-Dubé J (delivering the majority judgment for L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ) declared 'that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and "compassionate" considerations that guide the exercise of the discretion.'

<sup>164</sup> See, eg, *Jalil v Begum Jalil* (1998) 50 Dhaka Law Reports 55, 59 (Afzal CJ for Afzal CJ, Kamal, Rahman, Rouf and Choudhury JJ) (Supreme Court of Bangladesh, Appellate Division), where it was held that custody proceedings were not a dispute simply concerning the rights of the parents and that it was 'the rights of the child which [were] at issue.'

<sup>165</sup> See, eg, *State v M* [2008] 3 SA 232.

### C *The Procedures Adopted for the Resolution of the Issues*

The second area in which elements of a substantive rights approach may be present is the procedures adopted by a judge to ensure compatibility with children's rights. Again, the comments of Baroness Hale are instructive in this regard. After identifying the centrality of children's rights to the issue of corporal punishment, she lamented that

there has been no one here or in the courts below to speak on behalf of the children. No litigation friend has been appointed to consider the rights of the pupils ... No non-governmental organisation ... has intervened to argue a case on behalf of children as a whole. The battle has been fought on ground selected by the adults.<sup>166</sup>

Critical to her complaint was the absence of a procedure by which to represent to the House of Lords the nature of the children's interests independently from those of their parents and the teachers. It is a concern that is consistent with the requirement under art 12 of the *CRC* that children must be provided with 'the opportunity to be heard in any judicial and administrative proceedings affecting [them], either directly, or through a representative or an appropriate body'.

Importantly, the procedures adopted by a judge must not be limited to ensuring adequate representation of a child's views in a proceeding.<sup>167</sup> They must extend to every aspect of the proceedings in the courtroom, including the way in which a child provides evidence, the length of a sitting day and the physical arrangement of the courtroom itself. A detailed discussion of these issues is beyond the scope of this analysis and it is sufficient to make two observations. First, courts have increasingly recognised the need to adopt procedures which are sensitive to the need to protect children against further abuse and trauma when they provide evidence, particularly in sexual offences cases.<sup>168</sup> Secondly, courts have also recognised the need to adopt procedural measures that are sensitive to the needs of children given their age and level of maturity.<sup>169</sup>

This last point is particularly well illustrated by the decision of the European Court of Human Rights in *V v United Kingdom*, in which it was alleged that the trial of two young boys for the murder of a toddler violated a number of their rights.<sup>170</sup> Of particular concern to this article was the finding by the European

<sup>166</sup> *Williamson* [2005] 2 AC 246, 271.

<sup>167</sup> In this regard, several decisions in South Africa's courts have invoked art 12(2) of the *CRC* to demand appropriate representation for children: see *Soller v G* [2003] 5 SA 430, 434–5, 438 (Satchwell J) (Local Division); *Rosen v Havenga* [2006] 4 All SA 199, 202 (Moosa J) (Provincial Division). For discussion of these cases, see Sloth-Nielsen and Mezmur, above n 1, 17–19.

<sup>168</sup> See, eg, Judy Cashmore and Lily Trimboli, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (2005); Judy Cashmore, 'Innovative Procedures for Child Witnesses' in Helen L Westcott, Graham M Davies and Ray H C Bull (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 203; Thomas L Hafemeister, 'Protecting Child Witnesses: Judicial Efforts to Minimize the Trauma and Reduce Evidentiary Barriers' (1996) 11 *Violence and Victims* 71, 73.

<sup>169</sup> The literature in this area is vast and growing. For a small sample, see 'Special Issue: Including Children in Family Law Proceedings — International Perspectives' (2008) 46 *Family Court Review* 37.

<sup>170</sup> (1999) 30 EHRR 121, 130. See also *SC v United Kingdom* [2004] IV Eur Court HR 281.

Court that the procedures adopted by the English courts amounted to a violation of the young defendants' right to an effective fair hearing.<sup>171</sup> Although considerable effort had been made during the trial to accommodate the boys' youth within the English criminal justice system,<sup>172</sup> evidence was provided to the European Court that one of the boys 'was unable to follow the trial or take decisions in his own best interests.'<sup>173</sup> The Court therefore held that he 'was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6(1)' of the *European Convention*.<sup>174</sup>

Looking beyond the need to ensure that the conduct of proceedings is consistent with a child's rights, a substantive rights approach also requires that courts extend their consideration to matters such as the need to impose any restrictions on public access or the reporting of the proceedings in the media. A substantive rights approach does not necessarily require restrictions on attendance, but it does demand that there is no disclosure of any information that may reveal the identity of a child beyond the courtroom.<sup>175</sup>

Commentators have challenged this deference to children's rights in the context of media reporting on cases involving children in light of the rights to freedom of expression and access to information.<sup>176</sup> In responding to these concerns, it is not sufficient simply to invoke a superficial rights approach by using children's rights to trump freedom of expression concerns. A more resilient position needs to be advanced in resolving this tension, and it is suggested that such a position can be found in an application of the best interests principle. This principle operates where there is stalemate between competing rights — in this case a child's right to respect for privacy, a journalist's right to freedom of expression and the public's right to access information — to shift the balance in favour of the child where there is a (potential) risk to the child's best interests. This argument rests on the basis that the best interests principle must operate to provide children with the benefit of the doubt in circumstances where the precise consequences of a certain action are unknown but there is a risk of harm to a

<sup>171</sup> *V v United Kingdom* (1999) 30 EHRR 121, 181.

<sup>172</sup> *Ibid* 180. For example, one boy 'had the trial procedure explained to him and was taken to see the courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively.'

<sup>173</sup> *Ibid* 181.

<sup>174</sup> *Ibid*.

<sup>175</sup> See CRC Committee, *General Comment No 10: Children's Rights in Juvenile Justice*, 44<sup>th</sup> sess, [23], UN Doc CRC/C/GC/10 (2007); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, GA Res 40/33, UN GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, 206, Annex r 8, UN Doc A/RES/40/33 (1985); *V v United Kingdom* (1999) 30 EHRR 121, 176, where the Court made reference to the right of a child to privacy under the *CRC* and the *Beijing Rules* and held that these instruments demonstrated 'an international tendency in favour of the protection of the privacy of juvenile defendants'.

<sup>176</sup> See, eg, Fortin, 'Accommodating Children's Rights in a Post *Human Rights Act* Era', above n 1, 306–8.

child.<sup>177</sup> Thus, in this case, if there is evidence that disclosure may cause harm to a child, such as social stigma or discrimination, the protection of the child's interests must take precedence over the potential harm that may be experienced by a journalist or the public due to a failure to make the identity of the child widely known.<sup>178</sup>

An example of a recent case in which all these considerations concerning the procedures to be adopted by a court to ensure a substantive rights approach arose is the 2004 decision of the Family Court of Australia in *Re Alex: Hormonal Treatment for Gender Dysphoria* ('*Re Alex*').<sup>179</sup> This matter involved an application by the guardian of a 13-year-old girl who wished to commence the treatment for what is colloquially described as a 'sex change'.<sup>180</sup> Several features of this decision are pertinent to this analysis. First, the judge, Nicholson CJ, ensured that as many parties with a potential interest in the proceedings as possible were invited to participate. A child representative was appointed to represent Alex's best interests, the Australian Human Rights and Equal Opportunity Commission was invited to make submissions on the relevant human rights principles, Alex's aunt and mother were notified of the proceedings and a representative of an Australian statutory office concerned with the rights and interests of people with disabilities was also invited to participate.<sup>181</sup>

Critically, in the Family Court there is no capacity for a child to appoint a legal representative who acts solely on the child's instructions.<sup>182</sup> From the perspective of a substantive rights approach this is problematic because it does not ensure that a child will have their views expressed to a court in a truly independent way — Alex had a representative, but this lawyer was not bound to act in accordance with Alex's instructions. This limitation, however, was effectively overcome by the preparedness of Nicholson CJ to have a private meeting with Alex at the latter's request during which Alex was able to put his views to the judge.<sup>183</sup> Also of significance was the decision of the judge to refer to Alex in the

<sup>177</sup> Eekelaar, *Family Law and Personal Life*, above n 5, 162, who argues that 'adults must be aware that their interests should give way to those of the children where to do otherwise risks harming them.'

<sup>178</sup> Jane Fortin also rightly impressed upon me that, in the absence of any evidence to suggest a risk of harm to a child, courts in the UK are more inclined to allow disclosure.

<sup>179</sup> (2004) 31 Fam LR 503.

<sup>180</sup> *Ibid* 505–6 (Nicholson CJ).

<sup>181</sup> *Ibid* 507. It is important to stress that the Court did not regard Alex's condition as a disability.

<sup>182</sup> The issue of separate representation for children in the Family Court of Australia is a complex issue and is beyond the scope of this article. It is sufficient to note that the *Family Law Act 1975* (Cth) provides a judge with a discretion to appoint an independent children's lawyer for a child: s 68L. Such a lawyer must 'ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court': s 68LA(5)(b). But the lawyer 'is not the child's legal representative' and 'is not obliged to act on the child's instructions': ss 68LA(4)(a)–(b).

<sup>183</sup> *Re Alex* (2004) 31 Fam LR 503, 507, 511–12. See also above n 182. It is important to note, as Chief Justice Nicholson brought to my attention, that this often remains a contentious practice. This is in part because judges are not trained to illicit such evidence, although this can be overcome with the provision of appropriate training. A more serious objection is that the evidence cannot be used in an evidentiary sense because it has not been obtained in circumstances where all parties are privy to the process of obtaining the information. But as Chief Justice Nicholson explained, this limitation can be overcome by a judge ordering a counselling

male gender despite his legal status as a female<sup>184</sup> and to describe him as a ‘young person’ in light of his age and maturity despite the relevant legislation classifying him as a ‘child’.<sup>185</sup> Far from being merely incidental to the proceedings, these decisions actually reflect a deep understanding as to the need for courts to treat young people as subjects with rights rather than objects subject to adult intervention.

The hearing itself also reflected the need to adopt a process that would be conducive to Alex’s active involvement and full participation. Thus, rather than the traditional adversarial approach, the evidence was adduced in an inquisitorial manner, which ‘often took the form of an orderly discussion between witnesses and legal representatives’ and the presiding judge.<sup>186</sup> Moreover, rather than having the judge sit behind a raised bench with legal representatives at the Bar table, the entire proceedings were ‘conducted in a private conference room setting around a table using portable recording equipment.’<sup>187</sup> Additionally, Alex’s true identity was not disclosed because of the potential harm to his development, particularly if his condition became known to the students at the school he was attending.<sup>188</sup>

Clearly, *Re Alex* is not the only case in which a court has taken measures to adopt procedures that are compatible with the values underlying the conception of children’s rights under the *CRC*. But it does provide a good illustration of the ways in which courts must sometimes modify and even abandon orthodox procedures if they are to accommodate effectively the rights of children. Moreover, this shift from an adult-centric to a child-centric conceptualisation of the procedures required for the resolution of a dispute is a fundamental feature of the substantive rights approach.

#### D *The Meaning Given to the Content of the Rights in Question*

The requirement to conceptualise the issues before a court and adopt procedures for their resolution in a manner consistent with children’s rights also extends to the actual content of the rights in question. In this sense, a substantive rights approach demands of courts an approach that is similar to the way in which feminism has demanded an interpretation of rights that is grounded in and reflects the experience of women.<sup>189</sup> More specifically, courts must inform the content of a right with a meaning that accommodates the experiences and

report and inviting the child to give information to the counsellor for inclusion in a further report to the court, which in turn would be available to all parties.

<sup>184</sup> *Re Alex* (2004) 31 Fam LR 503, 507.

<sup>185</sup> *Ibid.* See also *Family Law Act 1975* (Cth) s 4(1) (definition of ‘child’ para (b)).

<sup>186</sup> *Re Alex* (2004) 31 Fam LR 503, 511 (Nicholson CJ); see also at 512.

<sup>187</sup> *Ibid.* 511.

<sup>188</sup> See *ibid.* 505.

<sup>189</sup> At the same time it is important to heed the warning of Meyers and not simply conceptualise children’s rights analogously to a liberal feminist framework, which would presume that children’s interests and rights could ‘fit easily within adults’ existing understanding and assumptions’: Meyers, above n 39, 52. It remains critical therefore to ‘engage with rather than merely assume children’s voices and desires, in efforts to articulate and critique their legal rights’: at 52 (emphasis in original).

situation of children. The treatment by the European Court of Human Rights of the right to a fair hearing and the prohibition against inhuman and degrading treatment provide examples of such an approach.

### 1 *A Child's Right to a Fair Hearing*

As noted above, in *V v United Kingdom* the European Court of Human Rights had to determine whether the procedures adopted by the English courts for the prosecution of two boys for the murder of a toddler were compatible with their right to receive a fair hearing. The European Court held that a violation had occurred and outlined the considerations required to ensure a fair hearing.<sup>190</sup> This decision was handed down in 1999. The ruling is significant for two reasons. First, it took until 1999 (nearly 50 years after the *European Convention* was adopted) for the European Court to determine that the procedures to which children were routinely subject in criminal proceedings in domestic jurisdictions for generations were not in fact consistent with one of the most analysed and litigated rights within the entire lexicon of human rights. Secondly, states not party to the *European Convention* but with an ostensible commitment to the right to a fair hearing and children's rights still to this day maintain the procedures which were held by the European Court to be inconsistent with a child's right to a fair hearing.<sup>191</sup> This demonstrates that the right to a fair trial was and still is in many jurisdictions interpreted from the perspective of adults in a way that remains completely oblivious to the need to interpret it in light of the experiences of children. The approach of the European Court represents an antidote to this adult-centrism and illustrates what is required of courts in developing an interpretation of the content of a right that is grounded in the experience of children.

### 2 *A Child's Right to Be Protected against Inhuman and Degrading Treatment*

Historically, the content of the prohibition against inhuman and degrading treatment was informed largely from the perspective and experiences of adults, and more specifically men. However, as Baroness Hale in the House of Lords recently observed: 'The European Court of Human Rights has taken particular note of the vulnerability of children in its judgments on the obligations of the state to protect people from inhuman or degrading treatment.'<sup>192</sup>

This sensitivity to and awareness of the need to accommodate the particular vulnerabilities of children is, as Baroness Hale has observed, relevant in two ways:

First, it is a factor in assessing whether the treatment to which they have been subjected reaches the 'minimum level of severity' — that is, the high level of

<sup>190</sup> See *V v United Kingdom* (1999) 30 EHRR 121, 179, 181.

<sup>191</sup> See Amanda Burnnard, 'The Right to a Fair Trial: Young Offenders and the Victorian *Charter of Human Rights and Responsibilities*' (2008) 20 *Current Issues in Criminal Justice* 173, which discusses the failure of the Supreme Court of Victoria to adopt procedures compatible with the right to a fair hearing for juveniles.

<sup>192</sup> *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536, 543.



severity — needed to attract the protection of article 3 [the prohibition against inhuman and degrading treatment in the *European Convention*].<sup>193</sup>

Thus the European Court has repeatedly held that:

In order to fall within the scope of Art 3, the ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.<sup>194</sup>

The critical parts of this test are the requirements to take into consideration both the age of an alleged victim and all the circumstances of a case when assessing any claim of inhuman or degrading treatment.

Secondly, the special vulnerability of children is also relevant in assessing the nature of the measures required of a state to satisfy its obligation to protect children from such treatment. In this respect, the European Court has declared that:

Steps should be taken to enable effective protection to be provided [against inhuman and degrading treatment], particularly to children and other vulnerable members of society, and should include reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge.<sup>195</sup>

The application of this test has led the European Court of Human Rights to determine, most recently in *Mayeka v Belgium*, that the detention of a 5-year-old unaccompanied girl in a facility designed for adults in circumstances where she received no proper counselling or educational assistance failed to satisfy the state's obligation to take proper care of her.<sup>196</sup> In earlier cases the Court had found, for example, that the defence of reasonable chastisement did not provide a child subject to corporal punishment with sufficient protection against inhuman and degrading treatment,<sup>197</sup> while the failure of authorities to respond to situations of prolonged and severe child abuse and neglect was also a violation of this right.<sup>198</sup> Such findings are significant to this analysis in that they represent an interpretation of the meaning of the prohibition against inhuman and degrading treatment that takes account of the particular vulnerabilities of children. As such, they reflect and satisfy the third element of a substantive rights judicial approach to matters involving children.

<sup>193</sup> Ibid 544.

<sup>194</sup> *Mayeka v Belgium* (2006) 46 EHRR 449, 466, citing *Raninen v Finland* (1997) 26 EHRR 563, 587–8.

<sup>195</sup> *Mayeka v Belgium* (2006) 46 EHRR 449, 467, citing *Osman v United Kingdom* (1998) 29 EHRR 245, 305–6.

<sup>196</sup> (2006) 46 EHRR 449, 467–9.

<sup>197</sup> See, eg, *A v United Kingdom* [1998] VI Eur Court HR 2692, 2699.

<sup>198</sup> See, eg, *Z v United Kingdom* [2001] V Eur Court HR 1, 24–5; *E v United Kingdom* (2002) 36 EHRR 519, 523–8, 545.

E *The Substantive Reasoning Adopted to Resolve the Issues in Cases concerning Children*

The final feature of a substantive rights approach concerns the reasoning adopted by a court in the resolution of the relevant issues, especially the manner in which it balances any competing rights. For the purposes of this discussion it is suggested that there are two categories of cases concerning children: those in which their rights and best interests are the paramount consideration and those where their rights and best interests are a primary consideration. With respect to those matters where the paramountcy principle applies — such as adoption — as the England and Wales Court of Appeal recently held in *F and H (children)*, this tends to mean that a child's best interests are 'more important than anything else' and the 'rights of the adults are ... subservient to those of the children.'<sup>199</sup> A substantive rights approach does not mean, however, that the rights and best interests of a child are the only consideration, and it remains incumbent upon a court to at least identify and discuss the interests of any other persons that may arise in the context of an issue in which a child's rights and best interests are paramount.<sup>200</sup>

This is exactly what the South African Constitutional Court did in 2003 in *Du Toit v Minister of Welfare and Population Development*, when it recognised that it was not only the best interests of children that were violated by a prohibition against persons in a same-sex relationship from making a joint application for adoption;<sup>201</sup> it also held that this prohibition was a violation of the adults' constitutional right to equality before the law and protection against unfair discrimination on the basis of their sexual orientation.<sup>202</sup>

In relation to those matters in which a child's interests and rights are merely a primary consideration, a more sophisticated and nuanced balancing of the competing rights must be adopted. This balancing will be required in several different and potentially overlapping contexts, more specifically when there is a judicial dispute between: (i) a child and other children; (ii) a child and their parents; (iii) a child, their parents and the state; and (iv) a child and the state. Clearly, it would be impossible to examine all the decisions of courts within each of these contexts to assess the extent to which they have adopted an approach to the resolution of the issues which could be considered compatible with a substantive rights approach. Instead, it is sufficient to provide as examples (in each of the contexts mentioned) those cases in which a substantive rights

<sup>199</sup> [2007] EWCA Civ 880 (Unreported, Wall LJ, 24 August 2008) [32].

<sup>200</sup> See *State v M* [2008] 3 SA 232, 249–50 (Sachs J for Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Sachs, Skweyiya and Van der Westhuizen JJ), noting with respect to *South African Constitution* s 28(2) that the best interests of the child have paramount importance in every matter concerning a child, but that 'the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.'

<sup>201</sup> [2003] 2 SA 198, 207–8 (Skweyiya AJ for Chaskalson CJ, Langa DCJ, Ackermann, Goldstone, Kriegler, Madala, Ngcobo, O'Regan, Sachs JJ, Du Plessis and Skweyiya AJJ).

<sup>202</sup> *Ibid* 208–9.

approach with respect to substantive reasoning has been adopted in order to illustrate its particular features.

### 1 *A Dispute between Children*

In relation to the resolution of a dispute in which a child's claim to a right must be tempered against the rights of other children, the 2006 decision of the House of Lords in *R (Begum) v Governors of Denbigh High School* ('*Denbigh High School*') provides an example of such a case.<sup>203</sup> This matter involved a claim by a young girl that a ban on wearing the Islamic jilbab to her school was a violation of her right to freedom of religion (under *European Convention* art 9).<sup>204</sup> Although a majority of the Law Lords held there had been no interference with the girl's right,<sup>205</sup> some still proceeded to assess whether the ban was reasonable in the circumstances.<sup>206</sup> In concluding that this was the case, some members of the House of Lords placed significant emphasis on the fact that the school had adopted a consultative process in designing its school policy.<sup>207</sup> Importantly, this process enabled several students to express their concerns that if other students were allowed to wear the jilbab this would place undue social pressure on them to do the same.<sup>208</sup> Thus the reasonableness of the restriction was informed in part by the need to ensure that the other students attending the school were also able to enjoy effectively their right to freedom of religion — a decision that was also enabled by the fact that the student claiming the violation of her rights was able to attend other public schools that did not impose a restriction on the wearing of the jilbab.<sup>209</sup>

Not surprisingly, this decision has attracted significant attention for a range of reasons.<sup>210</sup> Its relevance to this analysis, however, lies in its capacity to demonstrate the need for courts to give careful consideration to rights of all those children in a dispute which may be of concern to them, even in circumstances where they may not be directly involved in the proceedings. Where the balance must ultimately be drawn by a court will depend on the facts of each case. The critical consideration, however, is the need for a court to give explicit and sensitive consideration to the competing interests of any children in a case.

<sup>203</sup> [2007] 1 AC 100.

<sup>204</sup> *Ibid* 107 (Lord Bingham).

<sup>205</sup> *Ibid* 114 (Lord Bingham), 119 (Lord Nicholls), 120–1 (Lord Hoffmann), 126–7, 131 (Lord Scott).

<sup>206</sup> *Ibid* 114 (Lord Bingham), 123–5 (Lord Hoffmann), 132 (Baroness Hale); see also at 119 (Lord Nicholls).

<sup>207</sup> See *ibid* 117 (Lord Bingham), 119, 125 (Lord Hoffmann), 135 (Baroness Hale).

<sup>208</sup> *Ibid* 125 (Lord Hoffmann), 135 (Baroness Hale).

<sup>209</sup> *Ibid* 123 (Lord Hoffmann), 135 (Baroness Hale).

<sup>210</sup> See, eg, Maleiha Malik, 'Religious Freedom and Multiculturalism: *R (Shabina Begum) v Denbigh High School*' (2008) 19 *King's Law Journal* 377; Nicholas Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (2007) 66 *Cambridge Law Journal* 657; Stephen Howard and Billy Briggs, 'Law Lords Back School's Ban on Islamic Dress', *The Herald* (Glasgow), 23 March 2006, 7.

## 2 *A Dispute between a Child and Their Parents*

The classic judicial dispute between a child and their parents concerns access to information relevant to family planning or medical procedures to terminate a pregnancy. In such matters, as the above discussion of cases such as *Gillick* demonstrates, courts must not treat children as merely an appendage of their parents, to whom the interests of children would become entirely subservient.<sup>211</sup> A substantive rights approach concedes that a child of insufficient maturity and understanding will remain dependent on their parents. Indeed, art 5 of the *CRC* effectively requires that a court, as an organ of the state, must ‘respect the responsibilities, rights and duties of parents ... to provide ... appropriate direction and guidance in the exercise by the child of the rights recognized in the [CRC].’ This responsibility, however, remains subject to the caveat that it must be exercised ‘in a manner consistent with the evolving capacities of the child’.<sup>212</sup> Thus, as the House of Lords determined in *Gillick*, a child of sufficient understanding and maturity has the capacity to enter into legal relationships without the consent of their parents<sup>213</sup> — a position that has been endorsed in numerous jurisdictions by domestic courts.<sup>214</sup>

A grey zone exists, however, in circumstances where a child clearly expresses a view which is contrary to the wishes of their parents but lacks sufficient understanding and maturity for their views to be determinative of the issue. In such cases, a substantive rights approach demands that judges apply the best interests principle in making a decision. Importantly, the assessment of the child’s best interests is not to be reduced to the views of the parents or indeed those of the presiding judicial officer. Instead, the assessment of the child’s best interests must take into account any available empirical evidence as well as the impact of a court’s decision on the other rights to which a child is entitled under the *CRC*.

## 3 *A Dispute between a Child, Their Parents and the State*

Judicial disputes which concern children, their parents and the state tend to fall into two categories — those in which a child is the dominant subject of concern in the proceedings and those in which they are the secondary subject of concern. The first category would include cases arising out of circumstances in which the state seeks to take measures to protect and secure the rights of children which are contested by certain parents. Measures to prohibit corporal punishment are an example of such a case. Although the lower courts in England in the case of *Williamson* did not conceptualise this issue in such terms,<sup>215</sup> when the matter

<sup>211</sup> See above Part III(A)(4).

<sup>212</sup> *CRC* art 5.

<sup>213</sup> [1986] 1 AC 112, 169–72 (Lord Fraser), 188–90 (Lord Scarman), 195 (Lord Bridge).

<sup>214</sup> See, eg, *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218 (*‘Marion’s Case’*); *Re A* (1993) 16 Fam LR 715; *JSC v Wren* (1986) 35 DLR (4<sup>th</sup>) 419.

<sup>215</sup> See above n 91 and accompanying text.

went before the House of Lords, Baroness Hale was able to identify the interests of all three parties: ‘children, ... their parents and [their] teachers.’<sup>216</sup>

Importantly, Baroness Hale did not fall into the trap of a superficial rights approach and simply declare that the ban on corporal punishment was lawful because it sought to advance the rights of children. Instead, she carefully examined the rights of children and their parents that were relevant in the context of a prohibition of corporal punishment in schools and the role of the state in ensuring that an appropriate balance was struck between these rights.<sup>217</sup> She therefore concluded that the ban on corporal punishment was a limitation on the right of the parents to manifest a belief that their children must be subject to such a practice.<sup>218</sup> However, this interference with the right of the parents was found to be justified because it pursued a legitimate aim, namely, the protection of children’s rights, including their rights under the *CRC*.<sup>219</sup> Moreover, this interference was considered by Baroness Hale to be proportionate in its scope on the basis that its adoption was consistent with recommendations by the CRC Committee and with the large body of professional and educational child care opinion that supported a blanket ban.<sup>220</sup>

The approach adopted by Baroness Hale in *Williamson* is consistent with the features required for a substantive rights approach to a matter involving conflict between children, their parents and the state. In the first instance it is able to identify the rights and obligations of each of the relevant parties. More importantly, it then engages in a careful assessment as to the nature of these rights and the scope of the obligations to determine whether any interference with the relevant rights can be justified. In the case of *Williamson*, the balance was ultimately held to favour the rights of children, especially the right to be free from institutional violence.<sup>221</sup>

It is important to note, however, that a substantive rights approach does not demand that the balance *always* favour the rights and interests of children in disputes which concern children, their parents and the state. Indeed, in matters where children are the secondary (as opposed to the primary) subject of concern, there is always the prospect that the balance may favour the rights and interests of the other parties. The approach adopted by the South African Constitutional Court in *State v M*,<sup>222</sup> when dealing with the question of whether to imprison a primary caregiver of young children for criminal offences, provides a good example of a matter where this may be the case.

The issue before the Constitutional Court was whether the requirement under the *South African Constitution* that a child’s best interests be the paramount consideration in every matter affecting them required greater consideration of

<sup>216</sup> *Williamson* [2005] 2 AC 246, 271.

<sup>217</sup> See *ibid* 273–7.

<sup>218</sup> *Ibid* 273.

<sup>219</sup> *Ibid* 274 (Baroness Hale).

<sup>220</sup> *Ibid* 275–7.

<sup>221</sup> See *ibid* 264–5 (Lord Nicholls), 277 (Baroness Hale); see also at 253 (Lord Bingham), 270–1 (Lord Walker), 277 (Lord Brown).

<sup>222</sup> [2008] 3 SA 232.

children's rights in the sentencing process than had previously been the case. The existing approach to sentencing in South Africa was based on what is referred to as the 'Zinn triad' — a model that considers the nature of the crime, the circumstances of the criminal and the broader interests of the community.<sup>223</sup> Importantly, Sachs J, with whom the majority concurred, rejected the submission by the state that it was sufficient to consider the children of an offender as merely one of the 'personal circumstances' of a defendant to be taken into account in sentencing.<sup>224</sup> Instead, he accepted the submission of an amicus curiae in the proceedings that 'a child of a primary caregiver is not [merely] a "circumstance", but an individual whose interests needed to be considered independently.'<sup>225</sup> He declared:

Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk.<sup>226</sup>

Importantly, Sachs J did not suggest that this balancing exercise would always favour the imposition of a non-custodial sentence on a primary caregiver. Indeed, he explained that a 'balancing exercise has to be undertaken on a case-by-case basis' in which the state's legitimate interest in punishing offenders, not only the interests of a child, must be given appropriate consideration.<sup>227</sup>

On the facts of the case, Sachs J ultimately decided to suspend the term of imprisonment originally imposed by the lower courts on a mother of three children and to place her on a correctional order with various conditions.<sup>228</sup> The significance of this disposition for the present analysis is that it was produced as a result of a substantive rights approach. Whereas the lower Court had paid scant attention to the rights of the children of the primary caregiver,<sup>229</sup> Sachs J recognised that an application of the best interests principle required that they be given much closer attention. He therefore demanded reports as to the impact of the mother's imprisonment on her children,<sup>230</sup> which were influential in shaping his decision.

It is important to stress, however, that these reports were not determinative of the issue,<sup>231</sup> and a non-custodial disposition will not always be necessary in circumstances which involve the sentencing of a primary caregiver. As Sachs J himself declared, the need to give due consideration to the rights and interests of

<sup>223</sup> Ibid 242 (Sachs J for Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Sachs, Skweyiya and Van der Westhuizen JJ), citing *State v Zinn* [1969] 2 SA 537, 540 (Rumpff JA for Steyn CJ, Ogilvie Thompson and Rumpff JJA) (Appellate Division).

<sup>224</sup> *State v M* [2008] 3 SA 232, 250 (Sachs J for Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Sachs, Skweyiya and Van der Westhuizen JJ).

<sup>225</sup> Ibid; see also at 251–2.

<sup>226</sup> Ibid 252.

<sup>227</sup> Ibid 253.

<sup>228</sup> Ibid 265, 267–8.

<sup>229</sup> See ibid 256–8.

<sup>230</sup> Ibid 240–1.

<sup>231</sup> See ibid 265, 267–8.

children in the sentencing process ‘does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration ... [of] the interests of children who may be concerned’,<sup>232</sup> which must be balanced against the state’s ‘duty to protect life, limb and property by diligently prosecuting crime.’<sup>233</sup> Where the appropriate balance lies must be determined on a case-by-case basis. Of critical importance to this analysis, however, is the requirement that children’s rights are not overlooked or given token consideration in judicial disputes where they will be affected by the decision of a court, even though children are not a party to the proceedings.

#### 4 *A Dispute concerning a Child and the State*

The final category of judicial dispute in which children typically tend to be involved concerns those matters where there is a dispute between a child and the state. The most common example of such a dispute is when children are subject to criminal proceedings. But such disputes may also arise in other circumstances, such as an attempt by a student to resist the imposition of a curfew or an attempt to resist restrictions in schools on a child’s freedom of expression or on the wearing and/or carrying of religious symbols.

The adoption of a substantive rights approach in the reasoning of a court resolving such disputes demands first that it proceed on the basis that children have rights. Thus, for example, the US Supreme Court in *Re Gault* declared that children facing criminal charges were entitled to due process rights<sup>234</sup> and subsequently held in *Tinker* that children did not lose their right to freedom of expression when they entered the school gate.<sup>235</sup> In *Ramos v Town of Vernon* (*‘Ramos’*), a case which involved a challenge to a curfew, the US Court of Appeals for the Second Circuit recognised that the children affected were entitled to the right to equality before the law and freedom of movement.<sup>236</sup> In *Denbigh High School*, the House of Lords accepted that a student who was prohibited from wearing the jilbab had a right to freedom of religion,<sup>237</sup> while in 2006 in *Multani v Commission Scolaire Marguerite-Bourgeoys* (*‘Multani’*) the Canadian Supreme Court commenced its assessment of a ban on a Sikh student carrying his *kirpan* in school on the basis that the student also had a right to freedom to manifest his religious beliefs.<sup>238</sup>

The second step required of judges in resolving such disputes is to perform a proportionality analysis and to carefully assess whether the interference or

<sup>232</sup> Ibid 255.

<sup>233</sup> Ibid 253.

<sup>234</sup> 387 US 1, 13–14, 27–8 (Fortas J for Warren CJ, Black, Douglas, Clark, Harlan, Brennan, Stewart, White and Fortas JJ) (1967).

<sup>235</sup> 393 US 503, 514 (Fortas J for Warren CJ, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas and Marshall JJ) (1969).

<sup>236</sup> 353 F 3d 171, 172 (Cardamone J for Cardamone and Sack JJ) (2<sup>nd</sup> Cir, 2003).

<sup>237</sup> [2007] 1 AC 100, 112 (Lord Bingham).

<sup>238</sup> [2006] 1 SCR 256, 265, 297–8 (Charron J for McLachlin CJ, Bastarache, Binnie, Fish and Charron JJ).

limitation with the relevant right is justified.<sup>239</sup> Under the model of children's rights based on the *CRC*, justification will be established when (a) the limitation is undertaken in pursuit of a legitimate aim and (b) the measures to achieve this aim are reasonable and proportionate in all the circumstances.<sup>240</sup> Importantly, the assessment as to the necessity of a limitation must be made on the basis of objective considerations, and the burden of justification will lie with the state, which must use the least restrictive means required for the achievement of the purpose of the limitation.<sup>241</sup>

The judicial treatment of curfews within the US provides a good illustration of the impact on a court's reasoning of demanding that a state provide objective evidence in support of its interference with children's rights to equality before the law and freedom of movement. Curfews are common within many states in the US and they have generally been upheld when challenged in the courts.<sup>242</sup> The exception to this trend was the 2003 decision of the US Court of Appeals in *Ramos*. Here, the Court was not prepared to simply accept at face value the submissions of the authorities that the curfew was necessary to achieve aims such as a reduction in juvenile crime, the protection of the general public and the protection of young people themselves. The Court stressed 'the unreliability of assumptions and generalizations as justification for laws infringing on the constitutional rights of minors'<sup>243</sup> and sought to interrogate the authorities further and demand that evidence be provided in support of the claim that a curfew would achieve these aims.<sup>244</sup> When no such evidence could be tendered, the Court — observing that there was 'a conspicuous lack of relationship between the contours of the problem identified by the Vernon Town Council and the curfew ordinance enacted in response'<sup>245</sup> — held the curfew to be unconstitutional.<sup>246</sup>

The significance of this decision to the present analysis is the way it illustrates how a substantive engagement with the content and consequences of children as rights-bearers can have a profound effect on judicial outcomes. Judicial deference to state authorities on matters regarding the care and control of children is understandable given that courts lack the expertise and authority to determine matters of social policy concerning children. But this deference cannot blind courts to the need to scrutinise and hold states accountable for the exercise of their powers over children in a way that is consistent with children's rights. Put simply, judges cannot be considered to have exhausted their obligation of

<sup>239</sup> For a discussion of the doctrine of proportionality, see Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2000) 278–303.

<sup>240</sup> This formula represents a summary of the various steps required under the *Siracusa Principles*, above n 147, [10].

<sup>241</sup> *Ibid* [11]–[12].

<sup>242</sup> See *Ramos*, 353 F 3d 171, 176–81 (Cardamone J for Cardamone and Sack JJ) (2<sup>nd</sup> Cir, 2003), for a review of some relevant cases.

<sup>243</sup> *Ibid* 181.

<sup>244</sup> *Ibid* 186.

<sup>245</sup> *Ibid*.

<sup>246</sup> *Ibid* 187.



judicial review simply at the point where a state is able to establish a legitimate aim for interference with a child's rights. The judicial inquiry must extend further to an assessment as to whether the interference is justified in all the circumstances of the case. This is precisely what the US Court of Appeals did in *Ramos*.

This was also the approach adopted by the Canadian Supreme Court in *Multani*. As mentioned above, the Court had to determine whether a prohibition on a student, who was a Sikh, from carrying his *kirpan* at school was a violation of his right to freedom of religion. Not surprisingly, the authorities sought to justify the ban on the basis that the *kirpan* (which is a knife) was a symbol of violence that may have been used by the boy or other students to cause violence within the school.<sup>247</sup> Although Charron J (delivering the opinion of the majority) was sympathetic to the aims of the ban, she held that the authorities had failed to unequivocally establish their concerns.<sup>248</sup> More specifically, she noted: that the risk of the student using the *kirpan* as a weapon or another student taking it from him was very low, especially if it was concealed within clothing; that there are many other objects in schools that can be used as weapons; and that the evidence failed to reveal a single incident in relation to a *kirpan* that had ever been reported.<sup>249</sup> Also of significance to the Court's finding was the rejection of the claim by the authorities that the *kirpan* was a symbol of violence in favour of acceptance of its symbolic nature for Sikhs — a fact that was established on the evidence.<sup>250</sup> As a consequence, the ban was declared unconstitutional and the decision of the Board prohibiting the student from wearing his *kirpan* to school (albeit concealed under his clothing) was declared to be null.<sup>251</sup>

Like the decision in *Ramos*, the approach adopted by the Canadian Supreme Court in *Multani* is illustrative of the reasoning that judges must undertake if they are to satisfy a substantive rights approach in disputes involving children and the state. For most individuals not familiar with the Sikh religion, a ban on the carrying of knives in a school, irrespective of their religious significance, would seem to be uncontroversial. But the Canadian Supreme Court avoided this trap in preference for a level of scrutiny which cast the onus on the state to justify on the basis of verifiable evidence, as opposed to speculation and assumption, why the ban was actually necessary.

#### IV ASSESSING THE EXTENT TO WHICH INSTITUTIONAL CONSTRAINTS ACTUALLY RESTRICT THE ABILITY OF JUDGES TO ADOPT THE RIGHTS APPROACH

The preceding discussion has demonstrated that judges adopt a variety of approaches with respect to the treatment of children and their rights. In practice,

<sup>247</sup> *Multani* [2006] 1 SCR 256, 283, 287 (Charron J for McLachlin CJ, Bastarache, Binnie, Fish and Charron JJ).

<sup>248</sup> *Ibid* 287–8, 293.

<sup>249</sup> *Ibid* 288–9.

<sup>250</sup> See *ibid* 280–1, 295–6.

<sup>251</sup> *Ibid* 298.

a number of factors influence this engagement by judges with the model of children's rights advanced under the *CRC*. These include: the nature of the proceedings, that is, whether they are initiated by adults or concern children directly; procedural considerations, for example, whether the system provides children with a right to representation; and the capacity of lawyers to make submissions based on the rights of a child. Space does not permit a detailed discussion of these matters. Instead, careful consideration will be given to two further factors that impact on the capacity of a judge to adopt elements of a substantive rights approach: the existence of any institutional constraints or opportunities for a judge to engage with the international model of children's rights, and the preparedness of a judge to adopt an interpretative theory that embraces the notion of children as rights-bearers.

#### *A The Existence of Institutional Constraints and Opportunities*

Part III of this analysis sought to identify and classify the ways in which courts engage with a model of children's rights that is advanced under the *CRC*. The reality, however, is that although this instrument is widely ratified it has been incorporated into the domestic legal systems of very few states. Thus its provisions are rarely enforceable in domestic courts. This represents a potentially serious institutional constraint on the extent to which a judge can engage with a substantive rights approach. Indeed, if a domestic legal system prohibits a court from engaging with the notion of children as rights-bearers, a court can hardly be criticised for complying with this directive.

At the same time, the significance of this constraint should not be overestimated. An increasing number of states have adopted constitutions which expressly recognise the rights of children and invite or actually demand a consideration of these rights as understood under international law. South Africa, for example, has incorporated into the *South African Constitution* and rendered justiciable several of the rights recognised under the *CRC*.<sup>252</sup> Moreover, the *South African Constitution* actually demands that the courts consider international law when deciding matters arising with respect to the rights protected therein.<sup>253</sup> As a consequence, far from operating as an institutional constraint, the domestic legal system in South Africa actually mandates that judges adopt a substantive rights approach in matters involving children. The impact of this directive is manifest in decisions such as that of Sachs J in *State v M*, where he declared that 'courts must function in a matter which at all times shows due respect for children's rights.'<sup>254</sup>

Secondly, even in a state like the US, which has not even ratified the *CRC*, or a jurisdiction such as the UK, where the *Human Rights Act* and *European Convention* take precedence, there is no necessary impediment to the adoption of

<sup>252</sup> *South African Constitution* s 28.

<sup>253</sup> *South African Constitution* s 39.

<sup>254</sup> *State v M* [2008] 3 SA 232, 244 (Sachs J for Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Sachs, Skweyiya and Van der Westhuizen JJ).

elements of a substantive rights approach. On the contrary, the values which underpin such an approach are not unique to the *CRC*. They may have been captured in the text of this document but their implementation and relevance is not confined to states which have incorporated it into domestic law. Indeed, much of the impetus for the recognition of children as rights-bearers at the international level was driven by the approach of the courts in the US in cases such as *Re Gault* and *Tinker* as well as courts in the UK in cases such as *Gillick*. Thus in the absence of an express statutory or constitutional impediment to the adoption of the interest theory of children's rights as advanced under the *CRC*, there is scope for judges to embrace the values that underpin this model in disputes involving children when they interpret the rights under their relevant human rights instrument, whether it be the *United States Bill of Rights* or UK *Human Rights Act*.<sup>255</sup>

Indeed, for any judge whose task is to interpret and apply rights in the resolution of a dispute, whether those rights are contained in an international, regional or domestic instrument, there will always be scope to perform this task by reference to at least some aspects of the model of rights advanced under the *CRC*. Fortin has certainly advocated this approach with respect to the treatment of children's rights by the courts in the UK. The *European Convention* and *Human Rights Act* do not expressly embrace the same theoretical model as the *CRC*. More specifically, they do not contain an equivalent to *CRC* art 3 — the best interests principle — or to the *CRC* art 12 right to have views heard and taken into account by a court. However, children are still entitled to the rights which are accorded to all people under each of these instruments, and Fortin has argued that, when interpreting and applying these standards, the adoption of an interest theory of rights with respect to matters involving children will allow

<sup>255</sup> For example, in *R (R) v Durham Constabulary* [2005] 2 All ER 369, 386–7, 393, Baroness Hale stressed the need to interpret art 6 of the *European Convention*, as reflected in the *Human Rights Act*, in light of the provisions of the *CRC*. This approach was subsequently followed in *R (C) v Secretary of State for Justice* [2009] 2 WLR 1039, 1059 (Buxton LJ) (in relation to *European Convention* art 3) and *R (Pounder) v HM Coroner for the North and South Districts of Durham and Darlington* [2009] EWHC 76 (Admin) (Unreported, Blake J, 22 January 2009) [40], [51] (in relation to *European Convention* arts 3 and 8). Importantly, in *R (R) v Durham Constabulary* [2005] 2 All ER 369, 393, Baroness Hale conceded that a breach of a child's rights under the *CRC* did not necessarily amount to a breach of the child's rights under the *European Convention*, as the rights under this instrument are 'less extensive' than the rights under *CRC*. She did add, however, that 'the European Court would undoubtedly take those rights [under the *CRC*] into account when interpreting and applying' rights under the *European Convention*. This line of reasoning is also applicable to the judicial interpretation of legislation that does not necessarily explicitly seek to protect human rights. Thus, for example, in *Australia Family Law Act 1975* (Cth) s 60CA provides that a child's best interests must be the 'paramount consideration' when making a parenting order. Section 60CC lists the various considerations that a judge must take into account when assessing a child's best interests. The provisions of the *CRC* are not expressly included in this list. However, s 60CC(3)(m) provides a judge with a broad discretion to consider 'any other fact or circumstance that the court thinks is relevant' to an assessment of a child's best interests. This broad discretion arguably provides an opportunity for a judge to consider the model of children's rights advanced under the *CRC* in making a determination as to the best interests of a child in a particular case. The presumption that statutes, in the case of ambiguity, will be interpreted consistently with international law obligations (as to which see *Minister for Immigration and Ethnic Affairs v Teoh* (1994) 183 CLR 273, 287 (Mason CJ and Deane J)) further supports consideration of the rights model advanced under the *CRC* when interpreting provisions conferring such a broad discretion.

courts to ‘develop a more structured and analytical approach to decision making.’<sup>256</sup>

This potential for a judge to infuse an existing framework of rights protection with a substantive children’s rights approach is based on the theory that the process of adjudication does not simply involve the identification and mechanistic application of the law to the facts in a case. Instead, as commentators such as Dworkin and Waldron have so persuasively argued, an element of moral reasoning informs every aspect of the adjudicative process<sup>257</sup> — how a dispute is conceptualised, the procedures adopted, the content of each right and where the balance is ultimately drawn between competing rights. When that moral reasoning is informed by an interest theory of rights consistent with the model advanced under the *CRC*, a judge may be able to adopt decisions that conform with the *values* underlying this model in the absence of express authority to adopt such an approach.

There will of course be limits with respect to how far this model can be pursued by a judge. As Waldron has explained, the moral reasoning of judges is, in contrast to pure moral reasoning, constrained by legal precedents and/or legislative imperatives that cannot necessarily be swept aside. Judges are not free to ‘drop inconvenient lines of precedent or modify propositions embodied in authoritative texts.’<sup>258</sup> Or, to borrow the words of Dworkin, the task of a judge is not ‘to plant the flag of his [or her own moral] convictions over as large a domain of power or rules as possible.’<sup>259</sup> It is also true that in the absence of any form of express rights protection within a state, constitutional or otherwise, it is more difficult for a judge to justify the adoption of a substantive rights approach.<sup>260</sup> Thus in a country like Australia the comments of Gummow and Kirby JJ of the High Court, to the effect that children are the possessions of their parents,<sup>261</sup> reflect what Dworkin would identify as the powerful influence towards convergence with dominant social norms<sup>262</sup> concerning the status of children.

At the same time, the comments of the High Court Justices should not be taken to be inevitable. Dworkin has also explained that ‘[t]he dynamics of interpretation resist as well as promote convergence, and the centrifugal forces are particularly strong where the professional as well as the larger community is

<sup>256</sup> Fortin, ‘Accommodating Children’s Rights in a Post *Human Rights Act* Era’, above n 1, 326.

<sup>257</sup> Waldron, above n 9, 12; Dworkin, *Law’s Empire*, above n 14, 238–58.

<sup>258</sup> Waldron, above n 9, 13.

<sup>259</sup> Dworkin, *Law’s Empire*, above n 14, 211.

<sup>260</sup> Legislative models for the protection of human rights now exist in the Australian Capital Territory and Victoria: see *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic). There has also recently been a federal consultation (which concluded and reported to the government on 30 September 2009) with respect to the prospect of adopting a federal regime for the protection of human rights: see National Human Rights Consultation Committee, *Human Rights — Share Your Views* (2008) National Human Rights Consultation <<http://www.humanrightsconsultation.gov.au/>>.

<sup>261</sup> See above nn 86, 119 and accompanying text.

<sup>262</sup> Dworkin, *Law’s Empire*, above n 14, 88.

divided over justice.<sup>263</sup> Such a division now characterises the treatment of children within society. The historical insistence on the welfare model has been increasingly challenged by the rise of rights discourse as the most appropriate model to secure just outcomes for children. Indeed, it has been suggested by one commentator that ‘children’s rights have in recent years become perhaps the dominant programme within a social system which makes sense of the adult/child relationship.’<sup>264</sup> Although it is debatable whether the status of children’s rights has reached such a zenith, it is difficult to deny that this concept has now taken a firm rooting in what Dworkin would describe as the ‘general intellectual environment’<sup>265</sup> in which judges think about the process of adjudication. Historically, this environment (defined as it was through the prism of welfarism)<sup>266</sup> would have imposed a practical social constraint on the capacity of judges to engage with a substantive rights approach when dealing with matters concerning children. The emergence of children’s rights, however, provides an increasing opportunity for judges who engage with this model to occupy what Dworkin might describe as ‘the cutting edge’ of interpretation,<sup>267</sup> as opposed to offering idiosyncratic ramblings.

A question remains, however, as to the circumstances in which judges would develop an interpretative theory in which the moral reasoning they adopt in the resolution of disputes concerning children resists a traditional welfare model in favour of a rights-based approach.

#### B *Judicial Receptivity to an Interpretative Theory that Embraces the Notion of Children as Rights-Bearers*

Divergence amongst judges with respect to their engagement with the notion of children as rights-bearers should not come as a surprise. It reflects Dworkin’s observation that ‘[e]ach judge’s interpretative theories are grounded in his [or her] own convictions’<sup>268</sup> and the reality that ‘[j]udges think about law ... within society, not apart from it’.<sup>269</sup> It therefore follows that, in a general intellectual environment where the idea of children’s rights is competing with alternative models of how best to deal with children, such pluralism will also be reflected in the approaches adopted by judges. Some judges will actively embrace the notion of children as rights-bearers whereas others will be less familiar with or receptive to the model and lack the capacity or preparedness to apply it to the resolution of disputes involving children.

With respect to the treatment of children’s rights by courts in the UK, for example, Fortin has identified ‘a judicial ambivalence’ over the extent to which

<sup>263</sup> Ibid.

<sup>264</sup> Michael King, ‘The Child, Childhood and Children’s Rights within Sociology’ (2004) 15 *King’s College Law Journal* 273, 275.

<sup>265</sup> Dworkin, *Law’s Empire*, above n 14, 88.

<sup>266</sup> Eekelaar, *Family Law and Personal Life*, above n 5, 13–14.

<sup>267</sup> Dworkin, *Law’s Empire*, above n 14, 88.

<sup>268</sup> Ibid 87.

<sup>269</sup> Ibid 88.

courts are required to articulate matters concerning children in terms of their rights.<sup>270</sup> In contrast, with respect to the divergence of judicial approaches in South Africa, Julia Sloth-Nielsen and Benyam Mezmur have suggested that the trend towards ‘the individual pre-disposition of some judges to raise children’s rights *mero motu*’ is linked to ‘their prior history in the children’s rights movement, some having participated in early conferences which shaped the drafting of the constitutional clause on children’s rights’ under the *South African Constitution*.<sup>271</sup>

The significance of this observation is that judicial engagement with elements of a substantive rights approach is assisted by prior exposure to the values that underpin this model. Although this is hardly a remarkable finding, it tends to confirm the relevance of the recommendations which are repeatedly made by the CRC Committee that states provide training and education to judges in relation to children’s rights.<sup>272</sup> Indeed, Sloth-Nielsen and Mezmur noted in the context of South Africa that it was ‘not unwarranted to mention that various training initiatives may already be showing an impact in the jurisprudence emanating from the courts.’<sup>273</sup> This tends to confirm the need for and benefit of training judges in children’s rights as a way of shaping the framework of moral reasoning and interpretative theory they apply when resolving a case, so that they reach decisions in a way that is consistent with the various dimensions of a substantive rights approach. It also affirms the important role of procedures that enable the rights of children to be brought to the attention of judges and the role of lawyers using those procedures to contribute to judges’ awareness and understanding of children’s rights.<sup>274</sup>

## V CONCLUSION — JUDGING THROUGH THE EYES OF A CHILD

Judges from every jurisdiction in the world are routinely called upon to decide matters that involve and concern children. In undertaking this task, the CRC Committee has recommended that judges consider the impact of their decisions on the rights of children but has provided no guidance as to how to undertake this task.<sup>275</sup> An attempt has been made in this article to arrest this gap in the Committee’s work and outline the features of the model required for judges to

<sup>270</sup> Fortin, ‘Accommodating Children’s Rights in a Post *Human Rights Act* Era’, above n 1, 305.

<sup>271</sup> Sloth-Nielsen and Mezmur, above n 1, 3–4.

<sup>272</sup> See *General Comment No 5*, above n 3, [53]. Chief Justice Nicholson also confirmed the impact of education in exposing judges to new ‘vistas’ on various issues and allowing judges to recognise their own innate prejudices. He lamented, however, that judicial education about children’s issues in the Australian context has been ‘rudimentary’: Email from Chief Justice Alastair Nicholson to John Tobin, 16 February 2009.

<sup>273</sup> Sloth-Nielsen and Mezmur, above n 1, 27.

<sup>274</sup> See *ibid* (concluding, with respect to the increasing visibility of children’s rights in the decisions of South African courts, that ‘substantial credit must go to public interest litigators ... for bringing children’s interests to the fore in judicial proceedings’); Guggenheim, above n 16, 8 (observing that the most important legacy of the decision of the US Supreme Court in *Re Gault*, which was inspired by the submissions of lawyers, was ‘the elevation of the prominence of lawyers in leading the modern children’s rights movement’).

<sup>275</sup> See *General Comment No 5*, above n 3, [12].

undertake this task in a substantive way. At present, judges — whether in the US Supreme Court, Australian High Court, UK House of Lords, European Court of Human Rights or International Court of Justice — often fail to engage with the various features of this approach and instead adopt approaches which can be classified as being invisible, incidental, selective, rhetorical and superficial. In some instances, the existing legal and institutional system may act as a constraint and legitimate excuse for failing to engage with elements of a substantive rights approach. Invariably, however, the inconsistencies that characterise the way in which judges engage with the notion of children as rights-bearers reflect the idiosyncratic nature of the moral reasoning and interpretative theory they adopt in the resolution of a dispute concerning children.

Ultimately, the adoption of a substantive rights approach begins with the capacity to conceptualise a dispute through the eyes of a child — a task which, for judges and lawyers, can often prove difficult. As Baroness Hale remarked in a recent case before the House of Lords concerning an allegation that police in Northern Ireland had failed to provide sufficient protection for schoolgirls who were caught in a street riot:

With the best will in the world, there is a tendency to see confrontations such as this through adult eyes, and to forget that these are not the eyes of children, who are simply the innocent victims of other people's quarrels.<sup>276</sup>

It is the danger of this adult-centrism of which all judges must be acutely aware if they are to engage with the elements of a substantive rights approach in matters involving children. Such an approach does not demand that all other considerations be rendered nugatory. Indeed, for a judge to invoke children's rights so as to trump the rights of other interested parties in the absence of a careful consideration and balancing of any competing interests would amount to a superficial rights approach. A substantive rights approach resists such a simplistic approach in favour of a more inclusive and sophisticated examination of all the issues in a way that recognises but does not necessarily prioritise the rights of children. This article has sought to offer some insights into how this task should be undertaken. The challenge now is to encourage a dialogue among all relevant parties — judges, lawyers, policymakers, academics and arguably children themselves — as to whether such a vision is appropriate.

<sup>276</sup> *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536, 543.