

CHAPTER 3

THE CONSTITUTIONAL IMPERATIVES RELATING TO CHILDREN

3.1 Introduction

When the process of child law reform started in earnest after the conference **Towards Redrafting the Child Care Act** in 1996, South Africa still basked in the glory of its first democratic elections. This was a great period of transformation not only of the country and the way it was governed but also of the legal system. It is in this context and with South Africa's poor record of protecting children in mind that the idea of a comprehensive review of our child care legislation took root.

There were also key concerns raised in relation to the existing Child Care Act, 1983, and the way in which this Act was being amended on a piecemeal basis to comply with constitutional imperatives and South Africa's international obligations following the ratification of the UN Convention on the Rights of the Child (hereinafter CRC).¹ Since then the Constitutional and other Courts have had the opportunity to consider various aspects related to children and generally the verdict has been less than favourable. Various sections of the Child Care Act, 1983 have been declared unconstitutional in some highly published cases. This Chapter focusses on these constitutional issues.

3.2 Section 28 of the Constitution, 1983

Section 28 of the South African Constitution provides an important benchmark in the protection of children in South Africa as principles derived from international law on children's rights are now enshrined as the highest law of the land.² The section reads as follows:

- (1) Every child has the right-
 - (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

1 See 1.2 above for an exposition of the underlying reasons for the review of South Africa's child care legislation.

2 See, in general, L C Haupt and J A Robinson "n Oorsig oor die ontwikkeling van kinderregte met verwysing na die benaderings van die sogenaamde *kiddie libbers* en *kiddie savers*" (2001) 64 **THRHR** 23.

- (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that-
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section 'child' means a person under the age of 18 years.

3.3 Comments and submissions received

Before we embark on a discourse of section 28 (the children's rights clause) of the Constitution 1996 it is appropriate to consider what the children themselves said in response to two questions posed in

the child participation process.³

Areas of shared life experience that prompted selection	Category	No of worksheets returned
Children in foster care	A	9
Children in alternative care	B	6
Children in trouble with the law	C	5
Children in residential care	D	2
Children who had suffered abuse & neglect (including sexual abuse)	E	2
Deaf children	F	2
Street Children	G	2
Children with behavioural problems	H	1
Other (Groups that were not identified)	I	7

3.1.1 What rights do you think children should have (in addition to universal rights, which everyone has)?

³ Note: In this section we have categorised the responses according to the nature of the groups of children. The table below gives a breakdown of the nature of the category and identifies the category by a letter of the alphabet. The group from the after-school centre and the group from the religious school were placed with Group I (other). There is a degree of overlap where, for example, street children are now in an alternative care facility. In most instances we have grouped these worksheets under group B (alternative care). The responses are all group responses (except where indicated). Of course certain groups generated more responses than others to a particular question, and the aggregate of responses does therefore not match the number of groups.

Categories

ies

Responses	A	B	C	D	E	F	G	H	I
Protection against any kind of harm, including the provision of medical care	5	1	1	1	1		1		1
The right to be consulted, listened to and respected by adults, including people in authority, particularly when decisions are made in matters affecting children.	8	4	3		1		4	2	1
The right not to be expected to make adult decisions such as 'whether you want to go to school'.				1					
The right to be treated fairly, and not be discriminated against because of the fact that they live in institutions. (e.g. some children are denied access to the school matric dances if their parents can't pay fees)	7	2		1			2		
The right to decide on their future placement (as foster children).	1								
The right to choose their own friends	2	1					1		
The right to decide on and implement their own laws (also expressed as the freedom to choose). In the case of one group of street children this was expressed by the children as the right to have their glue.	1		1		1	1	2		
The right to say no to adults	1	1					1		

The right to knowledge (access to information, particularly about their rights and the distinction between right and wrong).	3	1					1		
The right not be beaten (or otherwise physically abused).	4	1		1			1		
The right to recreational activities and entertainment.	1		1			1			
The right to food and water.	2	1	1				1		2
The right to have good foster parents.	1								
The right to receive pocket money.	1								
The right to substance abuse rehabilitation programmes for youths awaiting trial.			1						
Children under 15 should have a right not to	4		1						

enter the labour market (including, for example, working for their parents)									
The right to have an identity document.							1		
Children under the age of 18 should have the right not to be detained in police cells.	1								
Children (particularly those living on farms) should have the right to receive a free formal education.	2	1	1	2		1	1		2
The right to live with (or be re-unified with) their family.	3				1		1		
The right to be clean.	1						1		
The right not to have to have sex.	1								
The right to go to University.	1	1							
The right to a sign language interpreter of one's own choice						2			
The right to express oneself in one's own language						1			
The right to choose a legal representative			1						
The right to have a roof over one's head				1					
The right to choose with whom to live (if their parents are incapable of providing for them)					1				
The right to be happy.	1								

Clearly the right which was emphasised by the majority of responses was the right to be heard, consulted, respected, taken seriously etc. One group suggested the establishment of an organisation (youth parliament) where children would have the vote and would be given an opportunity to share their opinions with the country/world as a means to give practical content to this right.

At the focus group discussion on the 'Parent - child relationship' held at the Breakwater Lodge on 12 - 13 March 1999 the following question was posed:

How can children's rights effectively be incorporated in a new comprehensive children's statute? What about the responsibilities of children? Should the rights (and responsibilities) of children be qualified and, if so, what should be the criteria? Should children's rights be the corollary of parental responsibilities?

Participants at the focus group discussions held at the Breakwater lodge were adamant that children's rights should not be seen in isolation and that children's rights should not be correlated with parental responsibilities. The **needs** of children are central and it should be very clear that a child will not break the law by not fulfilling his or her responsibilities. Universal support was

expressed for the right of the child to express an opinion and it was suggested that the Ghanaian approach set out on page 57 of the research paper be adopted.

Ms C Grobler on behalf of the Family Advocate said that although they are in favour of the incorporation of children's rights in a new comprehensive children's statute, the responsibilities of children should also be defined and included. She expressed the opinion that although children's rights are universally the same, particular family dynamics should be taken into consideration.

Ms Wilona Petersen of the Department of Social Welfare, Bloemfontein was of the opinion that the rights of children effectively can be incorporated in a new comprehensive children's statute through the principle of the best interest of the child. She said it should be made clear that along with rights comes responsibilities and is in favour of children's rights being the corollary of parental responsibilities.

Ms M D Nchabeleng of the Department of Health and Welfare, Nylstroom said children's rights can effectively be incorporated in a new comprehensive children's statute by giving children the right to express freely their opinions, to be listened to attentively and to participate in decision-making processes affecting their well-being. She believed the rights (and responsibilities) of children should be qualified, but did not see children's rights as the corollary of parental responsibility. Ms V K Mathakgane of the Department of Developmental Social Welfare, Kimberley said children's rights should be qualified, and that children's rights should be the corollary of parental responsibilities.

Ms Denise Mafoyane of the Department of Social Welfare, Bloemfontein opined that there is a need to qualify the rights and responsibilities so as to ensure that these rights and responsibilities are not absolute. She further said that parental responsibilities should be determined by the rights of children and not the other way around so as to ensure that the needs of the child are met.

Ms S M van Tonder of SANCA, Kimberley pointed out that the rights of children, as all other rights, are subject to limitation. The rights of children in particular are often qualified by the principle of the best interest of the child. She warned, however, that children's rights and responsibilities should not be viewed in isolation and that emphasis should not be placed solely on the rights of children to the exclusion of the rights of parents or the community at large.

Ms L Opperman and her colleagues at the Christelik-Maatskaplike Raad, Bellville stated that the rights of children presently appear to be 'out of proportion', probably the legacy of there being no rights at all for many years. They said the scale should be balanced by children also having responsibilities in accordance with their age, development and capacity. Children should respect the rights given to parents to carry out their responsibilities and it is important that children learn to accept responsibility for their own actions and the impact of these on others. Ms Opperman and her colleagues also said children's rights should not be allowed to impact negatively on their best interests. They were of the opinion that the former must be subordinate to the latter.

The National Coalition for Gay and Lesbian Equality said the Constitution provides a broad framework for the concept of children's rights. In the absence of specific contexts, it is difficult to specify the content of such rights with sufficient particularity. The Coalition submitted a general provision capable of inclusion is the right of the child to be heard in all major decisions regarding him or her, in a manner appropriate to the child's stage of development. Any child above the age of 12 should be presumed to be able to form a view, subject to the qualification of the 'best interests of the child'.

The Coalition said specific rights should be included by incorporation into various sections of the proposed new legislation, impacting on areas such as the acquisition of parental responsibility, parenting plans, and the revocation of parental responsibility. In these areas, the child should also be granted a right to be heard.

However, the Coalition pointed out that the vesting of rights in children does not mean that children have legally enforceable responsibilities. The Coalition felt all parents, family members and other caregivers of children should be obliged to encourage children to respect diversity, community and the environment. The Coalition opined furthermore that anyone with parental responsibility must provide an appropriate environment conducive to fostering the development of such respect.

Professor C J Davel of the Centre for Child Law, University of Pretoria proposed as inclusion as a right of the child the Ghanaian provision which provides that a child has the right to express an opinion, to be listened to, and to participate in a manner commensurate with his or her understanding in decisions which affects his or her well-being. Professor Davel was not in favour of incorporating children's responsibilities in a new children's statute. She said children's rights are

not always subjective rights, but more in the nature of fundamental human rights. Subjective rights always imply corollary duties which is not the case with human rights. Professor Davel used the following example to illustrate her point: Say children have the right to be taken seriously and the responsibility to listen to others. This could mean that a child has the duty (responsibility) to bow to peer pressure and take drugs when told to do so by bad friends. This surely cannot be and emphasised her point that children's rights do not have a corollary such as children's responsibilities.

Mr D S Rothman, a commissioner for child welfare, Durban pointed out that children's rights are set out in the Constitution and other international documents. These must be manifestly seen to be upheld in practice and provisions of those instruments must be incorporated in where appropriate. Mr Rothman regarded the responsibilities of the child as set out by the African Charter on the Rights and Welfare of the Child as wholly inappropriate because it expects the child to become a guardian of national interests and ambitious of Africa, but provides very little with regard to the child's own personality and family considerations. He posed the question as to whether there is an African Charter for adults as well. Mr Rothman said the responsibilities of the child should be contained within the realm of childhood and those characteristics that will make a better adult of the child. This is to be done at a family and not a national level. He continued:

Children are parents in the making, Their time will come. They should have rights (privileges) and responsibilities to go hand in hand with these.

3.4 **Judicial interpretation of section 28 of the Constitution, 1996**

The judiciary has on several occasions had cause to deal with aspects of the children's rights clause, and has through its judgments provided further guidance as to the interpretation to be accorded to aspects of constitutional children's rights. A brief overview of the most significant

judicial interpretations of children's rights principles is provided next.⁴

4 The Constitutional Court's approach in **Minister of Welfare and Population Development v Fitzpatrick and others** 2000 (7) BCLR 713 (CC) has been dealt with comprehensively in Chapter 3 above and is consequently not addressed in this Chapter. See also Julia Sloth-Nielsen 'Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child', paper presented at the Miller Du Toit Conference 'Family Law in a Changing Society: From the Margins to the Mainstream', Cape Town, 1 -2 February 2001, p. 4 et seq.

The series of cases that commenced with **Fraser v Children's Court, Pretoria North and others**⁵ concerning the rights of an extra-marital father in relation to an adoption order of the children's court, culminated in a Constitutional Court decision which put an end to three years of litigation. The narrow point on which the Constitutional Court was finally called to decide was whether to grant leave to appeal against the decision of the Supreme Court of Appeal which had upheld the original adoption order. Putting an end to Mr Fraser's quest for his son, the Constitutional Court determined that the best interests of the child outweighed the usual procedural ground for setting aside lower court decisions, that is, whether there were reasonable prospects for success on the merits of the case. The rights of the adopted child were regarded as central to the resolution of whether it was in the interests of justice to allow the litigation to continue. Since three years had elapsed since the first placement of the child, and since he was happily ensconced with his adoptive parents, his best interests determined that litigation concerning the adoption should not be allowed to continue, as this would imply continued uncertainty as to his status and the adoptive placement. Not only does this decision illustrate the paramountcy of the best interests criterion, even in the face of settled law concerning the test to be applied when seeking leave to appeal, but implicit in the Constitutional Court's approach is a premise that stable and secure placements in family environments are indeed in the best interests of children. This is an important consideration in weighing the relative roles of foster care (which is intended as a temporary placement of a child in need of care) and adoption (being the permanent transfer of parental responsibility to the prospective adoptive parents) in the proposed new legislation. Further, the judgment supports the notion of minimum interference in a child's life, where the child is not at risk of harm.⁶

The allocation of custody of children upon divorce was addressed in **V v V**,⁷ a case in which an application by a mother for joint custody of her children was opposed by the father, in part based on the fact that the mother was involved in a lesbian relationship. The father did not want her to exercise access when her partner was sleeping over, lest the children themselves adopted a gay or lesbian orientation. The Court emphasised that access rights are to be considered as a rights of the child, although it was pointed out that 'it is artificial to treat them as being exclusive of parent's

5 1997 (2) SA 218 (T). See also **Fraser v Children's Court, Pretoria North and others** 1997 (2) SA 261 (CC); **Naude and another v Fraser** 1998 (4) SA 539 (SCA).

6 The minimum interference principle has found statutory favour in jurisdictions such as the United States of America and Scotland.

7 1998 (1) SA 169 (C).

rights...[T]he rights which a child has to have access to its parents is complemented by the rights of parents to have access to the child'.⁸ The court was of the view that whereas the common law usually approached issues concerning access and custody from the vantage point of the parent, section 28(1)(b) of the Constitution entailed that the whole issue had to be addressed as part of the child's right to parental care, or to alternative care when removed from the family environment. The Court discussed the changing nature of the relationship between parents and children over the last few years, and referred to the shift in thinking from parental power of the parents to one of parental responsibility. The judicial acknowledgment of the changes that flow from a constitutional children's rights approach, as evidenced in this case, suggests support for the inclusion of clearly articulated principles concerning both parental responsibility and children's rights in the proposed statute.

8 At 189C-E.

The child's right to parental care as contained in section 30 of the Interim Constitution was discussed in **SW v F**.⁹ The case concerned adoption of a child by foster parents, in whose care the child had originally been placed when his mother was imprisoned. The child had spent all save he first four months in their care, and was by now six years old. On appeal, it was alleged that the right of the child to parental care in section 30 was incorrectly not used to interpret the applicable provisions of the Child Care Act. However, the Court held that the right to parental care did not mean the right to the care of a natural or biological parent. The provision was therefore no bar to an adoption order being granted.

An interpretation of the child's right to parental care in section 28(1)(b) was also the subject matter of the decision in **Jooste v Botha**,¹⁰ insofar as the claim for delictual damages was occasioned by the extra-marital father's failure to acknowledge, communicate or show any interest in his son. Alleging that as a result of this neglect, the child had suffered emotional distress and loss of the amenities of life, the root issue was whether the father was under a legal obligation to render the plaintiff love and affection. There was no suggestion that the father had not supported the child materially, as maintenance was regularly provided. The Court held that, since common law did not provide a source of authority for the claim, it had to be founded on the provisions of section 28(1)(b) of the Constitution or fail. Interpreting the constitutional provision, the Court held that section 28(1)(b) required family care, or care by a single parent where such parent had custody of the child. However, the Court was of the view that the law cannot enforce the impossible: '[I]t cannot create love and affection where there is none. Not between legitimate children and their parents and even less between illegitimate children and their fathers. That fact leads compellingly to the conclusion that the drafters of the Constitution could not have intended that result'.¹¹ Therefore, the right to parental care as enshrined in section 28(1)(b) does not impose upon a parent the obligation to love and cherish a child.¹²

9 1997 (1) SA 796 (O).

10 2000 (2) BCLR 187 (T). See also G J van Zyl and J C Bekker 'Case discussion: *Jooste v Botha* Case no 1554/1999 (T) (unreported)' (2000) 33 **De Jure** 149; J M T Labuschagne 'Die omgangsreg van die ongehude vader en sy buite-egtelike kind en die vraagstuk van deliktuele aanspreeklikheid binne konteks van 'n interaksierereg' (2001) 64 **THRHR** 308.

11 At 197F.

12 Some reservation about the correctness of this decision is articulated by B Bekink and D Brand 'Constitutional protection of children' in CJ Davel (ed) **Introduction to Child Law in South Africa** Cape Town: Juta 2000 at 184, as the plaintiff was not seeking a mandamus to compel the parent to show love and affection, but damages for emotional distress.

The judge remarked further that section 28 (1)(b) is primarily applicable in the 'vertical sphere', that is, between the individual and the State.

Primarily, s 28(1)(b) is aimed at the preservation of a healthy parent - child relationship in the family environment against unwarranted executive, administrative and legislative acts. It is to be viewed against the background of a history of disintegrated family structures caused by government policies.¹³

However, a somewhat contrary view on whether the section is primarily of horizontal or vertical application was expressed by the Constitutional Court in **Government of the Republic of South Africa v Grootboom and others**.¹⁴ In the **Grootboom** judgment, the central issue that Constitutional Court was obliged to consider was the relationship between everyone's right to housing in section 26 of the Constitution, and children's right to shelter as provided for in section 28(1)(c) of the Constitution. The lower court¹⁵ had held that section 28(1)(c) imposes an obligation upon the State to provide shelter for children in the event that their parents are unable to do so. The Constitutional Court, however, proceeded to analyse the rights concerned by pointing to the evident overlap between the rights in sections 26 and 27, which create the right of access to socio-economic rights for **everyone**, and those in section 28(1)(c), which concern the rights of **children alone**.¹⁶ Because of this, and because the Constitutional Court was of the opinion that viewing the right to housing and the right to shelter as being distinct would render the 'carefully constructed constitutional scheme' for the progressive realization of socio-economic rights nugatory, it was found that section 28(1)(c) did not create a 'direct and enforceable' claim upon the State by children. The Court concluded that section 28(1)(c) did not create rights that are separate and

13 At 195 F-G.

14 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

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

16 See also P de Vos 'The economic and social rights of children and South Africa's Constitution' (1995) **SAPL** 233, 'Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution' (1997) 13 **SAJHR** 67; Scott and Alston 'Adjudicating constitutional priorities in a transitional context: A comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16 **SAJHR** 206; G van Bueren 'Alleviating poverty through the Constitutional Court' (1999) 15 **SAJHR** 52; Julia Sloth-Nielsen 'Chicken soup or chainsaws: Some implications of the constitutionalisation of children's rights in South Africa' (1996) **Acta Juridica** 6, 'The child's right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 **SAJHR** 210; and Ellie Parker and Maurice Sunkin 'Needs: Resources and abhorrent choices' (1998) 61 **Modern LR** 401.

independent rights for children and their parents.¹⁷ The Court warned that the constitutional provisions concerning progressive realization of socio-economic rights would make little sense if they could be trumped in every case by the rights of children to get shelter from the State on demand.¹⁸

17 Par [74].

18 Par [75].

The Court was consequently of the view that section 28(1)(b) must be read together with section 28(1)(c),¹⁹ the former defining those responsible for giving care to children, whilst the latter lists various aspects of the care entitlement (the right to basic nutrition, to shelter, to basic health care services and to social services). The judgment suggests clearly that the right in section 28(1)(b) is primarily of horizontal application (that is, between individuals), as the obligation for fulfilment of the rights enumerated in section 28(1)(c) was regarded as lying primarily upon parents.

19 Par [76].

The judgment of the Constitutional Court in the **Grootboom** case appears to have established several other subsidiary principles of relevance to this investigation. First, the Court elaborated upon the **nature** of the State's obligation in relation to section 28 rights. Yacoob J stated that where children are in parental or familial care, the State's obligation would normally entail passing laws and creating enforcement mechanisms for the maintenance of children and for their protection from abuse, neglect or degradation.²⁰ The State would, the Court conceded, incur such primary obligation where children are removed,²¹ or lack a family²² environment, such as where they have been orphaned or abandoned. It is therefore implicit that insofar as children **are** removed, abandoned or orphaned, the State does in fact bear a primary responsibility to provide for those children's basic material needs. However, the Court did not detail precisely when parental care may be regarded as being 'lacking'. Thus, it could be argued that children living on the street, and other categories of children²³ who (for whatever reason) are de facto not in parental care, could be included as beneficiaries of this primary State obligation, in addition to all children in alternative care settings, such as children in foster care or those residing in children's homes.²⁴ The principle established by the **Grootboom** case is that legislative and other steps must be taken in order to ensure that the State does meet its commitments in this regard.

20 Par [78]. See also Geraldine van Bueren 'Alleviating poverty through the Constitutional Court' (1999) 15 **SAJHR** 52 who argues that constitutional human rights litigation has the potential to play an important role within a broader eradication of poverty strategy. She says new litigation tools need to be developed which are more appropriate for litigating on economic and social rights, including human rights budgets and indicators.

21 Par [77].

22 The meaning of 'family' in the context of the judgment is not explicit, and it has often been pointed out that the South African notion of 'family' is an extremely fluid one. The Roman Dutch common law duty of support is, however, based on a Western definition of biological ties within a narrow nuclear family structure.

23 Such as displaced children.

24 Par [77] where Yacoob J states that 'section 28 does not create any primary obligation ... if children are being cared for by their parent' (emphasis added). Children in alternative care are mentioned at par [79] of the decision. See also Julia Sloth-Nielsen 'The child's right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 **SAJHR** 210 at 230: 'What is left of children's socio-economic rights in the aftermath of *Grootboom* could well be a fallback position, premised on the role of the state as primary provider to children without families. In this scenario, if drafters of new children's legislation wish to put the 'mouth' where the 'money' is, child protection services should be weighted towards intervention and out-of-home placement, because it is in these settings that neglected and deprived children's constitutional claims to state resources may be optimally realised. Taking *Grootboom* at face value, this fall-back position would focus on fulfilling the state's primary obligation towards children in foster care, children in institutional settings, abandoned and orphaned children and children living on the street. (It may well require a veritable army of social workers, providing state services to the ever-increasing numbers of children without adult caregivers, as well as sharp increases in state subsidisation of foster care and institutions for orphaned and abandoned children.) As this option accords little or no priority (or fiscal commitment) to families and parents attempting to support their own children, it would impel social workers to remove children whose neglect or abuse stems from parental poverty'.

Further to the above, Yacoob J refers directly to child maltreatment, abuse and degradation, the right provided for in section 28(1)(d).²⁵ In commentary upon the **Grootboom** case, it has been argued that the State appears to be directly responsible for ensuring fulfillment of this right, whether children are in parental, familial, or alternative care.²⁶ Section 28(1)(d) does not, on the face of it, create a right which is subject to progressive realisation. In Yacoob J's view, the scope of the obligation to protect children from maltreatment, abuse, neglect and degradation normally includes

25 It seems that the responsibilities of parents and families with regard to children's development are linked thematically to their protection from abuse and neglect. Article 19 (1) of the CRC provides that 'States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury of abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or any other person who has care of the child'. Subsection 2 of this Article continues: 'Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement'. S Detrick **A Commentary on the United Nations Convention on the Rights of the Child** (1999) 322 comments, with regard to the above provisions, that the travaux préparatoires show that it was generally felt that emphasis should be placed on preventive action, and that this led to the reference to social and educational measures being incorporated in the final version of Article 19, as well as to the reference to the need for establishing social programmes to provide support for the child *and* for those who have care of the child. She alludes to a compromise that was achieved between those countries supporting a weighting towards judicial intervention in child abuse cases (mainly the USA), and those, chiefly from the then East Block, preferring an approach to child abuse which focussed more on social programmes to look after children in need.

26 Julia Sloth-Nielsen 'The child's right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 **SAJHR** 210 at 230 - 231.

passing laws and creating enforcement mechanisms degradation, and providing for the prevention of such occurrences.²⁷

The right to social services, it would appear, has no direct counterpart in treaty law. In commentaries on this section in South African literature thus far, little content analysis of the likely meaning of the right to social services has been attempted. There would appear to be two possible approaches regarding the possible scope and meaning of the right to social services in section 28(1)(c). The first approach would accord this notion a broad interpretation, and the right to social services would then take on a broad developmental hue, and include rights that properly fall under the category 'social spending' as evidenced in World Bank reports. The right to social services seen in this light focuses on the word 'social' in the sense of a community development model, encompassing services provided by a range of departments at different tiers of government.

27 Par [78].

A different idea of the scope of the right to social services can be discerned in a resource book on socio-economic rights published by Liebenberg and Pillay.²⁸ In a section on social welfare rights, the authors clearly link social security, social assistance and children's rights to social services.²⁹ This narrower view would focus more pertinently on developmental social welfare programmes and services as normally provided by the Department of Social Development. The judgment of the Constitutional Court in **Grootboom** refers to social **welfare** programmes,³⁰ which supports a welfarist reading of the right to social services, as oppose to an unbounded environmental and

28 S Liebenberg & K Pillay (eds) **Resource Book on Social and Economic Rights** Community Law Centre, University of the Western Cape (2000).

29 S Liebenberg & K Pillay (eds) **Resource Book on Social and Economic Rights**, p. 315. The interpretation of social services rights that these authors deduce from the CRC comprises the following: protection of children from physical or mental abuse or neglect, protection and assistance to children temporarily or permanently separated from their families, assistance to children with disabilities, protection of children from economic exploitation, drug abuse, sexual exploitation and abuse, and they refer too to the obligation in article 39 of the Convention to promote recovery and reintegration.

30 See para [75] and [88] of the judgment.

community development reading.³¹

31 Julia Sloth-Nielsen 'The child's right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 **SAJHR** 210 at 220, footnote 51. See too I Jamie 'Court offers little shelter for basic rights' (February / March 2001) 5(35) **Children First** 13.

It has been suggested³² further that the right to social services in section 28(1)(c) cannot be viewed on the same footing as the other 'care' rights in this section (nutrition, health care and shelter), and that the right to social services is possibly intended to refer to those social welfare services that the State must provide **only** when children lack a family environment or have been removed. Such view would accord with the narrower reading of the right to social services discussed above, and avoid the slightly incongruous idea that social welfare services form part and parcel of the parental duty of support.

Based on the above interpretation, the judgment in **Grootboom** may well have bestowed a degree of immunity upon the existing foster care system and welfare subsidies to children in out-of-home care, in view of the rationale that the State must make appropriate provisioning for children who lack parental or familial care. At minimum, any review downwards of the level of funding of the foster care grant might require 'compensatory' steps in relation to other grants which promote children's and family services, notably increases in the overall level of the child support grant,³³ and additional welfare programmes³⁴ aimed at providing appropriate care to children who lack a family environment.³⁵

It could be argued that the approach of the Constitutional Court in **Grootboom** is premised on the notion that the role of the State is only to provide resources where children are without families. The risk exists, however, that this approach may lead to child protection services being weighted towards intervention and out-of-home placement, because it is in these settings that neglected and deprived children's constitutional claims to state resources can be optimally realised. This could have the undesirable result that sharp increases in State subsidisation of foster care and institutional care for orphaned and abandoned children are experienced, because little priority (or fiscal commitment) is accorded to families and parents attempting to support their own children; this policy could impel social workers to remove children whose neglect or abuse stems from parental

32 Julia Sloth-Nielsen 'The child's right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 **SAJHR** 210 at 220.

33 Sandy Liebenberg 'The right to social assistance: The implications of *Grootboom* for policy reform in South Africa' (2001) 17 **SAJHR** 232 discusses the implications of the **Grootboom** judgment for social assistance, including the child support grant.

34 Such as professional foster care programmes, similar to the one being piloted in the Tsolo region of the Eastern Cape.

35 See also the discussion of the issue of grants in Chapter 25 below.

poverty.

However, the view has also been put forward that the **Grootboom** judgment recognises that children's right to protection from abuse, neglect, maltreatment and degradation in section 28(1)(d) is a right that is directly enforceable against the State. Given the links between parental poverty and child abuse, it may be argued that the State is obliged, where children's neglect stems from poverty alone, to adopt meaningful preventive measures, which must include some level of financial allocation for family preservation. Yacoob J does refer to the possible establishment of social welfare programmes providing maintenance and other material assistance to families in need in defined circumstances, albeit in the context of section 27 of the Constitution which the State need only implement progressively and within available resources. However, the constitutional right to protection from abuse and neglect in section 28(1)(d) is not limited by this qualification, nor even by the limitation inherent in the formulation as the right to 'have access to' such protection.

In the light of the above reasoning, the Commission has included a chapter in this Discussion Paper and draft Bill relating to the prevention of child abuse and neglect, in order to ensure that the State does meet its commitments as regards the implementation of section 28(1)(d).³⁶

36 See Chapter 9 below.

Christian Education South Africa v Minister of Education³⁷ concerned a constitutional challenge to the provision of the South African Schools Act 84 of 1996 which prohibits the administration of corporal punishment at schools to learners.³⁸ The matter was pursued by a consortium of parent bodies of independent schools, who argued that the blanket ban upon corporal correction in schools invaded their 'individual, parental and community rights to freely practice their religion'.³⁹ It was contended that the imposition of corporal punishment by teachers, with parental consent, was a vital aspect of the Christian religion.⁴⁰ The Minister of Education opposed the application, relying on the equality clause,⁴¹ the right to human dignity,⁴² the right to freedom and security of the person,⁴³ and the rights of children to be protected from maltreatment, neglect abuse and degradation.⁴⁴ The Minister also referred to the provisions of the CRC, stating that articles 37, 19 and 28(2) of this treaty **required** the abolition of corporal punishment in schools.⁴⁵

The Constitutional Court declined to decide whether the prohibition on corporal punishment was a practice that was in violation of the Bill of Rights, preferring instead to address the issue via a consideration of the limitations clause in section 36 of the Constitution. On the assumption that the blanket prohibition did indeed violate the applicants constitutional rights to religious and cultural freedom, the central question posed by Sachs J was 'whether the failure to accommodate the appellant's religious belief and practice by means of an exemption for which the appellants asked, can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality'.⁴⁶ The Constitutional Court was of the view that the Schools Act did not deprive parents of their general right to bring up their children according to Christian beliefs, but that it merely limited their capacity to empower or authorise teachers to administer corporal

37 2000 (4) SA 757 (CC).

38 Section 10. See also the Abolition of Corporal Punishment Act 33 of 1997.

39 Par [2].

40 Par [4].

41 Section 9 of the Constitution. Because the applicants only sought an exemption as regards the administration of corporal punishment upon boys in school, arguing that it was well-known that girls were better disciplined than boys: par [15].

42 Section 10 of the Constitution.

43 Section 12 of the Constitution.

44 Section 28(1)(d) of the Constitution.

45 Par [13].

46 Par [32].

punishment in their name.⁴⁷ The Court held further that the failure to provide for an exemption to accommodate the appellant's beliefs was reasonable and justifiable under the limitations clause contained in section 36 of the Constitution, for reasons which are set out fully in the judgment. These include the need for uniform norms and standards in schools, the constitutional duty upon the State to help diminish the amount of public and private violence in our society, and the duty incurred upon ratification of the CRC to 'take all appropriate measures to protect the child from violence, injury or abuse'.⁴⁸ Allusions were also made to the symbolic and principled function of introducing such a prohibition, given the authoritarian past which had prevailed in South Africa.⁴⁹ Judge Sachs found wide support for the stance that corporal punishment in schools was in itself a violation of the dignity of a child.⁵⁰

47 Par [38].

48 Par [40], referring to Articles 4, 19 and 34 of the CRC.

49 Par [50].

50 Par [52].

The Court did not offer a view on whether corporal punishment, applied moderately by parents, would amount to a form of violence from a private source, since this was not necessary on the facts before it. This was, however, in issue in the recent case before the European Court of Human Rights in **A v United Kingdom**.⁵¹ The European Court held unanimously that the repeated beating of a 9 year old boy by his step-father amounted to torture or inhuman or degrading treatment of punishment in contravention of article 3 of the European Convention. The government of the United Kingdom was held liable for failing to take measures to protect the child, in that the European Convention imposed an obligations upon States to implement laws which provided sufficient protection of children from serious breaches of personal integrity. The common law in the United Kingdom allowed parents, and other acting *in loco parentis*, to raise the defence of 'moderate and justified chastisement' in circumstances such as this, where the punishment was obviously of a level of severity which fell within the scope of Article 3.⁵²

The European Court has not, however, gone so far as to declare all forms of physical discipline (such as smacking) to be violations of the right to freedom from inhuman or degrading punishment, although a number of (mainly European) countries have prohibited the administration of corporal punishment upon children by their parents.⁵³

Despite the fact that the Constitutional Court did not pronounce on the constitutionality of the

51 [1998] 2 FLR 959.

52 JMT Labuschagne 'Case discussion: *A v United Kingdom* 1998-09-23, ECHR 1998-VI 2692, NJ 1999, 532' (2000) 33 **De Jure** 146 points out that the English law on moderate chastisement is very similar to the South African common law, and raises the question as to whether this area of the law is not in need of reform.

53 See S Pete 'To smack or not to smack: Should the law prohibit South African parents from imposing corporal punishment on their children?' (1988) 14 **SAJHR** 430 for cogent arguments and a plea for the introduction of a ban on parental corporal punishment.

common law rules pertaining to parental chastisement, there is a reference in the judgement to the matter of 'supervised regulation' of parental corporal punishment as a way of fulfilling the state's constitutional and international law obligations.⁵⁴ The Court alluded to the question whether or not 'the common law had to be developed so as to further regulate or even prohibit caning in the home',⁵⁵ but declined to express an opinion on this.

54 See para [48] and [59].

55 Par [48].

As regards discrimination against extra-marital children, of relevance is the Supreme Court of Appeal's decision in **Mthembu v Letsela and another**.⁵⁶ The rule of primogeniture in intestate succession where children born of customary unions are concerned was challenged as constituting unfair discrimination on the grounds of sex and gender. The purported heir was the illegitimate daughter of a black man who died intestate. The Court rejected the claim that the laws of intestate succession constituted discrimination on the ground of sex or gender, but did not pursue any inquiry into whether the rules of customary law did not discriminate on the basis of illegitimacy or the child's status by virtue of her birth. The Court, further, saw no need to intervene with the rule of customary law which prohibits all illegitimate children (male and female) from inheriting. Such an approach, however, violates the provisions of the CRC, which prohibit discrimination based on a child's birth or other status.⁵⁷

The best interests principle⁵⁸ contained in section 28(2) of the Constitution has been frequently cited by South African Courts. In **Minister for Welfare and Population Development v Fitzpatrick**,⁵⁹ Goldstone J expressed the view that 'the plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a

56 2000 (3) SA 867 (SCA).

57 Article 2.

58 The best interests of the child principle is discussed in more detail in the following section.

59 2000 (7) BCLR 713 (CC).

right that is independent of those specified in section 28(1).⁶⁰ However, the best interests standard is clearly not without limitation.

60 Par [17].

In **Sonderup v Tondelli and another**,⁶¹ the issue was whether the statute incorporating the Hague Convention on the Civil Aspects of International Child Abduction in South African municipal law (the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996), was constitutional. Since the basis of the claim was that the Act was inconsistent with the Constitution on the basis that it does not recognize the best interests of the child, the Constitutional Court considered whether such inconsistency would be justifiable under the provisions of section 36 of the Constitution. Holding that the Hague Convention provides both for a long term evaluation of a child's best interests in the determination of custody disputes, as well as for a consideration of the interplay between child's short-term and long-term best interests, the Court was of the opinion that the obligation to order prompt return was ameliorated by the provisions of section 13 of the Hague Convention, demonstrating a close relationship between the purpose of the Convention and the means sought to achieve that purpose. Further, a Court is empowered to tailor an order, and impose substantial conditions, designed to mitigate any interim prejudice to any child caused by a court-ordered return. Accordingly, it was held that the limitation in the Hague Convention situation on considering the individual child's immediate best interests was reasonable and justifiable.

3.5 Conclusion

Protection of children's rights leads to a corresponding improvement in the lives of other sections of the community, because it is neither desirable nor possible to protect children's rights in isolation from their families and communities. Further, as pointed out by Geraldine van Bueren,⁶² the essence of children's economic and social rights⁶³ is transformative and redistributory, because these rights create a legitimate claim for children to benefit from an equal share in the state's

61 2001 (1) SA 1171 (CC). See also the discussion of this case in 22.3.3 below.

62 'Alleviating poverty through the Constitutional Court' (1999) 15 **SAJHR** 52 at 55.

63 See P de Vos 'The economic and social rights of children and South Africa's Constitution' (1995) **SAPL** 233; E Muneirik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 4 **SAJHR** 464. See further D Parker 'Resources and child rights: An economic perspective' in J R Himes (ed) **Implementing the Convention on the Rights of the Child: Resource Mobilisation in Low Income Countries** (1995) 35 - 37; P Imbert 'Rights of the poor, poor rights? Reflections on economic, social and cultural rights' (1995) 55 **International Commission of Jurists Review** 85; R E Robertson 'Measuring state compliance with the obligation to devote the "maximum available resources" to realising economic, social and cultural rights' (1994) 16 **Human Rights Quarterly** 694; K Tomasevski 'Justiciability of economic, social and cultural rights' (1995) 55 **International Commission of Jurists Review** 203. For an interesting discussion of the possibility to bring criminal charges for the 'stealing' socio-economic entitlements, see J M T Labuschagne 'Diefstal in biopsigiese oorlewingsnood: Opmerkinge oor die strafregtelike spanningsveld tussen die menslike lewe en lewenskwaliteit' (2001) 64 **THRHR** 289.

resources. South Africa is therefore fortunate to have enshrined, as a constitutional imperative, the rights of children in section 28 of the Constitution, 1996.