THE ADOPTION OF AN INQUISITORIAL MODEL OF CRIMINAL PROCEDURE IN COURT PROCEEDINGS RELATING TO CHILDREN

by

STANLEY SIPHIWE HLOPHE
STUDENT NO: 207096282

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DECLARATION

I Stanley Siphiwe Hlophe hereby declare that “The adoption of an inquisitorial model of criminal procedure in court proceedings relating to children” is my own work. I further declare that it has not been submitted for any degree or examination in any other university, and that all the sources, used or quoted have been indicated and acknowledged by means of references.

Stanley Siphiwe Hlophe

January 2011

Signature
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SUMMARY

In this project the adoption of an inquisitorial model of criminal procedure in court proceedings relating to children is discussed. The traditional characteristics of adversarial and inquisitorial models of criminal procedure, the two models in a South African perspective and problems with the adversarial model are highlighted. That it terrifies and silence young victim and witnesses from giving evidence.

The inquisitorial elements present in South African criminal procedure such as in bail proceedings, plea proceedings, powers of the presiding officer to call, recall and examine witnesses, powers of the presiding officer to exclude inadmissible evidence, evidence on sentence, and investigation on unreasonable delay on trials are discussed.

The international instruments pertaining to children in conflict with the law and child witnesses are examined, together with their impact in our laws relating to children. The constitutional implications to the rights of children are discussed. The historical background that culminated to the Child Justice Act is highlighted. The Child Justice Act with particular reference to the inquisitorial aspects present in this Act is discussed.

The measures that aim to protect child witness present in the Criminal Procedure Act, Criminal law Sexual offences and Related Matters Amendment Act and Children’s Act are highlighted.

The conclusion, on the analysis of protective measures protecting children, is that in South African law there is a renewed interest in inquisitorial procedures as an effective means of ensuring justice. The conclusion suggests that adversarial model of criminal procedure is not the best method for our legal system to deal with children.
CHAPTER 1
INTRODUCTION ON THE ADOPTION OF AN INQUISITORIAL MODEL OF
CRIMINAL PROCEDURE IN COURT PROCEEDINGS RELATING TO CHILDREN

1.1 INTRODUCTION

This research addresses the adoption of an inquisitorial model of criminal procedure in court proceedings relating to children. The research therefore, involves an examination of the extent to which the Child Justice Act\(^1\) identifies and safeguards the interests of the children in conflict with the law and other legislative provisions relating to child witnesses.

All modern systems of criminal procedure can broadly be categorized as being either adversarial or inquisitorial. The adversarial model is typical of Anglo American Jurisdictions, whereas the inquisitorial model is prevalent in Continental systems.\(^2\) The South African criminal procedure is derived from English law and thus is adversarial in nature and character. However over the years the South African system of criminal procedure, has acquired certain distinctive features of inquisitorial systems.\(^3\) The same model is applied equally to both children and adults.

The adversarial model of criminal procedure is said to be stressful and not understood by the ordinary lay person especially the children. Dziech and Schudson\(^4\) advance that the courtrooms were designed for the large number of adults who became participants and spectators in trials. Their furniture, lighting, acoustics, and uniformed personnel assure a serious and in some ways, intimidating atmosphere. The theory is that in such an environment, witnesses and jurors will be more likely to take their responsibilities seriously. For children, however, the courtroom can do more than encourage civic responsibility - it can terrify and silence. These challenges are present in both children in conflict with the law and child witnesses.

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\(^1\) Act 75 of 2008. Hereafter referred to as “the Child Justice Act”.
\(^3\) Van Wyk, Dugard, De Villiers & Davis *The New South African Legal Order* 406.
The researcher will explore the adoption of inquisitorial criminal procedure in court proceedings relating to children in conflict with law. The Child Justice Act provides a statutory framework within which children who are in conflict with the law and are accused of committing offences must be dealt. The purpose of the Act is to establish a criminal justice system for children, who are in conflict with the law, in accordance with the values underpinning our Constitution and our international obligations.

The Act is aimed at protecting the rights of children accused of committing crimes, regulating the system whereby a child is dealt with and ensuring that the roles and responsibilities of all those involved in the process are clearly defined in order to provide effective implementation. The Child Justice Act provides a more comprehensive framework for assessment, providing that police will assist in ensuring that a child is assessed before the preliminary inquiry. It also provide for assessment by a Probation Officer before the preliminary inquiry. The preliminary inquiry is an innovation proposed by the Child Justice Act. The Act has adopted the inquisitorial model. The researcher will explore both adversarial and inquisitorial models and explore the model that best protect the rights of children in conflict with law.

The researcher will also explore the adoption of inquisitorial criminal procedure as measures aimed at protecting child witnesses and victims of crime. The South African Law Reform Commission\(^5\) accepted that the adversarial nature of proceedings in our courts is traumatic for child witnesses. The commission accepted that one of the great and repeated complaints against the present system is directed against the adversary system and everything it implies.

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\(^5\) www.childjustice.org.za/departmentdocs/Synopsis.doc. Background to the Child Justice Bill

12 BACKGROUND AND THE OUTLINE OF RESEARCH PROBLEM

During 1970’s and 1980’s thousands of young people were detained in terms of emergency regulations for political offences, causing national and international outcry. This culminated in political organizations, human rights lawyers and detainee support groups to rally to the assistance of these children. Their efforts centred on children involved in political activism, but during this period there were equally large number of children awaiting trial on crimes which were non-political in nature but which could invariably be traced to the prevailing socio-economic ills caused by apartheid. There was no strategy to ensure that these youngsters were treated humanly and with adherence to just principles. By the end of the 1980’s the number of political detentions waned, but the country’s police cells and prisons continued to be occupied by large number of children caught up in the criminal justice system.

The 1989 Harare International Children’s Conference provided a springboard for the development of the child right movement in South Africa.\(^7\)

This culminated to the Minister of Justice requesting the South African Law Commission to start an investigation into Juvenile Justice. The Juvenile Justice Project committee of the South African Law Commission commenced its work in 1997 and a discussion paper with a draft Bill was published for comment in 1999. The project committee followed a consultative approach, holding workshops and receiving written submissions from a range of criminal justice role players. Children were also consulted on the Bill whilst it was in development. The final report of the Commission was completed, and handed to the Minister for Justice in August 2000. The Child Justice Bill was approved by Cabinet for introduction into Parliament in November 2001 and was introduced into Parliament in August 2002 as Bill no. 49 of 2002. Although it was first introduced into Parliament in 2002, and debated by the Justice Portfolio Committee in 2003, it thereafter disappeared. At the end of 2007 the Bill re-appeared on the parliamentary agenda and it was passed by the National Assembly in November 2008. In May 2009 the Child Justice Bill was signed by the

\(^7\) Skelton and Tshehla *Child Justice in South Africa* 32.
President and published in Government Gazette Number 32225 on 11 May 2009. The Bill is now known as the Child Justice Act, No 75 of 2008.8

Traditional accusatorial courtroom procedures curtail efforts to elicit complete evidence from children. This has been highlighted in number of studies which were conducted to investigate the effect on children testifying in court.9 Hill and Hill10 conducted an experiment on the effect which the courtroom has on children ability to recall. A group of children were allowed to view a videotape of an incident. The following day the children were interviewed about the content of the videotape. Half of the children were interviewed in a courtroom and the other half in private room. The results clearly indicated that the children who were interviewed in the private room related more central items in free recall, answered specific questions more often and said “I don’t know” or gave no answer significantly less often than the children questioned in the courtroom.

In 1989 the South African Law Commission11 focused on the position of the abused child as a witness in court. The Commission accepted that courtrooms are spartan and severe in appearance, thereby creating a forbidding experience for witnesses. It further accepted that the juxtaposition of the presiding officer, the accused and his legal representative as well as the prosecutor in the courtroom clad in black robes, caused a child to become afraid, uncertain and confused. In response to this problem experienced by child witnesses the Criminal Law Amendment Act12 and the Sexual Offences and Related Matters Amendment Bill which culminated to the Act13 were introduced.

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8 Skelton “Reforming the Juvenile System in South Africa Policy Law Reform and Parallel Developments” UNAFEI Part two Resource Material Series no 75 42.
1.3 AIM AND OBJECTIVES

In this research the adversarial nature of the South African Law of Criminal Procedure will be discussed in general. The inquisitorial elements already present in the Criminal Procedure Act will be set out. The researcher will analyse the inquisitorial model of criminal procedure introduced by the Child Justice Act, the Criminal Procedure Act\(^\text{14}\) and Sexual Offences and Related Matters Amendment Act and argue that the South African criminal justice system is shifting away from the established adversarial system to inquisitorial. The researcher will explore both models and determine the model that best recognize and protect the rights of the children. Before expounding on the problem the distinction between the adversarial and inquisitorial models will be noted.

The aim of the study is to analyse and establish the model that adequately recognize and protects the rights of children. The objective of the study is focused on the introduction of inquisitorial model of criminal procedure introduced by the Child Justice Act, the Criminal Procedure Act and Sexual Offences and Related Matters Amendment Act.

1.4 RESEARCH METHODOLOGY

The research involves two types of children whose rights are affected by adversarial model of criminal procedure, children in conflict with the law and child witnesses. In order to achieve the aim of this study, the researcher will use a qualitative research approach. This will entail a comparative legal research, aimed at distinguishing between adversarial and inquisitorial models of criminal procedure. Comparative method will also analyse how the foreign countries deal with children in conflict with the law. Findings can be used to develop our law dealing with children in conflict with the law, as the South African Constitution contain a provision, that when interpreting the Bill of Rights, a court must consider international law and may consider foreign law.

The researcher will compare the international instruments, Juvenile Justice Laws from other countries, the Child Justice Act, South African legislations, relevant research articles and textbooks.

15  FEASIBILITY

The research problem is realistic and achievable. Literature research is readily available from Nelson Mandela Metropolitan University Library Online Catalogue and nationally from libraries at universities in South Africa. OPAC will provide information about textbooks, periodicals and government documents. This data will be in the form of textbooks, cases and journal articles.

16  STRUCTURE

In chapter 2 characteristics of adversarial and inquisitorial models of criminal procedure, the two models in a South African perspective and problems with the adversarial model will be discussed. Chapter 3 will discuss inquisitorial elements present in South African criminal procedure such as in bail proceedings, plea proceedings, powers of the presiding officer to call, recall and examine witnesses, powers of the presiding officer to exclude inadmissible evidence, evidence on sentence, and investigation on unreasonable delay on trials.
CHAPTER 2
ADVERSARIAL AND INQUISITORIAL MODELS OF CRIMINAL PROCEDURE

2.1 INTRODUCTION

Modern systems of criminal procedure are divided into two basic models: the accusatorial model and inquisitorial model.\textsuperscript{15} The South African criminal procedure system is derived from the common law, as amplified, modified, and supplemented by extensive statutory enactments, presently contained in the Criminal Procedure Act 51 of 1977. The basic system is derived from English law and thus is adversarial in nature and character. However over the years the South African system of criminal procedure, particularly as regards pre-trial procedures has acquired certain distinctive features of inquisitorial system.\textsuperscript{16} Most characteristics of the Anglo-American system stem from the English system of adversarial trials before a lay jury, as opposed to the Continental inquisitorial trials by professional judges adjudicating without the assistance a jury. It can be said that the Anglo-American procedural method of proving or ascertaining facts in a court of law is based upon adversarial principles and a strict system of evidence, whereas the Continental method is based upon inquisitorial principles and a free system of evidence.\textsuperscript{17}

2.2 TRADITIONAL CHARACTERISTICS OF ADVERSARIAL AND INQUISITORIAL MODELS

The inquisitorial model of criminal procedure prevailed in continental European countries from the thirteenth until the first half of the nineteenth century. The rough outline of this system is as follows. The criminal process was instituted by the investigator acting of his own motion in the form of a secret preliminary investigation. In its first phase the investigator’s task was to determine whether the crime had in fact been committed and the identity of the primary suspect. When the latter was found, the second phase of the investigation would begin, directed against a specific person. At this point the defendant was incarcerated and held \textit{incommunicado}. Both he and the witnesses were examined \textit{ex parte} and required to answer questions

\textsuperscript{15} Herman “Various models of criminal proceedings” (1978) SACC/SASK 3.
\textsuperscript{16} Van Wyk, Dugard, De Villiers & Davis \textit{The New South African Legal Order} 406.
\textsuperscript{17} Schwikbard & Van der Merwe \textit{Principles of Evidence} (2009) 6.
under oath, responses to all questions were put in writing. Until the investigation reached its final stages, the defendant was rather vaguely informed about the precise nature of the crime being investigated and the incriminating evidence.\textsuperscript{18} Law of evidence prescribed the kind and the quantum of proof required for conviction. Mere circumstantial evidence was not enough to support a conviction: the only legal proof attainable was often the defendant's confession. Thus, in cases involving serious crime, if the defendant did not voluntarily confess, and the evidence gathered against him raised a strong probability of guilt, the investigator was permitted to put the defendant to torture in order to extract a confession from him.\textsuperscript{19}

When the investigator completed all investigatory activities he would send the file of the case to a court for decision. The court would proceed on the basis of documents contained in the file, and in many countries would never see the defendant. In fact, there was no trial, but rather a closed session of the court. Public prosecutors, even where they existed, were not necessary for the proceedings to commence, develop, or terminate. Furthermore, in many countries the defendant had no right to assistance of counsel.\textsuperscript{20}

The adversarial model of criminal procedure prevailed in Europe from the fall of the Roman Empire, throughout the Dark Ages, and until the beginning of the thirteenth century.\textsuperscript{21} The sequence of procedural ideas inherent in the adversary model is that the fundamental matrix is based upon the view that proceedings should be structured as a dispute between two sides in a position of theoretical equality before a court which must decide on the outcome of the contest. The procedural aim is to settle the conflict stemming from the allegation of commission of crime. Since the proceeding is essentially a contest, devices such as pleadings and stipulations are not only acceptable but, indeed, essential because they establish the existence of a contest and delineate its borders. The protagonists of the model have definite, independent, and conflicting functions, the prosecutor's role is to obtain a conviction, and the

\textsuperscript{18} Damaska \textit{Evidential Barrier to Conviction and Two Models of Criminal Procedure: A Comparative Study} 556-557.
\textsuperscript{19} Damaska \textit{Evidential Barrier to Conviction and Two Models of Criminal Procedure: A Comparative Study} 557.
\textsuperscript{20} Ibid.
\textsuperscript{21} Damaska \textit{Evidential Barrier to Conviction and Two Models of Criminal Procedure: A Comparative Study} 556.
defendant’s role is to block this effort. In his charge the prosecutor determines which factual propositions he will attempt to prove and must marshal evidence in support of his factual contentions. Not only does he have the burden of persuasion with respect to the latter, but also the burden of presenting evidence in court. In doing so he is expected to be partisan.22

The defendant decides which facts favorable to his theses he will attempt to prove, and must adduce evidence in support of all his factual contentions. He cannot be examined by the court, nor can he be questioned by the prosecution. For if only one side to a contest were to use the other as an evidentiary source, such practice would destroy the balance of advantages and the position of theoretical equality between the contestants.23 The role of the adjudicator becomes that of an umpire who sees to it that the parties abide by the rules regulating their contest. Even here his basic attitude is one of passivity, he is to rule on the propriety of conduct only upon the objection of the side adversely affected. When the contest is over the adjudicator must decide on the outcome.24

Devlin25 says the essential difference between adversary and inquisitorial systems is apparent from their names, the one is the trial of strength, and the other is an inquiry. The question in the first is, “are the shoulders of the party upon whom is laid the burden of proof strong enough to carry and discharge it”. In the second the question is, “what is the truth of the matter?” In the first the judge or the jury are arbiters, they do not pose questions and seek answers, they weigh such material as is put before them, but they have no responsibility for seeing that it is complete. In the second the judge is in charge of the inquiry from the start, he will permit the parties to make out their cases and may rely on them to do so, but it is for him to say what he wants to know.

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22 Damaska Evidential Barrier to Conviction and Two Models of Criminal Procedure: A Comparative Study 563.
23 Ibid.
24 Damaska Evidential barriers to Conviction and two models of Criminal Procedure A Comparative Study 564.
25 Devlin The Judge (1979) 54.
2.3 THE TWO MODELS IN A SOUTH AFRICAN PERSPECTIVE

The adversarial trial procedure which finds its symbolic roots in the early ritual of trial by battle has three leading features. The parties are in principle responsible for the prosecution of evidence in support of their respective cases. The adjudication is required to play a passive role. Much emphasis is placed upon oral presentation of evidence and cross-examination of witnesses. The adversarial model proceeds from the premises that greater approximation of the truth is possible if litigants are allowed to present their own evidence in a process which guarantees not only cross-examination of an opponent who testifies but also all witnesses called by such opponent.

In contradiction to the adversarial model, the inquisitorial model is judge centered. It proceeds from the premises that a trial is not a contest between the two opposing parties but essentially an inquiry to establish the material truth. Judicial examination is accepted as the pivotal mechanism in the process of truth finding. Van der Merwe put it simplifies the difference by referring to Devlin who says inquisitorial procedure is a natural system of fact finding in the sense that it dispenses with technical rules and is applied in our every day activities for example, a father inquiring into a dispute between his children acts inquisitorially in the sense that he will not merely rely upon information which the parties are prepared to submit.

The essential difference between the adversarial and inquisitorial models of criminal procedure lies in the functions of the parties, i.e. the judicial officer, the prosecution and the defence. In an inquisitorial system the judge is the master of the proceedings (dominus litis) in the sense that he himself actively conducts and even controls the search for the truth by conducting the questioning of witnesses and the accused. After arrest the accused is questioned primarily by the investigating judge, not by the police. In the trial the presiding judge does the questioning, not the counsel for the prosecution or the defence.

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26 Van der Merwe “The Inquisitorial Procedure and Free System of Evidence in Small Claims Court. An Examination of Principles” (September 1985) De Rebus.
Van der Merve\textsuperscript{28} concludes that the fundamental differences which exist between the Anglo-American and Continental systems can, from a theoretical and practical point of view and within the context of South African courts, be best explained by comparing the procedural and evidential system of our ordinary courts with that which exist in our small claims court. South African small claims courts function along inquisitorial lines. Section 20(3) of the Small Claims Court Act\textsuperscript{29} provides that a party shall neither question nor cross-examine any other party to the proceedings, including his/her own witness. The same section provides that the presiding commissioner should proceed inquisitorially to ascertain the relevant facts, and may question any party or witness at any stage of the proceedings. The procedure in our courts is totally different.

Another important innovation of inquisitorial elements into South African Law is section 30(1) - (3) of the Restitution of Land Rights Act.\textsuperscript{30} It allows for the admission of hearsay evidence surrounding the dispossession of land, empowers the court to admit evidence whether or not such evidence is admissible in any other court and introduces the notion of weighing the evidence admitted.

2.4 PROBLEMS WITH THE ADVERSARIAL MODEL

Van Dijkhorst\textsuperscript{31} describes the aim of the criminal procedure is to arrive at the truth expeditiously and fairly. There is enough basis for stating that the common law prosecutor encounters more obstacles than his continental colleague in all phases of fact finding activity. First, he finds it harder to surmount the admissibility hurdle, where his informational sources undergo the metamorphosis into technically competent evidence. He will also find that many more demands are made of him at the level of presenting evidence. Finally the jury seems to be more reluctant to convict than the continental mixed tribunal.\textsuperscript{32}

\textsuperscript{29} 61 of 1984.
\textsuperscript{30} 22 of 1994.
\textsuperscript{31} Van Dijkhorst "The criminal justice system in jeopardy. Is the Constitution to blame?" (November 1998) Consultus 136.
\textsuperscript{32} Damaska Evidential Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study 550.
It is also argued that the operation of the adversarial trial proceedings in South Africa may, in some respects, impede the realisation of the objectives of truth-finding, fair process and the expeditious completion of proceedings. For the adversary system to achieve substantial or procedural justice, it is essential that parties should be highly combative, effective and evenly matched adversaries. In the event of inequality between the parties, the system would fail to achieve the goal of justice through combat. The courts, due to its ascribed passive role, would not intervene substantively on behalf of the weaker combatant in pursuit of the principles of a fair trial.

The undefended accused's inability as an adversary is the most acute in the adversarial truth-finding process. Where we are operating the adversary system without the adversaries, the truth will simply not emerge. The consequence is inevitably that innocent accused may be convicted because they do not have the benefit of legal representation.

The vast majority of accused persons in South Africa is indigent and cannot afford legal representation. The provision of legal aid to make legal representation more accessible to the accused is limited by a means test applied by the legal Aid Board. To provide legal aid to all who qualify for legal aid would require expenditure which is very high.

Distinct from the goal of truth-finding, and at times in conflict with it, an accused’s right to a fair trial is enshrined in the Bill of Rights, affording a considerable level of protection. However, as far as undefended accused are concerned, they are usually

35 SA Law Commission Project 73 Fifth Interim Report on Simplification of Criminal Procedure par 2.15.
36 Steytler The undefended accused on trial: Justice in the lower courts PhD Thesis University of Natal 36.
37 Steytler The undefended accused on trial: Justice in the lower courts PhD Thesis University of Natal 47.
38 Steytler The undefended accused on trial: Justice in the lower courts PhD Thesis University of Natal 49.
not aware of their rights and, if informed about them, may not be able to understand or exercise them effectively.\textsuperscript{39}

Steytler\textsuperscript{40} is of the view that lower courts routinely produce unjust practices and outcome. This is as a result of the legal structure’s failure to guard adequately against the undesirable consequences flowing from an undefended accused’s inability to be a competent adversary in highly professionalised adversarial proceedings.

In the adversarial trial the conduct of the trial is in the hands of the litigants, and this may result in prolonged trials. The prosecution may delay the process in marshalling sufficient evidence while the defence may employ delaying tactics to avoid the prosecution taking place. Delays in seeing that justice is done may undercut the very objectives of the trial, i.e. of establishing the truth and implementing penal policy effectively and expeditiously. Increasingly the answer has been sought by granting the presiding judicial officer powers of intervention in bringing the proceedings to a satisfactory conclusion.\textsuperscript{41}

On the part of the victim, giving evidence in an adversarial environment is a stressful experience for a witness. He will have to give evidence in a presence of a group of people, previously unknown to him, often about embarrassing and intimate details. If he is the complainant in the matter, he has the further arduous task of having to give evidence in the presence of the accused himself. He is then cross-examined by the accused representative, or even worse, by the accused himself. The cross-examination is often hostile, is used as a tool to trip up the witness, even confuse him at times, and is finally employed to suggest to the court that the witness has some other motive to implicate the accused falsely. The setting of the courtroom is in itself alien with the key figures wearing long black gown. A procedure that is followed is

\textsuperscript{39} SA Law Commission \textit{Project 73 Fifth Interim Report on Simplification of Criminal Procedure} par 2.22.

\textsuperscript{40} PhD Thesis \textit{The undefended accused on trial: Justice in the lower courts} University of Natal 503.

\textsuperscript{41} SA Law Commission \textit{Project 73 Fifth Interim Report on Simplification of Criminal Procedure} par 2.26.
not understood by the ordinary lay person and the language used is formalistic, at times archaic and very specialized.\textsuperscript{42}

\section*{2.5 Conclusion}

According to Pound the inquisitorial model had a free system of evidence which promotes procedural simplicity and avoids that air of procedural formality and sophistication which can create psychological barriers to litigants. Adversarial model makes a trial more complicated than is necessary and might well cause a gap between the courts and the people, which will not increase faith in the administration of justice.\textsuperscript{43}

Significant changes have been bought about in the administration of justice directed at the problems caused by adversarial mode of criminal procedure. The reforms have been developed to strengthen the inquisitorial process and the other has been to introduce a more inquisitorial process.\textsuperscript{44} The South African Law commission in trying to reform law and introduce a more inquisitorial approach to criminal procedure recommended that the truth-finding role of judicial conduct should be emphasised to enable the court to compensate for inadequate effort and skill on the part of the litigants. The recommendations of this commission were shelved away, they never become law.

The most far reaching adoption of an inquisitorial mode of procedure has been the recent proposals by the South African Law Commission’s Project Committee on Juvenile Justice. With the aim of diverting as many juveniles as possible from pretrial detention and the criminal courts, a specially trained magistrate, called the “inquiry magistrate”, is to fulfill the primary function of making placement decisions and final diversion decisions. All cases, except minor offences where diversion decisions are made by the police or probation officers, are to be brought before the inquiry magistrate who must hold a preliminary inquiry. At the inquiry conducted by the magistrate in his or her chambers, a free system of evidence (which includes the

\textsuperscript{42} Muller and Hollely \textit{Introduction of Child witnesses} (2000) 69.
\textsuperscript{43} Pound “The Administration of Justice in Modern City” (1913) 26 Harvard LR 302-319.
\textsuperscript{44} SA Law Commission \textit{Project 73 Fifth Interim Report on Simplification of Criminal Procedure} 15.
child's previous convictions or evidence of previous diversion) is recommended. Where a case cannot be diverted because the child contests guilt, the magistrate must decide whether there is sufficient evidence to put the child on trial.

In response to demands that vulnerable witnesses should be shielded from vigorous of cross-examination and confrontation with their alleged attackers, the Criminal Law Amendment Act\textsuperscript{45} inserted section 170A into the Criminal Procedure Act\textsuperscript{46} which enabled a child to give evidence via electronic means in a place other than the courtroom where the child would experience undue mental stress or suffering.

\textsuperscript{45} Act 135 of 1991
\textsuperscript{46} Act 51 of 1977
CHAPTER 3
INQUISITORIAL ELEMENTS IN SOUTH AFRICAN CRIMINAL PROCEDURE

3.1 INTRODUCTION

The South African criminal procedure system is derived from the common law, as amplified, modified, and supplemented by extensive statutory enactments, presently contained in the Criminal Procedure Act 51 of 1977. The basic system is derived from English law and thus is adversarial in nature and character. However over the years the South African system of criminal procedure, particularly as regards pre-trial procedures has acquired certain distinctive features of inquisitorial system.\(^\text{(47)}\) This inquisitorial model first featured in our criminal procedure 80 years ago in the oft-quoted dictum of Curlewis JA in \(R \ v \) Hepworth.\(^\text{(48)}\)

“A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and the Judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied to both sides. A Judge is an administrator of justice, not merely a figure head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done.”

This approach was more recently confirmed by the Supreme Court of Appeal in \(S \ v \) Gerbers,\(^\text{(49)}\) where it was held that the discretion and the power to call witnesses or to recall the accused can be exercised by a judge, whether the effect thereof is in favour of the State or the accused. There is no reason to distinguish between the exercise of that power on behalf of the accused or of the State, provided the power is exercised for the purpose of doing justice as between the prosecution and the accused.

Marais JA held that it is incumbent upon all judicial officers to constantly bear in mind that their \textit{bona fide} effort to do justice may be misconstrued as undue partisanship. Although it may be difficult to find the right balance between undue

\(^{47}\) Van Wyk, Dugard, De Villiers & Davis \textit{The New South African Legal Order} 406.

\(^{48}\) 1928 AD 265.

\(^{49}\) 1997 (2) SACR 601 (SCA).
judicial passivism and undue judicial intervention, judicial officers should strive to achieve this goal.

Presently, the following inquisitorial elements are found in criminal proceedings such as bail proceedings\(^{50}\) plea proceedings,\(^{51}\) powers of the presiding officer to call, recall and examine witnesses,\(^{52}\) powers of the presiding officer to exclude inadmissible evidence,\(^{53}\) evidence on sentence,\(^{54}\) and investigation on unreasonable delay on trials.\(^{55}\) These inquisitorial elements are discussed below.

### 3.2 Bail Proceedings

In the South African criminal justice system bail proceedings are regulated by chapter 9 of the Criminal Procedure Act. Chapter 9 contains section 60(3) which provides that if the court is of the opinion that it does not have reliable or sufficient information or evidence in its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding judicial officer should order that such information or evidence be placed before the court. This section, read with section 60(10), emphasises the proactive role of the court in determining bail applications, the court should instead of refusing bail order the state to grant the defence access to the required evidence or information.\(^{56}\) Kriegler J\(^{57}\) emphasised that bail procedure is less formal than a trial, the inquisitorial powers of the presiding officer are greater than in a trial. Edeling J\(^{58}\) said that in bail applications the presiding officer may not sit with folded hands if neither party puts information before court. A presiding officer in a bail application is not merely a neutral umpire between the parties, but becomes actively involved in the process.

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\(^{50}\) Chapter 9 of Criminal Procedure Act 51 of 1977.
\(^{51}\) Chapter 15 and 18 of Criminal Procedure Act 51 of 1977.
\(^{52}\) Ss 167 and 186 of Criminal Procedure Act 51 of 1977.
\(^{53}\) S 210 of Criminal Procedure Act 51 of 1977.
\(^{54}\) S 74 of Criminal Procedure Act 51 of 1977.
\(^{55}\) S 342A of Criminal Procedure Act 51 of 1977.
\(^{57}\) S v Dlamini S v Dladla and others S v Joubert v Schietekat 1999 2 SACR 51 63.
\(^{58}\) Prokureur Generaal Vrystaat v Ramokhosi 1997 1 SACR 127 150.
3.3 PLEA PROCEEDINGS

The procedure which follows upon a plea of guilty is prescribed by section 112. This section provides *inter alia* for the questioning of the accused in order to test the validity of his plea of guilty. This section introduces inquisitorial elements into our criminal procedure. This was confirmed in *S v Williams* where it was held that section 112(1)(b) of the Act establishes an inquisitorial regime. The status of the statements made by the accused in answer to the questions put by the magistrate were inconclusive until the magistrate had lawfully satisfied herself that the accused was guilty of the offences to which he had pleaded guilty.

In *S v Maseko* it was held that section 112(1)(b) is not unconstitutional, as long as the presiding officer informs the accused of his constitutional rights to remain silent. In *S v Damons* the court’s view was that the accused has no right to refrain from answering questions in relation to a plea of guilty. If he wishes to preserve his right to silence, his only course is to plead not guilty. In those circumstances the magistrate was not required to inform the accused that they had such a right before questioning them in relation to their pleas of guilty.

Section 115(1) of the Criminal Procedure provides for an accused who has pleaded not guilty to a charge to make a statement indicating the basis of his defence. This section introduced inquisitorial elements into the criminal trial process and this caused a considerable amount of controversy at the time of its introduction in 1977. This is particularly the applicable to section 115(2), which empowers the presiding officer to question an accused in order to establish which allegations in the charge are in dispute. In keeping with the accusatorial common law flavour of the South African criminal procedure system the courts have generally tended to interpret the powers of interrogation of the accused by the presiding officer in a restrictive manner.

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59 Act 51 of 1977.
60 *S v Ntlakoe* 1995 1 SACR 629 O 633 b-c.
61 2008 (1) SACR 65 C 20.
62 1996 (2) SACR 91 W 96 97.
63 1997 (2) SACR 218 WLD 225.
3.4 POWERS OF THE COURT TO CALL AND EXAMINE WITNESSES

Section 167 of the Criminal Procedure Act empowers the presiding officer at any stage of criminal proceedings to examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and to recall and re-examine any person, including an accused, already examined at the proceedings, and the court is empowered to examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case. Section 186 empowers the court at any stage of criminal proceedings to subpoena or cause to be subpoenaed any person as a witness at such proceedings if the evidence of such witness appears to the court essential to the just decision of the case.

These sections envisage a partly inquisitorial approach. The result is that the South African criminal trial is a compromise between “accusatorial” and “inquisitorial” means. The presentation of evidence is normally left to the parties, but if the presiding officer considers that the material before him or her is not sufficient to enable him or her to arrive at the truth, he or she may pursue the investigation him or herself.

3.5 POWER TO EXCLUDE INADMISSIBLE EVIDENCE

According to section 210 of the Criminal Procedure Act, a presiding officer is competent to rule that irrelevant or immaterial evidence which is not conducive to proving or disproving any point or fact in issue as inadmissible. The powers contained in this section indicate that the parties may not, at will, place any evidence before the court. The presiding officer thus has limited powers to exclude evidence, insofar as evidence which a litigant is attempting to place before the court may be ruled as irrelevant or immaterial and accordingly inadmissible.

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65 S v Ngcobo 1999 3 BCLR 298 N.
3.6 EVIDENCE ON SENTENCE

In terms of section 274 of the Criminal Procedure Act, a court may before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The court may itself call witnesses to give evidence regarding sentence, for example call a probation officer. It is the duty of the presiding officer to question the accused thoroughly and objectively in connection with possible mitigating circumstances where the accused is unrepresented.

There is an obligation on the presiding officer even where the accused was legally represented to ask questions and call witnesses to establish the existence of substantial and compelling circumstances if at all possible.

3.7 CONCLUSION

Although the South African criminal procedure can be described as being adversarial in nature, it contains some inquisitorial elements. There is a concern that these inquisitorial elements in our criminal procedure are not sufficient enough to protect the litigants. A more inquisitorial approach to Criminal Procedure has been recommended by the South African Law Commission. In a discussion paper the Commission argued that the operation of the adversarial trial proceedings in South Africa may, in some respects, impede the realisation of the objectives of truth-finding, fair process and the expeditious completion of proceedings. The recommendations by this commission were not implemented.

Kriegler at an international conference held in Pretoria on 30 September 2003 pointed out the shortcomings of our criminal justice system and stated that the rebuilding of our criminal justice system is in the hearts and minds of the judiciary. Judicial officers should be made aware of their critical role in the new South Africa. That they are indispensable in achieving the dream expressed in the Bill of Rights.

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69 S v Namseb 1991 1 SACR 223.
70 S v Dlamini 2000 2 SACR 266 T.
71 SA Law Commission Project 73 Fifth Interim Report on Simplification of Criminal Procedure.
72 Retired Chief Justice.
The first step on the road is for judicial officers to resume active control of the proceedings in their courts.

The Service Charter for Victims of Crime in South was intended to change the South African criminal justice system to shift away from an adversarial and retributive criminal justice system to restorative justice. Attempts have been made by the South African Law Reform Commission\textsuperscript{73} to shift away from the adversarial and retributive system to a system of restorative justice. A specific reference was made to a proposal that a dedicated judiciary coupled with an inquisitorial process would deliver the best results in sexual offence matters. The proposed inquisitorial elements were excluded in the Sexual Offences Act and related matters Act,\textsuperscript{74} despite the fact that our predominantly accusatorial system contains some inquisitorial elements.

In the next chapter the international instruments pertaining to children in conflict with the law and child witnesses will be discussed, together with their impact in our laws relating to children.

\textsuperscript{73} Report on Sexual Offences released in December 2002.
\textsuperscript{74} 32 of 2007.
CHAPTER 4
INTERNATIONAL INSTRUMENTS ON JUVENILE JUSTICE

4 1  INTRODUCTION

This chapter will be divided into two sections. In the first section it will deal with children in conflict with the law and in the second section with child witnesses.

4 1 1  CHILDREN IN CONFLICT WITH THE LAW

International instruments affecting children in conflict with the law have existed for several decades. The Standard Minimum Rules\textsuperscript{75} started setting out the principle of separation of young prisoners from adults in custodian facilities. The International Covenant on Civil and Political Rights of 1966 prohibited death penalty on children under the age of 18 years.\textsuperscript{76} It also states that where juveniles in conflict with law are brought before court, the procedure shall take into account their age and the desirability of promoting their habilitation.\textsuperscript{77} Currently the international instruments dealing with children in conflict with the law are Convention on the Rights of the Child 1989\textsuperscript{78}, United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985\textsuperscript{79}, United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990\textsuperscript{80} and United Nations Guidelines for the Prevention of Juvenile Delinquency 1990.\textsuperscript{81} The regional Instrument dealing with child justice is the African Charter on the Rights and Welfare of the Child.

4 1 2  THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The CRC was adopted by the United Nations General Assembly on 20 November 1989. This convention was ratified by the South African Parliament on 16 June 1995. It has been in force in South Africa since 30 July 1995. The Convention deals with a

\textsuperscript{75} Rules of 1955.
\textsuperscript{76} Art 6.5.
\textsuperscript{77} Art 14.4.
\textsuperscript{78} Hereinafter referred as CRC.
\textsuperscript{79} Hereinafter referred as Beijing Rules.
\textsuperscript{80} Hereinafter referred as JDL’s.
\textsuperscript{81} Hereinafter referred as Riyadh Guidelines.
broad range of children’s rights and provides a framework within which the issue of juvenile justice must be understood.\footnote{Skelton “Developing a juvenile justice system for South Africa International Instrument and restorative justice” Acta Juridica 182.}

In all actions concerning children the best interests of the child should be a primary consideration.\footnote{Art 3 1 of CRC.} The CRC state that states parties should ensure that children are not subjected to torture or other cruel, inhuman or degrading treatment or punishment. Children are not deprived of their liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child should be in conformity with the law and should be used only as a measure of last resort and for the shortest appropriate period of time. A child deprived of his/her liberty should be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his/her or her age. A child deprived of his/her or her liberty should have the right legal assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court.\footnote{Art 40 1 of CRC.}

The CRC also state that states parties should recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.\footnote{Art 40(2) set out due process rights. Article 40(3) obliges the states parties to establish laws, procedures, authorities and institutions specifically applicable to children accused of having committed the offence.} Article 40(2) set out due process rights. Article 40(3) obliges the states parties to establish laws, procedures, authorities and institutions specifically applicable to children accused of having committed the offence.

4 1 3 UNITED NATIONS STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE

The Beijing Rules require that the minimum age of criminal responsibility for juveniles should not be fixed at too low age, bearing in mind the facts of emotional, mental and
intellectual maturity. In South Africa the minimum age of criminal responsibility is set at 10 years. The juvenile justice system should emphasize the well-being of the juvenile and should ensure that any reaction to juvenile offenders is proportionate to the offenders and the offence. In proceedings involving juvenile offender discretion should be allowed to the officials at all stages and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and dispositions. This will ensure sufficient accountability at all stages and levels in the exercise of any such discretion.

The Beijing Rules guarantee the basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority. The juvenile’s right to privacy should be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling. Rule 11 deals with diversion, where the child offender is diverted away from the formal criminal justice system.

Where a juvenile offender has not been diverted, she or he shall be dealt with by the competent authority according to the principles of a fair and just trial. The proceedings should be conducive to the best interests of the juvenile and should be conducted in an atmosphere of understanding and the juvenile should be allowed to participate at those proceedings. At these proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid.

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86 Rule 4 of Beijing Rules.  
87 S 7(1) Child Justice Act 75 of 2008. In terms of common law children below the age of 7 were irrebuttably presumed to lack criminal capacity.  
88 Rule 5 of Beijing Rules.  
89 Rule 6 of Beijing Rules.  
90 Rule 7 of Beijing Rules.  
91 Rule 8 of Beijing Rules.  
92 Rule 15 of Beijing Rules.
4.1.4 UNITED NATIONS RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY 1990

The JDL’s deals with children who are in custody during the pre trial stage and those who are sentenced to imprisonment. It stipulates that juveniles should be deprived of their liberty in accordance with the principles and procedures set on this resolution and in the Beijing Rules. Deprivation of liberty of a juvenile should be a disposition of last resort and it should be for a minimum period.

It prescribes that juveniles who are detained under arrest or awaiting trial are presumed innocent and should be treated as such. Detention before trial should be avoided and should be limited to the exceptional circumstances. Awaiting trial detainees should be separated from the convicted juveniles.93

The DJL’s also deals with the management of juvenile facilities and the rights of juveniles whilst they are in detention.94 It also regulates the appointment and training of personnels who deal with juveniles who are in detention.95

4.1.5 UNITED NATIONS GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY 1990

The fundamental principle of Riyadh guidelines is the prevention of juvenile delinquency. It states that successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood. When interpreting these guidelines, a child centred orientation should be pursued. The state should avoid criminalizing and penalizing a child for behavior that does not cause serious damage to the development of the child or harm to others. Interventions by the officials are to be pursued primarily in the interests of the young person and guided by fairness and equity.96

93 Rule 17 of DJL’s.
94 Chapter iv of DJL’s.
95 Chapter v of Riyadh Guidelines.
96 Chapter 1 of Riyadh Guidelines.
The Riyadh Guidelines also contain comprehensive prevention plans that should be instituted at every level of government, such as policies, programmes and strategies based on prognostic studies to be continuously monitored and carefully evaluated in the course of implementation and community involvement through a wide range of services and programmes.97

Chapter IV of the Riyadh Guidelines deals with legislation and juvenile justice administration. It states that government should enact and enforce specific laws and procedures to promote and protect the rights and well-being of all young persons. A child or young person should not be subjected to harsh and degrading correction or punishment measures at home, in schools and in any other institutions. Law enforcement and other relevant personnel should be trained to respond to the special needs of young persons and should be familiar with and use, to the maximum extent possible, of programmes and referral possibilities for the diversion of young persons from the justice system.

416 THE AFRICAN CHARTER

The African Charter states that member states of the Organization of African Unity should recognize the rights, freedoms and duties enshrined in the Charter and should undertake necessary steps, in accordance with their Constitutional processes and with the provisions the Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Charter.98 For the purposes of the Charter, a child is every human being below the age of 18 years.99 In all actions involving the child the best interests of the child should be the primary consideration. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity should be provided for child to be heard either directly or through an impartial representative.100

Article 17 states that a child accused or found guilty of having infringed penal law should have the right to special treatment in a manner consistent with the child’s

97 Chapter 111 of Riyadh Guidelines.
98 Art 1 of African Charter.
99 Art 2 of Riyadh Guidelines.
100 Art 4 of Riyadh Guidelines.
sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others. States should ensure that a child is not detained or imprisoned or deprived of his/her liberty or subjected to torture, inhuman or degrading treatment or punishment and ensure that children are separated from adults in their place of detention or imprisonment. States should also ensure that every child accused of infringing the penal law is presumed innocent until duly found guilty, is informed promptly in a language that he understands and in detail of the charge against him, and should be entitled to the assistance of an interpreter if he or she cannot understand the language used, is afforded legal and other appropriate assistance in the preparation and presentation of his defence and should have the matter determined as speedily as possible by an impartial tribunal.

4.2 CHILD WITNESSES

Section 39(1) of the Constitution provides that regard must be had to international law when interpreting the Bill of Rights. In S v Makwanyane, the court stated that “international agreements and customary international law provide a framework within which Chapter 3 (of the Constitution) can be evaluated and understood”.

The CRC is a binding instrument and provides a backdrop to relevant sections in the Constitution, notably section 28. Article 3(1) of the CRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 4(1) of the 1999 African Charter has a similar provision. In M v The State the court also recognised that section 28 has its origins in international instruments and that the CRC has become the international standard against which to measure legislation and policies.

In addition to the best interest principle, both instruments set out two more principles relevant for child victims and witnesses; non-discrimination, and participation. The principle of non-discrimination entails that every child is entitled to enjoy the rights

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101 1995 (3) SA 391 (CC) [35].
102 2005 4 All SA 334 SCA.
103 Par 16.
and freedoms set out in the instruments irrespective of race, ethnic group, language, religion, sex, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.\(^{104}\) Article 2(2) of the CRC imposes an obligation on the state to take all appropriate measures to ensure that a child is protected from all forms of discrimination. The principle of participation entails that a child has the right to participate and express his or her views in any legal proceedings affecting him or her. The child should in particular be provided with an opportunity to express his or her views either directly or through a representative.\(^{105}\)

In addition article 39 of the CRC provides that: States Parties should take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. These are protective measures at the criminal proceedings which are aimed at preventing any further trauma or secondary victimisation of the child who is a witness.

There are also specific guidelines with reference to the rights of child victims of abuse contained in the in the United Nations Guidelines of Justice Matters Involving Child Victims and Witnesses of Crime\(^{106}\) which were adopted the Economic and Social Council in its resolution on 22 July 2005. These guidelines contains, the right to be treated with dignity and compassion which means that the child is an individual with individual needs and should be treated in a sensitive and respectful manner at all stages of the process taking into account the child’s personal situation, age gender and maturity and with respect for the child’s physical, mental and moral integrity.\(^{107}\) A child’s testimony may not be presumed to be invalid or untrustworthy by reason of the child’s age alone as long as the child is of an age and maturity to give intelligible and credible testimony.

The right to be informed means that the child and his or her family must be provided with sufficient information throughout the justice process including information on the

\(^{104}\) Art 2 of the CRC and art 3 of the African Charter.

\(^{105}\) Art 12 of the CRC and art 4(2) of the African Charter.

\(^{106}\) Herein referred as UN Guidelines.

\(^{107}\) Par 10 – 14 of the UN Guidelines.
availability of services and protective measures, the times and dates of hearings progress in the case and the rights of the child. The right to be heard and express views includes giving the child an opportunity to air his or her views or concerns regarding participation in the justice process and explaining to the child the reasons if his or her views and concerns cannot be accommodated. On the right to privacy the UN Guidelines state the child’s privacy as a matter of primary importance. Measures should be taken to protect the child from undue exposure to the public by holding hearings in camera.

The final measures to ensure that the best interests and dignity of the child are protected can minimise hardship experienced during the process, may include: a support person throughout all the stages of the process. access to professional services to enable children to participate effectively at all stages of the process, protection from intimidation, ensuring that there are as few delays as possible and the use of child-sensitive procedures including a interview room designed for children, modified court hearings scheduled at times appropriate for the child, more frequent recesses, examination and cross-examination in a sensitive manner and ensuring that the child only has to go to court when necessary.

The UN Guidelines also gives direction on training and emphasizes the importance of training in child-sensitive procedures for all professionals involved at all stages of the justice process with a view to improving and sustaining specialised methods to deal effectively with child witnesses. UN Guidelines place specific emphasis on a multi-disciplinary approach and co-operation between different professionals involved at different stages of the process.

4.3 CONCLUSION

The international and regional instruments discussed are the framework of juvenile justice for most of the foreign communities including South Africa. The starting point

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108 Par 19 – 20 of the UN Guidelines.
109 Par 21 of the UN Guidelines.
110 Par 26 – 28 of the UN Guidelines.
112 Par 40 – 46 of the UN Guidelines.
is to establish separate laws, procedures, authorities and institutions specifically applicable to children accused of having committed the offence. Then to treat children accused of having committed offence in a manner consistent with the promotion of their sense of dignity and worth, which reinforces their respect for the human rights and fundamental freedoms of others and which takes into account their ages and the desirability of promoting the their reintegration and the assuming constructive role in society. The Beijing Rules obliges the state to consider, whenever appropriate, not to resort to formal trial. It envisages diverting children away from the criminal justice system.

The South African Child Justice Act is in compliance with this international instrument. In its preamble, the act aims to establish a criminal justice system for children, who are in conflict with the law, in accordance with the values underpinning our Constitution and our international obligations. It creates among others a central feature of the new criminal justice system for children and the possibility of diverting matters involving children who have committed offences away from the criminal justice system. Children, whose matters are not diverted, are to be dealt with in the criminal justice system in child justice courts. It also expands and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law whilst ensuring their responsibility and accountability for crimes committed.

In the SALRC, specific reference was made to a proposal that a dedicated judiciary coupled with inquisitorial process would deliver the best results in sexual offences matters. It emphasised, the importance of training of judicial officers. It was argued that it should start with training in communication with the child witnesses, and in particular traumatised children, proper use of intermediaries, of video taped evidence, of closed circuit television and the handling of what will in essence be an inquisitorial process.

While the SALRC did not include a more inquisitorial approach in its proposals regarding sexual offences, it did recommend legislative measure aimed at the protection of child witness and victim including creating a category of “vulnerable witnesses” making provision for the appointment of support persons and abolishing of the cautionary rule in relation to child witnesses. It also proposed the amendment, to sections 154, 158, 164, 166, 170A, and 192 of the Criminal Procedure Act.

The Children’s Act has also been promulgated with the object of inter alia protecting children from discrimination, exploitation and from any other physical, emotional or moral harm or hazards. It also provides care and protection to children who are in need of care and protection.\(^{115}\)

In the next chapter constitutional implications to the rights of children will be discussed.

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\(^{115}\) S 2f and g.
CHAPTER 5
THE CONSTITUTIONAL PROTECTION ACCORDED TO CHILDREN

5.1 INTRODUCTION

South Africa ratified the CRC in 1995 and the African Charter on the Rights and Welfare of the Child in 2000. Both of these instruments recognise a wide range of children’s rights, and require member states to protect these rights and to put in place measures to ensure their realisation. These rights in international law are complemented by the Bill of Rights in the Constitution and effected by a legislative framework, particularly the Children’s Act, Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007, Criminal Procedure Act 51 of 1977 and Child Justice Act 75 of 2008.

The human rights of children are protected by the Bill of Rights. These rights are divided into two groups namely, the general and specific rights of children. Section 28 deals specifically with the rights of children, including those in conflict with the law. The content of section 28 also reflects the essence of the CRC. In addition section 12 and 35 provide further protection to these children. The Constitution defines a child as any person less than 18 years. This means that any person below 18 is entitled to the protection under section 28 without any discrimination. This is in line with the CRC and the African Charter which are binding on South Africa.

5.2 THE BEST INTEREST OF THE CHILD

Section 28(2) of the Constitution states child’s best interests are of paramount importance in every matter concerning the child. The principle has long been part of our common law but the inclusion of the best interest’s principle in the South African Constitution has greatly enlarged its scope. The wording of section 28(2) is powerful, and it has been described by the Constitutional Court as “an expansive

116 S 28(3).
117 S 9(3).
118 M v The State 2005 4 All SA 334 SCA.
guarantee”. The “best interests of the child” in section 28(2) is not limited to the children’s rights listed in section 28(1) of the Constitution. This has also been given recognition by the Constitutional Court in Minister of Welfare and Population Development v Fitzpatrick and Others.

According to Friedman and Pantazis, section 28(2) appears to be aimed at addressing the vulnerability of children, and ensuring that their rights do not, as in the pre-constitutional era, frequently have to give way to the rights of others. According to Friedman and Pantazis, section 28(2) implies that in every matter where a child’s rights are (substantially) involved, those interests must be taken into account. The authors state, correctly it is submitted, that section 28(2) involves a weighing up process of the various interests of children in order to decide what is best for them. In addition, a child’s interests have a leg up vis-à-vis other rights and values.

The matter of M v The State concerned the duties of the sentencing court in light of section 28(2) when sentencing a primary caregiver of minor children. With regard to paramountcy the court found that focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. Sachs J found that a sentencing court must balance all the varied interests including the children’s interest and that this balancing exercise must be done on a case by case basis bearing in mind proportionality and the context of the case.

In this case the judgment for the majority was given by Justice Sachs and that for the minority by Justice Madala who did not, however, differ from the analysis of section 28 by the majority. Sachs J held:

“The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be

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119 Sonderup v Tondelli 2001 (1) SA 2001 (CC); 2001 (2) BCLR 152 (CC).
121 2000 (3) SA 422 (CC); 2000 (3) BCLR 713 (CC).
124 Par 33
125 Par 37.
126 Par 15.
child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children’s rights.”

He continued and held that the four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28 is the right of a child to be a child and enjoy special care.\(^\text{127}\)

He also held that the law should create conditions to protect children from abuse and maximize opportunities for them to lead productive and happy lives and that, even if the State cannot prevent abuse from occurring or repair that which is damaged, the State has a duty to enact legislation and to implement enforcement mechanisms to create positive conditions for repair to take place. The State must also minimize consequent negative effects on children as far as it can and avoid conduct by its agencies that might place children in peril.\(^\text{128}\)

Section 42(1)\(^\text{129}\) establishes children’s court which may adjudicate matter \textit{inter alia}, involving the protection and well-being of a child, the care, support and paternity of a child.\(^\text{130}\) In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.\(^\text{131}\) The children’s court hearings must, as far as is practicable, be held in a room which is furnished and designed in a manner aimed at putting children at ease. It must be conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court. It must be a room which is not ordinarily used for the adjudication of criminal trials.\(^\text{132}\)

\(^{127}\) Par 17.  
\(^{128}\) Par 27.  
\(^{129}\) Children’s Act 38 of 2005.  
\(^{130}\) S 45 Act 38 of 2005.  
\(^{131}\) S 9 Act 38 of 2005.  
\(^{132}\) S 42(8) Act 38 of 2005.
5.3 CONCLUSION

All legislative framework, effected in compliance with the CRC and the African Charter namely, Child Justice Act, Children’s Act, and Criminal Law Sexual Offences and Related Matters Amendment Act emphasize the “best interest of the child” standard. In all matters concerning the care, protection and well-being of a child the best interest of the child is paramount important. The Child Justice Act has established a criminal justice process for children accused of committing offences aimed at protecting children’s rights as provided for in the Constitution and CRC.

The Children’s Act sets out principles of care and protection of children. The objects of this Act\textsuperscript{133} is inter alia to give effect to the constitutional rights of children, that the best interests of a child are of paramount importance in every matter concerning the child. It gives effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic. It protects children from discrimination, exploitation and any other physical, emotional or moral harm or hazards. It provides care and protection to children who are in need of care and protection and promotes the protection, development and well-being of children.\textsuperscript{134}

The Sexual Offences and Related Matters Act\textsuperscript{135} reform the law on sexual offences. The objects of this Act are inter alia to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide. It enacts all matters relating to sexual offences in a single statute. It criminalises all forms of sexual abuse or exploitation. It repeals certain common law sexual offences and replaces them with new and, in some instances, expanded or extended statutory sexual offences, irrespective of gender. It protects complainants of sexual offences and their families from secondary victimisation and trauma. It provides certain services to victims of sexual offences, including affording victims of sexual offences the right to receive Post Exposure Prophylaxis in certain circumstances. It establishes a National Register for Sex Offenders in order to establish a record of persons who are or have been convicted of sexual offences against children and

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\begin{itemize}
  \item \textsuperscript{133} Children’s Act 38 of 2005.
  \item \textsuperscript{134} S 2 Act 38 of 2005.
  \item \textsuperscript{135} Sexual Offences and Related Matters Act 32 of 2007.
\end{itemize}
persons who are mentally disabled so as to prohibit such persons from being employed in a manner that places them in a position to work with or have access to or authority or supervision over or care of children or persons who are mentally disabled.\textsuperscript{136} This Act reforms discriminatory court rules relating to complainants in sexual offences.\textsuperscript{137}

In the next chapter the historical background that culminated to the Child Justice Act will be discussed.

\textsuperscript{136} S 2 Act 32 of 2007.
\textsuperscript{137} Ss 58 59 and 60 Act 32 of 2007.
CHAPTER 6
CHILD JUSTICE ACT

6.1 INTRODUCTION

Historically, before the eighteen century, child was not recognized as having special status at common law, and age did not generally afford any special protection where children were charged with the commission of the offences. As regards juvenile justice, save for the presumption that children under the age of seven could not be held criminally responsible. Children were theoretically subject to the same procedures and penalties as adults and little attempt was made to separate them from adults incarceration.138

Before the law reform process there were four different statutes governing children in the criminal justice system. They are dealt with in terms of the Criminal Procedure Act 51 of 1977,139 the Correctional Services Act 8 of 1959, the Child Care Act 74 of 1983140 and the Probation Services Act 116 of 1991. The Criminal Procedure Act applies to children and adults alike.

The Criminal Procedure Act 51 of 1977 does not contain provisions which specifically relate to the arrest of children. It only states that the parent or the guardian of the child should without undue delay be notified of the arrest, by the investigating officer.141 Section 71 deals with various ways for releasing arrested child from custody. Section 74 requires that the parent or the guardian of accused person under the age of 18 years be warned to attend court proceedings. Criminal proceedings involving an accused under the age of 18 should be in camera and no person should publish any information which reveals or may reveal the identity of an accused under the age of 18 years or of a witness at criminal proceedings who is under the age of 18 years.142 Section 254 deals with referral of an accused under the age of 18 years to Children’s Court, to be dealt with in terms of the Children’s Act.

139 See chapter 3 supra.
140 The Child Care Act has been repealed by the Children’s Act 38 of 2005.
141 S 50.
142 S 154(3).
Section 290 of the Act refers to the manner of dealing with convicted juvenile and Section 337 of the Act deals with age estimate the age of a person.

The first legislative instrument that really treated children differently from adults in the criminal justice system is section 29 of the Correctional Services Act.\textsuperscript{143} It prevented the detention of children under 18 years for longer than 24 hours after arrest, in police cells or prisons. Section 4B of the Probation Services Act\textsuperscript{144} deals with the assessment of arrested child by a Probation officer.

6.2 THE HISTORICAL BACKGROUND OF THE CHILD JUSTICE ACT

Children’s rights in South Africa are contained in section 28 of the Constitution. It regards every person less than 18 years as a child. It gives every child the right not to be detained, except as a measure of last resort. In addition, when a child is arrested, he or she has a right to be detained only for the shortest appropriate period of time, to be kept separately from detained persons over the age of 18 years; and to be treated in a manner, and kept in conditions that take account of the child's age. A child’s best interests are paramount importance in every matter concerning the child.

The CRC also deals with a broad range of children’s rights and provides a comprehensive framework within which the issue of child justice must be understood.\textsuperscript{145} By ratifying the CRC, South Africa obliged itself in terms of article 40(3), to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. The CRC requires, in article 40(1), that State Parties should recognise the right of every child alleged or accused of having infringed the penal law, to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.

\textsuperscript{143} Amendment Act 17 of 1994.
\textsuperscript{144} 116 of 1991.
\textsuperscript{145} SA Law Commission Juvenile Justice Discussion paper 79 Project 106 Para1.1.
Upon the ratification of the URC in 1995, the South African Law Commission was requested to undertake an investigation into juvenile justice and to make recommendations to the Minister of Justice for the reform of this particular area of the law.

6.3 THE DISCUSSION PAPER ON JUVENILE JUSTICE

Upon the investigation Issue Paper was published for comment during 1997 which proposed that a separate Bill should be drafted in order to provide for a cohesive set of procedures for the management of cases in which children are accused of crimes. The Issue Paper was the subject of consultation with both government and civil society role players. Towards the end of 1998 the Commission published a comprehensive Discussion Paper, accompanied by a draft Bill. Wide consultation was held regarding this document, with all the relevant government departments and non-governmental organisations providing services in the field of juvenile justice being specifically targeted for inclusion in the consultation process. The draft Bill encapsulated a new system for children accused of crimes providing substantive law and procedures to cover all actions concerning the child from the moment of the offence being committed through to sentencing, including record-keeping and special procedures to monitor the administration of the proposed new system. The workshops and seminars held regarding the Discussion Paper, as well as the written responses received garnered substantial support for the basic objectives of the Bill as well as for the proposed structures and procedures. Many of the submissions and discussions included constructive criticisms and helpful suggestions as to how the Bill could be improved. This culminated to a draft bill entitled the Child Justice Bill.146

The draft Bill introduced the establishment of a criminal justice process for children accused of committing offences aimed at protecting children’s rights as provided for in the Constitution and CRC and provided the minimum age of criminal capacity of such children. It described the powers and duties of police and probation officers in relation to such children and the circumstances in which such children may be detained and provided for their release from detention. It introduced the diversion of

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146 49 of 2002.
cases away from formal court procedures and established an individual assessment of each child and a preliminary inquiry as compulsory procedures in the new process. It created special rules for a child justice court, extended the sentencing options available to such children, entrenched the notion of restorative justice, provided for legal representation of children in certain circumstances and established appeal and review procedure as well as an effective monitoring system for the legislation.147

An important aspect for this research is the recommendation of a distinct procedure prior to the appearance of a child in the proposed child justice court, referred to as the preliminary inquiry.148 The draft Bill states that the purpose of the inquiry would be to ensure that the child has been assessed, consider the possibility of diverting and the possibility of transferring the matter to the children’s court. The presiding officer also has to consider if there is sufficient evidence to sustain a trial, the release or placement of a child in the pre-trial stage. The project committee also recommended that a preliminary inquiry magistrate be designated for each district to preside over the proceedings which should take place in an informal atmosphere and be inquisitorial rather than adversarial in style.149

The project committee proposed that a preliminary inquiry should be held in a room, office or chamber but not in a court.150 The inquiry magistrate should be apprised of all relevant information to assist with the decision-making, but where he or she is provided with information which may be prejudicial to the child, the inquiry magistrate should recuse himself or herself as presiding officer in any trial which may eventuate.151 The preliminary inquiry should only be remanded for 48 hours, and then for a further 48 hours after which the inquiry should be closed.152 A decision of the magistrate presiding at a preliminary inquiry should not be subject to appeal.153 Where a child is co-accused with an adult, the case of the adult should be separated for the purposes of the preliminary inquiry, and where the child is co-accused with

147 Summary of draft bill South African Law Commission Project 106.
148 Clauses 1(xiv) and 37 of the draft bill.
149 Clause 38 of the draft bill.
150 Clause 38.
151 Clause 50(3).
152 Clause 45.
153 Clause 38(10).
another child or children, the court may hold a joint inquiry.\textsuperscript{154} Where a child is in detention, the inquiry magistrate must establish whether the child may be released, and that preference should be given, where possible, to the release of a child into the care of his or her parent or another appropriate adult.\textsuperscript{155} With regard to detention in a place of safety or secure care facility, that individual assessment should form the basis of a recommendation by the probation officer to which the inquiry magistrate must have due regard.\textsuperscript{156} With regard to pre-trial detention in a prison, that strict conditions for such detention be set, that pre-trial detention should be limited to children above the age of 16 years charged with serious offences which are listed in the draft Bill and where there is no vacancy in the secure residential facility within a reasonable distance from the court or where a substantial risk exists that such a child will cause harm to other persons in the secure residential facility.\textsuperscript{157}  A child in detention should be brought before the court every 14 days for the purpose of inquiring whether the detention remains necessary.\textsuperscript{158} There should be detailed provisions describing action to be taken following failure of the child to attend an assessment or a preliminary inquiry or to comply with diversion conditions.\textsuperscript{159} Where the child has not been diverted or is intending to plead not guilty to the charge, the inquiry magistrate should finalise the preliminary inquiry and refer the matter to the prosecutor for the institution of charges in the proposed child justice court or other court.\textsuperscript{160}

It also recommended that transfer of matters involving children to a Children’s Court inquiry under the Child Care Act, where such transfer is considered, should not be mandatory and that other measures in terms of the provisions of the proposed Bill may be considered, that where a child is in need of care, as contemplated by the Child Care Act, he or she may be referred to the Children’s Court immediately after the assessment, or the matter may be converted to a children’s court inquiry at any time during the trial.\textsuperscript{161}

\textsuperscript{154} Clause 39.  
\textsuperscript{155} Clause 44.  
\textsuperscript{156} Clause 46(3).  
\textsuperscript{157} Clause 46(4).  
\textsuperscript{158} Clause 46(6).  
\textsuperscript{159} Clauses 47 48 and 49.  
\textsuperscript{160} Clause 50.  
\textsuperscript{161} Clauses 29 30 31 and 51.
The project committee also recommended the establishment of a court at district court level with a particular identity, which should be less formal and less adversarial in style than a standard criminal court, and should involve active participation of all persons involved in the proceedings. This court should be designated as Child Justice Court, and its personnel should be specially selected and trained and that the child justice court should have an increased sentencing jurisdiction, at district court level, of five years imprisonment in order to enhance specialisation and minimise the referral of children to higher courts. In the case of children co-accused with adults, the draft Bill provided for the compulsory separation of trials, provided that any person involved in the proceedings may make an application for a joinder of the trials.

6.4 CONCLUSION

The draft Child Justice Bill was the first attempt to bring altogether the all four different statutes governing children in the criminal justice system. This was the first attempt to treat children in criminal justice system differently from adults. The draft Bill was first released in December 1998 and published for comment in 1999. The project committee followed a consultative approach, holding workshops and receiving written submissions from a range of criminal justice role players. Children were also consulted on the Bill whilst it was in development. The final report of the Commission was completed, and handed to the Minister for Justice in August 2000. The Child Justice Bill was approved by Cabinet for introduction into Parliament in November 2001 and was introduced into Parliament in August 2002 as Bill number B49 of 2002. The Bill was debated in 2003 and eventually became an act in 2009, when it was promulgated as Child Justice Act 75 of 2008.

In the next chapter a brief analyses of juvenile justice system in other countries will be discussed. Inquisitorial elements in the Child Justice Act will also be discussed.

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162 Clauses 53(7) and 59(3).
163 Clauses 53(5) and 53(8).
164 Clause 61.
165 Herein referred as Child Justice Act.
CHAPTER 7
PRELIMINARY INQUIRY

7.1 INTRODUCTION

In this chapter a brief analyses of juvenile justice system in Ghana and Uganda is discussed. Common law countries targeted have the same system of criminal procedure as ours. The inquisitorial elements present in those systems are compared with the inquisitorial features present in the Child Justice Act. The inquisitorial aspects present in our Child Justice Act will also be discussed.

Article 40(3) of the Convention on the Rights of the Child requires a State Party to establish separate laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. Countries such as India who ratified the Convention have established laws where Magistrates are expected to function as friends, philosophers and guides of the children brought before them. When a child alleged to have committed the offence is brought before them they hold inquiry not to determine whether or not child has committed a specific offence but to discover whether he is in need of special care and protection and to ensure an all-round growth and development of their individual personality.166

Ghana, the first African country to ratify the United Nations Convention on the Rights of the Child167 has a separate and dedicated Bill which has been drafted and it is still to be introduced in the Parliament. It provides for the establishment of Child Panel in each district at the District level. A child panel in criminal matters should assist in victim-offender mediation in minor criminal matters involving a child where the circumstances of the offence are not aggravated. A Child Panel should also seek to facilitate reconciliation between the child and any person offended by the action of the child. The proceedings are informal and are often held in a panel member’s house or garden. The statements by the parties are not required to be under oath. During the proceedings the child is permitted to express his opinion and participate in

167 29 June 1990.
any decision which affects his/her well being commensurate with the level of his/her understanding.

After Uganda’s ratification of the Convention on the Rights of the Child, it embarked on a law reform process that culminated in the enactment of Children’s Statute.\textsuperscript{168} The Statute establishes a Village Resistance Committee Courts with limited criminal jurisdiction as courts of first instance. These Resistance Committees have judicial powers over a number of criminal offences involving children. Here justice is dispensed in an informal and relaxed atmosphere. Children are given a chance to express themselves freely, and to put questions to witnesses. The Statute also creates a Family and Children Court,\textsuperscript{169} which has jurisdiction to hear and determine all criminal charges against a child except an offence punishable by death and an offence for which a child is jointly charged with a person above the age of 18 years. The F&CC can also hear cases referred to it by the Village Resistance Committee Courts in view of the seriousness of the offence and cases where a detention order is deemed necessary. Proceedings in this court are in camera and are informal. Children are not exposed to adversarial procedures. The Statute also requires a High Court, if proceedings involving a child are conducted before such a court, to have due regard to the child’s age and to the provisions of the law relating to the procedure of trials involving children.

South Africa has followed the same trend as other countries. After South Africa adopted the interim and subsequently the Constitution and the ratified the CRC, it stated an investigation into the law reform programme of juvenile justice which culminated in the Child Justice Act. The Child Justice Act has introduced a distinct procedure prior to the appearance of a child in court, referred to as the preliminary inquiry.

According to Sloth-Nielen\textsuperscript{170} the preliminary inquiry is intended to be the center-piece of the new system. It attempts to shift the debate from the present concentration of

\textsuperscript{168} Act 6 of 1996.\\textsuperscript{169} F & CC.\\textsuperscript{170} “Juvenile Justice law reform Process in South Africa Can a Children’s Rights Approach Carry the Day The Symposium The Juvenile Justice Counter-Reformation Children and Adolescents
attention on a plight of children awaiting trial in prison, to a more systematic approach to the procedure to be applicable to all juvenile cases. The inquiry provides a distinct phase in the criminal procedure to ensure the sifting of petty cases from serious matters, and of divertible matters from those which must proceed to trial. It also gives a more rational framework, with the necessary social background information available, to enable a proper inquiry into the necessity of pre-trial detention.

7.2 NATURE AND OBJECTIVES OF PRELIMINARY INQUIRY

In terms of section 43 of the Child Justice Act a preliminary inquiry is an informal pre-trial procedure which is inquisitorial in nature. It may be held in a court or any other suitable place. The objectives of a preliminary inquiry are to consider the assessment report of the probation officer, with particular reference to the age estimation of the child if the age is uncertain. The view of the probation officer regarding the criminal capacity of the child if the child is 10 years or older but under the age of 14 years and a decision whether an evaluation of the criminal capacity of the child by a suitably qualified person is necessary and establish whether a further and more detailed assessment of the child is needed. The other objectives are to establish whether the matter can be diverted before plea, identify a suitable diversion option, where applicable, establish whether the matter should be referred to children’s court referred to in section 42 of the Children’s Act. It is to ensure that all available information relevant to the child, his or her circumstances and the offence are considered in order to make a decision on diversion and placement of the child. It is to ensure that the views of all persons present are considered before a decision is taken, encourage the participation of the child and his or her parent, an appropriate adult or a guardian in decisions concerning the child. It is also to determine the release or placement of a child, pending the conclusion of the preliminary inquiry, the appearance of the child in a child justice court or the referral of the matter to a children’s court, where applicable.

A preliminary inquiry must be held in respect of every child who is alleged to have committed an offence, except where the matter has been diverted by a prosecutor in

terms of Chapter 6, the child is under the age of 10 years or the matter has been withdrawn. A preliminary inquiry must be held within 48 hours of arrest if a child is arrested and remains in detention or within the time periods specified in a written notice or a summons. A child’s appearance at a preliminary inquiry is regarded as his or her first appearance before a lower court, in terms of section 50 of the Criminal Procedure Act.

7.3 PERSONS TO ATTEND PRELIMINARY INQUIRY

In terms of section 44 of the Child Justice Act preliminary enquiry is held by the inquiry magistrate and prosecutor, and must be attended by the child, the child’s parent, an appropriate adult or a guardian and the probation officer. If a diversion order is likely to be made, a diversion service provider identified by the probation officer should be present at the preliminary inquiry. The inquiry magistrate may exclude any person from attending the preliminary inquiry if that person’s presence is not in the best interests of the child or undermines the inquisitorial nature and objectives of a preliminary inquiry. A preliminary inquiry may proceed in the absence of the child’s parent, an appropriate adult, guardian or the probation officer if the inquiry magistrate is satisfied that to do so would be in the best interests of the child. An inquiry magistrate who proceeds in the absence of the child’s parent, an appropriate adult, guardian or probation officer, must enter the reasons for the decision on the record of the proceedings. The inquiry magistrate may permit the attendance of any other person who has an interest in attending or who may contribute to the proceedings. The inquiry magistrate may subpoena or cause to be subpoenaed any person whose presence is necessary at the preliminary inquiry.

7.4 CONFIDENTIALITY OF INFORMATION FURNISHED AT PRELIMINARY INQUIRY

Section 154 of the Criminal Procedure Act relating to the publication of information that reveals or may reveal the identity of a child or a witness under the age of 18 years applies. No person shall publish in any manner whatsoever any information which reveals or may reveal the identity of an accused under the age of 18 years or of a witness at criminal proceedings who is under the age of 18 years. The enquiry
magistrate may authorize such publication if it is just and equitable in the interest of the child. No information furnished by any person at a preliminary inquiry in relation to the child may be used against that child in any bail application, plea, trial or sentencing proceedings.\(^{171}\)

### 7.5 FAILURE TO APPEAR AT PRELIMINARY INQUIRY

According to section 46 of the Child Justice Act a child or his or her parent, an appropriate adult or a guardian, who has been directed to appear at a preliminary inquiry in terms of a written notice, a summons, a written notice by a police official, a warning by a presiding officer or is otherwise obliged to appear at a preliminary inquiry and who fails to appear at the inquiry or to remain in attendance at the proceedings must be dealt with in accordance with the provisions of section 24(7) of this Act. The presiding officer may issue a warrant for the arrest of the child or cause a summons to be issued for the child to appear at the preliminary inquiry. When a child appears before a presiding officer pursuant to a warrant of arrest or summons the presiding officer must inquire into the reasons for the child’s failure to appear or comply with the conditions or to remain in attendance and make a determination whether or not the failure is due to the child’s fault. If it is found that the failure is not due to the child’s fault, the presiding officer may order the child’s release on the same conditions, or order the child’s release on any other condition, and if necessary, make an appropriate order which will assist the child and his or her family to comply with the conditions initially imposed.

If it is found that the failure is due to the child’s fault, the presiding officer may order the release of the child on different or further conditions or make an order that the child be detained, subject to the provisions of section 26 of this Act. A presiding officer may order the detention of a child in a child and youth care centre in accordance with section 29 of this Act, after taking into account the age and maturity of the child, the seriousness of the offence in question, the risk that the child may be a danger to himself, herself or to any other person or child in the child and youth care centre. The presiding officer must also consider the appropriateness of the level of

\(^{171}\) S 45 Act 75 of 2008.
security of the child and youth care centre when regard is had to the seriousness of
the offence allegedly committed by the child and the availability of accommodation in
an appropriate child and youth care centre.

A parent, an appropriate adult or guardian who fails to appear at the inquiry or to
remain in attendance at the proceedings is guilty of an offence and is liable on
conviction to a fine or to imprisonment for a period not exceeding three months. 172

7 6 PROCEDURE RELATING TO HOLDING OF PRELIMINARY INQUIRY

In terms of section 47 of the Child Justice Act the inquiry magistrate must conduct the
preliminary inquiry in an informal manner by asking questions, interviewing persons
at the inquiry and eliciting information, and must keep a record of the proceedings.
At the start of the preliminary inquiry the inquiry magistrate must in the prescribed
manner explain the purpose and inquisitorial nature of the preliminary inquiry to the
child, inform the child of the nature of the allegation against him or her, inform the
child of his or her rights including rights to legal representation 173 and explain to the
child the immediate procedures to be followed in terms of this Act.

According to the draft regulations issued in terms of this Act 174 the presiding officer
must at the start of the preliminary inquiry inform and explain to the child the purpose
and inquisitorial nature of the preliminary inquiry, the nature of the allegation against
him or her, his or her rights and the immediate procedures to be followed in terms of
the Child Justice Act. This must be done in a language of his or her choice or
through an interpreter, in plain language by using simple vocabulary and by avoiding
technical terms, and in a manner appropriate to the age, maturity and stage of
development of the child. The presiding officer must allow sufficient time so that the
child can absorb the information, encourage and allow the child to ask questions and
express his or her views. He or she must elicit responses from the child by asking
questions in order to ensure that he or she understands the information and ensure
that the atmosphere is conducive to participation by the child and the parent,

172 S 24(7)(e) of the Child Justice Act.
appropriate adult or guardian. He or she must be sensitive to the needs of the child and the fact that the child may be confused and may be experiencing anxiety and feel intimidated. The proceedings at the preliminary inquiry must be conducted in a manner that sets the child at ease and child should be treated with care and understanding.

After the explanation of the purpose and inquisitorial nature of the inquiry the allegations against the child, the inquiry magistrate must ascertain from the child whether he or she acknowledges responsibility for the alleged offence. If the child does not acknowledge responsibility, no questions regarding the alleged offence may be put to the child and no information regarding a previous diversion or conviction or charge pending against the child may be placed before the preliminary inquiry. The inquiry magistrate must obtain confirmation from the prosecutor that, there is sufficient evidence or there is reason to believe that further investigation is likely to result in the necessary evidence being obtained, for the matter to proceed on trial. He or she must enter the prosecutor’s confirmation on the record of the proceedings and inform the child that the matter is being referred to the child justice court for trial.

If the child does acknowledge responsibility, the preliminary inquiry will proceed with the inquiry. If the age of a child at the time of the commission of the alleged offence is uncertain, the presiding officer must first determine the age of the child by considering the age estimation by the probation officer and any documentation submitted by the probation officer. In addition the presiding officer may subpoena any persons who are likely to have direct knowledge of the age of the child to produce the documentation, information or statements that would assist the presiding officer to make age determination. If necessary, presiding officer may refer the child to a medical practitioner for an estimation of age. The presiding officer must make a determination and enter the age determined into the record of the proceedings as the age of the child. Should evidence to the contrary emerge, the presiding officer must alter the record to reflect the correct age.175

175 S 14.
Once the age of the child has been determined and the child is found to be a child as defined in this Act, the presiding magistrate will consider the probation officer’s assessment report, any other documents relevant to the proceedings, and any documentation relating to any previous conviction, diversion or a pending charge. If these documents are insufficient the inquiry magistrate may request any further documentation which may be relevant to the proceedings, elicit any information from any person attending the preliminary inquiry to supplement or clarify the available information, and take any steps as may be necessary to establish the truth of any statement or the correctness of any submission.\(^{176}\)

In order to ensure that the views of all persons present are considered before a decision regarding the child is made, the inquiry magistrate must encourage the participation of the child and his or her parent. If the child has no parent an appropriate adult or a guardian will be allowed to participate. The inquiry magistrate will allow the child, child’s parent, an appropriate adult or a guardian or any other person present to ask questions and to raise issues which, in the opinion of the inquiry magistrate, are relevant for the purposes of a preliminary inquiry.\(^{177}\)

If the preliminary enquiry is not concluded and the child is in custody, the inquiry magistrate may postpone the proceedings of a preliminary inquiry for a period not exceeding 48 hours. The proceedings of a preliminary inquiry may be postponed for additional period not exceeding 48 hours if the postponement is likely to increase the prospects of diversion. If a probation officer has recommended that a further and more detailed assessment of the child be undertaken to make appropriate recommendation and the inquiry magistrate is satisfied that there are reasons justifying such an assessment or where the child is charged with Schedule 3 offence and the state needs a written authority to divert the case, the inquiry magistrate may postpone the proceedings of a preliminary inquiry for a period not exceeding 14 days. Where the child is in need of medical treatment for illness, injury or severe psychological trauma or where the child has been referred for mental observation in

\(^{176}\) S 47(4).

\(^{177}\) S 47(7).
terms of section 77 or 78 of the Criminal Procedure Act, preliminary inquiry may be postponed for a period determined by the inquiry magistrate.\textsuperscript{178}

At the conclusion of the preliminary enquiry an inquiry magistrate may order that the matter be diverted. The Inquiry magistrate will make such an order if he is satisfied that the child acknowledges responsibility for the offence and the child has not been unduly influenced to acknowledge responsibility. Where there is a \textit{prima facie} case against the child and the child and, if available, his or her parent, an appropriate adult or a guardian, consent to diversion. The prosecutor or the Director of Public Prosecutions must also indicate that the matter may be diverted. The inquiry magistrate must also consider all relevant information presented, including whether the child has a record of previous diversions.\textsuperscript{179}

If the prosecutor indicates that the matter may not be diverted, the inquiry magistrate must obtain from the prosecutor confirmation, based on the facts of the case at his or her disposal that there is sufficient evidence against the child or there is reason to believe that further investigation is likely to result in the necessary evidence being obtained, for the matter to proceed. The inquiry magistrate must enter the prosecutor’s confirmation on the record of the proceedings, and inform the child that the matter is being referred to the child justice court for trial. If the child is not legally represented, the inquiry magistrate must explain to the child and the parent, an appropriate adult or a guardian, rights to legal representation and refer the child to the Legal Aid Board for the matter to be evaluated by the Board.\textsuperscript{180}

\section*{7.7 Referral of Children in Need of Care and Protection to Children’s Court}

If it appears to the inquiry magistrate during the course of a preliminary inquiry that a child is in need of care and protection referred to in section 150(1) or (2) of the Children’s Act\textsuperscript{181}, the inquiry magistrate may stop the proceedings and order that the child be brought before a children’s court referred to in section 42 of the Children’s

\textsuperscript{178} S 48.
\textsuperscript{179} S 49(1)(a) read with s 52.
\textsuperscript{180} Ss 47(9) and 52.
\textsuperscript{181} Act 38 of 2005 hereinafter referred as “the Children’s Act”.

51
Act and that the child be dealt with under sections 155 and 156 of this Act. The inquiry magistrate will make such order where it is desirable to deal with the child in terms of sections 155 and 156 of that Act, or the child does not live at his or her family home or in appropriate alternative care, or the child is alleged to have committed a minor offence or offences aimed at meeting the child’s basic need for food and warmth.\textsuperscript{182}

\section*{7.8 CONCLUSION}

The inquisitorial model which first featured in our criminal procedure 80 years ago in the oft-quoted dictum of Curlewis JA,\textsuperscript{183} recently confirmed by the Supreme Court of Appeal in \textit{S v Gerbers},\textsuperscript{184} presently found in bail proceedings, plea proceedings, in powers of the presiding officer to call, recall and examine witnesses, in powers of the presiding officer to exclude inadmissible evidence in evidence on sentence, and in the investigation on unreasonable delay on trials, is now enshrined by the Juvenile Justice Act. The Act has not only introduced separate juvenile justice system for children who are in conflict with the law but has also introduced inquisitorial mode of procedure in the South African criminal procedure which \textit{inter alia} provides a formal legal framework for diversion.

The introduction of the preliminary inquiry in the Act is only an attempt by the South African Law Reform Commission to shift away from the adversarial and retributive system to a system of restorative justice. The Juvenile Justice Act in specific terms, benefits children who are in conflict with the law by raising the minimum age of criminal capacity for children, ensuring that the individual needs and circumstances of children in conflict with the law are assessed, for securing attendance at court, the release or detention and placement of, children, and creating at an informal, inquisitorial, pre-trial procedure, designed to facilitate the disposal of cases in the best interests of children by allowing for the diversion of matters involving children away from formal criminal proceedings in appropriate cases.

\begin{footnotes}
\item[182] S 50.
\item[183] \textit{R v Hepworth} 1928 265 277.
\item[184] 1997 2 SACR 583 T.
\end{footnotes}
The preliminary inquiry is a distinct procedure prior to the appearance of a child in the child justice court. The purpose of the inquiry is limited to ensure that the child has been assessed, the possibility of diverting the matter is fully explored, the possibility of transferring the matter to the children’s court is considered, there is sufficient evidence to sustain a trial, the release or placement of a child in the pre-trial stage is properly considered if the matter is to proceed to the proposed child justice court. Children whose cases are not diverted during the preliminary inquiry and are referred to child justice court for trial will not benefit much from the inquisitorial proceedings introduced by the preliminary inquiry because inquiry will only apply at a pre-trial stage, not during the trial. The procedure during the preliminary enquiry is clearly stated, that the inquiry magistrate must conduct the preliminary inquiry in an informal manner by asking questions, interviewing persons at the inquiry and eliciting information.\textsuperscript{185} Whereas a child justice court must apply the relevant provisions of the Criminal Procedure Act relating to plea and trial of accused persons, as extended or amended by the Act. The Act is quite in so far as the presentation of evidence and admissibility of evidence during the trial. Therefore the adversarial procedure in the presentation of evidence and admissibility of evidence will still apply in the adjudication of matters involving children which are not diverted. The concerns by the South African Law Commission\textsuperscript{186} that the operation of the adversarial trial proceedings in South Africa, in some respects, impedes the realisation of the objectives of truth-finding, fair process and the expeditious completion of proceedings have not been addressed by the Act.

The project committee on the Child Bill had envisaged child justice court that should provide some form of differentiated court for dealing specifically with children accused of crimes. It therefore proposed the establishment of a child justice court with a particular identity. However this proposal has not been included in the Act. The Act stated that any child, whose matter has been referred to the child justice court, must appear before a court with the requisite jurisdiction to be dealt with in terms of this Chapter.\textsuperscript{187} This means that the multi-level jurisdiction will remain in a

\textsuperscript{185} S 47(1) of Act 75 of 2008.
\textsuperscript{186} Discussion Paper 96 project 37 dated 30 June 2001.
\textsuperscript{187} S 63(1)(a) of the Act.
juvenile justice court structure. All three levels district, regional and high court will have jurisdiction over cases where children are accused.

In the next chapter measures that aim to protect child witness present in the Criminal Procedure Act, Criminal law Sexual offences and Related Matters Amendment Act and Children’s Act will be highlighted.
CHAPTER 8
PROTECTIVE MEASURES IN CRIMINAL PROCEDURE ACT AND CRIMINAL LAW SEXUAL OFFENCES AND RELATED MATTERS AMENDMENT ACT

8.1 INTRODUCTION

The Constitution entrenches certain aspects of the adversarial system. The rights which are of particular relevance to the child witness are contained in section 35. Section 35(3) states that every accused has a right to a fair trial which includes the right, to public trial in an ordinary court, to be present when being tried, and to adduce and challenge evidence. These rights strengthen the adversarial features of criminal procedure by insisting on confrontation and cross-examination, although none of the rights are absolute. These rights have to be weighed with the rights accorded to children in section 28 that every child have the right to be protected from maltreatment, neglect, abuse, or degradation and that the child’s best interest is of paramount importance in every matter concerning the child.

Before discussing protective measures, the effect of the adversarial features on the child witness will be set out.

8.2 CONFRONTATION

Section 35(3) of the Constitution provides that an accused has the right to be present when he is being tried. Although the wording of the section does not specifically contain the terms confront or face to face. It has been argued that this right encompasses more than simple requiring that the trial and the decision of the court take place in his presence. It would also include confrontation in the sense of being able to see witnesses and to observe their demeanor. Even before the introduction of the Constitution, it has always been a basic principle of the South African criminal procedure that accusations had to be made face to face. This

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188 Muller and Hollely Introducing the child witness 8.
192 Muller and Hollely Introducing child witness 9.
accord an accused the right to be present during the trial and to hear all evidence that is led against him. He is entitled to demand that accusations against him be made face to face with him. This principle is contained in section 158\textsuperscript{194} which provides that all criminal proceedings in any court should take place in the presence of the accused.

Although an accused is given a right to be present at his trial in terms of statutory law, common law and the Constitution, the right is nevertheless not absolute. There are statutory provisions which specifically exclude confrontation.\textsuperscript{195} There is section 159(1) of the Criminal Procedure Act\textsuperscript{196} gives powers to the court to remove the accused from court if his presence makes the continuance of the proceedings impracticable and section 170A of the Criminal Procedure Act\textsuperscript{197} allows evidence to be given via the closed-circuit television.

### 8.3 THE EFFECT OF CONFRONTATION ON CHILD WITNESSES

Since the accused is allowed to be present in court at his trial, the traditional approach has been to let the child witnesses give evidence in court in the presence of the accused.\textsuperscript{198} This has created untold difficulties for the child who has, in most cases, to be faced with the very person who assaulted him or who he witnessed assaulting another. In addition to this, the child has to tell his story in a formal courtroom which will be alien to everything he has thus far experienced.\textsuperscript{199} The effects of confrontation on children were reinforced by Wilson J\textsuperscript{200} who had the following remarks regarding child witnesses:

"I propose for a moment to digress and to state that it appears to me that it is time that urgent consideration is given to a change in the manner of conducting criminal trials arising out of the sexual abuse of young children ... it appears to me that it would be eminently desirable to evolve a system that when a child is called upon to give evidence that child is not required to do so in a large austere looking court room before judicial

\textsuperscript{194} Act 51 of 1977.
\textsuperscript{195} Muller and Hollely \textit{Introducing the child witness} 10.
\textsuperscript{196} Act 51 of 1977.
\textsuperscript{197} Act 51 of 1977.
\textsuperscript{199} Hammond and Hammond \textit{Justice and the child witness} (1987) SACC 9.
\textsuperscript{200} \textit{S v Basil Simins DCLD} 84 88 13 June 1988 unreported.
officers sitting on a bench above them. In other words in circumstances that are completely strange to the child, and must cause a great deal of stress and tension. It would in my view be far fairer, both to the state and the defence, if arrangements could be made in cases of this nature for the child to give evidence in circumstances which are not strange to her, so that he or she, depending on the sex of the child, is not subjected to more traumatic experience than are absolutely necessary."

The S A L C\(^{201}\) accepted that courtrooms are spartan and severe in appearance, thereby creating a forbidding experience for a witness. They further accepted that the presence of the presiding officer, the accused and the latter’s legal representative, as well as the prosecutor, in the courtroom, clad in black robes, caused a child to become “afraid, uncertain and confused”.

In response to the above difficulties experienced by children, the legislature introduced section 170A of the Criminal Procedure which enables a child to give evidence via electronic means in a place other than the courtroom where the child would experience undue mental stress or suffering to do so. The use of these facilities is discretionary and dependent on whether the presiding officer is satisfied that the child will experience undue mental stress or suffering in the event of testifying. It is, therefore, not automatically available to every child who has to testify.

Schwikkard\(^{202}\) argues that the discretionary nature of section 170A gives rise to problems since it views those children who testify via closed-circuit television as being the exception rather than the norm. Since research has shown that in the vast majority of cases child witnesses suffer significant trauma when testifying in an adult-centered adversarial environment. He further argues that this section would be more effective if it required the court to make use of closed-circuit television in all cases where a child complainant has to testify. He limits this to complainants. Muller\(^{203}\) submits that there does not appear to be a justification for limiting section 170A to complainants. A child, who has viewed the murder of a family member, although not a complainant in a case, will experience the same traumatic effect of giving evidence in an adversarial environment.

\(^{201}\) Working Paper 28 Project 71 3.
\(^{203}\) Mulley and Hollely Introducing the child witness 28.
Since research has shown that children provide more accurate testimony outside of the courtroom and consequently experience less stress, it will be in the interests both of children in general and justice in particular that children be allowed to testify outside the adversarial nature of the trial. For these reasons, it was submitted that section 170A be amended to enable all children to testify from outside the courtroom. This would protect children from the stress and trauma associated with giving evidence in court, and would accord with section 28 of the Constitution in that it would assist in protecting children from abuse and their interests would be taken into account. At the same time, it would also be in the interests of discovering truth, and therefore justice, in that research had shown that children give more accurate evidence outside of the courtroom.\textsuperscript{204}

The Sexual Offences Amendment Bill\textsuperscript{205} had proposed the inclusion of inquisitorial element in the treatment of the victims of sexual offence. In terms of section 15(2) of the Bill the court could on its own initiative, declare a witness, other than the accused, a vulnerable witness, if in the opinion of the court the witness is likely to be vulnerable on account of factors such as age, trauma, race, language, intimidation etc. The court could also summon any knowledgeable person to advise the court on the vulnerability of a witness. In terms of section 14 of the Bill, the witness had to be informed of the possibility that he may be declared a vulnerable witness and of the protective measures available to the witness before testifying. Unfortunately these protective measurers were not included in the Act.\textsuperscript{206}

8.4 CROSS-EXAMINATION

The general rule is that any witness who has been sworn, and called, and who has given evidence in chief is liable to be cross-examined.\textsuperscript{207} This is provided by the Constitution\textsuperscript{208} as well as section 166 of the Criminal Procedure Act. Section 166 of the Criminal procedure Act sets out the rights of the accused and the state, in relation to the examination of witnesses. It provides that both the accused and the state may

\textsuperscript{204} Mulley and Hollely \textit{Introducing the child witness} 83.

\textsuperscript{205} Criminal Law Sexual Offences Amendment Bill 50 of 2003.

\textsuperscript{206} Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.

\textsuperscript{207} Zeffert and Paizes \textit{The South African law of Evidence} (2009) 907.

\textsuperscript{208} S 35(3)(i).
cross-examine any party called by the other side, including witnesses called by court. Subsection 3 empowers the court to curtain cross-examination if is being protracted unreasonable and thereby causing proceedings to be delayed unreasonable. Failure to allow cross-examination is a serious irregularity, which will almost invariable prejudice a party. In accusatorial system there is a fundamental belief that cross-examination, and the techniques employed therein are tools for discovering the truth and assessing credibility.

8.5 EFFECTS OF CROSS-EXAMINATION

Perhaps the most serious complaint that can be leveled against the accusatorial system is the importance accorded to cross-examination, and the inability of the children to deal therewith. Cross-examination is stressful for witnesses, even more for children. The stress is induced by not having to give evidence in court but also by the fact that the child will be called upon to reveal very intimate details. In the course of cross-examination “the child will be bullied for placing events, often months after they occurred and for not being able to remember important details concerning events.” The adversarial nature of the trial places the child in a position where he finds himself under attack. The defence is obliged to attack the child’s credibility in an attempt to highlight inconsistencies and discredit the child’s evidence.

As regards the victim, the adversarial approach requires defence counsel to attempt to establish that the victim who is cross-examined is sufficiently uncertain to warrant a finding that the case against his client has not been established beyond reasonable doubt. To sow confusion and uncertainty in the mind of a sexually assaulted and traumatised victim by an experienced legal representative is not difficult to imagine. The treatment of rape complainants in court can also be explained in terms of inherently combative nature of cross-examination. Advocates commonly speak of

209 Zeffert and Paizes The South African law of evidence 908.
210 Muller and Tait “The child witness and the accused’s right to cross-examination” (1997) TSAR 3 520.
211 Muller and Hollely Introducing the child witness 38.
212 Muller and Hollely Introducing the child witness 41.
“breaking” and “destroying” a witness during cross-examination.\textsuperscript{214} Evans\textsuperscript{215} uses the term “butchering” a witness.

The Commission recommended that section 166 of the Criminal Procedure Act, be amended by inserting after subsection (3) subsection (4) which will state that if it appears to the court that any cross-examination is scandalous, vilifying, unduly repetitive, needlessly annoying, intimidating or offensive, the court, may on its own initiative or upon objection from any witness, the prosecution or the defence, forbid the cross-examiner from pursuing such line of cross-examination unless the examination, in that form, relates to a fact or facts in issue or to matters that require revelation in order to determine the existence or a fact or facts in issue.

This would afford more protection to a vulnerable witness, it would allow the court even on its own initiative to step in and stop scandalous or insulting cross-examination.

It was also suggested that unrepresented accused in criminal proceedings involving the alleged commission of a sexual offence should not be allowed to directly question a vulnerable witness.\textsuperscript{216} The undefended accused should state the question to the court, which should repeat the question accurately to the witness. This was going to prevent face to face accusations. Unfortunately this was not included in the Criminal Law Sexual Offences and Related Matters Amendment Act.\textsuperscript{217}

The intermediary system was introduced following the recognition that “the ordinary adversarial trial procedure is at times insensitive to the needs of the child victim, this is especially so in cases involving child abuse.\textsuperscript{218} The introduction of section 170A of the Criminal Procedure Act did not only introduce closed-circuit television, but also created the persona of the intermediary.

The intermediary was, therefore, introduced to assist the child witness by removing all hostility and aggression from a question and by changing a question, where

\begin{itemize}
  \item \textsuperscript{214} Ellison \textit{Criminal Law Review} (1998) 614.
  \item \textsuperscript{215} Evans \textit{The Golden Rule of Advocacy} (1993) 97.
  \item \textsuperscript{216} Criminal Law Sexual Offences Amendment Bill 50 of 2003.
  \item \textsuperscript{217} Act 32 of 2007.
  \item \textsuperscript{218} Du Toit, De Jager, Paizes, Skeen & Van der Merwe \textit{Commentary on the Criminal Procedure Act} Revision 24 (2000) 22-31.
\end{itemize}
necessary, so that it would be more understandable to the child. However, in practice, the use of an intermediary has given rise to a number of problems. The power of the intermediary is very limited, since the intermediary is perceived to be nothing more than an interpreter and the court can at any time insist that the intermediary repeat the question exactly as it was phrased. A further disadvantage of the present system is that the intermediary does not have the authority to comment on a question and give an opinion as to whether a child understands a question or not. The intermediary is powerless to intervene and argue that questions should not be asked in a particular sequence or not phrased in a certain manner. The real problem is that the intermediary is not an expert witness, but only an interpreter.\textsuperscript{219}

Although section 170A has provided some relief for children who are entitled to use it, it does not address the traumatic effect of the adversarial nature of the trial as a whole.\textsuperscript{220} In essence, section 170A amounts to a plaster that is being used to cover the cracks of a system that is not capable of dealing with child witnesses. Based on the available research on child development and language acquisition, it becomes clear that children are not able to give accurate evidence when cross-examined in an adversarial environment. All accusatorial countries have accepted this fact, hence the introduction of statutory exceptions to ameliorate the position of the child witness. It is submitted that statutory exceptions created on an \textit{ad hoc} basis simply give rise to further confusion and, sometimes, place the child in an even worse position. It does not make sense to modify a system to suit children when the system itself does not support children. In such a situation, it is the system itself which needs to change.\textsuperscript{221}

\textbf{8 6 PROTECTIVE MEASURES IN THE CHILDREN’S ACT}

Many African cultures allow the practices of scarification and male and female circumcision. Whilst every one has a right to the freedom of religion, thought, belief

\textsuperscript{219} Klink v Regional Court Magistrate NO and others 1996 3 BCLR 402.
\textsuperscript{220} Schwikkard “The abused child a few rules of evidence considered” (1996) \textit{Acta Juridica} 156.
and opinion, this right has to be balanced against the rights of the child to be protected from maltreatment, abuse and degradation. The Children’s Act prohibits circumcision genital mutilation or the circumcision of female children, virginity testing of children under the age of 16.

The court has a duty towards the child brought before court, if it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection as is contemplated in section, the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for an investigation. If after the investigation the social worker finds that the child is in need of care and protection, the child must be brought before children’s court. If the court finds that the child is in need of care and protection the court may make an appropriate order like placing the child in the foster care with a suitable foster parent.

8.7 CONCLUSION

Since children are unable to testify effectively in an adversarial framework, it remains to be investigated whether they will be better able to do so in an inquisitorial environment. If proceedings were conducted as an inquiry into the truth rather than a contest, Zieff argues that children would not find giving evidence in court as traumatic, and suggests that many problems would be eliminated if an experienced judge conducted an inquiry in an informal setting with the object of trying to discover the truth.

Children’s court proceedings are also conducted in an inquisitorial manner. Proceedings are conducted in an informal manner, in a relaxed and non-adversarial

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222 S 15(1) of the Constitution.
223 S 28(1)(d) of the Constitution.
224 S 12 of Act 38 of 2005.
atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings.\textsuperscript{228}

\textsuperscript{228} S 60(3) Act 38 of 2005.
CHAPTER 9
CONCLUSION AND RECOMMENDATIONS

9 1 OVERVIEW

We have come the long way since the former President Mandela and Mr FW de Klerk signed the World Declaration on the Survival, Protection and Development of Children on 12 December 1993 and President Mandela with his cabinet spearheading a process to ensure that South Africa’s children are not left behind in the process of reconstruction and development.

This culminated to the S A L C in 1997, investigating and reviewing the Child Care Act, 1983 and making recommendations to the Minister for Social Development for the reform of the parent-child relationship, children living with HIV/AIDS, children living on the street, children in residential care, and child protection. It investigated sexual offences by and against children and made recommendations to the Minister of Justice for the reform of Substantive law relating to sexual offences, management, investigation and prosecution of sexual offences to protect the rights of the victims. South African Law Commission was also requested to undertake an investigation into juvenile justice and to make recommendations to the Minister of Justice for the reform.

9 2 CONCLUSION

All the three Acts\textsuperscript{229} have now been passed into law, although there has been delay in finalization and promulgation of the Child Justice Act. The process started in late 1996 with the appointment of a Project Committee of the South African Law Commission. The Child Justice Bill only became law in 2009.

The promulgation of the three Acts must be applauded. The Children’s Act clearly sets out principles relating to the care and protection of children, defines parental responsibilities and rights and makes provision for matters such as children’s courts,

\textsuperscript{229} Children’s Act, Sexual Offences and Related Matters Act and Child Justice Act.
adoption, child abduction and surrogate motherhood. This Act also clarifies the age of adulthood. In terms of Majority Act it was 21 years. The determination of the age of majority by this Act is in line with the Constitution, which defines a child as a person under the age of 18 years. The Children’s Act now determines that a child becomes a major on reaching the age of 18.

It is also important to note how the children’s court proceedings are conducted. The presiding officer in a matter before a children’s court controls the conduct of the proceedings. He may call any person to give evidence or to produce a book, document or other written instrument. He may question or cross-examine that person.230 Section 60(3)231 clearly states that children’s court proceedings must be conducted in an informal manner and in a relaxed and non-adversarial atmosphere.

A lot has been done to codify the substantive law relating to sexual offences and developing efficient and effective legal provisions for the reporting, management, investigation and prosecution of sexual offences. The new offence of rape created by Sexual Offences and Related Matters is non-gendered. It does not distinguish between boys and girls, and men and women. Secondary trauma is lessoned by allowing the victim to apply for compulsory HIV testing of her attacker, so that victim could take the prophylactic treatment.232 The plight of the child is now alleviated by exclusion of the cautionary rule in evaluating evidence of the complaint is sexual offences.233 Courts are also no longer at liberty to draw adverse inference for the victim’s failure to make a first report or for delay in making such a report.234

The legislation235 that treats children differently from adults in the criminal justice system is welcomed. The introduction of the preliminary inquiry which is inquisitorial in nature makes the proceedings more child friendlier and it promotes the object of truth finding.

231 Act 38 of 2005.
9.3 RECOMMENDATIONS

The introduction of the inquisitorial model of criminal procedure in court proceedings relating to children, although welcomed, teething problems will be experienced in its implementation. It is still early to see flaws at the inquisitorial model introduced in proceedings involving children.

The legal framework for formal introduction of inquisitorial procedure during the preliminary enquiry is welcomed. The introduction of inquisitorial procedure in the Act seems to be aimed at extending the right to a fair trial not only to the accused who is vulnerable because of the age but also benefit other role-players such as the victims of the crime, who in such procedure will not be subjected to adversarial system. The inquisitorial procedure will impact positively on the right of the child accused to a fair trial.

The procedural rights enshrined in the Constitution for all persons accused of having committed an offence will be upheld. The child will still have a right to plead not guilty, and will be referred to the child justice court, without consideration of the merits of diversion. In the actual trials the adversarial nature of the proceedings will be preserved as required by the Constitution. At a preliminary inquiry the inquiry magistrate may hear evidence with a tendency to incriminate the child, or prejudicial to the issue, resulting in the court not to act impartial. The inquiry magistrate may also have heard evidence on previous diversions, or previous convictions, or evidence relating to the case, which would in ordinary circumstances lead to a recusal. In such cases the Act states that the magistrate may not preside over any subsequent proceedings, procedure or trial arising from the same facts.236

It is submitted that the introduction of inquisitorial elements by the preliminary inquiry is consistence with the decision in *S v Dzukuda; S v Tshilo*237 that the right to a fair trial is a comprehensive and integrated right, the content of which will be established on a case by case basis, as our constitutional jurisprudence on section 35(3) develops. The court also held that it should not be assumed that a fair trial as

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236 S 47(10) of the Act.
237 2004 4 SA 1078 CC [9].
required by section 35(3) can only be achieved by one specific system of criminal procedure. There may be more than one way of securing the various elements of a fair trial and, provided the legislature devised a system which actively secures such a right, it cannot be faulted merely because it settles for a system which departs from the past procedures.

In order to investigate the efficacy of adopting an inquisitorial-based system of giving evidence in the case of child witnesses, the various elements of the present system will have to be evaluated, namely confrontation and cross-examination, and what effect any recommendations might have on the rights afforded to the accused by the Constitution. However, it is important to note at the outset that, although a move from an accusatorial to an inquisitorial form of procedure in certain cases would be a dramatic change, this by itself does not mean that such a change should be avoided. Both the accusatorial and the inquisitorial systems are the consequences of historical growth and political developments. They have not developed as a result of scientific inquiry into which of the two models is better equipped for accurate fact-finding. Rather, each system is based on popular conviction and speculation rather than on empirical research.\textsuperscript{238}

The basis of recommending any change to a system is that it will result in the discovery of the truth.\textsuperscript{239} The South African Law Commission\textsuperscript{240} accepted that if such a drastic change was needed, then the mere fact that the change would be of such a drastic nature would not stand in the way of reform.

This approach was endorsed by the Canadian court in \textit{Regina v Toten}\textsuperscript{241} where it was held:

"The public adversarial process is, however, a means to an end - the ascertainment of truth - and has virtue only to the extent that it serves that end. Where the established process hinders the search for truth, it should be modified unless the process or resource-based considerations preclude such modification."

\textsuperscript{238} Herman "Various models of criminal proceedings" (1978) SACC 12.
\textsuperscript{239} Muller and Hullely \textit{Introducing the child witness} 80.
\textsuperscript{241} 1993 16 CRR 2\textsuperscript{nd} 49 Ontario CA 58.
Dugard\textsuperscript{242} has also pointed out that an adequate system of criminal justice may be achieved by either system, provided that procedural safeguards are afforded to the individual. Our Constitution has provided these safeguards in section 35.

\textsuperscript{242} Dugard \textit{Introduction to criminal procedure} (1977) 117.
BIBLIOGRAPHY

Books

Bekker, PM; Geldenhuys, T; Joubert, JJ; Swanepoel, JP; Telblanche, SS; va der Merwe, SE and van Rooyen, JT *Criminal Procedure Handbook* (1999) Juta & Company


Damaska, M *Evidential barriers to Conviction and two Models of Criminal Procedure A Comparative Study* (1973) University of Pennsylvania Law Review


Du Toit, E; de Jager, FJ; Skeen, A and van der Merwe, S *Commentary on the Criminal Procedure Act* (2008) Juta & Company

Du Toit E, de Jager FJ, Skeen A, and van der Merwe S *Commentary on the Criminal Procedure Act* (Revision 24 2000) Juta & Company

Dugard, J *Introduction to Criminal Procedure* (1977) Juta & Company


Schwikkard, PJ; Skeen, A St Q and van der Merwe, SE *Principles of Evidence* (1997) Cape Town Juta & Company

Van Wyk, D; Dugard, J; de Villiers, B and Davis, D *Rights and Constitutionalism The new South African Legal Order* (1994) Cape Town Juta & Company

JOURNAL ARTICLES

South Africa:


Herman, J “Various models of criminal proceedings” (1978) South African Journal of Criminal Law and Criminology


Muller, KM and Tait, AM “The child witness and the accused’s right to cross-examination” (1997) TSAR 3


Van der Merwe, SE “The Inquisitorial Procedure and Free System of Evidence in Small Claims Court. An Examination of Principles” (September 1985) De Rebus


Other


Pound, NR “The Administration of Justice in Modern City” (1913) 26 Harvard LR 302-319

Skelton, A “Reforming the Juvenile System in South Africa Policy Law Reform and Parallel Developments” UNAFEI Part two Resource Material Series no 75


www.childjustice.org.za/departmentdocs/Synopsis.doc. Background to the Child Justice Bill
# TABLE OF LEGISLATION

**National Act**
- Children’s Act 38 of 2005
- Child Care Act 74 of 1983
- Child Justice Act 75 of 2008
- Constitution of the Republic of South Africa Act 200 of 1993
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- Criminal Procedure Act 51 of 1977
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- Restitution of Land Rights Act 22 of 1994
- Small Claims Court Act 61 of 1984

**National Bills**
- The Child Justice Bill B49 of 2002
- Summary of draft bill South African Law Commission Project 106

**Law Commission Papers**
- Discussion paper 79 Project 106 on Juvenile Justice
- Discussion Paper 96 Project 37 dated 30 June 2001
- Project 73 Fifth Interim Report on Simplification of Criminal Procedure

**Regulations**
- Draft regulations 28 relating to Child Justice Notice 1159 of 2009
Speeches
Speech by Johann Krieger retired Chief Justice at the International conference in Pretoria 3 October 2003
# TABLE OF CASES

**National**

Klink v Regional Court Magistrate NO and others 1996 3 BCLR 402

M v The State 2005 4 All SA 334 SCA

Minister of Welfare and Population Development v Fitzpatrick 2000 (3) SA 422 (CC)

Prokureur Generaal Vrystaat v Ramokhosi 1997 1 SACR 127

R v Hepworth 1928 Ad 265

S v Basil Simins DCLD 84 88 13 June 1988 unreported

S v Damons 1997 2 SACR 218 WLD 225

S v Dlamini 2000 2 SACR 266 T

S v Dlamini S v Dladla and others S v Joubert v Schietekat 1999 2 SACR 51

S v Dzukuda: S v Tshilo 2004 4 SA 1078 CC

S v Gerbers 1997 2 SACR 583 T

S v Gerbers 1997 2 SACR 601 SCA

S v Makwanyana 1995 (3) SA 391 (CC)

S v Maseko 1996 2 SACR 91 W

S v Namseb 1991 1 SACR 223

S v Ngcobo 1999 3 BCLR 298 N

S v Ntlakoe 1995 1 SACR 629 O

S v Williams 2008 1 SACR 65 C

Sonderup v Tondelli 2001 (1) SA 2001 (CC)

**International**

Regina v Toten 1993 16 CRR 2nd 49 Ontario CA 58
**International Instruments**  
Convention on the Rights of the Child 1989


United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990


**Regional Instrument**  
African Charter on the Rights and Welfare of the Child

**Foreign Sources**

**India**  
Juvenile Justice Act 56 of 2002

**Uganda**  
Children’s Statute Act 6 of 1996