

**THE SOCIAL SECURITY RIGHTS
OF CHILDREN
IN SOUTH AFRICA**

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1 Introduction

The concept of social security was introduced into the South African constitutional system through section 27 of the *Constitution of the Republic of South Africa*.¹ Section 27 places a constitutional obligation on the state to provide access to social security,² while section 28 relates directly to the social security rights of children.³ Other fundamental rights⁴ may also be interpreted as providing for different branches of social security.⁵ In addition to this constitutional obligation, South Africa has ratified the United Nations Convention on the Rights of the Child⁶ and is in the process of ratifying the United Nations International Convention on Economic, Social and Cultural Rights,⁷ both of which will have important social security implications in respect of children for the South African government.

Apart from the direct reference to the right to access to social security made by section 27, this section, along with other provisions in the Bill of Rights, makes indirect reference to this concept. Section 27(1)(a) grants everyone the right to have access to health care services, including reproductive health care, while section

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- 1 *Constitution of the Republic of South Africa*, 1996; Henceforth referred to as the Constitution.
 - 2 Jansen van Rensburg *Perspectives on Social Security* 1; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 15.
 - 3 Robinson 1996 *Word and Action* 9.
 - 4 For example the rights contained in sections 26, 27 and 29, namely the right to access to housing, the right to access to health care, food, water and social security and the right to education.
 - 5 Jansen van Rensburg *Perspectives on Social Security* 1.
 - 6 Henceforth referred to as the CRC. This convention was ratified by South Africa on 16 June 1995 which has bound South Africa to comply with the obligations contained therein. See Clark 2000 *SALJ* 342; Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 266; Heyns 1999 *De Jure* 206; Hopkins Dec 2001 *De Rebus* 27; Jansen van Rensburg and Olivier *International and Supra-national Law* 621; Liebenberg 1998 HYPERLINK http://sahrc.org.za/volume_v.PDF 13 Aug 2003; Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003; Lombard 2000 *Social Work* 134; Malherbe *Family* 380; Matthias 1996 *Social Work* 242; Sarkin 1998 *Human Rights Quarterly* 636; Sisk and Pronto 1995 *SAJHR* 439; Sloth-Nielsen 2000 *Stell LR* 261; Sloth-Nielsen 1996 *Acta Juridica* 6; Sloth-Nielsen and Van Heerden 1996 *SAJHR* 247-248; Van Bueren 1999 *SAJHR* 52; Van der Vyver *Constitutional Protection of Children and Young Persons* 266; Viljoen *The African Charter on the Rights and Welfare of the Child* 229; Viljoen 1999 *SALJ* 661. For a discussion on the CRC see 6.3 below.
 - 7 Henceforth referred to as the ICESCR. This convention was signed on 3 October 1994 and was due to be ratified on 10 December 1998. Cabinet has approved ratification, but to date this has not yet been effected due to technical problems. See Alston 1998 *ESRR* 2-3; Clark 2000 *SALJ* 342; Goosen *ea International and Comparative Standards* 538; Heyns 1999 *De Jure* 206; Hopkins Dec 2001 *De Rebus* 27; Jansen van Rensburg and Olivier *International and Supra-national Law* 621; Liebenberg 1995 *SAJHR* 359; Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003; Olivier and Kalula *Scope of Coverage* 126; Sarkin 1998 *Human Rights Quarterly* 634; Sisk and Pronto 1995 *SAJHR* 439. For a discussion on the ICESCR see 6.2 below.

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27(1)(b) grants access to sufficient food and water. The rights contained in section 27(1)⁸ are, according to section 27(2), to be realised progressively by the state through the taking of reasonable legislative and other measures within its available resources. Section 26 grants everyone the right to have access to adequate housing⁹ and places a duty on the state to take reasonable measures, within its available resources to achieve the progressive realisation of this right.¹⁰ According to section 29, everyone has the right to a basic education, including adult basic education¹¹ and to further education (which must be made progressively available and accessible through reasonable measures by the state).¹²

While the sections mentioned above will indirectly have an effect on the social security rights of children, section 28 relates directly to children. Section 28(1) grants every child the right to basic nutrition, shelter, basic health care services and **social services**,¹³ as well as the right to have a legal practitioner assigned to the child by the state, at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.¹⁴

An interesting phenomenon to be found in the Bill of Rights is the fact that, while the rights contained in sections 26 and 27 are internally qualified,¹⁵ the rights of children are not qualified in the same way or to the same extent.¹⁶

The High Court, in the case of *Grootboom and Others v Oostenberg Municipality and Others*,¹⁷ and the Constitutional Court in the case of *The Government of the Republic*

8 Namely the right to have access to health care, food and water and social security.

9 Section 26(1). The first reported case before the Constitutional Court which dealt with housing, namely *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC), is discussed in 4.3 below.

10 Section 26(2).

11 Section 29(1)(a).

12 Section 29(1)(b).

13 Section 28(1)(c). The rights contained in section 28 of the Constitution are included in section 11 of the *Children's Bill* (which, as the *Children's Act*, 2002, will come into operation on a date fixed by the President by proclamation).

14 Section 28(1)(h).

15 Such internal limitations are also termed an 'internal modifiers' or 'demarcations' of the rights in question due to the fact that they specifically demarcate the scope of such rights. De Waal, Currie and Erasmus *Bill of Rights Handbook* 164.

16 See Clark 2000 *SALJ* 344.

17 *Grootboom and Others v Oostenberg Municipality and Others* 2000 3 BCLR 277 (C); Henceforth referred to as *Grootboom v Oostenberg Municipality*.

of *South Africa and Others v Grootboom and Others*¹⁸ shed light on the meaning of these different provisions in sections 26(2) and 27(2) and the manner in which the courts are prepared to enforce socio-economic rights. The contentious issue regarding the question of whether the socio-economic rights of children are **unqualified and immediately realisable**¹⁹ was also addressed by the court.²⁰ This gives rise to the question whether the rights of children are accorded a special status relative to other rights.

In the case of *Grootboom v Oostenberg Municipality*, Davis J referred to the difference in the wording of sections 26 and 28. He indicated that section 28, which deals with the rights of children, does not contain the same internal limitations as the rights in section 26 and that section 28(1)(c) was set up as an internally unqualified constitutional right,²¹ with the implication that these internally unqualified rights could be extended to parents.²²

The Constitutional Court,²³ however, found that section 28 of the Constitution, is subject to the same internal limitations as those to which other socio-economic rights are subject.²⁴ The court emphasised the fact that the rights in question²⁵ had to be progressively realised. This means that the state does not have an obligation to realise these rights immediately, but that they should be progressively implemented, taking into account the resources available to the state.²⁶ After examining these factors, the Court found the housing programme in question to be unreasonable and ordered the state to provide the applicants with temporary housing.

In order to establish whether or not South Africa is complying with its constitutional and international law obligations in respect of the socio-economic rights of children,

18 *The Government of the Republic of South Africa and Others v Grootboom and Others* 2002 11 BCLR 1169 (CC); Henceforth referred to as *Government of the Republic of South Africa v Grootboom*.

19 Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 102.

20 *Government of the Republic of South Africa v Grootboom* para 72.

21 *Grootboom v Oostenberg Municipality* para 37.

22 For a comprehensive discussion of this issue, see 2.4 below.

23 *Government of the Republic of South Africa v Grootboom*.

24 For example the internal limitations in sections 26 and 27.

25 The right to access to housing in section 26, the right to access to social security in section 27 and children's social security rights in section 28.

26 *Government of the Republic of South Africa v Grootboom* para 95.

the definition of social security, the historical development of social security in South Africa, the constitutional imperative and other relevant constitutional provisions, and the role of the court in terms of *Soobramoney v Minister of Health (KwaZulu-Natal)*,²⁷ the *Grootboom* cases²⁸ and the *TAC* cases²⁹ will be discussed by way of a literature study. This study will further involve an analysis of the constitutional obligations on the state with regard to children's rights to social security and social assistance, as well as an international and regional comparative legal analysis of applicable instruments and the implications thereof for South Africa.

2 Description of social security

2.1 Introduction

There exists no uniform definition of social security.³⁰ Internationally, this concept is interpreted in very diverse ways.³¹ Each author, as well as each international and supranational document has its own definition.³² In certain countries, the law has defined the concept of 'social security', in others there will have been stated which arrangements in terms of national law belong to social security law and, in yet others, there is no legal description (or even notion) of social security.³³

According to the International Labour Organisation,³⁴ social security is defined as:

The protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise

27 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1996 (CC); Henceforth referred to as *Soobramoney v Minister of Health*.

28 *Grootboom v Oostenberg Municipality; Government of the Republic of South Africa v Grootboom*.

29 *Treatment Action Campaign and Others v Minister of Health and Others* 2002 4 BCLR 356 (T); Henceforth referred to as *TAC v Minister of Health* and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 10 BCLR 1033 (CC); Henceforth referred to as *Minister of Health v TAC*.

30 Dekker and Olivier *Informal Social Security* 562; Jansen van Rensburg 1999 *De Jure* 289; Jansen van Rensburg *Perspectives on Social Security* 1; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 16; Olivier *Concept of Social Security* 24; Van der Merwe 2000 *Development Southern Africa* 717.

31 Pieters *Introduction to Social Security* 1.

32 Jansen van Rensburg 1999 *De Jure* 289; Pieters *Introduction to Social Security* 1.

33 Some definitions emphasise the compensation of social risks, others describe social security in terms of the involvement of the state, employers and/or the private sector or in terms of the aim and/or benefits or financing of the system. It would, however, seem that the general purpose of social security is solidarity. See Euzeby 1998 *International Social Security Review* 4; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 16-17; Pieters *Introduction to Social Security* 1.

34 Henceforth referred to as the ILO; Social Security (Minimum Standards) Convention 102 of 1952.

will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children.

This definition is criticised as a description concerning the content of intended schemes rather than the content of social security.³⁵ As this description departs from a number of identified risks, there exists the danger that it leaves insufficient room for development regarding new social problems that may arise.³⁶ In the light of the above criticism, Pieters³⁷ suggests that social security should be perceived as the body of arrangements shaping the solidarity with people facing (the threat of) a lack of income from paid labour or facing particular costs. While this broader definition leaves more room for development, it is, however, not particularly applicable to the South African context. Pieters' definition focuses on the threat of unemployment, thereby implying that the normal state of affairs assumes that the majority of the population is in formal employment, which is not the case in South Africa.

The first attempt, in South Africa, to describe a comprehensive social security system, was in the White Paper on Social Welfare.³⁸ According to this document:

Social security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children.³⁹ The domains of social security are: poverty prevention, poverty alleviation, social compensation and income distribution.⁴⁰

In the glossary, the White Paper on Social Welfare goes on to identify unemployment, ill health, maternity, child rearing, widowhood, disability and old age as contingencies of social security and identifies four categories of benefits, namely benefits associated

35 Pieters *Introduction to Social Security* 1; Strydom *Introduction* 4.

36 For example the AIDS pandemic in South Africa. Olivier warns against too narrow a definition of social security and is of the opinion that South Africa should adopt a wider social protection approach. Olivier *Concept of Social Security* 25. See also Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 17; Pieters *Introduction to Social Security* 1.

37 Pieters *Introduction to Social Security* 4.

38 White Paper on Social Welfare Government Notice 1108 in *Government Gazette* 18166 of 1997-08-08; Henceforth referred to as the White Paper on Social Welfare.

39 The fact that the maintenance of children is listed as a separate contingency is indicative of the importance which the South African government places on the social security rights of children.

40 White Paper on Social Welfare Chapter 7 para 1.

with old age, disability, child and family care and poor relief. It however omits medical care and employment injury, which are traditionally part of the core of the concept of social security, from its list of contingencies.⁴¹

This definition differs from that of both Pieters and the ILO. According to Pieters and the ILO, social security consists of public measures while the definition in the White Paper on Social Welfare also includes private measures.⁴² The White Paper on Social Welfare, therefore, gives a wider definition and can also be described as social protection in the wide sense.⁴³

This definition of social security in the White Paper on Social Welfare constitutes a welcome development in South African law. Due to the fact that South Africa, because of historical and other reasons, has its own unique social and economic problems, it is of great importance that South Africa develops its own definition of this concept.⁴⁴ The South African government must, therefore, be careful not to adopt a description which merely reflects specific risks, so as to prevent future limitation of such a definition in accommodating South Africa's unique risks.⁴⁵ It is submitted that the fact that the White Paper's definition includes private as well as public measures is particularly applicable to the South African situation where, with the state being unable to provide for all those in need,⁴⁶ people rely on assistance from their families and the community.⁴⁷

From the above definitions it is evident that the traditional concept of social security is employment-centred.⁴⁸ Due to the fact that many developing countries⁴⁹ have a high

41 Olivier *Concept of Social Security* 30.

42 Jansen van Rensburg 1999 *De Jure* 290; Moore *ea Concept of Social Security* 10.

43 Jansen van Rensburg 1999 *De Jure* 290; Moore *ea Concept of Social Security* 10.

44 Jansen van Rensburg 1999 *De Jure* 290; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 18.

45 Jansen van Rensburg 1999 *De Jure* 290.

46 For example, children between the ages of nine and 18 are not eligible for the child support grant, and the unemployed, who have never been in formal employment, do not benefit from unemployment insurance.

47 This is referred to by Dekker and Olivier as 'informal social security'. See Dekker and Olivier *Informal Social Security* 562-575.

48 Committee of Inquiry *Consolidated Report* 40.

49 Some of the characteristics of developing countries, including South Africa, which make the traditional concept of social security inappropriate include the extent of poverty and deprivation to which millions of people are exposed, the current exclusion of most of these people from the existing social security system, the rise of informal employment and the exclusion of the

rate of unemployment, this traditional concept of social security is not always applicable to such countries.⁵⁰ For this reason, the concept of social protection has originated.⁵¹ The United Nations Commission on Social Development gives the following description of social protection:⁵²

Social protection embodies society's responses to levels of either risk or deprivation...These include secure access to income, livelihood, employment, health and education services, nutrition and shelter.

The UN Commission further notes that the ultimate purpose of social protection is human development which is done by increasing capabilities and opportunities.⁵³ The aim of social protection is to provide at least minimum standards of well-being to people in dire circumstances so as to enable them to live with dignity.⁵⁴ It should, however, not be seen as a residual policy function to assure the welfare of the poorest, but as a foundation at societal level for promoting social justice and social cohesion, developing human capabilities and promoting economic dynamism and creativity.⁵⁵ According to Olivier,⁵⁶ social protection can be seen as a general system of basic social support, which is no longer linked to the regular employment relationship, and which is based on the belief that society as a whole should take responsibility for its weaker members.

informally employed from the social security system, long-term unemployment and the absence of sufficient employment creation. Olivier *Concept of Social Security* 26-27.

50 According to Olivier, this Western-orientated concept of social security may also not be able to capture the characteristics of the African context sufficiently. See Olivier *Concept of Social Security* 24.

51 Committee of Inquiry *Consolidated Report* 40. The concept of social protection was already made mention of in the glossary of the White Paper on Social Welfare, where it was equated with social security.

52 Committee of Inquiry *Consolidated Report* 40.

53 This is in line with the preventative approach to social security.

54 This is also the aim of social assistance. Social protection differs from social assistance in that it is much broader. It does not aim to provide this minimum standard of living by providing people with hand-outs, but rather by increasing their capabilities and providing them with opportunities to help themselves. See 2.2 below. One way of ensuring that each member of society is able to live with dignity is the provision of a core minimum to which each person is entitled. In this regard see discussion of the justiciability of socio-economic rights in 4 and the international law position in 6.2 and 6.3 below.

55 Committee of Inquiry *Consolidated Report* 40; Olivier and Mpedi "Extending Social Protection" 1-2.

56 Olivier *Concept of Social Security* 26.

A broad conceptualisation of social protection has much merit for South Africa.⁵⁷ Firstly, it incorporates developmental programmes which are appropriate to a developing country such as South Africa.⁵⁸ Secondly, it provides a framework for integrating existing and proposed social and economic policies. These wider functions and objectives of social protection are better able to address current social and economic problems, new risks and increased vulnerabilities. Finally, social protection has the potential to integrate and link private, public and community sector interventions and benefit systems.⁵⁹

For these reasons, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa⁶⁰ has made use of the term comprehensive social protection.⁶¹ The Committee of Inquiry makes use of the following definition of comprehensive social protection:⁶²

Comprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.

Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.

This concept of CSP operates by means of a built-in package of social protection interventions and measures⁶³ such as measures to address 'income poverty',⁶⁴ measures

57 Committee of Inquiry *Consolidated Report* 40; Olivier and Mpedi "Extending Social Protection" 2; Olivier *Concept of Social Security* 27.

58 For example, it increases opportunities for people doing 'informal' work, such as domestic work, to gain access to social protection coverage. Domestic workers have recently been included in the Unemployment Insurance Fund, although they are still excluded from the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

59 Which is of particular importance to South Africa where, as mentioned above, reliance is not only made on the state, but also on the family and the community. See Committee of Inquiry *Consolidated Report* 40; Olivier *Concept of Social Security* 27.

60 Henceforth referred to as the Committee of Inquiry.

61 Henceforth referred to as CSP.

62 Committee of Inquiry *Consolidated Report* 41.

63 Olivier and Mpedi "Extending Social Protection" 2; Olivier *Concept of Social Security* 28.

64 By the provision of a minimum income.

to address 'capability poverty',⁶⁵ measures to address 'asset poverty'⁶⁶ and measures to address 'special needs'.⁶⁷ The advantage of this package approach is that it enables a balance to be developed between measures focusing on income, capability and asset poverty.⁶⁸ In general, the Committee of Inquiry is of the opinion that these components need to be established as an 'as-universal-as-possible' package of income transfers, services and access provided in a non work-related manner and whose availability is not primarily dependent on an ability to pay.⁶⁹ According to the Committee, a minimum level of provision should be made available to everyone.⁷⁰ It is submitted that this concept of social protection has much merit for a developing country such as South Africa, where income poverty is not the only form of poverty that needs to be addressed, but where many members of society do not have access to basic services or have never developed their capacity to generate an income.

It has also been suggested that a shift from curative to preventative social security has become necessary. This involves a three-tiered approach, including firstly prevention, secondly repair and, finally, compensation.⁷¹ It must first be attempted to prevent damage.⁷² Should damage occur, it must be attempted to repair the situation⁷³ before compensation⁷⁴ is offered as the last resort.⁷⁵ This approach deals with the causes of social insecurity⁷⁶ rather than merely the effects.⁷⁷

65 By the provision of certain basic services.

66 By the provision of income-generating assets.

67 For example disability or child support.

68 Olivier and Mpedi "Extending Social Protection" 2.

69 Committee of Inquiry *Consolidated Report* 41-42.

70 The key components hereof relate to the eventual introduction of a basic income grant, the immediate extension of the child support grant to gradually cover all children under the age of 18, maintenance of the state old age grant, free health care, free primary and secondary education, free water and sanitation and electricity (up to a certain basic level), access to affordable and adequate housing, access to jobs and skills training and a reformed disability grant, foster care grant and child dependence grant.

71 See Jansen van Rensburg *Perspectives on Social Security* 2; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 45.

72 Through, for example, employment creation policies, health and safety regulations and preventative health care. Olivier *Concept of Social Security* 32.

73 This can be done by means of labour market and social integration. Olivier *Concept of Social Security* 32.

74 Examples of such compensation include compensation in terms of the *Special Pensions Act* 69 of 1996, which makes provision for pensions to individuals or their dependants 'who have made sacrifices or who have served the public interest in the establishment of a democratic constitutional order' and in terms of the *Demobilisation Act* 99 of 1996, which makes provision for gratifications to people who were members of the *Azanian People's Liberation Army* and *uMkhonto we Sizwe*.

75 Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 45.

76 For example, amongst others, social exclusion and marginalisation.

A further concept which is recognised in the realm of social security is the 'minimum core obligation'.⁷⁸ According to the United Nations Committee on Economic, Social and Cultural Rights, such a minimum core obligation exists to ensure the satisfaction of, at the very least, minimum essential levels of social security rights.⁷⁹ A minimum core obligation is, however, not universal. There is a distinction between relative (state-specific) core minimums and absolute core minimums.⁸⁰ It is suggested that South African courts, when deciding matters relating to socio-economic rights, should start from the absolute core minimum as the bottom-line requirement and respond to claims accordingly.⁸¹

2.2 *The elements of social security*

Section 27 of the Constitution refers to the concepts of both social security and social assistance. This raises the question whether these concepts have the same meaning, or whether they have a specific relationship with one another.⁸² Various authors, as well as the ILO, are of the opinion that social security⁸³ and social assistance⁸⁴ should be viewed as components of a social security system.⁸⁵

The White Paper on Social Welfare describes the four elements of social security as private savings, social insurance, social assistance and social relief.⁸⁶ The first

77 Olivier *Concept of Social Security* 32.

78 As referred to by the United Nations Committee on Economic, Social and Cultural Rights General Comment 3 para 9.

79 Scott and Alston 2000 *SAJHR* 249.

80 Canada, as a developed country will, for example, have a core minimum which extends considerably beyond the absolute core minimum while a developing country like Mali's core minimum will go no further than this absolute core. Scott and Alston 2000 *SAJHR* 250.

81 Scott and Alston 2000 *SAJHR* 250. For a discussion on the application of the core minimum obligation approach by the courts in *Government of the Republic of South Africa v Grootboom* and *Minister of Health v TAC* see 4.3 and 4.5 below and for a discussion on the international approach to this concept, see 6.2 and 6.3 below.

82 Jansen van Rensburg 1999 *De Jure* 290.

83 According to the White Paper on Social Welfare, social insurance and social assistance are viewed as components of the social security system.

84 Also referred to as social welfare. Strydom *Introduction* 7.

85 Pieters *Introduction to Social Security* 5; ILO *Introduction to Social Security* 3.

86 See Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 25-26; Lund 1995 *Indicator South Africa* 31; Lund 1999 *Development Southern Africa* 64; Moore *ea Concept of Social Security* 11; SAHRC 4th *Economic and Social Rights Report* 172; White Paper on Social Welfare Chapter 7 Para 2.

component, private savings, consists of voluntary savings by individuals for unforeseen circumstances, such as retirement and chronic sickness.⁸⁷

Social insurance constitutes the second component. The ILO describes social insurance as contributions made by members of solidarity systems to provide for certain risks.⁸⁸ These contributions may be voluntary,⁸⁹ but are mostly obligatory.⁹⁰ Such schemes are often supported by government and may be financed via taxation, without necessarily depriving them of their social insurance character.⁹¹ The White Paper on Social Welfare describes social insurance as joint contributions by employers and employees to pension or provident funds, or social insurance covering other unexpected events.⁹² Government may also contribute to social insurance covering accidents at work⁹³ and unemployment.⁹⁴ As is evident from the above description, the South African social insurance system is largely linked to formal employment.⁹⁵ This results in a situation whereby the rural and urban poor and the informally employed are to a large extent being excluded and marginalised.⁹⁶

87 Examples of private savings in South Africa include private pensions and medical aids. See Jansen van Rensburg 1999 *De Jure* 290; Moore *ea Concept of Social Security* 11; SAHRC 4th *Economic and Social Rights Report* 172.

88 Because social insurance is contributory, it covers a relatively small percentage of the population. Examples of social insurance include occupational retirement insurance to cover the risk of retirement and medical insurance to cover the risk of sickness. It should be noted that the ILO does not consider private savings and private insurance to be part of social security. Its definition limits social security to protection afforded by society. However, the definition in the White Paper on Social Welfare is broad enough to include this strand of social security. See ILO *Introduction to Social Security* 3; Miller 1988 *CILJSA* 169; Naidoo 1999 *South African Labour Bulletin* 54; Pieters *Introduction to Social Security* 5; Strydom *Introduction* 11; Van der Berg 1997 *Development Southern Africa* 489.

89 For example, contributions to pension funds.

90 For example, contributions to unemployment insurance. See Asher *Finance and Tax* 598; Liebenberg 2001 *SAJHR* 237; Van den Berg 1997 *Development Southern Africa* 491; Van der Merwe 2000 *Development Southern Africa* 718.

91 An example hereof can be found in the Swedish system of notionally private unemployment insurance. Although the system is state-regulated and 90 per cent of the funding comes from government, its administration is private. In South Africa, the Unemployment Insurance Fund is self-financing, but the state intervenes to cover any deficit. See Asher *Finance and Tax* 598; Luiz 1995 *Development Southern Africa* 591; Pieters *Introduction to Social Security* 5; ILO *Introduction to Social Security* 3.

92 White Paper on Social Welfare Chapter 7 Para 2(b). See Moore *ea Concept of Social Security* 11; Naidoo 1999 *South African Labour Bulletin* 53; SAHRC 4th *Economic and Social Rights Report* 172.

93 For example compensation in terms of the *Compensation of Occupational Injuries and Diseases Act* 130 of 1993.

94 For example compensation in terms of the *Unemployment Insurance Act* 63 of 2001.

95 Olivier and Mpedi "Extending Social Protection" 3.

Children cannot contribute to social insurance schemes themselves, but they are, however, able to benefit from such schemes. An example hereof is a parent, as the breadwinner, insuring his or her life. Should the risk of the parent dying materialise, the children will be paid out by the insurer. In terms of the *Compensation for Occupational Injuries and Diseases Act*,⁹⁷ a child under the age of 18 years of the deceased employee in question⁹⁸ can benefit from the fund.⁹⁹ The *Unemployment Insurance Act*¹⁰⁰ also makes provision for the child of a deceased contributor to be entitled to dependant's benefits.¹⁰¹

The third component, namely social assistance, can be defined as a scheme which is generally financed from the general revenue of the country rather than individual contributions, with statutory scales of benefits adjusted according to a person's means.¹⁰² According the ILO, social assistance consists of benefits granted to people who need them. These schemes are financed by means of government funds and are subject to a means test¹⁰³ of the potential beneficiary of such assistance.¹⁰⁴ According

96 Olivier and Mpedi "Extending Social Protection" 3. The situation has somewhat improved by, for example, the inclusion of domestic workers as members of the Unemployment Insurance Fund.

97 *Compensation for Occupational Injuries and Diseases Act* 130 of 1993; Henceforth referred to as COIDA.

98 Or the child of his or her spouse, in terms of section 1(xv)(c) of COIDA.

99 In terms of COIDA, each child under the age of 18 years is entitled to a monthly pension equal to 20 per cent of the pension which would have been payable to the employee for 100 per cent disablement, provided that the total pension payable to the widow or widower and children does not exceed the amount that would have been paid to the employee if 100 per cent disabled. Section 54(1)(c)(i) of COIDA. See Smit *Employment Injuries and Diseases* 470-471.

100 *Unemployment Insurance Act* 63 of 2001; Henceforth referred to as the UIA.

101 In terms of section 30 of the UIA, if there is no surviving spouse or life partner, or if the spouse of life partner of the deceased has not made an application for benefits within six months of the contributor's death, a dependent child of the deceased contributor is entitled to benefits if the application has been duly made. The benefit payable to the dependent child is the unemployment benefit that would have been payable to the contributor in terms of the UIA had the contributor been alive. See Van Kerken and Olivier *Unemployment Insurance* 452.

102 In other words, social assistance provides support for persons based upon need rather than contributions. See Asher *Finance and Tax* 597; Naidoo 1999 *South African Labour Bulletin* 53; Moore *ea Concept of Social Security* 15; Strydom *Introduction* 7; Van der Berg 2001 *Social Work* 125; Van der Merwe 2000 *Development Southern Africa* 718.

103 A means test entails that the institution responsible for the administration of the funds evaluates the income and the assets of the person applying for assistance in order to decide whether the person's means are below the stipulated minimum. Should that be the case, the person will qualify for assistance. See Olivier and Mpedi "Extending Social Protection" 3; Strydom *Introduction* 8.

104 Examples of social assistance include benefits provided by the state to groups such as people with disabled children, who do not have the means to provide for their children's needs themselves. See ILO *Introduction to Social Security* 4-5; Pieters *Introduction to Social Security* 6; SAHRC 4th *Economic and Social Rights Report* 172; Strydom *Introduction* 7; Van Bueren 1995 *Development Southern Africa* 580.

to the White Paper on Social Welfare,¹⁰⁵ social assistance consists of non-contributory and income-tested benefits provided by the state to groups such as people with disabilities, elderly people and unsupported parents and children who are unable to provide for their own minimum needs.¹⁰⁶ In South Africa, social assistance has taken the form of social grants.¹⁰⁷ Section 27(1)(c) of the Constitution also refers to such a qualification by limiting the right to social assistance to people who are unable to support themselves and their dependants.¹⁰⁸ In South Africa, where poverty is rife,¹⁰⁹ social assistance¹¹⁰ plays a fundamental role in poverty alleviation by providing a safety net for the impoverished.¹¹¹ The underlying purpose of social assistance is to ensure that everyone has sufficient income (or in-kind benefits) to meet basic subsistence needs and to live with human dignity.¹¹²

Where there is little or insufficient social insurance,¹¹³ social assistance is legitimately expected to fill the gap.¹¹⁴ While beneficiaries of social assistance will be chosen by policy-makers, social insurance only covers the insured. It has, however, become possible to compel the establishment as well as the membership of funds.¹¹⁵ This convergence of social insurance and social assistance schemes is increasingly leading to a variety of mixed systems.¹¹⁶ This is a logical result of the fact that the same contingency often has both social insurance and social assistance components.¹¹⁷

105 White Paper on Social Welfare Chapter 7 Para 2(c).

106 To receive a grant for children, the parent or guardian must comply with the internal limitation set down by the White Paper on Social Welfare, namely that he or she must be unable to provide for their own minimum needs. Social assistance is thus not available to anyone with children, but only to people who pass a means test which indicates that they cannot provide for their own minimum needs.

107 Examples of social grants include the child support grant, the foster child grant and the care dependency grant. See Moore *ea Concept of Social Security* 12; White Paper on Social Welfare Chapter 7 Para 2(c).

108 This constitutional provision has a similar internal limitation as the White Paper on Social Welfare, namely that social assistance is only available to people who are unable to support themselves and their dependants.

109 According to Sloth-Nielsen, six out of every ten children live in poverty. Sloth-Nielsen 2001 *SAJHR* 213.

110 In the form of welfare programmes.

111 Liebenberg 2001 *SAJHR* 236; Sloth-Nielsen 2001 *SAJHR* 213.

112 Liebenberg 2001 *SAJHR* 240.

113 For example, in the case of unemployment or maternity benefits.

114 Jansen van Rensburg *Perspectives on Social Security* 4.

115 For example, retirement schemes.

116 For example social insurance has in some instances been extended to provide more universal coverage.

South Africa does not have a mixed system with regard to children. The social security system relating to children takes the form of grants. This means that children can only rely on social assistance as no direct social insurance measures exist for children. Despite this fact, however, children are able to benefit indirectly from social insurance, for example as dependants in terms of the COIDA and the UIA.¹¹⁸ The question that can thus be raised is whether the state is, in fact, complying with its constitutional obligations in respect of children. While it is clear that children do benefit from social insurance, this is only indirectly. Section 27(1)(c) grants everyone¹¹⁹ the right to have access to social security and, as has been indicated above, social insurance is a component of social security.

The final component is social relief, which consists of short-term measures taken by the state to tide people over a particular individual¹²⁰ or community crisis¹²¹ that has caused them to be unable to meet their most basic needs.¹²² It is also non-contributory and needs-tested.¹²³

2.3 Historical analysis of social security rights of children in South Africa

Social security has been one of the central features of social development in the twentieth century and, consequently, exists in most countries today.¹²⁴ Social security systems in different states are, however, very differently structured and developed and, as a rule, always depend on the level of development of the state in question.¹²⁵ Research shows that the social security share in GDP is determined by the degree of

117 Asher *Finance and Tax* 598; Jansen van Rensburg *Perspectives on Social Security* 4; Olivier *Concept of Social Security* 30.

118 See discussion above.

119 Which includes children.

120 An example of an individual crisis would be the death of the breadwinner and consequent lack of sufficient funds to sustain the surviving dependants, including children. Strydom *Introduction* 12.

121 Community crises which have prompted government to provide social relief are primarily natural disasters such as floods, hailstorms, tornadoes and fires that have severely damaged or demolished property and crops of communities. Strydom *Introduction* 12.

122 SAHRC 4th *Economic and Social Rights Report* 172; Strydom *Introduction* 14.

123 Moore *ea Concept of Social Security* 12; SAHRC 4th *Economic and Social Rights Report* 172; White Paper on Social Welfare Chapter 7 Para 2(d).

124 Ben-Israel 1995 *Comparative Labour Law Journal* 140.

125 Luiz 1995 *Development Southern Africa* 580; Van Bueren 1995 *Development Southern Africa* 580; Von Maydell *Fundamental Approaches and Concepts* 1031.

economic development, as well as the number of years that a system has been in place.¹²⁶

Under apartheid, a social security system that was relatively advanced for a middle-income country was created for the white population.¹²⁷ This unique system of welfare provision, a result of the demands of a racist political agenda had a narrow definition of welfare, which excluded broader welfare provision such as education, health and housing.¹²⁸ The expansion of this system to other groups has put South Africa in the uncommon position for a semi-industrialised country of having the trappings of a modern welfare state.¹²⁹

In the past, discrimination and differentiation were important characteristics of the social security system.¹³⁰ Under apartheid, race became the fundamental basis for both political and economic advancement in our society.¹³¹ The levels of financing of welfare programmes in South Africa were dependent on race¹³² and the systematic violation of the economic, social and cultural rights of black South Africans was an

126 Jansen van Rensburg *ea* *Issues of principle 2*; Olivier *ea* *Social Insurance and Social Assistance* 11. Due to the fact that most Third World countries have a low degree of economic development and have relatively new social security systems (because they are still developing countries), the social security share in the GDP is relatively low.

127 Few semi-industrialised countries have social security systems that include such large programmes of social assistance as South Africa. Another way of placing South African social security in perspective is to compare it to the development of social security in today's industrial countries. Though per capita income in South Africa is comparable to that of the first welfare state, Germany, in the first decades of this century, when social security was still in its infancy, the country's social security system is far more advanced. If one allows for the fact that South African occupational insurance is really a form of social insurance that does not flow through the budget, social security expenditure ratios have reached levels only attained by Western European welfare states in the period since the Second World War. Naidoo 1999 *South African Labour Bulletin* 54; Van der Berg 1997 *Development Southern Africa* 488.

128 Bhorat 1995 *Development Southern Africa* 595.

129 Van der Berg 1997 *Development Southern Africa* 481.

130 See Liebenberg 1998 HYPERLINK http://www.sahrc.org.za/volume_v.PDF 13 Aug 2003; Liebenberg 2001 *SAJHR* 242; Lombard 2000 *Social Work* 124; Luiz 1995 *Development Southern Africa* 585; Mhone *Socio-economic Context and Social Policy Needs* 8; Motala 1995 *SALJ* 69; Van der Berg 2001 *Social Work* 125; Van der Merwe 2000 *Development Southern Africa* 726; Vorster and Rossouw 1996 *Social Work* 296.

131 De Vos 2001 *SAJHR* 263.

132 Benefits for black people were historically far lower than those for people of other races. See Ardington and Lund 1995 *Development Southern Africa* 558; Clark 2000 *SALJ* 345; Liebenberg 1998 HYPERLINK http://www.sahrc.org.za/volume_v.PDF 13 Aug 2003; Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003; Liebenberg 2001 *SAJHR* 242; Lund 1995 *Indicator South Africa* 44; Naidoo 1999 *South African Labour Bulletin* 54; Sloth-Nielsen 2001 *SAJHR* 211-212; Strydom *Introduction* 19; Van der Berg 1998 *Social Work* 36-37.

integral part of apartheid.¹³³ Black people suffered gross inequalities in access to social services, resources and economic opportunities and black communities were deliberately underdeveloped.¹³⁴ In the 1920's and 1930's, maintenance grants for children¹³⁵ hardly reached African parents.¹³⁶ The main reasons for exclusion of black children from the social rights which existed for white children lay in the wider exclusion on black people from the state, and their non-incorporation into civil structures as opposed to the inclusion and incorporation of whites.¹³⁷ Benefits mostly went to white people, followed by coloured and Indian people.¹³⁸ No maintenance grants were given to rural Africans, whose children were expected to be cared for by guardians and chiefs.¹³⁹ Urban Africans were excluded on the basis that they were not easily discernible from their rural counterparts.¹⁴⁰ There were furthermore, great disparities in the per capita expenditure on the education of white and black children.¹⁴¹

133 For example, in terms of the *Black Land Act* 27 of 1913 and the *Development Trust and Land Act* 18 of 1936, black people were dispossessed of their land and forcibly removed to over-crowded reserves. The African population was restricted to 13% of the total land area of South Africa. The social structure of the African family also suffered under this system. The migrant labour system caused much suffering by breaking up many African families. Men lived in appalling conditions in mining compounds, while women and children were left to survive in the impoverished rural areas. Liebenberg 1998 HYPERLINK http://www.sahrc.org.za/volume_v.PDF 13 Aug 2003; Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003.

134 Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003.

135 In terms of the *Children's Protection Act* 25 of 1913, which entrenched the differential treatment of children in South Africa not only according to 'specific categories of need', but also according to categories of class, colour and gender. Chrisholm 1990 *South African Historical Journal* 100.

136 In fact, hardly any social assistance was available to Africans. In 1943, only 4 per cent of all social assistance spending in South Africa was on Africans. See Ardington and Lund 1995 *Development Southern Africa* 559; Van der Berg 1997 *Development Southern Africa* 486; Van der Berg 1998 *Social Work* 37.

137 Chrisholm 1990 *South African Historical Journal* 103-104.

138 Ardington and Lund 1995 *Development Southern Africa* 559; Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003.

139 This caused rural families to suffer particularly from lack of access to resources and services. Bhorat 1995 *Development Southern Africa* 595; Clark 2000 *SALJ* 345.

140 Bhorat 1995 *Development Southern Africa* 596.

141 It is estimated that in 1974 to 1975, the estimated per capita expenditure on white children in primary and secondary schools was R605, compared with the amount of R39 which was spent on each black child. Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003.

Because white persons were given preferential access to certain jobs under apartheid,¹⁴² most of their social security needs could be met through social insurance. Social assistance was set up as a safety net for poor whites who, in the wider South African context were, however, not the poorest.¹⁴³ Such a safety net for groups of other races was, in contrast, initially non-existent.¹⁴⁴ Through the decades as apartheid became diluted, however, benefits were gradually extended to other race groups in an attempt to unify benefit levels.¹⁴⁵ In the period since 1972 social security has moved towards a trend of re-incorporation and reduced inequality.¹⁴⁶ This has resulted in an unusually advanced, yet fragmented and inequitable, social security system for a middle-income country such as South Africa.¹⁴⁷

Despite South Africa's conversion to democracy, poverty and inequality which, according to Olivier and Mpedi,¹⁴⁸ can be traced back to South Africa's apartheid past, continue to wreak havoc on society and its social protection system.¹⁴⁹ This situation, according to the South African Human Rights Commission,¹⁵⁰ cannot be accepted. Despite South Africa's past, the state is under an obligation to comply with its socio-economic obligations in terms of the Constitution, which is, at present, not the situation. Even under the new constitutional dispensation, and although the state is

142 This, as a product of both statute and convention, was known as job reservation. Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003.

143 SAHRC 4th *Economic and Social Rights Report* 230; Van der Berg 1997 *Development Southern Africa* 488.

144 Until the 1970's, this racial inequality was the dominant feature of the South African social security system. SAHRC 4th *Economic and Social Rights Report* 230; Van der Berg 1997 *Development Southern Africa* 482.

145 Vorster and Rossouw 1997 *Social Work* 315.

146 This was largely due to pressure on the Nationalist Government by the international community to abandon its apartheid policy. Despite this, poverty in South Africa still has strong racial dimensions. According to the United Nations Development Programme, 61 per cent of Africans are poor compared with one per cent of whites, and South Africa has among the highest income inequalities in the world. Furthermore, significant numbers of the population lack adequate access to basic social services such as quality health care, safe water and education. See Liebenberg 2001 *SAJHR* 234-235; Strydom *Introduction* 19; Van der Berg 1997 *Development Southern Africa* 487.

147 Today there still exists racial discrimination in the scope and level of benefits. See Liebenberg 1998 HYPERLINK http://www.sahrc.org.za/volume_v.PDF 13 Aug 2003; Liebenberg 2001 *SAJHR* 243; SAHRC 4th *Economic and Social Rights Report* 211; Van der Berg 1997 *Development Southern Africa* 484; Vorster and Rossouw 1996 *Social Work* 296.

148 Olivier and Mpedi "Extending Social Protection" 5.

149 According to Liebenberg, apartheid has left a legacy of deep poverty and inequality in the country. Liebenberg 1998 HYPERLINK http://www.sahrc.org.za/volume_v.PDF 13 Aug 2003; Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003.

150 SAHRC 4th *Economic and Social Rights Report* 211.

gradually advancing socio-economic rights, the system still denies those most in need of assistance their constitutional rights.¹⁵¹

3 Social security under the constitutional dispensation

3.1 *The Preamble and the supremacy of the Constitution*

Fundamental reformation of the social security system is a way in which historical injustices¹⁵² can be repaired.¹⁵³ This reformational approach is embodied in the provisions of the Constitution.¹⁵⁴ The preamble of the Constitution declares, amongst other things, that the Constitution has the aim of healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights, as well as improving the quality of life of all citizens¹⁵⁵ and freeing the potential of each person. These provisions indicate a commitment to guarantee everyone in society, and especially children, as a particularly vulnerable group, a certain minimum standard of living, below which they will not again be allowed to fall, and are a clear indication of the state's willingness to concretise the right to access to social security.¹⁵⁶

The supremacy of the Constitution is entrenched in section 2. Section 2 recognises the Constitution as the supreme law of the Republic. Any law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled.¹⁵⁷ When read together with the provisions relating to social security,¹⁵⁸ the conclusion

151 SAHRC 4th *Economic and Social Rights Report* 211 and 231. See also Olivier and Kalula *Scope of Coverage* 127.

152 Such as apartheid and the injustices which took place under it, as discussed in 2.3 above, which took place in South Africa. It is for this reason that the preamble states that the people of South Africa 'recognise the injustices of our past' and adopt the 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 human rights'.

153 Jansen van Rensburg 1999 *Journal for Juridical Science* 44.

154 Jansen van Rensburg 1999 *Journal for Juridical Science* 44.

155 This can be done by, *inter alia* alleviating poverty and suffering of children.

156 The trend in constitutional interpretation is to utilise the preamble whenever it may cast light on the meaning of a constitutional provision. See Committee of Inquiry *Consolidated Report* 49; De Ville 1994 *SAPL* 289; Heyns 1999 *De Jure* 196; Jansen van Rensburg 1999 *De Jure* 291.

157 Ngweni 1996 *Acta Juridica* 145.

158 For example the right to access to housing in section 26, the right to access to health care, food, water and social security in section 27, children's rights in section 28 and the right to education in section 29, all of which will be discussed in 3.3 to 4.6.2 below.

can be reached that these fundamental rights are in fact justiciable, as section 2 expressly states that the obligations imposed by the Constitution must be fulfilled.¹⁵⁹

3.2 *The role of constitutional values*

According to section 39(1) of the Constitution, a court, tribunal or forum must, when interpreting the Bill of Rights, promote the values that underlie an open and democratic society based on human dignity, equality and freedom.¹⁶⁰ It thus follows that these values will have to be promoted when interpreting socio-economic rights.¹⁶¹ According to the *Grootboom* case:¹⁶²

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter.

In order to give meaning to the provisions of the Constitution, the values upon which the Constitution is founded will themselves have to be given meaning.¹⁶³ These values¹⁶⁴ must therefore be used in the interpretation of the right to social security.¹⁶⁵ The extent to which these rights are justiciable will depend on the Constitutional Court's interpretation of them.¹⁶⁶ The situation does, however, exist that values, like rights, are not absolute and have to be balanced against other values and interests.¹⁶⁷

159 This means that government is under an obligation to put systems in place to ensure that every South African has access to social security. See Committee of Inquiry *Consolidated Report* 49; Jansen van Rensburg 1999 *De Jure* 292; Naidoo 1999 *South African Labour Bulletin* 56; Ramaphosa 1996 *Finance Week* 24.

160 Section 39(1)(a). According to *Baloro v University of Bophutatswana* 1995 8 BCLR 1018 (B), at para 61, provisions of the Constitution are to be given a meaning that accords with its underlying values. Wolhuter 1996 *SAPL* 512-527.

161 According to Venter, all of the values must be considered in any interpretation of the Constitution, despite the fact that the values themselves may be in conflict with one another. Venter 1998 *PER* 16.

162 *Government of the Republic of South Africa v Grootboom* para 23.

163 This, according to Ferreira is the duty of the courts. Ferreira 1999 *SALJ* 286. See also Henderson 1998 *SALJ* 218; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 69.

164 Along with the meaning and content bestowed on them by the courts.

165 Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 67 and 70.

166 In *S v Zuma* 1995 4 BCLR 401 (CC), henceforth referred to as *S v Zuma*, para 17, Kentridge AJ discussed, with reference to the interim Constitution, the need for a perpetual consciousness of the values underlying the Constitution. See Henderson 1998 *SALJ* 217; Jansen van Rensburg 1999 *De Jure* 292; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 68.

167 Equality and freedom, for example, are two concepts which are continuously in competition with one another. This can be illustrated by way of example. Disadvantaged persons can insist on certain social security benefits based on the value of the achievement of equality, while advantaged persons with vested interests in the extension of freedom can insist that they should not have to contribute to a universal social security system. In this regard, a distinction needs to

Section 1 of the Constitution determines that the Republic of South Africa is one sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.¹⁶⁸ These values are explicitly spelled out in certain sections of the constitutional text.¹⁶⁹ Other values included in this section are non-racism, non-sexism,¹⁷⁰ the supremacy of the Constitution, the rule of law,¹⁷¹ universal adult suffrage and a multi-party system of democratic government.¹⁷² South Africa thus finds itself with a supreme Constitution with certain distinctive values and principles underpinning it and enshrined in it.¹⁷³ Unlike the other provisions of the Constitution, which generally require a two-thirds majority in the National Assembly for their amendment,¹⁷⁴ section 1 requires a 75 per cent majority.¹⁷⁵ It thus differs from the other rights in the Constitution in a formal sense.¹⁷⁶ The fact that this section requires a 75 per cent majority as opposed to a two thirds majority for its amendment is a clear indication of the importance which has

be made between formal and substantive equality. Formal equality refers to the equal treatment of all (equality of treatment) while substantive equality entails equality of result. According to this concept, people may be treated unequally in order to achieve equality in the end. Substantive equality has merit for the South African situation, where, due to the unequal treatment of groups of people in the past, many South African households live in outright poverty and where the distribution of income and wealth is among the most unequal in the world. The fact that human dignity, equality and freedom are mentioned first in the Constitution does not mean that they will always enjoy precedence over all other values and that all other values will always yield to them. See Beukes 1997 *SAPL* 439; Du Plessis 1997 *Stell LR* 185; Henderson 1998 *SALJ* 219; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 77; Venter 1998 *PER* 16.

168 Section 1(a). These values cannot necessarily be said to be exhaustive of the values which underlie an open and democratic society based on human dignity, equality and freedom, as referred to in section 39(1). Henderson 1998 *SALJ* 219.

169 For example, the Preamble, section 7 (the introductory section to the Bill of Rights), section 36 (the limitation clause) and section 39 (the interpretation clause). Du Plessis 2000 *Stell LR* 192.

170 Both non-racism and non-sexism could be subsumed under the values of 'human dignity' and 'equality'. Bearing in mind the backdrop of the history of South Africa, however, it is apparent why these two values had to be spelled out explicitly. See Beukes 1997 *SAPL* 440; Swanepoel 1998 *PER* 45-46; Venter 1998 *PER* 28.

171 The primary aim of a supreme constitution and the rule of law is the protection of an individual's rights and freedoms by taming state power by subjecting it to the law. Due to South Africa's history, it can once again be seen why these values had to be expressly included. Beukes 1997 *SAPL* 440.

172 Sections 1(b) to (d).

173 All of these values need to be read together with the preamble of the Constitution, which contextualises the Constitution by providing a backdrop and setting for the Constitution. The preamble is the bedrock of the founding values contained in the Constitution. Beukes 1997 *SAPL* 439 and 441-442.

174 Sections 74(2) and 74(3).

175 Section 74(1). See Henderson 1997 *SALJ* 545; Henderson 1998 *SALJ* 216.

176 Henderson 1998 *SALJ* 216.

been placed on the contents of section 1 by the constitutional drafters. Venter¹⁷⁷ refers to section 1 as the most entrenched section in the Constitution.

Certain of the constitutional values are also included in the Bill of Rights as fundamental rights.¹⁷⁸ It must, therefore, be emphasised that constitutional values and fundamental rights are not the same thing. There does, however, exist a relationship between these two concepts in terms of which constitutional values are of the greatest importance in the interpretation of the fundamental rights contained in the Bill of Rights.¹⁷⁹ Section 39(1) requires a court, tribunal or forum to, when interpreting the Bill of Rights, promote the values that underlie a democratic society based on human dignity, equality and freedom. It is thus evident that constitutional values can be seen as an instruction to the courts to seek and discover the values underlying the bill of rights in interpreting its provisions.¹⁸⁰ This, however, gives rise to the question of exactly what constitutional values are and where they are to be found.¹⁸¹

The answer to this question is not as straightforward as it may seem. On the one hand, values are sometimes represented as something to be found outside the text of the Constitution.¹⁸² On the other hand, values are sometimes seen as something inside¹⁸³ the text of the Constitution.¹⁸⁴

In terms of the former approach, the meaning of values is sought outside the text.¹⁸⁵ Judgements tend to describe the 'outside' in terms of the values of an open and democratic society as mentioned in section 39 of the Constitution.¹⁸⁶ As to where such values which underlie an open and democratic society can be found, views differ. Some decisions find these values in the present South African society.¹⁸⁷

177 Venter 1998 *PER* 21.

178 Such as equality in section 9 and human dignity in section 10.

179 Ferreira 1999 *SALJ* 299; Jansen van Rensburg 1999 *De Jure* 291.

180 Henderson 1998 *SALJ* 216.

181 Kroeze 2001 *Stell LR* 267.

182 In such a case, the court refers to values as underlying or underpinning the Constitution, or as reflected or articulated in the Constitution. Kroeze 2001 *Stell LR* 267.

183 Or as being a part of.

184 In such a case, the court describes the values as embodied in, enshrined in, entrenched in or defined or identified by the Constitution. Henderson 1998 *SALJ* 217; Kroeze 2001 *Stell LR* 267.

185 Kroeze 2001 *Stell LR* 267.

186 Kroeze 2001 *Stell LR* 268.

187 *S v Williams* 1995 3 SA 632 (CC), henceforth referred to as *S v Williams*, para 59 refers to 'the backdrop of the values of South African society'; *S v Makwanyane* 1995 3 SA 391 CC, henceforth

According to other decisions, they are to be found in an ideal for a future society that is still to become open and democratic,¹⁸⁸ while a third group of decisions find the values underlying an open and democratic society in the values of other comparable democracies.¹⁸⁹

The latter approach seeks to locate the meaning of the values inside the text.¹⁹⁰ This is done by consulting the clear language of a provision.¹⁹¹

Apart from section 39, section 36 also makes reference to constitutional values. This section requires the court to take values into account when determining whether limitations on rights are constitutionally valid.¹⁹² In addition to these sections, the Constitution also states that values form the foundation of the South African state.¹⁹³ With such emphasis on values, it would seem that it is necessary for the court to state what a value means in a specific case.¹⁹⁴ In most cases, however, values have not been given any definite or substantial content, but merely mentioned with reference to whether or not something is in accordance with a value or with values.¹⁹⁵ The actual content which is to be given to the values in the Constitution thus, at present, remains an unclear question.

A positive development has, however, been the use of a value-based approach to constitutional interpretation, which commenced in the *Soobramoney* case. The *Grootboom* case went on to serve as an excellent example of the court making use of

referred to as *S v Makwanyane*, para 232 refers to 'values which reflect the quality of this nation's civilisation'. See Kroeze 2001 *Stell LR* 268.

188 *S v Zuma* para 17 refers to 'values it seeks to nurture for a future South Africa'; *S v Williams* para 63 makes reference to 'values that fuel our progress towards being a more humane and caring society'; *S v Makwanyane* para 222 refers to 'values of a more mature society'; *Shabalala v Attorney-General* 1996 1 SA 725 (CC) para 28 indicates the break with present values. See Kroeze 2001 *Stell LR* 268.

189 *S v Williams* para 77 states that the sentencing of offenders must conform to standards of decency recognised throughout the civilised world; *S v Coetzee* 1997 3 SA 527 (CC) para 14 states that the presumption of innocence is acknowledged as a fundamental value in the criminal justice system of comparable democracies. See Kroeze 2001 *Stell LR* 268.

190 Kroeze 2001 *Stell LR* 269.

191 *S v Zuma* para 18.

192 See Kroeze 2001 *Stell LR* 271; Scott and Alston 2000 *SAJHR* 220.

193 Section 1 of the Constitution declares South Africa to be 'one sovereign and democratic state founded on the following values...'.

194 Henderson 1997 *SALJ* 550; Weinrib 1998 *SAJHR* 351.

195 Kroeze 2001 *Stell LR* 273.

equality and human dignity to give content to socio-economic rights.¹⁹⁶ In its approach, the court remarked that the constitutional values of human dignity, freedom and equality can only be upheld by ensuring that basic necessities of life are provided to all.¹⁹⁷ It is thus clear that the court made use of the constitutional values in the Constitution to give content to socio-economic rights, and that the denial of basic standards of living results in denial of a person's human dignity.¹⁹⁸

Section 10 of the Constitution states that 'everyone has inherent dignity and the right to have their dignity respected and protected'. As previously mentioned, section 1 recognises human dignity as one of the founding values of South Africa and, according to section 7(1), the Bill of Rights affirms, amongst others,¹⁹⁹ the democratic value of human dignity. The right to have one's dignity respected and protected is thus one of the core constitutional rights.²⁰⁰ Venter²⁰¹ provides a convincing argument as to why human dignity is the core value contained in the Constitution.²⁰² Due to the fact that the aim of social security is to allow a person to live with human dignity,²⁰³ it follows that the interpretation of the core value of human dignity will form the basis for the extent of justiciability of the right to social security. As all of the values contained in the Constitution need to be interpreted together, the importance of

196 Jansen van Rensburg "The Role of Equality and Human Dignity" 4.

197 Jansen van Rensburg "The Role of Equality and Human Dignity" 4.

198 Jansen van Rensburg "The Role of Equality and Human Dignity" 4.

199 Namely the democratic values of equality and freedom.

200 De Waal, Currie and Erasmus (De Waal, Currie and Erasmus *Bill of Rights Handbook* 230), recognise the right to human dignity as a core constitutional right. Section 10 does not, however, specifically grant a right to human dignity. Instead it recognises everyone's inherent dignity and grants them the right to have such inherent dignity respected and protected. In the *Children's Bill* (section 5(3)(b)), a child's inherent dignity is expressly protected by requiring that all proceedings, actions or decisions in a matter concerning a child must respect the child's inherent dignity.

201 Venter 1998 *PER* 27-29.

202 According to Venter (Venter 1998 *PER* 27-29), due to the fact that such a long list of values is contained in the Constitution, it is improbable that no value conflicts should occur. For this reason, he raises the question as to whether any of the values can be recognised as core values. While section 7(1) refers to the democratic values of 'human dignity, equality and freedom', the values in section 1(a)-(c) are 'human dignity, non-racism, non-sexism, the supremacy of the Constitution and the rule of law'. The values of equality and freedom, as named in section 7(1) are referred to in section 1(a) as processes and not values *per se*. He goes on to examine the values in section 1(a)-(c) and argues that non-racism and non-sexism are actually sub-species of equality and that the rule of law is implied in the supremacy of the Constitution, which is in actual fact a key characteristic of the formal constitutional state rather than a value. For this reason, Venter argues, human dignity is the only unqualified constitutional value and thus the core value of the Constitution. For a different perspective on the supremacy of human dignity as constitutional value, see Goolam 2001 *PER* 1; Nishihara 2001 *PER* 5.

203 See 2.1 above.

constitutional values in the interpretation of socio-economic rights²⁰⁴ becomes self-evident. In line with the accepted approach that the universal aim of social security is to allow a person to live in a manner consistent with his right to human dignity,²⁰⁵ Chaskalson,²⁰⁶ makes the comment that social and economic rights

... are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance?

It is for this reason quite obvious that human dignity as a foundational value in the Constitution plays a significant role in social security and can be used as a yardstick in the determination of the nature and limitations of socio-economic rights.²⁰⁷ According to the White Paper on Social Welfare,²⁰⁸ policy and programmes will be developed to ensure that every member of society can realise his or her dignity, safety and creativity.²⁰⁹

3.3 *Constitutional provisions relating to the social security rights of children*

Section 27 of the Constitution places a duty on the state to provide legislation concerning social security in increasing measures.²¹⁰ Section 27(1) provides:

Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.²¹¹

Section 27(2) provides:

204 Thus including the right to social security.

205 See Ben-Israel 1995 *Comparative Labour Law Journal* 139; Mpedi *Indirect Social Security* 538; Olivier *ea Constitutional Issues* 61. According to Sachs, these rights are about dignity and having meaningful control over one's life. Sachs 1999 *ESRR* 14. See also 2.1 above.

206 Chaskalson 2000 *SAJHR* 204-205.

207 Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 60.

208 White Paper on Social Welfare Chapter 2 para 26.

209 The White Paper on Social Welfare goes on to state that every member of society who finds him or herself in need of care will have access to support and that social welfare policies and legislation will facilitate universal access to social welfare services and social security benefits in an enabling environment.

210 Jansen van Rensburg 1999 *Journal for Juridical Science* 44.

211 Own emphasis.

The state must take **reasonable legislative and other measures**, within its **available resources**, to achieve the **progressive realisation** of each of these rights.²¹²

Section 27(3) provides that 'no one may be refused emergency medical treatment'.

Other socio-economic rights in the Bill of Rights²¹³ are similarly internally qualified.²¹⁴ Due to the fact that the above mentioned rights are applicable to 'everyone', they are also available to children. Apart from these rights, which indirectly affect the social security rights of children, section 28 relates directly to children. These are rights to which children alone are entitled and they protect interests that are unique to children.²¹⁵

3.4 Limitations on the social security rights of children

No fundamental right in the Bill of Rights is absolute.²¹⁶ All rights can be restricted under certain prescribed circumstances to safeguard other important societal interests.²¹⁷ All fundamental rights are subject to some form of limitation.²¹⁸ Limitations are, however, regarded as exceptions to the general rule and must therefore be interpreted restrictively.²¹⁹

The above mentioned sections make it clear that, while the Constitution has placed a duty on the state to provide a social security system, such duty is internally qualified,

212 Own emphasis.

213 For example the right to access to housing contained in section 26, the right to property in section 25 and the right to right to further education in section 29(1)(b).

214 For a discussion on these internal limitations see 1 above.

215 Bekink and Brand *Constitutional Protection of Children* 178. Section 28(1) grants every child the right to basic nutrition, shelter, basic health care services and social services, as well as the right to have a legal practitioner assigned to the child by the state, at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result, legal aid being considered a contingency of social security.

216 This includes socio-economic rights. Bekink and Brand *Constitutional Protection of Children* 177; De Ville 1994 *SAPL* 289; De Waal, Currie and Erasmus *Bill of Rights Handbook* 144; Olivier *et al* *Constitutional Issues* 69; SAHRC *4th Economic and Social Rights Report* 6.

217 For example public order, safety, health and democratic values. See De Ville 1994 *SAPL* 287 and 289; De Waal, Currie and Erasmus *Bill of Rights Handbook* 144.

218 Either as contained or referred to in the general limitation clause or elsewhere in the Bill of Rights. Bekink and Brand *Constitutional Protection of Children* 177; Rautenbach 2001 *SALJ* 618.

219 De Ville 1994 *SAPL* 289.

in terms of the applicable sections themselves.²²⁰ The rights in section 27(1), for example, are qualified by section 27(2).²²¹ In providing such a system, the state therefore only has to take reasonable measures, within its available resources to achieve progressive realisation thereof.²²² Most other sections relating to socio-economic rights have similar internal limitations.²²³ From this it can be deduced that socio-economic rights are programmatic rights which cannot be achieved immediately in general, as their fulfilment depends on a country's available resources.²²⁴ The state, however, is under an obligation to begin immediately taking steps towards the full realisation of socio-economic rights.²²⁵

Two sections relating to social security do, however, not have internal limitations.²²⁶ These are sections 28²²⁷ and 29(1)(a).²²⁸ At first glance it would thus appear that these children's socio-economic rights are only subject to the general limitation clause²²⁹ and are accorded special status relative to other socio-economic rights,²³⁰ Liebenberg²³¹ even having been of the opinion that these rights were even more directly justiciable

220 Such internal limitations are referred to as 'internal modifiers' or 'demarcations' of the rights due to the fact that they specifically demarcate the scope of the rights in question. See De Waal, Currie and Erasmus *Bill of Rights Handbook* 164-165.

221 As concluded by the Constitutional Court in both the *Grootboom* and *TAC* cases, where it was stated that these sections are textually linked.

222 Jansen van Rensburg 1999 *De Jure* 294; Swanepoel 1998 *PER* 40. For a discussion on the court's interpretation of these limitations, see the discussion of the *Grootboom* case in 4.3. Further, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, the Maastricht Guidelines on Violation of Economic, Social and Cultural Rights and the General Comments by the United Nations Committee on Economic, Social and Cultural Rights provide prove helpful in the understanding of the state's obligations with respect to socio-economic rights, particularly due to the fact that the wording of the internal limitations on these rights is formulated similarly to article 2(1) of the ICESCR. For a discussion on these instruments, see 6.2 below.

223 The right to access to housing in section 26 is qualified by section 26(2) which requires the state to take reasonable measures, within its available resources, to achieve the progressive realisation of this right. While the right to basic education in section 29(1) does not have an internal limitation, the right to further education in section 29(2) requires the state to take reasonable measures to make such education progressively available and accessible. Examples of the application of internal limitations took place in the *Soobramoney* and *Grootboom* cases, which will be discussed in 4.2 and 4.3 below.

224 Olivier *ea Constitutional Issues* 58; SAHRC 4th *Economic and Social Rights Report* 6.

225 SAHRC 4th *Economic and Social Rights Report* 8.

226 Clark 2000 *SALJ* 344; Myburgh *The Need to Maintain Children* 171.

227 Relating to the rights of children.

228 The right to basic education.

229 Section 36.

230 Clark 2000 *SALJ* 344; Van der Vyver *Constitutional Protection of Children and Young Persons* 306. Even after this judgement, Malherbe is of the opinion that these rights should, at least in principle, be easier to enforce. Malherbe *Family* 380.

231 Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003.

than their internally qualified counterparts. In the High Court judgement of the *Grootboom* case, Davis J went so far as to state that section 28 is not subject to the same internal limitations as the rights in section 26,²³² thus implying that they are immediately realisable and not subject to the state's available resources. This is, however, not the case, as was decided in the Constitutional Court case of *Government of the Republic of South Africa v Grootboom*.²³³ In this judgement it was made clear that the socio-economic rights of children are subject to the same limitations as the socio-economic rights contained in section 27(2) of the Constitution and are consequently only programmatically justiciable.²³⁴

The first internal limitation is that which requires the state to take reasonable legislative and other measures. In the *Grootboom* case, the court stated that the real question in this regard is whether the measures taken by the state to realise socio-economic rights are reasonable.²³⁵ The test for reasonableness does not require of the court to enquire whether or not more desirable or favourable measures could have been adopted, or whether public money could have been better spent.²³⁶ When made applicable to the access to social security, the court will not enquire if the current social security system is appropriate for South Africa or whether better measures should be put in place. For example, the court will not replace the new child support grant and reinstate the old child maintenance grant.

The question is thus whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures which could be adopted by the state to meet its obligations exist. Many of these would meet the requirement of reasonableness. Applied to social security, the court will consider the social security system as a whole and the different measures in place to address the state's obligation. In order for the state to meet its obligation, a safety net for the most

232 And by implication, the limitations contained in other internally qualified socio-economic rights, such as sections 25 and 27.

233 *Government of the Republic of South Africa v Grootboom* para 72.

234 See 4.3 below.

235 This is a deviation from the international law approach, in terms of which every State Party is under the duty to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights in question.

236 *Government of the Republic of South Africa v Grootboom* para 41.

needy in society will have to be provided by way of social assistance measures.²³⁷ In this regard, the conclusion can be reached that to exclude certain categories of the population from the safety net of the permanent grant administration process²³⁸ will make the social security system of a country unreasonable.

The court further stressed that the reasonableness of the state's policies and programmes applies to both their conception and their implementation.²³⁹ This implies that the social security system must reach the people. In *Mbanga v MEC, Health and Welfare, Eastern Cape and Another*²⁴⁰ and *Mahambehala v MEC, Health and Welfare, Eastern Cape and Another*²⁴¹ the provincial government failed to process claims for social grants within a reasonable time. The court held in both cases that the applicants' rights were infringed by the failure of the province to act within a reasonable time. This may be seen as a failure of the government of the requirement of reasonableness in the implementation of social security programmes.

The requirement of progressive realisation, according to the United Nations Committee on Economic Social and Cultural Rights,²⁴² imposes an obligation on the state to move as expeditiously and effectively as possible towards the goal. It is further stated by the Committee that the ultimate objective of the Covenant²⁴³ is the 'full realisation'²⁴⁴ of the rights. The fact that the full realisation is subject to the

237 Currently, it does not appear as if the state is complying with this requirement. Permanent social assistance grants in South Africa are highly categorical and only cover children from infancy to below nine years (child support grant); children in foster care (foster child grant); people with disabilities (disability grant); children with disabilities (care dependency grant); the elderly (old age grant) and additionally to the old age and disability grant, one can apply for a grant in aid. This entire system is subject to a strict means test under the *Social Assistance Act* 59 of 1992. No provision is made by way of the permanent social assistance grant process for people without disabilities from the age of nine to 60, in the case of females and 65 in the case of males. This implies that a large section of the population is still excluded from the social security programme which serves as the main safety net in South Africa for those who are not contributing to the unemployment fund, the compensation for occupational injuries and diseases fund or to any private fund. The exception to this is the temporary financial award which is granted to an individual as a means of temporary financial material assistance if such individual is unable to meet his or her family's most basic needs.

238 Because of the inadequacy of the social insurance system in South Africa.

239 *Government of the Republic of South Africa v Grootboom* para 42.

240 *Mbanga v MEC, Health and Welfare, Eastern Cape and Another* 2002 1 SA 359 (SE).

241 *Mahambehala v MEC, Health and Welfare, Eastern Cape and Another* 2002 1 SA 342 (SE).

242 General Comment No 3 para 9.

243 Namely the ICESCR, on which many of the socio-economic rights in the Bill of Rights are clearly based.

244 Sections 26(2) and 27(2) of the Constitution read that the state must 'achieve the progressive realisation of each of these rights' and not the full realisation of these rights.

condition of progressiveness is a recognition of the fact that the full realisation of all socio-economic rights will generally not be able to be achieved within a short period of time.²⁴⁵ In the *Grootboom* case,²⁴⁶ the court used the interpretation of the Committee on the meaning of the phrase 'progressive realisation'. The court stated that progressive realisation shows that it was contemplated that the right could not be realised immediately, but that the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation implies that the state must take steps to achieve this goal. If this statement by the court is made applicable to the right of access to social security, a two-fold question arises. In the first place it must be asked what steps the state is taking to keep the current social security system in line with inflation and the needs of children receiving the benefits thereof²⁴⁷ and, secondly, what steps are being taken by the state to expand the system to include a broader spectrum of children and to address new and urgent contingencies.²⁴⁸

According to the final limitation, the state must realise these rights within its available resources. This issue was addressed in *Soobramoney v Minister of Health (KwaZulu-Natal)*,²⁴⁹ where the court stated that the rights in question²⁵⁰ are dependant upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them, an unqualified obligation to meet these needs is at present not capable of being fulfilled. In the *Grootboom* case,²⁵¹ it was stressed that there is a balance between goal and means. The measures must be calculated to attain

245 Maastricht Guidelines Guideline 8.

246 *Government of the Republic of South Africa v Grootboom* para 45.

247 In this regard it is encouraging to note that the state has increased the amounts of the permanent social assistance grants and the age limit of the child support grant from under seven to under nine, and that it is in the process of being increased to under 14. See discussion on the child support grant 5.3.1 below.

248 As noted earlier, the targeting of permanent social assistance grants in South Africa is highly categorical. This has the result of a large section of the population still being excluded from the social security programme. Urgent contingencies such as financial support for children orphaned by HIV/AIDS, and especially those living in child-headed households are not being addressed by the state. It can be argued that the state will fail to meet the requirement of progressive realisation if it does not, in the future, develop a more comprehensive and less categorical social security system for South Africa. See SALC *Review of the Child Care Act* 333-338; SAHRC *4th Annual Economic and Social Rights Report* 28.

249 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1995 (CC) para 11.

250 The court specifically referred to the rights to access to housing, health care, food, water and social security.

251 *Government of the Republic of South Africa v Grootboom* para 46.

the goal expeditiously and effectively, but the availability of resources is an important factor in determining what is reasonable. The conclusion can thus be reached that the availability of resources is merely one of the factors that has to be considered when determining whether there was an infringement of a right.²⁵² Another factor to be considered, according to the Committee on Economic, Social and Cultural Rights,²⁵³ is that failure by the state to provide for the basic subsistence needs of the population may be considered a *prima facie* violation of the right to access to social security.²⁵⁴

The right to access to social security is subject to a further external limitation in terms of section 7(3) of the Constitution, according to which the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the bill.²⁵⁵ According to section 36(1):

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

Section 36(2) provides that, except as provided for in the Constitution, no law may limit any right entrenched in the Bill of Rights.

It must, therefore, be determined to what extent such right to access to social security is limited.

In the Constitutional Court case of *S v Zuma*²⁵⁶, the court decided that constitutional analysis consists of two phases.²⁵⁷ In the first phase, the applicant must indicate that

252 In its report to the SAHRC, the National Department of Social Development reported that even though there was no over or under spending in 2000/2002, the budget allocation for the reporting period was not adequate to enable the department to implement all of its programmes and projects effectively. SAHRC 4th *Economic and Social Rights Report* 28.

253 General Comment No 3 para 10.

254 The court in the *Grootboom* case, however, rejected this minimum core obligation approach.

255 This is the case with all fundamental rights in the Bill of Rights.

256 *S v Zuma* 1995 4 BCLR 401 (CC).

257 *S v Zuma* para 414.

an obligation in the Bill of Rights was not complied with.²⁵⁸ In the second phase, the respondent must indicate that such non-compliance can be reconciled with the general limitation clause²⁵⁹ of the Constitution.²⁶⁰

3.5 *The primary, secondary and tertiary obligations on the state*

Another provision of the Constitution affecting the right to social security is section 7(2). According to this section, the state must 'respect, protect, promote and fulfil the rights in the Bill of Rights'.²⁶¹ This, according to De Vos²⁶² illustrates the potentially multi-layered nature of these obligations which, according to him places the duties on the state to respect, protect and to assist and fulfil.²⁶³

The primary obligation on the state is to **respect** human rights. All fundamental rights require the state, on a primary level, to refrain from infringing them directly.²⁶⁴ This requires negative state action.²⁶⁵ The state thus has a duty to respect the autonomy of the individual.²⁶⁶ The application of this duty to social security rights will require the state to respect such rights and refrain from unjustly interfering with them.²⁶⁷ A

258 In other words, a right which is protected in the Bill of Rights must be infringed upon. See Jansen van Rensburg and Olivier *International and Supra-national Law* 639.

259 Section 36(1).

260 This will only be the case where the infringement serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy. De Waal, Currie and Erasmus *Bill of Rights Handbook* 162; See also Jansen van Rensburg 1999 *De Jure* 294; Olivier *ea Constitutional Issues* 70.

261 Thus including socio-economic rights. Section 5(3)(a) of the *Children's Bill* includes this section of the Bill of rights, by stating that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights.

262 De Vos 2001 *SAJHR* 261; De Vos 1995 *SAPL* 242-243.

263 Liebenberg refers to this duty as a duty to 'respect, protect, promote and fulfil' the rights. Liebenberg 1995 *SAJHR* 362.

264 Or, according to Budlender, indirectly. See Budlender 2002 HYPERLINK <http://www.lrc.org.za/4Pub/Papers/delhipaper.doc> 15 Oct 2002; De Vos 1995 *SAPL* 251; Olivier *ea Constitutional Issues* 78; O'Regan 1999 *ESR Review* 2; SAHRC 4th *Economic and Social Rights Report* 5.

265 Bekink and Brand *Constitutional Protection of Children* 173; Committee of Inquiry 51; Jansen van Rensburg and Olivier *International and Supra-national Law* 638; Olivier *ea Constitutional Issues* 78.

266 This obligation is of particular significance where the individual already enjoys the right to some extent, and there is a threat to remove it. See Budlender 2002 HYPERLINK <http://www.lrc.org.za/4Pub/Papers/delhipaper.doc> 15 Oct 2002; De Vos 1995 *SAPL* 243.

267 In relation to children, this would place a duty on the state not to adopt any law or take any other action which would deprive a child of security, basic nutrition and basic health care and social services. If, for example, the state orders the closing down of a primary health clinic in a rural area, it could be guilty of infringing its obligation to respect the child's right to basic health and social services. See De Vos *SAPL* 251; Jansen van Rensburg "Monitoring Socio-economic Rights" 43; Jansen van Rensburg and Olivier *International and Supra-national Law* 638.

negative infringement will take place where the state arbitrarily or unreasonably deprives people of the access that they enjoy to social security, for example by ceasing payment of a beneficiary's social security benefit or grant without justification.²⁶⁸ Any law or policy which acts as a barrier, obstructing people from gaining access to social security, or children from enjoying social services, for example the creation of conditions by the state which makes the receipt of social security benefits impossible, as well as any law or policy which unfairly discriminates against certain groups²⁶⁹ in providing access to social security,²⁷⁰ will also constitute such a negative infringement. As with all provisions contained in the Bill of Rights, non-compliance with the duty to respect can be justified in terms of the limitations attached to the right.²⁷¹

268 An example of this is the case of *Ngxuza and Others v The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2001 2 SA 609 (E). The appellants in this case approached the court to reinstate the disability grants which they had been receiving under sections 2(a) and 3(a) of the *Social Assistance Act* 59 of 1992, which the province had, without notice to them, wrongfully terminated. The court ordered the province to concede to the claims of the applicants, with payment of arrears and interest. Should the state wrongfully terminate social grants which serve to benefit children, for example the child support grant or foster child grant, this will, according to this decision, result in an infringement of the state's duty to respect such rights. See also *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Gxuxa and Others* 2001 4 SA 1184 (SCA). Another example is the case of *Maluleke v MEC, Health and Welfare, Northern Province* 1999 4 SA 367 (T) where the province had suspended payments of social pensions to some 92 000 people. The court ordered that the decision made by the province to suspend the payments of the pensions was unlawful and invalid. In two other cases, namely *Mbanga v MEC, Health and Welfare, Eastern Cape and Another* 2002 1 SA 359 (SE) and *Mahambehlala v MEC, Health and Welfare, Eastern Cape and Another* 2002 1 SA 342 (SE), the provincial government failed to process claims for social grants within a reasonable time.

269 Whether directly or indirectly.

270 The exclusion of permanent residents' children from social assistance grants (specifically the child support grant under section 4(b)(ii) of the *Social Assistance Act* 59 of 1992 and the care dependency grant under section 4B(b)(ii) of the same Act) was recently challenged in the High Court in *Mahlaule and Others v Minister of Social Development and Others* CCT 12/03 and *Khosa and others v Minister of Social Development and others* CCT13/03. The applicants in these cases, who were two Mozambican citizens living in the Limpopo Province, argued that the citizenship requirement infringed their constitutional rights to social security (section 27 of the Constitution), equality (section 9 of the Constitution) and the rights of children (section 28 of the Constitution). The application was unopposed in the High Court, which found for the applicants and struck down the applicable sections in the *Social Assistance Act*. These cases have been heard before the Constitutional Court (on 13 May 2003) and judgement is awaited. The implications of the striking down of these provisions are far-reaching. It enables not only South African citizens but also everyone in South Africa with permanent resident status, who has children and complies with the requirements of the *Social Assistance Act* to apply for these grants. See 5.3 below.

271 In other words, any conduct by the state which deprives people of the access which they enjoy to socio-economic rights, will have to be justified. In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR (W), the High Court held that a local council's termination of water supply to a block of flats amounted to a failure to respect the right of continuing access to water, that this was a *prima facie* breach of its obligations and that there was accordingly an onus on the council to justify it in a manner consistent with the Constitution. See

The secondary obligation on the state is to **protect** human rights.²⁷² This obligation requires that the state protect individuals against political, economic and social exploitation.²⁷³ The state is under a positive obligation to prevent the right, which includes the right to social security from being infringed by private actors and institutions.²⁷⁴ This obligation does not so much require of the state to provide money or resources to individuals, but rather to provide a framework within which individuals can realise these rights themselves without unnecessary interference by other parties or the state itself.²⁷⁵ In relation to children, it would require of the state to create and maintain legislation, policy and other measures to protect children, for example, by ensuring that private welfare organisations provide social services to children in a fair, non-discriminatory and effective manner, particularly where they are recipients of financial awards for these purposes. Failure to take positive action to protect a fundamental right constitutes a *prima facie* infringement which may be justified in terms of the limitations attached to the right in question.²⁷⁶

The tertiary obligation which faces the state, in terms of section 7(2) is the duty to **promote and realise** human rights.²⁷⁷ In other words, on a tertiary level, the beneficiary of a fundamental right has the right to require positive assistance or a

Budlender 2002 HYPERLINK <http://www.lrc.org.za/4Pub/Papers/delhipaper.doc> 15 Oct 2002; De Vos 1995 *SAPL* 244.

272 De Vos 1995 *SAPL* 244.

273 Jansen van Rensburg and Olivier *International and Supra-national Law* 639; Olivier *ea Constitutional Issues* 79; O'Regan 1999 *ESRR* 2.

274 For example, where parents, through abuse or neglect, cause their children to become destitute and homeless, the state has a constitutional duty to interfere. Children's rights to basic nutrition and basic health and social services will not be realised where parents fail to take proper care of their children. See Budlender 2002 HYPERLINK <http://www.lrc.org.za/4Pub/Papers/delhipaper.doc> 15 Oct 2002; De Vos 1995 *SAPL* 253; Du Plessis 1994 *Stell LR* 8; Olivier *ea Constitutional Issues* 79; SAHRC 4th *Economic and Social Rights Report* 5.

275 This duty requires of the state to provide effective legislative and common law remedies to protect people against violations of their rights by other individuals or groups in society. For example, the law should effectively prevent and prohibit unfair discrimination in the private insurance industry (medical aid schemes and life and disability insurance) on the basis of race, gender, HIV/AIDS status or sexual orientation. See Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 109; Jansen van Rensburg and Olivier *International and Supra-national Law* 639; Olivier *ea Constitutional Issues* 79.

276 De Vos 1995 *SAPL* 245.

277 De Vos (De Vos 1995 *SAPL* 245) describes this as the obligation to 'assist and fulfil', rather than 'promote and realise' human rights, while Jansen van Rensburg (Jansen van Rensburg "Monitoring Socio-economic Rights" 43) refers to it as the obligation to 'promote and fulfil'. For a discussion on the duty of the state to 'promote and fulfil' rights, see SAHRC 4th *Economic and Social Rights Report* 4-5.

benefit or service from the state.²⁷⁸ This right includes a duty on the state to assist in creating conditions in which the right can be realised by the individual. There thus exists a duty on the state to use its power to assist individuals in realising their fundamental²⁷⁹ rights.²⁸⁰ 'Promotion' requires of the state to provide relevant legislative, executive and judicial frameworks for the realisation of right to be in place and to be effective.²⁸¹ 'Fulfilment' requires the provision of opportunities for the realisation of the right, but could also include a duty on the state to directly provide basic resources for the fulfilment of an individual's basic needs where no other possibilities for the individual to realise his or her own rights exist.²⁸²

Each of the above obligations contain elements of the obligation of conduct²⁸³ and obligation of result.²⁸⁴ The state, however, enjoys a degree of freedom in selecting the means for implementing these respective obligations.²⁸⁵ Hence, in the *Grootboom* judgement, the Court acknowledged the wide range of possible measures that the state can adopt, and stated that it is not for the Court to prescribe the measures which the state should adopt, as long as the means selected would realise the enjoyment of a particular right.²⁸⁶ The nature and duty of the obligations of the state will depend on the exact wording or phrasing of the socio-economic right, the internal and external limitations on the right and the socio-economic right in question's relationship with

278 De Vos 1995 *SAPL* 253; Jansen van Rensburg and Olivier *International and Supra-national Law* 639; Olivier *ea Constitutional Issues* 79; SAHRC 4th *Economic and Social Rights Report* 5.

279 Including socio-economic rights.

280 For example, when applied to the rights of children, the state has a constitutional commitment to prevent children from dying of hunger, or because of a lack of basic health care or social services. This obligation will be violated where the state fails to fulfil the minimum core obligations to ensure basic levels of socio-economic rights to children, where the state unreasonably delays taking the necessary steps to realise children's socio-economic rights, where the state adopts retrogressive measures which retard the realisation process or where the state fails to follow the institutional processes necessary for taking well-targeted, effective measures to achieve socio-economic rights as expeditiously as possible. See Budlender 2002 [HYPERLINK http://www.lrc.org.za/4Pub/Papers/delhipaper.doc](http://www.lrc.org.za/4Pub/Papers/delhipaper.doc) 15 Oct 2002; Jansen van Rensburg "Monitoring Socio-economic Rights" 43.

281 Olivier *ea Constitutional Issues* 80.

282 Where, for example, a parent cannot afford to maintain his or her child, the state is under a constitutional obligation to provide assistance. De Vos 1995 *SAPL* 246; Olivier *ea Constitutional Issues* 80.

283 Which requires action reasonably calculated to realise the enjoyment of a particular right. SAHRC 4th *Economic and Social Rights Report* 5.

284 Which requires the state to achieve specific targets to satisfy a detailed substantive framework established by both the Constitution and the international community. SAHRC 4th *Economic and Social Rights Report* 5.

285 SAHRC 4th *Economic and Social Rights Report* 5.

286 *Government of the Republic of South Africa v Grootboom* para 41.

other fundamental rights.²⁸⁷ The court's duty is then to assess the appropriateness of the adopted measures.²⁸⁸ A violation of the state's duty will only occur if it pursues a policy or practice which deliberately contravenes or ignores its constitutional and international obligations, or fails to achieve the required standard.²⁸⁹

It has also been suggested that a fourth level of obligation may also be identified.²⁹⁰ A right may place an obligation on the State to act rationally and in good faith, and require that it justify its failure to carry out its obligations. In other words, there must be a good reason for the State not to respect, protect, promote and fulfil a right.²⁹¹ It is debatable whether this obligation is still relevant after the conclusion reached in the *Grootboom* case.²⁹²

3.6 *The role of international law*²⁹³

Previous South African constitutions made no mention of the place of international law in the South African legal order, with the result that international law has played little part in the advancement of human rights by the South African courts.²⁹⁴ This omission has been remedied by the 1993,²⁹⁵ as well as the 1996²⁹⁶ Constitutions.²⁹⁷ The adoption of the Constitutions saw public international law play a greater role in South African law.²⁹⁸

287 See Jansen van Rensburg and Olivier *International and Supra-national Law* 639.

288 SAHRC 4th *Economic and Social Rights Report* 5.

289 For example, in *Government of the Republic of South Africa v Grootboom*, the government was found to have in place a laudable nation-wide housing programme, which, however, failed to provide relief to those in peril and thus fell short of the obligations imposed by section 26 of the Constitution. *Government of the Republic of South Africa v Grootboom* paras 65-66.

290 O'Regan 1999 *ESRR* 2. This fourth level can be derived from *Soobramoney v Minister of Health*.

291 O'Regan 1999 *ESRR* 2; For example, in the *Soobramoney* case, the Constitutional Court held that the government is under an obligation to show that it acted *bona fide* and rationally in the circumstances.

292 For discussion on the *Grootboom* case see 4.3 below.

293 For discussion on the substantive international law provisions relating to the social security rights of children, see 6.1 to 6.4 and 7.1 to 7.2 below.

294 Dugard 1994 *SAJHR* 208.

295 *Constitution of the Republic of South Africa* 200 of 1993. Henceforth referred to as the 1993 Constitution.

296 *Constitution of the Republic of South Africa*, 1996.

297 Dugard *International Law* 51; Human 2000 *SAPL* 79.

298 The specific inclusion of international law within the Constitution represents a significant step forward in the status and role of this legal discipline in South Africa. International law is finally

Section 39(1) of the Constitution reads as follows:

When interpreting the Bill of Rights, a court, tribunal or forum-

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) **must consider international law**; and
- (c) may consider foreign law²⁹⁹

It is thus clear that international law plays an important role in the interpretation of the Bill of Rights.³⁰⁰ The duty on the courts to consider international law when giving content to any right contained in the Bill of Rights is thus peremptory.³⁰¹ This will ensure that human rights in South Africa will develop in line with international human rights norms.³⁰² International agreements and customary international law now provide a framework within which the rights contained in the Bill of Rights may be evaluated and understood.³⁰³ In contrast, the duty to consider foreign law is substantially diluted in that it is merely directory.³⁰⁴ Foreign law may thus be considered by the courts when they give content to the rights contained in the Bill of Rights.³⁰⁵

being accorded the position which it deserves. See Blake 1998 *SALJ* 669; Botha 1994 *SAPL* 245; Dugard 1994 *SAJHR* 210; Keightley 1996 *SAJHR* 405; Olivier 1993 *SAYIL* 3.

299 Own emphasis.

300 The term 'international law' has been interpreted generously to allow recourse to treaties such as the European Convention on Human Rights to which South Africa is not a party and cannot become a party. Dugard 1994 *SAJHR* 211; Dugard 1995 *SAJHR* 242; Maluwa 1998 *SAYIL* 45.

301 Or mandatory. The duty on the courts is, however, merely to consider international law. They are in no way bound to follow it. See Blake 1998 *SALJ* 670; Botha 1994 *SAPL* 246; Ehrenbeck, Lombard and Ramolotja 1996 *Codicillus* 45; Keightley 1996 *SAJHR* 415; Maluwa 1998 *SAYIL* 59.

302 As opposed to the situation in the past where they developed in opposition to such norms. Dugard 1995 *SAJHR* 242.

303 Olivier *ea Constitutional Issues* 59.

304 In other words, the courts have a discretion in deciding whether or not to consider foreign law. Foreign law refers only to the judgements of domestic courts in other states. See Blake 1998 *SALJ* 670; Botha 1994 *SAPL* 246; Hopkins Dec 2001 *De Rebus* 26; Maluwa 1998 *SAYIL* 59.

305 When dealing with comparative law, however, the courts must bear in mind that they are required to interpret the South African Constitution, and not the constitution of some foreign country. This therefore has to be done with due regard to the South African legal system, history and circumstances, as well as the structure and language of the South African Constitution. Such foreign jurisprudence will merely be of persuasive value. See Ehrenbeck, Lombard and Ramolotja 1996 *Codicillus* 45; Maluwa 1998 *SAYIL* 60; Scott and Alston 2000 *SAJHR* 217.

The South African Bill of Rights is clearly inspired by international human rights conventions.³⁰⁶ As virtually every provision in the South African Bill of Rights has some counterpart in an international human rights convention or is governed by general principles of international law, it is clear that international law will be applicable to their interpretation in most situations.³⁰⁷

Section 232 of the Constitution provides that, unless customary international law is inconsistent with the Constitution or an Act of Parliament, it is law in the Republic. This was the common law position before the adoption of the Constitution, which has now been entrenched.³⁰⁸ Although this was previously the common law position, customary international law has been elevated in status as it now acquires constitutional backing.³⁰⁹ This section does, however, pose a certain danger in that by subordinating customary international law to Acts of Parliament in cases of conflict or inconsistency between the two, the Constitution does not draw a distinction between Acts passed after the advent of the new constitutional dispensation in 1994 and Acts passed by the previous government.³¹⁰

Fortunately, section 2 of the Constitution, which declares that the Constitution is the supreme law in the Republic provides a certain amount of protection against this danger. Should an Act of Parliament be oppressive or discriminatory, it will be inconsistent with the Constitution. This will result in the Act being invalid and it will be unable to strike down customary international law.³¹¹

306 The internal limitation found in most socio-economic rights, namely that the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights, for example, is similar to article 2 of the ICESCR. Blake 1998 *SALJ* 674; De Villiers 1996 *SALJ* 698; Dugard 1994 *SAJHR* 211; Haysom 1991 *SAJHR* 102; Liebenberg 2000 [HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html](http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html) 7 Feb 2003.

307 In the consideration of international law, the first step would be to compare the South African Bill of Rights with the applicable human rights documents to determine which it most closely resembles. The primary document would then be turned to for guidance. Blake 1998 *SALJ* 674; Botha 1994 *SAPL* 249; Dugard 1994 *SAJHR* 213.

308 Barrie 1995 *SALJ* 79; Dugard 1994 *SAJHR* 208; Dugard *International Law* 26; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 83; Keightley 1996 *SAJHR* 406.

309 Dugard 1994 *SAJHR* 210; Dugard 1995 *SAJHR* 251; Ehrenbeck, Lombard and Ramolotja 1996 *Codicillus* 43; Keightley 1996 *SAJHR* 406-407; Sisk and Pronto 1995 *SAJHR* 439.

310 This can be seen as particularly dangerous in respect of legislation relating to social security due to the fact that it was, as a rule, discriminatory. See Botha 1994 *SAPL* 254; Keightley 1996 *SAJHR* 407.

311 Keightley 1996 *SAJHR* 407.

International law can be described as:³¹²

That body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore do commonly observe in their relations with each other and which includes also the rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals, and certain rules of law relating to individuals and non-state entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community.

According to article 38(1)(a) to (d) of the Statute of the International Court of Justice, the sources of international law are international conventions (treaties),³¹³ international custom,³¹⁴ the general principles recognised by civilised nations³¹⁵ and judicial decisions³¹⁶ and the works of jurists³¹⁷ as subsidiary means for the determination of rules of law.³¹⁸ The Court in *S v Makwanyane*³¹⁹ recognised a fifth source, namely the decisions of certain regional and international tribunals containing interpretations of public international law.³²⁰

312 Jansen van Rensburg 1999 *De Jure* 295. Dugard (Dugard *International Law* 1) proposes a more simplified definition, namely 'a body of rules and principles which are binding upon states in their relations with one another'. This is the traditional definition of international law.

313 International conventions are agreements between states or between states and international organisations. In order for an international convention to be binding on a state, it has to be signed and ratified.

314 International custom is international law which is in general use (*usus*) and that is generally accepted (*opinio iuris*). Express consent by a state is not necessary to make this form of international law binding.

315 General principles recognised by civilised nations is a contentious issue. It comes into operation when no convention or customary rule exists to solve an issue between two countries. General principles recognised by civilised nations can be defined as those principles of international law as well as general legal principles which are recognised by most national legal systems.

316 International tribunals can use judicial decisions as an additional method to establish international law norms. This source is subject to article 59 of the Statute of the International Court of Justice which determines that the decisions of the International Court of Justice do not have a binding effect on parties, apart from the parties to the specific case. The doctrine of *stare decisis* (the rule regarding precedent) is thus not valid in respect of international decisions.

317 Consulting the works of highly qualified and expert jurists is another method of identifying rules of international law. This method, however, is seldom used.

318 If South African courts were permitted to have regard to all these sources of international law, including international human rights treaties to which South Africa is not a party, they would be able to draw on the whole field of international human rights law. Dugard *International Law* 26; Dugard 1994 *SAJHR* 212-213; Dugard 1995 *SAJHR* 242-243; Hopkins Dec 2001 *De Rebus* 26; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 82; Jansen van Rensburg and Olivier *International and Supra-national Law* 625.

319 *S v Makwanyane* 1995 3 SA 391 (CC).

320 Specific tribunals mentioned were the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, the European Court of Human Rights and specialised agencies such as the ILO. Blake 1998 *SALJ* 671.

In the *Makwanyane* case,³²¹ the Court decided that, although a court must take notice of international law and international decisions, it is under no duty to follow them. Customary international law, on the other hand, has legal force in South Africa, and the Court will, in certain circumstances, be under a duty to follow it, if it is not inconsistent with the Constitution or an Act of Parliament.³²² Customary international law is international law which fulfils the requirements of *usus* (settled practice) and *opinio iuris* (general acceptance of an obligation to be bound).³²³

In the *Makwanyane* case,³²⁴ the court made a distinction between binding and non-binding law, stating that they are both included in public international law, and may both be used as tools of interpretation.³²⁵ The word 'binding', which was included in the 1993 Constitution with reference to customary international law³²⁶ has subsequently been dropped from our current Constitution.³²⁷ This has resulted in fact that customary international law now has the status of law in South Africa regardless of whether a rule of customary international law was previously considered binding on the Republic or not.³²⁸

While this omission has led certain authors to argue that all rules of customary international law, even those to which South Africa has persistently objected, now form part of municipal law, there remains support for the view that a state that consistently objects to a particular rule of customary international law will not be bound by that rule.³²⁹

321 *S v Makwanyane* para 414.

322 Section 232 of the Constitution.

323 Barrie 1995 *SALJ* 79; Dugard *International Law* 28; Olivier 1993 *SAYIL* 11.

324 *S v Makwanyane* paras 413-414.

325 See Dugard *International Law* 265; *Government of the Republic of South Africa v Grootboom* para 26; Jansen van Rensburg and Olivier *International and Supra-national Law* 621; Liebenberg 2000 [HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html](http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html) 7 Feb 2003; Olivier *ea Constitutional issues* 59. For cases in which both binding and non-binding international law were considered, see *S v Williams* 1995 3 SA 632 (CC); *Ferreira v Levin NO* 1996 1 SA 984 (CC); *S v Rens* 1996 1 SA 1218 (CC); *Coetzee v Government of South Africa* 1995 4 SA 631 (CC); *Bernstein v Bester* 1996 2 SA 751 (CC); *In re Gauteng School Education Bill* 1995 1996 3 SA 165 (CC); *Government of the Republic of South Africa v Grootboom*.

326 Section 231(4) of the 1993 Constitution.

327 Dugard *International Law* 54.

328 This has the result that all established customary rules of international law are relevant. Hopkins Dec 2001 *De Rebus* 26; Keightley 1996 *SAJHR* 408.

329 Botha 1994 *SAPL* 255; Dugard *International Law* 54; Keightley 1996 *SAJHR* 408; Olivier 1993 *SAYIL* 11.

According to section 233 of the Constitution:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

This section gives constitutional effect to the common law presumption in South Africa that legislation is intended to comply with international law.³³⁰ The importance of international law in the interpretation of all legislation, and not only the Bill of Rights, is thus signified.³³¹

In order for a treaty to be binding on South Africa, it has to be signed, ratified and enacted into law by national legislation.³³² This has resulted in the fact that many treaties that were signed as long ago as the beginning of 1993 have still not been presented to Parliament for ratification, and that where treaties have been ratified, they have not been incorporated into domestic law.³³³

The United Nations International Convention on Economic, Social and Cultural Rights³³⁴ has already been signed and is in the process of being ratified by South Africa. Once this convention has been ratified South Africa will be faced with an international obligation on the state to immediately begin taking steps to progressively realise the socio-economic rights contained in the treaty.³³⁵ The fact that it has only been signed and not ratified does not mean that it is unimportant for South Africa. By signing the Covenant, South Africa has undertaken not to take steps designed to

330 Hopkins K Dec 2001 *De Rebus* 25; Keightley 1996 *SAJHR* 415; Maluwa 1998 *SAYIL* 58. This can be viewed as an "international law-friendly-approach". See Jansen van Rensburg and Olivier *International and Supra-national Law* 621.

331 Keightley 1996 *SAJHR* 415; Scott and Alston 2000 *SAJHR* 212.

332 Sections 231(2) and (4) of the Constitution. No specific requirements for the ratification of treaties have been laid down by international law. Botha 1995 *SAYIL* 197; Maluwa 1998 *SAYIL* 45.

333 Keightley 1996 *SAJHR* 411.

334 Henceforth referred to as the ICESCR.

335 As this covenant is a treaty, its ratification will create legally binding obligations for South Africa. Barrie 1995 *SALJ* 71; Jansen van Rensburg 1999 *De Jure* 297.

defeat the object and purpose of its provisions and to review all policy and law to ensure compliance when ratification does take place.³³⁶

The United Nations Convention on the Rights of the Child came into force in 1990.³³⁷ It has already been signed and ratified by South Africa³³⁸ and thus creates legally binding obligations for the Republic.³³⁹

In terms of section 231(4) of the Constitution, a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Not all international agreements thus require ratification to have legal effect.³⁴⁰ The Constitution does not, however, give guidance as to the meaning of 'self-executing agreement' or 'self-executing provisions of an international agreement'.³⁴¹ The definition of a self-executing agreement is a difficult and controversial matter.³⁴² The term is more common in foreign jurisprudence, particularly that of the United States of America.³⁴³ It would appear that in the United States of America, a treaty can be said to be self-executing if its provisions are automatically, and without any formal or specific act of incorporation by state authorities, part of the law of the land and enforceable by the municipal courts.³⁴⁴ According to Dugard,³⁴⁵ whether or not a treaty is 'self-executing' is a question of intention. Where parties intend that an agreement is to come into force immediately without ratification at international level, South African Parliament should not be able to insist on parliamentary ratification.³⁴⁶ Each treaty will, however,

336 States that have ratified the Covenant are required to report to the United Nations on the measures which they have adopted and the progress they have achieved in the observance of the rights guaranteed under the Convention. See Clark 2000 *SALJ* 342; Dugard *International Law* 330; Goosen *ea International and Comparative Standards* 538; Jansen van Rensburg and Olivier *International and Supra-national Law* 637.

337 Barrie 1995 *SALJ* 79.

338 This convention was ratified by South Africa in 1995 which has bound South Africa to comply with the obligations contained therein. See Clark 2000 *SALJ* 342; Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 266; Hopkins Dec 2001 *De Rebus* 27; Lombard 2000 *Social Work* 134; Sloth-Nielsen 1996 *Acta Juridica* 6; Van Bueren 1999 *SAJHR* 52.

339 The only two countries which have not signed and ratified the CRC are the USA and Somalia.

340 Dugard *International Law* 56; Keightley 1996 *SAJHR* 413.

341 Pienaar and Stemmet 1999 *SAPL* 493.

342 Pienaar and Stemmet 1999 *SAPL* 493.

343 Dugard *International Law* 58; Keightley 1996 *SAJHR* 413; Pienaar and Stemmet 1999 *SAPL* 493.

344 In other words, a self-executing treaty operates by itself without the aid of any legislative provision. Pienaar and Stemmet 1999 *SAPL* 493.

345 Dugard *International Law* 56.

346 Dugard *International Law* 56-57.

have to be decided on its own merits, with due regard to the nature of the treaty, the precision of its language and the existing South African law on that subject.³⁴⁷

The inclusion of the above mentioned sections relating to international law in the Constitution serves a two-fold purpose.³⁴⁸ In the first place, they serve to inform that the new constitutional South African state, unlike the apartheid state, aims to conform to the prescriptions of the international legal order.³⁴⁹ Secondly, they inform the international community of South Africa's new commitment to international law.³⁵⁰

4 The extent of justiciability of social security rights of children and the court's application of these rights

4.1 Introduction

Traditionally, a distinction has been made between three types of fundamental rights, namely first generation-³⁵¹ second generation-³⁵² and third generation rights.³⁵³ The United Nations has also made this distinction by preparing two separate human rights

347 Dugard *International Law* 58.

348 Dugard 1995 *SAJHR* 241.

349 Dugard 1995 *SAJHR* 241.

350 Dugard 1995 *SAJHR* 241. For a discussion on South Africa's compliance with its international law obligations relating to socio-economic rights, see 6.2 to 6.4 below.

351 These rights are also referred to as civil and political rights or blue rights. First generation rights include the right to life and traditional liberties, namely the right to freedom of speech; to freedom of association; to freedom of assembly; to freedom of conscience and to personal liberty. See Basson 1994 *THRHR* 499; Bekink and Brand *Constitutional Protection of Children* 171; De Villiers 1996 *SALJ* 694; De Vos 1995 *SAPL* 233 and 235; Dugard *International Law* 240; Ermacora, Manfred and Tretter *International Human Rights* 17; Jansen van Rensburg "Alleviation of Poverty" 109; Mureinik 1992 *SAHRJ* 464; Ngwena 2000 *SAPL* 5; Olivier *ea Constitutional Issues* 66.

352 These rights are also referred to as social, economic and cultural rights, welfare rights or red rights. Second generation rights include the right to nutrition, shelter, health care, education, social security and family assistance. They seek to ensure the essentials of life. See Basson 1994 *THRHR* 499; Bekink and Brand *Constitutional Protection of Children* 172; Ben-Israel 1995 *Comparative Labour Law Journal* 146; De Wet *SAJHR* 42-43; De Villiers 1996 *SALJ* 694; De Vos 1995 *SAPL* 233 and 235; Dugard *International Law* 240; Ermacora, Manfred and Tretter *International Human Rights* 17; Jansen van Rensburg "Alleviation of Poverty" 109; Kruger 1994 *Stell LR* 15 and 27; Mureinik 1992 *SAJHR* 464-465; Ngwena 2000 *SAPL* 4-5; Nthai July 1999 *De Rebus* 41.

353 These rights, which include the right to self-determination, peace, development and a protected environment are also referred to as green rights. See Basson 1994 *THRHR* 499; Bekink and Brand *Constitutional Protection of Children* 172; De Villiers 1992 *SALJ* 425; De Villiers 1996 *SALJ* 694; De Vos 1995 *SAPL* 235; Dugard *International Law* 252; Jansen van Rensburg 1999 *Journal for Juridical Science* 46; Nthai July 1999 *De Rebus* 41; Rembe *The System of Protection of Human Rights under the African Charter* 1; Robertson and Merrills *Human Rights in the World* 255-256.

covenants, one on civil and political rights³⁵⁴ and another on social, economic and cultural rights.³⁵⁵ One of the reasons for making use of two documents was that, initially, many states were willing to ratify the ICCPR but not the ICESCR.³⁵⁶ States which had problems in implementing economic and social rights could nevertheless undertake binding obligations in regard to civil and political rights by ratifying the ICCPR.³⁵⁷

This distinction has given rise to controversy regarding the justiciability and enforceability of second generation rights.³⁵⁸ It is argued that first generation rights can be easily implemented due to the fact that they are negative in nature.³⁵⁹ These rights merely require negative enforcement by the state by requiring the state not to infringe on or interfere with an individual's civil and political rights.³⁶⁰ Because these rights merely require that the state refrain from doing something, they are inexpensive to enforce, as well as 'absolute' and can be immediately implemented without a conflict of interests.³⁶¹

354 The International Covenant on Civil and Political Rights; Henceforth referred to as the ICCPR.

355 The ICESCR. There exists no covenant for third generation rights. The reason for this is that these rights are still in a conceptual phase and have only developed in the last part of the twentieth century. At the time of the drafting of the ICCPR and the ICESCR, therefore, these rights did not exist. De Vos 1995 *SAPL* 235; Jansen van Rensburg 1999 *Journal for Juridical Science* 46; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 48.

356 Eide *Strategies for the Realisation of the Right to Food* 461; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 48.

357 Empirical reality has, however, shown this to be wrong. In practically all cases, states have ratified both Covenants. In those very few cases where states have ratified only one Covenant, it has been the ICESCR, not the ICCPR. Eide *Strategies for the Realisation of the Right to Food* 461.

358 Including the right to social security. See Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 47; Mureinik 1992 *SAJHR* 465; Swanepoel 1998 *PER* 41-42.

359 Alston and Quinn 1987 *Human Rights Quarterly* 159; Basson 1989 *SAPL* 123; De Waal, Currie and Erasmus *Bill of Rights Handbook* 432; De Wet 1996 *THRHR* 582; De Wet 1995 *SAPL* 73, 86; Ferreira 1999 *SALJ* 291; Jansen van Rensburg 1999 *Journal for Juridical Science* 46; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 49; Liebenberg 1995 *SAJHR* 361; Mureinik 1992 *SAJHR* 467; O'Regan 1999 *ESRR* 2.

360 In other words, they impose on the state the duty not to act in a certain way. These rights protect citizens against the state by limiting the power of government over the governed. The state may, for example, not interfere with an individual's rights to freedom of speech, the press and equal protection of the law. Alston and Quinn 1987 *Human Rights Quarterly* 159; Basson 1989 *SAPL* 123; Bekink and Brand *Constitutional Protection of Children* 171-172; De Wet 1996 *THRHR* 582; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 49; Shaw *International Law* 173; Starck "State Duties of Protection" 14.

361 Alston and Quinn 1987 *Human Rights Quarterly* 159; Bekink and Brand *Constitutional Protection of Children* 172; Eide *Strategies for the Realisation of the Right to Food* 460; Jansen van Rensburg 1999 *Journal for Juridical Science* 46-47; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 51; UNICEF *Poverty Reduction Begins with Children* 4.

Second generation rights, on the other hand, require a positive performance by the state.³⁶² It is, therefore, argued that socio-economic rights³⁶³ are unenforceable because they require the judiciary to impose on the terrain of the legislative and executive branches of government.³⁶⁴ This argument thus relates to the questions of separation of powers and democracy.³⁶⁵ This is, according to the doctrine of separation of powers, seen as a matter for parliament which should not be subject to enforcement by the courts.³⁶⁶ It is argued that socio-economic rights often require government expenditure to meet tertiary level obligations.³⁶⁷ Because these rights place a duty on the state to act positively, they are expensive to implement and can only be realised over a period of time.³⁶⁸ This control of the state's budget is also considered a political function which rests exclusively with the legislature.³⁶⁹ In the *Soobramoney* case, Sachs J, in his minority judgement, remarked that the courts must be cautious in their review functions, while the majority judgement further held that a court would be slow to interfere with rational decisions taken in good faith by political organs and medical authorities. Socio-economic rights are often considered to be vague, which

362 Thus, rather than simply protecting members of society from state power, socio-economic rights oblige the state to do whatever it can to secure for all members of society a basic set of social goods. This argument is supported by conservative supporters of a Bill of Rights. The argument compares civil and political rights to a shield (in other words, the individual uses these rights as a shield against abuse of state power) and socio-economic rights to a sword (the individual can use these rights to force the state to provide for him or her). Conservative supporters feel that a bill of rights should be a shield and not a sword. See Bekink and Brand *Constitutional Protection of Children* 172; Ben-Israel 1995 *Comparative Labour Law Journal* 147; De Waal, Currie and Erasmus *Bill of Rights Handbook* 432; De Wet 1996 *THRHR* 581; De Vos 1995 *SAPL* 236; Ferreira 1999 *SALJ* 291; Haysom 1991 *SAJHR* 107; Jansen van Rensburg "Alleviation of Poverty" 109; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 50; Kruger 1994 *Stell LR* 27; Liebenberg 1995 *SAJHR* 361; Mureinik 1992 *SAJHR* 465; O'Regan 1999 *ESRR* 2; Primstone 1995 *SAPL* 378; Robinson 1996 *Word and Action* 9.

363 For example, the right to basic nutrition and work, the right to shelter, the right to the basic necessities of life, the right to education, children's rights and the right to appropriate health care.

364 This argument is supported by the progressive opponents of the Constitutionalism of social and economic rights. See De Vos 1995 *SAPL* 237; Jansen van Rensburg "Alleviation of Poverty" 109; Jansen van Rensburg 1999 *Journal for Juridical Science* 47; Ka Mdumbe 1998 *SAPL* 460; Michelman 1998 *SAJHR* 501; Mureinik 1992 *SAJHR* 465; Nthai July 1999 *De Rebus* 41; Olivier *ea Constitutional Issues* 66.

365 De Wet 1996 *THRHR* 583; De Wet 1995 *SAPL* 77; Ka Mdumbe 1998 *SAPL* 460; O'Regan 1999 *ESRR* 3.

366 De Waal, Currie and Erasmus *Bill of Rights Handbook* 433; De Wet 1996 *THRHR* 583; O'Regan 1999 *ESRR* 3.

367 Tertiary level obligations require the state to promote and realise human rights. See discussion in 3.4 above.

368 See Alston and Quinn 1987 *Human Rights Quarterly* 159; Anon 19 May 1995 *Financial Mail* 47; Bekink and Brand *Constitutional Protection of Children* 172; Ben-Israel 1995 *Comparative Labour Law Journal* 147; De Villiers 1996 *SALJ* 697; De Wet 1996 *THRHR* 583; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 51; Liebenberg 1995 *SAJHR* 361-362.

might result in the courts being unable to translate their abstract values into enforceable orders.³⁷⁰

According to *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*,³⁷¹ the doctrine of separation of powers implies that the legislature makes the laws, the executive implements them and the judiciary determines whether, in the light of the Constitution and the law, conduct is lawful or unlawful.³⁷² The Court, however, goes on to state that the separation prescribed by the Constitution is not absolute and that on occasions, some overlapping of functions is permissible.³⁷³ This argument was taken further in the *TAC* case where the judges agreed that there was no bright line separating the different branches of government. According to the Court, the Constitution grants the courts a restrained and focused role, namely to evaluate the reasonableness of measures taken by the state. While such evaluation may have budgetary implications, they are not in themselves directed at rearranging budgets.³⁷⁴ The Court further stated that, while the separation of powers should indeed be respected, this does not mean that the courts cannot or should not make orders that have an impact on policy.³⁷⁵ In fact, according to the Court, if state policy is inconsistent with the Constitution, the Court has to examine this to comply with its constitutional duties. If the executive acts in a manner which is inconsistent with the Constitution, the intrusion by the court can be considered as an intrusion mandated by the Constitution itself. It is thus submitted that the issue in

369 A judge's function is not to co-ordinate the diversity of political factors which influence social priorities and the means to their realisation. See Basson 1989 *SAPL* 123; De Wet 1996 *THRHR* 583; De Wet 1995 *SAPL* 77; Heyns 1999 *De Jure* 197.

370 The argument goes that socio-economic rights are unenforceable as they fail the definiteness test. See Ben-Israel 1995 *Comparative Labour Law Journal* 147; De Vos 1995 *SAPL* 238; Gomez 1995 *Human Rights Quarterly* 161; Jansen van Rensburg 1999 *Journal for Juridical Science* 47; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 51; Mureinik 1992 *SAJHR* 467.

371 *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 7 *BCLR* 652 (CC); Henceforth referred to as *Minister of Public Works v Kyalami Ridge Environmental Association*.

372 In other words, it is the responsibility of the executive to decide upon priorities and formulate a budget, to face the fiscal consequences of its decision and to account to the people via parliament.

373 *Minister of Public Works v Kyalami Ridge Environmental Association* para 37. Courts' decisions almost invariably have policy implications when they decide constitutional issues affecting people's fundamental rights. In such cases, the courts are not dictating policy but fulfilling one of their key functions in a constitutional democracy, which is to ensure that all government policy conforms to the supreme law of the land, namely the Constitution. Bisseker 3 May 2002 *Financial Mail* 22-23. For a discussion on the case in question, see Kotze "Local Economic Development" 103-106.

374 *Minister of Health v TAC* para 38.

375 *Minister of Health v TAC* para 98.

question does not so much involve the separation of powers as the sharing of powers of the different branches of government.

Authors such as De Vos,³⁷⁶ however, warn against this distinction between first and second generation rights, arguing that it is false and that there is, in principle, no conceptual difference between these two categories of rights. According to this argument, all fundamental rights are aimed at protection of the individual's freedom to live his or her life with human dignity and respect.³⁷⁷ The distinction between the interests being protected is not absolute. First generation- and second generation rights are, therefore, interdependent and indivisible.³⁷⁸

Certain civil and political rights also require positive performance by the state.³⁷⁹ In contrast, certain socio-economic rights only require negative performance.³⁸⁰ In line

376 De Vos 1995 *SAPL* 235; De Vos 2001 *SAJHR* 264; Jansen van Rensburg 1999 *Journal for Juridical Science* 47.

377 Jansen van Rensburg 1999 *Journal for Juridical Science* 47; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 52.

378 According to Jansen van Rensburg (Jansen van Rensburg "Alleviation of Poverty" 109), arguments against the enforceability of socio-economic rights have become increasingly theoretical. Socio-economic rights have been accepted and enforced in international as well as national legal systems. De Vos (De Vos 1995 *SAPL* 235; De Vos 2001 *SAJHR* 264) is of the opinion that the different rights often operate in support of each other, since the realisation of one right may be dependent on the realisation of another. He uses the example that starving people may find it difficult to exercise their right to freedom of speech while a restriction on this right may make it difficult for individuals to enforce their right of access to housing. Furthermore, the Vienna Declaration and Programme of Action adopted by consensus on 25 June 1993 by the states participating in the World Conference on Human Rights reaffirms that 'all human rights are universal, indivisible, interdependent and interrelated'. This view that first- and second generation rights are independent and indivisible is in line with the Universal Declaration of Human Rights as well as the ICESCR. See Budlender 2002 HYPERLINK <http://www.lrc.org.za/4Pub/Papers/delhipaper.doc> 15 Oct 2002; Flinterman and Gutter 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/flinterman2000.pdf 7 Feb 2003; Gomez 1995 *Human Rights Quarterly* 155; Jansen van Rensburg 1999 *Journal for Juridical Science* 47; Liebenberg 1995 *SAJHR* 362; UNICEF *Poverty Reduction Begins with Children* 4. See also discussion on *Certification Judgement*, *Grootboom* cases and *Kyalami* cases in 4.3 and 4.4 below.

379 For example, the enforcement of the right to a fair trial in terms of section 35(3) could require the provision of legal aid, which would have budgetary implications for the state. In *August v Electoral Commission and Others* 1999 3 SA 1 (CC), the applicants, who were prisoners, asserted that they were being denied a classic civil and political right, namely the right to vote. To set up the necessary infrastructure to enable them to vote, would have significant financial implications, yet the Court still found that the state was obliged to take these steps to enable prisoners to vote. See Alston and Quinn 1987 *Human Rights Quarterly* 184; Basson 1989 *SAPL* 123; Budlender 2002 HYPERLINK <http://www.lrc.org.za/4Pub/Papers/delhipaper.doc> 15 Oct 2002; De Villiers 1996 *SALJ* 699; De Vos 1995 *SAPL* 251-252; Eide *Strategies for the Realisation of the Right to Food* 461; Ferreira 1999 *SALJ* 292; De Wet 1995 *SAPL* 87; Haysom 1991 *SAJHR* 107; Jansen van Rensburg 1999 *Journal for Juridical Science* 46-47; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 50; Ka Mdumbe 1998 *SAPL* 460; Liebenberg 1995 *SAJHR* 362; UNICEF *Poverty Reduction Begins with Children* 4.

with the argument that all fundamental rights are interdependent and indivisible,³⁸¹ the deduction can be made that the general welfare of all citizens is a prerequisite for a democratic government.³⁸²

This can be summarised by De Villiers³⁸³ as follows:

Social and economic rights concern the stomach of Africa and other impoverished areas: some form of acknowledgement that the state has a Constitutional duty to take care of the social and economic plight of people is necessary; ordinary citizens will not relate to a Bill of Rights that recognises only Lockean rights.³⁸⁴

The justiciability of socio-economic rights was dealt with in the *Certification of the Constitution of the Republic of South Africa, 1996*.³⁸⁵ In this judgement, the court, in responding to objections to the inclusion of these rights³⁸⁶ ruled that, despite the fact that the inclusion socio-economic rights in the Constitution could have fiscal implications for the state, they are, at the very minimum, negatively enforceable.³⁸⁷ In more recent decisions, however, it has become clear that the constitutional court is willing to order state organs to act positively.³⁸⁸

380 For example, the right of every worker to strike, contained in section 23(2)(c) requires merely from the state not to interfere. See Alston and Quinn 1987 *Human Rights Quarterly* 184; Budlender 2002 HYPERLINK <http://www.lrc.org.za/4Pub/Papers/delhipaper.doc> 15 Oct 2002; De Vos 1995 *SAPL* 251-252; De Vos 2001 *SAJHR* 260-261; Eide *Strategies for the Realisation of the Right to Food* 461; Jansen van Rensburg 1999 *Journal for Juridical Science* 46-47; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 50; Ka Mdumbe 1998 *SAPL* 460; Liebenberg 1995 *SAJHR* 362.

381 De Vos 1995 *SAPL* 235; Jansen van Rensburg 1999 *Journal for Juridical Science* 47; Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 53; UNICEF *Poverty Reduction Begins with Children* 4.

382 The protection of socio-economic rights can thus be seen as necessary for people to be able to act in ways protected by other rights, such as those of political participation. Jansen van Rensburg 1999 *Journal for Juridical Science* 49; Mollendorf 1998 *SAJHR* 332.

383 De Villiers 1996 *SALJ* 681.

384 See also Mollendorf 1998 *SAJHR* 332. According to Mollendorf, protection of socio-economic rights is a necessary condition for citizens being able to act in ways protected by other rights, especially those of political participation.

385 *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC); Henceforth referred to as the Certification.

386 Sections 26, 27, 28 and 29 of the Constitution.

387 In other words, the court can prevent the state from acting in ways that infringe socio-economic rights directly and can prevent interference by private individuals. *Certification* paras 76-78; Clark 2000 *SALJ* 344; De Waal, Currie and Erasmus *Bill of Rights Handbook* 434-435; Jansen van Rensburg 1999 *Journal for Juridical Science* 51; Ka Mdumbe 1998 *SAPL* 460; Liebenberg 1998 HYPERLINK http://www.sahrc.org.za/volume_v.PDF 13 Aug 2003; Michelman 1998 *SAJHR* 501.

388 See *Government of the Republic of South Africa v Grootboom*, discussion in 4.3 below, and *Minister of Health v TAC*, discussed in 4.5 below. See also Olivier *et al Constitutional Issues* 66-69.

Both civil and political rights and socio-economic rights have been included in the Constitution. The Bill of Rights follows a non-hierarchical approach to fundamental rights and makes no reference to the traditional division between first, second and third generation rights.³⁸⁹ All of the rights in the Bill of Rights have been included to ensure the achievement of the same objective, which is the creation of a society which allows all people to achieve their full potential as human beings.³⁹⁰ It thus follows that socio-economic rights have the same status as civil and political rights.³⁹¹ The fact that these different categories of rights are not differentiated from one another further emphasises the interrelatedness and indivisibility of civil and political and socio-economic rights.³⁹² It is thus clear that socio-economic rights are justiciable. It is not up to a court to decide on their justiciability, but on how they should be enforced in a given case.³⁹³ The question facing the court with regard to the social security rights of children is thus not whether these rights are justiciable, but to what extent they are justiciable.

4.2 *The first case: Soobramoney*

In the Constitutional Court case of *Soobramoney v Minister of Health (KwaZulu-Natal)*,³⁹⁴ the court was faced with an appellant with a terminal illness requesting emergency medical treatment in terms of section 27(3) of the Constitution.³⁹⁵ In his judgement, Chaskalson P stated that, while the words 'emergency medical treatment' could be construed broadly so as to include ongoing treatment of chronic illnesses for

389 Bekink and Brand *Constitutional Protection of Children* 172; Jansen van Rensburg "Alleviation of Poverty" 109; Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003; Olivier *ea Constitutional Issues* 54; Olivier and Kalula *Scope of Coverage* 125; Scott and Alston 2000 *SAJHR* 214.

390 De Vos 2001 *SAJHR* 265.

391 This is the case with the Universal Declaration of Human Rights, which also makes no differentiation between civil and political and economic, social and cultural rights, illustrating that the realisation of both groups of rights are essential for a dignified existence. Flinterman and Gutter 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/flinterman2000.pdf 7 Feb 2003; Liebenberg 1998 http://www.sahrc.org.za/volume_v.PDF 13 Aug 2003; Heyns 1999 *De Jure* 196; Mollendorf 1998 *SAJHR* 331; Olivier *ea Constitutional Issues* 54; Olivier and Kalula *Scope of Coverage* 125.

392 Jansen van Rensburg "Alleviation of Poverty" 109; Olivier *ea Constitutional Issues* 54.

393 *Government of the Republic of South Africa v Grootboom* para 20; Van der Walt 2001 *SAPL* 9-10.

394 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1996 (CC).

395 *Soobramoney v Minister of Health* paras 1-7.

the purpose of prolonging life, this was not their ordinary meaning and that, if such an interpretation had been the purpose of the legislature, it would have been expressed as such in positive and specific terms.³⁹⁶ The Court, therefore, interpreted the section to intend that no person should be refused emergency medical treatment, when otherwise available, by reason of bureaucratic requirements or other formalities.³⁹⁷

In casu, the Court stated that, even if section 27(3) had been given a broad construction, certain rights would have to be weighed against one another due to the scarcity of funds available for emergency medical treatment. Should this section have been construed in accordance with the appellant's contention, it would make it substantially more difficult for the state to fulfil its obligations under sections 27(1) and 27(2) to provide health care services to everyone within its available resources.³⁹⁸ The state has to manage its limited resources in order to address all of these claims. There will, therefore, be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.³⁹⁹ In making this statement, it is clear that the court considered the relevant political and socio-economic factors and was careful not to interfere with the political decision making processes of government.⁴⁰⁰

While the state has a constitutional duty to comply with the obligations imposed on it by section 27 of the Constitution, its failure to provide the medical treatment requested did not constitute a breach of those obligations. The Court thus found that, in the appellant's circumstances, he would not be entitled to the relief requested.⁴⁰¹

In its judgement, the Court stated that decisions as to the health budget are left to the health authorities and that a court will be slow to interfere with **rational decisions** taken in **good faith** by the political organs and medical authorities whose

396 *Soobramoney v Minister of Health* para 13. See Blackbeard 1999 *THRHR* 308; Ka Mdumbe 1998 *SAPL* 466.

397 *Soobramoney v Minister of Health* para 20. See Blackbeard 1999 *THRHR* 306; Ka Mdumbe 1998 *SAPL* 466; Michelman 1998 *SAJHR* 502.

398 *Soobramoney v Minister of Health* para 19. See Blackbeard 1999 *THRHR* 308; Ka Mdumbe 1998 *SAPL* 466.

399 *Soobramoney v Minister of Health* para 31.

400 See discussion on separation of powers in 4.1 above.

401 *Soobramoney v Minister of Health* para 36. See Blackbeard 1999 *THRHR* 308.

responsibility it is to deal with such matters.⁴⁰² It can, therefore be inferred that socio-economic rights are in fact justiciable,⁴⁰³ but that the Constitutional Court will not readily (apart from in extreme circumstances) encroach on the terrain of the legislative and executive authority.⁴⁰⁴ This decision made it clear that the judges chose to exercise self-restraint on account of the doctrine of separation of powers and viewed the matter as one that should essentially be resolved by elected politicians. The Court furthermore expressly stated that the government does not have the socio-economic resources to provide tertiary level health care on request to all those in need thereof.

Also important to take notice of, is the minority judgment of Sachs J. While in agreement with the majority judgment of Chaskalson P, Sachs J found it necessary to add certain considerations which he regarded as relevant.⁴⁰⁵ In this minority judgement, Sachs J emphasised the interdependence of health care rights and stated that, when rights by their very nature are shared and interdependent, the striking of a balance between equally valid entitlements of a multitude of claimants should not be seen as the imposing of limits on these rights,⁴⁰⁶ but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.⁴⁰⁷

While the *Soobramoney* judgement demonstrates the justiciability of the right to health care,⁴⁰⁸ it also emphasises the sensitivity of socio-economic rights to the availability of resources.⁴⁰⁹ This discrepancy between need and available resources will have the result of a weighing of the rights of individuals against the needs of the broader community.⁴¹⁰

402 *Soobramoney v Minister of Health* para 29. See Ferreira 1999 *SALJ* 293; Jansen van Rensburg 1999 *Journal for Juridical Science* 51; Ka Mdumbe 1998 *SAPL* 468.

403 Ngwena 2000 *SAPL* 14.

404 Jansen van Rensburg 1999 *Journal for Juridical Science* 51; Van den Heever *Health Care* 351. For a discussion on the separation of powers see 4.1 above.

405 *Soobramoney v Minister of Health* para 50.

406 Which would then have to be justified in terms of section 36.

407 *Soobramoney v Minister of Health* para 54. For a discussion on the court's interpretation of the limitation of these rights, see 3.4 above.

408 And, by implication, other socio-economic rights.

409 Ngwena 2000 *SAPL* 14.

410 Ferreira 1999 *SALJ* 293; Olivier *ea Constitutional Issues* 89.

Before the *Grootboom* judgement,⁴¹¹ the applicability of the decision in the *Soobramoney* case on the social security rights of children could have been questioned, due to the fact that section 28 is not internally qualified. Since this judgement, however, it is evident that *Soobramoney* will be applicable, as children's rights are subject to the same limitations as other social security rights.⁴¹² Applied to the social security rights of children, it is clear that, in terms of the *Soobramoney* judgement, such rights will also be sensitive to the availability of resources. In other words, the refusal to provide medical treatment (or any other socio-economic right) to children can be justified by reason of the state's lack of resources, and the court will be reluctant to interfere with such a decision.

4.3 *The Grootboom case*

Another judgement dealing with the enforceability of socio-economic rights⁴¹³ is *Grootboom and Others v Oostenberg Municipality and Others*.⁴¹⁴ In this judgement of the High Court, the applicants based their claim on sections 26 of the Constitution which provides that everyone has the right of access to adequate housing and section 28 of the Constitution which provides that children have the right to shelter.⁴¹⁵ It was noted by the Court that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. It must provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants.

In this case,⁴¹⁶ the claim based on section 28 was to shelter for the applicant children. In considering this right, the Court rejected the argument that the fact that the child is the bearer of the right in question creates a derivative right for the parents. Instead, it interpreted the right to provide shelter to the children to be of such a nature as to allow their parents to join them. This approach would, according to the Court, be in

411 Discussed in 4.3 below.

412 For a discussion on these internal qualifications, see 3.4 above.

413 With much emphasis on the socio-economic rights of children.

414 *Grootboom and Others v Oostenberg Municipality and Others* 2000 3 BCLR 277 (C); Henceforth referred to as *Grootboom v Oostenberg Municipality*.

415 *Government of the Republic of South Africa v Grootboom* para 13.

416 Namely the High Court judgement.

accordance with the spirit and purport of section 28 read as a whole. The Court, therefore, granted the children shelter and allowed the parents to be entitled to be accommodated with their children in such shelter until such time as the parents are able to shelter their own children.⁴¹⁷

In his judgement, Davis J referred to the difference in wording between articles 26 and 28. He indicated that section 28, which regulates the social security rights of children, is **not subject to the same internal limitations as the rights in section 26**. According to his judgement, section 28(1)(c) was set up as an internally unqualified constitutional right.⁴¹⁸

On appeal, the Constitutional Court however differed from the judgement of the High Court. In *The Government of the Republic of South Africa and Others v Grootboom and Others*⁴¹⁹ the Court referred to the state's duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights' conferred by section 7(2). It noted that the courts are, therefore, constitutionally bound to ensure that these rights are protected and fulfilled. The question which faced the Court was, consequently, not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.⁴²⁰ It was also stated that:⁴²¹

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter.

In its analysis of section 26, the court stated that it is not possible to determine the **minimum threshold** for the progressive realisation of the right without first identifying the needs and opportunities for the enjoyment of such a right.⁴²² It then went on to identify the real question in terms of our Constitution to be whether the measures taken by the state to realise the right afforded by section 26 are

417 *Grootboom v Oostenberg Municipality* para 16.

418 This interpretation of section 28 could, by implication, result in children having the right to immediate access to social services.

419 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC); Henceforth referred to as *Government of the Republic of South Africa v Grootboom*.

420 *Government of the Republic of South Africa v Grootboom* para 20.

421 *Government of the Republic of South Africa v Grootboom* para 23.

422 *Government of the Republic of South Africa v Grootboom* para 32.

reasonable.⁴²³ In its judgement, the Court concluded that, at the date of the launch of the application, the state was not meeting the obligation imposed on it by section 26(2) of the Constitution. In particular, the programmes adopted by the state did not comply with the requirements of section 26(2) as no provision was made for relief to the categories of people most desperately in need.⁴²⁴ Although a housing programme was being implemented, it focussed on medium to long term goals, aiming to deliver adequate housing to the inadequately housed, to the exclusion of immediate relief for those in a situation of crisis. This was not reasonable.⁴²⁵ It is evident from this decision that vulnerable members of society should be ensured a degree of priority in respect of housing.⁴²⁶

The Court noted that the right to have access to adequate housing, in terms of section 26(1) of the Constitution must be interpreted along with its internal limitation in section 26(2). The fact that the respondents had initiated a housing programme within the context of the scarce financial resources, considered in the light of the limitation of section 26(2), resulted in the failure of the applicants' claims based on section 26.⁴²⁷ Section 26(1) grants a 'right to access to adequate housing' and not a 'right to housing'. This, according to the Court, is wider than the mere 'right to housing'.⁴²⁸ It requires more than the mere provision of a house, in that 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. The Court went on to remark that a right of access to adequate housing is not only the responsibility of the state, but also that of other agents within society, including individuals themselves. The state must provide the conditions, including legislative and other measures, for access to adequate housing for people at all economic levels of our society.⁴²⁹

423 *Government of the Republic of South Africa v Grootboom* para 33.

424 *Government of the Republic of South Africa v Grootboom* para 69.

425 Budlender 2002 HYPERLINK <http://www.lrc.org.za/4Pub/Papers/delhipaper.doc> 15 Oct 2002.

426 And, by implication other socio-economic rights, including the right to social security. Budlender 2002 HYPERLINK <http://www.lrc.org.za/4Pub/Papers/delhipaper.doc> 15 Oct 2002; Olivier *ea Constitutional Issues* 90.

427 *Government of the Republic of South Africa v Grootboom* para 14.

428 Olivier *ea Constitutional Issues* 57.

429 *Government of the Republic of South Africa v Grootboom* para 35.

The minimum core obligation approach⁴³⁰ was not adopted by the Court.⁴³¹ The Court, thus, did not recognise a minimum essential level of housing to which the respondents were entitled. This is unfortunate, as the remedy which the applicants were seeking was close to, if not based upon a plausible definition of the core minimum content of the right to housing.⁴³²

In setting aside the decision of the High Court, the Constitutional Court expressed fear that, should parents be granted a derivative right to housing through their children, children could become stepping stones to housing for their parents instead of being valued for who they were.⁴³³ The Court went on to indicate that sections 28(1)(b)⁴³⁴ and 28(1)(c)⁴³⁵ must be read together. According to the Court, section 28(1)(b) identifies the parties responsible for children⁴³⁶ and section 28(1)(c) identifies the aspects to which children are entitled.⁴³⁷ The Court thus finds that section 28(1)(c) does not place a primary obligation on the state to care for children but that such primary obligation lies with the children's parents. Children that are not under family or parental care are entitled to alternative care which must be provided by the state.⁴³⁸ The Court⁴³⁹ thus ruled that:

Those of the respondents in this case who are children are being cared for by their parents; they are not in the care of the state, in any alternative care, or abandoned. In the circumstances of this case, therefore, there was no obligation upon the state to provide shelter to those of the respondents who were children and, through them, their parents in terms of section 28(1)(c). The High Court therefore erred in making the order it did on the basis of this section.

430 Of the UN Committee in General Comment 3.

431 Budlender 2002 HYPERLINK <http://www.lrc.org.za/4Pub/Papers/delhipaper.doc> 15 Oct 2002.

432 A minimum core obligation approach was recommended by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, which is of the opinion that the court may use this minimum core if there is a specific infringement or non-compliance with a social security right. See Scott and Alston 2000 *SAJHR* 256. For a discussion on the minimum core obligation approach in international law, see 6 below.

433 *Government of the Republic of South Africa v Grootboom* para 71.

434 Section 28(1)(b) grants every child the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

435 Section 28(1)(c) grants every child the right to basic nutrition, shelter, basic health care services and social services.

436 Namely the parents and family and, if a child is not in the care of the parents and family, the state must care for such child.

437 Namely basic nutrition, shelter, basic health care services and social services.

438 *Government of the Republic of South Africa v Grootboom* para 77.

439 *Government of the Republic of South Africa v Grootboom* para 79.

While it was found that section 28(1)(c) did not create a direct and enforceable claim on the state by children,⁴⁴⁰ the Court went on to state that this does not mean that the state has no obligation with regards to children under parental care. The state still has a duty to provide the necessary administrative and legislative infrastructure to ensure that children receive the protection that they are entitled to in terms of section 28.⁴⁴¹ The state must, for example, provide social assistance programmes to assist children and parents who are unable to support themselves, by means of for example, child support grants. With regard to the socio-economic rights of children, namely the right to basic nutrition, shelter, basic health care services and basic social services, the Court⁴⁴² stated the following:

In addition, the state is required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27. It follows from this judgment that sections 25 and 27 require the state to provide access on a programmatic and coordinated basis, subject to available resources.

The Court thus refused to recognise that the socio-economic rights of children, which are similar to the socio-economic rights recognised in sections 25, 26 and 27 are unconditional. The socio-economic rights are consequently, according to this judgment, subject to the same limitations as those in sections 26(2) and 27(2). **The conclusion can thus be made that the social security rights of children are, in the same manner as other social security rights, subject to internal limitations.** The Court thus sees the rights of children neither as an absolute priority nor a priority with much more weight than the rights of adults with the same needs.⁴⁴³

An analysis of the internal limitations of the rights in question was then given by the Court. The extent of the state's obligation is not absolute and unqualified, but is defined by three key elements that are considered separately, namely the obligation to 'take reasonable legislative and other measures', 'to achieve the progressive realisation'

440 Sloth-Nielsen 2001 *SAJHR* 224.

441 According to the Court, this obligation includes the following: 'This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation (28(1)(d)), and the prevention of other forms of abuse of children mentioned in section 28.' See Jazbhay December 2000 *De Rebus* 51.

442 *Government of the Republic of South Africa v Grootboom* para 78.

443 Scott and Alston 2000 *SAJHR* 267-268.

of the right and 'within available resources'.⁴⁴⁴ The test for **reasonableness** lies in whether or not the measures taken by the state were reasonable or not. This question does not inquire whether more favourable measures could have been taken or whether money could have been better spent.⁴⁴⁵ It involves the question whether the policies and programmes implemented by the state were reasonable in their conception and implementation.⁴⁴⁶ In determining whether a set of measures is reasonable, the following factors will have to be considered: housing problems in their social, economic and historical context, the capacity of the institutions responsible for implementing the programmes and whether the programme is balanced and flexible and makes provision for short, medium and long term needs. As stated above, a programme that excludes a significant segment of society cannot be said to be reasonable.⁴⁴⁷ Reasonableness must be understood in the context of the Bill of Rights as a whole. Those whose needs are most urgent must not be ignored by the measures aimed at achieving the realisation of the right. The fact that the measures are capable of achieving a statistical advance in the realisation of the right is not sufficient to meet the test of reasonableness. If the measures, though statistically successful, do not respond to the needs of the most desperate, they will not pass the test of reasonableness.⁴⁴⁸ The Court thus recognises the plight of vulnerable groups⁴⁴⁹ within society and indicates a willingness to grant such groups protection where necessary. Even though a programme may be advancing the needs of society as a whole, such programme may be excluding the needs of those who are particularly vulnerable. It appears as if the court will, in such circumstances, give preference to the needs of such groups.⁴⁵⁰ For example, applied to the social security rights of children, the child support grant,⁴⁵¹ while targeting children under the age of nine in general, excludes refugee children, which can be seen as a particularly vulnerable group, in need of

444 *Government of the Republic of South Africa v Grootboom* para 38.

445 *Government of the Republic of South Africa v Grootboom* para 41.

446 *Government of the Republic of South Africa v Grootboom* para 42.

447 *Government of the Republic of South Africa v Grootboom* para 43.

448 *Government of the Republic of South Africa v Grootboom* para 44.

449 Examples of vulnerable groups include the poor, women and children.

450 Section 9(2) of the Constitution provides for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. The prioritising of the needs of disadvantaged groups and the taking of special measures to expand their access to opportunities, resources and services would thus be in line with the right to equality. Liebenberg 2000 HYPERLINK http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html 7 Feb 2003. In this regard, a distinction needs to be made between formal and substantive equality. See discussion in 3.2 above.

451 Discussed in 5.1.3 below.

protection by the state. This policy does not, it is submitted, pass the test of reasonableness.

The term '**progressive realisation**' indicates that it was intended that the right could not be realised immediately. The goal of the Constitution is, however, that all basic needs of society must be effectively met.⁴⁵² In other words progressive realisation entails that accessibility to these rights should be progressively facilitated.⁴⁵³ The third aspect of the obligation, namely '**within available resources**' entails that the obligation does not require the state to do more than its available resources permit. This means that both the rate at which the content of the obligation is achieved as well as the reasonableness of the measures employed to achieve these results are governed by the availability of resources. The Court referred to the *Soobramoney* case, which stated that an unqualified obligation to meet needs would *in casu* not be capable of being fulfilled. There consequently has to be a balance between goal and means.⁴⁵⁴ If the state meets its obligation in the end, but in the process of doing so, discriminates unfairly against a vulnerable group, the means cannot be said to be reasonable. If the state were to, for example, summarily suspend all payments of social assistance grants to children in order to institute a new, more effective system, this could not be seen as reasonable. Although the new system will be more effective and target more children, the means to achieving this end⁴⁵⁵ will not pass the test of reasonableness.

Although this judgment concerned the right to shelter, the reasoning of the Court in respect of this right could be used to infer conclusions about the scope, content and enforceability of other social security rights, including the right to social assistance.⁴⁵⁶

The *Grootboom* judgment has both positive and negative implications in respect of children. On the positive side, the Court was implicit about the fact that the state has

452 According to the Committee of Inquiry, a minimum level of provision should be made available to everyone. See Committee of Inquiry *Consolidated Report* 41-42.

453 *Government of the Republic of South Africa v Grootboom* para 45. In certain respects, South Africa is complying with this requirement. The child support grant, which was initially only available to children under the age of seven is now available to children under the age of nine and is being made progressively available to children under the age of 14. The fact there are, at present, not plans to make it available to all children under the age of 18 could, however, indicate that the policy is not reasonable in that respect.

454 *Government of the Republic of South Africa v Grootboom* para 46.

455 Namely the suspension of payment of grants to children who are dependent on them.

456 Sloth-Nielsen 2001 *SAJHR* 224.

a primary responsibility to provide for the basic material needs of children who are not under parental care.⁴⁵⁷ A negative consequence, however, is the fact that the Court seems to send a message that children's claims do not have to be accorded priority.⁴⁵⁸ This approach of the Court, it is submitted, is incorrect. While no right is absolute, the fact that the wording of section 28 contains no internal limitation should convey a sense of priority in respect of children. Such an interpretation would also be in line with the CRC, which has been ratified by South Africa and which aims towards the establishment of priority for children.⁴⁵⁹

That the Court found it necessary to subject section 28 to the internal limitations of sections 26 and 27 can further be criticised with regard to the content of these sections. It can be argued that the rights in section 28 are intended to guarantee for children a certain basic subsistence level of the same social and economic goods that are provided for in more advanced form in sections 26 and 27.⁴⁶⁰ While section 26(1) guarantees the right of everyone⁴⁶¹ to access to 'adequate housing', section 28(1)(c) guarantees the right of children only to 'shelter'. Section 27(1)(b) guarantees the right of everyone to 'sufficient food and water, whereas section 28(1)(c) only guarantees children the right to 'basic nutrition'. The benefits to which a child is entitled in terms of section 28(1)(c) are thus of a narrower or lower level than those to which they are entitled in terms of sections 26 and 27.⁴⁶² They are regarded as the very minimum a child requires in order to subsist, whereas the entitlements in terms of everyone's socio-economic rights set the levels required for a person to live a full and dignified life.⁴⁶³

457 This would include abandoned and orphaned children and children living on the street, as they are *de facto* not under parental care. In coming years, there is a projected huge increase in the number of children orphaned by HIV/Aids. According to the *Grootboom* decision, the state now has a primary obligation towards these children. Sloth-Nielsen 2001 *SAJHR* 227 and 229.

458 Children, along with the elderly and disabled, are one of the most vulnerable groups in society and are currently desperately in need. Sloth-Nielsen 2001 *SAJHR* 229.

459 Scott and Alston 2000 *SAJHR* 259.

460 Bekink and Brand *Constitutional Protection of Children* 187.

461 And so of children.

462 Bekink and Brand *Constitutional Protection of Children* 187.

463 Bekink and Brand *Constitutional Protection of Children* 187.

A further disappointment is the fact that the Court did not give a clear indication of how it would assess the availability of resources.⁴⁶⁴ If the state were allowed to determine the extent of its own obligations,⁴⁶⁵ this would deprive socio-economic rights of their meaning. It would thus have been preferable for the Court to have indicated that the test for reasonableness would apply to determine the availability and allocation of resources.⁴⁶⁶ While it could be argued that, should the Court do this it would infringe on the doctrine of separation of powers, the approach by the court in both the *Kyalami* and *TAC* cases,⁴⁶⁷ is an indication that such an approach on the Court's part would not have this result. Instead, the Court could be seen to be exercising its mandate in terms of the Constitution.⁴⁶⁸

Despite the above mentioned criticism, the *Grootboom* judgement has, already, had a positive effect on the budget-allocation process by government in their attempts to ensure that socio-economic rights are, in fact, realised.⁴⁶⁹

4.4 *Minister of Public Works v Kyalami Ridge Environmental Association*

A further case dealing with housing, and applicable to the social security rights of children is *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*.⁴⁷⁰ In this case, the flooding of rivers left many people from the Alexandra Township, a populated township homeless.⁴⁷¹ This gave rise to an urgent need for accommodation for the victims, and it was decided by the government to establish a transit camp for the victims.⁴⁷² Residents of the area close to where it was decided to establish the camp, the Kyalami residents, contended that, by establishing the transit camp, the government was acting unlawfully as there was no

464 It did not indicate whether it will accept the budgetary allocations by government without question, or whether these allocations will also be subject to review for reasonableness. Liebenberg 2001 *SAJHR* 255.

465 Through its macro-economic and budgetary policies.

466 Liebenberg 2001 *SAJHR* 255.

467 Discussed in 4.4 and 4.5.2 below.

468 See 4.1 above.

469 The 2000 *Medium Term Budget Policy Statement* made reference to the *Grootboom* case and how, as a result of this judgement, increased resources have been made available to selected programmes to address the immediate needs of the poorest communities.

470 *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 7 BCLR 652 (CC); Henceforth referred to as *Minister of Public Works v Kyalami Ridge Environmental Association*.

471 *Minister of Public Works v Kyalami Ridge Environmental Association* para 2.

legislation authorising it to take such action.⁴⁷³ The High Court decided that the scheme was not a temporary one and was consequently unlawful and ordered that the decision to establish the camp be set aside.⁴⁷⁴

In the Constitutional Court, Chaskalson P made the statement that the provision of relief to the victims of natural disasters is an essential role of government in a democratic state.⁴⁷⁵ If government had done nothing to assist such victims, it would have failed its duty.⁴⁷⁶ The victims have a constitutional right to be given access to housing.⁴⁷⁷ This right has to be enforced, thereby again recognising the justiciability of socio-economic rights.⁴⁷⁸ The fact that property values in the vicinity may be affected by low cost housing is merely a factor which must be considered by government. It cannot stand in the way of the constitutional obligation that government has to address the needs of homeless people and its decision to use its own property for that purpose.⁴⁷⁹ *In casu* conflicting interests had to be reconciled and choices made. Proportionality is a relevant factor when determining what fairness requires.⁴⁸⁰ The application was consequently dismissed. This judgement, it is submitted, could be interpreted and applied to children's social security rights. The result of such an application could very well be that the right of poor and vulnerable children to shelter⁴⁸¹ could be given precedence over other property rights.

472 *Minister of Public Works v Kyalami Ridge Environmental Association* para 3.

473 *Minister of Public Works v Kyalami Ridge Environmental Association* para 10.

474 *Minister of Public Works v Kyalami Ridge Environmental Association* para 15.

475 This statement indicates the Constitutional Court's preparedness to grant relief to people who need the assistance of the state. See Kotze "Local Economic Development" 105.

476 *Minister of Public Works v Kyalami Ridge Environmental Association* para 52. In para 61, he refers to the constitutional obligation of the government render assistance to such victims.

477 *Minister of Public Works v Kyalami Ridge Environmental Association* para 107.

478 Kotze "Local Economic Development" 105.

479 *Minister of Public Works v Kyalami Ridge Environmental Association* para 108.

480 *Minister of Public Works v Kyalami Ridge Environmental Association* para 102. The interests, as discussed in para 104, were the interests in property values and in a peaceful environment that might be disturbed by the temporary settlement of a large number of persons in a transit camp in their vicinity on the one hand, and the interests of the flood victims to be accommodated at a place reasonably close to the place where they had previously been living and the interests of other homeless communities in search of land on which to settle on the other. As it is well known that there are many such people in Gauteng desperately looking for a place to live, the Court must take judicial cognisance of this.

481 Or any other of the child's basic needs.

4.5 *The TAC case*

4.5.1 High Court case

In the most recent cases dealing with socio-economic rights, *Treatment Action Campaign v Minister of Health*⁴⁸² in the High Court and *Minister of Health v Treatment Action Campaign*⁴⁸³ in the Constitutional Court, the issue of government's duty to provide HIV positive pregnant women with anti-retroviral drugs to lower the risk of mother to child transmission⁴⁸⁴ of the virus during childbirth was dealt with by the Court.

The background to this judgement will be summarised briefly. In South Africa, 24% of pregnant women are HIV positive and 70 000 children are infected with the virus through MTCT annually. MTCT is one of the most common forms of infection.⁴⁸⁵ Anti-retroviral drugs, such as AZT and Nevirapine can be used to prevent MTCT.⁴⁸⁶ Tests have shown that, while this treatment does have side-effects, it is effective in preventing transmission from mother to child.⁴⁸⁷ Breast feeding can also cause MTCT of HIV.⁴⁸⁸ The administration of a drug during labour should, thus be followed by feeding on formula feed rather than breast milk to further limit the chances of MTCT.⁴⁸⁹

During July 2000 the manufacturer of Nevirapine made a public offer to supply the drug to public health authorities in South Africa free of charge for 5 years.⁴⁹⁰ The respondents in the High Court judgement, however, decided to make Nevirapine available at only a limited number of pilot sites. Nevirapine was only made available at 18 sites nationally,⁴⁹¹ in the public sector, while it was readily available in the

482 *Treatment Action Campaign and Others v Minister of Health and Others* 2002 4 BCLR 356 (T); Henceforth referred to as *TAC v Minister of Health*.

483 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 10 BCLR 1033 (CC); Henceforth referred to as *Minister of Health v TAC*.

484 Henceforth referred to as MTCT.

485 *TAC v Minister of Health* 359E-F.

486 *TAC v Minister of Health* 359F-H.

487 *TAC v Minister of Health* 359H-I.

488 *TAC v Minister of Health* 359J.

489 *TAC v Minister of Health* 360A.

490 *TAC v Minister of Health* 360E-F.

491 With these 18 sites only serving 10 per cent of the population.

private sector.⁴⁹² For this reason, it was alleged by the applicants that this policy discriminated against people on the ground of poverty.⁴⁹³

In their bid to obtain judgement against government with regard to this policy, the applicants approached the case from the perspective of sections 27(1) and 27(2) of the Constitution.⁴⁹⁴ The question to be asked was thus whether the respondents had taken reasonable legislative and other measures, within their available resources to achieve the progressive realisation of the right to health care services, including reproductive health care.

In its attempt to answer this question, the Court noted that it is not only the right to health care that is at stake, but also the rights afforded by sections 9,⁴⁹⁵ 10,⁴⁹⁶ 11,⁴⁹⁷ 12(2)(a)⁴⁹⁸ and 28(1)(c),⁴⁹⁹ thus further illustrating the fact that all fundamental rights are interrelated and mutually supportive.⁵⁰⁰ It did, however, note that the real issue was whether or not the respondents' policy with regard to the dispensing of Nevirapine to prevent MTCT of HIV, could be considered to be in compliance with the obligation of the state in terms of section 27(2).⁵⁰¹

According to the Court, section 27(2) imposes a duty on the state to achieve progressive realisation of the right to health care as an ongoing obligation, and not to achieve such realisation overnight. The pace of such realisation will be dictated by available resources. Despite this, however, the Court identified the realisation of the right as the goal, even though it may be achieved progressively.⁵⁰² For this reason, the Court found nothing wrong per se with a gradual roll out of a comprehensive programme, as was government's policy. This was found to be in keeping with the

492 *TAC v Minister of Health* 360F-G.

493 *TAC v Minister of Health* 374H.

494 This section requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of social security rights. *TAC v Minister of Health* 375B.

495 The right to be equal before the law and the right to equal protection and benefit of the law.

496 The right to have one's dignity respected and protected.

497 The right to life.

498 The right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.

499 The right of every child to basic nutrition, shelter, basic health care services and social services. *TAC v Minister of Health* 375 B-D.

500 See discussion in 4.1 above.

501 *TAC v Minister of Health* 379A.

duty to achieve progressive realisation of the right to health care within the state's available resources.⁵⁰³

That said, the Court went on to state that the phased implementation of the programme in question was discriminating, that it caused inequality and that it denied access to those who found themselves outside the reach of the sites where implementation was being effected.⁵⁰⁴ The provision of Nevirapine for general use in the public sector, outside the 18 pilot sites, was within government's capacity.⁵⁰⁵

For this reason, the Court found that the policy of the respondents to limit the drug to the 18 pilot sites was not reasonable and that it was an unjustifiable barrier to the progressive realisation of the right to health care, as well as a breach of their negative obligation⁵⁰⁶ not to impair the right to health care.⁵⁰⁷ The steps taken by the state to give the whole affected population access to a MTCT prevention programme could, thus, not be regarded as reasonable.⁵⁰⁸ The Court went on to state that a programme that leaves everything for the future cannot be said to be coherent, progressive and purposeful.⁵⁰⁹ As the programme had no time scale, it lacked the impetus required for a programme to move progressively.⁵¹⁰ The programme should be goal driven, and there must be a balance between goal and means.⁵¹¹

A countrywide MTCT prevention programme is, according to the court, an obligation of the State.⁵¹² Evidence in the case proved that Nevirapine is affordable.⁵¹³ The Court went so far as to say that a MTCT prevention programme with full coverage is affordable with proper planning.⁵¹⁴

502 *TAC v Minister of Health* 382B.

503 *TAC v Minister of Health* 382D.

504 *TAC v Minister of Health* 382F-G.

505 *TAC v Minister of Health* 383F-H.

506 See *Government of the Republic of South Africa v Grootboom* para 34.

507 *TAC v Minister of Health* 384E-F.

508 *TAC v Minister of Health* 385E-F.

509 *TAC v Minister of Health* 385F-G.

510 *TAC v Minister of Health* 385H.

511 *TAC v Minister of Health* 385I. See *Government of the Republic of South Africa v Grootboom* para 71, as referred to by the Court.

512 *TAC v Minister of Health* 386A.

513 *TAC v Minister of Health* 386A.

514 *TAC v Minister of Health* 386E.

The Court thus ordered the respondents to make Nevirapine available to pregnant women with HIV who give birth in the public health sector, and to their babies, in public health facilities to which the present programme had not yet been extended.⁵¹⁵ The Court also, with reference to the *Grootboom* judgement, ordered the government to formulate an effective comprehensive national programme to prevent MTCT of HIV on a national basis.⁵¹⁶ The state was further ordered to report back to the Court⁵¹⁷ on what has been done to implement the order and on which further steps will be taken in the implementation, as well as when such steps will be taken. While this could be seen as an infringement of the court on the powers of the executive,⁵¹⁸ it is submitted that the court was justified in making this order. As stated in the *Kyalami* case, the separation is not absolute and the overlapping of functions is sometimes permissible.⁵¹⁹ The Court in the *TAC* case itself stated that, in cases where a direct infringement by the executive has taken place, the court has a direct mandate from the Constitution to remedy such infringement.

4.5.2 Constitutional case

On appeal to the Constitutional Court by the Minister of Health,⁵²⁰ the Court recognised, in accordance with the principles upheld in the *Grootboom* case,⁵²¹ that the state is under a constitutional duty to comply with the positive obligations imposed on it by the Constitution, but that these obligations are subject to qualifications.⁵²² It went on to state that when interpreting socio-economic rights and the corresponding obligations of the state, cognisance must be taken of the social and historical context in question.⁵²³

The question which the Court felt the need to address was thus not whether socio-economic rights are justiciable, as they clearly are, but whether the measures adopted

⁵¹⁵ *TAC v Minister of Health* 386I-387C.

⁵¹⁶ This programme should, according to the court, include voluntary counselling, voluntary testing, the provision of Nevirapine and the provision of baby formula milk. See Olivier *ea Constitutional Issues* 91.

⁵¹⁷ Before 31 March 2002.

⁵¹⁸ And thus in conflict with the doctrine of separation of powers.

⁵¹⁹ *Minister of Public Works v Kyalami Ridge Environmental Association* para 37.

⁵²⁰ *Minister of Health v TAC*.

⁵²¹ See Olivier *ea Constitutional Issues* 93.

⁵²² *Minister of Health v TAC* para 23.

⁵²³ *Minister of Health v TAC* para 24.

by the government to provide access to health care services for HIV-positive mothers and their newborn babies fell short of its constitutional obligation.⁵²⁴

In the applicants' submissions it was contended that section 27(1) of the Constitution establishes an individual right vested in everyone and that this right has a minimum core to which every person in need is entitled.⁵²⁵ According to the United Nations Committee on Economic, Social and Cultural Rights, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is *prima facie* failing to discharge its obligations. When assessing whether or not a state had discharged its minimum core obligations, account must, however, be taken of the resource constraints within the country in question. Should a state wish to attribute its failure to meet these obligations on lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy those minimum obligations.

In its attempt to determine what the minimum core obligation encompasses, the Court stated that this minimum core is not easy to define, but that it includes at least the minimum decencies of life consistent with human dignity. The Court, however, found that the socio-economic rights in question should not be construed as entitling everyone to demand that a minimum core be provided to them, but instead, that all that is required by the state is to act **reasonably** in providing access to these rights on a progressive basis.⁵²⁶ It went on to make the statement that no one should be condemned to a life below the basic level of dignified human existence.⁵²⁷ While it is impossible to give everyone access to this core immediately, it is expected of the state to act reasonably in providing access to socio-economic rights on a progressive basis.⁵²⁸ The state is obliged to take reasonable measures to progressively eliminate or reduce the large areas of severe deprivation affecting our society.⁵²⁹

⁵²⁴ *Minister of Health v TAC* para 25.

⁵²⁵ *Minister of Health v TAC* para 26.

⁵²⁶ *Minister of Health v TAC* paras 26-39, in particular, para 35. See discussion on the Court's approach to the minimum core obligation approach in the *Grootboom* case in 4.3 above, where the approach was rejected and the Court refused to establish what the minimum core entitlement entails.

⁵²⁷ *Minister of Health v TAC* para 28.

⁵²⁸ *Minister of Health v TAC* para 35.

⁵²⁹ *Minister of Health v TAC* para 36.

Reference was made to the statement in *Government of the Republic of South Africa v Grootboom* that section 26(1) places, at the very least, a negative obligation on the State not to prevent or impair the right of access to adequate housing.⁵³⁰ The Court then found that such negative obligation applies equally to the section 27(1) right of access to health care services, including reproductive health care.⁵³¹

The cost which concerned the government was not the cost of the Nevirapine itself, but the cost of providing the infrastructure for counselling and testing, of providing formula feed, vitamins and an antibiotic drug and of monitoring the mothers and children who have received Nevirapine. According to the Court, this argument was relevant to the comprehensive programme to be established at research and training sites, but was irrelevant to the provision of a single dose of Nevirapine to both mother and child at the time of birth.⁵³² While the provision of the formula feed, vitamins and drugs mentioned above will decrease the risk of MTCT of HIV even further, it was clear from the evidence that the provision of a single dose of Nevirapine, even if administered without the full package and support services, will still save the lives of a significant number of infants.⁵³³

Once again, the question which had to be answered was whether or not the government's failure to provide Nevirapine at all public health facilities could be considered **reasonable**. The policy of confining Nevirapine to research and training sites, it was found, fails to address the needs of mothers and their newborn children who do not have access to these sites.⁵³⁴ Reference was once again made to *Government of the Republic of South Africa v Grootboom* in which the court held that:

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...to be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is

530 *Government of the Republic of South Africa v Grootboom* para 34.

531 *Minister of Health v TAC* para 46.

532 *Minister of Health v TAC* para 49.

533 *Minister of Health v TAC* para 57.

534 *Minister of Health v TAC* para 67.

535 *Government of the Republic of South Africa v Grootboom* para 44 as referred to in *Minister of Health v TAC* para 68.

most in peril, must not be ignored by the measures aimed at achieving realisation of the right.

While the research and training sites will provide crucial data which will be used to develop a comprehensive programme for the prevention of MTCT, the court found that this does not mean that, until such time, Nevirapine must be withheld from mothers and children who do not have access to the research and training sites. A programme for the realisation of socio-economic rights must be balanced and flexible and must pay attention to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.⁵³⁶

The other consideration of material importance to the Court is concerned with newborn children.⁵³⁷ Sections 28(1)(b) and (c) of the Constitution provide that every child has the right

- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services.

In *Grootboom* it was held that paragraphs (b) and (c) must be read together.⁵³⁸ This resulted in the finding that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking.⁵³⁹ Government thus argued that section 28(1)(c) imposes an obligation on the parents of the newborn child, and not the state, to provide the child with the required basic health care services.⁵⁴⁰ In addressing this argument, the Court noted that while the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services, this does not mean that the State incurs no obligation in relation to children who are being cared for by their parents or families.⁵⁴¹

⁵³⁶ *Minister of Health v TAC* para 68, in accordance with the *Grootboom* judgement.

⁵³⁷ *Minister of Health v TAC* para 74.

⁵³⁸ *Minister of Health v TAC* para 75.

⁵³⁹ *Minister of Health v TAC* para 75.

⁵⁴⁰ *Minister of Health v TAC* para 76.

⁵⁴¹ *Minister of Health v TAC* para 77, referring to *Government of the Republic of South Africa v Grootboom* para 36.

The provision of a single dose of Nevirapine to prevent MTCT is, as far as children are concerned, essential. Their needs are 'most urgent' and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are most in peril as a result of the policy which excludes them from having access to Nevirapine.⁵⁴² The state has a duty to ensure that children are granted the protection included in section 28 that arises when the implementation of the right to parental or family care is lacking. The case in question, however, deals with children born to mothers who are for the most part indigent and unable to gain access to private medical treatment, as it is beyond their means. They and their children are dependent upon the state to make health care services available to them.⁵⁴³ In such a case, it is submitted, it can be argued that the state has a primary obligation in respect of such children. Such an approach will not infringe on the approach of the Court in the *Grootboom* case, in terms of which the primary responsibility rests with the parents,⁵⁴⁴ as the children *in casu* are under the care of parents that are, due to their indigency, unable to provide for their children. In other words, the primary obligation to provide health care to such children, it is submitted, lies with the state.

Based on this, the Court found that government's policy was inflexible⁵⁴⁵ and not reasonable within the meaning of section 27(2) of the Constitution.⁵⁴⁶ The policy consequently constitutes a breach of the state's obligations under section 27(2) read with section 27(1)(a) of the Constitution.⁵⁴⁷ Where a breach of any right⁵⁴⁸ in the Bill of Rights has taken place, a court is under a duty to ensure that effective relief is granted.⁵⁴⁹ The Court stated that in order for government's policy to be in line with the Constitution, it must be reformulated to meet the constitutional requirement of providing reasonable measures within available resources for the progressive realisation of the rights of women and newborn children.⁵⁵⁰

⁵⁴² *Minister of Health v TAC* para 78.

⁵⁴³ *Minister of Health v TAC* para 79.

⁵⁴⁴ *Government of the Republic of South Africa v Grootboom* para 77.

⁵⁴⁵ *Minister of Health v TAC* para 80.

⁵⁴⁶ *Minister of Health v TAC* para 81.

⁵⁴⁷ *Minister of Health v TAC* para 80.

⁵⁴⁸ Including a socio-economic right.

⁵⁴⁹ *Minister of Health v TAC* para 106.

⁵⁵⁰ *Minister of Health v TAC* para 122.

The Court noted that government has a constitutional obligation to devise and implement, within its available resources, a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat MTCT of HIV. This programme, which is to be realised progressively, must include reasonable measures for counselling and testing pregnant women for HIV and counselling HIV-positive pregnant women on the options available to them. The policy of government in respect of these obligations, according to the Court, fell short of compliance with these requirements.⁵⁵¹

Government was consequently ordered to, without delay, remove the restrictions that prevent Nevirapine from being made available, to permit and facilitate the use of Nevirapine, to make provision for counsellors based at public hospitals to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of MTCT of HIV and to take reasonable measures to extend the testing and counselling facilities in the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of MTCT of HIV.⁵⁵²

The decision by the court in this case is to be welcomed. As was the case with both the *Soobramoney* and the *Grootboom* cases, the *TAC* case recognises the justiciability of socio-economic rights and addresses the manner in which they should be enforced in the circumstances in question.

The judgment refers to the statement in *Grootboom* that the state does not have a primary obligation in respect of parental care.⁵⁵³ Fortunately, it considers the fact that, although the children in question are under parental care, the parents are unable to provide them with the health care in question and recognises that the state thus has a duty in respect of such children.⁵⁵⁴ Another positive aspect of the judgment, as opposed to the *Grootboom* judgment, is the fact that the Court considers the content of the minimum core obligation in respect of the right to health care⁵⁵⁵ but goes on to

⁵⁵¹ *Minister of Health v TAC* para 135.

⁵⁵² *Minister of Health v TAC* para 135.

⁵⁵³ *Government of the Republic of South Africa v Grootboom* para 77.

⁵⁵⁴ *Minister of Health v TAC* para 79.

⁵⁵⁵ *Minister of Health v TAC* para 28.

state that even a basic minimum cannot be immediately realised.⁵⁵⁶ This goes against the opinions of various authors, who are of the opinion that the state is under an immediate duty to ensure that the absolute core minimum of such obligation is complied with, irrespective of available resources.⁵⁵⁷ When it is possible, the government must realise such core.⁵⁵⁸ Despite the fact that it considers the content of such minimum core obligation, the Court, unfortunately, does not identify or define the minimum core of the right in question. It is, once again, submitted that this approach by the court is unfortunate. The fact that the Committee of Inquiry⁵⁵⁹ advocates the development of a minimum core obligation approach illustrates the urgency of this matter. It is further submitted that the Court could have, *in casu*, ordered the state to develop a minimum core.

A further criticism which can be levelled against the Court's decision is that, in determining whether or not pregnant mothers have a right to Nevirapine, it did not look into reasonableness of the measures taken by the state. The Court merely found that the measures were not reasonable, without applying the criteria laid down for reasonableness in the *Grootboom* decision.⁵⁶⁰ In *Grootboom*, the Court found that those whose needs are the most urgent and whose ability to enjoy all rights are most in peril must not be ignored.⁵⁶¹ Had this guideline been applied in the *TAC* case, the Court could have found that the practice of not supplying Nevirapine, apart from at the 18 pilot sites, neglected the needs of a vulnerable group, namely HIV positive pregnant women who did not have access to private medical schemes or to the pilot sites. *Grootboom* went on to state that it is not sufficient to meet the test of reasonableness to show that the measures being taken are capable of achieving a statistical advance in the realisation of the right.⁵⁶² *In casu*, the aim of eventually providing Nevirapine to all HIV positive pregnant women who rely on public health care does not, it is submitted, justify the fact that, until such point in time, these women are being excluded from the programme. The Court thus, apart from ignoring

⁵⁵⁶ *Minister of Health v TAC* para 35.

⁵⁵⁷ Scott and Alston 2000 *SAJHR* 250.

⁵⁵⁸ If the government claims that it is not possible to realise the core, the courts must require proof that the government lacks the capacity to do so. Bilchitz 2003 *ESRR* 3.

⁵⁵⁹ Committee of Inquiry *Consolidated Report* 43.

⁵⁶⁰ *Government of the Republic of South Africa v Grootboom* paras 39-44 as discussed above.

⁵⁶¹ *Government of the Republic of South Africa v Grootboom* para 44.

⁵⁶² *Government of the Republic of South Africa v Grootboom* para 44.

the guidelines laid out in the *Grootboom* case failed to lay out any further guidelines of its own in respect of the test for reasonableness of government action.

5 Legislative social security measures available to children in South Africa

The adoption of the Constitution introduced a new legal regime affecting families, children and child welfare in South Africa.⁵⁶³

5.1 Social Assistance

The basic assumption regarding the maintenance of children is that the child's basic financial needs should be met by its parents.⁵⁶⁴ Unfortunately, many parents are, due to various factors, unable to do so.⁵⁶⁵ It is for this reason that the maintenance system in South Africa rests on two legs.⁵⁶⁶ The one leg is the judicial maintenance system which is based on the legal duty to support one's dependants and the other leg is the state maintenance system, which is meant to act as a safeguard by providing support where the procedures of the judicial maintenance system fail to do so.⁵⁶⁷ When considering maintenance provision in South Africa, it is impossible to separate the two systems. When studying the implementation of the Constitution and international covenants concerning children's rights,⁵⁶⁸ these two systems be viewed holistically.⁵⁶⁹

While the primary responsibility to provide for the socio-economic rights of children rests with the children's parents,⁵⁷⁰ the state is under a duty to intervene or assist when the parents or guardians fail or are unable to provide.⁵⁷¹ The reality in South Africa is

563 Sloth-Nielsen 2000 *Stell LR* 261.

564 Malherbe *Family* 391.

565 Poverty and unemployment, for example, make it extremely difficult for parents to provide for their children. In terms of the *Maintenance Act* 99 of 1998, there is a legal obligation on a non-custodial parent to make a fair financial contribution towards the support of his or her children. Regrettably, non-custodial parents often fail to meet this obligation, leaving the custodial parent with the sole financial responsibility of raising the child. See Clark 2000 *SALJ* 344-345; Malherbe *Family* 391.

566 Clark 2000 *SALJ* 345; Malherbe *Family* 391.

567 Clark 2000 *SALJ* 345; Malherbe *Family* 391.

568 For example the ICESCR and the CRC.

569 Clark 2000 *SALJ* 345; Malherbe *Family* 391.

570 In terms of *Government of the Republic of South Africa v Grootboom* para 77. See Bekink and Brand *Constitutional Protection of Children* 183; Malherbe *Family* 378; SAHRC 4th *Economic and Social Rights Report* 172.

571 Malherbe *Family* 378; SAHRC 4th *Economic and Social Rights Report* 172.

that the majority of children in South Africa live in poverty.⁵⁷² Children in parental care face the same hardships as those without, as their parents are unable to provide them with basic necessities.⁵⁷³ The state thus has a duty to fulfil these rights in respect of these children. The link between social security and the provision of child maintenance by the state is significant.⁵⁷⁴ In South Africa benefits made available by the state to families are at present very limited.⁵⁷⁵ Such benefits are, as a rule, cash benefits with benefits in kind⁵⁷⁶ being the exception.⁵⁷⁷

Grants play a fundamental role in poverty alleviation, particularly in poor families.⁵⁷⁸ Notwithstanding this fact, the take-up rate of social grants is a cause for concern.⁵⁷⁹ This is because social welfare services, which incorporate social grants, are not accessible to all South Africans.⁵⁸⁰ The non-accessibility of social welfare services is, among other things, fuelled by ignorance⁵⁸¹ and illiteracy⁵⁸² among prospective beneficiaries.⁵⁸³

572 An estimated 60% of South African children live in poor households. See Malherbe *Family* 378; SAHRC 4th *Economic and Social Rights Report* 173.

573 For example, unemployed parents and single mothers who struggle to obtain maintenance payments from defaulting fathers. See Malherbe *Family* 378; SAHRC 4th *Economic and Social Rights Report* 173.

574 Clark 2000 *SALJ* 346.

575 Clark 2000 *SALJ* 346.

576 Examples of benefits in kind which have been implemented in South Africa are school feeding schemes and free medical care to children under the age of six years. Sloth-Nielsen and Van Heerden 1996 *SAJHR* 247.

577 Bolani *ea Family Support* 262; Clark 2000 *SALJ* 346.

578 Olivier and Mpedi "Extending Social Protection" 4.

579 During the period of April 2001 to March 2002, of the 3 308 467 children who were eligible for the child support grant, only 1 574 927 were receiving it, only 90 680 of the 319 354 eligible children were receiving the foster child grant and only 42 474 of the 276 776 children who were eligible for the care dependency grant were receiving it. SAHRC 4th *Economic and Social Rights Report* 203. See also Olivier and Mpedi "Extending Social Protection" 3-4.

580 More especially when it comes to people living in rural, semi-urban and informal settings. Olivier and Mpedi "Extending Social Protection" 4.

581 Many prospective beneficiaries are unaware of the fact that they qualify for grants.

582 A large number of potential beneficiaries cannot read or write and as a result, find it difficult to apply for social grants.

583 Olivier and Mpedi "Extending Social Protection" 4.

5.1.1 Social Assistance Act

In the realm of social assistance, the *Social Assistance Act*⁵⁸⁴ is the most important instrument, regulating the payment of social assistance grants and other relief measures.⁵⁸⁵ It should be noted, however, that the SAHRC is of the opinion that the social assistance notion adopted by the *Social Assistance Act*⁵⁸⁶ is too narrow from a constitutional perspective.⁵⁸⁷

5.1.2 Maintenance grant

The maintenance grant, which has recently been phased out, was paid for the children of parents who were not capable of providing for themselves and their children.⁵⁸⁸ It was payable to the legal parent of the child for a child in his or her custody, to a maximum of two children.⁵⁸⁹ These grants did not provide a general system of relief for poor families because of the fact that in order to receive this grant, the parent had to comply with certain requirements.⁵⁹⁰ The parent (or his or her spouse) had to pass a means test, the parent could not be in receipt of a social grant, and both the parent and the child involved had to be South African citizens.⁵⁹¹ An applicant mother had to prove that legal steps had been taken to obtain maintenance payments from the father.⁵⁹²

The maintenance grant lapsed when the beneficiary died; the child was no longer in the beneficiary's custody; the child turned 18 (unless the child was still at school and not yet 21); or the child left school.⁵⁹³ The beneficiary could lose entitlement to the grant if the child was not properly cared for, the child did not attend school regularly,

584 *Social Assistance Act* 59 of 1992. This Act will be repealed, insofar as it has not been assigned to another sphere of government, by the *Social Assistance Bill* B57 of 2003, when such Bill comes into operation. Section 37(1) of the *Social Assistance Bill*.

585 Olivier and Kalula *Scope of Coverage* 143.

586 This notion being restricted to the income-replacement grants system.

587 Olivier *ea Constitutional Issues* 65.

588 Luiz 1995 *Development Southern Africa* 588.

589 Bolani *ea Family Support* 262; Clark 2000 *SALJ* 346.

590 Luiz 1995 *Development Southern Africa* 588.

591 Bolani *ea Family Support* 262; Clark 2000 *SALJ* 346; Luiz 1995 *Development Southern Africa* 588.

592 Bolani *ea Family Support* 262.

or the beneficiary refused employment with which he or she could have contributed to the maintenance of the family.⁵⁹⁴ This grant was payable on a monthly basis. The amount payable was determined by calculating the sum of the basic grant (payable for social grants) and an extra amount per child, to a maximum of two children.⁵⁹⁵

This system of maintenance grants successfully reached a small proportion of poor mothers in need of support (primarily white, coloured and Indian), but omitted the poorest majority, namely rural African women and children.⁵⁹⁶ While all South Africans were eligible for the grant, African women were largely excluded from access as most of the former homelands did not administer it.⁵⁹⁷

The maintenance grant has been phased out and replaced by the child support grant. This phasing out took place over a period of three years, through a reduction in the rate of payment.⁵⁹⁸ The reason for phasing out this grant was the various deficiencies that were highlighted with regard to the grant.⁵⁹⁹ The reasons included, firstly, that in South African families, it is often not the legal parent that has to take care of the child. Many children in South Africa, thus did not receive the benefit of this grant. Further, many poor families in South Africa have more than two children. Because this grant was limited to a maximum of two children, additional children in such families did not receive the benefit of this grant.⁶⁰⁰ The requirement that the claimant had to prove steps taken by him or her to receive maintenance from the other parent before he or she was eligible for the maintenance grant posed another problem, namely that, due to administrative weaknesses, the maintenance system could not guarantee payment of maintenance.⁶⁰¹

593 *Bolani ea Family Support* 262-263; Clark 2000 *SALJ* 346; Visser Dec 1987 *Welfare Focus* 22.

594 *Bolani ea Family Support* 263.

595 Reg 12 GN R373 in GG 17016; *Bolani ea Family Support* 263.

596 Between 1960 and 1990, 50 per every 1 000 coloured, 40 per every 1 000 Indian and 14 per every 1 000 white children received the grant, against between two or three per 1 000 African children. See Clark 2000 *SALJ* 347; Naidoo and Bozalek 1997 *Agenda* 26; Van der Merwe 2000 *Development Southern Africa* 730.

597 Naidoo and Bozalek 1997 *Agenda* 26.

598 *Bolani ea Family Support* 263.

599 *Bolani ea Family Support* 263.

600 *Bolani ea Family Support* 263.

601 *Bolani ea Family Support* 263.

5.1.3 Child support grant

In the 1998/9 financial year, the government began the phasing out of maintenance grants and the child support grant was introduced on 1 April 1998 to solve the various problems with the state maintenance grant.⁶⁰² The central aim of the child support grant⁶⁰³ is to ensure a more equitable distribution among a larger number of children than were reached by the state maintenance grant,⁶⁰⁴ and to provide financial assistance to children from economically-disadvantaged families.⁶⁰⁵

This grant is payable to a primary caregiver of a child under the age of nine years.⁶⁰⁶ The primary care-giver is the person who has the parent's or parents' permission to care for the child and who is responsible for meeting the daily needs of the child.⁶⁰⁷ Anyone receiving payment for caring for a child or who does not have the consent⁶⁰⁸ of the parent or guardian of the child is not regarded to be the primary caregiver for the purposes of this grant.⁶⁰⁹ This grant is payable in respect of an unlimited number of own children of the primary care-giver and in respect of six other children.⁶¹⁰

The primary care-giver and the child must both be resident in South Africa at the time of the application for the child support grant and they must both be South African citizens.⁶¹¹ The primary caregiver also has to meet certain other conditions, namely that he or she (or any other person) may not already receive a grant for the child⁶¹² and the child must not be in an institution for the care and safety of children.⁶¹³

602 Bolani *ea Family Support* 264; Clark 2000 *SALJ* 347; Liebenberg 1998 HYPERLINK http://www.sahrc.org.za/volume_v.PDF 13 Aug 2003; Van der Merwe 2000 *Development Southern Africa* 730.

603 Henceforth referred to as the CSG.

604 Clark 2000 *SALJ* 349.

605 Malherbe *Family* 381.

606 Section 4(1) of the *Social Assistance Act* 59 of 1992 (As amended by the *Welfare Laws Amendment Act* 106 of 1997). See now R460 in GG 24630 of 31 March 2003.

607 In terms section 3 of the *Welfare Laws Amendment Act* 106 of 1997.

608 Express or implied.

609 Reg 3(2) GN R418 in GG 18771 of 31 March 1998. See Bolani *ea Family Support* 264; Malherbe *Family* 381.

610 Reg 3(1) GN R418 in GG 18771 of 31 March 1998. See Bolani *ea Family Support* 264.

611 According to section 4(b) of the *Social Assistance Act* 59 of 1992. See Bolani *ea Family Support* 264; Clark 2000 *SALJ* 348; Malherbe *Family* 382. The constitutionality of this provision has been challenged in the Constitutional Court in *Mahlaule and Others v Minister of Social Development and Others* CCT12/03 and *Khosa and Others v Minister of Social Development and Others* CCT13/03. See 3.5 above and 5.3 below.

612 Previously, under the maintenance grant system, a parent receiving any social grant was disqualified from receiving an additional grant for the child. The only restriction under the CSG

The applicant must undergo a means test, which is linked to his or her personal income.⁶¹⁴ In this way, the means test aims to ensure that the grants are paid only to families in which real need has been established.⁶¹⁵ The current amount of the child support grant is R160 per child per month.⁶¹⁶ This amount is much less than the amount of the maintenance grant, the reduction having been based on a policy decision to decrease the amounts payable under the maintenance grant in order to balance out the wider scope of the CSG.⁶¹⁷

There are many reasons why the CSG can be seen as an improvement on the maintenance grant.⁶¹⁸ While the maintenance grant was only available to a maximum of two children, the child care grant is available to an unlimited number of the caregiver's own children and to six children of another.⁶¹⁹ The fact that the grant is payable to the primary caregiver can also be seen as an improvement. As already mentioned, the modern⁶²⁰ reality is that it is not necessarily a parent who cares for the

is that the primary caregiver may not be in receipt of another grant for the child. For example, an elderly grandmother who is already receiving a social grant for the elderly is now, under the CSG system, entitled to receive a CSG for grandchildren in her care. Malherbe *Family* 383.

613 GN R813 in GG 20235 of 25 June 1999. In the past the conditions were contained in Reg 3(2) GN R418 in GG 18771 of 31 March 1998. Apart from the two above mentioned conditions, further conditions applied, namely: the child must be immunised where such a service is available free of charge; the primary caregiver must not, without good reason, refuse employment; he or she must make an effort to secure maintenance for the child from the parent; and he or she must not unreasonably refuse to participate in a development programme aimed at developing his or her income.

614 That is, the income of the primary caregiver and his or her spouse. GN R1233 in GG 22852 of November 2001. See Bolani *ea Family Support* 265; Clark 2000 *SALJ* 347; Malherbe *Family* 383; Naidoo and Bozalek 1997 *Agenda* 27; Van der Merwe 2000 *Development Southern Africa* 730.

615 A means test involves assessment, by an outsider of an individual or a family's income and assets. Malherbe *Family* 383.

616 GN 461 in GG 24631 of 31 March 2003. The amount, which was increased by 14 per cent in the 2003 Budget Speech, is determined by the Minister of Social Development and published in the *Government Gazette*. The increase became effective from 1 April 2003. Amounts for subsequent children do not vary, as is the case in some other countries, for example Canada. See Bolani *ea Family Support* 265; Malherbe *Family* 383.

617 Malherbe *Family* 383.

618 Bolani *ea Family Support* 265.

619 While family benefits have their origins in the Western-based nuclear family model, consisting of a father, a mother and their children, this grant gives recognition to a peculiar characteristic of African households in particular, namely that the person caring for a young child in an extended family context, is often not the parent of the child. See Malherbe *Family* 378; Olivier and Kalula *Scope of Coverage* 145.

620 Particularly in the African context.

child.⁶²¹ This extension of the scope of the grant is of particular importance in the context of the HIV/AIDS pandemic, where, in many cases, it is non-relatives in the community who are taking day-to-day care of AIDS orphans.⁶²² Because this resulted in rising costs, the grant was, until 1 April 2003, only available to the most vulnerable children, children under seven years.⁶²³ The grant is, however, currently also available to seven- and eight-year olds. As of 1 April 2004 it will be made available to nine- and ten-year olds and to 11- to 13-year olds the following year.⁶²⁴

The fact that the CSG is payable to a primary caregiver, however, also has disadvantages. Children who do not have such a caregiver, for example children living on the streets and in child-headed households,⁶²⁵ to apply for the grant on their behalf, are, unfortunately, excluded from receiving the grant.⁶²⁶

A parent could only receive the maintenance grant if he or she was not receiving any other grant, while the only restriction in the case of the child support grant is that the primary caregiver may not receive another grant for the child.⁶²⁷ To obtain the maintenance grant, the parent had to prove that legal steps had been taken to secure maintenance. Initially, the CSG was linked to the private maintenance system, by compelling caregivers to provide proof of their efforts to obtain maintenance for the child from the parent or any person who was legally obliged to take care of the child.⁶²⁸ This requirement was criticised as making the grant inaccessible to many poor women who did not have access to the maintenance system,⁶²⁹ and was consequently deleted in the amended regulations.⁶³⁰

621 In considering the international and constitutional obligation in respect of protecting the best interests of the child, a scheme which makes the benefit available to the person who factually cares for the child is clearly the most suitable. Malherbe *Family* 381-382.

622 Liebenberg 2001 *SAJHR* 243; Malherbe *Family* 382.

623 The grant is related to the age of the child as many mothers of young children are unable to earn an income, and children are most vulnerable when they are at their youngest. See Bolani *ea Family Support* 265; Malherbe *Family* 382.

624 Budget Speech by the Minister of Finance, 26 February 2003. Accessed at HYPERLINK <http://www.polity.org.za/pdf/BUDGETSPEECH2003MANU.pdf> 18 June 2003.

625 According to section 136(1) of the *Children's Bill*, a household may be recognised as a child-headed household if the parent or primary care-giver of the household is terminally ill or has died; if no adult family member is available to provide care for the children in the household and if a child has assumed the role of primary care-giver in respect of a child or children in the household.

626 Malherbe *Family* 382.

627 Bolani *ea Family Support* 265.

628 GN R418 in GG 18771 of 31 March 1998. See Bolani *ea Family Support* 265.

629 Liebenberg and Tilly *Poverty and Inequality Hearings* 14.

630 GN R813 in GG 20235 of June 1999.

A positive aspect of the CSG is that the elimination of racial discrepancies in the maintenance system can be seen as a step forward.⁶³¹ Although the new system of the child care grant has levels of benefits substantially lower than other grants, it aims to eventually provide a safety net of minimum assistance to children identified as the most vulnerable.⁶³²

Much criticism which has been levelled against this grant. In the first place, the targeting rate does not correspond with prevailing poverty levels among children. A large number of poor children in the eligible age group who are in need of state assistance will be excluded because of the means test.⁶³³ Also, the means test is based on the primary caregiver's household income, thus discriminating against children in larger households, which is where the poorest children live.⁶³⁴ A simple means test based on the income of the primary care-giver, as opposed to household income would be more transparent and more equitable.⁶³⁵ A further cause for concern is the two-tier means test for determining who is eligible for the grant,⁶³⁶ which is discriminatory⁶³⁷ against primary care-givers who live in rural areas. This means test is unnecessarily complex and could have the result of being to the disadvantage of primary care-givers who live in large and poverty-stricken households.⁶³⁸ While it could even be suggested that the means test be done away with completely, as the costs involved in conducting the means testing divert funds away from the actual recipients, South Africa's resource limitations result in the fact that grants and

631 According to Naidoo and Bozalek (Naidoo and Bozalek 1997 *Agenda* 27), for the first time, the poorest will be beneficiaries of maintenance grants. See also Clark 2000 *SALJ* 348.

632 Namely children under the age of fourteen years (although the grant is currently only available to children under the age of nine), particularly children in rural areas and informal settlements. See Clark 2000 *SALJ* 348; Naidoo and Bozalek 1997 *Agenda* 27; Van der Merwe 2000 *Development Southern Africa* 732.

633 Clark 2000 *SALJ* 349; Liebenberg and Tilly *Poverty and Inequality Hearings* 13-14.

634 Clark 2000 *SALJ* 348; Liebenberg and Tilly *Poverty and Inequality Hearings* 13-14.

635 Clark 2000 *SALJ* 350.

636 In terms of this test, a primary care-giver will qualify for the grant if the household income of the household of which he or she is a member is below R9 600 per annum or, if the child and the primary care-giver live either in a rural area or in an informal dwelling, R13 200 per annum. Reg 16(2) of GN R418 in GG 18771 of March 1998. See also Clark 2000 *SALJ* 350; Malherbe *Family* 383.

637 And thus in conflict with section 9 of the Constitution.

638 Clark 2000 *SALJ* 350.

subsidies can be targeted at only the poorest of the poor to enable those children to survive.⁶³⁹

Another cause for concern is the amount of the grant. According to Malherbe,⁶⁴⁰ the adequacy of the amount of the CSG should be measured against the needs of the children who are covered as beneficiaries. In this regard, Liebenberg⁶⁴¹ is of the opinion that the CSG can be regarded as adequate only if it enables the primary caregiver to 'at least feed, clothe, shelter and acquire basic medicine for the child'. It is highly questionable whether the present value of the grant is able to achieve this.⁶⁴² The small benefit level of the grant does not appear to be linked to the needs of poor children and the costs of their support.⁶⁴³ There is further no clear commitment to link the grant to inflation.⁶⁴⁴

One of the conditions with which the primary care-giver has to comply is that he or she can only qualify for the grant if he or she does not without good reason refuse to accept employment or participate in any development programme.⁶⁴⁵ This condition can be criticised for granting a wide discretion to administrative officials as to the interpretation of reasonableness in respect of a refusal to take up employment or to participate in a development programme.⁶⁴⁶

While this grant is only available to children under the age of nine, the Constitution defines a child as being under the age of 18.⁶⁴⁷ This could give rise to the question of

639 Which is ensured by keeping the means test. See SALC *Review of the Child Care Act* 333-338.

640 Malherbe *Family* 383.

641 Liebenberg 2001 *SAJHR* 243.

642 Malherbe *Family* 383.

643 While the grant covers food and clothing for the lowest rung, the African child, it does not provide for the cost of living of the caregiver in caring for the child. If the mother stays at home to look after the child, that work is being done at no cost to the state. If the mother cannot survive without work, she will have to put her children in the care of others. If she were to place her children in foster care, the financial burden on the state would be much larger. See Liebenberg and Tilly *Poverty and Inequality Hearings* 13-14; Naidoo and Bozalek 1997 *Agenda* 28.

644 Liebenberg and Tilly *Poverty and Inequality Hearings* 13-14.

645 Reg 3(2)(f) GN R418 in GG 18771 of 31 March 1998.

646 Clark (Clark 2000 *SALJ* 351) raises the question as to whether the refusal of a primary care-giver to accept employment for the reason that she is the only person who can take care of her young child during the day could be considered reasonable. She goes on to state that such a condition may actually deter primary care-givers from seeking assistance on behalf of children in their care.

647 Section 28(3) of the Constitution. Section 1 of the *Social Assistance Act* as well as section 1 of the *Social Assistance Bill* also define a child as under the age of 18, yet do not make the child support grant available to them. In terms of section 1 of the *Children's Bill*, a child is also defined as under the age of 18.

the constitutionality of access to the child care grant. No provision is made to assist parents to care for children of nine years and older.⁶⁴⁸ Olivier and Kalula⁶⁴⁹ argue that, as children within this age bracket should be attending school, with all its resulting expenses, there is a sufficient need for providing the grant to such children. The Committee on the Rights of the Child⁶⁵⁰ has, in its consideration of South Africa's first report⁶⁵¹ expressed concern as to the age limitation of six years.⁶⁵² The CRC Committee recommends that government expand the child support grant programme or develop alternative programmes to include support to children up to the age of 18 years, who are still in school.⁶⁵³ An alternative recommendation is that a universal child support grant, for all children under the age of 18 be introduced.⁶⁵⁴ The South African Human Rights Commission is of the opinion that, by limiting the age of eligible children to below seven,⁶⁵⁵ the state has neither promoted nor fulfilled the right of all children to social security.⁶⁵⁶ By failing to include those in desperate need, the CSG cannot be said to pass the test of reasonableness as outlined in the *Grootboom* case.⁶⁵⁷

Another problem with the child support grant⁶⁵⁸ is the fact that they are not being accessed by those who are entitled to them. During the period of April 2001 to March 2002, 3 308 467 children were eligible for the CSG, while 1 574 927 were receiving it.⁶⁵⁹ One of the reasons for this is the fact that eligible beneficiaries find the grant

648 Other than children who qualify for the care dependency grant. Clark 2000 *SALJ* 349. The grant is, however, as discussed above, in the process of being extended to children up to the age of 14.

649 Olivier and Kalula *Scope of Coverage* 144.

650 Henceforth referred to as the CRC Committee.

651 Committee on the Rights of the Child Concluding Observations 2000 CRC/C/15/Add.122.

652 Since the report, a positive development has taken place, in that access to the child support grant has been extended, as discussed above. It is, however, currently only available to children under the age of nine and, once fully extended, will only be available to children under the age of 14, thus still leaving a gap in respect of children aged 14 to 18.

653 According to the SAHRC, the scope of coverage of the grant should further be extended to cater for the special needs of children. A child infected with HIV/AIDS, for example, needs constant medical care and should thus be provided with more than the R160 grant. Malherbe *Family* 382; SAHRC 4th *Economic and Social Rights Report* 228.

654 Malherbe *Family* 382.

655 The age limit of eligible children has, since the report, been increased to under nine.

656 SAHRC 4th *Economic and Social Rights Report* 215.

657 *Government of the Republic of South Africa v Grootboom* para 42-44. SAHRC 4th *Economic and Social Rights Report* 215.

658 As well as the foster child grant and the care dependency grant.

659 Similarly, of the 319 354 eligible children, 90 680 were receiving the foster child grant, and of the 276 776 children eligible for the care dependency grant, only 42 474 were receiving it. SAHRC 4th *Economic and Social Rights Report* 203.

difficult to access due to the documentation requirements.⁶⁶⁰ Rural villages are at a distinct disadvantage in respect of access to social welfare services and children in child-headed households⁶⁶¹ and living on the street are generally not in a position to apply for grants as they do not have the assistance of an adult.⁶⁶² Other obstacles in the obtaining of the CSG include lack of awareness of eligibility for the grant, illiteracy,⁶⁶³ poor infrastructure at pay-points, long delays and back-logs in the processing of grant applications and the inability to provide documentary proof of all efforts to secure maintenance for the child concerned from the parents of that child.⁶⁶⁴ Various administrative obstacles, such as welfare officials not being able to understand and apply the relevant regulations, delays in obtaining necessary documents from other government departments and an inability to afford transport to the relevant government offices, have also been identified.⁶⁶⁵

While section 28 of the Constitution guarantees the rights contained in it to 'every child', the CSG is only available to children who are, and whose primary caregivers are, resident in South Africa and South African citizens.⁶⁶⁶ Children of permanent residents are thus not entitled to the grant.⁶⁶⁷ Refugee children, because of the fact that they do not have the necessary documentation, are thus not eligible for the CSG,⁶⁶⁸ despite the fact that, according to the *Refugee Act*,⁶⁶⁹ refugees enjoy full legal protection, which includes the enjoyment of the fundamental rights set out in the Bill of Rights.⁶⁷⁰ As refugee children constitute a particularly vulnerable group, the fact

660 Such as identity documents and birth certificates. SAHRC 4th *Economic and Social Rights Report* 216.

661 Which are becoming increasingly more prevalent due to the AIDS pandemic.

662 SAHRC 4th *Economic and Social Rights Report* 216.

663 Illiteracy causes pay-out dates to be missed and prevents the checking of the accuracy of grants and benefits.

664 The last requirement has been deleted in the amendments to the regulations found in GN R813 in GG 20235 of June 1999. See Liebenberg 1998 HYPERLINK http://www.sahrc.org.za/volume_v.PDF 13 Aug 2003; Malherbe *Family* 384 and 389.

665 Malherbe *Family* 389.

666 In terms section 2(1) of the *Social Assistance Bill*, which is to repeal the *Social Assistance Act*, a person who is not a South African citizen has the same rights and obligations in terms of the said Act as a South African citizen if an agreement, as contemplated in section 231(2) of the Constitution, between the Republic and the country of which that person is a citizen makes provision for the Act to apply to a citizen of that country who resides in the Republic.

667 In this regard see *Mahlaule and Others v Minister of Social Development and Others* CCT12/03 and *Khosa and Others v Minister of Social Development and Others* CCT13/03. See also 3.5 above and 5.3 below.

668 SAHRC 4th *Economic and Social Rights Report* 216.

669 *Refugee Act* 130 of 1998.

670 Section 27(b) of the *Refugee Act* 130 of 1998.

that the grant is not available to them should fail *Grootboom's* test of reasonableness. The SAHRC is of the opinion that the state is not complying with its constitutional obligation⁶⁷¹ and that the CSG should be made accessible to refugee and permanent residents' children.⁶⁷²

A dilemma facing many working parents⁶⁷³ is the fact that employment could disqualify them from receiving the CSG.⁶⁷⁴ It is unfair to disqualify a family from receiving this benefit if the portion of the income, derived from employment, which disqualifies the family from state grants does not exceed the child care costs.⁶⁷⁵ It is therefore imperative that child care costs and facilities be subsidised.⁶⁷⁶ Well-subsidised and good quality child care services will enable caregivers to take up employment, which in turn leads to savings by the social assistance system.⁶⁷⁷

5.1.4 Foster child grant

Although it is ideal for children to grow up in a home with their parents, it is sometimes unavoidable that children are removed from their families and placed in the care of other persons.⁶⁷⁸ Such placement, referred to as foster child placement, aims to provide care for abandoned and neglected children. It is of a temporary nature as it terminates upon family reunification or adoption.⁶⁷⁹

The foster child grant is payable to a person in whose custody a foster child has been placed in terms of the *Child Care Act*⁶⁸⁰ or the *Criminal Procedure Act*⁶⁸¹ or who is a

671 It can also be argued that the state is not complying with its international obligations, having ratified the CRC and the United Nations Convention Relating to the Status of Refugees of 1951, which specifically obliges state parties to grant refugees either the same treatment accorded to nationals of the state or, as a minimum, 'the most favourable treatment accorded to nationals of a foreign country in the same circumstances'. See Olivier *ea Constitutional Issues* 99.

672 SAHRC 4th *Economic and Social Rights Report* 230. See also Olivier and Kalula *Scope of Coverage* 136.

673 Especially single parents and female-headed families.

674 Malherbe *Family* 390.

675 When a parent is employed, additional expenses in respect of child care for when the parent is at work are incurred. If such employment disqualifies the parent from receiving the CSG, it may not be financially beneficial for the parent to take up the employment.

676 Malherbe *Family* 390.

677 This would also lessen the burden placed on NGO's that are currently battling to meet the demand for quality child care. See Malherbe *Family* 391.

678 Malherbe *Family* 384.

679 Malherbe *Family* 384.

680 Chapters III and VI of the *Child Care Act* 74 of 1983.

tutor in terms of the *Administration of Estates Act*.⁶⁸² In order to qualify for this grant, both the foster parent and child must be resident in South Africa at the time of application⁶⁸³ and they must comply with prescribed conditions.⁶⁸⁴ Since foster parents perform a public service, their material need is not a principal criterion.⁶⁸⁵ There is a means test to determine eligibility for the foster child grant, but it only considers the means of the foster child and not the means of the foster parent as well.⁶⁸⁶

The foster child grant lapses when the foster child dies, the foster child is no longer in the custody of the foster parent, the foster child turns 18,⁶⁸⁷ the foster child leaves school, or the last living foster parent dies.⁶⁸⁸

The aim of the foster child grant was to provide some monetary assistance to persons other than biological parents who care for a child while state and private welfare institutions search for a more permanent placement, either with the biological family⁶⁸⁹ or in an adoptive environment.⁶⁹⁰ In reality, however, given the limited number of adoption and institutional opportunities, many foster parents are permanent rather than temporary.⁶⁹¹ Although the shift from 'biological parent' in respect of state maintenance grants to 'primary care-giver' in respect of child support grants is to be welcomed, the foster care grant has become the preferable grant.⁶⁹² This is the case for a number of reasons, including the higher amount of the foster child grant,⁶⁹³ the fact that it is paid until the child is eighteen years old⁶⁹⁴ as well as the fact that the

681 Section 290 of the *Criminal Procedure Act* 51 of 1977.

682 *Administration of Estates Act* 66 of 1965.

683 Section 4A(b) of the *Social Assistance Act*. The foster child grant thus differs from the CSG in that there is no requirement that the foster parent and the child must be South African citizens. This makes it possible for children from other countries to become foster children in the Republic of South Africa. See Malherbe *Family* 384.

684 Bolani *ea Family Support* 267.

685 Luiz 1995 *Development Southern Africa* 589.

686 In order to qualify for the grant, the foster child's income may not exceed twice the annual amount of the grant. Reg 4 GN R418 in GG 18771 of 31 March 1998.

687 Unless the child is still at school and under the age of 21.

688 Reg 24(3) GN R418 in GG 18771 of 31 March 1998.

689 After regulation of the problems leading to statutory intervention.

690 Clark 2000 *SALJ* 351.

691 Clark 2000 *SALJ* 351.

692 Clark 2000 *SALJ* 351-352.

693 The value of the CSG is currently R160, while the value of the foster child grant currently amounts to R500.

694 While the child support grant is only payable until the child turns nine.

foster care grant is subject to a lower means test, which examines only the child's personal income.⁶⁹⁵

From 1996, an increase in the number of foster care applications have been reported by welfare agencies.⁶⁹⁶ While it is suggested that this is due to an increase in number of orphaned children, particularly as a result of AIDS, it is also suspected that some parents deliberately leave their children with other care-givers who will be eligible for the higher foster care grant, which is available for a longer period, rather than the child support grant.⁶⁹⁷ While foster care is supposed to be a temporary arrangement, as opposed to adoption, which is focused on permanent care, the fact that there is no social assistance available to adoptive parents⁶⁹⁸ may act as a deterrent to foster parents who are considering the adoption of children in their care.⁶⁹⁹ For this reason, a measure which will ensure a greater sense of security in respect of children in foster care,⁷⁰⁰ such as some form of means-tested social assistance to adoptive parents, should be considered.⁷⁰¹

5.1.5 Care dependency grant

The ideal situation for severely disabled children is for them to be cared for at home, in a nurturing environment.⁷⁰² Unfortunately, according to the White Paper on Social Welfare,⁷⁰³ there are inadequate support facilities available in order to assist families in keeping disabled children in the home environment for as long as possible. In such cases, social assistance from the state is limited to payment of the care dependency grant.⁷⁰⁴

695 As opposed to the child support grant which considers the full household income. Clark 2000 *SALJ* 352.

696 Clark 2000 *SALJ* 352.

697 While the child support grant is currently R160, the foster child grant currently amounts to R500. See Clark 2000 *SALJ* 352; Malherbe *Family* 385.

698 The *Unemployment Insurance Act* 61 of 2001 does, however, provide for social insurance adoption benefits to employees that adopt children.

699 Malherbe *Family* 385.

700 Adoption should be recognised as beneficial to the child as it provides a more secure situation of permanent care. See Malherbe *Family* 385.

701 Malherbe *Family* 385.

702 Malherbe *Family* 385.

703 White Paper on Social Welfare Chapter 8 par 26.

704 Henceforth referred to as the CDG.

The CDG is payable to the legal parent, custodian, guardian or foster parent of a child (between one and 18 years), that is so severely mentally or physically disabled, that the child must receive permanent home care.⁷⁰⁵ The parents of such a child must be South African citizens, and the parents as well as the care dependent child must be resident in South Africa at the time of the application.⁷⁰⁶ In order to receive this grant the parent or foster parent must provide proof that the child is in fact disabled⁷⁰⁷ and that the combined annual income of the family does not exceed R48 000 and the child's income does not exceed twice the annual amount of the grant.⁷⁰⁸ The amount of the grant is R700 per month per child.⁷⁰⁹

The care-dependency grant lapses when the beneficiary dies, the care-dependent child dies or turns 18⁷¹⁰ or if the child is admitted into a psychiatric institution or care and rehabilitation centre.⁷¹¹ The beneficiary's entitlement to the grant is lost if the child is not properly cared for, the child is no longer in his or her custody, the child has not been evaluated at the age of six to determine its suitability for a specialised education, a state official is denied reasonable access to the care-dependent child, the child is permanently cared for in a state-run institution or the child does not receive the prescribed medical or other treatment, where such treatment is available and affordable.⁷¹²

The care dependency grant is poorly accessed⁷¹³ and is not available to children on the basis of HIV/AIDS.⁷¹⁴ It is further denied to children with minor disabilities.⁷¹⁵ While

705 Sections 1 and 2(f) of the *Social Assistance Act*. See Bolani *ea Family Support* 268; Clark 2000 *SALJ* 351 and 356; Malherbe *Family* 385.

706 Klinck *People with Disabilities* 333; Malherbe *Family* 385.

707 In the form of a report from a medical officer or from an assessment panel, an assessment panel being defined as a group of individuals, appointed by the Director-General of Social Development, who have the relevant experience and expertise to assess disability and care dependency, confirming that the child is in fact a care dependent child. R1233 in GG 22852 of November 2001.

708 In other words, the grant is based upon a means test. Reg 5(1) GN R418 in GG 18771 of 31 March 1998.

709 Malherbe *Family* 386.

710 From the age of 18, the disabled person is entitled to his or her own social grant, based on his or her disability. See Malherbe *Family* 386.

711 Reg 24(4) GN R418 in GG 18771 of 31 March 1998. See also Bolani *ea Family Support* 268; Malherbe *Family* 386.

712 Reg 22 GN R418 in GG 18771 of 31 March 1998. See also Bolani *ea Family Support* 268; Malherbe *Family* 386.

713 According to the SAHRC, during the period April 2001 to March 2002, 276 776 children were eligible for the care dependency grant, while only 42 474 were receiving it. SAHRC 4th *Economic and Social Rights Report* 203.

it provides for certain contingencies such as severe disability, it fails to provide for childhood chronic illnesses.⁷¹⁶ Such children and their families, while not qualifying for the grant, have to incur extra costs due to the health condition, which greatly reduce their chances of development and equal opportunities in life.⁷¹⁷ In order to comply with its constitutional obligation, the state should, according to the SAHRC, extend the care dependency grant to children with minor disabilities as well as children with chronic illnesses.⁷¹⁸ A further recommendation is that foster parents be provided with incentives to take in HIV-positive children or children with disabilities, for example the incentive of receiving both a foster-care grant and a CDG.⁷¹⁹

The fact that, in order to qualify for the CDG, both parent and child have to be South African citizens and resident in the Republic,⁷²⁰ fails to take into account the reality of children in Southern Africa, many of whom live on or near the border of South Africa, with a parent resident in a neighbouring country.⁷²¹

5.1.6 Grants which indirectly benefit children

Children do not only benefit from grants which are specifically aimed at them. Old age grants, in particular, are used not only to see the elderly through their old age, but they are also being used to cater for the needs of the whole family.⁷²² These grants, while reducing the poverty gap for older persons by 94%, are used to support entire households, many consisting of three generations.⁷²³ Also, the White Paper on Social

714 This cause for concern is expressly mentioned by the SALC (SALC *Review of the Child Care Act* 333-338). See Clark 2000 *SALJ* 356; Klinck *People with Disabilities* 333.

715 Klinck *People with Disabilities* 333; SAHRC 4th *Economic and Social Rights Report* 217.

716 Despite the fact that such children's needs are equal to, or even greater than, those of many qualifying disabled children. See Klinck *People with Disabilities* 333; SAHRC 4th *Economic and Social Rights Report* 217.

717 SAHRC 4th *Economic and Social Rights Report* 217. See also Klinck *People with Disabilities* 333-334.

718 SAHRC 4th *Economic and Social Rights Report* 230.

719 Klinck *People with Disabilities* 334.

720 Klinck *People with Disabilities* 333; Malherbe *Family* 385. In this regard see *Mahlaule and Others v Minister of Social Development and Others* CCT12/03 and *Khosa and Others v Minister of Social Development and Others* CCT 13/03 as discussed in 3.5 above and 5.3 below.

721 Such as Lesotho or Zimbabwe. See Klinck *People with Disabilities* 333.

722 Olivier and Mpedi "Extending Social Protection" 3.

723 The benefit thus filters down and has an impact on children too. Olivier and Mpedi "Extending Social Protection" 4.

Welfare has indicated that the social assistance-based old-age grant serves the purpose of supporting an additional five members of an African household.⁷²⁴

5.2 *The right to family care or parental care*

Section 28(1)(b) of the Constitution grants every child the right to family care or parental care, or to appropriate alternative care when removed from the family environment. This section grants the child a number of possible entitlements for a child.⁷²⁵ These entitlements include the entitlement to the provision of care of a certain nature and quality, first against the parents and family, and then against the state,⁷²⁶ the entitlement not to have such care interfered with in an unwarranted fashion⁷²⁷ and the entitlement to respect for the institution of family as the context within which care should be provided.

The primary duty, which lies with the parents or family of the child, requires the parents or family of a child to care positively for such child.⁷²⁸ The material elements of this right and its implied duty are largely provided for in sections 28(1)(c)⁷²⁹ and 28(1)(d)⁷³⁰ of the Constitution. According to section 28(1)(b), children have the right to appropriate alternative care when removed from the family environment. This appropriate alternative care must be provided by the state, when it removes a child from family care⁷³¹ or when no family or parental care is available for the child.⁷³² Such alternative care must not merely be provided by the state, but must, according to section 28(1)(b), be appropriate. The care provided by the state must therefore be of

724 White Paper on Social Welfare Chapter 7.

725 Bekink and Brand *Constitutional Protection of Children* 183.

726 This was confirmed in *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 77, where the court held that the primary obligation in respect of children lies with its parents and family and, only in the event of a lack of such parental or family care, does the primary obligation lie with the state.

727 This entitlement primarily operates against the state.

728 Bekink and Brand *Constitutional Protection of Children* 183; Malherbe *Family* 378.

729 The right of children to basic nutrition, shelter, basic health care and social services, which provides the basic goods to which a child is entitled as components of such care. Bekink and Brand *Constitutional Protection of Children* 187.

730 The right against maltreatment, neglect, abuse and degradation. Bekink and Brand *Constitutional Protection of Children* 183.

731 To protect his or her safety. See Bekink and Brand *Constitutional Protection of Children* 184.

732 In the case of orphans. See Bekink and Brand *Constitutional Protection of Children* 184; Malherbe *Family* 378.

such a nature and quality that it approximates family or parental care.⁷³³ The state is also under a positive duty in respect of children who are under parental care, but whose parents are unable to care for them.⁷³⁴ In other words, it follows that the state is directly responsible for the provision of basic nutrition, shelter, basic health care services and social services only where children are not already being properly cared for by their parents or families.⁷³⁵

The fact that the primary duty to provide care rests with a child's parents and family imposes an obligation on the state to respect existing family or parental care.⁷³⁶ This implies that the state, in taking administrative and other decisions that affect the family and children's access to family, should have regard to the protection of the cohesion of family.⁷³⁷ The state is further obliged to ensure that children's rights are observed through the imposition of legislative and common law obligations on parents to care for their children.⁷³⁸ In cases where children are being properly cared for by their parents, the state is under a duty to create and enforce laws aimed at providing for the maintenance of children and protecting them against neglect and abuse.⁷³⁹

5.3 Recommendations

From the discussion above, it is evident that South Africa is not complying with its constitutional obligations in respect of children's rights to social assistance. For this reason, various proposals have been made in respect of the social assistance grants which are currently available to children. A brief summary of these proposals and recommendations is thus in order.

⁷³³ Bekink and Brand *Constitutional Protection of Children* 184-185.

⁷³⁴ For example, unemployed parents and single mothers who struggle to obtain maintenance payments from defaulting fathers. This is a common occurrence in South Africa, where it is estimated that 60% of South African children live in poor households. See Malherbe *Family* 378.

⁷³⁵ Malherbe *Family* 381.

⁷³⁶ It further limits the state's interference in such existing care to cases where it is justified. Bekink and Brand *Constitutional Protection of Children* 185.

⁷³⁷ This is despite the fact that the Constitution does not incorporate a right to family life which expressly requires the state to respect the institution of family, as do several international human rights instruments, for instance the CRC. Bekink and Brand *Constitutional Protection of Children* 186.

⁷³⁸ Malherbe *Family* 380.

⁷³⁹ Malherbe *Family* 381.

- In respect of the child support grant, it is recommended that the **targeting rate must correspond with the prevailing poverty rate**, or at least with the needs of children,⁷⁴⁰ which is currently not the case. The amount of the grant should consequently be increased.
- The grant should further be made available to **child headed households**, as a particularly vulnerable group and should be extended to children up to the age of 18.⁷⁴¹
- While the **means test** is used to determine need, the two-tiered nature of the means test, which is **discriminatory** towards families living in rural areas, should be done away with.
- The **necessity of a means test** at all should also be given attention. If the means test can be found to discourage employment, by increasing income sufficiently to disqualify a primary care-giver from receiving the grant but not by enough to feel a benefit in the household's income, particularly without the child support grant, doing away with the test as a whole needs to be considered. In its recommendations with regard to the social protection of children in the proposed Child Care Bill, the South African Law Commission⁷⁴² acknowledges that, while means testing is not ideal, as the costs involved in conducting such testing divert funds away from the actual recipients, it was decided by the SALC to retain means testing for all the grants except the child grant. The SALC notes that, due to South Africa's resource limitations, all grants and subsidies can only be targeted at the poorest of the poor to enable those children to survive.⁷⁴³
- The grant should further be made available to **non-citizens** and needs to be made more accessible to all who are entitled to it.⁷⁴⁴
- The unavailability of these grants to children of refugees is also a cause for concern. Refugees, in principle, enjoy full legal protection, which includes the

740 Which include food, clothing and shelter.

741 The SALC (SALC *Review of the Child Care Act* 333-338) expresses concern at the fact that only children under the age of seven (since increased to nine) who are living with a primary care-giver who can apply for a CSG or who are placed in foster care in order for the foster child grant to be payable, receive monetary support.

742 Henceforth referred to as the SALC. See SALC *Review of the Child Care Act* 333-338.

743 The means test is a way of ensuring that it is, in fact, these children who receive the benefit of such grants and subsidies.

rights set out in the Bill of Rights in the Constitution.⁷⁴⁵ Those who have obtained refugee status therefore qualify for constitutionally entrenched socio-economic rights. The fact that the CSG and CDG are not available to **refugee children** could thus be seen as falling short of South Africa's constitutional obligation and it is thus proposed that these grants be made available to refugee children.

- The care dependency grant should be extended to include children with **minor disabilities, chronic illnesses and HIV/AIDS**.⁷⁴⁶ Should this not be done, the SALC⁷⁴⁷ proposes that a supplementary special needs grant, which is payable only to children with chronic illnesses, including HIV/AIDS and children with moderate to severe disabilities be introduced.⁷⁴⁸
- It is further proposed that **foster-parents be provided with incentives** to take in HIV-positive children and children with disabilities, such as the incentive of receiving both a foster-care grant and a CDG. The grant should also be made available to all children in need of it, and not just South African citizens.
- In its recommendations with regard to children in the proposed Child Care Bill,⁷⁴⁹ the SALC proposes the **introduction of a social security scheme for children** which includes a child grant, a foster care and court-ordered kinship care grant, an informal kinship care grant, an adoption grant, an emergency court grant,⁷⁵⁰ a subsidy to enable children with disabilities to obtain assistive devices,⁷⁵¹ subsidies to non-governmental organisations⁷⁵² contracted to the state

744 See *Mahlaule and Others v Minister of Social Development and Others* CCT 12/03 and *Khosa and Others v Minister of Social Development and Others* CCT 13/03. See also 3.5 above and 5.3 below.

745 Section 27(b) of the *Refugee Act* 130 of 1998.

746 As recommended by the SALC. See *SALC Review of the Child Care Act* 333-338.

747 *SALC Review of the Child Care Act* 333-338.

748 Such special needs grant should be payable only after the degree of the child's chronic illness or disability has been assessed in terms of an objective prescribed assessment procedure. While the SALC would have preferred to extend the application of this grant to all children in especially difficult circumstances, it has realised that it would be impossible to provide a grant, in addition to the child grant, to all children affected by malnutrition in South Africa. It, however, noted that in the long-term, and given the constitutional imperative to ensure the progressive realisation of socio-economic rights, South Africa should strive to implement a needs-based supplementary grant for children in especially difficult circumstances.

749 *SALC Review of the Child Care Act* 333-338.

750 This grant would serve to ensure that where a child is at risk of removal into alternative care purely because of poverty, the court would be able to get immediate assistance to the child's parent or primary caregiver.

751 Such as wheelchairs. Such subsidies should, according to the SALC, be paid on presentation of an invoice substantiating the purchase and should be subject to a means test.

752 Henceforth referred to as NGO's.

to implement programmes and projects giving effect to the Act,⁷⁵³ fees to NGO's and welfare organisations who carry out services on behalf of the state and a subsidy to encourage the provision of early childhood development services.

- A further recommendation is made that the existing **social relief of distress grant** should be utilised more effectively. This could, according to the SALC, be done through the issue of a directive to all provincial Departments of Social Development and the courts recommending its use to assist families in crisis.⁷⁵⁴

6 International instruments

The right to social security has become a human right under international law.⁷⁵⁵ The most important sources of socio-economic rights in international law will be discussed below. Due to the fact that South Africa is now subject to a constitutional imperative to consider international law, the importance thereof needs to be emphasised.⁷⁵⁶ Of further importance is the fact that South Africa has ratified the two primary instruments relating to children's rights, namely the United Nations Convention on the Rights of the Child⁷⁵⁷ and the African Charter on the Rights and Welfare of the Child.⁷⁵⁸

6.1 *Universal Declaration of Human Rights*

Together with the ICCPR and the ICESCR, the Universal Declaration of Human Rights⁷⁵⁹ forms the International Bill of Rights.⁷⁶⁰ The adoption of the UDHR, in 1948, demonstrated a willingness by the international community to transform basic moral rights into affirmative legal ones.⁷⁶¹ Article 22 of the UDHR states:

753 The purpose of this proposed subsidy is to compensate these NGO's for the services delivered to children on behalf of the state.

754 Thus being used to directly benefit children.

755 This is evident from its inclusion in various international and regional instruments. Ben-Israel 1995 *Comparative Labour Law Journal* 145.

756 See discussion in 3.6 above.

757 Discussed in 6.3 below.

758 Discussed in 7.2 below.

759 Henceforth referred to as the UDHR.

760 Jansen van Rensburg *Toegang tot sosiale sekerheid* 126.

761 Ben-Israel 1995 *Comparative Labour Law Journal* 145.

Everyone, as a member of society, has the right to social security and is entitled to realisation through national effort and international cooperation and in accordance to the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 25 describes the types of risks which are covered by the right to social security as follows:

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

The UDHR has no binding force and can be described as 'soft law'.⁷⁶² This document lays down the foundations for the international promotion and protection of human rights and fundamental freedoms by the United Nations and its member states⁷⁶³ and it is generally accepted that the UDHR⁷⁶⁴ has attained the status of customary international law.⁷⁶⁵ Even if this were not the case, however, South African courts would still be under an obligation to consider the UDHR, according to the *Makwanyane* judgement.⁷⁶⁶

6.2 International Covenant on Economic, Social and Cultural Rights

The ICESCR may be considered the primary international document regulating social security rights.⁷⁶⁷ Although not specifically a children's rights document, the rights

762 Soft law consists of imprecise standards, generated by declarations which have been adopted by diplomatic conferences or by the resolutions of international organisations, that are intended to serve as guidelines to states in their conduct but which lack the status of 'law'. Alston 1998 *ESRR* 2; Goosen *ea International and Comparative Standards* 537; Jansen van Rensburg *Toegang tot sosiale sekerheid* 127; Olivier *ea Constitutional Issues* 59.

763 Flinterman and Gutter 2000 HYPERLINK http://undp.org/docs/publications/background_papers/flinterman2000.pdf 7 Feb 2003.

764 Or parts thereof.

765 Goosen *ea International and Comparative Standards* 537. According to Alston (Alston 1998 *ESRR* 2), the UDHR represents a common standard of achievement for all peoples of all nations.

766 For discussion of the *Makwanyane* case, see 3.5.

767 This document not only lists the extensive right it enacts but, in many instances, describes such rights in great detail. Alston 1998 *ESRR* 2; Goosen *ea International and Comparative Standards*

granted by the covenant to 'everyone' include children.⁷⁶⁸ Unlike the UDHR, this document, once signed and ratified, is of binding legal force.⁷⁶⁹ Although South Africa has signed the ICESCR,⁷⁷⁰ it has yet to ratify it.⁷⁷¹ The fact that it has only been signed and not ratified does not mean that it is unimportant for South Africa. By signing the Covenant, South Africa has undertaken not to take steps which would defeat the object and purpose of the treaty and to review all policy and law to ensure compliance when ratification does take place.⁷⁷² Furthermore, many provisions of the Bill of Rights relating to socio-economic rights are based on the ICESCR. This means that use can be made of the interpretations offered by the United Nations Committee on Economic, Social and Cultural Rights when attempting to interpret the provisions of the South African Bill of Rights.⁷⁷³

Article 9 states the following:

The State Parties to the present Covenant recognise the right of everyone to social security, including social insurance.

This article, as opposed to section 27 of South Africa's Constitution, does not qualify the right to social security with the words "access to". The implementation of the right to social security, however, is limited by the fact that it is to be progressively implemented.⁷⁷⁴

538; Jansen van Rensburg and Olivier *International and Supra-national Law* 621 and 636; Liebenberg 1995 *SAJHR* 359.

768 Viljoen *The African Charter on the Rights and Welfare of the Child* 216.

769 Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 127.

770 On 3 October 1994.

771 Alston 1998 *ESRR* 2-3; Clark 2000 *SALJ* 342; Goosen *ea International and Comparative Standards* 538; Heyns 1999 *De Jure* 206; Hopkins Dec 2001 *De Jure* 27; Jansen van Rensburg and Olivier *International and Supra-national Law* 636; Liebenberg 1995 *SAJHR* 359; Sarkin 1998 *Human Rights Quarterly* 635. See also discussion in 1 above.

772 States that have ratified the Covenant are required to report to the United Nations on the measures which they have adopted and the progress they have achieved in the observance of the rights guaranteed under the Convention. See Clark 2000 *SALJ* 342; Goosen *ea International and Comparative Standards* 538; Jansen van Rensburg and Olivier *International and Supra-national Law* 637; Liebenberg 1995 *SAJHR* 371.

773 As was done in the *Grootboom* case. See Goosen *ea International and Comparative Standards* 538; Jansen van Rensburg and Olivier *International and Supra-national Law* 636.

774 Jansen van Rensburg and Olivier *International and Supra-national Law* 637.

Article 10 protects the rights of families, mothers and children, article 11 grants the right to an adequate standard of living, including adequate food,⁷⁷⁵ clothing and housing, and to the continuous improvement of living conditions, article 12 contains the right to the highest attainable standard of physical and mental health and articles 13 and 14 protect the right to education.

According to section 10(3):

Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.

This article lays down the basic principle that all children, because of their vulnerability, are entitled to special protection and assistance additional to that provided for adults.⁷⁷⁶ According to article 10(3), therefore, a state is under a duty not to discriminate against specific groups of children as well as to provide vulnerable groups⁷⁷⁷ with special protection and assistance to ensure equality.⁷⁷⁸

According to article 11, everyone has the right to an adequate standard of living for himself and his family, which includes the right to adequate food, clothing and housing⁷⁷⁹ and for the continuous improvement of living conditions. A component of the right to food in this article is contained in article 2, which refers to 'freedom from hunger'. States are to take measures to improve the production, conservation and distribution of food, to disseminate information about nutrition and to structure agrarian systems to make the best of natural resources.⁷⁸⁰ At international level, states are expected to ensure the distribution of food according to need.⁷⁸¹

775 Section 27(1)(b) of the Constitution grants the right to have 'access to' sufficient food and water, rather than the right to adequate food, as in the ICESCR.

776 Van Bueren 1999 *SAJHR* 56.

777 According to the UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child, such groups include children who are temporarily or permanently deprived of their family environment, children with disabilities and children living and/or working on the streets.

778 Van Bueren 1999 *SAJHR* 56.

779 The right to 'access to' adequate housing, as opposed to the ICESCR's right to adequate housing is guaranteed by section 26(1) of the Constitution.

780 Robertson *The Right to Food in International Law* 453.

781 Robertson *The Right to Food in International Law* 453.

Article 2 of the ICESCR is the central article governing the nature and scope of the state's obligations in relation to all the substantive rights referred to above.⁷⁸² Article 2(1) reads as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

This wording shows strong similarities to that of the internal limitations which are contained in the Constitution.⁷⁸³

General Comment No 3 furthermore makes use of a 'minimum core obligation' approach. It places a state party under a 'minimum core obligation' to satisfy at least the essential levels of socio-economic rights such as basic nutrition, primary health-care, shelter and basic education,⁷⁸⁴ regardless of the fact that the state is a developing country or is experiencing economic difficulties.⁷⁸⁵ The state party is thus under a duty to prioritise its resources so as to meet these minimum duties, particularly in relation to vulnerable and disadvantaged groups.⁷⁸⁶ Failure to meet these basic needs and standards for a dignified human existence *prima facie* amounts to a breach of the obligations of the ICESCR.⁷⁸⁷ Only when a state can convincingly show that resources are 'demonstrably inadequate' can its failure to fulfil these duties be justified.⁷⁸⁸ Such minimum threshold is, however, country specific.⁷⁸⁹ In other words,

782 Liebenberg 1995 *SAJHR* 364. The limitations placed on the rights contained in the ICESCR are similar to the internal qualifications placed on the rights contained in sections 26 and 27 in the Constitution. The interpretation of these limitations in the ICESCR can thus, in terms of section 39 of the Constitution, serve as a useful tool in the interpretation of sections 26 and 27 of the Constitution. In the *Grootboom* case, for example, extensive reference was made to the interpretation of the ICESCR. For a discussion on the interpretation of these qualifications by the Constitutional Court, see 4.3 above.

783 For the court's use of this international law provision and interpretation of the constitutional qualifications see 3.4 above.

784 Alston 1998 *ESRR* 4; Liebenberg 1995 *SAJHR* 366.

785 Jansen van Rensburg and Olivier *International and Supra-national Law* 640.

786 As mentioned previously, children include a particularly vulnerable group. See Alston 1998 *ESRR* 4; Jansen van Rensburg and Olivier *International and Supra-national Law* 638; Liebenberg 1998 [HYPERLINK http://www.sahrc.org.za/volume_v.PDF](http://www.sahrc.org.za/volume_v.PDF) 13 Aug 2003. See also General Comment No 4 para 11.

787 A state which fails to satisfy such obligations is placed under an increased justificatory burden to demonstrate that every effort has been made to make use of all resources available to it to satisfy, as a matter of priority, these minimum obligations. General Comment No 3 para 10.

788 Alston 1998 *ESRR*; Bilchitz 2003 *ESRR* 3.

the ways in which economic and social rights can be realised will vary with the nature of the national situation and conditions applying there.⁷⁹⁰ The Committee has, however, indicated that a state party is still under the obligation to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.⁷⁹¹ The South African courts have refused to follow this approach, firstly by explicitly rejecting the minimum core obligation approach in the *Grootboom* case and then by acknowledging this approach but failing to define its contents in the *TAC* case.⁷⁹²

The general principle of progressive implementation is subject to the further qualification that some of the obligations imposed by the ICESCR are immediate and unconditional.⁷⁹³ This is indicated by the wording of particular articles read in the context of the ICESCR as a whole.⁷⁹⁴

The Committee has emphasised that priority attention should be given to any worse-off regions and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged.⁷⁹⁵ Thus the legislation, policies and plans implementing the obligations under the ICESCR should be designed to have the maximum impact on the poorest and most marginalized groups in society.⁷⁹⁶ The decision by the court in *Government of the Republic of South Africa v Grootboom* is in line with this approach. It is worth noting that, according to the South African Human Rights Commission, the greatest challenge facing the delivery of services to the vulnerable members of society, more often than not, lies not so much with government policies and other measures, but with the implementation of such policies.⁷⁹⁷

789 Eide *Strategies for the Realisation of the Right to Food* 468.

790 Eide *Strategies for the Realisation of the Right to Food* 468.

791 Alston 1998 *ESRR* 4.

792 For a discussion on the court's approach in these cases, see 4.3 and 4.5.2 above.

793 Liebenberg 1995 *SAJHR* 367.

794 According to Liebenberg, the use of words and phrases such as 'respect', 'recognise' and 'must' indicate obligations of an immediate and unconditional nature. An example hereof is the rights of parents in the education of their children, contained in article 13(3), which must be 'respected'. Liebenberg 1995 *SAJHR* 367.

795 General Comment No 1 para 3; General Comment No 4 para 11; General Comment No 5; Alston 1998 *ESRR* 4; Jansen van Rensburg and Olivier *International and Supra-national Law* 638.

796 Liebenberg 1995 *SAJHR* 366.

797 SAHRC 4th *Economic and Social Rights Report* 8.

From the above discussion it can be noted that the provisions of the ICESCR are mostly drafted in the form of obligations of result and not as obligations of conduct.⁷⁹⁸ This makes it more difficult for them to be made justiciable.⁷⁹⁹ For this reason, in June 1986, some of the world's leading experts in the field of the legal protection of social and economic rights, drafted the Limburg Principles,⁸⁰⁰ which is the best guide available on state obligations under the ICESCR.⁸⁰¹

Principle 8 states:

Although the full realisation of the rights recognised in the Covenant is to be attained progressively, the application of some of these rights can be made justiciable immediately while other rights can become justiciable over time.

What this principle means is that there can be a group of near-absolute core entitlements to the provision of the basic subsistence needs of the most vulnerable in all states which are party to the ICESCR.⁸⁰² This obligation to fulfil is, in respect of the most vulnerable, immediate in nature and is not dependent on scarce resources, except in the poorest of poor countries.⁸⁰³ The effect of this is that the needs of people who are not able to meet the most basic needs of health, nutrition and housing without government assistance are made a priority.⁸⁰⁴ This gives rise to a number of core entitlements to which every person is entitled.⁸⁰⁵ As mentioned above, the Constitutional Court has, while noting in the *Grootboom* judgement that special attention needs to be paid to particularly vulnerable groups within society, deviated from this near-absolute core entitlement approach in both the *Grootboom* and the *TAC* cases.⁸⁰⁶

798 De Vos 1995 *SAPL* 248; Jansen van Rensburg and Olivier *International and Supra-national Law* 638.

799 De Vos 1995 *SAPL* 248.

800 The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. Henceforth referred to as the Limburg Principles.

801 De Vos 1995 *SAPL* 248.

802 De Vos 1995 *SAPL* 249.

803 De Vos 1995 *SAPL* 249.

804 De Vos 1995 *SAPL* 249.

805 De Vos 1995 *SAPL* 249.

806 See 4.3 and 4.5.2 above.

In line with this near-absolute core entitlement approach, however, the Committee of Inquiry into a Comprehensive System of Social Security in South Africa⁸⁰⁷ has developed certain minimum requirements for a comprehensive social protection package. These measures include measures to address income poverty, capability poverty, asset poverty and measures to address special needs.⁸⁰⁸ According to the Committee of Inquiry, these measures are aimed at ensuring a minimum level of provision for everyone.⁸⁰⁹ It is submitted that the implementation of these suggestions would be welcomed.

6.3 *United Nations Convention on the Rights of the Child*

Although children's rights have already been guaranteed in some general human rights conventions⁸¹⁰ the CRC represents a comprehensive compilation of child-specific rights.⁸¹¹ It can be seen as the most important legal instrument for the promotion of children's rights,⁸¹² including the right of every child to benefit from social security.⁸¹³ Every child is further granted the right to an adequate standard of living.⁸¹⁴ Children require a greater degree of protection than adults due to their vulnerability.⁸¹⁵ It is for this reason that the CRC was drafted, using as its yardstick the best interests of the children in all matters concerning children.⁸¹⁶

807 Henceforth referred to as the Committee of Inquiry. See Committee of Inquiry *Consolidated Report*.

808 For a discussion on these measures see 2.1 above.

809 The key components of this include the eventual introduction of a Basic Income Grant and the immediate extension of the CSG to gradually cover all children under the age of 18 as well as free health care, free primary and secondary education, free water and sanitation (up to a certain basic level), free electricity (up to a certain basic level), access to affordable and adequate housing, access to jobs and skills training and a reformed disability grant, foster care grant and child dependence grant. See Committee of Inquiry *Consolidated Report* 42-43.

810 For example article 10 of the ICESCR.

811 The CRC is further symbolic of the child's stature in international law. See Ermacora, Nowak and Tretter *International Human Rights* 84; Human 2000 *SAPL* 80; UNICEF *Poverty Reduction Begins with Children* 4.

812 It can be seen as creating a set of internationally recognised fundamental rights for all children. Malherbe *Family* 395; Sloth-Nielsen and Van Heerden 1996 *SAJHR* 248.

813 Article 26 of the CRC. Section 28(1)(c), while not referring to the right to social security *per se* grants every child the right to social services.

814 Article 27 of the CRC. While the right to an adequate standard of living for every child is not expressly included in the Bill of Rights, it is implied by section 28(1)(c) which guarantees every child the right to basic nutrition, shelter, basic health care services and social services.

815 Bekink and Brand *Constitutional Protection of Children* 177; Human 2000 *SAPL* 86; Mower *The Convention on the Rights of the Child* 3.

816 Article 3 of the CRC. This yardstick in respect of children is entrenched in section 28(2) of the Constitution. See also Human 2000 *SAPL* 86; Van Bueren *The United Nations Convention on the Rights of the Child* 204.

This convention gives rise to legally binding norms and principles, and sets international standards to which member states must comply by means of national legislation and policy.⁸¹⁷ Ratified by all but two countries worldwide,⁸¹⁸ the CRC is the most widely accepted human rights instrument ever.⁸¹⁹ By having ratified the Convention, South Africa is bound to comply with the obligations contained therein by prioritising the needs of children in all programmes, services and development strategies.⁸²⁰ Apart from the fact that the CRC has been ratified by South Africa, section 28 of the Constitution imports specific provisions of the CRC.⁸²¹

The content of the CRC is divided into two categories, namely a category for civil and political rights⁸²² and a category for economic, social and cultural rights.⁸²³ Despite this fact, there was a deliberate attempt by the drafters of the Convention to break free from the generational chains and integrate civil and political rights with economic, social and cultural rights.⁸²⁴ The obligations assumed by state parties in terms of the CRC are, however, not unqualified.⁸²⁵ Article 4 attaches the term 'appropriate' to the measures which a state is to undertake in its implementation of the Convention's rights. A further limitation placed by article 4 relates to a child's economic, social and cultural rights.⁸²⁶ According to this article, state parties are to undertake implementary measures in regard to these rights 'to the maximum extent of their available resources'.⁸²⁷ Despite this provision, however, the state is obliged to ensure minimum

817 Human 2000 *SAPL* 89.

818 Namely Somalia and the United States of America.

819 UNICEF *Poverty Reduction Begins with Children* 4.

820 This also includes a duty to report to the Committee established in terms of the CRC regularly. See Clark 2000 *SALJ* 342; Jansen van Rensburg and Olivier *International and Supra-national Law* 627; Malherbe *Family* 395.

821 Van Bueren 1999 *SAJHR* 54.

822 For example the right to life (article 6), freedom of speech (article 13), freedom of thought and religion (article 14), freedom of association (article 15) and protection of privacy (article 16).

823 For example the right to health care services (article 24) and the right to education (articles 28 and 29).

824 Van Bueren 1999 *SAJHR* 55.

825 Mower *The Convention on the Rights of the Child* 25.

826 Mower *The Convention on the Rights of the Child* 26.

827 While section 28 of the Constitution does not contain such limitations in respect of children's rights, after the *Grootboom* judgement, it is accepted that children's rights are subject to the internal limitations imposed on other socio-economic rights, which are similar to these limitations contained in the CRC. According to Mower (Mower *The Convention on the Rights of the Child* 26), these constitute highly subjective terms, which can be interpreted and applied in whatever manner the government of a state party chooses, with the choice depending on that regime's attitude toward the rights in question and the place they occupy on its agenda.

essential levels in the living standards of children and is prohibited from allowing these living standards to decrease.⁸²⁸

A child, as defined in this Convention, is any human being under the age of 18, unless a particular nation's laws set an earlier age for the attaining of majority status.⁸²⁹ In terms of the CRC, the primary responsibility for the upbringing and development of the child is placed on parents.⁸³⁰ Parents are responsible for, within their means, creating circumstances which are necessary for their child's development.⁸³¹ While parents are recognised as the primary care-givers of their children, this does not necessarily mean that they have the ability to comply with their responsibilities and duties.⁸³² State parties must, therefore, within their means, take appropriate measures to assist parents, and others responsible for the child, to implement the right to an adequate standard of living and, in cases of need, provide material assistance and support programmes.⁸³³ State parties are further obliged to take all appropriate measures to secure the recovery of maintenance for the child both from within the country and abroad.⁸³⁴ According to article 20, a child that has been temporarily or permanently deprived of his or her family environment is entitled to special protection and assistance provided by the state.⁸³⁵

828 Jansen van Rensburg and Olivier *International and Supra-national Law* 628.

829 According to section 28(3) of the South African Constitution, 'child' refers to a person under the age of 18 years.

830 See Articles 5, 18 and 27(1) and (2) of the CRC, especially in relation to the child's physical, spiritual, moral and social development. This is emphasised by the preamble to the CRC, according to which 'the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'. This is, according to Human (Human 2000 *SAPL* 90), because the family is a universal phenomenon and is one of the most basic and most important institutions in the community. Similarly, section 28(1)(b) of the Constitution grants every child the right to family or parental care, or to appropriate alternative care when removed from the family environment. The *Grootboom* judgement established that the primary duty in respect of children rests with the child's parents or guardians. See Clark 2000 *SALJ* 343.

831 Article 27(2) of the CRC. Note should be taken of the fact that the court came to a similar conclusion to this in the *Grootboom* case.

832 Human 2000 *SAPL* 95.

833 Article 27(3) of the CRC.

834 Article 27(4) of the CRC.

835 According to section 28(1)(b) of the Constitution, when a child is removed from the family environment, such child is entitled to appropriate alternative care.

No definition of a family is provided by the CRC.⁸³⁶ This makes it a possibility that a variety of forms of family which are recognised by different states can be accommodated by the Convention.⁸³⁷ Article 5⁸³⁸ of the Convention brings to the attention of states the potential of the extended family, and also of the community, to play a role in the child's life.⁸³⁹ This is particularly relevant to the South African context, where various social and economic factors have led to the fact that the extended family has, to a certain extent, become the norm.

While the primary duty to care for a child lies with the parents, a state party bears a primary responsibility to perform certain functions.⁸⁴⁰ These include the provision of health care,⁸⁴¹ **welfare benefits**,⁸⁴² and education.⁸⁴³ A state party has further specific duties in respect of children with exceptional needs.⁸⁴⁴ A child that has been removed from parental care is entitled to special protection and assistance by the state.⁸⁴⁵ The state is obliged to, in accordance with national legislation, provide such child with alternative care.⁸⁴⁶

As mentioned above, the best interests of the child serves as a yardstick in all matters concerning children. This is contained in article 3 of the CRC, which reads:

In all actions concerning children, whether undertaken by public or private **social welfare institutions**, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁸⁴⁷

836 Human 2000 *SAPL* 90.

837 Human 2000 *SAPL* 90-91.

838 Article 5 of the CRC reads as follows: 'States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention'.

839 Human 2000 *SAPL* 91.

840 Human 2000 *SAPL* 97.

841 Article 9(1) of the CRC. Included in section 28(1)(c) in the Constitution as basic health care services.

842 Article 24 of the CRC.

843 Article 26 of the CRC. The right to education is entrenched in section 29 of the Constitution. The right to education in the Constitution is, however, not limited to children but is granted to 'everyone'.

844 Human 2000 *SAPL* 97.

845 Article 33 of the CRC.

846 Article 20(1) of the CRC.

847 Own emphasis.

In other words, the best interests of the child is the general standard applicable to the CRC.⁸⁴⁸ This concept is contained in various other provisions of the CRC⁸⁴⁹ as well as in a number of other international documents.⁸⁵⁰ While the content of the concept 'best interest' is not defined in the Convention, it is a standard which is generally used in national law.⁸⁵¹ The exact content thereof is, however, still the subject of much debate.⁸⁵² It is increasingly recognised that this concept is not one which lends itself to a universal and uniform result.⁸⁵³ Despite the fact that the vagueness of this concept gave rise to a wide discretion on the part of the decision-maker, no attempt was made during the creation of the CRC to give content and meaning to it at international level.⁸⁵⁴ This has resulted in the vagueness and lack of uniformity on national level also being found on international level.⁸⁵⁵

The concepts of the best interests of the child should, therefore, be applied to the individual circumstances peculiar to each case.⁸⁵⁶ In a country such as South Africa, where a heterogeneous community is characterised by divergent tendencies and structures in respect of family life and children, differences in culture, belief and traditions plays an important role in the interpretation of the best interest of the child.⁸⁵⁷ The vagueness of this concept in the CRC thus makes it possible to accommodate these divergent cultures and religious and other considerations within the South African context, when interpreting the yardstick of the best interest of the child.⁸⁵⁸

The CRC can be seen as revolutionary because the essence of its economic and social rights is transformative and redistributory.⁸⁵⁹ It provides a concrete set of responses to

848 Human 2000 *SAPL* 98.

849 See articles 9, 18, 20, 21, 37 and 40 of the CRC.

850 Human 2000 *SAPL* 99.

851 Human 2000 *SAPL* 99.

852 Human 2000 *SAPL* 99.

853 Wallace *International Human Rights* 141.

854 Human 2000 *SAPL* 99.

855 Human 2000 *SAPL* 99.

856 Wallace *International Human Rights* 141.

857 Human 2000 *SAPL* 100.

858 Human 2000 *SAPL* 100.

859 Van Bueren *The United Nations Convention on the Rights of the Child* 207; Van Bueren 1999 *SAJHR* 55.

specific facets of poverty⁸⁶⁰ as well as a legitimate claim for children to benefit from an equal share in the state's resources.⁸⁶¹

According to article 26(1):

States parties shall recognise for every child the right to benefit from **social security**, including **social insurance**, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.⁸⁶²

The social security benefits referred to in this article should be granted, taking into account the available resources and circumstances of both the child and those persons responsible for the maintenance of the child.⁸⁶³

Article 6 of the Convention incorporates the recognition by state parties that every child has the inherent right to life and that state parties should ensure to the maximum extent possible the survival and development of the child. This right, according to Van Bueren,⁸⁶⁴ extends far beyond the death penalty and abortion context. It thus requires more than the mere negative enforcement of not interfering with the right to life and indicates that positive action by the state could, in certain circumstances, be required. The duty on the state to ensure to the maximum extent possible the survival and development of the child highlights particular aspects of the right to life.⁸⁶⁵ This right gives rise to numerous derivative social security rights.⁸⁶⁶ Both the right of a child to enjoy the highest attainable standard of health and the right to enjoy nutritious food, clean drinking water and an adequate standard of living, can be subsumed under the duty of a state to ensure to the maximum extent possible the survival and development of the child.⁸⁶⁷ The right to survival and development can thus not be assessed from a narrow juridical viewpoint.⁸⁶⁸

860 Van Bueren *The United Nations Convention on the Rights of the Child* 201.

861 Van Bueren 1999 *SAJHR* 55.

862 Own emphasis.

863 Jansen van Rensburg and Olivier *International and Supra-national Law* 627.

864 Van Bueren *The United Nations Convention on the Rights of the Child* 208. The right to life in the context of the CRC does not, in fact, even deal with the issue of abortion. At no time during the preparing of the draft convention was the issue of abortion *per se* discussed by the working group. See Mower *The Convention on the Rights of the Child* 29.

865 Van Bueren *The United Nations Convention on the Rights of the Child* 208.

866 Jansen van Rensburg and Olivier *International and Supra-national Law* 627.

867 Jansen van Rensburg and Olivier *International and Supra-national Law* 627; Van Bueren *The United Nations Convention on the Rights of the Child* 208-209. According to Mower (Mower *The*

The right of a child to education is governed by articles 28 and 29 of the CRC.

In article 32, state parties:

recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.⁸⁶⁹

In order to implement these provisions, state parties commit themselves to provide a minimum age or ages for employment, appropriate regulation of hours and conditions and appropriate penalties or other sanctions to ensure the effective enforcement of the said article.⁸⁷⁰

Special protection is granted to mentally and physically disabled children by providing that such child has the right to a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.⁸⁷¹ The state is thus under a duty to provide assistance, subject to available resources, to the disabled child and those responsible for such child's care.⁸⁷²

In terms of its ratification of the CRC, the South African Government has assumed certain international obligations in respect of children,⁸⁷³ and is further placed under an international obligation to comply with the duties placed on member states. One of these duties is to report regularly to the supervising body under the CRC on the compliance with its duties as a member state. The United Nations Committee on the

Convention on the Rights of the Child 32), the denial of medicine, clean water or adequate nutrition is as clearly a violation of a person's right to life as is execution by a death squad.

868 Van Bueren (Van Bueren *The United Nations Convention on the Rights of the Child* 209) gives a good illustration of this. It would, in her opinion, be nonsensical to provide access for children to immunisation against potentially lethal diseases and not to provide children with food and water.

869 Section 28(1)(e) of the Constitution guarantees every child the right to be protected from exploitative labour practices and, according to section 28(1)(f), every child has the right not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age or that place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

870 Mower *The Convention on the Rights of the Child* 43-44.

871 Article 23 of the CRC.

872 Jansen van Rensburg and Olivier *International and Supra-national Law* 627.

873 Clark 2000 *SALJ* 342.

Rights of the Child⁸⁷⁴ has considered South Africa's first report and adopted concluding observations on South Africa's compliance with the Convention.⁸⁷⁵ The fact that South Africa has signed but not yet ratified the ICESCR has been criticised by the Committee. According to the CRC Committee, the ratification of the ICESCR would strengthen South Africa's efforts to meet its obligations in guaranteeing the rights of all children under its jurisdiction in terms of the CRC and South Africa has consequently been encouraged to reinforce its efforts to finalise the ratification of this instrument.⁸⁷⁶

The CRC Committee's report further goes on to indicate that South Africa fails to comply with the provisions of the CRC in certain major respects.⁸⁷⁷ Among its comments, the CRC Committee has criticised the South African government on the lack of co-ordination between those ministries responsible for the implementation of the Convention⁸⁷⁸ as well as the fact that insufficient effort has been made to ensure that adequate programmes are introduced at community level and to involve community-based organisations⁸⁷⁹ in the promotion and implementation of the Convention.⁸⁸⁰ The Committee has further criticised the age limitation of six⁸⁸¹ years as far as the child support grant is concerned.⁸⁸² The Committee has recommended that government expand the child support grant programme or develop alternative programmes to include support to children up to the age of 18 years, who are still in school, with specific emphasis on those who are particularly vulnerable.⁸⁸³

The Committee is further of the opinion that insufficient efforts have been made by the South African government to ensure adequate distribution of resources allocated for children's programmes and activities and consequently urges the prioritisation of

874 Henceforth referred to as the CRC Committee.

875 Committee on the Rights of the Child *Concluding Observations* 2000 CRC/C/15/Add.122.

876 Committee on the Rights of the Child *Concluding Observations* para 11. See Jansen van Rensburg and Olivier *International and Supra-national Law* 628.

877 See Committee on the Rights of the Child *Concluding Observations* paras 12, 15, 24, 29 and 32; Jansen van Rensburg and Olivier *International and Supra-national Law* 628-629.

878 The same point of critique was made by the SAHRC. See SAHRC 4th *Economic and Social Rights Report* 29-30.

879 Henceforth referred to as CBO's.

880 Jansen van Rensburg and Olivier *International and Supra-national Law* 629-630.

881 Now under nine.

882 A positive development since the Committee's recommendations has been the extension of the qualifying age from under seven to under 14 years over a three year period from 1 April 2003.

budgetary allocations and distributions to ensure implementation of the economic, social and cultural right of children, to the maximum extent of available resources and, where needed, within the framework of international co-operation.⁸⁸⁴ Concern is expressed that professional groups, children, parents and the public at large are generally not sufficiently aware of the Convention and the rights-based approach enshrined therein.⁸⁸⁵

The South African government is commended for the reflection of the principle of non-discrimination⁸⁸⁶ in its Constitution and domestic legislation, but the Committee is still concerned that insufficient measures have been adopted to ensure that all children, particularly vulnerable children are guaranteed access to education, health and other social services.⁸⁸⁷ The Committee, in particular, recommends that all necessary measures to reduce and prevent the increasing number of child-headed households be taken and that adequate support mechanisms for existing child-headed families be introduced.⁸⁸⁸ Concern is also noted with regard to the inadequate monitoring and evaluation of placements in the foster care programme as well as with the inadequate legal protection, programmes, facilities and services for children with disabilities.⁸⁸⁹

The survival and development of children within the state continue, according to the Committee, to be threatened by early childhood diseases⁸⁹⁰ and the high incidence of child and infant mortality; the high rate of malnutrition; the poor situation of sanitation and insufficient access to safe drinking water, especially in rural communities and the lack of adequate resources⁸⁹¹ in respect of health services is noted.⁸⁹²

883 In this regard, technical assistance from, *inter alia* the UNICEF is encouraged. See Jansen van Rensburg and Olivier *International and Supra-national Law* 630.

884 Jansen van Rensburg and Olivier *International and Supra-national Law* 629.

885 Jansen van Rensburg and Olivier *International and Supra-national Law* 629.

886 Article 2 of the CRC.

887 The Committee expresses concern in relation to Black children; girls; children with disabilities (particularly learning disabilities); child labourers; children living in rural areas; children working and/or living on the streets; children in the juvenile justice system; and refugee children. See Jansen van Rensburg and Olivier *International and Supra-national Law* 629.

888 Committee on the Rights of the Child *Concluding Observations* para 22.

889 Jansen van Rensburg and Olivier *International and Supra-national Law* 630.

890 Such as acute respiratory infections and diarrhoea.

891 Both financial and human.

892 Jansen van Rensburg and Olivier *International and Supra-national Law* 630.

It is clear from the Committee's report that South Africa has, in major respects, failed to comply with the provisions of the CRC. The recommendations of the CRC Committee, however, have assisted South Africa in addressing these problems. The South African Law Commission⁸⁹³ has taken some of these observations and recommendations into account in its proposals in the drafting of a new Child Care Act.⁸⁹⁴

6.4 International Labour Organisation Conventions

The International Labour Organisation⁸⁹⁵ sets international standards regulating labour conditions as well as social policy, human rights and civil rights issues.⁸⁹⁶ The ILO's standards take the form of International Labour Conventions and Recommendations.⁸⁹⁷ This body has adopted a number of conventions relevant to the position of children.⁸⁹⁸

The Social Security (Minimum Standards) Convention⁸⁹⁹ provides for minimum standards in nine distinct branches of social security, namely medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivor's benefits.⁹⁰⁰ This convention marked a new step in international social security legislation by introducing the objective of a basic level of social security to be attained everywhere in the world, whatever the nation's degree of economic development.⁹⁰¹ The minimum standard prescribed is characterised by its comprehensiveness, its flexibility regarding means and its precision regarding aims.⁹⁰²

893 Henceforth referred to as the SALC. See SALC *Review of the Child Care Act* 333-338.

894 For a discussion on these proposals, see 5.3 above.

895 Henceforth referred to as the ILO.

896 Goosen *ea International and Comparative Standards* 545.

897 Since the ILO's Conventions have the status of international treaties they are of binding effect, while recommendations are non-binding. Recommendations basically clarify the subjects dealt with by the Conventions and further set out guidelines which can orient national policy and action. ILO Constitution Article 19; Goosen *ea International and Comparative Standards* 545.

898 Viljoen *The African Charter on the Rights and Welfare of the Child* 216.

899 Social Security (Minimum Standards) Convention 102 of 1952. This convention has not been signed or ratified by South Africa.

900 Ben-Israel 1995 *Comparative Labour Law Journal* 148; Goosen *ea International and Comparative Standards* 546.

901 Ben-Israel 1995 *Comparative Labour Law Journal* 146.

902 Ben-Israel 1995 *Comparative Labour Law Journal* 146. A minimum standard approach to social security has been recommended by the Committee of Inquiry into a Comprehensive System of

Although the right to social security as guaranteed by the ICESCR makes no reference to this ILO convention, this convention is constructed in a manner that provides useful benchmarks aimed at assessing the minimum content of the right to social security.⁹⁰³

The Social Security (Minimum Standards) Convention was supplemented by additional conventions setting higher standards.⁹⁰⁴ According to the Equality of Treatment (Social Security) Convention,⁹⁰⁵ family allowances shall be guaranteed in respect of children resident within the territory of a state which has accepted the obligations of the Convention for such branch.⁹⁰⁶ Further ILO conventions affecting the rights of children include the Maternity Protection Convention,⁹⁰⁷ which was adopted to provide for 14 weeks maternity leave to all employed women, including those in atypical forms of dependent work and the Medical Care and Sickness Benefits Convention.⁹⁰⁸

7 Regional Instruments

7.1 *African Charter on Human and Peoples' Rights*

The African Charter on Human and Peoples' Rights,⁹⁰⁹ which has been ratified by South Africa,⁹¹⁰ in following the growing trend in the international community of

Social Security (Committee of Inquiry *Consolidated Report* 41-43), in terms of which a minimum level or measure of provision should be made to everyone. For a discussion on this report see 2.1 above. The minimum standard in respect of children, for example, would be a child support grant which is available to all children under the age of 18.

903 See Jansen van Rensburg and Olivier *International and Supra-national Law* 646-648.

904 Ben-Israel 1995 *Comparative Labour Law Journal* 148.

905 Equality of Treatment (Social Security) Convention 118 of 1962, which has not been ratified by South Africa.

906 It is evident that South Africa (who has not ratified the Convention in question) is not complying with this standard. Should South Africa have ratified this Convention, it would be required of the state to grant family allowances to all children resident within the South Africa, but the child support grant is only available to children who are (and whose primary caregivers are) South African citizens. See *Mahlaule and Others v Minister of Social Development and Others* CCT12/03 and *Khosa and Others v Minister of Social Development and Others* CCT13/03. See also Goosen *ea International and Comparative Standards* 547.

907 Maternity Protection Convention 183 of 2000, which has not been ratified by South Africa.

908 Medical Care and Sickness Benefits Convention 130 of 1988, which has not been ratified by South Africa.

909 African (Banjul) Charter on Human and Peoples' Rights of 1981. Henceforth referred to as the Banjul Charter.

910 On 9 July 1996. See Liebenberg 1998 HYPERLINK http://sahrc.org.za/volume_v.PDF 13 Aug 2003; Viljoen 1999 *SALJ* 660.

states towards the regional development, protection and adjudication of international human rights standards,⁹¹¹ contains several provisions on socio-economic rights.⁹¹²

The Charter is one of the first international attempts at including socio-economic rights alongside civil and political rights in a single document.⁹¹³ Although it contains many of the basic civil, political, social, economic and cultural rights,⁹¹⁴ and was inspired by various other international instruments, the Charter has still retained a distinctive African character.⁹¹⁵ The preamble to the Charter emphasises the indivisibility of civil and political and socio-economic rights by declaring that civil and political rights cannot be dissociated from economic, social and cultural rights in both their conception and universality.⁹¹⁶ It asserts that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.⁹¹⁷

The Charter provides for the protection of children.⁹¹⁸ In dealing with the rights of 'every individual' and of 'peoples', the rights of children are also protected.⁹¹⁹

Unfortunately, however, despite the emphasis on economic and social rights of the preamble, the Charter places little emphasis on socio-economic rights and does not enact a right to social security or an adequate standard of living.⁹²⁰ Rather than direct reference to social security, the Charter makes indirect reference to rights which can

911 Jansen van Rensburg and Olivier *International and Supra-national Law* 632.

912 Goosen *ea International and Comparative Standards* 549; Jansen van Rensburg and Olivier *International and Supra-national Law* 632.

913 Goosen *ea International and Comparative Standards* 549.

914 See Jansen van Rensburg and Olivier *International and Supra-national Law* 632; Mutua 1999 *Human Rights Quarterly* 342-343; Welch 1992 *Human Rights Quarterly* 43, 45.

915 This is illustrated by the inclusion of collective rights, the protection of peoples' rights and the imposition of duties as opposed to the classical position relating to the protection of individual rights. See Jansen van Rensburg and Olivier *International and Supra-national Law* 632; Okere 1984 *Human Rights Quarterly* 141.

916 Banjul Charter, Preamble para 8. For a discussion on the indivisibility and interdependence of these rights, see 4.1 above.

917 Banjul Charter, Preamble para 8.

918 Viljoen *The African Charter on the Rights and Welfare of the Child* 216.

919 Both as 'individuals' and as 'peoples'. Viljoen *The African Charter on the Rights and Welfare of the Child* 216.

920 See Goosen *ea International and Comparative Standards* 550; Jansen van Rensburg and Olivier *International and Supra-national Law* 633; Rembe *The System of Protection of Human Rights under the African Charter* 12.

be regarded as specific contingencies of social security.⁹²¹ Article 16 does guarantee the right to the best attainable state of mental and physical health⁹²² and article 18 guarantees the protection of the family, its morals, women, children and the disabled. The family is thus seen as the natural unit and basis of society which should be protected by the state.⁹²³ This section is in line with the philosophy underlying the drafting of the Banjul Charter, namely the need to reflect African values and traditions.⁹²⁴ The African continent has a unique way of addressing social rights and in particular social security rights. The duties of the family and community are of paramount importance in the social protection of the most needy. The Charter thus recognises socio-economic rights in a unique way by referring to economic development within the context of group solidarity.⁹²⁵ Individuals, for example, are under an obligation to maintain their parents in the event of need⁹²⁶ as well as to pay taxes in the interest of society.⁹²⁷ This implies that the duty to provide social protection is not only that of the state, but also that of the individual as a member of society.⁹²⁸ The duty to pay taxes in the interest of society further implies that the state has a duty to focus its budget on social expenditure in order to ensure social inclusion.

921 For example article 16, granting the right to enjoy the best attainable state of physical and mental health, article 18(1), which places a duty on state parties to protect the family as the natural unit and basis of society and to protect the physical health and morale of the family and article 18(4), which recognises the right of the aged and disabled to special measures of protection, in keeping with their physical and moral needs. See Jansen van Rensburg and Olivier *International and Supra-national Law* 634.

922 The right to have access to health care services, including reproductive health care, is guaranteed by section 27(1) of the Constitution. While this right is not limited to the best attainable standard, it is qualified by the internal limitations of section 27(2). For a discussion of the court's interpretation of these limitations see 3.4 above.

923 Rembe *The System of Protection of Human Rights under the African Charter* 13.

924 Rembe *The System of Protection of Human Rights under the African Charter* 14.

925 Jansen van Rensburg and Olivier *International and Supra-national Law* 633.

926 Article 29(1) of the Banjul Charter. See Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 225. In line with this approach, section 16 of the *Children's Bill* places on every child responsibilities appropriate the child's age and ability towards his or her family, society, the state, other legally recognised communities and the international community.

927 Article 29(6) of the Banjul Charter. See Jansen van Rensburg *Toegang tot Sosiale Sekerheid* 225.

928 This approach was amplified in *Government of the Republic of South Africa v Grootboom*, in particular as far as the family context is concerned. The court remarked that the primary responsibility to provide housing (and by implication for the other needs) to children is that of the parents and only when it is clear that the parents do not or cannot provide, may the state be called upon to provide support – as is the case with extremely vulnerable groups within our community who cannot afford any form of housing, in particular temporary temporary shelter. See *Government of the Republic of South Africa v Grootboom* para 77.

The right to education is also guaranteed in the Banjul Charter.⁹²⁹ This right is of much greater relevance to children than to any other sector of the population.⁹³⁰ State parties to the Banjul Charter are further under obligation to 'ensure the protection of the rights of the child as stipulated in international declarations and conventions'.⁹³¹

The rights in the Banjul Charter are to be promoted progressively, within the limitations and constraints of the African states.⁹³² Despite the fact the Charter recognises the indissoluble link between civil and political rights on the one hand, and economic, social and cultural rights on the other hand, this makes it difficult to make the second generation rights in the latter group justiciable in the same way as the first generation rights in the former.⁹³³ These rights must thus be read together with article 1 of the Charter, which requires of state parties to adopt legislative and other measures to give effect to the rights and freedoms enshrined in the Charter.⁹³⁴

The importance of group solidarity in economic development, as recognised by the Banjul Charter was given effect in the *Grootboom* case, in which the court emphasised the importance attached to group protection in the fight against poverty and deprivation.⁹³⁵

7.2 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child⁹³⁶ is not well known either in South Africa or in the rest of Africa.⁹³⁷ One of the reasons is that it has only recently entered into force.⁹³⁸ Before it could enter into force, the African Children's Charter required the ratification of fifteen Organisation of African Unity⁹³⁹ member

929 Article 17(1) of the Banjul Charter. Compare to the right to education in the South African Constitution, contained in section 29.

930 Viljoen *The African Charter on the Rights and Welfare of the Child* 216.

931 Article 18(3) of the Banjul Charter.

932 These rights, as with the socio-economic rights contained in the Bill of Rights are subject to qualifications. See Rembe *The System of Protection of Human Rights under the African Charter* 12.

933 Rembe *The System of Protection of Human Rights under the African Charter* 12.

934 Rembe *The System of Protection of Human Rights under the African Charter* 12-13.

935 Jansen van Rensburg and Olivier *International and Supra-national Law* 633.

936 Henceforth referred to as the African Children's Charter.

937 Viljoen *The African Charter on the Rights and Welfare of the Child* 214; Viljoen 1999 *SALJ* 660.

938 Viljoen *The African Charter on the Rights and Welfare of the Child* 214.

939 Henceforth referred to as the OAU.

states.⁹⁴⁰ The Charter consequently came into force on 29 November 1999, almost a decade after it was drafted.⁹⁴¹

The reason for the adoption of the African Children's Charter had to do with the shortcomings of the CRC.⁹⁴² As a global instrument, the CRC does not take regional specificities into account.⁹⁴³ A need was thus identified for a regional human rights instrument dealing with issues pertinent to children in Africa.⁹⁴⁴ Some of the issues which were identified by those involved in the drafting of the African Children's Charter were the situation of children living under apartheid and the socio-economic conditions, such as illiteracy and low levels of sanitary conditions, with all their threats to survival, which pose specific problems to Africa.⁹⁴⁵ In general, the protection granted to children under the African Children's Charter is of a higher level than that granted by the CRC and can be seen as the African 'supplement' to the CRC.⁹⁴⁶ The African Children's Charter has been ratified by South Africa⁹⁴⁷ and is consequently binding on South Africa.⁹⁴⁸

The preamble to the Charter emphasises, as its basic principle, the recognition of the unique and privileged position of children in African society and the right of children to grow up in a stable family environment.⁹⁴⁹ As does the CRC, the African Children's Charter identifies the best interests of the child as the primary consideration in all actions concerning children.⁹⁵⁰ The Charter defines a child as being below the age of 18 years.⁹⁵¹

940 Article 47(3) of the Children's African Charter.

941 The African Children's Charter was adopted by the OAU on 11 July 1990. Viljoen *The African Charter on the Rights and Welfare of the Child* 214; Viljoen 1999 *SALJ* 660.

942 Viljoen *The African Charter on the Rights and Welfare of the Child* 218.

943 Viljoen *The African Charter on the Rights and Welfare of the Child* 218.

944 Viljoen *The African Charter on the Rights and Welfare of the Child* 218; Viljoen 1999 *SALJ* 661.

945 Viljoen *The African Charter on the Rights and Welfare of the Child* 218.

946 Viljoen 1999 *SALJ* 661.

947 On 7 January 2000. The Charter was signed by South Africa on 10 January 1997. Viljoen *The African Charter on the Rights and Welfare of the Child* 229; Viljoen 1999 *SALJ* 662.

948 Viljoen *The African Charter on the Rights and Welfare of the Child* 229.

949 Malherbe *Family* 396.

950 Article 4 of the African Children's Charter. As included in section 28(2) of the Constitution.

951 Article 2 of the African Children's Charter, which contains the same provision in this regard as section 28(3) of the Constitution.

The primary responsibility to raise and protect children rests with the parents or other caregivers,⁹⁵² as the family is regarded by the Charter as the natural unit and basis of society. The state, however, still has a responsibility to protect and support families⁹⁵³ and to assist parents by providing material assistance and support programmes where necessary.⁹⁵⁴ The Charter further extends the duty of the state to providing care services and facilities to the children of working parents.⁹⁵⁵

According to the Charter, the right to education is granted in unqualified terms.⁹⁵⁶ Every child has the right to education, including 'free and compulsory basic education'.⁹⁵⁷ State parties must further progressively make secondary education free and available to all.⁹⁵⁸ The right to health care is qualified, in that the best attainable standard of health care is guaranteed.⁹⁵⁹

Children with mental or physical disabilities are entitled to special protection measures and the state is obliged to provide assistance to disabled children and their caregivers.⁹⁶⁰ Article 13(3) requires that such disabled children should have access to 'public highway buildings and other places to which the disabled may legitimately want to have access'.

952 Article 20(1) of the African Children's Charter.

953 Article 18 of the African Children's Charter. The Constitution grants children the right to family or parental care, or to appropriate alternative care when removed from the family environment (section 28(b)), while in *Government of the Republic of South Africa v Grootboom*, the court found that the primary responsibility to care for children rests with such children's parents or guardians and that, only when the parents or guardians do not or cannot care for their children, does the primary responsibility shift to the state.

954 Article 20(2) of the African Children's Charter.

955 Article 20(2)(c) of the African Children's Charter.

956 As in section 29 of the Constitution. By implication, however, since the *Grootboom* judgement, these rights will be subject to the same limitations as other socio-economic rights. See Viljoen *The African Charter on the Rights and Welfare of the Child* 222.

957 Article 11(3)(a) of the African Children's Charter. Section 29(1)(a) of the Constitution does not only grant the right to basic education (note that it does not grant the right to free and compulsory basic education, but merely to basic education) to children, but to 'everyone'.

958 Article 11(3)(b) of the African Children's Charter. The right to further education (section 29(1)(b) of the Constitution) must be made progressively available and accessible by the state through reasonable measures. This right is, in terms of the Constitution, to further education and not, as in the case of the African Children's Charter, to free secondary education.

959 Article 14(1) of the African Children's Charter. In terms of section 28(1)(c) of the Constitution, every child has the right to basic health care services.

960 Article 13 of the African Children's Charter.

The African Children's Charter places the primary responsibility of raising children on the child's family.⁹⁶¹ This approach was also followed in the *Grootboom* case, in which the Court remarked that the primary responsibility to provide housing rests with the parents and only when it becomes clear that the parents cannot or do not provide, does the primary responsibility shift to the state.

8 Conclusion and recommendations

In keeping with the aim of this study, namely to determine whether or not the South Africa government is in compliance with its constitutional and international law obligations in respect of the social security rights of children (by means of a literature study of relevant South African, international and regional instruments), the current situation and shortcomings will be summarised and the necessary recommendations made.

While there exists **no uniform or generally accepted definition of social security**,⁹⁶² it is submitted that a broad definition of social security has much merit for South Africa. Such definition should include the concept of social protection, as recommended by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa.⁹⁶³ The inclusion of the **concept of social protection should result in a minimum level of provision being made available to everyone**, and should address income, asset and capability poverty as well as **special needs**.⁹⁶⁴

Before the Constitutional Court judgement in *Government of the Republic of South Africa v Grootboom*, children's socio-economic rights, as contained in section 28 of the Constitution, could have been (and in the instance of the High Court judgement in *Grootboom v Oostenberg Municipality* were) interpreted as internally unqualified unconstitutional rights. Since this judgement, however, it is clear that the **socio-economic rights of children are subject to the same internal qualifications as the**

961 Article 20(1) of the African Children's Charter.

962 See 2.1 above.

963 Committee of Inquiry *Consolidated Report* 40.

964 For example the needs of children as a particularly vulnerable group. See 2.1 above.

other socio-economic rights in the Bill of Rights.⁹⁶⁵ It was, *in casu*, also established that the primary responsibility to care for children lies with the child's parents.⁹⁶⁶ In the event, however, of a child's parents being unable to care for him or her, the state will assume a primary duty in respect of such child, for example, through the provision of the child support grant or the care dependency grant.

Due to the **categorical nature of children's social security rights**, it is submitted that the state is **not, currently, conforming to the guidelines laid down in the Grootboom case**. In respect of the first requirement, namely that the measures taken by the state need to be reasonable, it does not appear as if the state is in compliance. Permanent social assistance grants in South Africa in respect of children only cover children from infancy to under nine years,⁹⁶⁷ children in foster care⁹⁶⁸ and children with disabilities.⁹⁶⁹ This entire system is subject to a strict means test under the *Social Assistance Act* 59 of 1992. No provision is made by way of the permanent social assistance grant process for children without disabilities from the age of nine to 18.⁹⁷⁰ **This implies that a percentage of children are still excluded from the social security programme which serves as the main safety net for children in South Africa.** The exception to this is the temporary financial award which is granted to an individual as a means of temporary financial material assistance if such individual is unable to meet his or her family's most basic needs.

The court further stressed that the reasonableness of the state's policies and programmes applies to both their conception and their implementation.⁹⁷¹ This implies that the **social security system must reach the people**. In *Mbanga v MEC, Health and Welfare, Eastern Cape and Another*⁹⁷² and *Mahambehlala v MEC, Health and Welfare, Eastern Cape and Another*⁹⁷³ the provincial government failed to process claims for social grants within a reasonable time. The court held in both cases that the

965 Such as the right to housing (section 26) and the right to social security (section 27). See 4.3 and 5.1 above.

966 As contained in various international instruments. See, for example, articles 5, 18 and 27(1) and (2) of the CRC and article 18 of the African Children's Charter. See also 6.3 and 7.2 above.

967 Child support grant.

968 Foster child grant.

969 Care dependency grant.

970 Although this age limit is in the process of being increased to 14.

971 *Government of the Republic of South Africa v Grootboom* para 42.

972 *Mbanga v MEC, Health and Welfare, Eastern Cape and Another* 2002 1 SA 359 (SE).

973 *Mahambehlala v MEC, Health and Welfare, Eastern Cape and Another* 2002 1 SA 342 (SE).

applicants' rights were infringed by the failure of the province to act within a reasonable time. This may be seen as a failure of the government of the requirement of reasonableness in the implementation of social security programmes.

The second requirement, according to the Court in the *Grootboom* case is that the measures aimed at achieving the full realisation of the rights in question must be **progressively implemented**. In this regard, it must firstly be asked what steps the state is taking to keep the current social security system in line with **inflation and the needs of children** receiving the benefits thereof⁹⁷⁴ and, secondly, what **steps are being taken by the state to expand the system to include a broader spectrum of children** and to address new and urgent contingencies.⁹⁷⁵

The state's obligations in respect of the realisation of the social security rights of children may be limited by way of a **lack of available resources**. The availability of resources is, however, merely one of the factors that has to be considered when determining whether there was an infringement of a right.⁹⁷⁶ Another factor to be considered, according to the Committee on Economic, Social and Cultural Rights,⁹⁷⁷ is that failure by the state to **provide for the basic subsistence needs of the population and especially children** may be considered a *prima facie* violation of the right to access to social security.⁹⁷⁸

974 In this regard it is encouraging to note that the state has increased the amounts of the permanent social assistance grants and is in the process of increasing the age limit of the child support grant from seven to 14. It is, however, questionable whether this increased amount of the grant can be regarded as adequate to meet the basic needs of the child. Liebenberg and Tilly (Liebenberg and Tilly *Poverty and Inequality Hearings* 13-14) express concern in respect of the fact that there is no clear commitment to link the grant to inflation. See discussion on the child support grant 5.3.1 above.

975 As noted earlier, the targeting of permanent social assistance grants in South Africa is highly categorical. This has the result of a large section of the population still being excluded from the social security programme. Urgent contingencies such as financial support for children orphaned by HIV/AIDS, and especially those living in child-headed households are not being addressed by the state. It can be argued that the state will fail to meet the requirement of progressive realisation if it does not, in the future, develop a more comprehensive and less categorical social security system for South Africa. See SALC *Review of the Child Care Act* 333-338; SAHRC *4th Annual Economic and Social Rights Report* 28.

976 In its report to the SAHRC, the National Department of Social Development reported that even though there was no over or under spending in 2000/2002, the budget allocation for the reporting period was not adequate to enable the department to implement all of its programmes and projects effectively. SAHRC *4th Economic and Social Rights Report* 28.

977 General Comment No 3 para 10.

While the Constitutional Court's interpretation of the right to parental care seems to be developing along the lines of international law, its approach to the **minimum core obligation** approach falls far short of international law.⁹⁷⁹ The courts should thus consider defining a minimum core obligation in respect of the socio-economic rights of children, to which children should be immediately entitled, irrespective of the state's lack of resources. If the Court, as indicated in the *Grootboom* and *TAC* cases is unable to do so, it is **suggested that the Court mandate government to start developing minimum core entitlements, as was done by the Committee of Inquiry.**⁹⁸⁰

The reality facing South Africa is that **many parents are unable to provide for the basic needs of their children.** In such a case, it is the duty of the state to provide social assistance which, in South Africa mainly takes the form of grants. The **grant system which is regulated by the *Social Assistance Act*, falls short of compliance with the state's constitutional obligations**⁹⁸¹ as well as its international law obligations⁹⁸² in many respects. Various recommendations have recently been made by the South African Law Commission,⁹⁸³ the South African Human Rights Commission,⁹⁸⁴ the Committee of Inquiry into a Comprehensive System of Social Security for South Africa⁹⁸⁵ and the United Nations Committee on the Rights of the Child in this regard.⁹⁸⁶

Based on these **recommendations** and the above study of South Africa's constitutional and international law compliance, various proposals are made in respect of the legislative framework which regulates the social security rights of children.⁹⁸⁷ The social assistance measures which are available to children in South Africa are, at present, the child support grant, the foster care grant and the care dependency grant.⁹⁸⁸

978 The Court in the *Grootboom* case, however, rejected this minimum core obligation approach and in the *TAC* case failed to give the concept any definite content.

979 See discussion in 3.4, 4.3, 3.4.2 and 6.2 above.

980 See Committee of Inquiry *Consolidated Report* 118.

981 See 5.1.3 to 5.1.6 above.

982 See 6.1 to 7.2 above.

983 See SALC *Review of the Child Care Act*.

984 See SAHRC *4th Economic and Social Rights Report*.

985 See Committee of Inquiry *Consolidated Report*.

986 See Committee on the Rights of the Child *Concluding Observations*.

987 For a more comprehensive discussion on this matter see 5.1.3 to 5.3 above.

988 As discussed in 5.1.3 to 5.1.5 above.

In the first instance, it is recommended that the targeting rate of the **child support grant** correspond with the basic needs of children, in other words, the amount of the CSG needs to be increased. The grant should further be made available to child headed households, non-citizen children, refugee children and to all children under the age of 18. Further, the discriminatory nature of the means test⁹⁸⁹ needs to be done away with.

In respect of the **CDG**, it is proposed that the **grant no longer be limited to children with severe disabilities, but be extended to include children with minor disabilities, chronic illnesses and HIV/AIDS**. If the state would rather not take this step, a supplementary special needs grant, which is payable in respect of such children, who are excluded from the CDG, but who require additional assistance, needs to be introduced. As with the CSG, this grant should be made available to non-citizen and refugee children.

The South African government should make a concerted effort to improve the **take-up rate of children's social grants** by those who are entitled to them. Co-ordination between those departments who are responsible for the implementation of the grant system needs to be achieved and eligible persons need to be made aware of their rights in respect of these grants. Government further needs to prioritise its budgetary allocations and distributions to ensure the implementation of the children's rights in question.

989 Which discriminates against families living in rural areas.

SUMMARY

THE SOCIAL SECURITY RIGHTS OF CHILDREN IN SOUTH AFRICA

The concept of social security was introduced into the South African constitutional system through section 27 of the *Constitution of the Republic of South Africa*, 1996. Section 27(1)(c) of the Constitution states that everyone has the right to have access to social security including, if they are unable to support themselves and their dependants, appropriate social assistance and that the state must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of these rights. Section 28 of the Constitution relates directly to the social security rights of children and drafted as an internally unqualified constitutional right. The Constitutional Court has, however, in *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC), subjected section 28 to the same internal limitations as the other social security rights in the Bill of Rights.

The question which this study addresses is whether or not South Africa government is in compliance with its constitutional and international law obligations in respect of the social security rights of children. Social assistance in respect of children takes the form of grants, specifically the child support grant, the foster child grant and the care dependency grant. Due to the categorical nature of children's social security rights, it is submitted that the state is currently conforming to neither the guidelines laid down in the *Grootboom* case in respect reasonableness and progressive realisation, nor its international obligations in terms of the International Covenant on Economic, Social and Cultural Rights, the United Nations Convention on the Rights of the Child, the African Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the Child.

In response to this submission the following are some of the recommendations flowing from this study:

- 1) In respect of the child support grant, the amount of the grant should be increased to correspond with the prevailing poverty rate and linked to inflation; the grant should be made more universally accessible, to include

child headed households, refugee children, children of non-citizens and all children under the age of 18; the means test should be reviewed or done away with completely and the take-up rate of grant should be improved.

- 2) The care dependency grant should be extended to include non-citizen and refugee children as well as children with minor disabilities, chronic illnesses and HIV/AIDS or a supplementary needs grant for such children should be introduced.
- 3) Foster parents should be provided with incentives to take in HIV-positive children or children with disabilities.
- 4) The courts should, either themselves, or by a mandate to government, start developing minimum core entitlements in respect of basic rights.

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