

**THE PROTECTION OF CHILDREN'S IDENTITY IN THE CRIMINAL JUSTICE
SYSTEM: AN ANALYSIS ON SECTION 154(3) OF THE CRIMINAL PROCEDURE
ACT 51 OF 1977**

by

LETSOALO LISBETH LEDILE

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ABSTRACT

The Constitution of the Republic of South Africa, 1996 provides that a child's best interests should be of primary consideration in any matter concerning him or her. Contrary to this value, and thereby excluding protection of child victims, section 154(3) of the Criminal Procedure Act 51 of 1977 simply focusses on anonymity protection of child offenders and witness involved in criminal proceedings. It currently expressly prohibits the publication of the identities of child offenders and witnesses when the media makes publications on the relevant criminal proceedings. However, this protection terminates once such child offenders and witnesses attain majority, therefore arbitrarily stripping them of the identity protection. As a result, media houses are not only at liberty to publish on criminal proceedings identifying child victims, but also to expose the identities of child offenders and witnesses upon attaining majority. Such publications have proved to impede on children's rights, as well as to contribute to the psychological challenges faced by the children whenever they are exposed to the criminal justice system. In this study the constitutional validity of section 154(3) is investigated and it is argued that it is unconstitutional in all respects. The section contradicts the specific right afforded to all children in the Bill of Rights, as well as other ancillary rights, which ought to ensure the progressive realisation of the protection afforded in terms of section 154(3). It is recommended, firstly, that section 154(3) be declared unconstitutional, and be amended to include child victims within the ambit of its protection. Secondly, the protection should extend beyond the age of 18, in respect of all children involved in criminal proceedings.

Key words: anonymity protection; children in criminal proceedings; best interests of the child; victim extension of anonymity; adult extension of anonymity; media and children in court

DECLARATION BY STUDENT

I, **Letsoalo Lisbeth Ledile**, do hereby declare that the dissertation “The protection of children’s identities in the criminal justice system: an analysis on section 154(3) of the Criminal Procedure Act 51 of 1977” submitted at the University of Limpopo is, in its entirety, my own work and has not been submitted by me at this or any other institution, and that all sources that I have made reference to have been duly cited and acknowledged.

LL LETSOALO

DATE

DEDICATION

For my beloved mother, Mrs. Sebolaishi Plantina Letsoalo (20 February 1972 - 19 November 2016), and my father, Mr. Matome Joseph Letsoalo. They have surely paved the way for me. Their sleepless nights have finally paid off, as I would not have achieved this, had it not been for their enduring love, support, guidance and prayers.

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ABBREVIATIONS

ACRWC : African Convention on the Rights and Welfare of the Child

CJA : Child Justice Act

CPA : Criminal Procedure Act

UDHR- : Universal Declaration of Human Rights

UNCAC : United Nations Convention Against Corruption

UNCRC : United Nations Convention on the Rights of the Child

UNICEF : United Nations International Children's' Fund

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CHAPTER 1

INTRODUCTION

1.1 Introduction

At the heart of open justice are the principles of transparency and openness, which the South African constitutional dispensation endeavours to maintain and promote. These principles underscore the well-known maxim that “justice must not only be done, it must be seen to be done”,¹ which highlights a court’s obligation to be transparent to the public.² The principle of open justice thus entitles the media access to courts proceedings and to make reports on matters, thereby, allowing the media to exercise its freedom of expression.³ Freedom of expression may however be limited by a court of law, bearing in mind the constitutional right to information which is accorded to everyone in the Republic of South Africa.⁴

The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution) is supreme law and any law or conduct which is inconsistent with it, is invalid.⁵ This means that any law enacted in the Republic must give proper effect to the Constitution and must therefore play a major role in the advancement of rights contained in the Bill of Rights. Amongst those protected by the Constitution are children, namely, persons below the age of 18.⁶ The Constitution outlines certain rights to which every child is entitled, and amongst those is the provision that a child’s best interests are of paramount importance in every matter concerning the child.⁷

¹This maxim was established in *R v Sussex Justices, Ex Parte McCarthy* [1924] KB 256, [1923] All ER Rep where Lord Hewart CJ held that “it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done”.

² S 152 of the Criminal Procedure Act 51 of 1977 (hereafter referred to as the Criminal Procedure Act) requires criminal matters to be conducted in public.

³ S 16(1) of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution) provides that everyone has the right to freedom of expression, which includes freedom of press and other media.

⁴ S 32 of the Constitution solely provides that everyone has the right to access to information, which information is held by the state or by another person. Such information may be required for the exercise or protection of any rights.

⁵ S 2 of the Constitution.

⁶ Children are protected in terms of s 28 of the Constitution.

⁷ S 28(2) of the Constitution provides that the best interests of the child are of paramount importance in every matter concerning the child.

To give effect to the constitutional rights of children involved in criminal proceedings, several legislations and policies were implemented to prescribe measures and procedures for dealing with children. These include, amongst others, the Child Justice Act 75 of 2008 (hereafter referred to as the Child Justice Act)⁸ which was enacted to provide a direction on how to deal with children in the criminal justice system; and the Service Charter for Victims of Crime in South Africa (hereafter referred to as the Victims Charter) which prescribes directives on how to deal with child witnesses and victims in criminal proceedings.

At cahoots with the principle of open justice is the protection of children's anonymity in the criminal justice system, in as far as section 154(3) of the Criminal Procedure Act 51 of 1977 (hereafter referred to as the Criminal Procedure Act) is concerned. Section 154(3) empowers the court to prohibit publication of children's identities in the media in respect of certain criminal cases where a child below the age of 18 is involved. However, as alluded to below, there has been a gap in as far as the identity protection in the criminal justice system is concerned, as it only explicitly refers to child offenders and witnesses, and is silent on the protection of child victims, as well as, any possible prolonged protection after them reaching the age of 18.⁹

1.2 Background of the study

Legislation which guards and enforces children's rights and liberties is informed by the Constitution and is endorsed by the courts. In this regard the view in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development*¹⁰ was that:

Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. Children merit special protection through legislation that guards and enforces their rights and liberties.¹¹

⁸ This Act gives effect to s 28(2) of the Constitution in that its main objective is to protect the rights of child perpetrators, as provided in the Constitution.

⁹ A 'child' means a person under the age of 18 years in terms of s 1 the Children's Act 28 of 2005.

¹⁰ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development* 2014 (2) 168 (CC).

¹¹ At para 1.

The Child Justice Act and the Criminal Procedure Act provide for these protections.¹² They serve as guidelines, inter alia, in dealing with the protection of children's anonymity in the criminal justice system. Section 154(3) of the Criminal Procedure Act provides for circumstances under which such proceedings may not take place in an open court, with section 63(6) of the Child Justice Act being correlative.¹³ In protecting children's privacy and dignity, and as an exception to the open courts principle, these provisions empower the courts to prohibit publication of information relating to criminal proceedings where such information may reveal the identity of an offender or a witness below the age of 18. Section 154(3) of the Criminal Procedure Act provides that:

No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years, provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.

These children, namely, offenders and witnesses below the age of 18, are given default protection of anonymity, which they lose when they turn 18. In protecting their identity, section 154(3) and section 63(6) give effect to the best interests of the child, which are of paramount importance, and, on the other hand, to their constitutional rights to privacy, dignity and equality.

It is in the courts' discretion to decide whether to allow publication in respect of proceedings, and/or publication of the identification of child witnesses and child offenders concerned in terms of section 154(3). In the absence of such an order and where the media breaches the protection of the children's anonymity, the court may impose any punishment outlined in section 154(5) of the Criminal Procedure Act. It may include a fine or imprisonment for a period of five years where the person concerned is below the age of 18, or either of the two.¹⁴

¹² In terms of s 63(6) of the Child Justice Act and s 154(3) of the Criminal Procedure Act.

¹³ The Child Justice Act provides that s 154(3) of the Criminal Procedure Act applies with the changes required by the context regarding the publication.

¹⁴ S 154(5) of the Criminal Procedure Act. S 1 of the Adjustment of Fines Act 101 of 1991 provides in ss (1) (a) that if any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed

In the case of *Centre for Child Law and Others v Media 24 Limited and Others*¹⁵ (hereafter referred to as *Media 24 (HC)* and/or *Media 24 (SCA)*) the Applicants/Appellants challenged the constitutional validity of section 154(3) of the Criminal Procedure Act. This was based on grounds that the section makes no specific reference to child victims of crimes; that children protected under the section lose all protection once they turn 18;¹⁶ and, it thus fails to protect the best interests of children and other constitutional rights related thereto as will be discussed later in the study.¹⁷ The matter was further appealed to the Supreme Court of Appeal, as well as the Constitutional Court, and judgement is awaited at the time of writing.

1.3 Problem statement

The media, in exercising their right to freedom of expression, may violate the rights of some children involved in criminal proceedings, specifically child victims who are sometimes adversely identified in publications, without their consent. The reason lies in the fact that section 154(3) excludes and thus fails to explicitly protect these most vulnerable individuals. Child victims have to obtain court orders to ensure protection of their identity.¹⁸

Although child offenders and witnesses (where in-camera proceedings are granted), are protected in the said provision, they currently lose this protection upon reaching

maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of s 92 (1) (b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in s 92 (1) (a) of the said Act, where the court is not a court of a regional division.

¹⁵*Centre for Child Law and Others v Media 24 Limited and Others* case no. 23871/15 [2017] ZAGPPHC 313 (11 July 2017) 23871/15 [2017] ZAGPPHC 313 (hereafter referred to as *Media 24 (HC)*) and *Centre for Child Law and Others v Media 24 Limited and Others* (871/2017) [2018] ZASCA 140; 2018 (2) SACR 696 (SCA); [2018] 4 All SA 615 (SCA) (28 September 2018) (hereafter referred to as *Media 24 (SCA)*). See also, the link for the parties' High Court heads of argument at <http://www.mediamonitoringafrica.org/index.php/news/entry/themedia24casecentreforchildlawand4othersvmedia24limitedand/>.

¹⁶ *Media 24 (HC)* at para 3. See chapter 4 for a discussion of the judgements.

¹⁷ *Ibid.*

¹⁸ The Respondents in *Media 24 (HC)* contend that an interdictory relief may be sought to prevent publication of children's identities who are not protected in terms of s 154(3), at para 42.2 of the Respondents' heads of argument (see link at fn 15 above). This was the position in the case of KL. An interim court order to protect her anonymity following various threats of exposing her identity in the media was obtained by the Applicants (see para 38 of the Applicants' heads of argument).

majority and are mostly identified once they turn 18.¹⁹ This therefore brings into question, whether section 154(3) is consistent with the Constitution, with specific reference to provisions such as section 28(2) (their best interest are of paramount importance); section 9 (their right to equality); section 10 (their right to dignity) and section 14 (their right to privacy).

The questions which this research thus aims to answer is how and to what extent all children's identity is protected in criminal proceedings, and to what extent is it in line with the constitutional provisions, as highlighted above.

1.4 Hypothesis

This study will show that the current provisions protecting children's anonymity are not meeting the relevant constitutional standards and that development is necessary in this regard.

1.5 Significance of the study

This study provides an in-depth view on the *Media 24* case,²⁰ which is the first case to challenge the constitutionality of section 154(3). The tension between children's right to the protection of their identity, and the right accorded to the media, specifically the right to freedom of expression, inclusive of the right to freedom of press and other media, are highlighted, and awareness created.

1.6 Aims and objectives

1.6.1 Aim of the study.

The main aim of the study is to produce a research report documenting an analysis of section 154(3) of the Criminal Procedure Act, therefore outlining how and to what extent children's identities are protected in the criminal justice system.

1.6.2 Objectives of the study.

- Main objective:

¹⁹ S 154(3) of the Criminal Procedure Act prohibits publication of identities of child offenders and witnesses below the age of 18. See also *Media 24 (HC)*, para 13.1 of the Applicants' heads of arguments.

²⁰ See fn 15 above. Reference is made to both the High Court decision, and the Supreme Court of Appeal decision.

The main objective of the study is to determine the constitutional validity of section 154(3) as it stands.

- Objectives relevant to the main objective are:
 - To determine prospects which are of significance to the protection of children's identities considering their best interests.
 - To investigate whether section 154(3) should also be applicable in respect of child victims who do not testify in criminal proceedings.
 - To examine whether the anonymity protection applying in respect of children involved in criminal proceedings, should be extended beyond the age of 18.

1.7 Research questions

Research questions to be answered in this study comprise of the following:

- What is the exact protection provided, and possible shortcomings, in the current legal framework for both child victims and offenders in criminal proceedings?
- How is the protection of the identity of children involved in criminal proceedings dealt with in other jurisdictions such as Canada and the United Kingdom?
- What constitutional values may influence re-interpretation or prohibit the reform of the protection afforded?
- What recommendations can be concluded from the study?

1.8 Literature review

Although the media is guaranteed freedom of press in terms of the Constitution,²¹ such freedom of press does not mean that 'the media should be beyond criticism but in a truly free democracy, media institutions should be free to decide how and on what they want to report'.²² The exercise of freedom of press is to some extent determined in the Press Code,²³ which requires the media to take cognisance of children's best interests when dealing with matters concerning them.²⁴

²¹ See fn 3 above.

²² Roets "The harsh reality of press freedom in South Africa". At <https://www.afriforum.co.za/harsh-reality-press-freedom-south-africa/> (accessed on 04/07/2017).

²³ Code of ethics and conduct for South African print and online media (2016) (Hereafter referred to as the Press Code).

²⁴ *Ibid*, s 8.1. This section requires the media, when applying the spirit of s 28(2) of the Constitution, to exercise exceptional care and consideration when reporting about children. It further provides that if there is any chance that coverage might cause harm of any kind to a child, such child shall not be

As it stands, it seems that the media, when dealing with matters concerning children, sometimes portray only a commercial interest, in lieu of what is in the best interests of the child victims, witnesses and child offenders. This is also evident from the media's disregard of court orders prohibiting publications.²⁵ It can be argued that in most cases, if not all, children are the most vulnerable group and as such are worthy of the protection afforded by section 154(3).

1.8.1 Constitutional rights at stake.

Prinsloo recognises that although "some of the rights contained in the Bill of Rights may not be repeated in section 28(2), they are of great importance for such children".²⁶ The rights which he mentions include the right to equality, the right to dignity, the right to bodily and psychological integrity, and the right to individual autonomy, which relates to the right to privacy.²⁷ Failure to protect children's anonymity not only affects their well-being, as alluded to below, but also contradicts several rights accorded to children in the Bill of Rights. The rights affected are as follow:

- The right to equality²⁸ in that the child victims are not placed on equal footing as child offenders and witnesses who are involved in criminal proceedings, therefore denying child victims equal protection and benefit of the law.
- The right to dignity²⁹ in that once the individual child goes through an unfortunate event and is identified in the media, such child may constantly be labelled as a victim of the crime committed or, the child may be given a name resulting from a specific crime committed. There is no dignity in having to carry a stigma of being labelled as a victim of, for example, abuse or as a murderer, in respect of child offenders.³⁰

interviewed, photographed or identified without the consent of the legal guardian or that of a similarly responsible adult and the child (taking into consideration of the evolving capacity of the child), and a public interest is evident.

²⁵ *Media 24 (HC)*, Applicants' heads of argument at paras 40-47.

²⁶ Prinsloo "In the best interests of the child: the protection of child victims and witnesses in the South African criminal justice system" 2008, 9(2) *Child Abuse Research a South African Journal* 49-64, at 58.

²⁷ *Ibid.*

²⁸ S 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Therefore, failure to put all children, including victims, involved in criminal proceedings on equal footing is a violation of s 9(1) of the Constitution.

²⁹ The right to dignity is provided for in terms of s 10 of the Constitution which provides that everyone has inherent dignity and the right to have their dignity respected and protected.

³⁰ See *Media 24 (HC)*, Applicants' heads of argument at para 115-122 for a full discussion in this regard.

- The right to privacy³¹ is affected when the media publishes private facts without the consent of concerned individuals, therefore violating their right to privacy.³²
- The paramount importance of the best interests of the child is affected in that failure to protect the child's anonymity is failure to take into cognisance the best interest of the child.³³ Children's interests are affected when the media publishes particulars which are regarded as personal facts, as they can cause harm to the children.

In line with Canadian jurisprudence,³⁴ a court should, in relation to any proceedings, be able to direct that no report of the proceedings was to reveal the name, address or school, or include any particulars calculated to lead to the identification of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein.³⁵

It is not only children's rights that are affected in the publication debate but the media's right to freedom of expression is also affected as "anonymity protections for children in the criminal justice system do have an impact on freedom of expression and open justice".³⁶ Yet, section 154(3) allows courts to achieve a balance between children's rights, on the one hand, and the rights to freedom of expression and open justice on the other hand.³⁷

These rights and interests must be seen in the context of the state's constitutional duty to respect, protect, promote and fulfil all rights under the Bill of Rights.³⁸ Section 154(3) is an attempt by the state to fulfil its constitutional duties to protect the rights and the best interests of the children. However, it fails to do so for as long as victims are not expressly protected, and the children lose the protection once they turn 18. Such failure enables the media to encroach upon children's rights to privacy, dignity and the paramount importance of the best interests of the child.

³¹ Supra, at para 98- 128.

³² Ibid.

³³ See fn 7 above.

³⁴ See *R (On the application of JC and Another) v Central Criminal Court* 2014 WL 5834009 (neutral citation number: [2014] EWCA Civ 1777), at para 3.

³⁵ See also s 39(1)(a) of the Children and Young Persons Act 1933 (hereafter referred to as Children and Young Persons Act).

³⁶ *Media 24 (HC)*, Applicants' heads of arguments at para 127.

³⁷ Ibid.

³⁸ S 7(2) of the Constitution.

The Constitutional Court in *J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)*³⁹ held that the best interests principle encapsulated the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable it to develop its moral compass.⁴⁰ The best-interests principle secured children’s right to “learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood”.⁴¹

1.8.2 The effect of publishing identifying details of children in criminal proceedings. Identification of children involved in criminal proceedings in the public forum not only violates their constitutional rights, as highlighted above, but further affects their psychological and emotional well-being. While psychologists and authors promote the protection of children’s identity in order to protect their well-being,⁴² media houses in *Media 24* differ. They argue that prohibition would impede on the media’s right to freedom of expression⁴³ and that publicity is essential in the context of criminal proceedings as it would assist in the search for the truth, and further plays a role in informing and educating the public about crime and how it is being prosecuted by the state.⁴⁴ They do, however, concede that it is harmful to identify victims of sexual violence and child abuse.⁴⁵ The media’s arguments suggest that the psychological impact of crime on minor children can be measured by the nature of offences, meaning some offences inflict more harm on children than others.

Despite the undesirable effects that identification causes on children, the New South Wales Standing Committee on Law and Justice (hereafter referred to as the New South Wales Committee) has, on the other hand, established several positive effects of identification. These include, but are not limited to, the fact that identification in the media increases children’s sense of responsibility.⁴⁶ Regardless of such positive effects, the Committee maintains that prohibition on the identification of children is

³⁹ *J v National Director of Public Prosecutions and Another (Childline South Africa and others as amici curiae)* [2014] ZACC 13.

⁴⁰ At para 36.

⁴¹ *Ibid.*

⁴² *Media 24 (HC)*, Applicants’ heads of argument at paras 71-90.

⁴³ *Media 24 (HC)*, Respondents’ heads of argument at para 13.

⁴⁴ At paras 25.1-25.4.

⁴⁵ *Media 24 (HC)*, Applicants’ heads of argument at para 159.

⁴⁶ Legislative Council *The prohibition on the publication of names of children involved in criminal proceedings* (2008) Standing Committee on Law and Justice, at 35.

intended to protect juvenile victims and juvenile offenders.⁴⁷ They support the recovery of the former, and the rehabilitation of the latter.⁴⁸

It is as a result of their vulnerability that child victims and offenders who are identified in various media reports or publications suffer from ‘extensive psychological harm’ and such identification is ‘detrimental for their recovery from trauma and reintegration into society’.⁴⁹ However, at one time it was common place for the media to report on matters affecting children, for example, issues of sexual assault.⁵⁰ Through such publications, the media included in their articles, the names of the victims or the alleged offender or even graphic details of the offence.⁵¹

Prinsloo submits, with particular reference to the sensitivity of these issues, that “the complexity surrounding the prosecution of criminal cases in which young victims or witnesses are involved, especially cases of sexual abuse, often results in the system neglecting the needs and welfare of the child victims and witnesses”.⁵² Although the Centre for Child Law and Prinsloo emphasise the need to enforce the protection of the identity of children in cases of sexual abuse, it is of great importance that the protection not only be afforded to children faced with such issues but further be afforded to every child exposed to any other offence where the revelation of their identities will affect them emotionally and psychologically.

In supporting these viewpoints, Finkelhor and Putnam⁵³ do not specifically implicate publicity as a source of trauma for victims. They rather contend that ‘embarrassment and shame have been established as two sources of trauma for children in the wake of victimisation’ and emphasise that it is when more people know about a particular painful matter that the potential sources of reminders about the trauma, increases.⁵⁴

⁴⁷ Ibid, 47.

⁴⁸ Ibid.

⁴⁹ De Lange “Rights groups, media battle about child anonymity”. At <http://citizen.co.za/news/news-national/1422904/rights-groups-media-battle-about-child-anonymity/> (accessed on 29/03/2017).

⁵⁰ Centre for Child Law (ed) *Justice: For Child Victims and Witnesses of Crimes* (2008), Pretoria University Law Press, at 35.

⁵¹ Ibid.

⁵² Prinsloo “The constitutional right to protection of child victims and witnesses in the South African criminal justice system: *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others*” 2010, 11(1) *Child Abuse Research a South African Journal* 1-10, at 1.

⁵³ Finkelhor and Putnam “Protecting the Privacy of Child Crime Victims” *National center for prosecution of child abuse: Update*, 17(2):1-2.

⁵⁴ Ibid.

They advise that enhancing the privacy of juvenile victims may help minimise the harm of crime victimisation, and increase their willingness to report crimes.⁵⁵

1.8.3 Naming and shaming of children by the media.

Various print and online media articles display disregard for children's dignity and privacy, and it is therefore apparent that there is a need to protect children from adverse exposures by the media. It is articles such as those published by the Daily Sun during 2011 which warrant the need to implement stringent measures to protect the identity of children in criminal proceedings. Daily Sun encroached upon the best interest of children as seen from an article which it published, which article identified two children through naming and photographing them, whom were said to have been dumped by their "evil mum" on some doorstep.⁵⁶ The article labelled and stigmatised the children as 'unwanted'.⁵⁷

A similar, but slightly different situation arose in another article where a parent has given consent to Daily Sun for publication of an article which speaks of a woman's sex life but further provides details of her children.⁵⁸ The question arises as to the significance of the mentioning of the woman's children in enhancing the story published, except for exposure, which may have caused humiliation and emotional damage to her children. It appears that the Daily Sun has a reputation for naming and shaming children below the age of 18, thereby failing to respect the rights of children and to minimise harm, and further failing to uphold the ethical, moral and legal obligations demanded when reporting on children.⁵⁹ Accorded to the media, all these publications were done in the spirit of freedom of expression and freedom of press. Slight regard was given to the need to protect the children, in their best interests.

Watchdog organisations play an important role in monitoring unethical treatment of children in the media. For example, Media Monitoring Africa not only played a

⁵⁵ Ibid.

⁵⁶ The said article was published on the 10th January 2011, at page 10 in the Daily Sun Newspaper. See Hlubi "Evil mum dumps two kids on the doorstep". At <http://www.mediamonitoringafrica.org/images/uploads/DailySun10012011p10.JPG> (accessed on 28/03/2017).

⁵⁷ Ibid.

⁵⁸ This is in a subsequent article which was published in the Daily Sun Newspaper, on the 11th January 2011 at page 4. See Ramotekoa "Haunted by her dead boyfriend". At <http://www.mediamonitoringafrica.org/images/uploads/DailySun11012011p4.JPG> (accessed on 28/03/2017).

⁵⁹ Media Monitoring Africa "Horrorific start to the year for daily sun". At <http://mma-ecm.co.za/horrific-start-to-the-year-for-daily-sun/> (accessed on 28/03/2017).

significant role in exposing the above attitude displayed by Daily Sun publications, but it also raised awareness about the *Media 24* case briefly explaining the parties' main arguments.⁶⁰ Media Monitoring Africa therefore focuses on the fact that section 154(3) of the Criminal Procedure Act is inconsistent with certain constitutional provisions such as section 28(2), section 10, section 14, section 16(1)(a), and the open justice principle. Some of the issues raised by Media Monitoring Africa are in relation to this study as they include examples of personal details or information, which if published, could identify children; the reason why witnesses and offenders are afforded protection in terms of section 154(3); and reasons why it is of great importance to protect child victims.⁶¹

In contrast to the above media articles exposing the identification of children, the BBC Online News campaigned for the need to protect the identity of child offenders.⁶² The article reports that 'child offenders need lifetime anonymity', which recommendation was made by a government-commissioned review in the United Kingdom (in Wales and England). It informs that there are strong considerations for a law that would ban publications identifying young offenders indefinitely.⁶³ Child offenders in England and Wales are granted automatic protection from identification,⁶⁴ and, like in South Africa, they lose such protection when they turn eighteen.

As naming and shaming of children, based on their experiences which are of a criminal nature, may hinder them from moving on, there is a need to ensure that children do not carry the stigma with them. The challenge now comes as to how the restrictions can be extended to apply even once the child turns 18. Media houses argue that the adult extension would then mean that all the absurd bans introduced by the victim extension would now endure forever.⁶⁵ Some writers believe that it is challenging to deal with reporting restrictions afforded to children in cases where they turn 18, and

⁶⁰ See links at fn 15 above.

⁶¹ *Ibid.*

⁶² BBC "Child offenders need lifetime anonymity, says review". At <http://www.bbc.com/news/uk-38457472> (accessed on 28/03/2017).

⁶³ *Ibid.*

⁶⁴ In terms of s 39 and s 49 of the Children and Young Persons Act. See also <https://www.loc.gov/law/help/child-rights/uk.php#t105>.

⁶⁵ *Media 24 (HC)*, Respondents' heads of argument at para 9.1.

argue that “applying the reporting restrictions to persons who are presently over 18 may be too intrusive an inroad into the right to freedom of expression”.⁶⁶

A question then arises as to what happens when a child offender is convicted and attains majority but there is a pending appeal, which question was brought about when DS (a child offender) was sentenced to 20 years in prison for the so-called *Griekwastad* murders turned 18, in 2014.⁶⁷ The extension of the ban would assist in these circumstances in that the child need not go through experiences such as fear of identification as a result of media’s entitlement to expose him.

It would be ideal if the media where to protect children through acting in their best interests and fully abiding by the Press Code when issuing publications. As children are vulnerable beings, South African courts should be stringent in considering section 154(3) orders. All children, including victims, are worthy of full, and automatic protection, which shall continue until such time that an application for publication, based on being just and equitable, is granted by a court. Thereby effect is given to the constitutional provisions protecting children.

It is evident that some challenges exist in this regard, especially if media houses such as GroundUp disregard what best serves children. In an article showing communication between Media Monitoring Africa and GroundUp Media Company, Media Monitoring Africa raised concerns regarding a publication by GroundUp which named and included the face of a child, therefore requesting GroundUp to blur the face of the child and remove his name and other identifying information.⁶⁸ The 10-year-old boy was shot in the mouth by a rubber bullet during protest in Pietermaritzburg.⁶⁹

The matter fell within the provisions of the Criminal Procedure Act as it related to accusation of police brutality, and the child victim was regarded as a witness in the matter. Of great disturbance is GroundUp’s refusal to do so. They averred that it was

⁶⁶ Milo and Scott “Griekwastad convicted of murder turns 18- now may we identify him?”. At <http://blogs.webberwentzel.com/2014/08/griekwastad-convicted-murderer-turns-18-now-may-we-identify-him/> (accessed on 04/042017).

⁶⁷ Ibid.

⁶⁸ GroundUp Staff “GroundUp response to complaint about publishing photo and name of child”. At <http://www.groundup.org.za/article/groundup-response-complaint-about-publishing-photo-and-name-child/> (accessed on 29/0/2017).

⁶⁹ Ngubane “Mother of injured 10-year-old boy lays complaint against police”. At <https://www.groundup.org.za/article/mother-10-year-old-boy-who-was-shot-mouth-lays-complaint-against-police/> (accessed 18/12/2018).

not unethical to have published the child's name and photo on reason that they obtained consent from the mother and that the child, as a victim, was not protected in terms of section 154(3).⁷⁰ Although this study does not intend to dispute the effectiveness of section 154(5) of the Criminal Procedure Act,⁷¹ the above media behaviour brings into question the effectiveness of the said provision, which is meant to deter the media from acting contrary to regulations that bind them.

These comments by the media support the view that the media sometimes places its financial interests above the need to protect children, all in the name of freedom of expression. The argument is not that freedom of expression is less important than the rights of the children, but that due regard to the best interests of the child should be of great importance.

1.8.4 Legislative framework on the protection of children's identities in criminal proceedings.

Subject to the supremacy clause,⁷² laws enacted must give effect to constitutional provisions and promote the advancement of human rights. It is of importance that rights such as the right to equality, privacy, inherent dignity, the best interests of the child, open courts principle and freedom of expression be taken into consideration when making a decision that is likely to cause harm to a child as a result of identification.

Whereas section 152 of the Criminal Procedure Act gives effect to the open justice principle by requiring criminal proceedings to be conducted in public, section 154 provides for exceptions under which proceedings may not take place in public therefore limiting the right to freedom of expression. Section 154(3) provides a default anonymity protection in respect of child offenders and witnesses. This provision can be considered together with the broader framework of the Child Justice Act.⁷³

As the Child Justice Act serves as guidance on how to deal with children in criminal proceedings, in particular, child offenders, section 154(3) can be taken into consideration when dealing with other children, in particular, child witnesses (and

⁷⁰ Fn 68 above.

⁷¹The penalty clause prescribing punishment which may be imposed on the media once they contravene s 154(3) orders.

⁷² S 2 of the Constitution provides that the Constitution is the supreme law and law and conduct which is inconsistent with it is invalid.

⁷³ *Media 24 (HC)*, at para 22 of the Applicants' heads of argument.

victims, if amended) during such proceedings.⁷⁴ This protection may only be lifted with the permission of the court, provided it is just and equitable.⁷⁵ The judicial officer must, whenever he exercises his or her discretion in terms of section 154(3), consider the best interests of the child.⁷⁶ This provision however, expressly excludes child victims from its protection and the children, who are protected, as alluded above, lose such protection once they turn 18.

In light of the freedom of press, the media is at liberty to report on all matters arising from the trial, save those details that reveal the identity of children involved in criminal proceedings.⁷⁷ The prohibition is not absolute or permanent as it only empowers courts, upon application, to permit the publication of identifying information, provided this is just and equitable and in the interest of any particular person.⁷⁸

As mentioned,⁷⁹ in analysing section 154(3), there are various constitutional rights at stake which are afforded to children, versus the right to freedom of expression accorded to the media. These rights influence the legal dispute between various media houses, and those organisations that advance children's rights.

1.8.5 Case law on the media and the protection of children's identities.

The *Media 24* case forms the basis upon which this study is conducted. This case came about following the story of Zephany Nurse, a child victim who was kidnapped after birth and was only found by the biological parents at the age of 17.⁸⁰ The facts of the story were unusual,⁸¹ as such, some members of the media took the position that any protection afforded to KL (as referred to in *Media 24*) would automatically terminate on her 18th birthday.⁸² The court a quo, in interpreting the provisions of section 154(3) held that the section does apply to child victims of crime who are below the age of 18.⁸³ On this basis, the Supreme Court of Appeal held that the constitutional

⁷⁴ See note 13 above.

⁷⁵ S 154(3).

⁷⁶ *S v Phashwane* case no. cc192/07 at para 83 (written submissions of the Centre for Child Law and Childline).

⁷⁷ *Media 24 (HC)*, Applicants' heads of argument at para 15.1.

⁷⁸ At para 15.2.

⁷⁹ See para 1.8.1 above, headed 'Constitutional rights at stake'.

⁸⁰ See fn 14 above.

⁸¹ *Ibid.*

⁸² *Media 24 (HC)*, Applicants' heads of argument at para 6.2.

⁸³ *Media 24 (HC)* at para 70.

challenge to section 154(3), must accordingly succeed, on the basis that it does not extend anonymity protection to victims of crime who are below the age of 18.⁸⁴

KL's identification was protected through a court order prior to, as well as after, the *Media 24* case, yet not all victims were fortunate. These are the likes of Henri Van Breda's sister (referred to as MVB).⁸⁵ She survived his horrific axe-wielding attack in which the whole family was murdered in their home, leaving her with severe injuries.⁸⁶ Although media houses use MVB's case as an example that identification can be beneficial for the victims and their families,⁸⁷ a blind eye should not be turned to the fact that her court-appointed curator rebuts by standing that MVB endured great stress and potential danger due to the media's continued interference in her life.⁸⁸ The continued interference in the lives of children involved in criminal proceedings violates their right to privacy. The court in *NM v Smith*⁸⁹ describes the right to privacy as 'the right to be left alone'⁹⁰ which can be waived when one gives consent to publication.⁹¹ Observations show that it is not only child victims and witnesses who do not testify in court who are identified in media reports. Child offenders are also identified regardless of the protection afforded in terms of section 154(3). This is also seen from the media's breach of the Press Code when they identified a child offender who was charged with the murder of his parents and sister.⁹²

These identifications have effects on children in that they are stigmatised and labelled according to the crimes they have committed. MO was only involved in a car accident at the age of 17, which resulted in the death of a man and two minors.⁹³ Despite there being a court order which prohibited publication, print media proceeded to publish his name which resulted in him being labelled as a 'murderer and a drunkard' in his

⁸⁴ *Media 24 (SCA)* at para 30.

⁸⁵ Singh "How the van Breda murders unfolded". At <http://www.news24.com/SouthAfrica/News/how-the-van-breda-family-murders-unfolded-timeline-20160613> (accessed on 30/06/2017).

⁸⁶ *Media 24 (HC)*, Applicants' heads of argument at para 41.

⁸⁷ At para 62.1.

⁸⁸ At para 42.2.

⁸⁹ *NM v Smith 2007 (5) SA 250 (CC)*.

⁹⁰ At para 32.

⁹¹ *National Media Limited v Jooste* case no. 335/94 15.

⁹² *Media 24 Holdings (Pty) Ltd v Chairman of the Appeals Board of the Press Council of South Africa and Another* [2014] JOL 32209 (GJ), under heading 'Mini summary'.

⁹³ *Media 24 (HC)*, Applicants' heads of argument at para 58.

community. He further received threatening phone calls, text messages and general abusive messages.⁹⁴

From this it is apparent that stringent measures need to be implemented, the restriction should be applicable to all children, and that it should also apply once they turn 18. Although the court's decisions in *Media 24* (HC and SCA) do favour child victims of crime as they are said to be amongst those who are protected, section 154(3) does not expressly mention child victims, which is an issue likely to cause confusion continuously. The courts' dismissal of the extension of the protection after children turn 18 years (that is, the adult extension) is a matter that has been further challenged and is evident from the pending Constitutional Court case.

1.9 Research methodology

This study will make use of a qualitative approach, incorporating the doctrinal method, focussing on various sources of law such as the Constitution of the Republic of South Africa, legislation, case law and international instruments, books, journal articles, media articles and interviews with various officials. A comparative analysis with Canada and the United Kingdom will be conducted, as well as a constitutional analysis.

1.10 Outline of chapters

The study consists of five chapters. Chapter 1 is introductory. It is an overview of the study documented. From it, one is able to grasp the research problem and the sources to be used in solving the problem.

Chapter 2 examines the extent to which children's identities are protected in criminal proceedings. It contains two parts, one that deals with the anonymity protection afforded to child offenders and witnesses, and the other that focuses on anonymity protection afforded to victims, including those who do not testify in court during proceedings.

⁹⁴ At para 60.

Chapter 3 studies lessons from abroad. It outlines a comparative analysis comparing the anonymity protections afforded to children in the Republic and that which is afforded to same in Canada and the United Kingdom.

Chapter 4 provides a detailed analysis of section 154(3), bearing in mind the constitutional values that warrant reinterpretation and those that hinder reinterpretation. The chapter further evaluates the *Media 24* judgements (both HC and SCA) and makes reference to the arguments in the Constitutional Court case (which judgment is pending at the time of writing).

Chapter 5 concludes the study. It draws recommendations that there is a need to protect all children's identities who are involved in criminal proceedings subject to more appropriate exceptions which do not place burdens on children, while allowing children to go through the process of rehabilitation.

CHAPTER 2

THE PROTECTION OF CHILDREN'S IDENTITIES IN CRIMINAL PROCEEDINGS: THE SOUTH AFRICAN POSITION

2.1 Introduction

As briefly alluded to earlier,⁹⁵ everyone has the right to freedom of expression, which includes freedom of the press and other media, as well as to receive and impart information or ideas.⁹⁶ As an exception to these values and rights, also known as the open justice principle, section 154(3) of the Criminal Procedure Act provides anonymity protection to child offenders and child witnesses. Child victims are thus excluded as the section expressly includes only children as offenders and witnesses within the ambit of its protection. The media has therefore been at liberty to publish any information about criminal proceedings, and to identify any child victim who was party to such proceedings, whether they testified in court or not. This was the reason the Centre for Child Law approached the court for an urgent interdict preventing the media from exposing the identifying details of KL (that being Zephany Nurse) as referred to in Chapter 1.⁹⁷

As pointed above,⁹⁸ on the return day of the interdict, coupled with a constitutional challenge, the North Gauteng High Court in the *Media 24* case relied on the interpretation of section 154(3) to include child victims who do not testify during proceedings, within the ambits of its protection. The Supreme Court of Appeal, on the other hand, rejected the High Court's interpretation in a further appeal, but declared section 154(3) constitutionally invalid to the extent that it does not protect children as victims of crime.⁹⁹ The adult extension, similar to the High court decision, was, however, not granted, which would have had the effect of protecting the children's' identities beyond childhood.¹⁰⁰ The matter was taken on a further cross-appeal to the Constitutional Court and the judgment is, at the time of writing, awaited.¹⁰¹

⁹⁵ Chapter 1, para 1.8.

⁹⁶ *Ibid.*

⁹⁷ See fn 18 above.

⁹⁸ See chapter 1 Background.,

⁹⁹ See a detailed discussion of the case below.

¹⁰⁰ *Media 24 (SCA)* at para 103.

¹⁰¹ *Centre for Child Law and Others v Media 24 Limited and Others* CCT Case No: 261/2018

This chapter consists of three parts. The first part provides a detailed examination of anonymity protection provided to child offenders and witnesses, while the second part traces the development in the *Media 24* case(s) regarding protection afforded to child victims in the Republic of South Africa. Thirdly, the position regarding adult extension of children's anonymity is evaluated and the current approach is highlighted as a critical shortcoming in fully meeting the principle of children's best interests in all matters concerning them.

2.2 Anonymity protection afforded to child offenders and witnesses in the South African criminal justice system

2.2.1 Child offenders.

The South African legal framework evidences that when children are involved in criminal proceedings as offenders, courts deal with matters in respect of them in terms of the Child Justice Act. Hence, the applicants in *Centre for Child Law and Others v Media 24 and Others* contended that section 154(3) should be considered together with the broader framework of the Child Justice Act.¹⁰² This means that children accused of committing crimes must be tried in a child justice court in accordance with the procedures set out in the Child Justice Act,¹⁰³ and the relevant provisions of the Criminal Procedure Act. Any court before which such child offender appears, is deemed to be a child justice court.

All offenders, whether young or adult, are also protected by the Constitution when they are involved in criminal proceedings. Section 35(3) of the Constitution provides that every accused person has the right to a fair trial, which includes, amongst others, the right to a public trial before an ordinary court. The above rights of the accused entrench and strengthen the accusatorial features of criminal procedure, for example, confrontation and cross-examination, although none are absolute rights.¹⁰⁴ In *S v Staggie and Another*¹⁰⁵ it was held that the right to a public trial was a fundamental

¹⁰² At para 22.

¹⁰³ See guidelines provided for in terms of Chapter 9 (s 63- 67) of the Child Justice Act.

¹⁰⁴ Schoeman "A Training Program for Intermediaries for the Child Witnesses in South Africa" (2006) LLD dissertation, University of Pretoria, 37-38.

¹⁰⁵ *S v Staggie and Another* 2003 (1) SACR 232 (C).

part of the legal system, but that it did not mean that there were no exceptions to the general rule.¹⁰⁶

Specific provisions in the Criminal Procedure Act provide for a departure from the strict right of confrontation outlined in section 35(3) of the Constitution. These are found particularly in sections 153(1)-(6), 154, 158, and 170A.¹⁰⁷ Of importance is the exception in section 154, which is the focus of this study. The essence of section 154(3) of the Criminal Procedure Act is that anonymity protection is afforded to all children who are involved in criminal proceedings, including offenders, but the courts may permit otherwise if it is just and equitable, and in the interests of justice.¹⁰⁸ The section thus establishes a default position that the publication of information which reveals or may reveal the identities of the child offenders involved in criminal proceedings, is prohibited.¹⁰⁹

Section 154(1) gives the courts the power to direct that information relating to the proceedings or any part thereof held behind closed doors shall not be published in any manner whatever. This is subject to a condition that such a direction by the court shall not prevent the publication of information, which include, amongst others, the name and particulars of the accused, the charge against him, the plea, the verdict and the sentence, unless the court is of the opinion that the publication of any part of such information might defeat the object of its direction under section 154(3).¹¹⁰

The above provision outlines that the court, in prohibiting publication of information relating to in camera proceedings shall not prevent the identification of an accused, the charge against him, the plea, the verdict and the sentence. Effectively, the section requires identifying details of the accused to be published for public knowledge. It speaks of an 'accused', however, it does not make reference to any age restrictions. An inference may be drawn that this provision applies to adult offenders, as section

¹⁰⁶ Le Roux-Kemp "Witness anonymity and the south African criminal justice system" *SACJ* (2010) 3, 361.

¹⁰⁷ *Ibid.* S 153(1) - (6) outlines the circumstances in which criminal proceedings shall not take place in an open court. S 154 provides a prohibition of publication of certain information relating to criminal proceedings. Although s 158 requires criminal proceedings to take place in presence of accused, it further permits a court to order that a witness or an accused give evidence by means of a closed-circuit television or similar electronic media. S 170A gives the courts powers to appoint an intermediary to enable a witness below the age of eighteen to give his or her evidence through the intermediary.

¹⁰⁸ *Media 24 (HC)*, Applicants' heads of argument at para 19.

¹⁰⁹ *Ibid.*, at para 18.

¹¹⁰ S 154(1) of the Criminal Procedure Act.

154(3) provides an exception which prohibits publication of identifying details relating to child offenders. However, this applies in respect of their identifying details, save for details relating to the proceedings.

Courts have made use of this exception, to the extent of determining whether section 154(3) has been contravened, therefore acknowledging that the identity of an accused under the age of 18 may not be made public and particulars from which his or her identity can be inferred, may not be published.¹¹¹ However, if the publication may be to the advantage of a particular person, the judicial officer can allow so much publication as he or she deems fair and equitable.

South African courts have also taken it upon themselves to properly apply section 154(3) in cases where minors are accused of serious offences, such as rape. An example, albeit by implication, is evident in *J v National Director of Public Prosecutions and Another*,¹¹² where the Western Cape High Court, on review, declared section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter referred to as the Sexual Offences Act) constitutionally invalid because it unjustifiably infringes on the rights of child offenders, as it required that the particulars of all sexual offenders to be entered on the National Register for Sex Offenders.

During confirmatory proceedings of the High Court's order of constitutional invalidity in the Constitutional Court, Skweyiya ADCJ, in a unanimous judgement, held that section 50(2) of the Sexual Offences Act infringes on the right of child offenders to have their best interests considered of paramount importance in terms of section 28(2) of the Constitution.¹¹³ The court limited its declaration of constitutional invalidity to child offenders. This is an indication that the anonymity protection extends beyond merely protecting children's identities against media exposures during criminal proceedings. Their particulars cannot be automatically entered in a public national register where a child is convicted of an offence of a sexual nature.

J, as referred to in *J v National Director of Public Prosecutions and Another*, was 14 years old at the time of the commission of the offence.¹¹⁴ The Constitutional Court,

¹¹¹ *S v Citizen Newspaper (Pty) Ltd and Another* 1981 (4) SA 889 (T), at para G to H.

¹¹² *J v National Director of Public Prosecutions* (fn 39 above).

¹¹³ *Ibid*, at para 2 of the Order.

¹¹⁴ Fn 39 above, at para 2 of the judgement.

therefore issued an order to secure the applicant's anonymity as he was a child at the time of the offence and was still a child at the time of the hearing. The court confirmed that no person shall publish any information which reveals, or may reveal, the identity of the applicant.¹¹⁵

Another example is the trial of *S v DD*¹¹⁶ which was also conducted under section 63 of the Child Justice Act read with section 154(3) of the Criminal Procedure Act, because the accused was a minor of 17 years. When the offences were committed by the perpetrator on 6th April 2012, he was 15 years and 8 months old. A probation officer conducted an assessment in terms of section 34 of the Child Justice Act for the purposes set out in the relevant provisions of section 35 of the Act.¹¹⁷ The purpose of the assessment is mainly to establish, amongst others, whether the child may be in need of care or protection in order to refer the child to a children's court in accordance with the Child Justice Act.¹¹⁸ The media applied, and were permitted, unopposed, to report on the proceedings subject to stringent conditions, mainly relating to the non-disclosure of the identity of the minor. Every care was taken to afford the minor a fair hearing.¹¹⁹

The identities of child offenders in the Republic of South Africa have at all costs been protected during trials. The courts have been inflexible in granting section 154(3) orders and the media, being aware of the provisions of section 154(3), have also complied with the orders and the provisions thereof.

2.2.2 Child witnesses.

As highlighted above, section 154(3) protects the identity of witnesses below the age of 18 at criminal proceedings. This is the case even if the child concerned is not a complainant and the child merely witnessed the crime.¹²⁰ Like with child offenders, the court can make it upon its discretion to allow publication in respect of child witnesses,

¹¹⁵ *J v National Director of Public Prosecutions*, at para 3 of the order dated 6 February 2014. Retrieved from <https://collections.concourt.org.za/handle/20.500.12144/3739?show=full> (accessed 30/05/2019).

¹¹⁶ *S v DD* (K/S 46/2012) [2014] ZANCHC 9; 2015 (1) SACR (NCK) (27 March 2014) (hereinafter referred to as *S v DD*).

¹¹⁷ *Ibid*, at para 1. Section 34 deals with the duty of the probation officer to conduct the assessment, while s 35 provides for the purpose of the assessment thereof.

¹¹⁸ S 35(a) of the Child Justice Act.

¹¹⁹ *S v DD*, at para 2.

¹²⁰ *Prinsloo and Another v Bramley Children's Home and Others* 2005 (5) SA 119 (T), at para 25.

provided it is just and equitable. Minor witnesses are protected even from indirect disclosure of their identity.¹²¹

The Victims Charter¹²² echoes the above. It states that a witness's right to protection entails that the court, in certain circumstances, prohibit the publication of any information, including a witness's identity, or order that the trial be held behind closed doors (in camera).¹²³ This echoes the protection afforded in terms of section 153(5) of the Criminal Procedure Act where courts are vested with a discretion to direct that the proceedings, not limited to sexual offence matters, proceed in camera, if a child witness is called to testify in court. The provision is subject to the court's power to allow the presence of those persons who are either necessary for the proceedings or allowed by the court to remain in attendance.¹²⁴ Section 153(5) makes specific reference to child witnesses only, and not child offenders and child victims.

As the right to confront witnesses and complainants is explicitly provided for in the Criminal Procedure Act,¹²⁵ it is required that accused persons should be present at their trial and that such a trial be conducted in an open court.¹²⁶ Some exceptions to this foundational principle of confrontation in the South African criminal justice system have been implemented over time.¹²⁷ Where there is a likelihood that harm may result to a person, other than the accused, who testifies in a criminal matter, the court has the discretion to direct that the witness testifies behind closed doors and that no person shall be present when such evidence is given unless his or her presence is necessary in connection with the proceedings or is authorised by the court.¹²⁸

In addition to giving evidence behind closed doors, a witness may be required to give evidence by means of a closed-circuit television. The public prosecutor may make an application for an order that a witness, if the witness or accused consents thereto, give evidence by means of a close circuit television or similar electronic media and the

¹²¹ *Media 24 Holdings* (fn 92 above), at para 10.

¹²² Department of Justice and Constitutional Development "Minimum Standards on Services for Victims of Crime for Implementing the Service Charter for Victims of Crime in South Africa" (2007) (hereafter referred to as the Victims Charter).

¹²³ *Ibid*, at para 16. See also, Centre for Child Law (fn 50 above), at 34.

¹²⁴ Centre for Child Law (fn 50 above), 35. See also s 153(5) of the Criminal Procedure Act.

¹²⁵ S 158(1) of the Criminal Procedure Act.

¹²⁶ Schoeman (fn 104 above), at 353.

¹²⁷ *Ibid*.

¹²⁸ S 153(2)(a) of the Criminal Procedure Act.

court may make an order to that effect, subject to the provision of section 153 of the Criminal Procedure Act.¹²⁹

The court may also direct that the identity of such a witness shall not be revealed or that it shall not be revealed for a period specified by the court.¹³⁰ Section 153(2) does not, however, make provision for complete witness anonymity in the sense that no person, not even the accused and legal representative in a particular case, shall know the identity of the witness.¹³¹ In the early 1990's it was recognised that the child witness's immaturity required a more specialised approach than that used with adults in the criminal courts.¹³² One innovative procedure which was introduced was the attempt to protect the child from direct confrontation by the accused or his attorney by making use of an intermediary and a closed circuit television whilst the child would sit in another room than the courtroom.¹³³

To further reduce the effects that come as a result of having a child witness testify in a court of law, the Criminal Procedure Act provides that whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4) appoint a competent person as an intermediary in order to enable such witness to give evidence through that intermediary.¹³⁴ As mentioned, these provisions do not mention as to whether the identity of the children involved remains anonymous to the accused and his or her representatives, or to the other persons following the criminal proceedings and the public at large. To remedy such a defect therefore, section 154(3) was enacted to prohibit the publication of any identifying information of a child witness involved in criminal proceedings, therefore excluding such details from the public.

¹²⁹ S 158(2)(a).

¹³⁰ S 153(2)(b) of the Criminal Procedure Act.

¹³¹ Le Roux-Kemp (fn 106 above) above, 353.

¹³² Schoeman (fn 104 above), 35.

¹³³ Ibid.

¹³⁴ S 170A(1).

2.3 Anonymity protection afforded to child victims in the criminal justice system

Being a victim of crime is often devastating and its effect may be long lasting. Frank explains the reason for this as follows:

Crime is a violation: a violation of the self, a desecration of who we are, of what we believe in, of our private space. Crime is devastating because it upsets the fundamental assumptions on which we base our lives; our belief that the world is an orderly, meaningful place, and our belief in personal autonomy.¹³⁵

Despite a criminal act's devastating effects on the child victims involved, the (lack of) anonymity protection afforded to child victims has (sometimes) not been sufficient to ensure that children are protected against the publication of their identifying details in the media and the effects connected therewith. Under this concept, there are two aspects which are discussed. The one aspect deals with child victims who testify in court during the proceedings (those who are regarded as witnesses), and the other deals with child victims who do not testify during the proceedings.

2.3.1 Anonymity protection afforded to child victims who testify during criminal proceedings.

Although child victims who testify during proceedings were not expressly mentioned under the provisions of section 154(3), they were protected by the provision as they are regarded as witnesses when they testify. There are other provisions which protect their identities whenever they testify during court proceedings. Section 154(2) states that, in respect of both section 153(3)¹³⁶ and section 153(3A),¹³⁷ there is an immediate reporting restriction in that no person is entitled to publish any information which might reveal the identity of any complainant in the proceedings, although the presiding judge or judicial officer may authorise the publication of this information if he or she is of the opinion that the publication would be just and equitable.¹³⁸ As this section makes use of the word 'complainant', one should be mindful of the fact that child victims are in

¹³⁵ Frank "Victimisation in South Africa and the Needs of Crime Victims", *Monograph No.137* July 2007. At <https://issafrica.org/chapter-2-victimisation-in-south-africa-and-the-needs-of-crime-victims>.

¹³⁶ In instances where a court, exercising its discretion, closes the courtroom at the request of complainant in a sexual offence or extortion case.

¹³⁷ Which provides that persons whose presence is not necessary during proceedings as outlined in ss3 shall not be admitted in those proceedings where the complainant of a sexual offences gives evidence.

¹³⁸ Milo and Stein *A Practical Guide to Media Law* (2013) LexisNexis South Africa, 87.

most cases complainants. The section provides for anonymity protection to child victims of sexual offences who testify in court as witnesses.¹³⁹

The General Law Amendment Act¹⁴⁰ which regulates civil proceedings, provides a similar regulation in instances where children are involved in court proceedings. Children in civil proceedings are expressly protected regardless of the title under which they appear in court. In lieu of the above, the Act stipulates as follows:

that no person shall publish or make known in any manner the name, address, school, place of employment or any other information likely to reveal the identity of any person under the age of 18 years who is or has been a party to any civil proceedings or a witness in any legal proceedings of whatever nature, unless the judge, magistrate or other officer who presides or presided at such proceedings, after having consulted any parent or guardian, if any, of such person, consents in writing to such publication or making known.¹⁴¹

The Victims Charter,¹⁴² in accordance with the Constitution and other relevant legislation, such as the Criminal Procedure Act and the Child Justice Act, outlines various rights which are accorded to victims of crimes. These rights include, amongst others:

- The right to protection.¹⁴³

¹³⁹ S 153(3) provides that in criminal proceedings relating to a charge that the accused committed or attempted to commit (a) any sexual offence as contemplated in s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; (b) any act for the purpose of furthering the commission of a sexual offence as contemplated in s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or (c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage, the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby. S (3A) on the other hand provides that any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of ss (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person in loco parentis, requests otherwise.

¹⁴⁰ The General Law Amendment Act 68 of 1957 (hereafter referred to as the General Law Amendment Act).

¹⁴¹ S 5(1) of the General Law Amendment Act.

¹⁴² See fn 122 above.

¹⁴³ Ibid. See para 4.5- 4.7 of the Charter.

- The right to assistance if under 18 years of age, where testifying in an open court would cause undue mental stress and suffering. In this instance the prosecutor can apply for an intermediary to be appointed and that the child victim testifies through a closed-circuit television link.¹⁴⁴

On the face of the Charter, these rights are accorded to those child victims who testify during proceedings and are therefore regarded as witnesses. No new rights are created, as the existing provisions of the Criminal Procedure Act are simply highlighted, which promote children's safety and rehabilitation through the use of an intermediary and closed-circuit televisions.

The Courts have also dealt with cases where victims were at the time unable to testify but were potential witnesses. In some cases, the media were permitted to make publications in respect of the proceedings to which children are involved, especially as victims. This was the case with regards to the case of Henri van Breda. In this case the media was cautioned to report carefully in their coverage of the murder trial, therefore refraining from speculation,¹⁴⁵ on the surviving victim in an attempted murder. Therefore, in covering criminal proceedings where an adult offender is involved, there should be consideration of the minors whom are party to such proceedings, as victims of the crime committed.

2.3.2 Anonymity protections afforded to child victims who do not testify during criminal proceedings.

It is apparent from the ongoing battle between officials advancing the rights of children and the media, that the latter has had less regards to the devastating effects that crime has on child victims in respect of whom proceedings are instituted. Prior to the High Court's and Supreme Court of Appeal's decisions in *Centre for Child Law and Others v Media 24 and Others*, the media persisted in publishing crime victims' details, as a result of the lack of child victim protection in as far as their identities are concerned.

Through these publications, the effect of crime tends to have even more demoralising effects on child victims than just a violation of their rights.¹⁴⁶ The media defended these

¹⁴⁴ Para 5.13-5.18 of the Charter.

¹⁴⁵ Qukula "Judge Asks Media to Report Responsibly After van Breda's Lawyer Scolds Paper". At <https://www.capetalk.co.za/articles/253812/judge-asks-media-to-report-responsibly-after-van-breda-s-lawyer-scolds-paper> (accessed on 28/04/2017).

¹⁴⁶ Hansungule "Protecting Child Offenders' Rights: Testing the constitutionality of the National Register for sex offenders" *South African Crime Quarterly* Vol 50 (2015), at 27. It was opined that the harm

publications regarding child victims' identities and their involvement in criminal proceedings on the basis that they were not part of the exception, especially when they are not called to testify. Their argument entailed that section 154(3) made specified provision for anonymity protection for child offenders and witnesses (including those victims who testify during proceeding) involved in criminal proceedings only.¹⁴⁷

They further argued that in terms of section 152 of the Criminal Procedure Act, criminal court proceedings are to be conducted in open court, and emphasised that the exception to the open justice in section 154(3), which affords protection to an accused and a witness, under the age of eighteen, is in relation to those 'taking part in criminal proceedings.'¹⁴⁸ This has, in essence, been the justification for infringements by the media of child victims' privacy and cause of conflicting rights of the media, against those of children.

In order to have their identities protected against publications, child victims who do not testify during proceedings had to obtain a court order interdicting the media from publishing their identities. An example is the case of Zephany Nurse,¹⁴⁹ who had to make an urgent application for an interdict preventing the media from publishing her identifying details, which application was successful and the order is still effective until the finalisation of the case.¹⁵⁰ In February 2015, Zephany Nurse was 'discovered' at the age of 17, after she had been abducted as a baby from the Groote Schuur hospital by the woman she knew for 17 years to be her biological mother.¹⁵¹

Though obtaining a court order (following an application to court) seem a generally feasible way of prohibiting publication of victim identities, there are some problematic instances. For example, where a child victim is incapacitated to seek such an order,

caused by sexual violence, for example, threatens a victim's rights to freedom and security of the person, privacy and dignity in a profound way. Sexual offences have effects that ripple far beyond the horrific immediacy and physicality of the crime. Retrieved from <http://dx.doi.org/10.4314/sacq.v50i1.3>. (accessed on 30/08/2018).

¹⁴⁷ *Media 24 (HC)* Respondents' heads of argument, para 97.

¹⁴⁸ *Media 24 (HC)*, at para 45.

¹⁴⁹ Zephany Nurse was the name given to her by her biological parents at birth, and considered her assumed name, as used in the media (Hamman and Nortje "The Disclosure of Identities of Anonymous Minors Upon the Age of Majority: Clean Slate or Dismissal Fate?" (2016), 13(2), 730-752 Faculty of Law, University of Western Cape, 1. At <http://repository.uwc.ac.za/xmlui/handle/105663145>).

¹⁵⁰ Zephany Nurse is referred to as KL throughout *Media 24* case.

¹⁵¹ Schroeder "How we Found Zephany". At <https://www.iol.co.za/news/how-we-found-zephany-1825048> (accessed on 30/08/2018).

or does not testify in criminal proceedings, the situation proves unfortunate since such child victim is unable to exercise his or her right to access to courts in order to prevent any rights from being violated. This was the position in respect of the case of MVB.¹⁵²

MVB was unable to make an application for an interdict to prevent the media from publishing identifying her details as she was in a coma after a tragic event that she and her family went through.¹⁵³ Shortly after the commission of the crime, the media published details of MVB's school, her name, photographs, and details of institutions where she was receiving treatment.¹⁵⁴ A court order was obtained at a later stage, by her curator, to prevent the media from publishing such information, yet the media continued to identify her without her consent, and that of her curator.¹⁵⁵

Although the Western Cape High Court ruled that the media would be allowed to broadcast the trial live in respect of Van Breda (the accused in the MVB case), the court prohibited the taking of photos of MVB (being the sister to the accused), before, during or after proceedings and that no audio recordings of interactional conversations or negotiations between legal representatives would be allowed to be taken.¹⁵⁶

From the above, it is evident that the practise to require child victims approach the court for an interdict is prejudicial in circumstances where the child victim is unable to approach the court and does not have an interested party who can apply for the interdict on his or her behalf. This is also the case in respect of child victims who do not testify in court. They are not protected by the relevant provisions affording the anonymity protection to child victims who testify during the criminal proceedings. This in turn constitutes a violation of their rights to privacy, dignity, equality, and the best interest of the child standard.

Since child victims are often exposed to the public eye and aggressive reporting by the media, this set the grounds for challenging the constitutional validity of section 154(3), by the Centre for Child Law. The section was challenged for its inconsistency

¹⁵² MVB is a survivor of an axe attack by his brother Henri van Breda which took the lives of their parents and brother in 2015 when she was 16 years old. As a result of the attack, she sustained brain injuries and suffered from retrograde amnesia. At <https://m.news24/SouthAfrica/News/van-breda-judgement-to-be-handed-down-20180521> (accessed 30/08/2018)

¹⁵³ *Media 24 (HC)* See para 40-47 of the Applicants' heads of argument.

¹⁵⁴ *Ibid*, at para 43.

¹⁵⁵ *Ibid*, at para 45.1.

¹⁵⁶ Giovanna "Van Breda Trial: Judge Suspends Order on Live Media Coverage". At <http://ewn.co.za/2017/03/27/breaking-van-breda-judge-suspends-order-on-live-media-coverage> (accessed on 11 November 2017).

with the constitutional principle of ‘best interests of the child standard’ and, for its failure to protect child victims (whether they testify or not) as opposed to child offenders and child witnesses.¹⁵⁷ The Zephany Nurse case, highlighted above, sets the basis for challenging section 154(3) of the Criminal Procedure Act and the interim interdict would only apply until the finalisation of the court case.¹⁵⁸

Both the High Court and the Supreme Court of Appeal judgements recognised the need to include child victims who do not testify under the protection of section 154(3),¹⁵⁹ save for those where there are no criminal proceedings. The Supreme Court of Appeal opined that on this basis, it is likely to be difficult to monitor without the risk of injustice and to strike an appropriate legislative balance.¹⁶⁰ As a result, it is not certain what the position should be where a crime has been committed against a minor but there are no proceedings (or proceedings are not instituted as yet).

An order was made where section 154(3) is deemed to read as follows:

No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused person under the age of 18 years or of a victim or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any person.¹⁶¹

2.4 Anonymity protection in offences of a sexual nature

The one offence in respect of which children are automatically protected from publications of their identities in the media and, in respect of which the anonymity

¹⁵⁷ The Applicants in *Media 24 (HC)* argued the constitutional invalidity of s 154(3) on the grounds of its failure to be in line with the constitutional provision of the best interests of the child standard as provided for in s 28 of the Constitution. Para 3 of the case outlines the relief sought by the Applicants.

¹⁵⁸ *Media 24 (HC)*, at para 6.

¹⁵⁹ In light of the above, it should be noted that the media’s argument that s 154(3) protects only those children who testify in court is disputed by the judges as well as by the Minister of Justice and Correctional Services. The Minister submitted that it was not the intention of the legislature not to provide for the child victims. The Minister further contended that s 154(3), even though not expressly stated, should be interpreted to include the protection of child victims, whether they participate in the relevant criminal proceedings or not. This should be the adopted approach in order to ensure that there is equal protection to children who are affected by a criminal offence.

¹⁶⁰ *Media 24 (SCA)* at para 98.

¹⁶¹ *Media 24 (SCA)*, at para 2.

protection extends beyond the age of 18, is in offences of a sexual nature. The courts and the legislature have adopted a different approach in respect of these offences, as opposed to other offences. Practice has indicated that child witnesses and child victims are afforded this protection whether they testify in court or not.

As highlighted above, child witnesses and child victims (who testify during proceedings) are given an opportunity to present their evidence through intermediaries in terms of section 170A of the Criminal Procedure Act. Courts have applied this provision in numerous sexual offence cases. In the case of *S v Stefaans*,¹⁶² a 16 year-old victim of rape gave evidence through an intermediary because she was afraid of the accused and was able to give evidence with more confidence through the appointed intermediary.¹⁶³ The Constitutional Court reiterated that the object of section 170A (1) of the Criminal Procedure Act is to protect child victims and witnesses from undergoing undue mental stress and suffering that may be caused by testifying in court.¹⁶⁴

The protection above is also subject to the provision of section 153(1) of the Criminal Procedure Act outlined above, as it requires criminal proceedings to take place behind closed doors, in the interests of the security of the State, of good order, of public morals or of the administration of justice. Special provision for parties below the age of 18 involved in sexual offence matters is also made in section 153(3) of the Criminal Procedure Act.¹⁶⁵ Moreover the court may direct that no information relating to such proceedings, or any part thereof, held behind closed doors shall be published in any manner whatsoever.¹⁶⁶

The Sexual Offences Act also requires the National Director of Public Prosecutions to issue and publish directives on the subject of matters which are essential to be provided for. These should then be followed by the prosecuting authority in conducting

¹⁶² *S v Stefaans* 1999(1) SACR 182 (CP).

¹⁶³ Cowling "Criminal Procedure" (1999) 12 SACJ 243, at 259.

¹⁶⁴ *Director of Public Prosecution Transvaal v Minister of Justice* 2009 (4) SA 222 (CC), at para 94.

¹⁶⁵ It is directed that in cases where it is alleged that the accused committed or attempted to commit any offence as contemplated in s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, or any act for the purpose of furthering the commission of such a sexual offence, or extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such a person, compelling the person to render advantage; the court may hold that any person whose presence is not necessary at the proceeding or any person or class of persons mentioned in the request, shall not be present at the proceedings.

¹⁶⁶ *Le Roux-Kemp* (fn 106 above), at 354. See also s 154(1) of the Criminal Procedure Act.

prosecutions of sexual offence cases, in order to achieve objects which have a bearing on complainants in such offences.¹⁶⁷ These include matters pertaining to child witnesses giving evidence through the closed circuit television,¹⁶⁸ the appointment of an intermediary,¹⁶⁹ conducting proceedings in a closed court,¹⁷⁰ and prohibiting publication of the complainant's identity,¹⁷¹ as required by the Criminal Procedure Act.

The identity protection extends to even adult offenders in circumstances where the offender is an adult and the offence in respect of which he or she is charged has been committed against a minor. Such adult protection is necessary if the identification of the adult would lead to the identification of the minor concerned. This is normally the case where the adult offender is closely related to the child victim. This was the position in the case of *H v S*¹⁷² where the South Gauteng High Court acknowledged the case as being one proper to preserve the victim's anonymity.¹⁷³ The court accordingly directed that neither the appellant (referred to as 'H') nor the victim (referred to as 'B' - whom is the stepchild to H) or her family's name may be revealed.¹⁷⁴

Although child victims are protected from adverse exposures when they testify in court, it seems that the protection applies automatically to a child victim who is a witness in criminal proceedings, save for matters of a sexual nature wherein all children's identities are protected. No express provision is made in the Criminal Procedure Act to protect those who do not testify in court. Frank acknowledges that the psychological effects of sexual assault, physical assault, robbery, burglary and kidnapping vary in intensity but share many features.¹⁷⁵ He mentions that although child victims of sexual

¹⁶⁷ S 66(2)(a) requires the National Director of Public Prosecutions, in consultation with the Minister and National Commissioners of South African Police Services and Correctional Services and Directors-General: Health and Social Development, to issue and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offences cases, in order to achieve the objects of this Act as set out in s 2 and in the preamble, particularly those objects which have a bearing on complainants of such offences including circumstances mentioned at fn 158-161 below.

¹⁶⁸ S 66(2)(a)(ii) read with s 158 of the Criminal Procedure Act.

¹⁶⁹ S 66(2)(a)(iii) read with s 170A of the Criminal Procedure Act.

¹⁷⁰ S 66(2)(a)(iv) read with s 153 of the Criminal Procedure Act.

¹⁷¹ S 66(2)(a)(v) read with s 154 of the Criminal Procedure Act.

¹⁷² *H v S* (A400/2012) [2014] ZAGPJHC 214 (16 September 2014).

¹⁷³ At para 1.

¹⁷⁴ At para 2.

¹⁷⁵ Frank (fn 135 above).

assault suffer greater distress than victims of robbery and burglary, the nature of their psychological distress is qualitatively similar.¹⁷⁶

This viewpoint indicates that there is a need to ensure that child victims need to be protected on an equal footing on the ground that the effects of various crimes cannot be measured on the individual children, based on the nature of the offence they are exposed to. A child is a developing being. For them to develop into adulthood they need assistance and protection at all costs. The effects of crime on the children tend to hinder their psychological development as will be discussed in broader detail in chapter four below.

2.5 The adult extension

The legislature has also brought the adult extension to the fore in the Child Justice Act where it extends certain protection to a child above 18 but below 21 years of age. This is borne out in the definition of a 'child' in the Child Justice Act.¹⁷⁷ It reads as follows:

'Child' means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in the terms of Section 4 (2).¹⁷⁸

Section 63(6) of the Child Justice Act provides that section 154(3) of the Criminal Procedure Act applies with the changes required by the context regarding the publication of information. The slight difference is that section 154(3) expressly protects an accused and a witness below the age of 18 during criminal proceedings. The Child Justice Act, on the other hand, applies to someone who is over 18 but below 21 during the criminal proceedings if he or she is below the age of 18 at the time of arrest.¹⁷⁹ The provisions of section 66(2) of the Child Justice Act applies to persons who may be over 18 during the criminal proceedings but was below 18 at the time he or she was (a) handed a written notice; (b) served with summons or (c) arrested; in respect of a particular offence.¹⁸⁰

¹⁷⁶ Ibid.

¹⁷⁷ *Media 24 (HC)*, at para 63.

¹⁷⁸ Ibid. See also s 1 of the Child Justice Act.

¹⁷⁹ As seen from s 154(3) of the Criminal Procedure Act and s 1 of the Child Justice Act under the concept 'child'.

¹⁸⁰ Fn 66 above.

In certain circumstances, the Child Justice Act thus applies to someone who is over 18 but below the age of 21. In reading the Child Justice Act one would conclude that the phrase results in the Act being applied until the completion of proceedings, even if the accused is above the age of 18. This could apply to any appeal in cases where the proceedings were concluded when the child was below the age of 18.¹⁸¹ The position is quite different with victims who turn 18 during proceedings. Some courts have granted interdicts in instances where it is deemed in the interest of the child that he or she be granted anonymity protection beyond the age of 18 where proceedings were not completed.

This was the position in the case of Zephany Nurse, who was over the age of 18 when the proceedings commenced. An interim order prohibiting the media from publishing her identifying details was granted prior to the High Court proceedings in *Centre for Child Law and Other v Media 24 and Others* and declared to be effective until the completion of the court case and any subsequent appeal thereto.¹⁸²

The legislature appears to be specific in its application of the protection afforded only up to the age of eighteen in the Criminal Procedure Act. In certain instances, it has demonstrated in the very same Act, when it sought to widen this protection.¹⁸³ This is apparent in terms of section 153(3) of the Criminal Procedure Act. Although it is not expressly mentioned that the provisions are applicable to children over the age of 18, an inference can be drawn to the effect that this section makes no specific reference to any age restrictions for individuals concerned in matters of a sexual nature. Certain courts have also been prepared to protect the identities of adult victims involved in offences of a sexual nature, whereas they have reached majority at the commencement of proceedings.

An example of such is the case of *NL and Others v Frankel and Others*¹⁸⁴ where the Gauteng Local Division, Johannesburg adjudicated over an application for the declaration of section 18 of the Criminal Procedure Act to be invalid and inconsistent with the Constitution as it bars the right to institute a prosecution for indecent assault

¹⁸¹ Ibid.

¹⁸² Fn 158 above.

¹⁸³ *Media 24 (HC)* at para 63.

¹⁸⁴ *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC) (14 June 2018) (hereafter referred to as *NL and Others v Frankel and Others*).

after the lapse of a period of 20 years after the alleged offence has been committed. The applicants were between the ages of 6 and 15 at the time the alleged offence of indecent assault was committed against them by the respondent,¹⁸⁵ which offences prescribed between 1999 and 2011.¹⁸⁶ The applicants are all over the age of 18 but their identifying details were not published as they were referred to using a pseudonym, during the proceedings.

However, on the media's interpretation of the law, children could be identified as soon as they turned 18, subject to certain limitations,¹⁸⁷ and as long as the offence is not of a sexual nature. According to section 154(3), the media's interpretation of the provision, the North Gauteng High Court and the majority judgement in the Supreme Court of Appeal, these children forfeit the anonymity protection once they turn 18, as also illustrated in cases such as the Griekwastad case (the case of DS) involving a teenager who murdered his family. Although his identity was protected throughout the trial, on his 18th birthday, South African media houses were permitted to identify him, dubbed the "Griekwastad killer".¹⁸⁸

The Star printed a photo of DS sitting in court, above the story headline "This is the boy who raped sister, killed parents".¹⁸⁹ *Beeld* carried a photo of him on the front page with the caption "*Griekwastad: Hier is Don*" while *Volksblad* had the photo and story on its front page.¹⁹⁰ Prior to his 18th birthday, most media reports did not state the family connection to the victims as this would have identified him while he was below the age of 18.¹⁹¹ Though Milo conceded that South African law was unclear on the issue of identifying a child who was the subject of a court case and who turned 18, he nevertheless believed the media were justified in identifying DS.¹⁹²

These publications were made on the basis that 'only' child offenders and witnesses, and not adults, have the right to have their identities protected against media

¹⁸⁵ Ibid, at para 3.

¹⁸⁶ Para 8.

¹⁸⁷ Venter "Leave me Alone, Marli Asks the Media". At <https://www.iol.co.za/news/crime-courts/leave-me-alone-marli-asks-media-2040641> (accessed on 11/11/2017).

¹⁸⁸ News 24 "Meet Don Steenkamp, the Griekwastad killer", <https://www.news24.com/you/Archive/meet-don-steenkamp-the-griekwastad-killer-20170728> (accessed on 07/11/2017).

¹⁸⁹ Media Now Free to Name Griekwastad Killer. At <https://m.news24.com/SouthAfrica/News/Media-now-free-to-name-Griekwastad-killer-20140815> (accessed on 07/11/2017).

¹⁹⁰ Ibid.

¹⁹¹ See fn 188 above.

¹⁹² Fn 66 above.

publications. Another example is the case of *S v Chris Mahlangu and Another*,¹⁹³ wherein the co-accused lost protection of his identity when he turned 18. The accused, PN, was a minor at the time of the commission of the offence and was charged with the murder of Eugene Terre'blanche, together with his adult co-accused. PN was aged 15 at the time of the alleged offence and therefore his trial was conducted in camera, under the provisions of the Child Justice Act.¹⁹⁴

The media brought an application to be allowed access to the trial.¹⁹⁵ The amicus curiae (Media Monitoring Africa) contended that freedom of expression and the vital function that the media fulfil in promoting the public's right to receive information, protecting the principle of open justice and constitutional values of openness, responsiveness and accountability were not the only considerations relevant to an application pursuant to section 63(5).¹⁹⁶ When dealing with children exposed to the criminal justice system, the importance of the best-interest principle cannot be denied.¹⁹⁷ The child's right to privacy, dignity, and a fair trial are equally important. As a result, the court granted an order which permitted limited media access to the trial and further prohibited the members of the news media and members of the Terre'blanche family from publishing information which reveals or may reveal the PN's identity.¹⁹⁸ Judgement was handed down after PN had turned 18 where he was therefore acquitted of murder, but his name and photograph were thereupon published by the media.¹⁹⁹

Subsequent to the court's judgement, the media published PN's name and his photographs in their various newspapers, seemingly on the basis that the automatic protection under section 154(3) of the Criminal Procedure Act had lapsed as he had then turned 18. It was acknowledged that there is no express provision signifying that the identity of a person should be protected after he or she has reached the age of 18,

¹⁹³ *S v Mahlangu and Another* (CC70/2010) [2012] ZAGPJHC 114 (22 May 2012).

¹⁹⁴ In terms of s 63 of the Act.

¹⁹⁵ Skelton and Courtney "The Impact of Children's Rights on Criminal Justice" *SACJ* (2012) 1, 185.

¹⁹⁶ *Ibid.* See also *Media 24 Limited and Others v National Prosecuting Authority and Others In re: S v Mahlangu and Another* (55656/10) [2011] ZAGPPHC 64; 2011 (2) SACR 321 (GNP) (29 April 2011), at para 10. S 63(5) of the Child Justice Act provides that for the exclusion of persons whose presence is not necessary in connection with the proceedings in the child justice courts, unless the presiding officer has granted such person permission to be present.

¹⁹⁷ Hansungule (fn 146 above), at 23.

¹⁹⁸ *Media 24 Limited and Others v National Prosecuting Authority and Others*, at para 31.

¹⁹⁹ *Media 24* (SCA), at para 65.

as the context of section 154(3) stipulated express anonymity protection below the age of 18.

In the absence of such protection, there is little evidence in South Africa on how child offenders have ensured that their identities are protected beyond the age of 18, especially where they fear that media exposures will pose a threat to their livelihood. In respect of such instances, reference to an English case is made as an indication of how some offenders have utilised limited measures available to protect themselves. The case involved two convicted minor offenders, whose identities were changed for fear that the family and friends of the murdered victim could possibly take the law into their own hands and cause harm to the offenders.²⁰⁰ This is an indication that the effects of publishing identifying details should have also been considered, and not just the public's interest. This is premised on the contention that the law protects all individuals, whether they are the general public, offenders, witnesses or victims of crimes.

In other cases, the courts, including the Constitutional court extended the anonymity protection in respect of children beyond the age of 18. This was the case in *Johncom Media Investments v M and Others*.²⁰¹ The High Court in *Centre for Child Law and Others v Media 24 and Others* held that there cannot be open ended protection in favour of children, even in their adulthood.²⁰² The Court was of the view that the extension would violate the rights of other parties and those of the children once they become majors.²⁰³ An example was used of a child who, having been involved in a crime, either as an accused, victim, or witness, wants to highlight awareness of their

²⁰⁰ Hamman and Nortje (fn 149 above), at 9. The case involved two 10-year old children who kidnapped and murdered a two-year old boy in Liverpool. Their identities were protected against media publications. Prior to their release in 2001, a civil case was filed by their legal representative to protect their client's identities. Judge President Butler Sloss issued a lifetime ban forbidding the media from publishing any identifying details upon their release.

²⁰¹ *Johncom Media Investments v M and Others* CCT 08/08. In this case, the Court dealt with the need to balance competing interests arising in the context of a declaration of constitutional invalidity. The court dealt with s 12 of the Divorce Act 70 of 1979 (the Divorce Act) which seeks to protect divorcing parties' rights (and those of their children) to privacy and dignity by prohibiting the publication of any information of the divorce action, including information which emerges during proceedings related to the enforcement or variation of such order. On 11 February 2008, the Johannesburg High Court declared s 12 invalid on the basis that it was inconsistent with the right to freedom of expression enshrined in s 16 of the Constitution. Although the Constitutional Court confirmed the order of constitutional invalidity, it held that "subject to authorisation granted by a court in exceptional circumstances, the publication of the identity of, and any information that may reveal the identity of, any party or child in any divorce proceeding before any court is prohibited".

²⁰² At para 67.

²⁰³ Ibid.

experience with others.²⁰⁴ This was regarded not to be possible, as there would be a prohibition on such publication, should the protection be open ended even into adulthood.

This contention is however disputed on the basis that the adult extension does not bar the child from waiving their right to the anonymity protection. Should the child see the need to speak up and raise awareness, to speak to the media once they have attained the age of majority, they can freely do so. Therefore, this means the anonymity protection can apply automatically, even beyond the age of 18 subject to the following exceptions:

- The child concerned waives the rights to anonymity protection, plus the adult extension.
- The child speaks to the public with the sole purpose of raising awareness.

These exceptions will make it feasible for a child who sees the need to publicly celebrate their recovery from trauma, their rehabilitation and reintegration or just to share their experiences with others, and for the publication of their autobiographies. The above contention is of significance as it relieves the child of financial constraints of having to approach the courts for an order prohibiting the media from publishing their identifying details once they attain majority. This does not however, place a bar on the media from publishing details relating to the commission of offences and the proceedings thereto. It only prohibits the media from publishing the identifying details of the children concerned indefinitely. The media is freely at liberty to publish on the court processes.

In a further appeal, and after extensively considering the effects that come with revealing the identity of children once they attain majority, the Supreme Court of Appeal had different views. In the majority judgement, the Court also refused the adult extension. It was held that the proposed adult extension not only implicates the right to freedom of expression but further implicates the open justice principle.²⁰⁵ The Court held in relevant part that:

It is clear that the adult extension severely restricts the right of the media to impart information and infringes the open justice principle. In the absence of any

²⁰⁴ Ibid.

²⁰⁵ *Media 24 (SCA)* at para 26.

limitation on the nature and extent of the adult extension, the relief sought by the appellants is overbroad and does not strike an appropriate balance between the rights and interests involved. Accordingly, the proposed limitation on the right of the media to impart information is neither reasonable nor justifiable, in terms of s 36 of the Constitution. The constitutional challenge to the provisions of s 154(3) of the CPA on this basis, must accordingly fail.²⁰⁶

However, the Court voiced its sympathy with the adult protection and left the regulation of the issue in the hands of the legislature.²⁰⁷ The minority judgement stands in sharp contrast to the majority judgement on the issue of the adult extension. Willis JA (with Mocumie JA concurring) saw it fit and justifiable to extend the anonymity protection beyond the age of 18. Amongst the reasons provided, in the case of child victims, was that it would be unacceptable for victims to have to bear an onus to obtain an injunction against allowing disclosure.²⁰⁸ They opined that the High Court correctly found that the provision should apply to child victims but wrongly refused to extend the protection beyond the age of 18.²⁰⁹

Though the majority opinion is the current legal stance and is cited as precedence, the minority judgement does not create a binding precedent. It is submitted that the minority opinion should be the preferred view. The reason is that the minority extensively considered the constitutional implications of the adult extension and emphasised the difficulties that result from failure to grant the adult extension. The majority, on the other hand, focused extensively on the right to freedom of expression and the open justice principle, without extensively considering children's rights at play.

2.6 Conclusion

Although the Constitution of the Republic of South Africa gives effect to the open justice principle, exceptions are available where children are involved in criminal proceedings. The Criminal Procedure Act makes express provision for the protection of the identities of child offenders and witnesses, to the exclusion of child victims. In a constitutional challenge, the Supreme Court of Appeal decided,²¹⁰ but it has not yet

²⁰⁶ *Media 24 (SCA)* at para 27.

²⁰⁷ *Media 24 (SCA)* at para 33.

²⁰⁸ *Media 24 (SCA)* at para 84.

²⁰⁹ *Media 24 (SCA)* at para 93.

²¹⁰ *Media 24 (SCA)* at para 34.

being confirmed by the Constitutional Court, section 154(3), that, through the principle of 'reading in', the section should include child victims within the scope of its protection.²¹¹ Awareness of past protection of child victims' anonymity is, however, evident from the protection of the identities of adult offenders in cases where identifying the adult would result in the identification of the child. This often occurs in matters of sexual offences.

In relation to the adult extension, both the High Court and the Supreme Court of Appeal (in the majority opinion), refused to extend the identity protection beyond the age of 18.²¹² The identity protection afforded by section 154(3) is a default protection which the minors forfeit once they attain majority. The refusal to grant the anonymity protection beyond the age of eighteen enables the media to publish details regarding the proceedings alone, however, make use of pseudonym when making reference to the children, but only until they attain majority.

As things stand, child offenders, witnesses and some victims in the Republic of South Africa have their identities protected whenever they are involved in criminal proceedings (which is automatic), which they forfeit upon turning 18. A general victim extension, in line with the *Media 24* (SCA) decision, would be welcomed, in that it protects the children's rights to privacy, dignity, their safety and security, it values the best interested of the child, and their need to develop and lead a happy life once they are subjected to cruel and inhuman behaviours. However, these privileges are limited the moment the turn 18, which serves as a ground for further appeal.

²¹¹ Ibid.

²¹² *Media 24* HC judgement, at paras 67-69 and SCA judgement at para 34.

CHAPTER 3

A COMPARATIVE ANALYSIS ON CHILD ANONYMITY

3.1 Introduction

Some countries have long relaxed their anonymity laws in order to fully advance the international principle of ‘the best interests of the child standard’,²¹³ and other rights afforded to children in accordance with the United Nations Convention on the Rights of the Child (hereafter referred to as the UNCRC). These countries include, amongst others, the United Kingdom and Canada.²¹⁴ South Africa may, in the near future, change its anonymity laws that will overlap with some provisions in these jurisdictions.

This chapter seeks to outline the extent to which anonymity protections in South Africa may be relaxed and conduct a comparative analysis on child anonymity regulations in Canada, and the United Kingdom. Canadian jurisprudence on freedom of expression and open justice is closely aligned with the South African approach and had often been used as a source of guidance by South African courts.²¹⁵ Therefore, selecting this jurisdiction meets the recent caution from the North Gauteng High Court, and the Supreme Court of Appeal in *Centre for Child Law and Others v Media 24 and Others* to avoid a comparison with foreign systems not sharing similar constitutional values.

Commonwealth countries such as Australia, Canada, New Zealand and the United Kingdom of Great Britain and Northern Ireland, all extend protection to children exposed to criminal proceedings, namely witnesses and offenders, as well as victims, without them necessarily being witnesses, but mostly only up to reaching adulthood.²¹⁶ In the United Kingdom, though only under certain conditions, anonymity protection

²¹³ The principle is provided for in terms of Article 3 of the United Nations Convention on the Rights of the Child, 1989 (hereafter referred to as UNCRC). Article 3 of the Convention 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.

²¹⁴ These two countries have been used to provide some light in *Centre for Child Law and Others v Media 24 and Others* on how other countries have dealt with issues of anonymity protection regarding minors.

²¹⁵ *Media 24 (HC)*, at para 129 of the Applicants’ Heads of Arguments. See fn 15 above.

²¹⁶ *Media 24 (SCA)*, at para 37. An interesting recent case from the United Kingdom involving the identity of Britain’s youngest terrorist, who plotted to murder police officers in Australia was ordered to remain a secret for the rest of his life following a high court ruling. See <https://www.theguardian.com/uk-news/2019/jul/29/britains-youngest-terrorists-identity-to-remain-secret> (accessed 09/08/2019).

extends even after the child has attained the age of 18 years. However, this protection may be waived after reaching adulthood by such person consenting to publication, or the court may authorise such publication.²¹⁷ Since this is an area open for development, the South African criminal justice system can possibly borrow from their legal approach in this matter, and therefore the United Kingdom is a highly suitable country for comparison.

3.2 Child anonymity protections in Canada

In Canada, anonymity is understood as ‘not being named or identified or as not having identity connected with certain pieces of information’.²¹⁸ Anonymity thus broadly covers the ‘availability or unavailability of various kinds of information that may be known or identified about persons’.²¹⁹ The Canadian legal framework defines a publication ban as a court order which prohibits anyone from publishing, broadcasting, or sending any information that could identify a victim, witness or other person who participates in the criminal justice system.²²⁰ They are mostly used to protect the fairness and integrity of the case, the privacy and safety of the victim or witness, or the identity of a child or youth.²²¹

3.2.1 Canadian legislative framework regarding child anonymity protection.

Like in the Republic of South Africa, freedom of expression has been recognised by the courts in Canada as a fundamental democratic right, and, as highlighted below, the role of anonymity in facilitating the exercise of this right has not been established.²²² The views of the Supreme Court of Canada on anonymity protections are particularly instructive, and the Supreme Court has provided an extensive analysis on the need for anonymity protections for children of any common law jurisdiction.²²³

In the judicial process, the concealment of identity generally arises during criminal trials,²²⁴ in respect of both minors and adults as will be seen in this discussion.

²¹⁷ Ibid.

²¹⁸ Kerr, Lucock and Steeves *Lessons from the Identity Trial: Anonymity, Privacy and Identity in a Networked Society* (2009) Oxford University Press, at 465.

²¹⁹ Ibid.

²²⁰ Department of Justice “Victims’ Rights in Canada: Publication Bans”, <http://www.justice.gc.ca/eng/cj-jp/victims-victimes/factsheets-fiches/publication.html> (accessed 13/10/2017).

²²¹ Ibid.

²²² Fn 218 above, at 467.

²²³ *Media 24 (HC)*, at para 136.

²²⁴ Fn 218 above, at 471.

Generally, when bans are issued, the person is known under a pseudonym in any publications, as is the position in reported legal decisions.²²⁵ This is also the position in the Republic of South Africa, as seen from the cases of children reported in the media as KL, PN and MVB (as referred to in this study), for purposes of protecting their true identities.

There is no general right to anonymity in Canada. Rather, the law focuses on the circumstances and conditions under which a person's identity may or must be revealed or hidden from view.²²⁶ The general rule is that the identity of the accused is not concealed or subject to publication restrictions.²²⁷ This adheres to the general policy of court openness prevalent in the Canadian criminal justice system.²²⁸ However, there is an exception in instances where minors are involved. The recognition of the inherent vulnerability of children has consistent and deep roots in Canadian law and results in the protection of young people's privacy based on age, not the sensitivity of the particular child.²²⁹

The protection of children's identities in Canada is regulated in terms of the Criminal Code, R.C.S. 1985, c.C-46 (hereafter referred to as the Criminal Code), and the Youth Criminal Justice Act, S.C. 2002, c.1 (hereafter referred to as the Youth Criminal Justice Act). In addition, the Victims Bill of Rights Act, SC 2015, c 13 (hereafter referred to as the Victims Bill of Rights Act),²³⁰ and the Statute of Canada 2015 requires the protection of victims involved in criminal proceedings.

3.2.2 Identity protections afforded to child witnesses and child victims in the Canadian criminal courts.

The strong presumption of open courts, supported by the Charter Protection of Freedom of Press, generally requires the identity of witnesses to be known and subject to publication, but their identities may be concealed for a variety of reasons.²³¹ The Canadian legal framework, like in South Africa, embraces the open justice principle in

²²⁵ Ibid.

²²⁶ See fn 218 above.

²²⁷ See fn 222 above.

²²⁸ Ibid.

²²⁹ *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567. This is provided for in the court's judgement as an introduction.

²³⁰ The main purpose of the Victims Bill of Rights is to adequately protect the privacy of young victims or alleged victims by making publication for victims under the age of 18, mandatory on application to the court.

²³¹ Fn 218 above, at 472.

courts with exceptions, as available in legislation and which will be discussed under this concept. The provision on open justice and its exceptions (thus, anonymity protections) are outlined in section 486 of the Canadian Criminal Code. Proceedings against an accused are required to be held in open court, however, the presiding judge or justice may, on application of the prosecutor, a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings.²³²

The presiding judge or justice may also order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice, or is necessary to prevent injury to international relations or national defense or national security.²³³ Such an order by the court is not necessarily to protect the identity of the witness for his or her own advantage. It merely confirms that the protection of identities extends beyond protecting a witness from imminent or existing harm which may come as a result of publishing his or her identifying details. The protection extends to the protection of national security.

The South African legal framework provides for a similar position. It affords an accused fair trial rights which includes having the trial conducted in public, subject to exceptions which exist for purposes of protecting the offenders, victims and witnesses.²³⁴ As a result, where there is a likelihood that a child concerned will be exposed to some sort of harm if he or she testifies in an open court, the court can order that he or she testify in camera or closed-circuit television.²³⁵

On issues of publishing information relating to proceedings, the Criminal Code affords the courts with the authority to make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.²³⁶ This provision does not make express mention of any age restrictions regarding the victim or witness concerned, and, in contrast to

²³² S 486(1) of the Criminal Code.

²³³ Ibid.

²³⁴ In terms of s 158 of the Criminal Procedure Act.

²³⁵ S 158(2)(a) of the Criminal Procedure Act.

²³⁶ S 486.5 (1) of the Criminal Code.

the South African position,²³⁷ do not apply automatically as such protection needs to be applied for by the prosecutor, a victim or a witness, a judge or justice.

Contrary to the protection afforded to witnesses, Criminal Code, in a separate provision, makes specific reference to age restrictions in respect of child victims' identities who are below the age of 18.²³⁸ The age restriction is thus expressly mentioned only in respect of child victims and not witnesses to criminal proceedings. However, a consideration of the publication ban requires the courts to consider offences in respect of which proceedings are instituted. Section 486.4 (2.1) makes reference to offences under which the court is authorised to impose a publication ban on any information that could identify a victim below the age of 18,²³⁹ therefore suggesting that the publication ban cannot be granted in respect of any other offences except those expressly provided for.

The Canadian Victims Bill of Rights Act requires appropriate authorities to take into consideration the security and privacy of victims in the criminal justice system. It requires the court to adequately protect the privacy of young victims or alleged victims by making publication bans for victims involved in proceedings. The Act provides that every victim has the right to have their privacy considered by the appropriate authorities in the criminal justice system.²⁴⁰ In considering their privacy, the Act further provides that every victim has the right to request their identity be protected if they are a complainant to the offence or a witness in proceedings relating to the offence.²⁴¹ It should be noted that in most cases, complainants are victims and do appear before courts as witnesses.

²³⁷ In South Africa, child victims are required to make an application to court prohibiting the publication of their identities. In *Media 24*, both the HC and the SCA granted the victim extension. However, the position still remains the same, that is, child victims are excluded, unless and until the order is confirmed by the Constitutional Court.

²³⁸ In respect of child witnesses, s 486.31 (1) provides that in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, make an order directing that any information that could identify the witness not be disclosed in the course of the proceedings if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice. On the other hand, s 486.4(2) (2.1) provides that if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

²³⁹ These offences include sexual offences as provided for in the Criminal Code.

²⁴⁰ S 11 of the Canadian Victims Bill of Rights.

²⁴¹ S 12.

In some cases, Canadian courts have been prepared to protect the identities of young victims involved in proceedings subject to a condition that there is proof of existing or imminent harm. This was the situation in the case of a 15-year old girl who found out that someone had posted a fake Facebook profile using her picture, a slightly modified version of her name, and other particulars identifying her.²⁴² The picture was accompanied by unflattering commentary about the girl's appearance along with sexually explicit references.²⁴³ As part of her application, she asked for permission to anonymously seek the identity of the creator of the profile and for a publication ban on the contents of the profile.²⁴⁴

Although the court of Appeal granted an order requiring the defendant to disclose the information about the publisher of the fake Facebook account,²⁴⁵ it upheld the decision to refuse the girl anonymity and the publication ban primarily on the ground that the girl had not discharged the onus of showing that there was evidence of harm to her which justified restricting access to the media.²⁴⁶ This indicates that courts have a discretion to grant or refuse a prohibition order on a number of sound reasons. In this case, the victim had to prove imminent or existing harm in order to be granted the anonymity protection, and she failed to do so.

However, her identity is protected through her right to proceed anonymously as the Appeal court allowed the appeal in part to permit A.B to proceed anonymously in her application, for an order requiring the defendant to disclose the identity of the Facebook account users.²⁴⁷ Her identity was also protected throughout the case through the use of a pseudonym, and not her real name. One of the significances of the publication ban is to protect a child victim's privacy and thereby ensure future victims will come forward with assurance of anonymity.²⁴⁸ In *R v Canadian Broadcasting Corporation*²⁴⁹ the accused was charged with the first-degree murder of the minor (D.H). The Crown Court requested a publication ban and a judge ordered a

²⁴² *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567.

²⁴³ *Ibid*, at para 1.

²⁴⁴ Para 3.

²⁴⁵ Para 5.

²⁴⁶ Supreme Court Judgements: *A.B v Bragg Communications Inc.*-SCC Cases (Lexum), at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10007/index.do> (accessed 10/08/2017).

²⁴⁷ Para 31.

²⁴⁸ Shireen "Balancing Freedom of Expression and the Privacy of Child Victims" <https://ablawg.ca/2016/05/31/balancing-freedom-of-expression-and-the-privacy-of-child-victims/> (accessed on 13/12/2017).

²⁴⁹ *R v Canadian Broadcasting Corporation*, 2016 ABQB 204 (CanLII).

mandatory ban under section 486.4(2) (2.2) of the Criminal Code.²⁵⁰ This type of order means there is a prohibition on ‘the publication, broadcast, or transmission in any way, of information that could identify the victim’.²⁵¹

3.2.2.1 Canadian anonymity protections afforded to children in offences of a sexual nature.

Although the protection of children’s identities is of outmost importance when they are involved in criminal proceedings, the one offence in which most countries’ legislation provide for automatic protection which extends beyond 18, to which adults are also entitled, is the offences of a sexual nature. Like in South Africa, child victims’ identities are protected in cases of a sexual nature in Canada.²⁵²

The Canadian courts have recognised, in the context of sexual assaults, that protecting a victim’s privacy encourages reporting. Some of the issues at display in the *R v Canadian Broadcasting Corporation* case related to two articles which pre-existed the publication ban and identified the victim by name and photographs, which remained on the CBC Edmonton website. The Attorney-General made an application to seek criminal contempt of court by the CBC for breaching the publication ban. CBC challenged the constitutionality of section 486.4 (2.2).²⁵³

The court decided that the offences specified in section 486.4 of the Criminal Code are offences of a sexual nature.²⁵⁴ Under this section the court has the authority to impose a publication ban on any information that could identify a victim under the age of 18. This protection is not only given to young persons victimised or allegedly victimised by a sexual offence but extends also to those victimised by other offences such as assault.²⁵⁵ The Crown, however, reasoned for publication bans from the perspective of harm to the administration of justice rather than the victim’s privacy, hence it found that harm to freedom of expression outweighed any harm to the

²⁵⁰ S 486.4(2) (2.2) makes it mandatory for the presiding judge or justice shall, where the victim is under the age of 18, as soon as feasible, inform the victim of their right to make an application for the order prohibiting publication and if such application is made by the victim or the prosecutor, make the order.

²⁵¹ *R v Canadian Broadcasting Corporation*, at para 2.

²⁵² In terms of s 486.4(1) of the Criminal Code.

²⁵³ S 486.4(2.2) makes it mandatory for the court or judge to make an order, on application, which prohibits the publication of identifying details of a victim below the age of 18, where the victim is involved in an offence other than that which is mentioned in ss (1).

²⁵⁴ *R v Canadian Broadcasting Corporation*, at para 37.

²⁵⁵ Para 39.

administration of justice.²⁵⁶ A proper consideration of the administration of justice would entail that the courts conduct a proper balancing of the rights afforded to the media and those afforded to children involved in criminal proceedings. Therefore, the Crown's decision does not consider the victim's rights and wellbeing. Had the Crown considered the victim's rights and wellbeing, it would have given a decision that, in all circumstances, constitute a justifiable limitation to freedom of expression, therefore protecting the identities of child victims.

Some courts, in adjudicating over anonymity protection matters in criminal proceedings, have viewed publication bans as having less effect on the open justice principle and the right to freedom of expression, hence the automatic anonymity protection which extends beyond 18 in offences of a sexual nature. In *Canadian Newspapers Co v Canada (Attorney-General)*²⁵⁷ the Canadian Supreme Court upheld a ban on the publication of the identities of victims of sexual offences, upholding that anonymity protections impose minimal restraints on media freedom and open justice.²⁵⁸ This decision encourages a justified limitation on freedom of expression and the consideration of rights afforded to child victims.

In considering a publication ban, several factors need to be taken into account to ensure proper administration. This includes, the right to a fair and public hearing²⁵⁹ (as is one of the constitutional rights afforded to an accused in the Republic of South Africa, whether young, or adult). Other factors include those which can help prevent or minimise harm that may be caused by the publication, such as whether there is a real and substantial harm if their identity were disclosed, as one of the impacts of publication; and whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation.²⁶⁰ Criminal Code provides for more factors in terms of section 486, 31 (3).²⁶¹

²⁵⁶ Para 66.

²⁵⁷ *Canadian Newspapers Co v Canada (Attorney-General)* [1988] 2 SCR 122.

²⁵⁸ The Court emphasised that nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public. See para 133 of the case.

²⁵⁹ S 486.31(3)(a) of the Criminal Code.

²⁶⁰ Nova Scotia Public Prosecution Service "Publication Bans Practice Note" (2015), at 2.

²⁶¹ In terms of s 486.31(3) of the Criminal Code. These factors include (a) the right to a fair and public hearing; (b) the nature of the offence; (c) whether the witness needs the order for their security or to protect them from intimidation or retaliation; (d) whether the order is needed to protect the security of anyone known to the witness; (e) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is

The Criminal Code provides for two types of publication bans, that is, an automatic and mandatory publication ban. With regards to mandatory publication bans, any complainant, victim or witness must be notified of their right to make an application for an order, and if requested by the complainant, prosecutor or witness under 18 years of age, the Criminal Code requires that the judge ‘must’ make such an order.²⁶² The automatic publication ban applies in instances which relate to evidence of the victim’s sexual activity,²⁶³ the fact of or details of a confession from the preliminary inquiry,²⁶⁴ and any information that was presented in court without the jury present.²⁶⁵

From Canadian laws, it is apparent that the children need to make the application to court themselves for an order prohibiting the publication of their identities. This was what the Respondents in *Centre for Child Law and Others v Media 24 and Others* prefer that it be the case with regards to child victims. Apparent, as alluded before, is an application made by MVB, and her curator for an interdict to prevent the media from publishing identifying details about her. This is also the position with KL (Zephany Nurse). The Appellants in *Media 24* require a change in this regard, that is, an automatic anonymity protection for all children, including child victims.

The Canadian Victims Bill of Rights gives every child victim the right to have their privacy taken into account by authorities in the criminal justice system²⁶⁶ and to ask that their identity be protected.²⁶⁷ At the same time Canadian courts embrace the open court principle and the names of all witnesses, victims, and accused persons are made public. However, exceptions are apparent where the courts order publication bans to protect victims, witnesses and justice system participants. The word ‘ask’ as used above indicates that there is an application that has to be made to court, by the child concerned.

acting or will be acting covertly under the direction of a peace officer; (e.1) whether the order is needed to protect the witness’s identity if they have had, have or will have responsibilities relating to national security or intelligence; (f) society’s interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; (g) the importance of the witness’ testimony to the case; (h) whether effective alternatives to the making of the proposed order are available in the circumstances; (i) the salutary and deleterious effects of the proposed order; and (j) any other factor that the judge or justice considers relevant.

²⁶² In terms of s 486.4(2).

²⁶³ S 276.3.

²⁶⁴ S 542(2).

²⁶⁵ S 648.

²⁶⁶ S 11 of the Canadian Victims Bill of Rights.

²⁶⁷ S 12 of the Canadian Victims Bill of Rights.

The Criminal Code sets out the steps for requesting a discretionary publication ban. These are that the concerned child victim, witness, justice system participant or the prosecutor must ask for such an order, provide reasons as to why the ban is required, which will take place before the judge hearing the case.²⁶⁸ Persons who may be affected by such a ban must be informed of the application, with the result that the court may hold a hearing to consider the request or application.²⁶⁹

Although by being granted anonymity protection, children are privileged to have their rights protected from infringement, in Canada such prohibition order also places a responsibility on children concerned. The court order or a ban has the effect that their names cannot be reported in the news, with the responsibility that such children cannot communicate with the media in any other way. For example, a victim cannot write a letter to the editor which identifies him or her as a victim or witness to the offence.²⁷⁰

3.2.3 Identity protections afforded to child offenders in the Canadian criminal justice system.

From the reading of the anonymity protections afforded in terms of the Criminal Code and the Canadian Victims Bill of Rights, discussed above, these anonymity protections are mainly afforded to child witnesses and child victims. The provisions do not provide any protection in respect of child offenders. Child offenders' right to have their anonymity protected in criminal proceedings is, however, provided for in terms of the Youth Criminal Justice Act.

The Act prohibits the publication of the name or any other information related to a young person accused of a crime.²⁷¹ Like every other general rule, there are exceptions which include treating the accused as an adult for the purposes of the Act, disclosure of identity for the purposes of the administration of justice, disclosure of identity when required to apprehend the young person or if the young person is a

²⁶⁸ S 486.5(1) and (2). S 486.5(4) requires such application to be made in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place.

²⁶⁹ S 486.5(4)(b) requires that a notice of the application be provided to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

²⁷⁰ See fn 220 above.

²⁷¹ S 110 (1) of the Youth Criminal Justice Act provides that subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

danger to others, and at the request of the person to whom the disclosure prohibition applies.²⁷²

The conduct of criminal proceedings in respect of child offenders had also been dealt with in terms of the Young Offenders Act²⁷³ which was repealed by the Youth Criminal Justice Act in 2003. The courts have been vigilant in balancing the rights of the children and those of the public (access to information, and the media's rights to report on information that may be of public interest). It is an important constitutional rule that the courts be open to the public and that their proceedings be accessible to all those who may have an interest.²⁷⁴ To this principle there are a number of exceptions where confidentiality outweighs the public interest in openness, which balance is dealt with explicitly in the disclosure provisions of the *Young Offenders Act*.²⁷⁵

The Parliament in Canada has recognised that a young person, once stigmatised as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy.²⁷⁶ In the long run, society is best protected by preventing recurrence and maximizing the chances of rehabilitation for young offenders. At the same time, the scheme of the Act does not attempt to achieve rehabilitation of the offender at the expense of public safety.²⁷⁷

3.2.4 The adult extension.

The Canadian legislative framework does not make any express reference to the extension of the anonymity protection beyond the age of 18. The assumption is that the adult extension is not permitted, unless in offences of a sexual nature. This is the case in South Africa as both the High Court and the Supreme Court of Appeal in *Centre for Child Law and Others v Media 24 and Others* did not grant the adult extension.²⁷⁸ The Criminal Code, the Victims Bill of Rights and the Youth Criminal Justice Act make express provision that victims, witness and offenders' identities are protected against

²⁷² Kerr, Lucock and Steeves (fn 218 above), at 472.

²⁷³ Young Offenders Act (R.C.S., 1985, C. Y-1).

²⁷⁴ *F.N. (Re)*, [2000] 1 S.C.R. 880.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ The North Gauteng High Court refused the adult extension on the view that the adult extension does not apply in the Republic of South Africa and is not required by the Constitution. See para 69 of the High Court Judgement. The Supreme Court of Appeal, on the other hand, rejected the adult extension in the majority judgement.

media publications provided they are below the age of 18. This issue is currently enrolled for a constitutional hearing in South Africa.

3.3 Child anonymity protections in the United Kingdom

In the United Kingdom, all children are afforded anonymity protection during criminal proceedings. This is similar to South Africa although the contested legislation did not expressly provide for the category of child victims. The United Kingdom prosecutors are given the responsibility to assist children in seeking reporting restrictions where automatic reporting restrictions do not arise, however, this can only be done when the public interest and the right to receive and impart information is outweighed by the rights of the victims, witnesses or defendants.²⁷⁹

The above indicates that there are instances under which automatic restrictions arise. These include restricting the reporting of the identity of a young defendant who is being tried in an open court only because he is jointly charged with an adult; or where the young witness fears that public identification will threaten their safety.²⁸⁰ Such protection is also required where there is or there is likely to be a real and substantial risk to a person's life, or personal wellbeing.

3.3.1 United Kingdom's legislative framework on child anonymity protection.

The United Kingdom has agreed to abide by a number of international treaties designed to protect human rights, which treaties are taken into account when applying domestic law.²⁸¹ The UNCRC states that, inclusive of the right to privacy,²⁸² the best interests of the child should always be a primary consideration when decisions are being made.²⁸³ These rights are not conditional on good behaviour, the purpose being that children involved in the criminal justice system are entitled to be treated with dignity and in a way that promotes their rehabilitation, and to have their privacy fully respected at all stages of the proceedings.²⁸⁴

²⁷⁹ The Crown Prosecution Service "Reporting Restrictions- Children and Young People as Victims, Witnesses and Defendants", at <https://www.cps.gov.uk/legal-guidance/reporting-restrictions-children-and-young-people-victims-witnesses-and-defendants> (accessed on 10/10/2017).

²⁸⁰ Ibid.

²⁸¹ Hart "What is a name? The identification of children in trouble with the law" Standing Committee for Youth Justice, at 7.

²⁸² The right to privacy is provided for in terms of Article 16 of the UNCRC.

²⁸³ The best-interest principle is provided for in terms of Article 3 of the UNCRC.

²⁸⁴ See fn 281 above.

The starting point is that the administration of justice should occur in public so that justice is seen to be done. The principal exception to the open justice principle relates to youth court proceedings, which by statute, are not open to the public.²⁸⁵ Child identity protection in the United Kingdom is regulated by the Children and Young Persons Act 1933 (hereafter referred to as the Children and Young Persons Act), and the Youth Justice and Criminal Evidence Act 1999 (hereafter referred to as the Youth Justice and Criminal Evidence Act).

Section 39 of the Children and Young Persons Act gives the courts power to prohibit publication of certain matters in newspaper reports. It provides that in relation to any proceedings in any court, the court may direct that no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein.²⁸⁶

It further prohibits the publication of a picture of any child or young person concerned in proceedings, unless the publication of such a picture is permitted by the court.²⁸⁷ Section 39 does not indicate whether such protection is afforded in criminal proceedings or civil proceedings, or whether it applies to child offenders, victims, or witnesses. The adopted view can be that the section can be applied in any proceedings to which the child is involved in, and the use of the words 'any child or young person' in the section indicates protection for all children irrespective of the classification under which they appear in court. Being a child would normally be a sound reason to restrict publication by imposing a section 39 order, and only in exceptional circumstances may it be necessary to name the child.²⁸⁸

Section 49 of the Children and Young Persons Act, like section 39 above, places an automatic restriction on reporting information that identifies or is likely to identify any child or young person under the age of 18 who is concerned in court proceedings.²⁸⁹ The Act defines a child or young person as a 'person against or in respect of whom

²⁸⁵ See fn 279 above.

²⁸⁶ S 39 (1)(a) of the Children and Young Persons Act 1933 (hereafter referred to as the Children and Young Persons Act).

²⁸⁷ S 39(1)(b) of the Child and Young Persons Act.

²⁸⁸ Vince "Reporting Restrictions in The Criminal Courts" Devon Chambers (2014), at 2.

²⁸⁹ S 49(1)(a) and (b).

the proceeding are conducted, or a witness to such proceedings'.²⁹⁰ This protection extends to the publication of identifying details or of pictures of the child concerned.²⁹¹

The proceedings in respect of which such publication ban applies relate to proceedings in the youth court;²⁹² proceedings on appeal from a youth court;²⁹³ proceedings in a magistrates' court under Schedule 2 to the Criminal Justice and Immigration Act 2008 (proceedings for breach, revocation or amendment of youth rehabilitation orders);²⁹⁴ and proceedings in a magistrates' court arising out of any proceedings mentioned in section 49(2)(c).²⁹⁵

The courts in the United Kingdom are entitled to lift this ban subject to a number of circumstances which include taking into consideration whether lifting the ban will avoid injustice to the child; whether it will assist with finding a child defendant who is at large, if they are charged with serious violent or sexual offence; whether the child has been convicted of and, after considering representations, the court considers it to be in the public interest.²⁹⁶

The power to grant a restriction order where automatic restriction does not apply is discretionary and courts are expected to give reasons for imposing such an order.²⁹⁷ In considering granting a restriction order, courts are prohibited from granting an automatic order where children involved are given an Anti-Social Behaviour Order.²⁹⁸ Whichever court is involved, there is never an automatic ban on naming children given such an order.

Besides relying on the Children and Young Persons Act, the courts have other ways in which the identity of children in criminal proceedings can be protected. The most important is the power of the high court to grant injunctions or reporting restrictions orders in order to protect the rights of children or incapacitated adults under

²⁹⁰ S 49(4).

²⁹¹ Fn 279 above.

²⁹² S 49(2)(a).

²⁹³ S 49(2)(b).

²⁹⁴ S 49(2)(c).

²⁹⁵ S 49(2)(d).

²⁹⁶ Hart (fn 281 above), at 8.

²⁹⁷ Ibid.

²⁹⁸ Ibid. This is an order to protect the public from behaviour that causes or is likely to cause harassment, alarm or distress. The order contains conditions which prohibit an individual from carrying out specific anti-social acts or, for example, from entering defined areas. CPS 'Anti-social Behaviour Orders on Conviction'. See <https://www.cps.gov.uk/legal-guidance/anti-social-behaviour-orders-conviction-asbos> (accessed on 30/03/2018).

international conventions, such as the European Convention on Human Rights.²⁹⁹ Applications are likely to be made in complex cases, such as those where a parent is facing child abuse charges and there is a wish to protect the children's identity.³⁰⁰

3.3.2 Anonymity protection afforded to child offenders in criminal proceedings.

Courts in the United Kingdom have also been prepared to apply the provisions of the Children and Young Persons Act in respect of child offenders in criminal proceedings. Two particular child offenders, that is, JC and RT, both 17 years of age at the time, appeared in a criminal court and pleaded guilty for an offence of joint possession of an explosive substance.³⁰¹ A third defendant (also 17 years old) admitted similar offence but faced more serious charges including charges under the Terrorism Act.³⁰² All 3 children had the benefit of an order under section 39 of the Children and Young Persons Act which restricts the media from reporting the name, address, school or other identifying information that could identify the children.³⁰³

Although child offenders' identities are protected against publication, the court can dispense with certain information relating to the proceedings, under the guidelines provided for in the Children and Young Persons Act. The courts are empowered, by order, to dispense to any specific extent with requirements of section 49(5) in relation to a child or young person who is concerned in the proceedings if it is satisfied that it is appropriate to do so to avoid injustice to the child,³⁰⁴ and if it is necessary to dispense with those requirements for the purpose of apprehending him and bringing him before a court or returning him to the place in which he was in custody.³⁰⁵

This section applies to any child or young person who is charged with or has been convicted of a violent offence, a sexual offence, or an offence punishable in the case of a person aged 21 or over with imprisonment for fourteen or more years.³⁰⁶ Where the child or young offender is not being tried in the youth court, that is where he is jointly charged with an adult and it is in the interests of justice for them to be tried

²⁹⁹ Ibid.

³⁰⁰ Hart (fn 281 above), at 9.

³⁰¹ *JC and Another v the Central Criminal Court* [2014] EWHC 1041 (QB) (08 April 2014), at para 1.

³⁰² Para 2.

³⁰³ Ibid.

³⁰⁴ S 49(5)(a).

³⁰⁵ S 49(5)(b).

³⁰⁶ S 49(6).

together, prosecutors should seek or not oppose a reporting restriction before conviction.³⁰⁷

This is also the position in the Republic of South Africa. Where a child below the age of 18 is charged with an adult as a co-accused, the court can make use of section 154(3) of the Criminal Procedure Act in respect of the child, resulting in the protection of their identity. On the other hand, the identifying details of the adult co-accused may be made available to the public. This is evident from the case of *S v Chris Mahlangu and Another*,³⁰⁸ where a minor, referred to as PN as his pseudonym, was charged with an adult co-accused. The court protected the identity of the minor against media publications.

Should the court decide, on the other hand, to impose or lift a restriction already approved, the case of *R v Winchester CC ex p B*³⁰⁹ identifies a number of principles which need to be taken into consideration when making such a decision. These include the good reasons for naming the defendant together with his age, and the potential damage that is likely to be experienced by any other person.³¹⁰ In such circumstances, the court must have due regard to the welfare of the child or young persons as required by section 44 of the Children and Young Persons Act.³¹¹

The Magistrates' Association in the United Kingdom suggests that the lifting of the automatic reporting restrictions should be considered where a child has been a persistent offender and it is in the public interest to do so, and that such powers to dispense with anonymity should be exercised with caution as identification may conflict with the welfare of the child or young person.³¹² However, this should not be seen as an additional punishment.³¹³

Hart provides that a major loophole in the United Kingdom legislation is that the rules about anonymity only apply once the case gets to court and that there were provisions to change this within the Youth Justice and Criminal Evidence Act, which provisions have not been implemented.³¹⁴ Child offenders also receive the anonymity protection

³⁰⁷ Fn 279 above.

³⁰⁸ Fn 193 above.

³⁰⁹ Fn 279 above. See further, *R v Winchester CC ex p B* [2000] 1 Cr. App. R. 11.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² Judicial College *Youth Court Bench Book* (2013) Youth Justice Legal Centre, at 9.

³¹³ Judicial College, at 10.

³¹⁴ Hart (fn 281 above), at 10.

in terms of the Youth Justice and Criminal Evidence Act. Once the provisions were implemented, identities of child offenders have in fact been protected before (during investigations) and during the criminal proceedings in terms of section 44 and section 45 of the Act.

Section 44 of the Act provides that no matter relating to any person involved in the offence shall, while he is under the age of 18, be included in any publication if it is likely to lead members of the public to identify him as a person involved in the offence.³¹⁵ This section applies in respect of a criminal investigation³¹⁶ and ceases to apply once the proceedings in court, in respect of such offence, have commenced.³¹⁷ From the reading of the section, “any person involved in the offence” includes any individual who is alleged to be involved in an offence in their respective classification (either as offenders, witnesses and victims).

Section 45 of the Act, on the other hand, restricts reporting of proceedings to which persons below the age of 18 are involved. This section applies once the criminal proceedings have commenced in court. During such proceedings, the court may direct that no matter relating to any person concerned in the proceedings, shall, while he is under the age of 18, be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings.³¹⁸

3.3.3 Anonymity protections afforded to child witnesses and child victims in the United Kingdom legal framework.

Like child offenders, child witnesses and child victims’ identities are protected in terms of the Children and Young Persons Act under the provisions of section 39 and 49 as discussed above. Prosecutors are tasked with the responsibility to make an application for a publication ban to restrict reporting the identity or identifying details that would lead to the identity of victim and witness under the age of 18, in terms of section 39, where the victim or witness has requested such restriction.

It is by no means uncommon for witnesses in criminal trials, or in public inquiries, to apply to be kept anonymous for fear of the retribution which might be exacted on them

³¹⁵ S 44(2) of the Youth Justice and Criminal Evidence Act 1999 (hereafter referred to as Youth Justice and Criminal Evidence Act).

³¹⁶ S 44(1).

³¹⁷ S 44(3).

³¹⁸ S 45(3).

by associates of the people whose reputations risk being damaged by the witnesses' evidence.³¹⁹ If an anonymity order is issued by the court, it obviously limits the right to free speech of those who are reporting the trial or otherwise speaking about it.³²⁰

There is also a discretionary power under the Youth Justice and Criminal Evidence Act to restrict any publication of the identity of any person below the age of 18 who is involved in the proceedings,³²¹ which limits the right to free speech of those desiring to make publications regarding criminal proceedings. Section 45 of the Youth Justice and Criminal Evidence Act gives courts the power to restrict reporting of criminal proceedings involving persons under the age of 18, which applies to any criminal proceedings in any court in England and Wales or Northern Ireland, except it does not apply to any proceedings to which the Children and Young Persons Act applies.³²²

Therefore, for purposes of section 44(2) and section 45(3) as outlined above, reference to 'a person involved in the offence or proceedings' refers to a person by whom the offence is alleged to have been committed; a person against or in respect of whom the offence is alleged to have been committed; or a person who is alleged to have been a witness to the commission of the offence,³²³ and to persons against or in respect of whom the proceedings are taken, or who is a witness in the proceedings.³²⁴ These protections are granted to child witnesses and child victims who should, at the time of the commission of the offence, or during such proceedings, be below the age of 18.

In deciding whether reporting restriction should be granted, courts must also balance the welfare of all children and young persons who are involved in court proceedings in accordance with section 44 of the Children and Young Persons Act and section 44(8) of the Youth Justice and Criminal Evidence Act (which are likely to favour restriction on publication), with public interests and the requirements of Article 10 of the European

³¹⁹ Dickson *Human Rights and the United Kingdom Supreme Court* (2013) Oxford University Press, at 282.

³²⁰ Ibid.

³²¹ S 44 of the Act restricts reporting of alleged offences involving persons under 18, provides that no matter relating to any person involved in the offence shall, while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person involved in the offence.

³²² Caddell and Johnson *Blackstone's Statutes on Media Law* (2013) Oxford University Press, at 49.

³²³ S 44(4).

³²⁴ S 45(7).

Convention on Human Rights (which is likely to hinder a restriction on publication).³²⁵ The welfare of the child is likely to favour a restriction on publication. Therefore, any decision to lift a reporting restriction must be necessary, proportionate and there must be a pressing social need for it.³²⁶

Section 11 of the Contempt of Court Act 1981 and the Youth Justice and Criminal Evidence Act gives protection to 'vulnerable witnesses'. Blackmail victims are entitled to anonymity whether an order has been made or not.³²⁷

3.3.4 Child identity protection in offences of a sexual nature in the United Kingdom. Child victims of sexual offences in the United Kingdom have automatic anonymity subject to the provisions of the Sexual Offences (Amendment) Act 2003, which protection they enjoy for the rest of their lives.³²⁸ Specific reference is made with regards to child victims. This means that it is at the discretion of the court to make an order under section 39 of the Children and Young Persons Act to grant the anonymity protection to the child witnesses. This position is different to the position in Canada and the Republic of South Africa as any child involved in criminal proceedings of a sexual nature in these two countries receives automatic protection against media exposures.

All sexual offence complainants (male and female) have media publication anonymity for all time after they have made a complaint of a sexual offence, unless they waive such a right. This privilege can be waived in circumstances such as assisting with a police enquiry or for some other personal or public interest reason. It is important that the permission for publication of the identifying details be in writing.³²⁹ In exceptional situations, a criminal court can lift the anonymity if it is anticipated that the restriction presents a substantial block to the reporting of the case.

This may also be the case in instances where publication will ensure a proper administration of justice, for example, where it is known that the victim was raped and

³²⁵ *R (on application of Y) v Aylesbury Crown Court* [2012] EWHC 1140 (Admin), at para 26.

³²⁶ *Ibid.*

³²⁷ Crook *Comparative Media Law and Ethics* (2009) Routledge, at 111.

³²⁸ Mullin and Wheatstone "Know the Law: What are UK anonymity rights for rape cases and why are victims' names kept secret?". At <https://www.thesun.co.uk/news/1923580/uk-anonymity-rape-sex-offence-cases/> (accessed on 29/03/2018).

³²⁹ Crook (fn 327 above), at 110.

is missing, there exists a need to publish her details in order to raise awareness in finding the said victim.

3.3.5 The adult extension.

The general rule is that reporting restriction expire when the young person attains the age of 18 as he or she is no longer a child in the proceedings and does not come within the child protection remit of the Children and Young Persons Act. The protection of anonymity for child defendants lasts until their 18th birthday, while victims and witnesses can ask the court for lifelong anonymity.³³⁰

Until now, media organisations have generally respected that once a reporting restriction is given, it continues beyond the child turning 18, if the case had concluded before then.³³¹ However, a recent High Court decision could lead to the press naming children once they reach adulthood, even though proceedings had concluded before they reached 18.³³² But, in response to the concerns raised by the courts and Peers in Committee, the Government has tabled amendments to allow lifelong anonymity to be provided to child victims and witnesses, but not defendants.³³³

The Standing Committee for Youth Justice believes that the exclusion of these defendants from the lifelong anonymity protection may have serious safeguarding implications and an immensely negative effect on their rehabilitation and reintegration into society.³³⁴ The court's analysis in *JC & Another* that a section 39 order expires when a child reaches 18 also applies to section 49 orders, as both provisions afford anonymity protection to children who are exposed to court processes.³³⁵ As the court made such ruling on the expiration of the reporting restrictions at the age of 18, JC and RT were required to participate in the third defendant's retrial after they pleaded guilty, by which time they had turned 18 years of age.³³⁶ They argued that they were

³³⁰ Youth Justice Legal Centre "Anonymity- Reporting restrictions for children in criminal cases" (2015) YJLC.

³³¹ Standing Committee for Youth Justice "SCYJ briefing: Anonymity for children in court and the Criminal Justice and Courts Bill-Amendments 122A & 139". See the briefing's download link at <https://www.justforkids.org/news/anonymity-for-children-in-court-and-the-criminal-justice-and-courts-bill/> (accessed on 10/10/2017).

³³² The court in *JC and Another v the Central Criminal* decided that a section 39 order in respect of each young man would automatically expire when he became 18. See para 3 of the case.

³³³ Fn 331 above.

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ *JC and Another v the Central Criminal Court* (fn 301 above), at para 5.

entitled to remain protected by the reporting restrictions even though they had turned 18.³³⁷

The court held that the purpose of the Act was to protect young people from publicity during the currency of their youth, and not into adulthood, and also found that under this Act, an order could only be made in respect of a “child or young person” which clearly could not include the identity of adult defendants.³³⁸ The position with regards to cases heard in magistrates’ courts and the crown courts where there are victims and witnesses under the age of 18 is slightly different. The Crown Prosecution Service should ask the police to inform the child or young person and their parents or guardians of the court’s power to restrict reporting and ascertain whether they would like the court to make an order under section 45A Youth Justice and Criminal Evidence Act as opposed to section 45. This is because an order made under section 45 ceases to apply when the young person reaches the age of 18 but an order made under section 45A imposes lifeline anonymity if the relevant conditions are met.³³⁹

On the proper reading of Children and Young Persons Act, the reporting restriction only applies to children below the age of 18 and does not make any reference to adults. If a child reaches the age of 18 during proceedings, he or she loses the protection afforded in terms of the Act. On these grounds, several major media organisations, including the BBC, have recently taken a case to court to argue that all reporting restrictions under the Children and Young Persons Act expire when a child reaches adulthood, even where these cases have long since concluded and the child has served their sentence.³⁴⁰

Their argument was accepted by Lord Justice Leveson on the grounds that the law does not explicitly state what should happen when children who were granted anonymity become 18.³⁴¹ If the media are allowed to name young adults in this way, it would seriously undermine the spirit of the legislation.³⁴² On the contrary, a government-commissioned review in the United Kingdom had made recommendations for life-long anonymity for child offenders in 2016.³⁴³ Their

³³⁷ Ibid.

³³⁸ At para 38.

³³⁹ Fn 279 above.

³⁴⁰ Hart, at 10.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ See fn 62 above.

recommendations were also considered by the government Ministers, some of the reasons being that children must be given a 'maximum possible chance of rehabilitation'.³⁴⁴

Subsequent to these recommendations, four criminals were granted lifelong anonymity, which decision was made as a result of the sickening murders which are shocking and horrific for fear that once the offenders are released, they could be subjected to attacks by the public.³⁴⁵ The gruesome nature of these offences resulted in judges feeling compelled to give the criminals new identities,³⁴⁶ since their details have already been published, inclusive of their pictures.³⁴⁷

It is unfortunate that the likes of Jon Venables and Robert Thompson's identities were published before court decisions as these, in that their identities would have been protected for the abduction, torture and murder of a two-year-old James Bulger in 1993. As a result of the nature of the offence and for their protection, the two were then forced to obtain new identities, which identities are withheld, by the state, from publication as a remedy to having published their true identities.³⁴⁸

This protection extended beyond the age of 18, even in offences which one, Jon Venables, committed when he had already obtained the age of majority. Reports show that Venables, at the age of 35, was imprisoned for possession of child sex abuse images, suspicion of affray, and possession of cocaine.³⁴⁹ Even at the incarceration for these offences, and during trial, his new identity remained protected from media publications.³⁵⁰ From these reports, one can conclude that although the legislative framework in the United Kingdom does not expressly provide for the adult extension, the courts are prepared to grant lifelong anonymity to children who commit crimes

³⁴⁴ Ibid.

³⁴⁵ Davison "Four criminals handed lifelong anonymity like James Bulger's killers Jon Venable and Robert Thompson", <https://www.mirror.co.uk/news/uk-news/four-criminals-handed-lifelong-anonymity-11990821> (accessed 30/03/2018).

³⁴⁶ Ibid.

³⁴⁷ See link at fn 62 above for an article in which the media published photos of child offenders, Jon Venables and Robert Thompson.

³⁴⁸ Christodoulou "The Nameless: What is Lifelong Anonymity, Why Did Jon Venables and Robert Thompson Get Handed New Identities and How Does It Work?", <https://www.thesun.co.uk/news/5530565/lifelong-anonymity-jon-venables-robert-thompson-identity/> (accessed 30/03/2018).

³⁴⁹ Fn 345 above.

³⁵⁰ Fn 348 above.

while below the age of 18. These reports only refer to child offenders and make no reference to child victims and witnesses.

3.4 Commonalities and conclusion

Although South Africa, Canada and the United Kingdom each have an individual legal framework in relation to how child anonymity in criminal proceedings should be dealt with, from the above one can deduce that they have the following in common:

- All three countries embrace the open justice principle, conduct their proceedings in open court and afford their media houses the right to freedom of expression (also referred to as freedom of speech), in that the media is allowed to make publications regarding criminal proceedings.
- Exceptions to the open court principle are available in instances where children below the age of 18 are involved, either as offender, witnesses, or victims. The media is prohibited from making publication of information that would identify the children concerned. These children are referred to through the use of pseudonym in case reports and media publications.
- In granting anonymity protections, courts are required to balance the children's rights, fair trial rights, freedom of speech and the public interest.
- Legislation governing these protections require that the child anonymity protections expire when the children turn the age of 18, save for the United Kingdom where some children have been granted lifelong anonymity.
- Children involved in offences of a sexual nature receive lifelong anonymity in all three jurisdictions.

All three countries thus do advance the best interests of children in criminal proceedings. They, however, have their differences in respect of what legislation prescribes, and how courts make decisions relating to publication prohibitions. Firstly, in Canada, all children are protected, however, age restrictions are specifically mentioned with regards to child offenders and child victims whereas there are no age restrictions on anonymity afforded to child witnesses, unless in offences of a sexual nature.³⁵¹

³⁵¹ See fn 236 above.

Secondly, in the United Kingdom, express provisions are made for the protection of all children's identities, with such protection extending beyond the age of 18. However, where child offenders are involved in shocking offences, the courts have granted lifelong anonymity protections.³⁵² However, the anonymity protection in the United Kingdom excludes children who are given Anti-Social Behaviour orders.³⁵³

Lastly, in South Africa, the Criminal Procedure Act makes express provision for the protection of identities in respect of child offenders and child witnesses. The Supreme Court of Appeal in *Centre for Child Law and Others v Media 24 and Others* declared section 154(3) unconstitutional to that extent and issued an order to remedy the situation through reading into the section, the protection of child victims too. All children lose the protection upon attaining majority.

It is evident from the above that there is room for improvement, especially for Canada and South Africa in light of the recent developments in the United Kingdom, as it has recently improved its anonymity laws. South Africa can improve its anonymity laws and borrow from the United Kingdom specifically with the adult extension. Children involved in the proceedings should be permitted to assume that the anonymity protection is ongoing and will then be able to continue with their lives without fear of being exposed to the media attention, especially if they do not reoffend, in the case of child offenders. This submission will further be advanced in Chapter 4 below. The victim extension issue has been enrolled in the Constitutional Court for confirmation, while the Supreme Court of Appeal has left the issue of adult extension to the legislature.

³⁵² See fn 345 and fn 348 above.

³⁵³ See page 58 above, and fn 296.

CHAPTER 4

A CONSTITUTIONAL ANALYSIS OF SECTION 154(3) OF THE CRIMINAL PROCEDURE ACT

4.1 Introduction

If the Constitutional Court confirms the order of constitutional invalidity made by the Supreme Court of Appeal in *Centre for Child Law and Others v Media 24 and Others*, all children involved in criminal proceedings will be afforded the anonymity protection in terms of section 154(3), which protection they lose upon attaining the age of majority. Though the same outcome as in the High Court was reached, the rationale differed. The High Court based its decision on the re-interpretation of section 154(3) to include child victims within the ambit of section 154(3)'s protection³⁵⁴ and held that it was not the intention of the Legislature to exclude them.³⁵⁵ However, the Supreme Court of Appeal based its judgement on a declaration of constitutional invalidity of the section, and the court used reading in to solve the exclusion of victims from the protection offered in terms of section 154(3). Similar to the High Court, the Supreme Court of Appeal refused to grant the adult extension as it was neither required by the Constitution nor the Criminal Procedure Act.

On the Supreme Court of Appeal's order, section 154(3) provides as follows:

No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused person under the age of 18 years or of a victim or of a witness at or in criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any person.³⁵⁶

In accordance with the Supreme Court of Appeal's decision, the media is at liberty to publish the identifying details of child offenders, witnesses and victims when they

³⁵⁴ *Media 24 (HC)* at para 70.

³⁵⁵ *Media 24 (HC)* at para 21. This was the contention of the Minister of Justice and Correctional Services that the Legislature did not intend to exclude child victims within the ambit of section 154(3).

³⁵⁶ *Media 24 (SCA)* at para 104.

attain majority, unless a publication ban is obtained. Had the decision of the minority been that of the majority, section 154 of the Criminal Procedure Act would have been deemed to contain a provision, being section 154(3A), which would read as follows:

(3A) Children subject to subsection 3 above do not forfeit the protections afforded by that subsection upon reaching the age of eighteen years but may, upon reaching adulthood, consent to publication of their identity.³⁵⁷

It is submitted that this should be the position, bearing in mind the constitutional rights at play. From the above we have learnt that a child's identity is protected during criminal proceedings, subject to considerations of other principles and rights such as those afforded to children, accused persons, the media, the public's interests and the open justice principle. Therefore, this chapter seeks to provide a detailed analysis as to whether section 154(3) is constitutional, as is, and as amended through reading in, by the Supreme Court of Appeal, and the factors (constitutional values) which influence and/ or hinder re-interpretation and the reform of the protection afforded.

The matter has been appealed in the Constitutional Court and judgement is awaited at the time of writing. The chapter argues for the confirmation of the Supreme Court of Appeal's judgement, as well as inclusion of the adult extension of the protection of children exposed to the criminal justice system (as held in the minority judgment).³⁵⁸

4.2 Factors that could limit the development of section 154(3)

4.2.1 Open justice principle.

As alluded before, the Criminal Procedure Act guarantees the principle of open justice in terms of section 152 which requires proceedings in any court to take place in an open court.³⁵⁹ This is consistent with the constitutional provision of section 34, which affords access to courts. It provides in relevant part that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial

³⁵⁷ Ibid.

³⁵⁸ See para 4.4 below.

³⁵⁹ S 152 of the Criminal Procedure Act provides that except where otherwise expressly provided by the Act or any other law, criminal proceedings in any court shall take place in open court and may take place on any day.

tribunal or forum.³⁶⁰ This in turn, is consistent with an accused's right to a fair trial, which includes having a public trial before an ordinary court.³⁶¹

Some authors have well indicated that allowing media coverage, while still protecting the right to a fair trial, would make the justice system more accessible to the public at large and dispel negative and unwanted criticism against the system.³⁶² The media's duty, as argued in the Pistorius case³⁶³ is to provide members of the public with information, which in turn will educate members of the public about the judicial process and promote the principle of open justice.³⁶⁴

In defining the open justice principle, the Supreme Court of Appeal in *City of Cape Town v South African National Roads Authority Limited & others*³⁶⁵ held that the open court principle meant in practice that: (a) court proceedings including the evidence and documents disclosed in proceedings should be open to public scrutiny; and (b) juries and judges should give their decisions in public.³⁶⁶

The Court further outlined the importance of open justice principle, that is:

Firstly, it assisted in the search for truth and played an important role in informing and educating the public. Secondly, it enhances accountability and deters misconduct. Thirdly, it had a therapeutic function, offering an assurance that justice has been done.³⁶⁷

In *Independent Newspapers (Pty) Ltd v Minister of Intelligence Services*³⁶⁸ the Constitutional Court held that the media's right to gain access to, observe and report on, the administration of justice and the right to have access to papers and written

³⁶⁰ S 34 of the Constitution.

³⁶¹ S 35(3)(c) Of the Constitution.

³⁶² See Nelson Mandela Metropolitan University "Research Outputs 2016", at 14. Further reference Erasmus "S v Pistorius: open justice principle, media coverage of court proceedings and the elephant in the room" *Litnet Akademies* 2016, 13 (3) 878-912. Retrieved from <http://law.mandela.ac.za/law/media/Store/documents/research%20brochure/Research-Publication-Booklet-30-March-2016.pdf> (accessed on 30 January 2019).

³⁶³ *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* (10193/2014) [2014] ZAGPPHC 37; [2014] 2 All SA 446 (GP); 2014 (1) SACR 589 (GP) (25 February 2014).

³⁶⁴ Erasmus (fn 362 above), at 15.

³⁶⁵ *City of Cape Town v South African National Roads Authority Limited & others* (20786/14) [2015] ZASCA 58 (30 March 2015).

³⁶⁶ *Ibid*, at para 12.

³⁶⁷ *Ibid*.

³⁶⁸ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 (5) SA 31 (CC).

arguments which are an integral part of court proceedings flows from the right to open and public justice and can be limited only in the interests of ensuring a fair trial.³⁶⁹

The idea of open justice finds its basic expression in the rule which permits attendance at the trial by the members of the public.³⁷⁰ However, the principle does not only entail an oral hearing during proceedings wherein the public is present in court but further entails the written and oral publication of the criminal proceedings. In some instances, the media publishes full details relating to the criminal proceedings, inclusive of live recordings and broadcasts. However, where minor children are involved, the media is prohibited from publishing their identifying details even during live broadcasts. This constitutes a limitation to section 152 of the Criminal Procedure Act and other regulatory provisions.

Open justice is concerned with the procedural standard of a fair hearing,³⁷¹ and is further recognised as part of the constitutional heritage of a free country.³⁷² The right to a public trial, including the open justice principle can be limited to the extent that such a limitation complies with the provisions of section 36 of the Constitution.³⁷³ Ordinarily court proceedings, and court records are to be open to the public. Criminal proceedings involving children are amongst the exceptions recognised by the South African criminal justice system. These exceptions are infringements of section 34 and 35 (3)(c) and, will therefore have to be justified as limitations of the right to a public hearing in terms of section 36.³⁷⁴ This is in line with the principles of transparency,

³⁶⁹ Ibid, at para 41.

³⁷⁰ Jaconelli *Open Justice: A Critique of the Public Trial* (2002) Oxford University Press, at 31. See also para 41 in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* wherein it was affirmed that “open justice is observed in the ordinary course in that the public are able to attend all hearings. The press is also entitled to be there and are able to report as extensively as they wish, and they do so. Courts should in principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (i.e. the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.”

³⁷¹ Ibid.

³⁷² Jaconelli (fn 370 above), at 36.

³⁷³ S 36 of the Constitution provides that(1) the rights in the Bill of Rights may be limited only in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

³⁷⁴ Currie and De Waal *The Bill of Rights Handbook* 6th ed (2013) JUTA, 742.

accountability and openness that inform our Constitution and its entrenchment of democracy and the rule of law.³⁷⁵

In limiting the open justice principle, the Constitutional Court in *Independent Newspapers (Pty) Ltd* held that in each case, the court will have to weigh the competing rights or interests carefully with the view to ensuring that the limitation it places on open justice is properly tailored and proportionate to the end it seeks to attain. In the end, the contours of our constitutional rights are shaped by the justifiable limitation that the context presents and the law permits.³⁷⁶ The Court went further to encourage that at the end of the day, a court is obliged to have regard to all factual matter and factors before it in order to decide whether the limitation on the right to open courtrooms passes constitutional muster.³⁷⁷

Although the open justice principle requires that courts be conducted in public and any information related thereto to be made public as set out above, the Supreme Court of Appeal in *Centre for Child Law and Others v Media 24 and Others* found that limitation was in order. The importance of the right of the media to impart information and the nature and extent of the limitation of this right, when balanced against the dual purpose of the limitation of this right, lead to the conclusion that the limitation on the right of the media in this instance,³⁷⁸ is reasonable and justifiable in terms of section 36 of the Constitution.³⁷⁹ The minority judgement took it further and found it justifiable also in the case of adult extension.

4.2.2 Freedom of expression.

The Universal Declaration of Human Rights 1948 (hereafter referred to as the UDHR) states that everyone has the right to freedom of expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.³⁸⁰ In the South African context, the scope of freedom of expression is grounded on the Constitution of South Africa which makes provision for the right to freedom of expression as a fundamental and

³⁷⁵ Ibid.

³⁷⁶ *Independent Newspapers* (fn 368 above), at para 45.

³⁷⁷ Ibid, at para 46.

³⁷⁸ The prohibition of the publication of identifying details where children are involved in criminal proceedings either as offenders, witnesses or victims.

³⁷⁹ *Media 24 (SCA)*, at para 30.

³⁸⁰ Article 19(2) of the Universal Declaration of Human Rights (UDHR) 1948.

democratic right. Section 16 of the Bill of Rights defines freedom of expression as it relates to:

- Freedom of press and other media;
- Freedom to receive or impart information or ideas;
- Freedom of artistic creativity; and
- Academic freedom and freedom of scientific research.³⁸¹

This study is premised mainly around the freedom of press and other media as a fundamental freedom afforded to the media. This right encompasses the media's right to have access to court proceedings and broadcast the proceedings thereto, as an integral part of the open justice principle discussed above. The Constitutional Court's decision in the *South African Broadcasting Corp Ltd v National Director of Public Prosecution*³⁸² and *Independent Newspapers* established a constitutional principle of open justice that stems from the right of freedom of expression and the right to a public trial.³⁸³ The principle has subsequently been put to use in several cases in which the media has sought permission to broadcast or report about court proceedings.³⁸⁴ These cases have included amongst the relevant cases, for example, the *Centre for Child Law and Others v Media 24 and Others*, and the *NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others*.³⁸⁵

Freedom of press is essential in order for individuals to receive information and ideas. The role of the mass media is therefore central in allowing the right to freedom of expression to contribute fully to democracy, transparency, and accountability.³⁸⁶ In *Print Media South Africa and Another v Minister of Home Affairs and Another (Justice*

³⁸¹ S 16(1) of the Constitution.

³⁸² *South African Broadcasting Corp v National Director of Public Prosecution* 2007 (1) SA 523 (CC).

³⁸³ Currie and De Waal (fn 374 above), at 348.

³⁸⁴ Ibid.

³⁸⁵ *NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others* (425/2017) [2017] ZASCA 97 (21 June 2017).

³⁸⁶ SALC Litigation Manual Series *Freedom of Expression: Litigation Cases of Limitations to Exercise of Freedom of Speech and Opinion* (2016) Southern Africa Litigation Centre. Retrieved from <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Freedom-of-Expression-Manual.pdf> (accessed on 31 August 2018).

Alliance of South Africa and Another as amici curiae)³⁸⁷ the Constitutional Court held that:

In considering the comprehensive quality of the right, one also cannot neglect the vital role of a healthy press in the functioning of a democratic society. One might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy, unimpeded media.³⁸⁸

One of the most significant guarantees that freedom of expression provides is its allowance for all citizens to participate in their systems of governance.³⁸⁹ In essence, democracy is the rule of the people, by the people, for the people, as such; it is expression through communication or action that ensures that the will of all in society is communicated.³⁹⁰ This is achieved as this right provides a platform for such communication to facilitate the enjoyment of other rights such as civil-political and socio-economic rights.³⁹¹

Section 16 of the Constitution encompasses a limitation on freedom of press in that the provision excludes expressions which are deemed to constitute:

- Propaganda for war;
- Incitement of imminent violence; or
- Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.³⁹²

However, the right can also be limited subject to the provision of section 36 of the Constitution, wherein relevant factors are taken into account.³⁹³ Freedom of press is also limited in terms of rules regulating the media in South Africa such as the Press Code³⁹⁴ which, in relevant circumstances, requires the media not to interview,

³⁸⁷ *Print Media South Africa and Another v Minister of Home Affairs and Another (Justice Alliance of South Africa and Another as amici curiae)* 2012 (12) BCLR 1346 (CC).

³⁸⁸ *Ibid*, at para 54.

³⁸⁹ Freedom of Expression Institute *Module Series: Hate Speech and Freedom of Expression in South Africa* (2013) Freedom of Expression Institute.

³⁹⁰ *Ibid*.

³⁹¹ *Ibid*.

³⁹² S 16 (2)(a)-(c).

³⁹³ See fn 373 above.

³⁹⁴ Fn 23 above.

photograph or identify a child without the consent of the legal guardian or that of a similarly responsible adult and the child (taking into consideration of the evolving capacity of the child) if there is any chance that coverage might cause harm of any kind to a child.³⁹⁵

Some authors are of the view that such a limitation which entails holding of criminal trials behind closed doors if in the interests of state security, good order, public morals or administration of justice as authorised by the Criminal Procedure Act is problematic.³⁹⁶ This is because it gives the presiding officers overly broad powers to ban the public and the media from attending court proceedings.³⁹⁷

The Supreme Court of Appeal, in determining whether the victim and adult extensions to section 154(3) constitutionally violated the right of the media to impart information, applied a two-staged inquiry as described in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others*³⁹⁸ where the Constitutional Court laid down that:

Ordinarily, one adopts a two-stage approach for determining the constitutionality of alleged violations of rights in chapter 3 of the Constitution... If so, the second stage calls for a decision whether the limitation can be justified in terms of section 33(1) of the Constitution.³⁹⁹

Although this case was concerned with the interim Constitution, the final Constitution is structured in the same way and requires the same approach.⁴⁰⁰ The crucial issue in *Centre for Child Law and Others v Media 24 and Others* was whether the limitation of the right of the media to impart information, whether in terms of the victim or adult extensions to the section, are reasonable and justifiable in terms of section 36 of the Constitution.⁴⁰¹ This required the balancing of competing rights. In deciding on this issue, the Supreme Court of Appeal, in the majority judgement held on the adult extension that:

³⁹⁵ fn 24 above.

³⁹⁶ Freedom of Expression Institute *the Media and the Law: A Handbook for Community Journalists* (2007) Freedom of Expression Institute, at 9.

³⁹⁷ Ibid.

³⁹⁸ *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC).

³⁹⁹ *Media 24 (SCA)*, at para 15.

⁴⁰⁰ Ibid.

⁴⁰¹ *Media 24 (SCA)*, at para 16.

The adult extension severely restricts the right of the media to impart information and infringes the open justice principle. In the absence of any limitation on the nature and extent of the adult extension, the relief sought by the appellants is overbroad and does not strike an appropriate balance between the rights and interests involved. Accordingly, the proposed limitation on the right of the media to impart information is neither reasonable nor justifiable, in terms of s 36 of the Constitution. The constitutional challenge to the provisions of section 154(3) of the Criminal Procedure Act on this basis, must accordingly fail.⁴⁰²

On the issue of the victim extension, the Court held, also in the majority judgement that the constitutional challenge on this basis must accordingly succeed on reason that the importance of the right of the media to impart information and the nature and extent of the limitation of this right, when balanced against the dual purpose of the limitation of this right, leads to the conclusion that the limitation on the right of the media in this instance, is reasonable and justifiable in terms of section 36 of the Constitution.⁴⁰³ The minority judgement did not agree with the decision of the majority on the victim extension, but went further to declare the provisions of section 154(3) of the Criminal Procedure Act constitutionally invalid, to the extent that it does not extend the protection beyond their reaching the age of 18 years.⁴⁰⁴

4.2.3 Public interest.

The notion of 'public interest' has now become widely used in case law on freedom of expression.⁴⁰⁵ The Supreme Court of Appeal articulates the concept particularly well:

We must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens- from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people- their means to

⁴⁰² *Media 24 (SCA)*, at para 27.

⁴⁰³ *Media 24 (SCA)*, at para 30.

⁴⁰⁴ *Ibid*, at para 104.

⁴⁰⁵ SALC Litigation Manual Series (fn 386 above), at 15.

convey their concerns to their fellow citizens, to officialdom and to government.⁴⁰⁶

The public's interest is closely aligned with the right to information, which information can be accessed when freedom of expression is exercised. It is of public interests to be acknowledged of how the South Africa justice system deals with offenders, whether young or adult, or any other individuals involved in criminal proceedings. In relation to the *Pistorius case*, Mofhe argues that there have been some positives in the live broadcast of the case.⁴⁰⁷ For example, the public probably now broadly comprehends the workings and construction of our criminal justice system, and as a result of the live broadcast, the public had its right of access to information upheld by the state.⁴⁰⁸

International law also entitles the public to have access to information. The United Nations Convention Against Corruption (hereafter referred to as the UNCAC), General Assembly Resolution⁴⁰⁹ requires the State Parties shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organisation, functioning and decision making processes, where appropriate.⁴¹⁰ Such measures may include adopting procedures or regulations allowing members of the general public to obtain information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public.⁴¹¹

This provides the members of the public with access to information, wherein at times the public may participate in the decision-making processes, and awareness that seeks to end criminal activities in their communities. The public interest notion is further important as a consideration wherein the South African courts need to release a habitual offender or inform the public of the criminal circumstances surrounding their areas. Although it is in the public's interests to be informed of offences that are also

⁴⁰⁶ Ibid. See also *Government of the Republic of South Africa v Sunday Times Newspaper and Another* 1995 (2) SA 221 (T) at 227H- 228A.

⁴⁰⁷ Mofhe "Public Interest v the Interest of Justice" *De Rebus*, November 2014:52 [2014] 220.

⁴⁰⁸ Ibid.

⁴⁰⁹ The United Nations Convention Against Corruption, General Assembly Resolution 58/4 (2003) (hereafter referred to as the UNCAC).

⁴¹⁰ Ibid, Article 10.

⁴¹¹ Article 10 (a).

committed by children within their communities, the identities of such children are protected to ensure that once the proceedings are complete, the children can lead a normal life back into the communities without any fear or stigmatisation.

4.2.4 The right to a fair and public trial.

Section 35(3)(c) of the Constitution provides that every accused person has a right to a fair trial, which includes the right to a public trial before an ordinary court. This is in line with the constitutional right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.⁴¹² Although the right to a fair and public trial is one of the factors that hinder reinterpretation of section 154(3), in this case, the accused's right to a fair public trial is limited in his or her interests. This is amongst the exceptions recognised by both the Child Justice Act and the Criminal procedure Act. The Supreme Court of Appeal has further granted the victim and adult extension, bringing into effect the protection of children's identities in matters concerning them.

The provision of the right to a public trial finds expression in section 152 of the Criminal Procedure Act.⁴¹³ It guards against the iniquities of secret trials and contributes to public confidence in the justice system.⁴¹⁴ Steytler defines a public trial as one which is open to the public and media, and can be reported upon; he makes the point that the public scheduling of hearings is a necessary prerequisite for public access.⁴¹⁵ This either requires the media to conduct live recordings and to make publications relating to the proceedings, therefore publicising the identifying details of the parties involved, in line with their freedom of expression and press.

The African Commission on Human and People's Rights provides that amongst the principles applicable to legal proceedings is the 'fair and public hearing' principle which provides that, in the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing

⁴¹² S 34 of the Constitution.

⁴¹³ Currie and de Waal, at 795.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

by a legally constituted competent, independent and impartial judicial body.⁴¹⁶ The concept 'public hearing' includes, amongst others, that:

- All the necessary information about the sittings of judicial bodies shall be made available to the public by the judicial body;
- Adequate facilities shall be provided for attendance by interested members of the public;
- No limitations shall be placed by the judicial body on the category of people allowed to attend its hearings where the merits of a case are being examined; and
- Representatives of the media shall be entitled to be present at and report on judicial proceedings except that a judge may restrict or limit the use of cameras during the hearings.⁴¹⁷

This has been the practice in the South African criminal justice system as seen from the cases of Pistorius;⁴¹⁸ Shrien Dewani⁴¹⁹ and van Breda⁴²⁰ to name a few, which received much media attention, with reports and live recordings being made thereto. However, media access may be restricted where it interferes with the right to a fair and public trial.⁴²¹ Songca opines that although fair trial rights, such as the right to be presumed innocent, are fundamental human rights, they can be justifiably limited.⁴²² He provide in an example that:

In terms of section 35 of the Constitution every accused person is guaranteed the right to be tried before an open and public court. In the case of child offenders, this right is however limited in that the Child Justice Act 75 of 2008 provides that all trials involving persons under the age of 18 years are closed to the public. The child offender has the right to public trial that is limited in order

⁴¹⁶ African Commission on Human and People's Rights "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa" (2003), at 1.

⁴¹⁷ Ibid, at 2.

⁴¹⁸ *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* (fn 363 above).

⁴¹⁹ *S v Dewani* (CC15/2014) [2014] ZAWCHC 188 (8 December 2014).

⁴²⁰ *Van Breda v Media 24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others* (425/2017, 426/2017) [2017] ZASCA 97; [2017] 3 All SA 622 (SCA); 2017 (2) SACR 491 (SCA) (21 June 2017).

⁴²¹ *South African Broadcasting Corporation v National Director of Public Prosecutions* (fn 382 above), at para 8.

⁴²² Songca *Vulnerable children in South Africa: Legal, Social development and Criminological Aspects* (2016) JUTA, at 38.

to protect him or her from public scrutiny and from being identified through public trial. This limitation is justified under the best interests standard... The limitation takes place in terms of section 36 of the Constitution, which is referred to as the limitation clause.⁴²³

The restriction also places a limitation on the right to freedom of expression. Some courts have opined that it further limits the information that may be imparted by the media and received by the public.⁴²⁴ As mentioned, this is the position where children are involved in the proceedings, hence they are able to give evidence through an intermediary or closed-circuit television as prescribed by the Criminal Procedure Act. This has been seen in cases involving the likes of PN, and, recently, a 17-year-old North West learner who has been sentenced to 10 years imprisonment for stabbing and killing his teacher.⁴²⁵ His identity has not been disclosed to the media, except the media did report on the circumstances relating to the case and the sentence imposed in open court. Hughes opines that the right to a fair trial is based on the dignity of the person,⁴²⁶ which dignity has been inextricably linked with the rights to privacy and autonomy.⁴²⁷ Therefore, the protection of children's identities, as an exception to the right to a fair and public trial, is solely for purposes of protection the young offenders' rights afforded by the Constitution, as they too, are regarded as vulnerable children.

4.3 Factors that support the development of section 154(3)

Although South African courts must provide the media and the public access to courts and the freedom of press to report on proceedings, circumstances wherein children are involved warrant a different approach even though this constitutes a limitation to section 16 of the Constitution. This limitation does not, however, mean that children's rights are absolute. There are several considerations which the Supreme Court of Appeal took into account in granting the victim extension, which considerations, as it

⁴²³ Ibid.

⁴²⁴ Fn 421 above.

⁴²⁵ Gous "Pupil sentenced to 10 years imprisonment for murdering North West teacher". At <https://www.timeslive.co.za/news/south-africa/2019-03-01-pupil-sentenced-to-10-years-imprisonment-for-murdering-north-west-teacher/> (accessed on 17 February 2019). The 17-year-old was arrested and convicted for the murder of a North West teacher at Ramotshere Secondary School near Zeerust.

⁴²⁶ Hughes *Human Dignity and Fundamental Rights in South Africa and Ireland* (2014) Pretoria University Law Press, at 79.

⁴²⁷ Ibid, at 80.

is submitted also, warrant the adult extension. These considerations are discussed in detail below.

4.3.1 The right to privacy.

The Constitution of the Republic of South Africa guarantees everyone the right to privacy in terms of section 14, subject to several exclusions.⁴²⁸ This right is recognised by the common law as an independent personality right that is a component of 'dignitas'.⁴²⁹ The entrenchment of the right to privacy in section 14 compels the Government to initiate steps to protect neglected aspects of the right to privacy in South Africa, such as data privacy or the protection of personal information.⁴³⁰

The right to privacy protects an individual's interests, which entails not having their identifying details being of public knowledge. Privacy is a valuable and advanced aspect of personality. In *Mistry v Interim National Medical and Dental Council of South Africa*,⁴³¹ the Constitutional Court considered several factors to be important when considering the informational aspect of the right to privacy. These include:

- Whether the information was obtained in an intrusive manner;
- The circumstances relating to the alleged invasion of constitutional privacy;
- Whether the information was about intimate aspects of applicant's personal life;
- The information did not involve data provided by applicant himself for one purpose and used for another;
- It was information which led to a search, not information derived from a search;
- The information was not disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld.⁴³²

The UNCRC provides children with the right to privacy and requires the law to protect them from attacks against their way of life, their good name, their families and their

⁴²⁸ S 14 of the Constitution provides that everyone has the right to privacy, which includes the right not to have their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed.

⁴²⁹ Currie and de Waal, at 296.

⁴³⁰ Van Der Bank "The Right to Privacy – South African And Comparative Perspectives" *European Journal of Business and Social Sciences*, Vol. 1, No. 6, pp 77-86, October, at 79.

⁴³¹ *Mistry v Interim National Medical and Dental Council and Others* (CCT13/97) [1998] ZACC 10; 1998 (4) SA 1127; 1998 (7) BCLR 880 (29 May 1998).

⁴³² *Ibid*, at para 51.

homes.⁴³³ It further provides that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.⁴³⁴ Where child offenders are involved, State Parties are required to recognise the right of every child alleged as, accused of, or recognised 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.⁴³⁵ This 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 and to have his or her privacy fully respected at all stages of the proceedings.⁴³⁶

The right to privacy is recognised by social scientists as essential for the preservation of an individual's human dignity, including his physical, psychological and spiritual well-being.⁴³⁷ The preservation of this right fosters one's dignity and autonomy. The African Charter on the Rights and Welfare of the Child (hereafter referred to as ACRWC) recognises that the child, due to the needs of his or her physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security.⁴³⁸

Children who are involved in criminal proceedings should be given the opportunity to develop like other children. This should not only be an opportunity afforded to those involved in offences of a sexual nature. It extends beyond other offences which have a devastating effect on the development of the child into adulthood. Where a child has been a victim, witness or perpetrator of a crime, that child's identity will be a deeply private fact, the disclosure of which would cause mental distress and injury to any reasonable person in their position.⁴³⁹

⁴³³ Article 16 of the UNCRC.

⁴³⁴ Article 16.1 of the UNCRC.

⁴³⁵ Davies "Children's Rights to Privacy in an Age of Digital Media: A Comparison Between Press Codes from Around the World" IAMCR pre-conference (2016). See also Article 40.1 of the Convention.

⁴³⁶ *Ibid.*

⁴³⁷ Van der Bank (fn 430 above), at 78.

⁴³⁸ *Ibid.* See also the African charter on the rights and welfare of the child (ACRWC), preamble. See also Article 10 which provides for a child's right to privacy; and Article 17 which provides for the Administration of Juvenile Justice and requires State Parties to (d) prohibit the press and the public from the trial where children are involved.

⁴³⁹ *NM v Smith* 2007 (5) SA 250 (CC), at para 34.

However, the right to privacy is not absolute. Some limitations of the right to privacy and the publication of children's identities may be justified. These include situations in which the identity of a child offender is required to be published for the public's interest where the child, as an offender, is a wanted suspect who is evading arrest or trial and is likely to cause harm to the public. A child victim's and witness's identity may also be published for awareness purposes if he or she is missing or is abducted. In such circumstances, the media would be assisting in raising awareness to find the children and could not be seen to violate their right to privacy.

At common law, invasion of privacy occurs when there is an unlawful and intentional acquaintance with private facts by outsiders contrary to the determination and will of the person whose right is infringed, such acquaintance taking place by an intrusion or by disclosure.⁴⁴⁰ Every reasonable person will agree that invasions of privacy are justifiable at times, subject to the application of important preconditions such as:

- The invasion must have a legal foundation, such as law which is applied properly or an employment contract;
- The invasion must be reasonable, in other words there must be a relation between method and purpose;
- The information may not be used for a purpose other than the one for which it was obtained; and
- All reasonable steps must be taken to ensure the correctness of the information, and it must be updated from time to time.⁴⁴¹

The consideration of a child's right to privacy requires a consideration of this right, not only including child victims into the anonymity protection but also when the child transitions into adulthood. This is premised on the fact that the right to privacy is afforded to all individuals, whether young or adult. The Supreme Court of Appeal, in the majority judgement, did not weight the right to privacy against the right to freedom of expression. It focused largely on the extent to which the right to freedom of expression may be limited in an open and democratic society.

However, the minority, in extensively weighing the competing rights, was of the view that the constitutional rights to dignity and privacy introduce balance into the equation

⁴⁴⁰ Currie and de Waal, 296.

⁴⁴¹ CM van der Bank, at 80.

in which the freedom of expression is to be measured against the interests of a child, even after that child has attained adulthood.⁴⁴² In balancing the competing interests, the Court held that it is reasonable not only to protect the identity of persons who have been victims of crime while they are children, but also that this and the other protections of them as witnesses and offenders should extend beyond when they reach adulthood.⁴⁴³ Their dignity and the right to privacy require no less.⁴⁴⁴

The protection of children's right to privacy is also premised on the fact that in some instances, the media's intrusion into the right to privacy is extensive, as was the situation with MVB. The media went as far as publishing MVB's name, her photographs, details of the institutions at which she had been receiving treatment and the name of the school which she attended.⁴⁴⁵ Upon her release from hospital, she was pursued by the media with intimate details about her life and her experiences.⁴⁴⁶

MVB's curator filed an affidavit detailing the great stress and harm that MVB suffered, however that did not stop the media from publishing the details as these intimate details have continued to be published in the media despite a court order and complaints to the Press Council.⁴⁴⁷ Therefore, a confirmation of the victim extension will continue to guard against the stress which MVB had endured at the expenses of the media, the adult extension would therefore promise an easier transition of children into adulthood.

4.3.2 The right to dignity.

The Constitution of the Republic of South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.⁴⁴⁸ It affords all individuals the right to human dignity,⁴⁴⁹ which is closely aligned with the constitutional right to privacy. The right to dignity is the source of a person's innate rights to freedom and physical integrity, from which a number of other rights flow, such as the right not to be subjected to slavery and the right to bodily

⁴⁴² *Media 24 (SCA)*, at para 74.

⁴⁴³ *Media 24 (SCA)*, at para 86.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Media 24 (SCA)*, at para 68.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.*

⁴⁴⁸ S 1 of the Constitution.

⁴⁴⁹ S 10 of the Constitution.

integrity.⁴⁵⁰ Human dignity also provides the basis for the right to equality-inasmuch as every person possesses human dignity in equal measure, everyone must be treated as equally worthy of respect.⁴⁵¹ Therefore, the right to dignity is closely aligned with the right to equality and the right to privacy.

Some of the provisions of the Criminal Procedure Act, work in concert with the Child Justice Act, ensure that children in conflict with the law are treated with dignity, and in a manner befitting their age and vulnerability.⁴⁵² However, the provisions of section 154(3) fail to prioritise the dignity of children in as far as it allows the identifying details of a young vulnerable victims to be published for public knowledge and scrutiny. The publication of MVB's identifying details serves as an example of instances in which the media violated the right to dignity of a child victim.

There is no dignity in being a child and having your details published for public scrutiny as it causes further stress, trauma and immense stigmatisation. Publishing a child's identifying details means having her school mates and teachers discussing her trauma in her presence, wherein the child will, in most instances, relive the experience. It creates an uncomfortable environment for her to transition into an adult. The stigma, trauma and stress will follow the child into adulthood and advance their state of vulnerability, therefore reducing the chances of her leading a normal life.

The Supreme Court of Appeal, held, on this basis that a default position in law, that allows for a retrospective intrusion into a person's victimhood of crime as a child, would violate that person's constitutional right to dignity.⁴⁵³ In weighing freedom of expression against the need to protect children's dignity, the Supreme Court of Appeal, in the minority, opined that,

It is reasonable indeed not only that there should be protection of the identity of persons who have been victims of crime while they are children, but also that this and the other protections of them as witnesses and offenders should extend even when they reach adulthood. Their dignity and right to privacy require no

⁴⁵⁰ Currie and de Waal, 251.

⁴⁵¹ Ibid, 252.

⁴⁵² Songca (fn 422 above), at 80.

⁴⁵³ *Media 24 (SCA)*, at para 83.

less. The same applies to those who were witnesses to crime as children or were children when they were offenders.⁴⁵⁴

Legislation, which has been enacted for purposes of protecting a child's right to dignity, must do so in a way that fosters a child's sense of dignity, hence the Supreme Court of Appeal (both the majority and minority judgement), granted the victim extension in pursuance of protecting their dignity. The same should be the case with the adult extension. The adult extension will ensure that upon attaining majority, the children's right dignity will remain protected against the media's intervention as the right is not only afforded to children, but to adults also.

4.3.3 The best interests of the child as a primary consideration.

Lord MacDermott of the United Kingdom outlined the definition of the best interests of the child in *J v C*.⁴⁵⁵ He opined that when we speak of the best interests of the child we connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood.⁴⁵⁶ That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.⁴⁵⁷

Section 28 of the Constitution provides in relevant part that a child's best interests are of paramount importance in every matter concerning the child. In explaining this right, the Constitutional Court held that the 'best-interests' or 'paramountcy' principle creates a right that is independent and extends beyond the recognition of other children's rights in the Constitution.⁴⁵⁸ Paramountcy requires that children's interests are to be afforded the 'highest value', meaning that their interests are 'more important than anything else' albeit that 'everything else is [not] unimportant.'⁴⁵⁹

The best interests of the child must be the primary concern in making decisions that may affect them. This requires parents, adults and law makers to do what is best for

⁴⁵⁴ *Media 24 (SCA)*, at para 86.

⁴⁵⁵ *J v C* 1970 AC 668, [1969] UKHL 4, [1969] 3 WLR 868, [1969] 3 All ER 1140.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *J v National Director of Public Prosecutions* (fn 39 above), at para 36.

⁴⁵⁹ *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC), para 29.

children when making decisions which will affect the children.⁴⁶⁰ Sometimes it is difficult to decide what a child's best interests are, as you often have to weigh up different issues carefully.⁴⁶¹ In making such a decision one should consider all factors, including the child's right to socialise (that is, to mix with other children), to live a 'normal' life, to remain healthy and to learn and develop with other children.⁴⁶²

In *French v French*⁴⁶³ the court outlined factors which should be considered in determining what is in the child's best interests. These include:

- The child's sense of security;
- The suitability of the custodian parent; and
- The material considerations and wishes of the child.⁴⁶⁴

Banach notes that by honouring the best interests of a child, the courts are helping with the physical, intellectual and emotional development of a child as the child matures into a well-judged adult.⁴⁶⁵ This further entails that when children are involved in criminal proceedings, there must be a consideration of them being able to develop with other children from the moment of the incident and be able to live a normal adult life afterwards. The Supreme Court of Appeal in *Centre for Child Law and Others v Media 24 and Others* took into consideration the best interests of the children in granting the victim and adult extension, as has been the practice in other court cases where children were involved, it however failed to do same with the adult extension. It failed to take into consideration, the need for them to develop into adulthood without further victimisation or stigmatisation.

The best interests of the children require that children, whether offenders, witnesses or victims, be treated the same before the law and benefit equally from the law. While the law can never guarantee that children are insulated from all traumas, section 28(2) requires that the law must do as much as possible to create conditions that protect

⁴⁶⁰ Factsheet: Summary of the United Nations Convention on the Rights of the Child, 2013. The 'best interests of the child standard' principle is provided for in terms of Article 3 of the UNCRC.

⁴⁶¹ Section 27 *The Rights of Children* (2010) Section 27, at 251.

⁴⁶² *Ibid*, at 252.

⁴⁶³ *French v French* 1971 (4) SA 298 (W).

⁴⁶⁴ Barrie "The Best Interests of The Child: Lessons from the First Decade of The New Millennium" *Tydskrif vir die Suid-Afrikaanse Reg*, Volume 2011, Issue 1, Jan 2011, 126 – 134, at 126.

⁴⁶⁵ Sisilana "The best interests of the child: a critical evaluation of how the South African court system is failing to use section 7 of the Children's Act accordingly in divorce proceedings" (2016) LLM dissertation, University of Cape Town, at 16.

children, allowing them to lead flourishing lives.⁴⁶⁶ As the Constitutional Court held in *S v M*:⁴⁶⁷

No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives.⁴⁶⁸

Considering of the best interests of the child does not only require us to consider their best interests as children. It includes taking into account the future of the child involved, at that time as a child, including their ability to lead a normal life once they become adults. What matters in this instance is not when the consequences are felt, but whether those consequences flow from actions or events occurring during childhood.⁴⁶⁹

Frank provides that a fundamental principle is that crime affects the whole person.⁴⁷⁰ Health and quality of life can suffer; money is needed to pay for the consequences, both direct and indirect; and support is needed by most people to cope with the often-overwhelming emotions that are a natural consequence of crime.⁴⁷¹ These are some of the considerations which the courts take into account when deciding matters which involve children. Extending their anonymity protection beyond 18 is also premised around the fact, as held by other courts, the anonymity of the minor victim is in the best interests of the child, not merely in light of the child's right to privacy, but because when the child "becomes an adult the many physical disabilities suffered by the child will result in vulnerability".⁴⁷²

⁴⁶⁶ *Media 24 (HC)*, para 104 of Applicants heads of argument.

⁴⁶⁷ *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007).

⁴⁶⁸ *Ibid*, at para 20.

⁴⁶⁹ *Media 24 (HC)*, at para 112 of the Applicants' Heads of Argument.

⁴⁷⁰ Fn 135 above.

⁴⁷¹ *Ibid*.

⁴⁷² *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC), at fn 1 of the court's judgement. The case dealt with an action in the High Court of South Africa, Gauteng Local Division, Johannesburg on behalf of WZ for damages arising from the allegedly negligent conduct of the employees of the applicant, the Member of the Executive Council for Health and Social Development in the Gauteng Province (Gauteng MEC), during his birth. This was after DZ, gave birth to WZ at the Chris Hani Baragwanath Hospital, Johannesburg. WZ was born by vaginal delivery, following prolonged labour, and was subsequently diagnosed with cerebral palsy due to asphyxia during delivery. The Supreme Court of Appeal made an order that both the disclosure of the respondent's and the respondent's child's identities is prohibited. See order 1 of the case.

4.3.4 The right to equality.

The Constitution provides that everyone is equal before the law and has a right to equal protection and benefit of the law.⁴⁷³ This comprises a guarantee that the law will protect and benefit people equally and prohibit unfair discrimination.⁴⁷⁴ At its most basic and abstract, the formal idea of equality is that people who are similarly situated in relevant ways should be treated similarly.⁴⁷⁵ This means section 154(3) of the Criminal Procedure Act unfairly discriminated on child victims, who were excluded from the ambit of its protection.

The dignity of the individual is inextricably linked with equality because each person has inherent worth, all are regarded as equal.⁴⁷⁶ The idea of the right to equality is that people who are in similar situations should be treated similarly, without any form of distinction. The right to equality entails the full and equal enjoyment of all rights and freedoms,⁴⁷⁷ and has the effect that all children should be treated equally and not be discriminated against based on factors mentioned in section 9 such as, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture language and birth.⁴⁷⁸

The preferred notion of equality is substantive equality which orients the right to equality from a negatively oriented right of non-discrimination to a positively-oriented right to substantive equality.⁴⁷⁹ It does this by ensuring that laws or policies do not reinforce the subordination of groups already suffering social, political or economic disadvantage and requires that laws treat individuals as substantive equals, recognising and accommodating peoples' differences.⁴⁸⁰

Some legislations place a limitation on certain rights as they provide protection to certain age groups, effectively excluding either children, or adults. This is the position in terms of section 154(3) which afford anonymity protection to children below the age of 18. Children are entitled not only to the rights contained in section 28, but also to all other rights in the Bill of Rights pertaining to them, which include, *inter alia* the right to

⁴⁷³ S 9(1) of the Constitution.

⁴⁷⁴ Currie and de Waal, 211.

⁴⁷⁵ Currie and de Waal, 210.

⁴⁷⁶ Hughes (fn 426 above), at 78.

⁴⁷⁷ S 9(2) of the Constitution.

⁴⁷⁸ S 9(3) of the Constitution.

⁴⁷⁹ Smith "Equality Constitutional Adjudication in South Africa" (2014) 14 *AHRLJ* 609- 632, at 612.

⁴⁸⁰ *Ibid*, at 613.

equality, the right to education and the right to personal autonomy constructed from the rights to privacy, freedom of religion, freedom of expression and freedom of association read together, are the most important.⁴⁸¹

The right to equality is one of the factors the Supreme Court of Appeal took into consideration in granting the victim extension.⁴⁸² Section 154(3) had the effect that only child offenders and witnesses were protected within the ambit of the provision. It made express mention to child offenders and witnesses, to the exclusion of child victims. This discrimination is contrary to the provisions of section 9 in it unjustifiably discriminates against child victims.

*Harksen v Lane NO and Others*⁴⁸³ adopted stages of inquiry into the determination of whether the right to equality has been violated. These stages of inquiry are further discussed in detail to indicate the constitutional invalidity of section 154(3) as it violates the child victims' right to equality:

- a. Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.⁴⁸⁴

The provision does differentiate between child offenders and witnesses, and child victims who are involved in criminal proceedings. It expressly provides anonymity protection to child offenders and witnesses below the age of 18, to the exclusion of child victims below the age of 18. There exists no legitimate governmental purpose in differentiating between the child offenders and witnesses, and child victims of crimes. This is the same vulnerable group of children who are exposed to the commission of

⁴⁸¹ Robison "Children's Rights in the South African Constitution" (2003) Vol 6 No.1 *Potchefstroom Electronic Law Journal* 1- 57, at 12.

⁴⁸² *Media 24 (SCA)*, at para 29. The Supreme Court of Appeal held that the additional purpose to the limitation of rights afforded to the media is to ensure that s 154(3) of the complies with the equality provisions of s 9 of the Constitution. The section grants anonymity to an accused and a witness at criminal proceedings who are under the age of 18 years but offers no protection at all to the victim at criminal proceedings, who is also under the age of 18 years. The exclusion of child victims from the provisions of s 154(3) was held to be irrational and in breach of s 9(1) of the Constitution, which guarantees the right to equal protection and benefit of the law to everyone.

⁴⁸³ *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997).

⁴⁸⁴ *Ibid*, para 50 (a).

crimes and the criminal justice system. If anything, child victims are likely to suffer more violation than child offenders whenever they are exposed to criminal conducts.

b. Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:⁴⁸⁵

- Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.⁴⁸⁶

The differentiation does amount to discrimination although it is not based on any of the specified grounds. Section 154(3) does not place child offenders, witnesses and victims on an equal footing.⁴⁸⁷ It, however, places a further limitation on child victims’ rights to dignity, privacy and security in that their identifying details can be made public, therefore stigmatising and traumatising them further. It can be an acceptable argument that child victims are the most vulnerable, and section 154(3) places a further financial, and emotional burden on them as they are expected to make an application to court to prohibit the media from publicising their identifying details whenever they are subjected to court processes.

This is not the position with regards to child offenders and witnesses. They have always enjoyed the automatic anonymity protection afforded to them in terms of section 154(3).

- If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.

⁴⁸⁷ *Media 24 (SCA)*, at para 29.

focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.⁴⁸⁸

As mentioned, the differentiation amounts to discrimination although it is not based on any of the specified grounds. However, the unfairness of the discrimination can be deduced on the basis that nothing justifies the exclusion of child victims from the ambit of section 154(3). The impacts of the exclusion have been felt by the likes of KL and MVB. They have been exposed to court processes for interdicts prohibiting the media from publishing their identifying details and have suffered further trauma and stigmatisation as a result. In other instances, as indicated above, the media published the details even though a court order had been obtained by MVB. This, as specified, has affected MVB emotionally.

- c. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(2).⁴⁸⁹

On the basis of the differentiation and unfairness of the differentiation specified above, the provisions of section 154(3) are unconstitutional, and contrary to the children's right to privacy, dignity, equality and the best interests of the child. The treatment of child victims as less worthy of the anonymity protection than the child offenders and witnesses is contrary to the equality of all children involved in the criminal justice system. The constitutional invalidity of this provision results in the limitation of the right to freedom of expression and press. The Supreme Court of Appeal held that the importance of the right of the media to impart information and the nature and extent of the limitation of this right, when balanced against the dual purpose of the limitation of this right, leads to the conclusion that the limitation on the right of the media in this instance, is reasonable and justifiable in terms of section 36 of the Constitution.⁴⁹⁰

In determining the constitutional validity of section 154(3) and its conformity with the right to equality, the Supreme Court of Appeal held that:

It is not in the best interests of child victims to offer them no protection under section 154(3) of the Criminal Procedure Act while affording full, automatic protection to accused and witnesses, irrespective of the severity of the crimes.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ *Media 24 (SCA)*, at para 30.

It is also not in the best interests to protect only those child victims who testify in court. Let alone the distinction between child offenders and victims but if victims are to be protected, they must all be provided with the protection. Secondly, this exclusion breaches the rights to human dignity and privacy in sections 10 and 14 of the Constitution. Children who are victims of crimes should not be forced to carry the public stigma and shame of victimhood throughout their lives. Nor should they be required to have their private concerns and matters rendered generally accessible to the public. The law must protect the dignity and privacy of child victims of crime, just as it protects the dignity and privacy of other child witnesses and children accused of committing crimes.⁴⁹¹

The Court's interpretation of the provision is applauded as there is no plausible reason to justify the exclusion of child victims from the protection. The purpose of the limitation is to ensure that section 154(3) complies with the equality provisions of section 9.⁴⁹² The exclusion of child victims from the provisions of section 154(3) is irrational and in breach of section 9(1) of the Constitution, which guarantees the right to equal protection and benefit of the law to everyone.⁴⁹³

The advancement of the right to equality requires that child offenders and witnesses be put on the same position as child victims when they are exposed to court processes. It requires that the interests of all children be taken into consideration on an equal footing. It is unfair that child victims, being the most vulnerable group than child offenders and witnesses in most instances, were excluded from the provisions of section 154(3).

4.3.5 The psychological impact of publishing the identifying details of children in criminal proceedings.

Section 28(2) is not merely an approach to be considered when dealing with protection of a child's right to dignity and privacy, but a directive to the courts to treat the child as somebody with attributes, qualities, sensibilities, and vulnerabilities, which make them different from adults.⁴⁹⁴ An effective justice system requires the protection of children

⁴⁹¹ *Media 24 (HC)*, at para 209.

⁴⁹² *Media 24 (SCA)*, at para 29.

⁴⁹³ *Ibid.*

⁴⁹⁴ Schoeman (fn 104 above), at 37.

and their rights when they are involved in criminal proceedings either as offenders, witnesses and victims. This ensures that all children receive equal benefit of the law.

Where provision is not made for separate and specialised services for this vulnerable children, they may be exposed to the negative effects of the criminal justice system or may further be victimised by it.⁴⁹⁵ Some authors acknowledge in part that there is secondary victimisation and trauma associated with the court processes.⁴⁹⁶ There is an amount of stress involved when a child is exposed to crime, and court processes. This requires the child's emotional immaturity and other relevant factors to be considered.

Van Niekerk in explaining 'stress' indicates that stress at an early age can have psychological effects on an individual even during adulthood.⁴⁹⁷ Prinsloo defines stress as follows:

Stress is the way in which the body and the mind respond to threats and demands from the environment, which can be harmful to the cognitive functioning of children. Clinical research result suggests that stress in early life can affect the development of multiple neurotransmitter systems and advance brain and neurological changes similar to those observed in adults suffering from depression. In addition to a diversity of possible cognitive and behavioural reactions and consequences that may hamper the child's personal and social functioning, he or she must also endure the trauma of testifying, which may further strain his or her development, behaviour and perception of the development.⁴⁹⁸

This is one of the reasons why the Media Monitoring Africa frequently contends that freedom of expression ought to be limited in appropriate circumstances when this is necessary to protect the rights of vulnerable persons, especially children.⁴⁹⁹ When children are exposed to crime and court processes, they should be treated fairly during

⁴⁹⁵ Ovens, Lambrechts and Prinsloo "Child witnesses in the criminal justice system" *Acta Criminologica* Vol 14(2) 2001 25-41, at 25.

⁴⁹⁶ Reyneke and Kruger "Sexual offences courts: better justice for children?" 2006 *Journal for Judicial Science* 31(2): 73-107, at 85.

⁴⁹⁷ Prinsloo (fn 52 above), at 7.

⁴⁹⁸ Ibid.

⁴⁹⁹ *Henri van Breda v Media 24 Limited and 2 Others; National Director of Public Prosecutions v Media 24 Limited and 2 Others* case Nos. 397/17 & 380/17, at para 4.

the proceedings and beyond. This entails a consideration of their right to privacy and human dignity, and their physical and mental state.

The expert evidence presented in *Centre for Child Law and Others v Media 24 and Others* indicates that children who are victims of crime tend to suffer from a range of psychological harm as a result of being identified in the media.⁵⁰⁰ The harm includes further trauma, stigma, shame and fear, affecting the child victim's ability to recover and return to normal life.⁵⁰¹ The Applicants, in their evidence, made use of Dr Del Fabbro expert evidence which explained that identification can re-traumatise children and undermine the long-term healing process.⁵⁰²

The threat of being identified in the media may prevent a child victim from trusting those around her,⁵⁰³ and has the pervasive effect of discouraging not only the reporting of crimes against children, but also child victims co-operating with the investigators.⁵⁰⁴ In *H v S*,⁵⁰⁵ the court dealt with the preservation of a victim's identity. It was held that aside from being a minor, as a victim grows up, her self-esteem and dignity may be unnecessarily affected if she perceives that those who she comes into contact with are aware of her identity.⁵⁰⁶ This decision also evidences the need for lifetime identity protection.

Some authors have justified the need for a lifetime anonymity by asking some of the relevant questions, such as 'what happens when a child accused attains majority during criminal proceedings or where a teenager who is convicted turns 18 and there is a pending appeal?' These questions were raised as a result of the Griekwastad murder, as the accused turned 18 during proceedings.⁵⁰⁷ Although the focus was on a child offender, the same would have been asked in the case of a young victim or witness who attained majority during proceedings or before they could even testify. It would not have been ideal to reveal their identities at such a crucial stage of their lives. MVB serves as an example of a situation wherein she was in a coma and had to wake

⁵⁰⁰ *Media 24 (SCA)*, at para 53.

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

⁵⁰³ *Ibid.*

⁵⁰⁴ *Media 24 (SCA)*, at para 54.

⁵⁰⁵ *H v S* (fn 172 above).

⁵⁰⁶ At para 1.

⁵⁰⁷ Milo and Scott (fn 66 above).

up to headlines outlining her personal details, and the circumstances surrounding her family's misfortune.⁵⁰⁸

An ideal position would be to guard against such situations. The Courts faced with these kind of applications for the protection of children's identities need to provide decisions which indicate that the time, effort, and resources necessary to launch an application for interdictory relief against large media organisations are substantial, putting this remedy beyond the reach of all but the rich or the fortunate few who have access to free and sufficiently skilled legal assistance.⁵⁰⁹ This accommodates children who turn 18 during the proceedings, or where there is a subsequent appeal, therefore causing less psychological trauma associated with both the court processes, the media, and being exposed to the public eye. The victim and adult extension ensure further that other right associated with the anonymity protection such as privacy, dignity and the best interests of the child are protected against media intervention.

4.4 The constitutional and possible development of the case

The matter relating to the protection of children's identities in criminal proceedings was first heard in the North Gauteng High Court where the Court accepted the applicants' interpretation of section 154(3) and found the provision constitutionally invalid to the extent that it did not include child victims within the ambit of its protection, however, the court further found no basis to declare section 154(3) constitutionally invalid to the extent that it does not provided ongoing protection. The Centre for Child Law therefore appealed the decision in the Supreme Court of Appeal which had a split judgment as far as the adult extension is concerned.

On both the victim and adult extension, the Supreme Court of Appeal delivered the following judgement:

1. The Supreme Court of Appeal was unanimous in its order on the victim extension. The Court declared section 154(3) invalid to the extent that it does not protect the anonymity of children as victims of crimes at criminal

⁵⁰⁸ See also para 1.8.5 and 2.3.2 above which discusses the facts in detail.

⁵⁰⁹ This was the desired result by the Applicants in *Media 24*. See *Media 24 (HC)*, at para 162.2 of the Applicants Heads of Argument.

proceedings. It suspended the declaration of invalidity for 24 months and granted an interim reading-in to apply during this period.⁵¹⁰

This order has been referred to the Constitutional Court for confirmation.⁵¹¹

2. In respect of ongoing protection, that is, the adult extension, the Supreme Court of Appeal had different opinions. The majority judgment held that section 154(3) could not be construed as giving ongoing protection to child accused, victims and witnesses when they turn 18.⁵¹² On this basis, the majority dismissed the applicants' appeal and found that section 154(3) was not unconstitutional for its failure to extend the anonymity protection beyond 18.⁵¹³

On the contrary, the minority judgment opined that section 154(3) did not presently confer ongoing protection to child accused, victims and witnesses when they turn 18, but held that this was unconstitutional on this basis.⁵¹⁴

The applicants now seek leave to appeal against the order of the Supreme Court of Appeal on the adult extension issue. The matter was heard in the Constitutional Court on the 07th May 2019.

The two main issues brought before the Constitutional Court are:⁵¹⁵

- Firstly, does section 154(3) permit the media to publish the identity of children who are victims of crimes, but have not yet testified or are not called to testify at trial? If so, is this consistent with the Constitution?⁵¹⁶
- Secondly, does the protection afforded by section 154(3) of the Criminal Procedure Act automatically terminate as soon as a child victim, witness, or accused turns 18? If so, is this consistent with the Constitution? This is the question of "ongoing protection".⁵¹⁷

The challenge to the constitutional validity of section 154(3) is now before the Constitutional Court as a combined application for confirmation, leave to appeal, and

⁵¹⁰ *Media 24 (SCA)*, at para 30.

⁵¹¹ *Media 24 (CC)*, at para 8.2 of the Applicants' Heads of Argument.

⁵¹² *Ibid*, at para 9.1.

⁵¹³ *Ibid*.

⁵¹⁴ *Ibid*, at para 9.2.

⁵¹⁵ *Centre for Child Law and Others v Media 24 and Others* CCT261/18 07 May 2019.

⁵¹⁶ *Media 24 (CC)*, Applicants' Heads of Argument, at para 4.1.

⁵¹⁷ *Ibid*, at para 4.2.

leave to cross-appeal in respect of the Supreme Court of Appeal's judgment and order.⁵¹⁸

The first challenge: the victim extension.

Section 154(3) is challenged on reason that it does not currently accord child victims of crimes anonymity protection whenever they are involved in criminal proceeding. As mentioned, the provision makes express provision for the protection of child offenders and witnesses. The appellants now seek a confirmation of the order made by the Supreme Court of Appeal on the constitutional invalidity of section 154(3) to the extent that it does not afford anonymity protection to child victims. The challenge is premised around reasons such as the lack of effective alternative protection. The Applicants contend that the common law remedy of an interdict against publication is an extraordinarily difficult and unrealistic prospect in the vast majority of cases.⁵¹⁹

It is therefore unrealistic and inconsistent with the Constitution to place the onus and the risk on some of the most vulnerable members of society to bring an application to court to obtain protection.⁵²⁰ The exclusion further places a limitation on rights afforded to children such as the right to equality, the best interests of the child, the right dignity and privacy.

Section 154(3) has the effect that only child victims who are called to testify have their anonymity protected, save for those child victims who are not called to testify or are not yet called to testify. This includes those children that are unable to testify for various reasons, such as, MVB who was in a coma when the proceedings commenced. This means that the only option is for the child victim to testify in court in order to enjoy the privilege of anonymity. The Applicants contend that there is no purpose in withholding anonymity protections until a child victim testifies and, by the time they take the stand, anonymity protections may have been rendered redundant by repeated and extensive publication of their identity.⁵²¹

The applicants hold that there is no justification under section 36 which justifies the limitation of the rights afforded to children.⁵²² On this basis, the Applicants seek a

⁵¹⁸ Ibid, at para 7.

⁵¹⁹ At para 54.

⁵²⁰ Para 55.

⁵²¹ Para 66.2.

⁵²² See paras 67- 79.

confirmation of the order made by the Supreme Court of Appeal, by the Constitutional Court.

The second challenge: the adult extension

The importance of the adult extension is to ensure that a child's need for protection from public identification does not stop when they turn 18 and to ensure that their rights are secured into adulthood.⁵²³ However, the Supreme Court of Appeal rejected the ongoing protection on the following reasons:

- The relief sought was overbroad and did not strike a balance between the rights and interests involved;⁵²⁴ and
- Notwithstanding the finding that section 153(4) did not provide for on-going protection and the expert findings that the applicants put before the court, the section was not unconstitutional.⁵²⁵

In considering the adult extension, the best interest of the child should also be of primary consideration. A key element of the section 28(2) right is that that the protection afforded by it does not terminate when a child turns 18.⁵²⁶ This principle entails that the life-long consequences of a child's actions or experiences are also the proper concern of section 28(2), even if those consequences are only felt in adulthood.⁵²⁷ The minority, in the Supreme Court of Appeal adopted this approach in their decision to grant the adult extension.

The reasons for the adult extension are premised around the expert evidence, which was submitted by the Applicants, as also outlined in their heads of argument.⁵²⁸ These include, in brief:

- The fact that the vulnerabilities of childhood persist after 18, particularly where a child's psychological development has been disrupted by the combined traumas of crime and participation in the criminal process.⁵²⁹

⁵²³ Para 80.

⁵²⁴ Para 81.1.

⁵²⁵ Para 81.2.

⁵²⁶ Para 84.

⁵²⁷ Ibid.

⁵²⁸ See para 87.

⁵²⁹ Para 87.1.

- Childhood traumas which leave deep and lasting psychological wounds that may be reopened in adulthood.⁵³⁰
- The threat of identification after turning 18 directly harms children. A child who fears being identified in the media when they turn 18 may experience added stress and trauma, as is clearly expressed in KL's affidavit.⁵³¹

The risk of identification can have other impacts on the development of the child into adulthood. In other instances, child victims may fear reporting crimes for fear of identification.⁵³² The Supreme Court of Appeal, in dismissing the appeal, ignored all these fundamentally important considerations.⁵³³ It did so, in part, because it failed to conduct an assessment of the limitation of rights resulting from the inadequate protections afforded by section 154(3).⁵³⁴

The alternative protection is inadequate. That is, the preference that children affected should make an application for an interdict preventing the media from publishing their identifying details. It places a further financial burden and emotional trauma especially in instances where the children turn 18 during proceedings or the proceedings are concluded a short-while before they turn 18.⁵³⁵ This process would retraumatise the children, who may at times, be reluctant to participate in the criminal justice system. The identification of children in the media upon attaining majority limits or violates the rights that have well been protected prior to adulthood.

The Applicants argue, in their Heads of Argument, that the refusal to grant the adult extension has no justification under section 36.⁵³⁶ The constitutional invalidity of section 154(3) arises from the fact that it unjustifiably strips all child victims, witnesses and accused of protection as soon as they turn 18, leaving children such as KL without protection.⁵³⁷ On this basis, the Applicants submitted that an order should be made by the Constitutional Court which should grant as follows:⁵³⁸

⁵³⁰ Para 87.2.

⁵³¹ Para 87.3.

⁵³² *Media 24 (SCA)*, see paras 53- 54.

⁵³³ *Media 24 (CC)*, Applicants' Heads of Argument, at para 95.

⁵³⁴ *Ibid.*

⁵³⁵ *Media 24 (CC)*, Applicants' Heads of Argument, see paras 54-56.

⁵³⁶ Paras 106- 110.

⁵³⁷ Para 109.1.

⁵³⁸ See para 114.

1. It is declared that the provisions of s 154 (3) of the Criminal Procedure Act 51 of 1977 are constitutionally invalid to the extent that they do not protect the anonymity of children as victims of crimes at criminal proceedings.
2. It is declared that the provisions of s 154(3) of the Criminal Procedure Act are constitutionally invalid to the extent to the extent that children subject to the section forfeit the protections afforded by it upon reaching the age of 18 years.
3. The declarations of invalidity are suspended for twenty-four months to allow Parliament to remedy the defects.
4. Pending Parliament's remedying of the defects, section 154(3) of the Criminal Procedure Act is deemed to read as follows:

(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years a witness at criminal proceedings who is under the age of eighteen years or of a victim of a crime under the age of eighteen years who is concerned in criminal proceedings: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person'; and
5. Section 154 of the Criminal Procedure Act is deemed to contain an additional section 154(3A) which provides: '(3A) Children subject to subsection (3) above do not forfeit the protections afforded by the section upon reaching the age of 18 years, but may, upon reaching adulthood, consent to publication of their identity.'

Should the Constitutional Court order otherwise in respect of the adult extension, it means that the likes of KL, and MVB and many others who have their identities protected will have their identifying details published for public knowledge upon attaining majority, therefore retraumatizing the children concerned. On this basis, section 154(3) should be declared constitutionally invalid to the extent that it does not extend the anonymity protection beyond childhood.

4.5 Conclusion

In granting both the victim and adult extension, the minority judgement in *Media 24* (SCA) has extensively weighed the right to freedom of expression of the media,

against the constitutional rights afforded to children, in particular, the best interests of children in all matters concerning them. Such limitation of section 16 of the Constitution would be within the bounds of the limitation clause as provided for in terms of section 36. In this minority judgement, the Supreme Court of Appeal took into account the psychological impacts that result from being exposed to crime, as well as court proceedings, either as a child offender, victim or witness, when granting the victim extension.

However, the Supreme Court of Appeal's majority decision on refusing the adult extension sets the ground for an appeal as the Court failed to extensively weigh the competing rights in this regard, since its main focus was on the right to freedom of expression, and freedom of press and other media. The minority on the other hand, took into consideration the children's rights which when they attain majority. It is therefore submitted that the minority judgement should be the preferred position as it justifiably limits the rights in accordance with the constitutional standards. The victim extension will, in all probability, be confirmed by the awaited Constitutional Court judgement, as submitted by the Appellants.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This dissertation is premised around the constitutional challenge of the provisions of section 154(3) of the Criminal Procedure Act which fails, in all relevant circumstances to protect the identities of child victims whenever they are involved in criminal proceedings, especially when they are not called to testify. It makes specific reference to child offenders and witnesses only. In addition, it strips child offenders and witnesses (as they are expressly mentioned in section 154(3)) of the anonymity protection when they attain majority.

The Centre for Child Law has, firstly, challenged the constitutional validity of the provision in the North Gauteng High Court and the Supreme Court of Appeal, being successful with the victim extension. The matter has recently been argued in a further cross-appeal before the Constitutional Court on the 7th May 2019., and the judgement is currently awaited. In deciding the matter, the High Court held that, based on purposive interpretation, child victims are not excluded from the anonymity protection afforded by section 154(3), but that it does not extend beyond the age of 18. Though this order was set aside by the Supreme Court of Appeal, a victim extension was achieved through a declaration of the section being unconstitutional and a reading in.

Competing views were held regarding the adult extension in the Supreme Court of Appeal. The Constitutional Court is now tasked to deal with the constitutional invalidity of section 154(3), as required by the Appellants, that is, to grant both the victim and the adult extension.

South Africa has enshrined children's rights in the Constitution, the supreme law of the country, that was designed to respect, protect, promote and fulfil the rights of all people in the country.⁵³⁹ This commitment resonates strongly with international principles.⁵⁴⁰ In terms of section 7(2) of the Constitution, the State has a duty to respect, protect,

⁵³⁹ Abrahams and Matthews *Promoting Children's Rights in South Africa: A Handbook for Members of Parliament* (2011) Parliament of the Republic of South Africa, at 1.

⁵⁴⁰ *Ibid.*

promote and fulfil all the rights in the Bill of Rights. Post 1994 has seen the implementation of legislation governing the rights of children and prescriptions on how issues concerning children are dealt with, these include, amongst others, the Child Justice Act, and the relevant provisions in the Constitution and the Criminal Procedure Act.

The protection of the children's identities is a matter which is also required by international instruments such as the UNCRC as is in line with, amongst other rights, the protection of children's right to privacy and the best interest of the child standard. The courts in Canada and the United Kingdom, as discussed above, also afford the anonymity protections to children involved in criminal proceedings in their criminal justice system. The anonymity protections in Canada are closely aligned to those of the Republic of South Africa, in that both of them provided the anonymity protection up to the age of 18, unless children are involved in offences of a sexual nature.

However, South Africa can learn and borrow from the United Kingdom. The United Kingdom has recently amended its anonymity laws to extend the protection beyond the age of 18. This was after offenders, who were children at the time offences were committed, experienced difficulties integrating into the communities after their release. The children received threats from the communities, which resulted in their departure from their homes, or change of identities in other circumstances.⁵⁴¹ The Government in the United Kingdom tabled these amendments in order to afford the minor offenders a maximum chance at rehabilitation, and to protect them against attacks by the public.

The challenge with these amendments in the United Kingdom is that they are only made in consideration of child offenders and not child witnesses and victims. The amendments do not place child offenders, witnesses and victims on an equal footing. Should the Constitutional Court in *Centre for Child Law and Others v Media 24 and Others* adopt the same as that of the United Kingdom, that is, to extend the anonymity protection beyond 18, it should grant the adult extension in respect of all children (child offenders, witnesses and victim) in order to afford them equal protection and benefit of the law, taking into account the right to equality.

⁵⁴¹ See Hamman and Nortje (fn 149 above).

5.2 Competing rights

There are several competing rights involved in this matter. In deciding on granting the victim and the adult extension, the media's right to freedom of press, the open justice principle, and the public's right to information should be weighed against children's rights to privacy, dignity and the best interests of the child standard. The psychological impact of identification is also a factor which the Constitutional Court must take into consideration if they favour reinterpretation or a finding of unconstitutionality of section 154(3).

The argument which the dissertation sets out is that the exclusion of child victims from the provision violates their right to privacy. The likes of KL⁵⁴² have experienced this firsthand, before and after turning 18. Her case and the ensuing criminal trial have been the subject of intense media scrutiny, both in South Africa and abroad.⁵⁴³ The media went as far as camping outside her school and home,⁵⁴⁴ and continued to invade her privacy by publishing details about her personal life. There were publications about her sister,⁵⁴⁵ KL's pregnancy, and details about her aunt.⁵⁴⁶

Through these publications, the child victims' right to dignity is also violated. KL will always be known as that girl who was abducted by a woman who raised her. This is how the public will see her especially if the public is aware of her true identity. This places the child victim in further trauma and victimisation, hence their dignity is worn-out. The exclusion, (and the lack of adult extension argued below), therefore constitutes a violation of their right to privacy and their dignity, without any justification in terms of section 36. A consideration of the fact that a child is a developing being should be a primary consideration in implementing legislation which seek to protect children.

It should be noted that children have the anonymity protection privilege for the sole purposes of protecting other rights which the Constitution affords them, which rights are not lost upon attaining majority. Their privacy and dignity remain important in terms of the Constitution, and if the courts are to permit the invasion of these rights, it must be constitutionally justified. Subjecting children to media and public scrutiny, even

⁵⁴² *Media 24 (CC)* at para 22 of the Applicants' Heads of Arguments.

⁵⁴³ *Media 24 (SCA)* at para 3.

⁵⁴⁴ *Media 24 (CC)* at para 5.2 of the Applicants' Heads of Argument.

⁵⁴⁵ *Ibid*, at para 22.3.

⁵⁴⁶ *Ibid*, at para 22.4.

when they attain majority, is not in their best interests. Children are a vulnerable group and they need to develop without fear of reliving the trauma they experienced during childhood.

In *S v M (Centre for Child Law as Amicus Curiae)*, the Constitutional Court described the language of section 28 of the Constitution as 'comprehensive and emphatic' and said that 'statutes must be interpreted, and the common law developed in a manner which favours protecting and advancing the interests of children'. Advancing the interests of children requires a consideration of their need to develop without being exposed to the public, therefore not being further victimised, and without reliving their trauma. Children must be given a fair opportunity at rehabilitation. Section 154(3) must be amended in the interest of the children.

As alluded above, the media's right to freedom of expression and freedom of press, must be weighed against a child's best interest, their right to privacy and dignity. Both the victim extension and the adult extension will limit the media's right to freedom of expression and press, which limitation must be justified in terms of section 36. The limitation will further implicate the open justice principle, the public interest, and the public's right to access to information. No right should be unjustifiably compromised or infringed upon.

The Supreme Court of Appeal in the majority judgement contends that the adult extension places a severe restriction on the right of the media to impart information and infringes the open justice principle.⁵⁴⁷ This view is respectfully questioned and criticised. In their judgement, the majority paid much focus on the effects of granting the adult extension, rather than also taking into account the effects of rejecting the adult extension.

5.3 Recommendation 1: the victim extension

The first argument that is made in this dissertation is that child victims should be expressly protected in terms of section 154(3). This is also in line with the order made by both the High Court and the Supreme Court of Appeal. Section 154(3) fails, in all constitutional aspects, to take into account, the child victims' rights as accorded by the Constitution. These include, amongst others, the right to be treated equally to child offenders and witnesses. The exclusion of child victims from the provisions of section

⁵⁴⁷ *Media 24 (SCA)* at para 27.

154(3) unjustifiably violates the child victims' rights to equality. There exists no plausible reason to exclude child victims from the ambit of the protection, specifically when one considers the fact that child victims are the most vulnerable individuals.

When measures are implemented with the aid to assist child victims, such measures must be centered around their needs. Child victims are unable to fully recover from the psychological impacts of crime on their lives if they are also aware that their identifying details will be for public knowledge. It is not feasible to expect child victims to deal with their trauma, and at the same time deal with the media and public scrutiny, or victimisation. Their financial means to obtain a court interdict may also be limited in other circumstances, as compared to that of the media to approach a court to request an order permitting the publication of any child's identity.

It should in fact be a child's choice, with the assistance of his or her parents, to have their identifying details published when they are involved in criminal proceedings. In essence, they can waive their right to identity protection even though that is not required by the Child Justice Act, the Criminal Procedure Act and the Constitution to have their identities published.

Child victims must be treated with care and respect so that they are able to have a sense of trust in the criminal justice system. Having their identifying details published in the media would deter them from reporting crimes and participating in the criminal justice system. This would cause further trauma and victimisation by the media, and the public will always perceive them as victims of specific crimes.

The Constitutional Court should therefore confirm the order of constitutional invalidity of section 154(3) to the extent that it excludes child victims from its protection, as ordered by the Supreme Court of Appeal. The provision should be declared unconstitutional and amended to include child victims. This view is in support of the Applicants' interpretation of section 154(3), which should be preferred over the media's contentions. The violation of the media's rights in this instance is justified in terms of section 36 of the Constitution. The media is only permitted to publish details relating to the court proceedings but is prohibited from publishing the identifying details of all children involved in those proceedings, whether they testify or not.

5.4 Recommendation 2: the adult extension

The second argument which this dissertation sets out is that the anonymity protection afforded in terms of section 154(3) should extend beyond the age of 18. As highlighted above, the majority judgment stated that it would not grant the adult extension, however, the minority judgement stated that section 154(3) is unconstitutional to the extent that it does not extend beyond childhood. The adult extension requires a constitutional analysis of the competing rights in order to determine the extent to which the rights may be limited. In weighing the competing rights, the minority correctly found the provision to be unconstitutional, therefore raising awareness for the consideration of a child's need to develop into adulthood.

A limitation of these rights would be justified in terms of section 36 as neither the victim nor the adult extension entirely prohibit the media from publishing details about the court proceedings. The public will be aware of the circumstances relating to the case and how the courts have dealt with the issues. The public will still be at liberty to express their opinions without having to expressly refer to the children involved in the proceedings. The limitation is premised around the fact that the rejection of the adult extension does not only place a limitation on the children's rights at play but arbitrarily violates these rights, in that the moment children attain majority, they are stripped of the right to anonymity protection, with the effect that their constitutional rights can easily be violated.

In most instances, the publication of identities of the children play a less important role. The main objective is mainly to convey to the public how the criminal justice system deals with children who commit offences, and how those who are prejudiced are protected by the system against further victimisation. Of course, room is left to the fact that the publication of the children's identities may play a positive role, that is in instances where there is a need to raise awareness. However, this does not entitle the media to freely publish the identifying details of the children. Rather, it should be left to the child to decide whether they wish to waive the anonymity protection or not, when they attain majority.

This does not arbitrarily impact on the principle of open justice. While courts may order that proceedings take place behind closed doors in line with section 153 of the Criminal Procedure Act, and prohibit the publication of children's identities thereto, the courts

are required to pass judgment and sentence in open court where the identities of the protected parties would not be revealed thereby.⁵⁴⁸ Therefore the principle of open justice is not compromised, and the media can still exercise their right to freedom of press.

The Constitutional Court should grant the adult extension, and in so doing, extensively weigh the competing rights. The relief sought by the applicants is of importance and the Constitutional Court should intensively consider the decision of the minority which was made in consideration of the necessary aspects such as the rights afforded to children in terms of the Constitution and the psychological impact of publishing their details when they turn 18. Although cases differ, the expert evidence submitted by the Appellants, supports the contention that in most instances, the psychological impact is severe.

Another aspect that justifies the adult extension is the need to ensure children's safety, before and after majority. The extended protection of children's identities will ensure that children are protected against any threat to their livelihood. In most instances, when an offender is released to the public, they are likely to face the public rage which may have an effect on their safety. In some instances, child offenders had to leave their homes to live elsewhere,⁵⁴⁹ while in other instances, they had to change their identities when they were released from prison.⁵⁵⁰

The need for safety covers a broad range of concerns. It relates firstly, to the period directly after the crime event and the victim's need to feel safe and protected from further harms.⁵⁵¹ Secondly, it relates to the need for safety within the context of the criminal justice process, where the victim may be acting as a witness.⁵⁵² The third dimension of this need relates to the need for a 'restored sense of safety and well-being', where the victim needs to be assured the he or she would not be revictimised.⁵⁵³

The knowledge, as a child, that one's identity as a victim of crime may be revealed upon attaining majority, may haunt that child, causing her considerable emotional

⁵⁴⁸ Songca (fn 421 above), at 80.

⁵⁴⁹ See the case of PN.

⁵⁵⁰ Hamman and Nortje (fn 149 above).

⁵⁵¹ Frank (135 above).

⁵⁵² Ibid.

⁵⁵³ Ibid.

stress.⁵⁵⁴ Failure to protect the identities of children might reduce the willingness to report crime, especially if they are aware that they will be identified upon attaining majority. Some of the challenges that will be faced by the court's failure to amend section 154(3), where the adult extension is concerned, is the fact criminal proceedings may commence a few months or days before the children attain majority. It would mean that such children will have to deal with trauma, stress and other psychological impact, and at the same time deal with media scrutiny. An assumption can be made to the effect that victims, in particular, are likely to find healing once court proceedings are completed and they are satisfied with the judgment against an offender. Therefore, if the child victim turns 18 during proceedings, there is a high probability that they are still extremely vulnerable. Identifying them at that stage would be inconsiderate.

The adult extension would guard against these instances where children turn 18 during proceedings, as other cases will also go on appeal. It would be irrational to expect the child to be exposed to further court processes and financial constraints of having to obtain an interdict preventing the media from publishing their identifying details. Stripping a child of all protection on turning 18 also makes the protections afforded by section 154(3) entirely arbitrary.⁵⁵⁵ Comparing the experiences of PN and DS⁵⁵⁶ with those of P and X,⁵⁵⁷ it is clear that a child's anonymity is made dependent on factors beyond their control.⁵⁵⁸ If a child is lucky and has a speedy trial that concludes before they turn 18, their anonymity may remain intact.⁵⁵⁹ They could be fortunate enough that the media and the public would have lost interest in the matter after they have attained majority.

However, if the trial is delayed by circumstances beyond their control and they turn 18 during the trial, then they will be exposed to heightened risks of being identified.⁵⁶⁰ This is contrary to the best interests of the child standard, and other constitutional

⁵⁵⁴ *Media 24 (SCA)* at para 83.

⁵⁵⁵ *Media 24 (CC)* at para 102.3 of the Applicants' Heads of Argument.

⁵⁵⁶ See page 36-37 above.

⁵⁵⁷ P and X were both child offenders, convicted of very serious offences. Both cases received a widespread media coverage, with their identities protected. When they turned 18 sometime after their court proceedings had been concluded, the media's interest in their cases had subsided. As a result, they were spared the ordeal of being identified in the media when they reached adulthood. See *Media 24 (HC)*, at para 63 of the Applicant's Heads of Argument.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

rights related thereto. The purpose of the Child Justice Act is to protect the rights of all children as per the Constitution. Part of this is to encourage children to become law-abiding citizens and it is clear that rehabilitation and the ability to move on with one's life is severely hindered if a child offender has to deal with being publicly named in the media, once they turn 18.⁵⁶¹

Hamman and Nortje state that the disclosure of the identities of minor witnesses, victims and offenders on them attaining the age of 18 is a sensitive issue that must be handled with respect, privacy and care.⁵⁶² It is submitted that there is a need to ensure protection of children's rights in court and throughout the criminal justice system. Developing awareness on some of the challenges encountered by the child victims of crimes who are forced to relive their trauma by being identified in the media may be an essential part of it. Journalists need to take great care, from a legal and ethical perspective, when reporting on cases involving children.

5.5 Conclusion

The Constitutional Court, in confirming the order for the victim extension and the adult extension, should adopt the approach in *Canadian Newspapers Co v Canada (Attorney-General)*.⁵⁶³ The court held that while freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognised that the limits imposed by [prohibiting identity disclosure] on the media's rights are minimal.⁵⁶⁴

The rights of children offer a vision that a child is an individual and a member of a family and community, with rights and responsibilities appropriate to his age and stage of development.⁵⁶⁵ These are the considerations the courts must adopt in granting the victim and adult extension. The former United Nations Secretary General, Mr. Kofi Annan during the State of the World's Children 2000 stated that:

There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their

⁵⁶¹ Van Der Walt "Making a case for the continued protection of identity of young offenders who turn 18 during criminal proceedings under the South African Law, compared with the law of England and Wales" LLM dissertation, University of Pretoria (2017), at 38.

⁵⁶² Fn 550 above.

⁵⁶³ *Canadian Newspapers Co v Canada (Attorney-General)* (fn 257 above).

⁵⁶⁴ *Ibid*, at para 133.

⁵⁶⁵ Schoeman (fn 104 above), at 40.

welfare is protected, that their lives are free from fear and want and that they can grow up in peace. In so doing, governments have an obligation to protect and promote the survival, development and well-being of children, which ultimately affects their quality of life.⁵⁶⁶

⁵⁶⁶ Annan *The State of the World's Children 2000*, <https://www.unicef.org/sowc00/foreword.htm> (accessed on 03/04/2018).

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