

Human Rights

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**\*15 RECOGNIZING CHILDREN'S RIGHTS: LESSONS FROM SOUTH AFRICA**[Barbara Bennett Woodhouse \[FN1\]](#)

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Children are the newest kids on the human rights block. Just ten years ago, the 1989 United Nations Convention on the Rights of the Child finally articulated a comprehensive scheme of rights specifically tailored to juveniles. This UN Convention holds the world's record as the most rapidly and universally accepted human rights document in the history of international law. Before its tenth anniversary, it was adopted by every nation save two: Somalia, which currently lacks a functioning government, and the United States of America. [\[FN1\]](#) However, recognition of children's human rights on an international scale is merely a beginning, not an ending. As lawyers know, rights are made accessible to ordinary people through incorporation into the constitutions and laws of nations and states and by integration into existing schemes of established rights. "Incorporation" is a term of art in U.S. constitutional jurisprudence, used to describe the Supreme Court's interpretation of the Fourteenth Amendment as implicitly incorporating various rights articulated in the Bill of Rights and/or deemed fundamental to a system of ordered liberty. One may use "incorporation" in a broader sense, however, to describe the process of integrating evolving understandings of basic human rights into constitutional law. The process of incorporating rights for the next generation into the world's constitutions is taking place, in many stages and variations, all around the globe.

A powerful example of this process is found in section 28 of the 1996 Constitution of the Republic of South Africa (RSA Constitution). Titled simply "Children," this section explicitly embraces the newest category of rights-bearers, setting out a detailed listing of children's rights. [\[FN2\]](#) Section 28 draws upon a number of comparative and international law sources, including the African Charter on the Rights and Welfare of the Child (1990) "and, preeminently, the United Nations Convention on the Rights of the Child (1989)." [\[FN3\]](#) Section 28 enumerates rights to name and nationality, to parental care, to "positive" or "welfare" rights--including shelter, nutrition, and medical care--to representation of counsel, and to have decisions based on the child's best interest, all bearing a strong resemblance to principles of the UN Convention. However, other striking features of the RSA Constitution are the detailed rights accorded to children in detention, the specific provisions regarding "family care" for children separated from their parents, and the right to counsel at public expense, even in civil cases where justice so requires.

In the South African scheme, children are given a set of specifically defined rights not in place of, but in addition to, those enjoyed by "everyone." [\[FN4\]](#) Instead of characterizing children as possessing merely a passive "interest," leaving protection and promotion of that interest to the state, the South African text makes the child an active rights-bearer whose claims are explicit and justiciable. Children are also empowered by procedural protections of their rights and by provisions that instruct courts to give a purposive and holistic interpretation to constitutional protections of human rights. [\[FN5\]](#)

### **Newly Articulated Constitutional Rights**

As section 28 illustrates, when it comes to articulating human rights principles, older constitutional democracies like the United States may have much to learn from relative newcomers. This is especially true in relation to women and children, whose status has changed radically in the 200+ years since the U.S. Constitution was created. Our forefathers consigned not

(Cite as: 26-SPG Hum. Rts. 15)

only slaves but also women and children to the private sphere. Modern constitution builders accept women and, increasingly, children as persons having claims to freedom, equality, and dignity.

Modern constitutions have taken rights and protections that the U.S. Supreme Court has articulated only in case law, if at all, and converted them into explicit black letter constitutional provisions. Not only children's rights but many other family matters find explicit protection in the RSA Constitution. Even \*16 more than other modern constitutions, the RSA Constitution contains carefully worded provisions defining the relation between government and family and between individuals within the family. These include rights of privacy and reproductive choice; protection against discrimination based on sex, marital status, pregnancy, sexual orientation, and age; protections of linguistic and cultural values; and protection of such economic rights as housing and education, which are central to family survival and children's development. By contrast, the U.S. Constitution's text is silent as to virtually all of these important issues. In U.S. constitutional law, many of these rights remain unrecognized and others, while recognized in case law, remain highly contested, depending for their survival on the Supreme Court's respect for principles of stare decisis.

The RSA Constitution is explicit not only about the substance of rights but about numerous procedural and jurisprudential issues such as standing and interpretation. It makes various rights binding not only on public or "state" action but on private action, and establishes government structures for monitoring and enforcing these rights. By contrast, the U.S. Constitution is silent, restrictive, or ambiguous regarding the scope, application, and enforcement of rights affecting the family. The South African document includes careful instructions on its interpretation and many provisions that constitute "tests" to apply in situations where competing rights and interests clash. [FN6] Here again, the U.S. document provides only minimal guidance, leaving a vacuum that has been filled over the centuries by elaborate doctrines created by judicial interpretation.

## Section 28 of the RSA Constitution

### Children

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

(Cite as: 26-SPG Hum. Rts. 15)

(3) In this section "child" means a person under 18 years.

What lessons can we learn from the South African document and the process that created it? The RSA Constitution is the result of a unique moment in history, and it was shaped by a distinctive drafting process. [\[FN7\]](#) Unlike the U.S. Constitutional Convention, which was held in secret, the South African process was extremely public. Individuals, as well as political parties and nongovernmental organizations, contributed extensively. A Website was established and telephone hot lines created, allowing any person to submit oral comments. Information was disseminated in all eleven of South Africa's official languages. [\[FN8\]](#)

The South African drafters consulted constitutional experts, borrowed models from other constitutional systems, and treated international human rights law as compelling authority in their project of creating a comprehensive and inclusive catalogue of modern rights. An Interim Constitution had been negotiated between the various political forces to establish basic ground rules for the Constitutional Assembly. A key provision stated that in order to achieve certification by the Constitutional Court, the final document would have to "entrench" all "fundamental rights." Thus the Constitutional Assembly and Justices of the Constitutional Court were obliged to consider the status of rights worldwide, to determine whether all those rights generally deemed fundamental were properly entrenched in the document. [\[FN9\]](#)

### **Focusing on Children**

It is no accident that both the Interim and the 1996 South African Constitutions singled out children for special attention. Modern scholars have suggested that "the conception of justice in periods of political change ... is alternatively constituted by, and constitutive of, the transition. As a state undergoes political change, legacies of injustice have bearing on what is deemed transformative." [\[FN10\]](#) The transitional moment in South Africa coincided with a transitional moment for \*17 children worldwide and in Africa--the promulgation and virtually universal acceptance of the UN Convention on the Rights of the Child and the 1990 promulgation of the African Charter on the Rights and Welfare of Children. Perhaps even more telling, in situating children's rights as part of South Africa's transformative agenda is the fact that children played a central and highly visible role in the South African struggle for dignity, freedom, and equality. Participants in the national debate on rights emphasized the debt owed by the nation to its youth, the sacrifices of youth in the battle against apartheid, and the destructive impact of the apartheid system across every aspect of the lives and prospects of the majority of the country's children. [\[FN11\]](#) Observers emphasized how apartheid laws such as the Group Areas Act and "influx control" laws forced parents to leave their children in order to find work and forced children to leave their homes and to seek survival on the streets. Legally enforced separation and inequalities in safety, education, shelter, and every other arena stunted the mental growth of children of all races and classes.

Children were not merely passive victims of apartheid. The struggle against apartheid engaged a generation of children as active combatants. [\[FN12\]](#) For those seeking to articulate a scheme of children's rights, the brutality of children's experiences under apartheid and children's status as freedom fighters provided a powerful motivating context. In the period before the Constitutional Assembly was convened, Albie Sachs, later appointed a Justice of the Constitutional Court, observed, "The greatest abuse to which South African children are subject today comes from the organized might of the state. Any charter of children's rights in a democratic South Africa has to take this fact as a starting point." In arguing for a right to play, he pointed to a history in which children's "school grounds are occupied by troops, when their courage is displayed not on the sports field but in the torture chambers of the police." [\[FN13\]](#) In addition to those children jailed for political activism, large numbers of street children who should have been served by a child welfare system were instead swept into criminal systems and detained indefinitely for petty offenses, often in the same facilities as adult offenders. [\[FN14\]](#) In his 1994 State of the Nation Address, President Mandela specifically highlighted the plight of children in detention and of street children, and

(Cite as: 26-SPG Hum. Rts. 15)

committed national resources to meeting their needs. [\[FN15\]](#)

Children also played a direct role in setting a children's rights agenda during this transformational moment. In May and June 1992, the International Summit on the Rights of Children in South Africa brought together over 200 children between 12 and 16, representing all races, classes, and regions of South Africa. They drew up and adopted a "Children's Charter of South Africa" and demanded the right to a children's council of representatives in any future governments. The charter concludes: "Children will no longer remain silent about their rights, but will speak and even shout out about their needs and demands." [\[FN16\]](#) In response to pressures for representation of children and youth, on June 1996 President Mandela created a National Youth Commission (NYC) composed of persons aged 14 to 35. A National Youth Policy, issued by the NYC in December 1997, reflects the views of over 3,000 delegates to regional NYC hearings and proposes policies for addressing youth unemployment, health, crime, and education issues. [\[FN17\]](#)

Americans maintain idealized images of our own children as precious objects sheltered from adult cares. We balk at the notion of children's autonomy or participation in decision making, seeing it as a threat to our own rights. Too many Americans regard poor and especially incarcerated children as "other people's children," alien and dangerous, by definition "delinquents" and "criminals." [\[FN18\]](#) Such attitudes permeate all societies that have historically been divided by class and color, including South Africa. But the constitutional text of the new Republic of South Africa explicitly commits all South Africans to sustaining and protecting all children. The South African provisions, singling out children in detention for heightened rather than diluted due process rights, as is the case in America, reflect the unique role played by children in the justice system in South Africa's "long walk to freedom."

### **Barriers to Emerging Rights**

In those transitional moments when a new constitution is being created, its authors seek the most up-to-date version of human rights consistent with their own cultural life. At such times, the door is thrown open to explicit incorporation of emerging rights. In established constitutional schemes, such as that of the United States, recognition of emerging rights involves a more complex and halting process. A look at our own history illustrates the barriers to recognition of emerging rights. Because laws and amendments require majorities and supermajorities, neither the amendment process nor the democratic process alone can ensure that our Constitution's growth and renewal will keep pace with emerging human rights. As with children's rights, new rights often are perceived as \*18 a threat to established rights. Often they pit isolated minorities or groups who have been systematically excluded from power against those already in power. When put to the substantive due process test (whether they are "deeply rooted" in our traditions) emerging rights often fail precisely because they have been so routinely violated as to be invisible. And yet, relatively "new" rights--such as those of women and people of color to equal dignity--are among the most compelling of human rights claims and surely belong in every constitution's scheme of rights, regardless of whether they can command majority support.

Incorporating new rights into an existing constitutional scheme depends on a robust belief among judges and among the people in the legitimacy of judicial interpretation. Judges must approach the written document as a "living" thing, not only "open" to interpretation but positively designed to grow, keeping pace with the global evolution of human rights principles. The South African Constitutional Assembly, writing on a fresh page of constitutional parchment, explicitly incorporated children's rights, "entrenching" them in the document as a reflection not only of the South African experience but also in recognition of their rapid and virtually universal legitimation in international law. Eventually, those charged with the task of defining principles of liberty, justice, and equality under established constitutions will follow South Africa's lead, incorporating rights for children in their constitutional schemes.

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Note 1. Author's Note: This writing is adapted from a forthcoming article in the University of Pennsylvania Journal of Constitutional Law's symposium issue on children's rights. See 2 U. PA. J. CONST. L. \_\_\_\_ (1999).

[FN1]. Within four years of its adoption by the United Nations General Assembly, 136 nations had ratified the Convention. See Timothy J. Treanor, [Relief for Mandela's Street Children and the Law in the New South Africa](#), 63 *FORDHAM L. REV.* 883, at n.146.

[FN2]. republic S. Africa Const. ch. 2, § 28 [hereinafter rSA Const.].

[FN3]. See CONSTITUTIONAL LAW OF SOUTH AFRICA at 33.1 (Matthew Chaskalson et al., eds. 1996); ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA 87 (1990).

[FN4]. See RSA CONST. ch. 2, §§ 9 (equality); 12(2) (bodily integrity and reproductive freedom); 15 (religious and customary family law); 16(2) (protection from race and gender-based hate speech); 18 (freedom of association); 26 (right to housing and protection from eviction); 27 (health care, food and water, social security); 29 (education); 30 (protection of language and culture).

[FN5]. See RSA CONST. § 39 ("when interpreting the Bill of Rights, a court ... must promote the values that underlie an open and democratic society based on human dignity, equality and freedom ... [and] must consider international law").

[FN6]. See DION BASSON, SOUTH AFRICA'S INTERIM CONSTITUTION: TEXT AND NOTES (1995); Chaskalson, *supra* note 3.

[FN7]. For a discussion of the historical events and the constitution-building process, see Case CCT 23/96 Certification of the Constitution of the Republic of South Africa, <http://www.constitution.org.za/cert.html>;

[FN8]. Author's interview of Hon. Yvonne Mokgoro, Justice of the Constitutional Court of South Africa, Aug. 13, 1997; see also [www.constitution.org.za/cgi](http://www.constitution.org.za/cgi) (collecting citizens' letters and oral comments).

[FN9]. INTERIM CONST. schedule 4, "Constitutional Principles II," reprinted in BASSON, *supra* note 6.

[FN10]. Ruti Teitel, [Transitional Jurisprudence: The Role of Law in Political Transformation](#), 106 *YALE L.J.* 2009 (1997).

[FN11]. Remarks of Justice Yvonne Mokgoro to Philadelphia School Children, Dec. 1997; Treanor, *supra* note 1, at n.67 (citing conclusions in 1994 of Goldstone Commission of Inquiry into the Effects of Public Violence on Children that apartheid had been "uniformly and profoundly destructive" of children).

[FN12]. See Treanor, *supra* note 1, at n.67; UNICEF AND NATIONAL CHILDREN'S RIGHTS COMM'N, CHILDREN AND WOMEN IN SOUTH AFRICA: A SITUATION ANALYSIS (1993).

[FN13]. SACHS, *supra* note 3, at 79-81.

[FN14]. Treanor, *supra* note 1, at n.273.

[FN15]. Nelson R. Mandela, State of the Nation Address (May 24, 1994) (cited in Treanor, *supra* note 1, at n.273).

(Cite as: **26-SPG Hum. Rts. 15**)

[FN16]. See Minutes of the National Children's Rights Public Hearing, May 13, 1995, <http://www.constitution.org.za/cgi-bin/vdkw>. The Children's Charter includes all of the rights adults often include in their formulations, but the spirit and emphasis are different.

[FN17]. See National Youth Commission, National Youth Policy (Dec. 17, 1997), <http://www.polity.org.za/govdocs/policy>.

[FN18]. Barbara Bennett Woodhouse, "Who Owns the Child?" Meyer and Pierce [and the Child as Property, 33 WM. & MARY L. REV. 995 \(1992\)](#).

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