

THE CHILD'S RIGHT TO SOCIAL SECURITY – SOUTH AFRICA'S NON COMPLIANCE WITH ITS CONSTITUTIONAL AND INTERNATIONAL DUTIES*

1 INTRODUCTION

In 2002 it was estimated that 11 million children (between the ages of 0-18) are living in dire poverty in South Africa on less than R200 per capita per month (R245 in 2002 real terms), and therefore living on less than half the minimal R400 per capita per month required to meet their basic needs, and that 14.3 million children are living in poverty on less than R400 per capita per month (R490 in 2002 terms). **Child poverty is on the increase.** Between 1995 and 1999 the rate of child poverty in South Africa on a poverty line of R400 per capita per month increased from 64.7% to 75.8% and the rate of children in dire poverty calculated on a poverty line of R200 per capita per month increased by 19.2% from 38.9% to 58.1%.¹

This situation makes **children** in South Africa a **particularly vulnerable group**. In their report to parliament, the South African Human Rights Commission² identified the following groups of children as **particularly vulnerable and marginalised**: all children, regardless of their age, and specifically children infected with HIV/AIDS; child-headed households;

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¹ Children's Institute ea. "Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill" 18 September 2003, Available from World Wide Web, <http://www.pmg.org.za/docs/2003/appendices/030922joint.htm>.

² South African Human Rights Commission (SAHRC) "Fourth Annual Economic and Social Rights Report" 2000-2002, Available from World Wide Web, http://www.sahrc.org.za/esreport_2000_2002.htm 227-229.

children living on streets; and children in extended families due to HIV/AIDS related deaths.³

Ironically many of these vulnerable children do not fall into the social protection net of the current social assistance system in South Africa. The purpose of my paper is to examine the **current social assistance grant system** available to children in South Africa and to indicate its major deficiencies. I am going to examine whether government is in compliance with its **constitutional and international duty** towards realising the social security and social assistance rights of children. I will argue that the exclusion of these vulnerable groups of children infringes upon their constitutional and international rights to social assistance, human dignity, life and equality.

2 THE SOCIAL ASSISTANCE SYSTEM IN SOUTH AFRICA

2.1 Introduction

The current system is complicated to describe. There are two acts in that need mentioning namely the old Social Assistance Act⁴ and the New Social Assistance Act.⁵ Although the new Social Assistance Act⁶ was assented to by

³ Compare Solange Rosa *Counting on Children: Realising the right to social assistance for child-headed households in South Africa* 2004, Children's Institute: Cape Town; Teresa Gutrie *ea. Comments made to the Department of Social Development: Social Security Benefits for Children and Families* 2002, Children's Institute: Cape Town; Solange Rosa, and Wieland Lehnert *Workshop Report Children without adult caregivers and access to social assistance* (Hosted by the Children's Institute University of Cape Town and the Alliance for Children's Entitlement to Social Security) 20-21 Aug 2003, Children's Rights Institute: Cape Town; Helen Meintjies *ea. Children in need of care or in need of cash? Questioning the social security provisions for orphans in the context of the South African AIDS pandemic* (A joint working paper of the Children's Institute and the Centre for Actuarial Research) 2003, University of Cape Town: Cape Town; UNAIDS, UNICEF, and USAID *Children on the Brink A Joint report of New Orphan Estimates and a Framework for Action* July 4th ed. 2004 United Nations Children's Fund: New York 3.

⁴ 59 of 1992 (hereafter Social Assistance Act).

⁵ 13 of 2004 (hereafter the new Social Assistance Act).

the President on 5 June 2004 it has not come into operation yet. According to section 34 of this Act, the Act will come into operation on a date determined by the President by proclamation in the *Gazette*. Recently government had wrongly published new regulations⁷ in terms of the New Social Assistance Act. These regulations cannot be in force because the Social Assistance Act itself is not yet in force. According to the Department of Social Development's website it was published for comments and inputs.⁸ The current Social Assistance Act is further complicated by the Welfare Laws Amendment Act which has amended it numerous⁹ and it contains numerous regulations in terms of these Acts that is currently still applicable.

The new Social Assistance Act is aimed to consolidate legal requirements and provisions for social assistance in the Republic, and to create uniform norms and standards, which can apply countrywide.¹⁰ The Department of Social Development in briefing the Portfolio Committee on Social Development indicated that **it will not be making any policy shifts in the new Social Assistance Act** and that the act is tabled to remove the assignment to the provinces as indicated in the Memorandum.¹¹ This is unfortunate because

⁶ 13 of 2004. Published for general information in *Government Gazette* 26446 of 10/06/2004.

⁷ New Proposed Regulations published in GN 162 in *Government Gazette* 27316 of 22/02/2005.

⁸ See Department of Social Development, Available from World Wide Web, <http://www.welfare.gov.za/Legislation/2005/2005.htm>.

⁹ 106 of 1997 (hereafter Welfare Laws Amendment Act).

¹⁰ Memorandum on the objects of the Social Assistance Bill B 57A-2003. As amended by the Portfolio Committee on Social Development (National Assembly). (As introduced in the National Assembly as a section 76 Bill; explanatory summary of Bill published in *Government Gazette* 25340 of 8/08/2003.) See *Mashavha v President of the Republic of South Africa and others* CCT 67/03 in this case it was argued that social assistance is a matter that cannot be regulated effectively by provincial legislation and requires minimum standards across the nation for the rendering of public services.

¹¹ Children's Institute *ea*.

numerous interest parties proposed reforms to the current Act especially with regard to children and none of these were integrated in the new Act.¹²

Social assistance grants in South Africa are highly categorised and only cover children from infancy to 11 years (**Child Support Grant**),¹³ children in foster care (**Foster Child Grant**),¹⁴ children with disabilities (**Care Dependency Grant**),¹⁵ people with disabilities (Disability Grant),¹⁶ and the elderly (Old Age Grant).¹⁷ In addition to the Old Age and Disability Grant, one can apply for a Grant-in-Aid.¹⁸ This entire grant system is subject to a strict means test under the old Social Assistance Act.¹⁹ No provision is made by way of the social

¹² See discussion under 4 below.

¹³ Section 4(1) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. The value of the Child Support Grant is currently R170. GN 409 in *Government Gazette* 26197 of 26/03/2004. Section 4(a) and 6 of the New Social Assistance Act.

¹⁴ Section 4A(b) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. The value of the Foster Child Grant currently amounts to R530. GN 409 in *Government Gazette* 26197 of 26/03/2004. Sections 4(c) and 8 of the New Social Assistance Act.

¹⁵ Section 4B of the Social Assistance Act as amended by the Welfare Laws Amendment Act. The amount of the grant is R740 per month per child. GN 409 in *Government Gazette* 26197 of 26/03/2004. Section 4(b) and 7 of the New Social Assistance Act.

¹⁶ Section 3(a) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. The value of grant is R740 available to women over 18 to 59 years and men over 18 to 64 years. GN 409 in *Government Gazette* 26197 of 26/03/2004. Sections 4(d) and 9 of the New Social Assistance Act.

¹⁷ Section 3(a) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. The value of the grant is R740 available for women from 60 and men from 65 years. GN 409 in *Government Gazette* 26197 of 26/03/2004. Sections 4(e) and 10 of the New Social Assistance Act.

¹⁸ Available for people who require full-time assistance by another person owing to his or her mental or physical disabilities who is not in care of an institution. The grant is R160. GN 409 in *Government Gazette* 26197 of 26/03/2004. Sections 4(g) and 12 of the New Social Assistance Act.

¹⁹ SAHRC "Fourth Annual Report" 27-28 reported that eligible beneficiaries of grants, eg the Child Support Grant, especially those in rural areas, found it difficult to access grants due to documentation requirements, such as identity documents and birth certificates

assistance grant process for people without disabilities from the age of 11 to 60/65 depending on gender. This implies that a large section of the population is still excluded from the social assistance programme which serves as the main safety net in South Africa.

The New Act makes provision for grants for the following categories of children: **Child Support Grant**,²⁰ **Care Dependency Grant**²¹ and **Foster Child Grant**.²² The new Act makes provision for exactly the same grants for children as under the previous Act except for the **Grant-in-Aid** that is now also available to children. This is a new development in the legislation. A person is, subject to section 5,²³ and 32(2)(b)²⁴ eligible for a grant-in-aid if that

and the minimal collaboration between the Department of Social Development and the Department of Home Affairs.

²⁰ Section 4(a) and 6 of the New Social Assistance Act.

²¹ Section 4(b) and 7 of the New Social Assistance Act.

²² Sections 4(c) and 8 of the New Social Assistance Act.

²³ Section 5 sets out the eligibility criteria to qualify for a grant under the New Social Assistance Act:

- (1) A person is entitled to the appropriate social assistance if he or she -
- a) is eligible in terms of section 6, 7, 8, 9, 10, 11, 12 or 13;
 - b) subject to section 17, is resident in the Republic;
 - c) is a South African citizen or is a member of a group or category of persons prescribed by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette;
 - d) complies with any additional requirements or conditions prescribed in terms of subsection (2)
 - e) applies for social assistance in accordance with section 14(1).
- (2) The Minister may prescribe additional requirements or conditions in respect of-
- a) income thresholds;
 - b) means testing;
 - c) age limits, disabilities and care dependency;
 - d) proof of and measures to establish or verify identity, gender, age, citizenship, family relationships, care dependency, disabilities, foster child and war veterans' status;
 - e) forms, procedures and processes for applications and payments;
 - f) measures to prevent fraud and abuse.

person is in such a physical or mental condition that he or she requires regular attendance by another person.²⁵ This grant-in-aid is currently R160²⁶ and the question could be asked who the beneficiaries of this will grant be. According to the new regulations proposed by the Department of Social Development a person is eligible for a grant-in-aid if he or she is in receipt of a social grant and, owing to his or her physical or mental condition, is certified by a medical officer as requiring full time attendance by another person.²⁷ I suspect it may benefit children already accessing the care-dependency grant. It could also benefit children with HIV/AIDS related illness where the primary care-giver already obtains the Child Support Grant but the care-giver is in further need of assistance because the child lacks care of his/her physical condition. The same argument may be applicable to foster children. Nothing in the new proposed regulations precludes this.

2.2 The Child Support Grant

This grant is currently payable to a primary care-giver of a child under the age of eleven years and from the end of March 2005 it will be extended to fourteen years.²⁸ The primary care-giver is the person who has the parent's or parents' permission to care for the child and who is responsible for meeting the daily needs of the child.²⁹ It may also be the parents or parent her/himself applying for the grant. Anyone receiving payment for caring for a child or who does not have the consent of the parent or guardian of the child is not regarded to be

²⁴ New Proposed Regulations published in GN 162 in *Government Gazette* 27316 of 22/02/2005. These regulations have been wrongly published under the Social Assistance Act 13 of 2004.

²⁵ Section 12 of the New Social Assistance Act.

²⁶ GN 409 in *Government Gazette* 26197 of 26/03/2004.

²⁷ New Proposed Reg 8(1) published in GN 162 in *Government Gazette* 27316 of 22/02/2005.

²⁸ Section 4(1) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. See now R460 in *Government Gazette* 24630 of 31/03/2003.

²⁹ In terms section 3 of the Welfare Laws Amendment Act.

the primary care-giver for the purposes of the grant.³⁰ The grant is payable in respect of an unlimited number of own children of the primary care-giver and in respect of six other children.³¹

A primary care-giver is defined by the old Act as

in relation to a child, means a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child, but excludes (a) a person who receives remuneration, or an institution which receives an award, for taking care of the child; or (b) a person who does not have an implied or express consent of a parent, guardian or custodian of the child.

It is important to note that this definition sets no age limit for a primary care-giver, although in order to apply for a grant³² one must be in possession of an identity document which can only be obtained by the age of 16.³³

A rather peculiar amendment to the New Social Assistance Act includes the restriction³⁴ on the definition of primary care-giver to people 16 years and older. 'Primary care-giver 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 that child.'³⁵ Hereby the new Act explicitly excludes children under the age of 16 who are performing the function of primary care-giver in child-headed household to access the child support grant.³⁶

³⁰ Reg 3(2) GN R418 in *Government Gazette* 18771 of 31/03/1998. Kitty Malherbe "Family" in Marius Olivier, Nicola Smit and Evans Kalula (eds.) *Social Security: A Legal Analysis* 2003, Durban: Butterworths 381.

³¹ Reg 3(1) GN R418 in *Government Gazette* 18771 of 31/03/1998. New Proposed Reg 4(1) published in GN 162 in *Government Gazette* 27316 of 22/02/2005.

³² Reg 9(1) of GN R 460 of 31/03/2003.

³³ Section 3 of the Identification Act 68 of 1997.

³⁴ It will later be argued that this is seen as a restriction and the requirement of identity documents must be done away with.

³⁵ Section 1 of the Social Assistance Act 13 of 2004.

³⁶ Rosa *Counting on Children* 9-12.

Both the primary care-giver and the child must be resident in South Africa at the time of the application for the child support grant and both must be South African citizens³⁷ or permanent residents.³⁸ The primary care-giver also has to meet certain other conditions, namely that he or she (or any other person) may not already receive a grant for the child and the child must not be in an institution for the care and safety of children.³⁹

The fact that the child support grant is payable to a primary care-giver has disadvantages. Children who do not have an adult care-giver are not able to apply for the grant, for example children living on the streets and in child-headed households.⁴⁰ Only children over 16, because they may access identity documents and the new Act requires the primary care-giver to be 16 years of age, may apply as primary care-givers for the children under their care in child-headed households. It is however doubtful if these children will access the system given their fear of social workers, the formalities for applying for identity documents and a general ignorance about the social grant system.⁴¹

³⁷ According to section 4(b) of the Social Assistance Act. See Brigette Clark "The duty of the state to support children in need" Vol 117 No 2 (2000) *South African Law Journal* 348; Malherbe "Family" 382.

³⁸ Khosa case. New Proposed Reg 4(2)(f) published in GN 162 in *Government Gazette* 27316 of 22/02/2005.

³⁹ GN R813 in *Government Gazette* 20235 of 25/06/1999. See now new proposed Reg 2 published in GN 162 in *Government Gazette* 27316 of 22/02/2005. Further conditions set out by the regulations proposed by the Department of Development for a primary care-giver are that "(1) he or she must continue to be a primary care-giver of the child concerned for the duration of the grant or until substituted by another; (2) the child must have accommodation, be fed and clothed; (3) he or she must allow the Agency reasonable access to the child and the dwelling in which the child resides; (4) he or she must ensure that the child receives immunisation and other health services; (5) he or she must use the grant for the benefit of the child." New Proposed Reg 28 published in GN 162 in *Government Gazette* 27316 of 22/02/2005.

⁴⁰ Malherbe "Family" 382. Although it is not recommended that grants are paid to children living on streets.

⁴¹ Rosa *Counting on Children* 5.

The current amount of the child support grant is R170 per child per month.⁴² This is another cause for concern. In this regard, Liebenberg⁴³ is of the opinion that the child support grant can be regarded as adequate only if it enables the primary care-giver to 'at least feed, clothes, shelter and acquire basic medicine for the child'. It is highly questionable whether the present value of the grant is able to achieve this, especially in the case of children infected with HIV/AIDS because they require medical care which result in medical cost and other related expenses.

The targeting rate of the child support grant does not correspond with prevailing poverty levels among children. A large number of poor children in the eligible age group who are in need of state assistance will still be excluded because of the means test.⁴⁴

One of the problems with the child support grant is that it is complicated by a strict means test. A primary care-giver will only pass the means test if the primary care-giver and child live in either a rural area in a formal or informal dwelling or in an urban area in an informal dwelling and the personal income of the primary care-giver and his or her spouse is below R13 200 per annum, or if they live in an urban area in a formal dwelling and the personal income is below R9 600 per annum. The amount of R9 600 is only applicable to a primary care-giver and child living in an urban area and who occupy a brick/concrete or asbestos house.⁴⁵ The two-tier nature of the means test for determining who is eligible for the grant⁴⁶ is discriminatory⁴⁷ against primary care-givers who live in rural areas. This means test is unnecessarily complex and could have the result of being to the disadvantage of primary care-givers

⁴² GN 409 in *Government Gazette* 26197 of 26/03/2004.

⁴³ Sandra Liebenberg "The right to social assistance: the implications of *Grootboom* for policy reform in South Africa" Vol 17 part 2 (2001) *South African Journal on Human Rights* 243.

⁴⁴ Clark "The duty of the state to support children in need" 349.

⁴⁵ R 16(2) of GN R418 in *Government Gazette* 18771 of 31/03/1998.

⁴⁶ See Clark "The duty of the state to support children in need" 350.

⁴⁷ And thus in conflict with section 9 of the Constitution.

who live in large and poverty-stricken households due to HIV/AIDS.⁴⁸ The means test does not take account of the number of people living off the income or the extra vulnerabilities faced by the family such as HIV/AIDS. Furthermore, the means test threshold has not increased since 1998 despite increases in inflation and the cost of living.⁴⁹

Another problem with the child support grant⁵⁰ is the fact that those who are entitled to it are not accessing it. One of the reasons for this is the fact that eligible beneficiaries find the grant difficult to access due to the documentation requirements.⁵¹ Rural villages are at a distinct disadvantage in respect of access to social welfare services and children in child-headed households⁵² and living on the street are generally not in a position to apply for grants, as they do not have the assistance of an adult.⁵³

Other obstacles in the obtaining of the child support grant include lack of awareness of eligibility for the grant, illiteracy, poor infrastructure at pay-points and long delays and back-logs in the processing of grant applications.⁵⁴ Various administrative obstacles, such as welfare officials not being able to understand and apply the relevant regulations, delays in obtaining necessary documents from other government departments and an inability to afford transport to the relevant government offices, have also been identified.⁵⁵

In essence a major problem with the child support grant is the unavailability thereof to child-headed households, children whose parents have died and who are being cared for by extended family members, children without adult

⁴⁸ Clark "The duty of the state to support children in need" 350.

⁴⁹ Children's Institute *ea.* "Joint Submission".

⁵⁰ As well as the foster child grant and the care-dependency grant.

⁵¹ Such as identity documents and birth certificates. SAHRC "Fourth Annual Report" 216.

⁵² Which are becoming increasingly more prevalent due to the AIDS pandemic.

⁵³ SAHRC "Fourth Annual Report" 216.

⁵⁴ Illiteracy causes pay-out dates to be missed and prevents the checking of the accuracy of grants and benefits.

⁵⁵ Malherbe "Family" 389.

caregivers not living in a particular community, children with moderate disabilities and chronic illnesses who need assistance and children living with HIV/AIDS.⁵⁶

6.2 Foster Child Grant

Foster child placement, aims to provide care for *abandoned and neglected* children. It is of a temporary nature as it terminates upon family reunification or adoption.⁵⁷ The foster child grant is payable to a person in whose custody a foster child has been placed in terms legislation, namely the of the Child Care Act.⁵⁸

In order to qualify for this grant, both the foster parent and child must be resident in South Africa at the time of application⁵⁹ and they must comply with prescribed conditions.⁶⁰ Since foster parents perform a public service, their material need is not a principal criterion. There is a means test to determine eligibility for the foster child grant, but it only considers the means of the foster child and not the means of the foster parent as well.⁶¹ This is quite an easy

⁵⁶ Children's Institute *ea.* "Joint Submission". See South African Law Commission (SALC) "Review of the Child Care Act" Discussion Paper 103, Project 110, Chapter 13, February 2002, 333-338.

⁵⁷ Malherbe "Family" 384.

⁵⁸ Chapters III and VI of the Child Care Act 74 of 1983. New Proposed Reg 5(1) published in GN 162 in *Government Gazette* 27316 of 22/02/2005.

⁵⁹ Section 4A(b) of the Social Assistance Act. The foster child grant thus differs from the child support grant in that there is no requirement that the foster parent and the child must be South African citizens or permanent residents of South Africa. This makes it possible for children from other countries to become foster children in the Republic of South Africa.

⁶⁰ Ester Bolani *ea.* "Family Support" in Marius Olivier *ea.* (eds.) *Social Security Law General Principle*. 1999, Durban: Butterworths 267.

⁶¹ In order to qualify for the grant, the foster child's income may not exceed twice the annual amount of the grant. Reg 4 GN R418 in *Government Gazette* 18771 of 31/03/1998. See now new Proposed Reg 5(2) published in GN 162 in *Government Gazette* 27316 of 22/02/2005.

test to overcome when compared too the very stringent means test applicable to the child support grant.

The initial aim of the foster child grant was to provide some monetary assistance to persons other than biological parents who care for a child while state and private welfare institutions search for a more permanent placement, either with the biological family⁶² or in an adoptive environment.⁶³ In reality, however, given the limited number of adoption and institutional opportunities, many foster parents are permanent rather than temporary.⁶⁴

From 1996 there have been reports by welfare agencies that the number of foster care application is on the increase.⁶⁵ While it is suggested that this is due to an increase in AIDS orphans, it is also suspected that **some parents deliberately leave their children with other care-givers who will be eligible for the higher foster care grant**, which is available for a longer period, and has a greater monitory value rather than the child support grant.⁶⁶

Both government and civil society representatives are in favour of the higher-value foster child grant as a social assistance mechanism aimed at addressing the needs of poor and orphaned children.⁶⁷ The question must however be asked whether this mechanism is the **correct tool to implement in addressing the needs of poor and orphaned children**. The grant can only be obtained when children are removed from their biological parents and placed in the care of other care-givers. As already indicated some parents deliberately leave their children with other care-givers who will be eligible for the higher foster care grant. This is truly not a health situation. **Where the situation allows it, children, even if they live in poor circumstances,**

⁶² After regulation of the problems leading to statutory intervention.

⁶³ Clark "The duty of the state to support children in need" 351.

⁶⁴ Clark "The duty of the state to support children in need" 351.

⁶⁵ Clark "The duty of the state to support children in need" 352.

⁶⁶ While the child support grant is much smaller than the foster child grant. See Clark "The duty of the state to support children in need" 352.

⁶⁷ Meintjies *ea.* *Children in need of care or in need of cash?* 5.

should remain with their biological parents if it is in their best interest.

Section 28(3) of the Constitution states that: 'A child's best interest is of paramount importance in every matter concerning the child.' It is submitted that although this social assistance mechanisms has a higher monetary value it could possibly infringe on the child's best interest.

It is clear from above argumentation that most children do not need the intervention of courts and social workers. Most of them are taken care of within the extended family or broader community and some even by their own parents. Shifting these children around to obtain the bigger foster care grant is in breach of the fundamental and universally accepted principle of the 'best interest of the child'. Legislative reform is urgently needed. Government will have to realise that vulnerable children need financial assistance, not formal supervised care.

6.3 Care-dependency grant

A care-dependency grant is payable to the legal parents, foster parents, guardians or custodians in respect of a child between the ages of 1 and 18 years in their care, who due to their severe mental and/or physical disability, need full-time home care.⁶⁸ The parents of such a child must be South African citizens or permanent residents⁶⁹, and the parents as well as the care-dependent child must be resident in South Africa at the time of the

⁶⁸ Sections 1 and 2(f) of the Social Assistance Act. Section 4(b) and 7 of the New Social Assistance Act.

⁶⁹ See *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) paras 92 and 95. (Hereafter the Khosa case). The new proposed regulations does not explicitly state whether the parents and the child must be South African citizens or permanent residents. See New Proposed Reg 6 and 30 published in GN 162 in *Government Gazette* 27316 of 22/02/2005.

application.⁷⁰ In order to receive this grant the parent or foster parent must provide proof that the child is in fact disabled⁷¹ and that the combined annual income of the family does not exceed R48 000 and the child's income does not exceed twice the annual amount of the grant.⁷² The amount of the grant is currently R740 per month per child.⁷³

The care-dependency grant is poorly accessed⁷⁴ and is not available to children on the basis of HIV/AIDS.⁷⁵ While it provides for certain contingencies such as severe disability, it fails to provide for childhood chronic illnesses and children infected with HIV/AIDS.⁷⁶ Such children and their families, while not qualifying for the grant, have to incur extra costs due to the health condition,

⁷⁰ Elsabe Klinck "People with Disabilities" in Marius Olivier, Nicola Smit and Evans Kalula (eds.) *Social Security: A Legal Analysis* 2003, Durban: Butterworths 333; Malherbe "Family" 385.

⁷¹ In the form of a report from a medical officer or from an assessment panel, an assessment panel being defined as a group of individuals, appointed by the Director-General of Social Development, who have the relevant experience and expertise to assess disability and care dependency, confirming that the child is in fact a care dependent child. R1233 in *Government Gazette* 22852 of 23/11/2001.

⁷² In other words, the grant is based upon a means test. Reg 5(1) GN R418 in GG 18771 of 31/03/1998. The proposed regulations states that "(b) the combined annual income of the applicant and his or her spouse, after all the deductions referred to in these regulations are made, does not exceed an amount determined by the Minister by notice in the Gazette; (c) and the income of the child does not exceed twice the annual amount of the care-dependency grant." See New Proposed Reg 6(1) published in GN 162 in *Government Gazette* 27316 of 22/02/2005.

⁷³ GN 409 in *Government Gazette* 26197 of 26/03/2004.

⁷⁴ According the SAHRC, during the period April 2001 to March 2002, 276 776 children were eligible for the care dependency grant, while only 42 474 were receiving it. SAHRC "Fourth Annual Report" 203.

⁷⁵ This cause for concern is expressly mentioned by the SALC "Review of the Child Care Act" 333-338. See Clark "The duty of the state to support children in need" 356; Klinck "People with Disabilities" 333. It is however available to adults with HIV/AIDS at a Phase 2 stage of infection in the form of the disability grant.

⁷⁶ Despite the fact that such children's needs are equal to, or even greater than, those of many qualifying disabled children. See Klinck "People with Disabilities" 333; SAHRC "Fourth Annual Rights Report" 217.

which greatly reduce their chances of development and equal opportunities in life.⁷⁷

It is submitted that the major problem with the care-dependency grant is the unavailability thereof to child-headed households, children whose parents have died and who are being cared for by extended family members, children without adult caregivers not living in a particular community, children with moderate disabilities and chronic illnesses who need assistance, children living with HIV/AIDS.⁷⁸

3 INTERNATIONAL AND CONSTITUTIONAL OBLIGATIONS

On 16 June 1995 South Africa ratified the **United Nations Convention on the Rights of the Child (CRC)**⁷⁹, without any reservations. This Convention contains a set of rights and freedoms to be enjoyed by all children. A child as defined in this Convention is any human being under the age of 18, unless a particular nation's laws set an earlier age for the attaining of majority status.⁸⁰ This is in line with the South African Constitution⁸¹, which also defines a 'child' as a person under the age of 18 years.⁸²

Article 26 of the CRC explicitly states that every child has the right to benefit from social security, including social insurance, and that the state should take the necessary measures to achieve the full realisation of this right in accordance with national law. Social security benefits should be granted,

⁷⁷ SAHRC "Fourth Annual Report" 217. See also Klinck "People with Disabilities" 333-334.

⁷⁸ SAHRC "Fourth Annual Report" 230, Children's Institute *ea.* "Joint Submission". See SALC "Review of the Child Care Act" 333-338.

⁷⁹ GA Res 44/25, Annex 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990.

⁸⁰ Article 1 of the Convention.

⁸¹ Section 28(3).

⁸² See also the Social Assistance Act 59 of 1992, Welfare Laws Amendment Act 106 of 1997 and new Social Assistance Act 13 of 2004 that defines child as a person under 18 years.

taking into account the resources and the circumstances of the child and those responsible for the maintenance of the child.

Article 6 of the Convention places state parties under an obligation to ensure the survival and development of the child to the maximum extent possible. Article 6 is understood by the Committee on the Rights of the Child (Committee on RC) as follows:⁸³

Under this section States Parties are requested to provide relevant information, including the principal legislative, judicial, administrative or other measures in force; the institutional infrastructure for implementing policy in this area, particularly monitoring strategies and mechanisms; and factors and difficulties encountered and progress achieved in implementing the relevant provisions of the Convention, in respect of:

- (a) survival and development (article 6, paragraph 2);
- (b) disabled children (article 23);
- (c) health and health services (article 24);
- (d) social security and child care services and facilities (articles 26 and 18, paragraph 3);
- (e) standard of living (article 27, paragraphs 1-3).

These provisions give rise to numerous derivative social security rights, such as the right to health care necessary for survival, and a standard of living that meets the needs for food, clothing, shelter and education.⁸⁴

These rights is confirmed in section 27(1)(c) of the Constitution of the Republic of South Africa 1996 which reads that 'everyone has the right to have access to social security, including, if they are unable to support

⁸³ CRC/C/5 entitled General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under art 44 para 1(a) of the Convention, which were adopted by the Committee on the Rights of the Child at its 22nd meeting (first session) on 15 October 1991 para 19.

⁸⁴ Committee of Inquiry Into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future Consolidated Report* March 2002, Government Printers: Pretoria 50.

themselves and their dependants, appropriate social assistance'. Textually linked⁸⁵ to section 27(1)(c) is section 27(2) which internally limits the obligation of the state to only '... take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right'. In addition to section 27(1)(c), children are further afforded protection by way of section 28(1) which grants every child the right to social services. Section 27(1)(c) and 28(1)(c) can be categorised as socio-economic rights,⁸⁶ similar to the right to access to adequate housing, health care, sufficient food and water as well as the right of children to basic nutrition, shelter and basic health care services. It places a positive obligation on government to take positive action to realise these rights.⁸⁷

In terms of its ratification of the CRC, the South African Government has assumed certain international obligations in respect of children, and is placed under an international obligation to comply with the duties placed on member states. One of these duties is to report regularly⁸⁸ to the supervising body⁸⁹

⁸⁵ As discussed in *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) para 30.

⁸⁶ This categorisation is of course purely theoretical as the Bill of Rights follows a non-hierarchical approach to fundamental rights and makes no reference to the traditional division between first, second and third generation rights. It must be further recognised that these rights are all interdependent and mutually related. Pierre De Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 13 *SAJHR* 258 – 276.

⁸⁷ In a number of Constitutional Court cases (*Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC)) the court dealt with these rights (in particular the right to adequate housing (section 26(1)) and health care services (section 27(1)(a)) and concluded that they are indeed justiciable. The question facing the court with regard to the socio-economic rights is not whether these rights are justiciable, but to what extent they are justiciable.

⁸⁸ Article 44 of the CRC.

⁸⁹ Committee on the Rights of the Child.

under the CRC on the compliance with its duties as a member state. On 25 and 26 January 2000, the United Nations Committee on the Rights of the Child considered South Africa's first report⁹⁰ and adopted concluding observations on South Africa's compliance with the indicated Convention.⁹¹

In the first place the Committee noted that South Africa had not yet ratified UN Covenant on Economic Social and Cultural Rights (CESCR). The Committee stressed that the ratification of CESCR would strengthen the efforts of the state party (i.e. South Africa) to meet its obligations in guaranteeing the rights of all children under its jurisdiction and encouraged South Africa to reinforce its efforts to finalise the ratification of this instrument.⁹²

With regard to socio-economic rights of children and the failures in the current system the Committee made several observations and recommendations. It criticised the South African government on, among others issues, the lack of co-ordination between institutions implementing the CRC;⁹³ the lack of prioritisation in budgetary allocations and distributions to ensure implementation of the economic, social and cultural rights of children;⁹⁴ inadequacies in data collection⁹⁵ regarding children's rights (the Committee recommended that such a system should cover all children up to the age of 18 years, with specific emphasis on those who are particularly vulnerable);⁹⁶ insufficient measures to guarantee access to education for all children, health care and other **social services particularly for especially vulnerable**

⁹⁰ CRC/C/51/Add.2 entitled *Initial reports of States parties due in 1997: South Africa* 22/05/99.

⁹¹ CRC/C/15/Add.122 entitled *Concluding Observations of the Committee of the Rights of the Child: South Africa* 23/02/2000.

⁹² Committee on the Rights of the Child *Concluding Observations* para 11.

⁹³ Committee on the Rights of the Child *Concluding Observations* para 12. The same point of critique was made by the SAHRC "Fourth Annual Report" 29-30.

⁹⁴ Committee on the Rights of the Child *Concluding Observations* para 15.

⁹⁵ This is annually done by the SAHRC "Fourth Annual Report" 171-234.

⁹⁶ Committee on the Rights of the Child *Concluding Observations* para 14.

children;⁹⁷ **inadequate levels of benefit of the Child Support Grant** which the Committee recommended must be expanded to include children up to the age of 18 years who are still in school;⁹⁸ and insufficient state provision to large numbers of **child-headed households.**⁹⁹

It is clear from the report that South Africa failed to comply with the provisions of CRC in major respects. The Committee indicated these deficiencies and recommended what still needs to be done. The Committee is not satisfied with the current Child Support Grant and is greatly concerned about vulnerable children, especially child-headed households which *inter alia* consist of large cases of children that are maternally and/or paternally orphaned through HIV/AIDS.

Taking cognisance of the recommendations of the Committee on CRC the **South African Law Commission**¹⁰⁰ acknowledged that means testing is not ideal, as the costs involved in conducting the means testing divert funds away from the actual recipients, it was decided to retain means testing for all the grants except the child grant. The Commission reasoned that, given resource limitations, all the grants and subsidies should be targeted only at the poorest of the poor to enable those children to survive.

The Commission further observed that a significant problem facing South African children at present concerns the availability of **financial support for children orphaned by HIV/AIDS, and especially those living in child-headed households.** Unless they are aged under 7,¹⁰¹ (currently 11) and living with a primary care-giver who can apply for a child support grant, or placed in formal foster care, there is no monetary support available. Further,

⁹⁷ Committee on the Rights of the Child *Concluding Observations* para 16.

⁹⁸ Committee on the Rights of the Child *Concluding Observations* para 24.

⁹⁹ Committee on the Rights of the Child *Concluding Observations* para 22.

¹⁰⁰ SALC "Review of the Child Care Act" 333-338.

¹⁰¹ See R 460 in *Government Gazette* 24630 of 31/03/2003.

children who are HIV positive or have AIDS themselves, are not regarded as able to qualify for the care-dependency grant.

The Commission therefore recommended the introduction of the following social security scheme for children: A child grant; a foster care and court-ordered kinship care-grant; an informal kinship care-grant; an adoption grant; an emergency court grant; a subsidy to enable children with disabilities to obtain assistive devices; subsidies to NGO's contracted to the State to implement programmes and projects giving effect to this Act; fees to NGO's, FBO's and welfare organisations who carry out services on behalf of the State; and a subsidy to encourage the provision of early childhood development services.

With regard to child-headed households the Commission proposed in the draft Children's Bill¹⁰² that **child-headed households be assisted by mentors** to access the child support grant. These mentors will assist the child in obtaining and spending the grant. The mentor can be an individual working for a NGO, CBO¹⁰³ or the Department of Social Development or someone appointed by the court. He or she may be a mentor over more than one child-headed household. The mentor is accountable to the Department, recognised NGO or the court. A similar mentorship scheme for children was included in section 136 of the official Children's Bill¹⁰⁴. Unfortunately it was decided to split the Bill due to its mixed character and it is unclear whether section 136 will form part of the amendment Bill.¹⁰⁵

¹⁰² Section 243 of the Draft Children's Bill 2002.

¹⁰³ Community Based Organisation.

¹⁰⁴ 19 August 2003 reintroduced in January 2004 Available from the World Wide Web <http://www.socdev.gov.za/Legislation/2003/2003.htm>.

¹⁰⁵ The Bill contains part of the envisaged Children's Act. The Bill that was initially submitted to Parliament, the so-called the consolidated Bill dealt with the full spectrum of protection of children in both national and provincial spheres and was to be dealt with in terms of section 76 of the Constitution (functional area of concurrent national and provincial legislative competence). It was later found to be a 'mixed' Bill, including elements to be handled in terms of both section 75 (functional area of national legislative competence)

The **Committee of Inquiry into a Comprehensive System of Social Security for South Africa**¹⁰⁶, taking into account the work done by the South African Law Commission, did not propose a comprehensive social security package for children arguing that the Commission will make provision for that in the Child Care Statute (Children's Bill). They did however, suggest that a comprehensive social protection package, including a basic income grant, income generating opportunities and free basic services to those in need.¹⁰⁷

The Committee proposed a minimum level or measure of provision made available to everyone. This *inter alia* includes the **immediate extension of the child support grant to cover children under the age of 18**, a mentorship scheme for child headed-households, and a simplified process for child-headed households to access social grants.¹⁰⁸ The scrapping of the

and section 76 of the Constitution. Due to its mixed character, the Deputy Speaker of the National Assembly requested the Executive to split the consolidated Bill, which has now been done. The provisions of the consolidated Bill which will apply to the provincial government have been removed and, consequently, the current Bill only contains matters which have to be dealt with in terms of section 75 of the Constitution. As soon as the current Bill is enacted, an amendment Bill containing the matters which apply to the provincial government only ('the amendment Bill') will be introduced. The amendment Bill will have to be dealt with in terms of section 76 of the Constitution. The amendment Bill will complete the current Bill by inserting the provisions that deal with service delivery and further protection of families and children. The amendment Bill will insert the following chapters in the envisaged Act: Chapter 8 introduces a provision on the compulsory reporting by certain persons of children in need of care and protection, addresses the child protection system, the provision of child protection services, the National Child Protection Register and measures relating to the health of children. Chapter 9 makes provision for prevention and early intervention as a first layer of services provided to children and families in need of assistance. Chapter 11 deals with contribution orders. Chapter 13 deals with foster care and care by family members. (Children's Bill B-2003 (Reintroduced) Explanatory summary of Bill published in *Government Gazette* 25346 of 13/08/2003).

¹⁰⁶ Committee of Inquiry *Transforming the Present* 61.

¹⁰⁷ Committee of Inquiry *Transforming the Present* 42-43.

¹⁰⁸ Committee of Inquiry *Transforming the Present* 81.

means test across the board was also recommended. Other elements of the package include, amongst others, free health care (the Committee advocates the eventual introduction of a National Health Insurance system), free primary and secondary education, free water and sanitation (up to a certain basic level), free electricity (up to a certain basic level), access to affordable and adequate housing, access to jobs and skills training, and a **reformed disability grant, foster care grant and child dependency grant.**¹⁰⁹

Unfortunately, **the proposed social security scheme for children by the Law Commission was not included in the new Children's Bill.** This has been criticised by numerous interest parties.¹¹⁰ The Department of Social Development has reported that these provisions are better placed within the Social Assistance Bill. As already indicated government also failed to incorporate this scheme or the proposals made by the Committee of Inquiry in the new Social Assistance Act.

4 UNCONSTITUTIONALITY OF THE ENTIRE GRANT SYSTEM AVAILABLE TO CHILDREN

4.1 The Child Support Grant and the exclusion of children from the ages of 11 as well as children in child-headed households

The exclusion of children from the ages of (currently) 11 to 18 and child-headed households from the child support grant infringes on their rights to social assistance (section 27(1)(c)),¹¹¹ human dignity (section 10), life (section 11)¹¹² and equality (section 9)¹¹³ of the Constitution.¹¹⁴

¹⁰⁹ Emphasis provided. Committee of Inquiry *Transforming the Present* 42-43.

¹¹⁰ Children's Institute *Providing for the needs of children in the context of HIV/AIDS Submission to the Department of Social Development on the Children's Bill* 7 September 2003, Children's Institute: Cape Town 3.

¹¹¹ Compare article 26 of the CRC. See discussion above.

¹¹² Compare with article 6(1) of the CRC which states: "States Parties recognize that every child has the inherent right to life."

To deal with the alleged infringement, the approach by the court in the recent Khosa and Mahlaule case will be used. The Court in this case¹¹⁵ remarked that when the **rights to life, dignity and equality** are implicated in cases dealing with **socio-economic rights**, they have to be taken into account along with the **availability of human and financial resources** in determining whether the state has complied with the **constitutional standard of reasonableness**, thereby, indicating that the availability of resources will play a role in considering reasonableness.¹¹⁶

The Court in the Grootboom case¹¹⁷ further stated that when determining **reasonableness**, it would not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. According to this statement in the Grootboom case, the court will not enquire if the current child support grant is appropriate for South Africa or ask if better measures should be put in place. For example, the court will not replace the new child support grant and reinstate the old child maintenance grant or create a new grant that currently does not exist.¹¹⁸

The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these

¹¹³ Compare with article 2(1) of the CRC which states: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

¹¹⁴ Compare Khosa case paras 1, 38 and 39.

¹¹⁵ Khosa case para 44.

¹¹⁶ Compare Grootboom case para 46.

¹¹⁷ Grootboom case para 41.

¹¹⁸ This is quite unfortunate because even if the current grant is extended to children under 18 it still does not address the problem of child-headed households and children in extended families due to HIV/AIDS adequately.

would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.¹¹⁹

Made applicable to the child support grant the court will look at the following factors:

- the purpose served by the child support grant,
- the impact of the exclusion on children from 11 to 18 as well as
- the impact of the exclusion on children without adult care-givers and
- the relevance of the age requirement in both cases to that purpose.

It is further necessary to have regard to the impact that this has on other intersecting rights. With regard to the exclusion of children from 11 to 18, where according to the Constitution and CRC children are defined as any person under 18 and children from 11 to 18 are denied access to child support grants due to their age, the **equality rights** entrenched in section 9 are directly implicated. With regard to the exclusion of children without adult care-givers, section 9 is again implicated because there is differentiation between children with adult care-givers and children without adult care-givers from accessing the child support grant because of their age, social origin, birth, family status and socio-economic status.¹²⁰

It is submitted that the purpose of the child support grant is mainly to

- alleviate child poverty,
- indirectly to enable a child to live with human dignity¹²¹ and
- to ensure that society children by providing them with their basic needs.¹²²

The following reasons may highlight the **impact and unreasonableness** of these exclusions:

¹¹⁹ Grootboom case para 41.

¹²⁰ Khosa case para 49.

¹²¹ See Khosa case para 49.

¹²² Khosa case para 52.

- Poverty has wide-ranging and often devastating effects on children. Many of its effects, such as homelessness and malnutrition, result directly from having too little income or too few resources. Some of the effects of poverty may include malnutrition and starvation, exposure to the elements, mental illness and drug dependency. Certain studies have also concluded that children who live a life of poverty are more susceptible to an adult life of crime and other problems such as depression, which can contribute to criminal behaviour. Furthermore, poverty tends to perpetuate itself. In many cases, poor children have become accustomed to the mindset that keeps them from getting out of poverty. These children then grow up to be poor adults earning lower than average incomes.¹²³
- As already indicated, **children are a vulnerable group in South Africa.** One may even go so far as to say that children are the most vulnerable members of society. They are not in the position to fend for themselves and they are dependant on parents, family members and other people in society to provide them with food, shelter and their most basic needs. It is submitted that a court, as in the Grootboom case,¹²⁴ will give priority to vulnerable members of society when deciding whether policies of the government are reasonable or not. It can further be argued that differentiating between children from 1 to 10 years and 11 years to 18 years is unfair and the state acts unreasonably in doing so. The same argument is applicable towards children without an adult care-giver.
- **In the Khosa case¹²⁵ it was accepted that one of the objects of the social assistance legislation is to comply with South Africa's international obligations.** South Africa ratified the United Nations Convention on the Rights of the Child and is therefore, internationally

¹²³ UNICEF *Poverty Reduction begins with Children* 2000, UNICEF: New York 9.

¹²⁴ Grootboom case para 20.

¹²⁵ Khosa case para 51.

obligated to comply with this document.¹²⁶ It was already mentioned that the Committee on the Rights of the Child criticised the South African government on, amongst others, the current child support grant and the large number of child-headed households.

- The South African Law Commission,¹²⁷ in drafting a Child Care Bill, also took into account the exclusion of children depending on age from the child support grant and made specific provision by way of a **mentorship scheme for child-headed households**.¹²⁸ None of these measures are however visible in any legislation yet.

It is clear from the above that government is acting **unreasonably** towards children over the age of 11 and toward children without adult care-givers. It is, therefore, not fulfilling its constitutional duty¹²⁹ towards the social assistance rights of the poorest of poor children. As indicated by the South African Human Rights Commission,¹³⁰ the South African Law Commission,¹³¹ the United Nations Committee on the Rights of the Child¹³² and several other interest groups working with children in South Africa,¹³³ children are a particular vulnerable group and denying them their rights is an infringement on their rights.

¹²⁶ See 2 above.

¹²⁷ SALC "Review of the Child Care Act" 333-338.

¹²⁸ Unfortunately, the proposed system, which included a child grant, which were not subjected to a means test, was not included in the new Draft Children's Bill. The Department has reported that these provisions are better placed within the new Social Assistance Act. None of these provisions, however, are incorporated in the new Social Assistance Act.

¹²⁹ Section 27(1)(c) and section 28(1)(c).

¹³⁰ SAHRC "Fourth Annual Report" 227-229.

¹³¹ SALC "Review of the Child Care Act" 333-338.

¹³² Committee on the Rights of the Child *Concluding Observations* paras 11, 12, 15, 24, 29 & 32.

¹³³ Several interest groups expressed great concern about the exclusion of vulnerable children above a certain age in the Social Assistance Bill.

The possible argument of the state that it does not have the **available resources** to extend the child support grant immediately and is extending it progressively to older children must be addressed. It is predicted that this will also be given as the (rational) reason why children from 11 to 18 years are excluded from the child support grant. The Court in the Khosa case¹³⁴ remarked that where the state argues that they cannot afford to pay benefits to everyone entitled under section 27(1)(c) the criteria for excluding a specific group, for example permanent residents, **must be consistent with the Bill of Rights as a whole**. The remark, that the age limit has no real rational basis and is not consistent with the Constitution's definition of a child, that is, those under 18 years of age, by the Committee of Inquiry,¹³⁵ may be used in reaction to this argument.

Given the above arguments and the particular vulnerability of these children the **'available resources'** and **'progressive realisation'** arguments will not be acceptable.

- Firstly, as in the case of permanent residents¹³⁶, children are part of a vulnerable group in society and are worthy of constitutional protection.
- Secondly, and again as in the case of permanent residents, the denial of children above a certain age and children without an adult care-giver from the child support grant is 'is total, and for as long as it endures'.¹³⁷ This is worsened by the fact that **children are 'unable to sustain themselves or to secure meaningful support from other sources'**. This has the effect that these **children are 'relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution'**.¹³⁸

¹³⁴ Khosa case para 45.

¹³⁵ Committee of Inquiry *Transforming the Present* 58.

¹³⁶ Khosa case para 74.

¹³⁷ Khosa case para 77.

¹³⁸ Emphasis provided. Khosa case para 77.

- Thirdly, it is submitted that **children of different ages are treated unequally and this amounts to unfair discrimination**. This will require having a look at the intersecting right of equality. Because age is one of the listed grounds in section 9(3) of the Constitution, discrimination is established. The next step is to establish whether the differentiation is unfair. Because age is one of the listed grounds in section 9(3) there is a presumption in favour of unfairness and the unfairness in the case of children older than 11 years will be presumed.¹³⁹
- Finally, with regard to children without adult care-givers section 9 is again implicated because there is differentiation between children with adult care-givers and children without adult care-givers from accessing the child support grant because of *inter alia* their age, social origin, birth, family status and socio-economic status.¹⁴⁰

The last argument that children without adult care-givers are discriminated against because they lack adult care-givers and because of their age, are unable to apply for the child support grant themselves, will not be an easy argument to prove before the Court.

The Current Social Assistance Act sets no age limit for a primary care-giver.¹⁴¹ The new Act requires from the primary care-giver to be at least 16 years.¹⁴² The fact that the primary care-giver in a child-headed household is under the required age of 16 does not necessarily mean that he or she will be able to fulfil the role of a primary care-giver. These children bear exactly the same burden as adults. It is submitted that this differentiation amounts to

¹³⁹ Khosa case para 68.

¹⁴⁰ Rosa *Counting on Children* 29-30.

¹⁴¹ See section 3.1 above. In order to apply for a child support grant one must be in possession of an identity document that can only be obtained by the age of 16.

¹⁴² See section 3.2 above.

discrimination. Unfair discrimination will be assumed according to section 9(5) of the Constitution.

Other possible grounds for unfair treatment are social origin, birth, family status and socio-economic status. Social origin is another ground for discrimination listed in section 9(3).¹⁴³ **It may be argued that poverty, HIV/AIDS and migrancy forced these children to look after other children.** They are unfairly discriminated because they come from poor backgrounds.¹⁴⁴

As indicated the state will properly argue that children cannot access this grant because the **legal age of majority** and the inability of children to take care of themselves and make financial decisions.¹⁴⁵ This however does not take away the fact that these children are vulnerable and are in need of the grant similar to children with adult care-givers.

The proposed Mentorship scheme for very young children in child-headed households could further be used to support the above argument of the inclusion of child-headed households.¹⁴⁶ Another possible argument to support the inclusion of child-headed household in the grants system and specifically the child support grant is section 28(2) of the Constitution which states that 'A child's best interest is of paramount importance in every matter concerning the child.'¹⁴⁷

¹⁴³ Section 9(3): The state may not *unfairly discriminate* directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or *social origin*, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and *birth*. Emphasis provided.

¹⁴⁴ Rosa *Counting on Children* 30.

¹⁴⁵ Rosa *Counting on Children* 30.

¹⁴⁶ See section 2 above.

¹⁴⁷ Emphasis provided.

Studies¹⁴⁸ have shown that children who are orphaned should, as far as possible, be supported to remain in their own communities rather than placed in institutions. This may imply that in some cases they remain living in the community along with their siblings without an adult care-giver. Rosa¹⁴⁹ argues that when mechanisms are created to alleviate the plight of these children the best interest of the child is paramount.

This prevailing manifestation of poverty in the form of the exclusion of children from the child support grant, is clearly an infringement of the right to social assistance (section 27(1)(b), their rights contained in section 28, their inherent dignity and the right to have their dignity respected and protected (section 10) and their equality rights (section 9). Because these children are vulnerable this exclusion needs to be addressed effectively.

The Court in *Grootboom* explicitly declared that children that are not under family or parental care are entitled to alternative care which must be provided by the state.¹⁵⁰ This alternative care may include, for example the mentorship scheme proposed by the Law Commission.

The extension of the child support grant to children up to 18 years and the abolishment of the means test will help to alleviate this situation. The mentorship scheme proposed by the South African Law Commission is a further way to address the problems faced by children living in child-headed households and street children. Another proposal is to recognise child-headed households as an independent family unit where the child acting as the care-giver may access the child support grant. Rosa¹⁵¹ goes so far to propose that children must qualify as independent primary care-givers. Nothing in the New Social Assistance Act as already mentioned precludes children over 16 from applying for the child-support grant for children under their care. She however

¹⁴⁸ Rosa *Counting on Children* 4 and 32.

¹⁴⁹ Rosa *Counting on Children* 32

¹⁵⁰ Grootboom case para 77.

¹⁵¹ Rosa *Counting on Children* 34.

criticises the age limit of 16 and the requirement of an identification document for these children. Her main argument is that children younger than 16 are currently fulfilling the role of primary care-givers and they will again be excluded from the system. Although child headed households are generally not desirable, they are a reality that must be legally recognised in South Africa.

4.2 The Care-Dependency Grant and the exclusion of children with HIV/AIDS

A major cause for concern expressly mentioned by the South African Law Commission is the unavailability of the care-dependency grant to children on the basis of HIV/AIDS.¹⁵² AIDS and the treatment of AIDS related illnesses is costly and it may affect the income of a poor family considerably.¹⁵³ AIDS care-related expenses could absorb a third of a household's monthly household income.¹⁵⁴ A study done in South Africa has shown that AIDS-affected households which already experienced food shortages spend 5% less on food to cover the AIDS-related care cost.¹⁵⁵

Denying the care-dependency grant to children on the basis of HIV/AIDS again infringes on their rights to social assistance (section 27(1)(c)), human dignity (section 10), life (section 11) and equality (section 9) of the Constitution. If their illness is of such a nature that they *need full-time home care* as required by the Social Assistance Act¹⁵⁶ there is no reason why the differentiation should exist. Apparently the differentiation exists on grounds of the specific wording in the two Acts which refers to 'mental and/or physical disability' and not illness. But again it can be argued that to differentiate

¹⁵² SALC *Review of the Child Care Act* 333-338. See discussion of care-dependency grant above.

¹⁵³ See discussion under introduction above.

¹⁵⁴ UNAIDS *2004 Report on the Global Aids Epidemic 2004*, UNAIDS: Switzerland 48.

¹⁵⁵ UNAIDS *2004 Report on the Global Aids Epidemic* 48.

¹⁵⁶ Sections 1 and 2(f) of the Social Assistance Act. Sections 1 and 7 of the new Social Assistance Act 13 of 2004.

between disability and illness (especially an illness like AIDS) is discriminatory.

If you are an adult HIV/AIDS sufferer in South Africa with a phase 2 stage of infection you are, however, allowed to access the disability grant. The disability grant (and not the illness grant) is available to a person older than 18 and 'owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance'.¹⁵⁷

Here is a clear discrepancy in legislation and practice again. If you are an adult and you have HIV/AIDS you are entitled to access the disability grant but if you are a child and you have HIV/AIDS you are not entitled to the care-dependency grant because you are not disabled.

The purpose of both the grants is the same. The disability grant is aimed to support an adult due to the fact that he or she is not able to work while the care-dependency grant is aimed to support a care-giver for looking after a child full-time due to this child's inability function normally and supporting the child. If this care-giver was absent the child would be institutionalised.

It is thus submitted that differentiating between children and adults on the grounds of age in accessing the care-dependency / disability grant constitutes unfair discrimination.¹⁵⁸

¹⁵⁷ Sections 1 and 2 of the Social Assistance Act. Sections 1 and 9 of the new Social Assistance Act 13 of 2004.

¹⁵⁸ The same argument is applicable to the care-dependency grant as those uses in the discussion above on the Child Support Grant and the exclusion of children from the ages of 11 as well as children in child-headed households.

5 CONCLUSION

It is clear from the above that the South African government is not fulfilling its constitutional or international duties towards the social security rights of the child. The aim of the social security and especially social assistance is to ensure that society values human beings by providing them with their basic needs. If this is not done it fundamentally infringes on a person or persons human dignity. The unequal treatment of persons in a social assistance system will also be unfair and unjust if it impacts on a group in such a way that it denies that group the enjoyment of their other rights guaranteed in the Constitution.

Children from the ages 11 to 18 and children without adult care-givers, are vulnerable groups in our society and deserve equal protection to children from infancy to 10 and children with adult care-givers with regard to the child support grant. Differentiating between children and adults on the grounds of age in accessing the care-dependency / disability grant further constitutes unfair discrimination. There is no rational reason why these exclusions exist. It is purely a policy decision by government that is in violation of sections 9(1), 27(1)(c), 27(2), 28(c) of the Constitution.

It is submitted that a fresh approach is needed to address the basic needs of children by way of a social assistance system. **The Universal Child Support Grant as proposed by the Children's Institute, AIDS Law Project and The Alliance for Children's Entitlement to Social Security**¹⁵⁹ proposes that the most effective way to alleviate poverty of all children in South is by the conversion of the child support grant in a **universal child grant**. This will have the effect that the **age limit will be extended to 18** and formalities like the **means test will be scrapped**. The purpose of this grant is to ensure that the **basic needs** of all children are addressed and, most importantly, that their

¹⁵⁹ Submission by the Children's Institute, AIDS Law Project, and The Alliance for Children's Entitlement to Social Security on the *Child Care Act Discussion Paper* April 2002, University of Cape Town: Cape Town 57-58.

rights are upheld. As indicated above one of the objectives of the universal child grant is to alleviate child poverty and indirectly to enable a child to live with human dignity. It is further proposed that the universal child support grant **will reduce the demand on other social security and services.**¹⁶⁰ This again is in line with the argument in the *Grootboom* case¹⁶¹ which states that if the state had better social assistance programmes available for the poor, there would be less pressure on the other socio-economic rights.

¹⁶⁰ Izaane Mc Murray and Linda Jansen van Rensburg "The utilisation of the right of children to shelter to alleviate poverty in South Africa" Vol 1 (2004) *Potchefstroom Electronic Law Journal* Available from World Wide Web,
<http://www.puk.ac.za/law/per/documents/04v1murrayjvr2.doc>.

¹⁶¹ *Grootboom* case para 30.