

**THE DUTY OF THE STATE TO GIVE EFFECT TO THE RIGHTS OF
CHILDREN IN CHILD-HEADED HOUSEHOLDS IN THE CONTEXT OF
SECTION 28(1)(b) AND (c) OF THE CONSTITUTION OF THE REPUBLIC
OF SOUTH AFRICA, 1996**

by

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DECLARATION

I declare that my limited dissertation entitled **THE DUTY OF THE STATE TO GIVE EFFECT TO THE RIGHTS OF CHILDREN IN CHILD-HEADED HOUSEHOLDS IN THE CONTEXT OF SECTION 28 (1) (b) AND (c) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete reference.

SIGNATURE

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DATE

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ABSTRACT

The scourge of HIV/AIDS is ravaging our communities; many children have lost their parents to this pandemic. The death of parents because of this pandemic has resulted in the emergence of a new phenomenon of child-headed households. This paper seeks to examine the rights of children in child-headed households as entrenched in section 28(1)(b) and (c) of the Constitution. Once the rights of children in child-headed households are ascertained, the state's duty to give effect to these rights is investigated. In the analysis of the rights, the socio-economic rights jurisprudence of the Constitutional Court is considered. The paper further argues that the state gives effect to the rights of children in child-headed households through legislation and policy. As such, the paper takes a closer look at the legislation and policies that seek to give effect to the rights of children in child-headed households as enumerated in section 28(1)(b) and (c) and gaps in that legislation and policy are highlighted. In conclusion, proposals are made that will assist the state to give effect to the rights of children in child-headed households as set out in the Constitution.

KEY TERMS

HIV/AIDS; child-headed households; international law; constitutional rights; children's rights; parental care; family care; state's duty; legislation; policies; child support grants; Children's Act

LIST OF ABBREVIATIONS

ACHPR:	African Charter on Human and People's Rights
ACRWC:	African Charter on the Rights and Welfare of the Child
AIDS:	Acquired-Immunodeficiency Syndrome
BCLR:	Butterworth's Constitutional Law Reports
CC:	Constitutional Court
CDG:	Care Dependency Grant
CSG:	Child Support Grant
FCG:	Foster Care Grant
GHS:	General Household Survey
HCBCS:	Home and Community Based Care and Support
HIV:	Human-Immunodeficiency Virus
HSRC:	Human Science Research Council
ICESCR:	International Covenant on Economic, Social and Cultural Rights
KZN:	Kwa-Zulu Natal
MEC:	Member of Executive Council
NGO:	Non-Governmental Organization
NIP:	National Integrated Plan
PCG:	Primary Care-Giver
SAJHR:	South African Journal on Human Rights
SALRC:	South African Law Reform Commission
SALJ:	South African Law Journal
SMG:	State Maintenance Grant
THRHR:	<i>(Tydskrif vir Hedengaagse Romeins Hollandse Reg)</i> Journal of Contemporary Roman Dutch law
UN:	United Nations
UNCRC:	United Nations Convention on the Rights of the Child
UNICEF:	United Nations International Children's Emergency Fund
USAID:	United States Agency for International Development
UNAIDS:	United Nations Joint Programme on HIV/AIDS

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CHAPTER 1

INTRODUCTION AND PURPOSE STATEMENT

1 INTRODUCTION

The phenomenon of child-headed households is one of the key social challenges associated with the HIV/AIDS¹ epidemic. The death of parents because of HIV/AIDS leaves many children in vulnerable situations resulting in the emergence of many households headed by children. The older children are, therefore, compelled by the circumstances to take care of both themselves and their siblings. Notably, the HIV/AIDS epidemic impacts mostly on children and families in the context of widespread and even extreme poverty.² The children in these poorest homes are left devastated by this situation.

As a result of these immense responsibilities, some of these children end up dropping out of school and devoting their time to caring and providing for their siblings through finding employment opportunities in industries like farming and transport (taxis).³

These children, like all others, have rights guaranteed under both international law and the Constitution.⁴ The international law instruments relevant in this regard are the United Nations Convention on the Rights of the Child (UNCRC),⁵ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶ the African Charter on the Rights and Welfare of the Child (ACRWC)⁷ and the African Charter on Human and Peoples' Rights (ACHPR).⁸

¹ Acronyms for Human-Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS).

² Richter & Desmond 2008 *AIDS CARE* 1026.

³ *Lund Report on Child and Family Support* 17.

⁴ Constitution of the Republic of South Africa, 1996.

⁵ Signed by South Africa on 29 January 1993 and ratified on 16 June 1996.

⁶ Signed by South Africa on 3 October 1994 but not yet ratified.

⁷ This charter entered into force on 29 November 1999. It was signed by South Africa on 10 October 1997 and ratified on 7 January 2000.

⁸ Signed by South Africa on 9 June 1986 and ratified on 9 June 1996.

This study has a limited scope. It examines the rights of children in child-headed households under both international law and the Constitution. Once the rights are established, the study will further explore the nature and extent of the state's duty in giving effect to those rights.

On the international front, children's rights are protected under various instruments like the UNCRC and the ICESCR. The UNCRC provides for the right of every child to an adequate standard of living.⁹ In the case of children in child-headed households, it cannot be said that their standard of living is adequate if one considers that in some instances these children have no access to proper housing and are left by their parents in unimaginable conditions. However, the UNCRC places the primary responsibility for the upbringing and development of a child on parents.¹⁰ Be that as it may, state parties are required "within their means" to take appropriate measures to assist parents and others responsible for the child to implement this right, and in cases of need, are required to provide material assistance and support programmes.¹¹

The ICESCR on the other hand, is the most important United Nations (UN) treaty that seeks to address socio-economic rights in general. Of critical importance to children in child-headed households is their claim to socio-economic rights against their parents, and in their absence arguably against the state. The ICESCR provides for the right of every person to social security, including social insurance.¹² States that have ratified the covenant are required to report to the UN on the measures they have achieved in the observance of the rights guaranteed under the convention. At this stage, it should be noted that South Africa has signed but not yet ratified this convention. However, signature on the convention indicates an intention to become a party to the treaty. Signature does not legally bind the state but states are obliged to refrain from acts that would defeat the object and purpose of such a treaty.¹³

On the African continent, there are two important instruments worth mentioning, namely the African Charter on the Rights and Welfare of the Child (ACRWC) and the African Charter on Human and People's Rights (ACHPR). The ACRWC provides for a variety of rights to children

⁹ A 6.

¹⁰ Aa 5, 18 & 27(1) & (2).

¹¹ Clark 2000 *SALJ* 343.

¹² A 11 of the Convention requires the continuous improvement of living conditions.

¹³ Rosa & Dutsche 2006 *SAJHR* 226.

including *inter alia* the right to survival and development, education, health services, adequate nutrition and safe drinking water.¹⁴ This instrument is hailed as being a progressive treaty on the rights of the child because it does not make the attainment of the socio-economic rights of children dependable on “progressive realization”.

The second instrument dealing with general human rights in Africa is the ACHPR. The ACHPR provides that the family shall be the natural unit and basis of society. It shall be protected by the state, which shall take care of its physical and moral health.¹⁵ This Charter further provides that the state shall ensure the elimination of every form of discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.¹⁶ In my view, both these provisions are important in the protection and preservation of the family unit. In this study, this charter will be explored further, in particular as it relates to the preservation of the family unit and its relevance to child-headed households.

In all the abovementioned international instruments, the rights of children are guaranteed and member states are bound to respect these rights and carry out the duties imposed on them by these treaties. Some of these instruments, like the UNCRC and the ICESCR, contain non-discrimination clauses which provide for the equal enjoyment of all rights guaranteed by these treaties. It is submitted that the correct interpretation of these non-discrimination clauses is that the vulnerable groups should be accorded special protection so as to enable them to equally enjoy all rights conferred on them by the treaty.¹⁷ The UNCRC goes on further to state in the preamble that there are children living in exceptionally difficult conditions, and that such children need special consideration, while the ACRWC provides for special protection of children living under various forms of discrimination, including conditions that prevail in Africa. This study therefore argues that child-headed households are one of the current prevailing conditions on this continent.

¹⁴ Aa 5, 11, 14 & 14(2) (c).

¹⁵ A18(1) of the Charter.

¹⁶ A 18(2) of the Charter.

¹⁷ Rosa & Dutsche 2006 *SAJHR* 226.

On a number of occasions, the enforceability of rights under these international instruments has come under the spotlight. Due to space constraints in this study, the question of enforceability of these instruments will not be discussed further save to mention that the enforcement mechanisms do need to be strengthened.¹⁸

On the domestic front, the Constitution of the Republic of South Africa, 1996 provides that in the interpretation of the Bill of Rights, international law must be considered.¹⁹ This duty is not dependent on the discretion of a body that interprets the Bill of Rights, but it is a peremptory provision, which casts an obligation to consider international law. Therefore, the courts and any other body interpreting the Bill of Rights is obligated to consider the international law-instruments referred to above.

The Constitution provides in section 28 for a number of rights for children, which include *inter alia* the right to family care or parental care, or to appropriate alternative care when removed from the family environment.²⁰ That section further provides for children's rights to basic nutrition, shelter, and basic health care services and social services.²¹

It is in this context that the duty of the state to give effect to the rights of children in child-headed households will be examined. Relevant legislation will also be investigated further in this study.

2 PROBLEM STATEMENT

The effects and realities of HIV/AIDS have, in recent times, manifested themselves in various forms. One form in which the effect of this pandemic has manifested is the emergence of a new phenomenon of child-headed households. These are children whose parents have died as a result of HIV/AIDS. Some of these children are left by their parents at a very young age and are forced to usurp parental responsibilities of being parents to their brothers and sisters.

¹⁸ Rosa & Dutsche 2006 *SAJHR* 230.

¹⁹ S 39(1)(b) of the Constitution.

²⁰ S 28(1) (b) of the Constitution.

²¹ S 28(1) (c) of the Constitution.

For the purposes of this study, a child-headed household is defined as a household where everyone who lives in that household is younger than 18 years old. In other words, a child-headed household is a household consisting only of children.²²

Universally, children's rights are protected in a number of treaties and domestically, in our Constitution as stated previously. To these children, the rights guaranteed by various international instruments and the Constitution have no practical meaning and remain paper guarantees until someone puts them into practice. For children in child-headed households, lack of access to food, money and shelter has been identified as the main problem they have to bear.²³

The primary custodians of children's rights are parents and in instances where there are no parents, the situation becomes extremely difficult for children. Children in child-headed households are sometimes left by their parents in abject poverty with no one to turn to except the government. In this study, it will be argued that the state has a duty to respect and protect the rights of children in child-headed households under both international law and the Constitution. It will be argued further that domestically, the state has a duty to respect, promote, protect and fulfill the rights of children as provided in section 28 of the Constitution. The study will further examine the social security system and highlight gaps in the system which make it difficult for children in child-headed households to access the social services provided by the state.

Therefore, the purpose of this study is to attempt to show the obligations that the state has to promote, protect, safeguard and fulfill the constitutional rights of children in child-headed households in the absence of their parents.

3 METHODOLOGY

The main methodology of the study is compilatory with an analytical review of literature relating to socio-economic rights of children in child-headed households. Furthermore, intensive library

²² In terms of s 28(3) of the Constitution, a child is defined as a person under the age of 18 years. Furthermore, s 17 of the Children's Act provides that a child, whether male or female, becomes a major upon reaching the age of 18 years. This means anyone younger than 18 years of age is a child in terms of both the Constitution and the Children's Act.

²³ Rosa & Lehnert *Workshop report*.

research is conducted in order to establish the nature and extent of the state's duty to give effect to these rights. Various websites were visited to extract relevant information on child-headed households.

Journal articles, international treaties, books, reports, legislation and case law relating to the interpretation of children's socio-economic rights and the state's duty to respect these rights, were used as sources.

CHAPTER 2

THE PHENOMENON OF CHILD-HEADED HOUSEHOLDS, AND CONSTITUTIONAL RIGHTS

1 INTRODUCTION

HIV/AIDS is a social reality facing our country and the continent. There are a number of children affected by the HIV/AIDS pandemic either directly or indirectly. As a result of this pandemic, some children care for their sick parents whilst others have become orphans. In addition to caring for their parents, children find themselves carrying new responsibilities which include domestic chores such as cooking, cleaning, carrying water, laundry, child care duties and income generating activities.²⁴ For a variety of reasons, little attention has been paid to the situation of children affected by HIV/AIDS. A greater understanding of the impact of HIV/AIDS on children is important for the formulation of policies and programmes to support children living in difficult circumstances. The impact of HIV/AIDS on children is compounded because many families live in communities which are already disadvantaged by poverty, poor infrastructure and limited access to basic services.²⁵ This in turn has an impact on human dignity and freedom as fundamental values of our society.²⁶

Being affected by HIV/AIDS comes with a burden of stigmatization by certain people within our communities. Stigmatization is not only confined to those people infected by the pandemic, but also those affected, in particular children. The stigmatization of children orphaned by HIV/AIDS can lead to low levels of self-esteem and self-confidence, which in turn affects the academic performance of the child.

2 HIV/AIDS IN CONTEXT

The United Nations International Children's Emergency Fund (UNICEF), the United States Agency for International Development (USAID) and the United Nations Joint Programme on

²⁴ Foster & Williamson 2000, *AIDS* Suppl 3 S275.

²⁵ Foster & Williamson 2000, *AIDS* Suppl 3 S278.

²⁶ S 1 (a) of the Constitution.

HIV/AIDS (UNAIDS) compiled a joint report which indicates that in sub-Saharan Africa, an estimated 12.3 million children lost either their father or mother or both parents to AIDS.²⁷ In this study, the term “child-headed household” refers to those children who have lost both parents due to HIV/AIDS and have usurped the responsibilities of providing for younger siblings.

There have been a number of research surveys conducted in our country to measure HIV prevalence. The Department of Health antenatal surveillance conducted on an annual basis is one such survey that seeks to measure the HIV prevalence.²⁸ The latest survey was conducted in 2006. According to this survey, a 29.1% prevalence rate was indicated, with as many as 38.7% of women in the 25–29 year age category being the most infected. Kwa-Zulu Natal recorded the highest prevalence with 39.1%, followed by Mpumalanga with 32.1%. The Western Cape recorded the lowest rate of 15.1%. Women between the ages 25–29 are more likely to be young parents.²⁹

The population-based HIV survey was conducted in 2002 at national level by the Nelson Mandela Children’s Foundation and the Human Science Research Council (HSRC). This survey found that females had a higher HIV prevalence rate of about 13.3% than males of about 8.2%. The survey found the prevalence rate in the 15-49 year old age group to be 20.2% in females and 11.7% in males.³⁰ In addition, this survey indicates that the prevalence rate is high in the age group in which people are more likely to be economically active and likely to be parents. These results are a cause for concern, as the prevalence rate is high in women who are the primary caregivers in most instances. At present, there is no evidence of a declining epidemic in South Africa, which indicates that AIDS is likely to impact heavily on the country for years to come.³¹ The results of the increase in HIV/AIDS related deaths, is the number of children left orphaned. It is estimated that by 2010 there could be as many as 5 to 7 million deaths resulting from AIDS in South Africa. It is further estimated that there are currently around 800 000 children in South Africa under the age of 18 years who have lost a mother, the majority to AIDS. This figure is expected to rise dramatically and to peak in 2015, with as many as 3 million children having lost

²⁷ UNICEF *Joint report*.

²⁸ Department of Health *National HIV and syphilis survey*.

²⁹ Freeman 2004 *South African Journal of Psychology* 139.

³⁰ Shisana & Simbayi *Nelson Mandela/HSRC study*.

³¹ UNAIDS *Update*.

their mothers. It is further predicted that by 2015, an estimate of 5.7 million children would have lost one or both parents.³² These statistics illustrate one of many problems caused by the HIV pandemic.

3 THE PHENOMENON OF CHILD-HEADED HOUSEHOLDS

As stated previously in this study, the death of parents as a result of AIDS results in orphanhood, which in many instances results in child-headed households. The emergence of households headed by children sometimes as young as 10-12 years old, is one of the most distressing consequences of the epidemic.³³

A child-headed household in this study is defined as a household where everyone who lives in the household is younger than 18 years old. The Constitution defines a child as a person under 18 years old.³⁴ The definition of a child-headed household in this study is consistent with the Constitution. The household head is the person responsible for the day-to-day running of the household, including child care, breadwinning and household supervision. Some scholars have made an interesting distinction between child-headed households and adolescent-headed households. An adolescent-headed household is defined as a household headed by a person between the ages of 13-24 years.³⁵ Because a child is a person under 18 years old, for the purposes of this study a household headed by a person who is under the age of 18 will be considered a child-headed household. The Nelson Mandela/HSRC survey found that 2.6% of children aged 12 to 18 years claimed to be the head of a household. It is said that 2.6% represents 180 433 child-headed households in South Africa in 2005.³⁶

There is a variety of factors that can lead to the establishment of a child-headed household. In the past, in particular amongst Africans, extended family served as an institution of support and care for children in the absence of parents; as such child-headed households never developed.

³² Johnson & Dorrington "The impact of AIDS orphanhood in South Africa: A quantitative analysis" Monograph No.4, 2001, Cape Town: Centre for Actuarial Research, University of Cape Town, quoted in Freeman 2004 *South African Journal of Psychology* 139.

³³ Forster *et al* 1997 *Health Transition Review* 155.

³⁴ S 28 (3) of the Constitution.

³⁵ Foster *et al* 1997 *Health Transition Review* 158

³⁶ Shisana & Simbayi *Nelson Mandela/HSRC study*.

However, the extended family structure has broken down, resulting in the emergence of this new phenomenon of child-headed households. In Africa, the extended family was a pillar of strength for the nuclear family and the members of the extended family were responsible for the protection of the vulnerable, care for the poor and sick and for passing on to the young ones traditional social values and education.³⁷

However, the extended family structure has collapsed and the reason for that collapse can be attributed to, *inter alia*, labour migration, the cash economy, demographic change, formal education and westernization, thus weakening the extended structure.³⁸ As the extended family structure has collapsed, the question that needs to be answered is what are the available options for those children in child-headed households who have no source of income and who live in circumstances of poverty and poor conditions. The General Household Survey in 2005 found that 9% of child-only households reported no or unspecified income, which may indicate that the children are engaging in the most basic survival activities such as begging.³⁹ For a child not to be able to go to school, have clothes to wear and food to eat, infringes the right to dignity, which is also a value underpinning the Constitution.⁴⁰ In this study, it will be argued that children are guaranteed rights under the Bill of Rights in the Constitution, and that they should be able to enforce those rights against the state in the absence of their parents.

4 THE PROBLEMS OF CHILD-HEADED HOUSEHOLDS

A number of studies have highlighted that children living in child-headed households generally experience the same problems as other children affected and infected by HIV/AIDS, as well as children living in poor conditions.⁴¹ However, child-headed households are different and unique in that there is no adult person taking care of the children.

Scholars in this field have noted that the problems experienced by child-headed households include *inter alia*, poverty, discrimination, stunting and hunger, pressure to work, early marriage,

³⁷ Foster *et al* 1997 *Health Transition Review* 157.

³⁸ Foster *et al* 1997 *Health Transition Review* 156.

³⁹ Statistics South Africa *GHS*.

⁴⁰ S 1(a) of the Constitution.

⁴¹ Nelson Mandela Children's Fund Study.

difficulties accessing education, poor housing, exploitation, psychological problems, lack of adequate medical care, lack of supervision and care, disruption of childhood and adolescence, vulnerability to physical and sexual abuse and poor health status.⁴²

It is submitted in this study that children in child-headed households need to be supported in their communities rather than placed in institutions. A child-headed household with appropriate support can be a viable social unit within the community, enabling siblings to remain in the house even though an adult is not present.⁴³ One of the critical and unique problems of child-headed households is the inability to access financial support from government in the form of social grants due to the lack of an adult primary caregiver who is able to apply for and receive the grant.⁴⁴

5 CHILDREN'S CONSTITUTIONAL RIGHTS

The rights of children are entrenched in section 28 of the Constitution. Acknowledging that children are a vulnerable group in society, the drafters of the Constitution dedicated a section of the Constitution to children rights. In addition to the rights of children entrenched in section 28, children are entitled to all the other rights in the Bill of Rights.⁴⁵ This study will discuss and analyse the rights of children in child-headed households as set out in section 28(1) (b) and (c) of the Constitution in relation to the state's obligations to give effect to them.

It is unfeasible to talk of children's constitutional rights without having regard to the established principle of the paramountcy of the best interests of the child in our law. This principle is now entrenched in section 28(2) of the Constitution. This study will also look at the evolution of this principle and its relation to children's constitutional rights.

⁴² Nelson Mandela Children's Fund Study 14.

⁴³ Foster *et al* 1997 *Health Transition Review* 164.

⁴⁴ Rosa Children's Institute working paper 4.

⁴⁵ Cockrell *Law of persons* 3E-20.

5.1 The right to family care or parental care, or to appropriate alternative care when removed from the family environment

The UNCRC provides that state parties must provide special protection for children deprived of their family environment and ensure that appropriate, alternative family care or institutional placement is made available to them, taking into account the child's cultural background.⁴⁶ The ACHPR protects the right to family. This charter provides that the family shall be the natural unit and basis of society. It shall be protected by the state, which shall take care of its physical and moral health.⁴⁷ In my view this article, amongst others, prescribes the detailed standards for the treatment of children who lack parental care and require state intervention.

The Constitution of South Africa in section 28(1)(b) provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

The point of departure in considering this right is to have regard to its predecessor in the interim constitution.⁴⁸ The Interim Constitution provided in section 30(1)(b) that every child has a right to "parental care". It is worth noting the difference in the wording of this right in the two sections of these Constitutions. This right in the Interim Constitution was framed in such a manner as to protect parental power, which involves the caring for one's children. The right in the Interim Constitution is constructed strictly to prevent any person interfering with parental care of children, including the state. The wording and construction is based on the principle of common law that children fall under parental power, and that part of the office of parenthood involves caring for one's children.⁴⁹ Under the Interim Constitution, it can be argued that the state was precluded from removing children from their parents' care for whatever reason. Furthermore, the Interim Constitution provided for neither the right to family care nor the right to alternative care. What it means therefore, is that where there are no parents to provide for parental care, there is nothing the state can do, as only the parents of a child can provide for parental care. This

⁴⁶ A 20.

⁴⁷ A 18(1).

⁴⁸ Constitution of the Republic of South Africa 200 of 1993.

⁴⁹ Cockrell *Law of persons* para 3E-8.

situation is best illustrated by the judgement in *Jooste v Botha*.⁵⁰ Although this case was decided based on the provision of the final constitution, section 28(1)(b), it is relevant in this regard as it deals with the right to parental care. In this case, the plaintiff's mother and the defendant had a sexual relationship as a result of which the plaintiff was conceived and born. The plaintiff's mother and the defendant were not married, nor were they cohabitants. The plaintiff claimed for damages for *injuria*, emotional distress and loss of amenities of life. The plaintiff *inter alia* based his claim on the following:

In terms of the Constitution the defendant is obliged to render the plaintiff such love, cherishment, attention and interest as can normally be expected of a father towards his natural son; the plaintiff relied on section 28 of the Constitution, in particular the child's right to family care or parental care. The court, in granting its judgement, held that neither our common law nor our statutes recognised the right of the child to be loved, cherished, comforted or attended to by a non-custodian parent as creating a legal obligation. The court went on to say that a non-custodian parent of a child, whether born in wedlock or out of wedlock, falls outside the scope of section 28(1)(b). What the court has done in this case is to limit the right to parental care to be enforced against custodial parents. In terms of this judgment, the right to parental care is only enforceable against the custodial parent. This judgment shows that this provision on parental care in the Interim Constitution was shockingly narrow. This limitation is in my view unjustified in the light of the Constitutional Court (CC) judgement in *Fraser v Children's Court, Pretoria North*⁵¹ and the subsequent promulgation of the Natural Father's of the Children Born out of Wedlock Act.⁵²

In the final constitution, the wording of section 28(1)(b) was widened to provide that, in addition to the right to parental care, every child also has the right to family care, and the right to

⁵⁰ 2000 (2) BCLR 187 (T).

⁵¹ *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC). In this case the question before the CC was to determine the constitutionality of s 18(4)(d) of the Child Care Act 74 of 1993. This section provided that adoption could be granted if the consent of both parents is obtained. However, in the case of an extramarital child, the only consent required was that of the mother. The CC held that this section discriminated between fathers in certain unions and those in other unions, that it further discriminated against fathers of extramarital children, and that that discrimination was unjustifiable. S 18(4)(d) was declared unconstitutional. This Act has since been repealed by the Children's Act 38 of 2005, which is discussed in detail in the next chapter.

⁵² Act 86 of 1997

appropriate alternative care when removed from the family environment. In examination of the right to family care and its implication in the South African context, one will recognise how wide this right has been constructed in the final Constitution. At this point, it is important to note that in view of the preamble of the UNCRC, which states that the family is a fundamental group of society and the natural environment for the growth and wellbeing of all its members, particularly children, the family should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

Our Constitution does not define the term “family”. To understand the content of the right to family care, it is necessary to investigate if the term “family” also includes extended family.

If one looks at the Constitution, there are indications that the child’s right to family care (s 28(1)(b)) is in fact aimed at the extended family. One indication of this is the provisions of section 15(3)(a)(ii) of the Constitution. Section 15 of the Constitution deals mainly with the rights to freedom of religion, belief and opinion. However, if one looks at subsection 15(3)(a)(ii), it protects any systems of personal and family law under any tradition through permitting the promulgation of legislation recognizing such system. Although this section deals with freedom of religion, belief and opinion it does not prevent (in fact it allows) the promulgation of legislation that will recognize the systems of personal and family law under any tradition. Therefore, the child’s right to family care (section 28(1)(b)) is connected to section 15(3)(a)(ii) in that amongst Africans an extended family is a system of personal and family law under their tradition. It is argued in this study that for African people an extended family is a system of personal and family law under their tradition. The Constitution in all probability intended such systems to be nurtured and protected. It is well-known that amongst Africans, a clan system is practiced and used to identify people who belong to the same group and which constitute an extended family. In these social structures, the emphasis therefore falls on the extended family as a means by which society is organised and one’s status is determined within the framework of his or her family.⁵³

⁵³ Robinson in Eekelaar & Nhlapo *Changing family* 489.

In the context of child-headed households, where there are no parents, but extended family members who are willing to take care of children in these households, it is submitted in this study that the right to family care, interpreted to include the extended family of a child, as argued above, is enforceable. For Africans in particular, there are questions of identity where it is preferable for children to grow up within their clan so as not loose touch with their roots. These children may choose to be placed in the foster care of extended family members rather than with a complete stranger.⁵⁴ Of course, that would be done in adherence to the principle of the best interests of the child (s 28(2)).

In its review of the Child Care Act 74 of 1983, the South African Law Reform Commission (SALRC) recognised the extended family as an option for formal placement of children.⁵⁵ In the *Grootboom* case,⁵⁶ which is discussed in detail below, the court held that section 28(1)(b) should be read together with section 28(1)(c). The court went on to say that, these rights ensure that children are properly cared for by their parents and families, and that they receive appropriate alternative care in the absence of parental or family care. The court further held that it follows from section 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.⁵⁷ It is argued therefore that where there are no parents as in the case of child-headed households, the right to alternative care provided by the state comes to the fore. Although the right to family care embraces an element of extended family within the African context, in giving effect to the right to alternative care, the state must ensure that the option of placing children with relatives is explored. This will ensure that even if a child is placed in alternative care which in this case will be with extended family, at the same time, the right to family care is realized.

5.2 Children’s socio-economic rights

Section 28(1)(c) of the Constitution provides for children’s rights to “basic nutrition, shelter, basic health care services and social services.” The Bill of Rights contains, besides those rights

⁵⁴ Robinson in Eekelaar & Nhlapo 498.

⁵⁵ SALRC Discussion Paper ch 8 185

⁵⁶ *Government of the Republic South Africa v Grootboom*. 2001(1) SA 46 (CC).

⁵⁷ Para [76]-[77].

of children, a wide variety of socio-economic rights in sections 26,⁵⁸ 27,⁵⁹ 29⁶⁰ and 35.⁶¹ However, for the purposes of this study, the focus is solely on the rights of children as enumerated in section 28. From the text of section 28, it is important to note that the rights of children are not qualified by the limitation of availability of resources and “progressive realisation” as those in section 26 and 27. A brief background on the inclusion of socio-economic rights in the South African Constitution is necessary to illustrate the complexities of those rights and their enforcement. A range of significant objections were raised early in the debate about the inclusion of these rights in the Constitution. The opponents of the idea of inclusion contended that these rights were not universally accepted fundamental rights to be included in a Bill of Rights.⁶²

It was further argued that their inclusion would be inconsistent with the doctrine of separation of powers because the judiciary would, in effect, encroach on the powers to determine policy, which resided in the legislative and executive organs.⁶³ In dealing with these objections, the CC held with regard to the argument on separation of powers, that as much as it is true that the inclusion of socio-economic rights may result in courts making orders which have a direct implication on budgetary matters, it cannot be said that by including socio-economic rights within the Bill of Rights, a task is conferred upon them by a Bill of Rights that results in a breach of the separation of powers.⁶⁴ A further argument was raised on the justiciability of these rights. The CC held that these rights were, to a certain extent, justiciable.⁶⁵ The court further said although socio-economic rights will give rise to budgetary implications, that cannot be a bar to their justiciability.⁶⁶ From this brief background, it becomes clear that the inclusion of these rights in the Constitution has been hotly contested.

⁵⁸ The right to housing.

⁵⁹ The right to health care, food, water and social security.

⁶⁰ The right to education.

⁶¹ The right of arrested, detained and accused persons.

⁶² De Vos 1997 *SAJHR* 69.

⁶³ Davis 2006 *SAJHR* 303.

⁶⁴ *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 54.

⁶⁵ Para [49]-[51].

⁶⁶ Para [77].

Under the Interim Constitution, children's socio-economic rights were contained in section 30(1)(c).⁶⁷ The critical question that comes to the fore is how these rights are enforced. If we look at the judicial process, for instance, can a court order the state to provide all children, including those in child-headed households, with basic nutrition, basic health and social services? Or can these rights be enforced in some other way? If one looks at these rights, do they have any legal meaning whatsoever to children in child-headed households?⁶⁸ The answer to these questions lies in the jurisprudence of the CC, which has over the years interpreted various sections of the Constitution dealing with socio-economic rights. The approach of the CC in dealing with socio-economic rights gives an indication of how these rights will be interpreted in the future; thus it is important to discuss the various judgments of the CC dealing with socio-economic rights in general.

The first case dealing with socio-economic rights to come before the CC was *Soobramoney v Minister of Health, (Kwa-Zulu Natal)*.⁶⁹ The appellant in this case was diabetic and at the same time suffered from ischaemic heart disease and chronic renal failure. His kidneys had failed and his condition was diagnosed as irreversible. He asked to be admitted to a state hospital for dialysis treatment. The hospital had a policy in place which set out instances where patients would receive dialysis treatment. The policy stated that only patients who could be cured within a short period and those who suffered from chronic renal failure could receive dialysis treatment, and only if they were eligible for a kidney transplant. Based on the policy, the hospital refused dialysis treatment, saying Soobramoney was ineligible because of his heart condition. Soobramoney brought an application, claiming that he had a right to receive treatment from the hospital in terms of section 27(3) of the Constitution (the right to emergency medical treatment). In adjudicating this matter, the Constitutional court exercised great caution, as it was the first case before it dealing with socio-economic rights.

The CC confined the scope of section 27(3) to the right to receive immediate remedial treatment that was necessary and available.⁷⁰ The court held that the right did not cover ongoing treatment

⁶⁷ The right to security, basic nutrition, basic health care services and social services.

⁶⁸ De Vos 1997 SAJHR 76.

⁶⁹ *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998(1) SA 765 (CC).

⁷⁰ Para [20].

of chronic illnesses for the purpose of prolonging life.⁷¹ The court further held that the right had to be construed in the context of the general availability of health services. In line with this interpretation, the court found that within its available resources, the hospital could not be expected to provide treatment to patients who matched the applicant's health profile. The court regarded the task of policy formulation as the exclusive domain of the hospital authorities, where it is done in good faith; as a result, the court was reluctant to interfere with the kind of decisions made within the context of scarce resources.⁷²

Fundamental to this judgement is the fact that the court recognised and acknowledged the right to emergency medical treatment, but in the interpretation of this right limited it only to where the treatment was remedial, immediate, necessary and available, taking into account the demand and the ability of the state to provide such treatment. The court in this case refused to impose an obligation on the state in instances where a *bona-fide* reasonable policy had been formulated, seeking to regulate the matter. The crux of the judgement is that the court refused to be a policy maker. The discussion of Soobramoney seeks to show the difference between the right of everyone in sections 26, 27 and 29 as against those of children in section 28(1)(b) & (c).

The most important socio-economic rights case for the purposes of this study is *Grootboom*.⁷³ In this case, the CC set out a framework for a South African socio-economic jurisprudence. The facts of the case are that Ms Grootboom and 899 squatters had been evicted from their informal homes, which had been erected on private land earmarked for formal low-cost housing. Many of the litigants had applied for subsidised low-cost housing from the municipality, but had been on the waiting list for many years. This case started at the Cape High Court and ended up in the CC. Both the judgements of the High Court⁷⁴ and the CC are interesting and warrant a discussion in this study.

In the High Court, the applicants in the court *a quo* applied for an order directing the respondents to provide them with:

⁷¹ Para [13].

⁷² Para [29].

⁷³ *Government of the Republic of South Africa v Grootboom* 2001(1) SA 46 (CC).

⁷⁴ *Grootboom v Oostenberg Municipality and others* 2000 (3) BCLR 277 (C).

- (i) adequate basic temporary shelter or housing to the applicants and their children pending their obtaining permanent accommodation; or
- (ii) basic nutrition, shelter, health care and social services to the applicants who are children.

The applicants based their claim on two constitutional provisions, first on section 26 of the Constitution, which provides that everyone has the right of access to adequate housing. The second basis for the claim was section 28(1)(c) of the Constitution, which provides that children have the right to shelter. The court granted a rule *nisi*, ordering that temporary accommodation must be provided for those applicants who were children and for one parent of each child who required supervision. On the return day, the matter came before two judges. Firstly, they considered section 26(1) and (2) of the Constitution, which provides that everyone has the right to have access to adequate housing. Further, the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights. Davis J declined to find a violation of section 26(1) and (2). The basis of this decline was that the court noted that the local authority had implemented a rational housing program and was in the process of constructing a substantial number of housing units.

On considering section 28(1)(c), which provides for every child's right to basic nutrition, shelter, basic health care services and social services, the court found that there had been a violation of this right. This decision was based on the fact that this section is unqualified by progressive realisation and the availability of resources. The court therefore held through Davis J that the section creates an immediately realisable entitlement, enforcement of which is not subject to the constraints of *Soobromoney*. The court further held that any such order must be in accordance with the spirit and purpose of section 28 as a whole, taking into account the need of the child to be accompanied by his or her parents. The effect of this judgment is that children and their parents can enforce an immediate entitlement to shelter under section 28(1)(c). Parents were, in other words, granted shelter through the unqualified right accorded to their children. The government appealed this judgement.

Addressing the judgement of the High Court, the CC held that the approach adopted by Davis J is unacceptable because it produces anomalous results in the sense that people who have children

have a direct and enforceable right to housing, while others who have none are not entitled to housing.⁷⁵ The court acknowledged that section 28(1)(c) is unqualified by progressive realisation and the availability of resources, but held that this does not mean that every child has an entitlement to those services when they are lacking. The obligation falls primarily on the family, and only alternatively on the state. The court held that the state incurs an obligation to provide shelter when children are, for example, removed from their families.

The judgment goes further to say that it was not contended that the children who are respondents in this case should be provided with shelter apart from their parents. Those of the respondents in this case who are children who are being cared for by their parents, are not in the care of the state; in these circumstances the court held that there was no obligation upon the state to provide shelter to those of the respondents who were children and, through them, their parents in terms of section 28(1)(c).

In deciding the respondent's right to section 26 of the Constitution, the court looked at whether the measures taken by the state to realize housing rights in terms of that section were reasonable. In considering the test for reasonableness, the court decided that it should not enquire whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent.⁷⁶ In considering reasonableness, the court said evidence had to be provided to show that there was sufficient attention given to the needy and most vulnerable within the community, for them to be considered a priority in the development of any sensible and constitutionally valid housing policy.

This judgement is in my view disappointing because it fails to consider the rights of children independently from their parents. Although this point was never canvassed at the hearing, it is my view that the court had a duty to consider children's rights independently of their parents as the upper guardian of all children. In spite the fact that their parents were unable to provide for the rights set out in section 28(1)(c), the court failed to protect those children.

⁷⁵ Para [71].

⁷⁶ Para [41].

However, this judgement is important when it comes to child-headed households, in that the court interpreted section 28(1)(b) and (c) to be interrelated. The court held:

“Subsections 28 (1)(b) and (c) must be read together. They ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. The section encapsulates the conception of the scope of care that children should receive in our society”.⁷⁷

In child-headed households, this judgement means that where parental care is lacking, the state should step in and provide alternative care. The interrelatedness means that once the state provides for alternative care, it is further obliged to provide for the rights enumerated in section 28(1)(c).⁷⁸ It should also be stated that alternative care in this context should mean placement with the extended family or to remain within the child-headed home, with the provision of support.

Another case to come before the CC regarding socio-economic rights was the *TAC* case.⁷⁹ In this case, the applicants in the court *a quo* (the Treatment Action Campaign) sought to force the Government to provide Nevirapine (a drug to prevent mother-to-child transmission of HIV/AIDS) to pregnant women. The Government selected two sites to administer and distribute the drug. This action was instituted based on section 27, which provides that everyone has the right to access to health care services, and section 28(1)(c), which provides that every child has the right to basic nutrition, shelter, basic health care services and social services.

However, the challenge ultimately ended up based on section 27; our courts seem reluctant to give proper interpretation to section 28(1) (c). In this case the court refused to treat section 27(1) as giving rise to a self-standing and independent positive right enforceable, irrespective of the qualifications contained in section 27(2), namely available resources and progressive realisation. The court held that socio-economic rights in the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. All that is possible and all that

⁷⁷ Para [76].

⁷⁸ Para [75]-[76].

⁷⁹ *Minister of Health v Treatment Action Campaign (TAC)* 2002 (5) SA 721 (CC).

can be expected from 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.⁸⁰

Another case concerning socio-economic rights to come before the CC was *Khosa*.⁸¹ In this case, the applicants challenged certain provisions of the Social Assistance Act 59 of 1992, which reserved the old age pension and child support grants for South African citizens only. They were Mozambiquean nationals, but permanent residents in the country and this excluded them from benefiting under this Act. The court held through Mokgoro J that the socio-economic rights in the Constitution are closely related to the founding values of human dignity, equality and freedom. The court added that all rights are interrelated and all equally important.⁸² The court noted that this case was different from the previous cases dealing with socio-economic rights, in that it also involved the possible infringement of section 9 of the Constitution. Section 9 of the Constitution provides for equality before the law and equal benefit of the law, and prohibits discrimination. Citizenship is not a listed ground in section 9(3). Even so, it can be considered an analogous ground of differentiation to those listed in that section, as the classification has an adverse effect on the dignity of the individual, or some other comparable effect.⁸³

The interplay between section 27⁸⁴ and 9⁸⁵ is an important feature. The court held that, even if the state was able to justify not paying a benefit on the grounds of unaffordability, the criteria used to determine the limitation must be consistent within the Bill of Rights as a whole.⁸⁶ The court went on to say that if the means chosen by the legislature to give effect to the state's positive obligation under section 27 unreasonably limits other constitutional rights, that must be taken into account. For this reason, Mokgoro J found that the exclusion of applicants on the grounds of their lack of citizenship alone does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.⁸⁷ The crux of this case is that the state in its legislative measures, which in this instance excluded non-citizens from access to social security

⁸⁰ Para [34]-[35].

⁸¹ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

⁸² Para [40].

⁸³ Para [70].

⁸⁴ The right to health care, food, water and social security.

⁸⁵ The right to equality.

⁸⁶ Para [45].

⁸⁷ Para [82].

benefits, had unreasonably limited other rights in the Bill of Rights, in this instance the right to equality and not to be discriminated against on the grounds of citizenship.

From all the discussed cases, it seems that the CC has developed a general approach to be adopted in the interpretation of socio-economic rights. If one looks at all the cases, the dominant feature is the reasonableness of the policy adopted to achieve progressive realisation of these rights and the ability of such policy to give attention to the most vulnerable people in society.

5.3 Paramourncy of the child's best interests

Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. In the past, the application of the best interests of the child standard was only limited to family-law proceedings. The best interests of the child standard is a common-law rule that was first laid down in the case of *Fletcher v Fletcher*,⁸⁸ that mainly dealt with the award of custody in divorce proceedings.

This standard further became a key factor in the international law arena through its inclusion in the UNCRC. The Convention states:

- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child must be a primary consideration.
- State parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for him or her, and, to this end, must take all appropriate legislative and administrative measures.
- State parties must ensure that the institutions, services and facilities responsible for the care or protection of children must conform with the standards established by competent

⁸⁸ 1948 (1) SA 130 AD.

authorities, particularly in the areas of safety, health, in the number and sustainability of their staff, as well as competent supervision.⁸⁹

Although this standard forms part of international law, that has not prevented some scholars from criticizing the standard. Heaton cites the biggest problem with the concept of the best interest of the child as being its indeterminacy.⁹⁰ According to her, what is best for a specific child or for children in general cannot be determined with any degree of certainty. She further states it is difficult to give definition to the concept and that this concept cannot have a fixed meaning and content that is valid for all communities and circumstances. However, Heaton believes despite these problems with the best interests of the child standard, the concept should continue to be used. She believes that the factors used to come to the conclusion on the interests of a child should not be regarded as fixed principles, but as guidelines and aids to enable and help the court to come to some decision about which alternative would most probably serve the interests of the particular child better than any other alternative.⁹¹

Some of the criticism of the standard is that members of the various professions dealing with matters concerning children have quite different perspectives on the concept. The historical background, cultural, social, political and economic conditions of a country have an influence in the implementation of the concept.⁹²

The best interests of the child criterion has since been constitutionalised in section 28(2) of the Constitution. This section provides:

“A child’s best interest are of paramount importance in every matter concerning the child”

The wording of the text of section 28(2) indicates that this standard is no longer only applicable to matters of custody and guardianship but in every matter concerning the child. If one further compares the text of the Constitution of the Republic of South Africa 200 of 1993 (“Interim

⁸⁹ A 3.

⁹⁰ Heaton 1990 *THRHR* 95.

⁹¹ Heaton 1990 *THRHR* 98.

⁹² Chaskalson *et al Constitutional law of South Africa* 47-31.

Constitution”) and the final Constitution, the distinction is clear in that the Interim Constitution provided in section 30(3) that the best interests of the child were paramount for the purposes of section 30 alone. In *Hlophe v Mahlalela and another*, the best interests of the child criterion came before court.⁹³ In this case the court was confronted with the question of deciding whether customary or common law was applicable in determining a custody issue. The respondents contended that the applicant could not get custody of a child because he had not fully paid the lobola. The court held that issues of custody of a minor child cannot be determined by a mere delivery or non delivery of a certain number of cattle. Relying on section 30(3) of the Interim Constitution, the court held that the matter should be decided only on the basis of what would be in the best interests of the child.⁹⁴

Section 28(2) of the Constitution extended the application of the best interests criterion to every matter concerning the child. In *Minister for Welfare and Population Development v Fitzpatrick and others*, the CC had the following to say about this constitutional standard.⁹⁵ The court held that section 28(2) proceeds to entrench constitutionally the general principle that a child’s best interests are of paramount importance in every matter concerning the child. The court observed that section 28(1) was not exhaustive of children’s rights. In dealing with the paramountcy of a child’s best interests in every matter concerning the child, the court held that section 28(2) clearly indicates that its reach could not be limited to the rights enumerated in section 28(1). Section 28(2) had to be interpreted to extend beyond those provisions. It created a right that was independent of those specified in section 28(1). The court held that the standard should remain flexible, since individual circumstances would determine in each case which factors secured the best interests of a particular child.⁹⁶

This case dealt with the constitutionality of section 18(4)(f) of the Child Care Act. This section precluded non-South Africans from adopting a child born of a South African. The court struck down this section as being unconstitutional and inconsistent with section 28 (in particular section 28(2)) of the Constitution.

⁹³ 1998 (1) SA 449 (T).

⁹⁴ Para 459D-G.

⁹⁵ 2000 (7) BCLR 713 (CC).

⁹⁶ Para [16] – [20].

The best interests of a child also came before the court in *Hay v B*.⁹⁷ In this case a doctor applied, on an urgent basis for an order authorizing her to administer a blood transfusion to an infant. The parents of the infant objected to the transfusion on the grounds of religious beliefs, and over concerns relating to the risk of infection associated with blood transfusions. The court held, in terms of section 28(2) of the Constitution, that a child's best interests are of paramount importance in every matter concerning the child. This is the most important factor to be considered when balancing or weighing competing rights and interests concerning children. According to the court, the duty to afford children protection falls on enforcement agencies, all right-thinking people and ultimately the court, which is the upper guardian of all children.⁹⁸ In applying these principles, the interests of the child outweigh the reasons advanced by the parents in opposing the administration of the transfusion.

Another important case on the balancing of competing rights and interests concerning children is *S v M*.⁹⁹ In *S v M*, the CC held that competing considerations had to be weighed by the sentencing court. The competing considerations in this instance is the importance of maintaining the integrity of family care, the state's duty to punish criminal misconduct and the interest of children to grow up in a world of moral accountability where criminality is publicly repudiated. It is significant that the court was of the view that the paramountcy principle should be applied in a meaningful way without disregarding other "valuable and constitutionally-protected interests".¹⁰⁰

In determining the best interests of a particular child, the CC thus weighs up competing interests, and does not consider one interest more important than the other.

⁹⁷ 2003 (3) SA 492 (W).

⁹⁸ At 494 I-E.

⁹⁹ 2008 (3) SA 232 (CC).

¹⁰⁰ Para [37] – [42].

An important development in this regard is that the best interests criterion has been included in the Children's Act.¹⁰¹ Section 7 of the Act provides for factors that must be taken into account in the application of the best interests standard when the provisions of the Act requires the standard to be applied. Section 9 further provides that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied.

The paramountcy of the best interests of a child proves to be a critical standard in children's rights jurisprudence in this country. For the state to give effect to the rights of children in child-headed households, in particular the right to family care and alternative care and for any other right for that matter, the interests of these children should be of paramount importance.

6 CONCLUSION

The prevalence of the HIV/AIDS pandemic in our country is a cause for concern. The high levels of the pandemic will result in an increase in the number of child-headed households. The rights of children in section 28(1)(b) and (c) are unqualified and in those instances where there are no parents, children in child-headed households are entitled to alternative care, whether within the extended family environment or within the household headed by the child. Once they are afforded alternative care, then the rights in section 28(1)(c) should be provided by the state.

The state gives effect to these rights in the Bill of Rights through legislative and policy intervention. In line with the jurisprudence of the CC, such legislative or policy interventions will be judged through its reasonableness and its ability to give attention to the most vulnerable groups in society. The study will now look at the interventions made by the state in fulfilling its obligations to child-headed households in terms of the Constitution.

¹⁰¹ Act 38 of 2005.

CHAPTER 3

THE STATE'S RESPONSE TO ITS CONSTITUTIONAL DUTIES IN CHILD-HEADED HOUSEHOLDS

1 INTRODUCTION

The Constitution requires the state to respect, protect, promote and fulfill the rights in the Bill of Rights.¹⁰² One of the ways in which the state fulfils the rights in the Bill of Rights is through the introduction of policy and legislation. Since the coming into force of the Constitution, the state has introduced and passed a range of policies aimed at giving effect to some of the rights in the Bill of Rights. Although section 28(1)(b) and (c) does not require the state to take reasonable legislative or other measures to achieve progressive realisation of the rights enumerated in that section, the state is nonetheless required to fulfill the rights under that section. The policies and legislation introduced and passed were not specifically aimed at alleviating the plight of children in child-headed households, but children in general. One of the ways in which the state seeks to fulfill the rights in section 28(1)(b) and (c) is through the provision of social assistance. In this study, it will be argued that the interventions made by the state to fulfill the rights of children in child-headed households is inadequate. Gaps within the social security system will be highlighted.

2 LEGISLATIVE AND POLICY FRAMEWORK

2.1 The Social Assistance Act 13 of 2004

2.1.1 The Child Support Grant

The law on social assistance is regulated by the Social Assistance Act 13 of 2004. The Act gives effect to the rights in the Constitution, in particular the right of access to social assistance in

¹⁰² S 7(2).

terms of section 27 of the Constitution.¹⁰³ This Act includes a number of cash grants for children, *inter alia*; the Child Support Grant (CSG), the Foster Care Grant (FCG) and the Care Dependency Grant (CDG).

The Child Support Grant was first introduced in 1997. It replaced the previous State Maintenance Grant (SMG). The SMG was intended to provide financial assistance to mothers and later fathers and their children, when the spouse was no longer present due to death, imprisonment, or a number of other specified reasons. However, this form of grant had its own problems, one being that the grant was severely skewed racially.¹⁰⁴

The CSG came as a result of a recommendation made by the Lund Committee on Child and Family Support. The main objective of the CSG is to help to alleviate the plight of poverty experienced by many South Africans through a flat rate child support benefit to be paid to the care giver of a child.¹⁰⁵ The grant was intended to protect the poorest children in the age bracket 0-7 years, those being considered the most vulnerable years. This was extended to children under 15 years of age as from January 2009. Civil society groups have campaigned for the extension of the grant to all children under 18 years old.¹⁰⁶

One of the progressive features of the CSG is the concept that the payment of the grant is not dependent on the biological ties and common-law relationship where a duty of support towards a child exists. The payment is based on who is taking primary responsibility for the daily care needs of the child, irrespective of his or her relationship to the child.¹⁰⁷

Another progressive feature is the principle that the grant follows the child. This principle takes cognisance of the effects of the HIV/AIDS pandemic in that children might have different and

¹⁰³ S 27(1)(c) of the Constitution provides that “[e]veryone has the right to have access to ... social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. S 27(2) further provides that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”, while s 28 (1)(c) provides for children’s socio-economic rights.

¹⁰⁴ Budlander *et al* *Developing social policy* 8.

¹⁰⁵ S 6 of the Social Assistance Act 13 of 2004.

¹⁰⁶ Some of those organizations are Molo Songololo and Black Sash.

¹⁰⁷ *Lund Report on Child and Family Support*.

successive caregivers within a short space of time. This principle is particularly important in the context of child-headed households where children in these households have lost their parents who are also their caregivers and find themselves in a situation where they have to look after themselves and their siblings.

As stated elsewhere in this study, one of the problems facing child-headed households is the lack of access to social grants. The lack of access to social grants, in particular to a CSG by children heading households, can be traced back to the definition of the “primary caregiver” under the Social Assistance Act.¹⁰⁸ Although the CSG is the social grant for the benefit of the child, the law requires the primary caregiver of the child to receive the grant.

The Social Assistance Act provides:¹⁰⁹

“Child Support Grants:

A person is, subject to section 5, eligible for a child support grant if he or she is the primary care giver of that child.” (*My emphasis*)

Section 5 of the Act provides:

A person is entitled to the appropriate social assistance if he or she-

- is a resident in the Republic at the time of the application for the grant in question
- is a South African citizens, and
- comply with the prescribed conditions.

This Act defines a primary caregiver as follows:¹¹⁰

“primary care give means a person older than 16 years, whether or not related to a child, who takes primary responsibility for meeting the daily care needs of the child.”

The definition of a primary care giver in terms of this Act sets an age limit as to who is eligible to be a primary care giver. In essence, the age limit set by the Act precludes children who are 16 years of age and

¹⁰⁸ Act 13 of 2004.

¹⁰⁹ S 6.

¹¹⁰ S 1.

younger from being primary care givers. This presents problems, as there are children who are 16 years and younger heading households and are performing care giving roles to their siblings. The recent research data shows that over half of children in child-headed households are 14 years or older. It further reveals that in the vast majority of child-headed households there is at least one child who is 15 years or older.¹¹¹

The refusal to provide a CSG to a 16 year old and younger primary care-giver could be a violation of the right to equality entrenched in the Constitution. The Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.¹¹² Should this refusal be challenged on these grounds, the challengers will have to show and prove that the different treatment of adults and children is not based on a rational connection to a legitimate government purpose.¹¹³ The state would definitely find it difficult to defend such action and would thus fail. Some of the children who are refused to be primary caregivers because they are 16 years or younger, are in fact performing care-giving duties.¹¹⁴ If the state can successfully defend the action that the differentiation between children and adults is indeed based on rational connection to legitimate government purpose, then section 9(3)¹¹⁵ would present problems. This section presents a number of grounds on which unfair discrimination is prohibited. This refusal can be challenged as unfair discrimination on the grounds of age. Another possible ground of challenge is that of social origin. Children heading households and who are primary caregivers arguably usurp those roles as a result of HIV/AIDS. Their parents have died as a result of the HIV/AIDS pandemic; they are in need of financial assistance. The failure to recognize this and assist such children, discriminates unfairly against them because they come from poor backgrounds.¹¹⁶

¹¹¹ Meintjes *et al* *Child-headed households in SA: Statistical brief*.

¹¹² S 9(1).

¹¹³ As the test was set out in *Prinsloo v Van der Linde* 1997 (3) SA 102 (CC).

¹¹⁴ Goldblatt & Liebenberg 2004 *SAJHR* 161.

¹¹⁵ S 9(3) provides that states 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 and birth.

¹¹⁶ Goldblatt & Liebenberg 2004 *SAJHR* 160-161.

2.1.2 *The Foster Care Grant*

Children in child-headed households who have lost both parents through death are orphans. According to Skinner, the most accepted definition of an orphan is a child who has lost both parents through death. Furthermore, according to Skinner, this definition can be extended to include loss of parents through desertion.¹¹⁷

The government has focused mainly on foster care as a mechanism to address the problem of orphans. This approach has proved to be unsustainable, inappropriate and to a certain extent a limited intervention for orphans, in particular for those in child-headed households.¹¹⁸ The system of foster care encourages adults in the community to care for orphans and become foster parents. A foster grant is payable to a foster parent in respect of a child who has been legally placed in their custody in terms of the Child Care Act.¹¹⁹

Section 8 of the Social Assistance Act¹²⁰ provides that a foster parent is eligible for a foster child grant for a child for as long as that child needs such care if:

- a) The foster child is in need of care, and
- b) He or she satisfies the requirements of the Child Care Act, 74 of 1983.

This Child Care Act is set to be replaced by the Children's Act,¹²¹ which at the time of this study had not wholly come into operation; only selected provisions of the Act were in operation.¹²²

The Children's Act is set to bring some reforms in foster care. Amongst others, the Act allows children to be placed in foster care with relatives until the child turns 18 without the need for a court review. In terms of the Child Care Act, children who are "in need of care" are fostered under an order of court, whether by relatives or others. These caregivers are officially appointed

¹¹⁷ Skinner *et al* *Defining orphaned and vulnerable children* 8.

¹¹⁸ Rosa *Children's Institute working paper* 12.

¹¹⁹ Act 74 of 1983.

¹²⁰ Act 13 of 2004.

¹²¹ Act 38 of 2005

¹²² The following sections came into force on the 1 July 2007: S 1-11, 13-21, 27, 30-31, 35-40, 130-134, 305, 307-311, 313-315 and schedule 4.

custodians or foster parents under supervision of a social worker. They are entitled to a Foster Care Grant, which in April 2009 stood at R680. A Foster Care Grant is not means tested like other grants, therefore in my opinion; it is not viewed as a poverty matter. To illustrate this point through an example, a person who is living a luxurious lifestyle with all the financial resources in the world, can be appointed a foster parent and receive a foster care grant, in this example the converse applies. The FCG is not in any way intended to assist in the elimination of poverty like the CSG. Seemingly, the aim of this grant is to reimburse the non-parent for the cost incurred in caring for a child.¹²³

Currently, this form of a grant does not take into account child-headed households and the plight of children heading these households. To be appointed a foster parent, the court should be involved. Children heading households would find it difficult to be appointed as foster parents of their siblings. The Child Care Act defines the foster child as any child who has been placed in the custody of any foster parent in terms of Chapter 3 or 6; it further defines a foster parent as any person except a parent or guardian, in whose custody a child has been placed.¹²⁴ From this definition, children heading households are unlikely to be designated foster parents of other children through the court process.

Due to the fact that the FCG fails to take into account child-headed households and in light of the long drawn-out court process involved, the foster care grant has no impact whatsoever on the phenomenon of child-headed households. This form of a grant is not a viable solution to the lack of access to financial resources encountered by child-headed households.

The Children's Act and its amendment (Children's Amendment Act), which are set to replace the Child Care Act, have left the provision that to be a foster parent a person must be appointed through an order of the court unchanged. Section 180(1)(a) of the Children's Amendment Act provides "a child is in foster care if the child has been placed in the care of a person who is not the parent or guardian of a child as a result of an order of a children's court". An important feature of this legislation will be to allow family members to be foster parents of children

¹²³ Rosa Children's Institute working paper 13.

¹²⁴ S 13-15.

without the decision being subject to a review until a child turns 18 years. This does not alleviate the plight of child-headed households experienced under the Child Care Act.

However, a progressive feature of the Children's Act is its definition of children "in need of care". Care in relation to a child is defined as including the necessary financial support. Under the Children's Act, once a child is declared to be "in need of care", he or she is entitled, depending on the available resources, to the necessary financial support. Although this progressive feature is welcomed, the Children's Act is silent on how the financial support will be provided and how much will be provided for children found to be in need. Children heading households are presumably children in need of care, although the Children's Act requires the social worker to investigate child-headed households to determine if they are in need of care and protection.¹²⁵

The policy of social security, which stems from the Constitution,¹²⁶ has the potential to realize the rights of children (in particular the right to basic nutrition) and to improve the general living conditions of children in child-headed households through accessibility to social grants. Due to the obstacles highlighted above in this system, it has failed to realize these children's rights and to acknowledge that there are children who have no alternative but to live without adult caregivers. As this system currently stands, child-headed households have no access to social grants. There is an obligation on the state to provide such children with financial resources via an accessible mechanism so that they can survive and develop.

¹²⁵ S 150.

¹²⁶ This policy came into being as a result of s 27(1) (c) of the Constitution.

2.2 The Children’s Act 38 of 2005, and the Children’s Amendment Act 41 of 2007

2.2.1 The legislative development process

2.2.1.1 Background

The Children’s Act is the culmination of a lengthy process initiated by the then Minister for Social Development to review the Child Care Act. The Minister for Social Development requested the South African Law Reform Commission (SALRC) to investigate the Child Care Act and to make recommendations on its reform. When the Bill was first formulated, it transpired that it affected both the National and Provincial government; a decision was taken to split the Bill to be dealt with in two different procedures, procedures outlined in section 75 and 76 of the Constitution. The Children’s Act assented to by the President on 8 June 2006, and certain sections came into operation by proclamation on 1 July 2007.¹²⁷ The Children’s Amendment Act was assented to by the President on 13 March 2008. The Children’s Amendment Act had not yet come into operation at the time of writing. The Children’s Amendment Act amends and completes the Children’s Act. Due to the fact that the Children’s Amendment Act amends and completes the Children’s Act, deliberations and public hearings on this legislation were held almost at the same time.

The purpose of the Children’s Act is to give effect to the constitutional rights of children to:

- Family care, parental care or appropriate alternative care;
- Social services; and
- Protection from abuse, neglect, maltreatment and degeneration.

This Act further recognises that South Africa had acceded to various international conventions, such as the UNCRC and the ACRWC, the principles of which have to be incorporated into our domestic legislation.¹²⁸

¹²⁷

Supra n 122.

¹²⁸

Preamble to the Act.

2.2.1.2 The South African Law Reform Commission (SALRC)

In the process of formulation of the Bill, the SALRC embarked on a series of engagements and in the process produced a variety of documents including a discussion paper and a draft Children's Bill.

The SALRC Discussion Paper highlighted the possibility that child-headed households would become a familiar phenomenon due to an increase of the HIV/AIDS pandemic. The SALRC recommended that, while some children might cope while living without any adult intervention, it would be preferable for the state to put in place external mechanisms to support children living without adults.¹²⁹

The Childline Family Centre made presentations to the SALRC and argued that it was in the best interest of siblings who had collectively suffered the loss of parental care, to remain living together even if this meant without adult caregivers, so as to continue the support and relationship of the sibling group whenever possible.¹³⁰

In line with this presentation of the Childline Family Centre, the Commission recommended that legal recognition should be given to child-headed households as a placement option for orphaned children in need of care, and a mentorship scheme be established to visit the children to access grants and other benefits which they currently cannot access.¹³¹ In order to provide support to child-headed households, the Commission recommended that:¹³²

- Legal recognition be given to schemes in terms of which one or more appropriately selected and mandated adults are appointed as “household mentors” over a cluster of child-headed households by the Department of Social Development, a recognized Non-Governmental Organization (NGO) or the court.

¹²⁹ SALRC Discussion Paper ch 13.

¹³⁰ SALRC Discussion Paper 561.

¹³¹ SALRC Discussion Paper 566.

¹³² SALRC Discussion Paper 567.

- The proposed “household mentor” may not make decisions in respect of the child-headed household without consulting the child at the head of the household, and without giving due weight to the opinions of the siblings as appropriate to their age, maturity and stage of development.
- The proposed “household mentor” should be able to access grants and other social benefits on behalf of the child-headed household.
- The proposed “household mentor” should be accountable to the Department of Social Development or a recognised NGO or the court.

In essence, this system provides for child-headed households to be assisted by mentors to provide the necessary adult supervision in the application and spending of the grant.

The draft Children’s Bill of the SALRC incorporated most of the proposals in the discussion paper as discussed above. Fundamental in the draft Bill was the inclusion of the mentorship scheme for child-headed households. This is a clear indication that the draft Bill recognized the existence of child-headed households.

The SALRC draft Children’s Bill included proposals for a range of grants for children up to the age of 18. Included in these proposals was an informal kinship care grant for children living with relatives, but not with their biological parents. This would not require court intervention and could be the same value as the child support grant.¹³³

2.2.1.3 The Department of Social Development and the Cabinet process

After receiving the draft Bill from the SALRC in 2002, the Department of Social Development produced a new version of the draft Bill, thus weakening that of the SALRC. The Department of Social Development removed almost the whole chapter on social security and the provisions on recognition of informal kinship care as a legal placement option. The new version was submitted to the Cabinet, which requested further deletions and weakened it further.

¹³³ Budlender *et al* *Developing social policy* 40.

The Cabinet approved the Bill, albeit without certain chapters and clauses. The Bill approved by Cabinet lost about four chapters. Among the lost chapters were those dealing with the National Policy Framework and the Children's Protector. Another critical deletion was the chapter on children, especially those in difficult circumstances, which covered children affected by HIV/AIDS. This chapter would have laid an obligation on government to formulate a strategy to ensure that these children and their families received comprehensive support. The chapter on funding, grants and subsidies was also removed.¹³⁴

It is important to note that these proposals were made by the South African Law Commission in its draft Bill. Both the Department of Social Development and the Cabinet deemed it fit to delete them. The deleted proposals were in my view progressive and would have gone a long way in giving effect to the rights of children (in particular the rights of children in child-headed households) in section 28(1)(b) and (c). In particular, the chapter on children in difficult circumstances would have to a larger extent addressed the plight of children in child-headed households.

2.2.1.4 The Children's Act 38 of 2005

Both the Children's Act and the Children's Amendment Act¹³⁵ contain interesting provisions on child-headed households. The Children's Act list categories of children in need of care and protection.¹³⁶ Amongst those categories are abandoned or orphaned children without any visible means of support. Children in child-headed households may fall into this category. This Act further states that a child in a child-headed household may be a child in need of care and protection and a social worker must investigate whether children in child-headed household are in need of care and protection.¹³⁷ It is important to note that care in this instance is defined to include, where appropriate, within available means providing the child with a suitable place to live, living conditions conducive to the child's health and development, and the necessary financial support. The Children's Act further recognizes children as caregivers. Caregivers are

¹³⁴ Budlender *et al* *Developing social policy* 25.

¹³⁵ Act 41 of 2007

¹³⁶ Ch 9, s 150.

¹³⁷ S 150(2).

defined as any person other than the biological or adoptive parents who factually cares for a child, whether or not that person has parental responsibilities or rights in respect of the child, and includes the child at the head of a child-headed household to the extent that the child has assumed the role of family caregiver.¹³⁸

The Children's Amendment Act is explicit on the issue of child-headed households.

This Act provides:¹³⁹

1. The Provincial head of Social Development may recognize a household as a child-headed household if:
 - (a) the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household.
 - (b) No adult family member is available to provide care for the children in the household.
 - (c) A child over the age of 16 years has assumed the role of caregiver in respect of the children in the household, and
 - (d) It is in the best interests of the children in the household.

2. A child-headed household must function under the general supervision of an adult designated by:
 - (a) Children's Court.
 - (b) An organ of state or a non-governmental organization determined by the provincial head of Social Development.

3. The supervising adult must:
 - (a) Perform the duties as prescribed in relation to the household.
 - (b) Be a fit and proper person to supervise a child-headed household.

¹³⁸ S 1.
¹³⁹ S 137(1)-(3).

This Act further allows children heading households to collect any grants on behalf of the household. Child-headed households may not be excluded from any grant, subsidy, relief or aid by any sphere of government for the sole reason that the household is headed by a child.¹⁴⁰

From these provisions it is evident that to a certain extent the Children's Amendment Act acknowledges the growing phenomenon of child-headed households. This Act also incorporates the proposals of the SALRC in its discussion paper to this legislation, in particular the mentorship programme.

However, from the wording of section 137(1)(c) it is clear that a child who is younger than 16 years and who performs care-giving roles in the households would still experience problems with accessing grants on behalf of siblings. Sadly, this provision recognises only those over the age of 16 years as care-givers in the households. Those children younger than 16 years and who perform care-giving roles will solely depend on the supervising adult for the collection of grants due to the administrative requirements of identity documents discussed above. The problem with this provision is that some of these children live in rural areas where NGO's and the Department of Social Development do not normally reach and courts are far away to appoint household supervisors. It is not clear how this provision will be implemented in practice. The problem of access to grants will remain a problem to those households headed by children younger than 16 years.

In spite of the aforementioned challenges (as well as the challenges relating to resourcing that will be discussed below, the Children's Act and Children's Amendment Act prove to be progressive pieces of legislation seeking to give effect to the rights of children as enunciated in section 28(1)(b) and (c) of the Constitution.

¹⁴⁰ S 137 (4)-(9).

2.2.1.5 Resourcing of the legislation

This legislation has been commended as a progressive move on the side of government. However, problems relating to the implementation thereof are anticipated. Financing and resourcing of the Bill surfaced repeatedly in the discussions on these legislative provisions. The advocacy groups regarded the issue of funding and resources as both inevitable and sensible, given the wide range of services prescribed by these laws.¹⁴¹

When the Bill was first formulated, it stated that “recognizing that competing social and economic needs exist, the state must, in the implementation of this Act, take reasonable measures within its available resources to achieve the progressive realisation of the Act”. After intense lobbying by advocacy groups this provision was amended; the word “progressive” was removed and the words “maximum extent” were inserted before “available resources”. This amendment meant that the National Treasury and provincial treasuries were obliged to prioritise the implementation of the Children’s Act when making decisions about their budgets and allocation of resources.¹⁴²

When the Portfolio Committee on Social Development discussed the funding of the Children’s Act in the Provinces, the Act provided that the Provincial MEC “may” provide funds for services under the Act. The advocacy groups attempted to convince the Portfolio Committee on Social Development to change the words “may” to “must”. However, the Portfolio Committee refused to include “must provide” but instead suggested that a clause be inserted that would provide for resources to be targeted to poor communities and children with disabilities.¹⁴³ The Portfolio Committee’s refusal to use “must provide” arose from concerns over limited resources, a backlog in service delivery and a fear of litigation to enforce this legislation. This form of phrasing of the duty of the MEC to provide funds for services under the Act, does not in any way oblige the MEC to make it a priority to fund these services.

¹⁴¹ Budlender *et al* *Developing social policy* 27.

¹⁴² Budlender *et al* *Developing social policy* 33.

¹⁴³ Budlender *et al* *Developing social policy* 34.

From the brief summary of the deliberations in these Acts, it becomes clear that the rights of children under this law are not given the necessary attention.

Finances are not the only form of resources needed for successful implementation of the Children's Act. Human resources remain as important as finances. It is acceptable that in South Africa social welfare services are primarily provided by social workers. The costing report of the Children's Bill/Act provides that the lowest level of service delivery requires 8 656 social workers and 7 682 social auxiliary workers in the first year of implementation. The report further states that by the fifth year, the numbers needed would be 16 504 social workers and 14 648 social auxiliary workers. Currently, the country's training institutions produce only 500 new social workers each year and no social auxiliary workers.¹⁴⁴

From this discussion, it is clear that the shortage of financial and human resources will be an extreme impediment on the implementation of this legislation. This in turn brings into question the state's ability to fulfill its obligation as set out in section 28(1)(b) & (c) of the Constitution for children in child-headed households.

2.3 Policy documents

2.3.1 The National Strategic Framework for Children Infected and Affected by HIV/AIDS

In addition to the legislation promulgated to give effect to the rights of children in child-headed households, government formulated a number of strategies and policies that seek to provide a variety of services to children infected and affected by the HIV/AIDS pandemic. One such policy is the National Strategic Framework for Children Infected and Affected by HIV/AIDS.

The main focus of the policy is to maximize the potential for care for children within the community by providing support, be it financial or otherwise, to families, alternative caregivers and the community itself. This policy identifies a number of needs for children infected and affected by HIV/AIDS, which implicitly refers to child-headed households, to include medical

¹⁴⁴ Barberton *The cost of the Children's Bill 93*.

care, basic needs such as food, clothing, shelter, education and general nurture. The provision of these needs should preferably be community based. This policy acknowledges that due to the increase in HIV/AIDS, the number of orphans will increase and place an additional strain on the already broken extended family structure. Therefore, resources should be directed to children and families to ensure that children and youth receive care, protection and support within their communities or communities of origin. This policy acknowledges child-headed households and states that the special needs of these children should be taken care of, particularly that government financial support must be made available to children in child-headed households. However, the policy fails to set out a plan on how these noble causes will be achieved.¹⁴⁵

In the meeting with the Portfolio Committee on Welfare, the Department of Welfare made it clear that in the implementation of this policy, there will be no new specific AIDS grants introduced. Children infected and affected by the epidemic will have to rely on the existing general grant system. In the same meeting, the Department of Welfare could not say where the funds for the implementation of this strategic framework would come from, except to say “from different unnamed sources”.¹⁴⁶

2.3.2 *The National Integrated Plan for Children and Youth Infected and Affected By HIV/AIDS*¹⁴⁷

The National Integrated Plan (NIP) was launched in 2000 to ensure that individuals, households and communities, especially children affected by HIV/AIDS, have access to an appropriate and effective integrated system of prevention, care and support services at community level.

This policy seeks to adopt a co-operative approach between four government departments: Health for medical treatment, Social Development for social relief aspects, Agriculture for food security and Education for awareness and educational programmes. To be successful, this policy

¹⁴⁵ Rosa Children's Institute working paper 19.

¹⁴⁶ Portfolio Committee on Welfare Meeting on the Integrated National Strategic Framework for Children Infected and Affected by HIV/AIDS held on 17 November 1999 Available at <http://www.pmg.org.za/minutes/19991116-integrated-natainal-strategic-framework-children-infected-hiv aids> [Accessed on 21 July 2009].

¹⁴⁷ Department of Social Development *Policy framework* 29.

requires extensive collaboration between these departments in implementing the plan as well as collaboration between government and communities. This plan is mainly focused on Home and Community Based Care and Support (HCBCS).

The aim of HCBCS is to establish and implement community based models of care and support for adults and children infected and affected by HIV/AIDS, including income support and a care networks for orphans. The HCBCS programme has been criticized for being inaccessible to remote rural areas. This creates a barrier in identifying children living in destitute conditions in order to ensure that their needs are addressed.¹⁴⁸ The HCBCS may include community representatives caring for orphans and the sick.

However, the roll-out of the programme has been slow and even where it has been rolled out, implementation is a problem. Some of these problems include the lack of capacity in provincial departments to understand programme content and to monitor it.¹⁴⁹ Besides the challenges with roll-out and implementation, the NIP does not seem to take into account the phenomenon of child-headed households.¹⁵⁰

2.3.3 *The National Guidelines for Social Services to Children Infected and Affected By HIV/AIDS*¹⁵¹

This policy seeks to assist organizations and persons offering services to children infected and affected by HIV/AIDS, and to ensure that the provision of community-based care and support as the intervention approach adopted by the Department of Social Development, does indeed protect the rights of children.¹⁵²

¹⁴⁸ Sloth-Nielsen 2003 *Law, Democracy & Development* 114, 127.

¹⁴⁹ Streak “Are we making progress in realizing the rights of children affected by HIV/AIDS?” Children Budget Project Idasa Available at <http://www.idasa.org.za/bis> [Accessed on 28 July 2009].

¹⁵⁰ Rosa *Children’s Institute working paper* 19.

¹⁵¹ *National Guidelines*.

¹⁵² Department of Social Development *Policy framework* 33.

These guidelines acknowledge that children should be cared for within the context of their immediate environment, that is family and community.¹⁵³ The aim of these guidelines are *inter alia* to provide information on establishing and implementing special programmes, including home/community-based care and support, to provide clarity on the development of community-based structures, and to establish and strengthen poverty alleviation programmes in affected areas. These guidelines encourage a culture of community caring for its members. However, resources remain a challenge in the establishment of community-based care programmes and the procedure to qualify for funding is stringent. According to the guidelines, it costs up to more than R300 000 to initiate a community care project and more than R500 000 to sustain it.¹⁵⁴

3 CONCLUSION

Without the full recognition of child-headed households, government policy will always fail to give effect to the rights of children in child-headed households as enumerated in section 28(1)(b) and (c) of the Constitution. From the discussion of the legislation and policies, it appears that only the Children's Act promises to deal with the problems of child-headed households. Admittedly, challenges are envisaged in the implementation of this legislation. However, others do not come close in adequately responding to the needs of child-headed households, in particular in respect of the lack of access to financial support.¹⁵⁵

It cannot be said with certainty that the Children's Act will adequately address the problems of child-headed households. This Act correctly categorises children in child-headed households as children who may be in need of care. If found to be in need of care, children may be entitled, depending on available resources, to *inter alia* a suitable place to live, suitable conditions conducive to the child's health, well-being and development and necessary financial support.

The problems with this state of affairs are the following:

- The Act does not outright declare children in child-headed households to be in need of care and protection, thus allowing for them to have access to these benefits. It requires a

¹⁵³ *National Guidelines* 11.

¹⁵⁴ *National Guidelines* 18.

¹⁵⁵ Sloth-Nielson 2003 *Law, Democracy & Development* 135.

social worker to investigate the matter in order to determine if the child-headed household is in need of care and protection. With the shortages of social workers in the country, it will be difficult to implement this provision

- Furthermore, It does not state how these benefits will be provided when a household is declared in need of care. For example, does provision of a suitable place to live mean provision of a house? The necessary financial support is also not quantified.

Further, children in child-headed households have problems in accessing child support grants (CSG) because they cannot be regarded as primary caregivers (PCG). They cannot even access a foster care grant (FCG) because to be a foster parent one must be appointed by a court of law, a process that is long and complicated. The Children's Amendment Act does not introduce a new grant for child-headed households, but seeks to facilitate access to the existing grant system. For this reason it does not improve access to grants by child-headed households. In terms of this Act access to grants by child-headed households will depend on the success of the household supervisor proposed by this Act, in particular for those households headed by children younger than 16 years of age. If this system of household supervision fails, the problem of inaccessibility of grants by child-headed households will persist.

CHAPTER 4 CONCLUSION

This study has explored the rights of children in child-headed households under both the international law and the Constitution. Furthermore, the state's duty through legislation and policy to give effect to these rights was investigated.

Under international law, a variety of instruments guarantee rights to children. Moreover, the Constitution guarantees socio-economic rights to children. In spite of these rights and guarantees, children in child-headed households continue to be confronted by extremely high levels of poverty. The current government policy as discussed above falls short in giving effect to the rights of children in child-headed households as espoused in section 28(1)(b) and (c). These children have lost their parents and do not have any adult caregivers. The state has a duty to give effect to the rights of children in child-headed households, that is the right to family care or parental care, or to appropriate alternative care when removed from the family environment, as well as the right to basic nutrition, shelter, basic health care services and social services as entrenched in section 28(1)(b) and (c).

The claim to these rights by children in child-headed households is further supported by the CC interpretation of these rights in *Grootboom*.¹⁵⁶ In its interpretation of these rights, the CC held that the rights in section 28(1)(b) and (c) are interrelated; where there are no parents the state should provide for alternative care. Once alternative care is provided, the socio-economic rights in section 28(1)(c) come to the fore and the state must give meaning to those rights. The court added that government policy should not be seen to exclude the most vulnerable groups in society. Children in child-headed households are the most vulnerable in our society. For the state to succeed in giving effect to the rights of children in child-headed households, the following proposals are hereby made:

- 1) There should be a revival of the extended family structure. The extended family structure has broken down, but it has not totally collapsed. As children in child-headed households

¹⁵⁶ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

have no parents, the state is required to give effect to the right to family care or alternative care. In giving effect to these rights the state must ensure that the extended family takes the center stage. As argued above, for African people an extended family structure is an institution of support and education, thus it should be taken into account in giving effect to both the children's right to family and alternative care. This proposal is strengthened by the proposal of the SALRC that the broader concept of family than the traditional nuclear family should be recognized.¹⁵⁷

This proposal of the SALRC is supported by the judgement in *Dawood*.¹⁵⁸ Judge O'Regan J held that families come in many shapes and sizes, therefore the definition of family should also change as social practices and traditions change. She added that in recognizing the importance of the family, care should be taken not to entrench particular forms of family at the expense of other forms.¹⁵⁹

It should be noted with concern that as far as the state is concerned, the right to alternative care means that a child must be taken to a children's home. In the context of child-headed households, taking these children to a children's home is not a solution. In some instances it is in the best interests of these children not to be separated from each other but to remain together. In placing these children in alternative care, the option of placing these children with extended family should first be explored, rather than taking them to children's home. To make the extended family structure attractive for this option, it should be supported financially and through any other way possible to make it conducive for such placements. The Children's Amendment Act contains a provision which advocates the supervision of child-headed households by a person designated to do so by a Court, NGO or Provincial Head of Social Development.¹⁶⁰ For this approach of a supervisor to succeed, it also needs a strong extended family structure. The extended family members should be the first people to be considered for designation as supervisors, then in their absence, outsiders can be considered.

¹⁵⁷ SALRC Discussion Paper ch 8 185.

¹⁵⁸ *Dawood and another v Minister of Home Affairs and others* 2000 (8) BCLR 837 (CC).

¹⁵⁹ Para [31].

¹⁶⁰ S 137

- 2) Prioritize the implementation of the provisions dealing with child-headed households in the Children's Act and Children's Amendment Act. The predecessor to this legislation, the Child Care Act, in this instance has failed to acknowledge the existence of child-headed households. It has proved to be outdated and not to be in sync with today's challenges. Although this legislation has not yet wholly come into operation, when they do, the provisions on child-headed households should be prioritized. It is argued in this study that both financial and human resources are inadequate for the maximum implementation of this legislation. The problematic provisions relating to the declaration of children in child-headed households as children in need of care and protection, and the provision of financial support and a suitable place to live to these children, must be sorted out before the commencement of the legislation, as these problems have the potential to hamper its implementation. Children in child-headed households have suffered for long and this suffering should not continue while having legislation which has a potential to address the plight of child-headed households.

- 3) The recommendations of the Taylor Committee of inquiry into a comprehensive system of social security should be implemented as matter of urgency.¹⁶¹ The Taylor committee recommended that the Department of Social Development must make provision to support the growing number of orphans, especially those left in child-headed households, to have access to social grants. In actual fact there should be a special grant designed for child-headed households. Neither the CSG nor the FCG were introduced for taking care of household needs.

They were introduced for specific purposes. With today's high food prices, it is impossible to run a household with the amount paid for a CSG and FCG. The amount for child-headed households should at least be equal to the old-age pension. The inaccessibility of the CSG and FCG for child-headed households strengthens the need for a special grant to be paid to child-headed households. The Children's Amendment Act seeks to facilitate access to grants through the introduction of a household supervisor.

¹⁶¹ Taylor Committee Report of Inquiry into a comprehensive system of social security in South Africa (March 2006) 61.

From the wording of section 137 of the Act it is clear that children younger than 16 years who are heading households will still not be able to access grants without a household supervisor. If a special grant for child-headed households is introduced; children who are performing care-giving responsibilities and are of adequate maturity to manage the grant should be able to access it regardless of their age or the presence of a household supervisor.

As previously indicated, the Department of Social Development has introduced various policies that seek to address the challenges of children affected and infected by HIV/AIDS. However, none of those policies address the problems of child-headed households relating to access to money and food.

- 4) As stated in this study, access to money plays a critical role in the fulfillment of the rights of children in child-headed households. If one takes note of these rights in section 28(1)(c), for instance the right to basic nutrition entails access to nutritional foods which must be bought with money. Even the right to basic health care needs money; people in rural areas travel kilometers to reach health centers and therefore need to pay taxis and bus fares. In most instances, grants are inadequate to meet the needs of children. Therefore, food parcels should be handed out to children in child-headed households on a weekly basis.
- 5) Child-headed households should be prioritized in the government housing programme. This will assist the government in ensuring that it gives effect to the right to basic shelter. In most instances child-headed households have no proper houses. In the case of child-headed households in urban areas, who have proper houses and where property rates and taxes are paid, the local authorities should ensure that they are exempt from paying taxes and property rates.

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