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# BORN FROM BAD MEMORIES: CONSIDERING THE BEST INTERESTS OF CHILDREN CONCEIVED AS A RESULT OF RAPE AND INCEST<sup>1</sup>

## SUMMARY

Despite the fact that, globally, possibly hundreds of thousands of babies each year are conceived and born as a result of rape and incest, there is hardly any research as to what should be considered to be in the best interests of such children. In South Africa, the *Children's Act* 38 of 2005 stipulates that children, born as a result of rape and incest, will be denied a relationship with their biological father, since he is automatically not regarded as a parent in these instances. This is not the default position in a few other jurisdictions. The article seeks to explore the rationale for the South African legal position and determines whether the legislative framework provides fairness, justice, and certainty in this regard. It examines what the best interests of children born as a result of rape and incest are, and whether these interests are considered to be of paramount importance, in line with the country's international and constitutional obligations. Hereafter, the contexts of rape and incest are analysed separately, explaining that the circumstances during conception, and possibly after the birth of the child, differ. It is argued that, in the case of rape, the South African approach promotes the best interests and rights of the child and balances these rights with those of the child's biological mother and father, although the position in the case of consensual statutory rape is potentially problematic. However, the same cannot be said where children are born as a result of certain instances of incestuous relationships. Since further uncertainties exist as to several other related aspects pertaining to rape and incest, the author calls for legislative reform to take place following further research into these issues.



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1 Children born as a result of the genocidal rapes in Rwanda are called *les enfants de mauvais souvenir* ("the children from bad memories") Umram 2008:935.

## 1. INTRODUCTION

Sec. 1 of the South African *Children's Act* 38 of 2005<sup>2</sup> provides that a “biological father of a child conceived through the rape of or incest with the child’s mother” is not regarded as the parent of such a child.<sup>3</sup> This means that the biological mother will have parental responsibilities and rights over a child born as a result of rape, and if she is a child herself, her parents will have guardianship over her child.<sup>4</sup> This will be the position also if both parties to an incestuous relationship consented to the sexual intercourse that led to the conception of a child: the biological mother or maternal grandparents will have rights and responsibilities over the child, but not the biological father or his parents.

In some other jurisdictions, this default position of denying the incestuous or rapist father any parental responsibilities and rights does not apply. For example, in England and Wales, a Private Member’s Bill was introduced in 2019, *inter alia*, proposing to remove the parental rights of fathers of children conceived through rape, but this bill never progressed further than the first reading in the House of Commons.<sup>5</sup> In the United States of America (USA), before the enactment of the *Rape Survivor Child Custody Act* in 2015, only six states had legislation in place enabling survivors to petition a court to remove their rapists’ parental rights. After much campaigning from women’s rights movements, the majority of states now have some form of restrictions in place to terminate the parental rights of the biological rapist father, but “victim protection remains drastically inadequate”.<sup>6</sup> The argument that is levied against the termination of parental rights over a child is found in the fourteenth amendment to the *Constitution of the USA*, protecting the rights to life, liberty, and property.<sup>7</sup> In fact, in light of arts. 12 and 16 of the Universal Declaration of Human Rights,<sup>8</sup> and art. 23 of the International Covenant on Civil and Political

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2 Hereafter, the *Children's Act*.

3 This places the rapist and incestuous father on equal footing with a sperm donor, since definition of “parent” also excludes “any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; ... and a parent whose parental responsibilities and rights in respect of a child have been terminated”.

4 See sec. 19 of the *Children's Act*.

5 UK Parliament “Parliamentary Bills: The Parental Rights (Rapists) and Family Courts Bill2”, <https://bills.parliament.uk/bills/2386> (accessed on 2 September 2021). See also Gravell & Wright “Parental responsibility: Is a rapist father still a father?”, [https://www.familylaw.co.uk/news\\_and\\_comment/parental-responsibility-is-a-rapist-father-still-a-father](https://www.familylaw.co.uk/news_and_comment/parental-responsibility-is-a-rapist-father-still-a-father) (accessed on 19 August 2021).

6 Dostis 2021:965. See further Beck *et al.* 2018:193-205; Bitar 2012:275-302.

7 This has been interpreted to mean that the “right to have and raise a family is a fundamental right” and that “parents are not easily deprived of these rights”. Bitar 2012:276, referring to *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) and *S.J. v. L.T.*, 727 P.2d 789, 795-797 (Alaska 1986).

8 The Universal Declaration of Human Rights, 1948, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed on 31 October 2022). Arts. 12 and 16 protect, *inter alia*, against arbitrary interference with family life and promotes the importance of the family as the “natural and fundamental group unit of society”.

Rights<sup>9</sup>, it could be said that the South African *Children's Act* is depriving some biological fathers of their right to establish a family. Further, considering arts. 7, 8 and 9 of the Convention on the Rights of the Child,<sup>10</sup> and art. 18(1) of the CRC, which provides that "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child", it could be argued that such a child is being denied his or her rights to parental care and identity.

This article seeks to explore the rationale for the South African legal position. It examines the provisions of the *Children's Act* and considers whether the legislative framework provides fairness, justice, and certainty in this regard. The article aims to establish what the best interests of children born as a result of incest or rape are, and whether these interests are considered to be of paramount importance, in line with the country's international and constitutional obligations. This article explains that the circumstances surrounding the conception of children born as a result of rape are different to those born as a result of incest. These two contexts are analysed separately. Ultimately, it needs to be established whether the approach adopted by the South African legislature for both these instances provides an appropriate balance between the rights of the child, the (victim) mother, and the rapist or incestuous father and, if not, whether legislative amendment is required.

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- 9 The International Covenant on Civil and Political Rights, 1966 (hereafter, the ICCPR) entered into force on 23 March 1976, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (accessed on 31 October 2022). South Africa ratified this instrument in 1998. Art. 23 also declares that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State". It further protects the "right of men and women of marriageable age to marry and to found a family".
- 10 Convention on the Rights of the Child (hereafter, the CRC), adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3. South Africa ratified the CRC in 1995. United Nations Treaty Collection "Status of Treaties – The Convention on the Rights of the Child", [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en) (accessed on 16 August 2021). See the discussion at 3.

## 2. INCEST, RAPE, AND SUBSEQUENT PREGNANCY IN SOUTH AFRICA

Whereas the global definition of what constitutes rape is essentially standardised as being sexual penetration without consent,<sup>11</sup> a number of different rules apply across jurisdictions and communities in respect of what would be considered “incestuous relationships”. For example, it is illegal in South Africa for a person to have sex with or marry a parent-in-law, following the dissolution of a marriage with the in-law’s child, as is evident from sec. 12(2) (b) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*,<sup>12</sup> but this is not the case in England and Wales.<sup>13</sup> Australia has repealed all prohibitions upon marriage based on affinity,<sup>14</sup> whereas the state of Michigan in the USA criminalises sexual contact between persons related “by blood or affinity to the third degree” and may sentence offenders to two

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- 11 See, for example, the definition included in sec. 1 of the *Sexual Offences Act 2003* of the United Kingdom; sec. 375 of the *Indian Penal Code*; sec. 3 of the Kenyan *Sexual Offences Act 3/2006*, and art. 213 of the *Brazilian Penal Code*, albeit that the definitions are not always phrased in gender-neutral terms. In South Africa, sec. 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32/2007* explains that “[a]ny person (‘A’) who unlawfully and intentionally commits an act of sexual penetration with a complainant (‘B’), without the consent of B, is guilty of the offence of rape”. An act of “sexual penetration” is defined by sec. 1 as being “any act which causes penetration to any extent whatsoever by (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person”.
- 12 Hereafter, the *Sexual Offences Act*. Sec. 12 provides as follows: “(1) Persons who may not lawfully marry each other on account of consanguinity, affinity, or an adoptive relationship and who unlawfully and intentionally engage in an act of sexual penetration with each other, are, despite their mutual consent to engage in such act, guilty of the offence of incest. (2) For the purposes of subsection (1), (a) the prohibited degrees of consanguinity (blood relationship) are the following: (i) Ascendants and descendants in the direct line; or (ii) collaterals, if either of them is related to their common ancestor in the first degree of descent; (b) the prohibited degrees of affinity are relations by marriage in the ascending and descending line; and (c) an adoptive relationship is the relationship of adoption as provided for in any other law.” See also sec. 28 of the *Marriage Act 25/1961* (hereafter, the *Marriage Act*). The processes and consequences of adoption and inter-country adoption are regulated by chapters 15 and 16 of the *Children’s Act*.
- 13 Following the promulgation of the *Marriage Act* (1949) Remedial Order in 2007. The amendment was made after the decision of *B and L v United Kingdom* (Application 36536/02) [2006] 1 FLR 35, in which the European Court of Human Rights held that the English rule that prevented a father-in-law from marrying his son’s former wife, violated art. 12 of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950, *i.e.* the right to marry and found a family. See also Schäfer 2008:219-229.
- 14 Schäfer 2008:220.

years imprisonment or a fine of up to \$500 or both.<sup>15</sup> However, a common denominator appears to be that sexual relationships between close blood relatives are prohibited.<sup>16</sup>

Of further importance for the current discussion is the fact that, in South Africa, the crime of incest would be committed in instances where both parties consented to the sexual intimacy and did so with the knowledge of their close familial relationship.<sup>17</sup> Thus, in instances where a man has consensual sexual intercourse with his son's (ex)- wife, they both will be guilty of incest. In cases where one of the parties does not consent, or one of the parties is a child under the age of sixteen years, the offences of both rape or possibly statutory rape<sup>18</sup> and incest are committed. Nel, however, convincingly argues that "sexual intercourse between an adult and a child below sixteen and related to the adult within the forbidden degrees, should never be prosecuted as incest".<sup>19</sup> Whilst incest is a competent verdict on a charge of rape, the charge of incest should only be reserved for cases "where both parties related within the prohibited degrees are sixteen years of age and above" and both parties consented to the sexual intimacy.<sup>20</sup> In instances where a blood relative has had sexual relations with a family member who is younger than the age of sixteen years, such relative should be charged with rape or statutory rape. If a child was born as a result of this violation, this child is a child born as a result of rape, not incest.

It was once believed that a woman cannot fall pregnant from being raped. In fact, a pregnancy could have been used as a defence against a charge of rape, since it was explained that "without an excitation of lust or the enjoyment of pleasure in the venereal act, no conception can probably take place. So

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15 Prain Law PLLC "Criminal sexual conduct in Michigan – Related by blood or affinity", <https://www.michigancriminalsexualconductattorney.com/blog/2019/may/criminal-sexual-conduct-in-michigan-related-by-b/> (accessed on 11 October 2020).

16 As was also explained in the *Code of Canon Law*, 1091. For a historical perspective on incest, see Wright 1981:121-124.

17 See sec. 12 of the *Sexual Offences Act*: "Persons ... who unlawfully and intentionally engage in an act of sexual penetration with each other, are, despite their mutual consent to engage in such act, guilty of the offence of incest."

18 Sec. 15 of the *Sexual Offences Act* stipulates that "(1) A person ('A') who commits an act of sexual penetration with a child ('B') who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was (a) 12 years of age or older but under the age of 16 years; or (b) either 16 or 17 years of age and the age difference between A and B was not more than two years".

19 Nel 2003:81.

20 Nel 2003:82. See also fn. 323, where the author explains that there have been a number of cases where fathers, having had sexual intercourse with their fourteen-year-old daughters, had been charged and convicted of incest, instead of rape.

that if an absolute rape were to be perpetrated, it is not likely she would become pregnant".<sup>21</sup>

This absurd notion has been dispelled,<sup>22</sup> with some studies even finding that an instance of rape is more likely to result in pregnancy than a given instance of consensual sex.<sup>23</sup> Although global statistics on the number of pregnancies that result from rape and incest are not conclusive, it is estimated that five per cent of rape victims between the ages of twelve and 45 years fall pregnant.<sup>24</sup> Of the rape victims, 32 per cent do not discover they are pregnant until they already have entered the second trimester of their pregnancy, while the same number of women decide to keep their child after discovering that they are pregnant. Roughly 50 per cent of rape victims have an abortion,<sup>25</sup> while about

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- 21 Farr 1814:43. Farr 1814:42 further claims that "the consummation of a rape by which is meant a compleat [sic], full, and entire coition, which is made without any consent or permission of the woman, seems to be impossible unless very extraordinary circumstances occur: for a woman always possesses sufficient power, by drawing back her limbs and by the force of her hands to prevent the insertion of the penis into her body, whilst she can keep her resolution entire".
- 22 Although it appears that the belief is still held by some, since, in 2012, a Republican candidate for senate in Missouri, USA, said that he did not support abortion for rape victims because "[i]f it's a legitimate rape, the female body has ways to try to shut that whole thing down". Heggie "Legitimate rape' – a medieval medical concept", <https://www.theguardian.com/science/the-h-word/2012/aug/20/legitimate-rape-medieval-medical-concept> (accessed on 9 October 2020). For more recent examples of where this belief has been spread, especially by anti-abortion lobbyists, see Coleman 2015:1.
- 23 Ajayi & Ezegebe 2020:1370. The authors found that, among a cohort of 420 adolescents and young girls aged between seventeen and 24 years, unintended pregnancy was higher among survivors of sexual violence (54.4 per cent) than for those who never experienced sexual abuse (34.3 per cent). The authors further explain that "[i]ndividuals who rape young people are likely not to use condoms, and since the knowledge of emergency contraception is low among [adolescent girls and young women], the risk of them having an unintended pregnancy is high. Also, given that victims of sexual violence rarely come forward, the risk of having unintended pregnancy is high as young people are rarely going to know how to prevent pregnancy after exposure to forced and coerced sex". See also Gottschall & Gottschall 2003:1-20.
- 24 Health Research Funding "18 Profound statistics of rape victims getting pregnant", <https://healthresearchfunding.org/18-profound-statistics-rape-victims-getting-pregnant/> (accessed on 9 October 2020). However, it is reported that, in Ethiopia, 18 per cent of women seeking pregnancy termination at a non-government organisation clinic reported pregnancy from rape. This research report from StepUp states that the likelihood of pregnancy following rape is much greater than that of HIV infection. Thompson *et al.* "Access to emergency contraception and safe abortion services for survivors of rape: A review of policies, programmes and country experiences in sub-Saharan Africa" [https://www.svri.org/sites/default/files/attachments/2016-07-15/2014STEPUP\\_EC-SA\\_Report.pdf](https://www.svri.org/sites/default/files/attachments/2016-07-15/2014STEPUP_EC-SA_Report.pdf) (accessed on 10 October 2020).
- 25 The majority of studies are from the USA, in states where abortion is permitted, although restrictions vary from state to state. However, Ajayi & Ezegebe 2020:1370 report that, in their study, a quarter of the unintended pregnancies resulted in abortions.

twelve per cent of the pregnancies result in a miscarriage or spontaneous abortion, and six per cent of women place the child up for adoption.<sup>26</sup>

For the period 1 April 2019 to 31 March 2020, 42 289 rapes were reported in South Africa.<sup>27</sup> As a result, and bearing in mind that it is reported that the births of 3 235 children born to mothers aged ten to fourteen years<sup>28</sup> were registered during 2018,<sup>29</sup> while for 62.7 per cent of live births registered during this year no information regarding the father was included,<sup>30</sup> it can be deduced that a substantial number of children are born each year that were conceived because their mothers had been raped. Crime statistics for the first quarter of the 2022/2023 financial year indicate that the majority of rapes occur in the home of the rapist or of the victim.<sup>31</sup> Statistics on incest are not easily obtainable, but it is believed that approximately 30 per cent of all instances of child sexual abuse occur within the family, while most of these are of fathers raping their daughters.<sup>32</sup> Ramakuela *et al.* found that, in South Africa, incest was crucial to the decision to have an abortion among adolescents, since it is believed that raising a child resulting from incest will curse the family and cause its demise.<sup>33</sup> For several others, the option of terminating the pregnancy is not a real one, since many girls are not aware of such services; are living in remote or rural areas where access to medical care is challenging, or are part of communities where “so-called objectors” are preventing pregnant women from making their own reproductive health choices.<sup>34</sup>

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26 Health Research Funding “18 Profound statistics of rape victims getting pregnant”, <https://healthresearchfunding.org/18-profound-statistics-rape-victims-getting-pregnant/> (accessed on 9 October 2020).

27 The South African Police Service “Crime statistics: Crime situation in Republic of South Africa twelve (12) months (April to March 2019-20)”, [https://www.saps.gov.za/services/april\\_to\\_march\\_2019\\_20\\_presentation.pdf](https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf) (accessed on 10 October 2020). See, however, the Commission for Gender Equality’s criticism of the fact that these numbers only represent reported cases: Rapoo *et al.* “Commission for gender equality review of crime stats”, <https://www.sabcnews.com/sabcnews/commission-for-gender-equality-review-of-crime-stats/> (accessed on 7 September 2021).

28 See fn. 18 above.

29 Statistics South Africa “Recorded live births, 2018”, <http://www.statssa.gov.za/publications/P0305/P03052018.pdf> (accessed on 12 October 2020).

30 Statistics South Africa “Recorded live births, 2018”, <http://www.statssa.gov.za/publications/P0305/P03052018.pdf> (accessed on 12 October 2020).

31 Speaking notes delivered by Police Minister General Bheki Cele (MP) on the occasion of the release of the Quarter One Crime Statistics 2022/2023 hosted in Pretoria, Gauteng, on Friday 19 August 2021, <https://www.gov.za/speeches/minister-bheki-cele-quarter-one-crime-statistics-20222023-19-aug-2022-0000> (accessed on 8 December 2022).

32 Gqgabi & Smit 2019:841.

33 Ramakuela *et al.* 2016:4-5. See also Bessa *et al.* 2019:474.

34 See, for example, Favier *et al.* 2018:143-144.

### 3. THE BEST INTERESTS OF CHILDREN BORN AS A RESULT OF INCEST OR RAPE

Despite the fact that, globally, possibly hundreds of thousands of babies each year are born as a result of rape and incest, there is scant research on the impact of these facts on their lives and those of their parents.<sup>35</sup> From the limited number of studies that have focused on conception as a result of rape during non-war conditions,<sup>36</sup> it is apparent that there are a number of adverse consequences for both children born as a result of such circumstances, and their mothers. Research conducted in relation to children born as a result of forced pregnancies during wars shows that often, upon discovering the truth about their conception, such children suffer serious questions as to their identity.<sup>37</sup> Although children are born to their mothers while their fathers are never involved in their lives, the identity of children born as a result of forced pregnancies during war is inextricably linked to that of their father and his nationality.<sup>38</sup> Moreover, while their mothers are viewed as the victims, the children themselves are seldom recognised as victims but rather carry a shadow of being a perpetrator themselves.<sup>39</sup> Such children often experience feelings of guilt and shame for the suffering that they cause their mothers.<sup>40</sup> It is clear that many conflicting interests arise from these scenarios.

The concept of the best interests of the child is enshrined in a number of international legal instruments, most notably in art. 3(1) of the CRC, providing 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”. In South Africa, sec. 28(2) of the *Constitution of the Republic of South Africa*, 1996,<sup>41</sup> declares that a “child’s best interests are of paramount importance in

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35 This submission is confirmed by a rapid evidence report, commissioned and published by the Centre for Women’s Justice in the UK. Butterby & Butterby “Children conceived in rape: A rapid evidence review for the Centre for Women’s Justice”, June 2022, [https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/62e3ac01535b560107b36d04/1659087874793/Children+conceived+in+rape\\_Rapid+evidence+review\\_Butterby\\_June+2022.pdf](https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/62e3ac01535b560107b36d04/1659087874793/Children+conceived+in+rape_Rapid+evidence+review_Butterby_June+2022.pdf) (accessed on 7 December 2022).

36 Bianchi 2014. DeHaas *et al.* 2012:592-608.

37 Van Ee & Kleber 2013:386-397, 391.

38 Van Ee & Kleber 2013:391.

39 See, however, plans announced by the UK government to amend the Victims Bill in order for children born as a result of rape in England and Wales to be recognised as victims of crime. Ministry of Justice Press Release “Law to recognise children born as a result of rape as victims for the first time”, <https://www.gov.uk/government/news/law-to-recognise-children-born-as-a-result-of-rape-as-victims-for-the-first-time> (accessed on 20 January 2023).

40 Some children reported that they “perceived themselves as a ‘live reminder of rape’” and that their “mother is all about pain and suffering” while their “hugs bring her even more pain”. One child commented that “I know she loves me and hates ... me at the same time”. Van Ee & Kleber 2013:392.

41 Hereafter, the *Constitution*.



every matter concerning the child”, whereas the *Children’s Act* gives further practical effect to these imperatives.<sup>42</sup>

The Committee on the Rights of the Child interpreted art. 3(1) of the CRC to be a substantive right in and of itself, while also being a rule of procedure and a method of interpretation.<sup>43</sup> It also pointed out that the concept “is aimed at ensuring both the full and effective enjoyment of all the rights recognized [sic] in the Convention and the holistic development of the child”.<sup>44</sup> For this reason, “all the rights provided for [in the CRC] are in the ‘child’s best interests’ and no right could be compromised by a negative interpretation of the child’s best interests”.<sup>45</sup> Consequently, the relevant rights, as protected by the CRC and, in the South African context, by the *Constitution* and the *Children’s Act*, must be identified and assessed.

### 3.1 *The right to parental care*

The CRC, in its preamble, recognises the importance of family life and refers to the family as “the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children”. In terms of art. 7 of the CRC, a child has a right to know and be cared for by his or her parents, “as far as possible”. Art. 9(1) of the CRC further stipulates that “a child shall not be separated from his or her parents against their will”, unless it is established that “such separation is necessary for the best interests of the child”. In instances where a child has been separated from his or her parent(s), member states must “respect the right of the child ... to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”.<sup>46</sup> Art. 18 of the CRC places an obligation upon state parties to “use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child”. When reading arts. 3, 5 and 18 together, it is clear that parents have to perform their responsibilities, rights, and duties in such a manner that their children’s best interests always remain their basic concern.

State parties must also “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities

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42 See, for example, sec. 9 of the *Children’s Act*, which confirms that the child’s best interests are of paramount importance, while sec. 7 of the act lists fourteen factors to be taken into consideration whenever a provision of this act requires the best interests of the child standard to be applied.

43 UNCRC “General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)”, UN Doc CRC/C/GC/14 4.

44 UNCRC “General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)”, UN Doc CRC/C/GC/14 3.

45 UNCRC “General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)”, UN Doc CRC/C/GC/14 3.

46 CRC art. 9(3).

and shall ensure the development of institutions, facilities and services for the care of children”.<sup>47</sup> Whereas parents are entitled to certain fundamental rights and freedoms, member states to the CRC must implement appropriate measures to balance parental rights with those of the child. Even though the CRC does not seek to regulate private family decisions, art. 3(2) of the CRC provides that state parties will “ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures”.

Sec. 28(1)(b) of the South African *Constitution* provides that a child has a right to family care or parental care. The *Children’s Act* refers to “parental responsibilities and rights” but explains the meaning of this phrase to relate more to the duties that parents have towards their children.<sup>48</sup> In terms of sec. 1, read with sec. 18 of this *Act*, a person with parental responsibilities and rights in respect of a child must care for the child; maintain contact with the child; act as guardian of the child; and contribute to the maintenance of the child.

It is submitted that the legislative attempt of explaining what it means to care for a child, found in sec. 1 of the *Children’s Act*,<sup>49</sup> cannot fully convey the reality of the special human bond that should exist between a parent

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47 In terms of CRC art. 18(2).

48 See also the *Children Act*, 1989, of England and Wales, that provides only for “parental responsibility”.

49 “[C]are’, in relation to a child, includes, where appropriate

- (a) within available means, providing the child with
  - (i) a suitable place to live;
  - (ii) living conditions that are conducive to the child’s health, wellbeing and development; and
  - (iii) the necessary financial support;
- (b) safeguarding and promoting the wellbeing of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional, or moral harm or hazards;
- (d) respecting, protecting, promoting, and securing the fulfilment of, and guarding against any infringement of, the child’s rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing, and securing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development;
- (f) guiding, advising, and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity, and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.”

and a child. As courts have often explained, a parent's role is extensive and complex.<sup>50</sup> The parental role transcends the mere physical realm of taking care of a child's bodily needs, and it requires patience, wisdom, and hard work. Being a parent also implies the responsibility of being a child's "most immediate moral exemplar",<sup>51</sup> of guiding, directing, and equipping the child, and of meeting the child's emotional needs. However, in *Jooste v Botha*,<sup>52</sup> the Court found that there is not a legally enforceable right of a child to be loved by his or her parent, explaining that "neither our common law nor our statutes recognise the right of a child to be loved, cherished, comforted or attended to by a non-custodian parent as creating a legal obligation. A bond of love is not a legal bond."<sup>53</sup>

The basis for this jurisprudential emphasis is established in extensive research as to the effect of the parental role in a child's life, why children need to establish close and healthy relationships with their parents, and the negative effects that may ensue if children are not receiving parental care.<sup>54</sup> Of particular importance for the purpose of this paper is the effect that the absence of one of the parents has on children's lives. Research by Lang and Zagorsky suggests that children who grow up with both biological parents have higher cognitive abilities and are more likely to receive more education than those who do not.<sup>55</sup> There is a great deal of documented evidence of a negative association between living apart from a biological father, and children's social-emotional development and well-being, including education, mental health, relationships, and employment-related success.<sup>56</sup> However, it

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50 See, for example, *M v Minister of Police* 2013 5 SA 622 (GNP): par. 22; *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) at par. 34. In the UK, Hale LJ appropriately explained in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA 530: paras. 70-71 that "[p]arental responsibility is not simply or even primarily a financial responsibility ... The primary responsibility is to care for the child. The labour does not stop when the child is born. Bringing up children is hard work ... The obligation to provide or make acceptable and safe arrangements for the child's care and supervision lasts for 24 hours a day, 7 days a week, all year round, until the child becomes old enough to take care of himself."

51 *S v M* par. 34. Sachs J explained: "[P]arents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cell phones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable."

52 *Jooste v Botha* 2000 (2) BCLR 187 (T).

53 *Jooste v Botha* at 194J-195A.

54 See, for example, Demo & Cox 2000:876-895; Xie *et al.* 2021:866-879; Maccoby 2000:1-27; Porumbu & Necşoi 2013:706-710.

55 Lang & Zagorsky 2001:253-273.

56 McLanahan *et al.* 2013:399-427.

appears that the stability of familial relationships plays an important role in a child's emotional and physical well-being. Demo and Cox's meta research shows that children who have experienced multiple transitions or variations in kin involvement, and especially if they experience them in later childhood, "and those living in stepfamilies fared poorly in comparison with those living their entire childhood in stable single-parent families or moving into two-parent families with biological or adoptive parents".<sup>57</sup>

### 3.2 *Knowing one's parents*

Art. 8 of the CRC explains that children have the right to preservation of their identity, nationality, name, and family relations, and that, in the event that any of these elements have been violated, States must provide appropriate assistance and protection, in order to re-establish a child's identity. Knowledge and preservation of one's family relations have been interpreted to refer to knowing both one's legal parents as well as biological and birth parents.<sup>58</sup> In *Jäggi v Switzerland*, the European Court of Human Rights explained that it

considers that the right to an identity, which includes the right to know one's parentage, [to be] an integral part of the notion of private life ... persons seeking to establish the identity of their ascendants have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity.<sup>59</sup>

Further, it has been said that the right to know one's origins is born from the right to truth,<sup>60</sup> and it is quite often accepted that "knowledge of one's genetic background is crucial to the development of a sense of identity or self".<sup>61</sup>

However, nearly 30 years ago, Van Bueren indicated that "[a]ccess by children to their birth records whilst they are still children is perceived as opening 'Pandora's Box'".<sup>62</sup> Numerous debates later, several jurisdictions, including England and Wales, Germany, and New-Zealand, have implemented legislative measures that provide adopted children and children conceived as a result of artificial insemination with the right to know their biological origins.<sup>63</sup>

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57 Demo & Cox 2000:886. The authors also refer to studies that prove "benefits of stable single-parent living arrangements for children's socioemotional adjustment and global well-being, and deleterious effects of multiple transitions, supporting a life-stress perspective" (references omitted).

58 Besson 2007:143. Besson 2007:144 points out that there are also other elements to a child's identity that are not included in the provisions, such as a child's personal history, race, culture, religion, language and physical appearance, as well as abilities and inclinations.

59 *Jäggi v Switzerland* (58757/00, 13 July 2006):paras. 37-38.

60 Besson 2007:140; O'Donovan 1988:27-45; Eekelaar 2006:ch. 3.

61 Clark 2012:621 citing O'Donovan 2000:73, 75. See also Hewitt 2002:14, 19.

62 Van Bueren, 1995:37.

63 Clark 2012 at fn. 3 explains that, since 1985, "[e]ven developed, democratic countries have prohibited anonymous gamete donation and established systems to assist donor-conceived people, even children, identify their donors".

Other jurisdictions such as France and South Africa<sup>64</sup> grant parents the “right to anonymous birth” in certain circumstances.<sup>65</sup> Drawing from a number of studies and from art. 30 of the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption of 1993,<sup>66</sup> several jurisdictions provide for the right of adopted persons to access information regarding their biological origins.

The Committee on the Rights of the Child has expressed concern over the fact that some jurisdictions provide for the anonymity of sperm donors<sup>67</sup> and, in fact, called on state parties, in “light of articles 3 and 7 of the Convention” to take all necessary measures “to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible”.<sup>68</sup>

The arguments used in support of access to information include research showing that secrets and lies concerning adoption have a negative effect on the adopted child.<sup>69</sup> Knowing the identity of one’s genetic ancestors is also thought to assist in making sense of one’s talents, interests, or physical

64 The legal position in South Africa, in terms of the *Children’s Act*, the *National Health Act* 61/2003 and reg. 19 of the *Regulations Relating to Artificial Fertilization of Persons* (GN R175 in GG 35099 of 2 March 2012), is that gamete donors and surrogate mothers remain anonymous, and it is an offence to reveal their identity. Sec. 41(1) of the *Children’s Act* provides that “[a] child born as a result of artificial fertilisation or surrogacy or the guardian of such child is entitled to have access to (a) any medical information concerning that child’s genetic parents; and (b) any other information concerning that child’s genetic parents but not before the child reaches the age of 18 years.” In terms of sec. 41(2), “[i]nformation disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother”. Further, sec. 41(3) provides that the “Director General: Health or any other person specified by regulation may require a person to receive counselling before any information is disclosed in terms of subsection (1)”. In June 2021, the Gauteng Division (Pretoria) of the High Court South Africa confirmed that the provisions of the *Children’s Act* provide legal certainty, which “is essential for sustaining the artificial reproduction system in South Africa. If this legal certainty is compromised, donors would not be willing to donate, recipients would not be willing to accept donations, and infertility would become an unsolvable burden.” *QG and Another v CS and Another* [2021] ZAGPPHC 366 (14 April 2021); par. 43. In terms of sec. 248 of the *Children’s Act*, the information contained in the adoption register may only be revealed once the adopted child has reached the age of 18 years.

65 Besson 2007:139.

66 Art. 30 provides that “(1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child’s origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved. (2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State”.

67 See Committee on the Rights of the Child 1994:2 (par. 10); Committee on the Rights of the Child 1995:2 (par. 11); Committee on the Rights of the Child 2002:8 (paras. 31-32).

68 Committee on the Rights of the Child 2002:par. 32.

69 The South African Law Reform Commission (hereafter, SALRC) 2017:112.

characteristics.<sup>70</sup> The “genealogical bewilderment”<sup>71</sup> that follows for both adopted children and children conceived through artificial insemination, due to a loss of identity upon discovering the truth, along with the importance of genetic and medical history for health reasons, and the prevention of incestuous relationships, have led to the promulgation of several legislative measures that enable children, normally from the age of sixteen years,<sup>72</sup> to have access to their biological history.<sup>73</sup>

Opponents to the disclosure of this information contend that the “right” to know one’s origins is a moral right, and not a legal one.<sup>74</sup> It is argued that there is no real proof of psychological harm in not knowing the truth about one’s biological origins and that this type of knowledge cannot be necessary for a child to develop an adequate sense of self.<sup>75</sup> The evidence does not support the claim that information regarding one’s biological parents is necessary for forging healthy identities.<sup>76</sup> It is further said that it is not clear how the disclosure of information regarding a person’s mode of conception is necessary to protect strong family relationships where those strong relationships had already been established with the adoptive or commissioning family.<sup>77</sup> In relation to the protection of health, it is reasoned that, even if people had accurate information about their genetic relatives, “there is not sufficient evidence to conclude that access to family history improves risk prediction, changes people’s risk perceptions, and leads to better health outcomes”.<sup>78</sup>

Van Ee and Kleber call for the development of clinical discourse and further research as to the effect that disclosure of the method of conception in instances of rape has on children and their identity.<sup>79</sup> Due to the scant number of studies focusing on this topic, it is unclear as to how to treat and support the victims – mothers and children – and how to effectively manage their conflicting interests. In instances where the child is being raised by her biological mother, she will have to answer some very difficult and often traumatic questions. In other instances, where a child so conceived has been adopted, the truth of his or her biological origins will have to be answered by his or her adoptive parents.

Adoptive parents have reported that professionals have always encouraged them to share the information of their child’s origins with their children, and even felt obliged to do so. However, it appears that no research has yet focused on “the outcomes of sharing such information or its impacts on

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70 SALRC 2017:27.

71 SALRC 2017:28.

72 Austria allows children from the age of fourteen to access such information. Clark 2012:21.

73 SALRC 2017:34-50.

74 SALRC 2017:19.

75 SALRC 2017:160.

76 SALRC 2017:29.

77 SALRC 2017:20-21.

78 SALRC 2017:25.

79 Van Ee & Kleber 2013:394-395.

adopted children”.<sup>80</sup> Adoptive parents are told that the “data support the long-term benefits of parents’ honest disclosure about their adoption to children”,<sup>81</sup> although there is limited research on how adoptive parents manage, talk about, or disclose the issue of their child’s conception when it resulted from unwanted sexual activity.<sup>82</sup> Some studies have reported that adoptive parents feel that, by not revealing the truth of these circumstances, they are shielding their children from harmful information.<sup>83</sup>

It is also reported that, due to the stigma that surrounds incest and rape;<sup>84</sup> uncertainty or a lack of information surrounding the nature or details of the story,<sup>85</sup> and a general contempt for a damaged, damaging, hypersexual, irresponsible, and dangerous father,<sup>86</sup> adoptive parents believe that they are acting in their child’s best interests by not disclosing the truth. By keeping this uncomfortable and painful information from their child, parents are trying to prevent damage to their child’s innocence, self-image, and mental health,<sup>87</sup> as well as their own relationship with their child.<sup>88</sup> In cases where a child was born as a result of an incestuous relationship, additional fears of medical problems resulting from “inbreeding” between people who share DNA,<sup>89</sup> may complicate matters even more.<sup>90</sup> Adoptive parents also reported that, in instances where their young child starts to ask questions as to why they look different from them, they attempt to provide as neutral information as possible, which may

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80 Goldberg *et al.* 2019:204. See United Nations ‘Women, peace, and security: Study submitted by the Secretary-General pursuant to Security Council Resolution 1325’ (2002) 28, <https://www.un.org/ruleoflaw/files/womenpeaceandsecurity.pdf> (accessed on 6 July 2021); Van Ee & Kleber 2013:387.

81 Goldberg *et al.* 2019:193.

82 Goldberg *et al.* 2019:193.

83 Goldberg *et al.* 2019:193. See also Eramian & Denov 2018:372-391.

84 Van Ee & Kleber 2013:391; Eramian & Denov 2018:375; Goldberg *et al.* 2019:193; Denov & Piolanti 2020:2.

85 Goldberg *et al.* 2019:193.

86 Goldberg *et al.* 2019:194. Goldberg *et al.* 2019:205 explain: “Parents likely hold concerns about sharing very negative information about birth fathers because children may internalize these attributions as having something to do with themselves (e.g., ‘I must be inherently bad because my birth father is bad’); indeed, children’s identity is linked to their birth fathers, regardless of who raises them. This concern may be especially powerful when adoptive parents are considering imparting information to their children about birth fathers that involves sexual assault – especially to their sons, who may be more likely to identify with birth fathers. Parents, then, weigh these concerns alongside concerns about the long-term effects of not telling children” (references omitted).

87 Goldberg *et al.* 2019:202 explain how an adoptive mother “had taken it upon herself to read stories on the Internet from the perspective of individuals who found out in adulthood that they were conceived via rape. She recounted how one woman, who was adopted as an infant, “thought [she was just born] to a too young teenage mother – and then, as an adult she found out that it was rape, and she was just devastated. It ruined her whole self-image.”.

88 Goldberg *et al.* 2019:194-195.

89 Deoxyribonucleic acid.

90 Goldberg *et al.* 2019:198-199.

increase in details as the child grows older.<sup>91</sup> Quite often, it is hoped that the child will one day be able to establish contact with the birth mother and that she will be able to answer their child's questions.<sup>92</sup> This presupposes, however, that the mother would like to meet the child and discuss the details with her child.

### 3.3 The rights to life, survival and development, health, and freedom from abuse and violence

A number of provisions in international and domestic legal instruments provide for the protection of children's general health and well-being. This includes art. 6 of the CRC, which has been identified as another one of the four general principles of the CRC,<sup>93</sup> recognising the child's rights to life, survival, and development. Art. 27 provides further support for the right to development, by instructing member states to assist parents and others who have the primary responsibility to secure (within their abilities and financial capacities) the conditions of living necessary for the child's development. States have to implement this right by providing material assistance (where necessary) and support programmes in aid of such development.

The Committee on the Rights of the Child describes early childhood development as a time during which children experience the most rapid period of growth and change. During the first years of their lives, children must make sense of the physical, social, and cultural dimensions of their worlds and they continuously learn from their activities and interactions with others, with other children and with adults. A young child's earliest years are also the foundation for his or her physical and mental health, emotional security, and developing competencies, as well as his or her cultural and personal identity.<sup>94</sup> The socio-economic conditions in which a child grows up play a vital role in a child's life, survival, and development. Poverty and a lack of resources, as well as parental

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91 Goldberg *et al.* 2019:202. The authors further describe how a "mother talked through how she might speak to her five-year-old daughter about the rape that was implicated in her story: 'She hasn't asked about her birth father. And that's a little sensitive. Her mother said it was an unreported rape. So, I mean, we're going to have to share that with her at some point. But at this point she doesn't know what rape is anyway. I wouldn't want to put that word in her head. ... So I might've said something like, "You know, I don't think your mother was in love with your birth father." Or, "I don't think your mother was very close to your birth father." But to tell you the truth, we almost never talk about her birth father"'.

92 Goldberg *et al.* 2019:200.

93 Along with the best interests of the child, as enshrined by art. 3, the general principles were identified by the Committee on the Rights of the Child to be the right to non-discrimination (art. 2); the right to life, survival, and development (art. 6), and the child's right to express his or her views freely (art. 12). See Committee on the Rights of the Child 2003:4.

94 Committee on the Rights of the Child 2005:3. See also Mills 2016:83-84.



care have an effect on a child's standard of living, education, the quality of the right to play and rest, access to information, and his or her health.<sup>95</sup>

The right to health, *inter alia*, enshrined in art. 24 of the CRC,<sup>96</sup> has been described as "indispensable" for the enjoyment of all the other rights in the CRC.<sup>97</sup> Furthermore, the Committee on the Rights of the Child has interpreted this right to health to be an

inclusive right [for children], extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services, but also to a right to grow and develop to their full potential and live-in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health.<sup>98</sup>

The Committee consequently endorsed a holistic approach to health and, in doing so, supports the approach by the WHO regarding health as a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.<sup>99</sup>

As explained earlier, a child's mental and social well-being can be affected by the environment in which a child is raised, and the experiences to which he or she is exposed. This is also true for the development of the *foetus*, *i.e.*, even before the child is born, since studies have found, *inter alia*, that babies born to mothers who were depressed and withdrawn during their pregnancies "were less exploratory and had lower Bayley mental scale scores".<sup>100</sup> Being exposed to violence in the home is more disturbing to children than witnessing other forms of adult-inflicted violence and leaves children at increased risk

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95 For a discussion of how these and other aspects affect a child's right to development, see Peleg "Time to grow up: The UN Committee on the Rights of the Child's jurisprudence of the right to development" in Freeman, *Law and childhood studies: Current legal issues* 14(2012):371-391.

96 The right is also protected by art. 25.1 of the Universal Declaration of Human Rights of 1948; art. 12.2 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") of 1966; art. 11.1 (f) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; art. 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979; art. 11 of the European Social Charter of 1961; art. 16 of the African Charter on Human and Peoples' Rights of 1981; art. 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988; art. 14 of the ACRWC of 1990, and art. 25 of the Convention on the Rights of Persons with Disabilities of 2006. Sec. 27 of the South African *Constitution* protects the right to healthcare.

97 Committee on the Rights of the Child 2013:4.

98 Committee on the Rights of the Child 2013:3.

99 Committee on the Rights of the Child 2013:3, citing the Preamble to the Constitution of the World Health Organization (WHO), as adopted by the International Health Conference, New York, 22 July 1946, where the right to enjoyment of the highest attainable standard of health was first articulated. See also art. 14 of the ACRWC protecting a child's "right to enjoy the best attainable state of physical, mental and spiritual health." See also Mills 2016:77-78.

100 Field *et al.* 2001:27-39, and the studies cited there.

of behavioural problems.<sup>101</sup> Research found that the prevalence of serious mental health problems among seventeen-year-olds could be decreased by as much as 16.8 per cent for girls and 8.4 per cent for boys, if they were not subjected to any forms of sexual violence.<sup>102</sup> Therefore, art. 19(1) of the CRC provides for the child's right of protection against "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child". Moreover, it is important to note that the CRC calls for these measures of protection to include "effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore".<sup>103</sup>

The CRC also endorses measures of support and recovery in Art. 39, which obliges state parties to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse ... Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

### 3.4 *A justified approach?*

From the above discussion, it can be deduced that the rationale for the decision to deny a rapist or incestuous father parenthood is rooted in the belief that it is against a child's best interests to allow the biological father parental responsibilities and rights. The South African legislature ostensibly decided to exclude such a man from the definition of a parent, in terms of sec. 1 of the *Children's Act*, since it is of the view that a rapist or incestuous father will not be able to provide a child with an adequate standard of parental care, and that a child's rights to identity, health, development, and freedom from violence and abuse would be too negatively affected by the involvement of such a man in the child's life. The next section considers and analyses this approach further, in order to establish whether this rationale can indeed be justified in all instances of rape and incest.

## 4. PARENTING CHILDREN BORN AS A RESULT OF RAPE AND INCEST

As explained earlier, the accepted legal position, based on extensive research, is that both parents should play an active role in children's lives and that the family is regarded as the "natural and fundamental group unit of

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101 Jouriles *et al.* 1996:223-234.

102 Bentivegna & Patalay 2022:874-883.

103 CRC art. 19(2).

society".<sup>104</sup> Whereas the notion of a *paterfamilias* having the all-encompassing *patria potestas* over his legitimate children has been abolished and the vast majority of jurisdictions afford legislative protection of the rights of both parents, some attempts at regulating the complex parent-child relationship still fall short of providing equality and equitable results.<sup>105</sup> However, the legal response to societal complexities needs to continue to develop in line with what psychological and sociological studies show to be in the best interests of the child. While the rights of children may be limited by other competing constitutional rights and will not trump all other rights in all circumstances,<sup>106</sup> the legislative answer to balancing the intricate relationships and rights of all parties involved in instances of rape and incest must continuously develop in line with what research indicates to be the best for the child involved. However, as explained earlier, and as will become evident from the discussion below, rape and incest do not present the same set of circumstances under which a child is conceived, and, for this reason, the exercise of parental responsibilities and rights in these two different contexts warrant individual assessment.

#### 4.1 *Children born as a result of rape*

Caring for a child born as a result of rape requires special skills, compassion, and understanding, whether the child is raised by his or her own biological mother and her family, or by adoptive parents. Whilst the rape victim him-/herself needs to recover from shock, denial, fear, confusion, withdrawal, shame or guilt, distrust of others, anxiety, depression, and post-traumatic stress disorder, she also may be expected to nurture a child who exists as a constant reminder of the physical and mental violations inflicted upon her. This often delays or even prevents the mother's healing process and has a negative impact on the mother-child relationship, frequently causing conflicting feelings of love and resentment, and possible (emotional) neglect. The biological mother has to live with the fact that the rape has combined her genetics with that of the perpetrator and through her child's birth, those genes

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104 See fns 8 and 9 above, citing the Universal Declaration of Human Rights and the ICCPR.

105 Such arguments are explored in the South African context by, for example, Louw 2010:156-206.

106 In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 2 SACR 445 (CC) [55], the court held that "s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with sec. 36." It is also important to note that the Gauteng High Court remarked that it is notable that, in terms of sec. 28 of the *Constitution*, children's rights, in comparison to other socio-economic rights, contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, "but the absence of any internal limitation entrenches the rights as unqualified and immediate." *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) 2271-J. See also Mills 2016:223.

continue to exist.<sup>107</sup> In his seminal work on parenting “different” children, Solomon describes some aspects of this complicated relationship as follows:

A child conceived in rape gets as rough a start as a child with dwarfism or Down’s syndrome. The pregnancy is usually greeted as a calamity, upending family life that may already be riddled with strife. The mother not only doubts her ability to meet the challenges of child-rearing but is also uncertain whether she will ever get over the very fact of the child’s existence. Rarely is a reliable partner on the scene to help. All new mothers are prone to ambivalence, but the hostility and revulsion often experienced by the mother of a rape-conceived child may be reinforced by her family. ... [T]he mother of a child conceived in rape has her own, separate, primary damage to negotiate. Her identity as a mother proceeds directly from her identity as a rape victim. Her child embodies the violence done against her and gives manifest permanence to what she may ache to forget.<sup>108</sup>

As explained in 3.1 above, being a parent is a demanding and complex role under any set of circumstances. When a child is born as a result of violence, and his or her parent is not equipped with the necessary support and assistance, the role becomes harrowingly difficult. If ever there was a group of parents to whom art. 18(2) of the CRC applies, it is mothers who gave birth to a child conceived as a result of her being raped. Apart from a handful of studies<sup>109</sup> and the research conducted by Solomon, “methodologically strong, empirically based data” in respect of these women and their relationships with their children “is extremely limited”.<sup>110</sup> Therefore, it is not clear as to how much “appropriate assistance”, if any, such mothers receive “in the performance of their child-rearing responsibilities”<sup>111</sup> and what effect the history behind their children’s biological origins has on their offspring and their development. Consequently, domestic law cannot respond with clear regulations or by providing instruction as to what type of assistance is required.

From the limited research available, some raped mothers have expressed the view that protecting their children from the biological fathers is the best thing they can do for their children and that they will never divulge the truth to them, even if their children demand it.<sup>112</sup> This may also be due to the fact that they would not like their children to feel that they were not “wanted or conceived out of love”.<sup>113</sup> Others cannot live with lies or a denial of the reality and tell their

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107 See Solomon 2012:482 who recounts how a rape survivor told him that she “worries that her bright, charming daughter might share personality traits with her rapist. ‘Half of her genes are evil ... I can do whatever I should as her mom to make her this loving, wonderful, caring person. But in her is the DNA of a person who is really sick, and is that DNA stronger than what I can do?’”.

108 Solomon 2012:475-476.

109 Butterby & Butterby 2022:4, 6.

110 Beck *et al.* 2018:199, 201.

111 In terms of art. 18(2) of the CRC quoted above.

112 Solomon 2012:481.

113 Solomon 2012:481.

children about the sexual violence that led to their child's existence.<sup>114</sup> Many have to explain, not only to their children but also to society, why they had their children at an inappropriate age, or despite not having the financial or emotional resources to provide for their child.<sup>115</sup>

In jurisdictions where the rapist father has parental responsibilities and rights over the child, the victim mother can be forced to raise a child with her rapist and will have to arrange care and contact of the child with the father. One such case from Michigan was reported by the media in 2017. The prosecutor's office initiated an order of filiation to test the convicted rapist's DNA, when it was notified of a rape victim's application for Temporary Assistance for Needy Families. Upon confirmation that the rapist was the biological father, the judge ordered joint legal custody, parenting time for the rapist, and child support for the eight-year-old boy from the convicted sex offender. The court order revealed the mother's address to the rapist and required the mother to not move beyond 100 miles from where she had been living when the case was filed.<sup>116</sup>

In instances when the mother chooses to give the child up for adoption, she may be held "hostage" by the perpetrator if he refuses to give consent to the adoption.<sup>117</sup> In England, a father with parental responsibilities must be notified of any care proceedings involving the child and is automatically a party to any family court case concerning his child.<sup>118</sup> Even if a father does not have parental responsibilities, he may be notified of care proceedings,<sup>119</sup> as was the case with the convicted rapist of Sammy Woodhouse, who was

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114 Solomon 2012:475-534 describes the experience of a number of women who did so, including Lori (at 496), who told her son, Bobby, about his origins when he began to ask questions at the age of seven. At the age of twelve, when he was interviewed by the author, Bobby said that he does not want to know his dad.

115 Solomon 2012:497.

116 Beck *et al.* 2018:198.

117 See, for example, Dostis 2021:975 referring to the legislative provision in Utah in this respect. Alabama only recently promulgated legislation that provides for a petition for the termination of parental rights of a parent who has been convicted of incest or first-degree rape or sodomy. Justia 'US Law: 2009 Alabama Code Title 12 Chapter 15 Section 319 Grounds for termination of parental rights; factors considered; presumption arising from abandonment', <https://law.justia.com/codes/alabama/2009/Title12/Chapter15/12-15-319.html> (accessed on 2 September 2021). However, the state is planning to oppose the legal challenge to legislation which will prohibit abortion also in instances of rape and incest. Chandler "Federal judge blocks Alabama's strict abortion ban", <https://apnews.com/article/laws-us-news-ap-top-news-courts-supreme-courts-dae2aa0b0796432daa146bbc6128643b> (accessed on 2 September 2021).

118 Ministry of Justice 'Procedural Rules – Family: PART 12' Rule 12.30, [https://www.justice.gov.uk/courts/procedure-rules/family/parts/part\\_12](https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_12) (accessed on 12 December 2022). See also Gravell & Wright 2019 "Parental responsibility: is a rapist father still a father?", [https://www.familylaw.co.uk/news\\_and\\_comment/parental-responsibility-is-a-rapist-father-still-a-father](https://www.familylaw.co.uk/news_and_comment/parental-responsibility-is-a-rapist-father-still-a-father) (accessed on 19 August 2021).

119 Ministry of Justice 'Procedural Rules – Family: Practice Directions' Direction 12C, par. 3.1, [https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_12c#IDASWMGC](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12c#IDASWMGC) (accessed on 12 December 2022).

listed as a respondent in a family court case involving the child. The local authority contacted him in prison, where he is serving a 35-year sentence for multiple sex offences, including the rape of Ms Woodhouse, and they promised to keep him informed of all future proceedings involving the child.<sup>120</sup> This matter and other examples led to a review of the presumption that it is in the child's best interests to have a relationship with both his or her parents.<sup>121</sup> The presumption was legislatively endorsed by an amendment to sec. 1 of the Children Act, 1989, in 2014, and has been criticised as detracting from the Court's focus on the child's individual welfare and safety.<sup>122</sup>

In South Africa, the father will not have any parental responsibilities and will not be notified of proceedings, but it is unclear as to whether the *Children's Act* requires a rape conviction in order for the biological father to be denied parentage. In the matter of *MM v AV*,<sup>123</sup> the court held that it did not have to answer the question as to "which party bears the onus to prove or disprove the respondent's allegation that she was raped by the applicant".<sup>124</sup> In this matter, the court found that it was an "irresistible conclusion ... that for almost 10 years the respondent [mother] treated and regarded the applicant as M's father in every sense, and chose to recognise his rights and obligations in terms of s 21 [of the *Children's Act*]." <sup>125</sup> The child had recognised and accepted the applicant as his father during all of his young life. However, when the child was nine years old, the mother alleged that their child had been conceived through the rape of the respondent by the applicant,<sup>126</sup> and, as a result, the applicant was not entitled to any responsibilities and rights over the child, due to the definition of "parent" as provided by the *Children's Act*.<sup>127</sup> The father subsequently approached the court for a declaratory order directing that he and the mother "are recognised as co-holders of parental responsibilities and rights in respect of" the child.<sup>128</sup>

120 Gravell & Wright "Parental responsibility: Is a rapist father still a father?", [https://www.familylaw.co.uk/news\\_and\\_comment/parental-responsibility-is-a-rapist-father-still-a-father](https://www.familylaw.co.uk/news_and_comment/parental-responsibility-is-a-rapist-father-still-a-father) (accessed on 19 August 2021).

121 Mishcon de Reya LLP "The presumption of parental involvement: A review, 20 November 2020", <https://www.mishcon.com/news/the-presumption-of-parental-involvement-a-review#:~:text=Section%201%20of%20the%20Children,at%20risk%20of%20suffering%20harm> (accessed on 12 December 2022).

122 Mishcon de Reya LLP "The presumption of parental involvement: A review", 20 November 2020", <https://www.mishcon.com/news/the-presumption-of-parental-involvement-a-review#:~:text=Section%201%20of%20the%20Children,at%20risk%20of%20suffering%20harm> (accessed on 12 December 2022).

123 Two judgments were handed down by the court in case no. 2901/10, namely one that is available as *MM v AV* 2011 JDR 0154 (WCC) (23 November 2010) (hereafter, *MM v AV* (1)) and *MM v AV* 2011 JDR 1574 (WCC) (23 November 2010; 16 November 2011) (hereafter, *MM v AV* (2)).

124 As was indicated by the parties to be an issue for determination in par. 3 of *MM v AV* (1).

125 At par. 18 of *MM v AV* (1).

126 Paras. 19 and 18 of *MM v AV* (1). Further details as to what allegedly happened on the night of the child's conception are found in paras. 1 and 2 of *MM v AV* (2).

127 Par. 21 of *MM v AV* (1).

128 Par. 1 of *MM v AV* (1).

Cloete AJ decided that the matter was to be determined from the perspective of the best interests of the child, and to consider such in the context of the facts that were acknowledged as common cause. Since the child, the applicant and the respondent had accepted the applicant as the child's parent, it could not be in the child's best interests to exclude the applicant from the provisions of sec. 21 of the Act.<sup>129</sup> The respondent could not rely "on the exclusionary provision in regard to the definition of a 'parent' in sec. 1 of the Children's Act".<sup>130</sup> Since the applicant had established parental responsibilities and rights over the child since his birth, the respondent failed in her contention that she could not be compelled to enter into an agreement with the applicant in terms of sec. 22 of the *Children's Act*.<sup>131</sup> Due to the particular facts of this instance, the court held that it did not need to

make a 'blanket' finding as to whether the exclusionary provision of a 'parent' in sec. 1 of the Children's Act only has application where it is expressly stated in the Act (as contended by the applicant), or whether wherever the words 'parent' or 'parental' appear in the Act, a biological father of a child conceived through the rape of the child's mother is expressly excluded (as contended by the respondent).<sup>132</sup>

It is submitted that this approach and the one adopted by the South African legislature align with protecting the best interests of the child as its primary concern, whilst recognising the rights of the victim mother. As a result, it is also in line with art. 9(3) of the CRC, which calls upon states parties to "respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, *except if it is contrary to the child's best interests*" (emphasis added). It is contended that, in jurisdictions where the parental rights of rapists first have to be terminated by means of court application and subsequent order, the child's emotional and psychological well-being and development, and possibly the child's bodily integrity and protection against physical harm are being compromised. Although the interests of mothers and their children do not always align, for especially infants the additional stress and trauma that such a process has on a mother will have a direct impact on her child.<sup>133</sup> Further, being raised by or being exposed to a parent with a history of sexual violence

129 Par. 30 of *MM v AV* (1). In *MM v AV* (2), the court also placed much emphasis on the best interests of the child, and at par. 94 held that "[n]o evidence was placed before [the court] to indicate that the relief sought by the applicant is not in M's best interests. The thrust of the respondent's evidence (on affidavit) pertains to her wish not to coparent M with the applicant, rather than that the relief sought by the applicant is not in M's best interests" (emphasis in the original). At par. 97, it found that "[t]o deprive M of his father's continued involvement in his life because of the respondent's recently acquired dislike for him would result in a miscarriage of justice".

130 Par. 41. The issues for determination and the decision in the *MM v AV* (2) matter related to the terms and provisions of a parenting plan.

131 The court emphasised that the provisions of sec. 22 are only applicable "to a father who does not have parental responsibilities and rights in respect of the child in terms of either sec. 20 or 21 or by court order."

132 *MM v AV* (1):par. 14.

133 Field *et al.* 2001:27-39 and the studies cited there.

cannot be in a child's best interests.<sup>134</sup> After all, in terms of art. 19 of the CRC and sec. 28(1) of the *Constitution*, the South African government has the responsibility to protect children from all forms of physical or mental violence, abuse, and neglect. Although a rebuttable presumption, it can reasonably be presumed that contact with or care by a perpetrator of sexual violence will violate the rights of the child.<sup>135</sup>

The preceding discussion shows that, despite the fact that the ostensible rationale behind the *Children's Act's* exclusion of a rapist father from being a parent may be supported for generally serving the child's best interests (and those of the biological mother), the case of *MM v AV* shows that the facts of a specific case – as informed by these very same interests – may permit an acceptable deviation from this otherwise seemingly blanket exclusion. However, despite this seemingly correct approach, there are some further uncertainties created in this regard by the *Children's Act*. One can foresee a possibility where an eighteen-year-old man fathered a child with his fifteen-year-old girlfriend, and since he would be guilty of statutory rape in terms of sec. 15 of the *Sexual Offences Act*,<sup>136</sup> he would not be considered a parent of their child, despite his willingness to care for the child. The maternal grandparents of the child would be able to argue that the father does not have any responsibilities and rights over their grandchild and that they are the sole guardian of the child in terms of sec. 19(2) of the *Children's Act*. It is not clear whether such a father, or any other rapist or incestuous father, may apply to have parental responsibilities and rights conferred upon him by means of a court order or in terms of a parental responsibilities and rights agreement.<sup>137</sup> Moreover, the possibility also exists that the paternal grandparents of a child born as a result of incest or rape may want to approach a court in an attempt to obtain at least contact with the child. The determination by the Courts, should such applications indeed be possible, would have to meet the requirements set by the *Children's Act*, most notably, the best interests of the child.<sup>138</sup>

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134 See, for example, Jouriles *et al.* 1996:223-234; Bentivegna & Patalay 2022:874-883.

135 See also sec. 41(1) of the *Sexual Offences Act*, which provides that persons who have been found guilty of sexual offences against children, may not "(a) be employed to work with a child in any circumstances; (b) hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a child, or which, in any other manner, places him or her in a position of authority, supervision or care of a child or where he or she gains access to a child or places where children are present or congregate; (c) be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a child or where children are present or congregate; or (d) become the foster parent, kinship caregiver, temporary safe caregiver or adoptive parent of a child".

136 The *Children's Act* does not stipulate whether such a father should have been found guilty of these crimes by a South African Court and the presumption is that an allegation of rape will not suffice.

137 In terms of secs. 22-24, and sec. 28 of the *Children's Act*.

138 See, for example, sec. 23(2)(a).



## 4.2 *Children born as a result of incest*

By contrast, in instances of incest, where sexual intimacy was consensual and did not constitute rape, the justification for the denial of parental responsibilities and rights to the biological father is not clear. The question must be asked as to why, if both parties to an incestuous relationship consented to the sexual intercourse, and a child was not born as a result of violence, only a biological mother will be regarded as a parent of the child but not the biological father. It is submitted that this position amounts to discrimination against the child, the mother, and the father.<sup>139</sup> Unlike in the cases of rape, the denial of the child's right to know and be cared for by both his or her parents are against his or her best interests, since it cannot be said that the child's rights to health, development, and protection against abuse will be violated in such instances.<sup>140</sup> In fact, it is submitted that, in these circumstances, the child's right to family and parental care, as well as his or her right to identity, are being violated. The mother will have to raise the child as a single parent, while the father will not be allowed to be involved in his child's life that was created from a loving relationship. This violates both parents' right to establish a family. It is acknowledged that there may be a number of different scenarios of incest where family members who are closely related to each other may create children through their sexual relationships. A distinction needs to be made between instances where a relative has had sexual relations with a family member who is younger than the age of sixteen years, or in instances where undue influence or power imbalances have resulted in sexual intimacy to occur. When children are conceived under the circumstances where there was no mutual consent, they are born as a result of rape, not incest.

As explained at 2 above, if a man has developed romantic feelings for his son's (former) wife, and the feeling is mutual, they will not legally be permitted to consummate their relationship in South Africa.<sup>141</sup> Should they have a sexual relationship and a child is consequently born, the couple will be guilty of having committed incest and only the mother will be regarded as the parent of their child. Despite calls for the decriminalisation of relationships through affinity that currently are regarded as incestuous,<sup>142</sup> and despite the South African Law Reform Commission's admissions that "what adults and adult family members do in the privacy of their bedrooms is their business and their business only"<sup>143</sup> and that it is "not the duty of the law to interfere with private, sexual activity between consenting adults",<sup>144</sup> this remains the legal position. As indicated earlier, it is not clear whether such a father will be able to apply

139 For further reasons as to why the failure by the *Children's Act* to confer automatic parental rights upon a biological father – whether married or unmarried to the mother – could arguably be construed as discriminatory. See Louw 2010:156-206.

140 This assertion is made in the absence of evidence to the contrary, once again, because the author could not establish whether any research exists in this context.

141 See sec. 12 of the *Sexual Offences Act*, and sec. 28 of the *Marriage Act*, explained above at fn. 12.

142 See Nel 2003:97-98; Nel 2002:331-351; Labuschagne 1985:435-455; Labuschagne 1990:415-425.

143 SALRC 1999:133.

144 SALRC 1999:135.

o have parental responsibilities and rights conferred upon him by means of a court order or in terms of a parental responsibilities and rights agreement.<sup>145</sup> It is submitted that this matter requires legal reform.

## 5. FURTHER UNCERTAINTIES REGARDING RAPE AND INCEST ARISING FROM THE *CHILDREN'S ACT*

Another aspect of the *Children's Act* that creates inequality and requires reform is the fact that rape can also be perpetrated by a woman. In instances where a woman has raped a boy or a man and gives birth to a child, the mother will automatically have responsibilities and rights over such a child, but the biological father will have to establish his responsibilities and rights in terms of sec. 21 of the *Act*.<sup>146</sup> A further aspect that is not explicitly addressed by the *Children's Act* is the duty of maintenance of a rapist or incestuous father. Sec. 21 explains that a biological father may obtain parental responsibilities and rights over a child under certain conditions. Sec. 21(2), however, states that, regardless of whether or not the father obtains such responsibilities and rights, he is still under the obligation "to contribute towards the maintenance of the child". It can thus be deduced that rapist or incestuous fathers are still under the duty to pay maintenance. This position may find support in the decision by the Gauteng High Court in *GM v KI*,<sup>147</sup> where it was held that

the responsibility of an unmarried father to maintain his child continues to exist as a duty which is distinct and independent from whether or not he has acquired parental rights and responsibilities by operation of s 21, and that the common-law position relating to the obligation to pay maintenance (ie that it existed separately from the parental authority) is thus preserved by the *Act*.<sup>148</sup>

This has the practical implication that the victim mother may have to have contact with the perpetrator, in order to receive the moneys necessary to care for her child.

Following the decision of *Wilsnach NO v M*,<sup>149</sup> it further is unclear as to how the rights to inheritance are affected in instances where a person is not considered a "parent" of that child. On 16 November 2020, the Gauteng Division of the High Court of South Africa ordered that the biological father, of a child who had passed away, was not to be considered the child's parent and subsequently not entitled to inherit from that child in terms of the *Intestate Succession Act*.<sup>150</sup> The court (per Kollapen J) found that, since the parental responsibilities and rights of the biological father had been terminated in terms

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145 See 4.1 above.

146 It is not the case that the father automatically will not be regarded as a parent of the child in terms of sec. 1 of the *Act*, since he will not be guilty of "the rape of ... the child's mother", but he will have to meet the requirements set by sec. 21 to establish any relationship with his child, born as a result of his rape.

147 *GM v KI* 2015 3 SA 62 (GJ).

148 *GM v KI*:par. 20.

149 *Wilsnach NO v M* 2021 1 All SA 600 (GP).

150 *Intestate Succession Act* 81/1987.

of the *Children's Act*,<sup>151</sup> the father could also not be considered to be a "parent" for purposes of sec. 1 of the *Intestate Succession Act*.<sup>152</sup>

Furthermore, a number of questions arise in respect of the situation of incestuous rape: if a father rapes his daughter and a child is born, will this child be entitled to inherit from him, and if so, will she be able to do so as a child or grandchild, or both? These questions have been addressed to some extent by the Namibian legislature in sec. 105(4) of the *Child Care and Protection Act*<sup>153</sup> which provides as follows:

In relation to rape or incest which results in the conception of a person born outside marriage, the person or in the case of incest, the persons who committed the crime do not have a right to inherit intestate from the person born as a result of the rape or incest, but the person born as a result of the rape or incest may inherit intestate from the perpetrator or in the case of incest, the perpetrators are considered to be included in the terms "children" or "issue" or any similar term used in a will or other testamentary disposition.<sup>154</sup>

The Namibian *Act* also provides that

a person conceived as a result of rape or incest does not have the legal duty to maintain a parent who was convicted of the rape or incest or does not have any legal duty to maintain that parent's relations, but the person who committed the rape or incest has a duty to maintain the child conceived as a result of that rape or incest.<sup>155</sup>

It is submitted that the South African legislature should consider including similar provisions in the *Children's Act*.

## 6. CONCLUDING REMARKS

The topic of children born as a result of rape or incest does not receive sufficient attention. It is a complex, sensitive, and disturbing matter, while children so conceived are often viewed as "intrinsically defective – including ... [by] their mothers".<sup>156</sup> Whereas the victim mother may receive counselling and support in overcoming the trauma of the sexual violence that she had to endure, the lack of research into whether such women receive guidance and assistance as to how to parent their children makes drawing any conclusions in this regard difficult. Nevertheless, it is probably correct to assume that such guidance and assistance (if any) is inadequate. Moreover, children born as a

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151 There were no allegations of incest or rape in this case.

152 For a discussion of the implications of this decision, see De Waal & Mills 2021:562-571.

153 *Child Care and Protection Act* 3/2015.

154 This *Act* contains a similar definition of "a parent" as that of the South African *Children's Act* in that it "excludes the biological father of a child conceived through the rape of or incest with the child's mother".

155 *Child Care and Protection Act*:sec. 106(2).

156 Solomon 2012:476.

result of rape and incest are not regarded as victims themselves,<sup>157</sup> and often will have to live with the knowledge that they are the painful, living reminder of their mothers' suffering.<sup>158</sup> Withholding information from these children may also have dire consequences, especially if the child accidentally discovers the truth. One man, who as an adult learned the truth about his conception through rape, explained that this knowledge "freed him from seeing his mother as 'the bad girl' or 'tramp' image that is sometimes associated with unwed mothers".<sup>159</sup> Another woman, who was reunited with her birth mother at the age of 47 years, tells of the fact that her mother said that much pain had resurfaced through the reunion. The woman questioned as to how she could be so bad as to cause her mother so much pain.<sup>160</sup>

This article highlighted only some of the intricacies that are involved in these circumstances and does not purport to provide a thorough analysis of the topic. It explained that the rationale for the South African legal position, which denies the biological rapist father to be regarded as a parent, is rooted in a consideration that the child's best interests are of paramount importance. However, the same cannot be said of instances where children are born as a result of some forms of incestuous relationships. This matter requires legislative amendment.

It is further submitted that, although the country is fulfilling its duties in prohibiting rapist fathers from acquiring parental responsibilities and rights, a number of uncertainties still exist and the legislative framework does not always promote equality in the context of incest. However, these are matters that raise intricate legal, philosophical, moral and social issues. It is abundantly clear that such children's rights cannot be interpreted or promoted without considering them as individual human beings, as members of a family, and as members of society.<sup>161</sup> How to balance their conflicting rights, and how to resolve the disputes that arise when their rights impact on the rights of others, necessitate a careful analysis of the existing legal principles and a comprehension of, and compassion for the realities of all parties involved. It is submitted that in-depth research that focuses on children conceived from non-wartime rape, their relationship with their mothers and understanding of these circumstances, the impact of discovering the truth, and their status as victims of violence need to be conducted. The law can only respond with measures of regulation and support once it has been established what is needed by all parties involved. Although they were born as a result of bad memories, the best interests of children born as a result of incest and rape must not be forgotten.

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157 England and Wales will become the first jurisdiction in the world to recognise their status as victims if plans for legislative amendment are to proceed. See fn. 39 above.

158 Solomon 2012:476. Solomon 2012:534 states that the "children described in the rest of this book sustain injuries; these children, through no fault of their own, *are* injuries" (emphasis in the original). See also Bindel "Why children born of rape must be recognised as victims", <https://www.theguardian.com/commentisfree/2019/aug/06/children-conceived-rape-legally-recognised-as-victims> (accessed on 10 July 2021).

159 Solomon 2012:498.

160 Solomon 2012:499.

161 Human 2009:243.

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