CHAPTER 4

CHILDHOOD: ITS BEGINNING AND END

4.1 Introduction

In this Chapter we concentrate on the definition of a child. The Chapter will discuss possible formulations as to when childhood begins and ends, and issues related to the attainment of majority.

4.2 The definition of a child

International law, as set out in the CRC, defines a child, for the purpose of the Convention, as 'every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.[1] The African Charter on the Rights and Welfare of the Child defines a child, for its purposes, as 'every human being below the age of eighteen years'.[2] Although the 18th birthday seems to be the generally accepted as the end of childhood, some international instruments define a child, for the purpose of that instrument, as a person below an age younger than eighteen years.[3]

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1 Article 1.

2 Article 2.

3 See Article 1(a) of the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children 1980 where a child is defined as a person of any nationality, so long as that person is under the age of 16 years and has not the right to decide his or her own place of residence under the law of his or her habitual residence, the law of his or her nationality, or the internal law of the State Party involved.

On a comparative basis, most countries in the world define a child as any person below the age of 18 years.[4] In some foreign legislation, however, 'child' or 'minor' is defined with a limit below that of eighteen years, notably when the legislation relates to juvenile offenders. The Zambian Law Reform Commission,[5] for instance, points out that the Zambian Juveniles Act, 1956 defines a child as a person who has not attained the age of sixteen years. The Zambian Law Reform Commission accordingly recommended that the age be increased and has defined a child as a person who has not attained the age of eighteen years.[6] The New Zealand Children, Young Persons, and their Families Act (No. 24 of 1989) defines a child, for the purposes of their legislation relating to children and young persons who are in need of care and protection or who offend against the law, as 'a boy or girl under the age of 14 years'.[7] A 'young person' is defined in terms of this Act, as a boy or girl of or over the age of 14 years but under 17 years who is or has not been married. The Victoria Community Services Act 1970 defines a child as a person under the age of 15 years.[8] This Act establishes the Department of Community Welfare Services and regulates family welfare services, school attendance, the employment of children, etc. The Tasmanian Child Care Act, 1960 defines a child as a person who has not attained the age of 17 years. The Queensland Child Care Act 1991 defines a child simply as 'a minor'. In their review of the law relating to child guardianship, custody and access, the Alberta Law Reform Institute has recommended that Alberta legislation should define 'child', for purposes of guardianship, as an unmarried person under the age of 18 years.[9]

For the purposes of section 28, the 1996 Constitution defines a child as a person below the age of 18 years. Therefore only persons below 18 years of age are entitled to the rights enshrined in

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4 See, for instance, clause 2(1)(d) of the Indian Children's Code Bill, 2000; section 105 of the UK Children Act 1989; section 121 of the UK Care Standards Act, 2000; section 3(1) of the Tasmanian Children, Young Persons and their Families Act, 1997; section 1 of the Ghanian Children's Act, 1998; article 3 of the Uganda Children's Statute, 1996; clause 3(1) of the Ireland Children Bill, 199; clause 1 of the draft Namibian Child Care and Protection Act, 1996; clause 2 of the draft Kenya Children Bill, 1994; clause 2(1) of the revised Children Bill, 1998 (see also the definition of a 'child of tender age' in this draft).

5 **Report on the Law related to the Child (Part 1: Reform of the Juveniles Act)**, May 1999, p. 12.

6 See clause 2 of the draft bill accompanying the Report.

7 Section 2(1).

8 Section 3. A 'young person' is defined as a person of or over the age of 15 years and under the age of 21 years.

9 **Child Guardianship, Custody and Access** (Report for Discussion No. 18.4), October 1998, p. 79, recommendation no. 6.4. The Institute justified the exclusion of married persons from the definition of 'child' on the basis that a married person under 18 years of age has moved out of the sphere of parental control and has taken on the responsibilities of adult life.

section 28 of the Constitution. The Child Care Act, 1983 also defines a child as any person under the age of 18 years.[10] The Age of Majority Act 57 of 1972, however, provides for attainment of majority at age 21 years.[11]

Given the international examples, it would appear that it would be possible to define 'child' in one of three ways: The first is the standard definition where a child is defined as a person under 18 years of age; the second is to define a child as a minor; and the third option is to define a child as a person under 18 years of age who is not married. The second and third options are to some extent linked: In most jurisdictions a minor who marries becomes a major. Given that it would be possible to attain majority status in more than one way, the Commission feels greater legal certainty will prevail should we retain the more universal definition of a child as being a person under the age of 18 years. **The Commission therefore recommends, particularly in the light of section 28(3) of the Constitution and the developments following the adoption of the CRC, that a child be defined for purposes of the new children's statute as a person under the age of 18 years**.

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10 As does the Social Assistance Act 59 of 1992. Sometimes the term 'minor' is used: see in this regard the definition of 'minor' in the South African Citizenship Act 88 of 1995 and the South African Passports and Travel Documents Act 4 of 1994.

11 For a discussion of this Act, see 4.3 below.

It is interesting to note that although all legislation is clear when childhood should end, none gives any indication of when it begins. The legislation and international instruments consulted avoid this difficulty by stating that a child is a 'person' or a 'human being'. This would in effect mean that childhood begins at birth[12] - i.e when the birth is complete[13] and provided the child is then alive.[14]

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12 Legal personality begins at birth. See also Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 28.

13 Some authors, notably Van der Vyver and Joubert **Persone- en Familiereg** 59 and 61, prefer to state this as only a general rule, subject to a proviso allowing for legal personality to begin at conception: 'Regsubjektiwiteit [legal personality] van 'n natuurlike persoon ontstaan gewoonlik by geboorte van die persoon maar as dit tot die persoon se voordeel is, by konsepsie'. The exceptio created by the proviso in the second part of the statement relates to the operation of the nasciturus rule of fiction.

14 For the purposes of the Births and Registration Act 51 of 1992 'birth' is defined as 'in relation to a child ... the birth of a child born alive' (section 1). See also M Slabbert 'The fetus and embryo: Legal status and personhood' 1997 **TSAR** 234 at 239 for an alternative interpretation of the term 'birth'. In **Van Heerden v Joubert NO** 1994 (4) SA 793 (A) at 796F it was held that the word 'person' in the Inquests Act 58 of 1959 did not include an unborn child. Consequently, the Inquest Act did not make provision for an inquest into the death of a stillborn child (at 798H).

The association of legal personality with birth could, the Romans found, have hard consequences for a child who had the misfortune to be born after its father's (or, indeed, anyone else's) death. Thus, if a father bequeathed his estate to 'my children' and died at a time when he had, say, two children and his wife was pregnant with a third, the posthumous child would not share the inheritance with its more fortunate siblings. The reason was that at the date of the father's death - the relevant date for determining who were the 'children' in whom the right to inherit vested - the as yet unborn child was not a legal person capable of having legal rights. And when this child was subsequently born and acquired legal personality, it was too late: the inheritance had already vested in the other children. This led Roman lawyers to develop a gloss upon the general rule that legal personality begins at birth - the so-called nasciturus rule - which states that an unborn child in the mother's womb is deemed to have been born, and therefore to have acquired legal personality, prior to the date of its actual birth, if this would be to its advantage.[15]

The Roman and Roman-Dutch writers, and earlier South African cases, applied the nasciturus rule to grant a posthumus child a right of inheritance,[16] and an action in its own right for the unlawful killing of its father before the child's birth.[17] In **Pinchin N O v Santam Insurance Co Ltd**[18] the novel question arose whether the nasciturus principle legitimately could be extended to allow a child, after birth, to sue for injuries suffered by the child while still in the womb, as a consequence of injuries inflicted upon the mother.[19] Although the court was prepared to hold that the action was available in principle, its view was rendered obiter by its finding that the causal connection between the disability with which the child was born and the injuries sustained by his mother before his birth had not been sufficiently proved.[20] The child's action therefore failed on the facts. The **Pinchin**-

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15 D 1.5.7, 1.5.26, 50.16.231; Grotius 1.3.4; Voet 1.5.5, 39.5.12; Van der Keesel **Th** 45; **Maasdorp's Institutes I Persons** 1; Hahlo and Kahn **The Union of South Africa: The Development of its Laws and Constitution** London: Stevens 1960 347; Barnard, Cronjé & Olivier South African Law of Persons and Family Law (3rd edition) Durban: Butterworths 1994 13 -14.

16 See e.g. **Ex parte Boedel Steenkamp** 1962 (3) SA 954 (O).

17 **Chisholm v East Rand Proprietary Mines Ltd** 1909 TH 297.

18 1963 (2) SA 254 (W).

19 Note that the concern here is with an action brought by the child itself, in its own right, though represented by a guardian. Of course, the mother has her own action for her own injuries.

20 Although the trial judge considered it 'necessary to decide the law point because it is relevant to costs' (see 1963 (2) SA 254 (W) at 263C), the Appellate Division, in dismissing an appeal from his judgement on the facts, refrained from deciding whether his decision on the law was correct.

decision none the less provides a firm basis in our law for a delictual action for pre-natal injuries.[21]

21 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 38.

More than thirty years after this decision new questions regarding the protection of foetal interests are being raised.[22] One is abortion. Another relates to forcing medical treatment on pregnant women. Yet another issue is whether a child who is born with abnormalities may sue the attending medical practitioner for negligently failing to disclose the risk of such abnormalities to the child's parents during the pregnancy, thus preventing them from choosing to terminate the pregnancy. Such a 'wrongful life' action[23] seeks to compensate the child for having to live an abnormal life, not because of any injury inflicted in the womb, but simply because it was, through the negligence of the defendant, allowed to be born. A further instance of the application of the nasciturus rule arises where a woman who is party to an action for divorce is pregnant. To obviate the necessity for further legal proceedings at a later stage, the court may make provision in its order for the custody, after its birth, of the child in *utero*.[24]

Whether or not the nasciturus rule gives the foetus the status of a legal person remains an open question. As McCreath J remarked in **Christian Lawyers Association of SA v Minister of Health**:[25]

> It is not necessary for me to make a firm decision as to whether an unborn child is a legal *persona* under the common law. What is important for purposes of interpreting s 11 of the Constitution is that, at best for the plaintiffs, the status of the foetus under common law may, as at present, be somewhat uncertain.

The Commission is likewise of the opinion that it is not necessary for us to express any opinion as to whether an unborn child is a legal person under the common law. However, given our definition of a child above (any **person** under the age of 18 years), **it should be clear that the Commission, for the purposes of the new children's statute, does not see the new statute as applying to unborn children**.

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22 For the developments in the USA, see Robert H Mnookin and D Kelly Weisberg (eds) **Child, Family and State** (3rd edition) Boston: Little, Brown and Co 1995 4 - 55.

23 There is a growing literature on wrongful life actions in South Africa. See P Q R Boberg 'An action for wrongful life' (1964) 81 **SALJ** 498; S Brownlie 'Wrongful life: Is it a viable cause of action in South Africa?' 1985 **Responsa Meridiana** 18; P F Louw 'Wrongful life: 'n Aksie gebaseer op die onregmatige veroorsaking van lewe' 1987 **TSAR** 199; M Blackbeard 'Die Aksie vir "Wrongful Life": To be or not to be' (1991) 54 **THRHR** 199; L Meintjes-Van der Walt 'The right to be born' (1991) 286 **De Rebus** 745. See also Glanville Williams 'The foetus and the right to life' (1994) **Cambridge LJ** 71 at 78; contra L M du Plessis 'Jurisprudential reflections on the status of unborn life' (1990) **TSAR** 44.

24 **Shields v Shields** 1946 CPD 242.

25 1998 (4) SA 1113 (T) at 1121G.

4.3 **The attainment of majority**

Today, South Africans of both sexes normally attain majority on reaching the age of 21 years.[26] It is also possible to acquire adult status by means of marriage and 'express emancipation' as is provided for in the Age of Majority Act, 1972. The effect of 'tacit emancipation' as a means of acquiring adult status, on the other hand, has been the subject of much controversy and is not dealt with, and it has been submitted that this institution has lost its old potency to promote a minor to majority.[27]

4.3.1 **The attainment of majority by age**

In law, there is an 'instantaneous transformation' from childhood to adulthood at a specified age.[28] As stated above, in South Africa a person is considered to be legally an adult at the age of 21 years.[29] Section 1 of the Age of Majority Act 57 of 1972 reads as follows:

> All persons, whether males or females, attain the age of majority when they attain the age of twenty-one years.

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26 Section 1 of the Age of Majority Act 57 of 1972.

27 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 466, 473 et seq.

28 R Ludbrook 'Children and the political process' (1996) 2(2) **Australian Journal of Human Rights** 278, 283.

29 See also the definition of 'major' or 'person of age' in the Births and Deaths Registration Act 51 of 1992. It is proposed that this definition be amended by bringing it in line with the Constitution (i.e. 18 years): See in this regard section 1 of the Births and Deaths Registration Amendment Bill, 2001, published as General Notice 1891 of 2001 in Government Gazette No. 22552 of 3 August 2001.

As Van Heerden et al[30] point out, it is not self-evident that this is the most appropriate age for the attainment of majority in modern times.[31] The desirability of reducing the age of majority was considered by the S A Law Commission in its **Report on the Investigation into the Advancement of the Age of Majority**.[32] The Commission recommended that the status quo be retained for the following reasons:

> Except from a minor's view an age of majority of 21 years has no disadvantages, except perhaps for some minor inconvenience of having to involve his parents in some of his decisions. The law makes adequate provision cases where it is undesirable for the minor to be dependent on his parents' decisions. The Commission believes that there is no real need for the advancement of the age of majority and that the young person can only benefit from the protection of the law while he is gaining experience of life.

This conclusion is supported by P J J Olivier[33] who contends that there is 'no social need for lowering the limit from 21 years of age'. A different view is taken by J D van der Vyver,[34] who argues as follows:

> The legislature will ... be well advised to substitute 18 for 21 years as the age of majority.

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30 Boberg's **Law of Persons and the Family** (2nd edition) 461.

31 In England, the age of majority was reduced to 18 years by section 1(1) of the Family Law Reform Act 1969. For a comparative survey, see D Rosenthal 'The age of majority' (1971) 88 **SALJ** 106, who argues for a similar reduction in the South African age.

32 Project 43, 1985.

33 'Minority and the parental power' 1983 **Acta Juridica** 97 at 98.

34 'Constitutionality of the Age of Majority Act' (1997) 114 **SALJ** 750 at 754. See also J D van der Vyver 'Beperkte en volledige emansipasie' (1979) 42 **THRHR** 309 at 315; Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 462, footnote 2.

> Improvement of educational standards and access to secondary education, increased exposure of young people through the mass media and otherwise to information and influences that contribute to their early maturity, and cultivation of all kinds of responsibilities in young persons through the strains and stresses of modern living conditions must surely count to demonstrate that the Age of Majority Act has fallen behind our times.

4.3.2 **The attainment of majority by marriage**

It has always been clear that, on marriage, the husband attains the status of majority for all purposes.[35] He keeps his status even if the marriage is dissolved[36] by death or divorce before he reaches the age of 21 years.[37] It matters not that the spouse reside under the parental roof.[38]

The fate of the wife used to be somewhat less clear-cut, but now all women who are minors when they marry will acquire majority status in the same way as men, however they choose to be married.[39] A woman widowed or divorced before she is 21 years old will retain the majority her marriage gave her.[40]

It must also be pointed out that in terms of section 26 of the Marriage Act 25 of 1961, no boy under the age of 18 years and no girl under the age of 15 years is capable of contracting a valid marriage except with the written permission of the Minister for Home Affairs or his or her designated official. A marriage officer may also not solemnise a marriage between parties of whom one or both are minors unless the necessary consent to such marriage has been granted and furnished in writing.[41]

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35 However, a married person below the age of 21 years will be regarded as a minor for the purposes of section 13(1)(a) of the Prescription Act 68 of 1969. See **Santam Verskeringsmaatskappy Bpk v Roux** 1978 (2) SA 856 (A).

36 Majority is not, however, retained where the marriage is annulled on the ground that it was void or voidable. If it was void it did not confer majority status in the first place; if it was voidable the decree of nullity operates with retroactive effect.

37 Grotius 1.6.4, 1.10.2; Voet 4.4.6, 7; **Santam Versekeringsmaatskappy Bpk v Roux** 1978 (2) SA 856 (A) at 864F-H; **Stassen v Stassen** 1998 (2) SA 104 (W) at 108H; H R Hahlo 'The legal effect of tacit emancipation' (1943) 60 **SALJ** 289 at 292.

38 Voet 1.7.13.

39 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 467.

40 She is therefore competent to assume guardianship of her children, and requires no assistance to contract a second marriage.

41 Section 24(1) of the Marriage Act 25 of 1961.

The Commission has recommended in its **Report on the Review of the Marriage Act 25 of 1961**[42] that section 26 of the Marriage Act 25 of 1961 be amended to provide that no person under the age of 18 years shall be capable of contracting a valid marriage, except with the written permission of the Minister or a court. Should this proposal be accepted, then the minimum age for marriage will be 18 years of age for both sexes.[43]

4.3.3 **The attainment of majority by express emancipation**

42 Project 109: **Report on the Review of the Marriage Act 25 of 1961** (April 2001), paragraph 2.20.9.

43 See further Chapter 10 below on the prohibition of harmful cultural practices such as child betrothals.

The Age of Majority Act 57 of 1972 introduced a form of express emancipation in South Africa.[44] Unlike *venia aetatis*,[45] this is granted by the High Court itself, on the application of any person who has attained the age of 18 years.[46] The application must be supported by an affidavit stating:[47]

(a) the applicant's full names, ordinary place of residence and date of birth;

(b) such particulars as will place the Court in a position to judge whether the applicant is a fit and proper person to manage his own affairs, with due regard to his behaviour, mental development and business acumen;[48]

(c) whether the applicant lives with his parents and, if so, whether he intends to continue living with them;

(d) whether the application is supported by the parents or guardian of the applicant and, if so, an affidavit by the parents or guardian to that effect shall be annexed thereto;

(e) full particulars of any immovable property which the applicant has or expects to have;

(f) full particulars of any movable or immovable property which the applicant holds subject to certain restrictions;

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44 For detailed analyses of the provisions and implications of the Act, see Erwin Spiro 'The Age of Majority Act 1972' (1973) 90 **SALJ** 48; JA v S D'Oliveira 'Venia aetatis, emancipation and release from tutelage revisited: The Age of Majority Act 1972' (1973) 90 **SALJ** 57. The question whether emancipation by complete release from parental authority has fallen into disuse or has, by implication, been abolished by the Age of Majority Act 57 of 1972, was raised but not decided in **Grand Prix Motors WP (Pty) Ltd v Swart** 1976 (3) SA 221 (C).

45 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 470, footnote 45 convincingly argues that the institution created by the Age of Majority Act 1972 is more aptly described as 'express emancipation'.

46 Section 2. The Act is silent as to whether the applicant (who *ex hypothesi* is still a minor) can bring the application without the assistance of his or her parent(s) or guardian(s). See Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 470 footnote 45 in this regard.

47 Section 3.

48 This does not mean that the applicant must actually run a business of his or her own. The question, on a broad basis, is whether the applicant is 'capable of getting along in the commercial world': D'Oliveira (1973) 90 **SALJ** 57 at 66.

(g) 'any other relevant information that will place the Court in a position to judge whether it is necessary or desirable in the interests of the applicant to grant the application'.

The court is empowered, after considering the application, any objections thereto and replies to such objections, to grant, refuse or postpone the application. The court may issue a rule *nisi* with directions as to service, call for further evidence, and make such order as to costs as it thinks just.[49] No provision exists, however, for the making of a qualified or conditional order, or for withholding any of the normal incidents of majority.[50] If the court decides to grant the application, it issues an order declaring the applicant to be a major. The effect of such an order is stated in section 7: 'Any person to whom an order declaring him to be a major is granted, shall for all purposes be deemed to have attained the age of majority'.

The Age of Majority Act 57 of 1972 offers no express guidance on the question as to how the court should come to its decision whether or not to grant the order sought. Van Heerden et al[51] argue that it may be inferred that the matters listed in section 3, required to be contained in the supporting affidavit, are the factors to which the court should have regard in reaching its decision. More particularly, it appears from section 3(g) that the paramount consideration is whether the interests of the applicant would best be served by anticipating his or her majority. In the only two reported judgments to date,[52] the courts have adopted a strict approach and have indicated that it is insufficient for an applicant merely to establish that he or she is competent to administer his or her own affairs. Although such competence is a necessary condition for the application to succeed, it is not a sufficient condition[53] and the applicant will be required to establish additional reasons why it is 'necessary or desirable' that majority should be advanced. It is doubtful whether such a restrictive interpretation of the Age of Majority Act is justified.[54]

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49 Section 6(1)(b), (c), (d).

50 P J J Olivier 'Minority and the parental power' 1983 **Acta Juridica** 97 at 100 argues that 'it would have been wise to have allowed the court a discretion to give a qualified or conditional order, as it is in any event regarded as the upper guardian of minors and so in a position to give the order which would be in his best interests'. See also D'Oliveira (1973) 90 **SALJ** 57 at 68.

51 **Boberg's Law of Persons and the Family** (2nd edition) 472.

52 **Ex parte Botes** 1978 (2) SA 400 (O); **Ex parte Smith** 1980 (2) SA 533 (O).

53 **Ex parte Botes** 1978 (2) SA 400 (O) at 401G-402A.

54 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 473. See also Spiro (1973) 90 **SALJ** 48 at 53; A C Beck '*Ex parte Botes* and the declaration of majority' 1979 **De Rebus** 528 at 569; Annél van Aswegen 'Meerderjarigheidsverklaring deur die Hof - 'n Oorsig' (1981) 22(2) **Codicillus** 31 at 36; Barnard,

Cronjé & Olivier **Law of Persons and Family Law** 98; Alfred Cockrell **Bill of Rights Compendium** 3E23.

4.3.4 **The attainment of majority in customary law**[55]

What is common among different systems of customary law is that childhood is not related to a particular age, but rather to factors such as initiation, marriage and the formation of a separate household.[56] In Xhosa customary law, for example, until the rite of initiation has been undertaken by a male, that person remains a child even if he is well over the age of 21 years. Although there appears to be some uncertainty as to whether the Age of Majority Act 57 of 1972 used to apply in customary law cases, it is now clear that the Act does apply.[57]

4.4 **Comments and submissions received**

In Issue Paper 13 it was said that in view of the definition of child in both the Constitution and the CRC, and bearing in mind the changed political, social and economical circumstances in South Africa, it is arguable that the Commission's earlier decision in its 1985 **Report on the Investigation into the Advancement of the Age of Majority** that there is no real need for the age of majority to be lowered, needs reconsideration.[58] In this regard the following question was posed:[59]

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55 See also Chapter 21 below.

56 Ann Skelton (ed) **Children and the Law**, p. 39.

57 Section 9 of the Recognition of Customary Marriages Act 120 of 1998 provides that despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972. Although it is not clear whether the legislature intended this provision to apply to children born of customary marriages (or only to spouses to the marriage), nothing prevents such an interpretation. See also South African Law Commission **Report on Customary Marriages** (August 1998), par 6.2.2.25. The Commission also recommended that 18 years be fixed as the minimum age for marriage for all persons in the South Africa (par. 5.1.19).

58 Issue Paper 13, p. 61 - 62, 55.

> How would commerce be affected if the age of majority for all purposes were to be lowered to eighteen years? Do any further age limits require attention during this investigation?

Very few of the respondents addressed this question in detail. The Durban Committee submitted that it can be argued that people who have not attained at least the age of 21 are not emotionally mature enough to make decisions relating to questions of business.

Mr DS Rothman stated that lowering the age of majority to 18 will certainly widen the scope of the risk factor for commerce. Regarding marriages he observed that the commissioner for child welfare is empowered to grant consent to marry a minor whose parents are unable to give consent. The commissioner may also instruct that a social worker investigate the matter before approving, and may decide whether or not an ante-nuptial contract should be entered into. He agreed that it does seem like an anomaly that a children's court commissioner can grant consent to a minor to marry while the High Court must be approached for a declaration of a minor to be a major in order to engage in commerce.

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59 Question 28.

In the worksheet used in the consultation process, the question was put more directly and respondents were asked whether they thought the age of majority should be lowered to 18 years. The responses indicated no clear preference for either maintaining the current age of majority at 21 years or for lowering it to 18 years.[60] However, respondents were in general agreement that children mature much younger in current times and that children are generally able to fend for themselves at 18 years of age. On the other hand, some respondents pointed out that by lowering the age of majority certain protections for children would be removed and that this would further prejudice disadvantaged children. It was pointed out, for instance, that in disadvantaged communities it is not uncommon to find persons of 19 years of age still at school.

The worksheet also specifically posed the question as to whether the general age of majority should apply to persons living in a customary setting.[61] Here the majority of respondents indicated that one

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60 Nine individual responses and 12 group responses were in favour of lowering the age of majority to 18 years, while 1 individual respondent and 15 group responses supported the status quo.

61 Majority and minority status in customary law are not determined by age as they are under the Age of Majority Act 57 of 1972. Even social rituals like initiation which indicate adulthood in a social sense do not equal legal majority. Instead, for males, legal majority is generally achieved upon marriage and the establishment of a home. Before the advent of the Recognition of Customary Marriages Act 120 of 1998, women, on the other hand, never reached majority and were considered minors throughout their lives: Ann Skelton (ed) **Children and the Law** Pietermaritzburg: LHR 1998, p. 35. See also Chapter 21 on the child in customary law below.

age of majority should apply, also to children (and persons) living in customary settings.[62] The general feeling was that there is a need for uniformity and that it may be discriminatory to have the age of majority not apply in customary settings.

As to the exceptions, the respondents were fairly united in their stance that children should not be allowed to own fire-arms, and that ownership of fire-arms should be linked to attaining the age of majority. The view was also expressed that a distinction should be drawn between independence and age as separate criteria determining majority. Thus exceptions should apply in the opposite direction as well so that mentally and physically challenged children, and children with special needs, could remain 'children' for longer. There was strong echoing of the view that parents should be obliged to support their dependent children even if they are older than 18 years (or any other legally set age threshold for attaining adulthood).

62 Twelfth individual responses and 36 group responses said that the age of majority should apply to children in customary settings while 1 group response reflected that it should not.

Conflicting views on whether the age for attainment of majority should be lowered and to what age if at all were voiced at the focus group discussion held at the Breakwater Lodge on the parent - child relationship.[63] However, after vigorous debate it seemed that consensus was that the age of majority could be lowered to 18 years subject to all kinds of qualification.[64] The observation was made that support in the family context implies a reciprocal duty which is not limited to age. The implication of such a statement is that it can also be expected of children to take care of their parents.

What the children said:

In the child participation process children were asked the following questions:

3.3.1 *When do you think that you become an adult and what does this involve?*

63 Question 12 of the worksheet. The workshop was held on 12 - 13 March 1999.

64 Children at school and university, mentally disabled children, etc.

The groups of children said that a child becomes an adult when he or she reaches the age of 21 years,[65] when a child can take responsibility for his or her own actions,[66] at 18 years of age,[67] when a child becomes economically independent,[68] when a child has a child,[69] when a child acquires a driver's licence,[70] when a child marries,[71] when a child works,[72] or at 16 years of age.[73]

Many of the reasons that were advanced for having 18 years as the indicator of adulthood, were also advanced in respect of the 21 year threshold. These were the

65 13 groups.

66 12 groups.

67 10 groups.

68 9 groups.

69 2 groups.

70 1 group.

71 1 group.

72 1 group.

73 1 group.

reasons reflected above (ability to make decisions, economic independence etc.). Also, a number of the responses were based on inaccurate assumptions and linked to existing thresholds for the age of majority (e.g. '18 years because then you can have children'. Or '21 years because then you can get married'.)

3.3.2 *What should you (as a child) be free to do?*

The children indicated that they should be free to make their own decisions, but with guidance from adults;[74] to live happily, to help around the house, to get an education;[75] to participate in sport and other recreational activities without fear, to vote;[76] to drive a car, to have sex;[77] to get married, to carry a licensed firearm;[78] to conclude legal contracts;[79] to use alcohol and to express yourself.[80]

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74 22 groups.

75 1 group each.

76 3 groups each.

77 5 groups each.

78 2 groups each.

79 3 groups.

80 1 group each.

3.3.3 *At what age do you think that children should be able to make their own decisions (without the permission of their parents or care-giver) to marry or establish their own family?*

9 groups felt that 18 years was the appropriate age.
17 groups felt that 21 years was the appropriate age.
3 groups felt that 25 years was more appropriate.

3.3.4 *Are there any exceptions that should be allowed to this?*

The following are the exceptions mentioned.

Cases where children should be assisted with decision-making	
Children with special problems/ needs should be protected (such as children in extreme poverty, deaf children and persons who are mentally challenged - in spite of the fact that they may have reached the age of majority).	4
Persons who have not yet completed school (irrespective of whether they might have reached the age of majority)	3
The decision to have an abortion (it was not stated who should be involved in this decision besides the pregnant child).	1
Cases where children should not be obliged to obtain assistance in decision-making	
Children who are heads of households	4
Children who are 'mature enough'.	2

The completed worksheets[81] do not offer any clarity on the vague concept of when a child is 'mature enough'. One example given was marriage which, it was felt, should be used as an indicator of the child having reached a sufficient level of maturity to make his or her own decisions. Another example was that of the child who is working and living independently of his or her parents.

81 Six groups felt that no exceptions should be allowed. Ten groups left this question unanswered.

4.5 Evaluation and recommendation

From the lack of formal (adult) response and the scarcity of reported cases, the impression could be gained that few problems are encountered in practice with the Age of Majority Act 57 of 1972. One could go even further and argue that the time is now ripe for the advancement of the age of majority to eighteen years. Seen from the (adult) workshop report and the perspective of children, however, it would appear that the issue is not that clear-cut. Indeed, there was considerable majority support amongst the groups of children interviewed for keeping the age of majority at 21 years, while some even suggested extending the age of majority to 25 years. As stated above, these propositions might be indicative of misunderstandings relating to the existing legal position, but this is by no means certain.

In this regard, the Commission wishes to point out that the law[82] imposes a duty upon one person to support another when three requirements are satisfied:[83]

(a) the person claiming the support must be unable to support himself or herself;
(b) the person from whom support is claimed must be able to support the claimant; and
(c) the relationship between the parties must be such as to create a legal duty of support between them.[84]

In the case of a parent,[85] the mere existence of a relationship creates a rebuttable presumption of a duty of support: there is no necessity to allege and prove the need for support and the ability to supply it where a child claims maintenance.[86] Where a child claiming maintenance has reached the

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82 I.e. duties of support arising by operation of the law - *ex lege* - not with duties imposed by agreement - *ex contractu* - which are different in nature.

83 P J Visser and J M Potgieter **Introduction to Family Law** (2nd edition) 210.

84 A step-parent has no legal duty of support in respect of his or her stepchildren: **Mentz v Simpson** 1990 (4) SA 455 (A).

85 The duty to support not only rests on parents, but on grandparents, brothers and sisters, and children in respect of their parents: P J Visser and J M Potgieter **Introduction to Family Law** (2nd edition), p. 210 -211. See also John Eekelaar 'Are parents morally obliged to care for their children?' in Eekelaar and Šar_evi_ (eds) **Parenthood in Modern Society** Dordrecht: Martinus Nijhoff 1993, p. 51.

86 **Gildenhuys v Transvaal Hindu Educational Council** 1938 WLD 260 at 262.

age of majority, he or she bears the onus of proving that the parent is obliged to support him or her.[87]

87 **Sikatele v Sikatele (2)** [1996] 2 All SA 95 (Tk).

The Commission further wishes to point out that the attainment of majority does not *per se* terminate the parental duty of support; it is the child's ability to maintain himself or herself that is important.[88] Simply put, the duty of parents to maintain their children ceases when the children become self-supporting.[89] Thus the obligation to maintain a crippled or otherwise handicapped child might persist throughout the child's life.[90] In appropriate circumstances, a child may be entitled to a university or other post-school education, possibly even if it extends beyond the attainment of majority.[91] Similarly, a duty which ceased when a son started work or a daughter married[92] may revive when the child faces financial difficulties.[93] There is no presumption that support is needed

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88 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 247. See too Spiro **Law of Parent and Child** (4th edition) 402 -3; **Kanis v Kanis** 1974 (2) SA 606 (RA) at 611; **Bursey v Bursey** [1997] 4 All SA 580 (E); **Sikatele v Sikatele** [1996] 1 All SA 445 (Tk).

89 Voet 25.3.16; **Goldman NO v Executor Estate Goldman** 1927 WLD 64 at 69; **Vermaak v Vermaak** 1945 CPD 89 at 96; **Bursey v Bursey** [1997] 4 All SA 580 (E).

90 Per Jansen J in **Kemp v Kemp** 1958 (3) SA 736 (D) at 737.

91 See **Richter v Richter** 1947 (3) SA 86 (W) at 92. See too **Ex parte Jacobs** 1982 (3) SA 276 (O) at 278.

92 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 247, footnote 75 point out that the primary duty to support a spouse falls upon the other spouse, not his or her parents.

93 **Gliksman v Talekinsky** 1955 (4) SA 468 (W) at 469. In casu the father was held liable to contribute towards the support of his widowed daughter and her six minor children.

and that the parent is able to supply it here; a major child must discharge the onus of proving that both these requirements of the duty to support are satisfied.[94] It has been held, however, that a major child is not entitled to support on as a generous scale as a minor child of the same parents.[95]

It is also worth noting that children may be obliged to support their parents in appropriate circumstances as the duty of support between parents and their children is reciprocal.[96] The source of the obligation is filial duty, and the requirements for its existence are: (a) the parents must be indigent, i.e. unable to maintain themselves; and (b) the children must be able to maintain their parents, with due regard to their own needs.[97]

However, given the divergence of opinion expressed by the respondents, the Project Committee decided at its 15th meeting held in Pretoria on 13 - 15 January 2000 to present three different options,

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94 **Grobler v Union Government** 1923 TPD 429; **Gliksman v Talekinsky** 1955 (4) SA 468 (W); **Hoffmann v Herdan** 1982 (2) SA 274 (T).

95 It has been held that such a duty is confined to necessities: **B v B** [1997] 1 All SA 598 (E).

96 **Oosthuizen v Stanley** 1938 AD 322 at 327-8; **Anthony v Cape Town Municipality** 1967 (4) SA 445 (A). However, in the case of a parent claiming support, an allegation that the support is necessary because the claimant is unable to support himself or herself constitutes an essential ingredient of the cause of action: **Waterson v Maybury** 1934 TPD 210.

97 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 248 - 252.

without taking a particular position. These options are:

(a) that the age of majority be left at 21 years with the proviso that the child will obtain certain rights when he or she turns 18;

(b) that the age of majority be lowered to 18 years with the proviso that any protection under the common law (and statutory law) can be extended;

(c) that the age of majority be left at 21 years, but with an increase in the number of exceptions for independence where persons between 18 and 21 years will be able to exercise certain categories of freedom.

The Commission, however, would like to recommend that the age of majority be 18 years, with a proviso that parental responsibility and or State support, where appropriate, in respect of such a person may be extended by the court beyond that person's eighteen birthday in special circumstances.[98]

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98 Legislation already provides for such special circumstances. See, for instance, section 33(3)(a) of the Child Care Act 74 of 1983 in terms of which the Minister for Social Development may approve that a foster child or pupil remain in the custody of the foster parent or institution after he or she has attained the age of 18 years in order to allow that person the opportunity to complete his or her education or training. Section 16(3) of the same Act provides that the Minister may order that any former pupil of or pupil in a school of industries whose period of retention has expired or is about to expire, return to or remain in that school of industries for any period which the Minister may fix or extent: 'Provided that no such order or extension shall extend the period of retention of any pupil beyond the end of the year in which that pupil attains the age of 18 years'. See also Chapter 19 on residential care below and the recommendation that the protection be extended until **the end of the year in which the child turns 18** to allow such child the opportunity to finish his or her schooling or training. See also clause 22(1)(d) of the Immigration Bill 2000 published in Government Gazette 20889 of 15 February 2000 which allows for the permanent residence permit of a foreigner to be extended to such foreigner's spouse and children younger than 21 years of age.

To provide for the possibility of extending parental responsibility and or State support in respect of a person beyond the age of eighteen years in special circumstances, the Commission recommends the inclusion of the following provision in the new children's statute:

Extension of parental responsibility and State support beyond 18 years

(1) Parental responsibility and State support in respect of a child may be extended by the court beyond the child's eighteen birthday until that person's twenty-first birthday if the court is satisfied upon application or of its own motion that special circumstances exist with regard to the welfare of that person that would necessitate such extension being made.

(2) An application under this section may be made before the child's eighteen birthday by -

(a) the parent or primary care-giver of the child;
(b) any person with parental responsibility for the child;
(c) the Director-General: Social Development; or
(d) the child himself or herself.

The Constitution[99] and the African Charter on the Rights and Welfare of the Child[100] define child as every person under the age of 18 years, while the CRC goes further where it says a child is every human being below the age of 18 years, 'unless, under the law applicable to the child, majority is attained **earlier**'.[101] It is of significance that the CRC does not extend its protection to persons older than 18 years by providing for the attainment of majority later. The Commission is convinced that

99 Section 28(3) of the Constitution, Act 108 of 1996.

100 Article 2. See also the Council of Europe Resolution (72)29 on the Lowering of the Age of Full Legal Capacity 1972. The Resolution recommended that the age of majority be lowered below 21 years and, if deemed advisable, to fix that age at 18 years, provided that State Parties may retain a higher age of capacity for the performance of certain limited and specified acts in fields where they believe that a higher degree of maturity is required.

101 Our emphasis. Article 1.

the changed political, social and economic circumstances in South Africa justify the advancement of the age of majority to 18 years. In this context the Commission inter alia considers that as the HIV/AIDS pandemic spreads, more and more children will assume greater responsibilities by assuming leadership roles in households, by taking care of younger siblings (and parents), by entering the labour market, leaving school, and so forth. The Western notion that children leave school at 18 to pursue a tertiary education, still under the parental wing, which held force when the Age of Majority Act 57 of 1972 was passed, simply do not apply.

If age of majority is advanced to 18 years, then little justification for the Age of Majority Act 57 of 1972 remains, and the Act can be repealed. However, realising that a child aged 16 years may leave school and lawfully enter the labour market, the Commission did entertain the possibility that such a child may wish to apply for a declaration to become a major. In such an instance, provisions similar to those in the Age of Majority Act 57 of 1972 will be required in the new children's statute. Such a step, i.e. providing for the declaration of 16 year old children as majors is not recommended at present, but the Commission would like to keep such option open for the moment.

However, whether or not the Age of Majority Act 57 of 1972 is incorporated in the new children's statute, it seems clear that the existing provisions of this Act can be strengthened by providing express guidance on the question as to how the court should decide whether or not to grant the order for advancement of majority and to include a provision to allow the court a discretion to grant a qualified or conditional order. The Commission accordingly recommends that such amendments be affected to the Age of Majority Act 57 of 1972.