

Incey-wincey Spider went Climbing up Again – Prospects for Constitutional (Re)interpretation of Section 28(1)(c) of the South African Constitution in the Next Decade of Democracy

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1 INTRODUCTION

This article reviews the first decade of jurisprudence concerning the interpretation of the rights enumerated in s 28(1)(c) of the 1996 Constitution of South Africa (the Constitution), commonly referred to as the children's socio-economic rights clause. Three broad trends are identified, which in the main have resulted in a far more limited scope of application of these rights than was originally anticipated. In addition, affirming existing jurisprudence in relation to socio-economic rights generally, dicta of the Constitutional Court signal clearly that the Court is not going to be persuaded to accept or define a minimum core content to elaborate the scope of individual socio-economic rights and the concomitant extent of the State obligations in respect thereof. In *Minister of Health v Treatment Action Campaign (TAC case)*,¹ for instance, the Court observed that:

“It is impossible to give everyone access even to a ‘core’ service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.”²

The article proceeds to investigate options for a revised understanding of the role of s 28(1)(c) in constitutional jurisprudence. We argue that s 28(1)(c) should not be classified as a socio-economic rights clause, but rather as a constitutional provision for child protection.

2 PHASE 1 – THE PHASE OF OPTIMISM: PRE-GROOTBOOM

The wording of s 28(1)(c) differs from other socio-economic rights provisions in the Constitution. The most striking distinction is that, unlike ss 26 and 27, the realisation of the rights in s 28(1)(c) is not subject to progressive realisation by

1 2002 10 BCLR 1033 (CC).

2 Para 35.

the State undertaking reasonable legislative and other measures within its available resources. As a result of this, the rights in s 28(1)(c) have been classified, together with the right to basic education and the rights of detained persons to conditions of detention consistent with human dignity, as rights without internal limitations.³ Section 28(1)(c) also refers to “basic” nutrition, “basic” health care services, shelter and social services. Section 26(1) merely refers to access to adequate housing and s 27 to access to health care services, and sufficient food and water. This drafting led many commentators to conclude that the Constitution had prioritised children’s socio-economic rights and placed children in their right place as a vulnerable group. One such commentator was Pierre De Vos in his widely referenced 1997 article in the *South African Journal on Human Rights*.⁴ De Vos submitted that the Constitution enunciates the rights of children as clear, near-absolute core entitlements that are necessary to provide basic subsistence needs of children. He considered children as “the most vulnerable group in any state”.⁵ De Vos was inspired by the use of the word “basic” in respect of nutrition and health care to submit that the mentioned rights provided children with a safety net in cases of deprivation, neglect, starvation and abuse. De Vos had made a similar submission with reference to s 30(1)(c) of the Interim Constitution, which is congruent in many respects to s 28(1)(c).⁶ In these circumstances, an onus was placed on the state to deliver the services where they are non-existent.⁷ De Vos suggested that:

“Whenever a challenge is brought, the court will have to determine whether the level of the services delivered meets the basic needs. If they do not, the court will have to order the state to comply with its obligations under s 30.”⁸

Devenish also submitted in 1999 that, unlike the ss 26 and 27 rights, the courts do not have to consider the question of availability of resources in ascertaining whether the state has complied with its s 28(1)(c) obligations.⁹ He also submitted that the duty on the State to provide the s 28(1)(c) rights become enforceable where the parents were either deceased or otherwise incapable of rendering parental care.¹⁰ Devenish further defined the obligation imposed on the State to provide the goods and services in s 28(1)(c) when parental incapacity or community inability to provide is established. In his words:

“The state is therefore responsible for rendering such services where the parents or community is unable to do so, or where what is rendered is inadequate. In these circumstances the state would be obliged to provide such minimum service to prevent *malnutrition* and *disease*.”¹¹

3 Liebenberg “Socio-economic rights” in Chaskalson *et al* (eds) *Constitutional Law of South Africa* Revision Service 3 (1998) 41–45.

4 De Vos “Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa’s 1996 Constitution” 1997 *SAJHR* 67–101.

5 De Vos 1997 *SAJHR* 88.

6 De Vos “The economic and social rights of children and South Africa’s transitional Constitution” 1995 *SA Public Law* 233 256.

7 De Vos 1997 *SAJHR* 88.

8 *Ibid*.

9 Devenish *A Commentary on the South African Bill of Rights* (1999) 386.

10 Devenish 384.

11 *Ibid* (our emphasis).

However, Devenish concedes that the extent of the application of the right will depend on reasonable limitations arising out of the available and finite resources of the State.¹² He replicates the submissions of Cachalia *et al* in reference to s 30(1)(c) of the Interim Constitution.¹³ Cachalia *et al* submitted that children are vulnerable,¹⁴ and that s 30 was intended to serve as a safety net. This would be so in cases of deprivation, neglect, starvation or abuse.¹⁵ They contended further that the qualification of the duty with the word “basic” requires that a minimum level necessary to prevent malnutrition or disease must be provided and that this obligation stands notwithstanding the resources allocated through the political processes.¹⁶ Cachalia *et al* also conceded that the provision could have reasonable limitations arising out of the available resources of the State. Likewise, Basson submitted in reference to s 30(1)(c) of the Interim Constitution that children had been awarded these rights because they are clearly the most vulnerable sector of society. He urged courts to accept this prioritisation in state expenditure in the allocation of resources to realise the rights.¹⁷

In *Grootboom v Oostenberg Municipality*¹⁸ the High Court adopted the same reasoning as the scholars above, by treating the obligations in s 28(1)(c) as enforceable irrespective of the resources available to the State. Davis J began by holding that the obligation to maintain a child rests upon the parents and on the State only in the event that the parents are unable to do so.¹⁹ Davis J thought that there was a distinction in the obligations engendered by s 28(1)(c) and their counterparts in ss 26 and 27, particularly the rights to shelter and housing. He construed shelter to mean a rudimentary form of temporary lodging which does not impose an obligation to provide housing.²⁰ This distinction was intended to emphasise the fact that children are the bearers of the rights and not the parents, although this, according to Davis, did not mean that children would be removed from the family context and denied any form of parental care. The children would be accompanied by their parents. On the question of resources, Davis J held that the question of budgetary limitations is not applicable to the determination of the rights in terms of s 28(1)(c).²¹

Following this reasoning, Davis J ordered that the children be provided with shelter and accompanied to such shelter by their parents, until such time as the parents are able to shelter their children. He also ordered the respondents to report back to the Court, under oath, on the implementation of the Court orders within a period of three months. This judgment was celebrated as a confirmation of the vulnerability of children and the need to prioritise their basic necessities of life. This celebration was, however, short-lived, and came to an end when the State appealed the judgment to the Constitutional Court (CC).

12 *Ibid.*

13 Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus *Fundamental Rights in the New Constitution: An Overview of the New Constitution and a Commentary on Chapter 3 on Fundamental Rights* (1994).

14 Cachalia *et al* 100.

15 Cachalia *et al* 102; this submission is supported by De Vos, as described above.

16 *Ibid.*

17 Basson *South Africa's Interim Constitution: Text and Notes* (1994) 46.

18 2000 3 BCLR 277 (C).

19 *Grootboom v Oostenberg Municipality* 288.

20 *Grootboom v Oostenberg Municipality* 288.

21 *Grootboom v Oostenberg Municipality* 291.

3 PHASE 2 – THE PHASE OF DAWNING PESSIMISM: *GROOTBOOM AND TAC*

On appeal, the CC differed from the conclusions drawn by Davis J as regards the obligations imposed by s 28(1)(c).²² The CC noted that the rights and obligations in s 28 can properly be ascertained only in the context of the obligations in ss 25(5), 26 and 27.²³ In the CC's opinion, the reasoning of Davis J produced an anomalous result:

“People who have children have a direct and enforceable right to housing under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be.”²⁴

The *amicus* in this case had sought to solve the problem of exclusion of other vulnerable groups of people by reading ss 26 and 27 as giving rise to a minimum core obligation, which requires the provision of minimum levels of basic needs to everyone.²⁵ The *amicus* submitted that s 28(1)(c) was just a specific manifestation of the minimum core.²⁶ However, the minimum core argument was rejected by the Court, which held that the obligation on the State was to undertake reasonable legislative and other measures within its available resources progressively to realise the rights. The Court contended that people's needs were diverse, and it would be hard to determine what minimum core would address all these needs.²⁷

The CC held further that the carefully constructed scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to be provided with shelter on demand. The Court feared that “[c]hildren could become a stepping stone to housing for their parents instead of being valued for who they are”.²⁸ According

22 *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

23 *Grootboom* (CC) para 74

24 *Grootboom* (CC) para 70.

25 The minimum core obligation has been read into the Covenant on Economic, Social and Cultural Rights (ICESCR) by the UN Committee on Economic, Social and Cultural Rights (the Committee). The Committee has said that “it is of the view that 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”. (See General Comment 3, *The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991) para 10.) The Committee has given as an example of a *prima facie* violation by a State party a situation 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. The minimum core content of a right is thus its essential elements, without which the right risks losing its substantive significance as a right. It is the floor below which standards should not fall. See Russell “Minimum state obligations: International dimensions” in Brand and Russell (eds) *Exploring the Core Content of Socio-economic Rights: South African and International Perspectives* 15, and Bilchitz “Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence” 2003 *SAJHR* 1–26.

26 Liebenberg “The interpretation of socio-economic rights” in Chaskalson *et al* (eds) *Constitutional Law of South Africa* 2 ed (2003) 33–49. See also Bekink and Brand “Children's constitutional rights” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 187.

27 *Grootboom* (CC) para 32.

28 *Ibid.*

to the CC, there is an overlap between the s 28(1)(c) rights and the ss 26 and 27 rights. The overlap is not consistent with the notion that s 28(1)(c) creates separate and independent rights for children and their parents.²⁹ This contextual reading is consistent with the proposal of the drafters of the Constitution, who had suggested that “[i]n taking decisions on the contents of these rights [in section 28] . . . care should be taken not to repeat rights afforded elsewhere in the Constitution to both adults and children”.³⁰ In addition to reading s 28(1)(c) in the context of ss 26 and 27, the Court held that it had to be read in the context of s 28 as a whole. Section 28, especially s 28(1)(b), ensures that children are properly cared for by their parents or families, and only receive appropriate alternative care in the absence of parental or family care.³¹ Section 28(1)(c) therefore does not create any primary state obligation to provide shelter on demand to children and their families.³² The Court stated that:

“It follows from subsection 28(1)(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in subsection 28(1)(c) is imposed primarily on the parents or family and only alternatively on the State. The State thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that section 28(1)(c) does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.”³³

The Court held that the obligation on the State, when children are being cared for by their parents, is to provide the legal and administrative framework necessary to ensure that children are accorded the protection contemplated by s 28. According to the CC, this obligation would be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse.³⁴ The finding of the High Court that there is a distinction between shelter on one hand, and housing on the other hand, was rejected. The Court held that shelter and housing are related concepts, and one of the aims of housing is to provide physical shelter; that shelter could be ineffective or rudimentary at the one extreme, and very effective or even ideal at the other.³⁵

This judgment was a big disappointment to children’s rights advocates, who had celebrated s 28(1)(c) as providing space for the direct provision of minimum basic needs of children. The Court’s construction was immediately criticised and described as stark,³⁶ and as an expression of reluctance on the part of the Court to

29 *Grootboom* (CC) para 74.

30 Constitutional Assembly Constitutional Committee Sub-Committee *Theme Committee 4 Draft Bill of Rights: Explanatory Memoranda Volume 1* (Unpublished documents, on file with authors) 159.

31 *Grootboom* (CC) para 76. See too for a discussion of the interplay between sub-ss 28(1)(b) and (c), Chapter 23 “Children” in Davis and Cheadle (eds) *Constitutional Law: The Bill of Rights 2* ed (2005).

32 *Grootboom* (CC) para 77.

33 *Grootboom* (CC) para 77.

34 *Grootboom* (CC) para 78.

35 *Grootboom* (CC) para 73.

36 Sloth-Nielsen “Too little? Too late? The implications of the Grootboom case for state responses to child headed households” 2003 *Law, Democracy and Development* 113–136.

interpret even the unqualified socio-economic rights to include an individual entitlement for direct material assistance from the State.³⁷ The approach was also described as an “exceedingly narrow reading of section 28, evidently a product of pragmatic considerations”.³⁸ The pragmatic considerations “suggest judicial reluctance to intrude excessively into priority setting at the democratic level”.³⁹ The Court’s initial perception of “parental” or “family” care appears to have confined this to the provision of mere physical care, irrespective of the parents’ capacity to provide for their children due to poverty or other reasons such as natural disasters. The Court, in holding that the children in this case were being cared for by their parents, and were not in alternative state care and had not been abandoned,⁴⁰ lost sight of the reality that these parents were themselves in a crisis and incapable of providing meaningful care. What this meant was that the rights of children living in families who are too poor to provide them with basic necessities had to be determined in terms of ss 26 and 27.⁴¹ Indeed, the Court mentioned that one of the ways in which the State would meet its s 27 obligations “would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances”.⁴²

The other leading socio-economic rights case, the *TAC* case, appears, to a limited extent, to have restored the confidence of children’s rights advocates that the Constitution is capable of protecting children as a vulnerable group. This case arose from a government programme of providing Nevirapine, a drug believed to reduce the chances of transmission of HIV/AIDS from mother to child during childbirth. The programme was allegedly unreasonable because of its restriction to selected hospitals, thereby excluding an HIV/AIDS positive mother (and her child) who did not have access to these hospitals. Relying on the *Grootboom* precedent, the State had argued that the primary obligation to provide for the basic health care of (the unborn) children lay on their parents.⁴³ The Court rejected this submission and, by expanding the ruling in the *Grootboom* case, held that the primary obligation to provide children with basic health care no doubt rests on those parents who can afford to pay for the services.⁴⁴ However, in the Court’s opinion, the State is obliged to ensure that children are accorded the measure of protection arising from s 28, and moreover, the State bears the primary responsibility as regards basic health care for children when “the implementation of parental or family care is lacking”.⁴⁵ The Court said that:

“Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them.”⁴⁶

37 Liebenberg “South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?” 2002 *Law, Democracy and Development* 159 173.

38 Sunstein *Designing Democracy: What Constitutions Do* (2001) 232.

39 *Ibid.*

40 *Grootboom* (CC) para 79.

41 Liebenberg in Chaskalson *et al* (eds) *Constitutional Law of South Africa* 33-50.

42 *Grootboom* (CC) para 78.

43 *Grootboom* (CC) para 76.

44 *Grootboom* (CC) para 77.

45 *Grootboom* (CC) para 79.

46 *Ibid.*

It is not very clear from the judgment as to what the court meant by the phrase “implementation of parental or family care is lacking”. However, in the context of the judgment, especially the quotation above, it appears that lack of implementation of parental care encompassed more than custodial care. For those parents who depend on the State for their health care needs and those of their children, although capable of providing a minimum level of mere physical care, cannot be said to be providing health care services. This issue is further elaborated in part 4 2 below.

But one should be very careful in celebrating the *TAC* judgment. In the first place, the court avoided any broad findings that would have wider application and that could easily be extended to other rights. Instead, it made its decision only in the context of the children’s rights to basic health care and in the context of a deadly disease, HIV/AIDS. There is no doubt that poor people are dependent on the State for certain health care services because of the infrastructural needs they require. Provision of health care services requires technical skills, expensive equipment and medication which may be beyond the reach of the poor. The *TAC* judgment does not read that children have a direct entitlement to basic health care generally in circumstances where their parents cannot afford it. The CC merely uses the primary State obligation argument as regards basic health care as a point of departure for its conclusion that the restricted State Nevirapine programme was unreasonable.⁴⁷

The *TAC* case, therefore, still leaves unresolved the extent of the State’s direct responsibility for the fulfilment of children’s socio-economic rights in the context of large-scale indigence among parents.⁴⁸ It is not even clear whether the State’s primary role can be extended with ease to health conditions other than HIV/AIDS. The judgment was carefully worded – and contextualised – to avoid imposing general obligations on the State arising from entitlements on demand. The Court stuck to its “reasonableness” standard of review and rejected submissions that socio-economic rights can be read as self-standing and giving rise to claims for socio-economic deliverables. The CC juggled both ss 27 and 28 in crafting its reasonable standard, which appears to emphasise the point, evident from the *Grootboom* case, that the socio-economic rights in s 28(1)(c) are not different from those in ss 26 and 27.

4 THE REVISIONIST PHASE

Faced with the stark position that s 28(1)(c) does not seem to advantage children in any meaningful way over adult beneficiaries of socio-economic rights, some commentators have, post *TAC*, sought to imbue s 28(1)(c) with a revisionist, and on the face of it attractive, alternative meaning. One example is Creamer, who argues that because the formulation of children’s rights is not internally constructed so as to be subject to “available resources” or “progressive realisation”, as is the case with the section 26 and 27 socio-economic rights, “government programmes seeking to achieve the implementation of these [ie the s 28(1)(c)] rights should have to comply with a higher standard which would include

⁴⁷ Liebenberg 2002 *Law, Democracy and Development* 185.

⁴⁸ Sloth-Nielsen 2003 *Law, Democracy and Development* 121.

additional elements in the test for reasonableness”.⁴⁹ He goes on to suggest that the “higher priority” could include the requirement that programmes giving effect to s 28(1)(c) rights “should be implemented as rapidly as possible” and that they “should be so devised as to reach all children in need, *inter alia*, entailing the explicit identification of children to be targeted, either due to their removal from the family environment or inadequate family care”.⁵⁰ He notes that the progressive realisation clause under ss 26 and 27 explicitly allows government to rely on resource constraints as a justification for a lengthier delivery time. Because there is no such justification that attaches to basic children’s rights under s 28, he deduces that programmes designed to advance children’s socio-economic rights should be:

“[C]haracterised by *accelerated* and *comprehensive* service delivery to all children in need . . . A reasonable time period, which should be regarded as concomitant with the state’s obligation to prioritise these rights, will be measured in terms of the period required for the urgent marshalling of real administrative capacity rather than any delay being justified in terms of a constraint of financial resources.”⁵¹

These suggestions have been accorded a cautious nod of acknowledgement in later sources. Liebenberg cites the proposed “higher standard of reasonableness” review with apparent approval,⁵² while still noting that the current jurisprudence has not resolved whether children have a direct entitlement to the socio-economic rights in s 28(1)(c). She nevertheless argues that this would entail placing the state under a higher standard of justification as to why relevant programmes do not benefit children in need. Streak, too, alludes to a higher standard of reasonableness review, citing Creamer and Liebenberg, repeating the arguments for prioritisation and accelerated delivery of services to meet children’s basic needs.⁵³

However, it is our contention that this form of revisionist interpretation is unhelpful, and moreover, that it would not convince the CC. There are three main reasons for this assertion. First, calling for a higher standard, and implementation that is rapid and accelerated, or of greater priority, is vague; higher than what? Accelerated by comparison to what? The answer can be given only with reference to an unspecified programme of implementation of “non-child” socio-economic rights, a programme that might differ depending on the right in question and where it falls in the list of government priorities. Thus progressive realisation of the delivery of health rights might be significantly different from implementation of programmes relating to housing. Against which benchmark is the accelerated delivery of children’s rights then to be measured?

49 Creamer “The implication of socio-economic rights jurisprudence for government planning and budgeting: the case of children’s socio-economic rights” 2004 *Law Democracy and Development* 221–231. See too Creamer “The impact of South Africa’s evolving jurisprudence on children’s socio-economic rights in budget analysis” in *IDASA Occasional Papers* (2002) 17.

50 *Ibid.*

51 Creamer 2004 *Law, Democracy and Development* 231 (italics in the original).

52 Liebenberg “Taking stock: The jurisprudence on children’s socio-economic rights and its implications for government policy” 2004 *ESR Review* 3–6.

53 Streak “Government’s social development response to children made vulnerable by HIV/AIDS: Identifying gaps in policy and budgeting” in *IDASA Occasional Papers* (2005) 11–12.

Secondly, the revisionist view tacitly endorses a “minimum core content” line of reasoning, in that the higher standard assumes a baseline of some sort from which to assess whether a more expeditious, or more prioritised, programme has been devised. Not only has the minimum core argument failed to attract the support of the CC in the two leading socio-economic rights cases (*Grootboom* and *TAC*),⁵⁴ but prospects for success on this score in future were dealt a further (and seemingly final) blow by the outgoing chief justice at the 3rd Dullah Omar memorial lecture held at the University of the Western Cape in June 2006. On that occasion, Justice Chaskalson said that as the Court had rejected arguments in favour of defining a minimum core content of specific socio-economic rights on each occasion that this had been raised, there was little purpose in pursuing this discussion. Reasonableness, he opined, was the prescribed standard of review.⁵⁵

Third, there is nothing intrinsic in the language of s 28(1)(c) to support the revisionist interpretation, which comes tantalisingly close to a “heightened scrutiny” standard of review. The plain language of the section eschews mention of the review standard, instead obliging the duty-bearer to provide the “basic” means of survival to children. (The term “duty-bearer” is used deliberately in deference to the *Grootboom* rationale that the primary obligation for the fulfilment of the rights enumerated in s 28(1)(c) lies upon parents and care-givers, and that the State incurs only subsidiary liability for fulfilment of the rights.⁵⁶)

The question to be posed, therefore, is, given the apparently unqualified formulation of the rights accorded children in s 28(1)(c), what can nevertheless be achieved for children’s rights in the next decade of constitutional democracy? The following sections of this article look more closely at prospects for advancing the jurisprudence of s 28(1)(c) positively, but within the strictures of the existing socio-economic rights debates. As a starting point, the discussion assumes that the minimum core content debate is over, which in turn means that the issue of the contents of the rights in s 28(1)(c) may have to be approached from another vantage point. We have also deliberately chosen not to focus on international law and jurisprudence, not because we think it irrelevant, but because in the past, the Constitutional Court has not been persuaded by this law and jurisprudence.⁵⁷ However, we rely on certain principles of international law and policy in support of some of the arguments that we put forward.

4 1 Children removed from or lacking family or parental care

The CC has clearly articulated the responsibility of the State for the fulfilment of children’s socio-economic rights where they have been removed from parental

⁵⁴ See, for further discussion of the rejection by the CC of minimum core arguments, Davis “Adjudicating the Socio-Economic Rights in the South African Constitution: Towards ‘Deference Lite’” 2006 *SAJHR* 301. See also Bilchitz “Giving socio-economic rights teeth: The minimum core and its importance” 2002 *SALJ* 484–501, and Roux “Legitimizing transformation: Political resource allocation in the South African Constitutional Court” 2003 *Democratization* 92–111.

⁵⁵ The authors were present at the delivery of the lecture. The comments were, however, explicitly linked to s 26 and s 27 socio-economic rights, and the former Chief Justice did clarify that his paper did not include a review of the normative content of the s 28 rights.

⁵⁶ See, too, Liebenberg 2004 *ESR Review* 3.

⁵⁷ Davis 2006 *SAJHR* 301.

care, have been abandoned, or otherwise lack a family environment. Although there are well-articulated adverse policy implications arising from arguments based on the premise that these children should be primary beneficiaries of the rights enumerated in s 28(1)(c),⁵⁸ there is, nevertheless, some possible advantage to be gained in examining more closely the contents of the State's duty towards these vulnerable children. A useful recent example of illustrating the possible benefit of pursuing this avenue is to be found in the (as yet unreported) judgment in *The Centre for Child Law and Others v MEC for Education and Others* (the Luckhoff case).⁵⁹

This case concerned the JW Luckhoff High School, a school of industry for children placed there after a children's court inquiry had found them to be in need of care and thus falling within the ambit of the s 15(1)(d) of the Child Care Act 74 of 1983. The hostels in which the children were housed were in a state of deterioration. Most dormitories had no windows, the floors were in poor condition and there were neither cubicles to provide privacy in the showers nor doors to the toilets. The lack of ceiling boards and window glass meant that the children were exposed to freezing weather conditions in their sleeping quarters. There was no heating in the dormitories, and, in some instances, no electricity. The children's beds consisted of old dirty foam mattresses, with one (sometimes two) thin grey blankets similar to those used in prisons. Some of the children did not have proper clothing, because they had sold their clothes to outsiders to obtain money to buy drugs, facilitated by the lack of access control and monitoring in the facility. Moreover, there was a complete absence of proper psychological support and therapeutic services at the school. The children were freezing cold, and understandably miserable.⁶⁰

The applicants requested that the children, who numbered about 150, each be provided with a sleeping bag at night, have the conditions in the building improved for them, and be provided with proper therapeutic services. The Respondent, the MEC for Education of the Province, argued that the problem was created because of budget constraints. The State further contended that providing sleeping bags for the children would be violating the equality principle of the Constitution, lest others similarly denied their rights should seek the same remedy at a very significant cost to the State. The relevant Department undertook, however,

58 In particular, the argument that removal of children (or incentivising their abandonment) might be an undesirable consequence of policies that favour resource allocation to these children, countering the accepted international principle that children are better off growing up in a family environment. In addition, available research on HIV/AIDS and orphans indicates that vulnerability cannot be "read off" from a child's status as an orphan, and indeed that the vast majority of children orphaned by HIV/AIDS are cared for to some or other degree in a family-like or community setting. See Streak in *IDASA Occasional Papers* (2005) 11–12 and the sources cited there.

59 Case No. 19559/06 (30 June 2006).

60 This case reminds us of the intolerable conditions in mental patients' institutions, some of them involving children, which sparked a wave of litigation in the United States in the 1970s and 1980s. The government departments had been recalcitrant, which forced the courts to take an activist approach by assuming administrative tasks and describing, in great detail, what was to be done to bring about reform; see for instance *Wyatt v Stickney* 325 F Supp 781 (MD Ala 1971), 334 F Supp 1341 (MD Ala 1971), 344 F Supp 373 (MD Ala 1972).

to seek donor or NGO funding, in order to assist it to fulfil its responsibilities towards the children.

After considering the relevant provisions of the Constitution and Child Care Act, the Court recorded that:

“[W]hat is notable about the children’s rights in comparison to other socio-economic rights is that section 28 contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, but the absence of any internal limitation entrenches the rights as unqualified and immediate.”⁶¹

The Court consequently gave an order compelling the authorities to provide each child with a sleeping bag, and to put in place proper access control and psychological support structures. It also ordered the MEC for Education, the first respondent, to be directed to make immediate arrangements for the school to be subjected to a developmental quality assurance (DQA) process to address the poor functioning of the institution. The Court noted that psychological and social support is a critical ingredient of state care where parental support is absent, and found that the lack of such a service is unacceptable. Documentation on record supported the evidence that some of the children had become disturbed, depressed and even suicidal, yet had been denied access to therapy or family support. This the Court also characterised as a lack of access to basic health care. The Court questioned what message is sent to children when they are removed from their parents because they deserve better care, and yet, the authorities concerned then neglect wholly to provide that care.

Regarding the idea of approaching donors and NGO’s, the judgment was scathing. According to the Court:

“The respondents proposal that efforts will be undertaken to raise funds from the Red Cross and the non-governmental sector is way off the mark and reflects a fundamental misunderstanding of its constitutional duty. The duty to provide care and social services to children removed from the family environment rests upon the State. The government must provide appropriate facilities and meet the children’s basic needs. The duty cannot be restricted to pleading on behalf of children with private interests to furnish it with resources.”⁶²

Noting further that six years of correspondence from the principal of the school to the Department in an attempt to redress the problems had been met with bureaucratic inertia, the Judge ordered that, given the dilatory and lackadaisical approach taken by the Department, the court would retain a supervisory role to ensure progress, especially in respect of the DQA process.⁶³

This case is interesting in several respects, even though it is a decision of a single judge at High Court level rather than of the CC itself, and even though, by

61 Page 7, lines 13–20 of the judgment. Acknowledging the budgetary implications of the decision, the Court noted that “our Constitution recognises, particularly in relation to children’s rights and the right to a fair trial, and that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits, with proper consideration of the circumstances and the potential for negative or irreconcilable resource allocations. The minimal costs or budgetary allocation problems in this instance are far outweighed by the urgent need to advance the children’s interests in accordance with our constitutional values” (7–8).

62 Page 8, line 22 to page 9, line 4.

63 Page 11, lines 7–9.

the Judge's own disclaimer, the judgment was handed down as a matter of urgency. First, it targets the overall deficit in the care needs of this group of children, *in casu* their need for warmth and social and therapeutic support, providing a more nuanced understanding of what children's developmental interests are. The Court proceeds from the assumption that children's survival into healthy adulthood requires a wide-ranging and extended series of services. This point, as indeed the concept of children's developmental interests, is well supported in international children's rights jurisprudence, programming and practice.⁶⁴

Second, although on the face of it the decision resurrects a minimum core content type of approach insofar as the provisions of deliverables is concerned (for example, sleeping bags, reminiscent of the rudimentary shelter that formed the basis of the High Court order in the *Grootboom* case, which was subsequently overturned by the Constitutional Court), the judgment can rather be construed as a response to the need for emergency relief for those in desperate need, namely children in a state institution who are unable to help themselves.⁶⁵ This reading is consistent with the implications of the CC's reasoning in the *Grootboom* case,⁶⁶ and arguably, when viewed on this basis, does not infringe our contention that the "minimum core argument" must be avoided. This point is further reinforced by the fact that the provision of sleeping bags was only one part of the order sought, the ultimate aim being a complete overhaul of the care – physical and otherwise – provided at the facility.⁶⁷

Third, this robust application of s 28(1)(c) creates the potential for the further development of the notion that s 28 rights are more about protection than they are about the progressive realisation of socio-economic deliverables.⁶⁸ Child

64 For instance, see Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* 2 ed (2002) 95–106. Under the Guidelines for Periodic Reports, while reporting under article 6 of the CRC, State parties are expected to "describe specific measures taken to guarantee the child's right to life and to create an environment conducive to ensuring to the maximum extent possible the survival and development of the child, including physical, mental, spiritual, moral, psychological and social development, in a manner compatible with human dignity, and to prepare the child for an individual life in a free society".

65 See the subsequent case of *EN v Minister of Correctional Services* (Natal Provincial Division, October 2006, as yet unreported) concerning an order compelling the provision of anti-retrovirals to prisoners dying of HIV/Aids. See, too, *Centre for Child Law v Minister of Home Affairs & Others* (*Lindela children* case, Transvaal Provincial Division, case no 22866/04, as yet unreported) which dealt with the conditions under unaccompanied non-South African children facing deportation and detained at the Lindela Repatriation Centre were being held. The Court held that the duty on the State to ensure basic socio-economic provision for children who lack family care extends to unaccompanied foreign children, and based the State's violation on the failure to provide protection needed by the children in the circumstances.

66 The CC held that for a programme to pass as reasonable it must take care of short, medium and long term needs simultaneously and must have a component that responds to the needs of those in desperate need: *Grootboom* (CC) para 44.

67 Personal communication with the applicant.

68 Pierre de Vos notes that the reasoning in *Grootboom* supports, in respect of children who are in parental care, the argument that the State nevertheless has the obligation "to provide the legal and administrative infrastructure necessary to ensure that children are accorded the *protection* contemplated by section 28" (emphasis added). See De Vos "The right to

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protection⁶⁹ is a well-known and often used term of art in international children's rights programming and policy, and has been said to form one of the organising values of the 1989 UN Convention on the Rights of the Child.⁷⁰

If s 28(1) came to be accorded the status of a protective measure (and one which is complemented by the provisions of s 28(1)(d) providing for the protection of children against abuse, neglect, maltreatment and degradation), rather than being viewed merely as a "mini" socio-economic rights provision, we contend that there is more scope than exists at present for a nuanced debate about the implementation of s 28(1)(c). We suggest, too, that the view that s 28 is primarily about child protection, and that it should be interpreted through a child protection lens, would appear to accord with the intention of the drafters of the Constitution to single out a most vulnerable group – children – for specific consideration in relation to constitutional rights,⁷¹ and that this ties in with many remaining s 28 rights which relate to protection (for instance, that from exploitative labour and from armed conflict).

Such a reading also explains why s 28 (unusually) provides for the child's rights to social services, loosely defined as the services designed to give vulnerable and marginalised persons, groups and communities the ability to meet their basic needs and achieve their potential. (This definition has been formulated within the new concept of developmental social services as articulated in the 1997 White Paper on Social Welfare.⁷²) The child's right to social services, we

housing" in Brand and Heyns (eds) *Socio-economic rights in South Africa* (2005) 105. See also *Grootboom* (CC) para 78.

69 "Protection", as used in this case, and as we use it further in this article, should be distinguished from the protection contemplated for everyone, including children, under s 7(2) of the Constitution. The protection that this section contemplates has been interpreted to mean protection against violation of the rights by third parties who may not be connected to the State. See *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, adopted by a group of experts at Maastricht, 22–26 January 1997, para 6. The case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) is an example of how the State can discharge this duty. We use protection here to mean all the things that have to be undertaken by the State to ensure child well-being and to advance their psychological, social and physical development. It could include protection from violations by third parties, but is not limited to this.

70 Van Bueren *The International Law on the Rights of the Child* (1995), along with the other "p's": prevention, participation and provision, which describe the range of CRC articles.

71 See *Cachalia et al Fundamental Rights in the New Constitution* for sources related to the drafting process.

72 Streak in *IDASA Occasional Papers* (2005) 8. She notes further that within the social development sector, this excludes social security, and that it covers the kinds of services provided to vulnerable children such as interventions via the children's court where children are at risk of abuse or neglect, the running of children's homes, adoption services, services to provide assistance to children living or working on the street, family reunification and counselling services, service for children living in child-headed households, and foster care placement. See, for a recent and substantial analysis of children's right to social services, Dutschke "Defining children's constitutional rights to social services" (Children's Institute, University of Cape Town, July 2006), where the concept is defined as "interventions that help people deal with social problems arising from social, economic or political change . . . [That is] that social services are one arm of a welfare system" (4). She points out further that the equivalent of s 28(1)(c) was contained in the Interim Constitution of 1993, but that that document did not, at that stage, include socio-economic rights generally (49).

suggest, is not traditionally a socio-economic right, but pre-eminently involves child protection, which reinforces the contention that the other rights in s 28(1)(c) relate to child protection.⁷³ The potential value of a “protection” lens through which s 28 is further interpreted will be explained more fully with reference to children’s rights to basic nutrition in part 4.3 below, but suffice it to say that the central theme of child protection jurisprudence relates to the likelihood of significant harm being experienced by the child, which then not only justifies, but indeed requires, State intervention.⁷⁴

Furthermore, in the *Luckhoff* case the potential harm in question was extremely significant, extending beyond living conditions characterised by poverty and extreme discomfort, to the prospects of death itself. This standard of harm finds an expression in those parts of the judgment detailing the children’s depression and possible suicide because of the absence of implementation of the children’s basic (mental) health care services, which threatened the children’s survival.⁷⁵ It is therefore our assertion that where children’s intrinsic developmental interests are at stake, policies or programmes which leave out of the reckoning children living in parental care, but whose parents lack the means of implementing their parental responsibilities, would be unreasonable and hence, constitutionally suspect. This is the basis of our suggestion, to be discussed in the next section, that the meaning of the notion “parental care” ought to be revisited.

4.2 Understanding the phrase “implementation of parental or family care”

It is very important in the context of the decisions of the CC that one understands what the Court means by “parental care”. In *Grootboom*, the Court held that the State only incurs an obligation when children “are removed from their families”.⁷⁶ The children were considered to be in the care of their parents because of the physical attachment that existed: “they are not in the care of the care of the State, in any alternative care, or abandoned”.⁷⁷ The ruling in the *TAC* case that the State incurs a primary responsibility as regards basic health care for children when “the implementation of parental or family care is lacking” potentially extends the concept of “parental care” beyond mere custody. It also presupposes a heightened State interventionist role in certain circumstances. This approach, developed significantly since the 1970s, contradicts assumptions based on a *laissez faire* attitude, one which maintains that state intervention should be limited so as to preserve the parents’ rights to autonomy.⁷⁸

73 See Sloth-Nielsen “The child’s right to social service, the right to social security and the primary prevention of child abuse: some conclusions in the aftermath of *Grootboom*” 2001 *SAJHR* 210 227–230.

74 See, for example, the European Court decision in *Z v United Kingdom* (Application no 29392/95, judgment 10 May 2001) for a ruling against the government of the United Kingdom for failing to intervene to protect four siblings when they were at risk of significant harm.

75 Article 6 of the Convention on the Rights of the Child provides for the child’s right to survival and development, and has been identified as one of the four pillars of the Convention by the Committee on the Rights of the Child. Country reports have to reflect on the four pillars in relation to the implementation of all other rights in the Convention.

76 *Grootboom* (CC) para 77.

77 *Grootboom* (CC) para 79.

78 See Freeman *The Moral Status of Children: Essays on the Rights of the Child* (1997) 24.

Overemphasis on parental autonomy rights has been criticised for failing to protect the
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Further, what is encompassed within the scope of “parental care” may be important. The care function extends to support for an entire range of children’s developmental interests, from the mere physical care of a child (for instance by bathing and feeding a baby and changing its diapers), to guiding and directing the child’s education, behaviour and moral development. The nature of “care” varies from child to child; different children have different physical care needs, which needs are dependent partly on age and evolving maturity, but also on such other factors as disability or special-needs requirements. At this more elaborate level, parental care comprises the overall duty to provide for the wellbeing of the child, which entails the provision of the child’s necessities of life, such as shelter, food, clothing and medical care.⁷⁹

In respect of parental care as defined above, the capacity on the part of the parents to fulfil this duty varies to the extent that it is shaped by a parent’s economic status and other factors such as their parenting skills. Ideally, every parent should be able to provide, at the very minimum, for a child’s necessities of life, but in reality, poverty makes this hard. Although there are cases of wilful neglect to maintain children, cases of unintentional neglect caused by poverty are far more common.⁸⁰ But, whatever the motivation for neglect, when the provision of parental care or aspects thereof are lacking to the degree that the child’s developmental potential is seriously threatened, it is submitted that this justifies some form of state intervention.

In addition, there are aspects of “care” that may simply be beyond the control of the parents, but are within the control of the State (such as the parental responsibility to provide health care), which may involve services that are expensive, or require costly equipment, infrastructure and expertise. These resources are beyond the reach of a great many parents, especially the economically disadvantaged. By contrast, the state has the capacity, both in terms of resources and expertise, to ensure that these services are provided effectively and efficiently. In relation to nutrition, at an essential level of parental care, the parent may be able to feed a child well-prepared food, but such a parent may not be able to determine the safety of the food he or she purchases. This may require skills beyond the reach of the parent, but which may be within State reach. In all above situations we argue that it is incumbent upon the State to intervene and provide the “missing” element of parental care, as it were, without having to remove the child from parental custody.

Our broad understanding of the term “parental care” accords with the definition of the term “care” in the Children’s Act 38 of 2005, which in s 1 is defined to mean more than custodial care. It includes psychological and moral aspects of child care, such as guiding children’s behaviour, as well as the provision of socio-economic necessities such as shelter, health, wellbeing and financial support.⁸¹ We suggest that an expanded concept of parental care (linked to

dignity of children; instead, it places undue weight on the private space and “dignity” of the parents.

79 Van Schalkwyk “Maintenance for children” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 41.

80 See Van Bueren *The International Law on the Rights of the Child* 88.

81 Section 1 provides that “‘care’, in relation to a child, includes, where appropriate – (a) within available means, providing the child with: (i) a suitable place to live; (ii) living

the substantial risk factor, or that there are threats to children's survival and development) may be able to assist us to identify when the "implementation of parental care is lacking", and, hence, when the State obligation arises.

4.3 Negative obligations

Next, we submit that the CC has arguably treated the negative aspect of the obligation incurred in respect of socio-economic rights more favourably than it has claims based on demands for positive fulfilment. In his recent address, as alluded to above, Justice Chaskalson appeared to confirm this, noting too that the positive component of rights called for a somewhat different approach. The most obvious applications of the Court's more interventionist response to negative violations of socio-economic rights is evident in the areas of evictions and in respect of termination of access to water.⁸² The orders in the *TAC* case also provide evidence of this approach, insofar as the Court ordered that the State remove the restrictions that prevented Nevirapine from being made more widely available.⁸³

In the children's rights arena, challenging negative violations relating to s 28 rights might be a fruitful line of enquiry, such as where children's access to social services is diminished or removed (as was cogently argued by the non-governmental sector to resist attempts to close the specialised child protection units in the South African Police Services a few years ago). Of particular note in regard to evictions and children's rights, and which has been established in recent research, is the exposure of children to violence and abuse during eviction processes.⁸⁴ This highlights the link between the protection of children from

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

82 See *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC); *Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W); and *Jaftha v Schoeman* 2005 1 BCLR 78 (CC). See too Davis 2006 SAJHR 301.

83 *TAC* para 135.

84 See Centre for Housing Rights and Evictions (Geneva) "Defending the Housing Rights of Children" June 2006 www.crin.org/resources.inforDetail.asp?ID+10289&flagreport (accessed 21-09-2006), citing studies that found that "[e]viction implies violence. During the event of a demolition, children are exposed to violence and abuse..." (59). A perusal of the records of our courts show that children are involved in almost all eviction cases. What is clear from the cases, however, is that focus is directed at the adults involved, without any special consideration of the vulnerable position of children faced with eviction. One reason for this could be the *Grootboom* case's ultimate reluctance to treat children as a special group, as the needs of the children were considered together with those of the adults. One

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negative violations of s 28(1)(c) rights, and the nature of the State obligation under s 28(1)(d), which requires their protection by the State from abuse, maltreatment and degradation.⁸⁵ A further avenue of thought relates to the elaboration of the role of the best interests standard (in s 28(2)) in the context of protection of children from negative violations, as our constitutional standard requires that the best interest be considered of paramount importance in all matters concerning a child.⁸⁶

The relevance of the child's best interest (also a pillar of the Convention on the Rights of the Child, as set out in Article 2) in the context of evictions has been regarded as including: consultation with families and children where eviction is threatened; avoidance of the use of force; taking efforts to ensure the minimisation of trauma and disruption to children during evictions which are deemed to be justified; avoiding evictions taking place at night, or during bad weather, or when children are home alone, or at a time when children's schooling would be disrupted.⁸⁷ Further, it is suggested that the best interests standard requires that legal remedies should be made freely available to affected children, including, wherever possible, the provision of free legal aid.⁸⁸ We aver that in the context of resisting negative intrusions in the delivery of children's basic needs, their individual best interests are surely relevant to the reasonableness enquiry.

4.4 Re-examining the concept of "overlap"

The Grootboom case has rather decisively ruled that there is an evident overlap between the right to shelter in s 28(1)(c) and the right to housing in s 26. The question we pose here is whether the rights to nutrition in s 28 and the right to sufficient food and water in s 26, and right to health care in s 27 also overlap or are co-terminous. As has been argued above, there is at least one other distinctive aspect of s 28, namely, the right to social services accorded children, a right which is not co-terminous with the rights of everyone to have access to social

could argue, however, that possibilities for children being given special consideration are to be found even within the provisions of s 26(3) of the Constitution, and the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which proscribes eviction from one's home without a court order given after considering all the relevant circumstances. Section 4(6) of PIE requires consideration of the needs of such vulnerable groups as children as one of the relevant circumstances that has to be considered: see *Port Elizabeth Municipality v Various Occupiers* para 30.

85 And, as has been previously noted, this right is not subject to internal limitations or qualifications.

86 See further the Children's Act 38 of 2005, which in s 7 describes a comprehensive package of factors to be considered "whenever a provision of this Act requires the best interests of the child standard to be applied" (s 7(1)), including amongst these: the child's physical and emotional security and his or her intellectual, emotional social and cultural development (s 7(h)); the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to maltreatment abuse, neglect, exploitation or degradation or other harmful behaviour or by exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards any other person (s 7(l)); and affirming the need for children to be brought up within a stable family environment wherever possible (s 7(k)) as constituting an important element of the child's best interests.

87 Centre for Housing Rights and Evictions (Geneva) "Defending the Housing Rights of Children" 74–75.

88 *Ibid.*

security,⁸⁹ and it has been argued that this is therefore a s 28(1)(c) right exclusively accorded to children.

Traditionally, “nutrition” has a specific and well-established scientific meaning in relation to children’s rights, and it hardly needs emphasising that children’s nutritional needs differ from those of adults, because they are developing physically, and because lack of requisite nutrients may result in lasting physical and mental consequences which cannot be overcome later in life. Evidence of the scientific meaning of nutrition in the context of a child’s birth weight, and thereafter the child’s weight and height growth indicators, has been authoritatively established by health professionals.⁹⁰ There has been acknowledgement of the different nutritional requirements of children in South African legal documents (the Correctional Services Act 111 of 1998, for example, provides for different nutritional formulae for prisoners who are children). Nutrition, moreover, is not simply about sufficient food and water. It calls into play specific kinds of food, in the correct quantities, and of the correct type of food for growing infants and children of different age-groups. It also requires that the diet ingested be capable of being nutritious, for example, that ingestion is not thwarted by infestation of parasites or by infection.

Malnutrition, as the Committee on the Rights of the Child has pointed out, results in the likelihood of children failing to make any significant progress in their physical, mental, spiritual, moral and social development, hence malnutrition remains at the top of the list of priorities for children.⁹¹ Malnutrition is not simply an absence of sufficient food, we contend, but a potentially significant threat to survival and development (particularly where the under the age five years are concerned, as is recognised by Millennium Development Goal No 4, which seeks to reduce mortality in this age bracket by two thirds by 2015). In this regard, we reiterate the *TAC* statement linking the adjudication of children’s socio-economic rights to the extent of harm they might otherwise suffer.

In regard to children’s rights to basic nutrition, even in the absence of a minimum core content line of reasoning, it is arguable that in situations where children fall below the accepted weight-for-age indicators (to the extent that they are diagnosed as malnourished, as has occurred in South Africa especially in poorer rural areas), one is not dealing with a positive fulfilment (subject to progressive realisation) issue. Rather, the issue is one of a negative violation of their basic rights, as nutritionally they have dropped below all acceptable norms. Even if the State were to show the existence of a reasonable policy in regard to alleviation of child poverty and malnutrition generally, such as the availability of the child support grant, this cannot suffice as justification, as the children’s care-givers may already be in receipt of the grant, yet be ignorant as to how to utilise it to combat malnutrition, or might be mis-spending it, or might be stretching it to accommodate a large household in need. This is rightly a child protection issue, in relation

89 See note 72 above.

90 See, for example, *The WHO Child Growth Standards* www.who.int/childgrowth/standards/en (accessed 21-09-2006); <http://www.sahealthinfo.org> (accessed 21-09-2006); www.webhost.sun.ac.za/nicus/links.htm (accessed 21-09-2006).

91 See Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* 396.

to which the State bears the primary obligation, even where a reasonable programme to give effect to the right to poor children generally is in place.⁹²

Although we feel obliged to concede the overlap between shelter and housing, it could, we suggest, be argued that children's health needs are quite different, in many respects, from those of adults, and that the basic health care services they require calls into play resources and interventions which differ from those necessary for adults "to have access to health care". Children are vastly more susceptible to death from preventable and immunisable diseases such as polio, tetanus, whooping cough, cholera, malaria and diphtheria, when compared to adults.⁹³ These and other health risks to which children are exposed, may well dictate that a more child-specific content be accorded to the "child's right to basic health care".⁹⁴ As stated above, in international law, there is a close linkage between both the child's rights to nutrition and to health care, and the right to survival and development.⁹⁵ In respect of aspects of children's rights to basic health care services, what is at stake for children is ensuring their survival and development. The same cannot necessarily be said about the right of access to health care services in s 27(1) of the Constitution, as this potentially covers the entire range of health interventions, from primary to tertiary levels. There may thus be a point at which the "overlap" suggested in the *Grootboom* case disappears.

5 CONCLUSIONS

The first decade of constitutional rights for children has delivered a rich jurisprudence and considerable, laudable efforts at improving legislative provisions, programmes and policies protecting children and giving effect to their rights.⁹⁶ On assessment, this progress has probably been more marked in the arena of civil and political rights, given the apparent worsening indicators of child poverty and their link to the fulfilment of children's socio-economic rights. South Africa is one of very few countries that is actually experiencing an increase in its child mortality rate.⁹⁷ It is well known that child mortality rates are heavily influenced by poverty.⁹⁸ There is thus empirical evidence for the proposition that in some

92 Whether that remedy is the provision of education on nutrition to care-givers, or other more direct forms of intervention.

93 See "Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s" para 9 <http://www.unicef.org/wsc/plan.htm#Child> (accessed 21-09-2006).

94 Jacobs "Children's health and the law" 2004 *ESR Review* 7-9.

95 See Van Bueren *The International Law on the Rights of the Child* 293, where she submits that both the right of the child to enjoy the highest attainable standard of health and to enjoy nutritious food, clean drinking water and adequate standard of living can be subsumed under the duty of the state to ensure, to the maximum extent possible, the survival and development of a child. She submits further that each aspect of survival and development is important as it would, for example, be nonsensical to provide children with access to immunization against potentially lethal diseases, whilst not providing nutrition.

96 Sloth-Nielsen "Harmonisation of the Law in South African with the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" (2006, forthcoming, African Child Policy Forum, Addis Ababa).

97 Health Systems Trust *Big rise in child mortality rate in SA* <http://www.hst.org.za/news/20040558> (accessed 22-09-2006).

98 See UNICEF Child mortality www.childinfo.org/areas/childmortality/ (accessed 22-09-2006).

respects, implementation of children's access to socio-economic rights is going backwards, and not forwards. However, we have tried to show that there remains scope for a more progressive approach to the rights enumerated for children in s 28(1) of the Constitution, especially if s 28(1)(c) is approached primarily as a child protection provision, rather than a tautologous repetition of the more substantive constitutional provisions in ss 26 and 27. We believe that emphasising the role of the State in child protection can provide a vehicle for an alternative jurisprudence around s 28(1)(c) to develop.