

GIRLS' SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

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ABSTRACT

This article explores girls' socio-economic rights fulfilment in South Africa. After setting out the international law context, the article turns to the lived reality of girls in this country through an examination of their rights to healthcare services, nutrition, social services and security, and shelter. The research indicates that whilst girls are babies and young children they enjoy relatively equal access with their male counterparts to socio-economic services made available to children by the state. However, during pre-puberty and adolescence girls face barriers in accessing their socio-economic rights. The challenges are linked to girls' biological and economic vulnerability, the relationships of power and difficulties in the negotiation of sexual relationships, lack of access to reproductive health rights, and the expectations of girls being caregivers. The article concludes with a consideration of how solutions might be developed, together with girls, to assist them in the achievement of their socio-economic rights. It further recognises that girls belong to the broader groups of both women and children, and that solutions should reflect a relational approach to rights.

I INTRODUCTION

Much attention has been paid to women in development and the issue of children and development – but the nexus of female children in the development context has remained relatively unexplored. In 1990, the United Nations Children's Fund (UNICEF) decided to focus on 'the needs of the girl child' for the following decade. The clumsy nomenclature 'girl child' bore witness to the need to identify this group of children, emphasising both gender and age. The 'girl child' also featured at the Fourth UN Conference for Women held in Beijing in 1995. Section L of the Beijing platform of Action spelt out nine objectives for the girl child. Amongst these was the aim to include girls' participation in social, economic and political life. Nevertheless, although commitments to improving the situation of the girl child were high on the agenda at UNICEF headquarters, it did not seem to translate readily into effective programming on the ground – the exception being girls' access to education.

In her article in the *South African Journal for Human Rights (SAJHR)* special issue on Women and Socio-Economic Rights, Beth Goldblatt drew on the work of Nicola Lacey to demonstrate that the project to engender socio-economic rights should provide evidence of women's lived experience and their gendered realities.¹ This article follows that imperative, and includes

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1 B Goldblatt 'The Right to Social Security – Addressing Women's Poverty and Disadvantage' (2009) 25 *SAJHR* 442.

references to research that is based on the descriptions by girls of their lived experience.

As noted by Elizabeth Croll,² the nomenclature ‘girls’ rights’ sounds less passive than ‘the rights of the girl child’. It suggests that girls can and should participate in their own rights fulfilment. Participation of children is a pillar of the UN Convention on the Rights of the Child. Commitment to participation provides a clear link with the capabilities approach, as outlined by Sandra Fredman (drawing on the work of Amartya Sen and Martha Nussbaum) in the *SAJHR* Women and Socio-Economic Rights special issue.³ Girls who have reached sufficient age, maturity and stage of development should be given a range of options to pursue what they value.⁴ Girls’ ability to make effective choices clearly depends on them being properly informed of the range of options that they have. The reality is that for many adolescent girls the options are limited due to the poverty in which they live, and to their biological vulnerability. To say that girls have choices and can participate is thus sometimes an oversimplification. Frances Olsen has pointed out that this oversimplified approach ‘neglects the subtle as well as blatant exercises of power that constrain and indeed structure the choices of adults and children’.⁵

This article will sketch the international law provisions that underpin girls’ socio-economic rights, as well as relevant sections of the Constitution of the Republic of South Africa, 1996 and the interpretation thereof by the courts. A picture will then be painted of the lived reality of girls by examining children’s rights to health-care services, nutrition, social services and security, and shelter. A consideration of the policy and practice environment reveals relatively equal access to socio-economic services made available to children by the state whilst they are babies and young children.

From pre-puberty through the adolescent years, particular challenges face girls in their pursuit for socio-economic rights fulfilment. The challenges are linked to girls’ biological and economic vulnerability, the relationship of power and decision-making regarding the negotiation of sexual relationships and access to reproductive health rights. Lack of support for teenage mothers, beyond the provision of the child support grant (CSG) is a particular concern. Research findings regarding teenage girls caring for other children in child-headed households are also considered. The article concludes with a consideration of how solutions might be developed, together with girls, to assist them in the achievement of their socio-economic rights.

2 E Croll ‘From the Girl Child to Girls’ Rights’ (2006) 27 *Third World Quarterly* 1285, 1289.

3 S Fredman ‘Engendering Socio-economic Rights’ (2009) 25 *SAJHR* 410, 423–5.

4 The Convention intentionally avoids setting a specific lower age for participation, and South African law has followed suit in s 10 of the Children’s Act 38 of 2005 which provides that ‘[e]very child that is of such an age, maturity and stage of development to be able to participate in any matter concerning the child has a right to participate in an appropriate way and views expressed by the child must be given due consideration’.

5 F Olsen ‘Children’s Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child’ (1992) 6 *Int J of Law and the Family* 192, 213.

II INTERNATIONAL LAW

Children's socio-economic rights are guaranteed through the United Nations Convention on the Rights of the Child (UNCRC),⁶ and in the African region through the African Charter on the Rights and Welfare of the Child (ACRWC).⁷ These form a powerful international (and regional) law framework that sets high standards for states parties regarding children's socio-economic rights. With regard to girls, these instruments are to be read with the Convention on the Elimination of Discrimination Against Women (CEDAW).⁸

(a) Provisions of the UNCRC relevant to socio-economic rights

Article 4 of the UNCRC deals with the enforcement of rights. It specifically identifies socio-economic rights as a subset of rights in the Convention, and sets a standard for their enforcement. The article reads as follows:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.⁹

The initial interpretation of this clause was sanguine. Hammerberg,¹⁰ observed that 'the maximum extent of their available resources' did not imply that poorer countries can avoid their responsibilities. He postulated that it should rather be understood as a call for prioritisation of children within the state budget to ensure appropriate service delivery. Hammerberg made the following comparison between art 2(1) of the Convention on Economic Social and Cultural Rights (CESCR) with art 4 of the UNCRC:

There is one clear difference between Article 4 of the UNCRC and the Article 2 of the CESCR: The latter allows for a progressive realization of rights (with the exception of non-discrimination). This possibility of a gradual approach is not at all included in Article 4, and is, in fact, limited in the UNCRC to a few specific articles.¹¹

However, in 2003 the UN Committee issued its General Comment 5, which gave guidance to states on general measures of implementation.¹² Paragraph 5 of that General Comment denied the possibility of an interpretation that art 4

6 Ratified by South Africa in June 1995.

7 Ratified by South Africa in January 2000.

8 Ratified by South Africa in December 1995.

9 Emphasis added.

10 T Hammerberg 'Children' in A Eide et al (eds) *Economic, Social and Cultural Rights* (2001) 366.

11 The articles that contain such qualifications as 'subject to available resources' or 'in accordance with national conditions and within their means' are arts 6(2), 23(2), 24(4), 27(3) and 28(1).

12 Committee on the Rights of the Child General Comment 5 on General Measures of Implementation for the Convention on the Rights of the Child (2003) <[http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En?OpenDocument)>. General Comments are not binding, but they are highly persuasive, and have been considered by South African courts. See S Rosa & M Dutschke 'Child Rights at the Core: The Use of International Law in South African Cases on Children's Socio-Economic Rights' (2006) 22 *SAJHR* 224.

of the UNCRC was not qualified by progressive realisation. The Committee on the Rights of the Child observed as follows:

The second sentence of article 4 reflects a realistic acceptance that lack of resources – financial and other resources – can hamper the full implementation of economic, social and cultural rights in some States; this introduces the concept of ‘progressive realization of such rights’.

This interpretation is unfortunate, as prior to this pronouncement by the Committee there was a prevailing view that art 4 did not include progressive realisation. In fact, as will be explained below, the drafting of s 28(1)(c) was based on an understanding that international law did not envisage progressive realisation in relation to children’s socio-economic rights. That reading of the law predates this General Comment.

There are other provisions in the UNCRC that are relevant to an assessment of states parties’ obligations regarding socio-economic rights. Article 6 deals with the child’s right to ‘maximum survival and development’. State services must ensure that babies are born healthy and thrive in their first five years. Child mortality indicators are important measures for testing the success of states in ensuring child survival.¹³ It is apparent that the UNCRC places the responsibility of caring for children firstly on parents. However, the state should take appropriate measures to ensure that working parents benefit from child-care services and facilities.¹⁴

Article 24 commits states to recognise every child’s right to the highest attainable standard of health and to treatment facilities. States must also take all effective and appropriate measures to abolish traditional practices prejudicial to children’s health, and this is of particular importance to girls as it relates to female genital mutilation and virginity testing.

Article 26 establishes that a child has the right to benefit from social security, which includes private maintenance (in which case the state’s responsibilities will be to undertake measures to achieve realisation of the right). No specific mention is made of social security funded by the state. Article 27 provides that every child has the right to a standard of living which is adequate to cater for the child’s physical, mental, spiritual, moral and social development. Although primary responsibility lies with the parents, it is the state’s duty to assist parents in this regard, and in case of need, the state must provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

The UN Committee on the Rights of the Child periodically issues General Comments that focus on certain thematic areas of children’s rights. Two general comments that have particular reference to girls are General Comment 3 on HIV-AIDS and the Rights of Children (2003), and General Comment 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child (2003). The key provisions will be discussed later in this article in respect of the right to health care.

13 See further ‘Facts about Child Deaths in South Africa’ (2006) <www.childrencount.ci.org.za>.

14 Article 18 of the UNCRC.

(b) Provisions of the ACRWC relevant to socio-economic rights

The ACRWC appears to be similar to the UNCRC. Benyam Mezmur has, however, highlighted the fact that the ACRWC sets a higher normative standard in relation to several issues.¹⁵ The advantages of the ACRWC are particularly significant in relation to socio-economic rights. The ACRWC does not contain a provision similar to art 4 of the CRC. It does not separate out socio-economic rights from political and civil rights, and there is no qualification regarding availability of resources.

Education rights are comprehensively framed in the ACRWC, and measures to promote girls' rights are expressed. Article 11(3)(e) obliges states to take affirmative action regarding female, disadvantaged and gifted children. Furthermore, protection is provided for the rights of girls who fall pregnant whilst they are still at school.¹⁶ These two provisions have no corresponding counterparts in the UNCRC.

The health services provisions are more detailed in the ACRWC than the UNCRC, requiring planning, meaningful participation by civil society and support for community resource mobilisation in developing primary health care for children.¹⁷ These health-care planning provisions do not appear in the UNCRC.

On the negative side, the ACRWC, unlike the UNCRC, does not set out a right to social security. The only reference to this good resides under art 18, which deals with protection of the family. Article 18(3) states that no child is to be deprived of maintenance due to the marital circumstances of the parent.¹⁸ The focus is on maintenance payments from private sources, and unlike in the UNCRC,¹⁹ there is no clause that directs government to play a role in achieving fulfilment of the right.

(c) Provisions in CEDAW relating to girls' socio-economic rights

Many provisions in CEDAW apply to girls because they are female. Non-discrimination, which is central to CEDAW, is also one of the four 'pillars' of the UNCRC. CEDAW makes specific reference to girls in relation to reduction of the early drop out of girls from education, and the need for programmes to address this.²⁰ Betrothal or marriage of any child shall have no effect, according to CEDAW and domestic laws must specify a minimum age for marriage.²¹ This clause is particularly relevant to girls as it is they, rather than boys, that are more likely to be drawn, coerced or forced into early marriage.

15 B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-Sum Game?' (2008) 23 *SAPR/PL* 1.

16 ACRWC art 11(6). See further F Veriava 'Gender Equality and Education in South Africa' in B Goldblatt & K McLean (eds) *Women and Socio-Economic Rights in South Africa* (2011) forthcoming.

17 Ibid art 14(2).

18 Ibid art 18(3).

19 See art 26 of the UNCRC.

20 Article 10(f).

21 Article 16(2).

(d) Conclusion

A consideration of the applicable international law in the field of socio-economic rights is relevant because s 39(1)(b) read with s 233 of the Constitution requires the courts to consider foreign law when interpreting the Bill of Rights, and to prefer an interpretation that is compatible with international law. This links to the next part of the article that deals with the emerging jurisprudence relating to children's socio-economic rights. As is evident from the above discussion, the Committee on the Rights of the Child has interpreted art 4 to encompass 'progressive realisation' of children's socio-economic rights. The next part of the article will consider how the South African courts have approached this question.

III THE EMERGING JURISPRUDENCE RELATING TO CHILDREN'S SOCIO-ECONOMIC RIGHTS

(a) The South African Constitution and children's socio-economic rights

Section 28(1)(c) of the Constitution states that every child has the right 'to basic nutrition, shelter, basic health care services and social services'. Unlike ss 26 and 27, s 28(1)(c) does not contain any internal qualifiers.²² In order to examine whether or not progressive realisation applies to children's socio-economic rights in South Africa, it is necessary to examine firstly, what the drafters of the Constitution intended, and secondly, how the courts have interpreted the relevant provisions and their inter-relationship with one another. The jurisprudence relating to children's socio-economic rights will not be detailed in full here, as it is general in nature rather than specific to girls. However, the question of how the courts have interpreted children's access to socio-economic rights is relevant to understanding how girls' rights might be realised.

(b) Children's socio-economic rights and progressive realisation

Paula Proudlock has given a thorough account of the history behind the inclusion of socio-economic rights in the South African Constitution.²³ She has pointed out that the textual differences between s 28(1)(c) and ss 26 and 27 have given rise to an interpretation that the drafters of s 28(1)(c) of the Constitution intended that subsection to impose a direct duty on the state to ensure that children must have their socio-economic rights met without delay. Proudlock observes that whilst the courts have supported this interpretation with regard to children in alternative care, they have taken a 'more nuanced procedural approach' with regards to children in the care of their parents.

22 The phrases 'access to', 'within available resources' and 'progressive realisation' are internal qualifiers.

23 P Proudlock 'Children's Socio-Economic Rights' in T Boezaart (ed) *Child Law in South Africa* (2009) 291, 293–5.

The first case that dealt, inter-alia, with children's socio-economic rights was *Government of the Republic of South Africa and Others v Grootboom and Others*.²⁴ The applicants were adults and children who lived in an informal settlement and needed housing. The Constitutional Court developed the reasonable test in *Grootboom*, and further developed it in *Minister of Health and Others v Treatment Action Campaign and Others*.²⁵ The reasonableness test is now well established,²⁶ but an analysis of its relevance to children's socio-economic rights rests mainly on the requirement that a reasonable policy should not exclude a significant segment of the population, especially not those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril.²⁷ Proudlock points out that this part of the test provides space for children's rights to be invoked, as demonstrated in the *TAC* case where the Court found that the negative impact on children's right to basic health-care services of the state's limited Prevention of Mother-to-Child Transmission programme was a ground contributing to the unreasonableness of the policy.²⁸ The exclusion of a vulnerable group of people, including children, was also a ground for finding government's policy unreasonable in the case of *Khosa and Others v Minister of Social Development and Others*.²⁹ In this case, the applicants were permanent residents who sought an order of constitutional invalidity regarding legal provisions that reserved pensions, CSGs and care dependency grants for South African citizens, excluding permanent residents.

Children's rights academics and activists have been somewhat disappointed by the fact that the courts have largely avoided basing their decisions on s 28(1)(c) of the Constitution, which is the clause on children's socio-economic rights, but have rather focused on the rights afforded to all in ss 26 and 27 of the Constitution. The Court's rationale rests on the fact that whilst children are living with their parents they must look first to their families for the provision of their socio-economic rights, such as the right to housing in *Grootboom*.

However, it has also been acknowledged by several writers³⁰ that the effect of the decision in *Grootboom* – vis-à-vis children's rights – underwent a

24 2001 (1) SA 46 (CC) (*Grootboom*).

25 2002 (5) SA 703 (CC) (*TAC*).

26 S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman et al (eds) *Constitutional Law of South Africa 2 ed* (2005) 33–2 to 33–44; C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 57–60.

27 *Grootboom* paras 43 & 45.

28 Proudlock (note 23 above) 299, citing *TAC* paras 77–80. See further A Friedman, A Pantazis & A Skelton 'Children's Rights' in Woolman et al (note 26 above) 47–13 who state that the *TAC* Court interpreted s 28(1)(c) as being subject to progressive realisation.

29 2004 (6) SA 505 (CC) (*Khosa*).

30 J Sloth-Nielsen 'Children' in DM Davis & MH Cheadle (eds) *South African Constitutional Law: The Bill of Rights* (2002) 421; I Currie & J De Waal (eds) *The Bill of Rights Handbook* (2005) 613; K McLean 'Housing' in Woolman et al (note 26 above) 55–52; M Wesson 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284, 304; E Bonthuys 'The South African Bill of Rights and the Development of Family Law' (2002) 119 *SALJ* 748; M Pieterse 'Reconstructing the Private/Public Dichotomy? The Enforcement of Children's Constitutional Social Rights and Care Entitlements' (2003) 1 *TSAR* 1; S Liebenberg 'Taking Stock: The Jurisprudence on Children's Socio-Economic Rights and its Implications for Government Policy' (2004) 5(4) *ESR Review* 2.

positive adjustment in the *TAC* case.³¹ In that case, which dealt with access to treatment to avoid mother-to-child transmission of HIV-AIDS, the Court held that the state is obliged to ensure the protection of children's s 28 rights when the implementation of the right to parental or family care is lacking – and the *TAC* case dealt with children born in public hospitals to indigent mothers.

So, whilst *Grootboom* had stated that children living with their parents will have to look to their parents, rather than the state, for the fulfilment of their s 28(1)(c) rights, this position was slightly adjusted in *TAC*.³² The Court based its main findings on s 27, but utilised s 28(1)(c) to add extra weight to that provision.

(c) The socio-economic rights of children separated from their parents

Since the judgments of *Grootboom* and *TAC*, there have been two reported High Court judgments that throw light on the claim to socio-economic rights of children who are not living with their parents. The Centre for Child Law has brought two matters before the North Gauteng High Court, which have developed the law in this regard. The first case³³ dealt with unaccompanied foreign children and the second with children in the care system who had been placed by a court order in a school of industries.³⁴ In both cases the Court laid emphasis on the fact that if children are not living with their parents they have a direct and immediate claim on the state for the fulfilment of their socio-economic rights.

(d) Discrimination against girls in the sphere of customary law

The cases discussed above have dealt with the obligations of the state – created by the Constitution – to provide an enabling environment or, where necessary, to provide direct support or assistance regarding children's socio-economic rights. There are, however, socio-economic challenges in the private law sphere also, where patterns of gender inequality in family relationships prevent or hinder women and girls from the fulfilment of socio-economic rights. The case of *Bhe*³⁵ dealt with the customary law rule of primogeniture which prevented girls from inheriting, thus locking girls into poverty. The case concerned the rights, under customary law, of women (who could not

31 (n 25 above) *TAC*.

32 S Liebenberg 'The Judicial Enforcement of Social Security Rights in South Africa' in H Riedel (ed) *Social Security as a Human Right* (2007) 78 points out that the Court did not conclude that children enjoyed an unqualified, direct claim to the provision of basic health-care services, but rather based their finding on the fact that the government's policy was unreasonable because it excluded a particularly vulnerable group.

33 *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T).

34 *Centre for Child Law and Others v MEC for Education, Gauteng and Others* 2008 (1) SA 223 (T).

35 *Bhe v Magistrate Khayelitsha (Commission for Gender Equality as amicus curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) (*Bhe*). The case arose from two different cases dealing with similar issues, which the Court considered in a single hearing. The SA Human Rights Commission and the Women's Legal Centre Trust brought an application for direct access to the Court in respect of the two matters, which was granted, largely on the basis of the vulnerability of women and children.

be the intestate heirs of their husbands); of girls (who could not inherit from their parents); of younger male children (who could not inherit from their parents) and of children born out of marriage (who could not inherit from their fathers). There were two issues before the Court: first, the constitutional validity of s 23 of the Black Administration Act 38 of 1927,³⁶ and second, the constitutionality of the principle of primogeniture in the customary law of succession. The Constitutional Court found that the principle of male primogeniture discriminated unfairly against children on the grounds of sex and of birth³⁷ by preventing them from inheriting the deceased estate of their father.³⁸ The law also infringed the children's right to dignity. Langa DCJ, as he then was, referred to s 28 of the Constitution, and emphasised that the Constitution protects all children's rights, not just those rights set out in s 28. Thus, children may not be subjected to unfair discrimination in terms of s 9(3) of the Constitution, just as adults may not be. He remarked further that the importance of not discriminating against children on the grounds of sex is acknowledged in the ACRWC.³⁹

The *Bhe* case is relevant to a discussion of the realisation of girls' socio-economic rights. A system that destined girls to live in poverty because of their gender was clearly a major impediment to their enjoyment of socio-economic rights. The legal framework is now reflective of gender equality, and is protective of all children's rights to inheritance. As discussed in the next part of this article, many children live in dire poverty, some in child-headed households. At least the result in *Bhe* opens the door to these children being able to inherit under the rules of intestate succession, regardless of their gender or their birth status. The property or money so inherited makes a significant difference to the arrangements that can be made for such children if they are orphaned.

IV THE RESPONSE TO CHILDREN'S SOCIO-ECONOMIC NEEDS

(a) Introduction

The first part of this article has sketched the international and constitutional provisions relevant to girl's socio-economic rights, including a discussion of how the courts have interpreted these rights. In this next part of the article, there will be a focus on the response to girls' socio-economic needs on the ground in South Africa. Section 28(1)(c) of the Constitution guarantees rights to nutrition, basic health care, shelter and social services. An analysis of the available data demonstrates that in early childhood, female and male children

36 This Act, which has subsequently been repealed in its entirety dealt (amongst other things) with the intestate deceased estates of Africans.

37 Male children born outside marriage could not inherit unless there were no other male descendants, see *Bhe* (note 35 above) para 58.

38 *Bhe* (note 35 above) para 95. The Court found it unnecessary to decide whether discrimination against younger children was unconstitutional.

39 This principle is also included in the preamble to the UNCRC. Although the Constitutional Court did not make reference to it, art 18 of the ACRWC is relevant to the issue. Article 18(2) enjoins states to take steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution.

in South Africa have equal access to those socio-economic rights that are available to children. However, from pre-puberty through adolescence, girls face greater challenges, and these will be discussed in context below. The discussion begins with access to health care and, after providing base-line information relating to all children, focuses on adolescent girls. Following the discussion on health care and closely linked to it, is nutrition. Thereafter the rights to social services and social assistance, and to shelter will be discussed, with an emphasis on issues of particular importance to girls.

(b) Health-care services, including reproductive health care

Section 27(1)(a) of the South African Constitution provides access to health-care services for everyone, which is to be achieved progressively, within available resources. Of particular relevance to women and girls is the fact that ‘health-care services’ expressly includes ‘reproductive health care’. Section 28(1)(c) provides specific protection by providing for ‘basic health-care services’ for all children. Notably absent in this clause are the words ‘access to’, ‘available resources’ and ‘progressive realisation’. The courts have not yet pronounced on the interpretation of ‘basic health-care services’.

The National Health Act 2003 makes provision for free health care for children below the age of six years, as well as for pregnant women. The Act does not provide comprehensively for children’s health care. However, the Children’s Act 38 of 2005 has filled in some of the lacunae through the introduction of provisions relating to consent, confidentiality, participation and access to information in relation to health care.⁴⁰ Of particular importance to girls are the provisions in the Children’s Act that provide access to contraceptives. No pharmacy or clinic may refuse to sell or provide condoms to a child who is 12 years or older. A child who is 12 years of age or older can also be provided with other kinds of contraceptives without parental consent. However, in this situation the child must be medically examined to determine if there are medical reasons not to provide a specific type of contraceptive. This section is clearly aimed at the provision of contraceptive pills, intra-uterine devices or intravenously administered contraceptives. These progressive provisions came into operation on 1 July 2007, and were met with some consternation by the public. It is submitted that these are sensible provisions in a country where the teenage pregnancy rate remains unacceptably high.⁴¹ Parental approval and involvement in contraception may be the ideal, but the reality in South Africa is that many girls live in families that do not talk about sex.

The Choice on Termination of Pregnancy Act 92 of 1996 was similarly controversial in some quarters when it was first passed. That Act allows women to choose to terminate their pregnancies in accordance with the provisions of

40 Sections 130, 131, 132, 133 and 134 came into operation on 1 July 2007. See further J Sloth-Nielsen ‘Protection of Children’ in CJ Davel & AM Skelton (eds) *Commentary on the Children’s Act* (2007) 7–29 – 7–41.

41 S Panday, M Makiwane, C Ranchod & T Letsoala ‘Teenage Pregnancy in South Africa: With a Specific Focus on School-going Learners’ (2009) 6.

the Act – and the definition of ‘woman’ includes any female person. Thus the Act does not provide for any lower age limit for termination of pregnancy, the only natural limit being that the girl must be of sufficient physical maturity to have become pregnant. Girls below 18 years choosing to terminate their pregnancies without adult assistance will be counselled to encourage them to consult with their families, but a refusal by the girl to do so is not a ground to refuse to terminate the pregnancy.⁴² The constitutionality of the Act was challenged in the case of *Christian Lawyers South Africa v Minister of Health and Others (Reproductive Health Alliance as amicus curiae)*⁴³ on the basis that it permitted girls below the age of 18 years to choose whether to terminate their pregnancies – provided that they possessed the intellectual and emotional capacity to grant informed consent. The Court rejected the challenge on the grounds that the rights to make decisions concerning reproduction, to security in and control over their body, and access to reproductive health care, as well as the rights to dignity and privacy apply to everyone, including girls under the age of 18 years. Although the legislative framework allows adolescent girls easy access to termination of pregnancy services, few teenagers report using the available services, though data from the Department of Health suggests that 30 per cent of the usage of termination of pregnancy services is by young women between the ages of 15 and 19. Saadhna Panday et al observe that some teenage girls may be resorting to illegal abortion due to their lack of knowledge about the availability of free legally obtainable services, and uncertainty about the applicability of the law in respect of different trimesters of pregnancy.⁴⁴

Under the Child Care Act 74 of 1983 girls could also give up their babies for adoption without adult assistance. The Children’s Act has repealed those provisions and makes it necessary for a girl who wishes to give her child up for adoption to obtain the consent of her parent or guardian.⁴⁵ This appears to be a retrogressive step, particularly when viewed against parental consent issues in relation to reproductive health rights of girls. If girls can choose to prevent or terminate pregnancy without parental consent, it is illogical that they should require such consent to give up their children for adoption.

Adolescent girls’ health needs are often overlooked as a specific category warranting targeted services, and this prompted the UN Committee on the Rights of the Child to issue two General Comments on the subject in 2003.⁴⁶ The first was General Comment 3 on HIV AIDS and the Rights of Children. Paragraph 8 of General Comment 3 records particular concern about gender-based discrimination combined with taboos or negative judgmental attitudes

42 Section 5(3).

43 2004 (1) BCLR 1086 (T).

44 Panday et al (note 41 above) 6.

45 Section 233(1)(a) of Act 38 of 2005. See further T Mosikatsana & J Loffell ‘Adoption’ in Davel & Skelton (note 40 above) 15-12. The authors acknowledge that it is good practice for guardians to be involved where a minor girl is giving up her child for adoption, but warn that making this mandatory could cause problems in certain circumstances.

46 UN Committee on the Rights of the Child General Comment 3 on HIV AIDS and the Rights of Children (2003); General Comment 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child (2003).

to sexual activity of girls, often limiting their access to preventive measures and other services. In the design of HIV-AIDS-related strategies, and in keeping with their obligations under the Convention, states are required to give careful consideration to prescribed gender norms within their societies with a view to eliminating gender-based discrimination as these norms impact on the vulnerability of both girls and boys to HIV-AIDS. The Comment recommends that states should, in particular, recognise that discrimination in the context of HIV-AIDS often impacts girls more severely than boys.

Many of the issues raised in General Comment 3 are practically illustrated in a study relating to children's rights in the context of HIV-AIDS in sub-Saharan Africa which found that girls are particularly vulnerable to HIV-AIDS because of their anatomy, their tendency to have relationships with older men who are more likely to be infected already, and their inability to manage their sexual relationships due to dominating views of gender roles.⁴⁷ Gender norms were found to play an important role, making it difficult for girls to say 'no' to sex, because it was seen as a part of life or an expectation from society that they should satisfy men and boys. In that context, if a girl refused, she might become a victim of violence or rape.⁴⁸ Transactional sex was found to be commonplace in the context of poverty, with sex being seen as a commodity not to be given away without a price. This was linked to adolescent girls having sex with 'sugar daddies', and the response of adolescent boys to this was to have sexual relationships with girls who were younger than themselves.⁴⁹ A key recommendation of the sub-Saharan study was that there should be interventions targeting men involved in transactional sex with young girls. A corollary to this was that girls should be educated in the relative risks of having sex with older men, as many of them seemed to be under the mistaken impression that married or older men would be less likely to be infected with HIV-AIDS.⁵⁰ The report concluded with the recommendation that girls should be provided with opportunities to avoid transactional sex.

Some practical suggestions for how to provide such opportunities can be gleaned from a paper presented by Judith Bruce at the Expert Group meeting on the 'elimination of all forms of discrimination and violence against the girl

47 SC Thomsen et al (Save the Children Sweden) 'Tell me More! Children's Rights and Sexuality in the Context of HIV/AIDS in Africa' (2007) 17. This aspect of the study draws on A Bankole et al *Risk and Protection: Youth and HIV/AIDS in sub-Saharan Africa* (2004).

48 In this regard, the study drew on the research of E Maticka-Tyndale et al 'The Sexual Scripts of Kenyan Young People and HIV Prevention' 2005 7(1) *Culture, Health and Sexuality* 27.

49 R Pattman & F Chege *Finding our Voices: Gendered and Sexual Identities and HIV/AIDS in Education* (2003). See also L Richter & S Rama *Building Resistance: A Rights-based Approach to Children and HIV/AIDS in Africa* (2006) 30.

50 Save the Children Sweden (note 47 above) 39. See also S Leclerc-Madlala ('Sugar Daddies and HIV: Is it Really About Money, Money, Money?' 2008 6(3) *HSRC Review* 11, 12) who warns that the reasons for girls having sex with older and more wealthy men are complex, and the solutions need to be broad enough to encompass broader issues.

child'.⁵¹ Bruce identifies puberty as a critical moment in a girl's life when, for many girls, vulnerability is consolidated. As puberty usually occurs at around 12 years of age for girls, Bruce points out that the age of 12 may be the last moment at which one can still reach the most vulnerable girls. At around this age is the transition from primary school to high school, and due to her biological changes, a girl often finds that school is no longer a safe space.

This is poignantly true in South Africa, where studies have shown that girls do not feel safe at school, particularly as sexual harassment and abuse by boys and teachers often occurs in adolescence.⁵² Bruce points out further that at the same moment that school begins to feel unsafe, the public space also becomes increasingly dangerous. She cites a study in KwaZulu-Natal which found that girls reported much lower levels of comfort in their schools and their communities than did boys.⁵³ Around this time, young girls may also feel a need for independent and disposable income. Bruce suggests some ways in which it is possible to connect existing structures with disadvantaged girls. She records that safe schooling of adequate quality remains the overarching priority. It is important to know when girls drop out of school and to make more efforts to keep them there. In addition, it is important to create safe spaces in communities – for example through youth centres – which can be of great assistance to adolescent girls.⁵⁴ South Africa does have such centres in the form of loveLife Y Centres, which aim to prevent the spread of HIV amongst young people through providing information and connection to services, but they are not spread widely throughout the country and there are no comprehensive studies on their effectiveness.⁵⁵

The Committee on the Rights of the Child's General Comment 4 focuses on the states' obligation to create a safe and supportive environment through the provision of laws and services to assist with the management of adolescent health issues. There is emphasis on the provision of information, involvement of adolescents in decision-making, and respect for their evolving capacity. Paragraph 31 of General Comment 4 deals specifically with the rights of adolescent girls. Girls should have access to information on the harm that early marriage and early pregnancy can cause, and those who become pregnant should have access to health services that are sensitive to their rights and particular needs. States parties should take measures to reduce maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practices, and to support adolescent parents. Young mothers, especially where support is lacking, may be prone to depression and

51 J Bruce 'A Note on the Social and Economic Development and Reproductive Health of Vulnerable Adolescent Girls' (2006). The Expert Group Meeting was the result of a collaboration between the UN Division for the Advancement of Women and UNICEF. It was held at the UNICEF Innocenti Research Centre in Florence, Italy, 25–28 September 2008.

52 Veriava (note 16 above).

53 N Swan, J Diers, K Hallman, B Devnarain & N Mthembu 'Using Maps to Assess Safe and Unsafe Spaces in School Communities: A Guide for Practitioners' (2005).

54 Bruce (note 51 above).

55 P Naidoo 'Youth Divided: A Review of loveLife's Y-Centre in Orange Farm' (2003).

anxiety, compromising their ability to care for their child. The role of the state is to develop and implement programmes that provide access to sexual and reproductive health services, including family planning, contraception and safe abortion services where abortion is not against the law, as well as adequate and comprehensive obstetric care and counselling; to foster positive and supportive attitudes towards adolescent parenthood in their mothers and fathers; and to develop policies that will allow adolescent mothers to continue their education.

Current child health initiatives tend to target babies and very young children, and then health professionals do not see children again until they are young adults. Child health initiatives should be interfaced with adolescent policy, and this may be particularly urgent when seeking to protect adolescent girls who may be affected in many different ways: as orphans, as carers for sick parents or siblings, and also as individuals subject to transactional sex. Girls who have babies whilst still young are also a concern, and motherhood initiatives should be refocused to reach out more specifically to single teenage mothers, as well as teenage mothers who have married young. Bruce commends new ‘livelihoods’ approaches including microfinance that have been successful in assisting adult women – she calls for an adoption of what has been learned from these initiatives to economically disadvantaged girls. In South Africa, there are few services available to teenage mothers, with the emphasis on CSGs as the key government response. This provides barely sufficient food for the child to survive on and offers nothing to support the teenage mother herself. The HIV & AIDS National Strategic Plan 2007–2011 acknowledges that pregnant teenage girls have been under-emphasised in policy and programme development, and that the services that have been provided have yielded negligible results.⁵⁶ Clearly, responsive services for teenage mothers in South Africa are an area where more work needs to be done.

(c) Nutrition

Karen Kallman describes the right to food from a gender perspective in some detail.⁵⁷ The international instruments guarantee adequate nutritious food and clean drinking water for children.⁵⁸

Section 28(1)(c) of the South African Constitution sets out nutrition first in its list of socio-economic rights applicable to each child. This has to be read together with s 27(1)(b) which provides to everyone the right to sufficient food and water. The broader right, for all people, is to be realised progressively

56 Department of Health ‘HIV & AIDS & STI National Strategic Plan 2007–2011’ 37–8 <<http://www.doh.gov.za/docs/misc/stratplan/2007-2011/part2.pdf>>.

57 K Kallman ‘The Right to Food – Addressing Women’s Needs as Individuals, Wombs and Mothers’ in B Goldblatt & K McLean (eds) *Women and Socio-Economic Rights in South Africa* (2011) forthcoming.

58 Article 24(2) of the UNCRC and art 14(2) of the ACRWC, the latter also emphasises the provision of information about nutrition and the importance of breastfeeding.

by the state within the available resources. This means that the state must institute measures to promote access to food and water. The right to nutrition in s 28(1)(c) is not qualified in the same manner. Does this mean that children have a direct and immediate claim against the state for the provision of food? The approach of the Constitutional Court in the *Grootboom* and *TAC* cases leads us to the conclusion that children living together with their parents must look first to their parents for the provision of nutrition. The constitutional duty on the state includes, firstly, the creation of a regulatory environment to ensure that those parents caring for children do in fact provide adequate nutrition for their physical and mental development. Secondly, the state must directly provide for the nutritional needs of children who are living separately from their parents, as well as children who are living with parents who are unable to provide their children with adequate nutrition due to poverty or other reasons. No legal claims have been made before the courts regarding children's right to nutrition.

The South African government was slow to establish a coherent policy framework to fulfil the right to food.⁵⁹ In 2002 the Department of Agriculture published its *Integrated Food Security Strategy for South Africa* (IFSS). The IFSS acknowledges that food insecurity often affects the more vulnerable members of the family, namely children and women – this suggests that girls are doubly vulnerable. The costs associated with food insecurity at the intra-household level relate to slow educational development, and the IFSS highlights the fact that this risk may disproportionately affect female children.⁶⁰ However the IFSS goes on to make a comparison according to the international ranges of protein energy malnutrition, as measured by stunting levels, and finds that protein energy malnutrition is a moderate public health problem in South Africa.⁶¹ Children in rural areas and those of mothers with limited education are worst off.⁶²

With regard to children, there are two permanent programmes to provide food and nutritional supplementation to children. The first of these is the Protein Energy Malnutrition Programme, which targets only severely malnourished children who are treated at public health facilities. The second programme is the Primary School Feeding Scheme, which is also referred to as the National School Nutrition Programme (NSNP). This is a targeted programme that aims to feed all grades from R up to 7 for 156 out of approximately 196 school days

59 D Brand 'Food' in S Woolman et al (note 26 above) 56C-23. The Department of Health issued an Integrated Nutrition Programme in 1995, but this was not comprehensive as it did not make provision for food security.

60 Department of Agriculture *Integrated Food Security Strategy South Africa* (2002) 16.

61 The national stunting rate ranges between 23 and 27 per cent, which means that approximately 1,5 million children under the age of six years are malnourished.

62 South African Vitamin A Consultative Group *Children Aged 6-71 Months in South Africa 1994: Their Anthropomorphic, Vitamin A, Iron and Immunization Coverage Status* (1995) chapter 5, 5: 'Children of mothers without formal education or with less than five years of formal education were more than twice as likely to have a low vitamin A status than children of mothers with a standard 10 or higher level of education' <www.sahealthinfo.org/nutrition/vitamina.htm>.

per year. The NSNP feeding scheme excludes all children below school-going age, most high school children, and all children not in school from its ambit.⁶³

The programme was transferred from the Department of Health to the Department of Education in 2004. An evaluation process by UNICEF, together with the Department of Education has produced a national report⁶⁴ setting out a summary of the results of the evaluation, covering the financial years from 2004/5 to 2006/7. According to the report, 98 per cent of the schools were feeding all targeted learners. The information in the survey does not give any gender breakdown and is not specific about which children are being targeted, or for how many days of the year. The available information regarding school feeding does not reveal any gender bias, and this is linked to the gender parity in enrolment of girls and boys in primary school.⁶⁵

According to the Annual Report (2007/8) presented by the Department of Education to the Education Portfolio Committee in Parliament in late 2008, the NSNP was reaching 6 million learners in 17,899 schools (with a budget of R1,152 billion per annum).⁶⁶ This is a massive increase over the 1,6 million reached in 2005/6.⁶⁷

Amongst children below the age of 15 years, it is encouraging to observe that deaths caused by malnutrition have been reduced by more than half between 2000 and 2005.⁶⁸ The gender difference in the numbers of deaths is negligible across all causes of death of children below the age of 15 years, including malnutrition. The difference is less than 1 per cent in all categories.

The results of this gender analysis compares favourably with the experience of India, for example, where girl children have a 36 per cent higher mortality rate than boys in the post-neonatal period and a 61 per cent higher rate at ages one to four years.⁶⁹ In addition, the population figures for girls and boys are markedly different. The gender ratio in India varies substantially from state to state and between urban and rural areas. Surprisingly, rural areas have 946 females for 1,000 males whereas in urban areas, there are 900 females for 1,000 males, which brings the average in the country to about 933:1,000. This difference in the gender ratio is the result of cultural and psychological notions surrounding girls and women, and is also linked with gender differences in nutrition. The bride price system in India requires money to be paid by the bride's family to the bridegroom's family, and it is suggested that this

63 K Kallman 'Food for Thought: A Review of the National School Nutrition Programme' in A Leatt & S Rosa (eds) *The Means to Live: Targeting Poverty Alleviation to Realise Children's Rights* Children's Institute (2005).

64 Department of Education & UNICEF 'Evaluation of the School Nutrition Programme, National Report: South Africa' (2008) <http://www.unicef.org/southafrica/SAF_resources_nutritionnat.pdf>.

65 Veriava (note 16 above).

66 PMG Minutes, 19 November 2008.

67 K Kallman 'Young Children's Position Paper' 49.

68 B Draper & J John-Langba 'Child Health: The General Context' in P Proudlock et al (eds) *South African Child Gauge 2007/2008* (2008) 78.

69 H Shroff 'Cultural, Social and Psychological Factors Impacting Child Nutrition in India: A Critical Review' (2008) conference presentation, Oxford Roundtable: Children in Danger.

has a bearing on the attitudes towards the nurturing of girls.⁷⁰ An interesting comparison can be made with the South African custom of lobolo, in which the payment is made by the bridegroom to the family of the bride. Although no research results have been found to support this view, it appears that the custom may have some protective effect on girls in relation to mortality.

Research has demonstrated that the CSG has had a positive impact on nutrition, growth and alleviating hunger.⁷¹ There is an indication that child hunger is decreasing, and this could well be as a result of more children becoming eligible for the CSG.

(d) Social services and security

Research into the area of children's rights to social services has trailed behind the analysis into other areas of children's socio-economic rights. Mira Dutschke has posited that the way to understand social services rests in the idea of children's right to be cared for by their parents or family, to be provided with alternative care if there is a failure thereof, and to receive protection from abuse and neglect.⁷²

The Children's Act 38 of 2005 presents a comprehensive system to protect children's rights, supported by social services. There is a new emphasis on prevention and early intervention services, in order to keep children safe in their own families where possible. Where it is not possible, there are children's court hearings to determine the correct placement for a child.

The cases referred to earlier in this article dealing with children living separately from their parents demonstrate the justiciability of the right to social services. *Centre for Child Law v Minister of Home Affairs*⁷³ dealt with social services required for unaccompanied foreign children. The Court found that they were, like South African children lacking parental care, entitled to the social services of a care inquiry and to accommodation in a place of safety pending the outcome. The second case, *Centre for Child Law and Others v MEC for Education, Gauteng and Others*,⁷⁴ dealt with children who had been removed from their families due to abuse or neglect, only to find themselves in equally bad or worse conditions when in the care of the state. The Court gave a wide-ranging order containing short-term relief (sleeping bags for each child), and medium-term relief (a perimeter fence, appointment of therapeutic services personnel and a development quality assurance process). These cases are clear examples of the Court directly ordering the immediate delivery of social services (and material assistance), unencumbered by the qualification of progressive realisation. It remains to be seen how the courts will deal with a

70 VK Borooh 'Gender Bias among Children in India in their Diet and Immunisation against Disease' (2004) 58 *Social Science and Medicine* 1719; A Bajpai *Child Rights in India: Law, Policy and Practice* (2003) 384.

71 K Hall & J Monson 'Does the Means Justify the End? Targeting the Child Support Grant' in J Monson et al *South African Child Gauge 2006* (2006) 40.

72 M Dutschke *Defining Children's Constitutional Right to Social Services* (2006) 67–8.

73 Note 33 above.

74 Note 34 above.

demand for social services to be rendered immediately to children still living with their parents. Whilst neither of these cases had a gender dimension, it is easily envisaged that girls have a claim to enforce specific social services – such as appropriate services for pregnant girls.

Social security for children takes the form of social assistance, which amounts to cash grants paid out to care givers. The grants relevant to children are the foster care grant, the care dependency grant, and the CSG. The grant that will be detailed here is the CSG, as it is the one that affects girls who are teenage mothers. The history of the CSG and a critique of the failure to include a portion for the caregiver is clearly described in the article by Goldblatt.⁷⁵ The CSG is payable to the primary caregiver of children. The income of the primary caregiver is means-tested. The Children's Institute embarked on litigation in 2008 in order to tackle two of the more unreasonable provisions of the CSG means test.⁷⁶ The first dealt with the fact that the income test had not been increased in line with inflation, and the second was the requirement that the means test include the spouse's income, even if the spouse is not related to the child and has no duty of care towards the child. The matter was ultimately withdrawn due to the fact that the Department of Social Development amended the regulations in order to deal with these unreasonable aspects.⁷⁷ Since that time, the regulations have been further amended.⁷⁸ Successful lobbying by civil society organisations saw changes made to the first draft which included children born any time after 1 January 1994. The CSG has been progressively increased since its inception in 1998, both in terms of the amounts paid and the age range of children in respect of whom the grant is paid. The government has made a commitment to extend the reach of the grant up to the child turning 18 years of age, which is being progressively introduced.

Teenage girls and young women have borne the brunt of speculation that they are likely to be induced by the grant to have children, and that the grant will therefore lead to teenage pregnancies and 'child farming'. Research undertaken by the Human Sciences Research Council has exploded this myth. Monde Makiwane and Eric Udjo⁷⁹ have found that, contrary to widespread public perception, there is no evidence that the CSG is a cause of an increase in pregnancies amongst girls and young women. The report acknowledges as a starting point that teenage fertility is relatively high. The upsurge in teenage

75 Goldblatt (note 1 above) 446. See further S Hassim 'Social Justice, Care and Developmental Welfare in South Africa: A Capabilities Perspective' (2008) 34(2) *Social Dynamics* 104.

76 *Ncamile and the Children's Institute v The Minister of Social Development and Minister of Finance* Case no 227/2008 Eastern Cape Division of the High Court. See further Children's Institute *Annual Report* (2007/2008) 24.

77 The regulations were published on 22 August 2008.

78 Social Assistance Act 13 of 2004 Amendment: Regulations GN 534 GG 32853 of 31 December 2009.

79 M Makiwane & E Udjo 'Is the Child Support Grant Associated with an Increase in Teenage Fertility in South Africa? Evidence from National Surveys and Administrative Data' (2007) 5(1) *HSRC Review* 6, 7. See also T Mokoma 'An Analysis of the Impact of the Child Support Grant on Teenage Fertility Rates in South Africa' (2008) unpublished masters thesis, University of Stellenbosch.

fertility was found to pre-date the introduction of the CSG, and the researchers interpret it as being linked to the end of apartheid, similar to a post-war baby boom.⁸⁰ In the first eight years of the grant (which was the period they reviewed) teenage beneficiaries of the grants made up less than 3 per cent of the total, this despite the fact that teenage fertility makes up 15 per cent of all fertility. Makiwane and Udjo make the following incisive point: 'If young women were bearing children to benefit from the grant one would expect a higher proportion of teenagers to take advantage of the money'. Instead, the figures show that it is women of 35 years and older who are likely to be the beneficiaries of the grants.

The CSG makes a positive difference in the lives of teenage mothers and their children, but this is limited. Social assistance needs to be supported by other kinds of interventions that will allow girls and young women to be more self-reliant and less dependent on men. This in turn will have a positive effect on their reproductive health, allowing them to avoid, or appropriately space, further pregnancies.

(d) Shelter

Children's right to shelter,⁸¹ as explained in the context of the *Grootboom* case above, was found by the Constitutional Court to mean nothing different from housing. Thus, children must look to their parents to provide them with housing. The state must take reasonable measures, within the available resources, to achieve the progressive realisation of the right to adequate housing for everyone.

Research has been undertaken regarding children living in informal versus formal housing.⁸² The research shows that there are 2,6 million children in South Africa living in backyard dwellings or shacks in informal settlements.⁸³ Overcrowding – both in formal and informal housing situations – places children at risk. It is apparent that the government's housing provision schemes are not keeping pace with the increase of the population, and that the size of the houses being built is too small.⁸⁴

Access to sanitation, water and electricity can also be considered together with housing. Informal settlements generally lack these amenities. The provision of adequate sanitation to existing formal housing has led to a slight improvement in children's access to sanitation.⁸⁵ The fact that just under half of South Africa's children still do not have access to adequate toilet facilities

80 See further K Naidoo 'Agency Amidst Adversity: Poverty and Women's Reproductive Lives' in K Van Marle (ed) *Sex, Gender, Becoming: Post-Apartheid Reflections* (2006) 93,102. Naidoo makes the link between teenage pregnancy and poverty, and that girls having babies with teachers or taxi drivers may be seen as a way of ensuring some financial support.

81 Section 28(1)(c).

82 K Hall 'Children's Access to Housing' in Proudlock et al (note 68 above) 86.

83 McLean (note 30 above) 55-29.

84 Hall (note 82 above) 90.

85 J John-Langba & D Marera 'Children's Access to Sanitation, Water and Electricity' in Proudlock et al (note 68 above) 91.

is of grave concern, due to the health risks that are occasioned by poor sanitation. The data relating to safe drinking water on site (a reliable source of clean water at or near the child's house) are not sufficiently strong to make a claim that children are progressively gaining better access, although the general trend seems positive, with marked provincial disparities.⁸⁶

Some of the poorest households in the country do not have electricity. There are a number of risks associated with this – open fires and paraffin burners used for cooking and illuminations often cause burns of children, and can also cause shack fires, placing children's lives at risk. The lack of lighting hampers children who need to complete homework or study for exams. Deaths and injuries of children from electric shock due to illegally connected electrical appliances are frequently reported. The number of households with an electricity connection is increasing.⁸⁷

Due to allocation of chores according to gender stereotyping in many households, girls are often tasked with carrying water and collecting firewood. Not only does this leave girls with less time for leisure and for completing school homework and studying, it also makes them vulnerable to sexual violence when they seek water or firewood in isolated places.⁸⁸

Child-headed households have been a particular area of interest regarding the right to shelter or housing. Children who are orphaned sometimes elect to stay in the family home after the death of parents. The reasons for this may be to preserve the family's fixed property as an asset, to prevent property grabbing by families,⁸⁹ or in order to allow siblings to stay together. The General Household Survey 2005 records about 118,500 children living in a total of 66,500 child-headed households. This is less than 1 per cent of the children and households in the country.⁹⁰ It appears that child-headed households are often temporary arrangements whilst other plans are being made or the estate of a deceased parent is wound up.⁹¹ A child-headed household is not considered to be an alternative care placement, but rather provides recognition of a situation that does occur in South Africa. This is evident from the fact that child-headed households are not included in the chapter in the Children's Act on alternative care,⁹² which is limited to temporary safe care, foster care and placement in a child and youth care centre. The Children's Act recognises the existence of child-headed households, and aims to regulate them in the chapter of the

86 Ibid 92.

87 Ibid 93.

88 J Dugard & N Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25 SAJHR 546, 547.

89 J Sloth-Nielsen *Realising the Rights of Children Growing Up in Child-headed Households: A Guide to Laws, Policies and Social Advocacy* (2004) 2.

90 Children Count Abantwana Babalulekile *Facts about Children Living in Child Headed Households* (2005) <<http://www.childrencount.ci.org.za/>>.

91 H Meintjies et al 'Child-headed Households in South Africa: A Statistical Brief' (2009). This is a report of the Children's Institute at the University of Cape Town, and is part of their Children Count/ Abantwana Babalulekile project.

92 Chapter 11 of Act 38 of 2005.

Act dealing with protection of children.⁹³ Thus although a children's court will not make an order placing a child in a child-headed household, the court may recognise that a child or children are living in such a household and will provide protection and support for the children.⁹⁴

Although it is generally thought that child-headed households are a growing phenomenon in South African society, recent research has challenged this assumption. The study,⁹⁵ based on an analysis of the 2006 General Household Survey, found that 0.67 per cent of children are living in child-headed households, which translates to approximately 122,000 children. The study found that a survey spanning the years 2000 to 2007 indicate no increase in the proportion of children living in child-headed households. Another assumption that this study throws into question is the belief that the majority of children living in child-headed households are orphans. The survey found that only 8 per cent of children living in child-headed households were children who had lost both their mother and father, and an astonishing 80 per cent had a living mother. This means that children in a child-headed household might often have a parent who is too sick to care for them, or who has moved away.

Initially the South African Law Reform Commission recommendations did not set any age limits regarding the heads of child-headed households. In an article published in 2004, Beth Goldblatt and Sandra Liebenberg protested against the fact that subsidies could not be paid to child heads of households who were younger than 16 years, because of the requirement of an identity document.⁹⁶ During the debates about the Children's Bill a decision was taken in Parliament to set the age of a child head of a household at 16 years. The final version of the Children's Act recognises only households headed by children who are 16 years or older.⁹⁷ This effectively means that a child-headed household is defined as a household in which children are being cared for by a 16 or 17 year old. Other alternative care arrangements will be made for children where there is no caregiver of 16 years of age, and once the head of the household turns 18 years he or she is a major, and therefore does not qualify for the assistance granted to child-headed households. The caregiver would, however, remain eligible to receive the CSG as the primary caregiver of the children living in the household, although his or her own grant will fall away.

93 Chapter 7 of Act 38 of 2005.

94 For a discussion on the legal provisions see D Kassin & P Mahery 'Special Child Protective Measures in the Children's Act' in Boezaart (note 23 above) 196–9.

95 Meintjies et al (note 91 above).

96 B Goldblatt & S Liebenberg 'Giving Money to Children: The State's Constitutional Obligations to Provide Child Support Grants to Child Headed Households' (2004) 20 *SAJHR* 151, 163.

97 Section 137(1) of the Children's Act reads as follows: A provincial head of social development may recognise a household as a child-headed household if (a) the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household; (b) no adult family member is available to provide care for the children in the household; (c) a child over the age of 16 years has assumed the role of care-giver in respect of the children in the household; and (d) it is in the best interest of the children in the household. Section 137(2) allows for a mentor to be appointed to assist the head of the child-headed household, and either the mentor or the child head may collect the grant, depending on the recommendation of the social worker.

According to Sloth-Nielsen, girls are more likely to be the carers in child-headed households. She explains that gender-based discrimination results in girls being more likely than boys to have to care for terminally ill family members, and to be the heads of child-headed households, or to bear a large responsibility for household chores.⁹⁸ This often causes them to leave school and to seek employment, and it also places them at risk of being sexually exploited if there are problems of economic security for the family.

V CONCLUSION

Children's entitlement to socio-economic rights is a well researched area in South African law. Law reform in respect of child law has been supported by budgeting and implementation planning, and there is a profound understanding in the child rights sector that children's rights cannot be realised without provisioning. Detailed research into the different ways that poverty impacts on children, drawn on in this article, is readily available and is being updated on a regular basis.⁹⁹ However, very little research has focused on girls' socio-economic rights, and there is clearly a need for more in-depth analysis in this regard.

Despite recognition in the literature of the special vulnerability of girls and young women, particularly in the context of HIV-AIDS, little attention appears to have been paid in the South African context to strategies and mechanisms that can be of direct assistance to them. Adolescence brings vulnerability to sexual exploitation, to teenage pregnancy and other reproductive rights challenges, to invisible forms of work in the form of caring for their own children or their younger siblings.

Whilst some authors have suggested interventions that may be useful in providing strategic assistance for the achievement of their socio-economic rights, particularly to adolescent girls, it must be noted that girls in this age cohort can and should be active participants in the formulation of their own demands for change. Their participation is an imperative of both the capabilities approach promoted by feminist legal theory¹⁰⁰ and the children's rights injunction to involve children actively in making decisions about them. A research and practice agenda is envisaged that would see South African researchers and activists working together with girls to properly document their lived reality, and to explain possible options that would assist girls in developing solutions to achieve substantive equality. Of course, this would have to be done with full awareness of the power dynamics that constrain and structure the choices that girls living in poverty can make. Indeed, the solutions to be suggested will have to be tempered by the realities of girls'

98 J Sloth-Nielsen 'Realising the Rights of Children Growing up in Child-headed Households' (2004) report of the Community Law Centre <<http://www.communitylawcentre.org.za/clc-projects/childrens-rights/other-publications>>.

99 In particular, the Children's Institute's South African *Child Gauge* and *Children Count* publications are a rich source of information. See <<http://www.ci.org.za>> and <<http://www.aces.org.za>>.

100 Fredman (n 3 above) 422-7.

vulnerabilities, and the participation of girls living in poverty will ensure that pragmatism.

Croll points out that the demands of girls may differ not only from the demands of other children, but also from demands of women, due to generational differences.¹⁰¹ Certainly, there are common sets of concerns around access to health care and reproductive rights. It is clear that girls are unlikely to realise their potential in households and communities where women's rights are obstructed. There is also the reality of continuity: girls become women. The linkages create some blurring of the competitive edges of rights claims – generally rights are set up as oppositional, but continuity points to the value of a relational approach to rights.¹⁰² This theme has been developed by Jennifer Nedelsky, which has been discussed by Goldblatt.¹⁰³ Nedelsky's argument urges us to not to view rights as boundaries or constraints, but rather as threads linking people who are in relationships. There are also advantages for girls below the age of 18 years to be able to claim their rights as children. Whilst girls' rights are deserving of special, focused attention, it is preferable that this be done in a way that does not sever them from the broader groups to which they also belong – namely women and children.

101 Croll (note 2 above) 1291.

102 E Burman 'The Abnormal Distribution of Development: Policies for Southern Women and Children' (1995) 2(1) *Gender, Place and Culture: A J of Feminist Geography* 21, 28: '[I]t is impossible to divide absolutely issues relevant to women from those of children. This is in contrast to the way discourse of rights sets up parties as distinctive and competing rather than continuous or allied'. See also M Minow 'Rights for the Next Generation: A Feminist Approach to Children's Rights' (1986) *Harvard J of Law and Gender* 1, 18.

103 Goldblatt (note 1 above) 447. See also M Pieterse 'Relational Socio-Economic Rights' (2009) 25 *SAJHR* 198, who argues for a recognition that socio-economic rights are often accessed privately, through relationships of dependency.