

**The unenforceability of the  
unalienable socio-economic rights of  
undocumented children in South  
Africa**

**Lizeri Mitchell  
22145095**

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Supervisors: Dr AF van den Berg  
Prof L Stewart

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**DECLARATION**

I, Lizeri Mitchell, declare that this study is my own work and all the sources have been indicated and acknowledged by means of complete references.

  
.....  
**Lizeri Mitchell**

31 / 03 / 2016  
.....  
**Date**

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## **LIST OF ABBREVIATIONS**

AJPHRD	African Journal for Physical, Health Education, Recreation and Dance
CILSA	Comparative and International Law Journal of Southern Africa
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

## **ABSTRACT**

All children are entitled to constitutional rights in terms of the *Constitution of the Republic of South Africa*, 1996, and human rights in terms of regional and international law, gaining access to these rights is however problematic to undocumented children because of the illegal position of the parents or caregivers, the absence of any caregivers and the undocumented status of the child. The study attempts to disentangle these discrepancies in human rights law and practice.

The research question is addressed by laying a philosophical basis by means of integrating and refining existing contemporary legal philosophical concepts. Working with Hannah Arendt's concept of rightlessness and Giorgio Agamben's concept of bare life, this dissertation aims to analyse and criticize the unenforceability of the inalienable socio-economic rights of undocumented children residing in South Africa. The study illustrates that undocumented children are, similar to the stateless in Arendt's work, reduced to live bare life due to their rightless condition. Within the philosophical framework, an analysis is then done of the relevant international human rights instruments. The analysis is completed by an investigating into South African constitutional law and recent case law.

In conclusion, this study illustrates that undocumented children, in both domestic and international law, are entitled to the exact same rights as citizen children. However, due to a lack of documentation, as well as procedural and legal barriers, these unalienable rights are not enforceable and the children are in effect rightless.

### **Keywords:**

Socio-economic rights, Hannah Arendt, Giorgio Agamben, *Homo Sacer*, bare life, rightlessness, illegal immigrant, unalienable rights, human rights, child, South Africa, constitutional law.

## **OPSOMMING**

Alle kinders is geregtig tot grondwetlike regte in terme van die Grondwet van die Republiek van Suid-Afrika, 1996, en menseregte in terme van regionale en internasionale reg. Toegang tot hierdie regte is egter problematies vir ongedokumenteerde kinders as gevolg van die onwettige status van hul ouers of voogde, die afwesigheid van voogde of the ongedokumenteerde status van die kind. Hierdie studie poog om die teenstrydighede aan te spreek tussen menseregte instrumente en die uitvoerbaarheid daarvan.

Die navorsingsvraag word aangespreek deur eerstens `n filosofiese basis neer te lê deur middel van die integrasie en verfyning van kontemporêre regsfilosofiese konsepte. Deur die toepassing van Hannah Arendt se se konsep van regloosheid en Giorgio Agamben se konsep van *bare life*, poog die studie om the onafdwingbaarheid van die onvervreembare sosio-ekonomiese regte van ongedokumenteerde kinders in Suid-Afrika te analiseer en te kritiseer. Die studie illustreer die korrelasie tussen ongedokumenteerde kinders en die staatloses soos gevind Arendt se werk. Beide groepe word blootgestel aan *bare life* as gevolg van hul reglose status. The analise word voltooi deur `n ondersoek na die Suid-Afrikaanse grondwetlike reg en onlangse hofsake.

Ten slotte illustreer die studie dat ongedokumenteerde kinders, in beide nasionale en internasionale reg, geregtig is tot presies dieselfde menseregte as Suid Afrikaanse kinders. `n Gebrek aan dokumentasie, sowel as prosedurele- en regsversperrings het egter tot gevolg dat die onvervreembare regte onafdwingbaar is en hierdie kinders in effek regloos is.

### **Sleutelwoorde:**

Sosio-ekonomiese regte, Hannah Arendt, Giorgio Agamben, Homo Sacer, bare life, regloosheid, onwettige immigrant, onvervreembare regte, menseregte, kind, Suid-Afrika, grondwetlike reg.

## Chapter 1: Introduction

The Rights of Man, after all, had been defined as "inalienable" because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back on their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.<sup>1</sup>

Working with Hannah Arendt's concept of rightlessness and Giorgio Agamben's concept of bare life, this dissertation aims to illustrate, analyse and criticize the unenforceability of the inalienable socio-economic rights of undocumented children residing in South Africa. Although these children are entitled to constitutional rights in terms of the *Constitution of the Republic of South Africa, 1996*,<sup>2</sup> and human rights in terms of regional<sup>3</sup> and international law,<sup>4</sup> gaining access to these rights are problematic because of the illegal position of the parents or caregivers, the absence of any caregivers and the undocumented status of the child.

Before a discussion of the problem statement can commence, there are certain key concepts relating to the study that needs to be defined. Arendt uses the concept of rightlessness, which refers to the lack of access to human rights due to a lack of effective nationality.<sup>5</sup> She described it as the loss of the "right to have rights".<sup>6</sup> Directly relating to this is her theory on the unenforceability of unalienable rights.<sup>7</sup> Unalienable rights describe those rights given to man by international instruments, like the *Declaration on the Rights of Man and Citizen (1789)*, which are described as being unable of being repudiated, taken away or denied.<sup>8</sup> For purposes of this study, the unenforceability of these alienable rights should be understood as referring to more than simply the fulfilment of the rights, it refers to all four of the state

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1 Arendt *The Origins of Totalitarianism* 268.

2 Hereafter referred to as the *Constitution*.

3 *African Charter on the Rights and Welfare of the Child* (1990).

4 For example the *United Nations Declaration on the Rights of the Child* (1989); *Convention of the Rights of the Child* (1990); *Declaration on the Rights of the Child* (1959).

5 Arendt *The Origins of Totalitarianism* 290-296.

6 Arendt *The Origins of Totalitarianism* 293.

7 Arendt *The Origins of Totalitarianism* 295-298.

8 There are various references to the rights of man as being unalienable, see for example the the Preamble of the *Declaration on the Rights of Man and Citizen* (1789); the preamble of the *United Nations Declaration on the Rights of Human Rights* (1948) and the preamble of the *African Charter of Human and People's Rights* (1982).

obligations as defined in section 7 of the *Constitution*. This includes the obligations to respect, protect, promote and fulfil. Turning to Agamben, the concept of bare life is a form of life that is deprived of political significance, a life lived just beyond the parameters of mere physiological existence.<sup>9</sup> A comparison will be drawn between bare life and rightlessness in relation to the undocumented child. These concepts will form the basis of this study.

### **1.1 Problem Statement**

As previously mentioned, there is a disjunction between the constitutional or human rights as represented in human rights language and the enforceability of these rights. Although children are entitled to unalienable rights they are in many cases left unprotected with little or no access to these rights.

This problem does not go unrecognised. According to the UNICEF, millions of children face the problem of invisibility or unrecognising.<sup>10</sup> Invisibility describes children whom, according to the state system, do not exist because they are unregistered children that are denied their right to a recognized name, nationality and official identity.<sup>11</sup> To access the social protection system, and indirectly the rights bestowed on children in terms of international, regional and constitutional human rights, a child must have a birth certificate and an identification number.<sup>12</sup> In other words, these children can be said to be invisible because they are not registered in the state apparatus and consequently they lack recognition which transpires into the invisibility from statistical surveys, policies and social programs.<sup>13</sup> There are several reasons for this lack of documentation, ranging from refugees, the children of illegal immigrants<sup>14</sup> to parents who for various reasons refrain from registering their children.<sup>15</sup>

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9 Ziarek "Bare Life" 194.

10 Children's Institute of the University of Cape Town 2013 [http://www.childrencount.ci.org.za/uploads/pub\\_InvisibleExcludedChildren.pdf](http://www.childrencount.ci.org.za/uploads/pub_InvisibleExcludedChildren.pdf).

11 United Nations Children's Fund 2002 *Innocenti Digest* 1.

12 United Nations Children's Fund 2011 [http://www.unicef.org/protection/57929\\_58010.html](http://www.unicef.org/protection/57929_58010.html).

13 UNICEF *A Passport to Protection: A Guide to Birth Registration Programming* 4-7.

14 Hereafter referred to as undocumented children.

15 UNICEF *A Passport to Protection: A Guide to Birth Registration Programming* 6, 11. According to 2014 statistics, the United Nations Children's Fund estimates that 230 million children under the

Inaccessibility to the social grant system, basic education and state funded medical care are some of the results where children lack an identity number or other legal documentation establishing, at least, residency in South Africa.<sup>16</sup> For example, the state gives social assistance to children by means of the Child Support Grant. To qualify for this grant the primary caregiver must be a South African citizen, permanent resident or refugee.<sup>17</sup> Undocumented children are therefore excluded from the system due to the lack of proper documentation. Different forms of this requirement are present in basic education and state funded medical care.<sup>18</sup> This implies that the undocumented child will not receive state funded aid and it will be left to private actors to provide the needed assistance.

The vulnerable position of these children departs from the philosophical work of Hannah Arendt and the contribution of Giorgio Agamben. Both of these philosophers developed theories which focus on exclusion from the full access to rights, due to situations arising from membership to nation states. Arendt's philosophy of the statelessness/rightlessness will be applied to the undocumented child. Arendt described the unenforceability of unalienable rights in the absence of the protection of a nation state.<sup>19</sup> This concept can be made applicable to the undocumented child, who lives in the absence of effective nationality and, therefore, effective state protection, this causes a disjunction in their access to rights, rendering them rightless. This rightlessness will be discussed as a form of Agamben's concept of bare life. Agamben uses the Ancient Roman image of the *homo sacer* to describe a person or

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age of 5 still have not been registered. The reasons for non-registration range from rural villages with no access to the outside world or registration procedures, lack of finances to register the child, which many times include travel expenses to parents simply not being informed about the importance or process of registration; United Nations Children's Fund 2002 *Innocenti Digest* 12-16.

16 Access to these services requires at least a South African birth certificate or other relevant documentation to prove legal residency. This will be discussed in further detail in Chapter 4.

17 SASSA 2015 <http://www.sassa.gov.za/index.php/social-grants/child-support-grant>.

18 Human Rights Watch *No Healing Here* 3-7; Browne *The right to education for refugees and asylum-seekers* 22.

19 Arendt *The Origins of Totalitarianism* 290-296.

group of people who are excluded from political life by a state created state of exception.<sup>20</sup>

While grounding the analysis of vulnerability on these philosophical contributions of Arendt and Agamben, this study will enquire whether and to what extent undocumented children has access to constitutional rights, focussing on socio-economic rights in the South African constitutional dispensation and the social and economic human rights guaranteed in terms of regional and international law. By applying these concepts to undocumented children, this study will argue that a lack of effective nationality and exclusionary social policies have caused a disjunction between the rights every child should have and the actual access to these rights. This disjunction has contributed to making undocumented children in South Africa not only rightless but furthermore a modern example of *homo sacer*.

In what follows a short background is sketched on the problem of migration in the context of the undocumented child in South Africa.

## **1.2 Crisis of Migration**

International migration, refugees, asylum seekers and illegal immigrants are present a worldwide crisis calling for political and legal interventions.<sup>21</sup> The migration of people across nation state boundaries presents problems for domestic, regional and international law systems. The increase in the number of citizens in a particular country has economic, social and cultural effects on individual countries and the citizens residing in that country. As such, these situations need to be controlled by the laws of the particular country. For example, in the United States of America, immigrants flood the borders from South America with the number of children

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20 Sowah 2013 [http://www.academia.edu/4091646/What\\_is\\_the\\_true\\_meaning\\_of\\_Giorgio\\_Agamben\\_s\\_Bare\\_Life\\_Homo\\_Sacer](http://www.academia.edu/4091646/What_is_the_true_meaning_of_Giorgio_Agamben_s_Bare_Life_Homo_Sacer).

21 Bhagwati 2003 *Foreign Affairs* 98; Andreas *Border Games* 8; De Haas 2005 *Third World Quarterly* 1272. The sheer number of illegal immigrants world wide support this statement, *the International Organization for Migration in Geneva* estimates that between 15% and 20% of the world's 200 million immigrants are, in fact illegal; Fuller 2014 <http://www.forbes.com/sites/edfuller/2014/08/06/illegal-vs-legal-immigration-is-a-global-issue/>.

entering the USA illegally estimated at a rate of 90 000 per year.<sup>22</sup> Another worrisome situation is the thousands of people annually crossing the Mediterranean Sea in the hope of safely reaching Europe.<sup>23</sup>

South Africa also faces great challenges, with people crossing the border from neighbouring countries and Central Africa.<sup>24</sup> Depending on which source one chooses to reference, the number of illegal immigrants in South Africa is estimated at anything from 500 000 to 5 million.<sup>25</sup> The accurate number is impossible to ascertain given the often-concealed nature of illegal immigrants entering the country.<sup>26</sup> Irrespective of the lack of any accurate statistic, it is clear that there is a substantial amount of illegal migrants residing in South Africa. It is important to note that unlike European countries, experiencing similar problems of migration, South Africa's has a lack of border control, with the borders being described as "porous" and "unprotected".<sup>27</sup> The overarching reason for migration is to achieve a better life.<sup>28</sup> The continent of Africa is plagued by poverty, drought and famine, war-stricken areas and very weak economies that lead to a lack of housing and other basic resources.<sup>29</sup> The

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22 Morrison 2015 <http://www.ibtimes.com/illegal-immigration-2015-unaccompanied-minors-are-crossing-us-border-lower-rates-1918259>; Dinan 2015 <http://www.washingtontimes.com/news/2015/apr/6/illegal-immigrant-children-surge-across-border-at-/?page=all>; Caldwell 2014 [http://www.huffingtonpost.com/2014/06/06/children-illegal-mexican-border\\_n\\_5462133.html](http://www.huffingtonpost.com/2014/06/06/children-illegal-mexican-border_n_5462133.html).

23 Hamouchene 2015 <http://www.globalresearch.ca/the-root-cause-of-the-migrant-crisis-putting-profits-before-people/5451243>.

24 Paton 2015 <http://www.rdm.co.za/politics/2015/04/30/inside-south-africa-s-illegal-immigration-nightmare>.

25 According to Idemudia, Williams and Wyatt 2013 *Journal of Injury and Violence Research* 19, the number is anything between 1 and 5 million, whilst the department of Home Affairs have changed their statistic from 5 million in 1998 to 500 000 in 2015; Mwiti 2015 <http://mgafrica.com/article/2015-04-22-six-huge-myths-about-south-africas-xenophobia>.

26 Wilkinson 2014 <http://africacheck.org/reports/are-there-70-million-people-in-south-africa-the-claim-is-unsubstantiated/>; according to Professor Loren Landau, director of the University of the Witwatersrand's Forced Migration Studies Programme, it is impossible to accurately estimate the number of illegal immigrant in South Africa, and that anyone claiming they know is lying.

27 Sidimba 2015 <http://www.sowetanlive.co.za/news/2015/04/21/r2.8bn-to-be-spent-on-south-africa-s-porous-borders>; Maputi 2014 [http://www.parliament.gov.za/live/content.php?Item\\_ID=6364](http://www.parliament.gov.za/live/content.php?Item_ID=6364).

28 This is globally the main factor, Jacqueline Babhe discusses this in an interview done at the Harvard Kennedy School, Gavel 2014 [http://www.hks.harvard.edu/news-events/publications/insight/social/jacqueline\\_bhabha](http://www.hks.harvard.edu/news-events/publications/insight/social/jacqueline_bhabha).

29 Stephens 2015 *Emory International Law Review* 181; Idemudia, Williams and Wyatt 2013 *Journal of Injury and Violence Research* 17-20, describe the reasons for Zimbabweans to enter South Africa as the attempt to try and escape economic hardships, for example unemployment; Masiloane 2010 *South African Journal of Criminal Justice* 39, "South Africa is experiencing an influx of illegal immigrants that could be attributed to lower standards of living, higher unemployment rates and political instability in the countries of their origin"; Food and Agriculture Organization of the United

consequences of living with this deprivation are driving immigration to South Africa. South Africa as a middle-income country is perceived as the "country of survival" <sup>30</sup> and can offer new life and opportunity.<sup>31</sup> Immigrants come with the hope of starting a new life within South Africa. Illegal immigrants are so determined, or one could argue, desperate, in their attempt to cross the South African border, that they are willing to risk their lives on the journey:

Most illegal immigrants in South Africa are people who embarked on a dangerous journey of crossing the border, running away from perilous political and economic conditions with the hope of improving their situation across the borders. The successful crossing of the border turns these people into violators of immigration laws in the perceived country of survival. Despite having to continuously evade the police because of their illegal status, they also tend to be victims of xenophobia, crime and labour exploitation.<sup>32</sup>

### **1.3 Crisis of Migration in South Africa**

The journey is especially hazardous for children and many endure physical and sexual abuse in order to guarantee passage to the borders.<sup>33</sup> Despite the expectations of finding a better life, this is no guarantee after crossing South Africa borders. Case law and media reports illustrates that migrating, undocumented children face great obstacles and uncertainty, this is especially prominent in, amongst others: the

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Nations 2014 <http://www.fao.org/hunger/en/> the Hunger Report 2014 estimated the number of undernourished people in Sub-Saharan Africa at 214 million for 2012-2014, that is an increase of 40 million in the last ten years, one in four people in this region in undernourished.

30 Masiloane 2010 *South African Journal of Criminal Justice* 39.

31 Kapindu 2011 *African Human Rights Law Journal* 93, "South Africa, as Africa's largest economy, is the foremost migrant-receiving country in Southern Africa. Migration to South Africa has been described as a well-established household poverty-reduction strategy. Many people from within Southern Africa, therefore, migrate to South Africa in the hope of a better life."

32 Masiloane 2010 *South African Journal of Criminal Justice* 39 "For example, people brave rapids, crocodiles and watchful border guards to cross the border from Zimbabwe to South Africa... According to the former Deputy Minister of Home Affairs, Dr Penuell Maduna, history has repeatedly shown that hunger and fear are strong propelling forces that paralyse even the most sophisticated alien control measures, if the magnet country is seen as the country of survival."

33 Van der Burg 2006 *Law, Democracy and Development* 83 "A critical case involving undocumented foreign migrant children in South Africa is the rape and subsequent imprisonment in June 2004 of two Rwandan teenage asylum seekers. The two teenage girls fled the Rwandan genocide and, during their journey to South Africa, they were raped by a truck driver with whom they were travelling. The truck driver had promised them documentation and accommodation. However, on arriving in South Africa, neither of these was forthcoming. Instead, the truck driver demanded sexual favours and threatened to abandon the children if they did not comply."

treatment of foreign labourers,<sup>34</sup> the unfair administrative procedures they are subjected to,<sup>35</sup> their inability to access the protection of the South African Police Service<sup>36</sup> and, of course, xenophobic attacks.<sup>37</sup>

#### **1.4 Legal Position of Children Crossing South African Boundaries**

Although entry into a state is illegal, it does not imply that a child suddenly loses their human rights. A child is not only protected in terms of international and regional human rights but also in terms of the Bill of Rights in terms of the *Constitution*. In what follows, the necessity of considering South African law and international law including regional law will be discussed.

##### *1.4.1 South African Law*

With the celebration of the new democracy of South Africa in 1994, a constitutional dispensation was designed to put social, political and legal structures in place which would be a radical change of the apartheid past.<sup>38</sup> The abuses and unfair

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34 *Somali Association and Others v Limpopo Department of Economic Development, Environment, and Tourism* (unreported) case number 16541/ 2013 of 19 September 2013 paras 1-5; *Sibande v Commission for Conciliation, mediation and Arbitration and Others Labour Court* (unreported) JR1032/04 of 30 July 2009; *Discovery Health Ltd v CCMA and others* 2008 29 IJL 1480 (LC).

35 Whitless 2015 <http://m.ewn.co.za/2015/05/10/Lawyers-denied-access-to-foreign-nationals>.

36 Masiloane 2010 *South African Journal of Criminal Justice* 39 "In South Africa, illegal immigrants struggle to exist outside the law. As 'illegal foreigners', they must strive to remain invisible from the state in order to guarantee their stay in the country. In the process, their safety against criminal acts is compromised and the police's ability to solve their committed crimes is also minimised." See also *Koyabe and Others v Minister for Home Affairs and Others (Lawyers For Human Rights as Amicus Curiae)* 2010 4 SA 327 (CC) and Crush and Williams 2002 *Migration Policy Brief No. 14* para 6; Wild and Tshandu 2015 <http://www.bloomberg.com/news/articles/2015-04-20/immigrants-fearing-attacks-face-south-african-police-harassment>; Lawyers for Human Rights 2015 <http://www.lhr.org.za/news/2014/press-statement-lhr-responds-detention-immigrants-police-stations-and-saps%E2%80%99-incorrect-inte>.

37 The lack of equality and dignity is gruesomely illustrated in the recent treatment of illegal migrants after a spread of xenophobic attacks. Many of the illegal migrants and foreigners have been housed in repatriation camps. The living conditions in this camps are far below the required standard. Sunday Independent, 2006 09 03 Illegal immigrants fume at their treatment in Lindela One of the men housed in this camp tells the story of their treatment inside these camps: " I was hit by a security guard yesterday. He called me an animal." When these people protested against their long period of detainment, they were attacked by Bosasa officers; Lawyers for Human Rights 2015 <http://www.lhr.org.za/news/2015/press-statement-civil-society-organisations-address-media-on-going-raids-targeting-foreign->; Alberts and Cohen 2015 <http://www.bloomberg.com/news/articles/2015-04-14/south-africa-struggling-to-contain-new-wave-of-foreigner-attacks>.

38 Robinson 2003 *PELJ* 22.

discrimination of the past had to be corrected to form a state founded on freedom, equality and human dignity.<sup>39</sup> In order to address these values, vulnerable groups were identified whom, due to discriminatory practices in the past could not enjoy equal access to human or constitutional rights.<sup>40</sup> Children, because of their inherent vulnerability were often the victims of past, unjust discrimination and was therefore included as a particularly vulnerable group.<sup>41</sup> Specifically, the access to social services in South Africa was limited to privileged racial groups and urban providers.<sup>42</sup>

The state has undertaken to bring social change by providing assistance to those in need with the objective of bridging the gap between rich and poor.<sup>43</sup> This supposedly implies that if there is an infringement of a child's socio-economic rights, it becomes a priority of the state. The manner in which the state then performs these duties is through the social system, specifically the granting of welfare grants.<sup>44</sup> In the past fourteen years, the South African social grant program has developed into one of the most comprehensive social protection programs in the developing world.<sup>45</sup> This is an extremely important tool for social protection and reaches more than 10 million South African children per month.<sup>46</sup> In a state where more than half of the children live below the poverty line, access to this grant, education and the health system is clearly crucial in the effective use of it, but the access is unfortunately not always so simple.

The right of the child is guaranteed in terms of the Bill of Rights and content is given to these rights in term of policy, legislation and other state measures. To analyse the access to socio-economic rights, it is, therefore, necessary to consider the rights of the child in terms of the constitution and different legislation and other measures aimed at realising these rights.

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39 Preamble of the *Constitution*.

40 Kende 2003 *Chapman Law Review* 137.

41 Robinson 2003 *PELJ* 22.

42 Sloth-Nielson 2001 *SAJHR* 211.

43 Devey en Möller 2002 *Social Indicators Research Series* 105.

44 Goko 2013 <http://www.bdlive.co.za/national/2013/08/21/south-africa-needs-alternative-to-social-grants>.

45 United Nations 2011 [http://www.F.org/southafrica/protection\\_6631.html](http://www.F.org/southafrica/protection_6631.html).

46 Children's Institute of the University of Cape Town 2013 [http://www.childrencount.ci.org.za/social\\_grants.php](http://www.childrencount.ci.org.za/social_grants.php)).

The basic socio-economic rights of a child are guaranteed in section 28 of the Constitution. However, all constitution rights are interrelated and to determine the possibility of rightlessness due to the limitation of section 28 rights, one must first establish the rights that are specifically relevant to the socio-economic rights of the undocumented child. The Constitution begs a two-stage analysis to determine the justifiability of a limitation to the access to a right.<sup>47</sup> During the first stage, the meaning and content of a human right must be ascertained and then determining whether alleged conduct is an infringement of that right, the second stage considers the justification of the limitation.<sup>48</sup>

In this analysis of socio-economic rights, one must also keep in mind section 39(1) of the *Constitution*, which provides that when a court interprets the Bill of Rights it:

- 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 law.

While section 39(2) provides that:

... when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

For this reason, international and regional law will be continuously be integrated in the study.

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47 Stewart 2008 *SAJHR* 474.

48 Stewart 2008 *SAJHR* 474 "During the first stage of constitutional analysis it is investigated whether a law or conduct of the respondent infringed a right in the Bill of Rights. The onus of proof rests on the applicant to show that the conduct or the status for which the applicant seeks constitutional protection is a form of conduct or status that falls within the ambit of a fundamental right. This requires the court to interpret the fundamental right by firstly establishing the meaning or content of the right and secondly, determining whether the conduct or challenged law conflicts with the right in question. During the second stage of constitutional analysis the justification for a limitation of the infringed right is considered. The onus of proof is then shifted to the respondent or party relying on the justification of the limitation to prove that the limitation is justifiable."

### 1.4.2 International and Regional Human Rights

As already mentioned it is necessary to deal with international and regional law because it is a constitutional imperative to consider international law when interpreting constitutional rights. Furthermore, the courts must give preference to any reasonable interpretation that is "consistent with international law over any alternative interpretation that is inconsistent with international law". For this reason, an integrated approach will continuously be taken by comparing the relevant international, regional and domestic law that enshrine these rights. Through this a legal framework for socio-economic rights will be formed, that is based on internationally recognized human rights.

When considering an international perspective on human rights, specifically the rights of minority and vulnerable groups, there has been rapid and dramatic growth in the last decade,<sup>49</sup> to such an extent that it now seems the purpose of protecting human rights has become the essential point of international law. It has been reconceived to the point where it is no longer the law of individual nation states, but the global law of human rights.<sup>50</sup> The United Nations set a common standard on human rights with the adoption of the *Universal Declaration of Human Rights* (1948).<sup>51</sup> Although this international instrument is not binding on domestic jurisdictions, the recognition of this charter by all states of the world gives great moral weight to the document.<sup>52</sup> After the realization that children, due to their inherent vulnerability require their own unique charter, in 1989, the General Assembly of the United Nations adopted the *Convention on the Rights of the Child* (1989)<sup>53</sup> which South Africa ratified on 16 June 1995.<sup>54</sup>

The *Convention on the Rights of the Child* sets the international standard that children's rights must comply with, it also serves as support and justification for the

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49 United Nations 2012 History of the United Nations <https://www.un.org/en/aboutun/history/>.

50 Moyn *The Last Utopia* 176.

51 Hereafter referred to as the *Universal Declaration of Human Rights*.

52 United Nations Children's Fund 2009 [http://www.unicef.org/crc/index\\_framework.html](http://www.unicef.org/crc/index_framework.html).

53 Hereafter referred to as *Convention on the Rights of the Child*.

54 Department of International Relations and Cooperation 2004 [http://www.dfa.gov.za/foreign/Multi lateral/inter/unicef.htm](http://www.dfa.gov.za/foreign/Multi%20lateral/inter/unicef.htm).

level of institutional capacity development needed for the promotion and protection of children.<sup>55</sup> Pursuant to section 26, every child has the right to benefit from social security.<sup>56</sup> Every child has the right to a standard of living adequate for the spiritual, moral, physical and social development.<sup>57</sup> Furthermore, the obligation is placed on the individual states to take the necessary steps to fully realize these rights.<sup>58</sup> The charter implies that more than just the satisfaction of physical needs is needed to protect children.

The *African Charter on the Rights and Welfare of the Child* (1990)<sup>59</sup> is based on the same principles as the *Convention on the Rights of the Child*, but developed to address issues specific to the continent of Africa.<sup>60</sup> South Africa had played a crucial role in the development of the *African Charter on the Rights and Welfare of the Child*.<sup>61</sup> The *African Charter on the Rights and Welfare of the Child* likewise gives children the right to the best possible state of physical, mental and spiritual health and an inherent right to life. It is argued that the rights in this section have to be interpreted in a broad sense that acknowledges a qualitative dimension to such an extent that not only physical health but also mental, emotional, cognitive, social and cultural development forms part of the rights.<sup>62</sup> Thus, the Charter places an even heavier burden on the state in respect of the implementation of legislation and policies to promote the rights. It can be deduced then that children in South Africa are entitled, both in international and regional law, to these basic socio-economic rights.<sup>63</sup>

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55 United Nations Children's Fund 1997 [http://www.unicef.org/rightsite/364\\_568.htm](http://www.unicef.org/rightsite/364_568.htm).

56 Section 26(1) *Convention on the Rights of the Child*.

57 Section 26(1) *Convention on the Rights of the Child*.

58 Section 27(1) *Convention on the Rights of the Child*.

59 Hereafter referred to as *African Charter on the Rights and Welfare of the Child*.

60 African Committee of Experts on the Rights and Welfare of the Child 2011 <http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acerwc>.

61 African Committee of Experts on the Rights and Welfare of the Child 2011 <http://acerwc.org/experts>.

62 Holmström en Karlbrink *United Nations Human Rights Fact Sheets no 1-25* 32.

63 An interpretation of this concept is done in chapter 4, but for clarity socio-economic rights can be understood as the entitlements bestowed on the bearer of human rights to guarantee the wellbeing or welfare of the child as a vulnerable subject of society.

## ***1.5 Methodology***

The dissertation starts with a discussion of the vulnerable position of undocumented children residing in South Africa focussing on the philosophical work of Arendt and Agamben in terms of the concepts statelessness/rightlessness as depicted as a form of bare life. The study depart from the philosophical contributions of Arendt and Agamben to form a critical basis to then inquire whether and to what extent undocumented children has access to constitutional rights focussing on socio-economic rights in the South African constitutional dispensation and human rights guaranteed in terms of regional and international law.

Correspondent to this, the general principles governing children rights will firstly be analysed to determine the content of these rights. This will demonstrate that children require special care and protection and that all matters affecting the child must be adjudicated with their best interest in mind. Within the context provided by these principles, socio-economic rights specifically will be interpreted in conjunction with the state obligations as defined by section 7 of the constitution. Only when the socio-economic rights have been defined will the limitation be tested. This study will argue that these limitations are not justifiable when read within the context provided and create a disjunction between the rights the child is entitled to and that which an undocumented child has access to. This will serve to illustrate that undocumented children's legal status should not be a barrier to their access to socio-economic rights.

In light of the two stage analysis, the implementation of socio-economic rights within South Africa will be evaluated. The policy, case law and legislation that govern the access to social grants, the health system and basic education will be analysed. The implication of these restrictive policies will be illustrated by a discussion of the effects thereof on the lives of undocumented children. By comparing the rights which the undocumented child is entitled to, by both international, regional and domestic law, with the rights they, in reality, have access to in South Africa, this study will argue that the restriction of their rights are unjustified and the current situation is making the unalienable rights of the undocumented child unenforceable and rendering them rightless and forcing them into bare life.

## Chapter 2: The Relevance of the Political Philosophy and Stateless Children

### 2.1 Introduction

The analysis of the rights of undocumented children will be done in the light of the work of various political philosophers, with a specific focus on the theory of Hannah Arendt. Arendt was a Jew who was affected and effected through a personal experience of statelessness during the Nazi reign in Germany during the Second World War.<sup>64</sup> In recent years, the corpus of Arendt's work has been increasingly used in the field of human rights.<sup>65</sup> Her work is especially appealing to this study because of her development of the understanding of statelessness and the consequences thereof on a person's access to human rights. Although Arendt only referred to civil and political rights, for the purpose of this investigation her argument will be extended for the purposes of this investigation.

Arendt's greatest critique against human rights was levelled at the underlying presumption that these rights are inalienable, because this presupposition contradicts the everyday experiences of people excluded from citizenship from a nation state. Her critique, which is partially based on her own experiences as a stateless person, expresses a resemblance to similar situations faced by many illegal immigrants worldwide. In *The Origins of Totalitarianism*, Arendt observes that:

...they were followed by migration of groups who, unlike their predecessor in the religious wars, were welcomed nowhere and could be assimilated nowhere. Once they had left their homeland they remained homeless, once they had left their human rights they were rightless, the scum of the earth...they had lost those rights which had been thought of and even defined as inalienable, namely the Rights of Man.<sup>66</sup>

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64 Gündoğdu "Statelessness and the Right to have Rights" 432, Arendt was stateless for eighteen years, from 1933-1951.

65 Agamben 2008 *Social Engineering* 90-95; Braun 2007 *Time and Society* 1-20; Berkowitz 2012 *Handbook of Human Rights* 60, "Taken together, Arendt's writings form the most coherent and critical appraisal of human rights since Immanuel Kant's philosophical grounding of human dignity."

66 Arendt *The Origins of Totalitarianism* 268.

Support of Arendt's work can be found in the writings of many diverse scholars. Specifically prominent is the work of contemporary philosopher, Giorgio Agamben, who was influenced by Arendt. Agamben<sup>67</sup> held that:

Rights, are attributed to the human being only to the degree to which he or she is the immediately vanishing presupposition (and, in fact, the presupposition that must never come to light as such) of the citizen... When their rights are no longer the rights of the citizen, that is when human beings are truly *sacred*, in the sense that this term used to have in the Roman law of the archaic period: doomed to death.

The purpose of this study is not aimed at criticising either Arendt or Agamben's philosophical project work, but rather to work with their concepts to seek answers through a philosophical investigation on the problems between the disjunction between human rights discourse and the real life experiences of undocumented children. This will be done by firstly defining statelessness to draw a comparison between the stateless, as applied by Arendt, and the undocumented child. When this comparison is complete there will be a basis on which Arendt's concepts can be applied to the undocumented child. Using the idea of rightlessness, due to the unenforceability of unalienable rights, Agamben's idea of bare life and the state of exception will be analysed. A correlation will be drawn between the undocumented child as rightless and the state of exception which causes them to live bare life.

## **2.2 Definition of Statelessness**

Since its first inception, there has been contention in international law, regarding the criteria for statelessness.<sup>68</sup> The traditional concept of statelessness was first defined in *Convention Relating to the Status of Stateless Persons* (1954) as "a person who is not considered as a national by any state under the operation of its law".<sup>69</sup> From this it can be understood that for a person to be considered *de jure* stateless, they must be

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67 Agamben 2008 *Social Engineering* 93.

68 United Nations High Commissioner for Refugees *UNHCR and De Facto Statelessness* 1-26, The UNHCR has had a mandate for stateless persons ever since the Office was established in 1950. Originally, that mandate only extended to stateless persons who are refugees. UNHCR's mandate began to be extended to stateless persons more generally in 1974, to include both refugees and non-refugees. The greatest debates still centres around the understanding of *de facto* statelessness and whether there should in fact be a distinction between *de jure* and *de facto* statelessness.

69 Section 1 of the *Convention Relating to the Status of Stateless Persons* (1954).

without any nationality. In later years, a more ambiguous concept, *de facto* statelessness,<sup>70</sup> was introduced. *De facto* statelessness refers to people who have not formally lost their nationality, but nonetheless, have no effective nationality because they are unprotected by their State of birth.<sup>71</sup> Refugees and undocumented children would be an example of *de facto* statelessness. The mayor concern of statelessness, *de jure* or *de facto*, is that a person is not protected by any specific national law or political convention.<sup>72</sup>

The possibility of including illegal immigrants in terms of the conception of statelessness has not been explored and engaged in human rights discourse. The present procedure dictates that an illegal migrant must prove that his nationality is, in fact, ineffective in order to be considered *de facto* stateless. Proving this is done by firstly making a formal request to their country of origin for protection. This country must then refuse this request by identifying this person nationality and then denying their return to the country of origin.<sup>73</sup> It, therefore, entails a tedious process which is not practical considering the conditions in which many illegal immigrants live.

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70 United Nations High Commissioner for Refugees *UNHCR and De Facto Statelessness* ii: "UNHCR has accordingly required its Country Operations to address problems of *de facto* statelessness and to report annual statistics on *de facto* stateless persons. However, the Office has never clearly defined what *de facto* statelessness is, nor what the legal and operational responses to *de facto* statelessness should be. In this respect, it should be noted that whereas an international treaty regime has been developed for addressing problems of *de jure* statelessness – including most notably the 1954 and 1961 Statelessness Conventions – there is no such legally binding regime at the global level for *de facto* stateless persons who are not refugees. Whereas the absence of such a regime does not mean in and of itself that UNHCR cannot address problems of *de facto* statelessness, it does mean that if UNHCR does indeed have a mandate to address such problems, the range of protection tools on which the Office can rely will necessarily be more limited than when addressing problems of *de jure* statelessness."

71 United Nations High Commissioner for Refugees *UNHCR and De Facto Statelessness* 26; UNHCR *Training Package: Statelessness and Related Nationality Issues* 9: "De facto statelessness refers to those who have a nationality in name but who do not have national protection"; UNHCR *Guidelines: Field Office Activities Concerning Statelessness* 4: 'people who are stateless *de facto* (who have a nationality in name which is not effective)".

72 Bernstein 2006 *Parallax* 51; Arendt *The Jew as Pariah* 63. Strictly speaking stateless people are those who have no bond of nationality to any state, these people are *de jure* stateless. De facto statelessness is a more ambiguous term, referring to people who have not formally lost their nationality, but do not have no effective nationality. For numerous reasons these people are in a situation where their citizenship does not imply effective access to their rights, as in the case of illegal migrants. One of Arendt's many critiques against the international community is their failure to recognize *de facto* statelessness.

73 United Nations High Commissioner for Refugees *UNHCR and De Facto Statelessness* 65.

Considering this requirement, it seems that undocumented migrants will not be viewed as *de facto* stateless in the strict sense of the word. For purpose of this study, it will, however, be argued that the legal position of undocumented children may possibly be conceptualized as stateless. The reading of Arendt, Agamben and others exposing the contradictions of inalienable human rights and bare life,<sup>74</sup> opens the possibility to also include undocumented children as part of the definition of *de facto* statelessness.

### **2.3 Hannah Arendt: The Perplexities of the Rights of Man**

*The Declaration of the Rights of Man and of the Citizen* (1789) was a decisive tipping point in the field of human rights.<sup>75</sup> It ushered in an age in which the rights of man<sup>76</sup> was no longer dependent on a religious conviction or any custom of history, but was rather grounded in human nature. Rights were described as being unalienable because mans' dignity and human rights vested in himself "without reference to some larger encompassing order".<sup>77</sup> The declaration granted mankind rights, based on the mere fact that a person is part of the human race. This sentiment was later repeated in the *Universal Declaration* and accentuated by words like "unalienable",<sup>78</sup> "inherent",<sup>79</sup> "born free and equal".<sup>80</sup>

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74 See discussion in 2.4 below.

75 Hampsher-Monk *The Impact of the French Revolution* 33-36; Spielvogel *Western Civilization* 405-407 "One of the most important documents of the French Revolution, the Declaration of the Rights of Man and the Citizen was adopted in August 1789 by the National Assembly. The declaration affirmed that "men are born and remain free and equal in rights," that government must protect these natural rights, and that political power is derived from the people."

76 With regard to the reference to "man" and "mankind" as opposed to human and humanity: At time that the Declaration of the Rights of Man was written, they struggle for gender equality was just starting. The Declaration was felt to be so gender specific that in 1791, Olympe de Gouges published the Declaration of the Rights of Woman and Citizen, a document which insisted both that women by nature, had all the rights men did. Scott *Only paradoxes to offer: French feminists and the rights of man* 20, "This was arguably the most comprehensive cal for women's rights in this period, it take the Revolution's universalism at its word and it exposes the incompleteness of that universalism in its own paradoxical attempts to represent women as abstract individuals by calling attention to the differences they embody." This is in stark contrast with the Universal Declaration, which refers to human, person and humanity.

77 Arendt *The Origins of Totalitarianism* 291.

78 Preamble *Universal Declaration*.

79 Preamble *Universal Declaration*.

80 Article 1 of the *Universal Declaration*.

Arendt criticizes the notion that rights are "inalienable" and vested only in the mere fact that one is part of humanity, because, almost immediately after their introduction, these rights were linked to being part of some form of social order which implies being subjected to a sovereign nation state. She explains that:

...the whole question of human rights, therefore, was quickly and inextricably blended with the question of national emancipation, only the emancipated sovereignty of the people, of one's own people, seemed to insure them...the Rights of Man, after all, had been defined as inalienable because they were supposed to be independent of all governments but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.<sup>81</sup>

Arendt argued that the dependency on the state to guarantee human rights meant that the loss of national rights will lead to the loss of human rights.<sup>82</sup> In other words, human rights, which are supposed to be inalienable, become unenforceable the moment a person lacks effective nationality.<sup>83</sup> Arendt, therefore, viewed statelessness as a symptom of the hollowness of human rights, <sup>84</sup> because human rights are "to be guaranteed by states and which, from the very start lacked substantive support".<sup>85</sup> This is illustrated in the lack of access that undocumented children have, for example, to social grants. When a person cannot provide proof of their citizenship they are placed outside of the scope of state guaranteed human rights. The state guarantees certain human rights only to the extent that a person is part of their citizenry.

Although the rights proclaimed in the Declaration can be seen reflected in most domestic constitutions and policies, its effectiveness still rests on the premise that a person falls within the protection of a particular domestic legal system, in other words, that the person is, in fact, a national of that state. When a person finds themselves, for whichever reason, outside the scope of protection of a particular legal

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81 Arendt *The Origins of Totalitarianism* 291-292.

82 Arendt *The Origins of Totalitarianism* 292.

83 Arendt *The Origins of Totalitarianism* 293.

84 Gündoğdu "Statelessness and the Right to have Rights" 436.

85 Blitz and Sawyer *Analysis: The Practical and Legal Realities of Statelessness* 11, Gündoğdu "Statelessness and the Right to have Rights" 434. Arendt especially criticized the international communities failure to recognise the *de facto* statelessness.

system, incorporating human rights into that domestic legal system, will not necessarily afford those persons any protection. As Arendt explains:

The conception of human rights, based upon the assumed existence of a human being as such, broke down the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human.<sup>86</sup>

Human rights presuppose that each human being is a citizen of a particular nation state. This presumption is inherent to the *Declaration of the Rights Man*, in which no distinction is made between a man and a citizen. The rights of man, in effect then, became the rights of the citizen.<sup>87</sup> The problem with this presumption is that, globally, there are millions of people who either have no nationality or are in a displaced situation.<sup>88</sup>

Arendt used the term "rightless", or put differently the absence of access to human rights, to describe the situation in which the stateless find themselves. She, therefore, argues that the only human right is the right to access to rights because it is not directly linked to a person being a citizen of a state. A person, therefore, becomes rightless when they are deprived of this right because they lose the "condition of possibility for meaningfully exercising other rights."<sup>89</sup>

Statelessness, therefore, implies rightlessness, because persons finding themselves in this displacement have according to Arendt, lost the "right to have rights". Benhabib<sup>90</sup> offers an explanation of Arendt's concept of "right to have rights" by providing the following analysis:

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86 Arendt *The Origins of Totalitarianism* 299.

87 Agamben 2008 *Social Engineering* 92.

88 Gündoğdu "Statelessness and the Right to have Rights" 433, the assumption of each man being a citizen comes from eighteenth century declarations, today the faulty reasoning of that time comes to light when one considers that there are "massive scales of statelessness produced by mass denationalizations and denaturalisations of the twentieth century."; Gündoğdu "Rightlessness in an Age of Rights" 92 "...the gap between man and citizen, which was characteristic of the eighteenth century idea of right, has not been overcome by moving to the more universalistic concept of "human person"; Agamben 2008 *Social Engineering* 90.

89 Gündoğdu "Statelessness and the Right to have Rights" 434.

90 Benhabib *The Rights of Others: Aliens, Residents, and Citizens* 57-59.

The first use of the term "right" (RIGHT to have rights) is addressed to humanity as such and enjoins us to recognize membership in some human group. In this sense this use of the term "right" evokes a moral imperative...What is invoked here is a moral claim to membership and a certain form of treatment compatible with the claim to membership?

The second use of the word (right to have RIGHTS) is built upon this prior claim of membership...Rights claims entitle persons to engage or not in a course of action, and such entitlements create reciprocal obligations.

The first reference to right in the singular refers to a person's right to be a part of a community: in essence a claim to membership, the moment a person is then recognised as belonging to a community they have certain rights and obligations. This reference to right in the plural refers to the civil and political entitlements of a person as a member of/or governed by a nation state.

The second reference to "rights" can be viewed as a triangular relationship between the person that is entitled to the rights, others on who the entitlement creates a duty and the party who is responsible for the enforcement of the rights.<sup>91</sup> The socio-economic rights of a child, for example, the triangular relationship consists firstly of the child who is entitled to socio-economic rights, secondly all other people on which there is a duty to respect this right and refrain from infringing this right and thirdly the state, on whom the obligation rests to protect and fulfil these rights. The issue with undocumented children is that this triangular relationship is not applicable due to the state only recognising this relationship with citizens. The link between the parties rests on a relationship of right and duties between all parties, which obviously does not exist within the context of a person whose presence in a country is viewed as illegal.

The correlation between the two uses of right in "right to have rights" can, therefore, be found in the premise that "one's status as a right-bearing person is contingent upon the recognition of one's membership" and specifically on membership of nation

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91 Benhabib *The Rights of Others: Aliens, Residents, and Citizens* 57.

state.<sup>92</sup> Unfortunately, the claim to be acknowledged as a member is addressed to humanity itself.

In theory, the stateless are entitled to all the rights of man, but there is a disjunction between the discourse of human rights and the application therefore in praxis. The undocumented has no domestic legal system to exercise their rights. As such they lack the condition which provides them with access to any human rights rendering them rightless. They are without rights to the extent that they are dependent on the charity or good will of others.<sup>93</sup>

Arendt's described two major losses that a stateless person initially face, firstly the loss of their home, or distinct place in the world<sup>94</sup> and secondly the loss of protection of a sovereign state.<sup>95</sup> When these losses occur, the stateless become the rightless. It is important to understand that the condition of loss Arendt refers to is "not the loss of specific rights, but the loss of a community, or put differently a sovereign state, willing to guarantee any rights whatsoever".<sup>96</sup>

If a human being loses his political status, he could, according to the implications of the inborn and unalienable rights of man, come under exactly the situation for which the declarations of such general rights provided. Actually the opposite is the case. It seems man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as fellow man.<sup>97</sup>

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92 Benhabib *The Rights of Others: Aliens, Residents, and Citizens* 58.

93 Gündoğdu "Statelessness and the Right to have Rights" 433.

94 Arendt *The Origins of Totalitarianism* 293 the first loss which the rightless suffered was the loss of their homes this meant the loss of the entire social texture into which they were born and in which they established for themselves a distinct place in the world.

95 Arendt *The Origins of Totalitarianism* 294; Bhabha 2009 *Human Rights Quarterly* 411 "To 'lack one's own government' is a status neither precise nor transparent. At minimum, though it includes the situation captured by the definition of statelessness: a person is stateless if "not considered a national by any State under the operation of its law".

96 Arendt *The Origins of Totalitarianism* 297.

97 Arendt *The Origins of Totalitarianism* 300.

Arendt's work has led to wide support for three principles that combat the appearance of statelessness, of which the obligation to reduce child statelessness is one.<sup>98</sup> Despite this, as illustrated above, the problem of child statelessness is far from resolved.<sup>99</sup>

Working with Arendt's theory, it opens the possibility to critically analyse the situation of undocumented children:

The decisive factor is that these rights and the human dignity they bestow should remain valid and real even if only a single human being existed on earth; they are independent of human plurality and should remain valid even if a human being is expelled from the human community.<sup>100</sup>

It is for exactly this reason that Arendt's work is applicable to this study, even though her focus was on civil and political rights. The idea of human rights and the access to these rights should extend to the socio-economic rights of undocumented children, irrespective of their status, simply because they are part of humanity.

#### **2.4 Georgio Agamben: Bare Life**

The social and political thought of Georgio Agamben closely relates to Arendt's theory of statelessness. Like Arendt, a continuing theme in the works of Agamben is how human life has been continuously defined and redefined by state power.<sup>101</sup> He agrees with Arendt that there is a significant contradiction in the United Declaration's claim that rights are unalienable and inherent to man. Especially his theory of "bare life" greatly supports the Arendtian concept of unenforceable unalienable rights. There are however certain key concepts that firstly need to be understood for one to comprehend the notion of bare life.

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98 A 7 *Convention on the Rights of the Child*; Bhabha 2009 *Human Rights Quarterly* 411, the other two principles being the right to a legal identity and the right to a nationality.

99 United Nations High Commissioner for Refugees 2015 <http://www.unhcr.org/pages/49c3646c26.html> "UNHCR cannot provide definitive statistics on the number of stateless people around the world, but we estimate that the total was up to at least 10 million."

100 Arendt *The Origins of Totalitarianism* 298.

101 Frost 2010 *Oxford Journal of Legal Studies* 546.

### 2.4.1 A State of Exception

Agamben proposes a theory of a state of exception that is at the heart of Carl Schmitt's well-known definition of the sovereign as "he who decides on the exception".<sup>102</sup> Schmitt contends that the power of the sovereign can be found in their power to determine what the exception to the rule or law is,<sup>103</sup> in other words, the sovereign is who determines what of who falls within, and what exceeds the rule of law. Cisney<sup>104</sup> explains this:

The exception, according to Agamben, is a type of exclusion, outside the juridical order, as that to which the juridical order, as such, does not apply. But most noteworthy is that the exclusion is not wholly excluded in the sense of being completely unrelated to the juridical order. Rather, the exclusion maintains its relationship to the juridical order, as precisely that which is outside of it, that which exceeds it. In this way, the outside of the system is brought to the interior.

The power to decide what or whom this exception is precisely where the power of the sovereign lie. Agamben, however, modifies Schmitt's definition by contending that the sovereign creates "bare life" as the ultimate state of exception.<sup>105</sup> He argues that when a group of people are decided to be part of the exception, the relationship between this group and the state become one of dereliction, where these persons attain more than a level of indifference: they are "actively abandoned by the law".<sup>106</sup> The state having the power to decide the exception supports Arendt's claim that

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102 Kelly and Shah 2006 *Critique of Anthropology* 253; Sowah 2013 [http://www.academia.edu/4091646/What\\_is\\_the\\_true\\_meaning\\_of\\_Giorgio\\_Agamben\\_s\\_Bare\\_Life\\_Homo\\_Sacer](http://www.academia.edu/4091646/What_is_the_true_meaning_of_Giorgio_Agamben_s_Bare_Life_Homo_Sacer); Humphrey 2006 *European Journal of International Law* 680; Frost 2010 *Oxford Journal of Legal Studies* 546 "For Schmitt, sovereignty was not identifiable through statutes, ordinances or constitutions, but instead rested on one concrete political fact, namely which individual or body could declare a state of exception and thus suspend the existing legal order. It was therefore the decision, rather than any pre-ordained power, that decided who was sovereign."

103 Ojakangas 2005 *Foucault Studies* 8; Cisney 2008 *The Southern Journal of Philosophy* 169; Fogel 2014 *Journal of Politics and Law* 75, "In France, this is often termed an *etat de siege*; in England, it is termed Martial Law. This is not to say that no laws exist in a state of exception but rather, that the laws of a particular land are suspended and replaced with laws that are believed to more suitable to the particular conditions that are being faced. It is an unusual use of state power."

104 Cisney 2008 *The Southern Journal of Philosophy* 169.

105 Ojakangas 2005 *Foucault Studies* 7; Frost 2010 *Oxford Journal of Legal Studies* 556 "Adopting and modifying Schmitt's definition of sovereignty, Agamben contends that the sovereign and sovereign power can be identified through the creation of bare life; the individual or body that creates bare life will be by definition imbued with sovereign power. This sovereign decision is tied directly to the operation of law. In State of Exception Agamben posits bare life not only being created through a sovereign decision, but also through the operation of the law, and specifically through the state of exception, which exists as a zone of indistinction between law and anomie, law's beyond."

106 Cisney 2008 *The Southern Journal of Philosophy* 170.

person which find themselves outside of the law will have very little if any access to human rights and that the loss of national rights will lead to a loss of human rights.

#### 2.4.2 *Zoe- and Bios*

The concept of bare life as a state of exception was developed within the parameters of Aristotle's conception of life. Aristotle made a distinction between two spheres of human life: *zoe* and *bios*.<sup>107</sup> *Zoe* refers to life in general, the part of life essential to survival, the kind of life we have in common with all living creatures<sup>108</sup> whilst *bios* refers to life in the political sense, or the good life as the Greeks referred to it.<sup>109</sup> This capacity for *bios* life, is, according to Aristotle, what distinguishes human from animal.<sup>110</sup> Political living is therefore very different from simply existing. This same distinction can be found in Arendt's work, she draws a strict contrast between natural and political life<sup>111</sup> and refers to the political life of speech and action that stateless persons consequently have no access to.

It should be noted that in the ancient times only "free men" had any claim to a political life, whilst woman and slaves were only allowed a life of *zoe* at home.<sup>112</sup> The major difference between the time of Aristotle and now is that whilst these two spheres were completely distinct and home life was kept separate from political life, we today face quite the opposite. In the nation state, the private and political life is interrelated.<sup>113</sup> In the modern age, the sustenance of the processes of life, or *zoe*, are the main concern of the state.<sup>114</sup> Owens<sup>115</sup> explains this by stating:

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107 Ojakangas 2005 *Foucault Studies* 7.

108 Ojakangas 2005 *Foucault Studies* 7; Owens 2009 *International Relations* 569; Sowah 2013 [http://www.academia.edu/4091646/What\\_is\\_the\\_true\\_meaning\\_of\\_Giorgio\\_Agamben\\_s\\_Bare\\_Lif\\_Homo\\_Sacer](http://www.academia.edu/4091646/What_is_the_true_meaning_of_Giorgio_Agamben_s_Bare_Lif_Homo_Sacer); Braun 2007 *Time and Society* 23.

109 Ojakangas 2005 *Foucault Studies* 7; Braun 2007 *Time and Society* 23; Owens 2009 *International Relations* 569.

110 Owens 2009 *International Relations* 569.

111 Arendt *The Human Condition* 24, 27.

112 Finlayson 2010 *The Review of Politics* 100, Arendt *The Human Condition* 144.

113 Frost 2010 *Oxford Journal of Legal Studies* 569.

114 Sowah 2013 [http://www.academia.edu/4091646/What\\_is\\_the\\_true\\_meaning\\_of\\_Giorgio\\_Agamben\\_s\\_Bare\\_Life\\_Homo\\_Sacer](http://www.academia.edu/4091646/What_is_the_true_meaning_of_Giorgio_Agamben_s_Bare_Life_Homo_Sacer); Finlayson 2010 *The Review of Politics* 100, Arendt *The human condition* 144; Braun 2007 *Time and Society* 8.

115 Owens 2009 *International Relations* 569; Agamben *Homo Sacer* 187 "Every attempt to rethink the political space of the West must begin with the clear awareness that we no longer know anything

Where the ancients excluded *zoe* from what they considered to be properly political, modern nation states have actively made life central to politics. The distinction between *zoe* en *bios* was blurred with the emergence of the nation state.

Finlayson<sup>116</sup> expands on this:

Agamben claims that in modern society political sovereignty, by dint of the institutional forms and effects of civilization, is directed against the human beings natural existence and his or her biological and animal functions. Or rather, these functions are maintained in existence, but closely controlled by the juridical, administrative, and executive power of the state.

It is in the development of this concept of the interrelatedness of state and biological existence that the influence of Foucault development of biopolitics,<sup>117</sup> is apparent in Agamben's work.<sup>118</sup> Biopolitics as a concept explains inter alia how the sovereign state got involved with personal decisions of life. It is an interpretation of the "inexorable trend toward the incorporation of life into more and more spheres of state practice."<sup>119</sup> Foucault held that the biological existence of humans has become the primary subject of politics.<sup>120</sup> Since the time of Aristotle, the state has become increasingly concerned with matters such a disease control, food and water supply, mental health, mortality rates and life expectancies.<sup>121</sup> Foucault<sup>122</sup> described it as:

For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for political existence; modern man is an animal whose politics places his existence as a living being in question.

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of the classical distinction between *zoe* and *bios*, between private and political existence between man as simple living being at home in the house and man's political existence in the city.

116 Finlayson 2010 *The Review of Politics* 100.

117 Finlayson 2010 *The Review of Politics* 100, "Agamben presents his conception of biopolitics as correction and 'completion' of Michel Foucault's concept of biopower."

118 Cisney 2008 *The Southern Journal of Philosophy* 169; Braun 2007 *Time and Society* 7 "It was Giorgio Agamben, however, who most influentially highlighted the aspects of biopolitics in Arendt and Foucault, bringing together the Foucauldian concept of biopolitics with Arendt's analysis of totalitarianism."

119 Owens 2009 *International Relations* 570.

120 Ojakangas 2005 *Foucault Studies* 5; Braun 2007 *Time and Society* 11; Finlayson 2010 *The Review of Politics* 101 "...government once based on the sovereign's power of life or death over its subjects developed *softer* technologies of power, which allowed them to extend their reach over their subjects by managing, regulating, and controlling populations.

121 Owens 2009 *International Relations* 570.

122 Foucault *The History of Sexuality* 143.

This obviously makes the ability to determine a state of exception even more powerful, because due to biopolitics, not only your *bios*, but also *zoe* can not only be controlled but also placed outside of the law,<sup>123</sup> amounting to a person's very existence being placed outside of the law.

### 2.4.3 *Bare Life as the Modern State of Exception*

Integrating the Schmitt's state of exception, Aristotle's dividing of life and Foucault's concept of biopolitics; Agamben uses *Homo Sacer*, an obscure figure created by Ancient Roman Law,<sup>124</sup> to personify the state of exception.<sup>125</sup> To invoke Ziarek:<sup>126</sup>

Homo Sacer, the notion of a banned man who can be killed with impunity by all is unworthy of either juridical punishment or religious punishment or religious sacrifice. Neither the condemned criminal nor the sacrificial scapegoat, and thus outside the human of divine law, homo sacer is the target of sovereign violence exceeding the force of law and yet anticipated and authorized by the law.

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123 Braun 2007 *Time and Society* 8-11 "Foucault (1980) observes that it was accompanied or even characterized by the move through which humans as living beings became the subject and target of political rule: 'Power would no longer be dealing simply with legal subjects over whom the ultimate domination was death, but with living beings, and the mastery it would be able to exercise over them would have to be applied at the level of life itself; it was the taking charge of life, more than the threat of death, that gave power its access event to the body' (pp. 142-3). The life at stake here is clearly not the life people live, not the life story, the biography, but rather the *zoe*-aspect of their existence. Public policy and the welfare state through the late 18th and 19th centuries, Foucault argues, co-emerged with practices, institutions, and new bodies of knowledge, designed to take care of the physical aspects of human life such as fertility, health, disease, longevity, or morbidity, in order to enhance the productivity of the population as well as its loyalty to the state.

124 Sowah 2013 [http://www.academia.edu/4091646/What\\_is\\_the\\_true\\_meaning\\_of\\_Giorgio\\_Agamben\\_s\\_Bare\\_Life\\_Homo\\_Sacer](http://www.academia.edu/4091646/What_is_the_true_meaning_of_Giorgio_Agamben_s_Bare_Life_Homo_Sacer) "In Roman antiquity, the revocation of a citizen's rights by sovereign decree produced the threshold figure of *homo sacer*, the sacred man who can be killed by anyone (he has no rights) but not sacrificed because the act of sacrifice is only representable within the legal context of the city- the very city from which *homo sacer* has been banished. He is an outlawed citizen, the exception to the law, and yet he is still subject to the penalty of death and therefor still included, in the very act of exclusion, within the law."

125 Ojakangas 2005 *Foucault Studies* 6; Sowah 2013 [http://www.academia.edu/4091646/What\\_is\\_the\\_true\\_meaning\\_of\\_Giorgio\\_Agamben\\_s\\_Bare\\_Life\\_Homo\\_Sacer](http://www.academia.edu/4091646/What_is_the_true_meaning_of_Giorgio_Agamben_s_Bare_Life_Homo_Sacer); Cisney 2008 *The Southern Journal of Philosophy* 172.

126 Ziarek "Bare Life" 195.

Agamben therefore, introduces a form of life that is lived outside the *bios*. The *Homo Sacer*<sup>127</sup> is a figure produced by a state of exception<sup>128</sup> and forced to live "bare life".<sup>129</sup>

Agamben described bare life as a human being's physical, instinctual, biological and material existence.<sup>130</sup> Bare life is thus a form of life stripped of any political significance, a damaged life exposed to violence.<sup>131</sup>

Ziarek<sup>132</sup> explains bare life as:

Bare life, wounded expendable and endangered is not the same as biological *zoe*, but rather the remainder of the destroyed political *bios*. As Agamben puts it in his critique of Hobbes' state of nature, mere life is not simply natural reproductive life, the *zoe* of the Greeks, nor *bios* "but rather a zone of indistinction and continuous transition between man and beast".

A comparison can be drawn between bare life and Arendt's concept of abstract nakedness. Abstract nakedness refers to a state in which a person, except for still being human, has lost all qualities and relationships that define them as part of a community.<sup>133</sup> Both bare life and abstract nakedness are the results of being in a state of exception.<sup>134</sup> The sovereign state is responsible for creating bare life because the state influences the operation of the law and determines a state of exception from the legal order.<sup>135</sup>

Agamben's concept of bare life is, therefore, useful because it elaborates on Arendt's account of rightlessness. It may, therefore, be argued that undocumented children

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127 Interesting to note here that this *Sacer* does not refer to "sacred" in the modern sense referring to something holy, Ojakangas 2005 *Foucault Studies* 10, explains it as "*Sacer* designates the person or the thing that one cannot touch without dirtying oneself or without dirtying; hence the double meaning of 'sacred' or 'accursed'." At issue here is, according to Agamben, nothing but a scientific mythologeme that has since the nineteenth century, led the social sciences astray "in a particularly sensitive region", that is, in interpretations of social phenomena in general and of the origin of sovereignty in particular.

128 Ojakangas 2005 *Foucault Studies* 6; Ziarek "Bare Life" 194.

129 Sowah 2013 [http://www.academia.edu/4091646/What\\_is\\_the\\_true\\_meaning\\_of\\_Giorgio\\_Agamben\\_s\\_Bare\\_Life\\_Homo\\_Sacer](http://www.academia.edu/4091646/What_is_the_true_meaning_of_Giorgio_Agamben_s_Bare_Life_Homo_Sacer); Cisney 2008 *The Southern Journal of Philosophy* 170.

130 Finlayson 2010 *The Review of Politics* 105.

131 Ojakangas 2005 *Foucault Studies* 8.

132 Ziarek "Bare Life" 194.

133 See section 2.3.

134 Ojakangas 2005 *Foucault Studies* 8.

135 Frost 2010 *Oxford Journal of Legal Studies* 546.

are in a position of being a modern *homo sacer*, where they are reduced to bare life and abandoned by the juridical powers of the nation state and as such what is considered to be unalienable human rights are no longer at their disposal. The following part of the study will explain bare life within the context of the undocumented child.

## **2.5 Comparison between Undocumented Children, the Stateless and Homo Sacer**

A peculiarly disenfranchised population that clearly illustrated this functional statelessness and its dire consequences is the subset of child migrants who lack their own government. I will call this population Arendt's children.<sup>136</sup>

There are certain discrepancies that hinder one from blatantly stating that undocumented children are stateless. One such discrepancy is the situation which arises when children, either accompanied by parents or not enter, enter the country for other reasons than fleeing from war or genocide. In many cases the illegal entry is simply due to the search for a better life. In this case, a vital characteristic of statelessness is absent, namely, that the country of nationality offers no protection. The children of illegal immigrants are not refugees. They could also theoretically, enter their country of birth unhindered, which eliminates the possibility of *de facto* statelessness.

To then still draw a comparison, there are two basic premises one may use as a point of departure. Firstly, the undocumented children in South Africa are not a homogenous group.<sup>137</sup> It can be explained that children find themselves in an irregular situation for a variety of reasons, which include: entering the country illegally with their parents, overstaying their visas and being born to illegal migrants and never being registered at birth. Some of them may fulfil the criteria for *de jure* or *de facto* stateless, but certainly not all of them. Stateless or not, most of these children know no other country than South Africa. The common factor is that the presence of these

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<sup>136</sup>Bhabha 2009 *Human Rights Quarterly* 412.

<sup>137</sup>Bhabha 2009 *Human Rights Quarterly* 412-413, Bhabha describes the different groups of children who could potentially be considered stateless, which include undocumented and irregular migrants.

children in South Africa is, or has become, illegal and that they are that not registered in South Africa and do not feature on any legitimate grid. Their absence from any official data means they technically do not exist. They are, like many children in similar situations across the world, invisible in the sense that these children are not recognizable in the eyes of international, regional or domestic legal systems. This invisibility is crippling them and making them unable to access the protection they are entitled to.<sup>138</sup> Agamben<sup>139</sup> held this same view:

These noncitizens often have nationalities of origin, but, inasmuch as they prefer not to benefit from their own states' protection, they find themselves, as refugees, in a condition of de facto statelessness.

Confirmation of the inclusion of undocumented children can also be found in the work of Jacqueline Bhabha. She agrees with Arendt when she described this unenforceability of what should be inalienable rights as the "fundamental human rights challenge of our age".<sup>140</sup> Within the framework of Arendt's articulation of statelessness, Bhabha refers to undocumented children as "Arendt's children", identifying three defining characteristics of these children:

Despite their differences in legal status, location, gender, race, religion, nationality, and class, in my conception, Arendt's children all share three defining characteristics: they are minors; they are, or they risk being, separated from their parents or customary guardians; and they do not in fact (regardless of whether they do in law) have a country to call their own because they are either noncitizens or children of noncitizens. Therefore, the group includes a variety of circumstances: migrant children who have travelled alone across the borders, first generation citizen children living in so-called 'mixed status' or 'undocumented' families, and unregistered or stateless children living in the country of their birth with their immigrant parents.<sup>141</sup>

When using these three characteristics, the application of Arendt's theory may be extended to undocumented children in South Africa.

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138 Bhabha 2009 *Human Rights Quarterly* 419, without official confirmation of the child's social entitlements, he remained outside the categories established by the state- in effect not a person before the law.

139 Agamben 2008 *Social Engineering* 95.

140 Bhabha 2009 *Human Rights Quarterly* 411.

141 Bhabha 2009 *Human Rights Quarterly* 414.

Secondly, the comparison between the stateless and undocumented children is not based on the criteria of statelessness, but rather on the consequences of statelessness as described by Arendt. She identified two initial losses, namely a loss of home and loss of government protection. This can be made applicable to the situation in South Africa by the following clarification: Undocumented children have no home in their state nationality and cannot effectively claim South Africa as their home. Although they live within the borders of South Africa, they cannot legally build a home and develop in the same sense as a citizen, a simple example is the great difficulty they would face registering in a state funded school with no legal documentation. With regards to government protection, undocumented children, in the same manner as *de facto* stateless persons, may have a nationality in name, but this nationality is ineffective because they do not enjoy the protection of either their state of nationality or their habitual state.

A crucial question to answer, considering the above is whether undocumented children are indeed rightless? Based on the three defining characteristics of "Arendt's children" that Bhabha identified, there is the following potential for rightlessness:

First, children are disproportionately represented among the world's poor. Secondly, children who are separated or unaccompanied face a far greater risk of abuse, exploitation, or neglect than their accompanied counterparts. Finally, being stateless, whether by virtue of alienage or familial noncitizen status, also brings with it economic, social and psychological dangers.<sup>142</sup>

Even in a country like South Africa, where children's rights are thoroughly enshrined and protected constitutionally, undocumented children face a greater risk for some form of rightlessness. In theory, undocumented children have rights; the loss they face is therefore not the loss of rights, but rather the authority to guarantee these rights. The undocumented child's right to have rights is "tenuous at best and frequently unenforceable in practice".<sup>143</sup> Although they are entitled to their "unalienable" rights, these rights are unenforceable because no authority or institution is willing to guarantee them.

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142 Bhabha 2009 *Human Rights Quarterly* 414.

143 Bhabha 2009 *Human Rights Quarterly* 415.

These children are, therefore, a modern day example of *homo sacer*, they are constructing their lives within a state of exception. Agamben used the figure of "the camp" to describe situations in which modern states of exceptions are created.<sup>144</sup> The refugee,<sup>145</sup> the death row inmate, the political prisoner<sup>146</sup> and undocumented children are present day examples of *homines sacri*.<sup>147</sup> When arguing that these children are rightless, one is arguing that they are reduced to bare life:

For Agamben, the contemporary experience, the rapid growth of the phenomena of the refugee, and the growing dissociation of birth and the nation-state, depriving more and more human beings worldwide of basic human rights, is evidence that "the camp, which is now securely lodged within the city's interior, is the new biopolitical *nomos* of the planet. On Agamben's understanding, much of the world has now become bandit, without peace, wandering, lacking a home, without a national identity, and thus, not quite human, under the constant rule of the state of exception."<sup>148</sup>

Ojankangas<sup>149</sup> elaborates on this:

The bio-political paradigm of the West is not the concentration camp, but, rather, the present-day welfare society.

Sowah describes these modern *homo sacer* as being "individuals deprived of national civil rights and international human rights", that live within a "zone of indistinction" where the lines between citizen and outlaw, law and violence, legal and illegal and

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144 Cisney 2008 *The Southern Journal of Philosophy* 173; Mbembe 2003 *Public Culture* 12 "Because it's inhabitants are divested of political status and reduced to bare life, the camp is, for Giorgio Agamben, "the place in which the most absolute *condition inhumana* ever to appear on Earth is realized."

145 Cisney 2008 *The Southern Journal of Philosophy* 173; Agamben 2008 *Social Engineering* 90-95 "What is essential is that each and every time refugees no longer represent individual cases but rather a mass phenomenon (as was the case between the two world wars and is now once again), these organizations as well as the single states – all the solemn evocations of the inalienable rights of human beings notwithstanding – have proved to be absolutely incapable not only of solving the problem but also of facing it in an adequate manner."

146 Sowah 2013 [http://www.academia.edu/4091646/What\\_is\\_the\\_true\\_meaning\\_of\\_Giorgio\\_Agamben\\_s\\_Bare\\_Life\\_Homo\\_Sacer](http://www.academia.edu/4091646/What_is_the_true_meaning_of_Giorgio_Agamben_s_Bare_Life_Homo_Sacer).

147 Braun 2007 *Time and Society* 5-23, this bares great resemblance to Braun's work on the zoefication of humans by the modern state, which implies that groups of people are being reduced to a status similar to that of an animal of living mere life; "...the rise of the social implies a certain degradation of individual lives to mere means of sustaining and feeding the economy. Thus, to a certain extent, we can say that the political zoefication of humans is inherent in modern society from the very beginning."

148 Cisney 2008 *The Southern Journal of Philosophy* 170.

149 Ojakangas 2005 *Foucault Studies* 22.

ultimately life and death are blurred.<sup>150</sup> The modern state, because of its power to create the exception has the power to exclude groups or individuals, to suspend the law and to strip a person of "civic rights and social value."<sup>151</sup> Undocumented children possess physiological life without any political significance or representation before the law. The inalienable unenforceable rights of undocumented children are therefore a modern example of a state of exception. Agamben<sup>152</sup> rightly stated that:

Every society- even the most modern- decides who it's 'sacred men' (homo sacer) will be.

This can be summed up as follow: Children are granted certain rights that are recognized in both international as well as domestic law. These rights, according to human rights discourse, should not be susceptible to discrimination of any kind, yet the state does not grant these children the same rights as the children of citizens. Undocumented children are the exception to the accepted norm regarding the rights of children. There are numerous political reasons for this, but it amounts to the greater good of the citizens. When used in conjunction with Arendt's concept of political action and speech it becomes apparent that undocumented children have little to no access to political life and their lives are mostly restricted to biological existence. The potential to develop into an adult with the capacity to engage in political life is also severely restricted by the absence of access to education and health services. One must also keep in mind that *zoe* existence is extremely dependent on the grants that the state offer which is meant to sustain individuals. The social grant system is a manner in which the state assists those who cannot meet their basic needs. It is in this zone that politics turn into biopolitics and a state of exception is created which produces bare life. Through the creation of a state of exception in which undocumented children are not part of the social grant system of a state, the state is regulating both the *bios* and the *zoe* of these persons and reducing persons falling outside eligibility for grants to bare life.

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150 Sowah 2013 [http://www.academia.edu/4091646/What\\_is\\_the\\_true\\_meaning\\_of\\_Giorgio\\_Agamben\\_s\\_Bare\\_Life\\_Homo\\_Sacer](http://www.academia.edu/4091646/What_is_the_true_meaning_of_Giorgio_Agamben_s_Bare_Life_Homo_Sacer).

151 Commaroff 2007 *Public Culture* 208.

152 Agamben *Homo Sacer* 139.

The result of the state of exception is that undocumented children are excluded from political life and get little to no assistance in securing their survival. It is in this space, where law and protection are all but suspended, that undocumented children, like the *homo sacer*, must live their precarious lives.

## **2.6 Conclusion**

Hannah Arendt along with others such as Benhabib, Agamben and Bhabha, illustrates the limits, weaknesses and incoherence of human rights discourse and questions the validity of the idea of human rights as inalienable.

In her discussion of what she termed the "perplexities of the rights of man," Arendt identifies certain intricacies associated with the concept of human rights. Her discussion starts with the eighteenth century idea that human rights no longer vest in a higher being but are inherent to man and this, in theory, should render the rights unalienable. The perplexity here lies in the fact that the guarantee of rights then lie in mortal man, and history has proven that this fails a large part of society. Inherent rights mean that man is longer being protected by social, traditional or religious convention. This has the effect that man is now standing naked before the power of the state, unable to rely on anything more than his own humanity as justification of a right to rights. Arendt contends that the rights of man are indistinguishable from the right of the citizen, this implies that in the absence of a government, a person is left with no authority to protect their human rights. The conclusion being that inalienable human rights, are in fact, often unenforceable and/or unresponsive to address the situations stateless and undocumented children find themselves in.

The work of Agamben is evoked to support Arendt's theory of the stateless. Agamben held that the sovereign's power lies in their capacity to decide who or what the exception to the law is. With this power the sovereign has created a modern state of exception for illegal immigrants, placing them outside the protection of the law and specifically outside the ambit of social assistance. This state exception produces the figure of *homo sacer* and the condition of bare life. Yet again, in the state of exception, unalienable human rights prove to be unenforceable, because the state has

created a zone of indistinction where the human rights discourse seem to be inapplicable.

The study will aim to illustrate that the manifestation of these perplexities can be seen in the everyday life and existence of undocumented children. Although they do not strictly meet the criteria of being stateless, undocumented children do, none the less, live in a state of exception where they face similar affects as those of stateless persons and their lives resemble those of the *homo sacer*.

It has become evident in this chapter that there is a need to take a critical look at the efficacy of human rights to address the states of exception that seem to be multiplying around us. It is worrying that individuals are abandoned to bare life when they are deprived of nationality or bereft of a political community.

Working with Arendt's concept of rightlessness and Agamben's concept of bare life, the following chapters will explore the ambiguous position between inalienable and unenforceable rights. An analysis will be done of the different inalienable rights interrelated to a child's socio-economic wellbeing and what the fulfilment of these rights entail. This will give a clearer picture of whether socio-economic rights are supposed to be unalienable in South Africa and whether undocumented children have access to social assistance, or stated in Arendt's words do they have a right to these rights?<sup>153</sup>

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153 Parekh 2004 *Journal of Human Rights* 41 "Yet more fundamental than these is the 'right to have rights', which is the right to a place in the world where meaningful speech and action are possible. Without the capacity for meaningful speech and action, Arendt claims, we are deprived of our humanity and are fundamentally rightless."

## **Chapter 3: General Principles of Child Law**

### ***3.1 Introduction***

The concept of rightlessness implies that there is an absence of access or unenforceability of human rights. In order to argue that the undocumented child in South Africa lives bare life and is rightless, one must firstly determine which of the unalienable rights of the child is applicable to this study and what the content of these rights are. One cannot determine the absence of a right, before determining the content of that which is presumably absent. Due to the interrelatedness of human rights, one can also not limit the discussion to only socio-economic rights, you must acknowledge the various other unalienable rights that influence, and is influenced by, socio-economic rights.

The work of both Arendt and Agamben was aimed at people in general, whilst the aim of this study is focused on the rights of the undocumented child, and, therefore, any arguments regarding the rights discussed should be argued and understood within the context of the uniqueness of the human child. It is for the purpose that this chapter will discuss the framework in which the rights of the child should be interpreted. Children's rights cannot just be accepted to form part of adult rights.<sup>154</sup> Further, it cannot be interpreted or implemented in the same manner. The very nature of children begs for prioritisation and acknowledgement of the uniqueness of their rights.

This sentiment is held by the UN Committee on the Rights of the Child, who, during its first formal session, highlighted the general principles that were to serve as guidelines in all matter affecting children.<sup>155</sup> These principles, which have also been described as instrumental rights, must always be kept in mind when interpreting the rights of the child.<sup>156</sup> The principles are: the best interest of the child, the right to survival and

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154 *S v M* 2008 3 SA 232 (CC) par 18.

155 UNICEF 2014 [http://www.unicef.org/crc/files/Guiding\\_Principles.pdf](http://www.unicef.org/crc/files/Guiding_Principles.pdf); Children's Rights in Wales 2014 <http://www.childrensrighthswales.org.uk/uncrc-principles.aspx>.

156 UNICEF 2014 [http://www.unicef.org/crc/files/Guiding\\_Principles.pdf](http://www.unicef.org/crc/files/Guiding_Principles.pdf).

development, non-discrimination, and the views of the child.<sup>157</sup> The importance of these principles have also been acknowledged in South African jurisprudence:

The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and enjoy special care. Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.<sup>158</sup>

The principles, and the very Convention they draw from, serve as a confirmation that the rights of the child should always be analysed and interpreted with a child sensitive approach. This is also true for the philosophical enquiry of this study, rightlessness must be determined within the framework of the rights of the child. For this reason, the discussion of the unalienable human rights of the undocumented child will commence with the international definition of the child, followed by a discussion of the inherent vulnerability of the child, which directly relates to the first general principle: the best interest of the child.

The right to survival and development, the second principle, is the only principle that directly relates to socio-economic rights, but as previously stated, before socio-economic rights can be analysed one must keep in mind the interrelatedness of rights. Survival and development is the child law elaboration of the right to life and will be firstly be analysed as such. When considering that the right to life contains the rights to survival and development one must question the traditional concept of the right to life and how this will relate to the undocumented child. Furthermore, the very phrase survival and development, opens the discussion for more than merely existing and places focus on not only the right to life, but a life of dignity, which this study argues is the direct opposite of Agamben's bare life. This is especially true in a country like South Africa, which bases its democracy on dignity. Dignity in itself is an abstract concept, even more so within the parameters of an undocumented individual. One

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<sup>157</sup>International Child and Youth Care Network 2011 <http://www.cyc-net.org/today2001/today011120.html>; UNICEF 2014 [http://www.unicef.org/crc/files/Guiding\\_Principles.pdf](http://www.unicef.org/crc/files/Guiding_Principles.pdf).  
<sup>158</sup>*S v M* 2008 3 SA 232 (CC) paras 17-18, hereafter referred to as *S v M*.

must question whether dignity can be achieved when the access to basic rights are denied.

Both the UN Committee on the Rights of the Child, as well as the drafters of the United Nations Declaration placed great value on the third principle: Non-discrimination. Achieving equality for all is also one of the cornerstones of the South African democracy. Sadly, even considering this, true equality and a society of non-discrimination still do not exist. Undocumented children, due to their lack of citizenship and nationality, still face harsh discrimination and struggle to get access to basic resources. Discrimination quite evidently has a direct link to a state of exception. For this study to argue that the socio-economic rights of the undocumented child are unenforceable due to them being part of a state of exception, one must understand discrimination and discriminatory policies based on criteria like citizenship.

These general principles, when implemented correctly, will protect a child from being subjected to bare life, but when the rights that are enshrined in these principles become unenforceable the abstract nakedness of the life of the undocumented child will become inevitable.

### ***3.2 Intricacies of the Rights of the Child***

#### *3.2.1 Definition of the Child*

To fully analyse any right, it important to firstly determine which part of society is in fact entitled to this right. Only then can it be determined whether the Agambian state of exception has been created.

According to the *Constitution*, as well as international and regional instruments, a person under the age of 18 years will be deemed a child in the eyes of the law.<sup>159</sup> This will be true, irrespective of any distinction or discrimination on grounds of race,

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<sup>159</sup>Section 28(3) of the *Constitution*, *African Charter on the Rights and Welfare of the Child* (1990) a 2; *Children's Charter of South Africa* Part 1 s 1; *Children's Act* 38 of 2005 s 1, *United Nations Declaration on the Rights of the Child* (1989) part 1 a 1.

sex or nationality.<sup>160</sup> The implication of this is that all people under the age of 18, regardless of their legal status or circumstances, will lawfully be considered a child and because of this status they are entitled to special care and protection. Zola Skewyiya,<sup>161</sup> a former South African Minister of Social Development, confirmed these sentiments:

Let me remind you all that Section 1 of the Children's Act define a child as a person under the age of 18 years. It does not add any additional requirements such as South African citizenship or that the child had to be born in South Africa. This means that foreign children are offered the same protective measures in terms of this legislation whilst they're in South Africa.

Case law further supports this, De Vos J confirmed the equal grounds of application in *Centre for Child Law v Minister of Home Affairs*,<sup>162</sup> when he held that it is already accepted that peoples within the borders of South Africa enjoy the protection of the courts and the Constitution. In *Lawyers for Human Rights v Minister of Home Affairs*<sup>163</sup> the court again held that the Constitution clearly expresses when a right is limited to citizens only and when it is not exclusively for citizens, all peoples within South African borders will be entitled to these rights.

This offers an important framework specifically for undocumented children who find themselves within the borders of South Africa. Considering only this definition, there are grounds to argue that it would be unconstitutional for the state to have discriminatory prerequisites in the social assistance given to children.

### *3.2.2 Inherent Vulnerability of the Child*

A child, much like women, minority groups, the disabled, indigenous people, refugees and migrant workers, require special protection and rights to exercise their human

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160 Palmer 2009 UNICEF 8: "Drawing on the Convention on the Rights of the Child, the African Convention on the Rights of the Child (ACRC) specifies that every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the ACRC irrespective of the child's or his/her parents or legal guardian's "race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status".

161 Skweyiye "Getting South Africa Ready to Implement the Children's Act".

162 2005 6 SA 50 (T) para 15.

163 2003 8 BCLR 891 (CC) paras 13-14.

rights.<sup>164</sup> This recognition that children are a vulnerable group that require special care and protection has been widely accepted in the 20th century.<sup>165</sup>

Children are, in fact, seen as "the most vulnerable major subgroup of the human family"; they are the most negatively affected by mistreatment and are least capable of assuring their own welfare.<sup>166</sup> Over and above this, childhood it is a time of relative social powerlessness. Children have no rights to vote, or to benefits,<sup>167</sup> their decisions, reasoning and practices are not regarded the same status as adults because of the various levels of immaturity.<sup>168</sup> This promotes compliance to adult demands, rules, practices and wishes. This discourse of vulnerability and innocence renders the child incapable of exercising many rights and undermines their equality.<sup>169</sup>

In an attempt to address the unique situation of the child, the United Nations drafted the *Convention of the Rights of the Child*. In the various references found in the preamble to the vulnerability of children, lies much of the rationale behind drafting the Convention:<sup>170</sup>

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance...Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" ...Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration...<sup>171</sup>

This same sentiment can be seen in numerous regional and domestic child rights instruments. South Africa in its own *Children's Charter* that explicitly state that:

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164Orr 2014 *King's Student Law Review* 44, 49-51; Steven and Taylor 2010 *International Journal of Children's Rights* 101-103. Reference to the special protection of the child is made in most mayor child rights instruments, for example, the *Declaration on the Rights of the Child* (1959), recognises that a child, due to their physical and mental immaturity require special care, this is repeated in the preamble of the *Convention of the Rights of the Child* (1990).

165Orr 2014 *King's Student Law Review* 44, the near universal ratification of *Convention of the Rights of the Child* is prove of this.

166UNICEF *State of the World's Children –Special Edition 2*, 6-14; Pare 2003 *The International Journal of Children's Rights* 2-5; Orr 2014 *King's Student Law Review* 50.

167Qvortrup "The Meaning of Child's Standard of Living" 51.

168Meyer 2007 *Childhood* 90.

169UNICEF *State of the World's Children –Special Edition 2*, 6-14; Meyer 2007 *Childhood* 92.

170Grover 2004 *The International Journal of Children's Rights* 263.

171Preamble *Convention on the Rights of the Child*.

Realizing that, all children are created equal and are entitled to basic human rights and freedoms and that all children deserve respect and special care and protection as they develop and grow.

This makes it evident that international and domestic law recognises the inherent vulnerability of a child and that this begs a child sensitive approach by both the state and the courts in all matters affecting the child.

### *3.2.3 Best Interest of the Child Principle*

In both international and the private law sphere, the best interest of the child is a well-established principle.<sup>172</sup> It has been described as "the golden thread that runs through all matters affecting children".<sup>173</sup> It is an important symbolic message to society regarding the vulnerability and importance of the child.<sup>174</sup> The principle has a long history of being used in custody matters,<sup>175</sup> but gained new application within the constitutional dispensation,<sup>176</sup> specifically in determining whether the limitation of a right is justifiable.

It is, however, an almost impossible task to rigidly define the best principle as an international standard, due to the various factors that have to be taken into account.<sup>177</sup> It is considerably easier when determining what is best for a child within a definite context and more specifically within a certain state.<sup>178</sup>

In South Africa, the best interest is elevated to be decisive in any matter concerning a child. Section 28(2) of the *Constitution* determines that:

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172 Ifezue and Rajabali 2013 *The UK Supreme Court Annual Review* 77; Mandlate 2014 *European Law Reform* 320-323.

173 *Kaiser v Chambers* 1969 4 SA 224 (C) para 228G; Clark 2000 *Student Law Review* 3.

174 Ifezue and Rajabali 2013 *The UK Supreme Court Annual Review* 79.

175 Mandlate 2014 *European Law Reform* 320-321; Skelton 2008 *Constitutional Court Review* 359.

176 *S v M*; Skelton 2008 *Constitutional Court Review* 359.

177 Ifezue and Rajabali 2013 *The UK Supreme Court Annual Review* 78; Degol and Dinku 2011 *Mizan Law Review* 323-325 "The challenge of interpreting the 'best interest principle' principle is complicated by many powerful forces at work in the world: poor and conflict torn societies of Africa to the bewildering legal and ethical concern about the technological manipulation of human genes and the human reproductive system."

178 Degol and Dinku 2011 *Mizan Law Review* 324 in this article it is explained that just as values and social norms are not the same everywhere, so the understanding of the notion of the best interest differ. The concept is described as inherently subjective and both social and environmental factors influence inform the choice.

A Child's best interests are of paramount importance in every matter concerning the child.

The Constitutional Court supports this principle by determining that section 28(2) creates an independent right that's application goes beyond custody matters.<sup>179</sup> When read together, section 28(1) and (2) establishes a set of rights that the courts are obliged to enforce.<sup>180</sup>

The principle has nonetheless been criticised as being inherently indeterminable, with little guidance for the proper application. It is exactly to counter this that the courts have attempted on numerous occasions to broaden and clarify the definition. In *S v M* the court, however, held that the power of section 28 can, in fact, be found in the contextual nature and inherent flexibility of the principle.<sup>181</sup>

The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children, and that courts must function in a manner which at all times shows due respect for children's rights.<sup>182</sup>

It is crucial that section 28 be flexible since this is the only way that the individual circumstances of each child will determine their best interest.<sup>183</sup>

A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved.<sup>184</sup> To apply a pre-determined formula for the sake of certainty, irrespective of the

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179 Skelton 2008 *Constitutional Court Review* 335; *S v M* para 14; *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 7 BCLR 713 (CC) para 17.

180 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 2 SACR 445 (CC) at par 54-5; *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 7 BCLR 713 (CC) at para 17, *S v M* para 14.

181 *S v M* par 23.

182 *S v M* par 15.

183 *S v M* par 16.

184 *S v M* par 23.

circumstances, would, in fact, be contrary to the best interests of the child concerned.<sup>185</sup>

Although the interest is described as a right and not leading principle,<sup>186</sup> this does not imply that the direct or indirect impact of the interest on a child will ignore or expel all other considerations.<sup>187</sup> It will be part of the considerations, but will not be the only one.<sup>188</sup> However, the purpose of the principle will be left null and void if its application is too constricted. The dilemma is thus, how to apply the principle in a meaningful way, without unnecessarily limiting or denying other constitutional rights.

The balance is in realising that the best interest can be limited.<sup>189</sup> There cannot just be assumed that section 28 is superior to other constitutional rights. One must always keep in mind that these rights are interdependent.<sup>190</sup> It is the duty of the state to ensure that every child has access to the basic rights found in section 28, but no single constitutional right or limitation can isolate a child from the dangers of a punishing and treacherous environment.<sup>191</sup> What the law can do, is create environments that protect children from abuse and have opportunities that will better their chances on a productive and dignified life. Therefore, the courts and the administrative authority are constitutionally bound to consider the effect of their decisions on the lives of children. It sets a standard that all state actions and decisions

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185 *S v M* par 24.

186 Skelton 2008 *Constitutional Court Review* 335; *S v M* para 14; *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 7 BCLR 713 (CC) para 17.

187 *Sonderup v Tondelli* 2001 1 SA 1171 (CC); 2001 2 BCLR 152 para 27-30.

188 Skelton 2008 *Constitutional Court Review* 360-361.

189 *S v M* par 42: "Take reasonable steps to minimise damage. It continues thus: The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned."

190 Skelton 2008 *Constitutional Court Review* 360 "In the High Court decision in the same matter, the Court had found that children's best interests can never be trumped by the rights of others. The Constitutional Court disagreed, reiterating its approach that constitutional rights are mutually interrelated and interdependent, forming a single constitutional value system. Citing its earlier judgment in *Sonderup*, the Constitutional Court held that section 28(2), like other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in accordance with section 36."

191 Skelton 2008 *Constitutional Court Review* 361.

can be measured against. In *Deijl v Deijl*<sup>192</sup> factors were listed that have to be considered when determining the best interest. The principle begs wide interpretation that includes economic, social, moral and religious conviction, but there must also be a sense of safety, stability and security for the child. As Sachs J<sup>193</sup> explains in his judgement in *S v M*:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sin and traumas of fathers and mothers should not be visited on their children. Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.

Ultimately the derivation can be made that when numerous constitutional rights are weighed against each other, section 28(2) will be the deciding factor.<sup>194</sup> In the words of Cameron J:

In means that the child's interests are "more important than anything else", but not that everything else is unimportant.

This begs the question of how it can be in the best interest of the child to deprive them of life-sustaining grants. If undocumented children constitute a state of exception in which basic socio-economic rights are seemingly absent, can it be said that this is in the best interest of the child is being served? If the choice is between budgetary limitations and the child's desperate need, whose interests are eventually being promoted?

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192 1966 (4) SA 260 (R) para 23.

193 *S v M* par 18.

194 Skelton 2008 *Constitutional Court Review* 360.

### 3.3 General Human Rights

#### 3.3.1 Right to Life

Of all the norms of international law, the right to life must surely rank as the most basic and fundamental, a primordial right which inspires and informs all other rights, from which the latter obtain their *raison d'être* and must take their lead.<sup>195</sup>

The inherent value of human life has long been recognised in religious and philosophical thought.<sup>196</sup> It, however, only became recognised as an international human right in the latter half of the twentieth century. Since then, it has been described as the fundamental right, from which all other rights flow and a prerequisite for the enjoyment of all other rights.<sup>197</sup> Between the fundamental human rights regulated in different national and international documents, a special place is taken by the right to life. Today, the international standard on the right to life is contained in every major international, regional and domestic human rights instrument.<sup>198</sup>

The right to life has been described as both a *jus cogens* norm,<sup>199</sup> as well as a customary norm.<sup>200</sup> The *jus cogens*<sup>201</sup> nature of the right means that the right cannot

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195 Ramcharan *The Right to Life in International Law* xi.

196 Pavel 2012 *Contemporary Readings of Social Justice* 970; Ramcharan *The right to life in international law* 48.

197 Winkler *The Human Right to Water* 94; Xiong *An international law perspective on the protection of human rights* 41; General Assembly Resolution 37/189A Par 1, 6; McCamphill 2010 *King's Student Law Review* 104; Pavel 2012 *Contemporary Readings of Social Justice* 973; Harrington 2012 *Loyola of Los Angeles International and Comparative Law Review* 313.

198 For example the *United Nations Declaration* a 3; *International Covenant on Civil and Political Rights* a 6; *African Charter on Human and People's Rights* a 4; *European Convention on Human Rights* a 2; *American Convention on Human Rights* a 4.

199 Blay "The Nature of International Law" 15-17; *International Court of Justice, Advisory Opinion 1996 Legality of the Threat of Use of Nuclear Weapons* 25; Xiong *An international law perspective on the protection of human rights* 41.

200 Goldsmith and Posner *The Limits of International Law* 23; Parker 1988 *HICLR* 417; Henderson *Understanding International Law* 59 Customary international law is the general, consistent practice of states that; with repetition and adoption; becomes binding law after n period of time. . It consists of the rules that emerge from the experiences of states over time as they try to resolve interstate problems.

201 *Vienna Convention* a 53 "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

be derogated from, even if States are not parties to those instruments that protect the right.<sup>202</sup> Whilst as a customary norm,<sup>203</sup> the right must be upheld as a matter of legal obligation by all States, whether or not party to those instruments which recognise the right.

When one considers the primordial and *jus cogens* character of the right, it is of importance to carefully analyse the dimensions of the rights to life. This is done by analysing the traditional concept of the right to life and the obligations arising from this.

### 3.3.1.1 Challenging the Traditional Concept of the Right to Life

The traditional concept of the right to life, limits it to the prohibition against the arbitrary deprivation of life;<sup>204</sup> a very restrictive ambit that accords the right to life with little more than protection against international or arbitrary deprivation of life by governmental agents or person acting contrary to the law.<sup>205</sup> The traditional concept of the right to life will not serve the aims of this study. Simply existing is equal to living bare life, if the right to life is understood to only mean being protected from arbitrary deprivation, then bare life will also be a fulfilment of the right to life. This study argues that not only is the right to life is intended to imply so much more.

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202 McDougal, Lasswell and Chen *Northwestern University Law Review* 345; Bianchi 2008 *European Journal of International Law* 495 There exists not set list of jus cogens norms. Identification of jus cogens norms is a difficult process with little clarity; this is in fact, one of the principal objections states have against its acceptance. Human rights, however, have "been almost invariably designated as part of it".

203 The South African constitution makes specific recognition of customary international law in section 231. It must be noted though that CIL is subordinate to a provision of the Constitution or an act of parliament and will be trumped if inconsistent with the above mentioned.

204 Winkler *The Human Right to Water* 11; Pavel 2012 *Contemporary Readings of Social Justice* 973; Harrington 2012 *Loyola of Los Angeles International and Comparative Law Review* 318.

205 Harrington 2012 *Loyola of Los Angeles International and Comparative Law Review* 318.

This traditional view of life has long been subject to great critique and is fortunately mostly been abandoned.<sup>206</sup> In 1989, Ramcharan<sup>207</sup> already wrote extensively on the changing conception of the right to life:

The right to life encompasses not merely the protection against intentional or arbitrary deprivation of life, but also places a duty on the part of each government to pursue policies which are designed to ensure access to the means of survival for every individual within its country...the duty of the state to assure satisfaction of the survival requirements of every person within its jurisdiction must be considered an unavoidable component of the right to life in its modern sense.

If the right to life amounts to the protection of an individual from possible threats to their life, it should include the access to the means of survival.<sup>208</sup>

This same stance was repeated more recently by Winkler, when she contended that there are no valid arguments for an interpretation that limits the right to life to simply the safeguard against killing or only the implications of negative obligations for the state. Winkler<sup>209</sup> explains:

However, a more modern interpretation of the interpretation of human rights obligation would apply the above-mentioned tripartite distinction of obligation to respect, protect and to fulfil the right to life. The right to be protected against arbitrary killing by the state is therefore only one component to the right to life-relating to the obligation to respect that right. Apart from that, the State is required to protect and fulfil the right to life. This encompasses the duty to ensure the minimum survival requirements.

The European Commission on Human Rights<sup>210</sup> has also expressed the view that:

the concept that 'everyone's life shall be protected by law' enjoins the State not only to refrain from taking life 'intentionally' but, further, to take appropriate steps to safeguard life.

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206 McCampbell 2010 *Kings Student Law Review* 104; Harrington 2012 *Loyola of Los Angeles International and Comparative Law Review* 318. See *Myrna Mack-Chang v Guatemala* Inter-American Court of Human Rights (ser. C) No. 101 25 November 2013.

207 Ramcharan *The Right to Life in International Law* 6.

208 Ramcharan *The Right to Life in International Law* 7; McCampbell 2010 *Kings Student Law Review* 104; Harrington 2012 *Loyola of Los Angeles International and Comparative Law Review* 313 "the Court has expanded the right to life, and the understanding of what life is, in order to protect individuals and communities as well as to protect the sanctity of life as a holistic concept."

209 Winkler *The Human Right to Water* 11.

210 Decision on Admissibility Application 7154/75 14 D R 31.

Similarly, the Inter-American Commission on Human Rights<sup>211</sup> has held, that:

The essence of the legal obligation incurred by any Government in this area is to strive to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition and education. The priority of the 'rights to survival' and 'basic needs' is a natural consequence of the right to personal security.

One must, therefore, acknowledge that the right to life entails more than mere protection from being killed. It contains a component regarding the basic requirements necessary for sustaining life.<sup>212</sup> Threats on human life are manifold, with the effects of poverty and famine being phenomenal. One cannot ignore that the loss on account of hunger and disease, cause more death than any other cause. When considering that immense impact of poverty on survival, it would simply not make sense that survival requirements are not a part of the right to life.

This of course, challenges the traditional concept of the obligations that rests on the state regarding the right to life. It is evident that is not just an obligation to protect against arbitrary killings; it is much more complex than that. The obligation of the state consists of both positive and negative component.<sup>213</sup> A negative obligation obliges the state to refrain from certain actions, whilst a positive obligation will oblige that state to take certain action to realise the right.<sup>214</sup> The prohibition against capital punishment is an example of the negative obligation on the state with regards to the right to life,<sup>215</sup> the state must refrain from taking life, whilst the access to health care will be an example of the positive obligation stemming from the right to life.

The ambit of this study lends itself to the positive obligations that rest on the state for the fulfilment of the right to life. The positive obligation requires of states to devote

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211 Inter-American Commission on Human Rights *Ten Years of Activities 1971-1981* 322.

212 Winkler *The Human Right to Water* 95; Xiong *An International Law Perspective on the Protection of Human Rights* 41; Harrington 2012 *Loyola of Los Angeles International and Comparative Law Review* 319.

213 Harpur 2007 *Notre Dame Australian Law Review* 95; Harrington 2012 *Loyola of Los Angeles International and Comparative Law Review* 319; McCampPhill 2010 *Kings Student Law Review* 104.

214 Harpur 2007 *Notre Dame Australian Law Review* 96; McCampPhill 2010 *Kings Student Law Review* 104.

215 Harrington 2012 *Loyola of Los Angeles International and Comparative Law Review* 334; Harpur 2007 *Notre Dame Australian Law Review* 96; McCampPhill 2010 *Kings Student Law Review* 104.

certain resources to ensure the fulfilment of the right. To combat the loss of life, there rests a positive obligation on the state to devote life sustaining resources to people in need. It is in this rationale that the interrelatedness of the right to life and access to socio-economic rights are found:

It has been stated that the right to life is the most important human right, as the realisation of all other rights depends on it and there would become meaningless without the rights to life. This holds true for the realisation of civil and political rights as well as of economic, social and cultural rights, underlining the interdependence of both set of rights. The fundamental importance of the right to life for the realisation of all other human rights is endangered not only when the State does not respect the right to life by killing someone, but also when survival requirements are not met. If an individual dies to famine, lack of medical attention or lack of access to safe drinking water, he or she cannot realise any of his or her other human rights. Accordingly, positive obligations aiming to ensure survival requirements are equally important for the realisation of the rights to life.<sup>216</sup>

This is supported by various international and regional instruments, for example, article 2 of the *International Convention on Civil and Political Rights*, obliges the state to both respect and ensure the rights in the covenant. The Inter- American Commission on Human Rights<sup>217</sup> has recently also ruled that:

the restrictive approach to the right to life is inadmissible ... (people are) not to be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur.

It can, therefore, be submitted that the right to life should be interpreted in broad terms, and includes both positive and negative obligations, that include a component of survival requirements. The right to life, places an obligation on states to protect human life from unwarranted deprivation.<sup>218</sup>

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216 Winkler *The Human Right to Water* 95.

217 Inter-American Commission on Human Rights 2011 <https://www.cidh.oas.org/countryrep/Seguridad.eng/CitizenSecurity.IV.htm>.

218 Harrington 2012 *Loyola of Los Angeles International and Comparative Law Review* 334.

### 3.3.1.2 Right to Life of the Child

Considering the quintessential vulnerabilities of childhood, the need for protection of the right to life is especially true in the case of the child.<sup>219</sup> Article 6 of the *Convention on the Rights of the Child*<sup>220</sup> confirms this:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

It is no mere coincidence that like most other human rights instruments, the right to life appears at the beginning of the *Convention*. The position in the text reflects the desire of the drafters that the right to life be "listed as a priority before other rights of the child".<sup>221</sup> It is also the only right in the convention that refers to inherency of a right, which confirms its primacy, it does not rely on the operation of law, but rather on the mere fact that one is part of humanity.

The greatest difference between the right to life as found in the *Convention*, in comparison to the right in other instruments, is the expressed reference to survival and development. During the second reading of the Convention, the World Health Organization<sup>222</sup> explained the meaning of 'survival' as used in article 6:

'Survival' includes growth monitoring, oral rehydration and disease control, breastfeeding, immunization, child spacing, adequate nutritious food and female literacy. It is clear from this enumeration of desiderata that 'survival' is concerned with those minimum requirements or basic needs which must be met to sustain human life or, perhaps more accurately, to avoid death from preventable causes. To this list, then, might be added safe drinking water and adequate shelter, clothing and sanitation facilities.

The exact meaning of development seemingly has less clarity and at times seems to overlap with survival. In principle 2 of the *Declaration of the Rights of the Child* (1959) described the development of the child as:

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219 Harrington 2012 *Loyola of Los Angeles International and Comparative Law Review* 325.

220 Hereafter referred to as the *Convention*.

221 UN Doc E/CN. 4/1988/28 para 21.

222 UN Doc A/RES/44/25 para 88.

The child ... shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity...

The *Declaration of the Right to Development* (1986)<sup>223</sup> elaborated and attempted to clarify development as:

an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development.

In conjunction with this, one finds that the *Convention* refers to the development of the child as the product of the fulfilment of the other rights recognised in the *Convention*.<sup>224</sup> Irrespective of the open-ended nature of development, there is simply no denying that the *Convention* places both a negative and positive obligation on the state to ensure the right to survival and development.<sup>225</sup> There rests an obligation on state parties to protect the child against the loss of life. The task is especially important in countries like South Africa where many children are subjected to extreme poverty, do not live in regular familial settings and survive on the margins of societal inclusion and acceptance. On top of this discriminatory law and policies cause that undocumented children are unable to avail themselves of social or legal protections.<sup>226</sup> States must ensure access to the ingredients necessary to sustain life and promote the development of the child's potential to live a full life. The simplest route to this is through access to their socio-economic rights and developing inclusive socio-economic policies.

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223 Article 2(1).

224 Preamble of the *Convention*.

225 For example a positive obligation will be the obligation to ensure access to basic nutrition for the whilst a negative obligation would be the refrain.

226 Section Chapter 4.3.

### 3.3.2 Right to Dignity

Human dignity has become one of the beacons of human rights and comparative constitutionalism.<sup>227</sup> It is enshrined in both international and domestic human rights instruments and is central in constitutions of many countries. The *United Nations Declaration of Human Rights* recognises in its preamble the inherent dignity and worth of all human beings and that these rights are given to humanity without any entitlements or prerequisites.<sup>228</sup> In South Africa, dignity is being used as supreme value and guide to interpretation.<sup>229</sup> The *Constitution* guarantees equal rights and dignity for 'all people' in South Africa.<sup>230</sup> It sets a standard that all other rights and more specifically, their fulfilment, have to be measured against.<sup>231</sup>

Even considering all of the aforementioned, the question of what exactly constitutes human dignity still remains. What are the limitations and substance of this sometimes abstract concept?

#### 3.3.2.1 Defining Human Dignity

The origin of the philosophical idea of human dignity can be found in the ancient civilizations,<sup>232</sup> whilst the modern branch of an inherent dignity can be greatly credited

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227 Botha 2009 *Stell LR* 171 "Dignity is invoked as a supreme value, an interpretive *Leitmotiv*, a basis for the limitation of rights and freedoms, and a guide to the principal resolution of constitutional value conflicts."

228 Novak "On Human Dignity" 276; Smith "Dignity as Socially Constructed Value" 178.

229 Botha 2009 *Stell LR* 172.

230 Section 7 of the *Constitution*.

231 Botha 2009 *Stell LR* 171.

232 Bayertz *Sanctity of Life and Human Dignity* 73; Karenga *Maat, the Moral Ideal in Ancient Egypt* 317 "ancient peoples, like the Egyptians, Greeks, Persians and Babylonians showed interest and concern for the value of human life." Your worth was greatly determined by your social class. The concept developed in time, influenced by philosophy and theology. Schroeder 2012 *Ethical Theory and Moral Practice* 324 „The concept of dignity is deeply imbued with religious significance. According to the Koran (1946 translation: Chapter al-Isra, verse 70; Shura, verse 7; Luqman, verse 10), everything created is noble and has dignity. According to a Buddhist commentator, "the source of human dignity in Buddhism lies...in the...infinite capacity of human nature for participation in goodness" . According to the late Pope John Paul II (1995): Man, living man, is the glory of God (Gloria Dei vivens homo)...Man has been given a sublime dignity, based on the intimate bond which unites him to his Creator: in man there shines forth a reflection of God himself"; Pele "Understanding Human Dignity Redux" 56.

to 17th century secular philosophy of the philosopher Immanuel Kant.<sup>233</sup> The concept only became a part of the legal system in the 20<sup>th</sup> century,<sup>234</sup> but it is still an almost impossible task to give it a solid ideological definition, because there is no explicit description in international instruments or national legislation.<sup>235</sup> This vagueness in defining human dignity, especially in the relevance to the legal system, has been the subject of harsh critique.<sup>236</sup>

Kant first introduced the notion of dignity in *Groundworks of the Metaphysics of Morals*,<sup>237</sup> where he describes human dignity as:

A Human being regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price; for as a person... he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other beings in the world. He can measure himself with every other being of this kind and value himself on a footing equal to them. Humanity in his person is the object of the respect which he can demand from every other human being.

Kant, therefore, contends that dignity is obtained when people are treated as ends in themselves and not simply as a means to an end.<sup>238</sup> Humans should never be used in

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233 Riley 2013 *Amsterdam Law Forum* 92.

234 Grant 2007 *Human Rights Law Review* 302; Rosen *Dignity: It's History and Meaning* 2 "Surprisingly, the term dignity was not part of the language of law or jurisprudence before the 20th century. It was first mentioned in the Constitution of the Weimar Republic in 1919, followed by the Portuguese Constitution in 1933 and the Irish Constitution in 1937. However, it was only the concept's inclusion in international legal documents which marked its ascendancy...starting with the Universal Declaration of Human Rights in 1948."

235 Botha 2009 *Stell LR* 182 "Dignity is notoriously difficult to define. Some constitutional lawyers have given up on this quest, declaring that the meaning of dignity can only be determined on a case-to-case basis, or that dignity can only be defined negatively, with reference to past instances of its violation."

236 Harris *Dignity and Vulnerability: Strength and Quality of Character* 83; Harees *The Mirage of Dignity* 89; Kirchhoff *Human Dignity in Contemporary Ethics* 24. There are also arguments amongst academics that the power of dignity lies in its vagueness. Schroeder 2012 *Ethical Theory and Moral Practice* "When the South African President, Jan Christiaan Smuts (1870–1950), suggested the opening lines for the Universal Declaration of Human Rights in 1945, he made reference to "fundamental human rights" and "the sanctity and ultimate value of human personality".'

237 Allison *Kant's Groundwork for the Metaphysics of Morals* 217.

238 Riley 2013 *Amsterdam Law Forum* 92; Botha 2009 *Stell LR* 183.

a purely instrumental way to achieve an aim, to do this is to deny a human their capacity to shape themselves and their environment.<sup>239</sup> Dürig<sup>240</sup> described this:

Human dignity as such is affected when a concrete human being is reduced to an object, to a mere means, to a dispensable quantity.[Violations of dignity involve] the degradation of the persons to a thing, which can, in its entirety, be grasped, disposed of, registered, brainwashed, replaced, used and expelled.

When one recognises this, you are forced to recognise the human behind the human right.

Riley<sup>241</sup> supports the development of human centred thinking in regards to dignity, when he describes dignity as the right where value and fact coincide:

... the embodied human being and the person recognised by law ... it is related to metaphysical concepts that justify the inherent status of the human on the basis of a relationship with humanity.

Arendt's understanding of dignity is of particular interest to this study, especially considering that the focus of her work was on the application of human rights on, specifically, the stateless. It has been said that rather than claiming Arendt developed a comprehensive theory human rights, she was in fact, more concerned with "the problems associated with the failures of the rights of man to secure human dignity".<sup>242</sup>

Arendt elaborates on dignity as defined by Kant. She held that dignity is the only universal human right and can only be maintained through the guarantee of participation in the political community.<sup>243</sup> To be treated as an end in itself, a person must be part of a political community which regards him as such. Helis<sup>244</sup> explains this:

Being alive as a human being rather than merely a body requires one to act, speak and engage with others. Humans thus require a public space in which they can

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239 Botha 2009 *Stell LR* 183.

240 Dürig *Archiv des Öffentlichen Rechts* 125.

241 Riley 2013 *Amsterdam Law Forum* 94.

242 Helis 2008 *Journal of Politics and Law* 73.

243 Helis 2008 *Journal of Politics and Law* 74; Birmingham *Hannah Arendt and Human Rights* 56.

244 Helis 2008 *Journal of Politics and Law* 73.

develop their full potential through politics, "the activity of conducting the affairs of a community by means of speech" As Arendt describes it: In acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world, while their physical identities appear without any activity of their own in the unique shape of the body and sound of the voice.

To respect the inherent dignity of every person implies that no individual will be viewed or treated as a mere object or instrument, subject to the control of others.<sup>245</sup> Dignity is obtained when a person is treated as both an individual and as part of the political community. This leads to a deeper analysis of the human and the ultimate ideal of distributive justice and social equality. It is an impossible argument to say that a person, whose basic needs are not fulfilled, is living a life of dignity and inherent worth.

In the previous chapter, Agamben's description of bare life is given as a life limited to little more than physical, instinctual and biological existence. This study, therefore, argues that a life stripped of dignity, in which the only concern is the fulfilment of basic needs, one is living bare life.

### 3.2.2.2 Dignity within the South African Constitutional Dispensation

Dignity has become a central value in the constitutions of many countries that have emerged from widespread discrimination,<sup>246</sup> for example, Germany and South Africa, which have both suffered under massive human rights violations. Within the South African Constitutional Dispensation, dignity has become a supreme value<sup>247</sup> and has been explored to some extent in case law. It plays a detrimental role in establishing boundaries of constitutionally protected rights and in the balancing of conflicting

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245 Schachter 1983 *AJIL* 851; Badawi 2002 <http://news.bbc.co.uk/2/hi/talkingpoint/forum/1673034.stm>, the importance of basic needs for a life of dignity was highlighted by the United Nations former High Commissioner of Human Rights, Mary Robinson, when she identified "extreme poverty" as the biggest human rights violation.

246 Botha 2009 *Stell LR* 175 "This is particularly the case in countries emerging from authoritarian, oppressive, colonial and/or racist past. The German Basic Law of 1949 ("the Basic Law"), the Constitutions of Greece (1975), Portugal (1976), Spain (1978), Namibia (1990) and Poland (1997) all invoke the fundamental dignity of the human person in signalling a break with the past and in seeking to prevent a reoccurrence of past horrors."

247 Section 1a of the *Constitution* states that the Republic is founded on the values of human dignity, equality and freedom.

interests.<sup>248</sup> In *S v Makwanyane* 1995 BCLR 665 (CC), the court held that dignity and the rights to are the "the most important of all human rights, and the source of all other personal rights".<sup>249</sup>

Botha<sup>250</sup> describes the fundamental role dignity plays within South African law:

Human dignity has presented constitutional interpreters in South Africa with a means of negotiating some of the contradictions lying at the heart of the constitutional order. The notion of inherent human dignity invokes a universal ideal which transcends national boundaries, yet resonates closely with the anti-apartheid struggle. Its entrenchment as an individual right and a founding value signals a decisive break with South Africa's racist, sexist and authoritarian past, yet establishes a measure of continuity with the protection afforded by common law to the individual's reputation and dignitas.

Consistent with the dignity as such a supreme value, it is referred to five times within the *Constitution*: In the preamble where dignity is identified as one of the founding values of the Republic;<sup>251</sup> in section 7(2)<sup>252</sup> dignity is affirmed as a democratic value; section 36(1),<sup>253</sup> which contains the limitation clause, determines that human rights may only be limited to the extent that it is justifiable within a democratic society based on dignity. In section 39(1)<sup>254</sup> dignity is again mentioned within the context of the guidelines for interpretation of the Bill of Rights and lastly in section 35(2)(e)<sup>255</sup> with reference to the conditions of detainment.

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248 Botha 2009 *Stell LR* 176.

249 *S v Makwanyane* 1995 BCLR 665 (CC) para 114.

250 Botha 2009 *Stell LR* 200-201.

251 Preamble of the Constitution "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".

252 Section 7(1) of the *Constitution* "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

253 Section 36(1) of the *Constitution* "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".

254 Section 39(1) of the *Constitution* "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.

255 Section 35(2) of the *Constitution* "Everyone who is detained, including every sentenced prisoner, has the right— (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

The *Constitution* grants dignity to all persons and it is, therefore, uncontroversial that dignity then vests in every human person regardless of their legal status. Included in this are illegal migrants finding themselves within the South African territory.

The *Constitution* also confers an enforceable right to human dignity, and it has been evoked in numerous cases, especially as a method of interpretation.<sup>256</sup> Here one can see the influence of the Kantian idea of treating an individual as more than a mere object.<sup>257</sup> Dignity has been used by the court mostly in a supplementary manner; in this regard, the court held that when adjudicating a constitutional issue and the primary constitutional breach is of a more specific right than dignity, the court will rather focus on that right.<sup>258</sup> This enforces the idea that dignity should be treated as an interpretive tool, used as a guideline when determining a constitutional infringement. Dignity is more than a right, it a fundamental value on which the promotion, protection and fulfilment of all other rights should be built.

In its interpretation of socio-economic rights, specifically, the Constitutional Court regularly evokes dignity as a central value.<sup>259</sup> In *Government of the Republic of South Africa v Grootboom*, Yacoob J<sup>260</sup> stated that:

It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.

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256 *President of the Republic of South Africa v Hugo* 1997 4 SA I (CC), 1997 6 BCLR 708 (CC) para 41; *Harksen v Lane* 1998 1 SA 300 (CC), 1997 11 BCLR 1489 (CC) paras 46, 50, 51, 53, 91, 92. Si *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC); *Bernstein v Bester* 1996 2 SA 751 (CC), 1996 4 BCLR 449 (CC) paras 65-67; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), 1998 12 BCLR 1517 (CC) paras 30,120; *August v Electoral Commission* 1999 3 SA I (CC), 1999 4 BCLR 363 (CC) para 1.

257 Especially prominent in *S v Williams* 1995 3 SA 632 (CC), 1995 7 BCLR 861 (CC) par 28; *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 60.

258 Botha 2009 *Stell LR* 198; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC), 2000 8 BCLR 837 (CC) par 36.

259 Liebenberg 2005 *SAJHR* 3.

260 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 83 hereafter referred to as the *Grootboom* case.

This correlation between human dignity and socio-economic rights is going to be explained by the use of Liebenberg's<sup>261</sup> work. The access to socio-economic rights for the fulfilment of the basic needs of a child is of immeasurable worth, not only for their survival but also for the development of their potential to shape their own lives and to be an active part of society. The worth of socio-economic rights does not lay in their use as a commodity; the worth is rather in what it offers a human life, the possibility of doing and to simply be.<sup>262</sup> Specifically, the exclusion of social assistance is:

Like to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus cast in the role of supplicants.<sup>263</sup>

The denial thereof limits various human skills, including the ability to realise future plans and to effectively form part of the political, economic and social life. It is for exactly this reason that the crucial role that socio-economic rights play for human dignity cannot be denied. It is the responsibility of the state to consider human dignity in all decisions concerning basic rights, which implies more responsibilities.

It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.<sup>264</sup>

The Constitutional Court<sup>265</sup> has described unfair discrimination, as in the case of the unequal distribution of state funding, as 'unequal treatment that impairs human dignity, or affects a person in a comparably serious manner'. The correlation between social grants and a life of dignity can be seen in this. Seleone<sup>266</sup> states this irrevocably when he argues that the right to life cannot be attained without the satisfaction of basic needs, and without this, there can be no mention of a life of dignity.

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261 Liebenberg 2005 *SAJHR* 141.

262 Liebenberg 2005 *SAJHR* 140-141.

263 *City of Chicago v Shalala*, 189 F.3d 598 (7th Cir 1999).

264 *Grootboom* case para 38.

265 *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 33.

266 Seleone *Socio-Economic Rights in the South African Constitution: Theory and Practice* 118.

### 3.2.2.3 Dignity and the Undocumented Child

Dignity can therefore only be obtained when all individuals and groups feel self-worth. This would imply that every undocumented child must feel empowered and have both physical and psychological integrity. In the situation in which children are denied access to basic rights, there can be no reference to dignity. Helis<sup>267</sup> described it as:

Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.

One must keep in mind that all rights are interrelated and dignity implies equal, non-discriminatory dignity for all, which is a very important concept within the framework of this study. Botes<sup>268</sup> elaborates on this idea of equal dignity:

The idea that no one is to be treated as a mere object shades naturally and almost imperceptibly into the notion of equal dignity. Women are not to be treated as perpetual minors on account of their gender, gays and lesbians are not to be treated as second-class citizens or as being incapable of forming meaningful intimate relationships, non-citizens are not to be reduced to the role of supplicants, and no-one is to be treated as incapable of autonomous choice or of administering their own affairs by virtue of irrelevant characteristics like race, religion or marital status.

Equal dignity for a child specifically means that all children, irrespective of any differentiation should be awarded the same basic goods that will grant them dignity. We cannot grant them with minor attempts at dignity or give them sort of dignified lives. As long as there are laws that do not recognize the undocumented child as part of the South African society and gives them access to the necessary resources for their survival and development, one cannot claim that these children live a life of dignity, what more to say about equal dignity.

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267 Helis 2008 *Journal of Politics and Law* 76.  
268 Botha 2009 *Stell LR* 171.

### 3.2.3 Equality and Non-Discrimination

The drafters of the United Nations Declaration held the destruction of discrimination as one of the first and most important<sup>269</sup> principles that needed to be adopted.<sup>270</sup> Discrimination between people was described as "one of the gravest things that had ever happened".<sup>271</sup> It is for this reason that non-discrimination was viewed as a principle of vital importance and is viewed today as part of the customary international law,<sup>272</sup> to such an extent that it has become almost mandatory to include some form of prohibition against discrimination in human rights treaties.<sup>273</sup>

This central norm is found in a comprehensive form in article 2 of the *United Nations Declaration*:<sup>274</sup>

#### Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

From the inclusion of "such as" and "other status" it can be inferred that the list is not exhaustive and most equality clauses are adaptations of this text. The Convention on the Rights of the Child, for example, recognises equal rights<sup>275</sup> and then continues to

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269 UN Doc E/CN.4/AC.1/SR.2 7.

270 Morsink *The Universal Declaration of Human Rights* 31, 93; UN Doc E/CN.4/AC.1/SR.3 3; UN Doc E/CN.4/AC.1/SR.5 6; UN Doc E/CN.4/AC.1/SR.5 7.

271 E/CN.4/AC.1/SR.3 3.

272 Shelton *Advanced Introduction to International Human Rights Law* 134; Doebbler *The Principle of Non-Discrimination in International Law* 11, 15.

273 Cohen 1997 *William & Mary Journal of Women and the Law* 36; The *Convention of the Rights of the Child* contains the principle in both the preamble and article 2. The *International Convention of Economic, Social and Cultural Rights* also prohibits any discrimination but qualified this in article 2(3). The *African Charter* also affirms the prohibition of discrimination in a 2 and equality before the law in a 3. The Charter contains a further provision that there shall be no discrimination of one group of people by another, including respect to economic, social and cultural development.

274 The principle is mentioned twice in the *United Nations Declaration*, first, in article 2<sup>274</sup> and then again in article 7,<sup>274</sup> which states that all are equal before the law without "any discrimination".

275 Preamble *Convention on the Rights of the Child*.

proclaim that there may be no distinction on grounds of the exact same list found in article 2 of the United Nations Declaration.<sup>276</sup>

The notion of equal rights and non-discrimination also lies at the root of both the theories of Arendt and Agamben. Rights, although claimed to be equal, have always been linked to the reigning social order and the power of the state.<sup>277</sup> Arendt's experiences emphasised that equal rights had become the privilege of those that find themselves within the scope of the law.<sup>278</sup> The power to make state policies discriminatory, whether justifiable or not, is in the hands of the state and with this power comes the ability to create Agamben's state of exception.<sup>279</sup> Although equal rights are part of all human rights instruments, it is not infallible right.

In fact, one does not have to search very far to find examples of *Homo Sacer*<sup>280</sup> all over the world. People whom, due to numerous factors do not enjoy equal rights and more than that, are subjected to policies that specifically exclude them from having access to life-sustaining social assistance. In the modern world our states are using discriminatory laws and policies to create the *Homo Sacer*.<sup>281</sup> This is specifically apparent when people find themselves without effective nationality.

### 3.2.3.1 Nationality as Discriminatory Ground

National origin is one of the grounds mentioned in article 2 of the *United Nations Declaration*, on which discrimination is not permitted. The importance of including "national origin" is illustrated clearly in a note that the Preparatory Commission for the International Refugee Organisation<sup>282</sup> submitted during the drafting process:

Discrimination is frequently based, not only on the grounds of sex, religion, race or political opinion but also on the grounds of nationality or lack of nationality. Such discrimination may be either between nationals and aliens or between different classes of aliens. It would, therefore, be desirable that the following principles be

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276 Preamble *Convention on the Rights of the Child*.

277 See section 2.3 above.

278 See section 2.3 above.

279 See section 2.4.1 above.

280 See section 2.4.3 above.

281 See section 2.4.3 above.

282 UN Doc E/CN.4/41 1947 para 3.

embodied in the Declaration....There shall, in principle, be no discrimination on the basis of nationality of lack of nationality.

Although there is no specific mention of nationality, as opposed to national origin, in the prescribed list of prohibition grounds, the Human Rights Committee held in *Gueye v France*,<sup>283</sup> discrimination on grounds of nationality forms part of "other status". This was supported in the case of *B.M.S. v Australia*<sup>284</sup> when the court found the distinctions that adversely affect a group of non-citizens as a violation of the *United Nations Declaration*. The Human Rights Commission made it clear that in cases concerning the discrimination of non-nationals, the defences of "mere administrative inconvenience" and financial conditions will not suffice as justification.<sup>285</sup>

Yet, one need not search far to see examples of nationality and citizenship being used as a ground for discrimination, either by die state of citizens or the state. The unprecedented numbers of migrants fleeing to Europa from Syria and North Africa is a tragic example of this.<sup>286</sup>

### 3.2.3.2 The Right to Equality and Non-Discrimination: a South African Perspective

When one keeps South Africa's history of discrimination in mind, you realize the crucial role that equal rights have in the constitutional dispensation. Equality, in fact, is one of the fundamental values on which the democracy is built. As the Constitutional Court stated in *Prinsloo v Van der Linde*:<sup>287</sup>

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283 UN Doc CCPR/C/35/D/196/1985 para 136.

284 UN Doc CERD/C/54/D/8/1996 para 28.

285 Shelton *Advanced Introduction to International Human Rights Law* 138; "This same stance can be seen in the judgement of regional courts. In the case of *UIDH, FIDH and Others v Angola* the court found the expulsions of people on various grounds including nationality as a violations of human rights. Furthermore the court found that: "A government action specially directed at a specific national, racial, ethnic or religious group is generally qualified as discriminatory in the sense that none of its characteristics has any legal basis."

286 At the time of writing, especially the Syrian Refugee crisis is one of the biggest international human rights issues that the world, and especially Europa has to face. Kingsley 2015 <http://www.theguardian.com/world/2015/sep/04/syrian-refugee-crisis-why-has-it-become-so-bad>; Fallows 2015 <http://www.theatlantic.com/notes/all/2015/08/the-global-refugee-crisis/402718/>; Sobczyk 2015://www.wsj.com/articles/europes-migration-crisis-refugees-move-faster-than-the-eu-1443127840.

287 *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 31.

Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them... [U]nfair discrimination... principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

Section 9 of the *Bill of Rights*<sup>288</sup> contains the equality clause, which provides the standards within which equality must be implemented:

- (i) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (ii) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (iii) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (iv) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (v) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

There are numerous cases in which the Constitutional Court has dealt with the provisions of section 9. For example, in *Harksen v Lane*,<sup>289</sup> the court provided a framework for the application of these provisions. It was held that the court must apply section 9(1) to determine whether a measure differentiates between groups or individuals and whether this is rationally justifiable with regards to the governmental purpose. If it seems that the measure is justifiable according to section 9(1), the court must then determine whether section 9(2)<sup>290</sup> or 9(3) has been breached.<sup>291</sup>

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288 Section 9 of the *Constitution*.

289 *Harksen v Lane* 1998 1 SA 1 (CC) para 42, hereafter *Harksen case*.

290 Grant 2007 *Human Rights Law Review* 316 "Section 9(2) was considered by the Constitutional Court for the first time in 2005 in *Van Heerden*. The drafting of section 9(2) reflects a conception of equality that encompasses corrective or remedial measures as integral to the requirements of equality. This interpretation was unequivocally endorsed in *Van Heerden*, the Court stating that '[r]emedial measures are not a derogation from, but a substantive and composite part of the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole" The equality clause thus makes no assumption of equality but concretises the constitutional

The provisions found in section 9(3), which relates to state policy, are the most relevant to this study and consequently feature the most in equality jurisprudence.<sup>292</sup> Section 9(3) consists of a two stage analysis in which the court must firstly determine whether there is discrimination and then whether this discrimination is fair. The section also provides a list of grounds on which there may not be discriminated on, preceded by the word "including" which is read to imply that grounds are not exclusive. When confronted with a ground that does not form part of the list, for example citizenship, the court must determine whether such discrimination 'is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings'.<sup>293</sup>

The situation of discrimination on specifically the grounds of citizenship was addressed in the case of *Larbi-Odam v Member of the Executive Council for Education(North West Province)*.<sup>294</sup> The court took various factors into account to determine the justifiability of discrimination. These included the minority status of non-citizens, their lack of control over their citizenship and the history of the disadvantage of black South Africans due to lack of citizenship. The court held that differentiation of the ground of citizenship has the potential to impair fundamental human dignity.

Even considering this, case law has shown that the court will base its determination of the experience of the victims in each specific situation.<sup>295</sup> The court, therefore, has a situation sensitive approach which will focus on the injuries as experienced by different groups,<sup>296</sup> this allows the court to build a picture of the whole context of a complaint.

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commitment to the achievement of equality by explicitly recognising the need for remedial measures."

291 *Harksen* case paras 44-45.

292 Grant 2007 *Human Rights Law Review* 316; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice* 1998 12 BCLR 1517 (CC) paras 122-123.

293 *Harksen* case para 43.

294 *Larbi-Odam v Member of the Executive Council for Education(North West Province)* 1998 1 SA 745 (CC).

295 *Harksen* case par 50.

296 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice* 1998 12 BCLR 1517 (CC) para 126.

National Coalition listed three factors which the court must consider when doing an impact review:

- (i) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage.
- (ii) the nature of the provision or power and the purpose sought to be achieved by it.
- (iii) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.<sup>297</sup>

When considering the criteria given in National Coalition for the determination of unfair discrimination, one cannot deny the merit of any complaint that undocumented children might ever bring. This will be tested in the following chapter when the access of the undocumented child to rights is investigated.

### 3.2.3.3 Discrimination in the Social Assistance of Undocumented Children

The Committee on the Rights of the Child has emphasised that the guarantee of non-discrimination in the Convention on the Rights of the Child applies to all children within a state's jurisdiction and have questioned the justifiability of policies which discriminates against undocumented children.<sup>298</sup>

Internationally there is has been much concern expressed at discrimination against undocumented children.<sup>299</sup> The discrimination is most apparent in the access to services like social assistance, health and education.<sup>300</sup> Social security laws and policies are in place that is subject to such strict criteria, that undocumented children are effectively deprived of it, health care is rarely expanded further that emergency

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297 As quoted in Grant 2007 *Human Rights Law Review* 319.

298 UN Doc CRC/C/15/Add.178 para 6.

299 UN Doc CRC/C/15/Add.243 para 21; UN Doc CRC/C/15/Add.183 para 24; UN Doc CRC/C/15/Add.178 para 6; UN Doc CRC/C/15/Add.158 para 20-21; UN Doc CRC/C/15/Add.127 para 21; UN Doc CRC/C/15/Add.149 para 33; UN Doc CRC/C/15/Add.265 para 18.

300 Vandenhoele *Non-discrimination and equality in the view of the UN human rights treaty bodies* 177.

care<sup>301</sup> and if any access is granted to the education system it restricted to the most basic schooling.<sup>302</sup>

Pelton<sup>303</sup> confirms this when he states that there is a problem with categorization in the context of state policy, practice and community obligations, in the light of article 2 and article 27<sup>304</sup> of the United Nations Declaration. He explains that the categorization can specifically be found in state policy concerning social assistance. There is a belief amongst citizens, which is unfortunately in many cases justified, that helping those in need result in individuals not in need, benefitting from the system and, therefore, living off the work of others. Discriminatory state policy serves to strengthen this prejudice. Pelton<sup>305</sup> highlights that another concern is that a wide-reaching welfare system will encourage freeloading and fraud. A spirit of dependency must be avoided at all cost. The problem with this rationale is that these concerns are rarely addressed without hurting the needy and leaving the most vulnerable, many times children, deprived of their most basic needs.

Children have a special claim on society.<sup>306</sup> They are dependent on adults for their sustenance and development and are recognized as innocent victims of poverty, by virtue of the fact they had no control over what families or situation they would be born into. Moreover, they have no obligations, as yet, to contribute to the community. However, being members of the community, they are entitled to its benefits. In no sense can their claims on the commonwealth be regarded as fraudulent, or can they be suspected of freeloading.<sup>307</sup>

When considering Pelton's argument as well as the submissions of The Committee on the Rights of the Child, it is difficult to justify any social welfare system that discriminates against children due to any category like nationality. The issue in most

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301 UN Doc CRC/C/15/Add.101 para 11.

302 UN Doc CRC/C/15/Add.195 para 36-37.

303 Pelton "Community Obligations and the Categorization of Children" 143-148.

304 The provisions of the article will be discussed below, for purpose of this section it is only important to note that the article grants every child the right to a standard of living adequate for physical, mental, spiritual, moral and social development.

305 Pelton "Community Obligations and the Categorization of Children" 145-148.

306 See section 3.2.2 above.

307 Pelton "Community Obligations and the Categorization of Children" 144.

cases are not the children, but their parents, whom society perceive as being lazy, immoral, illegal, unwelcome, strangers etc. Assisting the child is impossible without rewarding the undeserving parent. This would encourage freeloading. Therefore, although all children are worthy of the welfare help, the criteria for obtaining this help is set higher to exclude those parents suspected to be unworthy. But should the worthiness of receiving social help not rely solely on the criteria of simply being a child in need? By attempting to control the behaviour of parents, discriminatory policies are unjustifiably hurting children. An example of this can be seen in the child grant criteria found in South Africa, which requires a 13 digit ID number.<sup>308</sup> Although it counters dependency on the social system, one cannot simply disregard the existence and needs of all the children that were born in a situation that the criteria discredit. Children are born into welfare, by no fault of their own.

The Committee on the Rights of the Child emphasised that measures that need to be taken include the strengthening of administrative and judicial measures to prevent and eliminate de facto discrimination,<sup>309</sup> adoption of an effective legal framework for the protection of the rights of undocumented children<sup>310</sup> and the prosecution of those responsible for discrimination.<sup>311</sup> It boils down to the responsibility of state parties to establish social policies and programs that rely on one simple criteria: being a child.

### **3.3 Conclusion**

The implementation and interpretation of the rights of the child should always be done within the parameters of the general principles of children's rights. This means that children should not be seen as merely an extension of their parents or as miniature adults, but rather as unique human beings still immature in all dimensions of development.<sup>312</sup> Children should be treated as a vulnerable group that require special care and protection. All matters affecting them should be decided without

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308 Department of Social Development 2015 <http://www.gov.za/services/child-care-social-benefits/child-support-grant>.

309 CRC/C/15/Add.226, para 24.

310 CRC/C/15/Add.212, para 49.

311 CRC/C/15/Add.170 para 69.

312 See section 3.2.

discrimination and in their best interest with due consideration of their rights to life, development and survival.<sup>313</sup>

Concerning their right to life, there are certain basic submissions made in this study, firstly that the right to life is closely interrelated with other rights and as a primordial right should inspire and influence all others rights. For example, the right adequate standard of living should take its cue from the norm of the right to life.<sup>314</sup> Secondly, that the traditional concept of the right to life has long been abandoned and must now be understood to include survival requirement with both positive and negative obligations.<sup>315</sup> The impact of this on the undocumented child is that the State must ensure their access to life sustaining factors and promote the development of their potential to live full lives.<sup>316</sup> This relates to the concept of bare life, if the undocumented child is barely fulfilling their basic needs, living bare life, their right to life is not being fulfilled.

Human dignity is intrinsically linked to the right to life. Both Arendt and Kant held that dignity means to be more than simply a means to and can only be obtained through the guarantee of participation in the political community.<sup>317</sup> This is where the undocumented child struggles with dignity, they are not treated as part of the community and are not privy to the rights that participation would imply, in this regard they remind of the *Homo Sacer*. This is contradictory to the South African Constitution, which grants dignity to all persons, regardless of their legal status. Their exclusionary social policies hinder this ideal of dignity for all, because there lies a correlation between dignity and socio-economic rights.<sup>318</sup> The denial of socio-economic rights limits a person ability to realise future plans or develop their potential.

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313 See section 3.1.

314 See section 3.1.1.

315 See section 3.3.1.1.

316 See section 3.3.1.2.

317 See section 3.3.2.1.

318 See section 3.3.2.3.

The general principles discussed in this chapter form the foundation of the following discussion of specifically the socio-economic rights of the undocumented child in South Africa. The unenforceability of their socio-economic rights will be determined within the parameters of the general principles analysed in this chapter.

## Chapter 4: Socio-Economic Rights

### 4.1 Introduction

Throughout this study emphasis has been continuously placed on the vulnerable position of the child and the special protection they require. The general principles governing the interpretation of their rights has made it evident that every child has the rights to dignified life that is lived in an environment that not only enables them to survive, but also stimulates development.<sup>319</sup> Access to socio-economic rights is paramount to this development. It can in no way be argued that a child's alienable rights are enforced if their basic needs are not being met.<sup>320</sup> Unfortunately access to socio-economic rights is not simple administrative process and there are various factors excluding undocumented children.

To understand the complexity of this situation, Agamben's theory of the state of exception must be revisited. As previously explained, the power of the sovereign lay in their ability to decide the exception to the rule.<sup>321</sup> Bare life is the ultimate form or consequence of this exception, because bare life is a life stripped of political significance.<sup>322</sup> To determine whether undocumented children are the exception to the socio-economic rule this chapter will analyse what legislation and socio-economic policies state. The discussion will include both the international as well as the South African interpretation of socio-economic rights, with the international focus being limited to the right to an adequate standard of living.<sup>323</sup>

It is important to question whether the South African state, when referring to the socio-economic rights of the child, are granting these rights to all children or to citizen children. If either policy, administrative systems or state conduct create the impression, of even explicitly state, that it these rights are only enforceable for a

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319 See section 3.

320 Liebenberg 2005 *SAJHR* 27-28.

321 See section 2.4.2.

322 See section 2.4.1.

323 Although these are numerous references to socio-economic rights in international instruments, the adequate standard of living, in conjunction with the minimum core, for purpose of this study, best reflects the international standard for socio-economic rights.

South African child, a state of exception has been created in which the undocumented child is outside the political space in which their socio-economic rights could be enforceable. To determine the possibility of a state of exception, an interpretation will be done of the constitutional socio-economic rights. There is a clear textual distinction between the socio-economic rights of everyone<sup>324</sup> and only those of the child.<sup>325</sup> This distinction has an impact on the reasonability of any limitations and the analysis of the rights will include a discussion of the implications of the distinctions, with specific reference to case law. The obligations of the state will also be investigated to determine firstly what their constitutionally mandated obligations are<sup>326</sup> and to illustrate in which ways the state is either meeting or neglecting their obligations toward undocumented children.

Even if the discussion on the constitutional socio-economic rights, legislation and policies demonstrate that a state of exception has been created, it does not necessarily imply that an undocumented child is subjected to bare life. Bare life can only be argued if the undocumented child lives a life that is little more than physical survival in the regard that their lives are lived outside of the political realm (bios). Bare life, and rightlessness, implies a life in which their rights are not enforceable, because they are not recognised as part of the community entitled to these rights.<sup>327</sup> It is a life of biological survival, in which any development is restricted to resources that are disconnected from the state. It is, as Arendt described it, the abstract nakedness of being human. To investigate this possibility, this chapter will include a short analyses of the actual access undocumented children have to social grants, basic health care and basic education. Although the rights to basic education is not a part of the section 28 rights of the child,<sup>328</sup> the discussion would be incomplete without an acknowledgement of the profound impact education has on the development of the child and their potential to form part of a community. This discussion will give a more realistic perspective on the actual enforceability of the

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324 Section 27 of the *Constitution*.

325 Section 28 of the *Constitution*.

326 Section 7 of the *Constitution*.

327 See s 2.

328 The right to basic education is found in s 29 of the *Constitution*.

unalienable socio-economic rights of the undocumented child in South Africa and attempt to determine whether they have become the *homo sacer* of modern society.

## **4.2 International Social Economic Rights**

Succumbing to section 39 of the *Constitution* the discussion of the socio-economic rights of the undocumented child will start with a concise international perspective. Although numerous economic, social and cultural rights are mentioned in international human rights instruments<sup>329</sup> a complete analysis of all these rights would not serve the aims of this study. Focus will, therefore, be on the right to an adequate standard of living,<sup>330</sup> which directly relates to the basic socio-economic rights of the child.

### *4.2.1 Adequate Standard of Living*

Although the right to an adequate standard of living is part of most major human rights instruments, there is no exact definition provided by these instruments.<sup>331</sup> Understanding the parameters of this right is, however, very important to the aim of this study. The international standard of an adequate standard of living, should,

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329 This includes the rights to education, health, shelter, social security, an adequate standard of living and the right to the protection of family. The most comprehensive list is found in the *International Covenant on Economic, Social and Cultural Rights*, but there are ample provisions in other instruments, for example the *Convention on the Rights of the Child* and the *African Charter on Human and People's Rights*. The *Convention on the Rights of the Child* makes specific reference of the child's right to benefit from social security and charges the state with the duty to take the necessary measures to achieve to full realisation of this right. In fact, article 6 places the obligation on the states to ensure the survival and development of the child. This entails a range of social security rights that the child is entitled to. The *African Charter on the Rights and Welfare of the Child* support this by granting the child various socio-economic rights, including the rights to survival, protection and development.

330 Section 25 of the *United Nations Declaration*. Elaborations of this right are found in both the *Convention on the Rights of the Child* and the *International Covenant on Economic, Social and Cultural Rights*. Article 27 of the *Convention on the Rights of the Child*: "Article 27 (Adequate standard of living): Children have the right to a standard of living that is good enough to meet their physical and mental needs. Governments should help families and guardians who cannot afford to provide this, particularly with regard to food, clothing and housing." Article 11 of the *International Covenant on Economic, Social and Cultural Rights*: "Article 11(1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

331 Candappa 2000 *The International Journal of Children's Rights* 263.

considering section 233 of the *Constitution*,<sup>332</sup> influence our understanding of socio-economic rights in South Africa. Luckily, the meaning of this right can to a large degree be derived from the context given in the various instruments.<sup>333</sup>

The *United Nations Declaration* includes food, housing, clothing, medical and social services as part of an adequate standard of living,<sup>334</sup> the *Convention on the Rights of the Child* states a standard of living that is adequate for a child's physical, mental, spiritual, moral and social development,<sup>335</sup> whilst the *International Covenant on Economic, Social and Cultural Rights* specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living. Amongst others, this includes adequate food, clothing and housing.<sup>336</sup>

*General Comment 3*,<sup>337</sup> which specifically discusses the right to an adequate standard of living, also provides some context. It states that an adequate standard of living requires "at the very least, minimum essential levels of each of the rights incumbent upon each State Party".<sup>338</sup> Furthermore, the Office of the High Commissioner for Human Rights explains that the right to an adequate standard of living is fundamentally concerned "with the human person's rights to certain fundamental freedoms, including freedoms to avoid hunger, disease, and illiteracy".<sup>339</sup>

Considering all this it is important to bear in mind that what is perceived as adequate will necessarily differ from one society or group to the next.<sup>340</sup> This can be illustrated simply by taking the right to adequate clothing as an example; that which will be

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332 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."

333 Eide "Adequate Standard of Living" 1196; Candappa 2000 *The International Journal of Children's Rights* 263.

334 Article 25 of the *United Nations Declaration of Human Rights*.

335 Article 27 of the *Convention on the Right of the Child*.

336 Article 11 of the *International Covenant on Economic, Social and Cultural Rights*. The use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive. For example, the right to water has also been considered as part of these necessitous rights. Gleick 1998 *Water Policy* 487-500.

337 UN Doc E/1991/23 para 1.

338 UN Doc E/1991/23 para 10.

339 OHCHR Human Rights and Poverty Reduction: A Conceptual Framework 9.

340 Eide "Adequate Standard of Living" 196.

considered more than adequate clothing in a warm climate like Ethiopia; will be severely lacking in a cold climate like Russia. Adequate cannot realistically be given a fixed definition. *General Comment 12* explains that adequate is to be determined to a large extent by prevailing social, economic, cultural, climatic and other conditions.<sup>341</sup> Adequacy should, therefore, be understood within the parameters of a specific situation. South African policy should, therefore, be written and implemented in such a way that the unique circumstances within South Africa are addressed.

Although "adequate" in the context of socio-economic rights have proven to be quite a relative term, it is not impossible to have a basic idea of what it will require to realize the requirements of article 25. Closely related to the concept of an adequate standard of living, is the right to a life of dignity.<sup>342</sup> As explained in the previous chapter dignity is obtained when a person feels empowered and has both physical and psychological integrity. Liebenberg<sup>343</sup> argues that dignity can justify socio-economic claims by assessing the impact of deprivation on the individual and forcing the courts to respond in an appropriate manner. Fundamentally, these two rights are inseparable: realization of the one requires realization of the other.<sup>344</sup> Stewart<sup>345</sup> contends that:

...human dignity may be employed to define the basic socio-economic rights of children and may serve as motivation that the rights should at least include 'the minimum decencies of life'.

A child should be able to live in conditions in which they would not have to degrade themselves in order to satisfy their needs,<sup>346</sup> irrespective of the society they form a part of. When a person is forced to beg to sustain a livelihood, or a child is forced into labour, circumstances arise that will severely prohibit both an adequate standard of living and a life of dignity.<sup>347</sup> They should, therefore, be able to form part of ordinary,

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341 UN Doc E/C.12/1999/5 para 9.

342 See section 3.3.2.

343 Liebenberg 2005 *SAJHR* 18.

344 Eide "Adequate Standard of Living" 198.

345 Stewart 2008 *SAJHR* 483.

346 Icelandic Human Rights Centre 2007 <http://bit.ly/1okQ131>; Eide "Adequate Standard of Living" 198.

347 UN doc E/C.12/1999/5, para 1.

everyday interactions without unreasonable obstacles or doubt.<sup>348</sup> When looking at it in material terms it would constitute living above the poverty line. The World Bank describes this to be when:<sup>349</sup>

The expenditure necessary to buy a minimum standard of nutrition and other basic necessities, and a further amount that varies from country to country, reflecting the cost of participating in the everyday life of society.

In order to enjoy these social rights, there is, therefore, a need for economic rights, which can be given by means of social grants.<sup>350</sup> Eide<sup>351</sup> explains that economic rights have a dual function: firstly they serve as a basis for entitlements that can ensure an adequate standard of living and secondly they grant independence and freedom. Both of these are paramount to a life of dignity.

In the context of undocumented children, an adequate standard of living will be obtained when these children have access to the necessary socio-economic assistance to evolve in all spheres of development.<sup>352</sup> An adequate standard of living should, therefore, be understood to be a composite right, that can only be realized if the subsequent parts of it are realized, this includes food, clothing, housing, medical care and social services, all of which imply a state obligation.

This obligation within the context of the South African constitutional dispensation will be discussed in the following chapter.

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348 Eide 2007 <http://bit.ly/1okQ131>.

349 World Bank 1990 [http://elibrary.worldbank.org/doi/abs/10.1596/9780195208511\\_Chapter2](http://elibrary.worldbank.org/doi/abs/10.1596/9780195208511_Chapter2).

350 Eide "Freedom From Want: Taking Economic and Social Rights Seriously in Rights" 534. Economic rights can be obtained in three ways: 1) by the acquisition of property; 2) the right to work and thus gaining in income and lastly, when the abovementioned is inadequate or in the absence thereof, the right to social security.

351 Eide "Freedom From Want: Taking Economic and Social Rights Seriously in Rights" 533.

352 Section 27 of the *Children's Act* gives guidance as to which areas: "a child's physical, mental, spiritual, moral and social development."

### **4.3 Socio-Economic Rights within the South African Constitutional Dispensation**

The Constitutional protection of socio-economic rights in South Africa is considered to be one of the most progressive systems in the world.<sup>353</sup> Many scholars view South Africa as "a benchmark in terms of the constitutional protection and judicial enforcement of socio-economic rights".<sup>354</sup> Although not containing a full list of unqualified socio-economic rights, the Bill of Rights contains a range of socio-economic rights in sections 23 – 31. The inclusion of these rights is just one of the reasons that make the South African constitution transformative.<sup>355</sup> The constitution does more than limit collective power,<sup>356</sup> it uses collective power to transform and advance society.<sup>357</sup> All of these rights create entitlements to the material conditions of human welfare<sup>358</sup> and have social and economic ramifications associated with the delivery of certain goods and services.<sup>359</sup> As Wabwile<sup>360</sup> explains:

Sometimes labelled 'welfare rights', socio-economic rights can be understood as claims to a secured economic floor, below which human beings should not fall, as that would imperil their subsistence and survival and expose them to want and destitution.

The scope of this study does not lend itself to a detailed discussion of each of these rights. The focus will be limited to sections 26 and 27 and section 28(1)(c),<sup>361</sup> the former contains the socio-economic rights of "everyone" and the latter the rights of "every child":

26. (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

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353 Brand "Introduction to Socio-Economic Rights in the South African Constitution" 1; Mubangizi 2006 *African Journal of Legal Studies* 2.

354 Mubangizi 2006 *African Journal of Legal Studies* 3.

355 De Vos, Freedman and Brand *South African Constitutional Law in Context* 667.

356 Brand "Introduction to Socio-Economic Rights in the South African Constitution" 1.

357 Brand "Introduction to Socio-Economic Rights in the South African Constitution" 1.

358 Brand "Introduction to Socio-Economic Rights in the South African Constitution" 3.

359 Mubangizi 2006 *African Journal of Legal Studies* 4.

360 Wabwile *Legal Protection of Social Economic Rights of Children* 22.

361 Hereafter referred to as section 28.

- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
27. (1) 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.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
28. (1) Every child has the right -
- (c) to basic nutrition, shelter, basic health care services and social services;

The importance of the abovementioned sections is found in their guarantee to the basic necessities of a child's life and contains the components for an adequate standard of living.<sup>362</sup> In conjunction with this, a concise analysis of the right to education<sup>363</sup> will be done in section 4.4, the reason being the obvious importance of education in the attempt to better the life and prospects of the undocumented child. A life of dignity and an adequate standard living cannot be obtained without access to socio-economic rights.

The court held this same opinion in the *Grootboom*<sup>364</sup> case:

There can be no doubt that human dignity, freedom and equality, the foundational of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chapter two. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of society in which men and women are equally able to achieve their full potential.

To determine the rightlessness of undocumented children in South Africa, this study must analyse the limitation of the abovementioned socio-economic rights. The

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362 See section 4.3.1.

363 Section 29 of the *Constitution*.

364 *Grootboom* par 23.

Constitutional Court applies a two stage approach with regards to the limitation of constitutional rights.<sup>365</sup> The approach rests on two questions:

The first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justifiable.<sup>366</sup>

The first question is answered by means of a threshold enquiry, which demands that the content and scope of the rights be determined and then the "meaning and effect of the impugned enactment to see whether there is any limitation".<sup>367</sup> The second stage:

... requires a weighing up of the nature and importance of the rights that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out these factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved.

This study will not consist of a complete two stage enquiry into the limitation, because the main aim of the study is not to determine the justifiability of possible limitations of socio-economic rights, but rather to determine the effect these limitations has on the enforceability of the international, regional and domestic (supposedly) unalienable socio-economic rights of the undocumented child. However, in line with the two stage analysis and for the same rationale as the analysis of rights in the previous chapter, the content of the relevant socio-economic rights will be analysed as well as the current limitation of these rights, with the focus being on the barrier this limitation is placing on enforceability. In support of this, the discussion will begin with an analysis of section 7(2) of the Constitution to determine the extent of the obligation that rests on the state. This is done to illustrate that the obligation is so much more than a positive obligation to progressively fulfil rights.

During the following discussion one must, again, at all times bear in mind the unique nature of the human child and the obligation we as a society have towards them due

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365 De Vos, Freedman and Brand *South African Constitutional Law in Context* 354.

366 *South African National Defence Union v Minister of Defence* 1999 4 SA 469 para 18.

367 *S v Walters and Another* 2002 4 SA 613 para 26.

to their inherent vulnerability and absolute need for special protection.<sup>368</sup> This directly relates to the argument that will be made for the separation of the rights of the child and parents during adjudication.

This study argues that the socio-economic rights of the undocumented child are unenforceable and due to this they have become rightless. This can only be done by including a discussion of the actual real life circumstances that these children are subjected to, only by investigating this can it be determined whether the South African state has neglected their obligation by creating a state of exception that is subjecting the undocumented child to bare life.

#### *4.3.1 Section 7: State Obligations*

When interpreting any of the rights in the Bill of Rights, account must be taken of both sections 7(2) and 39(1).<sup>369</sup> The previous chapter, as well as the discussion on the adequate standard of living have explored the section 39<sup>370</sup> requirement and as such this chapter will focus on section 7(2), which contains the state obligations. South African courts have defined the state obligations regarding socio-economic rights by two characteristics.<sup>371</sup> Firstly, the duties to respect, protect, promote and fulfil, and secondly the negative and positive duties these rights impose.<sup>372</sup> This forms part the aims of a transformative constitution,<sup>373</sup> and socio-economic rights are both interpreted and adjudicated based on these two "foundational pillars".<sup>374</sup> This section is specifically important to the aims of this study, because it indicates the scope and nature of the possible entitlements that the socio-economic rights of the undocumented child can create.

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368 See section 3.2.

369 De Vos, Freedman and Brand *South African Constitutional Law in Context* 671.

370 Section 39 of the *Constitution* " (1) 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 law."

371 Dafel 2013 *SAJHR* 594; Ilse 2004 *SAJHR* 459.

372 Stewart 2008 *SAJHR* 475.

373 Brand "Introduction to Socio-Economic Rights in the South African Constitution" 1; De Vos, Freedman and Brand *South African Constitutional Law in Context* 671.

374 Dafel 2013 *SAJHR* 594.

#### 4.3.1.1 Section 7(2)

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

Section 7(2) serves a twofold purpose. Firstly it is a mechanism to oblige the State to positive action to fulfil human rights. Secondly, it also protects citizens against state interference in their autonomy.<sup>375</sup>

The court uses this section extensively when defining and determining state obligations.<sup>376</sup> *Dafel*<sup>377</sup> illustrates this by using the Right to Life as example:

For instance, the typology has been employed to assess the ambit of the right to life. In various decisions, it was held that the duty to respect the right to life is breached by the state through the exercise of the death penalty, the duty to protect is infringed if the state does not take reasonable measures to protect an individual's life against unlawful threats by other individuals, and the duty to fulfil the right to life is indirectly affected where the state does not fulfil its socio-economic obligations in providing social goods needed to enjoy human life. Accordingly, the application of the duties reflects that the right to life does not just protect against the deprivation of life, but also guarantees a certain quality of life which the state should strive towards.

The parameters of these obligations will differ, depending on the right in question, however, the Court held in *Glenister v President of the Republic of South Africa and Others*,<sup>378</sup> that the steps taken to fulfil section 7(2) must be 'reasonable and effective' and must 'fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt'.<sup>379</sup>

The obligation to respect requires from the State to refrain from conduct that deprives or interferes with a persons guaranteed right,<sup>380</sup> but also to mitigate the interference

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<sup>375</sup>Dafel 2013 *SAJHR* 597.

<sup>376</sup>As seen in *S v Makwanyane* para 222, 296; *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 2 SA 359 (CC) para 66 ,70; *Khosa* par 44, 81; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 44.

<sup>377</sup>Dafel 2013 *SAJHR* 594.

<sup>378</sup>2011 3 SA 347 (CC) hereafter referred to as the *Glenister* case. For a in depth discussion see Du Plessis; Penfold and Pudifin 2011 *Survey of South African Law* 81-84.

<sup>379</sup>Para 191.

<sup>380</sup>Dafel 2013 *SAJHR* 594; Ilse 2004 *SAJHR* 459; Ngang 2014 *African Human Rights Law Journal* 662; Nkuepo 2011 *ESR Review: Economic and Social Rights in South Africa* 8; Jansen van Rensburg and Lamarche "The Right to Social Security" 238.

when limitation is unavoidable.<sup>381</sup> In the context of section 28, it requires from the State to not to take any measures that would result in a child not having access, for example, to social grants or adequate food. If the provisions in a law or policy make it impossible for undocumented children to comply with, the state is obstructing access and also not obliging its duty to respect.<sup>382</sup>

This obligation to protect relates to third parties.<sup>383</sup> The State must protect the person's rights by ensuring that a third party does not interfere or deprive them of their human rights.<sup>384</sup> This would mean that the State will have to prohibit third parties for interfering with a child's access to the benefits of social grants or the access to sufficient food or shelter.

The promotion obligation is very closely linked to the obligation to fulfil. Socio-economic rights are promoted by creating awareness about the rights and educating people to better understand the entitlement to the right.<sup>385</sup> Dafe<sup>386</sup> elaborates on this obligation:

It has also been suggested that this obligation to promote socio-economic rights is directed at the discretionary decision-making of the state, and that their decisions must always be made with full consideration of the advancement of socio-economic rights and interests.

To then also fulfil the rights, the state is required to take affirmative measures to establish political, social and economic systems that provide access to human rights for all members of society.<sup>387</sup> This is more than merely adopting policies, there needs to be appropriate allocations of resources to help those in need.<sup>388</sup> The progressive realisation of a child's basic rights will, for instance, require state resources to be

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381 De Vos, Freedman and Brand *South African Constitutional Law in Context* 671.

382 Jansen van Rensburg and Lamarche "The Right to Social Security" 238; Malan 2014 *Acta Academica* 94.

383 Tissington *A Resource Guide to Housing* 42; Malan 2014 *Acta Academica* 94.

384 Nkuepo 2011 *ESR Review: Economic and Social Rights in South Africa* 8.

385 Tissington *A Resource Guide to Housing* 42; Ilse 2004 *SAJHR* 459.

386 Dafe 2013 *SAJHR* 599.

387 Ngang 2014 *African Human Rights Law Journal* 662; Nkuepo 2011 *ESR Review: Economic and Social Rights in South Africa* 8.

388 Tissington *A Resource Guide to Housing* 43.

allocated to shelters and the child grant system. Fulfilment should eventually result in full achievement of the required sections of the two acts under consideration.

#### 4.3.1.2 Positive and Negative Obligations

In conjunction with the specific elements of section 7(2), there also exist both negative and positive duties on the state.<sup>389</sup> Case law has shown that the distinction rests on the action required by the state. For example, in *Carmichele v Minister of Safety and Security and Another*,<sup>390</sup> the court held that there are circumstances in which there rests a positive duty on the State to provide appropriate protection for everyone. In *Kaunda and Others v President of the Republic of South Africa*,<sup>391</sup> Chaskalson J support this when he held that:<sup>392</sup>

The advancement of human rights and freedoms is central to the Constitution itself. It is a thread that runs throughout the Constitution and informs the manner in which government is required to exercise its powers. To this extent, the provisions of section 7(2) are relevant ... as showing that our Constitution contemplates that government will act positively to protect its citizens against human rights abuses ...

This can easily be seen when considering the different components of section 7(2), the duty to respect, for instance, has negative components, because it requires from the state to abstain from any conduct or action that will prevent or impair the right and protect existing rights from interference.<sup>393</sup> On the other hand, the duties to promote and fulfil the rights require positive action from the State to ensure access and delivery of social resources.<sup>394</sup> The duty to protect contains components of both positive and negative obligations. In *Mazibuko*, however, the court described the duty as an "intermediate duty", where the unique circumstances of each case and the specific rights will determine whether the duty is positive or negative.

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389 Ngang 2014 *African Human Rights Law Journal* 662; *Glenister* case para 105 "This provision extends beyond a mere negative obligation not to act in a manner that will infringe or restrict a right. Rather it entails positive duties on the State to take deliberate reasonable measures to give effect to all the fundamental rights contained in the Bill of Rights."

390 2001 4 SA 938 (CC) para 44.

391 2005 4 SA 235 (CC).

392 Para 66, 77.

393 Stewart 2008 *SAJHR* 475; Dafel 2013 *SAJHR* 591; Ngang 2014 *African Human Rights Law Journal* 662; Jansen van Rensburg and Lamarche "The Right to Social Security" 238.

394 Stewart 2008 *SAJHR* 475; Dafel 2013 *SAJHR* 595.

The courts have not been clear with the exact obligations the state has in respect of socio-economic rights, but as Cameron J and Moseneke DCJ held in the *Glenister* case:<sup>395</sup>

Now plainly there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the state takes as long as they fall within the range of possible conduct that a reasonable decision maker in the circumstances may adopt.

The test to determine whether the state is meeting its obligation to undocumented children will be one based on what is considered to be reasonable within the circumstances.

De Vos, Freedman and Brand<sup>396</sup> argue that a socio-economic claims should be done in terms of a negative duty. The reason for this being that negative obligations are subjected to more robust scrutiny,<sup>397</sup> and avoids the separation of power constraints.<sup>398</sup> This argument will be explored in more depth in section 4.3.4 in the discussion of the limitation of socio-economic rights.

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395 *Glenister* case para 191. This same approach had previously been adopted in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 61: "Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and executive ... indeed it is desirable as a matter of democratic accountability that they should do so for it is their programs and promises that are subjected to democratic popular choice."

396 De Vos, Freedman and Brand *South African Constitutional Law in Context* 693-696.

397 A limitation will be tested against section 36, whilst a positive obligation will be subject to internal qualifications of reasonable measures, progressive realisation and available resources. See section 4.3.4.

398 De Vos, Freedman and Brand *South African Constitutional Law in Context* 671 "Courts simply feel themselves less constrained when adjudicating negative infringements in the sphere of power of the political branches than the enforcement of positive duties." For purpose of this study a simplified explanation is given of positive and negative duties, it should however be noted that there are many scholars that argue that the distinction is simply not his clean cut and that there is cases in which there is little more than semantic differences between a negative and positive obligation, for example see Liebenberg 2011 *SAPL* 37-59.

### 4.3.2 Defining Social Assistance

Section 27 and 28 refers respectively to "social services", "social assistance" and "social security". They all seem to be used in the same context, namely as a means of promoting the ultimate goal of social protection, which can be defined as follow:

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 living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but it goes beyond that to focus on causality through an integrate policy approach including many of the developmental initiatives undertaken by the State.<sup>399</sup>

Although section 27 and 28 refer to social protection in its various forms, there is no clear definition of what exactly this entails.<sup>400</sup> This is, therefore, the first concept that needs to be defined.

Stewart<sup>401</sup> argues that social assistance can be described as the "means of promoting the ultimate goal of social protection". She continuous by stating that dignity or that, which will offer a life of dignity, should be the adequate scale in determining the extent of social assistance.<sup>402</sup> Considering the discussion on dignity above, social assistance should, therefore, be that which gives a person the tools to form part of political, social and economic life.<sup>403</sup> The most rudimentary step in achieving this will be ensuring that the undocumented child's basic needs are met.

Liebenberg<sup>404</sup> supports this with this comprehensive definition:

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399 Department of Social Development Transforming the Present – Protecting the Future 41.

400 For the sake of clarity the term "social assistance" will be used in this part as collective term for all of the variations.

401 Stewart 2008 *SAJHR* 483.

402 Stewart 2008 *SAJHR* 483-484 "I argue that social services can be described as a means of promoting the ultimate goal of social protection. According to the Commission of Inquiry into a Comprehensive System of Social Security for South Africa (also known as the Taylor Commission),<sup>83</sup> it incorporates '[all] developmental strategies and programmes designed to ensure, collectively, at least a minimum living standard for all citizens'. It consists of measures of social assistance, social insurance and social services but 'it goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State'."

403 See section 3.3.2.2 above.

404 Liebenberg *Socio-Economic Rights* 233.

It can be a narrow interpretation referring to social welfare services which typically form the other major component of the mandate of the department of social development. These services usually delivered by social workers and NGO's and include services to child victims of physical and mental abuse, protection and assistance to children who have temporarily been separated from their families, special support services provided to children with disabilities and protection of children from economic exploitation, drug abuse, sexual exploitation and abuse.

There exist other, more in depth definitions,<sup>405</sup> but for the purposes of this study, social assistance will be defined as the social services the South African government offer in relation to children. Furthermore, it will be measured by that which will adequately give a child a dignified existence. Social assistance is therefore, the social services the state provides for the effective realisation of rights, namely those services implemented to realise social policies and goals. This study will focus on specifically the Child Care Grant, state funded health services and education.

#### *4.3.3 Socio-Economic Rights in the Bill of Rights*

Socio-economic rights are enshrined in sections 26 to 28 of the Constitution. Section 28 differs by making specific provision for the socio-economic rights of the child. To understand the importance of section 28, a comparison must be made between sections 26 and 27 and section 28. Four main differences can be identified. The most apparent difference is that section 26, 27 is with regards to everyone and section 28 is exclusively for the rights of the child. Secondly, section 27 refers to "the right to have access to", whilst section 28(1)(c) speaks of "the right to". The rights of the child are also expressed in basic terms, for example, section 27 refers to health care services, whilst children have the right to basic health care services. The last discrepancy is that the right of everyone qualifies the state responsibility by stating "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights", whilst section 28(1)(c) seems to be unqualified. The implication of these differences has an influence on the interpretation of the socio-economic rights of the undocumented child.

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405 Webfinance Inc 2000 <http://www.businessdictionary.com/definition/social-services.html#ixzz2SUW0Gyen>; Stewart 2008 *SAJHR* 483; European Union *Social Services of General Interest Feedback report to the 2006 Questionnaire of the Social Protection Committee 2*.

#### 4.3.3.1 The Rights of Everyone and the Rights of the Child

Most academics agree that the separation of the socio-economic rights of the child and everyone is clearly indicative of the drafters intention to acknowledge children's rights as a priority. Section 28 recognises that children are vulnerable to violations of their rights and that they have peculiar interests.<sup>406</sup> This section should be seen as a confirmation of the child as a vulnerable group as discusses in section 3.

#### 4.3.3.2 Access

A significant discrepancy between the rights of everyone and those of the child is the fact that "everyone" has "the right to access" compared to the child's "right to". This raises the question whether "access to" limit the right to social assistance and does lack thereof make the child's right unqualified?

In the *Grootboom* case, the court explained the parameters of "the right to access to housing" as found in section 26. The court interpreted it to mean that not only the state has the obligation to provide housing, but it also includes other individuals and institutions.<sup>407</sup> Futhermore, "access to" has a broader interpretation than the right to housing, because it includes infrastructure and the conditions for access to housing, whilst keeping the different economic levels of society in mind.<sup>408</sup> With specific reference to the poor, as a vulnerable group that needs special protection, the court held that the state primary obligation lies in "issues of development and social welfare".<sup>409</sup>

Within the context of section 27, it would mean that the state has an obligation "to provide an environment in which everyone is, within the limits of their abilities"<sup>410</sup> able to acquire health care and sufficient food and water.<sup>411</sup> In the case where it falls outside a person's abilities, the state has the obligation to provide assistance to these

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406 Songca 2011 *CILSA* 345; Chirwa *Child Poverty and Children's Rights of Access to Food and Basic Nutrition* 21.

407 *Grootboom* para 35.

408 *Grootboom* para 35.

409 *Grootboom* para 36.

410 Chirwa *Child Poverty and Children's Rights of Access to Food and Basic Nutrition* 18.

411 Jansen van Rensburg and Lamarche "The Right to Social Security" 235.

people by means of state hospitals and social welfare programs,<sup>412</sup> subject to available resources and progressive realisation.<sup>413</sup> It is therefore not a direct, immediate right to, for example, sufficient food and water, but an obligation on the state to facilitate the right, which is part of the obligation to fulfil.<sup>414</sup>

Opposed to this is "the right to", as found in section 28 and 29. The courts have not given any clear guidance in this regard, but this study agrees with scholars like Liebenberg,<sup>415</sup> Stewart<sup>416</sup> and McConnachie and McConnachie<sup>417</sup> that argue that this, in conjunction with a lack of a limitation clause, suggests that the state is obliged to ensure that all children have access to a basic level of social services. It does not imply access to the means to acquire these rights, as seen in section 26 and 27, but direct access to these rights. Furthermore, it confirms that failure to ensure these rights will be tested by the general limitation clause.<sup>418</sup> It suggests a more enforceable right than those of everyone.

#### 4.3.3.3 Basic Needs

There are textual differences found in sections 26 and 27 and section 28(1)(c). For example, sufficient housing compared to shelter or sufficient food compared to basic nutrition.

In the *Grootboom* case, the court held that shelter, as used in section 28, should be understood to imply all shelter and not simply rudimentary forms and that shelter and housing(section 26) are synonymous. This, however, is not a rule for all the rights found in section 28. Chirwa,<sup>419</sup> for example, argues that this cannot be applied to food and nutrition:

It is argued therefore that children's right to basic nutrition means that they are, at the very least, entitled to the minimum amount of food that is necessary to meet

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412 *Grootboom* para 36; Jansen van Rensburg and Lamarche "The Right to Social Security" 235.

413 Section 27(2) of the *Constitution*.

414 Chirwa *Child Poverty and Children's Rights of Access to Food and Basic Nutrition* 19.

415 Liebenberg *Socio-Economic Rights* 234.

416 Stewart 2008 *SAJHR* 474.

417 McConnachie and McConnachie 2012 *South African Law Journal* 554-590.

418 See section 4.3.4.

419 Chirwa *Child Poverty and Children's Rights of Access to Food and Basic Nutrition* 20.

dietary requirements for their development, health and wellbeing. This right is, in effect, not a mere restatement for children of the right of everyone to sufficient food. Though these rights are without a doubt interrelated, they serve different but complementary purposes.

This same argument will be extended to the other socio-economic rights. I argue that the textual differences between the sections should be understood to mean that children are entitled to a minimum of basic level of socio-economic rights. Not to access to these basic levels, but the right to them. If the rights are interpreted as synonyms, one must ask why there is then a separate section with the rights of the child. We cannot accept an interpretation that gives no significance to this difference. The concept of basic socio-economic rights, as stated in section 28, can be better understood with application of the minimum core.

#### 4.3.3.3.1 Minimum Core

Although subject to substantial criticism, the concept of a minimum core can also offer assistance in determining the minimum requirements to fulfil a child's basic needs and how the textual differences in section 28 can be interpreted. Whilst not denying the criticism, the focus of this discussion will be on the guidance, rather than the confusion, of the minimum core in relation to this study.<sup>420</sup> Using the minimum core

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<sup>420</sup>See Young 2008 *Yale Journal of International Law* 114-115. Young described that 'the rejection of the minimum core concept, or its alternate embrace, is available only on the basis of a clearer analysis of its interpretation. Without this clarity, the concept cannot supply a predetermined content to economic and social rights, rank the value of particular claims, or set the level and criteria of state justification required for a permissible infringement. Indeed, I suggest that it is unlikely that the concept will ever offer the relative determinacy required for these three tests. Yet it can assist as an object of interpretive agreement—or disagreement—around claims for socioeconomic protection. What must be discarded, perhaps, are the goals of fixture, closure, and determinacy structured into the concept by its advocates.' Critics of the concept have suggested that paring down such rights to an essential core threatens the broader goals of economic and social rights, or pretends a determinacy that does not exist. A long-standing criticism faults the minimum core for directing our attention only to the performance of developing states,<sup>5</sup> leaving the legal discourse of economic and social rights beyond the reach of those facing material deprivation in the middle or high income countries. A more recent criticism points to the concept's tendency to rank different claimants of rights, while ignoring the more salient assessment of rights versus macroeconomic growth or defence policies. Even the primary conceptual questions remain unanswered. Is the minimum core in Mali the same as the minimum core in Canada? More specific, is it otherwise context-sensitive or context-blind? Is it a more general or more precise instantiation of the parent right? And, who gets to determine what it is?

entitlement as support of the international standard for the socio-economic rights<sup>421</sup> of the child, the possibility and extent of the state of exception can also more easily be determined.

There are writers that argue that the separate inclusion of socio-economic rights exclusively for children could be interpreted as a minimum core:

The separate provision on socio-economic rights to children in the Constitution is, to my mind, an indication that some kind of priority must be given to these rights. Children are one of the most vulnerable groups in society. They cannot fend for themselves, one of the reasons being that they cannot participate in the democratic process of voting. Children are furthermore perceived as weak and exploitable. This position child finds themselves in, calls for the prioritisation of their needs in the allocation of their resources. I, therefore, argue that the basic socio-economic rights of children should be interpreted to mean the minimum essential entitlements of that right.<sup>422</sup>

As previously stated, section 28 refers specifically to the "basic" levels of children's socio-economic rights, which suggests core minimum entitlement of rights that have to be met.<sup>423</sup> The interpretation of children's' basic socio-economic rights, therefore, require of the courts to determine a minimum core content of these rights, if undocumented children do not, at least, have this minimum entitlement, their socio-economic rights are unenforceable.

The minimum core is a substantive way for states to determine whether children's basic needs are satisfied. The minimum core has however been approached with caution due to the possible budgetary constraints that the implementation can lead to.

In General Comment 3,<sup>424</sup> UNESCO described the minimum core as:

... a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, 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

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421 The UN introduced the concept of the minimum core; by compiling a committee of independent experts in 1986, operating under the mandate of UNESCO who issued a General Comment on the minimum core 1990.

422 Stewart 2008 *SAJHR* 480.

423 See section 4.3.3.3.

424 UN Doc 12/14/1990.

its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Section 2 (1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a 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, as a matter of priority, those minimum obligations.

With this General Comment the UN recognized that there are minimum essential levels of socio-economic rights: housing, foodstuff, basic education and primary health care. States should use the minimum core concept as its guide when entering economic and social rights into law and binding policies. It serves to "establish a minimum legal content for the notoriously indeterminate claims of economic and social rights".<sup>425</sup> The importance of a minimum core was highlighted by Bilchitz<sup>426</sup> with the suggestion that there are certain minimum degrees of fulfilment of socio-economic rights that will take priority over a more a full realisation of the right.

South African courts should, therefore, if faced with the question of whether the socio-economic rights of the child is being enforced, determine a baseline of socio-economic protection, irrespective of progressive realization. It is outside the ambit of this study to determine what the minimum core should be and although there are various approaches to determining and interpreting the minimum core, it will not be analysed.<sup>427</sup>

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<sup>425</sup>Young 2008 *Yale Journal of International Law* 113.

<sup>426</sup>Bilchitz 2003 *SAJHR* 1, 13; Young 2008 *Yale Journal of International Law* 121 "For international lawyers attempting to give legal bite to the standard of obligation established by the Covenant, the minimum core initiates a common legal standard, disassembling the inherent relativism of the programmatic standard of "progressive realization" set out in the text of the Covenant... The minimum core provides an understanding of the direction that the steps should follow and an indication as to when their direction becomes retrogressive. Secondly, for those hoping to provide an objective standard across different state systems of political economy, the minimum core concept purports to advance a baseline of socio-economic protection across varied economic policies and vastly different levels of available resources.

<sup>427</sup>Including a comprehensive discussion on the various approaches would be impossible within the scope of this study, it is only important to note that there various approaches, each with merits and disadvantages.

The Constitutional court does not give much guidance,<sup>428</sup> although it has been one of the few courts to approach the concept of a minimum core. In *Grootboom*, it was required of the court to determine the normative content and enforcement of the right to housing.<sup>429</sup> Yacoob J, however, made no definite determination, but he held the view that the important question is not the content of a minimum core, but rather whether the state took reasonable measures to realize Constitutional rights.<sup>430</sup> The Court further held that there are particular cases that beg for a minimum core of a specific service and in these cases it will be appropriate to take into account a minimum core when determining whether a state took reasonable steps, but this does not imply an entitlement to everyone for the minimum core of a right.<sup>431</sup> The Court then, instead of giving a rigid interpretation of the minimum essentials levels for housing, directed the government to establish a well-coordinated, coherent, inclusive program.

The *Grootboom* approach was confirmed in the *Treatment Action Campaign* case when the Court, again, took the reasonable compliance approach, but made it evident that although it recognises the minimum core content of socio-economic rights, this does not imply an immediate self-standing right to everyone.<sup>432</sup> Thus, although the socio-economic rights are contained in the *Constitution*, this does not immediately entitle anyone to demand the minimum core.<sup>433</sup> The minimum core's relevancy, therefore, lies not in determining a minimum level of rights, but rather the reasonableness of state measures.

Although there is no definite minimum core given by the courts,<sup>434</sup> the jurisprudence suggests that a minimum core entails that there should at least be an established,

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428As seen in *Grootboom and Minister of Health v Treatment Action Campaign* 2002 5 SA 72 (CC), hereafter referred to as *Treatment Action Campaign*.

429 *Grootboom* para 13.

430 *Grootboom* para 29-33.

431 *Grootboom* para 33; De Vos "The right to housing" 101.

432 *Treatment Action Campaign* para 35.

433 *Treatment Action Campaign* para 35; De Vos "The Right to Housing" 101; Wabwile *Legal Protection of Social Economic Rights of Children* 22.

434It would be difficult for the courts to determine a minimum core due to the separation of powers and the budgetary implications thereof. As stated in the *Treatment Action Campaign* case: [37] It should be borne in mind that in dealing with such matters the courts are not institutionally

well-coordinated, coherent, inclusive program that addresses the socio-economic rights.

The role of the courts is therefore not to establish the content of a minimum core, but rather to determine whether the state is taking reasonable measures<sup>435</sup> to fulfil its constitutional duties.<sup>436</sup> Courts are therefore bound, when appropriate, to find that the state has failed to respect, protect, promote and fulfil the rights due to the lack of the formulation and implementation of inclusive socio-economic policies.<sup>437</sup>

Jansen van Rensburg and Lamarche<sup>438</sup> explain this approach in the context of social assistance:

The question would be whether the measures adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met. Again, as applied to social security, this means the Court will look at the social security system as a whole and the different measures to address the state's obligation. For example, is there a safety net for the most needy in society by way of social assistance measures? In our opinion the answer is no ... this entire grant system is subject to a strict means test under the Social Assistance Act 59 of 1992.

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equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. As was said in *Soobramoney*: The State has to manage its limited resources in order to address all these claims. There will 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.

[38] Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

435 Reasonable measures will be tested against budgetary constraints, but we must keep in mind that the budget for this realization, will not only be the official government budgetary allocations, but will also include international assistance and that even in situations where there are severe economic constraints vulnerable populations and individuals can be protected by the adoption of low cost target programmes.

436 Ngwenya and Cook "Rights Concerning Health" 115.

437 Ngwenya and Cook "Rights Concerning Health" 142.

438 Jansen van Rensburg and Lamarche "The Right to Social Security and Assistance" 240-241.

When this method is applied to the socio-economic rights of undocumented children, it will be required to test the reasonability of the access to social grants. It will require exploring whether the exclusion of this group from basic grants can be seen as the granting of a minimum core. Quite obviously, in the presence of social assistance policies subject to documentation requirements, and in the absence of any alternative relieve for the undocumented child, this method will not indicate the granting of the minimum core. When considering this, it supports the argument that the undocumented children are subject to a state of exception and that even a minimum core of their rights are unenforceable.

The limitation of socio-economic rights will now be analysed in an attempt to determine the actual enforceability.

#### 4.3.3.4 Limitation of Constitutional Rights

The last discrepancy between sections 26 and 27 and section 28, is the presence of an internal limitation in the socio-economic rights of everyone and the absence thereof in those of children. Although section 28 contains no internal qualification, no constitutional right is absolute; all rights are subject to possible limitations.<sup>439</sup> In both *Khosa*<sup>440</sup> and *Grootboom*<sup>441</sup> the court held that any such limitation must, however, be consistent with the Bill of Rights as a whole. There are two forms in which these possible limitations can be found, either a general limitation as provided for in section 36, or a right can contain an internal limitation as found in section 26 and 27.

##### 4.3.3.4.1 Internal Qualifications

Brand<sup>442</sup> distinguished between three groups of socio-economic rights: qualified rights, unqualified rights and prohibition rights.<sup>443</sup> The distinction is based on the

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<sup>439</sup>Section 7(3) of the *Constitution* s 'The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.'

<sup>440</sup>Para 45.

<sup>441</sup>Para 44.

<sup>442</sup>Brand "Introduction to Socio-Economic Rights in the South African Constitution" 3.

<sup>443</sup>Brand "Introduction to Socio-Economic Rights in the South African Constitution" 3. Third, sections 26(3) and 27(3) describe particular elements of the section 26(1) right to have access to housing

formulation of the rights. Only two of these are relevant to this study. The first group is the so-called qualified rights which sections 26 and 27 form a part of. The text of these rights makes it apparent that the access and implementation will be subject to certain limitations in relation to State action. It is only required of the State to take:

... reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

The implication is that these rights cannot be viewed as justification for individual relief,<sup>444</sup> it is therefore not the State's duty to immediately fully realise each individual's rights, but rather to develop and implement a comprehensive plan that, in time, will realize the rights. The term 'reasonable' as used in this section has not been defined by the Constitutional Court.<sup>445</sup> It has only been held that it will be determined on a case to case basis.<sup>446</sup>

The second group is the socio-economic rights that contain no internal limitation. Brand describes this as the basic socio-economic rights. Section 28 and 29 form part of this group, because it cannot be described as an access right and contain no internal qualification. Seemingly the only internal qualifications are the adjective "basic", which limits the extent of nutrition, health care and social services, and the right to shelter opposed to the right to housing.<sup>447</sup> Jansen van Rensburg<sup>448</sup> contends that this may suggest that section 28(1)(c) refers only to the most 'basic attenuated level of services needed for a dignified survival'. There are, however, contradictory opinions whether this lack of internal limitation then imply a direct, immediate right to section 28. Jurisprudence on this matter has not given clear guidance. De Vos<sup>449</sup> writes that the rights of a child are expressed in the Constitution as clear, direct, almost absolute core rights. The exact restricted way in which these rights are expressed points to these rights.

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and the section 27(1) right to have access to health services respectively. These rights are formulated as prohibitions of certain forms of conduct, rather than rights to particular things.

444 Iles 2004 *SAJHR* 460.

445 Iles 2004 *SAJHR* 455.

446 *Grootboom* para 92.

447 Stewart 2008 *SAJHR* 472.

448 Stewart 2008 *SAJHR* 472.

449 De Vos 1997 *SAJHR* 88.

These rights then serve as a safety net in circumstances of neglect, abuse and poverty. The responsibility rests on the state to deliver these services where they are non-existent or lacking. Christiansen<sup>450</sup> strengthens this by arguing that when the courts interpreted section 28 within the textual context, they will find that the internal qualifications are not applicable. He does, however, state that this will lead to the problem that even reasonable limitations, like valid financial constraints, will be invalid, which will imply that there will have to be made allocations to these rights outside of the democratic budget. This is also one of the main arguments against the immediate rights theory. Writers like Liebenberg<sup>451</sup> agree that that a direct, immediate right only exists in the limited circumstances where there is no parental care. Therefore, only children who are orphaned or whose parental care is inadequate will have a directly enforceable right. Although not directly dealing with this issue, the same argument was held by the Constitutional Court in the *Grootboom* case.<sup>452</sup> The application of the overlapping of the rights of the child and parent will be discussed in the following chapter, to shed light on how the courts interpret this limitation.

Quite contradictory to the absence of an internal limitation in section 28, section 5 of the *Children's Act* states:

Recognising that competing social and economic needs exist, organs of state in the national, provincial and where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act'.

These are quite clearly the same provisions found in qualified rights and considering that the *Children's Act* translate section 28 into legal entitlements,<sup>453</sup> one must question whether this then reduces section 28 into a qualified right? This study will approach section 28 as an unqualified right, but acknowledges that this is clearly a void in the law that needs to be explored and addressed.

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450 Christiansen 2006 *CHRLR* 383; Pieterse 2004 *Human Rights Quarterly* 888.

451 Liebenberg 2002 *Law, Democracy and Development* 174; Scott en Alston 2000 *SAJHR* 258-260.

452 *Grootboom* para 77; Stewart 2008 *SAJHR* 476-477 "The Court differentiates between children with parents and children without parents. According to the Court the primary responsibility to provide children with socio-economic needs vests in the parents. In effect the Court gives preferential treatment to children without parents by implying that these children have a direct and immediate claim to the rights in s 28(1)(c). This distinction is typical of the private law/public law dichotomy."

453 Stewart 2008 *SAJHR* 472.

#### 4.3.3.4.2 Section 36

If the case arises that a constitutional right has no internal qualification, it is still subject to section 36. It is with the second part of constitutional analysis that section 36 comes into play and more specifically in cases where the limitation is done in terms of the "law of general application",<sup>454</sup> as can be seen in the application of section 28.

During the initial certification of the Constitution, the Constitutional Court declared that the limitation clause in section 36(1) will be a substantial reflection of *S v Makwanyane*<sup>455</sup> where the court held that:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.

Section 36(1) of the Constitution lists the factors that need to be considered during the proportionality test in determining whether a limitation is justifiable:

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.

Any discrimination and requirements with regards to the access to social assistance will have to be justified according to the abovementioned factors, especially in light of the definition and vulnerability of a child. Section 36 is, however, "more rigorous and far less deferential"<sup>456</sup> than the internal qualifications.

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454 O'Regan and Friedman "Equality" 499; De Vos 1997 *SAJHR* 92.

455 1995 3 SA 391 (CC) para 104.

456 Dafel 2013 *SAJHR* 597.

It is a valid question to ask whether reasonableness differs in section 36 and section 27. Although the question has been raised in constitutional court cases,<sup>457</sup> there has been no clear indication if and what this difference would be.<sup>458</sup> It seems that most academics are in agreement that the test in both sections is identical.<sup>459</sup> Stewart, however, argues that the test for reasonability does in fact differ and she bases this on the standard of scrutiny used by the court, which has intensified in each case. This study will follow this approach.

There are indeed substantial differences between the application of the internal limitations and the general limitation clause in cases dealing with both children's and their parents' socio-economic rights. Clearly the most important distinction is the standard of scrutiny the Court will apply when establishing whether the measures taken by the state are reasonable. De Vos, Freedman and Brand<sup>460</sup> support Stewart by explaining that the section 36(1) enquiry requires a full-blown proportionality test and necessitates an enquiry into the substantive content of the right while the sections 26 and 27 test, as it is currently applied, will only enquire whether there is a reasonable link between the measures taken by the state and the constitutional goal.

It is for this reason that De Vos, Freedman and Brand<sup>461</sup> argue that socio-economic claims should be done under negative obligations. A negative obligation entails that

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457 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC) para 83 "There is a difficulty in applying s 36 of the Constitution to the socio-economic rights entrenched in sections 26 and 27 of the Constitution. Sections 26 and 27 contain internal limitations which qualify the rights. The state's obligation in respect of these rights goes no further than to take 'reasonable legislative and other measures within its available resources to achieve the progressive realisation' of the rights. If a legislative measure taken by the state to meet this obligation fails to pass the requirement of reasonableness for the purposes of sections 26 and 27, section 36 can only have relevance if what is 'reasonable' for the purposes of that section, is different to what is 'reasonable' for the purposes of sections 26 and 27.

458 *Khosa* para 84 Even if it is assumed that a different threshold of reasonableness is called for in sections 26 and 27 than is the case in section 36, I am satisfied for the reasons already given that the exclusion of permanent residents from the scheme for social assistance is neither reasonable nor justifiable within the meaning of section 36.

459 Rautenbach 2005 *TSAR* 653; Woolman and Botha "Limitations" 34-37; Brand, however, argues that the absence of an internal limitation with respect to children's nutritional rights makes these rights subject to a higher level of scrutiny, and that the state will have greater difficulty in justifying a possible infringement of the s 28(1)(c) rights.

460 De Vos, Freedman and Brand *South African Constitutional Law in Context* 694-695.

461 De Vos, Freedman and Brand *South African Constitutional Law in Context* 694 "Infringements of the positive duties imposed by qualified socio-economic rights are usually evaluated against a more

the state should refrain from action as opposed to do an action. A negative obligation will therefore always be done under section 36 scrutiny, because the problem of separation of powers is diluted. The claims of the undocumented child are then more likely to be enforced if done under the negative obligation, because of the robust scrutiny that section 36 demands. For example, if the claim is based on the negative obligation to respect, it can be argued that the state is interfering with the undocumented child's access to socio-economic rights by excluding them from the child grant system and the state is also neglecting its obligation to mitigate the interference by its lack of alternative access.<sup>462</sup>

Even if this succeeds, there still remains the issue of the intertwined nature of the rights of the undocumented child's with that of their parents.

#### 4.3.3.4.3 Limiting a Child's Rights with Those of Their Parents

There is an overlap between qualified and basic rights when the court must adjudicate the socio-economic rights of parents and children.<sup>463</sup> The application of the court is indicative of it trying to avoid that children become stepping stones for the socio-economic rights of their parents,<sup>464</sup> and even more so in the case of illegal parents.

It seems the manner in which the court counters this is by addressing the issue in terms of the rights of everyone and not section 28 rights. Is there then any difference then between a qualified and unqualified right?

In *Grootboom*, the first constitutional court case to address the issue of the rights of children and parents, three of the courts decisions are of interest to this study. Firstly, the court held that the obligation created by section 28 could only be understood in

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lenient standard of scrutiny than the standard that applies to other infringements of rights in terms of section 36(1). In other words, courts are more constrained in their assessment of such infringements than they are with respect to other infringements."

<sup>462</sup>This line of argumentation has been successfully run in court, although not in terms of undocumented children, but in terms of illegal occupants. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217, for example, the court found that the court had neglected its duty to respect on both these grounds.

<sup>463</sup>See *Grootboom* case.

<sup>464</sup>Stewart 2008 *SAJHR* 473.

the context of the obligations created by section 25-27.<sup>465</sup> Secondly, that the primary responsibility for the care of children rests with their parents, and that the state therefore only has a responsibility in the case where there is no parental care.<sup>466</sup>

This obligation was extended in the *Treatment Action Campaign* case, where the court held that the state will also have a duty towards children, when parental care is insufficient or lacking.<sup>467</sup> This, however, does not give these children a direct, immediate right. The reasonableness of the policy will still be tested against section 28 and 36.<sup>468</sup>

A case of specific interest to this study, due to it dealing with foreign children, is *Centre for Child Law v Minister of Home Affairs*.<sup>469</sup> The court based its decision on the Grootboom case and concluded that the state has a duty to provide unaccompanied foreign children with the rights set out in section 28.<sup>470</sup>

Stewart<sup>471</sup> correctly states that:

The current jurisprudence can be read to suggest that only children without parents<sup>41</sup> and children living in extreme poverty<sup>42</sup> may have a direct immediate claim to socio-economic rights.<sup>43</sup> It is indeed indigent children and children without parents who need their basic socio-economic rights to be realised. It is, however, doubtful whether the Court will in future interpret 28(1)(c) as bestowing an unqualified, immediate, direct right on children where parental care is present.

The only deduction one can make from the above jurisprudence is that the court prefers to adjudicate matters in terms of section 26 and 27 where parental care is present. Stewart<sup>472</sup> further holds that it appears as if the courts are trying to avoid interpreting section 28:

A possible reason for this reluctance to interpret s 28(1)(c) is that the remedies to realise socio-economic rights require time and resources. The difficulties inherent in

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465 *Grootboom* para 73.

466 *Grootboom* para 77.

467 *Treatment Action Campaign* para 79.

468 Stewart 2008 *SAJHR* 477.

469 2005 6 SA 50 (T).

470 Liebenberg *Socio-Economic Rights* 34-48.

471 Stewart 2008 *SAJHR* 478.

472 Stewart 2008 *SAJHR* 478.

the enforcement of s 28(1)(c), however, should not imply that children's socio-economic rights cannot be viewed as immediate and direct rights.

Brand<sup>473</sup> agrees with this:

However, curiously, despite its finding that a substantive duty for the provision of basic necessities to children exists, the Court managed in both cases to avoid applying that substantive duty as the basis for its decision, and avoid having to describe it. In *Grootboom* the Court did so consciously, holding that the children in the *Grootboom* community '[were] being cared for by their parents; [were] not in the care of the State, in any alternative care, or abandoned' and were as such not entitled to care from the state. But in *TAC*, having discussed the substantive duties that children's right to basic health care services impose on the state, the Court simply ignored them in its eventual decision.

Many academics agree that section 28 should be read to create a priority right, an entitlement to the basic socio-economic rights of the child.<sup>474</sup> This study argues that any approach that does not acknowledge section 28 as a priority right disregards the unique nature of the child and their globally recognised need for special protection, what is more, it loses sight of the importance of a separate provision for children.

To address this issue, this study agrees with Stewart, who proposes that when faced with the choice between testing a limitation of the socio-economic rights of the child in terms of sections 26 and 26 and section 36, section 36 must prevail. Her argument rests on the difference between the reasonability tests applied by sections 26, 27 and section 36. She states the following reasons for this:<sup>475</sup>

In the case of s 36, the limitation must not only be contained in a law of general application, but must also comply with a certain standard of justification. The standard of justification is relatively more intrusive and apparently stricter ... this allows courts to thoroughly investigate state conduct and so prescribe specific alternative options ... s 36 is no directed at the plan for realising socio-economic rights but an examination of the reasonableness of the limitation ... A full blown proportionality analysis in terms of s 36 will further allow for a higher degree of scrutiny ... The court will be forced to give substantive content to the socio-economic rights of children and in the process of doing so, will move away from its procedural, formalistic approach in adjudicating socio-economic rights.

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473 Brand "What are Socio-Economic Rights for?" 47.

474 Stewart 2008 *SAJHR* 480; Scott and Alston 2000 *SAJHR* 260; Viljoen "Children's Rights" 206.

475 Stewart 2008 *SAJHR* 491-493.

The core of the issue is that section 26 and 27 only require of the state to prove that there is a link between the measure currently taken and the constitutional goal. This will not suffice in the case of section 28. The approach recommended by Stewart recognises a very important aspect of this debate, and that is that the courts are dealing with the rights of an extremely vulnerable group of society. By applying section 36, the state must not only define the rights in question, but must also do a "full blown" proportionality test. This level of scrutiny takes many other rights into account, specifically the child's right to life and dignity. When applying reasonableness in terms of sections 26 and 27, the state will have satisfied the criteria by just proving that something is being done, this is simply not enough. Our society owes more to the children living in this country. The state must be able to justify that excluding undocumented children from social policies and therefore limiting their socio-economic rights is in the best interest of the child, that it respects their rights to dignity, equality and freedom, that there is a relation between the limitation and the purpose and there are no less restrictive means to achieve the purpose. I find it difficult to see how any of the previous requirements could possibly be justified. One must never lose sight of the fact that you are adjudicating the rights of the child and, therefore, different levels of scrutiny must be applied.

#### ***4.4 Undocumented Child's Access to Socio-Economic Rights***

What is unprecedented is not the loss of home, but the impossibility of finding a new one. Suddenly, there was no place on earth where migrants could go without the severest restrictions, no territory where they could find a new community of their own.<sup>476</sup>

Due to the clandestine nature of undocumented children, it is an almost impossible task to acquire information about their living conditions. It is, however, possible to access information about asylum seeking and refugee children. If their situation is barred with obstacles, one can only assume that the undocumented child is worse off. It is for the reason that many of the following information are based on asylum seekers and refugees, but the point is to illustrate the lack of access that foreigners

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476 Arendt *The Origins of Totalitarianism* 293.

face within South Africa and to then draw a logical conclusion concerning the access of undocumented children. It is possible to base a whole study on each of the following factors, however for this research aim, only brief discussions will be done which will show that access and enforceability of these rights are severely restricted.

Arendt stated that the Rights of Man where "by themselves supposed to be independent of citizenship and nationality",<sup>477</sup> the following will illustrate how there can hardly be said that this independence exists with regards to the socio-economic rights of the undocumented child in South Africa.

#### *4.4.1 Child Support Grant*

The South African government offers eight different social grants.<sup>478</sup> The Child Support grant was especially implemented to relieve the levels of poverty in which such a vast amount of children live and has had a mayor positive impact on child poverty as well as human capital development.<sup>479</sup> The grant consists of a predetermined set amount paid monthly to the primary caregivers of a child.<sup>480</sup> At the time of writing, this amount was R 350 per child per month.

UNICEF,<sup>481</sup> in their impact assessment of the South African Child Support Grant, explains the importance of this grant,

Cash grants directly reduce poverty of some of the most vulnerable and in so doing also reduce inequality. Payment of cash to poor households will reduce the poverty headcount or the poverty gap and also reduce inequality measures because they are typically funded from progressive taxation. Cash grants therefore directly improve the living standards of the poor and increase consumption levels of the poor relative to those in higher income groups, directly reducing poverty and inequality. In addition to directly reducing poverty cash grants also deal with some of the underlying causes of poverty and in so doing not only provide a safety net, but also generate positive dynamics through enabling risks to be mitigated and reduced over time. While

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477 Arendt *The Origins of Totalitarianism* 293.

478 SASSA 2015 <http://www.sassa.gov.za/index.php/social-grants/social-relief-of-distress> The grants are: Social Relief of Distress; Grants-in-aid; Child Support Grant; Foster Care Grant; Care Dependency Grant; War Veteran's Grant; Disability Grant; Grants for Older Persons.

479 Mbulaheni *et al* 2014 *AJPHRD* 66; UNICEF *The South African Child Support Grant: Impact Assessment* 1.

480 South African Government 2014 <http://www.gov.za/services/child-care-social-benefits/child-support-grant>.

481 SASSA *Child Support Grant* 6.

poverty reduces resources that provide minimum living standards it also keeps households from consuming more productive consumption bundles, participating in economic activities and investing in physical, social, and human capital (i.e. education, health, nutrition) assets to ensure future income streams. Cash grants, in addition to funding consumption, enable poor households to make different consumption decisions, participate in productive economic activity and invest in the future productivity of the household and household members.

It is therefore quite evident that what a crucial role these grants play in the attainment of an adequate standard of living, alleviating the dire circumstances in which undocumented children live and their development into economic contributing members of society. There are, however, various requirements that have to be met before a caregiver can apply for the grant.<sup>482</sup> The greatest barrier for the undocumented child is obviously the documentation of which the following is needed: the caregiver needs to provide their identity document, an affidavit confirming the income of the applicant; proof that the child is registered at a school or attends school and the child's birth certificate or in the alternative an affidavit confirming the child's identity.<sup>483</sup> This affidavit may provide relieve to South African citizens, but it offers little assistance to an undocumented caregiver, the reason being that the affidavit needs to be accompanied by proof of an application to the department of home affairs for the original birth certificate.<sup>484</sup> The undocumented child is therefore, again, left without any relief. The aim of the grant is to target the poorest children and those most in need, but these conditions are preventing a vulnerable group from accessing the grant.<sup>485</sup>

The only other option is to apply for citizenship which is only granted to foreigners that can prove that they are employed and financially independent.<sup>486</sup> This requirement clearly then excludes a vast amount of people who would have to make

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482 SASSA 2015 <http://www.sassa.gov.za/index.php/social-grants/child-support-grant> "the primary care giver must be a South African citizen, permanent resident or refugee; both the applicant and the child must reside in South Africa; applicant must be the primary care giver of the child/ children concerned; the child/children must been born after 31 December 1993; the applicant and spouse must meet the requirements of the means test; child can not apply for more than six non biological children; child cannot be cared for in state institution.

483 SASSA *Child Support Grant 2*.

484 SASSA *Child Support Grant 3*.

485 SASSA *Child Support Grant 3*.

486 Department of Home Affairs 2014 <http://www.home-affairs.gov.za/index.php/civic-services/citizenship>.

use of the grant system. Even if an undocumented migrant succeeds in applying for a temporary permit, citizenship is only given after five years.<sup>487</sup> This implies five more years with no access to any state funded assistance. This procedure gives no help to a child that requires urgent care and protection.

To put it in very simple terms, all children within South Africa are supposedly entitled to the rights in the Constitution,<sup>488</sup> there is also no discrimination based on nationality.<sup>489</sup> Furthermore, all children are entitled to an adequate standard of living and a basic level or minimum core of their human rights according to international law.<sup>490</sup> The discrepancy comes into play in the legislation that gives power to the constitution. The Child Care grant makes it evident that "every child" is entitled to state funded help, as long as they can prove they are citizens. Even if an undocumented child, therefore, lives below the poverty line, and even if their parents are unable to support them, they will not qualify to be a beneficiary of the child care grant. This means that the state will not fund the enforcement of their basic socio-economic rights, rendering them unenforceable. This is very clearly a state of exception, in which the undocumented child is the exception to the rule of basic socio-economic rights.

#### *4.4.2 Health Care*

Since 2007 the Department of Health has repeatedly affirmed the rights of asylum seekers and refugees to access the same public health care to which citizens have access. However during this same period, documented and undocumented migrants alike have been denied access to health care. Even when seeking emergency care after xenophobic attacks or rapes, migrants are often turned away by medical personnel who may discharge them prematurely, harass them, charge them excessive user fees, and call the police to deport them.<sup>491</sup>

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487 Department of Home Affairs 2014 <http://www.home-affairs.gov.za/index.php/civic-services/citizenship>.

488 See section 3.

489 See section 3.

490 See section 4.2 and 4.3.3.3.1.

491 Human Rights Watch *No Healing Here 2*.

In its preamble, the *National Health Act*<sup>492</sup> recognises the section 28 right of every child to basic health care services. Despite legislation and policies that guarantee free health, Human Rights Watch has, on numerous occasions given reports of harassment, lack of documentation and fear of deportation that has prevented undocumented migrants from having access to health care.<sup>493</sup> CoRMSA has also reported that undocumented migrants face the greatest challenges in accessing public health services and are the most affected by "the challenges linked to financial and human resource constraints".<sup>494</sup> In many instances, undocumented migrants are routinely denied medical care in hospitals and clinics.<sup>495</sup> This includes children, rape victims,<sup>496</sup> women in labour<sup>497</sup> and HIV patients.<sup>498</sup> They do not have unhindered

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492 Preamble of *National Health Act* 61 of 2003.

493 Human Rights Watch *No Healing Here* 3-7; Consortium for Refugees and Migrants in South Africa *Protecting Refugees, Asylum Seekers and Immigrants* 124; Odhiambo 2012 <https://www.hrw.org/news/2012/03/18/sick-system-abuses-its-refugees> "Human Rights Watch's research shows that they face discrimination in public health facilities and abuse from healthcare providers just because they are foreigners. The South African government, instead of addressing these problems, has taken policy steps that risk worsening the human rights abuses that asylum seekers and migrants already face. South Africa's obligation to provide healthcare to non-citizens within its borders presents a serious challenge in terms of resources, administration and service delivery, especially for a health system that struggles to meet the needs of its own citizens. But the health needs of migrants and citizens are intertwined. The consequences for South Africa of failing to treat migrants adequately, both in terms of its legal commitments and the public health and cohesiveness of a multi ethnic South African society strained by xenophobia, cannot be ignored."

494 Consortium for Refugees and Migrants in South Africa *Protecting Refugees, Asylum Seekers and Immigrants* 124.

495 Teagle 2014 <http://www.dailymaverick.co.za/article/2014-10-16-refugees-out-of-the-frying-pan-and-into-the-fire-of-south-africas-healthcare-system/#.Vjn35bcrLIU> It is a system that is intended to protect the poor and vulnerable, and to ensure that we can all realise our right to healthcare. Except that it does not extend to foreign patients without the 'correct documentation' Paballo 2011 <https://www.hrw.org/news/2009/12/07/south-africa-improve-migrants-access-health-care>; Human Rights Watch *No healing here* 5.

496 Human Rights Watch *No healing here* 9 "Language barriers and lack of information make meaningful counseling and consent (for example for HIV diagnosis, or provision of post-exposure prophylaxis (PEP)) all but impossible. Rape survivors, who frequently lack knowledge of the services available to them and often fear deportation, face barriers in accessing lifesaving post-rape emergency medical care, including emergency contraception and (PEP) within the 72 hour window in which treatment is available after an assault. Some health care facilities erroneously require survivors to report the rape to the police before medical treatment is given. For undocumented asylum seekers and other migrants who fear deportation, such a requirement is frequently prohibitive."

497 Teagle 2014 <http://www.dailymaverick.co.za/article/2014-10-16-refugees-out-of-the-frying-pan-and-into-the-fire-of-south-africas-healthcare-system/#.Vjn35bcrLIU>.

498 Vearey "Ensuring Migrant Rights to Health, Assessing Non-Citizen Access to ART"; Maduna <http://migration.org.za/uploads/docs/MigrantGautengDoH.pdf>.

access to health services, with the four major barriers being discrimination,<sup>499</sup> inadequate, inaccurate and misleading information,<sup>500</sup> barriers to emergency care for rape survivors and extralegal user fees.<sup>501</sup>

A study conducted by the South African Migration Programme in 2011 confirmed medical xenophobia in South Africa and found that it is most observable in:

(1) the requirement that refugee patients produce identification documentation and proof of residence status before receiving treatment; (2) health professionals refusing to communicate with patients in English or allow the use of translators; (3) treatment is sometimes accompanied with xenophobic statements, insults and other verbal abuse; (4) non-South African patients are required to wait until all South African patients have received medical attention, even if they have been waiting longer for treatment; and (5) refugees and asylum seekers have such difficulty accessing ARV for HIV in public hospitals that many are forced to rely on NGO treatment programmes.

No Healing Here<sup>502</sup> confirms this in the testimonials of undocumented migrants and refugees. Accounts are given of refusal of emergency treatment,<sup>503</sup> refusal of the treatment of chronic illnesses like TB and HIV<sup>504</sup> and that of children and woman in labour.<sup>505</sup>

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499 Zihindula, Meyer-Weitz and Akintola 2015 *Southern African Journal of Demography* 24; Human Rights Watch *No Healing Here* 7 The most serious barrier to health care access for asylum seekers, refugees and undocumented migrants is discrimination by individual health care providers. Documented and undocumented asylum seekers alike told Human Rights Watch of being refused care even for basic and emergency treatment, including patients with acute tuberculosis and women in labor, because they lacked South African identity documents or simply for being foreign.

500 Consortium for Refugees and Migrants in South Africa *Protecting Refugees, Asylum Seekers and Immigrants* 124-125.

501 Human Rights Watch *No Healing Here* 7.

502 Human Rights Watch *No Healing Here* 42-60.

503 Human Rights Watch *No Healing Here* 44 "I was robbed [and] assaulted. People on the street just watched it happen. I went to Hillbrow clinic. I asked for an x-ray but they said, 'No, that's not for foreigners. Go back to Zimbabwe if you want x-rays.' I went back four times but it was always, 'No, my friend. That's for South Africans.'"

504 Human Rights Watch *No Healing Here* 56 'Kelvin, an asylum seeker in Johannesburg interviewed by Human Rights Watch, did not successfully obtain treatment for TB until reaching his third health care facility: I went to Joburg Hospital because I felt like I had TB. I went to be tested. They told me to go to Hillbrow. At Hillbrow they said, "we don't like foreigners, you are thieves." So I went to Helen Joseph and got tested there. I was coughing, losing weight. At Hillbrow I heard some of the nurses saying "we don't like them here, this hospital is for South Africans." I was very sick. I had been sick for three weeks.'

505 Human Rights Watch *No Healing Here* 51 "Claudia, an asylum seeker from DRC living in Johannesburg, suffered a miscarriage when she was shot during civil conflict in her country. She

It seems that the most prevalent argument is that migrants are denied services in order to save resources for nationals, this is enforced by the strong anti-foreign attitude within South Africa and is negatively impacting the utilization of health care services.<sup>506</sup> This study and the discussion in the previous chapter supports Beldevere, Pigou and Handmaker<sup>507</sup> in their argument that it cannot be assumed that because states lack the capacity to meet the needs of their entire population, they have no responsibility for ensuring an acceptable level of health care for migrants, documented or otherwise.

Low quality, and even more so, no health services have a direct impact on the development and welfare of a child.<sup>508</sup> The access of children specifically came into the spotlight in 2014 when a 12 year old Somali girl, who travelled unaccompanied

through Kenya, Tanzania and Mozambique,<sup>509</sup> was refused a lifesaving operation<sup>510</sup> at a state funded hospital.<sup>511</sup> The Steve Biko Academic Hospital refused to treat the girl when her parents were unable to produce documentation. The hospital then required a deposit of R 250 000 before any treatment would be done - a ludicrous amount which resulted into the child being denied basic health care. Only after the Lawyers

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became pregnant again after fleeing to South Africa with her husband: They said, "you Africans can just give birth outside." One nurse said, "we were suffering here during apartheid, and no one came to help us. Now we have peace and all foreigners come to grow the population. That one is not my problem." They left me alone in the dark for hours. Finally in the morning the doctor came back and heard me crying in my language and said, "how can you leave the lady here suffering? Take her to surgery!" They did the c-section but the baby was traumatized. After I came home, the child's head grew large, he was vomiting and losing weight."

506 Zihindula, Meyer-Weitz and Akintola 2015 *Southern African Journal of Demography* 11.

507 Beldevere, Pigou and Handmaker "Realising Rights" 251.

508 South African Human Rights Commission *Poverty Traps and Social Exclusion Among Children in South Africa* 62.

509 City Press 2014 <http://www.news24.com/Archives/City-Press/Somali-girl-initially-denied-heart-operation-is-finally-put-on-the-list-20150430>; Narsee 2014 <http://www.timeslive.co.za/thetimes/2014/07/18/no-heart-surgery-for-ailing-girl>.

510 Lawyers for Human Rights 2014 <http://www.lhr.org.za/news/2014/press-release-lhr-and-steve-biko-hospital-reach-agreement-treatment-12-year-old-asylum-see> "She arrived in South Africa on 4 July as an asylum-seeker with the intention of applying for refugee status after fleeing conflict in Somalia. Unfortunately, before being able to apply, she collapsed, complaining of weakness, a fever and vomiting. She was rushed to Kalafong Hospital in Atteridgeville, Pretoria on 5 July where her brother was told that she was suffering from a serious heart condition."

511 Venter 2014 <http://www.iol.co.za/news/crime-courts/somali-refugee-girl-needs-urgent-op-1.1721220>; City Press 2014 <http://www.news24.com/Archives/City-Press/Somali-girl-initially-denied-heart-operation-is-finally-put-on-the-list-20150430>.

for Human Rights made an urgent application to the High Court, was the hospital compelled to perform the surgery.

Fortunately the court intervened, but one must keep in mind the obligations of the state as set out in section 7. There is a duty to protect against third party interference, but also a duty to promote, this includes that both the right bearer and third parties are aware of the rights a person is entitled to. At this stage, when reviewing the actual access undocumented children have, the fact that policy dictates they should have access to basic health care is not in any way guaranteeing the fulfilment of their right, in fact it seems in most cases quite unenforceable.

#### 4.4.3 Education

Every person — child, youth and adult — shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.<sup>512</sup>

The right to basic education is grounded in both international law,<sup>513</sup> most notably in the *International Covenant on Economic, Social and Cultural Rights*<sup>514</sup> and domestic law. Access to education is crucial to the fulfilment of the right to life and the right to dignity, as explained by the Supreme Court of India:<sup>515</sup>

'Right to life' is the compendious expression for all those rights which the Court must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour [sic] to provide educational facilities at all levels.

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512 Article 1 of the *World Declaration on Education for All* (1990).

513 Article 28 of the *Convention on the Rights of the Child*; Article 26 of the *Universal Declaration Human Right*; E/C.12/1999/10; Article 10 of the *Convention on the Elimination of all Forms of Discrimination Against Women*; Protocol 1 Article 1 *European Convention on Human Rights and Fundamental Freedoms*.

514 Article 13 of the *International Covenant on Economic, Social and Cultural Rights*.

515 *Miss Mohini Jain v State Of Karnataka And Others Supreme Court of India* 1992 SCR 3 658.30 July 1992 661.

The right to basic education is enshrined in section 29(1) of the Constitution.<sup>516</sup> Section 29, like section 28, is not subject to progressive realisation.<sup>517</sup> This was confirmed by the constitutional court in *Governing Body of the Juma Masjid Primary School v Essay*,<sup>518</sup> when the court held that the right to basic education is a distinct, unqualified right:

Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education "progressively available and accessible."<sup>519</sup>

McConnachie and McConnachie<sup>520</sup> argue that this court's decision, in this case should be interpreted to mean that section 29(1) is a direct right to basic education and that anything less is a limitation. The absence of an internal limitation further implies that, in the circumstance where the right is limited, the state will have to prove under section 36 scrutiny that the limitation is justifiable. It is of importance to keep in mind that the right to education is for "everyone", and unlike, for example, the right to vote, the constitution does not limit it to South African citizens. Even without an internal limitation and the prohibition of discrimination, the enforcement of this right has great difficulty, for citizen and undocumented children alike.<sup>521</sup> Barriers to basic education for the undocumented child include lack of documentation, age and grade placing, school fees and related access costs, limited places at schools, language

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516 Section 29(1) of the *Constitution* "(1) Everyone has the right - (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

517 There is no section on progressive realisation as found in sections 26 and 27; Consortium for Refugees and Migrants in South Africa *Protecting Refugees, Asylum Seekers and Immigrants* 127.

518 2011 8 BCLR 761 (CC).

519 Paragraph 37.

520 McConnachie and McConnachie 2012 *South African Law Journal* 564.

521 Browne *The Right to Education for Refugees and Asylum-Seekers* 22 "Mismanagement of funds, poor or non-existent infrastructure and ineffective or intermittent teaching are all problems endemic to education in South Africa."

difficulties, xenophobia and "a generalised mistrust and miscommunication between School Governing Boards (SGBs) and parents".<sup>522</sup>

Browne<sup>523</sup> describes the process before a child can be admitted to a public school:

When a parent applies to have his or her child admitted to a public school, the parent must submit an official birth certificate to the principal of the school. In the event that the parents cannot accomplish this, "the learner may be admitted conditionally until a copy of the birth certificate is obtained from the regional office of the Department of Home Affairs. Furthermore, a parent applying to have her child admitted must show proof of immunisation against polio, measles, tuberculosis, diphtheria, tetanus and hepatitis B, described as "communicable diseases.

The whole process bears an undocumented child from their constitutional right to education, again highlighting the severe disparity between internationally recognised rights and the actual enforcement thereof.

A recent court case, for example, has highlighted the problems with refugee policies and the practice of education law. Asylum seeking and refugee children are struggling to gain access to the South African public schooling system.<sup>524</sup> Admission to schools is rejected due to a lack of valid permits or other status relating documentation. The 1998 *Schools Admission Policy* states that the South African Act must be applied in the same manner to citizen children, and children whose parents have a valid temporary or permanent resident permit. The Act is, however, very clear on the matter of documentation, in the case of the undocumented child, there must be proof of an application for temporary or permanent residency, without this, no registration is allowed.

Lawyers for Human Rights and the Centre for Child law recently bought an application to the court in an attempt to address some of these issues, specifically with regard to valid permits and status relating documents.<sup>525</sup> The applicants argued that the

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522 Browne *The Right to Education for Refugees and Asylum-Seekers* 34.

523 *The Right to Education for Refugees and Asylum-Seekers* 34.

524 Variava 2014 <http://mg.co.za/article/2014-07-04-refugee-children-win-right-to-learn>.

525 Variava 2014 <http://mg.co.za/article/2014-07-04-refugee-children-win-right-to-learn> "The predicament of these separated children is evident in the story of the first applicant. He is a 16-year-old boy who was orphaned when soldiers killed both his parents when he was a month old. His maternal grandmother and aunt then cared for him. When his grandmother was later also killed

Department of Home Affairs were prohibiting schools from enrolling undocumented children. It was shown that schools that permit undocumented children even face the threat of state induced fines. Making documentation a barrier to basic education is contradictory to both section 28 of the Constitution, but also the *Schools Act*<sup>526</sup> that makes education until grade 9 compulsory.

In the abovementioned case, the Department of Basic Education did not oppose the applicants request that separated children may be registered at schools.<sup>527</sup> This revised policy will hopefully lead to the department making a distinction between undocumented children and the status of their parents, granting every child access to basic education, with no regard to documentation.

The current situation is yet again proving that the discrepancies between the rights, policies and implementation of the socio-economic rights of the undocumented child are rendering them rightless. The situation in South Africa is confirming Arendt's in her statement that, for the stateless or, in this case, the undocumented, the loss of national rights becomes identical to the loss of human rights.<sup>528</sup>

#### **4.5 Conclusion**

With regards to unalienable rights and rightlessness, Arendt referred to people without citizenship, but the information in this chapter has shown that, almost a hundred years later, her work still holds truth even for those people who have citizenship, but are not citizens of the constitutional state they reside in. This seems to

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and his aunt gang-raped, the boy and his aunt fled to South Africa. Although the aunt was able to obtain an asylum-seeker permit for herself she could not obtain one for her nephew, despite repeated efforts to do so. This is because he is not her child, and is therefore not recognised as her "dependant" in terms of the Refugee Act. The aunt was instead informed by department of home affairs authorities that she should obtain a court order appointing her as the nephew's legal guardian, which would enable him to be recognised as her dependant. The aunt has also struggled to register her nephew at a public school. His application for admission to the school was rejected because he does not have a valid permit, or other documentation relating to his status application."

526 *South African Schools Act* 84 of 1996.

527 Separated children could not be acknowledged as "dependants" of caregivers that have obtained documentation because they were not legally their guardians. To obtain guardianship is a lengthy and costly process that can only be done through an application to the high court. Without guardianship these children are treated as unaccompanied foreign children as opposed to dependants of asylum seekers.

528 Arendt *The Origins of Totalitarianism* 292.

be especially true in the enforcement of socio-economic right in South Africa, a country that prides itself on its Constitution. Simply put, the supposedly unalienable socio-economic rights of the undocumented child are unenforceable in South Africa.

The importance of the access to socio-economic rights for the development and protection of the child has been highlighted numerous times in this study. An adequate standard of living is essential for a dignified life, which can only be obtained when all children have access to the necessary socio-economic assistance to evolve in all spheres of development.

Although relatively new in the sphere of human rights, most international instruments currently contain some reference to socio-economic rights. The socio-economic rights of the child specifically is enshrined in all mayor child rights instruments. South Africa is no exception to this rule and has included these rights in various sections in the Bill of Rights.

The most important aspect of this is that the socio-economic of the child was purposely written as a separate section from the rights of everyone. The interpretation of the courts, however, seems to disregard this and they are continuously following an interpretation that focuses solely on the obligations as stated in sections 26 and 27, which contains the rights of "everyone" as opposed to those exclusively for the child.

This study cannot agree with this interpretation. If one supports this, one ignores the very important fact that the socio-economic rights of the child are written separate from those of everyone and furthermore it was written with no internal limitations. As argued in section 3, children are a vulnerable group that requires special protection. Their rights must be given priority and they cannot be treated in the same manner as the rights of adults. Children, irrespective of documentation, must have the entitlements to basic socio-economic rights as granted to them in section 28. A direct, immediate, but not absolute right.

The courts have also shied away from defining the socio-economic rights of the child. This chapter argues that human dignity and that which grants a dignified life, should be used to define section 28.

The exclusions of the undocumented child, whether by legislation or the actions of officials, illustrate that which Agamben described as a state of exception. The manner in which policy is written and the lack of substantive promotion of the rights of the undocumented child is forcing them to live outside the realm of what could be considered a normal childhood. They are forced outside the political sphere of everyday life, by a state which is in effect not acknowledging the basic needs these children are entitled to. The South African Constitution grants every child the right to a basic level of socio-economic rights, basic health care and basic education, but state conduct and official decisions have created an exception to the children that are entitled to these rights. This brings into question whether one can truly argue that the state is fulfilling its obligations, in terms of section 7, towards the undocumented child. By making undocumented children's rights a state of exception, the state has forced them into bare life. A life with little or no access to basic necessities, in which health care is an unaffordable luxury and basic education and with that the possibility of developing potential, is lost.

## Chapter 5: Conclusion

The Rights of Man, supposedly inalienable, proved to be unenforceable - even in countries whose constitutions were based upon them - whenever people appeared who were no longer citizens of any sovereign state.<sup>529</sup>

This study has illustrated, analysed and criticized the unenforceability of the inalienable socio-economic rights of undocumented children residing in South Africa, whilst using the Arendtian concept of rightlessness and Agamben's concept of bare life as a philosophical foundation.

The Arendtian concept of rightlessness is a consequence of a person not having the protection of a nation state and with that the guarantee of the fulfilment and access to their human rights.<sup>530</sup> It is based on the concept that a person can be entitled to certain rights, but that these rights become unenforceable in the absence of an effective nation state, they then live in circumstances which Agamben referred to as bare life.<sup>531</sup> It is easy to understand the possible applicability of these concepts and the real life situation of the undocumented child in South Africa, especially when considering these children do not enjoy the protection of a nation state due to their illegal status.<sup>532</sup> In order to investigate the extent of this applicability of both Arendt and Agamben on the socio-economic rights of the undocumented child in South Africa, the relevant rights and corresponding policies was analysed and investigated. By understanding the content and restrictions of these human rights, the enforceability could be investigated.

It is of importance to this study that one must never lose sight of the fact that the target group is children. Children are almost completely dependent on adults for their survival and development.<sup>533</sup> Undocumented children, specifically, have no control over the circumstances in which they find themselves within South African borders or

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529 Arendt *The Origins of Totalitarianism* 268.

530 See para 2.1 above.

531 See para 2.4.3 above.

532 See para 2.5 above.

533 See para 3.2.2 above.

the actions of their families. They further have no obligations, as yet, to contribute to the community, but only an entitlement to its benefits.<sup>534</sup>

As mentioned all question concerning the rights of the child must be done correspondent to the general principles of children's rights as given by the UN Committee on the Rights of the Child.<sup>535</sup> These principles include the best interest of the child, the right to survival and development and non-discrimination. The framework provided by these guidelines address the unique nature and inherent vulnerability of the child, which is recognised both internationally and domestically.<sup>536</sup>

The first principle and arguably the most important principle, the best interest of the child, has been known to be a source of confusion, because of its lack of a fixed definition.<sup>537</sup> This is study holds that the interpretation and application are easier when done within a definite context and an individualised examination of the precise real life situation of the particular child or children involved.<sup>538</sup> Furthermore, when applying the best interest principle within South Africa, one must acknowledge that although it is seen as paramount in cases concerning the rights of the child, it can still be limited.<sup>539</sup> Nonetheless, the aim of the State should be to create an environment that protects children from abuse and neglect and creates opportunities that will better a child's opportunity for a productive and dignified life. In order to achieve this, it is recommended that the rights of all children in South Africa should be a priority in budget allocations.

The right to life, as primordial right, must be understood to imply more than its traditional concept.<sup>540</sup> One must acknowledge that the right contains a component regarding the basic requirements necessary to sustaining life.<sup>541</sup> The state obligation, therefore has both a negative and positive component, in which the positive

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534 See para 3.2.2 above.

535 See para 3.3 above.

536 See para 3.3 above.

537 See para 3.2.3 above.

538 See para 3.2.3 above.

539 See paras 3.2.3 and 4.3.3.4 above.

540 See para 3.3.1 above.

541 See para 3.3.1.1 above.

component requires that the state devotes certain resources to the sustainment of life.<sup>542</sup> Interrelated to this is the right to dignity, this study holds that dignity cannot be achieved when a person is viewed as a mere object or instrument, but rather as an individual forming part of the political community.<sup>543</sup> The importance of dignity with regards to the evaluation of the reasonableness of state was affirmed in the *Grootboom* case.<sup>544</sup> Both the rights to life and dignity bear a strong correlation to socio-economic rights. The denial of access to socio-economic rights limits various human skills and the ability to realise future plans and to effectively form part of the political, economic and social life.<sup>545</sup> Undocumented children must be empowered and have both physical and psychological integrity. If a child has no access to the fulfilment of their basic needs, one can hardly claim that they are living a life of dignity or are obtaining an adequate standard of living.<sup>546</sup> This limits a child's life to bare life, which limits both their rights to life and dignity.<sup>547</sup> In regard to the life of the undocumented child this implies that socio-economic policies should be inclusive. This study, however, illustrates that this is not the case.<sup>548</sup>

Supporting of the rights to life and dignity, the South African *Constitution* recognises equality as a fundamental principle, this is apparent in the fact that all the human rights relevant to this study is granted to all children in South Africa. When going strictly by constitutional provisions, there should be no discrimination in the rights to life, dignity or section 28 socio-economic rights. The discrimination however exist, and is most apparent in the categorization of the access to social services, health and education.<sup>549</sup> All of which are detrimental elements to child's development and growth.

Any interpretation of the socio-economic rights of the child in South Africa, should recognise that the rights of the child and the rights of everyone was consciously

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542 See paras 3.3.1.1; 4.3.1 and 4.3.3.4.2 above.

543 See para 3.3.2 above.

544 See para 3.3.2 above.

545 See paras 3.3.1; 3.3.2; 3.3.3 and 4.3.3 above.

546 See paras 3.3.2, 4.2.1 and 4.3.3.3 above.

547 See para 4.4 above.

548 See para 4.4 above.

549 See para 4.4 above.

written as two different provisions of the *Constitution*.<sup>550</sup> This must be read as an acknowledgement of the priority that should be given to children's rights. Section 28, differs from section 26 and 27 by excluding the internal limitations of progressive realisation, resource availability and reasonable steps.<sup>551</sup> It was not written to be access rights, but rather as unqualified right to social assistance in those cases where parents cannot provide adequate care or are absent. During interpretation by the courts, there should be given significant weight to this. The interpretation by the court in the *Grootboom* case, in which the rights of the children were adjudicated under section 26 as opposed to section 28, failed to recognise the textual differences in these sections and it cannot be argued that this is in the best interest of the child.<sup>552</sup> The state is obliged to ensure the fulfilment of a basic level of socio-economic rights for all children and not only citizen children.<sup>553</sup> It is recommended that the courts take a more concrete standing when faced with this issue and determine a baseline of socio-economic protection, irrespective of progressive realisation. The jurisprudence suggests that this entails at least an established, well-coordinated, coherent, inclusive program that addresses the socio-economic needs of the undocumented child.<sup>554</sup> *Grootboom* held that any limitation of socio-economic rights must be consistent with the Bill of Rights as a whole. Section 28 has no internal limitation and, therefore, any limitation will be tested against section 36 scrutiny.<sup>555</sup> This study argues that this is true even in cases where the rights of the child and the parent overlap. The reasonableness test in sections 26 and 27 does simply not give enough scrutiny, it will be satisfied when it can be shown that any steps are being done by the state. Section 36 is more appropriate because it requires a full blown proportionality test, which takes the bill of rights as a whole into account, specifically the child's rights to life and dignity.<sup>556</sup>

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550 See para 4.3.3.1 above.

551 See para 4.3.3.1 above.

552 See para 4.3.3.1 above.

553 See paras 4.3.3.3.1 and 4.3.3.4.3 above.

554 See paras 4.3.3.3.1 above.

555 See para 4.3.3.3 above.

556 See paras 4.3.3.4.2 and 4.3.3.4.3 above.

The exclusion from the child grant system is interfering with the child's access to socio-economic rights and the state is neglecting its obligation to mitigate the interference by its lack of alternative access. The limitations in health, education and the grant system will not stand the section 36 proportionality test, because the state cannot justify that excluding undocumented children is in the best interest of the child, that it respects their rights to life, dignity, equality and freedom.<sup>557</sup> Additionally, the state would have trouble proving that there is a relation between the limitation and the purpose and that there are no less restrictive means to achieve the purpose.

There are worrisome disjunctions between constitutional rights and the laws and policies that should enforce these rights, for example section 5 of the *Children's Act*, which is contradictory to section 28 of the *Constitution*, states the socio-economic rights of the child as qualified rights.<sup>558</sup> There is a constitutional obligation on the state to do so much more than simply its positive obligation to fulfil rights, rights must also be respected, protected and fulfilled.<sup>559</sup> Discriminatory policies, specifically, is a blatant disregard for the rights of the child and the state is lacking in protecting of respecting these rights.<sup>560</sup> The state is not complying with the rights of the undocumented child in this regard.

Undocumented children are not recognised as being part of the political community in South Africa, because they are excluded from the access to basic state funded services. This study has shown that, contrary to international and constitutional rights, South African policy and state conduct has excluded undocumented children from access to the child care grant, they are not allowed to register for basic education and their health care is limited to emergency treatment.<sup>561</sup>

It is recommended that laws and policies should be put in place that are sensitive to needs and capacities and merits of different children within the context of their unique

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557 See para 4.4 above.

558 See para 4.3.3.4.1 above.

559 See para 4.3.1 above.

560 See para 4.4 above.

561 See para 4.4 above.

situations and that recognises the special protection children require.<sup>562</sup> State funding needs to be prioritised to respect the best interest of the child and equal distribution. The strict means test should be made away with to such an extent that all children in need can have access to state funded assistance. The state must recognise the integral part education plays in the development of all children and adapt current policy and registration barriers accordingly. Interpreting section 29(1) as anything less than a direct right to education is a limitation. The only criteria for access to socio-economic rights should be that a person still qualifies as a child. The state cannot continue to ignore the desperate need of these children and their claims on the commonwealth cannot be treated as fraudulent.

This study illustrates that undocumented children, in both domestic and international law, are entitled to the exact same rights as citizen children.<sup>563</sup> There should, in an ideal world, be no discrimination or distinction. Something as simple as the correct documentation should, due the very nature of a child, not justify any reason for these children's rights to be limited. Even considering all this, these unalienable rights are not enforceable.

When revisiting the theories of both Arendt and Agamben, the applicability of their concepts becomes evident. The strict means test, exclusion from basic education and health care are but three examples that illustrate that undocumented children fall outside the ambit of the socio-economic protection of the South African state. They are living within a state of exception<sup>564</sup> and not unlike Agamben's description of a modern *homo sacer*,<sup>565</sup> these children live their precarious lives outside the realm of political significance, their very survival does not feature as a state priority. It is in this lack of political significance that they become rightless, because, as this study has illustrated, the state is not willing to guarantee human rights to the undocumented masses.<sup>566</sup> The undocumented child's supposedly unalienable socio-economic rights,

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562 See para 3.2.3 above.

563 See paras 3.2.1 and 4.3.3.1 above.

564 See paras 2.4.1 and 4.4 above.

565 See 2.4.3 above.

566 See para 4.4 above.

become unenforceable due to a lack of proper documentation. It seems that Arendt's children are indeed rightless.

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