

Chapter 1

Introduction

1 RESEARCH PROBLEM

There has in recent decades been a global re-ordering of the parent-child relationship, a shift in emphasis from the rights of the parent to the interests of the child, from parental rights to parental responsibilities.¹ The 1960's saw the emergence of a movement for the advancement of the rights of children. This movement was given further momentum in 1989 with the acceptance by the United Nations of the Convention on the Rights of the Child. These events have had a profound influence globally on judicial policy-making relating to the parent-child relationship in general, and judicial interference with parental authority specifically.² The 1990's was also a time of great constitutional change in South Africa. South Africa adopted the interim³ and final Constitution,⁴ “which already ranks as one of the world's great declarations of the rights of mankind”.⁵

Professor Kenneth McK Norrie, professor of law of the University of Strathclyde, Glasgow, Scotland, made the following important statement in an article published in the *South African Law Journal* in 2002:⁶

¹ Van Heerden *et al* (eds) *Boberg* 657-658.

² Norrie 2002 *SALJ* 623.

³ Constitution of the Republic of South Africa 200 of 1993.

⁴ Constitution of the Republic of South Africa 108 of 1996.

⁵ Norrie 2002 *SALJ* 623.

⁶ Norrie 2002 *SALJ* 623.

“Given the plethora of statutes (and common-law and constitutional rules) that apply to children in contemporary South African law, it is likely that some time in the future more comprehensive legislation ... will be proposed. When that happens, policy-makers in South Africa will have to be careful to ensure that the changes that are made are substantive and real, and not merely theoretical and rhetorical. It is in the avoidance of that risk that comparative study can afford useful lessons.”

When Norrie wrote his article, the process of legislative change of South African child law had already begun. During September 1996, the parliamentary Portfolio Committee on Welfare and Population Development and the Community Law Centre (University of the Western Cape) held a conference at which a comprehensive review and redrafting of the Child Care Act 74 of 1983 and all other South African legislation affecting children was planned, together with the common law, customary law and religious laws relating to children.⁷

In January 2002, the South African Law Commission published a discussion paper, prepared by the Project Committee on the Review of the Child Care Act and the research staff of the Commission, for comment.⁸ This discussion paper contains a proposed draft Children’s Bill, which contains the Law Commission’s recommendations and findings as well as a draft Children’s Bill embodying those recommendations. The Department of Social Development intends introducing a Children’s Bill⁹ in Parliament soon.¹⁰ The Children’s Bill it intends introducing is an amended version of the draft Children’s Bill attached to the Law Commission’s report. (Incidentally, the Law Commission was renamed in 2003 and is now called the South African Law Reform Commission.)

The current comprehensive redrafting of the law relating to parent and child is the context

⁷ Community Law Centre *Towards redrafting the Child Care Act*.

⁸ *Review of the Child Care Act* Discussion paper 103 Project 110 (2002).

⁹ the Bill was published at <http://www.welfare.gov.za/Legislation/2003/2003.htm>.

¹⁰ GN 2200 GG 25346 of 13 August 2003.

within which this study takes place. In view of the fact that South Africa is in the midst of such a comprehensive redrafting of the law relating to parent and child, the question should be answered whether the provisions relating to judicial interference with parental authority by means of child protection measures proposed in the draft Children's Bill are adequate, keeping in mind the re-ordering of the parent-child relationship referred to above. This question should be answered against the background of Norrie's warning referred to above that "policy-makers in South Africa will have to be careful to ensure that the changes that are made are substantive and real, and not merely theoretical and rhetorical. It is in the avoidance of that risk that comparative study can afford useful lessons".¹¹

A study based on the relationship between parent and child, like this one, is a difficult and complicated one, as is clear from the following statement of Norrie:¹²

"Child law is and always has been an uneasy balance between conflicting principles and interests".

Difficult and complicated as a study based on the relationship between parent and child may be, it has never been more relevant and necessary than now. In this thesis, I will attempt to find an appropriate balance between the conflicting interests of parent, child and state in the delicate process of interference with parental authority by means of child protection measures, a balance that takes into account international trends in the law of parent and child, and at the same time reaches its primary goal of protecting the interests of the child.

2 RESEARCH METHOD

The research method that will be used in this thesis is a literature study. In view of the

¹¹ Norrie 2002 *SALJ* 624.

¹² Norrie 2002 *SALJ* 624.

nature of the research problem stated above,¹³ legislation, judicial decisions, books and journals will be used.

The nature of the research problem further necessitates a historical research component. However, the historical component will merely consist of a historical overview, and not a real in-depth legal-historical approach. The historical overview has the main purpose of clarifying modern concepts relating to parental authority.

In view of the fact that this thesis concentrates on the observation and systematic processing of knowledge, the legal positivist research method is used.¹⁴ Relevant legislation, commission reports and government initiatives are analysed and criticised throughout. Although errors, inconsistencies and shortcomings are pointed out, strong points that can form the basis of a reformed system of child law are also emphasised.

Since the legal comparative research method stimulates thought on legal research, and can lead to new insights and new, significant knowledge,¹⁵ this research method plays an important role in this thesis. As South Africa is in the midst of a comprehensive redrafting of *inter alia* its child protection measures, it is important to include a comparative research component in order to establish how the problem is dealt with in other legal systems. I will concentrate on state intervention and child protection measures in New Zealand and Scotland. The comparative research that follows below,¹⁶ thus belongs to the modernistic school of the South African legal science tradition, that concentrates on Anglo-American legal systems, in contrast to the puristic school, that concentrates exclusively on Roman-Dutch and European or Continental legal systems.

¹³ See ch 1 par 1 above.

¹⁴ See, in general, Venter *et al Regsnavorsing* 63-66.

¹⁵ See Venter *et al Regsnavorsing* 71, 208-209.

¹⁶ See ch 6 & 7 below.

South Africa and New Zealand have similar socio-economic circumstances. Like South African society, New Zealand society is characterised by cultural diversity. Like South African indigenous law, New Zealand customary law has an important influence on New Zealand positive law.¹⁷ The family group conference, which serves as an important instrument for the protection of children in New Zealand, came into existence as a result of the recognition of Maori values in the legislative process.¹⁸

Scottish family law is relevant when considering South African child law, since Scottish law, like South African law, is a mixed legal system, originating mainly in Roman law, but with much of the modern law drawn from or influenced by contact with the English common-law system.¹⁹ For these reasons, Scottish law provides a relevant basis of comparison. It goes without saying that comparisons with Scottish law must be done with caution, given the different social, economic and cultural backgrounds of the two countries.²⁰

In this thesis various research methods are thus used in order to find appropriate solutions for the current problems in South Africa, which will at the same time comply with the requirements of the modern South African community.

3 OUTLINE OF THESIS

In order to achieve the aim and the envisaged research result of this thesis,²¹ chapter 2 will

¹⁷ Robinson 1996 *Stell LR* (1) 210; 1996 *Stell LR* (2) 313.

¹⁸ Robinson 1996 *Stell LR* (2) 313-314.

¹⁹ Edwards in Davel (ed) *Children's rights* 37-38. Edwards refers to an example to illustrate her statement. She points out that, as in South African law, Scottish law still retains the division of children into those below the age of puberty (12 for a girl, 14 for a boy), known as pupils, and those above that age but under the age of majority (known as minors). However, the significance of this division has been removed by the Age of Legal Capacity (Scotland) Act 1991.

²⁰ Edwards in Davel (ed) *Children's rights* 38.

²¹ See ch 1 par 1 & 2 above.

consist of a historical overview of the legal nature and development of parental authority in Roman, Germanic, Roman-Dutch and South African law. The aim of this investigation is to determine whether parental authority as it was known in Roman-Dutch law, had a Roman or Germanic origin. This conclusion has important implications for the rest of the study. It is especially relevant when the legal nature and content of parental authority in current South African law is determined. The historical overview of the concept parental authority has the further purpose of clarifying modern concepts relating to parental authority.

It is impossible to formulate guidelines for interfering with parental authority without first of all establishing exactly what parental authority is, and what its boundaries are. In chapter 3 it is first of all determined how parental authority is acquired and lost. Secondly, the content of parental authority in South African law is investigated, followed by a discussion of the legal nature of parental authority. The conclusion that is reached on the legal nature of parental authority in South African law has important implications for the rest of the study, particularly the question when judicial interference with parental authority is justified.

As pointed out in chapter 3, one of the ways in which parental authority can be terminated, is by means of court order. This court order can either be granted in terms of the common-law authority of the High Court as upper guardian of minors, or in terms of various statutory provisions. The aim of chapter 4 is to investigate this common-law authority of the High Court, and the various statutory provisions authorising judicial interference with parental authority.

One of the statutory provisions authorising judicial interference with parental authority is the Child Care Act 74 of 1983, which provides for judicial interference with parental authority by means of child protection measures. Chapter 5 is devoted to an in-depth analysis of the provisions relating to judicial interference with parental authority in the Child Care Act. It starts with a general overview of the development of child protection legislation in South Africa. The relevant provisions of the draft Children's Bill proposed by the South African

Law Commission, as well as the draft Children's Bill proposed by the Department of Social Development, is investigated. Any differences between the two Bills are highlighted.

Chapter 6 consists of an in-depth analysis of state intervention and child protection measures in New Zealand. The overall emphasis throughout the Children, Young Persons and Their Families Act 24 of 1989 on family participation and decision making, culminates in the family group conference. The family group conference came into existence as a result of the recognition of Maori values in the legislative process. The operation of this system is critically analysed in chapter 6.

Chapter 7 consists of an analysis of Scottish state intervention and child protection measures. In Scottish law, children in need of compulsory measures of supervision are dealt with by a lay tribunal known as the children's hearing. In addition to this, the Scottish local authority has an important overarching role in Scottish child protection measures, as will be shown in chapter 7. Scottish law places a high premium on participation of children in decisions which affect them. Child participation, as well as legal representation of children in Scotland will be investigated in detail in chapter 7.

As the children's rights movement has formed the basis of the United Nations Convention on the Rights of the Child 1989 and the children's clause contained in the Bill of Rights, a study of the theoretical aspects of the protection of children's rights is of the utmost importance for this study. Viewpoints on the level of self-determination or autonomy that should be afforded to children, and the extent to which the state should be allowed to actively interfere in family life inform the decisions of judges, legislators and policy makers. These aspects will be investigated in detail in chapter 8.

South Africa ratified the United Nations Convention on the Rights of the Child 1989 on 16 June 1995. The Convention now establishes legally binding norms and principles which create international standards for South Africa to comply with in its domestic legislation and policy concerning the areas covered by the Convention. The question arises whether

the children's clause (final Constitution s 28), and the draft Children's Bill comply with these international standards. This question will be answered in chapter 9. This chapter will further consist of an analysis of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, concentrating specifically on European Court case law relating to article 8 of the European Convention, which protects the right to family life. Section 28(1)(b) of the Constitution is especially relevant to this study. It provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. The fact that every child's right to family care, parental care, or appropriate alternative care is entrenched in our Bill of Rights has important implications for child protection legislation. The question arises, in view of the Bill of Rights, especially the provision entrenching the right to family care, parental care, or appropriate alternative care, whether legislation dealing with judicial interference with parental authority by means of child protection measures will withstand judicial scrutiny.

In chapter 10, the following question will be answered by way of conclusion: what is South Africa's ideological stance on the protection of children's rights and family autonomy? This question cannot be answered without first determining exactly what the nature and content of parental authority in South African law is (with reference to its common-law roots), and in which circumstances the courts can interfere with parental authority in our law. Secondly, it will be of assistance in trying to establish whether the provisions relating to interference with parental authority contained in South African child protection legislation are appropriate, and afford adequate protection to the rights and interests of the child, taking into account the provisions of the children's clause and the United Nations Convention on the Rights of the Child 1989. In this regard, the ideological stance of South African law on the protection of children's rights and family autonomy determines how the courts interpret the children's clause (final Constitution s 28). Moreover, it is important to try and predict what the Constitutional Court's stance on the abovementioned issue will be should it ever be burdened with the task of testing the child protection measures against the children's clause. The discussion of the ideological approach of the South African law to the protection of children's rights, will be followed by a discussion of the conclusions reached

in the comparative analysis. Lastly, certain law reform provisions will be proposed.