

**THE UTILISATION OF SOCIO-ECONOMIC RIGHTS OF CHILDREN TO  
ALLEVIATE POVERTY IN SOUTH AFRICA**

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## 1 Introduction

Prior to the first free and democratic election held in 1994 and the adoption of the *Constitution of the Republic of South Africa 200 of 1993*<sup>1</sup>, South Africa was characterised by racial discrimination. Numerous laws, rules, regulations, and practices benefited the white minority of the population.<sup>2</sup> The racial discriminatory policies of the previous government brought about the unavoidable impoverishment of the majority of the country's inhabitants, while the privileged few stayed indifferent. South Africa is still regularly depicted by President Mbeki and others as being a state of two nations: one black and poor, the other, white and rich.<sup>3</sup> Apartheid and all the unjust actions committed in its name are accepted to be one of the major causes behind this situation.

The preamble of the *Constitution of the Republic of South Africa, 1996*<sup>4</sup> states:

We, the people of South Africa, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights; and improve the quality of life of all citizens and free the potential of each person.

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1 *Constitution of the Republic of South Africa 200 of 1993*. Herein after referred to as the 1993 Constitution.

2 Venter A (Ed) *Government and Politics* 323. Examples of these practices: the establishment of businesses and industries in "white" areas, reservation of jobs for white people (the so-called civilized labour policy), and legislation such as the Land Acts of 1913 which saw black people restricted to overpopulated rural areas.

3 Mbeki T 2003 <http://www.gov.za/reports/2003/son03adv.htm> 2 November 2003. See also Venter A (Ed) *Government and Politics* 4.

4 *The Constitution of the Republic of South Africa, 1996*. Herein after referred to as the Constitution. Notably, the preamble to the Constitution does not have any legal force and effect, However, it has some significant moral weight, which cannot be ignored.

The Constitutional Court summarised the situation most South Africans live in today in *Soobramoney v Minister of Health, KwaZulu-Natal*:<sup>5</sup>

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted. A commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.<sup>6</sup>

The preamble to the Constitution clearly states that the values of human dignity, freedom, and equality are at the forefront of South Africa's democratic development. The Constitutional Court expressly confirmed that there can be no doubt that human dignity, freedom and equality are denied to those who live in such deplorable conditions of abject poverty.<sup>7</sup>

For the first time in South African history the Constitution entrenches socio-economic rights. Section 24 guarantees everyone the right to an environment that is not harmful to their health or well-being, as well as the right to have the environment protected through reasonable legislative and other measures. Section 26 grants everyone the right to have access to adequate housing. Section 27 provides everyone the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants; and appropriate social assistance. Furthermore, section 28 grants every child additional rights to basic nutrition, shelter, basic health care

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5 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC), para 8. Hereinafter referred to as the *Soobramoney case*.

6 *Soobramoney case* para 8.

7 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) par 23. Herein after referred to as the *Grootboom case*.

services, and social services. Lastly, section 29 guarantees everyone the right to a basic education including adult basic education. In the *Grootboom* case the Constitutional Court recently submitted that the realisation of these rights is key to the advancement of a democratic South Africa based on human dignity, freedom, and equality.<sup>8</sup>

The inclusion of socio-economic rights in the Constitution has sparked debate. Traditionalists objected to the inclusion of such rights because of the difficulty concerning their enforcement. There are those who accept the interdependency and indivisibility of civil and political rights on the one hand, and on the other hand social and economic rights. This debate will be discussed in more detail later.<sup>9</sup> It is sufficed to say that the Constitutional Court ruled in *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*<sup>10</sup> that socio-economic rights are indeed justiciable.<sup>11</sup>

Poverty may be addressed through a rights based approach whereby socio-economic rights are realised to the poorest of the poor.<sup>12</sup> Poverty involves more than the suffering associated with lack of income. It incorporates an inability to develop human capabilities, suffering attendant on physical insecurity and abuse, as well as economic vulnerability.<sup>13</sup> Due to the inequality of the past the majority of the population live in some degree of poverty. Currently in South Africa 6 out of every 10 children live in poverty. It can be argued that these deprived children are the most vulnerable section of

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8 *Grootboom* case para 23.

9 The justiciability of socio-economic rights in South Africa will be discussed in section 2.1 of this dissertation.

10 *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC). Herein after referred to as the *First Certification* judgement.

11 This was later confirmed in both the *Grootboom* case para 20 and in *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 521 (CC) para 23. (Herein after referred to as the *TAC* case).

12 Jansen van Rensburg L "Adjudicating Socio-economic Rights" 1-10.

13 Corbett TJ 2003 <http://www.encarta.msn.com> 21 May 2003.

society who are most in need. In a speech by then president Nelson Mandela he stated:<sup>14</sup>

Our children are our nation's future. Prospects for development are seriously undermined by the kind of large-scale deprivation of children that South Africa has experienced. On the other hand investing in their health, nutrition, and education not only improves our children's quality of life, but it also facilitates growth and development.<sup>15</sup>

In this light, it is not surprising that the post 1994 South African government has committed itself to reducing child poverty and the protection of children's rights as part of its commitment to heal the divisions of the past.<sup>16</sup> In this dissertation poverty as a worldwide phenomenon and its manifestation under South African children will be analysed by assessing the extent thereof. The possible long- and short-term effects of poverty on children will also be discussed in light of the prevailing situation in South Africa.

As mentioned above, the Constitution expressly provides for certain socio-economic rights. In addition, certain specific socio-economic rights of children in the form of section 28(1)(c) have been included. In 1995 the government ratified the *United Nations Convention on the Rights of the Child*.<sup>17</sup> Thereafter the Government launched its first National Plan for Action for Children. Through these mechanisms government endeavour to mainstream the interests of children and the utilisation of their socio-economic rights.<sup>18</sup>

This dissertation will focus on the utilisation of the socio-economic rights of the child to alleviate poverty. The socio-economic right of children to basic shelter and housing will be addressed, with reference the Bill of Rights and

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14 Speech given at the launch of the National Programme of Action for Children and Report on Child Poverty.

15 Mandela N 1996 <http://www.anc.org.za/ancdocs/history/Mandela/1996/sp0531.html> 20 May 2003.

16 National Plan of Action for Children 1996. <http://www.gov.za/reports/1996/chilprog.htm> 20 May 2003.

17 Adopted and proclaimed by United Nations General Assembly Resolution 33/325 of 1989. Herein after referred to as UNCRC.

18 Streak J 2001 <http://www.idasa.org.za> 20 May 2003.

relevant international documents. Essential to this discussion is an effective understanding of the right to basic shelter as entrenched by section 28 of the Constitution in conjunction with the right of access to adequate housing conferred on everyone by virtue of section 26. This will be achieved by studying the general working of such rights, their limitations, and enforcement. Furthermore, legislative and other measures taken to implement the socio-economic rights of children in the fight against poverty will be discussed and critiqued.

Lastly, some recommendations will be made on how the socio-economic rights of children can be better utilised to alleviate poverty in South Africa.

## **2 Socio-economic rights in the South African Constitution**

Civil and political rights or first generation rights are usually termed negative rights as they impose a general duty on the state not to act in certain ways.<sup>19</sup> A typical example of these rights is the traditional freedom rights such as political rights, which include the right to vote.<sup>20</sup>

Positive rights exist in the form of social and economic rights or second-generation rights. These rights impose obligations on the state to act positively. The idea behind socio-economic rights is that the state must do whatever it can to ensure that the general society can attain certain social and economic goals.<sup>21</sup> The right of access to adequate housing<sup>22</sup> is an example of such rights.

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19 De Waal J Currie I and Erasmus G *Bill of Rights* 432, and Van Wyk D and Dugard J (eds) *Rights and Constitutionalism* 603. This general duty is also termed a negative obligation.

20 Political rights are entrenched in section 19 of the Constitution. Section 19(3)(a) provides that "every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution".

21 De Waal J Currie I and Erasmus G *Bill of Rights* 432 and Van Wyk D and Dugard J (eds) *Rights and Constitutionalism* 603.

22 Section 26(1) of the Constitution.

On international level the *Universal Declaration of Human Rights*<sup>23</sup> contains a whole range of fundamental rights. However, the United Nations General Assembly thought it wise to prepare two separate human rights covenants, one on civil and political rights, and the other on socio-economic rights.<sup>24</sup>

Several assumptions about the nature of these two sets of rights underlie this distinction: Socio-economic rights are positive in nature and require government action; they are pragmatic and therefore require time to realise; and they are also vague and require a great deal of interpretation from the courts. Whereas civil and political rights are negative and only require non-interference from government, their implementation is inexpensive and can be enforced immediately, lastly, these rights are formulated with a high degree of certainty, which precludes excessive interpretation.<sup>25</sup>

This distinction has led many commentators to view these two sets of rights as conceptually different, and therefore they object to the inclusion of socio-economic rights in domestic constitutions. These arguments were voiced during the drafting process of the South African Constitution.<sup>26</sup>

## **2.1 The justiciability debate**

The debate surrounding the inclusion of socio-economic rights in the South African Constitution focused mainly on the possible effect the inclusion of such rights may have on the legitimacy of the Constitution.<sup>27</sup>

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23 *Universal Declaration of Human Rights* adopted and proclaimed by United Nations General Assembly Resolution 217 A (III) of 1948.

24 This decision was taken to facilitate the different enforcement needs pertaining to socio-economic rights, as well as civil and political rights. The fact that the signing and ratification of the two covenants were under suspicion contributed to the making of this decision. See Dugard J *International Law* 242 and De Vos P 1997 *SAJHR* 68-69.

25 De Vos P 1997 *SAJHR* 69, Van Wyk D and Dugard J (eds) *Rights and Constitutionalism* 177,607-608, De Villiers B 1996 *TSAR* 696, and Liebenberg S 1995 *SAJHR* 361-362.

26 De Vos P 1997 *SAJHR* 68-69 and Liebenberg S 1995 *SAJHR* 361.

27 *First Certification* judgment para 76-78, De Vos P 1994 *SAJHR* 68, and De Waal J, Currie I and Erasmus G *Bill of Rights* 433-435.

Traditionally a constitution is viewed as a shield, to protect citizens against undue interference from the state.<sup>28</sup> The proponents of this belief argued against the inclusion of socio-economic rights because the entire Bill of Rights would be discredited if people were told that they have rights in respect of which the state cannot deliver due to lack of resources.<sup>29</sup> Thus, the objectors relied on the theory that these rights were not suitable for judicial enforcement. They further argued that the application of these rights requires the courts to direct the way in which government distributes state resources. In other words, the courts would make orders with budgetary implications.<sup>30</sup> As the argument goes, this would be undemocratic and against the doctrine of the separation of powers.<sup>31</sup>

In support of the inclusion of socio-economic rights, it was argued that it would make no sense to tell people that their civil and political rights would be protected, if they continued to be at the mercy of the elements and of social exploitation. The legitimacy of the Constitution may suffer because people would be bound to say that it did not deal with their most basic needs.<sup>32</sup> Nelson Mandela stated in his speech on the occasion of the ANC's Bill of Rights Conference:

We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.<sup>33</sup>

The Constitutional Court in the *First Certification* judgment<sup>34</sup> ended this debate by stating that socio-economic rights are indeed justiciable. The Court

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28 De Vos P 1997 *SAJHR* 69.

29 Heyns C and Brand D 2003 <http://www.up.ac.za> 20 May 2003.

30 De Vos P 1997 *SAJHR* 69, De Waal J, Currie I and Erasmus G *Bill of Rights* 432-433, and Van Wyk D and Dugard J (eds) *Rights and Constitutionalism* 599, 605.

31 De Vos P 1997 *SAJHR* 69, De Waal J, Currie I and Erasmus G *Bill of Rights* 432-433, and Van Wyk D and Dugard J (eds) *Rights and Constitutionalism* 599, 605. De Villiers B 1996 *TSAR* 695 states further that the proponents and opponents of protection of socio-economic rights differ mainly as to whether the state should have a passive and non-interventionist role, or whether it should be under a justiciable legal obligation to be active and interventionist in correcting socio-economic disparities.

32 Heyns C and Brand D 2003 <http://www.up.ac.za> 20 May 2003.

33 Nthai S 1999 *De Rebus* 1.

admitted that the inclusion of socio-economic rights might result in courts making orders, which have direct implications for budgetary matters, but pointed out that even the orders made to enforce civil and economic rights may also have such implications:<sup>35</sup>

In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers. The fact that socio-economic rights will almost inevitably give rise to budgetary implications does not seem to us to be a bar to their justiciability.

Because the justiciability of socio-economic rights has been put beyond any doubt,<sup>36</sup> the real question in this regard focuses on the interpretation of the obligations conferred upon the state by these rights, as well as on the implementation and enforcement thereof.

### 3 International development of children's rights

The dawn of the twentieth century was characterised by the internationalisation of humanitarian ideals by groups such as the Red Cross, the International Labour Organisation, and the League of Nations.<sup>37</sup> In 1922 Eglantyne Jebb focused the international community's attention on the plight of the children by pleading for the creation of a *Code for Children*.<sup>38</sup> According to Jebb such a code should be a document defining the duties of adults toward children, which every state should recognise by means of state intervention or private action.<sup>39</sup> Jebb's commitment to helping children during

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34 *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 1996 4 SA 744 (CC).

35 *First Certification* judgment, para 77-78. This was confirmed in the *Grootboom* case para 20. See also De Waal J, Currie I and Erasmus G *Bill of Rights* 432.

36 The justiciability of socio-economic rights has been expressly confirmed and accepted in the *Grootboom* case para 20, as well as in the *TAC* case para 23.

37 Human S 2000 SAPL 80.

38 Human S 2000 SAPL 80, Veerman PE *The Rights of the Child* 155, and Franklin B (ed) *Children's rights* 5.

39 Veerman PE *The Rights of the Child* 155.

the First World War led to the founding of the *Save the Children International Union*. The aim of this union was to alleviate the plight of children on a more permanent basis.<sup>40</sup>

Due to ongoing campaigning headed by Jebb and the *Save the Children International Union*, the League of Nations accepted the *Declaration of Geneva*<sup>41</sup> in September 1924.<sup>42</sup> This declaration became the first of its kind, it was simply accepted that adults should protect the rights of children, however, children were never seen to be the bearers of any of these rights.<sup>43</sup> Furthermore, the member states were by no means obligated to comply with the content of this declaration; it was left to the individual states to decide if, and how to give effect to the contents of the declaration.<sup>44</sup>

The Temporary Social Commission, a sub-commission of the United Nations Economic and Social Council wrote, "The welfare of children, physically, mentally, and spiritually, must be the first concern of every nation". Therefore, the Commission opted that the United Nations should confirm the terms of the *Declaration of Geneva*.<sup>45</sup> As a result, in 1959, the United Nations General Assembly accepted the *United Nations Declaration on the Rights of the Child*.<sup>46</sup> This document confirmed and developed the principles contained in the previous declaration.

The 1959 Declaration broadly dealt with the needs of children, while making the provisions contained in the *Universal Declaration of Human Rights*<sup>47</sup> more specifically applicable to them. This declaration was also non-binding on member states. However, because it was accepted unanimously, it has significant moral weight, and serves as a worldwide initiative to re-evaluate

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40 Veerman PE *The Rights of the Child* 61 and Franklin B (ed) *Children's rights* 5-6.

41 This declaration was drafted by the *Save the Children International Union*, and signed by all its members during a ceremony on February 28, 1924.

42 Veerman PE *The Rights of the Child* 156, Franklin B (ed) *Children's rights* 5, and Human S 2000 SAPL 82.

43 Human S 2000 SAPL 82.

44 Human S 2000 SAPL 82.

45 Veerman PE *The Rights of the Child* 159-160.

46 Hereinafter referred to as the 1959 Declaration.

the status of children.<sup>48</sup> Principle 4 of the Declaration provides for the socio-economic rights of children:<sup>49</sup>

The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. *The child shall have the right to adequate nutrition, housing, recreation and medical services.*<sup>50</sup>

Even during the drafting process of the 1959 Declaration, some states preferred a convention rather than a declaration. It took twenty years before this wish became a reality.<sup>51</sup>

### **3.1 The United Nations Convention on the Rights of the Child**

During the drafting process of the 1959 Declaration some states futilely argued that the needs of children could only be effectively addressed by means of a binding international document.<sup>52</sup> In 1978 Poland proposed that the International Year of the Child (1979) should be marked by a United Nations Convention on the Rights of the Child, which established a minimum set of rights for children and secured the compliance of governments with them.<sup>53</sup> Reaction to this proposal was mixed. Kelly Weisberg feared that the Convention, by its very nature, might weaken the persuasive moral force of

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47 *Universal Declaration of Human Rights* adopted and proclaimed by United Nations General Assembly Resolution 217 A (III) of 1948.

48 Veerman PE *The Rights of the Child* 161, and Human S 2000 SAPL 83.

49 Veerman PE *The Rights of the Child* 466.

50 Own emphasis added.

51 Veerman PE *The Rights of the Child* 181, and Human S 2000 SAPL 85. Dugard J *International Law* 26, 36 explains that declarations (soft law) are imprecise standards adopted by diplomatic conferences or resolutions of international organizations. These standards are not binding on the signatory parties. On the other hand, conventions are binding written agreements between states or between states and international organizations operating within the field of international law.

52 A binding international document such as a convention entails that every signatory state party must comply with the agreed upon provision on municipal level. Compliance with such binding international documents is normally ensured through a reporting system.

53 Veerman PE *The Rights of the Child* 181, Human S 2000 SAPL 86, and Franklin B (ed) *Children's rights* 4.

the 1959 Declaration. On the other hand, she thought that rejecting the idea of the Convention would weaken the mentioned Declaration.<sup>54</sup> In the end, the twenty-year old argument for the adoption of a binding convention finally prevailed. To allay the fears concerning the continued use and importance of the 1959 Declaration as raised by Weisberg and others, it was decided that it would serve as a starting point for the discussions on the drafting of the Convention.<sup>55</sup>

After only a decade, on November 20, 1989, the *United Nations Convention on the Rights of the Child*<sup>56</sup> was accepted by the United Nations General Assembly. The convention came into force a record-breaking year later on September 2, 1990 after almost all State Parties signed the Convention into power.<sup>57</sup> The preamble of the UNCRC reaffirms that children, because of their vulnerability, need special protection. The content of the UNCRC can be categorised into a civil and political rights category and a category containing socio-economic rights. Hammarberg suggests a further categorisation, which he calls the three P's:<sup>58</sup>

- Provision – the right to get one's basic needs fulfilled, i.e., the right to food, health care, *housing*,<sup>59</sup> education, recreation, and play;
- Protection – the right to be shielded from harmful acts or practices, i.e., to be protected from commercial or sexual exploitation; and
- Participation – the right to be heard on decisions affecting one's own life.

For the purposes of this dissertation, focus will only be on the socio-economic rights relating to shelter and housing contained in the UNCRC.

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54 Weisberg K as quoted by Veerman PE *The Rights of the Child* 181.

55 Veerman PE *The Rights of the Child* 161 and Human S 2000 SAPL 83.

56 Adopted and proclaimed by United Nations General Assembly Resolution 33/325 of 1989.

57 Veerman PE *The Rights of the Child* 184, Himes JR (ed) *Implementing the CRC* 1 and Human S 2000 SAPL 86.

58 Hammarberg as referred to by Human S 2000 SAPL 87 and Franklin B (ed) *Children's rights* 17.

### 3.1.1 Socio-economic rights guaranteed by the UNCRC

The principle most directly related to children's socio-economic rights is formulated in article 6, which states that "State Parties shall ensure to the maximum extent possible the survival and development of children". The purpose of the inclusion of the word "survival" was to introduce a dynamic aspect to the right to life, including the need for preventive action.<sup>60</sup> The inclusion of "development" added a qualitative dimension to the section. Not only physical health is needed but also economic, social, and cultural development.<sup>61</sup>

Article 27 of the Convention recognises the children's right to "a standard of living adequate for the child's physical, mental, spiritual, moral, and social development". This article can be interpreted as including a right to adequate housing, seeing that this requirement fits in with the requirement of an adequate standard of living.<sup>62</sup> Subsection (3) of this article confirms that the primary responsibility for the fulfilment of these socio-economic rights rests with the parents of the children; however, the state has a duty to ensure that this responsibility is capable of being fulfilled. This is in line with the provisions of article 18, which expressly provide for the responsibilities of the parents toward their children as well as the Constitutional Court's conclusion in the *Grootboom* case.<sup>63</sup> The purpose of these articles is to regulate the relationship between parents and the state, as well as to protect the parents from undue interference from the state.<sup>64</sup> It is submitted that these two elements are not mutually exclusive or contradictory: to recognise that parents have the primary responsibility implies that the state must stay in the

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59 Own emphasis added.

60 The recognition of the right to life's positive dimension is not followed in South African law. For more detail on this subject, see De Waal J, Currie I and Erasmus G *Bill of Rights* 238-245.

61 Franklin B (ed) *Children's rights X-XI* and Jansen van Rensburg L and Olivier MP *International and supra-national law* 626-627.

62 The Constitutional Court in the *Grootboom* case para 26-33 came to the same conclusion.

63 *Grootboom* case para 76-78. The question regarding who is primarily responsible for providing children with care will be discussed in section 4.2.1 of this mini-dissertation.

background. Lastly, in respect of socio-economic rights, article 26 provides for the right of the child to benefit from social security. Notably, it is proposed by the United States that when granting social security, account must be taken of the financial resources of the child and his/her family.<sup>65</sup>

The UNCRC represents the most authoritative and all encompassing declaration regarding fundamental rights of children. By ratifying this Convention in 1995 South Africa accepted a binding long-term commitment to put the interests of children first.<sup>66</sup> The importance of the Convention lies in the fact that it recognises children as human beings of equal value. It marks the end of the age-old idea that children, in legal terms, are not more than possessions of their guardians. This statement is similar to the opinion put forward by the learned Mr. Hammarberg.<sup>67</sup>

#### **4 Children's socio-economic rights in the South African Constitution**

The Constitution of South Africa entrenches children's rights in section 28.<sup>68</sup> The purpose of section 28 is to protect children in situations where they are

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64 Veerman PE *The Rights of the Child* 196. See also Jansen van Rensburg L and Olivier MP *International and supra-national law* 627.

65 Veerman PE *The Rights of the Child* 201. The reason for the proposal by the United States is the fact that social security may serve as a safeguard in instances where the parents are unable to provide the necessary care for their children.

66 See section 4.3.1 of this dissertation where the particular importance of the UNCRC with reference to the enforcement and implementation of children's socio-economic rights in South Africa will be discussed.

67 Hammarberg as referred to by Franklin B (ed) *Children's rights* 4 and Human S 2000 *SAPL* 89.

68 Section 28 of the Constitution reads:

- (1) Every child has the right-
  - (a) to a name and nationality as from birth;
  - (b) to family care, parental care, or appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services, and social services;
  - (d) to be protected from maltreatment, neglect, abuse, or degradation;
  - (e) to be protected from exploitative labour practices;
  - (f) not to be required or permitted to perform work or provide services that-
    - i. are inappropriate for a person of that child's age; or

particularly vulnerable. In this respect, the additional rights in section 28 enhance the protection afforded to everyone (including children) in the rest of the Bill of Rights. Section 28(1)(c) entrenches socio-economic rights for children that supplement the general socio-economic rights to *adequate housing*, health care, nutrition, and social security.<sup>69</sup> This section places a duty on the state to ensure that a child is provided with these basic needs. The state must also ensure that the family of the child is provided with the means to support those needs.<sup>70</sup>

#### 4.1 *Children's right to basic shelter*

Because this dissertation is aimed at studying the housing problem as manifestation of poverty in South Africa, focus will be on children's right to basic shelter as provided for by section 28(1)(c) of the Constitution.

In this section, the state's obligations in terms of this section will be addressed by referring to the common law, statutory law, as well as relevant case law.

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- ii. place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development;
    - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoy under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
      - i. kept separately from detained persons over the age of 18 years;
      - ii. treated in a manner, and kept in conditions, that takes account of the child's age.
    - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and not to be directly in armed conflict, and to be protected in times of armed conflict.
  - (2) A child's best interest is of paramount importance in every matter concerning the child.
  - (3) In this section, 'child' means a person under the age of 18 years.

69 Own emphasis added.

70 De Waal J, Currie I and Erasmus G *Bill of Rights* 457; Davis D, Cheadle H and Haysom N *Fundamental Rights* 265-266 and Mubangizi JC 2000 *TSAR* 348.

#### 4.1.1 *The state's general obligations in terms of the right to basic shelter*

Traditionally, a Constitution is only seen as a protective device in so far that it places a duty on the state to refrain from interfering with the rights of individuals.<sup>71</sup> This limited notion is rejected by the Constitution, which includes an obligation clause in the form of section 7(2). Section 7(2) reads:

The state must respect, protect, promote, and fulfil the rights in the Bill of Rights.

Therefore, in terms of section 7(2), the state no longer only has a duty to respect the socio-economic rights of children but also to protect, promote, and fulfil them along with the other rights entrenched in the Bill of Rights. The scope of these obligations was not defined by the Constitution, however, their meaning have been explored on international level.<sup>72</sup>

##### 4.1.1.1 The obligation to respect the right to basic shelter

This obligation entrenches the traditional notion that the state must refrain from interfering with the rights of individuals, in other words, the state must respect the autonomy of the individual.<sup>73</sup> In the *First Certification* judgement the Constitutional Court indicated that socio-economic rights could at least be "negatively protected from improper invasion".<sup>74</sup> Thus, on a primary level, the state must refrain from directly infringing a child's right to shelter. This duty also entails that the state may not promulgate legislation, nor act in a manner, which would deprive a child of his or her right to basic shelter. An example of infringement of the duty to respect the right to basic shelter would be where children in child headed households are evicted from temporary shelter, or

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71 De Waal J, Currie I and Erasmus G *Bill of Rights* 433, De Vos P 1997 *SAJHR* 78, and Jansen van Rensburg L and Olivier MP 2001 *LDD* 87. The specific primary and secondary obligations of the state toward children in terms of section 28(1)(c) will be discussed in section 4.2.1 of this dissertation.

72 See section 2.1 of this dissertation and De Vos P 1997 *SAJHR* 78.

73 De Vos P 1997 *SAJHR* 80, Jansen van Rensburg L and Olivier MP 2001 *LDD* 88, De Vos P 1995 *SAPL* 253, and Himes JR (ed) *Implementing the CRC* 15.

74 *First Certification* judgment para 78. See also the *Grootboom* case para 34.

where parents are arbitrarily deprived of their access to adequate housing causing them not to be able to provide their children with shelter.

#### 4.1.1.2 The obligation to protect the right to basic shelter

This obligation places a positive duty on the state to ensure the effective enjoyment of the right. This entails that the state must create a legal framework in which the right to basic shelter can be realised *without undue interference from other private parties*.<sup>75</sup> Thus, the state must protect individuals from interference with their social and economic well-being.<sup>76</sup> For example, the state must ensure that children and their families are not evicted arbitrarily from their shelter or other forms of housing by private persons.

#### 4.1.1.3 The obligation to promote and fulfil the right to basic shelter

The duty to promote entails that the state must ensure that all people are aware of their rights, whereas the duty to fulfil requires positive assistance from the state to ensure the full realisation of the rights in question.<sup>77</sup>

Depending on the formulation of the rights, they could include a duty on the state to directly provide resources to fulfil an individual's basic social and economic needs.<sup>78</sup> However, most socio-economic rights in the Constitution are formulated as rights of "access to". For example, section 26(1) state that "Everyone has the right of access to adequate housing". This does not require the state to directly provide everyone with free housing, it only entails that the state should assist the large number of people who are unable to secure access to housing.<sup>79</sup>

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75 De Vos P 1997 *SAJHR* 83, De Vos P 1995 *SAPL* 254 and Himes JR (ed) *Implementing the CRC* 15-16. See also Jansen van Rensburg L and Olivier MP 2001 *LDD* 89.

76 De Vos P 1997 *SAJHR* 83.

77 De Vos P 1997 *SAJHR* 86, De Vos P 1995 *SAPL* 255 and Himes JR (ed) *Implementing the CRC* 16.

78 De Vos P 1997 *SAJHR* 86, De Vos P 1995 *SAPL* 255 and Himes JR (ed) *Implementing the CRC* 16.

79 De Waal J, Currie I and Erasmus G *Bill of Rights* 444 and De Vos P 1997 *SAJHR* 87. However, the Court in *Grootboom v Oostenberg Municipality* 2000 3 *BCLR* 277 (C)

The effective realisation of children's socio-economic rights has proven to be no simple matter and the seemingly less limited wording of section 28(1)(c) has not improved the situation. The question that should be asked in this regard is who is primarily responsible for providing basic shelter for children as envisaged by section 28(1)(c) of the Constitution?

In terms of the common law parents have the primary duty to provide shelter, food, clothing, and basic support to their children. This duty has been incorporated into legislation such as the *Child Care Act* 74 of 1983,<sup>80</sup> which states that parents who are able to provide care for their children but fail to do so is guilty of a criminal offence.<sup>81</sup> Therefore, section 28(1)(b), which provides for the right to parental care and family life, together with section 8(3)<sup>82</sup> of the Constitution provide that the primary responsibility to care for children rest on the parents. The state will only intervene when the parents are unable to fulfil their responsibilities.<sup>83</sup> This is in line with the international rules formulated in articles 18 and 27(3) of the UNCRC, and has recently been confirmed by the Constitutional Court in the *Grootboom* case.<sup>84</sup>

When reading section 28(1)(b) together with section 28(1)(c), the question may be asked whether the state, when obligated to intervene and provide children with basic shelter, is also obligated to provide shelter to their parents. To answer this question, the relationship between section 26 and 28(1)(c) must be examined.

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para 288D-F concluded the opposite in that the state should directly provide housing to children along with their parents.

80 *Child Care Act* 74 of 1983. Herein after referred to as the 1983 *Child Care Act*. The new *Children's Bill* will also be discussed in section 6 of this dissertation.

81 Section 50(2) of the 1983 *Child Care Act*.

82 The horizontal application of the Bill of Rights is at present a heavily debated subject. For purposes of this dissertation, a full discussion is not necessary. Section 8(3) of the Constitution reads:

A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and any duty imposed by the right.

83 De Waal J, Currie I and Erasmus G *Bill of Rights* 457; Davis D, Cheadle H and Haysom N *Fundamental Rights* 265-266; and Mubangizi JC 2000 TSAR 348.

84 See section 3.1.1 above.

#### 4.1.2 *The relationship between section 26 and section 28(1)(c)*

The relationship between sections 26 and 28(1)(c) has been addressed by the High Court in *Grootboom v Oostenberg Municipality and Others*,<sup>85</sup> and subsequently by the Constitutional Court in the *Grootboom*-case.

##### 4.1.2.1 *The High Court case: Grootboom v Oostenberg Municipality and Others*

Mrs Irene Grootboom along with the other applicants<sup>86</sup> were rendered homeless after being illegally evicted from their informal settlements, which were situated on land earmarked for low-cost housing by the Cape Metro Land Programme. In the application before the High Court they pleaded for an order requiring local government to provide them with adequate basic shelter or housing until they obtained permanent accommodation or other relief.<sup>87</sup> The applicants firstly based their claim on section 26 of the Constitution, which provides everyone the right of access to adequate housing, which is limited by section 26(2). Secondly, the claim was based on section 28(1)(c), which provides children the right to basic shelter.<sup>88</sup>

The High Court drew a distinction between section 26 and section 28(1)(c). Concerning the right of access to adequate housing, Josman AJ concluded that this provision does place a duty on the state to provide for the progressive realisation of the right to access to adequate housing within budget constraints.<sup>89</sup> Thus, according to the Court's interpretation of section 26(1) in light of section 26(2), these provisions do not impose an obligation on

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85 *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C). Herein after referred to as the *Grootboom* High Court case.

86 The applicants were 510 children and 390 adults. Mrs. Grootboom brought the application before the High Court.

87 *Grootboom* High Court case para 227A, and see the *Grootboom* case para 4 and para 13. Notably, the Constitutional Court made no distinction between the term "housing" and the term "shelter".

88 *Grootboom* High Court case para 278B.

89 *Grootboom* High Court case para 286G-H.

the state to provide housing to everyone on demand.<sup>90</sup> The simple reason for this conclusion is the fact that the realisation of any socio-economic right is subject to the availability of resources.

The second part of the High Court judgement addressed the children's shelter claim in terms of section 28(1)(c). The Court held that this provision imposed an obligation on the state to provide shelter to children if the parents were unable to do so. The Court went on to say:

An order, which enforces a child's right to shelter, should take account of the need of the child to be accompanied by his or her parent. Such an approach would be in accordance with the spirit and purport of section 28 as a whole.<sup>91</sup>

The order made by the Court can be summarised as follows: (a) children must be afforded rudimentary protection from the elements in terms of section 28(1)(c) by the state; (b) the applicant parents are entitled to be accommodated with their children in the mentioned shelter, until the parents are able to shelter their own children; and (c) the state is bound to provide this rudimentary shelter irrespective of the availability of resources.<sup>92</sup>

Government appealed to the Constitutional Court against this decision.

#### 4.1.2.2 The Constitutional Court case: *Government of the Republic of South Africa and Others v Grootboom and Others*

Even though the High Court order was made in terms of section 28, the Constitutional Court found it appropriate to analyse the obligations imposed by section 26 in order to determine whether the Cape Metro Land Programme complied with constitutional requirements.<sup>93</sup> The Court found that section 26

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90 *Grootboom* High Court case para 286H-J. See also De Waal J, Currie I and Erasmus G *Bill of Rights* 464.

91 *Grootboom* High Court case 288D-F.

92 *Grootboom* High Court case 293H-J.

93 *Grootboom* case para 20.

does impose a positive duty on the state to provide everyone, including children, with access to adequate housing. However, this duty is subject to the provisions of section 26(2), therefore, the state must provide for the realisation of this right by means of reasonable legislative and other measures in a progressive manner within its available resources.<sup>94</sup> Thus, the Court concurred with the High Court's conclusion that no one is entitled to access to housing on demand. However, the Cape Metro Land Programme as the measure taken in order to realise the right to access to adequate housing, was analysed by the Court and found to be unreasonable due to the fact that it did not provide for emergency housing for people in desperate need, i.e. the children.<sup>95</sup>

The Constitutional Court then turned to section 28(1)(c) and the right to shelter. The Court rejected the High Court's interpretation of section 28(1)(c), which allowed parents to also receive shelter along with their children. The Court reasoned that the decision would produce an anomalous result.<sup>96</sup>

The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter on demand from the state. Moreover, children would be stepping-stones to housing for their parents instead of being valued for who they are.

Section 28(1)(c) must be read together with section 28(1)(b), which ensures that children are properly cared for by their parents or family, and that they receive appropriate alternative care by the state in the absence of parental or family.<sup>97</sup> According to the Constitutional Court<sup>98</sup> subsection (1)(b) defines those responsible for giving care, and subsection (1)(c) lists various aspects of the care entitlement. It then follows that these provisions contemplate that the primary responsibility for care giving, such as providing shelter, is imposed

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94 *Grootboom* case para 34-69. For the interpretation of the state's obligations in terms of section 26(1) and 26(2), please see section 4.1 of this dissertation.

95 *Grootboom* case para 69.

96 *Grootboom* case para 71.

97 *Grootboom* case para 76.

on the parents or family of the children, and only alternatively on the state if the parents are unable to fulfil their duties or if the child has been removed from their care.<sup>99</sup> In other words, the state is only obligated in terms of section 28 to provide shelter to children without parents or children in child-headed households, and not to children *and* their parents.<sup>100</sup>

This does not mean that the state has no responsibilities toward children living with their parents. The state must provide the legal and administrative infrastructure necessary to ensure that children are protected as envisaged by section 28. This obligation would normally be fulfilled by passing the necessary laws, and creating enforcement mechanisms. In addition, the state must fulfil its duties to provide families with access to land (section 25), *access to adequate housing* (section 26), as well as access to adequate health services, food, water, and social security (section 27) within reasonable progressively available resources.<sup>101</sup>

To summarise, the Constitutional Court confirmed that the primary duty to provide children with care such as envisaged by the Constitution in section 28(1)(c) is imposed on the parents. However, in order for parents to provide the primary care for children, the state must create the framework in which the right conferred upon everyone by section 26 can be progressively realised. Thus, the Court rectified the High Court's erroneous assumption that parents *along* with their children are entitled to shelter in terms of section 28(1)(c). It is then arguable that the measures taken to realise section 26 indirectly provide for the realisation of section 28(1)(c). However, in instances where the parents of children are unable to provide the necessary care, or the children have been removed from parental care, the state has a direct responsibility to ensure the effective realisation of section 28(1)(c).<sup>102</sup>

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98 *Grootboom* case para 76.

99 *Grootboom* case para 77.

100 *Grootboom* case para 77 and 79, this was confirmed in the *TAC* case para 76-77.

101 *Grootboom* case para 78-79. Also, see *TAC* case para 77-78.

102 See section 6.1 and 6.2 of this dissertation, in which the legislative and other measures implemented by the state to fulfil its primary and secondary duty in terms of section 28(1)(c) are discussed.

The Constitutional Court further stated that even children do not have a right to be provided with shelter *on demand* in terms of section 28(1)(c) by the state. This entails that the state's obligations concerning this internally qualified right of children as envisaged by the High Court order are in some ways restricted. The following section will focus on the limitations placed on the state's obligations in respect of section 28(1)(c).

#### **4.2 Limiting children's right to basic shelter**

It follows from the discussion above that the state has certain general obligations in terms of section 7(2) of the Constitution applicable to all rights entrenched in the Bill of Rights. However, certain constitutionally entrenched rights contain further internal provisions, which limit the state's mentioned obligations.<sup>103</sup> Section 28(1)(c) of the Constitution is worded in a restrictive manner by referring to basic needs. In other words, a child has a constitutional right to *basic* shelter only.<sup>104</sup> According to the Constitutional Court<sup>105</sup> the specific obligations created by section 28(1)(c) can only be properly ascertained in the context of all the socio-economic rights entrenched in the Constitution. Furthermore, the extent of the state's responsibilities to children must be interpreted in light of the international obligations binding upon South Africa, in other words obligations imposed upon the state by the UNCRC.<sup>106</sup>

The socio-economic rights conferred upon everyone in the Constitution expressly obligate the state to take reasonable legislative and other measures

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103 De Waal J, Currie I and Erasmus G *Bill of Rights* 164 explains that a distinction between limitations and demarcations of fundamental rights must be made. A right may be qualified by language, which specifically demarcates their scope. This is termed demarcations of the right in question. An example of such demarcation is found in section 16(1) of the Constitution, which provides for the right to freedom of expression, however, this right is demarcated by section 16(2), which provides that this right does not include the advocacy of hatred. On the other hand, other internal textual qualifications create special criteria in terms of which some rights may be limited by the legislature. They are properly termed limitation. An example of such limitation is found in section 26(2).

104 De Waal J, Currie I and Erasmus G *Bill of Rights* 463. See also the *Grootboom* case para 73.

105 *Grootboom* case para 75.

within its available resources to realise these rights progressively.<sup>107</sup> This is similar to article 4 of the UNCRC, which deals with the implementation of the Convention. It reads:

State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in this Convention. With regard to economic, social, and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

This article describes the obligations of conduct rather than the result. Emphasis is placed on the efforts State Parties make in promoting the implementation of the Convention, while accepting that the realisation of socio-economic rights is not immediate and requires the use of state resources, which may be limited in most cases.<sup>108</sup> It then follows that the interpretation of the State Parties' obligation to fulfil the rights contained in this convention will be useful in determining the state's obligations in terms of section 28(1)(c). In this regard, the interpretation of the state's specific obligations in terms of section 26(2) and must be taken into account. This section, referring to the right of access to adequate housing, reads:

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

It is submitted in concurrence with other writers,<sup>109</sup> as well as the *Grootboom* case,<sup>110</sup> that section 28(1)(c) is limited in much the same way as the other

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106 See section 3 of this dissertation where South Africa's obligations in terms of applicable international conventions were discussed.

107 An example of this provision can be found in section 26(2) and 27(2) of the Constitution.

108 Franklin B (Ed) *Children's rights* XI-XII, Himes JR (Ed) *Implementing the CRC* 2-4.

109 Davis D, Cheadle H and Haysom N *Fundamental Rights* 270; De Vos P 1995 *SAPL* 256.

110 See section 4.1.2.2 of this dissertation.

socio-economic rights in the Constitution in so far that *the state must take reasonable legislative and other measures within available resources to realise the right to basic shelter progressively.*

The following section will briefly discuss the internal limitations imposed upon the state's direct (pertaining to the direct realisation of the section 28(1)(c) when the parents are unable to provide care), and indirect obligations (providing for the realisation of section 26, which enables parents to provide their children with care) in terms of children's right to basic shelter with due regard to applicable international norms and standards as well as domestic case law.

#### *4.2.1 Reasonable legislative and other measures*

According to the Constitutional Court in the *Grootboom* case the key to the justiciability of all socio-economic rights is the standard of reasonableness:

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. However, they must ensure that the measures they adopt are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these measures would satisfy the requirement of reasonableness. Once it has been shown that the measures do so, this requirement is met.<sup>111</sup>

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111 *Grootboom* case para 41. The importance of the standard of reasonableness has also been emphasised in the *TAC* case para 68. See also Davis D, Cheadle H and Haysom N *Fundamental Rights* 347.

The formulation of the measures taken is only the first stage in meeting the state's obligation toward children. These measures should also be implemented, and therefore, the implementation should be reasonable. An otherwise reasonable measure that is not implemented reasonably will not constitute constitutional compliance.<sup>112</sup> Therefore, the Court stated in the *Grootboom* case that measures taken, which ignore the plight of those most in need (i.e. the children) could not be reasonable because it would be in conflict with the constitutional obligation to respect *inter alia* human dignity.<sup>113</sup>

This qualification provides for the formulation and implementation of legislative and other measures in order to realise the right to have access to adequate housing. The question is whether legislative measures are sufficient, or whether the incorporation of other measures is mandatory.<sup>114</sup> In the *Grootboom* case<sup>115</sup> the Court concluded that legislative measures by themselves would not be sufficient to constitute constitutional compliance, therefore, legislative measures will most likely be supported by programmes and policies implemented by the executive. Furthermore, the legislative and other measures implemented must entail a coordinated and comprehensive programme determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution. This was also confirmed by the Constitutional Court in the *Grootboom* case.<sup>116</sup>

The state's obligation to take these reasonable measures means in the first place that a legal framework must be created in which an individual through state assistance can realise his/her rights.<sup>117</sup> De Vos<sup>118</sup> submits that this obligation also entails that the state should provide for the appropriate judicial remedies to enable the rights in question to be enforced. This means that the courts can require explanation from the state of the measures taken to fulfil its

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112 *Grootboom* case para 42.

113 *Grootboom* case para 44. See also De Waal J, Currie I and Erasmus G *Bill of Rights* 440, Davis D, Cheadle H and Haysom N *Fundamental Rights* 348-349, Liebenberg S 1995 *SAJHR* 365.

114 De Vos P 1997 *SAJHR* 95 and De Waal J, Currie I and Erasmus G *Bill of Rights* 439.

115 *Grootboom* case para 42-43.

116 *Grootboom* case para 40.

117 De Waal J, Currie I and Erasmus G *Bill of Rights* 437.

118 De Vos P 1997 *SAJHR* 95.

duties. Furthermore, the courts may also require the state to give an account of its progress in implementing the measures. These reasons and explanations given by the state can also be evaluated by the courts for its reasonableness.<sup>119</sup>

#### 4.2.2 *Progressive realisation*

The term "progressive realisation" can be understood as a formulation which grants the state a margin of discretion in selecting the means and timeframe in which the right to basic shelter must be realised. Furthermore, the inclusion of this phrase shows that it was contemplated that the rights could not be realised immediately due to their pragmatic nature.<sup>120</sup>

This provision is sometimes seen as an escape clause for the state to evade the fulfilment of its constitutional obligations by postponing it to some unspecified time in the future. It is submitted that this is not the case. The fact that the right of access to adequate housing and the right to basic shelter cannot be realised immediately does not alter the state's obligation to immediately take those steps that are within its power and other steps as soon as possible.<sup>121</sup> In other words, any unreasonable delay or failure to exercise due diligence in adopting measures to secure access to adequate housing/shelter will not meet the requirements of this provision.

In determining the purpose of this provision, the Court in the *Grootboom* case once again reflected international opinion:<sup>122</sup>

It is a necessary flexible device, reflecting the realities of the real world and the difficulties involved for any country in ensuring the full realisation of economic, social, and cultural rights. On the other hand,

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119 De Waal J, Currie I and Erasmus G *Bill of Rights* 439-440.

120 *Grootboom* case para 45. See also De Waal J, Currie I and Erasmus G *Bill of Rights* 437, 441, De Vos P 1997 *SAJHR* 96, Jansen van Rensburg L and Olivier MP 2001 *LDD* 91, David D, Cheadle H and Haysom N *Fundamental Rights* 348.

121 De Waal J, Currie I and Erasmus G *Bill of Rights* 438, De Vos P 1997 *SAJHR* 96, and Davis D, Cheadle H and Haysom N *Fundamental Rights* 348.

122 *Grootboom* case para 45.

the phrase must be read in light of the overall objective of the Covenant, which is to establish clear obligations for State parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible toward that goal.

The inclusion of this provision qualifies the state's obligation by taking into account the harsh realities of the world. However, the state must still show that it is making progress toward the full realisation of the right to basic shelter.<sup>123</sup> Therefore, the right to adequate housing/basic shelter may not without good reason be subjected to what is termed deliberately retrogressive measures.<sup>124</sup> These measures are measures, which have the effect of denying individuals their existing access to adequate housing/shelter, water, food, or health services.<sup>125</sup> A clear example of such a violation is found in the *Grootboom* case where the local authority evicted a group of squatters including children and demolished their squatter camp without providing emergency alternative accommodation.<sup>126</sup> Thus, the state infringed upon the rights of a group of children in such a way that their existing access to such shelter was diminished. This was caused by the fact that the state did not provide emergency shelter to the children.

#### 4.2.3 *Within available resources*

This provision is clearly intended to avoid unrealistic demands on the state. In the *Soobramoney* case, the Court stated:<sup>127</sup>

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123 For example, the state must show that it has paid specific attention to providing safe housing to children living in child headed households. De Vos P 1997 *SAJHR* 97, and De Waal J, Currie I and Erasmus G *Bill of Rights* 442.

124 United Nations Committee on Economic, Social and Cultural Rights, General Comment 3 (1990) "The Nature of State Parties Obligations" UN Doc HRI/Gen 1/Rev 1 at 45 (1994) para 9. Herein after referred to as UN General Comment 3.

125 De Waal J, Currie I and Erasmus G *Bill of Rights* 434-435.

126 United Nations Committee on Economic, Social and Cultural Rights, General Comment 3 as referred to in *Grootboom*-case para 88.

127 *Soobramoney* case para 11, and quoted with approval in the *Grootboom* case para 47.

What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 ... are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.

This provision recognises that the extent of fulfilment of the rights reflects the practical economic and political reality that is the economy in which the state operates. Once again it must be stressed that this provision does not mean that the state can escape the fulfilment of its duties. In particular, resource scarcity does not relieve the state of its duty to fulfil its core minimum obligations.<sup>128</sup> According to the Committee on Economic, Social, and Cultural Rights,<sup>129</sup> each state party has a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of all the socio-economic rights including the right to access to adequate housing and children's right to basic shelter.<sup>130</sup>

Even when resources are scarce, the obligation to ensure the minimum essential levels of the right to basic shelter/access to housing and other socio-economic rights does not fall away. In order to attribute its failure to meet its minimum core obligations, a state must demonstrate that every effort has been made to use all resources that are available in an effort to ensure the realisation of, at least, the minimum essential level of the relevant right. However, even in such circumstances the state must strive to ensure the widest possible enjoyment of the relevant rights.<sup>131</sup> It is quite clear that the obligation to ensure progressive realisation and to do so within available

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128 De Vos 1997 SAJHR 97-98, Davis D, Cheadle H and Haysom N *Fundamental Rights* 349, De Waal J, Currie I and Erasmus G *Bill of Rights* 443, De Villiers B 1996 TSAR 696-697 and Liebenberg S 1995 SAJHR 366.

129 United Nations Committee on Economic, Social and Cultural Rights, General Comment 3, as quoted by the Constitutional Court in the *Grootboom* case para 29.

130 *Grootboom* case para 31, and *TAC* case para 26. See also De Waal J, Currie I and Erasmus G *Bill of Rights* 438 Davis D, Cheadle H and Haysom N *Fundamental Rights* 348-349, De Vos P 1997 SAJHR 98, and Liebenberg S 1995 SAJHR 366-367.

131 *Grootboom* case para 31.

resources are interlinked. In other words, the state cannot ensure the progressive realisation without taking into account the availability of resources. Moreover, the availability of resources will determine the pace at which these rights can be progressively realised.

In the *Grootboom* case, the Court declined and open invitation to establish a minimum core obligation in respect of the right of access to adequate housing due to the complexity of the task.<sup>132</sup> Instead, the Court found that the real question was whether the measures taken to realise these rights are reasonable.<sup>133</sup> The learned Yacoob J indicated that evidence in a particular case might show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state were reasonable. However, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them.<sup>134</sup> Therefore, the Court treated minimum core as being related to reasonableness under section 26(2), and not as a self-standing right under section 26(1).<sup>135</sup>

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132 *Grootboom* case para 32 the Constitutional Court explained its reason for not determining a minimum core obligation in terms of section 26:

"It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such right. These will vary according to factors such as income, unemployment, availability of land and poverty. All this illustrates the complexity of the task of determining a minimum core obligation ... without having the requisite information on the needs and the opportunities for the enjoyment of this right. The Committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information."

133 *Grootboom* case para 33.

134 *Grootboom* case para 33, see also *TAC*-case para 34.

135 It must be remembered that sections 26(1) and 26(2) do not give rise to self-standing rights. These rights should be read together as defining the scope of the positive rights and the corresponding obligations on the state to 'respect, protect, promote, and fulfil' such rights. See *Grootboom* case para 34. This is also the case regarding section 27 of the Constitution as concluded in the *TAC* case. Here the argument was that sections 27(1) and 27(2) were distinct rights and created two obligations on the state: one to give effect to section 27(1), and the other to do so through 'reasonable legislative and other measures, within its available measures'. The obligation created by section 27(1) has a minimum core to which everyone in need is entitled. For a detailed discussion, see the *TAC* case para 26-39. This argument was substantially similar to the one put forward in the *Grootboom* case,

Justice Sachs in the *Soobramoney* case emphasised that the state has to manage its limited resources in order to address the claims of people, including children, who are in need:<sup>136</sup>

The fact that resources are limited will require that the state must adopt a holistic approach to the larger needs of society rather than focus on the specific needs of particular individuals within a society.

To summarise, the Constitutional Court found that the realisation of socio-economic rights, and by association, children's right to basic shelter is subject to, *inter alia* the availability of resources among other equally important factors. In order to constitute constitutional compliance, the state must at least attempt to ensure the realisation of the minimum essential levels necessary for the enjoyment of the relevant right. The Court declined to determine a minimum core in respect of the right of access to adequate housing, opting rather to emphasise the requirement of reasonableness. Thus as explained the minimum core obligation may be used as a measuring stick when determining the reasonableness of a particular measure taken.

#### 4.2.4 *Right of access to*

Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*<sup>137</sup> provides for the right to adequate housing as opposed to section 26(1) of the Constitution, which provides for the right of access to adequate housing. Initially this has been understood as an attempt to avoid an interpretation that this section creates an unqualified obligation on the state to guarantee free housing on demand to everyone.<sup>138</sup>

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therefore it is not surprising that the Court followed its earlier conclusion that subsections (1) and (2) are linked.

136 *Soobramoney* case para 31.

137 *International Covenant on Economic, Social and Cultural Rights*, adopted and proclaimed by the United Nations General Assembly Resolution 2200 A (XXI) of 1966. Herein after referred to as the ICESCR. South Africa has signed the Covenant in 1994, but has not yet ratified it.

138 Davis D, Cheadle H and Haysom N *Fundamental Rights* 345.

However, in the *Grootboom* case, the Court stated that the qualification of the right to housing recognises that housing entails more than bricks and mortar; it requires available land, appropriate services such as the provision of water and the removal of sewage, and the financing of all these, including the building of the house itself. A right of access to adequate housing/shelter suggests that it is not only the state that is responsible for the provision of houses, but that other members of society must be enabled by legislative and other measures to provide housing/shelter.<sup>139</sup> Thus, the state must create the infrastructure, in which the right to adequate housing/shelter can be realised, while taking into account the different economic levels in society. This is in line with the state's direct and indirect duty in terms of section 28(1)(c) as fully explained in the previous section of this dissertation.

It then follows that the extent of the state's duties differs according to the economic levels present in sectors of South African society. Those with sufficient economic resources, in other words, those people who can afford to rent or purchase housing, already have access to housing, and can provide their children with the necessary shelter. Here the state's positive obligation lies in unlocking the system and providing the legal framework in which they can enjoy their right. On the negative side, the state must refrain from depriving people of access to housing without justification.<sup>140</sup>

Then there are those who do not have the economic resources to gain access to housing. It then follows that these people will not be able to provide their children with the necessary shelter. In this respect, the state will once again have a two-fold duty. On the one hand, the state must provide all people, including children with the necessary access to housing, by creating the infrastructure in which they can realise their rights. On the other hand, in respect of children without parents, the state must directly provide them with the necessary shelter in terms of section 28(1)(c). This does not mean that

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139 *Grootboom* case para 35. See also Jansen van Rensburg L and Olivier MP 2001 LDD 92.

140 Davis D, Cheadle H and Haysom N *Fundamental Rights* 347-346.

the state must provide housing/shelter immediately on demand for everyone, because section 26(2) is still applicable.<sup>141</sup> This is in concurrence with the Constitutional Court's judgement that even children do not have a right to shelter in terms of section 28(1)(c) immediately and on demand.<sup>142</sup>

#### **4.3 Enforcement of section 28(1)(c)**

The implementation and successful enforcement of children's socio-economic rights, such as the right to basic shelter necessitates integrated development strategies.<sup>143</sup> There is a growing awareness that the purpose of development work is to promote and to protect human rights – specifically social, economic, and cultural rights. What is proposed is a four-step planning and implementation strategy.

Firstly, the nature of the existing situation with respect to the right to basic shelter must be ascertained. The object of this analysis would be to identify the key problems (such as homelessness and overpopulation), which need to be addressed in order to effectively facilitate the progressive realisation of the right in question.<sup>144</sup> Secondly, effective planning of action in the children's rights field requires the setting of goals and standards. In other words, a child's right to basic shelter needs to be converted into verifiable goals or objectives, achievable within agreed upon periods.<sup>145</sup> Thirdly, a comprehensive action plan has to be developed to reach the set goals. This action plan can manifest itself in reasonable legislative and other measures, which recognise that the implementation thereof is subject to resource availability. In this regard, it must be remembered that all measures taken whether legislative or otherwise must be reasonable in its conception and

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141 *Grootboom* case para 36, see also De Waal J, Currie I and Erasmus G *Bill of Rights* 445.

142 *Grootboom* case par 77.

143 Himes JR *Implementing the CRC* 21.

144 Himes JR *Implementing the CRC* 21.

145 Himes JR *Implementing the CRC* 21-22.

formulation.<sup>146</sup> The fourth step entail the effective implementation of these measures.<sup>147</sup>

Two distinct kinds of norm enforcement play a role in the implementation of socio-economic rights in South Africa. In the first instance, focus will be on the adversarial enforcement mechanisms of the courts. Thereafter, inquisitorial mechanisms such as the South African Human Rights Commission, the UN Committee on Economic, Social, and Cultural Rights, and the United Nations Committee on the Rights of the Child will be discussed.

#### 4.3.1 *Judicial enforcement*

In *Fose v Minister of Safety and Security*<sup>148</sup> the Constitutional Court stated that, due to the supremacy of the Constitution,<sup>149</sup> all unconstitutional law or conduct is invalid. This is in line with section 172(1)(a), which provides that, when deciding a constitutional matter, a court must declare that any law or conduct that is inconsistent with the Constitution, is invalid to the extent of its inconsistency.<sup>150</sup> Therefore, inconsistency necessitates an order of invalidity.

The state's responsibilities regarding the realisation of children's rights are twofold. Because the parents of the children are in most cases the primary care givers, the state only has a secondary obligation to create the framework in which the parents can realise their children's rights. This can be primarily done by providing for the realisation of the socio-economic rights conferred upon everyone. However, if the parents are unable to provide care for their

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146 *Grootboom* case para 42.

147 Himes JR *Implementing the CRC 22*.

148 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 87. Herein after referred to as the *Fose* case.

149 Section 2 of the Constitution states:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

150 De Waal J, Currie I and Erasmus G *Bill of Rights* 170-171 and Davis D, Cheadle H and Haysom N *Fundamental Rights* 351.

children, or if the children have been removed from their care, the state will incur a direct responsibility for the realisation of section 28(1)(c).<sup>151</sup>

When applied to the enforcement of children's right to basic shelter, section 172(1)(a) begs the argument that a programme<sup>152</sup> which is designed to facilitate access to adequate housing in terms of section 26(1), read together with section 26(2), and does not expressly provide for the needs of children, or fail to regard their interests as paramount, does not constitute constitutional compliance, and is therefore invalid. The same argument can be voiced in regard to children without parents to who the state has a direct responsibility to provide the necessary shelter in terms of section 28(1)(c).

From reading the rest of section 172(1) it becomes clear that the declaration of invalidity is not the only remedy a court can award. Section 172(1)(b) provides that "a court may make any order that is just and equitable". Furthermore, section 38<sup>153</sup> of the Constitution provides for "appropriate relief", and specifically refers to a declaration of rights where fundamental rights have been infringed. In the *Fose* case, the Court concluded that:<sup>154</sup>

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

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151 See section 4.1 of this dissertation for a detailed discussion on the state's obligations in terms of section 28 of the Constitution.

152 See section 6 of this dissertation where the specific measures taken to implement the rights of children is discussed with reference to the alleviation of poverty in South Africa.

153 Section 38 provides:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

154 *Fose* case para 19.

The Court's statement regarding appropriate relief makes it clear that the object in awarding any remedy must be to effectively protect the rights contained in the Constitution.<sup>155</sup> This means that the remedy must at least vindicate the Constitution and deter future infringements. Specific constitutional remedies used by the Court include the following:<sup>156</sup>

- orders of invalidity;<sup>157</sup>
- the development of the common law to give effect to the constitutional rights;<sup>158</sup>
- constitutional damages;<sup>159</sup>
- interdicts;<sup>160</sup> and
- declaration of rights.<sup>161</sup>

#### 4.3.1.1 The Court's use of constitutional remedies in respect of children's right to basic shelter

The High Court in *Grootboom v Oostenberg Municipality*<sup>162</sup> extensively used the structured interdict<sup>163</sup> to enforce a positive obligation. The Court found that the conditions under which the squatters were living, were a violation of

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155 *Fose* case para 96. See also the discussion in De Waal J, Currie I and Erasmus G *Bill of Rights* 173, Davis D, Cheadle H and Haysom N *Fundamental Rights* 351, and *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38 (CC).

156 Jansen van Rensburg L and Olivier MP 2001 *LDD* 95, De Waal J, Currie I and Erasmus G *Bill of Rights* 451-454, and Davis D, Cheadle H and Haysom N *Fundamental Rights* 354.

157 In terms of section 172(1) (b) a court can make an order limiting the retrospective effect of the declaration of invalidity, also a court can make an order suspending the declaration of invalidity, to allow the competent authority to correct the defect. See De Waal J, Currie I and Erasmus G *Bill of Rights* 175-188.

158 Section 173 of the Constitution; see also *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) for the Court's use of this inherent power.

159 De Waal J, Currie I and Erasmus G *Bill of Rights* 188-191, see also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC).

160 De Waal J, Currie I and Erasmus G *Bill of Rights* 191-193, see *City Council of Pretoria v Walker* 1995 4 SA 631 (CC).

161 This remedy, in terms of section 38, is only applicable to infringement of rights entrenched in the Bill of Rights. In *JT Publishing v Minister of Safety and Security* 1997 3 SA 514 (CC) para 15, the Court held that a declaratory order is a discretionary remedy, in the sense that the court is not obliged to make such order even if the matter in question is capable of being answered in that way. See De Waal J, Currie I and Erasmus G *Bill of Rights* 193-194.

162 *Grootboom* High Court case.

the right of children to shelter in terms of section 28(1)(c). Reference was also made to section 26 in respect of the conditions in which the children's parents were living. According to the High Court, section 38 and section 172 of the Constitution permit the issuing of an order, which identifies the violation of a constitutional right and then defines the reform that must be implemented while affording the responsible agency the opportunity to choose the means of compliance.<sup>164</sup> In this case the High Court ordered that the state to provide the necessary emergency shelter to the children and their accompanying parent(s).<sup>165</sup>

On appeal, the Constitutional Court held in the *Grootboom* case that the High Court's interpretation of the relevant constitutional provisions was incorrect. The right to housing did not give the applicants a right to claim housing immediately on demand. Therefore, the remedy for the infringement could not put the applicants in a preferential position as opposed to people in similar situations who were not party to the litigation.<sup>166</sup> The Constitutional Court held that due to the pragmatic nature of socio-economic rights, it was necessary and appropriate to award a declaratory order.<sup>167</sup>

Due to these seemingly contradictory decisions clarity is needed on whether the Court, in respect of socio-economic right in general, can only make declaratory orders, or can it, when appropriate implement mandatory orders? It must however be remembered that due to South Africa's system of judicial hierarchy, the Constitutional Court judgment represents the present legal position.

In the *TAC* case counsel for government contended that if the Court should find that government policies fall short of the constitutional requirements, the only competent order that a court can make is to issue a declaration of rights

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163 A structured interdict is employed to direct a violator to take steps to rectify a violation of the rights under the court's supervision.  
164 *Grootboom* High Court case para 293H-J. See also Davis D, Cheadle H and Haysom N *Fundamental Rights* 354.  
165 *Grootboom* High Court case para 293I.  
166 *Grootboom* case para 79-81.  
167 *Grootboom* case para 99.

to that effect.<sup>168</sup> The making of government policy is a prerogative of the executive and not the court, therefore, so the argument went, any other order, which requires the executive to pursue a particular policy, was undemocratic in so far that it is inconsistent with the doctrine of separation of powers.<sup>169</sup>

The Court's obligation to declare unconstitutional law or conduct invalid in terms of section 172 is also applicable to government policies. This then serves as a constitutional mandate for the intrusion upon the executive's domain. The Court further held that that there is no merit in the distinction drawn between declaratory and mandatory orders - even a simple declaration of rights might have budgetary implications.<sup>170</sup> Referring to the *Fose* case, the Court emphasised that it is under a duty to ensure that appropriate and effective relief is granted. The nature of the right infringed, and the nature of the infringement will provide guidance as to the appropriate relief in a particular case.

Thus, the Court rejected the argument that it could only make declaratory orders due to the contention that mandatory orders are inconsistent with the doctrine of separation of powers.<sup>171</sup>

In this respect the Court also stated that the power to grant mandatory relief, where appropriate, might include the exercise of some sort of judicial supervisory jurisdiction.<sup>172</sup> This entails that the courts would give orders directing the legislature and executive branches of government to bring about reforms defined in terms of their objective and then to retain such supervisory jurisdiction as to the implementation of those reforms.<sup>173</sup> In other words, the Court or other institution may retain jurisdiction so as to ensure and supervise

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168 TAC case para 96 see also Davis D, Cheadle H and Haysom N *Fundamental Rights* 354.

169 TAC case para 97. This is similar to the Court's conclusion in the *First Certification* judgment, where it was argued that socio-economic rights were not justiciable because it is inconsistent with the doctrine of separation of powers.

170 TAC case para 99.

171 TAC case para 106.

171 TAC case para 104.

173 Jansen van Rensburg L and Olivier MP 2001 *LDD* 95, Jansen van Rensburg L *Sosiale Sekerheid* 247.

the implementation of the ordered reforms. An example of this new practice is found in the *Grootboom* case, where the Constitutional Court awarded the *Human Rights Commission* supervisory jurisdiction to ensure the effective implementation of the necessary policy reforms.<sup>174</sup>

#### 4.3.2 *Monitoring the enforcement of socio-economic rights*

To ensure the effective realisation of the totality of obligations engendered by the economic, social, and cultural rights of everyone, especially those conferred upon children, a mix of official and non-governmental monitoring mechanisms (international and municipal) are necessary.<sup>175</sup>

Concerning children's socio-economic rights, the binding UNCRC created an international monitoring system. Article 43(1) of the UNCRC provides for the establishment of the Committee on the Rights of the Child responsible for the monitoring of the implementation of the children's rights contained in the Convention. Each State Party is therefore obligated in accordance with article 44(1) to submit reports to the Committee on the measures they have adopted which give effect to the recognised rights as well as on the progress made with regard to the enjoyment of those rights.<sup>176</sup>

In January 2000, the Committee considered South Africa's first report and made certain observations and recommendations.<sup>177</sup> Certain of these observations and recommendations will be shortly mentioned.

The Committee found that South African law does not yet fully reflect the principles and provisions of the *UNCRC*. Therefore, South Africa was encouraged to continue its efforts of legal reform in order to ensure that its

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174 *Grootboom* case para 97.

175 Jansen van Rensburg L *Sosiale Sekerheid* 305-306, Himes JR *Implementing the CRC* 22 and Franklin B (Ed) *Children's rights* 15.

176 See section 4.3.1.1 of this dissertation where the Committee on the Rights of the Child's response to South Africa's first report is discussed.

177 Jansen van Rensburg and Olivier MP *International and supra-national law* 628 and Committee on the rights of the Child *Concluding Observations 2000* CRC/C/15/Add.122 para 12,15,24,29 and 32.

municipal legislation conforms fully to these principles and provisions.<sup>178</sup> The Committee also expressed its concern that insufficient effort has been made to ensure that adequate programmes are implemented at local level. In this regard the Committee also stated that community-based organizations must be involved in the implementation of the *UNCRC*. This necessarily implies that the government must ensure that the public at large should be made sufficiently aware of the Convention.<sup>179</sup> Concerning resources the Committee urged the South African government to prioritise budgetary allocations and distributions in order to ensure the progressive realisation of children's socio-economic rights.<sup>180</sup>

Article 16 of the ICESCR provides for the enforcement of socio-economic rights conferred upon everyone, including children, by means of a reporting obligation and a monitoring body (the UN Committee on Economic, Social, and Cultural Rights), which has the task of assessing the reports received from the states. In terms of article 21 the monitoring body may submit reports with recommendations to the United Nations General Assembly regarding the information received from the State parties. It should be remembered that these recommendations are in no way binding on the particular State Party or Parties to which they refers.<sup>181</sup>

These systems of international monitoring facilitate international co-operation and constructive dialogue among the relevant parties. This is necessary to provide children with the specialised protection they need.

The Human Rights Commission was established by section 184 of the Constitution, which serves as a similar monitoring mechanism on municipal level. Section 184(3) provides:

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178 Jansen van Rensburg and Olivier MP *International and supra-national law* 628.

179 Jansen van Rensburg and Olivier MP *International and supra-national law* 629.

180 Jansen van Rensburg and Olivier MP *International and supra-national law* 629.

181 Himes JR *Implementing the CRC* 22 and Veerman PE *The Rights of the Child* 208-209.

Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education, and the environment.

It is submitted that the objective of these reporting procedures is inspection and introspection. The performance of the relevant state organ is assessed from the outside by the Human Rights Commission, but in the process, the organ itself is also compelled to look at what it has achieved in respect of children's socio-economic rights in a critical way. In this way an obligation of internal and external justification is placed on the state.<sup>182</sup> Though the Human Rights Commission will most likely never be directly involved in the enforcement of socio-economic rights in general, the yearly reports received by them may play a vital role in litigation. From these reports the progress made in the realisation of socio-economic rights can be judged. The reports may also provide the basis for the elaboration of government policies in the future.<sup>183</sup>

In order to properly execute its constitutional mandate, the Human Rights Commission developed a set of questionnaires commonly referred to as Protocols. The aim of these protocols were to provide the Commission with information on policy, legislative, budgetary and other measures adopted during the reporting period in order to assess whether these measures are reasonable, comprehensive and cater for vulnerable groups such as children.<sup>184</sup> The Commission has listed various reasons why the reporting process has been difficult, these reasons are:<sup>185</sup>

- lack of understanding of constitutional obligations by government departments;

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182 Human Rights Commission *Fourth Annual Economic and Social Rights Report 2000-2002* 13.

183 De Vos P 1997 SAJHR 99, Jansen van Rensburg L *Sosiale Sekerheid* 420-421.

184 Human Rights Commission *Fourth Annual Economic and Social Rights Report 2000-2002* 13.

185 Human Rights Commission *Fourth Annual Economic and Social Rights Report 2000-2002* 17-18.

- lack of adequate information management systems in most government departments;
- insufficient and sometimes incorrect information by many organs of State to the Commission;
- late responses to the protocols by some government departments;
- lack of adequate resources for the commission.

## **5 Poverty affecting South African children**

### **5.1 Defining poverty**

Poverty can be defined as the condition of having insufficient resources or income to enable a person to consume the goods and services required for a secure, and healthy life. In its extreme form poverty is a lack of basic human resources, such as adequate housing or shelter, clean water, nutritious food, and health services.<sup>186</sup> Poverty involves more than the suffering associated with lack of income. It also pertains to an inability to develop human capabilities, and to suffering attendant on physical insecurity and abuse, and economic vulnerability.<sup>187</sup>

Economists have traditionally chosen income or lack thereof as the basis for measuring and defining poverty. A person is considered poor if his or her consumption or income falls below some minimum level necessary to meet their basic needs. This minimum level is usually called the poverty line.<sup>188</sup>

According to the World Bank, the reference lines are set at between \$1 and \$2 per day. It has been estimated that 1.2 billion people worldwide have consumption levels below this margin.<sup>189</sup> Numerous studies<sup>190</sup> have shown

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186 Jackson RJ and Jackson D *Political science* 407 and Venter A (Ed) *Government and Politics* 322.

187 Venter A (Ed) *Government and Politics* 407 and Streak J 2000 <http://www.idasa.org.za> 20 May 2003.

188 World Bank Group 2002 <http://www.worldbank.org/poverty/mission/up2.htm> 20 May 2003.

189 Streak J 2000 <http://www.idasa.org.za> 20 May 2003.

190 Motala S 2001 <http://www.childrensrightscentre.co.za/topics/poverty.html> 20 May 2003. See also Jackson RJ and Jackson D *Political Science* 407 and Venter A (Ed) *Government and Politics* 322.

that if lack of income is used as the yard stick to measure child poverty in South Africa, 72% of children, or 4,6 million aged 0-6, and 12,3 million aged 0-18 are poor. These children face shortages of food, clothing, and *shelter*. They also lack access to basic services. In the light of this their basic human dignity and other fundamental rights are denied. Therefore, it is not surprising that most of South Africa's children lack basic shelter and is often homeless. This prevailing manifestation of poverty needs to be effectively addressed.

## **5.2 *The causes of poverty***

Poverty has many causes, some of them very basic. In most cases, the causes and effects of poverty interact, so that what makes people poor also creates conditions that keep them poor. The accepted general factors that may lead to poverty include: overpopulation; the unequal distribution of resources in the world economy; inability to meet high standards of living and costs of living; inadequate education and employment opportunities; environmental degradation; certain economic and demographic trends; and welfare incentives.<sup>191</sup>

In the South African context, a number of factors contributing to the existence of poverty can be identified. These are:<sup>192</sup>

- The impact of apartheid, which stripped people of their assets (especially land), distorted economic markets and social institutions through racial discrimination, and resulted in violence and destabilisation;
- The undermining of the asset base of individuals, households, and communities, through ill-health, over-crowding, environmental degradation, the miss use of resources, discrimination, and social isolation; and

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191 Streak J 2001 <http://www.idasa.org.za> 20 May 2003.

192 May J 1998 <http://www.und.ac.za> 20 May 2003.

- The impact of a disabling state, which included the behaviour and attitudes of government officials, the absence of information concerning rights, roles and responsibilities, and the lack of accountability at all levels of government.

Overpopulation, the situation of having large numbers of people with too few resources, especially land, is closely associated with poverty.<sup>193</sup> Only a certain number of people can be supported on a given area of land, and that number of people depends on how much food and other resources the land can provide. During the apartheid era, millions of people, adults and children, were relocated to designated areas, which were completely inadequate to accommodate such a number. This inevitably led to inadequate shelter and often, homelessness. Due to the vulnerability of children, they suffered the most.

The unequal distribution of resources in South Africa was worsened by the effects of apartheid. It is not surprising that many previously disadvantaged people lack the knowledge and skills gained through formal education and training to effectively mobilise available resources. This legacy has been carried on into the next generation still causing children to be the ones fighting to meet their most basic needs.<sup>194</sup>

In many countries including South Africa, the deterioration of the natural environment is an important cause of poverty. This problem is a result of overpopulation of land, and over-exploitation and the uneducated miss use of natural resources.<sup>195</sup> Environmental problems have led to shortages of materials for *shelter*, food, clean water, and other essential resources. Apartheid can once again be named as one of the contributing factors causing this prevailing problem.

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193 Streak J 2001 <http://www.idasa.org.za> 20 May 2003.

See also Venter A (ed) *Government and Politics* 313-316 and 349-353.

194 Streak J 2001 <http://www.idasa.org.za> 20 May 2003 and Venter A (Ed) *Government and Politics* 313-316 and 349-353.

### 5.3 *The effects of poverty on children*

Poverty has wide-ranging and often devastating effects on children. Many of its effects, such as homelessness and malnutrition, result directly from having too little income or too little resources. Some of the effects of poverty may include malnutrition and starvation, exposure to the elements, mental illness, and drug dependency. Certain studies have also concluded that children who live a life of poverty are more susceptible to an adult life of crime, and other problems such as depression, which can contribute to criminal behaviour. Furthermore, poverty tends to perpetuate itself. In many cases, poor children have become accustomed to the mindset that keeps them from getting out of poverty. These children then grow up to be poor adults earning lower than average incomes.<sup>196</sup>

Inadequate shelter or housing creates conditions that promote disease.<sup>197</sup> Without decent protection, poor children are exposed to severe weather as well as to bacteria and viruses carried by other people and animals. Inadequate sanitation and unhygienic practices are usually associated with inadequate shelter, and may lead to illness. Because the poor commonly have no running water or sewage facilities, human excrement and garbage accumulate, quickly becoming a breeding ground for disease. In informal settlements such as townships and squatter camps, overcrowding may lead to high transmission rates of airborne diseases, such as tuberculosis.

Malnutrition is one of the most common effects of living in poverty. In developing countries people live in deplorable conditions and cannot obtain adequate calories to develop or maintain their appropriate body weight. In most cases children suffer the most. The malnutrition of children may lead to

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195 Streak J 2001 <http://www.idasa.org.za> 20 May 2003 and Venter A (Ed) *Government and Politics* 313-316 and 349-353.

196 Streak J 2001 <http://www.idasa.org.za> 20 May 2003, see also Motala S 2001 <http://www.childrensrightscentre.co.za/topics/poverty.html> 20 May 2003.

197 Streak J 2001 <http://www.idasa.org.za> 20 May 2003, see also Motala S 2001 <http://www.childrensrightscentre.co.za/topics/poverty.html> 20 May 2003.

a variety of other problems such as stunted growth, gastrointestinal disorders, and poor mental development.<sup>198</sup>

Some experts believe that the need for *adequate shelter*, nutritious food, and other necessities may all contribute to criminal behaviour among the poor.<sup>199</sup> Therefore, a child, continuously lacking in the most basic of needs may be more susceptible to a life of crime. Other problems associated with poverty are often linked to crime. For example some poor people commit the crime of selling illegal drugs in order to obtain money.

The following section of this dissertation will focus on those measures taken to utilise the socio-economic rights of children in order to make at least some progress in the alleviation of poverty in South Africa.

## **6 The implementation of children's socio-economic rights to alleviate poverty**

The preamble to the Constitution clearly states that the values of human dignity, freedom, and equality are at the forefront of South Africa's democratic development. Furthermore, it reaffirms government's commitment to heal the injustices caused by apartheid and to improve the quality of life of all citizens. The values mentioned in the preamble of the Constitution may be seen as South Africa's aspirations or promises for a better future.

One of the major problems facing government's fulfillment of these *promises* is poverty. Poverty denies people their basic needs such as *shelter*, food, water, and health-care. It can therefore be argued with conviction that human dignity is denied to these people. Children being the most vulnerable members of society are usually the ones most affected by living in deplorable

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198 Streak J 2001 <http://www.idasa.org.za> 20 May 2003, see also Motala S 2001 <http://www.childrensrightscentre.co.za/topics/poverty.html> 20 May 2003.

199 Streak J 2001 <http://www.idasa.org.za> 20 May 2003, see also Motala S 2001 <http://www.childrensrightscentre.co.za/topics/poverty.html> 20 May 2003.

conditions. Believing that children are the nation's future, it is necessary to put children and their interests at the forefront of the fight against poverty.

It is submitted that significant progress can be made in the fight against poverty through effective realisation and enforcement of socio-economic rights, especially those conferred upon children. This has recently been confirmed by the Constitutional Court when it stated that the realisation of socio-economic rights is key to the advancement of a democratic society based on human dignity, freedom, and equality. The utilisation of children's socio-economic rights as a response to poverty requires a multi-sectoral, multi-faceted approach, which relies heavily on social policies and incorporates poverty alleviating programmes, integrated development plans, capacity-development of communities, service delivery, and social security.<sup>200</sup>

This dissertation mainly focuses on children's right to basic shelter in conjunction with the right of access to adequate housing. Therefore, the following sections will be devoted to those legislative and other measures particularly aimed at remedying the housing problem.

### **6.1 *Legislative measures***

Firstly, the legislative measures taken specifically for the realisation of children's right to basic shelter as envisaged by section 28(1)(c) will be discussed. Thereafter attention will be drawn to those measures taken to ensure the progressive realisation of section 26. As explained, section 26 provides everyone, including children, the right of access to adequate housing. Thus, every measure taken to realise section 26 is indirectly applicable to the realisation of section 28(1)(c) and children's right to basic shelter.

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200 Motala S 2001 <http://www.childrensrightscentre.co.za/topics/poverty.html> 20 May 2003.

### 6.1.1 Legislation aimed at directly providing children with basic shelter

Presently in South Africa, the *Child Care Act* of 1983 (hereafter 'the Act') is the primary legislative measure responsible for the safeguarding of children's interests. Most importantly, the Act provides the legal machinery designed to protect children who are considered for possible removal into alternative care. In other words, this Act provides for the fulfilment of the state's direct duty to provide children with the necessary care in instances where their parents are unable to do so.

It follows that children will be considered for removal from parental care, if the parents are unable to provide them with basic shelter. However, it has been submitted that this will only be a last resort taken if all else fails. To provide such children with the necessary shelter, the state may remove them into alternative care. In terms of the Act alternative care can include places of safety, places of care, children's homes and foster care.

Places of safety are defined by section 1 of the Act as any place suitable for the reception of a child, into which the owner, occupier, or person in charge thereof is willing to receive the child. A court may remove a child into a place of safety if it appears that the child has no parent or guardian or if it is in the interest of or for its safety of the child to be placed in such alternative care.<sup>201</sup> To facilitate the continued housing of children in places of safety, government has provided for the payment of a place of safety grant to the owner, occupier, or person in charge of such an establishment.<sup>202</sup>

Secondly, the Act provides for the removal of children into places of care. A place of care is defined in section 1 as any building or premises maintained or used, whether for profit or otherwise, for the reception, protection, and temporary or partial care of more than six children. Places of care are sometimes referred to as a crèche or nursery school. These facilities provide care and shelter during those times the parents are unable to do so, without

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<sup>201</sup> Section 11(1) of the Act. For a more detailed discussion, see Zaal N 2001 SALJ 209.

resorting to unnecessary permanent removal.<sup>203</sup> There are also certain grants available to ensure the upkeep of these facilities.<sup>204</sup>

Section 1 defines a children's home as any residence or home maintained for the reception, protection, care and bringing-up of more than six children apart from their parents. The purpose of children's homes is to ensure the permanent protection of children and to provide them with the necessary care such as housing. These institutions may include those belonging to churches, private bodies, and organisations committed to the protection of children.<sup>205</sup> Furthermore, to ensure compliance with their duty to protect and care for children, the state has also provided for grants for homes such as these.<sup>206</sup>

Lastly, in this respect, the Act provides for children to be placed in foster care. Foster care is defined by the Act as care provided by any person except the guardian, in whose custody a child has been placed in terms of chapter 3 of the Act.<sup>207</sup> Since 1996 child welfare agencies have reported an increase in the number of foster care applications. It was suggested that this reflected an increase in the number of orphaned children left homeless particularly because of AIDS.<sup>208</sup> Once again, the state provides for foster-parent grants to ensure that the children receive proper care.<sup>209</sup> The foster care grants were intended to provide some monetary assistance to foster parents who care for children while the state and private welfare organisations searched for a more permanent placement. However, because of the increase in care needing children, foster care has become more of a permanent solution rather than a temporary one as originally intended.

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202 Regulation 39(1) of GK R2621 of 1986.

203 Bosman-Swanepoel HM and PJ Wessels *The Child Care Act* 16, see also Zaal N 2001 *SALJ* 212.

204 Regulation 38(1) of GK R2621 of 1986.

205 Bosman-Swanepoel HM and PJ Wessels *The Child Care Act* 11, see also Zaal N 2001 *SALJ* 213.

206 Regulation 37(1) of GK R2621 of 1986.

207 Chapter 3 of the *Child Care Act* of 1983 especially provides for the maintenance of children apart from their parents.

208 Clark B 2000 *SALJ* 351-352.

209 Regulation 36(1) of GK R2612 of 1986.

The *Child Care Act* of 1983 was last amended by the *Child Care Amendment Act* 86 of 1991, more than ten years ago. In the meantime South Africa has become a democratic state in which children are afforded certain fundamentally entrenched rights. Furthermore, South Africa has become a signatory to the binding UNCRC, which entails that its efforts to comply with this convention will be monitored by the Committee on the Rights of the Child. While considering South Africa's first report this Committee expressed its concern about the insufficient number of alternative care facilities in previously disadvantaged communities. The Committee also recommended that the Child Support grants should be expanded and new alternative programmes should be developed.<sup>210</sup> All these factors<sup>211</sup> have necessitated the adoption of a new, more comprehensive piece of legislation to make provision for the changing face of children's rights. In answer to this need, the Minister of Social Development has introduced the new *Children's Bill* on August 12<sup>th</sup>, 2003.<sup>212</sup>

The proposed *Children's Bill* is designed to give effect to the constitutional rights of children, as well as to give effect to the Republic's obligations concerning the well-being of children in terms of binding international instruments, particularly the UNCRC.<sup>213</sup> The Bill is aimed at ensuring government's commitment to improving the quality of life of all citizens, especially children, and the alleviation of poverty amongst children in South Africa.<sup>214</sup>

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210 Jansen van Rensburg and Olivier MP *International and supra-national law* 630.

211 In December 2002 the Law Commission of South Africa submitted a report concerning the 1983 *Child Care Act*. Due to the nature of this dissertation a complete discussion of this report can not be included. It is sufficed to say that the Law Commission's report concluded that the *Child Care Act* needs to be amended in various areas. See <http://www.fclm.wits.ac.za> for this report as well as a complete discussion concerning its findings and recommendations.

212 The *Children's Bill* hereinafter referred to as the Bill.

213 This is clearly facilitated by chapter 3 of the Bill, which reaffirms children's rights as stated in section 28 of the Constitution.

214 Section 2 of the Bill reads:

The objects of this Act are-

- (a) to make provision for structures, services and means for promoting and monitoring the sound physical, intellectual, emotional and social development of children;
- (b) to strengthen and develop community structures which can assist in providing care and protection to children; and

The Bill provides for the removal of children who are in need of care and protection, into alternative care. In terms of a child's right to basic shelter, section 150(1) defines a child who is in need of care and protection as a child-

- a. who has been abandoned, orphaned or is without any visible means of support;
- b. who lives or works on the streets or begs for a living; or
- c. live in exposed circumstances, which may seriously harm that child's physical, mental, or social well-being.

The categories of alternative care provided for by the Bill include foster care, court-ordered kinship care, child and youth care centres such as children's homes, safe care, as well as shelters and drop-in centres.<sup>215</sup> The provisions are largely similar to those in the *Child Care Act* of 1983, however, some development is evident along the lines of specific rights entrenched by section 28(1)(c).

#### 6.1.2 Legislation aimed at the realisation of section 26<sup>216</sup>

Poverty is synonymous with lack of development and is a characteristic of underdevelopment. Development and the development process are therefore usually aimed at eradicating poverty.<sup>217</sup> Thus, the realisation of any socio-economic right necessarily implies an ongoing development process.

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- (c) to protect children from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical and moral harm or hazards.

215 For a detailed discussion on the different forms of alternative care available for children in need see chapter 12-15 of the Bill.

216 This section of the dissertation will broadly focus on the legislative measures taken to implement section 26 of the Constitution. For a detailed discussion on these measures see Human Rights Commission *Fourth Annual Economic and Social Rights Report 2000-2002* 33-45.

217 Scheepers T *Law and Development* 59.

The *Development Facilitation Act*<sup>218</sup> (DFA) introduced into our legal system development law principles for land development, and measures to speed up the implementation of land development projects, especially the Reconstruction and Development Projects. In conjunction with the DFA, the *National Development Agency Act*<sup>219</sup> established the National Development Agency. This agency is aimed at granting funds for project and programmes meeting the development needs of the poor communities.

We now turn to legislation more specifically applicable to the realisation of section 26. The *Housing Act*<sup>220</sup> provides for the facilitation of a sustainable housing development process in South Africa. This Act defines some key principles applicable to housing development by the national, provincial, and local spheres of government.<sup>221</sup> These principles include giving priority to the housing of the poor, well-managed housing development based on socio-economic realities, and creating safe and healthy housing conditions. The *Less Formal Township Establishment Act*<sup>222</sup> provides for the designation, provision and development or establishment of townships for less formal forms of residential settlement. Furthermore, it regulates the use of land by tribes for communal forms of residential settlements. This Act also provides for instances where there is an urgent need for settlement in a less formal manner. People left homeless after a natural disaster or people who have been legally evicted by government serve as examples of an urgent need for less formal settlement. When people are in need of land for settlement on a permanent basis, the *Provision of Land and Assistance Act*<sup>223</sup> can be utilised. In terms of this Act, the Minister of Land Affairs has the power and authority to make land and development funds available to people in need.

Because of the prevailing problem of homelessness and overpopulation in South Africa, many cases of unlawful occupation occur. The unlawful occupation of land can seriously frustrate the development process. The

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218 *Development Facilitation Act* 67 of 1995. Hereinafter referred to as the DFA.

219 *National Development Agency Act* 108 of 1998.

220 *Housing Act* 107 of 1997.

221 *Housing Act* 107 of 1997, section 2.

222 *Less Formal Township Establishment Act* 113 of 1991.

development process can also be seriously derailed when people are illegally evicted from land. The *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*<sup>224</sup> prohibits unlawful eviction and provides for the procedures to be followed when having to evict unlawful occupants. This Act also contains provisions to ensure that no one who has been evicted is left without the necessary shelter.

Most of the discussed legislative measures are aimed at realising everyone's right of access to adequate housing, this includes children. However, most of these measures make little mention of the specific right of children to basic shelter. It is regarded as inclusive in the overall application of the legislation. Once again, it must be stressed that these legislative measures, in order to comply with the standard of reasonableness, must regard the interest of children to be paramount. If such legislation does not provide for the interest of children as a vulnerable group it can be argued that the relevant legislative measure is not constitutionally valid

## **6.2 Other measures**

This section will address non-legislative measures taken to facilitate the direct and indirect realisation of children's socio-economic rights in order to alleviate poverty.<sup>225</sup>

### **6.2.1 National Programme of Action for Children in South Africa<sup>226</sup>**

By ratifying the UNCRC South Africa has committed itself to implementing the principle of a first call for children whereby the needs of children are considered paramount throughout the government's programmes, services,

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223 *Provision of Land and Assistance Act* 126 of 1993.

224 *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998.

225 This section will broadly discuss the main programmes and policies implemented to realise socio-economic rights in South Africa. For a detailed discussion in this regard see Human Rights Commission 4<sup>th</sup> *Annual Economic and Social Rights Report 2000-2002* 23-33.

226 National Programme of Action for Children 1996  
<http://www.gov.za/reports/1996/chilprog.htm> 20 May 2003.

and development strategies. The National Programme of Action for Children (NPA) is the instrument by which these commitments to children are being carried out. It is a mechanism for identifying all plans for children developed by government departments, non-governmental organisations and other child-related structures.

A National Steering Committee has been established to oversee the coordination, implementation, and monitoring of the NPA, as well as to ensure that it accords with the commitments to the UNCRC. Social welfare development as well as child protection measures are included in the Steering Committee's policy priorities. Within each of these policy areas, special attention will be paid to the needs of children living in difficult circumstances, or with special needs, such as children who are *homeless*, orphaned, or living in other forms of poverty. The implementation of the NPA will involve all departments and offices of government at all levels, as well as non-governmental organizations and all sectors of society. The process of applying the Convention's standards and principles will be built into the core of government and into all existing co-coordinating and policy development structures.

To summarise, the NPA will directly address the issue of children's housing rights, by implementing different programmes in order to alleviate the problem. Furthermore, the National Steering Committee will ensure that every programme implemented to alleviate the child-housing crisis will comply with international standards set by the UNCRC. To be effective, the NPA must be implemented in close co-operation with all three spheres of government as well as other members of civil society and non-governmental organizations. On paper this national action programme seems impressive. However, considering that government organisations are characterised by corruption and incompetence, the question need to be asked whether this programme will find proper implementation in practice?

### 6.2.2 Reconstruction and Development Programme

The Reconstruction and Development Programme (RDP) is a policy framework for integrated and coherent socio-economic progress. It seeks to mobilize South African and the country's resources toward the final eradication of the results of apartheid. Its goal is to build a democratic, non-racial, and non-sexist future and it represents a vision for the fundamental transformation of South Africa.<sup>227</sup>

The RDP is based on the principle that socio-economic progress requires an integrated and sustainable programme, since the legacy of apartheid cannot be overcome with piecemeal, uncoordinated policies. Therefore, South Africa's resources should be harnessed in a coherent set of strategies, which will be implemented in all three spheres of government. This has been confirmed on numerous occasions, most notably in the *Grootboom* case.<sup>228</sup> Furthermore, the RDP acknowledges the fact that South Africa's people are the country's most important resource and to involve people in a democratic manner will promote peace and security.<sup>229</sup>

The RDP base document refers to five key programmes as focus points. One of these programmes entails the meeting of basic needs. The basic needs of people extend from job creation, and *land reform* to *housing*, social welfare and security.<sup>230</sup> RDP projects are special projects that meet the basic needs and services of South Africa's people while building the economy and fundamentally transforming government and society. In relation to land the RDP has implemented its Land Reform and Restitution Pilot Projects. The aim of these projects is to develop and support integrated sustainable rural development through land restitution, redistribution, tenure reform, and settlement support.<sup>231</sup> As confirmed by the National Programme of Action for Children, the principle of a first call for children was also adopted by the RDP.

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227 *White Paper on Reconstruction and Development* 7.

228 *Grootboom* case para 40, 47 and 55.

229 *White Paper on Reconstruction and Development* 8-9.

230 *White Paper on Reconstruction and Development* 9-12.

231 *White Paper on Reconstruction and Development* 51.

Therefore, the needs of children are also considered paramount and the UNCRC's standards and principles are featured centrally in all RDP programmes and projects. It then follows that the interest of children, especially those who are homeless and who live in other forms of extreme poverty will receive special attention in the RDP's integrated projects.

### *6.2.3 Programmes and policies implemented by the National Department of Housing*

The National Department of Housing (NDH) has implemented the following policies and programmes during April 2000 to March 2002 in order to facilitate the realisation of section 26:<sup>232</sup>

- Amendment to the housing subsidy scheme
- Environmentally Sound Low Cost Housing
- Peoples Housing Process
- Developer driven Individual subsidy Programme
- Savings Linked Subsidy Scheme
- Programme for Housing Development in Emergency Circumstances

The aim of the Amendment to the Housing Subsidy Scheme was to enable persons owing unsubsidised residential properties access to housing subsidies. This means that persons acquiring ownership of residential property with their own resources is now also eligible for government subsidies.<sup>233</sup>

According to the NDH, the main objective of the People's Housing Process as set out in the National Housing Code is to enable persons earning less than R3 500 per month to gain access to adequate housing.<sup>234</sup>

The Developer Driven Individual Subsidy Programme targets small-scale developers who are unable to execute large subsidy projects. This

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232 Human Rights Commission *Fourth Annual Economic and Social Rights Report 23.*

233 Human Rights Commission *Fourth Annual Economic and Social Rights Report 23-24.*

234 Human Rights Commission *Fourth Annual Economic and Social Rights Report 24.*

programme provides for the deduction of funds based on the value of work completed, and does not require the use of a conveyancer to administer the subsidy funding.<sup>235</sup>

Regarding the housing problem in South Africa, the Savings Linked Subsidy Scheme is partly aimed at providing and mobilising additional funding for low-income housing while facilitating the development of a better standard of housing quality than is currently being delivered.<sup>236</sup>

In light of the *Grootboom* case, the NDH is currently developing a housing development programme to address the emergency housing needs of affected persons such as children.<sup>237</sup> The aim of this programme is to provide funding and development framework to undertake housing projects that would ensure that persons, including children who have no access to land, adequate housing and are living in deplorable conditions, receive some form of emergency shelter.<sup>238</sup>

These national programmes and policies have also been implemented on provincial level by the Provincial Departments of Housing while taking their own province's specific needs into account.<sup>239</sup>

### **6.3 Government's role in implementing children's right to basic shelter and the alleviation of poverty**

Addressing poverty issues such as the need for adequate housing and shelter in South Africa will require that legislative and other measure be undertaken in a coherent manner across all three spheres of government that is the national, provincial, and local spheres.

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235 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 25.

236 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 25.

237 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 25.

238 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 25-26.

239 For a detailed discussion on the various policies and programmes implemented by the different Provincial Housing Departments, see Human Rights Commission *Fourth Annual Economic and Social Rights Report* 27-33.

At national level government must establish and facilitate a sustainable housing development process by adopting national legislation, determining national policy, setting broad national housing delivery goals, and budgetary goals. Furthermore, national government must provide assistance to the provinces and local government to ensure the effective compliance with their specific duties. Lastly, funding is allocated at national level for the facilitation of housing developments in different housing programmes, such as those implemented in the RDP.<sup>240</sup>

In the provincial sphere, each province must do everything in its power to promote and facilitate the provision of adequate housing and shelter within the framework of the national housing policy.<sup>241</sup> Because the housing problems and other forms of poverty differ from region to region, each province must determine its own policy, make laws, coordinate the housing delivery process, and prepare a multi-year plan for financing purposes.

Local governmental authorities, being geographically on the spot, are well placed to respond to local trends in general poverty, and specifically to poverty caused by housing shortages that affect children. Therefore, each municipality must take the necessary steps to ensure that its inhabitants have access to adequate housing and emergency shelter. These steps must include local housing projects and housing delivery goals, local allocation of land, and must generally promote effective housing development in their area. The potential importance of the role of local government in the alleviation of child poverty was recognised in Schedule 4 of the Constitution. Schedule 4 is titled "Functional Areas of Concurrent National and Provincial Legislative Competence". Schedule 4B lists "child care facilities" as a "functional area of concurrent competence" involving expressly local government as well as the other two spheres of government.<sup>242</sup> A logical interpretation would therefore be that childcare facilities such as children's homes and places of care

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240 Scheepers T *Land and Development* 54-55, see also *Grootboom* case para 40, 55 for similar recommendations.

241 Scheepers T *Land and Development* 55. See also *Grootboom* case para 47, 55 for similar recommendations.

242 Zaal N 2002 *SALJ* 138-145.

represent an area of concurrent competence for local, provincial and national government. Because local government is situated at grassroots level, it can provide more effective compliance with this duty.

Alarmingly, the National Project on Poverty and Inequality,<sup>243</sup> as well as the South African Human Rights Commission<sup>244</sup> found that municipalities are increasingly the site of a number of weaknesses, which could seriously undermine the progressive realisation of socio-economic rights and therefore hinder the alleviation of poverty in that area. In several instances attention was drawn to severe weaknesses in the capacity of local governments to function as development facilitators. Reference was also made to structural constraints on their operations, and in particular, to resource constraints.<sup>245</sup> To ensure successful poverty alleviation, these grassroots problems must be dealt with.

The *White Paper on Local Government*<sup>246</sup> established the Integrated Development Planning (IDP) as one of the most important methods of achieving greater coordination and integration in development planning. Integrated Development Plans provide powerful tools for local municipalities to facilitate integrated and coordinated development planning as well as effective service delivery for the short, medium, and long term.<sup>247</sup> The IDPs will normally include the DFA principles<sup>248</sup> that serve as guidelines according to which municipalities can build sustainable and liveable settlements in their area. Once again, it must be stressed that building sustainable and liveable settlements takes more than bricks and mortar, and depends on integrated service delivery, regulation, and planning of all aspects of land use, health, infrastructure, environmental management, and transport.

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243 National Project on Poverty and Inequality 1998  
<http://www.lovai.gov.za/DCD/ledsummary/led03c.html> 20 May 2003.

244 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 54.

245 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 54-55.

246 *White Paper on Local Government* issued by the Minister of Provincial Affairs and Constitutional Development in March 1998. Herein after referred to as the Local Government White Paper.

247 Scheepers *T Land and Development* 237.

248 This refers to the *Development Facilitation Act* and its principles as discussed in section 6.1.2 of this dissertation.

It is submitted that national government must recognise the importance of the role of local government, and local government should increasingly assume policy-making and implementation powers in their area. This will go a long way to building local capacity to function as effective development facilitators. As far as the resource problem is concerned, corruption in municipalities should be eradicated, while municipal capacity to manage and mobilise resources must be enhanced.

The importance of co-operative government cannot be over emphasised. Without an effective integrated plan of action, which includes cooperation between all three spheres of government, as well as the participation of civil society, especially people who are directly affected by the implementation of socio-economic rights and the alleviation of poverty will see no progress.

#### **6.4 *The South African Human Rights Commission's report concerning housing***

This section will focus on the South African Human Rights Commission's findings and recommendations concerning the measures adopted by government to execute its obligation in terms of section 26 of the Constitution. The Commission supported the Court's conclusion in the *Grootboom* case that the question in this regard is whether the measures adopted establishes a integrated coherent programme involving all three spheres of government, directed towards the progressive realisation of the right of access to adequate housing within the State's available resources.<sup>249</sup>

As mentioned previously, the Commission works a reporting system basis in terms of which different government departments answer a series of so-called protocols. The Commission concluded that the reports provided by the government departments still indicate a lack of understanding of the significance of this exercise. Furthermore, the Commission stated that

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249 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 49.

departments still provide information that is incomplete, repetitious, and irrelevant.<sup>250</sup> In this light the Commission recommended that departments should put more effort in compiling responses and ensuring that the included information is in fact relevant.<sup>251</sup>

The Court in the *Grootboom* case stated that housing involves more than bricks and mortar.<sup>252</sup> This statement has been accepted by the Commission when it stated that the National Department of Housing should understand that housing is not merely about numbers and targets, but involves the quality of the living environment.<sup>253</sup> In this regard, the Commission stated that housing projects should look after the ecological support system upon which all life depends.<sup>254</sup> The Commission further emphasised with reference to the *Grootboom* case,<sup>255</sup> that the programme developed to address emergency housing needs should be sufficiently flexible to respond to those in desperate need and to cater for immediate and short-term requirements whenever such need arises.<sup>256</sup>

'Habitability' is considered one of the factors when determining whether a particular form of shelter constitutes adequate housing. Adequate housing will be considered habitable if it "provides the inhabitants with adequate space and protection from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors".<sup>257</sup> Unfortunately the Commission concluded that most of the new housing projects in South Africa fall short of this definition.<sup>258</sup> It is not surprising that the Commission expressly stated that this problem is one of the major barriers facing the improvement of the quality of life for the poor, especially children.<sup>259</sup>

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250 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 50.

251 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 59.

252 *Grootboom* case para 35.

253 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 50.

254 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 59.

255 *Grootboom* case para 66.

256 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 51.

257 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 51.

258 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 51.

259 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 59-60.

The Commission further listed several of aspects detrimental to the successful implementation of measures adopted to facilitate the realisation of section 26 that should be remedied.<sup>260</sup> These aspects include the unavailability of suitable land, the delay in transferring land to the beneficiaries due to administrative problems, problems due to inexperienced developers and quality of products, issues concerning the security of tenure, and inadequate budget allocations.<sup>261</sup>

Most importantly for the purposes of this dissertation is the fact that the Commission found that most of the submitted reports do not clearly articulate the measures and the extent of the impact of the measures adopted on the lives of the vulnerable groups within their areas of jurisdiction.<sup>262</sup> The National Housing Subsidy Scheme serves as example in that it requires beneficiaries to be over the age of twenty-one and legally competent to qualify for housing subsidies. This has the direct effect of excluding individual children and child-headed households.<sup>263</sup> The Commission strongly recommended that national government must adopt policies and enact legislation or develop a strategy to alleviate difficulties facing these children.<sup>264</sup>

## **7 Conclusion: Findings and Recommendations**

Poverty is a worldwide phenomenon, which is most evident in third world countries. South Africa falls in this category as a developing state. In South Africa 50% of households are classified as poor, earning less than R352.53 per adult per month. Children being the most vulnerable members of society are the one most affected by living in poverty. This unacceptable situation can *inter alia* be attributed to the disastrous effects of Apartheid. During this unfortunate period in our nation's history millions of people were unjustly evicted from their homes and forced to live in deplorable conditions. Moreover, many of these people were left homeless or without the necessary

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260 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 52-53 and 60.

261 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 52-53.

262 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 56.

263 Human Rights Commission *Fourth Annual Economic and Social Rights Report* 56.

adequate shelter. Children who were born into these circumstances were denied basic resources such as proper *shelter*, food, water, and health care services. For the purpose of this dissertation, the focus was mainly on the prevailing housing problem as manifestation of poverty in South Africa.

These unfortunate circumstances existed at the adoption of South Africa's democratic Constitution. The preamble of the Constitution reaffirms government's commitment to heal the inequalities of the past and improve the quality of life of all citizens. The Constitution is based on certain fundamental values, most importantly, human dignity, freedom and equality. The fact that these values are denied to those people living without access to basic resources such as adequate *housing/shelter*, food, water or health care services, cannot be dismissed. To facilitate South Africa's development as a democratic state based on human dignity, freedom and equality, the problem of poverty must be addressed. In this light, the government has recently confirmed its commitment to eradicate child poverty in particular.

The Constitutional Court, in the *Grootboom* case, has recently stated that the effective realisation of socio-economic rights is key to the advancement of a value based democratic South Africa. The Constitution provides everyone with fundamentally entrenched socio-economic rights by virtue of sections 25(5), 26 and 27. Furthermore, section 28(1)(c) provides children with additional socio-economic rights and the right to basic shelter is expressly provided for.

By virtue of section 28(1)(b) the primary responsibility to provide children with the necessary adequate housing/shelter is vested in their parents, unless the parents are unable to fulfil their duty or the children are removed from their care. This provision is in line with the binding principles of the UNCRC. This does not in the least mean that the state has no responsibilities to children living with their parents. The state must still provide the framework in which parents can facilitate the realisation of their children's rights. The state can

fulfil this obligation by taking reasonable legislative and other measures within its available resources to progressively realise everyone's right of access to adequate housing. Therefore, it is submitted that the measures taken to realise section 26 also indirectly ensure the realisation of children's right to basic shelter (section 28(1)(c)).

It has been largely accepted by the courts and academics alike that all fundamental human rights are indivisible and interrelated. Clearly then, the state's obligations in terms of section 28(1)(c) cannot be properly interpreted without referring to the interpretation of those obligations conferred upon it by section 26(2) and the other socio-economic rights in the Constitution. Hence, section 28(1)(c) must be seen in the context of the Constitution as a whole. Put simply, the state must take reasonable legislative and other measures within its available resources to progressively realise children's right to basic housing/shelter.

The Constitutional Court in the *Grootboom* case could not over emphasise the importance of the reasonableness requirement. The Court stated that the legislative and other measures taken to realise the right will not be reasonable if it fails to provide for the protection of those most in need. Thus, it is convincingly argued that measures taken to realise the right of access to adequate housing (thereby, indirectly also realising children's right to basic shelter), which do not consider the interest of children to be paramount, will not constitute constitutional compliance due to lack of reasonableness.

The state's obligations in this regard are further qualified by the fact that measures have to be taken within available resources. This reflects the reality that is the economy in which the state operates. To comply, the state must show that it, at the very least, satisfied the minimum essential levels necessary for the enjoyment of adequate housing/shelter. This refers to the state's minimum core obligation. Unfortunately, the Constitutional Court in the *Grootboom* case, recently refused an open invitation to define the minimum core in respect to section 26. The Court stated with just cause that it did not have sufficient information before it to take on such a daunting task.

While accepting the present legal position, it is submitted that an established minimum core would have some far-reaching advantages, advantages such as providing socio-economic rights with more determinacy and certainty. This would have had the effect that goals and strategies in terms of realising the right to adequate housing/shelter could be more realistically established. Hence, legislative and other measures would be much more comprehensive, not to mention effective. Furthermore, defining a minimum core obligation would have greatly eased the enforcement of socio-economic rights as far as the courts would have had a minimum standard against which to judge the measures taken.

The measures taken must then also ensure the progressive realisation of the right in question, i.e. the right of access to adequate housing. This qualification recognises that socio-economic rights cannot be realised immediately and on demand. However, the state must still show that it has at least made some progress toward the full realisation of the right in question.

The realisation of socio-economic rights to alleviate poverty requires an integrated action plan encompassing various strategies, projects, and programmes implemented in all three spheres of government. The South African Human Rights Commission has confirmed that every level of government whether national, provincial, or local has a particular role to play in the response to poverty. Thus, the principle of co-operative government is essential.

Local government is ideally placed to address poverty related problems such as homelessness. Unfortunately, as found by the South African Human Rights Commission, local government in South Africa is riddled with corruption and incompetence. This is a major problem facing the successful alleviation of poverty through the implementation of socio-economic rights. In light of the recommendations made by the Commission, it cannot be denied that corruption needs to be forcefully eradicated on a permanent basis. Moreover, officials need to be educated in effective resource management

and development planning. This will also result in municipalities implementing more effective and goal orientated Integrated Development Plans in order to facilitate building of sustainable and liveable settlements for underprivileged members of their community. These IDP's must stress the importance of remedying the housing problem affecting children in particular.

This dissertation mainly focussed on children's socio-economic right to basic shelter in conjunction with everyone's right of access to adequate housing. Therefore, when discussing the legislative and other measures taken to implement these rights as a reaction to poverty, focus was mainly on those measures relevant to the housing problem. Interestingly most of the measures discussed only indirectly facilitated the realisation of children's right to basic housing/shelter. The only noteworthy legislative measures taken to directly provide for children's right to basic housing/shelter are the *Child Care Act* of 1983, as well as the new *Children's Bill*. Unfortunately, these measures do not appear to be equal to the task. In the light of South Africa's commitment to putting children first as well as the principles and standards of the UNCRC, it is submitted that more measures should be taken, which directly provide for the interests of children relevant to housing.

Children hold our nation's future in their hands. To ensure that our country and its inhabitants reach their full potential, the problem of poverty, especially child poverty and its devastating effects must be seriously addressed. To do this, people on all levels of society need to forgive the past and embrace the future together. The key word is solidarity in a prosperous South Africa.

## 8 Summary

According to the latest statistics it has been estimated that 72% of South African children, or 4, 6 million aged 0-6, and 12, 3 million aged 0-18 are poor. These children face shortages of food, clothing, and *shelter*. They also lack access to basic services. It can therefore be argued with authority that basic human dignity and other fundamental rights are denied to these children. In order to facilitate South Africa's development as a democratic state based on human dignity, freedom, and equality, the government has recently confirmed its commitment to eradicate child poverty in particular.

The concept of socio-economic rights, more specifically the right of access to adequate housing was introduced through section 26 of the *Constitution of the Republic of South Africa, 1996*. This right entitles everyone, including children to access to adequate housing. In terms of section 26(2) the state must take reasonable legislative and other measures to progressively realise the right. However, as confirmed by the Constitutional Court in *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC), the right of access to adequate housing is subject to the availability of state resources. Section 28(1)(c) of the Constitution expressly confers upon children an additional right to basic shelter over and above their right in terms of section 26. In this respect it must be remembered that a child's right to basic shelter is subject to the same internal limitations as the other socio-economic rights in the Bill of Rights.

The aim of this study was to analyse the possible utilisation of these rights in order to alleviate poverty, while keeping in mind that the Constitutional Court stressed that the realisation of socio-economic rights is key to the advancement of South Africa as a democratic state. This dissertation mainly focussed on children's socio-economic right to basic shelter in conjunction with everyone's right of access to adequate housing. Therefore, when discussing the legislative and other measures taken to implement these rights as a reaction to poverty, focus was mainly on those measures relevant to the housing problem. Further emphasis was also placed on the findings and

recommendations made concerning the realisation of housing rights in South Africa by institutions such as the South African Human Rights Commission.

In response to the research and findings presented in this dissertation, the following recommendations are made:

- The South African Human Rights Commission emphasised that the measures implemented to realise socio-economic rights such as the right of access to adequate housing must be done in an integrated and co-operative manner involving all three spheres of government. This lies at the heart of any successful reaction to poverty, thus it can only be stressed that the principles of co-operative government should be included in any measure implemented.
- Another problem facing the successful implementation of measures to realise socio-economic rights is the prevailing incompetence of department officials. It is recommended that government officials receive the necessary training in resource management and development planning. This would result in more effective development plans to implement measures to realise socio-economic right.
- Government especially at local level is riddled with corruption and resource miss-management. This problem must be remedied on a permanent basis as soon as possible.
- It was found that the measures taken to alleviate the housing crisis in South Africa focused mainly on the realisation of section 26, while realising children's right to basic shelter on an indirect basis only. In light of government's commitment to implement the principles of the UNCRC it is submitted that measures should be taken on a progressive basis that cater for the direct realisation of section 28(1)(c).
- Measures, which is currently taken to realise children's right to basic shelter, was found to be inadequate. This situation should be remedied by amending the relevant legislation and enacting more legislation, policies, and programmes specifically aimed at the children's housing interests.

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