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INTERPRETING AND LIMITING THE *BASIC* SOCIO-ECONOMIC RIGHTS OF CHILDREN

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DIE INTERPRETASIE EN BEPERKING VAN DIE BASIESE SOSIO-EKONOMIESE REGTE VAN KINDERS

INHOUD

- Inleidende opmerkings
- Probleemstelling
- Regspraak
- Interpretasie
- Beperking
- Voorstelle
- Afsluiting

ARTIKEL 28(1)(c)

- "elke kind het die reg op basiese voeding, skuiling, basiese gesondheidsorgdienste en maatskaplike dienste"
- Geen interne beperking

ARTIKEL 26 & 27

- Regte van "**almal**" op toegang tot behuising, gesondheidsorg, voedsel, water en sosiale sekerheid.
- Bevat interne beperkingsklousule: staat moet
  - Redelike stappe neem
  - Progressief
  - Binne beskikbare bronne

DOEL VAN ONDERSOEK

- Die benadering wat die Konstitusionele Hof gebruik in die interpretasie en moontlike beperking van kinders se basiese sosio-ekonomiese regte te **ontleed**;
- Die huidige benadering te analiseer en te **kritiseer**; en
- **Voorstelle** te maak oor 'n benadering wat gebaseer is op die substansiële inhoud van artikel 28(1)(c) deur die twee fase benadering in grondwetlike analisering **toe te pas**.

GRONDWETLIKE ANALISE

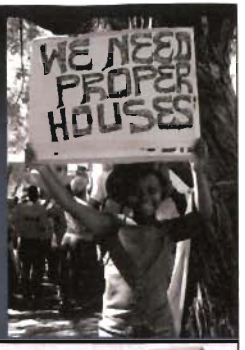
- **Twee fases:**
  1) Maak 'n optrede of wet van die respondent inbreuk op 'n reg?
     (Bewyslas op applikant)
  2) Is die inbreukmaking regverdigbaar?
     (Bewyslas op respondent)

VERPLIGTINGE OP STAAT

- Respekteer –negatiewe verpligting (staat moet weerhou om iets te doen)
- Beskerm, bevorder en verwesenlik – positiewe verpligting (staat moet iets doen)

GROOTBOOM SAAK

- Mev Grootboom, 510 volwassenes en 390 kinders woon in haaglike omstandighede in 'n plakkerskamp.
- Beroep hulle tot hof om behuising te voorsien uit hoofde van artikels 26 en 28(1)(c).



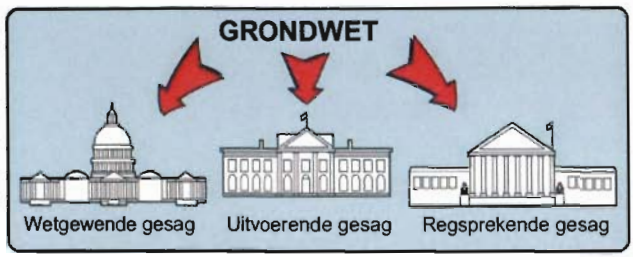
TAC SAAK

- TAC maak aanspraak op die voorsiening van anti-retrovirale middels vir arm swanger vrouens.
- Beroep hulle tot hof om gesondheidsorg te voorsien uit hoofde van artikels 27 en 28(1)(c).

INHOUD GEE AAN ARTIKEL 28(1)(c)

- Hof behoort eerstens artikel 28(1)(c) te definieer onafhanklik van moontlike interne of algemene beperkings.
- Dit sluit o.a. in die identifisering van 'n minimum kern van die reg (minimum core).

SKEIDING VAN MAGTE



INHOUD GEE AAN ARTIKEL 28(1)(c)

- Artikel 39(1) van Grondwet.
- Waardes in Grondwet – menswaardigheid, vryheid, gelykheid ens.
- Volkereg – Internasionale Verdrag insake Sosiale, Ekonomiese en Kulturele Regte, Konvensie oor die Regte van 'n Kind ens.

One *law* for one *nation*

BEPERKING VAN REGTE

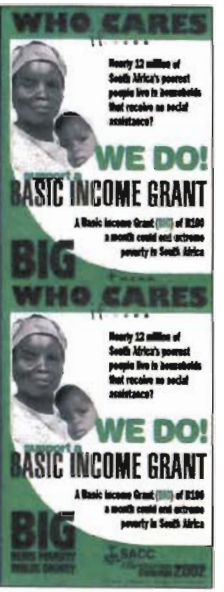
- Geen reg is absoluut nie.
- Vraag onstaan:
  - Moet die interne beperkings in artikels 26 en 27 aangewend word of moet die algemene beperkingsklousule gebruik word?

INTERNE EN ALGEMENE BEPERKING

- Artikels 26(2) en 27(2):
  - Die staat moet **redelike** wetgewende en **ander maatreëls** tref om binne sy beskikbare middele hierdie reg in toenemende mate te verwesenlik.
- Artikel 36(1):
  - Die regte in die Handves van Regte kan slegs kragtens 'n **algemeen geldende regsvoorskrif** beperk word in die mate waarin die beperking **redelik** en regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid, met inagneming van alle tersaaklike faktore, met inbegrip van- (a) die aard van die reg; (b) die belangrikheid van die doel van die beperking; (c) die aard en omvang van die beperking; (d) die verband tussen die beperking en die doel daarvan; en (e) 'n minder beperkende wyse om die doel te bereik.

KHOSA SAAK

- Permanente inwoners word uit die sosiale bystandsisteem gesluit.
- Beroep op hof om bepalings in die Sosiale Bystandwet tav ouderdomspensioen en kinderbystandstoelaag wat 'n burgerskapvereiste daarstel, ongeldig te verklaar.

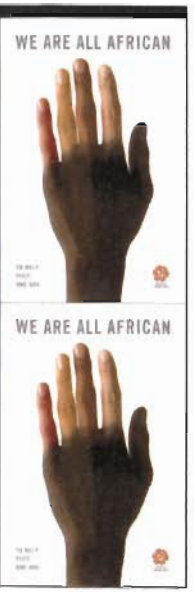


BEWYSLAS

- Hof gebruik interne beperkings om inhoud te gee aan reg gedurende 1e fase van grondwetlike analise.
- Hof behoort inhoud aan reg in hierdie fase te gee.
- Vraag na redelikheid behoort eers by die 2e fase van grondwetlike analise.
- Bewyslas ten aansien van redelikheid moet op die respondent vestig.

AARD VAN MEGANISMES

- Artikel 36: algemeen geldende regsvoorskrif.
- Artikels 26(2) en 27(2): enige redelike maatreëls.
- Gebruikmaking van artikel 36 meer voordelig.



STANDAARD VAN REDELIKHEID

- *Soobramoney* saak: bona fides en rasionaliteit
- *Grootboom* saak: is daar 'n moontlikheid dat die beleid die doel kan bereik?
- *TAC* saak: sal die beleid die grondwetlike doel bereik?
- *Khosa* saak: proporsionaliteitstoets

FORMALISTIESE BENADERING

- Indien hof versuim om inhoud aan die reg te verleen gedurende 1e fase van grondwetlike analise, sal hof nie kan vasstel of maatreëls redelik is nie.
- Hof kan dan net vas stel of maatreëls rasioneel, inklusief, omvattend ens is.
- So 'n benadering is prosedureel en formalisties.

PROPORSIONALITEITS-TOETS

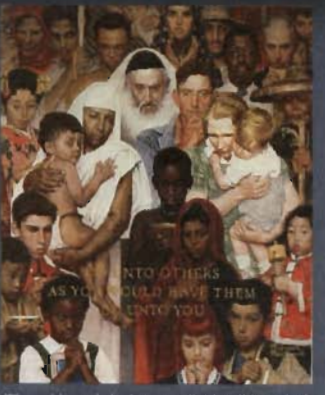
- Hof behoort ondersoek in te stel of daar ander en dalk beter maatreëls was om die basiese sosio-ekonomiese regte van kinders te realiseer.

AANBEVELING

- 'n Prinsipiële benadering om die sosio-ekonomiese regte van kinders aan te spreek is nodig.
- Noodsaaklik dat eisers weet waarop hulle geregtig is en
- Dat staat besef wat hulle verpligting is.
- Anders word hierdie regte, regte op papier alleen.

AFSLUITING

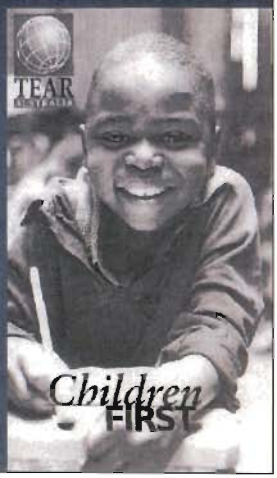
- **"....overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life. While poverty persists, there is no true freedom."**
- Nelson Mandela's speech to Trafalgar Square Crowd 3/2/2005



The golden rule by Norman Rockwell Inscribed with "Do unto others as you would have them do unto you." (Mosaic in United Nations building)

ARTIKEL 7(2) VAN DIE GRONDWET

Die Staat moet die regte in die Handves van Regte eerbied, beskerm, bevorder en verwesenlik.



ARTIKEL 28(1)(C) VAN DIE GRONDWET

Elke kind het die reg op basiese voeding, skuiling, basiese gesondheidsorgdienste en maatskaplike dienste;

ARTIKEL 26 VAN DIE GRONDWET

1) Elkeen het die reg op toegang tot geskikte behuising.
2) Die staat moet redelike wetgewende en ander maatreëls tref om binne sy beskikbare middele hierdie reg in toenemende mate te verwesenlik.

ARTIKEL 27 VAN DIE GRONDWET

1) Elkeen het die reg op toegang tot- (a) gesondheidsorgdienste, met inbegrip van reproduktiewe gesondheidsorg; (b) voldoende voedsel en water; en (c) maatskaplike sekerheid, met inbegrip van gepaste maatskaplike bystand indien hulle nie in staat is om hulself en hul afhanklikes te onderhou nie.
2) Die staat moet redelike wetgewende en ander maatreëls tref om binne sy beskikbare middele hierdie reg in toenemende mate te verwesenlik.

ARTIKEL 36(1) VAN DIE GRONDWET

Algemene beperkingsklousule

Die regte in die Handves van Regte kan slegs kragtens 'n algemeen geldende regsvoorskrif beperk word in die mate waarin die beperking redelik en regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid, met inagneming van alle tersaaklike faktore, met inbegrip van- (a) die aard van die reg; (b) die belangrikheid van die doel van die beperking; (c) die aard en omvang van die beperking; (d) die verband tussen die beperking en die doel daarvan; en (e) 'n minder beperkende wyse om die doel te bereik.

Ek dank u vir u teenwoordigheid.

Linda Jansen van Rensburg
9 November 2007

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INTERPRETING AND LIMITING THE *BASIC* SOCIO-ECONOMIC RIGHTS OF CHILDREN

Linda Jansen van Rensburg*

ABSTRACT

Section 28(1)(c) of the Constitution provides that 'every child has the right to *basic* nutrition, shelter, *basic* health care services, and social services.' It has been argued that in the absence of an internal limitation, these *basic* socio-economic rights of children place a direct and immediate duty on the state to provide children with basic social services. Current jurisprudence (the *Grootboom* and *TAC* cases) has not directly dealt with the issue whether children have a direct entitlement to these rights. However, the Constitutional Court indirectly dealt with the matter and implied that the basic socio-economic rights of children to be subject to the limitations as set out in section 26(2) and 27(2). This article investigates the approach used by the Court in the interpretation and limitation of the basic socio-economic rights of children and suggests an approach that is based on the substantive content of children's socio-economic rights by applying the two-stage approach of constitutional analysis of the Bill of Rights. In the first stage of analysis the Court should give substantive content to these rights. (For example identifying the minimum core entitlement of these rights.) In doing so the Court should be guided by the Constitution, the constitutional values, the transformative aims of the Constitution and international law. In the second stage of analysis the general limitation clause as opposed to the internal limitations in sections 26 and 27 should be employed. The general limitation clause calls for a full-blown proportionality test and it would therefore, be more difficult for the state to justify the limitation. A proportionality analysis will further allow for a higher degree of scrutiny to be applied in the case of the realisation of the duties imposed by section 28(1)(c), because children are vulnerable beneficiaries.

I INTRODUCTION

Section 28(1)(c) of the Constitution of the Republic of South Africa[1] provides that 'every child has the right to *basic* nutrition, shelter, *basic* health care services, and social services.[2] The rights in section 28(1)(c) may be described as socio-economic rights. Liebenberg describes socio-economic rights as entitlements 'that are concerned with the material dimensions of social

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[1] 1996.

[2] Own emphasis.

welfare'.[3] The socio-economic rights of children in section 28(1)(c) differ from the socio-economic rights of 'everyone' in sections 26 and 27 with regard to their textual setting in the Constitution. In section 28(1)(c) there is no internal limitation phrase that reads that the state only has the duty to take reasonable measures progressively within its available resources.[4] The ambit of the right appears to be qualified only by the adjective *basic* that refers to nutrition, health care services, social services and the word 'shelter' as opposed to 'housing' in the section.[5] This may be read to suggest that section 28(1)(c) only refers to a basic attenuated level of services needed for a dignified survival.[6]

It has been argued that in the absence of an internal limitation, the *basic* socio-economic rights of children place a direct and immediate duty on the state to provide children with basic social services.[7] Current jurisprudence has

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[3] S Liebenberg 'The interpretation of socio-economic rights' in S Woolman *et al* (eds) *Constitutional Law of South Africa* 2nd ed (2006) Ch 33 1; D Brand 'Introduction to the socio-economic rights in the South African Constitution' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 3.

[4] Liebenberg distinguishes between three categories of socio-economic rights, namely socio-economic rights that are qualified by an internal limitation, socio-economic rights that place a prohibition on state and private action and unqualified basic socio-economic rights. Examples of the latter are the rights of detained persons and prisoners to adequate accommodation, nutrition, reading material and medical treatment (section 35(2)(e)); as well as the right to basic education including adult basic education (section 29(1)(a)). Ibid Ch 33 1. For purposes of this article only the unqualified basic socio-economic rights of children will be discussed. Brand draws a similar distinction between socio-economic rights. Ibid 3.

[5] M Pieterse 'Reconstructing the private/public dichotomy? The enforcement of children's constitutional social rights and care entitlements' (2003) 1 *TSAR* 1, 5.

[6] The amici in the case of *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 72 (hereafter *Grootboom*) similarly argued that a distinction between housing on the one hand and shelter on the other must be drawn. They further contended that 'shelter is an attenuated form of housing and that the state is obliged to provide shelter to all children on demand'.

[7] In *Grootboom* (ibid) para 72 'the respondents and the amici emphasise that the right of children to shelter is unqualified and that, the "reasonable measures" qualification embodied in sections 25(5) 26, 27 and 29 are markedly absent in relation to section 28(1)(c)'. See

not directly dealt with the issue whether children have a direct entitlement to these rights. However, the Constitutional Court indirectly dealt with the matter and interpreted the basic socio-economic rights of children to be subject to the limitations as set out in section 26(2) and 27(2).[8]

The purpose of this article is to investigate the approach used by the Court in the interpretation and limitation of the basic socio-economic rights of children, to criticise the current approach and to suggest an approach which is based on the substantive content of children's socio-economic rights by applying the two-stage approach[9] of constitutional analysis of the Bill of Rights.

During the first stage of constitutional analysis it is investigated whether a law or conduct of the respondent infringed a right in the Bill of Rights.[10] The onus of proof rests on the applicant to show that the conduct or the status for which

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further Pieterse (note 5 above) 5; Liebenberg (note 3 above) Ch 33 49; D Brand 'Food' in S Woolman *et al* (eds) *Constitutional Law of South Africa* 2nd ed (2006) Ch 56C 1, 8.

[8] In *Grootboom* (ibid) para 74 the Court indicated that '[T]he obligation created by section 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by sections 25(5), 26 and 27 of the Constitution'. Section 26(2) and 27(2) respectively limits the realisation of the rights to reasonable measures that must be progressively realised within available resources.

[9] The two-stage model of limitations usually applies where there is an explicit provision or provisions in the Bill of Rights which limits the rights in the Bill of Rights. An example thereof is section 36 of the South African Bill of Rights. The one-stage model usually applies where there are no limitations on the rights in the Bill of Rights. The application of the one-stage model does not provide for a distinction between the scope and limit of a right whereas in the case of the two-stage model provision is made for a distinction between the scope of the right and the limitation of the right. G Van der Schyff *Limitation of Rights A study of the European Convention and the South African Bill of Rights* (2005) 11-12.

[10] I Currie & J De Waal *The Bill of Rights Handbook* 5th ed (2005) 166; IM Rautenbach 'The limitation of rights and reasonableness in the right to just administrative action and the right to access to adequate housing, health services and social security' (2005) 4 *TSAR* 627, 628; S Woolman & H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional Law of South Africa* 2nd ed (2006) Ch 34 1, 3-4; Brand (note 3 above) 26; K Iles 'Limiting socio-economic rights: beyond the internal limitation clause' (2004) 20 *SAJHR* 448, 453; Van der Schyff (note 9 above) 11.

the applicant seeks constitutional protection is a form of conduct or status that falls within the ambit of a fundamental right.[11] This requires the court to interpret the fundamental right by *firstly establishing the meaning or content of the right* and secondly, determining whether the conduct or challenged law conflicts with the right in question.[12] During the second stage of constitutional analysis the justification for a limitation of the infringed right is considered.[13] The onus of proof is then shifted to the respondent or party relying on the justification of the limitation to prove that the limitation is justifiable.[14] The importance of the distinction between the two stages is that a different form of analysis takes place in each of these stages.[15]

Before embarking on an investigation into a more principled approach to interpret and limit the socio-economic rights of children, it is necessary to distinguish between negative and positive duties placed on the state (or private party) to comply with socio-economic rights.[16] The duty to respect socio-economic rights places a negative obligation on the state (and other parties) to abstain from preventing or impairing these rights.[17] Negative enforcement of socio-economic rights does not necessitate the use of the

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[11] Woolman & Botha (note 10 above) Ch 34 4-5; Currie & De Waal (note 10 above) 166; M Pieterse 'Towards a useful role for section 36 of the Constitution in social rights cases? *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2003) 120 *SALJ* 41, 42.

[12] Currie & De Waal (note 10 above) 145; Van der Schyff (note 9 above) 123.

[13] Rautenbach (note 10 above) 628; Woolman & Botha (note 10 above) Ch 34 6; Currie & De Waal (note 10 above) 166; Brand (note 3 above) 26; Van der Schyff (note 9 above) 11-12.

[14] Woolman & Botha (note 10 above) Ch 34 6; Brand (note 3 above) 26; Pieterse (note 11 above) 42.

[15] Woolman & Botha (note 10 above) Ch 34 19.

[16] Section 7(2) of the Constitution. See Brand (note 3 above) 10-11 where he contends that this distinction is little more than a semantic distinction but remains important for strategic reasons because courts will be more willing to enforce negative than positive duties.

[17] Liebenberg (note 3 above) Ch 33 17-18; D Bilchitz 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *SAJHR* 1, 7.

internal limitations in sections 26(2) and 27(2).[18] In the context of the negative content of the right it is considered to be a free-standing right.[19] The duty to protect, promote and realise socio-economic rights places a positive obligation on the state. The Constitutional Court[20] has indicated that the internal limitations in sections 26(2) and 27(2) define and limit the full extent of the positive obligations imposed by sections 26(1) and 27(1).[21] This article will mainly focus on the interpretation and limitation of the socio-economic rights of children that impose a positive obligation on the state.

As a point of departure I will investigate the approach currently employed by the Constitutional Court with respect to socio-economic rights and specifically children's socio-economic rights. I will then argue that in the process of interpretation, substantive content needs to be given to children's basic socio-economic rights. This will be followed by an investigation into the possible limitation of children's basic socio-economic rights. Lastly, I will propose an appropriate approach concerning the interpretation and limitation of children's socio-economic rights.

II JURISPRUDENCE

In *The Government of the Republic of South Africa and Others v Grootboom and Others*[22] the Court partly dealt with the right of children to shelter. The

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[18] *Jafta v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) paras 31-33; *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) paras 15-18. Liebenberg (note 3 above) Ch 33 18; C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *SALJ* 264, 267; Iles (note 10 above) 460; Brand (note 7 above) Ch 56C 7; Pieterse (note 11 above) 44.

[19] Steinberg (note 18 above) 267.

[20] *Grootboom* (note 6 above) para 34. See also *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 72 (CC) para 79 (hereafter *TAC*).

[21] The socio-economic rights in section 26(1) and 27(1) are the right to access to housing, food, water, health care and social security and social assistance. Brand (note 7 above) Ch 56C 7; Pieterse (note 11 above) 44.

[22] Note 6.

judgment was not based on section 28(1)(c) but the Court made a number of remarks with respect to section 28(1)(c).

The Court declined to give substantive content to this right and only remarked that 'shelter' means the same as 'housing' in section 26(1) of the Constitution.[23] Although the Court did not explicitly deny the recognition of a minimum core socio-economic right of children, it is implied in the Court's opinion that shelter is not a rudimentary form of housing.[24] The Court opted for a contextual reading of children's basic socio-economic rights and stated that 'the obligation created by section 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by sections 25(5), 26 and 27'. This implies that the basic socio-economic rights of children are subject to the internal limitations set out in section 26(2) and 27(2) that apply to 'everyone'.[25] It further implies that the rights can only be seen in the light of the obligations placed on the state. The Court further held that the primary responsibility towards children rests with their parents. Only where children lack parental care the responsibility is shifted to the state.[26]

In *Minister of Health and Others v Treatment Action Campaign and Others*[27] the Court held that the immediate duty on the state to provide socio-economic rights to children without parents, is also extended to children 'when the implementation of the right to parental care is lacking.' The Court referred to

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[23] Ibid para 73.

[24] Ibid para 73.

[25] Ibid para 74.

[26] Ibid para 77. The Court differentiates between children with parents and children without parents. According to the Court the primary responsibility to provide children with socio-economic needs vests in the parents. In effect the Court gives preferential treatment to children without parents by implying that these children have a direct and immediate claim to the rights in section 28(1)(c). This distinction is typical of the private law/public law dichotomy. For a full discussion hereof see Pieterse (note 5 above) 2. D Brand 'The Proceduralisation of South African Socio-economic Rights Jurisprudence or "What are Socio-economic Rights for?"' in H Botha, A Van der Walt & J Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33, 48.

[27] *TAC* (note 20 above).

the fact that the parents of these children are mostly indigent and unable to access private health care.[28] The Court, however, did not conclude that indigent children have a direct, immediate claim to basic health care services. The Court followed the approach used in the *Grootboom* case and inquired into the reasonableness of the policy, relying on the right of children to basic health care in section 28(1)(c) to sustain its verdict that the policy was unreasonable.[29]

The current jurisprudence can be read to suggest that only children without parents[30] and children living in extreme poverty[31] may have a direct immediate claim to socio-economic rights.[32] It is indeed indigent children and children without parents who need their basic socio-economic rights to be realised. It is, however, doubtful whether the Court will in future interpret section 28(1)(c) as bestowing an unqualified, immediate, direct right on these children. It seems that the Court is reluctant to place any direct positive duties on the state. A possible reason for this reluctance is that the remedies to realise socio-economic rights will require time and resources. These rights cannot be realised immediately because it takes time to implement and execute such programmes. The difficulties inherent to the enforcement of section 28(1)(c), however, should not imply that children's socio-economic rights cannot be viewed as direct rights.

There is a need for a principled basis upon which to found the basic socio-economic rights of children. In what follows suggestions will be made on how the courts should deal with these rights.

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[28] Ibid para 79.

[29] Ibid, See Liebenberg (note 3 above) Ch 33 51; Brand (note 26 above) 48.

[30] *Grootboom* (note 7 above) para 77.

[31] *TAC* (note 20 above) para 79.

[32] See Liebenberg (note 3 above) Ch 33 51.

III GIVING SUBSTANTIVE CONTENT TO BASIC SOCIO-ECONOMIC RIGHTS OF CHILDREN

The question may be asked why it is important that the Court firstly defines the right in question before it establishes whether the right may be restricted. It can be argued that defining the right may automatically require from the Court to establish the demarcation and restrictions of that right. I argue that different forms of analysis take place when the court defines the right (first stage of constitutional analysis) and when it examines whether it may be restricted (second stage of constitutional analysis).[33] When the Court gives substantive content to a right, the values that may serve a particular right are identified but this process does not involve the balancing of values or a proportionality enquiry. The balancing of values and proportionality enquiry only take place when the inquiry into a possible limitation of the right in question is examined.[34]

In both *Grootboom* and *TAC* the Court was reluctant to explain the substantive content of the basic socio-economic rights of children.[35] Brand contends

> However, curiously, despite its finding that a substantive duty for the provision of basic necessities to children exists, the Court managed in both cases to avoid applying that substantive duty as the basis for its decision, *and avoid having to describe it*. In *Grootboom* the Court did so consciously, holding that the children in the Grootboom community '[where] being cared for by their parents; [where] not in the care of the State, in any alternative care, or abandoned' and were as such not entitled to care from the state. But in *TAC*,

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[33] Woolman & Botha (note 10 above) Ch 34 19.

[34] Iles (note 10 above) 453; Van der Schyff (note 9 above) 24.

[35] Brand (note 26 above) 47 criticises the Court's unwillingness to give substantive content to the socio-economic rights in the *Soobramoney*, *Grootboom* and *TAC* cases. DM Davis 'Adjudicating the socio-economic rights in the South African Constitution: towards 'deference lite'?' (2006) 22 *SAJHR* 301, 312; D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *SALJ* 484, 496; Iles (note 10 above) 454; M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383, 387; 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, 249.

> having discussed the substantive duties that children's right to basic health care services impose on the state, the Court simply ignored them in its eventual decision.[36]

Instead of defining the rights in section 28(1)(c), the Court focused on the obligations[37] placed on the state. The Court construed the basic socio-economic rights of children in conjunction with the obligations in section 25(5), 26 and 27.[38] Such a construction must be criticised. Firstly, the very aim of interpretation is to determine the meaning of a provision in the Bill of Rights so as to establish whether a law or conduct is contradictory with the right.[39] This

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[36] Own emphasis. Brand (note 26 above) 48. Bilchitz also criticises the Court in the *TAC* case for trying to sidestep the need to give content to the right in section 27(1)(a). He argues: 'Indeed, the judgment is notable for the virtual absence of any analysis of what the right to have access to health care services involves. What are the services to which one is entitled to claim access? Do these services involve preventative medicine, such as immunisations, or treatment for existing diseases, or both? Does the right entitle one to primary, secondary, or tertiary health care services, or all of these?' Bilchitz (note 17 above) 6.

[37] The Court indicated that the state has two obligations towards children under parental care: Firstly, to provide a legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. The provision of a legal and administrative infrastructure requires from the state to provide legislative and common-law structures that oblige parents to care for children at the risk of criminal and civil sanction, by legal and administrative structures aimed at enforcing parental maintenance obligations, by laws aimed at protecting children from abuse, maltreatment and degradation and by the existence of social welfare programs. Secondly, to provide families, and therefore children access to land (section 25), adequate housing (section 26) and health care, food, water and social security (section 27) subject to reasonable measures that must be progressively realised within available resources *Grootboom* (note 6 above) paras 75, 78. See Pieterse (note 5 above) 10. In *TAC* the Court followed the approach used in the *Grootboom* case and inquired into the reasonableness of the policy. *TAC* (note 20 above) para 79, See Liebenberg (note 3 above) Ch 33 51.

[38] *Grootboom* (note 6 above) para 74. See Van der Schyff (note 9 above) 103: 'The Court seemingly chose to interpret the qualifications outlined in section 26(2) as factors to be employed during the first stage of the two-stage model that are to be utilised in influencing the guarantee of the right. This is also clear as the balancing of competing interest was conducted without any reference having been made to the general limitations in section 36'.

[39] Currie & De Waal (note 10 above) 145.

is part and parcel of the first stage of constitutional analysis.[40] Only once the meaning of the right has been established, should an inquiry into the reasonableness of the measures[41] be undertaken.[42] It is furthermore important for the Court to give substantive content to a right in order to have an essential substantive referent against which its means-end reasonableness test can be applied.[43] If there is no clearly defined constitutional goal (end) the question may be asked how the reasonableness of the measures (means) can be evaluated. Another reason why the Court should explain the meaning of the right is that it is the only way in which the Court can engage in the process of specifying general principles that define the obligation placed on the state.[44] The final remark on this aspect is that a contextual or purposive reading should not be used to restrict rights; it should rather be used to define the content and scope of the right in question.

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[40] Van der Schyff (note 9 above) 121 argues that a proper application of the first stage requires a wide interpretation of the rights in question. The reason for such an approach is that it enhances the purpose of a bill of rights as an instrument guaranteeing freedom and enhancing the constitutionalisation of society.

[41] The content must also firstly be established before the availability of resources is considered. As in the case of reasonableness, the availability of resources relates to the measures and not the right itself. Bilchitz (note 17 above) 20.

[42] Bilchitz suggests that the Court should firstly attempt to understand the content of the right and then the Court should engage in an inquiry into the reasonableness of the measures. Bilchitz (note 17 above) 9. He further argues that 'reasonableness' qualifies the measures and not the right itself. Bilchitz (note 35 above) 496. I agree with this approach. However section 28(1)(c) does not contain an internal limitation clause and the second step in the case of *basic* socio-economic rights should be an investigation into whether these rights may be reasonably limited in terms of the general limitation clause in the Constitution. See section below where the limitation of these rights is discussed. See further Davis (note 35 above) 305; Rautenbach (note 10 above) 628; Iles (note 10 above) 452. This also supports a disjunctive reading of the socio-economic rights of everyone in sections 26 and 27. Bilchitz (note 35 above) 488; Bilchitz (note 17 above) 9.

[43] Brand (note 26 above) 48. In the following section the means-end reasonableness test will be discussed in more detail.

[44] Bilchitz (note 35 above) 487, Pieterse (note 35 above) 395, 406.

I further argue that the Court reads words into the Constitution by subjecting children's rights to internal limitations contained in another separate section of the Bill of Rights. The separate provision on socio-economic rights to children in the Constitution is, to my mind, an indication that some kind of priority must be given to these rights. Children are one of the most vulnerable groups in society. They cannot fend for themselves, one of the reasons being that they cannot participate in the democratic process by voting. Children are furthermore perceived as weak and exploitable. This position children find themselves in calls for the prioritisation of their needs in the allocation of resources.[45] I therefore argue that the *basic* socio-economic rights of children should be interpreted to mean the minimum essential entitlement of that right. According to Alston and Scott section 28(1)(c) spells out the core minimum of the other socio-economic rights bestowed on 'everyone'. They argue that the specific wording of section 28(1)(c) 'makes certain that the core entitlements of children is not lost in the interpretive evolution of the Bill of Rights'.[46] Viljoen disagrees with the notion of 'minimum core entitlement' in respect with section 28(1)(c). He suggest that section 28(1)(c) should become the threshold which the state has to meet in respect of children, in order to realise its obligations in terms of section 26 and 27 with respect to 'everyone".[47] Making section 28(1)(c) the threshold for other socio-economic rights has the same effect as recognising that section 28(1)(c) contains the minimum core entitlement. This does not mean that children are only entitled to a minimum core of the right. Children will still be entitled to the progressive and full realisation of socio-economic rights in terms of sections 26 and 27. Interpreting children's *basic* socio-economic rights thus requires the courts to determine the minimum core content of these rights. The recognition of a minimum core content of these rights supports the idea that priority should be given to the socio-economic

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[45] F Viljoen 'Children's Rights: A response from the South African Perspective' in D Brand & S Russel (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 201, 203.

[46] C Alston & P Scott 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney* legacy and *Grootboom*'s promise' (2000) 16 *SAJHR* 206, 260.

[47] Viljoen (note 45 above) 203, 206.

rights of children due to the fact that they are protected in a separate provision without any internal limitations whatsoever.

It has been argued that a court enters the domain of the legislature when it gives content to socio-economic rights (this includes the formulation of a minimum core of a right), thereby violating the doctrine of separation of powers.[48] Linked to the doctrine of separation of powers is the idea of judicial deference. According to this idea courts are expected to show respect for or submit to the policies of the administration, the executive and the legislature.[49] Other objections include the institutional incapacity of courts to engage in the policymaking process and the problems posed by polycentricity.[50] The same arguments are used to caution courts not to identify the minimum core of socio-economic rights afforded to 'everyone' in the Constitution.[51] I argue that the same reasons given by the court to support an argument against the recognition of a minimum core socio-economic right to everyone, may also be advanced to discourage a court to give substantive content to the basic socio-economic rights of children.

As already indicated the Court in *Grootboom* and *TAC* refused to elaborate and explain the meaning of children's basic socio-economic rights. The Court also refused to define the core content of the socio-economic rights bestowed

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[48] Steinberg (note 18 above) 264.

[49] A Pillay 'Reviewing reasonableness: An appropriate standard for evaluating state action and inaction' (2005) 122 *SALJ* 419, 419. See Davis (note 35 above) 319-321 where the author criticises this approach. Pieterse (note 35 above) 417. A more appropriate approach to the idea of deference should be 'A judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of such agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interest legitimately pursued by administrative bodies and the practical and financial constraints under which they operate' C Hoexter 'Administrative justice: A cornerstone of South Africa democracy' (2000) 117 *SALJ* 484-519. See further C Hoexter *Administrative Law in South Africa* (2007) 138-139.

[50] Pieterse (note 35 above) 392; T Roux 'Legitimating Transformation Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratisation* 92, 92.

[51] Steinberg (note 18 above) 264.

on 'everyone'. In *Grootboom* the Court firstly denied that shelter is a rudimentary form of housing.[52] It then went on to argue that it lacks sufficient information to determine the minimum core of a right, that the needs in respect to the right are too diverse and that there is uncertainty as to whether a minimum core should be established in general or only with regard to specific groups.[53] In *TAC* the Court referred to the reasons given in *Grootboom* against the acceptance of a minimum core and further argued that '[C]ourts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards' should be. It also expressed concerns that in recognising a minimum core the Court would infringe on the powers and functions of the other branches of government.[54] The Court did however recognise that minimum core may play a role in establishing what is reasonable.

The purpose of this article is not to enter into a detailed discussion or evaluation of the reasons given by the Court for not recognising the minimum core of a particular right. These reasons have been scrutinised and discussed by numerous authors.[55] In what follows, I will highlight the Constitutional imperatives the Court must take into account when it interprets (give meaning to) section 28(1)(c).

It seems that the central reason for the reluctance of the Court to give meaning to socio-economic rights and their refusal to determine a minimum core is centred on the separation of powers argument. However, the Court acknowledged that:

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[52] *Grootboom* (note 6 above) para 73.

[53] Ibid paras 32, 33. As outlined by Bilchitz (note 35 above) 486-487; Roux (note 50 above) 96.

[54] *TAC* (note 20 above) paras 26-39.

[55] Bilchitz (note 35 above) 486-489; Bilchitz (note 17 above) 1-26; Pieterse (note 35 above) 392-396; Steinberg (note 18 above) 264-284; Pillay (note 49 above) 419-412; Davis (note 35 above) 311; M Wesson '*Grootboom* and beyond: reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284, 299-305; Iles (note 10 above) 450.

> Where state policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. *In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.*[56]

The Constitution thus mandates the Constitutional Court to interpret and enforce rights.[57] As Pieterse indicates, 'Courts are experts in interpretation and are thus ideally suited to lend content to social rights and the standards of compliance that they impose'.[58] Wiechers contends that the Constitution is a policy document against which all policies of the state must be evaluated and it is inevitable that Courts have a secondary policy making function.[59] I argue that when the Court gives consideration to state policy it can hardly do so without explaining the substantive content of the right in question. It is however, important to note that in defining a socio-economic right and its minimum core, the Court is only required to set an invariable universal standard and not specific measures that the state has to take.[60] Liebenberg argues that the minimum core does not entail an absolute duty or rigid standard, but 'it establishes a high threshold of justification when deprivation of essential levels of socio-economic goods and services is at issue'.[61] It is furthermore not expected that the Court gives a final and exhaustive definition of the particular right.[62]

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[56] Own emphasis. *TAC* (note 20 above) para 99.

[57] Ibid, Pieterse (note 35 above) 392; Iles (note 10 above) 455.

[58] Pieterse (note 35 above) 395.

[59] M Wiechers '*Quo vadis* geregtelike hersiening van administratiefregtelike handeling? (2005) 3 *TSAR* 469, 474-475.

[60] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 686 (CC) para 104. Bilchitz (note 35 above) 487, Pieterse (note 35 above) 406; Davis (note 35 above) 320.

[61] S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1, 17-18. She argues, 'The state is required to show that it has exhausted all available methods, and that its resources are 'demonstrably inadequate' to meeting those needs.'

[62] Bilchitz (note 17 above) 8.

The Constitution further demands that government must be held accountable.[63] Citizens need mechanisms in terms of which the government (including, for example, the bureaucracy) may be held accountable for its decisions that affect basic human rights.[64] Courts (and especially the Constitutional Court) are the primary institutions to ensure executive accountability in the protection of basic human rights.[65] Davis contends as follows:

> What is first required is a theory of accountability which takes into account the essence of the constitutional promise, that citizenship in a post-apartheid society *means more than the provision of a range of negative rights*, which alone cannot power the model of a society prefigured in the Constitution, read as whole, being one based upon the cardinal values of dignity, freedom, equality and democracy read as coherently as possible.[66]

In turn, the judiciary may be held accountable through judicial reason-giving in judgments, the judicial appointment process, the doctrine of *stare decisis* and the public nature of judicial hearings.[67]

The Constitution further demands that when the Court gives substantive meaning to section 28(1)(c) the Court should be guided by the Constitution[68], the constitutional values of *inter alia* human dignity, equality and freedom, its transformative aims[69] and international law.[70]

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[63] Section 1(d) of the Constitution.

[64] Pieterse (note 35 above) 388.

[65] Section 74(2) and 172(1)(a) of the Constitution; Pieterse (note 35 above) 388; Rautenbach (note 10 above) 628-629.

[66] Own emphasis. Davis (note 35 above) 319.

[67] Pieterse (note 35 above) 391.

[68] Section 39 of the Constitution reads: 'When interpreting the Bill of Rights, a Court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law'.

[69] The preamble of the Constitution provides that the Constitution is aimed to *inter alia* improve the quality of life of all citizens.

[70] Liebenberg (note 61 above) 1-31; Alston & Scott (note 46 above) 220, Wiechers (note 59 above) 474; Pieterse (note 35 above) 406; Davis (note 35 above) 319.

Human dignity has played a valuable role in socio-economic jurisprudence thus far.[71] With reference to this value I shall illustrate how values may influence the content of children's basic socio-economic rights, without implying that it is the only value applicable to children's basic socio-economic rights. Liebenberg indicates that human dignity as a value may enrich the socio-economic jurisprudence in justifying claims, assessing the impact of deprivation on the individual and forcing the Courts to appropriately respond to these conditions.[72] I argue that similarly human dignity may be employed to define the basic socio-economic rights of children and may serve as motivation that the right should at least include 'the minimum decencies of life'.[73] This supposition may be used as the point of departure to define section 28(1)(c).

International law should further guide the Court in defining section 28(1)(c).[74] The International Covenant on Economic, Social and Cultural Rights (ICESCR)[75] and the United Nations Convention on the Rights of the Child (CRC)[76] are relevant for section 28(1)(c). The monitoring committee of the

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[71] *Grootboom* (note 6 above) paras 23, 25, 44, 83; *TAC* (note 20 above) para 28; *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) (hereafter *Khosa*) paras 40, 41, 52, 72. Liebenberg (note 61 above) 21.

[72] Liebenberg (note 61 above) 18.

[73] *TAC* (note 20 above) par 28.

[74] Section 39(1)(b) of the Constitution. Davis argues that '[T]he Court's approach does not reflect an ignorance of international jurisprudence nor a lack of cognisance of the implications of s 26(1) and 27(1) of the text, but rather the knowledge that the text itself holds out a promise of a kind of society predicated on a very different approach to economics from that which currently prevails in the Ministry of Finance and which holds sway over government policy. Were the Court to be more activist, it would have run the risk of placing itself in an increasing level of conflict with the state'. Davis (note 35 above) 316.

[75] GA Res 2200A (XXI), UN GAOR Supp (No 16) 49, Doc A/6316 (1966) UNTS, entered into force 3 January 1976. This covenant was signed by South Africa but not ratified.

[76] GA Res 44/25, Annex 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990. South Africa ratified the Convention on 16 June 1995, without entering any reservations.

ICESCR was responsible for the idea of the recognition of the minimum core[77] of rights and has produced extensive commentary on the content of socio-economic rights[78]. The CRC is the most important international document dealing with the rights of children and has been ratified by South Africa. It places the South African government under an international obligation to comply with the duties placed on member states.[79] Similar to the UNESCR, the supervising body of the CRC has also extensively commented on the rights contained in the CRC.[80] None of these commentaries are strictly binding under international law, but, as they aim to implement and advance human rights they constitute valuable material that the Court may use in defining the full scope and content of children's basic socio-economic rights.[81] With all this information available to the Court the argument of the Court that it lacks sufficient information to make an assessment on the core content of socio-economic rights, does not stand its ground.

Given the above stated Constitutional imperatives of what is expected when socio-economic right is interpreted, it must be emphasised that the Court should take account of the role of the administration, executive and legislature in this regard. There is immense support for the idea of shared constitutional

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[77] General Comment 3 'The nature of state parties obligations'.

[78] General Comment 3 'The nature of state parties obligations'; General Comment 4 'The right to housing'; General Comment 14 'The right to the highest attainable standard of health' accessible at http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

[79] L Jansen van Rensburg & L Lamarche 'The right to social security and social assistance' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 209, 218.

[80] Rosa & Dutschke (note 35 above) 233. Comments thus far are: General Comment 1: The Aims of Education — on the quality and content of education that should be provided (2001); General Comment 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child (2002); General Comment 3: HIV/AIDS and the rights of the child (2003); General Comment 4: Adolescent Health and Development in the Context of the CRC (2003); General Comment 5: General measures of implementation of the Convention on the Rights of the Child (2003);General Comment 6: Treatment of unaccompanied and separated children outside their country of origin (2005); General Comment 7: Implementing child rights in early childhood (2005).

[81] Rosa & Dutschke (note 35 above) 228-229, 249.

interpretation[82] between the judiciary and other institutions.[83] One way to achieve shared constitutional interpretation is for the courts to ensure that sufficient and factually correct evidence are placed before them. This may require the Court to appoint fact-finding commissions to gather the necessary information or call for additional expert evidence.[84] The Court could also invite the political branches of government or other organs of state to suggest alternatives when defining a specific socio-economic right.[85] Courts should further play a more inquisitorial role in polycentric matters.[86]

IV LIMITATION OF CHILDREN'S BASIC SOCIO-ECONOMIC RIGHTS

Although I argue that children have a direct immediate right in terms of section 28(1)(c), this right is not absolute. Similar to all the rights in the Bill of Rights it may still be justifiably limited.[87] This raises the question whether the internal limitations in section 26(2) and 27(2) or the general limitation clause in section 36(1) should be employed during the second stage of constitutional analysis.

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[82] Other terms used for this concept is constructive dialogue or inter-institutional cooperative interaction.

[83] See Alston & Scott (note 46 above) 224, Davis (note 35 above) 320, Pieterse (note 35 above) 411,414; Woolman & Botha (note 10 above) Ch 34 7-8.

[84] Pieterse (note 35 above) 395-396.

[85] Woolman & Botha (note 10 above) Ch 34 8.

[86] Pieterse (note 35 above) 395-396.

[87] Section 7(3) of the Constitution reads 'The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill'. Van der Schyff argues that the two-stage model of constitutional analysis is apparent when reading section 7(3). Van der Schyff (note 9 above) 22. Van der Schyff distinguishes between a one-stage - and two-stage model of constitutional analysis. The one-stage model does not provide for a distinction between scope and limit while the two-stage model do provide for such a distinction. Van der Schyff (note 9 above) 11-12.

The general limitation clause in the Constitution[88] regulates the limitation of rights by organs of state or private parties. It applies to all rights in the Bill of Rights.[89] However, the limitation clause is not necessarily employed in every instance for example, where the limitation does not take place in terms of a law of general application as required by section 36 or where the particular fundamental right itself provides how it should be limited. In this regard sections 26 and 27 make explicit provision for the limitation of the socio-economic rights of 'everyone' in respect of the positive obligation on the state to realise the right.[90]

In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*[91] the Court was faced with the methodological difficulty as to whether there is a difference in the standard of review under sections 27(2) and 36. Mokgoro J in the majority judgment describes the problem as follows:

> There is a difficulty in applying section 36 of the Constitution to the socio-economic rights entrenched in sections 26 and 27 of the Constitution. Sections 26 and 27 contain internal limitations which qualify the rights. The state's obligation in respect of these rights goes no further than to take 'reasonable legislative and other measures within its available resources to achieve the progressive realisation' of the rights. If a legislative measure taken by the state to meet this obligation fails to pass the requirement of reasonableness for the purposes of sections 26 and 27, section 36 can only have relevance if what is 'reasonable' for the purposes of that section, is different to what is 'reasonable' for the purposes of sections 26 and 27.[92]

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[88] Section 39(1) reads: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.'

[89] Rautenbach (note 10 above) 627-654.

[90] Woolman & Botha (note 10 above) Ch 34 6; Rautenbach (note 10 above) 627; Brand (note 3 above) 27.

[91] Note 71.

[92] Ibid para 83. In a minority judgment Ngcobo J expressed the same concern and questioned whether measures taken by the state may be 'reasonable' for section 27(2) but not 'reasonable and justifiable' under section 36. Ibid para 105.

Unfortunately, the Court heard no argument on the question whether 'reasonableness' for purposes of section 36 is different from 'reasonableness' as required by sections 26 and 27 and found that it was not necessary to decide the matter for purposes of this case.[93] The Court then held that:

> Even if it is assumed that a different threshold of reasonableness is called for in sections 26 and 27 than is the case in section 36, I am satisfied for the reasons already given that the exclusion of permanent residents from the scheme for social assistance is neither reasonable nor justifiable within the meaning of section 36.[94]

Most authors agree that the content of 'reasonableness' for purposes of sections 27(2) and 36(1) is identical.[95] This poses a dilemma to one of the central arguments in this article, namely that the Court should not have read section 28(1)(c) in conjunction with the internal limitations in sections 26(2) and 27(2). If it is argued that a section 27 analysis has the same effect as a section 36 analysis with respect to the limitation of socio-economic rights, it may be asked what the purpose is of pursuing an investigation into the question whether section 27 or section 36 is the designated limitation to apply to section 28(1)(c). In the following section, I argue that there is indeed a difference in the levels of scrutiny[96] under sections 27(2) and 36. I will firstly, examine the appropriateness of the current approach of the Court to use the section 27 analysis in the first stage of constitutional analysis. Secondly, it will be indicated that even if reasonableness has the same meaning in both these sections for purposes of socio-economic rights, there still are other differences

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[93] Ibid para 84.

[94] Ibid. Ngcobo J in his dissenting judgment also refrained from addressing this problem. He contends that the outcome will be the same irrespective of whether one begins with a section 27 inquiry and moves to a section 36 enquiry or whether one begins and ends the enquiry in section 27. Ibid para 107.

[95] Woolman & Botha (note 10 above) Ch 34 37; Rautenbach (note 10 above) 653. Brand however argues that the absence of an internal limitation with respect to children's nutritional rights makes these rights subject to a higher level of scrutiny, and that the state will have greater difficulty in justifying a possible infringement of the section 28(1)(c) rights. Brand (note 7 above) Ch 56C 8.

[96] And the content of reasonableness.

that will have implications for children's basic socio-economic rights. Thirdly, the levels of scrutiny used in the internal limitation clause will be compared to the levels of scrutiny employed in the general limitation clause.

One of the reasons for criticising an approach to employ the section 27 analysis (as opposed to the section 36 analysis) in the case of section 28(1)(c) is based on the fact that the Court erroneously uses this enquiry during the first stage of constitutional analysis to define the right and in the process of doing so the Court restricts as opposed to defines the right.[97] In the first stage the right should be defined without reference to the 'reasonableness' of the measures taken by the state. The latter is part of the second stage of constitutional analysis. The distinction between these two stages is important and is said to be an integral part of the principle of accountability in section 1(d) of the Constitution.[98] Rautenbach contends

> Obscuring the distinction between the concrete effect of limiting actions and their justification in, for example, arguments that in the first stage the content of a right is determined by either the limiting effect of the rights of others and the interest of the community as a whole or by the fairness or reasonableness of the perpetrators' limiting actions, could lead to serious injustice to the victim of human rights abuses who cannot be expected to explain why they should not have been harmed.[99]

The methodology employed by the Court in *Grootboom* using the section 26 inquiry during the first stage of constitutional analysis has lead to a misapprehension as to the real meaning and extent of socio-economic rights in general and specifically the basic socio-economic rights of children.

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[97] Iles argues that the internal limitation analysis should take place during the first stage of constitutional analysis to prevent Courts from placing obligations that are unreasonable and unenforceable on the state. He further argues that after the internal limitation clause is applied during the first stage the general limitation clause should be applied. As already indicated above, I argue that rights should not be limited during the first stage of constitutional interpretation. See Iles (note 10 above) 464. See Woolman & Botha (note 10 above) Ch 34 21; Rautenbach (note 10 above) 628 in support of this argument.

[98] Rautenbach (note 10 above) 628.

[99] Rautenbach (note 10 above) 628; Iles (note 10 above) 454.

This argument can further be supported by the fact that during the first stage of constitutional analysis the onus rests on the party who claims that her right is infringed (the applicant) to prove that her right is indeed being violated. Referring to the *Grootboom* case Woolman and Botha argue that the section 26(1) and 26(2) (and perhaps also section 36) analysis collapsed into a single test for reasonableness.[100] It is uncertain whether the state bears the burden to justify that the limitation is reasonable.[101] It cannot be expected from the applicant to argue and prove why the limitation of the right cannot be justified. Establishing the unreasonableness of the state's programmes in the light of available resources is a matter of great factual and legal complexity.[102] The applicants in most cases will be indigent and vulnerable members of society and may not have the expertise or resources to pursue such an argument.[103] Liebenberg contends that in case of a section 36 analysis the state clearly bears the burden of justification and if it wants to limit its obligations in respect to socio-economic rights, the state has to publicly defend its reasons.[104] This supports the argument of executive accountability that has been discussed in the previous section. It is also in line with the idea of shared constitutional interpretation where other actors are given the opportunity to suggest alternatives to or variations on the Court's interpretation of a specific right.[105]

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[100] Woolman & Botha (note 10 above) Ch 34 33; Van der Schyff (note 9 above) 105, 123 contends that it not clear whether 'the Court balance competing interest to narrow down the right to positive state action at the first stage, as seems to be the case; or does the Court engage in balancing in order to limit a right to positive state action at the second stage'. He argues that the effective realisation of these rights should ideally be addressed in the context of the two-stage approach to constitutional analysis.

[101] Woolman & Botha (note 10 above) Ch 34 33, 46-47; Brand (note 3 above) 29; Brand (note 7 above) Ch 56C 8.

[102] Liebenberg (note 61 above) 23.

[103] Rautenbach (note 10 above) 627; Woolman & Botha (note 10 above) Ch 34 44; Currie & De Waal (note 10 above) 166; Brand (note 3 above) 29; Liebenberg (note 61 above) 23. Liebenberg contends that in the case of section 26 and 27 socio-economic rights the applicants should be given the benefit of a presumption of unreasonableness.

[104] Liebenberg (note 3 above) Ch 33 55.

[105] Woolman & Botha (note 10 above) Ch 34 7-8.

Even if reasonableness has the same meaning in sections 27(2) and 36(1) for purposes of socio-economic rights, there still are other differences that will have implications on children's basic socio-economic rights. I now turn to the question whether the possible reasons that the state can offer in justification of its actions under section 27(2), exhaust the possible reasons the state can present in terms of section 36. Woolman and Botha, contend with reference to the language of both the sections, that when a section 27 analysis is used only reasons relating to the right itself or the resources that may be required to realise the right may be given, while in a section 36 analysis other reasons not directly related to the right may be presented by the state as justification.[106] If the section 27 enquiry is employed when the state fails to comply with or perform in terms of section 28(1)(c), the range of reasons the state may advance to justify its non-compliance is more limited than in the case where a section 36 enquiry is employed. With reference to children's basic socio-economic rights, under a section 27 inquiry it would be more difficult for the state (or other party) to justify the limitation (because the reasons for justification will be less) than in terms of a section 36 enquiry and for this reason it would be more beneficial in this case for those acting on behalf of the children to employ section 27(2) rather than section 36. For example, a possible justification to limit children's right to basic social services is the reason that the responsibility to financially care for children rests on the parents of these children. This reason for justification is not related to the right itself or to the resources to realise this right and will not be an acceptable reason under section 27(2) while it will be an acceptable reason under section 36.[107]

I agree with Woolman and Botha who consider this distinction and line of argumentation on the nature and source of justification to be pragmatic. They contend that the Constitutional Court is not likely to place 'constraints on its

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[106] Ibid Ch 34 40-41.

[107] Except where it is argued that section 28(1)(b) and section 28(1)(c) must be read together as the Court did in the *Grootboom* case where it held that the duty to provide for children primarily rest on the parents. See *Grootboom* (note 6 above) para 77.

FC[108] ss 26(2) and 27(2) "reasonableness" analysis in the service of creating a meaningful allocation of analytical responsibilities between FC ss 26(2) and 27(2), and FC s 36.'[109]

A further distinction between sections 27(2) and 36(1) relates to the nature of the mechanisms employed by the state to realise socio-economic rights. Section 36 provides that only a law of general application may limit a right, while section 27(2) suggests that any reasonable measure by the state may limit a right. Socio-economic rights are mostly realised by policies and programmes.[110] The question whether policies and programmes (directives, norms, standards and guidelines) are law of general application is unclear.[111] This question is important because if policies and programmes are not considered to be law of general application, section 36 cannot be employed at all. For example where it is argued on behalf of children that their right to basic health care is infringed, the state cannot justify their conduct by indicating that it has a policy or programme realising this right and that certain aspects of this right may be justifiably limited in terms of such a policy or programme. In this regard, a section 36 analysis will be more beneficial with respect to the basic socio-economic rights of children. The state will only be able to limit children's basic socio-economic rights in terms of legislation that is publicly debated and adopted by elected representatives.[112]

Brand draws a distinction between negative and positive duties on the state to realise socio-economic rights in order to address the question whether policies and programmes qualify as law of general application. He argues that a law of general application in the context of negative rights must be evaluated with reference to the characteristics of restrictions on exercising public power. In the case of positive rights the evaluation must be viewed in

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[108] The authors refer to the Final Constitution.

[109] Woolman & Botha (note 10 above) Ch 34 41.

[110] In *Grootboom* and *TAC* the Court evaluated policies and programmes on housing and health care, while in *Khosa* the Court evaluated legislation.

[111] Woolman & Botha (note 10 above) Ch 34 53.

[112] Liebenberg (note 61 above) 28.

terms of how the law underpinning that programme – enabling legislation, subordinate legislation and policies – functions to effect the desired ends.[113] Policies, programmes, directives, standards, guidelines and norms that have their origin in legislation will qualify as law of general application if they satisfy certain characteristics. Firstly, the policy or programme must ensure parity of treatment. Secondly, the policy or programme must embody a discernable standard (it may not be arbitrary). Thirdly, the policy or programme must be precise enough for individuals to conform their conduct. Fourthly, law must be accessible to the citizenry. Finally, the policy and programme must prevent any attempt at justification for bill of attainder.[114] If policies and programmes comply with these characteristics they may be considered to be law of general application and section 36 will be applicable.[115] The application of section 36(1) will thus depend on how 'a law of general application' is interpreted. If Brand's approach is followed there is no real difference in the application of on the one hand, section 36 and on the other hand, section 26 and 27 in relation to the nature of the mechanisms employed by the state to realise socio-economic rights, except in those cases where the state failed to adopt any measures to realise socio-economic rights or the conduct of the state is unrelated to any law of general application. In such cases the application of section 36 will be more beneficial to the applicants.

In what follows, I will argue that the standard of reasonableness for purposes of sections 26(2) and 27(2) indeed differs from the standard of reasonableness in section 36(1). This calls for an investigation into the way the Court has in the four socio-economic rights cases thus far, employed the reasonableness test. In all four cases the Court used a means-end reasonableness test, but the standard of scrutiny applied by the Court intensified with each case.

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[113] Brand (note 7 above) Ch 56C 7; Woolman & Botha (note 10 above) Ch 34 53.

[114] Woolman & Botha (note 10 above) Ch 34 48-51. See Currie & De Waal (note 10 above) 169-170; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

[115] Woolman & Botha (note 10 above) Ch 34 51-54.

In the first case on socio-economic rights, the *Soobramoney*[116] case the Court used the standard of rationality to evaluate the programme.[117] In the subsequent cases of *Grootboom, TAC* and *Khosa* the Court employed the standard of reasonableness to evaluate the measures.[118] In *Grootboom*[119] the standard of reasonableness the Court expected from the measures had to be comprehensive, coordinated, flexible, inclusive, sensitive to various degrees of deprivation and reasonably implemented and conceived.[120] In *TAC*[121] the Court further expected the measures (as described in *Grootboom*) to be transparent. An even stricter standard of scrutiny was applied by the Court by making detailed findings of fact, interrogating the wisdom of government's policy choices, and finding the policy option proposed by the respondents to be superior in a number of respects to government's position.[122] To describe the shifting standard of reasonableness Brand argues that the question in *Soobramoney* was whether the policy, at face value, was rationally linked to the goal, while in *Grootboom* it was whether the policy was likely to achieve the goal and in *TAC* whether the policy would achieve its constitutionally mandated goal.[123] Roux, with reference to the *Grootboom* case, argues that the Court stops short of a full-blown proportionality test by only enquiring whether the claimant group has an equal or better claim to inclusion than another group that has been catered to.[124] In *Khosa*[125] however, the Court intensified the standard of review by applying a stricter proportionality test.

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[116] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC). Hereafter *Soobramoney*.

[117] Ibid paras 27 and 29.

[118] Roux (note 50 above) 97; Brand (note 3 above) 27-28; Liebenberg (note 3 above) Ch 33 1; Brand (note 7 above) Ch 56C 7.

[119] *Grootboom* (note 6 above) paras 39-45.

[120] Brand (note 26 above) 41; Brand (note 3 above) 45-46.

[121] *TAC* (note 20 above) paras 38 and 123.

[122] Brand (note 26 above) 41.

[123] Brand (note 26 above) 40-41.

[124] Roux (note 50 above) 97. Liebenberg contends that the test entails more than 'relative inclusion'. It also makes provision for cases where the state has failed to adopt measures to realise socio-economic rights. Liebenberg (note 3 above) Ch 33 40.

[125] *Khosa* (note 71 above) para 82.

The Court asked whether the measures taken by the state could be achieved through measures less restrictive to permanent residents' rights. A possible reason why the Court employs this shifting standard of scrutiny is the fact that the context of the particular cases differs.[126] Factors influencing the standard of scrutiny the Court will employ are *inter alia*

> [T]he position of the claimants in society; the degree of depnvation they complain of and the extent to which the breach of the right affects their dignity; the extent to which the breach in question involves undetermined policy, complex policy questions; and whether or not the breach also amounts to a breach of other rights.[127]

The Court in *Soobramoney, Grootboom, TAC* and *Khosa* only applies an 'intermediate level of a means-end test and only in exceptional cases does it rise to the level of proportionality'.[128] In most cases this test does not allow the Court to enquire whether less intrusive measures should have been taken.[129] The means–end reasonableness test evaluates the measures taken by the state against the constitutionally prescribed goal the measures aim to realise. The measures would be justifiable if they reasonably relate to the constitutionally prescribed goal.[130] As already indicated, the Court in these cases refused to give substantive content to the different socio-economic rights and in the process of doing so presently lacks a coherent and substantive standard (constitutional prescribed goal) against which state measures (action or inaction) may be evaluated. Where the Court abstains from defining the right in question during the first stage of constitutional analysis, the Court will not be able to inquire whether the policies or programmes are capable of achieving the realisation of the rights. The Court

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[126] Brand (note 26 above) 42.

[127] Brand (note 3 above) 45.

[128] Brand (note 3 above) 27-28; Liebenberg (note 3 above) Ch 33 1; Brand (note 7 above) Ch 56C 7.

[129] In the *Grootboom* case (note 6 above) para 22 the Court held that it would not enquire whether other measures could have been adopted or whether the budget could have been better spent. Brand (note 3 above) 28; Roux (note 50 above) 97.

[130] Brand (note 26 above) 40. In *Grootboom* (note 6 above) para 41 the Court described the test as follows: 'The programme must be capable of facilitating the realisation of the right'.

will only be able to ask whether the policies and programmes are rational, coherent, inclusive, comprehensive, etc. like it did in the cases discussed above.[131] This approach of the Court in socio-economic rights cases so far may be considered as formal and procedural and this may have negative consequences for the adjudication of the basic socio-economic rights of children.[132] If the state's measures (action or inaction) in the realisation of children's basic socio-economic rights are only evaluated against good governance principles, the possibility exists that the essence and importance of the separate provision for children's rights in the Constitution will be lost.

In the case of section 36, the limitation must not only be contained in a law of general application, but it must also comply with a certain standard of justification. The standard of justification in section 36 is relatively intrusive and apparently stricter than the standard employed in the internal limitation clauses.[133] Brand describes the proportionality test prescribed in section 36 as follows:

> Proportionality analysis requires that the public interest advanced by the limitation of a right be weighed up against the harmful impact the limitation has on the general exercise of the right and the claimants before the Court and that the Court consider whether means are available to achieve the purpose of the limitation that are less restrictive to the right and the interest of the claimants.[134]

This allows courts to thoroughly investigate state conduct and to prescribe specific alternative options where the conduct of the state is not justified.[135] Kevin Iles with reference to the *Grootboom* case, argues that *reasonableness* in section 26(2) refers to the content of the right and the obligations in terms of the right, while *reasonableness* in section 36 is not directed at a plan for realising socio-economic rights but an examination of the reasonableness of

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[131] Brand (note 26 above) 49.

[132] Brand (note 26 above) 37. I fully agree with Brand's contention that the Constitutional Court has proceduralised its adjudication of socio-economic rights.

[133] Brand (note 3 above) 27; Liebenberg (note 3 above) Ch 33 1.

[134] Brand (note 7 above) Ch 56C 7.

[135] Brand (note 3 above) 27.

the limitation. The latter requires a court to exercise a value judgment and launch an enquiry into the question whether the state could have employed other measures to realise the right.[136]

A full-blown proportionality analysis in terms of section 36 will further allow for a higher degree of scrutiny to be applied in the case of the realisation of the positive duties imposed by section 28(1)(c), because children are vulnerable beneficiaries.[137] This is in line with Liebenberg's argument that

> In the case of children, material deprivation can have a profound impact on the future development of their basic capabilities, calling for heightened scrutiny of the impact of such deprivations.[138]

She further indicates that respect for human dignity necessitates a serious engagement by the Court with these justifications.[139] The section 36 analysis further calls for a substantive definition of the right in question in order to apply a full-blown proportionality test and the Court will be forced to give substantive content to the socio-economic rights of children and in the process of doing so it will move away from its procedural, formalistic approach in adjudicating socio-economic rights.[140]

There are indeed substantial differences between the application of the internal limitations and the general limitation clause in provisions dealing with children's basic socio-economic rights. Clearly the most important distinction is the standard of scrutiny the Court will apply when establishing whether the measures taken by the state are reasonable. The section 36(1) enquiry requires a full-blown proportionality test and necessitates an enquiry into the substantive content of the right while the sections 26 and 27 test as it is currently applied, will only enquire whether there is a reasonable link between the measures taken by the state and the constitutional goal. In other words, in

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[136] Iles (note 10 above) 456.

[137] Ibid 460.

[138] Liebenberg (note 61 above) 29.

[139] Ibid 25.

[140] Pieterse (note 11 above) 47.

the case of children's socio-economic rights it would be more beneficial for the realisation of section 28(1)(c) rights if the state can be held answerable to justify its conduct or measures in terms of section 36(1).

V CONCLUSION

The major shortcoming in the Constitutional Court adjudication of socio-economic rights so far, is the reluctance of the court to give substantive content to the rights in question. Therefore, a principled basis upon which to found the basic socio-economic rights of children is needed. This is necessary firstly, to enable claimants to determine what they are entitled to under section 28(1)(c) and secondly, to direct the state on its constitutional obligations in terms of children's basic socio-economic rights. Without a principled approach, the perception may arise that basic socio-economic rights of children will become rights on paper only and will lose their true meaning as actionable and justiciable rights.

I suggest the following approach when the Court is confronted with the interpretation and limitation of section 28(1)(c): during the first stage of constitutional analysis section 28(1)(c) should not be read in conjunction with the internal limitations set out in sections 25(5), 26 and 27. In the process of giving substantive content to section 28(1)(c) the Court should be guided by the Constitution, the constitutional values, the transformative aims of the Constitution and international law. Defining section 28(1)(c) means that the Court should identify the minimum core entitlement of the right because this section refers to basic attenuated level of services needed for a dignified survival. Identifying the minimum core entitlement of section 28(1)(c) does not entail an absolute duty or rigid standard. In identifying the minimum core a high level of justification is set for situations where the minimum core entitlement of this right is not respected, protected and fulfilled. The Court should further take account of the principle of shared constitutional interpretation, recognising the valuable role dialogue with the administration, executive and legislature may play in the interpretation of children's socio-economic rights.

During the second stage of constitutional analysis of section 28(1)(c) the general limitation clause as opposed to the internal limitations in sections 26 and 27 should be employed. By employing section 36, the onus will shift to the state to justify the limitation. To justify an infringement the state must show that its policies and programmes are based on laws that have been publicly debated and adopted. Section 36 further calls for a full-blown proportionality test and it would therefore, be more difficult for the state to justify the limitation. A proportionality analysis will further allow for a higher degree of scrutiny to be applied in the case of the realisation of the duties imposed by section 28(1)(c), because children are vulnerable beneficiaries.

However, the possibility still exists that the Court may prefer to use the internal limitations in sections 26 and 27 to limit children's socio-economic rights. If this is the unfortunate case, the substantive content of the right should firstly be established irrespective of the reasonableness of the state's measures during the first stage of constitutional analysis. A presumption of unreasonableness should further be recognised in favour of the applicant, and the state should bear the burden to rebut this presumption in the second stage of constitutional analysis.[141] This would require from the state to produce evidence that it is taking concrete and well-targeted budgetary and other measures to address the needs of children who experience severe deprivation.[142] The sections 26 and 27 test should further be developed to include a full blown proportionality test in terms of which the Court will be able to weigh the interests and rights of children against the public interest advanced by the limitation. A clearly defined constitutional goal (end) should also be set by the Court in order to establish whether the measures (means) taken by the state are justifiable. Such a test should also compel a Court to consider whether any other means that are less restrictive to the rights and interests of children are available to achieve the purpose of the limitation.

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[141] Liebenberg (note 61 above) 23.

[142] Ibid 26.